Case Commentary

Youth justice: new shoots on a bleak landscape – Director of Public Prosecutions v P

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In Director of Public Prosecutions v P Smith LJ raised the possibility that the defence of doli incapax, putatively abolished by section 34 of the Crime and Disorder Act 1998, remains available. This article examines the judgment within the context of the increasing criminalisation of young people and their (mis)behaviour and suggests that it may represent an important symbolic moment which could provide the springboard for a much-needed broader reflection on the direction of contemporary youth justice law and policy.

INTRODUCTION

The common law doctrine of doli incapax prevented the criminal conviction of children aged from 10 to 13 unless it could be established that the child knew at the relevant time that what she was doing was seriously wrong and not merely naughty or mischievous. It was assumed by commentators and practitioners alike that the doctrine was abolished by section 34 of the Crime and Disorder Act 1998 as part of New Labour’s radical reforms of the youth justice system. In Director of Public Prosecutions v P (DPP v P),¹ however, Smith LJ took the view that while Parliament has abolished the presumption of doli incapax, the substantive defence remains available. This article begins by outlining the youth justice policy context within which the judgment in DPP v P has emerged. It then examines the legal basis for Smith LJ’s judgment and ends with some thoughts on the potential impact of a revived doli incapax defence.

THE CRIMINALISATION OF YOUNG PEOPLE

The new youth justice system instigated by New Labour following its election to office a decade ago is criticised for ‘its ever-extending reach’.² It is claimed that the reforms have prompted a process of net-widening in which increasing numbers of young people and an increasing range of (mis)behaviours are increasingly subject to formal

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¹ [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr).

criminal justice action. However, it is important to be cautious when making claims regarding the expansion of the youth justice system. Indeed, looking at the numbers of children aged from 10 to 17 cautioned or found guilty in the courts, there was actually a fall between 1995 and 2005 of 8.7%, with the figures for males falling more sharply than females. Further, if the number of young persons found guilty or cautioned for indictable offences is considered in relation to the number of young persons in the population, a fall of 17.6% over the same period can be observed.

This decline in formal processing is actually a continuation of a trend which began in the early 1980s. In many respects, and all things being equal, stability or decline in the number of young people being processed by the system is what one would expect at a time when volume crime, as measured by victimisation data in the British Crime Survey, has fallen by around one third in the last decade. All things, however, have not been equal, and New Labour’s youth justice reforms, particularly the attempt to formalise police warning practice in respect of juveniles through the replacement of cautioning with a statutory scheme of reprimands and final warnings, were expected to lead to increasing numbers of young people being formally processed by the system. While this does not seem to have occurred initially and, indeed, the numbers continued to fall to reach a low point in 2003, since 2003 the trend has reversed quite significantly and in 2005 the rate of children being processed by the system was 13.4% higher than it had been two years previously.

Obviously one has to be wary of jumping to hasty conclusions based on an increase over a two-year period, but a shift towards increased formal processing of young people is also apparent if the Youth Justice Board’s figures concerning the number of offences (rather than offenders) processed by the system is considered. These data, which the Board began to publish in the financial year 2002/03, suggest that offences involving 10–17 year olds resulting in a court or pre-court disposal have risen significantly by 11.4% in the four-year period from 2002/03 to 2005/06. This would suggest that a significant proportion of young people’s behaviour which would

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6 Ibid, at table 3.23.
8 Home Office, Crime in England and Wales 2006/7, Home Office Statistical Bulletin (Home Office, 2007), at table 2.01. A picture of stability in the level of offending by young people in recent years is also beginning to emerge from the survey on self-reported offending carried out annually by the Home Office since 2003 (Home Office, Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey, Home Office Statistical Bulletin 17/06 (Home Office, 2006)).
12 Youth Justice Board, Youth Justice Annual Statistics 2005/6 (Youth Justice Board, 2006).
previously have been dealt with in some other way (if at all) is now being criminalised within the youth justice system. This lends some empirical weight to the claim that there has been some 'net widening' in English youth justice in the last few years. Such a perspective is bolstered when the increasing use of anti-social behaviour orders (ASBOs) against young people is considered.\(^\text{13}\) The number of ASBOs granted annually against young people have grown from a handful in the early years following their introduction in 1999 to over 1,500 in 2005.\(^\text{14}\)

