

“Adapt or Perish”: The uncertain fate of childhood contributory negligence in Scotland

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SUMMARY

The field of Delict (Tort) is a noteworthy exception to widespread, evolving child rights-based norms across Scottish Law, for there has been little change in the treatment of children in Delict in Scotland in over a century. This article argues that childhood contributory negligence, in its current form, cannot survive imminent, and full, statutory incorporation of the CRC in Scotland. The framework and operation of the law governing childhood contributory negligence is critically reviewed, drawing on Scottish, and relevant UK-wide, case law. Widespread inconsistencies in judicial reasoning about children in contributory negligence determinations are highlighted. Thereafter, consideration is given to what CRC compliance might involve in the field of Delict. Two core rights, article 3 (best interests) and article 6 (child’s right to life, survival and development), are then discussed with reference to new Scottish Criminal Sentencing guideline requiring courts to consider the evolving capacity of young people up until the age of 25 years. The article concludes with a call for conceptual and practical reform so that the largely punitive regime of childhood contributory negligence in Scotland must now – in the words of H.G. Wells – either “adapt or perish”.

1 Introduction: Seeing children as “real people”

In 2018, Lady Hale, then President of the United Kingdom (“UK”) Supreme Court (the highest court of appeal in civil cases), observed that the law “has trouble seeing children as real people”.¹ She posed the question: where the law does recognise children as real people, does it view them merely as “little adults”, or instead as different from adults, holding some modified adult rights alongside other “rights peculiar to childhood?”²

Throughout the last 30 years, Scotland has been on a journey towards recognising children as real people with real rights. That journey began on 16 December 1991 when, on behalf of all UK jurisdictions,³ the UK

1 Hale “Lecture on the 70th Anniversary of the Universal Declaration on Human Rights” 2 November 2018 <https://www.supremecourt.uk/docs/speech-181102.pdf> (last accessed 2022-11-22).

2 As above.

3 The four UK jurisdictions are England, Scotland, Wales, and Northern Ireland.

Government ratified the United Nations Convention on the Rights of the Child (CRC).⁴ Over the last three decades, a “slow conversion”⁵ of law and policy has taken place, so that children and their rights are now more visible in legal and administrative decision-making.⁶ Since none of the UK jurisdictions has yet fully incorporated the CRC, this conversion has been fragmentary in nature, with piecemeal statutory amendments being made over the years. However, Scotland is expected, imminently,⁷ to fully incorporate the CRC in statute, meaning that Children’s Rights will become “part of everyday life in Scotland”⁸ and, significantly, will be legally enforceable in Scottish courts.

In Scotland to date, much of the discussion concerning children and their rights has been focused on article 3 (best interests) and article 12 (child’s views) of the CRC.⁹ Where article 3 is concerned, the child’s best interests have become an increasingly apparent “primary consideration” (and in some areas of law it is the “paramount consideration”) when courts make decisions affecting children.¹⁰ Yet, the field of Delict (Tort) is a noteworthy exception to this widespread, evolving child rights-based

4 1577 UNTS 3 (20 Nov 1989) entered into force Sept 1990. The UK signed the UNCRC on 19 April 1990, ratifying it on 16 December 1991.

5 Fortin *Children’s Rights and the Developing Law* (2009) 783.

6 See, for example, Ss 1–2 of the Education Law (Standards in Scotland’s Schools etc. Act 2000, which contain a direct reference to Art 29(1) of the CRC in respect of the child’s right to school education); S 611(7) of the Family Law (e.g., Children (Scotland) Act 1995 concerned with respecting the child’s Art 3 and 12 rights in family disputes); S 41A of the Criminal Law (the Criminal Procedure (Scotland) Act 1995, added by the S 52(2) of the Criminal Justice and Licensing (Scotland) Act 2010, raised the age of criminal prosecution from 8 to 12 years).

7 The UNCRC (Incorporation) (Scotland) Bill, the purpose of which is to fully incorporate the CRC into Scottish Law, was introduced to the Scottish Parliament on 1 September 2020. It was passed unanimously on 16 March 2021. However, the UK Government referred the Bill to the UK Supreme Court asking for a ruling on whether certain provisions in the Bill exceeded the legislative competence of the Scottish Parliament. On 6 October 2021, the UK Supreme Court ruled that four ss of the Bill went beyond the powers of the Scottish Parliament. At the time of writing, the Scottish Government is revising the Bill with a view to it being passed by the Parliament, becoming law in the early course.

8 See Scottish Parliament “legislative overview” <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill> (last accessed 2022-11-22).

9 See the full text of the CRC <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (last accessed 2022-11-22); See, e.g., discussions about the Children (Scotland) Act 2020, which seeks to incorporate more fully the child’s Art 12 rights across the field, including within adoption law and in the public Children’s Hearing System.

10 S 11(7)(a) of the Children (Scotland) Act 1995; Across Scottish Family Law proceedings, e.g., the child’s best interests (the Scottish statutory synonym for which is “welfare”) is explicitly stated to be the court’s “paramount” consideration- see S 11(7), and 16(1) of the Children (Scotland) Act 1995; S 14(3) of the Adoption and Children (Scotland) Act 2007. In other fields, such as immigration, courts have said that best interests should be a “primary” consideration, see: *ZH (Tanzania v SOS for Home Department* [2011] UKSC 4 para 46.

norm, for there has been little change in the treatment of children in Delict in over a century. It is a field in which injured child claimants have often been treated as if they were “little adults”, while those special rights “peculiar to childhood,” as set out in the CRC, are afforded no consideration at all.

