Children and Crime: *Doli (In)Capax*.

I. Introduction

Doli incapax is defined as 'incapable of evil' or 'incapable of committing an offence'.[1] As things stand, children under 10 years old are *irrebuttably* presumed to be incapable of criminal responsibility by virtue of s.50 of the Children and Young Persons Act 1933 ("CYPA 1993"). Until 1998, the *rebuttable* presumption of *doli incapax* applied as a buffer for children aged 10 to 13 years old who were charged with a criminal offence.

The presumption has now been abolished and in effect leaves children between 10 and 13 to be treated as equally responsible as adults. However, the presumption remains applicable in cases of a historic nature. With the recent increase in prosecutions for historical sexual offences, it is useful to take a closer look at the doctrine, and to examine its principles and use in courts. Due to the unique difficulties these cases present, not least because, thirty years ago, the presumption was used in connection with very different offences to the ones in respect of which it is now invoked, it is essential that proper direction is given in relation to such cases.

II. The principle

1. What is it?

In relation to children aged 10 to 13 years old, there existed until 1998 a rebuttable presumption of *doli incapax* whereby they were presumed, unless the contrary was proved beyond reasonable doubt, to be incapable of committing a criminal offence. Leniency was afforded to reflect the fact that children of that age, although they could be criminally liable, were considered incapable of knowing the difference between right and wrong, and therefore lacked the criminal intent necessary for prosecution.

The presumption could be rebutted if the prosecution proved that the child had a 'mischievous discretion' or in other words, that he knew that what he did was 'seriously wrong', not just naughty or mischievous. This is to be contrasted with *doli capax*, in other words one who can "discern between good and evil at the time the offence occurred."[2]

[1] *R v T* [2009] UKHL 20 and Crime and Disorder Act 1998, s 34.
[2] *R v JTB* [2009] UKHL 20, para. 8.

Although *doli incapax* was abolished by the introduction of s.34 of the Crime and Disorder Act 1998 ("CDA 1998"),[3] the provision did not apply retrospectively and so it has been held that the presumption continues to apply to offences alleged to have been committed before the 30th September 1998.[4]

Reference in case law is made to both the presumption and the defence of *doli incapax*. It was once thought that the concept may have a separate existence from the presumption, and that the defence may have survived the CDA 1998.[5] However, although the two concepts had once been separate, the House of Lords considered that, by 1998, they co-existed and the doctrine embraced both the presumption and the defence.[6] It found that, in using the language of s. 34 CDA 1998, Parliament intended to abolish both the presumption and the defence.[7]

The position behind its abolition was that the presumption "made it very difficult for youth courts to convict young offenders and start the process of changing their offending behaviour."[8] The Government seemingly believed that progress in the education system had produced a generation of children who could distinguish right from wrong at a younger age.[9] However, criticism had been present from as early as the 1950s. Professor Glanville Williams outlined its absurdity when he commented that the result of the doctrine was that "the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law".[10] By the early 1990s, judges believed the rule went against common sense and generally disapproved of it.[11]

2. Directing the jury

The presumption is exercised by way of a jury direction, given during legal directions at the end of a trial. In their approach to the evidence as a whole, the jury should have in mind and be directed to have in mind the underlying *doli incapax* principle.[12]

Thus, where a defendant is charged with an offence alleged to have occurred when (s)he was or may have been aged between 10 and 13, prior to the commencement of the CDA, the jury must be directed in accordance with *C (a minor) v DPP*,[13] in that they must be satisfied:

