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# Responsibility and Culpability? - Children and Contributory Negligence

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1. The 2015 decision of the Supreme Court in ***Jackson v Murray* [2015] UKSC 5**, although primarily concerned with the role of the appellate court in reviewing a discretionary judgment of an inferior court, highlighted the difficulties facing courts both in England & Wales and also in Scotland in assessing the responsibility of children for their actions when those children are pursuing actions for damages. This paper will consider the current approach and its jurisprudential basis while comparing the approach in some other common law jurisdictions

2. Who is a "child"?

The Family Law Reform Act 1969 reduced the age of majority to 18, and anyone under that age is, of course, a "child" whose involvement in the litigation process is covered by the provisions of CPR Part 21.

3. The terminology can be confusing since the Family Law Reform Act 1969 provides that a person who is not of full age may be described as a minor instead of as an infant, and the term 'minor' has been used in a number of statutes passed between 1969 and 1989. However, in the Children Act 1989 the term 'child' is used throughout, and is defined as a person under the age of 18. Much of the earlier child welfare and related legislation was repealed by the Children Act. However in the Children and Young Persons Acts 1933 to 1969, 'child' generally means a person under the age of 14 years and for certain purposes those Acts refer to a person who has attained the age of 14 and is under the age of 18 years as a 'young person'. Moreover, the various offences commonly known as cruelty to children are in most cases offences in connection with children and young persons under the age of 16 years. In Scotland a child is, for most legal purposes, someone under 16.
4. The Animals Act 1971, s.2 attributes the knowledge of an animal's dangerous characteristics by a member of the household 'under the age of 16' to the head of the household as 'keeper' (of the animal – not the child!).
5. In this country a person can drive at least a moped as well as (eg) some tractors (including trailers) from the age of 16, and cars and motor cycles from 17. Cases like *Nettleship v Weston* (below) make clear that a person driving a vehicle on the roads has to meet an objective standard of competence and there is no discount for beginners.
6. The age of consent is 16, and a young person can marry at that age with parental consent.
7. It is, perhaps, relevant also to bear in mind that the law recognises that a young person below the age of 16 may (or may not) have a degree of maturity and understanding to form important judgments in respect of his or her own actions and their consequences: see eg *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] UKHL 7. There is

therefore accepted, in this context at least, that there is a degree of flexibility and a subjective assessment of such competence.

8. In the circumstances, for current purposes the age of a child is likely to be a relevant consideration when he or she is 16 or less. Over that age the relevance will depend very much on the circumstances.

#### The position of a child in negligence

9. At common law a child was regarded as of 'immature intelligence and discretion' and therefore required protection eg in respect of the formation of contracts, but not to any great extent in the field of negligence where much the same standard of care was expected of a child as of an adult, until well into the 20<sup>th</sup> century. The contributory negligence of a child was (as it was for an adult before 1945) a complete defence. While children under the age of about 4 were not expected to exercise care for themselves as if adults, the fault could then transfer to the parent or guardian, whose "contributory" negligence would be an absolute defence to an action on behalf of the child<sup>1</sup>. In these circumstances the law before the 1945 Act is of limited assistance to any modern analysis.
10. In many legal jurisdictions, children (generally those aged 16 and under) are now afforded special protection under law due to their inexperience and lack of ability to make judgments to the same standard as adults.
11. The UN Convention on the Rights of the Child 1989 which came into force in the UK on 15th January 1992 notes the importance of taking into account children's "physical and mental immaturity" by providing "special safeguards and care, including appropriate legal protection".
12. An example predating the UNCRC is the Occupiers' Liability Act 1957 s.2(3) which, in defining the common duty of care, provides that the circumstances relevant to

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<sup>1</sup> The topic of the liability of the parent or guardian to the child is a separate topic

establishing the duty of care include the degree of care, and of want of care, which would ordinarily be looked for in the visitor, so that (for example) in proper cases an occupier must be prepared for children to be less careful than adults.

13. The Law Reform (Contributory Negligence) Act 1945

The 1945 Act introduced a new concept in doing away with contributory negligence as an absolute or complete defence and replacing it with a power in the Court to adjust the recovery of a claimant who was himself in part at fault by reference to what is 'just and equitable' in the circumstances. One such circumstance, it is suggested, will be the age of the claimant and his or her ability to appreciate the risks and consequences of their actions.

14. Section 1 of the 1945 Act allowed for the following:

"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..."

15. It is sometimes relevant to note that it is the 'responsibility' for the "damage" that is in play and not merely responsibility for the accident giving rise to the damage.

