

A HANDBOOK FOR PRACTITIONERS

Civil Liability for Human Rights Violations

AUSTRALIA

BANGLADESH

CANADA

CHINA

COLOMBIA

ENGLAND & WALES

FRANCE

GERMANY

HONG KONG

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A HANDBOOK FOR PRACTITIONERS



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HANDBOOK



INTERACTIVE

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Foreword



Dr Uglješa Grušić

Associate Professor, University College London

Human rights violations by public and private actors are unfortunately a fact of life. Civil remedies offer a promising means of holding human rights violators to account, as the experience of human rights litigation from many countries demonstrates.

A characteristic feature of civil remedies is that they vary, sometimes quite significantly, and apply in different ways to human rights violations in different jurisdictions. The outputs of the Bonavero Institute of Human Rights project on civil liability for human rights violations, including this Handbook, are important because they shed light on the legal diversity that exists in this field.

On the one hand, this Handbook allows us to observe the similarities and differences between civil liability regimes for human rights violations in countries as diverse as, for example, China, England & Wales, and Russia. As such, it is a useful resource for comparative lawyers.

On the other hand, this Handbook has the potential to become a very helpful tool for human rights litigators around the world. National reports illustrate how ideas in this field can travel from one jurisdiction to another. For example, foreign direct liability claims, developed in the law of England & Wales, are also available under the laws of many other common law countries. This in turn enables the bringing of such claims in countries like Germany and the Netherlands against locally based transnational companies for human rights violations committed overseas in common law countries such as Nigeria or Pakistan. A thorough description of the law of civil remedies for human rights violations in 19 jurisdictions discloses a wealth of approaches that can be drawn upon by human rights litigators around the world when devising their litigation strategies.



Daniel Leader

Barrister and Partner, Leigh Day

The Handbook on civil liability for human rights violations is the first of its kind and represents an important resource for lawyers who work in the field of business and human rights. Increasingly, civil actions arising out of human rights abuses that are perpetrated by corporations are perceived as among the most promising routes to judicial remedy for victims of those abuses. Around the world in recent years,

there has been a marked increase in litigation brought by lawyers and activists seeking to fight against corporate impunity. This has included international mass tort claims arising out of environmental disasters caused by the operations of companies, as well as cases concerning serious human rights abuses by security linked to mines, agribusiness, and occupational health cases. The courts in many jurisdictions, such as the UK Supreme Court, have shown themselves to be receptive to international civil claims of this sort. The legal landscape is changing fast, and it is clear that parent companies domiciled in the Global North can no longer turn a blind eye to human rights and environmental abuses within their corporate groups or supply chains.

In almost all such cases the substantive law that the court will apply will be that of the country where the harm occurred. For example, a Dutch court has applied Nigerian law to an oil-spill pollution case on behalf of a Nigerian community against a Dutch oil company. As a result, practitioners are forced to grapple with complex concepts of foreign law and to work closely with lawyers from other jurisdictions. That process is costly and time consuming. This Handbook allows business and human rights practitioners to quickly understand the legal framework in a specific country, to obtain clarity as to whether a specific case has legal merit and how it could be brought. It is my hope that this Handbook will be widely used and result in a greater range of important and innovative civil litigation on behalf of victims around the world.



Robert McCorquodale

**Emeritus Professor of International Law and Human Rights
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This Handbook is an excellent comparative study of civil liability for human rights violations across 19 jurisdictions, with a variety of common law, civil law, and mixed legal systems. This is an impressive achievement, especially as it contains a coherent and consistent structure across every

chapter. In addition, each chapter provides insightful and high-quality analysis, with detailed references to relevant legislation, case law and commentary.

The breadth of this coverage provides a depth of understanding as to when and how the law of civil remedies can hold public bodies, corporations, and individuals accountable for their involvement in regard to three categories of human rights violations: assault or unlawful arrest and detention of persons; environmental harm; and harmful or unfair labour conditions. The law in this area has developed at a fast pace and this Handbook has brought together a vast amount of material in an accessible manner. In addition, since a great deal of the legislative and case law developments are being undertaken after consideration of the law in other jurisdictions, this Handbook provides great value as a comparative tool.

This is a highly valuable resource for governments, corporations, and civil society, as well as for legal practitioners and academics. It is also of great assistance for those providing reports and guidance from international organisations and other bodies.



Miriam Saage-Maaß

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Only twenty years ago, most human rights advocates and litigators would have been sceptical of the option to sue transnational companies in the courts of their home states for human rights violations these companies were involved in abroad. Today, rights holders and communities around the world have come to consider the option to sue

companies in foreign courts as part of the toolbox that is available to them in claiming their rights. At the same time, not only have options to sue companies at their headquarters for damages in Europe or North America opened up, but options for legal proceedings in the countries where harms were caused have increased.

This Handbook is a very timely reflection of recent developments in the field of human rights litigation against transnational companies. It gives important insights into the options for bringing civil claims in a great variety of jurisdictions, especially, but not only, in Global South countries. The book will hopefully help many lawyers, as well as victims and survivors of human rights abuse, to assess the legal options available for demanding redress not only from state actors, but also from business enterprises that have contributed to the harm suffered. Policymakers around the world would do well to consider the different case studies when assessing the need for legislative reform in the area of business and human rights.



Rupert Skilbeck

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The right to a remedy is a crucial protection for victims of human rights violations – one which is guaranteed by international law. This right is essential not just for the individual survivor, but also to encourage a broader policy response to violations. For most survivors of core rights violations, the right to a remedy is honoured more in the breach than the observance, leaving a vast remedies deficit,

where victims do not obtain justice or reparation for what has happened to them.

Civil society groups have a critical role to play in bringing claims in such situations, and the legal community in particular is uniquely placed to support this work. Initiatives in this regard may include using criminal law, administrative claims, the constitutional courts, but also civil claims.

This study captures significant insights as to how civil claims can be used to progress remedies, including in situations where state agents have used torture, in actions for assault and unlawful detention. In the vast majority of legal systems, a direct claim for torture is not an option. This means that existing mechanisms have to be deployed with creativity and determination to establish the truth and ensure justice for victims.

There are a great many variations in how such claims can be brought in different countries. The comparative examples in this study help to illustrate the main problems that arise, suggest solutions, and will inspire others to take up the challenge to pursue justice for victims.



Lise Smit

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This Handbook has been thoughtfully compiled and is valuable in many practical respects.

The UN Guiding Principles on Business and Human Rights (UNGPs) states in its Commentary on Principle 26 that '[e]ffective judicial mechanisms are at the core of ensuring access to remedy'. In reality, the lack of access to remedy

for corporate human rights harms remains as prominent as it did when the UNGPs were adopted in 2011. Indeed, the objective of strengthening access to remedy was one of the key reasons cited by stakeholders in support of introducing mandatory human rights due-diligence regulation, which is currently being taken forward at various domestic and EU legislative levels.

This Handbook outlines avenues and gaps that exist for victims of human rights violations to seek remedies against business enterprises in a variety of jurisdictions. It accordingly provides a rare picture of what our existing and evolving substantive law would offer us if claimants could get past the procedural barriers that so frequently prevent them from advancing to the merits of their claims. This knowledge is not only helpful for legal practitioners, but also for the purposes of designing legislation that bridges existing gaps in remedy, with human rights at its core.



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Editors' Introduction



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EDITORS' Introduction

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Publication Information: This is an introduction to the Handbook on civil liability for human rights violations covering 19 country reports. The Handbook was produced as part of the comparative research project led by the Bonavero Institute of Human Rights and funded by the Oak Foundation. To access the complete Handbook or download country reports, please [click here](#).

Project on civil liability for human rights violations

In 2019, the Bonavero Institute of Human Rights (Bonavero Institute) was awarded a grant by the Oak Foundation to [study civil liability for human rights abuses in various jurisdictions](#) (the Project). The Project's key focus is to analyse the substantive legal rules relevant to determining when civil claims to hold perpetrators to account for human rights violations will succeed. The Project involves a comparative study of the legal systems of a wide range of jurisdictions in order to analyse existing domestic law mechanisms or principles for imposing civil liability on public bodies, corporations, and individuals in three specified categories of human rights violation: (i) assault or unlawful arrest and detention of persons; (ii) environmental harm; and (iii) harmful or unfair labour conditions.

Research context

Civil liability for human rights violations is an area of significant contemporary importance. In the last few decades, there have been notable developments in the field which have renewed interest in the potential for civil claims to hold state and (especially) non-state actors accountable. Under the influence of human rights standards, the law of tort and delict in many jurisdictions is being employed by litigants to foster accountability for human rights violations. In other jurisdictions, specific legislation has been enacted to remedy human rights violations. The best-known example of legislation permitting tort litigation for certain violations of international law is the [US Alien Tort Statute](#). Practitioners across the globe have increasingly used civil claims as a means of corporate human rights accountability. The possibility of civil liability arising for human rights violations has been particularly discussed in the business and human rights field. This emerging debate has been triggered by the adoption of the [UN Guiding Principles on Business and Human Rights](#) by the UN Human Rights

Council in 2011. The continuing negotiation of a [UN Treaty on Business and Human Rights](#) as well as a range of domestic [legislative initiatives requiring corporations to undertake mandatory human rights due diligence](#) assessments have also contributed to the growing debate. A careful analysis of ongoing developments across the world in relation to civil liability for human rights violations is therefore timely and will assist us to assess whether civil liability does provide a real opportunity to hold perpetrators to account for human rights abuses.

Scope

The scope of the Project is broad and covers a range of internationally accepted human rights, as well as different types of harm. The Project sought to investigate the different legal consequences of different harms in different jurisdictions. It became evident at the early stages of the Project that experts from different jurisdictions, who represent different legal systems and legal traditions, conceive of 'civil remedies for human rights violations' in different ways. The Project team thus sought to define the terminology for the Project to avoid the risk of speaking at cross purposes. We identified variations in the concepts of 'civil law', 'civil liability', 'civil remedies', 'civil claims', and 'human rights violations'. To ensure coherence, it was necessary to develop a common and broad definition of some concepts (see '[Glossary](#)' below).

The selection of the three categories of human rights violation under review (assault or unlawful arrest and detention of persons; environmental harm; and harmful or unfair labour conditions) is illuminating for the following reasons. First, it allows us to establish whether and to what extent different rules apply to different forms of human rights violation (civil and political versus economic, social, and cultural) in different legal systems. Second, the broad scope of the inquiry allows us to explore whether civil remedies apply similarly to different categories of defendants (public versus private). Finally, the study reveals various forms of civil remedy that exist in different jurisdictions and their contemporary development in response to global challenges (general private law, specialised legislation, constitutional torts, etc).

The Project focuses on the substantive legal rules governing civil liability. There has been an increasing number of civil claims brought seeking redress for transnational human rights violations, ie litigation seeking remedies for victims of abuses committed outside the forum state. However, questions related to jurisdiction, conflict of laws, and procedure (disclosure rules, standing, litigation funding, costs, availability of group and class actions, etc) are outside the scope of the Project. The Project team recognises the overall importance of these questions (which may require further study) for examining the efficacy of existing frameworks, but the study is concerned with identifying the key principles of civil liability under substantive laws.

Research questions

The research questions considered by the Project fall within four major areas: (i) an overview of the legal foundations for civil claims and the core elements of liability; (ii) liability for the acts and omissions of third parties; (iii) liability within complex business structures (eg parent company liability and supply chain liability); and (iv) types of remedies available for human rights violations.

Steering Committee

The study was guided by a Steering Committee comprising: Dr Uglješa Grušić (UCL), Daniel Leader (Leigh Day), Professor Robert McCorquodale (UN Working Group on Business and Human Rights), Dr Annelen Micus (Amnesty International), Professor Catherine O'Regan (Bonavero Institute), Dr Miriam Saage-Maaß (European Center for Constitutional and Human Rights), Rupert Skilbeck (REDRESS), Lise Smit (British Institute of International and Comparative Law) and Professor Sandy Steel (University of Oxford). The Steering Committee provided support at all stages of the Project and contributed to the study's design, selection of contributors and review of the outcomes.

Research Design and Outcomes

The Project analysed the civil liability framework in the selected jurisdictions. In the first part of the Project, a range of practitioners and scholars were invited to undertake a scholarly analysis of the challenges and opportunities for using civil claims as a mechanism for human rights accountability in their jurisdictions. From 22-26 October 2020, the Bonavero Institute hosted an online research roundtable to discuss their research. Over nine panels, more than 50 scholars and human rights practitioners from 21 jurisdictions shared their views on various forms of civil remedy that exist within legal systems around the world and changes that are happening (quite rapidly) within these systems under the influence of human rights standards. Papers presented at the roundtable were published by Hart Publishing in 2022 as '[Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions](#)' edited by Dr Ekaterina Aristova and Dr Uglješa Grušić. The book covers 16 jurisdictions: Argentina, Australia, Bangladesh, Brazil, Canada, England & Wales,³ France, Germany, India, Kenya, the Netherlands, the Philippines, South Africa, Switzerland, Ukraine, and the United States.

The Handbook on Civil Liability for Human Rights Violations (the Handbook) is the second component of the Project. The Handbook aims to explore current state practice and trends in relation to the law of civil remedies in a more 'practical' way, to equip practitioners with an understanding of how civil claims may be used for holding perpetrators of human rights violations accountable in a range of jurisdictions. The Handbook covers 19 jurisdictions: Australia, Bangladesh, Canada, China, Colombia, England & Wales, France, Germany, Hong Kong, India, Malaysia, Mexico, the Netherlands, Russia, South Africa, Turkey, Ukraine, the United States, and Zambia. First drafts of country reports from the jurisdictions were discussed by the authors and members of the Steering Committee during an online workshop convened in January 2022 by the Bonavero Institute.

The Project's third outcome was the Oak Foundation Research Visitor Programme. This provided an opportunity for research visitors from the Global South to conduct independent research at Oxford and to foster collaboration between human rights scholars and human rights lawyers in practice. To this end, the Bonavero Institute hosted four Oak Research Visitors from Brazil, Mexico, Sri Lanka, and Zimbabwe, each of whom spent three months researching the civil liability for human rights violations in their respective jurisdictions.

³ The Project does not equate England & Wales with the UK. The UK comprises three legal jurisdictions: England & Wales, Northern Ireland, and Scotland.

About the Handbook

The Handbook is intended to serve as a practical resource to understand when and how civil claims can be used as a tool to vindicate human rights in the 19 jurisdictions. It is not a scholarly publication and does not seek to contribute to academic debates surrounding civil liability for human rights violations. Rather, the Handbook explains the basic principles of civil liability in the 19 jurisdictions and illustrates the principles by applying them to Case Scenarios. In this sense, the Handbook has three principal objectives. First, it seeks to identify jurisdictions in which the domestic law of civil remedies allows victims of three specified categories of human rights violations (eg assault or unlawful arrest and detention of persons; environmental harm; and harmful or unfair labour conditions) to obtain a remedy against public bodies, corporations and/or individuals. Second, taken together, the individual reports provide comparative law insights into the similarities and differences between the law of civil remedies in the relevant jurisdictions. Third, the Handbook aims to enrich strategic thinking about civil claims as a vehicle for fostering human rights accountability. We hope the Handbook will contribute to building capacity, expanding legal knowledge, and building partnerships between human rights lawyers and scholars in the field.

How to use the Handbook

The Handbook contains 19 reports. It is designed to enable practitioners to refer directly to a specific jurisdiction; it is not necessary to read the Handbook as a whole. Each report follows a uniform template and starts with an overview of the jurisdiction and identifies key points relevant to understanding the civil liability framework in that jurisdiction. Each report has two parts. Part I contains eight general questions about the principles of the law of civil remedies. The authors outline the applicable legal provisions and identify important developments in the case law. Part II approaches the analysis of civil liability practically by applying the basic principles of the law of civil remedies to three hypothetical cases which may lead to adverse human rights impacts (the [Case Scenarios](#)). The main purpose of the Case Scenarios is to use a defined set of circumstances to enable a comparative study of the national jurisdictions.

Target audience

The target audience of the Handbook is lawyers, civil society organisations, human rights activists, policymakers, and research institutes worldwide. We hope it will be a useful resource for practising lawyers who represent victims of human rights violations, as well as for policymakers and campaigners concerned with regulatory change through legislation. The Handbook can also be used for legal research or public advocacy purposes.

Important considerations

Readers should approach the Handbook with several significant considerations in mind.

- The Handbook assesses the viability of civil claims in relation to three specified categories of human rights violation (assault or unlawful arrest and detention of persons; environmental harm; harmful or unfair labour conditions). By selecting these three types of violation, we are not suggesting that they are the most important. They were selected as we consider they may provide useful insights to practitioners.
- The potential for extraterritorial application of existing domestic law of civil remedies is not analysed.

- Procedural hurdles, as well as aspects of legal and political culture, often influence the overall efficacy of the law of civil remedies and strategic litigation. The study does not investigate these issues, nor does it comprehensively investigate barriers to access to justice, although some reports do mention them.
- The 19 jurisdictions have been selected in an attempt to promote diversity. They include a wide geographic distribution of countries with different political systems and levels of socio-economic development. Some of the systems are common law systems and others civil law systems. Respect for the rule of law varies across the different systems, and levels of human rights protection also vary quite markedly. In some countries, the level of human rights protection, particularly for political opponents of the government, is limited or even absent. We include a range of systems because we consider that all legal systems should continue to be the subject of study by human rights scholars. Where the reports for jurisdictions have been prepared by scholars or practitioners who live in those jurisdictions, sustained criticism of their legal system or the government may have put them at risk. Accordingly, we have included three global indices that will enable readers to assess whether a jurisdiction has a weak record on democracy, the rule of law and the protection of human rights: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties, with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).
- The jurisdictions differ, sometimes widely, both in how they define civil remedies and in the forms of civil remedies they provide for the three types of human rights violations within the scope of the Project. Several terms were unified to ensure coherence among the reports and provide a common and broad definition (please refer to the '[Glossary](#)' below).
- Judicial decisions as a source of law have different authority in common law and civil law legal systems. Generally, common law is built on precedent, civil law on statutes, although this is not a strict line, and increasingly civil systems display some of the characteristics of common law systems.⁴ Unsurprisingly, country reports from jurisdictions based on common law frequently cite important case law. By contrast, in some reports from civil law jurisdictions discussion of case studies is limited.
- The Handbook does not claim to be exhaustive. A word limit of 10,000 – 12,000 words was prescribed for each country report. Due to constraints of space, many responses in the reports provide only a basic introduction, and the complexities of specific cases or provisions are not fully explored.
- The Handbook is not a guide on how to launch a case. Its focus is on outlining legal bases for commencing civil claims through the use of primary materials such as statutes, treaties and jurisprudence. The legal analysis in the Handbook is not intended to provide legal or other professional advice and should not be relied on or treated as a substitute for specific advice relevant for a particular jurisdiction. Readers should approach suitably qualified lawyers if they plan to commence legal proceedings in any jurisdiction.

4 A Jakab, A Dyeve & G Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

- In many of the questions, we asked authors to provide examples of various laws or cases and to insert a hyperlink if any such resources are available online. Not all documents cited in the reports are freely available online. For these, it is recommended that the reader access subscription sites and a relevant note is provided in some country reports (eg China, Malaysia, Turkey, Russia). Some citations are also only available in the local language. Finally, in the case of Mexico and Russia, some resources may not be accessible from outside these jurisdictions.

Comparative insights

Here we provide a few insights drawn from the reports to reflect on how the law of civil remedies is developing across the 19 jurisdictions and how it has been used to remedy human rights violations.

- Civil claims are usually based on **domestic law**. Rarely, violating **international law** may be an element of a civil cause of action. In the US, the [Alien Tort Statute](#) (ATS) has been a prominent vehicle for bringing civil lawsuits against state and non-state actors for actions committed in violation of the law of nations or a treaty to which the US is a party. A series of recent US Supreme Court cases, however, has significantly limited the scope of the ATS. Outside the US, there are notable developments in Canada, where the Supreme Court in [Nevsun Resources Ltd v Araya](#) held that violations of customary international law (eg forced labour) may be civilly actionable in Canadian courts; and in the Netherlands, in the landmark [Urgenda](#) decision, the Dutch state was held liable for its failure to reduce greenhouse gas emissions in contravention of its duty of care under articles 2 and 8 of the [European Convention of Human Rights](#).
- Civil remedies are available in the 19 jurisdictions through a **complex web of distinct yet overlapping legal bases**. Country reports widely discuss (i) the law of tort or delict; (ii) statutory remedies; and (iii) constitutional remedies (notably in Bangladesh and India). A few other remedies are also mentioned, such as ancillary civil actions as part of criminal proceedings and the law of unjust enrichment or restitution, but they are generally jurisdiction-specific.
- There are distinct patterns in the **treatment of public authorities** in the 19 jurisdictions. In common law jurisdictions and certain civil law jurisdictions (Netherlands, Russia, and Ukraine), the law of civil remedies does not distinguish between public and private defendants, and the rules governing civil liability apply generally. By contrast, in most civil law jurisdictions, specific liability regimes apply to the liability of public bodies. In Colombia and Mexico, the liability of public bodies is *strictly* a matter of administrative law, and the civil codes do not apply. In China, France and Turkey, the liability of public bodies is *generally* governed by administrative law, and civil claims can be brought only in rare and limited circumstances.
- The rights to life, bodily integrity and personal liberty are widely protected in all the jurisdictions. Most country reports discuss **assault or unlawful arrest and detention** in the context of the liability of public bodies.
- Regulatory responses to address **environmental harm** demonstrate unique combinations of causes of action based on the law of torts or delict, constitutional provisions and specialised legislation, with the latter playing a particularly important role.

- In several jurisdictions, there is a distinction between **private (individual)** and **public (collective)** environmental damage leading to the application of different liability regimes.
- Working conditions and labour protection are generally regulated through detailed legislation. Accordingly, civil remedies for **harmful or unfair labour conditions** have been largely displaced. As a general rule, obtaining compensation under occupational injury insurance prevents the commencement of a civil claim (Canada, China, Colombia, France, Russia and Ukraine). South Africa is an exception given that the Constitutional Court has held that at least some social security schemes do not bar concurrent delictual claims.
- **Civil liability for complicit or accessory conduct** is **seldom recognised** as a discrete form of liability. Several reports indicate that the concept of ‘complicity’ is set in criminal but not civil law (France and Netherlands). Consequently, the authors’ responses to this question tend to be brief.
- That said, in a **small number of jurisdictions**, there are rules for **accessory tortious or delictual liability**. These jurisdictions use different terms to characterise the perpetrator’s involvement in the commission of harm (for example, accessorial liability in Australia; concerted tortious action in Canada; tort of common design in England; liability of accomplices, instigators and abettors in Germany; aiding and abetting and conspiracy liability in the US). The precise test that establishes the degree of connection to the wrongful act necessary to trigger liability varies.
- **Vicarious liability**, that is, strict liability for another’s wrong, is recognised in almost all the jurisdictions and has proved to be a very useful tool in some of them.
- All the jurisdictions recognise and discuss **joint and several liability of multiple tortfeasors**. As a rule, where several persons, not acting in concert, commit a tort or delict against another person causing the same or indivisible damage, each tortfeasor is liable for the same damage. This is not a type of secondary liability since it does not involve a qualitative test about the extent of involvement of different tortfeasors in the wrongful act.
- The principles of **separate legal personality** and **limited liability** are the foundation of corporate law in all the jurisdictions. In many, the question of parent company liability for their subsidiaries is treated as a matter of corporate law. **Legislation on corporate groups** exists in an **exceptional and fragmented manner**.
- In common law jurisdictions, these foundational principles may be departed from in exceptional circumstances under the doctrine of **‘piercing the corporate veil’**. Tests vary across jurisdictions and appear underdeveloped and inconsistent. In some jurisdictions, an exception to the principle of separate corporate personality can be found under the law of **agency** whereby a subsidiary company can be found to be acting as the agent of the parent company (England, Hong Kong and US).
- The question of the **direct liability of parent companies for the acts of subsidiaries or suppliers** is, not surprisingly perhaps, so far most developed in the jurisprudence of developed countries. In several jurisdictions, where headquarters of multinational enterprises are located, there has been a trend towards civil claims alleging **breach of duty of care** in relation to harm that occurs through their overseas operations (Australia, Canada, England, Netherlands, and

US). In addition, several jurisdictions have recently enacted or are considering the enactment of legislation requiring companies to implement **human rights and environmental due diligence** across their group operations and supply chains (France, Germany and Netherlands).

- Instances of **supply chain liability** remain rare. In several cases, lawyers have relied on conventional tort law causes of action to establish that liability could arise in a supply chain (Canada, England and Germany). Overall, the law is highly fragmented, and clear rules have not yet been established.
- **Monetary remedies** are the most common method of reparation. Compensatory damages are universally available.
- Beyond monetary remedies, **injunctions** are also widely available in relation to the three defined harms. **Declaratory relief** as a form of vindication for the deprivation of rights is mentioned in several country reports (Australia, Canada, England, Netherlands and Russia).
- Particularly in cases concerning **environmental harm**, monetary compensation is insufficient, and other remedial measures are required. **Restoratory relief** can be ordered according to specialised legislation in some jurisdictions (Canada, China, France, Mexico, Ukraine and Zambia).
- Whether a domestic court has jurisdiction in a case will be determined by the rules of **private international law**. Generally, these rules allocate jurisdiction 'based on whether there is a sufficient nexus between the parties, the subject matter of the dispute and the forum in which the case is brought. Jurisdiction over foreign defendants is ordinarily established on the basis of a variety of **connecting factors**. These factors vary across jurisdictions, but for the three defined harms, the most common, which are widely discussed in the country reports, are **domicile and/or habitual residence of the parties** and the **place where the wrongful act was committed and/or the damages were sustained**.
- In common law jurisdictions, courts have wide discretionary powers to decline jurisdiction in favour of a more appropriate forum available to the parties on the basis of the **forum non conveniens** doctrine. This can often be a **significant procedural barrier** for commencing civil claims in common law jurisdictions.
- In many jurisdictions, the law of civil remedies is a useful tool for holding public bodies and/or private actors to account for human rights violations. Several country reports note the **flexibility of the law of civil remedies** (England, Netherlands, South Africa and Ukraine). In many jurisdictions, the law of civil remedies evolves in response to societal needs and may continue to develop in this field, something that perhaps can be seen in the burgeoning litigation relating to corporate liability for human rights violations.
- It is, however, evident that civil claims are **not always a perfect solution** for remedying human rights violations. Some human rights violations may not have a corresponding civil cause of action. In addition, the law of civil remedies is essentially backward-looking, and does not usually seek to identify root causes or provide a mechanism to resolve patterns of abuses beyond the case in question.
- All country reports acknowledge that **procedural barriers** hinder efficacy of civil claims to foster human rights accountability. These barriers vary, but the following

are discussed widely: the structure of the burden of proof; the difficulties involved in obtaining and presenting sufficient evidence; difficulties with pursuing collective actions; the cost of litigation; the absence of contingency-fee arrangements; the time it takes to pursue proceedings; and, in some cases, the inadequacy of awards of damages.

- The law of civil remedies can be an important tool to seek compensation for human rights violations, but it remains only **one of the many strategies available to claimants**. Other legal remedies include criminal law, administrative law, judicial review (notable in Malaysia), and non-judicial mechanisms such as national human rights commissions. Commencing civil claims will therefore not always be the preferred avenue to obtain redress, and practitioners should be mindful of the availability of different tools to ensure they represent the interests of their clients effectively.

Resources

In addition to the resources recommended in the country reports, we suggest the following books, reports, or online tools for anyone interested in learning how the law of civil remedies can be used to remedy human rights violations.

Books

- Ewa Bagińska (ed), [Damages for Violations of Human Rights](#) (Springer 2016)
- Simon Baughen, [Human Rights and Corporate Wrongs: Closing the Governance Gap](#) (Edward Elgar 2015)
- Liesbeth Enneking, [Foreign Direct Liability and Beyond. Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability](#) (Eleven International 2012)
- Sarah Joseph, [Corporations and Transnational Human Rights Litigation](#) (Hart 2004)
- Ken Oliphant (ed), [The Liability of Public Authorities in Comparative Perspective](#) (Intersentia 2016)
- Dawn Oliver and Jörg Fedtke (eds), [Human Rights and the Private Sphere: A Comparative Study](#) (Routledge-Cavendish 2007)
- Dinah Shelton, [Remedies in International Human Rights Law](#) (3rd edn, OUP 2015)
- Gwynne Skinner (assisted by Rachel Chambers and Sarah McGrath), [Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy](#) (CUP 2020)
- Lisa Tortell, [Monetary Remedies for Breach of Human Rights: A Comparative Study](#) (Hart 2006)
- Jason Varuhas, [Damages and Human Rights](#) (Hart 2016)
- Jane Wright, [Tort Law and Human Rights](#) (2nd edn, Hart 2017)

Reports

- Anita Ramasastry and Robert C Thompson, [Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law](#) (Fafo Research Foundation 2006)
- International Commission of Jurists, [Corporate Complicity & Legal Accountability: Volume 3 – Civil Remedies](#) (2009)
- Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, [The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business](#) (International Corporate Accountability Roundtable, Corporate Responsibility (CORE) Coalition, European Coalition for Corporate Justice 2013)
- European Union Agency for Fundamental Rights and Council of Europe, [Handbook on European Law Relating to Access to Justice](#) (2016)
- Axel Marx, Claire Bright, Jan Wouters, [Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries](#) (European Parliament 2019)
- European Union Agency for Fundamental Rights, [Business and Human Rights – Access to Remedy](#) (2020)
- International Federation for Human Rights, [Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms](#) (3rd edn, 2021)
- The Danish Institute for Human Rights, [Human Rights Due Diligence Laws: Key Considerations – Briefing on Civil Liability for Due Diligence Failures](#) (2021)
- European Coalition for Corporate Justice, [Suing Goliath: An Analysis of Civil Cases against EU Companies for Overseas Human Rights and Environmental Abuses](#) (2021)
- European Law Institute, [Business and Human Rights: Access to Justice and Effective Remedies](#) (2022)

Other resources

- [Action4Justice](#), a global civil society platform with step-by-step guides and tips on public interest litigation
- Business & Human Rights Resource Centre, [Lawsuit Database](#)
- Office of the United Nations High Commissioner for Human Rights, [Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses](#) (2016 – Ongoing)
- [Symposium: Civil Liability Claims for Business-Related Human Rights Abuses – Opening New Frontiers](#), convened by the Bonavero Institute of Human Rights and International Commission of Jurists (2021)
- European Coalition for Corporate Justice, [Map: Corporate Accountability Legislative Progress in Europe](#) (25 January 2022)



ANNEX1 Glossary

Several terms were assigned defined meanings to assist comparison across different jurisdictions

law of civil remedies	body of law that provides a cause of action for compensation or other form of relief where harm has been caused to a person as a result of an act or omission by another person. It does not, however, include causes of action that arise from a contract between the injured party and the other person. It covers <i>inter alia</i> (but not exclusively) both the law of tort in common law systems and the law of non-contractual obligations, such as the law of delict, in civil law jurisdictions. The terms 'civil remedy', 'civil liability' and 'civil claim' are used in the Handbook interchangeably.
public body	a range of actors or institutions undertaking public functions such as the state, central government, police and emergency services, local authorities, officials and members of the executive and public institutions or agencies acting in their official capacity.
corporation	bodies with legal personality incorporated according to the law, including joint-stock companies, limited liability companies, partnerships, state-owned enterprises, etc.
assault or unlawful arrest and detention	(1) an attack inflicting physical harm or unwanted physical contact upon a person or people; (2) a credible threat to injure someone in such an attack; (3) the intentional restriction of a person's movement or their detention without consent or legal justification. Such conduct may cause violations of human rights, including, but not limited to the following: the right to life; the right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment; the right to freedom and security of the person; the right of detained persons to humane treatment; and the right to freedom of movement.

environmental harm	impact on the environment as a result of human activity, such as the addition of any substance (solid, liquid, or gas) or any form of energy (such as heat, sound, or radioactivity) to the environment, that has an effect of polluting, degrading or otherwise adversely affecting the normal environmental processes and may result in injury, death, loss, or threatened loss to a person or property. Types of environmental harm include deforestation, soil pollution and land damage, water pollution and hydrological damage, air pollution, noise pollution, and radioactive pollution. Environmental harm often results in adverse human rights consequences and may affect the right to an adequate standard of living (including adequate food, clothing and housing, and continuous improvement of living conditions), the right to health, and the right to self-determination (eg when environmental pollution affects indigenous peoples). The Handbook does not cover climate change liability and litigation.
harmful or unfair labour conditions	occur when the working conditions may lead to physical harm to workers, for example, because of poor safety and health standards or abusive labour practices. For the purposes of the Project, harmful or unfair labour conditions include (1) systemic or gross exposure to unsafe practices, such as exposure to heat, noise, dust, and hazardous chemicals, without adequate protection (eg harmful working conditions of migrant workers during mega sporting events); (2) modern slavery (eg use of forced and child labour); and (3) abusive labour practices in supply chains. The Handbook does not cover discrimination in the workplace and equality rights.
three defined harms	for the purposes of the Project, these are assault or unlawful arrest and detention, environmental harm, and harmful or unfair labour conditions as defined above.
Other terms frequently used in the country reports are explained below	
battery	a category of tort entailing an act of intentionally and voluntarily bringing about unwanted harmful or offensive physical contact with a person.
cause of action	(1) the legal basis for commencing a civil claim; (2) the set of facts that entitles a party to seek judicial remedy.
conversion	a category of tort when one person interferes with the personal property of another, for example by taking it or withholding it without lawful justification.
corporate veil	a metaphor that captures the legal rule that incorporated associations have a separate legal personality from the individuals that established them and/or own them through shareholdings. In exceptional circumstances the corporate veil may be 'pierced' or 'unveiled', and the shareholders can be held liable for the debts of the corporation.

duty of care	an element of the tort of negligence which refers to the obligations placed on a party to act towards others in a certain way, in accordance with certain standards.
false imprisonment	a category of tort entailing complete deprivation of liberty for any period of time without lawful justification.
injunction	a court order requiring a person to do something (a mandatory injunction) or not to do something (a prohibitory injunction).
multinational enterprise	an enterprise producing goods or delivering services in more than one country. A multinational enterprise, abbreviated as MNE and sometimes also called a multinational corporation (MNC), has its management headquarters in one (or, rarely, more than one) country, the home country, while also operating in other countries, the host countries.
negligence	a category of tort entailing a breach of one's obligation to avoid acts or omissions that cause unreasonable loss or injury to another party or their property.
non-pecuniary damages	the compensatory damages that cannot be mathematically calculated in money (eg pain and suffering by the claimant; emotional distress; mental impairment, etc).
nuisance	a category of tort entailing an act which is harmful or offensive to the public or a member of it. Nuisance can be private or public.
parent company	a corporation which has a controlling or majority interest in another corporation referred to as subsidiary , which gives it the right to control the subsidiary's operations.
pecuniary damages	the compensatory damages that are directly linked to the incident that caused your injury. They are also called actual damages. They are easily quantifiable and can be readily measured in financial terms (eg medical expenses; lost wages; loss of earning capacity; damage to property, etc).
punitive (or exemplary) damages	damages that are intended to punish the defendant rather than compensate the claimant and are only available in precise and limited circumstances.
supply chain	a network of corporations and people that are involved in the production and delivery of a product or service.
vicarious liability	a legal doctrine that imposes liability on a party for the acts or omissions of another party if they are linked through a particular legal relationship such as employer and employee.

ANNEX2 ReportTemplate

X Country

Full names of the author(s), their affiliations, and links to web-profiles

Overview

Introduction

Part A: General Questions

Q1

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

Commentary

We asked authors to provide a brief and concise overview of the range of civil remedies for human rights violations that is available in their jurisdictions and, if necessary, explain how they relate to each other. If it is impossible to commence a civil claim for a specified type of human rights violation, we asked authors to indicate this. We also asked if there is a difference in treatment or if any special considerations apply in the case of civil claims against a public body, as opposed to civil claims against corporations or individuals and vice versa.

Q2

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

Commentary

We asked authors to identify the elements that must be established by a claimant seeking relief under specific remedies available in the focus jurisdiction for the three defined harms (eg general law of torts or delict, constitutional torts, specific legislation). These elements are likely to include establishing wrongful or unlawful behaviour, causation, harm, and possibly establishing intention, recklessness, and negligence or not.

Q3**Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?****Commentary**

We wanted to know whether the law of civil remedies in the focus jurisdiction provides that public bodies, corporations and/or individuals may face civil liability even when they are not the primary perpetrators of harm or abuse, but their conduct contributes to harm suffered by the victims. This kind of liability is referred to as 'complicity', 'accessory' or 'secondary' liability. Indirect involvement in the commission of abuse may be established, for example, by the provision of goods and services, purchase of raw materials and products, hire of security services, financing of harmful behaviour, etc. Some legal systems do not distinguish between the principal (also referred to as primary or actual) and secondary perpetrators. Different jurisdictions may use different terms to characterise assistance in the commission of harm, such as 'aiding and abetting', 'accessory', 'solicitation', 'facilitation', 'accomplice liability', 'complicity', etc. If these concepts are not recognised in a particular jurisdiction, we asked authors to make that clear.

We also asked authors to consider whether the rules governing vicarious liability may be applicable to incur civil liability for the civil wrongs of the third parties.

Q4**When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or independent contractor in a supply chain?****Commentary**

We sought details on how the law of civil remedies operates in relation to modern corporate groups. These business structures are complex, with vertical and horizontal integration, whereby parent companies own or control a range of subsidiaries often established in different jurisdictions. In addition, many global companies have complex networks of suppliers. The lead companies are not bound by direct or indirect shareholding with their suppliers in the same way as parent companies are linked to the subsidiaries in corporate groups. However, they often exercise a degree of managerial control over independent contractors by requiring suppliers to adhere to the purchasers' internal procurement policies which are frequently supported by prescribed training and social auditing. The question we seek to explore is whether, when the act or omission of a subsidiary company, or a supplier, has resulted in one of the three defined harms, there are civil remedies that will enable those who have been harmed to seek redress from the parent or lead company.

Q5**What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?****Commentary**

Authors were asked to outline the range of remedies under the law of civil remedies for the three defined harms in their jurisdiction. We were particularly interested in the question of whether a court may impose sanctions other than monetary penalties, including, for instance, restitution, injunctive relief, or mandatory orders to implement programmes to provide redress, guarantees of non-repetition, public or private apologies, land restitution, and/or environmental rehabilitation.

Q6**What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?****Commentary**

There is often more than one form of redress available to the victims of human rights violations. We wanted to determine whether civil claims are an effective means of human rights protection in the focus jurisdictions. We asked authors to outline the advantages and disadvantages of bringing civil claims for human rights violations. While questions of procedure are outside the scope of the Project, authors may briefly identify here some of the jurisdictional and procedural obstacles that impact the efficiency of civil claims. If civil claims in a particular jurisdiction are not a preferred route of redress for specified categories of human rights violations within the scope of the Project, we asked authors to mention this and to outline other types of legal action which are likely to be used (eg criminal case, administrative proceeding, human rights commission or ombudsman, etc).

Q7**Can civil claims be brought against a foreign defendant and if so, what are the rules for that?****Commentary**

This question was added in the report template following the workshop with the authors convened in January 2022. The focus of the Project and the Handbook is on the substantive law, and the extraterritorial application of the law of civil remedies is outside the scope of the inquiry. Yet, it was noted by the authors from several focus jurisdictions that civil claims are often commenced in a transnational context. This trend is particularly apparent in the business and human rights context. Victims of business-related human rights abuses increasingly commence civil claims against parent companies in Western states in relation to harm that has occurred in the overseas states where subsidiaries conduct their operations. We asked authors to set out basic rules explaining when civil claims can be brought against a foreign defendant. When courts consider cases concerning harm that occurred in another jurisdiction, they undertake analysis to determine which state's law should be applied to decide

the claim. Applicable law can be more or less favourable in different jurisdictions, therefore impacting the efficacy of pursuing civil claims. That said, country reports do not address the choice of law considerations in the focus jurisdictions.

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

Commentary

We asked authors to guide readers who require further information on the law of civil remedies in the focus jurisdiction, including online free-access-to-law websites and databases; key pieces of scholarly work; policy reports; websites of relevant institutions, research centres, civil society organisations, law firms, etc.

