HOW OLD DID *YOU* THINK SHE WAS?

For at least a century and a quarter one of the most settled and invariable maxims of the criminal law, founded upon a decision of 15 judges in the Court for Crown Cases Reserved (*Prince* (1875) 2 C.C.R. 154; see, also, *Robins* (1844) 1 C. & K. 456), has been that the prosecution did not have to prove fault on the defendant's part in respect of the element of age in statutory offences created for the protection of the young. Many statutes have been drafted (or amended), and thousands upon thousands of defendants have been convicted, on this basis. But no longer. For the Appellate Committee has decreed, without giving any reasons for doing so—there is just a bare assertion (*B.* v. *D.P.P.* [2000] A.C. 428, reversing a unanimous decision of a strong Divisional Court: [1998] 4 All E.R. 265)—that "an age-related ingredient of a statutory offence stands on no different footing from any other ingredient", and that proof of fault (in the shape of the absence of a belief—reasonable or unreasonable—that the child is above the proscribed age) is required *unless* excluded by Parliament either expressly or by "necessary implication, ... [that is, by] an implication which is compellingly clear" (Lord Nicholls). "Such an implication", we are told, "may be found in the language used, the nature of the offence, the mischief sought to be prevented, and any other circumstances which may assist in determining what intention is to be attributed to Parliament when creating the offence" (*ibid.*). This is, of course, none other than the all too depressingly familiar litany of vague, overlapping criteria which from time out of mind has signally failed to compel from the judges predictable answers to the question whether, when Parliament has been silent on the point, a person must, if she is to be convicted of a given offence, be presumed to have been at fault in respect of all, or some, of its external elements. The reference to a silent legislature's intention is to a fiction—a mere rhetorical device. There is, as everyone knows, only one sure and compelling guide: the express provision of a no-fault defence logically precludes a requirement to prove fault in regard to the matter to which it refers.

In *B* v. *D.P.P.* (which was occasioned by a grossly improper proposal repeatedly made by a 15-year-old boy to a 13-year-old girl on the top deck of a bus), however, the offence being considered was that of behaving indecently with or towards a child under 14 contrary to the Indecency with Children Act 1960, s. 1(1), which is without a no-fault defence. The conclusion that fault in respect of the child's age (though not, presumably, in respect of the indecent nature of the behaviour) was required followed, therefore,

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inevitably. For it had already been determined that neither the nature of the offence, nor the mischief it sought to prevent, were factors sufficiently compelling to exclude this requirement. The argument is transparently circular: which may be why the Law Lords, having concluded that there was nothing in the 1960 Act to displace "the common law presumption of *mens rea*", nevertheless went on to offer reasons why it *should* apply. Which is all a bit odd, since the whole point of legal presumptions like this is that they stand until displaced: they should not need propping up. And the props employed were a bit odd too: the offence, it is pointed out, is one of great width embracing both the truly wicked conduct of the predatory paedophile, and the often innocuous sexual experiments of teenagers. Neither, it is said, deserve to be convicted if they believe, even unreasonably, that their attentions are directed at 14-year-olds! Yet both the predatory paedophile and the experimenting teenager who goes beyond sexy talk will, whatever their beliefs about the child's age, commit or attempt to commit the equally serious offence of indecent assault on a child under 16. For both of them, the ambit of the indecency offence is, therefore, an irrelevance. If experimenting teenagers are to be protected from an over-intrusive criminal law this can only be done, as it is in many other jurisdictions, by restricting liability for so serious a crime to cases where there is a significant difference in age between the defendant and his—or her—"victim".

But we are not, the Law Lords warn us, to jump to the conclusion that the same decision will invariably be reached for other crimes aimed at protecting the young. Though fault as to the age element is required for the offence of indecency with or towards a child under 14, "it is plain" (to Lord Steyn, but not, perhaps, to the rest of us) that unlawful sexual intercourse with a girl under 13 (a crime punishable with life imprisonment) will remain an offence of strict liability, and judgment is suspended (Lords Nicholls and Hutton) on the rule that is to govern indecent assaults on those under 16 (Sexual Offences Act 1956, ss. 14(2) and 15(2)) and abduction of girls under 16 (*ibid.*, s. 20)—not to mention such offences as those of endangering children under 2 by exposing them to the elements (Offences against the Person Act 1861, s. 27), being drunk while in charge of a child who is apparently under 7 (Licensing Act 1902, s. 2); allowing a child over 4 but under 16 to frequent a brothel (Children and Young Persons Act 1933, s. 4); giving a child under 5 any intoxicating liquor (*ibid.*, s. 10); exposing a child under 12 to the risk of burning (*ibid.*, s. 11); encouraging the prostitution of a girl under 16 (Sexual Offences Act 1956, s. 28); inciting incestuous intercourse with a girl under 16 (Criminal

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Law Act 1977, s. 54); possessing an indecent photograph of a person under 16 (Criminal Justice Act 1988, s. 160); driving a motor vehicle with a child passenger who is under 14 and has not been "belted-up" (Road Traffic Act 1988, s. 15); permitting a child under 14 to ride a horse on a road without wearing protective headgear (Horses (Protective Headgear for Young Riders) Act 1990, s. 1); buying intoxicating liquor for consumption in a bar in licensed premises by a person under 18 (Licensing Act 1964, s. 169(3))—and so on, and so on. Vigilant defence advocates will have many opportunities to pick up and run with the torch lit by the Law Lords. With the bright-line rule abandoned, each offence will require examination to see whether the "language used", though non-explicit, or "any other circumstances" justify the fiction that Parliament did or did not intend that fault as to age should be proved.

