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Youth, mental incapacity and the criminal justice system

Introduction

‘ignoring the special position of children in the criminal justice system is not acceptable in a modern society’¹

In England and Wales the age of criminal responsibility is set at 10 years. The current law therefore assumes all children are sufficiently mature at this age to accept criminal responsibility for their behaviour. However this approach to youth criminal capacity pays little attention to the evidence that children and young people differ in developmental maturity from adults and thus may be less culpable than adults for their choices and behaviour. Children and young people are less mature than adults in terms of their judgment and sensation-seeking and experience difficulties in weighing and comparing consequences when making decisions and contemplating the meaning of long-range consequences. These cognitive difficulties also have implications for a young person’s ability to be a competent defendant in an adversarial atmosphere. In 2006 the Law Commission for England and Wales recognised that the current law is unduly harsh on young offenders and recommended that ‘developmental immaturity’ be incorporated into the defence of diminished responsibility thus allowing the courts to consider whether a young person’s developmental immaturity and cognitive limitations impairs their ability to stand trial for murder.² This recommendation was not included in the Coroners and Justice Act 2009. This chapter will consider whether young people’s developmental immaturity and cognitive limitations impairs their capacity to understand the wrongfulness of their actions and to answer for this in a criminal trial. A UNICEF report on *The Evolving Capacities of the Child* pointed out that in practice ‘adults

¹ *R v G and Another* [2004] 1 AC 1034 [53] (Lord Steyn)

² Law Commission *Murder, Manslaughter and Infanticide* (Law Com 304, 2006). Also Law Commission *Criminal Liability: Insanity and Automatism* (Law Com DP, 2013).

consistently underestimate children's capacities'.³ This chapter will argue that the English youth justice system takes a contrary view and that its approach to young people in conflict with the law has overestimated children's capacities and disregarded the child's right to respect for their evolving capacities and competencies. Further, it will consider the question of when is it fair to subject young people to the full rigours of the criminal justice system.

Criminal culpability and moral responsibility

Effective criminal law requires that citizens can understand and follow rules, understand that certain conduct is prohibited, the nature of their conduct and the consequences for doing what the law prohibits.⁴ Thus 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'.⁵ Therefore when a criminal court convicts a defendant, it is because he is responsible for his conduct. Hart emphasises the principle that punishment should be restricted to those who have voluntarily broken the law and stresses that criminal liability is founded upon '... the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him'.⁶ Hart similarly asserted that it would be contrary to morality, 'as morality is at present understood' for any system to disregard capacity as a necessary condition of liability'.⁷ Keating similarly argues that the central and enduring foundation of the criminal law has been that it is addressed to responsible subjects.⁸ Thus if the actor did not have the capacity to rationalise, decide and freely choose to act, then

³ Gerison Lansdown *The evolving capacities of the child*. (Innocenti Research Centre, 2005).

⁴ Stephen J Morse 'Immaturity and irresponsibility' [1997] 88 *Journal of Criminal Law and Criminology*, 157

⁵ Andrew Ashworth *Principles of Criminal Law* (4th ed., Oxford University Press, 2003) 158

⁶ Herbert L.A. Hart *Punishment and Responsibility* (Clarendon, 1968) 181.

⁷ Herbert L.A. Hart 'Varieties of responsibility' (1967) 83 *Law Quarterly Review* 346, 362. See also Anthony R. Duff *Answering for Crime* (Hart, 2007) 20

⁸ Heather Keating 'The 'responsibility' of children in the criminal law' [2007] 2 *Child and Family Law Quarterly* 183

the actor cannot be held responsible.⁹ Moreover Moore contends that criminal liability should be avoided for a wrongful action if ‘at the moment of such action’s performance, one did not have sufficient capacity or opportunity to make the choice to do otherwise’.¹⁰ There is therefore an expectation that for an individual to be convicted of a crime he must be a moral agent, as conviction represents a moral criticism.¹¹ Judgements about whether particular conduct is blameworthy must operate within the framework of substantive moral values and these values are what links justice to punishment.

Arenella asks ‘why should someone qualify as a moral agent if he lacks the capacity to deliberate about whether he should have acted differently?’¹² Adults are presumed to be mature and to have developed their decision-making capacities and thus are held accountable for their behaviour. However, under the normal rules of criminal law, an adult’s transgression is deemed less blameworthy than typical offenders if their decision-making capacities are impaired, for example by mental illness which is attributable to a condition falling within the M’Nagthen rules.¹³ Currently in England and Wales the defence of infancy excuses all children below 10 years of age from criminal liability as such children are considered morally not responsible and lacking blameworthiness. The current law assumes all children are sufficiently mature at 10 years of age to accept criminal responsibility for their behaviour. Previously the criminal law in England and Wales recognised that children between 10 and 14 years of age may also lack the capacity to be morally responsible and criminally culpable for their behaviour. The rebuttable presumption of *doli incapax* meant that children between

⁹ Victor Tadros *Criminal Responsibility* (Oxford University Press, 2005) 64

¹⁰ Michael S. Moore ‘Choice, character and excuse’ [1990] 7(2) *Social Philosophy and Policy* 219, 229.

