

Article in *Justice of the Peace*

Page 380

Offences by Children: the Mental Element

FRANCIS BENNION*

Introductory

This article is about the mental element in offences by children, concentrating on the child's mental condition at the time of the alleged offence¹. The article suggests that a certain aspect affecting the question of criminal liability of children has been overlooked in considering recent legal changes.

I will begin by describing the origins and nature of the *doli incapax* doctrine. Although this was abolished in England and Wales by a 1998 Act, following an earlier attempt by the courts to abolish it by judicial decree, its underlying basis remains relevant.

The *Doli Incapax* Doctrine

The courts are not authorised to abolish a common law rule of their own motion, particularly where Parliament may be assumed to have relied on it in enacting legislation. The lack of authority is even more obvious where it is known that Parliament had the opportunity to abolish or amend the rule but declined to take it. "Where Parliament fears to tread, it is not for the courts to rush in."² In a 1994 case the Divisional Court purported to abolish a common law rule in contravention of this principle. They held³ that because of changed conditions in society the rule no longer existed that a child between the ages of ten and fourteen is presumed to be *doli incapax* (incapable of committing an offence) unless the prosecution prove that he knew the act was seriously wrong.

On appeal the House of Lords reversed this decision⁴. Lord Lowry said⁵ that the point regarding a child's criminal incapacity should be treated as within the exclusive remit of Parliament. The legislature speedily acted on this view. It abolished the *doli incapax* presumption in England and Wales by the Crime and Disorder Act 1998 s 34. Avoiding Latin in the fashionable way, this reads: "The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished".

The two above paragraphs are based on a passage in my recent book⁶. It is followed in the book by a key sentence, which I will discuss later in this article. Meanwhile I will go on to explain in more detail the nature and history of the *doli incapax* presumption. Latham LJ recently said⁷ that the clearest expression of the concept or doctrine is in Stephen's *Digest*⁸.

*Francis Bennion is an author, constitutional lawyer and draftsman of state constitutions. A former UK Parliamentary Counsel and member of the Oxford University Law Faculty, he is currently a Research Associate of the Oxford University Centre for Socio-Legal Studies.

¹ For fitness to plead, and other aspects of the trial, see Adrian Turner, "Capacity to Stand Trial, Especially in the Youth Court", 172 JPN (7 June 2008), pp. 364-369.

² *Shaw v DPP* [1962] AC 220 at 275, per Lord Reid.

³ *C v DPP* [1994] 3 All ER 190.

⁴ *C (a minor) v DPP* [1995] 2 All ER 43.

⁵ At 64.

⁶ See *Bennion on Statutory Interpretation* (5th edn, 2008), pp. 1041-1042.

⁷ *R v T* [2008] EWCA Crim 815 at [6].

⁸ Sir James Fitzjames Stephen, *Digest of the Criminal Law* (1889), chap. III, headed "General

This says “No act done by any person over 7 and under 14 years of age is a crime, unless it was shown affirmatively that such person had sufficient capacity to know that the act was wrong”. This reflected the views of Sir William Blackstone:

“Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth until seven years of age; *pueritia*, from seven to fourteen; and *pubertas* from fourteen upwards . . . During the first stage of infancy and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime. During the other half stage of childhood, approaching to puberty from 10½ to 14, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations and not with the utmost rigour of the law. During the last stage (or the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.”⁹

Later, in a passage cited by Lord Lowry in a 1995 case previously mentioned¹⁰ Blackstone said:

“But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that *malitia supplet aetatem* . . . under fourteen, though an infant shall be prima facie adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. . . . But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt or contradiction.”¹¹

It became settled that at common law the age of discretion was fourteen. Professor Nigel Walker calls the term “discretion” here ambiguous. He says:

“As with ‘insanity’ it is not easy to be sure when inability to tell right from wrong became an excuse, because the institutional writers tended to use the ambiguous word ‘discretion’. But the 1338 Year Book says that Edward III’s Judge Spigurnel decided that a child could be hanged for killing his friend, because by hiding, he had shown that ‘he could discern between good and evil’. By the time of Lambard’s *Eriearcha*, designed as a handbook for Justices of the Peace and published in 1581, there could be no conviction of an infant under the age of 12 years, ‘unless it may by some evident token

Page 381

appeare that he had understanding of good and evil...’ Spigurnel’s principle (if it was his), had become a rebuttable presumption; and by Hale’s time (the late 17th century) its age limit had been raised to 14. Almost certainly it was not confined to homicide, for not many years after publication of *Eriearcha*, Pulton is cited as applying it to theft.”¹²

It was suggested by Smith LJ in an *obiter* judgment in *Director of Public Prosecutions v P*¹³ that the Crime and Disorder Act 1998 s 34 merely abolished the presumption of *doli incapax* while leaving the doctrine itself untouched. However in the later case of *R v T*¹⁴ the Court of

Exceptions”, art. 26.

