HOUSE OF LORDS SESSION 2008–09

**[2009] UKHL 20**

*on appeal from:*[2008] EWCA Crim 815

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

## R v JTB (Appellant) (on appeal from the Court of Appeal Criminal Division)

**Appellate Committee**

**Lord Phillips of Worth Matravers**
**Lord Rodger of Earlsferry**
**Lord Carswell**
**Lord Brown of Eaton-under-Heywood**
**Lord Mance**

**Counsel**

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*Respondents*:
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**HOUSE OF LORDS**

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**[2009] UKHL 20**

**LORD PHILLIPS OF WORTH MATRAVERS**

My Lords,

*Introduction*

1. On 4 October 2007 the appellant pleaded guilty at Worcester Crown Court to twelve counts of offences of causing or inciting a child under 13 to engage in sexual activity contrary to section 13(1) of the Sexual Offences Act 2003. The victims of this activity were young boys and the activity included anal penetration with the penis, oral sex and masturbation. At the time of the activity the appellant was 12 years of age. In interview he admitted the activity but said that he had not thought that what he was doing was wrong.

2. The appellant sought to advance, on the basis that he had not known that what he was doing was wrong, a defence that he was *doli incapax*. He sought a preliminary ruling from the trial judge that this defence was open to him. The trial judge ruled that it was not. Upon that ruling the appellant entered the guilty pleas. He appealed unsuccessfully against his conviction to the Court of Appeal on the ground that the judge's ruling was wrong [2008] EWCA Crim 815: [2008] 3 WLR 923; [2008] 2 Cr. App. R 235. He advances the same contention before your Lordships.

*The issue*

3. Until the last century the criminal responsibility of children and young persons was determined by the judges, as a matter of common law. A child of under 7 was incapable of incurring criminal responsibility. This incapacity was described by the Latin phrase *doli incapax*. Between the ages of seven and fourteen a child was presumed to be *doli incapax*. This presumption could be rebutted by proving that a child who had committed an act prohibited by the criminal law knew that he was doing something that was wrong.

4. Parliament intervened by section 50 of the Children and Young Persons Act 1933. This provided:

> "It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence".

The age of eight years was increased to ten by section 16 of the Children and Young Persons Act 1963. Throughout this time the position of a child under the age of 14 years remained governed by common law.

5. Section 34 of the Crime and Disorder Act 1998 ("section 34") provided:

> "**Abolition of rebuttable presumption that a child is doli incapax**
>
> The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished."

6. The issue raised by this appeal is whether the effect of section 34 has been to abolish the defence of *doli incapax* altogether in the case of a child aged between 10 and 14 years or merely to abolish the presumption that the child has that defence, leaving it open to the child to prove that, at the material time, he was *doli incapax*.

7. In concluding the judgment of the Court of Appeal, the Vice-President said that the question of whether section 34 had abolished the defence of *doli incapax* had to be resolved by determining whether or not by 1998 it could properly be said that the concept of *doli incapax* had existence separate from the presumption. He stated that the Court considered that it did not. While I agree with the result reached by the Court of Appeal, I would express my reasoning a little differently. The defence of *doli incapax* and the rebuttable presumption were two different things. In recent times they had, however, always coexisted. It had become customary to speak of "the presumption of *doli incapax*" as embracing both the presumption and the defence. In using the language of section 34 Parliament intended to abolish both the presumption and the defence. While it is not possible to reach this conclusion from the language of section 34 alone, it can be firmly founded once extrinsic aids to interpreting that section are taken into account.

*The meaning of "doli incapax"*

8. Section 34, rather unusually, uses the Latin *doli incapax* in the heading and then, in the section itself, refers to the rebuttable presumption that a child aged 10 or over is "incapable of committing an offence". Incapacity of committing an offence is as good a translation of *doli incapax* as any. What is more significant is the reason for that incapacity in a child. To find that it is necessary to go back in time. Although the origin of the defence is much earlier, I propose to start with the 1778 edition of Hale's History of the Pleas of the Crown, where the defence is considered in volume I, chapter 3 under the heading "Touching the defect of infancy and nonage". There the defence is described as a "privilege of infancy" and is justified on the ground that a child does not have the "discretion to discern between good and evil". The *doli incapax* is contrasted with the *doli capax*, who can "discern between good and evil at the time of the offence committed".

