

**Evidence of Bad Character in cases of historic youth sexual offending– demonstrating a defunct moral compass or distracting the jury and evading the retrospective effect of the presumption of *doli incapax*?**

*Abstract*

In *R v M* the Court of Appeal circumvented the retrospective application of the presumption of *doli incapax* doctrine by allowing for the admission of behaviours as evidence rather than hearing them as a charge on indictment. This article will consider whether the safeguards contained within the Criminal Justice Act 2003 are sufficient to protect against the potential unfairness in a decision to admit childhood behaviours to show propensity. Further, we question whether the behaviour of children younger than 14 years old should be deemed capable of serving as a predictive base for future behaviour, particularly where these behaviours have not previously been established beyond a reasonable doubt during a criminal trial. This article will argue that the current safeguards are unsatisfactory and that, although using bad character evidence is probative in some situations, it is not necessarily a solid predictive base particularly in cases of youth offending and effectively denies children the right to a fair trial in which all protections (including the presumption of *doli incapax*) are available to the child accused of offending.

Key words: Bad Character, propensity, historic sexual abuse and the presumption of *doli incapax*.

**Evidence of Bad Character in cases of historic youth sexual offending– demonstrating a defunct moral compass or distracting the jury and evading the retrospective effect of the presumption of *doli incapax*?**

**Introduction**

In *R v M*<sup>1</sup> the appellant (aged 32 at the time of the trial) was charged with three offences of indecent assault against his younger half-sister (C) when he was aged between 14 and 16 years including digitally penetrating her vagina and simulating sexual intercourse with her when she was aged between 10 and 12 years between 1997 and 1999. In addition to the evidence provided by his younger half-sister, the prosecution relied on bad character evidence (BCE) of two unindicted incidents of sexual misconduct by the defendant when he was between 10 and 14 years old to demonstrate the appellant's propensity to sexually assault his younger sister. These two unindicted incidents occurred prior to the coming into force of the Crime and Disorder Act 1998 and the abolition of the presumption of *doli incapax*. The prosecution believed that these incidents established a propensity to commit offences of the type the defendant was charged with, and demonstrated a steady progression from the defendant's 'wild behaviours' as a child towards sexual experimentation involving C.<sup>2</sup> The Court of Appeal ruled that the behaviour the defendant engaged in between the ages of 10 and 14 years could be relied on by the jury as BCE and could serve as a predictive base for future behaviour. As the appellant was not facing a criminal charge in relation to this behaviour the court ruled that the presumption of *doli incapax* had no application and consequently did not need to be rebutted.

The Court of Appeal in *M* noted that the charges were specifically structured to avoid behaviour that took place prior to D's 14<sup>th</sup> birthday: 'In his ruling allowing the evidence to be admitted, the recorder observed that the charges had been specifically framed to take into

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<sup>1</sup> [2016] EWCA Crim 674.

<sup>2</sup> *ibid* [8].

account the defendant's 14th birthday ... The reason for this being that the presumption of *doli incapax* would have been available to him prior to that date.<sup>3</sup> Admission of these behaviours as BCE preserved their evidential support for the prosecution case but removed the prosecutorial burden of having to rebut the presumption of *doli incapax*. The court's ruling in *M* effectively allows for the admission of behaviours as evidence while circumventing the retrospective effect of the presumption of *doli incapax*.

As such this judgment represents what Bandalli referred to, when discussing the abolition of the presumption of *doli incapax* by the Crime and Disorder Act 1998, as an erosion of the special consideration afforded to children and as 'symbolic of the state's limited vision in understanding children, the nature of childhood or the true meaning of an appropriate criminal law response.'<sup>4</sup> The only protection for defendants such as M, who are having to account for behaviour engaged in as a child, is that the BCE will only be admissible if it meets a gateway within s101(1) Criminal Justice Act 2003 (CJA 2003) and any relevant fairness/admissibility criteria. This article will demonstrate that the provisions of the 2003 Act are inadequate as a counterfoil to any unfairness inherent in the decision not to apply the presumption of *doli incapax* to the BCE itself. This article will also question whether the behaviour of children of less than 14 years old should be deemed capable of serving as a predictive base for future behaviour. This question is particularly apposite especially where these behaviours are put to the fact finder as 'non-conviction' propensity evidence and therefore have not previously been established beyond a reasonable doubt during a criminal trial, as was the case in *M*. This article will argue that although using BCE is probative in some situations, it is not necessarily a solid predictive base particularly in cases of youth offending.

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<sup>3</sup> *ibid* [17].

<sup>4</sup> S Bandalli, 'Children, responsibility and the new youth justice' in B Goldson (ed.), *The New Youth Justice* (Lyme Regis, 2000), 94.

### **The presumption of *doli incapax***

According to the rebuttable presumption of *doli incapax*, children did not automatically become fully criminally responsible for their actions once they reached the age of criminal responsibility, which is currently 10 years in England and Wales.<sup>5</sup> They would only be held criminally responsible if, in addition to committing the *actus reus* and *mens rea* of a criminal offence, the prosecution could also prove, beyond reasonable doubt, that when doing the act, the child knew that what they were doing was seriously wrong. The common law position was stated by Archbold, and approved by Lord Lowry in *Re C (a minor)*<sup>6</sup> and restated by the Court of Appeal in *R v H*,<sup>7</sup> as follows:

‘... at common law a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous disposition ...’<sup>8</sup>

The rebuttable presumption of *doli incapax* recognised the possibility that some children aged between the minimum age of criminal responsibility and 14 years of age (as the appellant was in relation to the two unindicted incidents) were incapable of understanding the gravity of their criminal actions because they did not have the prerequisite normal capacities akin to an adult offender. 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’.<sup>9</sup> In order to rebut the presumption of *doli incapax* and secure a conviction, the prosecution had to prove that the child was fully capable and aware that what was alleged was seriously wrong, not merely wrong but ‘gravely wrong, seriously wrong’.<sup>10</sup> The presumption required courts to consider whether the individual child defendant had more than simply a

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<sup>5</sup> s. 16 Children and Young Persons Act 1963

<sup>6</sup> [1995] UKHL 15, [18].

<sup>7</sup> [2010] EWCA Crim 312.

<sup>8</sup> Archbold *Criminal Pleading, Evidence and Practice* (London, 1993), vol 1, para 1-96, at para 13.

<sup>9</sup> Penal Affairs Consortium *The Doctrine of ‘Doli Incapax’* (London, 1995), 5.

<sup>10</sup> *R v Gorrie* (1918) 83 JP 186.

child-like knowledge of right and wrong, but instead had the capacity to understand their actions and judge whether these actions were right or wrong in a moral sense and an ability to act on that moral knowledge. Knowledge that an act was seriously wrong could not be presumed from the mere commission of the offence, notwithstanding how horrifying or obviously wrong to adult observers the act was.<sup>11</sup>

In the more recent case of *PF*<sup>12</sup> the Court of Appeal noted this criteria was all the more relevant in sexual offences committed by children. Touching of genitalia may be patently wrong to an adult, however in *PF* the court recognised that experimentation between children is not uncommon and a child may not realise such conduct is seriously wrong as opposed to merely rude or naughty. Instead normative criteria, such as the physiological and psychological development of the individual child, should be used to identify the divide between childhood and adulthood. The child's home environment could also be used to prove whether or not the child knew right from wrong.<sup>13</sup> Thus if the child did not have the capacity to rationalise, decide and freely choose to act, then the child could not be held responsible. Section 34 of the Crime and Disorder Act 1998 abolished the presumption of *doli incapax* however the abolition was not retrospective. The decision in *M* which disregards the relevance of the presumption of *doli incapax* renders the child as a competent social actor with capacity to exercise agency and understand criminality and the long-term consequences of his behaviour. The next sections will consider whether, in the absence of any consideration of the presumption of *doli incapax*, the Criminal Justice Act 2003 provides satisfactory safeguards to protect children between the ages of 10 and 14 against punishment where the child had not yet become a rational or moral agent.

