

Is the UK becoming a Hellhole Jurisdiction[®] for insurers?

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Welcome to Hell

Simply put, Judicial Hellholes® are places where the legal system is stacked against businesses and individuals. These jurisdictions are known for excessive lawsuits, outrageous damage awards, and a legal climate that's downright hostile to anyone who isn't a trial lawyer.

American Tort Reform Association



Hellhole characteristics

| | | Social inflation | No-injury lawsuits | Forum shopping | Litigation funding |
|----|-----------------------|---|---|---|---|
| 1= | Georgia |  | |  |  |
| 1= | Pennsylvania |  | |  | |
| 3 | Cook County, Illinois |  |  | | |
| 4 | California |  |  | | |
| 5 | New York City |  |  |  |  |
| 6 | South Carolina |  | |  | |
| 7 | Lansing, Michigan | | | | |
| 8 | Louisiana | | | |  |
| 9 | St Louis |  | |  | |

England and Wales: Heaven or Hell?

1. Social inflation
2. No-injury lawsuits
3. Forum shopping
4. Litigation funding
5. Anti-insurer decisions





1. Social inflation

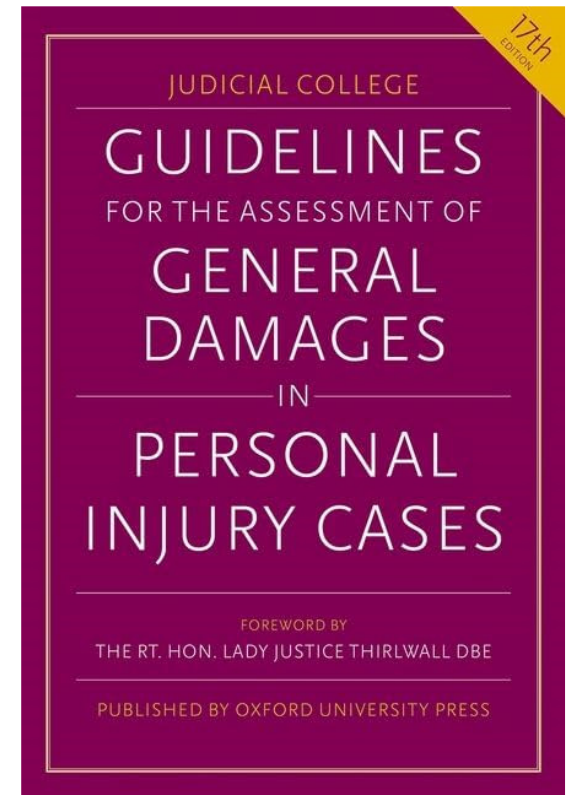
Social inflation: principal drivers

| Driver | Description | U.S. | U.K. |
|-------------------------|---|------|------|
| Youth population | Proportion of population below 15 years old | H | H |
| Social media | Indicator of active engagement in accessing and sharing information online. | H | M |
| Litigation funding | Presence of mechanisms to finance formal litigation or alternative dispute resolutions | H | H |
| Collective redress | Existing mechanisms of collective redress or indications of their likely introduction in the short-to-medium term | H | H |
| Politics and regulation | Government actions that may foster social inflation (e.g. taxes, rules, laws or regulations) | L | L |
| Legal environment | Features of common law versus civil law systems | H | H |
| Income inequality | Gini coefficient | H | H |

Source: Swiss Re

Social inflation in England & Wales

- JSB Guidelines 17th ed
 - All brackets increased by 22% since September 2021 ... but only in line with RPI
 - Affects thresholds for minor injuries and fixed costs regimes
 - Inflationary adjustment to be continuous
 - Significant increase in abuse claims: ceiling increased from £120,000 to £183,000
- Discount rate
 - In 2001, set at 2.5%
 - In 2017, moved to -0.75%
 - In 2019, moved to -0.25%