16. Clearly, for the purposes of this section, children do fulfil the category of "persons" and as such they are subject to the same judicial discretion in terms of contributory negligence as adults. The important words are "just and equitable" and "responsibility" which grant a significant degree of discretion to the trial judge. Courts across the jurisdictions affected by the Act (which also applies with slight variations in Scotland, but has very similar counterparts in other common law jurisdictions) have been left to develop their own tests to determine "just and equitable" outcomes in the cases of

children. Inevitably, different judges reach different conclusions on similar facts. Equally inevitably perhaps, the jurisprudential basis for the assessment remains uncertain.

17. The Act enables the Court to apportion liability according to "fault". A complicating factor, however, is that the expression "fault" is not itself defined. Is it breach of a legal duty, or does it extend more broadly to some moral 'fault' (apparently the view expressed by Lord Hodge in a somewhat harsh minority opinion in *Jackson v Murray* at para 50)? If it is a question of duty, to whom is the duty owed? To what extent should a victim be blamed for not taking care against the possible negligence of another?
18. The classic analysis of the relevant concepts is contained in *Davies v Swan Motor Co* [1949] 2 KB 291 where, on the issue of duty, Bucknill LJ said that "when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the Defendant. It is sufficient to show lack of reasonable care by the Plaintiff for his own safety." In respect of fault, however, Denning LJ identified the need to identify both the causative potency of an action and its "blameworthiness". This is not 'moral' fault but requires the judge nevertheless to balance, in effect, the degree of fault involved as between the parties. Thus for instance, a driver of a car is said to be in charge of a potentially lethal weapon, whereas the action of pedestrian is less likely to cause damage. The careless action of the car driver may, in some circumstances, therefore attract greater blameworthiness; see *Eagle v Chambers* [2004] RTR 115 per Hale LJ; *Smith v Ch Const Nottinghamshire Police* [2012] RTR 294; *Baker v Willoughby* [1970] AC 467 (per Ld Reid at 490) and more recently in England *Sabir (Suing by her Litigation Friend, the Official Solicitor) v Osei-Kwabena* [2015] EWCA Civ 1213 para 13 per Tomlinson LJ (referring to *Jackson v Murray*).
19. In *Jackson v Murray* at [40] Ld Reed also noted the car's greater causative potency when driven at speed but observed that "the overall assessment of responsibility should not be affected by the heading under which the factor is taken into account." This perhaps suggests a more 'holistic' assessment. But he went on to observe that because at 40 mph a car will probably kill any pedestrian it hits, for the defendant to carry on at 50 mph notwithstanding an obvious danger of pedestrians in the road, "points to a very

considerable degree of blameworthiness on the part of a driver who fails to take reasonable care while driving at speed.”

20. In seeking to rationalise the approach of the courts to recovery by children who are in part at fault, it is suggested that it is therefore important to separate out simple causation (and the defendant must prove causation in that the claimant’s ‘fault’ must be shown to have contributed to the damage) from ‘responsibility’. As Denning LJ observed, the court’s function is to search for all the causes, not just the effective or dominant cause, and apportion the damages accordingly.
21. The standard of care that an adult claimant should demonstrate is assessed objectively, in that the claimant is assumed to be of normal intelligence and skill in the circumstances. This remains true even if the adult in question is suffering from mental illness and an impairment of his ability to make judgments, as is apparent from the recent case of *Dunnage v Randall* [2015] EWCA Civ 673<sup>2</sup>. D suffered from schizophrenia and poured petrol over himself and set himself alight. He died and the claimant (his nephew who he was visiting) suffered serious burns. At first instance the judge held that a person was not subject to a duty to exercise reasonable care in respect of acts he could not reasonably be expected to control, unless the situation involved actionable voluntary behaviour. D’s actions were involuntary because of his mental illness. The CA overturned the decision. There was no principle which required the law to excuse a defendant from liability in negligence where he failed to meet the normal standard of care partly because of a medical problem. The courts had consistently and correctly rejected the notion that the standard of care should be adjusted to take account of the defendant’s personal characteristics. The single<sup>3</sup>

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<sup>2</sup> See also *Widdowson v Newgate Meat Corp* [1998] PIQR 138: mentally disordered pedestrian walking at night be a dual carriageway: 50% to blame.

<sup>3</sup> Some older cases (dating from before the 1945 Act) did show a degree of forbearance in the case of eg the deaf or blind who were not at culpable fault.

exception in respect of the liability of children should not be extended<sup>4</sup>. Only defendants whose medical incapacity had the effect of entirely eliminating any fault or responsibility for the injury could be excused. The experts had said that D lacked control over his actions, but they meant that he did not have rational control. They were not saying that he had no physical control. His mind, although deluded, directed his actions.

