

# Life in crime

Benjamin Newton discusses a recent Court of Appeal case that considered whether the defence of *doli incapax* was still available to defendants aged from 10 to 14 years

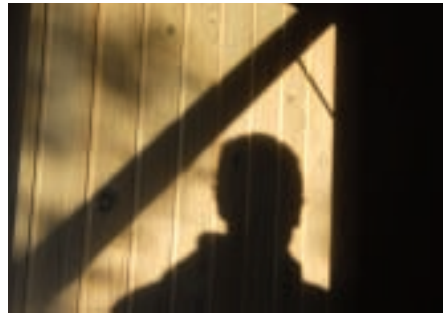
**A ONCE-FAMILIAR CONCEPT** from the common law was dealt its final blow when the Court of Appeal (Latham LJ, Forbes J, and Sir Richard Curtis) dismissed the appeal in *R v T* [2008] EWCA Crim 815 on 16 April. The issue before the court was whether the defence of *doli incapax* was still available to defendants between the ages of 10 and 14, notwithstanding s 34 of the Crime and Disorder Act 1998 which abolished the rebuttable presumption that a child aged 10 or over is incapable of committing an offence.

## Has done wrong

For those (myself included) who were not in practice prior to s 34 coming into force, the 'mischief' that it was intended to cure was the difficulty the prosecution faced in having to prove that every defendant between 10 and 14 years of age knew that what they had done was wrong. The House of Lords had been invited to change the common law presumption in *C (A Minor) v Director of Public Prosecution* [1995] 2 Cr. App R. 166, following Laws J's attempt to consign the concept of *doli incapax* to history when the case had reached the Divisional Court ([1995] 1 Cr. App R. 118).

Their Lordships were invited by prosecuting counsel to remove the rebuttable presumption and replace it with an evidential burden on the defence which would then need to be disproved to the criminal standard by the prosecution. Lord Lowry considered the presumption too firmly embedded in the common law to entitle the court to abrogate or amend it, however, and the issue duly fell to the consideration of Parliament.

The question of whether s 34 had abolished the whole concept of *doli incapax*, or only the rebuttable presumption, immediately gained academic attention in the competing arguments of Professor Nigel Walker, Loraine Gelsthorpe and Julia Fionda. It was Walker, in his article "The End of an Old Song" [1999] *NLJ* 64 that championed the potential argument that only the presumption had gone and it was open to a defendant to still run a defence that they lacked the necessary capacity, although it is fair to say that Gelsthorpe and Fionda both lamented the disappearance of the concept. Walker's



reasoning was embraced by Smith LJ in *Crown Prosecution Service v P* [2007] EWHC 946, who devoted paragraphs 37 to 47 of her judgment to an expressly *obiter dicta* opinion that the defence should still be considered to exist – concluding that: "I am drawing attention to the potential strength of the argument and the need for this issue to be authoritatively determined, after full argument, in a case in which it is properly raised." Gross J was persuaded by counsel not to express a view, but did echo Smith LJ's call for the matter to be considered.

The appellant in *R* had pleaded guilty to 12 counts of causing or inciting a child under 13 years to engage in sexual activity, at a time when he was himself 12 years old. The guilty plea was entered following a preliminary ruling that s 34 prevented the defendant raising the issue of whether he had the capacity to know that the acts were wrong. The case therefore provided the Court of Appeal with the opportunity to consider the arguments fully as Smith LJ had hoped, however Latham LJ (giving the leading judgment) took a different view in the final balance.

## Opinions differed

The two learned judge's opinions essentially differed on the weight to be attached to comments made by the then Solicitor General, Lord Falconer of Thoroton, who said while closing the debate in the Lords "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 specific defence. All the provision does is remove the presumption that the child is incapable of committing wrong".

Smith LJ had found these words persuasive, but Latham LJ considered the purpose of s 34 to be thwarted under such circumstances, and went on to consider with broader reference what was meant by "the presumption" in 1998. Tracing authorities including *JBH and JH (minors) v O'Connell* [1981] Crim LR 632 and *A v DPP* [1992] Crim LR 34, the court found a line of opinion intimating that the concept of *doli incapax* had become outdated due to such reasons as universal education.

Further support was drawn from the language of Jack Straw MP, who, at the time of the Bill's passage, said that "with great respect, we are abolishing the concept of *doli incapax*", and also from the experience of Lord Jauncey as expressed in *C (A Minor) v DPP*: "no such presumption operates in Scotland where the normal criminal responsibility attaches to a child over eight and I do not understand that injustice is considered to have resulted from this situation".

The Court of Appeal therefore held that "Parliament must be taken to have intended 'the presumption' to encompass the concept of *doli incapax* when it was abolished in s 34", affirming the decision to deny the 12-year-old appellant the opportunity of raising lack of capacity as a defence.

## Slammed shut

Although the door to a resurrection of *doli incapax* had only been pressed far enough to reveal a glimmer of light, the slam of it shutting is all too familiar when looked at in the context of the criminalisation of adolescent sexuality.

It is no surprise that the Court of Appeal were finally asked to adjudicate on a question that had been raised academically in 1999 only after the coming into force of the Sexual Offences Act 2003.

Desperate times call for desperate measures, although in this case that is probably an unfair characterisation of an argument that had strong academic and judicial support.

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