CHILD ABUSE

Law and Policy Across Boundaries

Child Abuse

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LAURA HOYANO
AND
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To our families, with love and gratitude

Preface

This project was conceived on a train journey between the University of Bristol and the Home Office in 1999. We were members of a research team at Bristol University commissioned by the Home Office to conduct an empirical study of how the evidence in criminal prosecutions for child abuse was collected, evaluated by decision-makers and ultimately assessed by a trier of fact for those few cases which went to trial. Caroline's academic interests focused on family law and criminal law, and Laura's on evidence law and tort law. We realized that our respective territories of law did not speak to or otherwise deal with one another; instead they operated in their own closed systems of doctrine and procedure, yet professionals working in child protection were continually being exhorted to develop inter-agency working practices in order to protect children better.

From that conversation comes this book. It is probably fair to say that we did not have any conception as to how huge this project would become. In the course of the book's gestation, Caroline has given birth to three sons and has moved to the University of Durham and later to Queen's University, Belfast, while Laura moved to Wadham College, Oxford (where she remains happily ensconced) and took up criminal law in her spare time. Our editors at the Oxford University Press have been remarkably understanding as publication dates had to be repeatedly postponed.

Tracking developments in four sprawling and disparate areas of law in 75 jurisdictions has been like standing on the railway platform at Didcot Parkway watching 75 express trains continually whiz past at 100 mph. Constant research and rewriting has been necessary. No sooner had the chapter on hearsay been completed than the US Supreme Court reversed its own decision of 24 years previously, on the basis of which most American States have adopted statutes to receive hearsay evidence from children. The UK Government 2006 initiative *Every Child Matters*, implementing the recommendations of the Climbié Inquiry, resulted in a major collection of new child protection protocols being published in the two months before our deadline for submission. The Government published proposals to open up the family courts to public scrutiny in July 2006. But at some point the work had to come to an end. While we have endeavoured to state the law in criminal, family, tort, and evidence law in England and Wales up to July 2006, inevitably there will be some gaps. As for our comparator jurisdictions, primarily Scotland, Canada, United States, Australia and New Zealand, we have endeavoured to state the law correctly as of October 2005, but in many instances we were able to update particular sections.

While we have collaborated throughout the research and writing of this book, Caroline took primary responsibility for chapters 2 (Family Law), 3 (Liability in Criminal Law), and 5 (Investigating and Evaluating Allegations of Abuse), and Laura for Chapters 4 (Liability in Tort and Human Rights Law), 6 (Introduction to Adjudication of the Allegation), 7 (Access to Evidence), 8 (The Child Witness),

9 (Testing the Credibility of the Child Complainant), 10 (Testing the Credibility of the Alleged Abuser), and 11 (The Admissibility of Expert Evidence). We wrote chapter 1 (Introduction) and chapter 12 (Themes and Future Directions) together.

We are grateful to many people who kindly shared their expertise with us:

In Australia: Shannon Bellett, Coordinator of the Child Witness Service in the Court Service, Ministry of Justice in Perth, Western Australia; James Edelman, Fellow of Keble College, and Barrister, Western Australia; The Hon David Malcolm, former Chief Justice of Western Australia and Honorary Fellow of Wadham College, Oxford; Celia O'Grady, Ministry of Justice, Western Australia; The Hon. Justice Pidgeon, Chair of the Judges Committee, Supreme Court of Western Australia.

In Canada: HHJ Patricia Kvill, Family Court of Alberta; The Hon Jack Watson, Justice of Appeal, Court of Appeal of Alberta; Margaret Hall, University of British Columbia.

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We are greatly indebted to the late Allan Levy QC for his generosity in sharing his advice, knowledge, and enthusiasm at the earlier stages of this project. An indomitable advocate for children, he is much missed.

Mary Hayes, Allan Hoyano, Peter Keenan, Anne-Marie McAlinden, Robbie McDonald, HHJ Mary Jane Mowat, Joyce Plotnikoff, HHJ Peter Rook QC and Catherine Williams read and commented on various draft chapters for us. Allan Hoyano did much of the tedious proofreading of footnotes, the table of cases, and the bibliography, at unsociable hours.

We are very grateful to our indefatigable research assistants from Oxford and Queens University, whose enthusiasm for this huge project buoyed us up when ours was flagging: Sophie Weller, Andrew Legg, Tamsyn Allen, Nerisha Singh, Karen Golding, and Leanne Smith. Andy and his wife Hannah showed extraordinary dedication in the final hectic days before submission, dashing about Manila in the Philippines on motorcycle taxis in quest of open internet cafes at 2 am to send footnotes for Caroline's chapters.

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Caroline would like to thank Rory, Oscar, and Angus McDonald for their joyful presence. She would also like to thank all those who have made it possible for her to write this book while looking after three children under five, Tracey Gibson in particular. She is also enormously grateful for the friendship of Catriona Armit, Clare Bell, Claire Breen, Francesca Campion, George and Alyce Griffith, Alison McAtamney, Roger and Annabelle McDonald, Antonella Soro, and Lucy and Nicholas Wirz during this time. She would like to express her deep gratitude for the love, support (and the baby-sitting, proofreading and cooking) of her parents Janet and Peter Keenan, and her brother Philip. Finally she would like to thank her husband Robbie McDonald, for his invaluable presence and for making life good.

Laura thanks the Fellows of Wadham College, Oxford for their kindness in continuing to express interest in this book at Common Table over the past six years, and especially her Law colleague in Wadham, Jeffrey Hackney, who has shouldered administrative and pastoral burdens over the past six years to free her to write. Her students at Wadham, past and present, have been tactful and reassuringly optimistic when inquiring about 'The Book'. The Faculty of Law, Oxford has been very generous in providing research and technical support for this project. Mindy Chen-Wishart, Bevis Nathan, Michael Osborn, Andrew Souter, and David Walker will know why she owes much to them. Laura's family in Canada have been extraordinarily patient with the way this book has dominated her life. Laura simply could not have written this book without her husband Allan, who has been with her every word and punctuation mark of the way.

Laura Hoyano and Caroline Keenan
August 2006

Summary Contents

List of Diagrams xxix
Table of Cases xxxi
List of Abbreviations lxxvii

I. THEMES AND QUESTIONS 1
1. Introduction 5

II. THE LEGAL FRAMEWORK FOR ADJUDICATING ALLEGATIONS 19
2. Family Law 21
3. Liability in Criminal Law 119
4. Liability in Tort and Human Rights Law 216

III. THE INQUIRY PROCESS 423
5. Investigating and Evaluating Allegations of Abuse 425

IV. ADJUDICATION OF THE ALLEGATION 527
6. Introduction: Themes and Influences 529
7. Access to Evidence 539
8. The Child Witness 598
9. Testing the Credibility of the Child Complainant 688
10. Testing the Credibility of the Alleged Abuser 803
11. The Admissibility of Expert Evidence 872

V. CHILD ABUSE LAW AND POLICY: EVALUATION 923
12. Themes and Future Directions 925

Bibliography 935
Index 975

Contents

List of Diagrams xxix
Table of Cases xxxi
List of Abbreviations lxxvii

I. THEMES AND QUESTIONS 1

1. Introduction 5
A. Overarching Themes 7
1. Child abuse as a social and legal construction 7
2. The protection of the family as a private sphere 8
3. Child abuse and moral panics 9
4. A federation of agencies? 12
B. A Note on the Comparative Analysis of Other Jurisdictions 13
1. Canada 13
2. Australia 15
3. New Zealand 15
4. The United States 16
5. Scotland 17

II. THE LEGAL FRAMEWORK FOR ADJUDICATING ALLEGATIONS 19

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 Human Rights and the United Nations Convention on the Rights of the 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 fundamental and lifelong 34
(c) Partnership between parent and state 35
(d) The state may only intervene once statutorily defined thresholds have been crossed 36
(e) Delay in decision making is bad for the child and should be avoided 36
(f) A court order is the last resort 37
2. Principles of child protection law in the United States 38
3. Principles of child protection law in Canada 39

4. Principles of child protection law in Australia 41
5. Principles of child protection law in New Zealand 43

C. The Structure of English Family Law Legislation Relating to Child Protection 45

D. Offering 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
2. Offering services in the United States 54
3. Offering services in Canada 56
4. Offering services in Australia 57
5. Offering services in New Zealand 58
6. Evaluation of the provision of services in jurisdictions 59

E. Granting 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
4. Court orders in Australia 88
5. Court orders in New Zealand 90

F. Monitoring State Care of a Child 93
1. Monitoring local authority care of a 'looked after' child in England and Wales 93
2. Monitoring state care of a child in the United States 100

G. Allegations of Child Abuse in Private Proceedings 103
1. Orders under the Children Act 1989 104
2. 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

H. Evaluation—Has Family Law Struck the Right Balance? 116

3. Liability in Criminal Law 119

A. Tracing the Influences on the Current Law 121
1. The 'failure' of the criminal law in cases of child abuse 121
2. Fear of 'Paedophiles' 123

3. The European Convention on Human Rights and the United Nations Convention on the Rights of the Child 126

B. Principles of Criminal Law 128
1. The harm principle 128
2. Liability for acting rather than failing to act 128
3. The subjectivist principle 129
4. Legal certainty 130
5. Presumption of innocence 131

C. Homicide 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. Infanticide 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. Non-Fatal Offences Against the Person 177
1. Ill-treatment and neglect 178
2. Offences against the person 181
3. Psychiatric injury 183
4. Reasonable parental chastisement 185
5. Allowing physical chastisement in the United States 188

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. Liability in Tort and Human Rights Law 216

A. Tracing the Influences on the Current Law 218
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 to Protect a Child 248
1. Tort liability for omissions 248
2. The structure of liability in negligence 251
(a) The initial premise 252
(b) The test for duty of care 252
3. The structure of liability for breach of statutory duty 257

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 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
(b) A subjectivized standard of care? 276
3. Non-interference as causing harm to the child 279
4. Evaluation: victimizing victims? 280

E. Abuse in an Institutional Setting: the Tort Liability of a Party with a Legal Connection 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
(c) Negligence in dealing with complaints of abuse 296
3. Vicarious liability for the intentional tort of the abuser 298
(a) The conventional approach 298
(b) Rewriting the rules of vicarious liability: the Canadian policy-based 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
4. 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 blanket immunity 329
(ii) The negligence liability of investigatory agencies: unravelling blanket immunity 332
(iii) The negligence liability of investigatory agencies in New Zealand 339
(iv) The negligence liability of investigatory agencies in Australia 339
(v) The negligence liability of investigatory agencies in Canada 340
(vi) The negligence liability of investigatory agencies in the United States 341
2. Liability of child protection investigators to the child 346

(a) Failure to investigate an abuse allegation 346
(i) Breach of a statutory duty to investigate 347
(ii) Liability for negligent failure to investigate in New Zealand law 348
(iii) Liability for negligent failure to investigate in Australian law 349
(iv) Liability for negligent failure to investigate in Canadian law 350
(v) Liability for negligent failure to investigate in American law 351
(b) Negligent investigation of an abuse allegation by social services 356
(i) Liability of social services for negligent investigation in New Zealand law 356
(ii) Liability of social services for negligent investigation in English law 357
(iii) Liability of social services for negligent investigation in Canadian law 359
(c) Negligent investigation of an abuse allegation by police child protection officers 361
(i) Liability of police for negligent investigation in English law 361
(ii) Liability of police for negligent investigation in Canadian law 364
(iii) Liability of police for negligent investigation in Australian law 365
(d) Negligent investigation of an abuse allegation by health professionals and health authorities 366
(i) Misdiagnosis of abuse or neglect 367
(ii) Failure to report suspected abuse to the authorities 368
(iii) Immunity from civil liability for reporters of suspected abuse 371
(iv) Witness immunity 372
3. Liability of social services for failure to protect the interests of a child in care 374
(a) Negligent placement or monitoring of a child with a foster family 374
(i) Negligent placement or monitoring of a child in care in English law 374
(ii) Negligent placement or monitoring of a child in care in Canadian law 376
(iii) Negligent placement or monitoring of a child in care in New Zealand law 377
(iv) Negligent placement or monitoring of a child in care in Australian law 378
(v) Negligent placement or monitoring of a child in care in American law 379
(b) Negligent placement of a dangerous child with a foster family 381
(i) Negligent placement of a dangerous child with a foster family in English law 381
(ii) Negligent placement of a dangerous child with a foster family in Canadian law 383
(iii) Negligent placement of a dangerous child with a foster family in American law 383
(c) Negligent management of a child in care 385

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
(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 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
(i) 'Defensive practice' versus standard-setting for public services 414
(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

5. Investigating and Evaluating Allegations of Abuse 425
A. Tracing 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. Dominant Themes of the Guidance for Investigators 434
1. Coordination, agreed procedure, and shared information 434
2. Partnership between parents and investigators 438
3. The involvement of children 440
C. The Procedures 441
D. Reporting 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. Reporting child abuse in Canada 453
6. Evaluation: do mandatory reporting provisions help? 454
E. Responding to a Report 455
1. 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. Starting an investigation in Canada 462
5. Starting an investigation in New Zealand 463
6. Starting an investigation in Australia 465
F. Protecting 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. Gathering Evidence from the Child 486
1. 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) 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

6. Introduction: 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. Access to Evidence 539

A. Disclosure of Evidence in Child Protection Proceedings 542
1. Disclosure by the local authority to the family 543
2. Disclosure by the family to the local authority or other investigators 546

B. Prosecution and Defence Disclosure of Evidence in Criminal Proceedings 548
1. Prosecution disclosure 548
(a) Staged disclosure under the CPIA 1996 and the CJA 2003 548
(b) Treatment of 'sensitive material' 549
(c) Prosecution claims to public interest immunity 549
2. Defence disclosure 551

C. Disclosure 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
(a) Disclosure in child protection proceedings 572
(b) The prosecution's obligation to obtain relevant information possessed by third parties 574
(c) Privilege for confidential relationships in civil and criminal proceedings 574
(d) Procedures for disclosure of confidential records in criminal proceedings 577
4. Third party disclosure in Australian law 583
(a) Pre-trial disclosure in criminal proceedings 583
(b) Public interest immunity 584
(c) Confidential communications 584
(d) Admissions and disclosures made in family mediation and 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. Access to Evidence: A Coherent System or Serendipity? 594
1. A privilege for social services records? 595
2. A privilege for counselling records? 595

8. The Child Witness 598

A. Testimonial Competence and Compellability 599
1. 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
3. Testimonial competence and compellability in Canadian law 609
4. Testimonial competence and compellability in New Zealand law 610
5. Testimonial competence and compellability in Scottish law 611
6. Testimonial competence and compellability in American law 612
7. Evaluation: should competence be incontestable? 613

B. Procedures 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 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. Testing the Credibility of the Child Complainant 688

A. Corroboration Warnings 690
1. Corroboration warnings in English law 690
2. Corroboration warnings in Australian law 692
3. Corroboration warnings in Canadian law 694
4. Corroboration warnings in New Zealand law 695
5. Corroboration warnings in American law 695
6. Evaluation: law and practice in conflict? 696

B. Hearsay Evidence 698
1. The common law hearsay rule defined 698
2. The impetus for hearsay reform 705
3. Hearsay reform in English criminal cases 706
(a) The admissibility of out-of-court statements by a non-witness 707
(i) The preserved common law exceptions 707

(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. Hearsay reform in Canadian law 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. 'Recent' 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. Character 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 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

(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) Previous 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) Previous sexual experience in child abuse prosecutions in Australian law 790
(i) The statutory framework in Australian law 790
(ii) 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
(v) Previous abuse or other sources to explain the child's precocious knowledge or sexualization in Australian law 794
(e) Previous sexual experience in child abuse prosecutions in New Zealand law 795
(i) The statutory framework in New Zealand law 795
(ii) 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
(v) Previous abuse or other sources to explain the child's precocious knowledge or sexualization in New Zealand law 798
4. Evaluation: the credibility conundrum 799

10. Testing the Credibility of the Alleged Abuser 803

A. Evidential Uses of Character Evidence 804

B. The Defendant's Other Misconduct as Direct Proof of Guilt: Reasoning from Propensity in Criminal Cases 806
1. The procedural context 806
2. Balancing probative value and potential prejudicial effect 807
3. Models for controlling the admissibility of propensity evidence 813
4. Propensity or 'similar fact evidence' in English criminal law before the Criminal Justice Act 2003 814
(a) The 'other purposes' model constructed 814
(i) One approved purpose: 'background' evidence 817
(b) The 'other purposes' model dismantled 818
(c) Probative value, collusion and unconscious contamination 820

(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 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

E. Propensity and Credibility Evidence in Civil Cases 862

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

11. The 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

5. The admissibility of expert psychological evidence in English criminal courts 892
6. The admissibility of expert psychological evidence in American courts 895
7. The admissibility of expert psychological evidence in Canadian courts 899
8. The admissibility of expert psychological evidence in New Zealand courts 902
9. The admissibility of expert psychological evidence in Australian courts 906
10. The admissibility of expert psychological evidence in Scottish courts 908
11. 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. Evaluation: Is Expert Evidence Superfluous, Dangerous or Probative? 917

V. CHILD ABUSE LAW AND POLICY: EVALUATION 923

12. Themes and Future Directions 925

A. Where the Law is Now 925
B. Points of Mismatch Between Legal Systems 927
C. Legal Doctrines Which Condone Stereotypes 928
D. Points of Mismatch Between Black Letter Law and Practice 931
E. Negative Effects of the Law on Practice 931
F. Future Directions 934

Bibliography 935
Index 975

List of Diagrams

1. The Threshold Test: s 31(2) Children Act 1989 as Interpreted by Case law [Chapter 2.E.1] 60
2. The Negligence Template in English Law [Chapter 4.C.2(b)] 254
3. The American Routes to the Liability of Third Parties in Common Law Tort [Chapter 4.E.2] 287
4. The Canadian Routes to the Liability of Third Parties in Tort and Equity [Chapter 4.E.2] 288
5. Tort Liability of Public Authorities in English Law [Chapter 4.F.1] 322
6. The Investigation Process [Chapter 5.E.1] 456
7. Protecting the Child Immediately [Chapter 5.F.1] 464
8. Public Interest Immunity Template: *R v H* [Chapter 7.B.1(c)] 550
9. Gateways to and Procedures for Special Measures Directions [Chapter 8.B.2(a)] 626
10. Special Measures Directions for Young Witnesses [Chapter 8.B.2(a)] 627
11. Special Measures Directions for Adult Witnesses [Chapter 8.B.2(a)] 628
12. The Admissibility of Out-of-Court Statements Made by a Non-Witness Before the Criminal Justice Act 2003 [Chapter 9.B.1] 701
13. The Admissibility of Out-of-Court Statements made by a Witness Before the Criminal Justice Act 2003 Reforms [Chapter 9.B.1] 702
14. The Admissibility of Out-of-Court Hearsay Statements made by a *Non*-Witness Under the Criminal Justice Act 2003 [Chapter 9.B.3(a)] 709
15. The Admissibility of Out-of-Court Hearsay Statements Made by a *Witness* under the Criminal Justice Act 2003 [Chapter 9.B.3(b)] 710
16. Evidence of the Bad Character of Witnesses other than the Defendant [CJA 2003 Part 11, Ch 1] [Chapter 9.D.1(b)] 758
17. The Admissibility of Defence Evidence of the Complainant's Previous Sexual Experience: under the YJCEA 1999 [Chapter 9.D.3(a)] 764
18. Mapping Approaches for Prosecution Evidence Inviting Reasoning from Other Misconduct Evidence to Guilt [Chapter 10.B.3] 815
19. Evidence of the Bad Character of the Defendant [CJA 2003 Part 11, Ch 1] [Chapter 10.D.1] 855

Table of Cases[1]

United Kingdom and Privy Council

Re A (A Child) (Care Proceedings: Non-Accidental Injury) [2003] EWCA Civ 839 72
Re A (Minors) [1992] 1 All ER 153 [1991] 1 WLR 1026 466
Re A (Minors) (Child Abuse: Guidelines) [1992] 1 FLR 439 (Fam Div) 544
R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45 . . . . . 760, 763, 765, 766, 774, 775, 777, 779, 781
Re A and B (Minors) (Investigation of Alleged Abuse) (No 1) [1995] 3 FCR 389 (Fam Div) 495
A and B v Essex County Council [2002] EWHC 2707, [2003] FLR 615 334
DPP v A and BC Chewing Gum Ltd [1968] 1 QB 159 (QBD) 909
A v The Archbishop of Birmingham [2005] EWHC 1361 (QB) 294
A County Council v DP, RS, BS (By the Children's Guardian) [2005] 2 FLR 1031 (Fam Div) 75
A v Hoare; H v Suffolk County Council; X and Y v London Borough of Wandsworth [2006] EWCA Civ 395 . . . . . 233, 234, 296
A v Iorworth Hoare [2005] EWHC 2161 (QB) 234
A v Lambeth London Borough Council [2001] EWCA Civ 1624, [2001] 3 FCR 673 . . . . . 50, 51
A v Liverpool CC (1981) 2 FLR 222 (HL) 95
A v UK (1998) 27 EHRR 611 (ECtHR) 126, 127, 185, 391, 674
Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) [2003] EWHC 2198, [2003] 1 FLR 579 (Fam Div) 556
Re AB (Child Abuse: Expert Witness) [1995] 1 FLR 181 (CA) 876, 920
R v Abbott (1955) 39 Cr App R 141 (CA) 158
R v Abdelrahman [2005] EWCA Crim 1367 771
R v Abdullahi [2006] All ER (D) 334 (CA) 200
Ablett v Devon County Council and the Home Office A3/2000/3187, A2/2000/3281, 4 December 2000 (CA) 231, 294
Acton Justices ex p McMullen (1991) 92 Cr App R 98 (CA) 708
R v Adomako [1995] 1 AC 171 (HL) 145
Air Canada v Secretary of State for Trade [1983] 2 AC 394 (HL) 542
Akenzua v Home Office [2002] EWCA Civ 1470, [2003] 1 WLR 741 323
R v Alan David C and Julie B [2003] EWCA Crim 29 . . . . . 770, 771, 774, 779
R v Alan V [2003] EWCA Crim 3641 821
Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310 (HL) 247, 366, 382
Alexandrou v Oxford [1993] 4 All ER 382 (CA) 322

[1] Criminal cases are alphabetized according to the name of the defendant. Privy Council cases are listed both under the United Kingdom and Privy Council list, and under New Zealand where the appeal to the Privy Council emanated from there. European human rights decisions where the UK was the respondent are listed both under that heading and under the United Kingdom heading. We have endeavoured to make these citations as accessible as possible for readers from other jurisdictions, and so have not always followed domestic citation conventions. We have retained the standard abbreviations for the highest courts in each jurisdiction: Aus HC for the High Court of Australia, HL for House of Lords, PC for Privy Council, SCC for Supreme Court of Canada, and USSC for United States Supreme Court. As the New Zealand Supreme Court was founded only in 2004, we have not abbreviated it.

Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2) [1974] AC 405 (HL) . . . 559
R v Alibaji [2004] EWCA Crim 681 . . . 564
Re AM (Minors) (Wardship: Child Abuse: Guidelines to Social Workers) [1991] 1 WLR 1026 (Fam Div) . . . 466
Ancell v McDermott [1993] 4 All ER 355 (CA) . . . 332
R v Andrews [1987] AC 281 (HL) . . . 703
Anns v Merton London Borough Council [1978] AC 728 (HL) . . . 253, 324, 343
R v Donna Anthony [2005] EWCA Crim 952 . . . 880
R v APM (2000) WL 1841688 (CA) . . . 185
KR [Various Claimants] v Bryn Alyn 26 June 2001, No HQ/99/01473, 2001 WL 753345 (QBD Connell J) . . . 230, 294
KR v Bryn Alyn [2003] EWCA Civ 85, [2003] QB 1441 (CA), application for leave to appeal to HL dismissed [2004] 1 WLR 1394 . . . 230, 232, 234, 289
Archer v Brown [1985] 1 QB 401 (QB) . . . 224
R v Archibald Reading Crown Court Ref No 200007367Y1*1; appeal on other grounds dismissed [2002] EWCA Crim 858 . . . 713, 895
Ash v Ash (1696) Comb 357, 90 ER 526 (KB) . . . 267
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (CA) . . . 692
Attorney-General (NSW) v Perpetual Trustee Co Ltd [1995] AC 457 (PC) . . . 309
Attorney-General's Guidelines on Disclosure 2000 (Nov 2000) . . . 564
Attorney-General's Guidelines on Disclosure 2005 (April 2005) . . . 564, 565
Attorney-General's Reference (No 3 of 1994) [1998] AC 245 (HL) . . . 184
Attorney-General's Reference (No 1 of 2003) [2003] EWCA Crim 1286, [2003] 2 Cr App R 29 . . . 704, 712, 714
Attorney-General's Reference (No 33 of 2003) sub nom R v David Scrivener [2004] EWCA Crim 2093 . . . 823
Attorney-General's Reference No 69 of 2001 (John Archibald) [2002] EWCA Crim 858 . . . 713
Attorney General's Reference (No 1 of 2004) [2004] EWCA Crim 1025 . . . 132
Attorney-General's Reference (No 80 of 2004) [2004] EWCA Crim 2061 . . . 178
August v UK (2003) 36 EHRR CD115 (ECtHR) . . . 242, 243, 244
R v Aziz [1996] 1 AC 41 (HL) . . . 826
R v Azmy (1996) 34 BMLR 45 (Manchester Crown Court) . . . 560
R v B [1996] Crim LR 406 (CA) . . . 741
R v B [1997] Crim LR 220 (CA) . . . 738
R v B [2001] EWCA Crim 1463 . . . 179
R v B [2003] EWCA Crim 951, [2003] 1 WLR 2809 (CA) . . . 777
Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam), [2004] 2 FLR 142 . . . 534, 535, 536
Re B (A Minor) (Disclosure of Evidence) [1993] 1 FLR 191 (CA) . . . 544
Re B (Disclosure to Other Parties) [2001] 2 FLR 1017 (Fam Div) . . . 537, 543, 544, 559
Re B (Minors) (Disclosure of Medical Reports) [1993] 2 FCR 241 (Fam Div) . . . 531
Re B (Minors) (Termination of Contact: Paramount Consideration) [1993] Fam 301 (CA) . . . 95
Re B (Sexual Abuse: Expert's Report) [2000] 1 FLR 871 (CA) . . . 500
Re B (Threshold Criteria: Fabricated Illness) [2003] EWHC 20 (Fam), [2004] 2 FLR 200 . . . 535

B v Attorney General of New Zealand [2003] UKPC 61, [2003] 4 All ER 833 ..... 223, 337, 357, 406
R v B County Council ex p P [1991] 1 WLR 221 (CA) 606, 716, 717, 718
B v B (Child Abuse: Contact) [1994] 2 FLR 713 (Fam Div) 499
B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340 (CA) 66, 67
B v DPP [2000] 2 AC 428 (HL) [1994] ELR 357 198,199
B v Harris [1990] SLT 208 (Scottish Court of Session Inner House Ist Div) 185
B v UK (1987) 10 EHRR 87 (ECtHR) 29
B v UK; P v UK [2001] 2 FLR 261 (ECtHR) 533, 534, 535
R v Ball [1911] AC 47 (HL) 807
Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2) [1998] PNLR 564 (CA) 256
R v Barnes [1994] Crim LR 691 (CA) 777
Barrett v Enfield London Borough Council [1998] QB 367 (CA) 271, 334, 374, 386
Barrett v Enfield London Borough Council [2001] 2 AC 550 (HL) 228, 250, 267, 271, 325, 326, 328, 333, 347, 375, 385, 386, 418
R v Baskerville [1916] 2 KB 658 (HL) 691
R v Bateman (1925) 19 Cr App R 8 (HL) 145
Bater v Bater [1950] 2 All ER 458 (CA) 64
R v Beard (1980) 85 Cr App R 395 (CA) 179
R v Beattie (1999) 89 Cr App R 302 (CA) 739
R v Birks [2003] EWCA Crim 3091, [2003] Crim LR 401 ..... 739, 742, 744
Bluett v Suffolk County Council [2004] EWCA Civ 1707 258
DPP v Boardman [1975] AC 421 (HL) 807, 808, 816, 818, 820, 824, 829, 848, 866, 871
Bolam v Friern Hospital Management Committee [1958] 1 WLR 582 (CA) 895
Bolitho v City & Hackney Health Authority [1998] AC 232 (HL) 895
Bonnington Castings Ltd v Wardlow [1956] 1 AC 613 (HL) 279
Bottrill v A [2001] 3 NZLR 662 (PC on appeal from New Zealand CA) 223
R v Brasier (1779) 1 Leach 199, East P C 441 600
R v David Benjamin Bradley [2005] EWCA Crim 20 860
R v Bratley [2004] EWCA Crim 1254 825
R v Britzman [1993] 1 WLR 350 (CA) 852
R v Brooks (1991) 92 Cr App R 36 (CA) 816, 824
Brooks v Metropolitan Police [2005] UKHL 24, [2005] 1 WLR 1495 ..... 338, 340, 361
R v Brown (Anthony Joseph) [1994] 1 AC 212 (HL) 197
Brown v Stott (Procurator Fiscal, Dunfermline) [2003] 1 AC 681 (HL) 548
R v Brushett Case No 99/7712 (21 Dec 2000), [2001] Crim LR 471 (CA) 562, 563, 565
R v Burke (1985) 82 Cr App R 151 (CA) 852
R v Diana Butler [1999] Crim LR 835 (CA) 818
R v Butterwasser [1948] 1 KB 4 (CA) 852
R v C [1996] Crim LR 37 (CA) 771
R v C [2006] EWCA Crim 1079 859
Re C (Care: Consultation with Parent not in Child's Best Interests) (2006) 32 Fam Law 246 (Fam Div) 78
Re C (Disclosure) [1996] 1 FLR 797 (Fam Div) 544
Re C (Disclosure: Sexual Abuse Findings) [2002] 2 FLR 375 (Fam Div) 11
Re C (Expert Evidence: Disclosure: Practice) [1995] 1 FLR 204 (Fam Div) 543, 545

