

# Hello, Doli?... or is it Goodbye?

Natalie Wortley<sup>1</sup>

Director of Public Prosecutions v P

Queen's Bench Division (Administrative Court), 27 April 2007

[2007] EWHC 946 (Admin)

## Introduction

Section 34 of the *Crime and Disorder Act 1998* abolished the rebuttable presumption of criminal law that a child between the ages of 10 and 13 was incapable of committing a criminal offence. Most commentators assumed that Parliament had effectively consigned the doctrine of *doli incapax* to the history books. In a remarkable resurrection, the Divisional Court in *Director of Public Prosecutions v P (DPP v P)*<sup>2</sup> suggested that *doli incapax* may still be available as a defence where a child lacks the capacity to understand that his actions are seriously wrong.

## The Facts

P was aged 13 at the date of his appeal. Ever since he was 4, the authorities had had concerns about his development and behaviour. He was diagnosed with Attention Deficit Hyperactivity Disorder at the age of 7 and was prescribed Ritalin. In 2002 he was assessed as having special educational needs. In 2004, P was committed to Teesside Crown Court for trial for a number of serious offences, including kidnapping, false imprisonment and indecent assault. The defence instructed a psychologist, who concluded that P had a full scale IQ of 65 and a mental age of 7 years and 4 months. In his opinion, P would have great difficulty differentiating between conduct that was "seriously wrong" and conduct that was "merely naughty". Further experts were commissioned and all accepted the IQ assessment and agreed that P would be unable to participate effectively in a criminal trial. The prosecution ultimately accepted that P was not fit to plead and proceedings were stayed in June 2005 with no further order.

Five months later, P appeared before the youth court for offences of assault and theft of a car. He denied both matters, accepting by implication that he was fit to plead. P's legal representatives then applied to stay the proceedings as an abuse of process. The original psychologist prepared a new report confirming that little had changed in the intervening months. He concluded that P remained incapable of understanding the nature of the proceedings; he would not be able to concentrate on, or remember, evidence and argument in the courtroom; he had very little understanding of the significance of his behaviour; and he would not have been capable of forming the necessary intent for the alleged offences.

The defence argued that since the rebuttable presumption of *doli incapax* had been abolished, the only way to protect a child such as P was through the doctrine of abuse of process. The District Judge reviewed the law and the medical reports and concluded that P would be unable to participate effectively in his trial and that the proceedings should therefore be stayed. The prosecution appealed by way of case stated.

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<sup>1</sup> Barrister; Senior Lecturer, School of Law, Northumbria University. The author is grateful to Kevin Kerrigan, Reader, School of Law, Northumbria University, for his helpful comments on an earlier draft of the article.

<sup>2</sup> [2007] EWHC 946 (Admin).

## The Law

### Fitness to Plead

Issues of capacity and fitness to plead often overlap and both issues arose in P's case. It is not clear why the Crown Court stayed the first set of proceedings without invoking the fitness to plead process set out in the *Criminal Procedure (Insanity) Act 1964*<sup>3</sup>. It may be that the Crown Court Judge considered that P's difficulties were so severe that it would be an abuse of the process of the court to subject him to any proceedings akin to a trial, even if those proceedings amounted simply to a fact finding exercise and could not result in a criminal conviction. The psychologist's comments that P would have difficulty distinguishing conduct that was seriously wrong from that which was merely naughty also suggested that P might be *doli incapax*. We do not know whether this issue played any part in the decision to stay the proceedings.

The 1964 Act does not apply to summary proceedings. In *R(P) v Barking Youth Court*<sup>4</sup>, the Divisional Court confirmed that section 11(1) *Powers of Criminal Courts (Sentencing) Act 2000* and section 37(3) *Mental Health Act 1983* provide a complete statutory framework for dealing with the question of fitness to plead in both the magistrates' court and the youth court. Under these provisions, the court should determine whether the defendant did the act or made the omission charged against him. If satisfied that he did, the court may act under either of the above sections and adjourn the proceedings for a medical report or make a hospital order or guardianship order.

