Transboundary Accountability for Transnational Corporations: Using Private Civil Claims

Myfanwy Badge

WORKING PAPER

March 2006

If you would like to comment on this paper, please email lbedford@chathamhouse.org.uk

Chatham House
10 St James’s Square
London
SW1Y 4LE
www.chathamhouse.org.uk

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Myfanwy Badge is a legal and policy consultant and a former litigation partner in the law firm, Lovells.
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Comments on this paper and the issues raised by it may be addressed to:

Ms Elizabeth Wilmshurst
Senior Fellow in International Law
Chatham House
10 St James’s Square
London
SW1Y 4LE
EWilmshurst@chathamhouse.org.uk

Transboundary Accountability For Transnational Corporations; Using Private Civil Claims
Myfanwy Badge (April 2006)
1 Introduction

The effective legal accountability of TNCs for their activities in developing countries raises a series of challenging issues. While there are numerous international codes to promote socially responsible behaviour by TNCs, these are largely voluntary. There is debate about the possibility and desirability of transforming some of the voluntary codes into binding law or creating new legal mechanisms to impose obligations on TNCs. The United Nations Human Rights Sub-Commission produced draft Norms in 2003 on the responsibilities of TNCs with regard to human rights based on existing agreements and standards and there were calls from civil society for them to be made binding. The UN Commission on Human Rights stated in 2004 that, whilst the draft Norms contained useful elements and ideas for consideration, they had no legal standing and the issue of human rights and transnational corporations is now under consideration by a Special Representative of the Secretary General. Various attempts have been made within different countries to approach the issues: for example, Corporate Social Responsibility bills imposing extraterritorial obligations of varying types on TNCs under individual national laws have been sponsored, and rejected, in the USA and Australia; and the issue of the liability of corporations for activities overseas and of subsidiaries has been raised in connection with the UK Company Law Review, the proposed new offence in the UK of corporate manslaughter, and the OECD Convention on Bribery 1997 together with the reform in the UK of the bribery and corruption offences. There is no international agreement requiring standards to be set more generally for the activities of corporations overseas. In the absence of internationally agreed standards and enforcement mechanisms, this paper considers the possibilities for bringing private civil claims in national courts against TNCs in relation to their activities in developing countries. The existing legal framework forms part of the consideration of any new system and the civil law principles, and the reasons behind those principles, constitute an instructive conceptual framework for addressing the issues, regardless of the actual outcome.

Some of the most complex issues relating to TNCs arise out of the fact that, in law, they are not one corporate entity but several, linked by shareholding or contractual relationships which give rise to varying degrees of control or influence over the activities of subsidiaries or associates. In addressing the legal obligations of TNCs, it is necessary to consider the obligations of the constituent entities separately. This paper focuses on the liability of companies which have control over the group or associates.

The other principal complicating factor in relation to TNCs is that the controlling companies are often incorporated and/or headquartered in a different jurisdiction from the operating companies and their activities. This means that, as well as the question of the extent of the substantive rights and

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1 The expression “TNC” is used in this paper as a general term without a precise legal definition. Comments are made on various specific corporate structures and legal relationships which may constitute TNCs in the main text.
2 E/CN.4/2004/L.73/Rev.1
3 Appointed pursuant to resolution 2005/69 with a mandate
   a. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
   b. To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
   c. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
   d. to develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
   e. to compile a compendium of best practices of States and transnational corporations and other business enterprises.

The Special Representative submitted his interim report setting out the overall context of his mandate, his general strategic approach and his current and planned future activities on 22 February 2006 e/CN.4/2006/97. The draft Norms themselves are discussed in paragraphs 56-69.
obligations themselves, there are issues as to which country’s courts should determine disputes (jurisdiction) and which country’s law should apply to the dispute (governing or applicable law).

Although the claim against a controlling company may be determined in the courts of its home state, in general, the law of the place where the harm occurred rather than the law of the home state will determine the extent of the controlling company’s obligations. The area of civil law which addresses wrongful harm caused by one person to another outside the contractual context is tort or delict, and this is common to many legal systems. There are common features between legal systems which indicate that there will be common issues and arguments in considering the liability of TNC controlling companies for harm caused by subsidiaries and associates. The USA and most other Commonwealth countries have legal systems based on English law with similar basic principles, although the legal systems may have diverged in certain respects (“common law” legal systems). Case law from other common law jurisdictions may be, and is, considered by courts. “Civil law” systems, which form the legal systems of many of the other developed and developing country legal systems, also have principles for attributing liability for non-contractual harm, often based on codified provisions setting out basic principles, supplemented by more specific statutes as well as case law (“civil law” systems). They address similar basic issues to the common law. There is consideration of harmonisation of tort law across the European Community and Europe generally. In this paper, the relevant English legal principles are set out, then applied to the case studies, and there is also brief commentary on other legal systems. In the next stage of this project, the approach of other legal systems will be examined in more detail.

In this paper, the operation of the civil claims framework is explored by reference to fictitious case studies to demonstrate the ultimate outcome of the inter-relation between the issues of substantive rights and obligations, governing law and jurisdiction. The case studies illustrate different scenarios of wrongdoing by a fictitious TNC, with different types of harm resulting, and different corporate control relationships. The case studies have been constructed on the basis of some of the matters addressed by the draft UN Norms on the responsibilities of TNCs which might be formulated as torts rather than breaches of human rights4, supplemented by discussions with individuals. However, no

4 Overlap between civil causes of action and the matters covered by the draft UN Norms may be very briefly summarised as follows, although this is not necessarily exhaustive. Equal opportunity and non-discriminatory treatment: breaches of these rights may well be covered by anti-discrimination legislation in the home state of the TNC parent company which may provide for civil liability in the event of breach, but such legislation is likely to apply only to activities in the home state. Any equivalent legislation in the host state would have to be construed to see whether it was applicable to the relevant company. Right to security of persons: breaches of these rights may give rise to civil liability for torts or delicts such as assault or false imprisonment under home or host state law. The relevant issue in many cases would be whether the parent company concerned was liable for wrongful acts committed by subsidiaries or associates. (In the US, civil claims in relation to this have been made under the Alien Tort Claims Act.) Rights of workers: again, these rights may be covered by home state legislation but such legislation is likely to apply only to activities in the home state and to the direct employer. Applicability of any host state legislation would need to be considered. If breach of workers’ rights caused harm to the worker, there may be civil liability if the requirements for a claim in negligence or the equivalent under host or home state law were established; there may be the possibility of suing in tort or delict for assault or false imprisonment in relation to forced labour and connected practices, but the real issue here may again be whether the parent company is liable for acts of subsidiaries or associates. Respect for national sovereignty and human rights: it is difficult to formulate an overlap between these broadly-framed principles and civil liability, which provides for compensation for actual harm caused to one person by another, save insofar as these are dealt with by the other more specific principles. Claims have been made in relation to complicity in the human rights breaches of States under the Alien Tort Claims Act in the US. Consumer protection: there may be relevant legislation in the home state but, again, there will be an issue as to territorial applicability. Applicability of any host state legislation would need to be considered. There is potential civil liability in negligence or the equivalent in respect of harmful products. Environmental protection: Civil liability essentially covers harm to the individual’s person and property, therefore harm to the environment per se will not be covered. There may also be limits on recovery for economic loss suffered by individuals as a result of environmental damage. There are also international schemes allocating liability and facilitating claims in specific areas e.g. oil pollution at sea, carriage of hazardous goods and nuclear claims.
fact-finding exercise as such has been carried out and this paper does not address the prevalence of any type of activity, harm, or legal or operational structure, either generally or in particular regions or industries.
2 Executive summary

The fundamental issue underlying this paper is the extent to which companies which have legal or de facto control over other companies in developing countries may be liable under civil law for harm caused by those companies and, if so, the nature of the harm. Put another way, what is the extent of companies' obligations to take action to investigate, make stipulations about, and monitor the activities of companies over which they have legal or de facto control?

The English tortious principles of causation and negligence/duty of care to an extent permit the weighing of the different potentially relevant factors and policy issues in relation to the imposition of obligations on a parent company in relation to the activities of its subsidiaries. The imposition of a duty of care on a parent company does not in principle seek to treat the subsidiary as automatically identical with the parent company: it implicitly accepts the parent's separate personality and functions, but identifies distinct obligations for it qua controller. On this approach, the existence and the scope of the duty may differ in different circumstances, and there will be situations where harm is caused by a subsidiary or associate and the parent is not liable. There may be a view in some quarters that this is not appropriate and that a parent should be liable for any harm caused by its subsidiaries. However, there have been significant attempts in past cases in the UK to equate the parent and subsidiary by arguing that the subsidiary was an agent of the parent, that the separate corporate form of the subsidiary should be disregarded (piercing the corporate veil) and the parent held liable, and/or that there should be some sort of joint “enterprise” liability for groups. These approaches have been comprehensively rejected by the English Court of Appeal as not being open to them under the existing law (Adams v Cape in 1990). This would therefore be a matter for consideration by parliament. Some of the case studies contain examples of cross-group management structures where the attribution of acts, omissions and knowledge of particular individuals to separate entities within the structure is very difficult to analyse under existing principles. Further information about the nature and prevalence of particular management structures would be of value.

There is case law which indicates that, in order to give rise to a duty of care on the part of a parent company, a significant degree of day-to-day involvement in the activities of the subsidiary on the part of the parent is required. However, there is a view that it is not fair and reasonable to allow a company to set up, purchase or control a company operating in a developing country, and potentially to take profits from it whilst enjoying the protection of limited liability, without imposing a duty on the company at least to take reasonable steps to protect the workforce or others foreseeably affected by its operations from foreseeable risks, particularly where those affected are vulnerable due to matters such as lack of education and poverty, and even more so where the local legal system may not be adequate to protect them. Moreover, a legal principle to the effect that the less involvement a parent company has in its subsidiary’s activities, the less likely it is to be liable for harm caused by the subsidiary, may inhibit companies from providing beneficial oversight over their subsidiary’s activities. More discussion of the issues is set out in the exposition of the principles and in the case studies below. Further information would be of value about the realities of operations in developing countries and the factors which may in practice weigh in favour of, and against, the imposition of such a duty, how such a duty would operate in practice, its extent, and whether it would in fact provide protection in the situations which in reality are likely to arise.

In relation to liability for associates apart from subsidiaries, such as contractors, suppliers, or joint venture partners or companies, there are English civil law principles whereby a party may be held liable for procuring a tort, or conspiring with another to cause injury, but their application is limited and requires a level of active participation and intention which may not correspond to the level of
obligation that some parties seek in relation to TNCs. Liability for associates can also be analysed by reference to the duty of care principles although difficult issues arise, particularly on causation given the TNC’s lack of legal powers in relation to a third party associate. The matter is also complicated in the case of a group, as it is also necessary to address which group company is the associate. Further information on the legal relationships, and also on the practicalities and the realistic options facing companies in relation to particular types of associates in particular industries and regions would be of value.

There are limitations on the types of abuse covered by civil law compensation claims. Matters such as child labour, excessive working hours, and racial or sexual discrimination will not amount to claims in tort under English law (assuming the absence of applicable statutory provision) unless all the elements of the cause of action are established, including actual harm of the types which tort law recognises. There are also limitations in English law on recovery for economic loss, which may prevent recovery for damage to livelihood consequent on harm to something which does not belong to the claimant, for example, pollution to a river. Comparison with civil law systems, which do not necessarily have the same restrictions, may be instructive.
3 Legal structures of TNCs

Although a TNC may be perceived by the general public and perhaps promoted by itself as one entity, it will generally consist of a group of companies, with one company holding shares in another, often in a structure similar to a family tree.

The usual practice for TNCs operating in developing (and indeed developed) countries is for a company (subsidiary) whose shares are wholly or substantially owned by another group company to be incorporated or acquired in the developing country and for the subsidiary to employ staff, lease or purchase premises, and enter into contracts relating to the business in the developing country. Large TNCs may have many operating subsidiaries and there may be companies interposed between the ultimate shareholder company (parent) and the operating subsidiary. The corporate structure may be determined by reference to factors other than the nature of the operations in question, such as tax considerations or local regulatory requirements. Companies may be set up to provide specific functions for the whole group, such as the provision of finance. Assets within a group are held by different companies and the parent company may not hold significant assets; some parents are pure “holding” companies and have no assets at all.

Senior individuals in TNCs may carry out management roles relating to operations in more than one country and involving more than one company. They may be directors of more than one company and the management structure crossing company boundaries may be complex. The identity of the company by which they are employed may reflect a need to simplify or protect their employment benefits where they are working overseas as much as their operational responsibilities. Because in law the constituent group companies are treated as independent legal entities, the assets of the parent company and the rest of the group are not available, without more, to satisfy the liabilities of subsidiaries in the event of claims against them arising out of their activities in developing countries. However, there are complex legal issues as to whether and when one company may be liable for the activities of another, and whether and when the knowledge and actions of particular individuals are to be attributed to particular companies within the group with whom they may have a connection.

TNCs may have associates in projects in developing countries and the activities of these associates may be the cause of harm. They may be local contractors or joint venture partners, or suppliers of goods, such as crops, raw materials, or processed or manufactured goods. Joint ventures often involve the creation of a locally-incorporated joint venture company in which the consortium members hold shares and there may be a joint venture/shareholders agreement regulating the relationship between the shareholders and their rights and obligations in relation to the venture, including the joint venture company. The nature of those rights may vary. There are limitations on the circumstances in which a person (whether human or corporate) will be held liable for the acts and omissions of a third party but the associates of a TNC in a business venture in a developing country are not entirely arm’s length third parties; the degree of legal or practical power or influence may vary considerably.

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5 This overlaps with the issues of the “sphere of influence” and “complicity” of TNCs referred to in the report of the UN High Commissioner on Human Rights in February 2005 and recommended for further research and clarification by the special representative appointed pursuant to the resolution of the Commission on Human Rights in April 2005.
4 General principles of UK law

The questions which must be addressed by the parties and the courts in relation to any civil claim which has a connection with more than one country are

- What law governs, or is the “applicable” law in relation to, the substantive claim - that of the host state, the home state or some other?
- Is there a right under the governing law which gives rise to a claim for compensation by the victims (the “cause of action”)?
- Does the home state have jurisdiction to hear the matter, and will it exercise that jurisdiction?

In order to determine the governing law, it is necessary to characterize the type of cause of action and therefore the potential causes of action are dealt with first below.

4.1 Cause of action

English law provides for one individual to obtain compensation from another for wrongful harm outside the contractual context principally via the common law of tort. Tort law has been codified, clarified and/or extended by statute in specific areas such as health and safety in the workplace/employers’ liability, product liability and occupier’s liability. The principal relevant torts for cases the subject of this project are:

Torts relating to harm to person and property
- negligence
- statutory torts
- nuisance and related torts

Torts relating to personal assault
- trespass to the person - assault, battery and false imprisonment
- intimidation

Torts relating to trade/livelihood
- unlawful interference with trade
- abuse of dominant position under competition law

The harm complained of may result from the activities of associates such as suppliers, contractors, joint venture partners, or (in view of their separate corporate personality) subsidiaries or other group companies. The specific legal principles which may apply in connection with liability in these circumstances (procurement of a tort, conspiracy to injure, agency/vicarious liability, and piercing the
corporate veil of a company which is a “mere façade”) are dealt with below under the heading “Associates”. Relevant principles relating to the attribution of the knowledge or actions of a particular individual to a corporate entity, and heads of damages which are recoverable for torts are also dealt with separately.

4.1.1 Torts relating to harm to person and property

4.1.1.1 Negligence

The principal elements of a negligence action are

- The defendant carried out an act (or, in some circumstances, an omission)
- The act or omission caused the claimant harm
- The circumstances were such that the defendant had a duty not to carry out that act, or omit to act (a “duty of care”)
- The carrying out of the act, or the omission to act, was negligent i.e. it fell below the standard of conduct which objectively would be expected in the circumstances
- The harm which the claimant has suffered was sufficiently foreseeable and is of a type which the law recognises as appropriate for compensation.

4.1.1.1.1 Causation

The claimant must show a sufficient causal link between a tort and the harm he has suffered. Not all actions which form part of the causal chain from a philosophical or scientific point of view are sufficient causal links for the purpose of legal liability. In negligence, this question frequently overlaps with whether the defendant owes the claimant a duty of care.

The claimant must establish that

- The defendant’s conduct did as a matter of fact result in the harm to the claimant. This is usually addressed by the “but for” test i.e. would the harm not have occurred “but for” the defendant’s act or, put another way, if the defendant had not committed the wrongful act, would the harm have happened anyway. (For example, even if the hospital had treated the claimant without negligence, the patient would have died anyway because even non-negligent treatment could not have saved him; even if the employer had provided safety equipment, the employee would not have used it (although in this case the scope of the duty has also to be considered as well as it may extend to supervising the employee to make sure he does use the safety equipment)); and
- Was the defendant’s conduct an “effective” or “operative” cause, or is the harm to the claimant too “remote” a consequence” of the defendant’s conduct? This is a practical enquiry and is decided by the courts on the basis of judicial “common sense”. In negligence cases, where the issue arises most frequently, it overlaps substantially with the policy question of whether the defendant owes the claimant a duty of care in relation to the harm suffered.

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6 C&L ch 8 Negligence
7 C&L ch 2 Causation in Tort: general principles; ch8 para 8-11 Notional Duty and Causation
In cases involving a series of events, only one of which is the defendant’s wrongful conduct, the court has to determine whether any of the events is so significant causally that it obliterates the wrongdoing of the defendant and breaks the chain of causation (a “novus actus interveniens”) in which case the defendant will not be liable\(^8\). If the claimant’s own conduct, for example, in failing to use safety equipment, contributes to the harm he\(^9\) has suffered, his recoveries may be reduced proportionately (“contributory negligence”). He will not be able to recover for loss he could have avoided by taking reasonable steps (mitigation of loss).

Where the claimant alleges that, if the defendant had taken a particular action, a third party would then have taken, or refrained from taking, a particular step which would have avoided or reduced the harm suffered by the claimant, the causation issue is addressed by the courts by assessing the value of the loss of the chance that the third party would have taken that step. The claimant must establish that the chance is real and substantial and not negligible. His damages will be discounted to reflect the degree of uncertainty or otherwise of the outcome\(^10\).

**The duty of care**\(^11\)

The courts carry out a balancing exercise to determine whether a duty of care exists. The relevant considerations are now formulated as whether

- the harm suffered by the claimant is reasonably foreseeable
- there exists between the plaintiff and the defendant a sufficiently close relationship (“proximity”) and
- it is “fair, just and equitable” to impose liability on the defendant.

However, these issues overlap and are essentially part of one balancing exercise\(^12\).

**Reasonable foreseeability** relates to the knowledge that someone in the defendant’s position would be expected to possess. The greater the defendant’s awareness of the potential for harm, the more likely it is that this criterion will be satisfied. The type of harm must be foreseeable and it must be foreseeable that it would happen to the particular person who has been harmed, or to a person in a class which includes the victim.

**Proximity** may be physical, it may relate to the parties’ circumstances (e.g. a professional relationship), it may relate to the closeness of the causal connection between the action taken and the harm which resulted, or it may result from an assumed responsibility\(^13\).

