

RETHINKING CHILDHOOD CONTRIBUTORY NEGLIGENCE: ‘Blame’, ‘Fault’ – But What About Children’s Rights?

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Article 3 of the United Nations Convention on the Rights of the Child provides that the child’s ‘best interests... shall be a primary consideration’ in all actions concerning the child. The United Nations Committee on the Rights of the Child has indicated something of the magnitude of the concept of best interests, describing it as ‘a substantive right’, ‘a fundamental interpretative legal principle’ and ‘a rule of procedure’. In many areas of domestic law the child’s best interests are discernible as a consideration when decisions are made that have an impact on children. However, the child’s best interests are not recognised as being of primary, or indeed of any, consequence in determinations about childhood contributory negligence. Further, judgments about the contributory negligence of the young often indicate inconsistent, and unpredictable, approaches and outcomes concerning children. This article contextualises the issue of childhood contributory fault within wider UK law and analyses the position of children in the field of delict/tort with reference to two high profile decisions, Probert v Moore and Jackson v Murray. A number of options for reform of the law, practice and policy are proposed – including a Children’s Civil Injuries Compensation Scheme – that would render the way the legal systems in the United Kingdom address the contributory negligence of children more compliant with Article 3.

INTRODUCTION

On 16 December 1989, the UK ratified the United Nations Convention on the Rights of the Child,¹ becoming Party to the ‘first legally binding international instrument to incorporate the full range of... civil, cultural, economic, political and social rights’² for children. The Scottish and Westminster governments routinely affirm their commitment towards fuller implementation of the UNCRC in domestic law and wide-ranging legislative provisions throughout the UK now pay deference to Convention principles.³ The State commitment to the UNCRC involves, in particular, implementing the Article 3 obligation, a founding principle⁴ of the Convention, which provides:

‘In *all actions* concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’⁵

¹ Hereinafter referred to as ‘the UNCRC’ or ‘the Convention’, available:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [accessed 20 December 2017].

² UNICEF Convention pages: http://www.unicef.org/rightsite/237_202.htm [accessed 20 December 2017].

³ In Scotland, see, e.g., Children (Scotland) Act 1995, s 6; s 11(7); Commissioner for Children and Young People (Scotland) Act 2003; Children and Young People (Scotland) Act 2014. In England, see, e.g., the Children Act 1989, s 1(1) & 1(3)(a), 22(4) & 22(5); Adoption and Children Act 2002, s 1(2) & s 1(4)(a); Children and Families Act 2014, s 58.

⁴ The four core principles of the UNCRC are: (i) Article 2 (non-discrimination); (ii) Article 6 (life, survival, development); (iii) Article 3 (primacy of best interests); (iv) Article 12 (child’s views).

⁵ UNCRC, Article 3(1). Italics added.

In their General Comment No. 14,⁶ the United Nations Committee on the Rights of the Child⁷ stressed the pervasive nature of the child's best interests, describing it as a 'threefold concept', being 'a substantive right', 'a fundamental, interpretative legal principle' and 'a rule of procedure'.⁸ The Committee emphasised that State Parties should ensure that the child's best interests are 'appropriately integrated and consistently applied in every action taken' in all 'judicial proceedings which directly or indirectly impact on children'.⁹ The term 'appropriately' is important, for it is an acknowledgment by the Committee that the integration of the child's best interests as a primary consideration requires to be balanced against other considerations and, in particular, with the predominant purpose of the field of law concerned. Of course, the interests of children 'are affected, directly or indirectly, by a mass of statutory provisions and common law rules'¹⁰ – and ensuring due regard is given to their best interests does not mean that other important, or indeed primary, considerations must be disregarded. Rather, adjustments should be made by State Parties towards ensuring that children, and the vulnerable stage of childhood itself, is afforded reasonable and consistent treatment in law.

The best interests (or 'welfare' as it is often termed in domestic law) of the child¹¹ is an increasingly discernable feature of judicial determinations in many contexts in which decisions have a significant impact upon children. However, the child's best interests are not recognised as a consideration in the field of delict/tort¹² nor, as a consequence, in decisions made about childhood contributory negligence. Further, even in factually similar cases, judicial approaches, and the decisions reached, can be difficult to reconcile. It is problematic accurately to state the law concerning contributory negligence and the young or to advise on it with any confidence. Such uncertainty in determinations about children is curious and, it is suggested, troubling.

⁶ General comment No. 14 (2013) *on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), hereinafter referred to as 'UN Committee General Comment No. 14: *Best Interests*', available:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 [accessed 20 December 2017].

⁷ Hereinafter referred to as the 'UN Committee' or 'the Committee'.

⁸ UN Committee General Comment No. 14: *Best Interests*, para 6. See also *UN Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Eds E E Sutherland and L-A Barnes Macfarlane, (Cambridge, Cambridge University Press, 2017).

⁹ *Ibid*, para 14(a).

¹⁰ A Bainham & S Gilmore, (2013), *Children: The Modern Law* (Jordans, 4th edn, 2013) p 56. For an overview of Scots law concerning the young, see EE Sutherland, *Child and Family Law* (Thomson/W Green, 2nd edn, 2008).

¹¹ "Child" is defined in Article 1 of the UNCRC as 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. The term 'child' is defined in Part I of the Children (Scotland) Act 1995 as a person 'under the age of sixteen years': ss 1(2)(a); 2(7); 11(2). See also ss 1(2)(b); 15(1) of the Children (Scotland) Act 1995). S 119 of the Adoption and Children (Scotland) Act 2007; s 199 of the Children's Hearings (Scotland) Act 2011, respectively, which extend the definition of 'child' to those 'under the age of eighteen years'. In England, the Children Act 1989, s 105(1), provides that "child" means, subject to paragraph 16 of Schedule 1 [financial support], a person under the age of eighteen' (see *Re N (A Child) (Financial Provision: Dependency)* [2009] EWHC 11 (Fam)). Although a person is a child until the age of 18 in terms of the 1989 legislation, s 8(6), 8(7) & s 91(10) create a restriction on courts making section 8 orders in respect of children who have 'reached the age of sixteen unless... satisfied that the circumstances of the case are exceptional.'

¹² The terms 'delict' and 'tort' are, albeit subtly different in their origins and detail, each 'used in modern jurisprudence as a convenient synonym' for the other: *Blacks Law Dictionary*, digitised version, 2nd ed: <http://thelawdictionary.org> [accessed 20 December 2017]. For discussion of conflict of laws, see Law Society Working Paper No 87 & Scottish Law Commission Consultative Memorandum No 62, (1984), *Private International Law and Choice of Law in Tort and Delict*, HMSO.

This article begins with an exploration of how Article 3 has been incorporated, by statute, across a range of areas of law in the United Kingdom before focusing on the treatment of childhood contributory negligence. Two decisions, *Probert v Moore* and *Jackson v Murray*, each of which received media attention, are then used to demonstrate that the failure to have regard to Article 3 highlights the inconsistencies that can emerge. A number of options are then proposed for reform of the law, practice and procedure – including a Children’s Civil Compensation Scheme – that would render the United Kingdom approach to the contributory negligence of children more compliant with Article 3.

ARTICLE 3 AND DOMESTIC LAW

How has the issue of the child’s best interests generally been incorporated into domestic law?

The Article 3 best interests obligation has, on various occasions, been integrated into domestic statute in a manner ‘appropriate’ to the field of law concerned. The obligation is often expressed in terms commensurate with the nature of decisions being made about children.¹³ Thus, for example, in Scottish cases concerning a child’s adoption, in which he or she is being given a new, permanent family, the best interests obligation forms a duty upon courts and adoption agencies to have ‘[r]egard to the need to safeguard and promote the welfare of the child throughout the child’s life as the paramount consideration.’¹⁴ A parallel provision exists in England.¹⁵

On the other hand, when courts are required to make decisions having a significant impact, not for the duration of life, but throughout childhood alone, the Article 3 obligation is expressed in statute, either implicitly or explicitly, in terms confined to that stage of life. Accordingly, when Scottish courts are making decisions about State intervention in family life, the best interests duty is stated in the Children (Scotland) Act 1995 to be a duty pertaining to ‘the welfare of that child throughout his childhood’.¹⁶ Similarly, the requirement, in Part III of the Children Act 1989, that care orders come to an end when a child reaches the age of 16 unless ‘the circumstances of the case are exceptional’¹⁷ implicitly confines the court’s considerations about best interests to childhood alone.

In some areas of law it can be difficult immediately to discern where consideration of the child’s best interests might feature in decisions made about him or her. However, scope for a Convention-compliant best interests ethos often emerges upon wider consideration. For example, there exists no explicit Article 3 obligation in either English or Scots Education Law. Yet, in both jurisdictions, legislation imposes upon the State and parents general duties directed towards ensuring that school education serves a child’s educational best interests.¹⁸ Since 2000, Scottish statute has accommodated

¹³ See, e.g., *AB & CD, Petitioners* 2015 CSIH 25, in which a sheriff’s finding that two social workers who disobeyed her contact order were in contempt was set aside on appeal. The Court of Session determined, at para [30], that the professionals had acted in ‘the best interests of the children’, doing ‘what they considered was right and proper in that regard.’

¹⁴ Adoption and Children (Scotland) Act 2007, s 14(3).