It appears that a youth court also has to consider whether the accused is able to participate effectively in his trial. If he cannot, it appears that a trial would be in breach of Article 6. In *SC v UK*,<sup>5</sup> the European Court of Human Rights held that effective participation presupposes that the accused has a broad understanding of the nature of the trial process; an understanding of what is at stake including the significance of any punishment; an understanding of the general thrust of the evidence with assistance if necessary; the ability to follow what is said by witnesses; the ability to explain his version of events pointing out anything he disagrees with; and the ability to make his lawyers aware of facts to be put forward in his defence.

In *R (TP) v West London Youth Court*,<sup>6</sup> the Divisional Court upheld a district judge's decision to proceed to trial in the case of a 15-year-old defendant who had the intellectual capacity of an 8-year-old. However, the Court accepted that in order to have a fair trial, the accused had to have an understanding of what he was said to have done wrong; the means of knowing it was wrong; an understanding of the defences available; a reasonable opportunity to make representations; the opportunity to consider representations once he understood the issues; and the ability to give proper instructions and participate by answering questions and suggesting questions to his lawyers. The district judge should keep matters under review and had a continuing jurisdiction to stay proceedings if satisfied that the accused could no longer participate effectively.

Thus, following TP, effective participation appears to incorporate a capacity test: the accused must have an understanding of what he has done wrong and "*the court had to be satisfied that the [accused] when he had done wrong by act or omission had the means of knowing that was wrong*".<sup>7</sup> Where the accused lacks the capacity to distinguish right from wrong, it therefore appears that he cannot have a fair trial and proceedings should be stayed.

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3 Sections 4, 4A and 5.

4 [2002] EWHC 734 (Admin).

5 [2004] 40 EHRR 10.

6 [2005] EWHC 2583 (Admin).

7 *Ibid.* para 7(ii).

However, is a stay of proceedings the most satisfactory resolution to a case where this issue arises? The Divisional Court in *DPP v P* thought not. Although it lacked the benefit of considered submissions from the parties on the issue, the Court speculated that where a child aged between 10 and 13 did not recognise that his act was seriously wrong, he could rely on the defence of *doli incapax*. The Court added that if the defence were available, it was preferable for a child to raise it and have the opportunity of an acquittal rather than merely a stay.

### Doli Incapax

The idea that a person should not be held liable in criminal law if he is unable to distinguish between right and wrong is a familiar one. Where an accused person can show that he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong, he has a defence of insanity<sup>8</sup>. This defence is only available where the failure to appreciate the difference between right and wrong is attributable to a disease of the mind.

The law also recognises that an inability to distinguish between right and wrong may arise as a consequence of the youth of the offender. A child was said to be *doli incapax* and therefore incapable of committing a criminal offence if he did not understand that what he had done was seriously wrong as opposed to merely naughty. There was significant debate during the twentieth century over the age at which children should no longer be able to rely on the doctrine of *doli incapax* and should be deemed responsible for their actions.

*Doli incapax* is an ancient doctrine and, as such, there is no clear record of its origins. In 1769, Sir William Blackstone wrote that a child under the age of 10 could not be punished for any crime and “*from ten and a half to fourteen, a child was punishable if found to be doli capaces, or capable of mischief, but with many mitigations, and not with the utmost rigor of the law*”<sup>9</sup>. In relation to capital offences, ancient Saxon law provided that a child under the age of 12 could not be guilty, whereas a child age 12–14 might be guilty, “*according to his natural capacity or incapacity*”<sup>10</sup>. Since at least the reign of Edward III, an infant under the age of 7 could not be guilty of a capital offence and, “*under fourteen, though an infant shall be prima facie adjudged to be doli incapax; yet if it appear to the court and jury that he was doli capax, and could discern between good and evil, he may be convicted*”<sup>11</sup>. This rule was later extended to cover all offences.

There are thus two aspects to the doctrine. First, there is an age below which every child is conclusively presumed to be *doli incapax* regardless of whether or not he actually has the capacity to understand that what he is doing is wrong. A child under this age cannot commit a criminal offence. This conclusive, or irrebuttable, presumption of *doli incapax* applied to those under the age of 7, until section 50 of the *Children and Young Persons Act 1933* raised the minimum age of criminal responsibility to 8. It was further raised to 10 by the *Children and Young Persons Act 1963*<sup>12</sup>.