“**Fairness, justice and reasonableness**” encompasses a wide range of considerations. It includes justice as between the parties, the effect that the imposition of a duty of this type may have on the operation of the legal system and its principles, and the social and public policy implications of imposing a duty. The courts are hesitant to look at broad questions of social, economic and financial policy as they do not have the full information or the basis on which to evaluate them. One senior judge noted that it had been said that

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\(^8\) C&L para 2-03, 2-36-59
\(^9\) Throughout this paper the terms “he” and “his” include “she” and “her”.
\(^10\) C&L para 2-53
\(^11\) C&L ch8 s2 Duty of Care
\(^12\) Caparo Industries plc v Dickman[1990] 2 AC 605. C&L para 8-15
\(^13\) Sutherland Shire Council v Heyman[1985] 60 ALR 1 Deane J at p55-56
“public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, [and] that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of mere generalities….“\(^\text{14}\),

The usual approach of the courts is to determine the existence of a duty by analogy with existing established categories of duty in the interests of certainty of the law. However, in exceptional cases where the interests of justice require it, the categories may be expanded\(^\text{15}\). The House of Lords in a case in 1999 indicated that moral considerations, in the sense of what the ordinary citizen would regard as right, do form an important part of the courts deliberations (in that case, in fact, restricting liability). Lord Steyn stated\(^\text{16}\)

“It may be objected that the House [of Lords] must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes the ordinary citizen would regard as right…..The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches.”

Perceptions of community attitudes, values and goals have been taken into account in some cases\(^\text{17}\). There is little direct authority on the liability of controlling companies in relation to activities of subsidiaries or associates in developing countries and the question of liability is therefore considered in the case studies substantially by reference to general principles.

4.1.1.1.2 Duty of care in relation to acts of third parties

One of the most problematic areas in relation to the activities of TNCs’ overseas is the question of the liability for associates. Associates may be suppliers, contractors or joint venture partners or companies and, because of the separate legal personality of companies within a group, the same legal principles may apply to the liability of companies for the activities of overseas subsidiaries or sister companies.

There is no general duty under English law to prevent a third party from causing damage to another\(^\text{18}\). There could be difficulties in establishing the necessary foreseeability of harm given the difficulty of knowing how the third party would act, and there may also be issues as to causation. However, more fundamentally, the courts are reluctant to impose liability in negligence for “pure

\(^{14}\) *Spring v Guardian Assurance plc* [1995] 2AC 296 at p 326 by Lord Lowry. C&L para 8-20


"When confronted with a novel situation the court does not...consider these matters [foreseeability, proximity and fairness] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional cases will the court accept that the interests of justice justify such an extension”.

\(^{16}\) *McFarlane v Tayside Health Board* [1999] 3WLR 1301at p1318-9. See also C&L ch 1 s2 The functions and development of tort liability, on the principles of corrective, distributive and retributive justice.

\(^{17}\) C&L cases cited in note 69 to para 8-19.


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omissions” on the basis that there is a general perception that we should not be held responsible for the deliberate wrongdoing of others 19.

Certain narrow exceptions to the rule against imposing liability for the actions of third parties were identified by the House of Lords in the case of Smith v Littlewoods Organisation Limited in 1987 20:

- Where there is a special relationship between claimant and defendant based on an assumption of responsibility by the defendant to the claimant (e.g. a decorator left alone to work in premises and told to lock the premises when he left, having failed to do so, was held liable for damage caused by a thief who entered in his absence);
- Where there is a special relationship between claimant and defendant based on control by the defendant (e.g. the Home Office was liable for damage caused by boys in a corrective institution whom they negligently allowed to escape; a school authority was liable for injuries suffered by a motorist in an accident caused by a child escaping from a school close to a road; a parent was liable to passengers injured in an accident in a car which he had allowed his son to drive in dangerous weather conditions);
- Where the defendant is responsible for a state of danger which may be exploited by a third party (e.g. a defendant was liable for injuries caused by a horse-drawn van which he had left unattended, when the horse bolted after a boy threw a stone at it);
- Where the defendant is responsible for property which may be used by a third party to cause damage (e.g. fireworks were well known to be stored in a defendant’s unlocked garden shed for a fireworks party, local boys went into the shed and set off the fireworks, causing a fire which spread to neighbouring land, and the defendant was liable for the resulting damage).

Lord Goff, in the course of giving the leading judgment in Smith v Littlewoods, indicated that English law may be viewed by some as too restrictive on this point and due for reconsideration, particularly by reference to more affirmative duties of good neighbourliness in civil law countries, although he noted that civil law countries in fact impose strict limits on such affirmative duties 21.

Associates of TNCs in developing countries are not necessarily entirely arm’s length third parties and whether the TNC owed a duty of care in relation to harm they caused would need to be considered in each case on the basis of the general principles of foreseeability, proximity and fairness outlined above, having regard to the facts of that case.

The specific issue of whether, or in what circumstances, a parent or sister company would, or would not, owe a duty of care in relation to the activities of a subsidiary has been given some consideration by the courts. There is no direct English authority on the point; a number of proceedings have been

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19 The reluctance of the courts to impose liability for pure omissions was explained by Lord Hoffman in a 1996 judgment, Stovin v Wise [1996] AC 923 at p 943-4, quoted in C&L para 8-44.

“One can put the matter in moral or political terms. In political terms it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose on him a duty to rescue or protect. A moral version of this point may be called the “Why pick on me?” argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms the efficient allocation of resources usually requires an activity should bear its own costs….But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else….So there must be some special reason why he should have to put his hand in his pocket.”


21 p271
issued but settled after decisions on interim procedural issues before any consideration was given to the issue of duty of care\textsuperscript{22}. The matter was, however, considered by the Australian Court of Appeal in \textit{James Hardie v Hall}\textsuperscript{23}, which related to illness suffered by employees in New Zealand as a result of working in contact with asbestos. The group in question consisted of a New Zealand subsidiary and an Australian sister and parent company.

The claimants alleged as evidence of proximity (foreseeability was conceded), inter alia, the facts that

- requests, recommendations and instructions given by the Australian sister company were acted on by the NZ subsidiary (NZ)
- an executive committee controlled the whole enterprise
- correspondence between NZ and its Australian sister company was referred to as “interhouse”
- there were annual group-wide conferences of factory executive staff and publications relating to the group as a whole
- the works director in NZ answered to works director in Australia
- the asbestos was sourced and allocated to NZ by the Australian sister company, which also appeared to have provided technical and scientific information and latterly health and safety information to NZ on asbestos
- The Australian parent company (Holdings) held 95% of the shares in NZ and the articles of association of NZ provided that all future ordinary directors should be appointed by Holdings. The ordinary directors had power to appoint and dismiss special directors, who became known as local directors, and were normally resident in New Zealand\textsuperscript{24}.

The judge at first instance held that the Australian sister company and the parent company did owe the claimants a duty of care on the basis that each exercised actual influence over the NZ subsidiary and the NZ subsidiary was part of single enterprise with them and this put the Australian companies in a relationship of proximity with the New Zealand subsidiary\textsuperscript{25}.

However, this was reversed on appeal. Sheller JA, delivering the judgment of the Australian Court of Appeal, characterised the basis of the claimants’ duty of care argument as being the degree or manner of control or influence of the Australian companies over the NZ subsidiary\textsuperscript{26}. He cited a decision of the Chief Judge in the Alabama district court in the \textit{Silicone Gel Breast Implants Products Liability Litigation}\textsuperscript{27} in 1993 in which the courts of Alabama had refused to extend a duty to control which exists under US law in certain established relationships (such as parent and child, master and servant, possessor of land or goods and licensee, person in charge of a person with dangerous propensities) to the relationship between parent and subsidiary. He distinguished a previous Australian Court of Appeal decision in which the parent had been held liable, \textit{CSR v Wren}\textsuperscript{28}, on the basis that, in that case, employees of the parent directed or controlled the day-to-day operations of the subsidiary, the system of work and the working conditions, and the factory manager and foreman was a CSR employee. He examined a number of cases relating to the circumstances in which the corporate veil may be pierced and said that the duty of care argument in this case was in reality an

\textsuperscript{22} Cape \textit{v} Lubbe [1999] ILPr113 (1\textsuperscript{st} CA) some consideration of the grounds on which the duty of care was argued at p117; RTZ \textit{v} Connelly 1998 AC 854; Sithole \textit{et al v} Thor Chemical Holdings Ltd \textit{et al} [1999] EWCA Civ 706 3 February 1999. See also comments in Gore-Browne on Companies para 7\textsuperscript{[10]}.
\textsuperscript{23} [1998] 43 NSWLR 554
\textsuperscript{24} p561-5
\textsuperscript{25} p579
\textsuperscript{26} p580A
\textsuperscript{27} 837 F Supp 1128
\textsuperscript{28} [1998] Aust Torts R 81-461
attempt to pierce the corporate veil, and was prohibited by *Adams v Cape Industries plc*²⁹.

*Adams v Cape Industries plc* was a UK Court of Appeal decision in which the court refused to pierce the corporate veil of a subsidiary. However, it related to whether or not the parent would be deemed to be resident in the US via its subsidiary for the purposes of the enforcement of a US default judgment against the parent in the UK. The question of the existence of a duty of care did not arise. (This case is referred to in detail in “Associates/Agency” below). The principles relating to the piercing of the corporate veil are clearly a factor to be taken into account in relation to legal policy and the operation and coherence of the law but wider issues of justice and fairness which form part of a consideration of whether or not a duty of care should be imposed were not really addressed. This was, of course, not a case involving a subsidiary operating in a developing country.

### 4.1.1.1.3 Type of harm

As part of the risk distribution issue, not all types of harm may be compensated in negligence claims. The type of harm and the class of victim must be foreseeable.

Physical harm to a person (including psychiatric injury) or to his property will be compensated, as will economic loss directly consequent on the physical harm, provided the harm is foreseeable.

However, the general rule is that pure economic loss which is not consequent on physical harm to the person’s own person or property but on damage to something on which he relies will not be compensated. This would apply in the context of this project to loss of livelihood due to pollution or perhaps forced eviction. The reason for this rule is that there was perceived to be a risk of indeterminate liability because of the consequential effects of commercial arrangements which it is not reasonable or practicable to impose on a defendant. Insofar as exceptions to this have been accepted by the UK courts, a close relationship of proximity has been required. The law has developed particularly in relation to negligent misstatements where an assumption of responsibility for the accuracy of the statement to the victim is required as a limiting factor. UK courts have in the past been reluctant to permit recovery for economic loss consequent on physical damage to someone else’s property but the Australian courts have been more willing to do so, although they have still been concerned to restrict indeterminate liability. In *Caltex Oil (Australia) Pty v The Dredge “Willemstad”* [1976]136 CLR 529, recovery was permitted where the oil supply to claimants’ refinery was cut because the defendant damaged the supply pipeline, which did not belong to the claimants. In *Perre v Apand Pty Ltd* in 1999, the High Court held that a supplier who supplied diseased potato seed to his customer was liable to neighbouring growers whose crops were quarantined in a 20 mile radius as a result of infection. It was not disputed that the loss suffered by the grower claimants was reasonably foreseeable and the defendants knew that persons such as the claimants would be liable to suffer economic loss in the event of an outbreak of the disease. The factors identified by the judges (who gave different reasoning for their decisions) as justifying the imposition of a duty of care for economic loss included the facts that the 20 mile quarantine radius meant that liability was not indeterminate, and the claimants had no way of appreciating the existence of the risk to which they were exposed by the conduct of the defendant nor any way of protecting themselves against that risk and were therefore vulnerable. Professor AM Dugdale comments that “the current willingness of the English appellate courts to articulate policy reasoning rather than to rely on bright lines excluding liability suggests that the incremental approach in *Perre* might be followed.”³³

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³⁰ See C&L ch8 s2 (j) negligence/Duty of Care/ Financial loss following damage to another’s property paras 8-115-8
³¹ [1999] 164 ALR 606
³² Professor of Negligence Law at Keele University and one of the general editors of, and author of relevant chapters in, the leading practitioners’ textbook on tort law in England, Clerk & Lindsell on Torts.
³³ C&L para 8-117

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The civil law approach may be more flexible in this area. Under French law, no types of loss are in principle excluded from recovery if there is a breach of the relevant legal principle; under German law there may be a right to an established and functioning business (see Overseas Law section below).

4.1.1.4 Standard of care

If it is established that the defendant owes a duty of care to the claimant, the question is then what is the standard of care, or what should he have, or have not, done? The standard of care is determined objectively: the courts hear evidence on and decide what would be expected of a reasonable individual or company in the circumstances of the case. They weigh the likelihood of the accident or harm occurring and the possible seriousness of the consequences against the difficulty and expense and any other disadvantage to the defendant of taking the precaution. However, this is not a purely utilitarian exercise: fairness between the parties is important. This includes fairness from the point of view of the claimant’s reasonable expectations, reflecting the community’s values, as well as the cost/benefit consequences for the defendant.

The courts are influenced by evidence of common practice but it is always open to them to find that common practice does not make proper provision for a known risk, although this is exceptional. Industry codes of practice, even though not legally binding, may be used both as evidence of knowledge of a particular danger and of the measures which should be taken to protect against them, although if they are not mandatory they will not necessarily have this effect. There may be an issue as to whether standards which might be applicable either legally or as a matter of practice in the TNC’s home state should apply to operations there. In the first Court of Appeal decision in Lubbe v Cape, Evans LJ commented that, even if the defendant believed, and was correct, that all South African regulations had been complied with and the operation was in no way unlawful under South African law, the allegation of negligence remained. Where business was carried on in the UK, the fact that statutory regulations had not been breached did not automatically mean there had been no negligence although, if the regulations took account of contemporary knowledge, they would be clear evidence as to the requisite standard.

4.1.1.5 Employers’ duty of care and standard

Case law has established specifically that employers do have a duty of care in negligence to take reasonable care to protect their workforce and this includes protection against health risks as well as accidents. The duty is to guard against risks which are foreseeable and the standard is that of the reasonably prudent employer, as to which general practice is relevant but not conclusive. The duty includes the provision of safe staff, safe equipment, a safe place of work and a safe system of work. In relation to equipment, at common law, the employer would not be held liable for a defect in equipment provided to the employee which he could not discover by reasonable inspection.

(Employers, of course, have significant statutory legal obligations in relation to health and safety at work (see Statutory Torts below) and are restricted by law in relation to matters such as hours of work, employment of children and deductions from wages. However, even if these statutes applied, the obligations and restrictions apply to employers and it will presumably be the local subsidiary or associate which is the employer.)

34 C&L ch8 s3 Negligence/Breach of Duty
35 C&L para 8-143
36 C&L para 8-146
37 C&L para 8-147
38 [1999] ILPr 113 at p127
39 C&L ch13 Employers’ Liability.
40 Halsbury’s Laws Vol 16 Employment; vol 5 Children & Young Persons ch 9 Employment of Children
4.1.1.6 Corporate Manslaughter

Although the policy issues which relate to criminal and civil liability for harm and death differ considerably in some respects, because the common law criminal offence of corporate manslaughter under English law is so closely linked to civil liability and has been under detailed consideration by law reform agencies, brief reference is made to it here. (There are, of course, many other issues which arise in relation to both the existing and the proposed new offence apart from those set out here).

At present, a company may be liable for manslaughter by gross negligence at common law where a duty is imposed on it pursuant to the ordinary principles of the civil law of negligence and it fails to perform that duty, or performs it in a way which is negligent or reckless, and thereby causes a death. A higher degree of negligence is required than that required to establish civil liability. It is also an offence under the Health and Safety at Work Act 1974, whether or not a death occurs as a result, for an employer to fail to ensure, so far as reasonably practical, the health, safety and welfare at work of his employees (s2), and to conduct his undertaking in such a way that others not in his employment who may be affected by it are not exposed to risks to their health and safety (s3).

Following a number of disasters, and a prosecution which failed, despite the fact that the company had been severely criticised by a judicial enquiry, because the law requires that all the elements of the offence have to be established against an individual employee, in 1996, the Law Commission recommended a new offence of corporate killing caused by a gross management failure, where

“the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities”

The government supported the new offence of corporate manslaughter in its response to the Law Commission’s proposals published in 2000 and published a draft Corporate Manslaughter Bill in 2005. The Bill retains the Law Commission’s proposal that the offence should be based on a gross failure in the way in which the company’s activities are organized but introduces a requirement that the failure should be that of senior managers, and re-introduces the requirement from the common law offence that the failure should amount to a breach of a relevant civil duty of care owed by the company to the deceased. The Joint Home Affairs and Pensions Committee conducting pre-legislative scrutiny of the bill criticized this approach on the basis of lack of certainty and inappropriateness of using a civil test to determine criminal liability and recommended a return to the Law Commission’s original approach.

The Law Commission did not address the issue of liability of groups of companies but it was raised by the government in their response in 2000. They expressed concern that it should not be possible for holding companies to attempt to evade possible liability through the establishment of subsidiary companies carrying on the group’s riskier business and that a subsidiary company within a large group of companies might have insufficient assets to pay a large fine. They proposed that criminal proceedings should also be able to be brought against the parent or other group companies “if it can

41 Law Commission Report 237 1996 Legislating the Criminal Code-Involuntary Manslaughter; Pt VI Corporate Manslaughter
43 Corporate Manslaughter: The Government’s Draft Bill for Reform Cm6497 March 2005
www.parliament.uk/parliamentary_committees/home_affairs_committee/draft_corporate_manslaughter_bill.cfm
be shown that their own management failings were a cause of the death concerned. There is no indication of the circumstances in which it is envisaged that a parent or other company’s management failings might have been a cause of death. There is no express reference to criminal liability of parent companies in the 2005 draft Bill but the accompanying paper states that, under the bill, a parent company as well as any subsidiary would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death. It is noted that a large majority of respondents agreed with the proposal that parent or other group companies should be guilty of an offence but only “where their own management failings had been a direct cause of death”. The matter was considered further by the Joint Committee who state that they have received evidence that there is no established principle in English law that parent companies have a duty of care in relation to the activities of their subsidiaries. They recommend that parent companies should potentially be liable for the offence and state that the uncertainty of the civil law in relation to parent companies is an additional argument in favour of the recommendation that the offence should not be based on civil law duties of care.

As to the extent to which the offence of corporate manslaughter applies to activities overseas, British subjects who commit murder or manslaughter abroad are subject to criminal jurisdiction in Great Britain but there is doubt as to whether this applies to companies incorporated in the UK or other parts of the British Isles. The Law Commission proposed that the new offence of corporate killing should only relate to injuries which result in deaths which take place in England and Wales and should not apply to killing by British corporations overseas. The reasons given were that they saw no pressing need for such a provision and that it was likely, although they said they had not considered the matter, that considerations affecting the liability of companies were different from those affecting natural persons, and there had been no consultation on the matter. The government in their response in 2000 said they agreed with the Law Commission that the new offence should not extend to acts abroad of English companies on the basis that (a) prosecutions would in practice be extremely difficult because the police had no power to gather evidence abroad or to compel the attendance of witnesses abroad and (b) they would only consider taking extra-territorial jurisdiction where dual criminality exists i.e. the behaviour constitutes an offence in the state where the offence took place as well, so that they are not accused of exporting English laws. The Joint Committee stated that it should be possible to prosecute a company for corporate manslaughter when the grossly negligent management failure has occurred in England or Wales irrespective of where the death occurred, although their recommendation was only that the offence should be extended to deaths which occur in the rest of the UK and in the European Union. The question of liability in relation to activities of overseas subsidiaries has not been addressed as such.