[3] The irrebuttable presumption that a boy under the age of 14 is incapable of sexual intercourse was abolished by s.1 of the Sexual Offences Act 1993 ("COA".) It does not have retrospective effect.
[4] *C (a minor) v DPP* [1996] A. C. 1, HL.
[5] Crown Prosecution Service v P [2007] EWHC 946 (Admin); R v T [2009] UKHL 20.
[6] *R v JTB* [2009] UKHL 20, para 7.
[7] *R v JTB* [2009] UKHL 20, para 7.
[8] Home Office, No More Excuses – A New Approach to Tackling Youth Crime in England and Wales (White Paper, Cm 3809, 1997).
[9] Home Office, No More Excuses – A New Approach to Tackling Youth Crime in England and Wales (White Paper, Cm 3809, 1997) 4.4.
[10] "The Criminal Responsibility of Children" [1954] Crim LR 493, 495-496.
[11] *C (a minor) v DPP* [1996] A. C. 1, HL, p.9.
[12] *R v H* [2010] EWCA Crim 312, para 40.
[13] [1996] A. C. 1, HL. See also *R v M (D)* [2016] EWCA Crim 674 and *R v PF* [2017] EWCA Crim 983.

a. That the child committed the *actus reus* with the requisite *mens rea* (in other words that (s)he committed the crime); and

b. That the child also knew that the particular conduct was not merely naughty or mischievous but seriously wrong (the 'guilty knowledge' limb).

The standard applied is 'beyond a reasonable doubt.'

Any directions to the jury relating to the defendant's age should be discussed with the advocates in the absence of the jury before closing speeches.[14]

Should a direction be thought appropriate, its exact terms will have to be tailored to the circumstances of the individual case. It may be that the direction need be given only in relation to certain counts. It will have to include an identification of the issue to which a defendant's age is relevant and a direction that the jury should consider that issue in light of what they know of a defendant's age, development and maturity at the time of the alleged offence.[15] A helpful example is provided in the compendium.[16]

If a jury direction to this effect is not given then this may form the basis for an appeal and, in previous cases, a non-existent or defective direction has led to convictions being quashed.

III. The guilty knowledge limb

1. 'Seriously wrong'

Under the doctrine, guilty knowledge is an ingredient of every offence charged against a child. It is thus important to understand what the words 'seriously wrong' mean, and what knowledge the defendant must be shown to possess in order for the presumption to be rebutted.

In this context, guilty knowledge refers to knowledge of the wrongfulness of the *actus reus*.[17]

In *A v DPP*,[18] the justices found that the test was not knowledge of unlawfulness but knowledge that what the defendant did was seriously wrong, beyond any measure of naughtiness or mischief.[19] It has been said that the notion is conceptually obscure but that, when contrasted with the words 'merely naughty or mischievous', then the meaning becomes reasonably clear.[20]

In *C (a minor) v DPP*, it was said that 'seriously wrong' cannot mean against the law, because ignorance of the law is no excuse, but that what must instead be proved is that the child appreciated the moral

[14] Crown Court Compendium: Part I: Jury and Trial Management and Summing Up, June 2022, 7-1.
[15] Crown Court Compendium: Part I: Jury and Trial Management and Summing Up, June 2022, 7-1.
[16] Crown Court Compendium: Part I: Jury and Trial Management and Summing Up, June 2022, 7-1.
[17] *C (a minor) v DPP* [1996] A. C. 1, HL, p. 14.
[18] [1992] Crim L R 34.
[19] See also *JM (A Minor)* v *Runeckles* (1984) 79 Cr. App. R. 255.
[20] *C (a minor) v DPP* [1996] A. C. 1, HL, p.33.

obliquity of what he was doing.[21] However, it is unnecessary to show that the child appreciated their action was morally wrong. It is sufficient that the child appreciated the action was seriously wrong.[22] It is unfortunate that Lord Lowry, in describing the concept, omitted the word 'seriously.' Lord Phillips made the same error in ***R v JTB***[23] however, there is nothing to suggest that it was anything more than that.

Up to the time of its abolition, *doli incapax* arose in cases of non-sexual offences such as murder, manslaughter, wounding, burglary, housebreaking and larceny, arson, criminal damage and minor public order matters.[24] Its use today is largely confined to sexual offences which are tried when the defendant is an adult, which makes the language 'seriously wrong' rather unhelpful. Further, although it can be safely assumed that it is the defendant himself who must understand his actions were seriously wrong, there is a lack of guidance as to whose standards should be used and of what period of time.[25] It is notable that directions given to the jury have included a reference to what right thinking people would regard as seriously wrong.[26]