In this article, it is argued that the current Scottish approach towards children in Delict cannot survive full incorporation of the CRC in Scotland. In section 2 below, a critical overview is provided of the framework and operation of the law governing childhood contributory negligence judgments, and two fundamental impediments are identified where CRC compliance is concerned. Section 3 explores this further, drawing on Scottish, and relevant UK-wide, case law. Judicial reasoning about children in contributory negligence determinations to date is analysed and inconsistencies across the field are highlighted. In section 4, consideration is given to what CRC compliance might involve in the field of Delict, with a focus on two of the child’s core rights of particular relevance to the field; article 3 (best interests) and article 6 (child’s right to life, survival and development). Finally, section 5 concludes with a call for conceptual and practical reform, so that the largely punitive regime of childhood contributory negligence must now – in the words of H.G. Wells – either “adapt or perish”.¹¹

2 Adults and children in delict: “In essentials the same”?

Scottish children are most likely to be involved in court proceedings about delictual liability when they have sustained an injury resulting from unintentional adult wrongdoing (i.e., negligence). In such cases, the child claimant or their legal representative commonly raise personal injury proceedings as Pursuer against the alleged wrongdoer – the Defender. The Defender may be an individual (e.g., a driver) or a body (e.g., an educator or a building company). A common defence in personal injury proceedings is that the Pursuer has been responsible, in whole or in part, for their own injury because of their contributory negligence. This defence has a statutory basis in current law in terms of the Law Reform (Contributory Negligence) Act 1945 (“the 1945 Act”),¹² which applies throughout the UK.

The 1945 Act provides that the financial award made by the court (termed “damages”) can be apportioned in any case in which a Pursuer’s

11 Wells “Adapt or Perish, Now as Ever, is Nature’s Inexorable Imperative” *The Mind at the End of its Tether* (1945) 19.

12 Law Reform (Contributory Negligence) Act 1945 c. 28 (note: the 1945 Act does not extend to Northern Ireland). Prior to the coming into force of the 1945 Act, a successful defence plea of contributory negligence at common law defeated entirely any claim in personal injury, including a claim made by or on behalf of a child. The 1945 Act made statutory provision for apportionment where responsibility for fault is shared.

own negligence, or “fault”, has contributed in some way to their injury.¹³ The Act requires that the court consider whether the claimant’s fault contributed to their injury and, if so, to what extent it would be “just and equitable”¹⁴ to reduce the claimant’s award. Apportionment is an exercise that normally involves reducing a financial award by a specified percentage. When deciding how large a reduction to make, courts have regard to decisions in previous cases, as well as the circumstances of the case before the court. In practice, the court is attributing respective degrees of fault (often termed “blame” or “blameworthiness”) between Pursuer and Defender.¹⁵ This process has been described by the UK Supreme Court as a “rough and ready”¹⁶ exercise.

It is, though, conceptually problematic to conflate any exercise that seeks to apportion blame between an injured child pursuer particularly a young child, and the negligent adult defender responsible for injuring the child. To complicate matters further, when considering the injured child’s level of blameworthiness, Scottish courts sometimes rely on existing judgments about the blameworthiness of adult Pursuers injured in similar scenarios.¹⁷ Insofar as general statements offering authoritative guidance on the Scottish Law of Delict are concerned, the *Stair Memorial Encyclopaedia* simply provides that:

[A] lesser degree of care may be expected of a child or a person suffering from an infirmity or disability.¹⁸

In other words, *if* Scottish children possess any entitlement to be treated differently from adults in the Law of Delict, then they can be assumed to fall into much the same category as infirm or disabled adults. There is no mention in the *Stair Memorial Encyclopaedia* of distinctions that might be made between different ages and stages of a child’s development. In addition, the field of Delict has been explicitly excluded from the various statutory updates across Scottish civil law. These updates have modernised, and to some extent, harmonised the legal approach towards issues of childhood capacity.¹⁹

13 The S1 of the Scottish Act 1945 is entitled “Apportionment of liability in case of contributory negligence” and provides that “Where any person suffers damage as the result partly of his own fault ... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”

14 S 1(1).

15 See, for example, *Barnes v Flucker* [1985] SLT 142; *McCluskey v Wallace* [1998] SC 711; *Wardle v Scottish Borders Council* [2011] SLT (Sh Ct) 199.

16 *Jackson v Murray* [2015] UKSC 5, para 28.

17 See, for example, *McCluskey v Wallace*.

18 *The Laws of Scotland: Stair Memorial Encyclopaedia*, 15, 406. This publication is the only comprehensive narrative statement of the law of Scotland. It is cited with approval before Scottish courts.

19 The Age of Legal Capacity (Scotland) Act 1991 sets down specific age limits for various activities, such as instructing a solicitor, drafting a will, entering into common transactions and consenting to medical treatment. However,

Accordingly, there is no definitive answer to the question of whether there is a minimum age²⁰ below which children cannot be found contributorily negligent in Scotland. The question is one that predates the 1945 Act, and much of the relevant case law is historic. It is certainly true that very young children, below the age of 3, have not ordinarily been found liable in contributory negligence on account of their “tender years”.²¹ However, there is also some case law suggesting that, when courts decide toddlers lack the capacity to be at “fault”, the child’s parent may be found contributorily negligent in their stead on account of parental failure to supervise.²² There are also a number of judgments in which courts have decided that injured young children between the ages of 4 and 6 years possess the capacity to be contributorily negligent.²³