4.1.1.2 Statutory Torts

45 paras 3.4.5-6
46 para 37
47 paras 110-115
48 Corporate Criminal Liability Pinto and Evans 2003 para 7.20
49 para 8.62
50 paras 3.7.1-4. See comments by Professor James Gobert on the government’s approach to the territorial scope of the offence in his article “Corporate Killing at Home and Abroad-Reflections on the Government’s Proposals” 2002 118 LQR 72. Comparison may also be made with the bribery and corruption offences overseas for which bodies incorporated under UK law, although not their subsidiaries, may be prosecuted (Anti-Terrorism, Crime and Security Act 2001 (s109)) - see also comments in Home Office Consultation Paper December 2005 “Bribery-Reform of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials” para 27.
51 paras 246-254
Certain types of claim involving private individual claimants have been made subject to statutory regimes in England, particularly in relation to product liability and workers’ compensation. Although these statutes are unlikely to apply to activities overseas, statutes similar to earlier versions of this legislation were enacted by many Commonwealth countries at independence and have been developed since. The statutory schemes simplify claims by deciding certain issues and they may supplement the common law or replace it. They also include criminal offences, and preventative or monitoring procedures and enforcement mechanisms other than private civil claims. Examples of relevant statutes are:

- **The Health and Safety at Work etc Act 1974** imposes general duties on every employer to ensure, so far as reasonably practical,
  - the health, safety and welfare at work of his employees (s2), and
  - to conduct his undertaking in such a way that others not in his employment who may be affected by it are not exposed to risks to their health and safety. (This obligation applies also to self-employed persons). (s3).
  - The general duties are not actionable in tort as breach of statutory duty (s47(1)(a)) but breach is a criminal offence (s33(1)(a)).
  - The general duties are supplemented by a series of regulations made under delegated legislation, many of them made in response to EC directives, which are actionable in tort (with a few exceptions) and also crimes (s33 (1)(c)). The Act requires employers to take a proactive approach by carrying out an assessment of the risks to which employees are exposed and provides for measures such as abatement notices and penal sanctions.

- **the Employers Liability (Defective Equipment) Act 1969** provides that, if an employee suffers injury as a result of a defect in equipment (which has a broad meaning and includes, for example, a merchant ship and a flagstone) supplied by the employer and the defect is due to the fault of a third party, the injury is deemed attributable to the negligence of the employer. The employee then does not have to identify and sue the manufacturer of the defective equipment.

- Under the **Occupiers Liability Act 1957**, an occupier of land owes a duty to lawful visitors to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises/land for which he is invited or permitted to be there. The “occupier” is the person in control of the premises/land. The factors relevant in ordinary negligence cases will apply to the standard of care expected of the occupier in a particular case. Under the **Occupiers Liability Act 1984**, the occupier owes a duty of care to a person on the premises/land without his permission if he is aware of the danger or has reasonable grounds to believe it exists, he knows or has reasonable grounds to believe that the other is in the vicinity of the danger or may come into the vicinity and the risk is one, which in all the circumstances of the case, against which he may reasonably be expected to offer some protection. The duty owed to a trespasser only relates to injury or death whereas the duty to the visitor also encompasses damage to property.

In the UK, there are also specific statutes relating to environmental matters. These are referred to in [Nuisance/Environmental law](#).
4.1.1.3 Nuisance/Environmental law

Much of the most significant law relating to environmental damage in England is contained in statutes giving bodies, such as local authorities, powers to control activities which affect the environment, in particular, the Environmental Protection Act 1990. There are, however, relevant, although limited, common law rights which are included here as they may correspond to rights under local law.

An owner of, or a person with a proprietary interest in, land can claim compensation from another who unlawfully interferes with his use or enjoyment of his land or some legal right over it or in connection with it, such as rights to water or rights of way; this is known as a claim for private nuisance. The right protected is the interest in land and the damages reflect the diminution in the value of the land. Therefore, if a person has no interest in land, he has no claim in nuisance. Nuisance is not fault-based in the same way as negligence as the issue is the balancing of the defendant’s right to use his land as he wishes as against the claimant’s right not to have his enjoyment of his land interfered with but, in practice, there is a substantial overlap between the two.

There is also a rule, known as the rule in *Rylands v Fletcher*, which provides that a person who, for his own purposes, brings onto his land, and collects and keeps there, anything “non-natural” likely to do harm if it escapes, is prima facie liable for all the damage which is a foreseeable consequence of the escape, regardless of whether he is at fault in relation to the escape. After its establishment, the rule underwent dilution by a large number of exceptions and defences and has been applied infrequently. However, in 2003, the House of Lords rejected the submission that the rule was obsolete and should be treated as having been absorbed by the tort of negligence. Although this is not entirely clear, it appears that he right to claim for harm caused by the escape is not limited to those with an interest in the land affected.

The Indian courts have developed a principle of absolute liability for enterprises engaged in a hazardous or inherently dangerous industry, known as the *Mehta doctrine*. This was formulated as follows:

> An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

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52 C&L ch20 Nuisance
53 C&L ch 21
54 Transco v Stockport MBC [2004] 2AC 1
55 C&L para 21-15
56 see discussion of the use of this rule under Indian law in the *Bhopal proceedings in “The Bhopal case:controlling ultrahazardous activities undertaken by foreign investors”* [1987] 50 MLR 545 P. Muchlinski.
This doctrine was relied on in the proceedings against Union Carbide Corporation in relation to the escape of toxic gas in Bhopal in India. The rule in *Rylands v Fletcher* has developed into a general principle of strict liability for ultra-hazardous activities in the USA as well. However, in Australia, it is treated as having been absorbed by principles of ordinary negligence.

It is also possible for an individual to claim compensation for so-called “public nuisance”, which is an action which “materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects”. This is not defined with any precision but includes, for example, carrying out trades which cause discomfort for others by noise or smells. However, a claimant must show that he has suffered special damage over and above that suffered by the class. Public nuisances are crimes as well and common law public nuisance has been supplanted by statutes such as the Environmental Protection Act 1990.

There are international treaties which establish rules on civil liability for environmental damage, for example, in the fields of oil pollution at sea, carriage of hazardous goods and nuclear claims, which indicate how statutory schemes can operate. The approach taken by such schemes is typically to:

- define the activities or substances covered
- define the damage (to persons, property, or the environment)
- channel liability
- establish the standard of care (usually strict liability)
- provide for liability amounts
- allow exonerations
- require maintenance of insurance or other financial security
- identify a court or tribunal to receive claims
- provide for recognition and enforcement of judgments

### 4.1.2 Torts relating to Personal Assault

#### 4.1.2.1 Trespass to the person

Every person’s body is in principle inviolate. There are three types of trespass to the person torts:

- Battery
- Assault
- False imprisonment

The relevant factual scenario for this project seems to be that the actual trespass has been committed by an associate and the claim against the TNC will be for some kind of associate liability.

Battery is the actual infliction of unlawful physical contact with the claimant. Assault (contrary to the common usage of the word) is causing the claimant to apprehend the immediate infliction of unlawful physical contact. False imprisonment is the unlawful imposition of a constraint on another’s freedom of movement. Battery, assault, and false imprisonment probably may be committed negligently as

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58 Butterworths The Law of Tort 2001 para 23.9. 23.30  
59 C&L para 21-05  
60 C&L paras 20-03-4  
62 C&L ch15 Trespass to the Person  
63 C&L para 15-09-11  
64 C&L para 15-12-13  
65 C&L para 15-23
well as deliberately\textsuperscript{66}. For a claim for false imprisonment to succeed, the imprisonment must be without lawful cause. The constraint need not be actual physical constraint, apprehension of physical force may be sufficient. Civil claims could therefore in principle be made in relation to wrongful arrest, torture, beating, and possibly also forced labour. It is a defence to a claim for trespass to the person if the defendant can show he acted with lawful excuse, which includes using reasonable force to defend his person or property, in the prevention of crime, to stop a breach of the peace, and effecting or assisting in the lawful arrest of offenders or suspected offenders\textsuperscript{67}.

Battery, assault and false imprisonment are actionable without proof of damage but, unless some kind of injury is shown, the claimant may only receive nominal damages\textsuperscript{68}.

Battery, assault and false imprisonment are also crimes and the courts have power to award compensation for criminal offences.

\textbf{4.1.2.2 Tort of Intimidation}

Again, the relevant factual scenario seems to be that the actual trespass has been committed by an associate and the claim against the TNC will be for some kind of associate liability.

The tort of intimidation is committed when one person threatens to use unlawful means so as to compel another to obey his wishes, and the person so threatened complies with the demand rather than risk the threat of its being executed. The unlawful means include violence, or a tort, or a breach of contract\textsuperscript{69}.

The existence of the tort of intimidation was confirmed in recent times in the context of industrial relations and threatened breaches of contract\textsuperscript{70}. However, it originated in relation to threats of violence and it still applies in that context, in which case it is likely to overlap on the facts with the torts involving trespass to the person. In \textit{Godwin v Uzoigwe}\textsuperscript{71} in 1993, the claimant, a young Nigerian girl had been brought to England by the defendants and was kept in conditions of virtual slavery, and the court found that the defendants were liable to her for the tort of intimidation. It was stated in the Court of Appeal that coercion was the essence of the tort of intimidation and that there had been prolonged and systematic coercion in addition to the beatings and threats of assault, which must be regarded as subsumed into the tort of intimidation. Threats of other types of tortious conduct may also found the tort of intimidation\textsuperscript{72}.

Intimidation cannot be committed negligently; it is an element of the tort that the defendant should have acted with the intention of injuring the claimant. In \textit{Godwin v Uzoigwe}, the Court was satisfied that the defendants must have foreseen that their coercive behaviour over more than 2 years would be injurious to her and their wrongful conduct therefore involved an intentional infliction of harm (per Steyn LJ).

\textsuperscript{66} C&L para 15-04-07
\textsuperscript{67} C&L para 15-49 and ch 31 Self-Help
\textsuperscript{68} C&L para 15-139
\textsuperscript{69} Lord Denning MR in \textit{Morgan v Fry} [1968] 2QB 710, 724;
\textsuperscript{70} \textit{Rookes v Barnard} [1964] AC 1129, [1964] 1AER 367. Action by a non-union member against union members who threatened an unlawful strike (in breach of employment contracts) against their employers, BOAC, unless BOAC dismissed him, which BOAC did. Ch. 4 \textit{An Analysis of the Economic Torts} H Carty 2001; C&L para 25-65 et seq.
\textsuperscript{71} [1993] Fam Law 65; [1992] TLR 3000
\textsuperscript{72} such as a threat of nuisance i.e. threatening to do an act which disturbs the claimant’s enjoyment of his property per Lord Herschell in \textit{Allen v Flood} [1898] AC1, 136-7.
The threatened conduct which is unlawful need not be done to the claimant himself; it can be done to someone else but it must be done with the intention of harming the claimant.

It is not clear whether pecuniary loss is a requirement of the tort of intimidation as it appears to be for the other “economic” torts, particularly where there is no damage to business interests. The Court of Appeal did not address this as a requirement of the tort of intimidation in *Godwin v Uzoigwe* but the factors they refer to in relation to their damages award are not pecuniary ones.

As to the quantum of an award of damages for intimidation, the Court of Appeal in *Godwin v Uzoigwe* in 1992 reduced the judge’s award of £25,000 to £20,000. They indicated that they regarded it as a serious case.

4.1.3 Torts relating to trade/livelihoods

4.1.3.1 Tort of unlawful interference with trade

The tort of unlawful interference with trade is committed if one party intentionally interferes with the claimant’s business by unlawful means with the intention to injure the claimant. Actual harm to the claimant must be proven. The means must be unlawful and this probably includes any tort. In one of the original leading cases on unlawful interference with trade in 1898, it was argued that there is a legal principle that every man has a right to pursue his trade or calling without molestation or obstruction and anyone who by any act, even if it is not otherwise unlawful, molests or obstructs him is guilty of a wrong unless he can show lawful justification or excuse for doing so, but this was rejected by a majority of the House of Lords. Moreover, it is a requirement of the tort that the defendant must intend to injure the claimant, although this need not be his predominant purpose as long as the unlawful act was in some sense directed against the claimant. The intention requirement may be difficult to satisfy: the position may not typically be that a TNC intends to harm local people’s livelihood; if harm occurs, it is simply an incident of its economic activities.

4.1.3.2 Abuse of dominant position under competition law

A civil claim may be made for an abuse by an undertaking of a dominant position within the common market (or a substantial part of it) under EC competition law and within the UK market (or any part of it) under domestic competition law which has an appreciable effect on trade between member states, or within the UK.

Examples of abuses are given in the legislation:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;

73 as was the case in *Rookes v Barnard* itself where the contract which the union members threatened to breach by strike action was with BOAC not the claimant
74 It is stated in McGregor that the consideration of the issue of damages cannot stretch beyond the manifestation of the tort in the context of interference with contractual relations para 40-012. (He refers to the facts, the amount of the award, and the fact that the Court of Appeal did not give its reasons for the award, in *Godwin v Uzoigwe* in note 7 to para 41-002.
This paragraph relates to the measure of damages in deceit and states that the measure of damages for the tort of intimidation should be the same but there is no reference to the issue of whether this award did or did not reflect a finding of pecuniary loss, or whether such a finding was required.)
75 C&L 25-88
76 *Allen v Flood* [1898] AC 1.
77 On the theory and functions of competition law, see generally Whish ch 1. On claims under Art 82. See Whish chs 5, 8 and 17. On claims under UK domestic competition law see Whish ch 9s3The Chapter II prohibition.
78 Art 82 EC Treaty. Whish chs 5, 8 and 17
79 s18 UK Competition Act 1998. Whish ch 9s3 The Chapter II prohibition.
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby
placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of
supplementary obligations which, by their nature or according to commercial usage, have
no connection with the subject of such contracts.

This list is not exhaustive and other types of conduct may be viewed as abusive\textsuperscript{80}. However, the
prohibition is against abusive conduct which affects trade between member states as being
incompatible with the common market, and the ECJ and the Commission have interpreted the rules
in the light of the overall objectives of the Treaty in Article 2

\begin{quote}
\textit{to promote throughout the Community a harmonious, balanced and sustainable development
of economic activities, a high level of employment and social protection, equality between
men and women, sustainable and non-inflationary growth, a high degree of competitiveness
and convergence of economic performance, a high level of protection and improvement of the
quality of the environment, the raising of the standard of living and quality of life, and
economic and social cohesion and solidarity among Member States.}
\end{quote}

and Article 3(1)(g)

\begin{quote}
\textit{a system ensuring that competition in the market is not distorted}.\textsuperscript{81}
\end{quote}

The abusive conduct has to have an appreciable effect on trade between member states in the case
of EU legislation, and on trade within the UK in the case of the UK legislation. In determining whether
the effect is appreciable, the relative positions and importance of the parties in the market for the
product in question will be considered\textsuperscript{82}. Indirect effects may be considered\textsuperscript{82}, as may an alteration in
the structure of competition within the market. In principle, conduct relating to trade outside the EU
may be covered but an appreciable effect on trade between member states must be established\textsuperscript{83}.

Article 82 (as well as Article 81(1) which prohibits agreements or concerted practices between
undertakings which restrict competition) has direct effect in Member States’ national courts and
infringement gives rise to an action for damages in national courts. Although it was assumed in a
number of UK cases that this was the case, the availability of damages for infringement was not set
out expressly in the treaty, and it was only in 2001 that this was confirmed by the ECJ in \textit{Courage v
Crehan}. A number of issues relating to an award of damages remain to be explored\textsuperscript{84}. The
Competition Act 1998 does not explicitly provide for an action for damages for infringement of the
Chapter II prohibition but the intention is that UK law on this issue should develop in a manner which
is consistent with the jurisprudence of the ECJ pursuant to the general principles clause to that effect
in s 60 of the Act\textsuperscript{85}.

On the face of it, trading terms and practices which are oppressive to a small supplier in a developing
country seem unlikely to be harmful to the common market, to distort competition in themselves, or to
have an appreciable effect on trade between member states or within the UK.

\textsuperscript{80} Whish p194 et seq
\textsuperscript{81} Whish p 177, 143-4
\textsuperscript{82} Whish p 139
\textsuperscript{83} Whish 144-6
\textsuperscript{84} Case C-453/99 [2001]ECR I-6297, [2001] 5CMLR 1058. Whish 281, 298 et seq
\textsuperscript{85} Whish p405 et seq.
4.1.4 Associates

The circumstances in which a company might owe a duty of care to those who have been harmed by the acts of others and issues relating to causation have been referred to above. There are a variety of other legal principles which may be relevant where the case involves wrongful action by an associate of a TNC, whether that associate is a subsidiary company, a company within the same group but not in a direct shareholding relationship, or a third party such as a joint venture partner, contractor or supplier. The wrongful action might be negligent, such as a failure to observe health and safety precautions, or it might be deliberate, such as assaults and intimidation. The principles summarised in this section are

- Procurement of a tort
- The tort of conspiracy to injure
- Agency/vicarious liability
- Piercing the corporate veil of a company which is a “mere façade”

The requirements for establishing liability pursuant to the principles set out in this section are difficult to satisfy. There is also likely to be a major dispute of fact as to the extent of the actual knowledge or involvement of TNC personnel in the wrongful activities, particularly where there are allegations of deliberate harm or wilful blindness to wrongful activities, which give rise to difficulties of proof.

4.1.4.1 Procurement of a tort\(^{86}\)

If a person procures a tort, he himself also commits and is liable for that tort, and may be sued either alone, or jointly with the person whom he has procured. A person may procure another to commit a tort by inducement, incitement or persuasion\(^ {87}\). Facilitation does not amount to procurement; for example, selling a machine which could be used for infringing the claimant’s copyright did not amount to procurement because it did not as such play any part in the purchaser’s decision to commit the infringement\(^{88}\) even if the goods supplied could only be used for an infringing purpose. A close participation had to be shown\(^ {89}\).

4.1.4.2 Tort of conspiracy to injure\(^{90}\)

It is a tort for two or more individuals to agree to do an unlawful act by lawful means, or a lawful act by unlawful means. This tort takes two forms

- conspiracy to injure, using means which are lawful in themselves and are only actionable as a result of the conspiracy
- conspiracy to use unlawful means

If the conspiracy relates only to acts which are otherwise lawful the claimant must establish that the predominant purpose of the conspirators’ acts, albeit lawful, was to injure him\(^ {91}\). If the conspiracy involves the use of unlawful means, the victim claimant need only establish that the acts themselves

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\(^{86}\) C&L para 4-04  
\(^{87}\) CBS Songs Ltd v Amstrad Plc [1988] 1 AC 1013, 1058E HL  
\(^{88}\) CBS v Amstrad above  
\(^{90}\) C&L para 25-116 et seq  
\(^{91}\) C&L para 25-117, 122, 130-4
were deliberate, and those acts had the effect of injuring him. He has to establish that the conspirators had an intention to injure him, but not that it was predominant\(^{92}\).

Conspiracy, for these purposes, is an agreement, combination, understanding, or concert to injure, involving two or more persons. There must be a combination, and lack of acts or communications of intention to join the conspiracy may indicate that the necessary combination has not taken place. Mere presence at meetings which formed part of the combination may not be sufficient. The question is whether the particular defendant, having regard to his knowledge, utterances and actions, was sufficiently a party to the combination or common design\(^{93}\).

Pecuniary or financial loss is an essential element of the tort of conspiracy and therefore the claimant will have to demonstrate that he has suffered, for example, medical or other expenses, damage to his property, or loss of earnings or income. Damages may also be awarded for injury to feelings but these alone would not be sufficient to establish the tort\(^{94}\).

