

A HANDBOOK FOR PRACTITIONERS | ENGLAND & WALES

Civil Liability for Human Rights Violations



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ENGLAND & WALES



English tort law does not provide specific nominate torts for human rights violations. Litigants rely on common tort law and causes of action that cover the harm and losses caused by the relevant violation. Civil claims that allege liability for international human rights violations are increasingly common. In recent decades, practitioners have fashioned novel claims and/or put well-established principles to novel issues, such as liability within complex corporate groups or supply chains. There have been major successes, but there have also been significant setbacks arising from the practical challenges and procedural hurdles. The torts of negligence and nuisance emerge as the strongest contenders, whereas claims on vicarious liability or common design face greater difficulties.

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The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. The legal system in the United Kingdom (UK) provides a range of well-established civil remedies for human rights violations. In recent decades, practitioners have fashioned novel claims and/or put well-established principles to novel uses.
2. This trend seems set to continue because the litigation funding (and insurance) market has undergone something of a revolution. In addition, in respect of personal injury claims, the risks of adverse costs that can make litigation intimidating is eased, to some extent at least, through the so-called 'qualified one-way costs shifting' or 'QOCS' regime under Part 44 of the [Civil Procedure Rules](#).¹
3. The UK is a **dualist legal system**. Firstly, treaty-making power vests with the executive. The traditional view is that unless they are incorporated by statute, treaties do not form part of, or alter the content of, domestic law. Unincorporated treaties do, however, retain some potential to influence a court's approach to domestic law. There are important canons of statutory interpretation such that it is presumed that Parliament will not intend to legislate contrary to the UK's international law obligations.² A similar presumption applies when interpreting and applying the common law.³ International standards might, therefore, be said to be relevant to the standard of care that it is reasonable for the common law to expect and impose on a defendant.
4. This report focuses on **England & Wales**, but one must not equate the UK with England. The UK comprises three legal jurisdictions: England & Wales, Northern Ireland⁴ and Scotland.⁵ Whereas England and Wales and Northern Ireland are common law jurisdictions, Scotland is a mixed legal system consisting of common law and civil law elements. The UK is also one of the few countries whose constitution is largely unwritten, in the sense that it does not have a single foundational constitutional text to which one can readily turn. Rather, practitioners must be familiar with a range of case law, legal rules and principles, the most important of which is the deceptively simple idea of parliamentary sovereignty (ie the unlimited capacity of the UK's Parliament to pass any law it chooses). Many 'constitutional' rules are contained in statutes, perhaps most notably

¹ The details of these procedural rules are beyond the scope of this overview.

² This might be considered to be encompassed by the principle of legality: the presumption that Parliament does not intend to legislate against fundamental rights unless it makes its intention to this effect very clear by express language or necessary implication.

³ [R v Lyons](#) [2002] UKHL 44 [27].

⁴ Within the UK, there is a great deal of law specific to Northern Ireland and its courts enjoy significant autonomy from parallel English institutions: see Nicholas Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 26.

⁵ Scots law is expressly protected by the Acts of Union 1707 (statutes passed by each of the Scottish Parliament and English Parliament to give effect to the Articles of Union). One constitutional curiosity that results is that a decision of the UK's Supreme Court is generally regarded as a decision of a court of the relevant part of the UK. Unless the Supreme Court makes it clear that a decision about the English common law is also a correct statement of Scots law, it is not binding within the Scottish system. For a discussion see Barber (n 4) 24.

the [Human Rights Act](#) 1998 (HRA),⁶ which incorporates the [European Convention on Human Rights](#) (ECHR)⁷ into domestic law. Other rules have been developed by the courts over centuries.

5. The HRA gives domestic legal effect to most of the rights protected in international law by the ECHR. This means that victims can have a remedy in domestic courts, rather than having to bring a claim against the UK in Strasbourg. Section 6 of the HRA makes it unlawful for a public authority to act in a way that is incompatible with a person's rights under the ECHR. The **meaning of public authority** is nuanced. It is defined by section 6(3) of the HRA to include 'any person of whose functions are functions of a public nature'. 'Public' is usually a synonym for governmental and the courts have, in general, adopted a restrictive approach to arguments that a body's decision/action fell within the sphere of 'public' functions.⁸ That said, there is 'room for doubt and for argument' about the meaning of 'functions of a public nature' and, therefore, the HRA's precise ambit.⁹
6. If a defendant is a 'public authority', a claimant may seek public law remedies against them plus damages if the court is satisfied that compensation is necessary to afford 'just satisfaction' (section 8(3) of the HRA) to the claimant.¹⁰ That said, monetary compensation is not the primary aim of the ECHR. Damages awards under the HRA are low.¹¹ Common law claims (including negligence) may therefore remain the preferred route, even against public bodies, depending on the particular context.

SPOTLIGHT: COMMON LAW FLEXIBILITY

Prominent examples of the application of well-established common law principles to new scenarios can be found in the UK Supreme Court's recent case law in respect of the liability of parent companies for harm caused by a subsidiary's operations.

In *Vedanta Resources plc v Lungowe and Others (Vedanta)*,¹² the Supreme Court held (at [54]) that there is 'nothing special' about the parent/subsidiary relationship. General tort principles in respect of liability for the wrongs of third parties should determine whether A owes a duty of care to C in respect of the harmful activities of B.

⁶ Human Rights Act 1998, c 42.

⁷ [European Convention on Human Rights](#), as amended (Convention for the Protection of Human Rights and Fundamental Freedoms).

⁸ *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, per Lord Hope at [36].

¹⁰ The State may remain responsible for the activities of a non-state body to which it has delegated State powers. A good example would be a privately managed prison. See [De Smith's Judicial Review](#) at [3-095].

¹¹ [De Smith's Judicial Review](#) at [19-084].

¹² *Vedanta Resources plc v Lungowe & Ors* [2019] UKSC 20.

In *Okpabi and Others v Royal Dutch Shell plc and Another (Okpabi)*,¹³ the Supreme Court added (at [147]) that de facto management by, or delegation to, 'emissaries' of a parent company could give rise to parent company liability.

In another case involving alleged liability in the context of value chains, the Court of Appeal observed that negligence liability for the conduct of third parties is 'one of the most fast-developing areas' of English law.¹⁴

Such decisions offer a potential route around the challenges of piercing the corporate veil and previous rejections of any suggestion that a subsidiary is the agent of a parent company: *Adams v Cape Industries plc*.¹⁵

7. Practitioners must therefore consider a range of common law and statutory provisions that might be applied in respect of any human rights violation. Whereas tort law does not provide specific named torts for 'human rights violations' per se, civil claims that rely on tort law can identify well-established causes of action that cover the harm and losses caused by the relevant violation. To take an extreme example, torture is not a common law tort; but torture will give rise to civil remedies, in particular a claim based on the well-established torts of trespass to the person (in addition to a claim against public authorities under the HRA).
8. The common law is the product of judicial decisions over centuries. It is not static. It can develop incrementally (sometimes progressively) over time and be adapted by independent judges to modern scenarios. Practitioners must therefore approach human rights litigation in the UK with a mind that is open to the range of sources, causes of action, and potential remedies that exist. That said, the common law has also been known to take wrong turns.¹⁶

¹³ *Okpabi and Ors v Royal Dutch Shell plc & Anor* [2021] UKSC 3.

¹⁴ *Begum (on behalf of Md Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA Civ 326, per Coulson LJ at [61] and [71].

¹⁵ *Adams v Cape Industries plc* [1990] Ch 433 (CA).

¹⁶ See *R v Jogee* [2016] UKSC 8 [83], holding that the law took a wrong turn in 1983 when it started to equate foresight with intention to assist, as a matter of law, when the correct approach is to treat foresight as evidence of intention. This was a criminal case, but the point applies with equal force to civil remedies.

General Questions





Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

9. A range of claims could be brought under English law against public bodies, corporations and/or individuals if one of the three defined harms results in human rights violations. Such claims could involve different (and overlapping) common law and/or statutory bases, each with different criteria and/or challenges.
10. Some **common law causes of action** such as negligence may arise in a range of circumstances. The essence of a negligence claim is a failure by a wrongdoer to adhere to a recognised legal duty to take reasonable care. Liability depends on the wrongdoer falling below some objective standard of care that is imposed by the common law, rather than any particular state of mind on the part of the wrongdoer.
11. **Statutory provisions** regulate environmental standards and health and safety in the workplace, and may provide for strict liability. Although some statutes might confer a right of action on an individual and provide for civil liability to pay damages, a court will generally presume that if an Act creates other specific means of enforcement, it will not usually be possible to use the statutory provision as the basis for a civil damages claim.¹⁷ In practice, however, statutory obligations may inform the standard of care to be expected at common law such that negligence may be established, in part, via the breach of statutory duties.

Assault or unlawful arrest and detention

12. The **torts of trespass** to the person (**battery, assault** and **false imprisonment**) have similar characteristics and protect an individual against infringements of their personal integrity. Battery means the actual infliction of unlawful physical force on another person. Assault means causing someone to apprehend the infliction of immediate, unlawful physical force. False imprisonment is the unlawful constraint on someone's freedom of movement to a particular place.¹⁸ All three types of trespass to the person are actionable per se, that is without proof of actual damage or loss. Claims under the HRA may be brought against public authorities.
13. Negligence alone is insufficient to establish trespass to the person.¹⁹ However, there may be cases where both trespass and negligence apply to the same facts. More generous rules on the remoteness of damage in trespass exist compared to negligence. In negligence, a defendant is responsible only for injuries that are reasonably foreseeable. In trespass, all of the damage actually resulting from the defendant's unlawful act should be recoverable.

¹⁷ In addition, the [Enterprise and Regulatory Reform Act 2013](#) s 69 abolished civil liability under a statute or health and safety regulations, unless new regulations specifically provide for civil liability.

¹⁸ The three torts were succinctly defined by Goff LJ in *Collins v Wilcock* [1984] 3 All ER 374, a case where a claimant police officer sought to stop and detain a defendant, without exercising the power of arrest, and used force or the threat of force to which the defendant resisted by scratching the officer's arm.