22. However, in the case of a child, the standard of care to be expected is modified. But how is that modified standard to be assessed? Is it by reference to objective criteria, with the claimant required only to show that degree of care reasonable in a child of his age, or by reference to a subjective assessment of the particular child's understanding? If a judge is assessing a child's responsibility for damage and assessing it on the basis of what is just and equitable, should the particular child's maturity and understanding be a relevant consideration? The decision in *Gillick* accepted that a child under 16 may understand the nature of the advice which is being given and may also have a sufficient maturity to understand what is involved including the consequences. In the context of medical consent it will be a question of fact in each case whether that is so.

### 23. The Objective Test

*Gough v Thorne* [1966] 1 W.L.R. 1387 remains the clearest and most relied upon formulation of the principle in this jurisdiction. Salmon L.J summed up the objective approach at 1391:

"The question as to whether the Plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of thirteen and a half can be expected to have done any more than this child did. I say "any ordinary child". I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of thirteen and a half."

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<sup>4</sup> For those interested there is a relevant article in the Sydney Law Review [Vol 32:41 2010] "Negligence and Inherent Unreasonableness" which analyses the inconsistency between the standard of care expected of children and of those affected by mental illness.

24. This passage was cited with approval in the Court of Appeal in *Mullins v Richards* [1998] 1 W.L.R 1304 (a decision on primary liability, where two girls were fencing with plastic rulers, one of which broke and injured one of the girls in her eye. The injured girl sued the other. The Court of Appeal found that the standard to be expected of a 15-year-old child was not the standard of a reasonable person, but that of a reasonable and "ordinarily prudent" 15-year-old. It was held that an ordinary prudent 15-year old could not have foreseen any injury when playing with rulers and the defendant was therefore found not liable). The approach does, however, leave the door open to significant uncertainty. The reality is that different judges have very different ideas about the capacity of children at different stages of development. Further questions flow from the test as to whether there is a certain stage of development (age) below which children simply do not have the capacity to be responsible for their conduct. What of children with an enhanced (or reduced) appreciation of risks? These questions are explored below.

25. The Subjective Test

Some courts have adopted a more subjective approach to determining standards of care in child cases. The individual characteristics of a child such as their intelligence, upbringing, experience and maturity can be taken into account in the context of the particular duty of care concerned. This is an approach which can be found in some of the courts of the United States. For instance in *Banks v United States*, 969 F.Supp. 884 (S.D.N.Y. 1997) an 8 year old child was injured when invited to ride on a gate being closed by a Post Office employee. Primary liability having been established the State (responsible for the Post Office) alleged contributory negligence under a New York statute in very similar terms to the 1945 Act. The judge observed that it was long established under New York law that "an infant is expected to exercise a level of care commensurate with his age, experience, intelligence and ability." While the infant's age was one factor, the court "must also consider a child's intelligence, experience and ability to apprehend the existence of danger, take precautions against it and exercise any degree of care for his own safety.". Further, a plaintiff with diminished mental

capacity "may not be held to any greater degree of care for his own safety than that which he is capable of exercising". The child was assessed by an expert in learning disabilities, who was called by the plaintiff, and the judge concluded that he had cognitive difficulties which interfered with his ability to think logically. No finding of contributory negligence was made.

26. In a rather more general approach in *Morton v Glasgow City Council*, 2007 S.L.T. (Sh Ct) 81 evidence was taken from a child psychologist as to "...the ready propensity of children of [14 years old] to indulge in risky activities without applying their minds to the degree of risk involved and the lack of expertise of such children in assessing risk."
27. In *Rheman v Brady* [2012] EWHC 78 (QB) the defendant sought to argue that the particular characteristics of a 7 year old claimant put her in a better position than "an ordinary child of her age" to appreciate the risks of crossing a road. Mrs Justice Sharp (as she then was) appears not to have given this argument detailed consideration, rejecting contributory negligence on the grounds that it was the defendant's speed that caused the accident.
28. These three examples illustrate the potential for subjective assessment of the child's degree of fault. If each case is to be decided on its own facts, and if a court is to apportion damages according to 'responsibility' for damage, and if responsibility stretches further than mere causation, then it is suggested that there must be room for a subjective assessment of the child's ability to understand cause and effect, and the consequences of her actions. If a child has particular experience of the circumstances giving rise to the accident, then why should not that sound in the assessment of responsibility? In *Galbraith's Curator ad Litem v Stewart (No.2)*, 1998 S.L.T. 1305, for example, Lord Nimmo-Smith at 1307G, spoke of "the nature of the *particular* danger and the *particular* child's capacity to appreciate it".
29. In that case the judge differentiated the experience and appreciation a child might have of a common danger from, for instance, traffic on a road, from the (by implication less obvious) danger that might arise (as in the case under consideration) from children playing on sewerage pipes. Importantly, however, he also referred to the allurements they presented.

