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UNIVERSITY OF SOUTHAMPTON

Faculty of Business, Law and Art
School of Law

Trial outcomes in child death cases: influenced by mothering myths?

NGF Orr

Thesis for the degree of Doctor of Philosophy
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UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF BUSINESS LAW AND ART

School of Law

Doctor of Philosophy

TRIAL OUTCOMES IN CHILD DEATH CASES: INFLUENCED BY MOTHERING MYTHS?

NGF Orr

This thesis draws on the insights of rape myth scholarship and also critical responses to battered women who kill to argue that trial outcomes in child death cases may have been influenced by mothering myths. It argues that in order to understand the reasons for wrongful convictions in such cases, we must look beyond the issue of flawed expert evidence, namely to possibly stereotypical interpretations of maternal behaviours around the time the children died. Notwithstanding the difficulties in reading across from rape trials to child death cases, and that both rape myth acceptance research and the carceral approach have been challenged, Gerger et al's definition of a rape myth is adapted here to theorise a *mothering myth*.

Child death cases are interrogated to identify evidence admitted of maternal behaviours, and using the theorisation of a mothering myth, this thesis suggests that if fixed beliefs were used to interpret maternal behaviours, biased inferences may have been made. Little evidence of the probative value of such material has been identified. This thesis therefore examines why evidence of maternal behaviour was admitted and whether mothering myths may have informed aspects of child death cases including admissibility, the absence of judicial directions and jury deliberations.

Options to limit the extent to which juries in future child death cases can rely on mothering myths are considered, and proposals for new judicial directions are made. A roadmap of empirical research is proposed to test the suggested analogies between rape myths and mothering myths, drawing on the methodological insights of rape myth work.

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Trial outcomes in child death cases: influenced by mothering myths?

I-1 Introduction

This thesis argues that outcomes of criminal proceedings may be influenced by inferences based on interpretations of the feminine. A number of high profile wrongful convictions have occurred in child death cases¹ and these form the key cases in this thesis.² The cases are characterised by the unexplained and sudden deaths of one or more young children in the same family. Some of the deaths were termed Sudden Infant Deaths (SIDS) or Sudden Unexplained Deaths in Infancy (SUDI).³ This chapter examines the recognised reasons for and consequences of such convictions. A complex web of blame has been identified involving individuals such as: expert witnesses, pathologists and defence advocates; organisations such as: the criminal justice system (CJS) and the media; and flawed medical materials and unreliable forensic science. Although blame has focussed on expert evidence and how this was handled by the CJS, other evidence was also admitted such as non-medical⁴ or non-forensic materials such as maternal behaviour and childcare, raising the possibility that alternative forms of evidence may also have been significant. Several similar cases in which women were prosecuted and some convicted have also been interrogated to identify

¹ This term is used to refer to cases in which women, as mothers and child carers were convicted for murder or manslaughter, following the unexplained and unexpected death of an otherwise healthy child in their care.

² *R v Clark (Sally) (Appeal against Conviction) (No 2)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Gay (Angela) R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *R v Donna Anthony (Appeal against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001.

³ SID or SUDI, previously known as cot death, are terms used by Coroners to register infant deaths where, following post-mortem, no explanation has been found, such as an infection or metabolic disorder.

⁴ Non-medical evidence may be defined in a number of ways, but is used here to refer to information that is not presented by an expert, nor based on research, whether scientific or medical. In the context of the cases examined in this thesis, the information includes maternal behaviour, child care, internet search history, diary entries, and sexual, personal, social and health history. The term *non-medical* is used instead of *non-expert*, in order to avoid confusion, as the latter term is often used to describe evidence purporting to be specialist and its author an expert, but the courts have decided following rigorous scrutiny, that neither the evidence nor the presenter is expert; see Ward T, “‘A New and More Rigorous Approach’ To Expert Evidence In England And Wales” (2015) 19 (4) *International Journal of Evidence & Proof* 228; Pattenden R, ‘Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia’ (1986) *Crim L Rev* 92; Pattenden R, ‘The Proof Rules of Pre-Verdict Judicial Fact-Finding In Criminal Trials By Jury’ (2009) 125 *LQR* 79; Redmayne M, *Expert Evidence and Criminal Justice* (OUP 2001).

whether information about behaviour and childcare was admitted in addition to expert opinion,⁵ including trials of female childminders and baby-sitters similarly prosecuted for the deaths of children in their care.⁶ Information about maternal behaviour and childcare was admitted in all cases considered apart from two,⁷ indicating that information about a woman's behaviour may be normatively admitted in such circumstances. Although the admission of non-medical information seems sensible, at the law-science divide when medical opinion is contested, controversial or scant, behaviour evidence may be problematic because it may be interpreted stereotypically,⁸ or even prejudicially.⁹ If such information forms part of the body of evidence as a whole that is considered by the courts, then there is a risk that stereotypical interpretations of the feminine may contribute to unsafe convictions.

Some of the consequences of the wrongful convictions considered in this thesis, were criticisms of the judiciary for admitting expert opinion in a laissez-faire¹⁰ approach, and of expert opinion for being unreliable¹¹. But, scant attention has been paid in the literature to the impact on criminal proceedings of admitting evidence of maternal behaviour and child care, and the questions whether such evidence may be interpreted using stereotypical interpretations and whether information about maternal conduct and child care is sufficiently

⁵ *R v Patel (Trupti)* (Reading Crown Court, June 11 2003); *LB of Islington v Al-Alas and Wray* [2012] EWHC 865 (Fam); *R v Khatun (Saleha)* (Central Criminal Court, 22 December 2009); *R v Kai-Whitewind (Chaha'oh Niyol)* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31; *R v Folbigg* [2003] NSWSC 895 (24th October 2003), [2005] NSWCCA 23; *R v Haigh (Tara Elizabeth)* [2010] EWCA Crim 90, [2010] WL 308548 CACD; *Hainey v HM Advocate No 7* [2013] HCJAC 47, 2013 S L T 525, [2014] J C 33; *R v Smith (Margaret)* (Newcastle Crown Court, 10th November 2004); *R v Underdown (Nicky)* [2001] EWCA Crim 1556, 2001 WL 753325 CA (CD). *Walker (Jennifer) v HM Advocate* [2011] HCJAC 51, 2011 S LT 1114;

⁶ *R v Stacey (Helen Brenda)* [2001] EWCA Crim 2031, [2001] WL 1135255 CACD; *R v Holdsworth (Suzanne)* [2008] EWCA Crim 971, 2008 WL 1867253; *R v Henderson* [2010] EWCA Crim 1269, 2010 2 Cr App R 24.

⁷ *Underdown* (n 5) and *Walker* HCJAC (n 5) in *Walker* the wrongful conviction was based upon the lack of proper judicial directions on expert evidence and in *Underdown* the defence offered no argument even though expert opinion for the prosecution was significantly flawed.

⁸ Stereotype defined as 'a widely held but fixed and oversimplified image or idea of a particular type of person or thing e.g. the stereotype of the woman as the carer' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

⁹ Prejudicial defined as 'harmful or detrimental to someone or something' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

¹⁰ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, (Law Com No 325, 2011) paras. 1.8, 1.17, 1.21, 2.16, 3.3, 3.4.

¹¹ *ibid* para 1.18.

reliable and therefore admissible. In contrast, the law privileges scientific and medical opinion evidence within criminal proceedings¹² because it:

compares very favourably against the known infirmities of confessions, eye witness identification and other comparatively equivocal forms of evidence, which nonetheless still routinely supply the principle evidential pillar supporting a criminal conviction.¹³

The experiences of courts, experts and scientists indicate however, that although expert opinion can be highly persuasive, a trusting approach to the admissibility of medical opinion may lead to widespread censure because of the unreliability of some scientific materials. Evidence of maternal behaviour discounted as holding merely peripheral or contextual value, may then as suggested by feminist scholars, be extremely influential when admitted into criminal proceedings. For example, when abused women are prosecuted for killing their husbands¹⁴ or women are claimants in rape cases,¹⁵ feminist scholarship and judicial commentary¹⁶ have noted that information about women's conduct and history may be interpreted using stereotypical expectations, assumptions and rape myths. Consequently, feminist scholars have argued that such interpretations may adversely and unfairly affect outcomes of criminal proceedings, and that information about female behaviour is far from representing innocuous background material.

It is therefore submitted that by analogy, interpretive mechanisms such as stereotypes and myths that have been identified by feminist critiques in particular homicide and rape trials, may be relevant to a consideration of whether stereotypical interpretations of maternal

¹² Genn H, 'Getting To the Truth: Experts and Judges in the "Hot Tub"' [2013] CJQ 275, 277.

¹³ Roberts P and Zuckerman A, *Criminal Evidence* (OUP 2010) 471.

¹⁴ Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 16; *R. v. Lavallee*, [1990]; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

¹⁵ Childs and Ellison (n 14); Ellison L and McGlyn C, 'Commentary on *R v A (No 2)*' in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 205-210.

¹⁶ *R v Seboyer* [1991] 2 SCR 577 paras 140-152, 207 per Madame Justice L'Heureux-Dubé.

behaviour influenced the wrongful convictions of criminal proceedings in child death cases. Although gender is a common factor, there is a concern as to whether one can make use of/transpose ideas such as *rape myths* to describe beliefs¹⁷ about maternal behaviour as *mothering myths*, in order to interrogate and identify what may have happened in child death cases. In addition, there is the question whether as recent feminist scholarship suggests, information about women's conduct is not straightforwardly factual. Accordingly, there are issues as to whether myths about rape myths have been created,¹⁸ and whether female behaviour evidence should be inadmissible, because of the way in which it may be interpreted.

The admission of informal, or corroborative or extraneous evidence is a common feature of criminal proceedings however,¹⁹ and in what I suggest are analogous areas of the CJS, moves to increase the scope of such information are widespread, and evolving. If the admission of one type of information such as previous sexual history becomes subject to legislative hurdles, other types of information may become available such as digitised records or internet searches. Within the context of the courts' approach to place as much relevant, or 'more or less relevant'²⁰ information before the jury, and to rely on 'judicial warnings and common sense to ensure that it is properly evaluated',²¹ it is unlikely that evidence of maternal behaviour would be deemed inadmissible. Such evidence may be regarded in the same way as information in rape cases, such as dress, and or intoxication, as merely facts which the jury are entitled to know, and such information is unlikely to be ruled inadmissible unless there is

¹⁷ Belief defined as 'an acceptance that something exists or is true, especially one without proof' and prejudicial defined as 'harmful or detrimental to someone or something' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

¹⁸ Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2007) 33 (3) OJLS 445.

¹⁹ Roberts and Zuckerman (n 13) 109, 115-125, 581.

²⁰ Tapper C, *Cross and Tapper on Evidence* (OUP 2010) 65 and explanatory notes at n 686-7.

²¹ Pattenden R, and Andrew Ashworth, 'Reliability, Hearsay Evidence and the English Criminal Trial' [1986] LQR 292, 296.

a ‘risk of jury irrationality’.²² The scope of this thesis is therefore not to argue that non-medical information or non-forensic information as it is sometimes referred to should be inadmissible, but to seek to understand whether interpretations of evidence of maternal behaviour may have influenced the outcomes of child death cases and if so, how that may be addressed.

The following section provides brief details of the key child death cases²³ and explores the complex evidential context of such criminal proceedings, to identify the acknowledged reasons for and wider consequences of such cases. The relevance of this discussion is to show that although inferences of maternal behaviour and child care may not have been held responsible for significant miscarriages of justice, and conventional reasoning attributes the causes of wrongful convictions to flawed forensic evidence, the real reasons how ‘jurors generally decide cases’²⁴ as Reece suggests, should not be overlooked.

I-1.1 Wrongful convictions: reasons and consequences

A number of cases are examined in this thesis; in order to illustrate the argument, brief details from two cases *Clark* and *Cannings*²⁵ are given here and further cases are considered in later chapters. Whether or not there was a case to answer in each instance has not been questioned, as in circumstances when a child dies suddenly, and no medical explanation can be found,

²² Pattenden R, ‘Authenticating “Things” in English Law: Principles For Adducing Tangible Evidence in Common Law Jury Trials’ [2008] International Journal of Evidence & Proof, 273, 279

²³ *Clark (No 2)* (n 2).

²⁴ Reece (n 18) 454 citing at n 91 a number of sources including Kibble N, ‘Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases’ (2008) 35 JLS 91, 92; O’Keeffe S, Brown JM and Lyons E, ‘Seeking Proof or Truth: Naturalistic Decision-Making by Police Officers when Considering Rape Allegations’ in Horvath MAH and Brown JM (eds), *Rape: Challenging Contemporary Thinking* (Willan 2009) 3; Dennis I, *The Law of Evidence* (4th edn, Sweet & Maxwell 2010) Ellison L and Munro VE, ‘Getting to (Not) Guilty: Examining Jurors’ Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial’ (2010) 30 LS 74.

²⁵ *Clark (No 2)* (n 2); *Cannings* (n 2).

suspicions may ‘naturally—and— logically’²⁶ attach to the last person who was with the baby or child before it died, ‘whether it be the mother, father, childminder etc’.²⁷

Sally Clark had three children Christopher, Harry and Tom and both Christopher and Harry died suddenly in infancy. Following Harry’s death, suspicions were raised that Clark may have killed both children.²⁸ She was charged with the murder of her two infant sons by smothering, and following a high profile criminal prosecution, was found guilty in 1999 of both counts of murder.²⁹ Her first appeal was dismissed,³⁰ but following referral to the Criminal Cases Review Commission (CCRC) a second appeal was successful.³¹ The prosecution had successfully argued using (flawed) statistical³² and (now discredited) medical opinion,³³ that Clark had smothered her sons to death. She was acquitted at her second appeal because microbiology test results not disclosed at trial indicated that Harry’s death might have been caused by an infection of his cerebro-spinal fluid.

The way Clark was portrayed at trial is nevertheless, also noteworthy. Despite being described positively as a ‘normal, happy, caring mother’³⁴ in the report of the first failed appeal, she was also and more damagingly referred to as a woman who resented being left

²⁶ Hoyano L, ‘Publication Review’ (2014) E & P 200, 202

²⁷ *ibid.*

²⁸ *R v Clark (Sally)* (Chester Crown Court 9 November 1999).

²⁹ *ibid.*

³⁰ *R v Clark (Sally) (Appeal against Conviction) (No 1)* 2000 WL 1421196 (CACD).

³¹ *Clark (No 2)* (n 2).

³² *ibid* paras 96, 99 per Kay LJ. At trial expert witness Professor Meadow was quoted as saying the odds of two infants dying from natural causes in one family were 1 in 73 million and those odds he suggested, were equivalent to placing a bet on a horse at the Grand National at odds of 80 to 1 for four consecutive years and winning. “‘Yes, you have to multiply 1 in 8,543 times 1 in 8,543 and I think it gives that in the penultimate paragraph referring to a Table 3.58 in which a calculation was made by the authors of a research study by Fleming P Blair P Bacon C et al, ‘*Sudden Unexpected Deaths in Infancy the CESDI SUDI Studies 1993-1996* (TSO 2000) 92 Table 3.58 referred to in *Clark (No 1)* (n 31) para 131 per Henry LJ.

³³ Meadow R, *The ABC of Child Abuse*, (3rd edn BMJ Publishing Group, 1997) 29 ‘one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise.’ This opinion represented as a ‘law’ was based upon the opinion expressed in Di Maio D J Di Maio V J M, *Forensic Pathology* (Elsevier, 1989) 291 ‘It is the authors’ opinion that while a second SIDS death...is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide’.

³⁴ *Clark (No 1)* (n 30) para 17 per Henry LJ.

alone, and, who ‘tended to drink more heavily when her husband was away’.³⁵ Such statements may have been relevant, but may also have been perceived as more prejudicial to Clark’s credibility than probative of the essential questions, because of the way in which mothers dependent on alcohol may be judged. Likewise at Clark’s trial and her first appeal, the fact that she had been the sole carer of both her infant boys who died, was held to be similar fact evidence³⁶ of her culpability. At her successful appeal however, Kay LJ held that ‘[c]hildren frequently spend the majority of the early part of their life in the sole care of their mother’.³⁷ An alternative truth and a different view of the evidential relevance of and interpretation of childcare facts was therefore provided. Although the conviction was overturned based on fresh forensic evidence, the probative value at trial and at first appeal of Clark’s alcohol dependency, was given greater evidential weight, than in the second appeal judgement. These short examples from *Clark* indicate that it is not only the weight of medical opinions that may vary and bear contradictory interpretations at different stages within a child death case, but interpretations of evidence of maternal behaviour also.

Clark’s experiences were similar to those of other mothers such as Angela Cannings who had four children, three of whom died suddenly in infancy.³⁸ Tried for the murder of two of her children by smothering, the prosecution used circumstantial evidence and medical opinion to argue that Cannings had murdered two of her three children. She was convicted, but acquitted two years later because medical opinion suggesting that the rarity of three infant deaths in one family was evidence of murder³⁹ was unsafe.⁴⁰ However, in addition to medical opinions the appeal report records information about maternal behaviour and childcare. For example,

³⁵ *Clark (No 1)* (n 30) para 87 per Henry LJ.

³⁶ *ibid* paras 95-102 per Henry LJ.

³⁷ *Clark (No 2)* (n 2) para 15 per Kay LJ.

³⁸ *Cannings* (n 2); and also see Donna Anthony convicted of two counts of murder in *R v Anthony (Donna)* (Bristol Crown Court, 17 November 1998), by smothering her two babies on similar medical opinions to those presented in *Clark* and *Cannings* and her acquittal at her second appeal on similar grounds *Anthony (No 2)* (n 2).

³⁹ *Meadow* (n 33).

⁴⁰ *Cannings* (n 2) para 165 per Judge LJ.

‘There was no suggestion of ill-temper, inappropriate behaviour, ill-treatment, let alone violence, at any time with any one of the four children’.⁴¹ Her behaviour as a mother was apparently exemplary; Cannings was depicted as a ‘woman of good character, described as a loving mother’.⁴² Health visitors reported that she and her husband had always cared for their children properly,⁴³ and that Cannings had bonded with her daughter Jade, who ‘seemed to be a well-cared for and loved baby’.⁴⁴ Her children were however not without unexplained health difficulties and at trial, prosecution counsel suggested that Cannings had smothered one of her sons ‘in an attempt to evoke sympathy’.⁴⁵ By suggesting that Cannings was mentally ill, prosecution counsel may have sought to reduce her credibility by alluding to the syndrome Munchausen Syndrome by Proxy (MSbP),⁴⁶ and that at the very least, Cannings had something wrong with her as an attention-seeking mother. Once fresh medical opinion was accepted that three sudden infant deaths in one family could occur naturally,⁴⁷ prosecution arguments included in the judicial summing up⁴⁸ seeking to syndromise or portray Cannings as a mentally ill mother, no longer carried weight.

The reasons why these and other similar wrongful convictions occurred, is the focus of this thesis. *Clark* was described by defence counsel Clare Montgomery,⁴⁹ as a ‘grotesque

⁴¹ *Cannings* (n 2) para 160 per Judge LJ.

⁴² *ibid* para 4 per Judge LJ.

⁴³ *ibid* para 66 per Judge LJ.

⁴⁴ *ibid* para 94 per Judge LJ.

⁴⁵ *ibid* para 59 per Judge LJ.

⁴⁶ MSbP ‘is a psychological and behavioural condition where someone pretends to be ill or induces symptoms of illness in themselves. It is also sometimes known as factitious disorder. People with the condition intentionally produce or pretend to have physical or psychological symptoms of illness. Their main intention is to assume the "sick role" to have people care for them and be the centre of attention. Any practical benefit for them in pretending to be sick – for example, claiming incapacity benefit – is not the reason for their behaviour. From the available case studies, there appear to be two relatively distinct groups of people affected by Munchausen's syndrome: women aged 20 to 40 years old, who often have a background in healthcare, such as working as a nurse or a medical technician’ see Glossary and UK NHS website <<http://www.nhs.uk/conditions/munchausens-syndrome/Pages/Introduction.aspx>> accessed 2 August 2015.

⁴⁷ *Cannings* (n 2) para 148 per Judge LJ.

⁴⁸ *ibid* para 5 per Judge LJ.

⁴⁹ ‘Clare Montgomery QC’, (*Matrix Chambers*, 2009).

<<https://www.matrixlaw.co.uk/Members/28/Clare%20Montgomery.aspx>> accessed on 29 June 2015.

miscarriage of justice’,⁵⁰ the explanation for which was judged to be the ‘result of flawed evidence given by forensic scientists’.⁵¹ Kay LJ, at Clark’s successful second appeal held that the jury had been misled by medical opinion⁵² and the non-disclosure of forensic evidence,⁵³ findings later confirmed by the Law Commission, who cited the unreliable medical opinion,⁵⁴ and medical expert bias⁵⁵ as fundamental errors in Clark’s prosecution.

The consequences of the appeals in *Clark*, *Cannings* and other similar cases⁵⁶ were extensive. Multiple investigations addressing the use of medical opinion not only in the CJS but also the family courts took place. Expert witnesses faced allegations of professional misconduct, and the CJS was criticised for failing to identify weaknesses in the medical opinion and the consequences for wrongly convicted mothers were severe. Concerns were raised in both Houses of Parliament as to how such miscarriages of justice could have occurred.⁵⁷ As a result, the ‘Attorney-General announced ... a review of 258 criminal convictions for the murder, manslaughter and infanticide of a child under two where there may have been similar miscarriages of justice’,⁵⁸ and a Government inquiry into the use of forensic science.⁵⁹ The Royal College of Pathologists (RCP) and The Royal College of Paediatrics and Child Health (RCPCH) reported on improved investigative protocols into sudden unexpected child deaths⁶⁰

⁵⁰ Batt J, *Stolen Innocence* (Ebury Press 2005) frontispiece citing Clare Montgomery QC addressing the British Academy of Forensic Scientists 18 Feb 2004.

⁵¹ Ibid.

⁵² Meadow (n 33).

⁵³ *Clark No 2* (n 2) para 6 per Kay LJ, ‘First and principally, the failure to disclose the information contained in the microbiological reports meant that important aspects of the case which should have been before the jury were never considered at trial’.

⁵⁴ Law Com No 325 (n 10) para 1.3.

⁵⁵ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability* (Consultation Paper, Law Com No 190, 2009) para 4.18.

⁵⁶ For example *Patel* (n 5); *Anthony* (No 2) (n 2); *Harris* (n 2) all referred to in Law Commission reports.

⁵⁷ Robert Key MP for Salisbury, HC Deb 24 Feb 2004, vol 418, Col 39 WH; Vera Baird HC Deb 24 Feb 2004, vol 418, Col 39 WH; HC Deb 11 Feb 2004, vol 417, col 1461W per Tim Loughton (question) and Solicitor-General (reply); HC Deb 13 Jan 2004, vol 709W Col 716W per Dr Ladyman (reply); HC Deb 11 Feb 2004, vol 417, col 1461W per Tim Loughton (question) and Solicitor-General (reply).

⁵⁸ HC Deb 24 Feb 2004, vol 418, col 31 WH per George Osborne MP for Tatton.

⁵⁹ Science and Technology Committee, *Forensic Science on Trial* (HC-96-1, 2004- 2005).

⁶⁰ Royal College of Pathologists (RCP) and The Royal College of Paediatrics and Child Health (RCPCH) ‘Sudden Unexpected Death In Infancy A Multi-Agency Protocol For Care And Investigation, Report of a

and following Law Commission consultations, a new draft Criminal Evidence (Experts) Bill⁶¹ was recommended to improve the thoroughness with which expert opinions were admitted by the criminal courts.⁶² Changes to the Criminal Procedure Rules (CPR)⁶³ and Criminal Practice Directions (CPD) were effected in 2014,⁶⁴ and lastly senior forensic scientists, reported endeavours to ensure that only judicially relevant scientific evidence is presented in court.⁶⁵

During this period, individual experts who had presented expert and forensic evidence in court were intensely criticised. Three experts who had given evidence or expressed child protection concerns related to *Clark*, were referred to the Fitness to Practise Panel (FPP) of the General Medical Council (GMC) for alleged professional misconduct.⁶⁶ GMC/FPP proceedings found Professor David Southall an eminent paediatrician guilty of serious professional misconduct in 2004 for his involvement with *Clark*.⁶⁷ He was banned from medical practice in child protection for three years.⁶⁸ Dr Alan Williams a pathologist, was found guilty of serious professional misconduct because of his failure to include a vital pathology report in court papers. He was banned in 2006 from undertaking Home Office pathology or Coroners' cases for three years,⁶⁹ after which he was reinstated. Finally, Professor Sir Roy Meadow an eminent paediatrician was found guilty of serious misconduct

Working Group Convened by the RCP and the RCPCH, Chair The Baroness Helena Kennedy QC' (RCP and RCPCH, 2004).

⁶¹ Law Com No 325 (n 10) 148, Draft Criminal Evidence (Experts) Bill.

⁶² Law Com No 190 (n 55); Law Com No 325 (n 10).

⁶³ Criminal Procedure Rules 2014 Parts 33-5; updated as Criminal Procedure Rules 2015, Part 19, page 148.

⁶⁴ Ministry of Justice, Criminal Practice Directions Division V Evidence 33A.

⁶⁵ O'Brien E, Daeid NN and Black S, 'Science in the Court: Pitfalls, Challenges and Solutions' (2015) 370 Phil Trans R Soc (B) <<http://dx.doi.org/10.1098/rstb.2015.0062>> accessed 16 August 2015; Roberts P, 'Paradigms of Forensic Science and Legal Process: A Critical Diagnosis' (2015) 370 Phil Trans R Soc (B) 4 <<http://dx.doi.org/10.1098/rstb.2014.0256>> accessed 16 August 2015.

⁶⁶ *Meadow v GMC* [2006] EWHC 146 (Admin), [2006] 1 WLR 1452; *Meadow v GMC* [2006] EWCA Civ 1390, [2007] QB 462; *Alan Williams v GMC* [2007] EWHC 2603 (Admin), (2008) 99 BMLR 59; *Southall v GMC* [2010] EWCA Civ 484, [2010] Med LR 252; *Southall v GMC* [2009] EWHC 1155 (Admin), [2009] 2 FLR 1246; *Southall v GMC* [2010] EWCA Civ 407, [2010] 2 FLR 1550.

⁶⁷ Dyer C, 'Southall Plans New Career as Expert Witness in Child Protection Cases' [2010] BMJ 340, c2529 <<http://www.bmj.com/content/340/bmj.c2529>> accessed 4 January 2013.

⁶⁸ Williams C, 'Bearing Good Witness: the Reluctant Experts' 2008 38(2) Fam Law 153, 156.

⁶⁹ *Williams (Dr Alan) v General Medical Council*, [2007] EWHC 2603 (Admin) 2007 WL 3352042 paras 7, 156.

by the GMC in 2005, and his name was ordered to be struck off the medical register.⁷⁰ He was however reinstated⁷¹ following both High Court and Court of Appeal⁷² agreement despite the FPP's view that Meadow had over reached himself, by presenting statistics as if he were an authority and allowing the court to rely on his flawed opinions.⁷³

Unsurprisingly, eminent medical authorities drew attention to concerns raised by the medico-legal community as to why medical experts such as paediatricians were blamed for causing injustices. Expert witnesses expressed the view that they had been scapegoated by the courts,⁷⁴ vilified by parents and parent activists,⁷⁵ and made to bear full responsibility for the wrongful convictions. Professor Alan Craft President of the RCPCH, highlighted the consequences to paediatricians who had given expert opinions in good faith:

“Paediatricians are frightened of getting involved in child protection work... I do not think you can actually underestimate what being reported to the GMC actually does to you-and paediatricians...It has a huge effect on them and on their families and on their children”.⁷⁶

⁷⁰ Williams ‘Bearing Good Witness’ (n 68), 156.

⁷¹ *ibid* 157.

⁷² *ibid* 156.

⁷³ *Meadow* EWCA (n 66) para 276 per Sir Anthony Clarke MR.

⁷⁴ *Alan Williams* (n 69) para 10 per Mr Justice Davis expressing the view of Counsel for Williams; Jackson G, ‘Expert Abuse Syndrome: The Scapegoating of Roy Meadow’ (2005) 59 (10) *Int J Clin Pract* 1121; Horton R, ‘A Dismal And Dangerous Verdict Against Roy Meadow’ (2005) 366(9482) *Lancet* 277; Horton R, ‘In Defence of Roy Meadow’ (2005) 366 (9479) *Lancet* 3; Jenny C, ‘The Intimidation of British Paediatricians’ (2007) 119(4) *Pediatrics* 797; Chadwick DL, Krous HF, Runyan DK, ‘Meadow, Southall, and the General Medical Council of the United Kingdom’ 2006 117(6) *Pediatrics* 2247.

⁷⁵ See concerns regarding parent complaints and controversial parent activist Penny Mellor, who ‘has been involved in more than 50 complaints against professionals working in child protection, accusing numerous doctors and nurses of misconduct’ see Lakhani N, ‘Child Abduction Conspirator Brought in to Advise Doctors’ *The Independent* (London 18 July 2010) <<http://www.independent.co.uk/life-style/health-and-families/health-news/child-abduction-conspirator-brought-in-to-advise-doctors-2029417.html>> accessed 20 August 2010; Mike Broad, ‘Penny Mellor Steps Down From GMC Group’ (*Hospital Doctor*, 1 November 2010) at <<http://www.hospitaldr.co.uk/blogs/our-news/penny-mellor-steps-down-from-gmcs-child-protection-working-group>> accessed 20 August 2015; Sally Pook, ‘Meadow Did Mislead The Sally Clark Jury’ *The Telegraph* (London 14 Jul 2005) <<http://www.telegraph.co.uk/news/uknews/1493990/Meadow-did-mislead-the-Sally-Clark-jury.html>> accessed 20 August 2015.

⁷⁶ *Meadow* EWHC (n 66) para 6 quoted by Collins J.

Further, Professor Craft queried why the CJS had not scrutinised itself to see whether it too had made mistakes in failing to identify the flaws in the evidence.⁷⁷ Scholars such as Catherine Williams suggest that some outside the legal profession perceived ‘double standards’⁷⁸ in the law’s attribution of blame to medical expert witnesses. For example, Coroner Roy Palmer queried why the prosecution team did not:

take the statistical advice along to anybody else? Why didn't the defence team do the same and challenge it? Why did the first instance trial judge not put further and more detailed questions? When the issue first went to the first Court of Appeal hearing why didn't they probe it far more thoroughly than they did? And why, above all else, when it went to the second Court of Appeal hearing, did their Lordships in the second Court of Appeal not in any way criticise their judicial brethren below?⁷⁹

The Court of Appeal in *Meadow v GMC*⁸⁰ supported Palmer’s criticisms in its comments regarding judicial proceedings at first instance in *Clark*.⁸¹ As local authority solicitor David Ryden notes, the Court recognised:

a failure by the Crown to put the full research material before the jury, the lack of any direction from the judge for the statistical evidence to be ignored by the jury, and the failure of Mrs Clark’s defence team fully to challenge Professor Meadow, despite being armed with both an eminent expert and a faxed letter as ammunition.⁸²

Nevertheless, such criticisms of the CJS provided small comfort to experts. The high profile child death cases had contributed to a wider concern about the ‘quality of medical expert

⁷⁷ Medico-Legal Society, ‘Paediatricians and Child Protection’ (2007) 75 Medico Legal Journal 55, 61 Address by Professor Sir Alan Craft then President of the RCPCH to the Medico-Legal Society and Discussion.

⁷⁸ Williams C, ‘The Trouble with Paediatricians’ (2010) 18 Medical Law Review 389, 400.

⁷⁹ Craft (n 77).

⁸⁰ *Meadow* EWCA (n 66).

⁸¹ *Clark* (n 28).

⁸² Ryden D, *Miscarriages of Justice, Privacy and Article 8: Part 1* [2007] Family Law 237.

witnesses⁸³ in use in the CJS, and precipitated in addition, a crisis of confidence regarding the use of expert medical opinions in family court proceedings.⁸⁴ And further, as Margaret Hodge and Professor Craft had earlier intimated, if paediatric experts ‘of high standing’ were subjected to professional scrutiny and public abuse, they would be reluctant to give medical evidence in family proceedings,⁸⁵ ‘particularly where child abuse is suspected’.⁸⁶

Solicitor General at the time Harriet Harman, confirmed the wider impact of such wrongful convictions. Although 54 criminal cases involving SIDS were a priority for reinvestigation, ‘potential injustices in care proceedings would be identified and acted upon’.⁸⁷ Paediatricians consequently became reluctant to work as experts in family courts. Chief Medical Officer Sir Liam Donaldson’s 2006 consultation into the availability and quality of medical expert resources to the family courts, followed.⁸⁸ The responses⁸⁹ highlighted that as a consequence of criminal cases such as *Clark* and others,⁹⁰ paediatricians had become afraid of referral to the GMC by ‘vexatious parties’⁹¹ and were therefore deterred from working as expert witnesses⁹² because of potential complaints. Consequently, proposals for the training and accreditation of experts, a new National Knowledge Service (NKS)⁹³ and the incentives and disincentives to working as expert witnesses, needed to be considered.⁹⁴

⁸³ Donaldson L, *Bearing Good Witness, Proposals for Reforming the Delivery of Medical Expert Evidence in Family Law Cases* (Department of Health 2006) 1

⁸⁴ Williams ‘Bearing Good Witness’ (n 68), 154.

⁸⁵ Such an impact is relevant, because the same theories or medical evidence e.g. MSbP, may be used by the same experts in both criminal and family courts.

⁸⁶ HL Deb 17 June 2004, vol 662, cols 35-6 W Written Ministerial Statement Minister for Children Margaret Hodge.

⁸⁷ HC Deb 20 Jan 2004 vol 416 cols 1215-23.

⁸⁸ Donaldson (n 83).

⁸⁹ *Summary of responses to Donaldson* (n 83).

⁹⁰ Donaldson (n 83) 10 citing *Clark No 2* (n 2); *Cannings* (n 2); *Patel* (n 5).

⁹¹ Williams ‘Bearing Good Witness’ (n 68).

⁹² *Ibid.*

⁹³ Donaldson (n 83) 14, paragraphs 34-35 ‘Concerns were ... how the service would be funded...it would be difficult to keep up to date ...it would duplicate existing systems such as the National Institute for Health and Clinical Excellence and the Cochrane Collaboration. One respondent pointed to the danger of having “a body of truth”. One response remarked: “This is a laudable proposal but the most difficult cases are likely to be at the cutting edge of knowledge and therefore keeping such a service up to date will be difficult. An expert should be

The potential disincentives to appearing as a medical expert witness became considerable. Williams highlights a ‘very real perception’⁹⁵ that paediatricians in such circumstances would be discriminated against by their own professional complaints administration processes, if they propounded a ‘child-centred approach’.⁹⁶ Adult-centred campaigning groups were considered to be responsible for organising complaints about paediatricians, and targeting the privacy of individual paediatricians.⁹⁷ More than 97% of complaints against paediatricians were found to be unsubstantiated in a survey conducted by the Royal College of Paediatrics and Child Health (RCPCH).⁹⁸ However, the ‘complaints had a profound impact on the professional and private lives of some paediatricians and had influenced their willingness to undertake future child protection work’.⁹⁹

Williams suggests that such complaints against paediatricians had been escalated by public and media perceptions of ‘injustice and incompetence’.¹⁰⁰ The adverse perceptions of paediatric experts¹⁰¹ arose not from the outcomes of criminal cases, which Williams suggests (perhaps controversially), did not merit such concern,¹⁰² but from the overreaction of the ‘media, encouraged by government, the disciplinary bodies and a determined campaign by groups intent on undermining the reputations of highly regarded professionals’.¹⁰³ That the views of senior courts, professional bodies and private individuals together with media commentary altered public perceptions of expert witnesses from highly respected

aware of issues relevant to the case if s/he is being used as an expert.” This highlights the difficulties with arriving at the degree of certainty the courts seek, especially where the evidence base is not robust.’

⁹⁴ Donaldson (n 83) *Summary of responses to the consultation on "Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in Family Law cases"* (Department of Health, Programme & Partnerships for Children, Families and Maternity 2007) pages 6-14.

⁹⁵ Williams ‘Bearing Good Witness’ (n 68).

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ Turton J and Haines L, *An Investigation into The Nature and Impact of Complaints Made Against Paediatricians Involved in Child Protection Procedures* (RCPCH 2007) 10.

⁹⁹ *ibid.*

¹⁰⁰ Williams ‘Bearing Good Witness’ (n 68) 154.

¹⁰¹ Turton (n 98) 11 ‘Paediatricians have been threatened, received threatening and unpleasant letters, been attacked, stalked, spat on, and accused of child abuse and even child murder’.

¹⁰² Williams ‘Bearing Good Witness’ (n 68), 154.

¹⁰³ *ibid.*

professionals, to enablers of injustice, is very possible. But, contempt proceedings are not available to medical professionals facing disciplinary proceedings in relation to the publication of potentially prejudicial and identifying material,¹⁰⁴ thus increasing the difficulties facing paediatric expert witnesses.¹⁰⁵

In addition, adverse perceptions may compound the reluctance of expert witnesses to give evidence, because many experts are now more aware that ‘the evidence-base behind many physical signs of abuse is weak’.¹⁰⁶ Nevertheless, in certain situations such as child protection proceedings and criminal cases, experts may ‘feel under pressure ... to make a definitive decision about non-accidental injury’.¹⁰⁷ But, paediatricians have expressed misgivings about relying upon controversial medical hypotheses including Fabricated or Induced Illness by Carers (FIIC) (previously known as Munchausen’s Syndrome by Proxy (MSbP), and Shaken Baby Syndrome (SBS)¹⁰⁸ both of which remain contemporary issues for both criminal¹⁰⁹ and family courts.¹¹⁰ Difficulties in diagnosing child abuse have been noted in all types of case¹¹¹ in which physical signs of abuse are ‘ambiguous or even non-existent’,¹¹² and the underlying knowledge base regarding the meaning of bruising or even

¹⁰⁴ Contempt of Court Act 1981; Smith R, ‘GMC under the cosh’ (1998) 316 BMJ 946 (21 March); Kerr A, ‘Are the Media Manipulating the GMC?’ (1998) 316 BMJ 1607 (23 May); *GMC v BBC*, *The Times* (London 11 June 1998); Smith R, ‘Medicine and the Media’ (1998) 316 BMJ 945. An issue to be examined further as to whether the GMC should present a forgiving or an authoritarian approach to erring medical professionals.

¹⁰⁵ This area may merit further investigation in the future.

¹⁰⁶ Turton (n 98) 11.

¹⁰⁷ *ibid.*

¹⁰⁸ Donaldson (n 83) 7; SBS ‘The term used to describe the constellation of injuries resulting from violent shaking of an infant by an adult or adolescent’ see Glossary and Crown Prosecution Service, ‘Non Accidental Head Injury Cases (NAHI, formerly referred to as Shaken Baby Syndrome [SBS]) - Prosecution Approach’ Glossary, (Guidance Document CPS, 6 January 2011) <http://www.cps.gov.uk/legal/l_to_o/non_accidental_head_injury_cases/annex_g_-_glossary/> accessed 2 August 2015; and see the current controversy regarding Dr Waney Squier who gave expert evidence challenging the identification of SBS ‘Doctor Wins Appeal Over Shaken Baby Syndrome Trials Evidence’ *Daily Express* (London 4 November 2016) <<http://www.express.co.uk/news/uk/728745/Doctor-Waney-Squier-wins-appeal-shaken-baby-syndrome-trial-evidence>>.

¹⁰⁹ Denyer J, ‘Experts and Evidence’ (2011) 175(24) *Crim Law & Justice Weekly* 352-354.

¹¹⁰ Delahunty J and Tyler W, ‘A “Miscarriage Of Justice” Corrected: The Difference Expert Evidence and a Full Re-Hearing Can Make To The Outcome: *Sutton LBC v Gray and Butler*’ [2012], 42(Nov) *Fam Law* 1344; Bettel J and Herring J, ‘Shaken Babies and Care Proceedings’ (2011) 41(Dec) *Fam. Law* 1370;

¹¹¹ Turton (n 98) 24.

¹¹² *ibid.*

retinal haemorrhages, is ‘constantly changing’.¹¹³ As Turton and Haines point out in the RCPCH study into complaints about paediatricians, the ‘interpretation of ambiguous physical signs places the paediatrician in a vulnerable position. If abuse is not considered as part of a differential diagnosis, the welfare of the child can be at risk’.¹¹⁴

Paediatricians themselves are therefore at risk, if they fail to recognise abuse and the consequences can be personally and professionally ‘devastating’.¹¹⁵ Accordingly, Turton and Haines suggest that at least in family law cases paediatricians will ‘balance their decision on the side of caution’¹¹⁶ when making child protection decisions, despite needing to rely on controversial and shifting criteria.¹¹⁷ The ‘damned if he does and damned if he doesn’t’¹¹⁸ dilemma was raised in *Southall v GMC*.¹¹⁹ Southall’s advocate argued that paediatricians may be accused of an inappropriately accusatorial stance in relation to parents whose child had died suddenly and in unexplained circumstances, but, paediatricians faced fierce public criticism if they were perceived to have failed to protect children, as demonstrated by the Baby P case.¹²⁰ The GMC however rejected this argument in the same manner that the FPP rejected Meadow’s suggestion that the miscarriage of justice in *Clark* was because ‘...others within the court system did not question ... (the)... erroneous application of statistics in the police statement, Magistrates’ Court and Crown Courts...’.¹²¹

This discussion indicates that in some cases, expert opinion relies on contested or controversial evidence and that it is difficult for experts to provide the courts with the

¹¹³ *ibid.*

¹¹⁴ Turton (n 98) 27.

¹¹⁵ *ibid* 16.

¹¹⁶ *ibid.*

¹¹⁷ See also *Gay v Gay* (n 5) referring to expert evidence of hypernatraemia; and *Alas and Wray* (n 5) referring to evidence of rickets.

¹¹⁸ *Southall v GMC* [2010] EWCA Civ 407, [2010] 2 FLR 1550 para 3.

¹¹⁹ *ibid.*

¹²⁰ *ibid* referring to the death of Peter Connolly see ‘Couple behind Baby P Death Named’ BBC News (London, 11 August 2009) <<http://news.bbc.co.uk/1/hi/england/london/8194235.stm>> accessed 10 June 2015.

¹²¹ *Meadow* EWHC (n 66) paras 50-54 per Collins J; *Meadow* EWCA para 188 per Sir Anthony Clarke MR.

certainty that they require because of the ‘cutting edge’¹²² nature of knowledge, and therefore, the ‘evidence base is not robust’.¹²³ Accordingly, experts may be obliged to make their presentations to the courts more certain than they consider the evidence warrants. Such confidence may be reinforced by professional concerns that they need to protect the vulnerable i.e. the child who has been harmed, or be an advocate for a child whom they suspect may have been unlawfully killed.

The use of controversial, contested and scant expert evidence in criminal or child protection processes has therefore had wide and profound consequences for: parents and carers who may be imprisoned with all the attendant harms especially ‘when injuries are found to have an innocent explanation’;¹²⁴ government bodies concerned about potential injustice within both criminal and family justice systems; the law and its dependence on forensic science; expert opinion concerned with the validity of science and the partiality of experts; the public, anxious that based on media reporting, decision making in courts may be unfair, and as a result, increasing the possibility of complaints against experts.

At the interface between science and law therefore, there are multiple risks as emphasised by Moses LJ. He suggested there is a ‘fundamental difficulty between science and law, in that for two areas that spend so much time together, they are so ill suited’.¹²⁵ Courts need clarity, he stated, but expert witnesses are concerned about the limits to the certainty of science, and in any case, ‘certainty today is tomorrow’s uncertainty’.¹²⁶ Moreover, if evidence is expressed as one hundred per cent certain by an expert, Moses LJ acknowledged that ‘it will invite attack’¹²⁷ within the CJS, because of the ever present possibility that ‘today’s

¹²² Donaldson (n 83) page 14, paragraphs 34-35

¹²³ *ibid* page 14, paragraphs 34-35

¹²⁴ Turton (n 98) 27.

¹²⁵ Moses LJ, Keynote Speech, (Bond Solon Expert Witness Conference 2010).

¹²⁶ *ibid*.

¹²⁷ *ibid*.

orthodoxy, may become tomorrow's outdated learning or heterodoxy'.¹²⁸ But, whereas paediatricians are now keenly aware that the diagnostic techniques of identifying child abuse are limited and uncertain,¹²⁹ according to scientists working with Professor Sue Black OBE and Research Fellow of the Royal Society, the substance and limitations of forensic science are still not fully appreciated by legal fact-finders.¹³⁰

Such considerations indicate that responsibility for wrongful convictions has been attributed more widely than to medical opinion alone, to include not only failings of the criminal justice system but also structural problems relating to the tension between the limitations of science and the desire for certainty in the adversarial criminal courts. The tension in the science-law interface, is exemplified not only by high-profile wrongful SID convictions such *Anthony, Clark* and *Cannings*¹³¹ but in further cases characterised by a context of contested and inconclusive medical opinion. SBS cases such as *Harris*,¹³² salt ingestion/hypernatraemia cases such as *Gay and Gay*,¹³³ and inflicted trauma/rickets cases such as *Al-Alas*,¹³⁴ all point to the uncertainty and diagnostic difficulties involving contemporary forms of medical opinion presented in courts.

Lorraine Harris¹³⁵ for example, a competent, experienced mother was convicted in 2000¹³⁶ of the manslaughter of her son, Patrick, who aged four months. The conviction based on expert medical opinion that Harris had used unlawful force including shaking on Patrick thereby

¹²⁸ Citing *Holdsworth* (2008) 102 BMLR 112 per Toulson LJ para 57.

¹²⁹ Turton (n 98) 24.

¹³⁰ O'Brien et al (n 65).

¹³¹ *Anthony* (No 2) (n 2) *Clark* (No 2) (n 2) *Cannings* (n 2).

¹³² *Harris* (n 2).

¹³³ *Gay and Gay* (n 2).

¹³⁴ *R v Al-Alas and Wray* (Central Criminal Court, 9 December 2011).

¹³⁵ *Harris* (n 2).

¹³⁶ *R v Harris (Lorraine)* (Nottingham Crown Court, 7 September 2000).

causing severe injury to his brain, was overturned in 2005, because the expert opinion was subsequently considered unreliable.¹³⁷

Further, Angela and Ian Gay, inexperienced prospective adoptive parents with whom three children were placed including Christian the eldest at three years old, were prosecuted on two counts;¹³⁸ first for murder because of evidence of trauma to Christian's head revealed at post mortem,¹³⁹ and secondly for manslaughter. They were cleared of murder, but convicted of Christian's manslaughter. Medical opinion was persuasive that no natural cause of Christian's hypernatraemia could be identified and therefore the prosecution argued, the parents had forced Christian to eat salt as a punishment, causing him to lose consciousness and die. The couple were later retried¹⁴⁰ and the conviction overturned¹⁴¹ due to fresh medical opinion heard at appeal, suggesting that Christian may indeed have suffered from naturally occurring hypernatraemia.¹⁴² As with *Clark* and *Cannings* concerns were raised in the House of Commons about the use of controversial and unreliable forensic evidence by the criminal justice system.¹⁴³ Lastly *Al-Alas and Wray*, concerns a young and inexperienced couple charged with the murder of their first son by the infliction of trauma.¹⁴⁴ At their trial however,

¹³⁷ *Harris* (n 2) para 153 per Gage LJ.

¹³⁸ *Gay and Gay* (n 2) para 22 per Richards LJ 'including 11 sub-scalp bruises which appeared to be recent. There were areas of subdural haemorrhaging and bruising, and the brain was grossly swollen. There were also retinal haemorrhages'.

¹³⁹ *ibid.*

¹⁴⁰ *ibid* para 99 per Richards LJ.

¹⁴¹ '*Pair Cleared of Boy's Salt death*' *BBC News* (London, 2 March 2007).

¹⁴² Hypernatraemia is an exceptionally high blood sodium concentration with a number of natural causes see RCPCH, 'The Differential Diagnosis of Hypernatraemia in Children, with Particular Reference to Salt Poisoning an Evidence-Based Guideline' (RCPCH 2009) 26-71.

¹⁴³ 'Early Day Motion 1067 Acquittal of Ian And Angela Gay' <<http://www.parliament.uk/edm/2006-07/1067>> accessed 26 April 2016, the acquittal prompted an Early Day motion put forward by John Hemming MP on 07 March 2007 'That this House notes that a jury recently acquitted Ian and Angela Gay of allegations that they had assaulted a child in their care who had symptoms of retinal haemorrhages and subdural haematomae; further notes that there has been considerable controversy about the use of such allegations as sufficient evidence either to prosecute parents or remove children from parents; and calls for a halt in the prosecutions of parents and actions in the family court under the Children Act 1989 where the only medical evidence of assault is the presence of those two symptoms, pending a detailed peer-reviewed review of the evidence in this area of biomechanics'.

¹⁴⁴ *Al-Alas and Wray* (n 134); 'Parents Shook Four-Month-Old Jayden Wray to Death' *BBC News* (London, 1 November 2011) <<http://www.bbc.co.uk/news/uk-england-london-15540082>> accessed 20 November 2014;

the jury was directed to acquit the parents,¹⁴⁵ because conflicting medical opinion indicated that the child may have died naturally as a result of rickets¹⁴⁶ caused by a vitamin D deficiency.¹⁴⁷

Because of such cases, Professor Black and her colleagues suggest that it is scientists themselves who need to ‘abandon the evidence types that do not meet the required judicial reliability before they are forced to do so in open court’.¹⁴⁸ Accordingly, she and her colleagues supported the suggestion made by the Lord Chief Justice¹⁴⁹ that the introduction, with agreement amongst scientists, of ‘standardized documents’¹⁵⁰ or ‘primers’¹⁵¹ on relevant forensic evidence¹⁵² would help not only juries but judges understand the ‘concepts underpinning the issues in their case’.¹⁵³ As with earlier suggestions regarding a NKS however, the same reservations could be expressed about primers, including funding, duplication¹⁵⁴ and how materials would be kept up to date,¹⁵⁵ even if agreement could be established between competing scientific opinions.

Such anxieties about science and the way it is interpreted, demonstrate the dilemmas facing the courts in seeking reliable information with which juries can make major decisions in the interests of individuals, the public and the law. If trained scientists even now express the need

‘Jayden Wray death: “Baby was Shaken”’ *BBC News* (London, 11 November 2011) <<http://www.bbc.co.uk/news/uk-england-london-15697630>> accessed 20 November 2014.

¹⁴⁵ *Al-Alas and Wray* (n 134).

¹⁴⁶ *ibid* para 1 Theis J.

¹⁴⁷ Delahunty J and Purkiss K, ‘The Vitamin D and Rickets Case: *LB Islington V Al-Alas and Wray*’ (2012) 42 (6) *Fam Law* 659.

¹⁴⁸ O’Brien et al (n 65) page 2.

¹⁴⁹ *ibid*; Roberts (n 65) page 5.

¹⁵⁰ The Rt Hon the Lord Thomas of Cwmgiedd, ‘The Future of Forensic Science in Criminal Trial’s. The 2014 Criminal Bar Association Kalisher Lecture’ <<https://www.judiciary.gov.uk/wp-content/uploads/2014/10/kalisher-lecture-expert-evidence-oct-14.pdf>> para 44 page 12-13.

¹⁵¹ *ibid*.

¹⁵² *ibid*.

¹⁵³ *ibid*.

¹⁵⁴ Donaldson (n 83) page 14, paragraphs 34-35 a National Knowledge System would ‘duplicate existing systems such as the National Institute for Health and Clinical Excellence and the Cochrane Collaboration.’

¹⁵⁵ Rozenberg J, ‘Are Juries Being Blinded By Science?’ *The Guardian* (London 15 October 2014); <<http://www.theguardian.com/law/2014/oct/15/juries-blinded-science-lord-chief-justice-primers>> accessed 01 March 2016.

for an NKS and primers for use in criminal proceedings, then the privileged place of science in law's 'hierarchy of knowledges'¹⁵⁶ is problematic. If even scientific information lacks intrinsic certainty and its limitations are not understood, then there may be an issue about the reliability of other evidence including that of female behaviour. It may be that the many consultations, reviews and investigations outlined above will, or have reduced the admission of inconclusive if not flawed medical opinions. Since the cluster of cot death cases occurred between 1999 and 2004,¹⁵⁷ few similar cases of wrongful conviction involving cot deaths have emerged in this jurisdiction with comparable forensic evidence and admissibility issues.¹⁵⁸ Accordingly, there is the prospect that issues relating to the admissibility of flawed medical opinion in SUDI cases at least, have been overcome.

Nevertheless, two convictions of Scottish mothers Jennifer Walker and Kimberley Hainey,¹⁵⁹ were recently overturned on the basis that the juries had not been properly instructed in how to assess conflicting expert opinions.¹⁶⁰ Walker¹⁶¹ was charged with the culpable homicide of her infant child who was born and later died in 1982. The infant's death had been recorded as a SID in 2002¹⁶² but she was convicted in 2006¹⁶³ on the basis of historical and circumstantial but conflicting medical opinion. Her subsequent appeal on the basis that the jury was not adequately directed in how to assess the conflicting medical opinion, resulted in her acquittal as a 'miscarriage of justice'.¹⁶⁴

¹⁵⁶ Nicholson D, 'Gender Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in Childs and Ellison (n 14) 24.

¹⁵⁷ Anthony (No 2) (n 2); Clark (No 2) (n 2); *Cannings* (n 2); *Patel* (n 5).

¹⁵⁸ *Birmingham City Council v H* [2006] EWHC 3062 (Fam), (2007) 95 BMLR 159.

¹⁵⁹ *R v Walker (Jennifer)* (High Court at Edinburgh, 7 April 2006); *Walker* HCJAC (n 5); *Hainey* (n 5).

¹⁶⁰ *Walker* HCJAC (n 5) para 58 per the opinion of the Court; *Hainey* (n 5) para 53 per the opinion of the Court.

¹⁶¹ *Walker* First instance (n 159).

¹⁶² *ibid* para 4 per the opinion of the Court.

¹⁶³ *Walker* First instance (n 157).

¹⁶⁴ *Walker* HCJAC (n 5) para 58 per the opinion of the Court.

*Hainey*¹⁶⁵ concerned a mother who was convicted in 2011 of the murder of her child following a prosecution that alleged she had ill-treated, neglected, and abandoned her child born in 2008.¹⁶⁶ The child's body was discovered in the mother's flat in 2010, and following *Walker*, the court upheld *Hainey*'s appeal in relation to the charge of murder.¹⁶⁷ The court held that the trial judge had failed to direct the jury properly in relation to the murder charge and the medical and scientific expert evidence,¹⁶⁸ and that a miscarriage of justice may arise if proper judicial directions are not given to the jury, regarding the whole of the expert evidence.¹⁶⁹

Unfortunately, the short Scottish appeal reports do not enable detailed case analysis and, these cases are quite different to the English SID cases in their reliance on historical evidence. But, reference is made to the Scottish cases here to illustrate three points. First, that difficulties in managing medical opinion at trials in SID cases, may not have not entirely disappeared in the UK, although it is acknowledged that Scotland has different CPR to those in England and Wales¹⁷⁰ and has yet to adopt the English approach to considering expert evidence at pre-trial hearings.¹⁷¹ However, it may be too early to say whether the changes to the English CPR¹⁷² and CPD¹⁷³ initiated in 2014-2015, will completely rule out any further wrongful convictions involving SID and expert opinion. Secondly, the High Court of

¹⁶⁵ *Hainey* HCJAC (n 5).

¹⁶⁶ *ibid.*

¹⁶⁷ But she remained in prison on a 7 year sentence following finding upholding a second charge of ill-treatment and neglect on the basis of 'a great deal of circumstantial evidence about the appellant's behaviour prior to and after the baby's death' see *Hainey* HCJAC (n 5) para 53 per the opinion of the Court.

¹⁶⁸ *Hainey* HCJAC (n 5) para 53 per the opinion of the Court.

¹⁶⁹ *ibid.*

¹⁷⁰ Act of Adjournment (Criminal Procedure Rules) 1996 SI, 1996/513 Schedule 2 applicable to cases initiated after 10 March 2008 in Scotland; The Criminal Procedure Rules Part 33 as in force on 6 October 2014, Part 33.1-33.9 Expert Evidence; Part 34.1-34.5 Hearsay Evidence; Part 35.1-35.6 Evidence of Bad Character; Criminal Procedure Rules 2015 Part 19 Expert evidence in England and Wales. The same sections relating to expert evidence are not currently in the Scottish legislation.

¹⁷¹ Connolly C, 'Quack Doctors And Other Experts' [2015] 134 Crim LB 3, 5.

¹⁷² CPR (n 63) Part 19 page 148.

¹⁷³ CPD (n 64) 'factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, sections a-h and Clause 33A.6 '...potential flaws in such opinion which detract from its reliability,' sections a-e including unjustifiable assumptions, flawed data, inferences or conclusions not properly reached'; Ian Dennis, 'Tightening the law on expert evidence' (2015) Crim LR 1.

Justiciary held in both cases that where an inadequate framework of judicial directions regarding complex expert evidence leads the jury to make a wrongful conviction, that verdict may trigger an appeal based upon an infringement of Art. 6 (1) of the European Convention on Human Rights (ECHR).¹⁷⁴ There is a ‘duty of the trial judge under Art. 6 to consider carefully the fairness of such evidence as the trial progresses’,¹⁷⁵ in order that an infringement against Art. 6 does not occur.¹⁷⁶ For reasons of space, neither the differing approaches between the Scottish and English courts to expert opinion, nor the relationship between wrongful convictions based on mishandling of expert evidence and infringement of Art. 6 have been explored in this thesis. That both *Walker* and *Hainey* in the view of the Scottish court were acknowledged as miscarriages of justice however, indicates continuing concerns both about the reliability of expert opinions and the way they are handled by the courts. Further, such cases highlight the importance attached by the judiciary to the need for judicial directions of a sufficient standard to avoid the possibility of an Art. 6 infringement. I suggest such concerns may have relevance to this thesis in relation to the way in which evidence of maternal behaviour evidence is likewise handled by the CJS.

I-1.2 Are there hidden reasons for wrongful convictions?

So far the exploration into reasons for wrongful convictions, indicates that the attribution of responsibility has been widespread. Blame has been directed by the CJS and professional bodies towards experts, but experts themselves have sought to find fault in the CJS, the media, campaigning and complaining parent bodies, and, their own medical and scientific

¹⁷⁴ Article 6 (1) ‘Right to a fair hearing: In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ Council of Europe/European Court of Human Rights, ‘Practical Guide to Article 6 – Civil Limb’ (Council of Europe/European Court of Human Rights 1 May 2013) paras 173, 209, 222 referring to criminal proceedings; *Walker* HCJAC (n 5) paras 3; Walker further argued see para 37 that ‘... the failure of the jury to provide reasons for their decision had denied the appellant a fair trial in terms of art.6 ...’ had followed from that the failure of judicial directions, see paras 37-38 and 57-58; Connolly (n 171).

¹⁷⁵ *Hainey* HCJAC (n 5) para 49 per the opinion of the Court, citing *N v HM Advocate* [2003] JC 140, [2003] SLT 761 para 35 per the opinion of the Court.

¹⁷⁶ *ibid.*

evidence. Scientists and independent bodies such as the Law Commission suggest that the law fails to appreciate that science cannot give it the certainty it seeks and that even with proper judicial directions, juries may still fail to understand the limitations of science.¹⁷⁷

However, the reasons such wrongful convictions if not miscarriages of justice occurred, may not be limited to either flawed organisations or science or mistakes by experts. In child death cases involving expert opinions, which may be inconclusive, poorly contested, controversial or scant, non-medical information such as maternal behaviour or child care is in most cases also admitted, and in some cases forms a significant part of the evidence as a whole, contributing to legal reasoning. The question is therefore asked in this thesis whether despite blame having been comprehensively apportioned elsewhere, non-medical information may also have influenced outcomes of criminal proceedings, and if so how. As evidence of maternal behaviour involves interpretations of the feminine, a broadly feminist approach may be helpful in seeking solutions to this issue.

The meaning of “feminist thinking”,¹⁷⁸ as explained by law professor Celia Wells, is that feminism focusses on gender relations, and feminist thinking is ‘shorthand for “issues that affect women”’,¹⁷⁹ including battered women, date rape, stalking and harassment.¹⁸⁰ Feminist legal theories include the liberal, radical, difference, essentialist, and postmodern approaches. In essence, liberal feminism posits that men and women are equally capable and rational and whilst critiquing sources of inequality as discriminatory and irrational, considers law to be

¹⁷⁷ See the failed appeal of Keran Henderson in which a child minder found guilty of manslaughter for causing a child’s death by shaking *Henderson* (n 5); a juror’s published comments in Times Newspaper, ‘Jury Foreman Guilty of Contempt’ *The BBC* (London, 13 May 2009) <<http://news.bbc.co.uk/1/hi/uk/8047756.stm>> accessed 26 April 2016 and his failed appeal to the ECtHR against a finding of contempt for voicing his concerns about the way the jury failed to understand the limitations of expert opinion under the Contempt of Court Act 1981, in *Seckerson v United Kingdom* Application Nos 32844/10 and 33510/10 (2012) 54 EHRR para 7.

¹⁷⁸ Wells C, ‘The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection’ [2004] *Crim LR* 88, 99.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

neutral.¹⁸¹ The radical feminist position in contrast, perceives gender inequalities as ‘institutional and systemic’,¹⁸² and that ‘institutions of law and state reflect and reinforce male power’¹⁸³ and do not provide a neutral way to overcome bias.¹⁸⁴ Thus Wells, drawing on Carol Smart’s work,¹⁸⁵ suggests that on occasion, relationships between men and women i.e. gender relations, are considered to be ‘characterised by patterns of domination, inequalities, oppressions’,¹⁸⁶ such that women are positioned as subordinate, not only relative to men, but within structures such as the law.¹⁸⁷ So one way of looking at the thesis question would be to use Smart’s radical feminist approach, to ask whether the injustices were as a result of the portrayal of mothers as subject women relative to men, and consequently bad mothers relative to good mothers.¹⁸⁸

Feminism has however ‘many strains’¹⁸⁹ and diverse debates¹⁹⁰ and the radical approach based upon the adversarialism perceived within questions of power and domination suggesting that women are ‘oppressed by a male-identified culture, law and state’¹⁹¹ has been challenged by the postmodern feminist view.¹⁹² In addition, difference theorists, such as cultural feminist and psychologist Carol Gilligan¹⁹³ have further differentiated the radical position by seeking to establish that feminine relational values need to be distinguished from what has been perceived as a masculine rules based approach favoured by law.¹⁹⁴ Thus an

¹⁸¹ Davies M, ‘Unity and Diversity in Feminist Legal Theory’ (2007) 2(4) *Philosophy Compass* 650,653

¹⁸² *ibid* 654.

¹⁸³ *ibid*.

¹⁸⁴ *ibid*.

¹⁸⁵ Smart C, *Law, Crime and Sexuality* (Sage Publications 1995) 125.

¹⁸⁶ Wells (n 178) 92.

¹⁸⁷ *ibid*.

¹⁸⁸ *ibid*.

¹⁸⁹ Wells (n 178) 91.

¹⁹⁰ Davies (n 181).

¹⁹¹ *ibid* 658.

¹⁹² Halley J, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2008), citing MacKinnon C, ‘Toward a Feminist Theory of the State’ (Harvard University Press 1990).

¹⁹³ Gilligan C, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge, Mass.: Harvard University Press, 1993).

¹⁹⁴ Davies (n 181) 655.

alternative approach could be based on the view that mothers are by definition carers,¹⁹⁵ and that the mothers in child death cases if compared to an ideal of the good caring mother, failed to live up to normative standards.

The good mother is however not theorised in the child death cases studied, to provide a logical basis for concluding that in some cases mothers were convicted because they were either perceived or portrayed as bad carers. As the examples of the child death cases indicate, in some cases mothers were described in approving terms, whilst in the same case, their behaviour or child care was judged prejudicially, but why is unclear. If consistent standards of good maternal behaviour and child care had been used in legal reasoning in the cases, then a rational comparison would have enabled logical analogies or distinctions to be made. But if explicit standards are not available then the question is raised how non-medical evidence is assessed and the concern is raised here, that perhaps maternal behaviour and child care was assessed according to personal standards. As has been identified in trials of sexual assault, if women's behaviour is evaluated according to considerations such as personal experience¹⁹⁶ common sense,¹⁹⁷ and logic, then, according to Madame Justice L'Heureux-Dubé, such criteria are 'particularly vulnerable to the application of private beliefs'¹⁹⁸ whether prejudicial beliefs,¹⁹⁹ such as stereotypes,²⁰⁰ and myths.²⁰¹

¹⁹⁵ Gilligan (n 193).

¹⁹⁶ Experience defined as 'the knowledge or skill acquired by a period of practical experience of something', Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

¹⁹⁷ Common sense defined as 'good sense and sound judgement in practical matters' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

¹⁹⁸ *R v Seboyer* [1991] 2 SCR 577 paras 140-152, 207 per Madame Justice L'Heureux-Dubé: at para 140 'Of tantamount importance in answering the constitutional questions in this case is a consideration of the prevalence and impact of discriminatory beliefs on trials of sexual offences. These beliefs affect the processing of complaints, the law applied when and if the case proceeds to trial, the trial itself and the ultimate verdict'; para 207 'Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant, and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and, again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society

The work of feminist legal scholars and judicial commentary shows that the possibility of prejudicial interpretations of the feminine within the criminal justice system is not novel.²⁰²

Accordingly, this thesis explores whether non-medical evidence such as maternal behaviour and child care may have been interpreted according to private beliefs such that the resultant inferences supported findings of guilt. Before explaining the structure and arguments of the thesis in subsequent chapters, a word about fathers.

I-1.2.1 *Fathers*

All the fathers were present in the families at the time of the relevant child's death but, because the fathers were not all present when their children died, suspicions were not raised in relation to them to the same extent. Stephen Clark (Clark's husband) was however investigated following allegations made by a professor of paediatrics David Southall, a claim for which Southall was himself later investigated by the FPP of the GMC.²⁰³ Rohan Wray and Ian Gay were also both charged with involvement in their children's deaths, but only Ian Gay was convicted. Fathers are therefore largely silent in this thesis, and the focus is on the way mothers' behaviour at or around the time their children died may have been interpreted.

1.2 Chapter layout and summary explanations

This thesis suggests that in child death cases, maternal behaviour evidence may have been interpreted using fixed beliefs and that the resulting inferences supported wrongful convictions. In order to examine this proposition, chapter one considers the interpretation of

which, to a large measure, holds these beliefs. It would also appear that recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law';

¹⁹⁹ Belief defined as 'an acceptance that something exists or is true, especially one without proof' and prejudicial defined as 'harmful or detrimental to someone or something' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

²⁰⁰ Stereotype defined as 'a widely held but fixed and oversimplified image or idea of a particular type of person or thing e.g. the stereotype of the woman as the carer' Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

²⁰¹ Myth defined as 'a widely held but false belief or idea' Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/>> accessed 19 May 2016.

²⁰² Childs and Ellison (n 14); Ellison and McGlynn (n 15).

²⁰³ *Council for the Regulation of Healthcare Professionals v Southall* [2005] EWHC 579 (Admin) [2005] ACD 87, Southall was found guilty of professional misconduct and barred from child protection work for three years see Dyer O, 'Southall is Barred for Three Years from Child Protection Work' [2004] BMJ 329.

the feminine in other criminal contexts, such as husband homicide and rape cases. The chapter questions whether female behaviour evidence drawn from the time of the alleged criminal event, whether before or immediately after a sexual assault or a sudden death may have been prejudicially interpreted and whether such inferences may contribute to unjust outcomes. The chapter analogises from these contexts to conclude that in all three areas of the criminal justice system, evidence of women's behaviour may be admitted which may be subject to prejudicial interpretations. Accordingly chapter one suggests that interpretations of maternal behaviour may have been significant in contributing to wrongful convictions in child death cases, especially those characterised by a complex scientific evidential context.

Chapter two examines rape myth scholarship to better understand the nature and definition of terms such as stereotype and myth. Using a leading theorisation of rape myths a definition of a *mothering myth* is proposed. A discourse of mothering is defined and its domain outlined, to provide the contextualising culture within which mothering myths may exist. The chapter concludes by suggesting that interpretations of female behaviour may occur not by dividing women into good or bad on the basis of their behaviours, but by interpreting particular behaviours according to prescriptive and descriptive beliefs about maternal behaviour when a child is dying or has just died.

Chapter three analyses child death cases and applies the *mothering myth* definition to evidence of maternal behaviours identified in child death cases, to consider how such mothers' behaviours may have been interpreted. The chapter concludes that beliefs about what should have constituted maternal behaviour during life-threatening moments for young children, may have supported and justified prejudicial inferences.

Chapter four considers why evidence of female behaviour was admitted. The chapter examines the controls on the admission of evidence of behaviour in rape cases and compares

these to the child death cases. Chapter four concludes that there are few guidelines to assist admissibility decisions as to whether behaviour evidence is relevant or probative in child death cases. Consequently, a permissive approach to the admission of maternal behaviour evidence is identified, opening up the possibility that if reliance is placed upon behaviour in order to enable extrapolations ‘from the past to the present’,²⁰⁴ juries may have used mothering myths to interpret maternal behaviours in order to make inferences about what a mother may have been thinking and feeling at the relevant time.

Chapter five examines whether judicial directions, warnings and summing up may have moderated the jury’s potentially prejudicial interpretations of maternal behaviour in child death cases. Chapter five finds that judicial directions regarding interpretations of maternal behaviour evidence are absent in such cases. Judicial silence in the face of potentially prejudicial evidence of maternal behaviour is therefore troubling, especially if the jury is faced with a complex, contradictory and uncertain evidential context, whilst being encouraged to look at the evidence holistically. Accordingly chapter five suggests that mothering myths may have influenced jury deliberations and decisions.

Chapter six explores the wide ranging and long-term consequences to mothers following wrongful convictions in child death cases and suggests that the potential impacts on mothers of misinterpretations of maternal behaviour evidence, supports the introduction of new judicial directions. In addition, the identification of a female perspective in mock juror rape trials,²⁰⁵ suggests that by analogy, the outcomes of child death cases may not only be influenced by masculine prescriptive beliefs, but by fixed beliefs held by women also. Consequently, although wrongful convictions may have been caused by a number of factors,

²⁰⁴ Redmayne M, *Character in the Criminal Trial* (OUP 2015) 1.

²⁰⁵ Ellison L and Munro VE, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49 (2) *The British Journal of Criminology* 202.

new judicial directions based on the CCC²⁰⁶ and aimed at all jurors, would be justified in order to check the use of mothering myths in interpreting maternal behaviour evidence and to highlight to jurors the need to be sure of guilt.

The thesis summary provides an overview of the thesis findings and submits that the implications of the suggestions made in this thesis may be significant in a number of ways either for the study of the criminal process, or the scholarly understanding of the relevant cases, and perhaps also for policymaking in the way future child death trials may be approached. An outline roadmap for future empirical research is offered to put the suggested analogies between rape myths and mothering myths to the test.

²⁰⁶ Crown Court Compendium (CCC) Part I: Jury and Trial Management and Summing Up (Judicial College, 2016) <<https://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/>> accessed 1 September 2016.

Abbreviations

APA: American Psychiatric Association

ALTE: Acute life threatening event for example when there is no respiratory effort for greater than 20 seconds or for a shorter period if accompanied by cyanosis or bradycardia,

BME – black and minority ethnicity.

CCC: *Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2016) <<https://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/>> accessed 1 September 2016.

CCC: This abbreviation used only in Chapter Four to denote Canadian Criminal Code and the Crown Court Compendium is not referred to in Chapter four.

CESDI: The Confidential Enquiry into Sudden Deaths in Infancy was a maternal and child health system reporting all stillbirths and deaths in infancy in England to the Department of Health started in 1992. CESDI's remit was to improve understanding of the causes of death in late foetal life and infancy. Its aim was to reduce mortality by identifying suboptimal patterns of practice and service provision related to those deaths and to make recommendations for improvement

CEMACH: replaced CESDI in 2003; The Confidential Enquiry into Maternal and Child Health.¹

CJS: Criminal Justice System

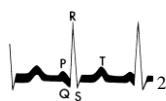
CONI: Care of Next Infant programme; the CONI programme supported families in which there had been a previous SID, and followed up all subsequent siblings of a deceased infant.

CPD: Criminal Practice Direction.

CPR: Criminal Practice Rule.

ECG: Electrocardiogram: the tracing made by an electrocardiograph, as indicated in the illustration with particular points of activity denoted by the letters P Q R S T. This image is used as the benchmark to detect irregularities in heart function, which can be identified using a tracing of the electrical activity in the heart.

Representation of typical ECG:



¹ AM Weindling, 'The Confidential Enquiry into Maternal And Child Health (CEMACH)' (2008) 88 Arch Dis Child 1034

EEG: Encephalogram graph readings. Brain cells continually send messages to each other that can be picked up as small electrical impulses on the scalp. The process of picking up and recording the impulses is known as an EEG.³

NICE: The National Institute for Health and Care Excellence⁴

ERP: The P300 event-related potential for example, is one of several physiological metrics currently being researched to suggest or detect concealed memories. These measurements of electrical nervous activity are considered to be of value in the future by the criminal justice system to detect involvement in criminal or terrorist activities for example. Measurements of autonomic nervous system activity such as heart rate, skin conductance, and blood pressure can be made to accompany the confrontation of a suspect with a photographs or evidence of a suspected criminal action or items. Recordings of brain activity may also be used to demonstrate association or recognition of information in the brain that is allegedly intentionally concealed but which may be exposed on confrontation with relevant materials. Similarly a P300 event-related brain potential may be used, derived from EEG recordings, or functional magnetic resonance imaging, can be used to demonstrate neural responses accompanying the viewing (or hearing) of things or people or materials involved in a suspected criminal event.

FIIC or FIIP: Fabricated (or Factitious) Induced Illness by Carers (FIIC), or Proxy. The presence of such a syndrome, ‘may first be suspected if: physical or psychological examination and diagnostic tests do not explain the reported signs and symptoms. One or more of the following warning signs must also be present: symptoms only appear when the parent or carer is present the only person claiming to notice symptoms is the parent or carer the affected child has an inexplicably poor response to medication or other treatment if a particular health problem is resolved, the parent or carer suddenly begins reporting a new set of symptoms the child’s history of symptoms does not result in expected medical outcomes’.⁵

FDbP: Factitious Disorder by Proxy was defined by the APA as ‘the deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual’s care. The motivation for the perpetrator’s behaviour is presumed to be a psychological need to assume the

² Medical Dictionary, (MedlinePlus, US National Library of Medicine and Merriam Webster search engine 2015) <<http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>> accessed 2 August 2015

³ UK NHS, ‘EEG (electroencephalogram)’ <<http://www.nhs.uk/conditions/eeeg/pages/introduction.aspx?>> 2 August 2015

⁴ NICE Guidance <<https://www.nice.org.uk/guidance>> accessed 2 August 2015

⁵ ‘Fabricated or Induced Illness’ <<http://www.nhs.uk/conditions/fabricated-or-induced-illness/pages/symptoms.aspx>> citing ‘NICE Clinical Guidelines: When To Suspect Child Maltreatment’ (National Institute for Health and Clinical Excellence Guidelines, Issued: July 2009, last modified: March 2013) <<http://www.nice.org.uk/guidance/cg89/resources/guidance-when-to-suspect-child-maltreatment-pdf>> accessed 2 August 2015

sick role by proxy. External incentives for the behaviour, such as economic gain are absent. The behaviour is not better accounted for by another mental disorder.⁶

GMC: General Medical Council

fMRI: Functional magnetic resonance imaging is a technique for measuring brain activity. It works by detecting the changes in blood oxygenation and flow that occur in response to neural activity – when a brain area is more active it consumes more oxygen and to meet this increased demand blood flow increases to the active area. fMRI can be used to produce activation maps showing which parts of the brain are involved in a particular mental process. ...Over the last decade it has provided new insight to the investigation of how memories are formed, language, pain, learning and emotion...fMRI is also being applied in clinical and commercial settings'.⁷⁸

FSID: Foundation for the Study of Infant Deaths. Charity registered in 1971 now known as the Lullaby Trust.

LQTS: Long QT Syndrome: a group of several inherited cardiac arrhythmias characterised by abnormal duration and shape of the QT interval that place the subject at risk of ventricular tachycardia.

MSbP: Munchausen Syndrome by Proxy: a psychological and behavioural condition where someone pretends to be ill or induces symptoms of illness in themselves. Also known as Factitious or Fabricated Disorder. People with the condition intentionally produce or pretend to have physical or psychological symptoms of illness. Their main intention is to assume the "sick role" to have people care for them and be the centre of attention. Any practical benefit for them in pretending to be sick – e.g. claiming incapacity benefit – is not the reason for their behaviour. There appear to be two relatively distinct groups of people affected by Munchausen's syndrome: women aged 20 to 40 years old, who often have a background in healthcare, such as working as a nurse or a medical technician.⁹

NAHI: Non accidental head injury refers to non-accidental injuries caused to a child's head in a number of different ways, including impact from a physical strike or implement. 'The pathological features of NAHI in children often include a triad (sometimes referred to as the Triad) of intracranial injuries consisting of: Retinal haemorrhages (bleeding into the linings of the eyes); Subdural

⁶ American Psychiatric Association, *Diagnostic and Statistical Manual (DSM), DSM-IV-R*, (APA, 2000) 781-782 <<http://www.dsm5.org/Pages/Default.aspx>> accessed 20 May 2013.

⁷ Hannah Devlin, 'How Does an fMRI work?' <How Does an fMRI Work?><<http://psychcentral.com/lib/what-is-functional-magnetic-resonance-imaging-fmri/>> and see <<http://www.ndcn.ox.ac.uk/divisions/fmrib/what-is-fmri/introduction-to-fmri>> accessed 2 August 2015

⁸ Neal Feigenson, 'Brain Imaging And Courtroom Evidence: on The Admissibility And Persuasiveness of Fmri' (2006) 2(3) Int J L C 233

⁹ UK NHS website <<http://www.nhs.uk/conditions/munchausens-syndrome/Pages/Introduction.aspx>> accessed 2 August 2015.

haemorrhages (bleeding beneath the dural membrane); Encephalopathy (damage to the brain affecting function). The mechanisms causing these injuries are not completely understood'.¹⁰

NKS: National Knowledge System

OCJR: Office for Criminal Justice Reform

RH: Retinal haemorrhage a discharge of blood from the blood vessels of the retinal membrane

SCCRC: Scottish Criminal Cases Review Commission.

SBS: Shaken Baby Syndrome; 'The term used to describe the constellation of injuries resulting from violent shaking of an infant by an adult or adolescent'.¹¹

SDH: Subdural haemorrhage; 'a haematoma that occurs between the dura mater and the arachnoid in the subdural space that may apply neurologically significant pressure to the cerebral cortex'.¹²

SMS: Short Message Service for sending e.g. texts

SNS: Social networking site; "online communication platforms which enable individuals to join or create networks of like-minded users."¹³

SADS: Sudden Arrhythmic Death Syndrome ; 'In about 1 in every 20 cases of sudden cardiac death, no definite cause of death can be found, even after the heart has been examined by an expert cardiac pathologist. This is then called Sudden Arrhythmic Death Syndrome. In the past it has also been called Sudden Adult Death Syndrome or Sudden Death Syndrome but, because it affects children too, the term Sudden Arrhythmic Death Syndrome is now used. It is thought that cot death (Sudden Infant Death Syndrome, or SIDS) may be partly due to the same causes responsible for SADS'.¹⁴

SID: Sudden Infant death previously known as cot death, sudden infant death is a term used by Coroners to register infant deaths where, following post mortem, no explanation has been found, such as an infection or metabolic disorder.

SUDI: Sudden Unexpected Death in Infancy.

¹⁰ Crown Prosecution Service, 'Non Accidental Head Injury Cases (NAHI, formerly referred to as Shaken Baby Syndrome [SBS]) - Prosecution Approach' Glossary, (Guidance Document CPS, 6 January 2011) <http://www.cps.gov.uk/legal/l_to_o/non_accidental_head_injury_cases/annex_g_-_glossary/> accessed 2 August 2015.

¹¹ Guidance Document CPS (n 45).

¹² Medline Plus (n 1).

¹³ Micheál O' Floinn, and David Ormerod, 'The Use of Social Networking Sites In Criminal Investigations' (2011) 10 Criminal Law Review 766, 767

¹⁴ Cardiac Risk in the Young (CRY), 'What is the difference between Sudden Arrhythmic Death Syndrome (SADS) and Sudden Cardiac Death (SCD)?' <http://www.sads.org.uk/about_sads.htm> accessed 1 August 2015 (CRY).

Chapter one: Interpreting the feminine: seeking analogies in the criminal justice system

1.0 Introduction

As set out in the Introduction, this thesis argues that although inferences drawn from forensic evidence and expert opinions were blamed for wrongful convictions in some child death cases,¹ it may be possible that prejudicial interpretations of maternal behaviour and child care also influenced the outcomes. In order to investigate this possibility, academic commentary examining interpretations of the feminine in other areas of the criminal justice system (CJS) are considered. Two discrete topic areas are considered in which information about female behaviour is admitted and it is argued, adversely interpreted. The first is when abused women have killed their husbands,² and the second when women are claimants in rape cases.³ In each area feminist scholarship and judicial commentary⁴ suggest that interpretations of female behaviour using stereotypical interpretations or rape myths are damaging, and thus it is argued, adversely affect outcomes of criminal proceedings. By analogy, this thesis suggests that the way in which maternal behaviour was perceived may have influenced the outcomes of child death cases.

¹ *R v Clark (Sally)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Gay (Angela)* *R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *R v Donna Anthony* [2005] EWCA Crim 952, 2005 WL 816001.

² Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 16; *R. v. Lavallee*, [1990]; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

³ Childs and Ellison (n 2) 11; Ellison L and McGlyn C, 'Commentary on *R v A (No 2)*' in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 205-210.

⁴ For example Madame Justice L'Heureux-Dubé in *R v Seboyer* [1991] 2 SCR 577 paras 140-152 and at 207 'Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant, and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and, again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs. It would also appear that recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law'. And at para 140 'Of tantamount importance in answering the constitutional questions in this case is a consideration of the prevalence and impact of discriminatory beliefs on trials of sexual offences. These beliefs affect the processing of complaints, the law applied when and if the case proceeds to trial, the trial itself and the ultimate verdict'.

Recent rape myth scholarship has however also identified that in some instances it is uncertain that outcomes of cases were unquestionably due to stereotypical interpretations or even rape myths, or further whether rape myths even exist.⁵ Consequently, in analogising from cases involving women in rape and homicide trials, the issue must also be considered whether information about maternal behaviour and child care in child death cases may have been rationally interpreted and not stereotypically, or using *mothering myths*.

Chapter one starts by considering the admissibility of non-medical information, before examining the three topic areas.

1.1 Women's behaviour as evidence

The admission of any information for use as evidence in criminal trials is governed by the law of evidence, which in practice functions through exclusionary rules of evidence. The rules balance the notion of 'free proof',⁶ such that all 'relevant evidence should be admissible to prove facts in issue'.⁷ Relevance is judged on the impact of the information on the central question to be decided. If information is logically probative or disprobative of an issue that needs proof, then it may be regarded as *relevant* and hence designated as *evidence*.⁸ Evidence is therefore relative, 'a word of relation used in the context of argumentation e.g. A is evidence of B'.⁹ Relevance can also be expressed in terms of probability in that evidence 'is capable of increasing or decreasing the probability of the existence of the fact in issue'.¹⁰ Thus in *Kilbourne*¹¹ (relied upon in *DPP v P*,¹² which in turn was relied upon in *Clark*),¹³

⁵ Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33 (3) Oxford J Legal Studies 445.

⁶ Nicholson D, 'Gender Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 13.

⁷ *ibid* 13 citing at n 1 Twining W, *Rethinking Evidence: Exploratory Essays* (Blackwell 1990).

⁸ *DPP v Kilbourne* [1973] AC 729, 756 per Lord Simon.

⁹ Twining W, 'Evidence as a Multi-Disciplinary Subject', [2003] Law Probability and Risk 91, 97.

¹⁰ *Randall v R* [2004] 1 WLR 56, para 20 Lord Steyn.

¹¹ *Kilbourne* (n 8) 756 involving similar fact evidence in a case concerning multiple indecent assaults on boys reliant on *Boardman v DPP* [1975] AC 421

¹² *DPP v P* [1991] 2 AC 447 involving similar fact evidence in a case of multiple victims of incest in one family.

‘relevant ... evidence is evidence which makes the matter which requires proof more or less probable’.¹⁴ Judicial interpretations of relevancy in *A (No 2)*¹⁵ have also used the concept of common sense¹⁶ in deciding whether information was admissible: ‘to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue’.¹⁷ The tests for relevancy have therefore remained consistent in their reliance on both objective and subjective tests since JB Thayer’s interpretation of relevancy, as “‘logic and general experience’”.¹⁸

Relevance is therefore an inexact science¹⁹ and consequently, all information that may be relevant to ‘an issue before the court is theoretically admissible’.²⁰ Nonetheless, even logically relevant information may not be admissible if it is not legally relevant i.e., it fails to satisfy the main exclusionary rules of evidence concerning opinion,²¹ hearsay,²² character,²³

¹³ *R v Clark (Sally) (Appeal against Conviction) (No 1)* 2000 WL 1421196, paras 81, 82, 90 per Henry LJ involving questions of similar fact evidence relating to multiple unexplained child deaths.

¹⁴ *Kilbourne* (n 8) 756.

¹⁵ *A (No 2)* (n 2) 45 para 31 involving questions of sexual history evidence in rape trials.

¹⁶ The arguments for and against common sense as grounds for relevance are discussed in more detail in chapter four.

¹⁷ *ibid* 62 per Lord Slynn.

¹⁸ Law Commission, *The Admissibility Of Expert Evidence In Criminal Proceedings In England And Wales A New Approach to the Determination of Evidentiary Reliability* (Consultation Paper Law Com No 190, 2009) 70, para A 3 citing at (n 4), Thayer JB, *A Preliminary Treatise on Evidence at the Common Law* (1898) 265

¹⁹ Munday R, *Evidence* (OUP 2011) 25.

²⁰ Tapper C, *Cross and Tapper on Evidence* (OUP 2010) 64 citing at n. 682 the rule in *XXX v YYY* [2004] EWCA Civ 231, [2004] IRLR 471.

²¹ *ibid* 66, ‘witnesses are generally not allowed to inform the court of the inferences they draw from facts perceived by them, but must confine their statements to an account of such facts.’

²² *Teper v R* [1952] AC 480, [486] (Lord Normand), ‘the rule against admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the witness whose words are spoken by another person cannot be tested by cross examination and the light which his demeanour would throw upon his testimony is lost.’ Usually now admissible in criminal trials if the court is satisfied that it is in the interests of justice for it to be admissible. Criminal Justice Act 2003 s.114 (1) (d).