## **BCE: The Relevant Law**

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<sup>11</sup> *A v DPP* [1997] Crim LR 125.

<sup>12</sup> [2017] EWCA Crim 983.

<sup>13</sup> *F v Padwick* [1959] Crim LR 439; *B v R* (1958) 44 Cr App R 1.

The Criminal Justice Act 2003 brought to bear a comprehensive consolidation of the law regulating BCE's admissibility and took a major step away from the pre-2003 Act prohibition on propensity reasoning, in an explicit sense at least.<sup>14</sup> The reforms were, in part, designed to rebalance the criminal justice system in favour of the victim and to recognise that propensity evidence has some probative value in demonstrating relevant behavioural dispositions.<sup>15</sup> Where evidence is BCE for the purposes of the 2003 Act, it must satisfy the requirements in one of the seven 'gateways to admissibility' found within s101(1) of the 2003 Act before it can be admitted into evidence at trial for the prosecution.<sup>16</sup> The relevant gateways to admissibility referenced in the case of *M* were s101(1)(1)(c) and (d). S101(1)(c) allows for 'important explanatory' BCE to be admissible where the jury would find it difficult or impossible to achieve a holistic understanding of the case at hand without the BCE and this has substantial value for understanding the case as a whole. S101(1)(1)(d) allows for admission where the evidence of misconduct relates to an important matter in issue between the defendant and the prosecution. The BCE that the prosecution successfully applied to admit into trial in *M* was as follows:

'The Lego Incident':<sup>17</sup> While C, approximately 7 years old (in 1994), was playing with Lego, M had attempted to persuade C to get under a blanket with him. He requested that she kiss him 'with tongues', and she did so. He then requested that she play with his genitals, and she refused. M then chased her upstairs where she tripped and sustained an injury to her eye. M told C to deny anything happened between them, should she be questioned about this;

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<sup>14</sup> s99 CJA 2003, See also *Makin v AG NSW* [1894] AC 57; *Boardman v DPP* [1975] AC 421; *DPP v P* [1991] 2 AC 447.

<sup>15</sup> Home Office *Justice for All* (London, 2002).

<sup>16</sup> see s98 CJA 2003 which states that BCE amounts to 'evidence of, or of a disposition towards, misconduct' and is admissible 'if, but only if' a gateway is satisfied. Misconduct is further defined in s112 CJA 2003 as 'the commission of an offence' or 'reprehensible behaviour'.

<sup>17</sup> [2016] EWCA Crim 674 [13].

‘The Swimming Baths Incident’:<sup>18</sup> C, approximately 9 years old (in 1996), was at the swimming baths with M, who insisted that they share a cubicle. M inserted his fingers into C’s vagina which caused her pain. He then threatened to do so again if she did not agree to perform oral sex upon him. She did so, in order to avoid further digital penetration.

In *M* the prosecution alleged that the combined effect of the two incidents of BCE were that they demonstrated a propensity towards sexual assault, and more specifically, ‘a propensity to behave in this way towards his sister’.<sup>19</sup> It was also argued that if the evidence was held to be incapable of showing a relevant propensity thereby satisfying gateway (d), it should still be admissible through gateway (c) as important explanatory evidence.<sup>20</sup>

The judge at first instance agreed that the two instances were admissible under both gateways (c) and (d).<sup>21</sup> This was undoubtedly evidence of bad character that *could* feasibly have been admissible under each gateway, however allowing for admissibility under multiple gateways at once poses a number of issues, not least because the criteria behind each gateway vary in stringency, and some enforce a higher threshold of admissibility than others. Whilst the gateway does not determine in a strict sense the content of the direction, couching admissibility in multiple gateways can directly affect the admissibility criteria and the presence or otherwise of fairness criteria and judicial directions as safeguards.<sup>22</sup>

### **BCE and fairness criteria: s101(3) Criminal Justice Act 2003**

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<sup>18</sup> *ibid* [14].

<sup>19</sup> *ibid* [17], see also [8].

<sup>20</sup> *ibid* [17].

<sup>21</sup> *ibid*.

<sup>22</sup> This is all that can be said within the scope of this article, but see further: M Stockdale, E Smith, M San Roque ‘Bad Character Evidence in the Criminal Trial: The English Statutory/Common Law Dichotomy – Anglo-Australian Perspectives’ (2016) 3(2) *Journal of International and Comparative Law* 441; P Huxley, ‘Mental Gymnastics and Intellectual Acrobatics: The Meanings of Statutory and Common Law “Bad Character”’ (2011) 75(2) *Journal of Criminal Law* 132; R Glover, *Murphy on Evidence* (15<sup>th</sup> Edition, Oxford University Press, 2017) Chapter 15

Some key differences exist between gateways (c) and (d). Gateway (c) is focused substantially on augmenting juror understanding of the evidence on a holistic level and is not subject to any CJA 2003 specific fairness tests.<sup>23</sup> Gateway (d) facilitates ‘propensity reasoning’, allowing the fact-finder to infer a propensity to commit like offences or be untruthful, and is therefore subject to the s101(3) CJA 2003 fairness test. According to s101(3) CJA 2003, ‘the court *must* not admit evidence under... [gateway (d) and (g)] if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.’ This provision requires a careful balance of the probative value and prejudicial effect of the BCE the prosecution seeks to admit (PV>PE) and represents a duty on the court to exclude where the criteria is met. This sits in contrast with s78 Police and Criminal Evidence Act 1984 (PACE 1984) which provides an alternative discretion to exclude, stating that the court *may* refuse to allow admission of any prosecution evidence where to do so would have an adverse effect on the fairness of proceedings. This discretionary power is wide in scope, and applies to all categories of prosecution evidence, but is not expressed in the same mandatory terms.

The fairness test in s101(3) CJA 2003 should provide an additional safeguard where BCE is admitted to demonstrate a propensity, but the reliability of s.101(3) CJA 2003 in excluding unfair evidence appears to have been frustrated by overlaps with existing gateways (as occurred in *M*) and a reliance upon the exercise of judicial discretion in deciding whether PV>PE, as will be illustrated below. Historic (or recent) sexual abuse has been admitted under s101(1)(d) CJA 2003 previously, as have grooming behaviours<sup>24</sup> suggesting that, whilst there will undoubtedly be valid overlaps between gateways (c) and (d) on occasion, the judge in *M* may have been incorrect to categorise evidence of *this* nature as coming within gateway (c).

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<sup>23</sup> but is subject potentially to exclusion under s78 PACE 1984 on the grounds of fairness.

<sup>24</sup> For examples of historic sexual abuse/grooming behaviours as bad character, see *R v PK* [2008] EWCA Crim 434, *R v DJ* [2015] EWCA Crim 563 and *R v Wilkinson* [2006] EWCA Crim 1332.



Only gateway (d) requires consideration of an additional fairness test beyond s78 PACE 1984 and a failure to consider this is significant in light of the nature of the evidence itself, i.e. evidence of behaviours that were alleged to have occurred when M was a *child*.

