CITATION:	*RIGBY v ND* [2021] NTLC034 (YJC)
PARTIES:	RIGBY V ND
TITLE OF COURT:	YOUTH JUSTICE COURT
JURISDICTION:	YOUTH JUSTICE
FILE NO(s):	22010272
DELIVERED ON:	30 NOVEMBER 2021
DELIVERED AT:	DARWIN
HEARING DATE(s):	27 OCTOBER 2021
DECISION OF:	ELISABETH ARMITAGE

CATCHWORDS:

Criminal Law – Youth Justice - criminal liability and capacity – child of immature age – *doli incapax*

Prosecution bore the burden of proving the 13 year old defendant had the capacity to know her conduct was wrong – wrong means morally or seriously wrong by the ordinary standards of reasonable adults

Criminal Code Act 1983 (NT) ss 38, 43AQ

RP v The Queen (2016) 259 CLR 641

KG v Firth [2019] NTCA 5

RJ v Dunne [2021] NTSC 32

O'Toole v Arnold (1982) 16 NTR 8

RYE v Western Australia (2021) A Crim R 174

R v F, Ex parte Attorney-General [1999] 2 Qd R 157

R v EI [2009] QCA 177

R v TF [2018] QChC 26

M v AJ (1989) 44 A Crim R 373

HS v Lawford [2018] WASC 257

REPRESENTATION:

Counsel:

Police: C McKay

Defendant: M Aust

Solicitors:

Police: Office of the Director of Public Prosecutions

Defendant: North Australian Aboriginal Justice Agency

Category classification:	A
Decision ID number:	
Number of paragraphs:	45

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22010272

BETWEEN:

RIGBY

AND:

ND

Defendant

REASONS FOR DECISION

(Delivered 30 November 2021)

JUDGE: Elisabeth Armitage

1. The young defendant in these proceedings was 13 years old at the time of the alleged offending.

2. The facts were largely not in dispute. The incident was recorded on a phone and the phone footage and some witness statements were tendered in the hearing. On 17 March 2020, at the end of the school lunch break, the defendant and another school girl engaged in a physical fight. The Assistant Principal stood between the two girls facing the defendant. His arms were outstretched in an effort to prevent the fight from continuing. The defendant slapped the Assistant Principal in the face, managed to push past him, and moved towards the other girl. A school based constable intervened and physically restrained the defendant, taking her to the ground and handcuffing her.

3. Concerning the slap, in his statement the Assistant Principal said that he did not recall feeling any pain but his face went red. He proceeded to teach his next class. At the outset I note that on this evidence I was not satisfied that the circumstance of aggravation, namely causing harm was established.

4. In response to the incident the defendant was suspended from school until 9 April 2020.

5. Approximately 9 months after the incident the defendant was charged with an unlawful assault on the Assistant Principal who was acting in the performance of his duties and causing him harm, contrary to s 188(1) and 2(a) of the *Criminal Code 1983* (NT) (the *Criminal Code*). The matter proceeded to hearing in the Youth Justice Court on 27 October 2021.

6. The only issue in dispute in the proceedings was whether the prosecution had proved the defendant's criminal responsibility for her actions.

What is the legal test of criminal responsibility for those of immature age (between 10 and 14 years) as provided for by s 38 of the *Criminal Code 1983*?

7. Unlike any other jurisdiction, the *Criminal Code* has two provisions dealing with the criminal responsibility of youths between 10 and 14 years of age. For this matter and all offences that do not fall under Part IIAA of the *Criminal Code* the test is found in s 38 as follows:

> (2) A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act,

making the omission or causing the event he had capacity to know that he ought not do the act, make the omission or cause the event.

8. For Schedule 1 offences to which Part IIAA applies the test for children between 10 and 14 years of age is found in s 43AQ as follows:

> (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is one of fact.
>
> (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

9. The Northern Territory Court of Appeal considered s 43AQ of the *Criminal Code* in *KG v Firth.*[1] The Court held at [25] that:

> "The requirement was to prove that at the time of the conduct the appellant knew that the conduct was wrong. That term is not subject to any statutory definition or elaboration. Section 43AQ of the *Criminal Code* was inserted in 2005, and is modelled on s 7.2 of the *Criminal Code Act 1995* (Cth). The formulation is in different terms to that appearing in s 38 of the Criminal Code which excuses a person under the age of 14 years from criminal responsibility for an act unless it is proved that at the time of doing the act he "had capacity to know that he ought not do the act".
>
> In the Macquarie dictionary definition of the term, "wrong" means not in accordance with what is morally right or good. It is generally accepted that the statutory formulation in s 7.2 of the *Criminal Code Act 1995* (Cth), is the same as, or at least very similar to, the common law test in relation to *doli incapax*. Neither party to this appeal submits otherwise. In the reasons of the plurality in *RP v The Queen*[2], that test and the onus it carries were described in the following terms:[3]
>
> > … From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew that the conduct was "seriously wrong" or "gravely wrong". **No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.** To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests the contrary approach, it is wrong. **The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's**

[1] [2019] NTCA 5
[2] 259 CLR 641
[3] Loc cit 2 at [9] per Kiefel, Bell, Keane and Gordon JJ.

> **education and the environment in which the child has been raised.** (emphasis added)
>
> Once the matter was sufficiently raised as an issue in the trial, the burden was on the prosecution to prove beyond reasonable doubt that the appellant did know his conduct was "wrong" in the relevant sense."

10. Accordingly, so far as s 43AQ is concerned, the test in the Northern Territory is "the same as or very similar to the common law test" which was expounded in *RP*. However, the Supreme Court of the Northern Territory has not similarly considered s 38 of the *Criminal Code* but specifically noted that s 38 is formulated in different terms to s 43AQ. Emphasizing this distinction of language, the prosecutor submitted that the test in s 38 was different to and less stringent than the test in s 43QA and the common law presumption of *doli incapax*.

11. In support of her submission, the prosecutor also relied on the decision of Riley AJ in *RJ v Dunne.*[4] As this case was decided on fresh evidence there was no detailed consideration of either s 38 or s 43AQ. However his Honour also appeared to acknowledge a difference between the provisions when he said:

> "Three of the files related to non-schedule 1 offences under Part II of Division 2 of the *Criminal Code*. In relation to those three matters, the Youth Justice Court considered whether, pursuant to s 38 of the *Criminal Code*, the appellant should be excused from criminal responsibility for certain acts on the basis that at the time of the act she did not have the capacity to know that she ought not do the acts.
>
> …
>
> In relation to the remaining file…, a Schedule 1 offence under Part IIAA of the *Criminal Code*, the Youth Justice Court considered whether, pursuant to s 43AQ of the *Criminal Code* the appellant, being a child aged 10 years or more but under 14 years, was criminally responsible for an offence because she knew that her conduct was wrong.
>
> …
>
> …Her Honour was invited to draw conclusions, and did draw conclusions, from the objective circumstances of each offence in relation to the *questions* to be answered under s 38 of the *Criminal Code* (i.e. whether the appellant had capacity to know that she ought not to do the act) and s 43AQ of the *Criminal Code* (whether the appellant knew that her conduct was wrong)."[5] (emphasis added)

12. The prosecutor also provided detailed submissions on interstate provisions in identical or similar terms to s 38 of the *Criminal Code* and how courts have applied and interpreted those provisions in the Code jurisdictions of Tasmania[6], Queensland[7] and Western Australia[8].

13. Concerning the equivalent provision (s 29) in the *Criminal Code 1899* (QLD) the prosecutor noted that in *R v F, Ex parte Attorney-General*[9] the onus and burden on the prosecution was expressed as follows:

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[4] [2021] NTSC 32 per Riley AJ
[5] Ibid at [2], [4], [14]
[6] *Criminal Code Act 1924*, s 18
[7] *Criminal Code 1899*, s 29
[8] *Criminal Code Act 1913*, s 29

> "…proving beyond reasonable doubt that the accused child had the capacity to know that he ought not do the act, *and no more*." (emphasis added)

14. The prosecutor relied on *R v EI*[10] in which the Queensland Supreme Court exercising its appellate jurisdiction, per McMurdo J (with Holmes JA, and Applegarth JJ concurring) said:

> "In *R v B,*[11] Pincus JA (with whom Davies JA and de Jersey J agreed) said that it was not the law of Queensland that "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt", referring to the statement to that effect in the English case of *B v R.*[12] Pincus JA said:
>
> > "What the Code requires could hardly be more clearly stated: it must be proved that at the relevant time 'the person had capacity' (I emphasise capacity) 'to know that the person ought not to do the act'. This is, of course, different from proving actual knowledge… Further, there is no intention in the section that any special burden of proof applies to this issue." [13]
>
> However, when discussing the facts of the case, Pincus JA also said the question was whether the appellant had the capacity to know that what he was doing was "wrong".

