

TOOLKIT //

Potential Civil Redress in England & Wales

For Victims of

**CHILD SEXUAL EXPLOITATION AND ABUSE
IN CAMBODIA**

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LIBERTY SHARED

CREATING AN ENVIRONMENT
SAFE FROM TRAFFICKING

PURPOSE OF THE TOOLKIT

This Toolkit provides an overview of some practical aspects to consider when determining whether it might be possible to seek compensation in the civil courts of England and Wales¹ for victims of child sexual abuse where the conduct occurred in Cambodia.

While the English courts recognise claims in respect of child sexual abuse as a claim in tort (most notably, the tort of trespass to the person), the default position will be that the English courts will consider whether there is a claim based on the local law where the conduct took place, i.e. Cambodia.

This Toolkit looks at some key principles underlying such claims and suggests issues for general consideration in the following areas:

- A. Who can bring a Claim?
- B. Jurisdiction
- C. Limitation Periods
- D. Causes of Action*
- E. Damages and Quantum
- F. Certain Litigation Risks

Given the fact-specific nature of child sexual abuse cases, the key principles and practical points explored in this Toolkit are not intended to be comprehensive and could never capture all issues relevant to civil compensation claims based on this behaviour. Further, litigation (including the steps required before any claim is initiated) is a complex process that requires expert advice and representation, taking into account the specific facts of a particular case.

This publication is not intended to provide legal advice, and the law examined in this Toolkit is current up to the date of publication. Where a claim is being considered, it will be important to seek advice from an English qualified lawyer as soon as possible because there may be time limits which apply.

Disclaimer: The report contains our findings based on a desktop review of publicly available sources in English (unless otherwise indicated). Liberty Shared does not accept responsibility for the accuracy of foreign laws, or the accuracy of the translations. Users should at all times consult the full text of the relevant laws in the original language as well as seeking advice from local counsel qualified in the relevant domestic jurisdictions. This report does not constitute legal advice under any circumstance.

* Causes of action refers to the claims that the victims may assert against the defendant.

¹ Referred to as the "English courts" in this Toolkit. It should be noted that Scotland has a separate civil compensation route for victims of sexual offences which is not covered in this guide.

A. WHO CAN BRING A CLAIM FOR COMPENSATION?

Practical Considerations: WHO CAN BRING A CLAIM?

1. Establish the current age of the child victim.
2. Obtain proof of current age such as birth certificate, family book, passport, national ID, or other form of identification.
3. Where the victim is under 18 years of age, consider alternative arrangements for representation such as appointment of a 'litigation friend'.

The victim is generally the person bringing the claim before an English court. However, the English courts do not usually permit children (i.e. persons under 18 years old²) to conduct proceedings on their own behalf (i.e. a child cannot be the claimant).

Where the victim is under 18 years old at the time of the case, an adult, known as a 'litigation friend', can be permitted to conduct the case on behalf of the child.³ Where a litigation friend is appointed, care must be taken to comply with the relevant requirements of the English courts regarding litigation friends.⁴

Where victims are 18 years or older at the time of the claim being started, they can bring the claim in their own right, even if the abuse took place when they were children.

B. DO THE ENGLISH COURTS HAVE JURISDICTION OVER THE CLAIM?

Practical Considerations: DETERMINING JURISDICTION

1. Determine whether there is a connection or link between the defendant and England and Wales.
2. Determine the range of possible defendants to pursue.
3. From that range, identify the appropriate defendant to sue following consideration of the defendant's status, location and assets.

For the English courts to hear a claim by a child victim of sexual abuse (or the 'litigation friend'), there must be some connection between the parties and England and Wales (i.e. to have 'jurisdiction'). Where the victim is a Cambodian child, in practical terms, this means that the defendant must have some connection with England and Wales. In broad terms, this means that the following persons could potentially be defendants in a claim before the English courts:

1. **Persons**, who sexually abused the Cambodian child victim, are British citizens or reside in England or Wales; or
2. **Persons**, who arranged or otherwise organised the sexual abuse of the Cambodian child victim, are British citizens or reside in England or Wales; or
3. Depending on the circumstances, the **British organisation or company or persons**⁵ for which the persons at (1) or (2) above worked while in Cambodia.

