

PROVING THE CRIMINAL RESPONSIBILITY OF CHILDREN: RP v The Queen¹

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INTRODUCTION

Discussions in this area frequently commence with the observation “No civilised society regards children as accountable for their actions to the same extent as adults”.³ The observation of course begs the question as to whether that differentiation should be made with respect to liability or penalty or both and as to how any differentiation should be made. The purpose of this paper is to discuss how the law deals with liability.

The age of criminal responsibility may be regarded as the age at which the law considers that a person “has the capacity and a fair opportunity or chance to adjust his behaviour to the law”.⁴

Criminal offences are, at their core, prohibitions on interference with the rights of others. Adults, as full members of society, have rights and can be expected to respect the rights of others. Children do not have the same rights, either to property or personal autonomy. The extent of a child’s rights in this regard will depend on his or her age, maturity and determinations of caregivers.

Having limited rights and being at an earlier stage of development, children will have limited personal experience to draw upon in understanding the rights

¹ *RP v The Queen* [2016] HCA 53; 91 ALJR 248

² With acknowledgement and appreciation to Shaun Croner who assisted in compiling the paper in its current form.

³ Colin Howard, *Criminal Law* (Law Book Co, 4th ed, 1982) 343, cited in *R (A Child) v Whitty* (1993) 66 A Crim R 462 (**Whitty**), 462 (Harper J), *C v DPP* [1996] AC 1 (**C v DPP**), [73] (Lord Lowry) and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (**CRH**).

⁴ HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 181 and see also 152, and Mathew Hale, *History of the Pleas of the Crown* (Vol 1, 1736) 14-15.

of others. This fundamentally distinguishes children from adults. Importantly for present purposes it highlights the need to eschew adult value judgments in determining whether children can be held responsible for a particular crime.

1. CRIMINAL RESPONSIBILITY OF CHILDREN

Minimum age of criminal responsibility

The common law recognised that children below the age of seven (often termed ‘the age of discretion’) were not criminally responsible for their acts. The common law also long distinguished a second age range for liability, above the absolute minimum, in which the individual child may be assessed for sufficient capacity (since at least the reign of King Edward III, 1327-1377).⁵ The upper threshold of 14 years was set around the first half of the seventeenth century.⁶ A child over seven but less than 14 was presumed to be ‘*doli incapax*’, or incapable of forming a criminal intent.

In New South Wales (and all Australian jurisdictions) the minimum age of criminal responsibility has been set by statute at 10 years: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.⁷ The legislature has not otherwise interfered with the common law position. The result is that in New South Wales, the common law rebuttable presumption of *doli incapax* is applied to children between 10 and 13 years of age (inclusive): *BP v R* [2006] NSWCCA 172 (**BP**) at [27]. It is also applied in Victoria and South Australia: *R v ALH* (2003) 6 VR 276 (**ALH**) at [20], [24] and [86]; *The Queen v M* (1977) 16 SASR

⁵ Sir William Blackstone, *Commentaries on the Laws of England* (Vol 4, 1769) 23.

⁶ *C v DPP* at 24 citing Sir Edward Coke

⁷ *Criminal Code Act 1995* (Cth) s 7.1, *Criminal Code Act 1899* (Qld) s 29, *Criminal Code Act Compilation Act 1913* (WA) s 29, *Criminal Code Act 1924* (Tas) s 18 *Criminal Code Act 1983* (NT) s 38, *Criminal Code 2002* (ACT) s 25. Ten is towards the lower end of the scale internationally. The most common age of criminal responsibility around the world (below which there is absolute protection) is 14, the median age is 13.5 years, and the average is 11.9. Excluding four countries that do not set a minimum age, the mean is 12.5 and the median is 14: Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board, 2008) 31. And see UN Committee on the Rights of the Child, *Concluding Observations on the Rights of the Child: Australia* (1997) CRC/C/15/Add.79 [29], and UN Committee on the Rights of the Child, *General Comment No. 10* (2007) CRC/C/GC/10 [30]-[33].