15. In addition the prosecutor relied on *R v TF*[14] in which Fantin DCJ sitting as a judge alone in a trial in the Queensland Children's Court at [21] rejected common law principles as applying to s 29 of the *Criminal Code 1899* (QLD) when he said:

> "In contrast to the common law test, it is not necessary under s 29 (2) for the prosecution to prove *actual knowledge* that the act was *wrong*, only the *capacity to know* that the person *ought not to do* the act." (emphasis added)

16. However, concerning what was meant by "ought not to do the act" Fantin DCJ also equated that with the concept of "wrongness" when he said at [23]:

> "Evidence of an allegation of an incident which the defendant denied may be relevant to show that it is being drawn to the defendant's attention on a previous occasion that conduct such as this was serious conduct and can show that the defendant would know thereafter that such conduct was wrong."

17. Tasmania has taken a slightly different approach. In *M v AJ*[15] Neasy J, considered s 18(2) *Criminal Code Act 1924* (TAS), a similar but not identical provision to s 38 of the *Criminal Code.* This case concerned the discharge of an air-rifle by a 13 year old when the law prohibited children from discharging a firearm. Neasy J said:

> "Section 18 (2) of our *Criminal Code* in my opinion is also to be interpreted in the common law sense that if the child is proved to have the capacity to know, he is presumed to know in fact, that "the act or omission was one which he ought not to do or make". Evidence of the child in fact knew that the act was wrong is of course

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[9] [1999] 2 Qd R 157
[10] [2009] QCA 177
[11] [1997] QCA 486
[12] (1960) 44 Cr App R 1, 3 (Lord Parker CJ)
[13] Loc cit 11 at [16]
[14] [2018] QChC 26
[15] (1989) 44 A Crim R 373

> the best evidence that he had the capacity to know. The words "which she ought not to do or make" are the same as the corresponding words in s16(1)(a)(ii) of the Code, which enact our equivalent of the second limb of the McNaughton Rules, and I respectfully agree with Bray CJ in the South Australian case, *M* at 591, that the meaning is the same also. That is, "ought not to do or make" incorporates the ordinary standards of reasonable men.
>
> …
>
> In the present case I think it would have been necessary to prove in respect of the first charge that the applicant had sufficient capacity to understand and know that the act of discharging the air-rifle was wrong because he was a child when he discharged it, whereas if he had been aged 16 years or over it would not have been wrong...It seems to me that it would take reasonably mature sense of civic responsibility, presumably of the kind possessed by legislators who enacted s 22 in the first place, and probably not to be expected of a 13-year-old boy, to understand that it is wrong for a person under the age of 16 years to discharge a firearm, including an air rifle, under any circumstances, whereas it is not wrong for an adult or person aged 16 years or more to do so. To believe that his father might punish him for using the air rifle was not the same thing as knowing or having the capacity to know that the act was in itself something not to do because he was a child."[16]

18. After receiving initial submissions from the prosecutor the Court was later referred to a more recent Western Australian decision, *RYE v Western Australia*[17] *(RYE*). In that decision the majority maintained a distinction between the concepts of "capacity to know" and "knowledge" but applied the common law notion of "wrongness" to the words "ought not to do the act". The majority, per Buss P and Mazza JA at [44] – [55], held that:

> "In our opinion, it is plain, from the text of s 29 of the *Code*, that a child who is aged at least 10 years but less than 14 years will not be criminally responsible for an act or omission unless the prosecution proves beyond reasonable doubt that at the time the child did the act or made the omission the child had "capacity to know" that he or she ought not to do the act or make the omission. In particular, that part of s 29 is concerned with the child's *capacity* to know as distinct from the child's *actual* knowledge. Our opinion on this is supported by the preponderance of the appellant decisions in Queensland to which we have referred.
>
> We turn to consider what is meant by the child's capacity to know that "he ought not to do the act or make the omission", within s 29 of the *Code*.
>
> In *R v B,* Pincus JA appears to have equated a child's capacity to know that "he ought not to do the act or make the omission" with a capacity to know that the doing of the act or the making of the omission was "wrong". The appellant in that case had been convicted of having unlawfully assaulted the complainant, who was a teacher, by threatening the complainant with a knife. Pincus JA said that "[o]ne would expect a child as old as 12 to have the capacity to know that threatening a teacher with a knife is wrong" (at 4).