Prior to the *Crime and Disorder Act 1998*, the common law also presumed that a child between the ages of 10 and 13 was *doli incapax*. In order to displace this presumption, the prosecution had to adduce clear and cogent evidence that the child knew that his act was seriously wrong as distinct from an act of naughtiness or childish mischief<sup>13</sup>. The prosecution could not rely solely on evidence of the act that

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8 *M'Naghten's Case* (1843) 10 CL. & F. 200

9 4 *Bl Com* (1st Ed) 22.

10 *Ibid.* 23.

11 *Ibid.* 23.

12 Section 16(1).

13 *R v Gorrie* (1919) 83 JP 136; *B v R* (1958) 44 Cr App R 1; *C v DPP* [1996] AC 1.

constituted the offence, however horrifying or obviously wrong that act might be<sup>14</sup>. Evidence of things said or done before or after the offence might be capable of rebutting the presumption but would not always be relevant. For example, evidence of running away would usually be equivocal, because a naughty child was just as likely to run away as a child who knew that his actions were seriously wrong<sup>15</sup>.

The sort of evidence that might displace the presumption could include the child's responses in interview; a psychological or psychiatric assessment; or evidence from a parent, teacher or social worker as to the child's general ability to distinguish right from wrong. It was suggested that this caused practical difficulties for the prosecution<sup>16</sup>. Both police interviews and expert assessments depend upon the child's co-operation, which might not be forthcoming, and parents, teachers or social workers would often be unwilling to jeopardise their relationship with the child by testifying against him.

There was thus a perception that the presumption placed an unfair burden on the prosecution and in 1994, shortly after the high profile murder of toddler Jamie Bulger by two young boys, the Divisional Court decided in an unrelated case (*C v DPP*)<sup>17</sup> that the presumption was "*unreal and contrary to common sense*"<sup>18</sup> and held that it was "*no longer part of the law of England*"<sup>19</sup>. On appeal, the House of Lords held that it was inappropriate for the courts to change the law by judicial decision but urged Parliament to review the position again<sup>20</sup>.

The continuing existence of the presumption was debated in numerous reports, consultations and White Papers from 1927 onwards. In a White Paper published in 1990, the Government confirmed that it did not intend to alter the presumption, "*which make[s] proper allowance for the fact that children's understanding, knowledge and ability to reason are still developing*"<sup>21</sup>.

In 1997, the new Labour Government reviewed the law and concluded that the irrebuttable presumption that a child under the age of 10 was *doli incapax* should remain but that the rebuttable presumption applicable to children aged 10 to 13 should be abolished. Section 34 of the *Crime and Disorder Act 1998* appeared to achieve this aim:

*The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is abolished.*

In *DPP v P*, after considering the wording of section 34 and looking at passages from Hansard, Smith LJ concluded that Parliament intended to abolish only the presumption and not the substantive defence of *doli incapax*. The Court thought that if this was right, the accused would bear the evidential burden of raising the defence and the prosecution would have to prove beyond reasonable doubt that the child was not *doli incapax*.

## The Decision in *DPP v P*

The Divisional Court allowed the prosecution's appeal against the decision to stay the proceedings. The Court held that the district judge's decision was premature and that he ought to have considered a number of important issues, including the possibility that P might have had a defence of *doli incapax*. The

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14 *R v Smith (1845) 1 Cox C.C. 260; C v DPP [1996] AC 1 at 38.*

15 *C v DPP [1996] AC 1 at 39.*

16 *C v DPP [1994] 3 WLR 888 at 894.*

17 *Ibid.*

18 *Ibid. at 890.*

19 *Ibid. at 898.*

20 *C v DPP [1996] AC 1.*

21 Great Britain. Home Office. (1990) *Crime Justice and Protecting the Public*. London: The Stationary Office. (Cm. 965) at para 8.4.

Court went on to explore the relationship between issues of capacity, fitness to plead and effective participation in court proceedings and set out the procedure to be followed where such issues arose.

The Court stressed that prosecutors should first consider whether civil proceedings under the *Children Act 1989* might be more appropriate in cases where issues of capacity arose. However, once a decision to prosecute had been taken, a court would have to determine the child's level of understanding. Medical reports were important but not decisive. A judge should consider all of the evidence in the case, including evidence about the offence itself, the child's replies or behaviour upon arrest or in interview and the child's responses in court. Direct exchanges between the judge and the child might be necessary. The court was responsible for ensuring that the child had a sufficient level of understanding and, in an appropriate case, would be entitled to disagree with expert opinion.

