

Page 757

Mens rea and defendants below the age of discretion

By Francis Bennion

Former Parliamentary Counsel; sometime Lecturer and Tutor in Law, St Edmund Hall, University of Oxford

Introductory

In *JTB*¹ the Appellate Committee of the House of Lords faced difficult questions concerning the legal meaning of s. 34 of the Crime and Disorder Act 1998 (in this article referred to as 'section 34'). With the headnote 'Abolition of rebuttable presumption that a child is doli incapax' section 34 itself simply says: 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'. The simplicity is misleading. Why for example does the term doli incapax appear in the headnote but not the section itself? The headnote tells us that the presumption in question applies only in relation to children who are aged ten or over but below fourteen. Why did the section itself not say this? This is only one of the problems raised by section 34 which will be discussed in this article.

This article will respectfully submit that the decision in *JTB* was incorrect.^{1a} It will also submit that section 34 left behind it a common law rule as to mens rea in the case of children under 14 that treated them (as does the common law generally) as not having reached the age of discretion, in the same way that they continue to be treated as exceptions to the rule that ignorance of the law is no excuse. The result is that, in the case of some offences at least, the prosecution needs to establish by evidence or informed admission that the child defendant had sufficient understanding of the nature of the offence. The article will also submit that in *JTB* the Appellate Committee failed to take sufficiently into account the rules etc. governing statutory interpretation and misapplied the rule in *Pepper v Hart*². It also failed to take properly into account the 'golden thread' laid down in *Woolmington*³.

The facts in *JTB*

JTB concerned section 13 of the Sexual Offences Act 2003 ('SOA'), which provides that a person under 18 commits an offence if he does anything which would be an offence

Page 758

under section 10(1) of SOA if he were aged 18. So far as relevant, section 10(1) says a person aged 18 or over (A) commits an offence if:

- (a) he intentionally causes or incites another person (B) to engage in an activity,
- (b) the activity is sexual, and
- (c) B is under 13.

¹ *JTB* [2009] UKHL 20, [2009] 2 Cr. App. R (p. 189).

^{1a} This is despite the fact that, in his Commentary on the case at [2009] Crim. L. R. 582-583, Professor Ashworth asserts that the leading speech by Lord Phillips of Worth Matravers 'constitutes a clear and convincing response' and that Lord Phillips's use of legislative materials is 'convincing'.

² *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 HL.

³ *Woolmington v DPP* [1935] A.C. 462 HL.

A definition of the term 'sexual' is contained in SOA s. 78. It has caused considerable controversy in itself, but to avoid lengthening this article unnecessarily I will not enter upon that here.

In *JTB* A was a boy of 12, whom I will call Boy A. He admitted 12 counts of causing or inciting contravention of the provisions just cited, but said that he had not thought that what he was doing was wrong. The recipients of his 'causing or inciting' were young boys and the activity, which seems to have been a form of childish sex-play, included anal penetration with the penis, oral sex and masturbation.⁴

It is not clear whether these acts were all consensual. The House of Lords report of the case and that relating to the Court of Appeal hearing⁵ are both silent on the point. This article assumes they were all consensual, as seems likely. It also assumes that Boy A did not inflict any lasting bodily harm on his playmates. A paradox is that, in relation to consensual acts which are rendered criminal solely on the ground of the immaturity of the participants, they are not, according to *JTB*, permitted to plead that immaturity in exculpation.

Boy A tried to advance the defence that he was *doli incapax*. He sought a preliminary ruling from the trial judge that this defence was open to him. The trial judge ruled that it was not, it having been abolished by section 34. Upon that ruling Boy A entered guilty pleas. He appealed unsuccessfully against his conviction to the Court of Appeal on the ground that the judge's ruling was wrong. He advanced the same contention, also unsuccessfully, before the Appellate Committee. These adverse rulings raised this question. What did Parliament intend the state of the law regarding mens rea to be after the coming into effect of section 34?

A defective deeming

It is trite law that the elements of a criminal offence usually consist of a physical act, called the *actus reus* or guilty act, together with a mental element called the *mens rea* or guilty mind. It was so here. The first edition of *Smith and Hogan*, a leading textbook on criminal law, said:

'. . . 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*.'⁶

Apart from the modern development of strict liability in certain cases (not applicable here), this is still an accurate description. 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'⁷. It seems that this test was not satisfied in *JTB*.