Coupled with this sense of net widening as overall system expansion, is a concern that there is an increasing degree of formalisation in the processing of young people within the system. The primary indicator of such a shift is the transfer of the locus of decision-making from the police station (in the form of both informal warnings and formal cautioning) to the youth court in a substantial proportion of cases. In 1994 two thirds of cases formally processed by the youth justice system were dealt with through cautioning with one third prosecuted in the court system.\(^\text{15}\) The proportion of cases dealt with pre-trial is now nearer 50\%.\(^\text{16}\) A young person processed for committing an offence is substantially more likely to be prosecuted in court today than he or she would have been a decade or so ago.

There is, therefore, some empirical support for the suggestion of youth justice system expansion in terms of the number of young people and offences formally processed. To a considerable extent, as already indicated, this reflects a deliberate policy choice by New Labour, part of its 'new youth justice' which aimed to reduce youth offending through compelling young people to take responsibility for their harmful behaviour. While many academic commentators,\(^\text{17}\) the former Chair of the Youth Justice Board\(^\text{18}\) and children’s charities\(^\text{19}\) have been critical of this strategy of ‘responsibilisation’ and increased criminalisation, there have been few signs that policy makers are inclined to reverse tack. Interestingly, however, some signs of stirrings of judicial resistance have recently become apparent. Over the last decade the judiciary have, from time to time, shown themselves unwilling simply to act as a rubber stamp to some of New Labour’s more extreme instrumentalist attempts to solve

\(^{13}\) ASBOs are civil prohibitive orders which carry a criminal penalty for breach. For a critique of the use of the ASBO against young people in England and Wales see S. Macdonald and M. Teiford, 'The Use of ASBOs Against Young People in England and Wales: Lessons from Scotland' (2007) 27 Legal Studies 604.


\(^{16}\) Youth Justice Board, Youth Justice Annual Statistics 2005/6 (Youth Justice Board, 2006).


\(^{18}\) Eg R. Morgan 'A Temporary Respite: Jailing Young People in Ever Larger Numbers is not the Answer to Tackling Youth Crime', The Guardian, 19 February 2007.

\(^{19}\) The Standing Committee for Youth Justice, Youth Justice: Steps in the Right Direction (Standing Committee for Youth Justice, 2005). The Standing Committee for Youth Justice is an umbrella group for a number of charities with an interest in Youth Justice issues including Barnardo’s, The Children’s Society, NCH, NSPCC and Save the Children.
complex social problems through use (or subversion) of the criminal law – at least as far as adults are concerned.20

SIGNS OF JUDICIAL RESISTANCE TO THE ‘NEW YOUTH JUSTICE’?

Signs of judicial resistance to the ‘new youth justice’ have been, however, harder to discern. The recent case of DPP v P21 is therefore of considerable interest as it perhaps reflects a sign of some stirrings of judicial discontent regarding the Government’s approach.

DPP v P concerned the criminal responsibility of children. In England and Wales a child under the age of 10 cannot be convicted of a criminal offence.22 At common law, children between the ages of 10 and 14 were presumed to be doli incapax, that is, incapable of committing a crime. Thus to secure a conviction of a child in this age bracket the prosecution had to prove beyond reasonable doubt not only the actus reus and mens rea of the offence but also that the child knew at the relevant time that what he or she was doing was seriously wrong and not merely naughty or mischievous.23