Moreover, it becomes increasingly clear from the case law that the presence of a ‘fairness’ safeguard that is potentially so widely construed and difficult to engage as s101(3) CJA 2003 is incapable of providing a panacea for the denial of a retrospective presumption of *doli incapax*. For example, in the case of *R v Leatham and Mallett*<sup>25</sup> the Court of Appeal were required to assess the correctness of a decision to admit BCE in the form of convictions for offences to which the defendant (Leatham) had pleaded guilty during an earlier hearing. HHJ Gosling declined to admit the BCE under both gateways (c) and (d) at the first trial as he considered that the admission of the evidence would be ‘overwhelmingly prejudicial to a fair trial’.<sup>26</sup> At the retrial, Judge Eades allowed admission under gateway (c) but rejected arguments to admit under s101(1)(d). The Court of Appeal ruled that allowing admission of BCE under gateway (c) on the basis that the BCE of Leatham could constitute important background evidence was acceptable,<sup>27</sup> as use for propensity does not de-legitimise admission under gateways (c) or (d). Worryingly, the Court of Appeal ruled that:

‘... This is one of those cases where the ‘prejudice’ of the ‘bad character’ evidence can be said to be concomitant with, or part and parcel of, its essential probative value... Admissibility under s.101(1)(d) is, of course, subject to the ‘fairness’ safeguard in s.101(3). However, for the reasons given above, we would not have interfered with the judge’s ruling on this basis if he had taken this alternative route.’<sup>28</sup>

Mirfield’s analysis of this decision sums up perfectly the pervasive problem in the court’s reasoning here: ‘one does not improperly avoid gateway (d) by having proper recourse to

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<sup>25</sup> [2017] EWCA Crim 42

<sup>26</sup> *ibid* [18]

<sup>27</sup> *ibid* [42]-[43]

<sup>28</sup> *ibid* [46]

gateway (c).<sup>29</sup> It is insufficient to state with hindsight that the defendant was not denied recourse to s101(3) (and the considerations required for admissibility in s103 CJA 2003) because the Court of Appeal would not have interfered with a finding of admissibility under gateway (d) in any event. It is true that where gateway (c) is deployed, the exclusionary discretion in s78 PACE 1984 is still an applicable safeguard. However, the terminology used in the CJA 2003 ('the court must not admit') illustrates the mandatory nature of the exclusionary duty in s101(1)(3) CJA 2003 (and lends itself to contrast with s78 PACE 1984 under which the court *may* refuse to admit<sup>30</sup>), suggesting that D may be no safer relying on s78 PACE 1984 to ameliorate unfairness. Where there is potential for admission under multiple gateways, it is unsatisfactory for the court to elect the gateway that has a less stringent fairness threshold, leaving the defendant without further recourse to challenge admissibility under s101(3) where relevant.

The insufficiency of the fairness test in s101(3) is further illustrated by the decision of the court in *Hanson*<sup>31</sup> which held that provided a trial judge properly directs the jury in relation to the admission of bad character evidence, the Court of Appeal would be very reluctant to interfere and would only do so if the trial judge's decision to admit BCE was plainly wrong, or if the exercise of judicial discretion had been palpably unreasonable in the *Wednesbury*<sup>32</sup> sense. This was applied in the case of *R v Staff*,<sup>33</sup> the appellate court in *Staff* noting that 'In the years since ...[*Hanson*]... numerous decisions of this court have affirmed that approach'. Further, in

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<sup>29</sup> Though Mirfield challenges admissibility under gateway (c) here – and is (correctly in the authors' opinion) of the mind that this evidence should have been admitted under gateway (d). P Mirfield 'Bad character: R. v Leatham and Mallett Court of Appeal (Criminal Division): McCombe LJ; Haddon-Cave J and Judge Batty QC: 15 February 2017; [2017] EWCA Crim 42' [2017] Crim LR 788 at 791-792. Mirfield notes (p792) that the court in L [2012] EWCA Crim 316 at [12] recognised that 'To say that evidence fills out the picture is not the same as saying that the rest of the picture is either impossible or difficult to see without it'. Further, it is accepted at common law that gateway (c) is not designed to serve as a substitute where gateway (d) is unavailable, see Beverley [2006] EWCA Crim 1287, D [2011] EWCA Crim 1474 and *R v Lee* [2012] EWCA Crim 316 at [19].

<sup>30</sup> JR Spencer, *Evidence of Bad Character 3<sup>rd</sup> ed.* (Oxford, 2016), 21.

<sup>31</sup> [2005] EWCA Crim 824, [15].

<sup>32</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

<sup>33</sup> [2017] EWCA Crim 1769, [28].

*R v Jahamithra Visvaniathan*<sup>34</sup> it was found that s101(3) CJA 2003 was inapplicable because the issues with admission ‘did not create the *kind of unfairness* section 101(3) was designed to prevent’ and a careful judicial direction on its limited relevance would counterbalance any unfairness.<sup>35</sup> In *R v PB*<sup>36</sup> the Court of Appeal found that despite the prosecution neglecting to submit a written application to admit BCE that would have prompted an explicit consideration of s101(3) CJA 2003, admission of BCE was safe. ‘Even if that [was] wrong, having regard to the evidence as a whole, we would not have been satisfied that the conviction was... unsafe.’<sup>37</sup>

If in *Leathem & Mallett* evidence capable of demonstrating propensity was admissible under gateway (c) as background evidence because it could have been admissible through (d) with hindsight, but ‘[A]ny risk of prejudice, was cured by the directions properly given by the judge’,<sup>38</sup> one wonders how s101(3) CJA 2003 can serve as a *reliable* safeguard for a defendant, particularly a defendant/appellant such as M where the evidence related to behaviours that were alleged to have occurred when he was a child. Read in conjunction with case law such as *R v Jahamithra Visvaniathan* and *R v PB* it becomes increasingly clear that the presence of a safeguard that is potentially so widely construed and difficult to engage as s101(3) CJA 2003 is incapable of providing a panacea for the denial of a retrospective presumption of *doli incapax*.

### **Section 108 Criminal Justice Act 2003: consideration of youthful misbehaviour**

It is significant that s108(1) CJA 2003 abolished s16(2)-(3) of the Children and Young Persons Act 1963 (CYPA 1963). This provision of the 1963 Act effected a wholesale ban on the admission of evidence of bad character where D was over 21, and the BCE pertained to

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<sup>34</sup> [2017] EWCA Crim 517.

<sup>35</sup> *ibid* [27]

<sup>36</sup> [2016] EWCA Crim 1462.

<sup>37</sup> *ibid* [47].

<sup>38</sup> *Leathem and Mallett* (n 24) [46]

convictions for offences committed before D was 14. This prohibition held, even where the evidence would have been admitted under the (no longer applicable) rules in the Criminal Evidence Act 1898, s1.<sup>39</sup> As Baroness Scotland of Asthal clarified during the House of Lords debates on the then Criminal Justice Bill in September 2003, s108 CJA 2003 was:

‘intended to remove the absolute barrier to admitting evidence of certain juvenile convictions in trials of offences committed as an adult... our aim is to simplify the plethora of rules governing the use of previous convictions... and enable that material to be admitted and assessed on its evidential merits.’<sup>40</sup>

The Baroness explains further that the idea behind the abolition of s16 of the CYPA 1963 was to create more flexibility and facilitate the admission of relevant BCE ‘provided – I emphasise this – it is safe to do so’.<sup>41</sup> Accordingly section 108(2) CJA 2003 states that the juvenile BCE of an adult (over 21) can only be admitted where the offence is triable on indictment and it is in the interests of justice that it is admissible.<sup>42</sup> At first glance, s108 would appear to offer a safety net to defendants who offend or act in a harmful manner as children, in that the 2003 Act prohibits admission of BCE where D was under 14 years old at the time the BCE originated and is over 21 at the time they are charged. However, on closer inspection, it becomes apparent that this provision is likely to have very little practical application as the nature of the s108 wording is such that it makes it very difficult to apply, especially given the arbitrary age limits that define the scope of the provision. In *B (Richard William)*<sup>43</sup> D was 14 at the time of the BCE which meant the safeguard in s108 did not apply despite the appellate court recognising<sup>44</sup>

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<sup>39</sup> This provision is no longer applicable and has no bearing on the admissibility of BCE following the reforms in the Criminal Justice Act 2003.

<sup>40</sup> HL Deb vol 652 col 1103 (18<sup>th</sup> September 2003).