²³ Criminal Justice Act 2003 s 101 (1) The particular gateways relevant here include: ‘In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if (a) all parties to the proceedings agree to the evidence being admissible, (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it, (c) it is important explanatory evidence, (d) it is relevant to an important matter in issue between the defendant and the prosecution, (f) it is evidence to correct a false impression given by the defendant’; Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001).

and conduct.²⁴ Further, prosecution evidence can be judicially excluded if it is ‘more prejudicial than probative’,²⁵ or it threatens to ‘distort fact-finding or ... render the trial unfair.’²⁶ But, exceptions to each rule exist and relevant information may only be excluded if there are judicial fears of a risk of ‘jury irrationality’.²⁷ The approach of the courts therefore is to place as much relevant, or ‘more or less relevant’²⁸ information before the jury, and to rely on ‘judicial warnings and common sense to ensure that it is properly evaluated’.²⁹ Consequently it is possible that evidence of female behaviour may be permissively admitted and further it may be interpreted in stereotypical ways, rendering it potentially prejudicial.

Feminist scholars have suggested that the interpretation of evidence of behaviour has been problematic in a number of ways for some women.³⁰ Childs and Ellison suggest this is because the law prevents women’s stories, that is, the facts of women’s lived experiences, to be heard or believed.³¹ For example in rape trials, complainant allegations are often delayed in reporting, or changed. Cross-examination will therefore expose as it should, inconsistency, which may result in doubts in the testimony and a discrediting of the complainant.³² As Scheppele suggested ‘The very fact of delay or change is used to demonstrate that the stories cannot possibly be true’,³³ despite the consequences of shock or abuse being linked to confusion and delays in reporting.³⁴ Similarly I suggest, loss of defendant credibility may

²⁴ Tapper (n 20) 67 ‘evidence may generally not be given of a party’s misconduct on other occasions if its sole purpose is to show that he is a person likely to have conducted himself in the manner alleged by his adversary on the occasion that is under enquiry’.

²⁵ Police and Criminal Evidence Act 1984 (PACE), s. 78; *R v Sang* [1980] AC 402, 422.

²⁶ Pattenden R, ‘Authenticating “things” in English law: principles for adducing tangible evidence in common law jury trials’ [2008] E&P 273, 279 citing *R v Cooke* [1995] 1 Cr App R 318, 328.

²⁷ *ibid* 279.

²⁸ Tapper (n 20) 65 and explanatory notes at n 686-7.

²⁹ Pattenden (n 26) 296.

³⁰ Childs and Ellison (n 2) 7.

³¹ *ibid* citing at n 19 Scheppele K, ‘Just the Facts Ma’am: Sexualised Violence, Evidentiary Habits and the Revision of Truth’ (1992) 37 NY Law School L Rev 123.

³² Scheppele (n 31) 126.

³³ *ibid*.

³⁴ *ibid*.

have followed in child death cases, if mothers either changed their testimony³⁵ or delayed seeking professional help,³⁶ even though there may have been good reason such as shock at the time of finding a child not breathing.

Further, Childs and Ellison suggest the law of evidence is more than questions of relevance, admissibility, rules and weight, and is part of a wider picture ‘concerned with how stories are heard and how society determines credibility’.³⁷ Hunter et al suggest gender bias is ‘inherent in evidentiary rules and practices’,³⁸ that ignore women’s understandings³⁹ and therefore women’s credibility is reduced. In addition, that a ‘belief in the neutrality of evidence law’,⁴⁰ should be challenged, for example by asking the ‘woman question’,⁴¹ in order to show how the ways in which women may be perceived by the CJS, differ from ‘the reality of women’s lived experiences’.⁴² If law plays an active role in the creation of gender norms because of the way in which information about women and femininity is admitted and interpreted,⁴³ then, understanding how information about women is construed once admitted, is essential.

1.1.2 Women’s behaviour: is it stereotypically interpreted in homicide cases?
Feminist scholars suggest that the trials of abused women accused of the murder of their husbands, have been characterised by interpretations of their conduct, and also by the prejudicial way in which potential defences to murder were interpreted. For example, a long

³⁵ See changes in testimony relating to time of return home of Mr Clark in *Clark No 1* (n 13) paras 89 (4) per Henry LJ.

³⁶ See delays in calling an ambulance in favour of calling her husband first by Cannings in *Cannings* (n 1) paras 108, 110 per Judge LJ.

³⁷ Childs and Ellison (n 2) 7 citing at (n 18) Orenstein A, “‘My God!’ A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule” (1997) 85 California L Rev 159, 162.

³⁸ Hunter R, McGlyn C and Rackley E, ‘Feminist Judgments an Introduction’ in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 35; Childs and Ellison (n 2) 8.

³⁹ Childs and Ellison (n 2) 8 citing at n 24 Orenstein A, ‘Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where you would Least Expect it’ (1999) 28 Southwestern UL Rev 221, 226.

⁴⁰ Hunter et al (n 38).

⁴¹ Bartlett K, ‘Feminist Legal Methods’ (1990) 103 Harvard Law Review 829.

⁴² Hunter et al (n 38) 35.

⁴³ *ibid* 7 citing the work of Smart S and Foucault M on law as a social discourse in creating and reinforcing gender norms.

standing partial defence of provocation was available in common law⁴⁴ and in legislation,⁴⁵ if the conduct in question satisfied both subjective and objective legal tests of a sudden anger based response to a provoking event and that a reasonable man would have lost self-control and acted as the defendant did. Sanghvi and Nicholson suggest that such tests, based on a male-oriented behavioural norm, ‘significantly prejudiced battered women’.⁴⁶ The reason for such a conclusion was the observation that the behaviour of some women who had killed their husbands following sustained and damaging domestic violence, was not based on a sudden outburst of anger in response to a specific provoking event.⁴⁷ Characteristically, such women suffered ‘a “slow-burn” of fear, despair and anger’⁴⁸ or a delayed reaction,⁴⁹ their anger resulting in violence towards their abuser when he was less likely to be able to react aggressively whether ‘asleep, drunk or otherwise indisposed’.⁵⁰

Consequently, provocation as a defence was not available to women in such circumstances, leading commentators to argue that the ‘law on provocation ... is so based upon male standards of behaviour as to cause considerable injustice to battered women who kill’.⁵¹

Accordingly, the test for satisfying a defence of provocation has been challenged as gendered and biased against women, because indirectly it discriminated against women, who, being generally physically weaker, may not behave in the same way as men who, if they were

⁴⁴ Provocation, defined in common law in *R v Duffy* [1949] 1 All ER 932 per Devlin J ‘Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable man, and actually caused in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her not master of his mind’.

⁴⁵ s3 Homicide Act 1957 as a) things done or said provoked the accused, b) the accused suffered a sudden and temporary loss of control c) the provocation was enough to make a reasonable person do as the accused had done and questions of reasonableness/ proportionality of the response for the jury. (Abolished and replaced by loss of control partial defence in ss 54-56 Coroners and Justice Act 2009).

⁴⁶ Sanghvi R and Nicholson D, ‘Battered Women and Provocation: The Implications of *R v Ahluwalia*’ (1993) Criminal Law Review 728.

⁴⁷ Herring J, Criminal Law (3rd Edition OUP 2008) 302.

⁴⁸ Sanghvi and Nicholson (n 46) 730.

⁴⁹ See *R v Ahluwalia*, [1992] 4 All ER 889; *R v Thornton (No 1)* [1992] 1 All ER 306; *R v Thornton (No 2)* [1996] 2 All ER 1023.

⁵⁰ Sanghvi and Nicholson (n 46) 730.

⁵¹ *ibid.*

physically stronger, could react suddenly and violently and their violence could be excused.⁵²

In addition, because in some cases it has been argued that female behaviour was normatively interpreted either as bad or mad, using factual information about a woman's personal history and behaviour.⁵³

David Nicholson has argued that in cases of women who suffered long term domestic abuse such as Sara Thornton,⁵⁴ such interpretations were influential in the outcomes of criminal appeals.⁵⁵ Multiple and failed sexual and marital relationships, drinking alcohol, and that Thornton worked and was perceived as aggressive, were he suggests, factors contributing to the law's portrayal and perception of her as a bad woman. Because she failed to follow gendered norms of good behaviour, for a woman, Nicholson argues that Thornton was constructed as a stereotype; a bad, 'cold-hearted killer'.⁵⁶ Accordingly, Thornton he suggests was regarded as deserving of the 'law's full penalty'⁵⁷ for the homicide of her husband, and, at her first appeal, as undeserving of a reduction in the severity of her punishment by a partial defence of either provocation or, as her defence sought to argue at trial, of diminished responsibility.⁵⁸

Thornton was portrayed at trial and at her first appeal as a vulnerable woman, with a long standing personality disorder who had suffered early mental health difficulties.⁵⁹ Her marriage to an alcoholic man described as violent, jealous and possessive⁶⁰ may have worsened her mental state although there was disagreement amongst expert opinions, with

⁵² Connelly C, 'Commentary on AG for Jersey v Holley in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 292.

⁵³ Nicholson (n 6) 21 citing at n 43 Heidensohn F, *Women and Crime* (Macmillan 1985); Jones A, *Women Who Kill* (Victor Gallancz 1991); Bell C and Fox M, *Telling Stories of Women who Kill* (1995) 5 SLS 471.

⁵⁴ *Thornton (No 1)* (n 49); *Thornton (No 2)* (n 49).

⁵⁵ Nicholson (n 6) 17, 21.

⁵⁶ *ibid* 21.

⁵⁷ Childs and Ellison (n 2) 17.

⁵⁸ Nicholson (n 6) 21; *Thornton (No 1)* (n 49); *Thornton (No 2)* (n 49).

⁵⁹ *Thornton (No 1)* (n 49) 113 per Beldam LJ.

⁶⁰ *ibid*.

two psychiatrists saying her mental responsibility was impaired and one saying that it was not.⁶¹ Her words reported by the police at trial apparently confirmed her culpability. She said, “I sharpened up the knife so I could kill him. Do you know what he has done to me in the past?”... At that moment Martin passed by. She took hold of his arm and said: “I want to say here and now this was all my fault and nothing to do with anyone else”.⁶² Thornton thus took responsibility for her actions, clearing her son (Martin) of any involvement, but understandably perhaps portraying herself as bad, and not mad, whilst simultaneously protecting her son. Consequently, perhaps because of expert disagreement regarding her mental state and her own testimony, the jury did not accept that she satisfied the legal tests for diminished responsibility i.e. that she was ‘suffering from an abnormality of mental functioning’⁶³ which explained what she did.⁶⁴ Neither was she able to fulfil the tests for provocation such as a sudden loss of self-control, and her first appeal failed.

In *Thornton (No 2)* however, Lord Taylor CJ accepted that medical knowledge since the time of her trial and first appeal had ‘progressed considerably’.⁶⁵ Fresh evidence of Battered Women's Syndrome (BWS)⁶⁶ he agreed could represent a ‘relevant characteristic’⁶⁷ that should be taken into consideration together with Thornton’s personality disorder, when

⁶¹ *ibid* 116, 119 per Beldam LJ.

⁶² *ibid* 115 per Beldam LJ.

⁶³ Diminished responsibility was defined at the time in s 2 (1) Homicide Act 1957 as: (1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—...provides an explanation for D’s acts and omissions in doing or being a party to the killing; (1A) Those things are—...(c) to exercise self-control; (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct. Although this is a question of fact for the jury, medical expert evidence is also relied on by the court. The defence is now amended by s 52(1) Coroners and Justice Act 2009, as an ‘abnormality of mental functioning’, which arose from a ‘recognised medical condition’, ‘substantially impaired D’s ability to understand the nature of her conduct, form a rational judgment, or exercise self-control, and that the abnormality ‘provides an explanation’ for D’s doing or being a party to the killing’. BWS has been accepted as an explanation, providing a partial defence to a charge of murder.

⁶⁴ *Thornton (No 1)* (n 49).

⁶⁵ *Thornton (No 2)* (n 49) 1183 per Lord Taylor of Gosforth CJ.

⁶⁶ BWS has been accepted as an explanation for a battered woman’s behaviour to provide a partial defence to a charge of murder. Although this is a question of fact for the jury, medical expert evidence is relied on by the court.

⁶⁷ *Thornton (No 2)* (n 49) 1175, 1181, 1183 Lord Taylor of Gosforth CJ.

instructing a jury as to the characteristics that could be attributed to the reasonable person in relation to provocation. The theory of BWS developed by Walker⁶⁸ identified that women experiencing both arbitrary and unescapable violence developed ‘common characteristics, such as low self-esteem, self-blame for the violence, anxiety, depression, fear, general suspiciousness, and the belief that only they can change their predicament’.⁶⁹ Expert evidence therefore of serious psychological harm, if put before a jury could help explain why abused women did not walk away from an abusive relationship and why a seemingly small event could trigger a delayed violent reaction.

Lord Taylor accepted the submission from Thornton’s defence advocate that had the ‘further evidence been led at the trial, the jury would have had to be directed to consider whether a reasonable woman with these two characteristics [personality disorder and BWS] might have lost her self-control and done as the appellant did’.⁷⁰ In other words, that Thornton acted as a reasonable woman with BWS. Further, Lord Taylor had previously accepted that a delayed reaction in losing self-control, ‘would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a ‘sudden and temporary loss of self-control’⁷¹ caused by the alleged provocation.

Thornton was acquitted at her second appeal because the fresh evidence of BWS made the conviction unsafe. At retrial, evidence of Thornton’s vulnerable mental state,⁷² and that she was an abused and threatened woman,⁷³ a victim of a violent alcoholic, was not contested. However, far from being portrayed as a reasonable woman who had violently responded to her abuse in order to satisfy the legal tests of provocation, evidence of BWS was used to represent her as a *BWS sufferer*, in order to satisfy the requirements of diminished

⁶⁸ Walker L, *The Battered Woman* (Harper and Row, 1979); *The Battered Woman Syndrome* (Springer, 1984).

⁶⁹ Sanghvi and Nicholson (n 46) 733.

⁷⁰ *Thornton (No 2)* (n 49) 1182 per Lord Taylor of Gosforth CJ.

⁷¹ *Ahluwalia* (n 49) 139 per Lord Taylor CJ.

⁷² *Thornton (No 2)* (n 49) 1176 per Lord Taylor CJ.

⁷³ *ibid* 1177, 1179, 1181, 1182 per Lord Taylor CJ.

responsibility⁷⁴ and if not ‘bad’, then possibly ‘mad’.⁷⁵

Another woman Kiranjit Ahluwalia,⁷⁶ had also endured many years of violence and humiliation from her husband. Despite her defence that she had not intended to kill her husband by setting fire to his bed, and that the marital history of unrelenting violence constituted provocation,⁷⁷ she was convicted of murder. Nicholson suggests she was also portrayed stereotypically, and if not as mad, as a ‘helpless victim of circumstances out of her control’.⁷⁸ But, again the facts of the case are more complex than a reduction to stereotypification suggests. At her appeal, missing expert opinion which had existed but which had not been presented at trial that Ahluwalia suffered from endogenous depression,⁷⁹ led the Court of Appeal to conclude that her conviction was unsafe and unsatisfactory.

The feminist view that Ahluwalia was convicted because she was a victim of gendered, stereotypical reasoning—as a mad woman, may be partly true, but, as the Court of Appeal concluded there had always been an ‘arguable defence, which, for reasons unexplained, was not put forward at her first trial’.⁸⁰ One can only wonder why that was, especially as she is reported at trial to have explained her actions saying, ‘I gave him a fire bath to wash away his sins’,⁸¹ hardly the words of a mentally responsible woman. The real reason for her conviction may therefore have been due to a flawed defence, and not stereotypification. By suggesting alternative interpretations for the wrongful convictions and failed appeals in these cases to the feminist view, I do not wish to trivialise the brutal experiences suffered, nor underestimate the lack of understanding shown by the CJS to victims of domestic violence, nor undermine

⁷⁴ (n 63).

⁷⁵ See Nicholson (n 6) 21 citing at n 43 Heidensohn F, *Women and Crime* (Macmillan 1985); Jones A, *Women Who Kill* (Victor Gallancz 1991); Bell C and Fox M, *Telling Stories of Women who Kill* (1995) 5 SLS 471.

⁷⁶ *Ahluwalia* (n 49).

⁷⁷ *ibid.*

⁷⁸ Nicholson (n 6) 21.

⁷⁹ *Ahluwalia* (n 49) 142 per Lord Taylor CJ.

⁸⁰ *ibid* 143 per Lord Taylor CJ.

⁸¹ *ibid* 136 per Lord Taylor CJ.

the contributions made by feminist and sociological scholarship. What I seek to identify is that the reasons for the outcomes of such criminal proceedings may be more complex than either the orthodox or the feminist views.

Both *Thornton* and *Ahluwalia* are situated within a wider context that has challenged the law's fact construction of women's conduct. The factors of an historical unavailability of a defence of provocation in the cases described, and the argued reductionist view in law of abused women as bad or mad, 'rational murderer or irrational sufferer',⁸² have been much criticised. Given the likely facts of women's behaviour, women could never succeed in using the rules of provocation for a successful defence, unless they reacted angrily, suddenly and violently. Such gendered fact positivism is argued to have enabled the reinforcement of male values and interests,⁸³ but failed to hear women's stories. The outcomes of these trials are therefore argued to be due to perceptions of standards of behaviour reflecting 'a male perspective',⁸⁴ whereby the nature of the provoking act or person is acknowledged in cases where men lost their self-control, but went unrecognised when a woman held her self-control for years, before finally losing it.

The importance of such findings is that in child death cases also, the facts of women's behaviour following the sudden death of a child may be interpreted according to stereotypical criteria. For example, whether on finding a child dying or dead, a mother immediately called the ambulance and or tried to resuscitate the child; or, whether she was immobilised through fear, failed to resuscitate and called her husband and not emergency services. The latter

⁸² Nicholson (n 6) 21.

⁸³ *ibid* 22.

⁸⁴ *ibid* 19.

behaviours may have been interpreted as indicative of non-accidental child abuse in *Cannings*⁸⁵ and also in *Stacey*,⁸⁶ but the evidence base for such a conclusion is elusive.

Psychological and sociological research has however provided much needed objective understanding of the ways in which abused women may behave. BWS:

was originally conceived in 1980 by psychologist Leone Walker as consisting of a three-part "cycle of violence" and "learned helplessness," that enabled expert evidence to be put before a jury to explain why abused women who killed their abusers in self-defence after a delay did not "retreat" or leave the abusive relationship.⁸⁷

The use of BWS as evidence sought to demonstrate that women were not as had formerly and stereotypically been perceived, 'inadequate, irrational, or, even, invit[ing] violence',⁸⁸ because they failed to suddenly and immediately react aggressively towards an abusive partner. BWS enabled both the law and the public to understand how women may have reacted to long term domestic abuse; i.e. differently to the stereotypical, masculine reaction characterised by the defence of provocation as defined in *Duffy* and s3 Homicide Act.⁸⁹

Although provocation as a defence was widely considered to be gender biased, aspects of BWS in particular 'learned helplessness'⁹⁰ and the 'cycle of violence',⁹¹ have in turn been

⁸⁵ See delays in calling an ambulance in favour of calling her husband first by Cannings in *Cannings* (n 1) paras 108, 110 per Judge LJ.

⁸⁶ A child death case involving a child minder: *R v Stacey (Helen Brenda)* [2001] EWCA Crim 2031, [2001] WL 1135255 CACD para 44 per Kennedy LJ when Stacey noted the child was unwell, 'she had failed to call for help. This omission in the view of expert opinion was indicative of non-accidental injury'. Also para 30 per Kennedy LJ, the judge rejected her appeal, because 'on any possible view of the medical evidence that child was grievously unwell ... while he was in her sole charge, and she did nothing about it'.

⁸⁷ Loveless J, '*R v GAC: Battered Woman "Syndromization"*' [2014] Crim LR 655.

⁸⁸ *ibid.*

⁸⁹ The common law definition of provocation per *Duffy* (n 45) was incorporated into s3 Homicide Act 1957 as a) things done or said provoked the accused, b) the accused suffered a sudden and temporary loss of control c) the provocation was enough to make a reasonable person do as the accused had done and questions of reasonableness/ proportionality of the response for the jury, was abolished and replaced by loss of control partial defence in ss 54-56 Coroners and Justice Act 2009.

⁹⁰ Loveless (n 87) citing at n 4, 'Learned helplessness was closely allied with depression and was defined as "deficits" of motivation, cognition, affect and self-esteem' in Walker LE et al, 'Beyond the Juror's Ken: Battered Women' (1982) 7 Vermont L REV 1, 82.

criticised since the syndrome's proposal.⁹² BWS itself is argued to have become a gender norm, 'entrenched in legal discourse',⁹³ because it 'essentialises battered women... and pathologises women victims of domestic abuse'.⁹⁴ Jennifer Loveless suggests that BWS which is still relied upon in criminal trials in England and Wales,⁹⁵ is 'a discredited theory',⁹⁶ because it supports a gendered norm that the issue is 'her syndrome rather than his'.⁹⁷ problem. Ann Scully has also suggested that presenting expert opinion of BWS in court is not helpful to the plight of women because it is merely an 'abstract model of how a battered woman might act',⁹⁸ and so distracts the courts from other factors such as whether a particular defendant did or did not intentionally kill her husband. In common with other syndromes such as MSbP,⁹⁹ there is a risk that BWS problematizes affected women, although it is only a device for suggesting the propensity of some women to behave in the way theorised by BWS. Further, it does not permit the understanding that an abused woman does not have to be mad or bad to do what she did, in order to have escaped from the horrors of her situation, and even so, she may reasonably deserve a partial defence of provocation.¹⁰⁰

BWS is therefore censured for lacking 'scientific integrity',¹⁰¹ and for contributing to the "syndromisation", or stereotyping of abused defendants'.¹⁰² In addition, expert opinion is argued to reflect an inaccurate and gendered reality of women's experiences because not all

⁹¹ *ibid* at n 3 citing i.e. tension building, acute battering followed by loving contrition, in Walker LE, *The Battered Woman* (Harper and Row, 1980) and *The Battered Woman Syndrome* (Springer Publishing Co, 1984).

⁹² *ibid* at n 39 citing e.g. Schuller R et al, 'Rethinking Battered Woman Syndrome Evidence: The Impact of Alternative Forms of Expert Testimony on Mock Jurors' Decisions' (2004) *Canadian Journal of Behavioural Science*.

⁹³ *ibid*.

⁹⁴ Connelly (n 47) 293.

⁹⁵ *ibid* 656.

⁹⁶ *ibid* citing at n 2 several international sources including from Canada, and Australia, and the United States.

⁹⁷ *ibid* 661.

⁹⁸ Scully A, 'Expert Distractions: Women who Kill, Their Syndromes and Disorders' in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 191, 204.

⁹⁹ MSbP, Munchausen Syndrome by Proxy, is a psychological and behavioural condition where someone pretends to be ill or induces symptoms of illness in themselves. It is also sometimes known as factitious disorder, further see Glossary.

¹⁰⁰ Scully (n 98) 204. Also noting that provocation as a defence has been replaced by one of loss of control.

¹⁰¹ Loveless (n 87).

¹⁰² *ibid* 656 citing *R v GAC* [2013] EWCA Crim 1472 (CA (Crim Div)).

women in abused relationships are helpless. Some women are ‘highly motivated to terminate the violence.’¹⁰³ There is therefore another concern that if women do not behave

stereotypically in accordance with the syndrome, they may have no viable defence.

Consequently, BWS has been condemned because it arguably fails to help women who take responsibility for themselves and channel their anger and determination in seeking help.¹⁰⁴

Nevertheless, even though BWS may have shortcomings, the search for objective information about women’s conduct following domestic abuse, has enabled mistreated women who would otherwise have been convicted of murder, to avail themselves of a defence and take a lesser manslaughter conviction.

The defence of provocation has now been abolished¹⁰⁵ and replaced by a new loss of control defence,¹⁰⁶ which is available to women in domestic abuse cases, to provide for those who may lose self-control as a result of cumulative violence, albeit not suddenly.¹⁰⁷ All three parts of the test must be satisfied¹⁰⁸ i.e., that the killing resulted from the defendant losing self-control in response to a qualifying trigger, and that a woman with a normal degree of tolerance and self-restraint in the circumstances in which she found herself, might have reacted similarly or in the same way.¹⁰⁹ The qualifying triggers are as in s 55 (3), that she feared ‘serious violence’,¹¹⁰ and, or, that she had a ‘justifiable sense of being seriously

¹⁰³ *ibid* 661 citing at n 40 data from the Office for National Statistics and the National Domestic Violence Helpline.

¹⁰⁴ *ibid*.

¹⁰⁵ s 56 Coroners and Justice Act 2009 (CJA 2009) in force October 2010.

¹⁰⁶ s 54 -55 CJA 2009.

¹⁰⁷ s 55 CJA 2009 ‘Meaning of qualifying trigger (1)This section applies for the purposes of section 54; (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies; (3)This subsection applies if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person. (4)This subsection applies if D’s loss of self-control was attributable to a thing or things done or said (or both) which— (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged; (5)This subsection applies if D’s loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4)’.

¹⁰⁸ *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2, [2013] QB 1 para 9 per Judge CJ.

¹⁰⁹ *ibid* paras 9-32 per Judge CJ.

¹¹⁰ s 55 (3) CJA 2009.

wronged'.¹¹¹ But, although s 55 (3) will enable a woman to engage the defence based on as Edwards suggests, the 'concept of cumulative fear',¹¹² s 55 (4)(b) still requires a woman to substantiate her sense of serious wrong because of the added requirement to evidence circumstances of an extremely grave character (s 55 (4) (a)).

Accordingly, it is possible that the loss of control defence may still as Edwards argues engage gender bias. A jury without expert opinion to rely on, may fail to appreciate that for those with a history of abuse as in *Ahluwalia*, loss of control may not be prompted by a qualifying trigger such as an extremely grave act,¹¹³ when the internal trigger is an enduring fear, and not a sudden fear of impending or actual violence.¹¹⁴ Further, that capacity for self-control can be subjectively impeded by long-term fear, which may not be appreciated, if assessed objectively as justifiable.¹¹⁵ However, the law has long recognised that for some women their reactions may not be violently triggered or anger based, but akin to 'the final surrender of frayed elastic'.¹¹⁶ Therefore, women may still need to rely on specialist opinion that:

The battered woman has a different perception of threats and an expert knowledge based on experience of the aggressor's likelihood of carrying them out; she is in a constant state of anticipation and fear knowing from past experience that anything or nothing at all may result in him assaulting or trying to kill her.¹¹⁷

More broadly however, there is a question why changes in the legislation continued to be based around loss of self-control when the Law Commission had concluded that:

¹¹¹ s 55 (4) (b) CJA 2009.

¹¹² Edwards SSM, 'Anger and Fear as Justifiable Preludes For Loss of Self-Control' 2010 J Crim L 223, 233.

¹¹³ *ibid.*

¹¹⁴ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 4.17 and s 55 c) Coroners and Justice Act 2009; Edwards (n 112) 227.

¹¹⁵ Edwards (n 112) 228.

¹¹⁶ Kennedy H, *Eve was Framed: Women and British Justice* (Chatto & Windus 1992) 201.

¹¹⁷ Edwards (n 112) 234.

The requirement of a loss of self-control has been widely criticised as privileging men's typical reactions to provocation over women's reactions. Women's reactions to provocation are less likely to involve a loss of self-control as such and more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even when they otherwise deserve a partial defence.¹¹⁸

There are several points that I would like to draw out of the discussion so far because they may be relevant to the later discussion of child death cases. First, the facts of women's behaviour may be interpreted in stereotypical and gendered ways, thereby discounting the reality of women's experiences. Secondly, the admission of non-medical evidence about female conduct as in *Thornton* may not be as neutral or as fact based as it may first appear, because of the interpretations that can be put upon that information by fact-finders. Law may itself assist in constructing legal facts, by deciding which information is admitted or omitted, as in *Ahluwalia*. Thirdly, that the information that is admitted does not necessarily point in only one direction as probative, or not probative, and therefore more than one inference is possible. Although insights resulting from research have been supportive in allowing the reality of women's experiences as victims of domestic abuse to be better understood, the law may both create and reinforce gendered behavioural norms,¹¹⁹ despite concerns that the norms are arguable if not unsustainable.

Further, it is possible that stereotypical perceptions of women may be incorporated into legal norms through medical opinions, which are privileged over non-medical evidence. This point is relevant to the ways in which the mental health of women in particular may be perceived in

¹¹⁸ HL Deb 7 July 2009, vol 712, col 573 per Baroness Mallalieu citing Law Commission, 'Murder Manslaughter and Infanticide' (Law Com No 304 2009) para 518.

¹¹⁹ Hunter (n 38).

law. *Dhaliwal*¹²⁰ an abused woman, committed suicide. The CPS alleged that her actions resulted from domestic abuse at the hands of her husband and he was charged with unlawful act manslaughter by inflicting grievous bodily harm through an unlawful and malicious act.¹²¹ The Crown's proceedings against Mr Dhaliwal for psychological injury sufficient to 'amount to "bodily harm"'¹²² understandably relied on the cumulative history of domestic violence, and his wife thereby suffered psychological harm that led to her suicide. Roberts J however considered that the prosecution could not proceed. When, he held, "a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct", it would be possible for the Crown "to argue that that final assault played a significant part in causing the victim's death".¹²³ Therefore, in seeking to prosecute for unlawful act manslaughter in Roberts J's view, the prosecution should have identified the specific unlawful and dangerous act or acts committed by Mr Dhaliwal, and then demonstrated beyond reasonable doubt both actus reus and mens rea in respect of Mr Dhaliwal.¹²⁴ The cumulative reality of Mrs Dhaliwal's experiences was consequently regarded as failing to satisfy the requisite legal test of unlawful act manslaughter. The prosecution's case was further disadvantaged by the uncertainty of medical knowledge regarding the differences between psychological and psychiatric conditions,¹²⁵ and mental health and illness.¹²⁶ Mr Dhaliwal did not stand trial.

On appeal, the court considered Roberts J's findings had merit¹²⁷ because no unlawful act had been proven. Roberts J's further conclusion that 'no reasonable jury could be satisfied to the

¹²⁰ *R v Dhaliwal* [2006] EWCA Crim 1139, [2006] 2 Cr App R 24.

¹²¹ Offences Against the Person Act 1861 s 20.

¹²² *R v Dhaliwal* [2006] EWCA Crim 1139, [2006] 2 Cr App R 24, para H2 per Sir Igor Judge P with respect to 'ss 18, 20 and 47 of the Offences against the Person Act 1981'.

¹²³ *ibid* para 7 per Sir Igor Judge P citing Roberts J.

¹²⁴ *ibid*.

¹²⁵ *ibid* para 18 per Sir Igor Judge P.

¹²⁶ *ibid* para 30 per Sir Igor Judge P.

¹²⁷ *ibid* para 8 per Sir Igor Judge P.

criminal standard, that Mrs Dhaliwal suffered from any recognised psychiatric illness'¹²⁸ was considered with the appeal court itself asking whether a psychological condition which was not recognisable or identifiable as a psychiatric illness, was 'capable of amounting to actual or grievous bodily harm for the purposes of the 1861 Act.'¹²⁹ In a deferential conclusion, the court upheld Roberts J's conclusion that as no known psychiatric illness such as post-traumatic stress disorder (PTSD) or depression had been diagnosed in Mrs Dhaliwal, to find otherwise would both introduce 'a significant element of uncertainty'¹³⁰ into the meaning and ambit of bodily injury for the purposes of the 1861 Act. Moreover as psychological harm was an 'illusory concept',¹³¹ 'non-experts (such as judges), should approach the issue with great caution'.¹³²

Burton suggests that in so doing, the Court of Appeal privileged the state of 'medical knowledge, over a large body of social science research on the effects of domestic abuse'.¹³³ Had medical knowledge at the time she suggests, recognised the effects of long-term domestic abuse as a discrete psychiatric condition made up of 'emotional, cognitive and behavioural deficits',¹³⁴ then the law might have recognised it and Mr Dhaliwal may have stood trial. Although the decision in this case has been criticised,¹³⁵ the courts indicated that certainty could only be established by relying on medical opinion, however tentative. But, medical opinion does not always provide certainty as indicated by child death cases¹³⁶ and further, judicial deference to medical opinion may on occasion be misplaced.

¹²⁸ *ibid* para 16 per Sir Igor Judge P.

¹²⁹ *ibid* paras 19, 31 per Sir Igor Judge P.

¹³⁰ *ibid* paras 31 per Sir Igor Judge P.

¹³¹ *ibid* paras 18 per Sir Igor Judge P.

¹³² *ibid*.

¹³³ Burton M, Commentary on *R v Dhaliwal* in Hunter R, McGlyn C and Rackley E, in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 256.

¹³⁴ *Dhaliwal* (n 102) para 18 per Sir Igor Judge P.

¹³⁵ Burton (n 106) 255-272.

¹³⁶ *Clark* (n 1); *R v Cannings* (n 1); *R v Patel (Trupti)* (Reading Crown Court, 11 June 2004).

In conclusion, in *Thornton*, *Ahluwalia* and *Dhaliwal*, both expert evidence and non-medical evidence can be argued to have influenced the outcomes of criminal proceedings. Medical opinion may at times be rightly privileged, in order that jury decisions are made using objective evidence, but in so doing, the reality of women's experiences may be overridden. Consequently, there is a possibility that in some cases, decisions have been gendered because women have not been perceived in context, or in the light of the reality of their experiences.

1.1.3 Women's behaviour: is it stereotypically interpreted in rape cases?

The second type of criminal proceedings in which the admissibility and interpretation of information about women's behaviour has been challenged, is in relation to rape complainants. The relevance of and constructions of non-medical evidence relating to sexual history,¹³⁷ dress, alcohol intoxication, time of reporting,¹³⁸ and more recently, personal records¹³⁹ has been questioned. Complainant behaviours have traditionally it has been argued, been subject to interpretation using normative expectations about women's behaviour and the circumstances of alleged rape, in order to reach conclusions on issues of claimant consent and credibility.¹⁴⁰ In some instances, unjust acquittals of usually male defendants have been argued to occur, because a complainant's credibility has been unfairly devalued as a result of the admission of information about claimant conduct, and its unfair interpretation.¹⁴¹ Louise Ellison suggests the issue is perceived in some cases to be more specifically a function of all-

¹³⁷ Easton S, 'The Use of Sexual History Evidence in Rape Trials' in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 167; *R v Seaboyer* (1991) 83 DLR (4th) 193.

¹³⁸ *R v D* [2008] EWCA Crim 2557, Times, November 26, 2008 (CA (Crim Div)).

¹³⁹ *H* [1997] 1 Cr App R 176, 177-178 per Sedley J 'It has become standard practice for defence lawyers in rape ... cases to seek to compel the production of any social services, education, psychiatric, medical or similar records concerning the complainant, in the hope that these will furnish material for cross-examination'. See also concerns raised in *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] ACD 124.

¹⁴⁰ Childs and Ellison (n 2) 211, 213, 219.

¹⁴¹ *ibid* 11 citing at n 34 Adler Z, 'The Relevance of Sexual History Evidence in rape: Problems of Subjective Interpretation' [1985] Crim LR 769; McColgan A, 'Common Law and the Relevance of Sexual History Evidence' [1996] OJLS 275.

male judicial perspectives on questions of relevance,¹⁴² which may ‘at best, risk[s] the undervaluing of women’s experience and interests’.¹⁴³

The admission of behavioural evidence and its stereotypical interpretations are therefore considered to contribute to a failure to consider the reality of women’s experiences as identified earlier. Rape Trauma Syndrome (RTS) identified in the early work of Ann Burgess and Linda Holmstrom has been helpful in explaining the reality behind what is perceived to be women’s aberrant or untruthful behaviour.¹⁴⁴ Burgess and Holmstrom identified that psychological trauma may follow sexual assault and may lead to the complete disruption of a woman’s normally rational behaviour.¹⁴⁵ Stereotypical assumptions however are argued to wrongly assume that following rape a woman will be ‘hysterical and tearful’.¹⁴⁶ In reality, rape victims have been identified as demonstrating an unnaturally controlled response, in which they mask their feelings, with a calm and composed demeanour.¹⁴⁷ However, police were previously reported to consider that unless a raped woman demonstrates ‘signs of extreme violence’, she may be lying.¹⁴⁸ As a result, the Crown Prosecution Service (CPS) have accepted the need to counter stereotypical attitudes towards and myths about rape victim behaviour, within jury thinking in particular.¹⁴⁹ Although expert testimony and judicial guidance may now be provided at trial to educate jurors about the reality of women’s behaviour in such circumstances,¹⁵⁰ broad concerns remain that the way in which rape complainants are perceived and portrayed in the CJS is still unbalanced. Annie Cossins goes

¹⁴² Ellison and McGlyn (n 3) 205, 206-7 citing at n 7 Kinports K, ‘Evidence Engendered’ (1991) 2 University of Illinois Law Review 413, 431.

¹⁴³ *ibid.*

¹⁴⁴ Temkin J, *Rape and the Legal Process* (2002, OUP 2005) 1, citing at n 3 Burgess AW and Holmstrom LL, *Rape—Crisis and Recovery* (Brady 1979) 35.

¹⁴⁵ Burgess and Holmstrom (n 144).

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid* 36.

¹⁴⁸ Temkin (n 144) 1, citing at n 22 Firth Police Review, 1975.

¹⁴⁹ Commission on Women and the Criminal Justice System, *Engendering Justice – from Policy to Practice* (Final Report, The Fawcett Society 2009) 60.

¹⁵⁰ See Chapter Five.

as far as suggesting that ‘myth, prejudice and disbelief surround the reporting, investigation and prosecution of sexual assault, within a ‘culture of scepticism’.¹⁵¹

Such suspicious attitudes may find expression in adverse interpretations of information about complainant behaviour, but, feminist driven legislative changes have sought to balance the opportunities for defence counsel to admit evidence of female behaviour, likely to be interpreted stereotypically, for example, information about a claimant’s previous sexual history.¹⁵² The so-called rape shield legislation has in its turn been challenged¹⁵³ by what has been termed ‘judicial over-ride’,¹⁵⁴ and further, non-traditional sources of non-medical evidence have become available with the digitisation of personal records. If traditional sources of complainant behavioural evidence are therefore deemed inadmissible, then information about a complainant’s ‘social work, counselling and therapeutic, medical or educational records’ may be sought instead.¹⁵⁵ As Susan Leahy suggests, albeit in relation to complainants and not defendants, such:

‘material can be used to direct jurors’ attention away from the alleged incident and place undue focus on issues such as mental illness or drug use which may prejudice the complainant in the eyes of the jury. The admission of personal records is undesirable for a complainant, revealing information which will not only invade her privacy but also potentially unfairly prejudice her testimony’.¹⁵⁶

A detailed examination of the ways in which the credibility of women complainants in sexual assault and rape trials may be prejudiced, using interpretations of such non-medical personal

¹⁵¹ Cossins A, ‘Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England’ (2013) *International Journal of Evidence and Proof* 74, 75.

¹⁵² The so called rape shield legislation especially s 41 in ss. 41–43 of the Youth Justice and Criminal Evidence Act 1999.

¹⁵³ *A (No 2)* (n 2).

¹⁵⁴ Ellison and McGlynn (n 3) 205, 206–7 citing at n 1 McColgan A, *Women under the Law: The False Premise of Human Rights* (Longman 2000) 250.

¹⁵⁵ Leahy S, ‘Too Much Information? Regulating Disclosure of Complainants’ Personal Records in Sexual Offence Trials’ (2016) *Crim LR* 229.

¹⁵⁶ *ibid* 230.

information, is outside the scope of this thesis. But, the important issue upon which I would like to focus is that feminist legal scholarship has argued strongly that for women defendants accused of killing their husbands, and for women claimants in rape trials, the outcomes of criminal trials may be influenced by factors other than forensic evidence and expert opinions. Moreover, even as one source of evidence may be found inadmissible, another source of information may replace it, such as personal records.¹⁵⁷ Such a development directly links with concerns regarding the relevance and admissibility of new types of maternal behaviour evidence in the child death cases in this study, e.g. diaries and internet searches, (see *Folbigg* and *Kular* both discussed in chapter four¹⁵⁸) and potential sources such as social media communications and blogs,¹⁵⁹ that the law is having to play catch up.

The nature of the non-medical evidence and the ways in which it may be interpreted is therefore significant within rape trials as well as homicide trials. Within rape trials, it is *rape myths* specifically that have been argued to (mis)interpret behavioural information about women complainants. Such beliefs are argued to ‘provide a compelling backdrop to juror deliberations’¹⁶⁰ and to compound an already sceptical approach to complainant behaviours, by negatively and subjectively interpreting information, whether sexual history or medical records.¹⁶¹ However, the nature of rape myths has been questioned and their existence, challenged.

¹⁵⁷ *ibid* 230.

¹⁵⁸ *R v Kular (Rosdeep Adekoya)* (HCJ August 25, 2014).

¹⁵⁹ O’ Floinn M and Ormerod D, ‘The Use of Social Networking Sites In Criminal Investigations’ (2011) 10 Crim LR 766 citing at (n 10) Warren G, ‘Interactive Online Services, Social Networking Sites and the Protection of Children (2008) Ent L R 165 ‘such as search, email, messaging, chat, blogs, gaming, discussion forums, VoIP [Voice over Internet Protocol e.g. skype], photos, music and videos.’

¹⁶⁰ Leahy (n 155) 243.

¹⁶¹ *ibid* 243.

Rape myths have been the subject of much research regarding their definition and function,¹⁶² but achieving agreement on who believes rape myths, what they are,¹⁶³ whether they function as feared, or even exist¹⁶⁴ has been problematic. Burt first defined rape myths as ‘prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists’.¹⁶⁵ Subsequently, the definition has been questioned to clarify how the beliefs were prejudicial and to whom.¹⁶⁶ Lonsway and Fitzgerald further queried in what sense such beliefs could be stereotypic, and suggested that such beliefs were regarded as ‘mythological, a term that generally implies a cultural function’.¹⁶⁷ The problem they identified, was that without a clear definition of a myth, the extent of the problem, or ‘rape myth acceptance (RMA)’,¹⁶⁸ could not be measured, and they proposed a further definition. ‘Rape myths are attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women’.¹⁶⁹

The attitudes identified by Burgess and Holmstrom however, focussed on information about women’s behaviour following an alleged rape, considered to decide the credibility of a woman’s claim in court. E.g. if a woman is neither recorded by police as having been ‘hysterical and tearful’¹⁷⁰ following an alleged rape, nor could show significant injuries sustained through violence, then fact finders in the widest sense may refute the reliability of her claims¹⁷¹ on the basis of their beliefs. Showing that a beliefs is false, and therefore a rape

¹⁶² Burt MR, ‘Cultural Myths and Supports of Rape’ (1980) 38 J Pers Soc Psychol 217; Burt MR, ‘Rape Myths and Acquaintance Rape’ in Parrot A and Bechhofer L (eds) *Acquaintance Rape: The Hidden Crime* (Wiley 1991); Costin F, ‘Beliefs about Rape and Women’s Social Roles’ (1985) 14 Arch Sex Behav 319; Lonsway KA and Fitzgerald LF ‘Rape Myths: In Review’ (1994) 18 Psychol Women 133; Gerger H, Kley H, Bohner G and Siebler F, ‘The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English’ [2007] 33 Aggressive Behaviour 422.

¹⁶³ Gerger et al (n 162).

¹⁶⁴ Reece (n 5).

¹⁶⁵ Burt ‘Cultural Myths’ (n 162).

¹⁶⁶ Lonsway et al (n 162) 134.

¹⁶⁷ *ibid* 134.

¹⁶⁸ *ibid*.

¹⁶⁹ *ibid*.

¹⁷⁰ Burgess and Holmstrom (n 144) 35.

¹⁷¹ Temkin (n 144) 1, citing at n 22 Firth Police Review 1975.

myth, is however as Gerger et al subsequently pointed out, ‘difficult or impossible because it is immune to empirical falsification’.¹⁷² In addition, if a belief depended on being a myth because of the number of people who held it, then if that spread reduced, it would no longer be definable as a myth, irrespective of its perceived problematic content.¹⁷³ Gerger et al therefore proposed to define rape myths as ‘*descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women*’.¹⁷⁴

Further, Gerger et al suggested that ‘sexist beliefs may have become increasingly subtle and covert’,¹⁷⁵ and characterised by ‘denial of continued discrimination, antagonism towards women’s demands and a lack of support for policies designed to help women’.¹⁷⁶ The true nature of gendered beliefs, or even rape myths if the latter exist, is consequently more likely now to be nuanced and elusive. According to Gerger et al, such beliefs are still measurable as ‘accepted modern myths about sexual aggression’ (AMMSA),¹⁷⁷ and statistically consistent with rape supportive beliefs identified by Burt.¹⁷⁸

The particular difficulty that definition and measurement studies of RMA and AMMSA identify, is that the argument that criminal proceedings may be influenced by beliefs, whether prejudicial, stereotypical or myths, depends on concepts which elude definition or even proof of existence, perhaps because of their subtle and covert nature. One of the key justifications underpinning rape myth work however, is a view that convictions for rape have been historically and perhaps unjustly low, because the public and fact finders, interpret

¹⁷² Gerger et al (n 162) 423.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid* 425 citing the research of Sears DO, ‘Symbolic Racism’ in Katz PA and Taylor DA (eds) *Eliminating Racism: Profiles in Controversy* (Plenum Press 1988) 53-54 and Swim JK, Aikin KJ, Hall WS et al, ‘Sexism and Racism: Old-fashioned and Modern Prejudices’ 1995 68 J Pers Soc Psychol 199-214.

¹⁷⁶ *Ibid.*

¹⁷⁷ *ibid* 435.

¹⁷⁸ Burt ‘Cultural Myths’ (n 162).

information about women's behaviour in unjust ways. Rape myths, have been blamed for failures to convict more defendants of rape. Rape myths such as, 'if a woman is raped when she is drunk, then she is partly or wholly to blame for her attack',¹⁷⁹ and 'if a woman is raped, she will fight back and shout a clear and equivocal no',¹⁸⁰ are considered by the Office for Criminal Justice Reform (OCJR) to account for the very low number of convictions for rape in this jurisdiction.¹⁸¹ The OCJR suggest that it is 'misperceptions and myths as to how "proper victims" should behave which is going unchallenged',¹⁸² that has led to low conviction rates.

Helen Reece however questions whether the problem is one of attitudes held by the public, police, juries, and the judiciary all of whom have been criticised in the carceral approach.¹⁸³ First she suggests, 'some attitudes are not myths; secondly, not all the myths are about rape; thirdly, there is little evidence that the rape myths are widespread'.¹⁸⁴ There is therefore a possibility according to Reece, that 'myths about myths or "myth myths"',¹⁸⁵ have been created. The implications for the way in which information about maternal behaviour may be interpreted, may be that similarly, beliefs about mothering or even mothering myths may be difficult to prove, difficult to prove false, and measuring how widely held they are, problematic. Gerger et al however suggested, that if *rape myths* could not be defined as false,

¹⁷⁹ Norris S, 'At Last, The DPP are Confronting Some Toxic Rape Myths With Their Guidelines' The Independent (London, 29 January 2015)

¹⁸⁰ *ibid.*

¹⁸¹ Office for Criminal Justice Reform (OCJR), 'Convicting Rapists and Protecting Victims –Justice for Victims of Rape, A Consultation Paper' (Criminal Justice System 2006) 5 'Fewer than 6% of rape cases reported to the police ultimately result in a conviction'.

¹⁸² *ibid* 17.

¹⁸³ Reece (n 5) 452, citing at n 66 Rumney PNS, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64 MLR 890, 910; Kelly L, Temkin J and S Griffiths 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006) 77; Finch E and Munro VE, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 LS 303, 309; Munro VE and Stychin CF (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) 24.

¹⁸⁴ *ibid* 446.

¹⁸⁵ *ibid* 446 citing at n 9 and 10 Felson RB, 'Violence and Gender Re-examined' (2002) American Psychological Association 170; and Reece (n 5) 446 citing at n 11 Redmayne M, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7 E&P 75.

they could be characterised as ““wrong” in an ethical sense’.¹⁸⁶ But, if attitudes cannot be defined they cannot be deemed unethical, because such an approach risks retaining subjectivities in the construction of *rape myths*, making challenges to what is and is not a *rape myth* even more problematic.

To circumvent that issue, Temkin and Krahe have suggested that all evidence of behaviour should be excluded from trials, such that fact finders can only have recourse to ‘data’¹⁸⁷ in a rationalist if not fact positive approach. In the situation of women who kill their husbands or children, this would mean that only scientific and direct evidence is admitted, together with expert opinions, thus further privileging medical opinion, and disregarding the possibility that medical opinions can be flawed, or that alternative reasons could exist for wrongful convictions. Further, as suggested by Reece, such a proposal fails to understand how ‘jurors generally decide cases’,¹⁸⁸ and that if for example sexual history evidence is unavailable, jurors will search for more subtle signs on which to base their decisions, such as a woman’s ‘behaviour at the time of the incident, or even in court’.¹⁸⁹ It is non-medical information about behaviour that may then be indispensable for juror decision making, but not necessarily scientific or data evidence.

Draper goes further, and suggests that if juries rely on the behaviour of rape complainants in court, then in order to ‘bypass ... popular prejudice’¹⁹⁰ a jury should be completely removed

¹⁸⁶ Gerger et al (n 162) 423.

¹⁸⁷ Reece (n 5) 454 citing at (n 90) Krahé B, Temkin S and Bieneck S, 'Schema-driven Information Processing in Judgements about Rape' (2007) 21 Applied Cognitive Psych 601.

¹⁸⁸ *ibid* citing at n 91 for example, Kibble N, 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' (2008) 35 JLS 91, 92; O'Keeffe S, Brown JM and Lyons E, 'Seeking Proof or Truth: Naturalistic Decision-Making by Police Officers when Considering Rape Allegations' in Horvath MAH and Brown JM (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 3; Dennis I, 'The Law of Evidence (4th edn, Sweet & Maxwell 2010); Ellison L and Munro VE, 'Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial' (2010) 30 LS 74.

¹⁸⁹ *ibid* 452 citing at n 74 Koski DD, 'Jury Decisionmaking in Rape Trials: A Review and Empirical Assessment' (2002) 38 Crim LB 21.

¹⁹⁰ *ibid* 472 citing at n 217 Draper D, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 41 Akron L Rev 957, 976.

from rape trials.¹⁹¹ Reece however points out that Draper's suggestion may not work, citing Temkin's concern that even without a jury, uncertainty remains that judges and barristers can 'challenge stereotypes' effectively.¹⁹² Further, literature cited by Reece indicates that cultural myths and stereotypes about rape have been 'embraced at all levels of the justice system and by all parties involved',¹⁹³ even according to Temkin, by a Home Secretary.¹⁹⁴

In summarising this section, personal and behaviour information about a claimant is regarded by Reece as integral to jury decision making, even though decisions may be influenced by rape myths, irrespective of whether the decision makers are 'police officers, crown prosecutors, forensic medical examiners, juries ... [or] judges'.¹⁹⁵ However, agreement on what constitutes a rape myth is problematic, and research indicates that gendered beliefs may be hidden and nuanced. From this brief outline of two examples of relationships between the use of behavioural information and its (mis)interpretations and possible injustices, there may be implications for the way in which the wrongful convictions of mothers such as Cannings and Clark may be explained. Largely as a result of feminist approaches to evidence, the admission of certain types of information is questionable because of the prejudicial inferences that may be drawn from it. But as both Lonsway et al¹⁹⁶ and Gerger et al¹⁹⁷ have identified, determining the nature of myths, and whether they are 'false or biased....widely shared... and serve to explain and justify existing cultural arrangements'¹⁹⁸ is not straightforward. As Reece suggests there is a possibility that beliefs serve a purpose in jury decision making.

¹⁹¹ *ibid.*

¹⁹² *ibid* 472 citing at n 222 Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 165.

¹⁹³ *ibid* 473 citing at n 223 Stewart MW, SA Dobbin and SI Gatowski, "'Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape' (1996) 4 Fem LS 159, 162.

¹⁹⁴ *ibid* 473 citing at n 224 Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 171-72.

¹⁹⁵ *ibid* 473 citing at n 225 Temkin J, "'And Always Keep A-hold of Nurse, For Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 New Crim L Rev 710, 714.

¹⁹⁶ Lonsway et al (n 162).

¹⁹⁷ Gerger et al (n 162).

¹⁹⁸ *ibid.*

The last section in this chapter considers the scant feminist literature relating to the role of behaviour evidence in child death cases, which argues that *Clark* and *Cannings* may have been wrongly decided because the mothers were perceived as bad. The arguments are questioned using the analysis of the previous sections.

1.1.4 Women's behaviour: is it stereotypically interpreted in child death cases?

The possibility that reasons other than expert opinion, could influence the wrongful convictions of mothers in child death cases, was first published by criminal law professor Celia Wells, who suggested that:

In *Clark's* and *Cannings'* successful appeals the Court of Appeal's analysis explains *how* the convictions came about. There is no attempt, however to ask *why* it was so easy to leap to conclusions that now seem so wrong, *why* in each of these cases the CJS effectively required bereaved mothers to explain the deaths of their babies.¹⁹⁹

Further, she argued that 'feminist arguments'²⁰⁰ could help 'unravel these questions'²⁰¹ and explain why the 'tragedy of multiple SIDS' had been converted 'into an epidemic of legal mistakes'.²⁰² Cases such as *Clark and Cannings* could Wells argued, 'best be understood through a framework of feminist thinking',²⁰³ because such cases 'provide contemporary evidence that a combination of unsubstantiated assumptions about women and undue deference to ...medical experts, still lead to extraordinary travesties of justice'.²⁰⁴ Wells cites the work on mothers and mothering by sociologist and radical feminist writer Carol Smart,²⁰⁵ to suggest that when women become mothers, they enter a 'web'²⁰⁶ of 'meanings and

¹⁹⁹ Wells C, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] Crim LR 88, 99.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ *ibid* 99-100.

²⁰⁴ *ibid* 90.

²⁰⁵ Smart C, *Law, Crime and Sexuality* (Sage Publications 1995).

²⁰⁶ Wells (n 199) 99.

behaviours which are deemed to constitute proper mothering'.²⁰⁷ Consequently, if women are perceived to fall short of the expectations of proper mothers, such assumptions could contribute to their wrongful convictions, as for example in *Clark* and *Cannings*,²⁰⁸ especially if such expectations inform medical expert evidence based on 'professional fallacies',²⁰⁹ for example MSbP.

To contextualise the Wells/Smart position, the meaning of "feminist thinking",²¹⁰ as explained by Wells, is that feminism focusses on gender relations, and feminist thinking is 'shorthand for "issues that affect women"'.²¹¹ For example battered women, date rape, stalking and harassment.²¹² Further, that on occasion, relationships between men and women i.e. gender relations, are considered to be 'characterised by patterns of domination, inequalities, oppressions',²¹³ such that women are positioned as subordinate, not only relative to men, but within structures such as the law.²¹⁴

Drawing on Smart's work,²¹⁵ Wells suggests that in general, '(F) feminist legal theories inform our understanding of the relationship between law and power',²¹⁶ and specifically that women or mothers in particular, are viewed by the law as subject. Wells' explanation for the wrongful convictions in *Clark* and *Cannings* therefore draws on several factors. First, on a particular feminist understanding of woman as subject, secondly on Smart's thinking that if mothers can be shown in court to be bad mothers²¹⁷ then they could also be perceived to be

²⁰⁷ Smart (n 205) 125.

²⁰⁸ *Clark* (n 1).

²⁰⁹ Wells (n 199) 95.

²¹⁰ *ibid* 99.

²¹¹ *ibid*.

²¹² *ibid*.

²¹³ *ibid* 92.

²¹⁴ *ibid*.

²¹⁵ Smart (n 205) 125.

²¹⁶ Wells (n 199) 93.

²¹⁷ Smart (n 205) 192

guilty of homicide, and thirdly, that assumptions about mothers may be concealed within certain types of medical evidence presented by influential expert witnesses.

Feminism has however ‘many strains’,²¹⁸ such as liberal, radical, cultural, difference and postmodern approaches, and therefore feminist legal theory encompasses a number of diverse debates.²¹⁹ For now, I would like to situate the Wells/Smart hypothesis as a (possibly) radical feminist approach to the wrongful convictions of *Clark* and *Cannings*, which draws on a perception of women as profoundly different from and with less power than men and who are consequently, subordinate.²²⁰ Radical feminist theory is however but one of the more prominent feminist approaches and it is possible that *Clark* and *Cannings* could be viewed through the frameworks of other feminist theories, for example the feminist rape myth acceptance (RMA) theory, which is discussed in chapter two. A further difficulty with Well’s approach is that as rape myth scholarship has identified, defining the assumptions made about women, showing that they are unsubstantiated and false, may be problematic. In addition, if the argument is that defendants as mothers are judged against ‘meanings and behaviours ...deemed to constitute proper mothering’,²²¹ then the meaning and behaviours constituting proper mothering also need to be defined and it is likely that such a task will also be difficult.²²²

A second similar approach to the question why the wrongful convictions occurred, was proposed by law professor Fiona Raitt, and research psychologist Suzanne Zeedyk who argue that ‘hidden factors’²²³ such as ‘underlying assumptions’²²⁴ and ‘discourses of

²¹⁸ Wells (n 199) 91.

²¹⁹ Davies M, ‘*Unity and Diversity in Feminist Legal Theory*’ (2007) 2(4) *Philosophy Compass* 650.

²²⁰ Halley J, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2008), citing MacKinnon C, ‘*Toward a Feminist Theory of the State*’ (Harvard University Press 1990).

²²¹ Smart (n 205) 125.

²²² *ibid* 125.

²²³ Raitt F and Zeedyk S, ‘*Mothers on Trial: Discourses of Cot Death and Munchausen’s Syndrome by Proxy*’ (2004) 12 *Fem LS* 257, 263.

²²⁴ *ibid*.

motherhood'²²⁵ may have 'played a major role in the initial convictions of Cannings and Clark'.²²⁶ Raitt and Zeedyk are further concerned in their discussion of *Clark* and *Cannings* about the reliance placed upon MSbP as a framework to make sense of unexplained sudden infant deaths.²²⁷ In such criminal cases, despite they suggest never having been defined properly by medical or legal practice,²²⁸ MSbP is argued to draw upon 'discourses of motherhood',²²⁹ including 'standards of childcare and the mother's emotional state',²³⁰ whereby childcare is seen to be an expression of the sufficiency of love shown to the child.²³¹

Such discourses are suggested to 'constitute an undercurrent that contributes significantly to the outcomes of prosecutions and appeals'.²³² In addition, that due to a lack of identification, analysis and understanding, 'they continue to operate efficiently and powerfully',²³³ constituting an influential but 'unrecognised form of circumstantial evidence',²³⁴ within the 'courtroom',²³⁵ and the 'official legal debate'.²³⁶ Raitt and Zeedyk argue, that there was no 'conclusive evidence of the mothers' guilt',²³⁷ apart from 'circumstantial evidence and experts' conflicting interpretations of medical pathology reports'.²³⁸ Such 'ambiguous circumstances',²³⁹ in which expert opinion apparently failed to conclusively demonstrate whether the defendants were responsible for their children's sudden deaths, prompted suggests Raitt, the prosecution to seek other ways of explaining why the children died. Raitt

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ *ibid* 276-277.

²²⁸ *ibid.*

²²⁹ *ibid* 263.

²³⁰ *ibid* 265.

²³¹ *ibid.*

²³² *ibid* 276.

²³³ *ibid* 277.

²³⁴ *ibid* 276.

²³⁵ *ibid.*

²³⁶ *ibid* 269.

²³⁷ *ibid.*

²³⁸ *ibid.*

²³⁹ *ibid.*

maintains that ‘courts and other professions’²⁴⁰ were therefore forced to explain the deaths in other ways, such as comparing *Clark* and *Cannings* with ‘social expectations about ‘proper’ mothering’.²⁴¹

Raitt and Zeedyk suggest that the legal approach assessed evidence of maternal behaviour, including emotional state and the sufficiency of maternal love as evinced through childcare, to decide whether Clark and Cannings met social expectations about proper mothering. The question whether defendants were proper mothers thereby provided a probability factor or ‘likelihood’²⁴² that such mothers were or were not guilty of killing their infants.²⁴³ If the jury could be convinced that Clark and Cannings ‘were uncaring, bad mothers’,²⁴⁴ then the inference that they did not love their children could be drawn, providing a maternal motive²⁴⁵ based on discourses of mothering to ‘explain why they would have murdered their infants’.²⁴⁶ Therefore, where the death of an infant was unexplained, the provision of motive could provide a reason for the child’s death,²⁴⁷ i.e. that the child had been killed because the mother did not love it enough.²⁴⁸

But, according to Raitt and Zeedyk, mothering discourses not only informed legal reasoning in both *Clark* and *Cannings*,²⁴⁹ they also informed expert evidence such as prosecution reliance upon a medical diagnosis of MSbP, to argue that injuries or even death was caused by the mothers. Such reliance was they suggest dangerous, because a medical diagnosis of MSbP may be used to demonstrate that even ‘loving’²⁵⁰ mothers kill their children. The use

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² *ibid* 275.

²⁴³ *ibid.*

²⁴⁴ *ibid* 267.

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

²⁴⁹ *Clark* (n 1); *Cannings* (n 1).

²⁵⁰ Raitt and Zeedyk (n 223) 267.

of mothering discourses therefore is argued to point to a position in which some mothers who have loved and cared for their children and who are later accused of killing them, cannot win, because of course in some situations very loving mothers without MSbP, also kill their children.²⁵¹ In this way, Raitt and Zeedyk argue, ‘monumental consequences flow from the interpretations that are placed on mothers’ childcare practices’,²⁵² not only by the law, but because such interpretations are additionally ‘enveloped within expert medical testimony’ such as MSbP.²⁵³ Raitt and Zeedyk further suggest that the ‘discourses that shape those interpretations do not warrant serious treatment within the official legal debate’.²⁵⁴

The possibility that discourses of mothering (however these may be defined), may influence legal outcomes, has also been embraced by Canadian law professor Emma Cunliffe. Cunliffe cites Raitt and Zeedyk’s proposals,²⁵⁵ in arguing that in the Australian case *Folbigg*,²⁵⁶ the mechanism for achieving a mother’s conviction as in *Clark* and *Cannings*, was based upon the use of discourses of motherhood within legal discourses, in order to portray Folbigg negatively and as a particular (bad) kind of mother.²⁵⁷ Folbigg was convicted of the murder of two of her infant children, the manslaughter of another and of causing grievous bodily harm to, and murdering a fourth.²⁵⁸ The prosecution alleged that Folbigg smothered her children to death in sudden, angry losses of control. Cunliffe firmly argues that the sequence of injustices demonstrated by the wrongful convictions in *Clark* and *Cannings*,²⁵⁹ is continued in

²⁵¹ See also Morrison T, *Beloved* (Alfred A Knopf, 1987).

²⁵² Raitt and Zeedyk (n 223) 269.

²⁵³ *ibid* 276.

²⁵⁴ *ibid* 269.

²⁵⁵ Cunliffe E, *Murder, Medicine and Motherhood* (Hart Publishing 2011) 37, 100, 101.

²⁵⁶ *R v Folbigg* [2003] NSWSC 895 (24th October 2003); *R v Folbigg* [2005] NSWCCA 23.

²⁵⁷ Cunliffe (n 255) 100.

²⁵⁸ *Folbigg* [2003] (n 256) 23 para 1 per Barr J.

²⁵⁹ Cunliffe (n 255).

Folbigg,²⁶⁰ because of the reliance by the prosecution on flawed expert opinion previously rejected in the English appeals.

Nevertheless, despite similarities, (a reliance on similar fact evidence, and a reliance on *Makin*²⁶¹ and *Boardman*²⁶² (- see later discussion in *Clark* of similar fact evidence), *Folbigg*²⁶³ includes evidence found in neither *Clark* nor *Cannings*. Therefore as in *Thornton*²⁶⁴ and *Ahluwalia*,²⁶⁵ information about a woman's conduct may be part of the evidence, but may be factually accurate, and may not have not engaged gendered stereotypes. In *Folbigg*, medical and welfare records, personal diaries and social and psychiatric opinions were admitted, detailing *Folbigg*'s childhood abuse,²⁶⁶ her depression²⁶⁷ and difficulties in controlling her anger as a very young child, and as an adult.²⁶⁸ If the body of evidence as a whole including these factors were taken into account, her guilt was not according to Sully J at appeal, 'inherently incredible'.²⁶⁹ But, despite positive descriptions of *Folbigg*'s child care as exemplary,²⁷⁰ interpretations of information including social and psychiatric information about *Folbigg*, may well have been influential in portraying a mother who would be perceived as being disposed to killing her own infants.

As *Folbigg* has not been acquitted²⁷¹ despite concerns about the safety of her conviction,²⁷² and further leave to appeal has been refused,²⁷³ it is difficult to argue that stereotypical

²⁶⁰ *Folbigg* [2003] (n 256).

²⁶¹ *Makin v Attorney General of New South Wales* [1894] A C 57.

²⁶² *R v Boardman* [1975] A C 421.

²⁶³ *Folbigg* [2003] (n 256).

²⁶⁴ *Thornton (No 1)* (n 49); *Thornton (No 2)* (n 49).

²⁶⁵ *Ahluwalia* (n 49).

²⁶⁶ *Folbigg* [2005] (n 256) para 169 per Sully J.

²⁶⁷ *ibid* para 173 per Sully J.

²⁶⁸ *Folbigg* [2003] (n 256) paras 48-50 per Barr J citing opinions submitted in court by Dr Giuffrida a psychiatrist, paras 105, 165 per Barr J.

²⁶⁹ *Folbigg* [2005] (n 256) para 141 per Sully J.

²⁷⁰ *Folbigg* was described as 'a caring mother, who, ... always kept her children clean and tidy ... was attentive to their appointments with doctors. ... she was concerned as a parent and enjoyed being a parent ... There was no 'failure to thrive' by the children ... they were well-nourished and cared for' *Folbigg* [2005] (n 256) para 47 per Sully J.

²⁷¹ *Folbigg* (n 256).

interpretations of non-medical information about Folbigg influenced her wrongful conviction. In addition, there is no indication in the Australian Supreme Court (NSWCCA) trial report of a connection to *Clark* and *Cannings* at Folbigg's trial. The NSWCCA who were granted access to the report of the *Cannings* interlocutory appeal hearing, (heard prior to *Cannings*), cited from that material at Folbigg's appeal,²⁷⁴ to distinguish *Folbigg* from *Cannings* in several ways.²⁷⁵ In *Cannings*, the findings were to be regarded as 'case-specific'; an expert witness was involved whose evidence was deemed seriously flawed; fresh scientific evidence was presented at appeal, together with an extended family tree context.²⁷⁶ Although defence counsel sought to rely on *Cannings*²⁷⁷ in Folbigg's unsuccessful first appeal in 2005,²⁷⁸ and her unsuccessful second application to appeal,²⁷⁹ according to the court none of the distinguishing *Cannings* features were present in defence arguments at Folbigg's appeal. Additional factors absent in *Cannings* however, were present in *Folbigg*, including as discussed above, information about loss of control and incriminating diary entries.

The court therefore appears to have had confidence not only in the expert opinions, but also the social and welfare evidence. Cunliffe suggests that the bad mother typification, (identified by Smart) influenced the jury's decision to convict Folbigg,²⁸⁰ based on prosecution portrayals of the defendant in Cunliffe's words, as a 'demonstrably unfit mother',²⁸¹ a 'malevolent mother',²⁸² and echoing the Wells/Smart notion, for failing to conform to 'normative conceptions of the good mother'.²⁸³ Cunliffe develops Raitt's argument²⁸⁴ to

²⁷² Cunliffe (n 255).

²⁷³ *Folbigg v The Queen* [2005] HCA Transcript 657 (2 September 2005) per McHugh ACJ, Kirby J, Heydon J.

²⁷⁴ *Cannings* (n 1) paras 10-13, especially 12 per Judge LJ.

²⁷⁵ *Folbigg* [2005] (n 256) para 156 per Sully J.

²⁷⁶ *ibid* paras 137-141 per Sully J.

²⁷⁷ *Cannings* (n 1).

²⁷⁸ *Folbigg* [2005] (n 256) paras 137-141 per Sully J.

²⁷⁹ *Folbigg v Queen* (n 273).

²⁸⁰ Cunliffe (n 255) 193.

²⁸¹ *ibid* 3.

²⁸² *ibid* 97, 100, 106.

²⁸³ *ibid* 109.

suggest that the prosecution in *Folbigg*, reliant on expert opinion as in *Clark* and *Cannings*, and already shown to be unreliable, drew on social expectations of ‘proper’ mothering. Such discourses of mothering, suggests Cunliffe, provided the prosecution with a seamless argument by filling the gaps with stereotypical representations of Folbigg, as a mother. By showing that Folbigg was not a proper mother, using evidence of ill temper towards her children and through her incriminating diaries, Cunliffe suggests the prosecution could transfer ‘public focus away from the inability of forensic pathology to explain a set of infant deaths’.²⁸⁵ ‘A longstanding gap in the science could be written off as never having been a gap at all’.²⁸⁶

In the light of the discussion in previous sections, there are number of issues that arise from the arguments put forward by Wells, Raitt and Cunliffe. Wells, Raitt and Zeedyk, argue that in the absence of conclusive expert opinion, advocates were forced to explain children’s deaths in *Clark* and *Cannings* using ‘social expectations about ‘proper’ mothering’.²⁸⁷ Cunliffe argues that where the diagnostic techniques of child mistreatment are uncertain, mothers may be criminalised by deliberately portraying them as failing to conform to the dominant ideology of motherhood.²⁸⁸ Such a suggestion, is as Laura Hoyano rightly points out, a ‘very large and diffuse claim to be substantiated by a single prosecution’.²⁸⁹

Moreover, the existence of ‘hidden factors’²⁹⁰ such as ‘underlying assumptions’²⁹¹ and discourses of mothering are not clearly defined, nor is it apparent whether they exist or how

²⁸⁴ Cunliffe (n 255) 37, citing at n 79 citing Raitt F and Zeedyk S, ‘Mothers on Trial: Discourses of Cot Death and Munchausen’s Syndrome by Proxy’ (2004) 12 Fem LS 257, 264.

²⁸⁵ *ibid* 37.

²⁸⁶ *ibid* 37.

²⁸⁷ Raitt and Zeedyk (n 223) 264.

²⁸⁸ Cunliffe (n 255) 100 citing M Klein ‘Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women’ in MA Fineman and I Karpin (eds) *Mothers in law: Feminist Theory and the Legal Regulation of Motherhood* (Colombia U Press, 1995) and DE Roberts, ‘Motherhood and Crime’ (1993) 79 Iowa Law Review 9.

²⁸⁹ Hoyano L, ‘Book Review, Murder, Medicine and Motherhood’ (2014) 18(2) E & P 200, 202.

²⁹⁰ Raitt and Zeedyk (n 223) 263.

²⁹¹ *ibid* 263.

they are used by the law to interpret maternal behaviour and child care. In addition, it is not clear to what extent negative interpretations of the behaviour of mothers may be accurate. As the discussion on husband homicide cases indicates, although such extraneous material is admitted, other information including defendant statements, inadequate defence advocacy and judicial beliefs, may also be influential. And, as the examination of the ways in which rape complainants may be perceived suggests, inferences about women based on extraneous and non-medical information may not be inaccurate, leading to the possibility that myths have been created about rape myths. Consequently, when deliberating whether stereotypical perceptions of maternal behaviour do influence the outcomes of criminal proceedings such considerations need to be addressed, particularly as information about mothering was admitted in almost all of the child death cases considered,²⁹² including those where mothers were acquitted at trial.²⁹³

The question whether one can extrapolate feminist arguments from husband homicide cases, and rape trials to child death cases heavily dependent upon forensic opinions, is problematic. Such proceedings are fundamentally dissimilar in a number of ways and at first sight it is not clear whether such situations could in any way be analogous. Across the three topic areas considered there is therefore a potential conflict in the way stereotypical perceptions and myths are argued to work. Rape myth scholarship argues that where scant and conflicting expert opinion exists, police and CPS may be unwilling to pursue cases, and juries may be reluctant to convict on a lack of real evidence and a wealth of conflicting circumstantial evidence.

²⁹² *Clark* (n 1); *Cannings* (n 1); *Harris* (n 1); *Gay and Gay* (n 1); *Anthony* (n 1); *R v Kai-Whitewind (Chaha'oh Niyol)* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31; *Folbigg* [2005] (n 256); *R v Henderson* [2010] EWCA Crim 1269, 2010 2 Cr App R 24; *Stacey* (n 74); *R v Haigh (Tara Elizabeth)* [2010] EWCA Crim 90, [2010] WL 308548 CACD; *Hainey v HM Advocate No 7* [2013] HCJAC 47, [2014] J C 33; *Walker (Jennifer) v HM Advocate* [2011] HCJAC 51, 2011 S LT 1114; *R v Smith (Margaret)* (Newcastle Crown Court, 10th November 2004); *R v Underdown (Nicky)* [2001] EWCA Crim 1556, 2001 WL 753325 CA (CD); *R v Holdsworth (Suzanne)* [2008] EWCA Crim 971, 2008 WL 1867253.

²⁹³ *Al-Alas and Wray* (n 293); *R v Khatun (Saleha)* (Central Criminal Court, 22 December 2009); *Patel* (n 136).

In contrast, feminist work based on BWS and child death cases, argues that police and CPS may be more willing to pursue convictions. Further, that juries in homicide cases involving women alleged to have killed a child, may be more willing to convict. In adult homicide trials, there is an adversarial relationship on behalf of a male victim and a female perpetrator, and in rape trials the gender relationship is (generally) reversed. A further difference between the three topic areas is that women may have admitted killing their husbands, whereas in both rape trials and the wrongful convictions in question, there is a denial of guilt. But, in all cases trial outcomes are dependent on the nature of the evidence presented at trial. For women who admit the killing of their husbands, or for rape complainants, trial outcomes depend on CPS gathered factual and forensic evidence, defendant statements, expert opinions, the defences that are consequently available (or not), to them and lastly information about behaviour that may or may not be sufficiently reliable.

If the context of the adversarial approach is set aside, and bearing in mind that it is very difficult to understand how particular juries make their decisions, as jury deliberations and reasons for verdicts are secret,²⁹⁴ the shared concern between the three types of criminal proceedings relates to the possibility that outcomes are related to gendered behavioural norms. The common issue between adult homicide, rape trials and child death cases may be I suggest that information about women's behaviour is admitted, and the common questions are why that information is admitted, how it is perceived and whether it really does impact credibility and or give rise to wrongful convictions.

That the impact of behaviour may be influential in child death cases is feasible given that such information interpreted at trial may give rise to different interpretations at appeal. In *Thornton, Clark* and *Cannings*, inferences about behaviour changed from trial to appeals, suggesting that such information does not generate consistently reliable conclusions. The

²⁹⁴ *Taxquet v Belgium* (Application no. 926/05) (ECtHR, 2010).

place of expert opinion in judging women's behaviour is also significant. As a result of expert opinion on BWS, Thornton's damaged mental state was accepted at her second appeal, whereas it was disregarded in favour of perceptions of her as bad, at trial and first appeal. In *Clark* and *Cannings* in particular, non-medical information relating to behaviour and child care was viewed differently by the courts, once expert opinion had been exposed as flawed.²⁹⁵ Confidence in interpretations of non-medical information of behaviour and child care, may as a consequence be problematic. There is a further difficulty in that seemingly adverse interpretations about women's and mothers' behaviours, may be argued to have some truth in them. *Rape myths* have been criticised for not being inaccurate, and in the husband homicide cases, and child death cases, non-medical evidence of mothering that portrays a woman or mother in a bad light, as in *Anthony*, *Clark* and *Folbigg*,²⁹⁶ may not be wrong and the inferences logical.²⁹⁷

The question remains however, whether it is possible that interpretations of mothering do support or lead to wrongful convictions, and how that happens in relation to expert opinion which is perceived to provide the foundations for both prosecution and defence arguments in child death cases. Expert opinion and syndrome evidence has been influential in all three types of cases considered. But the relationship between expert opinion and interpretations of maternal behaviour are confusing. If an expert opinion is contested, controversial and inconclusive, and there is no evidence of poor mothering but on the contrary the reverse, fact finders have accepted judicial confidence in expert opinion, and inferred that the mother must have done something wrong that has yet to be identified. For example, mothers and carers

²⁹⁵ *Cannings* (n 1) paras 160-161 per Judge LJ.

²⁹⁶ *Clark* (n 1); *Anthony* (n 1) *Folbigg* (n 256) and also see *Kai-Whitewind* (n 265).

²⁹⁷ See *Smith* (n 292) a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in *Jenkins R*, 'Mother Cleared of Baby Murder Had Stabbed Husband to Death' *The Times* (London, 10 November 2004). <<http://www.thetimes.co.uk/tto/news/uk/article1918828.ece>> accessed 2 September 2013; *Haigh* (n 265); *R v Hainey (Kimberley Mary)* (High Court Glasgow 15 December 2011) also an unsupported mother, described as having multiple coping difficulties.

Cannings, *Harris*, and *Henderson*²⁹⁸ were all convicted, despite evidence that they were all good mothers. On the other hand, *Patel*,²⁹⁹ was also described as an exemplary mother and acquitted at trial, but the judicial reason was a lack of judicial confidence in the contested expert opinion,³⁰⁰ and likewise in *Al-Alas and Wray*³⁰¹ and *Khatun*,³⁰² the latter described as having ‘impeccable character and mothering skills’.³⁰³ Therefore, judicial confidence in expert opinion, together with the lack of any information about mothering on which to ground a negative inference, may have been supportive of decisions to acquit.

Despite the strength of the radical feminist arguments, it is difficult to conclude that interpretations about mothering independently influenced the outcomes of criminal proceedings. Further, there have been few prosecutions involving SUDI since *Clark* and *Cannings*, apart from the Scottish cases³⁰⁴ which have raised similar concerns. It is tempting to suggest therefore, that the changes prompted by these cases in admitting expert evidence, have sufficed to prevent further similar wrongful convictions, and that the impact of wrongful interpretations of maternal behaviour is of little continuing relevance.

The reduction in such wrongful convictions however, may also be due to other factors, such as the reduction in reliance upon MSbP within the criminal justice system, (and its leading proponent, Professor Meadow), which Wells, and Raitt and Zeedyk suggested was bolstered by assumptions of mothering, unfavourable to defendants. But, in relation to both Wells’ and Raitt’s’ claims regarding the way the theory of MSbP incorporates assumptions about mothering, in neither *Clark* nor *Cannings* was this syndrome raised as a prosecution

²⁹⁸ *Cannings* (n 1); *Harris* (n 1); *Henderson* (n 292).

²⁹⁹ *Patel* (n 136).

³⁰⁰ *Cannings* (n 1) paras 15, 22, 164, 165, 171 per Judge LJ

³⁰¹ *Al-Alas and Wray* (n 293).

³⁰² *Khatun* (n 293).

³⁰³ Kelly T and Loveys K, *The Daily Mail* (London, 22 December 2009)

<<http://www.dailymail.co.uk/news/article-1238153/Freed-mother-wrongly-accused-killing-baby.html#ixzz41kMAHuSb>> accessed 4 Jan 2016; Defence QC Michael Turner is quoted as saying that when ‘the only evidence is one of experts, and they do not agree’, a mother should not be prosecuted.

³⁰⁴ *Hainey* (n 292); *Walker* (n 292).

argument and there is only one mention of the syndrome in each appeal report. In the first unsuccessful appeal in *Clark*, Professor Meadow, was described as ‘a distinguished paediatric consultant... and an acknowledged expert in the field of child abuse, and the discoverer of Munchausen Syndrome by Proxy’.³⁰⁵ Whether his presence as the expert in MSbP, influenced either Clark’s conviction, or her appeal when he gave no evidence that Clark was diagnosed with MSbP, is perhaps possible, but given the wealth of additional (flawed) expert opinions, unlikely.

Likewise, in *Cannings*, the syndrome is mentioned once in the appeal report to make clear that MSbP, or Factitious Disorder by Proxy (FDbP) as it is referred to, had been excluded in Cannings’ case,³⁰⁶ yet neither point was made by either Wells or Raitt. It is difficult to see therefore how one might support the Wells/Raitt propositions by reference to *Clark* and *Cannings*, that assumptions about mothering supported medical theories such as MSbP, thereby leading to decisions to convict. MSbP is however still relevant in child protection case law³⁰⁷ and the therapeutic analysis of mothers who are convicted of killing their children.³⁰⁸ Professor Meadow’s legacy remains, together with the possibility that mothers’ behaviour in family cases may be negatively interpreted, and therefore further cases may arise in the future in the family courts if not also in criminal proceedings.

1.2 Conclusion

In contrast to expert opinion and the changes in the law to ensure expert opinions are sufficiently reliable, the admission of non-medical information is currently subject to few

³⁰⁵ *Clark (No 1)* (n 13) para 119 per Henry LJ.

³⁰⁶ *Cannings* (n 1).

³⁰⁷ *A Council v LG, DS, GS, LS (by their Children's Guardian)* Case No: TK13C0079 HCJ [2014] EWHC 1325 (Fam) WL 1219895; *A County Council v A Mother, A Father, X, Y and Z (by their Children's Guardian)* Case No: WR03C00142 HCJ (Fam) [2005] EWHC 31, (Fam) 2005 WL 353381; *X County Borough Council v ZS, DJW, KJW (the child) By His Guardian v GEM, CM* Case No: CJ15C00093 Family Court 2015 WL 10382713; RCPCH, ‘Fabricated or Induced illness by Carers (FII): A Practical Guide for Paediatricians’ (RCPCH 2009).

³⁰⁸ Motz A, *The Psychology of Female Violence Crimes against the Body*, (Brunner-Routledge, 2001); Weldon E, *Mother, Madonna, Whore: The Idealization and Denigration of Motherhood*, (Free Association Press 1988, Guildford Press 1992).

controls. Three topic areas have been considered in which feminist scholarship has argued that female behaviour evidence is admitted and interpreted respectively, as stereotypically, or using rape myths, or employing discourses of mothering and that's such interpretations influence criminal proceedings leading to unjust outcomes for some women.

This chapter suggests that it is possible to analogise across the three different areas of the CJS, if the difference in adversarial attitude and carceral intent is set aside, and the scope of such an approach is narrowly limited to examining how non-medical information about women and mothers may be interpreted. The analysis suggests that uncontrolled admission of non-medical evidence is part of a gender biased approach³⁰⁹ that ignores women's understandings,³¹⁰ because of the way such information may be interpreted. Women's credibility, may therefore be unfairly damaged because of the ways in which such information may be interpreted, by disregarding 'the reality of women's lived experiences'.³¹¹

From the cases considered here, the women and mothers most vulnerable to injustice may be those who behave in unexpected ways, or who have psycho-social factors such as a poor childhood, or substance abuse, which may engage natural and logical suspicions,³¹² sustain judicial common sense,³¹³ and confirm unconscious stereotypes.³¹⁴ If courts take the body of evidence as a whole into consideration, including information about addictions (*Clark*), childhood and sexual assault as in *Folbigg* and *Kai-Whitewind* respectively, or inadequate mothering as in *Smith*, *Haigh* and *Hainey*,³¹⁵ there is a risk that stereotypical or biased

³⁰⁹ Hunter et al (n 38) 35; Childs and Ellison (n 2) 8.

³¹⁰ Childs and Ellison (n 2) 8 citing at n 24 Orenstein A, 'Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where you would Least Expect it' (1999) 28 Southwestern UL Rev 221, 226.

³¹¹ Hunter et al (n 38) 35.

³¹² Hoyano (n 289) 202.

³¹³ Samuels H, 'Judicial Deference and Feminist Method' [2014] Public Law 512, 514.

³¹⁴ *ibid* 515.

³¹⁵ *Smith* (n 292) - a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in *Jenkins R*, 'Mother Cleared of Baby Murder Had Stabbed Husband to Death' *The Times* (London, 10

interpretations of such information may occur because of the ways in which the behaviour of mothers which is unusual or unexpected may be perceived.

But, consideration of recent criticism of the feminist position in rape cases, suggests that non-medical information may be factual and not always lack either accuracy or relevance. Taking all the evidence presented as a whole, trial decisions may therefore be rational, although unjust with hindsight e.g. *Thornton, Ahluwalia, Clark*. Accordingly, without clarification of good and bad mothering concepts and the associated assumptions, beliefs, discourses, ideologies, stereotypes and myths, it is difficult to justify the view that non-medical information about maternal behaviour and child care is rightly or prejudicially interpreted. Further, there is an issue whether one can make use of or transpose the word *myth* to describe beliefs about mothering, or *mothering myths*, in order to interrogate and identify what may have happened in child death cases without a theorisation of myths.

This chapter concludes that criminal justice system outcomes in child death cases may be influenced by several potential factors, not only expert opinion, including judicial confidence in expert opinion, judicial beliefs, inadequate defence advocacy and interpretations of non-medical evidence. Although medical opinion is argued to be privileged and subsequently censured for being responsible for miscarriages of justice, medical opinion is not the only influencing factor in criminal proceedings. Analogising from other areas of the CJS to child death cases, suggests that interpretations of non-medical evidence may also play a part in a complex evidential mix.

November 2004) <<http://www.thetimes.co.uk/tto/news/uk/article1918828.ece>> accessed 2 September 2013; *Haigh* (n 265) described as a poor and inadequate mother with an abused and unstable early childhood; *Hainey* (n 292).

Chapter Two: Using RMA scholarship to theorise the mothering myth

2.0 Introduction

This thesis argues that prejudicial¹ interpretations of non-medical information including maternal behaviour and child care may have influenced wrongful convictions in child death cases. Two other topic areas have been considered in which feminist scholarship argues that the admission of non-medical evidence is always gendered since the parties are inescapably gendered.² Consequently, women's credibility may be damaged unfairly if the non-medical evidence is interpreted using stereotypical beliefs about women or rape myths. Chapter one suggested that analogising from these areas may be helpful in understanding how (mis)interpretations of the feminine in child death cases may arise. The common issue in all three areas is the admission of evidence of female behaviour and that it may be interpreted in a prejudicial way. Consequently legal decision making may not be based purely on forensic or expert evidence.³

Conventionally, a lack of forensic evidence,⁴ or false complaints,⁵ have been blamed for the 'low reporting rates, high attrition rates and low conviction rates at trial'⁶ of sexual assault,

¹ Prejudicial is defined as 'harmful or detrimental to someone or something' see Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/prejudicial>> accessed 19 May 2016.

² Hunter R, McGlyn C and Rackley E, 'Feminist Judgments an Introduction' in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 35; Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 8.

³ Nicholson D, 'Gender Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 21; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Cossins KA, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) *International Journal of Evidence & Proof* 74 citing at (n 3) *NSW Criminal Justice and Sexual Offences Taskforce, Responding to Sexual Assault: The Way Forward* (Attorney-General's Department of NSW, 2005); NSW Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No 208) (Report 22) (NSW Parliament, 2002).