Upon taking office, the first New Labour Government embarked upon a substantial overhaul of the youth justice system, which included legislating to abolish the presumption of doli incapax.24 Commentators and practitioners generally assumed that the effect of the legislation was to preclude 10 to 13 year olds from relying on the doli incapax doctrine thus placing them in an equivalent position to those aged 14 years and over.25 The age of full criminal responsibility in England and Wales was effectively lowered and would now start at 10.26 This move was viewed by many as emblematic of New Labour’s strategy of encouraging the ‘responsibilisation’ of children in trouble in an ‘adulterated’ youth justice process.27

It therefore came as something of a surprise that in April 2007 in DPP v P, some eight years after the Crime and Disorder Act 1998 came into force, Smith LJ breathed new life into the doli incapax doctrine. The case concerned a 13-year-old boy with special educational needs (Attention Deficit Hyperactivity Disorder and a full scale IQ of 65) charged with a number of criminal offences in the youth court. Following a decision by the district judge to stay the proceedings, the Crown Prosecution Service

20 The best known example is probably the Belmarsh detainees case (A v Secretary of State for the Home Department; X v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 WLR 87), in which it was declared that s 23 of the Anti-Terrorism, Crime and Security Act 2001, which permitted the Home Secretary to detain foreign nationals thought to pose a risk of committing acts of terrorism, was incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
21 [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr).
22 Children and Young Persons Act 1993, s 50.
24 Crime and Disorder Act 1998, s 34.
26 Though it should be noted that all but the most serious crimes committed by under 18s are tried in the Youth Court and that special sentencing arrangements apply to under 18s. For a concise introduction to the sentencing framework now applicable to children and young people see J. Fionda, Devils and Angels: Youth Policy and Crime (Hart, 2006), chapter 7.
appealed against the decision. In the course of a judgment primarily concerned with important procedural matters concerning fitness to plead and abuse of process, an intriguing observation regarding doli incapax was made. Smith LJ was careful to stress that her observations were obiter dicta and that the court had not had the benefit of full argument on the issue but nevertheless, taking inspiration from a short commentary by Professor Nigel Walker, concluded that although the Crime and Disorder Act 1998 had abolished the presumption of doli incapax it had not abolished the defence which remained available.

Smith LJ commenced her analysis by deploying a literal approach to interpreting section 34 of the Crime and Disorder Act 1998 which provides, 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is abolished'. Smith LJ observed that 'the subject in section 34 is "the rebuttable presumption of criminal law" and the verb "is abolished" can only apply to the subject. If so, it must be the presumption that has been abolished'. Looking only within the four corners of the statute it was difficult, Smith LJ suggested, to justify another interpretation as reflecting the ordinary meaning of the provision.

Smith LJ then proceeded to apply a ‘purposive’ approach to interpreting the provision through reviewing the legislative background in an effort to discern Parliament’s purpose in passing the measure. Particular weight was given to a statement by the Solicitor-General in the course of the Second Reading debate on the Bill in the House of Lords. It was claimed that doli incapax was being used ‘in a manipulative way in many courts by defendants’ and was ‘clogging up’ the youth court and was making proceedings ‘more difficult’. From this Smith LJ determined that ‘the mischief at which the provision was aimed was the difficulty of the prosecution in having to rebut the presumption in every case’. The remainder of the Solicitor-General’s statement noted that:

‘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.

This statement, which Walker had also cited, inclined Smith LJ towards the view that the Government’s intention was not to abolish the substantive defence of doli incapax but merely the evidential presumption. The defence and the presumption, it was concluded, were ‘distinct concepts’ and all that was required to address the mischief of frustrated prosecutions was removal of the evidential presumption.

Finally, Smith LJ concluded that there would be an evidential burden on the defence to raise the issue of doli incapax and the prosecution would then assume the burden of proving beyond reasonable doubt that the child knew at the relevant time that what she was doing was seriously wrong and not merely naughty or mischievous.