It would be rare that a stay should be granted at the start of proceedings. If a child could not take an effective part in the proceedings, either because he was unfit to plead or met the criteria set out in *SC v UK* and *TP*, the court should consider whether to switch to a fact finding exercise and decide whether the child did the act or made the omission charged. Article 6 would no longer be engaged as there would be no prospect of a criminal conviction. A stay should only be granted if no useful purpose could be served by finding the facts. In P's case, the Court concluded that the district judge had erred in staying the proceedings on the basis of the medical evidence alone. He should have considered whether he could defer the decision to see how P coped during the trial. He should further have considered the possibility of a finding of no case to answer or a finding that P was *doli incapax*, either of which would have resulted in an acquittal. Although the appeal was allowed, in the circumstances, the Court declined to remit the matter to the youth court.

## Comment

The decision in *DPP v P* provides a valuable summary of existing powers and procedures for dealing with young defendants who may have difficulty participating in court proceedings. Nevertheless, the headline-grabbing aspect is bound to be the apparent resurrection of the *doli incapax* defence for children over 10, which is much more controversial. But how likely is it that a court properly seized of the issue would conclude that such a defence still exists? Furthermore, given that issues of capacity, fitness to plead and effective participation tend to overlap, would the availability of a defence of *doli incapax* make any difference in practice?

## Statutory interpretation

The Divisional Court was of the view that a literal interpretation of section 34 was consistent with an attempt to abolish only the presumption and not the defence of *doli incapax*:

*"The subject of the sentence in section 34 is 'the rebuttable presumption of criminal law' and the verb 'is abolished' can only apply to the subject. If so, it must be the presumption that has been abolished."*<sup>22</sup>

However, given that the origins of *doli incapax* are unclear, we do not know whether a defence of *doli incapax* ever existed separately from the presumption. If not, then the removal of the presumption is effectively the end of the matter and there is no residual defence for the Court to recognise.

The Court then turned to *Hansard* for assistance. It is well established that where the meaning of an enactment is ambiguous or obscure, a court may have regard to any statement from *Hansard* made by, or

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<sup>22</sup> *Op.cit.* para 40.

on behalf of, the promoter of the Bill which clearly discloses the mischief aimed at or the legislative intention<sup>23</sup>. The court may also have regard to other Parliamentary material insofar as it assists in understanding the statement. In *DPP v P*, the Court cited two relevant statements.

The *Crime and Disorder Bill* was introduced in the House of Lords. During its second reading, Lord Falconer of Thoroton, then Solicitor-General, confirmed that *doli incapax* would still exist as a defence:

*“The possibility is not ruled out, where there is a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong, of seeking to run that as a specific defence. All that the provision does is remove the presumption that the child is incapable of committing wrong.”*<sup>24</sup>

The Court also quoted Jack Straw (the Home Secretary at the time) in the House of Commons but found that his statement was consistent with both the abolition of the presumption and the abolition of the defence<sup>25</sup>.

Finally, the Court referred to a Home Office circular published after the *Crime and Disorder Act 1998* came into force. The purpose of the circular was to set out a policy for CPS lawyers dealing with young offenders. According to the circular, children aged 10 to 13 were now to be treated in the same way as older children when deciding whether it was appropriate to prosecute. The Court accepted that the circular gave the impression that a defence of *doli incapax* was not available to a child aged 10 or over but reminded itself that a Home Office circular was not an admissible aid to construction.

In concluding that *doli incapax* remains as a defence, the Court thus relied heavily upon Lord Falconer’s statement, which was made at an early stage of the Parliamentary procedure. It is submitted that having regard to subsequent statements and to the mischief that the Act was aimed at, future courts are likely to conclude that Parliament in fact intended to remove the rule of *doli incapax* altogether insofar as it applied to children age 10 to 13.

### **The Parliamentary history of section 34**

In 1997 the Home Office published a consultation paper entitled *Tackling Youth Crime, Reforming Youth Justice*<sup>26</sup> in which it was argued that the rule of *doli incapax* was in need of reform for the following reasons:

- We now have compulsory education from the age of 5 and children can differentiate right from wrong at an earlier age;
- When *doli incapax* was introduced, children faced the death penalty for crimes less serious than murder. The modern system of sentencing, with its emphasis on preventing re-offending, means that a child who offends should be convicted so that he can be subject to proper control and appropriate intervention with the opportunity for rehabilitation at an early stage;
- It is extremely difficult for the prosecution to prove that a child has the necessary capacity in order to rebut the presumption.