As noted above, SOA s. 13(1) says that A, being under 18, commits an offence if he does anything which would be an offence under section 10 if he were aged 18. Did Boy A do something which would be an offence under section 10 if he were aged 18? An affirmative answer requires that the 'something' Boy A did corresponded exactly to the elements of the section 10 offence. It may have corresponded as regards the *actus reus*, but it did not correspond as regards the *mens rea*. One cannot effectually pretend that a boy of 12 is in all relevant respects equivalent to an adult man of 18. It would equate mental immaturity to mental maturity.

⁴ *JTB*, para. [1].

⁵ *R v T* [2008] EWCA Crim 815.

⁶ Smith and Hogan, *Criminal Law* (1st edn 1965) p. 35.

⁷ Andrew Ashworth, *Principles of Criminal Law* (Oxford, 4th edn 2003), p. 158.

In truth this piece of statutory deeming does not work. One could not realistically assert that what Boy A actually did in *JTB* (including the mental element) would have been an offence if done by a man of 18 because it could not have been done by a man of 18. A normal man of 18 does not have the inchoate mental equipment of a child of 12. He has adult, mature mental equipment. So the deemed translation cannot be made. A further defect in the statutory deeming, not relevant here, is that taken literally it seems to impose liability on children who are under the criminal responsibility age of ten, which cannot be right.

It seems that this piece of statutory deeming was inspired by the following observation of Glanville Williams:

‘As a matter of policy it is highly desirable that a child who has committed what, for an adult, would be a crime, should be put to answer, even if he is afterwards acquitted on the ground that he did not know his act to be wrong.’⁸

In saying ‘who has committed what, for an adult, would be a crime’ Glanville Williams made the same error as was made by SOA s. 13, surprising in one so astute in criminal law. This was of thinking that only the actus reus is significant here, even though, when discussing in the same article the doli incapax presumption, Williams said ‘In addition, the ordinary *mens rea* required for the crime must of course be brought home to the child’⁹.

It seems that the reason why Glanville Williams thought children should be ‘put to answer’ was that they would then be given protection, or as Williams put it ‘educational treatment’. In a passage from the same article relied on by Lord Phillips of Worth Matravers in *JTB*¹⁰ Williams said:

‘In this climate of opinion, the “knowledge of wrong” test no longer makes sense. The test is not needed to enable a child to escape punishment, because comparatively few wayward children are now officially punished. For his first offence a child may be fined or ordered to be detained, but is more likely to be admonished or placed on probation; for a second or subsequent offence, if it is desired to make use of the very restricted forms of punishment available to a juvenile court, it will generally be easy to show that the child knew his act to be illegal. Thus at the present day the “knowledge of wrong test” stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent, or the approved school.’

This view overlooks the important fact that the law should not criminalize young children simply in order to provide them with ‘educational treatment’. The view has endured, and underlies the treatment of children in the SOA. However it carries the drawback that the gateway to what may well be beneficial treatment for a child in need of it is a criminal conviction with its severe lifetime handicaps. This did not seem to concern Laws J who, as Lord Phillips said¹¹, ‘echoed the point made by Glanville Williams’:

‘. . . the very emphasis placed in modern penal policy upon the desirability of non-custodial disposals designed to be remedial rather than retributive - especially in the case of young offenders - offers powerful support for the view that delinquents under the age of 14, who may know no better than to commit antisocial and sometimes dangerous crimes, should not be held immune from the criminal justice system, but sensibly managed within it.’¹²

But a child who has not committed a crime should not be ‘managed within the criminal justice system’, whether sensibly or not. He is entitled to an acquittal. Another point is that

⁸ Glanville L. Williams, ‘The Criminal Responsibility of Children’, [1954] Crim. L. R. 493 at 498.

⁹ *Ibid.* at 494.

¹⁰ See para. [21].

¹¹ See para. [23].

¹² *C (A Minor) v Director of Public Prosecutions* [1996] 1 AC 1 at 11.

the purpose of SOA s. 13 was solely to impose reduced penalties on defendants aged below 18. It should surely be construed as limited to that purpose in cases where the defendants are otherwise guilty.

Finally on this point, even if one does not fully accept the argument of defective deeming it surely raises a real doubt as to the legal meaning of section 34. As I have pointed out elsewhere, for this purpose a doubt is 'real' whenever it is substantial, and not merely conjectural or fanciful.¹³ The existence of a real doubt of guilt should mean an acquittal.