¹⁹ *Letang v Cooper* [1964] 1 QB 232, where Lord Denning MR (with whom Dankwerts LJ agreed) explained at 240 that 'when the injury is not inflicted intentionally but negligently, I would say the only cause of action is negligence and not trespass'.

SPOTLIGHT: RELATIONSHIP BETWEEN TORT OF FALSE IMPRISONMENT AND PUBLIC LAW PRINCIPLES

In *Lumba (WL) v Secretary of State for the Home Department*,²⁰ the Supreme Court held that it was unlawful and a serious abuse of power for the Home Office to follow an unpublished policy to detain foreign national prisoners (pending their deportation) which contradicted its published policy by imposing a near blanket ban on release.

This breach of public law rendered the appellants' detention unlawful. Trespassory torts (including false imprisonment) are actionable per se, regardless of proven harm/loss. Thus, even though the detainees would have been detained anyway (pursuant to the published policy) the Home Office was still liable.

By a majority, the Supreme Court held that the fact that the appellants would have been lawfully detained was relevant to damages rather than to liability. The appellants had not proved any loss so they could recover nominal damages (of GBP 1) only.

The Supreme Court further held that vindictory damages (which has been developed in some Commonwealth countries with written constitutions) are not available at common law. Lord Dyson held (at [101]) that was 'no justification for letting such an unruly horse loose on our law'.

Although there had been a deliberate decision not to publish the hidden policy, that conduct was not so unconstitutional, oppressive, or arbitrary as to justify exemplary damages.

Environmental harm

14. The tort of **private nuisance** provides a means to claim for damage to, or interference in a person's enjoyment of land that is shown to be substantial and unreasonable. The assessment of the (un)reasonableness, and extent of any alleged interference in all the circumstances of a case, are frequently disputed factual issues in nuisance claims. The assessment in any particular case depends on the quality and cogency of evidence as to various factors including the intensity, time, duration and frequency of any interferences, together with the general characteristics of the location.
15. **Trespass to land** means any unjustifiable intrusion by one person upon land possessed by another person. Trespass differs from nuisance in that it is direct rather than consequential; and trespass is actionable without proof of damage whereas damage must be proved in nuisance.
16. Statutes also provide for strict and fault-based liability. The [EU Environmental Liability Directive](#) (2004/35/EC) strengthened and consolidated laws governing liability and negligence. It was implemented in England by the [Environmental Damage \(Prevention and Remediation\) \(England\) Regulations 2015](#) and by the [Environmental Damage \(Prevention and Remediation\) \(Wales\) Regulations 2009](#) in Wales.

²⁰ [2011] UKSC 12.

17. There are legislative regimes that provide different forms of liability and obligations to remedy environmental damage. Regulators such as national environmental regulators and local authorities are empowered to act. Regulators can require those responsible for the damage to remedy it, or they may carry out repairs themselves and then recover the costs from those liable for the damage.

SPOTLIGHT: CIVIL LIABILITY FOR BREACH OF STATUTORY ENVIRONMENTAL STANDARDS



Sometimes in parallel with the common law, specific statutory duties provide a gateway to damages claim.

Sections 33(1), 63(2) and 73(6) of the [Environmental Protection Act 1990](#) is one such example. These provisions create obligations which are expressly converted into a statutory duty, breach of which gives rise to a civil claim in damages.

Where any damage is caused by waste which has been deposited in or on land, any person who deposited it, or knowingly caused or knowingly permitted it to be deposited, is liable for the damage unless narrow exceptions apply (such as where the damage was wholly due to the fault of the injured party, or that person had voluntarily accepted the risk of the damage being caused).

Statutes may also provide remedies outside civil litigation. One example is section 94 of the [Water Industry Act 1991](#),²¹ which allows for complaints to be made to the regulator in connection with sewerage problems, which the regulator may then investigate.

Harmful or unfair labour conditions

18. Working conditions are regulated through a number of statutes, which provide for remedies against employers. Section 2(1) of the [Health and Safety at Work Act 1974](#)²² requires an employer to 'ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. Common law negligence may also apply.
19. The [Workplace Health, Safety and Welfare Regulations 1992](#) sets out minimum standards for workplaces. Employees are also protected by the [Employment Rights Act 1996](#).²³ An employee is entitled to leave the workplace and refuse to return until any imminent danger has passed.²⁴
20. Every employee has a contract of employment, which includes various terms (some express, some implied, some statutory). The statutory terms are inserted by Acts of Parliament, for example the [Equality Act 2010](#) inserts an equality clause into contracts.

²¹ Water Industry Act 1991, c 56.

²² Health and Safety at Work Act 1974, c 37.

²³ Employment Rights Act 1996, c 18.

²⁴ The Employment Rights Act 1996 was amended from 31 May 2021 so that workers, not just employees, have the right to bring a claim if they are subjected to any detriment where they reasonably believe there to be a 'serious and imminent' danger.

SPOTLIGHT: CASE STUDY



*Galdikas & Ors v DJ Houghton Catching Services Ltd & Ors*²⁵ involved allegations of human trafficking, forced labour and inhumane living and working conditions. The company supplied labour to chicken farms where workers were tasked with catching chickens, mostly at night.

The Court held the company had breached the Agricultural Wages (England and Wales) 2010 Order and the Gangmasters (Licensing Conditions) Rules 2009 by failing to pay workers the statutory minimum wage, by making unlawful deductions from wages, and by failing to provide adequate facilities. The Court also held that the individual Director and Company Secretary were liable because they were personally responsible for causing the company's breaches.

As to the directors' liability, the individual directors were not acting bona fide as neither honestly believed that they were paying chicken catchers the minimum wage, overtime and holiday pay or that they were entitled to withhold payments. As a matter of law, they were completely unable to act in that way on behalf of the company. They 'actually realised' that what they were doing involved causing the company to breach its contractual obligations to the claimants.

The Court [awarded](#) aggravated damages (at an additional 20%) in recognition of the exploitation, manipulation and abuse by the company directors, who had systematically denied the workers their statutory rights.

Corporate liability

21. There is no simple answer to the circumstances in which conduct and knowledge will be attributed to a legal person, such as a company. The 'identification principle' is a relatively restrictive method of attribution. It is distinct from vicarious liability, or agency principles. Its bemoaned effect is that a corporate entity is only liable if its 'directing mind and will' possessed the necessary knowledge and/or intention.

²⁵ [Galdikas & Ors v DJ Houghton Catching Services Ltd & Ors](#) [2016] EWHC 1376 (QB).

SPOTLIGHT: ORIGINS AND APPLICATION OF THE IDENTIFICATION PRINCIPLE

In *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd*,²⁶ the issue was a maritime trading dispute under the Merchant Shipping Act 1894. The legislation provided a defence to a claim for loss of cargo if the shipowner could show that the event(s) in question happened 'without his fault or privity'. The point therefore became who within the company was responsible for monitoring the condition of the ship, authorising repairs and so on.

Viscount Haldane reasoned that 'if Mr Lennard was the directing mind and will of the company, then his action must, unless a corporation is not liable at all, have been an action which was the action itself within the meaning of the [statute]'. On the facts, Mr Lennard was at fault and therefore the company could not rely upon the statutory defence.

In later cases, both criminal and civil, judges expanded upon the metaphor of the company's 'directing mind and will'.

In *Meridian Global Funds Management Asia Ltd v Securities Commission*,²⁷ Lord Hoffmann expressed some regret over the 'anthropomorphism' which had seeped into the case law because it has 'distracted attention' from the more fundamental question: 'Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company?'.

In *Kalma and Others v African Minerals Limited and Others*,²⁸ the judge dismissed claims that alleged corporate complicity in police violence at an iron ore mine in Sierra Leone. The judge concluded (at [38]) that the requisite intent had to be 'that of a member (or members) of its senior management'. The judge further concluded (at [333]) that, even if he could look further down the pecking order – for example to the mining company's community liaison officers who were more closely mixed up with the police officers who committed the violence – the company representatives did not possess the necessary intention on the facts.

22. **Vicarious liability**, if made out, is strict in the sense that it does not depend on any fault by the person being held liable for the tort committed by another. Whether or not vicarious liability attaches depends on: (i) the relationship between the tortfeasor and the defendant; and (ii) the connection between that relationship and the tort. Vicarious liability is relied on most commonly in claims that allege an employer is liable for the wrongs committed by their employee.
23. The relationship must be shown to be akin to employment and the tort must be closely connected to authorised acts such that, to establish liability, the conduct should fairly and properly be regarded as done while acting in the ordinary course of employment. This can include a relationship whereby the tortfeasor had authority over the claimant as a result of their employment by the defendant. Employers are generally not vicariously liable for the acts of independent contractors.

26 *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

27 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.

28 *Kalma & Ors v African Minerals Limited & Ors* [2018] EWHC 3506 (QB).

SPOTLIGHT: VICARIOUS LIABILITY



Two recent Supreme Court decisions have restricted developments in respect of vicarious liability.

In [*Barclays Bank plc v Various Claimants*](#),²⁹ the Supreme Court emphasised a distinction that had become clouded in the case law: employers are not vicariously liable for the torts of independent contractors. The bank was not vicariously liable for sexual assaults committed by a medical doctor who performed medical assessments on job applicants and assaulted them during those examinations. The question to be asked is whether the tortfeasor is carrying on business on their own account, or whether they are in a relationship akin to employment with the defendant company.

In [*WM Morrison Supermarkets plc v Various Claimants*](#),³⁰ the Supreme Court held that a supermarket was not vicariously liable for the acts of a disgruntled senior employee, who had published the personal data of thousands of other employees. The Court reasoned that the temporal chain and causal connection was too weak to establish vicarious liability, and the employee's animus towards his employer was also relevant to the assessment of whether the tort was sufficiently closely connected to authorised acts.

