

RESEARCH ARTICLE

Contributory negligence and children's rights: the (potentially) transformative role of courts in Scotland and South Africa

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(Received 03 June 2025; revised 20 January 2026; Accepted 03 March 2026)

Abstract

Little has been written about the rights of children in delict (a functional equivalent of tort), the legal field concerned with compensating those who have suffered injury or loss due to wrongful actions of others. Yet in many legal systems children can, and do, raise legal proceedings seeking damages for injuries caused by another's negligence. Negligent wrongdoers (normally adults) often attempt to reduce any damages awarded by arguing that the injured child was contributorily negligent. This paper analyses and compares how Scotland and South Africa approach such claims. Both have mixed, uncodified legal systems and have embedded children's rights in domestic law. In South Africa the provisions of the UN Convention on the Rights of the Child are incorporated in the Constitution of the Republic of South Africa 1996 and in various statutes, notably the Children's Act 38 of 2005. The recent UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 directly incorporates the child's Convention rights in Scottish law. We examine how each jurisdiction assesses childhood capacity for contributory fault, exploring what a rights-based approach might involve. Finally, we consider the (potentially) transformative role of courts. Drawing on the South African experience, we propose a way Scottish courts could integrate children's rights in contributory negligence decisions concerning children.

Keywords: torts (delict); children's rights; contributory negligence; transformative law-making

Introduction

In many jurisdictions, when victims are negligently injured by wrongdoers, wrongdoers may attempt to reduce the damages legally payable to victims by arguing that victims were contributorily negligent in respect of their own injuries.¹ Even when children are negligently injured by adults, those children might have their damages reduced on account of their contributory negligence. This legal position has

[†]The authors wish to express their sincere gratitude to the Leverhulme Trust and the Oppenheimer Memorial Trust for their financial support. The authors are also extremely grateful for the helpful comments of two anonymous reviewers on this submission.

¹For an overview of some of these jurisdictions in comparative perspective see eg EGC van Dongen *Contributory Negligence: A Historical and Comparative Study* (Leiden: Brill Nijhof, 2014); U Magnus and M Martin-Casals (eds) *Unification of Tort Law: Contributory Negligence* (Alphen aan den Rijn: Kluwer Law, 2004); G Williams *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens, 1951). Regarding the UK in particular see J Goudkamp and D Nolan *Contributory Negligence* (Oxford: Oxford University Press, 2nd edn, 2023) and for South Africa see RG McKerron *The Apportionment of Damages Act 1956* (Cape Town: Juta, 1956).

implications for children's rights and how childhood is understood, or constructed, in law. In this paper, we critically examine and compare the legal frameworks governing childhood contributory negligence in Scotland and South Africa, exploring what a rights-based approach in this area of private law might involve.

The private laws of Scotland and South Africa have often provided fruitful terrain for legal comparison.² At least four reasons can be provided for our choice in this comparison. First, both jurisdictions are uncoded and mixed legal systems. They are uncoded in the sense that the totality of private-law rules is not encapsulated in statute.³ Some statutes regulate parts of the arena while each jurisdiction's common law provides the substantive landscape. Scotland and South Africa do not share one common law, but both jurisdictions' common laws are infused with civilian (Romanist) and common law (English) flavour, making them part of the traditionally-labelled mixed legal systems family.⁴ The common laws of both jurisdictions are judge-made laws comprising of a mix of customs and modern developments.⁵

Secondly, Scotland and South Africa also share commitments in respect of the realisation of human rights,⁶ and the rights of children in particular, having made legislative provision – via statutory incorporation – to implement the child's rights as set out in the UN Convention on the Rights of the Child (the UNCRC or the Convention).⁷ In Scotland, the UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, which came into force on 16 July 2024, fully incorporates this Convention in domestic law. In South Africa, the UNCRC's provisions were incorporated much earlier, in sections 28–29 of the Constitution of the Republic of South Africa, 1996 and through various statutes (most notably including the Children's Act 38 of 2005) empowering courts to develop a body of children's rights jurisprudence across a range of legal fields to date.⁸ For both jurisdictions, statutory incorporation obliges courts to interpret and uphold the child's rights in legal fields beyond those (such as child and family law) traditionally associated with children and their rights. There is also a growing body of international guidance⁹ and literature on what constitutes a children's rights-based approach in proceedings concerning children – both in terms of procedural¹⁰ and substantive¹¹ law. Where procedural law is concerned, a rights-based approach involves adapting processes to ensure they are accessible and inclusive for the children involved.¹² In examining childhood contributory negligence, this paper focuses on the substantive law of delict, evaluating childhood capacity for fault through the

²See eg E Reid and D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh: Edinburgh University Press, 2013); R Zimmerman et al (eds) *Mixed Legal Systems in Comparative Perspective* (Oxford: Oxford University Press, 2004).

³See eg W Tetley 'Mixed jurisdictions: common law v civil law (codified and uncoded)' (2000) 60 *Louisiana Law Review* 680.

⁴See eg KGC Reid 'The idea of mixed legal systems' (2003) 78 *Tulane Law Review* 5 at 22–23.

⁵See eg R Zimmerman "'Double cross': comparing Scots and South African law' in R Zimmerman et al (eds) *Mixed Legal Systems in Comparative Perspective* (Oxford: Oxford University Press, 2004) p 12.

⁶See J du Plessis 'Comparative law and the study of mixed legal systems' in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn, 2019) p 497.

⁷1577 UNTS 3, 20 November 1989; EE Sutherland 'Child law: respecting the rights of children' in Reid and Visser, above n 2, pp 81–82.

⁸For wider discussion, see M Couzens 'The judicial application of the CRC: from formal reception to legal effect' in M Couzens *The UN Convention on the Rights of the Child and Domestic Courts* (Cambridge: Cambridge University Press, 2025) p 243.

⁹See eg *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* 1, 13 (Council of Europe, 2010) paras 1–3: on the 'place and role, and the views, rights and needs of the child in [all] judicial proceedings ... in which children are brought into contact with ... criminal, civil or administrative law'.

¹⁰UNCRC, Arts 3(1) (applicability in 'all actions ... concerning children') and 12 (participation). See L Lundy et al 'Article 12: The Right to Respect for the Views of the Child' in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) p 397.

¹¹See H Stalford et al (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Oxford: Hart Publishing, 2017) and J Tobin 'Courts and the construction of childhood: a new way of thinking' in M Freeman *Law and Childhood Studies* (Oxford: Oxford University Press, 2012) p 74.

¹²See T Liefwaard 'Child-friendly justice: protection and participation of children in the justice system' (2016) 88(4) *Temple Law Review* 905.

lens of children's rights. We explore how a rights-based narrative and the application of children's rights principles might influence judicial decision-making.

Thirdly, on the topic of contributory negligence in particular, Scotland and South Africa show some basic terminological and functional equivalence.¹³ We consider the significant differences that exist in relation to how children are treated in terms of contributory negligence, such differences offering valuable insights for addressing unresolved tensions between the law of delict and protecting children's rights.¹⁴

Fourthly, in this paper, we will demonstrate that this North/South comparison may be particularly useful for collaborative problem-solving in the area of childhood contributory negligence. Both Scotland and South Africa recognise – albeit in differing ways – that the delictual capacity of children is an evolving state. Since South Africa incorporated children's rights principles in domestic law earlier than Scotland, the South African Constitutional Court has 'built a powerful jurisprudence' around the child's rights, most notably in the application and interpretation of Article 3 (child's best interests) of the UNCRC across a diverse range of legal fields in which decision-making concerns children.¹⁵ As the time of writing few reported judgments exist on the 2024 Scottish Act incorporating the Convention.¹⁶ We therefore conduct our comparison in the spirit of 'post-colonial comparative law', where the North is open to draw wisdom from the South and in so doing invert the historical power dynamic between the two jurisdictions.¹⁷

Against this backdrop, in [Section 1](#) we explain the common point of departure of the Scottish and South African laws of delict as they relate to contributory negligence and the significance of children's rights incorporation for both jurisdictions. In [Section 2](#) we contrast the treatment of children's contributory negligence in Scotland and South Africa. From the differences between the two jurisdictions, we explore two themes in more detail: the meaning of capacity for negligent fault and the impact of age on the same (in [Section 3](#)) and how children's rights might enrich our discourse on children's contributory negligence (in [Section 4](#)). Finally, in [Section 5](#), we discuss some of the complexities of Scottish statutory incorporation of the UNCRC and explore the potentially transformative role that courts could play in securing a healthier symbiosis between the laws pertaining to children's contributory negligence and children's rights. In particular, we conclude by proposing a way forward for Scottish courts, drawing on lessons learned from the South African experience.