Scottish Law has not progressed significantly from the 1909 decision of *Cass v Edinburgh District Tramways*.²⁴ Here, the Court of Session, Scotland’s highest civil court, decided that William Cass, a 4-½-year-old child, was contributorily negligent after he was knocked down and seriously injured by a tram car. He had been crossing the road and had become distracted as he ate a little bag of nuts. Lord Guthrie observed that the circumstances of the case were:

in essentials the same as if a grown person, absorbed in a book, were to cross a thoroughfare, without looking up or down for approaching traffic.²⁵

As with England, Scottish case law about childhood contributory negligence has developed on a case-by-case basis with no underpinning rationale. Some courts have referred to the vulnerabilities of childhood when balancing the comparative “blameworthiness”²⁶ of a child pursuer and an adult defender. However, other courts²⁷ have not, and have instead made decisions about young children that continue to align with

19 S 1(3)(c) of the Act provides that “nothing in this Act shall affect the delictual responsibility ... of any person”.

20 Unlike many other jurisdictions, no minimum age of childhood contributory negligence has been set by Scottish statute or through evolving judicial practice. See Walker *The Law of Delict in Scotland* (1981) 86-7.

21 *Gardner v Grace* [1858] 1 F & F 359 at 359.

22 See, e.g., *Reilly v Greenfield Coal & Brick Co Ltd* 1909 SC 1328; *Christie’s Tutor v Kirkwood* 1991 SLT 805.

23 See, for example, *McKinnell v White* [1971] SLT; S 1(1) of the UK-wide Law Reform (Contributory Negligence) Act 1945 provides: “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage ...”.

24 1908 SC 841 (Outer House judgment); 1909 SC 1068 (Inner House judgment).

25 1909 SC 1068 para 2, First Instance (decision affirmed by Inner House).

26 For an early case, in which a distinction is made in the (English) court’s narrative between child and adult Pursuers, see *Gough v Thorne* [1966] 1 WLR 1387 para 1390, per Lord Denning.

the 1909 rationale in *Cass*.²⁸ Also, findings of contributory negligence in respect of children aged 6 and older, particularly in road traffic cases, have been commonplace over the years since then.²⁹

A further difficulty in Scottish (and wider UK) law is that there is no consensus from case law as to whether courts should be approaching decisions about childhood capacity using objective or subjective criteria.³⁰ If the test to be applied is an objective test, then is it that of the “reasonable person” or the “reasonable child?”³¹ If it is a subjective test, encompassing some consideration of the capacity of “the particular child” in question to be at fault, then what childhood characteristics is the court bound to consider – age,³² experience, gender, intelligence or attainment of developmental benchmarks, for example? And, regardless of whether an objective or subjective capacity test is applied, does any such legal test assist in determining what “reasonable” might mean in, for example, a case in which a 5-year-old child was afforded less than 6 seconds to respond to a sudden, and life-threatening, danger?³³

It is also rare for Scottish courts to be presented with any evidence about child capacity and development (either generally, or in respect of the injured child in question)³⁴ when reaching such decisions. Instead, questions about the age at which a child is capable of contributory negligence have, to date, simply been viewed as falling within the broad

27 *Fraser and Fraser v Edinburgh Street Tramway Co* [1882] 10 R 264; *Plantza v Corporation of Glasgow* [1910] SC 786; *Telfer v Glasgow Corporation* 1974 SLT (Notes) 51.

28 See, for example, *McCluskey v Wallace* (discussed in the main text below), in which the court used case law about injured adults to inform its decision-making, including *McDonald v Chambers* [2000] SLT 454; *McFarlane v Thain* [2010] SC 7.

29 See *McCluskey v Wallace* and *Jackson v Murray*; both discussed in the main text below.

30 Discussed further in S 3 below.

31 There has been little legal policy discussion about childhood contributory negligence to date. The Scottish Law Commission, Scotland’s law reform body, indicated in its *Report on the Legal Capacity and Responsibility of Minors and Pupils* (1987, *Report 110* para 5.1 and 5.6, that the child’s responsibility in contributory negligence might be “established” with reference to “the degree of care to be expected of a child of the same age, intelligence and experience” as “the child in question”. The matter was not given detailed consideration in that report.

32 Age, a commonly used benchmark in law, may merit deeper consideration. Recent research on the subject of brain development indicates that, while chronological age “infers general developmental changes”, biological brain age (which varies between individuals of the same chronological age) is a more accurate indicator of maturity and capacity. O’Rourke *et al* *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts* (2020) 14 <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf> (last accessed 2022-11-22).

33 *Barnes v Flucker*, discussed in the main text below.

34 For a rare case in which expert evidence was heard by the court about “the ready propensity” of teenagers to “indulge in risky activities”, see *Morton v Glasgow City Council* [2007] SLT (Sh Ct) 81.

sphere of judicial knowledge (*i.e.*, those matters that do not require evidence because it can be assumed that the court already knows the answer). Yet, the inconsistencies in case law on issues of childhood capacity over the years appear more suggestive of guesswork by the judiciary. In striking contrast, courts routinely consider expert evidence on other matters in dispute in personal injury proceedings, such as driving speed, road conditions or, indeed, the effect of alcohol intake on an adult Defender's capacity at the time of injury.³⁵ Thus, it is difficult to comprehend the lack of evidential input in such cases about the crucial issue of the child Pursuer's capacity.

The above overview of the legal approach in childhood contributory negligence case law reveals two fundamental issues regarding the treatment of Scottish children in Delict. These issues are interconnected and, it is submitted, both will be extremely problematic from the perspective of CRC compliance post-incorporation.