⁴ Nicholson (n 3); Temkin and Krahe (n 3); Cossins (n 3) 75 citing at (n 3) *NSW Criminal Justice and Sexual Offences Taskforce, Responding to Sexual Assault: The Way Forward* (Attorney-General's Department of NSW, 2005) and NSW Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No 208) (Report 22) (NSW Parliament, 2002).

⁵ Cossins (n 3) 75 citing at (n 4) Coyle IR, Field D, Wilson P et al 'Out of the Mouth of Babes: The Case for an Increased Use of Expert Evidence in Rebuttal of Sexual Abuse Allegations by Child Witnesses' (2009) 33 *Criminal Law Journal* 139.

⁶ *ibid* citing at (n 1) Wundersitz J, 'Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court' (Office of Crime Statistics and Research, 2003); see also Ellison L, 'Closing the Credibility Gap: The

and controversial and poorly contested expert opinions have been blamed for wrongful convictions in child death cases.⁷ If a rape case involves the ‘word of a complainant against the word of a defendant, with little or no corroborating evidence, insufficiency of evidence is said to be both the problem and the reason for low conviction rates at trial and high acquittal rates before trial’.⁸ Insufficiency of reliable evidence in child death cases has also been blamed as the problem of and reason for wrongful convictions in child death cases⁹ and the courts, academic commentary and the Law Commission¹⁰ have held overzealous experts, and flawed evidence responsible.

Cossins articulates the counter argument for explaining the high attrition of sexual offences complaints, which is that ‘myth, prejudice and disbelief surround the reporting, investigation and prosecution of sexual assault, producing a ‘culture of scepticism’.¹¹ Such an approach is argued to account not only for police reluctance to investigate some cases, but that a ‘culture of disbelief also permeates the criminal trial, including the jury room’.¹² The problems and reasons are regarded as wider than the problem of individual injustices.¹³ Temkin and Krahe

Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’ (2005) 9 E & P 239; Kelly L, Lovett J and Regan L, ‘A Gap or a Chasm? Attrition in Reported Rape Cases, Home Office Research Study No. 293 (Home Office, 2005); Temkin and Krahe (n 3) 20-1; Fitzgerald J, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’, Crime and Justice Bulletin No. 92 (NSW Bureau of Crime Statistics and Research, 2006); Daly K and Bouhours B, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ in M. Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2010) 565.

⁷ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, (Law Com No 325, 2011) paras 1.8, 1.17, 1.21, 2.16, 3.3, 3.4.

⁸ Cossins ‘Expert Witness Evidence’ (n 3).

⁹ For example in *R v Clark (Sally)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607.

¹⁰ Law Com 325 (n 7).

¹¹ Cossins A, ‘Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us’ (2008) 15 Psychiatry, Psychology and Law 153 and citing at (n 1) Ellison L, ‘Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’ (2005) 9 E & P 239 and Kelly L, Lovett J and Regan L, ‘A Gap or a Chasm? Attrition in Reported Rape Cases Home Office Research Study No 293 (Home Office, 2005).

¹² Cossins ‘What Laypeople Think’ (n 11).

¹³ There is an additional thread in the rape scholarship, of attribution theory, that argues that rape complainants may be blamed for the predicament in which they find themselves, which adds to the mix of problematical reasons for perceived unjust outcomes of rape trials. There is also the possibility that attribution theory could be discussed in terms of the wrongful outcomes of child death cases, by proposing that the reason for some wrongful convictions is that the mothers were blamed for the deaths of their children, irrespective of the

theorise that the “‘justice gap’”¹⁴ identified in sexual offending statistics,¹⁵ as the discrepancy between the rapidly rising number of recorded rapes as against a relatively static number of convictions’,¹⁶ may be explained by such beliefs. Temkin and Krahe however also found that although stereotypical judicial attitudes towards complainants,¹⁷ and unrealistic and stereotypical attitudes of jurors¹⁸ were identified by legal practitioners, factors such as ‘poor policing’,¹⁹ poor defence counsel behaviour,²⁰ and low standards of advocacy and incompetent prosecuting counsel,²¹ also contributed to the *justice gap*.

It is beyond the scope of this chapter to explore the statistical evidence and arguments about the attrition of rape complaints and conviction rates in rape trials. However, the point that is needed here is that there is a long-standing view in feminist argument²² and judicial commentary, that it is not only factual evidence that influences legal decision making in relation to charges of rape, but beliefs and interpretations of the feminine as well. As suggested in the Canadian case, *Seboyer*,²³ in the context of judicial tests of relevancy in rape trials, ‘Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs’.²⁴ In *Seboyer*, Madame Justice L’Heureux-Dubé’s commentary concluded that ‘there are certain areas of inquiry where

evidence. This possibility is outside the scope of this thesis but see also Temkin and Krahe (n 3) page 48; Redmayne M, *Character Evidence in the Criminal Trial*, (OUP 2015).

¹⁴ Temkin and Krahe (n 3) 31; Reece H, ‘Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?’ (2007) 33 (3) OJLS 445, 448-451.

¹⁵ For example Ministry of Justice, Home Office and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (2013) 20 cited by Reece (n 13) 448 at (n 32); Crown Prosecution Service, *Narrowing the Justice Gap 2014* <<http://www.cps.gov.uk/publications/prosecution/justicegap.html>> accessed 2 June 2016.

¹⁶ Conaghan J, Russell Y, ‘Rape Myths, Law, and Feminist Research: ‘Myths about Myths?’ [2014] 22 Fem Leg Stud 25, 26 citing at n 1 Crown Prosecution Service, *Narrowing the Justice Gap 2014* <<http://www.cps.gov.uk/publications/prosecution/justicegap.html>> accessed 2 June 2016.

¹⁷ Temkin and Krahe (n 3) 131.

¹⁸ *ibid* 132.

¹⁹ *ibid* 127.

²⁰ *ibid* 129.

²¹ *ibid* 130.

²² Ellison L, *R v A (No 2)*—Commentary in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 205.

²³ *R v Seboyer* [1991] 2 SCR 577 paras 140-152, 207 per Madame Justice L’Heureux-Dubé.

²⁴ *ibid*.

experience, common sense and logic are informed by stereotype and myth'.²⁵ Further, that judicial tests influence not only admissibility decision making, but also 'the processing of complaints, the law applied when and if the case proceeds to trial, the trial itself and the ultimate verdict'.²⁶ By analogy, this thesis argues that in child death cases also, it is possible that stereotypical beliefs and myths may have been used to interpret information about maternal behaviour from admission and throughout criminal proceedings in support of unjust outcomes.

Chapter one also noted however, that in some cases in both trials of battered women and rape trials, other potential causes of injustice were noted, including inadequate defence advocacy. Further, that rational decisions based on factual information about behaviour may be made and as a result, the outcomes of criminal proceedings may owe less to the impact of stereotypical beliefs and/or rape myths than is claimed, and more to other factors. The same possibility may therefore apply to child death cases, and so there are a number of areas that need to be considered.

In order to interrogate child death cases as to whether stereotypical beliefs or myths have influenced wrongful convictions, the most appropriate terminology needs to be identified. A number of different terms were noted in chapter one, and therefore in order to clarify which words will be most helpful, the definitions of and distinctions between myths, stereotypes and attitudes, ideologies and discourses will be explored. Definitions are nevertheless problematic. Even though 'every word in language signifies something',²⁷ one person may consider information and have a particular experience, another person may derive a different meaning from the same information.²⁸ As Wittgenstein suggests, how someone "takes" the

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Wittgenstein L, *Philosophical Investigations* (3rd edn Blackwell Publishing 2004) 6.

²⁸ *ibid* 10, 15.

definition is seen in the use that he makes of the word defined'.²⁹ Establishing definitions may therefore be perceived as a complex language-game.³⁰ Even though what are being described are beliefs or attitudes, words such as stereotype and myth may be used to emotional and functional effect, so the reasons for language choices also need to be examined. Further, although the purpose of theorising is to provide rules to prevent slippages between meanings, definitional exactness may not be realistic.³¹

There is relatively much more academic commentary involving the language of stereotypes, myths and attitudes about women in rape myth scholarship. Accordingly, the following discussion on terminology focusses on this area, rather than the topic area of abused women charged with murdering their husbands. The difficulties and advantages of stereotypical thinking, and of using particular language in rape cases is examined to show how myths have been theorised, and to expose the function and significance of myths in society. The way myths are used in the criminal justice system is examined, and the question whether it is possible to transpose the word myth from rape scholarship to describe a belief about mothering is addressed. Using leading research from rape myth scholars, a definition of a mothering myth is proposed with which to interrogate child death cases. Mothering is distinguished from motherhood for the purposes of this thesis, and theorised to uncover individual beliefs. Examples of normative beliefs about mothering are discussed to show how if held in a fixed manner, they may be applied within criminal proceedings to support or justify adverse decisions.

²⁹ *ibid* 12.

³⁰ *ibid* 10, 15.

³¹ *ibid* 37.

Although Gerger et al suggest rape myths are ““wrong” in an ethical sense’,³² and early social psychology scholars such as Zawadzki, that stereotypes represent ‘a very poor device in thinking’,³³ more recent social cognition research into the nature of stereotypical thinking shows that far from providing unprincipled decision making, stereotypical beliefs are merely unconscious efforts to make sense of and categorise complex observations,³⁴ and that ‘Implicit bias is biological, normal’.³⁵ Such differing positions therefore provide a further issue of responsibility, to consider. Theorisation of stereotypes through cognitive and social behavioural research has not only sought to understand how stereotyping occurs, but has also in its application to the understanding of racism for example,³⁶ sought to understand whether the holder of a stereotypical belief is responsible for the consequences of their beliefs, or whether such ideas are merely ‘unconscious’.³⁷ This point is important in understanding whether decision makers in the criminal justice system can be said to be morally culpable for relying on stereotypical beliefs to make decisions that lead to injustice, or, whether decisions using stereotypical beliefs are normal and inevitable.³⁸

The following discussion therefore seeks to 1) define and explore the use of terminology; 2) theorise myths; 3) theorise mothering as discourse, to show how child death cases may also be affected by the influence of stereotypical beliefs and myth.

2.1 Definitions

The first section seeks to define and distinguish the words used most frequently in the feminist scholarship explored in chapter one, (stereotypes, myths, attitudes, assumptions,

³² Gerger H, Kley H, Bohner G and Siebler F, ‘The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English’ [2007] 33 *Aggressive Behaviour* 422, 423.

³³ Zawadzki B, ‘Limitations of the Scapegoat Theory of Prejudice’ (1942) 43 *Journal of Abnormal and Social Psychology* 127, 140.

³⁴ Lawrence C III, ‘Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”’ (2008) 40 *Connecticut Law Review* 931, 960.

³⁵ Lawrence (n 34) 960.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid* 961.

discourses, ideologies, facts) in order to identify which concepts and terms might best be used to interrogate child death cases to understand what is happening there.

2.1.1. Defining stereotypes

In questioning certain legal decisions, e.g. *Thornton*,³⁹ Nicholson claims that the basis for an arguably unjust criminal decision was stereotypical thinking of the credible woman.⁴⁰ The Oxford dictionary defines stereotypes as ‘widely held but fixed and oversimplified ideas of a particular type of person’,⁴¹ where an idea can be a belief or opinion⁴² that accepts that something is true without proof.⁴³ Beliefs that women who have had multiple sexual relationships are bad,⁴⁴ or women dependent on alcohol are bad⁴⁵ if described as stereotypes, need first to be shown as widely held; secondly that the idea is fixed and oversimplified; and thirdly that the idea is a belief,⁴⁶ i.e. that it demonstrates an acceptance that something exists or is true, without the need for proof.⁴⁷ Justifying claims that certain ideas are stereotypes may be problematic without more, in the form of empirical proof of the idea from statistical analysis. However, as the following brief exploration of social psychologists’ theorisation of stereotypes indicates, the word stereotype is widely used whilst seemingly taking for granted that the belief under consideration fulfils the definition of a stereotype. It is therefore possible that using the word stereotype also fulfils a language game, such as implied criticism.

Central to social psychologists’ views of stereotypical thinking are theories of schemas, or ‘mental representations of social categories’⁴⁸ that influence the way we perceive others. If

³⁹ *R v Thornton* [1992] 1 All ER 306; *R v Thornton (No 2)*, [1996] 2 All ER 1023.

⁴⁰ Nicholson (n 3) 21.

⁴¹ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/stereotype>> accessed 19 May 2016.

⁴² *ibid* <<http://www.oxforddictionaries.com/definition/english/idea>> accessed 19 May 2016.

⁴³ *ibid* <<http://www.oxforddictionaries.com/definition/english/belief>> accessed 19 May 2016.

⁴⁴ Nicholson (n 3) 21.

⁴⁵ *R v Clark (Sally (No.1))* CACD 2000 WL 1421196 para 87 per Henry LJ Clark who stated that ‘Clark tended to drink more heavily when her husband was away’.

⁴⁶ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/idea>> accessed 19 May 2016.

⁴⁷ *ibid* <<http://www.oxforddictionaries.com/definition/english/belief>> accessed 19 May 2016.

⁴⁸ Kapardis K, *Psychology and Law A Critical Introduction* (3rd edn CUP 2010) 67.

for example a person categorises another as belonging to a particular group for example women, or rape complainants, or homicide suspects, then mental representations about that group of people may influence our expectations...what inferences we make about that person as well as how we judge them'.⁴⁹ For example, we may hold a belief that women are carers.⁵⁰ Kapardis suggests that 'Stereotypes are a type of schema, and therefore, they distort reality (as do all such concepts), and oversimplify it to a certain degree'⁵¹ to the extent that beliefs about groups in society become generalised.⁵²

Groups to which people themselves belong however, are perceived to be composed of individuals with diverse beliefs and behaviours. But those which are other, or 'out-groups'⁵³ such as women rape complainants or different racial or cultural groups, are perceived to be homogenous, having obvious traits and conduct. In considering beliefs about different racial groups, Lawrence has drawn attention to early social cognition research that proposes outgroups are theorised to be triggered by in-group held prejudice, that then justifies and rationalises negative beliefs and hostile behaviours.⁵⁴ It is not the purpose here to analogise from race theory to rape work, but caution is needed before assuming that beliefs inexorably lead to sexually aggressive behaviour or negative decisions within rape trials. Newcombe et al have identified that those holding stereotypical beliefs about rape, do not necessarily also demonstrate negative behaviours;⁵⁵ the same may therefore hold in child death cases,

⁴⁹ ibid citing Goodman KC and Gareis KC 'The Influence of Status on Decisions to Help' (1993) 133 *Journal of Social Psychology* 23.

⁵⁰ As suggested by Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/stereotype>> accessed 19 May 2016.

⁵¹ Kapardis (n 48) 68.

⁵² ibid citing Walter Lippman *Public Opinion* (Harcourt Brace 1922) credited with devising the term *stereotype*.

⁵³ ibid citing GA Quattrone and EE Jones, The Perception of Variability with In-Groups and Out-Groups: Implications for the Law of Small Numbers (1980) 38 *Journal of Personality and Social Psychology* 141.

⁵⁴ Lawrence (n 34) 961.

⁵⁵ See later discussion referencing Newcombe PA, Eynde J, Van Den, Hafner D et al, 'Attributions of Responsibility for Rape: Differences across Familiarity of Situation, Gender, and Acceptance of Rape Myths' (2008) 38(7) *Journal of Applied Social Psychology* 1736, 1749 citing amongst other researchers, Forbes GB and Adams-Curtis LE, 'Experiences with Sexual Coercion in College Males and Females: Role of Family Conflict, Sexist Attitudes, acceptance of Rape Myths, Self Esteem and the Big Five Personality Factors' 2001 16 *Journal of Interpersonal Violence* 865.

whereby stereotypical beliefs about mothering may be held, but which do not lead to negative decisions in the criminal justice system.

Within the context of rape trials, the influence of schemas and stereotypes on group thinking at many levels in the criminal justice system, has been considered in feminist literature.⁵⁶

Cossins suggests that jury-eligible citizens rely on a range of misconceptions based on victim and gender stereotypes, when assessing the credibility of sexual assault complainants and rendering verdicts.⁵⁷ She argues that jury members use ‘gender-based double standards’⁵⁸ and stereotypical thinking about how a ‘good’ woman behaves, to make their decisions about whether they believe a rape complainant. In addition, that police investigators studied as a group demonstrated stereotypical beliefs about the way in which women should behave following an incident such as rape.⁵⁹ Lees argues that the judiciary⁶⁰ permit prejudicial evidence⁶¹ that reduces the credibility of rape complainants, so maintaining the influence of stereotypical beliefs within legal decision making.⁶²

Schuller et al, develop the argument further, suggesting that stereotypical beliefs as ‘oversimplified and rigid cognitive schemas’⁶³ operate in a divisive binary manner, to identify women complainants as bad or good, and this echoes Carol Smart’s argument that

⁵⁶ Temkin J, *Rape and the Legal Process* (2002, OUP 2005); Cossins ‘Expert Witness Evidence’ (n 3); Finch E and Munro VE, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study’ (2005) 45 *British Journal of Criminology* 25; Schuller RA, McKimmie BM, et al ‘Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender and Victim Stereotypes’ (2010) 13 *New Criminal Law Review* 759; Burgess AW and Holmstrom LL, *Rape—Crisis and Recovery* (Brady 1979) 35.

⁵⁷ Cossins ‘Expert Witness Evidence’ (n 3).

⁵⁸ *ibid* 80 citing at (n 26) Stormo J, Lang AR and Stritzke WGK, ‘Attributions about Acquaintance Rape: The Role of Alcohol and Individual Differences’ (1997) 27 *Journal of Applied Psychology* 279, 303.

⁵⁹ Cossins ‘Expert Witness Evidence’ (n 3) 75.

⁶⁰ Lees S, ‘Judicial Rape’ (1993) 16 *Women’s Studies International Forum* 11; Temkin J, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 *J L S* 219, 235.

⁶¹ Temkin *Rape and the Legal Process* (n 56) 9 citing at (n 60) *CG v United Kingdom*, Application No. 43373/98, European Court of Human Rights, 19 Dec. 2001, [2002] *Crim L R* 313, and explaining that this case suggests ‘judges have considerable leeway to intervene’;

⁶² Lees (n 60).

⁶³ Schuller et al (n 56) 761.

women's credibility is conferred according to whether they are perceived as good or bad.⁶⁴

Wells too suggests that the artificial binary construct challenges the credibility of mothers.⁶⁵

Thus when rape complainants (who were also mothers), behaved in gender stereotypical ways and were 'portrayed as a "good" mother'⁶⁶ to the jury, they were perceived more positively than complainants (also mothers), who behaved in ways that were counter to gender stereotypes, and thus were 'portrayed as "bad" mother[s]'.⁶⁷

Credibility, has therefore been argued to be inferred by conformity (or not) to stereotypes of a good woman, and of a proper victim,⁶⁸ despite research demonstrating that such stereotypes are distortions of the diverse ways real members of an *out-group* behave.⁶⁹ The function of stereotyping may therefore be a tool with which to establish a woman's credibility or her lack of it, even though the belief may be fixed, over-simplified and not reflective of that individual's circumstances. Such an explanation presents two further issues; the first is whether decision makers experience their stereotypical beliefs as presenting them with binary options, or, whether it is the adversarial criminal justice system that imposes such an approach, and consequently there is an issue whether the divisive binary good-bad construct, is not itself a fixed and over simplified view.

Moreover, demonstrating that a belief is false is problematical. Using the word stereotype to describe particular beliefs implies that the holder is biased if not prejudiced. But, showing that this is so is difficult as the following exploration of rape myths indicates, particularly as

⁶⁴ Smart C, 'The Woman of Legal Discourse' in Smart C (Ed) *Women, Crime and Criminology* (Routledge, 1977) 192; See also the way mothers are differentiated in Weldon EV, *Mother, Madonna, Whore: The Idealization and Denigration of Motherhood* (Karnac Books 1988).

⁶⁵ Wells C, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' (2004) *Crim L Rev* 88, 99.

⁶⁶ Cossins 'Expert Witness Evidence' (n 3) 87 citing at (n 78) Schuller et al (n 56) 761.

⁶⁷ *ibid.*

⁶⁸ *ibid* 76-79 citing at (n 83) Schuller et al (n 56) 776.

⁶⁹ Kapardis (n 48) 68 citing Quattrone GA and Jones EE, The Perception of Variability with In-Groups and Out-Groups: Implications for the Law of Small Numbers (1980) 38 *Journal of Personality and Social Psychology* 141.

the understanding that some gendered beliefs are not publicly acceptable has led to denial of belief holding and less overt expressions.

2.1.2 *Rape myths: definitions, issues and relevance to child death cases*

Chapter one suggested that one way in which to assess whether the behaviour of mothers was prejudicially evaluated leading to injustice outcomes in child death cases, is to examine similar topic areas in which interpretations of the feminine occur. From that discussion in chapter one I suggest that one way forward is to analogise from the insights gained in rape myth scholarship, to understanding what may have happened in child death cases. Rape myths are I suggest relevant to this thesis about mothers' behaviour because an analysis of the plausibility of the claim that attitudes to rape are beset by myths, is necessary to advance the deployment of a comparable argument in the case of mothers.

But, to suggest that the reasons for rape complaint attrition and unjust acquittals in rape trials are due to myths—'widely held but false beliefs or ideas',⁷⁰ encounters similar issues to those discussed in relation to stereotypes, in particular, that demonstrating that such ideas held by a significant proportion of people are correct or incorrect. Feminist scholars have long considered that the reason for unjust acquittals in the CJS was due to rape myths. Therefore defining such beliefs and demonstrating their prevalence and their falseness, has been seen as fundamental in effecting change within the CJS, to balance the argued effects of negative beliefs. Martha Burt's original rape myth work sought to understand the extent to which American culture was rape supportive,⁷¹ and identified that such an approach risked incorporating rape myths into the belief systems of those working with rape victims, resulting in the institutionalisation of such beliefs in the law.⁷²

⁷⁰ Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/myth>> accessed 19 May 2016.

⁷¹ Burt MR, 'Cultural Myths and Supports of Rape' (1980) 38 J Pers Soc Psychol 217, 228.

⁷² *ibid.*

Burt provided contemporary examples of such ideas or beliefs including; “only bad girls get raped”; “any healthy woman can resist a rapist if she really wants to”; “women ask for it”; “women 'cry rape' only when they've been jilted or have something to cover up”; “rapists are sex-starved, insane, or both”⁷³ Later researchers cite an extensive number of beliefs, used in studies to identify rape myth acceptance and regarded as linked to beliefs justifying sexual violence.⁷⁴

In seeking to define rape myths, Burt’s regression analysis of interview data indicated that ‘settled ways of thinking or feeling’⁷⁵ about rape or *rape attitudes*, were ‘strongly connected to other deeply held and pervasive attitudes such as sex role stereotyping, distrust of the opposite sex (adversarial sexual beliefs), and acceptance of interpersonal violence’.⁷⁶ Such connections she concluded, would make change very difficult.⁷⁷ Burt’s work with Rape Myth Acceptance (RMA) scales to investigate the extent to which such beliefs were held, indicated that defining rape myths was problematic but that myths fulfilled cultural functions by endorsing other gendered ideas.

In their later review of rape myth literature, Lonsway and Fitzgerald also found definitional difficulty and inconsistencies, together with functional interconnectedness,⁷⁸ with RMA having at its core gender, traditional sex role attitudes, negative attitudes towards women, and

⁷³ *ibid.*

⁷⁴ See in particular Lonsway KA and Fitzgerald LF ‘Rape Myths: In Review’ (1994) 18 *Psychol Women* 133; Gerger et al (n 32) for example, ‘Women often make up rape accusations as a way of getting back at men’; ‘women cry rape’ only when they've been jilted or have something to cover up’; ‘a woman who initiates a sexual encounter will probably have sex with anybody’; ‘a woman shouldn't give in sexually to a man too easily or he'll think she's loose’; ‘men have a biologically stronger sex drive than women’; ‘a woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex’; ‘it isn't a rape unless he has a weapon’; ‘one reason that women falsely report a rape is that they frequently have a need to call attention to themselves’; ‘women often provoke rape through their appearance or behaviour’; ‘men often can't control their sexual urges’.

⁷⁵ Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/myth>> accessed 19 May 2016.

⁷⁶ Burt (n 71) 229.

⁷⁷ *ibid.*

⁷⁸ Lonsway et al (n 74) 134, 156, 158.

a likelihood of raping.⁷⁹ ‘Such a configuration conveys a powerful message about how RMA relates to other beliefs about women in our society’.⁸⁰ Lonsway et al identified that myths were characterised as ‘false or apocryphal beliefs that are widely held’; they explain some important cultural phenomenon; and they serve to justify existing cultural arrangements’.⁸¹ Nevertheless, despite the identification of the interrelatedness with sexist attitudes, defining a rape myth was difficult because of the ‘lack of any comprehensive articulation of the domain of rape myths’.⁸² Accordingly, scales seeking to measure RMA were they suggested, unreliable, because different studies used different scales of questions to identify acceptance (or not) of rape myths.⁸³ Lonsway and Fitzgerald's definition of a rape myth therefore took into account the arguments for interconnectedness and functionality, proposing that ‘Rape myths are attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women’.⁸⁴ The findings echo Burt's, in that rape myths could be expressed as rape supportive beliefs, but they also suggest that rape myths were ‘best conceptualised as stereotypes’.⁸⁵

Gerger et al challenged previous studies in their review of RMA literature seeking to measure how rape myths can be defined and acceptance measured.⁸⁶ Despite agreement with the general usefulness of an RMA construct, Gerger et al suggested that most scales produced skewed results⁸⁷ as a result of methodological approaches, leading them to develop a new AMMSA scale (acceptance of modern myths about sexual aggression).⁸⁸ The reasoning behind the creation of AMMSA was to take account of more recent research into modern

⁷⁹ *ibid* 134, 156, 158.

⁸⁰ *ibid* 155.

⁸¹ *ibid* 134.

⁸² *ibid* 156.

⁸³ *ibid* 155-158.

⁸⁴ *ibid* 134.

⁸⁵ *ibid*.

⁸⁶ *ibid* 423.

⁸⁷ *ibid* 424.

⁸⁸ *ibid*.

sexism and racism, suggesting that a greater degree of subtlety about scale question content areas was needed.⁸⁹

Whereas ‘‘old-fashioned’’ sexism was characterized by the endorsement of traditional gender roles, discriminating treatment of women, and stereotypes about lesser female competence, Swim and her colleagues suggested that modern sexism, like modern racism, was characterized by the denial of continued discrimination, antagonism toward women’s demands, and a lack of support for policies designed to help women.⁹⁰

The AMMSA scale incorporating more nuanced versions or modern myths, was found to be both reliable and consistent,⁹¹ although Gerger et al note that the studies were limited again by sampling methodologies.⁹²

Finally, rape myth functionality was explored further to identify that as in Burt’s work on cultural functionality,⁹³ RMA may have functions for women as well as men, whereby RMA ‘allows women to reduce their subjective vulnerability to sexual assault and protect their self-esteem’.⁹⁴ Accordingly, when considering the possibility of a mothering myth, the cultural significance of particular beliefs for other mothers may also need to be considered; i.e. that beliefs may be held by mothers, wishing to endorse their own respectable mothering standards, that decent mothers do not drink excessive alcohol, or blameless mothers always call for help if their child is unwell, or would always use an apnoea monitor, by day and night.

⁸⁹ Gerger et al (n 32) , 424-425 citing Swim JK, Aikin KJ, Hall WS, Hunter BA ‘Sexism And Racism: Oldfashioned And Modern Prejudice’ 1995 68 J Pers Soc Psychol 199.

⁹⁰ *ibid*

⁹¹ *ibid* 434.

⁹² *ibid* 436.

⁹³ Burt (n 71) 229.

⁹⁴ Gerger et al (n 32) 423-4.

Defining rape myths and measuring rape myth acceptance is therefore problematic; acceptance of such beliefs about rape can be demonstrated to some extent, but the content of beliefs are subject to change, becoming more nuanced, and fulfilling cultural functions connected with other gendered ideas. Consequently, scholars such as Helen Reece have controversially suggested that arguments based on rape myths are overstated,⁹⁵ within the context of their argued fundamental role in addressing the ‘justice gap’.⁹⁶ Further, David Gurnham has suggested a more cautious approach is needed in rape myth work, because of the dangers of ‘mythologizing, stereotyping and essentializing’.⁹⁷

It therefore seems that the word myth in relation to rape myths, is surrounded by difficulties, in defining, demonstrating, measuring, and distinguishing myths from other beliefs⁹⁸ and in relation to cultural connections and functions. As a result, it is likely that in considering whether there are myths about mothering, similar issues may arise. Before considering child death cases, the usage of the word *attitude* instead of myth and stereotype in this context is considered.

2.1.3 Defining attitudes to rape

Rape myth work uses the word *attitude*, ‘a settled way of thinking or feeling about something’⁹⁹ for example as ‘rape supportive attitudes’.¹⁰⁰ The word attitude is more neutral and narrower in focus than terminology such as stereotype or myth, by being disconnected from concerns of accuracy and prevalence and in rape myth scholarship is acquiring greater purchase. Burt’s work suggested rape supportive attitudes were connected to other gendered and questionable attitudes,¹⁰¹ as did Lonsway and Fitzgerald.¹⁰² Temkin and Krahe suggest

⁹⁵ Reece (n 14) 446.

⁹⁶ Temkin and Krahe (n 3).

⁹⁷ Gurnham D, (2015) ‘A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts’ (2016) 19 New Criminal Law Review 141.

⁹⁸ Lonsway et al (n 74) 134 ‘rape myths are best conceptualised as stereotypes’.

⁹⁹ Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/attitude>> accessed 19 May 2016.

¹⁰⁰ Reece (n 14) 446.

¹⁰¹ Burt (n 71) 229.

the issues of the justice gap relate to a 'question of attitude'.¹⁰³ Gerger et al also measured attitudes towards rape using the AMMSA scale, and found positive correlations with 'pervasive cultural attitudes related to gender and violence as well as sexual harassment'.¹⁰⁴

Reece echoes Burt in suggesting that rape myths are rape supportive attitudes,¹⁰⁵ but questions whether 'public attitudes deserve to be described as 'rape supportive attitudes', or 'rape myths''¹⁰⁶ She suggests that RMA work indicates that what are rape supportive attitudes, may not be widespread, so they are not myths. In addition, that some attitudes are not proven to be false, so they are not myths, and that some rape supportive attitudes are not about rape. Reece therefore suggests the possibility that scholars are creating myths about myths,¹⁰⁷ and further that Gerger et al's work was about 'designing a scale to catch people (out)',¹⁰⁸ and further to show how awful people's attitudes are.¹⁰⁹

The AMMSA scale is however according to Conaghan and Russell, 'regarded as the most advanced measure of rape myth acceptance to date',¹¹⁰ and not designed to 'catch people (out)',¹¹¹ but to investigate whether prejudicial views were more subtly held than previous RMA scales had identified. Moreover, in seeking to conceptualise rape myths, Gerger et al concluded that some beliefs about rape were 'immune against empirical falsification',¹¹² so proving their inaccuracy and therefore their position as a *myth* was difficult if not

¹⁰² Lonsway et al n 76.

¹⁰³ Temkin and Krahe (no 3).

¹⁰⁴ Gerger et al (n 32) 428, 435.

¹⁰⁵ Reece (n 14) 446.

¹⁰⁶ *ibid* 453.

¹⁰⁷ *ibid* 446.

¹⁰⁸ *ibid* 454-455.

¹⁰⁹ *ibid* however, this criticism seems unbalanced in failing to recognise that the accurate identification of so-called RMA or rape supportive attitudes, has a great deal to do with statistical analysis, study design and sampling methodology. In order to understand what is the nature and prevalence of rape supportive attitudes, it is vital to unpick the results and methodology of studies that demonstrate only politically supportive results.

¹¹⁰ Conaghan and Russell (n 16) 35.

¹¹¹ Reece (n 14) 454-455.

¹¹² Gerger et al (n 32) 423.

impossible.¹¹³ Gerger et al also recognised that such beliefs were ‘prescriptive in nature’,¹¹⁴ and that this aspect in particular, was central to the content of a rape myth, not its accuracy.

Conaghan and Russell¹¹⁵ have a number of criticisms of Reece’s analysis and conclusions on Gerger et al’s research, and argue also that although ‘the factual configurations comprising rape myths may on occasion be true’,¹¹⁶ rape myth research is more concerned with addressing ideas ‘treated as generalizable truths which function normatively to shape perceptions and inform judgment’.¹¹⁷ Therefore, in terms of considering how a consideration of rape supportive attitudes might be helpful in examining child death cases, current research indicates greater concern with the normative power of such ideas and less whether the beliefs are, or can be proven to be true, or held. Nevertheless, not everything that Reece suggests is unsupportable, particularly that the link between sexually aggressive behaviour and rape supportive attitudes is not borne out.¹¹⁸ Consequently caution is needed in defining or deploying a mothering myth with which to analyse child death cases, which indicates that some people’s attitudes who judge the behaviour or child care of others, are intolerant, inexperienced, ideological or anti-mother, or that even if such attitudes are held by jury members, they will influence their decisions in criminal trials.

However, identifying whether myths are false is problematical,¹¹⁹ and the measurement of rape myths whether using RMA, AMMSA or any other scale is methodologically difficult because attitudes alter. Some attitudes become covert,¹²⁰ and in some cases, beliefs that scholars call myths, may be true for some people.¹²¹ Considerable difficulties exist therefore

¹¹³ Gerger et al (n 32) 423.

¹¹⁴ *ibid.*

¹¹⁵ Conaghan and Russell (n 16) 26.

¹¹⁶ *ibid.*

¹¹⁷ *ibid* 34.

¹¹⁸ Newcombe et al (n 55).

¹¹⁹ Lonsway et al (n 74) 155.

¹²⁰ Gerger et al (n 32).

¹²¹ Gurnham (n 97).

in defining rape myths, and distinguishing between myths, stereotypes and attitudes. The word myth may function in this context by signalling that particular attitudes are questionable, if not ethically wrong. Nevertheless, using the term myth is also counter-productive because of the problems in proving that such attitudes are false. The force of rape myth arguments is therefore bound up with language difficulties. In addition, Lonsway and Fitzgerald considered that rape myths were best conceptualised as stereotypes,¹²² and Conaghan and Russell suggested that the term rape supportive attitudes, is interchangeable with myths.¹²³ But, it is Conaghan's focus on or 'turn to attitudes'¹²⁴ which is significant here, that indicates that the language of rape myth scholarship is moving towards the use of phrases such as, *norms* about behaviour e.g. sexual behaviour, which may affect criminal proceedings in rape cases.¹²⁵

2.1.4 *Stereotypes, myths and attitudes in child death cases*

In terms of what the discussion of definitions so far means for child death cases, there are a number of factors to consider. First, that although dictionary definitions distinguish the terms stereotype, myth and attitude, in the literature, the terms are often used interchangeably indicating conceptual overlap¹²⁶ and providing difficulty in isolating the most appropriate term to use in this thesis. Whichever term is chosen to examine child death cases, the domain will need to be clearly articulated, with examples to ensure consistency. The key definitional issues are whether: the belief or idea is identifiable; the belief is true or false; widely held or not; consciously or unconsciously held; fixed/settled; associated with other gendered ideas and or functionality; serves to convert attitude into behaviour; useful for decision making and/or comprises norms about behaviour dividing women into good and bad.

¹²² Lonsway et al (n 74) 134.

¹²³ Conaghan and Russell (n 16) 43 see '... it is vital to situate a discussion of rape-supportive attitudes, or myths, within the broader historical context ...'.

¹²⁴ *ibid* 26.

¹²⁵ *ibid*.

¹²⁶ Burt (n71); Lonsway et al (n 74); Conaghan and Russell (n 16) 43.

The literature on RMA scales indicates that myths may be identified using such methods but, may be more nuanced than anticipated¹²⁷ and because appreciation of unacceptable sexist and racist beliefs may be such that attitudes are covertly held. Further, if a myth were defined by the number of people holding it, then if that spread were reduced, it would no longer be definable as a myth, irrespective of its perceived problematic content.¹²⁸ Including spread within a definition therefore, does not add to conceptual clarity and may even not be necessary. Gerger et al suggest that ‘prevalence and consistency of rape myths... seem to be better treated as empirical problems, rather than matters of definition so they need not be included in a general definition ...’.¹²⁹

That rape myths and stereotypical beliefs may be interconnected with other gendered ideas, such as Burt’s ‘sex role stereotyping, [and] distrust of the opposite sex (adversarial sexual beliefs)’,¹³⁰ may also be significant. If as Lonsway and Fitzgerald suggest, ‘cultural beliefs influence individual behaviour’,¹³¹ then questionable beliefs may also be culturally functional. Some rape myth work therefore argues that a relationship exists between actual male behaviours and both individually and culturally supportive beliefs in rape myth. Consequently, that the behaviours of a (male) perpetrator may be seen as excusable because of common cultural attitudes towards women and their behaviour. However, Newcombe et al noted that the literature does not convincingly indicate conversion of attitude into behaviour as argued.¹³²

¹²⁷ Muehlenhard CL and Rogers CS, ‘Token Resistance to Sex: New perspectives on an Old Stereotype’ (1998) 22 *Psychology of Women Quarterly* 443; Muehlenhard CL and Peterson ZD, ‘Wanting and Not Wanting Sex: The Missing Discourse of Ambivalence’ (2005) 15(1) *Feminism & Psychology* 15.

¹²⁸ Gerger et al (n 32) 423.

¹²⁹ *ibid.*

¹³⁰ Burt (n 71) 229.

¹³¹ Lonsway et al (n 74) 153.

¹³² Newcombe et al (n 55) 1749 citing amongst other researchers, Forbes GB and Adams-Curtis LE ‘Experiences with Sexual Coercion in College Males and Females: Role of Family Conflict, Sexist Attitudes, acceptance of Rape Myths, Self Esteem and the Big Five Personality Factors’ 2001 16 *Journal of Interpersonal Violence* 865.

Caution is therefore needed when seeking to analogise from rape myth work to child death cases because in the latter, the thesis assumes a connection between decision makers' beliefs and the likely condemnation, not justification, of a defendant's behaviour through a guilty verdict. However, even though prescriptive beliefs may be held, there may also be no evidence to show that such beliefs influence decision making. Further, even if beliefs do not necessarily influence behaviour, there is the possibility that acceptance of particular beliefs could provide functional significance for women, e.g. for example, a mother who doesn't drink or smoke may believe therefore that she is an acceptable if not good mother.

Unexpected cultural functionality of RMA has been observed by Gerger et al, that if some women believe that only dissimilar types of women who behave “inappropriately” are at risk of rape, then they may experience an anxiety buffer, by their RMA.¹³³ Likewise, for mothers in general there is a possibility that certain beliefs about mothering, may affirm for mothers (irrespective of criminal proceedings), that they are a good mother, and not a bad or unreasonable mother.¹³⁴ The significance of this point is further, that women are also decision makers and part of the criminal justice system whether in the role of police, juror, advocate or judge, so caution is needed not to assume that particular attitudes are only held by men and applied to women.

Lastly, there is the issue that beliefs or statements may not be false, i.e. they are “myth’ myths’,¹³⁵ as Redmayne has suggested in relation to judicial discussion of sexual history evidence in *R v A*,¹³⁶ and that some beliefs may be true for some people.¹³⁷ As Gurnham submits, caution is required when judging particular incidents because fact finders may rely not on information about ‘what *actually* happened but on a generalised set of beliefs as to

¹³³ Gerger et al (n 32) 424.

¹³⁴ See current online discussion thread about aibu, <http://www.mumsnet.com/Talk/am_i_being_unreasonable> accessed 2 June 2016.

¹³⁵ Redmayne M, ‘Myths, Relationships and Coincidences: The New Problems of Sexual History’ 2003 International Journal of Evidence & Proof 75, 90, 91.

¹³⁶ *R v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45 (HL) in Redmayne n 131.

¹³⁷ Gurnham n (97) 145.

what *usually* happens'.¹³⁸ Therefore, both the truth and inaccuracy of stereotypes and myths within child death cases, needs to be considered together with the question whether it is helpful for a definition to include a statement of falsity.

Gerger et al note from Lonsway and Fitzgerald's work, that 'it is often difficult or impossible to determine if a given rape myth fulfils the criterion of being "false", because it is immune against empirical falsification e.g., "Many women *secretly* desire to be raped".¹³⁹ Gerger et al therefore argued that rape myths should not be defined in terms of being false, but "wrong" in an ethical sense',¹⁴⁰ proposing therefore that '*rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women*',¹⁴¹ thereby including the possibility that by definition some rape myths may be true for some people. Conaghan and Russell too support the approach that a key issue in understanding rape myths is not whether rape myths are true or false, but whether they are 'normatively infused'.¹⁴² Likewise, I suggest it is fixed beliefs in particular norms of maternal behaviour and child care, that may have led to mothers being judged not by what *actually* happened, but by what should have happened. Decisions in criminal proceedings may therefore not be made as argued because of broad distinctions into good mothers or bad,¹⁴³ but based on distinct beliefs.

2.2 Why are stereotypes or myths used?

In order to interrogate child death cases to understand what is happening in them, the most useful term has been sought, to help shed light on how non-medical information about

¹³⁸ Gurnham n (97) 145.

¹³⁹ Gerger et al (n 32) 423, citing DL, Lonsway KA and Fitzgerald LF 'Rape Myth acceptance: Exploration of its Structure and its Measurement using the Illinois Rape Myth Acceptance Scale' 1999 33 J Res Pers 27.

¹⁴⁰ *ibid* 423.

¹⁴¹ *ibid*.

¹⁴² Conaghan and Russell (n 16) 39.

¹⁴³ Smart C, *Law Crime and Sexuality* (Sage Publications, 1995) 192; Wells (n 65) 99; Raitt F and Zeedyk S, 'Mothers on Trial: Discourses of Cot Death and Munchausen's Syndrome by Proxy' (2004) 12 Fem LS 257, 263-4.

mothers may have been interpreted and consequently whether criminal proceedings were unjustly influenced. However the source, contents, existence and prevalence of mental shortcuts or heuristics including stereotypes, attitudes and rape myths are difficult to identify, for being individually held, subject to change and difficult to dispute. In discussing the relationship of beliefs to their sources, and the function of rape myths, Conaghan and Russell, argue that ‘Rape myths are an integral part of the scaffolding which supports rape culture’,¹⁴⁴ where the supportive framework is constituted by amongst other factors, agents of the criminal justice system, such as ‘police, lawyers, judges and juries’.¹⁴⁵

If such beliefs are cultural, the question whether they are consciously or unconsciously held, or even acted upon, has been raised in relation to research into racist beliefs.¹⁴⁶ In support of the unconscious approach is a range of literature examining intuitive decision-making processes suggesting that stereotypes are intrinsic to, if not necessary to the formation of reasoned judgements, for example in police stop and search activity.¹⁴⁷ In addition, models of juror decision making in rape trials suggest that when the:

information available is incomplete, open to interpretation or contested by the different parties, as is frequently the case where rape is concerned, perceivers may find it too difficult or cumbersome to scrutinise the evidence to arrive at data based

¹⁴⁴ Conaghan and Russell (n 16) 39.

¹⁴⁵ *ibid.*

¹⁴⁶ Lawrence (n 34) 960.

¹⁴⁷ Although concerns persist that negative stereotypes can be prejudicial, and lead to unjust decisions in the CJS; Ellis D, ‘Stop and Search: Disproportionality, Discretion and Generalisations’ 2010 *Police Journal* 199 citing Quinton P, Bland N and Miller J, *Police Stops, Decision-Making and Practice* (Home Office, Policing and Reducing Crime Unit, 2000); this article is cited because of its exploration into criticisms of the use by police of reasonable suspicion and racial stereotyping in stop and search activity, and its examination of literature supportive of the use of stereotyping, or emotions and intuitions as a positive means of making sense of complex matters and citing Jordan P, *Stop And Search: Impact of Crime on Public Opinion* (Police Foundation 2000).

conclusions. In such circumstances, they are susceptible to the operation of heuristic, schema driven interpretations of the evidence.¹⁴⁸

Further, evidence scholars identify that ‘We are tempted to rely on stereotypes when faced with demanding challenges’.¹⁴⁹ Theories such as the ‘halo effect’, ‘attribution theory’¹⁵⁰ and regret matrices¹⁵¹ support the proposition that in situations of cognitive overload, ‘plentiful for jurors in a criminal trial’,¹⁵² heuristic shortcuts become ‘particularly tempting’.¹⁵³

Stereotypes, myths and attitudes, have as a result been found to be problematical in the criminal justice system, because of the argument that decisions have been made based on fixed and over simplified beliefs, held to be false. As ‘mental short-cuts and rules of thumb’,¹⁵⁴ stereotypical beliefs can be characterised as heuristics or ‘cognitive tools’.¹⁵⁵ Such mental problem solving processes may be efficient, but are also likely to be inaccurate and founded upon individual experiences,¹⁵⁶ such as the availability or representative heuristics.¹⁵⁷ If something is frequently experienced, either from media reports or from personal understanding, it is available or easy to bring to mind and the actual frequency is therefore over estimated. Representativeness occurs when individuals perceive that events or

¹⁴⁸ Temkin and Krahe (n 3) page 48-9.

¹⁴⁹ Hunter J, ‘Publication Review Character Evidence in the Criminal Trial’ (OUP, 2015) in [2016] International Journal of Evidence & Proof 162, 170 citing Redmayne (n 13).

¹⁵⁰ *ibid* ‘an individual example of behaviour is treated as indicative of long-standing and stable personality traits’.

¹⁵¹ *ibid* ‘a decision-maker's diminished regret matrix (that is, a reduced regret that a negative decision about a person may be wrong where a person leaves a negative impression’.

¹⁵² *ibid*

¹⁵³ *ibid* citing Kahnemann D and Frederick S, ‘Representativeness Revisited: Attribute Substitution In Intuitive Judgment in Gilovich T, Griffin D and Kahnemann D (eds) *Heuristics and Biases: The Psychology of Intuitive Judgment* (CUP 2002) 49, 54 and Callen CR (2012) ‘Human Deliberation in Fact-Finding’ in Roberts P and Hunter JB (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 312.

¹⁵⁴ Temkin and Krahe (n 3) 48-9.

¹⁵⁵ Hastie R and Dawes RM, *Rational Choice in an Uncertain World* (2nd edn, Sage Publications, 2010) 88.

¹⁵⁶ *ibid*

¹⁵⁷ Beach LR and Connolly T, *The Psychology of Decision Making People in Organisations* (2nd edn, Sage Publications, 2005) 82.

thoughts that occur in small non-random samples, reflect the underlying processes in as accurate a manner, as in large random samples.¹⁵⁸

Within a discussion of how information about female behaviour in trials for sexual assault is interpreted, Temkin and Krahe have considered social psychology research and the use of heuristics, including attentional focus, counterfactual thinking and hindsight bias.¹⁵⁹

Attentional focus may be generated in which more biographical information (but not necessarily relevant) is made available to perceivers about one party in an adversarial context, which then results in that party being more likely to take the blame.¹⁶⁰ Counterfactual thinking whereby perceivers such as mock jurors are invited to re-imagine a situation such as a rape, and ask themselves what could have been done differently, are more likely to blame the person they have just imagined acting differently.¹⁶¹ Further, the hindsight bias, indicates that if perceivers have been told the outcome, e.g. a rape, of a series of events, that they would then construct the information leading up to the rape stereotypically, blaming the woman. Such research is therefore held by Temkin and Krahe to demonstrate the impact ‘of stereotypes and myths on judgments about rape’.¹⁶²

The issue whether such heuristics are unconscious and therefore intrinsic and carrying no moral culpability, or whether they are consciously held and responsible, will be addressed in the conclusion. For now I wish to suggest that for fact finders trial decision making is likely to be difficult, and when data is insufficient¹⁶³ choices may need to be made between complex sets of information based on intuition,¹⁶⁴ emotions,¹⁶⁵ gut feelings¹⁶⁶ or heuristics.¹⁶⁷

¹⁵⁸ *ibid.*

¹⁵⁹ Temkin and Krahe (n 3) 48-9.

¹⁶⁰ *ibid* 49.

¹⁶¹ *ibid.*

¹⁶² *ibid* 50.

¹⁶³ Berthoz A, *Emotion and Reason: The Cognitive Neuroscience of Decision Making* (Giselle Weiss tr, (OUP 2003) 4.

¹⁶⁴ Sadler-Smith E, *The Intuitive Mind* (John Wiley and Sons 2010).

Scholars such as MacCrimmon and Dwyer suggest that not only may heuristics influence decision making, but also as a result, inferential errors are likely¹⁶⁸ and ‘common sense (intuitive) inferential strategies’¹⁶⁹ may be ‘dangerously inaccurate’.¹⁷⁰ When required to engage in difficult assessments of competing sets of views and expert opinion, decision makers may rely on schematic processing such as stereotypes and follow their own ‘preconceived ideas about the offence and the parties involved’.¹⁷¹ The findings of decision making research and modelling of rape trials, suggest that it is possible that similar unconscious but inaccurate mental short cuts may be at work in child death cases, particularly as such trials have been characterised by an excess of expert opinions of varying accessibility.

Nevertheless, there are several issues associated with transposing findings from rape myth scholarship to the analysis of child death cases. First, whether in the absence of research or modelling into the way agents of the criminal justice system made/make decisions in child death cases, it is possible to say that beliefs were used in making decisions. Secondly, RMA feminist scholarship defines particular beliefs about and attitudes towards women, as very wrong and unethical. But, normative beliefs about mothering that effectively regulate behaviour are not necessarily wrong or unethical, although the possibility remains that such understandings may incorporate some fixed, and over simplified ideas. What I suggest may have occurred in child death cases, is that such beliefs were applied in a fixed manner, to support or justify reaching an adverse conclusion and such beliefs therefore constituted

¹⁶⁵ Drummond H, *The Art of Decision Making* (John Wiley and Sons 2001) 9; Damascio A R, *Descartes’ Error: Emotion, Reason, And The Human Brain* (Putnam 1994).

¹⁶⁶ Gigerenzer G, *Gut feelings* (Penguin 2008).

¹⁶⁷ Gigerenzer G, and Todd P M, *Simple Heuristics That Make Us Smart* (OUP 1999); Gigerenzer G, Engel C (eds), *Heuristics and the Law: Report of the 94th Dahlem Workshop on Heuristics and the Law* (Berlin 2004, MIT Press and Freie Universitat Berlin, 2007).

¹⁶⁸ MacCrimmon M, ‘What Is “Common” About Common Sense?: Cautionary Tales For Travelers Crossing Disciplinary Boundaries’ (2000-2001) 22 Cardozo L. Rev. 1433, 1435.

¹⁶⁹ Dwyer D, *The Judicial Assessment of Expert Evidence*, (CUP 2008) 67.

¹⁷⁰ *ibid.*

¹⁷¹ Temkin and Krahe (n 3) 67.

mothering myths. However, in order to do that the mothering myth would theoretically support or justify conviction, whereas the rape myth is argued to justify acquittal. But if a fixed normative belief that justifies an adverse gendered decision is at the heart of a definition of a myth, then the outcome of the decision may be of less consequence than the decision making process and the question why such beliefs are inadequately challenged.

The analysis of rape myth literature provides the basis for defining a mothering myth. The detailed depths of arguments and concerns about the content of rape myths and questions about what is the *real rape myth* have been skirted by, in order to concentrate on identifying which term would be most helpful in interrogating beliefs about mothering in child death cases. Although neither stereotype, myth nor attitude are without conceptual difficulties, Gerger et al's work and Conaghan and Russell's comments in relation to the justificatory purpose of a belief, and its relationship to ideas of normative behaviour are most helpful within the context of this thesis. A proposed definition of a mothering stereotype or myth could therefore be: *a fixed belief about mothering or normative behaviour for mothers, which serves to support or justify adverse decisions about mothers within the criminal justice system.*

The discussion to this point has concentrated on defining terms in relation to rape myth scholarship, rape trials and perceptions of rape complainants. In the following section, I define how the term mothering is used in this thesis, in order to outline the domain of particular beliefs, which if applied uncritically within criminal proceedings may be mothering myths. In Gerger's definition of a rape myth,¹⁷² beliefs may be used to justify behaviours shown by rape defendants, such as sexual violence. So for example if a belief is held that a woman should report a sexual assault immediately to police and she fails to do that, then she

¹⁷² Gerger et al (n 32) 423.

may be, or have been, regarded as lying about her experience. Such a belief that denies her experience would therefore be described as a rape myth.

In relation to the way beliefs about mothering may be applied within the criminal justice system, my argument is that, beliefs about mothering may be true for some people, but not everyone. If however beliefs are held in a fixed way, within criminal proceedings, they may support or justify an adverse conclusion. For example, if in the context of child care a belief is held that when a child is ill, immediate assistance should be sought urgently such as an ambulance, then any mother or parent who fails to do so, may be considered with suspicion. However, in the context of criminal proceedings, if an immovable belief is held that such behaviour is ‘indicative of non-accidental injury’¹⁷³ (NAI), then there is a possibility that an injustice may occur. The omission may be caused by factors other than NAI, such as shock, as a result of previous traumatic experiences including SIDs, inexperience, or a genuine lack of appreciation of the seriousness of a child’s condition.¹⁷⁴ Then, relying on the fixed belief within criminal proceedings that not seeking help urgently is proof of NAI, or even murder, could be described as a mothering myth.

2.3 Mothering: ideology and discourse

In the following sections the source of beliefs about maternal behaviour and child care (mothering), that may be identified within child death cases is considered. As outlined in chapter one, yardsticks such as ‘proper mothering’,¹⁷⁵ the ‘dominant ideology of motherhood’,¹⁷⁶ and ‘discourses of motherhood’¹⁷⁷ have been used by feminist legal scholars Wells, Raitt and Zeedyk, and Cunliffe respectively, to argue that perceptions of mothers’

¹⁷³ *R v Stacey (Helen Brenda)* [2001] EWCA Crim 2031, [2001] WL 1135255 CACD para 44 per Kennedy LJ.

¹⁷⁴ See later discussion of *LB of Islington v Al-Alas and Wray* [2012] EWHC 865 (Fam) 5; *R v Gay (Angela) R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *Cannings* (n 9); *Stacey* (n 173).

¹⁷⁵ Wells (n 65) 99; Smart (n 143) 125; Raitt et al (n 143) 263-4.

¹⁷⁶ Cunliffe E, *Murder Medicine and Motherhood* (Hart Publishing 2011) 100 citing M Klein ‘Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women’ in Fineman MA and Karpin I (eds) *Mothers in law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia U Press, 1995) and DE Roberts, ‘Motherhood and Crime’ (1993) 79 Iowa Law Review 9.

¹⁷⁷ Cunliffe (n 176) 37 citing at (n 79) Raitt et al (n 143) 264.

failures in fulfilling such benchmarks in child death cases,¹⁷⁸ resulted in their portrayal as uncaring and bad.¹⁷⁹ Raitt and Zeedyk argue that such perceptions explained in decision maker's minds 'why they would have murdered their infants'.¹⁸⁰ Consequently, the bad mother typification is argued by Raitt and Zeedyk, and Cunliffe to have negatively influenced the outcome of criminal proceedings.¹⁸¹ In order to theorise mothering I seek to clarify the terminology, distinguishing *motherhood* from *mothering*, and defining *ideology of motherhood*, and *discourse of motherhood*.

Bortolaia Silva and Slaughter have both drawn distinctions between motherhood and mothering on the basis that each term refers to different issues.¹⁸² Motherhood in its simplest reproductive sense, refers to the biological connection between woman and child so motherhood is female, but, care of dependent children or mothering, need not be.¹⁸³ Of course, mothering and motherhood have been biologically, and historically closely linked and continue to be. As a result, Bortolaia Silva suggests, motherhood has been theorised as natural, and idealised as a 'moral vocation'¹⁸⁴ for women. Nevertheless, the subsequent development of an ideology of motherhood i.e. the normative role for a woman has, argues Bortolaia Silva, been accompanied by a devaluing of mothering,¹⁸⁵ because mothering as child care, fails to generate income, the benchmark of value in a capitalist economy.¹⁸⁶ Consequently, the ideology of motherhood has led to a devaluing of women's work relative to men's work,¹⁸⁷ despite a 'glorification of carers'.¹⁸⁸ When fixed beliefs coalesce into a set

¹⁷⁸ *Clark No 1* (n 9); *Cannings* (n 9); *R v Folbigg* [2003] NSWSC 895 (24th October 2003).

¹⁷⁹ *Smart* (n 143) 192; *Raitt et al* (n 143) 267.

¹⁸⁰ *Raitt et al* (n 143) 267.

¹⁸¹ *Cunliffe* (n 176) 193.

¹⁸² Bortolaia Silva E, *The Transformation of Mothering* in Bortolaia Silva E (ed) *Good Enough Mothering? Feminist Perspectives on Lone Motherhood* (Routledge 1996); Slaughter MM, 'The Legal Construction of "Mother"' in Fineman MA and Karpin I (eds) *Mothers in Law: Feminist Theory and the Regulation of Motherhood* (Columbia University Press, 1995) 73.

¹⁸³ Bortolaia Silva (n 182) 12; Slaughter (n 182) 73.

¹⁸⁴ *ibid* 13.

¹⁸⁵ *ibid* 14; Herring J, *Caring and the Law* (Hart, 2013) 4.

¹⁸⁶ *ibid* 13.

¹⁸⁷ *Herring* (n 185) 4.

of theories or ideas, held by or characterising a social group or individual',¹⁸⁹ such as an ideology of motherhood, a number of difficulties arise.

In practice, the term infers that such ideas are unrealistic, dogmatic, and outdated.¹⁹⁰

Consequently, the term ideology is used to justify disapproval for particular ideas, closing off the reality that the beliefs are accepted by or true for some people. In addition, feminists have found difficulties with the use of the term ideology.¹⁹¹ Lois McNay suggests that the term ideology is bound to Marxist theory, regarded as reducing women to a 'peripheral',¹⁹² position, unless they are part of the labour force. The perceived issues of 'women's oppression',¹⁹³ have therefore been regarded as concentrated to an 'ideological effect',¹⁹⁴ of secondary importance to class relations.¹⁹⁵ But, if the important issue of class relations is set aside, the term ideology has a valuable function in identifying sets of fixed ideas about motherhood, that Farrelly and McGlynn argue obscure gender inequalities, for example in relation to the public/private divide and paid employment.¹⁹⁶ The term ideology is therefore important is identifying ideas about motherhood and mothering that may be privileged over other beliefs. Cunliffe has argued that because mothers failed to conform to the dominant ideology of motherhood,¹⁹⁷ they were criminalised in child death cases. However, based on

¹⁸⁸ *ibid* 293.

¹⁸⁹ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/ideology>> accessed 19 May 2016.

¹⁹⁰ *ibid* <<http://www.oxforddictionaries.com/definition/english/ideology>> accessed 19 May 2016.

¹⁹¹ McNay L, *Foucault and Feminism* (Polity Press, 1992) 25.

¹⁹² *ibid* 24.

¹⁹³ *ibid*.

¹⁹⁴ *ibid*.

¹⁹⁵ *ibid* 25.

¹⁹⁶ Farrelly C and McGlynn C, 'Equal Pay And The "Protection Of Women Within Family Life"' 1999 *European Law Review* 202, 207 critiquing *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 Case 184/83; McGlynn C, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *ELJ* 29; Caracciolo E, Torella D and Masselot A, 'Pregnancy, Maternity and The Organisation of Family Life: An Attempt To Classify The Case Law of The Court of Justice' [2001] *European Law Review* 240, 242; Schiek D, 'From Parental Leave To Parental Time: German Labour Law And EU Law' [2002] *Industrial Law Journal* 361, 364.

¹⁹⁷ Cunliffe (n 176) 100 citing Klein M, 'Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women' in Fineman MA and Karpin I (eds) *Mothers in law: Feminist Theory and the Legal Regulation of Motherhood* (Colombia U Press, 1995) and Roberts DE, 'Motherhood and Crime' (1993) 79 *Iowa Law Review* 9.

the brief theorisation of ideology here, the mothers in child death cases were fulfilling the ideology of motherhood, as far as they had willingly and autonomously chosen motherhood,¹⁹⁸ with most being full time mothers at the time of the child deaths.¹⁹⁹ It is therefore maternal behaviour and mothering as care that I suggest is the source of beliefs, which may have justified adverse decisions as mothering myths.

Theories of discourse and notions of a *discourse of motherhood* need also to be addressed here for a number of reasons. First because motherhood and mothering has been extensively studied by feminist scholars,²⁰⁰ some of whom such as Wallbank, have looked to Foucault's theory of discourse²⁰¹ to ground their arguments, producing important insights. Secondly, because some feminist scholars have raised the issue of a *discourse of motherhood*²⁰² having been instrumental in influencing outcomes of child death cases.²⁰³ Thirdly, because certain aspects of discourse theory may be helpful here in theorising *mothering*. Nevertheless, I follow an alternative theoretical trajectory to the Foucauldian and offer a different theorisation of mothering discourse, by examining relevant prevailing tropes and stereotypes of mothering in a way that is informed by the methods of feminist RMA research. Before going further, the term *discourse of motherhood*, is set aside in order to concentrate on mothering as child care for two reasons. First mothering as care, permits a consideration of

¹⁹⁸ However, see *R v Kai-Whitewind (Chaha'oh Niyol)* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31, in which her second child was alleged to be the result of rape by her partner and also Angela Gay in *Gay and Gay* (n 174) who chose to be an adoptive mother.

¹⁹⁹ For example Sally Clark a corporate solicitor, Trupti Patel a pharmacist, and Angela Gay, an Actuary. *Clark (No 2)* (n 9); *R v Patel (Trupti)* (Reading Crown Court, June 11 2003); *Gay and Gay* (n 174).

²⁰⁰ Malik M, 'The Branch on Which We Sit: Multiculturalism, Minority Women and Family Law' in Diduck A and O'Donovan K, (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006); Ussher JM, (ed) *Body Talk* (Routledge 1997) 4-5; Butler J, 'From Gender Trouble' in Gould CC (ed) *Gender: Key Concepts in Critical Theory* (Humanities Press International 1997) 80; Hunter et al (n 2); Monk D, 'Teenage Pregnancies and Sex Education: Constructing the Girl/Woman Subject' in Munro VE and Stychin CF, *Sexuality and the Law Feminist Engagements* (Routledge-Cavendish, 2007) 201; Smart C, Deconstructing Motherhood, in Bortolaia Silva E, (ed) *Good Enough Mothering? Feminist Perspectives on Lone Motherhood* (Routledge 1996) 38, 46; West R, *Caring for Justice* (NY University Press, 1997) 259.

²⁰¹ Wallbank J, *Challenging Motherhoods* (Pearson Education 2001) 15; Slaughter (n 182); Smart C, *Feminism and the Power of Law* (Routledge 1989).

²⁰² Cunliffe (n 176) 37 citing at (n 79) Raitt et al (n 143) 264.

²⁰³ Wells (n 65); Raitt et al (n 143); Cunliffe (n 176).

criminal proceedings involving child minders and baby sitters to be included, as I suggest normative beliefs and expectations of those caring for children are the same.²⁰⁴ Secondly, beliefs about motherhood as a moral vocation whether arrived at naturally, through reproductive technologies, or through fostering and adoption is not the key issue here, but maternal behaviour and child care is.

Discourse can be defined in the general sense of the Oxford Dictionary definition as a debate²⁰⁵ - a conversation belonging to everyone with an interest in child care, or, in the Foucauldian sense in which discourses refer to 'practices which form the objects of which they speak'.²⁰⁶ The question has also been considered whether mothering could also be characterised here as a *culture*, so making a link to rape justifying beliefs, which Conaghan and Russell argue are grounded in a rape supportive culture.²⁰⁷ Whichever term is chosen would need to be historically and socially contextualised, however, the term discourse is chosen instead of culture, because of its more fluid possibilities in suggesting development and change and as Wallbank argues, discourses can be 'generative and productive'.²⁰⁸ Bortolaia Silva also regards mothering as complex and shifting, because mothers amongst others 'continually recreate mothering'.²⁰⁹ Theoretically such an understanding of a discourse of mothering, would allow for the inclusion of new knowledge and practice, the consideration

²⁰⁴ For example see the way in which Keran Henderson a child minder was appraised in *R v Henderson (Keran Louise)* [2010] EWCA Crim 1269, [2010] 2 Cr App R 24 (CA (Crim Div)); Helen Stacey an experienced parent and registered child minder, was imprisoned for the murder of a six month old child in her care, because of SBS in *Stacey* (n 173); *R v Holdsworth (Suzanne)* [2008] EWCA Crim 971, 2008 WL 1867253 paras 20-22 per Toulson LJ, Suzanne Holdsworth a baby sitter was convicted in 2005 but later acquitted of murdering a child who died unexpectedly whilst in her care. At trial, the prosecution argument was accepted that she had caused the child's death by a 'blunt force head injury causing acute cerebral oedema' but, her defence offered no medical opinion on her behalf. At appeal, fresh expert evidence was permitted and found persuasive.

²⁰⁵ Meaning of discourse in online Oxford Dictionary

<<http://www.oxforddictionaries.com/definition/english/discourse>> accessed 22 June 2016.

²⁰⁶ Foucault M, *Archaeology of Knowledge* (trans) Sheridan M, (1st edn 1969 Tavistock 1972) 49.

²⁰⁷ Conaghan and Russell (n 16), 39.

²⁰⁸ Wallbank (n 201) 15.

²⁰⁹ Bortolaia Silva (n 182) 33.

of controversial beliefs,²¹⁰ and the rejection of demonstrably dangerous beliefs,²¹¹ whilst providing a source of normative beliefs.

In her project, Wallbank considers the use of discourse theory not only in relation to motherhood,²¹² but also in relation to further discourses of psychology, children's needs, and child support.²¹³ Within that context, Wallbank argues that discourses 'are extremely potent'²¹⁴ in establishing a 'set of rules that may or may not be adhered to by individuals'.²¹⁵ 'Discourses transmit and produce both power and truth ...'.²¹⁶ Such 'regimes of truth',²¹⁷ Wallbank suggests, have a powerful influence on single mothers who are perceived or portrayed as not adhering to discourse rules within e.g. child support theory. Mothering discourse as theorised here, therefore includes normalisation,²¹⁸ internalisation of rules,²¹⁹ and the need for compliance e.g. women as feminine, and mothers as practical carers, and the possibility of sanctions for non-compliance enabling distinctions to be made between good mothers and bad mothers.²²⁰

Nonetheless, I suggest that what may be happening in child death cases may be more nuanced and discoverable using a mothering myth theorisation to identify individual beliefs within the contextual discourse rather than or only using a good-bad mother typification derived from

²¹⁰ E.g., the debate that breast feeding is not 'best' see Wolf DB, *Breast is Best Isn't It?* (NYU Press 2013).

²¹¹ Gilbert R, Salanti G, et al, 'Infant sleeping position and the sudden infant death syndrome: systematic review of observational studies and historical review of recommendations from 1940 to 2002,' (2005) 34 International Journal of Epidemiol 874, conclusion 'Advice from Dr Spock to put infants to sleep on the front for nearly a half century was contrary to evidence available from 1970 that this was likely to be harmful'; Spock B, *Baby & Child Care* (6th edn, *Common Sense Book of Baby and Child Care*, Bodley Head 1979) page 217 para 284 'On back or on stomach? A Majority of babies seem, from the beginning to be a little more comfortable going to sleep on their stomachs.'

²¹² Wallbank (n 201) 4.

²¹³ *ibid* 6-7.

²¹⁴ *ibid*.

²¹⁵ *ibid* 5.

²¹⁶ *ibid* 5 citing Foucault M, 'The Eye of Power' in Gordon C, (ed and Trans) *Power/Knowledge* (Harvester Wheatsheaf 1980) 120.

²¹⁷ *ibid* 6.

²¹⁸ *ibid* 37.

²¹⁹ *ibid* 7 citing Foucault M, 'The Eye of Power' in Gordon C, (ed and trans) *Power/Knowledge* (Harvester Wheatsheaf 1980) 155.

²²⁰ *ibid* 7; Smart (n 64) 192; Weldon EV, *Mother, Madonna, Whore: The Idealization and Denigration of Motherhood* (Karnac Books 1988).

the feminist use of Foucauldian discourse serving to distinguish between the compliant and the non-compliant. Furthermore, using a good/bad analysis does not allow for the understanding provided by researchers studying mothers who admitting killing their children,²²¹ that ‘having killed one’s child is not evidence that one was a bad mother’.²²² US professors Oberman and Meyer of law and psychology respectively are described as leading authorities on maternal filicide.²²³ Based on interviews with women who admitted filicide, they suggest that even such mothers can be perceived as both good and bad. If mothers can be considered simultaneously good and bad, then the compliant/non-compliant dichotomy may not be helpful in understanding what may be happening within wrongful convictions in child death cases.

2.3.1 *An alternative discourse of mothering*

If I take as a starting point a definition of mothering as ‘bringing up a child with care and affection’,²²⁴ then a discourse of mothering could be defined as *a framework incorporating beliefs about mothering and normative behaviour for mothers*. Although some beliefs may regulate behaviour in practice because carers want to care for their children in the best way possible, discourse as a collection of multiple individual beliefs remains non-essentialised, setting aside also a generalised conception of *proper mothering*.

Sources of knowledge have been generated in a number of ways; by those in the private sphere who do the mothering,²²⁵ their friends and mothers, networks of mothers,²²⁶ those who

²²¹ Oberman M and Meyer CL, *When Mothers Kill Interviews from Prison* (NYU Press 2008).

²²² *ibid* 67.

²²³ *ibid*.

²²⁴ Oxford Dictionary http://www.oxforddictionaries.com/definition/english/mother?q=mothering#mother__16> accessed 16 June 16.

²²⁵ For example books by mothers: Purves L, *How Not to Be a Perfect Mother*, (Thorsons, 2004); contemporary blogs: The Mad House <<http://www.muminthemadhouse.com/>>; Not Another Mummy Blog <<http://notanothermummyblog.com/>>; Slummy Single Mummy <<http://slummysinglemummy.com/>>; Vuelio Media Database, <<http://www.vuelio.com/uk/social-media-index/mummy-blogs-uk-top-10/>>

²²⁶ Mumsnet "<<http://www.mumsnet.com/>> all accessed 2 June 2016.

care for mothers,²²⁷ and nannies and maternity nurses.²²⁸ In the public sphere, child health nurses, midwives²²⁹ health visitors,²³⁰ doctors,²³¹ child psychologists,²³² psychotherapists,²³³ children's hospitals²³⁴ and Department of Health advisors²³⁵ examine research and publish understandings of best practice that inform the discourse of mothering. A discourse of mothering as theorised here, may therefore be more akin to a debate encompassing multiple conversations from both individuals and the state contributing to and forming knowledge and experience and beliefs.

In Wallbank's project, decisions about mothers in legal proceedings were considered to be based not only on *mothering discourse* as practice, but also on related discourses including psychology, child support, and the public interest. However, the understandable perceived divisions between discourses such as mothering, and discourses from psychology or psychiatry may be artificial, because both relate to child care and maternal behaviour. What is important in legal proceedings therefore, is not the allocation of the belief to a particular framework or discourse, but the nature of the particular belief about what should happen, and how it is applied in criminal proceedings to what actually happened.

²²⁷ National Childbirth Trust, (NCT) <<https://www.nct.org.uk/>> accessed 2 June 2016.

²²⁸ Ford G, *The Contented Little Baby Book* (Vermilion, 1999).

²²⁹ Royal College of Midwives (RCM), *Evidence Based Guidelines for Midwifery-Led Care in Labour Immediate Care of the Newborn* (The Royal College of Midwives Trust, 2012); *RCM Maternal Emotional Wellbeing and Infant Development* (RCM, 2012).

²³⁰ Institute of Health Visiting Practice <<http://ihv.org.uk/our-work/publications-reports/>> accessed 20 June 2016.

²³¹ Spock B, *Baby and Child Care* (1st edn, 1946 Common Sense Book of Baby and Child Care, Bodley Head 1979); King T, *Feeding and Care of Baby* (Whitcombe & Tombs Ltd, 1942); Leach P, *Your Baby and Child* (4th edn Dorling Kindersley 2010); Stoppard M, *Complete Baby and Childcare* (Dorling Kindersley 2008).

²³² Weiner IB, and Elkind D, *Child Development: A Core Approach* (John Wiley & Sons, 1972) 43.

²³³ Winnicott DW, *The Maturation Processes and the Facilitating Environment* (1965, Karnac Books 2005); Winnicott DW, *Collected Papers : Through Paediatrics to Psycho-analysis* (1958 Tavistock Publications 1975); Winnicott DW, *Babies and their Mothers* (Free Association Books 1988); Ainsworth B and Bowlby J , *Child Care and the Growth of Love* (Penguin Books 1965); Bowlby J, *Maternal Care and Mental Health* (WHO 1951).

²³⁴ Hilton T and Messenger M, *The Great Ormond Street New Baby and Child Care Book The Essential Guide for Parents of Children aged 0-5* (3rd edn, Vermilion 1997) Foreword.

²³⁵ Shribman S, Billingham K, *Healthy Child Programme: Pregnancy and the First Five Years of Life* (Department of Health 2004).

For example in *Claire F*,²³⁶ the Court described the mother serving a long term prison sentence in a Mother and Baby Unit (MBU) as ‘making an excellent job of mothering’.²³⁷ There were no concerns ‘about Claire’s behaviour or about her handling of Lia-Jade’.²³⁸ To make its decision however, the court relied upon consultant psychiatrists,²³⁹ with whose expert opinions Munby J agreed, that the mother ‘seemed, however, less able to put the interests of her child above her own, as time went on...’.²⁴⁰ In addition, ‘Several of her statements to camera were about her feelings and her needs, rather than the child’s’.²⁴¹ Further, the court considered not only normative beliefs based on ethics of care,²⁴² and maternal altruism, but also expert opinions on attachment theory,²⁴³ to interpret the mother’s behaviour. Without wishing to comment whether the decision in this case was rightly decided, I wish only to focus on the beliefs that the court relied on to appraise the mother. Although the court recognised that mothering was excellent, they did not clarify what they meant by mothering. I suggest the court’s view of mothering in this case, was constructed as hands-on practical child care, and considerations of maternal behaviour were constructed as a domain of expert discourse.

However, in order to analogise from rape myth work to child death cases and the potential for mothering myths, I suggest maternal behaviour needs to be included in a theorisation of mothering, because normative beliefs about mothering are so focussed on how mothers

²³⁶ *Claire F v Secretary of State for the Home Department, Lia-Jade F (a Minor by her litigation friend the Official Solicitor)* [2004] EWHC 111 (Fam) 2004 WL 229322 para 15 per Munby J a judicial review examining whether the Secretary of State had properly decided to separate a baby from her mother at nine months.

²³⁷ Dr Dora Black, Honorary Consultant Child and Adolescent Psychiatrist at the Traumatic Stress Clinic in London and Honorary Consultant at the Royal Free Hospital, at the Great Ormond Street Hospital for Children and at the Tavistock Clinic giving evidence in *Claire F* (n 236) para 9 per Munby J.

²³⁸ *ibid* para 9 per Munby J.

²³⁹ *ibid*.

²⁴⁰ *ibid* para 133 per Munby J.

²⁴¹ *ibid*.

²⁴² See Herring (n 185) 68 ‘governing the extent to which a mother is normatively expected to be altruistic, and sacrifice her own needs in order to put a child first’.

²⁴³ *Claire F* (n 236) para 54, 142, 145, 146 per Munby J; Black D, Lansdown R, ‘Implications of the Separation of Babies from their Mothers in HM Prisons’ MBUs: Towards a Flexible Policy on Age Limits’ (2004) (89) Arch Dis Child 896 cited by Munby J in *Claire F* (n 236) para 70.

should behave, not only on how a mother is expected to keep a child fed and clean. Both areas of knowledge I suggest, generate beliefs about what constitutes mothering. The categorisation and privileging of beliefs about mothering as expert opinion or psychiatric/psychological discourse, therefore risks overlooking such beliefs as the source of potential mothering myths when applied in criminal proceedings. Consequently, mothering in this thesis, encompasses beliefs that both influence and appraise maternal behaviour and child care because they are normative, internalisable and regulatory, such as the need for altruism and bonding, irrespective of the source classification.

2.3.2 Mothering and beliefs

That women as mothers are the best carers of children, and that the care of children is mainly the responsibility of mothers, is a normative belief highlighted as a matter of concern by feminist commentators.²⁴⁴ Jill Marshall argues that such a belief constructs both maternity and motherhood in terms of connection, physically and emotionally'.²⁴⁵ Categorised by Farrelly and McGlynn as a 'traditional conception of motherhood',²⁴⁶ the belief that 'a child is best cared for by a blood-related parent, preferably the mother, in person for the first three years',²⁴⁷ has also been characterised by Schiek, as a *dominant ideology*.²⁴⁸ The notion of a dominant ideology of motherhood, which 'privileges the mother-child relationship and in which childrearing is considered to be the primary responsibility of mothers',²⁴⁹ has been criticised by feminist commentators for 'replicating traditional assumptions about motherhood and parenthood'.²⁵⁰

²⁴⁴ Farrelly and McGlynn (n 196); McGlynn (n 196); Caracciolo (n 196) 242; Schiek (n 196) 364.

²⁴⁵ Marshall J, 'Concealed Births, Adoption And Human Rights Law: Being Wary of Seeking To Open Windows Into People's Souls' [2012] CLJ 325.

²⁴⁶ Farrelly and McGlynn (n 196) 207.

²⁴⁷ Schiek (n 196) 364.

²⁴⁸ *ibid.*

²⁴⁹ McGlynn C, 'Pregnancy, Parenthood and the Court of Justice in *Abdoulaye*' [2000] European Law Review 654, 660-1; *Abdoulaye v Regie Nationale des Usines Renault SA* (C-218/98) [1999] ECR I-5723; Times, October 20, 1999 (ECJ (5th Chamber)).

²⁵⁰ *ibid.*

Nevertheless, developmental psychologist and cultural/difference feminist scholar Carol Gilligan,²⁵¹ has argued that women are nurturers because they focus on relationships, needs, connection and context in contrast to men, who she submits, focus on abstracted rules, and individualism.²⁵² In describing an ethic of care based upon nurturing, Gilligan argues that women are defined through their connectedness and their relationships with others, particularly children. As McGlynn and Marshall and Robin West,²⁵³ however point out, there are dangers in a discourse of mothering that is predicated on the belief that only women or women should, care for children. Such beliefs risk reinforcing gender stereotypes, devaluing women, maintaining the subject status of women, exceptionalising particular attributes (being a woman), whilst failing to account for other compelling needs for autonomy, through a professional career and generation of income from employment.

Consequently, the belief that women are wrongly expected to be naturally or inevitably charged with primary responsibility for the care for children, is countered by argument that such a belief is legitimate, and that child care is a choice made autonomously.²⁵⁴ However, a belief that mothers should care for children instead of giving that task over to others, would within criminal proceedings if used to support or justify a negative decision about a mother who went back to work, constitute a mothering myth, for example in the case of actuary Angela Gay, who did just that.²⁵⁵ In addition to the fact of care, the approaches to care are characterised by similar tensions, between normative regulations of behaviour and individual autonomous choices in carrying out child care.

²⁵¹ Gilligan C, *In a Different Voice*, (Harvard University Press 1996).

²⁵² *ibid* 177.

²⁵³ McGlynn (n 249); Marshall (n 245); West (n 200) 81.

²⁵⁴ Gilligan (n 251).

²⁵⁵ See *Gay and Gay* (n 174) and the judicial comments made of prospective adoptive parent, Angela Gay.

2.3.3 – Altruism

Alongside the belief that women care for children, is the belief that mothers are unselfish and self-sacrificing in so doing. Bortolaia Silva, argues that such an expectation has been constructed from religious discipline based on the Judaeo-Christian ideology of *Woman* as a mother. She ‘alone devotedly, unselfishly and wisely gives herself to the task of reproducing new generations’.²⁵⁶ The belief in maternal selflessness has however been criticised by Robin West²⁵⁷ for being ‘self-annihilating’,²⁵⁸ because it may create ‘injured, harmed, exhausted, compromised and self-loathing “giving selves”’.²⁵⁹ Rather than creating individuals who are truly compassionate, West suggests that women care because of a need for acceptance and a fear of sexual violence.²⁶⁰ Consequently, women undertake the ‘repetitive, physically exhausting and emotionally demanding work involved in raising children’,²⁶¹ and ‘their self-sacrifice is assumed both by the participants in the relationship and by the outside society as exemplary of virtue’.²⁶²

Commentators such as Diemut Bubeck too, see little reason to applaud altruism. Bubeck suggests an unselfish ethic of care is a ‘catalyst for exploitation’,²⁶³ and West likens altruism to a stunting of the self, a loss of personal integrity and ‘exemplary of injustice’.²⁶⁴ The issues of self-sacrifice may be further compounded because, as West argues, although ‘Courts and Judges do not themselves enter into relationships of care ... they are deeply complicit in the construction of those relationships.’²⁶⁵ Consequently, if criminal courts believe that mothers should submit their own needs to those of their children, there is the possibility that such a belief may be used to justify an adverse finding against a mother perceived to be acting

²⁵⁶ Bortolaia Silva (n 182) 10.

²⁵⁷ West (n 200) 81.

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

²⁶⁰ *ibid* 82.

²⁶¹ *ibid* 81.

²⁶² *ibid.*

²⁶³ Bubeck D, *Care, Gender and Justice* (OUP 1996) 177.

²⁶⁴ West (n 200) 82 and 82-3.

²⁶⁵ *ibid* 83.

selfishly in her own interests. For example, if she goes back to work,²⁶⁶ or as a professional she admits to finding it hard being at home alone,²⁶⁷ or because of her immaturity, she gives her child to her own mother to care for²⁶⁸ then, a fixed belief in altruism that justifies an adverse decision within criminal proceedings would represent a mothering myth.

2.3.4 – Bonding

A further element in the discourse of mothering is emotional attachment or bonding. The theory was developed by child psychotherapist Donald Winnicott, and psychologist, psychiatrist and psychoanalyst John Bowlby.²⁶⁹ A woman who normatively raises her child herself in a natural, instinctive and nurturing manner, may be regarded with approval as fulfilling her child's emotional needs. Bowlby argued that mother-love in infancy, enabled a child to form an attachment to her, which facilitated the later formation of healthy attachments to others. Attachment theory has become normatively powerful, and as in *Claire F*,²⁷⁰ legal proceedings may rely on an appraisal of the attachment between mother and child, to make decisions about mothers. For example in child death case *Kai-Whitewind*, the mother's inability to bond with her child, was noted as supporting evidence, justifying an adverse decision, and distinguishing *Cannings* despite the conflict between competing expert opinions about how the child died.²⁷¹ The possibility of a prescriptive and normative belief that bonding must and should take place, may therefore arise in criminal proceedings and an absence of attachment may indicate that a mother was likely to harm her child. But, if a mother admits to having, or has been observed to show difficulty in forming an attachment with a child, there may be many reasons. For example, she may have had postnatal

²⁶⁶ See *Gay and Gay* (n 174) and the judicial comments made of professional, Angela Gay.

²⁶⁷ See later analysis of *Clark (No 1)* (n 45) para 87 per Henry LJ in which Sally Clark was criticised for resenting her social isolation at home.

²⁶⁸ *R v Anthony (Appeal against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001 para 25 per Judge LJ. 'Mrs Anthony told the police that her parents looked after Jordan for 60 per cent of the time'.

²⁶⁹ Bowlby (n 233).

²⁷⁰ *Claire F* (n 236)

²⁷¹ *Kai-Whitewind* (n 198) paras 15, 16, 17, 88, 133, 139 per Judge LJ.

depression, a difficult birth, the child may be the result of rape²⁷² or she may have had a previous SID or stillbirth.²⁷³ Accordingly a fixed belief that absence of a bond justifies a prejudicial decision in criminal proceedings, could also constitute a mothering myth.

2.3.5 – Child care

Within the wider domain of mothering discourse, innumerable further normative expectations are situated, relating to how child care is carried out, and each may be used to appraise mothers in criminal proceedings either singly or together. For example, feeding a child, maintaining a clean home,²⁷⁴ hygiene and play provision, maintenance of health during pre-conception,²⁷⁵ pregnancy²⁷⁶ and when children are young.²⁷⁷ In addition, considerations whether to lie a baby on its front or back, to sleep,²⁷⁸ whether to attend clinics, or permit immunisations and even whether mothers are believed to know and understand what mothering is about,²⁷⁹ are a few of the many aspects of child care constituting mothering as defined in this thesis. However, my thesis is that within criminal proceedings normative individual beliefs about mothering, may justify adverse decisions, i.e. as mothering myths,

²⁷² The mother's failure to bond as a result of alleged rape in *Kai-Whitewind* (n 198)

²⁷³ NHS Choices, See bonding at <<http://www.nhs.uk/search?collection=nhs-meta&query=bonding>> accessed 4 June 2016.

²⁷⁴ See *R v Smith (Margaret)* (Leeds Crown Court, 22 October 2002) a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in Jenkins R, 'Mother Cleared of Baby Murder Had Stabbed Husband to Death' *The Times* (London, 10 November 2004).

²⁷⁵ NICE guidelines see <<http://cks.nice.org.uk/pre-conception-advice-and-management>> accessed 20 June 2016.

²⁷⁶ NHS Choices, <<http://www.nhs.uk/conditions/pregnancy-and-baby/pages/pregnancy-and-baby-care.aspx>> accessed 20 June 2016; Cave E, *The Mother of All Crimes: Human Rights, Criminalisation and The Child Born Alive* (Ashgate 2004).

²⁷⁷ *ibid.*

²⁷⁸ Smart (n 200); Royal College of Pathologists (RCP) and The Royal College of Paediatrics and Child Health (RCPCH) *Sudden Unexpected Death in Infancy A Multi-Agency Protocol for Care and Investigation* (Royal College of Pathologists 2004) 3 citing 600 SUDI deaths in the UK in 2004 <<http://www.rcpath.org/NR/rdonlyres/30213EB6-451B-4830-A7FD-4EEFF0420260/0/SUDIreportforweb.pdf>> accessed 28 February 2015 citing the Department of Health Back to Sleep campaign in 1991, 30.

²⁷⁹ *Anthony No 2* (n 268) para 25 per Judge LJ: 'a witness statement from Donna Anthony's mother stated her daughter did not initially understand 'what motherhood was like.'

not only in unselfishness or attachment, but also in relation to home hygiene,²⁸⁰ the use of apnoea alarms,²⁸¹ or refraining from negative health behaviours.²⁸²

The effects of inhaled cigarette smoke, drinking alcohol or ingesting other legal and illegal drugs, have been well documented to cause harm via the placenta to unborn children.²⁸³

Beliefs that particular behaviours threaten the interests of both unborn and born children as identified in medical and psychosocial research for example perceptions of alcohol abuse in *Clark*,²⁸⁴ may therefore be a constituent of normative discourse of maternal behaviour, in judging mothers in child death cases. I therefore argue that the domain of a discourse of mothering contains many normative beliefs generated and developed through private and public debates. Children are cared for presumptively by mothers, who are expected to know how to care, and to do it altruistically. Mothers are responsible for forming the child's first template for attachment, and they must feed and maintain a healthy environment for the child both in pregnancy and after its birth. As Wallbank argues, mothers are 'constructed and defined through an articulation of their children's needs'.²⁸⁵

The impact of such a wide discourse of mothering may therefore lead to an essentialism based upon connection, or an "'ideology" of motherhood'.²⁸⁶ Jill Marshall argues that such an ideology, leads some to find it difficult to perceive of mothers as independent autonomous 'persons - or human beings - in their own right, as legally and philosophically understood,

²⁸⁰ RCP (278) 74; And also see *Smith* (n 274) a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in Russell Jenkins, 'Mother Cleared of Baby Murder Had Stabbed Husband to Death' *The Times* (London, 10 November 2004).