In ***RP v the Queen,***[27] an Australian case, the court said that this part of the presumption is focused on the intellectual and moral development of the child at the time of the offence. It went on to say that, in defining 'seriously wrong' in this context, it is the moral wrongness of the act *in the mind of the child* that matters.[28] The focus of the moral wrongfulness of the act directs attention to the intellectual and moral development of the particular child.[29] In his concurring opinion, Gageler J stated that the child has to understand that his actions are seriously wrong by *normal adult standards* as they *existed at the time of the offending*.[30] The Court further stated that, where there was evidence of a child having intellectual limitations, there had to be clear evidence that, notwithstanding those limitations, (s)he knew how seriously wrongful his or her actions were.[31] A jury should be directed to this effect and, in conducting this assessment, it should look at all of the evidence, not just the evidence upon which the prosecution submits the presumption is rebutted.[32]

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[21] *C (a minor) v DPP* [1996] A. C. 1, HL, p.10.
[22] *JM (A Minor) v Runeckles* (1984) 79 Cr. App. R. 255.
[23] [2009] 1 AC 1310 at p.1328, para.3.
[24] In list order: R v Coulbourn (1988) 87 Cr.App.R. 309; R v Gorrie (1919) 83 JP 136; JM (A Minor) v Runeckles (1984) 79 Cr.App.R. 255; JBH & JH (Minors) v O'Connell [1981] Crim LR 632; B v R (1958) 44 Cr.App.R. 1; R v Smith (Sidney) (1845) 1 Cox CC 260; IPH v Chief Constable of South Wales [1987] Crim LR 42; A v Director of Public Prosecutions [1992] Crim LR 34. As cited in: The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[25] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[26] *R v PF* [2017] EWCA Crim 983.
[27] *RP v The Queen* [2016] HCA 53.
[28] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[29] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[30] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[31] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.
[32] The surprising second life of doli incapax, Paul Jarvis, Arch. Rev. 2018, 3, 6-9.

What is 'seriously wrong' is especially important in cases of young people aged between 10 and 13 who perform sexual acts. In the case of ***R v PF***,[33] the court found it useful to refer to ***RP v the Queen*** where it was said that "it is common enough for children to engage in forms of sexual play and to endeavour to keep it a secret, since even very young children may appreciate that it is naughty to engage in such play."[34] The court found that the Appellant's conduct in that case went well beyond ordinary childish experimentation, but that it did not "carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty."[35] The Court of Appeal reflected on this and said that "in a case where sexual conduct of a nature of childish experimentation is admitted, it is particularly important to focus the jury's attention upon the evidence said to be capable of demonstrating that the particular defendant must have known that his conduct went well beyond the mere 'rude or naughty' and to direct them that they must be satisfied by that evidence that the defendant knew that what he did was seriously wrong in the relevant case."[36] In other words, while touching of genitalia may be obviously wrong to an adult, experimentation between children is not uncommon and a child may not realise such conduct is seriously wrong, rather than merely rude or naughty.

2. The Crown must adduce clear, positive, independent evidence of a defendant's guilty knowledge

Proof that a minor has done the acts charged cannot not *per se* establish that he possessed guilty knowledge, "however horrifying or obviously wrong that act might be."[37] The Crown can only rebut the presumption by relying on what a defendant did if they also call evidence showing that (s)he was an *ordinary child with ordinary mental aptitudes*.[38] In other words, there must be stand-alone evidence sufficient for the jury to be sure.[39] This further evidence must be "strong and clear beyond all doubt or contradiction" and not tenuous or ambiguous.[40] It must be adduced as part of the prosecution's case or else there will be no case to answer.[41]

In ***R v M***,[42] it was found that the judge's direction in relation to count 1 had been deficient because, while the first part of the direction was correct, the judge failed to direct that the evidence to prove the appellant's guilty knowledge had to extend beyond the evidence of the acts amounting to the offence itself.[43]