<sup>41</sup> *ibid.*

<sup>42</sup> s108(2) CJA 2003: In proceedings for an offence committed or alleged to have been committed by the defendant when aged 21 or over, evidence of his conviction for an offence when under the age of 14 is not admissible unless— (a) both of the offences are triable only on indictment, and (b) the court is satisfied that the interests of justice require the evidence to be admissible.

<sup>43</sup> [2008] EWCA Crim 1850.

<sup>44</sup> *ibid* [17]

the danger inherent in allowing a jury to infer that D (aged 38) had a propensity towards sexual activity with children on the basis of behaviours when D was aged 14.<sup>45</sup> Further in *R v Hickinbottom*<sup>46</sup> it emerged on appeal that s108 could have been applicable, but the Court stated that this would not have altered the decision<sup>47</sup> – which begs the question of what exactly s108 CJA 2003 can realistically achieve as a safeguard, especially when defined in such an inaccessible way.

The Court of Appeal in *B (Richard William)* further recognise that ‘when [s]108 was inserted into the Bill and approved, it was not realised that the bad character provisions under gateway (d) could include misconduct which had not led to a conviction’.<sup>48</sup> The literal wording of the provision suggests that only behaviour amounting to the commission of an offence is relevant BCE for s108 purposes. It was accepted in *B* that

‘when a judge is asked to admit evidence of the defendant’s misconduct which is alleged to have occurred at a time when the defendant was under the age of 14, judges should apply the principles in section 108(2). If that were not the case, the prosecution would not be able to rely upon a conviction because of section 108(2), but could rely on the conduct which led up to that conviction’.<sup>49</sup>

Sadly the suggestion of the Court of Appeal in *B*, that s108 CJA 2003 be purposively interpreted so as to include the wider concept of ‘misconduct’,<sup>50</sup> appears to have been largely ignored. The court in *M* do not consider s108 at all, for example, which underlines how illusive the scope of s108 CJA 2003 is. The restrictions in s108(2) CJA 2003 do not seem to limit admission sufficiently due to how narrowly the provision has been drawn. This trend is

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<sup>45</sup> The court instead excluded under s101(3) CJA 2003, see [16]. Sadly, this kind of recognition is not routine in the available s108 CJA 2003 case law.

<sup>46</sup> [2012] EWCA Crim 783.

<sup>47</sup> *ibid* [56].

<sup>48</sup> [2008] EWCA Crim 1850 [12].

<sup>49</sup> *ibid*.

<sup>50</sup> as defined in s112 CJA 2003: misconduct” means the commission of an offence or other reprehensible behaviour

particularly evident in the recent cases of *R v Clarke (Lucy)*<sup>51</sup> and *R v Valencia (Bryan Fabrisio)*.<sup>52</sup>

In the case of *Clarke* D was unanimously convicted of assault occasioning Actual Bodily Harm during a retrial in which the judge departed from an earlier denial of BCE applications (at the first trial) and admitted all previous convictions under gateways (d) and (g),<sup>53</sup> holding that no fairness issues ensued that would engage s101(3) CJA 2003.<sup>54</sup> Defence counsel acknowledged gateway (g) may have been engaged due to D arguing self-defence but said the passage of time between the present offence and D's previous convictions made the admission of her BCE unfair and merely served to bolster a weak case. With respect to gateway (d), counsel argued that the circumstances of the offending (D was very young, aged 10/11, and in care at the time) prevented the BCE from being capable of demonstrating propensity, despite the size of her antecedent history. The gap in time (almost 10 years) between offending reinforced this and demonstrated a willingness to cease offending behaviours. The Judge in the second trial 'would have none of it' and held that the BCE must be admitted to prevent the jury from considering D and the complainant on an equal footing.<sup>55</sup> Unfortunately for the D in *Clarke*, she was aged 20 when charged as opposed to 21 and the court took a strict approach to this during retrial, despite defence counsel arguing that the existence of s108, even where its aims are somewhat elusive, demonstrates that Parliament placed significance on preventing the admission of D's juvenile BCE. The Court of Appeal dismissed the appeal, holding that judges did need to consider carefully and sensitively whether it would be appropriate to admit behaviours taking place before D attained 14 years of age, but the judge during the retrial bore this well in mind. On a holistic viewing, the totality of the offending demonstrated a propensity

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<sup>51</sup> [2014] EWCA Crim 1053.

<sup>52</sup> [2015] EWCA Crim 857.

<sup>53</sup> Section 101(1)(g) allows for admission of BCE where the defendant has made an attack on another person's character.

<sup>54</sup> *Clarke* (n 44) [7] - [15].

<sup>55</sup> *Clarke* (n 44) [15].

towards gratuitous violence that should not, according to the appellate court, be displaced by the fact that the incidents occurred when D was a young child, therefore the judge was held to have pursued a line of reasoning that was entirely proper.<sup>56</sup>

In *Valencia*, D's age again made s108 inapplicable, and the Court of Appeal observed that there is no:

'[R]oom for a near miss, as [per] the case of *Clarke*... However, counsel sought to extrapolate from the provisions of section 108, and to persuade us that it was wrong because of this appellant's age for the judge to have admitted his previous convictions. We are not persuaded by this point... [Parliament] legislated in a relatively limited way regarding convictions where a person over 21 was under 14 at the time of conviction, the very nature of those limitations tends to show that there is no inherent unfairness in circumstances such as these'.<sup>57</sup>

The court went on to observe that they were satisfied that the judge was sensitive to the need for careful consideration when admitting BCE of a person over 21, who was aged 14 at the time of the BCE and admission of the evidence was not unfair.<sup>58</sup> *Valencia* appears to suggest that because the age limits are couched in statute, they cannot be deemed unfair – which is not the case. Whilst one must be reticent when drawing inferences based on a limited number of cases, the common law to date evidences an undeniable emphasis on the literal wording of the provision, and a willingness to admit (and countenance admission on appeal) juvenile BCE provided the judge is mindful of the sensitivities surrounding admission of this evidence, especially where this is coupled with what the Court of Appeal considers to be a careful direction to the jury. The narrowly defined age limits mean that this provision does little to protect an adult defendant from admission of their behaviour committed before they could

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<sup>56</sup> *Clarke* (n 44) [20].

<sup>57</sup> *Valencia* (n 45) [19].

<sup>58</sup> *Valencia* (n 45) [19] and [20]

fairly be said to have developed any kind of definite understanding of their criminal responsibility.

### ***M* and the admission of BCE**

The Court of Appeal in *M* held that the BCE was properly admitted.<sup>59</sup> Furthermore, even though the unproven incidents occurred prior to the defendant's 14<sup>th</sup> birthday, the court held that the BCE did not constitute a criminal charge and so there was no need to provide a direction on the presumption of *doli incapax* with respect to this conduct.<sup>60</sup> The Court of Appeal in *M* considered the previous case of *R v H*.<sup>61</sup> In *H*, a case similarly involving historical sexual abuse, the Court of Appeal stated that:

‘It was essential that the jury should know - and the judge should only have ruled in this way - what happened in the years immediately preceding the attainment of the appellant's fourteenth birthday. It would have been wholly artificial and unsatisfactory if the evidence before the jury had commenced with the appellant's fourteenth birthday’.<sup>62</sup>

This passage was reproduced in *M*, the Court of Appeal noting that: ‘In [*H*] what was required was that the recorder should properly direct the jury that they must be sure that the two incidents occurred and, if they were, how the incidents might help them decide whether the defendant had committed the indicted offences’.<sup>63</sup> This is reminiscent of other case law in which admission of unproven (non-conviction) BCE has been rationalised by virtue of a jury direction requiring the prosecution to have proven the separate incidents of BCE so that the jury are sure.

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<sup>59</sup> this is not in dispute here necessarily; the authors take issue with the next point – i.e. that the presumption of *doli incapax* was held to be inapplicable where BCE is at play and the incidents pre-dated the D's 14<sup>th</sup> birthday.

