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## Strict Liability, Young People and the Sexual Offences Act 2003

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### Summary

This article looks at strict liability with respect to sexual offences relating to children in the Sexual Offences Act 2003 in the light of the House of Lords ruling in *R v G* [2008] UKHL 37; [2009] 1 AC 92.

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### Contents

Introduction.  
*R v G*: the Facts and Issues on Appeal.  
*R v G*: the Legal Arguments.  
    The strict liability argument.  
    Proportionality and the prosecution of children.  
Role of the Prosecution, Defence and Other Agencies.  
Criminalisation v Diversion.  
Where Does Strict Liability Go Next?  
Conclusion.

### Introduction.

There has been much academic and social debate about whether a mistake as to the age of the complainant in an underage sexual offence should provide an accused with a defence. Such debate continued even after the enactment of the Sexual Offences Act 2003 (SOA). The ruling of the House of Lords in *R v G* [2008] UKHL 37; [2009] 1 A.C. 92 appears to have finally laid these arguments to rest. In giving their reasoning, their Lordships reasserted that one of the most important principles of criminal law is the protection of young people in society. In their judgments they provided some guidance on how this public law function should be exercised in a manner which both recognises the changing cultural attitudes towards sexual activity and the dangers of arbitrary intervention into the private lives of citizens.

This article argues that if the criminal law is to fulfil its protective role in protecting the emotional and physical wellbeing of children, a coherent and principled response necessitates timely intervention for those least able to protect themselves. This must be done whilst ensuring that restraint is exercised against unnecessary or arbitrary interference in the private lives of young people. This article will further argue that prosecutors and other public bodies should consider a range of options in addressing inappropriate sexual behaviour by young people. While prosecution is one of those options it should not be considered as inevitable except in the most serious cases. Measures to divert children from the criminal justice process should also be considered, a suggestion that found some support in the House of Lords. This article will consider these points not in the abstract but against the background of the recent leading case referred to above. Strict liability is where an offence contains at least one material conduct element for which there is no corresponding mental element (*mens rea* or state of mind) required. *R v G* makes it clear that the element of knowledge of age of a victim is irrelevant to liability under the SOA offences where the child is under 13. The Law Lords rejected counsel's arguments that strict liability in this case was incompatible with Article 6(2) of the European Convention on Human Rights (ECHR) and that the prosecution was incompatible with Article 8. At the same time as clarifying *mens rea* requirements for SOA offences, *G* makes it harder for counsel to argue in other cases that strict liability can be invalidated by Human Rights Act (HRA) arguments. The House of Lords had not directly decided this point before. The outcome was never likely to be any other than this though, given that there is no decision of the European Court of Human Rights that directly challenges strict liability. With this in mind, the wisdom of the defence strategy must be questioned.<sup>1</sup> Another argument put by appellant's counsel was that prosecution of a young person for a serious strict liability sexual offence could be disproportionate in a particular case. This was supported by the two Lords in the minority and may be persuasive in future cases. These points will be evaluated.

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<sup>1</sup> The SOA has offences that can be committed by adults or children, offences that can be committed by children (generally carrying lower penalties) and offences specifically for the protection of children and young people. Themes relating to each will be touched upon.

This article will first set out the facts and issues in *G*; secondly evaluate the legal arguments relating to strict liability and the ECHR. Thirdly it will consider lessons for both prosecution and defence and note solutions that can be derived from the text of the judgments. Learning the lessons from this case it is hoped will help avoid both unnecessary appeals and unnecessary proceedings in similar cases in the future. In this analysis the need for balance between the protective function of the law, the requirement of legal certainty and to avoid unnecessary interference with and criminalisation of normal behaviour of young people will be core concerns.

## *R v G*: the Facts and Issues on Appeal.

The defendant (D), a 15 year old boy, had sexual intercourse with a 12 year old girl. The complainant (C) told friends a few weeks later that she had not consented to sexual intercourse. He was charged with rape of a child under 13 contrary to the Sexual Offences Act 2003, s 5. D pleaded guilty on the basis that: (i) C had willingly agreed to have sexual intercourse with him; (ii) at the time he believed that C was 15 years old, she had told him so on an earlier occasion; (iii) he none the less pleaded guilty having been advised that, by reason of the fact that C was under 13 the offence was committed irrespective of (a) consent; (b) reasonable belief in consent; and (c) a reasonable belief as to age. (This is summarised in the Court of Appeal report [2006] EWCA Crim 821). He was sentenced to a 12 month detention and training order. D appealed against conviction and sentence. C stated in interview (video recorded) that she did not consent and that she had made it clear to D at the time that she was not consenting. The prosecution subsequently accepted the plea on the basis put forward by D. No fact finding “*Newton* hearing” was held as C agreed that she had told the appellant that she was 15 and she was reluctant to attend court to give evidence. Lord Carswell highlights what will often be a factual problem in criminal cases: “the lack of definite knowledge of the true facts of what occurred between the complainant and the appellant.” (Para 58).