¹¹ Peter Arenella, ‘Convicting the morally blameless: reassessing the relationship between legal and moral accountability’, [1992] 39 *UCLA Law Review* 1511; Sanford H. Kadish (1987) *Blame and Punishment: Essays in the Criminal Law* (Macmillan, 1987); Peter F. Strawson *Freedom and resentment* (Methuen, 1974).

¹² Peter Arenella ‘Character, choice and moral agency: the relevance of character to our moral culpability judgements’, [1990] 7(2) *Social Philosophy and Policy* 59, 67.

¹³ Andrew Simister A.P., John R. Spencer, Robert G. Sullivan, Graham J. Virgo. *Simister and Sullivan’s Criminal Law: Theory and Doctrine* (4th ed., Hart, 2010) 796

10 and 14 years of age would only be held criminally responsible if the prosecution could prove, beyond all reasonable doubt, that when doing the criminal act, the child knew that what they were doing was seriously wrong as opposed to being merely mischievous or naughty. This meant that normative criteria, such as the physiological and psychological development of the individual child, were used to identify the divide between childhood and adulthood. In an early criminal law textbook, *Outlines of Criminal Law*, Kenny argued that to rebut the presumption there must be proof of a ‘wicked mind’ or ‘malice, revenge, craft and cunning’.¹⁴ Kenny equated a child having a ‘guilty mind’ with ‘mischievous discretion’ the test of which is: ‘[h]ad he a guilty knowledge that he was doing wrong?’¹⁵ In *Blackstone* the test was described as whether the child was able to discern between good and evil based on the strength of the child’s understanding and judgement.¹⁶ The modern test upon which *doli incapax* was based was established in *Gorrie*: did the child know that the act was wrong – not merely wrong but ‘gravely wrong, seriously wrong’.¹⁷ Glanville Williams argued that the rule in *Gorrie* refers to the particular child in question knowing that their behaviour was morally wrong, for although a child may be able to distinguish between slight and grave degrees of moral wrong, the child can hardly be expected to distinguish between slight and grave degrees of legal wrong.¹⁸ This suggests that the test of knowledge of ‘grave wrong’ was a subjective moral test. However, as Ormerod pointed out¹⁹, there are crimes which are serious in terms of both the penalty imposed upon conviction and the moral stigma, but which children may not appreciate as being seriously wrong. Ormerod cites the example of *R v T*²⁰

¹⁴ Ibid.

¹⁵ First published in 1902, now JW Cecil Turner *Kenny’s Outlines of Criminal Law* (18th ed., Cambridge University Press, 2013) 74

¹⁶ William Blackstone *Blackstone’s Commentaries on the Law of England* (Book IV, University of Chicago Press, 1769) 23-24.

¹⁷ *Gorrie* (1918) 83 JP 186

¹⁸ Glanville Williams ‘The Criminal Responsibility of Children’ [1954] *Criminal Law Review* 493, 494

¹⁹ David Ormerod ‘Young person: young person having low IQ - district judge determining young person having insufficient level of understanding to participate effectively in proceedings’, [2008] 2 *Criminal Law Review* 165-171, 168

²⁰ [2009] UKHL 20, [2009] 1 AC 1310 (HL)

in which T, aged 12, pleaded guilty to inciting a child under 13 to engage in sexual activity, but T admitted that he had not thought that what he was doing was wrong.

In the latter years of the presumption's operation only 'minimal evidence of a child's moral understanding of their actions' was necessary, particularly in very serious cases, to allow the trial to continue. Moreover, a large majority of children appearing in the youth court pleaded guilty so the presumption was not an issue.²¹ Despite these problems, the presumption of *doli incapax* reflected a concern that 'using criminal penalties to punish a child who does not appreciate the wrongfulness of his or her actions lacks moral justification'.²² The presumption offered a crude test of capacity where criminal responsibility was not based on the young person's age but on some consideration of their individual understanding and judgement, a fact that had been repeatedly recognised in previous reviews of the law in this area. For example, in 1989 the revised version of the Draft Criminal Code recommended that the presumption of *doli incapax* should only be abolished if its abolition was accompanied by a raising of the age of criminal responsibility.²³ Likewise, the Conservative government in a 1990 White Paper recommended that the presumption of *doli incapax* be maintained as it made 'proper allowance for the fact that children's understanding, knowledge and ability to reason are still developing'.²⁴

The Crime and Disorder Act 1998 abolished the presumption of *doli incapax* which means that a child aged 10 years is no longer presumed incapable of understanding the nature of criminal conduct and is considered as legally responsible for their actions as an adult. In the

²¹ Julia Fionda *Devils and Angels: Youth Policy and Crime* (Hart, 2005) 12-13

²² Penal Affairs Consortium *The Doctrine of 'Doli Incapax'* (Penal Affairs Consortium, 1995) 5

²³ Law Commission *Criminal Law: A Criminal Code for England and Wales* (HMSO, 1989) para. 10.28

²⁴ Home Office *Crime, Justice and Protecting the Public* (HMSO, 1990) para 8.4.