<sup>60</sup> *M* [2016] EWCA Crim 674 [17].

<sup>61</sup> [2010] EWCA Crim 312.

<sup>62</sup> *ibid* [45]

<sup>63</sup> [2016] EWCA Crim 674 [21]. See also, [17]-[20]. These decisions are confirmed in the later case of *R v PF*.



As will be demonstrated, this is neither reliable, nor sufficient to avoid the dangers of denying the application of the presumption of *doli incapax* in *M*.

Section 74(3) PACE 1984 states that where the previous conviction of a defendant is admitted into the trial as evidence he/she committed that offence, it will be assumed that he/she did so unless the contrary can be proven. However, where, as in the case of *M*, evidence that has not been proven at trial ('non-conviction' or 'unproven' BCE) is admitted this is regulated by common law. In *R v Lowe*<sup>64</sup> the court provided guidance regarding what must be covered in the jury direction where BCE takes the form of evidence other than previous convictions. Their Lordships dictated that the judge should identify the incidents in question for the jury and direct that they only use the BCE in their deliberation processes if they consider that the prosecution proved those incidents to them beyond a reasonable doubt. Any doubt will prohibit them from attributing any significance to the incident, and regardless they should be cautionary in their approach and not afford more weight than the evidence deserves. The court even went so far as to state that the jury should receive direction as to the potential significance of an incident or incidents that had been proved.<sup>65</sup> *Lowe* is cited with approval in later case law,<sup>66</sup> however, the Supreme Court case of *R v Mitchell*<sup>67</sup> suggests the potential for a turn in the tide. In this case, the Supreme Court agreed with the Northern Ireland Court of Appeal wherein the conviction of the defendant had been quashed and a retrial ordered on the basis of an insufficient direction to the jury on the admissible propensity evidence. The Supreme Court stated that the conviction was unsafe, but that the issue for the jury was not whether the incidents happened, but was in fact whether '[the jury] are sure that the propensity has been

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<sup>64</sup> [2007] EWCA Crim 3047. See also *R v Lafayette* [2008] EWCA Crim 3238; [2009] Crim LR 809, *Ngyuen* [2008] EWCA Crim 585.

<sup>65</sup> *Lowe* [21].

<sup>66</sup> See for example, *R v Stewart* [2016] EWCA Crim 447, *R v Awoyemi* [2016] 4 WLR 114 and *R v B(E)* [2017] EWCA Crim 35.

<sup>67</sup> [2016] UKSC 55. See further, E Engleby, M Stockdale, 'Non-Conviction Bad Character Evidence and Directions to the Jury on Use to Show Propensity: *R v Mitchell* [2015] NICA 34 (CA); [2016] UKSC 55; [2016] 3 W.L.R. 1405 (SC)' (2017) 81(2) *Journal of Criminal Law* 94.

proved'.<sup>68</sup> Consequently, where there are several instances of misconduct which are capable of showing a relevant propensity it is unnecessary for the jury to be convinced that each one occurred individually, instead they should adopt a more holistic viewpoint.<sup>69</sup> The Supreme Court did recognise that it was important that the judge still reiterate that propensity evidence 'must not be regarded as a satisfactory substitute for direct evidence of the accused's involvement in the crime charged'.<sup>70</sup> This suggests that unless only one incident of non-conviction BCE is involved, it may no longer be required that the incidents be proven for the jury to be able to take them into account as highlighting a relevant propensity.

The Court of Appeal in *M*, relying on *H*, stated that provided the jury is directed that they must be sure the incidents occurred, evidence of 'non-conviction' BCE was safely admitted and the presumption of *doli incapax* did not apply. This leaves only the fairness-based safeguards in the CJA 2003 and PACE 1984 some of which can only apply with respect to particular gateways. This is iterated as a justification for the non-application of the presumption of *doli incapax*, but what the above case analysis demonstrates is that this is unreliable as a counterfoil to any unfairness inherent in the decision not to apply the presumption of *doli incapax* to the BCE itself and as such are a poor substitute when compared to a finding of incapacity as regards criminal capability/responsibility.

### **The (Retrospective) Importance of the Presumption of *Doli Incapax*: Protecting Troubled Young People**

BCE, whilst probative in some situations, is not necessarily a solid predictive base. There have been intense and persistent debates surrounding the stability of 'character' and 'personality'

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<sup>68</sup> [2016] UKSC 55 [43].

<sup>69</sup> *Mitchell* [43].

<sup>70</sup> *Mitchell* [45]

and the extent to which situational factors influence the consistency or predictability of a person's behaviours for a long time. Using BCE is usually geared towards the enablement of a predictive exercise, but if we cannot say with certainty that the character of adults is stable enough across situational variants to serve as a predictive base, this raises questions regarding whether we should be using the behaviour of children of less than 14 years old in the same way, especially where these behaviours are put to the fact finder as 'non-conviction' propensity evidence and therefore have not previously been established beyond a reasonable doubt during a criminal trial, as was the case in *M*. As Kupperman observed, 'character traits are propensities to behave in certain ways... a person can have a propensity to behave in a certain way if given suitable opportunity, even if suitable opportunities hardly ever arise'.<sup>71</sup> This speaks to an ongoing debate based in social psychology regarding the influence of personality or of situation on a person's likelihood to behave in a particular way. Social psychologists have achieved something of a consensus on an approach based in interactionism, recognising that both the person and their circumstances can have an effect on behavioural tendencies.<sup>72</sup>

'The relation between character and actions, however, is much more complicated... Part of the reason is that to have a character trait *X* is to have a propensity to do things of sort *X* and does not require that one constantly, on every occasion, do things of sort *X*...it does not even require that one usually or often do them'.<sup>73</sup>

The extent to which personality or situation influences behaviour is difficult to quantify and it is almost impossible to say with certainty which will be the most prevalent, however, 'while we cannot say that *S* is aggressive *tout court*, we can say that *S* tends to be aggressive if he

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<sup>71</sup> JL Kupperman *Character* (Oxford, 1991), 15.

<sup>72</sup> M Redmayne *Character in the Criminal Trial* (Oxford, 2015), 12-13. For further discussion on Trait Theory, Situationist theories and Interactionism, see CH Rose 'Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules' (2006) 36 *New Mexico Law Review* 341.

<sup>73</sup> Kupperman (n 75) 59.

finds himself in situation X', and further 'recidivism is a brute fact of criminology'.<sup>74</sup> Redmayne recognises that whilst recidivist statistics offer no more than useful general lessons, making behavioural predictions difficult,<sup>75</sup> they do demonstrate that prior offending behaviours can make a person comparatively more likely to be guilty than someone who has not exhibited such behaviours, or the remainder of the general population.<sup>76</sup> This is known as a comparative propensity to offend and can even increase or decrease depending on the type of offence at hand. For example, when collating recidivist statistics based on long term studies, Redmayne notes that whilst sexual offending occurs less frequently than theft, the 'hazard rate' for sexual offences declines more slowly than for theft offences, and therefore a sex offender maintains their comparative propensity (likelihood of reoffence) for longer than a thief.<sup>77</sup> This is even more prevalent where the previous conviction is recent.<sup>78</sup> However, a note of caution is needed here, the inductive reasoning processes that underpin an inference of a propensity towards sexual offending requires an acceptance of the proposition that 'people who have sexually assaulted children in the past are likely to continue to do so'.<sup>79</sup> Whilst some of the recidivist statistics collated by Redmayne might point to this being a reliable assertion, Redmayne recognised the dangers of making generalised statements based on these. Some social science studies evaluating desistance and the significance of childhood risk factors can paint a different picture to that described above. Although a high percentage of adults who sexually offend began offending as young people,<sup>80</sup> many studies suggest that most children and young people

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<sup>74</sup> Redmayne (n 79) 12-14. However, see further MA Méndez 'The Law of Evidence and the Search for a Stable Personality' (1996) 45 *Emory Law Journal* 221 who recognises that the effects of situational variance can have significant effects on behaviour, and a person's perceptions of a situation are dependant upon a number of factors (Cognitive Affective Theory of Personality, page 232 onwards) – both of which might potentially diminish the predictive capability of BCE.

