TAKING CARE OF THE SMALL: ARTICLE 6 OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND CHILDHOOD ACCIDENTAL INJURY CLAIMS IN SCOTLAND

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1 Introduction

When Dr Seuss, the celebrated children's writer, penned the words "a person's a person, no matter how small,"[1] he might have been creating a worldwide mantra for future children's rights adherents. For the young are now internationally recognised as persons in possession of a canon of rights, as codified in the United Nations Convention on the Rights of the Child ("CRC") [2]. Included in this canon is the child's entitlement to special protection from potential dangers and mishaps attendant upon childhood itself. This article focuses on the extent to which the approach taken by the Scottish legal system, in dealing with claims by children who have sustained accidental injury, meets the obligations under article 6 of the CRC.

A "spectacular growth" in childhood personal injury claims has been observed in recent decades throughout the UK.[3] This is not surprising since, according to the *Royal Society for the Prevention of Accidents*:

> "Accidental injuries are a major health problem throughout the [UK]. They are the most common cause of death in children over one year of age. Every year they leave many thousands permanently disabled or disfigured."[4]

The nature and causes of childhood injury are manifold. Common injuries include, for example, younger children injured in public playgrounds, schools or in day-care[5] and adolescents involved in roadside accidents or injured

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1 Dr Seuss *Horton Hears a Who!* (2008) 6.

2 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

3 Personal injury claims were the largest individual category of child civil litigation observed by Oliphant in his chapter K Oliphant "Children as Victims under the Law of England and Wales" in M Martin-Casals (ed) *Children in Tort Law, Part II: Children as Victims* (2006) 65 67.

4 Royal Society for the Prevention of Accidents "Accidents to Children" (13-03-2015) *The Royal Society for the Prevention of Accidents* <http://www.rospa.com/homesafety/ adviceandinformation/childsafety/accidents-to-children.aspx#References (accessed 16-06-2015).

5 Injuries in/around school see for example *Hunter v Perth and Kinross Council* (OH) 2001 SCLR 856; injuries while playing outside school see for example *Galbraith's Curator ad Litem v Stewart* (No 2) 1998 SLT 1305.

while trespassing.[6] Recent Scottish National Health Service statistics on unintentional injury also paint a bleak picture: children living in the most deprived areas continue to be significantly more likely to sustain a serious accidental injury than those who do not.[7] Whilst the Scottish legal system has a comprehensive range of provisions designed to protect children from intentional injury and to respond appropriately to child abuse victims,[8] the same cannot be said of the law governing the position of children who are victims of unintentional, or accidental, injury. Although child victims of accidental injury can, as with any other victim, [9] seek redress in Scots civil law, significant difficulties are generated for child claimants within the law of delict ("tort").

This article addresses the nature of the obligation created by article 6 generally and, in particular, in respect of childhood accidental injuries in Scotland. The doctrine of contributory negligence is analysed and its shortcomings, in the context of injured child claimants, demonstrate that the operation of a generic doctrine of contributory negligence creates conceptual difficulty and produces contradictory and inequitable outcomes in cases concerning children. As a result, it is argued that the Scottish legal system cannot be said to provide a "safe and supportive"[10] environment, which respects the child claimant's right to life, survival and development. The article concludes by proposing a way forward, outlining three strategies which might be employed to produce an article 6 compliant approach within the existing legal framework.

2 Article 6 and childhood injuries

"***Article 6***

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

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[6] Road traffic-related/trespass cases, see for example *McKinnell v White* 1971 1971 SLT (Notes) 61; *Christie's Tutor v Kirkwood* 1991 SLT 805; *Morton v Glasgow City Council* 2007 SLT (Sh Ct) 81.

[7] NHS Scotland: Unintentional Injuries for year ending 31 March 2013/4, summary available <http://www.isdscotland.org/Health-Topics/Emergency-Care/Publications/2014-02-25/2014-02-25-UI-Summary.pdf> (accessed 16-06-2015).

[8] A raft of child protection statute and regulation exists. See for example Children's Hearing (Scotland) Act 2011; The Scottish Government "National Guidance for Child Protection in Scotland" (11/2010) *The Scottish Government* <http://www.scotland.gov.uk/Resource/ Doc/334290/0109279.pdf> (accessed 16-06-2015). Further general provision has been made for children in this area by Children and Young People (Scotland) Act 2014. Additionally, applications can be made for criminal injuries compensation to the relevant public board: https://www.gov.uk/criminal-injuries-compensation-a-guide#applying-on-behalf-of-children.

[9] Additionally, general health and safety regulations exist with the intention of preventing the occurrence of such accidents, but most of these (outside the field of education) are not child-specific. See for example (at school) Schools (Safety and Supervision of Pupils (Scotland) Regulations 1990/295; Scottish Government publication, 2005 Safe and Well: Good practice in schools and education authorities for keeping children safe and well, at: http://www.scotland.gov.uk/Publications/2005/08/0191408/14360. In the wider community the Public Health etc (Scotland) Act 2008, which makes wide-ranging provision about public health and safety, including, for example, (Part 8) allowing the use of sunbeds by persons below the age of 18 years.

[10] General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 39(a). See also General Comment No. 14: On the Right of the Child to have his or her Best Interests Taken as a Primary Consideration UN Doc CRC/C/GC/14 s B.2.

2 1 The general import of article 6

It is apparent from the text of article 6 that there is something of a dual function to the article. First, "life, survival and development", as set down in article 6.1 and 6.2, form an independent cluster of entitlements belonging to different categories of rights.[11] The child's right to life is expressed in inherent and absolute terms.[12] The child's right to survival and development is, however, qualified: it should be ensured "to the maximum extent possible", leaving States Parties room for more circumspect compliance. Secondly, as a general principle,[13] article 6 is also a lens through which all other articles in the CRC should be interpreted. How the terms of article 6 might be untangled from the other more specific articles that it either overlaps or underpins[14] is an enduring question that was anticipated by the United Nations Committee on the Rights of the Child ("the Committee"). The Committee posed a general (if somewhat circular) response in its first General Comment, in 2001, when it emphasised the "indispensable interconnected nature of the Convention's provisions", which "cannot be properly understood in isolation" from each other.[15]

Two years later, the Committee required that states interpret article 6 as widely as possible, with the term "development" being understood in "its broadest sense as a holistic concept embracing" six different aspects of development, namely, "the child's physical, mental, spiritual, moral, psychological and social development."[16] The characterisation of article 6 as a cluster of related rights concerning the quality of a whole childhood journey has been reiterated in successive General Comments. Accordingly, the Committee has explicitly related article 6 to other articles about specific areas of life,[17] childhood events[18] and particular developmental stages.[19] The intention is that the child's right to life, survival and development imposes upon States Parties a general duty to ensure the child does not merely survive,

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[11] For a helpful overview of rights-based theories and the categorisation of rights, see W Leif "Rights" in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (02-07-2011) <http://plato.stanford.edu/entries/rights/#1> (accessed16-06-2015).