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Part B: Case Scenarios

CASE SCENARIO 1: FACTS

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

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

QUESTIONS

Q1

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

Q2

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

Q3

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

Commentary

Case Scenario 1 is concerned with the use of force by the police during peaceful protests. The second actor is a private security company that provided police with vehicles, equipment and water. Case Scenario 1 allows testing of how the law of civil remedies applies to public bodies and whether a private company can be held accountable for contributing to the wrongdoing even if it is not a primary perpetrator.



CASE SCENARIO 2: FACTS

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

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations.

QUESTIONS

Q1

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

Q2

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

Q3

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

Commentary

Case Scenario 2 concerns the severe environmental pollution caused by oil spills. A subsidiary runs the extractive project, but the facts suggest that a parent company has been involved in the subsidiary's business. Case Scenario 2 focuses on the allocation of liability within corporate groups and explores the limits of liability of the parent company in relation to human rights breaches caused by its subsidiary's operations.



CASE SCENARIO 3: FACTS

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

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

Questions

Q1

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

Q2

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

Q3

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

Commentary

Case Scenario 3 occurs in the context of a supply-chain relationship. According to the facts, several workers died or were injured as a result of the fire at the factory. Case Scenario 3 examines how harms arising from poor working conditions and lack of safety procedures are protected by the law of civil remedies and whether a major purchaser of the clothes produced at the factory can be held liable.



A HANDBOOK FOR PRACTITIONERS | AUSTRALIA

Civil Liability for Human Rights Violations



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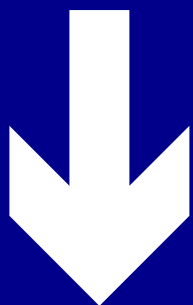
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AUSTRALIA



Australia is a rare example of a modern state without any express national human rights protection. As a result, non-human rights statutory protections and tort law offer a basis for litigants to pursue civil claims as a means of human rights protection, even if those claims rarely rely upon human rights language. Australian tort law originates in English common law, so its foundational principles are shared with other Commonwealth countries. Certain harms could also be remedied by engaging with statutory protections in addition, or in the alternative, to the common law tort protections. A few cases have contributed to the development of principles of parent-company direct liability for negligent harms caused by subsidiaries. However, Australian courts have exhibited a distinct conservatism in addressing these questions.

INDICES

9/167

Democracy Index
2021 Ranking

95/100

Freedom House
2022 Score

18/180

Transparency International
Corruption Index 2021 Ranking

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



Introduction

1. Australia was settled by the British in 1788, with Indigenous sovereignty never ceded and with the result that the common law of the UK became the law of Australia.¹ In a piecemeal fashion since federation in 1901, the Australian legal system has gained independence from the British and imperial legal systems, but the influence of those connections remains in important respects, including in the inheritance of the common law concerning torts.
2. As a **federation** (like the USA or Canada), each constituent body politic within Australia has its own statute (parliament-made) laws covering matters not covered by national laws. The country as a whole shares a common (judge-made) law.² While most laws on most topics will result in much the same legal outcome in the various parts of Australia, there are some stark differences, including in the regulation of government functionaries. For example (and relevantly to Case Scenario 1 discussed below), in the Northern Territory of Australia a civil proceeding against a police officer must be commenced 'within 2 months after the act or omission complained of'³ whereas in Victoria, such a proceeding may be able to be commenced decades later.⁴ The applicable limitations period may also vary between states depending on the age of the plaintiff.⁵ In that light, the applicable law of civil remedies would differ (possibly markedly) depending on the part of Australia in respect of which the claim arises.
3. The **Australian Constitution** offers both limited and relatively obscure rights protection.⁶ It contains no bill of rights and, despite some efforts to change this,⁷ none is likely for the foreseeable future. Further, there is no national statutory protection of human rights or, at least, no enforceable legislative instrument that adopts the language and concepts of international human rights law. To the limited extent to which there is enforceable statutory human rights protection, it is only provided in the states of Victoria (the Charter of Human Rights and Responsibilities Act) and Queensland (the Human Rights Act), and in the Australian Capital Territory (also called the Human Rights Act).⁸ Each of those jurisdictions have statutory human rights protection modelled on British and New Zealand human rights legislation. These statutory human rights protections do not create standalone causes of action⁹ and none permit awards of compensation for human rights breaches.¹⁰ For these reasons, human rights language and concepts from international law appear rarely in civil litigation in Australia.
4. All legal texts referred to below are available at no charge at either www.jade.io/ or www.austlii.edu.au.

1 *Mabo [No 2]* [1992] HCA 23; 175 CLR 1 at 34.

2 *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135].

3 *Police Administration Act 1978 (NT)* s 162.

4 *Limitation of Actions Act 1958 (Vic)*.

5 *Limitations Act 2005 (Western Australia)* s 31.

6 For example, property can only be taken by government on just terms (s 51xxxii), trial is by jury for some criminal offences (s 80), and there cannot be a religious test for qualification for any office or public trust (s 116).

7 Frank Brennan, *National Human Rights Consultation: Report* (Commonwealth of Australia, 2009).

8 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (CHRR); *Human Rights Act 2019 (Qld)*; *Human Rights Act 2004 (ACT)*. However, these can apply in a federal court if the proceeding is issued in the relevant state or territory; see *Hobson v Commonwealth of Australia* [2022] FCA 418 at [9].

9 Although, if a plaintiff claims relief not under the Charter, the relief can be given under that Charter; eg *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 at [184], [191]-[193], [542]-[556].

10 CHRR s 39(3) discussed at *Gebrehiwot v State of Victoria* [2020] VSCA 315; 287 A Crim R 226 at [132]-[133].

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

5. Yes, such a claim could be brought through tort law and, by implication or express terms, under statute passed by a Parliament. Unless a statute provides otherwise,¹¹ such options are available in respect of public bodies also.¹²
6. The relevant misdeeds in most of the Case Scenarios would be classified in Australian law as intentional torts. They would fall into three **sub-categories of intentional tort – battery, assault and false imprisonment**. As intentional torts, they are actionable per se – that is, without need to prove any actual personal injury.¹³
7. The tort of **battery** will be made out if the plaintiff proves, on the balance of probabilities,¹⁴ that a voluntary and positive act was done intending to cause contact with that plaintiff where contact occurs. There is no requirement that the person knows that the contact is unlawful.¹⁵ There is no need to prove that the defendant intended harm nor that the plaintiff suffered any harm, although those will be matters relevant to the quantification of damages.¹⁶ A defence of consent or necessity is available in such a claim.¹⁷
8. The tort of **assault** will be proved, further or alternatively, if there is any direct or intentional threat made to the plaintiff which gives rise to a fear of imminent contact.¹⁸ The contact can be either by the defendant themselves or someone in that person's control.¹⁹ Such a threat is a common precursor to battery.
9. The tort of **false imprisonment** requires the deprivation of liberty without lawful authority or in excess of lawful authority.²⁰ Unlike the other torts, the burden of proof in a false imprisonment claim is on the detainer.²¹ So, in Case Scenario 1, the police would have to rebut the presumption of Australian law that detention is unlawful²² by 'clear and cogent' evidence.²³ Whether the detention is lawful will depend on the specific statutory powers given to the detainer.

¹¹ *Bropho v Western Australia* [1990] HCA 24; 171 CLR 1.

¹² Constitution of the Commonwealth of Australia, [s 75\(iii\)](#).

¹³ *Lewis v Australian Capital Territory* [2020] HCA 26 at [45], [72], [134].

¹⁴ *Evidence Act 1995 (Cth)* s 140.

¹⁵ *Croucher v Cachia* (2016) 95 NSWLR 117.

¹⁶ *Carter v Walker* [2010] VSCA 340; 32 VR 1 at [215]-[216].

¹⁷ *State of NSW v McMaster* [2015] NSWCA 228.

¹⁸ *State of NSW v Ibbett* (2005) 65 NSWLR 168.

¹⁹ *ibid.*

²⁰ *Re Yates; Ex parte Walsh and Johnson* [1925] HCA 53; 37 CLR 36, 75; *Commonwealth v Fernando* [2012] FCAFC 18; 200 FCR 1, [89]; *Myer Stores Ltd v Soo* [1991] 2 VR 597.

²¹ *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223 at [282]; *Lewis v Australian Capital Territory* [2020] HCA 26 at [24]; *Trobridge v Hardy* [1955] HCA 68; 94 CLR 147 at 152; re-stated at *Ruddock v Taylor* [2005] HCA 48; 222 CLR 612 at [140]; see also *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514 at 528-529, *R v Carter; Ex parte Kisch* [1934] HCA 50; 52 CLR 221 at 227.

²² *Ruddock v Vadarlis* [2001] FCA 1329 at [73]; see also *Tervonen v Finland* [2008] FCA 99 at [8]; *Hicks v Ruddock* [2007] FCA 299 at [53]; *Sadler & State of Victoria v Madigan* [1998] VSCA 53 at [33].

²³ *McHugh* (n 21) [57], see also [53]-[60], [254]-[283].

10. The **tort of misfeasance in public office** is an intentional tort that provides a means to access damages. Despite it being a tort requiring a particular intention, it is not actionable per se: loss or damage must be proved. The tort can be made out if a public officer commits a criminal offence, including as an accessory, or where the perpetrator aided or abetted the commission of criminal offences. An example of such a claim involved a person who sued Australian government officials who knew of and took a minor role in his rendition overseas in the so-called War on Terror during which he was allegedly tortured.²⁴
11. The general law of **negligence** could also be utilised to access damages including where the perpetrator has not engaged in one of the above intentional torts. That body of law adopts broadly the same thresholds as the British common law and the elements for this are set out below at [18].
12. A claim in **nuisance** might also be available (as in Case Scenario 2). To prove that claim, the plaintiff would have to satisfy the court that the perpetrator had interfered, for example, with their use and enjoyment of land in a way that was substantial and unreasonable. It would cover property damage, personal injury and non-physical damage to the use and enjoyment of the land. This final form of damage is already recognised to cover pollution.²⁵ Negligence is not needed to make out such a claim and pure economic loss can be recovered for nuisance.²⁶
13. Any of the above tort claims will be subject to **limitations periods**. These are, most commonly, either three or six years.²⁷ The longer period is ordinarily for intentional torts, such as battery, assault and false imprisonment. Such periods are commonly extendable if, for example, the victim was a child or was under a disability.²⁸
14. Some of the same harms could also be remedied by engaging with statutory protections in addition, or in the alternative, to the common law protections just explored:
 - i. In a workplace setting, the primary mechanism for protecting against harmful or unfair labour conditions is through the federal Fair Work Act 2009 (Cth). It creates a range of workplace offences and most of them can result in financial awards. Unusually for Australian law, as discussed below at [72], the victim of unfair labour conditions could then personally receive the financial benefit of that civil penalty personally.
 - ii. In respect of environmental harms, there are a range of statutory protections offered in both federal and state legislation. For example, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) prohibits action in coal seam gas or large coal mining development that is likely to have a significant impact on water resources.²⁹ For the reasons explored at [58]-[61] below, these prohibitions may give a civil remedy for persons impacted by a breach of that protection, but are not likely to do so.

²⁴ *Habib v Commonwealth of Australia* [2010] FCAFC 12; 183 FCR 62 at [118].

²⁵ *Marsh v Baxter* [2015] WASCA 169; 49 WAR 1 at [244]-[245], [252].

²⁶ *Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379 at [175]-[182].

²⁷ [Limitation of Actions Act 1974 \(Qld\)](#), ss 10 and 11.

²⁸ *ibid* ss 29 and 31.

²⁹ [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) s 24D. Relevantly to Case Scenario 2, this prohibition does not cover oil extraction.

15. There is also scope to seek **public law remedies** in respect of the three Case Scenarios, including, for example, seeking release from detention by way of issue of the writ of *habeas corpus*,³⁰ or seeking judicial review of a decision of a government entity. However, because public law remedies are not means by which the perpetrator can be held civilly liable, these remedies are not discussed further below.
16. In some factual situations other civil claims may be available in Australia under, for example, unjust enrichment, or as a consumer claim based on misleading and deceptive conduct. These are not discussed below because of word limitations and since they are less likely to be engaged as routes to a remedy in the Case Scenarios.

Q2

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

17. In order to make out a claim under the law of torts, the person bringing the claim (the plaintiff) would be required to establish that an entity against whom a civil remedy is sought (the defendant) fulfilled each element of the cause of action brought against that defendant.
18. Where the cause of action is negligence, as in most common law countries, the plaintiff will be required to establish that the defendant owed a **duty of care and acted in breach** of the scope of that duty in a way that caused injury.³¹ The test to be applied by the courts to determine causation will be an assessment based on all the facts on a common-sense basis. A 'but-for' test is instructive in determining that answer ('But for the existence of X, would Y have occurred?').³² As to whether there is a duty of care, the court will consider all factors to establish whether there was a relationship of sufficient connection to provide a basis for liability to arise.³³ That assessment will be done by reference to the salient features of the relationship to determine whether it is appropriate to impute a legal duty.³⁴
19. As noted above, the **tort of assault** requires proof of a threat that is both direct and intentional, and that is one that gives rise to a reasonable apprehension of imminent contact. By contrast, the elements of the **tort of battery** require actual contact, rather than a threat of contact.
20. The **burden of proof** for all elements of each of the above torts will fall on the plaintiff and will have to be established on the balance of probabilities.³⁵ The primary relevant exception to this rule³⁶ is in relation to any claim of **false imprisonment**.³⁷ The elements of a tortious claim for false imprisonment are

³⁰ As to it generally and it being a public law remedy, see *McHugh* (n 21) at [247].

³¹ As an example in a human rights context, see *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. The general common law principles are sometimes modified by statute in ways of no relevance for present purposes; [Civil Liability Act 2002 \(WA\)](#); [Civil Liability Act 2002 \(NSW\)](#); [Civil Liability Act 2002 \(Tas\)](#) or [Civil Liability Act 2003 \(Qld\)](#).

³² *March v Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506, especially per Mason CJ.

³³ *Stuart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215, dealing with an unsuccessful claim against police for failing to intervene before a person committed suicide.

³⁴ *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 at [101]–[103].

³⁵ [EA](#) s 140 (n 14).

³⁶ Other examples to consider of unusual onuses in Australian law include [Sex Discrimination Act 1984 \(Cth\) \(SDA\)](#) s 7C; [Disability Discrimination Act 1992 \(Cth\)](#) ss 6(4), 30; [Age Discrimination Act 2004 \(Cth\)](#) s 15.

³⁷ *McHugh* (n 21) at [282]; *Lewis v Australian Capital Territory* [2020] HCA 26 at [24]; *Trobridge* (n 21) at 152; re-stated at *Ruddock* (n 22) at [140]; see also *Ex parte Beane* (n 21) at 528–529, *Ex parte Kisch* (n 21) at 227.

simpler – the detained person must prove the fact of their imprisonment and then, responsively, demonstrate why any claimed lawful authority on the part of the defendant was absent.

21. The elements of any statutory obligation giving rise to a civil remedy are determined by the terms of that statute. A statutory claim and a common law claim can be (and commonly are) pursued concurrently where the facts support both (unless the statute bars concurrent pursuit of a common law claim).

SPOTLIGHT: FAIR WORK ACT 2009

To give one example of a statutory claim relevant to Case Scenario 3, the Fair Work Act is the principal legislative tool for protection of employment conditions in Australia. While tortious proceedings may also be available in such a situation, this legislation is tailored to the employment context and would be at least as effective in many contexts. As an example of how legislation might prescribe the elements of the civil remedy scheme, an employer can be found to have acted in ‘serious contravention’ of worker protections under that legislation if the court is satisfied that their act was ‘part of a systematic pattern of conduct’. In turn, that will require consideration of the number and the frequency of the breaches.³⁸

Q3

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

22. Yes, a non-primary perpetrator could be liable principally through the doctrine of vicarious liability and also through accessorial liability.
23. A party may be liable for the commission of a tort by another if they can be shown to have **overborn** that other.³⁹ For example, they might be found to have overborn the primary actor if they caused or procured, aided or abetted the relevant misconduct, or if that misconduct would not have occurred but for that party’s intervention.⁴⁰
24. Similarly, **vicarious liability** extends to those hierarchically different from the primary actor: for example, an employer can be vicariously liable for the actions of an employee where that employee was pursuing the employer’s interests or acting within the scope of their contract of employment.⁴¹ This means that a person or entity will be civilly liable even if they took no direct action against the victim themselves, but they are responsible at law for those actions. That liability will be established by the common law⁴² or can be prescribed by statute.⁴³

³⁸ [Fair Work Act 2009 \(Cth\)](#) s 557A.

³⁹ *Porter v OAMPS Ltd* [2005] FCA 232; 215 ALR 327 at [42].

⁴⁰ *Coles Myer Ltd v Webster* [2009] NSWCA 299 at [106], [108], [113]–[119].

⁴¹ *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106; 71 NSWLR 354 at [21]–[29]; see also *Burton v Babb* [2020] NSWCA 331 at [75] concerning indemnification by the employee.

⁴² *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511.

⁴³ For example, in respect of police officers see [Law Reform \(Vicarious Liability\) Act 1983 \(NSW\)](#) s 9; or, as a further example in a different context, a landlord is said to be vicariously liable for the actions of the landlord’s agent and a tenant vicariously liable for damage to premises by a visitor, see [Residential Tenancies Act 1999 \(NT\)](#) ss 9 and 12.

25. **Accessorial liability** is another means by which a secondary actor might be held liable for misconduct performed by another. By way of relevant example and returning to the employment context, a person is liable for a civil penalty (which can be awarded to the employee) if that person was ‘involved in a contravention’ of a statutory protection for that employee.⁴⁴ The concept of ‘involvement’ is broad and it includes inducing, aiding, abetting, counselling or procuring the contravention.⁴⁵ An example of such a claim involved severe underpayment of foreign workers in regional motels for which the motel managers themselves were found personally liable in addition to the motel corporate entity.⁴⁶
26. It is also possible for a party to be civilly liable where that party has legal responsibility **jointly, severally, or jointly and severally**, with the primary perpetrator. A party will be jointly liable if it is liable equally to the full extent as another party. It will be severally liable if it is only partly liable with another party. And it will be jointly and severally liable if it can be pursued for either part or the whole amount. The extent and nature of liability will be determined by the legal relations between the perpetrators. This might be set out in a written agreement between those actors, or it might be determined by reference to the general law of tort or a statute governing proportionate liability.⁴⁷ Practically, if there are two or more parties who are jointly and severally liable, the case can be brought against any or any combination of them. Where one party has more assets than another or one is within the jurisdiction and the other is not, this might determine the party against whom the claim for civil remedies is brought.

Q4

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

27. The default position under Australian law is that separate legal personality divorces liability of that entity from others.⁴⁸ However, as in the UK, a parent company will generally be liable for acts of a subsidiary or independent contractor where it is found that the parent company itself owed a duty of care (see [18] above).⁴⁹ This was the case concept pursued to settlement in two notable cases concerning detention of immigrants, one on a remote Australian island⁵⁰ and the other on a remote, foreign island at the behest of Australia.⁵¹
28. In addition, a parent company could be held liable if the corporate arrangement is a sham or a device to avoid liability. In such circumstances, courts have been willing to ‘**pierce the corporate veil**’ – that is, to look behind the legal entities to see who is truly behind them and whether the legal entities were created or maintained solely or predominantly to protect that otherwise-hidden entity.⁵²

44 [Fair Work Act](#) s 550. For a like example in a corporate law context, see [Corporations Act 2001 \(Cth\)](#) s 598.

45 Discussed in *Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134.

46 *Fair Work Ombudsman v NSW Motel Management Services Pty Ltd & Ors* (No 2) [2019] FCCA 2638.

47 [Wrongs Act 1958 \(Vic\)](#) ss 24AA, 24AB, Part 4AA.

48 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at [577].

49 *CSR Ltd v Wren* (1997) 44 NSWLR 463; this possibility was left open in a dispute over pleadings, see *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another* (No 2) [1997] 1 VR 428. Please also refer to [48]-[52] in the English report. To access all country reports, please [click here](#).

50 *AS v Minister for Immigration and Ors* [2017] VSC 476; 54 VR 500; [2017] VSC 300; [2017] VSC 162; [2017] VSC 137; [2016] VSC 774; [2016] VSC 351; [2015] VSC 642; [2014] VSC 593; [2014] VSC 486.

51 *Kamasae v Commonwealth of Australia and Ors* [2018] VSC 138; [2017] VSC 537; [2017] VSC 272; [2017] VSC 171; [2017] VSC 167; [2016] VSC 770; [2016] VSC 605; [2016] VSC 595; [2016] VSC 492; [2016] VSC 438; [2016] VSC 404; [2015] VSC 148.

52 *Australian Securities and Investments Commission v Caddick* [2021] FCA 1443 at [275]-[279].

SPOTLIGHT: MODERN SLAVERY ACT 2018

Although it has no civil remedy consequence, the [Modern Slavery Act 2018 \(Cth\)](#) requires commercially significant entities based or operating in Australia to report annually on the risks of modern slavery in their operations and supply chains, and on actions taken to address those risks. The resulting statements are required to be published free and online. The fact of a failure to provide such a statement can be published by the responsible Minister, but there is no other penalty under this regime.

Q5

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

29. Broadly, there are two classes of remedy that would be available to such victims – private law remedies in damages or compensation (ie money) and public law remedies (eg injunctions or means of rectification, without money).
30. The **private law remedies of damages or compensation** would result in an award of money to the victim to return the victim as close as possible to the position they would have been in had the misconduct not occurred (being compensatory damages).⁵³ If the conduct is sufficiently reprehensible, there may also be an award of damages to reflect the gravity of the misconduct of the perpetrator (being exemplary damages). This requires analysis of the counterfactual – that is, consideration of what would have been the situation had the breach of law not occurred. For example, if someone was detained by reason that the law was not complied with, but had it been complied with the person would still have been detained, the damages will be merely nominal.⁵⁴ If they would have otherwise been at liberty, damages could be substantial.⁵⁵
31. **Exemplary and aggravated damages** could be awarded if the act is done in deliberate disregard for the person's rights.⁵⁶ Abuses of the kind dealt with in the Case Scenarios would likely engage such damages awards.
32. **Public law remedies** relevantly include a declaration as to right.⁵⁷ A victim might be able to obtain this remedy to vindicate their rights deprivation. A declaration 'will go some way to redressing the hurt felt by those injured. It will serve to restore the esteem and social standing which has been lost as a consequence of the contravention.'⁵⁸

⁵³ For example, see *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27.

⁵⁴ *Lewis* (n 37).

⁵⁵ *Majinkdi v The Northern Territory of Australia, Miller and Fitzell* [2012] NTSC 25; *White v South Australia* [2010] SASC 95. In both cases, over AUD\$150,000 (approximately USD\$115,000 was awarded, adjusted for inflation to 2021, and calculated as a daily amount.

⁵⁶ *Lewis* (n 37) at [110], [117], [161].

⁵⁷ As to the breadth and flexibility of the remedy, see *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* [1972] HCA 19; 126 CLR 297 at [12].

⁵⁸ *Eatock v Bolt* [2011] FCA 1103; 197 FCR 261 at [466]; *David Nolan v Executive Director, Land Management Policy, Department of Environment and Primary Industries* [2015] VSCA 301 at [72].

33. Other public law remedies might also be available to undo decisions of public authorities which have ongoing harmful effects. By way of example in the environmental harm context, if a public body decided not to limit or restrain polluting conduct that it regulates, that decision could be challenged if the public body did not consider the 'potential impacts' on climate change of their decision.⁵⁹ If a court were to declare that that provision had not been complied with, it would have the same practical effect⁶⁰ as if the decision had been quashed (by the remedy known as *certiorari*).⁶¹ The public body would then have to remake the decision having regard to the climate change effects of the decision.
34. If there was evidence that the actions of the defendants were going to be repeated or were ongoing, an **injunction** might be issued preventing them from committing unlawful conduct again. That is, where a tort is anticipated (ie *quia timet*) or ongoing, relief in the nature of an injunction compelling certain action may be available.⁶² Naturally, injunctive relief can also be obtained where the harm is ongoing.
35. The writ of *habeas corpus* is also available as a remedy to restore a person's liberty where there is no lawful basis for it to be deprived.⁶³

Q6

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

36. Australia is a rare example of a modern state **without any express national human rights protection**: the Constitution is almost silent on any form of human rights protection⁶⁴ and there is no national legislative means of human rights protection per se.⁶⁵ Two points follow from this:
- i. Civil claims are the only effective means of substantial human rights protection which can be both pursued by an individual and determined by a court.
 - ii. In the absence of goodwill by the perpetrator after a human rights violation,⁶⁶ remedies for human rights breaches can only be achieved by use of civil claims based on substantive human rights concerns, even if those claims rarely rely upon human rights language.

⁵⁹ [Climate Change Act 2017 \(Vic\)](#) s 17.

⁶⁰ *Davies v Minister for Urban Development and Planning* [2011] SASC 87; 109 SASR 518 at [24].

⁶¹ *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480 at [25].

⁶² *ELF18 v Minister for Home Affairs* [2018] FCA 1368; *Plaintiff S99/2016* (n 31).

⁶³ *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 at [45]-[69]; *Hobson v Commonwealth of Australia* [2022] FCA 418.

⁶⁴ There are very limited rights implied in the Constitution, including the right to freedom of political communication discussed at *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; see also discussion above at [3].

⁶⁵ Discussed in *Dietrich v the Queen* [1992] HCA 57; 177 CLR 292, especially at [18].

⁶⁶ For example, by way of *ex gratia* payment or compliance with a recommendation by the Australian Human Rights Commission; [Australian Human Rights Commission Act 1986 \(Cth\)](#) (AHRC) s 29(2)(c).

SPOTLIGHT: HUMAN RIGHTS STATUTORY PROTECTION

While there is no national human rights protection, as mentioned in [36] above, there is express human rights statutory protection in three jurisdictions of Australia at present – the Australian Capital Territory, Victoria, and Queensland. In those jurisdictions – and only in those jurisdictions – international human rights jurisprudence may have a direct role in how a court would determine the issues before it.⁶⁷ This is especially so where those scenarios relate to public authorities.⁶⁸ If the scenarios were litigated in Australia where the laws of those three jurisdictions did not apply, human rights law would have a limited, if any, role in determining the outcome of each case.⁶⁹ It should be noted too that compensation for breaches of human rights under the state instruments of the Australian Capital Territory, Victoria and Queensland is expressly prohibited. Relief beneficial to the person bringing the claim is only available to the extent that that relief could otherwise be claimed in a public law proceeding, as discussed above at [3].

37. Civil claims concerning human rights in Australia have the advantage of being able to be **deployed quickly**. In cases where a person's life or health is at risk, it is not unusual for an Australian court to convene out of hours, including over the weekend, to determine whether interlocutory (that is, temporary) relief should be granted.⁷⁰ This is especially so when the relief would 'preserve the subject matter' (ie the human) of the case.⁷¹
38. A further advantage of civil claims is to **shed light** on what has occurred. Court proceedings provide a means to compel perpetrators to divulge their internal workings. In particular, discovery can be ordered by a court including to redress the 'information asymmetry' that is likely between victim and perpetrator.⁷² Subpoenas to compel the provision of material from non-parties to the proceeding can also be sought if a civil proceeding is ongoing.⁷³ These mechanisms serve the interests of transparency and openness which are at the heart of litigation in Australia. Those ideals are similarly reflected in court hearings being open to the public⁷⁴ on all but rare and exceptional occasions.⁷⁵
39. The **disadvantages** of bringing a civil claim are, primarily, two-fold:
- A substantial risk of crippling **adverse costs orders** if the proceeding is unsuccessful – the default position is that the party that loses the case pays the legal costs of the party that wins the case. Usually that adverse costs order will be for most, but not all, of the costs incurred by the successful party, but in

⁶⁷ [CHRR](#) s 32(2).

⁶⁸ *ibid* s 4 and 38.

⁶⁹ Subject to the so-called principle of legality, by which all legislation is read on a presumption that it has been passed with the intention that Parliament was protecting fundamental rights; see *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41; 256 CLR 569 at [11] and *Oates v Attorney-General (Cth)* [2003] HCA 21; 214 CLR 496 at [45].

⁷⁰ *FJG18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585, in which orders were made at 1 am on a Sunday morning.

⁷¹ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; 210 FCR 505 at [279]-[280]; *Tait v R* [1962] HCA 57; 108 CLR 620.

⁷² *O'Donnell v Commonwealth of Australia* [2021] FCA 1223 at [108]-[109].

⁷³ [Federal Court Rules 2011 \(Cth\)](#) Chapter 2 Part 24.

⁷⁴ [Open Courts Act 2013 \(Vic\)](#) s 4.

⁷⁵ For a dramatic example involving claims of state secrecy arising from Australia bugging rooms used by East Timorese officials in treaty negotiations with Australia, see *R v Collaery (No 11)* [2022] ACTSC 40.

some circumstances it will be the ‘full costs’ of that party.⁷⁶ In robust or lengthy civil litigation, it would not be unusual for a costs order to be the equivalent of ten years of an average Australian’s income. While Australian courts have a power to cap the costs risk early in a proceeding⁷⁷ and, in other circumstances, have shown a willingness to make no order as to costs when the failed case is a ‘test case’⁷⁸ or when it concerns unlawful deprivation of liberty,⁷⁹ this is unlikely when a person is seeking a private benefit such as damages or compensation.⁸⁰

- ii. The final resolution of such claims will ordinarily **take years** if litigated to judgment. This is especially so if the case is brought as a class action.⁸¹

SPOTLIGHT: CASE STUDIES

Three cases illustrate this point, with each ultimately settled out of court after years of preliminary determinations. These cases concerned a challenge to:

- i. the lawfulness of Australia sending asylum seekers to Papua New Guinea to be detained there;⁸²
- ii. the conditions of detention of asylum seekers on a remote Australian island, Christmas Island, to which corporate service providers were joined;⁸³ and
- iii. the response of police to the community reaction of First Nations (also known as Aboriginal) people to a death in police custody on Palm Island.⁸⁴

Q7

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

40. Yes, a claim can be brought in Australia against a foreign defendant, or for acts done by or on behalf of Australia outside Australia. Such a claim will only succeed if there is a sufficient nexus between the acts outside Australia and legal obligations within Australia.⁸⁵

41. Examples of such proceedings are summarised at [10] and [39]. A further raft of examples were the 50-odd cases⁸⁶ brought successfully by those unable to access

⁷⁶ For a rare, codified example, see [Police Administration Act 1978 \(NT\)](#) s 162(4).

⁷⁷ *Environment East Gippsland Inc. v VicForests (No 3)* [2022] VSC 141.

⁷⁸ *Minister for Immigration and Multicultural and Indigenous Affairs v X* [2005] FCAFC 209; 146 FCR 408 at [15].

⁷⁹ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v MB* [2021] FCAFC 194 and *DBE17 v Commonwealth of Australia (No 2)* [2018] FCA 1793 at [21]–[24]; *J By His Litigation Guardian Maxwell Bernard Vardanega v Australian Capital Territory [No 2]* [2011] ACTSC 36.

⁸⁰ *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; see also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL (costs)* [2021] FCAFC 75 at [14]–[15].

⁸¹ By way of example, the false imprisonment claim discussed at *A S v Minister for Immigration & Ors (Ruling No 7)* [2017] VSC 137 was resolved by consent four years later, after the ruling cited at *DBE17 (by his litigation guardian Marie Theresa Arthur) v Commonwealth of Australia (No 2)* [2021] FCA 556.

⁸² *Kamasae* (n 51).

⁸³ *AS* (n 50).

⁸⁴ *Wotton v State of Queensland* [2018] FCA 1841; [2018] FCA 915; [2017] FCA 1315; [2017] FCA 639; [2017] FCA 406; [2017] FCA 245; [2016] FCA 1457; [2015] FCA 1075; [2015] FCA 1074; [2015] FCA 1073; [2015] FCA 910.

⁸⁵ *Habib v Commonwealth* [2010] FCAFC 12; 183 FCR 62; *Plaintiff S99/2016* (n 31).

⁸⁶ *FJG18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585; *ELF18* (n 62); *Plaintiff S99/2016* (n 31).

the urgent medical attention they required during their period detained on a remote Pacific island by Australia's regional processing arrangements.⁸⁷ In each of these cases, an Australian court issued an injunction requiring that the refugee be brought to Australia for medical treatment to prevent the ongoing commission of a tort.

42. Where such a claim involves the interpretation of foreign law, Australian courts will generally seek to avoid determining the operation of that law unless it is necessary and the position at law is clear.⁸⁸ The court may also resolve such issues by reliance on a quirky presumption of the common law, namely the counterintuitive presumption that foreign law is the same as Australian law.⁸⁹

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

43. Organisations worth investigating for further and up-to-date information and research papers about legal developments in Australia on topics related to civil liability for human rights breaches, as well as summaries of relevant jurisprudence include:
- i. Human rights litigators, such as the [Human Rights Law Centre](#) or one of the [state or territory publicly-funded legal aid schemes or community legal centres](#).
 - ii. Private plaintiff group proceedings specialist law firms such as [Maurice Blackburn Lawyers](#), [Phi Finney McDonald](#), [Slater and Gordon Lawyers](#), [Gordon Legal](#) or [Shine Lawyers](#).
 - iii. Human rights law advocates at Monash University's [Castan Centre for Human Rights](#), [Human Rights Watch](#) or [Amnesty International](#).
44. Reports by the [Australian Human Rights Commission](#) and recommendations issued by them are also a useful resource for the kinds of human rights issues that arise in Australia, albeit that the Commission is rarely involved in litigation itself.⁹⁰ Equally, a 2021 chapter by Peter Cashman and a 2022 chapter by Sarah Joseph and Joanna Kyriakakis touch on matters dealt with in respect of the Case Scenarios.⁹¹

⁸⁷ [Migration Act 1958 \(Cth\)](#) Part 2 Division 8 Subdivision B.

⁸⁸ The High Court did so in the extradition case from the Solomon Islands at *Moti v The Queen* [2011] HCA 50; 245 CLR 456.

⁸⁹ *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; 223 CLR 331 at [125], [249], [275] relevantly discussed and applied at *Plaintiff S99/2016* (n 31) at [184]-[186].

⁹⁰ Despite [AHRC](#) s 11(1)(o).

⁹¹ Peter Cashman, 'Civil Liability in Australia for International Human Rights Violations' in Richard Meeran and Jahan Meeran, *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021); Sarah Joseph and Joanna Kyriakakis, 'Australia: Tort Law Filling a Human Rights Void' in Ekaterina Aristova and Uglješa Grušić, *Civil Remedies and Human Rights in Flux: Key Legal Developments from Selected Jurisdictions* (Hart Publishing 2022).

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

45. Yes, protesters could bring civil claims against the police (either as an institution or in the name of the Chief Commissioner of Police, depending on the structure of the relevant police force) and probably also Security Co in Australia, including in the forms discussed above at [6]-[10] and [17]-[19]. Without knowing the location within Australia of the police and the powers they were purporting to rely upon, the scope of their power to detain cannot be determined.⁹²
46. **Torture** in the context of detention gives rise to an additional possible tort claim. Assuming for this purpose that the detention was otherwise lawful, the conditions of that detention may make the detention itself unlawful.⁹³ It is unresolved in Australian law whether the conditions of detention can convert otherwise lawful detention into being unlawful.⁹⁴ This may be a function of detention conditions in Australia not reaching a threshold of torture, nor there being reported instances of sexual assault or rape in detention on any occasion yet considered by a court.
47. Finally, but only in respect of the police officers, it may be possible to bring a claim in tort for **misfeasance in public office** for their conduct. This may be available where the actions were criminal in nature or where an officer aided or abetted the commission of criminal offences (for example, by Security Co officers).⁹⁵ Section 268.20 of the Schedule to the [Criminal Code 1995 \(Cth\)](#) prohibits torture, cruel, inhuman or degrading treatment, as well as arbitrary detention.
48. The Australian formulation of this tort has the five central elements:
- i. an invalid or unauthorised act;
 - ii. by a public officer (which is the reason only the police officers could be the subject of such a claim, and not Security Co employees);
 - iii. done in the purported discharge of that office;
 - iv. done with malice or reckless indifference as to the power to perform that act; and
 - v. loss or harm to the plaintiff.⁹⁶

92 *Gebrehiwot* (n 10) which dealt with a claim of unlawful arrest and false imprisonment against police pursuant to the [Victoria Police Act 2013 \(Vic\)](#) ss 72-74, including a claim concerning jury directions and statutory rights protection.

93 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; 219 CLR 486 at [51]; *MZYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694 at [15].

94 *Prisoners A-XX Inclusive v New South Wales* (1995) 38 NSWLR 622 at 627-633; *Potier v General Manager, Dawn De Loas Correctional Centre* [2012] NSWCA 352 at [12].

95 Much like in *Habib* (n 24) 62 at [118].

96 *Northern Territory v Mengel* [1995] HCA 65; 185 CLR 307 at 370.

49. In Case Scenario 1, it would seem that each of the above elements would likely be made out. The invalid or unauthorised act would arise if the police defendants did the acts themselves or ‘intentionally assisted or encouraged the principal offender to commit that offence’⁹⁷ – that is, if the police did the prohibited act themselves, or assisted or encouraged a Security Co officer to do the prohibited act. There would be no need for any agreement with that Security Co officer⁹⁸ and the claim would hold whether or not the Security Co officer knew of that police officer’s assistance.⁹⁹
50. As to the need to prove loss or harm, this aspect may not be strictly needed if the loss or harm is in the nature of an intentional tort which is, as noted above, actionable per se. Again, this question is presently unresolved in Australian law.
51. Case Scenario 1 presents a situation where both public and private actors are involved. As a broad proposition,¹⁰⁰ a party bringing litigation in Australia who has a choice of bringing a claim against a government, as compared with a non-government, entity would be **wise to bring it primarily (and perhaps even only) against the government entity**. This is so for three reasons:
- The government has the deepest and more reliable pockets (figuratively full of money). Private companies can be structured in a way that limit, or practically avoid, liability.
 - Litigating against government should be fairer¹⁰¹ and less combative (and thus less costly) than against private entities. This is so because by common law or statute,¹⁰² government entities are required to act as model litigants. That is, they are obliged to act in litigation against the ‘almost instinctive ... standard of fair play’.¹⁰³ This includes settling claims as early as possible and not taking technical points for the sake of doing so, including any limitations claims.¹⁰⁴ It also requires that they act ‘honestly, consistently and fairly when handling claims and litigation’.¹⁰⁵
 - If the private entity has a financial liability in the case, the government entity will probably join them to the proceeding and by so doing, carry the greater adverse costs risk if the claim against that private entity fails.¹⁰⁶
52. Thus, a pragmatic consideration concerning Security Co would arise: what could be gained from bringing a case against it that could not be obtained from suing the police directly? Given that the police were the primary perpetrators and they acted together on the facts, there would seem to be little to gain for the plaintiffs in also bringing Security Co into the proceeding. Indeed, it would carry the considerable risk that if the proceeding was not successful, the adverse costs risk would be roughly doubled.

97 *Giorgianni v R* [1985] HCA 29; 156 CLR 473.

98 *R v Oberbilig* [1989] QSCCA 67; 1 Qd R 342; *R v Nguyen* [2010] VSCA 23.

99 *R v Lam & Ors* (Ruling No 20) [2005] VSC 294.

100 There are exceptions to this. For example, a private defendant may be more willing to settle a claim because it is less concerned about precedent-setting than a public defendant. This might make the private defendant the better party to initiate a proceeding against.

101 As a dramatic example of a government using its power to upend extant litigation in a way that could be described as unfair, see *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42, 149–50 [339]–[343]. In that instance, the Australian government passed legislation shortly before the hearing to defeat part of the case and then cajoled a foreign government to change how it administered its own laws to defeat another part of the case.

102 *Judiciary Act 1903 (Cth)*, Pt VIII; *Legal Services Directions 2017 (Cth)*, App B.

103 *Melbourne Steamship Company Limited v Moorehead* [1912] HCA 69; 15 CLR 333 at 342.

104 *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* [2020] HCA 43 at [35].

105 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing) (No 2)* [2019] NTCAT 12 at [26].

106 *AS v Minister for Immigration and Border Protection and Ors (Costs Ruling)* [2017] VSC 300.