24. Common law principles of **agency** are also relevant to corporate liability. The classic agency relationship arises when an agent acts under the authority (express or implied) of a principal. Alternatively, a principal may be liable if they instigated, authorised or ratified or otherwise assumed responsibility for the actions of an agent. The application of these common law principles will depend on the particular facts in question.
25. It is worth remembering, however, that an agent (such as a company director) acting on behalf of their principal (a company) remains personally liable for their acts or omissions that constitute a civil wrong (see discussion of [*Galdikas v DJ Houghton Catching Services Ltd*](#) at [20] above). It is not a defence for the alleged tortfeasor (the company representative) to maintain that they acted under the authority, instructions or orders of another person (the company). The context in which the individual acted will, however, inform the assessment of whether or not they owed any personal duty of care towards a claimant; and if so, the scope of any such duty. A company director might also be liable for inducing, procuring or authorising the commission of a tort by the company or its employees.³¹ An agent can also be liable for participating in a common design to commit a tort with a principal (see [45] below on common design and joint torts).³²

29 [2020] UKSC 13.

30 [2020] UKSC 12.

31 There is a general principle that directors of a company are liable for the torts of the company committed at their direction. See *Rainham Chemical Works Ltd (In Liquidation) v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465.

32 See *Bowstead & Reynolds on Agency* (Peter G Watts (ed), 22nd edn, Sweet & Maxwell 2021) Art 113 and commentary thereto.



What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

The following provides a high-level overview of some of the common law causes of action on which reliance is often placed in practice.

Negligence

26. The tort of negligence imposes a duty not to inflict damage on another person carelessly against an objective standard of reasonable care in the circumstances. Negligence claims arise in a wide range of circumstances. The essential elements can be stated quite simply, but their application can generate complexity. Firstly, is there a duty of care? Secondly, has there been a breach of that duty of care? Thirdly, has the breach of duty caused the loss claimed? Fourthly, is the loss recoverable – for example does it fall within the scope of the duty of care, was it foreseeable and not too remote?
27. The circumstances in which a duty of care might be owed at common law are wide-ranging. English law continues to identify and develop duties in novel circumstances, usually by analogy with existing case law. If the court is asked to develop a novel category of negligence, it will deploy a three-fold test by considering: (1) the foreseeability of harm; (2) whether there was a sufficiently proximate relationship between the parties; and (3) whether it is fair, just and reasonable in all the circumstances, to impose a duty of care.³³ Negligence does not permit recovery for pure economic losses in the absence of damage save in prescribed circumstances, such as a special relationship existing between parties.
28. English law does not recognise a general duty to prevent others from suffering harm caused by the deliberate wrongdoing of third parties. The common law does not impose liability for 'pure omissions' except in exceptional circumstances.³⁴ The two main exceptions are: (1) where the relationship between the parties gave rise to an imposition or assumption of responsibility; or (2) where the defendant negligently caused or permitted a source of danger to be created, and it was reasonably foreseeable that third parties would spark that danger. More recent cases have doubted whether it would be useful to distinguish between conduct causing harm (making things worse) versus failing to confer a benefit (not making things better), rather than distinguishing between acts versus 'pure omissions': whereas the common law often imposes a duty of care not to make things worse, it rarely imposes a duty to make things better.

³³ [Caparo Industries plc v Dickman](#) [1990] UKHL 2.

³⁴ [Smith v Littlewoods](#) [1987] 1 AC 241, at 271 per Lord Goff.

SPOTLIGHT: CHALLENGES POSED BY OMISSIONS



In *Sutradhar v National Environmental Research Council*,³⁵ a claimant from Bangladesh was poisoned by arsenic after drinking water from an irrigation well which had been tested for other toxins (ie not arsenic) on behalf of the British Government by the British Geological Survey (BGS).

The claimant contended that BGS had a positive duty to test for arsenic because it was such a major environmental problem affecting millions of people in Bangladesh.

The House of Lords held that no duty of care existed in respect of BGS's failure to test for arsenic.

Lord Hoffmann found (at [27]) that 'BGS owed no positive duties to the government or people of Bangladesh to do anything. They can only be liable for the things they did ... not for what they did not do.'

29. A good example of liability resulting from the creation of a risk of injury is *Attorney General of the British Virgin Islands v Hartwell* (per Lord Nicholls).³⁶ A police force was held to be liable in negligence for allowing an unstable officer access to a firearm and ammunition, which he then used. The case is notable for its emphasis (at [33]) on the 'special dangers associated with certain types of articles such as loaded firearms, explosives and poisons' such that 'the greater the danger the higher the [...] the standard of diligence involved'.

Trespass to the person

30. The three torts which comprise trespass to the person involve direct actual or potential physical infringements of the claimant's person by touching them or causing them to fear touching, or by restricting their movement.
31. The key elements of **battery** are: an act which directly and intentionally or recklessly causes physical contact with the claimant without the claimant's consent and for which the defendant has no lawful justification. Battery must involve a positive act. The requirement of directness means that it is not enough that an act merely causes contact. Rather, the contact must follow immediately from the defendant's act. In other words, there must be no significant volitional act between the defendant's act and the contact with the claimant. Although the act itself must be intentional, an intent to injure is not an essential element of the tort of battery. One finds in the case law references to 'hostile touching'. Yet the term 'hostility' does not mean ill-will in this context. It simply means that the defendant is doing something to which the claimant might object or regard as an unlawful intrusion on their physical integrity.³⁷

³⁵ [2006] UKHL 33.

³⁶ [2004] UKPC 12.

³⁷ *F v West Berkshire Health Authority* [1990] 2 AC 1.

32. The key elements of **assault** are: an intentional or reckless act causing another to apprehend the infliction of immediate and unlawful force.³⁸ The law of assault is broadly the same as the law of battery except that, in assault, the reasonably held apprehension of contact replaces actual contact. Assault and battery will usually, but not always occur together.
33. The key elements of **false imprisonment** are: an intentional or reckless act which directly causes the confinement of the claimant within an area delimited by the defendant without legal authorisation.³⁹ Cases have involved confinement to a mine,⁴⁰ in a house,⁴¹ and a vehicle.⁴² The barriers that restrain the claimant need not be physical. Restraint on movement, even by threats that intimidate a person into compliance, is still false imprisonment. Thus, wrongfully using authority to dissuade a person from leaving a building has led to civil liability for false imprisonment.⁴³ Liability can attach to the persons active in promoting and causing the confinement.⁴⁴

Nuisance

34. Nuisance is of particular relevance to environmental claims. There are two types of common law nuisance: **private nuisance** and **public nuisance**. In cases of private nuisance, the injury is to individual property. In cases of public nuisance, the injury is to the property of mankind.⁴⁵ Private nuisance and public nuisance are not necessarily mutually exclusive.
35. The essence of private nuisance is interference with a property right, specifically the substantial or unreasonable interference with the enjoyment of land. The claimant must have a proprietary or possessory interest in the land affected by the nuisance. Compensation is for the interference with property rights, rather than any personal injury (for which separate causes of action exist, including trespass to the person and negligence).

38 [Mbasogo v Logo Ltd](#) [2006] EWCA Civ 1370 at [74].

39 [Prison Officers Association v Iqbal \(Rev 1\)](#) [2009] EWCA Civ 1312.

40 *Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67.

41 *Warner v Riddiford* (1858) 4 CBNS 180.

42 *Burton v Davies* [1953] QSR 26.

43 *Harnett v Bond* [1925] AC 66.

44 *Aitken v Bedwell* (1827) Mood & M 68.

45 *Attorney General v PYA Quarries Ltd* [1952] 2 QB 169.

SPOTLIGHT: PRIVATE NUISANCE



The rules for private nuisance were summarised by Carnwath LJ in *Barr v Biffa Waste Services Ltd*⁴⁶ as follows:

In order to bring a claim in the first place, the claimant must have a direct proprietary or possessory interest in the land affected by the nuisance.

- a. There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case.
- b. There must be a real interference with the comfort or convenience of living, according to the standards of the average man or, in the familiar words of Knight Bruce VC: ‘... not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people’.
- c. The character of the neighbourhood area must be taken into account. Again, in familiar terms from a 19th century authority, ‘what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey...’.
- d. The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance.
- e. Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. The latter will apply where a statute authorises the user of land in a way which will ‘inevitably’ involve a nuisance, even if every reasonable precaution is taken.
- f. The public utility of the activity in question is not a defence.

36. The essence of public nuisance is conduct that endangers the life, health, property or comfort of the public, or obstructs the public in the exercise or enjoyment of rights common to all. A public nuisance is actionable in tort and can also be a criminal offence: an individual who can prove some special damage arising out of the harm caused to the community at large can bring a civil claim. To show special damage, a claimant must show that they have sustained a particular damage or injury other than and beyond, the general injury to the public and that such damage is substantial.
37. In addition to common law nuisance, **statutory nuisance** exists under legislation such as the [Environmental Protection Act 1990](#). This imposes obligations on public authorities to take action to ensure that a statutory nuisance is abated. A failure to comply and abate a statutory nuisance may give rise to criminal liability. Evidence of action by public authorities in respect of statutory nuisances can be relied upon to ground claims for civil remedies.

⁴⁶ *Barr & Ors v Biffa Waste Services Ltd* [2012] EWCA Civ 312.

Rule in *Rylands v Fletcher*

38. This has been described as a 'sub-species' of the law of private nuisance.⁴⁷ It involves strict liability for one-off escapes of dangerous items brought onto land that were likely to harm.

39. This 'rule' which derives from an 19th century case was described more recently in the following terms:

*'the person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.'*⁴⁸

40. The rule has been confined in recent years. In [Transco](#), Lord Bingham observed that a consideration of the reported English case law over the past 60 years suggested that 'few if any claimants have succeeded in reliance on the rule in *Rylands v Fletcher* alone'.⁴⁹

Unjust enrichment

41. Unjust enrichment is a unifying legal concept whereby a defendant may be obliged to make fair and just restitution for a benefit derived at the claimant's expense. The principal elements are: (1) that the defendant was enriched; (2) at the claimant's expense; (3) the enrichment was unjust; and (4) lack of any defence.⁵⁰

42. The law of unjust enrichment is in an evolutionary state. In general, an unjust enrichment claim will seek to establish a proprietary interest in property held by the defendant. Some claims in England have started to rely on this cause of action in the context of alleged abuses in international value chains, but whether that succeeds remains to be seen.⁵¹



Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

43. Aiding and abetting is a familiar concept in criminal law. Equity recognises accessory liability in respect of breaches of trust or the knowing receipt of property that is subject to a trust or fiduciary obligation. In contrast, English law does not recognise any concept of merely facilitating, or aiding and abetting, a tort committed by another person. Courts have repeatedly held that it would be a mistake to compare crime with tort, or to expand tortious liability beyond established categories.