589 (*M*). In the remaining Australian jurisdictions the presumption has been replaced with statute.⁸ The language used varies between jurisdictions, but the provisions have either been accompanied by an express legislative intention to “repeat” the common law or else silence as to the desired effect of the provision.⁹

In *RP v The Queen* [2016] HCA 53; (2016) 91 ALJR 248 (*RP*) the High Court noted that “[t]he rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea.”¹⁰

The case of *RP v the Queen*¹¹

In *RP* the appellant was convicted, after a judge alone trial, of two counts of sexual intercourse with a child under 10 years. The complainant was the appellant's half-brother. At the time of the offending, the appellant was aged approximately 11 years and six months and the complainant was aged six years and nine months. The only issue at trial was whether the prosecution had rebutted the presumption of *doli incapax* by proving that the appellant knew that his actions were seriously wrong in a moral sense.

⁸ *Criminal Code Act 1995* (Cth) s 7.2, *Criminal Code Act 2002* (ACT) s 26 Crimes Act s 4N; Criminal Code (Tas) s 18(2); Criminal Code (WA) s 29; Criminal Code (Qld) s 29(2); *Childrens Services Act 1986* (ACT) s 27(2); Criminal Code (NT) s 38(2). In NSW, SA and Vic the presumption continues to be based on the common law: eg *IPH v Chief Constable of New South Wales* [1987] Crim LR 42. *Doli incapax* also applies in NZ: *Crimes Act 1961* (NZ) s 22. Around the common law world, the presumption continues to operate in (at least) Hong Kong, Ireland, New Zealand, South Africa, India, Malaysia and Singapore (the last three set the range at 10-12 years): Thomas Crofts, ‘Reforming the Age of Criminal Responsibility’ [2016] *South African Journal of Psychology* 1, 4, and Don Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate, 2009) 187-224. The presumption for children between 10 and 14 years of age was abolished in England and Wales in 1998.

⁹ Eg “This provision also repeats the law as it currently stands in the ACT and the rest of Australia”: Explanatory Memorandum to the *Criminal Code 2002* (ACT) Clause 26 (which provision is in the same terms as the Commonwealth Code), and see *M v J* [1989] Tas R 212

¹⁰ At [8].

¹¹ This summary is taken from the High Court case note dated 21 December 2016.

The first offence took place in circumstances where there were no adults in the house; the appellant grabbed the complainant and held him down; the complainant was crying and protesting; the appellant put his hand over the complainant's mouth; and the appellant stopped the intercourse when he heard an adult returning to the house and told the complainant not to say anything. The second offence took place a few weeks later, in circumstances where: the appellant and complainant were again without adult supervision; the appellant took hold of the complainant; and the appellant stopped intercourse when he heard an adult returning. There was also evidence that, when the appellant was aged 17 and 18 years old, he was twice assessed as being in the borderline disabled range of intellectual functioning and was found by the trial judge to be of "very low intelligence". The trial judge held that the circumstances surrounding the first offence proved beyond reasonable doubt that the presumption was rebutted in relation to that offence. His Honour found that it logically followed that the presumption was rebutted in relation to the second offence.

The Court of Criminal Appeal dismissed the appellant's appeal against his two convictions. The Court unanimously held that the presumption was rebutted in relation to the first offence. A majority of the Court held that it was also rebutted in relation to the second offence, finding that the appellant's understanding of the wrongness of his actions in the second offence was informed by the finding that he knew his actions in the first offence were seriously wrong. The appellant was granted special leave to appeal to the High Court of Australia. The appeal raised fundamental questions regarding the principle of *doli incapax* which are dealt with below.