53. That said, a claim could be brought against Security Co in the law of civil remedies if it was involved in one of the ways explored at [23]-[26] or if it could be shown that it owed the protesters a duty of care and acted in breach of the scope of that duty.¹⁰⁷ The difficulty on the limited facts provided would be in establishing that there was a duty of care owed. It is likely that there was no assumption of a particular responsibility to the protesters by Security Co. In the absence of that, making out the claim will be difficult. Although, it could be vicariously or accessorially liable for its involvement, applying the principles discussed at [23]-[25].



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

54. It may be possible for a **complaint to be made to the Australian Human Rights Commission**, depending on the characteristics of the individuals involved.¹⁰⁸ This would be the case if, for example, the only protesters that were beaten were of a particular race or gender. Following a complaint, the Commission could conduct a conciliation process with a view to resolving the complaint. The Commission also has the power to recommend compensation be paid by government instrumentalities for breaches of human rights protection within its remit,¹⁰⁹ but these recommendations are not enforceable. Such a complaint can also be terminated and then used as a basis for litigation.¹¹⁰
55. Complaints could also be made to the **integrity institutions** associated with the relevant police force (these differ from jurisdiction to jurisdiction within Australia). For example, in Victoria, the relevant body was previously known as the Office of Police Integrity but has, since 2013, been incorporated into the Independent Broad-based Anti-corruption Commission (IBAC).¹¹¹ The IBAC does not, itself, award compensation but it is possible that a finding by it could lead the State to make an *ex gratia* payment arising from serious police misconduct.¹¹² (In other Australian jurisdictions, an office with a similar function has the title of Ombudsman.) Australia's first national integrity body is currently expected in 2023.



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

56. A high-profile lawsuit of some relevance to Case Scenario 1 are the judgments concerning the response of police to the reaction to a death in police custody of a community of First Nations people on Palm Island.¹¹³ An example of other legal avenues being utilised in a similar situation is the [report of the Ombudsman in the state of Victoria into police responses](#) to protests around the World Economic Forum in 2000.¹¹⁴

¹⁰⁷ *Plaintiff S99/2016* (n 31).

¹⁰⁸ *AHRC* s 46P.

¹⁰⁹ For example, see Chris Sidoti, 'Report of an Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Age' (Human Rights Commissioner, August 2000).

¹¹⁰ *AHRC* s 46PO.

¹¹¹ *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* s 52, 64, 65, 84.

¹¹² The case of Corina Horvath and IBAC's Operation Yalgar; detailed at *Horvath v Australia*, Merits, UN Doc CCPR/C/110/D/1885/2009, IHRL 3892 (UNHRC 2014).

¹¹³ *Wotton* (n 84).

¹¹⁴ Available at <http://www.austlii.edu.au/au/other/VicOmbPRp/2000/1.pdf>.

CaseScenario 2

Q1

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

57. A civil claim could be brought against Subsidiary Co for the loss and damage arising from Case Scenario 2. Depending on the details of the role and involvement of Parent Co and its officers in the functioning of Subsidiary Co, it may also be vicariously or accessorially liable (discussed at [23]-[25]) and thus able to be joined as a second defendant, or it could be held directly negligent if a sufficient legal relationship was established.

Statutory protection breaches

58. The oil spills in this scenario would also engage a number of environmental protection laws. Which of those laws applied would depend on the location within Australia of the oil spill. Each of those laws will carry their own penalty for the relevant breach. For example, the [Environment Protection Act 2017 \(Vic\)](#) from the state of Victoria imposes heavy financial penalties on a person or body corporate who deposits oil in waterways.¹¹⁵ It also empowers a court to award compensation for such a breach to a person who has management or control of those waters for the removal of that oil,¹¹⁶ and, more relevantly, for injury, loss or damage suffered by an injured person as a result of the contravention.¹¹⁷ A simple causation test is likely to be required to make out such a claim.¹¹⁸

59. In the absence of such an express compensation scheme, broadly speaking, where an Australian legislative provision prescribes a penalty (as Australian environmental legislation commonly does, see for example as discussed above at [14(a),(b)]) it is read as to have been intended not to give rise to any civil liability.¹¹⁹ However, that rule does not apply if the penalty prescribed by statute is considered inadequate.¹²⁰ There have been situations where a penalty has been found to be inadequate enough to justify a conclusion that civil liability for provisions with prescribed penalties attached was also intended by parliament. This has arisen in cases where there has been catastrophic injury to a person where that person has

¹¹⁵ [Environment Protection Act 2017 \(Vic\)](#) ss 112(a), 115(2).

¹¹⁶ *ibid* s 120(1)(b).

¹¹⁷ *ibid* s 313, see also s 301(2)(e). Neither of these provisions has yet been utilised in any decided case.

¹¹⁸ By analogy, see *Marks v GIO Australia Holdings* [1998] HCA 69; 196 CLR 494.

¹¹⁹ *Ibrahimi v Commonwealth of Australia (No 9)* [2017] NSWSC 1051 [411], [443].

¹²⁰ *Gardiner v State of Victoria* [1999] VSCA 100 at [25].

no other recourse under the Act.¹²¹ It is possible that, given the repercussions for the affected community, a court may be willing to find that Parliament intended that the environmental offence provisions inevitably breached in Case Scenario 2 also carry an assumed civil remedy outcome.

Breach of statutory duty

60. A claim for a breach of statutory duty arising from environmental protection legislation may also be open.¹²² This would only be so if a specific provision of legislation mandated that a company of X Group was required to do something or refrain from doing something. This may happen, for example, as a statutory condition on a licence by an Australian government for the extraction of resources of the kind held in Case Scenario 2 by Subsidiary Co.
61. Whether an Australian statutory provision gives rise to a statutory duty capable of being the subject of a civil proceeding will be determined by reference to the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.¹²³ That is, it is a nuanced question which will turn on the specific provisions, read in their context.¹²⁴

Negligence and nuisance

62. Quite apart from statute and any breaches of them, a community member could bring a claim in tort for any negligence by either the Parent Co or Subsidiary Co. Two issues arise in respect of the claims in the context of the Case Scenario 2:
- i. The plaintiff will have to prove who caused the oil spill.¹²⁵
 - ii. The plaintiff will have difficulty in recovering damages for claims arising from pure economic loss – for example, where the water supply pollution caused crop destruction. To succeed in such a claim, the plaintiff would have to prove that they were particularly vulnerable to the X Group's actions.¹²⁶ This will be a question of fact to be determined in all of the circumstances of the case.
63. A claim could also be brought by a member of the community in this scenario for the tort of nuisance, as discussed at [12].

Parent and subsidiary liability

64. For the purposes of Australian corporate law, Subsidiary Co would be regarded as a subsidiary and a related body corporate of Parent Co, a holding company, by reason of its shareholding.¹²⁷ If Subsidiary Co was insolvent, Parent Co would

121 *Meredith v Commonwealth (No 2)* [2013] ACTSC 221; 280 FLR 385 at [570].

122 On the facts given, it is not clear what distance from a coast the relevant extraction is taking place. That would determine whether, for example, the [Offshore Petroleum and Greenhouse Gas Storage Act 2006 \(Cth\)](#) applies. That legislation broadly incorporates a 'polluter pays' model.

123 *SOVAR v Henry Lane Pty Ltd* [1967] HCA 31; 116 CLR 397 at 405.

124 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[71]. As an example of the application of these principles in a detention (not environmental harm) context, see *AS v Minister for Immigration and Border Protection* [2016] VSCA 206.

125 *March* (n 32).

126 *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [102]–[103].

127 [Corporations Act 2001 \(Cth\)](#) ss 46, 50.

probably be liable for the judgment debt under statutes governing corporations.¹²⁸ That is, whether or not Parent Co is a defendant (see [57]), recovery from it will be possible if recovery of the judgment debt is not possible because Subsidiary Co is insolvent.

65. Depending on the location within Australia of the environmental issue, it is possible that Parent Co or even 'a director or [a person] otherwise concerned in the management of the' subsidiary or parent company could also be the target of a statutory environment protection order, and be responsible for the consequences of that (including any civil law consequences).¹²⁹

Injunctive relief

66. If there is evidence that X Group might cause a further destructive spill or that the cause of the initial spill has not been remedied, an injunction would be another remedy that would probably be available, at least on an interlocutory basis. In that situation, the 'balance of convenience' would plainly favour the grant of the injunction preventing X Group from having further opportunity to cause destruction of the kind covered by the scenario. The balance of convenience would strongly favour a plaintiff community member and so a lesser standard of satisfaction in respect of the other element of the interlocutory injunction test – a *prima facie* case – would be required.¹³⁰ The court considering that application would take the course that carries the lower risk of injustice, which would be to prevent the risk of another oil spill.¹³¹



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

67. Civil claims would be the preferred route for holding the perpetrators to account. Such claims could be pursued alongside pursuit of complaints to the relevant state body for environmental law compliance.¹³² That body might, for example, review (and potentially revoke) any licence given to Subsidiary Co or Parent Co, or pursue a prosecution.
68. If such an event were to occur in Australia, there is a good chance that it would result in the calling of a Royal Commission, an executive body created solely for the purpose of investigation of significant public issues deserving especial attention. Such a body would be created for the purpose and would compile a report, having conducted an inquiry with powers equivalent to a court.¹³³ What comes of that report would depend on the willingness of government to be responsive to it.

¹²⁸ *ibid* ss 588V and 588W.

¹²⁹ [Environment Protection Act 1993 \(SA\)](#) s 103G.

¹³⁰ *Woodley v Woodley* [2018] WASCA 200 at [47]; *Warner-Lambert Co LLC v Apotex Pty Ltd* [2014] FCAFC 59 at [70].

¹³¹ *EHW18 v Minister for Home Affairs* [2018] FCA 1350 at [9]–[10] citing *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* [1988] FCA 127 at 502.

¹³² [Protection of the Environment Administration Act 1991 \(NSW\)](#) Part 4.

¹³³ [Royal Commissions Act 1902 \(Cth\)](#).

Q3 Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

SPOTLIGHT: MONTARA OIL SPILL



The Australian case closest to the facts of Case Scenario 2 was the class action arising from an oil spill at the Montara oil field in the Timor Sea. The lead plaintiff was an Indonesian seaweed farmer in the Rote/Kupang region of Indonesia who alleged damage to his crops caused by the oil spill.¹³⁴ The cause of action was negligence. The seaweed farmers succeeded on the basis that the defendant company (the Australian subsidiary of the Thai oil company PTTEP) had breached its duty of care to the farmers by failing to properly seal the well and that had caused the damage to the farmers' seaweed crops.¹³⁵

69. There are no known Australian claims for direct environmental degradation of the gravity postulated in the Case Scenario 2.¹³⁶ Recent cases concerning nuisance caused by (much more minor) forms of pollution are concerned with crop damage. For example, in *Marsh v Baxter*, it was asserted that an organic certified canola plantation was 'polluted' by genetically modified canola from a neighbouring farm. That claim was not successful.¹³⁷ Similarly, a claim that the Minister for the Environment owed children a novel duty of care in respect of minimising environmental harm was rejected.¹³⁸

134 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 3)* [2017] FCA 1272.
135 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237. For general discussion about Australian law impacting oil spills, see Peter Rose, 'Marine Oil Pollution Laws in Australia' (1991) Australian Mining and Petroleum Law Association Yearbook 175.
136 The closest proceeding at the time of writing is the subject of the ruling at *Haswell v Commonwealth of Australia* [2020] FCA 915 which concerns PFAS contamination.
137 *Marsh* (n 25).
138 *Minister for the Environment v Sharma* [2022] FCAFC 35.

CaseScenario3

Q1

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

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56

Claims against Factory Co

70. In respect of Factory Co, the conditions to which its employees were exposed would be an obvious breach of the **Fair Work Act**. That Act is the **principal legislative tool for protection of employment conditions in Australia**.
71. A claim under the Fair Work Act could be pursued by one or more of the affected workers, their workers union or through a body called the Fair Work Ombudsman.¹³⁹ The Fair Work Act contains a significant number of statutory worker protections. The worker protections are covered ordinarily by what are called Awards dealing with such things as hours of work and rest breaks.¹⁴⁰ The Act itself also regulates basic protections such as maximum working hours, which are set at 38 per week.¹⁴¹ Factory Co would seem to be in extreme breach of many of these basic protections.
72. The Act also has civil penalty provisions. Unusually for Australian law, a court ordering that there be certain pecuniary penalties¹⁴² has the power to award the penalty sum itself to be paid directly to the impacted employee.¹⁴³ That employee is also entitled to bring a proceeding seeking the penalty themselves, as is their workers union.¹⁴⁴ This effectively allows the court to award both compensation for breach¹⁴⁵ as well as an additional sum which is intended as a penalty for the employer. A court may be cautious not to give the employee too great of a 'windfall',¹⁴⁶ however it might also use such an order to ensure that the gravity of the harm is recognised in much the same way as aggravated damage might achieve.
73. **Tortious proceedings** could also be brought, and sensibly would be, if the particular damage to the victim was not or was not adequately covered by the statutory regime.¹⁴⁷ This would be the prudent course for those injured in the fire at Factory Co's garment factory. They would have a claim in tort for negligence against Factory Co for breach of its duty of care to the workers arising from the

¹³⁹ [Fair Work Act](#) s 682(1)(d).

¹⁴⁰ *ibid* s 139.

¹⁴¹ *ibid* s 62.

¹⁴² Listed at *ibid* s 539(2).

¹⁴³ *ibid* s 546(3)(c).

¹⁴⁴ *ibid* s 540.

¹⁴⁵ *ibid* s 545.

¹⁴⁶ *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338 at [80]-[93].

¹⁴⁷ Noting especially the cap on such statutory awards prescribed by the [Fair Work Act](#) s 546(2).

combination of the lack of emergency procedures, ineffective fire safety equipment, barred windows, closed emergency exits and non-functional smoke alarms at the factory. It is very unlikely that such a claim could be sustained against Brand Co given that it was not responsible for any of those deficiencies at the factory.

74. A further route for seeking civil remedies would be in respect of the gross breaches of statutory duties¹⁴⁸ in **occupational health and safety legislation**, especially in respect of the fire. In some parts of Australia, there are particular criminal offences that would likely have been committed by officers of Factory Co.¹⁴⁹ Those express criminal offences negate an implication that Parliament intended that there be a private right under the same provision.¹⁵⁰ Whether that applies in respect of all occupational health and safety protective legislation would depend both on where in Australia this occurred and the terms of the statute applicable there.

Claims against Brand Co

75. In respect of Brand Co, it is difficult to conceive of who would bring this claim or why they would bring it, given the ready remedies against Factory Co. Since Brand Co does not employ the exploited workers, it is not likely to be liable under the Fair Work Act or any of the state legislation regulating Factory Co as a workplace. It is possible that if Brand Co's proportion of purchase from Factory Co was very high, an argument may be available that it was in effective control of the factory such as to have liability in tort. Such a claim would be ambitious and would depend on establishing that Brand Co was responsible in law for what Factory Co did. Similarly, while there are statutory obligations on directors to act in good faith and with care and diligence, this is very unlikely to yield any civil remedy in this scenario because those obligations are understood to be primarily focused on protection of any benefit to the company.¹⁵¹
76. If Brand Co was a public company, it is possible that **shareholders** may bring a proceeding against it, seeking compensation if (and only if) the company failed to disclose the risk to its share price as a result of its link to human rights abuses, and those shares were then devalued. Such a proceeding could only be brought by the shareholders and would almost certainly be run as a class action.¹⁵²

¹⁴⁸ SOVAR (n 123).

¹⁴⁹ [Occupational Health and Safety Act 2004 \(Vic\)](#) ss 21, 22 and Part 5A; as to civil liability see s 34.

¹⁵⁰ *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39; [2004] 2 AC 280.

¹⁵¹ *Australian Innovation Ltd v Petrovsky* [1996] FCA 587.

¹⁵² As occurred in *TPT Patrol Pty Ltd as Trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747. For information about co-ordination of and research into such initiatives in contexts similar to those covered by the Case Scenarios, see the work of the Australasian Centre for Corporate Responsibility described at www.accr.org.au.

Q2

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

77. A standalone claim could be made against Factory Co for the **sexual harassment** of female workers by male supervisors. That claim would be based on an initial complaint to the Australian Human Rights Commission which has been terminated and referred to a court. The court would then consider the claim in full and determine the quantum of damages it would order be paid.
78. In such an extreme scenario, it would also be possible that a Royal Commission might be called, as discussed above at [68].

Q3

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

79. Slavery litigation is rare in Australia, but it is high-profile when it occurs.¹⁵³ The leading case arose in respect of a criminal prosecution concerning a group of women who worked in a brothel.¹⁵⁴
80. The work conditions described in the scenario would probably qualify as slavery as defined under the [Modern Slavery Act 2018](#) (Cth), as discussed above (see Spotlight Case Study following [28]).

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¹⁵³ *DPP (Cth) v Kannan & Anor* [2021] VSC 439.

¹⁵⁴ *R v Wei Tang* [2008] HCA 39.



A HANDBOOK FOR PRACTITIONERS | **BANGLADESH**

Civil Liability for Human Rights Violations



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BANGLADESH



Criminal prosecution has been the primary avenue within which victims of human rights violations have sought justice in Bangladesh. Claims in tort can be made for human rights violations even where there is no express statutory right to seek remedies. Yet this possibility has largely remained a theoretical one, without much practical enforcement, causing a severe tort law deficit. Notably, however, the enforcement of fundamental rights under Article 102(1) of the Constitution has emerged as a solution for the tort law deficit in Bangladesh, making it the primary basis through which civil remedies for human rights violations have been sought from not only the State but, increasingly, also corporations and individuals. The only exception to this general trend is where rights violations occur in the context of harmful labour conditions, where compensation has been more commonly sought through the statutory tort of employer's liability.

INDICES

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**Democracy Index
2021 Ranking**

39/100

**Freedom House
2022 Score**

147/180

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



Introduction

1. There are three avenues through which victims of human rights violations may seek civil remedies in Bangladesh: statutory law, common law of tort and public law. Because these avenues are distinct, yet overlapping, victims of human rights violations who seek remedies need to weigh up the relative merits of the options, as they may be supplementary or mutually exclusive. Certain statutory laws have been enacted which grant some specific civil remedies, such as the right to sue for compensation for unlawful arrest under the [Code of Civil Procedure 1908](#) (Code of Civil Procedure), environmental harm under the [Bangladesh Environment Conservation Act 1995 \(Environmental Conservation Act\)](#) and occupational injuries under the [Bangladesh Labour Act 2006 \(Labour Act\)](#). But as Bangladesh has a common law system, victims of human rights violations may claim civil remedies in tort law even in the absence of any express statutory right to do so. Even though this is so, the enforcement of tort law remedies using either common law or statutory law has been limited, causing a severe tort law deficit in Bangladesh.¹
2. On the other hand, Part III of the [Constitution of Bangladesh](#) guarantees a variety of civil and political rights as ‘fundamental rights’, which are directly enforceable before the Supreme Court of Bangladesh under Article 102(1) of the Constitution (Article 102(1)).² The Supreme Court of Bangladesh is comprised of two branches: the High Court Division and the Appellate Division.³ The High Court Division has special original jurisdiction to address all applications made under Article 102(1), while the Appellate Division acts as an appellate court to challenge decisions made by the former.
3. Human rights lawyers have increasingly favoured public interest litigation under [Article 102\(1\)](#) to seek redress for breaches of fundamental rights, causing it to emerge as the most significant of the three avenues for civil remedies for violations, including for unlawful detention and environmental harm. In particular, the use of Article 102(1) to claim compensation before the High Court Division has led to a significant, if emerging, body of jurisprudence on public law compensation.⁴ Claims under Article 102(1) appear to have become more common than compensation claims under private law, possibly because they have more often been the subject of Supreme Court jurisprudence.

¹ Taqbir Huda ‘[Bangladesh: A Constitutional Solution for a Tort Law Deficit?](#)’ in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdiction* (Hart Publishing 2022).

² Constitution of the People’s Republic of Bangladesh 1972 (Constitution).

³ *ibid* art 94.

⁴ Ridwanul Hoque, ‘Public Law Compensation in Bangladesh: Looking Within and Beyond’ (2010) 1(2) *Journal of Law and Development* 1; Taqbir Huda ‘[Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh](#)’ (2021) 21(2) *Australian Journal of Asian Law* 27.

Law reports and case law databases in Bangladesh typically only publish decisions of the Supreme Court, resulting in trial court decisions having little to no public access or jurisprudential value. However, an exception to this trend is in litigation for compensation for occupational injuries caused by unfair labour conditions. This has been sought more successfully through enforcing the statutory tort of employer's liability prescribed in the Labour Act, rather than under Article 102(1).

4. While compensation claims under Article 102(1) were initially made only for human rights violations by state officials, more recently such claims have also been made against corporations and individuals. The use of judicial review of fundamental rights to claim civil remedies for human rights violations, even against non-state actors, complicates doctrinal boundaries between private and public law and has been somewhat controversial in Bangladesh. However, for now, Article 102(1) remains the dominant avenue through which victims of human rights violations seek civil remedies, and it is likely to remain so well into the foreseeable future.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

5. A claim under the law of civil remedies in Bangladesh can be brought against public bodies, corporations and/or individuals for each of the three defined harms, using **three distinct options: statutory remedies, common law of tort, and judicial review of constitutionally guaranteed fundamental rights under Article 102(1).**

Statutory remedies

There are express statutory rights to seek remedies, such as compensation, for all three of the defined harms.

Assault or unlawful arrest and detention

6. [Section 94\(a\) of the Code of Civil Procedure](#) allows civil courts to issue a warrant for the arrest of a defendant and commit them to civil prison if they fail to comply with an order requiring them to furnish security for their appearance, such as a bond. [Section 95 of the Code of Civil Procedure](#) allows those who are arrested and committed to civil prison under Section 94(a) 'on insufficient grounds' to sue for compensation for the harm suffered.⁵ They may also sue for compensation if the suit in relation to which the arrest was made fails, and it appears to the Court that there was no reasonable or probable ground for instituting it. The words 'on insufficient grounds' has been taken to mean 'without reasonable or probable cause' by the Supreme Court of Bangladesh.⁶ The Supreme Court has also clarified that a claimant seeking compensation under Section 95 is only 'required to establish the ingredients referred to in the section and no more'.⁷ However, if an order of compensation is made under Section 95, the victim of the unlawful arrest would lose the right to sue for compensation through a money suit (ie through common law of tort).⁸
7. A civil prisoner is defined as 'any prisoner who is not a criminal prisoner' under [Section 3\(4\) of the Prisons Act 1894](#) (Prisons Act). Section 3(2) of the Prisons Act defines a criminal prisoner as 'any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court martial'. Therefore, a civil prisoner would be any prisoner who falls outside this definition. The Prisons Act requires civil prisoners to be kept separate from criminal prisoners. Unlike criminal prisoners, civil prisoners are generally not kept in prison at the expense of the State but at their own expense, or at the expense of a private person (where the civil prisoner has been committed to prison in execution of a decree in favour of that private person). This rule is set out in [Section 33\(2\) of the Prisons Act](#).

⁵ Code of Civil Procedure s 95.

⁶ *Loreto v Nasreen Sobhan and Ors*. 15 ADC (2018) 1 [11].

⁷ *ibid*.

⁸ Code of Civil Procedure s 95(2).

Environmental harm

8. In cases of environmental harm, victims have statutory rights to seek remedies under the Environment Conservation Act and Code of Civil Procedure.

The Environment Conservation Act

9. If any individual or group of people suffers harm due to the violation of any provision(s) of the Environment Conservation Act or the [Bangladesh Environment Conservation Rules 1997](#), they can file a compensation case before the Environment Court, or the Director General of the Department of Environment may file the case on their behalf.⁹ Additionally, any person affected or likely to be affected by environmental pollution or degradation can apply to the Director General seeking their assistance to secure a remedy for the harm suffered or for the apprehended harm.¹⁰
10. The Environment Conservation Act grants the Director General of the Department of Environment wide powers to fulfil the objectives of the Act.¹¹ Section 7 of the Act allows the Director General of the Department to order remedial measures for environmental harm by filing both a civil suit as well as a criminal case. The Director General has the power to determine necessary compensation for the harm caused and direct the concerned 'person' to pay the sum.¹² Section 2(h) of the Act defines 'person' as including 'a group of persons, and includes any company, association or corporation, whether incorporated or not'. Therefore, the power of the Director General to order compensation for environmental harm extends to a wide group of potential transgressors. It is unclear, however, whether public bodies are included within the definition of 'person'.
11. If the concerned party fails to pay compensation after being ordered to do so, the Director General has the option to file a compensation case before the Environment Court.¹³ According to annual reports published by the Department of Environment, it used its remedial powers under section 7 of the Environment Conservation Act to recover over BDT 123,000,000 (USD 1,423,535) as 'compensation' from polluters between 2012 and 2018.¹⁴ While the Department of Environment refers to this sum as 'compensation' and has described the exercise of its powers under Section 7 as the 'polluter pays principle', one may argue it would be more appropriate to label it a fine. This is especially so since there is no indication whether the recovered money is handed to those harmed by the pollution or used to redress their injuries. Instead, the Department of Environment mentions compensation collected from polluters as one of the ways it contributes to the revenue of the government, despite not being a revenue-collecting authority.¹⁵ Thus it is unclear whether this can be considered to be a civil remedy. And while the Department has the authority to determine and collect compensation for harm caused, there is scant evidence of cases actually

9 Environment Conservation Act ss 15A and 17. Previously, compensation cases before the Environment Court could only be filed after first obtaining a written report from the Department of Environment. However, this requirement was removed by an amendment to the Environment Conservation Act in 2010.

10 *ibid* s 8.

11 *ibid* ss 3 and 4.

12 *ibid* s 7.

13 *ibid* s 7(1). The Environment Court was initially established by the Environment Court Act 2000, which was then replaced by the Bangladesh Environment Court Act 2010. The compensation provisions in the Environment Conservation Act were also introduced in 2000 through amendments made alongside the enactment of the Environment Court Act 2000.

14 Department of Environment, Ministry of Environment and Forests, 'Annual Report 2017-18' (Government of Bangladesh, 2018) s 9.1 (Table 9) read with DOE, Ministry of Environment and Forests, 'Annual Report 2014-15' (Government of Bangladesh, 2015) 30.

15 Department of Environment, Ministry of Environment and Forests, 'Annual Report 2016-17' (Government of Bangladesh, 2018) 37.

being filed in Environment Courts, for compensation or otherwise,¹⁶ although an article published in 2005 listed ten (unreported) cases filed under the Environment Conservation Act before the Environment Court of Dhaka as of July 2003, three of which related to compensation.¹⁷

The Code of Civil Procedure

12. Section 91 of the Code of Civil Procedure permits the Attorney General, or two or more individuals who have obtained the consent of the Attorney General, to institute a suit for public nuisance.¹⁸ As the Code does not include a definition of public nuisance, the Supreme Court of Bangladesh in *Abdul Karim v Md Mafizar Rahman*¹⁹ accepted the definition of public nuisance in Section 268 of the Penal Code 1860 for the purposes of claims under Section 91. Thus, public nuisance can be defined as any act or 'illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, dangers or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage'.²⁰ The law expressly states that exercising this right will not be 'deemed to limit or otherwise affect any right of suit which may exist independently' of Section 91, such as actions under Environment Conservation Act, common law of tort or under Article 102(1).²¹

Harmful or unfair labour conditions

13. If harmful or unfair labour conditions lead to loss of life or disability of a worker by way of an 'accident arising out of the course of his employment', [Chapter XII of the Labour Act](#) grants injured workers and the dependants of deceased workers the right to sue the employer for compensation.²² For the purposes of recovering compensation under Chapter XII, the legal definition of 'worker' only includes workers from a closed list of 32 industrial occupations.²³ Only workers and dependants of workers in these occupations would be able to sue for compensation under the Labour Act in the event of workplace injury or death. By contrast, the general definition of 'worker' in Section 2(65) of the Labour Act (which is applicable for the rest of the Act), is not limited to a closed list of specific occupations. This limitation aside, the definition of worker in Chapter XII of the Act covers those employed not only under written or express contracts, but also oral or implied contracts.²⁴
14. If death ensues from the environmental harm, or harmful or unfair labour conditions, then victims (ie dependants of the individual killed) may also have the option to file a compensation claim under the [Fatal Accidents Act 1855 \(Fatal Accidents Act\)](#). This Act is worded broadly enough to establish liability on public bodies, corporations and/or individuals to pay compensation when their negligence leads to a wrongful death. However, if dependants of a worker killed in

16 Asaduzzaman and Ahmed Deepto, 'Environment laws and courts exist, but no cases' *Prothom Alo* (13 March 2021).

17 Syeda Rizwana Hasan, 'Application and Reform Needs of the Environmental Laws in Bangladesh' (2005) 9(1&2) *Bangladesh Journal of Law* 85, 95.

18 Code of Civil Procedure s 91(1).

19 (1997) 5 BLT (HCD) 86.

20 Penal Code 1860, s 268. The Supreme Court noted in *Abdul Karim v Md Mafizar Rahman* (n 19) that the CPC lacks a definition for public nuisance and therefore accepted the definition supplied by the Penal Code 1860.

21 Code of Civil Procedure s 91(2).

22 Labour Act s 150.

23 *ibid* s 150(8). These 32 industrial occupations include the 31 occupations listed in the Fourth Schedule to the Act along with a railway servant (as defined in Section 3 of the Railways Act, 1980).

24 *ibid*.

an industrial accident exercise the right to sue for compensation under the Fatal Accidents Act, their right to compensation under the Labour Act will fall away.²⁵

Common law of tort

15. Since Bangladesh has a common law system, claims can be made in the common law of tort for the three defined harms in the form of what are termed 'money suits' in Bangladesh. These claims for monetary compensation are heard before civil courts. However, litigation enforcing the common law of tort is even more rare than the enforcement of statutory torts, and there is very little accessible case law in this regard.
16. The **lack of enforcement of common law tort** can be attributed to several reasons. First, as tort claims usually need to be filed as money suits before civil courts, claimants need to deposit a proportion of the total suit value as *ad valorem* court fees. Until 2010, the rate of the *ad valorem* court fees was 15 per cent of the total amount of compensation being claimed – a very high cost for many in a lower income country, especially when coupled with other costs of civil litigation which tends to be lengthy.²⁶ In 2010, the calculation of *ad valorem* court fees was reduced to 2.5 per cent with a maximum cap of BDT 50,000 (USD 580) also being introduced.²⁷ It is likely that the legal requirement to pay excessive court fees in the first four decades of Bangladesh's existence had a lasting deterrent effect on common law tort litigation.

SPOTLIGHT: TORT LITIGATION

The low occurrence of tort litigation in turn has meant that the few tort cases that are filed are subject to inordinate delays not only due to the protracted nature of civil procedures, but also because judges lack a working knowledge of the legal questions at hand. For instance, the trial court decision remains pending in the case of *British American Tobacco Bangladesh v Begum Shamsun Nahar*,²⁸ despite the claim being filed almost twenty years ago, in 2003. In this case, a woman argued that her former employer was vicariously liable for sexual harassment at the workplace by two managers. It took over ten years for the claimant to establish that her case was maintainable. Additionally, in *Bangladesh Beverage Industries Ltd v Rowshan Akhter*,²⁹ which is possibly the best-known tort case in the country, litigation lasted 26 years. Even after success at the trial court and two appellate courts in 2016, the claimants are yet to receive compensation from the company. This case is now cited as an example of how difficult it is to seek compensation in tort law by those who argue the need to expand compensation claims under Article 102(1) to remedy human rights violations.³⁰

²⁵ Labour Act ss 150(7) and 150(6).

²⁶ Court Fees Act 1870 s 7 sch I(B).

²⁷ SRO No 326-Law/2010.

²⁸ *BATB v Begum Shamsun Nahar* (2014) 66 DLR (AD) 80.

²⁹ *Bangladesh Beverage Industries Ltd v Rowshan Akhter* (2010) 62 DLR (HCD) 483 [23].

³⁰ *CCB Foundation v Bangladesh* (2018) 70 DLR (HCD) 491 [72]-[73].

Judicial review of constitutionally guaranteed fundamental rights

17. The Constitution of Bangladesh guarantees a list of 18 human rights, which are known as 'fundamental rights', by making them judicially enforceable.³¹ Many of these fundamental rights would cover the three defined harms, such as the fundamental rights to life and personal liberty,³² safeguards as to arrest and detention,³³ protection of law and prohibition of forced labour.³⁴
18. Although environmental harm is not expressly covered by the wording of any of these rights, case law has established that the fundamental right to life 'encompasses within its ambit, the protection and preservation of environment'.³⁵ Remedies for the breach of any of these fundamental rights can be sought through **judicial review under Article 102(1)** through the filing of writ petitions before the Supreme Court of Bangladesh. Upon the application of 'any person aggrieved', the High Court Division of the Supreme Court of Bangladesh 'may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights'.³⁶

SPOTLIGHT: HORIZONTAL APPLICATION OF ARTICLE 102(1).

Since an order or direction can be made against 'any person or authority', claims under Article 102(1) can be brought against not only public actors but also private corporations and individuals. Therefore, the horizontal enforcement of fundamental rights through Article 102(1) is possible, although it is still an emerging trend with unsettled direction. For instance, in *Banu v Bangladesh*,³⁷ the Supreme Court ordered the state to pay BDT 2 million (USD 23,150) as compensation under Article 102(1) for the unlawful detention of a man who was imprisoned for more than five years after being mistaken for an absconding convict. Case law has established that the existence of a cause of action in private law is not in itself a bar to bringing the same under public law.³⁸ Case law has also established that an order of compensation under Article 102(1) will not 'affect other liabilities of the respondents concerned or its officials resulting from the [wrongful] death'.³⁹

19. No special conditions apply in the case of a civil claim against a public body using any of the three options mentioned in this section (ie statutory remedies, common law of tort, and claims under Article 102(1)). However, even where private actors are being sued for compensation under Article 102(1), relevant public actors are nevertheless impleaded in the same writ petition as co-respondents, for compliance purposes.

31 Constitution, Part III (Fundamental Rights) arts 26 to 47A.

32 *ibid* art 32.

33 *ibid* art 33.

34 *ibid* art 34.

35 *Dr Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) [101].

36 Constitution art 102(1).

37 *Banu v Bangladesh* Writ Petition No 7297 of 2019.

38 *Bangladesh v Md Abdus Satter* (2015) 1 SCOB (AD) 17 [65].

39 *CCB Foundation v Bangladesh* (n 30) [108].

Q2

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

Statutory remedies

20. For compensation claims for **wrongful arrest** under Section 95 of the Code of Civil Procedure, the claimant would have to prove that they were in fact arrested on insufficient grounds.⁴⁰
21. For **public nuisance** claims under Section 91 of the Code of Civil Procedure, the Attorney General's consent has to be obtained in writing by two or more claimants, but they do not have to prove special damage, as would be the case in English common law.⁴¹
22. For compensation claims for **occupational injury** under the Labour Act, the claimants would need to prove that the party being sued for compensation was an employer as defined by the Act, and that the 'accident' took place in the course of employment.⁴² Furthermore, the injury must cause the worker to lose their ability to work for more than three days.⁴³ There are three factual scenarios in which the employer is exempted from paying compensation for occupational injuries: if the accident is 'directly attributable to' (a) the worker being 'under the influence of drink or drugs' at the time; (b) the worker's 'wilful disobedience' of rules and orders intended to ensure their safety; and (c) the worker's 'wilful removal or disregard' of safety equipment or devices they knew to have been provided as a protective measure.⁴⁴

Common law of tort

23. Due to the lack of tort jurisprudence in Bangladesh, there is little judicial insight on the elements of liability that need to be established for a successful cause of action. This is why the Supreme Court of Bangladesh stated in a judgment relating to a rare private nuisance claim that:

'In the case of torts, there being no statutory law in this sub-continent, the courts of this sub-continent have always adopted the English Common Law as being consonant to justice, equity, and good conscience; they have departed from the English Law only when a particular rule was unsuitable to local conditions'.⁴⁵

Therefore, based on this pronouncement it is clear that elements of liability under the English common law (such as the establishment of duty of care, breach of duty and causation for negligence claims),⁴⁶ would also generally be applicable for tort actions in Bangladesh.

⁴⁰ Code of Civil Procedure s 95(1)(b).

⁴¹ *Ricket v Metropolitan Railway* (1867) LR 2 HL 175 (House of Lords).

⁴² Labour Act s 2(49) read with s 150. See also s 2(31) (definition of establishment) and s 2(60) (definition of industry).

⁴³ *ibid* s 150(2)(a).

⁴⁴ *ibid* s 150(2)(b).

⁴⁵ *Wahid Mia v Dr Rafiqul Islam* (1996) 16 BLD (HCD) 255 [16].

⁴⁶ Please refer to [26]-[28] in the English report. To access all country reports, please [click here](#).

Judicial review of constitutionally guaranteed fundamental rights

24. The burden of proof is less onerous in claims under Article 102(1). At the preliminary stage, claimants need only show in their writ petition that the action or inaction of a public body, corporation and/or individual has resulted in harm that has breached one or more of the 18 constitutionally guaranteed fundamental rights in a way that requires remedy. Afterwards, the Supreme Court typically issues a *rule nisi*, which is a preliminary rule whereby the onus falls on the defendant to literally 'show cause' as to why they should not be held liable for the remedy, such as payment of compensation. Increasingly, in compensation claims under Article 102(1) relating to loss of life or injury, the Supreme Court has either ordered the formation of independent inquiry committees (or accepted reports of such committees as sufficient evidence) to determine whether the parties being sued are in fact at fault and the extent to which they are at fault.

Q3

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

25. There is **no statutory provision or case law recognising civil liability for complicit or accessory conduct** in relation to the three defined harms. However, in the case of *Ruhul Quddus v Government and Others*,⁴⁷ the Bangladesh Road Transport Corporation (a public body) and a private bus company were both held vicariously liable for the negligence of two bus drivers who raced their buses against each other, causing a passenger to lose his hand and then die. The private bus company was held vicariously liable although the driver in question was the employee of a businessman to whom the bus had been leased.⁴⁸ The Court held that the private bus company had retained control of the bus and, therefore, of the negligent bus driver.⁴⁹ Although there is no direct case law on accessory liability, this judgment comes closest in illustrating the willingness of the Court to impose vicarious liability across complex business structures. It is also an example of the vicarious liability test being modified (whether willingly or unwillingly) to one that measures 'control' rather than a formal employment relationship between a negligent actor and a party being sued for compensation.

Q4

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

Liability under Article 102(1)

26. Recent case law suggests that a body can be held **vicariously liable** to pay compensation under Article 102(1) for the negligence of its independent contractor.

⁴⁷ *Ruhul Quddus v Government and Others* (2019) 7 CLR (HCD) 665.

⁴⁸ *ibid* [14], [19], [28].

⁴⁹ *ibid*.

For instance, in the case of *CCB Foundation v Bangladesh*,⁵⁰ the Bangladesh Railway (a public body) was held vicariously liable to pay compensation to the parents of a child who died as a result of the negligence of an independent contractor hired by the railway. The independent contractor had negligently left a wide pipe uncovered near a children's playground, and a child had fallen into the pipe and eventually died. Although the Bangladesh Railway argued that they should not be held liable for the negligence of an independent contractor, the Court held that Bangladesh Railway 'cannot avoid its liability' for the admitted negligence of its contractor.⁵¹ In so doing, the Court did not apply the legal test for vicarious liability. Rather, such liability was assumed. In the earlier landmark tort case *Bangladesh Beverage v Rowshan Akhter*,⁵² the Court adopted and applied the classic two-fold test of vicarious liability: that the tortfeasor was an employee of the defendant, and that the tort was committed in the course of their employment.

Liability under the Labour Act

27. The Labour Act makes it clear that even if a company hires workers through a **contracting agency** (as is common practice in many industries in Bangladesh), it would still be liable to pay compensation to a worker in the event of an industrial accident as the 'principal and original employer'.⁵³
28. Additionally, under the Labour Act it may be possible to hold a parent company liable for the actions of its subsidiary, such as when occupational injuries are caused by unfair labour conditions. This is because the broad definitions of an 'employer' and 'establishment' are not territorially limited to Bangladesh under the Act.⁵⁴ The definition of employer includes five different categories of individuals or bodies:⁵⁵
 - (a) an heir, guardian, or successor in assignment or legal representative of such person;
 - (b) a manager or any person responsible for the management or control of the establishment;
 - (c) in the case of an establishment run by or under the authority of the Government, an authority appointed in this behalf or where no such authority exists, the head of the Ministry or Division concerned;
 - (d) in the case of an establishment run by or on behalf of a local authority, an officer appointed in this behalf or where no such officer exists, the Chief Executive Officer of that authority;
 - (e) in the case of any other establishment, the owner of such establishment and every Director, Manager, Secretary, agent or any officer or person concerned with the management of the affairs of such establishment;
 - (f) in the case of an establishment under the possession of any person other than the owner, the person in possession of that establishment or the person who is in ultimate control over the affairs of the establishment or the manager or any competent officer who is connected with the management of such activities.