Re C (Interim Care Order) [1997] AC 489 (HL) [1997] 1 FLR 1 487
Re C (Interim Care Order: Assessment) [1996] 2 FLR 708 (CA) 96
Re C (Minors) [1992] 2 All ER 86 (CA) 34
Re C and B (Children) (Care Order: Future Harm) [2001] 1 FLR 611, [2000] 2 FCR 614 (CA) 68, 466, 473
C v Bury Metropolitan Borough Council [2002] 2 FLR 868 (Fam Div) 99
C v Eisenhower (1984) 78 Cr App R 48 (DC) 182
C v C (Child Abuse: Evidence) [1987] 1 FLR 321 495
C v D and SBA [2006] EWHC 166, [2006] All ER (D) 329 (QB) 246, 863
C v Middlesbrough Council [2004] EWCA Civ 1746; [2005] 1 FCR 76 ..... 232, 297
Calveley v Chief Constable of Merseyside [1989] 1 AC 1228 (HL) 329, 332
R v Camberwell Green Youth Court ex p D [2005] UKHL 4, [2005] 1 WLR 393 ..... 634, 672, 676, 677
R v Camellari [1922] 2 KB 122 (CA) 738
DPP v Camplin (1978) 67 Cr App R 14 (HL) 139, 141
Canadian Pacific Railway Co v Lockhart [1942] AC 591 (PC) 299
R v Cannings (Angela) [2004] EWCA Crim 01, [2004] 1 All ER 725 ..... 536, 810, 822, 828, 868, 878–82
Caparo v Dickman [1990] 2 AC 605 (HL) 252–4, 256, 271, 322, 326–28, 332, 334, 336, 363
R v Cargill (1913) 8 Cr App R 224 (CA) 756
Carmarthenshire County Council v Lewis [1955] AC 549 (HL) 267, 270, 271
Carty v Croydon London Borough Council [2005] EWCA Civ 19, [2005] 1 WLR 2312 ..... 322, 327
Re CB and JB [1998] 2 FLR 2 (CA) 917
CD (A Child By Her Litigation Friend VD) v Isle of Anglesey County Council [2004] EWHC 1635 (Admin) 99
Re CH (Care or Interim Care Order) [1998] 1 FLR 402 (CA) 76
Chalmers v Johns [1999] 1 FLR 392 (CA) 478
R v Chambers *The Times* 6 May 1993 (CA) 529, 691
R v Chan Fook [1994] 1 WLR 689 (CA) 183
R v Chard (1971) 56 Cr App R 268 (CA) 892, 916
R v Charlotte Smith (1865) 10 Cox 82 192
R v Cheshire [1991] 3 All ER 670 (CA) 134
R v Chief Constable of the North Wales Police ex p Thorpe [1999] QB 396 (CA) 11
R v Chief Constable of the West Midlands police ex p Wiley [1995] AC 274 (HL) 545
R v Christie [1914] AC 545 (HL) 835
R v Christopher Lillie and Dawn Reed ref no T931874 (QB 13 July 1994) 625, 639, 656, 892
R v Christou [1997] AC 117 (HL) 824, 839–41
R v Church [1966] 1 QB 59 (CA) 142
R v Churchill [1999] Crim LR 664 (CA) 738–40
R v Clark (Sally) [2003] EWCA Crim 1020, [2003] 2 FCR 447 878
R v Clarkson [1971] 3 All ER 344 (CA) 175
Cleary v Booth [1893] 1 QB 465 (QB) 235
Cleveland County Council v A; Cleveland County Council v B [1988] FCR 593 (Fam Div) 33
Cleveland County Council v C [1988] FCR 607 (DC) 874
Clibbery v Allan [2002] EWCA Civ 45, [2002] 1 FLR 565 (CA) 533
Collins v Wilcock [1984] 1 WLR 1172 (CA) 238
R v Coney (1881–1882) LR 8 QBD 534 175

R v Constanza [1997] 2 Cr App R 492 (CA) 181
Conway v Rimmer [1968] AC 910 (HL) 542
R v Cornwall County Council ex p LH [2000] 1 FLR 236 (QBD) 442, 512
Costello-Roberts v UK [1993] ECHR 13134/87, 19 EHRR 112 (ECtHR) 674
Council for the Regulation of Healthcare Professionals v Southall [2005] EWHC 579 (QBD (Admin)) 880
R v Court [1989] AC 28 (HL) 195
R v Cowan [1996] QB 373 (CA) 852
R v David Cox (1986) 84 Cr App R 132 (CA) 773
R v Creed [2000] 1 Cr App R(S) 304 (CA) 160, 179
R v Criminal Injuries Compensation Appeal Panel ex p CD and ex p JM [2004] EWHC 1674 (Admin) 1674 ..... 243, 244
R v Criminal Injuries Compensation Appeals Panel ex p Andrew Stuart Brown 30 June 2000 (QB) 242
R v Criminal Injuries Compensation Appeals Panel ex p Carl Wade August; Andrew Stuart Brown [2000] 2 WLR 1452, [2001] 2 All ER 874 (CA) 242
R v Criminal Injuries Compensation Appeals Panel ex p JE [2002] EWCA Civ 1050 243
R v Criminal Injuries Compensation Appeals Panel ex p JE [2005] EWCA Civ 1050, [2003] EWCA Civ 234 243
R v Croad [2001] EWCA 644 743
Cutler v Wandsworth Stadium [1949] AC 398 (HL) 257
R v D [2002] EWCA Crim 990, [2003] QB 90 (CA) 708, 713
Re D (Children) [2005] EWCA Civ 825 532
Re D (Infants) [1970] 1 WLR 599 (CA) 545
Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam Div) 106
Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593 (HL) 544
Re D (Minors) (Sexual Abuse: Evidence) [1998] 2 FCR 419 (CA) 500
Re D (Minors) (Wardship: Disclosure) [1994] 1 FLR 346 (CA) 561
D v Meah, W v Meah [1986] 1 All ER 935 (QB) 219
D v National Society for the Prevention of Cruelty to Children [1977] 2 WLR 201, [1978] AC 171 (HL) 409, 444, 542, 545, 559, 561, 575, 591
R v D(CR) [2003] EWCA Crim 2424, [2005] Crim LR 163 824
R v D and others (CA 3 November 1995) 541, 602, 893
R v Dallagher [2002] EWCA Crim 1903 (CA) 874, 911
R v Dalloway (1847) 2 Cox CC 273 134
Darker v Chief Constable of West Midlands [2001] 1 AC 435 (HL) 344, 363, 372, 373
R v Floyd Charles Darnell [2003] EWCA Crim 176 ..... 763–65, 775
R v David D; Phillip J [1996] 1 Cr App R 455 (CA) 541
R v Dawson (1985) 81 Cr App R 150 (CA) 142
R v Derby Magistrates' Court ex p B [1996] AC 487 (HL) 220, 371, 542, 546, 559, 560, 574
R v Dolan [2002] EWCA Crim 1859 818
R v Donna Anthony [2005] EWCA Crim 952 880
R v Dossi (1918) 13 Cr App R 158 (CA) 690
R v Doughty (1986) 83 Cr App R 319 (CA) 139, 140
R v DPP ex p Kebilene [2000] 2 AC 326 (HL) 337
Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2003] 2 AC 366 ..... 305, 306, 309
R v Duffy [1999] QB 919 (CA) 663
R v Dyson [1908] 2 KB 959 (CA) 134
Re E (A Minor) (Child Abuse: Evidence) [1987] 1 FLR 269 (Fam Div) 490
Re E (A Minor) (Child Abuse: Evidence) [1991] 1 FLR 420 (Fam Div) 492

R v E Sussex ex p W [1998] 2 FLR 1082 (QBD) 61
E v UK (2003) 36 EHRR 31, [2003] 1 FLR 348 (ECtHR) 336, 393, 459
R v Ealing Borough Council ex p C (1999) 3 CCLR 122 (CA) 50, 51
Re EC (Disclosure of Material) [1996] 2 FLR 725 (CA) 555, 556, 558
R v Edwards; R v Fysh; R v Duggan; R v Chohan [2005] EWCA Crim 1813 862
R v Edwards and Rowlands [2005] EWCA Crim 3244 857
R v EF [2002] EWCA Crim 1773 774
R v Elahee [1999] Crim LR 399 (CA) 776
Essex County Council v R (Legal Professional Privilege) [1996] 2 All ER 78 (CA) 548
Re ET (Serious Injuries: Standard of Proof) [2003] 2 FLR 1205 (Fam Div) 66, 67
Dennis Andrew Etches [also reported as Dennis AndrewE] v R [2004] EWCA Crim 1313 . . . . . 763, 765, 767, 771, 774, 779
R v Exeter Juvenile Court ex p H and H; R v Waltham Forest Juvenile Court ex p B [1988] FCR 474 [1988] 2 FLR 214 (Fam Div) 540, 552
In Re F [1990] 2 AC 1 (HL) 238
R v F [2005] EWCA Crim 493, [2005] 2 Cr App R 13 . . . . . 764–6, 776
Re F; F v Lambeth [2002] 1 FLR 217 (Fam Div) 94, 102
Re F (Minors) (Care Proceedings: Contact) [2000] 2 FCR 481 (Fam Div) 30
Re F (Specific Issue: Child Interview) [1995] 1 FLR 819 (CA) 606
Fagan v MPC [1969] 1 QB 439 (DC) 181
Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22, [2003] 1 AC 32 . . . . . 279, 365
Foran v London Borough of Barnet (20 Oct 1998 QBD) 32
Fowler v Lanning [1959] 1 QB 426 (QB) 237, 245
Freeman v Home Office (No 2) [1984] 1 QB 524 (HC and CA) 240
R v French (18 July 1997 CA) 738
Frost v Chief Constable of South Yorkshire [1999] 2 AC 455 (HL) 382
Re FS (Child Abuse: Evidence) [1996] 2 FLR 158 (CA) 467, 890
R v Fulcher [1995] 2 Cr App R 251 (CA) 818
R v Funderburk [1990] 1 WLR 587 (CA) 567, 755, 756, 762, 773, 797, 801
R v G [2003] UKHL 50 . . . . . 130, 164
Re G (A Minor) (Care Order: Threshold Conditions) [1995] Fam 16 (Fam Div) 70
Re G (A Minor) (Social Worker: Disclosure) [1996] 2 All ER 65 (CA) 553
Re G (Care: Challenge to Local Authority's Decision) [2003] 2 FLR 42 (Fam Div) 99, 440
Re G (Celebrities: Publicity) [1999] 1 FLR 409 (CA) 535
Re G (Minors) (Child Abuse: Evidence) [1987] 1 FLR 310 (Fam Div) 498, 499
Re G (No 2) (A Minor) [1988] 1 FLR 314 (Fam Div) 65
G v DPP [1997] 2 All ER 755 (QBD) 504, 889, 893
G v London Borough of Barnet [2001] 1 FCR 743 (QBD (Admin)) 51
G v R [2006] EWCA Crim 821, [2006] All ER 197 . . . . . 132, 198, 199
R v G [2004] 1 AC 1034 (HL) 164
General Medical Council v Alan Roy Williams 3 June 2005 (General Medical Council Fitness to Practise Panel) 918
R v George [1956] Crim LR 52 (Assizes) 195
R v Gibbons and Proctor (1918) 13 Cr App R 134 129
Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 (HL) 489, 490
Gogay v Hertfordshire County Council [2001] 1 FLR 280 (CA) 459, 460
Goldman v Hargrave [1967] 1 AC 645 (HL) 278
R v Goodway [1993] 4 All ER 894 (CA) 699
Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15, [2004] 1 WLR 1057 . . . . . 250, 322, 325, 327

R v Greenwood [1993] Crim LR 770 (CA) 739, 742
R v Guelbert [2001] EWCA Crim 1604 743
Guidelines for Crown Court Listing (Lord Chancellor's Department 1994) 624
R v Guilfoyle (No 2) [2001] 2 Cr App R 57 (CA) 457, 874, 892, 910, 913
R v H [1995] 2 AC 596 (HL) 820, 838, 847, 859
R v H [2006] EWCA Crim 853 194
Re H [1991] FCR 737 466
Re H (A Minor)(Custody)(Interim Care and Control) [1991] FCR 736 (CA) 32
Re H (Children) (Freeing Orders: Publicity) [2005] EWCA Civ 1325 536
R v H (Karl Anthony) [2005] EWCA Crim 732, [2005] 2 All ER 859 ..... 195, 196
Re H (Minors) (Adoption: Putative Father's Rights) (No 3) [1991] 2 All ER 185 (CA) 34
Re H (Minors) (Wardship: Sexual Abuse) [1992] 1 WLR 243 (CA), [1991] FCR 736 486
Re H (Minors: Sexual Abuse: Standard of Proof) [1996] AC 563 (HL) 230, 417, 531, 546
Re H (Parental Responsibility) [1998] 1 FLR 855 (CA) 107
Re H and others (Minors) (Threshold Criteria Standard of Proof) [1996] 1 All ER 1 (HL) 60, 64, 65, 66, 68, 104, 114, 117, 160
Re H and R (Child Sexual Abuse: Standard of Proof) [1995] 1 FLR 643 (CA) 66, 82
H v Bury Metropolitan Borough Council [2006] EWCA Civ 1, [2006] 1 WLR 917 358
H v H and C (Kent County Council Intervening) (Child Abuse: Evidence); K v K (Haringey London Borough Council Intervening) (Child Abuse: Evidence) [1989] 3 WLR 933 (CA) 497, 499
H v Norfolk County Council [1997] 1 FLR 384 (CA) 335, 374, 375
H v UK [1988] 10 EHRR 95 (ECtHR) 29
R v H, R v C [2004] UKHL 3, [2004] 2 AC 134, [2004] 1 All ER 1269 (HL) 542, 548, 549, 550, 551
Hackney London Borough Council v G [1994] 2 FCR 216 (Fam Div) 70
Halford v Brookes [1992] PIQR 175 (HC) 220
Halford v Brookes (No 1) [1991] 3 All ER 559 (CA) 220
R v Hampshire [1995] 2 All ER 1019 (CA) 602, 603
R v Hampshire County Council ex p K and Another [1990] 1 FLR 330 (QB) 543
R v Hanson; R v Gilmour; R v P [2005] EWCA Crim 824, [2005] 2 Cr App R 21 ..... 860, 862
Harris v DPP [1952] AC 694 (HL) 808
R v Harris; R v Rock; R v Cherry; R v Faulder [2005] EWCA Crim 1980, [2006] 1 Cr App R 5 ..... 880, 918, 921
Harris v Harris; Attorney-General v Harris [2001] 2 FLR 895 (Fam Div) 535
R v Harron [1996] Crim LR 581 (CA) 699
R v Hassana Francis (CA 8 November 2000) 874
R v Hayes [1977] 1 WLR 234, [1977] 2 All ER 288 (CA) 604
R v Hayles [1969] 1 QB 364 (CA) 179
Haystead v Chief Constable of Derbyshire [2000] 3 All ER 890 (QBD) 184
R v Henry (1969) 53 Cr App R 150 (CA) 690
R v Hertfordshire County Council ex p A [2001] EWCA Civ 2113, [2001] FLR 666 461
DPP v Hester [1973] 1 AC 296 (HL) 600, 690
R v Higgins [1996] 1 FLR 137 (CA) 561, 562, 565
R v Highbury Corner Magistrates' Court ex p D [1997] 1 FLR 683 (QBD) 606
R v Highton, Van-Nguyen, Carp [2005] EWCA Crim 1985; [2005] 1 WLR 3472 ..... 857, 861
Hill v Chief Constable of West Yorkshire [1989] 1 AC 53 (HL) 225, 329, 340, 341, 361, 364
A-G v Hitchcock (1847) 1 Exch 91, 154 ER 38 755
Hobbs v Tinling & Co Ltd [1929] 2 KB 1 (CA) 760
Hollington v F Hewthorne & Co Ltd [1943] KB 587 (CA) 541

Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL) 322, 324, 330
Hopley (1860) 2 F & F 202 185
Horrocks v Lowe [1975] AC 135 (HL) 409
R v Howes [1996] 2 Cr App R 490 (CA) 771, 842
Howse v The Queen [2005] UKPC 30 (on appeal from New Zealand CA) 699
Hulbert (1998) EWCA Crim 2578 144
Humberside County Council v B [1993] 1 FLR 257 (CA) 63
Hyam v DPP [1975] AC 55 (HL) 135
R v Inner London Education Authority ex p Ali (1990) 2 Admin LR 822 (QBD) 51
R v Ireland [1998] AC 147 (HL) 181, 183
R v Islam [1999] 1 Cr App R 22 (CA) 738, 740, 741, 753
R v Izard (1992) 156 JPN 826; *The Times* 30 July 1992 (CA) 529, 691
R v J [1998] Crim LR 579 (CA) 743
Re J (Care Proceedings: Disclosure) [2003] EWHC 976, [2003] 2 FLR 522 (Fam Div) 545
Re J (Child Abuse: Expert Evidence) [1991] FCR 192 (CA) 917
Re J (Minors) (Care: Care Plan) [1994] 1 FLR 253 (Fam Div) 96
Re J (Specific Issue Order: Leave to Apply) [1995] 1 FLR 669 (Fam Div) 48
J v Reading Borough Council and Thames Valley Police [2002] EWHC 2905 (QBD) 362
R v Jackson (CCA 19 November 1996) 601
R v James [1995] Crim LR 812 (CA) 711
Janvier v Sweeney [1919] 2 KB 316 (CA) 246
R v Jarvis [1991] Crim LR 374 (CA) 740
Jasper v UK (2000) 30 EHRR 441 (ECtHR) 563
JD v East Berkshire Community NHS Trust; MAK v Dewsbury Health Care NHS Trust; RK v Oldham NHS Trust [2003] EWCA Civ 1151, [2003] 4 All ER 796 (CA) 337, 338, 358, 368, 373, 393, 396
JD v East Berkshire Community NHS Trust; MAK v Dewsbury Health Care NHS Trust; RK v Oldham NHS Trust [2005] UKHL 23, [2005] 2 AC 373 ..... 320, 323, 331, 338, 339, 357, 359, 367, 368, 373, 406–09, 412–16, 419
R v Jennings and Miles [1995] Crim LR 810 (CA) 711
Joel v Morrison (1834) 6 C& P 501 298
R v John Allen Venn [2003] EWCA 236 ..... 820, 826, 827
R v John W [1998] 2 Cr App R 289 (CA) 826
R v Johnstone [2003] UKHL 28 132
DPP v K [1990] 1 All ER 331 (CA) 181
R v K [2002] 1 AC 462 (HL) 198, 199
K (Children) [2005] EWCA Civ 1226 (CA) 72
Re K (Contact: Mother's Anxiety) [1999] 2 FLR 703 (Fam Div) 106
R v K(DT) (Evidence) [1993] 2 FLR 181 (CA) 560
Re K and Others (Minors) (Wardship: Criminal Proceedings) [1988] 1 All ER 214 (Fam Div) 606, 607
R v Kai-Whitewind [2005] EWCA Crim 1092 ..... 881, 918
Re KD [1988] AC 806 (HL) 36, 39, 117
R v Keane [1994] WLR 746 (CA) 548
R v Kearley [1992] 2 AC 228 (HL) 14, 706, 707, 718
R v Kenneth Arnold [2004] EWCA Crim 1293 711
Kent v Griffiths and London Ambulance Service [2000] 2 All ER 474 (CA) 328, 333
Khorasandjian v Bush [1993] QB 727 (CA) 246
DPP v Kilbourne [1973] AC 729 (HL) 808, 865, 866
R v Royal Borough of Kingston-upon-Thames ex p T [1994] 1 FLR 798 (Fam Div) 52
KR v Bryan Alyn 26 June 2001, No HQ/99/01473, 2001 WL 753345 (QBD) 294

R v Kray [1970] 1 QB 125 (CA) 823
Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122 (HL) 224
R v L [1999] Crim LR 489 (CA) 692
Re L (A Child) (Care Proceedings: Responsibility for Child's Injury) [2006] EWCA Civ 49 69
Re L (A Child) (Contact: Domestic Violence) [2000] 2 FCR 404 (CA) 107
Re L (A Minor) (Police Investigation: Privilege) [1997] AC 16 (HL) 371, 546
L (A Minor) and P (Father) v Reading Borough Council and Chief Constable of Thames Valley Police [2001] EWCA 346, [2001] 1 WLR 1575 (CA) 344, 357, 362, 363
Re L (Care Assessment: Fair Trial) [2002] 2 FLR 730 (Fam Div) 31
Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam Div) 75
Re L (Contact: Domestic Violence), Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] 2 FLR 334 105
Re L (Sexual Abuse: Standard of Proof) [1996] 1 FLR 116 (CA) 96
L v K [2005] EWCA Civ 918 532
L v UK [2000] 2 FLR 322 (ECtHR) 546
Lambert [2001] 3 WLR 206 (HL) 131
Lancashire County Council v A (A Child) (Care Orders: Significant Harm) [2000] 2 AC 147 (HL) 69, 70
Lancashire County Council v A; Lancashire County Council v B [2000] 2 WLR 346 (CA) 70
R v Lane (1985) 82 Cr App R 5 (CA) 158, 159, 171
R v Lang (1975) 62 Cr App R 50 (CA) 193
LCB v UK (1998) 27 EHRR 212 (ECtHR) 389
R v Lee (1912) 7 Cr App R 31 (CA) 740
R v Lee Archer [2003] EWCA Crim 2072 (CA) 771
Letang v Cooper [1965] 1 QB 232 (CA) 232, 237
Lillie and Reed v Newcastle City Council, Barker and others [2002] EWHC 1600 (QB) 283, 410, 411, 493, 496, 625, 892
R v Lillyman [1896] 2 QB 167 (Ct of Crown Cases Reserved) 738–40
Lister v Hesley Hall Ltd 13 October 1999 The Times LR (CA) 296
Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215 . . . . . 291, 295, 296, 299, 304, 304, 313
R v Liverpool Magistrates Court ex p Pollock [1997] COD 344 (QBD) 606
R v Local Authority and Police Authority in the Midlands ex p LM [2000] 1 FLR 612 (QB) 11
R v London Borough of Barnet ex p B [1994] 1 FLR 592, [1994] 2 FCR 781 (CA) 51
R v London Borough of Barnet ex p G; R v London Borough of Lambeth ex p W; R v London Borough of Lambeth ex p A [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97 (HL) 50, 52
R v London Borough of Islington ex p Rixon [1997] ELR 66, (1996) 32 BMLR 136 (QBD) 441
R v London Borough of Tower Hamlets ex p Byas (1993) 25 HLR 105 (QBD) 50
London Passenger Transport Board v Upson [1949] AC 155 (HL) 257
Love (Alexander) v HM Advocate [1999] SCCR 783, [2000] JC 1 (Scottish High Court of Justiciary on Appeal) 778
Lowe [1973] QB 702 (CA) 142, 143, 152, 163
Lowery v The Queen [1974] AC 85 (PC) 826, 916
Re LU (A Child) and LB (A Child) [2004] EWCA Civ 567 882
R v Lucas (1981) 732 Cr App R 159 (CA) 699

Ludlow v Metropolitan Police Commissioner [1971] AC 29 (HL) 823, 824
R v Lynch [1993] Crim LR 868 (CA) 740
Re M [1987] 1 FLR 293 (Fam Div) 507
DPP v M [1997] 2 All ER 749 (QBD) 601, 602, 624
R v M (5 November 1999) (No 98/03990/Y4) (CA) 567
Re M (A Minor) (Care Orders: Threshold Conditions) [1994] AC 424 (HL) 546
Re M (A Minor) (Disclosure of Material) [1990] 2 FLR 36 (CA) 545, 561
Re M (A Minor) (Official Solicitor: Role) [1998] 2 FLR 815 (CA) 460
Re M (A Minor) (Secure Accommodation Order) [1995] 1 FLR 418 (CA) 33
Re M (Care Proceedings: Disclosure: Human Rights) [2001] 2 FLR 1316 (Fam Div) 543
Re M (Care Proceedings: Judicial Review) [2003] EWHC 850, [2003] 2 FLR 171 (QBD) 473
Re M (Challenging Decisions by Local Authority) [2001] 2 FLR 1300 (Fam Div) 99
Re M (Contact: Welfare Test) [1995] 1 FLR 274 (CA) 107
Re M (Intractable Contact Dispute: Interim Care Orders) [2003] EWHC 1024 (Fam Div) 106
Re M (Minors) (Disclosure of Evidence) [1994] 1 FLR 760 (CA) 544
Re M (Minors) (Sexual Abuse: Evidence) [1993] 1 FLR 822 492
R v M (Wasted Costs Order) [1996] 1 FLR 750 (QB) 560
M v Newham London Borough Council, reported with X v Bedfordshire County Council [1995] 2 AC 633 (HL) 320, 335, 367
Re M and R (Minors) (Sexual Abuse: Expert Evidence) [1996] 2 FLR 195, [1996] 4 All ER 239 (CA) 891
R v M(T) and others [2000] 1 WLR 421 (CA) 742, 818
R (on the application of McCann) v Crown Court of Manchester; Clingham v Kensington and Chelsea Royal London Borough Council [2002] UKHL 39, [2002] 3 WLR 1313 66
McFarlane v Tayside Health Authority [2000] 2 AC 59 (HL) 253
McGhee v National Coal Board [1973] 1 WLR 1 (HL) 279
R v McLeod [1994] 1 WLR 1500 (CA) 852
McLoughlin v O'Brian [1983] 1 AC 410 (HL) 247, 382, 383
McMichael v UK (1995) 20 EHRR 205 (ECtHR) 544
R v MacPherson [2005] EWCA Crim 365, [2006] All ER (D) 104 ..... 603, 604
MAK and RAK v Dewsbury Healthcare NHS Trust and Kirklees Metropolitan Council [2003] Lloyds LR 13 (Leeds Cty Ct) 358, 368
Makanjuola v Commissioner of Police for the Metropolis (1990) 2 Admin LR 214, The Times, 31 July 1989 (QB) 240
R v Makanjuola, R v Easton [1995] 3 All ER 730 (CA) 691
Makin v A-G for New South Wales [1894] AC 57 (PC) 807, 814–17, 819, 827, 832, 865, 868
Manchester County Council v B [1996] 1 FLR 324 (Fam Div) 875
Re Manda (Wardship: Disclosure of Evidence) [1993] 1 FLR 205 (CA) 537
Marsh and Marsh v Hodgson [1974] Crim LR 35 (DC) 158, 171
R v Martin [1996] Crim LR 589 (CA) 708
R v Martin [2004] EWCA Crim 916, [2004] 2 Cr App R 22 ..... 763, 765, 776
Martin v Watson [1996] AC 74 (HL) 408
R v Mattey [1995] 2 Cr App R 409 (CA) 711
R v Mawaz Khan [1967] 1 AC 454 (HL) 699
Maxwell v DPP [1935] AC 309 (HL) 804
Mayor and Burgesses of London Borough of Lambeth ex p K (2000) 3 CCLR 141 (QBD) 51

Meadow v General Medical Council [2006] EWHC 146 (Admin), [2006] All ER (D) 229 (QBD), appeal allowed in part [2006] EWCA Civ 3090, [2006] All ER (D) 315 ..... 919, 920
Meah v McCreamer (No 1) [1985] 1 All ER 367 (QB) 219
Meah v McCreamer (No 2) [1986] 1 All ER 943 (QB) 219
Mechanical and General Interventions Co Ltd v Austin [1935] AC 346 (HL) 756
Mersey Docks and Harbour Board Trustees v Gilts (1866) LR 1 HL 93 (HL) 321
Metropolitan Asylum District Managers v Hill (1881) 6 App Cas 193, [1881–1885] All ER 536 (HL) 863
R v MH; R v RT [2001] EWCA Crim 1877, [2002] 1 Cr App R 22 ..... 767, 769, 771, 773, 774, 779, 787, 793
Miller [1954] 2 QB 282 (Winchester Assizes) 64
R v Miller [1983] 2 AC 161 (HL) 128
R v Minhas and Haq [2003] EWCA Crim 135 766
Minister for Home Affairs v Fisher [1979] 3 All ER 21 (PC) 674
R v Misra [2004] EWCA Crim 2375, [2004] All ER (D) 107 131
Mitra [2004] EWCA Crim 2375 146
R v Mokrecovas [2001] EWCA Crim 1644, [2002] 1 Cr App R 20 ..... 764, 765, 769, 770, 775, 779, 788, 798, 802
Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 (CA) 863
Moriaty v Brooks (1834) 6 C & P 684 182
R v Morris [1998] 1 Cr App R 386 (CA) 183
Mullin v Richards [1998] 1 All ER 920 (CA) 278
Myers v DPP [1965] AC 1001 (HL) 14, 698, 706, 718
Re N (Child Abuse: Evidence) [1996] 2 FLR 214, [1997] 1 WLR 153, [1996] 4 All ER 225 875
Re N (Minors) (Child Abuse: Evidence) [1987] 1 FLR 280 (Fam Div) 492
N Yorkshire CC v SA (A Child: Care Proceedings Non-Accidental Injury) [2003] EWCA Civ 839 ..... 60, 72
R v Nagrecha [1997] 2 Cr App R 401 (CA) 773
R v Naveed Soroya [2006] EWCA Crim 1884 766
R v Nedrick [1986] 1 WLR 1025 (CA) 135
Neill v North Antrim Magistrates' Court [1992] 4 All ER 846 (HL) 711
DPP v Newbury [1977] AC 500 (HL) 142
R v Newport [1998] Crim LR 581 (CA) 699
R v Nigel Anthony Keast [1998] Crim LR 748 (CA) 740
R v NK [1999] Crim LR 980 (CA) 739
R v Norbury (1992) 136 SJ LB 136 600
R v Northavon District Council ex p Smith [1994] 2 AC 402 (HL) 5
Nottinghamshire County Council v H [1995] 1 FLR 115 (Fam Div) 542
Nottinghamshire County Council v P [1993] 2 FLR 134 (CA) 61
Re O (Care; Discharge of Care Order) [1999] 2 FLR 119 (Fam Div) 80
In Re O and another (Minors) (Care: Preliminary Hearing); In Re B (A Minor) [2003] UKHL 18, [2003] 1 FLR 1169, [2004] 1 AC 523 ..... 71, 72, 105
O and N (Care: Preliminary Hearing) [2002] 2 FLR 1167 (CA) 71
R v O'Brien [2000] Crim LR 863 (CA) 823
O'Brien v Chief Constable of South Wales Police [2005] UKHL 26, [2005] 2 All ER 931 ..... 859, 863, 871
Official Solicitor v K (Infants) [1965] AC 201 (HL) 544, 716
R v Osborne [1905] 1 KB 551 (CCR) 738, 739, 741