<sup>75</sup> Redmayne (n 79) 32.

<sup>76</sup> Hereafter referred to as 'comparative propensity', Redmayne (n 79) 15.

<sup>77</sup> Redmayne (n 79) 27.

<sup>78</sup> *ibid* 29.

<sup>79</sup> AE Acorn 'Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense' (1991) 11(1) *Oxford Journal of Legal Studies* 63, 87.

<sup>80</sup> P Tidmarsh 'Young men, sexuality and sexual offending (risk management and public education)' in M James (ed.) *Paedophilia: policy and prevention* (Canberra, 1997).

who commit sexual offences in their adolescence do not then carry on sexually offending in adulthood.

A study of 498 Netherland young sexual offenders, with a mean age of 14.4 years, and who had been convicted or confessed to a sexual offence, found that for 89.6% of the sample, sexual offending peaked at age 14 before declining to nearly zero by age 20.<sup>81</sup> Vandiver, in a study of 300 registered male sex offenders who were juveniles at the time of their initial arrest for a sex offence, explains how non-sexual offences are predominate in recidivism among juvenile sex offenders. The sample were followed through for up to six years after they reached adulthood and, while more than half of the participants were arrested at least once for a nonsexual offense during this adult period, only 13 (4%) were rearrested for a sex offense.<sup>82</sup> Research in the US has found that although a small number of sex-offending youth are at elevated risk to progress to adult sex offences, a large majority (about 85–95%) of sex-offending youth have no arrests or reports for future sex crimes. When previously sex-offending youth do have future arrests, they are far more likely to be for nonsexual crimes such as property or drug offenses than for sex crimes.<sup>83</sup> More recently, Janes found that contrary to popular opinion and regardless of the formal disposal, recidivism studies of those who committed sexual offences as children have concluded that child sex offenders are likely to desist in adulthood.<sup>84</sup>

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<sup>81</sup> P Lussier, C van den Berg, C Bijleveld, & J Hendriks, 'A developmental taxonomy of juvenile sex offenders for theory, research and prevention: The adolescent-limited and the high-rate slow desister' (2012) 39 *Criminal Justice and Behavior* 1559.

<sup>82</sup> DM Vandiver 'A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults' (2006) 21(5) *Journal of Interpersonal Violence* 673; Also, C Hargreaves, B Francis 'The long term recidivism risk of young sexual offenders in England and Wales— enduring risk or redemption?' (2014) 42 *Journal of Criminal Justice* 164.

<sup>83</sup> MF Caldwell 'What we do not know about juvenile sexual reoffense risk' (2002) 7(4) *Child Maltreatment* 291; LR Reitzel and JL Carbonell 'The effectiveness of sexual offender treatment for juveniles as measured by recidivism: A metaanalysis' (2007) 18 *Sexual Abuse: A Journal of Research and Treatment* 401; D Finkelhor, R Ormrod, M Chaffin 'Juveniles who commit sex offences against minors' (2009) *Juvenile Justice Bulletin* 1.

<sup>84</sup> L Janes 'Is criminalising children's sexual behaviour counterproductive?' (2016) 28(3) *Child and Family Law Quarterly* 239. Also R Beckett, 'Risk prediction, decision making and evaluation of adolescent sexual abusers', in M Erooga and H Masson (eds), *Children and Young People Who Sexually Abuse Others: Current Developments and Practice Responses* (London, 2006), at 233; C Hargreaves and B Francis, 'The long term

Research conducted over the past 30 years, in the USA and UK, has documented that young people who engage in sexually abusive behaviour are often characterised as having a number of psychosocial problems and social skills deficits, often being socially isolated, lacking intimacy skills and sexual knowledge, and experiencing high levels of social anxiety.<sup>85</sup> As with adult male sexual offenders, relatively high numbers of young male sexual abusers (up to 60%) report having been victims of sexual abuse themselves.<sup>86</sup> The families of such young people may also have a number of difficulties in terms of their stability and intra-familial dynamics. For example Burton et al.'s study of 287 sexually aggressive children aged 12 years and under, found that in 70% of the families at least one parent was chemically dependent, 48% had at least one parent known to have been sexually abused and 72% of the children were sexually abused themselves.<sup>87</sup> Lane and Lobanov-Rostovsky worked with 100 young people under 12 years of age who displayed sexually aggressive behaviour, 66% of the children had a history of sexual, psychiatric or emotional victimisation or abandonment experiences and 33% exhibited psychiatric, learning or medical problems.<sup>88</sup> This research tells us that the majority of children who engage in sexual offending live in families with poor emotional, physical and sexual boundaries and have generally observed domestic violence. Their role models are their

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recidivism risk of young sexual offenders in England and Wales - enduring risk or redemption?' (2014) 42 *Journal of Criminal Justice* 164.

<sup>85</sup> G. Awad, & EB Saunders 'Male adolescent sexual assaulters' (1989) 6 *Journal of Interpersonal Violence*, 6, 446; M Erooga and H Masson 'Children and young people with sexually harmful or abusive behaviours: underpinning knowledge, principles, approaches and service provision' in M Erooga and H Masson *Children and young people who sexually abuse others: current developments and practice responses* (London, 2006), at 3-17; S Smallbone 'Attachment insecurity as a predisposing and precipitating factor for sexually abusive behaviour by young people', in M Calder (ed.) *Children and Young People who sexually abuse. New Theory, Research and Practice Developments* (Lyme Regis, 2005).

<sup>86</sup> T Cavanagh-Johnson, 'Child perpetrators – children who molest other children: Preliminary findings' (1988) 12 *Journal of Child Abuse & Neglect* 219; D O'Callaghan, B Print (1994) 'Adolescent sexual abusers: research, assessment and treatment' in T Morrisson, M Erooga and RC Beckett (eds.) *Sexual offending against children: assessment and treatment of male offenders* (London: Routledge, 1994).

<sup>87</sup> DL Burton, AA Nesmith, L Badten 'Clinicians views on sexually aggressive children and their families: a theoretical exploration' (1997) 21(2) *Child Abuse and Neglect* 157.

<sup>88</sup> S. Lane, C Lobanov-Rostovsky 'Special populations: children, females, the developmentally disabled and violent youth' in G Ryan and S Lane *Juvenile Sexual Offending: Causes, Consequences and Corrections* (San Francisco, 1997).

parents' whose lives are generally fraught with marital break-ups, a history of abuse, incarcerations, drug and alcohol addiction and overall poor social and emotional adjustment. These children's caretakers provide coercive and aggressive role models.<sup>89</sup>

The approach in *M* marginalises the important welfare principle imposed by section 44 of the Children and Young Persons Act 1933 which requires every court to have regard to the welfare of a child who is brought before it, either as an offender or otherwise. The main virtue of section 33 is that it requires a decision made with respect to a child to be justified from the point of view of a judgment about the child's interests, objective immaturity, vulnerability and comparative lack of control over their immediate surroundings. In *R v Durham Constabulary*<sup>90</sup> Baroness Hale noted that the principles enshrined in section 44 of the 1933 Act are also reflected in Article 3(1) of the UN Convention which confers on a child a right to have his or her best interests treated as a primary consideration in all court actions involving them. Baroness Hale cited section 44(1) of the Children and Young Persons Act 1933 and Article 3 of the Convention on the Rights of the Child in support of the proposition that the first objective of the youth justice system is the promotion of the well-being of the child, including an adult such as *M* who is having to account for behaviour engaged in as a child. The primary importance of Article 3 is in making children's interests visible and giving them force in decision-making processes.<sup>91</sup> As such, Article 3 represents a radical transformation in giving effect to children's interests and capacities and the idea that all children need protection, including those who may have engaged in sexual offending behaviour.<sup>92</sup> In *S & Marper v UK*<sup>93</sup>

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<sup>89</sup> TC Johnson, R Doonan (2005) 'Children with sexual behaviour problems: what have we learned in the last two decades?' in M Calder (ed.) *Children and Young People who sexually abuse. New Theory, Research and Practice Developments* (Lyme Regis: Russell House Publishing, 2005), 32-58.