1. A common point of departure

Scotland and South Africa each call the area of law that determines the conditions and consequences for injury liability the law of delict, even though most of the English-speaking world uses the term tort law.¹⁸ The Scottish and South African laws of delict have comparable rules regulating reparations for the negligent infliction of harm.

When a child is negligently injured by an adult – in the case law, oftentimes a motor vehicle accident – the child victim would pursue a delictual action grounded in negligence against the adult wrongdoer. In Scottish law, victims must show that wrongdoers owed them a duty of care which was

¹³J Husa 'Traditional methods' in M Siems and PJ Yap (eds) *The Cambridge Handbook of Comparative Law* (Cambridge: Cambridge University Press, 2024) pp 21–26.

¹⁴On the role that comparative difference can play in legal development see G Dannemann 'Comparative law: study of similarities or differences?' in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn, 2019) p 408.

¹⁵A Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52(1) *De Jure* 557 at 579.

¹⁶*Lord Advocate's References (JH & LL)* [2025] HCJAC 2, [2025] HCJAC 12, two judgments in the same criminal law case, and *X, Petitioner* [2026] CSOH 15, which concerned family law and child protection.

¹⁷See eg CGS Tan 'On law and orientalism' (2012) 7 *Journal of Comparative Law* 17.

¹⁸ECR Reid *The Law of Delict in Scotland* (Edinburgh: Edinburgh University Press, 2022) para 1.01. Tort and delict are termed 'functional equivalents' in N Jansen 'Law of torts/delict, general and lex aquilia' (2012) *Max Planck Encyclopaedia of Public International Law* (online edn).

breached (contrary to what is expected of the reasonable person) which has caused non-remote loss.¹⁹ Under South African law, victims must show that the conduct of the wrongdoer negligently and wrongfully caused harm.²⁰

The Scottish concept of duty of care is not functionally dissimilar to the South African notion of wrongfulness.²¹ The Scottish breach of duty is what South Africans would roughly equate with negligence – weighing up the conduct of the wrongdoer against what is expected of the reasonable person.²² Causation and non-remoteness from Scottish law is covered by the overarching element of causation in South Africa. Both legal systems clearly require damage, and the South African element of conduct is implicitly whispering in the Scottish law of delict too. The substance of these laws thus appears to be remarkably similar even though terminological differences may obscure the likeness at times.

In both legal systems, if the child can demonstrate that the wrongdoer has met all conditions for delictual liability grounded in negligence, the wrongdoer is traditionally held liable to pay damages, an order of court requiring the wrongdoer to pay money to the victim to cover the patrimonial and non-patrimonial loss that the victim has suffered. During the damages phase of the litigation, the wrongdoer might employ various strategies to reduce the amount of damages payable to the victim. A common phenomenon in both the Scottish and South African law of delict is that the wrongdoer might argue that the victim was contributorily negligent towards their own injury and so the victim's damages should then be reduced. That reduction is sometimes called apportionment of damages. An argument for apportionment is made in terms of statute.

The Scottish section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (the 1945 Act) reads as follows:

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

The South African analogue in section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 (the South African 1956 Act) was clearly based on the UK legislation:

Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

Both statutes practically envisage the situation where victims (alongside their wrongdoers) play a role in causing their own harm which triggers the need for a judicial recalibration of the damages award claimed by the victim. The technical differences between the two statutes appear to be largely cosmetic. In both jurisdictions, the key considerations are the victim's fault and the court's discretion to reduce damages in a just and equitable manner. There is nothing in these statutes that prevent their application to child victims. Indeed, the case law in both jurisdictions shows that the statutes have found application to cases where adult wrongdoers have negligently injured children resulting in delictual claims. However, the way in which the Scottish courts go about reducing the damages claimed by child victims differs significantly from the South African judiciary's approach.

¹⁹The locus classical being *Donoghue v Stevenson* 1932 SC (HL) 31. See also *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49 para 3.

²⁰The most authoritative and most recent case being *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para 13.

²¹See A Fagan 'A duty without distinction' (2000) *Acta Juridica* 49.

²²*Muir v Glasgow Corp'n* [1943] AC 448 at 457 per Lord Macmillan.

2. The difference in approach to childhood contributory negligence

(a) Terminological clarity

The statutes dealing with contributory negligence in Scotland and South Africa require victims to be partly at fault in respect of their own injuries in order for their damages to be reduced. One of the immediate questions that arise is under what circumstances children can be said to have acted with fault towards their own injuries such that they have acted (or failed to act in their own interests) with contributory negligence.

In Scotland, damages can be apportioned in respect of contributory negligence where there is fault, defined widely in the 1945 Act as a ‘wrongful act, breach of statutory duty or negligent act or omission’.²³ Such fault manifests itself in a failure to take care of one’s own safety, through conduct falling below the standard of care expected of the reasonable – and reasonably capable – person, which in turn contributes to the injury one has sustained.²⁴ Unlike negligence, which is concerned with injury to others, the Scottish/UK-wide doctrine of contributory negligence (sometimes termed self-regarding fault) arguably enables the court to engage in a more subjective consideration of a victim’s capacity for fault by taking account of the victim’s personal characteristics such as age and/or infirmity.²⁵ However, there remains some debate over whether victims are treated more leniently than wrongdoers in respect of capacity to be at fault.²⁶ There are conflicting authorities, and the judicial practice of apportioning responsibility for respective degrees of fault on the parts of wrongdoer and victim in terms of the 1945 Act has been described as ‘rough and ready’²⁷ – an exercise based on individual judicial impression²⁸ in consideration of the facts of the particular case.

In South Africa, the fault required for statutory apportionment technically ‘includes any act or omission’ of the victim that would ‘have given rise to the defence of contributory negligence’.²⁹ South African courts have implicitly addressed the vagueness of the statutory definition of fault by interpreting the term consistently with how fault is defined as an element of delictual liability in a typically Romanist manner.³⁰ The South African doctrine of fault³¹ in delict requires the actor concerned to have both capacity for fault *and* to demonstrate one of the substantive forms of fault, namely intent (consciousness of wrongfulness coupled with direction of will)³² or negligence (behaviour contrary to what is expected of the reasonable person in light of reasonable foreseeability and reasonable preventability of harm).³³ Similarly, when wrongdoers raise the issue of the victims’ contributory fault, they would have to show that the victims had capacity for fault *and* behaved either intentionally or negligently towards their own injuries.³⁴

In the unfolding discussion we will show how the notion of capacity for fault in South African law has had a profound impact on how children’s age is considered in the context of contributory negligence cases, while age-related considerations seem to play a less dramatic role in the Scottish counterpart.

²³Section 5(a) of the 1945 Act as applying to Scotland.

²⁴Goudkamp and Nolan, above n 1, p 3, describing the relevant law, at p 2, as ‘substantially uniform’ across each of the UK nations.

²⁵Ibid, at p 42, also referring to contributory fault as ‘unreasonable disregard for one’s own safety’. See also *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 324 per Denning LJ; J Dietrich and I Field ‘The “reasonable tort victim”: contributory negligence, standard of care and the “equivalence theory”’ (2017) 41(2) Melbourne University Law Review 639.

²⁶See eg K Simons ‘Victim fault and victim strict responsibility in Anglo-American tort law’ (2015) 8 Journal of Tort Law 33.

²⁷*Jackson v Murray* [2015] UKSC 5 at [28] per Lord Reed.

²⁸Goudkamp and Nolan, above n 1, p 87.

²⁹Section 1(3) of the South African 1956 Act.

³⁰See eg PJ Du Plessis *Borkowski’s Textbook on Roman Law* (Oxford: Oxford University Press, 6th edn, 2020) p 327.