Social inflation: the Hellhole view

Georgia

- \$1.7bn crashworthiness verdict
- \$160m, \$118m, \$28.5m premises liability verdicts
- \$135m verdict in solar farm nuisance case
- \$32.5m award to parents of college student following single-vehicle accident
- \$40m, \$10.5m med-mal verdicts

Philadelphia

- \$1bn crashworthiness verdict
- \$182.7m med-mal verdict
- \$175m Roundup verdict

Cook County, Illinois

- \$363m breast cancer verdict
- \$91m premises liability settlement
- \$55.5m, \$32.7m, \$28.7m, \$19m med-mal verdicts

New York City

- \$80m med-mal verdict
- \$48m construction liability verdict
- \$38m asbestos verdict
- \$28.5m verdict for unsuccessful ankle surgery



Social inflation

England 0 – 5 Hellholes



2. No-injury lawsuits

The rise of no-injury lawsuits

1991

'It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.'

Kaye v Robertson (1991)

2004

'In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy'... But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions.'

Campbell v MGN (2004)

2021

'Uncontroversially ... the court must, in a privacy claim against the media, ensure that it properly reconciles the competing rights under the ECHR'

Duchess of Sussex v Associated Newspapers (2021)

2023

'the Court of Appeal suggested that "what is really the issue ... is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property ... They expressed the view that this is an area which is better left to the legislature to decide whether any further laws are needed rather than for the courts to extend the law of private nuisance...'

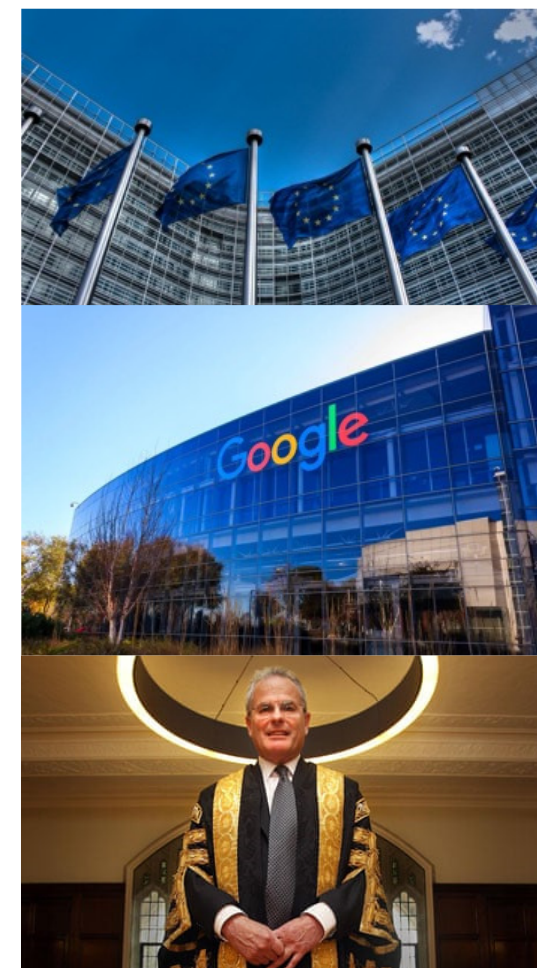
No new privacy laws are needed to deal with this complaint. The general principles of the common law of nuisance are perfectly adequate to do so."

Fearn v Board of Trustees of Tate Gallery (2023)



Legislative support for no-injury lawsuits

- 1995 Any person who has suffered damage as a result of an unlawful processing operation ... is entitled to receive compensation from the controller from the damage suffered
Directive 95/46/EC
- 1998 An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation ... for that distress if ... the individual also suffers damage by reason of the contravention
Data Protection Act 1998, s.13(2)
- 2015 *'Misuse of private information should now be recognised as a tort... This does not create a new cause of action... it simply gives the correct legal label to one that already exists... These claims raise serious issues which merit a trial. They concern what is alleged to have been the secret and blanket tracking and collation of information... The case relates to the anxiety and distress this intrusion upon autonomy has caused.'*
Vidal-Hall v Google (2015)
- 2016 Any person who has suffered material or non-material damage ... shall have the right to receive compensation from the controller or processor for the damage suffered.
Art 82(1), GDPR
- 2018 In Article 82 of the [GDPR] ... “non-material damage” includes distress.
Data Protection Act 2018, s.168