case of *DPP v P*²⁵ the court questioned whether or not the defence of *doli incapax* still exists in law for 10-14 year olds. Smith LJ took the view in this case that although Parliament has abolished the presumption of *doli incapax*, the defence of *doli incapax* still remains. Any comments made by Smith LJ were, by her own admission, obiter dicta as the ‘court had not had the benefit of full argument on the issue’ but she concluded that although the Crime and Disorder Act 1998 had abolished the presumption of *doli incapax*, it had not abolished the defence. Smith LJ’s arguments were based on a literal interpretation of section 34 and the words in section 34 ‘the rebuttable presumption of criminal law’ and the verb ‘is abolished’ can only apply to the subject. Accordingly, it is the presumption that has been abolished. Thus, according to Smith LJ young people can raise a defence of *doli incapax*, with the burden of proof resting on the young person to prove that they were *doli incapax*. However, as stated above, these comments were merely obiter. In 1997 the government in the White Paper *No More Excuses* made explicit their desire to abolish the presumption rather than reversing it. Consideration was given by the government to retaining the defence but the government made clear in 1997 that it preferred outright abolition because this was the ‘simplest course and would send a clear signal that in general children of 10 and over should be held accountable for their own actions’.²⁶ The government was also concerned that retaining the defence would result in it being used often and therefore perpetuate difficulties when prosecuting children under 14 years of age,²⁷ thus Smith LJ’s interpretation of section 34 could not possibly have been intended by the government.

The Court of Appeal specifically addressed this issue in *R v T* in which Latham LJ was emphatic that the defence of *doli incapax* had been abolished. Latham LJ concluded that:

²⁵ [2007] EWHC 946

²⁶ Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (The Stationery Office, 1997) 15

²⁷ Home Office *Tackling Youth Crime* (The Stationery Office, 1997) 18

‘It is difficult to see ... how the abolition of the presumption was intended to result in anything other than the abolition of the concept of *doli incapax* as having any effect in law. ... In our judgment, accordingly, Parliament must be taken to have intended ‘the presumption’ to encompass the concept of *doli incapax* when it was abolished in Section 34.’²⁸

This Court of Appeal ruling was upheld by the House of Lords in *R v JTB*²⁹ in which the House of Lords pointed out that section 34 of the Crime and Disorder Act 1998 was enacted in response to growing concerns about the extent to which the presumption of *doli incapax* placed an unfair burden on the prosecution. Their Lordships concluded that the Crime and Disorder Act 1998 abolished both the presumption and the defence of *doli incapax*. The impact of the decisions in *DPP v P* and *R v JTB* is that young defendants who do not understand the consequence of their offending, including those with impaired mental capacity, are exposed to the full rigours of the criminal justice system. This is exactly the type of situation in which the presumption could have acted as a safeguard.

Youth criminal responsibility and international human rights standards

The New Labour government believed in 1997 that the presumption of *doli incapax* was ‘contrary to common sense’ and ‘not in the interests of justice, or victims or of the young people themselves’.³⁰ New Labour argued that criminal prosecution was in the child’s best interest as it afforded the child the opportunity to be confronted with his criminality at an early age in order to reform him. The age of criminal responsibility varies from country to country. For example, it is 12 in Canada, Greece, Republic of Ireland, the Netherlands and

²⁸ [2008] EWCA Crim 815, para 20.

²⁹ [2009] UKHL 20

³⁰ Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (The Stationery Office, 1997) 4.4

Scotland; it is 14 years in Austria, Germany and Italy; 15 in Denmark, Finland, Iceland, Norway and Sweden; 16 in Poland, Portugal and Spain; and 18 years of age in Belgium and Luxembourg. It is clear that the minimum age of criminal responsibility in England and Wales is much lower than most other countries in Europe and many other countries worldwide. The UN Convention on the Rights of the Child represents the most comprehensive legally binding statement of children's rights. The Convention recognises that young people under the age of 18 years may need special protection because of their age or emotional development. The Convention was ratified by the UK in 1991 and under international law this places an obligation on the government to comply with its principles and standards. Article 40 of the United Nations Convention on the Right of the Child requires each state to set a reasonable minimum age of criminal responsibility. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 recommend that the minimum age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. The important consideration, as outlined in Rule 17 of the Beijing Rules, is whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for their behaviour. Baroness Hale in *R v Durham Constabulary*³¹ cited s 44(1) of the Children and Young Persons Act 1933 and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 in support of the proposition that the first objective of the youth justice is the promotion of the well-being of the young person, whether in the family courts or the criminal justice system. Similarly in *R v G*³² Lord Steyn believed that the United Nations Convention on the Rights of the Child created a norm which acknowledged that the criminal justice system should take account of a defendant's age, level of maturity, and intellectual and emotional capacity. It is only by doing so that the system can redress the

³¹ [2005] UKHL 21, [2005] 1 WLR 1184

³² [2003] UKHL 50, [2004] 1 AC 1034

imbalance which is the inevitable result where a child or young person is confronted by the power of criminal justice. In its report in 2002 the UN Committee expressed particular concern about ‘the abolition of the principle of *doli incapax*’ and recommended that the age of criminal responsibility should be raised considerably.³³ The UN Committee on the Rights of the Child has recommended that state parties should increase their age of criminal responsibility to the age of 12 years as the absolute minimum age. The UN Committee also strongly recommended that states parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.³⁴