⁴⁷ [Transco plc v Stockport Metropolitan BC](#) [2003] UKHL 61 [9].

⁴⁸ [Cambridge Water Co v Eastern Counties Leather plc](#) [1994] 2 AC 264 HL.

⁴⁹ [Transco plc](#) (n 47) [5].

⁵⁰ [Bank of Cyprus UK Ltd v Menelaou](#) [2015] UKSC 66, per Lord Clarke at [18].

⁵¹ [Josiya & Ors v BAT & Ors](#) [2021] EWHC 1743 (QB).

44. English law does, however, provide for expansive forms of liability, including in circumstances where the principal wrongdoer is a third party. Negligence and/or vicarious liability could be said to be broader and/or stricter than stereotypical notions of complicity or accessory liability. Negligence does not depend on the mental state of the alleged 'accessory'. Rather, the tort of negligence asks whether a duty of care exists and whether the person upon whom any duty rests (including in respect of the conduct of third parties) acted reasonably in all the circumstances.
45. **Joint tortious liability** can arise if a defendant assists the commission of an act by a primary tortfeasor as part of a common design that the act be committed, and the act in question turns out to be tortious. A joint tortfeasor is distinguished from a **several tortfeasor**: the latter causes damage to the same claimant so their liability is distinct and arises from separate causes of action.

SPOTLIGHT: JOINT TORTIOUS LIABILITY FOR PARTICIPATION IN A COMMON DESIGN



The law on common design liability was reviewed and clarified by the Supreme Court in *Sea Shepherd UK v Fish & Fish Ltd*.⁵²

- The act of assistance only needs to provide a more than minimal contribution.
- The mental element seems more onerous: there must be a common design that the act be committed. Whereas conditional intent is sufficient, mere knowledge that another person will commit a tort is insufficient to give rise to liability.
- However, it is unnecessary to show that the defendant appreciated or intended that the act constituted or gave rise to a tort: it is the act itself which much have been the subject of the common design, not any inherent wrongfulness.⁵³

46. An agent who commits a tort on behalf of a principal is a joint tortfeasor with the principal. For example, a company director and the company itself may be regarded as joint tortfeasors where the director 'is sufficiently bound up in [the company's] acts' to make themselves personally liable.⁵⁴
47. English law includes a general principle of liability for procuring actionable wrongs, albeit the precise details of its application vary depending on the type of wrong, and the case law in respect of procuring (or authorisation of torts) is not well-developed. Procuring and authorisation are best viewed as a form of joint tortious liability.⁵⁵ The Supreme Court has confirmed that a defendant may incur joint liability by 'procuring the commission of a tort by inducement, incitement or persuasion'.⁵⁶

⁵² *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10.

⁵³ See Mustill LJ in *Unilever v Gillette* [1989] RPC 583, at 609; approved by Lord Neuberger in *Fish & Fish Ltd* [2015] UKSC 10 [37] and [59].

⁵⁴ See *Clerk & Lindell on Torts* (23rd edn, Sweet & Maxwell 2022) para 4-04 and authorities cited therein.

⁵⁵ In *Smith v Pywell and Spicer*, The Times, 28 April 1959, Diplock J held that 'There was no separate tort of procuring a third person to commit a tort, but the procurer was a joint tortfeasor with the person who actually committed it'.

⁵⁶ *Fish & Fish Ltd* (n 53), per Lord Toulson at [18]. Lord Sumption further explained that procuring 'necessarily involves common intent'.

SPOTLIGHT: EXAMPLES OF JOINT LIABILITY IN TORT

In [*Monsanto v Tilly*](#),⁵⁷ an environmental group carried out protests against genetically modified crops by pulling up plants. Although the group's media liaison officer had not pulled up any plants himself, he was held to have no arguable defence to a claim that he was a joint tortfeasor because he had scouted the site, met the press and led them to the site for the purpose of reporting the uprooting activities and he was present while others uprooted the plants and he explained the purpose and significance of their acts to the onlooking media.

- In [*Shah v Gale*](#),⁵⁸ the defendant was liable as a joint tortfeasor in assault because she had pointed out to the assailant the address of the claimant who was then murdered.
- In [*Kalma v African Minerals Ltd and African Minerals \(SL\) Ltd and Tonkolili Iron Ore \(SL\) Ltd*](#),⁵⁹ the Court of Appeal stressed that foreseeability alone that a third party (in that case the Sierra Leonean police) might use excessive force is insufficient. Proof of actual intention is required.

Q4

When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or independent contractor in a supply chain?

48. Some ground-breaking cases have tackled this question. Claims have focused on the tort of negligence, with courts addressing the question of when a parent company might arguably owe a duty of care towards persons harmed by a subsidiary's activities. The answer generally turns on the degree of de facto control and/or oversight by the parent company of the subsidiary's activities that gave rise to the relevant harm. There is no principled reason why the same form of liability could not also apply to an independent contractor in a supply chain, if the essential elements of the tort of negligence are established.
49. There is no single test to determine whether a parent company owes the relevant duty of care. In [*Chandler v Cape plc*](#),⁶⁰ a case about industrial injury during employment by a subsidiary company, Arden LJ, identified four indicators for when parent company liability might arise.



⁵⁷ [*Monsanto plc v Tilly & Ors*](#) [1999] EWCA Civ 3044.

⁵⁸ [*Shah v Gale*](#) [2005] EWHC 1087 (QB).

⁵⁹ [*Kalma*](#) (n 28).



⁶⁰ [*Chandler v Cape plc*](#) [2012] EWCA 525.

SPOTLIGHT: THE *CHANDLER* INDICATORS OF PARENT COMPANY LIABILITY

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- a. The business of the parent company was the same in a relevant respect;
 - b. The parent had, or ought to have, superior knowledge on some relevant aspect of health and safety in the relevant industry;
 - c. The subsidiary's system of work was unsafe as the parent knew, or ought to have known; and
 - d. The parent company knew or ought to have foreseen that the subsidiary or its employees would rely on the parent company using its superior knowledge for the employees' protection.
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50. In *Vedanta*,⁶¹ however, Lord Briggs explained that *Chandler* merely identified examples and should not be treated as having imposed an unnecessary straitjacket. Lord Briggs offered other examples where liability might arise.

SPOTLIGHT: ILLUSTRATIVE ROUTES TO PARENT COMPANY LIABILITY IDENTIFIED IN *VEDANTA*

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- The Supreme Court's judgment in *Vedanta*⁶² identifies four illustrative examples when a parent company might be liable for harm caused by a subsidiary's operations. There is, however, nothing special about the parent/subsidiary relationship. Therefore, these routes are of broader application, potentially including the conduct of independent contractors in a supply or value chain. The four examples:
- a. A parent company had, in substance, taken over the management of the relevant activity (including jointly with the subsidiary's management);
 - b. A parent company promulgated deficient policies and guidelines to be implemented by a subsidiary;
 - c. A parent company took active steps to implement relevant standards; or
 - d. A parent company held itself out as supervising and controlling the relevant matters, even if it did not exercise such supervision and control in practice.
- 

51. It bears emphasis that *Vedanta* route 4 is cast (at [53]) as an omissions-based liability: 'In such circumstances, [the parent company's] very omission may constitute the abdication of a responsibility which it has publicly undertaken.'

⁶¹ *Vedanta* (n 12).

⁶² *ibid*.

52. The overall approach in *Vedanta* was confirmed in *Okpabi*,⁶³ where (allowing a claim to proceed in England) Lord Hamblen also stressed (at [129] and [158]) the importance of disclosure of internal corporate documents to the assessment and also highlighted that de facto management of part of a subsidiary's activities may suffice. This chimes with the statement in *Vedanta* (at [51]) that a 'parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant'.
53. As to liability for the conduct of independent contractors in a supply chain or value chain, as noted above in [49] there is no principled reason why the approach in *Vedanta* and *Okpabi* would not apply: there is, after all, nothing special about the parent-subsidary relationship. Liability could arguably also arise in a value chain where a company knowingly exposes workers to significant dangers in an industry (such as ship breaking) that is inherently dangerous. In *Begum*,⁶⁴ the Court of Appeal considered it to be arguable that the 'creation of danger' principle could extend to a claim against a shipbroker that negotiated the sale of an oil tanker for demolition, and it ended up at a dangerous shipbreaking yard in Bangladesh where a worker fell from the ship and died.



What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

54. The primary private law remedy is compensatory damages. This applies to all three defined harms. In the context of harmful or unfair labour conditions, there may be contractual damages claims available to an employee or contractor.
55. Damages are generally compensatory in nature in that the court will endeavour to compensate the claimant for the losses, both pecuniary and non-pecuniary, caused by the defendant's wrongdoing. Pure loss of amenity or mental distress and anxiety can only form a head of loss if it was tethered to a claim for personal injury or property damage.
56. Damages are designed, via the proxy of a financial award, to put the claimant in the position they would have been had the tort never occurred. Damages will therefore include losses directly occasioned by the tortious act and consequential losses, provided the rules in respect of causation and remoteness are met.

⁶³ *Okpabi* (n 13).

⁶⁴ *Begum* (n 14).

SPOTLIGHT: CAUSATION



In a tort claim, a claimant must prove that, on the balance of probabilities, a tortious act caused their injury, loss or damage.