⁵⁰ *CCB Foundation v Bangladesh* (n30).

⁵¹ *ibid* [24], [64]-[69].

⁵² *Bangladesh Beverage v Rowshan Akhter* (n 29) [27]-[36], [51]-[57].

⁵³ Labour Act s 2(65).

⁵⁴ *ibid* s 2.

⁵⁵ *ibid* s 2(49).

29. Due to such a broad definition of employer, there may be scope to hold a parent company liable if they are found to be 'responsible for the management or control of the establishment' or 'the owner of such establishment'.⁵⁶ Existing case law on **piercing the corporate veil** to hold the parent company liable for the conduct of its subsidiary is to be found in the context of voluntary creditors rather than involuntary creditors. The Supreme Court of Bangladesh has held that while courts have 'always been reluctant' to pierce the corporate veil of limited companies, there have been exceptions to this general rule, including to prevent fraud from being committed.⁵⁷ It has also cited with approval Indian Supreme Court jurisprudence on piercing the corporate veil 'to pay regard to the economic realities behind the legal façade' in exceptional circumstances such as tax evasion or other circumvention of tax obligations.⁵⁸
30. Section 167 of the Labour Act states that the venue of proceedings for matters under Chapter XII (which deals with compensation for occupational injuries) must be the Labour Court that has jurisdiction over the area in which the occupational injury took place. This could therefore mean that a Labour Court in Bangladesh may order parent companies based outside the country to pay compensation for the employees of its subsidiaries who are killed or injured due to an industrial accident within Bangladesh. However, this may not apply for employees of foreign-based subsidiaries of parent companies located in Bangladesh as their injury would take place outside the territorial limits of the jurisdiction of Labour Courts in Bangladesh.

SPOTLIGHT: THE RANA PLAZA COLLAPSE

On 24 April 2013, 1,132 workers were killed and over 2,500 more injured after an eight-storey building named [Rana Plaza](#) collapsed in Savar, just outside Dhaka, in what is believed to be the deadliest industrial disaster in modern human [history](#). Just the day before, people inside the building, including garment workers, had noticed large structural cracks that appeared in the building. Staff at shops and the bank situated in the lower floors perceived the risk and these were immediately shut down. However, garment factory owners whose premises were on the upper floors ignored warnings and forced thousands of workers to come to work in the cracked building. For workers whose livelihoods depended on this lowly paid job, refusal was simply a luxury they could not afford. In the early hours of the morning shift, the entire building collapsed.

⁵⁶ *ibid* ss 2(49)(b) and 2(49)(e).

⁵⁷ *Polymer Knitwear Industries Ltd v National Board of Revenue and Others* (2016) 4 CLR (HCD) 299 [8].

⁵⁸ *Reliance Finance Limited v Judge Artha Rin Adalat No 4 Dhaka and Others* (2018) 6 CLR (HCD) 497 [23]-[24] citing *Commissioner Income Tax v Sri Meenakshi Mills Ltd and Others* 63 ITR (SC) 609.

Those who were fortunate enough to make it out alive gave horrifying accounts of survival, including how some had no choice but to amputate their own limbs in order to be freed from the rubble. According to a [fact sheet](#) published by the Bangladesh Legal Aid and Services Trust and Clean Clothes Campaign, at least seventeen cases were filed seeking justice and remedies for victims of the Rana Plaza collapse, of which thirteen were criminal cases (one under the Penal Code 1860, one under the Building Construction Act 1952 and eleven under the Labour Act).⁵⁹ The remaining four cases were writ petitions under Article 102(1) seeking accountability (including payment of compensation) filed by NGOs and activists.

Attempts have been made to hold Western buyer brands accountable in American⁶⁰ and Canadian⁶¹ courts. One of the major reasons why these attempts were unsuccessful in both countries is because the limitation period in Bangladeshi law was held to apply. Of relevance here is that the Appellate Division of Supreme Court of Bangladesh's judgment in the *Bangladesh Beverage* case was interpreted as affirming that tort actions were subject to a one-year limitation period in Bangladesh, not six years, as had been held in the High Court Division judgment.⁶² Article 21 of Schedule I to the Limitation Act 1908 prescribes a one-year limitation period for compensation claims under the Fatal Accidents Act 1855 while Article 22 also prescribes a one-year limitation period for compensation claims relating to 'any other injury to the person'.⁶³ The High Court Division of the Supreme Court of Bangladesh had earlier held in the *Bangladesh Beverage* case that since there is no specific limitation period prescribed for tort claims, Article 120 of Schedule I to the Limitation Act 1908 ought to apply. This prescribes a six-year limitation period for suits for which 'no period of limitation is prescribed elsewhere'. However, the Appellate Division later concluded that the claim in *Bangladesh Beverage* case was made under the Fatal Accidents Act 1855 and not the common law of tort, and hence applied the one-year limitation period. The Appellate Division did not address the broader question of what the applicable limitation period is for tort actions in Bangladesh: one year (as prescribed by Article 22) or six years (as prescribed by Article 120, and as the High Court Division had held). Nevertheless, the American and Canadian courts appeared content to ignore this lack of clarity in the law, and considered a one-year limitation period for tort actions in Bangladesh to be a settled question of law, thereby striking out the claims.

59 Nine of the labour court cases were filed under s 290 of the Labour Act (penalty for failure to give notice of accidents), while two of them were filed under Section 301 of the Act (penalty for non-compliance with the provisions of s 210 (7), which deals with settlement of industrial disputes).

60 *Rahaman v JC Penney Corp* (2016) CA No N15C-07-174 MMJ (Delaware Superior Court, 2016).

61 *Das v George Weston Limited* 2017 ONSC 4129 (Superior Court of Justice, Ontario).

62 Taqbir Huda, 'Vicarious Liability of Employers in the Law of Tort: Deciphering Bangladesh Beverage Industries vs. Rowsan Akhter and Others' (2016) 16(2) *Bangladesh Journal of Law* 119, 131–33.

63 Limitation Act 1908 sch 1 and arts 21 and 22.

Q5

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

Statutory remedies

31. For compensation claims under Section 95 of the Code of Civil Procedure, the court has the discretion to award compensation, but the amount is capped at BDT 10,000 (USD 115).⁶⁴
32. For **public nuisance** claims under Section 91 of the Code of Civil Procedure, the claimants can seek a declaration and injunction to stop the public nuisance, or any 'such other relief as may be appropriate to the circumstances of the case'.⁶⁵
33. For an application to the Director General of the Department of Environment seeking a remedy for **environmental harm** under the Environmental Conservation Act, the Director General may hold a public hearing and take any other measures to secure remedies for harms that have been suffered.⁶⁶
34. The amount of compensation under the Labour Act is fixed and does not reflect the extent of personal loss, as the quantum of damages in a tort claim would. This is because fixed amounts of compensation are prescribed for scheduled injuries: BDT 200,000 (USD 2,315) for deaths; BDT 250,000 (USD 2,890) for permanent total disablement; and a suitable proportion of the amount set for total disablement for permanent partial disablement.⁶⁷ Occasionally, however, Labour Courts are willing to award compensations that are higher than these prescribed sums, where claimants include additional heads of recovery in the plaint, such as litigations costs, medical costs and the imposition of a 25 per cent excess for the employer's late payment of compensation.⁶⁸ In *Md Afaz Sheikh v Hashem Professor*,⁶⁹ the Labour Court ordered the employer to pay BDT 176,250 (USD 2,040) for permanent total disablement suffered by a worker due to a workplace injury, instead of the then-prescribed BDT 125,000 (USD 1,450) (this was the amount applicable under the Labour Act before a 2018 amendment doubled the sum). In this case, the Labour Court accepted the claimant's prayer for litigation costs (BDT 20,000) as well as 25 per cent excess for late payment by the employer (an additional BDT 31,250 / USD 360).

Remedies under Article 102(1)

35. Since Article 102(1) allows the Supreme Court of Bangladesh to 'give such directions or orders' as 'may be appropriate for the enforcement of any of the fundamental rights', the type of remedy that can be awarded remains broad in scope. Therefore, it is up to the claimant and the Court to fashion any remedy that may be seen as 'appropriate' for the enforcement of the fundamental rights. This may arguably include less-commonly sought, non-monetary remedies such as restitution,

⁶⁴ Code of Civil Procedure s 95(1)(b).

⁶⁵ *ibid* s 91.

⁶⁶ BECA s 8(2).

⁶⁷ Labour Act sch V.

⁶⁸ Taqbir Huda 'Tire Them Out': Challenges of Litigating Compensation Claims under the Labour Act, Bangladesh Legal Aid and Services Trust, 18.

⁶⁹ BLL (Compensation) Case No 55/2010, Labour Court, Rajshahi.

injunctive relief, mandatory orders to implement programmes to ensure justice or provide redress, guarantees of non-repetition, public or private apologies, land restitution, or environmental rehabilitation.⁷⁰

36. In the case of compensation, while case law has established that compensation claims under Article 102(1) will not restrict a claimant's right to seek compensation in private law, the Supreme Court has referred to the existence of this additional right to sue for compensation in private law as a basis to substantially lower the amount of compensation awarded under Article 102(1) when issuing an order.⁷¹

Q6

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

37. There are a number of **advantages** to making a case under Article 102(1) compared to a claim under private law (including common law torts and statutory remedies), making this the preferred avenue for seeking civil remedies for human rights violations in Bangladesh.
- First, a compensation claim under Article 102(1) would not be subject to *ad valorem* court fees (ie a proportion of the total value of the suit) as a claim in private law in many other countries, including Bangladesh, would be.⁷²
 - Second, the burden of proof can be more favourable for a claimant under Article 102(1) than in a (private) tort case or in the prosecution of a criminal case. This is because once the Supreme Court issues a *rule nisi*, which is a preliminary show-cause rule, the onus is in effect transferred to the defendant to literally 'show cause' as to why they should not be held liable to pay compensation. It is also becoming common for the Supreme Court itself to order the formation of independent inquiry committees or to rely on the findings of a committee already formed, to determine the question of negligence and fault. Together, these have the effect of easing the burden of proof on the claimant.
 - Third, there are no special rules or additional requirements for actions against public bodies, such as satisfying the test for justiciability in tort of negligence claims in England, or the sovereign immunity doctrine applicable to public law compensation claims in India.
 - Fourth, since the Supreme Court of Bangladesh has the power to 'give such directions or orders' as 'may be appropriate for the enforcement of any of the fundamental rights' under Article 102(1), the claimant has the opportunity to seek a wide range of remedies that may go beyond traditional remedies available in tort (eg compensation and injunction etc) as long as they are able to prove that the remedy claimed is appropriate for the enforcement of the fundamental right(s) in question.

⁷⁰ See for example *M Samsul Alam v Government of Bangladesh* (2018) 23 BLC 384 [66], which is the only case where restitution was sought as relief under Art 102.

⁷¹ *CCB Foundation v Bangladesh* (n 30) [108].

⁷² Some statutory remedies may be expressly exempt from the payment of *ad valorem* court fees, such as those under the Labour Act. See Bangladesh Labour Act s 346 read with Bangladesh Labour Rules 2015, r 365.

38. There are a couple of **disadvantages** to making a claim under Article 102(1) as well, which in turn act as advantages to a claim in private law.

- First, the quantum of compensation awarded under Article 102(1) claims is likely to be much lower than the quantum awarded in private law.⁷³ For instance, in the *CCB Foundation* case, the Supreme Court has taken into account the victims' additional right to sue for compensation in private law as a basis to award one-third the amount of compensation that was claimed.⁷⁴ This reduction suggests that the High Court views compensation under Article 102(1) to be of a palliative nature.
- Second, as Article 102(1) claims can only be filed before the High Court Division of the Supreme Court of Bangladesh located in the capital city of Dhaka, victims from other parts of the country are likely to face accessibility challenges. This can be contrasted to private law claims which may typically be filed in civil courts at the district level, or in the case of certain statutory remedies (such as under the Labour Act, and the Bangladesh Environmental Conservation Act), in special courts in major cities other than the capital.

Q7

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

39. [Section 9 of the Code of Civil Procedure](#) states that civil courts shall have jurisdiction to 'try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred'. [Section 19 of the Code of Civil Procedure](#) establishes that for compensation claims (relating to personal injury or harm to movable property) where the harm was done within the local limits of the jurisdiction of one court and the defendants reside or conduct businesses within the local limits of the jurisdiction of another court, the claim may be instituted at the option of the claimant in either of the courts. For all other types of civil suits, [Section 20 of the Code of Civil Procedure](#) establishes that the suit can be instituted either where the defendant resides or where 'the cause of action, wholly or in part, arises'. Section 20 further clarifies that '[a] corporation shall be deemed to carry on business at its sole or principal office in Bangladesh or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place'. Therefore, claims of a civil nature can be brought against a foreign defendant in Bangladesh where the cause of action arises wholly or partly within Bangladesh, or where the foreign defendant could be held to have business in Bangladesh, such as through a subordinate office, unless such claims are expressly or impliedly barred.

⁷³ Provided that the amount of compensation is not expressly limited in private law, as it is in the case of compensation for workplace injury or death in the Labour Act and civil imprisonment on insufficient grounds under Section 94(a) of the Code of Civil Procedure.

⁷⁴ *CCB Foundation* (n 30) [108].

SPOTLIGHT: THE NIKO CASE

A notable example of a foreign defendant being sued for compensation for personal injury and environmental harm are the cases against a Canadian company, Niko Resources Limited, for the Chhatak gas field blowouts in Northeastern Bangladesh in 2005. Niko Resources Limited was the parent company of Niko Resources Bangladesh Limited (Niko Bangladesh) which was conducting drilling operations in the Chhatak gas field when the explosions took place, causing immense damage to the surrounding areas and its inhabitants. In 2008, the Government of Bangladesh and the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) filed a compensation case against Niko Bangladesh, seeking damages amounting to BDT 7,465,083,973 (USD 85,379,061) for the blowouts.⁷⁵ In 2009, the High Court Division of the Supreme Court of Bangladesh ruled in a writ petition that had been filed by the Bangladesh Environment Lawyers Association (BELA) under Article 102 in 2005, challenging the legality of the Joint Venture Agreement between Niko Bangladesh and Petrobangla's subsidiary, Bangladesh Petroleum Exploration and Production Company (Bapex), under which Niko was conducting the drilling operations. This petition sought adequate compensation for the harm caused by the blowouts.⁷⁶ The Court stated that 'Niko cannot avoid its responsibility of giving adequate compensation for the losses caused by two successive blowouts' and directed Niko to 'pay compensation money as per the decision taken in the money suit now pending in the Court of the Joint District Judge or as per mutual agreement among the parties'.⁷⁷ The Court also restrained Petrobangla and Bapex, by an order of injunction, from making any payment to Niko Bangladesh. This order of injunction was to remain in force 'till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier'.⁷⁸

40. Afterwards, in 2010, Niko Bangladesh in turn filed two arbitration cases against Petrobangla and Bapex before the World Bank's International Centre for Settlement of Investment Disputes (ICSID), seeking payment for gas supplied from a gas field in Feni and a declaration of non-liability of Niko Bangladesh for the 2005 blowouts at the Chhatak gas fields.⁷⁹ In 2016, an energy expert filed another writ petition under Article 102 against parent company Niko Resources Limited and its subsidiary in Bangladesh arguing, inter alia, that their assets should be attached and seized to provide adequate compensation for the 2005 blowouts.⁸⁰ The Government of Bangladesh, Petrobangla and Petrobangla's subsidiary were also made co-respondents in the case. When the Court issued a ruling in 2017,

⁷⁵ Money Suit No 224/2008 before the 2nd Court of the Joint District Judge, Dhaka (unreported); *M Samsul Alam v Government of Bangladesh and Ors.* (n 70) [29].

⁷⁶ *BELA v Bangladesh* Writ Petition No 6911 of 2005, Supreme Court of Bangladesh (unreported).

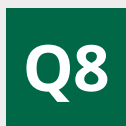
⁷⁷ *ibid*; *M Samsul Alam v Government of Bangladesh and Ors.* (n 70) [13].

⁷⁸ *ibid*.

⁷⁹ *Niko Resources (Bangladesh) Ltd v Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No ARB/10/18.

⁸⁰ *M Samsul Alam v Government of Bangladesh and Ors.* (n 70).

the compensation case filed by the Government and Petrobangla in 2008 was still pending. Therefore the Court directed the Government and Petrobangla 'to expeditiously seek adequate compensation for the damages caused by the 2005 blowouts and also take necessary steps to recover any proceeds of crime that may have already been siphoned off or taken out of Bangladesh' by the respondent No 4 [Niko Bangladesh] and No 5 [Niko Resources Limited].⁸¹ It further directed the Government of Bangladesh 'to effectively and expeditiously pursue the long pending money suit and seek adequate compensation' from Niko and Niko Bangladesh for the damages caused by those 2005 blowouts.⁸² In 2016, Bangladesh had also filed a petition to the ICSID claiming over USD 1 billion (made up of USD118 million for Bapex and USD 896 million for the Government of Bangladesh) in compensation for the destruction of properties and gas reserves in the field. In February 2020, the ICSID [concluded](#) that Niko Bangladesh must compensate Bapex and the Government of Bangladesh for direct loss and damage caused by the 2005 blowouts for an amount that would be determined by the ICSID at a later stage.



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

Articles

- Rehan Abeyratne, '[Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia](#)' (2018) 54 *Texas International Law Journal* 1
- Peter J Atkins, M Manzurul Hassan and Christine E Dunn, '[Toxic Torts: Arsenic Poisoning in Bangladesh and the Legal Geographies of Responsibility](#)' (2006) 31(3) *Transactions of the Institute of British Geographers* 272
- Ananyo Basu, 'Torts in India: Dharmic Resignation, Colonial Subjugation, or "Underdevelopment"?' (2001) 100(4) *South Atlantic Quarterly* 1053
- Naima Haider, '[Development of the Laws of Tortious Liability in Bangladesh](#)' (2021) 32(1) *Dhaka University Law Journal* 196
- Syeda Rizwana Hasan, '[Application and Reform Needs of the Environmental Laws in Bangladesh](#)' (2005) 9 (1&2) *Bangladesh Journal of Law* 85
- Ridwanul Hoque, 'Public Law Compensation in Bangladesh: Looking Within and Beyond' (2010) 1(2) *Journal of Law and Development* 1
- Taqbir Huda, '[Vicarious Liability of Employers in the Law of Tort: Deciphering Bangladesh Beverage Industries vs. Rowsan Akhter and Others](#)' (2016) 16(2) *Bangladesh Journal of Law* 119
- Taqbir Huda, '[Beyond Criminal Justice: Toward Tort Liability for Sexual Violence Against Women](#)' (2017) 17 *Bangladesh Journal of Law* 201

81 *ibid*, [86].

82 *ibid*.

- Taqbir Huda, '[Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh](#)' (2021) 21(2) Australian Journal of Asian Law 27
- Md Awal Hossain Mollah, Judiciary and Good Governance in Bangladesh (2008) 15(2) South Asian Survey 245
- M Rafiquazzaman, '[Public Interest Litigation in Bangladesh: A Case Study](#)' 6(1&2) (2002) Bangladesh Journal of Law 128
- Johan Razzque, '[Access to Environmental Justice: Role of the Judiciary in Bangladesh](#)' 4(1&2) (2000) Bangladesh Journal of Law 1
- Liaquat Ali Siddiqui, '[Common Law Tort Principle of Nuisance as Applied in Bangladesh](#)' (1995) 6(1) Dhaka University Law Journal (The Dhaka University Studies Part-F) 55

Books and book chapters

- Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust (BLAST) 1999)
- Kamal Hossain, '*Interaction of Fundamental Principles of State Policy and Fundamental Rights*', in Shahdeen Malik, Bushra Musa, and Sara Hossain (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies* (The University Press Limited 1997)
- Justice Md Hamidul Haque, *Trial of Civil Suits and Criminal Cases* (3rd edn, Universal Book House 2015)
- Ridwanul Hoque, *Judicial Activism: A Golden Mean Approach* (Cambridge Scholars Publishing 2011)
- Taqbir Huda, 'Readymade Garment Workers and Inchoate Compensation Rights' in Mohammad Shahabuddin (ed) *Bangladesh and International Law* (Routledge 2021)
- Taqbir Huda, 'Bangladesh: A Constitutional Solution for a Tort Law Deficit?' in Ekaterina Aristova and Uglješa Grušić (eds) in *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdiction* (Hart Publishing 2022)
- Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012)
- Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004)

Reports

- Taqbir Huda, '[Tire Them Out': Challenges of Litigating Compensation Claims under the Bangladesh Labour Act](#)' (Bangladesh Legal Aid and Services Trust 2008)
- Rebecca Prentice, '[Workers' Right to Compensation after Garment Factory Disasters: Making Rights a Reality](#)' (University of Sussex 2018)

Databases

- [Laws of Bangladesh](#): a repository of all national legislation
- [Chancery Law Chronicles](#): a case law database
- [Bangladesh Public Interest Litigation \(PIL\) Repository](#)
- [BDLex](#): a case law database

Relevant organisations

Organisations that actively work on using civil liability as an accountability mechanism for human rights violations in Bangladesh include:

- [Ain o Salish Kendra \(ASK\)](#)
- [Bangladesh Environmental Lawyers Association \(BELA\)](#)
- [Bangladesh Institute of Law and International Affairs \(BILIA\)](#)
- [Bangladesh Institute of Labour Studies \(BILS\)](#)
- [Bangladesh Legal Aid and Services Trust \(BLAST\)](#)
- [Children's Charity Bangladesh \(CCB\) Foundation](#)
- [Tort Law Project Bangladesh \(TLPB\)](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

Claims against the police

41. The injured or unlawfully arrested protesters may bring a compensation claim under Article 102(1) against the police for breach of their fundamental rights to liberty and protection of law. However, existing case law on compensation for unlawful arrest under Article 102(1) concerned wrongful imprisonment for much longer periods of time, such as six months to several years.⁸³

Claims against Security Co

42. The claim can also extend to Security Co, since liability under Article 102(1) can and has been [placed](#) on an ad hoc basis on private parties whose conduct could be interpreted as having contributed to the rights violation(s) in question. Therefore, the key elements of liability that the claimants would need to show are breaches of the constitutionally guaranteed fundamental rights to liberty and protection of law, such as in the undue use of force and arrest without lawful grounds having taken place to an extent that rendered a remedy necessary.

Q2

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

43. Protesters who were subjected to custodial torture may file a criminal case under the [Torture and Custodial Death \(Prevention\) Act 2013](#), where compensation of BDT 25,000 (USD 290) would be payable by each offender upon conviction.⁸⁴

⁸³ *Banu v Bangladesh* (n 37). See also *Md Shahanewas v Bangladesh* (1998) 18 BLD (HCD) 337 and *Korban v Bangladesh* (2003) 55 DLR (HCD) 194.

⁸⁴ Torture and Custodial Death (Prevention) Act 2013, s 15(1).



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

44. In *Banu v Bangladesh*,⁸⁵ the Supreme Court ordered the state to pay BDT 2 million (USD 23,150) as compensation under Article 102(1) for the unlawful detention of a man who was imprisoned for more than five years after being mistaken for an absconding convict.



CaseScenario 2



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

Claims against Subsidiary Co

45. Members of the local community appear to have suffered environmental harm within the meaning of the Environment Conservation Act.⁸⁶ Therefore, the Act empowers them to file a compensation case against any person whose act or omission 'directly or indirectly' caused 'injury to the ecosystem or to a person or group of persons' before the Environment Court.⁸⁷ The Director General of the Department of Environment is also empowered under the law to file a compensation case on behalf of victims.⁸⁸

Claims against Parent Co

46. Since the Act defines 'person' as 'a person or group of persons, and includes any company, association or corporation, whether incorporated or not', this definition is likely to cover both Parent Co and Subsidiary Co.⁸⁹
47. In addition to compensation, the local community can also apply to the Director General of the Department of Environment seeking any other remedy they deem fit from Parent Co and Subsidiary Co, for the harm caused to food and water supplies, and to the health of community members.⁹⁰ The Director General can then hold a public hearing or 'take other measures' to dispose the application.⁹¹

⁸⁵ *Banu v Bangladesh* (n 37).

⁸⁶ Environment Conservation Act ss 2(b), 2(e) and 2(j).

⁸⁷ *ibid* ss 15A and 17.

⁸⁸ *ibid*.

⁸⁹ *ibid* s 2(h).

⁹⁰ *ibid* s 8.

⁹¹ *ibid*.

Q2

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

48. Not applicable

Q3

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

49. Not applicable

////////////////////////////////////

CaseScenario3

Q1

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

Claims against Factory Co

50. The dependants of the 76 workers killed in the fire and the 58 injured workers would be able to file a compensation claim against Factory Co, as the employer, under the Labour Act. The workers who died would be entitled to compensation of BDT 200,000 (USD 2,315) while those injured would be entitled up to BDT 250,000 (USD 2,890) depending on the extent of their injury. The claimants would need to prove that Factory Co was in fact the employer of the workers killed or injured in the fire (through employment contracts or appointment letters etc) and that the fire took place in the course of their employment.⁹² Furthermore, injured workers must show that the burns caused them to lose their ability to work for more than three days.⁹³ There appears to be no scope to sue Brand Co for compensation under the Labour Act as they would fall outside the definition of employer.⁹⁴

⁹² Labour Act s 2(65). See also s 2(31) (definition of establishment) and s 2(60) (definition of industry).

⁹³ *ibid* s 150(2)(a).

⁹⁴ *ibid* s 2(49).

51. Alternatively, the dependants of the 58 injured workers may sue Factory Co for compensation under the Fatal Accidents Act, where the amount of compensation payable is not limited (as it is under the Labour Act).⁹⁵ However, they would need to pay *ad valorem* court fees at 2.5 per cent of the total compensation being claimed, with an upper limit of BDT 50,000 (USD 580), which would not be payable under the Labour Act. Furthermore, for claims under the Fatal Accidents Act it would not suffice to simply prove the existence of an employment relationship and death within the course of employment, but **negligence** on part of Factory Co must also be proved.

Claims against Brand Co

52. Arguably, the dependants may also be able to sue Brand Co for compensation under the Fatal Accidents Act alongside Factory Co, if it can be shown that the deaths were 'caused by wrongful act, neglect or default' of Factory Co.⁹⁶ As Brand Co does not have any subordinate office in Bangladesh, the condition for suing a foreign defendant in a Bangladeshi civil court would apply and the claimants would have to prove that the cause of action wholly or partially arose within Bangladesh.⁹⁷

53. In addition to seeking compensation under the Labour Act or Fatal Accidents Act, the claimants may also seek additional compensation under Article 102(1) from Factory Co and Brand Co, for breach of the fundamental rights to life and liberty, protection of law and prohibition of forced labour etc. Although there is an emerging trend of enforcing Article 102(1) horizontally against private defendants, typically a relevant state authority is impleaded as a co-respondent for compliance purposes. In this case, the relevant state authority would be the Ministry of Labour and Employment.



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

54. Not applicable



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

55. There have been a number of high-profile cases under Article 102(1) in response to large-scale industrial disasters in Bangladesh, such as the Spectrum Factory Collapse in 2005,⁹⁸ the KTS Factory Fire in 2006,⁹⁹ the Tazreen Fashions Fire in

⁹⁵ The Fatal Accidents Act is almost identical to the UK's Fatal Accidents Act 1846.

⁹⁶ Fatal Accidents Act s 1.

⁹⁷ Code of Civil Procedure ss 19 and 20.

⁹⁸ *Kamal Hossain v Bangladesh*, Writ Petition No 3566 of 2005, Supreme Court of Bangladesh.

⁹⁹ *ASK, BLAST v Bangladesh* Writ Petition No 2019 of 2006, Supreme Court of Bangladesh. No direction for compensation was issued, but the respondents were ordered to submit a report as to how the victims were compensated.

2012,¹⁰⁰ the Rana Plaza Collapse in 2013,¹⁰¹ and the Tampaco Factory Fire in 2016.¹⁰² However, all of these cases remain pending for hearing with only an initial *rule nisi* being issued. These nevertheless recognise the obligation of the concerned employer companies and their owners to pay compensation to the victims. Notably in the Tampaco case, the Supreme Court directed the Bangladesh Bank to freeze the bank account of the employer so that compensation (along with other dues, such as, allowances and reconstruction costs) could be paid from that account. Afterwards, Tampaco submitted a report to the Supreme Court indicating that they had deposited compensation for the victims to the relevant Labour Court.



100 *ASK, BLAST v Bangladesh* Writ Petition No 15693 of 2012, Supreme Court of Bangladesh.

101 *ASK, BLAST v Bangladesh* Writ Petition No 4390 of 2013, Supreme Court of Bangladesh.

102 *BLAST v Bangladesh* Writ Petition No 12182 of 2016, Supreme Court of Bangladesh.



A HANDBOOK FOR PRACTITIONERS | CANADA

Civil Liability for Human Rights Violations



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FREQUENTLY USED ABBREVIATIONS

CEPA	Canadian Environmental Protection Act
Charter	Canadian Charter of Rights and Freedoms
Québec Charter	Québec's Charter of Human Rights and Freedoms

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CANADA



There are many legal traditions in Canada including the common law, civil law, and numerous types of Indigenous law. However, Canada is still typically described as a bijural country composed of 14 jurisdictions. Québec is the only province using the civil law system for private law matters. All other provinces and territories operate under the common law and federal laws must be interpreted harmoniously with both legal systems. Across these jurisdictions, remedies may be available through a complex web of statutory provisions, common law and civil law causes of action, and pursuant to guarantees entrenched in the *Canadian Charter of Rights and Freedoms*. The Canadian legal system is generally considered fair and free from political interference. However, the high cost of litigation significantly limits access to redress for human rights violations.

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2021 Ranking

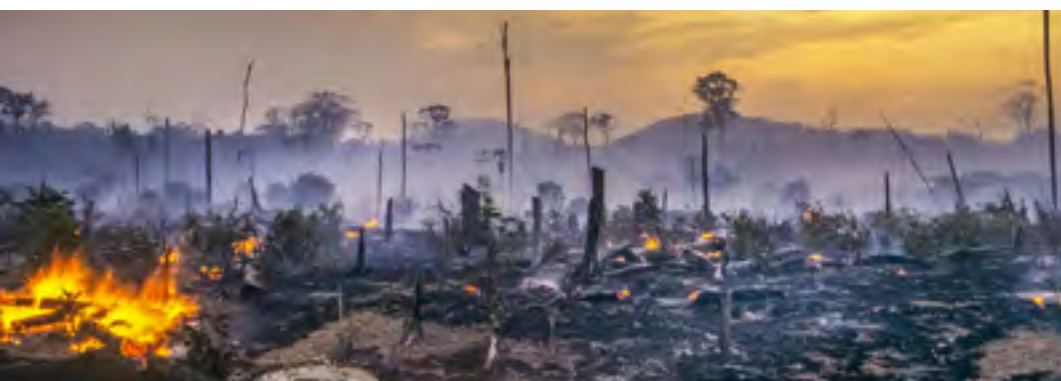
98/100

Freedom House
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13/180

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



Introduction

1. The Canadian legal system includes a diversity of protections for human rights. The most foundational source, the [Canadian Charter of Rights and Freedoms](#) (the 'Charter'), is constitutionally entrenched and guarantees a range of fundamental rights and freedoms from government interference (eg the freedoms of conscience and religion, expression, assembly, and association; democratic rights; protections against certain deprivations of life, liberty and security of the person; rights specific to the criminal justice system; the right to equality; and official language rights). Human rights are also guaranteed in both public and private relations through human rights legislation enacted federally as well as in every province and territory, although the focus of this legislation is typically anti-discrimination.
2. With respect to the specific human rights violations under study – assault or unlawful arrest and detention; environmental harm; and harmful or unfair labour conditions – remedies are available through a complex array of statutory provisions, common law and civil law causes of action, and Charter guarantees.
3. International human rights law influences Canadian law in a variety of ways, notably: customary international law is directly incorporated into Canadian law, unless displaced by statute (which has recently opened up the possibility of novel tort claims grounded in violations of international peremptory norms); Canadian legislation is presumed to conform with Canada's international customary and treaty commitments; fundamental values, including international human rights norms, structure the exercise of discretionary powers; and courts have affirmed that Charter rights should be interpreted to provide at least as robust guarantees as those found in international human rights documents that Canada has ratified.
4. While the Canadian legal system is generally considered fair and free from political interference, the high cost of litigation is a significant barrier to those seeking reparations through civil litigation. Further, the incidence of human rights violations continues to disproportionately impact marginalised communities: eg Indigenous and racialised people face heightened rates of criminalisation and incarceration, and their communities are all too often subjected to environmental harms. For these reasons and many others, including several discussed in paragraphs [19]-[20], [25], [34], [42]-[43], and [46]-[57] below, Canada often falls short on providing adequate protection to those who need it most.
5. With respect to private law, all provinces and territories in Canada except Québec are common law jurisdictions – Québec is a civil law jurisdiction. While it is not possible to canvass the law in each of Canada's 14 jurisdictions, there are broad similarities in the law of civil remedies in Canada's common law jurisdictions. Thus, we have endeavoured to illustrate the law primarily by way of examples from the federal system and from Ontario, Canada's most populous province. We have also included some brief discussion of the more salient aspects of Québec's civil law system. However, for the purpose of the Case Scenarios, only federal law and the law of Ontario were applied due to project limitations (we also have not examined the intricacies of whether, for particular factual contexts either or both levels of government would have jurisdiction, but have simply assumed jurisdiction). Finally, this text does not address Canada's many Indigenous legal traditions.

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Assault or unlawful arrest and detention

6. Plaintiffs who have experienced an attack inflicting physical harm, credible threats of injury, or have had their movements restricted may seek a remedy through the following common law torts, which can be brought against individuals, corporations, and public bodies outside of Québec:
 - **Battery** may be available when a person directly¹ and ‘intentionally [or negligently]² causes a harmful or offensive contact with another person³ (or an extension of that person⁴). For example, if a police officer unlawfully grabs and pushes a person.⁵
 - **Assault** may be available when a person directly and intentionally creates the apprehension of imminent harmful or offensive contact (ie the threat of imminent battery).⁶ Battery will usually include assault unless it is committed by surprise, but assault can also occur in the absence of battery if contact is never made.⁷
 - **False imprisonment or arrest** may be available when a person intentionally⁸ and directly detains or ‘confines another person within fixed boundaries⁹ even where that person does not use physical force¹⁰ or the threat of force (eg through assertion of legal authority).¹¹ A person who intentionally and without legal justification stops or restrains another person commits a false arrest.¹² False arrest is one form of the tort of false imprisonment. Thus, an unlawful arrest (an arrest made without legal authority) qualifies as both a false arrest and a false imprisonment.¹³
 - **Negligence** may be available when a person owes a duty of care to another but fails to meet the required standard of care (ie behaves carelessly) causing reasonably foreseeable injury or loss. Negligence can take many forms in this context; for instance, claims can be made against police officers and other public officials for

1 *Non-Marine Underwriters, Lloyd's of London v Scalera* [2000 SCC 24](#) (Supreme Court of Canada) [8].

2 Despite the tort commonly being defined with reference to intent, negligent battery is possible. *ibid* [125]–[126].

3 *Shaw v Shaw* [2012 ONSC 590](#) (Superior Court of Justice of Ontario) [45] citing Allen Linden and Bruce Feldthusen, *Canadian Tort Law* (8th edn, LexisNexis Butterworths 2006) 44.

4 *Parrett v Vanderford et al* [2001 BCSC 23](#) (Supreme Court of British Columbia) [82] citing Philip H Osborne, *The Law of Torts* (Irwin Law 2000) 1 (eg grabbing a person by their clothing or snatching something from their hands).

5 *Figueiras v Toronto (Police Services Board)* [2015 ONCA 208](#) (Court of Appeal for Ontario) [140]–[153].

6 *McLean v McLean* [2019 SKCA 15](#) (Court of Appeal for Saskatchewan) [59] citing Allen Linden and Bruce Feldthusen, *Canadian Tort Law* (10th edn, LexisNexis 2015) 49; *Calin v Calin* [2019 ONSC 3564](#) (Superior Court of Justice of Ontario) [20].

7 Philip H Osborne, *The Law of Torts* (6th edn, Irwin Law 2020) 273. However, actions only in assault have become uncommon and awards for damages are likely to be modest in the absence of battery or factors justifying an award of punitive damages (at 274).

8 There is some debate about whether false imprisonment must be intentional. *ibid* 275.

9 *Albanese v Franklin et al* [2016 ONSC 6479](#) (Superior Court of Justice of Ontario) [113] citing Allen M Linden, *Canadian Tort Law* (7th edn, Butterworths 2001).

10 *Kovacs v Ontario Jockey Club* [1995 CanLII 7397](#) (Ontario Court (General Division)) [47].

11 *Campbell v SS Kresge Co Ltd et al* [1976 CanLII 1275](#) (Supreme Court of Nova Scotia, Trial Division) 718–719; Osborne (n 7) 275.

12 David Grant Boghosian, *Canadian Law of First Responders' Liability* (LexisNexis Canada 2020) [4].

13 *Jensen v Stemmer et al* [2007 MBCA 42 2007](#) (Court of Appeal of Manitoba) [64] (concurring reasons of Hamilton JA) referring to Lewis N Klar, *Tort Law* (3rd edn, Thomson Carswell 2003) 55; *Heijs v Breuker* [2020 PECA 7](#) (Prince Edward Island Court of Appeal) [51]–[52] citing *Kovacs* (n 10) [39].

negligent use of force,¹⁴ negligent investigation,¹⁵ or negligent treatment while in custody (eg for not providing medical treatment).¹⁶

7. While we cannot canvass all possible causes of action in detail here, we note that other causes of action may be available if the circumstances permit, including:
 - **Conspiracy** takes two forms in Canada: predominant purpose conspiracy and unlawful means conspiracy. Predominant purpose conspiracy may be established where ‘the predominant purpose of the defendant’s conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant’s conduct’.¹⁷ On the other hand, unlawful means conspiracy does not require a predominant purpose to injure, but ‘requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur’.¹⁸
 - **Malicious prosecution** will only succeed against prosecutors in ‘exceptional circumstances’ due to the need to protect Crown discretion.¹⁹ Nevertheless, malicious prosecution offers access to remedies to protect the rights of accused persons and qualifies the general rule of prosecutorial immunity.²⁰
 - **Misfeasance in public office** takes two forms: (1) when a public official undertakes conduct specifically intended to injure the plaintiff; and (2) when a public official acts, knowing they lack the legal power to act, and that the act is likely to injure the plaintiff.²¹ In Ontario, leave of the court is required to allege misfeasance in public office.²²
8. Special considerations apply to establishing liability of law enforcement (principles that are more broadly applicable to public bodies are discussed further below at [25]):
 - **Liability of law enforcement:** Police will not incur civil liability if they can demonstrate that their actions were authorised by law (eg through sections 495 or 25 of the Criminal Code,²³ or the common law²⁴). For instance, in the case of assault or battery, paragraph 25(1)(b) of the Criminal Code provides that a police officer is justified in doing what they are required or authorised to do and in using as much force as necessary if they are acting upon reasonable grounds.²⁵
 - In some provinces, provincial officers are also given a form of limited immunity to civil actions. This is the case in British Columbia, where subsection 21(2) of the Police Act will bar civil claims against officers for actions taken in the performance of their duties unless the conduct amounts to dishonesty, gross negligence, or

14 *Robertson and Robertson v Joyce* 1948 CanLII 88 (Court of Appeal for Ontario); Boghosian (n 12) [59]–[71].

15 *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41 (Supreme Court of Canada).

16 *Lipscsei v Central Saanich (District)* 1994 CanLII 16701 (Supreme Court of British Columbia); Boghosian (n 12) [198]–[202].

17 *Pro-Sys Consultants Ltd v Microsoft Corporation* 2013 SCC 57 (Supreme Court of Canada) [74].

18 *ibid* [80].