In England and Wales the low age of criminal responsibility overlooks the fact that children are still in the process of maturing at this stage of life and may not yet be developed enough to understand the wrongfulness of what they do. Children who are alleged to have broken the law are held accountable for their actions through the criminal justice process, which means they are subject to an adversarial system that prioritises the finding of guilt or innocence and sentencing for a particular offence. Although the welfare of the child is a consideration in sentencing, it is not the prime consideration of the court, or of those professionals involved with the court system.³⁵ Section 37 of the Crime and Disorder Act 1998 places all those carrying out functions in the youth justice system under a statutory duty to have regard to the principal aim of preventing offending by children and young people. This Act gives no direction to the courts or anyone else that the child’s welfare should be of primary consideration. Consequently the primary duty of those involved, including the police, is to

³³ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland* (United Nations Committee on the Rights of the Child, 2002)

³⁴ United Nations Committee on the Rights of the Child *General Comment No. 10: Children’s Rights in Juvenile Justice* (United Nations Committee on the Rights of the Child, 2007) 32-34

³⁵ Jessica Jacobson, Jenny Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust, 2009)

prevent offending and not necessarily to promote the child's best interests.³⁶ In *R v Inner London Crown Court, ex p N and S*³⁷ Rose LJ examined section 37 of the Crime and Disorder Act 1998 and stated that the need to impose a deterrent sentence may take priority over the provisions of section 44(1) of the Children and Young Persons Act 1933, which requires the court to promote the welfare of individual offenders. Thus the youth court may impose a deterrent sentence with the aim of preventing young people in general from offending, but which does not necessarily serve the welfare of the young offender, which has led to the charge that England and Wales is 'the site of the most punitive youth justice system in Europe'.³⁸

The abolition of *doli incapax* thus reflects an erosion of the special consideration afforded to children and is 'symbolic of the state's limited vision in understanding children, the nature of childhood or the true meaning of an appropriate criminal law response'.³⁹ Bandalli stressed that the presumption of *doli incapax* operated in a protective manner 'shielding the child from the damage that might otherwise be done by being absorbed into the criminal justice system' and that its removal makes childhood irrelevant to criminalisation.⁴⁰ The abolition of *doli incapax* allows the criminal justice system to treat young offenders as entirely rational, fully responsible young adults rather than children, thus justifying their subjection to the full rigours of the criminal law. The rationale for this approach to youth offending has been set out clearly and consistently by political leaders for over 20 years. In the aftermath of the tragic killing of James Bulger in February 1993, the then Prime Minister, John Major,

³⁶ Raymond Arthur 'Protecting the best interests of the child: A comparative analysis of the youth justice systems in Ireland, England and Scotland' [2010] 18(2) *International Journal of Children's Rights* 217

³⁷ [2001] 1 Cr. App. R. 343

³⁸ Barry Goldson and John Muncie *Youth Crime and Justice* (Sage, 2006), p. ix.

³⁹ Sue Bandalli 'Children, responsibility and the new youth justice' in Barry Goldson (ed.), *The New Youth Justice* (Russell House, 2000) 94

⁴⁰ Sue Bandalli 'Abolition of the presumption of *doli incapax* and the criminalisation of children' [1998] 37(2) *Howard Journal of Criminal Justice* 114

declared that ‘society needs to condemn a little more and understand a little less’.⁴¹ On the same day, the Home Secretary, Kenneth Clarke, made the following statement on BBC Radio 4 ‘John Major and I believe it is no good that some sections of society are permanently finding excuses for the behaviour of the section of the population who are essentially nasty pieces of work’.⁴² When Michael Howard became Home Secretary he argued that young people needed to feel the force of the law and be treated like adults and face adult punishments. He referred to a problem with ‘self-centred arrogant...young hoodlums...who are adult in everything except years... [and who]...will no longer be able to use age as an excuse ... from effective punishment...’.⁴³ More recently, Jack Straw (2008) bluntly argued, when he was Justice Minister, that young people in custody ‘... are not children; they are often large, unpleasant thugs, and they are frightening to the public.’⁴⁴ In the House of Lords Lord McNally (2010), Minister of State for Justice, referred to young people in custody as ‘... large and quite violent young people ... we use the word “children” very casually’.⁴⁵ This portrayal of young people as fully responsible, unpleasant and violent young adults has served to allow for youth crime to be dissociated from its social roots and masks the fact that the state and the law-abiding majority also have responsibilities.⁴⁶ Accordingly, England and Wales has tipped the balance towards criminalising and punishing for *what* young people have done rather than *understanding why*. It has been assumed that children mature earlier and are thus capable of being criminally responsible at a younger age than in past times, yet this has not been proven.⁴⁷ Children may generally appreciate the wrongfulness of certain conduct by the age of 10, however it is not certain that all children will have this

⁴¹ John Major *Mail on Sunday*, February 21st 1993, p.8

⁴² cited in Bob Franklin, Julian Petley ‘Killing the age of innocence: newspaper reporting of the death of James Bulger’ in Jane Pilcher, Stephen Wagg (eds.) *Thatcher’s children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer/Howard 1996), 142

⁴³ Michael Howard *Daily Mail*, June 3rd 1993, p. 6.