² As defined in Rule 21.1(2)(b) of the Civil Procedure Rules 1998.

³ See Part 21 (Children and Protected Parties) of the Civil Procedure Rules 1998, which set out rules relating to proceedings involving children.

⁴ These requirements concern the appointment of the litigation friend, control of money recovered by or on behalf of the child, and recovery of costs or expenses incurred by the litigation friend, proceedings involving children.

⁵ The assessment of whether an organisation could be held responsible for the acts of an individual is complex and would need very careful consideration against clear evidence of the nature of any employment of the individual by that organisation.

Given the type of potential defendants who could be sued in the English courts, care would need to be taken to ensure that the most appropriate defendant(s) is chosen. The answers to the following questions will assist in deciding which person(s) or entities may be the most appropriate defendant(s):

- STATUS**
- Is the individual who carried out the abuse still alive?
 - Is that individual a British citizen or a British resident? Is evidence available to prove this?
 - Does or did that individual work for a British organisation / company whilst in Cambodia? Is evidence available to show this?
 - If so, does that British organisation / company remain active (i.e. it is active and not in administration or dissolved)?
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- LOCATION**
- Where is the individual currently located? For example, the individual defendant could be in prison (whether in the UK or elsewhere). Note that this is relevant not only for the question of jurisdiction, but also for practical issues such as service of court papers.

Some of the above information could be obtained by conducting open source investigation or instructing third parties to engage in an investigation.

Where there is an option regarding which person to sue, an important practical factor will be the **known value of the assets** of the person from whom compensation could be paid. For example, if an individual does not have assets from which to pay any compensation, the victim might wish to consider bringing claims, if possible, against an organisation which employed the individual who sexually abused the child (see Section (D)(2)).

C. LIMITATION PERIODS FOR BRINGING COMPENSATION CLAIMS

Practical Considerations: DETERMINE LIMITATIONS PERIODS FOR CLAIMS

At the start of the case, it is important to:

1. Determine the date when the sexual abuse took place.
2. Establish whether English law or Cambodian law applies to the question of limitation periods. Where the events leading to the claim took place in Cambodia, it is likely that Cambodian law would be used to determine the applicable limitation period. Advice would therefore need to be obtained from a Cambodian lawyer.

English courts apply limitations on the period within which certain claims can be brought. For claims that arise through events occurring in England or Wales, the limitation periods are set out in the Limitation Act 1980.⁶ However, the position is different where the events giving rise to the claim took place outside of England and Wales. In such cases, it is necessary to examine the applicable limitation periods under the local laws. It will therefore be necessary to take advice from local lawyers regarding these limitations periods to assess how they impact on the ability of the victim to embark on proceedings. The date on which the victim attains majority is likely to be important when considering limitation periods because generally these periods do not begin to run until the victim has attained majority age (e.g. If the majority age is 18 years old under the law, then a three-year limitation period only begins once the victim is 18 years old. Thus, the victim would be able to bring a claim until she turned 21 years old. After that, she could be barred from suing the defendant.).

⁶ Under English law the limitation period for a civil action for sexual abuse is three (3) years from the date of the cause of action or, if different, three (3) years from the date of the victim's knowledge of such claim arising (i.e. the date when the victim becomes aware that the injury in question is significant, the injury is attributable to the negligent act or omission of the other party and becomes aware of the identity of the defendant). See ss.11 and 14 of the Limitation Act 1980. In relation to child sexual abuse cases, the three-year limitation period starts to run from the victim's eighteenth birthday. See s.28 of the Limitation Act 1980. The court has discretion to extend the limitation period. In deciding whether to exercise its discretion, the court will have look at all the circumstances including the reason for the delay. The victim will have to demonstrate that it is fair and appropriate for an extension to be granted. See s.33 of the Limitation Act 1980.

D. CAUSES OF ACTION

1. CAUSES OF ACTION: INDIVIDUAL DEFENDANTS

As noted above, where child sexual abuse takes place overseas, the law determining whether that abuse would give rise to a claim is based on the place where the abuse occurred (in this case, Cambodia). On occasion, it may be the case that the defendant does not take issue with the application of English law. In such circumstances, English law could be applied.