Osman v Ferguson [1993] 4 All ER 344 (CA) 332, 361
Osman v UK (2000) 29 EHRR 245, [1999] 1 FLR 193 (ECtHR), (2000) 29 EHRR 245 . . . . . 225, 332, 333, 361, 388–91, 395, 413
DPP v P [1991] 2 AC 443 (HL) 815, 818–20, 826, 832, 833, 836, 841, 865, 871
Re P (Parental Responsibility) [1998] 2 FLR 96 (CA) 107
Re P (Sexual Abuse: Standard of Proof) [1996] 2 FLR 333 (CA) 104, 105
Re P (Witness Summons) [1997] 2 FLR 447 (HC) 607, 716
P v BW (Children Cases: Hearings in Public) [2003] EWHC 1541 (Fam), [2004] 1 FLR 171 . . . . . 535, 537
P, C and S v UK [2002] 2 FLR 631 (ECtHR) 467, 473, 882
P Samuel & Co v Dumas [1924] AC 431 (HL) 273
Page v Smith [1996] AC 155 (HL) 382
R v Pagett (1983) 76 Cr App R 279 (CA) 134
Palmer v Tees Health Authority [1999] All ER (D) 722 (CA) 333, 334, 370
Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530, [2002] QB 266 253
R v Paul Baird (1992) 97 Cr App R 308 (CA) 823, 824
R v PB [2001] EWCA Crim 3042 . . . . . 772, 774, 779
Re P-B (A Minor) (Child Cases: Hearings in Open Court) [1997] 1 All ER 58 (CA) 535
Peabody v Parkinson [1985] AC 210 (HL) 262
Pelling v Bruce-Williams [2004] EWCA Civ 845, [2004] Fam 155 534–7
R v Pendleton [2001] UKHL 66, [2002] 1 Cr App R 34 893
R v Peter M (9 Aug 2000 CA) 741
R v Pettman (2 May 1985) (CA) 818
Phelps v London Borough of Hillingdon Anderton [2001] 2 AC 619 (HL) 253, 322, 326, 327, 334
Philcox v Civil Aviation Authority (1995) 92 (27) LSG 33 (CA) 262
Poland v Parr (John) & Sons [1927] 1 KB 236 (CA) 298
R v Powell [2006] EWCA Crim 03, [2006] All ER (D) 45 603
Practice Direction [1995] 1 FLR 456 (Fam Div) 543
Practice Direction (Crime: Spent Convictions) [1975] 1 WLR 1065 756
Practice Direction (Family Division) [1988] 1 All ER 223, modified by [1988] 2 All ER 1015 (Fam Div) 606
Practice Direction of 31 January 1995 (Case Management) [1995] 1 FLR 456 (Fam Div) 543, 717
Practice Direction: Trial of Children and Young Persons in the Crown Court [2000] 2 All ER 285 673
Re R [2003] EWCA Civ 455 107
R v R [2004] EWCA Crim 1964 . . . . . 775, 778
Re R (A Minor) (Wardship: Medical Treatment) [1991] 3 WLR 592 (CA), [1991] 4 All ER 177 (CA) 490
Re R (Care: Disclosure: Nature of Proceedings) [2002] 1 FLR 755 (Fam Div) 531, 545, 559
Re R (Child Abuse: Video Evidence) [1995] 1 FLR 451 (Fam Div) 543
R (on the application of AB and SB) v Nottinghamshire County Council [2001] EWHC (Admin) 235 . . . . . 49, 457
R (on the application of D) v Camberwell Green Youth Court [2003] EWHC 227, [2003] 2 Cr App R 16 (QB DC) 676
R (on the application of H) v Thames Youth Court [2002] EWHC 2046 678

R (on the application of McCann) v Crown Court at Manchester; Clingham v Kensington and Chelsea Royal London Borough Council [2002] UKHL 39; [2002] 3 WLR 1313 66
R (on the application of O'Shea) v Coventry Magistrates Court [2004] EWHC 905 (DC) 700
R (on the Application of P) v West London Youth Court [2005] EWHC 2583 (Admin), [2006] 1 All ER 477 (QB DC) 675
R (on the application of the DPP) v Redbridge Youth Court [2001] EWHC Admin 209, [2001] 4 All ER 411 ..... 622, 678
Re R (Minors) (Wardship: Criminal Proceedings) [1991] 2 FLR 95 (CA) 606, 607
R v R (Mark) [2005] EWCA Crim 2257 881
R v Raghip *The Times*, 9 December 1991 (CA) 892, 916
R v Randall [2003] UKHL 69, [2004] 1 WLR 56 ..... 826, 916
Ratten v The Queen [1972] AC 378 (PC) 699, 703, 704
R v Rawlins; R v Broadbent [1995] Crim LR 335 (CA) 624
R v RD [2002] EWCA Crim 2893 ..... 765, 778
Reading Borough Council v Angela D [2006] EWHC 1465, [2006] All ER (D) 211 (Fam Div) 554
R v Reading Justices ex p Berkshire County Council [1996] 1 Cr App R 239 (CA) 560
R v Redpath (1962) 49 Cr App R 319 (CA) 690, 740
Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360 (HL) 280, 412, 417
R v Reigate Justices ex p Counsell [1984] 148 JP 193 (QBD) 182
RK v Oldham NHS Trust [2003] Lloyds Rep Med 1 (QB) 338, 358
R v Robb (1991) 93 Cr App R 161 (CA) 874, 895, 911
R v Robinson (1994) 98 Cr App R 370 (CA) 893
Rochdale BC v A and Others [1991] 2 FLR 192 (Fam Div) 366, 492, 493, 499, 875
Rookes v Barnard [1964] AC 1129 (HL) 224
R v Rosemary West [1996] 2 Cr App R 374 (CA) 865
Rowling v Takaro Properties Ltd [1988] AC 473 (PC) 324
Rowntree v Commissioner of Police for the Metropolis 2001 WL 1346941 (QBD 18 July 2001) 417
R v Russell and Russell (1987) 85 Cr App R 388 (CA) 171
R v Rutherford [1998] Crim LR 490 (CA) 708
R v Ryland (1867) LR 1 CCR 99, 31 JP 790 180
R v S [2004] EWCA Crim 1320, [2004] 3 All ER 689 ..... 740, 741
In Re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593 537
Re S (Care Order: Criminal Proceedings) [1995] 1 FLR 151 (CA) 540, 560
Re S (Discharge of Care Order) [1995] 2 FLR 639 (CA) 80
Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan) [2002] UKHL 10, [2002] 2 AC 291, [2002] 1 FLR 815 ..... 76, 385
Re S (Minors) (Inherent Jurisdiction: Ouster) [1994] 1 FLR 623 (Fam Div) 476
R v S (Paul F), Bond and Cook [2003] EWCA Crim 3435 771
R v S (Snook) [1992] Crim LR 307 (CA) 773, 779
Re S and B (Minors) (Child Abuse: Evidence) [1990] 2 FLR 489 (CA) 890
Re S and D (Children: Powers of Court) [1995] 2 FLR 456 (CA) 76
Re S and W (Minors) (Confidential Reports) (1982) 4 FLR 290 (CA) 545
S County Council v B [2000] 2 FLR 161 (Fam Div) 531, 547
S v Gloucestershire County Council; L v Tower Hamlets London Borough Council [2000] 3 All ER 346 (CA) 334, 335, 375, 376, 416
S v Swindon Borough Council, Wiltshire Borough Council [2001] EWHC Admin 334, [2001] FLR 776 459
S v W (Child Abuse: Damages) [1995] 1 FLR 862 (CA) 234, 271

S v Walsall Metropolitan Borough Council [1986] 1 FLR 397 (CA) 270
S v Waltham Forest Youth Court [2004] EWHC 715 (Admin) 673, 676
Re S(J) (A Minor) (Care or Supervision Order) [1993] 2 FLR 919 (Fam Div) 77
Sambasivum v Public Prosecutor, Federation of Malaya [1950] AC 458 (PC) 820
DPP v Santa Bermudez [2003] EWHC 2908 (Admin), [2004] Crim LR 471 181
R v Savage; DPP v Parmenter [1991] 1 AC 699 (HL) 182, 183
Science Research Council v Nassé [1980] AC 1028 (HL) 559
R v Scott (1995) 16 Cr App R 451 (CA) 144
Scott v Scott [1913] AC 417 (HL) 533, 534
Sedleigh-Denfield v O'Callaghan [1940] AC 880 (HL) 278
R v Sellick [2005] 2 Cr App R 15 (CA) 679
Selvey v DPP [1970] AC 304 (HL) 852, 853
R v Senior (1832) 1 Mood CC 346 134
R v Sergeant [1997] Crim LR 50 (CA) 197
Seymour v Williams [1995] PIQR P470 (CA) 233
R v Sharp [1988] 1 WLR 7 (HL) 698
Sheldrake v DPP; A-G's Reference (No 4 of 2002) [2004] UKHL 43, [2005] 1 AC 264 132
Sheppard [1981] AC 394 (HL) 179, 180
R v Shone (1983) 76 Cr App R 72 (CA) 700
R v Silverlock [1894] 2 QB 766 (QBD) 874
R v Sims [1946] KB 531 (CA) 824
R v Singh (Gurphal) [1999] Crim LR 582 (CA) 145
R v SL [2006] EWCA Crim 1902 ..... 540, 541
R v Smellie (1919) 14 Cr App R 128 (CA) 637, 686
DPP v Smith [1961] AC 290 (HL) 182
R v Smith (1985) Crim LR 42 (CA) 185
Smith (Morgan) [2001] 1 AC 146 (HL) 141
Smith v Eric S Bush [1990] 1 AC 831 (HL) 253
Smith v Littlewoods [1987] AC 241 (HL) 280
R v SMS [1992] Crim LR 310 766
Southwark London Borough v B [1993] 2 FLR 559 (CA) 33
R v Sparks [1964] AC 964 (PC)Z 745
R v Spencer, R v Smails [1987] 1 AC 128 (HL) 740
Spring v Guardian Assurance [1995] 2 AC 296 (HL) 253
ST [Trotman] v North Yorkshire County Council [1999] IRLR 98 (CA) 294, 299, 304
R v Stephan H [2003] EWCA Crim 2367 (CA) 771
R v Stephen Cullip Lawtel LTL 18/2/2000 (CA, 18 Feb 2000) 870
Stovin v Wise [1996] AC 923 (HL) 252, 253, 322, 324
R v Straffen [1952] 2 QB 911 (CA) 816
R v Strudwick and Merry [1994] 99 Cr App R 326 (CA) 910
Stubbings v UK (1996) 23 EHRR 213 (ECtHR) 127, 231, 232
Stubbings v Webb [1991] 3 All ER 949 (CA) 232
Stubbings v Webb [1993] AC 498 (HL) 220, 232
Subramaniam v Public Prosecutor [1956] 1 WLR 965 (PC) 699
Surtees v Kingston-upon-Thames Borough Council [1991] 2 FLR 559 (CA) 267, 270
Sweet v Parsley [1969] 1 All ER 347 (HL) 130
R v Swindon Borough Council, Wiltshire County Council ex p S [2001] EWHC Admin 334, [2001] FLR 776 ..... 459, 461
Swinney v Chief Constable of Northumbria Police [1996] 3 All ER 449 (CA) 332, 333
T & V v UK (1999) 30 EHRR 121 (ECtHR) 673

Re T (A Minor) (Care or Supervision Order) [1994] 1 FLR 103 (CA) 76
Re T (A Minor) (Care Order: Conditions) [1994] 2 FLR 423 (CA) 95, 96
T (A Minor) v Surrey County Council [1994] 4 All ER 577 (QB) 258
Re T (Termination of Contact: Discharge of Order) [1997] 1 FLR 517 (CA) 80
Re T and E (Proceedings: Conflicting Interests) [1995] 1 FLR 581 (Fam Div) 33
T v DPP [2003] EWHC 2408 (QBD (Admin)) 182
R v Tameside Metropolitan Borough Council ex p J [2000] 1 FLR 942 (QBD) 79
R v Taylor [1995] Crim LR 253 (CA) 638
R v Taylor; R v Goodman [1999] 2 Cr App R 163 (CA) 759
Re TB (Care Proceedings: Criminal Trial) [1995] 2 FLR 801 (CA) 540
Teper v The Queen [1952] AC 480 (PC) 703
Thompson v The King [1918] AC 221 (HL) 808, 816
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1 (HL), [2003] 2 AC 1 (HL) 323
Three Rivers District Council v Governor and Company of the Bank of England (No 5) [2004] UKHL 48, [2005] 1 AC 610 546
R v Todd No 96/7540/W4, 21 March 1997 (CA) 768, 773, 779
R v Tomlinson [2005] EWCA Crim 2681 204
R v Tower Hamlets London Borough Council, ex p Bradford [1998] 1 FCR 629 (QBD) . . . 48, 51
TP and KM v UK (Application no 28945/95) (2001) 34 EHRR 42 (ECtHR) 335, 392
R v Turner [1975] QB 834 (CA) 892, 916
R v TW [2004] EWCA Crim 3103 771
R v Tyndale [1999] Crim LR 320 (CA) 739
Re U (A Child) (Serious Injury: Standard of Proof), Re B (a Child) (Serious Injury: Standard of Proof) [2004] EWCA Civ 567; [2004] 2 FLR 263 66
Re Uddin (A Child) [2005] EWCA Civ 52 535
R v Underwood [1999] Crim LR 227 (CA) 818
R v UK (1987) 10 EHRR 74 (ECtHR) 29
R v UK [1988] 2 FLR 445 (ECtHR) 78
Re V (Care Proceedings: Human Rights Claims) [2004] EWCA Civ 54 98
R v V [2006] EWCA Crim 1901, [2006] All ER (D) 404 . . . . . 772, 801
V v UK [1999] ECHR 24888/94 (ECtHR) 673, 674
R v Valentine [1996] 2 Cr App R 213 (CA) 740, 741, 744
Various Claimants v Flintshire CC (formerly Clwyd CC) [North Wales Children's Homes Litigation] Case No HQ9901416, [2000] WL 33793637 (QBD) 230
Vernon v Bosley (No 2) [1997] 1 All ER 614 (CA) 547
Viasystems (Tyneside) Ltd v Thermal Transfer (Northern Ltd) [2005] EWCA Civ 1151, [2005] 4 All ER 1181 307
R v Viola [1982] 1 WLR 1138 (CA) 762
R v Vye; Wise; Stevenson (1993) 97 Cr App R 134 (CA) 826, 850
Re W [1992] 2 ALL ER 627 (CA) 490
Re W (A Child) (Non-Accidental Injury: Expert Evidence) [2005] EWCA Civ 1247, [2005] All ER (D) 370 917
Re W (A Minor) (Child Abuse: Evidence) [1987] 1 FLR 297 (Fam Div) 495
Re W (A Minor) (Contact) [1994] 2 FLR 441 (CA) 107
Re W (A Minor) (Wardship: Jurisdiction) [1985] AC 791 (HL) 95
Re W (Children) (Care Proceedings: Disclosure) [2003] EWHC 1624, [2003] 2 FLR 1023 (Fam Div) 545
Re W (Disclosure to Police) [1998] 2 FLR 135 (CA) 553, 556
Re W (Wardship: Discharge: Publicity) [1995] 2 FLR 466 (CA) 535
Re W (Section 34(2) Orders) [2000] 1 FLR 512 (Fam Div) 78

Re W (Wardship: Evidence) [1990] 1 FLR 286 (A) 718
Re W (Wardship: Evidence) [1990] 1 FLR 286 (CA) 718
Re W and B (Children) and Re W (Children) [2001] EWCA Civ 757 . . . . . 95, 97, 385
W v Egdell [1990] 1 All ER 835 (CA) 371
W v Essex County Council [2001] 2 AC 592 (HL) 334, 366, 382
W v Essex County Council [1998] 3 All ER 111 (CA) 381, 382
W v UK (1987) 10 EHRR 29 (ECtHR) 29
Wainwright v Home Office [2003] UKHL 53, [2004] 2 AC 406 . . . . . 238, 246, 247
R v Walker [1996] Crim LR 742 (CA) 692
R v Walker [2006] All ER 08 (CA) 197
Walker and Hayles (1990) 90 Cr App R 226 (CA) 135
Walker v Northumberland County Council [1995] 1 All ER 737 (QBD) 417
R v Wallwork (1958) 42 Cr App R 153 (CA) 600
R v Wannell (1923) 17 Cr App R 53 (CA) 739
R v Ward (Judith Theresa) (1993) 96 Cr App R 1, [1993] 1 WLR 619 (CA) 892, 916
R v Waters [1997] Crim LR 823 (CA) 711
Waters v Commissioner of Police for the Metropolis [2000] 1 WLR 1607 (HL) 297
R v Watford Magistrates' Court ex p Lenman [1993] Crim LR 388 (CA) 638
Watkins v Home Office [2006] UKHL 17 322
R v Watson [1989] 2 All ER 865, (1989) 89 Cr App R 211 (CA) 142
R v Weightman (1991) 92 Cr App R 291 (CA) 892
R v Weir [2005] EWCA Crim 2866, [2006] 2 All ER 570 . . . . . 757, 856, 858
R v White [2004] EWCA Crim 946 778
White v Chief Constable of the South Yorkshire Police [1999] 2 AC 455 (HL) 219, 252
White v Jones [1995] 2 AC 207 (HL) 253
White v The Queen [1999] AC 210 (PC) 738, 740
R v Wigan Metropolitan Borough Council ex p Tammadge [1998] 1 CCLR 581 (QBD) 51
R v Wilbourne (1917) 12 Cr App R 820 (CA) 740
Wilkinson v Downton [1897] 2 QB 57 (QBD) 246, 247
Williams v A & W Hemphill Ltd 1966 SC (HL) 31 298
Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830 (HL) 251
R v Williams-Rigby and Lawson [2003] EWCA Crim 693 870
R v Willoughby (1988) 88 Cr App R 91 (CA) 740
R v Wilson [1984] AC 242 (HL) 182
Wilson v Pringle [1986] 2 All ER 440 (CA) 238
Wong Kam-Ming v R [1980] AC 247 (PC) 756
R v Woollin [1999] AC 82 (HL) 135, 137, 157
Woolmington v DPP [1935] AC 462 (HL) 131
R v Wright and Ormerod (1990) 90 Cr App R 91 (CA) 600, 741
Re X (A Minor) (Child Abuse Evidence) [1989] 1 FLR 30 (Fam Div) 500
Re X (Emergency Protection Orders) [2006] EWHC 510 (Fam Div) 467, 473, 474
Re X (Non-Accidental Injury: Expert Evidence) [2001] 2 FLR 90 (CA) 876
X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam) [2005] 1 FLR 341 . . . . . 473, 474
X v Bedfordshire County Council [1995] 2 AC 633 (HL) 228, 250, 252, 257, 258, 320, 323, 325–7, 330, 331, 333–40, 344, 346–50, 52, 356, 357, 367, 372, 374, 379, 381, 382, 386, 390, 392–94, 396, 412, 414
X v Dempster [1999] 1 FLR 894 (Fam Div) 534
X v UK (1992) 15 EHRR CD113 (EComHR) 637, 678

Re X, Y, Z (1990) 91 Cr App R 36 (CA) 686
R v Xhabri [2005] EWCA Crim 3135, [2006] 1 Cr App R 26 ..... 712, 714, 744
Re Y (Children) (Care Proceedings: Split Hearing) [2003] EWCA Civ 669, [2003] 2 FLR 273 468
R v Yaqoob [2005] EWCA Crim 1269 145
R v Young (1992) 97 Cr App R 280 (CA) 180
Young v Rankin [1934] SC 499 (Sessions Court of Scotland) 267
R v Z [1990] 2 All ER 971 (CA) 601, 624
Re Z (Children) (Disclosure: Criminal Proceedings) [2003] EWHC 61 (Fam Div) 564
R v Z (Prior Acquittal) [2000] 2 AC 483 (HL) 807, 809, 820, 833, 842, 857
Z and others v UK (2002) 34 EHRR 3, [2001] 2 FLR 612 (ECtHR) 335, 390–2
Z v UK (Application number 29392/95) (1999) 28 EHRR CD 65 (EComHR) 61, 335, 390–93, 395, 413

Australia

R v AH (1997) 42 NSWLR 702 (New South Wales CCA) 832, 835, 837
Alister v The Queen (1984) 154 CLR 404 (Aus HC) 583, 584
Anglicare WA & Anor v Department of Family and Children's Services [2000] WASC 47 (Western Australia Supreme Ct) 586, 301
Attorney-General's Reference No 2 of 1993 (1994) 4 Tas R 26 (Tasmania Ct Crim App) 608
R v B [1989] 2 Qd R 343 (Queensland CCA) 839
R v B and D (1993) 66 A Crim R 192 (South Australia Supreme Ct) 693
B v The Queen (1992) 175 CLR 599 (Aus HC) 837
B and B (1988) 12 Fam LR 612 (Aus HC) 111, 112, 113
B and B: Family Law Reform Act 1995 (1997) 21 Fam LR 676 (Aus Fam Law Ct) 113
Batchelor v Tasmania [2005] TASSC 11 (Tasmania Supreme Ct) 365
Benning v Wong (1969) 122 CLR 249 (Aus HC) 340
R v Bernthaler No 60394/93, 17 December 1993 (New South Wales CCA) 793
R v Beserick (1993) 30 NSWLR 510 (New South Wales CCA) 837, 866
R v Best [1998] 4 VR 603 (Victoria CA) 832, 836, 839
R v BFB [2003] SASC 411, 87 SASR 278 (South Australia CA) 810
Bourne v Elliss [2001] WASCA 290 (Western Australia SCA) 646
R v Braye-Jones [1996] Qd R 295 (Queensland CCA) 741
Breen v The Queen (1976) 180 CLR 233 (Aus HC) 750
BRS v The Queen (1997) 191 CLR 275 (Aus HC) 835, 838, 849
Bull v The Queen (2000) 201 CLR 443 (Aus HC) 790
Bunyan v Jordan (1937) 57 CLR 1 (Aus HC) 247
R v BWT (2002) 54 NSWLR 241 (New South Wales CCA) 752
C v R (1993) 60 SASR 467 (South Australia Supreme Ct) 906
R v Camilleri [2001] VSCA 14, 119 A Crim R 106 (Victoria CA) 836
Carrier v Bonham [2000] QDC 226 (Queensland DC) 247
Cattanach v Melchior [2003] HCA 38 (Aus HC) 256
Centacare Central Queensland v G [1988] Fam CA 109 (Fam Ct of Aus) 585
R v Charbel Rahme [2004] NSWCCA 233 (New South Wales CCA) 794
R v Colby [1999] NSWCCA 261 (New South Wales CCA) 833, 838, 842
Conway v The Queen (2000) 98 FCR 204 (Aus Fed Ct Full Ct) 837
R v Cowie ex p Attorney-General [1994] 1 Qd R 326 (Queensland CA) 726
The Queen v Crabbe (1984) 156 CLR 464 (Aus HC) 155
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 (Aus HC) 339
Crofts v The Queen (1996) 186 CLR 427 (Aus HC) 750, 752

Cubillo v Commonwealth (No 2) [2000] FCA 1084, 103 FCR 1 (Aus Fed Ct 2000) affirmed [2001] FCA 1213 (Aus fed CA) 378
R v Darren Douglas Ellis 60764/01, 2003 NSWCCA 319 (New South Wales CCA) 833, 835
Re David (1997) 22 Fam LR 489 (Aus HC) 111, 112
R v Davies and Partridge [2005] NSWSC 324 (New South Wales Supreme Ct) 156
De Jesus v The Queen (1986) 68 ALR 1 (Aus HC) 839, 870
Department of Health & Community Services (NT) v JWB and SMB ('Marion's Case') (1992) 175 CLR 218 (Aus HC) 239
Derrick v Cheung [2001] HCA 48 (Aus HC) 350, 415
Doggett v The Queen [2001] HCA 46, 208 CLR 343 (Aus HC) 693
Eastough v The Queen [1998] WASCA 53 (Western Australia CA) 752
Enever v The King (1906) 3 CLR 969 (Aus HC) 309, 339, 378
Evidence of Children & Special Witnesses: Guidelines for the Use of Closed-circuit Television, Videotapes, and Other Means for the Giving of Evidence, Approved by the Judges of the Supreme Court April 1, 1996, revised May 1, 1998 (Supreme Court of Western Australia) 637, 646, 647
R v F (1995) 83 A Crim R 502 (New South Wales CCA) 906
R v Far [1996] 2 Qd R 49 (Queensland CA) 726
Farrell v The Queen (1998) 194 CLR 286 (Aus HC) 906
Foster [2001] SASC 20 (South Australia Supreme Ct) 173
R v GAE (2000) 109 A Crim R 419 (Victoria CA) 837
R v George Frederick Thorne (1995 Vic Lexis 1064) (Victoria CCA) 910
Giorgianni v The Queen (1985) 156 CLR 473 (Aus HC) 173
Gipp v The Queen (1998) 194 CLR 106 (Aus HC) 832
Graham Barclays Oysters Pty Ltd v Ryan (2002) 211 CLR 540 (Aus HC) 256, 340
Grindrod v R [1999] WASCA 44 (Western Australia SCA) 639, 646
R v Guthrie & Watt [2003] VSC 323 (Victoria Supreme Ct) 173
Hackshaw v Shaw (1984) 155 CLR 614 (Aus HC) 237
Hahn v Conley (1971) 126 CLR 276 (Aus HC) 267, 268, 272
Hamilton v The Queen, Library No 970082 4 March 1997 (Western Australia CCA) 111, 838
Hargan v The King (1919) 27 CLR 13 (Aus HC) 693
HG v The Queen [1999] HCA 2, 160 ALR 554 (Aus HC) 790, 793
Hillman v Black (1996) 67 SASR 490 (South Australia Supreme Ct) 406
R v Hoch [1988] 165 CLR 292 (Aus HC) 820, 821, 832, 834, 838, 839, 869
Hopkins v Queensland [2004] QDC 21 (Queensland Dist Ct) 379
Ingles v R (1992 No CCA 82/1921) (Tasmania Supreme Ct) 906
R v J (1994) 75 A Crim R 522 (Victoria CA) 906
Jacara Pty Ltd v Perpetual Trustees Wa Ltd (2000) 180 ALR 569 (Aus Federal Ct) 864
Jamieson v The Queen (1992) 60 A Crim R 68 (New South Wales CCA) 583
Johnson v Department of Community Services [1999] NSWSC 641 (New South Wales Supreme Ct) 378
R v Jolly [1998] VICSC 56 (Victoria Supreme Ct) 752
Jones v The Queen [1998] HCA 23, (1997) 149 ALR 598 (Aus HC) 750
KBT v The Queen (1997) 191 CLR 417 (Aus HC) 837
Kelleher v The Queen (1974) 131 CLR 534 (Aus HC) 690, 693
Kemp v The King [1951] HCA 39; (1951) 83 CLR 341 (Aus HC) 833, 842
Kilby v R (1973) 129 CLR 460 (Aus HC) 750
R v Kirkman [2000] ACTSC 2 (unreported ruling on voir dire 3 Feb 2000) (Australian Capital Territory Supreme Ct) 751