³¹The consensus on this meaning of fault is shared by J Neethling and JM Potgieter *Law of Delict* (Cape Town: Juta, 8th edn, 2020) pp 155–157; M Loubser and R Midgley (eds) *The Law of Delict in South Africa* (Oxford: Oxford University Press, 3rd edn, 2017) p 138; JC van der Walt and JR Midgley *Principles of Delict* (Durban: LexisNexis Butterworths, 4th edn, 2016) paras 135–136.

³²*Dantex Investment Holdings v Brenner* 1989 (1) SA 390 (A) 396C–E.

³³*Kruger v Coetzee* 1966 (2) SA 428 (A) 430E–F.

³⁴Neethling and Potgieter, above n 31, p 200; Loubser and Midgley, above n 31, p 532; Van der Walt and Midgley, above n 31, at para 217.

(b) Childhood contributory negligence in South Africa

As observed above, the South African dogma on fault stipulates that a person has acted negligently if, and only if, that person had the capacity to act negligently, and acted contrary to what the reasonable person would have done in terms of reasonable foreseeability and reasonable preventability of harm.

The prerequisite step of testing the person's capacity for fault involves asking if that person had the psychological ability to distinguish between right and wrong and had the correlative ability to act in accordance with that appreciation.³⁵ This is neatly summarised as the twin requirements of cognition and conation.³⁶ If people do not have the requisite capacity, they cannot be found to have acted negligently.³⁷

The legal construct of 'a child' features most prominently in discussions about capacity for negligence because youthfulness is considered a major factor impacting a person's cognitive and conative abilities.³⁸ In this regard, South African courts have adopted the law as laid down by the Roman-Dutch authorities, which divide childhood into three distinct stages.

Children under seven years are irrebuttably presumed to lack capacity for fault.³⁹ These children can never act contributorily negligent to their own injuries.

According to some cases, boys who are between seven and twelve years and girls between seven and fourteen years are rebuttably presumed to lack capacity for fault.⁴⁰ According to other cases, children between seven and fourteen years, regardless of their gender, are rebuttably presumed to lack capacity.⁴¹ These children are often found to lack capacity for contributory negligence, but they may nonetheless be shown to have sufficient knowledge and impulse control to be held to the standard of a reasonable person.⁴²

Finally, teenage children (ages fourteen plus, if we accept the gender-neutral age-bracket mentioned above) are treated similarly to adults: they are rebuttably presumed to have capacity for fault unless something like a psychosocial disability (mental health) suggests otherwise.⁴³

Since the decision in *Jones*, once it has been established that a child has capacity for fault, that child's conduct will be measured against the objective standard of the reasonable person, on the reasoning that the child has been proven capable of being held to that standard.⁴⁴ Thus, there is no reasonable child standard of care in the South African law of delict.⁴⁵ Once the prerequisite capacity has been established in the affirmative, childhood effectively no longer matters for the negligence enquiry.

(c) Childhood contributory negligence in Scotland

In Scotland (as with tort law in the UK generally), there is no equivalent threshold cognition and conation capacity test in the law of delict. Legislation regulating the child's legal capacity in other Scottish fields explicitly excludes delict from its purview.⁴⁶ The term capacity is used rather loosely in the Scottish

³⁵The classical case in this regard is *Weber v Santam* 1983 (1) SA 381 (A) 389H, 403B–C.

³⁶This terminology is not popular in the delict literature but is commonly used by criminal lawyers who use the same test for capacity for fault: J Burchell *Principles of Criminal Law* (Cape Town: Juta, 2016) p 251.

³⁷Neethling and Potgieter, above n 31, p 157; Loubser and Midgley, above n 31, p 139; Van der Walt and Midgley, above n 31, para 136.

³⁸Neethling and Potgieter, above n 31, p 158; Loubser and Midgley, above n 31, pp 140–141; Van der Walt and Midgley, above n 31, para 136.

³⁹*Van Oudtshoorn v Northern Assurance* 1963 (2) SA 642 (A) 648H.

⁴⁰See eg the historical survey in *Weber v Santam*, above n 35.

⁴¹*Jones NO v Santam* 1965 (2) SA 542 (A) 552B; *Roxa v Mtshayi* 1975 (3) SA 761 (A) 765H; and supported in passing more recently in *Eskom v Hendricks* 2005 (5) SA 503 (SCA) para 16.

⁴²*Eskom*, above n 41, para 17.

⁴³On these other factors affecting capacity see Neethling and Potgieter, above n 31, p 159; Loubser and Midgley, above n 31, pp 142–144; Van der Walt and Midgley, above n 31, para 136.

⁴⁴*Jones*, above n 41, at 551F–H.

⁴⁵Neethling and Potgieter, above n 31, pp 171–173.

⁴⁶Age of Legal Capacity (Scotland) Act 1991, s 1(3)(c).

law of delict, and the developmental factors relevant to the emergence of childhood capacity to commit a delict or to be contributorily negligent have not been explored in depth in contemporary law.⁴⁷ Additionally, there is no formal minimum age of delictual responsibility.⁴⁸ It is, however, widely accepted that a child must possess the capacity to neglect their own safety (ie ‘the exercise of reason’⁴⁹) before a finding of contributory negligence can be made.

In practice, contemporary courts – much like their historic counterparts – are unlikely to find children below four years of age capable of contributory negligence.⁵⁰ Such children have long been considered ‘infants of tender years’,⁵¹ lacking legal capacity altogether. However, once children reach around five years of age,⁵² Scottish courts have found that they possess the capacity to be contributorily negligent.⁵³ As discussed in Section 3 below, this construction in delict of the very young child as a social actor bearing responsibility for personal behaviour is at odds with the more protectionist approach adopted towards children in other Scottish legal fields.⁵⁴

Nor is it clear whether, in delict, Scottish children above the age of tender years (ie those aged from around age five until reaching adulthood) form a distinct class of person.⁵⁵ A narrative overview of delict found in the *Stair Memorial Encyclopaedia* provides that ‘a lesser degree of care *may* be expected of a child or a person suffering from an infirmity or disability’.⁵⁶ This suggests that children are considered to belong to a generic reduced-capacity group of persons – including older adults and adults with disabilities – who may benefit from lower expectations regarding their capacity to exercise care(fulness).⁵⁷

In addition, Scottish case law and commentary has presented an opaque and, at times, inconsistent picture regarding how the objective, *adult* reasonable person standard of care translates into judicial expectations of what constitutes reasonable conduct in children.⁵⁸ Certainly, there seems to be widespread agreement that some adjustment of the adult standard is required. The Scottish Law Commission, Scotland’s law reform body, outlined the Scottish judicial approach as one that measures childhood conduct against how the hypothetical reasonable child of the same ‘age, intelligence and experience’ would (or should) have behaved in the circumstances concerned.⁵⁹ However, intelligence and experience are not objective characteristics, and some commentators advocate age alone⁶⁰ as the relevant characteristic governing expectations of how the reasonable child is expected to behave.

⁴⁷In Scottish criminal law, there has been more discussion on the subject of childhood capacity to commit an offence by academics and policy-makers. See eg recent *Report from the Age of Criminal Responsibility Advisory Group on the Review of the Age of Criminal Responsibility (Scotland) Act 2019* (Scottish Government, published 24 December 2024).

⁴⁸Scottish Law Commission *Legal Capacity and Responsibility of Pupils and Minors*, Report No 110 (1987) Chapter 5.

⁴⁹Erskine III, i, 13; *Campbell v Ord and Maddison* (1873) 1 R 149, Inner House judgment at 153 per Lord Justice-Clerk Moncrieff.

⁵⁰*Campbell v Ord and Maddison*, *ibid*; *Banner’s Tutor v Kennedy’s Trustees* 1978 SLT (Notes) 83; *Christie’s Tutor v Kirkwood* 1991 SLT 805.

⁵¹A term found in the English judgment, *Gardner v Grace* (1858) 1 F&F 359 at 359.

⁵²See eg *Cass v Edinburgh District Tramways* 1909 SC 1068; *Harvey v Cairns* [1989] SLT 107 at 109; *Christie’s Tutor v Kirkwood*, above n 50.

⁵³*McKinnell v White* 1971 SLT (Notes) 61.