[16] Ibid at 383, 384
[17] 288 A Crim R 174

In *R v F*, Davies JA expressed the view that if the phrase "ought not to do the act" needs to be paraphrased, and his Honour doubted whether it does, then the phrase enunciated by Bray CJ (Bright JA agreeing) in *R v M*[18] namely that the act was "wrong according to the ordinary principles of reasonable men", should be used (at 160; 116).

In *R v EI*[19], McMurdo J referred, with apparent approval, to Pincus JA's formulation of the relevant question in *R v B*, namely whether the child had the capacity to know the what he or she was doing was "wrong" [16].

In *R v TT*[20] Keane JA said that what the trial judge had to decide in that case was "whether he was satisfied beyond reasonable doubt that the appellant had the capacity to know that it was *wrong* to assault another person". (emphasis added)

In our opinion, the word "ought" in s 29 connotes, in context, duty or rightness. The words "ought not" in s 29 are the negative form of the word "ought". See the *Australian Oxford Dictionary* (2nd ed.2004) p 915.

In our opinion, the statement in s 29 of the *Code* as to the child's capacity to know that "he ought not to do the act or make the admission" is a reference to the child's capacity, at the material time, to know that doing the act or making the omission was morally wrong. The requisite capacity to know that doing the act or making the omission was morally wrong is not to be equated with capacity to know that the conduct in question was legally wrong or a breach of the criminal law. See, generally *RP at [11]*. Also, the requisite capacity to know that doing the act or making the omission was morally wrong is not to be equated with capacity to know that the conduct in question was naughty, mischievous or rude. See, generally, *RP* at [9], [11], [33]. A child's capacity to know that "he ought not to do the act or make the omission" in s 29 is concerned with the child's capacity to know that the relevant act or omission was morally wrong as distinct from legally wrong or a breach of the criminal law or merely naughty, mischievous or rude. It is necessary, however, to connect the concept of moral wrongness within s 29 to community standards which give the concept practical meaning and enable the test to be readily understood and applied by a jury or other fact-finding Tribunal. In our opinion, a child will have capacity to know that doing the relevant act or making the relevant omission was morally wrong if, at the material time, he or she had capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults. See, generally, *R v Porter*,[21] *R v MacMillan*,[22] *R v M* (at 591). So, the question for the jury or other fact-finding Tribunal where the State must prove beyond reasonable doubt that a child had the requisite capacity is whether, at the material time, the child had capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults…

…

[18] (1977) 16 SASR 589 at 591
[19] [2009] QCA 177
[20] [2009] QCA 199
[21] (1933) 55 CLR 182 at 189-190 (Dixon J)
[22] [1966] NZLR 616 at 621-622 (Turner J delivering the judgment of the Court of Appeal New Zealand)

> In our opinion, where the State must prove beyond reasonable doubt that a child had the requisite capacity, within s 29 of the *Code*, attention must be focused upon the intellectual and moral development of the particular child at the material time. See *RP* at [12]. A child's education and the environment in which he or she was raised a highly relevant in considering whether the child had the capacity to know, at the material time, that the conduct in question was seriously wrong by the ordinary standards of reasonable adults. See *RP* at [9]."

19. Handing down a separate decision Vaughan JA largely agreed with the majority in *RYE* but clarified his concept of wrongness by reference to "the normal adult standards of a reasonable person" and not by reference to "morality". At [87] – [93] he said:

> "Obviously enough, in terms of a child between seven and 14 years of age, what is required is proof of *capacity* to know rather than actual knowledge. That is not to say that proof of actual knowledge on the part of such a child that she he or she ought not to do a particular act or make a particular omission is irrelevant. Forensically, proof of actual knowledge may be an appropriate means of satisfactorily proving capacity to know.
>
> The further question is what is meant by s 29's requirement that it be proved that the child had capacity to know that he or she "ought not to do the act or make the omission".
>
> It is in this latter respect that I have a slightly different view to Buss P and Mazza JA. Their Honours state that the relevant statement in s 29 is a reference to a child's capacity, at the material time, to know that doing the act or making the omission was "*morally* wrong" (emphasis added) (see [51] above). I accept that the words "know that [he or she] ought not to do the act or make the omission" should be read and construed as "know that it is *wrong* to do the act or make the omission". There is considerable authority in support of that conclusion.
>
> The plurality in *RP v The Queen* – a case concerning the presumption of *doli incapax* at common law – distinguished between a child's knowledge of "moral wrongness" and awareness that conduct is "merely naughty or mischievous". Their Honours stated that the presumption may be rebutted by evidence that the child knew it was morally wrong to engage in the conduct.
>
> The proper approach to the construction of the *Code* is well-established and requires no development in these reasons. In considering the text, context and purpose of s 29, I would not qualify s 29's requirement of proof of the child's capacity to know that the act or omission was wrong (i.e. that he or she ought not to do the act or make the omission) in terms of moral wrongness. The relevant purpose or object of s 29 is to stipulate when a child between seven and 14 years of age has criminal responsibility in the same way as if he or she was an adult. Having regard to that purpose, I prefer the exposition of Davies JA (MacPherson JA and Shepherdson J agreeing) in *R v F; Ex parte Attorney –General* (p 160):
>
> > It is preferable in my view, if the phrase "that the person ought not to do the act" needs to be paraphrased, and I doubt if it does, to use the phrase "that the act was wrong according to the ordinary principles of a reasonable man".
>
> It may well be that my preference for this formulation over the term "morally wrong" is a distinction without a difference – especially given how Buss P and

> Mazza JA go on to explain the concept (see [51] above) and then apply it (see [79] above). Certainly in most cases that will be the position. I, however, favour avoiding the potential for any philosophical sophistry that may arise in seeking proof that a child had capacity to know that an act or omission was morally wrong. It is enough, in my view, that the child has the capacity to know that the act or omission is wrong by the normal adult standards of a reasonable person.
>
> Lest there be any doubt, this does not require that the child be proven to have the capacity to know that an act or omission is *legally* wrong. I agree with what Buss P and Mazza JA have stated in this respect."

20. The prosecutor addressed this recent authority in supplementary submissions. The prosecutor submitted that *RYE* maintained the appropriate distinction between the concepts of "capacity to know" as distinct from "actual knowledge". However, where their Honours equated "ought not to do" with the concepts of "moral wrongness" or "wrong by the normal adult standards of a reasonable person", the prosecutor submitted that such an approach was not consistent with the correct interpretation of the *Criminal Code*, particularly considering the different language between the two provisions.

21. Concerning *RYE* and all the interstate decisions the learned prosecutor submitted:

> "However, what this case is incapable of doing, as is also the position with the cases of the other jurisdictions, is address the existence of the two provisions in the NT on incapacity. This is a factor which is unique to the NT, and a matter which, in the prosecution submission, cannot be overlooked in the Court's interpretation of the requisite tests which apply to those provisions.
>
> The Court should have regard to the varying interpretations interstate. However, ultimately, the Court should arrive at an interpretation which is consistent with the express (and different) words of s 38 and s 43AQ, and which accounts for, and has regard to, the existence of the two provisions in the NT.
>
> …
>
> The prosecution submits that the 'test' as enunciated in *RP*, namely knowledge by the child as to the conduct being seriously or gravely wrong, is not the applicable test as to s 38 or s 43AQ."

22. I consider that the prosecutor was submitting for an essentially literal interpretation of the section noting that: s 38 is contained in a codifying Act; the words used are ordinary and are capable of being given their ordinary English meaning; and such an approach is consistent with there being two different sections concerning an immature person's criminal responsibility and permits each section to be interpreted and applied according to its own language.

23. In contrast to the prosecution submissions, defence counsel adopted a largely purposive approach to the task of interpretation and submitted for a consistent interpretation in line with the common law as applied by the Supreme Court in *KG v Firth*. In support of his position defence counsel submitted that:

> "The purpose of the sections is to ensure that young and vulnerable children are not unduly or arbitrarily made liable to criminal responsibility for actions they are too immature to conceive as criminally wrong.
>
> There is no basis for differentiating the relevant test, and in fact it makes perfect sense that s 43AQ and s 38 are read and interpreted in a consistent manner in circumstances where the same defendant may face multiple charges that fall within both Part II and Part IIAA, such as a criminal damage and an unlawful entry. It is

absurd in the extreme for the prosecution to lead the same evidence and legitimately seek to uphold a conviction for an unlawful entry on the basis of rebutting a lesser presumptive test under s 38 and accept an acquittal on a criminal damage on the basis of *doli incapax* under s 43AQ. To do so is to undermine the integrity of the criminal justice system."