<sup>90</sup> [2005] UKHL 21.

<sup>91</sup> R Taylor 'Putting children first? Children's interests as a primary consideration in public law' (2016) 28(1) *Child and Family Law Quarterly* 45.

<sup>92</sup> F Earls, 'Children: From Rights to Citizenship' (2011) 633(1) *The ANNALS of the American Academy of Political and Social Science* 6.

<sup>93</sup> (2009) 48 EHRR 50, 124.

the European Court of Human Rights referred to the UNCRC and commented upon the importance of treating young people differently from adults with regard to the criminal justice system ‘given their special situation and the importance of their development and integration in society’. In *V and T v UK*<sup>94</sup> Lord Reed held in the European Court of Human Rights that ‘Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood’.<sup>95</sup> This case involved Jon Venables and Robert Thompson, two boys convicted of murdering toddler James Bulger in 1993. The US Supreme Court decision in *Roper v Simmons*<sup>96</sup> which declared the juvenile death penalty unconstitutional also accepted and reaffirmed the presumption of the diminished responsibility of youth. The US Supreme Court ruled that young peoples’ objective immaturity, vulnerability and comparative lack of control over their immediate surroundings renders them less culpable than adult criminals. Similarly in *R v G*<sup>97</sup> Lord Steyn believed that the United Nations Convention 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.<sup>98</sup> Lord Steyn emphasised that ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society.<sup>99</sup> In *Camplin*<sup>100</sup> Lord Diplock expressly acknowledged that the law must make allowances for youthful immaturity rather than insisting on the impossible, that the young person must at all times demonstrate the same standard of self-control as an adult.

The welfarist and paternalist approach of the 1933 Act, and Article 3 of the UNCRC, must be read in conjunction with section 37 of the Crime and Disorder Act 1998 which

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<sup>94</sup> (2000) 3 EHRR 121.

<sup>95</sup> Ibid.

<sup>96</sup> (2005) 543 US 551

<sup>97</sup> [2003] UKHL 50, [2004] 1 AC 1034.

<sup>98</sup> [2003] UKHL 50, para [53]

<sup>99</sup> [2003] UKHL 50, para [53]

<sup>100</sup> *Camplin* [1978] AC 705, 717



establishes preventing offending by children and young people as the principal aim of the youth justice system and places all those working in the youth justice system under a duty to have regard to that aim in carrying out their duties. The Crime and Disorder Act 1998 gives no direction to the courts or anyone else working in the youth justice system that the child's welfare should also be of primary consideration. Consequently the primary duty of those involved, including the police, is to prevent offending and not necessarily to promote the child's best interests. In *No More Excuses* New Labour stressed that it did not see any conflict between protecting the welfare of the young offender and preventing that individual from offending again because 'preventing offending promotes the welfare of the individual young offender and protects the public'.<sup>101</sup> However this is not a view necessarily shared by the courts. In the case of *R v Inner London Crown Court, ex p N. and S.*<sup>102</sup> 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 despite the government's assurances in *No More Excuses* to protect the welfare of young people who engage in offending behaviour, section 37 of the 1998 Act allows for the imposition of 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.

Focussing on prevention of youth offending allows the law (for example, section 34 of the Crime and Disorder Act) and the courts (as in *R v M*) to respond to childhood criminality in a retributive way by focussing on the moral culpability of the young person accused of sexual offending. Goldson and Muncie have characterised these processes as 'adulteration'<sup>103</sup> or

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<sup>101</sup> Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (London, 1997), para 2.2.

<sup>102</sup> [2001] 1 Cr. App. R. 343

<sup>103</sup> J Muncie and B Goldson, B 'States of transition: convergence in international youth justice' in J Muncie and B Goldson (eds,) *Comparative youth justice* (Sage, 2006)

‘adulteration’,<sup>104</sup> which means that children are increasingly being treated in ways usually reserved for competent adults. This process of ‘adulteration’ of young people in trouble with the law, which Goldson characterises as a ‘mutation of justice’,<sup>105</sup> underpins the rationale for abolishing the presumption of *doli incapax* – the presumption was considered to be ‘contrary to common sense’, ‘not in the interests of justice, or victims or of the young people themselves’;<sup>106</sup> and ‘the child is, and must be, capable of being held to account’.<sup>107</sup> The presumption was ‘wholly out of date’<sup>108</sup> as it allowed young offenders ‘to run rings around the court system, and to avoid proper sanctions’.<sup>109</sup> Accordingly society must stop making excuses for youth crime and children must bear an increasing responsibility for their actions.<sup>110</sup> Similarly the judiciary criticised the presumption of *doli incapax* as being ‘in principle objectionable and disturbing’,<sup>111</sup> ‘nonsensical’ and ‘as capable of giving rise to the risk of injustice’;<sup>112</sup> and that it could ‘lead to results inconsistent with common sense’.<sup>113</sup>

The ‘adulteration’ of young people in conflict with the law and the desire to force young people to accept responsibility for their actions is also evident in other aspects of the English criminal justice system. For example, this focus on predicting the risk of the young person engaging in future offending behaviour is also evident in the English criminal justice system’s approach to creating and disclosing youth criminal records. A spent childhood conviction will be removed from the Disclosure and Barring Service basic (or enhanced) certificate if 66

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<sup>104</sup> B Goldson ‘Difficult to understand or defend a reasoned case for raising the age of criminal responsibility’ (2009) 48(5) *Howard Journal for Criminal Justice* 514

<sup>105</sup> B Goldson ‘Unsafe, Unjust and Harmful to Wider Society: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales’ (2013) 13(2) *Youth Justice* 126

<sup>106</sup> Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (The Stationery Office, 1997), [4.4].

<sup>107</sup> *Ibid.*

<sup>108</sup> *Hansard, Lords Debates* vol 585, col 1323 (12 February 1998), per Lord Williams of Mostyn

<sup>109</sup> *Hansard, HC Deb*, vol 294 col 390 (19 May 1997), per Jack Straw

<sup>110</sup> Home Office *No more excuses: A new approach to tackling youth crime in England and Wales* (The Stationery Office, 1997)

<sup>111</sup> *C (A Minor) v Director of Public Prosecutions* [1994] 3 All ER 190, per Laws J 197

<sup>112</sup> *Ibid.* 198

<sup>113</sup> *A v Director of Public Prosecutions* [1992] Crim LR 34, per Bingham LJ

months have elapsed since the date of the conviction; and it is the person's only offence; and it did not result in a custodial sentence; and it does not appear on the list of "exempt offences" which will never be removed from a certificate. Exempt offences include sexual offences. Also, even where no arrest takes place, any investigation by the police will be logged and details of the individuals involved and the nature of the allegations will be recorded on the police intelligence database.<sup>114</sup> This intelligence can include non-conviction information such as reports to the police and is held for a minimum of 6 years and can be retained until the subject's 100<sup>th</sup> birthday.<sup>115</sup> The existence of a recorded investigation without any discretion for the police to delete that record could have a significant and disproportionate impact on a child's future access to education, employment, travel, insurance and housing.<sup>116</sup>

If the court in *R v M* were focussing on the rights, vulnerability, welfare and best interests of the accused as a young person, then this would have required a consideration of the obligation of the state to provide a fair trial in which all available defences are carefully considered. Lord Justice Scott Baker in *R (TP) v West London Youth Court*<sup>117</sup> held that the minimum requirements of a fair trial include, amongst other issues, that the court is satisfied that the accused had the means of knowing that their actions were wrong. This ruling reaffirms the requirement under Article 40 of the UNCRC that criminal proceedings should consider whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for their behaviour. This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system. On a practical level it was questionable how much protection the presumption provided to young people as it was rarely used due to the high proportion of guilty pleas by young

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<sup>114</sup> Home Office *Home Office Counting Rules for Recorded Crime: Crime Recording General Rules* (London: Home Office, 2017).