⁹ *Commentaries on the Laws of England* (Oxford, 1st edn 1769) iv 2, 22.

¹⁰ *C (a minor) v DPP* [1995] 2 All ER 43 at [15].

¹¹ *Loc. cit.*, pp. 23-24.

¹² Nigel Walker, “The End of an Old Song”, 1999 NLJ 64.

¹³ [2007] EWHC 946 (Admin); [2007] 4 All ER 628.

¹⁴ [2008] EWCA Crim 815 at [6].

Appeal rejected this suggestion and held that the entire *doli incapax* doctrine had been abolished by s 34.

Some academics deplored the abolition of the *doli incapax* doctrine. They included Loraine Gelsthorpe¹⁵ and Julia Fionda¹⁶, who observed that the United Kingdom had the lowest age of criminal responsibility in Europe and that the current law did not recognise the incapacities of childhood¹⁷. They failed to perceive, as did many others, that a different element of the law does recognise those incapacities when it comes to deal with criminal liability.

An Element Overlooked

I mentioned above a passage in my recent book, adding that it is followed by a key sentence which I would discuss later. It is time to discuss that key sentence. It says that s 34 of the 1998 Act “overlooks the effect of immaturity on the ability to satisfy the *mens rea* test that underlies the concept of criminality”. The book does not enlarge on that thought. I will now spell out what I meant.

A good starting point is the case of *R v T*¹⁸, mentioned above. In it Latham LJ cited¹⁹ the following words of the Solicitor General in parliamentary proceedings on the Bill for the 1998 Act:

“It offends against common sense that you have to prove [that the defendant knows that what he or she is doing is wrong]. The possibility is not ruled out, where there is a child who has genuine learning difficulties and is genuinely at sea on the question of right or wrong, of seeking to run that as a specific defence. All [s 34] does is remove the presumption that the child is incapable of committing wrong.”

Latham LJ went on to suggest that the Solicitor General was here indicating that “the child would in many, obviously not all, cases be able to argue that his or her immaturity meant that the prosecution had not established the appropriate *mens rea*”.

I refer next to another case I have already mentioned, *Director of Public Prosecutions v P*²⁰, where the defendant was a boy of twelve. The judgment of Smith LJ mentions a report on the young defendant P by a consultant clinical psychologist, Mr Charles Burdett:

“He said that P’s level of intellectual functioning was within the learning disabled range. His verbal intellectual skills, his general memory functioning and his ability to pay attention and concentrate were all within the severely disabled range. He was diagnosed as having ADHD and a conduct disorder. He would not be capable of understanding the nature of court proceedings. He would not be able to concentrate on the evidence and argument in a courtroom. His memory capacity was so impaired that he would not remember what had gone before. He would not understand much of what was going on during the proceedings. Also, he would have very little understanding of the significance of his own behaviour. *He would not be capable of forming the necessary intent for the offences he was said to have committed*²¹.”

That the *doli incapax* doctrine was really founded in the requirement of *mens rea* is shown by the following citation from *Archbold*:

“. . . at common law a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous disposition . . . Between 10 and 14 years a child is

¹⁵ “Much Ado about Nothing – a critical comment on key provisions relating to children in the Crime and Disorder Act 1998” [1999] CFLQ 209.

¹⁶ “New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998” [1999] Crim LR 36.

¹⁷ See *Director of Public Prosecutions v P* [2007] EWHC 946 (Admin); [2007] 4 All ER 628, at [38].

¹⁸ [2008] EWCA Crim 815 at [6].

¹⁹ Paragraph [4].

²⁰ [2007] EWHC 946 (Admin); [2007] 4 All ER 628.