4.1.4.3 No tort of knowing assistance

The claimants argued in a House of Lords case in 2000, *Credit Lyonnais v ECGD*\(^ {95}\), partly by analogy with the criminal offence of aiding and abetting, that acts of assistance in connection with another’s wrong, if carried out with the intention of bringing about a violation of a third party’s right, should be recognised as a new independent tort. The reason why the claimants put forward this argument in that case was to establish vicarious liability on the part of ECGD for a fraud for which its employee was jointly liable with another person, but all of whose constituent acts were not committed in the course of his employment. The argument was, however, rejected on the basis that there was no authority to support it, such authority as there was strongly suggested that there was no such tort, and the limit on an employer’s liability for acts committed by his employee to those committed in the course of his employment was well-established and generally accepted as appropriate. Lord Woolf

\(^{92}\) C&L para 25-117, 122-4

\(^{93}\) C&L paras 25-118-121. NB It is stated in C&L para 24-121 that whether a person is a party to a combination constituting a conspiracy is essentially the same question as whether he is liable as a joint tortfeasor. Whether liability of the TNC and its associate is joint, or joint and several, is not a significant issue for the purposes of this project. There is sometimes, however, some overlap in terminology. (Where two or more parties are liable in connection with a tort, there may be an issue as to whether they are “joint tortfeasors”, or several tortfeasors causing the same damage, or several tortfeasors causing different damage. Apart from employee and agency relationships, in order for a tort to be joint, there must be concerted action or acts done in furtherance of a common design. Whether a tort was committed by joint or several tortfeasors used to be an issue of some significance because where there was a joint tort, there could only be one action and one judgment, and a judgment against one defendant effectively operated as a bar to proceedings against the others. If the torts were several, successive actions against each tortfeasor could be brought if necessary. However, the matter is now regulated by statute and much of the distinction has been removed. C&L para 4-02-07).

\(^{94}\) McGregor paras 40-008-11, 2-041-52; C&L 25-137

\(^{95}\) [2000] 1 AC 486. The case involved a fraud on the bank, Credit Lyonnais, perpetrated by an individual, Chong. Chong sold Credit Lyonnais forged bills of exchange relating to fictitious contracts for the sale of goods. Chong was aided in the fraud by an employee of the Export Credit Guarantee Department, Pillai, who authorised the issue of guarantees by ECGD in relation to the forged bills of exchange, and also wrote letters on behalf of ECGD indicating that the transactions were acceptable to ECGD. There was no dispute that Chong and Pillai would have been liable jointly and severally to Credit Lyonnais for the tort of deceit. However, only part of the conduct constituting the deceit was in the course of Pillai’s employment. That part was the issue of the guarantees, but this by itself would have had no adverse consequences for the bank; in fact, ECGD would have had to honour the guarantees, had it not been for the fact that Credit Lyonnais themselves had not taken reasonable steps to satisfy themselves as to the validity of the bills of exchange as they were required to do under the terms of the guarantee. The further conduct needed to constitute the tort of deceit was that carried out by Chong, who had no authority to act on behalf of ECGD. Thus all the elements of the tort of deceit were not been carried out by Pillai and, if they had been carried out by him, would not have been in the course of his employment.
commented that seeking to draw analogies between the criminal law and civil law in this area was not appropriate given their separate development\(^{96}\).

4.1.4.4 **Agency**\(^{97}\)

The principles of agency in the context of this project may be relevant both to whether a company may be liable in relation to the acts of its subsidiary or of other companies, and to whether the acts/defaults or knowledge of a particular individual who is not an employee of the relevant company may be attributed to that company (see also *Attribution* below).

A person (including a company) is liable for acts carried out by other persons (including other companies) which he has expressly or impliedly authorised, or subsequently ratified. If the principal company has given an express written or oral authority to an individual or to another company to carry out a particular act on its behalf, it will in principle be liable for the consequences of that act. Authority to do a particular act on the principal company’s behalf may be implied from all the facts, even though no express authority has been given.

A general authorisation can be given whereby the agent is given discretion as to the acts he may carry out on the principal’s behalf and, if the acts come within the scope of the authority, the principal will be liable for them, even if he has not specifically authorised them. It is well established that an employer is vicariously liable for the acts of his employees provided that the act is committed in the course of their employment. An employer may also be liable where the employee has carried out an act in the course of his employment even if, had the employer known about it, he would have forbidden it, provided that it was an wrongful and unauthorised mode of doing an act authorised by his employer\(^{98}\).

Where the person or company which has committed the wrongful act is not an employee of the relevant company (which may be the case in the group context), the nature of the task he, or it, was instructed to perform and all the surrounding circumstances need to be considered to determine the scope of the authority given, the width of the discretion and whether the act in question came within the authority. Matters relating to an implied authority or the scope of an authority can involve an extensive factual investigation as is illustrated in the case of *Heatons Transport St Helens Ltd v TGWU* which related to the scope of the implied authority which shop stewards had from a union, and whether it extended to potentially unlawful industrial action\(^{99}\).

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\(^{96}\) P 499-500

\(^{97}\) See generally Bowstead; Charlesworth ch2 The duty to take care s5 Vicarious liability; C&L ch 6 Vicarious Liability.

\(^{98}\) e.g. *Lister v Helsey Hall Ltd*[2001] 1 AC 215 (HL) in which a company which owned a school was held vicariously liable for sexual abuse by its employee boarding house warden, which it clearly had not authorised, on the basis of the closeness of the connection between his wrongful acts and the nature of the work he had been employed to carry out.

\(^{99}\) [1973] AC 15. The court held that the defendant shop stewards had a general implied authority. The claimant container haulier companies alleged that the defendant union was liable for “unfair industrial practices” under legislation then in force by virtue of actions taken by its shop stewards in preventing their lorries from entering docks to carry out their business (“blacking”). The court ordered the union to stop the blacking but the blacking continued. It was alleged that the union was in contempt of court. The union contended that the actions in disobedience of court orders were those of shop stewards acting outside the scope of their authority from the union and despite the advice of the union. The court found that the union had a policy of devolution and, on the basis of its rules and practice, its shop stewards had a general implied authority to defend and improve the rates of pay and working conditions of the union members they represented, including by industrial action, but not to do any act outside union rules or policy; it was union policy to protect container work for dockers, including by industrial action such as blacking and therefore the shop stewards were acting within the scope of their authority in instigating the blacking; once the court orders had been granted, the union did not take sufficient action to prevent the blacking continuing, which should have included the removal from office of the offending shop stewards if necessary (even if this would in fact have only exacerbated the dispute).
It should be noted that the creation of an agency involves not just an instruction or authority to the agent to do a particular action but also to do it on behalf of the principal, not on the agent’s own behalf. This test is likely to be difficult to satisfy in relation to another company, whether a subsidiary or an associate, on the basis of Adams v Cape Industries PLC. In Adams v Cape, the claimant contended that a default judgment by the US courts against Cape Industries Plc (Cape Industries) should be enforced by the UK courts on the basis of its subsidiary and/or associate’s presence in the USA at the time the judgment was given.

The enforcement of the US judgment was governed by English common law, under which one of the conditions for enforcing a foreign default judgment was that the defendant should have been “resident” in the foreign country when the action began. “Residence” for a corporation for these purposes meant, inter alia, that the corporation was carrying on business within the jurisdiction of the courts which gave the judgment and was doing so at a definite and to some extent permanent place.

The corporation could carry on business through an agent, including a subsidiary, but it had to be established that the agent was carrying out the parent’s business, not its own. Whether or not the agent had power to contract on behalf of the parent was an important, although not wholly determinative, factor. An investigation of the functions which the agent had been performing and all aspects of the relationship between it and the overseas corporation was required. The court set out a variety of factors which would be relevant to this investigation, such as the purpose for which the agent’s place of business was acquired, reimbursement by the parent for the agent’s staff and premises cost, contribution by the parent to costs of the agent’s business, nature of remuneration of the agent, degree of control by the parent over the business of the agent; other business of the agent; whether the agent made contracts in the name of the parent and the authorization required.

The claimant alleged that Cape Industries’ US subsidiary, NAAC, was carrying out the business of Cape Industries PLC in the US at the relevant time and therefore Cape Industries was present in the US for the purpose of the enforcement of the judgment in the UK. The court rejected this. Although NAAC had been incorporated by Cape Industries to be the marketing agent of the Cape group in the USA, NAAC conducted business on its own behalf in that it leased its own premises and employed its own staff, sold and purchased asbestos on its own account for which it rented warehouse premises (albeit that such sales only represented about 25% of its total business) and basically observed the separate corporate form in that it earned profits and paid taxes on them, had its own debtors and creditors, it was remunerated on the basis of a commission on sales effected and its return to Cape Industries took the form of a dividend to it as shareholder. It did carry out significant

The court examined a wide range of materials to determine the scope of the shop stewards’ authority to act on behalf of the union, including the union’s constitution as to delegation of authority in general, the TUC Handbook on industrial relations legislation which gave advice about the content and operation of union rules, a Royal Commission report on Trades Unions and Employers associations, a Code of Practice issued under industrial legislation (even though it was actually inapplicable in the particular circumstances of the case), the union’s rules relating to the calling of strikes, and in relation to shop stewards generally, the incidents of the shop stewards relationship with the workers who elected them, the union and their employers, such as pay, provision of facilities, the union’s handbook for shop stewards, details of the manner in which the decision to black the claimants was taken, who knew about it, who was present etc, statements made by union staff at the time about the blacking.

NB The House of Lords pointed out that this case related to the liability of the union under the terms of a statutory provision and stated expressly that liability for tortious acts was outside the scope of the appeal; although it was a closely connected subject, it was not under consideration for the purpose of the appeal and that what was said would not therefore necessarily apply.

Transboundary Accountability For Transnational Corporations; Using Private Civil Claims

Myfanwy Badge (April 2006)
functions for Cape Industries in the form of communication, organization and coordination, and NAAC and Cape Industries even referred to one another as “our Chicago office” and our “London office” respectively, but it had no general authority to bind Cape and had, in fact, never effected a transaction which had the effect that Cape Industries became bound. The Court of Appeal upheld the judge’s finding that the business carried on by NAAC was carried out on its own behalf not on behalf of Cape Industries.

4.1.4.5 Piercing the corporate veil

Under UK law every company is treated as a separate legal person; its separate legal personality cannot be ignored to attribute its rights and responsibilities to its shareholders. This rule can be displaced where special circumstances exist indicating that a company is a mere façade concealing the true facts. This is referred to as “piercing the corporate veil”. However, the circumstances in which this has been done have been rare and the case of Adams v Cape Industries referred to above also demonstrates how difficult it would be to succeed in piercing the corporate veil in the group commercial context.

Cape Industries had caused its subsidiary, NAAC, to be liquidated and its functions were taken over by companies which were not subsidiaries of Cape. The claimants contended that these companies were mere facades concealing the true nature of Cape Industries’ activities and their separate corporate form should be disregarded to deem Cape Industries present in the US for the purpose of the enforcement of the default judgment.

The court accepted that the arrangements in relation to these companies were made by Cape Industries in order to continue sales of asbestos in the US by its South African subsidiaries whilst reducing the appearance of involvement by Cape Industries or its subsidiaries and to reduce the risk of liability to US tax or amenability to the jurisdiction of the US courts of it or its subsidiaries. The court said that, whether or not such a course deserved moral approval, it was not suggested that these arrangements were actually or potentially illegal or intended to deprive anyone of their existing rights. They stated:

"we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been so used as to ensure that legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on a another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morrison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group’s asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was entitled in law to organise the group’s affairs in that manner and… to expect that the court would apply the principle in Salomon v Salomon &Co Ltd….in the ordinary way.”

The claimants argued in the alternative that there was a broader general principle, referred to as the “single economic unit argument”, that the court could ignore the distinction between companies within a group in law treating them as one whenever observing legal technicalities would produce an injustice. The Court of Appeal did not accept that the cases relied on went this far and took the view

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101 Salomon v Salomon & Co Limited [1897] AC 22
102 Woolfson v Strathclyde Regional Council 1978 SLT 159
103 [1990] 1 Ch 433
104 See generally Gore Browne on Companies ch 7 Legal Personality and Attribution, especially paras 9-9C.
that, in accordance with their approach on the “façade” point, if a company chose to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it was entitled to do so. They accepted that Cape Industries ran a single integrated mining division with little regard to corporate formalities between the group but the corporate formalities were observed and NAAC, subject to supervision and some control by Cape Industries, ran its own business on a day-to-day basis. They recognised the attraction of the claimants’ arguments but did not believe they had the power to reject the distinction between members of the group as a technicality.

4.1.5 Attribution of acts, defaults and knowledge of individuals to company

Although a company is treated by the law as an independent legal person, it can only act, omit, know, or not know, by individuals.

Where groups of companies are run on a unitary basis, individuals may carry out activities which affect the operations of a number of companies within the group. Conversely, knowledge of relevant facts, such as a potentially dangerous state of affairs, may be known to some individuals but not to others within the group. The individuals in question may be employed by one or other of the operating companies, by the parent company, or perhaps by a services company set up for the purpose of employing staff. They may be formally seconded from one group company to another pursuant to a written contract, but the arrangements may not be formalised. Directors may be directors of more than one company within the group, whilst being employed by another company. The issue as to the company within the group to which the acts or knowledge of a particular individual are to be attributed may therefore be complex.

The acts, omissions or knowledge of the individual which are imputed to the company may form part of the factual circumstances constituting the duty, or of its breach. The company itself may have no independent duty to the victim, but it may become liable by virtue of the principle of vicarious liability for the tort of the individual; in this case, all the elements of the tort must be established against the individual (e.g. a company becomes liable for injuries caused to a pedestrian on the public highway by the dangerous driving of an employee who was travelling in the course of his employment). Alternatively, the company may have a duty of care, which is breached by the individual’s acts or omissions (e.g. a hospital authority which has treated a patient owes him a duty of care, which is breached by the negligence of an individual doctor at the hospital).

In order to determine whether a particular act, omission or piece of knowledge of an individual is to be attributed to a company, it is necessary to consider its primary rules of attribution (principally found in its constitution or in company law) and, more relevant in practice, the principles of agency and vicarious liability. It may also be necessary to consider the purpose of the rule for which the act, omission or knowledge is sought to be attributed to the company to see whether it would, for example, defeat the purpose of a statutory provision not to attribute or, conversely, whether attribution would result in a liability never intended.

If the individual in question is not an employee of the parent company, it will be necessary to determine whether he is an agent of the company for the purpose of carrying out the act or omission or in connection with the relevant knowledge. Issues relating to the determination of the scope of an agency have been referred to under Associates/Agency above. The issue arose in the case of

105 See, for example, *New Zealand Guardian Trust Co Ltd v Kenneth Stuart Brooks & Ors* [1995] 1WLR 96 (PC) @p100B-C

Sithole et al v Thor Chemical Holdings Ltd et al\textsuperscript{107}. Thor Chemical Holdings Limited (Thor Holdings) was a UK company with a wholly-owned South-African subsidiary, Thor SA, which manufactured and reprocessed mercury compounds at factories in Natal in South Africa. The infrastructure of the relevant plant was designed by an individual, Desmond Cowley, who was both the controlling shareholder and chairman of Thor Holdings, as well as, apparently, an employee of Thor SA. It was alleged that the infrastructure was defective and that this resulted in mercury poisoning to the employee claimants. The employees sued Cowley and Thor Holdings. The defence of Cowley and Thor Holdings was that Thor Holdings was a true holding company in the sense that it simply held shares and had no employees, and that Cowley was acting as an employee of Thor SA in designing the allegedly negligent infrastructure and his defaults could not therefore be attributed to Thor Holdings to render them liable. However, the case was settled before this issue was explored.

There is case law which addresses the situation where an employee of one company is “lent” by his employer to another and commits a tort whilst so lent\textsuperscript{108}. The test for whether the lendee company becomes liable for the tort and not the general employer company is whether the employee is transferred, or only the use and benefit of his work, and this depends on the extent to which the employee is placed under the control of the lendee company i.e. which company has the authority to direct, or to delegate to the employee, the manner in which the work is to be done. In principle, the responsibility for the servant rests on the person who engaged him and it is said to be a heavy burden to shift that responsibility. However, the case law deals with independent organisations, rather than the intra-group situation, and the starkness of this test may not be appropriate in the situation where there is a group management structure.

In relation to the knowledge of individual employees and the extent to which the law will attribute, or impute, their knowledge to companies, the following general principles may be set out, although extracting principles from the case law is not straightforward\textsuperscript{109}:

(1) the law may impute to a principal knowledge relating to the subject-matter of the agency which the agent acquires while acting within the scope of his authority.

(2) Where an agent is authorised to enter into a transaction in which his own knowledge is material, knowledge which is acquired outside his capacity as agent may also be imputed to the principal.

(3) Where the principal has a duty to investigate and make disclosure, he may have imputed to him not only facts which he knows but also material facts of which he might expect to have been told by his agents, unless the agent was defrauding the principal in such a way as to make certain that he would not disclose the facts to the principal.

4.1.6 Damages

As well as the direct benefit to the claimants and the deterrent effect on potential defendants, the size of the possible damages awards may have significant practical effect on the real possibility of claims being pursued as it may affect the availability or otherwise of contingency fees to fund the litigation (see further below).


\textsuperscript{108} Bowstead para 8-179; Charlesworth 2-232; C&L 6-22-3

\textsuperscript{109} as set out in Bowstead paragraph 8-207 - 214, although the author comments that it is difficult to reduce the case law to any order and expresses some reservations about the formulation of the second and third rules.
The amount of compensation awarded for torts will, in principle, be such sum as will be sufficient to put the claimant in the position in which he would have been had the damage not been suffered (the tortious “measure of damages”). The size of damages awards may differ considerably in different jurisdictions.

Compensatory damages for personal injury include loss of earnings and medical expenses and compensation for pain and suffering and loss of amenities of life, the latter being calculated by reference to awards in other similar cases. Economic loss, such as damage to livelihood, which is not consequent on personal injury or damage to the claimant’s property, is often not recoverable in claims in negligence (see Negligence above), although it may be in other torts.

Additional “aggravated” damages may be awarded for injury to feelings such as indignity, disgrace and humiliation where the conduct, character and circumstances of the claimant and/or defendant make it appropriate. However, the levels of awards are not high (£7000 and £10,000 in 1986 for serious sexual assaults110).

“Exemplary” or “punitive” damages111, where the purpose of the award is not to compensate the claimant but to punish the defendant, have been all but excluded under English law following the House of Lords’ detailed consideration of the issue in Rooks v Barnard112 in 1964. They will principally be awarded where the defendant has deliberately calculated that the damages he has to pay will be less than the profit he makes or in the case of oppressive, arbitrary or unconstitutional conduct by public servants, in particular, the police. Awards of exemplary damages have not been large (£15,000 and £25,000 for the exemplary element of false imprisonment, malicious prosecution, wrongful arrest and assault in 1998113) although the means of the parties may be taken into consideration114, so it is possible larger awards could be made against wealthy companies.