⁵⁴See eg the Children (Scotland) Act 1995, s 11(10); Age of Legal Capacity (Scotland) Act 1991, s 2.

⁵⁵*Muir v Glasgow Corp’n*, above n 22.

⁵⁶*Stair Memorial Encyclopaedia: The Laws of Scotland* Vol 15 para 406 (emphasis added).

⁵⁷*Ibid*.

⁵⁸*Galbraith’s Curator ad Litem v Stewart* (No 2) 1998 SLT 1305; *McCluskey v Wallace* 1998 SC 711.

⁵⁹*Legal Capacity and Responsibility of Pupils and Minors*, above n 48, in which it was stated that, in delict, a child ‘is required to show ... the degree of care ... expected from a child of the same age, intelligence and experience in the circumstances’: para 5.1. See also L-A Barnes Macfarlane ‘“Adapt or perish”: the uncertain fate of childhood contributory negligence in Scotland’ (2023) 56 De Jure 588.

⁶⁰Reid, above n 18, p 338.

(d) Significant differences and questions arising

While both jurisdictions recognise, in varying degrees, a concept of capacity for negligence, there are two major differences in approach to childhood capacity for negligence in South Africa and Scotland. The first difference is that South Africa recognises a formal definition of capacity for fault (cognition plus conation) while Scotland does not. The second difference is a stark one that relates to the roles of age and development in determining capacity for negligence: South African children up to the age of fourteen are provided with a significantly stronger strategic legal advantage in contributory negligence cases compared to their Scottish friends who only receive optimal legal protection up to around age five. In South African law, from age seven upwards, a differential approach is applied with presumptions of capacity depending on objective categories of children's stages of development, while in Scotland, a binary yes/no approach to capacity is employed. We are of the view that these divergences between the South African and Scottish law on age-related capacity invite further reflection and analysis.

Two important questions arise relevant to our discussion of the child's human rights in the field of delict. First, how might childhood capacity for fault best be understood and rationalised and, secondly, how can the child's rights be promoted and protected in the context of contributory negligence decisions? Little has been written about children's capacity or children's rights in delict, a field primarily concerned with recompense for wrongful loss or injury. In the next section, we will briefly discuss the concept of capacity as it is understood by international bodies and scholars. Thereafter we will address four General Principles of the UNCRC, namely Articles 2 (non-discrimination), 3 (best interests), 6 (life, survival and development) and 12 (voice). It is also recognised that many other rights set out in the UNCRC will have relevance to a consideration of childhood in delict, such as Articles 1 (age), 5 (evolving capacities), 23 (disabled child's right to a full life), 24 (health) and 31 (play and recreation). Our aim in exploring the meaning of capacity and the UNCRC General Principles is to determine what a broad children's rights-based approach to capacity for fault might involve.

3. Childhood capacity for fault

Capacity is a notoriously complex term, surrounded by uncertainty,⁶¹ but it is broadly understood to refer to an individual's sense of 'knowing, judging and evaluating'.⁶² Childhood capacity is viewed as evolving and the prevailing view in children's rights literature is that adopting a children's rights-based approach towards childhood capacity requires implementing rights in an age-and-stage appropriate manner.⁶³ This involves integrating established knowledge from the childhood sciences about child development when considering childhood capacity.⁶⁴ The UN Committee on the Rights of the Child (the Committee) has recognised three broad yet distinctive dimensions of childhood development, notably early childhood (birth–eight years), middle childhood (eight years until adolescence), and adolescence, a period characterised by 'building up of the capacity to assume adult behaviours and roles'.⁶⁵ Various

⁶¹See eg M Cowden 'Capacity, claims and children's rights' (2012) 11 Contemporary Political Theory 362; E Henderson-Dekort et al 'The complex notion of the capacity of a child: exploring the term capacity to support the meaningful participation of children in family law proceedings' (2022) 11 Social Sciences 98.

⁶²A Daly 'Assessing children's capacity: reconceptualising our understanding through the UN Convention on the Rights of the Child' (2020) 28 International Journal of Child Rights 472.

⁶³G Lansdown *The Evolving Capacities of the Child* (UNICEF Innocenti, 2005) p 13; S Varadan 'The principle of evolving capacities under the UN Convention on the Rights of the Child' (2019) 27 International Journal of Child Rights 307.

⁶⁴J Todres and U Kilkelly (eds) *Children's Rights and Children's Development: an Integrated Approach* (New York: NYU Press, 2025).

⁶⁵Committee on the Rights of the Child General Comment No 7 (2005) *Implementing Child Rights in Early Childhood*, 20 September 2006, crcc/gc/7/Rev 1, para 1; Committee on the Rights of the Child General Comment No 4 (2003), *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, crcc/gc/2003/4, para 2; D Archard and J Tobin 'Article 1: the definition of a child' in Tobin, above n 10, p 31.

factors are also believed to impact significantly on a childhood capacity in any given context, including the level of stress in the environs, and the amount of information and support available.⁶⁶

In the literature, the construct of legal capacity underpins the enjoyment of certain core rights and the exercise of certain duties.⁶⁷ Where children are concerned, the term legal capacity is used in a variety of contexts, often for quite different purposes.⁶⁸ Legal capacity can, for example, refer to the child's ability to make decisions on their own behalf (or to contribute meaningfully to a decision-making process concerning them) or to engage in certain activities. The concept of capacity is also used in a broader sense in law to support the argument that the capable, or competent, child might – and in some situations should – bear personal legal responsibility for their behaviour.⁶⁹

Where children in conflict with the criminal law are concerned, a dominant theme of the literature on the minimum age of legal responsibility is providing the level of protection for children that is consistent with the level of their unevolved or still-evolving capacities.⁷⁰ The Committee interprets the Convention as requiring child-oriented justice systems to be guided by the child's best interests and it commends states to set a minimum age of age fifteen or sixteen years below which children 'shall be presumed not to have the capacity' to commit a crime.⁷¹

A children's rights-based construct of capacity for negligence can therefore be understood as recognising that children's knowledge and discernment about risks develops over time and that, accordingly, children should be treated differently at different stages of their development. Empirical evidence suggests, for example, that children may not develop full 'cognitive-perceptual' capacity to judge dynamic traffic until age fourteen or later.⁷² South Africa's formal definition of capacity for fault and the notion of imposing clear age-related rules might therefore be seen as a general approach that better aligns with the Committee's understanding of evolving capacity – more clearly so when compared to the law of Scotland, in which no minimum age of delictual responsibility exists. In Scotland, injured child pedestrians as young as five or six have been found contributorily negligent in recent decades.⁷³

The core question is this: if children are to be held responsible for contributory negligence, how should courts balance the child's interests and rights alongside the broader interests of society?⁷⁴ In delict/tort, a key consideration is how courts should appropriately weigh children's conduct against that of adults, who generally have both greater experience and mature cognitive capacity.⁷⁵ Following UK-wide statutory incorporation of the European Convention on Human Rights in 1998, a considerable

⁶⁶V Reyna and F Farley 'Risk and rationality in adolescent decision making: implications for theory, practice, and public policy' (2006) 7 *Psychological Science in the Public Interest* 33; Lansdown, above n 63, p xi.

⁶⁷O Lewis 'Advancing legal capacity jurisprudence' (2011) 6 *European Human Rights Law Review* 700; Daly, above n 62, at 472.

⁶⁸J Tobin and S Varadan 'Article 5: the right to parental direction and guidance consistent with a child's evolving capacities' in Tobin, above n 10, p 175.

⁶⁹Lansdown, above n 63, p 36; J Herring 'The age of criminal responsibility and the age of consent: should they be any different?' (2016) 67(3) *Northern Ireland Legal Quarterly* 345; UNCRC, Art 40(3)(a).

⁷⁰Lansdown, above n 63, p 15; U Kilkelly '“Evolving capacities” and “parental guidance” in the context of youth justice testing the application of Article 5 of the Convention on the Rights of the Child' (2020) 28(3) *International Journal of Children's Rights* 500 at 507.

⁷¹UNCRC, Art 40(3)(a); General Comment No 24 (2019) on *children's rights in the child justice system*, 18 September 2019, CRC/C/GC/24 paras 1, 21–22.