²¹ Paragraph [10] (emphasis added).

presumed not to know the difference between right and wrong and *therefore to be incapable of committing a crime because of lack of mens rea* . . . Wrong means gravely wrong, seriously wrong, evil or morally wrong.”²²

These passages confirm what many have missed regarding the abolition of the *doli incapax* doctrine. *It was possible for Parliament to abolish the legal doctrine, but it was not possible for Parliament to abolish the factual incapacity of certain defendants.* Nor did Parliament attempt to abolish for this class of case the golden thread established by the decision in *Woolmington v Director of Public Prosecutions*²³. In that case Viscount Sankey LC, delivering the conclusions of the Appellate Committee, said:

“If at any period of a trial it was permissible for the Judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the Judge in such a case to say that the jury must in law find the prisoner guilty and so make the Judge decide the case and not the jury, which is not the common law . . . Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence . . . Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception . . . No matter what the charge or where the trial, the principle that the prosecution must

Page 382

prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

This means that, except where the offence is one of strict liability, the prosecution of a child of ten, eleven, twelve or thirteen will fail unless the evidence establishes beyond reasonable doubt that the child had the necessary *mens rea* or guilty mind. If the evidence adduced does not show that the child is mentally subnormal for his or her age, *mens rea* may be inferred from the child’s proved or admitted misconduct unless, as in a complex case such as forgery or fraud²⁴, a normal child of that age might not have the ability to understand the factual basis of the offence. In such an exceptional case, or if the child is shown to be mentally subnormal, evidence of the necessary capacity will be required for a conviction.²⁵

A Problem with the Sexual Offences Act

In relation to certain offences, the Sexual Offences Act 2003 s 13(1) deems a person who is under 18, and therefore an infant in law, to be aged 18, and therefore an adult in law. It reads: “A person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18”. This arbitrarily converts the mental capacity of a child to that of an adult, which is illegitimate. Let us look for example at section 9(1) of the Act, which reads:

- A person aged 18 or over (A) commits an offence if—
- (a) he intentionally touches another person (B),
 - (b) the touching is sexual, and

²² See *C (a minor) v DPP* [1995] 2 All ER 43 at [18], *per* Lord Lowry (emphasis added).

²³ [1935] AC 462.

²⁴ See Donaldson LJ, cited by Lord Lowry in *C (a minor) v DPP* [1995] 2 All ER 43 at [41].

²⁵ See generally Lord Lowry’s speech in *C (a minor) v DPP* [1995] 2 All ER 43.

(c) either—

(i) B is under 16 and A does not reasonably believe that B is 16 or over,
or

(ii) B is under 13.

Various problems are posed by the operation of s 13(1) in relation to this.

(1) *Mens rea* The elements of a criminal offence consist of a physical act, called the *actus reus* or guilty act, together with a mental element called the *mens rea* or guilty mind. A leading textbook on criminal law says:

“ . . . until the twelfth century a man might be held liable for many harms, simply because he caused them, without proof of any blameworthy state of mind whatsoever on his part. Under the influence of Canon law and the Roman law, a change gradually took place and the courts began to require proof of an element of moral blameworthiness – a “guilty mind” of some kind. In the developed common law of crime, some such mental element is always necessary, and is known as *mens rea*.²⁶

Professor Andrew Ashworth says that the essence of the principle of *mens rea* is that “criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences”²⁷. Is this test satisfied in the following case?

A is a girl of 9. Because he asks her to, A intentionally touches the penis of B, a boy she knows to be aged 15.

Section 13(1) says that A, being under 18, commits an offence if she does anything which would be an offence under section 9 if she were aged 18. Has A done something which would be an offence under section 9 if she were aged 18? An affirmative answer requires that the ‘something’ A did corresponds exactly to the elements of the section 9 offence as set out above.

We see that this piece of statutory deeming will not work. One cannot effectually pretend that a girl of 9 is an adult woman of 18. The mental element does not fit. One could not realistically assert that what A actually did in the case given (including the mental element) would have been an offence if done by a woman of 18 because it could not have been done by a woman of 18. A normal woman of 18 does not have the inchoate mental equipment of a child of 9. She has adult, mature mental equipment. The *mens rea* component does not work, and the deemed translation cannot be made.