The Rooks v Barnard restriction on exemplary damages was not followed by many Commonwealth countries and was criticized at the time. The principal argument against exemplary damages is that they are anomalous in the civil sphere, confuse the civil and criminal functions of the law, and result in windfalls for claimants which are in reality unmerited. This approach seemed to be accepted in the UK for some time after Rooks v Barnard but, in 1997, the Law Commission produced a report Aggravated, Exemplary and Restitutionary Damages115 in which it stated that civil punishment had an important and distinctive role to play in the law if it were put on a principled basis. Lord Scott in the case of Kuddus v Chief Constable of Leicestershire116 strongly recommended the total removal of exemplary damages from English law but Lords Nicholls and Hutton favoured the retention of at least the first head of common law exemplary damages (oppressive, arbitrary or unconscionable conduct by government servants) as a buttress of civil liberties.117

In cases involving a tort committed by a TNC and by its associate, including subsidiaries, if the torts have caused the same harm, each of the TNC company and the associate is liable for the whole of the harm. However, each of them may claim a contribution from the other and the court will assess

110 W v Meah [1986] 1AER 935, as referred to in para 37-003 McGregor
111 Generally McGregor ch 11
112 [1964] AC 1 129
113 Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis [1998] QB 498, as referred to in McGregor para 11-036
114 McGregor para 11-037
115 no 247 1997
116 [2002] 2AC 122
117 McGregor para 11-007. See also 2nd Supplement
the amount of the contribution by reference to the contributor’s responsibility for the damage in question.\textsuperscript{118}

4.2 Governing law

The law applicable to issues in tort is presently determined in the UK in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (“PIL”) which came into force on 1 May 1996 and applies to acts or omissions committed (not harm suffered) after that date.\textsuperscript{119}

4.2.1 PIL general rule s11

The general rule under PIL is that the law applicable to issues in tort is the law of the country where the events constituting the tort occur (s11(1)). Where the elements of those events occur in different countries, the general rule (s11(2)) is that the applicable law will be:

- for a cause of action in relation to personal injury (which includes disease or any impairment of physical or mental condition (s11(3)), the law of the country where the individual was when he sustained the injury;
- for a cause of action relating to damage to property, the law of the country where the property was when it was damaged.

There is a residual category, “any other case”, when the applicable law will be the law of the country in which the most significant element(s) of the relevant events occurred.

4.2.2 PIL rule of displacement s12\textsuperscript{120}

However, the general rules may be displaced under s 12 if it appears that, in all the circumstances, from a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under the general rule and the significance of any factors connecting the tort with another country, it is substantially more appropriate for the applicable law for determining the issues arising in a case, or any individual issue, to be the law of that other country.

The factors that may be taken into account as connecting a tort with a country include factors relating to the parties, to any of the events which constitute the tort in question, or to any of the circumstances or consequences of those events.

S.12 requires that it should be “substantially more appropriate” that a law other than that which would apply under the general rule in s11 should be the applicable law and there is not a great deal of guidance in case law on what might make displacement appropriate. Lord Wilberforce in the pre-PIL House of Lords case of Boys v Chaplin\textsuperscript{121} said that a foreign rule could not simply be rejected on grounds of public policy or some general conception of justice. Consideration had to be given to whether the foreign state whose law was to be displaced had an interest in applying the law in the

\textsuperscript{118} C&L ch 4 Joint Liability and Contribution
\textsuperscript{119} See generally Dicey ch 35 Torts. PIL does not apply to defamation, or to torts on the high seas or to aerial torts.
\textsuperscript{120} Dicey paras 35R-091-118
\textsuperscript{121} 1971 AC 356. Boys v Chaplin related to exceptions to the now abolished rule on double actionability, in which a UK claimant injured by negligent driving claimed against a UK defendant in relation to an accident in Malta but Maltese law gave no right to damages for pain and suffering whereas UK law did. The court said that nothing suggested that Maltese law had any interest in applying their rule on recoverable damages to persons resident outside Malta or denying the application of the UK rule to these parties nor had any argument been suggested why a UK court should renounce its own rules (pp391-2)
particular circumstances, having regard to the interest that rule was devised to meet. A similar approach may be taken to the consideration of the s12 rule of displacement under PIL.  

S.12 also envisages in its wording that the general rule may be displaced in relation to individual issues in a case rather than the whole case. This was the position at common law before PIL. Therefore, there is the possibility of arguing that, although the injury took place in the host state, if, for example, activities of the defendant which had some connection with the injury took place in the home state, home state law should apply to issues relating to those activities. The issues relevant to the cases which are the subject of this project where parties may seek to argue that UK law applies include:

- whether or not a parent has a duty of care in relation to the wrongful actions of its subsidiary or associate
- the standard of the parent’s duty
- issues relating to associates

Recent case law has stressed the exceptional nature of the displacement in relation to an individual issue alone.

4.2.3 Duty of care

It was argued in Lubbe v Cape in 2000 under the common law pre-PIL that UK law governed whether a UK parent company had a duty of care to South African victims even though South African law might govern other aspects of the case.

The Cape group had been involved in asbestos related mining, processing, product manufacture and sale from asbestos since the late C19. The parent company of the group was a UK company, Cape Plc. It had South African subsidiaries operating asbestos mines, mills and a factory in South Africa, and also subsidiaries in the UK and Italy operating factories. The parent company itself also operated a number of factories. Claims were brought against Cape plc by employees of the South African subsidiaries for asbestos-related illness on the basis that it exercised de facto control over the operations of the foreign subsidiaries and knew through its directors that those operations involved risk to the subsidiaries’ employees. The claimants alleged that the question of whether the defendant owed a duty of care towards individual workers centered upon decisions made and activities undertaken at senior and board level in England and should therefore be governed by English law.

The defendant, Cape, contested the applicability of English law to this issue on the grounds that the fact that a policy was formulated in the UK was insufficient when all the substantive actions which lead to the harm suffered by the victims took place in South Africa. (The claimant appears to have argued that the question of whether or not the UK parent owed a duty of care was a matter of policy for the UK but it may be that this issue went more to the appropriate forum than to governing law). The case settled after going to the House of Lords on an application by Cape Plc for a stay on the ground of forum non conveniens and therefore the governing law issue was not resolved and the details of the substantive claim are not fully reported. However, the Court of Appeal commented then that there were strong arguments in favour of each party’s position as to governing law.

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122 as proposed in Dicey para 35-103 note 33
124 [2000] 1WLR1545
125 Lubbe v Cape Plc [1999] ILpr 113, p123-7 (first CA judgment)
Similar principles will apply to determining the law applicable to whether a company owes a duty of care to those harmed by the activities of its associates.

4.2.4 Standard of care

On the question of the law which is applicable to determining the appropriate standard of care (which is not the same question as what that standard of care actually is), it may be argued that the determination of the standard of care is so closely linked to the existence of a duty of care that, if the local law is displaced in relation to one, it must be displaced in relation to the other. It is stated in Dicey that, if the issue involves determining the standard of conduct applicable in a host jurisdiction, at least in a "single country" case, even a preponderance of connections with a foreign jurisdiction would not justify the application of the law of that jurisdiction, as the host jurisdiction has a legitimate policy interest in seeing that standards normally applicable there are applied. (The applicability of UK law to the determination of the standard of care would not necessarily mean that standards of behaviour which would be legally required or normal practice in the UK would be those which would be applied in relation to activities in the host state. The matter would be determined objectively having regard to what was reasonable in all the circumstances (see Negligence/Standard of Care above). The policy position might be different if the effect of disapplying local law was to apply lower standards to activities in the territory of the host state or different standards which would otherwise be unacceptable to the host state).

In Johnson v Coventry Churchill (pre-PIL), the court held that UK law applied to a claim, including the standard of care, by a workman injured on a site in Germany against his English employer. German law would only have held the employer liable for wilful default whereas English law allowed a claim for failing to take reasonable care. There does not appear to have been any discussion as to whether UK law might apply to the issue of standard of care/breach in Lubbe v Cape from the case reports on the interim applications. In Codd v Thomson Tour Operations Ltd, which was a claim on behalf of a child against a UK tour operator which had agreed to be liable for the negligence of its suppliers, relating to an injury sustained when the child trapped his finger in a lift door in a Spanish hotel, the Court of Appeal stated that English law applied to the establishment of negligence, but that Spanish rather than English safety standards were the appropriate standards to apply to a hotel in Spain.

4.2.5 Other issues relating to associates

The same principles will apply to issues relating to liability for, or in conjunction with, third parties (i.e. procurement, tort of conspiracy to injure, agency/vicarious liability, attribution, and piercing the corporate veil. In addition, matters relating to the constitution and internal management of a company are governed by the law of the place where it was incorporated and there could possibly be an argument that by analogy issues relating to the liability of the parent for its subsidiary’s actions should be governed by the same law. It does not appear to have been argued in Adams v Cape that the question of whether the corporate veil of the US subsidiary should be pierced should be governed by US law. If the question of whether or not the company in question is liable depends on the terms and effect of a contract such as a supply contract or a joint venture agreement, it may be that the law which governs the associate issue should be the law which governs the contract.

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126 Dicey para 35-104
127 [1992] 3AER 14 (1st inst.)
128 Times October 2000 quoted in Dicey 4th Supplement para 35-107
129 Dicey para 30-024 case law has established that the law of the place of incorporation governs who are the corporation’s officials authorised to act on its behalf.
4.2.6 PIL Conflict with UK public policy s14

There is a further restriction in the UK on the applicability of overseas law: under s 14 PIL, the English courts will not apply overseas law if it conflicts with principles of public policy. Dicey suggested that this would apply, for example, to claims recognised by the European Convention on Human Rights/ Human Rights Act 1998 so that foreign law which was incompatible with the Convention would be denied application or even that, if a foreign law did not recognize a claim in tort where the Convention regarded a claimant as having such rights, UK law would be applied rather than the foreign law.130

4.2.7 Damages131

The courts have refused to displace overseas law under s12 in relation to the damages issue alone on the grounds that, although it could be said that the factors which connected the matter in question with England made it appropriate for English law to govern the damages issue, they did not make it substantially more appropriate as required by s12, and the Court of Appeal indicated in a recent case that the issue of damages for negligence cannot be separated out from the negligence itself.132

Matters of procedural law are governed by the law of the forum (the law of the country where the case is being heard), even if some other law governs the substantive issues in the case. Under English law, tortious damages are partly a matter of substantive law and partly a matter of procedural law. The heads (or categories) of damage which are recoverable (e.g. loss of earning capacity, pain and suffering), whether the damage is too remote to be recoverable, whether the claimant could have taken steps to mitigate his loss, or whether exemplary damages are recoverable are matters of substantive law and the applicable law must be determined in accordance with the rules outlined above. It has traditionally been said that the quantification of the damages recoverable is a matter of procedural law and thus governed by the law of the forum but recent case law has indicated that any rule which bears upon the existence, extent or enforceability of rights and obligations will be a matter of substantive law, and reference to the rules of the forum should be the exception.133

4.2.8 Proposed EU Regulation governing law in non-contractual matters “Rome II”

The UK rules on governing law may change as a result of a proposed Regulation (which would be directly enforceable in all EU member states) on the law governing non-contractual obligations. Harmonization of private international law in civil and commercial matters in member states of the EU began in the late 1960s and there are long-standing conventions relating to jurisdiction and the enforcement of judgments (the Brussels Convention 1968, superceded by the “Brussels 1” Regulation in 2001- see further Jurisdiction below). A Convention on the law relating to contractual obligations entered into force on 1 April 1991, known as the “Rome Convention”, and enacted into English law as The Contracts (Applicable Law) Act 1990. Work on a Regulation on the law applicable to non-contractual relations (referred to as “Rome II”) has been in progress for some time. A draft

130 para 35-112. Redress, Justice and AIRE stated in their submission to the House of Lords European Union Sub-Committee on Rome II that the English courts would not apply overseas law if that law did not recognize as a tort breach of a human right which it would recognize in relation to civil claims for redress for torture.

131 See generally Dicey para 35-052-5, together with Harding v Wealands [2005] 1WLR 1539

132 Roerig v Valiant[2002] 1WLR 2304 (CA)

133 Harding v Wealands [2005] 1WLR 1539 para 45 (under appeal to House of Lords).

134 PIL s14 (3) (b)

135 Harding v Wealands [2005] 1WLR 1539 (under appeal to House of Lords).
regulation is currently under review pursuant to the “co-decision” procedure whereby the European Parliament and the Council of Ministers must both agree on the terms of new legislation. A draft Regulation was submitted by the European Commission to the European Parliament in July 2003. A rapporteur was appointed by the European Parliament and, following extensive review, the Parliament has approved at first reading an amended version of the Commission’s proposal on 6 July 2005. The matter must now be considered by the Council of Ministers.

There was some tension between the desire for certainty and the desire for national courts to have the flexibility to do justice in particular circumstances. The general rule in the draft Regulation approved by the European Parliament in 2005 is that, in the absence of agreement between the parties and unless otherwise provided for, the law applicable to a non-contractual obligation arising out of a tort or a delict shall be the law of the country in which the damage occurs or is likely to occur, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise (art 4(1)). The European Parliament did not accept the provisions drafted by the Commission in relation to specific areas, including environmental claims and product liability.

The general rule will only be displaced by way of exception where it is clear from all the circumstances of the case that the non-contractual obligation is “manifestly more closely connected” with another country. The Regulation also provides for consideration of separate issues (art 4(3)).

There is a public policy exception allowing the member state to decline to apply the overseas law but only if it is manifestly incompatible with the public policy of the forum, in particular the European Convention on Human Rights, national constitutional provisions or international humanitarian law (art 24).

4.3 Jurisdiction of the UK courts

Pursuant to the common EU rules as to jurisdiction and the enforcement of judgments in civil and commercial matters, any company with its registered office in the UK (or, if it is has no registered office, which was incorporated in the UK) or with its central administration or principal place of business in the UK can be sued in the UK courts. The UK courts have a general power to stay proceedings on the grounds that some other forum is more appropriate for determination of the proceedings (the forum non conveniens principle). However, there had been a question mark over the compatibility of this power with the Brussels Convention scheme of jurisdiction since the UK acceded to it in 1978 and the matter had been raised in a number of cases but not resolved.

A reference to the European Court of Justice on the point was finally made by the UK Court of
Appeal in *Owusu v Jackson*⁴⁰ in 2002. This case related to a serious swimming accident suffered by the UK claimant whilst on holiday in Jamaica which left him paralysed. The first defendant, who rented him the villa in which he was staying when the accident occurred, was domiciled in the UK, but the other defendants were all resident and had their businesses in Jamaica and had been joined as “necessary and proper” parties. The defendants argued that Jamaica was the appropriate forum. The ECJ held in a judgment given on 1 March 2005 that the Brussels Convention precluded a court in a member state from declining jurisdiction conferred on it pursuant to that convention on the grounds that the courts of a non-contracting state would be a more appropriate forum. The reasons for this decision were that the Brussels Convention was mandatory in nature and no exception was provided in it for the doctrine of *forum non conveniens*; legal certainty was one of the specified objectives of the Convention and the doctrine of *forum non conveniens* undermined the predictability of the rules on jurisdiction; and the doctrine of *forum non conveniens* affected the uniform application of the rules on jurisdiction as only a limited number of states had a similar doctrine (in fact, only the UK and Ireland)⁴¹.

Following *Owusu*, it appears that the only situations (and even these are not certain) where proceedings against a UK company may not take place in the UK which are likely to be relevant to cases the subject of this project are now⁴²:

- where proceedings have already been commenced between the same parties on the same subject matter in another jurisdiction (“lis alibi pendens”). Where the parties have different views on where proceedings should take place, this could lead to a race to issue proceedings, with the party who is alleged to have committed the wrong seeking a declaration in the proceedings he issues that he is not liable (a negative declaration);
- where the parties have contractually agreed that the courts of another state should have jurisdiction over the dispute;
- where there is a particularly close connection between the dispute and another jurisdiction of the type which ousts the exclusive jurisdiction of EU member states under Art 22 of the Convention, of which the only ones which are likely to have any relevance in relation to this project are proceedings relating to rights in land, where the courts of the place where the land is situated have jurisdiction, and proceedings relating to specific technical matters of company law, where the courts of the place where the company has its seat have jurisdiction.

As far as torts committed by non-UK companies are concerned, the UK courts may accept jurisdiction over a defendant outside the UK in relation to a tort where damage was sustained within the jurisdiction, or the damage which has been sustained resulted from an act committed within the jurisdiction⁴³. This is unlikely to apply to, for example, a tort of the type under consideration in this project which has been committed in developing country by an overseas subsidiary of a TNC⁴⁴. However, an overseas defendant may be joined into proceedings in England against a defendant who is subject to the jurisdiction of the English courts with the court’s permission even if the overseas defendant would not otherwise be subject to the jurisdiction of the UK courts. The requirements are that there is a real issue to be tried between the claimant and the first defendant, that the overseas

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⁴⁰ *Owusu v Jackson* [2002] EWCA Civ 877 pending as Case- 281-02
⁴¹ *Owusu v Jackson* [2005] 2WLR 942 (ECJ), paras 37-46. See also opinion of Advocate-General 14 December 2004.
⁴³ CPR 6.20 (8)
⁴⁴ The jurisdiction argument in torture cases is that victims who have come to the UK suffer post-traumatic stress syndrome in the UK so the damage is suffered in the UK - *Challenging Impunity for Torture-manual for bringing civil and criminal proceedings in England and Wales for torture committed abroad* Redress 2000 paras 12.1.2; 12.3.
defendant is a “necessary or proper party” to the claim\textsuperscript{145} and that the claims can conveniently be disposed of in the same proceedings\textsuperscript{146}. This means that foreign parties with no connection with England could be brought into proceedings in England if the English court has jurisdiction over one potential defendant. However, it has been suggested that, in view of the fact that they no longer have power to stay proceedings on the ground of \emph{forum non conveniens}, the courts may be more willing to refuse permission to join overseas defendants where injustice would result. The Jamaican defendants in \textit{Owusu} appealed on the grounds that they were not “necessary and proper” parties on the grounds that the claim by the claimant against the first defendant had no real chance of success. The Court of Appeal deferred consideration of this until after the ECJ had given its ruling.

4.4 \textbf{Access to justice-some aspects of UK court procedure}

This section does not deal with every aspect of UK court procedure which may be relevant to claims against TNCs in relation to activities overseas but identifies certain specific areas which may be significant:

- Access to information
- Mass tort procedures
- Costs, legal aid and contingency fees

Other matters which might be considered include interim or permanent injunctions/asset-freezing/disclosure orders, ADR, case management/expedition, use of preliminary issue/declaration, limitation, enforcement of judgments.

4.4.1 \textbf{Access to information}

Parties to litigation in England are required to disclose to each other the existence of documents on which each relies or which support or damage the other party’s case\textsuperscript{147}. They are required to make a reasonable search for documents and their solicitors are under a duty to the court to ensure that the duty is carried out properly. An identified individual in the case of a company must also give a formal confirmation to this effect, and breach may be a contempt of court. If disclosable documents have been lost or destroyed, this has to be disclosed as well and adverse inferences may be drawn by the court. The documents which have to be disclosed are only those which are in the party’s control, which means he has physical possession of them or a right to take possession or copies of them\textsuperscript{148}. Disclosure of documents may also be sought from non-parties in certain circumstances\textsuperscript{149}.

Parties may seek disclosure of documents which would have to be disclosed in litigation before the litigation starts\textsuperscript{150}, provided they can show, principally, that this would assist the dispute to be resolved without proceedings or save costs. They are also generally required to act reasonably in exchanging information and documents relevant to the claim and generally trying to avoid the necessity for starting proceedings\textsuperscript{151}.

\footnotesize{\textsuperscript{145} CPR 6.20 (3) \textsuperscript{146} CPR 7.3 \textsuperscript{147} CPR Pt 31 \textsuperscript{148} CPR 31.8(2) \textsuperscript{149} CPR 31.17 \textsuperscript{150} CPR 31.16 \textsuperscript{151} Practice Direction-Protocols para 4}
4.4.2 Mass tort procedures\textsuperscript{152}

Group Litigation Orders may be made by the English courts which identify a cluster of claims which give rise to related issues of fact or law as suitable for determination as group litigation with a nominated judge taking on their management. There are two basic approaches
\begin{itemize}
  \item Generic issues are identified first and decided before individual cases are considered
  \item Individual cases are considered and filtered so that appropriate case management techniques can be determined.
\end{itemize}
The individual case model has predominated in product liability cases, with modifications.