A blow to no-injury liability: *Lloyd (Therium) v Google*

- **‘Loss of control’ is not an actionable tort**

‘I conclude that section 13 of the DPA 1998 cannot reasonably be interpreted as conferring on a data subject a right to compensation for any (non-trivial) contravention by a data controller of any of the requirements of the Act without the need to prove that the contravention has caused material damage or distress to the individual concerned.’

- **Representative procedures must not be abused**

It would be open to Mr Lloyd to claim, at least in his own right: (1) damages under section 13(1) of the DPA 1998 for any distress suffered ... and/or (2) damages for the misuse of private information without the need to show that it caused any material damage or distress

... regardless of what view of it is taken [however], the claim has no real prospect of success. That in turn is because, in the way the claim has been framed in order to try to bring it as a representative action, the claimant seeks damages under section 13 of the DPA 1998 for each individual member of the represented class without attempting to show that any wrongful use was made by Google of personal data relating to that individual or that the individual suffered any material damage or distress as a result of a breach of the requirements of the Act by Google. For the reasons explained in this judgment, without proof of these matters, a claim for damages cannot succeed.



Lloyd v Google (2022)

No-injury liability: the Hellhole view

Illinois

- Biometric Information Privacy Act: \$1,000 for negligent violations and \$5,000 for reckless violations
- Genetic Information Privacy Act: \$2,500 for negligent violations and \$15,000 for reckless violations



California

- Prop 65 : \$2,500 daily fines for failure to disclose trace chemicals
- Private Attorneys General Act ('Sue Your Boss Law')
- California Privacy Rights Act 2020: \$2,500 for violations and \$7,500 for intentional violations
- Americans with Disabilities Act: \$4,000 per violation; 2,500 filings per year





No-injury liability

England 2 – 5 Hellholes



3. Forum shopping

ca. 1500-1510
Non liber homo tuus, sed laboriosus erit

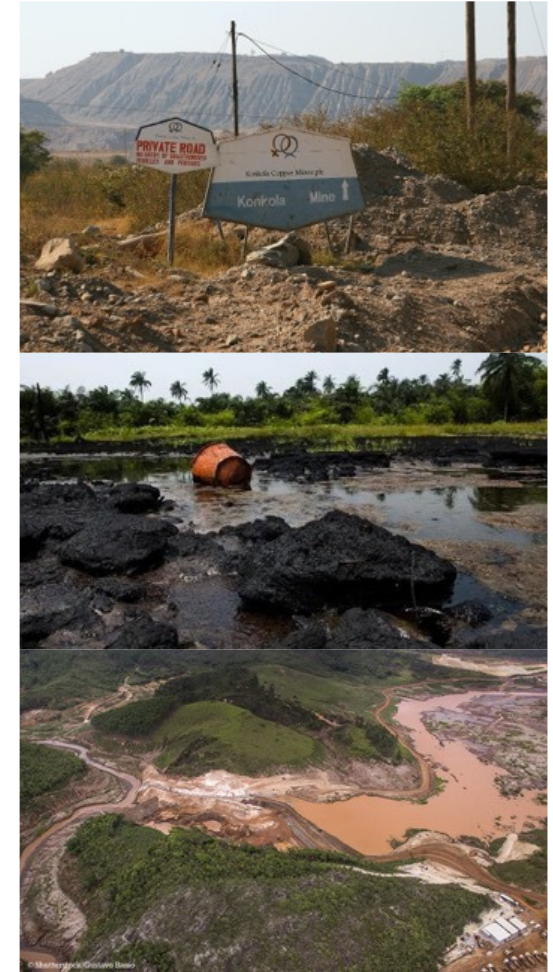
Forum shopping in London

- London has become a shopping destination for environmental claims
 - *Vedanta v Lungowe* (2019)
 - *Jalla v Shell* (2021)
 - *Okpabi v Shell* (2021)
 - *Mariana v BHP* (2022)