2. REBUTTING THE PRESUMPTION OF *DOLI INCAPAX*

In *RP* the High Court restated the principles in relation to the presumption of *doli incapax*. Those principles had previously been set out in *C v DPP* (1996) AC 1 (particularly at 38). Whilst essentially restating the existing law, the decision in *RP* is useful in its statement of the principles, its emphasis on the

moral quality of what is to be proved and the need for evidence to be adduced in order to prove it. The test can be summarised as follows:

1. The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;
2. Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child's awareness that his or her conduct was merely naughty or mischievous;
3. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction; and
4. The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be.

2.1 The onus is on the prosecution to rebut the presumption of *doli incapax* as part of the prosecution case;

The onus is on the prosecution to prove that the child is *doli capax* (that is, not *doli incapax*). Accordingly, the prosecution must call evidence to prove, to the criminal standard, that the presumption does not apply.¹² The determination of whether the presumption has been rebutted is a matter for the tribunal of fact.

*“No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.”*¹³ If at the end of the prosecution case, no evidence has been called to rebut the presumption, the prosecution has failed to establish their case. The defence may make a no case submission in this circumstance.¹⁴

¹² *RP v The Queen* at [32].

¹³ *RP v The Queen* at [9].

¹⁴ *C v DPP* at [36]-[37].

Where evidence relevant to rebutting the presumption is adduced, the defendant may choose to call evidence in response. However, there is no requirement for the defendant to establish that the presumption applies.

2.2 Proof of capacity requires proof the child appreciated the moral wrongness of the act or omission and is to be distinguished from the child’s awareness that his or her conduct was merely naughty or mischievous

It has been repeatedly said that in a case in which the presumption of *doli incapax* applies, the prosecution must prove beyond reasonable doubt that when doing the act charged the child “knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief”.¹⁵

It had been observed that this test is simply stated but difficult in application: *RP v the Queen* [2015] NSWCCA 215 at [129] (***RP CCA Decision***) per Hamill J and, see also, *C v DPP* at [53](3) and [73].

In *RP*, the High Court made clear that the test is directed to “[k]nowledge of moral wrongness”.¹⁶ Whilst not new, this stress is an important part of the decision in *RP*. A child’s acknowledgment that he or she understood that an act was “seriously wrong” will not, of itself, provide an indication that the child appreciated the moral wrongness of the act or omission. That is, a child might view conduct as “seriously wrong” in the sense that he or she is likely to be in serious trouble if found out, without the requisite understanding of the act for the purposes of criminal responsibility. Focussing on the child’s belief that the act was more than mischievous or naughty may tend to obscure what it is that has to be established.

Further the evidence must concern the particular child. In *RP* the High Court noted at [12]:

¹⁵ *Ibid.*

¹⁶ At [9].

The only presumption which the law makes in the case of child defendants is that those aged under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

In relation to the specific offences in that matter, the Court said at [35]:

The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was largely based on the inferences that he knew his brother was not consenting and that he must have observed his brother's distress. It cannot, however, be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding that the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding.

Assuming a child within a certain age range has a proper understanding of which intrusive acts are permissible, in what circumstances, and by whom, and which might be seriously wrong as opposed to frowned upon, naughty or merely wrong, fails to give effect to the presumption and may reverse the onus of proof. It is also contrary to the psychological and neurological understanding of the moral development of children and adolescents. Knowing something is “seriously wrong” involves:

more than a child-like knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.¹⁷

2.3 The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction

To rebut the presumption, the prosecution must adduce evidence that proves, beyond all doubt, that the child knew that his or her actions, in committing the offence, were seriously wrong. In *C v DPP* Lord Lowry described the quality of the evidence that the prosecution was bound to adduce, at [38C]:

¹⁷ N J Lennings and C J Lennings, ‘Assessing serious harm under the doctrine of *doli incapax*: A case study’ (October 2016) *Psychiatry Psychology and Law* 1, 2.