- The conventional approach is to apply a ‘but for’ test as to whether the damage was caused or materially contributed to by the act or negligence relied upon as the basis for the cause of action.
- The tortious act in question does not need to be the sole cause, but the claimant must prove (on the balance of probabilities) that, but for the act giving rise to the claim, the damage would not have occurred.
- Liability in tort is joint and several, meaning that if more than one defendant is liable to a claimant, each defendant is liable for 100 per cent of the claimant’s losses. However, the court will have to decide on what proportion each defendant will have to pay damages, considering the different degrees of blameworthiness and causation.
- The [Civil Liability \(Contributions\) Act 1978](#) gives a defendant a right to claim an indemnity for or a contribution towards its liability if they should be held liable as well.
- In addition to factual causation, potential liability is subject to the doctrine of remoteness: the claimant must also prove that the type of damage or injury alleged, though not the extent of it, was reasonably foreseeable.⁶⁵

57. If a personal injury claim is made out, additional damages can also be recovered for non-pecuniary losses, such as pain and suffering and loss of amenity; physical inconvenience and discomfort; and social discredit.⁶⁶ A distinction is therefore drawn between general damages and special damages. The former represents things that cannot easily be assigned a monetary value (pain and suffering and loss of amenity). The latter covers financial losses including out-of-pocket expenses and lost income.⁶⁷

⁶⁵ *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*, known as [The Wagon Mound \(No. 1\)](#) [1961] AC 388.

⁶⁶ [Simmons v Castle](#) [2012] EWCA Civ 1288.

⁶⁷ See for example the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (16th edn, OUP 2012).

SPOTLIGHT: EXEMPLARY (OR PUNITIVE) DAMAGES

- In addition to compensatory damages, exemplary or punitive damages⁶⁸ are non-compensatory and can be awarded in two main circumstances.
 - a. First, where there has been oppressive or unconstitutional action by servants of the government (including the police).
 - b. Secondly, where the defendant's conduct was calculated to make a profit that may well exceed the compensation payable to the claimant.
- Exemplary damages are not available for negligence or public nuisance, but they are available for a range of other torts.
- Restitutionary damages are another type of damages that can be claimed in respect of proprietary torts. These aim to strip away from a defendant any gains made by committing a tort.

58. **Aggravated damages** provide compensation for mental distress or injury to feelings caused by the particular manner or motive with which a wrong was committed, or by the defendant's conduct afterwards. Aggravated damages are not often awarded but are still considered to be compensatory in nature. They are awarded in addition to the basic damages award where the sense of injury has been justifiably increased by malicious, insulting or oppressive conduct.

AN EXAMPLE OF AGGRAVATED DAMAGES

In [*Quinn v Ministry of Defence*](#),⁶⁹ the claimant was injured by the British Armed Forces during the [Bloody Sunday atrocity](#). He was awarded GBP 125,000 for physical injury (a severely disfiguring facial injury), GBP 25,000 for injury to feelings, and GBP 38,000 by way of aggravated damages.

A claim for exemplary damages (on grounds of deterrence and punishment) was refused because the government had funded and accepted the findings of a public inquiry which exonerated the victims from any wrongdoing.

Aggravated damages were awarded because those for whom the defendant was responsible had lied about the events for decades that heightened the injury to feelings.

Aggravated damages require a finding of deliberate misconduct – negligence (even gross negligence) will not suffice.

68 In [*Cassell and Co Ltd v Broome*](#) [1972] AC 1027, the House of Lords decided to use the word 'exemplary'.

69 [*Quinn v Ministry of Defence*](#) [2018] NIQB 82.

59. Another remedy that should not be overlooked is a **declaration** – whereby the court states the law and legal rights on a particular point. The readiness of English courts to give judgments declaring legal rights where it would serve a useful purpose has increased in recent years.
60. Other private law remedies include **injunctions**, either interim (before trial) or final (after trial). An injunction is an equitable remedy whereby the court will order a defendant to do or not to do a specific act. A prohibitory injunction forbids something. A mandatory injunction requires something.
61. Injunctions are powerful remedies because the failure to comply with an order may be contempt of court. Injunctions can only be granted in support of a legal or equitable right – it is therefore necessary to identify the cause of action to which the remedy of an injunction will properly attach. A claimant will also need to show that damages would not be an adequate remedy, but this is relatively easy to satisfy if the aim is to stop a defendant doing something (such as causing pollution – see box below). Injunctions are particularly useful in respect of trespass or nuisance. Moreover, freezing injunctions can be sought over assets in order to ring-fence money or items to ensure that they remain available to compensate claimants in the event that the claim succeeds.

SPOTLIGHT: REMEDIES FOR PRIVATE NUISANCE



If successful, a claimant will be entitled to compensatory damages and/or injunctive relief that requires the defendant to cease causing the nuisance.

There are three recognised categories of loss: (1) actual physical damage to land; (2) loss of enjoyment of the land (which can be much more difficult to calculate); and (3) consequential losses such as lost profits. The damages award will be sufficient to rectify the damage caused and cover any consequential losses that are not too remote.

Whereas compensation is effectively the only remedy available in respect of past nuisances, an injunction is available in respect of an ongoing nuisance or a nuisance that is likely to recur in the future. If an ongoing nuisance is established, the starting point is that an injunction ought to be granted. Alternatively, a court might decide to award additional damages in lieu of the injunction.

It would be rare for a court to require the complete cessation of an offending activity. This would be a draconian remedy, although it is sometimes deployed in construction (eg right to light) cases. The purpose of an injunction is to prevent the nuisance, rather than entirely prevent an activity. It is therefore more common for a set of specifically tailored restrictions to be imposed (or agreed), for example by limiting a nuisance causing activity to particular days or times, or by imposing measurable limits to any interference that results.

A court's decision to award an injunction is based not only on the nature and severity of past nuisances, but a consideration of the current position and the likely position in the future. In practice, a court will also be aware that, if an injunction is refused but the situation worsens significantly in the future, it would usually be open to a claimant to re-apply for urgent interim relief later on. The prospects of obtaining an injunction depend on cogent and recent evidence of alleged nuisance.

SPOTLIGHT: FURTHER REMEDIES AGAINST PUBLIC AUTHORITIES

The primary public law remedies are a quashing order, a mandatory order, or a prohibiting order.

A public law claim (including a claim under [HRA](#)) may include a claim for damages (for just satisfaction) but this is generally not the only relief sought (see section 8(3) of the HRA). The court should not award exemplary or punitive damages; but it may award damages for psychological damages, anxiety and distress.⁷⁰

*Dobson and others v Thames Water Utilities Ltd*⁷¹ is a rare example where HRA was relied upon in an environmental case because the defendant was not a private company. The judge found that the defendant had committed unlawful acts under section 6(1) of the HRA. It had failed to carry out the work and conduct the operations at the sewerage works with all reasonable regard and care for the interests of other persons, including the claimants, and as such failed properly to respect their rights.

Claims under the HRA are complicated by the fact that public authorities will ordinarily operate in accordance with a statutory scheme, which may contain its own remedial mechanism or processes.⁷²

⁷⁰ See De Smith's Judicial Review at [19-084].

⁷¹ *Dobson & Ors v Thames Water Utilities Ltd* [2011] EWHC 3253 (TCC).

⁷² Herbert Smith Freehills LLP, *Class Actions in England & Wales* (Sweet & Maxwell 2018) at [10-016].



What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

62. The nature of any advantage will depend on the remedy sought and obtained. It may fairly be said, for example, that an award of money damages will probably not truly put a claimant in the position they would have been had an egregious human rights violation never been perpetrated against them. On the other hand, an injunction that makes a violation stop (for example, ongoing pollution or abuse) might be vital.
63. The vindication that comes with a public reasoned judgement in a claimant's favour can be powerful monument.⁷³ A public trial is stressful, but the opportunity to tell a court what happened, and to challenge the narrative presented by a defendant, can be cathartic. The disclosure obligations that come with civil litigation can mean that documents come to light that otherwise would have remained secret.
64. The majority of civil claims settle before a final public reasoned judgment is obtained, perhaps long before any trial. On one view, this is a disadvantage caused by the risky and costly nature of civil litigation. It deprives claimants of definitive liability findings in judgments published for posterity. On the other hand, the transactional nature of an out-of-court settlement carries the opportunity for more creative remedies than a court could order. There have been recent examples of [settlements](#) that included public apologies, the implementation of new monitoring systems, grievance mechanisms, training programs and the like. Civil litigation can, therefore, empower claimants to stand up to powerful defendants, exercise greater autonomy than might be available to the victim in a criminal process, fashion creative remedies acceptable to them, and possibly obtain guarantees in respect of a defendant's future conduct.
65. The **costly and risky nature of civil litigation** is worth repeating. In addition, if the claim fails the general rule is that the claimant will bear the reasonable costs of the successful defendant.⁷⁴ This can be a huge disincentive, in particular if a claim faces a well-resourced defendant. In addition, depending on the nature of the case, civil litigation can take a long time – especially if there are jurisdiction disputes and/or complex procedural issues to address (as is often the case in collective or group actions). The path to redress is rarely straightforward. Finally, even if a civil claim succeeds, whether in a judgment or via a settlement, litigation can be a blunt tool, brought on behalf of individual claimants, when the harms might be more widespread and/or systemic.

⁷³ The relevant causes of action might not provide adequate labels for the nature of the harms suffered: a claim for 'trespass to the person' following torture is one such example. However, the judge will make factual findings as to whether the factual allegations are proven or not.

⁷⁴ There is an important exception for personal injury claims for which qualified one-way costs shifting applies. This means that defendants will not be able to recover their costs even if they successfully defend the claim.