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[33] *R v PF* [2017] EWCA Crim 983, para 8.
[34] *RP v The Queen* [2016] HCA 53, para 33.
[35] *RP v The Queen* [2016] HCA 53, para 33.
[36] *R v PF* [2017] EWCA Crim 983, paras 28-29.
[37] *C (a minor) v DPP* [1996] A.C. 1, as cited in *R v H* [2010] EWCA Crim 312, para 36.
[38] *C (a minor) v DPP* [1996] A. C. 1, HL, p.31.
[39] Crown Court Compendium: Part I: Jury and Trial Management and Summing Up, June 2022, 7-1.
[40] C (a minor) v DPP [1996] A. C. 1, HL, p. 38.
[41] *C (a minor) v DPP* [1996] A. C. 1, HL, p.37. See also *JBH and JH (minors) v O'Connell* [1981] Crim LR 632.
[42] [2016] EWCA Crim 674.
[43] *R v M (D)* [2016] EWCA Crim 674, para 31.

In *R v PF*, there had been evidence of the appellant's coercive and bullying behaviour towards his sisters but the jury were not directed of the need to find evidence independent of the acts in question in order to rebut the presumption, and had not been informed that the Crown relied on the same alleged bullying and coercion as part of the necessary independent evidence.[44]

In *R v C (a minor)*, the justices inferred from the following facts that the defendant had done something seriously wrong: the damage done to the bike was substantial and the defendant and his accomplice ran away from the police officers leaving a crowbar behind.[45] However, there was no evidence outside the commission of the offence upon which it could be found that the presumption had been rebutted.[46]

What independent evidence will rebut the presumption?

The House of Lords said that the surrounding circumstances of an offence are relevant and that what the defendant said or did before or after the act may go to prove his guilty mind.[47]

Other than that, the prosecution has to rely 1) on interviewing the suspect or having him psychiatrically examined (two methods which depend on receiving co-operation from the other side), or 2) the additional evidence must be obtained from someone who knew the minor well, by interviewing the minor or by psychiatric examination.[48] The defendant's background and home circumstances qualify as evidence which may rebut the presumption.[49]

Proof of mental normality has in practice been largely accepted as proof that the child can distinguish right from wrong and thus form a criminal intent, although the two are not true equivalents.[50] Further, evidence bolstering the rebuttal cannot be limited to the age or maturity of the alleged offender.[51]

In *C (a minor)* the following circumstances were identified as those in which the presumption can be rebutted:[52]

(i) Where there is evidence of the child's conduct before or after the commission of the crime;

(ii) Where an admission is made either at interview or at trial. An issue arises where the child remains silent, does not give evidence or falsely purports to be ignorant of the fact that his acts were seriously wrong, even if questions to probe the issue are asked as early as during police interview;

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[44] *R v PF* [2017] EWCA Crim 983, para 27.
[45] *C (a minor) v DPP* [1996] A. C. 1, HL, p.22.
[46] *C (a minor) v DPP* [1996] A. C. 1, HL, p.39.
[47] *C (a minor) v DPP* [1996] A. C. 1, HL, p.39.
[48] *C (a minor) v DPP* [1996] A.C. 1, [1995] 3 WLUK 246.
[49] *C (a minor) v DPP* [1996] A. C. 1, HL.
[50] *C (a minor) v DPP* [1996] A. C. 1, HL, p.33.
[51] See *R v PF* [2017] EWCA Crim 983; and *R v M (D) [2016] EWCA Crim 674*.
[52] *C (a minor) v DPP* [1996] A. C. 1, HL, pp.19 and 39.

(iii) Where there is evidence of a child's upbringing and education. A criticism of this type of evidence from a prosecutorial standpoint is that the evidence may actually assist the child if they behave badly with frequency;

(iv) Where there is psychological evidence. A criticism of this type of evidence is that the Crown has no power to compel the examination of a defendant while it is up to them to rebut the presumption;

(v) Where there is evidence of previous convictions.[53] These are relevant to whether or not the defendant knows the difference between something that is mischievous and something that is seriously wrong. However, they can be excluded.