¹⁵ Adoption and Children Act 2002, s 1(2) requires the court or adoption agency to have as its ‘paramount consideration’ the ‘child’s welfare throughout his life’.

¹⁶ Children (Scotland) Act 1995, s 16(1); Children’s Hearings (Scotland) Act 2011, ss 25-26.

¹⁷ Children Act 1989, s 8(6), 8(7) & s 91(10).

¹⁸ In England, see s7(a) of the Education Act 1996, providing for parents’ duty to ensure their child has a full-time education suitable to ‘his age, ability and aptitude’, and ss 13, 13A & 14 detail the State duty, among other things, to promote ‘the fulfillment of learning potential’ (s 13(A)(1)) of children. In Scotland, see, e.g., Standards in Scotland’s

the child's best interests more directly by providing for the 'right' of every child to a school education that is '[d]irected to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.'¹⁹

In other fields, such as private family law, the primacy (or, as it has been expressed in Scots and English legislation, the paramountcy²⁰) of the child's best interests requires that the court focuses on issues of welfare above all other considerations. On the other hand, in public family law, it has long been recognised by courts North and South of the border that statutory provisions concerning the child's best interests must be interpreted with reference to the best that the public purse can reasonably afford.²¹

Notwithstanding the overarching welfare-based philosophy underpinning the Scottish Children's Hearing System, the best interests approach permits the detention of a child offender in secure accommodation where to detain serves the public interest.²² In 2010, Scottish statute was amended to prohibit prosecution for any offences committed by a person under the age of 12.²³ This step aligned criminal law with other fields of law in which the age of 12 is a common benchmark, and the age of criminal responsibility is also due to be increased from eight to 12 years of age in Scotland.²⁴ In England, where the age of criminal responsibility is 10, the 'principal aim of the youth justice system' is to prevent children and young people from offending.²⁵ This is achieved by educating the young offender about the impact of his or her conduct upon the victim and the community – into which the system actively promotes the young offender's reintegration.

The pervasive influence of children's rights can also be seen in terms of increasing sensitivity to nomenclature by lawmakers. This manifests in a general willingness to update, and to keep under review, terminology used in respect of the young throughout various fields of law. For example, in current law, young offenders are not sent to jail, or prison. In Scotland, they are placed in 'secure

Schools etc. Act 2000, ss 1-2 and s 1(5)(a) of the Education (Scotland) Act 1980, which provides for education that suits the 'age, ability and aptitude' of the child concerned.

¹⁹ Standards in Scotland's Schools etc. Act 2000, ss 1-2. This is also a direct reference to Article 29(1)(a) of the UNCRC.

²⁰ Children (Scotland) Act 1995, s 11(7)(a); Children Act 1989, s 1(1).

²¹ See, e.g., *R v London Borough of Barnett* [2003] UKHL 57, per Lord Hope, at para 85, considering the provision of local authority accommodation serving the child's best interests: 'A child in need... is eligible for the provision of those services, but he has no absolute right to them' (parallel Scottish provisions for 'child[ren] in need' at ss 22-25 of the Children (Scotland) Act 1995).

²² The Secure Accommodation (Scotland) Regulations 2013 provide for restricting the liberty of children following upon the Criminal Procedure (Scotland) Act 1995, s 44. Reg 11(4)(c) providing where a 'child is likely to cause injury to another person' he or she may be detained.

²³ Criminal Procedure (Scotland) Act 1995, s 41A, added by the Criminal Justice and Licensing (Scotland) Act 2010, s 52(2) (in force 28 March 2011).

²⁴ See, e.g., the Age of Legal Capacity (Scotland) Act 1991 (instructing a solicitor; drafting a will etc.), Children (Scotland) Act 1995, ss 6 and 11; Children's Hearings (Scotland) Act 2011, s 27 (expressing a view). Following public consultation and the work of an Advisory Group, the Scottish Government formally committed, in December 2016, to raise the age of criminal responsibility from 8 years to 12. A bill is expected throughout the current parliamentary session.

²⁵ Crime and Disorder Act 1998, ss 34; 37(1). See also provisions under s 11 of the 1998 Act in respect of 'child safety orders' for those children under the age of 10 years and the Anti-social Behaviour, Crime and Policing Act 2014, s 12 ('Powers in respect of under 18s').

accommodation.’²⁶ In England, ‘youth rehabilitation orders’ are made which contain one or more requirement(s) including, for example, a residence or supervision requirement, education or mental health treatment.²⁷ The use of constructive language in respect of juvenile justice underlines the significance of the child offender’s best interests, ‘dignity and worth’, and society’s desire to act in a manner that serves ‘[his or her] wellbeing’.²⁸

Similar exercises in updating terminology, or ‘re-branding’, can also be seen in civil law. For example, the stigma in Scotland believed to attach to public law provisions concerning children ‘in care’ led to that expression being superseded in legislation by the term ‘looked after child’.²⁹ In England, section 12 of the Children and Families Act 2014 replaced residence and contact orders with ‘childcare arrangements orders’, the latter being considered more likely to ‘encourage parents to focus on their child’s needs, rather than their own perceived rights and entitlements’.³⁰

There is, and there has been throughout the last 20 years, growing uniformity in culture and approach across various fields of law in which decisions are made that concern the young. In what has been described as a ‘slow conversion’³¹ over the years, children, and their rights, have become more visible in law and policy. Without full incorporation of the UNCRC, the process of statutory reform is inevitably piecemeal. However, a degree of consistency now exists in legal and administrative decision-making: decisions in which there has been no consideration of the best interests of a child clearly affected by that decision deviate from the general norm.³² The Article 3 best interests obligation is increasingly – and in many contexts ‘appropriately’³³ – being integrated into decisions affecting children.

What is the current approach adopted in respect of childhood contributory negligence?

²⁶ The Children’s Hearings (Scotland) Act 2011 updated Scottish Law and ‘secure accommodation’, in which the child’s liberty will be restricted, continues to be a disposal that can be made: s 85.

²⁷ Criminal Justice and Immigration Act 2008, ss 1(1)(b);(k);(o). For a critique of the rights of the child offender and the current English system, see J Fortin, *Children’s Rights and the Developing Law* (CUP, 3rd edn, 2009), chapter 18.

²⁸ UNCRC, Article 40(1) and 40(4).

²⁹ See, e.g., the provisions of the Children (Scotland) Act 1995, Chapter 2, Part I, s 17, and the Children’s Hearings (Scotland) Act 2011.

³⁰ Public Bill Committee, Children and Families Bill 2013 in the House of Commons, Ministerial Comments: Hansard, HC, Vol 559, col 297 (14 March 2013).

³¹ J Fortin, *Children’s Rights and the Developing Law* (CUP, 3rd edn, 2009), p 783.

³² This includes, e.g., immigration and accommodation decision-making. In, e.g., *ZH (Tanzania) v SOS for the Home Department* [2011] UKSC 4, the Supreme Court ruled unanimously that, in parental deportation cases, the child’s best interests must be considered. This requirement may not always mean a decision will be made in favour of what the child, or parents, wish: *AF (Nigeria) v SOS for the Home Department* [2013] CSIH 88; *Dear v SOS for Communities and Local Government* [2015] EWHC 29 (Admin). See also decisions about best interests in extradition decisions: *H v Lord Advocate* [2012] UKSC 24, in which the Supreme Court noted, at para [59], the court’s duty to ‘ensure that the best interests principle will not be seen as having a reduced importance when there are other important compelling considerations which, on the particular facts of the case, must be respected.’ In the Supreme Court judgment, *Nzolameso v City of Westminster* [2015] UKSC 22, a housing authority’s failure to consider or assess the welfare needs of each of the children affected by the decision resulted in the authority’s decision being quashed.

³³ UN Committee General Comment No. 14: *Best Interests*, para 14(a).

Delict, or tort,³⁴ is discordant with many other legal fields in that no steps have yet been taken by lawmakers to accommodate the child's best interests as a primary, or indeed as any, consideration. Delictual responsibility is expressly excluded from the Age of Legal Capacity (Scotland) Act 1991, the Act regulating the capacity of those below 16 years of age.³⁵ In England, age forms no defence to any tort committed.

While a personal injury claim may therefore be brought against children of any age in the UK, it is rare for children to be defenders in such proceedings. Far more common is litigation arising from a child's injury, often in road traffic accidents. In such cases, a claim is made by the child, or the child's representative, against the person (almost always an adult) whom it is alleged caused the injury. If the defence of contributory fault, or negligence, is pled by the defender, then the court must determine whether the victim has fallen short of the standard of care that would be expected of him or her in the circumstances in which the injury took place. However, where contributory negligence is concerned, there is (in theory at least) no minimum age below which any injured Scottish or English child is immune from a finding that he or she is at least in part responsible for that injury. In that the ages of criminal liability are 12 in Scotland and 10 in England, it does seem peculiar that the law in both jurisdictions appears generally more forgiving of children who deliberately do wrong than of children unintentionally at fault.

Nor are children distinguished from adults in the Law Reform (Contributory Negligence) Act 1945, applying throughout the United Kingdom, that provides for the apportionment of damages in cases where 'fault' is to be shared. The 1945 Act simply makes reference to the court's ability to reduce a claimant's damages 'to such extent' as appears 'just and equitable' with 'regard to the claimant's share in the responsibility for the damage'.³⁶ The 1945 Act is silent on the question of how apportionment should be allocated in individual cases.