[12] The nature and scope of the article 6 right is discussed in some depth in E Sutherland "The Child's Right to Life, Survival and Development: Evolution and Progress" (2015) 26 *Stell LR* current.

[13] The four general principles include: art 2 (non-discrimination); art 3 (best interests); art 6 (life, survival, development) and art 12 (right to be heard).

[14] For example arts 24, 27, 28, 29 and 31 of the CRC. The importance, application and comprehensive nature of the article 6 obligation have been stressed throughout the Committee's General Comments on a range of other articles to date.

[15] General Comment No. 1: The Aims of Education UN Doc CRC/GC/2001/1 para 6.

[16] General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child UN Doc CRC/GC/2003/5 4.

[17] For example standards of health care and protection from economic exploitation, see art 24: highest attainable standard of health; art 32: protection from economic exploitation; art 19: freedom from all kinds of violence; art 23: education.

[18] For example being directed into a juvenile justice system, see General Comment No. 10: Children's Rights in Juvenile Justice UN Doc CRC/GC/2007/10.

[19] See for example General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4; General Comment No. 7: Implementing Child Rights in Early Childhood UN Doc CRC/GC/7/Rev1; General Comment No. 13: The Right Of The Child To Freedom From All Forms Of Violence UN Doc CRC/GC/2011/13.

but that he or she thrives by benefitting from a broad assortment of nurturing (if, at times, equivocal) experiences.

It is, however, arguable that the greatest threat to the practical impact of article 6 lies in its all-encompassing nature. In being relevant to everything it is an article that hazards being perceived, in reality, as specifically relevant to nothing. This is a significant concern in Scotland since the CRC has not yet been incorporated into Scots law.[20] Securing access to, and realisation of, any right not yet enshrined in domestic law is rendered even more problematic where that right is expressed in language that is too "indeterminate … aspirational" or "highly general".[21]

2 2 The application of article 6 to childhood injuries

In General Comment 7: *Child's Rights in Early Childhood*,[22] the Committee made it clear that article 6 requires states to ensure that younger children are free to "engage in [age-appropriate] play and recreational activities" in a safe environment.[23] Where older children are concerned, the Committee's observations on article 6 in General Comment 4: *Adolescent Health and Development* are significant. There, the Committee noted that article 6 reinforced the state duty to safeguard the child in adolescence, a stage at which they had observed:

> "the gradual building up of the capacity to assume adult behaviours" leads to "rapid physical, cognitive and social changes" and often "risky health behaviour."[24]

In the same General Comment, the Committee discussed article 6 with reference to "accidental injuries", such as "road traffic accidents".[25] In particular, the state's broader duty towards children in accident/injury scenarios

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[20] The Children and Young People (Scotland) Act, passed in early 2014, was another opportunity missed by the Scottish Government to implement the Convention in Scots law. The Bill was passed on 19 Feb 2014 amidst much well-publicised criticism by Scots lawyers of its lacklustre provisions. Some of these provisions have been expressed in terms expected to render problematic (if not impossible) attempts to enforce the obligations the Act creates. The Bill and supporting documentation is available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62233.aspx>.

[21] *Momcilovic v The Queen* [2011] HCA 34 para 429, per Heydon JJ:

> "But its language is highly general, indeterminate, lofty, aspirational and abstract. It is nebulous, turbid and cloudy … here, the generality of the words … prevents them providing 'objectively determinable criteria' and leaves the courts to their own 'idiosyncratic conceptions and modes of thought'."

[22] General Comment No. 7: Implementing Child Rights in Early Childhood UN Doc CRC/GC/7/Rev1, the working definition of "early childhood" proposed by the Committee extends until the child reaches 8 years of age. Where art 6 is concerned as a general principle, the Committee recognised, para 10, that "the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play (arts 24, 27, 28, 29 and 31)".

[23] General Comment No. 7: Implementing Child Rights in Early Childhood UN Doc CRC/GC/7/Rev1; quotations taken from art 31(1) of the CRC.

[24] General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 paras 2 and 39. The primary focus of General Comment No. 4 are art 5 (evolving capacities of the child), art 6 (life, survival, development), art 24 (right to health), although other articles (notably 2, 3, 12-17, 28, 29, 31) are discussed.

[25] Road traffic injuries were noted by the Committee to "affect adolescents disproportionately" General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 21.

can be seen in the Committee's comment 4 as encompassing the "creat[ion of] a safe and supportive environment … in all types of institutions".[26]

In contextualising the breadth and fluidity of article 6, the Committee has built upon the CRC preamble, which provides that, by virtue of the child's "physical and mental immaturity", he or she requires "special safeguards and care" at home and within the community.[27] Significantly, the Committee envisages the state obligation to "ensure to the maximum extent possible the survival and development of the child"[28] as comprehensive. It extends to the legal system and court processes and, consequently, to child claimants who have sustained accidental injury.

3 Accidental injury claims brought by children under Scots law

3 1 Actions in delict: contributory negligence

In Scotland, an injured child or the child's legal representative can bring personal injury proceedings.[29] Such claims fall within the law of delict: the pursuer ("plaintiff") raises proceedings, which may be resisted by the defender ("defendant"). The claim is founded upon three broad precepts. First, it is argued that the defender has neglected a duty, imposed by law in the circumstances, to have regard to the child's safety. The second precept is that a reasonably foreseeable injury has occurred. Thirdly, the injury must not be too remote from the defender's act of neglect.[30] If the claim is successful, an award of financial compensation, or "damages", may be made in favour of the child.[31]

In the vast majority of childhood accidental injury proceedings, the defender will be an adult (for example a driver, teacher, etcetera) [32] or an institution (for example a local council, education authority, transport

[26] General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 39(a); (f) and (h).

[27] Preamble of the CRC: this care and protection includes "appropriate legal protection".

[28] Art 6.2.

[29] If a child lacks legal capacity his or her representative is normally a parent (or another person holding "parental responsibilities and rights"): Children (Scotland) Act 1995, ss 1(1)(d); 2(1)(d).

[30] These have recently been referred to as the "building blocks of fault (or "breach of duty"), damage, causation, remoteness", D Nolan "Deconstructing the Duty of Care" (2013) 129 *Law Q Rev* 559 599. Where, of course, a court determines that accidental injury was inevitable, and "could not have been avoided by the exercise of ordinary care, caution or skill" then no legal liability follows: DM Walker *The Law of Delict in Scotland* 2 ed (1981) 35.