Mens rea and *JTB*

Before the coming into effect of section 34 the defence could argue regarding a defendant such as the 12-year old Boy A that-

- (a) he was protected by the *doli incapax* presumption; and
- (b) quite apart from that presumption, since he was under the age of 14 (which is known by the common law as the age of discretion) there lay on the prosecution a special onus regarding proof of mens rea (in this article called the *doli incapax* defence).

In *JTB* Lord Phillips accepted that these 'were two different things'.¹⁴ The law is stated in this way to show that, even if the presumption did not exist or were abolished, the *doli incapax* defence would remain as a long stop. Also remaining then is of course the general onus on the prosecution to prove beyond reasonable doubt the mens rea of the offence charged.

In *JTB* it was held, it is respectfully submitted perversely, that the effect of section 34 was to abolish both the presumption and the defence even though the section simply says that the presumption is abolished. In any case, though it was possible for Parliament to abolish one or both of these rules it was not possible for it to abolish the actual mental state of immature defendants or the need for the criminal law to cater for this in an adequate fashion. This means that if section 34 is held to abolish both (as happened in *JTB*) the general onus referred to above becomes inflated by factors related to the immaturity of the defendant.

The question arises of what Parliament is to be taken as having intended the resulting law to be following the coming into operation of section 34. In *JTB* the Appellate Committee did not fully consider this question, but it nevertheless needs to be answered. It is likely that Parliament is to be taken as having intended the mens rea requirement, which underlay the *doli incapax* defence, to continue to be modified, though not so rigidly, in its application to immature defendants. In other words, as the literal wording of section 34 indicated, it is to be taken as having intended only the presumption to be abolished, leaving the defence to apply in its place.

In any case Parliament surely did not intend to abolish for this class of case the golden thread established by the decision in *Woolmington v Director of Public Prosecutions*¹⁵ where 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

¹³ See *Bennion on Statutory Interpretation*, 5th edn 2008 (hereinafter *Bennion Code*), s. 3.

¹⁴ Para. [7].

¹⁵ [1935] AC 462.

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 prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'¹⁶

This means that, except where the offence is one of strict liability, the prosecution of a child such as Boy A should fail unless the evidence establishes beyond reasonable doubt that the immature child had the necessary mens rea. 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. However, by analogy with the law on the doli incapax presumption, in relation to more complex offences this may not be enough. Here is a case where both types of offence, simple and complex, were considered.

In *C (a minor) v DPP*¹⁷ Lord Lowry referred to *J.B.H. and J.H. (Minors) v. O'Connell*¹⁸, which was decided by the Divisional Court (Donaldson L.J. and Forbes J.) on 20 January 1981. The case was unreported but their Lordships were given a transcript. What I am calling the simple offence was described as follows by Lord Lowry. Two boys aged 13 and 11 broke into a school and stole various articles. They equipped themselves with eggs, flour, cornflakes and tubes of duplicating ink, with which they 'redecorated' the school, thereby causing £3,000 worth of damage. When charged with burglary and malicious damage they called no evidence. The magistrates convicted, made a supervision order and fined one boy £100 and the other £50. Donaldson L.J. said:

'In this day and age, to coin a phrase, it may require relatively little evidence in a case of this sort to justify magistrates in finding that children of this age do know that what they are doing is wrong. We have, after all, universal education and these boys were of course at school. This was a very simple offence . . .'

Donaldson L.J. went on to give an example of what I am calling a complex offence. He said:

' . . . it would be otherwise with rather more sophisticated offences. If, for example, children between the ages of 10 and 14 were charged with forgery, it might require a considerable body of evidence before magistrates were satisfied that they knew that what they were doing was wrong.'

By analogy with Donaldson L.J.'s final remark here, it can be said that if today a child of the age of Boy A were charged with forgery the prosecution could not discharge the onus of proving mens rea without calling appropriate evidence regarding his mental state. It is submitted that the same applies to the offences with which Boy A was actually charged in *JTB*. They were not like cases of malicious damage or the infliction of serious bodily harm where the wrongful nature of the acts is obvious. Many would say that voluntary sex-play among themselves is something most pubescent boys consider 'natural if naughty' and would be very surprised to find constituted criminal offences. Indeed many commentators at the time the Bill for the SOA was going through Parliament argued that such relatively harmless play should not be caught by the new Act.