R v Knuth No 64 of 1998, 23 June 1998 (Queensland CA) 837
Kondis v State Transport Authority (1984) 154 CLR 672 (Aus HC) 260
R v KRA [1999] 2 VR 708 (Victoria CA) 840
KRM v The Queen [2001] HCA 11, 206 CLR 221 (Aus HC) 837
The Queen v Lavender 41 MVR 492 (New South Wales CA 2004) 155
The Queen v Lavender [2005] HCA 37 (Aus HC) 155
R v Lawless (1979) 142 CLR 659 (Aus HC) 583
Lepore v New South Wales (2001) 52 NSWLR 420 (New South Wales CA) 314
Lepore v New South Wales [2003] HCA 4; 212 CLR 511 (Aus HC) 260, 292, 309, 310, 311, 313, 314, 315
R v Liddy (2001) SASR 401 (South Australia Supreme Ct) 584, 807
R v Lock (1997) 91 A Crim R 356, 363 (New South Wales Supreme Ct Crim Div) 835, 837
R v Lockyer (1996) 89 A Crim R 457 (New South Wales Supreme Ct Crim Div) 834, 835
R v Loguancio (2000) 110 A Crim R 406 (Victoria CA) 837
Longman v The Queen (1989) 168 CLR 79 (Aus HC) 691, 693, 752
Lorincz v Lonardo & Fischetto [2000] SADC 97 (South Australia DC) 157
R v Lowe [1996] Vic Lexis 1330 (Victoria CA) 584
Lowery v The Queen [1974] AC 85 (PC) 826, 916
R v LSS [2000] 1 Qd R 546 (Queensland CA) 837
R v LTP [2004] NSWCCA 109 (New South Wales CCA) 750
R v M (1993) 67 A Crim R 549 (New South Wales CCA) 793
M and M (1988) 12 Fam LR 606 (Aus HC) 111, 112
M v The Queen (1994) 181 CLR 487 (Aus HC) 750
R v Macaskill [2003] SASC 61 (South Australia Supreme Ct) 173
McHale v Watson (1964) 111 CLR 384 (Aus HC), appeal dismissed by the Full Court on another ground (1966) 115 CLR 199 ..... 237, 278
R v McIlvanie No 93/11/14 95, Shillington DCJ, 30 August 1994 (New South Wales DC) 793
Maddison v Goldrick [1976] 1 NSWLR 651 (New South Wales CA) 583
Makin v A-G for New South Wales [1894] AC 57 (PC) 807, 814, 865
Markby v The Queen (1978) 140 CLR 108 (Aus HC) 832
R v Martin [2000] NWSCA 332 (New South Wales CA) 834
Melbourne v The Queen [1999] HCA 32, 198 CLR 1 (Aus HC) 836
R v Mitchell [2000] VSCA 54, 112 A Crim R 315 (Victoria CA) 836
R v Morgan (1993) 67 A Crim R 526 (New South Wales CCA) 791
R v Morris (70005/89, Wood J, 18 October 1990) (New South Wales Supreme Ct) 794
R v Murray (1987) 39 A Crim R 315 (New South Wales CCA) 694
R v Nieterink [1999] SASC 560, 76 SASR 56 (South Australia Supreme Ct) 817, 836, 837, 866
R v Norman Lee [2000] NSWCCA 444 (New South Wales CCA) 587
Northern Territory of Australia v Gpao [1999] HCA 8, 196 CLR 553 (Aus HC) 585
Northern Territory v Mengel (1995) 185 CLR 307 (Aus HC) 247
R v Graham Lenard Noyes [2003] QCA 564 (Queensland CA) 836
R v NRC [1999] 3 VR 537 (Victoria CA) 694, 906
Nydam v R [1977] VR 430 (Victoria Supreme Ct) 156
R v O'Keefe [2000] 1 Qd R 564 (Queensland CA) 836
R v Pahiya (1988) 49 SASR 272 (South Australia Supreme Ct) 693
Palmer v The Queen (1998) 193 CLR 1 (Aus HC) 773, 777
Papakosmas v The Queen (1999) 196 CLR 297 (Aus HC) 750, 752
Perre v Apand Pty Ltd [1999] HCA 36 (Aus HC) 256

Perry v The Queen (1982-83) 150 CLR 580 (Aus HC) 811, 832, 833
Pfennig v The Queen (1995) 182 CLR 461 (Aus HC) 811, 817, 832, 833, 836, 847, 871
R v Phillips (1968) 60 ALJR 76 (Aus HC) 853
R v PJE (CCA 60216/95, 9 October 1995) (New South Wales CCA) 792, 794
R v PML (2000) 160 FLR 263, affd (2001) 122 A Crim R 21 (South Australia Supreme Ct) 584, 586
Posthuma v Campbell (1984) 37 SASR 321 (South Australia Supreme Ct) 156, 304
Pyrenees Shire Council v Day [1997–98] 192 CLR 330 (Aus HC) 340
R v Rao [1999] ACTSC 132 (Australian Capital Territory Supreme Ct) 173, 174
Reynolds v The Queen [1998] WASCA 217 (Western Australia CA) 752
Robertson v Swincer (1989) 52 SASR 356 (South Australia Supreme Ct) 156, 157, 268
Robinson v The Queen [1999] HCA 42 (Aus HC) 752
R v Peter James Robinson (1997) CA No 314 1997 (Queensland CA) 693
Rogers v Rawlings [1969] Qd R 262 (Queensland Supreme Ct) 267
Russell [1933] VLR 59 (Victoria Supreme Ct) 173
R v S [2001] QCA 501 (Queensland CA) 838
R v Saleam (1989) 16 NSWLR 14 (New South Wales CCA) 583
Sankey v Whitlam (1978) 142 CLR 1 (Aus HC) 584
SB v New South Wales [2004] VSC 514 (Victoria Supreme Ct) 340, 379
R v Schneider [1998] QCA 303 (Queensland CA) 754
SD v Director General of Community Welfare Services (Victoria) [2001] NSWSC 441 (New South Wales Supreme Ct) 261
Sheldon v Sun Alliance Australia Ltd (1989) 53 SASR 97 (Aus FC) 864
R v Singleton [1997] SADC 3619 (South Australia Dist Ct) 752
R v Stevenson [2000] WASCA 301 (Western Australia SCA) 608, 640, 646
Stickland v The Queen [2002] WASCA 339 (Western Australia CCA) 836, 840
Stingel v Clark [2006] HCA 37 (Aus HC) 233
Sullivan v Moody [2001] HCA 59, 207 CLR 562 (Aus HC) 256, 340
Suresh v The Queen (1998) 153 ALR 145 (Aus HC) 750, 752, 754
Sutherland Shire Council v Heyman (1985) 60 ALR 1 (Aus HC) 329, 340
Sutton v R (1984) 152 CLR 528 (Aus HC) 833
Swan v South Australia (1994) 62 SASR 532 (South Australia Supreme Ct) 366
R v Taktak (1988) 14 NSWLR 226 (New South Wales CA) 174
R v Tamme [2004] VSCA 165 (Victoria Supreme Ct) 173
TC v New South Wales [1999] NSW SC 31 (New South Wales Supreme Ct), [2000] NSWSC 292 ..... 348, 349, 350, 415, 417
TC v New South Wales [2001] NSW CA 380 (New South Wales CA) 349, 350
R v Tektonopoulos [1999] 2 VR 412 (Victoria CA) 836
R v TJB [1998] 4 VR 621 (Victoria CA) 840, 878
Towart v Adler (1986) 52 SASR 373 (South Australia Supreme Ct) 156, 268
R v Ugle (1989) 167 CLR 647 (Aus HC) 750
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 647 (Aus HC) 224
R v Vonarx [1999] 3 VR 618 (Victoria CA) 837
Walton v The Queen (1989) 166 CLR 283 (Aus HC) 705
Williams v The Minister, Aboriginal Land Rights Act 1983 and Anor [2000] NSWCA 255 (New South Wales), dismissing appeal from (1999) Aus Torts Rep 81-526 (New South Wales Supreme Ct) leave to appeal denied by Aus HC S246/2000 (22 June 2001) 261
Wilson v The Queen 174 CLR 313 (Aus HC 1992) 155
R v Young [1999] NSWCCA 166, (1999) 46 NSWLR 681 (New South Wales CCA) 585, 586, 595

Canada

R v A(S) 2002 WL 37422 (Ontario Superior Ct of Justice) 783
A(M) and A(T) v Attorney General of Canada [2001] SKQB 504, 212 Sask R 241 (Saskatchewan QB) 864
A(M) and A(T) v Attorney General of Canada [2003] SKCA 002 (Saskatchewan CA) 417
AAD, TD and KGD v Tanner, Winnipeg Child and Family Services Agency 2004 MBQB 213 (Manitoba QB) 341, 364, 406, 407
R v AK1 (2005) CanLII 11389 (Ontario CA) 170
R v AK and AV May 27, 2002, docket: C3285, 3286 (Ontario CA) 170
Allan v New Mount Sinai Hospital (1980) 109 DLR (3d) 634 (Ontario HC) 246
ANDB v Ferguson [1999] MJ No 170 (Manitoba QB) 341
André v Quebec (Procureur général), [2003] RJQ 720 (Quebec CA, leave to appeal to SCC denied) 341, 406
Anishinaabe Child and Family Services Inc v S(R) (1993) 90 Man R (2d) 3 (Manitoba QB) 573
R v Anstey (2002) 209 Nfld & PEIR 264 (Newfoundland CA) 783, 784
ARB v The Queen (1998) 41 OR (3d) 361 (Ontario CA) appeal dismissed [2000] 1 SCR 781 (SCC) 784, 785
Ares v Venner [1970] SCR 608 (SCC) 14, 718, 719
R v Arp [1998] 3 SCR 339 (SCC) 807, 808, 842, 844, 845, 847, 848
R v Audet [1996] 2 SCR 171 (SCC) 209
R v Ay (1994) 93 CCC (3d) 456 (British Columbia CA) 747
R v B(CR) [1990] 1 SCR 717 (SCC) 816, 818, 843, 844, 845, 846, 847, 866, 868
B(D) v C(M) 2000 SKQB 64, [2000] 7 WWR 186 (Saskatchewan QB) 267, 268
B(D) v C(M) 2001 SKCA 9, [2001] 5 WWR 617 (Saskatchewan CA) 267
B(D), B(R) and B(M) v Children's Aid Society of Durham Region [1994] OJ No 643 (Ontario Gen Div) 360, 361, 393, 419
B(D), B(R) and B(M) v Children's Aid Society of Durham Region (1996) 136 DLR (4th) 297 (Ontario CA) 341, 350, 359, 360, 361, 393, 406, 419, 420
R v B(DC) [1994] 7 WWR 727 (Manitoba CA) 747
R v B(FF) [1993] 1 SCR 697 (SCC) 844
R v B(G) [1990] 2 SCR 30 (SCC) 694, 900
R v B(KG) [1993] 1 SCR 740 (SCC) 14, 718, 722
R v B(L) (1997) 35 OR (3d) 35 (Ontario CA) 808, 844, 846, 865
B(M) v British Columbia [2000] BCSC 735 (British Columbia Supreme Ct) 275, 278
R v B(O) (1995) 103 CCC (3d) 531 (Nova Scotia CA) 747, 782
B(V) v Cairns and Watch Tower Society (2003) 65 OR (3d) 343 (Ontario Supreme Ct) 863
R v Barrett 1998 CanLII 6093 (British Columbia CA 1998) 154
R v Batte (2000) 145 CCC (3d) 498 (Ontario CA) 738, 777, 851
Bazley v Curry [1999] 2 SCR 534 (SCC) 282, 291, 299, 300, 301, 302, 303, 304, 305, 306, 308, 309, 310, 312, 313, 315, 318, 403
Beckstead v Ottawa (City) Chief of Police (1997) 37 OR (3d) 62 (Ontario CA) 341
R v Béland [1987] 2 SCR 398 (SCC) 899, 915
R v Béland and Phillips [1987] 2 SCR 398 (SCC) 899, 915
R v Bell (No 1) (1997) 115 CCC (3d) 107 (Northwest Territories CA) 167, 784, 900
R v Bell (No 2) (1998) 126 CCC (3d) 94 (Northwest Territories CA) 784
BG v British Columbia [2003] BCSC 1890 (British Columbia Supreme Ct) 864
R v Big Eagle (1997) 163 Sask R 73 (Saskatchewan CA) 724
Blackwater v Plint 2005 SCC 58, [2005] 3 SCR 3 . . . . . 226, 289, 296, 307, 308, 313
R v Blundon (1993) 84 CCC (3d) 249 (Newfoundland CA) 782, 783, 784

BM [Bonnie Mooney], MM and KM v Attorney General (British Columbia) and Attorney General (Canada) 2004 BCCA 402, [2004] 10 WWR 286 (British Columbia CA) leave to appeal to SCC refused 3 March 2005 No 30546) 341, 365, 416, 844
R v Bradford (2002) 158 OAC 140 (Ontario CA) 747
British Columbia (Superintendent of Family & Child Services) v H(J) [1996] WDFL 225 (British Columbia Supreme Ct) 573
R v Brothers (Robert James) (1995) 40 CR (4th) 250 (Alberta CA) 786
Brown v University of Alberta Hospital (1997) 145 DLR (4th) 63 (Alberta QB) 369
R v Burke [1996] 1 SCR 474 (SCC) 847
R v Burns [1994] 1 SCR 656 (SCC) 899
R v C (Roy H) (1996) 87 OAC 366 (Ontario CA) 889
R v C(B) and G(K) (1993) 12 OR (3d) 608 (Ontario CA) 724
R v C(G) (1997) 8 CR (5th) 21 (Ontario Gen Div) 747, 886, 887, 889, 910, 917
R v C(HJ) (1993) 87 CCC (3d) 66 (Manitoba CA) 784
C(M) v M(F) (1990) 74 DLR (4th) 129 (Ontario Gen Div) 219
R v C(MH) [1991] 1 SCR 763 (SCC) 844
R v C(R) (1993) 85 CCC (3d) 522 (British Columbia CA) 900
R v C(RA) (1990) 57 CCC (3d) 522 (British Columbia CA) 900
R v C(RC) (1996) 107 CCC (3d) 362 (Nova Scotia CA) 782
Canada v Saskatchewan Wheat Pool [1983] 1 SCR 205 (SCC) 257
Canadian Foundation for Children Youth and the Law v Canada (Attorney General) 2004 SCC 4, [2004] 1 SCR 76 ..... 122, 189
Canadian National Railway Co v Norsk Pacific Steamship Co [1992] 1 SCR 1021 (SCC) 256
R v Canhoto 140 CCC (3d) 321 (Ontario CA 1999) 152, 153, 162, 165
R v Carosella [1997] 1 SCR 80 (SCC) 579, 580
Catholic Children's Aid Society, Hamilton Wentworth (Regional Municipality) v S(JC) [1986] OJ No 1866 (Ontario Family Ct) 875
Catholic Children's Aid Society of Metropolitan Toronto v M(C) [1994] 2 SCR 165 (SCC) 87
Catholic Children's Aid Society of Toronto v V(S) 2000 CanLII 5844 (30 June 2000) (Ontario CJ, leave to appeal to Ontario Supreme Ct denied 16 Oct 2000) 420
CH v British Columbia 2004 BCCA 385, 242 DLR (4th) 470 (British Columbia CA) 359, 376, 419, 420
Chaput v Romain [1955] SCR 834 (SCC) 419
R v Charron [1969] RL 125 (Quebec Trib) 246
R v Chase [1987] 2 SCR 293 (SCC) 172
Child and Family Services of Winnipeg West v G(NJ) [1990] MJ No 633 (Manitoba QB) 725
Children's Aid Society v R(J) (Doc Algoma 145/97 Feb 1998) (Ontario Prov Div) 574
Children's Aid Society of the Niagara Region v DM and AK [2002] OJ No 1461 (Ontario Superior Ct of Justice) 86
Children's Aid Society of the Niagara Region v M(D) [2002] OJ No 1421 (Ontario Superior Ct of Justice) 875
Children's Aid Society of the Niagara Region v MJ [2004] OJ No 2872 (Ontario Superior Ct of Justice) 86
Children's Aid Society of the Niagara Region v P-LR (2005) Canlii 11791 (Ontario Superior Ct of Justice) 87
Children's Aid Society of Ottawa–Carleton (Regional Municipality) v L(DJ) (1980) 15 RFL (2d) 102 (Ontario Prov Ct) 86
Children's Aid Society of Oxford (County) v M(D) [1993] WDFL 1630 (Ontario Gen Div) 574
Children's Aid Society of Peel (Region) v J(V) [1994] WDFL 042 (Ontario Prov Ct) 573

Children's Aid Society for Sudbury & Manitoulin (Districts) v M(G) (Ontario Prov Ct 17 January 1992) 573
Children's Aid Society of Toronto v D(C) (2004) ACWSJ LEXIS 4288 (Ontario Superior Ct of Justice) 87
Children's Aid Society of Winnipeg (City) v Bouvette (1975) 24 RFL 350 (Manitoba CA) 86
R v Clifford (Robert) (2003) 58 OR (3rd) 257 (Ontario CA) 580
Cloutier v The Queen [1979] 2 SCR 709 (SCC) 808, 843
R v Collins (1997) 118 CCC (3d) 514 (British Columbia CA) 736
R v Conway and Husband (1997) 36 OR (3d) 579 (Ontario CA) 724
Cook v Lewis [1951] SCR 830 (SCC) 236, 239
R v Corbett [1988] 1 SCR 670 (SCC) 850, 851
R v Crosby [1995] 2 SCR 912 (SCC) 782
R v Cross (1996) 112 CCC (3d) 410 (Quebec CA), leave to appeal refused 215 NR 160n (SCC) 848
R v Cullen (1989) 52 CCC (3d) 459 (Ontario CA) 845
R v Cuthbert (Delmain Aiken) (1996) 106 CCC (3d) 28 (Ontario CA), appeal dismissed [1997] 1 SCR 8 (SCC) 347
D(B) v Children's Aid Society of Halton (Region) (2006) 264 DLR (4th) 135 (Ontario CA, leave to appeal granted by SCC 10 Aug 2006) 407
D(B) and D(SV) v British Columbia [1996] 1 WWR 581 (British Columbia Supreme Ct) ... 383
D(B) and D(SV) v British Columbia [1997] 4 WWR 484 (British Columbia CA, leave to appeal denied by SCC [1997] 224 NR 398) 383
R v D(D) 2000 SCC 43, [2000] 2 SCR 275 (SCC) 748, 901
R v D(LE) [1989] 2 SCR 111 (SCC) 810, 867
R v Darrach [2000] 2 SCR 443 (SCC) 781, 782, 783
Deacon v The King [1947] SCR 531 (SCC) 722
Delaronde v British Columbia 2000 BCSC 700 (British Columbia Supreme Ct) 420
R v Dieffenbaugh (1993) 80 CCC (3d) 97 (British Columbia CA) 876, 899
R v Dipietro (1994) 13 Alta LR (2d) 1 (Alberta CA) 703
Director of Child Welfare for Prince Edward Island v Victor (1984) Nfld & PEIR 81, 139 APR 81 (Prince Edward Island CA) 86
Dix v Canada (Attorney General) 2000 ABQB 580, [2003] 1 WWR 436 (Alberta QB) 364
Jane Doe v Board of Commissioners of Police for Metropolitan Toronto (1990) 72 DLR (4th) 580 (Ontario Gen Div, leave for a further appeal to Ontario CA refused (1991) 1 OR (3d) 487) 340, 341
John Doe v Bennett and Roman Catholic Episcopal Corporation of St George's (2002) 218 DLR (4th) 276 (Newfoundland CA), revd on other grounds 2004 SCC 17, [2004] 1 SCR 436 ..... 293, 294, 296, 306, 307, 308, 463
Doe v O'Dell and Roman Catholic Episcopal Corporation for the Diocese of Sault Sainte Marie [2003] OJ No 3546 (Ontario Superior Ct) 308
R v Doherty [2000] WL 1437045 (Ontario Superior Ct of Justice) 782
R v Dubois (1997) 118 CCC (3d) 544 (Quebec CA) 724
DW v Starr and Attorney General of Canada 1999 SKQB 187, (1999) 187 Sask R 21 (Saskatchewan QB) 289
R v E(AW) [1993] 3 SCR 155 (SCC) 694
EB v Oblates of Mary Immaculate 2005 SCC 60, [2005] 3 SCR 45 ..... 283, 300, 308, 315, 318
EDG v Hammer 2003 SCC 52, [2003] 2 SCR 459 ..... 260, 307, 308, 313
R v Edwards (1994) 19 OR (3d) 239 (Ontario CA) 707
R v F(DS) (1999) 43 OR (3d) 609, (1999) 169 DLR (4th) 639 (Ontario CA) 747, 818

R v F(JE) (1993) 85 CCC (3d) 457 (Ontario CA) 747, 900
R v F(RG) [1997] 6 WWR 273 (Alberta CA) 724
R v F(WJ) [1999] 3 SCR 569 [also reported sub nom R v Folino] (SCC) 679, 722, 723
R v Farley (1995) 99 CCC (3d) 76 (Ontario CA) 609
R v Ferguson (1996) 112 CCC (3d) 342 (British Columbia CA) 609
Fidelity and Casualty Co v Marchand [1924] 4 DLR 157 (SCC) 267
R v Finta [1994] 1 SCR 701 (SCC) 720
R v Fiqia (1993) 87 CCC (3d) 377 (Alberta CA) leave to appeal refused (1994) 176 NR 160n (SCC) 782
R v Forsythe [1980] 2 SCR 268 (SCC) 779
Frame v Smith [1987] 2 SCR 99 (SCC) 261
FSM v Clarke and the Anglican Church of Canada [1999] 11 WWR 301 (British Columbia Supreme Ct) 285, 292, 293, 294, 297
Re G (1984) 48 Nfld & PEIR 298 (Prince Edward Island CA) 86
G(A) v British Columbia (Superintendent of Family & Child Services) (1989) 61 DLR (4th) 136 (British Columbia CA) 359, 361, 420
G(ED) v Hammer (2001) 197 DLR (4th) 454 (British Columbia CA) 313
G(JRL) v Tyhurst (2003) 226 DLR (4th) 447 (British Columbia CA) 864
G(P) v James (2001) Canadian Insurance Law Reporter ¶I-3927 (Ontario) 273
R v Gagné [1996] Carswell Qué 787 (Quebec CA) 886, 889
R v Gauthier (1995) 100 CCC (3d) 563 (British Columbia CA) 783, 784, 785, 793
Gareau v British Columbia (Superintendent of Family and Child Services) (1986) S BCLR (2d) 352 (SC) aff'd (1989) 38 BCLR (2d) 215 (British Columbia CA) 483
R v George (1985) 23 CCC (3d) 42 (British Columbia CA) 195, 747
R v Gervais (1990) 58 CCC (3d) 141 (Quebec CA) 783
GJ v Griffiths [1995] BCJ No 2370 (British Columbia Supreme Ct) 282
Glegg v Smith & Nephew Inc 2005 SCC 31, [2005] 1 SCR 24 577
Glendale v Drozdazik (1993) 77 BCLR (2d) 106 (British Columbia CA) 224
Goodis v Ontario (Ministry of Correctional Services) 2006 SCC 31 575
Grdic v The Queen [1985] 1 SCR 810 (SCC) 842, 845
Griffith v Winter and British Columbia 2003 BCCA 367, 15 BCLR (4th) 390 (British Columbia CA) 318
R v Gruenke [1991] 3 SCR 263 (SCC) 575, 576
R v Guay [1979] 1 SCR 18 (SCC) 844
H(C) v British Columbia [2003] BCSC 1055 (British Columbia Supreme Ct) 275
H(DL) v F(GA) (1987) 43 CCLT 110 (Ontario Supreme Ct) 267
R v H(DT) (1995) 137 Nfld & PEIR 77 (Prince Edward Island Supreme Ct TD) 782, 784
R v H(LM) (1994) 39 BCAC 241 (British Columbia CA), appeal dismissed [1994] 3 SCR 758 (SCC) 747
R v H(RJ) [2000] Carswell BC 1515 (British Columbia Supreme Ct) 888, 889
R v H(SC) [1995] 5 WWR 427 (British Columbia Supreme Ct) 888, 889
H(TEG) v K(P) [2001] ABQB 43, [2001] 6 WWR 546 (Alberta QB) 290
R v Handy 2002 SCC 56, [2002] 2 SCR 908 ..... 807, 809, 810, 821, 843, 844, 845, 846, 847, 864, 865, 867, 868, 871, 930
Harder v Brown (1989) 50 CCLT 85 (British Columbia Supreme Ct) 220, 241
R v Hayes and Morris (1991) 12 WCB (2d) 282 (Alberta QB) 210
R v Heinrich (John) (1996) 108 CCC (3d) 97 (Ontario CA) 747, 748
Hill v Hamilton-Wentworth Regional Police Services Board (2005) 259 DLR (4th) 4676 (Ontario CA, leave to appeal granted by SCC 27 April 2006) 340, 341, 364

HL v Starr and Attorney General of Canada 2002 SKCA 131, 227 Sask R 165 (Saskatchewan CA), appeal allowed in part 2005 SCC 25 311
R v H(RJ) [2000] Carswell BC 1515 (British Columbia Supreme Ct) 888, 889
V DJ(A) v Cairnie and the Government of Manitoba [1999] 11 WWR 82 (Manitoba QB) 351
J(A) v Cairnie and the Government of Manitoba 2001 MBCA 59, 198 DLR (4th) 659 (Manitoba CA) 350, 351, 373
J(A) v D(W) [1999] 11 WWR 82 (Manitoba QB) 341
J(LA) v J(H) (1993) 102 DLR (4th) 177 (Ontario Gen Div) 231, 268, 269, 275, 277, 279, 281
R v J(RH) (1994) 86 CCC (3d) 354 (British Columbia CA), leave to appeal to SCC denied (1994) 29 CR (4th) 35 ..... 900, 901
Jacobi v Griffiths [1999] 2 SCR 570 (SCC) 299, 301, 302, 303, 304, 306, 307, 308
James v T (5388/93, 5563/93, 4 February 1994) (Ontario Gen Div) 573, 576
Jauvin v Quebec (Procureur général) [2004] RRA 37 (Quebec CA, leave to appeal to SCC denied) 341
JH v British Columbia [1998] BCJ No 2926 (British Columbia Supreme Ct) 386
R v J-LJ 2000 SCC 51, [2000] 2 SCR 600 ..... 874, 913, 915
R v Jmieff (1994) 94 CCC (3d) 157 (British Columbia CA) 889, 900
J-PB v Jacob (1998) 166 DLR (4th) 125 (New Brunswick CA) 298
JPG v Superintendent of Family and Child Services (BC) (1993) 25 BCAC 116 (British Columbia CA) 725
Just v British Columbia [1989] 2 SCR 1228 (SCC) 328, 329
R v K(A) and K(N) (1999) 176 DLR (4th) 665 (Ontario CA) 747, 886, 899, 900, 901
K(G) v K(D) (1999) 122 OAC 36 (Ontario CA) 247
R v K(K) (2002) 224 Nfld & PEIR 302 (Newfoundland SCTD) 241, 416, 783, 784
R v K(RA) (1996) 106 CCC (3d) 93 (New Brunswick CA) 211
K(SD) v Alberta (Director of Child Welfare) (2002) 309 AR 219 (Alberta QB) 572, 573
R v K(V) (1991) 68 CCC (3d) 18 (British Columbia CA) 694, 910
K(W) v Pornbacher and Roman Catholic Bishop of Nelson [1998] 3 WWR 149 (British Columbia Supreme Ct) 291, 293, 298
R v Khan [1990] 2 SCR 531 (SCC) 14, 609, 610, 718, 720, 724, 728, 747
Re Khan and College of Physicians and Surgeons of Ontario (1992) 94 DLR (4th) 193 (Ontario CA) 724
King v Low [1985] 1 SCR 87 (SCC) 87
KJ and MT [1999] BCJ No 2909 (British Columbia Supreme Ct) 361
KLB v British Columbia 2003 SCC 51, [2003] 2 SCR 403 ..... 269, 306, 308, 313, 374, 376, 377, 416
Kleysen v Canada (Attorney General) [2001] MJ No 350 (Manitoba QB) 364
KM v HM [1992] 3 SCR 3 (SCC) 228, 231, 235, 376, 742
R v Kusk (1999) 132 CCC (3d) 559 (Alberta CA) 777
Kvello and Klassen v Miazga, Hansen 2003 SKQB 559, 234 DLR (4th) 612 (Saskatchewan QB) 409, 411, 493, 721
R v L(DO) [1993] 4 SCR 419 (SCC) 634, 848
R v L(Z) (2000) 144 CCC (3d) 444 (British Columbia CA) 910
L(J) v Children's Aid Society of Halifax (City) (1985) 44 RFL (2d) 437 (Nova Scotia CA) 86
R v Lavalée [1990] 1 SCR 852 (SCC) 899
LC and LS v British Columbia 2005 BCSC 1668, 49 BCLR (4th) 164 (British Columbia Supreme Ct) 359, 361, 406, 420
Lewis (Guardian ad litem of) v British Columbia [1997] 3 SCR 1145 (SCC) 260, 548
R v Litchfield [1993] 4 SCR 33 (SCC) 844, 848