²⁸¹ Apnoea monitors are electronic devices activated by sensors attached to a baby's chest or abdomen that respond to a baby's respiratory movements and were provided for families of next infants following a SID, to use when the baby was asleep or at night. See later analysis of the interpretation of Angela Cannings' behaviour in not relying on apnoea monitors all the time, in Cannings (n 9).

²⁸² Wolfe I, Macfarlane A, Donkin A et al, *Why Children Die: Death in Infants, Children and Young People in the UK Part A* (A Report for the British Association for Child and Adolescent Public Health, RCPCH and National Children's Bureau, 2014).

²⁸³ Cave (n 276).

²⁸⁴ See Sally Clark's alcohol dependency and how that may have been interpreted in *Clark (No 1)* (n 45) para 87 per Henry LJ who stated that 'Clark tended to drink more heavily when her husband was away'.

²⁸⁵ Wallbank (n 201) 5.

²⁸⁶ Marshall (n 245) 330.

with choices to make about ways of being and living.²⁸⁷ Accordingly, the framework represented by a discourse of mothering in this thesis, is constituted by normative expectations of mothers, and this view of women's subjectivity is based on a normative absence of autonomy. Within the criminal justice system therefore, there is a risk that mothers are judged by fixed beliefs. But if mothers exhibit behaviours that transgress normative beliefs, that may be shocking²⁸⁸ because a mother may therefore be perceived to have threatened the interests of the child. Whether going back to work, not calling an ambulance, not achieving bonding, not checking an apnoea alarm, abusing alcohol, or simply not knowing that a child was so ill they shouldn't have walked to the hospital but should have dialled 999 instead, I suggest mothers may be judged against fixed normative beliefs, and not by the logic or rationality of their decisions.

However, none of the discussion here suggests that the beliefs are wrong in principle. Smoking around children, alcohol abuse, keeping an unhygienic home or being selfish are poor ways to care for a child. But, if beliefs are applied in criminal proceedings, in a fixed and oversimplified way, without considering what really happened as opposed to what should happen, to justify an adverse decision, then using the definition of a mothering myth, informed by rape myth scholarship, such a decision may be flawed. Decisions therefore based on interpretations of the feminine may unjustly influence outcomes in criminal proceedings, in child death cases.

2.4 Conclusion

This thesis argues that maternal behaviour and child care may have been interpreted using stereotypical beliefs, or myths, and that such interpretations justified damaging decisions about women in child death cases. Chapter two has defined beliefs including stereotype, myth

²⁸⁷ Marshall (n 245) citing at (n 24) West R, 'Jurisprudence and Gender' (1988) 55 University of Chicago Law Review 1; MacKinnon CA, 'Are Women Human? In addition, Other International Dialogues' (London 2006); Naffine N, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart 2009).

²⁸⁸ Hunter (n 2) 20.

and attitude, in order to distinguish between the terms and identify the functions served by the terms. Rape myths have been examined to theorise the notion of myth and although there are a number of issues associated with transposing rape myth scholarship to theorising a mothering myth, a possible definition of a *mothering myth* is proposed. Beliefs defined as rape myths are difficult to prove as widespread, or false, giving rise to a debate about myth myths within rape myth scholarship. Researchers however suggest that identifying that some beliefs are descriptive or narrow fixed conceptions that justify adverse conclusions within criminal proceedings, is more important in understanding what is happening in rape cases, not whether beliefs can be proven to be widespread or false.²⁸⁹

I have concluded that theoretically the definition of a rape myth, as reflected in wider rape myth scholarship and the findings of Conaghan and Russell and Gerger et al's research in particular, could help understand some prevalent attitudes to mothering within the criminal justice system. A mothering myth, could be defined as a *descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system*. In the final section, I have considered key contents in the domain of a mothering discourse, in order to provide some examples of the application of the *mothering myth* in practice, and in some child death cases.

Feminist scholars argue that outcomes in cases involving women such as spousal murder, rape and child death were as a result of the separation of women into good and bad, and that this dichotomy led to adverse decisions. I suggest that the theorisation of a *mothering myth* may be more helpful in understanding what may be happening in child death cases, by focussing on individual beliefs that singly or together may have justified a guilty verdict, rather than a broader question whether mothers were good or bad.

²⁸⁹ Gerger et al (n 71).

Chapter three: Maternal behaviours in child death cases: indicative of guilt or mothering myths?

3.0 Introduction

Chapter one analogised from particular cases of homicide and sexual assault to child death cases, to show that women's behaviour has been interpreted negatively using stereotypical thinking and rape myths, and likewise, maternal behaviour and child care may have been adversely interpreted in child death cases. Using Gerger et al's definition of a rape myth,¹ a definition of a *mothering myth* was proposed in chapter two: *a descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system*. In this chapter a number of child death cases are explored for indications of such mothering myths.²

In analogising from rape myth scholarship,³ this thesis has sought to distinguish the impacts of interpretations of expert evidence in criminal proceedings, from the possible impacts of interpretations of maternal behaviour and child care. By so doing, the significance of information about maternal behaviour in child death cases may be shown, together with the possible impact of fixed beliefs in interpreting such information. The distinction between expert evidence and non-medical evidence may however be inexact, depending on the meaning of expert evidence. Expert witnesses have traditionally been regarded as 'men of science',⁴ giving opinions as in *Clark*, on areas such as post mortem pathology findings⁵ and

¹ Gerger H, Kley H, Bohner G and Siebler F, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English' [2007] 33 *Aggressive Behaviour* 422, 423: 'rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women'.

² *R v Clark (Sally) (Appeal Against Conviction) (No 2)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Gay (Angela) R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *R v Donna Anthony (Appeal Against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001; *R v Kai-Whitewind (Chaha'oh Niyol)* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31; *R v Patel (Trupti)* (Reading Crown Court, June 11 2003); *LB of Islington v Al-Alas and Wray* [2012] EWHC 865 (Fam); *R v Khatun (Saleha)* (Central Criminal Court, 22 December 2009).

³ See chapter 2.

⁴ Jones CAG, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press 1994) 14.

statistical analyses.⁶ However, interpretations of maternal behaviour have also been made by medical witnesses⁷ and expert medical witnesses,⁸ in addition to those from other health professionals and non-professional witnesses such as friends and neighbours, observers and bystanders.⁹ Chapter three therefore seeks to focus only on maternal behaviour and child care, and the way it was interpreted in a number of wrongful convictions whether or not the information was sourced from a medical expert to reveal how mothering myths may have operated in child death cases.

In rape myth scholarship the type of normative beliefs found to be ““wrong” in an ethical sense’,¹⁰ relate to the behaviour of women at, during and after the time of the alleged sexual assault,¹¹ although links have also been shown to beliefs held more widely within what has been termed a rape supportive culture.¹² Similarly in child death cases, the behavioural evidence provided about mothers mostly concerns beliefs about their behaviour immediately prior to the child becoming unwell, whilst the child dies, and following the child’s death. Such beliefs may also as discussed in chapter two be contextualised within a wider normative discourse about mothering, and linked to expectations of women and mothers as carers. For

⁵ For example *R v Clark (Sally) (Appeal against Conviction) (No 1)* CACD 2000 WL 1421196 para 8 per Henry LJ, reference brain haemorrhages, petechial haemorrhages on eyelids, rib fractures, spinal bleeding and a swollen cord.

⁶ For example in *Clark (No 2)* (n 2): Waite A, McKenzie A and Carpenter RG et al, *Report on 5000 Babies Using the Care Of Next Infant (CONI) Programme* (Foundation for the Study of Infant Deaths, 1998); Fleming P, Bacon C, Blair P et al, *The CESDI SUDI Studies 1993-1996; Sudden Infant Deaths in Infancy* (Department of Health, 2000) preface page xi.

⁷ *Clark (No 1)* (n 5) para 258 per Henry LJ, ‘The behaviour of the appellant at hospital when told her baby was dead impressed Dr Douglas as “... very dramatic and almost hysterical ...” and was described by her as “... such an over-reaction.”’

⁸ For example MSbP, Meadow R, ‘Munchausen Syndrome by Proxy: The Hinterland of Child Abuse’ (1991) 33 (3) *Dev Med Child Neurol* 270; -- ‘Recurrent Cot Death and Suffocation’ (1989) 64 (1) *Arch Dis Child* 179; -- ‘Suffocation, Recurrent Apnoea, and Sudden Infant Death’ (1990) 117 (3) *J Pediatr* 351; -- ‘Unnatural Sudden Infant Death’ (1999) 80 (1) *Arch Dis Child* 7.

⁹ For example evidence obtained from neighbours and acquaintances of Anthony in *R v Anthony (No 2)* (n 2).

¹⁰ Gerger et al (n 1) 423.

¹¹ Ellison L, ‘Closing The Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’ [2005] 239, 240 citing at (n 5 and 6) HMCPSI/HMIC, ‘A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape (HMCPSI, 2002) 55 ‘The study notably found that complainants’ behaviour after an assault was a key feature taken into account by prosecutors in their credibility determinations.’

¹² Burt MR, ‘Cultural Myths and Supports of Rape’ (1980) 38 *J Pers Soc Psychol* 217, 228, 229.

example, that altruistic care for children is or ought to be a mother's naturally overriding concern, because mothers are 'constructed and defined through an articulation of their children's needs'.¹³ The beliefs that are considered in this chapter relate to maternal behaviour and child care once mothers realised their child was unwell; whether they should have known their child was dangerously unwell; whether and when they called an ambulance; whether they started to resuscitate the child; whether they used an apnoea alarm properly; what they said and how they behaved before and following the death of a child; and further, whether the mothers should have recalled accurately the circumstances surrounding children's deaths.

The discussion about maternal behaviour is supported by the understandings provided by rape myth scholarship in a number of ways. First by the way in which behaviour and memory may be affected by traumatic events such as sexual assault. Ellison suggests that in the literature on cases of sexual assault, there is widespread support for the notion that advocates for the defence may as a matter of course, interpret signs of psychological trauma as indicative of lying.¹⁴ By analogy, there is a possibility that in child death cases also, the use of 'commonly assumed credibility cues'¹⁵ such as inconsistent testimony and poor event recall, 'are potentially misleading when applied to the testimony of those who have witnessed or experienced a traumatic event'.¹⁶ Secondly, Ellison and Munro's research indicates that the public (extrapolated to jurors) may attribute responsibility to female claimants because of

¹³ Wallbank J, *Challenging Motherhoods* (Pearson Education 2001) 5.

¹⁴ Ellison 'Closing The Credibility Gap' (n 11); Cossins A, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' [2013] *International Journal of Evidence & Proof* 74; Ellison L and Munro VE, 'Better The Devil You Know? "Real Rape" Stereotypes and The Relevance of a Previous Relationship in (Mock) Juror Deliberations' [2013] *International Journal of Evidence & Proof* 299; Rumney PNS, 'False Allegations of Rape' [2006] *Cambridge Law Journal* 128; Ellison L and Munro VE, 'Reacting to Rape Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 (2) *The Br J Criminol* 202;

¹⁵ Ellison 'Closing The Credibility Gap' (n 11) 241.

¹⁶ *ibid.*

their behaviour.¹⁷ For example, the behaviour of the complainant in the lead-up to the incident¹⁸ or her use of alcohol.¹⁹ Consequently it is possible that female behaviour evidence in child death cases may have been similarly interpreted as attributing responsibility to mothers if they failed to fulfil prescriptive beliefs about what they should have done, whether call an ambulance, use an apnoea monitor, or refrain from drinking alcohol. However, there are risks in extrapolating too readily from rape myth scholarship; Ellison and Munro identify ‘key behavioural cues’²⁰ that may be used by jurors to attribute responsibility in rape trials, e.g. ‘lack of resistance, delayed reporting and calm complainant demeanour’.²¹ As yet, such juror cues have not been identified in child death cases, and the possibility whether they can be will be further explored in the conclusion.

3.1 Mothering myths

Alison Saunders, Director of Public Prosecutions (DPP) has acknowledged (in relation to rape) that it is important that cases are constructed ‘without being influenced by or relying on pre-conceived or stereotypical notions and assumptions’.²² It would be logical to apply such a view also to child death cases. In practice however, achieving such clarity and neutrality has been difficult both in rape cases and child death cases. The SUDI protocol²³ states that prior to 2004, professionals often held fixed beliefs about parents whose child (ren) died

¹⁷ Ellison and Munro ‘Reacting to Rape’ (n 14) 203.

¹⁸ *ibid* 203 citing Lees S *Carnal Knowledge Rape on Trial* (Hamish Hamilton 1996).

¹⁹ *ibid* 203 citing Finch E and Munro V ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: Findings of a Pilot Study’, [2005] 45 Br J Criminol 25; — ‘Breaking Boundaries? Sexual Consent in the Jury Room’ [2006] 26 Legal Studies 303; — ‘The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ [2007] 16 Social and Legal Studies 591; — ‘Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research’ [2008] 35 Journal of Law and Society 30;

²⁰ Ellison and Munro ‘Reacting to Rape’ (n 14) 203.

²¹ *ibid*.

²² Saunders A, ‘Supporting vulnerable witnesses through the Criminal Justice Process’ 26 February 2015 (Speech delivered at St. Mary's Centre 13th Annual Conference 2015) available at http://www.cps.gov.uk/news/articles/supporting_vulnerable_witnesses_through_the_criminal_justice_process_-_26_feb_2015/ accessed 3 March 2015.

²³ Royal College of Pathologists (RCP) and Royal College of Paediatrics and Child Health (RCPCH), *Sudden Unexpected Death in Infancy A Multi-Agency Protocol For Care and Investigation* (Royal College of Pathologists 2004) 1.

suddenly.²⁴ Further, when observing and interviewing parents, the approach of paediatricians was to ‘think dirty when diagnosing illness in children, and to start from the standpoint that the problems arise from misconduct on the part of the carers’.²⁵ In addition, former senior police officer Phil Palmer has described how when police visited a home where a child had just died, they were required to be suspicious from the outset, looking for information that might indicate that the child had not died naturally.²⁶ His observation is supported by Robert Key’s suggestion during a House of Commons debate, in relation to *Cannings*, that ‘the police had made up their minds at an early stage that it stood to reason that the three deaths must be murder’.²⁷ His assertion was however challenged by Vera Baird who maintained that in *Cannings*, there was no ‘sign on the face of it...of any lax investigation by the police...They appeared to be unable to decide what was what and so turned to expert evidence that was intended to help’.²⁸

The controversial *thinking dirty* approach may have been overstated, but much of the evidence of maternal behaviour presented in child death cases, was obtained from such witnesses around the time of the child’s death, including police, paediatricians, paramedics, hospital and community health professionals. I suggest therefore that fixed normative beliefs may have been relied upon in child death cases, to appraise maternal behaviour preceding and around the time that a child was found in a life threatening situation, and afterwards if a death ensued. Such beliefs include considerations of maternal mental health in relation to questions of infanticide and theories of attention seeking behaviour.

²⁴ *ibid.*

²⁵ Bache W, ‘When the Law Doesn’t Listen’ (2007) NLJ 1677; William Bache, solicitor to Angela Cannings and formerly a practising solicitor in Salisbury, <<http://www.sra.org.uk/consumers/solicitor-check/094683> article> accessed 7 July 2015 referring to the views of pathologist Dr Maurice Green, who later influenced Professor Meadow.

²⁶ Palmer P, Senior Lecturer, University of Southampton School of Law, personal communication 17 February 2015.

²⁷ Key R, MP for Salisbury, HC Deb 24 Feb 2004, vol 418, Col 39 WH speaking in the House of Commons following Angela Cannings’ acquittal.

²⁸ Baird V, HC Deb 24 Feb 2004, vol 418, Col 39 WH.

3.1.1 *Is alcohol dependency indicative of guilt?*

Perceptions of women's credibility within criminal proceedings may be lowered if they are suspected of having consumed alcohol. Cossins suggests that in cases of sexual assault, gender-based double standards may be partly to blame,²⁹ and Gunby et al cite research indicating that 'many people are reluctant to believe a woman who states she was raped when voluntarily intoxicated or alternatively hold her in some way blameworthy'.³⁰ Rape myths consequently may be responsible for acquittals in sexual assault cases, if jurors feel that women are even partly responsible for the rape.³¹ Likewise in child death cases, mothers may be negatively perceived because maternal behaviours such as smoking and drinking alcohol have long been regarded as harmful especially if carried out during pregnancy.³² Health promotion programmes and research studies by public organisations such as the Royal College of Paediatricians and Child Health (RCPCH),³³ have sought to publicise the dangers and disseminate normative understanding that maternal tobacco and alcohol dependencies harm children. Drinking excess alcohol in pregnancy may harm the unborn child, 'resulting in "foetal alcohol syndrome", (FAS) and "foetal alcohol effects (FAE)"', characterised by growth retardation and central nervous system impairment.³⁴ The combination of alcohol and certain cardiac arrhythmias such as Long QT Syndrome (LQTS)³⁵ may also be fatal in infants

²⁹ Cossins (n 14) 76 citing at (n 9) Taylor N, 'Juror Attitudes and Biases in Sexual Assault Cases', Trends and Issues in Crime and Criminal Justice No 344 (Australian Institute Of Criminology, 2007) 1 and citing at (n 26) Stormo KJ, Lang AR And Stritzke WJK, 'Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences' (1997) 27 Journal of Applied Psychology 279, 303.

³⁰ Gunby C, Carline A and Beynon C, 'Alcohol-Related Rape Cases: Barristers' Perspectives on The Sexual Offences Act 2003 and its Impact on Practice' [2010] Journal of Criminal Law 579, 580.

³¹ Withey C, 'Female Rape - An Ongoing Concern: Strategies For Improving Reporting and Conviction Levels' Journal of Criminal Law 2007 54, 77 citing at n 120 the results of a 2005 study by Amnesty International reported at 'Rape: Is a Woman's Behaviour to Blame' London (BBC News website, 21 November 2005) <<http://news.bbc.co.uk/1/hi/programmes/breakfast/4455622.stm>> accessed 23 September 2016.

³² Cave E, *The Mother of All Crimes Human Rights, Criminalisation and the Child Born Alive*, (Ashgate 2004) 5, and citing at n. 13 Department of Health, 'Smoking Kills, A White Paper on Tobacco (Cmnd. 4177 Department of Health 1998).

³³ Wolfe I, Macfarlane A, Donkin A et al, *Why Children Die: Death in Infants, Children and Young People in the UK Part A* (A Report for the British Association for Child and Adolescent Public Health, RCPCH and National Children's Bureau, 2014).

³⁴ Cave (n 32) 5 citing KL Jones, DW Smith et al, 'Patterns of Malformation in Offspring of Chronic Alcoholic Mothers' (1973) 1(7815) Lancet 1267.

³⁵ Please see Glossary.

and adults because ‘alcohol abuse is associated with an increased incidence of cardiac arrhythmias’.³⁶ Clark³⁷ had an alcohol dependency for which she had received treatment prior to her pregnancies,³⁸ but the facts of whether she drank in pregnancy or as a mother are not known, but were inferred by the prosecution. But for her known dependency, there is little doubt that her defence could have argued that she was unquestionably a person of good character as evidenced by her health visitor,³⁹ GP⁴⁰ and nanny.⁴¹

As reported in the first appeal against conviction report, Clark’s health visitor had observed a close attachment to and bond between Clark and her first ‘responsive’ baby Christopher.⁴² Clark attended a mother and baby group ‘where she appeared as a normal, happy, caring mother’,⁴³ her babies ‘were well cared for, loved by their parents and happy and content’,⁴⁴ and was reported as a ‘loving, caring mother’.⁴⁵ She is reported as welcoming visits from health visitors as part of the CONI programme,⁴⁶ indicating she was a responsible mother of a *next infant*. Prior to the deaths of her children, health professionals praised her as exemplifying the ideal of the good mother, by her caring, nurturing and compliant behaviour.

In contrast to Clark’s behaviour as a mother that satisfied normative expectations of mothering, counsel for the prosecution told the court that on the day of her second son Harry’s death, she ‘visited the off-licence on two occasions to buy some wine saying (falsely,

³⁶ Colling RT and Gallagher PJ, ‘The Pathology of Unexplained Cardiac Deaths’ in Money-Kyrle R, Macleod S, and Money-Kyrle A, ‘SAD Cases in the Coroners’ Courts’ (Report of a Conference at The University of Oxford, The Foundation for Law, Justice and Society 10 January 2013) 9 and see *Clark (No 2)* (n 2).

³⁷ *Clark (No 1)* (n 5) para 87 (5) per Henry LJ.

³⁸ Batt J, *Stolen Innocence* (Ebury Press 2005) 131 written by a member of Clark’s defence team.

³⁹ *Clark (No 1)* (n 5) para 34, 43, 65, 69 per Henry LJ.

⁴⁰ *ibid* para 35, 36 per Henry LJ.

⁴¹ *ibid* para 43, 64, 69 per Henry LJ.

⁴² *ibid* para 34 per Henry LJ.

⁴³ *ibid* para 17 per Henry LJ.

⁴⁴ *ibid*.

⁴⁵ *ibid* para 43 per Henry LJ.

⁴⁶ *ibid*; *Cannings* (n 2) para 74 per Judge LJ, referring to the work of the Foundation for the Study of Infant Deaths (FSID).

it would appear) that they were having a dinner party that evening'.⁴⁷ The implications of such a fact may have raised concerns in juror's minds, although the CPS could not use the fact of Clark's alcohol dependency in argument due to a pre-trial ruling, and beliefs in the wrongness of maternal alcohol dependency may have served to support if not justify a guilty verdict. Such views were amply reinforced by media portrayals following the trial when Harrison J reversed his pre-trial ruling. As a result the BBC described Clark as a '35-year-old lawyer who drank through both her pregnancies... a lonely drunk... a depressed alcoholic',⁴⁸ who had received hospital treatment for 'bouts of severe binge drinking',⁴⁹ and by *The Lawyer*, as 'driven by drink and despair, the solicitor who killed her babies'.⁵⁰

Clark's alcohol dependency was suggested at trial, confirmed after conviction, and affirmed in her first appeal where it was reported that she 'tended to drink more heavily when her husband was away'.⁵¹ A belief on the part of both jurors and judiciary that a mother may have abused her child is understandable, if she purchases alcohol covertly on the day her second son dies suddenly and unexpectedly and she has received treatment for alcohol dependency in the past. However, holding such a belief in a fixed way within criminal proceedings to support a finding of guilt is not justified. The second (successful) appeal did not mention alcohol at all in its judgement acquitting Clark.⁵² Her dependence on alcohol and her possible consumption on the day her second child died, therefore did not justify either a belief or a decision that she was guilty of murder, nor her continued imprisonment.

The reasons for using Clark's alcohol dependency as part of legal argument in criminal proceedings although understandable, may reasonably be expected to be linked with fixed

⁴⁷ *Clark (No 1)* (n 5) para 87 (5) (Henry LJ).

⁴⁸ 'Baby killer was "lonely drunk"' *BBC News* (London, 9 November 1999) <<http://news.bbc.co.uk/1/hi/uk/512099.stm>> accessed 9 April 2015.

⁴⁹ *Ibid.*

⁵⁰ The Editor 'Mother's Ruin' (*The Lawyer*, 2 February 2002) <<http://www.thelawyer.com/mother039s-ruin/100860.article>> accessed 22 October 2013.

⁵¹ *Clark (No 1)* (n 5) para 87 (5) (Henry LJ).

⁵² *Clark (No 2)* (n 2).

views about the harm that alcohol may cause to children both in pregnancy and when caring for a small child. As Ann Oakley reflected ‘of all the things women are supposed to be, mothers come first’.⁵³ Helena Kennedy suggests that society expects women ‘to embody nurturance and protectiveness associated with mothering,’⁵⁴ and consequently when women are accused of harming their child, Kennedy suggests there is a ‘heightened outrage’.⁵⁵ Not only may such a mother be perceived as selfish, contravening expectations that she should forego autonomous behaviour in favour of altruism, such beliefs may induce prejudicial perceptions of the maternal behaviour.

That alcohol dependency is not problematic for any person including mothers, is not my position. But I wish to suggest that raising the fact of Clark’s past alcohol dependency at trial and at first appeal, without evidence of her having drunk excess alcohol prior to the children’s deaths, risked providing the jury with a *key behavioural cue*, and engaging a fixed belief in criminal proceedings, that justified the view that a mother with an alcohol dependency was responsible and guilty of murder.

3.1.2 Are emotional over reactions indicative of guilt?

As discussed in chapter one the consequences of trauma whether through physical violence⁵⁶ or sexual assault⁵⁷ can result in significant ‘emotional disorganisation’⁵⁸ that may affect the behaviour of otherwise rational women. How such emotions including ‘fear, shock, disbelief, anger, self-blame and embarrassment’⁵⁹ may be expressed varies according to the individual. But such demeanours may diverge from the expected norms and consequently may be

⁵³ Oakley A, *Subject Women* (Fontana, 1981) 85.

⁵⁴ Kennedy H, *Eve Was Framed Women and British Justice* (Vintage 1992) 25.

⁵⁵ *ibid.*

⁵⁶ Battered Women Syndrome (BWS) now consolidated in s 52(1) Coroners and Justice Act 2009, as an ‘abnormality of mental functioning’, which arose from a ‘recognised medical condition’, ‘substantially impaired D’s ability to understand the nature of her conduct, form a rational judgment, or exercise self-control, and that the abnormality ‘provides an explanation’ for D’s doing or being a party to the killing’.

⁵⁷ Rape Trauma Syndrome (RTS) see Burgess AW and Holmstrom LL, *Rape—Crisis and Recovery* (Brady 1979) 35.

⁵⁸ Ellison (n 11) 251.

⁵⁹ *ibid.*

perceived as bizarre and unexpected and interpreted according to prescriptive beliefs such as rape myths,⁶⁰ for example that had not allowed for the impact of trauma on behaviour.⁶¹

Similarly in child death cases, the appeal reports provide evidence of mothers' behaviour on the days their children died, and the following sections identify that such behaviour may have been interpreted according to fixed beliefs about how traumatically bereaved mothers should behave, that may have supported trial outcomes.

Clark was on her own at home when she noticed that her son Christopher aged nearly three months was 'a "dusty grey colour"'⁶² and she knew something was wrong. She picked him up and dialled 999⁶³ and asked for an ambulance. There is no mention whether she tried to resuscitate the baby. When the ambulance arrived only two minutes later according to the appeal report,⁶⁴ the house was locked on the inside with Clark unable to find the keys.

Paramedics entered the house after a 'neighbour arrived with the spare keys',⁶⁵ to find Clark holding the baby who was already 'pale, cyanosed, cold and quite rigid'.⁶⁶ Clark's behaviour is described at home, in the ambulance and at hospital; the ambulance driver stated Clark was 'very distressed, crying and screaming',⁶⁷ she was 'on the verge of hysteria'⁶⁸ and was so distressed the paramedic could not put the child on the resuscitator.⁶⁹ On being told that Christopher was dead, Clark's 'reaction was described by a hospital doctor as very dramatic and hysterical'.⁷⁰ Further, the doctor branded the behaviour as 'atypical and the over-reaction

⁶⁰ Rumney (n 14) 135-6, 141, 152-153 citing at n 96 Jordan J, 'Worlds Apart? Women, Rape and the Police Reporting Process' (2001) 41 British Journal of Criminology 679, 692.

⁶¹ *ibid* 135-6, 141 citing at (n 44 - 47) Temkin J, 'Reporting Rape in London: A Qualitative Study' (1999) 38 Howard Journal of Criminal Justice 17, 23 and 27; Temkin, J, 'Plus Ça Change: Reporting Rape in the 1990s' (1997) 37 British Journal of Criminology 507, 516.

⁶² *Clark* (No 1) (n 5) para 36 per Henry LJ.

⁶³ *ibid*.

⁶⁴ *ibid* para 18 per Henry LJ.

⁶⁵ *ibid* para 37 per Henry LJ.

⁶⁶ *ibid* para 18 per Henry LJ.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

⁶⁹ *ibid*.

⁷⁰ *ibid* para 19 per Henry LJ.

made her feel quite uncomfortable'.⁷¹ In addition, a staff nurse stated that Clark had 'said that her husband would blame her and would not love her any more'.⁷² The evidence provided by professional witnesses suggest doubts that Clark's grief was normal, indicating concern that Clark may have harmed Christopher.

Misgivings may have further increased because of discrepancies between Clark's accounts to ambulance personnel and doctors concerning Christopher's whereabouts when he died.⁷³

Clark stated that he was in a Moses basket to ambulance crews,⁷⁴ but in a bouncy chair to paediatricians.⁷⁵ When the police visited the home at 02.00 am on the night of the baby's death they questioned the parents and removed both pieces of baby equipment,⁷⁶ having already noted on the coroner's form that Christopher had been found in a bouncy chair.⁷⁷

Clark failed to later challenge that discrepancy, and the first appeal report states, 'The fact that the appellant gave inconsistent accounts of where she found Christopher adds to its significance rather than detracting from it',⁷⁸ as she was unable to remember whether the child died in a bouncy chair or the Moses basket.⁷⁹

It is difficult to tell whether remembering which place the child was in when discovered lifeless was probative as the prosecution suggested, or whether Clark's memory may have been impaired by the shock of Christopher's death. Ellison for example suggests that the impact of trauma in sexual assault cases may have a significant effect on memory.

'Significantly, research suggests that the normal variability of memory can be exacerbated by

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid* para 19 per Henry LJ.

⁷⁵ *ibid* para 20 per Henry LJ.

⁷⁶ *Batt* (n 38) 32.

⁷⁷ *Clark (No 1)* (n 5) para 20 per Henry LJ.

⁷⁸ *ibid* paras 89 (1), 257 per Henry LJ.

⁷⁹ *ibid* para 240 per Henry LJ.

the impact of trauma, such as that experienced by victims of sexual assault'.⁸⁰ It is therefore possible that the risk that Clark may have suffered post-traumatic stress disorder (PTSD) as a result of the death of her child, resulting in impaired memory performance, may have been overlooked by both the defence and judicial summing up. Such a shocking moment of discovery is unlikely to be forgotten. But the view that detailed memories are either accurate or can be recalled, indicates that evidence of Clark's faulty memory may have been interpreted by a fixed belief that all mothers should remember the factual circumstances of child death. Consequently any inconsistencies would lead to support for an adverse conclusion.⁸¹

Clark's second child Harry, also suddenly stopped breathing in the evening; she called the ambulance whilst her husband commenced resuscitation.⁸² Again the first appeal court judgement records professional witness evidence about Clark's behaviour. Paramedics said when they arrived, Clark was 'running up and down the street outside the house, barefoot, in pyjamas and very distressed';⁸³ that she had behaved in a "very dramatic and almost hysterical"⁸⁴ manner, described as "such an over-reaction".⁸⁵ To compound the concerns about Clark at the time of Harry's death, she could not accurately recall to police in interviews at home, the time that her husband had returned home on the night the second baby died, as she said she had confused the night the second child died with the night the first

⁸⁰ Ellison 'Closing the Credibility Gap' (n 11) 243 citing at n 28 Petrak J and Hedge B, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (Wiley 2002).

⁸¹ See discussion in chapter four regarding jury decision making in the face of inconsistent witness testimony ref: Ellison 'Closing The Credibility Gap' (n 11) 243 citing at n 19 Brewer N, Potter R, Fisher R et al, 'Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony' (1999) 13 Appl Cognitive Psych 297, 310 'The influence of testimonial inconsistencies on juror judgments has, however, been specifically examined in several mock-juror studies. This research indicates that highlighting or eliciting inconsistencies in a witness's statements is likely to be 'an extremely effective means of discrediting the witness'.

⁸² *Clark (No 1)* (n 5) para 3 per Henry LJ.

⁸³ *ibid* para 44 per Henry LJ.

⁸⁴ *ibid* para 258 per Henry LJ.

⁸⁵ *ibid*.

had died.⁸⁶ In addition, a few days later the coroner⁸⁷ said that Clark had stated ‘she and her husband would try for another baby’.⁸⁸ Mrs Hurst said she felt that comment ‘most unusual’,⁸⁹ and realised then that Clark had lost two babies. This observation led her to contact a senior police inspector and request a Home Office pathologist to conduct the post-mortem on the second baby Harry.⁹⁰

Clark’s behaviour and comments were therefore appraised by professionals and an adverse interpretation was made that her behaviour was not normal. Whether Clark’s comments support an adverse interpretation, is uncertain. Newly bereaved mothers must surely behave as individuals and not according to preconceived essentialised normative understandings. Nevertheless, a coroner is likely to have witnessed many bereaved parents and possibly sufficient to form a view that Clark’s behaviour was aberrant, however, such interpretations about behaviour based upon experience are not the same I suggest, as objective large scale research studies on bereavement behaviour, which are lacking in this area.⁹¹

The points identified in this section about Clark’s behaviour are taken from Henry LJ’s judgment dismissing her first appeal. Whereas Clark’s hysteria and distress behaviour is mentioned twenty times by Henry LJ in his legal reasoning, in Kay LJ’s judgment of the second successful appeal,⁹² both words are mentioned once. It is possible that Henry LJ was persuaded that Clark’s behaviour around the time of her sons’ deaths was so abnormal, it supported if not justified her continuing conviction and dismissing her appeal. However, in the judgement of her second appeal, such factors were barely mentioned. One cannot know

⁸⁶ *ibid* paras 65, 66 per Henry LJ.

⁸⁷ *ibid* paras 46, 67, 270 per Henry LJ.

⁸⁸ *ibid* para 270 per Henry LJ.

⁸⁹ *ibid*.

⁹⁰ *ibid* para 46 per Henry LJ.

⁹¹ Brabin P, ‘Editorial: Understanding and Managing Grief after Perinatal Loss’ (2014) (4) 31 *Grief Matters* 31; Wilson T, ‘Perinatal Loss: Application of Loss and Grief Theories’ (2014) (4) *Grief Matters* 32; Hartog ON den, ‘Supporting Parents Following Perinatal Death’ (2104) (4) *Grief Matters* 58; Clark A, ‘Working with Grieving Adults’ (2004) 10 *Advances in Psychiatric Treatment* 164.

⁹² *Clark (No 2)* (n 2) para 103 per Kay LJ.

the extent to which any member of the court may have believed that the evidence of Clark's overwhelming distress, confusion and inappropriate comments justified a guilty verdict. But it is clear that in Kay LJ's judgement, such factors were of no relevance or weight.

Accordingly, there is a question whether professionals' fixed beliefs about normal behaviour of mothers confronted with a dying child supported, if not justified a guilty verdict, without expert evidence from a psychiatrist to support such perceptions, and why therefore defence counsel failed to adequately challenge what may have been *mothering myths*.

How a mother should behave following the death of a child may therefore be impossible to state without over simplification. However as Judge LJ suggested in a second case *Cannings*,⁹³ if a fixed and over simplified view is held that 'lightning does not strike three times in the same place'⁹⁴ then however a mother behaved, 'might be thought to confirm the conclusion that lightning could not indeed have struck three times'.⁹⁵ If the children's deaths were natural then 'virtually anything done by the mother on discovering such shattering and repeated disasters would be readily understandable as personal manifestations of profound natural shock and grief'.⁹⁶ Judge LJ suggests that maternal behaviour in *Cannings* was therefore adversely interpreted within the context of and as a result of flawed expert evidence,⁹⁷ and the same could be said of *Clark*.⁹⁸ The judicial comments indicate that prejudicial interpretations of maternal behaviour may be very persuasive, especially where expert evidence on the interpretation of pathology findings such as 'petechial or pinpoint

⁹³ *Cannings* (n 2) in which three children died suddenly and without explanation, and the mother was charged with the murder of two children.

⁹⁴ *ibid* para 11 per Judge LJ.

⁹⁵ *ibid*.

⁹⁶ *ibid*.

⁹⁷ Meadow R, *The ABC of Child Abuse*, (3rd edn. BMJ Publishing Group 1997) 29, that 'one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise'. This aphorism named 'Meadow's law', was based upon the opinion expressed by Di Maio and Di Maio that while a second SIDS death from a mother is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide in Di Maio D J and Di Maio VJM, *Forensic Pathology* (Elsevier, 1989) 291.

⁹⁸ *Clark (No 1)* (n 5) para 171 per Henry LJ citing Professor Meadow saying "You have to say two unlikely things have happened, and together it is very, very, very unlikely."

haemorrhages’,⁹⁹ and ‘Intra-retinal haemorrhaging’¹⁰⁰ are complex and unfamiliar. Moreover there is little indication in *Cannings* either that evidence of maternal behaviour was robustly challenged by her defence.¹⁰¹

The appeal judgement records that evidence of Cannings’ behaviour and emotional reactions when her young children experienced apparent or acute life threatening events (ALTE), was submitted in great detail,¹⁰² together with evidence of her use of the apnoea alarm,¹⁰³ and who she called when she realised a child was in danger.¹⁰⁴

3.1.3 *Is failing to use an apnoea monitor indicative of guilt?*

Cannings was regarded by health professionals as a good mother, and care-giver, with the appearance of an affectionate and caring mother.¹⁰⁵ She had four children of which three died. She was charged with the murder of two. All three suffered from what were referred to as acute or apparent life threatening events (ALTE) where they apparently stopped breathing, and the appeal transcript identified ALTE’s as SIDS in which no death had actually resulted.¹⁰⁶ Prosecution counsel argued that the ALTE’s were the result of Cannings attempting to smother the children by obstructing their upper airways,¹⁰⁷ and the reasoning was supported by evidence that Cannings frequently forgot to use the apnoea alarm.¹⁰⁸

⁹⁹ *Clark (No 2)* (n 2) para 69 per Kay LJ.

¹⁰⁰ *ibid* para 69 per Kay LJ.

¹⁰¹ *Cannings* (n 2) para 14 per Judge LJ: Mrs Cannings’s defence was simple: she had done nothing to harm any of her children. Although she was contending that the deaths were natural, notwithstanding specialist evidence called on her behalf at trial, she could not explain them, and she was not seeking to offer an explanation of her own. And, unusually, she was doing so in the very special context that medical specialists, both domestically and internationally, continue to acknowledge that the death of an infant or infants at home can simultaneously be natural and unexplained, even by them’.

¹⁰² *ibid* para 51, 58, 65, 76, 102, 108, 112, per Judge LJ.

¹⁰³ *ibid* paras 47, 52, 57, 58, 61, 63, 64, 76, 77, 78, 97, 99, 100, 101, 103, 104, 108, 109, 111, 112, 157 per Judge LJ.

¹⁰⁴ *ibid* paras 40, 76-82, 93, 108-110 per Judge LJ.

¹⁰⁵ *ibid* para 25 per Judge LJ.

¹⁰⁶ *ibid* para 9 per Judge LJ.

¹⁰⁷ *ibid* para 4 per Judge LJ.

¹⁰⁸ *ibid* paras 77, 78, 157 per Judge LJ.

At the time when the mothers in this thesis were having their families, those with a new baby where there had been a previous SID, were offered support from the Care of the Next Infant (CONI)¹⁰⁹ programme managed by the University of Sheffield's Child Health Unit.¹¹⁰ The worry for parents about how to care for a *next infant* was considerable, as Frances Rose, who was monitored as a baby explains:

I know my parents went through the CONI scheme with me, ending up with a year or so of sleepless nights due to apnoea monitors (23 years ago these were less than accurate!), which gave them a certain amount of peace of mind, but was coupled with countless false alarms.¹¹¹

Apnoea is the term used when there is no respiratory effort for greater than 20 seconds or for a shorter period if accompanied by cyanosis¹¹² or bradycardia,¹¹³ as in an acute life threatening event (ALTE).¹¹⁴ Apnoea monitors are electronic devices activated by sensors attached to a baby's chest or abdomen that respond to a baby's respiratory movements and were provided for families to use when the baby was asleep or at night. Waite et al found that most (86%) families used them.¹¹⁵ The monitor beeped with respirations and sounded a continuous alarm if the chest or abdomen stopped moving, indicating that respirations could not be detected. A variety of monitors were issued under the CONI programme for home use,¹¹⁶ but they always had 'serious drawbacks'¹¹⁷ because they were unable to 'reliably

¹⁰⁹ Waite et al, (n 6) the CONI programme supported families in which there had been a previous SID, and followed up all subsequent siblings of a deceased infant.

¹¹⁰ The Child Health Unit collated data from professionals and parents for publication in the CONI reports.

¹¹¹ Lullaby Trust, 'I Never Thought I was A "Replacement" Child' <<http://www.lullabytrust.org.uk/page.aspx?pid=1390>> accessed 17 April 2014.

¹¹² A term given to a bluish colour of the skin and the mucous membranes of the lips and mouth, usually due to lack of oxygen and an increase of unoxygenated haemoglobin or deoxyhaemoglobin in the blood stream.

¹¹³ A term given to an abnormal slowing of the heartbeat.

¹¹⁴ Acute Life Threatening Event (ALTE): when a baby stops breathing or its heart slows and such events occurred in Cannings (n 2).

¹¹⁵ Waite et al (n 6) 11.

¹¹⁶ *ibid*.

¹¹⁷ Burke MJ and Downes J, 'A Fuzzy Logic Based Apnoea Monitor for SIDS Risk Infants' (2006) 30 (6) *Journal of Medical Engineering & Technology* 397.

detect life threatening events, their high rate of false alarms...failing to reliably detect when babies stop breathing'.¹¹⁸ Hence, as in Frances Rose's example, apnoea monitors often sounded an alarm for no apparent reason, and confidence in monitors 'gradually declined'¹¹⁹ as parents became more aware of the 'limitations of the apnoea monitors'.¹²⁰ As Judge LJ pointed out in *Cannings*, 'it is not, as some think, a machine which prevents an infant death'.¹²¹

Cannings was issued with a monitor,¹²² but her behaviour was argued by prosecution counsel to be anomalous because she often forgot to ensure that it was attached and working,¹²³ and she reported being unable to remember whether she had heard the sound of the alarm when her babies had stopped breathing.¹²⁴ She stated in evidence that 'the police believed I had never used them [apnoea alarms] at all',¹²⁵ and that police had sound engineers test the alarms.¹²⁶ Consequently, prosecution counsel argued that 'the appellant had not told the full truth about the workings of the apnoea alarm'.¹²⁷ Evidence of her inconsistent memories, and emotional reactions was also presented in terms that suggested her behaviour described as, distressed, very shocked, sobbing, retching and vomiting,¹²⁸ may like Clark's have been perceived as too much, and therefore indicative of guilt.¹²⁹

¹¹⁸ *ibid.*

¹¹⁹ Waite et al, (n 6) 11 'from 84% confidence to 75%.

¹²⁰ *ibid* 19 para 2.

¹²¹ *Cannings* (n 2) para 47 Per Judge LJ.

¹²² *ibid* paras 47, 57, 63, 76 per Judge LJ.

¹²³ *ibid* paras 47, 57, 63, 76, 77, 78, 157 per Judge LJ Cannings frequently forgot to put the apnoea alarm on.

¹²⁴ *Cannings* A with Lloyd Davis M, *Cherished: A Mother's Fight to Prove her Innocence* (Sphere 2007) 101.

¹²⁵ *ibid.*

¹²⁶ *Cannings* (n 2) paras 111, 157 per Judge LJ.

¹²⁷ *ibid* para 157 and alarms are also mentioned at paras 9, 47, 52, 57, 76, 77, 78, 97, 99, 100, 103, 104, 105, 109, 111, 154 per Judge LJ.

¹²⁸ *ibid* para 51, 58 per Judge LJ.

¹²⁹ There is an issue therefore in relation to interpretations of the feminine, that in some cases traumatic events lead to women behaving with *too little* emotion as in sexual assault cases, and in other cases with *too much* emotion as in these child death cases. There is a question whether there is any evidence as to the appropriate level of emotion to be shown in any given situation, if such behaviour is to be relied upon as evidence in criminal trials. See chapter six discussion of mock jury research.

Whether the jury believed that because of the strength of Cannings' emotional reactions and because she did not attach the monitor and listen for it at all times, such behaviour supported a finding of guilt, is difficult to know for sure, however, the prominence given to such factors in the appeal judgement, suggests that at trial, such considerations were significant. Hallett J directed the jury to 'look at all the evidence',¹³⁰ and therefore maternal behaviour would have formed part of that appraisal, especially as there is no mention in the appeal report of a defence challenge to such evidence. In addition, although *Clark* and *Cannings* may be distinguished by Cannings having lost three babies and Clark having lost two, both were part of the CONI programme and issued with monitors, however Clark did not use the apnoea alarm at all during the day,¹³¹ and this fact was not raised in evidence. A belief might be held that in Cannings' home where the young infants suffered repeated ALTE's, twenty four hour monitoring should have been in place. However, monitors were known to be unreliable, infants were under continuous observation and monitor use as a decisive factor in criminal proceedings was inconsistent.

Consequently it is possible that heuristics may have played a part in juror decision making.¹³² For example, as Temkin and Krahe suggested in relation to rape trials, counterfactual thinking has been observed to occur when mock jurors are invited to re-imagine a situation such as a rape, and ask themselves what could have been done differently. In such circumstances, mock jurors are more likely to blame the person they have just imagined acting differently. If instead of a rape, the mock jurors were to imagine an ALTE and imagined what could or should have been done differently, then theoretically jurors might blame the mother for not making sure the child was attached to a working apnoea monitor. Of course that may be a very reasonable belief, but whether the belief supports or justifies a

¹³⁰ *Cannings* (n 2) 2607 para 167 per Judge LJ.

¹³¹ *Clark (No 1)* (n 5) para 69, 47 per Henry because they had had 'trouble with the CONI monitor giving false alarm', 'They only used the monitor at night'.

¹³² Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 49.

finding of murder, given the known difficulties of monitoring instruments, is a different matter. Nevertheless it is possible that failing to use an apnoea monitor may have been used by the jury as a *key behavioural cue* in attributing responsibility to the mother.

As Judge LJ later suggested, it was possible that given the large number of experts called and the complexity of the evidence given, that the jury ‘may not, inadvertently, unconsciously, have thought to itself that if, between them all, none could offer a definitive or specific explanation for these deaths, the Crown's case must be right’.¹³³ Or, if evidence of maternal behaviour was interpreted using fixed beliefs combined with heuristics, a guilty verdict was supported and justified because the expert evidence was so inconclusive, thus presenting the possibility of a mothering myth.

3.1.4 *Is not calling for an ambulance supportive of guilt?*

When Cannings found her first baby Gemma ‘lying on her back, looking very, very white.

She tried, unsuccessfully, to revive her. She called an ambulance’,¹³⁴ but, the baby was could not be revived. The second baby Jason had an ALTE when the health visitor was present who resuscitated the child prior to his admission to hospital.¹³⁵ Jason had a further ALTE at home a few days later, whereupon Cannings dialled 999 and the paramedic arrived.¹³⁶ The baby died subsequently in hospital, and following a review of both deaths by leading paediatricians and neuropathologists, no cause of death was identified.¹³⁷ The third baby Jade had an ALTE (whilst not connected to the apnoea alarm); Cannings called her GP who attended, and the child was taken to hospital¹³⁸ and survived until adulthood.

¹³³ *Cannings* (n 2) para 170 per Judge LJ.

¹³⁴ *ibid* para 40 per Judge LJ.

¹³⁵ *ibid* para 50-59 per Judge LJ.

¹³⁶ *ibid* para 62 per Judge LJ.

¹³⁷ *ibid* para 66-73 per Judge LJ.

¹³⁸ *ibid* para 76-82, 93 per Judge LJ.

Following the fourth child Mathew's birth, Cannings was taught 'advanced resuscitation techniques'.¹³⁹ When Mathew too suffered an ALTE in contrast to the three previous occasions, Cannings did not call 999, but called her husband to come home; no ambulance was called until after he rushed home from work.¹⁴⁰ At the hospital when Mathew was confirmed to have died,¹⁴¹ Cannings' husband 'asked her in the presence of the staff nurse why she had called him before she had called an ambulance, as indeed she had. She was quiet for a few minutes, and then told her husband that she had panicked'.¹⁴² When interviewed by police on this question, she said she had wanted her husband to be present, that she wanted his help, 'so that he could see Matthew and see what he was like'.¹⁴³ The prosecution considered Cannings' behaviour to be irregular, because although she had commenced resuscitation after ringing her husband, she 'had not herself directly and immediately sought help either from the emergency services or indeed from neighbours, at least one of whom was a nurse who had offered to help'.¹⁴⁴ In response, Cannings said of Mathew that she "couldn't believe the way he was". She wanted "Terry to be there to support me. I had always been on my own".¹⁴⁵ It is difficult to understand how a mother may have felt in Cannings' situation at the moment of discovering Mathew, faced with the prospect of losing a third child, and suspicion from her husband and family, and investigations by doctors and police. It is understandable that she did not want to be alone. But, it was the coincidence of 'Mathew's death that triggered the investigation which culminated in her conviction'¹⁴⁶ for the murder of both Jason and Mathew. The question whether Cannings' behaviour in not calling the ambulance immediately in Mathew's case, was so prejudicially interpreted by the court at her

¹³⁹ *ibid* para 96 per Judge LJ.

¹⁴⁰ *ibid* para 108-110 per Judge LJ.

¹⁴¹ *ibid* para 108 per Judge LJ.

¹⁴² *ibid*.

¹⁴³ *ibid* para 108, 110 per Judge LJ,

¹⁴⁴ *ibid* para 110 per Judge LJ.

¹⁴⁵ *ibid* para 112 per Judge LJ.

¹⁴⁶ *ibid* para 128 per Judge LJ.

trial, cannot be known. However, within the framework of expert evidence that ‘lightning does not strike three times in the same place’,¹⁴⁷ then a fixed belief that Cannings should have called the ambulance immediately before commencing resuscitation and before calling her husband, may have supported and justified a finding of guilt.

Nonetheless, if each child’s death is considered separately, Cannings behaved correctly throughout her challenging time as a mother, apart from the very last occasion, when she said she panicked and wanted her husband there. It is therefore also possible that the jury took her long tribulations into consideration and neither failure to use the apnoea alarm nor call the ambulance were significant in a finding of guilt. But, the jury needed to decide whether the child deaths were natural, or unnatural,¹⁴⁸ and they heard expert evidence that three infant deaths in one family is very rare,¹⁴⁹ and there was no direct evidence or indirect evidence,¹⁵⁰ and Cannings had a case to answer.¹⁵¹

Judge LJ held that the ‘expert evidence was absolutely critical to these convictions’¹⁵² and that the fresh evidence regarding Long QT syndrome undermined the original expert evidence.¹⁵³ Accordingly, it is possible that the jury came to a guilty verdict on the basis of a belief in the certitude of expert evidence (later considered to be unreliable in *Patel*,¹⁵⁴) rather than because a fixed belief was held about maternal behaviour. If this is so, it is uncertain why defence counsel were unable to convince the court of the reliability of expert evidence of Long QT syndrome presented at trial, unless other factors were more persuasive, such as

¹⁴⁷ *ibid* para 11 per Judge LJ.

¹⁴⁸ *ibid* paras 7, 157-9 per Judge LJ.

¹⁴⁹ *ibid* para 12, 44, 113, 114, 129, 137, 138, 142, 144, 145, 146, 147, 148, 149, 156, 159 per Judge LJ.

¹⁵⁰ *ibid* para 14 per Judge LJ.

¹⁵¹ *ibid* para 163 per Judge LJ.

¹⁵² *ibid* paras 96, 116- 120, 175 per Judge LJ regarding the likelihood of Long QT syndrome in the genetic makeup of the Cannings family thus causing sudden deaths in her infants.

¹⁵³ *ibid* para 175 per Judge LJ.

¹⁵⁴ *Patel* (n 2); and see *Cannings* (n 2) para 15, 22, 164, 165, 171, with reference to Jack J acquitting *Patel* per Judge LJ. He identified that the causes of the deaths in *Patel*, (three) were similarly to *Cannings* very rare. But the probabilities of the causes as rare, had not been exposed. Consequently the logic used in *Patel* was flawed.

adverse interpretations of maternal behaviour, and whether, as will be discussed in chapter five, expert witnesses for the prosecution were more convincing.

The manner in which carers behave at that critical moment of realising that a child needs help, occurs in other cases too such as *Stacey*. Helen Stacey an experienced parent and registered child minder, was imprisoned for the murder of a six month old child in her care, on the basis of SBS.¹⁵⁵ The law report in this case is short, but there are indications that Stacey's credibility is questioned and perceived perhaps as lower than that of the baby's parents. The father is cited in the law report as working for the 'Royal Air Force as an assistant air traffic controller and his mother a nurse'.¹⁵⁶ Stacey's view of the facts was very different to that of the father, who according to Kennedy LJ was a caring and hard working parent.¹⁵⁷ Stacey maintained that the child was ill when he was delivered to her care, and that she didn't want to look after him.¹⁵⁸ The father however maintained that the child was well when he was delivered to Stacey's care.¹⁵⁹

At trial, Stacey disputed that any injury had occurred to the child whilst in her care and her defence argued against expert medical opinion that the child must have been so badly shaken that a deep brain injury had occurred. However, the injury might have occurred while the baby was in Stacey's care, or if a subdural haemorrhage which required less force had caused the injury, could have been caused earlier by the parents.¹⁶⁰ Stacey was convicted because expert opinion suggested that the head injury could only have occurred with greater force and only she in the court's view could have done that. Further and significantly, when she noted the child was unwell, she had failed to call for help. This omission in the view of expert

¹⁵⁵ *R v Stacey (Helen Brenda)* (Norwich Crown Court, 20 July 1998).

¹⁵⁶ *R v Stacey (Helen Brenda)* [2001] EWCA Crim 2031, [2001] WL 1135255 CACD para 7 per Kennedy LJ.

¹⁵⁷ *ibid* paras 13, 46 per Kennedy LJ.

¹⁵⁸ *ibid* para 14 per Kennedy LJ.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid* para 30 per Kennedy LJ.

opinion was indicative of non-accidental injury,¹⁶¹ leading Kennedy LJ to his conclusion in rejecting her appeal, that ‘on any possible view of the medical evidence that child was grievously unwell ... while he was in her sole charge, and she did nothing about it’.¹⁶²

The issue of calling for or seeking immediate help was significant in two further cases,¹⁶³ together with appraisals of the mother’s behaviour. In these cases inexperienced mothers were criticised for their lack of judgement and that they failed to call for an ambulance, preferring instead to take the child to hospital themselves. *Gay and Gay*¹⁶⁴ concerned a couple seeking to adopt three children. When the oldest child Christian, died from excessive salt in his body after six weeks in their care, they were suspected of killing the child by the ‘unlawful administration of salt’,¹⁶⁵ especially after the mother admitted the child had bitten her hand.¹⁶⁶ Further unexplained bruising on the child’s head provided additional evidence for considering that the couple may have abused the child and forced Christian to eat salt.¹⁶⁷

Medical knowledge about the natural causes of hypernatraemia¹⁶⁸ and the ability to distinguish between natural and unnaturally high levels of sodium in the blood, was then and is now scant.¹⁶⁹ The prosecution alleged that ‘Christian could not have taken such a large amount of salt accidentally, and that it must have been deliberately administered to him... as a punishment’,¹⁷⁰ in the knowledge that the couple had admitted to being upset by Christian’s

¹⁶¹ *ibid* para 44 per Kennedy LJ.

¹⁶² *ibid* para 30 per Kennedy LJ.

¹⁶³ *Gay and Gay* (n 2); *Al-Alas and Wray* (n 2).

¹⁶⁴ *Gay and Gay* (n 2).

¹⁶⁵ *ibid* para 25 per Richards LJ.

¹⁶⁶ *ibid* para 16 per Richards LJ.

¹⁶⁷ *ibid* para 22, 27 90 per Richards LJ.

¹⁶⁸ RCPCH, *The Differential Diagnosis of Hypernatraemia in Children, with Particular Reference to Salt Poisoning: An Evidence-Based Guideline* (RCPCH, 2009) 26-32; The guideline written since *Gay and Gay* stresses that if new findings are published, its own findings could be invalidated at any time, indicating the on-going research taking place to understand hypernatraemia, at iii.

¹⁶⁹ *ibid* 11 ‘There are currently no evidence-based guidelines relating to the differential diagnosis of hypernatraemia in children or guidance on the assessment leading to a diagnosis of hypernatraemia due to sodium poisoning and its causes’.

¹⁷⁰ *Gay and Gay* (n 2) per Richards LJ.

hostile behaviour towards Mrs Gay.¹⁷¹ Pitchers J criticised Ian Gay's ill-advised comments expressing his frustration with Christian's poor cognitive skills to social workers, referring to Christian as a 'vegetable and a zombie'.¹⁷² Pitchers J is reported as saying that 'It was "quite extraordinary" to describe a three-year-old child in this way',¹⁷³ and that the parents 'became more upset and angry about his behaviour, which was in reality hardly out of the ordinary even for a child who had not had his difficult start. The only inference is you decided to punish him by making him ingest salt'.¹⁷⁴

Angela Gay, a prospective adoptive mother was described by the prosecution as 'cold and ambitious',¹⁷⁵ rather than a warm nurturing mother. Such an assessment is at odds with Mr Gay's testimony that Mrs Gay wanted to comfort and be affectionate towards Christian, but that he had (understandably for an adopted child), rejected her.¹⁷⁶ At sentencing, Pitchers J dismissed her as 'intelligent enough',¹⁷⁷ but considered that she had 'little real understanding or sympathy ... for the needs of a child like Christian'.¹⁷⁸ She was described as 'entirely selfish',¹⁷⁹ in putting her need to return to work before Christian's needs. 'Both of you showed that your approach to that little boy was entirely selfish',¹⁸⁰ Pitcher J was quoted as saying. If the media reports are true, such assessments of Gay and her attempts at mothering are highly critical and although it is possible they may have been apt, there is nothing in the law report to substantiate such a view. Nor does the court show any understanding of the

¹⁷¹ *ibid* para 14, 15, 16 per Richards LJ.

¹⁷² 'Couple killed boy by force feeding him salt', (The Guardian, 13 January 2005) <<http://www.theguardian.com/society/2005/jan/13/childrensservices.childprotection>> accessed on 3 July 2015.

¹⁷³ Guardian (n 172).

¹⁷⁴ *ibid*.

¹⁷⁵ Jardine C, 'Did Salt Really Poisoning Kill Christian?' *The Daily Telegraph* (London, 25 Feb 2005) <<http://www.telegraph.co.uk/health/healthnews/3315091/Did-salt-poisoning-really-kill-Christian.html>> accessed 24 September 2013.

¹⁷⁶ *Gay and Gay* (n 2) para 15 per Richards LJ.

¹⁷⁷ 'Couple who poisoned boy with salt' *Daily Mail* (London, 13 January 2005) <<http://www.dailymail.co.uk/news/article-333998/Guilty-Couple-poisoned-boy-salt.htmlGuilty>> accessed 9 June 2015.

¹⁷⁸ *Daily Mail* (n 177).

¹⁷⁹ *ibid*; Guardian (n 172).

¹⁸⁰ *ibid*.

difficulties faced by adoptive parents when they find themselves trying to make sense of and cope with children who are far more emotionally traumatised and medically needy than perhaps they had been led to expect.

Consequently, it is possible that fixed ideological and normative expectations that a mother should nurture, not work, were used to appraise Mrs Gay, who was rejected by a sick disturbed child, within an abnormal context of mothering three troubled siblings. The couple strenuously denied harming Christian, maintaining that the local authority had failed to disclose to them the true extent of Christian's considerable medical needs.¹⁸¹

Against a context of inexperience, inappropriate behaviour, and possible selfishness, on discovering that Christian was unresponsive, the couple drove the unconscious child to hospital themselves, arriving 20 minutes later,¹⁸² instead as one might expect, calling an ambulance. If a fixed belief is held that in an emergency an ambulance should be called, then the Gays' actions may well have supported a finding of guilt, because transporting an unconscious sick child in a private car, is not the normative choice. Accordingly in the light of the Gays' acquittal, it is very questionable whether evidence of maternal (or paternal) selfish, inappropriate and inexperienced behaviour was indeed probative. Such demeanours may however have been interpreted by the jury using prescriptive beliefs about what should have occurred (calling an ambulance or a doctor), as indicating a degree of responsibility.¹⁸³

¹⁸¹ Hardy R, 'The Unending Nightmare: Ian and Angela Gay Speak Out' *Daily Mail* (London, 5 March 2007) <<http://www.dailymail.co.uk/news/article-440053/The-unending-nightmare-Ian-Angela-Gay-speak-out.html>> accessed 24 September 2013 reporting details that Christian may have had pre-existing medical illnesses not communicated to Angela Gay.

¹⁸² *Gay and Gay* (n 2) para 20 per Richards LJ.

¹⁸³ Ellison and Munro 'Reacting to Rape' [2009] (n 14) 203 citing several researchers whose work indicates that rape claimant behaviour may be perceived by the public as attributing responsibility to the claimant.

Similarly however in *Al-Alas and Wray*,¹⁸⁴ a young couple who were later acquitted at trial), were accused of causing their first born son's death by the infliction of trauma.¹⁸⁵ The young parents had consulted their GP because of concerns that the child could not feed. They were then instructed to take their child to hospital, and as no emergency transport was advised, they did so on foot and by bus.¹⁸⁶ They show no indication on the journey (as shown by on-street CCTV footage) that they were aware that the child had less than a day to live.¹⁸⁷ But, Theis J stated that the 'The lack of any sense of urgency (although inexperience must have played a part in this decision) is graphically illustrated by allowing the parents to take Jayden to the hospital by public transport'.¹⁸⁸ The child who was thought to be fitting¹⁸⁹ on his arrival at hospital, died very soon afterwards, and as evidence of unexplained injuries including a number of old fractures were found, clinical staff concluded that the parents had caused non-accidental injuries.¹⁹⁰

Al-Alas was sixteen when Jayden was born following an unplanned pregnancy. She continued to live with her mother, attending antenatal¹⁹¹ and later health visiting appointments. She and her partner were described positively by their health visitor; 'I had no concerns with them or Jayden. They handled Jayden well and seemed to interact well with him – both looking at him and smiling...They presented as a happy family and Jayden as a

¹⁸⁴ *Al-Alas and Wray* (n 2); The report of the criminal court trial heard by Kramer HHJ is not available; facts are taken from media reporting and the subsequent family court report resulting from an application to the family court whether the remaining living child Jayda, taken into care at birth following criminal charges, should be returned to the parents. The LB of Islington brought the application that the second child Jayda should not be returned to the parents, because of the death of and the injuries found on the first child. Following the parents' acquittal and the family court hearing, Theis J directed Jayda to be returned to the parents.

¹⁸⁵ 'Parents Shook Four-Month-Old Jayden Wray to Death' *BBC News* (London, 1 November 2011) <<http://www.bbc.co.uk/news/uk-england-london-15540082>> accessed 20 November 2014; 'Jayden Wray death: "Baby was Shaken"' *BBC News* (London, 11 November 2011).

¹⁸⁶ *Al-Alas and Wray* (n 2) para 39 per Theis J.

¹⁸⁷ *ibid* para 40 per Theis J.

¹⁸⁸ *ibid* para 218 (2) per Theis J.

¹⁸⁹ *ibid* para 46 per Theis J.

¹⁹⁰ *ibid* para 2 per Theis J.

¹⁹¹ *ibid* para 18 per Theis LJ.

happy healthy baby. I had no concerns'.¹⁹² The mother breast fed her baby and for nearly four months took her baby to all relevant appointments. Until his admission to hospital the baby and his mother had been seen routinely by '20 medical and health professionals on about 30 occasions when no concerns were noted'.¹⁹³

Unfortunately both mother and child had congenital rickets, but the condition remained undiagnosed until after he had died and the cause of the baby's ill health on admission, was considered by a consultant paediatrician at Great Ormond Street Hospital to demonstrate 'all the features of inflicted head trauma'.¹⁹⁴

At trial, medical evidence was submitted based upon the injuries found on Jayden during his brief stay in hospital by clinical medical specialists and pathologists at post-mortem.

However, 'HHJ Kramer Q.C., acceded to the defence application that the case should not be put to the jury. The prosecution did not appeal that ruling; the jury were directed to acquit the parents'¹⁹⁵ because, conflicting expert evidence indicated that the child may have died naturally as a result of rickets¹⁹⁶ caused by a vitamin D deficiency.¹⁹⁷

It is difficult to say whether evidence of maternal (or parental) behaviour in failing to call an ambulance contributed to adverse conclusions that led to a criminal trial. It is noteworthy however that the judgement refers at several points, to the way in which the parents sought medical help. Although there was no evidence that the parents had harmed their child in this case, the way in which mothers and carers behave in the time leading up to a death, in identifying that they need help, and or seeking help is sensibly, evidence taken into consideration in criminal proceedings. But, whether it is probative without research is

¹⁹² *ibid* para 25 per Theis LJ.

¹⁹³ *ibid* para 35 per Theis LJ.

¹⁹⁴ *ibid* para 56 per Theis LJ.

¹⁹⁵ *ibid* para 1 per Theis J referring to *R v Al-Alas and Wray*, (Central Criminal Court, 9 December 2011).

¹⁹⁶ *ibid* para 1 Theis J.

¹⁹⁷ Delahunty J and Purkiss K, 'The Vitamin D and Rickets Case: *LB Islington V Al-Alas and Wray*' (2012) 42 (6) Fam Law 659.

questionable, and perhaps defence counsel should seek to expose such doubts. However, media reports of contemporary events may also serve to reinforce the strength of adverse beliefs,¹⁹⁸ illustrating availability heuristic theory in practice.¹⁹⁹

It is possible that the courts consider there are fixed normative expectations that essentialise carers into a group who know when a child is seriously unwell. In addition, that they know that emergency services must always be called, in preference to a partner; indeed if anyone has learnt simple first aid often taught in school, that is current knowledge.²⁰⁰ However, in some unusual circumstances even outside the experience of most community medical practitioners and hospital paediatricians, such as sudden infant death, hypernatraemia or undiagnosed rickets, it is possible that parents do not recognise how sick their child is, and how their actions may be later appraised. Consequently, admitting such evidence as relevant because of its probative value, needs to be questioned because if interpreted in a prescriptive manner, to support or justify a finding of guilt, there is a risk of injustice.

The last section on evidence of behaviour relates to mental health, and whether evidence of behaviour can rightly indicate poor maternal mental health that explains a child's death.

There are two areas of maternal mental health that are referred to in child death cases such as *Cannings* and *Anthony*.²⁰¹ The first relates to the possibility of child killing whilst a mother's mind was disturbed,²⁰² and the second relates to child killing as a result of attention seeking behaviour such as MSbP.²⁰³

¹⁹⁸ 'Ben Butler Jailed For Murdering Daughter Ellie After Custody Battle' *London* (BBC News, 21 June 2016) 'He did not call 999 for two hours and instead called Jennie Gray back from work in the City of London'. <<http://www.bbc.co.uk/news/uk-england-london-36587103>> accessed 22 June 2016.

¹⁹⁹ Beach et al n 154, 82.

²⁰⁰ 'Unresponsive and breathing baby', (St John Ambulance, 2015) <<http://www.sja.org.uk/sja/first-aid-advice/first-aid-for-parents/unresponsive-and-breathing/unresponsive-breathing-baby.aspx>> accessed 17 July 2016.

²⁰¹ *Cannings* (n 2); *Anthony* (No 2) (n 2).

²⁰² Infanticide Act 1938 s (1) "Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of

3.1.5 Does maternal mental ill health indicate guilt?

Cannings, was described as a ‘woman of good character’,²⁰⁴ that is in this context she had no previous convictions,²⁰⁵ and she was ‘a loving mother, apparently free of personality disorder or psychiatric condition’,²⁰⁶ such as depression or post-partum psychosis, and she ‘consistently denied harming any of her children’.²⁰⁷ Judge LJ explained in the appeal transcript that ‘Without medical evidence about the appellant's mental state, a verdict of infanticide was not open to the jury’.²⁰⁸ Judge LJ’s comments indicate that at trial, the court was concerned that if the jury returned a verdict of murder, she should not be imprisoned for the maximum tariff for homicide for each child, but for the offence of infanticide ‘a specific, lesser offence of homicide’.²⁰⁹ ‘Conviction for infanticide is usually followed by a noncustodial sentence’,²¹⁰ albeit often subject to a treatment or hospital order.²¹¹

As considered in this chapter, *Cannings*’ behaviour was criticised at trial for not calling the ambulance when Mathew was critically ill, for not calmly proceeding to resuscitate Jason or Jade herself, and for not using and being alert to the apnoea monitor at all times. The appeal transcript suggests however that *Cannings* was ‘faced with recurring disasters which made comprehensible any form of response which, on cold forensic analysis, would otherwise appear strange’.²¹² But, the jury were told by the prosecution that she would not ‘have killed

the effect of lactation consequent upon the birth of the child, then, ... she shall be guilty of ... infanticide, and punished ... (for) ... manslaughter of the child’.

²⁰³ MSbP was theorised as a condition in which a mother attempts to simulate an illness in a child for which she then seeks medical advice: Meadow (1991) (n 8); Meadow (1989) (n 8); Meadow (1990) (n 8); Meadow (1999) (n 8).

²⁰⁴ *Cannings* (n 2) para 4 per Judge LJ.

²⁰⁵ Redmayne M, *Character in the Criminal Trial* (OUP 2015) 9.

²⁰⁶ *Cannings* (n 2) para 4 per Judge LJ.

²⁰⁷ *ibid.*

²⁰⁸ *ibid* para 5 per Judge LJ.

²⁰⁹ Law Commission, *A New Homicide Act for England and Wales? A Consultation Paper* (Law Com No 177 Law Commission 2005) para 2.69.

²¹⁰ *ibid.*

²¹¹ IA 1938; (Law Com No 177 (n 209) para 1.115 and Chapter Nine; Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006).

²¹² *Cannings* (n 2) para 161 per Judge LJ.

the children (as the jury found that she had) unless she was suffering from some form of personality disorder or psychiatric condition'.²¹³

It is therefore possible that a settled or fixed belief that Cannings' behaviour was abnormal, together with a prescriptive belief that only a mental health diagnosis could account for the child deaths, justified a guilty verdict, on the understanding 'there was no evidence to sustain any such diagnosis: indeed it was to the contrary'.²¹⁴ Hallett J was moved to say after the guilty verdict was returned that, "I have no doubt that for a woman like you to have committed the terrible acts of suffocating your own babies there must have been something seriously wrong with you",²¹⁵ which she considered, was the only way to explain why Cannings could have murdered her children.²¹⁶ The judge may have been trying to frame the case in order to allow for a compassionate legal response had an application for an infanticide defence been made. If made at trial then the mandatory imposition of a life sentence that a murder conviction requires, may well have been averted or, had Cannings later admitted to killing her children, she may have been considered for an expedited appeal.²¹⁷ A confession is however required for a defence of infanticide and mothers may be unable to admit to a killing at trial;²¹⁸ they may be guilty, or have an undiagnosed psychiatric illness as suggested in *Kai-Whitewind*,²¹⁹ or be innocent.

Whether or not a mother suffered from mental illness at the time of a child's death, is therefore significant in permitting the law to respond more mercifully, but the defence of infanticide has been criticised. The Law Commission has recognised that a defence of

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid* para 5 per Judge LJ.

²¹⁶ *ibid* para 5 per Judge LJ.

²¹⁷ Law Com No 304 (n 211) para 8.4 as later recommended by the Law Commission.

²¹⁸ *ibid.*

²¹⁹ *Kai-Whitewind* (n 2).

infanticide “‘belongs to the territory where law and medicine meet ...”²²⁰ and both Marland and Smart suggest that perceived medical expertise about questions of a ‘woman’s state of mind’,²²¹ led to a consolidation of constructions of the feminine within criminal trials,²²² reliant upon medical opinion. Further criticisms of the medical justification for infanticide were noted by the Law Commission,²²³ for example that the diagnosis is ‘gendered’,²²⁴ the link between serious mental health problems and child death is ‘unsubstantiated’,²²⁵ it perpetuates the belief that women are “‘infirm and labile””,²²⁶ and further risks excluding women “‘from their full status as legal subjects and of perpetuating their social and legal subordination””.²²⁷ Moreover, the Commission acknowledged that some commentators have suggested that the Infanticide Act is a process of “‘myth-making by legislation,””,²²⁸ because it had created a ‘link between childbirth and infanticide that would not otherwise have existed’.²²⁹

Nonetheless, a number of studies have investigated how many children are killed by mothers in general, and why this might happen.²³⁰ Although the literature as a whole is uncertain, some studies indicate a link between maternal mental health and child deaths. Much research into maternal filicide has been instigated by psychiatrists because hypothetically, if mental

²²⁰ Law Com No 304 (n 211) para 8.1 citing Hansard (HL), vol 108, col 292 (22 March 1938).

²²¹ Marland H, *Dangerous Motherhood Insanity and Childbirth in Victorian Britain* (Palgrave Connect 2004) 170.

²²² Smart S, ‘Disruptive Bodies and Unruly Sex the Regulation of Reproduction and Sexuality in the Nineteenth Century’ in Carol Smart (ed) *Regulating Womanhood Historical Essays on Marriage Motherhood and Sexuality* (Routledge 1992) 17; Marland (n 221) 171.

²²³ Law Com No 177 (n 209) para 9.20.

²²⁴ *ibid* para 9.22.

²²⁵ *ibid*.

²²⁶ *ibid* para 9.22 citing at n 22 Ussher J, ‘Reproductive Rhetoric and the Blaming of the Body’ in Nicolson P and Ussher J (eds) *The Psychology of Women’s Health and Health Care* (Palgrave Macmillan 1992) 34-35.

²²⁷ *ibid* para 9.22 citing at n 24 Edwards S (1985) cited in H Allen, ‘Rendering Them Harmless’ in Carlen P and Worrall A (eds) *Gender, Crime and Justice* (OUP 1987).

²²⁸ *ibid* para 9.20 citing at n 21 Walker N and McCabe S, *Crime and Insanity in England: Volume One, The Historical Perspective* (Edinburgh University Press 1st edn 1984) 136.

²²⁹ *ibid*.

²³⁰ Guileyardo JM, Prahlow JA and Barnard JJ, ‘Familial Filicide and Filicide Classification’ 1999 20 (3) *Am J Forensic Med Pathol* 286; Meyer C and Oberman M, *Mothers Who Kill Their Children: Inside the Minds of Moms from Susan Smith to the “Prom Mom.”* (NY U Press 2001; Friedman SH, Horwitz SM and Resnick PJ, ‘Child Murder by Mothers: A Critical Analysis of the Current State of Knowledge and a Research Agenda’ (2005) 162(9) *Am J Psychiatry* 1578.

illness causes maternal filicide,²³¹ and some mental illnesses can be treated, then some filicide could be prevented.²³² Whether lactation psychosis is to blame,²³³ or depression,²³⁴ maternal young age or lack of support,²³⁵ the idea that a mother's mental state is implicated in any child's death, not just in infancy, has been a common presumption amongst researchers. Wilczynski found that 47% of child deaths were attributed to the mother, and of these 63% pleaded diminished responsibility.²³⁶ Falkov's research supported her findings,²³⁷ as did Pritchard's.²³⁸ A large scale US project²³⁹ however cast doubt on such earlier and small scale studies, concluding that 'the factors associated with maternal filicide were 'non-specific',²⁴⁰ including mental state.

A more recent English study²⁴¹ however showed an 'overrepresentation of mental illness in filicide',²⁴² confirming the findings of previous smaller studies, and demonstrating that mentally ill fathers killed twice as often as mothers.²⁴³ Although fathers were most associated with non-accidental injury such as shaking (43%), mothers were more likely to suffocate or

²³¹ Resnick PJ, 'Murder of the Newborn: A Psychiatric Review of Neonaticide' (1970) 126 (10) *Am J Psychiatry* 1414; FS Hopwood, 'Child Murder and Insanity', (1927) 73 *J Ment Sci* 95; VJ Hirschman and E Schmitz, 'Structural Analysis of Female Infanticide' (1958) 8 *Psychotherapy* 1; Resnick (n 230).

²³² West SG, 'An Overview of Filicide' [2007] *Psychiatry* 49.

²³³ Hopwood FS, 'Child Murder and Insanity', (1927) 73 *J Ment Sci* 95.

²³⁴ Resnick PJ, 'Child Murder By Parents: A Psychiatric Review of Filicide' (1969) 126 *Am Journal of Psychiatry* 325;

²³⁵ D'Orban PT, 'Women Who Kill Their Children' (1979) 134 *Br J Psychiatry* 560.

²³⁶ Morris A and Wilczynski A, 'Parents Who Kill Their Children' (1993) *Crim L R* 31, 34, using UK Home Office Criminal Statistics with a study period 1982-1989 where a parent was a suspect.

²³⁷ Falkov A, *Fatal Child Abuse And Parental Psychiatric Disorder* (Report 1, Department of Child Health, (1996).

²³⁸ Pritchard C and Bagley S, 'Suicide and Murder in Child Murders and Child Sex Abusers' (2001) 12 *Journal of Forensic Psychiatry* 269, analysed Hampshire police crime data from 1986-95.

²³⁹ Friedman et al (n 230) a retrospective study of and 39 studies on maternal filicide from 14 nations including the US and the UK.

²⁴⁰ Friedman et al (n 230) based on data from 1975 to 2000 analysed in 2001.

²⁴¹ Flynn SM, Shaw JJ and Abel KM, *Filicide: Mental Illness in Those Who Kill Their Children* (PLOS ONE, 2013) Page 2 and Table 1 <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0058981#pone-0058981-t001>> accessed 18 December 2014 investigating 'all filicide and filicide-suicide cases in England and Wales using data from 1997-2006 taken from Home Office, National Office of Statistics and the National Confidential Inquiry into Suicide and Homicide by People with Mental Illness (NCI).

²⁴² *ibid* Table 1.

²⁴³ *ibid* Discussion.

smother their children.²⁴⁴ This last finding appears to lend support to paediatric research including that of Emery, that maternal covert filicide is caused by smothering or ‘gentle battering’.²⁴⁵ However, the question whether ‘14% of SIDS were caused by abuse and smothering by mothers’²⁴⁶ as suggested by expert medical opinion in *Cannings*, is debatable.

The Manchester study results further indicated that although mothers were more ‘likely to have symptoms of mental illness at the time of the offence’ (53%),²⁴⁷ such illness was affective, for example depression,²⁴⁸ and only 17% of mothers who committed filicide had schizophrenia or showed delusions.²⁴⁹ Hence, if the Manchester study looked at 297 filicides, committed over a nine year period, in which 34% were maternal filicide, and 17% of these mothers were delusional,²⁵⁰ then about 17 cases of maternal filicide in association with psychosis occurred in nine years, or about 2 a year in England and Wales between 1997 and 2006.²⁵¹ The Manchester study indicated therefore that psychosis is less likely to be linked with child death, than depression.²⁵² Accordingly, the study supports seeking evidence of maternal mental ill health whether psychosis or depression, as a means of addressing questions of culpability and the extent to which a defendant should be blamed if she has committed a dangerous act. As the Law Commission also concluded, even though there is no official diagnosis of postpartum illness,²⁵³ ‘It would, however, be misleading to say that the

²⁴⁴ *ibid* Table 1.

²⁴⁵ Emery suggested 1-2% SUDI were caused by covert maternal filicide in Emery JL, ‘Aviemore Meeting and the Gently Battered Child’ (1983) 58 *Archives of Diseases in Childhood* 75; Emery later increased the scale of his suspicions to 2-10% in 1985 in Emery JL, ‘Infanticide, Filicide, and Cot Death’ (1985) 60 *Archives of Disease in Childhood* 505; and further to 10-20% in 1993 Emery JL ‘Child Abuse, Sudden Infant Death Syndrome, and Unexpected Infant Death’ (1993) 147 *Ped L Med* 1097.

²⁴⁶ *Cannings* (n 2) para 140 per Judge LJ citing Dr Ward Platt who relied upon the statistics in Fleming et al (n 6).

²⁴⁷ Flynn et al (n 241) Table 2.

²⁴⁸ *ibid*.

²⁴⁹ *ibid* abstract.

²⁵⁰ *ibid*.

²⁵¹ Calculated by 297 filicides x 34% = 101 maternal filicides, x 17% = 17.1 maternal filicides caused by delusional mothers in nine years.

²⁵² Flynn et al (n 241) page 4.

²⁵³ Law Com No 177 (n 209) para 9.29 citing at n 32 Maier-Katkin D and Ogle R, ‘A Rationale for Infanticide Laws’ [1993] *Crim LR* 903, 908 ‘The term was taken out of the Diagnostic and Statistical Manual of Mental

link between childbirth and mental illness is mythical'.²⁵⁴ The question whether there is a 'valid psychiatric basis for the offence'²⁵⁵ however, remains.

Consequently in child death cases where mothers have been charged with the murder of their child, mental health considerations were understandably relevant alongside requirements to show whether an intention to kill or an intention to do serious harm to the child could be proved by the prosecution. Evidence of maternal mental ill health, or information that may permit a 'reading of her mind',²⁵⁶ may be justifiable, to prove whether or not a mother's 'balance of her mind was disturbed at the time the child died which accounted for her actions'.²⁵⁷ If such an imbalance could be shown, it would have been a defence to a charge of murder,²⁵⁸ in order to 'mitigate the harshness of the law of murder insofar as women who kill their infant children are concerned'.²⁵⁹ Although 'A mother may be "in denial"' about having killed her infant ... and cannot accept that she did do it',²⁶⁰ she is unlikely to have another defence; this the Law Commission said, was not in the public interest.²⁶¹

Although legislation provides the possibility of a defence and reduced sentencing for mothers who admit harming their child, at the same time the need to ensure such a defence is available, risks compounding the difficulties for mothers such as Cannings. If a fixed belief exists that mothers such as Cannings should have said and done things differently, together with a belief that where mental ill health is absent and a denial of having caused harm may indicate guilt not innocence, then such beliefs may have supported contested expert opinions,

Disorders published by the American Psychiatric Association in the earlier part of the twentieth century and in 1972 the World Health Organization also took it out of its International Classification of Diseases'.

²⁵⁴ Law Com No 177 (n 209) para 9.29.

²⁵⁵ *ibid* para 9.30.

²⁵⁶ Harris J and Lawrence DR, 'Hot Baths and Cold Minds: Neuroscience, Mind Reading, and Mind Misreading' 2015 24(2) Cambridge Quarterly of Healthcare Ethics 123.

²⁵⁷ Infanticide Act 1938 s (1).

²⁵⁸ Law Com No 177 (n 209) para 9.3 and n 2 reference Infanticide Act 1938 s.1 (2).

²⁵⁹ *ibid* para 9.8.

²⁶⁰ Law Com No 304 (n 211) para 1.51.

²⁶¹ *ibid* para 1.51 referring to *Kai-Whitewind* (n 2).

and justified a guilty verdict. Research evidence therefore supports the notion that mental ill health is associated with child deaths, and legislation supports the need for compassion in such cases. The absence of both a confession and recognised mental illness, may however compound perceptions of a mother's culpability and the defence of infanticide may further complicate the way mothers are perceived in child death cases, by suggesting that a mother such as *Cannings* was simply unable to admit her guilt.

3.1.6 Is attention seeking behaviour indicative of guilt?

However, the prosecution also contended that *Cannings* had smothered one of her sons 'in an attempt to evoke sympathy',²⁶² suggesting the 'need to draw attention to herself, a manifestation of factitious disorder by proxy, a condition which, in her case, was excluded'.²⁶³ The appeal court 'had difficulty following this suggestion',²⁶⁴ and it is unclear why it was made, unless to damagingly associate *Cannings* with a destructive diagnosis of MSbP.²⁶⁵ In *Anthony*²⁶⁶ however evidence of an MSbP diagnosis²⁶⁷ was put forward for admission, but excluded following defence submissions, who argued that Professor Meadow's diagnosis 'amounted to no more than evidence of propensity'.²⁶⁸ Evidence of 'behavioural tendency or propensity',²⁶⁹ indicates that a mother is more likely to behave in a particular way than another,²⁷⁰ but propensity could not describe what really happened,²⁷¹ only what *Anthony* may have done.

²⁶² *Cannings* (n 2) para 59 per Judge LJ.

²⁶³ *ibid.*

²⁶⁴ *ibid.*

²⁶⁵ Otherwise known as Fabricated (or Factitious) Induced Illness by Carers (FIIC see, RCPCH *Fabricated or Induced Illness by Carers, Report of the Working Party*, (RCPCH, 2009).

²⁶⁶ *Anthony* (No 2) (n 2) para 2 pages 2,3,8 per Judge LJ.

²⁶⁷ MSbP was theorised as a condition in which a mother attempts to simulate an illness in a child for which she then seeks medical advice: Meadow (1991) (n 8); Meadow (1989) (n 8); Meadow (1990) (n 8); Meadow (1999) (n 8).

²⁶⁸ *R v Donna Anthony (Appeal against Conviction) (No 1)* CACD [2000] WL 989311 page 2 per Tuckey J.

²⁶⁹ Redmayne (n 205) 6.

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

Anthony had two children, Jordan who died aged almost a year, and Dean who died aged just over four months. Anthony denied harming either child and submitted that both deaths were natural.²⁷² Post-mortem findings on Jordan showed no evidence that the death was unnatural, nor any indication that the death was natural either,²⁷³ and the cause of death was concluded as unascertained or SUDI. In Michael's case although features of SID were also identified, the pathologist stated that 'the possibility of one mother having two unexplained deaths, in other words lightening striking twice, was most unlikely and outside his experience'.²⁷⁴ He therefore concluded that the babies had both been suffocated.²⁷⁵

Professor Meadow who had also given (flawed) evidence in both the *Clark* and *Cannings*²⁷⁶ cases, reviewed the post-mortem findings in *Anthony*, concluding that the deaths were typical of smothering because of the "incredibly long odds" against two children in the same family dying of natural unexplained causes.²⁷⁷ Natural cot death he said happened every 1 in 1000 births, therefore he suggested, the "chance of a natural cot death occurring twice in the same family is 1 in 1000 x 1 in 1000 which is 1 in 1000,000. It is extraordinarily unlikely...".²⁷⁸ As a result of this conclusion, Anthony was alleged to have killed the children 'to bring attention to herself',²⁷⁹ in line with MSbP,²⁸⁰ although no submissions on expert opinion on MSbP were permitted. Anthony was sentenced to life imprisonment.

Her first appeal in 2000 was refused; at that appeal she sought to exclude expert witness Meadow's opinions, because he had been of the view (although it was not admitted in court), that she suffered MSbP, and that therefore his opinions submitted in court would have been

²⁷² *Anthony (No 2)* (n 2) para 2 per Judge LJ.