The paper asked whether, in the circumstances, the presumption should be abolished, so as to put a child between the ages of 10 and 13 in the same position as one aged between 14 and 17, or whether it should be reversed. On this basis it appears that the use of the word “abolished” in section 34 is significant and that it was intended to do more than simply alter the presumption.

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23 *Pepper v Hart* [1993] 1 AC 593.

24 *HL Deb* 16 December 1997 c596.

25 *HC Deb* 8 Apr 1998 c372.

26 *Great Britain. Home Office. (1997) Tackling Youth Crime, Reforming Youth Justice: A Consultation Paper.*

The consultation paper was followed by a White Paper entitled 'No More Excuses'<sup>27</sup>. Upon its publication, Jack Straw told the House of Commons that:

*"The present rule of doli incapax – being incapable of evil – can stand in the way of holding properly to account 10- to 13-year-olds who commit crimes, yet young people of that age know that it is wrong to steal, vandalise or commit an assault. We intend to abolish that archaic rule to ensure that such young people are answerable for their offences."*<sup>28</sup>

In answer to a question about whether these proposals might be contrary to European human rights law, he replied:

*"We are convinced that our proposal to remove the concept of doli incapax is fully consistent with the European Convention on Human Rights. Interestingly, there was a period in the Divisional Court – when C v the Director of Public Prosecutions set the law – when doli incapax was effectively abolished. That did not lead to injustice for young offenders, but made for a little more efficiency."*<sup>29</sup>

The reference to abolition of the "rule" of doli incapax and the "concept" of doli incapax suggest that the Government intended to abolish doli incapax altogether. It is submitted that this interpretation is reinforced by the context in which these words are used and particularly the approval of the Divisional Court's decision in *C v DPP*, which temporarily abolished both the presumption and the defence for children over the age of 10.

In December 1997, Lord Falconer made the statement referred to in *DPP v P*, which clearly indicates that a defence of doli incapax would remain. However, following this, a number of references in Hansard suggest that Lord Falconer may have been out of step with the rest of the members of the Government, who intended something entirely different.

During both the committee stage and the report stage of the Bill, the Liberal Peer Lord Goodhart proposed the following amendment to the relevant clause<sup>30</sup>:

*"Where a child aged 10 or over is accused of an offence, it shall be a defence for him to show on the balance of probabilities that he did not know that his action was seriously wrong."*

In response, the Government did not suggest that the amendment was unnecessary because the wording of the clause already left a defence of doli incapax available in an appropriate case. Rather, during the committee stage, Lord Williams of Mostyn argued against the amendment on the grounds that where the *actus reus* and *mens rea* of an offence are present, age should be no defence:

*"If [the sanction of the criminal law] needs to be invoked, the presumption of doli incapax has gone. We then need to demonstrate that the child has the appropriate mens rea and that the act itself was committed. However regrettably, and no one regrets it more than me, if that act has been done, the child is guilty of a criminal offence... [Some] children do wicked acts. No one rejoices in that. No one is happy that at the age of 10, which is very young indeed, those children have done evil things. Very often it is not really their fault because they have been formed by others who have failed to care for them. But the fact is that the act has been committed and the intent demonstrated; otherwise no conviction is possible."*<sup>31</sup>

27 Great Britain. Home Office. (1997) *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales*. London: The Stationary Office. (Cm. 3809).

28 HC Deb 27 November 1997 c1090.

29 HC Deb 27 November 1997 c1100.

30 HL Deb 12 February 1998 c1316; HL Deb 19 March 1998 c829.

31 HL Deb 12 February 1998 c1323.

Lord Williams further argued that the Government's proposals would benefit children because the abolition of *doli incapax* would enable them to receive “*appropriate intervention and the decent opportunity for rehabilitation with care, help and support*”<sup>32</sup>.

Lord Goodhart withdrew his amendment during the committee stage but proposed it again during the report stage, when it was rejected by a significant majority<sup>33</sup>. It is submitted that this clearly indicates a Parliamentary intent to remove the defence entirely.