Litigation funders are supercharging activity

Mariana v BHP is the largest group action ever to reach the English courts:

- Damages claim on behalf of 732,000 claimants following collapse of the Fundao dam in Brazil
- The defendants are BHP's English and Australian parent companies
- In July 2022, the CA allowed the claim to proceed, reasoning that there was a real risk of the claimants not obtaining “substantial justice” in Brazil.



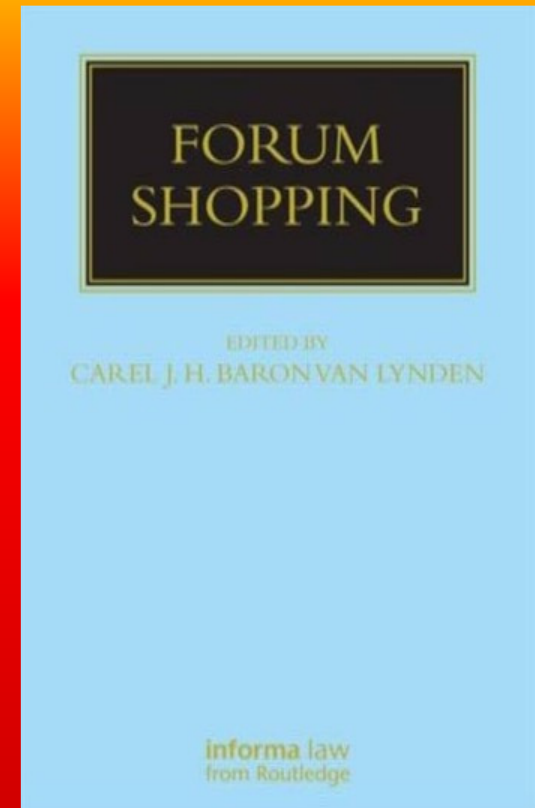
Forum shopping: the Hellhole view

Multiple types of forum shopping

- Domestic: vertical, horizontal, individual
- International
- *In re Chiquita Brands* (2024) – Florida federal court held Chiquita liable for paramilitary payments made in Colombia

But all's not bad in Hell...

- *Piper v Reyno* (1981) – California state court did not have jurisdiction over product liability claim against Ohio manufacturer following plane crash in Scotland
- *Acuña v Newmont* (2020) – Delaware federal court did not have jurisdiction over claim against Delaware-incorporated entity for alleged torts in Peru





Forum shopping

England 5 – 3 Hellholes

*ea. laboribus erat sed si tu facis pro
Non liber uno tu, sed laboribus erat*



4. Litigation funding

Litigation funding in the UK

- Rapid growth after endorsements by OFT and CJC in 2007
- Funders love collective redress against big, cash-rich defendants: tech giants, utilities, financial institutions, vehicle manufacturers, insured sports bodies
- Funders accept between 3% and 5% of cases submitted, with typical success rates between 50% and 75%
- Different types of funding:
 - DBA/Hybrid DBA
 - Portfolio funding
- Economic drivers:
 - Interest rates
 - Defendant solvency
 - High return on investment (80% of Post Office judgment went to funder and law firm)
 - Timeframe and settlement likelihood
 - Benign regulatory environment
- Self-regulated via Association of Litigation Funders

THERIUM.
LITIGATION FUNDING

POGUST 
GOODHEAD

 **Gramercy**
We are Emerging Markets

 **ASERTIS**

Litigation funding: the Hellhole view

Georgia

- 'Cash for lawsuits' industry: lawsuit loans repayable from damages are not caught by usury laws