The certified questions for the House of Lords were:

- (1) May a criminal offence of strict liability violate article 6(1) and/or 6(2)...?
- (2) Is it compatible with a child’s rights under article 8...to convict him of rape contrary to section 5...in circumstances where the agreed basis of plea establishes that his offence fell properly within the ambit of section 13...?”

Article 6 is the right to a fair trial. Article 8 is the right to private life. D’s appeal on conviction was dismissed by the Court of Appeal but the sentence was replaced with a 12 month conditional discharge. D had been in custody for approximately five months at the time of the appeal. The effect of the conditional discharge if he committed no offence during that period is that he would not thereafter be deemed to have had a conviction, a very significant change in result.<sup>2</sup> The success of the appeal on sentence reflected the fact that D was charged with rape under s 5, rather than the relatively less serious young person specific sexual offence under s 13, but that on the basis of the

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<sup>2</sup> This is from the formulation by the Court of Appeal (para 52), also explained by Lord Hope at para 16. The journal’s referee suggests however that “this somewhat over-states the effect of a conditional discharge, since although a conditional discharge is a conviction for limited purposes, it remains on a person’s criminal record permanently (whatever their age).”

plea, D's offence fell within the latter. This decision was affirmed by the House of Lords. In the House of Lords the majority dismissed the appeal by the defence. Lord Hoffman, Baroness Hale and Lord Mance ruled that strict liability did not violate the right to a fair trial and that the conviction for s 5 was not contrary to the right to private life. Lord Hope and Lord Carswell by contrast agreed on the former but would have allowed the appeal on the article 8 point. The majority endorsed the Court of Appeal's observation that the article 8 rights of a child could be taken into account by the judge in sentencing by giving a lower sentence under s 5 if appropriate. Therefore the case raises important questions about strict liability and the ECHR, about the proportionality of prosecuting children for serious offences, about sentencing and about strategies adopted by the police, prosecutors and the defence.

The SOA tries to group offences, with general offences, offences where the victim is a child under 13 and offences where the offender is a child. The Court of Appeal judgment, para 14, explains the confusing overlap between various sections of the Act, correcting a flaw in drafting, explained by Spencer 2004, p 353. Consent is irrelevant in offences involving children under 13 (ss 5 – 8) and in children specific offences (ss 9 – 12 and s 13). Under the latter offences where the other child is aged 13 or over the accused (A) is guilty of an offence if "B is under 16 and A does not reasonably believe that B is 16 or over". There is nothing in principle against a prosecution under s 5 when the prosecution could be under the s 13 'child sex offences committed by children or young persons'. Section 13 is designed to deal with less serious cases. This case does make clear that the prosecution need to give careful thought to which charge is appropriate and risk losing an appeal if a more serious charge is used against a child than the court thinks is reasonable.

## **R v G: the Legal Arguments.**

The key issue addressed by the House of Lords was whether reasonable belief as to age in cases of consensual sexual intercourse provides a defence. The common law has taken different views on the issue whether reasonable belief in a fact that negates *mens rea* should provide a defence at different times. A second issue was whether the defendant, as a minor, should have been charged with the less serious child / young person specific offence under s 13 rather than the more serious (adult-targeted) s 5 offence. Where consent was an issue the Act specifies that reasonable grounds for belief in consent are required rather than the previous requirement of an honest belief.<sup>3</sup> However, even after the Act, counsel for appellants continued to argue that if age was an issue – for example a belief that C was over the age of consent – then in order to be convicted D had to be at least *aware* of the risk that C was of the relevant age. This argument was based firstly on the presumption of *mens rea* expressed in similar cases, for example *B* (although the actual law in that case was replaced by new offences in the SOA s 10 read with s 13<sup>4</sup>). Secondly it was based on the argument that the ECHR prohibited strict liability in serious criminal cases because such an offence conflicted with the presumption of innocence under article 6.

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<sup>3</sup> *B (a minor) v DPP* [2000] 2 A.C. 428. In *B* the 15 year old defendant's honest belief that the victim was over the age of 13 was a defence to a charge of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960.

<sup>4</sup> *Ibid.* See also *R v K* [2001] Crim LR 993, HL, the law there replaced by s 9 SOA.

## The strict liability argument.

There were insurmountable obstacles for the appellant to overcome with his legal reasoning and it is submitted that the result of the case was never in doubt. Parliament specifically intended to make *mens rea* requirements more restrictive in the new law of sexual offences. At the same time there is no judgment from the European Court of Human Rights that specifically supports the contention put forward by D in relation to article 6. It is submitted that the argument of counsel for D was unmeritorious when it had no realistic prospect of success. The case may have given this appellant and others hope that their convictions could be overturned when this was not likely to happen. On the other hand there have been cases where the law is clear and yet a test case pushing the argument again has led to a change in the law by the House of Lords and a conviction being quashed that was properly obtained on the state of the law at the time. Therefore this SOA challenge was arguably an important test case for the House of Lords to state the law.

The legal arguments presented in the case will now be considered.