⁷²See DC Schwebel 'Children crossing streets: the cognitive task of pedestrians across nations' (2017) 83(2) *Annals of Global Health* 328; JM Plumert et al 'How do children perceive and act on dynamic affordances in crossing traffic-filled roads?' (2014) 8 (4) *Child Development Perspectives* 207.

⁷³See Mckinnell, above n 53; *Christie's Tutor v Kirkwood* above n 50; cf the contemporary English judicial approach, illustrated by *Ellis v Kelly* [2018] EWHC 2031 (QB) at 62 per Yip J, holding it was not 'just and equitable' to find an 8-year-old child contributorily negligent. The adult defender's speeding driving was something 'outside [the child's expectation] based on [the child's] understanding and experience'.

⁷⁴On this, see K Sandberg 'The role of national courts in promoting children's rights' (2014) 22 *International Journal of Children's Rights* 11.

⁷⁵A Deluka-Tibljaš et al 'Child-pedestrian traffic safety at crosswalks – literature review' (2022) 14(3) *Sustainability* 1142, section 2.1.

literature has developed on the subject of adults' human rights in delict/tort law, including judicial decision-making in negligence disputes between adults.⁷⁶ Since, like South Africa, Scotland has now incorporated the UNCRC in domestic law, we seek to develop greater children's rights-based discourse in this field. In particular, we argue that interpreting the concept of capacity for negligence through the lens of children's rights can better protect children from being held to a legal standard they lack the developmental ability to meet. This angle of approach is justifiable in our view because children are a vulnerable group worthy of special legal protection. While the South African legal position has historically (solely) been rationalised based on a tight connection between delictual liability and subjective blameworthiness, it could now additionally be justified under the new constitutional order simply by emphasising the need for stronger legal protections for children as a vulnerable group. In the case of Scotland, perhaps one could argue that a child victim's subjective capacity (or lack thereof) ought to be given greater regard so that their best interests are optimally protected. Childhood responsibility for delicts/torts committed by children fall beyond the scope of the current paper.

4. Children's rights in contributory negligence decision-making

What might a broad children's rights-based approach look like in contributory negligence decision-making concerning children? A consideration of how the four General Principles of the Convention might be implemented within the field of delict is a fruitful place to begin.

Article 2 (non-discrimination) requires that state parties 'respect and ensure' the child's rights 'without discrimination of any kind', meaning that any differential treatment of children must demonstrably be 'proportionate and justifiable' in the circumstances.⁷⁷ Particular care, therefore, would be required to avoid discrimination on grounds of, for example, childhood gender, race, sexual orientation and disability. It can also be argued that Article 2 calls for a reconsideration of the practice of imposing of any inflexible/objective age-and-stage standard of care upon all children, particularly neurodiverse children.⁷⁸ Child litigants, across jurisdictions, including Scotland and South Africa, are also more likely than adults to experience barriers in accessing justice. These barriers (which often include the lack of legal support/assistance and the absence of 'child-sensitive' proceedings) are also increasingly being framed as matters which concern the child's right not to be discriminated against in the literature.⁷⁹

In respect of the child's best interests, Article 3, which applies to 'all actions concerning children ... undertaken by courts of law', imposes wide-ranging duties in view of its threefold composition, being 'a substantive right', 'a fundamental, interpretative legal principle' and 'a rule of procedure'.⁸⁰ Further, the article imposes upon decision-makers the requirement that the child's best interests must be 'considered individually according to the facts of that specific case'.⁸¹ The Committee interprets this process as involving decisions that are clear and precise, consistent and 'motivated, justified and explained' to the child with reference to the child's best interests.⁸² Unlike other fields of Scottish law, such as family law and criminal law, in which statute specifically requires the court to focus on the child's best interests in decision-making, there is no such requirement in delict. Delict is considered a legal field that provides

⁷⁶COE ETS 005, 1950; Human Rights Act 1998; D Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011); J Wright *Tort Law and Human Rights* (Oxford: Hart Publishing, 2nd edn, 2017); M Elliott and K Hughes (eds) *Common Law Constitutional Rights* (Oxford: Hart Publishing, 2020); G Turton 'Causation and risk in negligence and human rights law' (2020) 79(1) *Cambridge Law Journal* 148.

⁷⁷UNCRC, Art 2; see also C Breen *Age Discrimination and Children's Rights* (Leiden: Martinus Nijhoff, 2006) p 20.

⁷⁸Lansdown, above n 63, p 13.

⁷⁹T Liefwaard 'Access to justice for children: towards a specific research and implementation agenda' (2019) 27(2) *International Journal of Children's Rights* 213; A Daly et al 'UN Convention on the Rights of the Child, Article 2 and discrimination on the basis of childhood: the CRC paradox?' (2022) 91 *Nordic Journal of International Law* 425.

⁸⁰Art 3(1); Committee on the Rights of the Child 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), 29 May 2013, *crc/c/gc/14*, para 6.

⁸¹Sandberg, above n 74.

⁸²General Comment No 14, above n 80, para 97.

redress for civil wrongs. Embedding any consideration of the child's best interests in childhood contributory negligence proceedings would therefore represent a *volte-face* where legal reasoning in Scottish delict judgments is concerned. Yet these are, indisputably, decisions 'concerning [the] children' to whom such proceedings relate.

In South Africa, courts have not specifically considered the best interests of children in childhood contributory negligence proceedings. However, courts have considered the standard in many other contexts since its constitutional incorporation. While the classical residence of the best interests of children seems to be family law, South African courts have routinely invoked the best interests of children in diverse fields like criminal law and delict where children are involved.⁸³ While it has been observed that the South African Constitutional Court has perhaps utilised the principle of 'best interests' (Article 3) to the exclusion of other Convention rights,⁸⁴ South African law nonetheless provides a blueprint regarding how rights-based discourse might be infused explicitly into areas of law which are not traditionally viewed as child-centred. This is a point to which we will return later.

The Committee guidance on Article 6 (life, survival and development) makes clear the specific nature of the rights owed to children at each stage of their development as their capacities evolve, and there is a growing body of literature on the child's developmental rights.⁸⁵ Where road traffic accidents and other accidental injuries are concerned, the Committee has interpreted the Article 6 duty to provide a safe and healthy environment for children as extending to child-healthy practices in all institutions, including courts determining disputes.⁸⁶ Accordingly, while it has not yet been directly considered by South African or Scottish courts in this context, Article 6 is a General Principle that permeates administrative and judicial processes governing decision-making in delict.

Article 12 (voice) provides that the child 'capable of forming [their] own views' should be able to express those views 'freely in all matters affecting' them, with that view being given 'due weight in accordance with ... age and maturity' in judicial and administrative proceedings 'affecting the child'.⁸⁷ The right to be heard in judicial and administrative proceedings extends to any area of law where a decision is one 'affecting' the child concerned.⁸⁸ As such, the child benefits from a rights-based entitlement to have their voice heard in contributory negligence proceedings. One way in which children might have their voice heard in proceedings is to have their own legal counsel. In Scotland, the Age of Legal Capacity (Scotland) Act 1991 provides that a person '[twelve] years of age or more shall be presumed to be of sufficient age and maturity' to instruct their own lawyer 'in connection with any civil matter'.⁸⁹ This means that while children below twelve years of age might be deemed to have a general understanding of what it means to instruct a lawyer (the legal test for childhood instruction), they must overcome the lack of legal presumption as to their capacity to do so. South Africa benefits from a more child-friendly provision, unencumbered by an age limit for instructing counsel: section 14 of the Children's Act provides that '[e]very child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court'.

Given the incorporated status of the UNCRC in both South Africa and Scotland, it seems clear that any contemporary consideration of childhood in delict requires what Tobin once referred to as 'an expansion of the idea of children's rights' into an area of law in which the rights of children have long been invisible or ignored.⁹⁰ In the next section we explore the role that courts might play in

⁸³Eg *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

⁸⁴See extensive analysis in Skelton, above n 15.

⁸⁵N Peleg 'What do we mean when we speak about children's right to development' in F Malekian and K Nordlöf (eds) *Sovereignty of Children in Law* (Cambridge: Cambridge Scholars Publishing, 2012); Varadan, above n 63.