New York

- 'Pre-settlement' funding available at interest rates up to 124%
- \$31m fraudulent trip and slip funding scheme involving 400 patients paying 50% interest on medical loans and 100% on personal loans

Louisiana

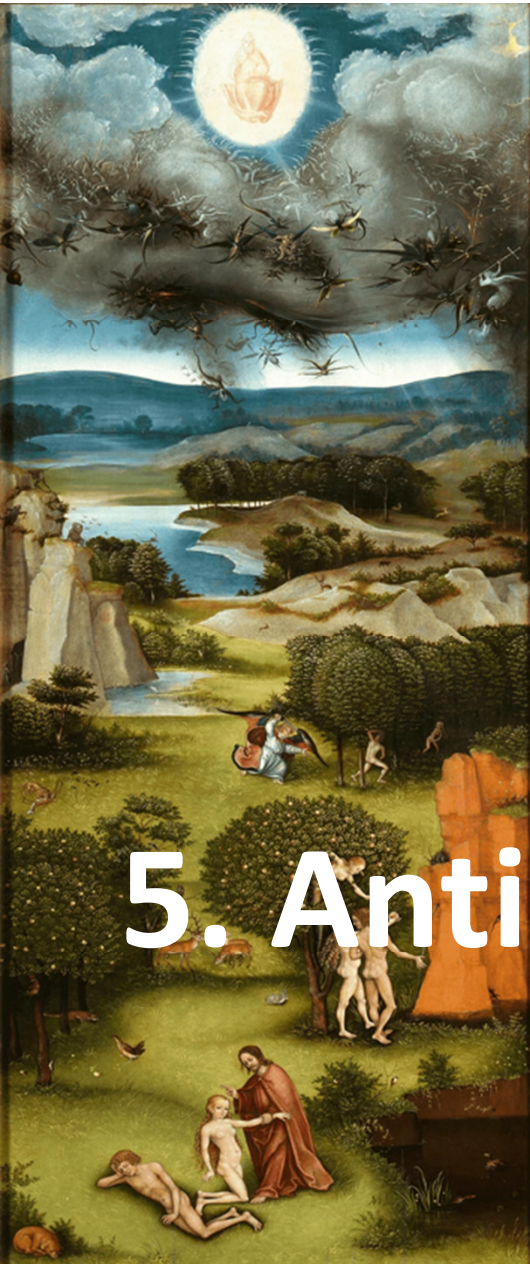
- Abuse of right to assign insurance benefits: 850 consumers were represented in proceedings without their knowledge
- Funding transparency legislation vetoed





Litigation funding

England 3 – 5 Hellholes

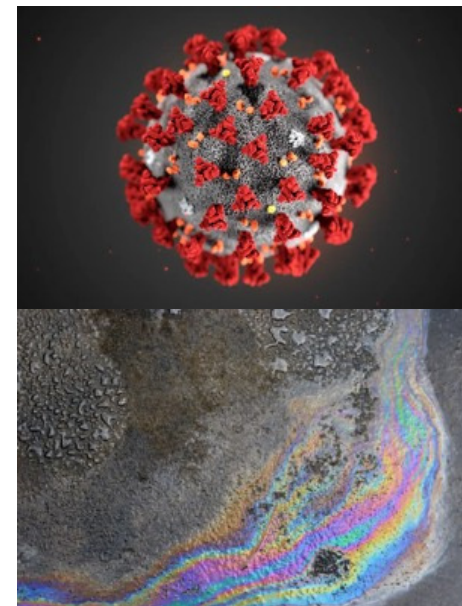


5. Anti-insurer decisions

Anti-insurer decisions in England & Wales

Some recent shockers ...