9. More recently, where the question of whether a child was *doli incapax* has arisen, the courts have put a gloss on this test. Thus, in *R v Gorrie* (1918) 83 JP 136 Salter J directed the jury that the prosecution had to satisfy them that when the boy who was accused committed the act charged "he knew that he was doing what was wrong – not merely what was wrong, but what was gravely wrong, seriously wrong". In *JM (A Minor) v Runeckles* (1984) 79 Cr. App.R. 255, when giving the judgment of the Divisional Court, Mann J. said at p. 259:

> "I would respectfully adopt the learned judge's use of the phrase 'seriously wrong'. I regard an act which a child knew to be morally wrong as being but one type of those acts which a child can appreciate to be seriously wrong. I think it is unnecessary to show that the child appreciated that his or her action was morally wrong. It is sufficient that the child appreciated the action was seriously wrong. A court has to look for something beyond mere naughtiness or childish mischief."

*The nature of the "presumption"*

10. The legislation in this field has drawn a distinction between the child under 8, later increased to 10, who is "conclusively presumed" to be incapable of committing a crime and the older child, aged under 14, in respect of whom there is a "rebuttable presumption" that he is not capable of committing an offence. If one goes back to Hale, one finds that the conclusive presumption is described as a "*praesumptio juris*", or a presumption of law, and the rebuttable presumption as a "common presumption".

11. In considering the law as developed after the time of Edward III, Hale distinguished between a number of categories of young persons. He started at p. 25 with the infant above 14 and under 21 years of age:

> "It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments, as well as others of full age; for it is *praesumptio juris*, that after fourteen years they are *doli capaces*, and can discern between good and evil; and if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion. Experience makes us know, that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority, no man's life or estate could be safe".

12. In contrast, the position of a child of under seven was set out at pp. 27-28 as follows:

> "…if an infant within age be *infra aetatem infantiae, viz.* seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear; for *ex praesumptione juris* he cannot have discretion, and no averment shall be received against that presumption".

13. Thus far Hale agrees with other commentaries of the time. So far as children between the ages of 7 and fourteen are concerned, the precise position, as set out by Hale at p. 26, is not agreed by all, although there is common ground that no conclusive or irrebuttable presumption applied. Hale divided this category into two. The position of older children was as follows:

> "An infant under the age of fourteen years and above the age of twelve years is not *prima facie* presumed to be *doli capax*, and therefore regularly for a capital offence committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty. But tho *prima facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death.."

14. The position of the younger children was as follows:

> "…if an infant be above seven years old and under twelve years, (which according to the ancient law was *Aetas pubertati proxima*) and commit a felony, in this case *prima facie* he is to be adjudged not guilty, and to be found so, because he is supposed not of discretion to judge between good and evil; yet even in that case, if it appear by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him."

15. These passages suggest that the common law recognised that the capacity to distinguish between right and wrong was an element of criminal responsibility. There was a conclusive presumption, which

might be described as a rule of law, that children over fourteen were capable of distinguishing between right and wrong. There was another conclusive presumption that children under the age of seven were not so capable. For children between these ages there was a *prima facie* inference, or common presumption, that they were not capable of distinguishing between right and wrong, but this could be rebutted. The younger the child the stronger the inference and the more cogent the evidence or circumstances that were required to rebut it.

16. At the time of Hale there were no rules as to what was required to rebut this inference, or rebuttable presumption as it later came to be described. The circumstances of the offence itself might be enough to show that the defendant knew that he was doing wrong. With time the presumption came to be more rigidly applied. In *R v Smith* (1845) 1 Cox CC 260 Erle J, in a case where a ten year old stood charged with arson of a haystack, directed the jury that the defendant's guilty knowledge had to be proved by evidence and could not be inferred from the mere commission of the act, and this became an established principle of law.

17. The common law thus drew a distinction between the capacity to commit a criminal offence, which required an ability to distinguish between right and wrong, and presumptions, rebuttable or irrebuttable, as to whether or not this capacity existed. The only circumstances where the existence of *doli capax* could be an issue, however, was where the defendant was aged between eight, later ten, years and fourteen years, where the presumption that he was *doli incapax* was rebuttable.

18. The rebuttable presumption of *doli incapax* led to some startling results. In *JBH and JH (Minors) v O'Connell* [1981] Crim LR 632 the defendants, boys aged 13 and 11, broke into a school, stole various items and "used 12 tubes of duplicating ink to redecorate the school". They offered no evidence and submitted that there was no case to answer as the prosecution had not rebutted the presumption that they did not know that they were doing wrong. The magistrates convicted them on the ground that ordinary boys of their ages would have known that they were doing wrong. The Divisional Court quashed the convictions on the ground that the magistrates could not assume that the defendants had the understanding of ordinary boys of their ages. The prosecution should have adduced evidence of this.