The need for such evidence reduces as the child's age comes closer to 14, at which *mens rea* may be inferred from perpetration of the *actus reus*.[54] Similarly, the more heinous the offence, the easier it is to rebut the presumption.[55]

IV. Issues that have arisen in case law

1. Uncertainty as to when the offences occurred within the indictment period and whether the defendant was under 14 at the relevant time

In *R v M*, one count was said to have been committed at a time when, on the complainant's evidence, she was not sure whether the defendant had been under 14.[56] This issue was one which the jury had to decide.[57] The recorder dealt with two points in a further direction: first, whether the jury had to agree as to the precise date when the conduct occurred, to which the answer was no; and second the significance of the appellant's 14th birthday.[58] The deficiency with the judge's direction was relevant only to the count in question because there was sufficient doubt that the jury may have considered that the facts charged under that count occurred before the defendant's 14th birthday.[59]

In *R v PF*, the complainant did not know exactly when the offences occurred between 1979 and 1983, during which time the appellant was aged between 10 years and 4 months and 14 years 6 months. The complainant did not know whether the appellant could have been 13 at the time, but it was possible.

[53] *C (a minor) v DPP* [1996] A. C. 1, HL, p.11.
[54] *C (a minor) v DPP* [1996] A. C. 1, HL, p.14.
[55] *C (a minor) v DPP* [1996] A. C. 1, HL, p.33).
[56] *R v M (D)* [2016] EWCA Crim 674.
[57] *R v M (D)* [2016] EWCA Crim 674, para 11.
[58] *R v M (D)* [2016] EWCA Crim 674, para 26.
[59] *R v M (D)* [2016] EWCA Crim 674, para 32.

The trial judge had directed the jury that the appellant must be treated as being below the age of 14 and that the rebuttable presumption of *doli incapax* applied to all counts.[60]

In *R v Bevan*,[61] the defendant had been aged 10 or 11 when the events he was charged with under count 1 were alleged to have taken place.[62] At the time, there was an irrebuttable common law presumption that a child under the age of 14 was incapable of committing the offence of rape. The conviction under count 1 was thus unlawful.[63] Throughout the trial, the prosecution proceeded under the assumption that the prosecution had to prove the defendant's capacity to commit the offence by establishing his understanding that what he did was seriously wrong, but no one spotted he was in law incapable of committing the offence at all.[64] The court however found that they could substitute for the conviction of rape in count 1 a conviction for indecent assault, contrary to s 1(4) Sexual Offences Act 1956.[65]

2. Counts straddling the age range and contamination of other counts

In *R v H*,[66] convictions on 3 counts were quashed because the jury were not properly directed and the defendant was under 14 years of age at the time the offences had been committed. Further, the court found that, had the jury been directed in relation to the counts in which the defendant was under 14, it could not see how such a warning as to the approach to evidence when the appellant was under 14 would have affected the jury's approach to the defendant's evidence when he attained that age, in respect of other counts when he was over the age of 14.[67]

The court further found that it was essential that the jury should know what happened immediately preceding the attainment of the appellant's 14th birthday. It would have otherwise been wholly artificial and unsatisfactory if the evidence before the jury had commenced with the appellant's 14th birthday. The conduct of the defendant must be considered by a jury as a whole, it is in the defendant's interests as well as that of the complainant and the public.[68]

3. Admissibility of acts committed when the defendant was under 14 years old as evidence rebutting the presumption

Offences precluded from prosecution by virtue of *doli incapax* can be adduced as bad character.

In *R v M*, the prosecution sought to rely on bad character evidence of two unindicted incidents of sexual misconduct carried out by the appellant when he was under 14 years old (when he was 11 and 13) under

[60] *R v PF* [2017] EWCA Crim 983, para 8.
[61] [2011] EWCA Crim. 654.
[62] *R v Bevan* [2011] EWCA Crim. 654, para 17.
[63] *R v Bevan* [2011] EWCA Crim. 654, para 18.
[64] *R v Bevan* [2011] EWCA Crim. 654, para 18.
[65] *R v Bevan* [2011] EWCA Crim. 654, para 27.
[66] [2010] EWCA Crim 312.
[67] *R v H* [2010] EWCA Crim 312, para 44.
[68] *R v H* [2010] EWCA Crim 312, para 45.

sections 101(1)(c) and (d) Criminal Justice Act 2003 ("CJA"). The court found these had been properly admitted. The appellant was not facing a criminal charge in relation to the two incidents and therefore the *doli incapax* presumption had no direct application to them.