30. In contrast, in *N (A Child) v Newham LBC* [2007] C.L.Y. 2931 the damages awarded to a young child who had suffered injury after punching a pane of glass were reduced by 60 per cent. The rationale for such a large reduction in recovery was based, at least in part, on the "native intelligence" that "even a 7 year old child.." would have and who "... knew the difference between right and wrong" behaviour of this sort (Latham J). This would appear to have been an objective assessment of the average 7 year old's understanding. On the other hand, however, if a child is inexperienced, learning disabled or otherwise less able to assess a situation, should that not reduce his 'responsibility' or at least his 'blameworthiness'?
31. An obvious counter argument is that too subjective an analysis would open up each case into a detailed analysis of the individual child's intellect and maturity and would increase costs, extend the length of trials and render the system difficult to manage.
32. Nevertheless, however this may be, within England and Wales, and largely in Scotland, it seems that cases adopting the subjective approach are, overall, the exception rather than the norm and the objective approach of determining reasonable behaviour for a child of a certain age, is the more likely line which courts in these jurisdictions will follow.
33. Other common law approaches

In Ireland the test, although not wholly clear, is (in the view of the Irish Law Commission) a subjective one to be determined by the child's age, his mental development and possibly his general experience: *Brennan v Savage Smyth & Co* [1982] I.L.R.M. 223 (Sup. Ct.). O'Higgins, C.J. held that the 7½ year knew of the risks of "scutting" (riding on the back of a moving vehicle holding onto it by any means possible) and was "a child of his environment" being familiar with vans and vehicles, but equally the Chief Justice observes that "no question [was] raised as to his intelligence nor as to his knowledge of what he was doing", the implication being that such evidence would have been both admissible and relevant to reduce the level of blame. The Supreme Court increased the child's contribution from 5% (awarded by the jury) to 25%.

34. In Canada there is what has been described as a 'modified subjective test' which appears to simply amount to adjusting the degree of responsibility to that to be expected of a (notional) child of the relevant age. Such a test appears to derive from the decision of the Privy Council in *Yachuk v Oliver Blais Ltd* [1949] AC 386, where boys of 9 and 7 deceitfully obtained from a filling station some gasoline which subsequently exploded when they lit a torch and the 9 year old was burned. No special knowledge of the explosive properties of the fuel were proved and an objective test based on the child's age (rather than his intelligence and experience as well) was applied, although the Committee left open the question of the appropriate approach had such special knowledge been proved. This does not in itself support a subjective test because the claimant's particular knowledge may be taken into account in assessing (that is to say, increasing a finding of) contributory negligence. In *McEllistrum v. Etches* [1956] S.C.R. 787 (in which *Yachuk* appears not to have been cited) the Supreme Court held it to be "a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience." That is largely an objective test, albeit the reference to experience allows some specificity
35. The main Australian authority in this area (albeit concerned with primary liability rather than contributory negligence) of *McHale v Watson* [1966] 115 CLR 199 is consistent with the principles in the English case of *Gough* (the two cases were decided within months of each other but neither refers to the other). *McHale* has been approved by subsequent English authority (eg *Orchard v Lee*) as well as cited favourably in *Mullins* (above). In *McHale* Kitto J stated at para 213 of a child defendant (as opposed to a claimant whose contributory fault is being assessed) that:

"The standard of care being objective, it is no answer for him, any more than it is for an adult to say that the harm he caused was due to his being abnormally slow-witted, quick tempered, absent minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective standard and not a subjective standard." (emphasis supplied)

36. In the United States, as we have seen, at least some states adopt a more subjective approach (see *Banks v United States* above). Different states have adopted different approaches and historically there was a divide between the “Massachusetts” approach (objective) and the “Illinois” approach (more subjective at least between ages 7-14). Some states (eg Virginia) retain contributory negligence as a complete defence but the defendant must satisfy both a subjective and objective test in respect of children between 7-13, and an objective test for older children. In summary, there is no general rule.

37. Conclusion

On balance the more prevalent approach in the jurisdictions to which the 1945 Act applies appears to be the objective test in *Gough* notwithstanding that an assessment based on (*inter alia*) blameworthiness would seem to invite a subjective approach, and although certainty is elusive in child contributory negligence assessments, this may be the most likely standard to be applied. The issue might usefully be aired at appellate level. At least some other common law jurisdictions appear to embrace a more subjective approach. As will appear below the opportunity to review the law was not taken in *Jackson*.