19. In *IPH v Chief Constable of South Wales* [1987] Crim L.R. 42 the defendant, aged 11, joined with other boys in smashing the windows of

a motor van, scraping its paintwork and pushing it into a post. The Divisional Court quashed his conviction for malicious damage on the ground that there had been no evidence before the Magistrates that he knew that what he was doing was wrong.

*The mischief*

20. These two cases demonstrated that the rebuttable presumption of *doli incapax* was an anachronism. Children in the 20th Century had to go to school where they were, or were supposed to be, taught the difference between right and wrong. In the case of some offences it beggared belief to suggest that young defendants might not have appreciated that what they were doing was seriously wrong. The presumption was the subject of adverse judicial comment. In *A v Director of Public Prosecutions* [1992] Crim L.R. 34 the defendant, a boy of 11, was convicted of an offence under the Public Order Act 1986, on evidence that he had thrown bricks at a police vehicle. He had then fled the scene. The Divisional Court felt bound to quash the conviction. The fact that the defendant had run away might have indicated no more than that he thought that he had been naughty rather than done something that was seriously wrong. Bingham LJ concurred in the result only with considerable reluctance, commenting

> "…children have the benefit of the presumption which in this case and some others seems to me to lead to results inconsistent with common sense."

21. That comment was directed more to the presumption than to the defence of *doli incapax*. Nearly forty years earlier, however, Professor Glanville Williams had suggested that there was reason to question the continued existence of the defence itself. In an article on the Criminal Responsibility of Children [1954] Crim LR 493 he said, at pp 495-496:

> "In this climate of opinion, the 'knowledge of wrong' test no longer makes sense. The test is not needed to enable a child to escape punishment, because comparatively few wayward children are now officially punished. For his first offence a child may be fined or ordered to be detained, but is more likely to be admonished or placed on probation; for a second or subsequent offence, if it is desired to make use of the very restricted forms of punishment available to a juvenile court, it will generally be easy to show that the child knew his act to be illegal. Thus at the present day the

> ‘knowledge of wrong test’ stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent, or the approved school. The paradoxical result is that, the more warped the child’s moral standards, the safer he is from the correctional treatment of the criminal law.”

22. In *C (A Minor) v Director of Public Prosecutions* [1996] 1 AC 1 the Divisional Court, in a judgment delivered by Laws J, purported to abolish the “presumption of *doli incapax*”. The terms in which it did so, however, made it plain that the court intended to abolish not merely the presumption but the defence itself. The defendant, aged 12, was holding the handlebars of a motor cycle while another youth attempted to force the chain and padlock that secured it. Both ran off when the police arrived on the scene. Dismissing his appeal against conviction for attempted theft Laws J remarked at p 9:

> “Whatever may have been the position in an earlier age, when there was no system of universal compulsory education and when, perhaps, children did not grow up as quickly as they do nowadays, this presumption at the present time is a serious disservice to our law. It means that a child over ten who commits an act of obvious dishonesty, or even grave violence, is to be acquitted unless the prosecution specifically prove by discrete evidence that he understands the obliquity of what he is doing. It is unreal and contrary to common sense;”

23. Laws J then added at p 11 a comment that echoed the point made by Professor Glanville Williams:

> “Even that is not the end of it. The rule is divisive and perverse: divisive, because it tends to attach criminal consequences to the acts of children coming from what used to be called good homes more readily than to the acts of others; perverse, because it tends to absolve from criminal responsibility the very children most likely to commit criminal acts. It must surely nowadays be regarded as obvious that, where a morally impoverished upbringing may have led a teenager into crime, the facts of his

> background should go not to his guilt, but to his mitigation; the very emphasis placed in modern penal policy upon the desirability of non-custodial disposals designed to be remedial rather than retributive – especially in the case of young offenders – offers powerful support for the view that delinquents under the age of 14, who may know no better than to commit antisocial and sometimes dangerous crimes, should not be held immune from the criminal justice system, but sensibly managed within it. Otherwise they are left outside the law, free to commit further crime, perhaps of increasing gravity, unchecked by the courts whose very duty it is to bring them to book."