The appeal was pursued on ECHR grounds. First it was argued that strict liability for a serious criminal offence was in breach of the article 6 right to a fair trial. The defence wanted a *mens rea* requirement to be read into the statute (to 'read down' the statute) so that it complied with the Convention. The Court of Appeal agreed that if the wording was in breach of article 6(2) this would be required. Both the Court of Appeal and House of Lords concluded that there was no breach of the Convention. Tim Owen QC (for A) argued that there could be a breach of article 6(2) because of the serious consequences of a young person without *mens rea* being prosecuted for a s 5 offence. However, even ignoring that culpability could be considered and taken into account to some extent at sentencing stage, article 6(2) simply does not say what lead counsel wished it to say. It states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." It is therefore not possible on the wording of the Convention to disagree with the assertion by Jeremy Johnson intervening for the Home Secretary:

"[T]hat article 6(2) imposes no fetter on the right of a state to enact and enforce a crime of strict liability. Article 6(2) is concerned with the procedural fairness of a trial, not with the substantive law that falls to be applied at the trial." (Summarised by Lord Phillips CJ at CA judgment para 23).

In the leading case of *Salabiaku v France* (1988) 13 EHRR 379 D argued he was in possession of cannabis due to a mix up over collecting a trunk. If D's defence is believed then his conviction shows the injustice of current laws on possession and the inefficacy of the Convention to provide protection but does not invalidate those laws which are similarly found in the UK and US as well as France.

The court in *Salabiaku* stated

"in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence." (At para 27).

It is worth pausing at part of the Court of Appeal judgment where Lord Phillips extrapolates principles from the reasoning of the ECHR in *Salabiaku* and argues that

“Prosecution for [an absolute] offence and the imposition of sanctions under it may well infringe articles of the Convention other than article 6. The legislation will not, however, render the trial under which it is enforced unfair, let alone infringe the presumption of innocence under article 6(2).” (Para 33).

The Court of Appeal cited Auld LJ quoting with approval Roberts

“Article 6(2) has no bearing on the *reduction or elimination* of mens rea requirements, and is therefore perfectly compatible with offences of strict or even absolute liability.”<sup>5</sup>

In the House of Lords, Lord Hope endorsed this conclusion (para 30, see also para 28). Lord Hoffman was more blunt. Talking about *Salabiaku* he said:

“My Lords, I think that judges and academic writers have picked over the carcass of this unfortunate case so many times in attempts to find some intelligible meat on its bones that the time has come to call a halt. The Strasbourg court, uninhibited by a doctrine of precedent or the need to find a ratio decidendi, seems to have ignored it. ... I would recommend your Lordships to do likewise.” (Para 6).

Other analyses do support this conclusion, albeit not using the colourful language of Lord Hoffman. There is no suggestion in the leading British commentaries that strict liability is invalidated by the ECHR.<sup>6</sup> Emmerson and Ashworth discuss the importance of level of sentence for such offences but not the validity of strict liability *per se*. The validity of strict liability is not discussed by Starmer *et. al.* (Starmer, 2001). Sullivan concludes:

“It would be naïve to assume that one of the ultimate consequences of the incorporation of the Convention into English law will be the demise of strict liability in English criminal law. Such an outcome is not inconceivable: it may be that proof of negligence by the defendant will be the default position for all criminal offences .. [y]et such a development is far from assured”. (Sullivan 2005, p 201).

Lacey made the same point in the second of her Hamlyn lectures: “the idea that there could be a challenge to strict liability offences or offences without full *mens rea* requirements is just not on the agenda.” (Lacey 2007). These scholars demonstrate why claims against strict liability *per se* on Human Rights Act (HRA) grounds are obviously spurious. It is possible that the European Court of Human Rights may treat differently cases of strict liability involving defendants who are minors because of the significant consequences early in life. However it is not likely that a sexual offences

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<sup>5</sup> *Daniel* [2003] 1 Cr App R 99 para. 39, citing P. Roberts at (2002) 118 LQR 41, 50. Cited in *G* at para 39.

<sup>6</sup> By contrast Emmerson and Ashworth did flag up the importance of the level of sentence in 2001 (para 9-65, and in the 2<sup>nd</sup> edition: 2007, pp 374-6). ECHR concerns about level of punishment for strict liability offences turned out to be a key issue in *G*, discussed below.

case is one where a favourable interpretation would be given. There does not appear to be any ECHR case specifically deciding on the issue of strict liability applied to minors.

### Proportionality and the prosecution of children.

A second ECHR argument raises significant issues relevant to future prosecutions even though not persuasive in the present case: whether prosecution was a disproportionate interference with the right to private life. This argument was that to impose strict liability for rape on a 15 year old child in circumstances when there was an alternative more appropriate charge was not necessary in a democratic society. Further it was argued that the label 'rape' was disproportionate to any legitimate aim sought to be achieved and this was not removed by the Court of Appeal's substitution of a conditional discharge. (Summarised by Lord Hope at para 35). Given the increased prosecutions of children since the abolition of *doli incapax* in 1998 this is an issue that could be argued in other criminal cases, that prosecution was not appropriate and measures to divert a child out of the criminal justice process would be a preferable reaction to inappropriate behaviour (On attitudes to offending by children see Keating (2007) at 553, 557-8). Diversionary measures will be considered below. Here the legal argument will be briefly analysed.