⁸⁶Committee on the Rights of the Child General Comment No 4 (2003), above n 65, paras 21, 39; L-A Barnes Macfarlane 'Taking care of the small: Article 6 of the Convention on the Rights of the Child and childhood accidental injury claims in Scotland' (2015) 26(2) Stellenbosch Law Review 424.

⁸⁷UNCRC, Art 12(2).

⁸⁸Ibid; L Lundy et al 'Article 12: The Right to Respect for the Views of the Child' in Tobin, above n 10, p 421.

⁸⁹Age of Legal Capacity (Scotland) Act 1991, s 2(4A).

⁹⁰Tobin, above n 11.

conceptualising contributory negligence decision-making as a process involving children and that engages with their human rights.

5. The way forward: implementation and transformation by courts

(a) *The challenges for Scotland*

As observed above, the Scottish law of delict is, for the most part, a common law field in which court decisions both establish and develop the law. Delict belongs to what the Scotland Act 1998 (the legislation that established the modern Scottish Parliament) calls Scots private law.⁹¹ As such, it is also an area of law in which the Scottish Parliament possesses the devolved⁹² power to legislate.

The Law Reform (Contributory Negligence) Act 1945, introduced above, is one example of a – now somewhat dated – statutory provision of the UK-wide Westminster Parliament with application in this field. Section 1 of the 1945 Act⁹³ established a basic apportionment⁹⁴ framework for use by courts once it has been decided that a (capable) victim bears some responsibility for their own injury. Courts do not employ section 1 on their own initiative.⁹⁵ A wrongdoer must first establish that their victim was contributorily negligent and demonstrate that the victim's own (contributory) negligence exacerbated the damage/injury sustained.⁹⁶ Moreover, while contributory negligence is sometimes loosely called a defence, its real effect is in mitigating (apportioning) an award of damages 'in the light of the [victim's] conduct', meaning that it is perhaps more accurately described as a rule affecting quantum.⁹⁷

The intersection between children's rights and childhood contributory negligence is, as with many jurisdictions, underexplored in Scotland. However, the landmark UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the 2024 Act) represents a significant step for Scottish Law as a whole.⁹⁸ The Act, which came into force on 16 July 2024, fully incorporates the UNCRC into Scottish law – making Scotland the first of the UK jurisdictions to incorporate the Convention in domestic law. The intention of the Scottish Government was that the 2024 Act would adopt a maximalist approach that coherently and comprehensively imported the child's civil, political, economic, social and cultural Convention rights across all areas of (existing and future) law and legal policy.⁹⁹

Here, however, it must be noted that the Bill which ultimately became the 2024 Act was revised and its scope considerably restricted following a decision of the UK Supreme Court in October 2021 upholding a UK Government challenge to the Bill.¹⁰⁰ The UK Supreme Court ruled that key sections of the Bill exceeded the devolved powers bestowed upon the Scottish Parliament by the Scotland Act 1998. These

⁹¹Scotland Act 1998, s 126(4)(c).

⁹²Devolved areas include eg civil and criminal justice systems, health and education. Matters 'reserved' for the UK-wide, Westminster, Parliament include immigration and foreign policy. The UK government does 'not normally' legislate on devolved matters 'without the consent of the Scottish Parliament': Scotland Act 2016, s 2, referring to the Sewel Convention regarding this practice.

⁹³Scottish s 1 of the Act (NB: a parallel s 1 applies to England and Wales).

⁹⁴Section 1 of the Act is entitled 'Apportionment of liability in case of contributory negligence'.

⁹⁵J Goudkamp and D Nolan 'Contributory negligence in the twenty-first century: an empirical study of first instance decisions' (2016) 79(4) *Modern Law Review* 575, section titled 'The Law of Contributory Negligence in outline'.

⁹⁶See discussion in Reid, above n 18, paras 29.56–29.58.

⁹⁷Ibid, para 29.01.

⁹⁸See Scottish Government *Getting it Right for Every Child, Progressing the Human Rights of Children in Scotland: An Action Plan, 2021–2024* (2021) ISBN: 9781802015942, p 4.

⁹⁹Scottish Government *Children's Human Rights Statement* (Cabinet Secretary for Social Justice); Scottish Government *Guidance on Taking a Children's Human Rights Approach* (January 2024). See also K Mills and A Birdsall 'Human rights in Scottish foreign policy: constructing Scotland as a good global citizen' (2024) 16(3) *Journal of Human Rights Practice* 915 at 916.

¹⁰⁰Reference by the Attorney General and the Advocate General for Scotland – UNCRC (Incorporation) (Scotland) Bill, Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42.

sections would, in essence, have permitted Scottish courts to alter the intended meaning and/or purpose of legislation passed by the UK-wide, Westminster Parliament.¹⁰¹ Broadly, as a result of this Supreme Court judgment, the revised 2024 Act incorporating the UNCRC in Scotland applies only to devolved areas of law in which the present Scottish Parliament either has (since its establishment in 1999) legislated *or* Scottish common law areas, such as delict, in which the Scottish Parliament has the power to legislate in future. Further, where any legislative provision of the Scottish Parliament amends an earlier Westminster ‘parent’ statute, that provision will not be covered by the terms of the 2024 Act.¹⁰²

The last legal policy consideration of the child in delict was undertaken by the Scottish Law Commission in 1987. The Commission then recommended that no minimum statutory age for delictual responsibility should be introduced, leaving courts to continue to decide whether as a matter ‘of fact in each case ... the child had the requisite mental capacity to appreciate the risk involved in his conduct’.¹⁰³ Any future ‘new’¹⁰⁴ legislation passed by the Scottish Parliament regulating childhood responsibility in delict would, then, be covered by the provisions of the 2024 Act. Where does this leave Scottish courts now when making decisions about childhood contributory negligence?

Notwithstanding the rather considerable limitations of the 2024 Act, its passage is creating a widespread children’s rights-based cultural shift in Scottish legal policy and practice.¹⁰⁵ More specifically, section 6 of the 2024 Act provides that it is unlawful for public authorities, including courts, to act in a manner incompatible with ‘UNCRC requirements’ when they are exercising a ‘relevant function’.¹⁰⁶ Relevant functions are those either contained in legislation passed by the Scottish Parliament (and which, as above, do not merely amend earlier Westminster legislation) *or* functions pertaining to ‘rule[s] of law not created by an enactment’ – which includes Scottish private common law fields, like delict.¹⁰⁷ ‘UNCRC requirements’ are defined in the 2024 Act as the rights and obligations from the Convention itself and from the first two Optional Protocols adopted on behalf of all UK jurisdictions by the UK government.¹⁰⁸ The 2024 Act also obliges courts to interpret ‘Scottish’ legislative provisions (as narrowly defined above) in a manner compatible with the Convention.¹⁰⁹ Scottish courts have in addition been given new powers to strike down or declare incompatible any ‘Scottish’ legislative provisions that conflict with UNCRC requirements.¹¹⁰ Compensation (damages) can be awarded to children who are victims of rights’ violations by public authorities.¹¹¹

In addition to the new judicial powers outlined above, Scottish courts have been given further powers in respect of their broad decision-making role. Where a court ‘is determining a question in connection with UNCRC requirements which has arisen in proceedings before it’ that court is empowered by section 4 of the 2024 Act to take into account any part of the Convention itself, the Optional Protocols adopted and other publications, including General Comments, Concluding Observations, recommendations from Days of General Discussion and ‘other international law and comparative law’.¹¹²

¹⁰¹Ibid, para 24 onwards. The UK Supreme Court referral was made under s 33(1) of the Scotland Act 1998 – specifically, regarding cll 6, 19(2)(a)(ii), 20(10)(a)(ii) of the UNCRC (Scotland) Bill.

¹⁰²Section 42(2); the Explanatory Notes to UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (paras 26, 28) provide that ‘over time’ UK Parliament ‘Acts can be repealed and replaced with new provisions enacted by the Scottish Parliament’.

¹⁰³Scottish Law Commission *Report on Legal Capacity and Responsibility of Pupils and Minors* (Scot Law Com No 110, 1987) para 5.1.

¹⁰⁴Above n 102. Any new legislation would require to be ‘free-standing’, or ‘new’, not amending an existing Westminster Parliament Act. Part 4 of the 2024 Act addresses ‘Legislation and the UNCRC requirements’.