⁴⁴ Jack Straw, *Parliamentary Debates*, House of Commons, 10 June 2008, column 155.

⁴⁵ Tom McNally *Parliamentary Debates*, House of Lords, 21 July 2010, column 973.

⁴⁶ Janet Jamieson, Joe Yates ‘Young People, Youth Justice and the State’ in Roy Coleman, Joe Sim, Steve Tombs, David Whyte (eds.) *State Power Crime*, (Sage, 2009)

⁴⁷ Thomas Croft *The Criminal Responsibility of Children and Young Persons* (Ashgate Publishing, 2002) 84

understanding nor that children will generally understand the wrongfulness of all criminal acts. The English youth justice system should urgently seek to learn from European neighbours that have higher ages of criminal responsibility and lower rates of offending. A brief survey of the age of criminal responsibility and the size of the juvenile prison population in European countries suggests that the lower the age of criminal responsibility, the larger the juvenile prison population. Thus the countries with the lowest ages of criminal responsibility – England and Wales, Turkey and Northern Ireland fall within the top six highest youth prison population.⁴⁸

Children’s competency to participate meaningfully in decision-making

The youth justice system assumes that in the context of criminal proceedings, young people from the age of 10 are capable of participating meaningfully in any court case involving them, have a rational understanding of court proceedings, are able to follow what is said by prosecution witnesses, can explain their version of events, point out any statements with which they disagree, make the court aware of any facts which should be put forward in their defence and have a broad understanding of the nature of the trial process and of what is at stake, including the significance of any penalty that may be imposed. In *T & V v the UK*⁴⁹ the European Court of Human Rights determined that the trial of a child aged as young as 11 years does not in itself give rise to a breach of the Convention provided effective participation is ensured. This case involved Jon Venables and Robert Thompson, two boys convicted of murdering toddler James Bulger in 1993. The judges were particularly struck by the paradox that children who were deemed to have sufficient mental capacity to engage their criminal responsibility had a play-area made available to them during adjournments.

⁴⁸ Howard League for Penal Reform *Punishing children: A survey of criminal responsibility and approaches across Europe* (Howard League for Penal Reform, 2008) 8

⁴⁹ [2000] 30 EHRR 121

Nonetheless they concluded that the minimum age of criminal responsibility did not in itself deviate so far from European practices as to violate human rights standards. In *SC v UK*⁵⁰ the European Court of Human Rights defined ‘effective participation’ as including a broad understanding of the trial process and an understanding of the general thrust of what was said in court, in particular the ability to follow, and, if relevant, explain or challenge prosecution evidence. This requires that the child is dealt with in a manner which takes full account of his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his or her ability to understand and participate, including taking appropriate steps to enable a youth with learning difficulties or mental impairment to participate in their trial.⁵¹ Although a judge has a continuing jurisdiction to stay proceedings if it becomes apparent during the course of the hearing that the young person is unable effectively to participate, neither youth nor limited intellectual capacity alone necessarily leads to breach of the Article 6 right to effectively participate in a trial. A child might be *doli incapax* without any such impairment but simply on account of immaturity or the unusual nature of his upbringing.

Evidence suggests that young defendants often do not understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over.⁵² Children lack the ability to concentrate for long periods and it may be difficult for them to participate properly in proceedings. The child may not be able to follow evidence and may not understand the complex language used in court. As a result he may not be able to give instructions to his lawyer and may not be in a position to make vital decisions.⁵³ Young

⁵⁰ [2004] 40 EHRR 121

⁵¹ *R on the application of TP v West London Youth Court* [2005] EWHC 2583 Admin

⁵² Neal Hazel, Ann Hagell Laura Brazier *Young Offenders’ Perceptions of their Experiences in the Criminal Justice System* (Policy Research Bureau, 2002); Michelle Botley, Becca Jinks, Carol Metson *Young people’s views and experiences of the Youth Justice System*. (CWDC, 2010)

⁵³ Thomas Croft *The Criminal Responsibility of Children and Young Persons* (Ashgate Publishing, 2002) 78

offenders also feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. The criminal justice system can also automatically transform the young person into an autonomous adult and subject them to a trial in the adult Crown Court, rather than the youth court, in certain circumstances. A young person will be subject to an adult trial if they are accused of committing a homicide, an offence punishable with at least 14 years imprisonment or where a young person has committed an offence with an adult offender. Adult Crown Court trials can place a very heavy burden on children. Such long and complicated trials can be traumatic for children.