The first relates to the very young ages at which children have, with some regularly, been found guilty of contributory negligence. This is significantly out of step with contemporary provisions elsewhere in Scottish Law about children. For example, in Family Law, a 6-year-old child is not currently presumed to be "of sufficient age or maturity" to form a view about their family life."³⁶ In Criminal Law, for example, Scottish statute prevents the prosecution of children under the age of 12 for the commission of any offence.³⁷ The Age of Criminal Responsibility (Scotland) Act 2019, which came into force in December 2021, now provides that "[a] child under the age of 12 years *cannot* commit an offence",³⁸ removing any discussion about the possibility of capacity in

35 See, e.g., the recent Court of Session Outer and Inner House judgments in *Cameron v Swan* [2020] CSOH 20, a case involving an adult Pursuer in which evidence from a road traffic expert and an expert in cognitive psychology and aero-visual psychophysics was considered.

36 S 11(10) of the Children (Scotland) Act 1995. This provision will, once the Children (Scotland) Act 2020 comes into force, be replaced with a presumption that all children can express a view, regardless of age.

37 S 52 of the Criminal Justice and Licensing (Scotland) Act 2010, S 52 inserted a new S 41A to the Criminal Procedure (Scotland) Act 1995 preventing the prosecution of children under age 12. This provision came into force on 28 March 2011. It has now been repealed and replaced by the provision below which came into force on 17 December 2021.

38 Italics added. S 1 of the Age of Criminal Responsibility (Scotland) Act 2019 came into force on 17 December 2021, creating a new S 41 of the Criminal Procedure (Scotland) Act 1995, repealing S41A of the Criminal Justice and Licensing (Scotland) Act. The former S 41A had prevented the prosecution of children but had not removed their potential legal responsibility. It is also worth noting that the current age of criminal responsibility in Scotland is still 2 years below the international standard and has attracted wide-ranging criticism. The UN Committee on the Rights of the Child has called on States to raise the minimum age of criminal responsibility to age 15 or 16 (with an absolute minimum of 14). For an overview, see "Minimum Age of Criminal Responsibility" <https://www.cypcs.org.uk/positions/age-of-criminal-responsibility/> (last accessed 2023-11-23).

a child below this age to behave in a way that gives rise to responsibility in Criminal Law.

Further, across the civil law in Scotland, the Age of Legal Capacity (Scotland) Act 1991 provides that children below the age of 12 years are not presumed to be of “sufficient age and maturity” to have the requisite level of understanding required to instruct their own solicitor “in connection with any civil matter”.³⁹ This has long given rise to the paradox that, as the law currently stands, a child below the age of 12 is able to be found liable in contributory negligence proceedings, but that same child is not presumed to be capable of instructing their own solicitor in those very proceedings.⁴⁰

The low age of liability for childhood contributory negligence is additionally problematic when considered in the light of guidance provided by the United Nations Committee on the Rights of the Child (“the UN Committee”) to States Parties on “early childhood.”⁴¹ In defining early childhood as those years from birth until the age of 8, the UN Committee stressed that this is the period throughout which children are most dependent upon others for special care and recognition of childhood vulnerability. The position of the UN Committee indicates that findings of childhood contributory negligence by Scottish courts after the CRC has been incorporated, particularly in respect of young children, are likely to be vulnerable to legal challenges.

The second issue relates to the general state of uncertainty and inconsistency across the field of Delict in respect of children. Where contributory negligence is concerned, case law involving children reveals clear and pervasive inconsistencies in judicial approach. This has, in turn, generated several contradictory outcomes for children of similar ages injured in different, but factually similar, circumstances. Such differences are evident both in respect of whether a finding of contributory negligence is made at all, and, if it is, the percentage by which the child’s award of damages is reduced. These inconsistencies render it impossible to state the law in this area with confidence or to explain the law clearly to injured children and their legal representatives. It is suggested that the long-standing and unsatisfactory status quo is unacceptable from a human rights perspective and is discussed below with reference to specific case law examples.

39 S 2(4A) of the Age of Legal Capacity (Scotland) Act 1991.

40 This raises further issues, outside of the scope of the current paper, in terms of safeguarding and promoting the child’s Art. 12 right to be heard/ participate within the field of delict.

41 CRC “General Comment No. 7: Implementing Child Rights in Early Childhood” (2005) UN Doc CRC/GC/7/Rev1 para 10; CRC Preamble; and Art 31(1).

3 Critique of judicial reasoning about childhood contributory negligence

This section draws on Scottish and relevant UK-wide precedent to date and provides a critical overview and analysis of judicial reasoning in some of the most noteworthy modern childhood contributory negligence judgments.

3 1 *Mckinnell v White*:⁴² Objective and subjective conjecture on capacity

As noted in section 2 above, in the decades following the 1909 *Cass v Edinburgh District Tramways* judgment, even very young children have been found guilty of contributory negligence with some regularity. However, the judicial rationale supporting these decisions has been inconsistent. A starting place for more modern case law development can be found in the 1971 case, *Mckinnell v White*. There, the Court of Session cited the judgment of *Cass* when it found that Stephen Mckinnell, aged 5, was “guilty” of contributory negligence in equal proportion to the driver who knocked him down. In making this finding, Lord Fraser referred to the child’s education and the fact that he lived in an urban area and concluded that he would have been aware of the dangers of crossing a busy road.

Thus, in *Mckinnell*, the child was subjected in the litigation to what might be described as a hybrid legal test in respect of his capacity to be contributorily negligent. The court pronounced what (objectively) might be expected of a reasonable 5-year-old child. However, Lord Fraser then went on to note that Stephen himself was a particularly bright 5-year-old child (subjective). This hybrid approach, it seems, placed the child in an unenviable position, because it enabled the court to hold him to a higher standard of accountability – that of a child “somewhat above average intelligence”⁴³ of other children his age.