The court took a similar approach to that in ***R v H***, stating that, in respect of the material relating to the previous allegations, it was important for the jury to consider the situation as a whole and that the jury should be properly directed to this effect. In other words, they must be sure that the incidents occurred and, if they were, how the incidents might help them decide whether the appellant had committed the indicted offence(s).[69]

4. Conviction of accessories when the principal was *doli incapax*

In ***DPP v K and B***,[70] it was held that the fact the presumption that a child aged over 10 but under 14 was *doli incapax* had not been rebutted in the case of the principal did not preclude the conviction of others as accessories. Two girls aged 14 and 11 threatened, falsely imprisoned and robbed another girl. A boy became involved and subsequently raped the same girl. He was never traced but the two girls were charged with, amongst other offences, aiding and abetting counselling and procuring the commission of rape. Evidence was before the court that the boy involved was or might have been under the age of 14, but was over the age of 10. The magistrate said that the he would have found that the acts had amounted to the offence however, as the prosecution had failed to negate *doli incapax* in relation to the boy, and because the girls could not in law be convicted as principal offenders, they had to be acquitted of the charge of aiding and abetting rape. The Court of Appeal held that the magistrate had been wrong to acquit the defendants. The presumption had been rebutted in relation to the younger girl, the *actus reus* had been proved and the defendants had had the requisite *mens rea*, namely the desire that the rape should take place and the procuring of it.[71]

V. Conclusion

The presumption of *doli incapax* is a useful tool in historic cases (pre-1998), where defendants are charged with offence(s) alleged to have been committed when they were or may have been under 14. In some cases, the Crown may take the presumption into account in limiting the offending period on the indictment, or not charging some of the alleged behaviour. Indeed, considering non recent offending committed whilst a youth, prosecutors should consider the general public interest factors set out in the Code for Crown Prosecutors which includes, for example, whether the offending can be properly described as sexual experimentation between young people. However, previous incidents committed when a child was under 14 may still be of relevance and can be used as evidence which rebuts the presumption. In other cases, the presumption is seemingly not borne in mind when drafting indictments

[69] *R v H* [2010] EWCA Crim 312.
[70] [1997] 1 Cr. App. R. 36.
[71] *DPP v K and B* 1996 WL 1090932 (1996).

and should not be forgotten. Where it applies, a difficulty for the Crown will be obtaining evidence other than that relating to the *actus reus* due to the time elapsed since the allegations. Recollections are often confused, vague or muddled, especially because the presumption is most likely to arise in sex cases, and so the presumption provides an important hurdle for the prosecution overcome before a jury can convict a defendant. Prosecutors should therefore ensure there is evidence about a defendant at the relevant time in order to assess whether there is a realistic possibility of persuading the jury to the criminal standard that the defendant had the capacity to understand, and that he understood, the moral wrongfulness of his actions.

Looking at the broader legal context, since the abolition of the *doli incapax* doctrine, there has been no system which provides guidance on whether conduct is that of a child criminal or whether the act is simply just childish behaviour. While this author is not necessarily calling for the presumption to be revived, it is interesting to note that, while criticism may justify the removal of the presumption, it does not provide a justification for removing the entire doctrine of *doli incapax*. The issue identified in case law was with the presumption, in that it was presumed to apply in every case.[72] Were this to be removed, there may have remained a workable defence in its stead.[73] However, this is merely a temporary measure until or if the legislative structure can be changed. Moreover, it is notable that the case of James Bulger demonstrated that the presumption was clearly workable in practice.

The broader issue at play is thus one of policy, whereby the age of criminal responsibility in the UK is viewed by many as too low and children being criminalised without proper legal safeguards in place. These issues will be addressed in a subsequent article.

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[72] *DPP v P* [2008] 1 WLR 1005.
[73] *DPP v P* [2008] 1 WLR 1005.