²⁷³ *ibid* para 55 per Judge LJ.

²⁷⁴ *ibid* para 59 per Judge LJ.

²⁷⁵ *ibid*.

²⁷⁶ *Clark (No 2)* (n 2); *Cannings* (n 2).

²⁷⁷ *Anthony (No 2)* (n 2) para 69 per Judge LJ.

²⁷⁸ *ibid* para 69 per Judge LJ.

²⁷⁹ *ibid* para 4 per Judge LJ.

²⁸⁰ Meadow R, 'False Allegations of Abuse and Munchausen Syndrome by Proxy' (1985) 60 (4) *Arch Dis Child* 385; — 'Management of Munchausen Syndrome by Proxy' (1984) 26 (5) *Dev Med Child Neurol* 672.

prejudiced by that view.²⁸¹ In addition, Anthony's defence sought to argue that she was suffering from a severe personality disorder at the time of the children's deaths and that she should have the defence of diminished responsibility.²⁸² Both grounds for appeal were rejected, but five years later, following referral to the CCRC²⁸³ a second appeal accepted that as in *Cannings*,²⁸⁴ 'the occurrence of a second unexpected infant death within a family is not a rare event and is usually from natural causes'.²⁸⁵ Meadow's evidence on statistical probabilities was acknowledged to have been flawed.²⁸⁶ The Appeal court drew on fresh evidence²⁸⁷ in *Anthony* to conclude that if the case were to have proceeded at the time of the second Appeal then 'the medical evidence for the Crown would have appeared less compelling than it must have seemed at trial'.²⁸⁸

It is therefore difficult to know the extent to which Anthony's alleged attention seeking behaviour influenced either the trial or the first appeal outcomes. However, given the presence of the leading proponent of MSbP at trial, even though he could not give evidence of MSbP, considerations of mental health may have been significant in both judicial and juror considerations. Beliefs in the actuality of difficult and unlikeable parents,²⁸⁹ fictitious illness,²⁹⁰ and mothers who kill their children,²⁹¹ may have been encouraged by Meadow's discourses at JSB seminars,²⁹² his publication record,²⁹³ and argument that if no medical

²⁸¹ *Anthony (No 2)* (n 2) para 4 per Judge LJ.

²⁸² *ibid* para 5 per Judge LJ.

²⁸³ CCRC Referral number 715/03 available at < <http://www.justice.gov.uk/about/criminal-cases-review-commission/case-library/2> > accessed 18 December 2013.

²⁸⁴ *Cannings* (n 2).

²⁸⁵ *ibid* para 141 per Judge LJ cited at *Anthony (No 2)* (n 2) para 78 per Judge LJ.

²⁸⁶ *Anthony (No 2)* (n 2) para 92 per Judge LJ.

²⁸⁷ Carpenter RG et al, 'Repeat Sudden Unexpected and Unexplained Infant Deaths: Natural or Unnatural?' (2005) 365 *The Lancet* 29 2005; Waite et al, (n 6); Weindling AM, 'The Confidential Enquiry into Maternal and Child Health (CEMACH)' (2008) 88 *Arch Dis Child* 1034; Fleming et al (n 6).

²⁸⁸ *Anthony (No 2)* (n 2) para 96 per Judge LJ.

²⁸⁹ Meadow R, 'Difficult and Unlikeable Parents' (1992) 67 (6) *Arch Dis Child* 697

²⁹⁰ Meadow R, 'Fictitious Epilepsy' (1984) 2 (8393) *Lancet* 25

²⁹¹ Meadow R, 'Mothering to Death' (1999) 80 (4) *Arch Dis Child* 359

²⁹² Baird (n 28).

²⁹³ Meadow (1989) (n 8); Meadow (1990) (n 8); Meadow (1999) (n 8); Meadow (1991) (n 8); Meadow R, 'Munchausen Syndrome by Proxy' (1980) 55 *Archives of Diseases of Childhood* 731.

reason could be established for a SID then MSbP should be considered. It is also possible that Anthony was discredited as a ‘wholly unreliable informant’²⁹⁴ using statements from friends and neighbours. For example, one witness ‘...Lisa Wilkinson said that Anthony had spoken in a vulgar manner about her first baby Jordan and that she was, ‘an absolute nightmare’.²⁹⁵ Allegedly the witness told Anthony that ““you are a hopeless mother and you didn't deserve children””,²⁹⁶ and a further witness maintained that Anthony failed to stay with her sick child Michael in hospital.²⁹⁷ The probative value of such hearsay is further analysed in chapter four.

The possibility of MSbP as a consideration in child death cases has been criticised by feminist commentators,²⁹⁸ however the American Psychiatric Association, (APA) has recognised Factitious Disorder by Proxy (FDbP).²⁹⁹ Defining FDbP as ‘The deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual’s care’.³⁰⁰ The APA retains the disorder in its 2013 publication,³⁰¹ and the RCPCH has published guidance on the diagnosis of FIIC³⁰² or Proxy, (FIIP), as the syndrome has been variously referred to in the UK,³⁰³ but it remains controversial in both English³⁰⁴ and Australian courts.³⁰⁵

²⁹⁴ *Anthony (No 2)* (n 2) para 94 per Judge LJ.

²⁹⁵ *ibid* para 20 per Judge LJ.

²⁹⁶ *ibid* para 21 per Judge LJ.

²⁹⁷ *ibid* para 39 per Judge LJ.

²⁹⁸ Raitt R and Zeedyk MS, ‘Mothers on Trial: Discourses of Cot Death and Munchausen’s Syndrome by Proxy’ (2004) 12 *Fem LS* 257.

²⁹⁹ American Psychiatric Association, (APA) *Diagnostic and Statistical Manual (DSM)*, *DSM-IV-R*, (APA, 2000) <<http://www.dsm5.org/Pages/Default.aspx>> accessed 20 May 2013.

³⁰⁰ APA (n 299) 781-782

³⁰¹ *ibid* 781-782 corrections and para. 300.19.

³⁰² RCPCH (n 265).

³⁰³ See Glossary for slightly different definitions depending on the source, whether the APA, the NHS, or the RCPCH.

³⁰⁴ *A County Council v A Mother and A Father and X, Y, Z children (CC v XYZ)* [2005] EWHC 31 (Fam), [2005] WL 353381; *X County Borough Council v ZS, DJW, KJW (the child) By His Guardian v GEM, CM (GEM and others)* [2015] WL 10382713.

³⁰⁵ *R v LM* [2004] QCA 192.

In support of MSbP, in *X v ZS*, a mother admitted to having wrongly said that her 14 month old son had suffered fits at home, which had resulted in unnecessary ‘prescription and administration of anti-epileptic medication’.³⁰⁶ The court held that ‘if the situation had continued undetected, then physical injury/harm resulting might well have been catastrophic’.³⁰⁷ In *A County Council v A Mother and A Father and X, Y, Z children* however Ryder J held that ‘there are no internationally accepted medical criteria for the use of either label’,³⁰⁸ that is MSbP or FIIP. ‘In these circumstances, evidence as to the existence of MSBP or FII in any individual case is as likely to be evidence of mere propensity... For my part, I would consign the label MSbP to the history books’.³⁰⁹ His comments were supported by McMurdo, President of the Queensland Court of Appeal in *R v LM*³¹⁰ where a mother was convicted of harming her four children by torturing and unlawfully wounding them by ‘causing a noxious thing to be taken with intent to annoy’.³¹¹ He held in allowing her appeal that ‘The effect of allowing this category of evidence to be given is to lead as expert evidence the propensity, not of the accused but of other people, to engage in similar unlawful behaviour’.³¹² MSbP he held ‘is not a diagnosis of a recognised medical condition, disorder or syndrome’,³¹³ it is ‘merely descriptive of a behaviour...it does not relate to an organised or recognised reliable body of knowledge or experience’.³¹⁴ Nevertheless, in *A Council v LG*, evidence of MSbP was indicated when a mother conceded that she had inter alia fabricated symptoms of epilepsy in her child, and a peanut allergy for which medications had been

³⁰⁶ *GEM and others* (n 304) para 21 per Jones G; *A Council v LG, DS, GS, LS (LG and others)* (by their Children’s Guardian) Case No: TK13C0079 High Court of Justice Family Division [2014] EWHC 1325 (Fam) 2014 WL 1219895;

³⁰⁷ *GEM and others* (n 304) para 21 per Jones G.

³⁰⁸ *CC v XYZ* (n 304) para 178 per Ryder J.

³⁰⁹ *ibid* para 175 per Ryder J.

³¹⁰ *R v LM* [2004] QCA 192.

³¹¹ *ibid* para 1 per McMurdo P.

³¹² *ibid* para 66 per McMurdo P.

³¹³ *ibid* para 72 per McMurdo P.

³¹⁴ *ibid* para 67 per McMurdo P.

prescribed for the child.³¹⁵ It is therefore not appropriate to completely dismiss either the existence of behaviour that amounts to FIIC, nor to suggest that the Crown were wholly wrong to raise the possibility of MSbP in both *Cannings* and *Anthony*. However, the difficulty arises if a fixed belief is held by agents of the court, that where there is no conclusive pathology, nor irrefutable evidence of mental ill health but there are indications that may be interpreted as attention seeking behaviour, that a mother must be guilty of abuse or murder.

3.1.7 Does evidence of behaviour indicate guilt?

Finally the last section in chapter three considers why behaviour evidence such as mental health, buying alcohol, or failing to call an ambulance, or failing to be alert to or use an apnoea alarm may be admitted in criminal trials. Redmayne suggests that in simple terms, behaviour can be equated with character,³¹⁶ and that ‘judgements of character play a central role’³¹⁷ in our lives by influencing how we ‘extrapolate from the past to the present’.³¹⁸ Within criminal proceedings however, ‘character sometimes becomes more controversial’,³¹⁹ because of the assumption that behaviour as a ‘disposition’³²⁰ ‘persists over time’,³²¹ such that ‘Character and risk are intertwined’.³²² So for example, a rape complainant’s sexual history may be used by defence counsel within rape trials as ‘evidence of consent’,³²³ because of the belief that in extrapolating from the past to the rape allegation, consent to sexual relations was more likely.

³¹⁵ *LG and others* (n 306) para 10 per Keehan J.

³¹⁶ Redmayne (n 205) 3.

³¹⁷ *ibid* 1.

³¹⁸ *ibid*.

³¹⁹ *ibid*.

³²⁰ *ibid* 4.

³²¹ *ibid*.

³²² *ibid* 3.

³²³ *ibid* 5.

Several different types of information relating to behaviour in sexual assault cases may be drawn upon, not only sexual history,³²⁴ but dress,³²⁵ alcohol intoxication,³²⁶ whether reporting was delayed,³²⁷ and personal records.³²⁸ As discussed in this chapter, evidence of maternal behaviour in child death cases has been submitted in order to decide whether a mother is culpable of having killed her child. Redmayne suggests that behaviour may reveal character,³²⁹ as disposition, but, that in criminal proceedings some forms of behaviour evidence such as previous convictions, have been restricted.³³⁰ The possibility that evidence of behaviour may be prejudicial is therefore recognised within the criminal justice system. Nonetheless, previous behaviour evidence may also be helpful in suggesting that an event such as a deliberate child killing, was so ‘out of character’,³³¹ that blameworthiness is reduced, especially where expert evidence is inconclusive as occurred recently in *Khatun*.³³² However, such an argument may be unhelpful to mothers, not only because babies do die at the hands of good mothers who are mentally ill, but also where the prosecution successfully presents credible expert opinion.

³²⁴ Easton S, ‘The Use of Sexual History Evidence in Rape Trials’ in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 167; *R v Seaboyer* (1991) 83 DLR (4th) 193.

³²⁵ Whatley M ‘The Effect of Participant Sex, Victim Dress, and Traditional Attitudes on Causal Judgments for Marital Rape Victims’ (2005) 20 *Journal of Family Violence* 191; Workman J and Freeburg E ‘An Examination of Date Rape, Victim Dress, and Perceiver Variables within the Context of Attribution Theory’ (1999) 41 *Sex Roles* 261.

³²⁶ Norris J and Cubbins L, ‘Dating, Drinking and Rape: Effects of Victims’ and Assailants’ Alcohol Consumption on Judgments of their Behaviour and Traits’, (1999) 16 *Psychology of Women Quarterly* 179.

³²⁷ *R v D* [2008] EWCA Crim 2557, *Times*, November 26, 2008 (CA (Crim Div)).

³²⁸ *H* [1997] 1 Cr App R 176, 177-178 per Sedley J; See also concerns raised in *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] ACD 124.

³²⁹ Redmayne (n 205) 3.

³³⁰ *ibid* 1.

³³¹ *ibid* 5.

³³² As for example *Khatun* (n 2); Kelly J and Loveys K, ‘Freed, the mother wrongly accused of killing her baby’ *The Daily Mail* (London 23 December 2009) ‘Saleha Khatun was freed at the Old Bailey after being wrongly accused of murdering her ten-month-old son Mohammed. Prosecutors claimed that the 22-year-old, who is originally from Bangladesh, had caused his death by shaking him or by inflicting head injuries. ... she was ... freed ... after medical experts were unable to agree on how he came about his injuries. ... prosecutors offered no evidence against her ... Defence QC Michael Turner said: “I very much hope a lesson will be learned from this case. ... Where the only evidence is one of experts, and they do not agree, they should not be prosecuted”’.

For example, mothers of exemplary good character, such as Lorraine Harris,³³³ were wrongly convicted of killing their child. At her trial health professionals gave evidence on her behalf that ‘There were no financial difficulties...the family gave the impression of perfection.’³³⁴ Harris was described by her husband as ‘being as happy as he had ever known her’,³³⁵ and in addition she had support from both her husband’s ‘mother and her own mother’³³⁶ in caring for the new baby. Her GP described her as a ‘careful and caring mother’,³³⁷ she ‘appeared calm and controlled’³³⁸ and he had ‘formed the opinion that Lorraine was an experienced and sensible mother’.³³⁹ The prosecution however alleged (wrongly) in *Harris* that she killed her third and wanted son Patrick, ‘by deliberately shaking him violently or by shaking him violently and then throwing him down in his cot so as to cause bleeding inside his skull, thus leading to his collapse and death’.³⁴⁰ Defence counsel counter argued that the prosecution argument was based on expert hypothesis,³⁴¹ and that some deaths could not be explained.³⁴² In criminal proceedings therefore evidence of behaviour as character, may be persuasive where expert evidence is agreed to be inconclusive. But if expert opinion is convincing, even if controversial, evidence of good character may not be sufficient to overcome expert opinion,³⁴³ by showing that child killing was too out of character to be feasible.

³³³ *Harris* (n 2) convicted for the manslaughter of her infant son Patrick, aged four months and sentenced to 3 years’ imprisonment in 2000.

³³⁴ *ibid* para 7 per Gage LJ.

³³⁵ *ibid*.

³³⁶ *ibid* para 7 per Gage LJ.

³³⁷ *ibid* para 150 per Gage LJ.

³³⁸ *ibid*

³³⁹ *ibid* para 9 per Gage LJ.

³⁴⁰ *ibid* para 16 per Gage LJ.

³⁴¹ ‘Prof. Luthert was one of those doctors who was concerned that the triad was a hypothesis and that the full aetiology of the injuries comprising the triad was not “necessarily known”’ cited from *Harris* (n 2) para 128 per Gage LJ.

³⁴² *ibid* para 135 per Gage LJ.

³⁴³ Although some recent case law indicates great scrutiny of expert opinions for example, *R v Carter & Cox* (Guildford Crown Court 7 October 2015) <<http://www.gardencourtchambers.co.uk/parents-found-innocent-of-child-abuse-after-their-baby-was-removed-and-adopted/>>; *R v Miah* (CCC alleged baby shaking murder); *R v Shripka* (CCC alleged baby shaking murder).

3.2 Conclusion

Using Gerger et al's definition of a rape myth,³⁴⁴ chapter two proposed a definition of a *mothering myth* as: *a descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system*. In this chapter, evidence of maternal behaviour admitted in child death cases³⁴⁵ has been explored to identify whether such behaviour might have been interpreted using mothering myths.

Although maternal behaviours, such as alcohol dependency, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for help, or not using an apnoea alarm as instructed or expected, may be questionable, and justify admission, there is little evidence to suggest that such behaviours were probative. In addition, at the time of these child death cases, there is little indication that maternal behaviour or mental health was interpreted using peer reviewed research, nor were the effects of bereavement on the mental health and behaviour of mothers³⁴⁶ considered in relation to objective studies. It is therefore possible that during criminal proceedings, beliefs about maternal normative behaviour when children were very ill, were, or became prescriptive and censorious. As a result, it is possible that beliefs about what should have constituted maternal behaviour during particular and critical moments, supported and justified adverse conclusions, as mothering myths, perhaps assisted by other heuristics such as hindsight bias³⁴⁷ and counterfactual thinking.³⁴⁸ Further, the mothers' acquittals based on fresh expert evidence indicate that such behaviours were not considered relevant or of significant weight at appeal.

³⁴⁴ Gerger et al (n 1) 423: 'rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women'.

³⁴⁵ *Clark (No 2)* (n 2); *Cannings* (n 2); *Harris* (n 2); *Gay and Gay* (n 2); *Anthony (No 2)* (n 2); *Kai-Whitewind* (n 2); *Patel* (n 2); *Al-Alas and Wray* (n 2); *Khatun* (n 2).

³⁴⁶ Brabin, Wilson, Hartog, Clark (n 91).

³⁴⁷ Temkin and Krahe (n 132) 50 the hindsight bias, indicates that if perceivers have been told the outcome, e.g. a rape, of a series of events, that they would then construct the information leading up to the rape stereotypically, blaming the woman.

³⁴⁸ *ibid* 49.

However, it is true that few similar child death cases have occurred since *Clark* and *Cannings*, and it is possible that such outcomes were greatly influenced by particular expert opinions, now discredited or more cautiously used. It is also possible that evidence of behaviour may not have influenced jurors. But, given the emphasis on such behaviour evidence at trial within a context of complex, inconclusive and controversial expert evidence provided by large numbers of expert witnesses, I suggest that particular maternal behaviours when children were very ill, may have provided the jury with significant cues, triggering justificatory adverse conclusions that mothers were responsible, even if expert opinions were inconclusive. The difficulty for jurors may be that inferences of behaviour evidence are believable, and once a belief is held that a mother may be guilty, then even a judicial instruction ‘to discount the believable, will be just as ineffective as an instruction to believe the unbelievable’,³⁴⁹ i.e. that a mother is innocent.

Consequently, it is possible that beliefs about the significance of maternal behaviour at key critical moments, or mothering myths, may have supported or justified adverse decisions within criminal proceedings. Therefore, the reasons why such evidence is admitted need to be more carefully examined. If as Redmayne suggests, behaviour indicates disposition, then the possibility exists that some maternal behaviour evidence is prejudicial within criminal proceedings, because of the way in which beliefs about behaviour are held and their context in the wider discourse of mothering. The admissibility of maternal behaviour evidence is therefore examined in chapter four, and chapter five considers what safeguards exist to balance the possibility of a prejudicial impact of maternal behaviour and childcare evidence within the adversarial trial.

³⁴⁹ Roberts P and Zuckerman A, *Criminal Evidence* (OUP 2010) 85 citing at n 199 Bentham J, *The Rationale of Judicial Evidence* (1827) vol 3 219.

Chapter Four – Admissibility of maternal behaviour evidence: influenced by mothering myths?

4.0 Introduction

A tension exists in criminal proceedings between protecting the innocent from wrongful convictions and defending the public interest by punishing offenders.¹ Following jury trials such as rape cases and child death cases, the jury deliver their decisions as ‘unreasoned peremptory general verdict[s]’.² However, as Roberts and Zuckerman argue, a number of judicial techniques including admissibility decisions may influence trial outcomes.³ Rulings on the admissibility of evidence together with other factors therefore,⁴ can have a significant impact on the balance between protecting the innocent and punishing the guilty and without proper scrutiny may result in injustice.⁵

Chapter three identified that evidence of maternal behaviours including alcohol dependency, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for help, or not using an apnoea alarm as instructed or expected were admitted in child death trials.⁶ Further, that such behaviours may have been interpreted using fixed normative beliefs about maternal behaviour during particular and

¹ Roberts P and Zuckerman A, *Criminal Evidence* (OUP 2010) 26.

² *ibid* 72 I have inserted the plural.

³ *ibid* 73 five techniques are cited ‘(a) rulings on the admissibility of evidence advanced by the parties; (b) judicial stays of proceedings for abuse of process; (c) rulings on defence submissions of ‘no case to answer’; (d) judicial comment and summing up at the close of trial proceedings; and (e) appellate review of convictions’.

⁴ *ibid* 73 (b) judicial stays of proceedings for abuse of process; (c) rulings on defence submissions of ‘no case to answer’; (d) judicial comment and summing up at the close of trial proceedings; and (e) appellate review of convictions’.

⁵ See the issues relating to admission of expert opinion investigated by the Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales a New Approach to the Determination of Evidentiary Reliability* (Consultation Paper, Law Com No 190, 2009) para C.12 with reference to *Clark and Cannings* but changes were made because of similarly caused wrongful convictions in other types of cases; see the issues regarding female behaviour evidence admitted in rape trials, in Temkin J, *Rape and the Legal Process* (2002, OUP 2005) 9; Leahy S, ‘Too Much Information? Regulating Disclosure of Complainants’ Personal Records in Sexual Offence Trials’ (2016) *Crim LR* 229, 243.

⁶ *R v Clark (Sally (Appeal Against Conviction (No 2))* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Gay (Angela) R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *R v Anthony (Donna (Appeal Against Conviction (No 2))* [2005] EWCA Crim 952, 2005 WL 816001.

critical moments, which supported and justified adverse conclusions, as mothering myths. Behavioural facts at the time that children become fatally unwell may be logically relevant. But given the possibility that holders of mothering myths may interpret such behaviours prejudicially, this chapter questions why such behaviours were ruled admissible, and whether mothering myths⁷ may have influenced rulings on the admissibility of such behaviours.

Section one considers the admissibility of behaviour evidence, focussing on judicial approaches, and the use of exclusionary evidential rules, and their exceptions. The purpose is to consider the factors that inform admissibility rulings. Section two draws on some insights from rape myth scholarship, to identify issues surrounding the admissibility of behaviour evidence in rape trials, to ask whether rape myths⁸ may influence admissibility decisions in rape trials.⁹ Section three examines the admissibility of maternal behaviour evidence in particular child death cases and asks if the behaviour evidence could have been ruled inadmissible. The possibility is considered that mothering myths may have influenced admissibility decisions.

4.1 Which factors influence the admissibility of behaviour evidence?

Behaviour evidence must be considered relevant before it can be admitted, as outlined in chapter one.¹⁰ If behaviour is logically probative or not probative of an issue that needs proof, i.e. the evidence may contribute or detract from the prosecution case, indicating that the

⁷ 'Descriptive or prescriptive beliefs about mothering that serve to support or justify adverse decisions about mothers within the criminal justice system.'

⁸ Gerger H, Kley H, Bohner G and Siebler F, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English' [2007] 33 *Aggressive Behaviour* 422, 423: 'rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women'.

⁹ Temkin (n 5) 9; Leahy (n 5) 243.

¹⁰ That is the evidence is 'capable of increasing or decreasing the probability of the existence of the fact in issue' see *Randall v R* [2004] 1 WLR 56, para 20 Lord Steyn; and 'relevant ... evidence is evidence which makes the matter which requires proof more or less probable' see *R v Kilbourne* [1973] AC 729, 756 involving similar fact evidence in a case concerning multiple indecent assaults on boys reliant on *DPP v Boardman* [1975] AC 421; 'to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue' see *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 page 62 per Lord Slynn; and JB Thayer's interpretation of relevancy, as "logic and general experience" see *Law Com No 190* (n 5) 70, para A 3 citing at n. 4, Thayer JB, *A Preliminary Treatise on Evidence at the Common Law* (1898) 265.

ultimate question is more likely or less likely,¹¹ then it may be regarded as relevant and designated as evidence by the court.¹² But, as Munday warns, relevance is an inexact science¹³ and consequently any material that is logically relevant to ‘an issue before the court is theoretically admissible’.¹⁴ Potentially prejudicial information about behaviour may as a result be considered relevant, and admitted. Roberts and Zuckerman argue that one of the trial judge’s principal functions is not to admit all logically relevant information, but to filter the material to be presented to the jury,¹⁵ so that it is also legally relevant. The reason is because there are long standing concerns about how jurors may interpret information about behaviour or character admitted as “‘background evidence’”,¹⁶ and that they might have a ‘tendency to read more into the evidence than is justified’.¹⁷

Exclusionary rules of evidence, have therefore focussed on the potentially prejudicial inferences that jurors might make. Evidence must not be admitted if it is more prejudicial than probative;¹⁸ it must satisfy the need for fairness,¹⁹ must not ‘distort fact-finding or ... render the trial unfair,’²⁰ and should meet legislative provisions designed to exclude

¹¹ Redmayne M, *Character in the Criminal Trial* (OUP 2015) 17 ‘it is this comparative element which creates probative value’.

¹² *Kilbourne* (n 10) 756 per Lord Simon of Glaisdale.

¹³ Munday R, *Evidence* (OUP 2011) 25.

¹⁴ Tapper C, *Cross and Tapper on Evidence* (OUP 2010) 64 citing at n 682 the rule in *XXX v YYY* [2004] EWCA Civ 231, [2004] IRLR 471.

¹⁵ Roberts and Zuckerman (n 1) 73.

¹⁶ Hunter J, ‘Publication Review Character Evidence in the Criminal Trial’ (2016) E and P 162, 163, in relation to evidence of character as ‘background evidence’.

¹⁷ *ibid* 163, in relation to evidence of character as ‘background evidence’.

¹⁸ Roberts and Zuckerman (n 1) 74, citing at n 137 the *Sang* discretion see *R v Sang* [1980] AC 402, 422, 434 per Lord Diplock ‘I would hold that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its evidential value’.

¹⁹ Police and Criminal Evidence Act (PACE) 1984 s. 78 (1) (section 78) ‘In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it’.

²⁰ Pattenden R, ‘Authenticating “Things” in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials’ [2008] *International Journal of Evidence & Proof* 273, 279 citing *R v Cooke* [1995] 1 Cr App R 318, 328.

prejudicial evidence of behaviour.²¹ Further, particular types of evidence which carry their own specific risks of jury misinterpretation, have been controlled including opinion,²² hearsay,²³ character,²⁴ and conduct.²⁵ But then again, exceptions to the exclusionary rules exist and a judge will only exclude relevant information if it is feared that there is a 'risk of jury irrationality'.²⁶ It is solely a judge's responsibility to decide, and their discretion is decisive.²⁷ Admissibility rulings are consequently contextualised within a problematical historical debate that 'juries both are and are not competent to evaluate evidence',²⁸ and not within an approach that questions whether judges may read more into the evidence than is justified. Accordingly exclusionary rules and their application are 'much less prominent than they were'.²⁹ A permissive approach is thus now prevalent such that courts may consider that a fact is relevant and admissible, if 'to even a minute degree its existence would make the fact in issue more or less likely'.³⁰ Further and perhaps more importantly, the law of evidence does not require the test for admissibility to depend on the ultimate standard of proof.³¹ A

²¹ Such as sexual history in rape trials see s 41 (1) Youth and Criminal Justice Act 1999 'Restriction on evidence or questions about complainant's sexual history. (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—(a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

²² Tapper (n 14) 66, 'witnesses are generally not allowed to inform the court of the inferences they draw from facts perceived by them, but must confine their statements to an account of such facts; and courts will use expert opinion only if a judge or jury cannot 'form their own conclusions without help' *R v Turner* [1975] QB 834.

²³ *Teper v R* [1952] AC 480, [486] (Lord Normand), 'the rule against admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the witness whose words are spoken by another person cannot be tested by cross examination and the light which his demeanour would throw upon his testimony is lost.' Usually now admissible in criminal trials if the court is satisfied that it is in the interests of justice for it to be admissible. Criminal Justice Act 2003 s114 (1) (d).

²⁴ Criminal Justice Act 2003 (The 2003 Act), s 101 (1) The particular gateways relevant here include: 'In criminal proceedings evidence of the defendant's bad character is admissible if, but only if (a) all parties to the proceedings agree to the evidence being admissible, (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it, (c) it is important explanatory evidence, (d) it is relevant to an important matter in issue between the defendant and the prosecution, (f) it is evidence to correct a false impression given by the defendant'; Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001).

²⁵ Tapper (n 14) 67 'evidence may generally not be given of a party's misconduct on other occasions if its sole purpose is to show that he is a person likely to have conducted himself in the manner alleged by his adversary on the occasion that is under enquiry'.

²⁶ Pattenden (n 20) 279.

²⁷ *ibid* 280 citing *R v Currie* [2007] EWCA Crim 926 paras 19-20.

²⁸ Redmayne (n 11) 33.

²⁹ *ibid*.

³⁰ Law Com No 190) (n 5) para A6 citing at n. 6 Fisher J in *R v Wilson* [1991] 2 NZ LR 707, 711.

³¹ Hunter (n 16) 167- 8 citing Redmayne (n 11) 17.

tension therefore exists, between the need to ensure that all information that may however slightly assist the jury to make a decision is admitted, and the possibility that evidence may be admitted that may not be interpreted appropriately. Either more may be read into the evidence than is justified, or in this context it is possible that the evidence may engage fixed beliefs such as rape or mothering myths, leading to biased decisions.

The courts have however developed other techniques including judicial comment and summing up,³² to counter the possibility of jury misapprehensions. But, it is arguable whether a judicial instruction to the jury to discount what is to them a believable inference,³³ will have the desired effect. In relation to evidence of bad character, Redmayne suggests that it is ‘odd that we are reluctant to trust the jury properly to evaluate certain types of evidence, especially when judicial directions can be used to warn jurors to evaluate such evidence carefully’.³⁴ But if rape and mothering myths are more than a possibility, it is uncertain whether the broad approach to admissibility that seeks to rely on editing at the pre-trial stage,³⁵ judicial directions³⁶ and summing up,³⁷ will ensure the evidence is properly assessed. As reasons for jury verdicts are not required, the way in which real juries deliberate and reach conclusions can only be inferred using mock jury research, and the possible influences on jury decision making are considered in chapters five and six.

Judicial discretion in assessing the relevance of behaviour evidence is consequently significant. Either too broad or too restrictive an approach may lead to injustice and

³² Roberts and Zuckerman (n 1) 73 (b) judicial stays of proceedings for abuse of process; (c) rulings on defence submissions of ‘no case to answer’; (d) judicial comment and summing up at the close of trial proceedings; and (e) appellate review of convictions’.

³³ *ibid* 85 citing at (n 199) Bentham J, *The Rationale of Judicial Evidence*’ (1827) vol 3 219.

³⁴ Redmayne (n 11) 33.

³⁵ E.g. in relation to expert evidence see Ward T, ‘Expert Evidence and the Law Commission: Implementation without Legislation?’ (2013) *Crim L R* 561, citing at n 6 *R v Reed* [2009] EWCA Crim 2698, [2010] 1 Cr App R 23; *R v Henderson and others* [2010] EWCA Crim 1269, paras 108-118, 200-221 per Moses LJ; *Re T (Footwear Mark Evidence)* [2010] EWCA Crim 2439; Redmayne M et al, ‘Forensic Science Evidence in Question’ [2011] *Crim LR* 347, 351.

³⁶ Roberts and Zuckerman (n 1) 28.

³⁷ Ward (n 35) 566.

widespread criticism. For example, the previously laissez-faire³⁸ approach to the admissibility of expert opinion, which formed a significant component of the evidence in child death cases, was widely condemned because it was considered to have resulted in ‘some miscarriages of justice caused by a jury’s reliance on unreliable expert evidence’.³⁹ The admissibility of expert opinion such as that submitted by Professor Meadow in *Cannings*, *Clark*, *Anthony* and also *Patel*,⁴⁰ in respect of inferences made on statistical material⁴¹ and probabilities of multiple SIDS,⁴² is now subject to CPR⁴³ and CPD,⁴⁴ incorporating the “indicia of reliability”⁴⁵ recommended by the Law Commission.⁴⁶ Although admissibility of expert opinion still relies on judicial discretion to establish legal relevance and whether the information is outside a jury’s knowledge and experience,⁴⁷ expert opinion must be submitted by a competent expert,⁴⁸ and judged as *sufficiently reliable* in order to be admissible.⁴⁹ The changes to admissibility rules may contribute to a more considered approach to the admissibility of expert opinion which will be beneficial, but as suggested in earlier chapters the outcomes of rape trials and child death cases may not be based entirely on expert

³⁸ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, (Law Com No 325 2011) paras. 1.8, 1.17, 1.18, 1.21, 2.16.

³⁹ Law Com No 190 (n 5) paras C.12 with reference to *Clark* and *Cannings*.

⁴⁰ *Clark* (No 2) (n 6); *Cannings* (n 6); *Patel* (n 6); *Anthony* (No 2) (n 6).

⁴¹ *Clark* (No 2) (n 6), para 96 per Kay LJ; Fleming P, Blair P and Bacon C et al, ‘Sudden Unexpected Deaths in Infancy the CESDI SUDI Studies 1993-1996 (TSO 2000) 92 Table 3.58.

⁴² Meadow R, *The ABC of Child Abuse* (3rd edn. BMJ Publishing Group, 1997) 29.

⁴³ Criminal Procedure Rules (CPR) 2014 Parts 33-5

<<http://www.legislation.gov.uk/uksi/2014/1610/part/33/made>> accessed 9 December 2014.

⁴⁴ Criminal Practice Directions (CPD) Division V Evidence 33A: Expert Evidence; Ian Dennis, ‘Tightening the Law on Expert Evidence’ [2015] C LR 1.

⁴⁵ CPD (n 44) Part Clause 33A.5 ‘factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, sections a-h and Clause 33A.6 ‘...potential flaws in such opinion which detract from its reliability,’ sections a-e including unjustifiable assumptions, flawed data, inferences or conclusions not properly reached’.

⁴⁶ Law Commission No 325 (n 38), para 1.11, 3.9, 3.41, 3.79, 5.78.

⁴⁷ *Turner* (n 22) 841 per Lawton LJ ‘Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life’.

⁴⁸ CPD (n 44) Clause 33A.1 page 12.

⁴⁹ *ibid* page 12-13; Law Com No 190 (n 5) para 6.35; Law Com No 325 para 3.41 and page 148, s 4 (1) Reliability: meaning. The first two factors require a trial judge at the admissibility stage, to seek to establish ‘(a) the extent and quality of the data on which the expert’s opinion is based, and the validity of the method by which they were obtained and (b) if the expert’s opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms).

opinion.⁵⁰ Using the insights of Hunter⁵¹ and Redmayne,⁵² I suggest a technically complex evidential context may hide the true operation of evidence of behaviour in practice,⁵³ through the influence of rape and mothering myths.

But, even though evidence of behaviour is significant in such cases, there is an issue whether the logical and legal relevance of female behaviour evidence has been carefully assessed for reliability and why that may be. Using rape myth scholarship to inform this discussion, there is a possibility that in the absence of admissibility guidance for evidence of behaviour, information may be admitted using judicial discretion and ‘common sense’,⁵⁴ and not on the basis that the evidence is reliable. How and why evidence of behaviour is considered relevant therefore needs to be considered.

A number of conventional classifications of evidence exist,⁵⁵ and the following analysis uses Roberts and Zuckerman’s typology,⁵⁶ in order to understand what sort of evidence is represented by evidence of female behaviour admitted in rape trials and child death cases.⁵⁷

The first issue is whether the material is direct or circumstantial. ‘Direct evidence goes to

⁵⁰ Nicholson D, ‘Gender Epistemology and Ethics: Feminist Perspectives on Evidence Theory’ in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 21; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Cossins KA, ‘Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England’ (2013) *International Journal of Evidence & Proof* 74 citing at n 3 *NSW Criminal Justice and Sexual Offences Taskforce, Responding to Sexual Assault: The Way Forward* (Attorney-General’s Department of NSW, 2005); NSW Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No 208) (Report 22) (NSW Parliament, 2002).

⁵¹ Hunter (n 16).

⁵² Redmayne (n 11) 33.

⁵³ Hunter (n 16) 166, see her suggestion ‘that a complex evidentiary and advocacy landscape often hid from law reports the full operation of character evidence in practice’.

⁵⁴ *R v G and others* [2003] UKHL 50, [2004] 1 AC 1034 para 39 per Lord Bingham; and see also Pattenden R and Ashworth A, ‘Reliability, Hearsay Evidence and the English Criminal Trial’ [1986] LQR 292, 296; Temkin (n 5) citing at page 201 and n 97 citing Bronitt S, ‘The Rules of Recent Complaint’, in Eastaugh P, *Balancing the Scales: Rape, Law Reform and Australian Culture* (ed) (The Federation Press, 1998) 50–3; *A (No 2)* (n 10) page 62 per Lord Slynn; *R v Seboyer* [1991] 2 SCR 577 paras 140–152, 207 per Madame Justice L’Heureux-Dubé.

⁵⁵ Munday (n 13); Tapper (n 14); Roberts and Zuckerman (n 1).

⁵⁶ Roberts and Zuckerman (n 1) 109.

⁵⁷ Including sexual history, dress, alcohol intoxication, whether reporting was early or delayed, personal records; and alcohol dependency, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to call for help, or resuscitate a child, or not using an apnoea alarm as instructed.

prove a fact in issue directly,⁵⁸ for example, a rape complainant's testimony, or that of an eyewitness to a crime, or a voluntary confession to a crime.⁵⁹ Consequently, such evidence is relevant and if believed may prove a defendant's guilt.⁶⁰ Within this context, the direct evidence of a rape complainant's testimony or a mother's testimony can be significant and powerful when given in court. In order to counter direct evidence defence counsel may seek the admission of evidence of behaviour around the time of the alleged crime⁶¹ (whether rape or child murder) and more widely,⁶² in order to challenge the credibility of female complainants or defendants.

Behaviour evidence is however indirect evidence and therefore deemed circumstantial,⁶³ i.e. there is a gap between the evidential fact and the constitutive fact (a conclusion of guilt or innocence), which is dependent upon inference. It is therefore possible that any factor that enables interpretations of the circumstantial evidence will influence a jury verdict.

Accordingly if fixed normative beliefs are held about women, and mothers, then rape or mothering myths may influence jury deliberations. The nature of the admitted circumstantial evidence suggesting opportunity, motive, bad character and poor conduct may consequently have a significant impact on whether or not a rape complainant or mother is believed. This may be because, as Redmayne suggests, evidence of behaviour can be equated with character, and 'judgements of character play a central role'⁶⁴ in our lives by influencing how we 'extrapolate from the past to the present'.⁶⁵ Accordingly, it is possible that circumstantial evidence such as sexual history,⁶⁶ or the use of an apnoea alarm,⁶⁷ or diaries, sms and internet

⁵⁸ Roberts and Zuckerman (n 1) 109.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Her use of alcohol or drugs, her dress; did she try and resuscitate the child, did she call for help.

⁶² Her previous sexual history; her personal records such as medical or psychiatric. Had another child died previously; what did friends and neighbours say about her child care; what internet searches had she made, did she keep a diary.

⁶³ Roberts and Zuckerman (n 1) 110.

⁶⁴ Redmayne (n 11) 1.

⁶⁵ *Ibid.*

⁶⁶ Including sexual history, dress, alcohol intoxication, whether reporting was early or delayed, personal records.

communications⁶⁸ may be used to infer what a person is thinking or feeling and extrapolated to adverse conclusions.

But, if juries are vulnerable to the influence of fixed beliefs in making their decisions, it is questionable why such circumstantial material is admissible as even logically relevant circumstantial evidence has a highly ‘variable probative value’.⁶⁹ For that reason, evidence scholars caution that ‘each piece of evidence is to be considered independently’⁷⁰ for relevance, and evidence needs to be ‘narrowly examined’⁷¹ at the admissibility stage for both relevance and potential prejudice. In the present context, I suggest such constraints are vitally important because of the dangers of cross-admissibility.

If a body of circumstantial evidence is considered as a whole as in *Clark*,⁷² and in *Folbigg*,⁷³ the combination of circumstantial evidential components may appear overwhelmingly probative,⁷⁴ i.e. in favour of inferring that the mother’s behaviour showed intention to kill her child (ren).⁷⁵ Observations from other areas of the criminal justice system lend support to the argument that such an approach may lead to unsafe decisions. For example in considering a

⁶⁷ Including alcohol dependency, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to call for help, or resuscitate a child, or not using an apnoea alarm as instructed.

⁶⁸ O’Floinn M and Ormerod D, ‘Social Networking Material as Criminal Evidence’ (2012) 7 Crim LR 486.

⁶⁹ Roberts and Zuckerman (n 1) 110.

⁷⁰ Law Com No 190 (n 5) para A5 citing at n 7 *Cross and Tapper on Evidence* (10th edn 2004) 72, n 640.

⁷¹ Roberts and Zuckerman (n 1) 110.

⁷² *R v Clark (Sally) (Appeal against Conviction) (No 1)* 2000 WL 1421196 para 254 per Henry LJ ‘We have considered with care the extensive evidence placed before the jury at trial, and we have concluded that there was overwhelming evidence of the guilt of the appellant on each count’.

⁷³ *R v Folbigg* [2005] NSWCCA 23, para 141 per Sully J. If the body of evidence as a whole including these factors (behaviour, diaries), were taken into account, her guilt was not according to Sully J at appeal, ‘inherently incredible’.

⁷⁴ Roberts and Zuckerman (n 1) 258.

⁷⁵ The Law Commission *Murder, Manslaughter And Infanticide* (Law Com No 304, 2006) referring on page 31 at n 23 to *R v G and others* [2003] UKHL 50, [2004] 1 AC 1034 para 39 per Lord Bingham ‘[T]here is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time’; Roberts and Zuckerman (n 1) 258 for that reason, suggest Roberts and Zuckerman, an “‘eliminative inductive”” heuristic should be used in relation to circumstantial evidence, such that the jury should only convict when all innocent explanations of the circumstantial evidence have been rejected as untenable.

rape case *R v Z*,⁷⁶ Forster contends that ‘Mutually supportive evidence can be powerful evidence and potentially bolster an otherwise weak case’.⁷⁷ As in *Wallace*,⁷⁸ the dangers of cross-admissibility may be overlooked in child death cases with multiple child deaths, when strands of behaviour evidence are viewed holistically at trial.⁷⁹ The potential danger of cross-admissibility of circumstantial evidence in respect of one child’s death to that of a second child’s death, is illustrated by *Clark*,⁸⁰ in which insignificant details were viewed together as influential, and cross-admissibility is further discussed in section three. Given the potential risks of pieces of circumstantial evidence of behaviour, either singly or holistically, it is essential to understand how admissibility rulings of circumstantial evidence of behaviour are made, and whether any guiding factors are used.

Professor Temkin identifies in relation to admissibility of behaviour evidence in rape cases in some jurisdictions, “the principal structural flaw of these legislative schemes is their failure to define the key concepts for determining admissibility” leaving the judges free rein to apply

⁷⁶ Forster S, ‘Cross-Admissibility of Bad Character Evidence’ [2011] 175(19) Crim Law and Justice Weekly 274, 274 in *R v Z* [2000] 2 WLR 117 ‘the House of Lords ruled that it was permissible for the prosecution to adduce evidence from the complainants of three previous rapes in which the defendant had been acquitted. The three previous acquittals logically supported the allegation of rape, even though this might implicate his guilt to those previous unproved allegations’.

⁷⁷ Forster (n 76) 276; and at 274: ‘Similar fact evidence is used by the prosecution to invite the jury to draw inferences from facts of similar misconduct of the defendant as being highly relevant to proving the current offence(s) or to rebut a specific defence and that to disregard it would be an affront to common sense. ... Nonetheless, similar fact evidence risks unfairly prejudicing the jury against the defendant. In *R v Weir and Others* [2005] EWCA Crim 2866, the Court of Appeal ruled that the existing test of admissibility of similar fact evidence of enhanced probative value in *DPP v P* [1990] 2 AC 447 no longer applies and is now governed by s 101(1)(d) and (3) of the Criminal Justice Act 2003. However, the statutory test of admissibility is less than comprehensible when dealing with similar fact type evidence’.

⁷⁸ *R v Wallace* [2008] 1WLR 572, [2007] EWCA Crim 1760 evidence relating to other robberies was admitted in this case of robbery as direct circumstantial evidence, but was entirely circumstantial; only if viewed holistically was the evidence probative, based on cross admissibility, where evidence relevant to one charge was also relevant to another charge.

⁷⁹ Roberts and Zuckerman (n 1) 607.

⁸⁰ *Clark (No 1)* (n 72) para 271 per Henry LJ ‘Taken separately there was a very strong case on each count. Take together we conclude that the evidence was overwhelming having regard to the identified similarities: a) the babies died at the same age; b) they were both found by the appellant and both, according to one version of the appellant, in a bouncy chair; c) they were found dead at almost exactly the same time of evening, having been well, having taken a feed successfully, and at a time when the appellant admitted tiredness in coping; d) on each occasion the appellant was alone with the baby when it was found lifeless; e) on each occasion the appellant’s husband was away from home, or about to go away from home’.

their “common sense assumptions”⁸¹ to questions of relevance. Harriet Samuels also suggests that even though judges ‘sincerely believe they are impartial and independent ... [I]n reality they are acting in accordance with beliefs or values, which they may think are, “common sense or common knowledge”’.⁸² The risk of an approach to admissibility based on common sense and not on notions such as reliability, has also been addressed by Canadian Professor Marilyn MacCrimmon who warns that common sense can contain both ‘... racist and sexist stereotypes...’.⁸³ Consequently, there is a possibility that suggesting that judicial admissibility rulings based on common sense, may also mask the operation of fixed beliefs such as rape and mothering myths.

Further, if such material risks misinterpretation at trial, there is an issue why common sense is an acceptable approach to the admissibility of circumstantial behaviour evidence, and this question is returned to in sections two and three. Section one continues with a consideration of key exclusionary evidential rules and their exceptions, and how they have been used to exclude or admit behaviour evidence in rape trials and child death cases.

Section one has considered the judicial approach to the admissibility of behaviour evidence, which is characterised by judicial discretion and common sense. The need to trust jury competence, indicates a permissive approach to behaviour evidence that may be informed by rape and mothering myths.

Section two considers the admissibility of behaviour evidence in rape cases, the use of exclusionary evidential rules and admissibility guidance, and asks whether rape myths may inform admissibility decisions.

⁸¹ Temkin (n 5), citing at page 201 and n 97 citing Bronitt (n 54).

⁸² Samuels H, ‘Judicial Deference and Feminist Method’ [2014] Public Law 512, 514 citing at n 20 Graycar R, ‘The Gender of Judgments: An Introduction’ in Thornton M, (ed) *Public and Private: Feminist Legal Debates* (OUP 1995) 262, 276.

⁸³ MacCrimmon M, ‘What Is “Common” About Common Sense?: Cautionary Tales For Travelers Crossing Disciplinary Boundaries’ (2000-2001) 22 Cardozo LR 1433, 1442.

4.2 Do rape myths influence the admissibility of behaviour evidence in rape trials?

Evidence of behaviour of rape complainants including sexual history,⁸⁴ dress,⁸⁵ alcohol intoxication,⁸⁶ whether reporting was early or delayed,⁸⁷ and personal records,⁸⁸ has been a distinctive component of rape trials. For example, citing a Canadian rape trial, MacCrimmon discusses how in *Ewanchuk*,⁸⁹ the appeal judge dismissed a rape complainant's appeal, because evidence had been admitted as part of the defence case, that in presenting herself at a job interview the complainant had not been modestly dressed,⁹⁰ (preferring a T shirt and shorts). MacCrimmon concurred with the subsequent Supreme Court decision that the lower court had relied upon a rape myth, that 'if a woman is not modestly dressed, she is deemed to consent'.⁹¹ The case illustrates that admissibility rulings about female behaviour evidence may have been informed by rape myths, rather than admissibility guidance or the reliability of the evidence.

⁸⁴ Easton S, 'The Use of Sexual History Evidence in Rape Trials' in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 167; *R v Seaboyer* (1991) 83 DLR (4th) 193; McColgan A, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275.

⁸⁵ MacCrimmon (n 83) 1445 citing a Canadian rape trial *R v Ewanchuk* [1999] 169 D LR (4th) 193 (Can); author discusses how an Appeal judge dismissed an Appeal because the raped woman had not presented herself for a job interview 'in a bonnet and crinolines', (preferring a T shirt and shorts). MacCrimmon concurs with the Canadian Supreme Court, that in giving a decision apparently based upon common sense, the Appeal judge had relied upon stereotypical assumptions about rape, that 'if a woman is not modestly dressed, she is deemed to consent' at 230; Nevertheless MacCrimmon noted, publicly the 'social meaning of the way a complainant of sexual assault was dressed is a contested one' at 1446.

⁸⁶ Temkin and Krahe (n 50) 'A large body of evidence ... shows that if the complainant is portrayed as drunk, she is perceived as less credible and the perpetrator is seen as less likely to be culpable. A complainant who is drunk at the time she is raped is very far removed from the real rape stereotype. Her claim is thus more likely to be regarded as false by the police and her complaint is less likely to result in conviction.'

⁸⁷ *R v D* [2008] EWCA Crim 2557, Times, November 26, 2008 (CA (Crim Div)) an appeal case based upon a part of the judicial summing up, in which the (convicted) appellant of 6 counts of rape and one of sexual assault, argued that the judge had gone too far in his summing up. "... You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some Latham time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you." Para 9 per Latham LJ.

⁸⁸ *H* [1997] 1 Cr App R 176, 177-178 per Sedley J; See also concerns raised in *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] ACD 124.

⁸⁹ MacCrimmon (n 83) 1445; *Ewanchuk* (n 85).

⁹⁰ *Ewanchuk* (n 85).

⁹¹ MacCrimmon (n 83) 1446; *Ewanchuk* (n 85).

Because of concerns related to ‘the discrepancy between the rapidly rising number of recorded rapes as against a relatively static number of convictions’, the justice gap’,⁹² academic commentators and some legal professionals have questioned the admissibility of female behaviour evidence in rape trials,⁹³ because of the risks that jury members may interpret such behaviours prejudicially.⁹⁴ Childs suggests that the lack of clear guidelines for the admission of female behaviour evidence, has led to unjust conclusions on claimant consent and credibility.⁹⁵ Consequently the justice gap is perceived to be the result of RMA both at trial and at the admissibility stage. Temkin has conducted extensive research into the admissibility issues of behaviour evidence in rape trials including the recent complaint exception, admission of previous sexual history, corroborative evidence and previous misconduct of the accused.⁹⁶ Temkin argues that the whole ‘notion of relevance’⁹⁷ of information about women’s behaviour is a cause for concern⁹⁸ and that in addition, evidential rules and their exceptions may be ‘implicated in the low conviction rate for rape’.⁹⁹

⁹² Conaghan J, Russell Y, ‘Rape Myths, Law, and Feminist Research: ‘Myths about Myths?’ [2014] 22 Fem Leg Stud 25, 26 citing at n 1 Crown Prosecution Service, Narrowing the Justice Gap 2014 <<http://www.cps.gov.uk/publications/prosecution/justicegap.html>> accessed 2 June 2016.

⁹³ Easton (n 84) 167; *R v Seaboyer* (1991) 83 DLR (4th) 193; Ellison L and McGlynn C ‘Commentary on *R v A (No 2)*’ in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 205-227; *R v A (Complainant's Sexual History)* [2001] UKHL 25, [2002] 1 AC 45 (HL); Temkin (n 5) 9; Temkin J, ‘Digging the Dirt’ (2002) 61 Cambridge LJ 126; Temkin J, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 Journal of Law and Society 219; Leahy (n 5), 243. Childs M, ‘The Character of the Accused’ in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 211, 213, 219; Rape: Is a Woman's Behaviour to Blame, (BBC News 21 November 2005) <<http://news.bbc.co.uk/1/hi/programmes/breakfast/4455622.stm>> accessed 11 August 2016 ; Kibble N, ‘Judicial Discretion and the Admissibility of Prior Sexual History Evidence under s 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot’ [2005] Crim LR 263; Winter J, ‘The Role of Gender in Judicial Decision-Making: Similar Fact Evidence, The Rose West Trial and Beyond’ [2004] International Journal of Evidence & Proof 31, 45.

⁹⁴ Gerger (n 8) 423: ‘rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women’.

⁹⁵ Childs M, ‘The Character of the Accused’ in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 211, 213, 219.

⁹⁶ Temkin (n 5) 187-268.

⁹⁷ *ibid* 9.

⁹⁸ *ibid* 187, including ‘hitchhiking, excessive drinking or smoking, the wearing of “seductive” clothing or the use of bad language’.

⁹⁹ *ibid* 187.

Insight into the reasons why complainant behaviours are regarded as relevant at the admissibility stage, is provided by Temkin's research; she cites interviews with highly experienced defence and prosecution barristers in rape trials, revealing that 'the discrediting of the complainant was the central defence strategy in rape cases'.¹⁰⁰ Temkin argues that such behaviour evidence could be used to 'suggest to the court that this sort of woman, who behaves in this kind of way, in these circumstances is quite reasonably to be taken to be consenting'.¹⁰¹ Relevance therefore Temkin suggests may be, or may have been 'in the mind of the beholder and all too often it can be swayed by stereotypical assumptions, myths, and prejudice'.¹⁰²

As indicated in section one, the absence of clear criteria for establishing admissibility leaves judges to adjudicate difficult decisions about relevance and admissibility of behaviour evidence using their discretion and common sense, and as Temkin's work indicates, adverse perceptions of rape complainants' behaviours have resulted in prejudicial outcomes at trial as a result of RMA.¹⁰³ The risks associated with a lack of admissibility guidance and rules are that possible judicial RMA may result in the admission of behaviour evidence that will also be adversely interpreted at trial. Madame Justice L'Heureux-Dubé in the Canadian case *Seboyer*,¹⁰⁴ is much quoted for her comments on admissibility decisions in rape cases and her comments on the admissibility may be relevant also for child death cases. Admissibility decisions she stated, may be based on 'experience, common sense or logic', but were 'particularly vulnerable to the application of private beliefs,' and further she suggested that the area of criminal law relating to female rape complainants in sexual assault and rape had

¹⁰⁰ Temkin 'Perspectives from the Bar' (n 93) 231; Temkin '*Rape and the Legal Process*' (n 5) 245.

¹⁰¹ Temkin (n 5) citing at note 59 Newby L, 'Rape Victims in Court—The Western Australian Example', in Scutt J (ed) *Rape Law Reform* (Australian Institute of Criminology 1980) 118-120.

¹⁰² *ibid* 199; *ibid* 201 citing at note 97 Bronitt (refer to n 54 in this chapter).

¹⁰³ *ibid* 9-10 citing examples at notes 61-63 including Pattullo P, *Judging Women* (National Council for Civil Liberties, 1983) 21, 120-1 of Judge Wild in the Crown Court at Cambridge who said 'Women who say no do not always mean no' and Sir Melford Stevenson 'It is the height of imprudence for any girl to hitch-hike at night....She is in the true sense asking for it'.

¹⁰⁴ *Seboyer* (n 54) paras 140-152, 207 per Madame Justice L'Heureux-Dubé.

been ‘particularly prone to the utilisation of stereotype in the determination of relevance’.¹⁰⁵

If admissibility decisions in rape trials have been noted for their application of stereotypical interpretations of the feminine, then by analogy it is possible that in child death cases where the behaviour of women is also scrutinised, private beliefs, common sense and experience may also have influenced admissibility decisions.

A number of procedural reforms have consequently taken place in this and other jurisdictions, seeking to reduce the impact of prejudicial beliefs on the interpretation of female behaviour evidence in rape trials. For example s 41 the *rape shield*¹⁰⁶ and changes to the hearsay rule in England and Wales, and the introduction of s 278 to the Canadian Criminal Code in respect of personal records information.¹⁰⁷ However, despite the need to reduce the unjust effects of fixed beliefs, such changes have resulted in limited impacts on the admission of information about female behaviour and consequently the risk of prejudicial inferences about women rape complainants remains. If the admission of such behaviour is so difficult to avoid in rape trials, there may be implications for child death cases. In order to better understand why changes have been necessary and why they may not work as well as expected, the procedures permitting admissibility and those seeking to prevent admission of potentially prejudicial behaviour evidence are briefly examined. The bad character rule and its similar fact exception discussion informs the later exploration of similar fact evidence in child death cases.

4.2.1 *Bad character and similar fact evidence*

Admissibility of potentially prejudicial behaviour evidence has been achieved using the similar fact exception to the bad character rule. Personal background information, conduct

¹⁰⁵ *Seboyer* (n 54).

¹⁰⁶ *R v Gjonj (Kujtim): Sexual History Evidence* [2014] EWCA Crim 691 the trial judge correctly, ruled that the contents of a conversation revealing details about a rape victim’s previous sexual behaviour were not admissible under the Youth Justice and Criminal Evidence Act 1999 s 41.

¹⁰⁷ Section 278 of the Canadian Criminal Code (CCC) provides a statutory scheme for the regulation of disclosure of personal records in sexual offence trials which may provide a suitable blueprint for reform. In s 278, a "record" is defined as ‘any form of record that contains personal information for which there is a reasonable expectation of privacy’.

and character evidence has long been admitted in criminal trials according to Jill Hunter¹⁰⁸ in order that the courts had an opportunity of hearing from defence character witnesses about the nature of the accused, and whether the allegation was ““out of character””.¹⁰⁹ The reason is that as Redmayne suggests, character evidence can be used to indicate disposition, which may persist over time, and aid in interpreting behaviour around the time of a criminal event, based on past behaviours.¹¹⁰ But behaviour as character was most commonly used to denote a person’s ‘bad character, previous convictions, disposition, or reputation’¹¹¹ in common law, and such evidence has been considered inadmissible. Such background evidence was considered prejudicial to a defendant because it ‘encouraged mistaken inferences and faulty fact finding’¹¹² and demonstrated merely propensity.¹¹³

The exception to the exclusionary rule has been employed to demonstrate either propensity or reduced credibility. Because of its potentially prejudicial effect on either a defendant or a complainant, similar fact evidence may undermine the right of a defendant to a fair trial ‘by making it more likely that he will be convicted even if innocent’.¹¹⁴ The meaning of *bad* character and what constitutes similar fact evidence however, has lacked admissibility guidance and according to Roberts and Zuckerman has been essentially a matter of common sense,¹¹⁵ leading to criticisms about the probative value of evidence going to propensity.

¹⁰⁸ Hunter (n 16) 163.

¹⁰⁹ *ibid* 164 citing Lord Phillips CJ.

¹¹⁰ Redmayne (n 11), 3.

¹¹¹ Roberts and Zuckerman (n 1) 582.

¹¹² *ibid* 587.

¹¹³ Lacey N, ‘The Resurgence of Character: Responsibility in the Context of Criminalization’ in Duff A and Green S (eds) *Philosophical Foundations of Criminal Law* (OUP 2011) 166; and see *R v Campbell* in [2007] EWCA Crim 1472, [2007] 1 WLR 2798 in which previous convictions for ABH were adduced as evidence that the defendant had a propensity to commit ABH, but that Lord Phillips CJ suggested that bad character evidence used to demonstrate propensity was of lesser probative value than evidence of actual conduct.

¹¹⁴ Redmayne (n 11) 33.

¹¹⁵ Roberts and Zuckerman (n 1) 604.

Rape complainants' previous sexual history evidence has been admitted as evidence of propensity and bad character¹¹⁶ and as such, highly criticised. Temkin suggests previous sexual history was formerly admissible and used to 'blacken the character of rape complainants',¹¹⁷ because of the influence of rape myths. Controls on the admissibility of sexual history were provided by legislative changes, s 41¹¹⁸ but commentators have suggested that s 41 is of arguable assistance.¹¹⁹ For example, Redmayne, Reece and Gurnham question whether interpretations of some sexual behaviours for some individuals are not myths, and that there is a risk that myths about myths have been created.¹²⁰ Redmayne cautions that one should be wary of arguing that sexual history lacks relevance, and that even if it is probative, he questions whether it should be excluded merely because it is prejudicial.¹²¹ He suggests that in fairness such behaviour can be interpreted in competing ways, i.e. it 'points in both directions at once'.¹²² That behaviour evidence, and not only previous sexual history may point in more than one direction, may be one reason why admissibility decision making in rape trials has been and is so controversial and problematic. As Redmayne argues, if there are competing inferences to be drawn from behaviour evidence, such as sexual history, that does not mean that the evidence is not relevant and should be excluded.¹²³ Redmayne's insight that we may have conflicting perceptions about behaviour evidence such as sexual history¹²⁴ may

¹¹⁶ Roberts and Zuckerman (n 1) 600 at n 65 previous sexual history is regarded as bad character.

¹¹⁷ Temkin (n 5) 9.

¹¹⁸ YJCEA 1999 (n 21).

¹¹⁹ Ellison and McGlyn C, 'Commentary on R v A (No 2)' in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 205; *R v A* (n 93); Hoyano L, 'Journal Article - Case Comment *R v Gjon* (Kujtim): Sexual History Evidence - Youth Justice and Criminal Evidence Act 1999 s 41' [2014] 10 Crim LR 765, 757 'As lamentably complex as s.41 is'; Redmayne M, 'Criminal Justice Act 2003: Disclosure and its Discontents' [2004] Crim LR 441 for a critique of the legislation; Redmayne M, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' [2003] 7 (2) E & 75, 94 's. 41(3)(c) is very difficult to make sense of' citing at n 64 McEwan J, 'The Rape Shield Askew' (2001) 5 E & P 257, 260 'The provision has been described as 'perplexing' and 'obscure'.

¹²⁰ *R v A* (n 93); Redmayne 2003 (n 119); Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2007) 33 (3) OJLS 445; Gurnham D, (2015) 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19 New Criminal Law Review 141.

¹²¹ Redmayne (n 119) [2003] 84.

¹²² *ibid* 87.

¹²³ *ibid*.

¹²⁴ *ibid*.

partly explain why there may be a lack of judicial restraint in ruling such evidence inadmissible. If responsibility for interpreting behaviour evidence is located with the jury, not the trial judge, then appeals against allegedly biased judicial decisions may be limited. What this means for child death cases is that when previous maternal behaviours were considered for admission, because such evidence could have been interpreted in more than one way, it may have been admitted, despite the real risk that it would be potentially prejudicial. Similar difficulties have arisen in relation to the admission of personal records in rape trials.

4.2.2 *S 278 CCC and personal records*

Personal records are increasingly sourced by defence counsel for potentially relevant information about women rape complainants in rape trials.¹²⁵ But as Leahy points out, ‘The admission of personal records is undesirable for a complainant, revealing information which ... will potentially unfairly prejudice her testimony’.¹²⁶ As she argues, ‘anything which challenges the credibility of the complainant or defendant is of utmost significance, and could be instrumental in jurors’ assessment of the evidence’.¹²⁷ She suggests that the ‘potential for advocates to focus on stereotypes to undermine complainants’ credibility by suggesting they are prone to mendacity ... is particularly acute in sexual offence trials where rape myths provide a compelling backdrop to juror deliberations’.¹²⁸ Likewise in child death cases such as *Folbigg* and *Kai-Whitewind*,¹²⁹ where evidence from personal records was admitted, such information may have provided information that unfairly and prejudicially reflected upon the

¹²⁵ Leahy (n 5).

¹²⁶ *ibid* 230.

¹²⁷ *ibid* 238-9 ‘In s 278, a “record” is defined as “any form of record that contains personal information for which there is a reasonable expectation of privacy”’.

¹²⁸ *ibid* 243.

¹²⁹ *Folbigg* [2005] (n 73) para 169 per Sully J her medical and welfare records, and social and psychiatric opinions about her childhood abuse were admissible evidence; para 173 per Sully J detailed evidence of Folbigg’s depression was admissible; *R v Folbigg* [2003] NSWSC 895 paras 48-50 per Barr J citing opinions submitted in court by Dr Giuffrida a psychiatrist, paras 105, 165 per Barr J describing difficulties in controlling her anger as a very young child, and as an adult.

mothers. Leahy suggests that admissibility guidelines¹³⁰ in such cases will assist the judiciary in making rational decisions, without relying on common sense, or experience. In contrast however Temkin argues that ‘Procedural reforms will not create an assumption that a woman who says she has been raped is telling the truth in the face of an abundance of prejudicial myths concerning women who allege rape’.¹³¹ Accordingly although as Leahy suggests interpretations of personal records will undermine women’s credibility, as Temkin suggests changing admissibility procedures, may be of little effect if fixed prejudicial beliefs about women remain. Consequently for those child death cases in which personal record information was admitted, it is very possible that the mothers concerned, were unfairly prejudiced. The third example of changes to prevent the admissibility of potentially prejudicial behaviour evidence is the hearsay rule which has historically provided guidance on whether or not hearsay should be admitted.

4.2.3 Hearsay rule and the late complaint

According to Cross, hearsay as ‘a statement other than one made by a person while giving oral evidence in the proceedings, is inadmissible as evidence of any fact stated’,¹³² even though the content may be relevant or reliable. However, for rape complainants who may have been traumatised and unable to report their experiences to police, a late complaint may be inadmissible as hearsay.¹³³ The exception to the hearsay rule however means that if a

¹³⁰ Leahy (n 5) 238 ‘Section 278 of the Canadian Criminal Code (CCC) provides a statutory scheme for the regulation of disclosure of personal records in sexual offence trials’; 240, S. 278.5(2) provides that the judge “shall consider the salutary and deleterious effects of the determination on the accused’s right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates”. Specifically, the judge must examine: (a) the extent to which the record is necessary for the accused to make a full answer and defence; (b) the probative value of the record; (c) the nature and extent of the reasonable expectation of privacy with respect to the record; (d) whether production of the record is based on a discriminatory belief or bias; (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; (f) society’s interest in encouraging the reporting of sexual offences; (g) society’s interest in encouraging the obtaining of treatment by complainants of sexual offences; and (h) the effect of the determination on the integrity of the trial process’.

¹³¹ Temkin (n 5) 191.

¹³² Cross R, *Cross on Evidence* (5th edn, Butterworths 1979) 6, 462.

¹³³ Temkin (n 5) 188 with reference to the use of the recent complaint exception – in ‘*Valentine* the Court of Appeal demonstrated how far some judicial attitudes have progressed as far as sexual victimization is concerned. Roch LJ stated: We now have greater understanding that those who are the victims of sexual

prompt report is made to another person, a complainant can rely on that statement as evidence of their credibility.¹³⁴ The exception to the hearsay rule, allows the prosecution to seek to admit evidence that the rape complainant reported the rape to the police or other third party as soon as she was able,¹³⁵ in order to sustain her credibility. In this way the difficulty presented by the hearsay rule, that a late complaint would be perceived prejudicially and challenged by the defence,¹³⁶ has been addressed. The evident difficulties presented by the permissive admissibility of female behaviour evidence and the variety of steps taken to control admissibility indicates the level of concern that female behaviour evidence may invite prejudicial interpretations at trial and that preventing such inferences by controlling admissibility is important. Nonetheless, such changes and others such as the use of expert witnesses,¹³⁷ are not seen as fully preventing or addressing the issues faced by women in rape trials. For mothers in child death cases, the discussion highlights the importance of the admissibility stage, in controlling the admissibility of potentially prejudicial information. However, scant attention has been paid to the way in which evidence of maternal behaviour in child death cases is admitted, and whether if relevant and probative, it is also reliable. As rape myths may affect the admissibility of information about female behaviour in rape trials, so also I suggest, may mothering myths influence the admissibility of maternal behaviour in child death cases.

4.3 Do mothering myths influence the admissibility of maternal behaviour in child death cases?

The third section considers whether mothering myths may influence the admissibility of maternal behaviour in child death cases, by examining examples of the admission of

offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.’

¹³⁴ Temkin (n 5) 187.

¹³⁵ *ibid* 188 citing at note 7 *R v Osborne* [1905] 1 KB 551.

¹³⁶ *ibid* 188.

¹³⁷ *ibid* 195 citing at note 56 and 57 Bronitt (refer to n 54 in chapter four).

behaviour information and the factors influencing the admissibility decisions, including common sense and the exclusionary evidential rules and exceptions.

4.3.1 *Similar Fact evidence, common sense and multiple child deaths*

The first example focusses on the possibility that mothering myths influenced the admissibility of evidence of previous child deaths as similar fact doctrine.¹³⁸ Although the Criminal Justice Act 2003¹³⁹ (the 2003 Act), still permits the admissibility of similar fact evidence,¹⁴⁰ it is inadmissible if its probative value is outweighed by its probable prejudicial effect.¹⁴¹ In *Clark*,¹⁴² decided before the 2003 Act, similar fact evidence was considered admissible, even though post the 2003 Act, such evidence may have been regarded as more prejudicial than probative and ruled inadmissible.¹⁴³ Redmayne, argues strongly that similar fact evidence of ‘prior offending is amongst the most significant predictors of future offending’.¹⁴⁴ But, whether the same conclusion can be met on the facts of multiple unexplained deaths in child death cases, when no previous criminal proceedings had occurred is questionable and discussed further in section three.

Clark was alleged to have murdered both her babies, Christopher and Harry.¹⁴⁵ Although the pathologist decided that Christopher died a natural death from a respiratory infection, the coincidence of two babies dying whilst in the presence of only their mother, attracted the

¹³⁸ *Clark (No 1)* (n 72) paras 95, 113 per Henry LJ ‘Direction to similar fact evidence’.

¹³⁹ Criminal Justice Act 2003 s 98 ‘evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part’; s 101 (1) In criminal proceedings evidence of the defendant’s bad character is admissible if, (a) all parties to the proceedings agree to the evidence being admissible, (b) the evidence is adduced by the defendant himself or is given in answer to a question, (c) it is important explanatory evidence, (d) it is relevant to an important matter in issue between the defendant and the prosecution, (f) it is evidence to correct a false impression given by the defendant, s. (1) (3) The court must not admit evidence under subsection (1) (d) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

¹⁴⁰ *Makin v Attorney General for New South Wales*, [1894] AC 57 similar fact evidence is admitted as bad character evidence, following Criminal Justice Act 2003 s 101(1) (d).

¹⁴¹ Criminal Justice Act 2003 s 101 (1) (3) The court must not admit evidence under subsection (1) (d) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

¹⁴² *Clark (No 1)* (n 72) paras 95, 113 per Henry LJ ‘Direction to similar fact evidence’.

¹⁴³ Forster (n 76); Weir (n 77).

¹⁴⁴ Redmayne (n 11) 31.

¹⁴⁵ *R v Clark (Sally)*, (Chester Crown Court, 09 November 1999) Harrison J.

Coroner's attention and prompted a chain of events resulting in Clark's wrongful conviction.¹⁴⁶ During preliminary admissibility hearings,¹⁴⁷ Clark's defence struggled to rebut the prosecution argument that the circumstances in which both babies died were so similar,¹⁴⁸ that the two deaths should be joined in the Crown's indictment against her.¹⁴⁹ The circumstances included were that:

(1) the babies were about the same age at the time of death, namely 11 weeks and 8 weeks; (2) they were each found by the appellant unconscious in the same room; (3) both were found at about the same time of day, shortly after having been fed; (4) the appellant had been alone with each child when he was discovered lifeless; (5) in each case Mr Clark was either away or about to go away.¹⁵⁰

Harrison J declined to separate the two deaths in the indictment,¹⁵¹ and relying on the ruling of enhanced probative value of similar fact evidence decided in *DPP v P*,¹⁵² allowed the prosecution to admit the facts as evidence,¹⁵³ because he considered that two babies dying in the care of their mother was not a coincidence, nor were the deaths due to unexplained natural causes. He is reported to have stated that:

the similarity between the circumstances surrounding the death of these two children is of sufficiently probative force to make it just to admit the evidence on one count in

¹⁴⁶ Hill R, 'Multiple Sudden Infant Deaths – Coincidence or Beyond Coincidence?' (2004) 18 Paediatric and Perinatal Epidemiol 320, in at least some of these cases, it appears that the trigger for the criminal investigation was just the coincidence of the second or third death.

¹⁴⁷ *Clark* [1999] (n 145).

¹⁴⁸ *Clark (No 1)* (n 72) para 6 per Henry LJ.

¹⁴⁹ *ibid* paras 81, 95, 113 per Henry LJ. Direction to similar fact evidence.

¹⁵⁰ *ibid* para 6, (6) 'in each case, according to the prosecution, there was evidence of previous abuse and of deliberate injury recently inflicted' per Henry LJ.

¹⁵¹ *ibid* para 81 per Henry LJ.

¹⁵² *DPP v P* (n 77).

¹⁵³ *Clark (No 1)* (n 72) para 81 per Henry LJ relying on *DPP v P* (1991) 2 AC 447 paras 460-1 per Lord Mackay.

relation to the other, and vice versa, despite the prejudice that is thereby caused to the defendant.¹⁵⁴

Relying on *DPP v P*,¹⁵⁵ he stated that in relation to the two unexplained sudden infant deaths, ‘In my view an explanation based on coincidence offends common sense’.¹⁵⁶ The similar fact evidence admitted in *DPP v P*¹⁵⁷ and its precedent cases, *Boardman* and *Kilbourne*¹⁵⁸ however, related not to the coincidence of two babies dying in one family, but to multiple victims of incest in one family as in *DPP v P*,¹⁵⁹ multiple victims of sexual offences by a headmaster as in *Boardman*,¹⁶⁰ and multiple indecent assaults on boys in *Kilbourne*.¹⁶¹ In each of the latter cases, several different victim’s statements of assault were available. Even though the admission of such similar fact evidence to demonstrate propensity in those cases may have enabled fair trials, the facts are distinguishable from the facts in *Clark*.¹⁶² Nevertheless the judicial ‘rule of common sense’¹⁶³ used in *Boardman*,¹⁶⁴ and approved in *Kilbourne*,¹⁶⁵ and followed in *DPP v P*¹⁶⁶ was applied in *Clark*,¹⁶⁷ that a properly directed jury would realise that if they treated the evidence of Clark’s behaviour as a mother as ‘coincidence by reason of the “nexus”, “pattern”, “system”, “striking resemblances”’,¹⁶⁸ such a decision would be an ‘an affront to common sense’.¹⁶⁹

¹⁵⁴ *Clark (No 1)* (n 72) para 81 per Henry LJ.

¹⁵⁵ *DPP v P* (n 77).

¹⁵⁶ *Clark (No 1)* (n 72) para 81 per Henry LJ.

¹⁵⁷ *DPP v P* (n 77).

¹⁵⁸ *Boardman* (n 10); *Kilbourne* (n 10).

¹⁵⁹ *DPP v P* (n 77).

¹⁶⁰ *Boardman* (n 10).

¹⁶¹ *Kilbourne* (n 10).

¹⁶² *Clark (No 2)* (n 6) para 14 per Kay LJ.

¹⁶³ *Boardman* (n 10); para 453 per Hailsham LJ citing ‘Professor Cross Evidence, 3rd ed., p. 316: ‘If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense’.

¹⁶⁴ *Boardman* (n 10) 450, 452, 454, 455, 456 per Hailsham LJ.

¹⁶⁵ *Kilbourne* (n 10) 732, 741, 742, 758 per Lord Simon.

¹⁶⁶ *DPP v P* (n 77) 456, 457, 458 per Lord Mackay.

¹⁶⁷ *Clark (No 2)* (n 6) para 81 per Kay LJ.

¹⁶⁸ *Boardman* (n 10) 453-454 per Hailsham LJ citing Lord Simon in *Kilbourne* (n 10) 759.

¹⁶⁹ *ibid* 454 Lord Hailsham citing Lord Simon in *Kilbourne* (n 10) 759.

Harrison J thus relied on judicial common sense to justify an admissibility decision that Clark may have committed two murders, based on his fixed view that two such unexplained infant deaths in one family, could not be a coincidence. Accordingly I suggest that Harrison relied upon a mothering myth, or a prescriptive belief about mothering that served to justify his adverse decision about similar fact evidence in *Clark*, and the myth was hidden by common sense. In order to use similar facts as evidence of bad character prior to the 2003 Act, ‘facts were required which were strikingly similar to the facts of the offence charged’,¹⁷⁰ however that threshold was later lowered such that the use of similar fact evidence could ‘depend upon the facts of the case’,¹⁷¹ although the evidence still needed to be strongly probative.¹⁷² Information about similar circumstances and maternal conduct was therefore admissible, and Harrison J directed the jury that it was for them to assess the similarities in Clark’s behaviour at or around the time of each child’s death and for them to decide whether the similar circumstances provide support for the ‘inference that both deaths were unnatural by excluding the possibility of coincidence’.¹⁷³

At Clark’s first appeal,¹⁷⁴ Henry LJ supported the trial judge, holding that the ‘circumstances of both deaths shared similarities which would make it an affront to common sense to conclude that either death was natural, and it was beyond coincidence for history to so repeat itself’.¹⁷⁵ He dismissed defence arguments that there was ‘no basis upon which it can properly be concluded that the circumstances of one death provide probative evidence relating to the other’,¹⁷⁶ and he considered there was “‘... such an underlying unity between the offences as to make coincidence an affront to common sense’”.¹⁷⁷ Henry LJ considered

¹⁷⁰ *Boardman* (n 10) 444 per Lord Morris.

¹⁷¹ *DPP v P* (n 77).

¹⁷² *ibid* 460 Lord Mackay.

¹⁷³ *Clark (No 1)* (n 72) para 97 per Henry LJ.

¹⁷⁴ *ibid* para 6, 91, 97 per Henry LJ.

¹⁷⁵ *ibid* para 6, 91, 97 per Henry LJ.

¹⁷⁶ *ibid* para 89 per Henry LJ.

¹⁷⁷ *ibid* para 90 per Henry LJ.

the facts of maternal behaviour, including that she alone discovered the children lifeless, at almost the same time of day, she had fed them, she was tired, she admitted not coping,¹⁷⁸ and that these elements of her behaviour represented ‘similarities in the detailed history of the death of each child’.¹⁷⁹

Unfortunately, at trial and at the first (failed) Appeal,¹⁸⁰ the similar facts of maternal behaviour were not recognised as normal or coincidental, nor challenged as such by the defence. The second successful appeal however indicated that the belief that normal maternal behaviour was indicative of guilt, was misplaced and the behavioural facts were criticised for being ‘imprecise’.¹⁸¹ The routine nature of maternal behaviour was recognised as normal not coincidental, with Kay LJ opining that ‘Children frequently spend the majority of the early part of their life in the sole care of their mother’,¹⁸²

Lord Hailsham’s ‘rules of logic and common sense’ detailed in *Boardman*¹⁸³ and followed in *Kilbourne* and *DPP v P*,¹⁸⁴ may arguably have led to just outcomes in those cases, but in *Clark*¹⁸⁵ and *Cannings*,¹⁸⁶ the adoption of a common sense approach to the admissibility of maternal behaviour on the basis of a fixed disbelief in coincidence was unsafe. The reason for taking this approach is that as Redmayne argues, ‘we are not very good at recognizing when patterns are due to chance’.¹⁸⁷ In addition the research by statistician Ray Hill on cot death

¹⁷⁸ *Clark (No 1)* (n 72) para 271 per Henry LJ ‘Taken separately there was a very strong case on each count. Take together we conclude that the evidence was overwhelming having regard to the identified similarities: a) the babies died at the same age; b) they were both found by the appellant and both, according to one version of the appellant, in a bouncy chair; c) they were found dead at almost exactly the same time of evening, having been well, having taken a feed successfully, and at a time when the appellant admitted tiredness in coping; d) on each occasion the appellant was alone with the baby when it was found lifeless;

¹⁷⁹ *Clark (No 2)* (n 6), para 14 per Kay LJ.

¹⁸⁰ *Clark (No 1)* (n 72) paras 95-102 per Henry LJ.

¹⁸¹ *Clark (No 2)* (n 6) para 15 per Kay LJ.

¹⁸² *ibid* para 15 per Kay LJ.

¹⁸³ *Boardman* (n 10) 450, 452 per Hailsham LJ.

¹⁸⁴ *Kilbourne* (n 10); *DPP v P* (n 77).

¹⁸⁵ *Clark (No 1)* (n 72) paras 6, 81, 90, 91, 97 per Henry LJ.

¹⁸⁶ *Cannings* (n 6) para 12 per Judge LJ.

¹⁸⁷ Redmayne (n 11) 47.

cases¹⁸⁸ has illustrated how frequently real coincidence is underestimated. When remarkable events are repeated such as the sudden unexplained child deaths, there is a general ‘predisposition to underestimate the chances of coincidence’.¹⁸⁹ At such times, Hill suggests, it is important to guard against fallacious arguments which further raise those chances to the point ‘where “coincidence” becomes “beyond coincidence”’.¹⁹⁰ Gilovich also argues that ‘we are predisposed to see order, pattern and meaning in the world ... As a consequence we tend to see order where there is none and we spot meaningful patterns where only the vagaries of human chance are operating’.¹⁹¹ Accordingly using common sense to admit the similar fact evidence in *Clark* indicates that relying on fixed beliefs about the infrequency of coincidence was unsafe. Moreover although the odds of the children having died naturally had been calculated,¹⁹² the odds of a mother killing two of her children had not been considered,¹⁹³ nor had the probability of such events occurring by chance been calculated.

A belief in the improbability that such events cannot occur naturally and cannot be the result of coincidence, was also the basis for admitting circumstantial evidence of ALTE’s followed by infant deaths in *Cannings*.¹⁹⁴ As Dwyer suggests ‘the line between circumstantial evidence and speculation is neither clear nor sharp’.¹⁹⁵ Common sense is therefore a poor substitute for

¹⁸⁸ Hill (n 146) 326; ‘These figures suggest that with each successive death, there are indeed grounds for slightly increased suspicion, but to nothing like the extent suggested by Meadow’s Law. There is certainly no justification for a second or third death in itself being the trigger for a criminal investigation’; Royal Statistical Society, ‘Royal Statistical Society concerned by issues raised in Sally Clark case’ (News release, Royal Statistical Society 2001).

¹⁸⁹ *ibid* 326.

¹⁹⁰ *ibid*.

¹⁹¹ Gilovich T, *How We Know What Isn’t So: The Fallibility of Human Reason in Everyday Life* (Free Press, 1991) 9.

¹⁹² Wrongly, by Fleming et al (n 41) 92 Table 3.58 the odds of two children dying in one family from SIDS was cited in court as 1 in 73 million.

¹⁹³ Redmayne (n 11) 120 citing at n 26 Dawid AP, ‘Bayes’s Theorem and Weighing Evidence by Juries’ in Swinburne R, (ed) *Bayes’s Theorem* (OUP, 2002) 75-8 that Dawid calculated the probability that a single child will be murdered in its first year of life as 0.00001.

¹⁹⁴ *Cannings* (n 6) para 9 per Judge LJ.

¹⁹⁵ Dwyer D, *The Judicial Assessment of Expert Evidence*, (CUP 2008) 66.

mathematical expertise and interestingly the enhanced probative value of similar fact evidence provided by *DPP v P*,¹⁹⁶ and relied on in *Clark*, no longer applies.¹⁹⁷

But, common sense is a competence used to make decisions by almost everyone with capacity. Maher suggests that common sense is ‘what everybody knows’,¹⁹⁸ and that ‘...its essential quality is that it is knowledge...accepted *uncritically*, not reflected on, received without analysis...an amalgam of sound knowledge, inherited wisdom, inaccurate data, popular instincts and stupid prejudices...’.¹⁹⁹ MacCrimmon argues that common sense means different things to different people,²⁰⁰ and that although common sense is ‘frequently relied upon, it is seldom defined, nor is reliance on common sense justified’.²⁰¹ The relevance of such observations to this chapter is that ‘common sense includes the generalizations that link evidence with facts’²⁰² and these simplifications from individual life experiences or educational expertise and knowledge may act as heuristics.

If heuristics influence the reasoning of both judges and jury members, as a number of commentators suggest is possible, including Hunter, Cunliffe, Ellison and Munro and Redmayne,²⁰³ there is a danger that common sense admissibility decisions are based on oversimplified beliefs. The reliance on common sense at the admissibility stage in child death cases therefore raises similar issues to those in rape trials about the reliability of admissibility decisions. If common sense is an inferential strategy²⁰⁴ used by the judiciary to aid admissibility decision making, there is a problem because ‘common sense (intuitive)

¹⁹⁶ *DPP v P* (n 77).

¹⁹⁷ *Weir* (n 77).

¹⁹⁸ Maher FKH, *Common Sense and Law* (1972) 8 Melbourne U Review 587, 590.

¹⁹⁹ *ibid* 594-5.

²⁰⁰ MacCrimmon (n 83) 1437.

²⁰¹ *ibid* 1435.

²⁰² *ibid* 1443.

²⁰³ *ibid* 1434-5; supported also by Cunliffe E, ‘Judging, Fast And Slow: Using Decision-Making Theory To Explore Judicial Fact’ [2014] *International Journal of Evidence & Proof* 139; Ellison L and Munro VE ‘Telling Tales: Exploring Narratives of Life and Law Within The (Mock) Jury Room’ (2015) 35(2) *Legal Studies* 201; Roberts P, ‘Mastering Evidence and Proof: A Tribute To Mike Redmayne’ [2016] *International Journal of Evidence & Proof* 89; Redmayne (n 11) 46-47.

²⁰⁴ Dwyer (n 195) 66.

inferential strategies’²⁰⁵ may be ‘dangerously inaccurate’.²⁰⁶ The possibility is therefore raised that mothering myths may “inform” common sense.

There is however an alternative view amongst evidence scholars, that law nevertheless embraces a conception of common sense.²⁰⁷ Allen suggests that the judiciary use the law of evidence against ‘sudden assaults on common sense’,²⁰⁸ ‘particularly in relation to ‘overbearing expert opinion’.²⁰⁹ Allen’s proposition is not made out in relation to this point in Clark’s first appeal,²¹⁰ where the judicial common sense approach to admissibility was coupled with a failure to adequately question what with hindsight was dogmatic, overzealous expert opinion. But in *Patel*,²¹¹ judicial common sense operated at trial in the way that Allen argues.

In overturning *Cannings*’ conviction,²¹² Judge LJ drew attention to Jack J’s comments in *Patel*²¹³ in which three babies died suddenly without explanation. (*Patel* is only reported in small part in *Cannings*). Jack J followed Kay LJ in Clark’s second appeal²¹⁴ in declining to follow Henry LJ’s common sense approach to coincidence in *Clark*’s first appeal.²¹⁵ Jack J directed the jury in *Patel* that just because the mother was present in all three children’s deaths did not make it ‘more likely that the causes are unnatural’.²¹⁶ That he held, was a ‘dangerous approach’.²¹⁷ Jack J considered that expert opinions that submitted that unexplained multiple infant deaths were commonly the result of maternal smothering, did not

²⁰⁵ Dwyer (n 195) 67.

²⁰⁶ *ibid* 67.

²⁰⁷ Allen RJ, ‘Common Sense, Rationality, and the Legal Process’ (2000-2001) 22 *Cardozo L. Rev.* 1417, 1427.