4.4.3 Costs, legal aid and funding\textsuperscript{153}

In English proceedings, in general the unsuccessful party pays the successful party’s costs as well as his own\textsuperscript{154}. State funding for legal representation in civil claims is available\textsuperscript{155} but only for claimants with very limited assets and merits and cost/benefit requirements must be satisfied. Moreover, funding for representation for actions involving allegations of negligently caused injury, death or damage to property was withdrawn from April 2000 (although funding for cases relating to assault or deliberate abuse remains)\textsuperscript{156} unless it can be demonstrated that they have a significant wider public interest in the sense that its determination will produce real benefits to individuals other than the claimants\textsuperscript{157}. Recently published guidelines on funding also provide that an action where the beneficiaries are not residents of the EU will be a lower priority than a similar action for the benefit of EU residents if it is a “very expensive case” (for 2005/6 where the likely costs to disposal exceed £100,000 or to trial exceed £250,000), although they do state that establishing the accountability of an EU company may be a matter of public interest\textsuperscript{158}. All civil claims (apart from family and insolvency cases) may now be funded by conditional fee arrangements\textsuperscript{159} where the claimant’s lawyer agrees that he will not charge any fees if the claimant loses but may charge an uplift up to a maximum of 100\%\textsuperscript{160} of his normal fees if he wins. A contingency fee agreement may not be available for commercial reasons if the case involves novel issues so that the chances of success are difficult to determine. Conversely, a large case may be difficult to fund under a contingency fee agreement because the lawyers must have the turnover to sustain a significant amount of work over a long period.

\textsuperscript{152} CPR 19.10-15. Multiparty Actions C. Hodges 2001 ch 2
\textsuperscript{153} Multiparty Actions C. Hodges 2001 chs 10, 12
\textsuperscript{154} CPR 44
\textsuperscript{155} under the Community Legal Service (CLS) administered by the Legal Services Commission (CLS) pursuant to the Access to Justice Act 1999
\textsuperscript{156} Access to Justice Act 1999 Schedule 2, LSC Funding Code s.3.2
\textsuperscript{157} s5 LSC Funding Code Guidance
\textsuperscript{158} LSC Funding Code pt 3 Decision-Making Guidance December 2005: 3C-125: s15.4 Managing the Central Budget/Guidelines on Affordability para 2(iii)
\textsuperscript{159} Access to Justice Act s27
\textsuperscript{160} The Conditional Fee Agreements Order 2000 s4 (White Book Vol 2 April 2005 para 7A-10)
4.5 Human Rights Act 1998

In considering any of the above matters, it should also be noted that the European Convention on Human Rights (ECHR) has been substantially enacted into English law by the Human Rights Act 1998 (HRA), which came into force on 4 October 2000. This Act provides that UK legislation should be interpreted in a way which is compatible with the ECHR and that a public authority carrying out public functions must act in a way which is compatible with the ECHR. The rights cover:

- Non-discrimination
- Right to life
- Freedom from torture, inhuman or degrading treatment, slavery, forced labour
- not to be deprived of liberty, security
- peaceful assembly and association
- fair hearing
- no punishment without offence
- free elections with secret ballot
- freedom of thought
- freedom of expression
- respect for privacy and family life
- to marry and found a family
- peaceful enjoyment of property
- education

Although the express principle of interpretation only applies to legislation, a court is a body carrying out public functions and it was argued that this means that the courts should give effect to the ECHR principles in all proceedings not just those in which a question of statutory interpretation arises, even to the extent of creating new rights not known to existing English law. This was, however, controversial.\textsuperscript{161} The courts have now indicated that, although they are influenced by the ECHR in the application of existing principles, the HRA 1988 is essentially perceived as having a “gap-filling” function.\textsuperscript{162} It seems unlikely therefore that new causes of action will be formulated, particularly against legal persons.

\textsuperscript{161} Civil Liberties and Human Rights in England and Wales D Feldman 2002 p 101
\textsuperscript{162} C&L para 1-63-6
5 Case studies

These case studies are fictitious and are not intended to refer to actual persons, companies or situations. The developing country jurisdiction in which the operations which gave rise to the harm took place is referred to as HostCountry.

Any case turns on its own facts. These case studies are necessarily simplified and can only give an indication of arguments which might be raised. Independent advice should be sought in individual cases.

5.1 Coffee plantation pesticides - parent subsidiary

Workers in a HostCountry coffee plantation suffer severe health damages as result of inhaling pesticides whilst working. No masks were provided to them nor were any warnings given. If adequate masks had been worn, they would have prevented the damage to the employees’ health. Suitable masks are widely available in Europe and are not expensive. They are not generally available in HostCountry.

The plantation is owned by XCoHostCountry, which is a locally incorporated subsidiary of a TNC agribusiness whose parent company, XcoUK, is incorporated in UK.

The pesticide was purchased in the name of XCoHostCountry by the HostCountry factory manager, who is employed by XCoHostCountry, from an unrelated company which was incorporated in, and had its manufacturing facilities, in another country in the region.

There have been many reports in the technical press in Europe and the USA as to the serious health risks of the pesticide and the code of conduct of a European trade body strongly recommends that the pesticide should not be used without protective masks, if it is used at all. The pesticide is not generally used in Europe now but is in widespread use in HostCountry and other countries in the region. Workers rarely wear protective masks and it is not the practice for plantation managers to provide any sort of protective equipment or to give them any information on the dangers of the pesticide or advice or instruction on how to protect themselves.

XCoHostCountry is unlikely to have sufficient assets to satisfy the claims of all the workers. The workers want to bring claims against XCoUK in the UK.

5.1.1 Governing law

It is assumed that the acts and omissions relating to the decision to use the pesticide took place after 1 May 1996 and PIL applies.

The workers have suffered personal injury. The pesticide was used in HostCountry, the victims were in HostCountry when they suffered their illnesses and any other loss consequential on that illness, such as medical expenses and loss of earnings. If any other factors caused or contributed to their illness, they probably took place in HostCountry as well, although this would have to be checked. The pesticide itself was manufactured in a different country and there may be an issue as to the information or instructions which the manufacturer provided, or failed to provide, to XCoHostCountry. There may be an issue as to the involvement of individuals in the UK who are employees or agents of XCoUK in the activities of XCoHostCountry and their knowledge or otherwise of the harmfulness of
the pesticide, which will involve consideration of events in the UK, and possibly elsewhere. The matter is thus one in which elements of the events took place in different countries, and the general rules in s11(2) PIL will therefore apply.

As this is an action relating to personal injury, the applicable law will prima facie be the law of the place where the individuals were when they sustained the injury. Assuming the workers were in HostCountry when they were harmed by the pesticide, HostCountry law would apply.

However, if any other potentially applicable law on any issue is materially different, the parties will want to consider whether the exceptional s12 PIL rule of displacement, where the application of a different governing law is “substantially more appropriate”, will apply to that issue, such as the existence of a duty of care on the part of XCoUK, the method of determining the applicable standard of care which would be expected of XCoUK, or the extent to which XCoUK might be held liable for the acts of, or in conjunction with, XCoHostCountry.

S12 PIL requires an examination of the facts surrounding the tort, or the issue, to compare the significance of the factors connecting it with the UK and those connecting it with other countries. If the factors connecting it with the UK were sufficiently significant, it would then be necessary to consider, following the approach in Boys v Chaplin, whether HostCountry had any policy interest in ensuring that its laws rather than those of the UK should govern the issue. Consideration would be given to the circumstances surrounding the law in HostCountry; for example, the policy conclusion might be different if the HostCountry government had put in place legislation on a particular issue than if it had had simply not addressed it. Conversely, it would also be necessary to consider whether the application of HostCountry law would be contrary to UK public policy under s14 PIL and so consideration would have to be given to what UK public policy may be relevant to this scenario. The principles of the ECHR and the HRA 1988 might have relevance in this context.

As far as the proposed EU reforms to governing law in the proposed Rome II Regulation are concerned, the outcome under the draft Regulation as approved by the European Parliament in 2005 seems likely to be the same as under existing English law as the law of the place where the damage occurred would be HostCountry law and consideration may similarly be given to the proposed rule of displacement where the obligation is “manifestly more closely connected” with another jurisdiction and the policy exception where overseas law is “manifestly incompatible” with the public policy of the forum.

5.1.2 Cause of action

5.1.2.1 Negligence

5.1.2.1.1 Duty of care
On the basis that the board of XCoUK are aware of their subsidiary’s coffee plantation activities in HostCountry, including the use of pesticides, and the dangers of pesticides to agricultural workers are fairly well-known, harm to the plantation workforce from dangerous pesticides seems foreseeable. However, if the UK courts follow the James Hardie approach, in order to establish a duty of care on the part of XCoUK, the claimants would have to produce evidence of a significant degree of actual involvement by individuals acting on behalf of XCoUK in the day-to-day activities of XCoHostCountry in order for the court to hold that there was a duty of care.

The court in James Hardie placed heavy emphasis on the lack of involvement of management in the day to day activities of the subsidiary and the need to preserve the separation of corporate personality within the group. Even if a court were prepared to hold a parent company liable in relation
to activities of its subsidiary on the basis of a lesser degree of involvement, the danger of the *James Hardie* approach is that TNCs might take the view that they run less risk of other group companies being held liable for harm caused by subsidiaries if they take an entirely hands-off approach to the subsidiary’s activities than if they become involved, which might inhibit them from providing for beneficial oversight and assistance by overseas management. The *James Hardie* approach also requires a minute examination of documentary and oral evidence to determine the extent of the parent or sister company’s involvement which will be time-consuming and costly.

It may be argued against the *James Hardie* approach in the developing country context that it is not fair and reasonable to allow a company to set up, purchase or control, and potentially benefit from a crop-growing operation whilst enjoying the protection of limited liability, without imposing a duty on the company to take reasonable steps to protect the workforce of the operating subsidiary against foreseeable risk, particularly may not have adequate laws or an adequate court system to provide the type of protection which may be available elsewhere and the employees are less able to protect their own interests because of their lack of education, poverty and need for work.

A different way of formulating the argument in some circumstances could be that, by starting a crop-growing operation which needed or would be likely to use pesticides, where the employees were uneducated and/or vulnerable because of their poverty and need for work, where the local staff had access to dangerous chemicals locally and there was a risk that they would be used without protection, XCoUk created a situation of danger which could be exploited by XCoHostCountry, whether deliberately or inadvertently, which comes within the *Smith v Littlewoods* exceptions to the rule against imposing liability for the actions of third parties.

Further matters which may be relevant to consider in relation to arguments based on the separation of legal persons and limited liability are

- areas of English law where obligations of the group, as opposed to its individual component companies, are recognized (for example, groups are treated as one entity for some accounting purposes\(^{163}\); the existence of the group *qua* group is recognized in certain areas of law such as EC competition legislation which refers to “undertakings” or “enterprises” which the ECJ has not interpreted as referring to the strict corporate form but rather the reality of the economic unit\(^{164}\)). It may be noted that the Steering Group of the Company Law Review stated that the current legal framework does not match economic reality in relation to groups generally\(^{165}\) and the debate relating a parent company’s liability in relation to subsidiaries’ activities in relation to corporate manslaughter has been referred to above.

- Consideration might also be given to the extent to which voluntary international standard-setting instruments and codes and TNC management practices prescribe or imply intervention by the parent or controlling companies in the activities of subsidiaries or associates.

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\(^{163}\) Gore-Browne on Companies para 7[7].

\(^{164}\) See e.g. Whish p80-91,177, 313, 435-6

\(^{165}\) Modern Company Law for a Competitive Economy-Completing the Structure November 2000- paras 10.7 et seq. A working group was set up to look groups of companies, although the practical concern was principally the burden of preparing individual accounts for companies within a group. The Steering Group did briefly address the question of holding parents liable for subsidiaries’ torts. They stated that it was legitimate to segregate activities in a subsidiary in many circumstances, that defining the circumstances in which use of limited liability would be abusive would be difficult and that they were not aware of cases where parent companies had engaged in such abuse (para 10.59). The issue was not pursued in the Final Report, nor in the government’s White Paper.

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Myfanwy Badge (April 2006)
“Community attitudes and goals” have been considered by the courts and consideration might be given to whether these can be formulated in relation to the activities of TNCs in developing countries. Consideration might be given to whether the general public would find a strict adherence to the separation of corporate form within a TNC as a defence to liability appropriate.

5.1.2.1.2 Parent standard of care

If XCoUK did owe the coffee plantation workers a duty of care in principle, the question will then be what was the standard of care, or what steps should XCoUK have taken.

In broad terms, it may be argued that the parent should have a duty to carry out reasonable investigations to identify potential risks to those who might be affected by its subsidiary’s operations and to put in place an adequate system to protect against such risks. It may further be argued that it should also have a duty to monitor the effectiveness of the operation on an ongoing basis.

On general principles, the court will consider what would reasonably be expected of a defendant in the position of XCoUK at the relevant time, weighing up the likelihood of harm and the seriousness of the consequences with the difficulty, expense and disadvantage of taking precautions. In this case, the harm is clear, and precautions appear straightforward. The only factor which might weigh on the other side is the fact that the masks would have to be imported. The fact that there is no practice in HostCountry of wearing masks would not on general principles determine the matter.

The difficult questions in practice are likely to be (a) how far the parent, as opposed to the subsidiary, should have to go in seeking out risks, either at the outset of an operation or on an ongoing basis, and (b) whether it should have an ongoing obligation to monitor the conduct of the subsidiary to ensure that the subsidiary complies with the parents stipulations or system, and, if so, the extent of the monitoring required. The cost-benefit analysis may be charged; for example, can a court countenance the argument that it should accept lower standards of conduct in the interests of encouraging investment in an under-developed region if higher standards would make the investment uneconomic for the TNC.

The duty to monitor may be separately contentious in that it may be accepted that it is reasonable to carry out an investigation at the outset of an investment and to set up an appropriate management system but, from a commercial perspective, thereafter the operation should run itself and the parent should not effectively be required to duplicate the function of local management. The argument against this would be that, in some countries, managers may be inexperienced and unfamiliar with the health and safety culture embodied in the system and therefore monitoring of compliance is a logical corollary of the obligation to set up the system in the first place.

There is also an issue as to whether there can, or should be, a different standard applied to the parent company of a TNC with many and diverse investments, where there may be companies and layers of management interposed in the corporate structure between the ultimate holding company and the senior management and the local operating subsidiary, than for a simpler organisation with closer connections between the head office and the developing country operation, and what role actual knowledge, or lack of it, in head office should play. (The legal question of attribution of knowledge is addressed in subsequent case studies).

The issues have to be considered in the context of the particular facts of the case in question. However, sector-specific analyses of the type of risks and the systems which leading TNCs have put in place (which may form part of their social and environmental assessments), including how detailed
a risk assessment they have carried out and the nature of their ongoing monitoring and auditing systems could be of value. Some sectors may be more advanced than others.

The arguments concerning fairness and the cost/benefit analysis, and similar arguments in later case studies, would benefit from further discussion with practitioners and others with practical experience of developing country operations.

5.1.2.2 Breach of statutory duty

Any applicable local statute or regulation should be considered to determine whether it can be construed to apply to XCoUK.

5.1.2.3 Associate issues

It seems difficult to argue that XCoUK gave XCoHostCountry any express or implied authorization to act on its behalf in relation to the activities which caused the harm, nor for piercing the corporate veil between XCoUK and XCoHostCountry on the basis of Adams v Cape Industries. If XCoHostCountry were liable in tort to the workers for the harm caused as a result of the use of the pesticide, procuring of that tort by XCoUK would require its inducement, incitement or persuasion by an agent of XCoUK, not just facilitation. Similarly, the tort of conspiracy to injure the workers would require a common design to injure and this would include evidence of intention to injure on the part of an individual whose state of mind could be attributed to XCoUK, rather than carelessness.

5.1.2.4 Loss/damages

Under English law, the claimants would be able to recover compensation for loss of earnings and medical expenses resulting from their illnesses, subject to proof of loss, as well as compensation for pain and suffering and loss of amenities of life, the latter being calculated by reference to awards in other similar cases. However, the recoverable damages are likely to be governed by the law which governs the rest of the claim, save insofar as they can be said to be matters of procedure pursuant to the approach in Harding v Wealands.

5.1.3 Jurisdiction

The UK courts will have jurisdiction over XCoUK as it has its registered office in the UK and, on the basis of Owusu, XCoUK will not be able to apply to stay the proceedings on the grounds that the courts of HostCountry are more appropriate. The workers could also claim against XCo HostCountry as part of the proceedings in the UK on the grounds that XCoHostCountry is a “necessary and proper” party as the issues in the claim against it will overlap substantially with the issues in the claim against XCoUK and they can therefore conveniently be disposed of in the same proceedings. However, the HostCountry courts may also have jurisdiction over the claims and, if proceedings were issued first by XCoUK for a declaration of non-liability to the claimants (if such a proceeding is possible in HostCountry), proceedings issued by the claimants in the UK may be stayed.

5.1.4 Practicability and procedure

If the establishment of liability against XCoUK depends on the extent of the involvement of agents of XCoUK in the activities of XCoHostCountry, the immediate practical issue may be that the claimant will not have access to the internal papers of XCoUK which it might need to demonstrate that involvement to commence its case. Once the case has been commenced, it should be possible to
obtain such documents as part of the disclosure process if necessary but this will not help the claimant formulate his case sufficiently to commence proceedings in the first place. It is possible that the claimant could obtain the necessary documents prior to the commencement of proceedings either by consent or by court order on the basis that their disclosure would assist the dispute to be resolved without proceedings as they would demonstrate the strength or weakness of each side’s case. The parties have any express duty to the court to act reasonably in exchanging information and documents and try to avoid the necessity for starting proceedings and the court may make an order for disclosure on the same basis. The more generally formulated arguments on duty referred to above would not necessarily require advance disclosure of such documents.

As this would be an action involving allegations of negligently caused injury, state funding for legal representation will not be available unless it is certified as a public interest case. If not, funding under a contingency fee arrangement would have to be sought and, if it is a “very expensive case” it will have to satisfy the additional hurdle in relation to cases where the beneficiaries are not residents of the European Union.

5.2 River pollution - group management

- **XCoUK**
  - Ds: do not include Smith

- **Extractives Processing Team (EPT)**
  - Head: Smith
  - Members: include Carlos, Gomez’ line manager

- **XCoServicesSouth WestCountry**
  - D/Empee: Smith

- **Other locally incorporated XCo subsidiaries**
  - Empees: include other members of EPT
  - Ds: Smith is D of 3 subsidiaries

- **XCoSouthCountry**
  - D: Smith
  - Empees: 1. Gomez
  - 2. Engineers who carried out faulty machinery installation
Toxic chemicals regularly escape into a river in HostCountry from a plant processing raw materials owned by XCoHostCountry. This causes pollution of the local river and surroundings, damaging the ecosystem and seriously affecting the livelihood of local fishermen as the fish are dying. The chemicals escape because of the faulty installation by engineers employed by XCoHostCountry of machinery supplied by an independent manufacturer. In order to rectify the problem, the machinery will have to be taken out, parts which have been damaged replaced and the whole system reinstalled. This will interrupt the processing schedule resulting in loss of profits. The local people have repeated complained to the local plant manager, Gomez, about the effect on their livelihood.