There has, to date, been little legal policy discussion about childhood contributory negligence throughout the UK. In 1978 (more than a decade before the UK ratified the UNCRC), a proposal was made in England that contributory negligence should not apply to children below the age of 12.³⁷ This was never enacted. The Scottish Law Commission similarly rejected the suggestion, in 1987, that there should be a minimum age for contributory negligence in their *Report on the Legal Capacity and Responsibility of Pupils and Minors*.³⁸ They considered that the 'arbitrary' imposition of an 'irrebuttable presumption of absence of fault' in children below a particular age might limit claims and cause prejudice.³⁹ The Scottish Law Commission observed that the child's responsibility for contributory negligence was 'established' by courts throughout the UK with reference to '[t]he degree of care to be expected of a child of the same age, intelligence and experience' as 'the child in question'.⁴⁰

³⁴ See note 12.

³⁵ Section 1(3)(c) states that nothing in the Act shall 'affect the delictual or criminal responsibility of any person'.

³⁶ Section 1 (Scottish parallel section).

³⁷ Report of the Pearson Committee: *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Vol. 1, 1494.

³⁸ A minimum age of liability was rejected in respect of delictual liability: Scot Law Com, Report no. 110, (1987), Part V.

³⁹ The age of 7 had been proposed. Scot Law Com, Report no. 110, (1987), para 5.4 onwards.

⁴⁰ *Ibid*, paras 5.1 and 5.6.

It remains a point of contention, and thus uncertainty, as to whether this is an objective or a subjective test. Some courts have inclined to the view that the test 'is an objective one; but the fact [a child is involved]... is not irrelevant', whereas other courts have preferred to consider 'the nature of the particular danger and [that] particular child's capacity to appreciate it'.⁴¹ Additionally, it is uncertain whether the court is considering what is expected of the 'reasonable child' (i.e. what might be described as a diluted version of the 'reasonable adult') or something altogether different?⁴² While chronological age can normally be confirmed with ease, measuring 'intelligence' and 'experience' is a far more complex (and, arguably, subjective) exercise. How are courts, in reality, to determine what degree of care to expect from a notional child in possession of the same attributes as the injured child concerned? Should addressing this question of fact, and any subsequent degree of responsibility, necessitate a 'rough and ready'⁴³ approximation or, alternatively, a more careful consideration of the evolving 'physical, mental... psychological and social development'⁴⁴ of the child concerned? Certainly, the latter approach better accords with our Article 3 obligations.

Very young children are generally not found guilty of contributory negligence.⁴⁵ Such children, historically termed 'infants of tender years',⁴⁶ have long been considered incapable of contributory negligence. Children below four years old generally fall within this category. There is no automatic parental liability in Scotland or in England. Parents have, only on rare occasions in modern law, been found guilty of contributory negligence⁴⁷ for failure to supervise a young child.⁴⁸ However, children of around four years of age upwards have been found blameworthy for failure to exercise proper care for their own safety (often in an adult context, such as a public park or a busy road⁴⁹). Language in the fields of delict and tort is pejorative and has never been moderated to accommodate the status of childhood. Accordingly, the characterisation of child claimants as being (like adults) 'at fault', 'to

⁴¹ *Mullin v Richards* [1998] 1 W.L.R. 1304, per Hutchison LJ, at 1308 and *Galbraith's Curator ad Litem v Stewart* (No. 2) 1998 SLT 1305, per Lord Nimmo Smith, at 1307. See also, e.g., *Campbell v Ord & Maddison* (1893) 1 R. 149 per LJC Moncrieff at p153; *Plantza v Corporation of Glasgow* 1910 SC.78. See also *Gardner v Grace* (1858) 1 F&F 359; *Gorely v Codd* [1967] 1 WLR 19.

⁴² For a general overview, see M Moran, (2003), *Rethinking the reasonable person: an egalitarian reconstruction of the objective standard*, OUP, ch 3.

⁴³ *Jackson*, Supreme Court judgment, para 27.

⁴⁴ General Comment No. 5 (2003): *General Measures of Implementation of the Convention on the Rights of the Child*, available:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11, at p 4 [accessed 20 December 2017].

⁴⁵ For the origin of the approach in Scots law, see: *Campbell v Ord and Maddison*, (1873) 1 R 149.

⁴⁶ See English decision, *Gardner v Grace* (1858) 1 F&F 359, at 359, in respect of a 3 year old child: 'the doctrine of contributory negligence does not apply to an infant of tender years'.

⁴⁷ See, e.g., *Reilly v Greenfield Coal & Brick Co Ltd.* 1909 SC 1328, at 1330 (per the Lord President), in which a child of 3 years 11 months had been killed on a train line: '... the true cause... was the fact that the child was unattended... for that its own parents are responsible.'

⁴⁸ In *Christie's Tutor v Kirkwood*, 1991 SLT 805, a 4 year old girl wandered into a road and was knocked down. The court agreed in that case that the defences of parental contributory negligence and the child's contributory negligence could be put to a civil jury.

⁴⁹ See, e.g., *McKinnell v White* 1971 SLT (Notes) 61 (5 year old child found contributorily negligent in road traffic case; damages were reduced by 50%).

blame', and 'blameworthy'⁵⁰ is commonplace, and injured children as young as four or five have been described by courts as 'guilty' of contributory negligence.

From about six years of age upwards, children have, with some regularity, been found guilty of contributory negligence and have had damages awards in their favour apportioned – at times significantly.⁵¹ Here it is worth observing that six year olds fall within the UN Committee's definition of 'early childhood' (from birth until the age of eight years), a 'critical phase' of growth and development during which experts confirm that children are known to be much in need of protection.⁵² Further, the UNCRC provides that children at every age and stage of development require 'special safeguards and care' on account of their 'physical and mental immaturity' in all administrative and judicial processes affecting them.⁵³

Where the process of reaching an apportionment percentage is concerned, courts engage in a 'ballpark' exercise.⁵⁴ In this exercise, however, the judiciary routinely cite authorities concerning injured adults.⁵⁵ There are conceptual flaws inherent in this practice. The child is being found guilty of a failure to have regard for his or her own safety in an environment in which an adult has already been found negligent (i.e. responsible in law for the child's injury). This juxtaposes with the 'special safeguards and care'⁵⁶ children benefit from in other fields of law where it is commonly accepted that children have not the maturity to conduct themselves as adults do. In England, a child of any age is 'as liable to be sued [in tort] as an adult',⁵⁷ while the contemporary approach in Scotland towards children in delict has been neatly encapsulated in the *Stair Memorial Encyclopedia* as follows: '[A] lesser degree of care *may* be expected of a child or a person suffering from an infirmity or disability'.⁵⁸

In delict/tort, children are, then, recognised as forming part of a diverse diminished-capacity group⁵⁹ – one that also includes the elderly and disabled adults – in which they may be afforded a degree of leniency by courts. It is significant, and in contrast with other fields of law considered, that in delict/tort, the young do not even form a distinct category. Nor is there any particular consistency discernable in the approach adopted by courts deciding cases involving children. Certainly, courts

⁵⁰ E.g. the terms 'fault', 'blame' and/or 'blameworthiness' were used in the following judgments: *Barnes v Flucker* 1985 SLT 142 (5 year old child knocked down); *McCluskey v Wallace* 1998 SC 711 (10 year old child knocked down); *Wardle v Scottish Borders Council* 2011 SLT (Sh Ct) 199 (9 year old injured in playground).

⁵¹ *McKinnell v White*, 1971 SLT (Notes) 61, in which a 5 year old child received a 50% apportionment. There Lord Fraser observed, at p 61, when making such a high apportionment, that the child was 'somewhat above average intelligence'.

⁵² General Comment No. 7 (2005): *Implementing child rights in early childhood*, at para 4, paras 10 and 21, available: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 [accessed 20 December 2017].

⁵³ UNCRC, preamble.

⁵⁴ *Jackson v Murray*, [2015] UKSC 5 para 28.

⁵⁵ In, e.g. *McCluskey v Wallace*, 1998 SC 711, the court relied upon adult precedent. That case was cited in subsequent judgments involving determinations of contributory negligence by adult road traffic victims, e.g., *McDonald v Chambers* 2000 SLT 454; *McFarlane v Thain* 2010 SC 7.

⁵⁶ UNCRC Preamble.

⁵⁷ A Bainham & S Gilmore, (2013), *Children: The Modern Law* (Jordans, 4th edn, 2013), p 855.

⁵⁸ *Stair Memorial Encyclopedia*, Vol 15, para 406. Italics added.