29 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [40].
31 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [42].
33 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [46].
34 Ibid, at para [47].
The fact that this was a decision of the Divisional Court, that Smith LJ’s conclusions regarding *doli incapax* were explicitly *obiter dicta* and that Gross J chose to express ‘no view’ on the matter, should caution against hasty conclusions but the consequences of a decision that the defence of *doli incapax* remains available are potentially quite profound. Indeed, such was the concern of the prosecutorial authorities concerning the ‘wide implications for youth justice’ that a draft of Smith LJ’s judgment was widely circulated around the Crown Prosecution Service, the Home Office and HM Court Service in what was described as a ‘serious breach of confidentiality’. Smith LJ’s reasoning therefore warrants close and careful analysis.

The starting point for the interpretation of a criminal statute is to consider the ordinary meaning of the provision in context. Considering the longstanding nature of *doli incapax*, which dates from the reign of Edward III, only a clear and unambiguous statutory statement should be taken as having abolished the defence. As Smith LJ makes clear, however, what is contained in the statute is a clear and unambiguous statement that, to quote section 34, ‘The rebuttable presumption ... is abolished’ (emphasis added). Looking only at the statute the argument that the defence of *doli incapax* remains available is irresistible.

Whether Smith LJ’s observations are correct and reliance on the defence remains available turns, first, on whether it is deemed necessary to move beyond a literal interpretation of the provision to a purposive approach and, secondly, the outcome of that purposive analysis. On the first question, the criminal courts have increasingly (though not always consistently) adopted a purposive approach to statutory interpretation and in a decision with such potentially profound implications for English youth justice it would be surprising if narrow literalism was permitted to be determinative.

With regards to the second question, Smith LJ was keen to stress that her conclusions regarding *doli incapax* were *obiter* and that the issue had not been fully argued. Had the court had the opportunity to hear full argument it is possible that a different view of the pre-legislative and legislative history of the provision may have been adopted. The starting point is the House of Lords decision in *C (A Minor) v Director of Public Prosecutions* which not only re-established *doli incapax*, following a somewhat audacious attempt by Laws LJ to abolish it in the Divisional Court, but also alleged problems in its operation and invited governmental review. Although the Conservative Government at the time was beginning to take a harder line on youth crime issues following the relatively liberal ‘developmental approach’ of the late 1980s, reform of *doli incapax* was not on its agenda. The New Labour Opposition was, however, keen to stake its claim to be the party of law and order, and viewed reform of *doli incapax* as a key ingredient of its wider reforms of youth justice.

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35 Ibid, at para [64].
36 *Director of Public Prosecutions v P* [2007] EWHC 1144 (Admin), [2007] All ER (D) 246 (Apr), at para [6].
39 *DPP v P* [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [40].
41 [1994] 3 WLR 888.
provenance of section 34 can accordingly be traced to a Labour Party consultation paper published in May 1996 in which it was argued that doli incapax was unsatisfactory as ‘most young people aged 10-13 are plainly capable of differentiating between right and wrong, especially where the issue is one of theft or damage to the property of others’. Reform of doli incapax was advocated, though the nature of reform was not spelt out in any detail. Clearly, however, just because a view was taken that most young people of that age would have the requisite capacity, it did not follow that all would and accordingly the statement in the document is quite consistent with abolition of the presumption but retention of the defence.

More useful for the purposes of construction of the statutory provision is the Home Office Consultation paper Tackling Youth Crime published in September 1997 following Labour’s general election victory earlier that year. The Government boldly stated that the presumption of doli incapax urgently required reform because it ‘fell[ew] in the face of common sense’ and was ‘archaic’, ‘illogical’ and ‘unfair in practice’. When considering the legislative history of section 34, Smith LJ considered that the mischief at which the provision was aimed was ‘the difficulty of the prosecution in having to rebut the presumption in every case’. This was clearly a concern of the Government in the consultation paper. It was argued that it was ‘unfair in practice’ because difficulties in providing necessary evidence to rebut the presumption ‘stop[ped] some children who ought to be prosecuted from ever appearing in court’. However, as noted by Smith LJ, identification of this mischief is of limited assistance in interpreting the provision as it could be argued that removal of the presumption would be one means by which the problem could be addressed, though complete abolition of the defence would arguably be more effective.