19 *Ontario (Attorney General) v Clark* 2021 SCC 18 (Supreme Court of Canada) [36] citing *Proulx v Québec (Attorney General)* 2001 SCC 66 (Supreme Court of Canada) [4]. For elements of malicious prosecution, see *Miazga v Kvello Estate* 2009 SCC 51 (Supreme Court of Canada) [3].

20 *Clark* (n 19) [34]–[39], [60].

21 *Odhavji Estate v Woodhouse* 2003 SCC 69 (Supreme Court of Canada) [23] (In this case the Court declined to strike a claim in misfeasance in public office for police officers’ failure to cooperate with an investigation into a fatal police shooting).

22 Crown Liability and Proceedings Act, 2019, SO 2019, c 7, sch 17, s 17 (This is also so in the case of other torts against the Crown based on bad faith).

23 Criminal Code, RSC 1985, c C-46, ss 25 and 495.

24 *Fleming v Ontario* 2019 SCC 45 (Supreme Court of Canada) [43]–[48]; *R v Reeves* 2018 SCC 56 (Supreme Court of Canada) [77]–[78]; Boghosian (n 12) [20]–[28].

25 Criminal Code (n 23) para 25(1)(b). See elements of para 25(1)(b) as explained in *R v Melo* 2018 ONCJ 292 (Ontario Court of Justice) [84].

malicious or wilful misconduct (subject to other exceptions).²⁶ However, because most of the torts described in this section are intentional torts, this may not bar access to a remedy.²⁷

9. The next cause of action, which might be described as a constitutional tort, is only available in relation to government action²⁸ because it falls under the umbrella of public law. It is available in all Canadian jurisdictions, including Québec:
 - **Subsection 24(1) of the Charter**²⁹ is a constitutional remedy available where there has been a violation of the plaintiff's Charter rights (eg section 9 of the Charter protects against arbitrary detention). In such circumstances, courts are granted a broad discretion to award a remedy 'the court considers appropriate and just in the circumstances' (which may include damages).³⁰

SPOTLIGHT: VANCOUVER (CITY) V WARD

Police received information that someone would be attempting to throw a pie at the Prime Minister during a ceremony.³¹ Police mistakenly identified the plaintiff as the would-be pie thrower. He was arrested, strip-searched, and held in lockup while his car was impounded. He was released shortly thereafter.

At trial, the plaintiff alleged assault, battery, false imprisonment, and negligence, as well as violations of his Charter rights including section 7 (life, liberty, and security of the person); section 8 (unreasonable search or seizure); and section 9 (arbitrary detention or imprisonment).³²

On appeal before the Supreme Court of Canada, the only remaining issue was whether a remedy for Charter breaches should have been awarded, and if so, what quantum.

The Supreme Court of Canada upheld the trial judge's award of CAD 5,000 against the province because the strip search was a violation of section 8 of the Charter.³³ However, the Court found that a declaration that the city violated the plaintiff's section 8 rights by improper seizure of his car was sufficient to meet the objectives of vindication and deterrence.

²⁶ Police Act, *RSBC 1996, c 367*, s 21.

²⁷ *Ward v Vancouver (City of)* [2003 BCSC 1158](#) (Supreme Court of British Columbia) [12]–[13].

²⁸ *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component* [2009 SCC 31](#) (Supreme Court of Canada) [15]–[16]; *Eldridge v British Columbia (Attorney General)* [\[1997\] 3 SCR 624](#) (Supreme Court of Canada) [35]–[44].

²⁹ Canadian Charter of Rights and Freedoms, part I of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11, s 24 [Charter].

³⁰ *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003 SCC 62](#) (Supreme Court of Canada) [52]–[59]; *Vancouver (City) v Ward* [2010 SCC 27](#) (Supreme Court of Canada) [16]–[21].

³¹ *Vancouver (City)* (n 30).

³² *Ward v City of Vancouver* [2007 BCSC 3](#) (Supreme Court of British Columbia) [3], [35]–[36].

³³ *Vancouver (City)* (n 30) [78]–[79]. Charter damages awards can be more significant: see *Elmardy v Toronto Police Services Board* [2017 ONSC 2074](#) (Superior Court of Justice of Ontario) where the plaintiff was awarded CAD 50,000 for violations of the Charter ss 8, 9, 10, and 15, when police racially profiled and unlawfully detained him.

10. Québec's private law primarily operates under a civil code:

- **The basis for civil liability:** In Québec, a single principle set out in article 1457 of the Civil Code of Québec³⁴ forms the basis for most of the civil remedy regime. The principle requires that the plaintiff demonstrate three constitutive elements of this general principle of civil liability, namely fault, injury, and causal connection.³⁵ Fault is established by reference to an objective standard of conduct – that of the reasonable person.³⁶ This general liability regime applies to corporations, individuals, and public bodies (including police officers using force and making arrests).³⁷
- **Québec's Charter of Human Rights and Freedoms³⁸ ('Québec Charter')** is a quasi-constitutional instrument which applies exclusively in Québec. The Québec Charter applies to disputes between private individuals and between individuals and public bodies. Section 49 of the Québec Charter provides for a variety of remedies for prejudice caused by unlawful interference with the rights safeguarded by the Québec Charter.³⁹ In the context of this harm, the Québec Charter may be invoked by a plaintiff who has suffered physical harm, or threat of injury. For instance, physical or psychological harm may be characterised as an interference with the plaintiff's security and inviolability under section 1 of the Québec Charter.⁴⁰ When an individual is alleged to have interfered with another's rights, proof of the general elements of civil liability (fault, injury and causality) will typically be required in order to award compensatory damages (as discussed directly above).⁴¹ However, the Québec Charter may still be used to put an end to ongoing action or practice that is incompatible with the Québec Charter even in the absence of these elements as such intervention is considered 'in no way related to the law of civil liability'.⁴²

Environmental harm

11. The following causes of action, available at common law, apply to individuals, corporations, and public bodies and are the torts commonly used to establish civil liability in the environmental context:

- **Private nuisance** may be available when an act indirectly causes physical injury to land or substantially interferes with the use or enjoyment of land (or interest in land), where, in light of all the surrounding circumstances, the injury or interference is unreasonable.⁴³ For example, a defendant was found liable in nuisance when dry

34 Civil Code of Québec, [CQLR c CCQ-1991](#), art 1457.

35 Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile: Principes généraux* (vol 1, 9th edn, Éditions Yvon Blais 2021) [1-101]–[1-104]; Vincent Karim, *Les obligations* (vol 1, 4th edn, Wilson & Lafleur 2015) [2465]–[2466].

36 Baudouin, Deslauriers and Moore (n 35) [1-161], [1-165]; Stéphane Beaulac and Jean-François Gaudreault-Desbiens, 'Common Law and Civil Law: A Comparative Primer' (2017) Federation of Law Societies of Canada 20.

37 *Kosioian v Société de transport de Montréal* [2019 SCC 59](#) (Supreme Court of Canada) [42]–[51].

38 Charter of Human Rights and Freedoms, [CQLR c C-12](#). Note that the Québec Charter referred to here is distinct from the Canadian Charter of Rights and Freedoms. Both are applicable in Québec.

39 *ibid* s 49.

40 *ibid* s 1.

41 *Bou Malhab v Diffusion Métromédia CMR inc* [2011 SCC 9](#) (Supreme Court of Canada) [23]; *de Montigny v Brossard* (Succession) [2010 SCC 51](#) (Supreme Court of Canada) [44]; Baudouin, Deslauriers and Moore (n 35) [1-265]; Christian Brunelle and Mélanie Samson, 'La mise en œuvre des droits et libertés en vertu de la Charte québécoise' in École du Barreau (ed), *Droit public et administratif: Collection de droit 2019-2020* (vol 8, Yvon Blais 2020) 111–112. However, some authors question whether this is an unduly narrow conception of the impact of the Québec Charter on the availability of compensation (eg Manon Montpetit, *L'atteinte illicite: repenser le droit de la responsabilité en fonction de ses sources* (Éditions Yvon Blais 2015) 191–202.

42 *Québec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal* [2004 SCC 30](#) (Supreme Court of Canada) [26].

43 *Smith v Inco Limited*, [2011 ONCA 628](#) (Court of Appeal for Ontario) [42] citing *St Pierre v Ontario (Minister of Transportation and Communication)* [\[1987\] 1 SCR 906](#) (Supreme Court of Canada) [10].

cleaning chemicals sank into the ground on the defendant's property and were eventually transmitted by groundwater onto the plaintiff's land, contaminating the plaintiff's groundwater and soil.⁴⁴

- **Trespass to property** may be available when an intentional or careless act causes direct and physical intrusion onto land in the possession of another.⁴⁵ This may include discharging a substance onto land, as long as the requirement of directness is satisfied.⁴⁶ For example, a company was found liable in trespass for spraying the plaintiffs' property with pesticides by airplane.⁴⁷
- **Rylands rule** (strict liability rule from *Rylands v Fletcher*)⁴⁸ may be available when an occupier of land has brought or kept on their land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances which escapes causing damages to another's property (or, 'probably', their person);⁴⁹ liability attaches regardless of whether the occupier acted negligently or intentionally.⁵⁰ For example, a construction company was found liable under the *Rylands* rule when gasoline from an underground storage tank leaked and was transported by groundwater to a nearby retail property.⁵¹

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The plaintiffs sought damages through nuisance, trespass, and strict liability against a nickel refinery which had released nickel exhaust fumes, causing nickel to be deposited into the soil of the surrounding properties.⁵² The trial judge rejected that a claim in trespass was established because the intrusion was not direct.⁵³ On appeal, the Court overturned the trial judge's finding of liability in nuisance because the plaintiffs had not demonstrated any harm (ie any detrimental effect on the land or its use by its owners resulting from the accumulation of nickel in the soil).⁵⁴ The plaintiffs also lost their claim under the *Rylands* rule (strict liability) on appeal for the same reason, and because the operation of a nickel refinery was not found to be an extra-hazardous activity constituting a non-natural use of the property,⁵⁵ nor had the nickel particles 'escaped'.⁵⁶

44 *Huang v Fraser Hillary's Limited* 2017 ONSC 1500 (Superior Court of Justice of Ontario) [51]–[55], [118]–[142], upheld on appeal in 2018 ONCA 527 (Court of Appeal for Ontario).

45 *Smith v Inco* 2010 ONSC 3790 (Superior Court of Justice of Ontario) [37], citing *Grace v Fort Erie (City of)* 2003 CanLII 48456 (Superior Court of Justice of Ontario) [86] and *R & G Realty Management Inc v Toronto (City)* [2005] OJ No 6093, 2005 CarswellOnt 7857 (Superior Court of Justice of Ontario) [40]. The judgment in *Smith v Inco* 2010 was later reversed on other grounds in *Smith* (n 43).

46 *Smith* (n 45) [38] (explaining 'directness'), reversed on other grounds in *Smith* (n 43). However, trespass has been established in other cases that do not appear to meet this standard of directness: *Doucette v City of Charlottetown* 2022 PESC 11 (Supreme Court of Prince Edward Island) [11]–[28], [33]–[41]; *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd* 2014 ONSC 288 (Superior Court of Justice of Ontario) [284]–[294].

47 *Friesen et al v Forest Protection Limited* 1978 CanLII 2759 (New Brunswick Supreme Court, Queen's Bench Division) [1], [33].

48 (1868) LR 3 HL 330 (House of Lords). The *Rylands* rule is discussed in further detail in [38]–[40] of the English report. To access all country reports, please [click here](#).

49 *Smith* (n 43) [68], [84].

50 *ibid* [68]–[113].

51 *Canadian Tire Real Estate Ltd* (n 46) [9]–[11], [284]–[294], [297]. See also *Doucette* (n 46) [113].

52 *Smith* (n 45) overturned in part on appeal in *Smith* (n 43).

53 *ibid* [42] overturned on other grounds in *Smith* (n 43).

54 *ibid* [103] overturned on this point in *Smith* (n 43) [55]–[59].

55 *Smith* (n 43) [103].

56 *ibid* [112]–[114].

- **Negligence** in relation to environmental harm may also be available when a person fails to meet the required standard of care, causing reasonably foreseeable losses or injury to another.⁵⁷ For example, in one case a company that delivered oil used for heating was found to be negligent for having overfilled another company's oil tank despite the existence of an alarm indicating when to stop, causing oil to spill and contaminate the foundation and soil below.⁵⁸ In nearly all provinces, the common law of negligence is qualified by statute, eg Ontario's Negligence Act dealing with contributory negligence and apportionment of damages.⁵⁹

12. The following causes of action may also be available in the context of environmental harm, though more exceptionally:

- **Battery**, as mentioned above at [6], may be available when a person directly causes a harmful or offensive contact with another person. For example, in one case, the Court recognised that a claim in battery brought by tenants had merit because the landlord had kept silent about what he knew were 'unacceptable levels' of arsenic in the water supply, in order to obtain rental income (but the Court did not decide as between negligence or battery in finding liability).⁶⁰
- **Public nuisance** is similar to private nuisance but arises from 'any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience'.⁶¹ For a private party to establish public nuisance, they must also satisfy an additional condition: either the private party must prove special damages (beyond those experienced by everyone) or the action must be brought with the Attorney General's consent.⁶² However, in Ontario, this condition has been displaced by statute for persons who have suffered or may suffer direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment.⁶³
- **Riparian rights** may be asserted by a plaintiff whose property borders a natural watercourse because they are 'entitled to have the natural flow of the water without sensible diminution or increase [...] and without sensible alteration in its character or quality'.⁶⁴

13. Beyond the common law, additional rights and corresponding remedies are available by statute. The following causes of action are available under the [Canadian Environmental Protection Act](#) ('CEPA'):

- **Sections 39 and 40 of CEPA** allow a person to bring an action in relation to any contravention of that Act (section 39 provides for injunctive relief for existing or anticipated losses or damage; section 40 provides for compensation).⁶⁵

57 *Mustapha v Culligan of Canada Ltd* 2008 SCC 27 (Supreme Court of Canada) [3].

58 *Park Place Centre Ltd v Ultramar Ltd* 2010 NSSC 39 (Supreme Court of Nova Scotia) [35], [47], [50]–[51].

59 Negligence Act, RSO 1990, c N.1.

60 *MacDonald v Sebastian* 1987 CanLII 5371 (Supreme Court of Nova Scotia, Trial Division) [1]–[3].

61 *Ryan v Victoria (City)* [1999] 1 SCR 201 (Supreme Court of Canada) [52] citing Lewis N Klar, *Tort Law* (2nd edn, Carswell 1996).

62 *Sutherland v Vancouver International Airport Authority* 2002 BCCA 416 (Court of Appeal for British Columbia) [28]–[29]; *Ryan* (n 61) [52].

63 Environmental Bill of Rights, 1993, SO 1993, c 28, s 103(1).

64 *Mihaylov v Long Beach Residents' Association* 2018 ONSC 14 (Superior Court of Justice of Ontario) [11] citing *KVP Co v McKie* [1949] SCR 698 (Supreme Court of Canada) 703; Jamie Benidickson, *Environmental Law* (5th edn, Irwin Law 2019) 119; In some Canadian common law jurisdictions, riparian rights have been extinguished by statute – see *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan inc* 2015 BCCA 154 (Court of Appeal for British Columbia) [43]–[47], referring to what is now s 5 of the Water Sustainability Act, SBC 2014, c 15.

65 Canadian Environmental Protection Act, 1999, SC 1999, c 33 ss 39–40.

- **Section 22 of CEPA** creates a cause of action for individuals who have applied to the Minister of the Environment for an investigation,⁶⁶ where ‘the Minister failed to conduct an investigation and report within a reasonable time’; or ‘the Minister’s response to the investigation was unreasonable’.⁶⁷ When the investigative process fails in one of these ways, a person is entitled to bring an action against a defendant who committed an offence under CEPA that ‘caused significant harm to the environment’. These environmental protection actions do not require the plaintiff to have *personally* incurred any loss or harm.

14. Statutory causes of action and remedies have also been enacted by the provinces. For example, in Ontario, the following statutory causes of action are also available:

- **Section 99 of Ontario’s Environmental Protection Act** imposes strict liability for losses caused by spills, failure to carry out a duty under the Act, and more.⁶⁸
- **Section 84 of Ontario’s Environmental Bill of Rights** provides a right of action against a person who has or will imminently contravene specified acts, regulations or instruments regulating environmental matters⁶⁹ and in doing so has caused or will cause significant harm to a public resource of Ontario.⁷⁰ However, like section 22 of CEPA, the plaintiff must first apply for an investigation.⁷¹

15. On the other hand, provinces have also enacted statutes that limit civil liability for environmental harms. For instance, most provinces have enacted legislation limiting nuisance claims in relation to farm operations.⁷²

16. In Québec, the civil regime and specific legislation dictate the remedies available:

- **Article 1457 of the Civil Code of Québec** provides the basis for civil liability and requires fault, injury, and a causal connection between the fault and injury (discussed above at [10]).⁷³ Article 1457 remains available in the environmental context where these elements can be established.⁷⁴
- **Article 976 of the Civil Code of Québec** can be used to put an end to ‘abnormal neighbourhood disturbances’ and is therefore similar to the tort of nuisance.⁷⁵ As with nuisance, the focus is on the effect of the conduct rather than the conduct itself, and thus, a remedy may be available regardless of fault (ie the general rules of civil liability mentioned earlier do not apply under article 976).⁷⁶
- **Article 1465 of the Civil Code of Québec** creates a specific liability scheme for injury resulting from the ‘autonomous acts of a thing’.⁷⁷ A thing may be said to be acting autonomously simply through the laws of physics.⁷⁸ For example, a pipe bursting would amount to an autonomous act of a thing. The provision creates

⁶⁶ *Ibid* s 17(1).

⁶⁷ *Ibid* s 22.

⁶⁸ Environmental Protection Act, [RSO 1990, c E.19](#), s 99. For examples of application, see *Midwest Properties Ltd v Thordarson* [2015 ONCA 819](#) (Court of Appeal for Ontario); *Huang* (n 44).

⁶⁹ General, [O Reg 73/94](#), ss 9–11.1

⁷⁰ Environmental Bill of Rights (n 63) s 84.

⁷¹ *Ibid* s 84(2).

⁷² Ontario’s Farming and Food Production Protection Act, 1998, [SO 1998, c 1](#) s 2(1).

⁷³ Civil Code of Québec (n 34).

⁷⁴ Marie-Claude Desjardins and Hélène Mayand, ‘Recours des citoyens en vertu du droit commun’ in *JurisClasseur Québec*, col *Droit public*, vol *Droit de l’environnement*, fasc 18 (Lexis Nexis 2012) (loose-leaf updated 2022) [18]–[19].

⁷⁵ Civil Code of Québec (n 34) art 976.

⁷⁶ *St Lawrence Cement inc v Barrette* [2008 SCC 64](#) (Supreme Court of Canada) [86].

⁷⁷ Civil Code of Québec (n 34) art 1465.

⁷⁸ Baudouin, Deslauriers and Moore (n 35) [1-953]–[1-956].

a *presumption* of fault: plaintiffs must only prove that the defendant was the custodian of the thing and that the injury was caused by the autonomous act of the thing.⁷⁹ To escape liability, the defendant may rebut the presumption of fault.⁸⁰

- **The Québec Charter** may also provide recourse for environmental harm. Since its adoption in 2006, section 46.1 of the Québec Charter explicitly provides for the right ‘to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law’.⁸¹ In addition, section 6 guarantees that every person has a right to the peaceful enjoyment and free disposition of their property.⁸² A person that unlawfully interferes with these rights may be ordered to stop the interference, and to compensate the victims for the prejudice suffered.⁸³
- **The Environment Quality Act** recognises the right of every person ‘to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by [the] Act’ and instruments adopted under it.⁸⁴ Injunctions are available to ‘prohibit any act or operation which interferes or might interfere’ with the exercise of this right.⁸⁵ Standing to seek such an injunction is very broadly defined: any ‘natural person domiciled in Québec frequenting a place or the immediate vicinity of a place in respect of which a contravention is alleged’, the Attorney General and ‘any municipality in whose territory the contravention is being or about to be committed’ may apply.⁸⁶ Various public enforcement mechanisms exist to address contraventions of the Act: eg monetary administrative penalties can be imposed;⁸⁷ permits can be amended, suspended, or revoked;⁸⁸ and penal sanctions apply for the contravention of specific provisions.⁸⁹

Harmful or unfair labour conditions

17. In Canada, working conditions are regulated through a complex web of federal, provincial, and territorial statutes. As such, civil remedies have been largely displaced in favour of administrative regimes. These complex schemes vary across Canadian jurisdictions but tend to share important features. We provide only a brief overview of the most salient aspects.
18. The rights of workers are primarily governed by the Canada Labour Code⁹⁰ (for federally regulated workers), and provincial statutes such as Ontario’s Employment Standards Act⁹¹ or Québec’s Act Respecting Labour Standards⁹² (for workers under provincial jurisdiction, which is the case for the majority of workers).

79 *ibid* [1-935]; Karim (n 35) [3100].

80 Baudouin, Deslauriers and Moore (n 35) [1-974]; Karim (n 35) [3087].

81 Charter of Human Rights and Freedoms (n 38) s 46.1.

82 *ibid* s 6.

83 *ibid* s 49.

84 *ibid* s 19.1.

85 Environment Quality Act, [CQLR c Q-2](#), s 19.2.

86 *ibid* s 19.3. See also Michel Bélanger and Paule Halley, ‘Accès à la justice pour protéger l’environnement au Québec: réflexions sur la capacité à agir des particuliers et des groupes environnementaux’ (2017) 62(3) McGill Law Journal 603, 608–609.

87 Environment Quality Act (n 85) ss 115.13–115.28.

88 *ibid* ss 115.5–115.12.

89 *ibid* ss 115.29–115.47.

90 Canada Labour Code, [RSC 1985, c L-2](#).

91 Employment Standards Act, 2000, [SO 2000, c 41](#).

92 Act Respecting Labour Standards, [CQLR c N-1.1](#).

- **Minimum standards**, such as minimum wage standards, are provided for by these statutes.⁹³ The standards are minimums in the sense that provisions in employment contracts that attempt to circumvent these minimums standards will be rendered void.⁹⁴ While workers are free to agree to additional benefits,⁹⁵ the reality is that, outside of unionised workers, these statutes are the primary source of protection for the majority of workers.⁹⁶
 - Minimum standards are usually enforced through administrative systems – and workers may seek compliance through complaint mechanisms⁹⁷ or may seek ordinary civil remedies (but not both).⁹⁸ Those who investigate complaints typically have broad investigatory powers⁹⁹ and may impose penalties or order employers to rectify the situation in various ways, including by way of monetary compensation.¹⁰⁰
 - In Québec, a civil claim to recover unpaid wages or other amounts may be brought by employees themselves¹⁰¹ or by an administrative commission in its own name or on behalf of the employee.¹⁰² The commission also receives and conducts inquiries into complaints regarding conduct proscribed by the Act;¹⁰³ disputes are then adjudicated by an administrative tribunal (in which the commission may, in most instances, represent the employee).¹⁰⁴ Employees are not generally barred from pursuing parallel complaints and civil claims.¹⁰⁵
19. However, certain categories of workers, including individuals who may be particularly vulnerable, are excluded entirely from these statutes (eg in Ontario, inmates are excluded from the Employment Standards Act¹⁰⁶) or from certain key protections they confer (eg although farm employees are subject to Ontario's Employment Standards Act, certain employees are not entitled to a host of protections, including the minimum wage, daily and weekly limits on hours of work, time off between shifts, overtime pay, etc¹⁰⁷).¹⁰⁸
20. The safety of employees in the workplace is also statutorily regulated, federally, by part II of the Canada Labour Code, and in the provinces and territories often in separate statutes (eg Ontario's Occupational Health and Safety Act¹⁰⁹ and Québec's Act Respecting Occupational Health and Safety¹¹⁰).

93 Employment Standards Act (n 91) s 23. For Québec, see Act Respecting Labour Standards (n 92) s 40 and its Regulation Respecting Labour Standards, *N-1.1, r. 3*, ss 3–4.

94 Employment Standards Act (n 91) s 5(1). For Québec, see Act Respecting Labour Standards (n 92) s 93.

95 Employment Standards Act (n 91) s 5(2). For Québec, see Act Respecting Labour Standards (n 92) s 94.

96 Geoffrey England, Roderick Wood, and Innis Christie, *Employment Law in Canada* (4th edn, LexisNexis Butterworth 2005) (online) [8.4].

97 Employment Standards Act (n 91) s 96. For Québec, see Act Respecting Labour Standards (n 92) ss 102–108, 123, 123.6 and 124.

98 Employment Standards Act (n 91) ss 8(1) and 97.

99 *ibid* s 91. For Québec, see Act Respecting Labour Standards (n 92) ss 109–110.

100 Employment Standards Act (n 91) s 103 (order to pay wages).

101 Civil Code of Québec (n 34) art 1372.

102 Act Respecting Labour Standards (n 92) ss 39(8)–(10), and 98–99; Robert Gagnon and Langlois Kronström Desjardins, *Le droit du travail du Québec* (7th edn, Éditions Yvon Blais 2013) [253]–[255].

103 See Act Respecting Labour Standards (n 92), regarding prohibited practices (ss 122–123.5), psychological harassment (ss 123.6–123.16), and dismissals made without good and sufficient cause (ss 124–131).

104 *ibid*, ss 121.5–121.6, 123.4–123.5, 123.12–123.13, and 126–126.1.

105 Gagnon and Langlois Kronström Desjardins (n 102) [261]. For example, in the context of a dismissal, an employee may seek a remedy pursuant to the Act Respecting Labour Standards ss 122–123 (prohibited practices) and 124 (dismissal without good and sufficient cause) (n 92), as well as a civil remedy based on article 2091 of the Civil Code of Québec (n 34).

106 For inmates in Ontario subject to provincial jurisdiction, see Employment Standards Act (n 91) s 3(5). See instead Ministry of Correctional Services Act, *RSO 1990, c M.22*, s 25; and General, *RRO 1990, Reg 778*, s 18. Similarly, inmates under federal jurisdiction are not subject to part III of the Canada Labour Code (n 90). See instead Corrections and Conditional Release Act, *SC 1992, c 20*, s 78(1) and the discussion in *Guérin v Canada (Attorney General)* 2018 FC 94 (Federal Court) [64], [112]–[116], [140]. See also Alberta Civil Liberties Research Centre, *Keeping the Peace: Prisoners' Rights and Employment Programs* (ACLRC 2014) 102. In Québec, inmates are also excluded from the Act Respecting Labour Standards (see Act Respecting the Québec Correctional System, *CQLR c S-40.1*, s 202).

107 Exemptions, Special Rules and Establishment of Minimum Wage, *O Reg 285/01*, s 2(2). In Québec, different working conditions apply to farm workers with respect to overtime, weekly rest period and the right to refuse to work (Act Respecting Labour Standards (n 92) ss 54, 59.0.1 and 78).

108 England, Wood and Christie (n 96) [8.81].

109 Occupational Health and Safety Act, *RSO 1990, c O.1*.

110 Act Respecting Occupational Health and Safety, *BLRQ, c S-2.1*.

- **The right to refuse dangerous work**, in theory, provides employees with a right to avoid working conditions that they have reason to believe are unsafe.¹¹¹ In practice, however, economic realities or lack of knowledge may undermine this.
 - **Standards:** These laws also establish a variety of standards, relating for instance, to the minimum age required for a person to work.¹¹² While an Internal Responsibility System seeks to make everyone responsible for their safety and that of their colleagues,¹¹³ the rules are also enforced externally through inspections,¹¹⁴ and ultimately prosecution¹¹⁵ if deemed necessary (among other approaches to ensuring compliance).
21. Workers injured in the course of their employment are compensated through a no-fault insurance system (eg Ontario's Workplace Safety and Insurance Act¹¹⁶).¹¹⁷
- **No-fault workers compensation systems** provide for state-administered no-fault insurance for accidents and diseases. In other words, to receive compensation, workers do not need to prove the negligence of their employer, nor that of any other party.¹¹⁸
22. The compromise with respect to workplace safety is that these schemes replace causes of action that would otherwise be available (ie most claims related to injury or death in the course of employment such as negligence are barred by statute).¹¹⁹ Evidently, this bar does not apply to workers that are not captured by the insurance scheme, such as independent operators and sole proprietors outside of the construction industry.¹²⁰

Novel causes of action that may be generally relevant to the human rights under study

23. Novel causes of action grounded in peremptory norms of customary international law may be available with respect to certain instances of the harms discussed above (eg torture or forced labour):¹²¹

111 Occupational Health and Safety Act (n 109) s 43(3). For Québec, see Act Respecting Occupational Health and Safety (n 110) s 12.

112 In Ontario, these standards are industry-specific: eg Ontario regulations concerning the minimum age to work in underground mines, which is 18 years (Mines and Mining Plants, *RRO 1990, Reg 854*, s 8); and regulations concerning the minimum age to work in an industrial establishment other than a factory (such as retail stores and restaurant serving areas), which is 14 years (Industrial Establishments, *RRO 1990, Reg 851*, s 4(1)). For Québec, see Act Respecting Labour Standards (n 92) ss 84.2–84.5: while there is no general minimum age to work, a child cannot perform work that is disproportionate to the child's capacity, or 'that is likely to be detrimental to the child's education, health or physical or moral development' (s 84.2). Written parental consent is required for a child under 14 to work (s 84.3). Further, those children who are required to attend school may not be made to work during school hours (s 84.4). See also Gagnon and Desjardins (n 102) [234].

113 England, Wood and Christie (n 96) [9.23]–[9.34]; Ontario, Ministry of Labour, Training and Skills Development, 'Guide to the Occupational Health and Safety Act: *The Internal Responsibility System*' (updated 4 November 2019).

114 Occupational Health and Safety Act (n 109) Part VIII. For Québec, see Act Respecting Occupational Health and Safety (n 110) Chapter X.

115 Occupational Health and Safety Act (n 109) ss 66(1). For Québec, see Act Respecting Occupational Health and Safety (n 110) Chapter XIV and more specifically s 242.

116 Workplace Safety and Insurance Act, *1997, SQ 1997, c 16 sch A*.

117 The federal workers compensation statute applies only to employees of the federal government. England, Wood and Christie (n 96) [9.56].

118 For Québec, see the Act Respecting Industrial Accidents and Occupational Diseases, *QLR c A-3.001*, s 1.

119 Workplace Safety and Insurance Act (n 116) ss 26–28. See eg *Decision No 642/13 2013 ONWSIAT 1507* (Ontario's Workplace Safety and Insurance Appeals Tribunal) [6]–[17]. For Québec, see Act Respecting Industrial Accidents and Occupational Diseases (n 118) ss 438–439 (subject to very specific exceptions: ss 441–442).

120 Workplace Safety and Insurance Act (n 116) ss 11(1), 12.2(1).

121 With respect to the possible existence of environmental *jus cogens* norms, see Louis Jacobus Kotzé, 'Constitutional Conversations in the Anthropocene: In Search of Environmental *Jus Cogens* Norms' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens – Quo Vadis?* (TMC Asser Press 2016).

- **Violations of peremptory norms of customary international law (*jus cogens*)** may constitute an independent cause of action in Canada. In *Nevsun Resources Ltd v Araya*,¹²² a 2020 pre-trial decision, Canada's highest court found that it was not 'plain and obvious' that violations of peremptory norms of customary international law (eg forced labour) could not be causes of action,¹²³ including where, as in that case, the perpetrator is a corporation.¹²⁴ Through the doctrine of adoption,¹²⁵ customary international law is automatically (ie without the need for legislation), incorporated into Canadian law, and since 'where there is a right, there must be a remedy', courts may be able to develop domestic remedies.¹²⁶ However, the parties settled the case before it could be heard on the merits, and as such, it will be important to monitor developments in this area.

Special considerations with respect to the liability of corporations and public bodies in relation to the three defined harms

24. Liability of corporations is typically established through *vicarious* liability (discussed in greater detail at [41]), instead of *direct* liability – because vicarious liability covers most situations in which direct liability could be found, and is ordinarily far easier to establish.¹²⁷ However, establishing the *direct* liability of a corporation remains possible:
 - **For a corporation to be *directly* liable in tort**, the person who committed the tort must be the 'directing mind' of the corporation. The wrongful act of a representative who amounts to the 'directing mind' of the corporation is, in effect, the act of the corporation (including for intentional torts).¹²⁸
25. The civil liability of the Crown is highly complex and nuanced and cannot be fully explored beyond what is discussed throughout, and in the following overview:
 - **Applicability of legislation to the Crown:** The federal Crown Liability and Proceedings Act¹²⁹ and equivalent provincial statutes have been interpreted to bind the Crown to all relevant statutes in the context of proceedings against the Crown 'by virtue of their adoption by the Crown proceedings statute'.¹³⁰
 - Outside of proceedings against the Crown, the Crown is not bound by statute unless explicitly stated in legislation or by necessary implication¹³¹ (by virtue of the common law, and statutes codifying it. See for example, the federal Interpretation Act,¹³² and that of provinces, such as Ontario.¹³³).
 - **Crown immunity from tort** at common law has been displaced by statute in all Canadian jurisdictions. When seeking to hold the federal government liable in tort, section 3 of the Crown Liability and Proceedings Act establishes that the Crown is

122 *Nevsun Resources Ltd v Araya* [2020 SCC 5](#) (Supreme Court of Canada).

123 *ibid* [122], [132].

124 *ibid* [68].

125 *ibid* [90].

126 *ibid* [120].

127 J Anthony VanDuzer, *The Law of Partnerships and Corporations* (4th edn, Irwin Law 2018) 299.

128 *ibid* 300; *Nelitz v Dyck* [2001 CanLII 24090](#) (Court of Appeal for Ontario) [33].

129 Crown Liability and Proceedings Act, [RSC 1985, c C-50](#).

130 *Mason v Ontario* [1998 CanLII 1316](#) (Court of Appeal for Ontario).

131 *Canada (Attorney General) v British Columbia Investment Management Corp* [2019 SCC 63](#) (Supreme Court of Canada) [48].

132 Interpretation Act, [RSC 1985, c I-21](#), s 17.

133 Legislation Act, 2006 [SO 2006, c 21, sch F](#), s 71.

liable 'for the damages for which, if it were a person, it would be liable' in respect of torts committed by a servant of the Crown, and breaches of duties attaching to the ownership, occupation, possession or control of property.¹³⁴ Provincial Crown liability statutes follow a similar structure, but in addition to the two categories of liability recognised under federal law, also tend to enable liability arising out of the Crown's duties as an employer and liability under statutes, regulations, and by-laws.¹³⁵

- **The Crown can be found *only* vicariously liable** in most Canadian jurisdictions.¹³⁶ In practice, this is not particularly significant, especially because it is not necessary for plaintiffs to identify the Crown's particular servant for vicarious liability to be found.¹³⁷
- **Special considerations** usually apply when alleging that a public body committed a tort. For example: a qualified immunity applies to public bodies, such that they are not liable in negligence for 'core policy' decisions provided they are neither irrational nor taken in bad faith, but they can be liable for operational decisions;¹³⁸ and the defence of statutory authority has barred nuisance claims, though it has been heavily circumscribed.¹³⁹
- **As for Québec**, article 1376 of the Civil Code of Québec specifically states that the rules of the Civil Code, 'apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them'.¹⁴⁰ Those rules of law include the qualified immunity of public bodies for core policy decisions which are not reckless or made in bad faith.¹⁴¹ The federal government may also be liable under the civil law of Québec by virtue of section 3 of the federal Crown Liability and Proceedings Act.¹⁴²

¹³⁴ Crown Liability and Proceedings Act (n 129) s 3.

¹³⁵ Ontario's Crown Liability and Proceedings Act (n 22) s 8.

¹³⁶ Crown Liability and Proceedings Act (n 129) s 10; Ontario's Crown Liability and Proceedings Act (n 135) s 8. Conversely, direct liability may be available in British Columbia, given the open-ended statutory language used in the Crown Proceeding Act s 2(c), *RSBC 1996, c 89: JCR (Litigation Guardian) v British Columbia* [2007 BCCA 496](#) (Court of Appeal for British Columbia) [28].

¹³⁷ *Markesteyn v Canada* [\[2001\] 1 FC 345](#) (Federal Court) [31].

¹³⁸ *Nelson (City) v Marchi* [2021 SCC 41](#) (Supreme Court of Canada) [37]–[59]; *Just v British Columbia* [\[1989\] 2 SCR 1228](#) (Supreme Court of Canada) 1240–1241.

¹³⁹ *Sutherland* (n 62) [63]–[75]; the defence was not successful in *Ryan* (n 61) [54]–[56]. The defence is only available where the nuisance is the inevitable consequence of the exercise of statutory authority.

¹⁴⁰ Civil Code of Québec (n 34) art 1376.

¹⁴¹ *Ressources Strateco inc c Procureure générale du Québec* [2020 QCCA 18](#) (Court of Appeal of Québec) [67]; *Québec (Ville de) c Équipements EMU ltée* [2015 QCCA 1344](#) (Court of Appeal of Québec) [163]; *Hinse v Canada (Attorney General)* [2015 SCC 35](#) (Supreme Court of Canada) [21]–[53]; Baudouin, Deslauriers and Moore (n 35) [1–152].

¹⁴² Crown Liability and Proceedings Act (n 129) s 3.



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

Battery

26. The elements of battery that the plaintiff must prove are:

- The defendant directly caused contact or interference with the plaintiff¹⁴³ (or an extension of the plaintiff, eg their clothing¹⁴⁴).
- The contact was physically harmful or offensive to a person's reasonable sense of dignity (ie tapping someone on the shoulder to get their attention is not actionable).¹⁴⁵

27. In Canada, the onus is on the defendant to establish that their act was neither intentional nor negligent (ie without fault).¹⁴⁶ There is no requirement that damages be proven.¹⁴⁷

Assault

28. The elements of assault that the plaintiff must prove are:

- The defendant directly created the apprehension of imminent harmful or offensive contact.¹⁴⁸
- The plaintiff must demonstrate that they had 'reasonable grounds to believe they were in danger of violence from the tortfeasor'.¹⁴⁹

29. In Canada, the onus is on the defendant to establish that their act was neither intentional nor negligent (ie without fault).¹⁵⁰ There is no requirement that damages be proven.¹⁵¹

False imprisonment and false arrest

30. The elements of false imprisonment that the plaintiff must prove are:¹⁵²

- The plaintiff was totally deprived of their liberty (ie the restriction was complete or total).
- The deprivation of liberty was against the will of the plaintiff.
- The defendant caused the plaintiff's deprivation of liberty.

¹⁴³ *Shaw* (n 3) [45] citing *Linden and Feldthusen* (n 3).

¹⁴⁴ *Parrett* (n 4) [82] citing *Osborne* (n 4).

¹⁴⁵ *Figueiras* (n 5) [143]–[144].

¹⁴⁶ *M(K) v M(H)* [1992] 3 SCR 6 (Supreme Court of Canada) 25–26. See *Osborne* (n 7) 270.

¹⁴⁷ *McLean* (n 6) [63].

¹⁴⁸ *ibid* [59] citing *Linden and Feldthusen* (n 6).

¹⁴⁹ *Deluca v Bucciarelli* 2021 ONSC 7094 (Superior Court of Justice of Ontario) [67].

¹⁵⁰ *M(K)* (n 146) 25–26 (invoking this principle for both battery and assault). Negligent assault should be possible because the tort of assault has its origins in the tort of trespass and negligent trespass is a recognised tort in Canadian law. See *Lewis N Klar and Cameron SG Jefferies, Tort Law* (6th edn, Thomson Reuters 2017) 50–51 (note 93); *Allen M Linden, Bruce Feldthusen, Margaret Isabel Hall, Erik S Knutsen and Hilary AN Young, Canadian Tort Law* (11th edn, LexisNexis 2018) § 2.1 (note 1).

¹⁵¹ *McLean* (n 6) [63].

¹⁵² *VAH v Lynch* 2008 ABQB 448 (Court of Queen's Bench of Alberta) [182] citing *Klar* (n 13) 54–61.