[31] The Damages (Scotland) Act 2011, in force since 7 July 2011, has restated the law governing the making of certain legal claims in respect of damages, although the terms of the Act did not remove the victim's right to claim under the general principles of the common law of delict. In 2007, the Scottish Law Commission produced a report (No 207) on *Personal Injury Actions: Limitation and Prescribed Claims*. It was noted, at 12 of report 207, that the current limitation period (currently 3 years) for delictual claims for injuries throughout childhood does not begin to run until the pursuer has "attained full capacity" (ie 16 years old: Age of Legal Capacity (Scotland) Act 1991, s 1(1)(b)). There has as yet been no implementing legislation (although the Scottish Government consulted on report 207 in 2012 and published an analysis of written responses on 6 August 2013, available here: <http://www.scotland.gov.uk/Publications/2013/08/6983)>.

[32] See for example, *McKinnell v White* 1971 SLT (Notes) 61 (injured 5 year old child was 50% to blame after car knocked him down); (*Barnes v Flucker* 1985 SLT 142 (driver of a car which hit a 5 year old had not been negligent as the child should have exercised more care). In the case of teachers, or other employees, personal and/or vicarious employability may follow.

company, etcetera).[33] While it is technically possible to bring a personal injury claim against children of any age in Scotland,[34] it is rare for negligent children to have proceedings brought against them – for obvious financial reasons.[35] In contested cases, a defender who has been negligent may argue that an adult or a child pursuer has failed to exercise reasonable care for his or her own life, or safety, and so has contributed to the injury sustained. In the UK, and across a range of jurisdictions, this plea, or defence, has long been termed "contributory negligence".[36] The defence requires that the court carefully consider the degree of care (ie the level of caution, or prudence) that it would be reasonable to expect of the victim in the circumstances in which the injury occurred. In other words, a judicial balancing exercise is conducted in order to determine whether there ought to be some degree of shared responsibility between the defender and his, or her, victim.

The concept of contributory negligence and its continuing impact upon cases involving injured children creates particular difficulty where the state's duty to safeguard and promote the child's right to life, survival and development is concerned.

The 1909 decision, *Cass v Edinburgh District Tramways*,[37] illustrates some of the enduring difficulties in the approach of Scottish courts towards childhood accidental injury claims. *Cass* concerned a young boy who was four years and eight months old. His father gave him a penny to buy a bag of nuts, and as he walked home he was:

> "absorbed, poor chap, in the little purchase of nuts made on his own account, without looking whether any car was approaching, and too absorbed to hear its noise."[38]

The child was knocked down and injured by a tram. In one of the first reported cases of its kind, the Court of Session, Scotland's highest civil court, decided that a child not yet five years old could be "guilty" in such

[33] See for example, *Hunter v Perth and Kinross Council* 2011 SCLR 856 (pupil sued education authority when she was injured in bus queue in an incident of "horseplay", but authority not found negligent); *Morton v Glasgow City Council* 2007 SLT (Sh Ct) 81 (14 year old boy who fell while climbing on scaffolding surrounding block of council housing was 25% contributorily negligent in respect of his injury).

[34] S 1(3)(c) of the Age of Legal Capacity (Scotland) Act 1991, drafted before the UK ratified the CRC, excludes negligence (and, indeed, the broader field of delict) from its statutory regulation of children's "legal capacity". The result of this is that a child of any age may (in theory at least) be found delictually liable.

[35] This is the situation throughout the UK. One English authority, *Mullen v Richards* [1998] 1 WLR 1304, concerned a school ruler "play-fight" between two 15 year old pupils resulting in a serious eye injury. Here, a damages award made in favour of one child against the other, subject to a 50% reduction for contributory negligence, was overturned on appeal, with the court finding that the defender had not been negligent.

[36] Detailed discussion of the contributory negligence defence is beyond the scope of this article. For an early application of the defence concerning a child, see: *Campbell v Ord and Maddison* (1873) 1R 149. See also UK-wide text, GL Williams *Joint Torts and Contributory Negligence: A Study of Concurrent Fault* (1951). For a conceptual discussion of the defence, see ch 2 of GJ Postema *Philosophy and the Law of Torts* (2007).

[37] 1908 SC 841 (Outer House, ie first instance, judgment); 1909 SC 1068 (Inner House, ie appeal, judgment).

[38] Opinion of Lord Guthrie, quoted at note point 2 in the judgment of the Inner House 1080.

circumstances of contributory negligence.[39] Lord Guthrie, at first instance in the Outer House, observed:

> "The case is 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."[40]

On appeal, the Inner House affirmed Lord Guthrie's judgment. Although *Cass* was decided more than 100 years ago, neither the court's decision, nor its rationale, would be out of keeping with a number of child contributory negligence decisions today. Children's rights have made dramatic inroads into wide-ranging fields of law[41] (including the creation of child law as a field in its own right). Yet Scots law concerning the child's liability in the field of delict has neither significantly developed nor has it been comprehensively stated in over a century. It appears that a broad judicial perception that adult and child victims are "in essentials the same" persists.

3 2 Modern case law

What, then, might a child victim of accidental injury expect of the judicial process if he or she raises personal injury proceedings in Scotland? The only certain answer is that nobody knows. This seems, in itself, to be an indicator of an unhealthy *status quo*. Two cases, decided within months of each other, demonstrate contrasting judicial approaches in respect of contemporary childhood accidental injury claims. Both cases were decided in 1998 in Scotland's highest civil court, the Court of Session, and both concerned children injured in roadside accidents.

3 2 1 Galbraith v Stewart

Galbraith[42] was decided in February 1998. It concerned an eight-year-old boy injured by concrete pipes he had pushed onto the road while playing. The pipes had been left at the roadside by builders, which the court determined, had been negligent. In making no finding of contributory negligence,[43] Lord Nimmo-Smith said:

> "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 (…) the nature of the risk and his capacity to

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[39] Quotation taken from the Inner House judgment in *Cass v Edinburgh District Tramways* 1077 per Lord Low. The child's delictual liability for fault (ie the duty not to cause injury to *others*) is subtly different from the child's liability for contributory negligence, which relates to the duty to "taking care for one's *own* safety". This distinction was discussed by the Scottish Law Commission *Legal Capacity and Responsibility of Pupils and Minors* Report No 110 (1987) Part V para 5.6.

[40] 1909 SC 1068, opinion of Lord Guthrie, quoted at note point 2 in the judgment of the Inner House (1080).

[41] See for example, Education Law (Standards in Scotland's Schools etc) Act 2000; Education (Additional Support for Learning Act) (Scotland) 2009: Family Law (recent statutes include: Children's Hearing (Scotland) Act 2011); Children and Young People (Scotland) Act 2014; Criminal Law (Criminal Procedure (Scotland) Act 1995 s 41).

[42] *Galbraith's Curator ad Litem v Stewart* (No 2) 1998 SLT 1305 (Outer House judgment). The proceedings were raised on the child's behalf by his *curator ad litem*, Ian McLean Duguid.