It should be noted, however, that the Consultation Paper also identified other (albeit closely related) reasons for reform of doli incapax. It was argued, for example, that ‘the doctrine’ was ‘archaic’ because:

‘it assumes not only that a child under 14 is less morally culpable for his or her actions than an adult, but that in general, a child under 14 cannot differentiate right from wrong. While it is true that a child’s understanding, knowledge and ability to reason are still developing, the notion that the average 10–14 year old does not know right from wrong seems contrary to common sense in an age of compulsory education from the age of five, when children seem to develop faster both mentally and physically.’

Arguing that doli incapax was out of step with the common sense view that in contemporary society the average 10–14 year old or even the overwhelming majority of children of that age could discern right from serious wrongdoing was consistent with removal of the presumption and retention of the defence as well as complete abolition and is, again, therefore only of limited use in statutory construction.

It was also argued in the consultation paper that doli incapax was illogical because:

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46 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [43].
48 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [45].
For a child aged 10–14 to be convicted of an offence, the prosecution must rebut the presumption by showing that the child knew that what he or she was doing was seriously wrong. In practice, the presumption can be rebutted if the prosecution produces evidence that the defendant is of normal mental development for his or her age. But the doctrine itself presumes that children of that age normally do not know right from wrong, so to rebut the presumption by proving the child’s normality is logically inconsistent.  

Once again, however, identification of this mischief of illogicality is of limited assistance in interpreting section 34 because removal of the presumption of doli incapax would deal with the issue as effectively as complete abolition of the defence. If the defence were to remain in place absent the presumption, proof of normality by the prosecution would follow a claim of abnormality made by the defendant in raising the defence of doli incapax. This would be perfectly logical.

The consultation paper concluded (for present purposes somewhat ambivalently) that, ‘justice is best served by allowing courts to take account of the child’s age and maturity at the point of sentence’, which might suggest complete abolition of the defence, ‘not by binding them to presume that normal children are incapable of the most basic moral judgements’ (emphasis added), which focuses on the issue of the impropriety of presumption.

Undoubtedly most useful for the purposes of interpreting section 34, and perhaps, the most surprising omission in Smith LJ’s judgment, is that the Government then identified two possible options for reform of doli incapax: abolition of the presumption (which it favoured) and reversal of the presumption. Reversal of the presumption would have put the defence on an equivalent footing to substantive defences of incapacity such as insanity and diminished responsibility. It would be for the defence to prove to the civil standard (balance of probabilities) that the defendant did not know that what she was doing was seriously wrong and only if that were successful would it fall to the prosecution to demonstrate to the criminal standard (beyond reasonable doubt) that she actually did know that her act was seriously wrong.

The Government explicitly argued against the option of reversing the burden of proof primarily on expediency grounds:

The Government believes that if the presumption were reversed, rather than abolished, practical difficulties in securing prosecutions and convictions of children under 14 might persist. Reversing, rather than abolishing, the rule might simply lead to the doli incapax defence being employed in almost every case. To counter this defence, the prosecution would once again be set the task of proving, beyond reasonable doubt, that the child knew the seriousness of his or her act. This will involve extra argument, delay and expense. The Government believes that this option would thus do little to ensure that justice in such cases was made simpler, speedier and clearer.  