24. Defence counsel further submitted that:

> "…the Tasmanian line of authority should be followed in the Northern Territory, and that actual knowledge that the child "ought not do the act" is required. In 2005 the *Code* was amended to introduce a new criminal responsibility regime. This introduced… s 43AQ which requires actual knowledge by the child that conduct was wrong, rather than the capacity to know the conduct was wrong.
>
> …
>
> This is part of the modernisation of the *Code* in which it is envisaged all offences will eventually be re-drafted to adopt the Part IIAA criminal responsibility regime.[23] To follow the Tasmanian line of authority on this point supports an interpretation which ensures consistency across the current regimes and adopts the common law approach as an accurate reflection of the modern drafting of the *doli incapax* principle.
>
> …
>
> The capacity to know that the act is one that the child "ought not to do or make" is expressed… in the interstate authorities as the capacity to know that the act was wrong…
>
> …
>
> *RYE* and *M v AJ* both support the construction and interpretation contended for by the defendant, namely that "capacity to know he ought not do the act", inherently requires actual knowledge of serious or moral wrongness of the act or omission.
>
> Whilst the wording of ss 38 and 43AQ are different, the test to be applied is effectively the same and is reflected as set out at [51] of the majority judgement in *RYE.*
>
> The prosecution bears the onus of proving beyond reasonable doubt, that at the material time, the defendant "had the capacity to know not to do the act" because *she actually knew, that slapping a teacher in the face in an attempt to reengage in a consensual fight with another student, during a moment of high emotion, was seriously or morally wrong by the standards of reasonable adults.* It is not enough to prove only that she knew what was naughty or rude or a breach of the school rules."

25. Before the introduction of the *Criminal Code* the Supreme Court applied the common law presumption of *doli incapax* for a child between 10 and 14 years of age and held that the child's knowledge that an act or omission was wrong was a necessary ingredient of the charge.[24] When the

[23] Second Reading Speech, *Criminal Code Amendment (Criminal Responsibility Reform Bill) (No 2)* 2005, per Dr Toyne
[24] *O'Toole v Arnold* (1982)16 NTR 8

Criminal Code was drafted the common law language was not used. The words doli incapax do not appear and nor is there any reference to rebutting presumption. In *HS v Lawford*[25] Jenkins J stated:

> "I acknowledge that Samuel Griffith's draft *Criminal Code* inserted a marginal note which indicated the basis of s 29 is 'common law'. However, the text of s 29 has a plain and unambiguous meaning. The meaning of the provision of the *Code* should be ascertained from its text rather than by reference to the common law."

However, this approach was not followed in *RYE*.[26]

26. So far as the words of s 38 and s 43AQ are concerned it appears on its face that there are potentially significant differences in meaning between the two sections, namely, the child's "capacity to know" that he or she "ought not to do and act" in s 38 versus the child actually "know(ing)" that the "conduct is wrong" in s 43 AQ. The differences in terminology have been acknowledged by the Northern Territory Supreme Court.

27. However, in the absence of Northern Territory authority on s 38, in my view the proper approach to statutory interpretation requires me to have significant regard to the interstate authorities in which interstate superior courts have considered the same or similar provisions in their Criminal Codes. I consider that those decisions provide strong persuasive authority which I should follow concerning the interpretation of s 38 of the *Criminal Code.*[27]

28. As to what is meant by the words "capacity to know" there is some difference between the Tasmanian authorities which equate "capacity to know" with actual "knowledge" and the Queensland and Western Australian authorities which maintain a distinction between the two concepts as explained in *RYE*. Given the lengthy precedent history in Queensland, the thorough analysis and very recent adoption of that history by their Honours in *RYE*, and noting that all three Justices in *RYE* agreed on this issue, I consider that I should follow the decision in *RYE*. I consider that s 38 requires proof that a child between 10 and 14 years of age has *capacity* to know rather than actual knowledge.