⁵⁹ For an overview of the child's position in England, see *Clark and Lindsell on Torts*, M Jones, A Dugdale, M Simpson (eds) (Sweet & Maxwell, 21st edn, 2014), chapters 4 & 5.

do not routinely accommodate the child's evolving capacity by recognising his or her possible inability to 'appreciate' the full 'nature of the risk involved' in the circumstances leading to injury.⁶⁰

Delict/tort is, of course, a field of law 'primarily concerned with the circumstances under which a person who suffers damage may recover compensation'⁶¹. Might it be argued that the law of delict/tort, having no child-centred focus, ought to be a field exempt from the UNCRC and, consequently, the requirement that considerations of the child's best interests be 'appropriately' integrated? It would be difficult to reconcile such a narrow position with the Scottish/Westminster governments' declared commitment to the Convention and with steps taken in other fields of law⁶² in which decisions are made that impact upon children. Further, it is surely impossible to maintain that a personal injury claim brought by or on behalf of an injured child is not an action 'concerning' that child in terms of Article 3.

Given the increasingly consistent efforts of the UK legal systems to incorporate elements of Article 3 into domestic law, it is somewhat surprising to find so little regard for it when the treatment of children in the context of delict/tort is considered. Two decisions, each involving the contributory negligence of a child of the same age, injured in similar circumstances, demonstrate the lack of integration of the best interests obligation in such cases and the conspicuous inconsistencies in judicial approach.

CHILDHOOD CONTRIBUTORY NEGLIGENCE: TWO CASE STUDIES

The decisions in *Probert v Moore*⁶³ and *Jackson v Murray*,⁶⁴ each concerned female child pedestrians, of the same age, who were seriously injured after being struck by vehicles. In both cases, the driver was found negligent and the question of the child's contributory negligence was considered. In *Jackson*, the extent of the child's contributory negligence was reconsidered on appeal on two subsequent occasions, with the final decision being handed down by the UK Supreme Court on 18 February 2015.

Probert v Moore

In *Probert*,⁶⁵ the child claimant was injured in a road traffic accident at around 5pm on 3 December 2009. She was then 13 years old. She sustained 'multiple injuries in particular traumatic brain damage... likely to have a significant effect on her personality, employability and ability to live independently in the future'.⁶⁶

⁶⁰ For an occasion on which a child's lack of capacity to fully process risk was considered by the court, see *Galbraith's Curator ad Litem v Stewart* (No. 2) 1998 SLT 1305, per Lord Nimmo Smith at 1307.

⁶¹ *McHale v Watson* (1966) 115 CLR 199, per Menzies J (dissenting) at 16.

⁶² Neither is the law of contract concerned with children and their rights but, e.g., Scots law has made provision for the capacity and vulnerability of youth there: Age of Legal Capacity (Scotland) Act, ss 2(1(a), 3 & 4.

⁶³ [2012] EWHC 2324 (QB).

⁶⁴ Outer House judgment [2012] CSOH 100; Inner House judgment 2013 SLT 153; UK Supreme Court judgment [2015] UKSC 5. Hereinafter referred to as '*Jackson*'.

⁶⁵ Hereinafter referred to as '*Probert*'. Proceedings were raised on behalf of the victim, Bethany Probert, by her Litigation Friend and mother, Joanna Probert.

⁶⁶ Para 1.

The child had been walking home from a horse-riding lesson, in the dark, on a rural single lane carriageway⁶⁷ that had no street lighting. She was listening to music on earphones and wearing dark clothing. The speed limit was 60 miles per hour and the defendant was estimated to be driving at least at 50 miles per hour⁶⁸ when he struck the child. He did not brake until he struck her. The High Court (Queen's Bench Division) determined that the driver 'should have been aware of the presence of other road users whether pedestrians, cyclists or horse-riders, on country roads'.⁶⁹ He was, accordingly, found negligent.⁷⁰

In addressing the question of the child's contributory negligence, the court considered whether the child was at 'fault' in terms of the Law Reform (Contributory Negligence) Act 1945, section 1(1)⁷¹ of which 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.... 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...'

The court cited various authorities concerning injured child claimants, using *Gough v Thorne*,⁷² a case that is some 50 years old, as the 'the starting point' for its analysis.⁷³ This is noteworthy for two reasons. First, *Gough* also concerned a roadside accident involving a 13 year old girl, albeit a child who was crossing a road rather than walking along a road. Secondly, although decided in 1966, a time when children and their rights were rarely a focus in law, *Gough* is a judgment that is unusually child-focused in its observations about what it might mean for a child to be at 'fault' or 'blameworthy' in the context of adult negligence, particularly in road traffic cases. The court in *Probert* quoted the words of Lord Denning, Master of the Rolls, in *Gough*:

'A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense nor the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.'⁷⁴

In *Gough*, the court had also stressed that the correct expectation of the behaviour of a child of 13 was that of an 'ordinary child' – and an ordinary child, according to Salmon LJ, was neither a 'paragon

⁶⁷ Abthorpe Road in Northamptonshire.

⁶⁸ Expert testimony was given on speed by Dr Ninham on behalf of the claimant and by Dr Coley on behalf of the defendant from paras 16-24. The police report was prepared by PC Marrocco. Findings on speed at para 26 & 34.

⁶⁹ Para 35. Judgment of Mr David Pittaway QC (sitting as a Deputy Judge of the High Court).

⁷⁰ Para 39. At para 26 the judge observed: 'a reasonably prudent driver would not have exceeded a speed of 40 or 45 mph on this section of the road'.

⁷¹ Discussed at para 40 of the judgment. Hereinafter referred to as 'the 1945 Act'. There are parallel section 1 provisions in the Act for England and Wales and for Scotland. Section 5 of the 1945 Act addresses the application of the Act to Scotland. Section 4 of the Act states that 'fault' means 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.'

⁷² [1966] 1 WLR 1387. Hereinafter referred to as '*Gough*'.

⁷³ Para 42.

⁷⁴ Lord Denning MR, at 1390 in *Gough*, cited at para 42 in *Probert*.

of prudence' nor 'a scatter brained child'.⁷⁵ The decision in *Gough* enunciates, perhaps, a common social understanding, namely, that society (and our courts) should not expect children to possess the capacity or experience to 'go through those mental processes'⁷⁶ routinely expected of adults in situations of risk. The observations of Salmon LJ concerning the 'ordinary child' have been repeated in various decisions concerning childhood personal injury claims – not only road traffic injuries – both north and south of the border.⁷⁷

The High Court took the view that an adult pedestrian would certainly be expected to realise how foolish it was to walk home along such a road without high visibility clothing or other reflective markings.⁷⁸ However, to impose such onerous expectations upon a 13 year old child was to expect her to be a 'paragon of prudence'. It did not 'make a material difference' that the child claimant was listening to music using earphones 'because of the noise [made by] the approaching vehicles'.⁷⁹ In short, the 13 year old child's decision to walk home alone in that manner was 'ill-informed but not culpable'.⁸⁰ Accordingly, she could not be said to be truly at 'fault'. No finding of contributory negligence was made.

Further, following upon *Gough*, the judge in *Probert* went on to observe '[e]ven if I am wrong and Bethany [Probert] did contribute to the cause of the accident' it would not be 'just and equitable to make a finding of contributory negligence.'⁸¹ The vulnerability attributable to the child's youth, and the impact this had on her capacity to exercise due care, was a central feature of the court's rationale. The rationale of the courts in *Gough* and *Probert* suggest that, even in the case of a child clearly bearing some responsibility for the accident, the court – having regard to the state of childhood itself – is not bound to find that this responsibility amounts to contributory negligence.

This was not quite the end of the matter, however. In a step that generated significant controversy and media attention at the time, the defendant's insurer, Churchill, later sought – and was granted – leave to appeal against the decision of the High Court.⁸² It was Churchill's position⁸³ that, while it accepted the driver it insured had been negligent, the child claimant ought also to have been found guilty of contributory negligence. The case eventually settled outwith court, in August 2013, following an offer from Churchill to settle on the basis that the child accepted that she was 10%

⁷⁵ Salmon LJ, at 1391 in *Gough* and cited at para 43 in *Probert*.

⁷⁶ *Gough v Thorne*, at 1392, per Salmon LJ.

⁷⁷ See, e.g., *Mullin v Richards* [1998] 1 WLR 1304 (15 year old school pupil injured in play ruler fight); *Galbraith's Curator ad litem v Stewart* (No. 2) 1998 SLT 1305 (8 year old child injured playing with pipes that had been left by the roadside); *Toropdar v D* [2009] EWHC 2997 (TCC) (10 year old child injured by car after running across road).

⁷⁸ Para 44.

⁷⁹ Para 48.

⁸⁰ Paras 48-50.

⁸¹ Para 50. In reaching his decision, Mr David Pittaway QC said that '[t]here was no positive act on her part which caused the accident itself'. He distinguished the child in *Probert* from a child who ran out heedlessly in front of a car.

⁸² See, e.g., 'Bethany Probert crash payout at risk over hi-vis jacket', 6 February 2013, BBC News':

<http://www.bbc.co.uk/news/uk-england-northamptonshire-21351438> [accessed 17 December 2017]; 'Churchill insurance appeals against '£1 million payout' to girl, 16...' 6 February 2013, MailOnline:

<http://www.dailymail.co.uk/news/article-2274372/Churchill-insurance-appeals-1m-payout-girl-16-wasnt-wearing-high-visibility-jacket.html> [accessed 17 December 2017].

⁸³ On 8 February 2013, Churchill insurance issued a statement on the Bethany Probert case on its website: <http://www.churchill.com/press-office/releases/2013/20130802> [accessed 17 December 2017].

contributorily negligent. The child claimant⁸⁴ accepted the offer and, accordingly, retained 90% of the damages awarded to her at first instance.

