



## RESPONSE FORM

### PREPARATION OF THE NINTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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# Questions

1. Do you have any suitable law reform projects to suggest?

## Comments on Question 1

Yes: consideration of (i) fixing a minimum age for child liability in negligence / contributory negligence, and (ii) updating terminology (concerning children) in the field of delict.

2. Do you have any project to suggest that would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

## Comments on Question 2

As above, if appropriate.

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

Childhood delictual liability and the rights of the child: (i) consideration of the imposition of a minimum age (whether presumptive or conclusive) for childhood delictual liability / liability in contributory negligence; (ii) consideration of “rebranding” (or introducing more appropriate, contemporary terminology) in the field of delict in respect of children having regard to the UN Convention on the Rights of the Child and to the child’s evolving cognitive and developmental capacity.

- (b) Please provide us with information about the impact this is having in practice:

Since ratifying the UN Convention on the Rights of the Child (“UNCRC” / “the Convention”) on 16 December 1991, the UK has been on a trajectory towards fully incorporating the child’s Convention rights into domestic law. In the last two decades, children’s rights have made considerable inroads into wide-ranging fields of law (including the creation of child law as a field in its own right). However, 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.

### **(i) Consideration of fixing a minimum age (and of other, connected, issues)**

Inconsistencies, and, it is considered, inequities, concerning childhood liability in the field of

delict are evident in case law throughout the UK, and in Scotland in particular. These problems can most easily be seen in judgments concerning the contributory negligence of child victims of accidental injury (e.g. *Galbraith's Curator ad Litem v Stewart* (No. 2) 1998 SLT 1305; *McCluskey v Wallace* 1998 SC 711; *Jackson v Murray* 2013 SLT 153; *Probert v Moore* [2012] EWHC 2324 (QB)). While injured children can, as with any other victim, seek redress in Scots law, a mechanistic application of the generic doctrine of contributory negligence creates conceptual difficulty and produces inconsistent outcomes in cases concerning children. In particular, it fails to take proper account (as stated in the UNCRC preamble) of the child's "physical and mental immaturity", or the requirement that "special safeguards and care" be provided for the child, both at home and within the community. Significantly, the UN Committee on the Rights of the Child envisages the state obligation to "ensure to the maximum extent possible the survival and development of the child" is comprehensive. It extends to the legal system and court processes and, consequently, to children in the field of delict.

Unlike some jurisdictions (e.g. South Africa, Austria, Netherlands, Italy), there is no minimum age in Scotland (or, indeed, in England) below which a child is immune from being found negligent or "guilty" of contributory negligence. In 1978 (over a decade before the UK ratified the UNCRC), 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 throughout the UK. 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* (Report No. 110).

The Commission then took the view that the creation of an "irrebuttable presumption of absence of fault" in children below any arbitrary age might be problematic (at para 5.4, with the Commission noting that the doctrine of liability for fault and that of contributory negligence were not based on the same principles). As a result of this, section 1(3)(c) of the Age of Legal Capacity (Scotland) Act 1991 specifically excluded delict (and criminal law) from statutory regulation. Additionally, the Commission broadly envisaged that the judicial approach in childhood negligence / contributory negligence determinations should be 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" (paras 5.1 & 5.6). It is not, however, entirely clear from case law to date whether this necessitates an objective or a subjective assessment by Scottish courts. Is the test being advocated that of the 'reasonable child' (i.e. a tempered version of the 'reasonable adult/person' test) or something subtly different? 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 characteristics and abilities (see, e.g., *McKinnell v White* 1971 SLT (Notes) 61; *Galbraith's Curator ad Litem v Stewart* (No. 2) 1998 SLT 1305).

Report 110 was produced some years before the UK ratified the UNCRC and Scottish society (and Scots law) has evolved considerably since 1987. Criminal law (an area also excluded from the terms of the 1991 Act) has now been updated in keeping with contemporary law. Our current government, for example, has already set the minimum age of criminal prosecution at twelve years old (Criminal Justice and Licensing (Scotland) Act 2010, s 52). It seems inequitable that the contemporary Scottish legal system appears more

forgiving of children who deliberately do wrong than it is of children unintentionally at fault.

Further, no standardised judicial approach has emerged towards children within the field of delict. In rare cases, for example, expert evidence has been heard on the stages of childhood development and the child's ability to process risk (see, e.g., *Morton v Glasgow City Council* 2007 SLT (Sh Ct) 81). In other cases, expert evidence is given on other matters believed to fall outwith judicial knowledge, such as the driving speed of a vehicle at the time of impact, but not about childhood evolving capacity or cognitive development (e.g. *Jackson v Murray* 2013 SLT 153). Consequently, judicial determinations about child contributory negligence are not, nor have they ever been, particularly consistent. The *Stair Memorial Encyclopedia* neatly 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" (Vol 15, para 406).

It appears that Scottish children are not considered as forming a homogenous group deserving "special safeguards and care" (UNCRC Preamble) in the field of delict. Instead, they belong to a general reduced-capacity group of individuals that includes disabled adults and the elderly. 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. This seems unsatisfactory in contemporary law.

#### **(ii) Updating terminology in the field of delict**

Additionally, consideration might be given to "rebranding", or updating terminology, 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) as "guilty" of contributory negligence, and the use of the terms "fault", "blame", and "blameworthiness" when apportioning the damages of a child claimant who has sustained accidental injury (see, e.g., *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)). Instead, other, less pejorative, language might be imported into the field of delict. For example, the attribution of a certain percentage of the child's injury might simply be described as 'non-liability', rather than linked to the child's 'guilt' or 'blameworthiness' 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 UNCRC-compatible legal approach. 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.

(c) Please provide us with information about the potential benefits of law reform:

Childhood delictual liability and the rights of the child – potential benefits:

(i) Consideration of the imposition of a minimum age (whether presumptive or conclusive) for child delictual liability and liability in contributory negligence: the Scottish Law Commission last had the opportunity to consider this matter 27 years ago. Since then, dramatic changes have taken place in Scots law and society concerning children and their rights. A

reconsideration of the child's position within the law of delict, with the imposition of a minimum age of liability, would align delict with other fields of Scot law.

(ii) A "rebrand" of legal terminology, from pejorative to positive, would, it is hoped, generate an approach in Scots law towards such child claimant cases that meets our obligations, as a State Party, in terms of the UNCRC.

### **General Comments**

One issue is perhaps worth addressing, if only to dismiss it: might it be argued that negligence / contributory negligence determinations are exempt from the UNCRC? 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, however, be hard to reconcile such a narrow position with the terms and spirit of the Convention or, indeed, with the far-reaching guidance published since 2001 by the Committee on the Rights of the Child. In General Comment No. 14 (2013, para A1), specific reference was made to "all actions or decisions that concern" children. The Committee also stressed (para 6b) 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."

It was also 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" (para 14(a)). The child's rights are, accordingly, relevant to anything having "an important impact on the life and development of the child" (para 29). This, it is submitted, must include negligence / contributory negligence determinations.

Many thanks for considering this suggestion.

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Ninth Programme of Law Reform.