38. The relevance of the age of the child

It is technically correct to say that there is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence. While this statement is true it should be approached with caution. The reality is that an older child, well into their teens, has an understanding of the world which is sufficient upon which to base an attribution of fault, in many factual contexts. A very young child by contrast may have very little ability to reason or understand the consequences of their actions in the vast majority of contexts. Again referring to *Gough v Thorne*, Lord Denning noted that “a very young child cannot be guilty of contributory negligence”. He went on to note that:

“An older child may be [contributorily negligent] but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety: and then, he or she is only be found guilty if blame should be attached to him or her...He or she is not to be found guilty unless he or she is blameworthy.”

39. In Canada the courts recognise the immunity of children of tender years from either liability for their actions or responsibility sounding in contributory negligence. The Supreme Court of Canada in *McEllistrum v. Etches* [1956] S.C.R. 787 (at 793) found that such immunity extended to the point "where the age is not such to make a discussion of contributory negligence absurd". In Canada that age is generally accepted as about 5 years after which the possibility negligence is accepted.
40. In most American states there seems to be a bar on a finding of negligence against a child below 7 and a (rebuttable) presumption to that effect up to age 13 or 14.
41. In Ireland as noted above the Supreme Court in *Brennan v Savage Smyth & Co* [1982] I.L.R.M. 223 (Sup. Ct.) found a 7½ year old boy 25% to blame for his injuries. Nevertheless in *Fitzgerald v South Dublin County Council* [2015] IEHC 343 it was conceded that a 9 year old boy was too young to be held guilty of contributory negligence.
42. In England & Wales in 1978 a recommendation was made (although not followed) that the defence of contributory negligence should not be available in cases of motor vehicle injury where the Claimant was under the age of twelve at the time of the injury (The Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054-I (1978) para 1077). No such principle appears in the case law as will be seen.
43. In *J (A Child) v West* (Court of Appeal 12 July 1999, unreported) the majority held a boy of 9½ who was guilty (per Judge LJ) at worst of momentary inadvertence and should not be criticised as negligent when, in avoiding the possibility of being hit by another child with whom he was larking about, he jumped off a kerb into the path of a truck. But May LJ (dissenting) would have held the boy 20% to blame in that larking about

was an obvious risk which the boy, young though he was, should have appreciated had he stopped to think about it

44. There remain a good many cases where judges do find significant proportions of contributory negligence on the part of younger children e.g. in the Scottish case of *Harvey v Cairns* [1989] S.L.T. 107, a six year old girl stepped into the path of a vehicle being driven at excessive speed and was killed. Contributory negligence was assessed at two thirds. In *McKinnell v White* [1971] S.L.T. 61, a five year old boy who let go of his brother's hand and ran in front of a car was deemed to be 50% contributorily negligent. As a general observation, many of the findings of contributory negligence on the part of very young children come from Scotland. It may well be that such Scottish precedents for findings of contributory negligence on the part of children are continuing to influence Scottish courts to make findings which are significantly harsher on children than those in English courts. The decision in *Jackson v Murray* seems unlikely to change that.
45. As previously noted *Jackson* did not contribute significantly to the debate as to the extent to which the courts should or should not adopt a subjective assessment of the child's appreciation of risk. The majority's view, expressed by Lord Reed took into account the pursuer's youth but appears to have done so in a generic rather than a specific way. The case concerned a child of 13 alighting from a school bus which while stationary was displaying hazard warning lights (although the sign indicating it was a school minibus was not illuminated) on a winter's evening in poor light. She set out to cross the road and stepped into the path of a car being driven at about 50 mph in a 60 mph limit but the driver of which, although he had seen the minibus (and indeed had seen it on this stretch of road in the past), had made no allowance for the possibility that a child might attempt to cross in front of him. While the court below had assessed the causative potency of his actions as greater than the child's, the judges appear to have assessed the blameworthiness of the child much higher for carelessly failing to look or failing properly to assess the speed of the car's approach than the blameworthiness of the driver. The trial judge had characterised her action as an act of reckless folly and held her 90% responsible. The Extra Division disagreed that her action was reckless, stressed her age and the difficulty of making an assessment of speed in

the circumstances, but opined that she bore the major share of responsibility “because her negligence was both seriously blameworthy and of major causative significance” and reduced her responsibility to 70%. The majority of the Supreme Court held a sufficiently different view to justify interfering further and held the parties equally responsible.