Jackson v Murray

In *Jackson*,⁸⁵ the pursuer raised personal injury proceedings in the Court of Session in respect of serious injury⁸⁶ and loss sustained after being hit by a car in January 2004 when she was then 13 years old. The child in *Jackson* had stepped off a school minibus. She was crossing, or stepping out to cross, a junction ‘near the bellmouth’⁸⁷ of a private farm road when she was knocked down. As with *Probert*, the accident occurred late on a winter afternoon when it was growing dark on an unlit road in the country which had a speed limit of 60 miles per hour.⁸⁸ Also, like *Probert*, the defender did not brake until he struck the child.

(i) The decision at first instance

At first instance, the Lord Ordinary, Lord Tyre, took the view that the driver ‘ought to have recognised the minibus as being a vehicle from which passengers, including children, were likely to alight’.⁸⁹ The vehicle was clearly marked as a school bus and its hazard lights were switched on. It was, otherwise, a dark, quiet road. The defender had continued travelling at 50 miles per hour along the country road as he approached the school bus. In terms of causation, the Lord Ordinary observed that ‘the collision would not have occurred’ had the defender driver ‘fulfilled the duties... incumbent upon him in the circumstances of the present case’.⁹⁰ He was, accordingly, found negligent.⁹¹

So far as the pursuer’s contributory negligence was concerned, the court stated that, ‘at the age of thirteen the pursuer was fully aware of the danger of crossing a major road without taking reasonable care’.⁹² The Lord Ordinary noted that the Pursuer’s failure to adopt a safer strategy on crossing the road was left ‘unexplained on her behalf’⁹³ by her counsel. Thus, the court found that the child bore ‘overwhelming responsibility’ for the accident.⁹⁴ *Gough* was not cited, nor were any other judgments

⁸⁴ Information about the settlement was confirmed to the writer on 17 Dec 2014 by the Probert family’s solicitor, Richard Langton of Slater & Gordon (UK) LLP. The helpful information provided by Mr Langton is gratefully acknowledged.

⁸⁵ All references in section (i) *The decision at first instance* are to the Outer House judgment, reported at [2012] CSOH 100. Ms Jackson raised proceedings on her own behalf in July 2009.

⁸⁶ These injuries, not detailed, ‘were properly assessed... at £2.25 million’: <https://www.supremecourt.uk/cases/uksc-2014-0070.html> [accessed 17 December 2017].

⁸⁷ Paras 3 and 6.

⁸⁸ The pursuer was struck on the A98 road between Banff and Fraserburgh, near its junction with the private farm road leading to her home. The accident occurred around 4.30pm ‘approximately 40 minutes after sunset’ (para 6).

⁸⁹ Para 39. While the driver was not bound to reduce his driving speed he should have ‘foreseen that there was a risk that a person might, however foolishly, attempt to cross the road’.

⁹⁰ Para 45.

⁹¹ Para 42. Para 206 of the Highway Code was also cited (at para 42) in the court’s deliberations. The 1945 Act was not discussed. The case was noted, at para 2, to be a difficult one in which to make findings in fact due to ‘the poor quality of the evidence’ and the years that had passed between injury and the Pursuer raising proceedings. There was also some debate, at para 8, as to whether the child had looked both ways, walked or run across the road, and whether another driver had slowed down and ‘signalled with his hand to indicate’ that she was ‘free to cross’.

⁹² Para 46.

⁹³ Para 46.

⁹⁴ Para 37. He later stated, at para 47 that he found the pursuer’s conduct ‘even less excusable than those of the claimant in *Ehrari v Curry* [2007 EWCA 120]’, a case also involving a 13 year old child pedestrian knocked down in which a 70% apportionment was ‘not challenged on appeal’. However, in *Ehrari*, the child had run out from behind a

concerning the extent to which a child might possess the capacity to ‘go through those mental processes’ routinely expected of adult pedestrians.⁹⁵ In rejecting the suggestion by the pursuer’s Counsel that the child’s decision to cross the road might be ‘characterised as a justifiable misjudgment’,⁹⁶ Lord Tyre observed:

‘Either [the pursuer] did not look to the left before proceeding across the road or, having done so, she failed to identify and react sensibly to the presence of the defender’s car in close proximity.’⁹⁷

The court found that, in failing to identify risk and sensibly moderate her behaviour, the pursuer had ‘committed an act of reckless folly’.⁹⁸ The 1945 Act was not discussed, but the pursuer’s damages award was reduced by 90% on account of her contributory negligence.⁹⁹

In reaching this decision, the court was, in reality, ruling that only one-tenth of the injury, or ‘damage’, sustained in the collision between the car and the pursuer was the responsibility of the driver. While section 1(1) of the 1945 Act does not detail how the court should apportion responsibility for ‘damage’, it is worth observing that the court is required to decide what is ‘just and equitable having regard to the claimant’s share in the responsibility for the *damage*’.¹⁰⁰ Responsibility for ‘damage’, as was observed at a later stage in this case,¹⁰¹ is not the same thing as responsibility for the accident itself – particularly when an adult negligently driving a fast moving vehicle collides with a contributorily negligent child.

The finding in *Jackson* of such a large percentage of contributory negligence in the case of a child claimant was controversial, being described by Scottish personal injury practitioners as ‘bemusing’, ‘a massive reduction’ and ‘staggering’.¹⁰² Certainly, in view of what the Supreme Court has previously termed the ‘destructive disparity’¹⁰³ between drivers and pedestrians, such an extreme

parked car without once looking for traffic, at 3.30pm in a busy street, and the driver had been travelling at 20 miles per hour.

⁹⁵ Quote from *Gough v Thorne*, at 1392, per Salmon LJ. In *Jackson*, the Lord Ordinary listed, at para 12, the matters in respect of which he wished to assess evidence and make findings in fact: none of these matters included a consideration of the child’s capacity to exercise care for her safety.

⁹⁶ Para 46.

⁹⁷ Para 46.

⁹⁸ Para 47.

⁹⁹ By comparison, in a decision involving a motorcyclist who died after ‘tailgating’ the car he collided with resulted in a finding of only 80% contributory negligence: *Bellingham v Todd* [2011] CSOH 74.

¹⁰⁰ Italics added.

¹⁰¹ Supreme court judgment, discussed below, para 20.

¹⁰² See, e.g., commentary on Brodies LLP *Legal Resource Area* blog (‘a massive reduction by any standard’):

<http://www.brodies.com/blog/bclaims/contributory-negligence/contributory-negligence-cars-and-pedestrians/>

[accessed 1 June 2017]; Drummond Miller blog: *Jackson v Murray & Another* – ‘THE SAGA CONTINUES’ (‘The judge... deducted a staggering 90% of the damages to be paid to [child pursuer]’):

<http://www.drummondmiller.co.uk/news/2014/02/litigation-jackson-v-murray-another-the-saga-continues/> [accessed 1 June 2017]; Bonnar Accident Law Legal Blog (‘Almost everyone I have spoken to about the case of *Jackson* is bemused at the decision at first instance... some think that the Inner House have it wrong’):

<http://www.bonnaraccidentlaw.com/blog/legal/2014/01/08/walking-on-the-wild-side-liability-for-pedestrian-road-traffic-accidents/> [accessed 1 June 2017].

¹⁰³ *Eagle v Chambers* [2003] EWCA Civ 1107, per Lady Hale, at para 11, referring to the words of the lower court judge.

apportionment of the pursuer's damages was perturbing – and, arguably, would have been so even had she been an older teenager or an adult.¹⁰⁴

Both parties reclaimed.

(ii) *The decision of the Inner House*¹⁰⁵

In the Inner House, an Extra Division of three judges considered first the defender driver's reclaiming motion that he should bear no liability in negligence. In refusing that motion and delivering the Opinion of the Court, Lord Drummond Young observed that Lord Tyre's determination on the question of the defender's negligence had been 'careful and well considered.'¹⁰⁶

The pursuer sought to have overturned the finding that she had been contributorily negligent. The Inner House recognised that a distinction had long been drawn, on one hand, between cases in which pedestrians were 'visible in the roadway' and, on the other, cases in which pedestrians 'suddenly moved in front of an oncoming vehicle'.¹⁰⁷ They preferred, instead, to consider the latter as 'not so much a distinct category [but] part of a spectrum of situations where a pedestrian moves in front of a vehicle with greater or lesser abruptness'.¹⁰⁸ Thus, it does not follow that, just because a pedestrian may have moved into the road quickly, he or she should necessarily be deemed the sole or, indeed, principal cause of the accident. Where a driver has been negligent, the fact that the pedestrian concerned (whether adult or child) may have darted into the road is just one among a number of considerations before the court in determinations about possible contributory negligence.