[43] The court considered previous road traffic cases in which children as young as 4 or 5 had been found guilty of contributory negligence and took the view that no "hard and fast rule" had emerged, 1307.

appreciate it were [not] such that [the child] was guilty of any failure to take reasonable care for his own safety."[44]

In *Galbraith*, the court decided that an eight-year-old child, accidentally injured while playing by the roadside, was in no way to blame for his injury. The child's conduct was reasonably foreseeable in the circumstances. Further, in directing his attention to this "particular" child's ability to keep himself safe, Lord Nimmo-Smith favoured a subjective (ie an individualised) consideration of the injured child's capacity. The court did not merely consider, objectively, how a notional person in the place of the injured child might have been expected to appreciate risk in the circumstances. The rejection of an objective approach in determining the standard of care to be expected of the child claimant in *Galbraith* accords with the general focus on the best interests of the child in other fields of Scots law.[45] Further, such an approach supports the ethos of the CRC, including article 6, which refers to States Parties ensuring the right to life, survival and development of "every child".[46]

Significantly, the door was left open in *Galbraith* for an injured child's personal characteristics (such as age, gender, education, cultural background, ability and intelligence)[47] to influence judicial determinations about childhood contributory negligence. However, no expert evidence was heard in *Galbraith*. Consequently, there was no discussion of what cognitive, social or developmental factors might be relevant to the consideration of a particular child's capacity to neglect his or her own safety. It seemed to be a matter of judicial discretion – or rather, conjecture.

3 2 2 *McCluskey v Wallace ("McCluskey")*[48]

McCluskey was decided in May 1998, three months after *Galbraith*. In *McCluskey*, the child concerned was a ten-year-old girl, injured when she was knocked off her bicycle by a passing car as she cycled from the pavement onto the roadside. As with the builders in *Galbraith*, the driver was found negligent and the issue of contributory negligence was debated. But, in contrast to *Galbraith*, the court in *McCluskey* focused entirely on the child's fault: there was no discussion of the child's capacity, or her age. Nor was there any suggestion that a subjective test concerning the standard of care expected of this particular child in safeguarding her own well-being be applied. The injured child was found guilty of contributory negligence, and her damages were reduced by 20%. The Inner House of the Court of Session (ie the higher court) approved the discussions in the lower court about respective

[44] *Galbraith's Curator ad Litem v Stewart* (No 2) 1998 SLT 1305 1307.

[45] See for example provisions concerning the paramountcy of the welfare of the child: s 11(7) of the Children (Scotland) Act 1995; s 25 of the Children's Hearing (Scotland) Act 2011.

[46] Art 6(1) of the CRC.

[47] This approach has arguably been adhered to in previous case law. In, for example, *McKinnell v White* 1971 SLT (Notes) 61 61, Lord Fraser found a child he described as being "alert and intelligent… somewhat about average intelligence" guilty of contributory negligence in a road traffic case, apportioning his damages award at 50%.

[48] *McCluskey v Wallace* 1998 SC 711 (Second Division/Inner House judgment). Proceedings were raised by the child's father and guardian, Joseph Casey McCluskey, on her behalf.

"blameworthiness" for the accident and the court referred to previous cases concerning adult pedestrians in support of its decision.

In *McCluskey*, a finding of contributory negligence was made in respect of a ten-year-old child in a case in which the adult party had already been found at fault. The judicial reasoning applied to the child was no different from that which had been applied to adult pedestrians[49] in the decisions the court cited. At most, there was an indication that a slightly diluted version of the traditional, objective adult "reasonable person" test was being applied.[50] No proper consideration was given to childhood perceptions, reactions or evolving capacity.[51]

3 2 3 Questions raised by the Galbraith and McCluskey decisions

There was a noticeable difference in judicial approach between the personal injury claims brought by the children in *Galbraith* and *McCluskey*. This raises a number of questions. Should a subjective or an objective test be applied to child claimants in contributory negligence determinations? Why were such high expectations to keep safe and exercise care imposed on one child and not on the other? Was it significant that one child was riding a bike between the pavement and road (in a road traffic scenario) while the other was rolling pipes (in an enticement to play scenario) across the road? In *Galbraith*, Lord Nimmo-Smith did "not consider" that "risk of injury … should have been apparent to an eight year old"[52] playing in the street: does this mean that two years of childhood development (ie between the age of eight and ten years) are considered critically important in such cases? Did it matter that one child was a girl and the other was a boy? Contemporary Scots law provides no clear answer to any of these questions.

3 3 Shortcomings: the doctrine of contributory negligence and child injury claims

Scottish courts determine the extent of any contributory negligence on the part of a victim with reference to a broad percentage or fraction-based, scale. As with the rest of the UK, previous rulings about apportionment (ie reduction) of damages are often used as a guide. In many personal injury judgments, no clear distinction is drawn between adult and child victims in judicial rationale. Determinations about the contributory negligence of adults injured in similar circumstances are often cited as authority in child victim

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[49] *McCluskey v Wallace* 1998 SC 711, 717 (adult pedestrian cases, *Adamson v Roberts* 1951 SC 681 and *Baker v Willoughby* [1970] AC 467 applied).

[50] In apportioning liability, Lord McCluskey, in the Inner House, made reference, at 717, in delivering the Opinion of the Court, 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".

[51] For a detailed discussion of the "reasonable person" see the Introduction and chs 1-5 especially of M Moran *Rethinking the Reasonable Person: an Egalitarian Reconstruction of the Objective Standard* (2003).

[52] 1998 SLT 1305 1307.

cases, and vice versa.[53] Expert practitioners also advise that there is, at core, an arbitrariness in contributory negligence determinations: lawyers "apply rough approximations" as they "play the 'Blame Game'".[54]

The idea of engaging in a "blame game" in cases involving adult wrongdoers and injured children generates particular difficulty where the child's article 6 rights are concerned. Once a court makes a finding of contributory negligence, then (as with any adult pursuer) the child's damages can be reduced, often significantly.[55] It can be argued that there are conceptual inconsistencies inherent in this approach. 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 responsible in law for the child's injury. The CRC requires that States Parties recognise that the child's "immaturity" and limited "cognitive" development deserve "special safeguards and care."[56] Should an injured child's compensation be reduced because of his or her failure to process risk fully in such a hazardous circumstance? Does this represent a just and equitable consideration of child personal injury claims, or is it, effectively, punitive? If Scottish courts are in fact penalising children because of factors that arise from the condition of childhood itself, then this must sit uncomfortably with the holistic picture of article 6 outlined above. In particular, it would appear to be undermining of the article 6.2 duty requiring that States Parties create a positive climate throughout all institutions to "ensure to the maximum extent possible the survival and development of the child".[57]

While there is no minimum age of delictual liability in Scotland, very young children (for example toddlers) are unlikely to be found guilty of contributory negligence.[58] These children have long been termed "infants of tender years"[59] and, as such, are generally considered incapable of playing any part in safeguarding their own life or well-being. Accordingly, Scottish

[53] See for example *McCluskey v Wallace* 1998 SC 711 (discussed in main text above): the judgment relied on adult precedent and was thereafter cited in subsequent judgments involving determinations of contributory negligence by adult road traffic victims, including *McDonald v Chambers* 2000 SLT 454; *McFarlane v Thain* 2010 SC 7.