The age of discretion doctrine

¹⁶ The continued applicability of the 'golden thread' is shown by *Charles* [2009] EWCA Crim 1570, which confirmed the correctness of para. 6.5 of the *Guide for the Judiciary on Anti-Social Behaviour Orders*: see paras. [2], [8] and [16] of *Charles*. Para. [16] shows that if the defence put forward by a child aged under 14 raises an absence of mens rea (as in *JTB*) that satisfies an evidential burden 'but leaves the legal burden on the Crown'.

¹⁷ [1995] UKHL 15 at [41].

¹⁸ [1981] Crim. L.R. 632.

The pre-section 34 position was stated by Archbold as follows:

‘ . . . 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 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* . . . ’¹⁹

This was treated as a correct summary of the former law by Lord Lowry in *Re C (a minor)*.²⁰ The discretion in question was described as the ‘discretion to discern between good and evil’.²¹ This is of course an over-simplification. A healthy child aged between 10 and 14 can discern whether some things are good or evil while having difficulty with others. This is akin to the distinction drawn between acts that are seriously wrong and those that are merely naughty.

The age of discretion doctrine is also relied on by the common law rule that ignorance of the law is no defence (the ignorance of law doctrine). the latter is expressed in various maxims of which the best known is *ignorantia juris neminem excusat* (ignorance of the law excuses no one).²² Because of the ignorance of law doctrine, *mens rea* can be possessed even though the defendant was in fact unaware that the *actus reus* formed an element of an offence. That excuse does not avail a defendant, *provided he or she has attained the age of discretion*. Lord Lowry said: ‘In the 17th century the “age of discretion” was fixed by Coke at 14. It was accepted as such by Hale.’²³ That still is the age of discretion at common law, so the ignorance of law doctrine continues not to apply to children aged under 14. This is unavoidable, since a rule that imputed knowledge of the law generally to children of that tender age would be preposterous.

It was not suggested by the Appellate Committee in *JTB* that their decision had any effect on the rule that the ignorance of law doctrine has no application to children aged under 14. How exactly does the rule apply in criminal cases? On first principles, it must bear on the prosecution duty regarding *mens rea*. This means that the rule that *mens rea* can be possessed even though the defendant was unaware that the *actus reus* formed an element of an offence does not apply to such youthful defendants. If evidence is given that they are so unaware (the position with child A in *JTB*) then the prosecution must establish positively that *mens rea* exists. The *JTB* decision ignored this. It failed even to mention the ignorance of law doctrine.

Rules etc of statutory interpretation

To answer questions concerning the legal meaning of section 34 requires bringing into play the techniques of statutory interpretation. It is striking that in reaching its decision in *JTB* the Appellate Committee made little reference to these techniques. Yet there is surely a duty to take fully into account, in accordance with law, the rules, principles, presumptions and linguistic canons making up the relevant interpretative criteria, and if they conflict carry out the appropriate balancing exercise.²⁴

I will now examine some of the interpretative criteria that were applicable in *JTB*.

Principle against doubtful penalisation In the Court of Appeal hearing of the case Latham LJ said:

‘On behalf of the appellant, Mr Peter Blair Q.C., in his extremely able submissions, has sought to persuade us that common law has long recognised the concept of *doli incapax* as a defence, in the same way as self defence, and that it has an existence

¹⁹ Archbold (1993), vol. 1, para. 1-96. (emphasis added).

²⁰ [1995] UKHL 15 at [18].

²¹ See *JTB*, para. [8].

²² For details of the ignorance of law doctrine see *Bennion Code*, s. 9.

²³ *Re C (a minor)* at [19].

²⁴ See *Bennion Code*, s. 193.

entirely separate from the presumption which existed up to 1998 which required the prosecution to prove that the child between the ages of 10 and 14 knew that what he or she had done was wrong. Bearing in mind the well-known passages in *Bennion* Part XVII entitled The Principle Against Doubtful Penalisation²⁵, that concept, Mr Blair submits, could only have been abrogated by clear express words.²⁶

The Appellate Committee in *JTB* did not mention the principle against doubtful penalisation. Yet it applied in this case because Boy A was obviously penalised if he could not rely on the *doli incapax* defence.