The Division took the view that, while the Lord Ordinary was 'clearly entitled to hold that contributory negligence existed', his apportionment of 90% contributory negligence was 'too high'.¹⁰⁹ They observed that it was:

'...wrong to describe the actings of the pursuer as 'an act of reckless folly'... recklessness implies that the pursuer acted without caring about the consequences. We do not think that such a description of the pursuer's conduct is justified'.¹¹⁰

The Lord Ordinary's finding that the larger portion of responsibility for injury lay with the pursuer herself was reiterated since the Inner House took the view that the pursuer's 'negligence was both seriously blameworthy and of major causative significance.'¹¹¹ However, in reducing the contributory

¹⁰⁴ See, e.g., *Smith v Chief Constable Nottinghamshire Police*, [2012] EWCA Civ 161 (17 year old female moved into the path of an oncoming police car: contributory negligence reduced to 1/3 from 75% by Court of Appeal).

¹⁰⁵ All references in this section are to the Inner House judgment, reported at 2013 SLT 153. The case came before Lord Clarke, Lord Drummond Young and Lord Wheatley.

¹⁰⁶ Para 19, holding that it was 'quite impossible for an appellate court to interfere with the Lord Ordinary's findings' on the question of the defender's negligence.

¹⁰⁷ Para 24.

¹⁰⁸ Para 29.

¹⁰⁹ Paras 26 – 27.

¹¹⁰ Para 28. The Inner House also took the view, at para 30, that '*Ehrari*... it does not appear to us that that case provides a particularly helpful guide to the present case.'

¹¹¹ Para 28.

negligence apportionment from 90% to 70%,¹¹² the Division cited various factors concerning blameworthiness, or ‘fault’. These included the defender continuing to drive at high speed despite approaching a school minibus with ‘obvious ... hazard lights’ on, the fact that a car ‘is a dangerous weapon’ and poor pedestrian visibility at the time.¹¹³ The pursuer’s youth (‘a 13 year old will not necessarily have the same level of judgment and self control as an adult’) was merely one factor considered along with the others.¹¹⁴ Lord Drummond Young observed:

‘... in assessing whether it was safe to cross, [the pursuer] was required to take account of the defender’s car approaching at a fair speed, 50 mph, in very poor light conditions with its headlights on. The assessment of speed in those circumstances is far from easy even for an adult, and even more so for a 13 year old.’¹¹⁵

There was no fuller discussion by the Inner House about what particular impact the pursuer’s age and stage of development might have had on her or her capacity to identify risk or to act with proper regard for her own safety. In view of the apportionment authorities cited,¹¹⁶ the Division’s re-assessment figure of 70% contributory negligence remained a relatively high apportionment of damages in respect of an injured child.

The pursuer appealed to the Supreme Court.

*(iii) The decision of the Supreme Court*¹¹⁷

The Supreme Court judgment, delivered by Lord Reed, was handed down on 18 February 2015. The appeal was allowed by a majority decision, and contributory negligence re-assessed (again), this time at 50%. Two questions were described as ‘central’¹¹⁸ to the determination of the appeal: first, how should responsibility be apportioned in a case of this sort? And, secondly, when should an appellate court review the apportionment decision of a lower court?

In its consideration of the first question, the Supreme Court reviewed the ‘inevitably... rough and ready exercise’¹¹⁹ of apportionment itself. In this exercise, the court is considering both the ‘causative potency’ and the ‘respective blameworthiness’ of the parties’ actions.¹²⁰ Lord Reed observed that it is impossible for any court to ‘arrive at an apportionment which is demonstrably correct’.¹²¹ This highlights the fact that different judges might ‘legitimately take different views’ on what is equitable in the same case.¹²² Further, in referring to section 1(1) of the 1945 Act, the court noted the inherent

¹¹² Lord Drummond Young said that the Inner House would not interfere with the Lord Ordinary’s apportionment of negligence except in exceptional circumstances demonstrating that ‘he has manifestly and to a substantial degree gone wrong’ (citing *Porter v Strathclyde Regional Council* 1991 SLT 446, at 449).

¹¹³ All quotes from paras 27-28.

¹¹⁴ Para 27.

¹¹⁵ Para 27. This was observed to be true, at para 13, notwithstanding that the pursuer was ‘familiar with the locus’.

¹¹⁶ Including, e.g., *Smith v Chief Constable Nottinghamshire Police*, [2012] EWCA Civ 161; *Eagle v Chambers*, [2003] EWCA Civ 1107.

¹¹⁷ [2015] UKSC 5. All references in this section are to the Supreme Court judgment. The case came before Lady Hale, Lord President Wilson, Lord Reed, Lord Carnwath and Lord Hodge.

¹¹⁸ Para 3.

¹¹⁹ Para 28.

¹²⁰ Para 26. This was also an observation made by the Inner House in *Jackson* (at para 28).

¹²¹ Para 27.

¹²² Para 28.

conceptual difficulty in using the terms ‘blameworthy’, or ‘fault’, in considerations of contributory negligence. The blameworthiness, or fault, of the pursuer and the defender are ‘incommensurable’ for the defender ‘has acted in breach of a duty... owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests...’¹²³

The court, in its apportionment exercise, is thus seeking to balance two forms of fault that are quite unlike against each other. In the case of apportionment exercises involving drivers and pedestrians, one party at ‘fault’ is in control of a potentially lethal machine.¹²⁴ That already artificial apportionment exercise is rendered all the more problematic when the court is comparing an adult’s ‘breach of duty’ against the possible contributory negligence of a child.

In summarising the rationale for re-apportionment at 50% of the damages awarded, Lord Reed observed, rather pragmatically, that the pursuer’s injury was caused by the combined conduct of both parties, for:

‘If the pursuer had waited until the defender had passed, he would not have collided with her. Equally, if he had slowed to a reasonable speed in the circumstances and had kept a proper look-out, he would have avoided her.’¹²⁵

In other words, bearing all things in mind, the Supreme Court was persuaded that there existed a finely balanced attribution of fault: the parties should be considered ‘at least equally blameworthy’.¹²⁶

Next, the Supreme Court turned its attention to the second question: when might an appellate court review the decision of a lower court? The Extra Division was strongly criticised¹²⁷ for determining the pursuer to be ‘far more blameworthy’ than the defender, since:

‘As they pointed out, she was only 13 at the time, and a 13 year old will not necessarily have the same level of judgment and self-control as an adult... As they recognised, the assessment of speed in those circumstances is far from easy... after dusk and without street lighting, [it] is not straightforward, even for an adult.’¹²⁸

No ‘satisfactory explanation’¹²⁹ had been given by the Inner House for finding that the pursuer bore the larger share of responsibility for her injuries. Accordingly, the Supreme Court justified its re-apportionment on the grounds that, based on the facts, there existed a ‘wide difference’ of opinion between considering the pursuer largely *responsible* for her injuries (as had the Inner House) and, alternatively, finding her equally at *fault* in terms of the legislation.¹³⁰ This exceeded the ‘ambit of

¹²³ Para 27. DM Walker writes: ‘Although contributory negligence does not depend upon a duty of care, it does depend on foreseeability’, *Delict* (W Green & Son, 2nd edn, 1981), p 361.

¹²⁴ Lord Reed noted, at para 26, the ‘high burden’ imposed ‘upon the drivers of cars, to reflect the potentially dangerous nature of driving.’

¹²⁵ Para 40.

¹²⁶ Para 43.

¹²⁷ Para 43, Lord Reed observed: ‘I cannot discern in the reasoning of the Extra Division any satisfactory explanation of their conclusion that the major share of the responsibility must be attributed to the pursuer...’

¹²⁸ Para 41.

¹²⁹ Para 43.

¹³⁰ *Italics* added.

reasonable disagreement’ and supported the conclusion that the lower court had, in significant degree, ‘gone wrong’.¹³¹

It is, however, worth observing that Lord Hodge, the other Scottish Justice, dissented.¹³² In his opinion, the appeal should have been dismissed because the Inner House had not reached a decision outwith the ‘generous limits’ of divergence allowable before an appellate court might substitute its own apportionment decision for that of the lower court.¹³³ Further, he cautioned against allowing an appeal in which there was no dispute on any point of law.¹³⁴ Here, it should be said that there was no dispute on any point of fact either. Rather, the issue concerned how to interpret the facts (as determined some years previously) in the light of significantly differing judicial perceptions of how ‘blameworthy’ the child’s actions had been.

On any reading, *Jackson v Murray* is a case beset by judicial discord: three significantly different contributory negligence apportionments were arrived at over a period of litigation ongoing for six years.¹³⁵ Both appellate courts deemed it necessary to interfere with the apportionment decision of the lower court. Neither appellate court heard new evidence. The final ruling in February 2015 by the Supreme Court was itself not unanimous. The child’s age and stage of development, and her perceived capacity to exercise care for her own safety, had a significant impact upon each re-apportionment decision.

Yet, for all that, it remains hard to see why – on the same facts – the first court considered that the thirteen year bore ‘overwhelming responsibility’ for the accident, the second did not find her so but still found her ‘clearly’ more negligent than the driver, while the third court determined the child and driver ‘equally blameworthy’.¹³⁶ The implications of these determinations are considered from a children’s rights perspective below.

PROBERT v MOORE AND JACKSON v MURRAY – AND CHILDREN’S RIGHTS

The above judgments, *Probert v Moore* and *Jackson v Murray*, raise particular questions about determinations of childhood contributory negligence and, it is submitted, about the status of children’s rights in the fields of delict/tort generally.