46. Lord Reed reviewed the principles upon which the courts have assessed contributory negligence since 1945 but did not explore the special case of children beyond his comments at para [41] where, after analysing the Extra Division’s views as necessarily implying that the driver’s conduct was of a greater causative potency than that of the pursuer, and therefore they must have concluded that she was to be considered far more blameworthy than the defender (to have to bear 70% of the overall responsibility), he expressed his disagreement and said:

“...as the Extra Division recognised, regard has to be had to the circumstances of the pursuer. As they pointed out, she was only 13 at the time, and a 13 year old will not necessarily have the same level of judgment and self-control as an adult. As they also pointed out, she had to take account of the defender’s car approaching at speed, in very poor light conditions, with its headlights on. As they recognised, the assessment of speed in those circumstances is far from easy, even for an adult, and even more so for a 13 year old. It is also necessary to bear in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60 mph speed limit, after dusk and without street lighting, is not straightforward, even for an adult.”

47. His conclusion was that the parties were equally responsible.
48. This analysis focuses on the particular circumstances of the incident but not on the particular circumstances, characteristics, knowledge or experience of this particular girl, and appears rather to consider her as a generic 13 year old acting in a particular set of facts. While such an approach may have been conditioned by the way the case was argued, it is disappointing that the opportunity to consider more generally the approach to cases involving children was not taken.

49. Types of cases and the success of the contributory negligence defence

Overall, road traffic accident contexts are those where child contributory negligence is most likely to be established. As noted above there may be an inclination to impose a higher standard of care on children in these contexts on the basis of the dangers of which they may reasonably be aware. In the Scottish case of *Galbraith's Curator ad Litem v Stewart (No.2)* [1998] S.L.T. 1305 (see above), concerning injury to an 8 year old child which occurred while they were playing on sewage pipes, it was commented by Lord Nimmo-Smith at 1307G that:

“...no hard and fast rule can be derived from [road traffic] cases...no doubt in [such] case[s]...great and obvious dangers...are impressed on all children from infancy [so that] contributory negligence may arise at a relatively young age. Different considerations appear to me to arise where the danger arises from something, like the present pipes, which is an allurements to children...”

No contributory negligence was found in this case. (See also *Glasgow Corp v Taylor* [1922] 1 AC 4 where a 7 year old was poisoned by eating attractive berries in a public park.)

50. It is worth noting also on this point that a range of authorities from the USA and also Commonwealth states has suggested that a child involved in what are essentially adult activities such as driving a motor vehicle, or trail bike or snowmobiling should be subject to an adult standard of care: see for instance the Florida case of *Merdina v McAllister*, 202 So. 2nd 755 (Fla. 1967) – a 14 year old driving a motor scooter - or *McErlean v. Sarel* (1987) CarswellOnt 762 (ONCA) where Justice Robins of the Ontario Court of Appeal stated:

“[A]s a general rule in determining negligence, children are not required to conform to the standard of conduct which may reasonably be expected of adults. Their conduct is judged by the standard to be expected of children of like age, intelligence and experience. This is essentially a subjective test which recognizes that the capacities of children are infinitely various and accordingly

treats them on an individual basis and, out of a public interest in their welfare and protection, in a more lenient manner than adults ...There are, however, exceptions to this general rule. Where a child engages in what may be classified as an adult activity, he or she will not be accorded special treatment, and no allowance will be made for his or her immaturity. In those circumstances, the minor will be held to the same standard of care as an adult engaged in the same activity.

51. The principle was articulated (albeit not in respect of children) by Lord Denning in *Nettleship v Weston* [1971] 3 AER 581 (in respect of primary liability) that a driver's "incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity...". It may be the mandatory insurance has an influence on policy in this context.
52. Although the ability of a child is generally assessed on an objective standard then, depending upon their age-group, the context within which contributory negligence occurs may be a relevant consideration (as in *Jackson*). The facts of the case will determine whether a certain age group will be deemed able to appreciate associated risks, but there is (it is suggested) the further consideration of whether it is "just and equitable" to make a finding of contributory negligence, as opposed to primary liability.
53. The legal basis of the assessment of contributory negligence in children cases

As discussed above, a child's liability to have her damages reduced for contributory negligence depends not on any duty of care to the defendant, but on her duty to take reasonable care for her own safety. That is the fault to which the 1945 Act refers and is the first stage, which the defendant must prove. The Act focuses on causation, that is to say the measurable effect of contributory fault on the victim (s.1(1), and in Scotland s.5). From the point of view of direct causation, there is no difference between a young child who steps into the path of an oncoming vehicle and an adult doing the same. The adult though may be found to be guilty of contributory negligence and the child may

not. Although the causation is the same, the difference lies in the language of the section which focuses on the 'responsibility' of the victim for the damage.