¹⁰⁵See eg extensive Scottish Government *Statutory Guidance on Part 3 of the UNCRC (Incorporation) (Scotland) Act 2024*, updated version published 18 September 2024, outlining/explaining the operation of the children’s rights scheme, Child Rights and Wellbeing Impact Assessments, reporting duties on the Scottish Parliament, ‘listed authorities’.

¹⁰⁶2024 Act, ss 1, 6.

¹⁰⁷Ibid, s 6(2)(b)(iv).

¹⁰⁸Ibid, s 1(2).

¹⁰⁹Ibid, ss 24, 29, 30.

¹¹⁰Ibid, Part 4.

¹¹¹Ibid, Part 2.

¹¹²Ibid, s 4(1), (2).

The above devolution convolutions surrounding the ‘reach’ of the 2024 Act create widespread technical complexities in the context of judicial decisions made about children, including in respect of contributory negligence. In that delict is a Scottish common law area with some statutory inroads (for example, the Law Reform (Contributory Negligence) Act 1945), it is now necessary to consider the origin – whether common law or statutory – of the court’s various decision-making functions in respect of children. It is argued here that, in childhood contributory negligence proceedings, the court’s functions are threefold, with the first two of these functions deriving from the court’s common law powers. First, the court determines whether the child(ren) involved in proceedings possess the capacity to be neglectful at all. Secondly, if so, the court decides whether they have been negligent as a matter of fact in the circumstances concerned. Finally, where there is a finding of contributory negligence, the court conducts the apportionment exercise set down in section 1 of the 1945 Act.

As an Act of the UK-wide Westminster Parliament, the 1945 Act falls outside the scope of the provisions of the 2024 Act incorporating the UNCRC in Scotland. This means that, for example, in conducting the apportionment process set down in section 1 of the 1945 Act, the court does not require to ‘read and [give] effect to [section 1] in a way which is compatible with the UNCRC requirements’.¹¹³ In line with the normal rules of statutory interpretation the court’s duty is simply that of giving ‘full and fair effect to the meaning of [the words of the] statute’.¹¹⁴ However, since the UK is a ratifying state party to the UNCRC, there is still an expectation that all UK courts adhere to the ‘fundamental interpretive legal principle’ that where legislation is ‘open to more than one interpretation’, the interpretation ‘which most effectively serves the child’s best interests should be chosen’.¹¹⁵

Significantly, though, the statutory apportionment exercise set down in section 1 of the 1945 Act becomes relevant only if a (legally capable) victim has been found by the court to be contributorily negligent – to some degree.¹¹⁶ Most of the decision-making functions of Scottish courts concerning childhood contributory negligence, therefore, sit outside the confines of the 1945 Act. Instead, these functions fall within the wider common law of delict – allowing for the operation of section 6 (overarching judicial duty to act compatibly with UNCRC requirements) and section 4 (determining a children’s rights question) of the 2024 Act in respect of these judicial functions.

It remains to be seen how Scottish courts making decisions about childhood contributory negligence will interpret and apply these new sections of the 2024 Act. The judicial opportunity to engage is likely to depend, at least to some extent, upon whether the issues in dispute are framed in the language of children’s rights by the parties’ lawyers.¹¹⁷ How receptive will the legal profession be, for example, to idea that the child’s best interests (Article 3), or the child’s right to survival and development (Article 6), or to express a view (Article 12), should have relevance in reaching decisions about childhood contributory negligence? And, if a Scottish court is asked to ‘determine a question’ on these or any other of the child’s rights, what meaning might the content of those rights be given in the law of delict? It is here that Scottish courts might look for guidance to the transformative approach already being adopted by their South African counterparts.

(b) Transformative reflections from South Africa

The 1996 Constitution ushered in a new democratic era in South Africa after colonial apartheid. This Constitution is said to be ‘transformative’ in nature. Klare famously attached this adjective to the

¹¹³Ibid, s 24(1). Nor does the court require, eg, to act compatibly with the ‘UNCRC requirements’ in terms of s 6 of the 2024 Act.

¹¹⁴*R v J* [2004] UKHL 42 at [15], per Lord Bingham; *Bennion, Bailey and Norbury on Statutory Interpretation* (London: Butterworths, 8th edn, 2020) section 10.10.

¹¹⁵General Comment No 14 (2013), above n 80, para 6(b).

¹¹⁶Goudkamp and Nolan, above n 95, at 576, outlining this two-stage judicial process, observing that ‘The second stage of the analysis is relevant only if the claimant is found guilty of contributory negligence. It centres on the statutory apportionment provision ... found in section 1 of the [1945 Act]’.

¹¹⁷Tobin, above n 11, p 73.

South African supreme law, arguing that its drafters clearly envisaged that law, politics, the economy, and society as a whole would change because of a new human-rights culture.¹¹⁸ Following Klare, at the heart of the constitutional project is a commitment to realising the flourishing of the human dignity, equality and fundamental freedoms of adults and children alike, and creating a tolerant and compassionate society made up of diverse people.

Without underplaying the important role that the executive and judiciary would have to play in realising the Constitution's transformative aspirations, the judiciary was envisaged to have a special role in this endeavour. Courts are explicitly obliged to strike down unconstitutional laws and conduct (sections 2; 172) and to give effect to rights while applying legislation and the common law (section 8). Courts 'must promote the spirit, purport and objects of the bill of rights' when developing the common law or interpreting legislation (section 39(2)) and have the discretionary power to develop the common law considering the interests of justice (section 173). This power has been used to champion the rights of adults and children across all fields of law, including delict.

Regarding the practicalities of constitutionally inspired statutory interpretation, South African courts have struck down provisions in statutes that were found to be irredeemably unconstitutional. A classic example was the striking out of the statutory provisions allowing the death penalty, which over-extensively violated (among others) the rights to life and dignity.¹¹⁹ Inversely, where large statutory gaps have caused an unconstitutional situation, South African courts have instructed the legislature to take proactive steps to undo the human rights crisis. A notable example was the absence of a statute to recognise same-sex marriages, which Parliament was instructed to rectify.¹²⁰ The courts have also 'read in' or 'read out' phrases that offend constitutional principles. A recent example is the case of *Qwelane*.¹²¹ There, the statutory delict of hate speech was formulated as (roughly) speech that is harmful, hurtful, hateful – with no conjunction between the three concepts. The Constitutional Court found the term hurtful to be an overly vague limitation on the constitutional right to freedom of expression which had to be read out. The court also read in a conjunction between hatefulness and harmfulness, also to strike the balance between freedom of expression and the dignity/equality of groups (including children as a vulnerable group). Finally, in employing a rights-inspired interpretation to legislation, South African courts have interpreted the phrases in statutes restrictively or generously to ensure the best possible promotion of constitutional spirit. For example, in *Daniels* the court interpreted a certain statutory protection for spouses to include those married in accordance with religious rites who had not complied with the requirements of civil law.¹²² This interpretation was made to ensure a constitutional, non-discriminatory outcome grounded in human rights.

The transformative approach may have much to offer Scottish courts in terms of constructing creative children's rights-based solutions in private law. Regarding the practicalities of human-rights inspired common-law development in the context of delict, South African courts have understood their mandate to include abolishing certain rules, like the historic claim for adultery that was dealt a deadly blow in *DE*.¹²³ South African courts have introduced new rules; for example, new defences for defamation that better protect freedom of expression in a post-censorship society.¹²⁴ And the judiciary has played a significant role in refining existing doctrines to be aligned better to the Constitution, including how wrongfulness and vicarious liability might be determined.¹²⁵

In all of these curial transformative endeavours, the South African courts have followed a natural-law style approach of weighing up existing laws against human-rights norms, with a vision for a better future.

¹¹⁸KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 South African Journal on Human Rights 150.

¹¹⁹*S v Makwanyane* 1995 (3) SA 391 (CC).

¹²⁰*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

¹²¹*Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC).

¹²²*Daniels v Campbell* 2004 (5) SA 331 (CC).

¹²³*DE v RH* 2015 (5) SA 83 (CC).

¹²⁴See *National Media v Bogoshi* 1998 (4) SA 1196 (SCA).