Q7

Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

66. The UK ceased being a member state of the European Union on 31 January 2020, with a transitional period during which EU law continued to apply ending on 31 December 2020. Without accession to the [Lugano Convention](#),⁷⁵ or something else in the place of the [Recast Brussel Regulation](#), the position in respect of jurisdiction has reverted to the traditional common law rules.⁷⁶
67. English courts can exercise **personal jurisdiction over foreign defendants**, although public international law may constrain the ability to exercise jurisdiction over state actors. As a matter of English procedure, a court will have jurisdiction over a defendant if they have been served with proceedings. The question therefore becomes whether the foreign defendant is either present in the jurisdiction such that it can be served there,⁷⁷ or whether the English court will give permission to a claimant to serve the foreign defendant outside the jurisdiction.
68. There are **procedural ‘gateways’** whereby the English court may permit service out of the jurisdiction on the foreign defendant.⁷⁸ They include where a tort is committed, or damage sustained, within the jurisdiction. Another common scenario is where an ‘anchor defendant’ is in the jurisdiction, in respect of whom there is a serious issue to be tried, and the foreign defendant is a ‘necessary or proper party’ to that claim.
69. The **‘necessary or property party’** question should be considered by asking: ‘Supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?’⁷⁹ This scenario has arisen in several parent company liability cases in recent years, where the parent company was domiciled in the UK and the operating company was based overseas.
70. Satisfying the jurisdictional gateways is not the end of the matter: under Civil Procedure Rules 6.37 the court will not give permission to serve out of jurisdiction ‘unless satisfied that England and Wales is the proper place to bring the claim’. Even if a foreign defendant is served, it can apply to stay the proceedings against it or challenge the previous grant of permission to ‘serve out’. The **doctrine of *forum non conveniens*** is Scottish in origin, but was adopted into English law by the House of Lords in [Spiliada Maritime Corp v Cansulex](#).⁸⁰ A court may grant a stay of English proceedings against a defendant if satisfied that the court of some other forum is more appropriate for the trial of the dispute. If the defendant establishes that England is not the natural forum, the burden switches to the claimant to establish whether there is a real risk that substantial justice cannot be obtained in the foreign jurisdiction.⁸¹
71. In [Spiliada](#),⁸² Lord Templeman famously suggested that jurisdiction disputes would be capable of quick resolution, with submissions measured ‘in hours and not days’. In practice, jurisdiction challenges involving well-resourced parties can take much longer.

75 The UK applied to join the Lugano Convention in April 2020.

76 Before the UK's exit from the EU, mandatory jurisdiction existed against UK-domiciled defendants based on article 4 of the Brussels Recast Regulation 1215/2012: see *Owusu v Jackson* [2005] QB 801.

77 For example, an individual may pass through the UK; or a foreign company may have a place of business in the jurisdiction at which it can be served. The precise requirements are technical and beyond the scope of this chapter.

78 Civil Procedure Rules Part 6 (and para 3.1 of the accompanying Practice Direction 6B).

79 *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC [87].

80 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

81 *AK Investment CJSC* (n 79) at [89]–[95].

82 *Spiliada* (n 80).



Do you have any recommendations for further research on civil liability for human rights violations in your jurisdiction?

General resources

Open-access

- [BAILLI](#) (free database of case law)
- [Legislation.gov.uk](#) (free database of UK legislation)
- [Supreme Court of the UK](#) (judgments, summaries of judgments, videos of oral arguments)
- HM Courts & Tribunals Service, '[Group Litigation Orders](#)' (GOV.UK, 2020)
- Ministry of Justice, [Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020-2021](#) (2021)
- [Joint Committee on Human Rights, Human Rights and Business 2017: Promoting responsibility and ensuring accountability](#) (2017)
- Alice Donald, Jane Gordon and Philip Leach, [The UK and the European Court of Human Rights](#) (Research report 83, Equality and Human Rights Commission 2012)
- Leigh Day, [International Brochure](#) (2022)

Subscription-based

- [Butterworths Human Rights Cases Set](#) (LNUK 1996)
- David Hoffman and John Rowe QC, [Human Rights in the UK: An Introduction to the Human Rights Act 1998](#) (4th edn, Pearson 2013)
- Helen Fenwick, Gavin Phillipson and Alexander Williams, [Text, Cases and Materials on Public Law and Human Rights](#) (4th edn, Routledge 2016)
- [Human Rights Law Reports – UK Cases](#) (Sweet & Maxwell)
- Herbert Smith Freehills LLP, [Class Actions in England & Wales](#) (Sweet & Maxwell 2018)
- Rachel Chambers and Katherine Tyler, 'The UK Context for Business and Human Rights' in Lara Blecher, Nancy Kaymar Stafford, Gretchen Bellamy (eds) [Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms](#) (American Bar Association 2015), 301-330
- Ekaterina Aristova, '[The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum \[Non\] Conveniens Back?](#)', *Business and Human Rights Journal*, Vol. 6(3) (2021), pp. 399-422
- Daniel Leader, 'Human Rights Litigation against Multinationals in Practice – Lessons from the United Kingdom', in Richard Meeran (ed), [Human Rights Litigation against Multinationals in Practice](#) (OUP 2021)

- Russell Hopkins, 'England and Wales: The Common Law's Answer to International Human Rights Violations' in Ekaterina Aristova and Uglješa Grušić (eds), [Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions](#) (Hart Publishing, 2022).

Harmful or unfair labour conditions

Open-access resources

- Jo Broadbent and Stefan Martin, '[UK: Employment & Labour Laws and Regulations 2021](#)' (ICLG 2021)

Subscription-based resources

- Astra Emir, [Selwyn's Law of Employment](#) (22nd edn, OUP 2022)

Environmental harm

Open-access resources

- Tallat Hussain, '[The Environment and Climate Change Law Review: United Kingdom](#)' (*The Law Reviews* 2022)

Subscription-based resources

- '[Environment cases tracker 2021](#)' (LexisNexis 2021)
- Elizabeth Fisher, Bettina Lange and Eloise Scotford, [Environmental Law: Text, Cases and Materials](#) (OUP 2013)

Assault or unlawful arrest and detention

Open-access resources

- College of Policing, '[Public Order: Core Principles and Legislation](#)'
- Home Office, '[Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures](#)' (2018)

Subscription-based resources

- John Beggs and Hugh Davies, [Police Misconduct, Complaints and Public Regulation](#) (2nd edn, OUP 2022)

Corporate, public bodies, and other

Open-access resources

- Joint Committee on Human Rights, [The Meaning of Public Authority under the Human Rights Act](#) (Seventh Report of Session 2003-04 HL 39, HC 382)

Subscription-based resources

- Andrew Clapham, [Human Rights in the Private Sphere](#) (OUP 1993)
- Paul Davies, [Introduction to Company Law](#) (Hart 2020)
- Paul Davies, [Accessory Liability](#) (Bloomsbury 2015)
- Rachel Leow, [Corporate Attribution in Private Law](#) (Hart 2021)
- David Lowe and Charlie Potter, [Understanding Legislation: A Practical Guide to Statutory Interpretation](#) (Hart 2018)

CaseScenarios

1

Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. [READ MORE](#)

2

Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists

and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. [READ MORE](#)

3

Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. [READ MORE](#)



CaseScenario 1

Q1

Could injured or unlawfully arrested protesters bring civil claims against the police and or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

Claims against the Police

72. A civil claim against the police would be more straightforward than a claim against Security Co (or its personnel), and legal aid might be available for such a claim subject to the claimant(s) meeting the necessary eligibility criteria. The liberty of the subject is a fundamental constitutional principle.
73. Physical force used by a police officer must be necessary, reasonable and proportionate in the circumstances. The facts described fall squarely within the torts of trespass to the person, namely battery, assault and/or unlawful arrest and detention. The tort of misfeasance in public office may be available as well – it arises when a public officer has exercised their powers in bad faith. However, this tort would seem to add little to the other causes of action that are available. The prospects of success may differ between the different factual allegations. For example, in practice it might be harder to prove that some forms of force (eg tear gas) were unlawful in the circumstances, even if the protest is said to have been entirely peaceful.
74. **Battery** is the infliction of unlawful physical force on a person. **Assault** means causing someone to apprehend the infliction of immediate, unlawful physical force. **False imprisonment** is the unlawful constraint on someone's freedom. Although torture is not a nominate tort, its commission would amount to the tort of battery and exemplary damages and aggravated damages could be recoverable.
75. The **tort of negligence** provides another cause of action where a defendant owes a duty of care towards a claimant and that duty of care was breached. Negligence does not require a mental element in the same manner as other torts. Rather, negligence is a failure to take reasonable care to avoid causing harm to others. More generous rules on remoteness of damage apply to intentional torts such as trespass to the person compared to negligence.
76. There is a technicality in that police officers are not employees of the Crown or the police authority. Rather they are 'office-holders'. According to legislation, however, the Chief Constable of the relevant police force's area will be liable for 'any unlawful conduct of constables under his direction and control in the performance or purported performance of their functions'.⁸³ This statutory liability of a Chief Constable extends to the payment of exemplary damages.⁸⁴

83 [Police Act 1996](#), c 16 s 88. The legislation provides that the chief officer for the relevant police area shall be treated 'for all purposes as a joint tortfeasor'.

84 [Rowlands v Chief Constable of Merseyside](#) [2006] EWCA Civ 1773.

Claims against Security Co

77. As there is no evidence that personnel from Security Co were involved in the violence that injured the protesters, a claim against Security Co will be more difficult. English tort law does not recognise civil liability for aiding and abetting a tort committed by another person. The tort of negligence can include liability for the conduct of third parties, but it would be necessary to prove that Security Co owed the claimants a duty of care to safeguard their physical safety or well-being. This would appear to be difficult in the circumstances, but a relevant factor would be that the protesters had gathered in the market square where Security Co provides security to the premises and personnel in that area. In [*Kalma v African Minerals Ltd and African Minerals \(SL\) Ltd and Tonkolili Iron Ore \(SL\) Ltd*](#), the Court of Appeal held that a party 'who calls on the services of the police to restore law and order cannot be liable in tort for the actions of the police simply because it is foreseeable that the police might use excessive force to achieve that result'.⁸⁵ Whether or not a duty of care could be established would depend on the precise details of Security Co's relationship with the police and the protesters.
78. Although Security Co only provided the police with vehicles, equipment and water, it might be feasible to establish that Security Co became a joint tortfeasor together with the police. This is because the level of assistance given only needs to be more than minimal. The crucial question would be whether Security Co (or persons whose mental states could be attributed to Security Co) intended for the tortious acts to be committed by the police. In practice, the longer that the mistreatment continued and the more sustained the acts of assistance, the easier it would be to prove that Security Co became a joint tortfeasor together with the police.



If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protesters.