3 2 *Barnes v Flucker*:⁴⁴ When concessions are made...

Just over a decade years later, in *Barnes v Flucker*, in 1984, the Court of Session considered a case in which a 5-year-old girl was knocked down as she attempted to cross a road. In *Barnes*, the injured child, Lee Ann Barnes, was found to be “wholly [i.e., 100%] to blame for the

42 *McKinnell v White* 1971 SLT (Notes); S 1(1) of the UK-wide Law Reform (Contributory Negligence) Act 1945 provides: “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...”

43 As Above.

44 *Barnes v Flucker* [1985] SLT 142.

accident”.⁴⁵ In reaching this decision, the court referred to the standard “training and instruction in road safety” given to children of age 5 (an objective consideration). Submissions were also made to the court about the potential liability of the child’s mother who was also “vulnerable to the plea of contributory negligence because she knew that the children were going in and out of the house and playing.”⁴⁶

In its judgment, the court in *Barnes* explicitly stated that lawyers for all parties agreed that a child aged 5 “could in law be guilty of contributory negligence”.⁴⁷ This was unfortunate, for the court’s judgment concluded by stating that the case had been decided “[i]n view of the concession that the [child] could in law be guilty of negligence”.⁴⁸ The decision in *Barnes* therefore leaves open the possibility that, had such a concession not been made by the lawyers, the arguments advanced in the case (and perhaps even the decision reached) might have been very different.

3 3 *Galbraith’s Curator ad Litem v Stewart*⁴⁹ and *McCluskey v Wallace*.⁵⁰ No hard and fast rule?

In 1998, almost 15 years later, the inconsistencies in approach towards childhood contributory negligence were thrown into sharp relief by two different cases. That year, the Court of Session handed down two judgments in respect of two personal injury claims made on behalf of children injured in separate accidents. The children were of similar ages, although different genders. Both had been injured while playing at the roadside and, in each case, the adult defenders were found negligent. The question for the court to determine in each case was whether, and if so, to what extent, either child could be found guilty of contributing to their own injury.

The first case, *Galbraith’s Curator ad Litem v Stewart*, involved James Galbraith, an 8-year-old boy who had been injured while pushing around building materials left at a roadside by Stewart Construction. In finding that the child was too young to exercise care for his own safety in such circumstances, Lord Nimmo-Smith explicitly departed from the *Cass* rationale. He said that:

no hard and fast rule can be derived from [*Mckinnell* and *Barnes*], and the question of a child’s contributory negligence must depend on the nature of the particular danger and the particular child’s capacity to appreciate it.⁵¹

The judge referred to the building materials as “an allurements to children”⁵² and decided that James, as a child aged 8, was too young in

45 *Barnes v Flucker* 145.

46 *Barnes v Flucker* 145.

47 *Barnes v Flucker* 145.

48 *Barnes v Flucker* 145.

49 *Galbraith’s Curator ad Litem v Stewart* (No 2) [1998] SLT 1305.

50 *McCluskey v Wallace* [1998] SC 711.

51 *Galbraith’s Curator ad Litem v Stewart* 1307.

52 As above.

those circumstances to be held guilty (to any extent) of contributory negligence. In reaching this decision, the court applied a largely subjective legal capacity test – one which focused on that child’s personal ability to ascertain and respond to the dangerous situation in which he found himself.

This approach can be contrasted with the judgment in *McCluskey v Wallace* only three months after *Galbraith*. This time, proceedings had been raised in the Court of Session on behalf of Lucy McCluskey, a 10-year-old girl, who had been struck by the Defender’s car as she played on her bike at the side of the road. The Defender was found negligent by the court, and he raised the issue of the child’s contributory negligence.

Unlike the previous decision in *Galbraith*, the court did not focus on what impact, if any, the vulnerabilities that Lucy’s childhood should have upon contributory negligence considerations. Instead, Lord Marnoch, at first instance, relied on previous case law involving injured adults and decided that the child was 20% to blame for her injuries.⁵³ When the Defender appealed against this apportionment decision, the Inner House of the Court of Session held that, in failing to “appreciate the danger presented by the presence of two children on the pavement”,⁵⁴ the defender driver’s behaviour amounted to “very considerable” negligence. Lord McCluskey, delivering the opinion of the Inner House, observed in particular that it was:

appropriate to attach some significance to the fact that a young child on a child’s bicycle presents relatively little significant danger to others whereas a person driving a motor car is always a danger to others with which the car might collide at speed.⁵⁵

Notwithstanding these damning observations about both the extent of the Defender’s fault and the respective degrees of danger involved, the court upheld the original finding that Lucy was 20% to blame for her injuries.

The judgments, and respective rationales, in the *Galbraith* and *McCluskey* judgments, indicate an area of law sorely in need of reform. The final two cases discussed below (*Probert v Moore*⁵⁶ and *Jackson v Murray*⁵⁷) followed upon childhood personal injuries occurring in the 2000s. These cases involved older children, each of whom had been seriously injured after being struck by cars. However, as with *Galbraith* and *McCluskey*, the reasoning of the courts in *Probert* and *Jackson*, and the outcomes for each child, are difficult to reconcile.

53 *McCluskey v Wallace* adult pedestrian cases; *Adamson v Roberts* [1951] SC 681 and *Baker v Willoughby* [1970] AC 467 cited.

54 *McCluskey v Wallace* (case appealed by reclaiming motion from the Outer House of the Court of Session to the Inner House).