Appellant counsel had more success with the Article 8 argument. The Court of Appeal had been sympathetic:

“We accept the possibility that prosecution of a child under section 5 rather than section 13, or indeed prosecution at all, in relation to consensual sexual intercourse may, on the particular facts, produce consequences that amount to an interference with the child's article 8(1) rights that is not justified under article 8(2)”. (Para 46).

However, as noted already the court felt that any potential infringement could normally be dealt with in the sentencing evaluation to take account of blameworthiness.<sup>7</sup> This in effect supports Horder's view that what agencies do in practice will be most important in determining whether strict liability is proportionate in particular cases. (Although he is particularly considering regulatory offences, as well as more serious crime: Horder 2005, pp 106-07). The effect of the law is not only what Parliament or judges say but what agencies tasked with enforcing the law do. This will be considered further below.

In the House of Lords by contrast Lord Hoffman was derisive: “the case has in my opinion nothing to do with article 8 or human rights” (para 9). While Lord Hoffman stated that “Prosecutorial policy and sentencing do not fall under article 8”, he appears to insufficiently consider a legitimate argument that disproportionate punishment could breach articles of the Convention. I would submit that the law may develop in this way. Lord Hope appears to show a better understanding of the debate about

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<sup>7</sup> *R v Corran* [2005] EWCA Crim 192, CA gives general guidance on sentencing under the SOA. The emphasis of the reasoning in *G* has now been repeated in the sentencing case *Attorney-General's Reference No. 29 of 2008* (*Jon Peter Dixon*), [2008] EWCA Crim 2026. The charges involved sexual grooming, consensual assault by penetration and attempted rape of an 11 year old girl by the 19 year old male.

criminalisation of sexual awakening by young people (para 14, para 36) and assumes that the police and prosecution may use discretion:

“It is unlawful for a prosecutor to act in a way which is inconsistent with a Convention right. So I cannot accept Lord Hoffmann’s proposition that the Convention rights have nothing to do with prosecutorial policy.” (Para 34).

As Ashworth has noted in his commentary on the House of Lords decision: “Lord Hoffmann’s speech contains some vigorous rhetoric against the deployment of human rights arguments, but the substance of his approach to the Art.8 issue seems doubtful.” (Ashworth 2008 p 820). Due to the stigma and level of sentence available many of the Part 1 SOA offences are serious offences even if committed by a young person in a wholly consensual situation with another young person of a similar age. Of course prosecution must be appropriate for serious offences unless there are strong reasons relating to the individual case otherwise (for example offender or victim circumstances). On the other hand, in relation to sexual offences more generally, Spencer’s critique of the “strikingly muddled” thinking regarding the legislation as applied to children is hard to fault.

“the child sex offences cover not only consensual sexual acts between children and adults, but all forms of sexual behaviour between consenting children. The result is to render criminal a range of sexual acts, some of which are usually thought to be normal and proper, and others at least not seriously wrong.” (Spencer 2004 p 354)

One may disagree (as the Lords did) with his view that “it would have been safe as well as simple to exclude from the offences of consensual sex with minors, any consensual act between persons of the same or similar age” but it is easy to see how enthusiastic prosecution and police activity could risk criminalising large numbers of young people because “these provisions of the Act [are far] out of line with the sexual behaviour of the young”. (Spencer 2004, p 354). By contrast Lord Hope considers that the broad nature of the offences will allow for changes in the nature of conduct over time to be taken into account (para 36). This relies on the exercise of discretion by the police and prosecution. The Crown Prosecution Service (CPS) Legal Guidance on the SOA 2003 does explicitly state “that prosecutors may exercise more discretion where the defendant is a child” and cites Lord Falconer in Parliament stating “*Where sexual relationships between minors are not abusive, prosecuting either or both children is highly unlikely to be in the public interest.*” (See section headed ‘Code for Crown Prosecutors - Child defendant (under 18)’). Guidance is a useful safeguard but will not necessarily prevent excessive criminalisation.<sup>8</sup> This point is considered further below.