54. Roderick Denyer QC (as he then was) in his paper "The Reasonable Child Defined" (1993 LS Gaz, 17 Feb, 90 (25)) gave the following explanation for this apparent anomaly:

"If we are looking for some basis in legal theory to explain this apparent anomaly, the clue is to be found in the concept of "blameworthiness". In the case of an adult, the concepts of "causation" and "blameworthiness", though both relevant, are kept separate. In *Davies v Swan Motors* [1949] 2 KB 291, Denning LJ said:

"Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of reduction does not depend solely on the degree of causation. The amount of reduction is such an amount as may be found by the court to be "just and equitable" having regard to the Claimant's share in the responsibility for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. The fact of standing on the steps of a dust cart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of their employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different."

What seems to happen in the children cases is that the "causation" factor is largely overlooked (or simply assumed) and attention is focused instead on the "blameworthiness" factor. This is assessed by reference to the objective reasonable child of similar age..."

55. In *Davies* Denning LJ had said that causation is relevant to whether there should be a reduction in damages, but that the amount of that reduction depends on blameworthiness which in turn (it might be argued) informs the assessment of 'responsibility'. In the subsequent case of *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682 Ld Reid said:

“A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but ‘the claimant’s share in the responsibility for the damage’ cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.”

56. This appears (in adult cases at least) to place importance on the causative potency of each party’s actions but it still retains for separate consideration the blameworthiness which (it is suggested) requires a focus on the specific facts of the particular case and necessarily introduces (or at least permits) a degree of subjective assessment of the circumstances to inform the assessment of ‘responsibility’. (It is for this reason that it is suggested that a subjective assessment of the particular claimant child’s ability to appreciate and to judge risk is or may be more appropriate.)
57. However, as Lord Reed points out in *Jackson v Murray* at para [27]:

“It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word “fault” in section 1(1), as applied to “the person suffering the damage” on the one hand, and the “other person or persons” on the other hand, is therefore being used in two different senses. The court is not comparing like with like.”

58. As he then points out, it follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise. Tomlinson LJ in *Sabir* (above) at paras 13-17 seeks to introduce some structure to the exercise. It may be argued that he concentrates on causal potency as informing the assessment also of blameworthiness. The pedestrian, for instance, offers little threat to anyone while the driver controls a potentially lethal machine, so that want of care in its management is both more potentially causative of harm and therefore blameworthy. This would seem to elide the two concepts.

59. Is there any pattern in the case law?

In the appendix below there are references to some of the more recent decisions but a sample of cases suggests inevitably that each case depends on its own facts, and that there is little in the way of any clear pattern, save that after the age of 16 it is likely that a child claimant will be more likely to be judged by similar standards to an adult, and it is rare for children younger than 6 or 7 to be found contributorily negligent (save perhaps in Scotland). Examples of cases where D did not choose to pursue an allegation of contributory negligence are included (and can be contrasted with cases where findings were made).

60. Conclusion

In enacting a provision which enabled the court to assess an outcome by reference to what is 'just and equitable' Parliament may be thought to have written a blank cheque for the exercise of judicial discretion. As Lord Reed observes the balance of fault as between claimant and defendant involves comparing incommensurable concepts, so that the process is rough and ready and predicting the outcome is going to be difficult.

61. When the additional consideration of the youth and immaturity of judgment of a child is introduced to the mix, the situation becomes only more difficult. The most that can be said is that if a child is engaging in an adult activity he is likely to be judged as an adult, that if the context is one where the dangers should be familiar to most children, his level of responsibility may be assessed more critically, and that, in England at least, contributory negligence is very unlikely to be found at an age less than 6, and even at an age of less than 10 it is going to be probably less likely to be found against the child.

62. What remains an uncertain question is the extent to which a child claimant in the home jurisdictions may plead a special characteristic to reduce, or a defendant may plead a special characteristic to increase, the degree of responsibility beyond that to be attributed to an ordinary child who is neither a paragon of prudence, nor a scatter-

brained child. The better view, however, would appear to be that such an argument would not currently succeed.

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## **APPENDIX**

E&W = England and Wales. S = Scotland.