[54] M Seaward & N Caiden *The Blame Game: Contributory Negligence* (2011) unpublished paper prepared for a seminar hosted by Cloisters Chambers, 15-09-2011 1 (available at http://www.cloisters.com/seminar-downloads/the-blame-game---contributory-negligence---final-15-sep-2011.pdf).

[55] See for example *McKinnell v White* 1971 SLT (Notes) 61: here, a 5 year old child's damages were reduced by 50% on account of his contributory negligence; *Jackson v Murray* 2013 SLT 153, in which a finding was made of 90% contributory negligence (eventually reduced to 70% by the Inner House) in the case of a 13 year old road traffic victim described as having acted in "reckless folly".

[56] Quotations taken from General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 2 and preamble of the CRC, respectively.

[57] Art 6(2) of the CRC.

[58] For the origin of this general approach in modern Scots law, see: *Campbell v Ord and Maddison* (1873) 1 R 149 149, per Lord Justice Clerk (Moncrieff) observing that before a child could be found guilty of contributory negligence he or she must have the "capacity to apprehend … the duty, obligation or precaution neglected".

[59] For one of the earliest UK reported judgments, see *Gardner v Grace* (1858) 1 F&F 359 359, in respect of a 3 year old child: "the doctrine of contributory negligence does not apply to an infant of tender years", but cf *Cass v Edinburgh and District Tramways Co Ltd*. 1909 SC 1068, in respect of a child 4 years 8 months old, per Lord Low 1076:

> "It is quite settled that there may be contributory negligence on the part of a child of… tender age".

It may simply be that the term "tender years" has been used loosely by the judiciary and that it is preferable to speak in terms of chronological age.

children below four years old are almost certain to escape being found guilty of contributory negligence. There is no automatic parental liability (nor, it is worth observing, parental immunity) in Scotland. Although reported judgments are scarce, parents have, on rare occasions, been found guilty of contributory negligence[60] for failure to supervise a young child.[61]

Injured children between four and six years of age are likely to be found guilty of contributory negligence. In one notable judgment, a five year old child claimant was found "wholly to blame" when she sustained accidental injuries in a road traffic accident.[62] From about six years of age and upwards,[63] children have, with some degree of consistency, been found guilty of contributory negligence. Six year-olds, of course, fall within the definition given by the Committee of "early childhood" (from birth until the age of eight years[64]), a "critical phase" of development during which children are known to be especially vulnerable.[65]

Certainly, where the Scottish judiciary is concerned, it is clear that a child of around four years of age or more is routinely expected to do something (often in an adult context, such as a busy street or public park) to safeguard his or her own life, survival and development. Failure to do so renders a child likely to be found guilty of contributory negligence. Such an approach is out of keeping with other legal fields in Scotland which set a far higher age benchmark for legal accountability.[66] Only, recently, the relevant statute was amended to prohibit prosecution of a child below the age of 12 and to prevent prosecution for offences committed by a person under that age.[67] It seems perverse that

[60] See for example *Reilly v Greenfield Coal & Brick Co Ltd.* 1909 SC 1328, 1330 (per the Lord President), in which a child of 3 years 11 months had been killed on a train line: "… the true cause of the [injury]… was the fact that the child was unattended, and for that its own parents are responsible."

[61] Most precedent is somewhat dated on this point, however, in *Christie's Tutor v Kirkwood*, 1991 SLT 805 (Outer House judgment) a 4 year old girl wandered into a road and was knocked down. The court agreed in that case that the defences of both parental contributory negligence and child contributory negligence could be put to a civil jury.

[62] *Barnes v Flucker* 1985 SLT 142 and 144: the capacity for contributory negligence of an injured 5 year-old child was not considered further since the driver had not been found negligent. Lord Brand took the view that the accident was caused by the children involved, both of whom were "wholly to blame".

[63] See for example, injuries across a range of scenarios: *McCluskey v Wallace* 1998 SC 711 (child cyclist, discussed in main text above, 10 year old, 80% contributory negligence found); *Telfer v Glasgow Corporation* 1974 SLT (Notes) 51 (10 year old climbing on a roof, 50% contributory negligence found); *Jackson v Murray* 2013 SLT 153 (13 year old pedestrian injured: 90% contributory negligence found, reduced to 70%); *Morton v Glasgow City Council* 2007 SLT (Sh Ct) 81 (trespasser, discussed below in main text, 14 year old, 25% contributory negligence found).

[64] Para 4 of General Comment No. 7: Implementing Child Rights in Early Childhood UN Doc CRC/GC/7/Rev1 working definition of "early childhood" proposed by the Committee.

[65] Paras 10 and 21.

[66] The age of 12 is a common benchmark in Scots law. See for example the Age of Legal Capacity (Scotland) Act 1991, ss 6 and 11 of the Children (Scotland) Act 1995 and s 27 of the Children's Hearing (Scotland) Act 2011.

[67] S 41A of the Criminal Procedure (Scotland) Act 1995 added by the Criminal Justice and Licensing (Scotland) Act 2010. The provision came into force on 28 March 2011. Scotland, however, continues to have one of the lowest ages of criminal responsibility in the world, that age being eight.

the contemporary Scottish legal system appears more forgiving of children who deliberately do wrong than it is of children unintentionally at fault.[68]

Further, and most unhelpfully, no standardised judicial approach has emerged towards children within the field of delict. This is largely because judicial determinations about child contributory negligence are not, nor have they ever been,[69] particularly consistent. The *Stair Memorial Encyclopedia*, which provides a comprehensive narrative statement of the law of Scotland, encapsulates the position in one sentence:

> "[A] lesser degree of care may be expected of a child or a person suffering from an infirmity or disability".[70]

It seems that Scottish children are not considered as forming a homogenous group deserving "special safeguards and care"[71] in the field of delict. Instead, they belong to a general reduced-capacity group of individuals that includes disabled adults and the elderly.[72] It is also worth noting that Scots law does not guarantee any person belonging to this broad reduced-capacity group (note the word "may" in the above quotation) more lenient treatment in law.

4 A way forward

4 1 Past reform discussions

It is unfortunate that there has, to date, been little detailed discussion of childhood contributory negligence from a legal policy perspective throughout the UK. Unlike some jurisdictions,[73] there is no minimum age in Scotland or, indeed, in England below which a child is immune from being found guilty of contributory negligence. In 1978 (over a decade before the UK ratified the

[68] Scotland has been committed to a welfare-based approach to juvenile justice matters since 1961, when the Kilbrandon Report revolutionised social work and created the Children's Hearing System. However, it is not uncommon in jurisdictions (even those which have fully incorporated the CRC) "that children's rights are upheld to a greater extent with regards to children in conflict with the law than for children in other fields": K Sandberg "The Role of National Courts in Promoting Children's Rights" (2014) 22 *Int'l J Child Rts* 1 19.