The progress of the clause was more straightforward in the House of Commons, where there was virtually no debate about the distinction between reversal of the presumption and its abolition. However, in addition to the passage cited by the Court in *DPP v P*, Jack Straw referred to *doli incapax* as a “*legal fiction*” which was to be abolished<sup>34</sup> and, later, confirmed “*we are abolishing the concept of doli incapax*”<sup>35</sup>. Thus when the totality of ministerial pronouncements is considered, there is strong evidence of an intent to remove *doli incapax* completely from the relevant age group.

Further, it is submitted that the complete abolition of *doli incapax* addresses the mischief that the enactment was aimed at, whereas reversal of the presumption does not. One of the main problems that the Government sought to address was the perceived difficulty for the prosecution in rebutting the presumption. Parliament was told that:

“*Lawyers acting for offenders between the ages of 10 and 13 use the presumption of doli incapax—incapacity to commit evil—to run rings around the court system, and to avoid proper sanctions for young offenders.*”<sup>36</sup>

The obvious remedy to this perceived imbalance was to abolish *doli incapax* altogether. If *doli incapax* were to continue to exist as a defence, it would place an evidential burden upon the defendant, forcing the prosecution to adduce evidence to rebut the defence to the usual criminal standard. It is submitted that it would be relatively easy for the defence to adduce some evidence of *doli incapax*, such as the testimony of a parent or the child himself. The prosecution would then face exactly the same difficulties as were apparent prior to section 34.

Thus, having regard to both the full extent of the debates in Parliament, the specific rejection of an amendment which would have reversed the presumption and to the mischief that the statute was designed to remedy, it is submitted that there is little prospect that a court properly seized of the issue would conclude that section 34 permits a defence of *doli incapax*.

### Is Doli necessary?

In any event, it is clear from *DPP v P* that issues of fitness to plead, the ability to participate effectively in a trial, the ability to distinguish right from wrong, and even the capacity to form the requisite *mens rea* will often overlap. It would probably be unusual if a child did not appreciate that his acts were seriously wrong but was capable of understanding court proceedings sufficiently to be considered fit to plead. It is, of course, possible that a child may be fit to plead but lack capacity due to immaturity or to issues concerning his upbringing and development, in which case the question of whether he was able to participate effectively in the proceedings would arise. It appears that having the means to know that an act was wrong is a prerequisite for being able to participate effectively in a trial and an inability to

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32 HL Deb 12 February 1998 c1324.

35 HC Deb 3 June 1998 c423.

33 HL Deb 19 March 1998 c838.

36 HC Deb 8 Apr 1998 c372.

34 HC Deb 8 April 1998 c376.



participate effectively will result in a stay. Thus a child defendant who cannot distinguish right from wrong retains some measure of protection under the criminal law, even though this protection exists in the form of a stay rather than a defence.

*DPP v P* makes it clear, however, that a decision to stay proceedings at the outset on the basis of medical evidence alone is unlikely to be upheld save in exceptional circumstances. The Court gave little guidance as to what this might mean but it may be that if the trial process itself would potentially harm the child, this would constitute an exceptional circumstance justifying an early stay. Experts should therefore give consideration to the likely impact of a trial process, or fact-finding process, on a young defendant.

The Court confirmed that a stay could also be granted if no useful purpose could be served by finding the facts. It appears that even if a defendant would not receive a hospital order or a guardianship order, a useful purpose may still be served by going through the fact finding process. Proceedings in a civil jurisdiction may follow, as they did in P's case, and a youth court's findings may simplify these proceedings. It would seem that if proceedings under the *Children Act 1989* are not available or have already been carried out and a hospital order is not appropriate, there would be no point in switching to fact-finding and, again, this might justify a stay.

### **Conclusion: Will doli go away again?**

Defence lawyers and expert witnesses are right to take seriously the possibility of utilising the doli incapax defence in light of *DPP v P*. Ultimately though, it is likely that the courts will recognise that the true effect of section 34 was to remove both the presumption and the defence. The real value of *DPP v P* lies not in its attempt to resurrect doli incapax as a defence but in its recognition that capacity and understanding of right and wrong are highly relevant to the young defendant's ability to participate effectively in his trial.