²⁰⁸ *ibid* 1431 citing at n 50 Siegwert Lindenberg, ‘Commonsense and Social Structure: A Sociological View’ in Frits van Holthoon & David R Olson (eds) (1987) 3 *Common Sense* 9.

²⁰⁹ *ibid* 1418 citing at n. 6 Frits van Holthoon and David R Olsen ‘Common Sense: An Introduction’, in Frits van Holthoon & David R Olson (eds) (1987) 3 *Common Sense* 9.

²¹⁰ *Clark (No 1)* (n 72) para 81 per Henry LJ.

²¹¹ *Patel* (n 142).

²¹² See discussion on inadmissible circumstance and coincidence in *Cannings* (n 6) para 165 per Judge LJ.

²¹³ *Patel* (n 142).

²¹⁴ *Clark* (1999) (n 162).

²¹⁵ *Clark (No 1)* (n 72).

²¹⁶ *Cannings* (n 6) para 165 per Judge LJ.

²¹⁷ *ibid*.

mean that ‘the common event is the more likely cause’²¹⁸ or that the intentional infliction of harm was the cause of death.²¹⁹ Jack J’s view that reliance upon common sense to admit multiple instances of maternal behaviour evidence as indicative of an unnatural death was unsafe, providing a judicial common sense view to challenge overzealous expert opinion.

Accordingly, it is difficult to say with authority that common sense as such is always unsafe and unreliable, and thus that it is always dangerous for it to be a consideration in judicial decisions. Judicial discretion and common sense may be all that is available in association with powerful and persuasive expert opinions, to inform pre-trial proceedings in child death cases. In *Clark*, however it seems possible that mothering myths may have informed the judicial approach to admissibility of maternal circumstances and behaviour. The use of common sense as fixed beliefs at the admissibility stage, may therefore support unfairly prejudicial decisions. However the question whether such beliefs were informed by personal experience or expert opinion, is difficult to say.

4.3.2 Section 78 and alcohol dependency

Another example of maternal behaviour to be considered is Clark’s alcohol dependency.

Judicial discretion to exclude evidence that will be unfair to an accused, is always available at any time through an application of specific legislative provisions.²²⁰ In *Clark* Harrison J used the discretion to rule that mention of Clark’s alcohol dependency was inadmissible,²²¹ because otherwise it would have risked an unfair trial. The prosecution could not then show that Clark’s character was bad, but then neither could her defence draw on detailed evidence to show that she was a woman of good character. Good character is based upon general reputation²²² the absence of previous convictions²²³, and specific examples of behaviour.²²⁴

²¹⁸ *ibid* para 165 per Judge LJ.

²¹⁹ *ibid* para 177 per Judge LJ.

²²⁰ *PACE* (n 19).

²²¹ *Clark (No 1)* (n 72) para 89 (5) per Henry LJ.

²²² *R v Rowton* (1965) Le and CA 520; *R v Redgrave* (1982) 74 Cr App R 10.

Clark was described at trial as ‘a solicitor of previous good character’²²⁵ and evidence of her exemplary child care from her health visitor²²⁶ and her mother and baby group was admitted.²²⁷ For Clark to argue however that it was out of character for her to have harmed her children, would have required her defence to show that her behaviour as a mother accorded with the ideology and normative expectations of a good mother, discussed in chapter two. Had her defence done so, the prosecution would most likely have sought admission of Clark’s long standing difficulties with alcohol dependency in order to rebut the defence case. After trial however, the judge disregarded his previous decision and permitted prosecution counsel to brief the media about Clark’s alcohol dependency.²²⁸ On the one hand Harrison J used the exclusionary evidential provision to rightly exclude evidence that was more prejudicial than probative. Permitting the inadmissible information to be made public, provided support for the decision to convict *Clark*. Further research is needed on whether permitting the dissemination of previously inadmissible information into the public domain by a trial judge, may unfairly affect a subsequent appeal. It is possible that as information about previous convictions may be released about defendants following conviction or sentencing, so Harrison J felt justified that Clark’s alcoholism was evidence of bad character, but whether it was more probative than prejudicial is doubtful. It is possible that the decision to release information was informed by a prescriptive view of Clark as a mother, which justified the court’s decision to convict. It is therefore possible that mothering myths may have influence Harrison J’s decision.

²²³ Redmayne (n 11) 217; a judge is obliged to instruct the jury to take a defendant’s good character into account if they have no previous convictions.

²²⁴ *R v Del-Valle* [2004] EWCA Crim 1013; Redmayne (n 11) 216.

²²⁵ *Clark (No 1)* (n 72) paras 2 per Henry LJ.

²²⁶ *ibid* paras 17, 34, 43 per Henry LJ.

²²⁷ *Clark (No 1)* (n 72) para 17 per Henry LJ.

²²⁸ Batt J, *Stolen Innocence* (Ebury Press 2005) 296-297 written by a member of Clark’s defence team.

4.3.3 Hearsay and mothering capability

Following the discussion of the admissibility of similar fact evidence and bad character, the possibility is discussed that prejudicial hearsay evidence may have been admitted in *Anthony*.²²⁹ Despite historical warnings that hearsay is poor evidence,²³⁰ hearsay has been increasingly been admitted if the information is at all probative,²³¹ and the court satisfied that it was in the interests of justice for it to be admissible.²³² In child death cases *Clark*²³³ and *Anthony*,²³⁴ witnesses testified to comments spoken out of court by the defendant mothers which were deemed admissible. It is possible that the courts may have granted exceptions to the hearsay rule in child death cases, because common sense suggested the testimony was probative, instead of judging admissibility on ‘how reliable the maker of the statement appears to be’,²³⁵ and ‘how reliable the evidence of the making of the statement appears to be’.²³⁶

The witness statements collated by police in *Anthony* were argued by the defence to be prejudicial and hearsay, and ‘amounted to no more than evidence of propensity’.²³⁷ Although one of the witnesses who provided hearsay testimony was cross examined at trial,²³⁸ not all were,²³⁹ but their damaging hearsay statements were nevertheless admitted as evidence of Anthony’s behaviour and quality of mothering.²⁴⁰ It is hard to see how judicial discretion considered that such hearsay should be admitted ‘in the interests of justice’,²⁴¹ nor how the

²²⁹ *Anthony (No 2)* (n 6).

²³⁰ *Teper* 486 per Lord Normand (n 23).

²³¹ Roberts and Zuckerman (n 1) 26.

²³² Criminal Justice Act 2003 s 114 (1) (d).

²³³ *Clark (No 1)* (n 72) para 19 per Henry LJ.

²³⁴ *Anthony (No 2)* (n 6) page 3 per Tuckey J.

²³⁵ Criminal Justice Act 2003 s 114 (2) (e).

²³⁶ *ibid* s 114 (2) (f).

²³⁷ *Anthony (No 2)* (n 6) page 2 per Tuckey J.

²³⁸ *Anthony (No 1)* (n 6).

²³⁹ *ibid* para 39, 46-49 per Judge LJ.

²⁴⁰ *ibid* para 20 per Judge LJ.

²⁴¹ Spencer JR, ‘Hearsay under the Criminal Justice Act 2003: The Case Law One Year On’ (2006) 8 Archbold News 5, 7.

witnesses²⁴² could ever have been regarded as reliable, or their statements relevant. For example, ‘...Lisa Wilkinson said that Anthony had spoken in a vulgar manner about Jordan (Anthony’s first baby who died) and that she was, ‘an absolute nightmare’.²⁴³ Anthony is recorded as denying that she made such statements and further reported that the witness, Miss Wilkinson had said to her that ““you are a hopeless mother and you didn't deserve children””.²⁴⁴ In addition a second acquaintance of Anthony said ‘she was angry that Mrs Anthony was not at hospital with Michael’,²⁴⁵ (the second of Anthony’s children to die). It is possible that the admissibility decisions were informed by fixed beliefs that Anthony was a poor mother and such statements were considered relevant and probative and rightly indicative of her low credibility. However the evidential reliability of such material and the statement makers is doubtful, and the material can reasonably be considered more prejudicial than probative so consequently it is possible that admitting such information suggests that mothering myths may have influenced this admissibility decision also.

4.3.4 *Opinion and witness statements*

The opinion rule prevents the presentation of testimony including opinions inferred from the facts;²⁴⁶ the exception to the rule is engaged if the witness is a recognised expert. If a jury can make its own inferences from the facts, then expert opinion is regarded as unnecessary.²⁴⁷ As detailed in chapter three witnesses gave testimony that following her children’s deaths Clark had behaved in a ““very dramatic and almost hysterical””²⁴⁸ manner, described as ““such an over-reaction””.²⁴⁹ Clark’s ‘reaction was described by a hospital doctor as very dramatic and hysterical’.²⁵⁰ Her behaviour was described by a doctor as ‘atypical and the over-reaction

²⁴² See current legislation not in force at Anthony’s trial, Criminal Justice Act 2003 s 114 (2) (e).

²⁴³ *Anthony (No 2)* (n 6) para 20 per Judge LJ.

²⁴⁴ *ibid* para 21 per Judge LJ.

²⁴⁵ *ibid* para 39 per Judge LJ.

²⁴⁶ *Tapper* (n 14) 66.

²⁴⁷ *Turner* (n 22) 841 per Lawton LJ.

²⁴⁸ *Clark (No 1)* (n 72) para 258 per Henry LJ.

²⁴⁹ *ibid*.

²⁵⁰ *ibid* para 19 per Henry LJ.

made her feel quite uncomfortable'.²⁵¹ In addition, a staff nurse stated that Clark had 'said that her husband would blame her and would not love her any more'.²⁵² The evidence provided by professional witnesses suggest doubts that Clark's grief was normal, indicating concern that Clark may have harmed Christopher. However such statements could have been ruled inadmissible either under the hearsay rule or under the opinion rule.

Legal realist Jerome Frank, argued that separating facts from opinion in witness statements is highly problematic.²⁵³ Frank considered that ordinary witnesses interpret their observations such that fact and perception are joined, giving such 'facts...as are found... in courts a twice refracted quality'.²⁵⁴ 'Subjectivity is piled upon subjectivity'²⁵⁵ contended Frank, and 'a trial court's finding of fact, is at best, its belief or opinion about someone else's belief or opinion'.²⁵⁶ Frank's point is that even witness testimony of fact may contain inferences because the margin between fact and opinion is so slight.

I suggest therefore that witnesses such as health professionals may present their observations together with personal opinion in their use of language, such as *unusual*, *dramatic*, *atypical*, *over reaction*, and *hysterical*. If they hold fixed normative beliefs about maternal behaviours based on their training and experience which is highly likely, admitting such testimony of that Clark's behaviour was abnormal and not an individual expression of grief, may owe much to fixed beliefs on the part of the admitting judge. Consequently it is possible that such witness testimony²⁵⁷ could have been ruled inadmissible under both hearsay and opinion rules. Nevertheless, it is also possible that mothering myths may not have influenced admissibility decisions, and that due to the diminishing use of exclusionary evidential rules

²⁵¹ *ibid* para 19 per Henry LJ.

²⁵² *ibid*.

²⁵³ Frank J, *Courts on Trial: Myth and Reality in American Justice* (Princeton U Press 1949).

²⁵⁴ *ibid* 22.

²⁵⁵ *ibid*.

²⁵⁶ *ibid*.

²⁵⁷ *Clark (No 1)* (n 72) para 19 per Henry LJ.

and the need to permit all information to be placed before the jury, that the trial judges in these cases had little admissibility guidance on which to rely to rule the testimony inadmissible. There is still an issue though as to whether such testimony was not more prejudicial than probative and if so, whether at trial judicial warnings were given to the jury to place little weight on such evidence.

Chapter four has so far examined how behaviour may have been considered relevant to child death cases and the judicial approach and techniques that were available to assess admissibility. The discussion so far identifies that a permissive if not laissez-faire approach is used, based on judicial common sense, discretion and experience. There are exclusionary evidential rules and exceptions that may have assisted judges to exclude behaviour evidence but overall it appears that there are few evidential guidelines available to assist such decisions. In addition the behaviour admitted is, if interpreted using mothering myths, more likely to be prejudicial rather than probative, such as the similar fact evidence, the hearsay and the witness testimony. Chapter three also identified further types of information that were admitted, such as not calling for an ambulance,²⁵⁸ failing to resuscitate a child despite training²⁵⁹, and not using an apnoea alarm as instructed.²⁶⁰ In addition, other forms of maternal conduct or behaviour have been admitted in child death cases such as diaries in *Folbigg*,²⁶¹ her personal records, medical and psychiatric reports,²⁶² and internet searches.²⁶³

²⁵⁸ *Gay and Gay* (n 6); *LB of Islington v Al-Alas and Wray* [2012] EWHC 865 (Fam); *R v Stacey (Helen Brenda)* [2001] EWCA Crim 2031, [2001] WL 1135255 CACD para 30 per Kennedy LJ; *Cannings* (n 6) para 112 per Judge LJ.

²⁵⁸ *Cannings* (n 6) para 112 per Judge LJ.

²⁵⁹ *ibid* para 96 per Judge LJ.

²⁶⁰ *ibid* paras 47, 52, 57, 58, 61, 63, 64, 76, 77, 78, 97, 99, 100, 101, 103, 104, 108, 109, 111, 112, 157 per Judge LJ.

²⁶¹ The mother's diary entries were regarded as admissible evidence in *Folbigg* [2003] (n 129) paras 12, 29, 53, 54, 57, 61, 63, 64, 71, 72, 74, 91 per Barr J.

²⁶² *Folbigg* [2005] (n 73) para 169 per Sully J her medical and welfare records, and social and psychiatric opinions about her childhood abuse were admissible evidence; para 173 per Sully J detailed evidence of *Folbigg*'s depression was admissible; *Folbigg* [2003] (n 129) paras 48-50 per Barr J citing opinions submitted in court by Dr Giuffrida a psychiatrist, paras 105, 165 per Barr J describing difficulties in controlling her anger as a very young child, and as an adult.

As identified in section one, such behaviour evidence is circumstantial, and as such reliant upon the use of inference to decide both whether such material is relevant, probative, and admissible, and whether indicative of guilt. Although such material may appear prejudicial, at first sight, it is also open to alternative interpretations, and as such may appear lacking in probative value. For example the failure to use an apnoea monitor, may be explained away because apnoea alarms are notoriously unreliable. Failing to resuscitate may be explained by understandable maternal panic, not calling an ambulance may be similarly explained. However as Redmayne has suggested, just because evidence is prejudicial is not a reason to rule it inadmissible and in fairness much of the behaviour evidence points in more than one direction.

I suggest that it is possible that the reason that such behaviour evidence plays such a significant part in the law reports, is that the evidence of behaviour is used not only to indicate propensity and diminish credibility as Temkin has suggested in relation to previous sexual history in rape trials, and Leahy in relation to personal records, but to provide some indicators of maternal intention, and thereby attempt infer what a mother may be thinking or feeling.

For example in *Folbigg* the appeal court acknowledged that the ‘Crown case at trial depended heavily upon the contents of the appellant’s diaries’²⁶⁴ as indications of her state of mind, as the diaries ‘contained virtual admissions of guilt of the deaths of Caleb, of Patrick and of Sarah; and admissions by the appellant that she appreciated that she was at risk of causing,

²⁶³ Ramage S, ‘Case Comment: *R. v Kular (Rosdeep Adekoya)*’ (HCJ August 25, 2014) (2014) Crim Law 2; Rosdeep Kular was convicted for the culpable homicide of her young son following the identification of internet searches suggesting motive. She had typed into search engines, ‘Why am I so aggressive to my son?’, and ‘I find it hard to love my son’; Brooks L, ‘Rosdeep Adekoya jailed for 11 years for killing her son Mikael Kular’ *The Guardian* (London, 25 August 2014) <<http://www.theguardian.com/uk-news/2014/aug/25/rosdeep-adekoya-jailed-11-years-killing-son-mikael-kular>> accessed 4 November 2014.

²⁶⁴ *Folbigg* [2005] (n 73) para 44 per Sully J.

similarly, the death of Laura'.²⁶⁵ Sully J suggested that the 'probative value of the material was, in my opinion, damning',²⁶⁶ and in relation to relevant legislation²⁶⁷ showed that she 'did a particular act or had a particular state of mind'.²⁶⁸

Similarly in *Kular* where a mother's intention to kill her son was inferred by police and prosecutors when they found what they considered to be relevant internet searches on her laptop. *Kular* had searched for information on-line, typing into search engines, 'Why am I so aggressive to my son?', and 'I find it hard to love my son'.²⁶⁹ *Kular* demonstrates that the private use of internet communications may as with private hand written diaries, or social networking site (SNS) communications,²⁷⁰ be a 'veritable treasure trove for criminal investigators',²⁷¹ to evidence murderous intention as in *Folbigg*, inferred from a defendant writing out loud as it were, to themselves. It is therefore possible that information of maternal behaviour, including that illustrated in child death cases,²⁷² rape trials,²⁷³ together with diaries²⁷⁴ and on-line footprints,²⁷⁵ may be considered relevant, because it arguably reveals both disposition, and state of mind.

In order to develop the argument that maternal behaviour is considered relevant, because of the way it may be used to infer what a mother may be thinking or feeling, I wish to recap the possible reasons for relevance of maternal behaviour. First that the maternal behaviour may

²⁶⁵ *ibid.*

²⁶⁶ *Folbigg* [2005] (n 73) para 132 per Sully J.

²⁶⁷ The Evidence Act 1995 s 98 (1).

²⁶⁸ *Folbigg* [2005] (n 73) para 152 per Sully J.

²⁶⁹ Brooks (n 263).

²⁷⁰ O'Floinn M and Ormerod D, 'The Use of Social Networking Sites In Criminal Investigations' (2011) 10 Crim LR 766 citing at (n 10) Warren G, 'Interactive Online Services, Social Networking Sites and the Protection of Children (2008) Ent L R 165 'such as search, email, messaging, chat, blogs, gaming, discussion forums, VoIP [Voice over Internet Protocol e.g. skype] photos, music and videos.'

²⁷¹ O'Floinn and Ormerod (n 68) 788.

²⁷² See chapter three for examples: not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour.

²⁷³ Such as sexual history, dress, alcohol intoxication, time of reporting, and personal records, see n 8-10.

²⁷⁴ *Folbigg* [2003] (n 129) para 54 per Barr J.

²⁷⁵ O'Floinn (n 68) citing at (n 10) Warren G, 'Interactive Online Services, Social Networking Sites and the Protection of Children (2008) Ent L R 165.

be argued at the admissibility stage to be both logically probative and legally relevant. Second in analogising from Temkin's work,²⁷⁶ the purpose of seeking the admission of information about behaviour, may be to suggest to the court, that for example, failures to use an apnoea monitor properly, frantic reactions to a child's death, lies about the purpose of buying wine, not knowing when her child was ill, failing to seek emergency assistance, indicated a guilty mind.

John Harris however has spoken of his deep concern²⁷⁷ surrounding the preoccupation with what he terms mind reading in criminal proceedings, such that we may 'understand what kind of person the bearer of the mind is'.²⁷⁸ In relation to questions of murder or rape,²⁷⁹ Harris identifies that hitherto it has been impossible to even think of reading a person's mind. But, he notes that researchers have developed a 'modeling algorithm that could identify and (crudely) reconstruct the images and video from the neural activity data itself; thereby "reading" what the brain saw'.²⁸⁰ Such neuroscience technologies including functional magnetic resonance imaging (fMRI),²⁸¹ and electro-encephalogram graph readings (EEG) such as the P300 event-related potential (ERP),²⁸² have been created to assess human cognition and possibly thereafter intention, within criminal proceedings. Even though such technologies are at the early stages, 'there has been much research into using fMRI...for the detection of falsehood'²⁸³ and electroencephalography (EEG), or "brain fingerprinting"²⁸⁴

²⁷⁶ Temkin (n 101) citing at (n 59) Newby L, 'Rape Victims in Court—The Western Australian Example', in Scutt J (ed) *Rape Law Reform* (Australian Institute of Criminology 1980) 118-120.

²⁷⁷ Harris J and Lawrence DR, 'Hot Baths and Cold Minds: Neuroscience, Mind Reading, and Mind Misreading' 2015 24(2) *Cambridge Quarterly of Healthcare* 123; John Harris, 'Life in the Cloud and Freedom of Speech', (2013) 39 (5) *Journal of Medical Ethics* 307.

²⁷⁸ Harris and Lawrence 2015 (n 277) 125.

²⁷⁹ *ibid* 124.

²⁸⁰ *ibid* 127.

²⁸¹ *ibid* citing at n 19 Huettel SA, Song AW and McCarthy G, *Functional Magnetic Resonance Imaging* (2nd edn Sinauer, 2009) 214; and see Glossary for the meaning of fMRI.

²⁸² *ibid* citing at n 34 Farwell LA, Smith SS, 'Using brain MERMER testing to detect knowledge despite efforts to conceal' (2001) 46 (1) *J Forensic Sci* 135; and see Glossary for the meaning of ERP.

²⁸³ *ibid* 127.

²⁸⁴ *ibid*

for ‘lie detection’.²⁸⁵ Consequently Harris is troubled at the way such technologies are being used:

However fraught with current technological or neurobiological difficulties the techniques of thought identification or mind reading might be, they introduce a serious possibility that thought may, in the face of significant confirmatory neurological evidence, be at some point taken to be the equivalent of action or evidence for certain purposes.²⁸⁶

Harris also identifies the use by prosecutors of internet searches that may be relied upon as evidence of a defendant’s intentions, by inferences or *mind reading*. It is therefore possible that neuro-technological findings, Folbigg’s diaries,²⁸⁷ Kular’s internet searches,²⁸⁸ the use of female sexual history and medical records in rape cases, and maternal behaviour in child death cases may all be means of, as Harris suggests, *reading a mind*, or rather, to infer what a mother may have been thinking or feeling at the relevant time, which is why maternal behaviour was and is considered relevant and inadmissible. But, as Harris warns, ‘our minds can be read and, sometimes, perhaps often, misread’,²⁸⁹ and consequently I suggest mind misreading may have occurred in child death cases as a result of mothering myths.

Nevertheless, again as Harris warns, the opportunities of mind reading and misreading are inseparable. ‘In the cloud ... we already have a massive capacity for “mind reading” and hence mind misreading, against which there is no effective defence, and to which most of us are exposed’.²⁹⁰ Not only Harris suggests:

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ *Folbigg* [2003] (n 129) para 54 per Barr J.

²⁸⁸ *R v Kular (Rosdeep Adekoya)* (HCJ August 25, 2014)

²⁸⁹ Harris and Lawrence 2015 (n 277).

²⁹⁰ *ibid* 129.

do we have no knowledge or control over who will have access to our words and in what circumstances, we do not even have any control over how they will be edited, sensationalised, decontextualized, bowdlerised or otherwise distorted.²⁹¹

The same risks of trying to infer what a person is thinking or feeling, I suggest, can be said to occur with the interpretations of women's behaviour using rape myths and maternal behaviour using mothering myths. When information of maternal behaviour is deemed relevant in child death cases, the mother has no control over how she is perceived. Behaviour evidence may be decontextualised or distorted,²⁹² but provides a means of *reading a mother's mind* or in other words a means to infer what a mother may have been thinking or feeling at the relevant time. Therefore, admissibility rulings are likely to view the evidence as relevant and probative if evidence is viewed through the prism of descriptive or prescriptive beliefs about mothering.

4.4 Conclusion

There are in conclusion a number of key points that arise from the debate in chapter four whether mothering myths influence admissibility decisions in child death cases. The first section identified that there are few clear guidelines to assist admissibility rulings in relation to behaviour evidence in general, apart from a reliance upon judicial discretion - s 78, an assessment of fairness, experience and common sense. Further, that admissibility of behaviour evidence depends upon lower standards than the ultimate standard of proof required at trial.²⁹³ Consequently, a permissive approach exists to behaviour evidence supported by the view that the jury's competence should be trusted. As a result, as much relevant or almost relevant information is submitted for the jury's consideration and any

²⁹¹ *ibid* citing at page 7 and n 42 Harris (2013) (n 277).

²⁹² *ibid*.

²⁹³ Hunter (n 16) 167-8 citing Redmayne (n 11) 17.

concerns about prejudicial interpretations of behaviour are allayed by trust in judicial techniques such as judicial summing up and directions.

Section two identifies that in relation to rape trials some guidance exists to rule behaviour evidence inadmissible, including s 41 for sexual history, and in Canada, s 278 for personal records, in order to control prejudicial inferences at trial of propensity, disposition and credibility. Concerns exist however that ruling evidence inadmissible because it is prejudicial is not logical,²⁹⁴ because of observations that evidence such as sexual history can be both probative and not probative.²⁹⁵ But, in trying to avert the possibility of myths about myths,²⁹⁶ and relying on a more permissive approach to admissibility may mean that making judgements on relevance leaves much to the mind of the beholder.²⁹⁷ The risk that judicial discretion and rape myths may continue to inform decisions on admissibility thus remains. Although the detailed and extensive rape scholarship supports the view that rape myths may have informed admissibility decisions in rape trials, such a view is more difficult to sustain with respect to mothering myths in child death cases.

Section three considers the admission of evidence of maternal behaviour and whether the existing guidelines and exclusionary rules may have been available to exclude potentially prejudicial information and were not used. The use of judicial common sense to admit evidence of maternal behaviour as similar fact evidence is scrutinised in *Clark* to show that, the lack of guidance on the application to dissimilar facts, of the similar fact exception to the inadmissibility of bad character, enabled a prejudicial and faulty argument to be made, that Clark's children's deaths could neither be natural nor coincidence. Judicial common sense in this instance is suggested to have been based upon fixed and oversimplified beliefs, as

²⁹⁴ Redmayne (n 131).

²⁹⁵ *ibid.*

²⁹⁶ Reece (n 120); Gurnham (n 120).

²⁹⁷ Temkin (n 3) 199.

mothering myths. Evidence of hearsay and opinion it is further argued, could have been ruled inadmissible, but was not, permitting prejudicial testimony of doubtful probative value to be admitted. Even though judicial discretion rightly excluded Clark's alcohol dependency at trial, using s 78, the information was promptly placed in the public domain following the jury's verdict for reasons that are unclear, but the decision to do so will no doubt have justified the adverse verdict of the court.

The reasons for admitting circumstantial behaviour evidence such as the failures to call for an ambulance and the omissions to use an apnoea alarm are discussed, including propensity, disposition and credibility. Drawing on the insights of Harris's work that questions why evidence of behaviour drawn from on-line sources is admitted, I conclude that it may be admitted in child death cases to infer what a mother may have been thinking and feeling at the relevant time. But because such evidence is also suggestive of maternal carelessness, or panic, it is questionable whether it is probative. As Harris argues, there are significant dangers with the admission of such circumstantial evidence in order to 'read a person's mind'²⁹⁸ because it can be so deeply misinterpreted.

Finally, judicial admissibility of evidence of maternal behaviour is questioned because of the inherent risks of the evidential context and the dangers of cross-admissibility. If strands of circumstantial behaviour evidence that individually have little weight, are viewed holistically,²⁹⁹ then as in *Cannings*, *Clark* and *Folbigg*, such individual elements may 'bolster an otherwise weak case'³⁰⁰ and produce a more powerful one. Moreover, the significance of admitting behaviour evidence may be hidden behind a complex evidentiary landscape of

²⁹⁸ Harris and Lawrence 2015 (n 277) 129 'In short, we already have massive capacity for "mindreading" and hence of mind misreading from which there is no effective defence, and to which most of us are exposed'

²⁹⁹ Roberts and Zuckerman (n 1) 607.

³⁰⁰ Forster (n 76) 276.

competing, controversial and inconclusive expert opinion.³⁰¹ I suggest in addition, that it is possible that judicial admissibility rulings may have been informed by mothering myths, which not only drew on judicial experience but also on the prescriptive views of experts.

Chapter five considers the issue of why defence counsel failed to challenge admissibility rulings in child death cases more vigorously. The question is asked whether jury competence and judicial techniques such as directions and summing up do ensure that evidence of behaviour is not interpreted using mothering myths.

³⁰¹ Hunter (n 16) 166, see her suggestion ‘that a complex evidentiary and advocacy landscape often hid from law reports the full operation of character evidence in practice’.

Chapter Five: Jury decisions in child death trials: influenced by mothering myths?

5.0 Introduction

This thesis has drawn on the insights of rape myth scholarship to argue that mothering myths¹ may have influenced trial outcomes in child death cases. Within the criminal justice system, descriptive beliefs about how women are likely to act, and prescriptive beliefs about how women should act, may influence the jury as indicated in rape myth scholarship.² The basis for analogising from decision making in rape cases to that in child death cases is because jury decisions may be similarly informed by inferences about women's behaviour in both areas, and that fixed beliefs may be used to make such inferences.

The jury's findings may however be controlled by judicial techniques including directions, comments and summing up,³ which are currently formalised within publications such as the Crown Court Compendium (CCC).⁴ For example, the CCC states that a 'judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct'.⁵ Judicial directions are therefore recognised by the criminal justice system as techniques by which trial judges may seek to caution 'juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while

¹ A mothering myth could be defined as a *descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system.*

² Gerger H, Kley H, Bohner G and Siebler F, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English' [2007] 33 *Aggressive Behaviour* 422; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 57; Temkin J, *Rape and the Legal Process* (2002, OUP 2005) 9-11.

³ Roberts P and Zuckerman A, *Criminal Evidence* (OUP 2010) 73; Tapper C, Cross and Tapper on Evidence (OUP 2010) 185, and subsequently and collectively referred to as *judicial directions*.

⁴ Crown Court Compendium (CCC) - *Specimen Directions to the Jury* published by the Judicial Studies Board and then the Judicial College and the *Crown Court Bench Book - Directing the Jury*, have been superseded by: Courts and Tribunals Judiciary, *Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2016) <<https://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/>> accessed 1 September 2016;

⁵ CCC (n 4) page 20.1 para 1 following *R v D* [2008] EWCA Crim 2557,

giving evidence, and to judge the evidence on its intrinsic merits'.⁶ However, judicial directions may only be provided to the jury if the admissible evidence is judicially recognised as potentially prejudicial.

In considering whether in child death cases mothering myths may have influenced the jury's interpretations of evidence of maternal behaviour,⁷ chapter five examines first the influences on judicial directions, and secondly the influences on jury decision making. Influences on judicial directions including formal guidance,⁸ advocacy, the evidential context, and judicial deference to experts are considered, as are influences on jury decision making including judicial directions, jury deference to experts, media coverage and mothering myths. The chapter does not address the current use of experts in rape trials to guide the jury in interpreting evidence of female behaviour in order to avoid prejudicial inferences because of rape myths acceptance.⁹ The possibility that experts could be similarly used in child death cases is addressed in chapter six.

5.1 Judicial directions: purpose and influences?

Without the trial transcripts it is not possible to gauge the actual extent to which juries were given guidance in child death cases, because directions may well have been given which were not questioned by the appellant and therefore not referenced in the appeal reports relied upon in this chapter. In addition, although it may have been helpful to be able to refer to the specific directions texts provided for trial judges in the child death cases, this chapter relies

⁶ *ibid* para 4 citing the Court of Appeal citing the Judicial Studies Board Benchbook 2010 in *R v Miller* [2010] EWCA Crim 1578.

⁷ For example not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour.

⁸ CCC (n 4).

⁹ Temkin (n 2) 293; Temkin (n 2) 57-63; Ellison L 'Promoting Effective Case-building in Rape Cases: A Comparative Perspective' [2007] Crim LR 691, 704; Office for Criminal Justice Reform (OCJR), 'Convicting Rapists and Protecting Victims –Justice for Victims of Rape, A Consultation Paper' (OCJR 2006); Norris S, 'At Last, The DPP are Confronting Some Toxic Rape Myths With Their Guidelines' *The Independent* (London, 29 January 2015); The Centre for Law, Gender and Sexuality, 'Response to the Office for Criminal Justice Reform's Consultation Paper: "Convicting Rapists and Protecting Victims of Rape – Justice for Victims of Rape"' (CLGS 2006); Ellison L, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 E & P 239.

upon the current CCC¹⁰ together with texts by leading evidence scholars¹¹ to inform the discussion about the purpose of and influences on judicial directions.

As reliance on exclusionary evidential rules has declined, the use of spoken and written judicial directions to the jury has increased,¹² to assist juries in handling evidence that may be potentially unreliable¹³ and to avoid the possibility of an unfair trial.¹⁴ However, despite increased reliance on judicial guidance for juries, the legal rules, according to Tapper, have ‘never been precisely formulated’.¹⁵ Tapper provides detailed legal rules derived from common law about the expectations of a trial judge, emphasising the complexity of judicial guidance and the consequent need for specimen directions to enable a fair trial.¹⁶ Directions and warnings may be given at any time regarding the inferences to be drawn from evidence received,¹⁷ and summing up is given at the end of submissions and cross-examination before juries retire to deliberate and reach a verdict.¹⁸ The summing up includes details of the charges, the facts that need to be proved, and explains the ‘prosecution burden and standard of proof’.¹⁹ Which particular element of judicial control provides the greatest impact is difficult to estimate as Tapper suggests, because ‘juries expect and receive considerable guidance with regard to the evidence submitted to them’.²⁰ Therefore, in this discussion judicial controls are for the most part, collectively referred to as judicial directions.

¹⁰ CCC (n 4).

¹¹ Roberts (n 3); Tapper (n 3); Munday R *Evidence* (7th and 8th edn OUP 2011 and 2015).

¹² Thomas C, *Are Juries Fair?* (Ministry of Justice Research Series 2010); Thomas C, ‘Avoiding the Perfect Storm of Juror Contempt’ (2013) *Crim L Rev* 483; research demonstrating an increase in juror comprehension when given written summaries of judicial directions.

¹³ Duff A, Farmer L and Marshall S et al, *The Trial on Trial* (Hart Publishing 2004) 136.

¹⁴ Article 6 (1) of the European Convention on Human Rights (ECHR) provides for the right to a fair trial whereby ‘In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

¹⁵ Tapper (n 3) 216.

¹⁶ *ibid* 216-218.

¹⁷ CCC (n 4) Part 1 Introduction Section 1-4 Timing of Directions of Law page 1-6.

¹⁸ Munday (n 11) 83.

¹⁹ Roberts (n 3) 83.

²⁰ Tapper (n 3) 215.

The overall purpose of judicial directions is to guide the jury in a balanced and public way.²¹ Where ‘potentially prejudicial evidence’²² has been admitted, which I suggest in child death cases included evidence of maternal behaviour,²³ the judge must ‘direct the jury on its potentially probative value, which is then for the jury to decide’.²⁴ Directions therefore aim for material to be perceived in a fair manner at trial, by the objective identification as to why evidence may be probative, i.e. not just because of common sense. The principle duty of the judge in Tapper’s words is to ‘put the defence fairly and adequately to the jury’,²⁵ and to ‘leave to the jury any defence that is raised’,²⁶ and further to ‘direct the jury on any other evidence, even if the defence has not raised it’.²⁷ This last rule raises the issue whether potentially prejudicial evidence will be raised in judicial directions, if no specific defence applied, and the defence failed to invite the judge to do so.²⁸

Judicial directions are also and importantly public indicators that potentially prejudicial evidence was identified, so that anyone can understand why a jury verdict has been given, even though juries do not need to give reasons for their decisions, a principle upheld by the ECtHR in *Taxquet*.²⁹ In the successful appeals in child death cases *Walker*³⁰ and *Hainey*,³¹ the

²¹ *ibid* 217 citing at n 489 *R v Lloyd* [2000] 2 Cr App Rep 355.

²² *ibid* citing at n 484 *R v Docherty* [1999] Cr App Rep 274.

²³ For example not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour.

²⁴ Tapper (n 3) 217 citing at n 485 *R v Bethelmie* London (The Times, 27 November 1995).

²⁵ *ibid* 216 citing at n 470 *R v Spencer* [1987] AC 128, [1986] 2 All ER 928.

²⁶ *ibid*.

²⁷ *ibid* 217 citing at n 481 *Franco v R* [2001] UKPC 38 (provocation) and *DPP v Bailey* [1995] 1 Cr App Rep 257 (self-defence) and *Shaw v R* [2001] UKPC 26, [2001] 1 WLR 1519 (special statutory defence); whatever the judge’s own view whether or not it would reasonably make any difference.

²⁸ See later the criticisms made of Clark’s defence counsel in *R v Clark (Sally) (Appeal against Conviction) (No 1)* CACD 2000 WL 1421196.

²⁹ *Taxquet v Belgium* (926/05) (2012) 54 EHRR 26.

³⁰ *R v Walker (Jennifer)* (High Court at Edinburgh, 7 April 2006); *Walker (Jennifer) v HM Advocate* [2011] HCJAC 51, 2011 S C L 55, paras 3, 4, 58 per the opinion of the court; Walker was charged with the culpable homicide of her infant child, who was born and later died in 1982. Although the infant’s death had been recorded as a SID, she was convicted in 2006 on the basis of historical and circumstantial but conflicting expert evidence. Subsequently, her case was referred to the High Court via the Scottish Criminal Cases Review Commission (SCCRC), and on appeal, her conviction was quashed. This case, involving a mother and conflicting expert evidence, was deemed by the Scottish Court to be ‘a miscarriage of justice’ and the basis of Walker’s appeal was that the jury was not adequately directed in how to assess the conflicting expert evidence.

courts stressed the need for proper judicial directions and summing up at trial particularly in relation to expert opinion. In *Henderson*³² also, Moses LJ submitted that judicial summing up was of vital importance so that ‘anyone concerned with an adverse verdict’³³ could understand how it had been reached, and further, to avoid a miscarriage of justice. Judicial directions have not only been advocated for cases involving expert opinion,³⁴ but also in cases in which hearsay evidence,³⁵ evidence of bad character such as similar fact evidence³⁶ and corroborative evidence³⁷ has been admitted.

In relation to the evidence of maternal behaviour in child death cases as previous chapters have indicated, categorising circumstantial behaviour evidence is problematic, whether as facts, non-medical evidence, non-forensic evidence, background evidence, character in its simplest form, or misconduct. How evidence is classified matters, because I suggest, unless evidence is recognised as being potentially prejudicial, (e.g. hearsay, bad character, expert opinion, previous sexual history in rape trials, corroborative), it is unlikely to be accompanied by judicial directions. In relation to evidence of female behaviour, the judge in rape trials may now give directions at any stage to balance the risk of fixed beliefs.³⁸ The reason for the directions is that ‘There is a real danger that juries will make and/or be invited by advocates

³¹ *R v Hainey (Kimberley Mary)* (High Court Glasgow 15 December 2011); *Hainey v HM Advocate No 7* [2013] HCJAC 47, [2014] J C 33, paras 2, 49, 53 per the opinion of the court; Hainey was convicted of the murder of her child following a prosecution that alleged she had ill-treated, neglected, and abandoned her child born in 2008. The child’s body was discovered in the mother’s flat in 2010. Hainey was successful in her appeal against conviction, even though there ‘was a great deal of circumstantial evidence about the appellant’s behaviour prior to, and after, the baby’s death’. The court considered that the trial judge had failed to direct the jury properly in relation to the medical and scientific expert evidence.

³² *R v Henderson* [2010] EWCA Crim 1269, 2010 2 Cr App R 24, paras 10, 74, 215 per Moses LJ; Henderson was an ‘admired’ registered childminder in whose care an 11 month old child collapsed suddenly, and died. She was convicted of manslaughter for causing the child’s death by shaking.

³³ *ibid* paras 10, 74, 215 per Moses LJ.

³⁴ CCC (n 4) Page 10-6 Expert Evidence.

³⁵ Roberts (n 3) 440 citing at n 322 *R v Z* [2009] 1 Cr App 34, [2009] EWCA Crim 20, to illustrate the need for trial judges who, having admitted hearsay, to provide directions to the jury to assess hearsay evidence carefully; CCC (n 4) Page 14-1 Hearsay.

³⁶ Roberts (n 3) 613 where ‘evidence of bad character is admitted, the judge’s direction is likely to be of the first importance ...’ citing *R v Edwards and Rowlands* [2006] 2 Cr App R 4, [2005] EWCA Crim 3244; CCC (n 4) 12.1 Bad Character.

³⁷ CCC (n 4) Part 10 Evidence General, Section 10-2 Corroboration Evidence Page 10-4 ‘Corroboration and the Special Need for Caution’.

³⁸ *ibid* Part 20 Sexual Offences Section 20.1 Sexual Assault: the Dangers of Assumptions page 20-1.

to make unwarranted assumptions',³⁹ which may be based on rape myths as discussed in chapter two.⁴⁰ In relation to evidence of maternal behaviour in child death cases however, there is a question whether the evidence of maternal behaviour that this thesis suggests may have been coloured by mothering myths,⁴¹ was judicially identified as potentially prejudicial, and consequently in need of judicial directions.

The CCC currently acknowledges that cases dependent upon circumstantial evidence, (such as I suggest child death cases), generate the most controversy and that 'specific directions will be required'.⁴² Further, that 'A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence: circumstantial evidence "works by cumulatively, in geometrical progression, eliminating other possibilities" (*DPP v Kilbourne*)⁴³ ...'.⁴⁴ As the CCC goes on to state, such circumstantial evidence includes for example 'opportunity, proximity to the critical events',⁴⁵ (as identified in child death cases), and 'scientific evidence',⁴⁶ amongst other factors. However, the CCC states, in cases reliant solely upon circumstantial evidence, (such as child death cases), the jury should be judicially directed that:

there is no direct evidence and the prosecution rely on ... circumstantial evidence.

That means different strands of evidence which do not directly prove that D is guilty

³⁹ *ibid* page 20.3 para 6 Directions.

⁴⁰ Lonsway KA and Fitzgerald LF 'Rape Myths: In Review' (1994) 18 *Psychol Women* 133; Gerger (n 2); Temkin (n 2); Cossins KA, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) *International Journal of Evidence & Proof* 74.

⁴¹ For example not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour.

⁴² CCC (n 4) Section 10-1 Circumstantial evidence page 10.1 para 1.

⁴³ [1973] AC 729 page 758 per Lord Simon.

⁴⁴ CCC (n 4) page 10-1 para 2.

⁴⁵ *ibid*.

⁴⁶ *ibid*.

but which do, say the prosecution, leave no doubt that D is guilty when they are drawn together'.⁴⁷

In such cases the judge should 'Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it',⁴⁸ and direct the jury how to interpret the evidence.⁴⁹ As will be discussed in this chapter, in the child death cases considered, although sufficient judicial summing up of scientific evidence, opportunity and proximity was given, there is no recorded summing up regarding the potentially prejudicial nature of circumstantial evidence of maternal behaviour,⁵⁰ nor relevant directions to the jury. It is therefore possible that the potentially prejudicial impact of such evidence was not brought to the jury's attention.

In addition, the CCC indicates in relation to its section on corroborative evidence,⁵¹ that in some cases (such as child death cases) where there is expert disagreement about the inferences to be drawn from post mortem findings, 'Supporting evidence independent of expert opinion may be required'.⁵² In such cases, it is up to the discretion of the judge as to whether directions may then be given to the jury to look to the supporting materials to assist in their deliberations. In *Cannings*⁵³ for example, such a direction was given, indicating that Hallet J may have considered that the evidence of maternal behaviour was helpful if not

⁴⁷ *ibid* page 10-1 para 8 (2).

⁴⁸ *ibid* page 10-1 para 8 (3).

⁴⁹ *ibid* page 10-1 para 9 (2) 'The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept. (3) However, the jury must not speculate or guess or make theories about matters, which in their view are not proved by any evidence. (4) It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty'.

⁵⁰ Including not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour, together referred to in this chapter as evidence of maternal behaviour.

⁵¹ CCC (n 4) section 10-2 page 10-4, para 1 'Corroborative evidence is relevant, admissible, and credible evidence independent of the source requiring corroboration, and which has the effect of implicating the accused'.

⁵² *ibid* page 10-6, para 5 (6) citing for example *R v Cannings* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Kai-Whitewind* [2005] EWCA Crim 1092.

⁵³ *Cannings* (n 52) para 166, 168, 170 per Judge LJ.

probative corroborative evidence but without balancing her comment, that the evidence may also have been potentially prejudicial. But, then again, Hallett J may have considered that the jury was entitled to hear such evidence in order to draw its own conclusions without the assistance of judicial directions, but this approach may not lead to transparent jury decisions, and four cases to illustrate this point are briefly discussed here.

Following Rose West's conviction for murder,⁵⁴ she appealed inter alia that the trial judge had wrongly admitted circumstantial evidence of her past sexual behaviour and misconduct.⁵⁵ Objections to the evidence were rejected by the Court of Appeal despite the court's recognition that some of the evidence was of 'borderline relevance',⁵⁶ because it was held, the jury were entitled to hear the 'evidence in its totality'.⁵⁷ Winter argues that the judicial decision to admit information about West's sexual behaviour was both gendered and prejudicial.⁵⁸ Further, in *Sawoniuk*,⁵⁹ extraneous misconduct evidence was admitted on the 'broader basis of background evidence'⁶⁰ and in *Mackie*,⁶¹ prejudicial evidence of misconduct was admitted which 'far outweighed the probative value ...'.⁶² Although in these cases, all three defendants were convicted, and perhaps rightly so, without judicial directions and warnings about the circumstantial evidence, jury deliberations may have been informed by biased beliefs, but there is no way of knowing how decisions were made. On occasion, therefore, damaging behaviour evidence of doubtful probative value may be admitted, and judicial directions and summing remain silent on the potentially prejudicial interpretations

⁵⁴ *R v West (Rosemary)* (Winchester CC, 22 November 1995, Mantell J).

⁵⁵ *R v West (Rosemary)* [1996] 2 Cr App R 374.

⁵⁶ *ibid* para 392 per Lord Taylor.

⁵⁷ *ibid* paras 375, 390, 391, 398 per Lord Taylor; this judicial reasoning echoes that in *R v Folbigg* [2005] NSWCCA 23, para 141 per Sully J; If the body of evidence as a whole including these factors (behaviour, diaries), were taken into account, her guilt was not according to Sully J at appeal, 'inherently incredible' see chapter four.

⁵⁸ Winter J, 'The Role of Gender in Judicial Decision-Making: Similar Fact Evidence, The Rose West Trial and Beyond' [2004] *International Journal of Evidence & Proof* 31, 45 the article highlights that the admission of female previous sexual history may be gendered for both complainants and defendants.

⁵⁹ *R v Sawoniuk* [2000] 2 Cr App R 220 CA relating to a prosecution for war crimes against Jewish prisoners.

⁶⁰ Roberts (n 3) 633 at n 213.

⁶¹ *R v Mackie* (1973) 57 Cr App R 453 relating to a charge of the manslaughter of the defendant's stepson.

⁶² Roberts (n 3) 634 n 214.

that may be made. Likewise, if behaviours of doubtful probative value are admitted in child death cases⁶³ which may give rise to prejudicial inferences, and judicial guidance is silent, then there is an issue as to how the jury should interpret such material and whether the juries may have interpreted such evidence using mothering myths.

Providing transparency through judicial directions in relation to admissible evidence of behaviour is as Duff suggests essential, in order to confirm publicly that the criminal justice system has done all it can to ensure that potentially problematic evidence has been accompanied by advice to the jury, as to how the evidence should be evaluated.⁶⁴ Judicial directions may therefore be perceived as a more visible method of identifying prejudicial evidence than admissibility hearings and the exclusion of evidence. If judicial directions are a means by which jury decisions may be later publicly justified, then admissibility decisions and judicial directions are events of great importance⁶⁵ because the appeal court will ‘scrutinise what the judge has said to the jury with considerable particularity’,⁶⁶ in deciding whether the defendant’s conviction is safe.

However, even though the aims of judicial directions are to provide jury guidance and to do so publicly, the influences on giving or not giving judicial directions may include a number of factors. Trial judges may consider that jurors should rely on their own common sense in interpreting such evidence,⁶⁷ and to prevent them from doing so would be to interfere with

⁶³ For example not calling an ambulance, not using an apnoea monitor, buying bottles of wine, going back to work, forgetting what time a husband returned home, or which cot a baby was found in, and attention seeking behaviour.

⁶⁴ Duff (n 13) 136; the word transparency is used here to mean knowing the scope of the evidence including judicial directions available to juries, and not to mean knowing how juries deliberated and decided, because juries do not give reasons for their verdicts; see section on jury decision making at page 27.

⁶⁵ Munday (n 11) 23 para 1.1, 1.5, 1.6.

⁶⁶ *ibid* para 1.5.

⁶⁷ *Boardman v DPP* [1975] AC 421, 453 citing ‘Professor Cross Evidence, 3rd ed., p. 316: ‘If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense’. (Hailsham LJ).

their role.⁶⁸ In addition, as Sir Sedley suggests a trial judge may believe a defendant to be guilty.⁶⁹ A judge ‘convinced of the guilt of the accused can give direction to a doubting jury, which is a work of Machiavellian art’.⁷⁰ Sedley has written that ‘Provided the judge has told the jury that they can disregard his views, the Court of Appeal will not interfere with a conviction based on a heavily weighted summing-up’,⁷¹ the subtlety of which may not appear on trial transcripts made as Sedley suggests, by ‘Deadly vocal inflections’.⁷² Accordingly, the influences on judicial directions are complex, and it is possible that there may also be drawbacks to some judicial directions.

5.1.1 *Judicial directions in child death cases*

A number of child death cases have been interrogated to see when and why judicial directions were given. Judicial directions formed a significant part of the appeal grounds, and support the premise that the appeal courts will examine carefully any judicial comments to the jury.⁷³ In *Clark*,⁷⁴ judicial directions were given to the jury in respect of similar fact evidence⁷⁵ and the use of statistics⁷⁶ but not in relation to Clark’s silence on advice during later police interviews and in court.⁷⁷ Clark appealed on five grounds⁷⁸ that: the judge was wrong not to have had a separate trial for each child’s death; the judge was wrong to permit the evidence surrounding one child’s death to be cross admissible to the other child’s death; the statistics provided by expert opinion were wrong and the judge failed to warn the jury of

⁶⁸ *R v Turner* [1974] QB 834 at 841.

⁶⁹ Sedley Sir S, *Ashes and Sparks Essays on Law and Justice* (CUP, 2011) 144.

⁷⁰ Sedley (n 69) 144.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Munday (n 11) 23 para 1.5.

⁷⁴ *R v Clark (Sally)* (Chester Crown Court, 9 November 1999).

⁷⁵ *Clark (No 1)* (n 28) paras 95-98 per Henry LJ.

⁷⁶ *ibid* paras 138, 144 per Henry LJ - At trial Professor Meadows was quoted as saying the odds of two infants dying from natural causes in one family were 1 in 73 million and those odds he suggested, were equivalent to placing a bet on a horse at the Grand National at odds of 80 to 1 for four consecutive years and winning; see also *R v Clark (Sally) (Appeal against Conviction) (No 2)* [2003] EWCA Crim 1020, [2003] 2 F C R 447 paras 96, 99 per Kay LJ.

⁷⁷ *Clark (No 1)* (n 28) paras 240-4 per Henry LJ.

⁷⁸ *ibid* para 78 per Henry LJ.

the risk of ‘prosecutor’s’ fallacy⁷⁹; fresh forensic evidence challenged the Crown’s pathologists’ findings; the judge failed to direct the jury about Clark’s silent behaviour in police interviews. Further, the appellant challenged the balance of the summing up suggesting that the trial judge had favoured the prosecution case.⁸⁰ Henry LJ rejected three grounds, but conceded two, the first of which related to Clark’s silence. Henry LJ accepted that Harrison J ‘should have gone on to direct the jury not to draw any adverse inference from the appellant’s “no comment” answers’.⁸¹ Henry LJ held that the judge ‘fell short of giving such a direction’⁸² but he did not consider that the lack of such a direction prejudiced Clark, nor rendered the conviction unsafe.⁸³

In relation to the second claim regarding a lack of directions on statistical evidence, Henry LJ considered the background in detail, but concluded by saying that ‘the introduction and use of statistics was never canvassed with the judge at any stage’⁸⁴ and that as far as he was aware, the prosecutor’s fallacy was never mentioned by the defence to Harrison J, and neither ‘was any objection taken to the admission of any evidence at trial’.⁸⁵ Further he stated, the defence complained ‘that the judge did not direct the jury “... to reject the Crown's erroneous reasoning”—but they did not draw the judge's attention to that reasoning and its errors’.⁸⁶

Following a detailed summary of the statistical evidence submitted by experts and prosecution counsel at trial, Henry LJ concluded that ‘there is some substance to the criticism

⁷⁹ The prosecutor’s fallacy as identified in *R v Deen*, Times, 10th January 1994 CA Case Analysis in relation to DNA evidence; ‘It was necessary to ask what the probability was that a defendant’s sample could match the crime sample given that he was innocent (match probability), and what the probability was of a defendant being innocent although his sample matched the crime sample (likelihood ratio). Giving the answer to the first question as the answer to the second is the “prosecutor’s fallacy”’; and see also Redmayne M, *Presenting Probabilities in Court: The DNA Experience* (2006-7) E and P 187, 190.

⁸⁰ *Clark (No 1)* (n 28) para 101 per Henry LJ.

⁸¹ *ibid* para 242 per Henry LJ.

⁸² *ibid*.

⁸³ *ibid* para 243 per Henry LJ.

⁸⁴ *ibid* para 163 per Henry LJ.

⁸⁵ *ibid* para 164 per Henry LJ.

⁸⁶ *ibid* para 168 per Henry LJ.

that the judge appeared to endorse the prosecution's erroneous approach in this particular',⁸⁷ but nevertheless, Henry LJ held that the case against Clark remained overwhelming.⁸⁸

It is possible that Henry LJ's conclusions may have contradicted the legal rule identified by Tapper, that a trial judge should 'direct the jury on any other evidence, even if the defence has not raised it'.⁸⁹ But, although Harrison J could have identified for the jury that the expert's statistical evidence was potentially flawed, he would have needed to know that it was unreliable and at the time, defence counsel held that knowledge.

5.1.2 Judicial directions: influenced by defence counsel?

Henry LJ's judgment indicates that in his view, the defence may have been responsible for judicial failures to direct and warn the jury appropriately both regarding Clark's silence and regarding the prosecution use of statistical evidence. Counsel he said had not invited the trial judge to 'direct the jury to ignore the evidence relating to Table 3.58 of the Study, nor to give any special direction in relation to it'.⁹⁰ Defence counsel may however be ill prepared to attack complex scientific data. Inequality of arms in relation to prosecution resources,⁹¹ may have led the defence to employ a 'defence expert either ... (lacking)... appropriate specialist qualifications or (who) failed to give sufficient time to making a proper assessment'.⁹² Notwithstanding possible resource based deficits, defence counsel may as Henry LJ hints and as some scholars argue, have been responsible in failing to identify fallacious opinions based

⁸⁷ *ibid* paras 169-184 per Henry LJ.

⁸⁸ *ibid* paras 181-183, 272-3 per Henry LJ.

⁸⁹ Tapper (n 3), 216 citing *Franco v R* [2001] UKPC 38 and *DPP v Bailey* [1995] 1 Cr App Rep 257.

⁹⁰ *Clark (No 1)* (n 28) para 131 per Henry LJ; Table 3.58 refers to a calculation made by the authors of a research study by Fleming P Blair P Bacon C et al, '*Sudden Unexpected Deaths in Infancy the CESDI SUDI Studies 1993-1996* (TSO 2000) 92 Table 3.58, that the probability of two SIDS deaths in one family matching the profile of the appellant were 1 in 73 million', although Professor Berry ... one of the four editors of the CESDI study had said in evidence that squaring the probability of one child dying of SIDS in a family (1 in 8,543 x 1 in 8,543) 'was an illegitimate over simplification' see *Clark (No 2)* (n 76) para 103 per Kay LJ.

⁹¹ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability* (Consultation Responses, Law Com No 190, 2009) paras 1.29, 1.75, 1.500, 1.80, 1.102.

⁹² Elks L, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (Justice 2008) 339, but this is unlikely given that at trial five experts testified for the prosecution and five for the defence.

upon unsound evidence,⁹³ particularly as the lead author of the CESDI SUDI paper from which the flawed statistics were quoted, had contacted the defence team in *Clark* to warn that the statistics were unreliable.⁹⁴ As Stone argues, the purpose of cross-examination by defence counsel is to challenge harmful evidence and raising a reasonable doubt⁹⁵ in the jury's mind is all that is required.⁹⁶ If defence counsel were unable to challenge either experts or their evidence effectively, even with sound advice, it is unlikely within such an evidential context, that they would have been any more effective in challenging and bringing to the judge's attention the potentially prejudicial effect of maternal behaviour in *Clark*. Accordingly, it is likely that at least in *Clark*, defence counsel failed to influence the direction and content of judicial guidance even though the opportunity was available.

It is outside the scope of this chapter to consider in detail the relationship between trial judges and defence counsel, and also who should be responsible for ensuring that a warning about potentially prejudicial evidence is included in judicial directions but there are two points to make here. The first is the need for judicial distance in order to avoid the possibility of judicial interventionism,⁹⁷ and the unlikelihood that a trial judge would include a warning or direction if objections had not been raised in or before defence counsel summing up.

Secondly, the CCC refers to the potential for judicial discussions with counsel prior to

⁹³ Dwyer D, 'Ethical Constraints on the Visualisation of Evidence at Trial' (2008), 11(1) Legal Ethics 85, 95-6 'the problems with Meadow's statistical evidence could readily have detected at trial' 97; Leader L and Schofield D, 'Madness in The Method: Potential Pitfalls in The Handling of Expert Evidence' (2006) Journal of Personal Injury Law 68; and more broadly Mason JK, 'Expert Evidence in the Adversarial System of Criminal Justice' (1986) 26 (1) Medicine, Science and the Law 8, 9 citing *Preece v HM Advocate* [1981] Crim LR 783 and *R v Abrol* (1982) (The Times, 14 July 1983) 3 in relation to the lack of legal challenge to the expert evidence by cross examination or in re-examination.

⁹⁴ Williams C, 'The Trouble with Paediatricians' [2010] Medical Law Review 389, 392.

⁹⁵ CCC (n 4) Page 5.1 Burden and Standard of Proof para 2, 'If an advocate has referred to "beyond reasonable doubt", the jury should be told that this means the same thing as being sure; para 3 If the jury ask for clarification of this, their question should be answered as shortly as possible. The jury might be told that "beyond reasonable doubt" means being sure so that they have no realistic doubts'.

⁹⁶ *Woolmington v DPP* [1935] AC 462, 481 per Viscount Sankey L C.

⁹⁷ *Jones v National Coal Board* [1957] 2 QB 55 per Lord Denning 'In the system of trial which we have evolved in this country the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large'; *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 per Lawton LJ the judge is 'like a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts, I must neither take part in it nor tell the players how to play'.

judicial directions being given, particularly in relation to directions in trials for sexual assault.⁹⁸ Accordingly, although most child death cases in this thesis occurred over ten years ago, it is likely that the responsibility to raise an issue of concern, whether on matters of expert evidence or maternal behaviour was at the discretion of defence counsel, in the same way that prosecution counsel may now challenge prejudicial interpretations of the feminine in rape trials,⁹⁹ albeit prosecutors are now supported by legislation and comprehensive judicial directions for use in sexual assault trials.¹⁰⁰

Defence inability to effectively challenge expert opinion, has I suggest been a feature of all the wrongful convictions in the child death cases in this thesis.¹⁰¹ But, expert evidence scholar Gary Edmond argues that defence advocacy in cases characterised by scientific opinion carries particular drawbacks not only because of limited resources, but also because of the way defence advocacy is approached.¹⁰² Responding to ‘speculative incriminating opinions’¹⁰³ using ‘relatively limited evidence ... and a much more constrained defence narrative’¹⁰⁴ may be ineffectual, as is using ‘rebuttal expert evidence’¹⁰⁵ instead of constructing a ‘comprehensive narrative or story’¹⁰⁶ that also relies on expert opinions as he suggests is the case for prosecuting counsel. Further, Edmond argues that defence advocacy

⁹⁸ CCC (n 4) Part 20 Page 20.1 Sexual Offences the Dangers of Assumptions para 1 regarding the need for judicial directions if appropriate to warn of the risk of stereotypes and assumptions, and at para 5 ‘This direction may be given at the outset of the case ... or as part of the summing up. Whenever it is given it is advisable to discuss the proposed direction with counsel ... Considerable care is needed to craft the direction to reflect the facts of the case... and to retain a balanced approach’

⁹⁹ Temkin (n 2) 130-131 Temkin and Krahe however have identified that doubts still exist whether prosecution counsel are effective in making such points.

¹⁰⁰ CCC (n 4) Page 20.1.

¹⁰¹ *Clark (No 2)* (n 76); *Cannings* (n 52); *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Patel (Trupti)* (Reading Crown Court June 11 2003); *R v Donna Anthony (Appeal against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001; *R v Al-Alas and Wray*, (Central Criminal Court, 9 December 2011); *R v Angela Gay, Ian Gay* [2006] EWCA Crim 820, 2006 WL 1078909.

¹⁰² Gary Edmond, ‘Is Reliability Sufficient? The Law Commission And Expert Evidence in International and Interdisciplinary Perspective: Part 1’ [2012] *International Journal of Evidence & Proof* 30, 51.

¹⁰³ Edmond (n 102) 49.

¹⁰⁴ *ibid* 50.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*.

may be too nuanced for the jury to ‘appreciate’,¹⁰⁷ with superficial cross-examination of experts concentrating on their credibility, and not on the substance of the evidence.¹⁰⁸

Such concerns about the ineffectiveness of the content and approach of defence arguments have been highlighted not only in *Clark* but also in other child death cases including *Holdsworth*¹⁰⁹ and *Underdown*.¹¹⁰ In *Holdsworth* the baby sitter of a child who died unexpectedly whilst in her care, was convicted of his murder. At trial, the prosecution case was accepted that she had caused the child’s death by a ‘blunt force head injury causing acute cerebral oedema’,¹¹¹ and her defence offered no evidence on her behalf.¹¹² At appeal however, fresh expert evidence was accepted resulting in her acquittal. Similarly in *Underdown*, a mother was convicted of murdering her two week old baby by shaking or striking him, causing a fractured skull which led to his death.¹¹³ Expert evidence at appeal however, showed that radiographic features interpreted as a skull fracture, were more likely to be a skull fissure of natural cause,¹¹⁴ and therefore the conviction was unsafe. The outcomes in both *Holdsworth* and *Underdown* lend support to concerns raised following *Clark* regarding defence argument effectiveness in wrongful convictions in child death cases. The point to be taken from these examples, is that judicial directions may have depended upon particular issues being raised by defence counsel. An inhibited defence is therefore unlikely to alert a trial judge either to flawed expert evidence, or in this context to the potentially prejudicial effect of maternal behaviour evidence. Consequently it is possible that a key influence on judicial directions, essential to balance a broad approach to the

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid* 51.

¹⁰⁹ *R v Holdsworth (Suzanne)* (Teesside Crown Court, 8 March 2005).

¹¹⁰ *R v Underdown (Nicky)* [2001] EWCA Crim 1556, 2001 WL 753325 CA (CD) para 8 per Connell J.

¹¹¹ *R v Holdsworth (Suzanne)* [2008] EWCA Crim 971, 2008 WL 1867253 paras 20 - 22 per Toulson LJ; Andrew Roberts, ‘Case Comment Expert Evidence: Murder - No Medical Evidence Called by Defence at Trial’ [2009] 3 Crim LR 195.

¹¹² *Holdsworth* (n 111) para 23 per Toulson LJ; Roberts (n 111).

¹¹³ *Underdown* (n 110) para 8 per Connell J.

¹¹⁴ *ibid* paras 9, 10, 14, 15, 21 per Connell J.

admissibility of evidence including maternal behaviour, was not grasped in some child death cases.

The discussion so far indicates, that the purpose of judicial directions is to summarise both prosecution and defence arguments equally and fairly and to balance potentially prejudicial effects of evidence perhaps permissively admitted. At times as shown in *Clark* this may not happen perhaps because a trial judge may be convinced by the evidence as a whole of the defendant's guilt, or because defence counsel failed to make appropriate points, or defence counsel may have unconsciously felt that Crown prosecution experts were right. The risk of advocate and judicial deference to experts may also have played a part in whether judicial directions were made.

5.1.3 *Judicial directions: influenced by judicial deference to experts?*

The possibility that judges may be deferential towards experts has been raised by academic and judicial commentators.¹¹⁵ Feminist legal scholars and some members of the judiciary have raised concerns that judicial deference to expert witnesses may hide judicial “common sense” beliefs of women's place in society,¹¹⁶ or even judicial unconscious stereotypes.¹¹⁷ Samuels cites Lord Sumption's concession that, ‘It would be foolish to pretend that [judges] were not occasionally influenced by unconscious stereotypes and perceptions of ability moulded by their own personal experiences.’¹¹⁸ Instead of taking an active approach towards expert evidence, as may be the case when experts from fields other than medicine give

¹¹⁵ Lord Woolf, ‘Are The Courts Excessively Deferential To The Medical Profession?’ (2001) 9 (1) Medical Law Review 5; Jonathan Montgomery, ‘Medicine Accountability, and Professionalism’ (1989) 16 (2) J Law & Soc 319; Jonathan Montgomery, *Healthcare Law* (2nd edn OUP 2003); Norrie K McK, ‘Medical Negligence: who sets the standard?’ (1985) 11 Journal of Medical Ethics 135; Szasz T, *The Theology of Medicine* (OUP 1979); Brazier M and Miola J, ‘Bye-Bye Bolam: A Medical Litigation Revolution?’ (2000) 8 (1) Medical Law Review 85.

¹¹⁶ Samuels H, ‘Judicial Deference and Feminist Method’ [2014] Public Law 512, 514.

¹¹⁷ *ibid* 515.

¹¹⁸ *ibid* citing at (n 78) Lord Sumption, ‘Home Truths about Judicial Diversity’ (Bar Council Reform Lecture 15 November 2012).

evidence, trial judges may be more deferential towards medical expert witnesses.¹¹⁹ The risk of deference is that as the Law Commission comment, the reliability of expert evidence cannot be guaranteed by an expert's 'seniority and standing',¹²⁰ and as the child death cases demonstrated, expert evidence at the 'boundaries of medical knowledge'¹²¹ can be highly unreliable leading to wrongful convictions. However, some medical experts may have been extended additional respect particularly if they had provided training seminars for the judiciary. Professor Meadow who gave evidence for the prosecution in a number of child death cases,¹²² was appointed as a special advisor to the Department of Health, and lectured judges and other court officials on the subject of infanticide and harm of children at the hands of their parents.¹²³ Although the extent of such influence is impossible to quantify,¹²⁴ reluctance to challenge expert witness evidence may have been understandably increased if the expert was a respected Government official.¹²⁵

For example in *Clark*, in relation to the circumstances of the child deaths, Professor Meadow identified for the prosecution argument that particular maternal behaviour evidence was probative;¹²⁶ this evidence was supported by the trial judge despite its lack of probative value, as later demonstrated by the second appeal hearing.

¹¹⁹ Brazier (n 115) citing at n 12 instances of 'robustness' towards professions other than medicine; Lord Woolf, 'Are the Courts Excessively Deferential to the Medical Profession?' (2001) 9 (1) Medical Law Review 5.

¹²⁰ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, (Law Com No 325, 2011) para 1.36.

¹²¹ Crown Court Benchbook Directing the Jury, (Judicial Studies Board 2010) page 153, citing *Cannings* (n 52); *R v Kai-Whitewind* [2005] 2 Cr App R 31, [2005] EWCA Crim 1092; *R. v Holdsworth (Suzanne)* [2008] EWCA Crim 971, 2008 WL 1867253; and *R v Harris and others* [2006] 1 Cr App R 5, [2005] EWCA Crim 1980.

¹²² Including *Clark (No 2)* (n 76); and *Anthony (No 2)* (n 101).

¹²³ HC Deb 11 February 2004, vol 417, col 1461W per Tim Loughton (question) and Solicitor-General (reply). The Solicitor General replied that lectures were given by Meadow on the topics of the Paediatric Witness and Paediatric Reports at seminars run by the JSB.

¹²⁴ HC Deb (n 123) MP's were concerned at the extent of expert influence on the judiciary and Tim Loughton questioned the Solicitor-General about the extent of Meadow's influence.

¹²⁵ HC Deb 13 January 2004, vol 709W Col 716W per Dr Ladyman (reply) at the time there were 50 advisors for the Department of Health.

¹²⁶ *Clark (No 1)* (n 28) para 7 per Henry LJ - including (2) they were each found by the appellant unconscious in the same room; (3) both were found at about the same time, shortly after having been fed; (4) the appellant had been alone with each child when he was discovered lifeless; (5) in each case Mr Clark was either away or about

In *Anthony*, the trial judge rejected the defence submission, that expert evidence from Professor Meadow was inadmissible on the grounds that Meadow believed that Anthony's behaviour amounted to MSbP. Professor Meadow was permitted to give evidence without reference to MSbP, but as in *Clark*, the basis for Professor Meadow's opinions although flawed were unassailable by defence counsel.¹²⁷ Consequently, the jury were not warned against descriptive beliefs that because Professor Meadow was a world expert on abusive and attention seeking behaviour in mothers, his presence made such a conclusion likely.¹²⁸

It is difficult to know how far one can extrapolate from these cases, involving one former and highly influential expert witness especially as no further similar cases have occurred. The point that I wish to illustrate however, is that judicial and possibly defence deference to respected experts who opine also on evidence of maternal behaviour, may be difficult to challenge for all the reasons suggested by Edmond. The possibility of judicial deference influencing judicial directions therefore remains.

5.1.4 Judicial directions: influenced by expert's gendered thinking?

There is another factor that may have influenced judicial directions in child death cases, which is the way medical experts may have viewed mothers as women. A number of feminist writers have challenged the gendered assumptions made by doctors. Doyal has suggested in early work that the 'medical model of women',¹²⁹ was based on Freudian thought¹³⁰ and as a result doctors considered women to be physically and therefore psychologically inferior.¹³¹ In addition, that many aspects of women's lives including childbirth and child rearing had

to go away and para 9 'Features identified by the prosecution expert, Professor Meadow, for an unnatural death as opposed to a SIDS death were applicable'.

¹²⁷ *Anthony (No 2)* (n 101) per Judge LJ surrounding the basis on which statements were made e.g. para 9 'He concluded that each death was typical of smothering'; para 68 'However, death soon after discharge from hospital in good health was found in many cases where a child had been killed'; para 69 "'Natural cot death has an incidence now of about 1 in 1,000, so the chance of natural cot death happening twice in a family is 1 in 1,000 times 1 in 1,000, which is 1 in 1,000,000. It is extraordinarily unlikely ...'".

¹²⁸ *R v Anthony (Appeal against Conviction) (No 1)* [2000] WL 989311; *Anthony (No 2)* (n 101).

¹²⁹ Doyal L and Pennell I, *The Political Economy of Health*, (Pluto Press 1987) 219.

¹³⁰ *ibid.*

¹³¹ *ibid.*

become medicalised.¹³² Certainly, in 1987, Doyal's observations were true to many women's experiences, but improvements in medical attitudes may have occurred. Marland has also charted the rise of medical practitioners as advisors of judges and juries on a 'woman's state of mind',¹³³ in child death cases. Doctors suggests Marland, have come to position themselves with an 'expertise superior to that of the legal profession',¹³⁴ in relation to non-medical issues such as 'family worries ... financial difficulties'¹³⁵ and even female character.¹³⁶

More strongly, Smart has argued that the criminal trial became a 'forum for the public expression and consolidation of adverse constructions of the feminine'.¹³⁷ And further Hunter et al cite Smart's argument that trial judges ceded 'power ... by deferring to medical or welfare "experts", effectively handing over decision making to these authorities, or incorporating "expert" knowledge as incontrovertible legal truth'.¹³⁸ That some judicial deference may have occurred in child death cases, and that medical experts such as Professor Meadow may have held fixed views about women and mothers are real possibilities. But both concerns are difficult to demonstrate, despite indications from titles of his scientific papers on difficult and unlikeable parents,¹³⁹ fictitious illness,¹⁴⁰ and mothers who kill their children,¹⁴¹ that he disliked mothers and from media reports that he disliked women.¹⁴² However, his

¹³² Doyal L, *What Makes Women Sick* (Macmillan Press, 1995) 24.

¹³³ Marland H, *Dangerous Motherhood Insanity and Childbirth in Victorian Britain* (Palgrave Connect 2004) 170.

¹³⁴ *ibid* 171.

¹³⁵ *ibid*.

¹³⁶ *ibid*.

¹³⁷ Smart C, 'Disruptive Bodies and Unruly Sex The Regulation of Reproduction and Sexuality in the Nineteenth Century' in Smart C, (ed) *Regulating Womanhood Historical Essays on Marriage Motherhood and Sexuality* (Routledge 1992) 17.

¹³⁸ Hunter R, Clare McGlyn, Erika Rackley, 'Feminist Judgements an Introduction' in Rosemary Hunter, Clare McGlyn, Erika Rackley (eds), *Feminist Judgements from Theory to Practise* (Hart Publishing 2010) 25 citing Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

¹³⁹ Meadow R, 'Difficult and unlikeable parents' (1992) 67 (6) Arch Dis Chil 697

¹⁴⁰ Meadow R, 'Fictitious epilepsy' (1984) 2 (8393) Lancet 25

¹⁴¹ Meadow R, 'Mothering to death' (1999) 80(4) Arch Dis Child 359

¹⁴² Cohen D, 'He Doesn't like Women' (The Evening Standard 23 January 2004) reporting Gillian Paterson Professor Meadow's first wife: <<http://www.msbp.com/Munchausendiscredited3.htm>> accessed 10 October 2012 reportedly citing Mrs Meadow saying 'In retrospect, though, the signs were there... He found it everywhere. He was over the top. He saw mothers with Munchhausen Syndrome by Proxy wherever he looked. I wish that somebody could have said to him Roy, they're not everywhere. They do exist, but they're rare. I wish

work may also, reasonably, have indicated real health care and paediatric concerns about delicate subjects such as problematic parents, which continue to be current,¹⁴³ and mothers who really do fabricate or exaggerate illness in a child, that results in unnecessary and invasive medical treatment.¹⁴⁴ Further, although most opprobrium has been directed at Professor Meadow for his part in *Clark and Anthony*, and rightly so, many more expert witnesses were involved in those and other child death cases.¹⁴⁵ However, although there is no conclusive proof, there are indications that fixed views about women held by expert witnesses may have influenced judicial decisions on what to include or exclude in their guidance for the jury.

5.1.5 Judicial directions: influenced by judicial gendered thinking or mothering myths?

An associated concern is that judicial fixed views about women may influence the way in which the judiciary formulate both their legal reasoning¹⁴⁶ and their jury guidance. Helena Kennedy observed that the treatment of women by the criminal justice system, ‘is constantly determined by the degree to which they conform to a non-legal mythology shared by judges, lawyers and jurors alike’.¹⁴⁷ Substantial criticism has built up over the content of judicial utterances in rape trials based upon fixed beliefs as illustrated by Temkin¹⁴⁸ and discussed in chapter two. Although the examples cited by Temkin may be viewed as clichés, the Canadian

somebody could have stopped him”. She went even further. “Roy is a misogynist”, she said baldly. “I don’t think he likes women”.”

¹⁴³ For example see the issues surrounding Charlotte Wyatt whose parents were perceived to be difficult to deal with (personal communication) *Portsmouth NHS Trust v Derek Wyatt, Charlotte Wyatt by her Guardian (CAFCASS) v Southampton NHS Trust* [2004] EWHC 2247 (Fam) 2004 WL 2246295.

¹⁴⁴ *X County Borough Council v ZS, DJW, KJW (the child) By His Guardian v GEM, CM* [2015] WL 10382713.

¹⁴⁵ *Cannings* (n 52) para 140 per Judge LJ citing Dr Ward Platt who relied upon the statistics in Fleming P, Bacon C, Blair P et al, *The CESDI SUDI Studies 1993-1996; Sudden Infant Deaths in Infancy* (Department of Health, 2000); *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *Patel* (n 101); *R v Al-Alas and Wray*, (Central Criminal Court, 9 December 2011); *Gay and Gay* (n 101).

¹⁴⁶ Smart C, *Law Crime and Sexuality* (Sage, London, 1998); Elvin J, ‘The Continuing Use of Problematic Sexual Stereotypes in Judicial Decision-Making’ (2010) 18 Fem L S 275; Wells C, ‘The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection’ (2004) Crim LR 88; Cunliffe E, *Murder Medicine and Motherhood* (Hart Publishing 2011); Hunter R (n 138) 25.

¹⁴⁷ Kennedy H, *Eye Was Framed Women and British Justice* (Vintage 1992) 1.

¹⁴⁸ Temkin (n 2) 7, citing at n 47 Lord Lane CJ in *R v Goodwin*, (1989) 11 Cr App R (S) 194, 196. 9, at n 315, in *The Times*, 3 July 1993 for example and several others.

Judicial Council is currently considering whether to remove a judge for his comments in 2014. He is reported as asking a 19 year old victim of sexual assault why she could not “‘just keep her knees together’”,¹⁴⁹ and further and unusually referring to her as the *accused*, before acquitting the defendant. Although this example is an anecdotal illustration of the types of judicial utterances cited by Temkin, it does not prove a pattern or general judicial approach. But it is possible that by analogy, judicial attitudes towards women and mothers may have influenced the content of jury directions in child death cases.

However such a notion is difficult to demonstrate clearly, in practice, based on judicial utterances. The comments attributed to Pitchers J in *Gay and Gay*¹⁵⁰ are the only gender critical comments made of a mother identified in these child death cases. At sentencing, Pitchers J dismissed Angela Gay as ‘intelligent enough’,¹⁵¹ but considered that she had ‘little real understanding or sympathy ...for the needs of a child like Christian’,¹⁵² and that she was ‘entirely selfish’.¹⁵³ The comments about Angela Gay as a mother are harsh, but, Pitchers J was as critical if not more so, in relation to the father, Ian Gay’s ill-advised comments expressing his frustration with Christian’s poor cognitive skills to social workers, and referring to Christian as a ‘vegetable and a zombie’.¹⁵⁴ In these comments, Pitchers J demonstrates his prescriptive beliefs about both maternal and parental behaviour. It is clear that although the Gays failed to grasp the extent of Christian’s needs, the court failed to recognise that the parents had no way of knowing that the child was so ill if, as the parents

¹⁴⁹ Although the defendant was later convicted; ‘Canadian Judge Faces Inquiry over Handling of Sex Assault Trial’ *London* (BBC News 7 September 2016) <<http://www.bbc.co.uk/news/world-us-canada-37293324>> accessed 7 September 2016.

¹⁵⁰ *Gay and Gay* (n 101).

¹⁵¹ ‘Couple who poisoned boy with salt’ *Daily Mail* (London, 13 January 2005) <<http://www.dailymail.co.uk/news/article-333998/Guilty-Couple-poisoned-boy-salt.html>> accessed 9 June 2015.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ ‘Couple Killed Boy By Force Feeding Him Salt’, (The Guardian, 13 January 2005) <<http://www.theguardian.com/society/2005/jan/13/childrenservices.childprotection>> accessed on 3 July 2015; Pitchers J is reported as saying at sentencing, that ‘It was “quite extraordinary” to describe a three-year-old child in this way’, and that the parents ‘became more upset and angry about his behaviour, which was in reality hardly out of the ordinary even for a child who had not had his difficult start’.

later alleged, the information had been withheld from them by social services.¹⁵⁵ Therefore in the circumstances, the parents reactions may I suggest have been predictable. If prescriptive beliefs were judicially held about Angela Gay as they appear to have been, in relation to her role as a mother and not with respect to her gender it is more likely that mothering myths and not gendered beliefs may have operated to influence judicial directions, but not by what was said, but by what was left unsaid.

The earlier discussion of *Clark* would support this conclusion about the absence of directions, and the treatment of maternal behaviour evidence in *Cannings* and *Anthony* also. As discussed in previous chapters, evidence of Canning's behaviour was admitted, but the appeal report is silent on judicial directions whether the maternal behaviour here argued to be potentially prejudicial, had any probative value.¹⁵⁶ The appeal report suggests that the 'extraneous'¹⁵⁷ evidence indicating that Cannings may have been 'responsible for the deaths of her children',¹⁵⁸ was 'counterbalanced',¹⁵⁹ by other extraneous evidence that she 'was a loving and caring mother without any unusual or troublesome personality or psychiatric problems'.¹⁶⁰ Therefore the court suggested, the extraneous evidence as a whole suggested that Cannings 'would not have harmed, let alone killed, them',¹⁶¹ and as a result, evidence of maternal behaviour could not have been responsible for the wrongful conviction.

Nevertheless, as Tapper indicates, if 'potentially prejudicial evidence has been admitted, the judge must direct the jury on its potential probative value, which is then for the jury to

¹⁵⁵ Hardy R, 'The Unending Nightmare: Ian and Angela Gay Speak Out' *Daily Mail* (London, 5 March 2007) <<http://www.dailymail.co.uk/news/article-440053/The-unending-nightmare-Ian-Angela-Gay-speak-out.html>> accessed 24 September 2013, Angela Gay blamed her local social services for failing to provide her with full medical information about her prospective adopted child; Christian one of three adopted siblings, had been born prematurely and taken into care at a year, following which it was reported he had a serious medical history and been admitted to hospital eight times in his first year; according to media reports Christian may have been suffering from hydrocephalus; prior to placement, the Gays asked about medical issues, and been told that there were none.

¹⁵⁶ *Cannings* (n 52) paras 164-171 per Judge LJ examine Hallet J's directions.

¹⁵⁷ *ibid* para 76 per Judge LJ.

¹⁵⁸ *ibid*.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid*.

¹⁶¹ *ibid*.

determine'.¹⁶² Consequently without publicly stated judicial guidance, which is absent, the basis for the jury decision lacks transparency. It is possible that based on Hallett's comments at sentencing, the lack of judicial directions were influenced by her descriptive belief that Cannings had committed infanticide,¹⁶³ which justified her decision not to make clear that the extraneous evidence as a whole had little probative value.

In contrast, in *Anthony* the mother's behaviour was admitted and deemed 'cogent and disturbing evidence ... which supported the allegations made against the appellant and her own account of events was inconsistent and at times self-contradictory'.¹⁶⁴ For example, evidence was admitted from one witness who suggested that Anthony was a 'hopeless mother',¹⁶⁵ and another who said Anthony showed little care for her sick son in hospital.¹⁶⁶ But, appeal reports are silent with respect to judicial warnings of the probative value of such potentially prejudicial 'cogent and disturbing',¹⁶⁷ evidence of maternal behaviour. The second appeal report indicates that the 'disturbing features about the appellant's behaviour',¹⁶⁸ were regarded as significant. Such an observation indicates that the trial judge may have considered that Anthony as a mother, had not behaved as she should have done, and her disturbing behaviour suggested that it was therefore likely that she might have smothered her two children. Mothering myths may therefore have justified the adverse decision not to make a judicial warning about probative value based on the potentially prejudicial maternal

¹⁶² Tapper (n 3) 217 citing at n 484 *R v Bethelmie, London* (The Times 27 November 1995).

¹⁶³ *Cannings* (n 52) 5 per Judge LJ "I have no doubt that for a woman like you to have committed the terrible acts of suffocating your own babies there must have been something seriously wrong with you. All the evidence indicates you wanted the children, and apart from these terrible incidents you cherished them, so in my layman's view, it is no coincidence that these events took place within weeks of your giving birth. It can, in my view, be the only explanation for why someone like you could have committed these acts when you have such a loving and supportive family."

¹⁶⁴ *Anthony (No 2)* (n 101) para 76 per Judge LJ.

¹⁶⁵ *ibid* para 21 per Judge LJ.

¹⁶⁶ *ibid* para 39 per Judge LJ.

¹⁶⁷ *ibid* para 76 per Judge LJ.

¹⁶⁸ *ibid* para 94 'the appellant herself was a "wholly unreliable informant"', and at para 97, 'Notwithstanding the presence of disturbing features about the appellant's behaviour and her account of events, we have concluded that if the evidence available in the unchallenged form in which it is available to us had been available at trial, the decision of the jury might well have been different' per Judge LJ.

behaviour evidence. Once expert opinions had been challenged however, the maternal behaviour evidence appeared far less compelling,¹⁶⁹ exposing both the lack of weight of the maternal behaviour evidence, but its significance at trial.

In conclusion, although it has not been possible to show that gendered judicial beliefs about the defendants as women influenced the making of judicial directions, it is possible to suggest that mothering myths may have influenced the failure to direct the jury in relation to the lack of probative value of maternal behaviour evidence in *Clark*, *Cannings*, *Anthony* and *Gay and Gay*. Consequently, it is possible that without judicial guidance juries may rely on their own beliefs to interpret evidence of maternal behaviour, with the result that wrongful convictions may be supported.

5.1.6 Judicial directions, rape myths and rape trials

This section aims to illustrate that judicial directions may be influential, both explicitly and implicitly. The possibility of rape myths influencing judicial reasoning and directions has been a sufficiently significant and public issue to require training for the judiciary¹⁷⁰ and specific specimen directions for cases of sexual assault, are provided by the CCC.¹⁷¹ Because of fixed beliefs that women might lie and invent false rape claims, judicial directions to the jury previously commenced with a warning.¹⁷² Judges were required to ‘warn the jury that it may not be safe to convict the defendant on the uncorroborated evidence of the victim’.¹⁷³ Further, previous sexual history was formerly admissible because it challenged a rape complainant’s credibility and or her consent. Legislation intended to balance the influence of rape myths on both judicial warnings and admissibility decisions¹⁷⁴ is now in force. However

¹⁶⁹ *ibid* para 96 per Judge LJ.

¹⁷⁰ Rumney PNS and Fenton RA ‘Judicial Training and Rape’ [2011] *Journal of Criminal Law* 473 Serious Sexual Offences Seminars (SSOS) are run by the Judicial College.

¹⁷¹ CCC (n 4) Page 20.1.

¹⁷² Lacey N, Wells C and Quick O, *Reconstructing Criminal Law* (4th edn (CUP 2010) 533.

¹⁷³ *ibid* prior to the Criminal Justice and Public Order Act (CJPOA) 1994 s 32 (the 1994 Act).

¹⁷⁴ Criminal Justice and Public Order Act (CJPOA) 1994 s 32 (the 1994 Act); Youth, Justice and Criminal Evidence Act 1999 s 41.

both the 1994 Act and s 41, may have contributed to the mutation of judicial directions into a more subtle approach, similar to that argued to occur in relation to mothering myths, based not upon what is said, but what is left unsaid. (It should however be acknowledged that judicial training and specimen directions may counter this argument).