Where English law applies, the most likely appropriate cause of action for sexual abuse would be a claim for personal injury based on the tort of trespass to the person. Trespass to the person comprises one of three separate torts, namely battery, assault, and false imprisonment.

TRESPASS TO THE PERSON		
<i>Assault</i>	<i>Battery</i>	<i>False Imprisonment</i>
The tort of assault occurs when the defendant acts in a way that causes the victim to apprehend immediate unlawful force. No touching is necessary as the defendant need merely cause the victim to feel threatened.	Battery is a tort which involves the intentional and direct use of physical force in an unlawful manner. Touching someone would suffice.	False imprisonment is a tort which involves depriving the individual of their freedom of movement from a particular place without any lawful reason.

OVERVIEW OF THE TORT UNDER ENGLISH LAW

It will obviously be important to gather evidence to support any claim. It will not be necessary for a criminal prosecution to have commenced against the proposed individuals and, if it has, for it to have resulted in a conviction (whether in the UK or elsewhere). That said, where a defendant has been found guilty of abuse by a criminal court in Cambodia, that may assist a civil law claim before the English courts. However, the extent to which a conviction could be of assistance would need further consideration to assess, among other things, the nature of the conviction, and whether there were aspects of the Cambodian judgment (or of the Cambodian criminal justice process) which might make it difficult for the child victims to rely on the convictions as evidencing the alleged abuse.

Practical Considerations: INTERESTS OF VICTIM

- Victims have a statutory right of anonymity to protect their identity in any claim.
- Victims may not have to give evidence, depending on the case.
- Protections can be put in place to prevent victims from being further exploited regarding the payment of any damages awarded.

2. CAUSES OF ACTION: CORPORATE DEFENDANT

The English courts have accepted that it is possible for an organisation to be liable for torts committed by one of its employees and that such so-called ‘vicarious liability’ could extend to liability for criminal acts of sexual abuse.⁷ However, again, where the sexual abuse took place overseas, the principles applicable to determining vicarious liability will be those of the local jurisdiction.

Depending on the local law, it may be possible to establish vicarious liability where, for example, the individual who abused the child worked for an aid agency or educational institution, or worked for other persons, organisations or companies which dealt with children, or which came into contact with or otherwise interacted with children in Cambodia. Naturally, the more distant a connection between the individual’s employment in Cambodia and the sexual abuse, the more difficult it would be to seek to establish that the employer should be liable for the acts of its employee. This is a complex area which will require significant investigation and consideration by legal advisers, including those in Cambodia.

VICARIOUS LIABILITY FOR ORGANISATIONS

English courts have held that an organisation can be vicariously liable for the tortious acts of one of its members and that such acts can extend to liability for criminal acts of sexual abuse. This includes bodies such as multinational companies, churches, schools, charities, and individual UK citizens. *CD v Catholic Child Welfare Society* [2012] UKSC 56 and *Maga v Birmingham Roman Catholic Arch Diocese Trustees* [2010] 1 WLR 1441.

E. DAMAGES AND LEVEL OF DAMAGES (‘QUANTUM’)

Practical Considerations:

1. Identify the type of applicable damages (general, special or aggravated).
2. Obtain evidence (including expert evidence) to support the damages claim.
3. Ascertain whether there are issues which could affect the quantum of damages.

The amount of any damages payable to a victim would be determined by reference to principles of English law even where the liability of the defendant had been established on the basis of principles of local law.

1. CAUSATION

Where personal injuries have been caused by the sexual abuse, the victim must prove that the particular tort was, as a matter of English law, the cause of the relevant injury (whether physical or psychiatric).

⁷ Under English law, vicarious liability is established using a two-stage test: (a) The first stage considers whether the relationship between employer and the employee is such that it could give rise to liability and whether it would be ‘fair and just and reasonable’ to hold the employer liable for the acts of the employee; and (b) The second stage considers the connection between the relationship of employer and employee on the one hand and the conduct in question on the other hand (for example, a teacher abuses a child at school or contact with the child is initiated via the school where the teacher worked).