LLA v AB and the Queen [1995] 4 SCR 536 (SCC) 575, 576, 578, 579, 595
R v Llorenz (2000) 145 CCC (3d) 535 (Ontario CA) 886, 887, 889
R v Lupien [1970] SCR 263 (SCC) 914
Lyth v Dagg (1988) 46 CCLT 25 (British Columbia Supreme Ct) 219, 241
R v M(A) (No 3) [1998] BCJ No 1915 (British Columbia Supreme Ct) 782, 785
M(A) v Ryan [1997] 1 SCR 157 (SCC) 571, 576–77, 593, 596
R v M(B) (1998) 42 OR (2d) 1 (Ontario CA) 874, 899, 900
M(C) v Attorney General of Canada (2004) 130 ACWS (3d) 1227 (Saskatchewan QB) 863
R v M(D) (2000) 37 CR (5th) 80 (Ontario Supreme Ct) 784
R v M(H) (1999) 177 Sask R 189 (Saskatchewan CA) 166, 782
M(M) v F(R) [1999] 2 WWR 446 (British Columbia CA) 269, 275, 277–8
M(PA) v M(AP) (May 27 1991) Doc No A890055 (British Columbia Supreme Ct) 111
R v M(PS) (1992) 77 CCC (3d) 402 (Ontario CA) 747
R v M(W) (1997) 115 CCC (3d) 233 (British Columbia CA) 899
MacDonald v MacDonald (1991) 288 APR 136 (NS Fam Ct) 111
McDonald v Mombourquette (1996) 152 NSR (2d) 109 (Nova Scotia CA), leave to appeal refused [1997] 2 SCR xi (SCC) 298
R v McIntosh (1997) 117 CCC (3d) 385 (Ontario CA) 899
R v McKenzie (1996) 141 Sask R 221 (Saskatchewan CA) 694
McMillan v The Queen (1975) 23 CCC (2d) 160 (Ontario CA) affd [1977] 2 SCR 824 (SCC) 913, 914
R v MAM [2001] BCCA 6 (British Columbia CA) 599
R v Markovitch (1994) 91 CCC (3d) 51 (British Columbia CA) 900
R v Marquard [1993] 4 SCR 223 (SCC) 599, 609, 694, 883, 899, 901
MB v British Columbia 2003 SCC 53, [2003] 2 SCR 477 . . . . . 308, 313, 377
MCC v Canada (Attorney General) [2004] OJ No 4924 (Ontario CA) 318
R v Meddoui [1991] 3 SCR 320 (SCC) 780
R v Merz (1999) 46 OR (3d) 161 (Ontario CA) 866
R v Meyn (Andreas Alexander) 2003 BCCA 401, (2003) 176 CCC (3d) 50 (British Columbia CA) 900, 902
Millar v Millar (1994) 148 AR 225 (Alberta QB) 725
R v Mills [1999] 3 SCR 668 (SCC) 581, 582, 583-84
MM v KK (1989) 61 DLR (4th) 382 (British Columbia CA) 241, 417, 420
R v Mohan [1994] 2 SCR 9 (SCC) 873, 874, 899, 901, 913, 914, 915
Moore v Slater (1979) 101 DLR (3d) 176 (British Columbia Supreme Ct) 236
R v Morin [1988] 2 SCR 345 (SCC) 913
Morris v The Queen [1983] 2 SCR 190 (SCC) 808, 843, 850
R v Mountain (1996) 110 CCC (3d) 179 (Alberta CA) 748
Muir v Alberta (1996) 132 DLR (4th) 695 (Alberta QB) 235
Murdoch v Richards [1954] 1 DLR 766 (Nova Scotia Supreme Ct) 116
R v Naglik [1993] SCR 122 (SCC), 83 CC (3d) 526 (SCC) 172
Nelles v Ontario [1989] 2 SCR 170 (SCC) 408
R v Nette [2001] 3 SCR 488 (SCC) 153
New Brunswick (Minister of Health and Community Services) v G(J) [1999] 3 SCR 46 (SCC), (1998) 41 RFL (4th) 339 . . . . . 532, 572
New Brunswick Minster of Health and Community Services v L(M) [1998] 2 SCR 534 (SCC) 87
Norberg v Wynrib [1992] 2 SCR 226 (SCC) 224, 239–41
R v Norman (1993) 87 CCC (3d) 153 (Ontario CA) 886
R v O'Connor [1995] 4 SCR 411 (SCC) 576, 577–9, 586, 593
Odhavji Estate v Woodhouse [2003] SCC 69, [2003] 3 SCR 263 (SCC) 341
R v Olscamp (1994) 35 CR (4th) 37 (Ontario Gen Div) 908

R v Osolin [1993] 4 SCR 595 (SCC) 783
R v P (Clary) (1992) 15 CR (4th) 121 (Ontario Gen Div) 900
R v P(C) (1992) 74 CCC (3d) 481 (British Columbia CA) 900
R v P(LT) (1997) 113 CCC (3d) 42 (British Columbia CA) 210
R v P(J) [1993] 1 SCR 469 (SCC) 721
R v P(TE) (1993) 32 BCAC 124 (British Columbia CA) 786
R v Paré (1987) 38 CCC (3d) 97 (SCC) 152
R v Pearson (1994) 36 CR (4th) 343 (British Columbia CA) 724
R v Pengelly (2000) 136 OAC 183 (Ontario CA) 152
R v Popen (1981) 60 CCC (2d) 233 (Ontario CA) 169, 172, 268
R v Porter 2001 WL 451836 (Ontario Supreme Ct of Justice) 783, 784
Proulx v Quebec (Attorney General) 2001 SCC 66, [2001] 3 SCR 9 408
Queen (Litigation Guardian of) v Hodgins (1991) 36 RFL (3d) 159 (Ontario Gen Div) 224
R v Quesnel (Paul Albert) (Ontario CA 16 Dec 1994) 901
Re R(AS) (1998) 218 AR 276 (Alberta Prov Ct) 862
R v R(D) [1996] 2 SCR 291 (SCC) 721, 722, 724, 755, 900
R(GB) v Hollett and Nova Scotia (1995) 143 NSR (2d) 38 (Nova Scotia Supreme Ct), varied as to damages (1996)154 NSR (2d) 161 (Nova Scotia CA) 290, 291, 296
R v R(M) [2004] JQ No 9288 (Quebec CA) 721
R v R(P) (1998) 132 CCC (3d) 72 (Quebec CA) 784
R v R(S) (1992) 73 CCC (3d) 225 (Ontario CA) 900
R v RAD (1993) 80 CCC (3d) 97 (British Columbia CA) 885
Reibl v Hughes [1980] 2 SCR 880 (SCC) 239
Re Residential Indian Schools 2002 ABQB 667, 222 DLR (4th) 124 (Alberta QB) 226
R v Riley (1992) 11 OR (3d) 151 (Ontario CA), leave to appeal to SCC refused [1998] SCCA No 567 784
R v RM (1995) 29 NR 241 (SCC) 885, 899, 900
R v Robertson [1997] 1 SCR 918 (SCC) 807, 845
R v Rockey [1996] 3 SCR 829 (SCC) 609, 720, 721
R v Ross [1996] OJ No 1361 (Ontario Gen Div) 747
R v Roud [1981] OJ No 921 (Ontario CA) 169
Rumley v British Columbia 2000 SCC 69, [2001] 3 SCR 184 317
R v Ryan (1991) 69 CCC (3d) 226 (Nova Scotia CA) 575
R v S (RJ) (1985) 19 CCC (3d) 115 (Ontario CA) 575
S v Glendinning and Roman Catholic Episcopal Corporation of London Ontario 2004 CanLII 5011 (Ontario Supreme Ct) 293
Re S(AL) Burnaby F3957 12 Dec 1996 (British Columbia Prov Ct) 573
S(B) v British Columbia (Director of Child, Family & Community Service) (1998) 160 DLR (4th) 264 (British Columbia CA) 862
R v S(DJ) (1998) 105 BCAC 185 (British Columbia CA) 784
R v St Pierre (1974) 3 OR (2d) 642 (Ontario CA) 850
R v Sanertanut [1995] NWTR 36 (Northwest Territories Supreme Ct) 574
Sansalone v Wawanesa Mutual Insurance Co 2000 SCC 25, [2000] 1 SCR 627 ..... 236, 273
Scalera v Non-Marine Underwriters, Lloyd's of London 2000 SCC 24, [2000] 1 SCR 551 ..... 236–9, 245, 273
R v Schell & Paquette (No 1) (1977) 33 CCC (2d) 422 (Ontario CA) 168, 169
R v Schell & Paquette (No 2) (1979) 47 CCC (2d) 193 (Ontario CA) 168
Scott v Wawanesa Mutual Insurance Co [1989] 1 SCR 1445 (SCC) 273
R v Seaboyer [1991] 2 SCR 577 (SCC) 578, 760, 765, 775, 780, 782, 785, 786, 792, 799, 802, 844
R v Sebastian (1996) 22 OTC 397 (Ontario Gen Div) 782

SGH v Gorsline and The Calgary School Board 2004 ABCA 186, (2004) 29 Alta LR 203 (Alberta CA) 290, 296, 311
R v Shearing 2002 SCC 58, [2002] 3 SCR 33 ..... 580, 846, 847, 870
R v Simpson (O'Connor) (1995) 100 CCC (3d) 285 (Ontario CA) 747
Slavutych v Baker [1976] 1 SCR 254 (SCC) 575
R v Slocum 2003 WL 38816 (Ontario Supreme Ct) 786
R v Smith [1992] 2 SCR 915 (SCC) 14, 530, 719, 720, 724
Smith v Jones and Southam Inc [1999] 1 SCR 455 (SCC) 574, 575
R v Smithers [1984] 1 SCR 506 (SCC) 153
R v Starr 2000 SCC 40, [2000] 2 SCR 144 ..... 705, 720, 724
R v Stinchcombe [1991] 3 SCR 326 (SCC) 572, 573, 574, 578
R v Stymiest (1993) 79 CCC (3d) 408 (British Columbia CA) 694
Sweitzer v The Queen [1982] 1 SCR 949 (SCC) 844
R v T(DB) (1994) 89 CCC (3d) 466 (Ontario CA) 851
T(J) v T(M) [1996] Carswell Ont 3522 (Ontario Gen Div) 889
T(L) v T(RW) (1997) 36 BCLR (3d) 165 (British Columbia Supreme Ct) 277
R v T(R) (2001) 205 Nfld & PEIR 352 (Newfoundland SCTD) 786
R v Talbot C35019, 17 January 2002 (Ontario CA) 900, 902
R v Tayebi (2001) 161 CCC (3d) 197 (British Columbia CA) 902
Taylor v MacGillivray (1993) 110 DLR (4th) 64 (Ontario Gen Div) 241
Teno v Arnold (1974) 55 DLR (3d) 57 (Ontario Supreme Ct), affd 67 DLR (3d) 9 (Ontario CA), revd on liability [1978] 2 SCR 287 (SCC) 267, 268
R v Thatcher [1987] 1 SCR 652 (SCC) 169, 170
Timm v The Queen [1981] 2 SCR 315 (SCC) 390
TM v Poirier [1994] OJ No 1046 (Ontario Gen Div) 293
R v Trotta and Trotta (2004) 23 CR 6th 261 (Ontario CA) 153
R v Tutton [1989] 1 SCR 1392 (SCC) 172
R v U(FJ) [1995] 3 SCR 764 (SCC) 716, 722
R v Valley (1986) 26 CCC (3rd) 207 (Ontario CA) 913
R v Vandenberghe (1995) 96 CCC (3d) 371 (Ontario CA) 777
R v Vanderest (1994) 91 CCC (3d) 5 (British Columbia Supreme Ct) 782, 785
Vennell v Barnardo's [2004] OJ No 4171 (Ontario SJC) 318
R v Villamar [1996] Ontario OJ 2742 (Ont Gen Div) appeal dismissed [1999] OJ 1923 (Ontario CA) 899, 910
Vorvis v Insurance Corporation of British Columbia [1989] 1 SCR 1085 (SCC) 224
R v W(BA) [1992] 3 SCR 811 (SCC), revg (1991) 59 OAC 325 (Ontario CA) 783
W(D) v White, the Durham Region Police Services Board, The Children's Aid Society of the Durham Region [1998] OJ No 2927 (Ontario Gen Div) 417
R v W(LT) (1995) 131 Sask R 47 (Saskatchewan CA) 724
W(N) v Prince Edward Island (Director of Child Welfare) (1997) 156 Nfld & PEIR 241 (Prince Edward Island Supreme Ct) 86
R v W(R) [1992] 2 SCR 122 (SCC) 694, 746
White v Attorney General of Canada 2006 BCSC 561 (British Columbia Supreme Ct) 318
Re Whitecap (1979) 2 Sask R 429 (Sask UFC) 573
Wilkieson-Valiente v Wilkieson [1996] ILR ¶1-3351 (Ontario Gen Div) 246
Winnipeg Child and Family Services (Central Area) v KLW 2000 SCC 48, 191 DLR (4th) [2000] 2 SCR 519 483
Winnipeg Child and Family Services v LL [1994] 6 WWR 458 (Manitoba CA) 724
R v Wismayer (1997) 115 CCC (3d) 18 (Ontario CA) 694
R v Wray [1971] SCR 272 (SCC) 844
WW v Canada (Attorney General) [2003] BCJ No 442 (British Columbia CA) 318

Y(AD) v Y(MY) [1994] 5 WWR 623 (British Columbia Supreme Ct) 247, 268, 275
Young v Bella, Rowe and Memorial University of Newfoundland 2006 SCC 3, [2006] 1 SCR 108 (SCC) 406
Young v Young [1993] 4 SCR 3, 108 DLR (4th) 193 (SCC) 483
R v Younger (2004) 186 CCC (3d) 454 (Manitoba CA) 153

European Human Rights Cases

A v UK (1996) 23 EHRR 213 (ECtHR) 29
A v UK (1998) 27 EHRR 611 (ECtHR) 29, 126, 127, 185, 186, 190, 391, 674
Airey v Ireland Series A no 32 (1979) (ECtHR) 389
Asch v Austria [1991] ECHR 123 98/86 (ECtHR) 675
August v UK (2003) 36 EHRR CD115 (ECtHR) 242, 243, 244
B v UK (1987) 10 EHRR 87 (ECtHR) 29
B v UK; P v UK [2001] 2 FLR 261 (ECtHR) 533, 534, 535
Baegen v Netherlands Application No 16696/90, ECmHR Report adopted on 20 October 1994 (declared admissible but case struck from the list by ECtHR on 24 October 1995) ... 658, 678
Borgers v Belgium (1981) 15 EHRR 92 (ECtHR) 674
Costello-Roberts v UK [1993] ECHR 13134/87, 19 EHRR 112 (ECtHR) 674
Croissant v Germany [1992] ECHR 13611/88 678
Dombo Beheer BV v Netherlands (1993) 18 EHRR 213 (ECtHR) 674
Doorson v Netherlands (1996) 22 EHRR 330 (ECtHR) 617
E v UK (2003) 36 EHRR 31, [2003] 1 FLR 348 (ECtHR) 336, 393, 394, 459
Edwards and Lewis v UK (2003) 15 BHRC 189 (ECtHR) 548
Erikkson v Sweden (1990) 12 EHRR 183 (ECtHR) 29
Feldbrugge v Netherlands (1986) 8 EHRR 425 (ECtHR) 543
Finkensieper v Netherlands unreported, Application No 19525/92, Report 17 May 1995 (EComHR) 658, 679
Fitt v UK (2000) 30 EHRR 480 (ECtHR) 548, 563
Gaskin v UK (access to personal files) [1989] ECHR 10454/83 (ECtHR) 395
H v UK [1988] 10 EHRR 95 (ECtHR) 29
Hendriks v Netherlands (1983) 5 EHRR 223 (ECtHR) 29
Hokkanen v Finland [1996] 1 FLR 289 (ECtHR) 29
Hols v Netherlands App No 25206/94 ruled inadmissible 19 October 1995 (EComHR) 638, 658, 678
Jasper v UK (2000) 30 EHRR 441 (ECtHR) 563
Johnson v Norway (1997) 23 EHRR 33 (ECtHR) 30
Johnston v Ireland Series A no 112 (1986) (ECtHR) 389
K and T v Finland (No 2) [2001] 2 FLR 707 (ECtHR) 467
KA v Finland [2003] 1 FLR 696, [2003] 1 FCR 21 (ECtHR) 29
Kilkiç v Turkey [2000] ECHR 22492/93 (ECtHR) 390
Klass v Germany (1978) 2 EHRR 214 (ECtHR) 394
Kostovski v Netherlands (1989) 12 EHRR 434 (ECtHR) 675
Kremers v Netherlands Application No 25205/94, declaration of inadmissibility 19 Oct 1995 (EComHR) 658, 678
Kutzner v Germany [2002] ECHR 46544/99 467
L v UK [2000] 2 FLR 322 (ECtHR) 546
LCB v UK (1998) 27 EHRR 212 (ECtHR) 389
Luca v Italy (2003) 36 EHRR 46 (ECtHR) 677, 679, 711
McCann v UK (1995) 21 EHRR 97 (ECtHR) 839
McMichael v UK (1995) 20 EHRR 205 (ECtHR) 544
Marckx v Belgium Series A no 31 (1979) (ECtHR) 389

MC v Bulgaria (2003) 40 EHRR 20, 15 BHRC 627 (ECtHR) 127, 390
MG v UK (Access to Social Services Records) Application no 39393/98, (2002) 13 BHRC 179 (ECtHR) 395
O v UK (1987) 10 EHRR 82 (ECtHR) 29
Olsson v Sweden (No 2) (1994) 17 EHRR 134 (ECtHR) 30
Osman v UK (2000) 29 EHRR 245, [1999] 1 FLR 193 (ECtHR) 225, 332, 333, 361, 388, 389, 390, 391, 395, 413
P, C and S v UK [2002] 3 FLR 1, [2002] 2 FLR 631 (ECtHR) 467, 473, 882
Riepan v Austria [2000] ECHR 35115/97 (ECtHR) 678
Rowe v UK (2000) 30 EHRR 1, 8 BHRC 325 (ECtHR) 563
Sahin v Germany [2003] 2 FLR 619 (ECtHR) 126
Salabiaku v France [1998] 13 EHRR 379 (ECtHR) 198
SC v UK [2004] ECHR 263, [2005] FCR 347 (ECtHR) 674, 675
Stanford v UK [1994] ECHR 16757/90 (ECtHR) 638
Stubbings v UK (1997) 23 EHRR 213 (ECtHR) 127, 220, 231, 232, 233, 234, 296
Sutter v Switzerland (1984) 6 EHRR 272 (ECtHR) 533
T & V v UK (1999) 30 EHRR 121 (ECtHR) 673
TP and KM v UK (Application No 28945/95) (2001) 34 EHRR 42 (ECtHR) 335
R v UK (1987) 10 EHRR 74 (ECtHR) 29
R v UK (A/136-E) [1988] 2 FLR 445, (1991) 13 EHRR 457 (ECtHR) 78
Unterpertinger v Austria (1991) 13 EHRR 175 (ECtHR) 679
V v UK [1999] ECHR 24888/94 (ECtHR) 674
Van Mechelen v Netherlands (1987) 25 EHRR 647 (ECtHR) 638
Venema v Netherlands [2003] 1 FLR 552, [2003] 1 FCR 153 (ECtHR) 882
Vidal v Belgium [1992] ECHR 123251/86 (ECtHR) 675
W v UK (1987) 10 EHRR 29 (ECtHR) 29
X v UK (1992) 15 EHRR CD113 (EComHR) 637, 678
X and Y v Netherlands (1986) 8 EHRR 235 (ECtHR) 29, 127
Z v UK (Application no 29392/95) (1999) 28 EHRR CD 65 (EComHR) 61, 335, 390, 391, 392, 393, 395, 413
Z and others v UK (2002) 34 EHRR 3, [2001] 2 FLR 612 (ECtHR) 335, 391, 392
Zimmerman and Steiner v Switzerland (1983) 6 EHRR 17 (ECtHR) 29

New Zealand

A v X [2005] 1 NZLR 123 (Auckland HC) 114
R v Accused (CA 208/87) [1988] 1 NZLR 573 (New Zealand CA) 841
R v Accused (CA 174/88) [1989] 1 NZLR 714 (New Zealand CA) 902
R v Accused (CA 298/88) [1989] 2 NZLR 698 (New Zealand CA) 695
R v Accused (CA 32/91) [1991] 2 NZLR 649 (New Zealand CA) 611
R v Accused (CA 449/91) [1992] 2 NZLR 673 (New Zealand CA) 611
R v Accused (CA 92/92) [1993] 1 NZLR 553 (New Zealand CA) 796, 797, 799
R v Accused (CA 160/92) [1993] 1 NZLR 385 (New Zealand CA) 695
R v Accused (CA 357/94) (1994) 12 CRNZ 417 (New Zealand CA) 592
R v Accused (CA 8/96) (1996) 13 CRNZ 677 (New Zealand CA) 807, 841
R v Accused (1997) 15 CRNZ 26 (New Zealand CA) 748
Attorney-General v Prince and Gardner [1998] 1 NZLR 262 (New Zealand CA) 223, 336, 348, 349, 356, 357, 416
Attorney-General v Carter [2003] 2 NZLR 160 (New Zealand CA) 257
Attorney-General v Gilbert [2002] NZCA 55 (New Zealand CA) 247
R v Aymes (CA123/04, 16 Dec 2004) (New Zealand CA) 798, 903, 904
AG v B [1992] 2 NZLR 351 (New Zealand HC) 695

R v B [1987] 1 NZLR 362 (New Zealand CA) 902, 910
R v B [2003] 2 NZLR 777 (New Zealand CA) 903
B v Attorney General of New Zealand [1997] NZFLR 550, [1999] 2 NZLR 296 (New Zealand CA) 357
B v Attorney General of New Zealand [2003] UKPC 61, [2003] 4 All ER 833 . . . . . 223, 337, 357, 406
R v Baillie (CA418/02, CA, 10 March 2003) (New Zealand CA) 904
Beales v Hayward [1960] NZLR 131 (New Zealand Supreme Ct) 237
R v Bills [1981] 1 NZLR 760 (New Zealand CA) 795
Bottrill v A [2001] 3 NZLR 662 (PC on appeal from New Zealand CA) 223
Re C [2004] NZFLR 49 (New Zealand Fam Ct) 91
C and C v Chief Executive of the Department of Child, Youth and Family Services [2003] NZFLR 643 (New Zealand HC) 91
R v Clark [1953] NZLR 823 (New Zealand CA) 853
CMP v D-GSW [1997] NZFLR 1 (Auckland HC) 514
Cook v Evatt [1992] 1 NZLR 673 (New Zealand HC) 864
R v Daniels [1986] 2 NZLR 106 (New Zealand CA) 796
Daniels v Thompson [1998] 3 NZLR 22 (New Zealand CA) 223, 224
R v Degnan [2001] 1 NZLR 280 (New Zealand CA) 842
R v Dobson (CA 25/95 1 June 1995) (New Zealand CA) 592
Donselaar v Donselaar [1982] 1 NZLR 97 (New Zealand CA) 223, 224
R v Duncan [1992] 1 NZLR 528 (New Zealand CA) 749, 753, 796, 799
R v Fissenden (CA 227/94) 28 March 1995 (New Zealand CA) 841
R v G (CA 414/03, 26 Oct 2004) (New Zealand CA) 903
G v Auckland Hospital Board [1976] 1 NZLR 638 (New Zealand Supreme Ct) 222
R v Guthrie (1997) 15 CRNZ 67 (New Zealand CA) 903
R v H [1997] 1 NZLR 673 (New Zealand CA) 738, 749, 753
R v H [2000] 2 NZLR 257 (New Zealand CA) 590, 592
H v R [1996] 1 NZLR 299 (New Zealand HC) 231, 240, 261
Re HM (care and protection) [2001] NZFLR 534 (New Zealand Lower Hutt Fam Ct) 92
R v Howes [2003] 3 NZLR 767 (New Zealand CA) 842
Howse v The Queen [2005] UKPC 30 (on appeal from New Zealand CA) 699
R v Huijser [1988] 1 NZLR 57 (New Zealand CA) 841
In the matter of the L children [2001] NZFLR 681 (Auckland Fam Ct) 91
R v J [1988] 1 NZLR 20 (New Zealand CA) 728
R v K [1995] NZFLR 341 (New Zealand CA) 485
R v KMP [1996] DCR 380 (New Zealand Dist Ct) 903
R v L [1994] 2 NZLR 54 (New Zealand CA) 728
Re Leading Aircraftman F [1998] 1 NZLR 714 (New Zealand Courts-Martial App Ct) 590
R v Lewis [1991] 1 NZLR 409 (New Zealand CA) 635
R v Lory (Ruling 8) [1997] 1 NZLR 44 (New Zealand HC) 591, 593
Re M [1990] NZFLR 575 (Fam Ct Palmerston North) 352
R v M [1994] 3 NZLR 641 (New Zealand CA) 748, 749
R v M [1999] 1 NZLR 315 (New Zealand CA) 841
The Queen v M [2002] NZ FLR 91 (New Zealand HC) 904
R v M [1999] 1 NZLR 315 (CA) 841
M v L [1999] 1 NZLR 747 (New Zealand CA) 591, 592, 593, 594, 596
McCallion v Dodd [1966] NZLR 710 (New Zealand CA) 267, 268, 272, 273
R v McClintock [1986] 2 NZLR 99 (New Zealand CA) 795, 796
R v Peter Hugh McGregor Ellis (New Zealand CA 120/98, 14 October 1999) 908
R v Meynell [2004] 1 NZLR 507 (New Zealand CA) 157, 842

R v Moke and Lawrence [1996] 1 NZLR 263 (New Zealand CA) 635
R v Ricardo John Moore (CA 69/01 2 May 2001) (New Zealand CA) 592
R v Narain (No 2) [1988] 1 NZLR 593 (New Zealand CA) 841
R v Nazif [1987] 2 NZLR 122 (New Zealand CA) 741, 748
R v NSM [1997] DCR 711 (New Zealand DC) 796, 797
R v O [1996] 3 NZLR 295 (New Zealand CA) 624, 635
R v O [1999] 1 NZLR 347 (New Zealand CA) 841
R v Parker [1968] NZLR 325 (New Zealand CA) 695
R v Phillips (1989) 5 CRNZ 405 (New Zealand HC) 798
R v Piri [1987] 1 NZLR 66 (New Zealand CA) 157
Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (New Zealand CA) 257
R v Rust CA 572/95 (New Zealand CA, 12 September 1996) 797
R v S (NZ CA 244/91 20 December 1991) (New Zealand CA) 903
R v S [1993] 2 NZLR 142 (New Zealand CA) 611
R v S [1995] 3 NZLR 674 (New Zealand CA) 903, 904
R v S [1998] 3 NZLR 392 (New Zealand CA) 798
S v Attorney-General [2003] NZCA 149 (New Zealand CA) 222, 223, 311, 312, 377, 378
S v G [1995] 3 NZLR 681 (New Zealand CA) 231, 261
S v Police [1992] NZFLR 150 (New Zealand HC) 592
R v Secord [1992] 3 NZLR 571 (New Zealand CA) 591
Sharma v The Police A 168/02 07/02/03 (New Zealand HC) 191
T v H [1995] 3 NZLR 37 (New Zealand CA) 231, 235, 240, 245, 261
R v T [1998] 2 NZLR 257 (New Zealand CA) 749, 777
R v Tait [1992] 2 NZLR 666 (New Zealand CA) 904, 906
R v Emile Tuagalu [2001] NZCA 235 (New Zealand CA) 748
Re v (1991) CYPF (Family Court, Napier) 44
V v G [2001] NZFLR 1005 (New Zealand Fam Ct) 592
R v W [1995] 1 NZLR 548 (New Zealand CA) 904
W v Attorney General [2003] NZCA 150 (New Zealand CA) 222, 223, 378
R v Walker [2000] NZCA 121 (New Zealand CA) 749
R v Walker (CA 417/03, 15 June 2004) (New Zealand CA) 903
R v Witika [1993] 2 NZLR 424 (New Zealand CA) 165, 174, 176, 282

South Africa

Klink v Regional Court Magistrate (1996) 3 LRC 666 (South Africa Supreme Court, South Eastern Cape Local Division) 665

United States

Achterhof v Selvaggio 886 F 2d 826 (US CA 6th Cir 1989) 345, 452, 465, 483
Adams v State 555 P 2d 235 (Alaska Supreme Ct 1976) 342
R v Ake 470 US 68 (USSC 1985) 917
People v Aldrich 849 P 2d 821 (Colorado CA 1992) 786
Commonwealth v Allen 665 NE 2d 105 (Massachusetts AC 1996) 746
US v Allen J 127 F 3d 1292 (US CA 10th Cir 1997) 612
Althous v Cohen and University of Pittsburgh Western Psychiatric Institute and Clinic 710 A 2d 1147 (Pennsylvania Superior Ct 1998) 406
Altmeyer v State 496 NE 2d 1328 (Indiana CA 1996) 654
American States Insurance Co v Borbor 826 F 2d 888 (US CA 9th Cir 1987) 236
Commonwealth v Amirault 535 NE 2d 193 (Massachusetts Supreme Ct 1989) 746
Commonwealth v Amirault 677 NE 2d 652 (Massachusetts Supreme Judicial Ct 1997) 655