[69] See for example, *Holland v District Committee of Middle Ward* 1909 SC 1142 (child age 6 drowned in a private quarry: parents, not child, found guilty of contributory negligence (child thought too young), cf *Cass v Edinburgh and District Tramways* 1908 SC 841 (child, age 4, knocked down crossing road: child found guilty of contributory negligence).

[70] The Laws of Scotland *Stair Memorial Encyclopaedia* Vol 15 para 406.

[71] Quotation taken from the Preamble of the CRC.

[72] There are indications in case law that English judges seem more willing to focus on children as a defined sub-category within a broader reduced-capacity group in their rationale. Whether the existence of such a sub-category provides a more lenient consideration of childhood remains unclear. See for example *Toropdor v C* [2009] EWHC 2997 1390 (10 year old child in road traffic accident, damages reduced by a third) but cf *Probert v Moore* [2012] EWHC (QB) (13 year old knocked down had done nothing wrong according to the "objective standard of the ordinary 13 year old child" and no finding of contributory negligence found).

[73] Many minimum ages for liability in negligence/contributory negligence are presumptive only, or the application of the minimum age may be dependent upon the circumstances surrounding the injury: see chapter by M Martin-Casals "Comparative Report" in M Martin-Casals (ed) *Children in Tort Law* (2006) 255-283. Some jurisdictions do not have a minimum age for liability in negligence and/or contributory negligence (for example France, Italy, Spain, Germany). Others do (for example Austria, Italy, Netherlands, Russia). Where a minimum age is imposed by law in European jurisdictions, commonly the age will be somewhere between 7 and 14 years old, for example Austria, 14 years (presumptive); Portugal, 7 years (presumptive); Germany, below 7 no liability, with the age raised to 10 years in road traffic cases.

CRC), it was proposed in England that contributory negligence should not apply to children below the age of 12, which is a common age benchmark today in other fields of law.[74] The proposal was never enacted.

In 1987, the Scottish Law Commission (the "Commission") rejected the suggestion that there should be a minimum age (seven years old had been mooted) for contributory negligence in their *Report on the Legal Capacity and Responsibility of Pupils and Minors*.[75] The Commission took the view that the creation in statute of an "irrebuttable presumption of absence of fault" in children below any "arbitrary" age might restrict claims and generate social hardship. [76] Negligence on the child's part should, the Commission observed, be "established" by the judiciary 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".[77] It is not, however, entirely clear whether this necessitates an objective or a subjective contributory negligence assessment by Scottish courts. Is the test being advocated that of the "reasonable child" (ie a tempered version of the "reasonable adult/person" test) or something subtly different?[78] Age can normally be ascertained easily with reference to an objective benchmark, but measuring intelligence and experience is a far more complex, and subjective, exercise involving consideration of an individual's personal "physical, mental … psychological and social development".[79] Thereafter, determining what society ought to expect of a notional child possessing broadly the same personal characteristics as the injured child is, surely, a rather artificial construct – and a muddled endeavour. While capacity is a question of fact, rather than law, [80] evidence on the question of childhood development and capacity is rarely heard.

A further barrier to securing a more coherent, or at least more child-friendly, approach towards contributory negligence determinations can be found in the relevant legislation. The Law Reform (Contributory Negligence) Act 1945, a UK-wide statute, came into force almost 70 years ago. [81] It is a short statute containing just seven sections: section 1 outlines the apportionment of damages in a case where blame, or "fault", for injury is to be shared between the parties. The word "child" does not feature anywhere in the statute. There is no guidance in the Act as to how apportionment should be allocated in individual cases. The Act simply provides that:

[74] Report of the Pearson Committee *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* I (1978) 1494. The UK ratified the CRC on 16 December 1991.
[75] A minimum age of liability was rejected in respect of delictual liability as a whole. Scot Law Com Report no 110 (1987) part V.
[76] Scot Law Com Report no 110 (1987) para 5.4 onwards.
[77] Paras 5.1 and 5.6.
[78] Wider discussion of the subjective/objective "reasonable person" standard of care debate is beyond the scope of the present article. For a general overview of this area, see M Moran *Rethinking the Reasonable Person: an Egalitarian Reconstruction of the Objective Standard* (2003) ch 3 which is concerned with the standard(s) of care that might be appropriate for children.
[79] General Comment No. 5.4.
[80] The Scottish Law Commission made this observation in their report no 110 para 51.
[81] Prior to the coming into force of the Contributory Negligence Act 1945 (the "1945 Act"), a finding of contributory negligence operated as full defence, meaning that a finding of contributory fault in any pursuer in respect of his own injury defeated his claim entirely in personal injury proceedings. S 5 of the 1945 Act addresses the application of the Act to Scotland.

> "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 damage".[82]

One issue is worth addressing, if only to dismiss it. Could a credible argument be made that contributory negligence determinations are exempt from the CRC? The law of delict, after all, has no child-centred focus. It is concerned with recompense for wrongs and not the welfare, or rehabilitation, of children. It would, of course, be hard to reconcile such a narrow position with the terms and spirit of the CRC or, indeed, with the Committee's far-reaching guidance published since 2001. In General Comment 14,[83] specific reference was made to article 6 in respect of "all actions or decisions that concern"[84] children. The Committee also stressed that, in the event the law is:

> "[O]pen to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen."[85]

Thereafter, it was emphasised by the Committee that States 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". [86] The right to life, survival and development is, accordingly, relevant to anything having "an important impact on the life and development of the child."[87] This, it is submitted, must include contributory negligence determinations.

4 2 Avenues for reform: three potential strategies to generate an article 6 compliant approach

In discussing the role of national courts and the legal system in the promotion of children's rights earlier this year, the Norwegian academic and former Chair of the Committee, Kirsten Sandberg, observed:

> "It is when the rights and interests of children compete with strong societal interests that we can actually measure their strength".[88]

No established consensus concerning children and contributory negligence exists in Scotland. This is unsatisfactory and produces inconsistent, and inequitable, outcomes for children. Is there a solution? Options worth considering include, of course, the various approaches adopted by other

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[82] S 1: it should be noted that there is a parallel s 1 for England (and Wales) and for Scotland. All references in this article are to the Scottish s 1.

[83] General Comment No. 14: On the Right of the Child to have his or her Best Interests Taken as a Primary Consideration UN Doc CRC/C/GC/14. It is worth noting that the scope of [this] general comment is limited to article 3, para 1, of the Convention. The General Comment thus does not cover article 3 para 2 which pertains to the well-being of the child, nor article 3 para 3 which concerns the obligation of States Parties "to ensure that institutions, services and facilities for children comply with the established standards".

[84] General Comment No. 14: On the Right of the Child to have his or her Best Interests Taken as a Primary Consideration UN Doc CRC/C/GC/14. Quotation from para A1.