<sup>115</sup> The power for police to keep records on the Police National Database is contained in the National Police Records (Recordable Offences) Regulations 2000, [SI No 2000/1139](#).

<sup>116</sup> R Arthur 'Consensual Teenage Sexting and Youth Criminal Records' (2018) 5 *Criminal Law Review* 381-387

<sup>117</sup> [2005] EWHC 2583 (Admin).

people.<sup>118</sup> When used, the presumption was easily rebutted as evidence that the child understood the act was seriously wrong could be inferred from the surrounding circumstances of the offending or evidence that the child was of normal mental capacity for their age.<sup>119</sup> For example, if the surrounding circumstances were sufficient for the court to conclude that the defendant knew what he was doing was seriously wrong then the presumption of *doli incapax* had been rebutted. It was only in exceptional cases that expert evidence would be required.<sup>120</sup> Lord Lowry in *CC (Minor) v DPP*<sup>121</sup> stated that in practice the courts ‘often treat the rebuttal of the presumption as a formality’. Nevertheless the immediate impact of abolition of the presumption was striking: in 1999, the number of 10-14 year olds criminalised for indictable offences was 29% higher than it had been in the year prior to implementation, and actually fell by 2% for older children.<sup>122</sup>

Criminal liability should only be imposed when an evidence-based approach which considers all of the circumstances of the child’s life and the offending concludes that the child had sufficient mental capacity, competence and maturity to understand the nature of their conduct and exercise volition over their behaviour. *R v M* is exactly the type of situation in which the presumption of *doli incapax* could have acted as a safeguard. In *M* the court held the BCE to be admissible under two separate gateways, and allowed for its use to demonstrate a propensity on the part of D to sexually assault, or groom his younger sibling C. The misconduct forming the BCE is admitted merely as evidence of a proclivity towards specific offending behaviours rather than constituting a charge *because* to make it a charge would have attracted

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<sup>118</sup> For example in 1995 81% of young people pleaded guilty in magistrates courts (Home Office, *Criminal Statistics for England and Wales 1995* (The Stationery Office, 1996). Also Audit Commission *Misspent Youth: Young People and Crime* (Audit Commission, 1996).

<sup>119</sup> T Crofts ‘Rebutting the presumption of *doli incapax*’, (1998) 62(2) *Journal of Criminal Law* 185; E Stokes, ‘Abolishing the Presumption of *Doli Incapax*: Reflections on the Death of a Doctrine’ in J Pickford (ed), *Youth Justice: Theory and Practice* (London: Cavendish, 2000), 57-58.

<sup>120</sup> *L and others v DPP* [1996] 2 Cr App R 501

<sup>121</sup> (1996) 1 CR APP 375, 382

<sup>122</sup> Home Office *Criminal statistics: England and Wales 2000*. (The Stationery Office, 2001).

the application of the presumption of *doli incapax*. To infer guilt, and deny the applicability of the presumption of *doli incapax* on the basis of a lack of a direct charge demonstrates a harsh blindness to M's status as a child when the behaviour occurred. The denial of the presumption of *doli incapax* in *M*, when viewed in light of the above considerations, suggests that there may be an ongoing shift in emphasis; the courts are now less concerned with childhood capacity to offend and/or carry criminal responsibility and the importance is now squarely placed on the consistency of offending behaviours. This represents a worrying shift in focus from whether the defendant appreciated the wrongfulness of his conduct to whether this defendant is the kind of person that would, or is likely to, commit serious sexual offences.

The judgment in *R v M* is needlessly divisive and encourages highly contestable judgments about individuality, identity, needs and welfare. Had the court in *R v M* required the prosecution to rebut the presumption of *doli incapax* this could potentially have created a space for the court to consider M's developmental capacities, psychological development, maturation, understanding and judgment at the time of the alleged behaviour and locate the behavioural repertoires of M within a holistic socio-economic and familial context. Emphasising such an individualised focus on the child's needs may plausibly result in uncertain and unclear outcomes and disproportionate and indeterminate treatments, in circumstances where if an adult had committed the offences they would have been treated more leniently. However the presumption also underlines the importance of treating young people, including adolescent sex offenders, in developmentally sensitive ways and the need to focus on young people's sexual development and sexual histories and their broad experiences of sex and sexuality, abusive and nonabusive, in order to understand their overall sexual motivations, rather than an approach which focuses primarily on the 'offence'.<sup>123</sup> It must be acknowledged

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<sup>123</sup> S Hackett, J Phillips, H Masson, M Balfe 'Individual, family and abuse characteristics of 700 British child and adolescent sexual abusers' (2013) 22(4) Child Abuse Review 232.

that the complexities surrounding work with young sexual abusers have yet to be fully understood within the broader contextual frameworks relating to the nature of childhood and childhood sexuality.<sup>124</sup> Hackett *et al.*'s UK wide study of experienced practitioners in the field who were asked about the principles and goals of working with young people displaying sexually harmful or abusive behaviour, found high levels of respondent agreement that children and young people who display sexually harmful or abusive behaviour are children first and should not be regarded as mini adult sex offenders.<sup>125</sup> The practitioners recommended that the goal should be for carers to acknowledge what their child has done, believe in and support change and to take on responsibility for changing the context of the family.

## Conclusion

The law must protect any victim who does not consent to sexual activity and children as young as the victim in this case who do not have the capacity to consent. Yet this case forces the court to think about childhood, sexuality and how children are held to account for their behaviour. The misconduct forming the BCE in *R v M* is admitted merely as evidence of a proclivity towards specific offending behaviours rather than constituting a charge *because* to make it a charge would have attracted the application of the presumption of *doli incapax*. Had the prosecution been required to rebut the presumption of *doli incapax* in this case, it may very well have not altered the outcome. However as Gelsthorpe and Morris stated 'the importance of the presumption lay in its symbolism: it was a statement about the nature of childhood, the vulnerability of children and the appropriateness of criminal justice sanctions for children.'<sup>126</sup> Had the prosecution in *M* been required to rebut the presumption of *doli incapax*, this may have

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<sup>124</sup> H Masson, T Morrisson 'Young sexual abusers: conceptual frameworks, issues and imperatives' (1999) 13 *Children & Society* 203.

<sup>125</sup> S Hackett, H Masson, S Phillips *Services for young people who sexually abuse* (London: 2005).

<sup>126</sup> L Gelsthorpe, A Morris 'Much ado about nothing: A critical comment on key provisions relating to children in the Crime and Disorder Act 1998', (1998) 11(3) *Child and Family Law Quarterly* 213

allowed the court to ‘focus on individual capacity and the development of understanding, rather than an arbitrary measure of chronological age’.<sup>127</sup> The presumption would have ensured that criminal liability could only be imposed after some assessment of the mental capacity, competence, autonomy and maturity of the child to prove that the child knew that what they were doing was seriously wrong as opposed to being merely mischievous or naughty. It could have ensured a greater focus on children’s rights, development and justice.

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<sup>127</sup> E Stokes, ‘Abolishing the Presumption of Doli Incapax: Reflections on the Death of a Doctrine’ in J Pickford (ed), *Youth Justice: Theory and Practice* (London: Cavendish, 2000). 54