Lacey has highlighted that where judges previously ruled sexual history inadmissible, defendants would appeal because they could argue the verdicts would have been in their favour had the evidence been admitted, and many were successful.¹⁷⁵ Despite s 41, the exclusion of such evidence may still give rise to an appeal that the inadmissibility ruling gave rise to an unfair trial for the defendant. In *R v A (No 2)*, the trial judge ruled that previous sexual history evidence was inadmissible;¹⁷⁶ the Court of Appeal allowed the defendant's appeal on the basis that the evidence was relevant to his belief in the complainant's consent and could be admitted,¹⁷⁷ although a judicial direction might still have been required at trial that it was not relevant to the issue of her actual consent. The Court of Appeal were however concerned that a judicial direction to that effect might be unfair, because Rose LJ considered previous sexual history was relevant to the issue of consent, as well as a belief in consent.¹⁷⁸ The issue of a *fair trial* then considered by the House of Lords resulted in a conclusion that previous sexual history would be permitted in the resumed trial in *R v A*,¹⁷⁹ that was arguably relevant to complainant consent and as Temkin suggests, unquestionably likely to be interpreted using rape myths.¹⁸⁰ Although this is one example only from within rape myth scholarship, the point that I would like to draw out of this relates to the question of judicial

¹⁷⁵ Lacey et al (n 172) 528.

¹⁷⁶ *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, 47.

¹⁷⁷ Under section 41(3) (a).

¹⁷⁸ *R v A (No 2)* (n 176) para II per Rose LJ.

¹⁷⁹ *ibid* para 69 per Lord Slynn 'The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention'.

¹⁸⁰ Temkin J, 'Sexual History Evidence – Beware the Backlash' [2003] Criminal Law Review 217, 233.

directions. If potentially prejudicial evidence of female behaviour is admitted, because it points in two directions at once, i.e. it can be perceived as both probative and not probative (of consent in this case), then judicial directions may no longer be given, leaving evidence to be interpreted by the jury using its own common sense and potentially rape myths. By analogy I suggest the same may occur in child death cases and mothering myths.

In concluding this first section that has sought to identify the influences on the making of judicial directions in child death cases, a number of factors are identified. These are the legal rules, formal guidance and advocacy particularly from defence counsel. Further, in relation to circumstantial evidence that is neither opinion nor hearsay, but behaviour evidence of uncertain probative value, the jury may be left to decide without judicial directions. Although further research may be required, it has not been possible to argue that gendered beliefs about women held either by the judiciary or by experts, or mothering myths clearly influence the making of judicial directions. But, I suggest that it may be possible to suggest that mothering myths may have an impact on the judiciary as indicated by the absence of directions and warnings. Further, judicial prescriptive and descriptive beliefs may be influenced by the broader context in child death cases including judicial deference to expert opinions.

It is possible that the lack of judicial directions about maternal behaviour indicates neither importance nor insignificance. But, it is also possible that without directions, the jury may have assumed first, that the prosecution would not have raised the evidence if it lacked probative value, and second that the defence had offered no objections in the child death cases that it was potentially prejudicial. As a result the absence of judicial directions may have reinforced a view, that the evidence of maternal behaviour was admitted for a purpose. As in *Cannings*, where Hallett J encouraged the jury to take a holistic view of all the

evidence,¹⁸¹ the jury may have done just that. The following section considers some of the influences on jury decision making in child death cases.

5.2 Jury decision making: what are the influences?

This section considers whether jury decision making in child death cases may have been influenced by mothering myths. In order to examine whether and how far that may have occurred, this section considers the contributions of other factors to the decision making process including bias, judicial directions, jury deference and media coverage.

Juries have not been required to provide the reasons for their decisions in this jurisdiction,¹⁸² an approach supported by the ECtHR in *Taxquet*; provided that the jury were guided by the judge, then the possibility of an unfair trial could be circumvented.¹⁸³ Jury secrecy has been supported on several grounds. Jurors need to feel confident that they can discuss a case in a confidential and unrestrained manner, free from the possibility of reprisals consequent on the publication of their conclusions, prejudices¹⁸⁴ or identities in the media.¹⁸⁵ Further, jurors need to be free from the later possibility of bribes e.g. from the media to divulge details of jury deliberations,¹⁸⁶ so that *trial by media* is averted.¹⁸⁷ Secrecy is considered to contribute

¹⁸¹ And see *Folbigg* chapter four.

¹⁸² Lord Reed, 'The Confidentiality of Jury Deliberations' 36th Upjohn Lecture 2002, published on line [2010] 37 (1) *The Law Teacher* 1, 5.

¹⁸³ *Taxquet* (n 29).

¹⁸⁴ Quinn K, 'Jury Bias and the European Convention on Human Rights: a Well-kept Secret' [2004] *Crim LR* 998, 999 citing at n 3 and 4, the possibility that juries exhibit one or more of four types of prejudice, in particular 'generic prejudice include racial and ethnic prejudice, prejudice against the police and prejudice against complainants in sexual cases' from Vidmar N, 'Pretrial Prejudice in Canada: a Comparative Perspective on the Criminal Jury' (1996) 79 *Judicature* 249; Vidmar N, 'Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials' (1997) 21 *Law and Human Behavior* 5.

¹⁸⁵ Reed (n 182) 1, 2.

¹⁸⁶ In contravention of S 8 Contempt of Court Act 1981 'it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'; Juror conduct is now covered by modifications to the Juries Act 1974, within Criminal Justice and Courts Act 2015 ss 20 A – 20 G, following reports from Law Commission, *Contempt of Court (1): Juror Misconduct and Internet Publications* (Law Com No 340, 2013) and Law Commission, *Contempt of Court: Scandalising the Court* (Law Com No 335, 2012); s 8 CCA is replaced by ss 20 D-E in particular.

¹⁸⁷ Reed (n 182) 1, 3-4.

to public support for the jury system,¹⁸⁸ and a majority of jurors (82%) interviewed post-verdict in a 2010 research project, supported jury secrecy.¹⁸⁹ There is a risk, however that some jurors may have a variety of prejudices,¹⁹⁰ and their decisions may as a result be influenced by their fixed beliefs.¹⁹¹ For example, multicultural and race bias scholarship suggests that jurors make decisions using prejudice and their own fixed beliefs in cases involving defendants of different race,¹⁹² and rape myth scholarship suggests also that jurors rely on rape myths in order to interpret evidence of female behaviour in cases involving women rape complainants.¹⁹³

Further, the recent inclusion of a *prohibited conduct* clause in new legislation, acknowledges that bias (such as generic prejudice which includes prejudice against rape complainants)¹⁹⁴ is a real possibility in jury trials,¹⁹⁵ that can lead to perceptions of unfair trials if not the

¹⁸⁸ *R v Mirza* [2004] UKHL 2, [2004] 2 Cr App R 8, 112 per Lord Steyn; *Seckerson v United Kingdom* (2012) 54 EHRR SE19, 221 per Lech Garlicki P.

¹⁸⁹ Thomas (n 12) 39.

¹⁹⁰ *R v Abdroikov* [2007] UKHL 37 para 34 per Lord Rodger of Earlsferry who suggested that the ‘the jury system operates, not because those who serve are free from prejudice, but despite the fact that many of them will harbour prejudices of various kinds when they enter the jury box’.

¹⁹¹ Fitzpatrick P, ‘the British Jury: An Argument for the Reconstruction of the Little Parliament’ [2010] Cambridge Student Law Review 1, 2, 3, 9, 12, 13.

¹⁹² King NJ, ‘The American Criminal Jury’ (1999) 62(2) Law and Contemporary Problems 41, 55; Deosaran R, ‘The Jury System in a Post-Colonial Multi-Racial Society: Problems of Bias’ (1981) 21(4) British Journal of Criminology 305, 312; Lawrence C III, ‘Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”’ (2008) 40 Connecticut Law Review 931, 960; Howlin N, ‘Multiculturalism, representation and integration: citizenship requirements for jury service’ [2012] Dublin University Law Journal 149; Daly G and Pattenden R, ‘Racial Bias and the English Criminal Trial Jury (2005) 64 (3) CLJ 678, ‘reporting 15 cases with claims of racist remarks made during deliberations, although the racial composition of the jury was unknown in 10 of the cases, was all-white in three cases and racially mixed in two cases’.

¹⁹³ Burt MR, ‘Cultural Myths and Supports of Rape’ (1980) 38 J Pers Soc Psychol 217, 228; Lonsway KA and Fitzgerald LF ‘Rape Myths: In Review’ (1994) 18 Psychol Women 133; Gerger (n 2); Temkin (n 2); Ellison L, ‘Closing the Credibility Gap’ (n 9); Ellison L, ‘Exploring Mock Jurors’ Assessments of Complainant Credibility’ [2009] 49 (2) Br J Criminol 202-203; Finch E, Munro VE, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study’ (2005) 45 (1) Br J Criminol 25; Lees S, *Carnal Knowledge Rape on Trial* (Hamish Hamilton 1996); Cossins (n 40).

¹⁹⁴ Quinn (184) 999 citing at (n 4) the possibility that juries exhibit one or more of four types of prejudice, in particular ‘generic prejudice include racial and ethnic prejudice, prejudice against the police and prejudice against complainants in sexual cases’ from Constable M, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (University of Chicago Press, 1984) 18.

¹⁹⁵ S 20 C Criminal Justice and Courts Act 2015 on prohibited conduct ‘(1) It is an offence for a member of a jury that tries an issue in a case before a court intentionally to engage in prohibited conduct during the trial period ...’ and (2) ‘conduct from which it may reasonably be concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue’.

potential collapse of trials.¹⁹⁶ Smith suggests that the prohibited conduct clause is the result of cases such as *Davey*,¹⁹⁷ in which a juror communicated their intention to decide the charges against a person accused of sexual offences against a child, using their own fixed and prejudicial views.¹⁹⁸ The possibility that juror misconduct may lead to a successful appeal finding of an unfair trial of a rightly convicted person, has led to increased research into jury deliberations,¹⁹⁹ and legislative change,²⁰⁰ particularly following juror use of the internet for communications and searches. In addition, jurors in sexual assault cases may be provided with directions from the current CCC, because ‘There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this’.²⁰¹

The possibility of jury bias in the context of Art 6 requirements for a fair trial has been considered by Quinn.²⁰² ‘[S]ubjective bias, requires consideration of whether the judge or tribunal is actually biased and ... objective bias, concerns the issue of whether adequate safeguards have been put in place to eliminate any legitimate doubts as to the partiality of the tribunal’.²⁰³ The ECtHR, records Quinn, states in *Sander v UK* that it is of:

Fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused.

¹⁹⁶ HC Deb col. 406 (March 25, 2014) Per Vara S.

¹⁹⁷ *Attorney General v Davey* [2013] EWHC 2317 (Admin); [2014] 1 Cr App R 1, the juror’s communications read: ‘Woowow I wasn’t expecting to be in a jury Deciding a paedophile’s fate, I’ve always wanted to Fuck up a paedophile & now I’m within the law!’.

¹⁹⁸ Smith ATH, ‘Repositioning The Law of Contempt: The Criminal Justice and Courts Act 2015’ [2015] Criminal Law Review 845

¹⁹⁹ Thomas (n 12); Taylor N and Denyer R, ‘Judicial Management of Juror Impropriety’ (2014) 78 JCL 43, 53; Horan J, *Juries in the 21st Century* (Federation Press, 2013).

²⁰⁰ The Juries Act 1974 has been modified by sections within Criminal Justice and Courts Act 2015 ss 20A – 20G.

²⁰¹ CCC (n 4) Page 20-1.

²⁰² Quinn (184).

²⁰³ *ibid* 999 citing at n 6 *Incal v Turkey* (1998) 29 EHRR 449.

To that end it has constantly stressed that a tribunal including a jury, must be impartial from a subjective as well as an objective point of view.²⁰⁴

The test for bias, is whether ‘a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased’.²⁰⁵

Quinn suggests that for the House of Lords, the key issue in relation to jury bias as considered in *Lawal* was whether the public perceived unconscious bias in jury decision-making.²⁰⁶ However, if this is the case, as Quinn suggests there is a problem if the bias ‘is of a kind that does not cause the public concern’,²⁰⁷ and such a possibility may affect trials in which defendants are considered to be rightly convicted, or acquitted, whether rape trials or child death cases.

Although cases involving bias may be numerically and statistically few, there may be sufficient to indicate that even though both racial and gender biases may be increasingly hidden,²⁰⁸ jury biases exist.²⁰⁹ A respected study by Thomas however, indicates that there is ‘little evidence to show that juries are not fair’.²¹⁰ Conviction rates in rape trials were found to be higher than anticipated (55%), despite the offence of rape being ‘widely perceived and claimed to have a very low jury conviction rate’²¹¹ because of ‘jurors’ prejudicial attitudes towards female complainants’.²¹² The Thomas study therefore challenges the expected conclusion for jury decision making in rape trials, that there is a ‘general jury bias against

²⁰⁴ *ibid* 1000-1001 citing at n 7 *Sander v UK* (2001) 31 EHRR 44 at para 22 per Lord Steyn.

²⁰⁵ *ibid* 1001 citing at (n 11 and 22) *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 para 22 per Lord Steyn.

²⁰⁶ *ibid* 999 citing at n 6 *Incal v Turkey* (1998) 29 EHRR 449.

²⁰⁷ *ibid*.

²⁰⁸ Lawrence (n 192) 960.

²⁰⁹ See Quinn (184) 1002 for discussion of cases involving racist juror comments and the possibility of juror bias in *Gregory v United Kingdom* (1997) 25 EHRR 577 and *Sander v United Kingdom*, (2001) 31 EHRR 44 and *R v Connor and Mirza*, [2004] 1 AC 1118.

²¹⁰ Thomas (n 12) i (the Thomas study).

²¹¹ *ibid* 31 citing Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008).

²¹² *ibid*.

female complainants'.²¹³ What is not known for this context, is whether the higher conviction rate was due to the receipt of judicial directions along the lines of the current CCC or not.²¹⁴ But, Thomas also found that 'Jury conviction rates for rape vary according to the gender and age of the complainant, with high conviction rates for some female complainants and low conviction rates for some male complainants'.²¹⁵ Conviction rates for trials involving females 13-15 years of age were high, (62%), but in those relating to females over 16 were lower, (47%).²¹⁶ This Thomas suggests indicates that 'a jury's propensity to convict or acquit in rape cases is not necessarily due to juror attitudes to female complainants',²¹⁷ or jury failures to convict in rape cases.

Nevertheless, I suggest a possibility that has not been ruled out from the conclusions that could be drawn from the data, is that although a generalised prejudicial approach has not been shown to be statistically significant, the age differences of rape complainants associated with conviction rates, point to the risk that RMA may have been present. For example, in relation to girls over the age of 16, and the issue that consent may have been perceived as more likely. Further, although the possibility that proving rape in trials which 'hinge on juries believing one person's version of events over another's (Temkin & Krahe, 2008)',²¹⁸ was discounted in the Thomas study, such an option I suggest must surely be a possibility in adversarial trials for rape. In addition, I suggest that if jury uncertainty occurs and is accompanied by fixed beliefs, where the latter is stronger, an acquittal may be more likely (in rape trials). By analogy, if both rape trials and child death trials involve evidence of female behaviour and fixed or sexist beliefs may apply to each equally, then in child death cases it is possible that

²¹³ *ibid* 32 Figure 3.13.

²¹⁴ *ibid* i 'The research used a multi-method approach to examine jury fairness; 1) case simulation with real juries at Crown Courts (involving 797 jurors on 68 juries); 2) large-scale analysis of all actual jury verdicts in 2006–08 (over 68,000 verdicts); 3) post-verdict survey of jurors (668 jurors in 62 cases).

²¹⁵ *ibid* v.

²¹⁶ *ibid* 32.

²¹⁷ *ibid*.

²¹⁸ *ibid*.

fixed beliefs may provide certainty in child death cases, where expert evidence for example creates uncertainty.

The research into juror decision making in situations involving both rape and intoxication, carried out by Finch and Munro supports the view that jurors (focus groups and simulated trials) would consider ‘numerous extra-legal factors when reaching a decision’,²¹⁹ including rape myths.²²⁰ Further, but taking a different approach, Ward’s conclusions support the view that decision making in court relies not only on evidence, but on ‘weak internalism’,²²¹ where internalism is defined as ‘a view that a true belief can be counted as knowledge, if it is justified by a reason accessible to the person who holds the belief’.²²² Unlike externalist beliefs, in this context, the holder of the internalist belief has access to reasons for the belief, but the reasons, perceptions, myths or prejudices, need not be publicly expressed, nor arrived at by a reliable process.

A further consideration in seeking to understand whether jurors make decisions rationally, are the findings in the Thomas study relating to whether bias based on race or gender could be detectable in jury outcomes. The findings suggested that all-white juries did not demonstrate a higher tendency to convict either BME or white defendants,²²³ indicating that although bias may be held, beliefs did not necessarily translate into an identifiable bias in conviction rates suggesting support for Newcombe et al’s research discussed in chapter two.²²⁴

In concluding a brief consideration of bias in jury decision making, I suggest that although the Thomas study failed to detect indications of bias in jury decision making, related to

²¹⁹ Finch E and Munro VE, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study’ (2005) 45 (1) Br J Criminol 25, 29, 33, 34, 37; Finch E and Munro VE ‘The Sexual Offences Act 2003: intoxicated consent and drug assisted rape revisited’ [2004] Crim L Rev 789.

²²⁰ Finch and Munro (n 219) ‘Juror Stereotypes’ 26, 29, 37.

²²¹ Ward T, ‘English Law’s Epistemology of Expert Testimony’ (2006) 33 (4) J of Law and Society 572.

²²² *ibid.*

²²³ Thomas (n 12) ii; BME – black and minority ethnicity.

²²⁴ Newcombe PA, Eynde J, Van Den, Hafner D et al, ‘Attributions of Responsibility for Rape: Differences across Familiarity of Situation, Gender, and Acceptance of Rape Myths’ (2008) 38(7) Journal of Applied Social Psychology 1736.

ethnicity,²²⁵ or gender in rape trials, the possibility that fixed beliefs such as RMA are operative remains. It may be that further jury research is needed in order to detect the subtlety with which fixed beliefs may be held, as highlighted in the works of Lawrence and Gerger in chapter two.²²⁶ The following section discusses the influence of judicial guidance on jury decision making.

5.2.1 Jury decision-making: influenced by judicial directions?

Research into juror behaviour during rape trial role-play by the OCJR, has suggested that judicial directions could be very persuasive on juror decision making in rape trials.²²⁷ The following section explores this possibility in more detail. The Thomas study suggests that ‘almost all jurors felt they had little difficulty understanding judges’ legal directions’,²²⁸ however ‘... there has been no empirical research examining jurors’ actual comprehension of judicial directions’.²²⁹ Thomas’s research suggests that only a minority of jurors (31%) understood oral ‘judicial directions fully in the legal terms used by the judge’,²³⁰ although written directions had a much higher level of comprehension.²³¹ In support of this finding Henderson et al found that juries do not follow oral judicial directions because they do not understand them, even though they may think that they do.²³² Notwithstanding such concerns about the level of juror competence, Roberts and Zuckerman suggest that judicial directions that appear to ‘contradict common sense reasoning’²³³ may fail to engage either juror comprehension or sympathy. Accordingly, although potentially prejudicial evidence may be

²²⁵ Thomas C, *Exposing the Myths of Jury Service* [2008] *Criminal Law Review* 415, 430 ‘Despite the fact that some jurors did show bias towards defendants based on race, the verdicts of the juries on which these jurors sat did not discriminate against defendants based on race’.

²²⁶ Gerger (n 2) 424-425 citing Swim JK, Aikin KJ, Hall WS, Hunter BA ‘Sexism and Racism: Oldfashioned and Modern Prejudice’ 1995 68 *J Pers Soc Psychol* 199; Lawrence (n 192), 960.

²²⁷ OCJR ‘Convicting Rapists’ (n 9) 17 citing British Psychological Society research carried out using role play.

²²⁸ Thomas (n 12) 3 35, citing Zander M and Henderson P, *Royal Commission on Criminal Justice Research Study No 19* (1993) (Crown Court Study HMSO 1993).

²²⁹ *ibid.*

²³⁰ *ibid* vi.

²³¹ *ibid*; CCC (n 4) Part 1 Introduction Section 1-5 Written Directions and Routes to Verdict page 1-7.

²³² Henderson E and Harvey D, ‘Myth-Busting in Sex Trials: Judicial Directions or Expert Evidence?’ [2015] *Archbold Review* 5 citing at n 7 MacDonald E and Tinsley Y (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (Victoria U Press, 2011) 237.

²³³ Roberts (n 3), *Criminal Evidence* (OUP 2010) 634.

interpreted by jurors' fixed beliefs, if jurors understand the evidence such as maternal behaviour and can make sense of it using their own beliefs, judicial directions that contradict jury inferences may risk alienating the jury, even though their common sense reasoning may encompass fixed beliefs or mothering myths. The provision of judicial directions in relation to behaviour may therefore carry risks.

But, the CCC states that both 'prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s); otherwise the trial cannot be fair'.²³⁴

Although this stipulation is made in relation to the need for jury members not to consult outside sources to inform their decision making, the principle is that a fair trial is one in which the evidence used to convict is known. As the previous section argues, without identification of the particular factors to be taken into consideration by the jury using public judicial directions, the transparency of a jury verdict may be in doubt. Despite the need for clarity however, the jury is entitled to take all the evidence into consideration in their deliberations as emphasised in *Cannings*.²³⁵ Hallett J provided directions to the jury asking them to look at the entirety of the evidence and the burden of proof on the prosecution,²³⁶ and the appeal court did not fault her directions nor find them the cause of an unsafe conviction.²³⁷ Consequently, even though clear unambiguous judicial directions regarding for example expert evidence of coincidence are given, as in *Cannings*, the outcome may not be as expected.

Although it is tempting to assume that each jury properly directed would make consistent decisions, the verdicts in *Cannings* and in *Patel*,²³⁸ were reversed, although both received

²³⁴ CCC (n 4) page 3-3 para 12 (2).

²³⁵ *Cannings* (n 52).

²³⁶ *ibid* para 166, 168, 170 Judge LJ.

²³⁷ *ibid* para 171 Judge LJ.

²³⁸ *Patel* (n 101) Patel was charged, but acquitted of causing the deaths of her three children. The trial is referred to and cited in *Cannings* (n 52) at paras 15, 22, 164, 165, 171 per Judge LJ. Although the prosecution argued that Patel had smothered her children, Jack J directed the jury that just because three deaths occurred, the

very similar judicial directions.²³⁹ The possibility therefore exists that if judicial directions are required to be balanced, favouring neither the prosecution nor the defence, the jury fails to be guided by judicial directions and seeks guidance in other sources, including heuristics²⁴⁰ as suggested in chapter two, their own fixed beliefs, beliefs of other jurors,²⁴¹ jury deference to experts, or media reports.²⁴² Moreover, as the appeal court suggested in *Cannings*, that the jury may have felt ‘inadvertently, unconsciously’²⁴³ that if no unequivocal reason for the deaths could be found, then, ‘the Crown’s case must be right’.²⁴⁴ Although this chapter has focussed on judicial directions as the means by which potentially prejudicial evidence of maternal behaviour may be portrayed in a balanced way, I suggest that judicial directions in respect of behaviour evidence in child death cases, played an insignificant role. The absence of judicial directions may be significant therefore, by indicating that the jury may rely on extra-legal factors such as fixed beliefs, common sense, and perhaps jury deference is also a factor.

5.2.2 Jury decision-making: influenced by juror deference?

Juror deference to expert opinion has been suggested as a reason for some wrongful convictions in child death cases, which are characterised by deep disagreements between experts. Within such a complex evidential context,²⁴⁵ Blom-Cooper suggests that jurors may lack the competence to adjudicate experts’ disagreements.²⁴⁶ In addition respected scientists

conclusion was not ‘more likely that the causes are unnatural ... That he held was a ‘dangerous approach’ see *Cannings* (n 52) para 165 per Judge LJ.

²³⁹ Blom-Cooper L and Miles T, *With Malice Aforethought* (Hart Publishing 2004) 83.

²⁴⁰ Hastie R and Dawes RM, *Rational Choice in an Uncertain World* (2nd edn, Sage Publications, 2010) 88; Beach LR and Connolly T, *The Psychology of Decision Making People in Organisations* (2nd edn, Sage Publications, 2005) 82; Temkin (n 2) 48-9; Hunter J, ‘Publication Review Character Evidence in the Criminal Trial’ (OUP, 2015), in (2016) *International Journal of Evidence & Proof* 162, 170.

²⁴¹ Ward (n 221) ‘English Law’s Epistemology’.

²⁴² For example, the acquittal at appeal in *Cannings* (n 52) may have played a part in Patel’s acquittal see *Cannings* (n 52) para 164 per Judge LJ.

²⁴³ *Cannings* (n 52) para 170 Judge LJ.

²⁴⁴ *ibid.*

²⁴⁵ As for example in *Cannings* (n 52) and see CCC (n 4) 10.6, 10.10 drawing attention to the need for supporting material, and extra care for summing up in cases of serious expert disagreement.

²⁴⁶ Blom-Cooper (n 239) 74 citing at n 1 James Fitzjames Stephen *Trial by Jury and the Evidence of Experts* (Papers of the Juridical Society, 1858-1863) Vol 1 Paper XIV, at 236 ‘Few spectacles it may be said, can be

consider that juries are unable to ‘differentiate between valid and flawed methodology’,²⁴⁷ particularly as the Law Commission noted, when complex scientific evidence is presented.²⁴⁸ Nevertheless, Wilson argues that based on empirical research, juries do comprehend expert evidence,²⁴⁹ and further that the perception of jury gullibility may be ill founded. However, it is possible that as Redmayne suggests, in particularly complex cases, unless a jury member has specialist knowledge already, the jury may be unable to decide which expert opinions may be flawed and which reliable.²⁵⁰ The Law Commission has suggested that the jury’s ‘insufficient understanding of the limitations of ... scientific evidence...’²⁵¹ may lead them to ‘assume that just because an expert’s evidence is presented as “scientific” it may be taken to be reliable’.²⁵² However, a further possibility that would perhaps benefit from further research is the suggestion that poor understanding, preparation and presentation of expert evidence in court by advocacy teams, is a reason why juries have difficulty in deciding between competing sets of evidence.²⁵³

In any event, Redmayne suggests that when complex scientific evidence is presented, ‘jurors shift their focus and rely on peripheral indicia of reliability such as the expert’s qualifications

more absurd and incongruous than that of a jury composed of twelve persons who, without any previous scientific knowledge or training, are suddenly called upon to adjudicate in controversies in which the most eminent scientific men flatly contradict each other’s assertions’.

²⁴⁷ Ayala FJ, Black B and Saffran-Brinks C, ‘Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge’ (1994) 72 Texas Law Review 715, 789; Kovera MB et al, ‘Assessment of the Commonsense Psychology Underlying Daubert’ (2002) 8 Psychology, Public Policy and Law 180, 185, 189-191.

²⁴⁸ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability* (Consultation Paper, Law Com No 190, 2009) para 2.8.

²⁴⁹ Wilson A, ‘Expert Testimony in the Dock’ [2005] JCL 330, citing Mathews R, Hancock L and Briggs D, ‘Jurors’ Perceptions, Understanding, Confidence And Satisfaction In The Jury System: A Study In Six Courts’ (Home Office Online Report 2004/2005) 39 available at <<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf>> accessed on 7 May 2013.

²⁵⁰ Redmayne M, *Expert Evidence and Criminal Justice* (OUP 2001) 111.

²⁵¹ Law Commission, *The Admissibility Of Expert Evidence In Criminal Proceedings In England And Wales A New Approach to the Determination of Evidentiary Reliability* (Consultation Paper Law Com No 190, 2009) citing at (n 5) Ayala et al (n 246) 789.

²⁵² *ibid.*

²⁵³ Wilson (n 249).

or demeanour',²⁵⁴ instead of assessing the true weight of the evidence in its entirety. Redmayne proposed that juries may 'give undue weight to unreliable expert evidence simply because it appears to corroborate other evidence',²⁵⁵ which could be female behaviour. Hence a self-assured demeanour may be more likely to command confidence in court²⁵⁶ by leaving as 'much of an impression on the jury as what was actually said'.²⁵⁷ Mason suggests that consequently a jury may be more likely to believe an 'expert witness who has become something of a good advocate for his or her cause, as against the expert witness who remains objective in attitude and dispassionate in manner'.²⁵⁸ But it is also possible that the latter sort of expert may come across as more reliable exactly for the reason that s/he is not biased by any kind of politics of evidence. Without further empirical research into how jurors respond to experts, it is difficult to conclude how they may be influenced; what is clear from the discussion and the results of child death cases however, is that it is possible that expert demeanour may influence outcomes as in *Clark*²⁵⁹ and *Kai-Whitewind*²⁶⁰ for example. Faced with needing to make a decision, jurors may as Roberts suggests, be deferential to expert witnesses,²⁶¹ and accept expert opinion with 'blind faith'.²⁶²

²⁵⁴ Redmayne (n 250) 110.

²⁵⁵ *ibid* 111.

²⁵⁶ British Medical Association, *Expert Witness Guidance* (BMA 2007) 2.

²⁵⁷ Select Committee on Science and Technology, (Seventh Report, Use of Forensic Evidence in Court, 2004-5) citing at (n 140) White PC, (ed) *Crime Scene to Court: The Essentials of Forensic Science* (2nd edn, Royal Society of Chemistry, 2004).

²⁵⁸ Mason JK, 'Expert Evidence in the Adversarial System of Criminal Justice' (1986) 26 (1) *Medicine, Science and the Law* 8, 10.

²⁵⁹ *Clark (No 1)* (n 28) the leading expert spoke confidently to expert evidence later found to be unreliable.

²⁶⁰ *R v Kai-Whitewind* [2005] EWCA Crim 1092 2005 WL 1078602 paras 55-59 Judge LJ although the expert may have had significant content, para 61 per Judge LJ the expert failed to impress.

²⁶¹ Roberts (n 3) 292-296.

²⁶² Imwinkelried EJ, 'The Educational Significance of the Syllogistic Structure of Expert Testimony' (1993) 87 *NW U L Rev* 1148, 1155; Imwinkelried EJ, 'The Next Step In Conceptualizing The Presentation of Expert Evidence As Education: The Case For Didactic Trial Procedures' [1997] *International Journal of Evidence & Proof* 128, 129.

On the other hand, if experts are unimpressive, then, as Hunter suggests when jurors are faced with ‘demanding challenges’, they may also be tempted to rely on fixed beliefs.²⁶³ In such instances, theories including the ‘halo effect’, ‘attribution theory’²⁶⁴ and regret matrices²⁶⁵ may support the suggestion that for juries, heuristic shortcuts are ‘particularly tempting’.²⁶⁶ Accordingly, if judicial directions are absent, and juries are faced with uncertain expert evidence that they lack the skills to evaluate, or is so judicially balanced in directions, and they are unimpressed by expert demeanour, then the possibility that fixed beliefs as mothering myths may influence juror decision making in child death cases is a real possibility.

5.2.3 Jury decision-making: influenced by mothering myths?

If maternal behaviour evidence is admitted as background material and is identified as neither potentially prejudicial nor accompanied by judicial warnings, there is a risk that in some child death cases, jury decisions may rely on mothering myths to interpret maternal behaviour evidence that they feel they do understand. As Blom-Cooper et al suggest in relation to *Clark*, ‘It may be that the jury utterly confused by the welter of conflicting medical evidence, plumped for the non-forensic evidence of the accused and her husband, to guide them to their verdict’.²⁶⁷ Analogising from rape myth scholarship to child death cases, suggests that ‘misconceptions and myths’²⁶⁸ based on gender stereotypes are taken into the jury room. In contrast to the Thomas research, Cossins suggests that ‘empirical evidence shows that such

²⁶³ Hunter ‘Character Evidence’ (n 240) 170 citing Redmayne M, *Character Evidence in the Criminal Trial* (OUP 2015).

²⁶⁴ *ibid* 170 ‘an individual example of behaviour is treated as indicative of long-standing and stable personality traits’.

²⁶⁵ *ibid* ‘a decision-maker’s diminished regret matrix (that is, a reduced regret that a negative decision about a person may be wrong where a person leaves a negative impression’.

²⁶⁶ *ibid* 170 citing Kahnemann D and Frederick S, ‘Representativeness Revisited: Attribute Substitution In Intuitive Judgment in Gilovich T, Griffin D and Kahnemann D (eds) *Heuristics and Biases: The Psychology of Intuitive Judgment* 49, 54 (CUP 2002) and Callen CR ‘Human Deliberation in Fact-Finding’ in Roberts P and Hunter JB (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 312.

²⁶⁷ Blom-Cooper (n 239) 78 in relation to *R v Clark (Sally)* (Chester Crown Court, 9 November 1999).

²⁶⁸ Cossins (n 40) 77.

beliefs influence their decisions to convict or acquit'.²⁶⁹ Further, Henderson et al suggest that despite the introduction of legislation, which some commentators suggest may also be difficult to comprehend,²⁷⁰ juror beliefs may have a 'strong impact on their decision-making, whatever the strength of the evidence'.²⁷¹

There are therefore differing views whether juries are biased, or reliant upon non-legal factors in their decision-making, but despite conflicting conclusions, there is little to rule out the possibility that adverse interpretations of the feminine take place in rape trials, and also I suggest in child death cases. One last possibility that has yet to be considered is the impact of media reports on jury decision making and whether reporting may have influenced decision making in child death cases.

5.2.4 Jury decisions: influenced by the media?

As the Thomas study identified,²⁷² the media predominantly report the prosecution arguments in pre-trial and in-trial reporting,²⁷³ and it is possible that jurors may be influenced by reporting that 'will often be to suggest guilt of the defendant'.²⁷⁴ Thomas identified that jurors in high profile cases especially, and this could include child death cases such as *Clark* and *Cannings*, recalled media reports of their cases suggesting that the defendant was guilty, finding these reports difficult to exclude from their minds.²⁷⁵ Jurors may therefore take notice

²⁶⁹ *ibid.*

²⁷⁰ Sexual Offences Act 2003 and sections 74, 75, 76 on Consent; Anna Carline and Clare Gunby, "'How an Ordinary Jury Makes Sense of It Is a Mystery'": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32 *Liverpool Law Rev* 237, 238.

²⁷¹ Henderson (n 233); Dinos S, Burrowes N, Hammond K et al 'A Systematic Review Of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision- Making?' (2015) 43(1) *International Journal of Law, Crime and Justice* 36.

²⁷² Thomas (n 12) pages 40-41 'A survey was conducted with 668 jurors who served on 62 trials at courts in three different locations: London, Nottingham and Winchester. All jurors that took part had served on a trial. The study intentionally included standard cases (those lasting less than two weeks with little media coverage) and longer, high profile cases (those lasting two weeks or more with substantial pre-trial and in-trial media coverage).' substantial pre-trial and in-trial media coverage).

²⁷³ Thomas (n 12) 40-42.

²⁷⁴ *ibid.*

²⁷⁵ *ibid* 41 - in high profile cases, 50% of jurors said they saw or heard a small amount of coverage, 39% a moderate amount and 11% a large amount. Jurors in high profile cases recalled media reports of their cases from a range of media outlets, with television (66%) and national newspapers (53%) the two main sources. This

of biased media reporting of defendant guilt. In addition, Thomas found that although in most cases jurors had not perceived the media reports as having a particular bias, ‘Where jurors did recall some emphasis, almost all (89%) remembered the coverage suggesting that the defendant was guilty’.²⁷⁶ Although the Thomas study highlighted the possibility that jurors may be influenced by medial reporting, the direction of the study was focussed on juror use of the internet during trials. Thomas does not comment on the influences of conventional media on trial outcomes. Nevertheless, I suggest that jurors in child death cases may have been influenced by traditional media reports, although to what extent is difficult to say. I suggest that it may not have been decisive, but, in addition to other extra-legal factors could have been persuasive.

5.3 Conclusion

This chapter has sought to understand whether the permissive admissibility of potentially prejudicial evidence of maternal behaviour is moderated by judicial techniques such as judicial warnings, directions and summing up, because the presumption that judges do guide juries on prejudicial matters ‘has been central to jury trial for centuries’.²⁷⁷ However the examination of child death cases in this chapter, suggests that in relation to maternal behaviour no such judicial directions were given. The child death cases are instead characterised by a silence and an absence of guidance to the jury on interpreting maternal behaviour, the nature of its probative value and the possibility of bias or fixed beliefs. On the one occasion when a judicial direction on maternal behaviour could and should have been given, (Clark’s silence) it was absent, and the appeal court acknowledged its omission.

contrasts with jurors serving on standard cases, where local newspaper reports accounted for almost all (77%) the coverage jurors recalled.’

²⁷⁶ *ibid* 42.

²⁷⁷ Crosby K, Juror Punishment, Juror Guidance and the Criminal Justice and Courts Act 2015 Criminal Law Review 578, 588.

Judicial directions may publicly identify the factors, which a jury should take into account, in order to emphasise rationality and transparency. If judicial directions do include the notion of bias in relation to interpretations of maternal behaviour, then it is arguable that public confidence in the jury system may be reduced. However similarly, the absence of judicial directions could lead to the inference that some trial judges may have been influenced by mothering myths or even that they considered a mother guilty or that they knowingly permitted the jury to use their own bias to decide culpability in child death cases.

But, there is also the possibility that on matters of female behaviour, directions are not given because of a belief that jurors can understand such material, can interpret it using their own common sense, and to give judicial directions that challenged common sense views, might risk alienating the jury. In addition, trial judges encourage the jury (as in *Cannings and Folbigg*) to look at all the evidence in the round, increasing the risk of jurors relying on fixed beliefs to interpret maternal behaviour. For example, Angela Gay should have understood her child's needs; Cannings should have called an ambulance, resuscitated her child, and used an apnoea alarm all the time; Clark should not have bought alcohol and lied about it; Anthony should not have left her child alone in hospital, all of which could have prompted beliefs that such maternal behaviours indicated that it was likely that such mothers may have killed their children.

Although judicial directions are essential, and in current rape trials may be detailed and clear, the absence of such guidance in child death cases I suggest, increases the possibility that jurors may have relied upon mothering myths in making their decisions, particularly within a complex, conflicting evidential context. It is also possible however, that a number of other factors may also coalesce with, or support fixed beliefs, including jury deference to experts, deference to the prosecution, failures on the part of the defence to properly challenge expert

evidence or draw the judge's attention to its flaws (as in *Clark*), and prejudicial media reporting.

Juries in such cases have an unenviable task; the burden of having to make, and deciding how to make decisions, and being compelled to decide child death cases because the authority for finding facts is delegated solely to the jury,²⁷⁸ must weigh heavily. Therefore, I suggest, juries will make decision making as manageable and as fairly as they can and consequently jury decisions may not be based entirely on forensic or expert evidence,²⁷⁹ as submitted in chapter two. Scholars such as Gerger et al suggest that rape myths are ““wrong” in an ethical sense’,²⁸⁰ and represent unprincipled decision-making. In analogising from rape myths to mothering myths, it may be that such fixed beliefs are unconscious efforts to make sense of and categorise complex observations.²⁸¹ Jurors under pressure of time, with strangers, in unfamiliar, challenging surroundings trying to make sense of contradictory post-mortem findings, theories about MSbP, statistical findings, and the causes of hypernatraemia, may unconsciously fall back on the safety of implicit bias, which feels normal.²⁸²

This chapter therefore concludes that judicial silence in the face of potentially prejudicial evidence of maternal behaviour is troubling, especially if the jury is encouraged to look at the evidence in a holistic approach. The jury may therefore try to find a way out of its difficulties by interpreting all the evidence whether according to theories of internalist views,²⁸³ jury deference, media reports,²⁸⁴ extra-legal factors,²⁸⁵ or just their own ‘moral lights’.²⁸⁶ Thus,

²⁷⁸ Dwyer DM, *The Judicial Assessment of Expert Bias* (CUP 2008) 84.

²⁷⁹ Nicholson D, ‘Gender Epistemology and Ethics: Feminist Perspectives on Evidence Theory’ in Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 21; Temkin (n 2); Cossins (n 40) citing at n 3 *NSW Criminal Justice and Sexual Offences Taskforce, Responding to Sexual Assault: The Way Forward* (Attorney-General's Department of NSW, 2005); NSW Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No 208) (Report 22) (NSW Parliament, 2002).

²⁸⁰ Gerger (n 2) 423.

²⁸¹ Lawrence (n 192) 960.

²⁸² *ibid.*

²⁸³ Ward ‘English Law’s Epistemology’ (n 221).

²⁸⁴ Thomas (n 12) 40-42.

fixed beliefs may provide certainty where expert evidence has created uncertainty. In support of this conclusion, is the current CCC, which indicates that the jury in sexual assault cases should be directed not to:

think that evidence which the judge does mention in the summing up must be important, or that evidence which the judge does not mention must be unimportant. It is for the jury alone to decide about the importance of the different parts of the evidence.²⁸⁷

Despite the assurance that judicial directions may be presumed to moderate the potentially prejudicial effect of maternal behaviour, juries in child death cases may have to effect such a balancing on their own.²⁸⁸ The impact of mothering myths on jury decision making may therefore be significant. Accordingly the grounds on which jury decisions are made matter. Chapter six will consider three main areas; first the impacts of traumatic events such as rape or child deaths on women and mothers²⁸⁹ and the consequences for wrongly convicted mothers following child death cases; secondly a more detailed reflection on particular aspects of jury decision making and thirdly whether judicial directions (perhaps written)²⁹⁰ would assist the jury in understanding the effects of trauma on women/mothers, the consequences of wrongful decisions and the need to make decisions without relying on fixed beliefs.

²⁸⁵ Finch (n 219) Juror Stereotypes.

²⁸⁶ Roberts (n 3) 134.

²⁸⁷ CCC (n 4) Part 4 Functions of Judge and Jury page 4-2 para 5 (8) (c).

²⁸⁸ *ibid* para 5 (9).

²⁸⁹ Ellison L, 'Closing the Credibility Gap' (n 9) for source material on the traumatic consequences and therefore the credibility of women in rape and child death cases.

²⁹⁰ Thomas 'Perfect Storm' (n 12) 497, 'no reliable data exists on how many judges use written directions and how often they are used'; 497–498 'Among the 70 per cent of juries that received written directions on the law in their case (figure six), every single juror who served on these juries (100 per cent) said they found the written directions helpful' and at n 20 detailing the 2012 research funded by the Economic and Social Research Council (Grant No. ES/J000876/1) and conducted by the UCL Jury Project in co-operation with the Judiciary of England and Wales, HMCTS, Ministry of Justice and Jury Central Summoning Bureau and in consultation with the Attorney General, Law Commission and Criminal Cases Review Commission. Summing up - Madge N, 'A Judge's Perspective' [2006] Crim LR 817.

Chapter six – Mothering myths: Countering the Consequences

6.0 Introduction

Chapter five suggested that the absence of judicial directions in child death cases able to moderate the potentially prejudicial effect of maternal behaviour, indicates that juries may have had to come to their own conclusions whether such evidence was important. Accordingly, jurors may have interpreted maternal behaviour evidence using descriptive beliefs about how mothers are likely to act, and prescriptive beliefs about how mothers should act. Such mothering myths¹ have been theorised in this thesis by analogising from rape myth scholarship,² particularly that of Gerger et al.³ The academic understanding about rape myths and rape myth acceptance (RMA) developed from research in law, psychology and sociology, has contributed to changes in the way the criminal justice system approaches evidence of female behaviour in rape trials, for example through legislation and specimen judicial directions.⁴ More recently, the introduction of expert opinion into rape trials to educate jurors about the reality of female behaviour before, at the time of and following

¹ A mothering myth, could be defined as a *descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system* and see chapter two.

² See chapter two: Burt MR, 'Cultural Myths and Supports of Rape' (1980) 38 J Pers Soc Psychol 217, 228; Lonsway KA and Fitzgerald LF 'Rape Myths: In Review' (1994) 18 Psychol Women 133; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Cossins KA, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) International Journal of Evidence & Proof 74; Conaghan J, Russell Y, 'Rape Myths, Law, and Feminist Research: 'Myths about Myths?' [2014] 22 Fem Leg Stud 25; Finch E, Munro VE, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45 (1) Br J Criminol 25; Finch E and Munro VE, 'Breaking Boundaries?: Sexual Consent in the Jury Room' (2006) 26 Legal Studies 303; Finch E and Munro VE 'The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trails involving Intoxicants' (2007) 16 Social and Legal Studies 591; Finch E and Munro VE, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (Blackwell 2008); Lees S, *Carnal Knowledge Rape on Trial* (Hamish Hamilton 1996); Krahé B, Temkin J and Bieneck S, 'Schema-driven Information Processing in Judgements about Rape' (2007) 21 Applied Cognitive Psych 601.

³ See chapter two and Gerger H, Kley H, Bohner G and Siebler F, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English' [2007] 33 Aggressive Behaviour 422, 423 proposing that '*rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women*'.

⁴ See chapter five and legislative amendments section 41 Youth Justice and Criminal Evidence Act 1999; Section 278 of the Canadian Criminal Code; and judicial directions see Crown Court Compendium (CCC) Part I: Jury and Trial Management and Summing Up (Judicial College, 2016) <<https://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/>> accessed 1 September 2016.

sexual assault is under implementation in some jurisdictions, seeking to further challenge and reduce the impact of biased or fixed attitudes and beliefs on verdicts in rape trials.⁵ Other possible changes debated by academic commentators but not implemented, include the exclusion of evidence of behaviour from rape trials, holding jurors accountable for their decisions,⁶ and removing the jury from rape trials.⁷

Accordingly and by analogy, the question is raised whether an amendment would be helpful to prevent the use of mothering myths by jurors in construing maternal behaviour in child death cases, thereby reducing the risk of wrongful convictions. However, as this thesis has illustrated, the evidential context in child death cases was highly complex and additional factors may have contributed to the outcomes in child death cases other than misinterpretations of evidence of maternal behaviour. Judicial decisions to admit unreliable expert opinion; the inconclusive and conflicting nature of the scientific evidence; defence ineffectiveness in challenging expert opinion; the admissibility of behaviour evidence; the absence of judicial directions relating to behaviour evidence, deference to experts⁸ and media coverage may all have contributed in some way to trial verdicts. It is therefore possible that maternal behaviour evidence occupied a more peripheral role in child death case jury deliberations, than female behaviour is argued to do in rape trials.

⁵ Ellison L, 'Promoting Effective Case-building in Rape Cases: A Comparative Perspective' [2007] Crim LR 691, 704; Temkin J, *Rape and Legal Process* (OUP 2002) 293. Office for Criminal Justice Reform (OCJR) 'Convicting Rapists and Protecting Victims –Justice for Victims of Rape, A Consultation Paper' (OCJR 2006) page 5, 18; Norris S, 'At Last, The DPP are Confronting Some Toxic Rape Myths With Their Guidelines' *The Independent* (London, 29 January 2015); Henderson E and Harvey D, 'Myth-Busting in Sex Trials: Judicial Directions or Expert Evidence?' [2015] *Archbold Review* 6.

⁶ Krahé and Temkin [2007] (n 2) 618 citing Auld R, *Review of the Criminal Courts in England and Wales 2001* <<http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/auldconts.htm>> accessed 4 October 2010.

⁷ Temkin and Krahé [2008] (n 2) 177; Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2007) 33 (3) *OJLS* 445, 472 at n 217 and 219 citing Draper D, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 41 *Akron L Rev* 957, 976.

⁸ Roberts A and Zuckerman A, *Criminal Evidence* (OUP 2004) 292-296; Imwinkelried EJ, 'The Next Step In Conceptualizing The Presentation of Expert Evidence As Education: The Case For Didactic Trial Procedures' [1997] *International Journal of Evidence & Proof* 128, 129;--'The Educational Significance of the Syllogistic Structure of Expert Testimony' (1993) 87 *NW U L Rev* 1148, 1155.

But as Jill Hunter suggests, a technically complex evidential context can hide the true operation of evidence of behaviour in practice.⁹ Further, the permissive admission of maternal behaviour evidence may be compounded by juror fixed beliefs as part of a gender biased approach¹⁰ that disregards ‘the reality of women’s lived experiences’,¹¹ and therefore it is possible that within a technical forensic context, evidence of female behaviour may be highly significant.

There is however a further concern which is whether in the absence of further similar cases since the child death cases in this thesis, countering mothering myths and their possible consequences, matters. For the following reasons I would suggest that counteracting mothering myths is important, although each of these reasons needs further research. First, the consequences of wrongful convictions on the mothers in this thesis were disturbing and it is debateable whether agents of the criminal justice system including jurors, are aware of the full extent to which those who are wrongly convicted suffer as a result of wrongful conviction. One reason why the consequences of wrongful conviction in general may not be more widely appreciated, is because academic scholarship may have understandably concentrated on identifying the causes of wrongful conviction,¹² rather than their consequences.¹³ It is also possible however that the extent of the consequences may not be

⁹ See chapter four and Hunter J, ‘Publication Review Character Evidence in the Criminal Trial’ (2016) E and P 162, 163, in relation to evidence of character as ‘background evidence’; and at 166, the suggestion ‘that a complex evidentiary and advocacy landscape often hid from law reports the full operation of character evidence in practice’; Redmayne M, *Character in the Criminal Trial* (OUP 2015) 33.

¹⁰ Hunter R, McGlyn C and Rackley E, ‘Feminist Judgments an Introduction’ in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 35.

¹¹ *ibid* 35.

¹² Elks L, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (Justice 2008); Nobles R and Schiff, D *Understanding Miscarriages of Justice* (OUP 2000); Huff CR and Killias M, (eds) *Wrongful Conviction International Perspectives on Miscarriages of Justice* (Temple U Press 2010); Edmond G, ‘Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals’ [2002] OJLS 58; Legal Action Group, *Preventing Miscarriages of Justice: A Summary and Initial Responses to the Royal Report on Criminal Justice* (LAG 1993); Ogletree CJ and Sarat A, *When Law Fails: Making Sense of Miscarriages of Justice* (NYU Press 2009); Quirk H, ‘Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer’ (2007) 70 MLR 759.

¹³ Brandon R and Davies C, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (Allen and Unwin 1973); Grounds AT ‘Psychological Consequences of Wrongful Conviction And Imprisonment’ (2004)

communicated to the public from whom jurors are drawn, at trial, either by judicial directions or defence summing up. If such consequences may follow in part from reliance upon mothering myths as argued in this thesis, then I suggest that addressing such fixed beliefs is important.

Secondly, countering mothering myths matters because more injustices may follow in the future, particularly if the sources of evidence of maternal behaviour continue to widen to include personal records including medical and psychiatric reports,¹⁴ social media and internet communications and searches.¹⁵ Thirdly, it is not only in child death cases that mothers may be under scrutiny in the criminal justice system. Women rape complainants for example, may be mothers and their behaviour may be interpreted not only as a rape complainant, but also as a mother. Consequently the biased way in which I suggest maternal behaviour evidence is interpreted in the criminal justice system, may be more widespread than within child death cases alone.

46(2) Canadian Journal of Criminology and Criminal Justice 165; — — ‘Understanding the Effects of Wrongful Imprisonment’ (2005) 32 Crime and Justice 1 <<http://www.miscarriagesofjustice.org/wp-content/uploads/2011/09/Adrian-Grounds-10.pdf>> accessed 22 August 2013; Campbell K. and Denov M, ‘The Burden of Innocence: Coping With a Wrongful Imprisonment’ (2004) 46 (2) Canadian Journal of Criminology and Criminal Justice 139; Naughton M, ‘Redefining Miscarriages of Justice: A Revived Human Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction’ (2004) 45 British Journal of Criminology 165; — — Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg (Palgrave Macmillan 2007); Naylor B, ‘Women’s Crime and Media Coverage: Making Explanations’ in Emerson R, Dobash RP and Noaks L, Gender and Crime (U of Wales 1995); Westervelt SD and Cook K.J, ‘Coping with Innocence after Death Row’ (2008) 7 Contexts 32; Roberts S, ‘Unsafe Convictions: Defining and Compensating Miscarriages of Justice,’ (2003) 66 MLR 442; Walker C and Starmer K, Miscarriages of Justice, A Review of Justice in Error (1999, Blackstone Press 2004); Cole SA, ‘Cultural Consequences of Miscarriages of Justice’ (2009) 27 Behavioral Sciences and the Law 431.

¹⁴ See chapter four and *R v Folbigg* [2005] NSWCCA 23, para 169 per Sully J her medical and welfare records, and social and psychiatric opinions about her childhood abuse were admissible evidence; para 173 per Sully J detailed evidence of Folbigg’s depression was admissible; *R v Folbigg* [2003] NSWSC 895 paras 48-50 per Barr J citing opinions submitted in court by Dr Giuffrida a psychiatrist, paras 105, 165 per Barr J describing difficulties in controlling her anger as a very young child, and as an adult.

¹⁵ See chapter four and discussion relating to Ramage S, ‘Case Comment: *R. v Kular (Rosdeep Adekoya)*’ (HCJ August 25, 2014) (2014) Crim Law 2; Rosdeep Kular was convicted for the culpable homicide of her young son following the identification of internet searches suggesting motive. She had typed into search engines, ‘Why am I so aggressive to my son?’, and ‘I find it hard to love my son’; Libby Brooks, ‘Rosdeep Adekoya jailed for 11 years for killing her son Mikael Kular’ The Guardian (London, 25 August 2014) <<http://www.theguardian.com/uk-news/2014/aug/25/rosdeep-adekoya-jailed-11-years-killing-son-mikael-kular>> accessed 4 November 2014.

The following sections of this thesis will first explore the consequences to mothers of wrongful convictions to illustrate why addressing mothering myths matters. Next I suggest that it is difficult to perceive a way in which the proposed impact of fixed beliefs about mothering may be addressed, without knowing more about how jurors may have approached evidence of maternal behaviour. For that reason, the second section explores additional insights from mock juror mini rape trials.¹⁶ Rape myth scholarship suggests that jurors rely on their own or other's preconceived assumptions in making their decisions. Ellison and Munro found that in mock jury trials, female jurors in particular put themselves in the shoes of female rape complainants to argue that they themselves would have behaved differently to the rape complainant.¹⁷ Such a 'female perspective'¹⁸ was observed to influence male jurors in mock rape trials.

By analogy, this chapter suggests that female jurors may have approached decision making about female behaviour in child death cases also using a *female perspective*, which similarly influenced male jurors. The possibility of a female perspective provides another factor in understanding what may be happening in rape cases, and possibly in child death cases also. Such a perspective differs to that suggested by feminist scholars considered in chapter one, which is that if women are considered to be assessed using biased beliefs, such views may be assumed to be held in general by men. Consequently, whereas prescriptive masculine beliefs about female rape complainants might have been anticipated, what is unforeseen is that there may also be a prescriptive female perspective, which may also be damagingly influential to the way female rape complainants are perceived.

¹⁶ Ellison L and Munro VE, 'Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 (3) *The British Journal of Criminology* 363; -- 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 (2) *The British Journal of Criminology* 202.

¹⁷ *ibid* 209.

¹⁸ *ibid* 206-7.

In order to address possible mothering myths therefore, any suggestion needs to highlight the potential unreliability of inferences about maternal behaviour, thoughts and feelings, based upon preconceived assumptions. The third section considers changes to judicial directions in the Crown Court Compendium (CCC),¹⁹ that take factors such as the female perspective into consideration, bearing in mind the evidential context and alternative causes of wrongful convictions in child death cases earlier identified.²⁰

6.1 Consequences for mothers: do mothering myths matter?

When a child dies unexpectedly and without reason, its death ‘is a terrible shock and can be one of the most distressing events that can ever happen’.²¹ Angela Cannings wrote, ‘losing a baby isn’t just about losing that tiny person – it’s about losing your dreams, your hopes for the future, and your faith in yourself as a parent when no-one can explain to you why they died’.²² When such a death occurs, mothers such as Sally Clark questioned themselves, whether they could have prevented the deaths.²³ Batt, a solicitor and family friend to Clark suggested that she turned to alcohol in order to cope. He quotes her as saying, ‘I am stifling grief under a mountain of paper. Bubbles of bereavement escape to the surface and overwhelm me without warning. I find that a drink helps’.²⁴

When a second baby dies, the guilt at not having protected the baby and the associated sense of failure may be overwhelming.²⁵ Mothers such as Clark and Cannings reported asking

¹⁹ CCC (n 4).

²⁰ Judicial decisions to admit unreliable expert opinion; the inconclusive and conflicting nature of the scientific evidence; defence ineffectiveness in challenging either expert opinion; the admissibility of behaviour evidence; the absence of judicial directions relating to behaviour evidence, deference to experts, and media coverage may all have contributed in some way to trial verdicts.

²¹ The Lullaby Trust, ‘If you are bereaved’ <www.lullabytrust.org.uk/bereavement-support accessed 21 October 2011.

²² Cannings A with Lloyd Davis M, *Cherished: A Mother’s Fight to Prove her Innocence* (Sphere, 2007) 27; see *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607.

²³ Batt J, *Stolen Innocence* (Ebury Press 2005) 34; see *R v Clark (Sally) (Appeal against Conviction) (No 2)* [2003] EWCA Crim 1020.

²⁴ Batt (n 23) 38.

²⁵ Cannings and Lloyd (n 22) 35-6.

themselves whether they missed signs or did something wrong.²⁶ Clark described feelings of panic, anguish and horror,²⁷ and when a third baby dies, Patel reported ‘complete shock’,²⁸ and Cannings described being ‘frozen inside’.²⁹ The mothers in this study endured further consequences as a result of their trials, convictions and imprisonment; accusations of being a bad mother,³⁰ vilified by the media,³¹ abuse in prison,³² and loss of reputation.³³ Some lost their homes and employment,³⁴ and needed to live on income support once acquitted.³⁵ Marriages broke down,³⁶ some were refused compensation,³⁷ and others felt permanently stigmatised.³⁸ Even after acquittal some may lose the desire to live.³⁹ The impacts on such mothers’ lives have been described as ‘abhorrent’.⁴⁰

All convicted prisoners however may suffer from the effects of institutionalised incarceration, being far from home, with a lack of social and family contact, freedom, a lack of dignity—such consequences do not just happen to mothers. But, it is possible that for mothers who are wrongly convicted, the impacts of such *normal* punishment may be more profound as a result

²⁶ Batt (n 23) 31 referring to Clark (n 23); Cannings and Lloyd (n 22) 35, 41.

²⁷ *ibid* 53-55.

²⁸ *R v Trupti Patel*, (Reading Crown Court, 11 June 2003); Jeevan Vasagar and Rebecca Allison, ‘How Cot Deaths Shattered Mother’s Dreams’ *The Guardian* (London, 12 June 2003).

<www.theguardian.com/society/2003/jun/12/medicineandhealth.lifeandhealth1> accessed 8 October 2012

²⁹ Cannings and Lloyd (n 22) 43.

³⁰ *R v Anthony (Appeal Against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001 para 21 per Judge LJ.

³¹ ‘Baby killer was ‘lonely drunk’ London (*BBC News*, 9 November 1999)

<<http://news.bbc.co.uk/1/hi/uk/512099.stm>> accessed 9 April 2015, reference Sally Clark.

³² Batt (n 23) describing Clark’s arrival in prison.

³³ ‘Trupti Patel says “no more children”’ London (*BBC News* 21 June 2003)

<<http://news.bbc.co.uk/1/hi/england/berkshire/3009134.stm>> accessed 22 October 2013 referring to Patel’s inability to work as a pharmacist again.

³⁴ Cannings and Anthony lost their home, Knight K, ‘She Lost Her Babies, Then Spent Seven Years in Jail before Being Cleared of Their Murders. But Donna Anthony Says She’ll Always Be Seen as a Child-Killer’ *Daily Mail* (London, 29 January 2010) <<http://www.dailymail.co.uk/femail/article-1247053/She-lost-babies-spent-seven-years-jail-cleared-murders-But-Donna-Anthony-says-shell-be-seen-child-killer.html#ixzz3MH1J5BcF>> accessed 18 December 2014; the Clarks sold their home to avoid bankruptcy see “‘Sally Clark’ obituary’ (*Daily Telegraph*, 19 March 2007)

<<http://www.telegraph.co.uk/news/obituaries/1545933/Sally-Clark.html>> accessed 20 September 2013.

³⁵ Cannings and Lloyd (n 22) 272.

³⁶ *ibid* 346.

³⁷ *Allen v UK* App no 25424/09 (ECtHR, 12 July 2013).

³⁸ Knight (n 34).

³⁹ ‘Alcohol Killed Mother Sally Clark’ *BBC News* (London 7 November 2011)

<<http://news.bbc.co.uk/1/hi/england/essex/7082411.stm>> accessed 22 November 2014.

⁴⁰ *Cannings* (n 22) para 179 per Judge LJ.

of prior bereavement, the subsequent removal of later born children to foster care or adoption⁴¹ and wrongful conviction. The impact on a vulnerable and bereaved individual may therefore be intensely damaging. Some child death cases have been designated miscarriages of justice in order to publicly recognise the consequences suffered.

Such a label may not however acknowledge the very similar damage suffered by all wrongly convicted mothers. Lord Bingham suggests that if convictions such as *Gay and Gay*⁴² are ‘mishaps or errors’⁴³ of the legal system, and are corrected ‘in reasonable time’,⁴⁴ then the criminal justice system ‘may be said to be working’.⁴⁵ *Gay and Gay* is therefore not officially regarded as a miscarriage of justice despite the undoubted and undeserved distress caused. If a second appeal is required before a conviction is overturned as for example in *Clark*, or *Anthony*,⁴⁶ then a ‘gross injustice’⁴⁷ is considered to have occurred⁴⁸ which epitomises an official miscarriage of justice. However, cases such as *Clark*, *Cannings*, *Harris*, and *Anthony*,⁴⁹ are all referred to as miscarriages of justice by both Criminal Cases Review Commission (CCRC)⁵⁰ and the Law Commission.⁵¹ *Cannings*⁵² was nonetheless a ‘no appeal

⁴¹ *Clark (No 2)* (n 23) the third child was removed to foster care see *Batt* (n 23) 91; *Cannings* (n 22) - her remaining child Jade was under a care order; *R v Harris (Lorraine)* [2005] EWCA Crim 1980 her subsequent and fourth child was removed at birth and adopted see ‘I Lost My Faith in Justice’ *BBC News* (London, 12 December 2007) <<http://news.bbc.co.uk/1/hi/england/7139385.stm>> accessed 22 October 2013, *Harris*’ fourth baby born in prison was adopted; *Patel* (n 28) the mother was not permitted to care for her child without supervision; *LB Islington v Al-Alas and Wray* [2012] EWHC 865 (Fam), 2012 WL 1357829 para 1 per Theis J, the second baby was removed from the mother at birth and remained in the care of the Local Authority until she was returned to her parents aged 17 months following family court proceedings; *R v Angela Gay, Ian Gay* [2006] EWCA Crim 820 the remaining two placed children were removed from the family home.

⁴² *Gay and Gay* (n 41).

⁴³ Lord Bingham, *Justice and Injustice, The Business of Judging, Selected Essays and Speeches* (OUP 2000) 269.

⁴⁴ Bingham (n 43).

⁴⁵ *ibid*

⁴⁶ *Clark (No 2)* (n 23); *Anthony* (n 30).

⁴⁷ Bingham (n 43).

⁴⁸ *ibid*.

⁴⁹ *Clark (No 2)* (n 23); *Cannings* (n 22); *Harris* (n 41); *Anthony* (n 30).

⁵⁰ Elks (n 13) *Clark* at 355, 74, 75, 97, 207; *Cannings* at 75; *Harris* at 86; *Gay and Gay* 97, 98; *Anthony* at 75.

⁵¹ Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability* (Consultation Paper, Law Com No 190) para 2.16, referring to *Clark*; para 2.20 referring to *Cannings*; para 2.22 referring to *Harris*; para 2.20 n. 24 referring to *Anthony*;

⁵² *Cannings* (n 22).

case'⁵³ i.e. there had been no previous appeal,⁵⁴ like *Gay and Gay*, although *Cannings* was referred to and considered by the CCRC. Harris, in contrast to Clark, Cannings and Anthony was not only refused compensation⁵⁵ but also lost a child to adoption. Defining a miscarriage of justice may not therefore be altogether straightforward in this context. Officially a miscarriage of justice arises if procedural criteria are fulfilled, (more than one appeal, referral to the CCRC, fresh evidence is a new fact not opinion.⁵⁶) But, considering the consequences of wrongful convictions permits a clearer understanding of the significance of jury decisions and what will be the reality and quality of lived women's experiences. Accordingly, there are several issues surrounding the application of the term miscarriage of justice, and so the following discussion uses the term wrongful conviction, and focusses on the impacts on mothers of *normal* punishment consequent on conviction and gender, and how punishment may be compounded by multiple bereavements, wrongful conviction and loss of compensation, to illustrate why countering mothering myths is important.

⁵³ CCRC, *Annual Report and Accounts 2013/2014* (CCRC 2014) 14 see <<http://www.ccrcc.gov.uk/publications/corporate-publications/>> accessed 1 June 2015 and ss 13 and 14(2) Criminal Appeal Act 1995; although the CCRC also has discretion to 'fast track' see, CCRC, 'Formal Memorandum Discretion in Referrals' (CCRC 22 January 2013). <<http://www.ccrcc.gov.uk/publications/ccrc-casework-policies/>> accessed 1 June 2015.

⁵⁴ CCRC (n 51).

⁵⁵ Application was refused because requirements were not fulfilled see s 133 of the Criminal Justice Act 1988 (1) (s 133), when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction... see *R (on the application of Harris) v Secretary of State for the Home Department* [2007] EWHC 3218 (Admin) 2007 WL 4266038; the decision was upheld at Judicial Review see *R (Allen) (formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 1 Cr App R 2 para 23 per Sir Mark Potter P, The Secretary of State held that the 'fresh medical evidence was a change of medical opinion and did not disclose a "new or newly discovered fact"' and at para 24 "He is not satisfied that the medical evidence referred to is fact as opposed to opinion, that is subject to development and change. It can therefore only be regarded as new evidence"; and at para 45 Mitting J held that in acquitting Harris, the Court of Appeal Criminal Division (CACD) judgement had only decided that 'the new evidence created the possibility that when taken with the evidence given at the trial a jury might properly acquit the claimant. That falls well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice in this case.'

⁵⁶ Section 23 of the Criminal Appeal Act 1968 allows for evidence that was not adduced at trial to be adduced at an appeal against conviction, subject to the evidence satisfying the four conditions set out in s. 23(2) (a)-(d).

6.1.1 *Normal consequences of punishment*

The experience of being perceived as a child killer and therefore the subject of hate in prison was horrifying as reported by Harris,⁵⁷ who spoke of her experiences when ‘put in prison with sex offenders’.⁵⁸ Even Clark as a solicitor and daughter of a police officer was lower in status than the women making up the rest of the prison population as Batt recorded:

Fifty faces stare at me screaming: ‘Here’s the nonce!’ ‘Murderer!’ ‘Die woman, die!’

I shall hear those words many times over the coming weeks. I am put in a small holding cell. Other prisoners are banging on the door, shouting more abuse and clambering up to look through the window. I feel like a caged animal.⁵⁹

Irrespective of the reason that women are sentenced to imprisonment, the personal costs to individual women prisoners and their families are extremely high.⁶⁰ Women are held in prisons often over 100 miles away from home⁶¹ making family visits difficult. Clark whose home was in Manchester was held Styal prison, followed by Bullwood Hall in Essex for nearly three and a half years⁶² and Cannings whose home was near Salisbury was held in Eastwood Park Gloucestershire.⁶³ Thus mothers have an almost impossible task in maintaining contact with their families, a difficulty compounded by the low number of women’s prisons.⁶⁴ Furthermore women experience prison as extremely stressful, due to the

⁵⁷ Harris (n 43).

⁵⁸ BBC News (n 41).

⁵⁹ Batt (n 23) Prologue page xv-xvi writing about Sally Clark’s arrival in prison following the death of her second son, and subsequent conviction and sentencing by Harrison J. at Chester Crown Court in November 1999.

⁶⁰ Carlen, *Women’s Imprisonment: A Study in Social Control* (Routledge, 1983); *Alternatives to Women’s Imprisonment* (OUP, 2002); *Women and Punishment: The Struggle for Justice* (Willan Publishing, 2004); Carlen P and Worrall A, *Analysing Women’s Imprisonment* (Willan Publishing, 2004).

⁶¹ Prison Reform Trust, *The Bromley Report: Prison the Facts*: accessed 22/11/2014 <<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20the%20facts%20May%202014.pdf>> page 4; *Women in Prison, Statistics*; October 2013; accessed 25 October 2013).

⁶² Batt (n 23) 305.

⁶³ Cannings and Lloyd (n 22) 156.

⁶⁴ Corston J, *Review of Women with Particular Vulnerabilities in the Criminal Justice System* (Justice 2007) Chapter 3, Life and Death, How Women Experience prison, Foreword.

noise, crowding and threatening atmosphere.⁶⁵ Gay recounted that her cell bed ‘was moulded out of concrete. There was a toilet but it was open so if an officer looked through the observation hatch they could see what you were doing. It was cold. There's only one word to sum up how I felt: desperation’.⁶⁶ In addition, strip searching found by Currie to be more humiliating to women than men, contributed to feelings of helplessness ‘common to the experience of abuse’,⁶⁷ and the ‘loss of autonomy and the feelings of shame and isolation are further felt due to the close proximity of male staff who are authorised to be involved in the process’.⁶⁸ Although the amount of ‘regular, repetitive, unnecessary overuse of strip-searching in women’s prisons, which is degrading and undignified has been criticised, the practise continues.’⁶⁹ Cannings,⁷⁰ described her loss of dignity in the first embarrassing hours in prison:

“Lift up your arms, open your mouth, lift up your tongue and turn around”, they said after pulling back the curtain, as one peered at me, while the other checked behind my ears. I felt like a specimen in a laboratory... I was shocked... I took off my skirt, underwear, tights and shoes while the prison officers silently watched.⁷¹

Likewise Gay⁷² is reported to have said, ‘I’d never been strip searched or anything like that. Being strip-searched by two prison officers laughing at you because you have a name like Gay was horrendous’.⁷³ For a mother to be accused of killing her child, whilst ‘brutally

⁶⁵ *ibid* 7.

⁶⁶ Hardy R, ‘The Unending Nightmare: Ian and Angela Gay Speak Out’ *Daily Mail* (London, 5 March 2007) <<http://www.dailymail.co.uk/news/article-440053/The-unending-nightmare-Ian-Angela-Gay-speak-out.html>> accessed 24 September 2013.

⁶⁷ Currie B, ‘Women in Prison: A Forgotten Population?’ (2012) *Internet Journal of Criminology* <www.internetjournalofcriminology.com> accessed 25 October 2013 citing at page 7 Bastick M, and Townhead L, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* (Quaker United Nations Office 2008).

⁶⁸ Currie (n 67).

⁶⁹ Corston (n 64) 5.

⁷⁰ *Cannings* (n 22).

⁷¹ *Cannings and Lloyd* (n 22) 158.

⁷² *Gay and Gay* (n 41).

⁷³ *Hardy* (n 66).

scarred by the unexplained death or deaths of her babies’⁷⁴ is exceptionally harsh, but normal prison practices are normatively shaming and humiliating. For those who are wrongly convicted and who should not be in prison in the first place, the punishments are not only deeply distressing, but serve no justifiable purpose.

6.1.2 Additional consequences of punishment

In accordance with the provisions in the Children Act 1989⁷⁵ other children came under the supervision of the local authority, either being placed on the at-risk register as in *Cannings*,⁷⁶ or as new born babies, placed in the care of the local authority as occurred in *Clark*, *Harris* and *Al-Alas*.⁷⁷ The ‘paramount’⁷⁸ issue faced at the time by local authorities and courts would have rightly been how to ensure the welfare of the children and prevent the possibility of significant harm⁷⁹ resulting from leaving the children with their mothers/parents after they had been charged with killing their siblings. An assessment of harm would have been undertaken,⁸⁰ and the removal of children seems to have been unquestioned by local authorities. Although most children taken into the care of the local authority (*Clark*, *Al-Alas* *Harris*) or under the supervision of the local authority, (*Cannings* and *Patel*⁸¹), were eventually returned to the custody of their parents, Harris lost her child permanently and was not permitted to have the adoption order overturned. Although there may have been good

⁷⁴ *Cannings* (n 22) para 179 per Judge LJ.

⁷⁵ Children Act 1989 section 31 (1).

⁷⁶ *Cannings* and *Lloyd* (n 22) 57.

⁷⁷ *Clark* (no 2) (n 23); *Harris* (n 41); *Al-Alas and Wray* (n 41).

⁷⁸ Children Act (CA) 1989 s 1 (1) ‘the child’s welfare shall be the court’s paramount consideration’.

⁷⁹ *ibid* s 1 (2) ‘A court may only make a care order or supervision order if it is satisfied—(a) that the child concerned is suffering, or is likely to suffer, significant harm; and (b) that the harm, or likelihood of harm, is attributable to— (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him’.

⁸⁰ Adoption and Children Act 2002 s 120 in force January 31, 2005, introduced “‘harm” means ill-treatment or the impairment of health or development [including, for example, impairment suffered from seeing or hearing the ill-treatment of another]’ Children Act 1989 s 31 (9); and s 31 (10) (10) ‘Where the question of whether harm suffered by a child is significant turns on the child’s health or development, his health or development shall be compared with that which could reasonably be expected of a similar child’.

⁸¹ *Cannings* (n 22); *Patel* (n 28).

reasons for refusing to overrule the adoption order,⁸² such long term consequences represent I suggest, a punishment greater than the norm for convicted prisoners.

In the light of more recent jurisprudence from the ECtHR the consequences for such mothers may not have been justifiable.⁸³ Balancing the needs and rights of mothers⁸⁴ with the welfare and best interests of the child⁸⁵ and its protection from potential harm⁸⁶ are demanding and challenging issues, however judicial thinking has progressed since the decision in *Harris*, and Baroness Hale has more recently stated that:

Measures that totally deprive a birth parent of his or her family life with the child and are inconsistent with the aim of reuniting the family ‘should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child’s best interests.’⁸⁷

Furthermore, despite the loss of children, homes, relationships, reputation and earnings, mothers may have suffered significant emotional damage. In Clark’s case her alcoholism may have gone untreated, as following her acquittal she died in 2007⁸⁸ of acute alcohol poisoning.⁸⁹ The coroner Mr Phelby reported that she ‘never fully recovered from the effects of ...appalling miscarriage of justice’,⁹⁰ and furthermore suffered from mental health illnesses following acquittal attributable to her wrongful treatment by the criminal justice

⁸² For example the need for local authorities to maintain the confidence of adopters in the agreed criteria to the legal adoption, whether for no contact, or direct or indirect contact.

⁸³ *YC v UK* [2012] 2 FLR 332, (2012) 55 EHRR 33 para 134, ‘the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the “necessity” for such an interference with the parents’ right under article 8 to enjoy a family life with their child’.

⁸⁴ European Convention on Human Rights, Article 8, Right to respect for private and family life.

⁸⁵ CA (n 78) s 31 Welfare of the child.

⁸⁶ *ibid* Care and supervision orders.

⁸⁷ *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, page 1970, para 195 per Baroness Hale citing *Aune v Norway* (2010) 54 EHRR 1145, para 66; *Johansen v Norway* 23 EHRR 33, para 78; *P, C and S v United Kingdom* (2002) 35 EHRR 1075, [2002] 2 FLR 631, para 118.

⁸⁸ ‘Sally Clark’ obituary (n 34).

⁸⁹ ‘A Mother Wrongly Convicted of Killing Her Two Children Died Accidentally of Acute Alcohol Intoxication, an Inquest Has Ruled’ (*BBC News*, 7 November 2007)

<<http://news.bbc.co.uk/1/hi/england/essex/7082411.stm>> accessed 20 September 2013

⁹⁰ ‘Sally Clark’ obituary (n 34).

system. ‘Mr Phelby said Mrs Clark had undergone various assessments eventually being diagnosed with a number of serious psychiatric problems’⁹¹ which ‘included enduring personality change after catastrophic experience, protracted grief reaction and alcohol dependency syndrome’.⁹² (Enduring personality change, is one of the psychiatric changes noted in research on men who have been wrongfully imprisoned).⁹³ The BBC interviewed John McManus of the Miscarriages of Justice Organisation, ‘who called for people in Mrs Clark’s position to be given more support. He said: “In my opinion, this woman died of a broken heart and basically used alcohol to take away the horrors”’.⁹⁴

Although Clark may have had a long-standing alcohol addiction, it is clear that as a vulnerable, wrongly convicted mother, the consequences for her as a result of many factors including flawed expert evidence and I suggest mothering myths were unjust and it is understandable that *Clark* is recognised as a grotesque miscarriage of justice.⁹⁵ However the consequences for other mothers such as Cannings, Anthony and Gay, in whose cases it has also been argued that mothering myths may have contributed to jury verdicts, are sobering. Although Cannings did not suffer the disappointment of failed appeals, she and her husband were unable to properly grieve the deaths of their three children.⁹⁶ Following her release from prison, Cannings’ relationships with her husband and her remaining child Jade failed,⁹⁷ and the family home was lost.⁹⁸

⁹¹ *ibid.*

⁹² *BBC News* (n 39).

⁹³ *Grounds* (n 14) 32.

⁹⁴ *BBC News* (n 39).

⁹⁵ *Batt* (n 23) frontispiece citing Clare Montgomery QC, addressing the British Academy of Forensic Scientists 18 February 2004.

⁹⁶ *Cannings and Lloyd* (n 22) 83.

⁹⁷ *ibid* 296, 312, 346.

⁹⁸ *ibid* (n 22) 88.

It might be argued that within a criminal justice system mistakes are inevitable,⁹⁹ and that some wrongful convictions may be considered an inescapable product of crime control.¹⁰⁰ But the consequences of making wrong decisions as Liberty have pointed out, may lead to shattered lives¹⁰¹ and if compensation is also refused, then harmful consequences may be further compounded as in the cases of *Cannings* and *Harris*. Cannings' first application for compensation was refused, a decision described as misogynistic in the media,¹⁰² prompting written questions in the House of Lords as to why compensation was not paid.¹⁰³ Challenging the decision she was reported as saying that 'it's not just about the money. It's about acknowledging that someone's mistakes devastated our lives'.¹⁰⁴ Although at that time her application was said not to meet the necessary criteria¹⁰⁵ to qualify for the discretionary scheme,¹⁰⁶ later abolished on cost grounds,¹⁰⁷ Cannings was eventually made a discretionary

⁹⁹ Quirk H, 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer' (2000) 70 Mod LR 759.

¹⁰⁰ Packer H, *The Limits of the Criminal Sanction* (Stanford U Press, 1969) 15.

¹⁰¹ Liberty, *Briefing on the Criminal Justice and Immigration Bill June* (Liberty 2007) 16 para 33 <<http://www.liberty-human-rights.org.uk/pdfs/policy07/criminal-justiceand-immigration-bill.pdf>> accessed 8 July 2013.

¹⁰² Smith J, 'When Money is the Only Way to Say Sorry' *The Independent* (London, 12 January 2005) <<http://www.independent.co.uk/voices/commentators/joan-smith/when-money-is-the-only-way-to-say-sorry-6155071.html>> accessed 21 August 2013.

¹⁰³ HL Notices and Orders of the Day, (UK Parliament website, 24 January Session 2004-2005) Question to be put by Lord Lamont of Lerwick 'To ask Her Majesty's Government why they have decided not to pay compensation to Angela Cannings following the quashing of her conviction for the murder of two of her children.' <<http://www.publications.parliament.uk/pa/ld200405/minutes/050114/ldordpap.htm>> accessed 3 June 2015.

¹⁰⁴ Smith (n 102).

¹⁰⁵ s 133(1) Criminal Justice Act 1988 'Where a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage to the person who has suffered punishment as a result.

¹⁰⁶ Fitzpatrick B, 'Case Comment *R v Cannings (Angela)* [2004] EWCA Crim 1' [2013] J Crim L 210, 213 'Access to the *ex gratia* scheme normally depends on there having been seriously deficient conduct on the part of a public authority'; From 1995 to April 2006, 'compensation was "normally" paid on application to anyone who had spent a period in custody and who had had' for example a free pardon, or their conviction quashed by the Court of Appeal, or their imprisonment was the result of a wrongful conviction or the result of police default or facts appears at trial or later that completely exonerated the victim; Lipscombe S, Beard J, *Miscarriages of justice: compensation schemes* (Commons Library Standard notes SN02131, 6 March 2015) 3 <<http://www.parliament.uk/briefing-papers/SN02131>> Accessed 4 June 2015.

¹⁰⁷ Home Secretary Charles Clarke said the discretionary scheme 'cost over £2 million to operate and benefitted only 5-10 applicants' see Lipscombe (n 105).

payment in 2008.¹⁰⁸ Although in cases such as *Cannings*, compensation cannot repair the ‘terrible consequences’¹⁰⁹ including marriage and family breakdown suffered by mothers when the criminal justice system makes mistakes,¹¹⁰ Liberty suggests it is the ‘very least that could reasonably be expected’.¹¹¹ However despite the UK’s obligations under the 1976 UN International Covenant on Civil and Political Rights (ICCPR) art 14 (6),¹¹² successful claims for compensation for a miscarriage of justice under 133 (1) of the Criminal Justice Act 1988,¹¹³ are ‘the exception rather than the rule’.¹¹⁴

The difficulty with such an approach is that although the decision to refuse an application for compensation may not intentionally undermine the force of an acquittal, without the figurative strength of compensation, it may compound the sense of injustice experienced by wrongly convicted individuals including mothers such as Harris.¹¹⁵ On release from prison, ‘lawyer Campbell Malone said Harris was still suffering the terrible consequences of her conviction. She was unable to go to her baby’s funeral and a baby she gave birth to just as she was starting her sentence was taken away for adoption.’¹¹⁶ Harris is reported to have said, ‘They took part of my life away from me and they took my children off me’,¹¹⁷ and her

¹⁰⁸ Boffey D, “‘Six-Figure’ Sum For Mother Wrongly Jailed Over Cot Deaths’ (Mail Online 21 June 2008) <http://www.dailymail.co.uk/news/article-1028262/Six-figure-sum-mother-wrongly-jailed-cot-deaths.html> accessed 12 May 2013; Constable N, ‘Shunned by her last surviving child: Angela Cannings was wrongfully convicted of killing two of her three cot death children. Now her only daughter tells MoS “I never want to see her again”’ *Mail on Sunday* (London, 1 February 2014) <<http://www.dailymail.co.uk/news/article-2550132/Shunned-surviving-child-tragic-mum-lost-3-babies-cot-death.html>> accessed 21 July 2015.

¹⁰⁹ Liberty (n 71).

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² ‘When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him’.

¹¹³ s 133 (n 98).

¹¹⁴ Lipscombe (n 105).

¹¹⁵ For example Harris (n 43) the mother was acquitted of the manslaughter of her son Patrick after 16 months imprisonment. She was unable to go to her baby’s funeral and a baby she gave birth to just as she was starting her sentence was taken away for adoption; ‘Shaken Baby Convictions Quashed’ *BBC News* (London 21 July 2005) <<http://news.bbc.co.uk/1/hi/uk/4702279.stm>> accessed 3 June 2015.

¹¹⁶ *BBC News* (n 115)

¹¹⁷ *BBC News* (n 41).

relationship with her partner failed.¹¹⁸ Her application for compensation¹¹⁹ to enable her to make a fresh start in life¹²⁰ was refused by the Secretary of State¹²¹ on the basis that her application did not fulfil the criteria of s 133, a decision later upheld by the ECtHR.¹²²

Lastly Anthony,¹²³ was successfully awarded compensation¹²⁴ but following acquittal she too admitted to finding life very hard.¹²⁵ She was reported as saying that she had ‘lost my family, my freedom, my friends and my mother who had died while I was in prison without me being able to say goodbye properly. I was penniless. And, worst of all, I hadn’t been able to grieve for my babies’.¹²⁶ As with Harris, inability to grieve for lost children is characteristic of child death cases; Angela Gay who served 15 months in prison was highly distressed by her experiences following their conviction. She and her husband were not told where Christian was buried, and his siblings were removed back into care and placed with a different adoptive family.¹²⁷ Angela Gay was reported by a local newspaper as saying ‘We lost our child but we weren’t shown any compassion’¹²⁸ and that she and her husband had been ‘living a nightmare...as the ‘victims of a gross miscarriage of justice’.¹²⁹ Gay a previously successful

¹¹⁸ The Justice Gap; <http://thejusticegap.com/2012/08/shaken-baby-syndrome-and-the-fight-for-justice/> accessed 2 December 2014.

¹¹⁹ s 133 (n 98).

¹²⁰ Malone C, ‘Shaken Baby Syndrome – and the Fight for Justice’ (*The Justice Gap*, 1 August 2012) <<http://thejusticegap.com/2012/08/shaken-baby-syndrome-and-the-fight-for-justice/>> accessed 2 December 2014.

¹²¹ *R (on the application of Harris) v Secretary of State for the Home Department* [2007] EWHC 3218 (Admin) 2007 WL 4266038.

¹²² s 133 (n 98); Malone (n 120); *R (on the application of Harris) v Secretary of State for the Home Department* [2007] EWHC 3218 (Admin) 2007 WL 4266038; *R (Allen) (formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 1 Cr App R 2 para 23 per Sir Mark Potter P; *Allen v UK* App no 25424/09 (ECtHR, 12 July 2013).

¹²³ Anthony (n 30) para 94 per Judge LJ.

¹²⁴ Knight (n 34).

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ ‘Salt boy tragedy couple “left broken”’ *Birmingham Mail* (Birmingham 5 March 2007) <<http://www.birminghammail.co.uk/news/local-news/salt-boy-tragedy-couple-left-38245>> accessed 4 December 2014.

¹²⁸ ‘Pair Deny Killing Child with Salt’ *Birmingham Post* (Birmingham 15 March 2005) <<http://www.birminghampost.co.uk/news/local-news/pair-deny-killing-child-salt-3998652>> accessed 10 May 2013.

¹²⁹ *ibid.*

actuary, is reported to have suffered chronic depression following acquittal and was reported to be ‘often moved to tears ... spending years on antidepressant medication’.¹³⁰

The impacts of the combined consequences of bereavement, wrongful conviction, and imprisonment were I suggest particularly significant. Although a search has been undertaken for information on the mental health of bereaved, wrongly convicted mothers, so far nothing directly relevant has been located. This may be due to the small numbers of women in prison relative to men and the even smaller numbers of wrongly convicted women, such that no studies have been undertaken. However the research examining the mental health of wrongfully imprisoned men on acquittal strongly indicates the risk of enduring personality change, (EPC) and post-traumatic stress disorder (PTSD),¹³¹ both conditions demonstrated by Clark following her acquittal.¹³² Hence impacts of the criminal justice system on wrongly convicted mothers are likely to be damaging to their mental health, and ‘persistent and disabling’.¹³³ Furthermore building on the research on men, for those who were acquitted feelings of ‘hostility, mistrust, social withdrawal, emptiness, hopelessness and estrangement’,¹³⁴ may also be experienced, together with ‘bitterness and coping with injustice’,¹³⁵ thus magnifying the problems of adjustment following release. As Grounds has shown there is a lack of research and therapeutic knowledge (apart from that gained from war veterans), to treat victims of wrongful accusations and convictions,¹³⁶ and this may be an area that needs further examination.

As discussed throughout this thesis, the possibility that mothering myths may have been relied upon to interpret maternal behaviour evidence, giving rise to wrongful convictions, has

¹³⁰ Hardy (n 66).