The XCo group legal and management structure which impacts on the HostCountry plant’s activities is as follows

- XCoHostCountry is a locally incorporated subsidiary of XCoSouthCountry, registered and headquartered in SouthCountry, another country in the same region. XCoSouthCountry is a subsidiary of XCoUK.
- The plant manager, Gomez, is employed by XCoHostCountry.
- Gomez’ line manager, Carlos, is based in SouthCountry and employed by XCoSouthCountry. He regularly visits the factory in HostCountry.
- Carlos is part of a working group, Extractives Processing Team, which contains staff based in different countries and employed by different subsidiaries throughout the world and is headed by Smith. It meets once a month, usually by telephone. Line managers in the various countries provide short notes for the team on activities and issues of concern prior to team meetings. Smith visits the various operations covered by the EPT in rotation. He has been to HostCountry three times, once after the pollution first occurred. Smith sends written reports monthly on EPT’s activities to the board of XCoUK and is invited to attend board meetings in person from time to time for discussion of issues.
- The head of EPT, Smith, is presently based in a different country, WestCountry and is employed by a company incorporated in another country in the same region, XcoServicesSouthWestCountry, which is a subsidiary of XcoUK. This company is Smith’s employer rather than the XCo subsidiary incorporated in WestCountry in order to give him better employment and pension protection as WestCountry was perceived as being particularly unstable at that time. Smith is a director of XCoHostCountry, XCoSouthCountry, as well as three other XCo subsidiaries incorporated in another region, which otherwise have no connection with the activities in HostCountry. He is not a director of XCoUK.
- This management structure was established by the board of XCoUK when they acquired a local mining company (which subsequently changed its name to XCoHostCountry).

Gomez has informed Carlos about the pollution incidents and the complaints by local people and he and Gomez have had a number of meetings with local people and also with the plant manufacturers about what needs to be done to rectify the problem. Carlos reported the problems in HostCountry two years ago at an EPT meeting and Smith discussed them with Carlos and Gomez when he visited HostCountry. Smith took the view that action was not urgent as no-one had been physically injured. No action has been taken and the pollution is
continuing.

The HostCountry operation is not a particularly significant part of the group’s activities. The XCoUK board are unaware of the pollution problems in HostCountry which have not been mentioned by Smith in his reports on EPT’s activities, and none of the employees of XCoUK are aware of them either.

5.2.1 Governing law

It is assumed that the acts and omissions relating to the decision to use the pesticide took place after 1 May 1996 and PIL applies.

The harm which has been caused in this case is

- destruction of the livelihood of local fishermen i.e. loss of earnings/profits
- pollution of the river and ecosystem

Most of the relevant events took place in HostCountry but matters relating to a failure of supervision by the SouthCountry line manager, Carlos, may have taken place in SouthCountry, matters relating to a failure of supervision by Smith as Head of EPT in WestCountry or elsewhere, and matters relating to the failure of supervision by the UK board in the UK.

The harm caused is neither personal injury nor injury to property and therefore, prima facie, the governing law under s11(2) PIL will be the law of the place where the most significant element(s) of the relevant events occurred. Taken overall, this would probably be HostCountry.

The s12 displacement rule may exceptionally permit the application of a different governing law in relation to issues relating to the duty of care on the basis that it is substantially more appropriate, in the same way as in the pesticide case. However, the principal relevant representative of XcoUK in relation to the pollution problem, Smith, is not based in the UK and his acts and defaults probably would not have taken place in the UK. The relevant issues still relate to the liability of a UK company as in the pesticide case but the factual connection with the UK is weaker. The policy considerations in favour of and against the application of HostCountry law would be considered as in the pesticides case.

It seems unlikely that a UK court would consider that any law other than HostCountry law would apply to land-related claims such as nuisance-type claims between adjoining land-owners, including whether or not XcoUK might be construed to have the necessary interest in the land.

The result under the current version of the Rome II Regulation would probably be the same.

5.2.2 Cause of action

5.2.2.1 Negligence

The interplay between the identification of the elements of a cause of action and the principles of agency and attribution of knowledge and acts/omissions of individuals in the group context is particularly complex in this case study. In reviewing this it is helpful to consider the potential liability of XCoHostCountry as well as XCoUK itself.
The acts or omissions which caused the pollution

The initial cause of the pollution was the faulty installation of the machinery and the subsequent cause of the ongoing pollution was the failure to have the problem rectified.

In relation to the faulty installation, there would probably be allegations against the engineers of technical failings. There may be allegations of failure of supervision by Gomez as plant manager depending on the circumstances, in particular, what he knew about the way in which the machinery was being installed, any risks involved, or the extent to which it might have been reasonable for him to rely on the technical expertise of the engineers. On normal principles of vicarious liability, XCoHostcountry would be liable for the defaults of the engineers and Gomez as its employees, either on the basis that XCoHostcountry itself owed a duty of care to the fishermen on the usual principles of foreseeability, proximity and fairness, and that the acts and omissions of its staff constituted breach of that duty; or possibly on the basis that the individuals themselves owed a duty of care to the fishermen and carried out their acts and omissions in the course of their employment and XCoHostcountry is vicariously liable for their acts and omissions (by analogy with the well-established principle that a company is liable to pedestrians injured by a negligent driver in the course of his employment). The latter is not the usual formulation in a straightforward single company negligence case but is included as it is more relevant when consideration is given to the liability of other group companies.

In relation to the failure to rectify, assuming the failure fell below the appropriate standard of care, there would in principle probably be a claim against XCoHostcountry on the basis that it had a duty to the fishermen to take action on normal principles of foreseeability, proximity and fairness and failed to do so. (The nature of the loss is problematic but this is dealt with below). Gomez is employed by XCoHostcountry and his knowledge of the problems was obtained in the course of his employment so there seems little doubt that it would be attributed to XCoHostcountry on general principles relating to attribution. XCoHostCountry failed to take action and therefore they are potentially liable.

However, the issue for the purpose of this case study is whether XCoUK are potentially liable for the same loss. The elements of a cause of action in negligence against XCoUK would be:

- an act or omission by or on behalf of XCoUK
- which caused the fishermen harm
- in circumstances where it is appropriate to impose a duty of care i.e. foreseeability of harm to fishermen as a result of breach, proximity between fishermen and XCoUK, and fairness
- XCo’s act or omission fell below the standard which would be expected of XCoUK
- the harm to the fishermen was of a type which is foreseeable and compensated by law.

There was no active involvement by any individuals other than employees of XCoHostcountry in the faulty installation of the machinery. If XCoUK owed a duty of care to the fishermen in relation to the installation of the machinery, it would probably have to be formulated on a similar basis to that proposed in the pesticides case, namely that, in view of matters such as the nature of the activity, possibly a low skills base of engineers in the region and the vulnerability of those likely to be harmed as a result of negligent installation of machinery, XCoUK owed a duty on investment to the fishermen to investigate the risks and ensure that an appropriate system was set up to ensure that reasonable steps were taken to protect against those risks, and those risks would include risks in relation to the faulty installation of the machinery. What might be reasonable would depend on the facts; it might amount to no more than setting up procedures to ensure competent staff were appointed but, particularly if there were a low skills base in the region, it might require provision of ongoing technical advice, support, monitoring or supervision. If there were such a duty on XCoUK, its liability in this case would depend on whether the extent of the duty were such that compliance with such a duty
would have prevented the problems with the installation. If the duty were simply to set up a system to ensure that competent staff were appointed by XCoHostcountry and the system set up was adequate, XCoUK would probably not be liable if those staff made negligent errors.

As to whether XCoUK might be liable in relation to the failure to rectify the problem, the issue is whether XCoUK had a duty to take action and, if so, what action they could have taken.

In relation to the duty, none of the directors or employees of XCoUK actually know about the problem so, on that basis, they cannot foresee harm resulting from a failure to act. Whether they should have known about the problem will depend on whether they had a duty to set up a monitoring system as outlined above and, if they had, whether this would have resulted in the disclosure of the problem to them. It may be argued that the line management and EPT structure was such a monitoring system, but it failed to channel the information to them because Smith did not pass on his knowledge. The principles relating to the imputation of knowledge which a principal might expect to be told by his agents where a principal has a duty to investigate and make disclosure may be relevant in this respect- see Attribution above.

Even if the line management and EPT structure were not established pursuant to a duty on the part of XCoUK to do so, if individuals with relevant knowledge were agents of XCoUK and their knowledge was acquired in the course of that agency, that knowledge may be attributed to XCoUK. It may be argued that EPT and the line management structure was set up by XCoUK in order to safeguard its investment and therefore the functions carried out by, in particular, Smith as head of EPT both in receiving information and giving instructions were carried out as the representative of XCoUK as sole shareholder. He thus would have acquired his knowledge and acted in the course of his agency for XCoUK. On the other hand, it may be argued that his role was, in fact, carried out on behalf of XCoHostCountry insofar as it affected the operations of XCo Hostcountry. Technically speaking, even a controlling shareholder has no power to direct the operational decisions of a subsidiary, which is a matter for its board. However, a controlling shareholder is in a position to exercise a powerful influence over the conduct of a subsidiary as was recognized in James Hardie and the cases to which it referred\(^{166}\). Determination of the company on whose behalf Smith was acting may require a close examination of matters such as the terms of Smith’s employment and any secondment, documents relating to EPT and the role of the head of EPT, and evidence of the actual activities of Smith and EPT similar to the examination carried out in Heatons v TGWU referred to in Associates/Agency above. If the knowledge of Smith is attributed to XCoUK, the requirements of foreseeability and proximity would seem to be established and issues of fairness would need to be addressed.

As to the action XCoUK could have taken, the power of the parent to influence the actions of the subsidiary has been referred to above. The question for this purpose is not whether XCoUK had a legal power to direct XCo Hostcountry to remedy the pollution problem but whether, as a matter of fact, XCoHostcountry would have complied with their instructions.

An alternative argument would be that XCoUK are vicariously liable for Smith as their agent. Smith himself could be argued to owe a duty of care to the fishermen for his failure to act on the basis that it was clearly foreseeable to him that they would be harmed if he did not, they are in a sufficiently proximate relationship to him and there is no consideration of fairness which would militate against such a duty; as he gave the instructions to take no further action in the course of his authority from XCoUK as outlined above, XCoUK are vicariously liable for his default (in the same way as an employer would be liable for a driver who negligently injures a pedestrian while in the course of his

\(^{166}\) [1998] 43 NSWLR 554 at p 580D-581A
employment). However, whether XCoUK were liable would depend on whether or not Smith was acting in the course of an agency from XCoUK and the arguments for and against this have been referred to.

The public policy point which has been mentioned in connection with the *James Hardie* approach to the imposition of a duty of care on a parent, namely, that care needs to be taken to avoid, if possible, a legal principle which has the effect that parent companies of TNCs take the view that they run less risk of liability if they take a hands-off approach to their subsidiary’s activities in developing countries than if they set up a monitoring or management system which might result in their having, or having attributed to them, knowledge which they would not otherwise have.

The fishermen’s claim in negligence for damage to their livelihoods would constitute a claim for economic loss which was not consequent on physical damage to them or their property and therefore there would in principle be difficulties in recovering their loss in negligence. However, if the *Perre v Apand Pty Ltd* approach is followed, the fishermen are clearly vulnerable to the pollution and presumably there is nothing they can do to protect themselves against the risk of pollution; it would seem to be reasonably foreseeable that the fishermen’s livelihoods would be adversely affected by the pollution. However, the difficult issue would be whether there would be an indeterminate number of claims for economic loss resulting from the pollution if the fishermen’s claims were admitted and this will depend on the facts of the particular incident and how many other claims there might be. Economic loss is recoverable for the tort of conspiracy to injure, should a case for that tort be made out.

It may be easier to recover loss of this type in civil law jurisdictions- see Overseas Law section below.

5.2.2.2 Nuisance/environmental law

As the nature of the local law (in particular rights in relation to land and statutory provisions) on this may differ substantially from English law, further comment will await advice from overseas lawyers.

5.2.2.3 Associate issues

It seems difficult to argue that XCoUK gave XCoHostcountry any express or implied authorization to act on its behalf in relation to the activities which caused the harm, nor for piercing the corporate veil between XCoUK and XCo Hostcountry on the basis of *Adams v Cape Industries*. If XCo Hostcountry were liable in tort to the workers for the harm caused as a result of the use of the pesticide, procuring of that tort by XCoUK would require its inducement, incitement or persuasion by an agent of XCoUK and similarly, the tort of conspiracy to injure the workers would require a common design to injure and this would include evidence of intention to injure on the part of an individual whose state of mind could be attributed to XCoUK. This raises a similar issue as to whether Smith was an agent of XCoUK as that discussed above in relation to negligence.

5.2.2.4 Damages

The difficulty in relation to damage to livelihood/economic loss has been referred to above.

5.2.3 Jurisdiction

The position will be similar to the pesticides case.

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167 [1999] 164 ALR 606
5.2.4 Practicalities and procedure

The position will be similar to the pesticides case.

5.3 Clothes factory - poor labour conditions of third party supplier

A clothes manufacturing company in Hostcountry, KCo, supplies clothes to a UK retailing company, XCo, incorporated in the UK. KCo’s factory uses child labour and imposes excessive working hours. The workers’ pay is only sufficient to provide them with the bare necessities of life and the company has told them that they must buy what they need in the company shop. For 3 months last year, their wages were reduced by a third without warning because they were told that the company was in difficulties. Before the factory was opened, they earned their living as small mixed crop farmers or handicrafts producers selling in a local market. However, they stopped growing their crops and making goods to work in the factory and the market no longer functions because the majority of the local people have to buy their goods from the factory shop. The workers have therefore now no economic option but to work in the factory, however objectionable the conditions.

There are no terms in the supply contract between KCo and XCo relating to the working conditions in KCo’s factory. XCo’s senior management have made visits to KCo and have been to the factory but have not enquired into working conditions.

This is not an easy example to analyse from the private civil claims perspective under English law in terms of the harm suffered. Matters such as use of child labour, excessive working hours, unauthorised deductions from wages and victimisation matters are expressly prohibited or restricted by English statutes and abuses by employers may be adjudicated by special tribunals or, in some cases, constitute criminal offences. (The legislation applies only to employers, and parent companies will not usually be party to the contract of employment.) However, they are not recognised as heads of damage or types of loss as such which are compensated by the common law; in order to be actionable, the claims would have to be formulated in terms of actual harm of a type which is compensated by the law. This is possible in the case of excessive working hours; as far as child labour is concerned, although this in practice may be allied with physically harmful treatment, by itself the harm it causes is more to the child’s education and mental development and it is difficult to see how this can be formulated as a type of loss recoverable at common law. (There may be more flexibility in civil law jurisdictions where there is a less prescriptive definition of loss (see Overseas Law section below)). The study in any event demonstrates some limitations of the common law in the overall human rights accountability context. The supply chain/liability for harm caused by third parties aspect of the case is, of course, also applicable in the context of more clearly recoverable types of harm.

Because of the problems in identifying causes of action, in this case study, the cause of action is dealt with before governing law.

5.3.1 Cause of action

It is KCo which is the direct cause of the harm to the workers and any liability on the part of XCo will either be pursuant to a duty of care in negligence in relation to the acts of third parties or liability under one of the “associate” principles along the lines outlined above. Causation issues, including the “loss of a chance” principles, will also be material.
Negligence

It may be argued that XCo had a duty to take reasonable steps to obtain terms as part of its supply contract with KCo to protect KCo’s workforce from foreseeable harm suffered as a result of working on goods to fulfil its contract, which would include provisions as to working conditions, and possibly also to take reasonable steps to monitor compliance. Causation issues will be material because there is uncertainty about what KCo would have done if XCo had taken the steps in question. This would be a very novel duty and there must be considerable doubt as to whether it would be entertained. Nonetheless the legal principles can be applied to the scenario.

The foreseeability of the harm would need to be established which might require evidence as to general knowledge, and actual knowledge on the part of agents of XCo, of working conditions in the region, the industry and the actual factory. If XCo could be shown to know that the circumstances were such that its contract would put such strain on the factory that they would have to impose excessive hours on the workforce, to fulfil it, the foreseeability case would be stronger. Even if they did not actually know, there may be a case for arguing that there should be a duty to investigate the factory’s capacity, at least if the order were particularly large, urgent or otherwise could reasonably be expected to put pressure on the particular operation, or developing country operations generally, on a similar basis to those discussed in the earlier case studies. Proximity would also have to be established, but there is a reasonable argument that the relationship between the workers in the factory which makes the specific goods for which XCo has specifically contracted, and XCo as contractor, is sufficiently proximate. The arguments on fairness may differ depending on what precisely it is alleged that the TNC should have done and how far it should have gone to obtain terms from KCo as to the proper treatment of workers, and whether and to what extent monitoring was required. Alternatives are considered below and, in each case, causation issues have also to be considered.

If the claimants can establish that, if XCo had sought terms from KCo as to the proper treatment of workers, there is a substantial chance that KCo would have agreed even if they cannot prove that it would, they will in principle be entitled to recompense, although damages would be discounted to reflect the level of probability. Evidence would have to be brought on this, which might include evidence from KCo themselves, evidence of what KCo had done in similar circumstances, and evidence of what similar organisations in the region had done in similar circumstances. If the evidence is that KCo would have agreed, or there is a substantial chance that they would have agreed, but would have required a higher price for their goods, the issue will be whether it was reasonable for XCo to pay the higher price. It may be that the higher price would have made the deal less commercial, or completely uncommercial, from XCo’s perspective. Evidence would be considered on this, such as an analysis of the difference in profit to XCo with and without the stipulations, what the nature of XCo’s requirements was, how feasible it would be for it to obtain the goods from another supplier on better terms, what XCo had done in comparable situations, and what other similar companies had done in comparable situations. The position may differ depending on the particular stipulations; some types of protection may be more expensive than others. Formulated in this way, the standard of care cost/benefit analysis would come into play; as in previous case studies, there may a difficult question as to whether there is too high a price to pay for protection from foreseeable harm to vulnerable people. If the court determines that XCo, having requested terms and having been prepared to pay a price which reduces their profit but still gives them the prospect of making a profit have taken sufficient steps to comply with their duty of care, this appears to have the consequence that, if KCo still refuse to agree to the stipulations, XCo are entitled to enter into the contract without terms as to the proper treatment of the workers. To address this, the argument would have to be that XCo’s duty is not a duty to take reasonable steps, but an absolute duty not to enter into a contract without the appropriate terms so that, if it does so, it bears the risk of harm.
caused as a result. Considerations of fairness would have to be addressed in relation to the imposition of such a duty.

5.3.1.2 Breach of statutory duty

Any applicable local statute or regulation should be considered to determine whether it can be construed to apply to XCo.

5.3.1.3 Associate issues

There would be no grounds in this case to argue that XCo gave KCo any express or implied authorization to act on its behalf, nor for piercing the corporate veil between XCo and KCo.

As to associate liability, KCo may be in breach of local statutory or common law. Under English common law (not prima facie the applicable law but there may be similar causes of action under local law), unlawful acts which KCo might have committed include

- the excessive working hours may be a breach of their duty of care to their employees, or an implied term in their contracts as employers.
- the requirement to buy in the company shop and the consequent effective destruction of the local market could come within the tort of unlawful interference with trade, but the intention requirement on the part of KCo would probably be difficult to satisfy.
- the reduction of wages may be a breach of express or implied terms in the employment contracts if an obligation could be construed to continue paying at a particular rate, at least for a particular period. There may also have been an express or implied representation by KCo to that effect on the basis of which the workers gave up their alternative employment.