This point is strengthened by the fact that there was widespread opposition to abolishing the *doli incapax* presumption and defence, which were upheld by many authorities. Glanville Williams had said at an earlier time that the then Government ‘does not intend to change these arrangements which make proper allowance for the fact that children’s understanding, knowledge and ability to reason are still developing’²⁷. Julia Fionda said that to assume modern children grow up more quickly and therefore do not need such protection as was given by the *doli incapax* rule ‘indicates a dangerous blindness to the incapacities of childhood’ and is contradicted by research findings.²⁸

If a form of statutory penalisation is highly controversial it is arguable that that strengthens the need to avoid applying it in doubtful cases. Lord Lowry in his very thorough review of the matter gave five reasons in defence of the *doli incapax* presumption, of which the first four were:

‘1. It is true that there is (and has been for a considerable time) compulsory education and, as the judge said, perhaps children now grow up more quickly. But better formal education and earlier sophistication do not guarantee that the child will more readily distinguish right from wrong.

2. The presumption is “out of step with the general law.” True enough, but the general law was not meant to apply without qualification to children under 14.

3. I agree that the phrase “seriously wrong” is conceptually obscure, and that view is confirmed by the rather loose treatment accorded to the *doli incapax* doctrine by the text books, but, when the phrase is contrasted with “merely naughty or mischievous,” I think its meaning is reasonably clear.

4. The rule is said to be illogical because the presumption can be rebutted by proof that the child was of normal mental capacity for his age: this leads to the conclusion that every child is initially presumed not to be of normal mental capacity for his age, which is absurd . . . We start with a benevolent presumption of *doli incapax*, the purpose of which was to protect children between 7 (now by statute 10) and 14 years from the full rigour of the criminal law. The fact that the presumption was rebuttable has led the courts to recognise that the older the child . . . and the more obviously heinous the offence, the easier it is to rebut the presumption. Proof of mental normality has in practice (understandably but perhaps not always logically) been largely accepted as proof that the child can distinguish right from wrong and form a criminal intent. The presumption itself is not, and never has been, completely logical; it provides a benevolent safeguard which evidence can remove. Very little evidence is needed but it must be adduced as part of the prosecution’s case, or else there will be no case to answer.’²⁹

²⁵ See *Bennion Code*, pp. 625-659.

²⁶ [2009] EWCA Crim 815 at [4].

²⁷ Cited by Lord Lowry, [1995] UKHL 15 at [27].

²⁸ Julia Fionda, ‘New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998’, [1999] Crim. L. R. 36. The research findings mentioned are those of John Graham and Benjamin Bowling, *Young People and Crime*, Home Office Research Study No. 145 (1995, HMSO).

²⁹ [1995] UKHL 15 at [53]. The fifth reason concerned previous convictions.

Charlotte Welsh gathered the arguments against abolition in her 1998 article 'Irrational Presumptions of Rationality and Comprehension'.³⁰

Plain meaning rule This is stated as: 'If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.'³¹ It is otherwise called the literal meaning rule. Section 34 says only: 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.' The ordinary and natural meaning of this is that the presumption is abolished, and no more. Lord Reid said:

'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.'³²

In *JTB* Lord Phillips said that the legal meaning of section 34 'is, when read in isolation, ambiguous'.³³ It is respectfully submitted that this is not so, and that the legal meaning is in fact free from ambiguity. Speaking as an experienced legislative drafter I can say that I would regard it as unthinkable to use the language of section 34 if the legislative intention were to abolish both the *doli incapax* presumption and the *doli incapax* defence.

Presumption against changing the common law The *doli incapax* defence is a rule of the common law. Lord Browne-Wilkinson said: 'Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication'.³⁴

Rule in Pepper v Hart The Appellate Committee in *JTB* applied *Pepper (Inspector of Taxes) v Hart*³⁵ in an unexpected way. Lord Phillips said:³⁶

'In the course of the Second Reading of the Bill in the House of Lords, Lord Falconer of Thoroton, the Solicitor General, made the following comment:

"The possibility is not ruled out, where there is a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong, of seeking to run that as a specific defence. All that the provision does is remove the presumption that the child is incapable of committing wrong."
(Hansard, House of Lords Debates, 16 December 1997, cols 595-596).