Both cases were concerned with 13 year old girls seriously injured in road traffic accidents. A point noted in each case was that neither child had exercised the degree of care that would have been expected of a reasonably prudent adult – nor was this standard expected of either child.¹³⁷ In both cases, the driver was found negligent. However, the rulings on contributory negligence and

¹³¹ Quotes from this and previous sentence from para 44 and wide discussion of previous authorities from para 27 onwards.

¹³² Lady Hale and Lord Carnwath agreed with Lord Reed in allowing the appeal. Lord Wilson agreed with Lord Hodge and would have refused the appeal.

¹³³ Paras 58 and 59.

¹³⁴ Para 45, Lord Hodge said this was ‘an appeal which does not raise a disputed issue of legal principle.’

¹³⁵ During that time, the pursuer, who was 13 years old at the time of the accident, and 18 when litigation began, has now reached the age of 24.

¹³⁶ Quotes taken from: Outer House, para 37; Inner House, para 26; Supreme Court para 43.

¹³⁷ In *Jackson*, each court noted the age of the child as relevant to its determinations, and in *Probert*, the judge, Mr David Pittaway QC, observed, at para 47, that ‘the question of whether an adult would be at fault for not taking [the] precautions [the child did not] is not the issue I have to determine.’

apportionment in *Probert* and in *Jackson* strikingly contrast. This is particularly true of the judgments at first instance, in which the child in *Probert* retained 100% of the damages awarded in her favour, while the damages awarded to the child in *Jackson* were reduced by 90%.

Certainly, decisions about contributory negligence are notoriously fact-bound, and, as the Inner House observed in *Jackson*, existing precedent (even in cases that are factually alike) might be only ‘of very general assistance’¹³⁸ in apportionment decisions. However, the judgments in *Probert* and *Jackson* highlight an area of concern for the legal profession. They demonstrate that lawyers are likely to find it particularly difficult to advise victims of childhood accidental injury about both contributory negligence determinations and judicial apportionment calculations.

From a children’s rights perspective, the *Probert* and *Jackson* judgements indicate, on the face of it, highly inconsistent approaches and outcomes in judgments about childhood contributory negligence. Children at the same stage of childhood, exercising a similar degree of care for their personal safety, risk being deemed by a court either ‘ill-informed but not culpable’¹³⁹ or, quite conversely, ‘blameworthy’ on account of their ‘reckless folly’.¹⁴⁰ The United Nations Committee on the Rights of the Child, observed over a decade ago that childhood, and in particular adolescence, is a stage of development characterised by ‘the gradual building up of the capacity to assume adult behaviours’ accompanied by ‘rapid physical, cognitive and social changes’ known to manifest at times in ‘risky... behaviour.’¹⁴¹ It has, throughout the UK, long been acknowledged that:

‘The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable... lacking the maturity... the insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to measure the probable against the possible.’¹⁴²

Of course, delict/tort has long been established as a field concerned with recompense of civil wrongs, not with children and their rights. But why should this remain the fixed position in contemporary law? As discussed above, much of Scots and English law affecting children has been reformed in recent decades to implement the child’s rights. Consideration of the child’s best interests has increasingly been ‘appropriately’¹⁴³ integrated across a broad range of fields. It would not follow that ensuring the child’s best interests are a primary consideration in contributory negligence determinations must mean that other important, and indeed primary, considerations – such as those concerning the duty of care, the imposition of liability upon any other party and public policy – need be disregarded. The continuing lack of any best interests requirement in delict/tort does nothing to focus the court’s attention, at any stage in decision-making about contributory negligence or apportionment, upon the child involved.

¹³⁸ Para 30.

¹³⁹ *Probert*, at para 50.

¹⁴⁰ *Jackson*, Outer House judgment at para 47.

¹⁴¹ General comment No. 4 (2003): *Adolescent health and development in the context of the Convention on the Rights of the Child*, at paras 2, 39, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 [accessed 20 December 2017].

¹⁴² *Re S* 1993 WL 13725957, per Sir Thomas Bingham.

¹⁴³ UN Committee General Comment No. 14: *Best Interests*, para 14(a).

TIME TO RETHINK CHILDHOOD CONTRIBUTORY NEGLIGENCE?

Notwithstanding the existence of the Law Reform (Contributory Negligence) Act 1945, it is apparent, then, that there is no unified approach in the United Kingdom on the capacity and responsibility of children in delict/tort. Further, the lack of any Article 3 ethos in the field means that no clear or consistent approach concerning the rights of children has emerged in recent years. This is unsatisfactory for, as demonstrated by the contrasting *Probert* and *Jackson* decisions on contributory negligence, an absence of commonality in approach produces unpredictable and inequitable outcomes. The law on contributory negligence and children is in need of updating and there are a number of ways that this might be done, ranging from changes in practice, through relatively modest statutory reform, to the more radical introduction of a Children's Civil Compensation Scheme.

Adapting practice in personal injury litigation involving children

In *Jackson*, the litigation continued for six years, concluding in the UK Supreme Court. Judicial observations were made at every stage about the 'level of judgment and self-control' that might be expected of a thirteen year old crossing the road in 'poor light conditions'.¹⁴⁴ Each appeal highlighted judicial disagreement over the extent to which the pursuer ought to be held responsible for a perceived failure to exercise the degree of care that a notional child ought to be capable of exercising. However, no empirical evidence was led about rudimentary capacity of a 13 year old female to process or respond to such situations of high and immediate risk.

While courts seldom hear expert evidence about a child's capacity to exercise care for his or her personal safety,¹⁴⁵ evidence of this nature has, on occasion, been adduced. In *Morton v Glasgow City Council*,¹⁴⁶ a 14 year old pursuer injured while he was climbing on scaffolding, led expert evidence relating to his cognitive and social development. A chartered child psychologist was instructed to provide an expert 'assessment of the degree of intelligence and maturity of the pursuer at the time of the accident'.¹⁴⁷ The psychologist's report outlined in particular:

'[t]he ready propensity of children of [14 years old] to indulge in risky activities without applying their minds to the degree of risk involved and the lack of expertise of such children in assessing risk.'¹⁴⁸

The expert evidence informed the finding of 25% contributory negligence in the case since the Sheriff accepted 'Dr Boyle's evidence that 14 year olds' inherently lack the capability of adults when 'assessing risks.'¹⁴⁹ This judicial acknowledgement of the vulnerabilities of youth accords with the UN Committee's observations in General Comment No. 3, issued over a decade ago, about the need to recognise, rather than penalise, the 'rapid physical, cognitive and social changes' of adolescence

¹⁴⁴ Observations made by the Inner House, at paras 27-28 of the judgment, and later quoted by the Supreme Court at para 15 of the judgment.

¹⁴⁵ This is the general position throughout the UK. See, e.g., *N (A Child) v Newham LBC* [2007] CLY 2931, in which the court held that while the local authority bore primary liability, a 7 year old child should have known that if he punched glass it would likely break and injure him.

¹⁴⁶ 2007 SLT (Sh Ct) 81 (an occupiers' liability case).

¹⁴⁷ *Ibid*, judgment para [1].

¹⁴⁸ Para [1].

¹⁴⁹ Para [21].

and consequent ‘risky health behaviour’.¹⁵⁰ The evidence led and the rationale of the court in *Morton* indicate that there is scope for courts to have greater regard to this sort of expert evidence in cases concerning childhood contributory negligence. Established research on child development emphasises that ‘[c]hildren respond differently from adults [to stress] and the exact nature of a child’s response is determined by their developmental stage’.¹⁵¹

Lawyers are not experts in child development or capacity. The developmental stages of childhood is surely beyond ‘judicial knowledge’¹⁵² and reference should be made to expert opinion. The UNCRC requires more of States Parties than the mechanical application of existing contributory negligence precedent (often concerning adult claimants¹⁵³) in proceedings concerning child claimants. Further, the Article 3 obligation to have regard to the child’s best interests as a primary consideration must surely necessitate more than a perfunctory nod to the child’s chronological age.¹⁵⁴

Concerns might be expressed about the financial considerations that would follow upon the routine commissioning of expert reports in litigation where childhood capacity to be contributorily negligent is in dispute. Such concerns may well be legitimate. However, they would have to be considered as part of the overall picture in an area of litigation in which experts are already instructed about a range of other issues.¹⁵⁵ These other issues are, arguably, not as important as establishing whether the child might, fundamentally, possess or lack the capacity to take reasonable steps to protect his or her own safety in the circumstances leading to injury. It is also worth noting that, in contrast to the *Jackson* litigation, proceedings were raised in *Morton* and concluded relatively quickly and inexpensively in the sheriff court.

Adapting practice to provide for the inclusion of expert evidence about the child’s development and evolving capacity is, accordingly, desirable.

Statutory reform

A further way to ensure a common approach and to seek to accommodate appropriately the child’s rights within the field of delict/tort would be through legislation. The Scottish Government, for example, has already expressed its commitment to ‘thinking creatively’ in order to ‘[make] rights real for children’.¹⁵⁶ As discussed below, reform might range from modest, essentially linguistic, changes to more substantive reform on the issue of a minimum age of liability.

¹⁵⁰ UN Committee General Comment No. 14: *Best Interests*, para 2.

¹⁵¹ G Tufnell, ‘Stress and reactions to stress in children’, (2008), *Psychiatry*, 7:7, 299-303, at 299 and 303.