¹²⁵See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

In a recent case on constitutionally inspired common-law development (which could equally apply to constitutionally attentive statutory interpretation), the Constitutional Court has delineated a five-step approach.¹²⁶ First, the existing legal position must be laid out. Secondly, the rationale for the existing legal position must be determined from its history and present practice. Thirdly, the constitutional considerations must be clearly articulated and weighed against the prevailing legal position. Fourthly, if a constitutional inconsistency is observed, a court must determine how the existing law might be amended. Finally, a court must be attentive to the knock-on effects of the suggested development in the law.

While Scotland does not have a constitution that bestows equally far-reaching powers on courts in general, the 2024 Act bears a similarity in spirit to the South African model for human-rights infiltration into all notional areas of devolved law. We argue that the five-step process of legal evaluation and constructive critique offered by the South African Constitutional Court could be a useful springboard from which a Scottish court could embark on a UNCRC-compliance exercise that the incorporating Act requires. To be clear, no court in Scotland or South Africa has conducted a UNCRC-compliance test in the context of children's contributory negligence cases. But the South African legal system provides a potentially useful blueprint for doing so.

In both jurisdictions, in the context of children's contributory negligence, the existing legal positions (covered in Sections 1 and 2 of this paper above) can then be viewed within the broader context of the relevant UNCRC provisions (explored in Section 4 above), determine the extent of compliance (or not), and forge a path forward that ensures the optimal legal protection of children. In Scotland, the anticipated means by which a court might consider the interpretation of, and compliance with, the UNCRC in the context of the common law field of delict would primarily be in respect of: (i) acting compatibly with 'UNCRC requirements' when exercising a 'relevant function';¹²⁷ and (ii) 'in determining a question in connection with the UNCRC requirements which has arisen in proceedings'.¹²⁸

In South Africa, the common law rules on capacity for fault directly influence whether children could act with fault towards their own injuries as contemplated by the Apportionment of Damages Act. So, in South Africa, a possible solution would be for a court to develop the common law rules of delict, dealing with age-related capacity for fault. One school of thought in South Africa promotes the idea of doing away with all the presumptions linked to age and granting courts a wider discretion to deal with each case on its own merits, where the best interests of the child ought to win the day.¹²⁹ Another school of thought in South Africa favours keeping the broad structure of the age-related capacity rules but changing the cut-off ages to ones more favourable to children generally, placing emphasis on the UNCRC's call for sensitivity towards children's evolving capacities and development.¹³⁰ If a South African judge, after determining that the current law fails to uphold the Constitution, finds it inappropriate to bring about this type of development judicially, it would be possible to instruct the legislature to bring about the change.

(c) May, not must: Scottish lessons from South Africa

The new power bestowed by section 4 of the Scottish 2024 Act on courts to take into account the UNCRC and other children's rights guidance and principles when 'determining a question in connection with the UNCRC requirements which has arisen in proceedings' could be transformative in court cases concerning children – regardless of the devolved field of law being adjudicated. It is worth noting, however,

¹²⁶ *Mighty Solutions v Engen Petroleum* 2016 (1) SA 621 (CC) para 39.

¹²⁷ 2024 Act, s 6(1), (2)(iv), (5).

¹²⁸ 2024 Act, s 4(1).

¹²⁹ R Jansen and J Neethling 'Delictual capacity and (contributory) negligence of minors' (2017) 80 *Journal of Contemporary Roman-Dutch Law* 474.

¹³⁰ H Kruger 'The discrepancy between the criminal capacity and delictual accountability of children' (2022) 85 *Journal of Contemporary Roman-Dutch Law* 68; E Zitzke 'Transforming age-related capacity for fault in delict' (2021) 138 *South African Law Journal* 367.

that section 4 of the 2024 Act gives Scottish courts discretion by providing only that courts ‘may take into account’ the UNCRC and related guidance. Accordingly, this UNCRC provision is a weaker version of that found in section 2 of the UK-wide Human Rights Act 1998, which incorporated the European Convention on Human Rights (the ECHR), and which states that courts or tribunals ‘must take into account’ the ECHR and related judgments, decisions and opinions when ‘determining a question which has arisen in connection with a[n ECHR] right’.¹³¹ The wide power held by South African courts to develop common law in pursuit of the best possible promotion of rights could, therefore, serve as a useful prototype for Scottish courts confronting the potential of their very recently conferred children’s rights-based powers.

A modified version of the five-step approach set down by the South African Constitutional Court in *Mighty Solutions v Engen Petroleum* could, we argue, assist Scottish courts when they decide what meaning to give to UNCRC rights in the law of delict, as well as in other legal fields. The first two steps in the approach require that: (i) the existing legal position, and (ii) the rationale for that position, be laid out. In the Scottish law of delict, the existing legal position is one of uncertainty, whereby children aged around five years and above may be found responsible for fault in terms of contributory negligence. The rationale for this has not been the subject of a legal policy review for almost 40 years and, it is submitted, is a rationale rooted in historical assumptions about children and childhood. The third step requires that (iii) children’s rights considerations be ‘clearly articulated and weighed against the prevailing legal position’. Such children’s rights considerations might include, for example, acknowledging the recent increase of the minimum age of criminal responsibility to twelve years (with calls for a further increase in the age of criminal responsibility).¹³² The recent Scottish criminal Sentencing Guideline based on the UNCRC and scientific findings about cognitive development in children and young people would also have relevance.¹³³ Thus, the continued imposition of responsibility in delict, a field also addressing childhood capacity for fault, or wrongdoing, appears particularly problematic from a children’s rights-based perspective. The fourth and fifth steps require that, if the court finds a lack of compliance with UNCRC requirements in the common law of delict, it must consider (iv) how existing law can be amended while also (v) being attentive to repercussions of its judgment. Here, the court might be invited to decide that continuing uncertainty in delict serves neither the child nor the other stakeholders in the legal system. The court would then have the opportunity to establish a broad age-based precedent as to capacity for fault in delict (perhaps, in the first instance, one according with the age of criminal responsibility). Alternatively, the court could recommend that this is a legal policy matter to be addressed by the legislature and/or a cross-disciplinary expert group.¹³⁴

Conclusion

It has been observed elsewhere that the apparent failure of delict/tort law to protect the interests of the young may simply be ‘a product of tort law’s perception of the purpose of tort law rather than tort law’s perception of children’.¹³⁵ Yet contributory negligence litigation involving children is a feature common to many legal systems – as is (in one form or another) the UNCRC, the world’s most ratified human rights treaty. How best to balance the children’s rights and interests against those of others in litigation about contributory negligence is an underexamined issue that invites more critical consideration within

¹³¹ Human Rights Act 1998, s 2(1)(a)–(d).

¹³² Age of Criminal Responsibility (Scotland) Act 2019, s 1. See L McAra and S McVie ‘Raising the minimum age of criminal responsibility: lessons from the Scottish experience’ (2023) 36(4) *Current Issues in Criminal Justice* 403.

¹³³ *Sentencing Young People Guideline* (Scottish Sentencing Council, 2022) Guidelines 4 and 5; S O’Rourke et al *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts* (Scottish Sentencing Council, 2020).

¹³⁴ *Commodity Solution Services Ltd v First Scottish Searching Services Ltd* 2019 SC (SAC) 41, para 46.

¹³⁵ R Bagshaw ‘Children through tort’ in J Fionda (ed) *Legal Concepts of Childhood* (Oxford: Hart Publishing, 2001) p 127.

and across jurisdictions.¹³⁶ Almost three decades after South African steps were first taken to incorporate this treaty into its domestic law, the UNCRC has been fully incorporated in Scottish law. Scottish courts exercising a relevant function have been granted new powers in respect of interpreting UNCRC requirements when children's rights issues arise in litigation. There is much potential for developing children's rights jurisprudence in this new judicial role. The existing South African framework, empowering courts to adopt a transformative, rights-based approach across all fields of domestic law, warrants consideration as a comparative model for Scotland's judiciary in contributory negligence decision-making concerning children.

¹³⁶For wider discussion, see L-A Barnes Macfarlane 'Children's rights and childhood negligence proceedings: the inevitable questions' (2024) 32(3) *International Journal of Children's Rights* 533.