Case	Date	Jurisdiction	Age	% of contrib.	Notes
Goundry [2005] EWCA Civ 1738	2005	E&W	4	0	Not pursued. D succeeded on primary liability
McKinnell v White 1971 SLT (Notes) 61	1971	S	5	50%	RTA
Barnes v Flucker 1985 SLT 142	1985	S	5	Finding	RTA
Howell-Williams [2008] EWCA Civ 1108	2008	E&W	5	0	Not pursued. Child ran across road from school bus. Liability divided between bus driver (for permitting her to do so) and vehicle that hit her.
BRB v Herrington [1972] 2 W.L.R. 537	1972	E&W	6	0	Trespass; per Ld Reid: His age was such that he was unable to appreciate the danger of going on to the railway line and probably unable to appreciate that he was doing wrong in getting over the fence.
Puffett v Hayfield [2005] EWCA Civ 1760	2005	E&W	6	0	Not pursued. C emerged from parked cars into path of D whose speed was excessive for circs.
Harvey v Cairns [1989] S.L.T. 107	1989	S	6	66.6%	Child stepped into path of speeding vehicle
Jones v Lawrence [1969] 3 All E.R. 267	1969	E&W	7	0	D motorcyclist doing 50 mph in 30 limit. C's conduct running

					out only that to be expected of a seven-year-old child and could not amount to contributory negligence
N v Newham LBC [2007] C.L.Y. 2931	2007	E&W	7	60%	Punched pane of glass. A 7 yr old should appreciate risk.
Rehman v Brady [2012] EWHC 78 (QB)	2012	E&W	7	0	Rejected: youth and causation
Hughes v Lord Advocate [1963] AC 837	1963	S	8 & 10	0	Pleaded but abandoned at trial.
Richardson v Butcher [2010] EWHC 214	2010	E&W	<9	0	Not pursued because of age. Ran out in front of D who should have seen him.
McCluskey v Wallace 1998 SC 711	1998	S	10	20%	D driving at appropriate speed but fails to see C who crossed without checking if traffic coming
Toropdar v D [2009] EWHC 2997	2009	E&W	10	One third	Application of objective test of what a 10 year old should know.
Morales v Eccleston [1991] RTR 151	1991	E&W	11	75%	Running into road
Dawson v Scottish Power (1999) SLT 672 (OH)	1999	S	11	33.3%	C trying to retrieve a ball, injured when climbing a 4' fence topped with spikes
Melleney v Wainwright [1997] EWCA Civ 2884	1997	E&W	11	One third	D driving at 30 in 60 limit. 2 friends ran across road, C stayed on kerb then dashed out in front of D.

					High standard needed when motorists drive by young children. <i>Armstrong</i> (below) followed
Honnor v Lewis [2005] EWHC 747 (QB)	2005	E&W	<12	20%	C crossing road to school without looking. Road known to have children on it.
Armstrong v Cottrell [1993] PIQR 109	1993	E&W	12	One third	C crossing busy main road hesitated in middle then darted in D's path. Trial judge held C totally to blame. CA: C's culpability not realistically to be compared with D (who had seen C and her friends)
Britland v East Midlands Motor Services [1998] EWCA Civ 590	1998	E&W	12	75%	School bus driver should have seen C running along pavement, but C "reckless" in running into road
C v Imperial Design Ltd [2001] Env LR 33 (CA)	2001	E&W	13	50%	C interfered with flammable liquid left by D in container contrary to stat duty
Smith v Co-op [2010] EWCA Civ 725	2010	E&W	13	No recovery	Bicycling newspaper delivery boy rode out in front of lorry. Accident held all C's fault and D driver recovered for PTSD 100% against C (or his

					employer)
Probart v Moore [2012] EWHC 2324 (QB)	2012	E&W	13	0	Youth and causation (not wearing hi-vis jacket walking in country lane at night)
Paramasivan v Wicks [2013] EWCA Civ 262	2013	E&W	13	75%	D should have seen C but at 13 C should have had understanding of traffic dangers and not run into D's path
Jackson v Murray [2015] UKSC 5	2015	S	13	50%	90% at trial reduced to 70% on appeal and to 50% by SC. C crossed road into path of speeding D.
Gough v Thorne [1966] 1 WLR 1387	1966	E&W	13 ½	0	CA overturned 1/3 finding by judge
Ehrari (A Child) v Curry [2007] EWCA Civ 120	2007	E&W	13 <sup>9/12</sup>	70%	Lorry, 20 mph, failed to see C in road where children expected. Primary cause was C walking out without looking.
Rooke v Liston [1999] EWCA Civ 749	1999	E&W	16	One third	C attempting to cross A2. D did not see him but should have. C negligent in going on roadway when he knew he could not get off.
Phethean-Hubble [2012] EWCA Civ 349	2012	E&W	16	50%	Judge assessed contribution at 50% but discounted for

					age to 35%. CA re-instated 50%.
McCracken v (1) Smith, (2) MIB and (3) Bell [2015] EWCA Civ 380	2015	E&W	16	65%	Pillion on trials bike, dangerous driving joint venture (increased by CA from 30 to 50%) + no helmet 15%.