In England and Wales children and young people defined in law as criminally responsible are being addressed by the criminal justice system and the criminal law in ways which are largely similar to how adults are treated. Yet the expansion of the concept of childhood in our culture, such that the child has been defined as a person under 18 years of age in the Children Act 1989 and the European Convention on Human Rights, and the extension of young people's transition to adulthood requires fundamental changes in the way the criminal law addresses young people. Zimring suggests that an important test of the moral quality of any penal policy is whether its treatment of those who are still growing up is consistent with other ways in which the law deals with those who are advancing towards adulthood – for instance age related legal rules concerning drinking, driving, marriage, voting and military service.⁵⁴ A young person must be 16 years old before they can consent to sexual relations, including consensual sexual relations with another young person. A young person cannot join the armed forces until they are 16 years old. They must be 18 years old to buy cigarettes or alcohol, get a tattoo or vote. Within family law, young people are assumed to lack the

⁵⁴ Franklin E. Zimring 'Penal proportionality for the Young Offender: Notes on Immaturity, Capacity, and diminished responsibility' in Thomas Grisso, Robert G. Schwarz (eds.) *Youth on Trial. A Developmental Perspective on Juvenile Justice* (University of Chicago Press, 2000)

competency to participate responsibly and articulate their own wishes and feelings. In *Gillick v West Norfolk & Wisbech AHA*⁵⁵ the House of Lords held that the mature minor possessed certain rights; in this case the right to a confidential relationship with a doctor for the purposes of receiving contraceptive advice and treatment. Adult patients are entitled to such a confidential relationship and the House of Lords in *Gillick* held that young people should not be discriminated against, but only if the young person fully understood all the issues. The Children Act 1989 allows children to instruct a solicitor to start family proceedings, but, again, only if the solicitor and the court are satisfied that the child has sufficient understanding to initiate the legal action. In *Re H*⁵⁶ the court held that a child wishing to instruct their own solicitor in their own right had to demonstrate sufficient ‘rationality that leads to coherent and consistent instruction’. The House of Lords in *Gillick*, the Children Act 1989 and the Children Act 2004 all require courts to ascertain and pay due regard to the wishes and feelings of the child, however these wishes and feelings may be marginalised, ignored or overruled where it is considered to be in the child’s best interests. Article 12 of the UN Convention on the Rights of the Child protects the right of every child to have their views heard and ultimately embodies the ethos of autonomy which the Convention aims to create for the child. Nonetheless Article 12 only requires that every child’s views be taken seriously. Even older children’s wishes can be so contrary to their long-term welfare that a court is empowered to override them if the court believes the child is not competent to understand the implications of their choices. In *Mabon v Mabon*⁵⁷ three young people aged 13, 15 and 17 applied to the court for leave to represent themselves independently. The court emphasised that a balance needed to be struck between the child’s right to participate in decision-making processes that fundamentally affect his family life and the ‘sufficiency of

⁵⁵ [1986] AC 112

⁵⁶ [1993] 1 FLR 440

⁵⁷ [2005] EWCA Civ 634

the child's understanding'.⁵⁸ In *F (Mother) v F (Father)*⁵⁹ Theis J met with L and M, aged 15 and 11 respectively, and found them 'charming, intelligent, articulate and thoughtful'.⁶⁰ Nonetheless the court made a declaration that it was in the best interests of L and M to receive the MMR vaccination despite their objections. Theis J stated that the girls' wishes were 'of course an important factor, particularly bearing in mind their ages'⁶¹ but the court also has to consider their level of understanding of the issues involved and what factors have influenced their views. Thus the law recognises that these actions require a certain level of maturity and capacity and that children need protection in a paternalistic form from the long-term consequences of their immaturity in various areas of their lives. This protection is not extended to children in the context of the criminal justice system.

The lived reality of young offenders: disrupted psychological development and fragmented families

Children under 14 years are not adults and the more a young person is involved with crime, the greater the gap with adults tends to be. Yet once they are 10 years of age they can be put through and expected to understand a system modelled closely on a criminal justice system designed for convicting and punishing adults. Children and young people are still developing in terms of cognitive capacity and emotional maturity and are often much more impulsive than adults. They are less mature than adults in terms of the judgment factors of responsibility, perspective and sensation-seeking and thus experience difficulties in weighing and comparing consequences when making decisions and contemplating the meaning of long-term consequences.⁶² Developments in neuroimaging technology has allowed for a

⁵⁸ [2005] EWCA Civ 634, para 25

⁵⁹ [2013] EWHC 2683 (Fam)

⁶⁰ [2013] EWHC 2683 (Fam), para 6.

⁶¹ [2013] EWHC 2683 (Fam), para 22

⁶² Kathryn L Modecki, 'Addressing gaps in the maturity and judgment literature: age differences and delinquency' [2008] 32 *Law and Human Behaviour* 78; Jennifer L. Woolard, 'Capacity, Competence, and the

more detailed understanding of the adolescent brain which has found that there are developmental differences in the brain's biochemistry and anatomy that may limit adolescents' ability to perceive risks, control impulses, understand consequences and control emotions.⁶³ The prefrontal lobe is 'involved in behavioural facets germane to many aspects of criminal culpability' including 'the control of aggression and other impulses'⁶⁴ and yet this lobe is the last area to mature.⁶⁵ This research has examined the brain development and cognitive functioning of adolescents and has found that with respect to moral culpability, those parts of the brain that deal with judgement, impulsive behaviour and foresight develop in the twenties rather than the teen years.⁶⁶ Because the prefrontal lobe is not fully mature and is still developing during adolescence, teens are almost inevitably overly emotional, more prone to risk taking and subject to wide mood swings, immature judgment, decreased risk perception and impaired future-time perspective.⁶⁷ Furthermore their functioning in respect of considering issues empathically from the perspective of others, capacity for autonomy and resisting pressure from others and their ability to experience guilt and shame are underdeveloped.⁶⁸ This contributes to the tendency to make choices that are harmful to themselves and others.