24. The Defendant appealed to this House, and his appeal was allowed. Counsel for the Crown did not go so far as to submit that it would be right to abolish the defence of *doli incapax,* but attacked the presumption. His argument was reported as follows at p. 18:

> "If the facts speak for themselves then it is for the child between the ages of 10 and 14 to prove that he did not know what he did was wrong. In the time of Blackstone, for a defendant under the age of 14 to be convicted, it was necessary that he could 'discern between good and evil:' *Commentaries on the Laws of England*, 1st ed. vol. 4, p. 23. The presumption should be removed and the question of doli incapax raised as a defence. This is an evidential loophole. It is not a change in the substantive criminal law and therefore it is within the powers of this House to make such a change."

25. The House did not accept this submission. In the leading speech Lord Lowry said at p. 37 :

> "Of course, no one could possibly contend (nor did Mr. Henriques try to do so) that this proposal represents what has always been the common law; it would be a change or a "development." It is quite clear that, as the law stands, the Crown must, *as part of the prosecution's case*, show that a child defendant is doli capax before that child can have a case to meet. To call the proposed innovation a merely procedural change greatly understates, in my view,

> its radical nature, which would not be disguised by continuing to impose the persuasive burden of proof upon the prosecution. The change would not merely alter the trial procedure but would in effect get rid of the presumption of doli incapax which must now be rebutted before a child defendant can be called for his defence and the existence of which will in practice often prevent a charge from even being brought. This reflection must be enough to discourage any thought of 'judicial legislation' on the lines proposed."

26. Lord Lowry referred, however, to Professor Glanville Williams' article and suggested that the time had come to re-examine the doctrine of *doli incapax*. Three other members of the Committee urged Parliament to review this area of the law.

*The use of the phrase "presumption of doli incapax".*

27. In *C v DPP* in the Divisional Court Laws J treated the presumption and the defence as part and parcel of a single, and anomalous, rule. He said at p. 10:

> "…the presumption is in principle objectionable. It is no part of the general law that a defendant should be proved to appreciate that his act is 'seriously wrong.' He may even think his crime to be justified; in the ordinary way no such consideration can be prayed in aid in his favour. Yet in a case where the presumption applies, an additional requirement, not insisted upon in the case of an adult, is imposed as a condition of guilt, namely a specific understanding in the mind of the child that his act is seriously wrong. This is out of step with the general law."

28. In this House, Lord Jauncey of Tullichettle spoke of "the presumption" in a context that indicated that he meant by this, not merely the presumption, but also the defence. Thus he commented at p. 20:

> "No such presumption operates in Scotland where normal criminal responsibility attaches to a child over 8 and I do not understand that injustice is considered to have resulted from this situation."

Lord Lowry also, in some passages of his speech, referred to "the presumption" as embracing the defence itself. At p. 26 he remarked that the Government still regarded the presumption as an "effective doctrine". At pp.35 to 36 he said:

> "It has also been said that the rule is divisive because it bears hardly on perhaps isolated acts of wrongdoing done by children from 'good homes,' and also perverse because it absolves children from 'bad homes' who are most likely to commit 'criminal' acts. One answer to this observation (not entirely satisfying, I agree) is that the presumption contemplated the conviction and punishment of children who, possibly by virtue of their superior upbringing, bore moral responsibility for their actions and the exoneration of those who did not."

29. The incoming Labour administration responded swiftly to the adverse comments on the presumption of *doli incapax* made by this House in *C v DPP*. A Home Office Consultation Paper "*Tackling Youth Justice"* was published in September 1997 which, at paragraphs 3 to 18, addressed the defence of *doli incapax.* This advanced the following alternative options for reform:

> "(i) **abolition**
>
> *First*, the presumption could be abolished. This would put a child of, say 12, who was accused of a crime in the same position as one aged 14 to 17. If the offence was one which required a particular criminal intent the prosecution would have to prove beyond reasonable doubt that the necessary intent existed. But they would not separately have to show that the child knew that what he or she was doing was seriously wrong.
>
> (ii) **reversal**
>
> *Second*, the presumption could be reversed. This would mean the court would start with the presumption that a

> child of 10 and over but under 14 was capable of forming criminal intent. But such a child would be acquitted if the defence could prove on the balance of probabilities that he or she did not know that what they were doing was seriously wrong. If such a defence were made, to secure conviction, the prosecution would have to show beyond reasonable doubt that the child did indeed know that the action was seriously wrong."