What is striking about this proposal is that it would have put young defendants in a weaker position than that which would follow should Smith LJ’s interpretation of the

52 Ibid, at paras 14–18.
law prove to be correct. Smith LJ concluded that if the substantive defence survived the abolition of the presumption then, following principle derived from other substantive common law defences (other than insanity) only an evidential (not probative) burden would fall on the defence to raise the issue of doli incapax. 54

By explicitly rejecting the reverse burden scheme as being inadequate to tackle the mischief of frustrated prosecution it can be argued, a fortiori, that the outcome consequent upon Smith LJ’s interpretation of section 34 could not possibly have been intended by the Government. This view is bolstered when one considers that, following consultation, the White Paper No More Excuses: A New Approach to Tackling Youth Crime in England and Wales confirmed the Government’s view that the option to reverse the burden of proof should not be adopted and that the presumption of doli incapax should be abolished. 55 Further support for this interpretation can be garnered from the Parliamentary debates on (what would become) section 34.

As noted above, Smith LJ made a point of quoting a statement of the Solicitor General in the Second Reading debate as a strong indication of Parliamentary intent. Reference, however, should also have been made to the fact that in the House of Lords Committee 56 and Report 57 stages amendments which sought to reverse the burden of proof were rejected by the House of Lords.

Following the enactment of the legislation, guidance issued by the Home Office on the effect of section 34 stated that the effect would be that ‘children who are over the age of criminal responsibility (10–13 year olds) will be treated in the same way as other juveniles (14–17 year olds) when deciding whether or not prosecution is appropriate’. 58 While Smith LJ was correct to point out that this guidance could not be used as an aid to statutory construction, it does appear to fit in with what the Government thought it was doing as measured by its Consultation Paper, White Paper and Parliamentary action. 59

In conclusion, as indicated above, whether Smith LJ’s interpretation of the law can be sustained is determined by the extent to which her decision was dependent upon the legislative history of the provision. If the literal or ordinary interpretation of the words of the statute is viewed as sufficient in itself then it can be concluded that the evidential rule was abolished but the substantive defence of doli incapax remains. If, on the other hand, a purposive interpretation, which relies on pre-legislative and legislative history, is thought to be required then it is more difficult to argue that complete abolition of doli incapax (presumption and defence) was not intended and achieved.

54 DPP v P [2007] EWHC 946 (Admin), [2007] All ER (D) 244 (Apr), at para [47].
59 However, it should be noted, that what matters in interpreting a statute is not what the Government thought it was doing but the meaning of the words which Parliament used. As Lord Reid once put it, ‘We are seeking not what Parliament meant but the true meaning of what they said.’ (Black-Clawson International Ltd v Papierwerke Waldhof-Ashaffenburg AG [1975] AC 591, at 613).
DOES IT REALLY MATTER WHETHER THE DEFENCE HAS BEEN ABOLISHED OR NOT?

A central tenet of English criminal law is the principle of *mens rea*. The principle ensures that the imposition of censure and punishment by the state on an individual is justified by holding as criminally responsible only those who can be shown to be to blame for committing a prohibited action. The essence of the principle, according to Ashworth, 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’.

In other words, there should be no criminal conviction without proof of fault.

It is arguable that the statements of Government Ministers in the debates on the Crime and Disorder Act 1998 which appeared to leave open the possibility of a defence of *doli incapax* for children with learning difficulties could be read merely as a reaffirmation of this *mens rea* principle. One difficulty with this argument, however, is that while the *mens rea* required for some offences does, in theory at least, leave some scope for a concession to a young person’s immaturity, this is by no means universally true across the full range of criminal offences in which young people are commonly involved. Perhaps the most flagrant example of *men rea* doctrine’s insensitivity to childhood, at the time the Act came into force, was the interpretation given to the key concept of recklessness in criminal damage offences by the House of Lords in the (now overturned) controversial decision of *Metropolitan Police Commissioner v Caldwell*. By a majority, the House of Lords held that a defendant could be held to be reckless even where no thought was given to the risk of damaging property provided the risk would have been obvious to the ordinary (adult) prudent bystander.