¹⁵² Judicial knowledge (i.e. knowledge which is a fact so commonly understood that no evidence need be led): *Donaldson v Valentine* 1996 SLT 643.

¹⁵³ See note 55.

¹⁵⁴ Here it is worth noting that some childhood experts consider that age benchmarks are not especially useful indicators of childhood capacity and that other factors, such as, e.g., gender and education, are better (see: A James and A James, *Key Concepts in Childhood Studies*, (2012), at p1). This view has not made great inroads into the law.

¹⁵⁵ In *Jackson*, for example, two witnesses, Mr McCartney and Mr Hooghiemstra, were instructed to give expert evidence on walking and driving speeds at, or around, the time of impact.

¹⁵⁶ Quotes taken from: <http://www.scotland.gov.uk/Topics/People/Young-People/families/rights> [accessed 1 December 2017].

Experts claim that ‘language directs thought’.¹⁵⁷ Less pejorative language should be used throughout the field of delict/tort, particularly if the UK is to meet its Convention obligation to incorporate the child’s best interests as a primary consideration in decisions concerning children. Characterising injured children, some as young as four or five years of age, as ‘guilty’, ‘at fault’, ‘to blame’, and ‘blameworthy’ is antiquated and infelicitous. As with other fields of law considered, a ‘rebrand’ of legal terminology – from condemnatory to constructive – would be likely to generate a more child-focused environment when, for example, determinations about childhood contributory negligence are made.

In addition, new statutory terminology could be drafted that takes account of the ‘special safeguards and care’¹⁵⁸ owing to childhood and to the child’s evolving capacity. If the legal system continues the practice of finding children contributorily negligent and reducing damages awards in their favour, then new a vocabulary is required. Where an apportionment decision is made, this percentage might, for example, be described as owing to ‘non-liability’ injury, rather than injuries arising from the child’s failure or wrongdoing. Where the possibility and extent of a child’s contributory negligence is being determined, greater use of terms like ‘cognitive development’, ‘risk comprehension’ and ‘childhood evolving capacity’ seem more appropriate than terms like ‘fault’ and ‘blameworthy’.

New legislation might accomplish more than simply creating a more sensitive linguistic framework. It is suggested that the time has come to debate afresh the imposition of a minimum age of responsibility, whether presumptive or absolute, throughout the field of delict/tort.¹⁵⁹ For example, the age of 10 is the age of criminal responsibility in England while the age of 12 is a common benchmark that would fit well with other fields in Scotland.¹⁶⁰ The Scottish Law Commission rejected the suggestion of any minimum age in their 1987 *Report on the Legal Capacity and Responsibility of Pupils and Minors*,¹⁶¹ but that report is now nearly 30 years old and predates ratification by the UK of the UNCRC.

The creation of a statutory capacity test, akin to that found for childhood consent to medical decisions in the Age of Legal Capacity (Scotland) Act 1991, is something worth exploring for older children. No statutory age benchmark for capacity has been set down in statute for medical consents. A more considered test has been provided in section 2(4) of the 1991 Act in which the doctor concerned must assess that particular child’s capacity to understand the ‘nature and possible consequences of the procedure or treatment’.¹⁶² It should not, then, follow that there would be an automatic presumption

¹⁵⁷ See, e.g., BL Whorf, ‘Science and linguistics,’ in *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf*, ed JB Carroll, ed. (1956), 207–219; L Boroditsky, ‘Does language shape thought? Mandarin and English speakers’ conceptions of time’, (2001), *Cognitive Psychology*, 43, 1-22.

¹⁵⁸ UNCRC Preamble.

¹⁵⁹ This was, as noted above, dismissed by the Scottish Law Commission at para 5.5 of their *Report on the Legal Capacity and Responsibility of Pupils and Minors*. There was a brief consideration of parental liability in the report: para 5.10.

¹⁶⁰ See note 24.

¹⁶¹ *Report on the Legal Capacity and Responsibility of Pupils and Minors*, Part V.

¹⁶² Section 2(4) of the 1991 Act provides that: ‘A person under the age of 16 years shall have legal capacity to consent... to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.’

of capacity to be contributorily negligent in the case of children above any minimum fixed age of liability in delict/tort.

Whether statutory reform proceeds on a UK-wide basis, by the use of a legislative consent motion, empowering the Westminster parliament to legislate for Scotland at the same time as it addresses the issue for England and Wales, should also become a matter for discussion.

A change in public policy in respect of accidental injury claims made by children

A final, and more radical, rethink of contributory negligence is now proposed – one that requires rethinking public policy and how it responds to injured children. As the Supreme Court observed in *Jackson*, any apportionment to be made to the damages awarded to an injured child must be calculated with reference to what is ‘just and equitable’ in the light of responsibility for the damage, or injury.¹⁶³ The rationale in *Probert* suggests that, even once it has been found that a child has contributed (perhaps even significantly) to injury sustained, the court might still determine that it is unjust and inequitable to make any apportionment.¹⁶⁴

An argument could be made that it is *always* ‘unjust and inequitable’ to apportion the damages awarded to children involved in road traffic accidents. To do so does not serve the child’s best interests: the obvious, and inexorable, ‘destructive disparity’¹⁶⁵ existing between drivers and pedestrians is magnified where a child pedestrian is involved. Might it not be better – even in cases where there is no driver negligence or where a child has been contributorily negligent to a high degree – to characterise the child’s injuries as the result of ‘an accident’?

For such cases, a Children’s Civil Injuries Compensation Scheme,¹⁶⁶ funded through drivers’ insurance, might be established. A similar scheme, operated by the Motor Insurance Bureau, already exists in order to compensate victims of road accidents caused by uninsured and untraceable drivers. Currently, every UK driver makes a diminutive contribution, within their annual insurance premium, towards maintaining the Bureau fund.¹⁶⁷ The Children’s Civil Injuries Compensation Scheme would make a payment in cases in which it was agreed by, or on behalf of, all parties involved – or established by legal proof – that the child’s injury was caused by an accident for which neither driver nor child should be held accountable. In cases where a court had apportioned the damages of an injured child, an application could be made for a ‘top up’ award to the scheme fund. Payments from

¹⁶³ Paras 19-20. See also D M Walker, *Delict* (W Green & Son, 2nd edn, 1981), pp 363-364.

¹⁶⁴ *Probert*, at para 50 of the judgment: ‘[e]ven if I am wrong and Bethany [Probert] did contribute to the cause of the accident’ it would not be ‘just and equitable to make a finding of contributory negligence.’

¹⁶⁵ *Eagle v Chambers* [2003] EWCA Civ 1107, per Lady Hale, at para 11, referring to the words of the lower court judge.

¹⁶⁶ The existing ‘Criminal Injuries Compensation Scheme’ makes provision for victims of crime. See: <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority> [accessed 20 December 2017].

¹⁶⁷ The scheme, operated by the Motor Insurance Bureau, was established in 1946 as a central fund to create a means of compensating the victims of road accidents by negligent uninsured, and untraced, drivers. All drivers pay an additional sum (ranging from £15-30 per annum) on their motor insurance policies to provide universal protection for such accidents: <https://www.mib.org.uk/making-a-claim/faqs/> [accessed 20 December 2017]. Here it is worth noting that the Pearson Committee made a general recommendation in 1978, which was not followed, for a non-fault road injuries compensation scheme (based on moral as well as economic grounds) in its *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Vol. 1, 1494, discussed at para 996 onwards.

the fund would not be connected to ‘responsibility’ or ‘guilt’ (of driver or child¹⁶⁸) but would be made with reference to the severity of the injuries sustained by the child.

CONCLUSION

The human rights of the young have long been codified in the UNCRC. Since ratifying the Convention in 1991, the UK has been on a trajectory towards fully implementing the child’s Convention rights in domestic law. The Article 3 obligation that the child’s best interests be ‘a primary’ consideration has been incorporated, ‘appropriately’, throughout much of domestic law concerning children with an appreciation that there are often other primary considerations to balance. That the field of delict/tort contrasts so sharply with these other areas of law is perhaps a tribute to the journey already undertaken in these other fields.

In *Probert v Moore* and *Jackson v Murray*, respective courts ruled on childhood contributory negligence. Issues of responsibility (sometimes termed ‘blame’ or ‘fault’) were discussed – but what about children’s rights? The three options have been proposed in this article for rethinking the law concerning childhood contributory negligence including (i) adapting practice in personal injury proceedings involving children, (ii) new statutory provision for children and (iii) the creation of a Children’s Civil Injuries Compensation Scheme. Were contemporary law to integrate the child’s best interests as ‘a primary consideration’ in contributory negligence determinations, this need not be tantamount to ensuring the child’s welfare was ‘paramount’, as it is in some other fields of law. Rather, adopting a rights-based approach would be more likely to prevent decisions being made as they currently are without any focus on the child’s best interests. Such a change would generate more consistent and, it is hoped, more compassionate decision-making for injured child claimants. In short, the long overdue process of giving due regard to the rights of children within the field of delict/tort might begin.

¹⁶⁸ Thus not deeming the blameless driver into whose path a child runs blameworthy or guilty of negligence. The time may also be ripe for wider debate on the issue of parental liability for failure to supervise children: see notes 47 & 48.