31. There is only one element to false arrest that must be proven by the plaintiff:
- The plaintiff must prove that the defendant caused the plaintiff to be arrested.¹⁵³
32. In each case, the onus then switches to the defendant to prove that the imprisonment or arrest was lawful.¹⁵⁴ There is no requirement that damages be proven.¹⁵⁵ Note that whether false imprisonment can be negligent is subject to debate.¹⁵⁶

Charter damages (under subsection 24(1) of the Charter)

33. Plaintiffs seeking Charter damages under Subsection 24(1) of the Charter must show that:¹⁵⁷
- The defendant public body unjustifiably infringed a Charter right.
 - Damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the three related functions of (a) compensation for the personal loss caused by a breach, (b) vindication of the Charter right, and/or (c) deterrence of future breaches.
34. The government (be it federal or provincial) may establish countervailing factors to defeat the functional considerations that support a damage award and render damages inappropriate or unjust.¹⁵⁸ For example, where an act is carried out pursuant to a duly enacted law that is subsequently declared unconstitutional, in the absence of conduct that is 'clearly wrong, in bad faith or an abuse of power', damages will not be awarded.¹⁵⁹ This immunity does not apply in relation to policies that are found unconstitutional.¹⁶⁰

Negligence

35. The elements of negligence that the plaintiff must prove are:¹⁶¹
- *Duty of care*: The defendant owed the plaintiff a duty of care.
 - New duties of care are established using the *Anns/Cooper* jurisprudential framework.¹⁶² For public bodies, additional considerations apply (see [25] above, discussing immunity for 'core policy' decisions).
 - *Fault*: The defendant's behaviour breached the standard of care.
 - *Injury or loss*: The plaintiff sustained damage.
 - *Causation*: The damage was caused, in fact and in law, by the defendant's breach.

153 *Kolosov v Lowe's Companies inc* 2018 ONSC 7541 (Superior Court of Justice of Ontario) [235] citing *Lloyd v Toronto (City) Police Services Board* 2003 CanLII 15846 (Superior Court of Justice of Ontario) [36]–[37].

154 *Hermiz v Canada* 2013 FC 288 (Federal Court) [90]. See also *Kolosov* (n 153) [235]–[236].

155 *Michalishen v Urbanoski* 2016 SKQB 78 (Court of Queen's Bench for Saskatchewan) [20] citing *Trew v 313124 Saskatchewan Ltd* 2005 SKQB 79 (Court of Queen's Bench for Saskatchewan) [19].

156 *Osborne* (n 7) 275 (note 26).

157 *Vancouver (City)* (n 30) [16]–[31]; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* 2020 SCC 13 (Supreme Court of Canada) [167].

158 *Vancouver (City)* (n 30) [32]–[43].

159 *Conseil scolaire francophone de la Colombie-Britannique* (n 157) [168], citing *Vancouver (City)* (n 30) [39].

160 *ibid* [179].

161 *Mustapha* (n 57) [3].

162 The *Anns/Cooper* framework is the test used by courts to determine whether a duty of care exists. See an example of its application in *Childs v Desormeaux* 2006 SCC 18 (Supreme Court of Canada).

- *Causation in fact*: But for the defendant's breach of the required standard of care the defendant would not have incurred the injury or loss.
- *Causation in law*: The injury or loss is of such kind that a reasonable person should have foreseen it as a real risk (ie that the damage is not too remote to be viewed as legally caused by the negligence).¹⁶³

Private nuisance

36. The elements of private nuisance that the plaintiff must prove are:¹⁶⁴

- The defendant *substantially* interfered with the plaintiff's use or enjoyment of the property (ie the interference was not trivial).¹⁶⁵
- The interference is *unreasonable* in all of the circumstances (established through the balancing of factors).¹⁶⁶

37. It flows from these two elements that damages must be proven.¹⁶⁷ Whether the interference results from intentional, negligent or are otherwise faultless conduct is without consequence.¹⁶⁸ Where the plaintiff alleges physical injury to the property (as opposed to interference with the use or enjoyment of the property) establishing that the interference is unreasonable will usually be less onerous.¹⁶⁹

Trespass to property

38. The elements of trespass to property that the plaintiff must prove are:¹⁷⁰

- The defendant's direct and physical intrusion onto land.
- The land intruded upon is in the possession of the plaintiff.
- The defendant's act was voluntary (but not necessarily intentional).

39. There is no requirement that damages be proven.

Rylands rule (strict liability)

40. The elements of *Rylands* rule that the plaintiff must prove are:¹⁷¹

- The defendant was engaged in a 'non-natural' use of their land.
- The defendant brought on to their land something that was likely to make mischief if it escaped.
- That thing in fact subsequently escaped.
- Damage was caused to the plaintiff's property as a result of the escape.

163 *Mustapha* (n 57) [13].

164 *Antrim Truck Centre Ltd v Ontario (Transportation)* 2013 SCC 13 (Supreme Court of Canada) [18]–[19].

165 *ibid* [22]–[24].

166 *ibid* [26].

167 *Smith* (n 43) [55]–[59].

168 *St Lawrence Cement* (n 76) [77].

169 *Antrim Truck Centre* (n 164) [50].

170 *Smith* (n 45) [37], reversed on other grounds in *Smith* (n 43) citing *Wallington Grace* (n 45) [86] and *R & G Realty Management Inc* (n 45) [40]. These cases identify as a fourth element the following proposition: 'While some form of physical entry onto or contact with the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto the plaintiff's land can constitute trespass.' However, for clarity, we suggest this is better understood as a qualification of the first element, than as a distinct element of the tort.

171 *Kirk v Executive Flight Centre Fuel Services Ltd* 2019 BCCA 111 (Court of Appeal for British Columbia) [86] citing *Smith* (n 43) [68]–[71].

Q3

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

41. One party can be held responsible for the actions of another pursuant to the following doctrines and concepts:

- **Concerted tortious action** can lead to one party being held liable for the actions of another. Parties will be held to be joint tortfeasors where there is concerted action between them toward a common end (see also the tort of conspiracy, briefly discussed at [7] above).¹⁷² It has been said that knowingly assisting, encouraging, inciting, or even merely being present may suffice.¹⁷³ Nevertheless, courts have resisted describing the precise connection to the tortious act necessary to establish concerted action liability, noting that the inquiry must depend on the circumstances of each case.¹⁷⁴ For example, in a case where a group had trespassed onto land to cut down trees for the purpose of obtaining an ocean view, the Court held that all defendants were liable, including one for whom there was no evidence he had cut any trees nor any evidence he directed the loggers to cut the trees.¹⁷⁵
- **Vicarious liability** provides for one party to be held responsible for the tortious act of another, typically where an employee-employer or agent-principal relationship exists.¹⁷⁶ The relationship between the tortfeasor and the person to be held vicariously liable must be sufficiently close, and the tort must be 'sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialisation of the risks created by the enterprise'.¹⁷⁷ This is a particularly useful way to establish liability of a corporation.
- In Québec, the existence of vicarious liability as a general concept is set out in the third paragraph of article 1457 of the Civil Code of Québec¹⁷⁸ and elaborated in articles establishing specific liability regimes, including article 1463 which provides for employer-employee relationships.¹⁷⁹
- **Non-delegable duties** may prevent parties from avoiding liability through independent contractors. While vicarious liability will not *typically* apply to those hiring independent contractors,¹⁸⁰ in some circumstances, those who hire independent contractors, may nevertheless be found liable through the doctrine of non-delegable duty.¹⁸¹ A non-delegable duty arises when the *performance* of the duty may be delegated, but *responsibility* cannot – it is a duty 'to ensure that the independent contractor also takes reasonable care'.¹⁸²

¹⁷² *Rutman v Rabinowitz* 2018 ONCA 80 (Court of Appeal for Ontario) [33]–[35].

¹⁷³ *ibid* [34] citing John G Fleming, *The Law of Torts* (C Sappideen and Prune Vine (eds), 10th edn, Thomson Reuters 2011) 302.

¹⁷⁴ *Rutman* (n 172) [35].

¹⁷⁵ *Horseshoe Bay Retirement Society v SIF Dev Corp* 1990 CanLII 8047 (Supreme Court of British Columbia) [9], [16].

¹⁷⁶ *Blackwater v Plint* 2005 SCC 58 (Supreme Court of Canada) [20].

¹⁷⁷ *KL B v British Columbia* 2003 SCC 51 (Supreme Court of Canada) [19].

¹⁷⁸ Civil Code of Québec (n 34) art 1457.

¹⁷⁹ *ibid* art 1463.

¹⁸⁰ 671122 Ontario Ltd v Sagaz Industries Canada inc 2001 SCC 59 (Supreme Court of Canada) [33]–[35].

¹⁸¹ *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145 (Supreme Court of Canada) [17].

¹⁸² *ibid* [50].

Q4

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

42. In Canada, the liability of corporate subsidiaries may be addressed either through piercing the corporate veil (which courts are reluctant to do) or perhaps by the recognition of a direct duty of care in negligence (which recent jurisprudential developments suggest may be a more promising avenue):

- **Piercing the corporate veil** is the act of disregarding the separate legal personality of a corporation to impose liability where it otherwise would not be found, including liability for shareholders. However, academics,¹⁸³ courts,¹⁸⁴ and even empirical analysis¹⁸⁵ conclude that the law demonstrates ‘no consistent principle’. Generally, courts are extremely reluctant to pierce the corporate veil, but are more likely to do so when there are few or only one shareholder,¹⁸⁶ and when the corporation is private rather than public.¹⁸⁷
- The corporate veil may be pierced in the following narrow circumstances¹⁸⁸ (the ‘*Transamerica* test’¹⁸⁹):
 - When doing so is required by contract or statute;
 - When the court is satisfied that a company is a ‘mere façade’ concealing the true facts (which requires that there be complete control of the subsidiary and that the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity); or
 - When it can be established that the company is an authorised agent of its controllers or its members, corporate or human.
- Similarly, under the Civil Code of Québec, the corporate veil may only be pierced in the precise and limited circumstances where the juridical personality of a legal person is invoked ‘to dissemble fraud, abuse of right or contravention of a rule of public order’.¹⁹⁰ In other words, the corporate veil may only be pierced when the following conditions are met:
 - The legal person has been manipulated by the shareholder, administrator or director and is a mere façade or an alter ego; and
 - The company’s juridical personality has been diverted from its economic purpose in order to commit a fraud, an abuse of right or a contravention of a rule of public order to the detriment of another person.¹⁹¹

183 VanDuzer (n 127) 148.

184 *Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2 (Supreme Court of Canada) [12].

185 See generally, Mohamed F Khimji and Christopher C Nicholls, *Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study* (2015) 41(1) Queen’s Law Journal 207.

186 *ibid* 242.

187 *ibid* 232.

188 *Yaiguaje v Chevron Corporation* 2018 ONCA 472 (Court of Appeal for Ontario) [65].

189 *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* 1996 CanLII 7979 (Ontario Court (General Division)).

190 Civil Code of Québec (n 34) art 317.

191 Raymonde Crête and Stéphane Rousseau, ‘Les exceptions au principe de la personnalité juridique distincte: le soulèvement du voile corporatif’ in Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions* (4th edn, les Éditions Thémis 2018) [257]–[258], [277].

- However, as in common law jurisdictions, Québec courts are generally reluctant to pierce the corporate veil¹⁹² and whether they will do so is highly unpredictable.¹⁹³
 - **Parent corporations may be liable to those affected by their subsidiaries** following the pre-trial decision in *Choc v Hudbay Minerals inc*,¹⁹⁴ which suggested that a parent corporation could potentially owe a duty of care to those affected by its subsidiary's operations abroad.¹⁹⁵ As a pre-trial decision, the decision only indicates that it was not 'plain and obvious' that the plaintiffs' claim would fail for disclosing no reasonable cause of action in negligence.¹⁹⁶ With respect to domestic subsidiaries, the Ontario Court of Appeal recently allowed a similar claim to advance to trial in *Avedian v Enbridge Gas Distribution inc (Enbridge Gas Distribution)*.¹⁹⁷ This could allow plaintiffs to establish *direct* rather than vicarious liability in negligence – the most used and versatile tort in Canada – and would not require piercing the corporate veil to do so.
43. Lack of corporate due diligence legislation remains an issue in Canada. There is currently no legislation requiring companies to conduct due diligence with respect to human rights in their supply chains.¹⁹⁸ There is a Canadian Ombudsperson for Responsible Enterprise whose mandate is to advise companies and encourage them to follow responsible business practices, as well as to review complaints about possible human rights abuses by Canadian companies working outside Canada in the garment, mining, and oil and gas sectors.¹⁹⁹ However, the Ombudsperson does not have any significant remedial power beyond the ability to make recommendations.²⁰⁰

Q5

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

44. The following are monetary remedies:

- **Compensatory damages** are typically divided into general damages and special damages. Special damages are readily ascertainable past pecuniary damages. General damages include both future pecuniary losses (eg future healthcare costs)

192 Jean-Louis Baudouin and Yvon Renaud, *Code civil du Québec annoté* (24th edn, Wilson & Lafleur 2021) art 317. See also *P Talbot inc c Entreprises Mirgil inc* 2004 CanLII 17854 (Court of Appeal of Québec); 8781435 *Canada inc c Maison3D.com inc* 2020 QCCQ 1088 (Court of Québec, Small Claims Division) [62]; Stéphane Rousseau and Nadia Smaïli, 'La "levée du voile corporatif" en vertu du Code civil du Québec: des perspectives théoriques et empiriques à la lumière de dix années de jurisprudence' (2006) 47(4) Les Cahiers de droit 815, 859–860.

193 Rousseau and Smaïli (n 192) 819.

194 *Choc v Hudbay Minerals inc* 2013 ONSC 1414 (Superior Court of Justice of Ontario).

195 *ibid* [50]–[75].

196 *ibid* [55], [75].

197 *Avedian v Enbridge Gas Distribution inc* 2021 ONCA 361 (Court of Appeal for Ontario) [16]–[23].

198 However, *Bill S-211*, which is currently before Parliament, would establish reporting obligations related to human rights in supply chains. In its current form, Bill S-211 would, among other things, require government bodies and businesses (meeting certain requirements) to submit annual reports to the government outlining 'the steps the entity has taken [...] to prevent and reduce the risk that forced labour or child labour is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity'. However, the Bill does not require that any such steps be taken. See failed attempts to enact relatively modest obligations of this kind such as *Bill S-216* (2020), *Bill S-211* (2020, a previous version of Bill S-211), and *Bill C-423* (2018). See also *Bill C-300* (2009), which would, among other things, have withdrawn federal funding from Canadian extractive companies operating in developing countries that are found to have violated corporate social responsibility guidelines. See also Canada's Corporate Social Responsibility Strategy: Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (Government of Canada, 14 November 2014) (last modified 13 May 2021).

199 Canadian Ombudsperson for Responsible Enterprise, *'About the Canadian Ombudsperson for Responsible Enterprise'* (Government of Canada).

200 Order in Council, *PC Number: 2019-1323* (6 September 2019).

and any non-pecuniary losses (eg pain and suffering).²⁰¹ In the environmental context, compensatory damages may mean the cost of remediating the property rather than the loss of property value.²⁰² In addition, aggravated damages (a form of general non-pecuniary damages) may be available to compensate for conduct that is 'reprehensible or outrageous'.²⁰³

- In Québec, a plaintiff can claim compensatory damages 'for bodily, moral or material injury which is an immediate and direct consequence' of a defendant's fault.²⁰⁴ The term 'direct' does not mean that only the direct victim who suffered the immediate consequences of the injury is entitled to compensation. The 'victims by *ricochet*' are also entitled to compensation for their injuries where the causal link between the fault and the injury is direct enough.²⁰⁵
 - **Punitive (or exemplary) damages** are exceptionally awarded for the purpose of punishing, deterring, or denouncing certain acts.²⁰⁶ As such, they are only awarded when compensatory damages are insufficient to meet those objectives and where the conduct is 'malicious, oppressive and high-handed' and 'offends the court's sense of decency'.²⁰⁷
 - In Québec, punitive damages can be awarded only where they are expressly provided for by law.²⁰⁸ Article 1621 of the Civil Code of Québec explicitly stipulates this precondition.²⁰⁹ For example, section 49 of the Québec Charter (a general provision establishing the availability of remedies for non-legislative breaches of the Québec Charter) provides for, and is the most used legislative basis for, punitive damages.²¹⁰
 - **Nominal damages** are symbolic monetary awards given to those whose rights have been infringed but who have not proven any loss.²¹¹ They are only available for those torts in which proof of damages is not required (eg available for battery, but not for negligence).
45. Beyond monetary remedies, the following other remedies may also be available in relation to the three defined harms:
- **Injunctions** are orders to do something (a mandatory injunction) or not do something (a prohibitory injunction). An interlocutory injunction is granted before a determination of the case. The test for an interlocutory injunction is the *RJR-MacDonald* test²¹² which requires plaintiffs to demonstrate that there is (a) a serious question to be tried, (b) that they will suffer irreparable harm (ie which cannot be compensated with money) unless the injunction is issued, and (c) the balance of convenience (ie relative harms to the plaintiff, defendant, and the

201 *McKnight v Ontario (Transportation)* 2018 ONSC 52 (Superior Court of Justice of Ontario) [48] citing *Ryan v Sun Life Assurance Co of Canada* 2005 NSCA 12 (Nova Scotia Court of Appeal) [29]–[33].

202 *Midwest Properties* (n 68) [57]–[70].

203 *Whiten v Pilot Insurance Co* 2002 SCC 18 (Supreme Court of Canada) [116].

204 Civil Code of Québec (n 34) art 1607. See also art 1457.

205 Boudouin, Deslauriers and Moore (n 35) [1-130]–[1-139]. See also *Hôpital Notre-Dame de l'Espérance c Laurent* [1974] CA 543 (Court of Appeal of Québec), confirmed in [1978] 1 SCR 605 (Supreme Court of Canada) 606.

206 *Whiten* (n 203) [43], [68]–[69].

207 *Filice v Complex Services inc* 2018 ONCA 625 (Court of Appeal for Ontario) [57] citing *Whiten* (n 203) [36].

208 Beaulac and Gaudreault-Desbiens (n 36) 23.

209 Civil Code of Québec (n 34) art 1621.

210 Charter of Human Rights and Freedoms (n 38) s 49. Beaulac and Gaudreault-Desbiens (n 36) 23.

211 *Skrypnik v Crispin* 2010 BCSC 140 (Supreme Court of British Columbia) [18].

212 *RJR-MacDonald inc v Canada (Attorney General)* [1994] 1 SCR 311 (Supreme Court of Canada) 348–349.

public) favours granting the injunction.²¹³ The test is more difficult to meet when a mandatory injunction is sought, requiring that plaintiffs demonstrate a strong *prima facie* case instead of a serious question to be tried.²¹⁴

- A permanent injunction is granted after the decision on the merits and a different test applies. The plaintiff must establish: '(1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction'.²¹⁵
- In addition, some statutes provide for an injunction as a remedy, for example, section 39 of CEPA allows a person who has suffered or is about to suffer loss or damages as a result of a violation of that Act or its regulations to seek an injunction.²¹⁶
- Finally, while Crown liability statutes typically bar injunctive relief,²¹⁷ injunctions are nevertheless available against Crown officers when they exceed their powers²¹⁸ or against Crown servants and agents acting unconstitutionally.²¹⁹
- **Declarations** are 'judicial statement[s] confirming or denying a legal right of the applicant.'²²⁰ Declarations are discretionary remedies and the exercise of the discretion to grant a declaration is appropriate when the court has jurisdiction; the dispute is real and not theoretical; the party raising the issue has a genuine interest in its resolution; and the responding party has an interest in opposing the declaration being sought.²²¹
- **Subsection 24(1) of the Charter** provides an extremely broad remedial jurisdiction which is limited only to what courts consider 'appropriate and just in the circumstances' – at least in theory.²²² In practice, while courts have occasionally granted creative remedies,²²³ traditional remedies (eg damages, injunctions, and declarations) are likely to be the most common remedies for the situations discussed here. As discussed above at [9] and [33], subsection 24(1) only applies when there has been an underlying Charter violation (which can only occur through government action).
- **Restoration plans** can be ordered pursuant to statute. For example, where a plaintiff succeeds on an environmental protection action pursuant to section 84 of Ontario's Environmental Bill of Rights,²²⁴ the court may (among other things) 'order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time'²²⁵ and if the court is not satisfied, it may take charge of the plan.²²⁶ A similar remedy is also available under paragraph 22(3)(d) of CEPA.²²⁷

213 *R v Canadian Broadcasting Corp* [2018 SCC 5](#) (Supreme Court of Canada) [12] citing *RJR-MacDonald* 334–335, 348 (n 212).

214 *Canadian Broadcasting Corp* (n 213) [15]–[18].

215 *Google Inc v Equustek Solutions Inc* [2017 SCC 34](#) (Supreme Court of Canada) [66].

216 Canadian Environmental Protection Act (n 65) s 39.

217 Crown Liability and Proceedings Act (n 129) s 22(1); Ontario's Crown Liability and Proceedings Act (n 135) s 22(1).

218 *Smith v Attorney General (NS)* [2004 NSCA 106](#) (Nova Scotia Court of Appeal) [6], [105]–[107].

219 *Canada (Attorney General) v Saskatchewan Water Corp* [1993 CanLII 9138](#) (Court of Appeal for Saskatchewan) [77].

220 *Makara v Canada (Attorney General)* [2017 FCA 189](#) (Federal Court of Appeal) [16] citing Lazar Sarna, *The Law of Declaratory Judgments* (4th edn, Thomson Reuters 2016) 1.

221 *Ewert v Canada* [2018 SCC 30](#) (Supreme Court of Canada) [81].

222 *Doucet-Boudreau* (n 30) [52]–[59]; *Vancouver (City)* (n 30) [17].

223 *Doucet-Boudreau* (n 30) [87]–[88].

224 Environmental Bill of Rights (n 63) s 84.

225 *ibid* para 93(1)(b).

226 *ibid* s 98(1).

227 Canadian Environmental Protection Act (n 65) para 22(3)(d).

Q6

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

46. There are many advantages and disadvantages to using civil claims as means of human rights protection. We briefly identify some general ones:

- **The cost of litigation** is a major barrier to civil remedies as a mechanism for enforcing rights.²²⁸ Even if an individual plaintiff can bring a claim for one of the defined harms, they will likely remain financially disadvantaged. For instance, in the context of environmental law, issues relating to access to justice are exacerbated by the fact that polluters are typically well-resourced while individual plaintiffs are often not. Class actions may be helpful in this respect, especially because the effects of environmental harm will often affect a number of individuals directly. Indeed, more generally, '[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims'.²²⁹
- In all Canadian jurisdictions, the losing party in a civil lawsuit must generally pay some portion of the winner's legal costs – this is a double-edged sword as it can support litigation by those with fewer resources or can be a significant burden for such litigants.²³⁰
- **Compensation may be inadequate** even where a plaintiff is successful. At least in the context of personal injury, the quantum of non-pecuniary awards has long been limited.²³¹ In 2022, accounting for inflation, these damages are capped at around CAD 400,000 – an amount that may not necessarily compensate for loss. Nevertheless, the ability to be compensated at all may be seen as advantage.
- **The discovery process** may be considered as an advantage because parties are required to answer questions and disclose all documents relevant to the lawsuit, often including confidential documentation (which is protected from use for ulterior purposes²³²) This process can help plaintiffs better understand what occurred (within limits, ie plaintiffs cannot go on what is commonly referred to as a 'fishing expedition'). On the other hand, this process can be weaponised against plaintiffs with fewer resources by delaying litigation which may make it difficult to financially sustain the lawsuit.

Assault or unlawful arrest and detention

47. In Canada, the perpetrator of this harm will often be law enforcement. While all of the causes of action described with respect to this harm apply to law enforcement in the execution of their duties, plaintiffs will typically face additional obstacles to succeeding against law enforcement because the tortious act cannot have been authorised by law (see [8] above).

228 See generally, Trevor CW Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Canadian Forum on Civil Justice: Toronto 2016). See also Thomas A Cromwell, 'Access to Justice: Towards a Collaborative and Strategic Approach' (2012) 63 University of New Brunswick Law Journal 38.

229 *Western Canadian Shopping Centres inc v Dutton* 2001 SCC 46 (Supreme Court of Canada) [28]–[29]. Despite the fact that class actions are a theoretically promising approach to environmental issues, climate change class actions have not found particular success in Canada to date – often failing at the certification step. However, it has been argued that a Charter- rather than torts-based approach may be more promising (see Jasminka Kalajdzic 'Climate Change Class Actions in Canada' (2021) Supreme Court Law Review, 2d, 100, 29). Furthermore, justiciability is also an obstacle to successful class actions due to the view that that courts are not the appropriate forum for adjudication of these disputes (*ibid* at 44–46). For an example of such judicial reticence, see *Environnement Jeunesse c Procureur général du Canada* 2021 QCCA 1871 (Court of Appeal of Québec).

230 Ontario's Rules of Civil Procedure, *RRO 1990, Reg 194*, rules 57–58.

231 *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 (Supreme Court of Canada) 233.

232 *Kitchenham v Axa Insurance Canada* 2008 ONCA 877 (Court of Appeal for Ontario) [28]–[32]; Ontario's Rules of Civil Procedure (n 230) rule 30.1.

Environmental harm

48. For the sake of brevity, we mention only four shortcomings of traditional civil liability regimes with respect to addressing environmental harms:
- i. It may be difficult for plaintiffs to establish damages when the science is inconclusive.²³³
 - ii. Certain causes of action rely on directness (eg trespass, battery) but harm in the environmental context is typically caused indirectly.²³⁴
 - iii. Causation may be difficult to establish where a substance increases the probability of a disease that can arise in different ways (eg cancer) – to make matters worse, there is often latency between exposure and consequent harm.²³⁵
 - iv. More broadly, some core concerns of environmental protection (eg long-term and diffuse environmental degradation through climate change or loss of biodiversity) may be removed from traditional harms protected against by traditional civil liability regimes (eg injury to proprietary, economic, or bodily interests).
49. Environmental protection statutes may be more effective at providing redress by providing causes of action that are specifically tailored to environmental harm. These causes of action are frequently embedded into the regulatory framework, for example, by creating a cause of action for failure to comply with statutory obligations.²³⁶

Harmful or unfair labour conditions

50. As noted above at [17], [21] and [22], employment standards and workers' compensation regimes significantly displace traditional civil remedies, in favour of administrative systems and no-fault compensation schemes. While, in principle, these approaches further better access to justice through simplified procedures and compliance through oversight mechanisms, they have also been subject to critique.
51. Some of Canada's most vulnerable workers nevertheless face barriers to enforcing employment standards through the complaints systems because of 'well-founded fears of employer reprisal, direct and opportunity costs of the claim process, difficulties presenting and documenting their claims, and lack of access to professional advice or representation'.²³⁷ Of course, these concerns would likely be heightened in the context of judicially enforced civil remedies. As mentioned earlier at [19], other vulnerable workers may be excluded from these protections in whole or in part.
52. Similarly, prior to the implementation of the no-fault insurance scheme for injuries that occur in the course of employment, workers had difficulty securing compensation in tort for a variety of reasons, including the high cost and slow pace of litigation.²³⁸ Thus, while the statutory bar against tort claims (discussed at [22]) can be controversial, especially when conduct is blameworthy, 'few would today argue for a full-fledged return to the tort system'.²³⁹ Some commentators advocate, instead, for allowing workers to pursue parallel civil remedies in certain circumstances.²⁴⁰

²³³ Benidickson (n 64) 121.

²³⁴ *ibid* 118; *Smith* (n 45) [38]–[42] (Here the trial judge rejected that a claim in trespass was established because the emission of nickel particles from a refinery was not a direct intrusion despite contaminating neighbouring soil.).

²³⁵ Benidickson (n 64) 121.

²³⁶ Environmental Protection Act (n 68) para 99(2)(a).

²³⁷ Kevin Banks, 'Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness' (Ministry of Labour, 2015) 6 in Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary* (9th edn, Irwin Law 2018) 1016–1017.

²³⁸ England, Wood and Christie (n 96) [9.59].

²³⁹ *ibid* [9.71]–[9.72].

²⁴⁰ *ibid* [9.72]–[9.73].

Corporations

53. The main obstacle to establishing corporate liability is that claimants must operate within a regime designed specifically to limit liability, and corporations typically take full advantage of the tools offered by the regime to further limit their liability through complex corporate structures involving multiple layers of subsidiaries (often across jurisdictions). Thus, the reluctance of Canadian courts to pierce the corporate veil will often limit recovery, even in cases where the subsidiary is wholly owned and wholly controlled.

Public bodies

54. As discussed earlier at [25], claimants may face significant additional hurdles when seeking to establish the liability of a public body. For instance, the defence of statutory authority prevents liability for damages for a nuisance that is the inevitable consequence of discharging a statutory duty.²⁴¹

55. In addition, public policy considerations have often resulted in modified tests to establish a cause of action. For instance, it is more difficult to establish that a regulatory authority owes a duty of care to a particular individual under the *Anns/Cooper* framework.²⁴²

56. On the other hand, the availability of damages for violations of the Charter is a powerful tool that is only available with respect to government action.

Q7

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

57. It can be very difficult to hold a foreign defendant (or the Canadian parent corporation of a foreign subsidiary) liable in Canada. We highlight four issues to consider in this context: jurisdiction; the appropriateness of the forum (ie *forum non conveniens*); choice of law (ie *lex loci delicti*); and the legal separation between subsidiary and parent corporations.

- **Jurisdiction** over foreign defendants may be established when there is a 'real and substantial connection' between the forum and the defendant or subject matter of the dispute (through consideration of a variety of connecting factors).²⁴³ In cases where the defendant is a parent corporation with its head office in Canada, the court will always have jurisdiction.²⁴⁴
- **The appropriateness of the forum** may be challenged through a *forum non conveniens* motion, even where jurisdiction exists. As a matter of discretion, the court seized with the issue may decline jurisdiction if it finds another forum is clearly more appropriate to decide the matter in dispute (through consideration of a variety of factors).²⁴⁵

²⁴¹ Ryan (n 61) [54]–[56].

²⁴² See eg *Taylor v Canada (Attorney General)* [2012 ONCA 479](#) (Court of Appeal for Ontario) [76]–[97]; *Ernst v Alberta (Energy Resources Conservation Board)* [2014 ABCA 285](#) (Court of Appeal of Alberta) [16]–[18].

²⁴³ *Club Resorts Ltd v Van Breda* [2012 SCC 17](#) (Supreme Court of Canada) [80]–[100].

²⁴⁴ *ibid* [86].

²⁴⁵ *Garcia v Tahoe Resources Inc* [2017 BCCA 39](#) (Court of Appeal for British Columbia) [48]–[131]. This case is decided on the basis of s 11 of British Columbia's Court Jurisdiction and Proceedings Transfer Act, [SBC 2003, c 28](#), which the Supreme Court of Canada has found to be a complete codification of the common law in this regard; *Teck Cominco Metals Ltd v Lloyd's Underwriters* [2009 SCC 11](#) (Supreme Court of Canada) [22].

- **Choice of law** is generally governed by the principle of *lex loci delicti*, which holds that ‘the law to be applied in torts is the law of the place where the activity occurred’.²⁴⁶ In practice, it may be difficult to characterise the wrongful activity as having occurred in Canada when the injury itself occurs outside of Canada.²⁴⁷
- **The legal separation between a foreign subsidiary and a Canadian parent corporation** can be difficult to overcome due to the courts’ reluctance to pierce the corporate veil. Currently, the best approach appears to be to assert *direct* liability in negligence of the parent corporation headquartered in Canada, as was done in *Choc v Hudbay*.²⁴⁸ These topics are discussed in further detail at [42] above.



Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

General

Open-access resources

- Canadian Judicial Council, [‘Civil Law Handbook for Self-Represented Litigants’](#)
- [CanLII](#) (database containing jurisprudence, legislation, and open-access works)
- Law Society of Ontario, [‘Continuing Legal Education Articles’](#)
- Library of Parliament, [‘Canadian Parliamentary Historical Resources’](#)
- Stéphane Beaulac and Jean-François Gaudreault-Desbiens, [‘Common Law and Civil Law: A Comparative Primer’](#) (Federation of Law Societies of Canada 2017)
- Supreme Court of Canada, [‘Sources of Legal Information Available to the General Public’](#) (links to a variety of resources across all provinces)

Closed-access resources

- Canadian Encyclopedic Digest and Halsbury’s Laws of Canada (legal encyclopedias)
- Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 9th ed, vol 1, Principes généraux, Montréal, Éditions Yvon Blais, 2021
- Philip H Osborne, *The Law of Torts* (6th edn, Irwin Law 2020)
- Vincent Karim, *Les obligations*, (4th edn, vol 1, Montréal, Wilson & Lafleur, 2015)
- Penelope Simons and Heather McLeod-Kilmurray, *Canada: Backsteps, Barriers and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm* in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

²⁴⁶ *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon* [1994] 3 SCR 1022 (Supreme Court of Canada) 1045–1050.

²⁴⁷ *Das v George Weston Limited* 2018 ONCA 1053 (Court of Appeal for Ontario) [80]–[99].

²⁴⁸ *Choc* (n 194). The plaintiffs asserted that security forces working for the defendant’s subsidiary committed a variety of human rights abuses in Guatemala. The Court found that a parent corporation could potentially owe a duty of care to those affected by its subsidiary’s operations – and it was therefore not plain and obvious that a claim in negligence establishing direct liability of the defendants would fail.

Harmful or unfair labour conditions

Open-access resources

- Federally and provincially maintained webpages on employment standards: [Canada](#); [Alberta](#); [British Columbia](#); [Manitoba](#); [New Brunswick](#); [Newfoundland and Labrador](#); [Northwest Territories](#); [Nova Scotia](#); [Nunavut](#); [Ontario](#); [Prince Edward Island](#); [Quebec](#); [Saskatchewan](#); [Yukon](#)

Closed-access resources

- Robert Gagnon, *Le droit du travail du Québec* (8th edn, Yvon Blais 2022)
- G England, R Wood and I Christie, *Employment Law in Canada* (4th edn, LexisNexis Butterworth 2005) (loose-leaf or online)
- Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary* (9th edn, Irwin Law 2018)

Environmental harm

Open-access resources

- Allan E Ingelson and others, [Environment in the Courtroom](#) (University of Calgary Press 2019)
- Michel Bélanger and Paule Halley, '[Accès à la justice pour protéger l'environnement au Québec: réflexions sur la capacité à agir des particuliers et des groupes environnementaux](#)', (2017) 62:3 McGill Law Journal 603

Closed-access resources

- Jamie Benidickson, *Environmental Law*, (5th edn, Irwin Law 2019)
- JurisClasseur Québec, col '*Droit public*', vol '*Droit de l'environnement*' (Lexis Nexis 2012) (loose-leaf updated 2022)
- Lynda Collins and Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Canada Law Book 2014)

Assault or unlawful arrest and detention

Open-access resources

- Justice Canada, '[Charterpedia](#)' (Continually updated page containing summaries of the jurisprudence surrounding Charter rights and remedies)

Closed-access resources

- David Grant Boghosian, *Canadian Law of First Responders' Liability* (LexisNexis Canada 2020)

Corporate, public bodies, and other

Closed-access resources

- J Anthony VanDuzer, *The Law of Partnerships and Corporations* (4th edn, Irwin Law 2018)
- Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (Routledge 2014) 286
- Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown* (4th edn, Carswell 2011)
- Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions* (4th edn, les Éditions Thémis 2018)

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against the police

58. The following claims may be brought against the police:

- **Assault and battery** may both be available to a person who was beaten or subjected to some other form of contact which was physically harmful or offensive to their reasonable sense of dignity (eg tear gas), and apprehended the harm (eg they could see an officer charge at them). On the other hand, a person who was beaten without ever apprehending imminent harm (eg hit from behind) would only have an action in battery.
- **False imprisonment and false arrest** would likely be available to claimants who were detained or arrested. Prima facie false imprisonment and arrest could be established by the fact that the protesters were held for several days (presumably they were also arrested). Thus, a prima facie case for false imprisonment and/or false arrest could be established, at which point the police would be entitled to establish they had legal authority for the detention or arrest. Furthermore, those who kept the protesters imprisoned longer than reasonably necessary may also be liable in false imprisonment.²⁴⁹
- **Violations of the peremptory norms of customary international law** may also form the basis of an action (see [23]). For example, in this case, it is possible that plaintiffs could seek redress for torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of liberty, the prohibitions against which are peremptory norms of customary international law.²⁵⁰ However, such actions would be novel (and may be less attractive given the range of existing private and Charter remedies available).
- Subsection 24(1) of the Charter could provide a remedy for the violation of many Charter rights at issue in this scenario, including:
 - freedom of expression (subsection 2(b));
 - the right to peaceful assembly (subsection 2(c));
 - the right to life, liberty, and security of the person (section 7);
 - the right not to be arbitrarily detained or imprisoned (section 9);

249 *Costain v Ryhorchuk and Hubbell* 58 Sask R 81 (Court of Queen's Bench for Saskatchewan) [54].

250 *Nevsun Resources Ltd* (n 122) [103], [126]–[129], [171]; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 (Supreme Court of Canada) [152]; United Nations General Assembly, Report of the Working Group on Arbitrary Detention, UNGAHR Doc A/HRC/22/4 (24 December 2012) [75].

- the right to retain and instruct counsel without delay (subsection 10(b)); and
 - the right not to be subjected to any cruel and unusual treatment or punishment (section 12).
- Once it is established that a Charter right was unjustifiably infringed, the protester must demonstrate that an award for Charter damages is ‘appropriate and just in the circumstances’, by reference to the functions of subsection 24(1), namely compensation, vindication, or deterrence.²⁵¹ All three functions would likely be served here.²⁵²
 - The government would have the opportunity to introduce any countervailing considerations (eg concerns for good governance or the existence of alternative remedies). For instance, overlapping successful claims in tort may adequately address the Charter breaches and duplicative awards would not be granted.²⁵³
59. **Statutory immunity** will usually be the largest obstacle to overcome when making claims against the police. Besides the provincial statutory bars (eg in British Columbia), law enforcement will not incur civil liability if they can demonstrate that their actions were authorised by law (as explained at [8], above). For instance, pursuant to section 25 of the Criminal Code, police can use as much force as is necessary in the execution of their duties.²⁵⁴ To be brief, most, if not all of the actions set out in the scenario would not be authorised by law. Indeed, even a justification based on pre-empting a breach of peace by arresting protesters would fail because a person cannot be arrested simply to prevent a breach of peace committed by others.²⁵⁵

Claims against Security Co

60. It is unlikely that Security Co would be found to be liable if it merely provided the police with vehicles, equipment, and water. However, it may be possible with significant factual assumptions:
- **Negligence** would be difficult to establish against Security Co. It is unlikely that Security Co owes a duty of care to protesters when providing equipment to police. In our view, the primary obstacle to establishing such a duty is that courts may be reluctant to impose a duty of care in relation to aiding police. This is especially so given that it is an offence in Canada to omit, without reasonable excuse, to assist a public officer or peace officer in the execution of their duty in arresting a person or in preserving the peace, after having reasonable notice that one is required to do so.²⁵⁶ Furthermore, even if such a duty were to exist, simply providing equipment to police is very unlikely to amount to a breach of the standard of care, and any harm that subsequently arises would be difficult to characterise as a reasonably foreseeable. However, it might be possible to establish these elements if Security Co gave the police equipment that Security Co had seen the police use in unambiguously unlawful activities (eg if police used vehicles to hit the protesters and were subsequently given vehicles by Security Co).

²⁵¹ *Vancouver (City)* (n 30) [24]–[31].

²⁵² *ibid* [30].

²⁵³ *ibid* [35]–[36].

²⁵⁴ Criminal Code (n 23); *Fleming* (n 24) [114]–[119].

²⁵⁵ *Fleming* (n 24) [64], [102].

²⁵⁶ Criminal Code (n 23) s 129(b). There is very little, if any, case law on this specific provision of the Criminal Code (on this point, see Larry C Wilson, ‘Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada’ (2000) 27(2) *Manitoba Law Journal* 273, 277).

- **Concerted action:** Security Co could be found to be a joint tortfeasor in similar circumstances as those described directly above, for instance, if there was some planning or coordination between Security Co and the police. As explained earlier, courts have been reticent about the extent to which a defendant must be connected to the tortious act, stating, each case ‘must depend on its own circumstances’.²⁵⁷ That said, without some shared design that is illegal or could foreseeably become illegal, it is unlikely that Security Co would be held liable.