Reflection on that catalogue of offences may, moreover, give rise to doubts whether a belief that the young person is over the statutory age carries as much moral weight as the Law Lords suppose. For it is only the person who is aware of the detailed content of a particular criminal prohibition who is likely to have entertained any belief—reasonable or not—about the young person's precise age so as to benefit from having made a mistake about it. She must first have been aware that it is only children over 4 who may not reside in brothels, or that it is only when the child of whom she is in charge is "apparently under 7" that she must not get drunk; that 14 is the relevant age for most sexual activity that falls short of physical contact, whereas it is 16 if she goes that far. And if she has given thought to the child's precise age she will also have been aware that she was sailing close to the wind, or walking on thin ice—whichever metaphor is preferred. Such venturers deserve very little more sympathy than those without mistaken, albeit clear, belief as to the ages of the children they, too, risk harming. And, after all, ignorance, let alone a mistake, about these arbitrary legal rules, though entirely reasonable, would not excuse. So to say that "an age-related ingredient of a statutory offence stands on no different footing from any other" is, to put it mildly, simplistic. The judges of the Court for Crown Cases Reserved may have been wiser in their generation than the Law Lords in ours.

What difference will *B* v. *D.P.P.* make in practice? For offences of sexual abuse, not much, thought Lord Steyn, who considered the *Prince* rule "a relic from an age dead and gone". For there would first have to be evidential material "supporting the possibility" that the defendant believed that the young person was

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over-age before the prosecution was called on to prove that he did not. Lord Hutton, who considered the arguments for and against maintaining the *Prince* rule "almost evenly balanced", was more perceptive. He admitted to being "conscious that the [present] decision ... may make it more difficult to convict those who are guilty ... and thus reduce the protection given to children", and expected it to be reversed by legislation. He is surely right, for a defendant will be entitled to be acquitted if the jury or magistrates entertain any real doubt about whether he may not have believed the child was over the relevant age. Once a defendant becomes aware of the legal relevance of the "victim's" age, a claim, bolstered by some mildly plausible, though not very good, reason, that he thought her to be over that age will be easy to make and difficult to rebut.

The difficulty will be of only temporary duration if the Home Secretary gets round to promoting a new statutory code of sexual offences along the lines recommended in his Review Group's Consultative Paper *Setting the Boundaries* (Home Office, July 2000). *B* v. *D.P.P.* may provide the necessary stimulus. The Paper recommends the creation of separate offences of sexual abuse of children under, respectively, 13 and 16 by adults (*i.e.*, those over 18), and of sexual activity by a person under 18 with a child under 16. These would embrace the indecency, the indecent assault and the unlawful intercourse offences of the present law. Sexual abuse of a child under 13 would be an offence of strict liability (or more accurately, perhaps, constructive liability—for if a child is in fact under 13 the defendant cannot but be aware that she may be under 16). The others would be subject to a defence, to be available in court only once, and then, it is tentatively suggested, only to those under 21 (a five- rather than the present eight-year differential for the unlawful intercourse offence is thought to be quite big enough), who can show that they honestly and reasonably believed that their "victim" was over 16, *and* had taken all reasonable steps to ascertain her age (paras. 3.5.10; 3.6.7–14; 3.9.13). This rule, the Paper convincingly argues, is the best way of resolving "the genuine tension between the interests of fairness to defendants with the wider interests of child protection" (para. 3.6.8). For as Sir Rupert Cross once memorably observed (in an article from which the Law Lords quote only selectively), "if the consent of young girls to the intercourse is immaterial, why should their statements with regard to their age provide an over-credulous accused with a defence? The requirement of reasonableness may at least do a little to ensure that men do not jump to conclusions they desire to reach" ((1975) 91 L.Q.R. at 551–552).

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On the broader front, it is impossible to predict how influential the decision will be in curtailing the imposition of strict and constructive liability. Will it fare any better than *Sweet* v. *Parsley* [1970] A.C. 132 which it emphatically endorses, but which has, for the last 30 years, been accorded more prominence in the text books than in the courts? The similar endorsement given to *Gladstone Williams* [1987] 3 All E.R. 411 and *Beckford* [1988] A.C. 130 will certainly make it more difficult for courts to hold that "the common law presumption of *mens rea*" is satisfied by proof of carelessness, although *disproof* of that, rather than proof of knowledge or deliberate risk-taking, is overwhelmingly the modern *legislative* trend.

B v. *D.P.P.* shows how, with the materials of our criminal law now so voluminous, chaotic and contradictory, the Law Lords are left free to decide cases as the fancy takes them. So they may either refuse to bring some sense and order into antique and muddled law (as they did when confronted in *Parmenter; Savage* [1991] 4 All E.R. 968 with the provisions of the Offences against the Person Act 1861) or, as here, embark on a radical and liberal-minded reform of statutes governing sexual offences—an enterprise which, given the limitations inherent in judicial adjudication, will almost always be a good deal less satisfactory than the legislative reform for which every criminal lawyer in desperation prays.

P.R. GLAZEBROOK

ENTRAPMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

AN acutely difficult question of principle arises when a person commits an offence because the police incite him to do so. For the civil libertarian, "undercover agents" (as the prosecution will seek to call them) usually go by another and nastier name: secret police. Even for authoritarians entrapment is of dubious value, because policemen find the crimes they have themselves incited particularly easy to solve—and if we condone entrapment too readily we risk having a police force which expends its energy on committing new crimes instead of solving old ones. But regrettably, the use of entrapment is something effective crime prevention occasionally requires.

In *Nottingham City Council* v. *Amin* [2000] 1 W.L.R. 1071 the courts were asked to look at entrapment in the light of the European Convention on Human Rights—in which respect it may well be the first of a series.

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