Juvenile Defendant: Implications for Research and Policy' in Bette L. Bottoms, Margaret B. Kovera, Bradley D. McAuliff, *Children, Social Sciences and the Law* (Cambridge University Press, 2002)

⁶³ Frances J. Lexcen, Dickon N. Reppucci 'Effects of Psychopathology on Adolescent medical Decision-Making' [1998] 5(63) *University of Chicago Law School Roundtable* 63, 77; Sara B. Johnson, May Sudhinaraset, Robert W. Blum 'Neuromaturation and adolescent risk taking: why development is not determinism' [2010] 25(1) *Journal of adolescent research*, 4-23, 10.

⁶⁴ Ruben C. Gur, 'Brain maturation and the execution of juveniles' [2005] *University of Pennsylvania Gazette* 103

⁶⁵ Peter Kelly 'The brain in the jar: a critique of discourses of adolescent brain development', [2012] 15(7) *Journal of Youth Studies*, 944-959, 946.

⁶⁶ William Di Mascio 'Punishment has replaced juvenile redemption' [2006] *Correctional Forum* 2; Ruben C. Gur, 'Brain maturation and the execution of juveniles' [2005] *University of Pennsylvania Gazette* 103

⁶⁷ Kathryn L Modecki, 'Addressing gaps in the maturity and judgment literature: age differences and delinquency' [2008] 32 *Law and Human Behaviour* 78; Jane Rutherford, 'Juvenile justice caught between *The Exorcist* and *A Clockwork Orange*' [2002] 51 *De Paul Law Review* 715, 727

⁶⁸ Nigel Stone 'Old heads upon young shoulders: 'compassion to human infirmity' following R v. JTB' [2010] 32(3) *Journal of Social Welfare & Family Law* 287-297, 292.

Additionally the way in which psycho-social factors influence decision making and the kinds of choices adolescents make depend in part on the social and family context in which young people find themselves. Children involved in crime, particularly where that involvement is persistent, have often had difficult, deprived backgrounds and serious multiple problems in terms of their school achievement, psychological health and family life. The challenges that confront children who are engaging in anti-social and offending behaviour, their families and the various professionals who work with them are complex, deep-rooted and multi-faceted. Many of those entering the youth justice system have serious multiple problems in terms of their school achievement, psychological health, alcohol and drug abuse.⁶⁹ These children are the most disadvantaged, have the poorest educational experiences and are more likely to suffer from poor health, including mental health and substance misuse. The abolition of *doli incapax* ignores these important developmental differences between children and adults and instead reconstructs young people who offend as non-children and denies them the right to remain children. These developmental differences render such children and young people the least ready to assume the responsibilities associated with autonomous individuality and to participate effectively in their own criminal proceedings, and the most seriously in need of adult help and guidance. If young people lack the capacity to make a meaningful choice and to control their impulses, should they be held criminally culpable for their behaviour and expected to participate in criminal proceedings?

The Law Commission⁷⁰ examined this neurological and sociological research and argued that wider consideration should be given to the problems faced by young people in conflict with the law. The Law Commission recommended a new defence of development immaturity for those young people who lacked the capacity to control their conduct and comply with the

⁶⁹ Raymond Arthur *Family Life and Youth Offending: Home is where the hurt is* (Routledge, 2007).

⁷⁰ Law Commission *Criminal Liability: Insanity and Automatism* (Law Com DP, 2013), pp. 185-191.

law. Previously the presumption of *doli incapax* would have acted as a safeguard to protect such young people from the full rigours of the criminal justice system. The Law Commission's proposal acknowledges that vulnerable and needy children should not be held to the same standards of criminal responsibility as adults, because their decision-making capacity is diminished, they are less able to resist coercive influence, and their character is still undergoing change. Similar recommendations have been made by members of the judiciary. For example Smith LJ in *Director of Public Prosecutions v P*⁷¹ and Hughes LJ in *DPP v R*⁷² both expressed the view that criminal proceedings should be avoided in relation to young people wherever possible. Instead they recommended that recourse should be had to civil proceedings under the Children Act 1989 to respond to children's antisocial and offending behaviour. Given the relationship between abuse and neglect and subsequent youth criminality, any programme that effectively reduces abuse and neglect could serve as a prevention strategy for youth offending behaviour. Public services can guide young people towards responsible behaviour by providing help with parenting, structured nursery education, support in schools and positive leisure opportunities. Proceedings under the Children Act 1989 have the potential to deter young people from becoming involved in crime as the 1989 Act compels local authorities to improve the chances for youth to lead healthy, productive, crime-free lives. The Children Act 1989 recognises the importance of intervening early in high-risk families in order to prevent delinquency and youth offending. Schedule 2 of the 1989 Act requires local authority children's services departments to take reasonable steps to encourage children in their area not to commit criminal offences. *Guidance* suggests that this might involve advice and support services for parents, the provision of family support services, family centres, day care and accommodation, health-care and social care, structured nursery education, support in schools, positive leisure opportunities and better employment