Anaya v Husley 2005 US Dist LEXIS 6104 (North Dakota CA 2005) 655
Anderson v Creighton 483 US 635 (USSC 1987) 371
Anderson v Minneapolis St Paul & Sault Ste. Marie Railway Company 179 NW 45 (Minnesota Supreme Ct 1920) 279
US v Antone 1981 F 2d 1059 (US CA 9th Cir 1992) 570, 898
Commonwealth v Appenzeller 565 A 2d 170 (Pennsylvania Superior Ct 1989) 787, 789
Arbaugh v Board of Education, County of Pendleton 591 SE 2d 235 (West Virginia Supreme CA 2003) 258, 368, 369
People v Arenda 330 NW 2d 814 (Michigan Supreme Ct 1982) 787, 789, 790, 800
Armstrong v Squadrito 152 F 3d 564 (US CA 7th Cir 1998) 345
People v Arnold 177 AD 2d 633 (New York App Div 1991) 570
AS v Tellus 22 F Supp 2d 1217 (US DC Kansas 1998) 401
Austin v Borel 830 F 2d 1356 (US CA 5th Cir 1987) 345
Avon v Gourley 47 F Supp 2d 1246 (Dist Ct Colorado 1998), affd on other grounds 185 F 3d 873 (US CA 10th Cir 1999) 290
US v Azure 845 F 2d 1503 (US CA 8th Cir 1988) 789
Babcock v State 809 P 2d 143 (Washington Supreme Ct 1991) 380, 381
Commonwealth v Bailey 510 A 2d 367 (Pennsylvania Superior Ct 1986) 731
Bailey v County of York 768 F 2d 503 (US CA 3rd Cir 1985) 397
Bailey v Pacheco 108 F Supp 2d 1214 (US DC New Mexico 2000) 401
State v Barber 766 P 2d 1288 (Kansas App 1989) 788
Barnes v Barnes 603 NE 2d 1337 (Indiana Supreme Ct 1992) 266
State v Baron 292 SE 2d 741 (North Carolina CA 1982) 787
US v Bartlett 856 F 2d 1071 (US CA 8th Cir 1988) 787
People v Bastien 541 NE 2d 670 (Illinois Supreme Ct 1989) 655
State v Batangan 799 P 2d 48 (Hawaii Supreme Ct 1990) 897
Battle v United States 630 A 2d 211 (US DC 1993) 753
Battles v State 140 SW 783 (Texas CCA 1911) 831
BB v Continental Insurance Co 8 F 3d 1288 (US CA 8th Cir 1993) 236
Beach v Jean 746 A 2d 228 (Connecticut Superior Ct 1999) 289
Becerra v County of Santa Cruz 68 Cal App 4th 1450 (California CA 2nd Dist 1998) 381
US v Bedoni F 2d 782 (USCA 10th Cir 1990) certiorari denied 501 US 1253 (USSC 1990) 612
Beltran v Washington Department of Social and Health Services 989 P 2d 604 (Washington CA 1999) 380
Commonwealth v Bergstrom 524 NE 2d 366 (Massachusetts Supreme Judicial Ct 1988) 655
Berkovitz v United States 486 US 531 (USSC 1988) 343
People v Berliner 686 NYS 2d 673 (New York City Ct 1999) 570
Big Brother/Big Sister, Inc v Terrell 359 SE 2d 241 (Texas App Ct 1987) 290
US v Binder 769 F 2d 595 (US CA 9th Cir 1985) 897
Bivens v Six Unknown Federal Narcotics Agents 403 US 388 (USSC 1971) 341
Bivin v Wright 656 NE 2d 1121 (Illinois App Ct 1995) 290
BJM v Florida Department of Health and Rehabilitative Services 67 So 2d 512 (Florida Dist CA 1993) 386
State v Blanchette 2006 Kan App LEXIS 480 (Kansas CA 2006) 655
Blaney v O'Heron 568 SE 2d 774 (Georgia CA 2002) 371
Blanton v State 880 So 2d 798 (Florida App 2004) 655
People v Bledsoe 189 Cal Rptr 726 (California Supreme Ct 1984) 897
Blessing v United States 447 F Supp 1160 (US DC Pennsylvania 1978) 329
Board of Regents of State Colleges v Roth 408 US 564 (USSC 1972) 403

Bobadilla v Minnesota 709 NW 2d 243 (Minnesota Supreme Ct 2006) 734
Boone v State 668 SW 2d 17 (Arkansas Supreme Ct 1984) 167
US v Bordeaux 400 F 3d 548 (US CA 8th Cir 2005) 653
State v Bordis 905 SW2d 214 (Tennessee CA 1995) 149
Borne v Northwest Allen County School Corp. 532 NE 2d 1196 (Indiana Superior Ct 1989), app denied 558 NE 2d 828 (Indiana Supreme Ct 1990) 297
Borst v Borst 251 P 2d 149 (Washington Supreme Ct 1952) 264
State v Boutwell 558 A 2d 244 (Connecticut App 1989) 596
Bowers v DeVito 686 F 2d 616 (US CA 7th Cir 1982) 397
People v Bowker 249 Cal Rptr 886 (California CA 1988) 897
Bowser v Blair County Children and Youth Services 346 F Supp 2d 788 (US DC Pennsylvania 2004) 345
Brady v State 575 NE 2d 981 (Indiana Supreme Ct 1991) 655
State v Braham 841 P 2d 785 (Washington CA 1992) 913
Branzburg v Hayes 408 US 665 (USSC 1972) 790
Brasher v State 555 So 2d 184 (Alabama Ct of Crim App 1988) 655
State v Brigman 2006 NC App LEXIS 1071 (North Carolina CA 2006) 735
Broadwell v Holmes 871 SW 2d 471 (Tennessee Supreme Ct 1994) 264
Broderick v King's Way Assembly of God Church 808 P 2d 1211 (Alaska Supreme Ct 1991) 290
Brodie v Summit County Children's Services Board 554 NE 2d 1301 (Ohio Supreme Ct 1990) 258, 345, 353, 354, 419
State v Broseman 947 SW 2d 520 (Missouri CA 1997) 140
US v Brown 26 MJ 148 (US Court of Military Appeals 1988) 188
State v Brown 836 SW 2d 530 (Tennessee Supreme Ct 1992) 149
People v Brown 883 P 2d 949 (California Supreme Ct 1994) 746, 753
Brown v Brown 600 NW 2d 869 (North Dakota Supreme Ct 1999) 109
State v Budis 593 A 2d 784 (New Jersey Supreme Ct 1991) 787, 789, 802
Burris v State 420 SE 2d 582 (Georgia App 1992) 831
Cairns v Commonwealth 40 Va App 271 (Virginia CA 2003) 787
California v Green 399 US 149 (USSC 1970) 654, 655, 729
State v Cardall 982 P 2d 79 (Utah Supreme Ct 1999) 571
State v Carothers 692 NW 2d 544 (South Dakota Supreme Ct 2005) 734
State v Carpenter 570 A 2d 203 (Connecticut Supreme Ct 1990) 149
State v Carver 678 P 2d 842 (Washington App 1984) 811
State v Carver 380 NW 2d 821 (Minnesota Ct App 1986) 695, 789
Caryl S v Child & Adolescent Treatment Services, Inc 614 NYS 2d 661 (New York Supreme Ct) 406
US v Castillo 140 F 3d 874 (US CA 10th Cir 1998) 827, 831
Cathey v Bernard 467 So 2d 9 (Louisiana Ct App 1st Cir 1985) 314
CC and MS v RTH 714 A 2d 924 (New Jersey Supreme Ct 1998) 269, 270, 275, 277, 279
Cechman v Travis and Hospital Authority of Gwinnett County 414 SE 2d 282 (Georgia CA 1991) 369, 495, 497, 499
State v Chandler 376 SE 2d 728 (North Carolina Supreme Ct 1989) 654
Chaney v Kennedy 39 Cal App 4th 152 (California CA 2nd District 1995) 276
Ciarochi v Boy Scouts of America, Inc Ketchikan Registry IKE-89-42 CI, August 6, 1990 (Alaska Supreme Ct) 303
US v Classic 313 US 299 (USSC 1941) 398
Commonwealth v Clancy 524 NE 2d 395 (Massachusetts Supreme Judicial Ct 1988) 594
Commonwealth v Cleary [1898] 172 Mass 175 (Massachusetts Supreme Judicial Ct 1898) 738

Cleveland Board of Education v Loudermil 470 US 532 (USSC 1985) 479
Clinebell v Commonwealth 368 SE 2d 263 (Virginia Supreme Ct 1988) 787, 788
CNA Insurance Co v McGinnis 666 SW 2d 689 (Arkansas Supreme Ct 1984) 236
Coburn v Ordnur 14 Conn L Rptr 9 (Connecticut Superior Ct 1995) 266
State v Coffey 389 SE 2d 48 (North Carolina Supreme Ct 1990) 828
Coffey v Milwaukee 247 NW 2d 132 (Wisconsin Supreme Ct 1976) 342
Coleman v Cooper 366 SE 2d 2 (North Carolina CA 1988) 354
Collins v City of Harker Heights, Texas 503 US 115 (USSC 1992) 397, 399
Contreras v State 2005 Fla App LEXIS 1443 (Florida Dist Ct App 4th Dist 2005) 734
Cort v Ash 422 US 66 (USSC 1975) 347
Cotton v Stange 582 NW 2d 25 (South Dakota Supreme Ct 1998) 419
County of Los Angeles v Superior Court 102 Cal App 4th 67 (California CA 2nd Dist 2002) 380, 381
County of Sacramento v Lewis 523 US 833 (USSC 1998) 398, 399
Coy v Iowa 487 US 1012 (USSC 1988) 653, 678
Cracraft v City of St Louis Park 279 NW 2d 801 (Minnesota CA 1979) 343
State v Crane 799 P 2d 1380 (Arizona Ct App 1990) 829
Crane v Kentucky 476 US 683 (USSC 1986) 787
Crawford v Washington 541 US 36 (USSC 2004) 654, 655, 729, 730, 731, 734, 736
State v Cressey 628 A 2d 696 (New Hampshire Supreme Ct 1993) 571, 574, 884, 897
Croft v Westmoreland County Children and Youth Services 103 F 3d 1123 (US CA 3rd Cir 1997) 481
Currier v Doran 23 F Supp 2d 1277 (US DC New Mexico 1998) 401
US v Curry 31 MJ 359 (US Court of Military Appeals 1990) 149
State v Curtis 783 SW 2d 47 (Arkansas Supreme Ct 1990) 655
Curtis v State 568 P 2d 583 (Nevada Supreme Ct 1977) 149
Cuyler v United States 362 F 3d 949 (US CA 7th Cir 2004) 369
State v d'Ambrosia A 2d 442 (Connecticut Supreme Ct 1989), certiorari denied 493 US 1063 (USSC 1990) 569
DR v Middle Bucks Area Vocational Technical School 972 F 2d 1364 (US CA 3rd Cir (en banc) 1992) 403
Daniels v Williams 474 US 327 (USSC 1986) 397, 398, 399
Daubert v Merrell Dow Pharmaceuticals Inc 113 S Ct 2786 (USSC 1993) 874, 887, 895, 896, 897, 899, 911, 915, 917
State v Davis 645 NW 2d 913 (Wisconsin CA 2002) 914
Davis v Washington, Hammon v Indiana 05-5224, 05-5705 (19 June 2006) (USSC) 734
Del A v Roemer 777 F Supp 1297 (Louisiana DC 1991) 55
Department of Health & Rehabilitative Services v Yamuni 498 So 2d 441 (Florida CA 3rd Dist 1986) 345, 347
US v DeNoyer 811 F 2d 346 (US CA 8th Cir 1987) 731, 883
Delaware v Fensterer 474 US 15 (USSC 1985) 656
State v DeLawder 344 A 2d 446 (Maryland Ct Special App 1975) 788
DeShaney v Winnebago County Department of Social Services 812 F 2d 298 (US CA 7th Cir 1987 352
DeShaney v Winnebago County Department of Social Services 489 US 189 (USSC 1988) 250, 251, 343, 352–53, 354, 396, 397, 398, 400, 401, 402, 403, 404, 405, 406, 412, 462
Devereaux v Abbey 263 F 3d 1070 (US CA 9th Cir 2001) 505
Dinius v Dinius 564 NW 2d 300 (North Dakota Supreme Ct 1997) 108
DLC v Walsh 908 SW 2d 791 (Missouri CA 1995) 372

Dobson v Harris 530 SE 2d 829 (North Carolina Supreme Ct 2000) 372, 592
State v Doe 719 P 2d 554 (Washington CA 1986) 731
State v Doe 103 P 3d 967 (Idaho CA 2004) 734
Doe v Colletto 24 Conn L Rptr 387 (Connecticut Superior Ct 1999) 266
Doe v Franklin 930 SW 2d 921 (Texas Ct App 1996) 270, 276, 277
Doe v Hartz 52 F Supp 2d 1027 (US DC Iowa 1999) 297
Doe v Marion 605 SE 2d 556 (New Hampshire CA 2004) 369, 370
Doe v New York City Department of Social Services 649 F 2d 134 (US CA 2nd Cir 1981) certiorari denied 464 US 864 (USSC 1983) 402
Doe v Redeemer Lutheran Church 531 NW 2d 897 (Minnesota CA 1995) 297
Doe v United States 976 F 2d 1071 (US CA 7th Cir 1993) certiorari denied 510 US 812 (USSC) 733
Doe "A" v Special School District of St Louis County 901 F 2d 642 (US CA 8th Cir 1990) ... 297
Doe by Fein v District of Columbia 93 F 3d 861 (District of Columbia Circuit 1996) 404
Doe by Glanzer v Glanzer 232 F 3d 1258 (US CA 9th Cir 2000) 831
Doe by Nelson v Milwaukee County 903 F 2d 499 (US CA 7th Cir 1990) 404
Doggett v Perez 348 F Supp 2d 1198 (US DC Washington 2004) 480
State v Donahue 549 A 2d 121 (Pennsylvania Supreme Ct 1988) 828
State v Douglas 797 SW 2d 532 (Missouri Ct App 1990) 789
D R v Middle Bucks Area Technical School 972 F 2d 1364 (US CA 3rd Cir Cen bank 1992) 343, 403
DRR v English Enterprises 356 NW 2d 580 (Iowa CA 1984) 289
Duchesne v Sugarman 566 F 2d 817 (US CA 2nd Cir 1977) 480
Dunlap v Dunlap 150 A 352 (New Hampshire Supreme Ct 1930) 266
State v Dykes 867 So 2d 908 (Louisiana CA 2d Cir 2004) 831
State v Edward Charles L 398 SE 2d 123 (West Virginia Supreme CA 1990) 827
Commonwealth v Elder 452 NE 2d 1104 (Massachusetts Supreme Judicial Ct 1983) 788
Elliott v State 600 P 2d 1044 (Wyoming Supreme Ct 1979) 829
Elton v County of Orange 3 Cal App 1053 (California CA 4th Dist 1970) 380
Emery v Emery 289 P 2d 218 (California Supreme Ct 1955) 188
State v Enger 539 NW 2d 259 (Minnesota App 1995) 571
Ernst v Child & Youth Service of Chester County 108 F 3d 486 (US CA 3d Cir 1997) 344, 345
People v Espinoza 2004 WL 1560376 (California App 6 Dist 2004) 655
State v Esposito 471 A 2d 949 (Connecticut Supreme Ct 1994) 569, 571
Estelle v Gamble 49 US 97 (USSC 1976) 398, 400
Estelle v McGuire 502 US 62 (USSC 1991) 827, 828
Evan F v Hughson United Methodist Church 8 Cal App 4th 828 (California CA 3rd Dist 1992) 297
FA by PA v WJF 656 A 2d 43 (New Jersey Superior Ct App Div 1995) 371
State v Fabritz 348 A 2d 275 (Maryland CA 1975) certiorari denied sub nom Hopkins v Fabritz (1979) 443 US 915 (USSC) 279
Faulkner v The McCarty Corp 853 So 2d 24 (Louisiana CA 4th Cir 2003) 342
Commonwealth v Fleury 632 NE 2d 1230 (Massachusetts Supreme Judicial Ct 1994) 746
Fischer v Metcalf 543 So 2d 785 (Florida Dist CA 3rd Dist 1989) 258, 297, 369
Florida v Ford 626 So 2d 1338 (Florida Supreme Ct 1993) 657
People v Foggy 521 NE 2d 86 (Illinois Supreme Ct 1988), certiorari denied 486 US 1047 (USSC 1988) 570
Fortner v State 582 So 2d 581 (Alabama CA 1990) 732
Frye v United States 293 F 1013 (DC Circ 1923) 874, 895, 896, 897
Frideres v Schiltz 540 NW 2d 261 (Iowa Supreme Ct 1995) 266

People v Frost 5 P 3d 317 (Colorado App 1999) 570
Frye v US 293 F 1013 (DC Circ 1923) 874
Commonwealth v Fuller 667 NE 2d 847 (Massachusetts Supreme Judicial Ct 1996) 570
State v Gagné 612 A 2d 899 (New Hampshire Supreme Ct 1992) 570
Gagné v O'Donoghue 1996 WL 1185145 (Massachusetts Superior Ct 1996) 290, 293, 297
US v Gambino 741 F Supp 412 (US Dist Ct New York 1990) 594
Gammons v North Carolina Department of Human Resources 459 SE 2d 295 (North Carolina Supreme Ct 1995) 354
Commonwealth v Garcia 588 A 2d 951 (Pennsylvania Superior Ct 1991) 654, 898
García v Shriro 2006 WL 988920 (US CA 9th Cir 2006) 654
Gaubert v United States 499 US 315 (USSC 1991) 343, 344
People v Gearhart 560 NYS 2d 247 (New York Cty Ct 1990) 370
US v Gillespie 852 F 2d 475 (US CA 9th Cir 1988) 913
George v State 813 SW 2d 792, supplementary opinion 818 SW 2d 951 (Arkansas Supreme Ct 1991) 829
Getz v State 538 A 2d 726 (Delaware Supreme Ct 1988) 827
Gibson v Brewer 952 SW 2d 239 (Missouri Supreme Ct 1997) 290, 293
Gibson v Gibson 479 P 2d 648 (California Supreme Ct 1971) 264, 266, 277
Re Gina D 645 A 2d 61 (New Hampshire Supreme Ct 1994) 885, 889
Gladwell v Gladwell 14 Conn L Rptr 71 (Connecticut Superior Ct 1995) 266, 275
Goldsmith v State 651 A 2d 866 (Maryland CA 1995) 570
Goller v White 122 NW 2d 193 (Wisconsin Supreme Ct 1963) 265
Gonzales v City of Castle Rock 366 F 3d 1093 (US CA 10th Cir 2004) 404, 405
Gonzalez v Avalos 866 SW 2d 346 (Texas App El Paso 1993) 258
Re Grand Jury 103 F 3d 1140 (3rd Cir 1997) certiorari denied 117 S Ct 2412 (USSC 1997) 572
People v Gray 568 NE 2d 219 (Illinois App 1991) 788
State ex rel White v Gray 2004 WL 1878/98 (Missouri App W Dist 2004) 571
People v Grey 187 Cal App 3d 213 (California CA 1986) 898
State v Griggs 999 SW 2d 235 (Missouri App 1998) 695
Gammons v North Carlonia Department of Human Resources 459 SE 2d 295 (North Carolina Supreme Ct 1995) 354
Guy v State 755 NE 2d 248 (Indiana CA 2001) 655
Haddock v City of New York 553 NE 2d 987 (New York CA 1990) 289
People v Hall 453 NE 2d 1327 (Illinois App Ct 1983) certiorari denied 467 US 1228 (USSC 1984) 851
Harden v State 438 SE 2d 136 (Georgia App 1993) 831
Harlow v Fitzgerald 457 US 800 (USSC 1982) 346, 371
People v Harris 580 NE 2d 185 (Illinois App Ct 1991) 828, 831
US v Harrison 31 MJ 330 (Court-Martial App 1990) 897
Haselhorst v State 485 NW 2d 180 (Nebraska Supreme Ct 1992) 384
Hawkins v United States 258 US 74 (USSC 1958) 571
Hebein v Young 37 F Supp 2d 1035 (US DC Illinois 1998) 402
Heinrich v Conemaugh Valley Memorial Hospital 648 A 2d 53 (Pennsylvania Superior Ct 1994) 372
Hellstrom v Commonwealth 825 SW 2d 612 (Kentucky Supreme Ct 1992) 886
State v Henderson 129 P 2d 646 (Kansas CA 2006) 734
State v Henriod 131 P 3d 232 (Utah Supreme Ct 2006) 655
Hern v The State 635 P 2d 278 (Nevada Supreme Ct 1981) 148
Heroux v Carpentier 1998 WL 388298 (Rhode Island Superior Ct 1998) 290
Herzfeld v Herzfeld 781 So 2d 1070 (Florida Supreme Ct 2001) 266

Heuring v State 513 So 2d 122 (Florida Supreme Ct 1987) 867
Hewellette v George 9 So 885 (Mississippi Supreme Ct 1891) 264, 265
State v Hill 578 A 2d 370 (New Jersey Supreme Ct 1990) 753
Hite v Brown 654 NE 2d 452 (Ohio CA 1995) 269, 270, 277
State v Hoag 749 A 2d 331 (New Hampshire Supreme Ct 2000) 186
Hobbs v North Carolina Department of Human Resources 520 SE 2d 595 (North Carolina CA 1999) 384
Hochheiser v Superior Court 161 Cal App 3d 777 (California CA 1984) 643
State v Holland 346 NW 2d 302 (South Dakota Supreme Ct 1984) 828
Hollingsworth v Hill 110 F 3d 733 (US CA 10th Cir 1997) 479
Horace Mann Insurance Co v Independent School District No 656 355 NW 2d 413 (Minnesota Supreme Ct 1984) 236
Horace Mann Insurance Co v Leeber 376 SE 2d 581 (West Virginia Supreme CA 1988) 236
Horridge v St Mary's County Department of Social Services 854 A 2d 1232 (Maryland CA 2004) 342, 345, 354, 355, 412
Horton v Flenory 889 F 2d 454 (US CA 3rd Cir 1989) 403
Horton v Reaves 526 P 2d 304 (Colorado Supreme Ct 1974) 246
State v Howard 426 A 2d 457 (New Hampshire Supreme Ct 1981) 789
State v Howard 604 A 2d 1294 (Connecticut Supreme Ct 1992) 570
Howard v State 816 NE 2d 948 (Indiana App 2004) 655
Howe v Andereck 882 So 2d 240 (Mississippi CA 2004) 372
State v Howell 839 P 2d 87 (Montana Supreme Ct 1992) 695
US v Huddleston 485 US 681 (USSC 1988) 807
State v Hudgins 810 SW 2d 664 (Missouri CA 1991) 828
Huff v Williams 743 A 2d 1252 (Maine Supreme Judicial Ct 1999) 966
Hungerford v Jones 422 A 2d 478 (New Hampshire Supreme Ct 1998) 411
People v Hurlbert 333 P 2d 82 (California CA 1958) 787
Hurst v Capitell 539 So 2d 264 (Alabama Supreme Ct 1989) 264, 265, 266
Hutchison v Luddy 763 A 2d 826 (Pennsylvania Superior Ct 2000, appeal denied 788 A 2d 377 (Pennsylvania Supreme Ct 2001) 297
Idaho v Wright 497 US 805 (USSC 1990) 730
Iglesia Cristiana La Casa Del Senor, Inc v LM 783 So 2d 353 (Florida Dist CA 3d District 2001) 296
In the interest of RR, Jr 6 ALR 4th 140 (New Jersey Supreme Ct 1979) 666
In the matter of JG 1998 WL 271053 (Texas CA 1998) 915
Isaac v State 440 SE 2d 175 (Georgia Supreme Ct 1994) 140
Isely v Capuchin Province 880 F Supp 1138 (US Dist Ct of Michigan 1995) 290, 297
People v Jackson 18 Cal App 3d 504 (California CA 1971) 828
Jackson v Department of Human Resources 497 SE 2d 58 (Georgia CA 1998) 381
Jackson v State 447 NW 2d 430 (Minnesota CA 1989) 851
Jaffee v Redmond 518 US 1 (USSC 1996) 571, 577, 593, 595
State v Jalo 557 P 2d 1359 (Oregon App 1976) 788
State v Jaques 558 A 2d 706 (Maine Supreme Judicial Ct 1989) 789
State v Jarzbek 527 A 2d 1245 (Connecticut Supreme Ct 1987) certiorari denied 484 US 1061 (USSC 1988) 655
JC Penney Casualty Insurance Co v MK 804 P 2d 689 (California Supreme Ct 1991) 236
Jehovah's Witnesses in the State of Washington et al v King County Hospital Unit No 1 (Harborview) et al 391 US 961 (USSC 1968) 82
State v Jendras 576 NE 2d 229 (Illinois Ct App 1991) 829
Jennette v State 398 SE 2d 734 (Georgia CA 1990) 897
State v Jensen 432 NW 2d 913 (Wisconsin Supreme Ct 1987) 897

Jensen v Anderson County Dept of Social Services 403 SE 2d 615 (South Carolina Supreme Ct 1991) 342, 343, 345, 353, 354, 355
Jensen v Conrad 747 F 2d 185 (US CA 4th Cir 1984) certiorari denied 470 US 1052 (USSC 1985) 397
JM v Minnesota District Council of Assemblies of God 658 NW 2d 589 (Minnesota CA 2003) 290
John R v Oakland Unified School District 769 P 2d 948 (California Supreme Ct 1989) 298, 299, 312, 318
State v John W Brisco 852 A 2d 746 (Connecticut App Ct) 789
Commonwealth v Johnson 566 A 2d 1197 (Pennsylvania Superior Ct 1989) 786
Jones v Father Trane and Roman Catholic Diocese of Syracuse 591 NYS 2d 927 (New York Supreme Ct 1992) 293, 297
Jordan v City of Philadelphia 66 F Supp 2d 638 (US DC Pennsylvania 1999) 355
Jordan v Jackson 15 F 3d 333 (US CA 4th Cir 1994) 479, 480
State v Kallin 877 P 2d 138 (Utah Supreme Ct 1994) 897
Kansas State Bank & Trust Co v Specialized Transp. Services, Inc 819 P 2d 587 (Kansas Supreme Ct 1991) 289
Kansas v Albert 778 P 2d 386 (Kansas CA 1989) 655
US v Kappell 2005 FED App 0333P (US CA 6th Cir 2005) 656
State v Kelly 456 SE 2d 861 (North Carolina Ct App 1995) 493
Kelly v State 452 NE 2d 907 (Indiana Supreme Ct 1983) 788
Kenneth R v Roman Catholic Diocese of Brooklyn 654 NYS 2d 791 (New York SCAD 1997) 293, 296, 297
KH v Morgan 914 F 2d 846 (US CA 7th Cir 1990) 401, 402
State v Kim 645 P 2d 1330 (Hawaii Supreme Ct 1982) 897
Kirchner v Crystal 474 NE 2d 275 (Ohio Supreme Ct 1984) 265
Kirkland v State 440 SE 2d 542 (Georgia CA 1994) 831
State v Kirschbaum 535 NW 2d 462 (Wisconsin CA 1996) 655, 898
Kneipp v Tedder 95 F 3d 1199 (US CA 3rd Cir 1996) 398
State v Kobow 466 NW 2d 747 (Minnesota CA 1991) 787
Koepf v York County 251 NW 2d 866 (Nebraska Supreme Ct 1977) 380, 381
State v Kohli 672 A 2d 429 (Rhode Island Supreme Ct 1996) 571
Konkle v Henson 672 NE 2d 450 (Indiana Ct App 1996) 293
State v Kristich 359 P 2d 1106 (Oregon Supreme Ct 1961) 817, 829
State v Kulmac 644 A 2d 887 (Connecticut Supreme Ct 1994) 786
Kumho Tire Co v Carmichael 526 US 137 (USSC 1999) 896
People v Kyle Colo CA No 01CA122 (Colorado CA 29 July 2004) 572, 589
LaBastida v State 931 P 2d 1334 (Nevada Supreme Ct 1996) 167
LaChance v Erickson 522 US 262 (USSC 1998) 479
State v Lachterman 812 SW 2d 759 (Missouri CA), certiorari denied 112 S Ct 1666 (USSC 1992) 829
Lajoie v Thompson 217 F 3d 663 (US CA 9th Cir 2000) 787, 781
Landeros v Flood 551 P 2d 389 (California Supreme Ct 1976) 258, 279, 280, 368, 371, 416
Lannan v State 600 NE 2d 1334 (Indiana Supreme Ct 1992) 831, 867
LaShay v Department of Social and Rehabilitation Services 625 A 2d 224 (Vermont Supreme Ct 1993) 344, 381
Leary v Geoghan 2000 WL 1473579 (Massachusetts Superior Ct 2000) 293
US v LeCompte 131 F 3d 767 (US CA 8th Cir 1997) 830
US v LeMay 260 F 3d 1018 (US CA 9th Cir 2001) certiorari denied 534 US 1166 (USSC) 831, 832
Levinsky v Diamond 559 A 2d 1073 (Vermont CA 1989) 346

People v Lewis 506 NE 2d 915 (New York CA 1987) 828
Lewis v Anderson 308 F 3d 768 (US CA 7th Cir 2002) 401, 403
Commonwealth v Licata 591 NE 2d 672 (Massachusetts Supreme Judicial Ct 1992) 753
State v Lindsey 720 P 2d 73 (Arizona Supreme Ct 1986) 897
Linebaugh v Berdish 376 NW 2d 400 (Michigan CA 1985) 236
Lintz v Skipski 25 F 3d 304 (US CA 6th Cir 1994) 402
Lisa M v Henry Mayo Newhall Memorial Hospital 907 P 2d 358 (California Supreme Ct 1995) 298, 312
Little v Utah State Division of Family Services 667 P 2d 49 (Utah Supreme Ct 1983) 381
State v Logue 372 NW 2d 152 (South Dakota Supreme Ct 1985) 731
Loll v Loll 561 NW 2d 625 (North Dakota Supreme Ct 1997) 109
US v Lollar 606 F2d 587 (US CA 5th Cir 1979) 850
State v Lopez 822 P 2d 465 (Arizona CA 1991) 829
People v McAlpin 812 P 2d 563 (California Supreme Ct 1991) 913
State v McCafferty 356 NW 2d 159 (South Dakota Supreme Ct 1984) 654
State v McFarlin 517 P 2d 87 (Arizona Supreme Ct 1973) 829
McGee v McGee 936 SW 2d 360 (Texas App 1996) 266
State v McGill 539 SE 2d 351 (North Carolina App 2000) 596
State v McKay 787 P 2d 465 (Oregon Supreme Ct 1990) 829
McKelvey v McKelvey 77 SW 664 Tennessee Supreme Ct 1903 264
People v McLoud 737 NYS 2d 216 (New York App Div 2002) 695
Malicki v Doe 814 So 2d 347 (Florida Supreme Ct 2002) 292, 293
Mammo v State 675 P 2d 1347 (Arizona Ct App 1984) 258, 354, 461
Marcelletti v Bathani 500 NW 2d 124 (Michigan CA 1993), appeal denied 505 NW 2d 582 (Michigan Supreme Ct 1993) 369
Marisol A by Forbes v Giuliani 929 F Supp 662 (US DC New York 1996) motion denied 104 F 3d 524 (US CA 2nd Cir 1997) certiorari denied 520 US 1211 (USSC 1997) 355
Mark K v Roman Catholic Archbishop 67 Cal App 4th 603 (California CA 2nd Dist 1998) 297
Marquay v Eno 662 A 2d 272 (New Hampshire Supreme Ct 1995) 289, 297, 369
Martínez v Lakewood 655 P 2d 1388 (Colorado App Ct 1982) 342
Mary M v City of Los Angeles 814 P 2d 1341 (California Supreme Ct) 312
Maryland v Craig 497 US 836 (USSC 1990) 653, 654, 655
Massee v Thompson 90 P 3d 394 (Montana Supreme Ct 2004) 342
Massie v State 553 P 2d 186 (Oklahoma CA 1976) 149
MDR v New Mexico Human Resources Department 836 P 2d 106 (New Mexico CA 1992) 384
US v Meacham 115 F 3d 1488 (Utah CA 1997) 831
Meador v Cabinet for Human Resources 902 F 2d 474 (US CA 6th Cir 1990) certiorari denied 498 US 867 (USSC 1990) 402
Mensch v Pollard 99 Wash App 1005 (Washington CA 2000) 889
Merrick v Sutterlin 610 P 2d 891 (Washington Supreme Ct 1980) 265
Meyer v Neb 262 US 390 (USSC 1923) 479
MH, DH and PT v State 385 NW 2d 533 (Iowa Supreme Ct 1986) 347, 355
People v Michael M 618 NYS 2d 171 (New York Supreme Ct 1994) 495
State v Michaels 642 A 2d 1372 (New Jersey Supreme Ct 1993) 491, 505, 886, 890, 897
Michelson v United States 335 US 469 (USSC 1948) 804, 808, 870
Michigan v Lucas 500 US 145 (USSC 1991) 787, 790
Midgett v State 729 SW 2d 410 (Arkansas Supreme Ct 1987) 149
People v Mikula 269 NW 2d 195 (Michigan App 1978) 787, 789
State v Milbradt 756 P 2d 620 (Oregon Supreme Ct 1988) 897