The rigidity of this objective formulation was subsequently confirmed, and applied to a juvenile justice context, in relation to a vulnerable schoolgirl with learning difficulties in *Elliott v C (A Minor)*. In that case a girl had set fire to a neighbour’s shed after playing with matches and white spirit. The magistrates had found that not only had she not given thought to the risk of damage inherent in her act but that she was not capable of appreciating it. Nevertheless, in the Divisional Court, Goff LJ felt ‘bound by the doctrine of precedent’ and allowed the prosecution’s appeal. The girl in that case was 14, so the doctrine of *doli incapax* could not protect her, but the doctrine at that

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61 A good example are the offences of theft and other property offences where the *mens rea* element of dishonesty requires that the prosecution establish that the defendant was aware that his conduct would be considered dishonest by the ordinary standards or reasonable and honest people (*R v Ghosh [1982] 2 All ER 689*). Indeed in the case of *I v Director of Public Prosecutions* [1989] Crim L R 498 the requirements of dishonesty and *doli incapax* appear to have been treated as indistinguishable, suggesting that the defence could be viewed as more or less redundant in relation to dishonesty offences.

62 The criminal damage offences are important as far as the criminal liability of children and young people are concerned, as one in five offences committed by 10–13 year olds (inclusive) which result in a disposal by the youth justice system, are offences of criminal damage (*Youth Justice Annual Statistics 2005/06*, at p 8).


64 [1983] 1 WLR 939.
time would surely have provided a protective shield for similarly situated younger children.\textsuperscript{65} Of course, this most flagrant example of the insensitivity of mens rea doctrine to vulnerable children could be argued to be atypical. Caldwell recklessness was mainly confined to criminal damage offences with subjective or advertent Cunningham recklessness prevailing in most other key areas (such as offences against the person). Moreover, since the abolition of the presumption of doli incapax,\textsuperscript{66} the House of Lords was presented, in \textit{R v G and Another}\textsuperscript{67} with a reckless criminal damage case involving two young children (aged 11) and took the opportunity to overturn its decision in Caldwell and bring the concept of recklessness in criminal damage into line with the subjective conception found in other areas of the criminal law. Consequently, liability for criminal damage now requires proof that the child was actually aware that her act risked damaging property rather than merely evidence that a reasonable adult would have had such awareness if put in the defendant’s shoes. It could be argued that a subjective conception of mens rea removes the need for an excusatory doli incapax defence to avoid injustice being done to young people. A young defendant in an equivalent position to the child in Elliott v C (A Minor) would now escape conviction, through lack of mens rea, notwithstanding the absence of a doli incapax defence.

It is, however, possible to envisage circumstances only marginally different to that in Elliott v C (A Minor) in which although the young person might be aware that her act might cause harm to another person or property (and therefore mens rea could be proven) she would not have the capacity to fully appreciate the ramifications of that harm.\textsuperscript{68} In other words, she might not appreciate that her act was seriously wrong. This distinction between a narrow cognitive capacity to appreciate a risk of harm and a genuine understanding of the consequences of her act and their meaning points to the limitations of the mens rea principle in showing due regard to a child’s immaturity and is suggestive of a role for an excusatory defence of doli incapax.

CONCLUSIONS

The abolition of doli incapax was heralded as an important symbolic statement of the Government’s intention to ensure young people should be made to take responsibility for their harmful behaviour and also as a practical measure to prevent the frustration of youth criminal proceedings and thereby improve the efficiency of the youth justice process. Critics complained that a widening of the youth justice net would inevitably follow from this move and harmful consequences for the young people involved and, ultimately, society would follow.\textsuperscript{69} System expansion did not occur immediately but in

\textsuperscript{65} With this in mind it is perhaps surprising that the existence of Caldwell recklessness did not prevent New Labour when proposing abolition of doli incapax stressing that ‘especially’ in cases of criminal damage (as well as theft), young people could differentiate between right and wrong (Labour Party, \textit{Tackling Youth Crime: Reforming Youth Justice} (Labour Party, 1996), at p 11.) and presumably, ex hypothesi, a defence of doli incapax would be least justifiable in such a context.