79. Since the police are a public authority, the HRA also provides a possible claim for breaches of relevant rights in the ECHR (eg the right to life, prohibition of torture, right to liberty and security, no punishment without law, right to respect for private and family life, and freedom of expression). The right to protest is protected by articles 10 and 11 of the ECHR, albeit they are qualified rights so they can be restricted in certain circumstances. Qualifications aside, the police must facilitate peaceful protests rather than obstruct them.
80. The Independent Office for Police Conduct is an independent body that deals with complaints against the police. Organisations such as the Association Against Abuse of Police Powers and Privileges can assist.
81. It may be possible to submit a complaint to the Equality and Human Rights Commission, which is the regulatory body responsible for enforcing the Equality Act 2010. It is the UK's accredited National Human Rights Institute.
82. NGOs, such as [Liberty](#), have an established track record supporting cases that raise questions of freedom of expression / the right to protest.

⁸⁵ [*Kalma*](#), (n 28), per Coulson LJ at [103]. The Court of Appeal also rejected an alleged duty of care, including in respect of the suggestion that the company had created a source of danger.



Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?

83. Several claims that bear similarities to the allegations described in Case Scenario 1 have been brought in England, in particular in transnational cases. Examples include:
- a. [*African Minerals*](#) (concerning protests at an iron-ore mine in Sierra Leone – this was dismissed following a costly trial that included the English judge hearing evidence in Sierra Leone);⁸⁶
 - b. [*Xstrata/Glencore*](#) (concerning protests at a copper mine in Peru and dismissed on a belated limitation point);⁸⁷
 - c. [*Monterrico Metals*](#) (concerning protests at a mine in Peru, settled shortly before the trial was due to start);⁸⁸
 - d. [*Gemfields*](#) (concerning allegations against public and private security forces at a ruby mine in Mozambique, settled on a basis that included financial compensation and a suite of non-monetary measures);
 - e. [*Camellia*](#) (concerning allegations against security guards employed at agricultural businesses in Tanzania and Malawi, settled on a basis that included financial compensation and a suite of non-monetary measures); and
 - f. [*Petra Diamonds*](#) (concerning allegations against security forces at a diamond mine in Tanzania, settled on a basis that included financial compensation and a suite of non-monetary measures).
84. In a purely domestic setting, the family of Ian Tomlinson, who died after being pushed to the ground by a riot police officer during G20 protests in 2009, sued the Metropolitan Police, resulting in a settlement and formal apology for the relevant officer's excessive and unlawful use of force. There has also been litigation surrounding many other protests including Extinction Rebellion, the expansion of Heathrow, Black Lives Matter, the Defence & Security Equipment International arms fair, among other causes.



⁸⁶ *ibid.*

⁸⁷ [*Vilca v Xstrata Ltd*](#) [2018] EWHC 27 (QB).

⁸⁸ [*Guerrero & Others v Monterrico Metals plc, Rio Blanco Copper SA*](#) [2009] EWHC 2475 (QB).

CaseScenario 2

Q1

Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

Claims against Subsidiary Co

85. English tort law provides several bases to claim against Subsidiary Co for the range of harms caused by its extractive operations. This could include the following claims, of which private nuisance and negligence are most likely:

- a. Pursuant to the tort of **private nuisance**, Subsidiary Co could be liable for damage caused to the land (property rights) owned or occupied by claimants, to the extent that it can be shown that pollution is an unreasonable interference with the claimants' enjoyment of their property rights. Such a claim would not include damages for the personal injuries described, such as breathing problems and skin lesions, but damages can be claimed for the loss of amenity (or enjoyment) of the property.
- b. Under the **tort of negligence**, Subsidiary Co could be said to owe local communities affected by the oil spills a duty of care to take reasonable care to ensure that they are not harmed by the extractive project. Claimants will be able to claim for all the damages they have suffered that are a foreseeable consequence of a breach of duty.
- c. Under the **tort of trespass to land**, the discharge of oil onto another person's land without consent would also give rise to liability. This tort differs from negligence because it is actionable per se, that is without proof of damage.
- d. Under **public nuisance**, however, damages for personal injury may be recoverable, for example if it can be shown that the relevant claimants suffered a particular harm.⁸⁹ A public nuisance is something that endangers life, health, property, morals or comfort of the public or obstructs the public in the exercise or enjoyment of rights common to all. A claimant would be entitled to restrain a public nuisance in the name of the Attorney General (the person bringing the action is known as a 'relator'). In practice, public nuisance claims are relatively rare because of the statutory nuisance regime, but a claim for public nuisance should not be ruled out because, in addition to providing a basis to claim for personal injuries, it does not require the claimant to have a property interest that is affected.

⁸⁹ [Corby Group Litigation v Corby BC](#) [2008] EWCA Civ 463.

- e. Under the so-called rule in ***Rylands v Fletcher*** discussed in [38]-[40] above, depending on the precise fact pattern, Subsidiary Co may be strictly liable for the escape of contaminants from parts of the extractive project on the basis that it is a hazardous enterprise and if it can be shown the extractive project entailed a non-natural use of the land, for example if external chemicals were introduced and used.

Claims against Parent Co

86. In a purely domestic case, and provided Subsidiary Co is solvent and/or insured, a claim against Parent Co might be thought to be unnecessary or unlikely. However, there may also be strategic reasons why a claim against Parent Co would be brought, including if Parent Co itself played an important role in the relevant events.
87. Claims against parent companies have achieved greater prominence in insolvency or international settings, for example where the parent company is an anchor defendant to establish jurisdiction, to which the overseas operating companies might be joined pursuant to the relevant gateways under the Civil Procedure Rules.⁹⁰ The tort of negligence provides an established basis upon which a claim against Parent Co might be brought, provided it can be shown that Parent Co owed a duty of care towards persons affected by Subsidiary Co's operations and that Parent Co breached that duty, thus causing loss.
88. In [Vedanta](#),⁹¹ Lord Briggs explained at [49] that, in assessing whether a parent company owes such a duty of care, '[e]verything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'. Lord Briggs offered examples whereby a parent company might owe a duty of care, one of which included a scenario whereby 'in published materials, [the parent company] holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.'
89. There could be an argument that the Parent Co of X Group has such a duty based on its recent report to shareholders that it is committed to operating in an 'environmentally sound manner', but the contours of any such duty have not been tested. The principles in [Vedanta](#)⁹² were confirmed in [Okpabi](#),⁹³ where the Supreme Court added (at [147]) that de facto management by, or delegation to, 'emissaries' of a parent company could give rise to parent company liability.

⁹⁰ As to the insolvency setting: [Chandler](#) (n 60) was a domestic asbestosis claim where Mr Chandler's employer had been dissolved, so he sued the parent company; and [Thompson v Renwick Group plc](#) [2014] EWCA Civ 635 was a mesothelioma case where neither employer was solvent, so the claimant sued the parent company.

⁹¹ [Vedanta](#) (n 12).

⁹² *ibid.*

⁹³ [Okpabi](#) (n 13).

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.

90. There is a statutory nuisance regime set out in Part III of the Environmental Protection Act 1990. Pursuant to this regime, the local authority where Subsidiary Co's extractive project is located would be expected to serve and enforce abatement notices to prevent and abate statutory nuisances.
91. There may be various other remedies available, including in respect of the licence, permits or planning conditions associated with the extractive project, and breaches of article 8 (the right to private and family life) of the ECHR if the public bodies failed to take action.

Q3

Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

92. Several claims bearing some similarities to the allegation described in Case Scenario 2 have been brought in England. The following cases involved a transnational element:
- a. [*Motto and Others v Trafigura Limited and Another*](#) (concerning a claim by some 30,000 claimants following the dumping of hazardous waste in the Ivory Coast, settled for some GBP 30 million (USD 37,573,350.00) plus substantial costs running into the tens of millions of pounds);⁹⁴
 - b. [*Bodo Community and Others v Shell Petroleum Development Company of Nigeria Limited*](#) (concerning a claim against Shell's Nigerian subsidiary on behalf of thousands of claimants following oil spills in the Niger Delta, settled for some GBP 55 million);⁹⁵
 - c. [*Okpabi v Royal Dutch Shell plc*](#) (concerning a claim against Shell's UK parent company and its Nigerian subsidiary arising from oil pollution in Nigeria – ongoing);⁹⁶
 - d. [*Jalla and Others v Shell International Trading and Shipping Company and Another*](#) (concerning a claim against Shell entities following an oil spill from an offshore floating platform off the coast of Nigeria – ongoing);⁹⁷
 - e. [*Vedanta Resources plc v Lungowe and Others*](#) (concerning a claim by Zambian villagers against a UK parent company and its Zambian subsidiary for pollution from a large opencast copper mine, eventually settled);⁹⁸
 - f. [*Ocesa Pipeline*](#) (concerning a claim against a BP subsidiary regarding the consequences of the laying of an oil pipeline in Colombia on farmlands, dismissed following a trial on the merits);⁹⁹ and

⁹⁴ [*Motto & Ors v Trafigura Ltd & Anor*](#) [2011] EWCA Civ 1150.

⁹⁵ [*Bodo Community & Ors v Shell Petroleum Development Co of Nigeria Ltd*](#) [2014] EWHC 1973 (TCC).

⁹⁶ [*Okpabi*](#) (n 13).

⁹⁷ [*Jalla & Ors v Shell International Trading and Shipping Co & Anor*](#) [2021] EWCA Civ 63.

⁹⁸ [*Vedanta*](#) (n 12).

⁹⁹ [*Ocesa Pipeline Group Litigation*](#) [2016] EWHC 1699 (TCC).

- g. [Amerisur Resources](#) (concerning a claim against a UK parent company following oil pollution in Columbia).¹⁰⁰
93. In a purely domestic UK setting, some examples include:
- a. [Corby Group Litigation](#) (claim in negligence, breach of statutory duty and public nuisance against the local council relating to birth defects said to have been caused by the reclamation of a steelworks);¹⁰¹
 - b. [Colour Quest Ltd v Total Downstream UK plc](#) (a claim in negligence and nuisance arising from the Buncefield explosion);¹⁰²
 - c. [Dobson v Thames Water Utilities Ltd](#) (a group of 1,350 claimants brought a claim against the defendant in nuisance and negligence and for breach of article 8 of the ECHR relating to complaints about odour and mosquitoes caused by the Mogden Sewage Treatment Works);¹⁰³
 - d. [Anslow v Norton Aluminium Ltd](#) (damages for nuisance – odours, noise and dust – caused by an aluminium foundry);¹⁰⁴
 - e. [Barr v Biffa Waste Services Ltd](#) (a claim brought by some 150 households for nuisance caused by odours from a waste tip operated by the defendant);¹⁰⁵ and
 - f. [Sona Group Litigation](#) (claim in negligence and public nuisance for personal injury brought by 16,500 claimants arising from a fire on the defendant's premises).¹⁰⁶
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¹⁰⁰ [Bravo & Ors v Amerisur Resources plc](#) [2020] EWHC 2279 (QB).