On the other hand the Law Lords clearly and it is submitted correctly argued that Article 8 does not only aid a defendant but also a complainant. The State is obliged to use the criminal law to protect prospective victims and victims from harm. The

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<sup>8</sup> It should be acknowledged that the section headed ‘Code for Crown Prosecutors - Adult/child defendants’ is unequivocal in its language: “In addition, it is **not** in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption.” (Existing emphasis).

argument in favour of strict liability relating to age *per se* was put simply by Lord Hoffman: “If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are.” (Para 3). Baroness Hale like Lord Hope is alert to the problem of “criminalising precocious sexual activity between children” as well as the dangers of under-age sexual activity. (Paras 48, 36). Lord Hope states that the need for children “to be protected against themselves is as obvious as is their need to be protected from each other.” (Para 36). Baroness Hale turns the article 8 argument around - to specify that this sexual act is not protected. The protection of the private life of the young victim under article 8 requires clear legal rules (para 54). For Lord Mance, the SOA protects potential young victims in compliance with article 8:

“[the State] may have to take positive steps to provide effective protection for those vulnerable to the sexual attentions of others. S.5 of the Sexual Offences Act 2003 represents a positive step in that sense.” (Para 64 – 65); and “the offence under s. 5 is deliberately strict in its protective intention” (para 71).

It is clear that all of these views can be correct; sometimes prosecution for a serious offence is best, sometimes for a lesser offence, sometimes diversion and other intervention may be better for the young people’s physical and mental and moral health. Therefore the article 8 argument may still be appropriate in other cases. However more thought must be given to the values and beliefs that formed the basis on which the instant judgment was given. Baroness Hale clearly demonstrated the influence of her background in the family courts and took a strongly paternalistic approach in a judgment that associates wrong with the male behaviour but is more ambivalent about the prosecution of both children involved in consensual activity (paras 49, 48). That was not directly relevant to this case but is a logical result of applying the law as enacted by Parliament. It would surely increase the conviction rates for sexual offences if prosecution was gender neutral in cases of consensual activity involving young people. Baroness Hale emphasises the role for the law to convey the message to the children themselves that any sort of sexual activity with a child under 16 is an offence. While it is directly relevant to the case the tone of her language appears judgemental against men which is unfortunate.

“Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust or irrational about a law which says that if he chooses to put his penis inside a child who turns out to be under 13 he has committed an offence (although the state of his mind may again be relevant to sentence). .. in principle sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger.” (Para 46).

It is submitted that Baroness Hale is correct to be greatly concerned about penetrative sex. It also must be correct that all men (including young men) are encouraged to think about their actions and the circumstances in which they act, including the potential consequences if their judgment is wrong. To that extent, strict liability regarding age for the most serious offences is appropriate to achieve these aims. It

remains valid for the defence to stress the serious consequences that may be incurred even if sentence reflects lesser culpability. Although the majority emphasised that *G* would no longer be treated as having committed an offence, there are still consequences.<sup>9</sup> Baroness Hale would surely argue that these are justified by the 15 year old boy's conduct towards a 12 year old girl; and, as Lord Mance points out, there would have been consequences anyway with a conviction under the lesser offence (para 69). Whether a case involving an older female of similar age to the male should be treated in the same way is debateable. The most important conclusion about the *G* case for academics is that strict liability will not be invalidated under the ECHR without an explicit decision of the European Court of Human Rights saying so. For practitioners it is that they must take great care not only to secure a conviction or to put forward a defence but to ensure that the charge and defence strategy in the case are appropriate. Convention rights and obligations must be taken into account by the agents involved at every stage.

As Ashworth observed writing about *G* in the Court of Appeal:

“wide sentencing discretion ... may not be sufficient. Lord Phillips accepted .. that prosecution under s.5 in a case of consensual intercourse ‘may, on the particular facts, produce consequences that amount to an interference with the child’s Article 8.1 rights that are not justified under Article 8.2’. This was surely such a case, and the remedy of a reduced (non-custodial) sentence is surely not sufficient when the offence label (rape) is so condemnatory.” (Ashworth 2006, p 934).

One *per curiam* should be noted. Four Law Lords discussed use of the term ‘statutory rape’, a term that does not exist in English law. (Lord Hope, Baroness Hale, Lord Carswell and Lord Mance). It is unfortunate that use of this inaccurate and misleading Americanism appears to be condoned by Baroness Hale and Lord Mance (paras 44; 70). Lord Carswell, perhaps unfairly, refers to the term as “convenient lawyers’ shorthand” but one can agree with him that “it is a crude generalisation, containing a use of the term “rape” which is often inaccurate.” One may further agree with his plea “It would in my view be a good thing if the term now disappeared from the lawyers’ vocabulary.” (Para 60). It seems unlikely however that his plea will be heeded. The accurate term now for the offence is rape but paradoxically the public will probably better understand it as ‘statutory rape’.

## Role of the Prosecution, Defence and Other Agencies.

There are lessons for the defence, lessons for the prosecution and lessons for other agencies. The problem for the Prosecutor is set out by Lord Hope (para 23):

“The choice as to which of sections 5 or 13 to employ is left by the statute entirely to the prosecutor. The context suggests however that a child under 18

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<sup>9</sup> One of these is being subject to the notification requirements under the Act. I am grateful to the journal’s referee for highlighting this omission “The other consequence .. is escaping notification requirements under the SOA 2003. Schedule 3 to the Act appears to say that if a person is convicted under s 5 of the 2003 Act, they are subject to the notification requirements but, if convicted under s 13, only if the sentence was custodial for 12 months or more.” See also Lord Mance at para 68.

ought not to be prosecuted under section 5 for performing a sexual act with a child under 13 of the kind to which that section applies unless the circumstances are such as to indicate that it plainly was an offence of such gravity that prosecution under section 13 would not be appropriate. ... The problem revealed by this case is the familiar one which faces every prosecutor. The complainer's account of events may change."