(2) *Minimum age of criminal responsibility* There is another factor to be taken into account. Professor Ashworth tells us that in England and Wales “the minimum age of criminal responsibility is 10, substantially lower than the minimum age in many other European countries, where teenage children are dealt with in civil tribunals up to the age of 14, 16, or even 18”²⁸. At common law the minimum age of criminal responsibility is 7. It was raised to 8 by statute in 1933²⁹. Thirty years later it was again raised to the present age of 10³⁰. Does the literal meaning of section 13(1) override this general rule and make a child of 9 liable? Probably not, though the point would need to be argued.

(3) *Official explanatory note* The official explanatory note to section 13 says:

“The purpose of this section is to provide a lower penalty where the offender is aged under 18. In practice (although there is no provision about this in the Act) decisions on

²⁶ Smith and Hogan, *Criminal Law* (1st edn 1965) p. 35.

²⁷ Andrew Ashworth, *Principles of Criminal Law* (4th edn, 2003), p. 158.

²⁸ *Ibid.*, p. 205.

²⁹ Children and Young Persons Act 1933 s 50.

³⁰ Children and Young Persons Act 1963 s16 (1).

whether persons under 18 should be charged with child sex offences will be made by Crown Prosecutors in accordance with the principles set out in the Code for Crown Prosecutors. In deciding whether it is in the public interest to prosecute these offences, where there is enough evidence to provide a realistic prospect of conviction, prosecutors may take into consideration factors such as the ages of the parties; the emotional maturity of the parties; whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust.”

This does not deal with the central problem now being examined.

Conclusion It seems from the foregoing that the section 13(1) deeming is for various reasons unsound. The notion of what the legal position regarding the child’s act would

Page 383

be if the child in question had been an adult instead of a child is unrealistic. One ought not to found criminal liability on such an awkward pretence, especially where it is children who are the subject-matter of the exercise. What the court will make of it if it is not altered one cannot forecast. Under normal principles of statutory interpretation the court is bound to endeavour to make the section work. The explanatory note suggests that the purpose of the section is merely to provide a lower penalty where the offender is aged under 18, but this is not stated in the section. The practical answer seems to be that the court should apply any of sections 9 to 12 to a defendant aged 10, 11, 12 or 13 with regard to their actual rather than imputed mental state, and should not apply the sections at all to a child under ten.

A Civilised Way To Treat Child Delinquency

I would suggest finally that because of their immaturity it is high time delinquent children were removed altogether from a criminal justice system designed for adults. As was said by Lord Jauncey of Tullichettle:

“It is, no doubt, undesirable that a young person who commits an offence and who genuinely does not know that he is doing something seriously wrong should suffer the rigours of the criminal law.”³¹

He or she should be dealt with instead by a new system tailored to fit immaturity. The reform required is for the law to insert between the infancy period of total innocence and the adulthood period where full criminal guilt exists an intermediate period recognising the nature of childhood. For this purpose I suggest we return to the wisdom of the common law and treat “childhood” as beginning on attaining the age of seven. It should end on attaining sixteen, when a child has long been recognised by the law as mature enough for marriage. This gives a childhood period of nine years.

During this childhood period the modern law should recognise, as the old common law did to a limited extent, that delinquent children, being to a greater or lesser degree immature, ought not to be regarded as criminals. Instead their misconduct should be treated by the law, where the law has to notice it for social reasons, as falling into a special category perhaps known as child misbehaviour.

Recognition of this category would have certain consequences. The whole criminal apparatus of offences, police, courts, prosecutors, and penalties including prison should cease to apply within it. Applying it to children is an outworn relic of the days when children were hanged or thrown into prison for trivial misdeeds, and when indeed little difference was drawn by the law between children and adults. (It is significant that children were not dressed any differently either, being clothed in smaller versions of adult wear.)

³¹ *C (a minor) v DPP* [1995] 2 All ER 43 at [2].

If we were starting afresh to design a legal system, no one would imagine that a structure of criminal justice designed for adult offenders should also be applied to children. Instead their misbehaviour would be treated as naughtiness of greater or less gravity. The sanctions for it would not be such penalties as fines or imprisonment but punishments more appropriate for today's children, such as asbos or curfews, or deprivation for a time of treasured objects like mobile phones. In serious cases custodial treatment might indeed be required, but this would not be served in prisons. It is worth remembering that we used to have places for unruly children called reformatories. This name gives the right flavour. Delinquent children need to be *reformed* through education and training, not made to graduate from the colleges for a criminal career that prisons are.