Milburn v Anne Arundel County Department of Social Services 871 F 2d 474 (US CA 4th Cir 1989) 402
State v Miller 709 P 2d 350 (Utah Supreme Ct 1985) 913
Miller v City of Philadelphia 174 F 3d 368 (US CA 3d Cir 1999) 345
Millspaugh v County Department of Public Welfare of Wabash County 937 F 2d 1172 (US CA 7th Cir 1991) 344
Commonwealth v Minerd 753 A 2d 225 (Pennsylvania Supreme Ct 2000) 898
Mitchell v Forsyth 472 US 511 (USSC 1985) 345
People v Molineux 61 NE 286 (New York CA 1901) 827
State v Moore 819 P 2d 1143 (Idaho Supreme Ct 1991) 829
Moore v Sims 442 US 415, 99 S Ct 2371, 60 Ed 2d 994 (USSC 1979) 480
Morris v Dearborne 69 F Supp 2d 868 (US DC Texas 1999) 400, 402
People v Morse 586 NW 2d 555 (Michigan CA 1998) 767, 789
Moses v Diocese of Colorado 863 P 2d 310 (Colorado 1993) 297
US v Mound 149 F 3d 799, rehearing denied 157 F 3d 1153 (US CA 8th Cir, 1998) certiorari denied 525 US 1089 (USSC 1999) 831
Mount Zion State Bank & Trust v Central Illinois Annual Conference of United Methodist Church 556 NE 2d 1270 (Illinois App Ct 1990) 298
Munro v Pape 365 US 167 (USSC 1961) 398
Murray v White 587 A 2d 975 (Vermont CA 1991) 346
Mutual Life Insurance Co v Hillman 145 US 284 (USSC 1892) 705
State v Muyingo 15 P 3d 83 (Oregon Ct App 2000) 786
Myers v Contra Costa County Department of Social Services 812 F 2d 1154 (US CA 6th Cir 1989) 344
State v Nab 421 P 2d 388 (Oregon Supreme Ct 1966) 787
National Union Fire Insurance Co v Lynette C 279 Cal Rptr 394 (California CA 1991) 275
Nelson v Gillette 571 NW 2d 332 (North Dakota Supreme Ct 1997) 293
New Jersey v JQ 617 A 2d 1196 (New Jersey Supreme Ct 1993) 886, 898
People v Newbrough 803 P 2d 155 (Colorado Supreme Ct 1990) 654
Newkirk v Commonwealth 937 SW 2d 690 (Kentucky Supreme Ct 1994) 898
Newman v Cole 872 So 2d 138 (Alabama Supreme Ct 2003) 266
State v Nicholson 2000 WL 122244 (Tennessee Crim App 2000) 898
Nicholson v Williams 203 F Supp 2d 153 (US DC New York 2002) 480
Nicini v Morra 212 F 3d 798 (US CA 3rd Cir 2000) 251, 345, 399, 401, 402
Norfleet v Arkansas Department of Human Services 99 F 2d 289 (USSC 8th Cir 1993) 402
People v Novy 597 NE 2d 273 (Illinois CA 5th Dist 1992) 167
Commonwealth v O'Brien 536 NE 2d 361 (Massachusetts App Ct 1989) 570
Ohio v Roberts 448 US 56 (USSC 1980) 654, 655, 729
State v Oliveira 576 A 2d 111 (Rhode Island Supreme Ct 1990) 788, 810
State v Oliver 760 P 2d 1071 (Arizona Supreme Ct 1988) 786, 800
Olson v Magnuson and the Redeemer Covenant Church of Brooklyn Park 457 NW 2d 394 (Minnesota CA 1990) 297
State v Ostlund 416 NW 2d 755 (Minnesota CA 1987) 828
State v Pace 212 P 2d 755 (Oregon Supreme Ct 1949) 212
State v Padilla 329 NW 2d 263 (Wisconsin CA 1982) 789
Pamela B v Ment 709 A 2d 1089 (Connecticut Supreme Ct 1998) 480
Pamela L v Farmer 112 Cal App 3d 206 (California CA 1980) 270
Re Paoli RR Yard PCB Litigation 35 F 3d 717 (US CA 3d Cir 1994) 896
Parham v JR 442 US 584 (USSC 1979) 479
Parks v Kownacki 711 NE 2d 1208 (Illinois App Ct 1999) 290

US v Peneaux 432 F 3d 888 (US CA 8th Cir 2005) 730
People v Passenger 572 NYS 2d 972 (New York App Div 1991) 787
Patterson v State 532 NE 2d 604 (Indiana Supreme Ct 1988) 140
Pennsylvania v Ritchie 480 US 39 (USSC 1987) 568, 569
Pennycuff v State 727 NE 2d 723 (Indiana App 2000) 695
People of the Territory of Guam v Thomas V Mcgravey 14 F 3d 1344 (US CA 9th Cir 1994) 505
Perez v State 536 So 2d 206 (Florida Supreme Ct 1988) 654
Perry v SN 973 SW 2d 301 (Texas Supreme Ct 1998) 258, 274, 369
PG and RG v State 4 P 3d 326 (Alaska Supreme Ct 2000) 384
Phillips v Deihm 541 NW 2d 566 (Michigan CA 1995) 269
Phillips v Kernan 2006 US App LEXIS 2787 (North Carolina CA 4th Cir 2006) 656
Pierce v Delta County Department of Social Services 119 F Supp 2d 1139 (US DC Colorado 2000) 400, 404
Pierce v Society of the Sisters of the Holy Names of Jesus and Mary 268 US 510 (USSC 1925) 479
Pierce v State 677 NE 2d 39 (Indiana Supreme Ct 1997) 731
Powell v Department of Human Resources of the State of Georgia 918 F Supp 1575 (US DC Georgia 1996) 401
Prince v Massachusetts 321 US 158 (USSC 1944) 479
State v Pulizzano 456 NW 2d 325 (Wisconsin Supreme Ct 1990) 789
Purdy v Fleming 655 NW 2d 424 (South Dakota Supreme Ct 2002) 355, 419
People v Putnam 129 P 2d 367 (California Supreme Ct 1942) 696
Putnam v Walcott 434 US 246 (USSC 1978) 479
Radke v County of Freeborn 694 NW 2d 788 (Minnesota Supreme Ct 2005) 342, 343
State v Ramos 858 P 2d 94 (New Mexico CA 1993) 594
Randi F v High Ridge YMCA 524 NE 2d 966 (Illinois App Ct) 298
Rangel v State 2006 WL 1563058 (Texas CA 2006) 655, 656, 734
Ray v Foltz 370 F 3d 1079 (US CA 11th Cir 2004) 402, 403
Rayfield v South Carolina Dept of Corrections 374 SE 2d 910 (S Carolina CA1988) certiorari denied 379 SE 2d 133 (South Carolina Supreme Ct 1989) 342
Reagan v United States 157 US 301 (USSC 1895) 850
State v Richard AP 589 NW 2d 674 (Wisconsin CA 1998) 914
Richardson v Commonwealth 590 SE 2d 618 (Virginia CA 2004) 788
Richelle L v Roman Catholic Archbishop 106 Cal App 4th 257 (California App Ct 2003) ... 299
US v Ricks 2006 US App LEXIS 2787 (North Carolina 4th Cir 2006) 656, 666
State v Rimmasch 775 P 2d 388 (Utah Supreme Ct 1989) 897
People v Rincon-Pineda 538 P 2d 247 (California Supreme Ct 1975) 696, 697
Rittscher v State 352 NW 2d 247 (Iowa Supreme Ct 1984) 347
Rivera v State 561 So 2d 536 (Florida Supreme Ct 1990) 828
Robbins v Hamburger Home for Girls 32 Cal App 4th 671 (California CA 1995) 372
State v Robinson 735 P 2d 801 (Arizona Supreme Ct 1987) 654, 732
Robinson v Robinson 914 SW 2d 292 (Arkansas Supreme Ct 1996) 266
Robinson v State 453 NE 2d 280 (Indiana Supreme Ct 1990) 140
Robison v Via 821 F 2d 913 (US CA 2nd Cir 1987) 419
People v Rocha 547 NE 2d 1335 (Illinois App Ct 1989) 654
Rodriguez v Williams 729 P 2d 627 (Washington Supreme Ct (en banc) 1986) 236
Roller v Roller 79 P 788 (Washington Supreme Ct 1905) 264, 265
State v Rolon 777 A 2d 604 (Connecticut Supreme Ct 2001)
Roman Catholic Diocese of Jackson v Morrison 905 So 2d 1213 (Mississippi Supreme Ct 2005) 290

Rosado v Bridgeport Roman Catholic Diocesan Corp 716 A 2d 967 (Connecticut Superior Ct 1998) 297
US v Rouse 1997 WL 169279 (US CA 8th Cir 1997) 898
US v Robertson 36 MJ 190 (US Court of Military Appeals 1992) 188
Ruiz-Troche v Pepsi Cola 161 F 3d 77 (US CA 1st Cir 1998) 896
Sabia v State 669 A 2d 1187 (Vermont Supreme Ct 1995) 251, 253, 258
Sabia v Neville 687 A 2d 469 (Vermont Supreme Ct 1996) 350, 354
Salyer v Patrick 874 F 2d 374 (US CA 6th Cir 1989) 344
Samantha H v Fields 2003 WL 193471 (California CA 3rd District) 276
Santosky v Kramer 455 US 745 (USSC 1982) 83, 86, 188, 479
Sapp v Cunningham 847 F Supp 893 (US DC Wyoming 1994) 400, 401
US v Snipes 18 MJ 172 (Court-Martial App 1984) 898
State v Sargent 813 A 2d 402 (New Hampshire Supreme Ct 2002) 897, 899
Sayles v Pennsylvania Department of Public Welfare, County of Monroe 24 F Supp 2d 393 (US DC Pennsylvania 1997) 401
Schaefer v State 676 So 2d 947 (Alabama Crim App 1995) 570
Schutz v State 957 SW 2d 52 (Texas Crim App 1997) 889
State v Schwab 409 NW 2d 876 (Minnesota CA 1987) 849
State v Scott 347 SE 2d 414 (North Carolina Supreme Ct 1986) 851
State v Self 564 NE 2d 446 (Ohio Supreme Ct 1990) 655
State v Settle 531 P 2d 151 (Arizona Supreme Ct 1975) 696
Shelton v State 395 SE 2d 618 (Georgia Ct App 1990) 788
Sims v State 399 SE 2d 924 (Georgia Supreme Ct 1991) 612
Sims v State Department of Social Welfare of Texas 438 F Supp 1179 (Texas DC 1977) 480
People v Sisavath 13 Cal Rptr 3d 753 (California CA 2004) 655
State v Slimskey 779 A 2d 723 (Connecticut Supreme Ct 2001) 596
Commonwealth v Smith 635 A 2d 1086 (Pennsylvania Superior Ct 1993) 831
Smith v Orkin Exterminating Co 540 So 2d 363 (Louisiana App Ct 1st Cir 1989) 289
Smith v State 377 SE 2d 158 (Georgia Supreme Ct 1989) certiorari denied 493 US 825 (USSC 1989) 787
State v Clark Martin Smith 971 P 2d 1247 (Montana Supreme Ct 1998) 889
Smith v The Organization of Foster Families 431 US 816 (USSC 1997) 55
Smith v United States 507 US 197 (USSC 1993) 341
Snell v Tunnell 920 F 2d 673 (US CA 10th Cir 1990) 345
Commonwealth v Snoke 580 A 2d 295 (Pennsylvania Supreme Ct 1990) 746
Snow v State 445 SE 2d 353 (Georgia App 1994) 831
Snowdon v State 867 A 2d 314 (Maryland CA 2005) 734
Snyder v Massachusetts 291 US 97 (USSC 1934) 125
Sorensen v Sorensen 339 NE 2d 907 (Massachusetts Supreme Judicial Ct 1975) 265
State v Spencer 459 SE 2d 812 (North Carolina CA) review denied 462 SE 2d 524 (North Carolina Supreme Ct 1995) 915
State ex rel Juvenile Department of Multnomah County v Spencer 108 P 3d 1189 (Oregon CA 2005) 369
State v Spigarolo 556 A 2d 112 (Connecticut Supreme Ct 1989) certiorari denied 493 US 933 (USSC 1989) 654, 656
Spikes v Banks 586 NW 2d 106 (Michigan CA 1998) 266
SS v McMullan 225 F 3d 960 (US CA 8th Cir 2000) 401
People v Stanaway 521 NW 2d 577 (Michigan Supreme Ct 1994) certiorari denied 115 S Ct 923 (USSC 1995) 569
Stanley v Illinois 405 US 645 (USSC 1972) 188, 400, 479, 480
State Farm Fire & Casualty Co v DTS 867 SW 2d 642 (Missouri CA 1993) 236

State Farm Fire and Casualty Co v Williams 355 NW 2d 421 (Minnesota 1984) 237
Stecks v Young 38 Cal App 4th 365 (California CA 4th Dist 1995) 371
People v Stoll 783 P 2d 698 (California Supreme Ct 1989) 913
Streenz v Streenz 487 P 2d 282 (Arizona Supreme Ct 1970) 265
Strickland v State 550 So 2d 1054 (Alabama Supreme Ct 1989) 656
Summerlin v State 643 SW 2d 582 (Arkansas CA 1982) 851
People v Summers 559 NE 2d 1133 (Illinois App Ct 1990) 828
Suter v Artist M 503 US 347 (USSC 1992) 101, 102
Swanson v Roman Catholic Bishop of Portland 692 A 2d 441 (Maine Law Ct 1997) 293
Swartz v Swartz 87 SW 2d 644 (Missouri Ct App WD 1994) 266
TA v Allen 669 A 2d 360 (Pennsylvania Superior Ct 1995) appeal denied 676 A 2d 1201 (Pennsylvania Supreme Ct 1996) 270, 277
Tague v Richards 3 F 3d 1133 (US CA 7th Cir 1993) 789
Tarasoff v Regents of the University of California 551 P 2d 334 (California Supreme Ct 1976) 367, 369
Taylor v Ledbetter 818 F 2d 791 (US CA 11th Cir 1987) certiorari denied 489 US 1065 (USSC 1989) 397, 402, 404
Tazioly v City of Philadelphia WL 633747 (US DC Pennsylvania 1998) 401
State v Tecca 714 P 2d 136 (Montana Supreme Ct 1986) 828
Tenenbaum v Williams 193 F 3d 581 (US CA 2nd Cir 1999) 479
People v Terry 180 Cal App 2d 48 (California Dist CA 1960) 657
Terry B v Gilkey 229 F 3d 680 (US CA 8th Cir 2000) 401
Thomas v People 803 P 2d 144 (Colorado Supreme Ct 1990) 654
Thompson v County of Alameda 614 P 2d 728 (California Supreme Ct 1980) 370
TM v Carson 93 F Supp 2d 1179 (US DC Wyoming 2000) 399, 403
Tome v United States 513 US 150 (USSC 1995) 733, 735, 745
Tony L by and through Simpson v Childers 71 F 3d 1182 (Kentucky CA 1995) certiorari denied 517 US 1212 (USSC 1996) 355, 404
US v Torres 937 F 2d 1469 (9th Cir 1991) certiorari denied 502 US 1037 (USSC 1992) 789
Touchton v State 437 SE 2d 370 (Georgia CA 1993) 831
Town of Castle Rock v Gonzales 545 US 748 (USSC 2005) 404, 405
Townsend v State 734 P 2d 705 (Nevada Supreme Ct 1987) 897
TP v State 2004 Ala Crim App LEXIS 236 (Alabama Crim App 2004) 734
Trammel v United States 445 US 40 (USSC 1980) 571
Troelstrup v District Court 712 P 2d 1010 (Colorado Supreme Ct (en banc) 1986) 236
Troxel v Granville 530 US 57 (USSC 2000) 188, 479
Turner v District of Colombia 532 A 2d 662 (District of Columbia CA 1987) 345, 355
Tyus v Urban Search Management 102 F 3d 256 (US CA 7th Cir 1996) 895
Uhlrig v Harder 64 F 3d 567 (US CA 10th Cir 1995) 398
Vasquez v State 975 SW 2d 415 (Texas CA 1998) 889
Vernon v State 841 SW 2d 407 (Texas Crim App 1992) 831
People v Vigil 2006 Colo LEXIS 65, reversing 104 P 3d 258 (Colorado Supreme Ct 2006) 734
State v Vincent 768 P 2d 150 (Arizona Supreme Ct 1989) 657
Virgin Islands v Riley 754 F Supp 61 (Virgin Islands DC) 654
Vonner v State 273 So 2d 252 (Louisiana Supreme Ct 1973) 380
Vosburg v Department of Social Services 884 F 2d 133 (US CA 4th Cir 1989) 344
State v Wagner 508 NE 2d 164 (Ohio App 1986) 731
State v Walden 293 SE 2d 780 (North Carolina Supreme Ct 1982) 166
Commonwealth v Wall 586 A 2d 1203 (Pennsylvania Superior Ct 1992) 788
State v Walther 623 NW 2d 205 (Wisconsin App 2000) 570
People v Waples 79 Cal App 4th 1389 (California 4th Dist 2000) 831

Warner v Mitts 536 NW 2d 564 (Michigan CA 1995) 371, 372
Washington v Glucksberg 521 US 702 (USSC 1997) 188
Webb v Neuroeducation Inc 88 P 3d 417 (Washington CA 2004) 372
Wheeler v United States 159 US 523 (USSC 1895) 612
White v Chambliss 112 F 3d 731 (US CA 4th Cir 1987) 401, 402, 403
State ex rel White v Gray 2004 WL 1878198 (Missouri App W Dist 2004) 571
White v Illinois 502 US 346 (USSC 1992) 731
US v White Buffalo 84 F 3d 1052 (US CA 8th Cir 1996) 787
US v White Horse 177 F Supp 2d 973 (US DC, South Dakota, 2001) 738, 915
People v Whitehurst 12 Cal Rptr 2d 33 (California CA 1992) 188
Whitley v New Mexico Children, Youth and Families Department 184 F Supp 2d 1146 (US DC New Mexico 2001) 399
Wilkinson v Balsam 885 F Supp 651 (US DC Vermont 1995) 406
Williams v Butler 577 So 2d 1113 (Louisiana Ct App 1st Cir 1991) 289
Winkler v Rocky Mountain Conference of United Methodist Church 923 P 2d 152 (Colorado CA 1995) 297
Wis v Yoder 406 US 205 (USSC 1972) 479
Wisconsin v Kirschbaum 535 NW 2d 462 (Wisconsin CA 1995) 655
Wisconsin v Williquette 385 NW 2d 145 (Wisconsin Supreme Ct 1986) 279
US v Withorn 54 Fed R Evid Serv 255 (US CA 8th Cir 2000) 787
Wojcik v Town of North Smithfield 874 F Supp 508 (Rhode Island Dist Ct 1995) 371, 400
Wolff v McDonnell 418 US 539 (USSC 1974) 399
US v Woods 484 F 2d 127 (US CA 4th Cir 1973) 149
State v Wright 776 P 2d 1294 (Oregon Ct App 1989) 786
Wright v Arlington County Department of Social Services 388 SE 2d 477 (Virginia CA 1990) 86
Youngberg v Romeo 457 US 307 (USSC 1982) 397, 398, 399, 401
Yvonne L v New Mexico Department of Human Services 959 F 2d 83 (US CA 10th Cir 1992) 345, 399, 402
Zaal v State 602 A 2d 1247 (Maryland CA 1992) 594

List of Abbreviations

Statutes	
CJA 1988	Criminal Justice Act 1988
CYPA 1933	Children and Young Persons Act 1933
YJCEA 1999	Youth Justice and Criminal Evidence Act 1999
Organizations	
ACPO	Association of Chief Police Officers (in England and Wales)
CAIU	Police Child Abuse Intelligence Units (in England and Wales)
CPS	Crown Prosecution Service of England and Wales
HMIC	Her Majesty's Inspectorate of Constabulary
LSCB	Local Safeguarding Children Board
Other	
ICS	Integrated Children's System
Publications	
Achieving Best Evidence	*Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children* (Home Office, Lord Chancellor's Department, Crown Prosecution Service, Department Of Health, the National Assembly for Wales, 2001) 2 volumes.
Aus LRC, *Seen and Heard*	Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission *Seen and Heard: Priority for Children and the Legal Process* (Report 84 1997)
Badgley Report	*Sexual Offences against Children in Canada: Report of the Committee on Sexual Offences against Children and Youths* (Ottawa Ministry of Supply and Services 1984)
Birch and Powell, *Meeting the Challenges of Pigot*	D Birch and R Powell *Meeting the Challenges of Pigot: Pre-trial Cross-Examination under s. 28 of the Youth Justice And Criminal Evidence Act 1999: a Briefing Paper for the Home Office* (February 2004)
Bristol Study	G Davis, L Hoyano, C Keenan, L Maitland and R Morgan *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (HMSO, London August 1999)

Burton et al *Evidence from Criminal Justice Agencies*	M Burton, R Evans and A Sanders *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office Online Report 01/06 London 2006)
Cleveland Report	Dame Elizabeth Butler-Sloss *Report of the Inquiry into Child Abuse in Cleveland 1987* (Cm 412)
Cooper & Roberts *Analysis* of *CPS Monitoring Data*	D Cooper and P Roberts *Special Measures for Vulnerable and Intimidated Witnesses: an Analysis of Crown Prosecution Service, Monitoring Data* (Crown Prosecution Service, London June 2005)
The Climbié Inquiry	Lord Laming (Chair) *The Victoria Climbié Inquiry* (The Stationery Office, London 2003 Cm 5730).
Hamlyn et al *Surveys of VIWs*	B Hamlyn, A Phelps, J Turtle and G Sattar *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research, Development and Statistics Directorate, London June 2004)
Law Com No 245, *Hearsay*	Law Commission of England & Wales *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com 245 Cm 3670 1997)
Memorandum of Good Practice	Home Office and Department of Health *Memorandum of Good Practice on Video-Recorded Interviews with Child Witnesses for Criminal Proceedings* (HMSO London 1992)
Myers, *Evidence in Child Abuse Cases*	J Myers *Evidence in Child Abuse and Neglect Cases* (3rd edn John Wiley & Sons, Inc, New York 1997)
NZLC Report No 55, *Evidence*	New Zealand Law Commission *Evidence* (Report 55 August 1999)
NZLC PP No 26, *Evidence of Children*	New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses: a Discussion Paper* (Preliminary Paper 26 October 1996)
Ontario LRC, *Child Witnesses*	Ontario Law Reform Commission *Report on Child Witnesses* (1991)
Plotnikoff and Woolfson *In Their Own Words*	J Plotnikoff and R Woolfson *In Their Own Words: the Experiences of 50 Young Witnesses in Criminal Proceedings* (NSPCC and Victim Support, London 2004)

Queensland LRC *Evidence of Children*	Queensland Law Reform Commission *The Receipt of Evidence by Queensland Courts: the Evidence of Children (*Report No 55 Dec 2000)
Pigot Report	HH Judge Thomas Pigot QC (Chair) *Report of the Advisory Group on Video-Recorded Evidence* (HMSO, London 1989)
Speaking Up for Justice	Home Office *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (June 1998)
Working Together to Safeguard Children 2006	H M Government *Working Together to Safeguard Children* A guide to inter-agency working to safeguard and promote the welfare of children (Stationery Office, London 2006)

'Children are our future' is a catchphrase often echoed in the media, in academic journals and in everyday conversations. But what does this mean? This question is particularly topical or salient . . . today given the recent (apparent) upsurge in child abuse and child deaths. These tragedies focus our attention on our government and non-government agencies and the efforts they put into the welfare aspects of children. The focus however does not end with a critical focus on the failures of these departments; it also spreads wider afield to the parental responsibilities that are obviously lacking in these prominent cases. Perhaps, it is even fair to say that we, the general public, the politicians and all concerned look immediately for the scapegoat, the persons, the body to point the finger at. There is then a public outcry for something to be done about the plight of these abused children in general terms. Generally we follow the pattern of all similar countries in this position, we ask for Inquiries or for Royal Commissions to provide an analysis, provide a scapegoat, to provide the solution to this problem. Meanwhile the media slowly burns itself out on that topic (unless there is another atrocity) and turns its front page to something else. So the catchphrase becomes less important as a real issue and relegated to the problem of a scapegoat. The Inquiries and Commissions continue and social and government agencies toil on, still unassisted, dreading the next atrocity. The knee-jerk reaction to these tragedies, and media frenzied attacks on the agencies providing support for children continue in the public backdrop. They are the ambulance at the bottom of the cliff picking up the wounded and dead from the most recent tragedy and waiting to pick up the next.[1]

[1] Judge M Brown *Care and protection is about Adult Behaviour: the Ministerial Review of the Department of Child, Youth and Family Services Report to the Minister of Social Services and Employment Hon Steve Maharey* (2000) 33.

1

Introduction

A. Overarching Themes 7
1. Child abuse as a social and legal construction 7
2. The protection of the family as a private sphere 8
3. Child abuse and moral panics 9
4. A federation of agencies? 12

B. A Note on the Comparative Analysis of Other Jurisdictions 13
1. Canada 13
2. Australia 15
3. New Zealand 15
4. The United States 16
5. Scotland 17

There is universal agreement that 'something must be done' about the problem of child abuse, but there is much less clarity about what behaviour qualifies as child abuse and what should be done about it. Policymakers often enact laws as a solution to problems which demand a strong societal response. The presence of more legislation on the statute book, or the creation of more rules which professionals must follow, is one socially acceptable sign that the problem has been recognized by the government of the day and an appropriate response has been made. Child abuse is the epitome of this phenomenon. Contemporary episodic panics about the extent and nature of maltreatment of children, as well as sundry research-led initiatives, have led to a patchwork of legislation, caselaw, procedures, circulars, guidance and inquiry report recommendations which investigators, other child protection professionals and the courts are expected to apply across the distinct areas of family law, criminal law, tort law and the law of evidence. Problems are caused by the plethora of guidance and procedures which professionals in a diverse range of disciplines are meant to read, digest and apply whilst performing an extraordinarily difficult and time-consuming job. While a great deal of the law is well thought out and constructive, its sheer weight and complexity makes applying it a daunting experience. To borrow the description of Sir William Utting, in relation to the guidance on children living away from home, the law is 'now so large that responsible managers have difficulty

in comprehending it all and it is less a tool for practitioners than a subject for their research'.[2]

Legal responses to child abuse are not confined to one legal doctrine. The objective of family law is to prevent child abuse; of criminal law to punish it; and of tort law to compensate for the harm it inflicts. It is an irony that whilst professionals involved in child protection have been increasingly exhorted to work together across disciplines to protect children by coordinating their work, there has been minimal cross-fertilization between the areas of law within which they operate. The development and analysis of policy objectives and their implementation through statutes, procedural protocols and guidance, and ultimately caselaw, tend to be insular exercises. The starting premise for this book is that no one part of the law relating to child abuse can be considered or implemented in isolation. Accordingly this book presents a critical and comprehensive cross-boundary analysis of the investigation and adjudication of allegations of child abuse by the criminal, family and tort systems of law and of the rules of evidence operating in each of those legal systems. We seek to penetrate the rhetoric of coordination between agencies and legal systems with different objectives, ethos and legal and operational constraints.

We describe, compare and evaluate the templates used by these systems:

- to define the type and level of abuse recognized as warranting state intervention,
- to delineate what evidence is relevant to a decision-maker in respect of that allegation and the permissible modes of collecting it,
- to determine the sufficiency of that evidence necessary to trigger juridical or extra-curial action, and
- to establish the range of actions which are available where the allegation is proved to the requisite standard.