It is significant that the first option, "the presumption could be abolished", was advanced on the footing that this would abolish not merely the presumption but the defence. The other option, "the presumption could be reversed", retained the defence.

30. The Consultation Paper stated that the Government's preference was to abolish the presumption (and thus the defence). This remained its choice after consultation. In November 1997 the Secretary of State for the Home Department presented to Parliament a White Paper, *"No More Excuses: A new approach to tackling youth crime in England and Wales"*. This made it quite plain that the Government intended to abolish the defence of *doli incapax*, describing the notion as "contrary to common sense". It spoke once again of abolishing the presumption rather than reversing it in terms that made it plain that the former involved abolition of the defence.

31. When the Crime and Disorder Bill passed through Parliament, the same terminology was used in debate to the same effect. During the committee and report stages of the Bill's passage through the House of Lords, Lord Goodhart QC twice moved amendments which were designed to reverse the presumption rather than abolish it: on 12 February 1998 he moved to amend the relevant clause (clause 27) by inserting:

> "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." (Amendment 174: Hansard, House of Lords Debates, 12 February 1998, col 1316).

When moving this amendment Lord Goodhart QC stated:

> "I must say that I think the complete abolition of the doli incapax rule is wholly inappropriate. If the government are not prepared to consider the possibility of raising the age of criminal responsibility, a better solution would be that which is in fact set out in Amendment No 174: that is not to abolish the presumption but in effect to reverse it." (Hansard, House of Lords Debates ,12 February 1998, col 1316).

Lord Williams of Mostyn responded to the proposed amendment on behalf of the Government. In rejecting the proposal he stated:

> "…we consulted widely. We put forward our consultation document 'Tackling Youth Crime'. Of the 180 who responded on this point, 111 felt that the presumption should be abolished; 48 felt that it should be reversed; and 21 felt that it should be retained in its current form." (Hansard, House of Lords Debates, 12 February, col 1324).

Lord Goodhart QC withdrew the proposed amendment.

32. On 19 March 2008 Lord Goodhart QC proposed the same amendment. He said "we seek not to abolish the rule, but to modify it". He stated:

> "If we are to retain an age of criminal responsibility as low as 10, what is needed is an intermediate stage. We should not jump straight from no criminal responsibility at the age of nine to full responsibility at the age of 10. We need to protect 10 or 11 year olds who do not understand that what they are doing is seriously wrong. We should do so by allowing the defence to raise and prove, on the balance of probabilities, that the child in question did not have the capacity to understand that what he or she was doing was seriously wrong…I believe this amendment would improve the Bill as regards the protection of children of 10 and 11 years old who will not be adequately protected if the existing law of doli incapax is removed and nothing

> put in its place." (Hansard, House of Lords Debates,19 March 2008, cols 830-831).

Lord Williams opposed the amendment. He stated:

> "My Lords, there does not seem to be any disagreement that the ancient presumption is in need of reform. Therefore, the question seems to be: should it be reserved or should it be abolished? When we were deciding how best to proceed we considered whether reversal or abolition was the better course. We put it out to consultation. I respectfully remind your Lordships of what I said earlier. Of those who responded to the consultative paper '*Tackling Youth Crime*', 111 out of the 180 who expressed a view said that abolition was appropriate." (Hansard, House of Lords Debates, 19 March 2008, col 836).

33. The import of the wording of the clause that was to become section 34 was quite clear. This was demonstrated by the following statement by Mr Clappison on behalf of the opposition in a standing committee debate in the House of Commons on 12 May 1998

> "We have given careful consideration to the proposal to abolish the presumption. We know that some quarters have argued that the presumption should be reversed and that a child or his legal representatives should show that the child does not know the difference between right and wrong. We have listened to judicial authority and to practitioners and, on balance, we think that it is right that the rule should be abolished. We shall not oppose the Government…"

*A different impression*

34. In the course of the Second Reading of the Bill in the House of Lords, Lord Falconer of Thoroton, the Solicitor General, made the following comment:

> "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." (Hansard, House of Lords Debates, 16 December 1997, cols 595-596).

In so far as this suggested that the relevant clause would not abolish the defence of *doli incapax*, this statement was at odds with the other Ministerial statements to which I have referred. Professor Nigel Walker none the less fastened on Lord Falconer's comment as indicative of the Government's intentions, in an article entitled "The End of an Old Song" (1999) 149 NLJ 64. He suggested that the effect of section 34 was to abolish the presumption but not the defence. A similar view was expressed, *obiter,* by Smith LJ after a detailed and careful study of background material that was the product of her own researches in *Director of Public Prosecutions v P* [2007] EWHC 946 (Admin); [2008] 1 WLR 1005.