It follows that the laws defining what constitutes criminal offences should not apply to children. What should replace them? Here reformers are faced with a difficulty. Either Parliament enacts a lengthy and complicated series of enactments spelling out exactly what constitutes each type of child misbehaviour or much is left to the discretion of those administering the scheme. I would favour the latter, allowing a kind of common law of child misbehaviour to grow up over time and gradually provide more certainty. At the start I would merely lay down three categories: grave misbehaviour, serious misbehaviour, and minor misbehaviour.

What system should replace courts and prosecutors? Here I suggest there should be local tribunals staffed by officials perhaps known as child misbehaviour assessors. Above all, the system should be speedy as well as fair. Informal hearings would take place to determine whether misbehaviour had occurred and if so what the sanction if any should be.³² (The enabling Act would confer suitable powers to impose sanctions.) The method would be inquisitorial rather than accusatory, and legal aid would not be allowed. The rules of evidence would be relaxed, though sworn or affirmed testimony should be permitted where the tribunal considered this appropriate.

An accused child would be allowed a McKenzie friend or similar helper, but not a legal representative. I would exclude lawyers from taking part in such hearings, whether as assessors or advocates. The law cannot be totally excluded, for obvious reasons. If a tribunal is alleged to have exceeded its jurisdiction there must for example be a legal remedy. This should be confined as closely as justice allows, and should take the nature of judicial review.

The new system should also take full account of the responsibilities of parents, and other carers such as foster mothers. In the case of child misbehaviour such as school truancy parents are already treated as liable to vicarious penalties.

This would not be the first recent attempt to take children out of the criminal law. The Children and Young Persons Act 1969 s 4 said "A person shall not be charged with an offence, except homicide, by reason of anything done or omitted while he was [under the age of fourteen]". Unhappily s. 4 was repealed in 1991 without having been brought into force³³. This was regretted by many. A. E. Bottoms wrote:

"Had the radical reforms to the jurisdiction of the juvenile court planned by the Labour Government in the 1960s and enacted in the Children and Young Persons

Page 384

³² It needs to be remembered that some child misbehaviour is caused by factors such as dietary inadequacy, where punishment is inappropriate though medical remedies might be applied. Mental problems can also lead to apparent misbehaviour, but need treating appropriately.

³³ Criminal Justice Act 1991 ss 72, 101(2) and Sch 13. See *C (a minor) v DPP* [1995] 2 All ER 43 at [23].

Act 1969 been fully implemented, children under the age of 14 would not have been brought before the juvenile court in criminal proceedings and there would have been substantial restrictions on the prosecution of young persons aged 14-16.”³⁴

In his recent article³⁵, Adrian Turner said of s. 4:

“The reference to “charged” shows the philosophy behind this. The commission of a criminal offence was originally one of the primary grounds for the making of a care order, and that was seen as the route to take (if necessary) in respect of 10 to 13 year olds; ie, ‘crime’ by such youngsters was seen as a welfare, rather than a criminal justice, issue.”

Disquiet has often been expressed about the criminalizing of children. In his recent article Adrian Turner said:

“Criminalizing youngsters of very low intelligence creates, rather than resolves, a problem. One can almost guarantee that the courts will see them again and again.”³⁶

This disquiet was particularly manifested during the passing of the Bill for the Sexual Offences Act 2003.³⁷ I leave the last word with the columnist Mike Hume:

“Even the practice of underage teenagers fumbling with one another is now officially a sex crime. However, the Home Office has made clear that it does not want such heavy petting cases brought to court. Instead, the new law is apparently intended to send young people a ‘message’ about right and wrong. What the actual message of such a confused measure might be is anybody’s guess.”³⁸

³⁴ A. E. Bottoms, "On the Decriminalisation of the English Juvenile Courts" in R. Hood (ed.), *Crime, Criminology and Public Policy* (London: Heinemann, 1974).

³⁵ *Loc. cit.*, p. 365.

³⁶ *Loc. cit.*, p. 369.

³⁷ See F A R Bennion, *Briefing on the Sexual Offences Act 2003* (3rd edn, 2003), www.francisbennion.com/2003/009.htm

³⁸ *The Times*, May 3, 2004.