[85] Para 6(b).

[86] Para 14(a).

[87] Para 29.

[88] Sandberg (2014) *Int'l J Child Rts* 19. Sandberg also observes that "The future of children's rights is dependent on the rights being domesticated", not only in our legislation and through government, but children's rights "must also be applied by the courts".

jurisdictions, such as the imposition of a minimum age for childhood liability contributory negligence or the creation of a presumption against childhood liability.[89] Wholesale reform is matter for wider debate and legal policy discussions, but might there be scope for developing existing Scots law and legal reasoning? A way forward is proposed below: it is suggested that there is currently scope for moving towards an article 6 compliant approach in Scottish child personal injury proceedings using the three strategies below.

4 2 1 Strategy 1: Judicial reference to empirical research

The first step would be for lawyers presenting cases to provide the Scottish judiciary with readily available empirical evidence about childhood cognitive capacity and developmental benchmarks. Tufnell's research, for example, provides that:

> "children respond differently from adults [to stress] and the exact nature of a child's response is determined by their developmental stage".[90]

As might be expected, empirical research concerning childhood accidental injury confirms that prevention is better than cure: where steps are taken to make private and public areas more child friendly this has a positive effect on the child's independent and safe mobility.[91] Study findings also demonstrate that "nurturing, responsive … parents usually have emotionally and cognitively healthier children".[92] Such children might be better placed to avoid accidents by having a care for their own lives and well-being than children living in poverty.

It is very likely that consideration by Scottish courts of empirical evidence about childhood capacity would generate novel debate. For example, a number of childhood studies researchers have cautioned against the "institutionalisation of chronological age".[93] These researchers[94] argue that the "mapping of an age-and-stage-based categorisation … onto children's social, intellectual and psychological development, irrespective of social context" is, in reality, artificial.[95] This notion, that age is an unhelpful (or a less useful) indicator of childhood capacity than other factors, such as social

[89] See n 73 above.

[90] G Tufnell "Stress and Reactions to Stress In Children" (2008) 7 *Psychiatry* 299 299 and 303.

[91] See for example M Kytta "The Extent of Children's Independent Mobility and the Number of Actualised Affordances as Criteria for Child-Friendly Environments" (2004) 24 *J Environ Psychol* 179 179-198; A Fyhri & R Hjorthol "Children's Independent Mobility to School, Friends and Leisure Activities" (2009) 17 *J Transp Geogr* 377-384; TR Hochschild "Cul-de-sac Kids" (2012) 20 *Childhood* 229-243; J Rudner "Public Knowing of Risk and Children's Independent Mobility"(2012) 78 *Progress in Planning* 1-53.

[92] JL Culbertson, JE Newman & DJ Willis "Childhood and Adolescent Psychologic Development" (2003) 50 *Pediatric Clinics of North America* 741 741; J O'Connor & A Brown "A Qualitative Study of 'Fear' As a Regulator of Children's Independent Physical Activity in the Suburbs" (2013) 24 *Health & Place* 157-164.

[93] A James & A James *Key Concepts in Childhood Studies* 2 ed (2012) age is noted 1. See also J Hockey & A James *Social Identities Across the Life-Course* (2003) ch 1-3 in which the authors observe, 64, that it is unfortunate that "what it means to be a child … has become highly contextualised in relation to … age".

[94] Other writers on children and childhood, such as Professor David Archard, disagree with this approach, arguing that "since the use of age has not been shown to be evidently arbitrary or unfair … it remains, in principle, an acceptable delineation". D Archard *Children, Rights and Childhood* 2 ed (2004) 91.

[95] James & James *Key Concepts* 1.

background, gender and education, has certainly not made great inroads into the law. Yet the Scottish legal system has shown itself capable of breadth of thinking on the issue of age and capacity in other contexts.[96] Perhaps it is time that lawyers at least consider the impact that other measurable factors might have upon child capacity. At present, the legal imperative for certainty and regulation through reference to age benchmarks is deeply ingrained in statute, policy and practice – this is true, somewhat ironically, even in the field of delict in which no minimum age of liability exists.[97]

4 2 2 Strategy 2: Greater reliance on expert evidence

There is, at present, no common practice in contributory negligence cases for courts to look beyond the narrow confines of Scots law for answers about child capacity. Expert evidence about a child's ability to exercise care for his or her own life, or personal safety, is rarely led.[98] However, in 2007, in *Morton v Glasgow City Council*[99] the child Pursuer produced expert evidence. *Morton* was a fourteen-year-old boy who had been injured while climbing on scaffolding. He instructed Dr Boyle, a chartered child psychologist, to provide the court with a report concerning:

> "the ready propensity of children of [fourteen 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."[100]

The language used by the child psychologist reiterated the terms of General Comment 4, when the Committee discussed the child's article 6 rights with reference to the "rapid physical, cognitive and social changes" and "risky health behaviour" belonging to adolescence.[101] Dr Boyle also gave oral evidence relating to the child's cognitive and social development. The expert's evidence informed Sheriff Kearney's finding of 25% contributory negligence

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[96] The Age of Legal Capacity (Scotland) Act 1991 s 2(4) and s 2(4A) concern, respectively, the child's capacity to consent to medical/surgical/dental treatment and to instruct his or her solicitor. In the case of the former, no age benchmark applies, and the doctor in question is required simply to form a view on the child's capacity to "understand the nature and possible consequences of the procedure or treatment". In the case of the latter, although a presumption of 12 years is mentioned, the solicitor is required principally to assess whether the child (regardless of age) possesses "a general understanding of what it means" to instruct a solicitor. In both cases, the focus of the capacity test is comprehension, or intelligence (a subjective consideration), rather than simply deferring to chronological age.

[97] The legal imperative to focus on age was observed almost 20 years ago in K Marshall *Children's Rights in the Balance: The Protection Participation Debate* (1997) 85. Age remains the bedrock of the law and of legal discourse in many fields concerning the young in Scotland: see for example n 66 above.

[98] This is the general position throughout the UK. See for example *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 be likely to break and injure him. A finding of 60% contributory negligence was made. Lantham J observed that the application of common sense was sufficient to determine the capacity of a 7 year old to ascertain and process risk.

[99] 2007 SLT (Sh Ct) 81. N.b. this was an occupiers' liability case.

[100] 2007 SLT (Sh Ct) 81 para [1]. Sheriff Kearney said para [21]:

"I accept Dr Boyle's evidence that 14 year olds are not as good as adults in assessing risks …"

[101] General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 2. A connected question is whether the civil law does/should "punish" children injured because they disobey adult instruction: case law suggests that such children will be more likely to be found guilty of contributory negligence. See for example *Wardle v Scottish Borders Council* 2011 SLT (Sh Ct) 199 (9 year old child, warned not to swing on playground rafters was injured and found 50% contributorily negligent).

in the case. The evidence led and the judicial determinations in *Morton* indicate that there is scope for Scottish courts, routinely, to have regard to this sort of expert evidence.