Lord Hope highlights (para 34). "where choices are left to the prosecutor they must be exercised compatibly with the Convention rights." He points out that "there is some lack of consistency about the approach that should be adopted in cases of this kind." (Para 33). Mr. Perry for the Crown had "conceded, in view of the basis on which the appellant was prepared to plead guilty, that the prosecution should probably not have accepted it as a plea to rape under section 5". Therefore a procedural solution can be suggested. In a similar case the prosecution should accept the plea as one to a s 13 charge instead.

Baroness Hale is more sympathetic to the prosecution, pointing out that the defence did not suggest an alternative course of action (para 53). This does not absolve the CPS of their responsibility to act in a proportionate way.<sup>10</sup> It is submitted that there should be consistency in similar cases and that prosecution for the most serious offences should be restricted for children to the most extreme cases. The CPS Legal Guidance on the SOA 2003 does make clear that discretion can be used when dealing with child defendants and gives a range of relevant factors for consideration (CPS 2008, above). There are clear lessons for defence solicitors as well – they must be aware of the procedural options and arguments to try and get the correct result for the defendant. The CPS guidance should be studied by all involved, not only the prosecution. The solicitors for *G* tried to get the case dropped but did not try to persuade the judge to allow D to plead guilty to a lesser charge (see Lord Mance, para 66). This overambitious attempt may have led to the stigma for this young defendant. Defence solicitors in particular towns and cities may know the likely reaction of prosecutors and judges to an attempt to allow a plea to a lesser offence. Significant for considering defence strategy in the House of Lords, the Court of Appeal endorsed the Divisional Court's rejection of leading Counsel's ECHR arguments in the school attendance case of *Barnfather* [2003] 1 WLR 2318. (At para. 38). Lord Phillips rejected Mr. Owen's argument as "manifestly unsound in principle and in conflict with the jurisprudence" (para 41), a salutary lesson for those lawyers inclined to fly kites with Human Rights arguments. Lord Hope impliedly approved Auld LJ's comments and the soundness of the decision in *Barnfather* by rejecting argument to the contrary. Both members of the Bar and the solicitors' profession must share responsibility for the waste of public money in the case. At the same time the victory for the prosecution in *G* should not discourage the police and CPS from considering alternative options to prosecution.

Despite her hawkish approach Baroness Hale made clear that, given wide variations in blameworthiness of the behaviour caught, in some cases there "will be no reason to take any official action at all", and in others "protective action by children's services, whether in respect of the perpetrator or the victim or both, may be more appropriate."

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<sup>10</sup> One example of such a discussion that mirrors the case in *G* is considered in the High Court judicial review hearing, *S v DPP* [2006] EWHC 2231 (Admin). The defence did not challenge on HRA grounds and the court upheld CPS decision to prosecute the older party but under s 13 rather than s 5

(Para 48). Early inter agency discussions on such cases to ascertain what is best for the individuals, families and the community may ensure better outcomes than a strict adversarial approach to these matters of great concern. Lord Hope speaks approvingly about the diversionary measures in Scotland under the Children's Hearing system. This adopts a welfare approach to consensual sex between underage young people rather than necessarily charging them with a criminal offence. (Para 48). By contrast Janes recently argued in relation to children who are convicted of sexual offences that there is "a systematic failure to deal with these children in a constructive way" and suggested "ways in which the law can be used to improve the chances of effective rehabilitation". (Janes 2007. See also Daly (2008) who argues in favour of restorative justice). While being sympathetic to juveniles in this case, all the Law Lords are very clear to use language that cannot be deliberately misconstrued by the tabloid press – that is not to allow any portrayal of the higher judiciary as too lenient or 'out of touch'.

Horder (above) uses real examples (relating to truancy and parental duty) to argue for what the courts should take into account in deciding whether an offence is one of strict liability or not. This takes account of the law in action today with the increased partnership role for public agencies and other bodies from the 1980s though the 1990s and continuing. The argument put is that prosecutors will usually prosecute those who are in fact blameworthy and do have a degree of *mens rea*. Discussion on this is often considering what are described as 'regulatory offences' rather than 'true crimes'. J. C. Smith devastatingly criticised this distinction but it is one that is made throughout the criminal law literature. (See Smith 2000). The logical argument remains that strict liability should be rare for serious crimes and be restricted to minor or administrative offences. This would be consistent with the principle in favour of *mens rea*. Achieving this requires Parliament to set clear parameters. (For detail see: Reid 2008). Encouraging discretion in the policies of agencies will help lead to a just result if one also views the courts as part of a coherent system. Work is required to make sure that justice does not vary geographically due to variations in the policies of agencies involved in different localities in a way that infringes the rights of victims or suspects.