¹³¹ Grounds (n 13).

¹³² *BBC News* (n 39).

¹³³ Grounds (n 13).

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

been balanced with the possibility of other factors also influencing jury verdicts including the forensic evidential context. However, Cannings' solicitor later commented, that 'the difficulties in the *Cannings* case came as a surprise ... because of the prejudice faced by women defending themselves against charges of killing their babies'.¹³⁷ I suggest that it is therefore possible that agents of the criminal justice system such as defence advocates, may have been unprepared for the way in which mothers charged with the murder of their children were perceived, and therefore, they failed to address the possibility of biased interpretations of maternal behaviour.

The possibility of prejudicial interpretations of maternal behaviour, is I submit predictable, based on the findings of mock juror mini trials which highlight how both male and female jurors in rape trials, may influence juror verdicts. By analogy I suggest such approaches may have been operative in child death cases, and therefore it is proposed that positive approaches to counter mothering myths, would enable defence advocates to be better prepared to address fixed beliefs.

6.2 Mock juror rape trials and behavioural cues

A number of researchers use mock juror research to assess how members of the public behave in mock jury deliberations¹³⁸ in order to better understand by extrapolation, how jurors decide their verdicts, and from those insights, assess the impact of expert witness testimony on 'inferential shortcomings in jurors' understandings'¹³⁹ in rape trials. Some of the findings from Ellison and Munro's study – 'Reacting to Rape'¹⁴⁰ are examined here, because

¹³⁷ Bache W, 'We Can Afford Justice' [2014] *The London Advocate* 6.

¹³⁸ Ellison and Munro 'Turning Mirrors into Windows?' (n 16); Ellison and Munro 'Reacting to Rape' (n 16); Finch and Munro (2005) (n 2); Thomas C, *Are Juries Fair?* (Ministry of Justice Research Series 2010); Thomas C, 'Avoiding the Perfect Storm of Juror Contempt' (2013) *Criminal Law Review* 483.

¹³⁹ Ellison and Munro 'Reacting to Rape' (n 16) 203.

¹⁴⁰ *ibid.*

I suggest they may be helpful in theorising what may have occurred in jury deliberations using mothering myths in child death cases.¹⁴¹

‘Reacting to Rape’, focusses on the ‘influence upon juror deliberations of key behavioural cues involving lack of resistance, delayed reporting and calm complainant demeanour’,¹⁴² in order to establish the extent to which jurors ‘faced with particular fact patterns translate their immersion within broader societal norms into concrete attributions of responsibility, and ultimately into verdicts’.¹⁴³ By analogy it may be possible to consider how jurors faced with behavioural cues in child death cases, for example, emotional responses, carrying out resuscitation and calling for help, could have drawn on their own personal engagement with mothering, to attribute responsibility for a child’s death.

Ellison and Munro identify in their research, an approach they designate as the “‘female perspective’”¹⁴⁴ which is observed to have also influenced male jurors. Consequently, although feminist scholarship may on the whole lead to the assumption that female jurors will be more sympathetic to females in trials, this is not necessarily so; female jurors may not refrain from reliance on assumptions or fixed beliefs or a gender biased approach¹⁴⁵ that disregards ‘the reality of women’s lived experiences’.¹⁴⁶ The female perspective noted in some mock juror trials may therefore be different to the reality of female experience that feminist scholarship has sought to make known.

Two of the three behavioural cues considered in ‘Reacting to Rape’ are explored here to illustrate the female perspective. The first is the question whether a rape complainant fought her assailant and whether in the process of the fightback and assault she had been injured and

¹⁴¹ But I am not looking at the use of expert witness testimony in educating jurors in this section.

¹⁴² Ellison and Munro ‘Reacting to Rape’ (n 16) 203-4.

¹⁴³ *ibid* 204.

¹⁴⁴ *ibid* 206-7.

¹⁴⁵ Hunter R, McGlyn C and Rackley E, ‘Feminist Judgments an Introduction’ in Hunter R, McGlyn C and Rackley E, (eds), *Feminist Judgment from Theory to Practice* (Hart Publishing 2010) 35.

¹⁴⁶ *ibid*.

to what extent. The researchers found that jurors held ‘unshakeable’¹⁴⁷ beliefs that a woman faced with a potential rapist would struggle, and would maintain injuries such as severe bruising as a result of the assault.¹⁴⁸ Notably, female jurors were often in the forefront of discussions about fighting back, ‘asserting that had they been in the complainant’s situation they would have resisted more forcefully—and where such views were not spontaneously offered, male members of the jury specifically sought out this “female perspective” on the issue’.¹⁴⁹

The influence of the *female perspective* based on the observations in this study may therefore not be limited to female jurors, but to male jurors also. In such situations, female jurors may have been offering a normative view that they felt represented how they saw themselves behaving in a similar situation, and which if voiced, was socially acceptable in a peer group setting of jury members. But in so doing it is possible that both male and female jurors ‘overestimated the capacity of women to fight back and how much damage they could really do’.¹⁵⁰ Inadvertently perhaps, the female perspective may have reinforced ‘unrealistic expectations regarding a woman’s capacity to struggle or to inflict defensive injury upon her assailant’¹⁵¹ by, I suggest, talking down the actual experience of sexual violence experienced by female rape complainants, thus reflecting Gerger’s et al’s understanding of rape myths.¹⁵²

In relation to the second behavioural cue under investigation—the time of reporting, Ellison and Munro found that jurors also held fixed views about the time of reporting such that where a rape complainant delayed making a report to police by three days, the jury were less likely

¹⁴⁷ Ellison and Munro ‘Reacting to Rape’ (n 16) 206.

¹⁴⁸ *ibid* 206, 207-8.

¹⁴⁹ *ibid* 206-7.

¹⁵⁰ *ibid* 207.

¹⁵¹ *ibid*.

¹⁵² Gerger (n 3) 423 see Gerger et al’s definition of a rape myth: ‘*rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women*’.

to convict the defendant.¹⁵³ Again it was found that female jurors who ‘attempted to put themselves in the shoes of the complainant were frequently adamant that their instinctive reaction would have been to telephone the police immediately and they were unwilling to countenance any other response’.¹⁵⁴ In relation to juror reactions to the mock trial in which the rape complainant reported the assault immediately, ‘Female jurors in these deliberations were again vocal in insisting that their own reaction would have mirrored that of the complainant, with one juror even stating “I wouldn't know what else to do”’.¹⁵⁵ The responses by female jurors in the mock trials indicated that they put themselves *into the shoes* of the woman, using a form of role-play in order to decide the complainant’s credibility, on the basis of what they themselves would have done, rather than considering the evidence.

By analogy, it is possible that in child death cases, female jurors may similarly have imagined themselves in a defendant mother’s position in a child death case. By comparing the defendant’s behaviour with preconceived assumptions of their own conduct and finding a clear difference, some jurors may have thereby inferred whether a mother may have been guilty, particularly if the juror was confronted by complex forensic and expert evidence. I suggest that female jurors are unlikely to agree that they would have behaved like Cannings and Clark for example.¹⁵⁶ As a result, it is possible that female jurors relying on their own preconceived assumptions or fixed beliefs, may have come to the conclusion that mothers in child death cases may have been responsible for their children’s deaths.

Nevertheless, as Ellison and Munro found in addition, some jurors did not rely on fixed beliefs, and understood that not all truthful complainants report a rape immediately for

¹⁵³ Ellison and Munro ‘Reacting to Rape’ (n 16) 209.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ i.e. they would not have used an apnoea alarm, or would not have known which cot their child died in, or not remained calm, not started resuscitation immediately, not phoned the ambulance, or known where the house keys were, or, would have bought large quantities of wine, for example.

example.¹⁵⁷ But, even as jurors demonstrated more empathetic feelings towards a rape complainant who had taken three days to report an assault, when a number of behavioural cues were combined, jurors struggled to see how the complainant could have been panic struck one minute and sufficiently “compos mentis” the next to make the call¹⁵⁸ to report the rape to police. In addition, jurors questioned ‘whether a woman in this position would turn to the police as a first point of contact or would be more likely instead to seek comfort and reassurance from a family member or friend’.¹⁵⁹ As Ellison and Munro, suggest if a rape complainant behaviours ‘conflicted with jurors’ narrow views of conceivable post-assault behaviour’,¹⁶⁰ then ‘one set of normative assumptions simply replaced another’.¹⁶¹

Such findings echo the case of *Cannings*,¹⁶² in which the mother stated that she was paralysed with fear, which is why she did not call the ambulance, but, she did start resuscitating and she called her husband.¹⁶³ How jurors may have perceived her behaviour is of course a matter of conjecture; based on the research into mock jury deliberations however, if female jurors had put themselves into Cannings’ shoes, it is possible that jurors may have struggled to understand how Cannings was so panicked as to fail to call the ambulance,¹⁶⁴ but, she was able to call her husband, and she did start resuscitation. But then again, as the research study identified, jurors might have felt it was understandable that she called her husband first.¹⁶⁵ Despite the difficulties in understanding how jurors really came to their decisions, it is possible to suggest that jurors may seek to make sense of a woman’s behaviour, not by evaluating whether what she did was probative, but by speculating what they would have

¹⁵⁷ Ellison and Munro ‘Reacting to Rape’ (n 16) 210.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *Cannings* (n 22).

¹⁶³ *ibid* para 108-110 per Judge LJ.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid* para 108, 110 per Judge LJ When interviewed by police on this question, she said that she had wanted her husband to be present, that she wanted his help ‘so that he could see Matthew and see what he was like’.

done in her shoes. The female perspective in mock juror trials, or putting the self into the shoes of another, is not I suggest a gendered approach; both male and female jurors may use a role play approach in assessing the behaviour of both defendants and complainants in criminal proceedings whether in relation to driving offences, caring for children, or offences on the battlefield. However, what I suggest is more unexpected, is that female jurors may interpret the feminine on the basis of their own assumptions, and therefore less realistically and with less compassion.

Ellison and Munro identify the limitations of the research, in that its “role-playing” aspect of mock jury deliberation creates an inevitable lack of authenticity, and makes any uncritical generalization of experimental findings to “real” courtrooms problematic’.¹⁶⁶ But the researchers note that the participants took their deliberations seriously, engaged with the material and the tasks, and expressed their own emotional reactions to the serious nature of the subject matter in the research.¹⁶⁷ Consequently, there are some points I wish to draw out, which add to the discussion of mothering myths in previous chapters.

The first is that in examining the behavioural cues, there are appear to be two main ways in which jurors approach mock juror trials. The first is that jurors maintain some degree of rape myth acceptance as part of their pre-existing attitudes. The second is that jurors, particularly women placed themselves in the position of the female rape complainant, to assess not how the complainant behaved, but how the juror considered she herself would have behaved. Jurors contended that they in the same situation would have acted normatively, i.e. fought back an assailant, and made an early complaint.¹⁶⁸ As shown in the findings of Ellison and Munro’s study, jurors rarely empathised with rape complainants and paid lip service to the notion that “different people will react differently” to frightening or traumatic

¹⁶⁶ Ellison and Munro ‘Reacting to Rape’ (n 16) 206.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid* 214.

experiences'.¹⁶⁹ Juror assumptions showed little understanding how real rape complainants might behave, being normatively imbued by ideas of how they themselves would have behaved in such circumstances, to decide how the complainant should have behaved. The self-referring, female perspective to role play in a mock juror research study may be different to that experienced by jurors in real life; however if members of the public as mock jurors are typical, then given the extent to which Ellison and Munro suggest mock jurors engaged with the process, I suggest that some extrapolations to child death cases are possible.

Accordingly, female jurors in child death cases may similarly have put themselves in the *mother's shoes* and instead of empathising with them, imagined whether they themselves would have behaved in the ways in which mothers in child death cases behaved.¹⁷⁰ How female jurors might visualise themselves behaving in the face of such cues may owe as much to expectations of the female as self, as to expectations about the female as other. The point that I would like to draw out of this section is that as Ellison and Munro's research indicates, the female perspective may be more influential in rape trial jury deliberations, than hitherto assumed, and it is not necessarily sympathetic to women. Within rape trials, beliefs may be held by women relating to what women ought to do, which are harsh on women complainants, and influential on male jurors. Male behaviour in rape trials however, in rape trials may be judged less harshly and according to what men are perceived to naturally do and how beliefs about how men perceive situations. By analogy, in child death cases, women jurors may hold prescriptive beliefs which are both unsympathetic to mothers and influential on male jurors. Consequently, any guidance on how to interpret evidence of maternal

¹⁶⁹ *ibid* 214; see also Ward T, 'Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials' [2009] *International Journal of Evidence & Proof* 83, 99 'Most of the supposedly counter-intuitive behaviours likely to be ascribed to a rape complainant can be explained without reference to PTSD.

¹⁷⁰ For example, buying alcohol in an underhand way, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for help, or not using an apnoea alarm as instructed or expected and see chapters three and four.

behaviour using for example, written judicial directions¹⁷¹ needs to take the female perspective into consideration.

6.3 Countering juror reactions to behavioural cues in child death cases

This chapter has so far argued that the consequences of wrongful convictions in child death cases were sufficiently problematic to justify addressing the possibility that mothering myths may have been used to interpret maternal behaviour evidence. In addition, that whilst one might think that the female juror perspective will be kinder to women, this is not necessarily so. The female perspective may be in alignment with a male perspective which is informed by traditional beliefs about the role of women.¹⁷² Hence, female behaviour tends to be judged harshly using prescriptive beliefs of what women ought to do, whilst male behaviour in rape trials may be judged according to what men are considered to do naturally, and how they perceive intimate circumstances.

As discussed in chapter five, other factors may have also contributed to the wrongful convictions,¹⁷³ including measures to ensure that only sufficiently reliable expert evidence is admissible, presented by accredited expert witnesses. The question is therefore how best to counter the proposed juror reliance upon mothering myths as they interpret evidence of maternal behaviour. Rape myth scholarship has considered a number of options to address the use of fixed beliefs in rape trials of which six are briefly considered here. Legislative changes, judicial directions and expert testimony are the most widely implemented changes.

¹⁷¹ Thomas (n 136) (2013) 497–498 ‘70% of jurors in Thomas’s 2012 study were given written directions, and at n 20 detailing the 2012 research funded by the Economic and Social Research Council (Grant No. ES/J000876/1) and conducted by the UCL Jury Project in co-operation with the Judiciary of England and Wales, HMCTS, Ministry of Justice and Jury Central Summoning Bureau and in consultation with the Attorney General, Law Commission and Criminal Cases Review Commission. Summing up - Madge N, ‘A Judge’s Perspective’ [2006] Crim LR 817.

¹⁷² Smart C, *Law, Crime and Sexuality* (Sage Publications 1995); Wells C, ‘The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection’ [2004] Crim LR 88, 99.

¹⁷³ Including judicial decisions to admit unreliable expert opinion; the inconclusive and conflicting nature of the scientific evidence; defence ineffectiveness in challenging either expert opinion; the admissibility of behaviour evidence; the absence of judicial directions relating to behaviour evidence, deference to experts, and media coverage.

Suggestions to exclude evidence of behaviour from rape trials, or holding jurors accountable for their decisions, or removing the jury from rape trials have also been made.

Within this thesis, a proposal for legislative change is I suggest unrealistic, because as discussed in chapter two, the domain and discourses of mothering are so broad, and the types of potential maternal behaviour evidence are, in contrast to previous sexual behaviour - a hitherto common feature of sexual assault trials, so varied. Similarly, the suggestion to remove the jury from child death cases¹⁷⁴ is I suggest impractical, first because of the level of support for jury trials,¹⁷⁵ and secondly that juries may as suggested in chapter five and section two of this chapter, engage seriously with their decision making responsibility.

Making the jury accountable for their decisions as suggested by Krahé following proposals by Auld LJ,¹⁷⁶ could be effective. Krahé et al concluded that if they announced in mock jury research studies that ‘participants might be held accountable for their judgements prior to their ratings of victim blame and perpetrator liability’¹⁷⁷ they were able to ‘reduce the strong tendency by individuals high on female precipitation beliefs to blame the victim and exonerate the perpetrator in cases of ex-partner rape through use of force’.¹⁷⁸ As discussed in previous chapters, juries do not have to give reasons for their decisions. But Auld LJ ‘proposed that a judge should be permitted to require a jury to identify their process of reasoning and ‘to justify their verdict by answering publicly each of his questions’,¹⁷⁹ and Krahé et al called for further research into the ‘ effects and effectiveness of holding juries

¹⁷⁴ Reece (n 7) 472 citing at (n 217) and (n 219) Draper D, ‘After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?’ (2008) 41 Akron L Rev 957, 976 and at n 216 citing Draper D, ‘Rape, Law and American Society’ in McGlynn C and Munro VE (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish 2010) 235-36.

¹⁷⁵ Nobles and Schiff (n 12) 27.

¹⁷⁶ Krahé (n 2) 618.

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

accountable in this way'.¹⁸⁰ To date such a suggestion has not been implemented, but whether such a requirement would make juries more responsible decision makers or simply less decisive is unclear. As Krahé suggests more research is required, but this proposal is included in later suggestions here.

Ellison and Munro examined mock juror decision making with a view to understanding the impact of using expert witness testimony 'to inform jurors about the disparate reactions of victims of rape'.¹⁸¹ They argue that following expert testimony, their findings of 'less prejudicial assessments of the relevance of counter-intuitive behaviours, such as delayed reporting or a calm courtroom demeanour', indicated that general expert testimony together with judicial guidance gave them 'cause for optimism'.¹⁸² A number of further studies have also considered the value of and the implementation of expert witness testimony in rape trials in order to moderate the impact of fixed beliefs in drawing inferences of female behaviour evidence in rape trials.¹⁸³ However, it is difficult to say that the use of expert witness testimony to explain counter-intuitive behaviour either following sexual assault, or around the time of a child's death would be helpful in countering reliance on mothering myths in child death cases. Ward for example suggests that 'supposedly counter-intuitive behaviours likely to be ascribed to a rape complainant, can be explained without reference to PTSD'.¹⁸⁴ In addition, in contrast to the lack of personal experience of sexual assault held by most jurors, jurors are likely to have experience of being mothered and some will have knowledge of being a mother. Some may therefore consider themselves expert, and without more research

¹⁸⁰ *ibid.*

¹⁸¹ Ellison and Munro 'Turning Mirrors into Windows?' (n 16) 379.

¹⁸² *ibid.*, and even though their findings in relation to the 'absence of physical injury/resistance yielded less positive outcomes, we offered an explanation for this that -- though requiring further exploration -- may ultimately confirm rather than undermine the value of carefully constructed juror guidance'.

¹⁸³ Ellison (n 5) 704; Temkin (n 5); OCJR (n 5) 5, 18; Norris (n 5); Henderson and Harvey (n 5) 6.

¹⁸⁴ Ward (n 169) 99 citing Garcia-Rill E and Beecher-Monas E, 'Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder' (2001) 24 U Ark Little Rock L Rev 9, 38-9.

there is an issue how beliefs about particular maternal behaviours should be reliably designated as counter-intuitive.¹⁸⁵

As experiments carried out by Rettinger and Hastie demonstrate, once a ‘decision maker becomes an expert in a given domain ... Decisions are then based on the similarity of the current instance to previous ones or on abstract rules generated as a result of experience’.¹⁸⁶ Accordingly, Rettinger and Hastie suggest that the ‘content domain in which a decision problem occurs plays an important role in determining the decision outcome’.¹⁸⁷ It is therefore possible that the content domains of rape myths and mothering myths, can be distinguished by the level of personal expertise professed by individual jurors. Jurors in child death cases, may have considered themselves far more confident if not expert on the basis of their personal experience in interpreting maternal behaviour evidence. As a result, the disadvantages in using expert opinion could be more pronounced if expert witness testimony were to be provided in child death cases in order to guide the jury. Jurors may feel ‘patronised’¹⁸⁸ and ‘insulted by the notion that they required the guidance of an expert’ on simple issues,¹⁸⁹ or areas in which they might consider themselves expert. Experts may therefore be perceived to represent not only a threat to justice by intruding into jury independence¹⁹⁰ and usurping the jurors’ decision making role,¹⁹¹ but also a threat to the integrity of jurors’ beliefs, if experts challenge the female perspective.

¹⁸⁵ In the sense that individual beliefs are ‘Contrary to intuition or to common-sense expectation’ for example ‘The mothers are showing a typical male profile, and that’s counter-intuitive since you would expect them to be showing a more typical female profile’ <<https://en.oxforddictionaries.com/definition/counter-intuitive>>

¹⁸⁶ Rettinger DA and Hastie R, ‘Content Effects on Decision Making’ (2001) 85 (2) *Organizational Behavior and Human Decision Processes* 336, 355.

¹⁸⁷ *ibid* 352.

¹⁸⁸ Coen M and Heffernan L, ‘Juror comprehension of expert evidence: a reform agenda’ [2010] *Criminal Law Review* 195, 199 citing at fn. 20 research by S. Sundby, ‘The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony’ (1997) 83 *Virginia Law Review* 1109.

¹⁸⁹ *ibid* (191).

¹⁹⁰ *R v Turner* [1974] QB 834 at 841 per Lawton LJ ‘If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary’.

¹⁹¹ Ward (n 169) 84.

As discussed in chapter two, the broad domain and discourses of mothering contains beliefs that both influence and appraise maternal behaviour and child care because they are normative, internalisable and regulatory.¹⁹² For example, a belief that mothers should care for children instead of giving that task over to others, would within this context support or justify a negative decision about a mother who went back to work, and constitute a mothering myth. It is therefore possible that jurors who believe that giving up work is what is expected of mothers, might, if they put themselves in a defendant mother's shoes, have believed that they would not have left vulnerable children at home, as did Angela Gay, and that therefore what she did was so wrong, as to be indicative of something more disturbing. Alternatively, if the perspective of a female juror is that returning to work is an essential norm, she might see herself behaving in the same way as the defendant. Another juror however might consider the *Gay's* children as highly vulnerable being within days of being placed, so both female and male jurors might therefore question whether they would have returned to work in such circumstances; but again some jurors might know that adoption panels generally stipulate that only one parent must give up work and remain at home.

In addition if jurors themselves had found it hard to be at home alone with a child, they might have sympathised with Clark¹⁹³ who was criticised for resenting her social isolation at home, or Anthony who relied heavily on her own mother for child care support.¹⁹⁴ But, within jury deliberations, there is also the possibility I suggest, that some jurors may not wish to publicly own such beliefs, professing more socially acceptable and normative views instead. It is therefore difficult to establish that interpretations of maternal behaviour are wrong as in an ethical sense, even if based upon mothering myths. Further the need for educative expert witness testimony in normal maternal behaviour is difficult to ground.

¹⁹² See chapter two page 36.

¹⁹³ *R v Clark (Sally) (Appeal against Conviction) (No 1)* CACD 2000 WL 1421196 para 87 per Henry LJ.

¹⁹⁴ *Anthony* (n 30) para 25 per Judge LJ. 'Mrs Anthony told the police that her parents looked after Jordan for 60 per cent of the time'.

However, there is little indication that in the child death cases, maternal mental health and behaviour at the time a child died was interpreted using peer reviewed psychiatric research for example the effects of trauma on behaviour.¹⁹⁵ Nor were the effects of bereavement on the mental health and behaviour of mothers¹⁹⁶ considered in relation to objective studies. Accordingly expert witness testimony may have been helpful had reliable research on the behaviour of traumatised multiply bereaved mothers at the time their children were dying and immediately after, been available.

The admissibility or not of evidence of behaviour and judicial directions are two further possibilities to consider that may influence juror decision making. According to Krahe, ‘legal decision-making should be purely data driven, i.e. based on the information specific to the case at hand’¹⁹⁷ and she suggests that ‘stereotypic rape beliefs affect judgements of the credibility of rape complaints and the legal culpability of the assailant’.¹⁹⁸ But, preventing the admissibility of behaviour evidence in child death cases would run counter to the current permissive approach that exists towards the admissibility of evidence including behaviour evidence. But then again admissibility is underpinned by the law’s confidence that the jury’s competence should be trusted, in combination with judicial techniques such as directions as suggested in chapter four. Permitting uncontrolled admission of maternal behaviour evidence could lead to injustice because as Harris suggests, behaviour evidence provides a means of reading a mother’s mind may be decontextualised or distorted¹⁹⁹ if interpreted using mothering myths. Nevertheless, as chapter five highlighted, in relation to the evidence of maternal behaviour in child death cases in this thesis, no judicial directions were given. The

¹⁹⁵Ellison L, ‘Closing The Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’ [2005] 239 for source material on the traumatic consequences and therefore the credibility of women in rape and child death cases.

¹⁹⁶ Brabin (n 169); Wilson (n 169); Hartog (n 169).

¹⁹⁷ Temkin and Krahé (n 2) 602.

¹⁹⁸ *ibid.*

¹⁹⁹ Harris J and Lawrence DR, ‘Hot Baths and Cold Minds: Neuroscience, Mind Reading, and Mind Misreading’ 2015 24(2) *Cambridge Quarterly of Healthcare* 123 citing at page 7 and n 42 Harris J, ‘Life in the Cloud and Freedom of Speech’, (2013) 39 (5) *Journal of Medical Ethics* 307.

child death cases were instead characterised by an absence of guidance to the jury on interpreting maternal behaviour, or the possibility of fixed beliefs.

Such judicial silence I suggest, may have increased the possibility that jurors relied upon mothering myths in making their decisions, particularly if forensic complexity and uncertainty prevails and jurors were encouraged to consider the evidence as a whole. The feminine perspective may have added yet another more worrying dimension to jury decision making in this context. If a juror is convinced that a particular maternal behaviour is different to the way in which she believes she herself would have behaved in the same situation, then as Ellison and Munro noted in mock juror trials, prescriptive normative expectations replace a consideration of the probative value of the behaviour evidence.²⁰⁰ But in contrast, Krahé et al found that more men may blame the rape complainant, and that ‘gender can only be an indicator or marker of differences in rape attributions...’.²⁰¹ The question whether juror gender plays a role as a feminine perspective in child death cases as I have suggested, is therefore questionable and the inferences based on research study findings need to be cautious.

Accordingly judicial directions relating to maternal behaviour evidence which I suggest are the way forward in this context, must be gender neutral. Framing appropriate judicial directions may however be difficult, because self-referencing assumptions and inferences based on mothering myths may feel believable. As suggested in chapter three once a belief is held that a mother may be responsible then judicial directions to ‘discount the believable, will be just as ineffective as an instruction to believe the unbelievable’.²⁰² Nevertheless, given the consequences that follow wrongful convictions, any small measure that might reduce that risk is justified, and in addition the possibility that jurors may not take note, has not prevented the

²⁰⁰ Ellison and Munro ‘Reacting to Rape’ (n 16) 210.

²⁰¹ Temkin and Krahé (n 2) 603.

²⁰² Roberts et al (n 8) 85 citing at n 199 Bentham J, *The Rationale of Judicial Evidence*’ (1827) vol 3 219.

inclusion of particular judicial directions in the CCC to address the risk of fixed beliefs in interpreting female behaviour in rape trials.²⁰³

The following section considers judicial directions in the Crown Court Compendium (CCC) in three areas, trial management, circumstantial evidence, and preconceived assumptions and makes suggestions to modify judicial directions to take account of the risks of interpreting maternal behaviour evidence using mothering myths.

6.3.1 Judicial directions

Behaviours exhibited by mothers just before, at, or immediately after a child died, that may have been interpreted by juries in child death cases using mothering myths have been examined in chapter three.²⁰⁴ It was concluded that as with much circumstantial evidence, maternal behaviour evidence has little probative value, but was potentially dangerous because it could be extrapolated to adverse conclusions. For that reason, unless each piece of evidence is examined independently, behaviour evidence provided as part of a prosecution narrative and considered as a whole might appear overwhelmingly probative, i.e. in favour of inferring that the mother's behaviour showed intention to kill her child(ren).²⁰⁵ The following suggestions to modify CCC directions keep in mind both the necessity of making inferences from evidence of behaviour in a rational, logical manner and the potential consequences of wrongful convictions.

²⁰³ CCC (n 4) Part 20 Sexual Offences Section 20-1 Sexual offences the dangers of assumptions - page 20-1.

²⁰⁴ Including inconsistent accounts, not calling for an ambulance, buying alcohol, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for help, or not using an apnoea alarm as instructed or expected.

²⁰⁵ The Law Commission *Murder, Manslaughter And Infanticide* (Law Com No 304, 2006) referring on page 31 at n 23 to *R v G and others* [2003] UKHL 50, [2004] 1 AC 1034 para 39 per Lord Bingham '[T]here is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time'; Roberts et al (n 8) 258 for that reason, suggest Roberts and Zuckerman, an "eliminative inductive" heuristic should be used in relation to circumstantial evidence, such that the jury should only convict when all innocent explanations of the circumstantial evidence have been rejected as untenable'.

6.3.2 Trial Management

The CCC Trial Management section provides opening remarks and directions to be made to the jury in relation to their responsibilities, and mentions that juries are also provided with guidance on the jury DVD.²⁰⁶ Currently, paragraph 8 of the trial management section detailing on judicial directions regarding the jury's responsibilities provides that:

The jury's tasks are to weigh up the evidence, decide what has been proved and what has not and return a verdict / verdicts based of their view of the facts and what the judge will tell them about the law.²⁰⁷

The jury are further to be directed to pay no attention to media reports; to refrain from discussing the case with those not on the jury; to desist from carrying out additional research and not to share trial information.²⁰⁸ Although there is a clear direction stating that 'The prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s)' ²⁰⁹ there is no direction suggesting to the jury how they should or should not arrive at their view of the facts i.e. whether the view has to be objective and rational or whether dependence upon personal experience or prescriptive beliefs are adequate. In addition there is little reference in the CCC to the consequences that may be meted out or suffered by those convicted by jury trials.

Jurors are included in criminal proceedings because it is assumed that they will bring a range of beliefs and experiences to their deliberations that will make their decision representative of society at large. Nevertheless, based on the findings of sections one and two, in order to benefit mothers, I suggest that judicial directions should include a short phrase to alert jurors to the need to avoid putting themselves in the defendant's shoes however expert they may consider themselves to be. Although the dangers of assumptions are mentioned in the CCC in the section

²⁰⁶ CCC (n 4) Part 3 Trial Management - Section 3-1 Opening remarks to the jury Legal Summary - page 3-1 para 2.

²⁰⁷ *ibid* page 3-2 para 8.

²⁰⁸ *ibid* page 3-3 para 11.

²⁰⁹ *ibid* page 3-3 para 12 (2).

on Sexual Offences,²¹⁰ I suggest that para 8 of the Trial Management section²¹¹ might be usefully extended to include a reference to the risks and consequences of relying on fixed beliefs.

A new subsection to para 8 i.e. *para 8 (1)* would then read:

If evidence of behaviour is presented in court, the jury should avoid basing their inferences on what they themselves would personally have done.

A further new subsection i.e. *para 8 (2)* would read:

Using personal beliefs however expert to reach a verdict, rather than the evidence given in court, means that the basis on which a verdict has been reached will be uncertain.

And a new subsection i.e. *para 8 (3)* would read in the form of a warning that:

The consequences of criminal proceedings on the defendant such as these may be grave; jurors should conduct their deliberations, and make their decisions as if they may later have to give an account of themselves and their reasoning to the trial judge.

If such additions were made, I suggest that jurors may consider focussing on the evidence presented, rather than putting themselves in the shoes of the defendant. Further, although the reasons for jury decisions remain secret, the last proposed warning (8(3)) may assist jurors in questioning the basis of their own and others' inferences.

6.3.3 Circumstantial evidence

The second area in which judicial directions could be helpful to child death cases relates to circumstantial evidence. The CCC provides a legal summary before discussing directions for circumstantial evidence,²¹² within which the summary states that 'At the conclusion of the prosecution case the question for the judge is whether, looked at critically and in the round,

²¹⁰ *ibid* Part 20 Sexual Offences – Section 20-1 Sexual offences – The dangers of assumptions – page 20-1.

²¹¹ *ibid* Part 3 Trial Management – Section 3-1 the jury's responsibilities - page 3-2 para 8.

²¹² *ibid* Part 10 Evidence General – Section 10-1 Circumstantial Evidence – Page 10-1.

the jury could safely convict'.²¹³ The CCC continues, that the 'question for the jury is whether the facts as they find them to be drive them to the conclusion, so that they are sure, that the defendant is guilty',²¹⁴ and further, that Pitchford LJ has held that the 'correct question is "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?"'.²¹⁵ The CCC clearly states that in cases where all the evidence is circumstantial (including expert opinions, and evidence of maternal behaviour such as in child death cases), the jury should be directed that that is the case and that there is no direct evidence.²¹⁶ What is not clear without further research, is the extent to which jurors understand that individual strands of circumstantial evidence may lack probative value.

The trial judge is however required to direct the jury that 'different strands of evidence which do not directly prove that D is guilty but which do, say the prosecution, leave no doubt that D is guilty when they are drawn together',²¹⁷ and also 'summarise any evidence and/or arguments relied on the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it'.²¹⁸ The examination of child death cases in previous chapters indicates that although the difficulties of the forensic evidence and expert opinions were to some extent the subject of judicial directions, evidence of behaviour evidence particularly in *Clark*,²¹⁹ or *Cannings*²²⁰ was not reported to be. In this respect, defence advocacy may be crucial in bringing to the judge's attention matters to be included in judicial directions. For example, that the jury should be directed to: examine each of the

²¹³ *ibid* page 10-1 para 3 citing at n 256 *P (M)* [2007] EWCA Crim 3216.

²¹⁴ *ibid* citing at n 257 *McGreevy v DPP* [1973] 1 WLR 276.

²¹⁵ *ibid* page 10-1 para 4 citing at n 258 *R v Masih* [2015] EWCA Crim 477.

²¹⁶ *ibid* page 10-2 para 8 (2).

²¹⁷ *ibid*.

²¹⁸ *ibid* page 10-2 para 9 (1).

²¹⁹ *Clark (No 1)* (n 192) para 271 per Henry LJ for example, that Clark was at home alone and that 'the appellant admitted tiredness in coping and on each occasion the appellant's husband was away from home, or about to go away from home'. See chapter four page 10 n 80.

²²⁰ *Cannings* (n 22) paras 47, 52, 57, 58, 61, 63, 64, 76, 77, 78, 97, 99, 100, 101, 103, 104, 108, 109, 111, 112, 157 per Judge LJ relating to Cannings' failure to use an apnoea alarm.

strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept'.²²¹ This direction is vitally important in order that as Roberts and Zuckerman rightly suggest, the jury should only convict when 'all innocent explanations of the circumstantial evidence have been rejected as untenable'.²²²

The CCC goes on to state that the jury should be directed not to 'speculate or guess or make theories about matters which in their view are not proved by any evidence'.²²³ It is at this point that I suggest that if the proposed direction under Trial Management - The jury's responsibilities - Directions *para 8 (1)* had not been given earlier in proceedings then a new direction clause could be added stating that:

If evidence of behaviour is presented in court, the jury should avoid basing their inferences on what they themselves would personally have done.

This clause might usefully be included in a direction on circumstantial evidence, alongside part of the very clear existing CCC example judicial direction that 'You must not however engage in guess-work or speculation about matters which have not been proved by any evidence'.²²⁴ In that way I suggest that if the female perspective has been an issue in child death cases as is argued here based on an extrapolation from the findings of mock juror research, then its impact may be diminished.

²²¹ CCC (n 4) page 10-2 para 9 (2).

²²² The Law Commission *Murder, Manslaughter And Infanticide* (Law Com No 304, 2006) referring on page 31 at n 23 to *R v G and others* [2003] UKHL 50, [2004] 1 AC 1034 para 39 per Lord Bingham '[T]here is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time'; Roberts et al (n 8) 258 for that reason, suggest Roberts and Zuckerman, an "eliminative inductive" heuristic should be used in relation to circumstantial evidence, such that the jury should only convict when all innocent explanations of the circumstantial evidence have been rejected as untenable'.

²²³ CCC (n 4) page 10-3 para 9 (3).

²²⁴ *ibid* Page 10-3 Example Direction.

6.3.4 Preconceived assumptions

Within the section on sexual offences, the CCC warns that in such cases ‘There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions’.²²⁵ Consequently, the CCC advises that judges should ‘... warn the jury against approaching the evidence with any preconceived assumptions’,²²⁶ in order to counter the ‘risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct’.²²⁷ The CCC highlights that ‘people react differently to the trauma of a serious sexual assault, that there is no one classic response’,²²⁸ and gives examples relating to the behaviour cues studied by Ellison and Munro, such as late reporting²²⁹ and demeanour.²³⁰ The CCC suggests that:

‘Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice’.²³¹

There is no discrete entry in the CCC for mothers in child death cases, nor one for behaviour evidence. Behaviour evidence relating to defendants is however mentioned in several sections including for example absence of the defendant,²³² dishonesty²³³ mistake²³⁴ intoxication,²³⁵

²²⁵ *ibid* Part 20 Sexual Offences – Section 20-1 Sexual offences the dangers of assumptions - page 20-1 para 1 page 20-1.

²²⁶ *ibid* page 20-3 para 7.

²²⁷ *ibid* page 20-1 para 1.

²²⁸ *ibid*.

²²⁹ *ibid* paras 1, 2.

²³⁰ *ibid* para 3.

²³¹ *ibid* citing from the 2010 Benchbook “Directing the Jury”.

²³² *ibid* Part 3 Trial Management - section 3-3 Trial in the Absence of the Defendant - page 3-8 para 3-1.

²³³ *ibid* Part 8 States of Mind - Section 8-6 Dishonesty - page 8-18 para 8 Example Direction.

²³⁴ *ibid* Part 8 States of Mind - Section 8-7 Mistake - page 8-20 para 1.

²³⁵ *ibid* Part 9 Intoxication - Section 1 Legal summary - page 9-2 para 6.

bad character²³⁶ and sexual offences.²³⁷ Behaviour is clearly a much valued type of evidence but, as discussed in chapter four, its probative value is highly variable. Further there are long standing concerns about how jurors may interpret information about behaviour or character particularly if admitted as “background evidence”²³⁸ because jurors may draw inferences that are not justified.²³⁹ How jurors should interpret behaviour evidence is a difficult topic as recent academic rape scholarship indicates.

Reece for example is concerned with the conflict between populist interpretations of sexual behaviour evidence and what have been termed ‘elite interpretations’,²⁴⁰ and she questions whether the academics are right to seek to re-educate the public about its beliefs. Conaghan and Russell in turn criticise Reece’s assertion that “the regressiveness of current public attitudes towards rape has been overstated”²⁴¹ and further that ‘rape researchers have wrongly “stigmatized” the general population by claiming that rape myths are widespread’.²⁴² Conaghan and Russell condemn Reece’s suggestion that ‘public attitudes are sensible and deserving of respect’.²⁴³ Irrespective of such opposing views, as research by Ellison and Munro cited in section two and more recently indicates,²⁴⁴ jurors may genuinely struggle to make decisions about who to believe when faced with evidence of behaviour in cases of sexual assault. If jurors have and continue to rely on speculation, the female perspective and

²³⁶ *ibid* Part 12 Bad Character - Section 12-3 Agreed evidence - page 12-5 para 9.

²³⁷ *ibid* Part 20 Sexual Offences – Section 20-1 Sexual offences the dangers of assumptions - page 20-1 para 1.

²³⁸ Hunter J (n 9) 163 in relation to evidence of character as ‘background evidence’.

²³⁹ *ibid*.

²⁴⁰ Reece (n 7) 472 citing at (n 2) Draper D, ‘After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?’ (2008) 41 Akron L Rev 957, 958 Reece cites Draper’s view that rape myth scholarship is ‘elitist’, but that although ‘Elite opinion has controlled the law-on-the-books... popular opinion has had more influence on the law-in-action’

²⁴¹ Conaghan and Russell (n 2) 28 citing Reece (n 7) 446.

²⁴² *ibid*.

²⁴³ Reece (n 7) 467.

²⁴⁴ Ellison and Munro (n 16) ‘Turning Mirrors into Windows?’; Ellison and Munro ‘Reacting to Rape’ (n 16); -- ‘A stranger in the bushes, or an elephant in the room? Critical Reflections upon Received Rape Myth Wisdom in The Context of a Mock Jury Study’ 2010 13(4) New Criminal Law Review 781; -- ‘Better The Devil You Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) E and P 299.

‘sexual ‘scripts’,²⁴⁵ that may be for a variety of reasons, including the lack of clear judicial guidance, and not only because they may hold unethical or fixed beliefs.

Whether or not the popular views of female behaviour are wrong in an ethical sense, or are sensible, or a last resort, or simply respond to advocacy invitations as is suggested by the CCC,²⁴⁶ an extensive section covering directions for the interpretation of behaviour evidence in cases of sexual assault is included in the CCC.²⁴⁷ I therefore suggest that in order for juries to consider the evidence in child death cases without the risk of bias, a further clause could be added to the Trial Management²⁴⁸ section working from material cited in the CCC²⁴⁹ for example that:

Jurors should judge the evidence on its merits, and should be careful to avoid drawing heavily on potentially stereotypical beliefs about how mothers normally behave.

In addition if such a direction were given at the start of a trial, the jury may be further assisted, if defence advocates were not to ignore evidence of behaviour as merely background material, but to use such material in constructing narratives providing an alternative explanation and understanding of the behaviour e.g. pointing out to the jury that not calling for an ambulance, buying alcohol, and not using an apnoea alarm for example are behaviours that do not point in one direction alone and can be easily misconstrued. If nothing is said,

²⁴⁵ Conaghan and Russell (n 2) 28 citing Ellison L and Munro V, ‘A Stranger in the Bushes, Or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom In The Context Of A Mock Jury Study’ 2010 13(4) New Criminal Law Review 781; -- ‘Better The Devil You Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’. (2013) 17(4) E and P 299.

²⁴⁶ CCC (n 4) page 20-3 para 7 ‘There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this’.

²⁴⁷ *ibid* page 20-1.

²⁴⁸ *ibid* page 3-1 para 2.

²⁴⁹ *ibid* page 20-1 para 3 citing from the 2010 Benchbook ‘Directing the Jury’ that cautioned “‘juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.’”

then the trial judge may not feel able to refer to such concerns in her summing up, and further the jury may consider in the absence of judicial warnings that the behaviours were probative.

6.3.5 Inconsistency of accounts

A further example that might have been helpful to child death cases relates to truthfulness and inconsistency of account.²⁵⁰ In *Clark* as discussed in chapter three, the court were instructed according to the appeal report that, ‘The fact that the appellant gave inconsistent accounts of where she found Christopher adds to its significance rather than detracting from it’,²⁵¹ as she was unable to remember whether the child died in a bouncy chair or the Moses basket.²⁵² Thus, a direction along the lines of ‘Example 3’, situated in the circumstantial evidence section, given in judicial summing up, and raised in examination previously by defence counsel, might have assisted the jury:

‘When you come to consider whether or not this allegation is true, you must avoid making an assumption that because V has said something different to someone else her evidence to you is untrue. You have heard that when V gave a statement to the police she said *the child died in a bouncy chair* whereas when *she spoke to ambulance crew she said the child died in a Moses basket*’.²⁵³ (Italics are my insertions where the directions say {insert}).

The rest of ‘Example three’ could be also used,²⁵⁴ particularly as it draws attention to the possibility that memory and therefore consistency of account may be affected by post-traumatic stress, as highlighted by Ellison’s work drawing attention to research which

²⁵⁰ *ibid* page 20-3 para 8 (1) and page 20-5 Example 3.

²⁵¹ *Clark (No 1)* (n 192) paras 89 (1), 257 per Henry LJ.

²⁵² *ibid* para 240 per Henry LJ.

²⁵³ CCC (n 4) page 20-3 Example 3.

²⁵⁴ *ibid* page 20-5 Example 3.

suggests that ‘the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault’.²⁵⁵

6.3.6 Emotion and distress

The last suggested example of a judicial direction relates to emotion and distress. It draws on the insights of Ellison and Munro’s research²⁵⁶ suggesting that mock jurors interpret emotional reactions of rape complainants using assumptions about how they should behave in court, but that there is little evidence to say that emotional reactions are or are not indicative of guilt. Accordingly, I suggest that a judicial direction would have been helpful in child death cases along similar lines to that in CCC examples relating to the interpretation of emotional reactions.²⁵⁷ However more empirical research would be necessary to investigate the extent to which measures used in rape trials are necessary in ensuring fair outcomes in child death cases.

As the example directions state, the ‘presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying’.²⁵⁸ Again, if the lack of probative value offered by emotional distress is addressed in summing up by defence counsel, such a judicial direction could be given, and situated within the section on circumstantial evidence for example:

The presence or absence of a show of emotion or distress is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying, and neither are the reactions of others to that behaviour.

²⁵⁵ Ellison (n 197) 243 citing at n 28 Petrak J and Hedge B, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (Wiley 2002).

²⁵⁶ Ellison and Munro ‘Reacting to Rape’ (n 16) 211 citing Kaufmann et al ‘The Importance of Being Earnest: Displayed Emotions and Witness Credibility’, (2003) 17 *Applied Cognitive Psychology* 21 but which were not discussed in section two.

²⁵⁷ CCC (n 4) page 20-6 Examples 5 and 6.

²⁵⁸ *ibid.*

6.4 Conclusion

Chapter six has explored the consequences to mothers following wrongful convictions in child death cases. Although wrongful convictions may have been caused by a number of factors, the impacts on mothers suggest the introduction of a few simple judicial directions based on the CCC, would be justified in order to prevent the use of mothering myths in interpreting maternal behaviour evidence and to highlight to jurors the consequences to wrongly convicted defendants. The nature of the proposed directions is supported not only by existing material in the CCC but also on analogising from rape myth scholarship, in particular the way in which jurors may speculate using the female perspective based on prescriptive and or descriptive beliefs. The female perspective may also influence male jurors, but I do not suggest that the perspective is either gendered or restricted to rape trials or child death trials. However where female jurors may consider themselves to have a particular perspective or expertise such views may be particularly influential.

Although as discussed in chapter three and four, judgements of other's past behaviour may influence how we 'extrapolate from the past to the present',²⁵⁹ but as rape myth scholarship has highlighted, such inferences are unreliable and, may contribute to a wrongful verdict. The question as to whether such beliefs are wrong in an ethical sense needs more research particularly in relation to mothering myths because of the normative functionality of such beliefs. I suggest that the best way forward is to seek to prevent wrongful convictions, and that the suggestions for judicial directions made in this chapter, could together with greater involvement by defence advocates, address biased interpretations of the feminine. The upshot may be that mothers in the criminal justice system more widely may be judged in a more rational manner, not only mothers in child death cases.

²⁵⁹ Redmayne M, *Character in the Criminal Trial* (OUP 2015) 1.

In the thesis conclusion to follow, the findings are summarised and suggestions are made for future empirical research to put the suggested analogies between rape myths and mothering myths to the test.

Thesis summary: The role of female behaviour evidence in child death

cases: analogising from rape myths to mothering myths

7.0 Introduction

The reasons why mothers were wrongly convicted in a number of child death cases have been examined.¹ Widely blamed on flawed expert evidence, this thesis questions whether other factors may have contributed to such outcomes, in particular, interpretations of maternal behaviour evidence.² Scant academic scholarship exploring the role of such evidence in child death cases is available, but there is significant scholarship on the way evidence of female behaviour is interpreted in other topic areas such as homicides by battered women,³ and rape trials.⁴ Feminist commentators suggest that the admission of female behaviour evidence may lead to interpretations of the feminine using biased individual beliefs, preconceived assumptions and rape myths, which support jury verdicts prejudicial to women.⁵

This thesis argues that it is possible to use the insights of rape myth scholarship especially, to improve understanding of the role of maternal behaviour evidence in child death cases. Rape

¹ *R v Clark (Sally) (Appeal against Conviction) (No 2)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings (Angela)* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris (Lorraine)* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; *R v Gay (Angela) R v Gay (Ian Anthony)* [2006] EWCA Crim 820, 2006 WL 1078909; *R v Donna Anthony (Appeal against Conviction) (No 2)* [2005] EWCA Crim 952, 2005 WL 816001.

² Such as, maternal behaviour evidence, and also judicial admissibility decisions, judicial deference to experts, failures on the part of the defence to properly challenge expert evidence or draw the court's attention to its limitations, jury inability to understand the limitations of complex forensic evidence and prejudicial media reporting.

³ See *R v Ahluwalia*, [1992] 4 All ER 889; *R v Thornton (No 1)* [1992] 1 All ER 306; *R v Thornton (No 2)* [1996] 2 All ER 1023.

⁴ Burt MR, 'Cultural Myths and Supports of Rape' (1980) 38 J Pers Soc Psychol 217, 228; Lonsway KA and Fitzgerald LF 'Rape Myths: In Review' (1994) 18 Psychol Women 133; Gerger H, Kley H, Bohner G and Siebler F, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validations in German and English' [2007] 33 Aggressive Behaviour 422, 423; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Cossins KA, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) International Journal of Evidence & Proof 74; Conaghan J, Russell Y, 'Rape Myths, Law, and Feminist Research: 'Myths about Myths?' [2014] 22 Fem Leg Stud 25; Lees S, *Carnal Knowledge Rape on Trial* (Hamish Hamilton 1996) – behaviour prior to an assault; Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2007) 33 (3) OJLS 445.

⁵ For example Childs M and Ellison L, *Feminist Perspectives on Evidence* (Routledge Cavendish 2000) 16; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Cossins KA, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) International Journal of Evidence & Proof 74.

myth scholarship has been explored and the differences between rape cases and child death cases considered, in order to examine the difficulties of analogising between the two types of criminal proceedings. Common themes are identified which are the admission of female behaviour evidence, and the question whether female behaviour is interpreted in a way that disadvantages women in general, and mothers in particular. The definition of rape myths provided by Gerger et al indicates that the behaviours of women around the time of a sexual assault may be misinterpreted using fixed beliefs.⁶ Notwithstanding the difficulties in reading across from rape trials to child death cases, and that rape myth acceptance research and the carceral approach have been challenged,⁷ her theorisation is transposed to a definition of a *mothering myth* proposing that: prescriptive beliefs about how mothers should have behaved, and descriptive beliefs as to how women usually behave, may have supported or justified adverse decisions about mothers in child death cases.⁸

A number of child death cases are interrogated to identify evidence admitted of maternal behaviours,⁹ and using the theorisation of a mothering myth, this thesis suggests that if fixed beliefs were used to interpret maternal behaviours, biased inferences may have been made. Little evidence of the probative value of such material has been identified, and therefore this thesis further examines why evidence of maternal behaviour was admitted in particular cases, and whether mothering myths may have informed aspects of child death cases including admissibility, the absence of judicial directions and jury deliberations.

⁶ Gerger et al (n 4) 423 'rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women'.

⁷ See Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2007) 33 (3) OJLS 445; and Gurnham D, (2015) 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19 New Criminal Law Review 141 in chapter two for example for a discussion of the criticisms of rape myth acceptance research.

⁸ A mothering myth could be defined as a *descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system.*

⁹ Behaviours including alcohol dependency, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for an ambulance, or not using an apnoea alarm as instructed or expected, having been raped, finding it difficult to bond

Rape myth scholarship indicates that because the dangers of prejudicial interpretations of female behaviour evidence in rape cases are recognised, admissibility decisions are rightly controlled and judicial directions provided in order that jury interpretations of the feminine may be rationally based on the evidence, allowing speculative or fixed beliefs to be challenged and minimised. In the child death cases studied however, no indications were found that evidence of maternal behaviour evidence despite its lack of probity, was either subject to restrictions on admissibility, or to considerations whether judicial directions on maternal behaviour were necessary, not even relating to defendant silence.¹⁰

The reasons why maternal behaviour evidence was admitted in child death cases are therefore unclear. One explanation may be that behaviour evidence is admitted as background or additional cogent material, in order to enable the courts to infer what a mother may have been thinking and feeling at the relevant time. Such inferences may however be problematic. Individual strands of circumstantial behaviour evidence may point in more than one direction, and if viewed holistically, can be difficult to reconcile, and risk misconstruction as a result of mothering myths. Further, if behaviour evidence claims less overt attention in court, against a complex evidentiary landscape of competing, controversial and inconclusive expert opinions,¹¹ its interpretation may be less obvious but nonetheless influential.

Given the argued permissive practices on the admissibility of maternal behaviour evidence, this thesis is concerned that few judicial directions were identified in the child death cases. It is possible that directions were not given because of a belief that jurors can understand information concerning maternal behaviour, and that to give judicial directions that challenged juror common sense views risked jury alienation, if not usurpation of its role. The

¹⁰ In the latter instance, the appeal court acknowledged its omission.

¹¹ Hunter J, 'Publication Review Character Evidence in the Criminal Trial' (2016) E and P 162, 163, in relation to evidence of character as 'background evidence'; and at 166, the suggestion 'that a complex evidentiary and advocacy landscape often hid from law reports the full operation of character evidence in practice'; Redmayne M, *Character in the Criminal Trial* (OUP 2015) 33.

absence of such guidance in child death cases may however increase the risk that jurors relied upon mothering myths in making their decisions. If jurors are not guided in how to interpret behaviour evidence, they may understandably feel that their own beliefs, common sense, perspective and experiences are sufficient and unproblematic.

The damaging consequences for wrongly convicted mothers following child death cases are however considerable, and this thesis argues that accordingly, it is not satisfactory to leave juries to reach verdicts possibly using mothering myths, without the benefit of judicial guidance. Nevertheless, other factors may have contributed to jury verdicts, and mothering myths may not be ‘wrong’ in an ethical sense,¹² such that popular inferences about mothering may be as valid as academic opinion. Whilst acknowledging such issues, options to limit the extent to which juries in future child death cases can rely on mothering myths are considered. Judicial directions are suggested as the most practical way forward and proposals for new judicial directions are made. The directions seek to take account of the possibility that as identified in rape myth scholarship, female jurors may not necessarily be more sympathetic to the plight of women in the criminal justice system. The same may hold true in child death cases if female jurors rely on mothering myths in drawing their conclusions about guilt, which male jurors in their turn may find persuasive.

7.1 Future Directions: Testing for analogies between rape myths and mothering myths

This thesis has relied upon the theoretical foundations of rape myth scholarship particularly Gerger et al’s definition of rape myths, to argue that by analogy, the outcomes of child death cases may have been influenced by the interpretation of maternal behaviour evidence using mothering myths. Rape myth scholarship however is well established with a significant body

¹² Gerger et al (n 4).

of empirical research, which has supported changes to the ways in which rape complainants and rape trials are approached.

The implications of the suggestions made in this thesis may nevertheless be significant in a number of ways for example, to the study of the criminal process, in scholarly understanding of the relevant cases, and further for policymaking in the way future child death trials may be handled. Accordingly, further investigations may be warranted; this section therefore proposes a roadmap of empirical research to test the suggested analogies between rape myths and mothering myths, informed by methodological insights from rape myth work. There are, I suggest, four stages to the roadmap: analysis of child death cases for relevant maternal behaviours; benchmark data collection on maternal behaviour; data collection on beliefs about mothering; and data collection of mock juror focus group beliefs about maternal behaviours in child death cases.

7.1.1 Case analysis

In rape cases, the types of behaviours and contexts admitted have included previous sexual history, dress, level of intoxication, failure to resist, failure to report to police immediately, and a lack of emotional response. Maternal behaviours by analogy identified in child death cases, include for example, the failure to resuscitate, failure to call an ambulance, excessive emotional reactions, alcohol purchase and memory loss. The analysis of child death cases in this thesis has identified a range of maternal behaviours that may occur around the time of child death.¹³ This stage seeks to extend and refine the list of maternal behaviours admitted in further child death cases. The case analysis would seek to identify if certain maternal behaviours as cues, are considered more significant and relevant than others.

¹³ Maternal behaviours identified in child death cases: For example, whether the mother 1) called her husband first; 2) failed to call the ambulance; 3) used an apnoea alarm inconsistently; 4) forgot where the baby died; 6) went back to work 7) had an alcohol dependency; 8) reacted hysterically or over emotionally, or in an attention seeking way; 9) was inexperienced or who had unrealistic expectations; 11) found it difficult to bond with her child; 12) gave the child to someone else to care for; 13) disliked being home alone; 14) felt resentful if their partner was away from home; 15) had had a previous cot death; 16) had a dirty home; 17) commenced resuscitation.

7.1.2 Benchmark data collection

In order to further test for analogies between rape myths and mothering myths, subject to proper ethical approval and scrutiny, benchmark data are needed to provide an understanding of the range of observed maternal behaviours around the time of child deaths, which are not considered suspicious or criminal. The prior case analysis would provide a list of behaviours to form the initial interview questionnaire; focus group involvement would be helpful at this stage in establishing whether the emphasis of the questionnaire is correctly structured. A pilot study would then use the questionnaire to gain qualitative data from face to face interviews with either or both bereaved mothers and relevant health professionals, and seek to identify whether there are any particular behaviours that are commonly demonstrated around the time a child is dying. A subsequent and larger study would then use the questionnaires and analyse the results for significance. Assuming that *normal* maternal behaviours following a child's death can be recognised, the hypothesis would be tested that: some maternal behaviours are unusual but amongst suddenly bereaved mothers are realistic and not indicative of criminality. Such an exercise would be analogous with identifying behaviours demonstrated by rape myth complainants that do not indicate lying but which may be assumed to indicate false allegations, such as late complaints or lack of bruising or a flat affect. A cross analysis would then be required between the findings of the first and second stages, to identify if there are significant differences between the behaviours admitted in child death cases, and those associated with normal maternal behaviours around the time that a child dies. A wider study would then be necessary to further test the hypothesis that certain types of maternal behaviour are admitted in criminal cases, which are not associated with criminal behaviour, because it is these that may be vulnerable to interpretation using mothering myths. Methods such as on-line completion of questionnaires could also be considered to gain data for this stage.

7.1.3 Questionnaire studies

Once benchmark data of the range of actual maternal behaviours is established, questionnaires could be used to test the existence of mothering myths more widely. A number of empirical studies have been cited throughout this thesis testing the existence and scope of rape myth acceptance (RMA) within the public,¹⁴ and agents of the criminal justice system.¹⁵ Further, questionnaire methodology such as Burt's has been employed to test hypotheses that rape myth acceptance was associated with other factors,¹⁶ such as age, sex, personality, social background, attitudes¹⁷ and experience. However, showing that particular beliefs are associated with other variables may be problematic. The analysis of several research studies by Lonsway and Fitzgerald found gender to be the only variable reliably associated with RMA.¹⁸ Links between RMA and men holding traditional views about the roles of women and negative attitudes towards women¹⁹ were indicated, but the extent to which such beliefs or associations indicated that beliefs influenced behaviour e.g. making jury decisions, were difficult to establish.²⁰ Lonsway et al made four suggestions for investigations into rape myth acceptance,²¹ which I propose to follow in providing an approach to further testing the analogies, whilst also addressing the common definitional issues identified in chapter two between rape myths and mothering myths.²²

¹⁴ Burt (n 4); Lonsway and Fitzgerald (n 7); Gerger et al (n 4).

¹⁵ Kibble N, 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' (2008) 35 JLS 91, 92; O'Keeffe S, Brown JM and Lyons E, 'Seeking Proof or Truth: Naturalistic Decision-Making by Police Officers when Considering Rape Allegations' in Horvath MAH and Brown JM (eds), *Rape: Challenging Contemporary Thinking* (Willan 2009) 3; Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 165.

¹⁶ Burt (n 4) 220.

¹⁷ *ibid* for example, 'sex role stereotyping, adversarial sexual beliefs, sexual conservatism, and acceptance of interpersonal violence'.

¹⁸ Lonsway and Fitzgerald (n 4) 145.

¹⁹ *ibid* 134.

²⁰ *ibid* 153.

²¹ *ibid* 158-159 which were 1) conceptual clarity and definitional consistency, 2) domain articulation, 3) psychometric adequacy, and 4) theoretical power

²² Whether the belief or idea could be identified; was true or false; widely held or not; consciously or unconsciously held; fixed/settled; associated with other gendered ideas and or functionality; served to convert attitude into behaviour; useful for decision making and/or comprised norms about behaviour dividing women into good and bad;

Gerger et al addressed Lonsway's first suggestion for definitional clarity by proposing a definition of rape myths that set aside issues of whether rape myths were false or widespread.²³ Working from the Burt, Lonsway and Gerger studies, and analogising from Gerger's definition, the proposed definition of a mothering myth likewise puts the issues of whether beliefs about maternal behaviour are true or widespread, to one side;²⁴ i.e. what needs to be empirically tested first is whether particular beliefs about maternal behaviour are held, not whether they can be shown to be false, or widespread. Although a significant number of rape myth scholars are confident that rape myths are held,²⁵ more recently, concerns have been expressed regarding the existence and functionality of rape myths.²⁶ Consequently, although examples of mothering myths have been identified in this thesis, the aim of this stage of the empirical research would be to identify whether mothering myths as defined, do exist in people's minds.

To do this the next step would be to identify the domain of a) general beliefs about maternal behaviour in their widest sense working from the analysis of normal mothering discourses and ideology in chapter two. Secondly, b) the domain of mothering myths as specific beliefs about maternal behaviour before, around or after the time a child may be dying, as identified in this thesis, would need to be tested. A number of questions and/or statements could be framed for both a) and b) for respondents to consider, and the replies would need to be scaled to indicate the level of agreement or disagreement. Beliefs about maternal behaviour for a) could be sourced from many discourses of mothering in order to establish whether there are consistent, identifiable beliefs about maternal behaviour in general. Many examples of beliefs about maternal behaviour for b) have been identified in the analysis of previous chapters and

²³ Gerger et al (n 4) 422, 423 'rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women'.

²⁴ *A descriptive or prescriptive belief about mothering that serves to support or justify adverse decisions about mothers within the criminal justice system.*

²⁵ For example, Burt (n 4) Lonsway et al (n 4); Gerger et al (n 4); Temkin Krahe B (n 4); Cossins (n 4).

²⁶ Reece (n 4); Gurnham (n 7).

would be further developed at the case study stage. A questionnaire would be designed to assess how respondents rated particular maternal behaviours, when faced with a very ill child in terms of maternal credibility and likelihood of guilt.²⁷

In order to achieve Lonsway's third suggestion of psychometric adequacy, further variables would need to be assessed to understand how or whether *mothering myth acceptance* was associated with other factors. The hypothesis that mothering myths are associated with female gender and traditional sex role attitudes could be tested by analysing for associations with demographic factors,²⁸ knowledge factors²⁹ and attitudes.³⁰ It is possible that mothering myths may as Burt suggested in relation to rape myths, be associated with male respondents; or, they may be associated as in Ellison and Munro's research, with female respondents.³¹

Lastly, in contrast to rape myth work I suggest that the nature of the respondents needs to be wider, given the evidential context of child death cases. Rape myth questionnaire scholarship has used randomly chosen cohorts of voluntary adults either from a geographical area,³² or university social psychology students,³³ or passengers on commuter trains,³⁴ and also law students³⁵ and judicial and advocacy personnel.³⁶ I suggest that medical students and paediatricians could also be included to test whether, for example, not phoning for an ambulance is indicative of non-accidental injury, or is a professionally held mothering myth.

²⁷ Maternal behaviours in child death cases (n 12).

²⁸ For example age, level of education, whether a parent or grandparent, cultural background, whether the respondent worked, and whether supported by a partner.

²⁹ For example whether respondents were aware that maternal bereavement could alter emotional reactions and short term memory; whether respondents were aware of the practical problems associated with apnoea alarms; whether they knew how to resuscitate a young child; whether they knew about research detailing damage to health from smoking, drugs and alcohol

³⁰ For example whether traditional attitudes to parenting roles were held, and attitudes to alcohol, and smoking

³¹ Ellison L and Munro VE 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 (2) The British Journal of Criminology 202 the female perspective 206-7.

³² Burt (n 4) 220.

³³ Gerger et al (n 4).

³⁴ *ibid.*

³⁵ Temkin and Krahé (n 7) 75.

³⁶ *ibid* 125.

7.1.4 *Mock juror studies*

Once information has been gained about whether fixed beliefs about maternal behaviour in general and specific to child death cases are held, and in what psychometric context, further research using the ‘mock jury paradigm’³⁷ can be carried out, in order to better understand both how individual beliefs are held, and group beliefs develop.³⁸ Different styles of group work have been utilised in rape myth scholarship. Mock juror studies in which ‘jurors are asked to put themselves in the role of jurors and make judgements about hypothetical cases presented to them in various forms’,³⁹ are as Temkin suggests, and as indicated by the rape myth scholarship considered in this thesis, popular.⁴⁰ Mock jurors can be shown actual trial materials as videos, audiotapes, transcripts and summaries;⁴¹ or jurors as a focus group watch simulated trials with a number of controlled variables; or, jurors in focus groups consider ‘critical variables of interest’⁴² which are introduced one at a time to deliberations, to ascertain which pieces of evidence may shift jury decisions.⁴³ Alternatively, mock jurors in focus groups watch mini mock trials in which different behaviours are presented, and

³⁷ *ibid* 53.

³⁸ *ibid* 54 the authors suggest both have advantages.

³⁹ *ibid* 53.

⁴⁰ for example: Finch E and Munro VE, ‘Breaking Boundaries?: Sexual Consent in the Jury Room’ (2006) 26 *Legal Studies* 303; Finch E and Munro VE ‘The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials involving Intoxicants’ (2007) 16 *Social and Legal Studies* 591; Krahé B, Temkin J and Bieneck S, ‘Schema-driven Information Processing in Judgements about Rape’ (2007) 21 *Applied Cognitive Psych* 601;

Finch E and Munro VE, ‘Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research’ (Blackwell 2008); Ellison L and Munro (n 32); Ellison L and Munro VE, ‘Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49 (3) *The British Journal of Criminology* 363; Ellison L and Munro V, ‘A Stranger in the Bushes, Or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of A Mock Jury Study’ 2010 13(4) *New Criminal Law Review* 781; Ellison L and Munro VE, ‘Getting to (Not) Guilty: Examining Jurors’ Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial’ (2010) 30 *LS* 74; Thomas C, ‘Are Juries Fair?’ (Ministry of Justice Research Series 2010); Thomas C, ‘Avoiding the Perfect Storm of Juror Contempt’ (2013) *Crim L Rev* 483; Ellison L and Munro VE ‘Better The Devil You Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *E and P* 299.

⁴¹ Temkin and Krahé (n 7) 54.

⁴² *ibid*.

⁴³ See Finch E, Munro VE, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study’ (2005) 45 (1) *Br J Criminol* 25 in which mock jurors were used in focus groups, to watch simulated jury rape trials to investigate juror assessments of complainant intoxication. The research found that ‘jurors considered numerous extra-legal factors when reaching a decision’ including rape myths.

deliberate as groups to reach verdicts, in order to test the impact of female behaviours on outcomes.⁴⁴

The analogies between rape myths and mothering myths are based on the argument that female behaviour evidence, relating to the time immediately preceding, during or following particular events subject to criminal proceedings - either sexual assault or child death – may be interpreted prejudicially by jurors. Consequently, in considering how empirical mock juror research might work in investigating whether jurors use mothering myths in deciding child death cases, a series of mini child death cases could be organised, in which common expert evidence is presented and or the presence of varying types and combinations of female defendant behaviour. Ellison and Munro's research used behaviours as cues: the lack of calm demeanour in court; the lack of physical resistance and thirdly delayed reporting. Likewise, mock juror research investigating child death cases, could consider a number of behaviour cues as variables,⁴⁵ starting with the failure to call for help, the failure to resuscitate the child and extreme emotional reactions.

In seeking to further model mock juror trials on actual child death cases however, a difficulty arises as to whether and which expert evidence should be presented. In order to simulate reality, some expert evidence should be included, but clearly not that which was later shown to be flawed⁴⁶ as in *Clark, Anthony, Cannings, Gay and Gay*. The hypothesis that a framework of complex, contradictory and incomplete expert evidence may lead jurors to rely on mothering myths to interpret maternal behaviour could then be tested, by varying the way in which the expert evidence is presented to jurors, and the degree to which it is contested. In addition mock trials using the facts in cases where the mothers were not acquitted, such as

⁴⁴ Ellison and Munro 'Reacting to Rape' (n 28).

⁴⁵ Maternal behaviours in child death cases (n 12).

⁴⁶ Meadow R, *The ABC of Child Abuse*, (3rd edn BMJ Publishing Group, 1997) 29 'one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise.'

Kai-Whitewind,⁴⁷ or even *Folbigg*,⁴⁸ could be helpful in testing the impact of particular maternal behaviours such as the lack of maternal-infant bonding, or personal records showing childhood abuse and anger management issues, respectively.

7.2 Impacts of empirical research

Interpretations of the feminine in rape trials are argued to follow normative understandings about the expected behaviour of women experiencing sexual assault. Such events are however outside the normal experiences of most people and by extrapolation probably most jurors and therefore, normative interpretations may be unrealistic.⁴⁹ Rape myth scholarship suggests a significant difference between some juror perceptions of what women should do in instances of sexual assault, and what women actually do.⁵⁰ By analogy, this thesis suggests that juror perceptions of the ways in which mothers should have behaved, may have influenced jury deliberations and supported guilty verdicts in child death cases.

The four stages in the road map of proposed empirical research would therefore seek to test the analogies between rape myths and mothering myths to understand how mothers may be perceived in child death cases and to gain insights into a number of questions. These questions include: whether mothering myths exist, and to what extent; whether they are realistic; how mothers normally behave at the time a child dies and whether maternal behaviour is a reliable indicator of wrongdoing. Further, whether those who hold fixed beliefs about maternal behaviour in relation to child death cases, translate their beliefs into decisions about guilt, and whether a female perspective can be identified which influences male jurors.

⁴⁷ *R v Kai-Whitewind (Chaha'oh Niyol)* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

⁴⁸ *R v Folbigg* [2003] NSWSC 895 (24th October 2003), [2005] NSWCCA 23.

⁴⁹ Ellison and Munro 'Reacting to Rape' (n 28).

⁵⁰ *ibid.*

Lastly, the question whether judicial directions influence mock juror thinking needs to be tested in order to know whether judicial guidance in the form of the proposed judicial directions, would be helpful in order to limit the possibility of an unfair trial.⁵¹

Although few similar child death cases have followed those examined here, the suggestions in this thesis could be a catalyst in developing an improved evidenced based understanding of how mothers behave around the time a child dies. Not only may mothers whose children die and those involved with them benefit, if mothering myths and their impacts can be identified, a more realistic understanding of the role of expert evidence may be gained, and the consequences of blaming experts could be limited.

⁵¹ See Introduction and discussion of *Hainey* HCJAC (n 5) para 49 per the opinion of the Court, citing *N v HM Advocate* [2003] JC 140, [2003] SLT 761 para 35 per the opinion of the Court; Art. 6 (1) of the European Convention on Human Rights (ECHR). ‘Right to a fair hearing: In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ Council of Europe/European Court of Human Rights, ‘Practical Guide to Article 6 – Civil Limb’ (Council of Europe/European Court of Human Rights 1 May 2013) paras 173, 209, 222 referring to criminal proceedings; *Walker* HCJAC (n 5) paras 3; *Walker* see para 37 that ‘... the failure of the jury to provide reasons for their decision had denied the appellant a fair trial in terms of art.6 ...’ had followed from the failure of judicial directions, see paras 37-38 and 57-58.

Glossary

Affective disorder: a mood disorder that can be any of several psychological disorders characterised by abnormalities of emotional state and including especially major depressive disorder.¹

Affective: relating to, arising from, or influencing feelings or emotions.²

Apnoea monitor: an electronic device activated by sensors attached to a baby's chest or abdomen that responds to a baby's respiratory movements and which was provided for families to use when the baby was asleep or at night.

Apnoea: transient cessation of respiration; the term applied when there is no respiratory effort for greater than 20 seconds or for a shorter period if accompanied by cyanosis or bradycardia, as in an acute life threatening event (ALTE).

Arachnoid: a thin membrane of the brain and spinal cord that lies between the dura mater and the pia mater.³

Blog: is similar to any 'word processed document spread sheet, website...chat-room message, email, voicemail, fax or instant or text message' and is 'hearsay when its content originated in or passed through the mind of a person and is adduced for its substantive truth'.⁴

Blood clotting: is a complex sequence of chemical and physical reactions that results in a conversion of fluid blood to a coagulum, that involves the shedding of blood, release of thromboplastin from blood platelets and injured tissues, inactivation of heparin by thromboplastin, permitting calcium ions of the plasma to convert prothrombin to thrombin, interaction of thrombin with fibrinogen to form an insoluble fibrin network, in which blood cells and plasma are trapped, and contraction of the network to squeeze out excess fluid.⁵

¹ Medical Dictionary, (MedlinePlus, US National Library of Medicine and Merriam Webster search engine 2015) <<http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>> accessed 2 August 2015 (Medline Plus).

² Medline Plus (n 1).

³ Medline Plus (n 1).

⁴ Rosemary Pattenden, 'Machinespeak: section 129 of The Criminal Justice Act 2003' [2010] Crim LR 623, 625,626

⁵ Medline Plus (n 1).

Bradycardia: A relatively slow heartbeat which may be normal or an abnormal slowing of the heartbeat.⁶

Cardiac dysrhythmia: an abnormal rhythm especially a disordered rhythm exhibited in a record of electrical activity of the heart or brain.⁷

Cloud: ‘The cloud’ refers to various internet services whereby information and files are kept on remote servers connected between the individual and the internet. This means that instead of keeping files on a single computer, any device that a person can use, that can access the internet, can access the same files remotely. However the originator of the material has little control over the life of the materials.⁸

Cognitive: relating to or being conscious, intellectual activity (as thinking, reasoning, remembering, imagining, or learning words).⁹

Congenital: existing at or dating from birth or acquired during development in the uterus and not through heredity.¹⁰

Cyanosis: a term used to describe the bluish or purplish discoloration of the skin and the mucous membranes of the lips and mouth, usually due to a lack oxygen and an increase of unoxygenated haemoglobin or deoxyhaemoglobin in the blood stream.

Delusional: the state of being deluded, is an abnormal mental state characterised by the occurrence of psychotic delusions, or a false belief regarding the self or persons or objects outside the self that persists despite the facts and occurs in some psychotic states.¹¹

Depression: feelings of sadness, inactivity, difficulty thinking and concentrating, a significant decrease in appetite and time spent sleeping, feelings of dejection and hopelessness and sometimes suicidal thoughts.¹²

Dura mater: also called the dura, is a tough fibrous membrane lined with endothelium on the inner surface of the skull that envelopes the brain and spinal cord external to the arachnoid

⁶ Medline Plus (n 1).

⁷ Medline Plus (n 1).

⁸ ‘What is cloud computing?’ (BBC Webwise 10th October 2012)

<<http://www.bbc.co.uk/webwise/guides/what-is-cloud-computing>> accessed 3 August 2015

⁹ Medline Plus (n 1).

¹⁰ Medline Plus (n 1).

¹¹ Medline Plus (n 1).

¹² Medline Plus (n 1).

and pia mater, that in the cranium closely lines the bone, does not dip down between convolutions and contains numerous blood vessels and venous sinuses and that in the spinal cord is separated from the bone by a considerable space and contains no venous sinuses.¹³

Encephalopathy: a disease of the brain especially one involving alterations of brain structure.¹⁴

Facebook: is a free social networking website, that can be used to create an individual Facebook page on which individuals upload comments, photos, video, and messages which are stored on Facebook servers and in pages registered to other users making removal of an individual's data difficult.

Fibrin: a white insoluble fibrous protein formed from fibrinogen by the action of thrombin especially in the clotting of blood.¹⁵

Fibrinogen: a plasma protein that is produced by the liver and is converted into fibrin during clot formation.¹⁶

Filicide: Murder of a child up to the age of 18 years committed by one of its parents.

Forensic: relating to the application of scientific knowledge to legal problems.

Google: 'Google is a multinational, publicly-traded organization built around the company's 'search engine';¹⁷ to search for information on the Internet using the search engine Google may now be referred to by the brand name i.e. to search for something or someone is 'to google'.¹⁸

Haematoma: a mass of usually clotted blood that forms in a tissue or an organ or body space as a result of a broken blood vessel.¹⁹

Haemoglobin: an iron containing respiratory pigment of vertebrate red blood cells that functions primarily in the transport of oxygen from the lungs to the tissues of the body.²⁰

¹³ Medline Plus (n 1).

¹⁴ Medline Plus (n 1).

¹⁵ Medline Plus (n 1).

¹⁶ Medline Plus (n 1).

¹⁷ Google (The Company definition) <<http://searchcio.techtarget.com/definition/Google-The-Company>> accessed 3 August 2015

¹⁸ Google To google < <https://www.google.co.uk/>> accessed 3 August 2015

¹⁹ Medline Plus (n 1).

²⁰ Medline Plus (n 1).

Hallucination: a perception of something (as a visual image or a sound) with no external cause usually arising from a disorder of the nervous system or in response to drugs.²¹

Hereditary: genetically transmitted or transmittable from parent to offspring.²²

Hypernatraemia: which is an exceptionally high blood sodium concentration with a number of natural causes.²³

Hypofibrinogenemia: ‘an abnormal deficiency of fibrinogen in the blood’.²⁴

Immunisation: the creation of immunity usually against a particular disease, usually by vaccination of a child or adult for the purpose of making it immune to a particular pathogen.

Infanticide: represents the unnatural death or the killing of a child under the age of one year, by one of its parents

Insanity: ‘a severely disordered state of mind that usually occurs as a specific disorder like paranoid schizophrenia, and or an unsound mind or lack of the ability to understand that prevents one from having the mental capacity required by law, to enter into a particular relationship status or transaction, or that releases one from criminal or civil responsibility’.²⁵

Insulin: a protein hormone that is synthesised in the pancreas from proinsulin and secreted by the beta cells of the islets of Langerhans, that is essential for the metabolism of carbohydrates, lipids and proteins that regulates blood sugar levels by facilitating the uptake of glucose into tissues by promoting its conversion into glycogen, fatty acids and triglycerides and by reducing the release of glucose from the liver and that when produced in insufficient quantities results in diabetes mellitus.²⁶

Metadata: is data about data ‘including automatic date stamps, fax and email headers, “hidden” information generated by digital operating systems or application programmes and the electronic footprints of those who have accessed a website’.²⁷

²¹ Medline Plus (n 1).

²² Medline Plus (n 1).

²³ RCPCH ‘The Differential Diagnosis of Hypernatraemia in Children, with Particular Reference to Salt Poisoning an Evidence-Based Guideline’ (RCPCH 2009) 26-71.

²⁴ Medline Plus (n 1).

²⁵ Medline Plus (n 1).

²⁶ Medline Plus (n 1).

²⁷ Pattenden, ‘Machinespeak’ (n 5) 627. 627

Mitochondrial inheritance: ‘Inherited mitochondrial disorders are progressive and often cause severely debilitating and disabling health problems. There is no cure for these conditions, and they can result in the death of babies, children and young people.

Mitochondria are tiny structures inside our cells which provide the energy for cells to function. Their failure to work properly can have devastating effects. Mitochondrial disorders can be caused by either problems in the genes in the nucleus affecting mitochondrial function, or by problems in genes within the mitochondria themselves.²⁸

Modelling algorithm: Mathematical calculation used to model outcomes, through a sequence of stages incorporating known or random information.

Mortality: the number of deaths in a given time or place or as a proportion of the population.²⁹

Neonatal death: refers to the death of a child within 24 hours of birth due to natural causes.

Neonaticide: refers to the unnatural death or the killing respectively of a baby within 24 hours of birth by either of its parents

Neural activity: affecting nerve or nervous system relating to the brain or spinal cord.³⁰

Neuroscience: a ‘science dealing with anatomy, physiology, biochemistry, or molecular biology of nerves and the nervous tissue and especially their relation to behaviour and learning.’³¹

Pathology: the study of the essential nature of diseases and especially of the structural and functional changes produced by them. The anatomical and physiological deviations from the normal that constitute disease or characterise a particular disease or abnormality’,³² or occurrence, such as smothering.

Pia: ‘the delicate and highly vascular membrane of connective tissue investing the brain and spinal cord, lying internal to the arachnoid and dura mater, dipping down into the

²⁸ Jonathan Montgomery, *Novel Techniques For The Prevention of Mitochondrial DNA Disorders: An Ethical Review* (Nuffield Council on Bioethics, 2012) Foreword

²⁹ Medline Plus (n 1).

³⁰ Medline Plus (n 1).

³¹ Medline Plus (n 1).

³² Medline Plus (n 1).

convolutions of the brain, and sending an ingrowth into the anterior fissure of the spinal cord'.³³

Post neonatal death: represents the natural death of a child under the age of one year.

Postpartum psychosis: 'a severe mental illness that can affect a woman after she has a baby. It causes her to have hallucinations and delusional thinking (symptoms of psychosis) and is thought to affect one in every 1,000 women who give birth. It's sometimes referred to as puerperal psychosis or postnatal psychosis'.³⁴

Psychotic: a serious mental disorder (as schizophrenia) characterised by defective or lost contact with reality often with hallucinations or delusions.³⁵

Puerperal: relates to an occurrence during childbirth or the period immediately following.³⁶

Respiratory infection: a disease produced by the establishment of an infective agent in the respiratory tract.³⁷

Respiratory tract: the respiratory system consists of the nose, nasal passages, naso-pharynx, (upper respiratory tract), and larynx, trachea, bronchi and lungs, (lower respiratory tract), altogether referred to as the respiratory tract.³⁸

Retina: refers to 'the sensory membrane that lines most of the large posterior chamber of the vertebrate eye, is composed of several layers, including one containing the rods and cones, and functions as the immediate instrument of vision by receiving the image formed by the lens and converting it into chemical and nervous signals which reach the brain by way of the optic nerve'.³⁹

Rickets: a deficiency disease that affects the young during the period of skeletal growth, that is characterised especially by soft and deformed bones and is caused by failure to assimilate and use calcium and phosphorous normally due to inadequate sunlight or vitamin D.⁴⁰

³³ Medline Plus (n 1).

³⁴ 'Postpartum psychosis' (NHS Choices, 19 September 2014) <<http://www.nhs.uk/conditions/postpartum-psychosis/Pages/Introduction.aspx>> accessed 14 March 2015

³⁵ Medline Plus (n 1).

³⁶ Medline Plus (n 1).

³⁷ Medline Plus (n 1).

³⁸ Medline Plus (n 1).

³⁹ Medline Plus (n 1).

⁴⁰ Medline Plus (n 1).

SMS: Short Message Service for e.g. texting.

Tachycardia: a relatively rapid heartbeat whether physiological as after exercise or pathological as in ventricular tachycardia.⁴¹

Triad: refers in this thesis to ‘a triad of intracranial injuries consisting of encephalopathy (defined as disease of the brain affecting the brain's function); subdural haemorrhages (SDH); and retinal haemorrhages (RH). For many years the coincidence of these injuries in infants (babies aged between one month and two years) has been considered to be the hallmark of ‘NAHI’, (Non-accidental head injury).

Unified Hypothesis: ‘The hypothesis put forward by Geddes (2004), challenging the mainstream interpretation of the triad. It suggests that brain hypoxia, infection or raised intracranial pressure can cause not only encephalopathy, but also subdural haemorrhage and by implication retinal haemorrhage’.⁴²

Ventricles: ‘are two chambers of the heart (right and left) which receive blood from the corresponding atrium (right or left) and from which blood is pumped into the arteries to the lungs (right) or the body (left)’.⁴³

Ventricular Tachycardia: occurs when ‘electrical impulses within the ventricles are abnormal and characterised by an electrocardiogram having a broad QRS complex. A ventricular arrhythmia can be life-threatening’.⁴⁴

Ventricular: relating to the ventricles of the heart.⁴⁵

Vitamin D: ‘refers to a number of fat soluble vitamins chemically related to steroids, essential for bone and tooth structure and found especially in fish -live oils egg yolk and milk or produced by activation (as by ultraviolet irradiation) of sterols eg calciferol or cholecalciferol’.⁴⁶

⁴¹ Medline Plus (n 1).

⁴² Guidance Document CPS (n 45).

⁴³ Medline Plus (n 1).

⁴⁴ CRY (n 58).

⁴⁵ Medline Plus (n 1).

⁴⁶ Medline Plus (n 1).

Abbreviations for Bibliography

* In order to cite secondary sources from medicine consistently, the following source has been used, as neither OSCOLA nor CARDIFF provide abbreviations for medical journals; Citing Medicine: The NLM Style Guide for Authors, Editors, and Publishers [Internet], 2nd edition available at the *National Center for Biotechnology Information* website, <<http://www.ncbi.nlm.nih.gov/books/NBK7251/#IX-A>> accessed 6 May 2015 onwards.

Abbreviations for some secondary sources are not found within OSCOLA and the recommended abbreviation from the Cardiff Index to Legal Abbreviations has been used in the bibliography and footnotes without punctuation; <<http://www.legalabbrevs.cardiff.ac.uk/titles/titsearch/tsearch/0/ttype/0>> accessed 6 May onwards 2015

Am	American
Arch*	Archives
Austr J For Sci	Australian Journal of Forensic Sciences
Brit J Criminol	British Journal of Criminology
BMLR	Butterworths Medico Legal Reports
CSLR	Cambridge Student Law Review
Cardiol	Cardiology
Child*	Children
CJQ	Civil Justice Quarterly (UK)
Crime & Just United States	Crime and Justice
CJQ	Criminal Justice Quarterly (New Zealand)
Crim L & J Weekly	Criminal Law & Justice Weekly
Crim Law	Criminal Lawyer
Dis*	Disease(s)
Epidemiol*	Epidemiology
ECHR	European Court of Human Rights
Ent L R	Entertainment Law Review
E&P	International Journal of Evidence & Proof
EWHC	England & Wales High Court (Administrative Court) [Neutral Citation]
Fam Law	Family Law
Fem L S	Feminist Legal Studies
Int J L C	International Journal of Law in Context
IRLR	Industrial Relations Law Reports
Child Abuse Negl	International Congress on Child Abuse & Neglect

Int JLPF	International Journal of Law, Policy and the Family
ICLJ	Irish Criminal Law Journal
J*	Journal
JCL	Journal of Criminal Law
J Dev Behav Pediatr	Journal of Developmental and Behavioral Pediatrics
J For Psch	Journal of Forensic Psychiatry
J Law & Soc	Journal of Law and Society
JPIL	Journal of Personal Injury Litigation
LQR	Law Quarterly Review
LSG	Law Society's Gazette
Med L Rev	Medical Law Review
N Z LR	New Zealand Law Review
N Y	New York
Neurol	Neurology
OJLS	Oxford Journal of Legal Studies
NSWCCA	New South Wales Court of Criminal Appeal
NSWSC	New South Wales Supreme Court
N Z	New Zealand
NW U LR	Northwestern University Law Review
Pediatr*	Pediatric
Pediatr L Med	Pediatric Legal Medicine
QCA	Queensland Supreme Court: Court of Appeal [Neutral Citation]
RCPCH	Royal College of Paediatrics and Child Health
RCCJ	Royal Commission on Criminal Justice
Sci	Science
SLJB	Solicitors' Law Journal Brief
J Ment Sci	The Journal of Mental Science
Vill L Rev	Villanova Law Review (US)

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