Neither judges, nor lawyers, are experts in the developmental stages of childhood. Child development is a matter beyond "judicial knowledge" [102] and, in contested cases, it should be a matter for expert opinion. The CRC requires more of States Parties than the perfunctory application of contributory negligence precedent in proceedings concerning injured child claimants. Rather, the legal system ought to embrace an interdisciplinary approach, with expert evidence including, if appropriate, empirical evidence being led in court about child development and evolving capacity. It is suggested that interdisciplinary discussion is much needed.

4 2 3 Strategy 3:"Rebrand" (or, at least, update) legal terminology

A change in terminology within the field of delict, particularly in respect of child litigants, is long overdue in Scotland. Terminology matters: in contemporary Scots law and practice, for example, child offenders are placed, where necessary, in "secure accommodation"[103] rather than sent to prison, or jail. The use of the former term in the juvenile justice system underlines the child's best interests, "dignity and worth", and a desire to promote the social "reintegration" of the child offender "in a manner appropriate to [his or her] well-being".[104] Similarly, the stigma that attached to a child being "in care" resulted in that expression being abandoned in favour of modern reference to a "looked after" child.[105]

Consideration should be given to "rebranding", or updating, in the field of delict. Certain antiquated terms that remain in use are infelicitous. This includes labelling children (some as young as four or five years of age[106]) as "guilty" of contributory negligence, and the use of the terms "fault", "blame", and "blameworthiness"[107] when apportioning the damages of a child claimant who has sustained accidental injury. Instead, other, less pejorative, language should be imported into the field of delict. For example, the attribution of a certain percentage of the child's injury could simply be described as "non-liability", rather than linked to the child's "guilt" or "blameworthiness"

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[102] Judicial knowledge is knowledge, which is a fact that is so commonly understood that no evidence need be led: for example. *Donaldson v Valentine* 1996 SLT 643 (for example "M" means motorway in the UK).

[103] S 85 of The Children's Hearing (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. This is effected under a "compulsory supervision order".

[104] Arts 40.1 and 40.4 of the CRC.

[105] See for example the provisions of Ch 2 Part I s 17 of the Children (Scotland) Act 1995 and the Children's Hearing (Scotland) Act 2011.

[106] For example *McKinnell v White* 1971 SLT (Notes) 61, 5 year old child found "guilty" of contributory negligence; *Wardle v Scottish Borders Council* 2011 SLT (Sh Ct) 199 (9 year old child's contributory negligence discussed with reference to her "guilt", the court citing the *Royal Commission on Civil Liability and Compensation for Personal Injury* reporting in 1978 (CMND 7054 Vol 1 para 1077 in its judgment).

[107] For example the terms "fault", "blame" and/or "blameworthiness" was 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); *Jackson v Murray* 2013 SLT 2012 (13 year old pedestrian knocked down).

in the circumstances. It is also suggested that terms such as "evolving capacity", "cognitive development", "comprehension of risk", and "degree of environmental hazard" would better fit a CRC-compatible court process. It has long been argued that "language directs thought".[108] A "rebrand" of legal terminology, from censorious to constructive language, would, it is hoped, generate a more positive, child-focused climate in child claimant cases.

5 Conclusions: taking care of the small?

> "I know up on top you are seeing great sights, but down here at the bottom we, too, should have rights".[109]

It would, of course, be more convenient for the powerful (adults) if the small (children) had no rights.[110] As Freeman once wryly observed, without children's rights it would "be easier to rule" from above: "decision-making would be swifter, cheaper, more efficient, more certain".[111] However, Scotland has been on a journey for over two decades towards fully implementing the CRC. Our current government frequently broadcasts its dedication to children's rights in seeking to ensure that children are "at the heart" of services provided by law and policy-makers.[112] As a jurisdiction, we are committed to the notion that there should be no experience, event or stage throughout childhood to which the child's right to life, survival and development is an extraneous consideration.

Yet, beneath the rhetoric, significant concerns remain – particularly in the case of childhood accidental injury claims which are the focus of this article. While there has been no decision in Scottish courts to date about the child's article 6 rights, it is submitted that contributory negligence is an antiquated and problematic concept where the young are concerned. The mechanistic operation of the doctrine in Scottish courts cannot be said to facilitate "to the maximum extent possible"[113] access to, or realisation of, the child's rights. A solution has been proposed in the form of three strategies which might be employed to generate a more child-focused approach, namely through: (i) judicial reference to empirical research about child development; (ii) greater reliance by courts upon expert evidence; and (iii) "rebranding", or updating, legal terminology in the field of delict. Certainly, re-examination of Scots law

[108] See for example BL Whorf "Science and Linguistics" in JB Carroll (ed) *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf* (1956) 207–219; L Boroditsky "Does Language Shape Thought? Mandarin and English Speakers' Conceptions of Time" (2001) 43 *Cognitive Psychology* 1-22. See also N Klemfuss, WW Prinzmetal & RB Ivry "How Does Language Change Perception: A Cautionary Note" (2012) 3 *Frontiers in Psychology* 78 78.

[109] Dr Seuss *Yertle the Turtle and Other Stories* (2008) 18.

[110] Sutherland observes that while it is "one thing to be acknowledged by the legal system as an object of protection [it] is quite another to be recognised as a person with rights" EE Sutherland *Child and Family Law* 2 ed (2008) 145.

[111] M Freeman "Why It Remains Important to Take Children's Rights Seriously" (2007) 17 *Int'l J Children's Rts* 5 8.

[112] *Scottish Government Policy Memorandum* for the Children and Young People (Scotland) Bill (now the Children and Young People (Scotland) Act 2014) para 2.13: <http://www.scottish.parliament.uk/help/62233.aspx>.

[113] Art 6.2.

is long overdue and is of critical importance if Scotland is to create a "safe and supportive environment" [114] for injured children bringing claims.

SUMMARY

This article addresses the right to life, survival and development, guaranteed to every child by the United Nations Convention on the Rights of the Child, article 6, within the context of childhood accidental injury in Scotland. It is argued that Scots law fails to meet the obligations incumbent on States Parties to provide a safe and supportive environment that recognises the special position of the injured child claimant. The nature of the obligation that article 6 imposes upon States Parties, and upon Scotland in particular, is discussed before certain significant legal difficulties facing Scottish child claimants are analysed. That analysis demonstrates that a mechanistic application of the doctrine of contributory negligence in cases concerning children is conceptually flawed and has produced inconsistent and inequitable outcomes. In conclusion, a way forward is proposed in the form of three strategies which might be employed to generate an article 6 compliant approach within the existing legal framework.

[114] General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child UN Doc CRC/C/GC/2003/4 para 39(a) discussing art 6. See also General Comment No. 14: On the Right of the Child to have his or her Best Interests Taken as a Primary Consideration UN Doc CRC/C/GC/14 s B 2.