In so far as this suggested that the relevant clause would not abolish the defence of *doli incapax*, this statement was at odds with the other Ministerial statements to which I have referred. Professor Nigel Walker none the less fastened on Lord Falconer's comment as indicative of the Government's intentions, in an article entitled "The End of an Old Song" (1999) 149 NLJ 64. He suggested that the effect of section 34 was to abolish the presumption but not the defence. A similar view was expressed, obiter, by Smith LJ after a detailed and careful study of background material that was the product of her own researches in *Director of Public Prosecutions v P* [2007] EWHC 946 (Admin).

Later Lord Phillips said:³⁷

³⁰ <http://webjcli.ncl.ac.uk/1998/issue3/walsh3.html>.

³¹ *Halsbury's Laws*, title Statutes, vol. 44(1) (Reissue) para. 1487.

³² *Pinner v Everett* [1969] 1 WLR 1266 at 1273. The plain meaning rule is explained in *Bennion Code*, s. 195.

³³ Para. [34].

³⁴ *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 573. The presumption against changing the common law is explained in *Bennion Code*, pp. 814-816.

³⁵ [1993] AC 593.

³⁶ Para. [34].

‘It is a legitimate aid to construction to have regard to the fact that the phrase “presumption of *doli incapax*” was widely used to embrace both the presumption and the defence. I further consider that this is one of the rare cases where it is both legitimate and helpful to consider Ministerial statements in Parliament under the principle in *Pepper v Hart* [1993] AC 593. In issue is the meaning of a single short section of the Act . . . The clause that was to become the section was debated at some length in Parliament . . . Consideration of the debates discloses Ministerial statements that made the meaning of the clause quite clear, with the exception of the one statement by Lord Falconer . . . Parliament was in no doubt as to the meaning of the clause, in part perhaps because in the Consultation Paper and the White Paper that preceded the legislation the Home Office had made it quite clear what was meant by abolition of the presumption of *doli incapax*.’

This is unsatisfactory. No particulars are given of the ‘wide use’ or of the Ministerial statements. Lord Falconer was Solicitor General, and a statement by him deserved to be treated as authoritative. There is no precedent for applying *Pepper v Hart* where government statements conflict, and for obvious reasons it is undesirable to do this. It is also undesirable for the senior appellate court to rely so much on statements in Parliament, or in government white papers and other documents, or in other secondary sources. In a recent lecture, the growing tendency of courts to rely on such extraneous aids was recently noted, it seems with regret, by Stephen Laws, the First Parliamentary Counsel.³⁸ He went on to say:

‘Recent forces for change all have a common feature involving the attachment of increased relevance to factors that distract from the literal effect of the text. The appropriate response to change of that sort seems to me to be a collective acceptance by drafters of an even greater responsibility to ensure that the text of the legislation yields a clear answer. So the responsibility of the drafter . . . becomes a responsibility to provide legislation that yields its meaning clearly and immediately in a way that cannot be falsified by anything (including external material or indeed extraneous analysis) . . . Get the text right and make it the final answer.’³⁹

This contains a broad hint to appellate courts to concentrate on the *ipsissima verba* of the legislator, and bring to bear on it scholarly ratiocination based on enduring legal doctrine. The Australian Justice Michael Kirby said:⁴⁰

‘A further difficulty is that legislation, at least, has the formal imprimatur of Parliament. Other material may not. Even second reading speeches by Ministers are nowadays frequently written by their officials and simply incorporated in the Hansard record. In such circumstances, to ascribe to them an authority approaching that of legislation may be effectively to shift power from the legislature to the administration which drafts the explanatory memoranda, second reading speeches and background reports . . .’

The statement by Lord Falconer, later Lord Chancellor, was highly significant. Lord Phillips dismissed it only so far as it bore upon the continuance of the *doli incapax* defence. But it also has a bearing on the claim made by this article that the general need to establish *mens rea* convincingly in the case of child defendants remains to be satisfied, by prosecution evidence if necessary. Can it be doubted that if a post-1998 defendant is shown to be ‘a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong’

³⁷ Para. [35].

³⁸ Stephen Laws, ‘Plus ça change? Continuity and change in UK legislative drafting practice’ (William Dale Memorial lecture 2008), para. 75.

³⁹ *Loc. cit.*, paras. 102, 103.