\textsuperscript{66} Although there is no evidence that the court was influenced by the abolition of the doli incapax presumption in reaching its conclusions. Indeed there was scarcely any consideration of the issues surrounding the criminal responsibility of children in the various judgments which preferred to focus on the problems with Caldwell recklessness more generally (H. Keating, ‘Reckless Children’ [2007] Crim LR 546).

\textsuperscript{67} [2003] UKHL 50; [2003] 1 WLR 1060.

\textsuperscript{68} See, eg, IPH v Chief Constable of South Wales [1987] Crim LR 43.

the last few years the tide appears to have turned and increased levels of formal youth justice processing of young people’s misbehaviour is apparent. It is understandable that society should wish to address the harmful behaviour in which young people are often engaged but, quite apart from the potential harm to the young person involved, criminological research has long cautioned against a resort to increased criminalisation and punishment as the most appropriate approach to reducing offending. There is a danger that criminal (or juvenile) justice interventions rather than reducing offending can backfire and make matters worse and so measures which risk unnecessarily stigmatising young people should be avoided lest they exacerbate the behaviour they were intended to address.70 Empirical evidence from longitudinal studies, most recently, the Edinburgh Study of Youth Transitions of Crime, shows that young people processed by the juvenile justice system are more likely to persist in their offending than those who offended at a similar level but who are not caught.71

Some would argue therefore that increased criminalisation and punishment of young people appears irrational from a criminological point of view but it has undeniable political appeal for politicians faced with a tabloid media (undoubtedly) and general public (apparently) with an insatiable appetite for an increasingly punitive response to young people’s offending. Contemporary society risks being trapped in a ‘new iron cage’ of ever more criminalisation and punishment,72 but criminal policy history is replete with examples of progressive shoots emerging from apparently bleak landscapes.73 In the search for some such shoots in the contemporary scene there is a temptation to welcome the decision of Smith LJ in DPP v P explored in this article. The possibility was raised that the ancient defence of doli incapax, presumed dead by most commentators and practitioners, could still be relied upon by young defendants under the age of 14. In certain respects a resuscitation of doli incapax could be beneficial. First, it would provide a clear symbolic statement from the substantive criminal law of the relative immaturity of young defendants. Secondly, it could provide partial compensation for the narrow cognitivism of the criminal law’s traditional approach to mens rea identified above and, finally, and perhaps most importantly, by forcing age onto the agenda in the consideration of the evidential sufficiency of the case against the young person, it could serve to structure the pre-trial decision making of the police and Crown Prosecution Service away from too ready a resort to criminal justice processing.

Ultimately, however, the impact of doli incapax is likely to be at best marginal. At other points in the history of youth justice the presence of the doctrine did not prevent increased criminalisation, punishment and growth in the use of custody for young people.74 After all, the famous criminological concept of ‘net widening’ was first coined by Stan Cohen with reference to criminal (and especially juvenile) justice practice in

England and Wales in the 1970s. As several commentators have noted, in practice, prosecutors were rarely troubled by doli incapax prior to its (putative) abolition and the symbolic ramifications of its reinstatement, should that be confirmed, are likely to be more important than its direct practical effects.

Penal policy, however, is a field in which symbols matter a great deal. Abolition of doli incapax was one strand of New Labour’s attempt to establish its law and order credentials by sending a clear signal that young people’s offending would be dealt with seriously. The abolition derived from, and contributed to, a culture of intolerance concerning young people which, in turn, has fed a hardening of youth justice law, policy and practice.

The most significant effect of the raising of the question of (partial) re-instatement of doli incapax is therefore likely to be as an, albeit hopelessly inadequate, counterweight to this pervasive negative mentality. Ultimately, however, it is policy makers who must pick up the gauntlet, resist the temptation to engage in populist punitive rhetoric and engage more rationally with the problems of contemporary youth justice.

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