⁷¹ [2007] EWHC 946 (Admin)

⁷² [2007] EWHC 1842

and training opportunities.⁷³ Children's services are thus provided with the opportunity to positively influence the quality of life for young people and their families; help parents overcome problems with childcare; and prevent the difficult behaviour exhibited by some young people from deteriorating to the point of antisocial and offending behaviour. The local authority also has the power under section 25 of the Children Act 1989 to keep a child which it is looking after in secure accommodation if the child has a history of absconding and is likely to do so and suffer significant harm, or if he is likely to injure himself or other people were he kept in any other type of accommodation. In *Re M (A Child) (Secure Accommodation)*⁷⁴ the Court of Appeal characterised secure accommodation order proceedings under the Children Act as a benign jurisdiction to protect the child. Furthermore Butler-Sloss P held, in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)*,⁷⁵ that although a secure accommodation order under section 25 of the 1989 Act involved a deprivation of liberty, it was not incompatible with the European Convention on Human Rights as any action must be limited to such reasonable restrictions as are necessary in order to protect the child from causing significant harm to himself or others, or seriously damaging property.

The primary responsibility of the local authority children's services department in relation to identifying and supporting children at risk of offending does not diminish the role of other agencies and the need for inter-agency and multi-agency co-operation. Section 27 of the Children Act 1989 provides children's services departments with the statutory mandate necessary to call upon other departments within local government, such as any other local authority, any local education authority, housing authority, youth offending team and any

⁷³ Department of Health *The Children Act 1989 Guidance and Regulations Volume 2 Family Support, Day Care and Educational Provision for Young Children* (HMSO, 1991)

⁷⁴ [2001] 1 FCR 629.

⁷⁵ [2001] 2 All ER 719, [2001] 1 FLR 526.

health authority, primary care trust or NHS trust to assist them in their duties to provide services for children and to prevent youth crime. Local authorities not only need to collaborate internally to fulfil their youth crime prevention role, they may also facilitate the provision of family services by others, in particular voluntary organisations. The Children Act 2004 reinforces the need for closer joint working and better information-sharing between the various agencies involved with children. It also establishes a duty for the key agencies who work with children to put in place arrangements to make sure that they take account of the need to safeguard and promote the welfare of children when doing their jobs. Guidance stresses that safeguarding and promoting the welfare of children is an essential part of preventing youth offending.⁷⁶ Thus the Children Acts 1989 and 2004 empower children's services to pursue youth crime prevention practices that are child-centred; take account of children's vulnerability; prevent their exclusion from school; prevent their abuse and neglect; tackle poverty and social exclusion; and create opportunities for young people's participation in the community. These are wide-ranging and ambitious programmes that enable a great deal of supportive, preventive and rehabilitative work to be undertaken by the local authorities.

Conclusion

If the criminal trial is to become legitimate as a process that calls citizens to answer for their alleged wrongdoing, what is needed is the development of ways in which unjustly disadvantaged children can pursue their legitimate grievances. Under the current rules, even an incompetent child who did not understand the consequences of his behaviour may be held criminally responsible.⁷⁷ Howard argues that 'no civilised society regards children as

⁷⁶ Department for Education and Skills *Statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004* (Nottingham, 2005).

⁷⁷ Kathryn Hollingsworth 'Responsibility and rights: children and their parents in the youth justice system' [2007] 21 *International Journal of Law, Policy and the Family* 190, 195.

accountable for their actions to the same extent as adults'.⁷⁸ To apply the same standards to a 13-year-old as an adult is to ignore large amounts of evidence about the immaturity of children at that age. Terms such as 'intention' and 'mens rea' cannot and should not be applied without taking account of the large differences in capacity and judgement between adults and children. Indeed there are many academic writers who believe that a 'lack of *mens rea* may need to be pressed into service more often' in the youth justice context as young people are simply not capable of a sufficient degree of moral agency to warrant conviction of criminal offences at the age of 10.⁷⁹ The law should protect children from the full rigours of the criminal justice system until they are old enough to take full responsibility for their actions. The age of criminal responsibility in England and Wales should be reviewed with a view to raising it at least to the UN Committee on the Rights of the Child recommended minimum of 12 years with the aim of progressively reaching 18 years.

⁷⁸ Colin Howard *Criminal Law* (4th ed., Law Book Company, 1982) 343

⁷⁹ Lord Justice Hooper, David Ormerod *Blackstone's Criminal Practice 2010* (Oxford University Press, 2009). Also see Raymond Arthur 'Rethinking the Criminal Responsibility of Young People in England' [2012] 20(1) *European Journal of Crime, Criminal Law and Criminal Justice* 13-29; Andrew Ashworth 'Commentary on *R v. Wilson*' [2008] 2 *Criminal Law Review* 138-141; Andrew Ashworth 'Commentary on *R v. JTBH*' [2009] 8 *Criminal Law Review* 581-583; Francis Bennion '*Mens rea* and defendants below the age of discretion' [2009] 11 *Criminal Law Review*, 757-770.