*Conclusions*

35. As I remarked at the outset, the result of this appeal cannot be deduced from the language of section 34 alone. It is a legitimate aid to the interpretation of that section to look, as I have done, at the mischief that the section was designed to obviate. It is a legitimate aid to construction to have regard to the fact that the phrase "presumption of doli incapax" was widely used to embrace both the presumption and the defence. I further consider that this is one of the rare cases where it is both legitimate and helpful to consider Ministerial statements in Parliament under the principle in *Pepper v Hart* [1993] AC 593. In issue is the meaning of a single short section of the Act. The meaning of that section is, when read in isolation, ambiguous. The clause that was to become the section was debated at some length in Parliament. An amendment was moved to it on two occasions in the House of Lords. Consideration of the debates discloses Ministerial statements that made the meaning of the clause quite clear, with the exception of the one statement by Lord Falconer. Furthermore, the proposed amendment was moved on the premise that the clause, as drafted, would abolish not merely the presumption but the defence of *doli incapax.* Parliament was in no doubt as to the meaning of the clause, in part perhaps because in the Consultation Paper and the White Paper that preceded the legislation

the Home Office had made it quite clear what was meant by abolition of the presumption of *doli incapax.*

36. For these reasons I have concluded that the trial judge and the Court of Appeal were correct to hold that section 34 abolished the defence of *doli incapax* and that, accordingly, this appeal should be dismissed.

**LORD RODGER OF EARLSFERRY**

My Lords,

37. I have had the advantage of considering in draft the speech of my noble and learned friend, Lord Phillips of Worth Matravers. While I should have been inclined to reach the same result without reference to the passages in Hansard, as he has shown, they put the position beyond doubt. Accordingly, in full agreement with him, I would dismiss the appeal.

**LORD CARSWELL**

My Lords,

38. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Phillips of Worth Matravers. For the reasons which he has given, with which I agree, I would dismiss the appeal.

39. I would only add that, like my noble and learned friend Lord Rodger of Earlsferry, I might have been inclined to reach the same result solely on construction of the section and taking account of the mischief and of the consequences of the legislation.

40. I do consider, however, that it is a legitimate case for the House to consider the Parliamentary materials, which in my view settle the

matter conclusively. I would myself place most weight on the fact that Lord Goodhart QC twice moved an amendment designed to reverse the presumption of *doli incapax* rather than abolish it, the construction of the Act for which the appellant's counsel argued in the appeal before the House. It was firmly opposed by the Government, with the consequence that on the first occasion Lord Goodhart withdrew the amendment and on the second the proposed amendment was rejected on a vote. Although such Parliamentary history was regarded as inadmissible before *Pepper v Hart* [1993] AC 593 (see *Viscountess Rhondda's Claim* [1922] 2 AC 339, 383, per Viscount Haldane), it is now possible in appropriate cases to take it into account as an aid to ascertaining the intention of Parliament. In my opinion the rejection of the proposed amendments is very cogent evidence of intention, stronger even than the statements of Ministers, and it puts the conclusion beyond doubt.

**LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

41. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Phillips of Worth Matravers. I agree with it and for the reasons he gives I too would dismiss the appeal.

42. I agree not least that this is one of those comparatively rare cases where weight may legitimately be put upon the Parliamentary materials. Amongst these I share my noble and learned friend, Lord Carswell's view that the most telling are Lord Goodhart QC's two unsuccessful proposed amendments to the Bill (see paras 31 and 32 of Lord Phillips' opinion)—amendments designed to achieve the very result which the appellant is driven to contend was nevertheless achieved despite their failure.

43. In this connection it is perhaps worth recalling the use made by Lord Nicholls of Birkenhead in *R (Jackson) v Attorney General* [2006] 1 AC 262, 292 of similar proposed but unsuccessful amendments to what became section 2 of the Parliament Act 1911: "These ministerial statements [resisting the amendments] are useful in practice as confirmatory evidence of the object sought to be achieved by section 2. Transparency requires this should be recognised openly." (para 66)

**LORD MANCE**

My Lords,

44. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood. I agree with them all and there is nothing I would wish to add. I too would, therefore, dismiss this appeal.