55 *McCluskey v Wallace*.

56 *Probert v Moore* [2012] EWHC 2324 (QB).

57 *Jackson v Murray* [2015] UKSC 5.

3 4 *Probert v Moore*.⁵⁸ A welcome interpretation of “just and equitable”

Probert, is an English judgment from 2012. As such, it carries persuasive weight in Scotland. The case began when proceedings were raised on behalf of a 13-year-old girl, Bethany Probert, who was knocked down and seriously injured as she walked home along a country road. The defender driver was found to be negligent, and the court ruled that, while the 13-year-old may have been “ill-informed” in walking home alone in the dark, she should not, as a matter of law, be held to blame for the accident on account of her youth.⁵⁹ No finding of contributory negligence was made, and the English judge said:

[Even if] I am wrong and Bethany did contribute to the cause of the accident I have to consider whether it would be just and equitable to make a finding of contributory negligence. In my view it would be inappropriate for me to do so...⁶⁰

This statement is interesting and very welcome. The words “just and equitable” are taken from section 1(1) of the UK-wide Law Reform (Contributory Negligence) Act 1945. These words form part of a larger whole:

... the damages recoverable... shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage⁶¹

When referring to this section, courts have generally focused on the word “share” in determining how best to distribute, or apportion, liability between the adult Defender and the child. However, in *Probert*, by stating that the mere fact of Bethany’s youth made it “unjust and inequitable” to make a finding of contributory negligence, the court placed the emphasis instead on the word “responsibility”. Doing so introduces the possibility of applying the existing provisions in the 1945 Act in a way that might immediately facilitate a more child rights-based approach.

58 *Probert v Moore* [2012] EWHC 2324 (QB).

59 *Probert v Moore* para 50.

60 *Probert v Moore* para 51. The judge, Pittaway observed, in the same paragraph, that “[t]here was no positive act on her part which caused the accident itself”. She was merely walking home. He drew a distinction between such cases and cases in which a child may run heedlessly out into the road. It is worth noting that the defender driver’s insurers were granted leave to appeal against this decision and the case was later settled out of court with a reduction of 10% in the Bethany Probert’s damages award.

61 S 1(1) of the Act provides: “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage ...”.

Such an approach would allow courts to determine facts as before, and to acknowledge any “contribution” on the child’s part to the cause of the injury. In cases involving, for example, road traffic injury this is likely to afford some degree of solace to an adult driver who is not wholly to blame for the accident. However, a child rights-based interpretation of section 1(1) of the 1945 Act would then require that courts consider whether, in view of the child’s best interests, development and evolving capacities,⁶² it would be “just and equitable” to find that child guilty of contributory negligence as a matter of Law. As with Bethany Probert, courts could still decide that an injured child had behaved in an ill-judged way, but would not be bound to follow this finding in fact with a finding of legal liability against the child. If, for example, the Scottish court in *McCluskey* had asked this question with regard to 10-year-old Lucy McCluskey, might it have decided that – given her age and stage of childhood – it was neither just nor equitable to find her legally blameworthy?

3 5 *Jackson v Murray*.⁶³ One case, three courts, three conflicting decisions

In Scottish case of *Jackson v Murray*, Lesley Jackson, a 13-year-old girl had, like Bethany Probert, been knocked down and seriously injured by a car driving at speed after she had dismounted from a school mini-bus and was crossing a country road. At first instance, the Outer House of the Court of Session found the Defender driver negligent, and then turned to the question of the child’s contributory negligence. Unlike the judge in *Probert*, the Lord Ordinary, Lord Tyre, rejected entirely the suggestion made on behalf of Lesley Jackson that her decision to step onto the road could be “characterised as a justifiable misjudgement”⁶⁴ of youth. Lord Tyre found the child “overwhelmingly”⁶⁵ to blame for her injury and apportioned her damages award, reducing it by 90%. This was a controversial⁶⁶ decision which was appealed to the Inner House of the Court of Session.

62 Art 3 of the CRC (best interests), Art 5 (evolving capacities of the child) and 6 (right to life, survival and development); See also General Comment No. 7: Implementing Child Rights in Early Childhood para 17 – recognising “evolving capacities” as a process “whereby children progressively acquire knowledge, competencies and understanding... it is important to take account of individual variations in the capacities of children of the same age and of their ways in reacting to situations”. Other rights are likely to be of relevance in reaching such decisions, depending on the circumstances of the individual case.

63 *Jackson v Murray* [2015] UKSC 5.

64 *Jackson v Murray* Outer House judgment para 46.

65 *Jackson v Murray* Outer House judgment para 37.

66 See, for example, Deery “Litigation: *Jackson v Murray* & Another: ‘The saga continues’” (“The judge ... deducted a staggering 90% of the damages to be paid to [child pursuer]”) <https://www.drummondmiller.co.uk/news/2014/02/litigation-jackson-v-murray-another-the-saga-continues/> (last accessed 2022-02-18).