... What is required has variously been expressed, as in Blackstone, 'strong and clear beyond all doubt or contradiction', or in *Rex v Gorrie* (1919) 83 JP 136, 'very clear and complete evidence' or in *B v R* (1958) 44 Cr App R 1 at 3 per Lord Parker CJ, 'it has often been put this way, that ... "guilty knowledge must be proved and the evidence to that effect must be beyond all reasonable possibility of doubt.

As noted above, it is essential to focus on the child's capacity and not that of a hypothetical child. In this regard, it has been recognised that in jurisdictions where the protection of the absolute presumption is not available to children over 10 years, the rebuttable presumption at least allows for the "vast differences" in the development of the capacities necessary for criminal responsibilities between individuals of the same biological age to be taken into account and, in theory, for children under 14 lacking adult capacity to be protected.¹⁸

The ability of children, even at the upper end of the presumption age range, to understand the "serious wrongness" of an act (or omission), cannot be presumed, and, if anything, from a modern neurological perspective, remains presumptively in doubt throughout adolescence.

In *RP*, apart from evidence of the acts said to constitute the offences themselves, and the circumstances surrounding those events, the only evidence of the appellant's capacity was contained in experts' reports addressed to the appellant's capacity at ages 17 and 18, in relation to different issues, (themselves made some five to six years after the offending conduct).

The circumstances around the events established that the appellant knew the conduct was wrong in at least some sense. (He was anxious to avoid parental scrutiny of the acts.) He also, from the reaction of the complainant, could be inferred to have known that he was causing his brother significant distress. This latter fact was regarded as being of particular significance in

¹⁸ Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 *Current Issues in Criminal Justice* 123, 126.

the determination in the CCA. The Court, however, had no evidence directed to the appellant's intellectual or moral development at ages 11-12. As such, the appellant submitted that the CCA misconceived the nature of the presumption and the quality of evidence necessary to rebut it beyond a reasonable doubt in finding that the presumption was rebutted.

The appellant in *RP* also submitted that various aspects of the Crown's evidence tended to cast doubt on the appellant's capacity; namely, that the appellant may have thought the actions were not seriously wrong because he had been himself subjected to sexual abuse or else had been inappropriately exposed to pornography. The expert reports served to underscore this possibility.

The report of a psychologist, Mr Champion, raised the possibility that the appellant may have been experiencing PTSD type issues which may have flowed from "past adverse events such as possible molestation or exposure to violence in earlier years", stated that the appellant "does not have the level of understanding of the proceedings that a person of his age with average intelligence would have"; and noted his disadvantage "by reason of his intellectual limitations": At the time of the report the appellant fell within the "borderline disabled range" (albeit towards the top of that range), meaning his IQ was 79 or less. A Job Capacity Assessment Report, conducted two years earlier, was also tendered in the Crown case. This also cast doubt on the appellant's capacity. The evidence suggestive of molestation, considered together with the act itself and use of the condom, also gave rise to a strong inference that the appellant had himself been inappropriately sexualised.

In relation to that evidence Davies J said (*RP* CCA Decision at [67]):

Reliance on the report of Mr Champion has a number of difficulties. His examination of the Applicant was conducted in January 2012 which was more than six years after the events complained of. It is not easy to determine, for example, what violence the Applicant was exposed to nor how it had affected him at the relevant time. Certainly a reading of paragraph 29 of Mr Champion's report leads to the strong inference that the violence was not directed towards the Applicant. Moreover, Mr Champion speaks of "possible molestation" without the Applicant having suggested it or made complaint

about it, and despite there being no other evidence of it. Contrary to the Applicant's submission it cannot be concluded on the evidence that he was highly sexualised.

Davies J's criticisms of the report can be accepted. However, it was not for the appellant to prove a lack of capacity. The High Court ultimately accepted that the reports served to highlight the gap in the prosecution evidence.