## Criminalisation v Diversion.

The discussion about sexual offences and young people can be set in the context of debate about dealing with young offenders in England and Wales. The state of youth justice is highly political and controversial. So far there is no evidence to suggest that prosecution is widespread in relation to consensual sexual acts by children but the pressure for formal responses in other areas has been well documented. (Morgan & Newburn 2007, pp 1043 – 1047).

Since the age of criminal responsibility was changed to 10 without exception in 1998, the prosecution of young children has increased greatly and become routine. Research by the Institute for Public Policy Research (IPPR) has found that since 2002

- The number of under-18s being brought into the criminal justice system has risen by over a quarter, two-and-a-half times faster than adults.
- The number of under 15s being criminalised has increased by a third.

- The average seriousness of offences being brought into the youth justice system has been falling. (IPPR 2008).<sup>11</sup>

This is indirectly relevant to the case at hand – the number of prosecutions for serious sexual offences is very low. However the trend is clear. While sexual offences are described as “a very wide category” and amount to 0.7 per cent of offences resulting in a disposal this is nearly 2,000 offences, of which some will be serious and others represent prosecutions or a diversionary outcome for less serious offences. Nearly a quarter of these offences are committed by those aged under 14: 460 of 1988 offences. 225 resulted in custodial sentences in 2005/06. (Youth Justice Board 2006, pp 60, 7, 8, 21).

The increased prosecution of young children for serious offences does not appear to have led to people in society feeling safer nor has it led to any reduction in the ‘demonisation’ of young people by sections of the media, community and some local politicians probably more than national ones. This is largely in relation to less serious matters but is arguably part of the same trend. The 2,000 sexual offences that went through the system in 2005/06 are 20% more than in 2002/03. (Youth Justice Board 2003, pp 6, 7). For example Scraton has charted the increase in formal responses in relation to ASBOs, (Scraton, 2007, ch. 7); as have Hodgkinson & Tilley (Hodgkinson & Tilley, 2007). There is much analysis relevant to these topics in the Criminological literature. The point for this article is that across the range of youth offending, both less serious and more serious, there appears to be a more frequent response to invoke prosecution when that may not be a proportionate response of public bodies. Writing in November 2006 Professor Rod Morgan, then Chair of the Youth Justice Board, queried

“We know that criminalising children and young people when there are alternative ways of getting them to face up to their anti-social and offending behaviour is generally counter-productive, indeed criminogenic. Yet what are we doing? We’re criminalising more and more children and young people – 26% more in the past three years.” (Morgan 2006, p 14).

While youth justice campaigners seem opposed on principle to general use of imprisonment, the actual numbers of young persons imprisoned are very small, therefore it could be suggested that this issue is hypothetical. However many commentators have expressed grave concerns about the negative effects of child imprisonment (Goldson 2005). The crime reduction charity NACRO argues that: “Custody is ineffective in reducing youth crime, it does incalculable damage to children who are already amongst the most disadvantaged and vulnerable in society”. (NACRO 2005, p 1). In light of the proportion of child offenders who go on to reoffend after custody diversion may be a better choice for society as well as the young person. Therefore trends in sentences relating to young people need to be kept under review as well as trends relating to prosecution.

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<sup>11</sup> For contrasting views on youth offending see the original Labour Government proposals in Consultation paper: *Tackling Youth Justice* (Home Office 1997) 30 September 1997, *Doli incapax* (paras 3-18); and commentary by the Brazilian ‘Comunidad Segura’ security information website ‘UK leads in European child prisoner population’ (Moriconi 2007).

## Where Does Strict Liability Go Next?

*G* is now the leading authority in England and Wales but there are wider issues about the application of strict liability to be resolved by development of ECHR and domestic jurisprudence in the future. It is important to consider in relation to the facts of individual cases whether the law is sufficiently clearly stated to comply with the ECHR requirement of sufficient certainty. *Salako* takes exception to common law strict liability partly for this reason (*Salako* 2006, p 546-7).

The lack of any human rights treaty limitation on strict liability *per se* demonstrates the flawed nature of the Convention which is a product of its time, understandably limited by its framers to the very weighty human rights concerns at the fore after World War Two. There is inadequate protection by judges of the European Court of Human Rights to stop individuals who are not morally at fault from being convicted due to strict liability. This is an example of the conservatism of the European Court of Human Rights and the function of the Convention of its time to preserve only certain fundamental values called 'rights'. *Salako* rejects utilitarian arguments in favour of strict liability as being incompatible with the ECHR. This ignores the fact the Convention itself is a relativist and utilitarian set of principles. The Convention is relativist and utilitarian because it supports particular values and beliefs grounded in a liberal democratic society over others. Human rights discourse is about expression of political preferences. Gearty for example distils a wide range of writing to support his view that "[t]he term 'human rights' is the phrase we use when we are trying to describe decency in our post-philosophical world" (Gearty 2006, p 56-57). This writer takes Gearty's point to be that public debate is no longer dominated by discussion of ideology or philosophy, as it was during the Cold War or between the Wars for example, but that many arguments are now made for or against policies being pursued by an appeal to 'human rights'. Gearty has come to see this as positive. Human rights language can be used to make the world a better place.