The Inner House held that the Lord Ordinary had erred in making such a significant reduction in the child's award and re-apportioned her damages, awarding her 70%.⁶⁷ In doing so, the court made reference to the fact that a car was, after all, "a dangerous weapon" and also to Lesley's age: "a 13-year-old will not necessarily have the same level of judgment and self-control as an adult".⁶⁸ However, the Inner House was keen to stress that childhood was only one factor, among others, to be considered by the court in reaching decisions about liability for contributory negligence.⁶⁹

Lesley Jackson thereafter appealed to the UK Supreme Court, the highest civil Court of Appeal in the UK. The Supreme Court again revisited the same questions about capacity, causation and "respective blameworthiness"⁷⁰ between the child pedestrian and an adult driver. The Supreme Court observed:

If [Lesley Jackson] had waited until the defender had passed, he would not have collided with her. Equally, if [the defender] had slowed to a reasonable speed in the circumstances and had kept a proper look-out, he would have avoided her.⁷¹

The apportionment percentage of the damages award was again amended, this time to 50/50. The litigation in *Jackson*, which took 6 years to conclude involved two appellate courts interfering with decisions reached by lower courts (on the same facts) on the question of apportionment. The highly unusual twists and turns in the case reveal a worrying level of inconsistency within the field of Delict where children are concerned.

The irregularities observable in the contributory negligence case law determinations discussed above demonstrate that child rights-based reform is much needed if Scotland is to meet its obligations once the CRC is fully incorporated. In particular, the State obligations under articles 3 ("child's best interests") and 6 ("right to life, survival and development") merit further consideration.

4 What might compliance with the CRC look like?

Articles 3 and 6 are both core principles of the CRC, and both are of particular relevance to issues of childhood contributory negligence. Each article prompts uncomfortable questions for jurisdictions, like Scotland, where childhood liability is imposed and in which the Law of Delict has

67 *Jackson v Murray* Inner House judgment para 27.

68 As above.

69 *Jackson v Murray* Inner House judgment para 29.

70 *Jackson v Murray* [2015] SC (UKSC) 105 para 26.

71 *Jackson v Murray* para 40.

no child-centred focus. What, then, might compliance with these articles look like in post-incorporation Scotland? Each article is addressed in turn.

4 1 Article 3: Best interests “a primary consideration”

Article 3 places a duty on courts, and other bodies, to ensure that “the best interests of the child shall be a primary consideration” in “all actions concerning children”.⁷² The application of article 3 has been discussed primarily with reference to areas of law in which the welfare of the child is stated to be “the paramount consideration” in Scotland, such as Family Law or Child Protection Law. However, claims brought within the field of Delict, raised by or on behalf of an injured child, must also fall within the scope of article 3 because they are proceedings “concerning” that child.

It does not follow that Scottish courts are bound to elevate the child’s best interests to the paramount consideration as is the case in the field of Family Law, but in order to comply with the article 3 obligation, the child’s best interests must become “a *primary* consideration”. Whether this necessitates statutory intervention, in the form of, for example, introducing a conclusive/presumptive minimum age⁷³ below which a child cannot in law be found guilty of contributory negligence is ultimately a decision for the Scottish Government. However, given the imminent incorporation of the CRC in Scotland, finding the right way in which the field of Delict can honour the child’s best interests is a matter urgently requiring debate. In view of the article 6 discussion below, it may be very hard to justify the continuing imposition of any level of childhood liability in contributory negligence.

4 2 Article 6: childhood development – a comparison with Criminal Law

Where compliance with article 6 is concerned, States Parties are required to recognise not only the child’s “inherent right to life”, but also to “ensure to the maximum extent possible the survival and development of the child”.⁷⁴ In its guidance on article 6, the UN Committee has been clear that the article 6 duty extends to the provision of safe environs for young children “engag[ing] in play and recreational activities”.⁷⁵ In respect of older children, the article 6 duty requires that States Parties accommodate “the gradual building up of the capacity to assume adult behaviours” while noting that adolescence is marked by “rapid physical,

72 Art 3(1) of the CRC.

73 The last significant legal policy consideration of children in Delict was by the Scottish Law Commission in 1987. In its *Report on the Legal Capacity and Responsibility of Minors and Pupils*, it recommended that no minimum age of childhood liability be imposed. On balance, it considered that there was “no evident need for reform” at that time para 5.13.

74 Arts 6(1)–(2).

75 CRC “General Comment No. 7: Implementing Child Rights in Early Childhood” (quotes from CRC Art 31(1)).

cognitive and social changes”.⁷⁶ The current judicial practice of apportioning “guilt” and “blame” towards injured child pursuers (i.e., human beings still in the process of evolving their ability⁷⁷ to perceive or respond to danger) creates particular difficulty where the duty to safeguard and promote the child’s right to life, survival and development is concerned.

In terms of article 6, an argument can be made that finding any child (defined in the CRC as any person below the age of 18 years) guilty of contributory negligence is incompatible with a child rights-based approach. The force of this argument is strengthened by recent reforms elsewhere in Scottish Law. As noted above, in section 2, all children below the age of 12 are deemed incapable in Scottish Law of committing an offence. As such, they can neither be held criminally responsible for their conduct nor may they be prosecuted.⁷⁸ In addition, on 26 January 2022, the Scottish Sentencing Council, the body responsible for preparing sentencing guidelines for the Scottish judiciary, brought into effect a new guideline entitled “Sentencing Young People.”⁷⁹

“Young people” are defined in the guideline as those under the age of 25 years at the time they are either found guilty or have pled guilty in criminal court proceedings.⁸⁰ In drafting the guideline, the Sentencing Council explicitly took account of:

distinct aspects of existing Scottish law about the sentencing of young people, the treatment of young people generally, and the United Nations Convention on the Rights of the Child.⁸¹

76 CRC “General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003) UN Doc CRC/C/GC/2003/4 paras 2–3. General Comment No. 4 addresses, e.g., the interconnected responsibilities following from Arts 5 (evolving capacities of the child), 6 (life, survival, development), and 24 (right to health).