2. TYPES OF DAMAGES

Damages as a matter of English law are intended to compensate a victim for loss and/or suffering. There are three types of damages which might be relevant in the case of a claim arising from sexual abuse:

General Damages	Special Damages	Aggravated Damages
<p>Payable to compensate for the pain, suffering, and loss of ability to engage in normal life.</p> <p>Includes physical harm, psychiatric damage, and possibly other matters like loss of education, suffered because of the acts of sexual abuse.</p>	<p>Intended to compensate for more easily quantifiable losses and could include past and future losses. Past losses might relate to expenses that the child victim or their family incurred as a result of the sexual abuse (e.g. the cost of seeking therapy). Future losses could include loss of earnings, the cost of future therapy, or future care costs.</p>	<p>This type of damages is unusual. Generally, only awarded when the circumstances in which the injury was caused, or the conduct of the defendant during and after the sexual abuse (including during any trial), were particularly egregious (e.g. where the victim was forced into prostitution or where the assault took place over a long period of time).</p>

3. EVIDENCE OF INJURY OR LOSS

In support of any claim for damages, it would be necessary to gather as much evidence as possible. The more obvious sources of evidence would be copies of police reports relating to the circumstances of the sexual abuse and the harm caused by the defendant. It would also be important to obtain medical evidence of any physical harm and any psychological or psychiatric harm, as well as the treatment received by the victim following the sexual abuse. In addition, it would be necessary to consider any financial loss caused by the sexual abuse, for example loss of earnings. Any medical evidence obtained would need to be provided in the form of an expert report in order for the evidence to be considered by the English court.

4. THE LEVEL OF DAMAGES (OR THE 'QUANTUM')

The English courts have provided guidance (from its decided cases) on the amount (or quantum) of damages which might be payable to victims of child abuse. The cases focus on certain factors which will have a bearing on the quantum, such as the type of abuse experienced, the duration of the abuse, and the impact the abuse had on the child victim.

The Judicial College Guidelines ('JCG') provide guidance on the amount of damages which might be awarded in the English courts for certain injuries.⁸ Specifically, with regard to general damages, in most sexual abuse cases resulting in injuries, the award in general damages will be to compensate for psychiatric injuries. For special damages regarding loss of earnings, the English courts tend to apply a broad approach to calculate past and future losses of earnings given uncertainties regarding how much a child victim would have earned if uninjured. Finally, for aggravated damages, the courts generally only award them where there are egregious circumstances.⁹

⁸ While the JCG are not binding on courts, they do provide a reliable sense of the scope of possible damages which might be awarded.

⁹ The English courts seek to ensure that an award for aggravated damages is not out of all proportion to the circumstances of the case or so excessive as to justify interference by the English courts.

5. PRIOR COMPENSATION

In assessing the potential quantum of any damages, it will be relevant to know whether the victim has already received any compensation in respect of the sexual abuse (for example as part of the resolution of the criminal proceedings in Cambodia). Although an out-of-court settlement with the defendant may preclude a further claim for compensation, the nature of any such compensation would need to be thoroughly investigated to understand its impact on the victim's entitlement to damages before the English courts.

F. ASSESSING & UNDERSTANDING LITIGATION RISKS AT THE OUTSET

As a practical matter, prior to commencing any action for compensation, in addition to seeking advice on the merits of any claim, it will be necessary for the client to understand the nature of the risks involved in pursuing legal proceedings in the English courts. As to those risks, while specific advice will be required in each case, it is possible to identify some of the common ones.

1. Litigation Costs: What are they, and in what circumstance may they be mitigated?

Conducting legal proceedings can be expensive, but there may be ways to mitigate these costs. Under English law, the general position is that the **party who loses the case pays the winning party's costs**, although the court has discretion to depart from this principle. In personal injury cases, like child sex abuse cases, this position can be softened such that the costs paid are no greater than those awarded in damages.

Thus, if a Cambodian child victim were unsuccessful in his or her sexual abuse civil claim, the types of costs payable **could** include:

- (1) a significant portion of the defendant's legal costs (plus interest).
- (2) his/her own legal costs (depending on the extent he/she mitigated those costs).
- (3) payment of all the court fees.