¹⁰¹ [Corby Group Litigation](#) (n 89).

¹⁰² [Colour Quest Ltd v Total Downstream UK plc](#) [2009] EWHC 540 (Comm).

¹⁰³ [Dobson](#) (n 71).

¹⁰⁴ [Anslow v Norton Aluminium Ltd](#) [2012] EWHC 2610 (QB). The odour claim largely succeeded, but the noise, smoke and dust claims failed because of inadequate evidence of interference and/or causation.

¹⁰⁵ [Barr v Biffa Waste](#) (n 46). The Court of Appeal held that the common law of private nuisance existed independently from the statutory provisions, such that even if it was shown that an activity complied with statutory permits, this would not necessarily defeat a nuisance claim if the elements of nuisance are established on the facts.

¹⁰⁶ [Sona Group Litigation](#) [2015] EWHC 2264 (QB).

CaseScenario3

Q1

Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.

Claims against Factory Co

94. A number of potential claims exist against Factory Co, both for poor and/or exploitative conditions, and for deaths and injuries following the garment factory fire.
95. **Employment law** and extensive **health and safety regulations** provide a range of bases for the workers at the garment factory to claim against Factory Co for the unsatisfactory labour conditions. In addition to health and safety legislation, an employer must take reasonable care for the safety of employees. This takes effect as an implied term in an employment contract. The compulsory unpaid overtime might be a breach of the workers' employment contracts. In addition, the national minimum wage imposed by statute will apply. Therefore, a range of contractual and statutory civil claims will be available.
96. A claim in the **tort of negligence** will also be available on the basis that Factory Co owes a duty of care to the workers in its garment factory, for example to provide a safe working environment. Health and safety and/or employment legislation will inform the standard of care to be expected.
97. Instances of physical abuse will give rise to additional claims, such as in tort as a trespass to the person. Likewise, instances of sexual harassment will give rise to additional claims, including for discrimination under the [Equality Act 2010](#). Factory Co is likely to be vicariously liable for the misconduct of the individual abusers.
98. Section 1(1) of the [Protection from Harassment Act 1997](#) provides that '[a] person must not pursue a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other'. Section 3(1) provides that a breach of section 1(1) amounts to a tort which may be the subject of a claim in civil proceedings.¹⁰⁷
99. In respect of the fire, claims can be brought by dependants on behalf of the deceased's estate under the [Fatal Accidents Act 1976](#), and the survivors can bring civil claims for the injuries they have suffered. Various features of the Case Scenario 3 make it likely that a negligence claim would succeed, including barred windows, closed emergency exits, smoke alarms that did not work and repeated failures to implement safety protocols and fire evacuation procedures.

¹⁰⁷ The conduct must pass a threshold of seriousness before the tort of harassment is established under the 1997 Act. See [Majrowski v St Guy's and St Thomas's NHS Trust](#) [2006] UKHL 34.

Claims against Brand Co

100. A claim against Brand Co in this scenario would be relatively novel. English case law draws a distinction between (i) a defendant who harms the claimant compared to (ii) a defendant who fails to protect the claimant from harm (including harm caused by third parties); and between (iii) a defendant who causes harm (by making things worse) as opposed to (iv) a defendant who fails to confer a benefit (by not making things better). At first glance, Brand Co appears to be in the position of (ii) or (iv), and on standard principles Brand Co would not usually bear civil liability. But much will depend on a detailed analysis of the facts.
101. A negligence claim could arise against Brand Co by application of established principles of the circumstances in which a person may be liable for torts committed by a third party. The routes of liability identified by the UK Supreme Court in [Vedanta](#) and [Okpabi](#) could, depending on the relevant facts, apply to a supply or value chain context.¹⁰⁸
102. Although Factory Co supplies ‘many large international clothing retailers’, Brand Co is ‘the major purchaser’ (my emphasis). It is also relevant that a feature of the poor and exploitative conditions is said to be production targets, and Brand Co has held itself out as committed to responsible business practices. One can see that some of the features of a possible negligence claim appear to be present (in particular [Vedanta](#) route 4),¹⁰⁹ but such a claim would push the boundaries of the existing authorities. One can also see an argument that the relationship of foreseeability and proximity between Brand Co and the workers may be such as to impose a duty of care on Brand Co, but there would likely be a factual dispute as to whether the conduct of Factory Co consists of an intervening act which breaks the chain of causation.¹¹⁰
103. It seems unlikely that the scope of any duty of care on Brand Co would cover the full range of abuses. Foreseeability alone does not create a duty of care. It would also need to be established that Brand Co breached the relevant duty of care and that this caused the harm described.
104. Unjust enrichment offers another novel but potential cause of action against Brand Co. It could be said that Brand Co has been enriched at the workers’ expense, for example if it has bought garments from Factory Co at low prices (which are directly linked to the terrible labour conditions). Given that such enrichment is somewhat removed and therefore indirect, any claim would need to fall within a clear exception to the usual requirement for direct enrichment, for example if it could be shown that the labour conditions and Brand Co’s purchase of garments were all part of a ‘single scheme’. It would also be necessary to identify factors that make Brand Co’s enrichment unjust, such as the vulnerable position of the workers or other illegalities.

¹⁰⁸ [Vedanta](#) (n 12); [Okpabi](#) (n 13).

¹⁰⁹ *ibid.*

¹¹⁰ See the discussion in [Begum](#) (n 14) [38]-[50].

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

105. The deaths from the fire may result in an inquest, at which findings and recommendations will be made. It is also possible that a public inquiry would be convened, given the scale of fire, and the lessons to be learned from it. It is likely that criminal proceedings would follow: the breach of health and safety legislation can result in strict liability.
106. It is possible that various offences under the [Modern Slavery Act 2015](#) will also have been committed. This legislation provides the court with powers to make certain civil orders (eg Slavery and Trafficking Prevention Orders), and established an independent [Anti-Slavery Commissioner](#) to encourage good practice in preventing modern slavery and to assist with the identification of victims.
107. While not of direct comfort to the victims and/or families in this particular scenario, it is likely that an incident of this scale, if it were to take place in the UK, would give considerable impetus to further legislative reform in order to introduce mandatory human rights due diligence legislation. In 2017, a Parliamentary Committee published a report titled [Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability](#). One of the recommendations made by the Committee included the following:

'We recommend that the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the Bribery Act 2010. This would require all companies to put in place effective human rights due diligence processes (as recommended by the UN Guiding Principles), both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided. It should include a defence for companies where they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate that this has been done.'

108. This recommendation was the subject of further consideration in a report published by the British Institute of International and Comparative Law titled [A UK Failure to Prevent Mechanism for Corporate Human Rights Harms](#). This included a recommendation that a right to civil action should be established for those affected by a failure to prevent human rights harms, with preventative and injunctive orders and state-based oversight mechanisms. A [coalition](#) of civil society groups are campaigning for a new law that would impose liability on companies that fail to take adequate steps to prevent human rights and environmental abuses in their operations or supply and value chains.



Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

109. In June 2017, a fire in the Grenfell tower block in London killed and injured many residents. A [public inquiry](#) is ongoing, as is a civil claim against various defendants including the Royal Borough of Kensington and Chelsea (the landlord), a contractor involved in refurbishing the tower block, and companies said to have supplied combustible cladding panels and insulation.
110. The [Sonae Group Litigation](#) was a claim in negligence and public nuisance for personal injury arising from an industrial fire in June 2011, but the claim failed as the Judge found that the test claimants had not suffered actionable injury.¹¹¹
111. In [Colour Quest Ltd v Total Downstream UK plc](#)¹¹² various companies brought a claim in negligence and nuisance arising from the Buncefield oil depot explosion in 2005. Fortunately nobody was killed but there were dozens of people injured. Residents in the area also brought claims for personal injury, uninsured losses, loss of earnings and a fall in house prices.
112. Civil claims related to workplace abuses, or exposing workers to dangers, are commonplace in the United Kingdom. Well known examples include [Chandler v Cape plc](#);¹¹³ [Antuzis v DJ Houghton Catching Services Ltd](#);¹¹⁴ and [Galdikas and Others v DJ Houghton Catching Services Ltd and Others](#).¹¹⁵
113. A number of claims have also been brought in the UK related to overseas violations. Well-known examples include:
 - a. *Ngcobo and others v Thor Chemicals Holdings Ltd* (November 1996, per Maurice Kay J, unreported);
 - b. [Connelly v RTZ \(Namibia\)](#) [1998] AC 854;
 - c. [Lubbe and others v Cape plc](#) (No. 2) [2000] UKHL 41;
 - d. [Young v Anglo American South Africa Ltd](#) [2014] EWCA Civ 1130;
 - e. [AAA v Unilever plc and Another](#) [2018] EWCA Civ 1532;
 - f. [Begum v Maran \(UK\) Ltd](#) [2020] EWHC 1846 (QB);
 - g. [Rihan v Ernst & Young Global Ltd and Others](#) [2020] EWHC 901 (QB); and
 - h. [Josiya and Others v BAT and Others](#) [2021] EWHC 1743 (QB).



¹¹¹ *Sonae Group Litigation* (n 106).

¹¹² *Colour Quest Ltd* (n 102).

¹¹³ *Chandler v Cape plc* (n 60).

¹¹⁴ [Antuzis v DJ Houghton Catching Services Ltd](#) [2019] EWHC 843 (QB).

¹¹⁵ *G v DJ Houghton Catching Services Ltd* (n 25).