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

61. The perpetrators may also be held to account via bodies mandated to investigate police behaviour, for instance, in Ontario, the Special Investigations Unit.²⁵⁸



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

62. Many lawsuits arose in response to the actions of police officers at protests in relation to the 2010 G20 summit in Toronto.²⁵⁹ Among them, two class actions relating to the behaviour of law enforcement toward protesters during the summit have been settled after certification.²⁶⁰
- ***Stewart v Toronto (Police Services Board)***:²⁶¹ The plaintiff refused to submit to a search of his backpack that police had imposed as a condition of entry to a park that was serving as a collection point for protests related to the G20 summit. As a result, he was forcibly restrained and searched. The plaintiff alleged assault, battery, false imprisonment, false arrest, negligence, misfeasance in public office, and trespass. The plaintiff sought a remedy under subsection 24(1) for violations of subsection 2(b) (freedom of expression), section 7 (right to life, liberty, and security of the person), section 8 (right to be secure against unreasonable search or seizure), section 9 (right not to be arbitrarily detained or imprisoned), and section 15 (right to equality) of the Charter. Ontario’s Court of Appeal found that the police violated the plaintiff’s Charter rights and awarded CAD 500 in Charter damages for vindication and deterrence.
 - ***Figueiras v Toronto (Police Services Board)***:²⁶² During the G20 summit, police told the plaintiff as he was walking down the street to either submit to a search or leave the area. He did not submit to the search and was subsequently pushed by an officer and told leave the area, which he did. The plaintiff sought a declaration that the officers committed battery and violated his Charter rights, notably subsections

²⁵⁷ *Rutman* (n 172) [35].

²⁵⁸ The governing legislation for this is the Special Investigations Unit Act, [2019, SO 2019, c.1, sch. 5](#).

²⁵⁹ See the National Union of Public and General Employees and Canadian Civil Liberties Association, ‘*G20 Toronto: A Citizens Inquiry Into Policing and Governance*’ (CCLU 2011).

²⁶⁰ *Good v Toronto (Police Services Board)* [2016 ONCA 250](#) (Court of Appeal for Ontario). See terms of these settlements: [Toronto G20 Summit Class Actions Settlement](#).

²⁶¹ *Stewart v Toronto (Police Services Board)* [2020 ONCA 255](#) (Court of Appeal for Ontario).

²⁶² *Figueiras* (n 5).

2(b), and 2(c) (freedom of peaceful assembly), and section 7. Ontario's Court of Appeal declared the police had violated his common law right to travel unimpeded on a public highway and his Charter right to freedom of expression. In addition, the Court declared that one of the officers had committed the tort of battery.



CaseScenario 2



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

Liability of Subsidiary Co

63. A number of avenues for civil claims may be weighed to hold Subsidiary Co to account. Each would require particular elements to be considered.

- **Negligence** could likely be established against Subsidiary Co. First, Subsidiary Co owes a duty of care to its neighbours and likely to the local community more generally.²⁶³ The scenario does not provide sufficient detail to weigh a possible lapse in the standard of care; however, legislation relevant to the way the oil spilled would be relevant to the determination because '[t]he fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness' (and vice versa).²⁶⁴ Thus, legislation on, for instance, the drilling or storage of oil and gas operations (such as Ontario's Oil, Gas and Salt Resources Act²⁶⁵) could help to determine whether Subsidiary Co breached the standard of care.
- Causation could be established where 'but for' the careless act (ie the failure to meet the standard of care), the local community would not have suffered these damages. For instance, the farmers could establish damages in relation to their crops but would need to demonstrate how the breach in the standard of care caused that damage.
- Continuing from the same example, a reasonable person would foresee lost crops as a real risk created by the careless extraction and storage of oil – establishing that the injury was not too remote.

²⁶³ Huang (n 44) [160].

²⁶⁴ Ryan (n 61) [29].

²⁶⁵ Oil, Gas and Salt Resources Act [RSO 1990, c P.12](#).

- **Private nuisance** could be established if the oil leak either damaged or interfered with use and enjoyment of property in which the plaintiffs have a possessory interest. First, the interferences described are clearly not a 'slight annoyance or trifling interference'²⁶⁶ – they are substantial. Second, the plaintiffs would need to establish that the interference is unreasonable by reference to factors such as the severity of the interference, the character of the neighbourhood, and the sensitivity of the plaintiff.²⁶⁷ As mentioned earlier at [36], those plaintiffs who assert actual injury to their property will usually easily establish that the interference is unreasonable;²⁶⁸ destroyed crops and the types of personal injury described would also be likely to amount to unreasonable interference in the use and enjoyment of property.²⁶⁹
- **Riparian rights** could be invoked by property owners whose lands abut the polluted waterways. In this scenario, the oil spill results in a detectable alteration of the character or quality of the abutting waterways.²⁷⁰ The property owners could seek damages for the breach of their riparian rights.
- **Public nuisance** may be available where an oil spill flows into public areas, such as the local river described above. In Ontario, pursuant to subsection 103(1) of the Environmental Bill of Rights, a claim in public nuisance could be pursued without the Attorney General's consent and without any 'special damage'.²⁷¹ In other provinces, one of those two conditions must be met (see [12] above).
- **Rylands rule** may be available to establish strict liability. In these circumstances, the crux of the issue would be establishing whether Subsidiary Co made 'non-natural' use of the land. A court would consider 'where the use is made, the time when the use is made and the manner of the use' to determine whether the use of land is 'natural'.²⁷² On the one hand, the fact that Subsidiary Co was given a licence favours finding that it was a 'natural' use of land (assuming any terms of the licence were respected).²⁷³ On the other hand, storing and transporting large amounts of fuel has been found to be an unnatural use of land²⁷⁴ and many cases have found liability when underground fuel tanks leak.²⁷⁵ Thus, there is a reasonable prospect of success. Assuming these elements could be established, strict liability is 'probably' also available to those who only suffer personal damages.²⁷⁶
- **Section 40 of CEPA**²⁷⁷ creates a civil cause of action for violations of the Act or its regulations and could thereby provide a remedy to the local community. For instance, it would be a violation of section 201 of the Act not to 'repair, reduce or mitigate any negative effects on the environment or human life or health that result from the environmental emergency or that may reasonably be expected to result from it' or to fail to 'make a reasonable effort to notify any member of the public who may be adversely affected by the environmental emergency'.²⁷⁸

266 *Antrim Truck Centre Ltd* (n 164) [22].

267 *ibid* [26].

268 *ibid* [50].

269 Osborne (n 7) 419; *Antrim Truck Centre Ltd* (n 164) [23]: 'Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier'.

270 *Mihaylov* (n 64) [11]; *KVP Co* (n 64) 703. See also, Klar and Jefferies (n 150) 887–888.

271 Environmental Bill of Rights (n 63) s 103(1).

272 *Smith* (n 43) [97].

273 *ibid*.

274 *10565 Nfld inc v Canada (Attorney General)* [2017 CanLII 25468](#) (Supreme Court of Newfoundland and Labrador) [343]–[344].

275 *Canadian Tire Real Estate Ltd* (n 46) [8]–[11], [297]; *BC Tel Co v Shell Can Ltd*, [1987 CanLII 2777](#) (Supreme Court of British Columbia) [20]; *Doherty et al v Allen, Allen's Service Station Ltd and Irving Oil Ltd* [1987 CanLII 7271](#) (Court of Queen's Bench of New Brunswick) [25].

276 *Smith* (n 43) [68].

277 Canadian Environmental Protection Act (n 65) s 40.

278 *ibid* paras 201(1)(b) and (c).

CEPA includes in the definition of an ‘environmental emergency’ an uncontrolled, unplanned or accidental release of a prescribed substance (eg petroleum crude oil, diesel fuel, various oil fuels, etc).²⁷⁹

- **Section 99 of Ontario’s Environmental Protection Act**²⁸⁰ is a promising avenue to seek compensation for an oil spill. It assigns liability to ‘the owner of the pollutant and the person having control of the pollutant’. The section allows those who incur losses or damage as a direct result of the spill of a pollutant to be compensated (among other bases for liability) and does not depend on any fault or negligence.²⁸¹ Thus, members of the local community could seek compensation from Subsidiary Co who is both the owner as well as the person in control of the pollutant.

Claims against Parent Co

64. Distinct considerations relevant to claims against Parent Co arise as a result of the corporate structure.

- **Negligence** may be used to establish direct liability if it can be shown that Parent Co owed members of the local community a duty of care. As discussed above at [42], for the moment, there is a pre-trial decision establishing that it is not ‘plain and obvious’ that a corporation does not owe a duty of care to those affected by its subsidiary’s operations. These facts are analogous to those in that decision: Parent Co made public representations about its commitment to operating in an environmentally sound manner and ensuring the health and safety of those affected by its business operations, creating an expectation, which can help establish the existence of a duty of care.²⁸²
- In another recent pre-trial decision,²⁸³ Ontario’s Court of Appeal considered a similar question (in this case, as in these facts, the subsidiary was not foreign). There, improper replacement of gas regulators by individuals subcontracted by a subsidiary of the parent company was found to have led to an explosion and fire. The Court found that there was a triable issue as to whether the parent company had undertaken sufficient intervention in the management of its subsidiaries such that it assumed duty of care to third parties. The Court found that whether the parent company ‘had undertaken an obligation to the customers of its subsidiaries to set standards for its subsidiaries and enforce them’ was a triable issue. Thus, depending on the extent of Parent Co’s control and the extent of their public representations, members of the local community may be able to establish direct liability of Parent Co through negligence.
- **Section 99 of Ontario’s Environmental Protection Act**²⁸⁴ may or may not apply because it is not clear whether the defined term ‘the person having control of the pollutant’²⁸⁵ could also apply to Parent Co. Courts have not foreclosed the possibility that a parent corporation could have ‘control’ of a pollutant within the meaning of subsection 99(2).²⁸⁶ If this is possible, then a claim pursuant to section 99 of Ontario’s Environmental Protection Act could succeed.

279 *ibid* s 193; Environmental Emergency Regulations, 2019, [SOR/2019-51](#), s 2(1).

280 Environmental Protection Act (n 68) s 99.

281 *ibid* s 99(6).

282 *Choc* (n 194) [66]–[70].

283 *Avedian* (n 197).

284 Environmental Protection Act (n 68) s 99.

285 *ibid* s 99(2).

286 *United Canadian Malt Ltd v Outboard Marine Corp* 2000 [CanLII 22365](#) (Superior Court of Justice of Ontario) [27]–[32].

- **The corporate veil would have to be pierced** for all other causes of action discussed with respect to Subsidiary Co to also give rise to liability for Parent Co. As discussed at [42], it is notoriously difficult to predict when a court would pierce the corporate veil. First, Parent Co must have had complete control of Subsidiary Co (ie more than just being the sole shareholder or merely operating closely – Subsidiary Co must have, *in fact*, not functioned independently).²⁸⁷ Second, Parent Co must have incorporated Subsidiary Co for a fraudulent or improper purpose or used by the parent as a shell for improper activity.²⁸⁸ However, it is not an improper purpose to incorporate in order to limit or shield against liability.²⁸⁹ Without more, a court would be unlikely to pierce the corporate veil based on these facts.

Q2

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

65. Civil claims are the preferred route for the local population. However, such claims would run parallel to potential regulatory investigations and consequences under the relevant federal and provincial legislation. Under some statutes such as CEPA, members of the local population could apply for an investigation into an alleged offence.²⁹⁰

Q3

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

66. In Canada, these cases tend to take the form of class actions, and once the class is certified, they are often settled out of court.²⁹¹ Thus, high profile events often do not correlate with high profile lawsuits. One of Canada's largest industrial disasters, the Lac-Mégantic disaster, was caused by an oil-carrying train that derailed in a small town, killing 27 people and destroying much of the town. It has been the subject of multiple claims, including the ongoing class action which was certified in *Ouellet v Rail World inc.*²⁹²
67. That said, *Kirk v Executive Flight Centre Fuel Services*,²⁹³ is more representative of environmental litigation. In *Kirk*, a tanker truck full of fuel overturned, spilling some 35,000 litres of helicopter fuel destined for a firefighting operation into Lemon Creek and connected waterways in the Kootenay region of British Columbia. The plaintiff brought a class action on behalf of all persons who owned, leased, rented, or occupied real property in the area. They are pleading negligence, nuisance, and the *Rylands* rule.²⁹⁴ The class was certified and the matter does not appear to have been settled.²⁹⁵

²⁸⁷ *Transamerica Life Insurance Co of Canada* (n 189).

²⁸⁸ *O'Reilly v ClearMRI Solutions Ltd* [2021 ONCA 385](#) (Court of Appeal for Ontario) [46]–[47].

²⁸⁹ *Clarkson Co Ltd v Zhelka* [1967] 2 OR 565 at 577, [1967 CanLII 189](#) (Ontario High Court of Justice).

²⁹⁰ Canadian Environmental Protection Act (n 65) s 17.

²⁹¹ See the examples discussed in André Durocher, *Environmental Class Actions in Canada* (Carswell 2018) 2–16, 192–196, 709–711, 727–731 (discussing *Clark v 4107781 Canada inc* 2013 QCCS 4164 (Superior Court of Québec) 765–767, 767–784 (discussing *Anderson et al v Manitoba et al*, see [Manitoba Flood Class Action Settlement Agreement](#) (1 September 2017)) 825–832 (discussing *Blouin c Ste-Anne-de-Beaupré (Ville de)* 2008 QCCS 3793 (Superior Court of Québec)).

²⁹² *Ouellet v Rail World inc* [2015 QCCS 2002](#) (Superior Court of Québec).

²⁹³ *Kirk v Executive Flight Centre Fuel Services* [2017 BCSC 726](#) (Supreme Court of British Columbia) remitted back to the chambers judge for reconsideration in part in *Kirk* (n 171), reconsidered in part in [2021 BCSC 987](#) (Supreme Court of British Columbia). See also, CBC News, [‘Lawsuit Filed Over Lemon Creek Jet Fuel Spill’](#) (9 August 2013).

²⁹⁴ *Kirk* (n 293) [1]–[15].

²⁹⁵ *ibid* [160]–[162], [2021 BCSC 987](#) [47]–[50]; see the webpage for the [Lemon Creek Fuel Spill Class Action](#).

CaseScenario3

Q1

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

68. Workers in factories which manufacture textiles are part of schedule 1 set out in the General regulation under Ontario's Workplace Safety and Insurance Act.²⁹⁶ Therefore, those workers (and their spouses, children, and dependents) are barred from pursuing all rights of action in this context against Factory Co.²⁹⁷ Similarly, Brand Co would likely be captured by schedule 1 as a clothing retailer (Class I) or wholesaler of personal goods (Class H)²⁹⁸ and therefore cannot be sued by Factory Co's workers under Ontario's Workplace Safety and Insurance Act.²⁹⁹ This statute bar generally operates even where malice is involved.³⁰⁰ In lieu of a right of action, workers would be entitled to compensation as determined by the Workplace Safety and Insurance Board.

Q2

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

69. The combined effect of facts such as the windows being barred, emergency exits closed, non-functional smoke alarms, and lack of safety protocols and fire evacuation procedures could lead to charges of criminal negligence (including criminal negligence causing death and criminal negligence causing bodily harm) among other charges.³⁰¹

296 General, [O Reg 175/98](#), sch 1 (Class E – Manufacturing).

297 Workplace Safety and Insurance Act, 1997, [SO 1997, c 16, sch A](#), ss 26(2) and 28(1).

298 General, [O Reg 175/98](#), sch 1.

299 Workplace Safety and Insurance Act (n 297) ss 26(2) and 28(1).

300 *Decision No 1227/19 2019 ONWSIAT 2324* (Ontario Workplace Safety and Insurance Appeals Tribunal) [49]–[51]. See also, *Ashraf v SNC Lavalin ATP inc* [2013 ABQB 143](#) [25] (Court of Queen's Bench of Alberta).

301 Criminal Code (n 23) ss 219–221.



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

70. The case of *Das v George Weston* arose from a building collapse in Bangladesh. In 2013, Rana Plaza, a building in Bangladesh which contained several clothing factories collapsed, killing 1,130 people and injuring many more. Shortly before the collapse, cracks were found in the building, and as a result, all employees were sent home. Later in the day, the owner announced that the building was safe and employees should return the next day. Injured workers and relatives of those who died commenced a class action lawsuit against Loblaws, a large retailer in Canada who purchased clothes from the manufacturers. The plaintiffs alleged that Loblaws was negligent, breached their fiduciary duty, and were vicariously liable for the negligence of the suppliers.³⁰² On a pre-trial motion, Ontario's Court of Appeal concluded that Bangladeshi law applied to the plaintiffs' claims and that many of the plaintiffs were barred from bringing the action due to Bangladesh's limitations legislation (ie the actions were brought too late).³⁰³ Furthermore, the Court found that it was plain and obvious that the negligence claims would fail under Bangladeshi law and that Loblaws could not be held vicariously liable.³⁰⁴
71. Turning to a workplace accident that occurred in Canada, in January 2012, an explosion and ensuing fire occurred at the Babine Forest Products Ltd ("Babine") sawmill in Burns Lake, British Columbia. The incident killed two workers and injured many more.³⁰⁵ A few months later, a similar explosion and fire killed two more workers and injured many others at the Lakeland Mills Ltd ("Lakeland") sawmill in Prince George, British Columbia.³⁰⁶ As an illustrative example of workers' compensation benefits, one of the workers at the Babine sawmill, who had been employed with the company for 35 years, was gravely injured and left permanently disabled in the incident. He was granted CAD 1,395,871.18 in compensation which included wage loss, health care, permanent total disability payments, and a pension reserve.³⁰⁷ The Workers' Compensation Board of British Columbia (which operates as WorkSafeBC) also imposed combined administrative penalties and levies on Babine and Lakeland totalling CAD 1,011,639.62³⁰⁸ and CAD 417,775.52³⁰⁹ respectively in relation to these incidents. No criminal charges were laid in relation to either incident due to flaws in WorkSafeBC's investigations.³¹⁰ Some of those affected have brought civil proceedings against WorkSafeBC, in relation to its investigations before and after the explosions (among other things).³¹¹

302 *Das v George Weston Limited* 2017 ONSC 4129 (Superior Court of Justice of Ontario) [117]–[127].

303 *Das* (n 247) [79]–[126].

304 *ibid* [129]–[216].

305 See the conclusions of WorkSafeBC's investigation: WorkSafeBC, *'Explosion and Fire at Sawmill in Burns Lake'* (January 2012) (amended 2014).

306 See the conclusions of WorkSafeBC's investigation: WorkSafeBC, *'Lakeland Mills Incident Investigation Report'* (April 2014) (amended 2014).

307 *A1601174 (Re) 2017 CanLII 150280* (British Columbia Workers' Compensation Appeal Tribunal) [65]–[67] (see also additional descriptions of injuries and compensation [70]–[71], [73]–[78], [83]–[86]).

308 WorkSafeBC, *Penalty Summaries (Babine Forest Products Limited)* (2 April 2014) (search: "Babine" in year "2014").

309 WorkSafeBC, *Penalty Summaries (Lakeland Mills Ltd)* (29 July 2014) (search: "Lakeland" in year "2014").

310 Criminal Justice Branch of the BC Ministry of Justice, Media Statement *'No Charges Approved against Babine Forest Products'* (10 January 2014); Criminal Justice Branch of the BC Ministry of Justice, Media Statement, *'No Charges Approved against Lakeland Mills Ltd'* (14 April 2014).

311 *A1601174 (Re)* (n 307) [6]–[7], [17].



A HANDBOOK FOR PRACTITIONERS | **CHINA**

Civil Liability for Human Rights Violations

 **OAK**
FOUNDATION

Bonavero
Institute
of Human
Rights



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CHINA



China's legal system is largely a civil law system. The first Civil Code in the history of Communist China was enacted in 2020. It distinguishes the so-called personality rights of individuals and provides that their violation can give rise to civil liability claims. At the same time there is a gap between the law on paper and the law in action. The liability of the State and its agents is largely a matter of administrative law and is governed by the State Compensation Law. In recent years, Chinese scholars have relied on the UN business and human rights framework, calling for legislative initiatives to regulate corporate human rights obligations. However, there are currently no explicit provisions regarding a parent company's liability for human rights violations resulting from the operations of its subsidiaries and suppliers.



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INDICES

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**Democracy Index
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9/100

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2022 Score**

66/180

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction¹

1. Article 33, Paragraph 3 of the **Constitution of the People's Republic of China**² stipulates that the State shall respect and protect human rights. This is regarded as a domestic law implementation of the obligations to protect human rights contained in the International Bill of Rights (comprising of the [Universal Declaration of Human Rights](#), the [International Covenant on Economic Social and Cultural Rights](#) and the [International Covenant on Civil and Political Rights](#)). The Constitution clarifies that the State not only has the negative obligation not to interfere with citizens' lawful exercise of their rights, but also has the positive obligation to prevent the violation of human rights, and to promote the realisation of human rights by legislative, judicial, and other measures,³ including ensuring access to effective remedies for victims of human rights violations.
2. Based on the Constitution's provisions on basic human rights, China has adopted a series of laws and regulations, including the **Civil Code**,⁴ the **State Compensation Law**,⁵ the **Labour Law**,⁶ and the **Environmental Protection Law**⁷ among other laws and regulations. These laws and regulations govern different types of human rights violations and their related liabilities, such as in cases of assault or unlawful arrest and detention of persons, environmental harm, and harmful or unfair labour conditions.
3. In cases of **assault or unlawful arrest and detention of persons**, the victim may seek relief mainly on the basis of the Civil Code and the State Compensation Law.⁸ If the victim is tortured or illegally detained by a person who is not a functionary of the State, the victim may claim relief in accordance with the Civil Code. If the victim is tortured or illegally detained by a state agency or a designated official while exercising assigned powers, the victim may claim relief in accordance with the State Compensation Law.
4. The Civil Code regulates the personal relationship and property relationship between equal persons (ie individuals and corporations). It was adopted in 2020 and entered into force on 1 January 2021. If public bodies participate in civil activities, the Civil Code can also be applied to the public bodies. Book 4 of Personality Rights and Book 7 of Tort Liability in the Civil Code are the basis for the protection

¹ The authors recommend the following websites for searching English translations of Chinese laws and regulations: <http://english.www.gov.cn/archive/lawsregulations/>, <http://en.pkulaw.cn/>, <https://www.chinalawtranslate.com/en/>. Not all documents cited in this report are available on free sites. For these it is recommended that the reader access subscription sites. Some citations are also only available in Chinese.

² Constitution of the People's Republic of China (2018 Amendment).

³ Shi Jiayou, *Civil Code and Social Transformation* (Renmin University Press 2018) 151.

⁴ [Civil Code of the People's Republic of China 2020](#).

⁵ State Compensation Law of the People's Republic of China (2012 Amendment).

⁶ [Labor Law of the People's Republic of China \(2018 Amendment\)](#).

⁷ [Environmental Protection Law of the People's Republic of China \(2014 Amendment\)](#).

⁸ [State Compensation Law of the People's Republic of China \(2012 Amendment\)](#).

of human rights by the law of civil remedies in China. The Civil Code distinguishes personality rights in a separate book, which not only directly declares that personality rights are protected by law, but also clarifies that the violation of personality rights can give rise to civil liability. It takes the protection of these rights a step further than the previous Tort Law⁹ and the General Principles of the Civil Law.¹⁰

5. The State Compensation Law mainly regulates the infringement of the legitimate rights and interests of a citizen, a legal person or any other organisation by a **state organ or state functionary** when performing their functions.¹¹ The specific organs with compensation obligations include state administrative organs, judicial organs, procuratorial organs and prison management organs.¹² The scope of State compensation governed by the State Compensation Law includes administrative compensation and judicial compensation, but excludes legislative compensation and military compensation.
6. In cases of **environmental harm**, the environmental authorities monitor environmental harm. But procuratorial organs can also make procuratorial suggestions or file administrative public-interest lawsuits against administrative bodies that perform their duties incorrectly or fail to act.
7. In the field of **labour protection**, if a worker suffers damage due to harmful or unfair labour conditions provided by the employer, the worker is protected by the Labour Law, the Regulation on Work-Related Injury Insurance,¹³ the Civil Servant Law,¹⁴ and other labour laws and regulations. The main avenues for resolving labour disputes are negotiation, reconciliation, mediation, arbitration, and litigation.
8. The above-mentioned methods of relief do not use judicial means only; some rely more on administrative mechanisms to resolve the problems.
9. In China, upholding the leadership of the party is a foundational principle that must be adhered to in building a socialist legal system with particularly Chinese characteristics. This can lead to complex legal and political issues which may affect the availability of remedies for violations of rights.

9 [Tort Law of the People's Republic of China 2009](#) (Expired).

10 [General Principles of the Civil Law of the People's Republic of China](#) (2009 Amendment) (Expired).

11 State Compensation Law (2012 Amendment), art 1.

12 *ibid*, art 21.

13 [Regulation on Work-Related Injury Insurance](#) (2010 Amendment).

14 [Civil Servant Law of the People's Republic of China](#) (2018 Amendment).



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

China recently adopted a comprehensive Civil Code which regulates general tort principles, including rights and interests, elements of liability, scope of damages, as well as specific torts, including liability for environmental pollution.

10. According to several laws and regulations, including the Civil Code, the Labour Law, the Environmental Protection Law and the State Compensation Law, if a citizen's personal freedom is violated, the ecological environment is destroyed, or labour conditions are harmful or unfair, the victim may file a claim against the relevant natural persons, legal persons, or unincorporated organisations. The avenues for the victim to seek relief vary according to the circumstances.

Assault or unlawful arrest and detention

a) Claims against a private body

11. According to Articles 990, 991 and 995 of the Civil Code, the right to health and personal freedom are among personality rights which are protected by law and may not be infringed by any organisation or individual. A person whose personality rights are infringed has the right to request the perpetrator of the infringement to bear civil liability.¹⁵ Liable actors here include natural persons, legal persons and unincorporated organisations.

b) Claims against a public body

In 1994, China enacted a comprehensive State Compensation Law which allows individuals and legal entities to claim compensation in appropriate circumstances for the harm caused by the wrongful acts of public bodies.

12. If it is a state agency or its functionary illegally violates a victim's personal rights when exercising their powers, such as when seeking to extract a confession through torture that causes the victim's injury or death, the victim may claim state compensation in accordance with the State Compensation Law.

c) Joint torts by private and public bodies

13. With regard to joint torts committed by state agencies and non-state agencies, Article 98 of the Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law stipulates that if an administrative agency fails to perform, or delays the performance of its statutory duties, resulting in damage to the legitimate rights and interests of citizens, legal persons, or other organisations, the People's Court shall rule that the administrative agency shall bear the responsibility for administrative compensation. When determining the

¹⁵ Civil Code 2020, arts 990, 991 and 995.

amount of compensation, consideration should be given to factors such as the role played by the non-performance or the delay in performance of statutory duties in the process and results of the damage.¹⁶ In the case of a third party's infringement, if the state agency is remiss in performing its statutory duties, it shall bear the corresponding responsibility according to the effect of its actions on the damage.

d) Criminal remedy

14. If the acts of the infringing party constitute the crime of illegal detention or the crime of intentional injury, victims can request criminal responsibility for the infringing party through criminal charges. Victims can also bring an incidental **civil claim as part of criminal proceedings**.

Environmental harm

a) Private body

15. In the Civil Code, Book 7 ('Tort Liability') Chapter VII ('Liability for Environmental Pollution and Ecological Damage') provides for tort liability for environmental harm. According to Article 1229 of the Code, a tortfeasor who has polluted the environment or harmed the ecological system and thus caused damage to others shall bear tort liability.¹⁷ The tortfeasor here includes natural persons, legal persons, and unincorporated organisations.

b) Public body

16. Article 25 of the Administrative Litigation Law stipulates that the People's Procuratorate must act if it finds violations by an administrative authority with supervisory and administrative functions in the field of the protection of the ecological environment and resources. The procuratorate must consider whether the administrative authority has performed its functions in violation of any law, or has conducted nonfeasance which infringes national interest or public interest. In such instances, the procuratorate must offer procuratorial recommendations to the administrative authority, and urge it to perform its functions lawfully. If the authority then fails to perform functions in accordance with the law, the People's Procuratorate shall file a lawsuit with the People's Court.¹⁸

c) Civil public interest litigation

17. According to Article 58 of the Civil Procedure Law, where there is conduct that pollutes the environment, or that damages the public interest, an authority or relevant organisation prescribed by law may institute an action in a People's Court. If the relevant authority or organisation does not file a lawsuit, the People's Procuratorate may file a lawsuit in the People's Court. If the relevant authority or organisation does file such a lawsuit, the People's Procuratorate may support the filing of this lawsuit.¹⁹ Article 58 of the Environmental Protection Law specifies the organisations that are eligible to file an environmental public interest lawsuit.²⁰ According to Article 29 of the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental

¹⁶ [Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China 2018](#), art 98.

¹⁷ Civil Code 2020, art 1229.

¹⁸ [The Administrative Litigation Law of the People's Republic of China](#) (2017 Amendment), art 25.

¹⁹ [Civil Procedure Law \(2021 Amendment\)](#), art 58.

²⁰ Environmental Protection Law (2014 Amendment), art 58.

Civil Public Interest Litigations, even if an authority or relevant organisation specified by law has already filed an environmental public interest lawsuit, citizens, legal persons and other organisations that have suffered personal or property damage due to the same act of polluting the environment or destroying the ecological environment may also file lawsuits.²¹

d) Administrative remedy

18. Environmental usage is regulated by environmental or resource authorities who are responsible for overseeing the implementation of environmental laws. Relevant administrative agencies can handle some disputes over infringements of environmental regulations directly, or mediate those disputes as a third party. The Water Pollution Prevention and Control Law,²² the Law on Prevention and Control of Pollution from Environmental Noise,²³ the Atmospheric Pollution Prevention and Control Law,²⁴ and the Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes²⁵ stipulate that disputes relating to liability for compensation and amounts of compensation can be mediated by the environmental authorities at the request of the parties to the dispute. If mediation fails, the parties may file a civil lawsuit.

e) Criminal remedy

19. According to Section 6 of Chapter VI of the Criminal Law, if the discharge of pollutants into the environment causes serious danger or harm to people's lives, health, or property safety, criminal responsibility for undermining protection of environmental resources should be pursued in terms of the Criminal Law.²⁶ Further, according to Article 101 of the Criminal Procedure Law, a victim engaged in criminal litigation can bring a civil claim as part of the same criminal proceedings. The procuratorate, or a qualified civil society organisation, can also bring an incidental civil public interest lawsuit as part of the criminal proceedings.²⁷

Harmful or unfair labour conditions

a) Work-related injury insurance

20. According to Articles 2, 30 and 62 of the Regulation on Work-Related Injury Insurance, if an employee is injured in an accident due to harmful labour conditions, or is identified as having an occupational disease, the employee shall be awarded economic compensation through the relevant **work-related injury insurance fund**. An employer is required to pay such insurance premiums for all its employees. If the employer fails to pay this fee for the injured employee in accordance with the law, the employer will be liable to pay the expenses in accordance with the insurance benefits stipulated in the Regulation.²⁸ If the worker has obtained social insurance compensation or compensation from the employer,

21 Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations (2020 Amendment), art 29 (available only in Chinese).

22 [Water Pollution Prevention and Control Law of the People's Republic of China](#) (2017 Amendment).

23 [Law of the People's Republic of China on Prevention and Control of Pollution from Environmental Noise](#) (2018 Amendment).

24 [Atmospheric Pollution Prevention and Control Law of the People's Republic of China](#) (2018 Amendment).

25 [Law of the People's Republic of China on the Prevention and Control of Environment Pollution Caused by Solid Wastes](#) (2020 Revision).

26 [Criminal Law of the People's Republic of China](#) (2020 Amendment) s 6.

27 [Criminal Procedure Law of the People's Republic of China](#) (2018 Amendment), art 101.

28 Regulation on Work-Related Injury Insurance (2010 Amendment), arts 2, 30, and 62.

they may not file a civil lawsuit.²⁹ If the relationship of the worker and the employer does not constitute a labour relationship, but is rather a contractual relationship established to provide a service, the worker must claim relief in accordance with laws related to tort liability for the damages.

b) Personal injury compensation

21. If a worker suffers damage due to harmful or unfair labour conditions, but the damage is not recognised as a work-related injury, the worker can claim compensation for personal injury according to laws related to tort liability. It is worth noting that the judicial practice of the courts in Guangdong District of China recognises that work-related injury insurance benefits and personal injury compensation can be both applied to workplace harm.³⁰

c) Situation of a government employee

22. If a government employee suffers human rights violations due to events or circumstances arising in their work, the government employee may make appeals and complaints in accordance with the Civil Servant Law and related regulations.

d) Arbitration and litigation

23. When an employee suffers damage due to harmful or unfair labour conditions, and a labour dispute is initiated between the employer and the employee, this will be arbitrated by labour arbitration. Only those who are dissatisfied with the arbitration results may resort to civil litigation.³¹



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

The elements to be established in general torts can be categorised as objective or subjective. The objective elements include wrongful acts or omissions, damage, and causation; the subjective elements are the actor's fault, including intention and negligence. In some circumstances, however, not all elements of liability will need to be established, or liability can be reduced.³²

Assault or unlawful arrest and detention

24. When a citizen is assaulted or unlawfully detained by **non-state agencies**, the victim seeking relief needs to provide evidence to prove all the elements itemised above.
25. When it is a **state agency and/or its functionary** who violates the personal rights of the victim while exercising their powers, the State Compensation Law stipulates that the claimant and the state agency responsible for compensation shall provide evidence for their claims.³³ The victim must prove the illegal behaviour

²⁹ [Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury](#) (2020 Amendment), art 12.

³⁰ [Answers to Difficult Issues in the Trial of Labour Dispute Cases by the Guangdong Higher People's Court 2017](#) (Only in Chinese).

³¹ Labour Law (2018 Amendment), art 79.

³² Cheng Xiao, *Tort Law* (3rd edn, Law Press 2021) 215.

³³ State Compensation Law (2012 Amendment), art 15.

of the actors, and must prove the specific damage the victim suffered due to the illegal behaviour. If the victim died or was incapacitated during the detention, the compensatory agency must give evidence to prove that it did not cause the death or injury of the victim.³⁴

Environmental harm

26. In cases of environmental harm involving environmental pollution and ecological damage, Articles 1229 and 1230 of the Civil Code specify that a presumption of causation and no-fault liability shall be applied. The victim claiming tort liability for environmental pollution or ecological damage needs only to prove that the defendant has been polluting the environment and damaging the ecology, and to provide preliminary or probabilistic evidence that establishes a preliminary connection between the defendant's polluting behaviour and the damage the victim has suffered. There is no need for the victim to prove that there is causation between the defendant's act and the damage, or to prove that the defendant is at fault. The defendant shall bear the burden to prove that he should not be liable, or that his liability could be mitigated as provided by the law, and that there is no causation between his act and the damage.³⁵

Harmful or unfair labour conditions

27. According to Articles 17 and 18 of the Regulation on Work-Related Injury Insurance, if the employee is injured as a result of harmful or unfair labour conditions, the employer must file an application to the administrative department of the relevant social insurance for assessment of the work-related injury. If the employer fails to file this application, the worker who suffered the injury, or his close relatives, or the relevant trade union organisation may directly file the application to the administrative department.³⁶ The application must demonstrate that a labour relationship between the employee and the employer exists; that the injury occurred within working hours and workplaces; that the injury was caused by work; and a certificate of medical diagnosis or a certificate of diagnosis of an occupational disease must be furnished.³⁷

Q3

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

The Civil Code regulates the **joint liability of multiple parties** and the **vicarious liability of the employer**. The victim can claim that the joint tortfeasors bear the joint tort liability.

³⁴ *ibid.*

³⁵ Civil Code 2020, arts 1229 and 1230.

³⁶ Regulation on Work-Related Injury Insurance (2010 Amendment), art 17.

³⁷ *ibid.*, art 18.

Multiple-party tort

28. Multiple-party tort mainly involves two categories:

- joint harmful acts; joint dangerous acts; and abetting and aiding such acts;
- multiple-party tort without intentional contact, including tort by unintentional contact between several persons who bear joint and several liability; and tort by unintentional contact between several persons who bear proportionate liability.

a) Joint harmful acts

29. Joint harmful acts refer to two or more persons who carry out infringements based on joint intention and cause damages to others. The joint tortfeasors need to bear joint and several liability.³⁸ The tortfeasor in joint harmful acts also includes the corporate legal person.

SPOTLIGHT: CASE STUDY

In the case of *Sichuan Hydropower Group Jiangyuan Electric Power Corporation, Yuan Yuan, Hengjie Construction Company v Yi Youliang*,³⁹ Yuan Yuan affiliated with Hengjie Construction Company to contract the project and hired Yi Youliang who was injured by electric shock during the construction process. The court found that both Yuan Yuan and the construction company knew that their affiliation violated mandatory provisions of the law, and nevertheless reached an agreement of affiliation. This indicated that the two parties had an intentional contact, the faults were joint intentions, and that they should be jointly and severally liable for the injury of Yi Youliang.

a) Joint dangerous acts

30. Joint dangerous acts are when two or more persons endanger the personal and property safety of others. While the behaviour of one or more of them actually causes the damage, it is not certain who has caused the damage. In this instance, all of them bear joint and several liability, unless the actor can prove that there is no causal relationship between his behaviour and the damage.⁴⁰

b) Abetting and aiding

31. In acts considered to be abetting and aiding, the abettor or the aider does not directly participate in the infringement. To eliminate the difficulty of the victim to prove the causation, the law equates the abettor and the aider as joint tortfeasors who shall jointly bear tort liability.⁴¹ For example, in the case of *Shu Shunping v Ding Hai and Ding Zhongxiang*,⁴² the plaintiff and the defendant Ding Hai had a dispute. Ding Hai then asked two of his friends to beat the plaintiff. Ding Hai himself did not beat the plaintiff. The court decided that Ding Hai and his friends who beat the plaintiff jointly bear the tort liability.

³⁸ Civil Code 2020, art 1168.

³⁹ *Sichuan Hydropower Group Jiangyuan Electric Power Corporation, Yuan Yuan, Hengjie Construction Company v Yi Youliang* [2019] Intermediate People's Court of Chengdu City 16607.

⁴⁰ Civil Code 2020, art 1170.

⁴¹ *ibid*, art 1169.

⁴² *Shu Shunping v Ding Hai and Ding Zhongxiang* [2017] People's Court of Wuhua District 9807.

c) Multiple-party tort without intention contact

32. The multiple-party tort without intentional contact refers to a situation where several persons, without joint intentions, respectively carry out infringements and cause the same damage to others. If each tort behaviour is sufficient to cause all the damage, the tortfeasors shall be jointly and severally liable; if the specific amount of liability of tortfeasors can be determined, the tortfeasors shall bear proportionate liability.⁴³

Vicarious liability of the employer

33. Chinese law also stipulates the vicarious liability of the employer. Employer liability defined narrowly includes not only the employer's liability in civil law, but also the employer's liability in public law and in state compensation liability. Articles 1191 and 1192 of the Civil Code stipulate that where an employee causes damage to another person in the course of acts connected to the performance of the employee's work, or the party providing labour services causes damage to another person in acts connected to the labour services, the employer or the party receiving labour services shall assume tort liability. The employer or the service-receiving party may, after assuming the tort liability, claim indemnification against an employee or service-providing party who acts intentionally or with gross negligence.⁴⁴ Articles 7 and 16 of the State Compensation Law stipulate that state agency shall bear state compensation liability for related tortious damages caused by their functionaries in the exercise of their powers. After compensating the damages, the state agency can also order the functionary who has acted with intention or gross negligence, or the entrusted organisation or individual, to bear part or all the compensation expenditure.⁴⁵
34. Employer liability more broadly also includes instances where someone suffers damage from a third party due to the performance of the work task or the provision of service. In such circumstances, the employer or the party receiving the service shall be liable in accordance with the law. An employee who suffers damage from a third party due to the performance of the work task is considered to have suffered a work-related injury, and the employee can receive work-related injury insurance compensation.⁴⁶ If the service provider in the contractual relationship suffers damage from a third party when providing the service, the service provider has the right to request the third party to bear tort liability, and they also have the right to request compensation from the party receiving the service.⁴⁷

Vicarious liability in environmental torts

35. According to Article 1233 of the Civil Code, where environmental pollution or ecological damage is caused due to the fault of a third person, the person who has suffered harm may claim compensation against either the tortfeasor or the third person. After making compensation, the tortfeasor has the right to indemnification against the third person.⁴⁸

⁴³ Civil Code 2020, arts 1171 and 1172.