77 See Art 5 (evolving capacities of the child) and General Comment No. 7: Implementing Child Rights in Early Childhood para 17, recognising “evolving capacities” as a process “whereby children progressively acquire knowledge, competencies and understanding ... it is important to take account of individual variations in the capacities of children of the same age and of their ways in reacting to situations”.

78 S 1 of the Age of Criminal Responsibility (Scotland) Act 2019.

79 Scottish Sentencing Council “Sentencing Young People” <https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf> (last accessed 2022-11-22)

80 *Sentencing Young People* guideline 2. The guideline also provides, at guideline 12, that courts “should not rely solely on age when determining the maturity of a young person”. While, inevitably, chronological age arguably remains a useful benchmark across Scottish Law, the sentencing guideline takes account of the research which indicates that other factors, such as trauma, and adverse childhood experiences, may have more bearing upon capacity and maturity in the individual case (see n 32 above).

81 *Sentencing Young People* guideline 5. Although not all articles are referenced specifically in the guideline, it is assumed that articles of relevance include arts 3, 6, 19 and 40 of the CRC.

The “distinct aspects of existing Scottish law” referred to include, for example, the decision to preserve the court’s duty to consider the impact of the crime upon the victim as a relevant factor in sentencing decisions. Courts also retain the same range of sentencing powers as before and this includes the power to impose custodial sentences. However, a custodial sentence can now only be imposed on a young person “if the court is satisfied that no other sentence is appropriate”, and it must be shorter than the sentence that would have been imposed if “an older person”⁸² had committed the same offence. Thus, courts are now bound to consider the cognitive vulnerabilities of youth and the greater scope that exists for rehabilitating young people.

This guideline is also noteworthy in a much broader sense, for it represents a departure from the established widespread practice in the field of Delict of making general assumptions about the capacity of the young, because the new guideline is:

based upon research into how young people develop physically and psychologically, and into the differences between young people and older people.⁸³

This research, from 2020, included a literature review of findings to date on the development of the human brain from childhood to maturity. The focus of these findings was adolescence, “a time ... often characterised by poor decisions and impaired problem solving” because “the adolescent brain [is] ‘under construction’ until early adulthood”.⁸⁴ By taking account of the “lower level of maturity” and “greater capacity for change” in young people – not only up to the age of 18 but up until the age of 25 – the Criminal Justice system is adopting an approach that is compliant with having regard both to the best interests of young people (art 3) and to their developing faculties (art 6).

Significantly, the new sentencing guideline also requires a subjective consideration of the young person being sentenced. Criminal courts must now adopt an individualistic approach⁸⁵ that considers the personal characteristics and circumstances of the particular young person concerned. This acknowledges that the level of “blame”/guilt that the young person may bear in relation to the offence may be lower than that of a more mature person of the same age. Additionally, any sentence ultimately imposed must be one that recognises that the “culpability of a young person will ... be lower than that of an older person who is to be sentenced for the same, or a similar, offence.”⁸⁶

This approach contrasts starkly with the field of Delict, which is a field concerned with addressing civil – rather than criminal – wrongs. In

82 *Sentencing Young People* guideline 21.

83 *Sentencing Young People* guideline 4. Supporting research is O’Rourke *et al* (2020) guideline 4.

84 O’Rourke *et al* (2020) 2.

85 See n 32 and 80 regarding chronological age.

86 *Sentencing Young People* guideline 11.

Delict, injured child Pursuers (sometimes as young as 4 or 5 years of age) have been subjected to quite arbitrary determinations, comparing them with adult Pursuers injured in similar circumstances.⁸⁷

5 Time for childhood contributory negligence in Scotland to adapt – or perish?⁸⁸

While childhood contributory negligence is a deeply ingrained feature of the Law of Delict in Scotland, it is submitted that it cannot in its present state survive the forthcoming incorporation of the CRC. The question of how best to effect human rights reform for children (*i.e.*, those under the age of 18 years) is, accordingly, a pressing one to address.

The writer has suggested elsewhere⁸⁹ that both conceptual and practical reform is much required. Such reform is likely to include reconceptualising the theory of “fault” in respect of the young, considering the imposition of a statutory minimum age for liability in contributory negligence⁹⁰ and “rebranding” terminology in the field. The pejorative language⁹¹ currently used in respect of childhood conduct is wholly inconsistent with that found in other fields of contemporary Law. The practice of lawyers, judges and policymakers in the field should also be reconsidered with a view to hearing evidence about childhood capacity/cognitive development. Further, consideration should be given to the creation of a drivers’ injury compensation scheme to compensate childhood victims of road traffic accidents.⁹²

However, the new Criminal “Sentencing Young People” guideline, based on recent research about the evolving capacities of humans up until the age of 25, now raises an inexorable question for the Scottish Government and judiciary to consider: can findings of childhood contributory negligence *ever* be justified?

87 *Barnes v Flucker* [1985] SLT 142, discussed in Section 3 above.

88 Wells (1945) 19.

89 Macfarlane “Rethinking Childhood Contributory Negligence: ‘Blame’, ‘Fault’ – But What About Children’s Rights?” 2018 *Juridical Review* 75.

90 Some jurisdictions have imposed conclusive/presumptive age thresholds for the imposition of liability (the ages of 7, 10, 12 and 14 years are common). As observed in n 73, the last time the Scottish Law Commission considered the possibility of an age threshold for childhood liability was 35 years ago, before the UK ratified the CRC.

91 For example, “guilty”, “at fault”, “to blame”, and “blameworthy”, as discussed in S 2 of this article above.

92 A similar scheme, operated by the British Motor Insurers’ Bureau, is already in existence, and the scheme compensates victims of road accidents caused by uninsured/untraceable drivers.