If KCo were liable to the workers for the harm caused to them, in principle, procurement of a tort by XCo or conspiracy to injure by unlawful means might be considered but as XCo have done nothing active, and are unlikely to have had the requisite intention to injure for conspiracy to injure, these seem unlikely to succeed. Economic loss is recoverable for the tort of conspiracy to injure, should a case for conspiracy by XCo with KCo to unlawfully interfere with the trade in the local market be made out.

5.3.2 Governing law

Insofar as this is an action for personal injury, the position will be similar to the pesticides case, namely that Hostcountry law will prima facie apply but that consideration might be given to whether it is substantially more appropriate that English law should apply to certain issues under the rule of displacement on the basis of the same arguments made in Cape, namely that the relevant decisions would have been taken in the UK.

If there were a claim against XCo for procurement of a tort or conspiracy to injure by using one of the unlawful means identified and it did not constitute an action for personal injury or damage to property, the applicable law would be the law of the country where the most significant elements of the relevant events occurred, subject to the rule of displacement where it is substantially more appropriate. If the procurement/conspiracy elements could be made out against XCo and these took place in the UK it might be arguable that UK law applied by analogy with the arguments in Cape.
5.3.3 Jurisdiction
The position will be similar to the pesticides case, namely that the UK courts have jurisdiction over a claim against XCo and it cannot be argued that there is another more appropriate forum. KCo may be joined into the UK proceedings as a necessary and proper party.

5.3.4 Practicalities and procedure
The position will be similar to the pesticides case.

5.4 Oil extraction – assaults by third party – joint venture

XYCo is a company incorporated in Hostcountry as part of a joint venture to carry out oil extraction, one of whose major shareholders is a TNC whose parent is incorporated in the UK, XCoUK. XCoUK holds 30% of the shares in XYCo, the Hostcountry government holds 30%, with the remainder being held by other consortium companies. State security forces protect the oil extraction installations because of their strategic importance. The security forces threaten, assault and imprison local trades union activists campaigning against the way in which the oil extraction is being carried out. XYCo employees give the security forces information about who is involved in the protests and their movements, which enables the security forces to target them.

XYCo as a partially-owned joint venture company is a third party in a category between the wholly-owned subsidiary in the pesticides case and the entirely separate supplier in the clothing manufacturer case, with the position further complicated by the fact that it is another third party, the security force, which has actually caused the harm. This example gives rise to issues which may not arise outside the context of major infrastructure projects; it deals with deliberate violence, state misconduct and allegations of complicity in very serious offences on the part of TNCs, and it gives rise to specific problems of proof as well as issues arising out of state immunity and potential parallel criminal liability. However, the joint venture vehicle is used in other industries and situations and the issue of liability for the activities of a joint venture vehicle may be addressed in another context. Valuable further factual investigations could include

- In what other industries and types of project would a vehicle of this type be used?
- What legal or de facto control would a consortium member typically have under the terms of the joint venture/consortium documentation over the activities of the joint venture company in general and specifically in relation to the terms on which contractors might be employed.
• How would the joint venture be managed? Would there be any overlap individuals’ roles which might give rise to attribution issues (particularly where one of the consortium members is the de facto operator of the joint venture activities and supplies know-how, management, reporting and possibly personnel.

5.4.1 Cause of action

5.4.1.1 Negligence

The analysis in relation to possible negligence liability of XCoUK will follow that in the clothes manufacturer case study above. The arguments relating to whether a duty of care would be imposed on XCoUK and whether that duty would effectively be to use their best endeavours to obtain appropriate contractual control over state security forces or not to enter into the joint venture in the absence of such controls, would involve different policy considerations. A TNC’s attempting to impose requirements on a state in relation to its own civil rights might be diplomatically more problematic than the imposition of health and safety checks on a local factory and a debate over the benefits and the disadvantages to local people of a major infrastructure project would be very different from a goods supply contract.

5.4.1.2 Associate Issues

In principle, the security forces may be liable for the torts of intimidation, battery, assault and false imprisonment (assuming they did not have lawful excuse in the light of the conduct of the activists). They would be likely to have sovereign immunity from suit but that would not prevent other parties who did not have such protection being liable in relation to the same matters, provided all the elements of the appropriate tort were established against them.

There may be an argument that XYCo would be liable for procurement of these torts or for conspiracy to injure on the basis of the involvement of their employees. In practice, this is likely to raise considerable difficulties of proof. Such matters may not be documented and witnesses are likely to be reluctant to give evidence.

Assuming there was no active involvement on the part of directors or employees of XCoUK sufficient for liability for procurement or conspiracy, the issue would be the extent to which either knowledge or acts/defaults of employees of XYCo might be attributed to XCoUK but more information would be needed about the way in which the joint venture vehicle operations and personnel might overlap with those of XCoUK.

5.4.2 Governing law

S11(3) PIL states that personal injury “includes disease or any impairment of physical or mental condition”168. On the basis that this is an action for personal injury, the position will be similar to the pesticides case.

5.4.3 Jurisdiction

The position will be similar to the pesticides case. There is a possibility of joining XYCo and the other consortium members into the UK proceedings as necessary and proper parties.

168 see also Dicey para 35R-078
5.4.4 Practicalities and procedure

The position will be similar to the pesticides case. Funding may be available for legal costs if the case is framed in terms of deliberate abuse rather than negligence.

5.5 Supermarket – oppressive treatment of agricultural supplier-group

XCo TNC, which owns supermarkets in the UK and other countries in Europe (held via locally incorporated subsidiaries) purchases fruit and vegetables from small producers in Hostcountry via a locally incorporated subsidiary, XCoHostcountry.

The parent company of the TNC, XCoUKPLC is incorporated in UK. Purchasing policy in terms of type and quality of product are determined by a Product Policy group consisting of representatives from a number of different regions in the world and headed by the Head of Products Policy, Jones, who is employed by and a director of XCoPLCUK. He is also a director of XCoUK.

There is no written contract between any XCo company and the Hostcountry producers and XCo purchases at short notice based on demand from its supermarkets, which requirements are notified to it by the local supermarkets. Employees of XCoHostcountry inspect the crops and arrange for their collection and transport. The purchases are recorded in the books of XCoUK, a company incorporated to fulfil this function, which makes purchases of products in a number of different countries and then on-sells them to the local XCo supermarket company which needs the product.

The XCoHostcountry employees encouraged the producers to grow particular crops on the basis that the TNC would be likely to buy them. However, they frequently reject the crop on grounds that it does not comply with the PP Group’s very strict rules on standard sizes,
blemishes etc, or that demand from the XCo European supermarkets for the particular crop is insufficiently high. Alternatively, they offer very low prices because there is a glut of the crop elsewhere in the world. This leaves the producers with effectively no market for the crop as there is little local demand and they have no access to marketing mechanisms to sell the crop on the international market.

After 5 years, the board of XCoUKPLC decided that the cost of transport from Hostcountry was uneconomic and the TNC stopped buying from the producers altogether without any warning, leaving them with no market for their crop and making their investment in equipment to plant, care for and harvest the crop valueless, as there is no local market for the crop.

5.5.1 General comment

Insofar as this case study rates to allegedly unfair or oppressive trading practices, it brings in issues relating to competition, the structure of global markets and the desirability or otherwise of protecting weaker competitors, which are more appropriate for a separate study. Further consideration may be given to whether this type of problem can be formulated in terms of harm, rather than unfairness, to see whether there might be any of actionable duty of care in relation to it. This case study does raise similar issues to the others in relation to group liability.

The substantive causes of action, insofar as there are any, may otherwise include:
- There might conceivably be an oral contract that one or other company within the group would buy produce, which has been breached, or an actionable misrepresentation, but it will depend very much on the particular facts.
- For a damages claim under EU (or UK) anti-competition law/ abuse of a dominant position, it would be necessary to demonstrate that (assuming XCo constituted a dominant undertaking within the relevant market) its procurement practices in relation to the Hostcountry producers were abusive in the sense of being harmful to the common market (in relation to EU law) and distorting competition, and that they had an appreciable effect on trade between member states or within the UK, which seems problematic.
- There would have to be a material expansion the tort of unlawful interference with trade to cover this, which also seems problematic.

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A general issue applicable to all cases is the extent to which Human Rights Act 1998 is applicable and its effect.

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6 Overseas Law

This section is for general reference only. Full advice is to be obtained from overseas lawyers.

6.1 Substantive civil law

Civil legal systems are codified, usually in general terms in Codes (Civil Code, Commercial Code) with more specific subsidiary statutes. They have a similar distinction in principle between civil and criminal law to common law systems. The court procedure is inquisitorial, rather than adversarial as it is under common law systems. This means that, although the commencement and much of the substance of the proceedings are the responsibility of the parties, the court plays a more active role in the conduct of the proceedings than in common law proceedings, especially the gathering of evidence. Judgments in previous cases are not binding on the court and are less significant as a source of law than in common law jurisdictions; academic materials, however, are used more widely.

Commonwealth countries have a common law legal system and share many principles and legal authorities with common law developed country legal systems. From research so far, it appears that most other countries (including developing countries in Africa, Far East and South America) have civil code systems based originally on the French legal system but we do not at present know to what extent the developments in their systems mirror those of the French legal system or indeed of other civil law systems, such as German or Italy. It will be seen from the notes below that there is, for example, a difference of approach in some material aspects between German and French tort law.

6.1.1 French law

Under French law, there are 5 articles in the Civil Code which provide for all cases of delictual, non-contractual liability, of which the most material are:

- Any human deed whatsoever which causes harm to another creates an obligation by the person whose fault it was to compensate it (art 1382).
- Everyone is liable for the harm which he has caused not only by his deed but by his failure to act or his lack of care (Art 1383).
- One is liable for the harm which one causes by one’s own deed, but also for that which is caused by the deed of persons for whom one is responsible, or things which one has in one’s keeping (art 1384 al 1).

These principles have been interpreted by the French courts as giving rise to liability for

- Personal fault
- Liability without fault for the deeds of “things in one’s keeping”
- Possibly, liability without proof of fault for the deeds of persons for whom one is responsible.

These obligations apply to companies as legal persons as well as to natural persons. French companies are separate legal persons and also are subject to limited liability.

There is, in principle, liability for any type of harm. There is, for example, no bar in principle to liability for economic loss as there is under common law systems and the French system permits broad recovery for “dommage morale” such as nervous shock, grief and mental distress. However, the harm must be direct, certain and legal.

169 Principles of French law - Bell etc 1998

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There is no need to prove the existence of a “duty of care” owed by the defendant to the claimant although there has to be a causal link between the act and the harm. The principle of causation may be used to restrict the ambit of liability. In practice, the courts require the act causing the harm to be of such a nature that normally and according to the natural course of events it would produce the harm, as opposed to only producing it in exceptional circumstances. Acts of third parties may give rise to joint and several liability or may break the chain of causation. Damages may be reduced for contributory fault by the claimant.

Fault is “abnormal behaviour” or “failure to do what one should”. In principle, the courts apply an objective standard in deciding what a reasonable man (bon pere de famille) should do in any particular circumstances and this has been the subject of consideration by the courts in many different factual circumstances. Subjective factors such as the defendant’s possession, or conversely lack of, particular skill or knowledge, may be taken into account but there is no equivalent of the cost benefit analysis which forms part of the common law analysis. The view of an expert appointed by the court is usually decisive. Although that expert may, in fact, take into account similar factors to those included in the common law cost/benefit analysis, he is not required to do so as a matter of law. The court will only substitute its own opinion or require a new report in extreme cases.

There is no special treatment for pure omissions.

Jurisprudence has established that liability for the deeds of “things in one’s keeping” (such as machinery) is strict although this may be qualified in particular cases. Strict liability is often justified by the principle of risk profit — that a person who profits or benefits from a thing should bear the burden, and risk cre — that a person who creates a risk should shoulder the consequences of that risk transpiring, although neither principle has gained universal acceptance and have not featured in the reasoning of the courts.

Liability as “keeper” of a thing may be split e.g. between owner and hirer or between supplier, owner and manufacturer.

The basis of liability for another person’s actions is not entirely clear under French law. It appears that there is a general liability for another person’s actions in cases of personal fault under the general principles of articles 1382 and 1383 and also liability which may be strict in certain circumstances under article 1384, but it is not clear whether those circumstances are limited to the specific cases originally set out in that article (i.e. parents for minor children living with them, teachers and craftsmen for their pupils and apprentices, and comettants (principals) for preposes (agents)), or whether there is a more general principle of liability for harm caused by others, of which these and other cases are simply examples 170.

The French courts are said to be “adventurous in developing delictual liability”.

The measure of damages is full reparation, to place the claimant in the position in which he would have been had the harm not occurred.

Under French law, unlike English law, commercial law is a distinct branch of substantive law separate from civil law. There is a separate commercial code and commercial courts. There may be different types of proof for commercial transactions. Where one party is commercial and the other is not,

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170 Bell p386-391

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different types of proof may be applied. The nature of the defendant determines which court has jurisdiction.

The commission of any criminal offence automatically constitutes a civil fault and a victim of a crime may constitute himself a “partie civile” and be awarded damages. As a result of this procedure, many claims for damages based on delictual liability are brought in the French criminal, rather than the civil, courts. For this procedure to be relevant to the cases which are the subject of this project, there will have to be a crime which a company is capable of committing and the French courts would have to have jurisdiction in relation to it. French law only holds companies liable for crimes where there is an express provision to this effect in the relevant part of the Code or statute. Although the imposition of criminal liability on companies has been increasing, it is still restricted.

6.1.2 German law

Although German law appears to have a similarly wide a basis of delictual liability as French law, in fact it is interpreted more narrowly. Section 823 para 1 of the Burgerliches Gesetzbuch (BGB) provides

A person who intentionally or negligently injures the life, body, health, freedom, property or other right of another unlawfully is obliged to compensate the other from harm arising from this.

The claimant must have been harmed in one of the five specific interests listed or in an “other right”. “Other rights” do not include economic loss, apart from a limited right to an “established and functioning business”.

The claimant has to establish a duty of care on the part of the defendant (verkehrssicherungspflicht) which is a duty to protect from the risk of damages likely to arise to others in the affairs of life, arising from the defendant’s actions or property. This might arise if the defendant

- is in control of premises or goods
- starts an activity e.g. a factory, or does something which affects an existing activity e.g. obstructs a highway
- has created a danger by his own actions
- carries on a profession or trade
- is in a close relationship with the claimant
- is in control of the claimant

There is liability for an omission only where there is a breach of a duty to act.

As to the standard of care, a person acts negligently if he does not have regard to the care necessary in the affairs of life (s276 BGB). The standard is objective, that of the group of persons normally undertaking the activity in question. There is a higher standard for dangerous businesses.

The causal connection between the act and the harm must be “adequate”.

6.2 Governing Law

The current English statute which deals with the law governing matters or issues, PIL, was not the
result of an international convention and therefore will not necessarily be reflected in the law of other jurisdictions, including common law jurisdictions. PIL represented a significant change in the English choice of law rules following detailed analysis by the Law Commission and was designed to clarify the English common law position and eliminate perceived defects, in particular, the rule against double actionability (which required a tort to be actionable under English law as well as the relevant foreign law before it was justiciable in UK courts).

The European Commission’s Explanatory Memorandum for the proposal for the Regulation on the law applicable to non-contractual obligations (“Rome II”) (see Governing Law above) states that a comparative law analysis of the conflict of law rules of European Union member states indicates that differences in relation to choice of law rules for torts are markedly wider than was the case for contracts. Most states apply the law of the place where the tort was committed but there are variations on the application of this rule where the harmful event and the place where the loss was sustained are spread over several countries. Some states still take the traditional solution of applying the law of the country where the event giving rise to the damage occurred, but recent developments favour the law of the country where the damage is sustained and a growing number of member states allow the claimant to opt for the law which is most favourable to him. Others leave it to the courts to determine the country with which the situation is most closely connected, either as a basic rule or exceptionally where the basic rule turns out to be inappropriate in a particular case. Only some of the member states have codified their rules.

6.3 Jurisdiction

Under the Brussels Convention, any company with its registered office in an EU state (or, if it is has no registered office, which was incorporated in that state) or with its central administration or principal place of business in that state can be sued in the courts of that state. The only member states in which the courts have any power to stay proceedings on the grounds of forum non conveniens are UK and Ireland, and, as explained above, this does not apply where they have jurisdiction pursuant to the Brussels Convention.

The courts in many other common law jurisdictions have discretion to stay proceedings against companies incorporated in their jurisdictions on the grounds of forum non conveniens, including USA, Canada, New Zealand, Hong Kong, Singapore and India. In Australia, the High Court has adopted a doctrine that a stay should be granted only if the local court is clearly an inappropriate forum, which will be the case if continuing the proceedings there would be oppressive in the sense of being seriously and unfairly burdensome, prejudicial or damaging, or vexatious in the sense of productive of serious and unjustified trouble and harassment.

The forum non conveniens principles applicable in the UK (if the Brussels Convention does not apply) are set out below by way of comparison. Under the principle of forum non conveniens, even though the UK courts have jurisdiction over a matter, they have a discretion, on the application of a defendant, to stay the proceedings on the grounds that the matter should be tried in another country whose courts also have jurisdiction but which is “more appropriate”. “More appropriate” means that the matter may more suitably be tried in that country for “the interests of all the parties and the ends of justice”.

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172 Explanatory Memorandum pp 5-6
173 Opinion paras 219-280
174 Dicey para 12-011
175 Spiliada Maritime Corp. v Cansulex Ltd. [1987] AC 460
On an application to stay proceedings on the grounds of _forum non conveniens_, the court considers the reason why the other forum may be the “natural” forum; these are the factors which indicate that the dispute has the most “real and substantial” connection with it. They include factors affecting convenience and expense, such as availability of witnesses, the law governing the transaction and the places where the parties reside and carry on business, and the governing law. If, at this stage, the court concludes that there is no other jurisdiction which is clearly more appropriate for a trial of the action, the court will ordinarily refuse a stay. However, if there are additional circumstances by reason of which justice requires that a stay should not be granted, the court may not grant a stay, even if the other jurisdiction is the natural forum. The stay of proceedings will not be refused simply because the claimant would be deprived of an advantage available in the UK courts, such as a higher scale of damages, a procedure for obtaining evidence, or more generous rules of limitation. However, the courts have declined to stay proceedings on the grounds that justice will not be done in the foreign forum for ideological or political reasons, because of the inexperience or inefficiency of the judiciary, excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies.

### 6.4 Procedure

The US system of class actions is far more comprehensive and far-reaching than the English Group Litigation Orders. Differences between the English and US systems include

- tort claims tried by juries
- scale of jury damages awards far higher than that made by judges in England
- firms of lawyers in the US earn billions of dollars in cases which do not even come to trial and often result in meagre recoveries by individual claimants.

The Law Lord, Lord Steyn, comments that there is a perception among judges and the public that the tort system has become too expansive and wasteful, as well as an unarticulated but real conviction among judges that we must not allow our social welfare system to become a society bent on litigation and the introduction of a US style class action system cannot but contribute to such unwelcome developments in the English legal system.

*With thanks to all those who have provided information and comments for the purpose of this paper and, in particular to Peter Muchlinski, Professor of International Business Law, The School of Oriental and African Studies.*

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176 Dicey para 12-025
177 Identified by Lord Steyn in the foreword to _Multiparty Actions_ C. Hodges 2001, see also ch 13 US Class Actions
178 In the foreword to _Multiparty Actions_ C. Hodges 2001