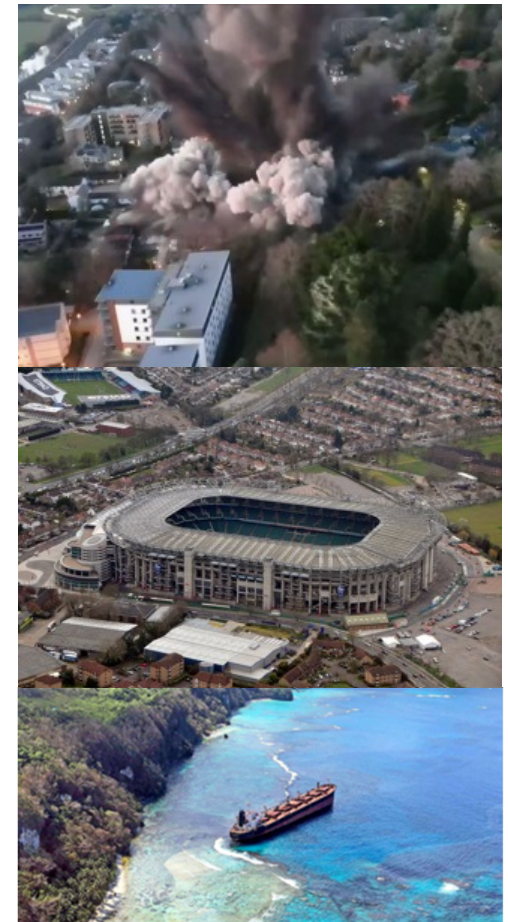
- UK Covid Litigation (from 2020):
 - disease 'at the premises' wordings capable of responding to pandemics;
 - each and every case of Covid-19 causative of the pandemic;
 - pandemic comprised of multiple occurrences;
 - pandemic exclusions disapplied;
 - FCA chose test case route then systematically ignored its conclusions.
- *Leighton Garages v Allianz* (2022) – exclusion for damage 'caused by' pollution insufficiently broad to capture an escape of oil from a leaky pipe
- *WCE v Zurich* (2023) – insurer liable for loss which was outside the scope of the insuring clause because it had previously accepted claims



Anti-insurer decisions in England & Wales

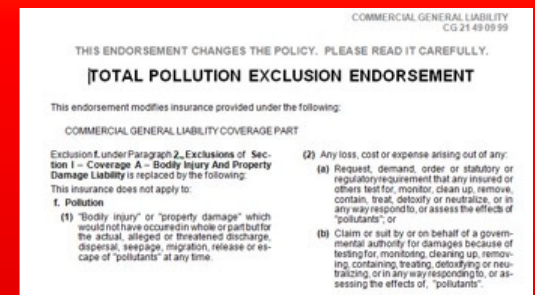
... but generally a benign environment

- *Exeter University v Allianz* (2023) – war exclusion applied to losses caused by discovery of WW2 bomb
- *FM Conway v RFU* (2023) – main contractor not insured for all purposes under project construction policy, allowing insurer to pursue subrogated claim
- *MS Amlin v King Trader* (2024) – insurer not required to indemnify where insured had gone insolvent and policy contained ‘pay first’ clause
- *Mok Petro v Argo* (2024) – first decision on s.11, Insurance Act decided in insurers’ favour
- *Project Angel Bidco v Axis* (2024) – apparent inconsistency between cover clause and exclusion resolved in favour of exclusion
- *Bellini v Brit* (2024) – insurer saved from non-damage BI cover by (accidental?) inclusion of word ‘damage’ in introductory language



Anti-insurer decisions: the view from a Hellhole

- *Acuity v M/I Homes of Chicago* (2023) – property damage to insured’s own work can be covered occurrence under a CGL policy
- *Citizens Ins Co v Wynndalco Enterprises* (2023) – breach of biometric privacy statute covered by CGL policy – exclusion for ‘any other laws, statutes, ordinances or regulations’ too broad
- *Regan v Arbella* (2023) – Total Pollution Exclusion does not bar coverage for oil spilled inside a building (definition of pollutant not sufficiently clear)





Anti-insurer decisions

England 2 – 5 Hellholes

A painting depicting a man's head inside a wooden barrel. Above the barrel, a severed animal head with sharp teeth and a knife with a dark handle and a large blade are visible. The background is a dark, textured brown. The text 'Final scores' is overlaid in white, bold font across the center of the image.