⁴⁰ ‘Statutory Interpretation and the Rule of Law – Whose Rule, What Law?’ in David St L. Kelly (ed.), *Essays on Legislative Drafting: In Honour of J. Q. Ewens* (Adelaide Law Review Association, Adelaide, 1988) 84 at 86-99.

the prosecution will fail unless it produces positive evidence that mens rea existed nonetheless?

Taking account of the mischief Lord Phillips said:⁴¹

‘ . . . the result of this appeal cannot be deduced from the language of section 34 alone. It is a legitimate aid to the interpretation of that section to look, as I have done, at the mischief that the section was designed to obviate.’

This is a reference to the presumption that the court is to apply the remedy provided by Parliament for the ‘mischief’ with which the enactment deals.⁴² However treating the *doli incapax* defence as removed by section 34 creates a counter-mischief in the cases of juvenile immaturity with which this article is concerned. There is a presumption that Parliament does not intend a counter-mischief.⁴³ Here the mischief did not embrace all cases of under-14 delinquents, but only those where the nature of the actus reus indicated that the wrongdoing was obvious. It promotes a counter-mischief to remove the need to prove mens rea in other cases

Remember *Spath Holme*

I reported above the remark by Lord Phillips that ‘this is one of the rare cases where it is both legitimate and helpful to consider Ministerial statements in Parliament under the principle in *Pepper v Hart* [1993] AC 593’. It is necessary, at the cost of lengthening this article somewhat, to include here a reminder of the salutary words of Lord Nicholls of Birkenhead in the *Spath Holme* case.⁴⁴ He said:

‘The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions . . . Additionally, the courts employ [external] aids . . . This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279-280:

“The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by

⁴¹ Para. [35].

⁴² See *Bennion Code*, Part XIX.

⁴³ For the implication that Parliament does not intend to promote a counter-mischief see *Bennion Code*, s. 288(4), pp. 890, 911-912.

⁴⁴ *R. v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2001] 1 All ER 195 at 216-218.

Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.”

. . . But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations . . . Experience has shown that the occasions on which reference to parliamentary proceedings is of assistance are rare. To be of assistance as an external aid, the parliamentary statement relied upon must be clear and unequivocal. Otherwise it is of no real use. Parliamentary statements seldom satisfy this test on the points of interpretation which come before the courts. Increasing awareness of the lack of help provided by parliamentary material will, it is to be hoped, result in counsel being more realistic and more sparing in their references to such material.’

It is submitted that *JTB* should be treated as incorrect so far as it fails to recognise that in the case of complex offences, for example forgery and certain consensual sexual behaviour such as that engaged in by Boy A, the prosecution may still need to establish by evidence that a defendant who is below the age of discretion possesses the requisite mens rea. In *JTB* this meant that the prosecution needed to prove beyond reasonable doubt that Boy A understood the substance of the ingredients of the offence in question, for example those imported by the SOA definition of ‘sexual’. The decision in *JTB* amounted to holding, in disregard of Boy A’s statement that he did not know the acts charged were wrong, that once commission of the actus reus was admitted by Boy A nothing remained for the prosecution to do in order to establish the necessary mens rea. That breaches the golden rule laid down by *Woolmington* and surely cannot be right.

It is also submitted that in *JTB* the Appellate Committee failed to bring into play the necessary techniques of statutory interpretation. In the end it was necessary, by applying these techniques adequately, to ascertain correctly the legal meaning of section 34.

In various ways, areas of the law recognise that its provisions need to be tempered for those who are immature. For example children who are under the age of discretion are not permitted to give sworn evidence.⁴⁵ The CPS code for Crown prosecutors says a prosecution is less likely to be needed if an offence was committed as a result of a genuine mistake or misunderstanding.⁴⁶ Both are to be expected where the defendant is under the age of discretion.

Lord Lowry ended his thorough examination of the question of doli incapax with the statement by the Australian Professor Colin Howard that ‘No civilised society regards children as accountable for their actions to the same extent as adults’.⁴⁷ Section 34 marked a

⁴⁵ Youth Justice Criminal Evidence Act 1999 s. 55(2).

⁴⁶ Paragraph 5.10.

⁴⁷ [1995] UKHL 15 at [73].

worrying regression from this standard if it is seen as altogether removing from English law the merciful concept of *doli incapax*.⁴⁸

⁴⁸ I am grateful to Jeffrey Barnes of La Trobe University Australia and Michael Jackson of the University of Hong Kong for helpful comments on a draft of this article.