We also look across jurisdictional boundaries at the way in which several similar common law jurisdictions, notably the United States, Canada, Australia and New Zealand, have developed their own legal responses to particular—and universal—problems which child abuse raises. We do not attempt to describe all the law in each of these jurisdictions, but rather highlight initiatives and changes in the law which might (or might not) provide some solutions to the problems with which our own jurisdiction is struggling. In addition, our own analysis of the law in England and Wales has been greatly aided by the comparisons which we have been able to make between the law from one jurisdiction and another.

We aim in this book to bring together the law and procedures in key areas of the law concerning child abuse. However, this book is not intended to be a manual for professionals involved in cases where there are concerns about child abuse, for we firmly believe that there is no need for yet another manual. That said, we hope that they will find this book both interesting and useful. We aim to consider each type of law in the context of the other substantive law relating to child abuse and child protection in England and Wales, and in the context of analogous law from other jurisdictions.

[2] Sir William Utting *People Like Us—The Report of the Review of Safeguards for Children Living Away from Home* (HM Stationery Office, 1997) [17.1].

We are seeking to measure the match between black letter law and what actually happens, as one indicator of the legitimacy of that law. Again, we have tried as much as possible to consider the law realistically in terms of how it can operate within the context and constraints of practice. The best child protection law and investigatory and decision-making procedures will be futile if they cannot (or are not) used. So as lawyers, we are attempting to identify the reasons why child abuse investigators and other child protection professionals might not adhere to procedures required by the law.

While we have tried to include as much of the English law as possible there will naturally be lacunae in our description. Our aim is to distil and compare the essence of the legal approaches to this complex legal and social problem across juridical and geographic boundaries. It is in this way that we seek to contribute to debate and to practice. We identify below the overarching themes for our analysis.

A. Overarching Themes

1. Child abuse as a social and legal construction

The single unifying term 'child abuse' encompassing all child maltreatment emerged in the late 1960s and early 1970s. In the 19th century no single term was used to designate adult–child sexual contact. 'It could be called unlawful carnal knowledge, incest, criminal assault, an outrage, an unnatural act, a slip.'[3] Similarly the child protectors of the 1880s and onwards used several terms, predominantly 'child cruelty' and 'child neglect', to define the types of evil which they were intent on preventing and punishing.[4] Even when the term 'child abuse' began commonly to be used in the 1970s, it was used primarily to refer to the physical assault of children.[5] The term became all-encompassing in the late 1980s when the problem of child sexual abuse became more widely recognized. The, now common, use of the term 'child abuse' gives the impression of a universal consensus about what acts and omissions are abusive; however this is far from true.

Time[6], place[7], cultural norms and context[8] dictate which aspects of all the behaviour towards children will be considered to be unacceptable.[9] The lack of a consistent, universally accepted social definition of child abuse can make legal decisions particularly contentious, both in instances where the law breaks new ground in using legal powers in circumstances which historically had not been considered to be abusive,

[3] C Smart 'A History of Ambivalence and Conflict in the Discursive Construction of the "Child Victim" of Sexual Abuse' (1999) 8(3) *Social and Legal Studies* 391, 393.

[4] H Ferguson 'Cleveland in History: The Abused Child and Child Protection 1880–1914' in R Cooter (ed) *In the Name of the Child—Health and Welfare 1880–1940* (Routledge, London 1992).

[5] 'The Battered Babies Scandal' *The Sunday Times* 11th November 1973; see N Parton *The Politics of Child Abuse* (Macmillan, London 1985) 94–95.

[6] Smart (n 3).

[7] Lord Williams of Mostyn (Chair) *Childhood Matters: Report of the National Commission of Inquiry into the Prevention of Child Abuse* (HMSO, London 1996) 1.

[8] S Creighton and N Russell *Voices from Childhood* (NSPCC, London 1995) 29.

[9] Department of Health *Messages from Research* (Studies in Child Protection HMSO, London 1995) 15.

such as corporal punishment,[10] or conversely where the law has not kept in step, or is not viewed as having kept in step, with social views of what is abusive, such as sexual exploitation of relationships of trust.[11]

Not only do legal definitions have to reflect social expectations and definitions, they also have to comply with expected forensic legal norms. Thus in the context of family law, definitions of child maltreatment are ostensibly child-focused, inquiring into whether a particular state of affairs exists. However, since a finding that a child has been abused is a justification in family law for intervention by the state in the way in which a family is organized, the definition of what acts qualify is crucial. This is especially because family law acknowledges the state's interest in preserving the integrity of families. In terms of finding redress for injury, legal action is only justified when a claimant has suffered harm, and the harm was in some way brought about by a person (or organization) who owed him a duty of care. In criminal law the question becomes not only whether a person caused a defined harm, but also whether he did so intentionally, recklessly, or negligently. Often those working in fields other than the law, as well as families trying to cope with the system, may find these distinctions and differences in emphasis confusing and unclear. Many family members going through the family law process may feel themselves on trial and react accordingly, notwithstanding the claims that the family court system is non-adversarial.

For victims too the legal dictionaries of abuse can perplex. A sexual act of a child aged 13 with a man in his 50s is a criminal offence and also constitutes harm which may justify the family court's intervention depending on the circumstances, but the Criminal Injuries Compensation Board has ruled that it is not an act of violence, and hence not compensable, if the child is a prostitute.[12] Even though the child is deemed by the law to be incapable of consenting to the act, de facto consent bars compensation. The principles of one type of law rarely inform the development of another.

2. The protection of the family as a private sphere

While it is axiomatic that children should not suffer abuse, state involvement in the protection of children remains contentious. The boundary between what has been the 'state's business' and 'parents' choice' has been constantly re-negotiated across time and cultures.[13] The concept that parents naturally have their children's best interests at heart is challenged by the reality of child abuse and statistical evidence indicating that members of a child's family are the most likely abusers.[14] At the same time, it is also acknowledged in debate that 'good enough' parenting covers a range of behaviour which other people might consider potentially damaging to a child.

[10] See Chapter 3 section B.4.
[11] See Chapter 3 section E.1(d).
[12] See Chapter 4 section B.
[13] L Fox Harding *Perspectives in Child Care Policy* (2nd edn Longman, London 1997).
[14] P Cawson, C Wattam, S Brooker and G Kelly *Child Maltreatment in the United Kingdom; A Study of the Prevalence of Child Abuse and Neglect* (NSPCC, London 2000) Conclusions.

Moreover it is increasingly being recognized that state involvement can also damage children.[15]

Currently there is wide variation between the value that different jurisdictions place on supporting the child within her family and removing a child from home for her own protection. Underlying these variations are considerable differences in the priorities which are accorded the rights of the child and the rights of the parents. The United States has very little concept of children's rights in law,[16] a highly developed concept of parental ownership of children,[17] and at the same time, a draconian model of state intervention in family life involving the rapid termination of parental rights for those found by a court to have injured their child.[18] In contrast, the burgeoning jurisprudence from the European Court of Human Rights and from English courts under the Human Rights Act 1998,[19] and the children's rights movement in England, have led to a developing legal concept of children's rights in child protection matters. They have also led to a privileging of the child's birth family in law as the most likely promoter of the child's welfare in the future, unless evidence proves otherwise.

3. Child abuse and moral panics

The focus that the law adopts, and indeed the priorities of law-makers, are determined by the type of behaviour that is considered problematic at the time.[20] Fears about child abuse and child abusers may be placed into four main categories:

- child deaths at the hands of a parent, guardian or carer as a result of prolonged abuse within the family;
- sexual and physical abuse of children within an institutional setting such as a church or residential care centre;
- anxiety that paedophiles may be living unrecognized within the community, placing every child in peril;

and, allied to each of these three,

- concern about the mishandling of allegations of child abuse, such as the perpetuation of abuse due to the failure of investigators to respond competently to reports, or conversely the stigmatizing of innocent people as abusers due to the over-reaction of investigators.

[15] N Parton, D Thorpe and C Wattam *Child Protection—Risk and the Moral Order* (Macmilllan, Basingstoke 1997). [16] Discussed in Chapter 4 section F.5(c) and Chapter 2 section A.3.

[17] J Dwyer 'Parents' Religion and Children's Welfare: Debunking the Doctorine of Parents' Rights' (1994) 82 Calif L Rev 1371, 1378; K Hirosawa 'Are Parents Acting in the Best Interests of their Children when they make Medical Decisions Based on Their Religious Beliefs?' (2006) 44 Fam Ct Rev 316.

[18] C Ross 'The Tyranny of Time: Vulnerable Children, "Bad" Mothers and Statutory Deadlines in Parental Termination Proceedings' (2004) 11 Virginia J of Social Policy & L 176.

[19] Discussed in Chapter 4 section F.4(a) and (b) and Chapter 2 section E.

[20] S Cohen *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Blackwell, Oxford 1972) 28.

Child deaths and sexual abuse within the family tend to make the headlines and thus enter public consciousness about child abuse when they are allied to concerns about the official response to the problem.[21] The 'panics' which these cases have created relate to the cruelty which parents can inflict upon their children and the ineffectiveness of the existing child protection mechanisms to prevent its occurrence.[22] Systemic problems have often been revealed within agencies involved in child protection linked to lack of skills, poor record-keeping, and a paucity of mechanisms for coordination and information-sharing between agencies which led to the replication of some work and still other avenues of inquiry and intervention being overlooked.[23]

The scandals emanating from systemic abuse in institutional settings have tended to be centred on situations where mismanagement, or denial that abuse could take place, created a culture in which those who wished to exploit children could do so with impunity, and where the abuse was condoned by inaction, wilful blindness or complicity by officials in the institution and public authorities. Numerous inquiry reports in every jurisdiction we examine have also attested to horrific and systematic abuse within children's residential care facilities and foster homes. The reports clearly concluded that children were abused because of serious failings in the public care system, including an inability to countenance the fact that children were being abused within the institution which was supposed to protect them from precisely that harm.[24]

[21] Dame Elizabeth Butler-Sloss *Report of the Inquiry into Child Abuse in Cleveland 1987* (Cm 412)196 [11.45]; The Right Hon Lord Clyde *Report into the Inquiry into the Removal of Children from Orkney in February, 1991* (HMSO, 1992) 260 [14.94–14.98]. For New Zealand see L Hood *A City Possessed: The Christchurch Civic Creche case* (Longacre Press, Dunedin 2001). For the USA L Wimberley 'The Perspective from Victims of Child Abuse Laws (VOCAL)' in J Myers (ed) *The Backlash: Child Protection Under Fire* (Sage Publications Thousand Oaks, California 1994) 58–59.

[22] H Hendrick *Child Welfare England 1872–1989* (Routledge, London 1994) 254.

[23] London Borough of Brent *A Child in Trust: The Report of the Panel of Inquiry into the Circumstances Surrounding the Death of Jasmine Beckford* (London Borough of Brent 1985) 121; London Borough of Lambeth *Whose Child?: The Report of the Public Inquiry into the Death of Tyra Henry* (London Borough of Lambeth 1987) chapter Four; L Blom Cooper (Chair) *A Child in Mind: Protection of Children in a Responsible Society Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberley Carlile* (London Borough of Greenwich 1987) 128; Lord Laming (Chair) *Victoria Climbié Inquiry* (Cm 5730, 2003) [1.16]; Newham Area Child Protection Committee *Ainlee [Walker] Born 24.06.1999 died 07.01.2000 Chapter 8 Review* (December 2002); Lauren Wright killed by her father and stepmother 6 May 2001: Norfolk Health Authority *Summary Report of the Independent Health Review of the Health Services Treatment of Lauren Wright* (March 2002). In other jurisdictions see for example the United States: the death of Rilya Wilson, discussed in C Keenan 'Lessons from America? Learning from Child Protection Policy in the USA' (2006) 18(1) Child and Family Law Quarterly 43, 62–64; Canada: the investigation into child deaths in British Columbia by Hon Ted Hughes OC, QC *BC Children and Youth Review: an independent review of BC's child protection system* (7 April 2006); New Zealand: Commissioner for Children *Final Report on the Investigation into the Death of James Whakaruru* (New Zealand Office of the Commissioner for Children, Wellington 2000).

[24] See amongst many other excellent reports, A Levy and B Khan *The Pindown Experience and the Protection of Children* (Staffordshire County Council Stafford 1991); G Williams and J McCreadie *Ty Maur Community Home Inquiry* (Cwmbran Gwent County Council 1992); A Kirkwood *The Leicestershire Inquiry—The Report of the Inquiry into Aspects of the Management of Children's Homes in Leicestershire between 1973 and 1986* (Leicestershire County Council 1993); Sir Ronald Waterhouse (Chair) *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974* (Stationery Office London 2000); Hon Stuart G Stratton, former Chief Justice of New Brunswick for the Nova Scotia Department of Justice *Report of an Independent Investigation in Respect*

For the first time public discussion has identified abusers of children as being not only those at the margins of society but those ensconced in positions of trust who have exploited the belief of others that they were decent members of society. When combined with a further moral panic about paedophiles living unrecognized within the community,[25] it has led to calls for more legal mechanisms in criminal and civil law by which the dangerous may be indelibly labelled and controlled. The communication of information to the public about those convicted or suspected of sexual assaults against children has become the key battleground in the debate about legal responses to sexual crimes against children, the premise of campaigners being that if the law can label the dangerous then the risk of abuse may be eradicated by avoiding them.[26]

The United States, Canada, Australia, and to a more limited extent New Zealand, have a long and tragic history of the use of child welfare provisions to effect the eradication of indigenous cultures.[27] Whilst more enlightened attitudes now prevail, the history of children removed forcibly from their families and cultures ostensibly for their own welfare still raises important questions about the operation of any threshold for the state's legal intervention in a multicultural society. It has led to a number of well-meaning attempts within child welfare legislation to recognize cultural diversity and not to penalize non-dominant cultures. The difficulty now is to strike the right balance between recognizing that child-rearing standards may be different in different societies, and applying a national and universally accepted standard of child welfare to prevent harm. For example, at present a cultural defence in relation to physical chastisement of children has been raised by minority groups in all the jurisdictions studied, that the level of violence used is acceptable within the minority culture, if not in the culture of the majority.[28] Some jurisdictions have adopted a model of

of Incidents and Allegations of Sexual and Other Physical Abuse at Five Nova Scotia Residential Institutions (1995), followed by The Hon Fred Kaufman CM, QC *Searching for Justice: an Independent Review of Nova Scotia's Response to Reports of Institutional Abuse* (Government of Nova Scotia 2002); Law Commission of Canada (DA Wolfe, PG Jaffe, JL Jetté and SE Poisson) *Child Abuse in Community Institutions and Organisations: Improving Public and Professional Understanding* (2002); Hon Mr Justice Sean Ryan, Chair, Commission to Inquire into Child Abuse (Ireland) *Identifying Institutions and Persons under the Commission to Inquire into Child Abuse Act 2000: a Position Paper*; Leneen Forde, Chairperson *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999).

[25] A Sampson *Acts of Abuse: Sexual Offenders and the Criminal Justice System* (Routledge, London 1994) 1; D West 'Sexual Molesters' in N Walker (ed), *Dangerous People* (Blackstone Press, London 1996) 52.

[26] T Thomas and B Hebenton 'Tracking Sex Offenders' (1996) 35(2) *Howard Journal* 97; R Ericson 'The Division of Expert Knowledge in Policing and Security' (1994) 45(2) *British Journal of Sociology* 149; *R v Chief Constable of the North Wales Police ex p Thorpe* [1999] QB 396 (CA); *R v Local Authority and Police Authority in the Midlands ex p LM* [2000] 1 FLR 612 (QB); *Re C (Disclosure: Sexual Abuse Findings)* [2002] 2 FLR 375 (Fam Div).

[27] M Bennett, C Blackstock and R de la Ronde *A Literature Review and Annotated Bibliography Focussing on Aspects of Aboriginal Child Welfare in Canada* (2nd edn First Nations Child and Family Caring Society of Canada 2005) 16; S Fournier and E Crey *Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Douglas and McIntyre Ltd, Vancouver 1997); National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families *Bringing them Home* (Commonwealth of Australia, Sydney 1997)108; L Graham 'The Past Never Vanishes: A Contextual Critique Of The Existing Indian Family Doctrine' 23 American Indian L Rev 1.

[28] T Taylor 'The Cultural Defense and its Irrelevancy in Child Protection Law' (1997) 17 B C Third World L Journal 331.

law-making that tries to reflect cultural differences: for example a cultural defence to physical chastisement has been incorporated into three child protection statutes in the United States.[29] Other jurisdictions such as England and Wales have tried to develop a universal standard of child welfare.[30] Neither model has been very successful in reconciling the competing arguments in relation to child-rearing standards.

4. A federation of agencies?

In practice, in each jurisdiction we examine, several different agencies have some responsibility for the protection of children. Initially in England, when the problem of child abuse was rediscovered the relationship of agencies was conceived as a federation.[31] Each would retain its own goals and working practices, and the law would act as the glue between them, creating a shared model of inter-agency working. To this end a series of inter-agency guidance has been published called *Working Together* which aspires to create a shared pattern investigating an allegation for child abuse.[32] An inter-agency body in each area has been expected to write local guidance on the demarcation of responsibility in child protection cases for particular work, run joint training, and jointly investigate the deaths of children within the local area.

However there have always been serious problems in this federation. Information about children has often not been routinely shared between agencies, as the *Victoria Climbié Inquiry* showed so graphically.[33] Child protection has not always been prioritized in individual agencies, and children's cases have fallen between the cracks when all the professionals involved in their case have assumed that someone else was responsible for protecting them. In practice those working on the ground have had to reconcile competing goals between agencies in individual cases.[34] The duty to cooperate has now been placed on a statutory basis.[35] The *Every Child Matters* initiative has lead to the creation of a shared database of all children who have had contact with an agency in relation to their well-being[36] and to the launch of Children's Trusts.[37] This has the potential to move child protection practice from a federative model to a unitary one, as Children's Trusts are expected to bring together practitioners trained by different agencies under a single umbrella to promote child well-being.

[29] See below Chapter 2 section E.2.

[30] See below Chapter 2 section E.1(a).

[31] C Hallett and E Birchall *Coordination and Child Protection* (HMSO, Scotland 1992).

[32] H M Government *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (HM Stationery Office, London 2006).

[33] Lord Laming (Chair) *Victoria Climbié Inquiry* (Cm 5730, 2003) [1.16]. No fewer than 12 agencies with child protection responsibilities knew about Victoria, but none took decisive steps to prevent her death from torture and neglect.

[34] ibid.

[35] Children Act 2004 (England) s 10.

[36] ibid, s 11; HM Government *Information Sharing: Practitioners, Guide to Integrated Working to Improve Outcomes for Children and Young People* (HM Stationery Office, London 2006).

[37] HM Government *Statutory Guidance on Making Arrangements to Safeguard and Promote the Welfare of Children under s 11 Children Act 2004* (HM Stationery Office, London 2005).

It has been realized that 'to do something about child abuse' is not enough: the response must be 'appropriate and proportionate'. Law must also guide the conduct of those working in child protection and hold them, as well as the abusers, accountable for their actions, omissions, and decisions.[38] Family, criminal and tort law have historically developed independently in responding to child abuse cases, with minimal cross-fertilization. The question for the law now is the extent to which it can transcend the conflicting goals and ethos of these different systems of law and reflect the drive for a unified child protection policy and delivery of services. While it seems impossible that there will ever be a single child protection law, it should be possible that one system of law could reflect rather than ignore the responses of other legal systems to child abuse. We hope that this book can be the beginning of this process.

B. A Note on the Comparative Analysis of Other Jurisdictions

Our intention has not been to present a comprehensive view of the approach of other jurisdictions to all the issues we identify in this book. Instead, we have focused on specific aspects of the law elsewhere which are instructive, either as solutions which English law might wish to emulate or might wish to avoid; in a good number of instances the experience elsewhere supports the approach that English law currently takes to the problem. In this section we provide a brief introduction to the other common law legal systems which we consider, primarily to provide a jurisdictional context to their statutes and cases.

1. Canada

The Canadian constitutional system is based upon a Confederation of ten Provinces which are autonomous in their own areas of jurisdiction.[39] Powers not expressly devolved to the Provinces default to the Federal Parliament. There are also three Territories, all in the north of Canada and with First Nations populations in the majority, with some devolved powers from the national government exercised by legislative assemblies. The Province of Quebec has inherited a distinctive civil code tradition from France, and accordingly is not bound by common law decisions rendered by the Supreme Court of Canada.

Unlike Australia and the United States, in Canada jurisdiction over criminal law and the criminal rules of evidence is allocated to the Federal Parliament, with rulings of the Supreme Court of Canada binding on all lower courts, including those in Quebec. Canadian criminal law has been entirely codified in the Criminal Code of Canada since 1898, although the rules of criminal evidence have been only partially codified. There are two unusual features of Canadian criminal justice which are important for our analysis. The first is that the Crown has a general right of appeal from acquittals

[38] M Freeman *The Moral Status of Children—Essays on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague 1997) 279–81.

[39] Allocated by the British North America Act 1867, now the Constitution Act 1981.

on any error of law, which is widely construed. The second is that all offences up to and including first-degree murder may be tried by trial judges sitting without a jury, at the accused's election.[40] One advantage for the defence of electing trial by a superior court judge sitting alone is that the detailed reasons for the verdict greatly expand the scope for an appeal. The defence may also wish to have a seasoned and case-hardened trier of fact in trials involving charges which are thought likely to stir the emotions of jurors. So many of the appellate child abuse cases we discuss were tried by trial judges sitting alone. Nevertheless the content of the rules of evidence is considered by the courts on the basis that cases will be heard by lay juries.

Since 1982, the Canadian Charter of Rights and Freedoms has radically changed substantive and procedural criminal law, as the courts have been given the power to strike down legislation and common law principles which contravene constitutional guarantees. The Charter of Rights largely parallels the guarantees of a fair trial under Articles 5 and 6 of the European Convention on Human Rights, and hence under the Human Rights Act 1998, as well as the right to security of the person (s 7). In the Canadian Charter, as in the European Convention, the guarantees are not absolute, unlike the American Constitution. The potential conflict between fundamental rights and freedoms is recognized and mediated through s 1, which envisages their reasonable limitation 'as prescribed by law', where this can be 'demonstrably justified in a free and democratic society'.[41]

Over the past decade the Supreme Court of Canada has reformed the rules of evidence, returning to first principles to evaluate their continuing validity in the modern criminal and civil trial setting. The Court has decided that if judges have created problems in the law, then the judiciary cannot abdicate responsibility to solve them.[42] The Court's determination to take a 'common sense approach'[43] to the evidential problems of child abuse prosecutions has broken the ground for reform on a much broader basis, such as the abolition of the exclusionary hearsay rule, with the express objective of admitting all relevant and probative evidence.[44] In contrast, Australian, New Zealand and English[45] courts have relied upon Parliament to reform the common law of evidence. For that reason, the evidence statutes in Canada are very far from comprehensive, but the jurisprudence is very instructive.

Marriage and divorce falls within federal jurisdiction; however other aspects of family law such as matrimonial property are governed by the Provinces under their constitutional jurisdiction for property and civil rights. Child protection statutes are enacted by the Provincial Legislatures. Tort law falls within provincial jurisdiction; however decisions from the Supreme Court of Canada, while strictly speaking not binding on Provinces other than the one from which the appeal originated, are considered to represent the common law across all other Provinces

[40] Criminal Code of Canada Part XIX. Juries are required for offences of treason, sedition and the like.
[41] Canadian Charter of Rights and Freedoms s 1.
[42] *Ares v Venner* [1970] SCR 608 (SCC); *R v Khan* [1990] 2 SCR 531 (SCC); *R v B(KG)* [1993] 1 SCR 740 (SCC).
[43] *R v B(KG)* (n 42) 54–55.
[44] *R v Khan* (n 42); *R v Smith* [1992] 2 SCR 915 (SCC); *R v B(KG)* (n 42).
[45] *Myers v DPP* [1965] AC 1001 (HL); *R v Kearley* [1992] 2 AC 228 (HL).

except Quebec, in the absence of any provincial statutes which make the decision distinguishable.

2. Australia

Australia is a federation of six States and one Territory; in addition the federal parliament has jurisdiction over the Australian Capital Territory. Unlike Canada, in Australia any jurisdiction which is not expressly allocated by the 1900 Constitution is deemed to belong to the States. The Australian Capital Territory has its own Legislative Assembly.

The States generally have jurisdiction over justice and criminal law prosecution, and all offences against children will be tried by the law of the State in which they were committed. All Australian States have much more comprehensive and detailed evidence statutes than Canadian jurisdictions. Although the Commonwealth of Australia has limited federal criminal law jurisdiction, it initiated the uniform Evidence Act 1995 which includes provisions relating to child witnesses. The federal model has now been adopted by New South Wales and Tasmania, although some specific provisions differ in the State versions. Western Australia is currently considering adopting it. The Commonwealth's Evidence Act 1995 has also been influential in the legislation of other Australian States.

There is a very clear demarcation in Australian family law between law-making which is the responsibility of the Commonwealth and law-making which is the responsibility of the individual States. The law of the Commonwealth determines all disputes between family members concerning where a child should live and with whom he should have contact, whereas the protection of the child by the State is the responsibility of the individual Australian States. There has been increasing concern that the wide variation in child protection legislation between States is directly hindering the child protection process and there have been some moves to create a single Commonwealth child protection statute.[46]

As in Canada, decisions of the High Court of Australia in areas of State jurisdiction technically are binding only on the State from which the appeal emanated, but are nonetheless for practical purposes considered as affecting the law on the point for all Australian jurisdictions. Australia is the only one of the jurisdictions we study which does not have a national human rights instrument.

3. New Zealand

New Zealand is a unitary state and so all the jurisdictional issues besetting Canadian, American and Australian courts are absent. Until 2004 the highest appellate court for New Zealand was the Privy Council in London, which could grant leave to appeal from decisions of the New Zealand Court of Appeal. The judges on the Privy Council

[46] Discussed in Chapter 2 section E.4.

are empanelled from the Law Lords. This system ended in 2004 with the creation of the new Supreme Court of New Zealand. As in Canada, in New Zealand criminal trials may be conducted by a trial judge sitting without a jury, but in New Zealand the accused must have the court's permission, and juries are required for any offence punishable by a term of life, or 14 years imprisonment or more.[47]

New Zealand has a Bill of Rights which has proved influential in the development of criminal, family and tort law. The rights apply only as against the three branches of government (the legislature, the executive, and the judiciary) or anybody in the performance of any public function, power or duty greeted by the law. Although the Bill of Rights has not been constitutionally entrenched, under s 4 the courts have power to rule that any provision of an enactment which is inconsistent with any provision of the Bill of Rights is 'impliedly repealed or revoked', is invalid or ineffective, or should not be applied by the courts. Modelled on the European Convention on Human Rights (ECHR) and the Canadian Charter, the rights guaranteed are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in free and democratic society' (s 5). The rights guaranteed which are relevant for our discussion are very similar to those in the ECHR and the Canadian Charter of Rights: the rights to life (s 8) and freedom from torture or cruel, degrading or disproportionately severe treatment or punishment (s 9), and to a fair trial in criminal proceedings (s 24). Section 27 guarantees everyone the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognized by law, and so this would apply in child protection proceedings. Every person also has the right to bring civil proceedings against the Crown.

Finally, as discussed further in Chapter 4 section A.1(c), New Zealand is unique amongst the jurisdictions we study in its almost total replacement of the common law tort system with its no-fault compensation scheme for 'accidental' personal injury, which has been interpreted as also applying to intentional torts such as battery and assault committed by child abusers.

4. The United States

Criminal law is generally a matter of State jurisdiction in America, although there is limited Federal jurisdiction in respect of some offences, such as those committed across State boundaries or on Indian reservations or by members of the armed forces. Child abuse prosecutions usually fall within State jurisdiction, so there is a considerable variation across the 52 American jurisdictions in the procedural and substantive rules. Laws relating to child abuse, and in particular those applicable to child witnesses, must pass muster not only under the national Constitution, but also under the appropriate State Constitution. Thus some protective measures for child witnesses may be found to be constitutional in some States but not others, making generalization as to the American experience in protecting child witnesses difficult,

[47] Crimes Act 1961 (New Zealand) s 361B.

and even hazardous. Congress has also legislated in respect of child witnesses in the Federal Rules of Evidence, which provide a model for State legislatures.

Family law and tort law are also generally within State jurisdiction in the United States. However, 'constitutional tort' actions against State agencies for breach of a person's civil rights are tried in the Federal court system.[48] However, Congress has had a very significant influence upon the provision of family and child protection services in all States, by making federal funding contingent upon States enacting statutes with specific provisions detailed in the Child Abuse Prevention and Treatment and Adoption Reform Act,[49] and so there is a marked degree of uniformity across all States in this area. Similarly the Federal Rules of Evidence have proved very influential in State Codes.

5. Scotland

We consider Scottish law primarily in relation to vulnerable witnesses in criminal trials, which both have been influenced by and influence procedures for vulnerable witnesses in England. Even before devolution of powers by the Westminster Parliament to the Scottish Parliament in 1999, Scotland had its own substantive and procedural criminal law. Criminal trials are tried by juries of 15, and a strict majority of eight votes is sufficient for a final verdict. In addition to the usual verdicts of 'guilty' and 'not guilty', juries may return a verdict of 'not proven', which nonetheless does not have any penal consequences. Even the terminology used in the criminal justice system is distinctive—for example the prosecutor is called the procurator-fiscal, and barristers are called advocates. The system of pre-trial discovery, called precognition, permits the defence to interview all the prosecution witnesses.

These jurisdictions share with England and Wales a common legal heritage in the adversarial trial model and the creative development of the law through judicial decisions. They offer a rich terrain for exploration of the problems besetting all courts in the adjudication of child abuse allegations.

[48] Discussed in Chapter 4 section F.4.
[49] Child Abuse Prevention and Treatment and Adoption Reform Act 42 USCA ch 67 §5106a.