Final scores

England 12 – 23 Hellholes

Postscript:

A tale of two tragedies

The Grenfell Tower disaster

- Fire occurred on 14 June 2017
- 72 residents died
- First settlement of claims April 2023
- A 7-year Public Inquiry issued its Phase 2 report last week
- Many civil claims remain unresolved, including £400m claim from RBKC and contribution claims between commercial parties
- Legal costs are highly likely to exceed £500m:
 - Inquiry costs: £173m as of March 2024
 - Core participant costs: up to £50m per party



Grenfell Tower Inquiry core participants

| Trade Unions | RLR Firm |
|----------------------------|----------------------|
| Fire Brigades Union | Thompsons Solicitors |
| Fire Officers' Association | Burton Copeland |

| Public Bodies | RLR Firm |
|--|---|
| London Fire Commissioner | The General Counsel's Department of the London Fire Brigade |
| Commissioner of Police for the Metropolis | MPS Directorate of Legal Services |
| Mayor of London | Transport for London Legal |
| Royal Borough of Kensington & Chelsea | DWF LLP |
| Secretary of State and Minister for the Cabinet Office | Government Legal Department |
| Secretary of State for the Home Department | Government Legal Department |
| Secretary of State for Housing, Communities and Local Government | Government Legal Department |

| Other Organisations | RLR Firm |
|---|------------------|
| Kensington & Chelsea Tenant Management Organisation | Kennedys Law LLP |

| Commercial CPs and individuals | RLR Firm |
|------------------------------------|-----------------------|
| Arconic Architectural Products SAS | DLA Piper UK LLP |
| Artelia Projects UK Ltd | Reed Smith LLP |
| British Board of Agrément | Ashfords LLP |
| Building Research Establishment | Fieldfisher LLP |
| Cadent Gas Ltd | Eversheds Sutherland |
| Celotex Ltd | Linklaters LLP |
| CEP Architectural Facades | Clyde and Co. LLP |
| C S Stokes and Associates Ltd | Weightmans LLP |
| Curtins Consulting Ltd | Holman Fenwick Willan |
| Exova UK Ltd | Simmons & Simmons LLP |
| Harley Facades Ltd | Brabners |
| J S Wright & Co Limited | Browne Jacobson LLP |

| | |
|---|--|
| Jamie Hayes | Withers LLP |
| Kevin Lamb t/a Bespoke Design | Hallinan Blackburn Gittings & Nott LLP |
| Kingspan Insulation Ltd | Gowling WLG |
| Local Authority Building Control (LABC) | Womble Bond Dickinson LLP |
| Max Fordham LLP | Beale and Company Solicitors LLP |
| National House Building Council (NHBC) | Dentons UK and Middle East LLP |
| Osborne Berry Installations Ltd | Stephen Rimmer LLP |
| PSB UK Ltd | Shoosmiths LLP |
| Rydon Maintenance Ltd | DAC Beachcroft LLP |
| Jonathan Roper | Birketts LLP |
| S D Plastering Limited | Stephens Scown LLP |
| Siderise Insulation Ltd | Horwich Farrelly Ltd |
| Studio E Architects Ltd | RPC |
| Thames Water Utilities Limited | Eversheds Sutherland |
| tRIIO | Addleshaw Goddard LLP |
| Whirlpool Corporation | Cooley (UK) LLP |

The Miami Champlain Tower disaster

- The building collapsed on 24 June 2021
- 98 residents died in the collapse
- Civil proceedings were resolved within 12 months:
 - A lawsuit was filed on the day of the collapse
 - Class counsel were appointed on 16 June 2021
 - A \$1bn settlement was approved on 23 June 2022
 - \$70m awarded to lawyers
- NIST released preliminary causation report in March 2024 (cost \$30m)