Conversely, if the Cambodian child victim were successful in the claim, then the defendant would pay a significant portion of the victim's legal costs (plus interest) and court fees.

Moreover, in sexual abuse civil cases, various arrangements may be available to mitigate litigation costs. The table below sets out the potential costs and mitigation options.

RISK	MITIGATION OPTIONS
Payment of the victim's legal costs	<ul style="list-style-type: none"> • It may be possible to find solicitors and/or barristers who are willing: <ol style="list-style-type: none"> a. to provide free legal advice and representation (i.e. pro bono). b. to enter into alternative fee arrangements which may involve the solicitor taking some of the risks regarding fees. Such arrangements will need to be discussed carefully with the solicitors as they will expect an increase in their fees in certain circumstances. • It may be possible to obtain third-party funding.
Payment of the victim's third-party costs (e.g. expert, investigator)	<ul style="list-style-type: none"> • It may be possible to find third parties who are willing to provide services on a pro bono basis.
Payment of the defendant's legal costs	<ul style="list-style-type: none"> • The victim could consider obtaining after the event ('ATE') insurance to cover the legal costs which the victim might have to pay to a defendant if the claim is unsuccessful. Such premiums can be modest.

1. Enforcement of a Judgment: Does the potential defendant have available assets?

Practical Considerations: ENFORCEMENT OF A COMPENSATION ORDER

1. Carry out an assets investigation to determine the extent of the defendant's assets prior to deciding whether to bring a civil action.
2. If the defendant has assets that could be used to fulfil a compensation order, then consider whether it would be possible to apply for an order freezing the defendant's assets to prevent the defendant from disposing of these assets or removing them from the jurisdiction.

Even where a child victim has been successful in his or her claim against the defendant and has been awarded damages, it will still be necessary to recover the damages from the defendant. In this regard, the defendant may refuse to pay and/or frustrate efforts to secure payment.

There are several mechanisms which may be available to enforce the judgment and recover payment, such as: an execution order against the goods owned by the defendant; an attachment of earnings order; or a charging order over the property owned by the defendant. Further, to try to prevent the defendant from dissipating his assets, a freezing order could be sought.

Although there are mechanisms available to the victim to enforce payment or prevent the dissipation of assets, these are not entirely satisfactory because they do not guarantee payment of the entire sum owed. Pursuing these mechanisms would likely be time-consuming and would necessitate further court proceedings with the costs associated with them.

While enforcement would be an issue to contend with at the end of a matter, it is something which should be considered prior to filing the case, as it may have an impact on the decision on whether to start proceedings in the first place.

MECHANISMS FOR ENFORCEMENT OF JUDGMENTS FOR COMPENSATION

1. Execution order in respect of property or goods owned by the defendant.
2. Attachment of earnings, which means that the compensation is deducted directly from the defendant's earnings.
3. Charging order over real property owned by the defendant, which means that the property stands charged with the payment of the compensation order.

G. CONCLUSION

Where Cambodian child victims of sexual abuse may be considering a claim in the English courts, it will be important to seek advice from an English qualified lawyer (and in some cases also a Cambodian lawyer) as soon as possible so that some key principles discussed in this Toolkit can be evaluated. Such initial consultations are generally free of charge, and pro bono arrangements may be available under certain circumstances.

THESE KEY PRINCIPLES INCLUDE:

1. Whether the victims may file their claims on their own behalf or whether the appointment of a 'litigation friend' will be required.
2. Whether the English courts have jurisdiction, i.e. whether there is a connection between the parties and England and Wales.
3. Whether certain time limitations for filing a claim have expired or may be extended, depending on whether English or Cambodian law would be applied and whether the victim has attained majority age.
4. What causes of action can the victims bring, depending on whether English or Cambodian law is applied.
5. What types of damages are available under English law and in what amounts.
6. What are the potential risks associated with filing a claim in the English courts and could these risks be mitigated.

Litigation, including the steps required to be taken before any claim is formally started, is a complex process which requires expert advice and representation which takes account of the specific facts of a particular case.