29. The further question is what is meant by s 38's requirement that it be proved that the child had capacity to know that he or she "ought not do the act or make the omission". In Tasmania, Queensland and Western Australia the courts have consistently held that it must be proved that the child has the capacity to know that what he or she was doing was "wrong". Having considered the Queensland authorities, the majority in *RYE* explained this as "morally wrong" as distinct from naughty, mischievous, rude or "legally wrong". The majority said "a child will have capacity to know that doing the relevant act or making the relevant omission was morally wrong if, at the material time he or she had capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults".[28] I consider I should also follow and apply this reasoning of the majority in *RYE* to s 38 of the *Criminal Code.*

What evidentiary matters should be considered when determining whether the prosecution has proved criminal responsibility pursuant to s 38 of the *Criminal Code (NT)*?

30. As I have concluded that "ought not do the act or make the omission" connotes the concept of wrongness as explained by the majority in *RYE* in my view the evidentiary matters relevant to this question are the same matters relevant to the question under s 43AQ of the *Criminal Code (NT).* In *KG v Firth* the plurality said at [27]:

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[25] [2018] WASC 257
[26] Loc cit 19 at [30] (Buss P and Mazza JA)
[27] Pearce and Geddes, Statutory Interpretation in Australia, LexisNexis Butterworths 8th Ed. at [1.9]
[28] Loc cit 18 at [51] (Buss P and Mazza JA)

"… the burden was on the prosecution to prove beyond reasonable doubt that the appellant did know his conduct was "wrong" in the relevant sense. The categories of evidence which might be relevant to that issue include: any admissions made by the appellant; the nature of the alleged conduct (subject to the qualification that the presumption cannot be rebutted merely as an inference from the doing of the act); the circumstances surrounding the conduct, including any attempts at concealment or escape; and the appellant's background, including his education, upbringing, mental capacity and any previous criminal convictions. In *RP v The Queen*, the plurality stated:

> What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. The child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and excess of others property compared to offences such as damaging public property, fear of aiding, receiving stolen goods, or forgery. Answers given in the course of a police interview may serve to prove the child possesses the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required."

31. Further, at [29] the plurality in *KG v Firth* said "it will ordinarily be the case that the evidence of an experienced child psychologist in relation to a child's ability to understand right from wrong in a particular context will be given significant weight".

32. The plurality in *RP v The Queen* at [12] seems to have dispensed with the notion that the age of the child will necessarily be a relevant factor. Although the decision is concerned with the rebuttal of the presumption of *doli incapax* in common law, I consider this reasoning is also applicable to the question of proving criminal responsibility pursuant to s 38 of the *Criminal Code (NT)*. The plurality said that attention should be directed "to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not." It cannot be presumed that all children will develop at the same rate of maturity. This reasoning also focuses attention on the subjective nature of the test.

What evidence was led to prove the criminal responsibility of the defendant under s 38 of the *Criminal Code (NT)*?

33. The prosecution adduced evidence from a teacher responsible for truancy at the defendant's school. When the defendant was caught truanting by that teacher, the teacher considered that the defendant was able to articulate that she should be in class and that she would go to class. The teacher said that the defendant was encouraged to take responsibility for attending class but she was not told that there would be serious or punitive consequences if she did not go to class. In my view the evidence concerning truanting was largely irrelevant. The teacher was also aware that on occasions there were physical interactions between girls at the school. To his knowledge the police were never involved following any of the girls' fights.

34. Evidence of a more substantial nature was given by the Principal, who at the relevant time of the incident was the Head of Campus. The Principal gave evidence that the defendant commenced at the school in year 7 in 2018. The defendant's school records were tendered which contained, inter alia, a record of behavioural incidents. Those incidents included the following:

a. Between 6 November 2015 and 6 September 2018 the records reveal that the defendant was involved in 10 incidents of physical violence in the classroom.

b. On 13 June 2018 the defendant was non-compliant, refused to follow reasonable requests of her teacher and verbally abused the teacher. She was suspended from school for 2 days.

c. On 21 June 2018 the defendant punched another girl in class. The defendant also grabbed the other girl's hair, pulled her to the ground and punched her while on the ground. Two teachers broke up the fight. The defendant broke free and punched the other girl again. The defendant was suspended from school for a period of 5 days.

d. On 5 September 2018 the defendant pushed passed a teacher, pulled another girls hair, and threw the girl off her chair and onto the ground. The defendant was suspended for 1 day.