One can use another argument deployed by *Salako* to address use of strict liability for minor offences. He advances the view that use of civil sanctions for regulatory offences would remove any problem of strict liability being in breach of the ECHR for them. His assertion that "civil sanctions would offer equivalent possibility of enforcing regulatory offences" is compelling (*Salako* 2006, p 531). This would require Parliament to clearly set out when strict liability was to be used for serious crimes and, in matters where the public interest can be achieved without the criminal sanction, to set out an alternative regulatory or administrative system, similar to the situation in France or Germany (Reid 2008, pp 188-91). On the question of what is a 'regulatory' offence Glover argues for a licensing approach (based on purposive analysis of the cases) to denote situations in which a reverse legal burden could be legitimately imposed.

Glover says that "the defendant who voluntarily engages in an activity, which is lawful but which presents a serious risk or danger to public health and safety, can expect an offence concerned with the activity to be classified as regulatory". He argues that the 'licensing' approach is "particularly appropriate to road traffic offences". (Glover 2006, conclusion. See also Glover 2007).

The ECHR system takes account of the fact that European criminal law systems do have significant differences in substantive law, even though they are dealing with the same criminal legal problems. Britain is different to France next door just as France is different to Germany next door and there are even differences within states, England and Wales being different at least in degree to Scotland. The same applies in North America where Canada prohibits strict liability offences as a constitutional matter for offences involving imprisonment, whereas strict liability is found for serious offences in many US jurisdictions.<sup>12</sup> In *CC v Ireland* [2006] IESC 33 the Irish Supreme Court emphasised a requirement of justice in the Constitution as a reason for invalidating a strict liability sexual offence. The Criminal Law (Sexual Offences) Act 2006 has cured this defect.<sup>13</sup> As attitudes among jurists change over time the Convention may help restrict strict liability in specific cases by reinforcing the Common Law presumption for an interpretation that excludes strict liability where an Act is silent on *mens rea*. While it marks a great improvement on the previous law the SOA could still have been drafted rather more clearly in setting out when provisions were strict and limiting this in relation to children. (For a recent consideration of the issues involved in drafting clearer legislation from Ireland see Expert Group on the Codification of the Criminal Law 2004 para 1.59; 3.47).

## Conclusion.

That the Sexual Offences Act abolished a mistaken honest belief in consent as a defence for very serious criminal offences caused some concern among practitioners and has been discussed at length elsewhere. The ruling in *G* makes it clear that HRA / ECHR arguments do not invalidate strict liability over age either. The House of Lords had taken a strong stance in favour of *mens rea* immediately prior to the Act, such that Lamb, in a text published in 2003, confidently stated that “Fortunately for all concerned, the issue is now crystal clear and such a defence [of mistaken belief] does exist”. (Lamb 2003, Preface). Parliament has not yet followed the SOA with other general criminal law legislation reducing *mens rea* requirements but one potential trend is that Parliament will choose in other offences to make reasonable belief in any defence element the default position. That would fairly put the issue of risk on the defendant. If D takes a risk as to a fact that may lead to liability, without reasonable grounds, they stand to be convicted. Alternatively the use of strict liability may be encouraged by the ruling in the instant case; Parliament has generally introduced strict liability offences subject to mitigation by no-negligence or similar defences. These are compliant with the Convention.

The litigation that arose in *G* was largely due to the attitude of the lawyers involved. (On lawyers and drafting refer to Lord Phillips’ critique in ‘The Draftsman’s Contract’, BBC 2008). Parliament must take responsibility as well though. If clear and precise language was used in drafting offences – making it explicit what are the fault elements required – such cases could be avoided. At the same time it can be hoped by all those concerned for the rule of law as a meaningful concept that Parliament will restrict strict liability to minor offences unless there are very compelling reasons to

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<sup>12</sup> For Canada see *Reference re. Section 94(2) of the Motor Vehicle Act* 23 CCC 3d 289 (1985).

<sup>13</sup> Discussed by Gillespie 2007; for a summary of the law on Sexual Offences, see Citizens Information, 2008.

the contrary. Any such exceptional state of affairs (such as the need to protect children) should be made clear by our elected representatives.

There are some optimistic signs for those concerned with over-criminalisation. There may be some hope for greater diversion of young offenders when appropriate in the future. Both the 'right' leaning think tank Reform and the 'left leaning' IPPR, as well as the opposition Liberal Democrat party, have called for new approaches to youth justice that would concentrate on deterrence and prevention, while using prosecution for the most serious offences. (Giangrande 2008, pp 30 – 31; Liberal Democrat Justice & Home Affairs Team, 2008; Margo & Stevens, 2008). *Prima facie* an offender in a case like the one discussed here would still be prosecuted but other options may be taken to deal with lesser inappropriate sexual behaviour by young people.

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