Importantly, the High Court accepted that the conduct itself (far from proving that the presumption was rebutted), raised a real question as to the appellant's understanding of his act. The plurality said (at [34], footnotes omitted):

The evidence of the appellant's use of the condom is significant. Given the way the appeal was conducted, it was an error for Davies and Johnson JJ to disregard it in determining whether, upon the whole of the evidence, it was open to the trial judge to be satisfied that the presumption had been rebutted and the appellant's guilt of the offence charged in count two established beyond reasonable doubt. The fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference. Mr Champion's report did not serve to allay the latter suggestion.

The High Court agreed that the prosecution had not established, to the criminal standard, that the appellant knew his actions were "seriously wrong", as at [36]:

...In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.

Importantly, the fact that the appellant may have been aware he was causing great distress to another human being was not sufficient to establish that he

was aware that what he was doing was seriously wrong for the purposes of rebutting the presumption (see *RP* at [35]; cf the approach of the trial judge in *RP* set out by the CCA at [34]; and Hodgson JA in *BP* at [30]). The absence of evidence as to *RP*'s development meant that the necessary inference could not be drawn from this circumstance.

2.4 The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be

In *C v DPP* Lord Lowry commented that, apart from evidence of what the child has said or done (in addition to the alleged act), the prosecution must rely on interviewing the child or having him or her psychiatrically examined, or on evidence from someone such as a teacher: at [70]. To this might be added a requirement that the evidence address the moral maturity (which Lord Lowry distinguished from mental development: at [70]) of the child at the time of the offending.

There had been a divergence between NSW and Victoria as to whether the act constituting the offence could be sufficient (together with the child's age) to rebut the presumption beyond reasonable doubt. It was held in *C v DPP* and *R v CRH* (unreported, NSWCCA, 18 December 1996, Smart, Newman and Hidden JJ) (***CRH***), that although the act is relevant, there must be more than proof of the act charged. In Victoria, Cummins AJA held in *ALH* that the requirement "that mere proof of the act charged cannot constitute evidence of requisite knowledge" (at [86], Callaway JA and Batts JA agreeing at [20] and [24]):

doubtless is founded upon the danger of circular reasoning. But proper linear analysis could have regard to the nature and incidents of the acts charged without being circular. What is required is the eschewing of adult value judgments. Adult value judgments should not be attributed to children. If they are not, there is no reason in logic or experience why proof of the act charged is not capable of proving requisite knowledge. Some acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child;

others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

The High Court resolved this divergence in *RP* stating, at [9]:

... No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts¹⁹. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in R v ALH²⁰ suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised

It is, therefore, insufficient for the prosecution to solely rely on the nature of the charged act, or an impression of the child's state of mind gleaned from the commission of the act, to rebut the presumption of *doli incapax*.

CONCLUSION

While the case of *RP* confirms the law relating to *doli incapax*, the judgment highlights the heavy burden that the prosecution bears when prosecuting children, reiterating that “[t]he starting point... is that [a child] is presumed in law to be incapable of bearing criminal responsibility for his acts.”

The case underscores the importance of proving the child's knowledge of the moral quality of his or her act and makes clear that the inquiry will involve an analysis of the child's capacity through an examination of the child's background and psychological history, rather than the application of adult

¹⁹ *R v Smith (Sidney)* (1845) 1 Cox CC 260 per Erle J; *C v DPP* at 38; *BP* at [29]; *R v T* [2009] AC 1310 at 1331 [16] per Lord Phillips of Worth Matravers.

²⁰ (2003) 6 VR 276 at 298 [86]; see also at 280-281 [19], 281 [24].

value judgments on the child's behaviour or undue regard to the abhorrent nature of the alleged crime itself.

A review of the decision of the House of Lords in *C v DPP* (some 20 years ago) against the recent exposure of the treatment of children in custody alerts us to the fact that we are not as enlightened as we would sometimes give ourselves credit for. The High Court's decision in *RP* provides a timely reminder that the State's exercise of power over children through prosecution (and imprisonment) should not be approached lightly and can only be appropriate where criminal responsibility has been properly established.

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