35. In respect of incidents (b) – (d) the Principal said that she investigated each matter, including speaking to the defendant. When the decision was made to suspend the defendant the Principal discussed the behaviour with the defendant and told her the behaviour was "not acceptable". Before the defendant was allowed to return to school she was required to participate in a re-entry interview with the Principal. During each re-entry interview the incident was discussed, it was explained to the defendant that her behaviour was not appropriate, and alternative approaches were suggested if conflict arose in the future. The Principal considered that at each re-entry interview the defendant was calm, polite, and responsive. However, when cross examined the Principal agreed that in spite of her interventions the message about correct behaviour was "not getting through".

36. The school records also revealed that on 19 February 2018, when the defendant's mother completed an enrolment form for primary school, the mother disclosed that the defendant suffered from intellectual/learning impairments and mental health or behaviour issues. However, similar disclosures were not made in any of the other enrolment forms.

37. In 2014, 2016 and 2018 the defendant's NAPLAN results indicated that she was operating well below the national average and below the school average in all the tested domains of reading, writing, language conventions and numeracy. The defendant was operating in bands one or two, but did attain a band 3 for reading in 2014 when she was in year 3.

38. The defendant's records reveal school attendance at about 74% when the defendant was in year five in 2016; about 64% when the defendant was in year six in 2017; about 37% when the defendant was in year seven in 2018; about 48% when the defendant was in year eight in 2019; about 13% when the defendant was in year nine in 2020; and 0% when the defendant should have been in year 10 in 2021.

39. A school record that became exhibit 6 in the proceedings noted behavioural and emotional concerns dating from 2017. From 2020 it is noted that defendant requires "ongoing senior teacher support to engage with learning, history of truancy, fighting and disengagement with learning, requires regular support for appropriate social interactions."

40. All in all I consider the evidence can be summarised in this way:

a. The Defendant was at all times operating well below the national academic standards.

b. Her attendance at school was poor and on a declining trend.

c. It was recognised as early as 2017 the she required support in respect of her truancy, fighting, disengagement with learning and appropriate social interactions. There was no evidence as to what, if any, special support was provided to her.

d. Police were not involved in any other incidents of fighting at the school.

e. On two occasions in 2018 when the defendant was caught fighting (and one incident included pushing past a teacher) she was suspended from school for a short period of time. At re-entry

meetings she was told that her conduct was not acceptable/appropriate and she appeared to acknowledge this. She appeared to understand that there were different approaches or strategies that she should follow to avoid physical conflict in the future. As a result of participating in those discussions she was allowed to return to school.

f. In the incident in question, the defendant was similarly engaged in a fight at school and she slapped the Assistant Principal in a spur of the moment effort to get past him and continue the fight.

41. I consider that the evidence establishes that the defendant knew that fighting at school was not acceptable or appropriate. If she engaged in fights she could be suspended and she would only be allowed to return to school if she agreed to adopt different strategies to fighting in the future. However, in spite of these school interventions it appears the defendant had difficulty in moderating or changing her behaviour. Given her poor reading and comprehension, it appears possible that she lacked the language skills of other children her age and she may have found it more difficult to resolve disputes through the use of language. The educational authorities recognised that she required additional support to improve her engagement with the school and her social interactions but there was no evidence as to what, if any, support had been provided.

42. However, I consider the evidence is incapable of supporting any inference, let alone one beyond a reasonable doubt, that the defendant understood or appreciated physical fighting, including slapping a teacher to continue to engage in a fight, was morally or seriously wrong in the sense required to prove criminal responsibility under s 38 of the *Criminal Code*. Indeed, I consider that the single slap was objectively less serious than the fight itself which was not the subject of a criminal charge. I am unable to find any evidence that points to the defendant having a capacity to understand the difference between the inappropriateness of fighting with other children, and the concept that a single slap aggravated the behaviour to such an extent that she could or should have understood that the slap was seriously or morally wrong.

43. In my view the conduct engaged in was another example of the kind of childish, immature and disruptive behaviour the defendant had been engaged in over a number of years. In the past it had been dealt with by school imposed interventions and discipline. On this occasion the school dealt with it in the same way, by imposing a suspension. There was nothing about the incident that elevated it beyond this other than the chance happening that the school based constable was present and used force.

44. It is difficult to discern on what basis it was determined that the public interest required the institution of criminal proceedings. It seems to me that there were alternative means of dealing with the matter, namely the measures open to and taken by the school.[29]

45. The defendant is not guilty and the charge is dismissed.

Dated this 30th day of November 2021

ELISABETH ARMITAGE
YOUTH JUSTICE COURT JUDGE

[29] *Youth Justice Act 2005* s 4 (q)