⁴⁴ *ibid*, arts 1191 and 1192.

⁴⁵ State Compensation Law (2012 Amendment), arts 7 and 16.

⁴⁶ Regulation on Work-Related Injury Insurance (2010 Amendment), art 14.

⁴⁷ Civil Code 2020, art 1192.

⁴⁸ *ibid*, art 1233.

Q4

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

36. China does not directly regulate a parent company's liability for infringement by its subsidiary or supplier. The Company Law⁴⁹ provides general provisions for how a parent company should assume the debts of its subsidiary. Article 14 of the Company Law provides that a company may set up branches or subsidiaries. A branch does not have legal personality and its civil liabilities shall be borne by its parent company. Subsidiaries, however, have **separate legal personality** and are independently responsible for their own civil liabilities.⁵⁰ Article 3 of the Company Law stipulates that a company shall bear liability for its debts with all its property; and for a joint-stock limited company, a shareholder shall be liable for the debts of company to the extent of the shares it has subscribed to.⁵¹
37. Thus, in the Chinese legal framework, there are two main avenues to require a parent company to bear liability for infringement by its subsidiary:
- by identifying the parent company itself as the tortfeasor according to laws related to tort liability;
 - by identifying the subsidiary as the tortfeasor, but requiring the parent company and the subsidiary to bear joint and several liability through piercing the corporate veil.

Parent company as the tortfeasor

38. The general provisions of laws related to tort liability are the primary vehicle to determine whether a company bears tort liability. It is worth noting that in environmental torts, in addition to its provisions on responsibility for environmental pollution and ecological damage, the Civil Code also specifically provides for liability for ultra-hazardous activities such as nuclear accident damage liability and aircraft damage liability. The tort liability subjects of ultra-hazardous activities covers inter alia the possessors, users, owners or managers of ultra-hazardous materials, and the operators of civilian nuclear facilities and so on.⁵² In other words, under the conditions of liability for ultra-hazardous activities, a parent company may bear tort liability as the possessor or owner of ultra-hazardous materials, but the scope of application of this liability is extremely limited.

Piercing the corporate veil

39. According to Article 20 of the Company Law, where any of the shareholders of a company evades the payment of its debts by abusing the independent status of legal person or abusing the shareholder's limited liabilities, and where this action seriously injures the interests of any creditor, the shareholder shall bear several

⁴⁹ [Company Law of the People's Republic of China](#) (2018 Amendment).

⁵⁰ *ibid*, art 14.

⁵¹ *ibid*, art 3.

⁵² Civil Code 2020, ch VIII.

and joint liability for the debts of the company.⁵³ Company creditors here refers to all types of creditors in civil relations, including but not limited to creditors of contractual debts, creditors of tort debts, creditors of *negotiorum gestorum*,⁵⁴ and creditors of unjust enrichment. Therefore, the victims of infringements by the company or its staff are also creditors.⁵⁵ Chinese scholars and legal practitioners tend view that if the parent company is the shareholder of its subsidiary and meets the conditions for piercing the corporate veil, then the parent company shall take responsibility for the environmental infringement behaviour of its subsidiary.⁵⁶

40. It is worth mentioning that in recent years, many scholars in China have been using the United Nations framework for business and human rights (and, in particular, the [UN Guiding Principles on Business and Human Rights](#)) as a blueprint, calling on the Chinese government to legislate in this field to create legal incentives for companies to assume social responsibilities, including to require companies to bear responsibility for human rights violations by contractors in a supply chain, and requiring companies to conduct human rights due diligence during mergers and acquisitions.⁵⁷

Q5

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

41. Article 179 of the Civil Code stipulates 11 forms of civil liability, of which eight are the forms of tort liability, including: cessation of the infringement; removal of the nuisance; elimination of dangers; restitution; restoration; compensation for losses; extension of apologies; elimination of adverse effects; and rehabilitation of reputation. These forms of tort liability may be applied separately or concurrently. There are provisions for punitive damages for specific infringements.⁵⁸

Assault or unlawful arrest and detention

a) Private body

42. If an infringement endangers the personal safety of others, the victim has the right to request the tortfeasor to cease the infringement, remove the nuisance, eliminate the dangers, or bear other liabilities.⁵⁹ If the tortfeasor causes damage to others due to assault or illegal arrest or detention, the tortfeasor shall compensate medical expenses, nursing expenses, transportation expenses, nutrition expenses, food allowances for hospitalisation and other reasonable expenses for treatment and rehabilitation, as well as lost earnings due to missed work. In the event of tort resulting in disability, further compensation shall be made in the form of expenses for assistive devices and disability compensation. Where tort results in death,

⁵³ Company Law (2018 Amendment), art 20.

⁵⁴ *Negotiorum gestorum* refers to the act of voluntarily managing the affairs of others or providing services for others in order to avoid the loss of the interests of others without legal or agreed obligations.

⁵⁵ Liu Junhai, *Modern Corporation Law* (Law Press 2008) 476.

⁵⁶ Feng Ru, 'Piercing the Parent-Subsidiary Corporate Veil in Environmental Tort Cases' (2014) 2 *Hebei Law Science* 158.

⁵⁷ Radu Mares and Zhang Wanhong, 'Critical Issues in Business and Human Rights and Its Significance in a New Era: Focusing on the UN Guiding Principles on Business and Human Rights' (2018) *Journal of Southwest University of Political Science and Law* 2.

⁵⁸ Civil Code 2020, art 179.

⁵⁹ *ibid*, art 1167.

further compensation shall be made in the form of funeral expenses and death compensation.⁶⁰ If the infringement of the personal rights causes serious mental damage, the victim has the right to request compensation for mental damage.⁶¹

b) Public body

43. The State Compensation Law stipulates similar liability if state agencies or their functionaries infringe upon the personal rights of citizens when exercising their powers. In addition to general liability for compensation, in cases of violation of a citizen's personal freedom, the daily compensation shall be calculated according to the national average daily wages of the employee in the previous year.⁶²

Environmental harm

44. In environmental torts, if the tortfeasor deliberately pollutes the environment and damages the ecosystem in violation of the law, causing serious consequences such as death, disability, mass injuries, or significant property damage to the victim, the victim has the right to request corresponding punitive damages.⁶³ For environmental damage that can be restored, state agencies or organisations specified by law have the right to request the tortfeasor to bear the responsibility for restoration within a reasonable period.⁶⁴
45. In addition, the tortfeasor can be required to compensate for the following: losses caused by the suspension of service functions during the period from damage to the environment to the completion of restoration; losses caused by permanent damage to environmental functions; costs for investigating and evaluating the environmental damage; costs for cleaning up pollution and restoring the environment; reasonable costs for preventing the occurrence and expansion of damage.⁶⁵

Harmful or unfair labour conditions

46. A victim who suffers damage due to harmful or unfair labour conditions enjoys work-related injury insurance benefits which can be claimed through administrative procedures. The work-related injury insurance fund can pay for medical expenses, nursing expenses, wages and benefits during the period of suspension of pay, and expenses for assistive devices.⁶⁶
47. If a victim becomes disabled as a consequence of an injury suffered due to their work, the victim can also receive a one-time disability subsidy allocated according to the level of disability. If the labour relationship is terminated as a result of disability, the victim can also receive a one-time work-related-injury medical subsidy and a one-time disability-employment subsidy.⁶⁷ If a victim dies due to a work-related injury, close relatives of the victim can receive funeral subsidies, dependent relatives' pensions, and a once-off work death subsidy from the insurance fund.⁶⁸

⁶⁰ *ibid*, art 1179.

⁶¹ *ibid*, art 1183.

⁶² State Compensation Law (2012 Amendment), art 33.

⁶³ Civil Code 2020, art 1232.

⁶⁴ *ibid*, art 1234.

⁶⁵ *ibid*, art 1234.

⁶⁶ Regulation on Work-Related Injury Insurance (2010 Amendment), arts 30, 32 and 33.

⁶⁷ *ibid*, art 35.

⁶⁸ *ibid*, art 39.

Q6**What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?****The advantages of using civil claims**

48. The **advantages** of using civil claims as a means of human rights protection are as follows:
- a) This approach is conducive to safeguarding the economic interests of the victim as the victim can receive substantial material compensation after his personal rights are violated.
 - b) A victim can obtain better relief through civil claims than through administrative and criminal channels. For example, after suffering personal injury, the victim can claim substantial compensation for mental damage.
 - c) The procedures of civil claims are more open and they are fairer. The judicial processes can be relatively neutral, and there is greater protection of the procedural rights of victims.

The disadvantages of using civil claims

49. The **disadvantages** of protecting human rights through civil claims are as follows:
- a) For the victim, the time and economic cost (such as litigation and legal fees) of civil litigation are both high, and it may be difficult to obtain effective relief sufficiently quickly.
 - b) Compared with an approach through administrative channels and criminal incidental civil litigation, the plaintiff bears a far greater burden of proof in civil litigation, especially in the face of serious torts, and it may be difficult to provide evidence.

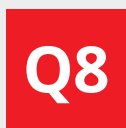
Q7**Can civil claims be brought against a foreign defendant and if so, what are the rules for that?**

50. According to the Civil Procedure Law and its judicial interpretation, civil lawsuits can be brought against foreigners, foreign enterprises or foreign organisations in China. According to Article 5 of the Civil Procedure Law, foreign nationals, stateless persons and foreign enterprises and organisations which institute or respond to actions in the People's Courts shall have equal procedural rights and obligations as Chinese citizens, legal persons and other organisations.⁶⁹ Part 4 of the Civil Procedure Law provides detailed provisions for foreign-related civil procedures, involving jurisdiction, service of process, periods, arbitration and international judicial assistance.⁷⁰

⁶⁹ Civil Procedure Law (2021 Amendment), art 5.

⁷⁰ *ibid*, part 4.

51. In determining jurisdiction, Articles 22 and 27 of the Civil Procedure Law provide that if the place of the infringement, the domicile of the defendant, the place of habitual residence, the place of the representative office, etc, are in China, the corresponding court can have jurisdiction.⁷¹ According to Article 283 of the Civil Procedure Law, judicial assistance can be provided in the service of documents, investigation and evidence collection and other litigation acts in foreign-related civil litigation in accordance with the international treaties concluded or acceded to by China.⁷²
52. The Law on Choice of Law for Foreign-related Civil Relationships⁷³ clarifies the scope of the choice of law in foreign-related civil disputes. In relation to tort liability, Article 44 of the Law stipulates that tort liability shall be governed by the law of the place of the tortious act, but if the parties have a common habitual place of residence, the law of the place of common habitual residence shall apply. After the infringement occurs, if the parties agree to choose the applicable law, the agreement shall be followed.⁷⁴ In particular, in the event of a labourer being injured due to harmful or unfair labour conditions, the law of the labourer's place of work, or the employer's main business place, or the place where labour services are dispatched can be applied in accordance with Article 43 of the Law on Choice of Law for Foreign-related Civil Relationships.⁷⁵



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

53. The following resources are useful to further explain China's laws, precedents and academic views on civil remedies for human rights violations.

Publicly available legal resources

54. Some useful publicly available legal resources are:
- a) The Chinese People's Government website (<http://www.gov.cn/index.htm>), where legal information can be obtained through the information disclosure link.
 - b) The official website of the Supreme People's Court of China (<http://www.court.gov.cn/>), where judicial interpretations, judicial data and judicial cases issued by the Supreme People's Court can be obtained.
 - c) The official website of the Supreme People's Procuratorate of China (<https://www.spp.gov.cn/>), where public interest litigation cases can be obtained.
 - d) The Judgment Document Website (<https://wenshu.court.gov.cn/>), where the legally effective judgments, rulings, and decisions of the People's Courts at all levels are published.

⁷¹ *ibid*, arts 22 and 27.

⁷² *ibid*, art 283.

⁷³ [Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships](#) 2010.

⁷⁴ *ibid*, art 44.

⁷⁵ Law on Choice of Law for Foreign-related Civil Relationships 2010, art 43.

- e) The China Law Information Database (<http://www.pkulaw.cn/>), which has four retrieval systems, where Chinese law, Chinese judicial cases, Chinese law journals, and English versions of Chinese law can be obtained.
- f) The CNKI website (<https://www.cnki.net/>), for academic literature.

Other resources

55. Some other useful resources are as follows:

- a) For information on laws and regulations: For legal standards, please refer to the Bulletin of the Standing Committee of the National People's Congress; for administrative regulations, please refer to the Bulletin of the State Council; for judicial interpretations, please refer to the Bulletin of the Supreme People's Court and the Supreme People's Procuratorate.
- b) For information on cases: *China Case Guidance*, edited by the Supreme People's Court and the Supreme People's Procuratorate; *Selected Cases of the People's Court*, edited by the China Institute of Applied Jurisprudence of the Supreme People's Court, etc.
- c) Newspapers: *Legal Daily*, *People's Court Daily*, *Procuratorate Daily*, and local legal daily newspapers.

Books

56. Several books are recommended, including:

- Cheng Xiao, *Tort Law (Third Edition)*, Law Press, 2021.
- Wang Liming, *Tort Law (Second Edition)*, China Renming University Press, 2021.
- Yang Lixin, *Tort Liability Law*, Law Press, 2020.
- Shen Kui, *State Compensation Law: Principles and Cases (Second Edition)*, Peking University Press, 2017.
- Wang Jing, *Environmental Law (Fourth Edition)*, Peking University Press, 2018.
- Lv Zhongmei, *New Vision of Environmental Law (Third Edition)*, China University of Political Science and Law Press, 2019.



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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CS

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Claims against police

57. According to Article 3 of the State Compensation Law, in Case Scenario 1, the police as staff members of the state agency, violated citizens' personal rights by beatings, torture, and illegal detention when exercising their powers, and in so doing caused damages. The victims have the right to claim state compensation through the administrative organ of the police in accordance with the State Compensation Law.⁷⁶ The victims need to prove the existence of the damage and provide preliminary proof that there is a causal relationship between the damage and the illegal behaviour of the administrative agency.

Claims against Security Co

58. Article 3 of the State Compensation Law stipulates that if a state organ or its functionaries cause bodily injury or death to a citizen by battery or maltreatment, or by instigating or conniving at battery or maltreatment by another person, the victim shall have the right to compensation.⁷⁷ Article 7, paragraph 4 of the State Compensation Law also stipulates that where an organisation or an individual, in exercising the administrative powers entrusted to them by an administrative organ, infringes upon the lawful rights and interests of a citizen or a legal person or other organisations, thereby causing damage to them, the administrative organ that did the entrustment shall be the organ liable for compensation.⁷⁸ Therefore, if the personnel of the Security Co directly participated in illegal acts after accepting the entrustment of the police agency, the police agency shall bear the state compensation liability.

59. Existing evidence can only prove that the personnel of the Security Co provided vehicles, equipment, and water to the police, so the victims may not be able to directly file a civil litigation against them.

⁷⁶ State Compensation Law (2012 Amendment), art 3.

⁷⁷ *ibid.*

⁷⁸ State Compensation Law (2012 Amendment), art 7.

Q2

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

60. The police in Case Scenario 1 are suspected of committing criminal offences such as illegal detention and intentional injury. Therefore, the victims can seek criminal responsibility for the police through criminal charges. It is also possible for victims to bring an incidental civil litigation during the criminal procedure. If the victims receive compensation through this approach, they shall no longer be entitled to claim state compensation.
61. If the personnel of the Security Co can be shown to have the joint intention of illegal detention and intentional injury with the police, they can also be criminally charged on suspicion of committing a joint crime.

Q3

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

62. The State Compensation Law was applied in the case of *Zhang Ming v the Detention Centre of the Qinzhou Branch of the Tianshui City Public Security Bureau*.⁷⁹ On 11 March 2013, Zhang and the criminal suspect Xin were chasing each other as they were playing during their free time in the front yard of the prison area of the Qinzhou Detention Centre. After reaching Xin, Zhang crossed his legs and hugged Xin's legs from behind. Xin turned and pulled Zhang by the shoulder, causing Zhang to fall to the ground and fracture his right calf. The court determined that inadequate supervision of the prisoners by the detention centre played a role in the damage suffered by Zhang, and the detention centre should be liable for state compensation.

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⁷⁹ *Zhang Ming v The Detention Centre of the Qinzhou Branch of the Tianshui City Public Security Bureau* [2019] Higher People's Court of Gansu Province 2.

CaseScenario 2

Q1

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

≡

CS

156

Claims against Parent Co

63. The question of whether a parent company assumes defendant responsibility depends on whether it participates in joint torts or abuses its shareholder status. If the parent company and its subsidiary jointly carry out environmental torts, they shall bear joint and several liability. If the parent company and its subsidiary separately carry out environmental torts, they shall bear corresponding liability according to the degree of damage that their actions cause. In Case Scenario 2, Parent Co may not assume joint and several liability beyond the limit of its shares, but due to litigation strategy considerations, in addition to Subsidiary Co, Parent Co and other subsidiaries can also be listed as co-defendants.
64. In accordance with Articles 1229 and 1230 of the Civil Code, if the environmental pollution and ecological damage causes harm to others, the tortfeasor shall bear the tort liability regardless of whether the tortfeasor is at fault. In this case, the plaintiff shall provide evidence to prove the following facts: (i) The tortfeasor discharged pollutants or damaged or destroyed the ecology; (ii) The victim suffered damage; (iii) The tortfeasor's behaviour and the damage are related.⁸⁰ According to Article 61 of the Civil Procedure Law, the plaintiff's representative for such litigation may include a lawyer or basic legal service worker, a close relative or staff member of a party, a citizen recommended by the community or the entity employing a party, or a citizen recommended by a relevant social group.⁸¹

Claims against Subsidiary Co

65. In addition, if Subsidiary Co violates the regulations and causes ecological damage, the provincial, municipal and prefecture-level people's governments and their designated relevant departments and institutions, or the departments entrusted by the State Council to exercise the ownership of nationally owned natural resource assets, may act as plaintiffs to bring litigation for compensation for ecological environmental damage. In this kind of litigation, the plaintiff shall bear the burden of proof for the following facts: (i) The defendant has committed environmental

⁸⁰ Civil Code 2020, arts 1229 and 1230.

⁸¹ Civil Procedure Law (2021 Amendment), art 61.

pollution, ecological damage or other circumstances for which they should be liable in accordance with the law; (ii) The ecological environment has been damaged, and the specific amount of repair costs and damage compensation; (iii) There is a correlation between the defendant's behaviour and the damage to the ecological environment.

66. The authorities and relevant organisations stipulated by law can also file public interest litigation in cases where environmental pollution or ecological damage has harmed the public interest of society, or has a major risk of harm to the public interest of society. If no relevant organisation or authority initiates such litigation, the People's Procuratorate can initiate public interest litigation. If the relevant organisation has filed litigation, the People's Procuratorate can support the litigation. Detailed information can be found at [17] above.



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

Criminal remedy

67. Section 6 of Chapter VI of the Criminal Law has provisions relating to crimes of undermining the protection of environmental resources.⁸² Therefore, criminal prosecution is a way to hold the perpetrators liable. In criminal litigation, a victim can bring a criminal incidental civil lawsuit. The procuratorate, or a qualified social organisation or institution can also bring a criminal incidental civil public interest lawsuit.⁸³

Administrative remedy

68. Administrative mediation by relevant administrative agencies on disputes relating to environmental infringements is also a way to solve an environmental dispute. Detailed information can be found at [18] above. Compared with civil litigation, the administrative process is simpler and procedurally easier, and environmental authorities have greater professional knowledge in the field of environmental protection than judges, so they are more professionally equipped to manage dispute resolution.

⁸² [Criminal Law of the People's Republic of China](#) (2020 Amendment) s 6.

⁸³ [Criminal Procedure Law of the People's Republic of China](#) (2018 Amendment), art 101.

Q3**Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?**

69. A similar case to Case Scenario 2 is the case of the dam break that occurred at Xinyi Zijin Mining. On 21 September 2010, affected by the Typhoon Fanapi, a dam breach occurred in the mine of Xinyi Zijin Mining Company, causing 22 deaths and a large amount of property damage. After the disaster, the government and the affected villagers filed the lawsuit demanding compensation from the responsible parties. The plaintiff claimed that Xinyi Zijin's parent company Zijin Group was the sole shareholder with registered capital not fully paid and mixed personalities in terms of property, personnel, and business. Therefore, the plaintiff sought that Zijin Group should bear joint and several liability. This case was finally settled by mediation.⁸⁴



CaseScenario 3

Q1

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

Claims against Brand Co

70. First, if Brand Co did not directly participate in the joint tort, the victim could not claim civil liability against it.

Claims against Factory Co

71. In relation to Factory Co, the victims can apply for work-related injury or death reparation and enjoy work-related injury insurance benefits. The elements for the victims to prove include: the employee and the employer have a labour relationship; the injury occurred during working hours and at the workplace; the injury occurred due to work; and the specific results of the damage.

⁸⁴ Ru (n 56) 159.

72. In addition, it is also possible to claim civil liability for the specific actor who caused the fire. The elements for the plaintiff to prove include: the actor's behaviour was an infringement; the victim has suffered losses; the victim's loss has a causal relationship with the actor's behaviour; and the actor is at fault.
73. Employees who have suffered physical abuse, sexual harassment, and compulsory unpaid overtime, can claim civil compensation from the relevant tortfeasor, and the employer can also be required to bear responsibility.

Q2

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

74. In a labour relationship, if an employee claims compensation for work-related damage, the labour arbitration committee will arbitrate the dispute first. Only those who are dissatisfied with the arbitration results can resort to civil litigation.
75. In addition, the Labour Law and other regulations encourage that in labour and personnel disputes, precedence should be given to negotiation between employees and employers, as well as the mediation hosted by the administrative department. In Case Scenario 3, negotiation may be an efficient way of relief.
76. If the relevant responsible person of the employer is suspected of criminal acts such as fire crimes or major liability accident crimes, victims may also require that person to bear criminal responsibility through criminal charges.

Q3

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

77. A similar case is the Shenzhen Zhili Toy Factory fire incident in 1993.⁸⁵ This incident had a significant impact and directly contributed to the formulation of the Labour Law. On 19 November 1993, a short-circuit in the electrical wiring of the warehouse of the Zhili Toy Factory caused molten beads to ignite, which in turn ignited combustibles that were stacked nearby, causing a big fire which resulted in 87 deaths and 51 injuries. The investigation team found the following: iron bars were welded to all the factory windows, and most were covered with barbed wire; there were few evacuation routes and these were not unobstructed. These factors meant that nearly 300 workers could not quickly escape. Moreover, the burning fibre emitted poisonous gas, and many workers suffocated at the entrance of the stairs. The relevant personnel of the factory were sentenced to fixed-term imprisonment for the crime of major liability accident; the responsible personnel of the administrative department were sentenced to fixed-term imprisonment for the crime of bribery and dereliction of duty.

⁸⁵ Chang Kai, 'The 20th Anniversary of Shenzhen Zhili Fire' (2013) *China Worker* 11.



A HANDBOOK FOR PRACTITIONERS | COLOMBIA

Civil Liability for Human Rights Violations



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FREQUENTLY USED ABBREVIATIONS

CCA	Constitutional Class Action
PA	Popular Action

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COLOMBIA



Colombia has a civil law system. The law of civil remedies primarily refers to extra-contractual liability (also known as non-contractual liability) equivalent to tort liability in common law jurisdictions. The Colombian legal system has a few distinctive features. First, reparation for harm caused by public bodies is obtained under contentious-administrative jurisdiction and is not technically considered a civil remedy. Second, constitutional actions, such as popular actions, class actions and a writ for constitutional protection, or *tutela*, are available to the victims of human rights violations. Using civil claims as a means of human rights protection in Colombia has several advantages, but the cost of litigation and the lengthy duration of proceedings remain significant barriers.



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Democracy Index
2021 Ranking

64/100

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. Colombian law provides many avenues to seek civil reparation¹ for human rights abuses. The selection of an appropriate avenue for reparation depends on who caused the harm, who was harmed, and what right or interest was injured.
2. Whenever a *private party* causes harm to another, civil remedies are available under Colombia's [Civil Code](#).² Generally, the injured party may sue an individual, a group of individuals, or a private company(ies) for extra-contractual harm. Extra-contractual liability designates situations of civil liability that occur in the absence of a contract between the parties. However, if an individual is injured by the actions or omissions of a *public body* (ie police officers or judicial agents), they must seek reparations through the country's **contentious-administrative jurisdiction**. The applicable law for reparations from state actors is the [Code of Administrative Procedure and Administrative Litigation](#),³ and not the Civil Code.
3. Depending on the number of claimants and the type of rights affected, constitutional actions like **popular actions** (for the protection of collective rights) and **class actions** (when a group of twenty or more people have been harmed) are also available. The remedy under Colombia's [Constitution](#) known as a **writ for constitutional protection** or *tutela*, although very common in Colombian legal culture, is not meant to grant economic damages to victims. Nonetheless, it is possible to use this avenue in exceptional circumstances. For reparations for injuries that resulted from a crime, another option is to start civil reparations proceedings within a criminal process.
4. This report discusses several avenues to seek reparations for human rights abuses through civil litigation, including through asserting extra-contractual civil liability, labour law and constitutional guarantees. It also discusses three significant Supreme Court of Justice decisions.⁴ In the first of these, relevant to the understanding of causation, the Supreme Court found an oil company civilly liable and sentenced it to pay economic and non-economic damages for the harms caused by an armed group's blasting of a pipeline (see the *Machuca* case highlighted after para [10] below). In the second case, relevant to strict liability for environmental harms, the Supreme Court held that a company was strictly liable for a flower grower's crop loss because its logging operations altered the ecosystem (see [25] below). In the third case, relevant to the possibility of using the civil courts to claim labour-related harms, the Supreme Court held the country's largest airline accountable for disincentivising the right to freedom of association and ordered it to pay civil reparations to its union (see the *Avianca* case highlighted after [14] below).

¹ We define a civil reparation as a remedy that comes from a judicial process where compensation or other forms of relief can be ordered if a harm is caused by another person.

² Civil Code of the Republic of Colombia, Law 84 of 1873.

³ Code of Administrative Procedure and Administrative Litigation, Law 1437 of 2011.

⁴ [Supreme Court of Justice](#) decisions can be found on its website.

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Claims against public bodies

5. Reparation for harms caused by public bodies can be obtained under Colombia's contentious-administrative jurisdiction, but this is not technically considered a civil remedy in Colombian law. Nonetheless, contentious-administrative law provides a cause of action for compensation or other forms of relief for harm caused by another person. Thus, for comparative purposes, and for the purposes of highlighting remedies available for human rights violations under Colombian law, remedies arising from contentious-administrative law are listed with civil remedies in this chapter, although they do not arise from strictly civil causes of action (ie under the Civil Code).
6. Civil courts in Colombia do not have jurisdiction over public bodies. Article 104 of the Code of Administrative Procedure and Administrative Litigation states that the purpose of the contentious-administrative jurisdiction is to judge administrative disputes arising from the activities of public bodies and of private persons who perform public functions.⁵ Thus, claims against public bodies related to assault or unlawful arrest and detention, environmental harm, or harmful or unfair labour conditions, must be brought before the contentious-administrative jurisdiction. In these cases the main source of liability is article 90 of the [Constitution](#),⁶ which establishes 'wrongful damage' (*daño antijurídico*) as the legal standard for the liability of a public body for its actions or omissions.
7. It is important to note that in a claim brought in the contentious-administrative jurisdiction, a private corporation or individual can be included as a defendant, but only if the claim also includes a public body or a private person who performs public functions. Even if the public body is found not liable during such proceedings, the court could still hold the private corporation or individual liable. There is no final requirement of shared liability.
8. Except in criminal proceedings, if a public official or a private person who performs public functions is personally at fault, and his actions cannot be attributed to the public institution or their public function, victims must seek remedy through civil courts. If the action or omission of the public official is attributable to their institution, the claim must be brought before the contentious-administrative courts, whether the claimant sues the public official or their institution/employer.

⁵ Public bodies include companies in which the State has a participation equal to or greater than 50 per cent of its capital. Law 410 of 1971, art 466.

⁶ Constitution of Colombia, 1991.

Claims against private corporations or individuals

Extra-contractual civil liability

9. The main avenue to achieve redress in Colombia for harms that do not arise from a contract is an **extra-contractual civil liability claim**.⁷ Claimants must prove that the defendant's act or omission resulted in the harm they suffered. In exceptional cases, and according to article 167 of the [General Procedure Code](#),⁸ the theory of the dynamic burden of proof allows judges to shift this burden to the defendant. The Constitutional Court has left open the possibility of pursuing civil litigation to hold third parties accountable for their involvement in causing harm.⁹
10. Generally, the statute of limitations for extra-contractual civil liability claims is ten years.¹⁰ For claims concerning the conduct of a third party for which the defendant is liable, the statute of limitations is three years.¹¹ Other special cases have even shorter statutes of limitations (eg liability for damages caused by airplanes expires after two years,¹² and the statute of limitations on insurance claims is two years¹³). The statute of limitations varies for damages that are sought through civil proceedings within a criminal process (eg through a 'comprehensive reparation proceeding' explained in [20] below).

SPOTLIGHT: THE MACHUCA CASE

Decided by the Supreme Court of Justice in late 2018, the *Machuca* case is a landmark ruling on extra-contractual liability involving business activities and violations of human rights. The Supreme Court found Ocesa, an oil company, civilly liable for causing harm and sentenced it to pay economic and non-economic damages (see explanation of these types of damages in [46] below) to the Machuca community, which was affected by an oil spill that resulted when an armed group destroyed an oil pipeline. The issue at hand was not only the environmental harm caused by the oil spill (similar to the [Chevron case in Ecuador](#) or [Shell in Nigeria](#)), but also that the spilled oil caught fire and dozens of Machuca community members died as a result. Colombian law does not clearly delimit when an intervening event exonerates a party from civil liability. The Supreme Court decided that because the company created a risk which could have been avoided by designing the pipeline in a different way (ie avoiding its proximity to the Machuca community), it was civilly liable, despite the long causality chain.¹⁴

⁷ Civil Code (n 2), art 2341.

⁸ General Procedure Code, Law 1564 of 2012.

⁹ Constitutional Court. [C-080/2018](#). Antonio José Lizarazo Ocampo. Note: The citation of Colombian court rulings always includes the name of the judge in charge of drafting the judgment. In this instance the judge is Antonio José Lizarazo Ocampo.

¹⁰ Civil Code (n 2), art 2356.

¹¹ *ibid* art 2358.

¹² Commerce Code, Decree 410 of 1971 art 183.

¹³ *ibid* art 1081.

¹⁴ Supreme Court of Justice. Civil Cassation Chamber. [Filing 05736-31-89-001-2004-00042-01](#). [SC5686-2018](#). 19 December 2018. Margarita Cabello Blanco.

Labour law claims

11. Article 2 of the [Procedural Code of Labour and Social Security](#)¹⁵ states that disputes and claims relating directly or indirectly to a labour contract, may only be brought before judges in labour courts.¹⁶ The claimant must establish the link to the work and the link between the employer and the worker.
12. According to article 216 of the [Substantive Labour Code](#) (the Labour Code),¹⁷ if the employer is proved to be at fault for a workplace accident or illness, full compensation is due. If the claim involves the consequences of an employer's *action*, the worker must prove that the employer is at fault, and the employer must prove that they carried out due diligence and took care to avoid liability. If the claim involves the consequences of an employer's *omission*, the employer must prove it undertook due diligence to protect the worker's health and safety.¹⁸
13. Labour contracts are applicable mainly in private relationships. Public officials are not usually bound to public bodies through labour contracts; they have a different legal relationship. Therefore, claims relating to conditions of work of public officials are mainly brought before the contentious-administrative courts. A public official would be able to bring a claim before a labour court if the person is categorised as a 'public worker'.¹⁹ This would be a person who is involved in the construction or maintenance of public works or is a non-managerial worker of an industrial or commercial public company or mixed-economy companies with 90 per cent or more of public capital participation.²⁰
14. If an employee, whether formally hired or not, is subject to harmful, unfair and/or illegal labour conditions, they may recover economic damages. If, for example, an employee works longer hours than the legal maximum of 48 hours per week and eight hours per day (10 hours including overtime),²¹ they may sue their employer and ask the court to order the employer to pay the actual hours that the employee worked without pay.²² If children are working without written authorisation from the Ministry of Labour, the employer will have to pay the child all owed amounts that arise from the contract (eg salary, medical insurance, pension, etc) in addition to administrative fines.²³ Where an employee is hired through an intermediary who does not disclose an employer's identity, and the employee suffers harmful, unfair and/or illegal labour conditions, rules governing the responsibilities of agencies and joint and several liability apply to the intermediaries.²⁴

15 Procedural Code of Labour and Social Security, Decree 2158 of 1948.

16 This also applies to issues relating to union-related disputes and some social security disputes.

17 [Substantive Labour Code 1951](#).

18 Supreme Court of Justice. Labour Cassation Chamber. Filing 64480. SL3189-2020. 19 August 2020. Donald José Dix Ponnefz.

19 Administrative Department for the Public Function. [Concept 48711/2015. Filing 20156000048711](#).

20 Law Decree 3135 of 1968, art 5.

21 Or, exceptionally, 10 hours per day, with extra pay. For more detail, see art 161 of the Labour Code (n 17).

22 *ibid* art 161.

23 *ibid* art 31.

24 *ibid* art 32.

SPOTLIGHT: THE AVIANCA CASE

In 2020, the Labour Chamber of the Supreme Court of Justice ruled in a case against *Avianca* – the country’s largest airline – and ordered it to pay its union a civil fine for having disincentivised workers from joining a union. Importantly, the Supreme Court ordered that the violation of human rights in this case had to be ‘adequately repaired’, even if claimants could have sought redress through administrative²⁵ or criminal courts.²⁶ The Court established that when there is a violation of the fundamental right to freedom of association, ‘it is necessary to activate all the protection and defence mechanisms of the human rights protection systems, which ensure the adoption of effective measures to guarantee comprehensive reparation, the imposition of dissuasive sanctions, and the establishment of guarantees of non-repetition’.²⁷ The fact that other areas of law protect unions and unionised employees did not, in the Court’s opinion, preclude the possibility of seeking civil remedies through labour courts.²⁸ The Supreme Court decided that the company’s incentives for employees who did not join the union had resulted in economic damage to the union because it reduced the union’s bargaining power and lost the union its opportunity to have more members. The Court did not specify whether future claims seeking similar civil reparation should be filed in civil or in labour courts.

Social security mechanisms

15. Colombian law also provides workers with another legal avenue to claim their rights. When a worker is harmed by a workplace illness or accident, the Colombian social security system provides them with economic and healthcare benefits, mainly through the Labour Risk Social Security System administered by the country’s Labour Risk Administrator. According to article 4 of [Law 1562 of 2012](#),²⁹ the worker must have contracted an *illness* as a result of exposure to inherent risks related to the work or the environment in which the work was carried out. Article 3 of Law 1562 of 2012 defines a workplace *accident* as a sudden event that occurred because of or related to the work causing a lesion, disability, or death.³⁰
16. Employers are legally bound to register employees on the Labour Risk Social Security System and pay the applicable fees for them. If a workplace accident or illness occurs, workers can seek healthcare and economic compensation through this system.³¹ If the employer fails to fulfil its obligation, the law provides for different

²⁵ *ibid* art 354.

²⁶ Criminal Code, Law 599 of 2000, art 200.

²⁷ Supreme Court of Justice. [Labour Cassation Chamber. 3597-2020](#). 16 September 2020. Iván Mauricio Lenis Gómez.

²⁸ *ibid*.

²⁹ Law 1562 of 2012.

³⁰ Art 3 of Law 1562 of 2012 details some situations that should be considered a labour accident. This provision is useful as a guide, especially in cases which fall into a grey area.

³¹ Healthcare includes services such as medical care, surgery, recovery care, medication, etc. Economic compensation includes (i) paid leave during the recovery period if the worker cannot go back to work; (ii) economic compensation when a permanent partial disability occurs as a consequence of the event and the work capacity loss is classified between five per cent and 50 per cent; (iii) a disability pension if the classification of work capacity loss surpasses 50 per cent; (iv) a survivor pension for some of the family members if the worker dies as a consequence of the accident or illness; and/or (v) a sum to cover the worker’s funeral expenses.

consequences depending on whether (i) there was a delay in the payments of the fees, or (ii) the employer did not register their workers. Generally, if an employer does not register a worker on the system, the employer must assume the duties of the Labour Risk Administrator, granting the worker the benefits they would have received had the employer registered them on the system in the first place.

17. A worker can claim benefits from the Labour Risk Social Security System in addition to suing the employer in the labour courts for their role in the illness. To access benefits from the social security system, the worker does not have to prove that the employer was at fault or involved in misconduct (see [28] below). However, in their claim before a labour court judge, the worker must prove that the employer was at fault or engaged in misconduct. Thus, a worker may receive benefits from the social security system without showing a cause of action against the employer (if there is no fault or misconduct). If both claims succeed, however, article 216 of the Labour Code provides that deductions should be made from the award to the injured worker.

Other remedies

'Popular Actions' and 'Class Actions' under the Constitution

18. Article 88 of the Constitution and [Law 472 of 1998](#) provide for the possibility of commencing two types of constitutional actions that protect against the violation of rights which affect multiple individuals.

- **A Popular Action (PA)** allows claimants to seek to safeguard and protect collective interests and rights, such as those arising from the environment.³² Since environmental damages may affect the quality of life of an entire community, a claimant may ask for preventive or restorative actions on behalf of the community.
- **A Constitutional Class Action (CCA)** is available when a group of twenty or more people want to seek economic compensation for damages sustained individually by each claimant. This is different to damages arising from a PA which focuses on collective rights which affect communities at large. Compensation here can be sought for economic and non-economic damages.³³ Although textually intended only to provide economic compensation, the influence of the Inter-American Court of Human Rights has seen courts adopt broader restorative measures in CCA cases. Among these, courts have ordered innovative reparation measures such as public condemnation of the defendant, guarantees of non-repetition, and an order to the legal representative of a company to publicly apologise to the community (see the *Doña Juana* case³⁴). Lower court orders³⁵ have included restorative measures such as repopulating the fish of a river that a defendant had heavily contaminated (the *Anchicayá* case – this order was struck down by higher court). The statute of limitations to bring a CCA is generally two years.³⁶
- PAs and CCAs can be brought both against public and private defendants.

³² Law 472 of 1998, art 2.

³³ Colombian Constitution (n 6), art 88; Law 472/1998 art 3, 46.

³⁴ [Council of State, Contentious-administrative Chamber, Third Section. Filing 25000-23-26-000-1999-00002-04. \(AG\). 13 February 2013. Enrique Gil Botero.](#)

³⁵ Contentious Administrative Tribunal of Valle del Cauca. Judgment of 7 September 2009. Filing 2002-04584. MP Bertha Lucía Luna Benítez).

³⁶ Code of Administrative Procedure and Administrative Litigation (n 3), art 47.

Writ for constitutional protection

19. The constitutional remedy of a '*tutela*' or a writ for protection of constitutional rights is not meant to grant compensation or economic damages to victims. Rather, the purpose of a *tutela* is to guarantee fundamental rights through injunctions. A *tutela* can be brought against public and, in some cases, private bodies, including corporations or individuals.³⁷ Colombia's Constitutional Court has noted that it is not appropriate to seek compensation for damages through a *tutela* except in a very limited range of situations.³⁸ However, other components of reparation are available through a *tutela*.³⁹

Compensation within criminal proceedings

20. Although the criminal process alone can determine criminal liability, the [Criminal Code](#)⁴⁰ also provides for a mini-civil process, the so-called '**comprehensive reparation proceeding**',⁴¹ which follows the rules of civil procedure.⁴² In this, victims have the right to seek restitution or compensation from individuals or corporations, based on the economic harm that the crime caused them.⁴³ Because crimes are a source of civil liability according to the Civil Code, when a crime causes damages, victims are entitled to seek compensation within or outside of the criminal process.

Q2

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

Claims against public bodies

21. Article 90 of the Constitution establishes that the State is liable for 'wrongful damages' that can be attributed to it. These are damages caused by the actions or omissions of public bodies. The State will be liable for public bodies' actions if, through a contentious-administrative claim, the claimant proves the following elements: (i) a certain and determined or determinable damage or injury of an economic or non-economic nature that is inflicted on one or several individuals; (ii) a conduct that is legally attributable to a public body; and (iii) a causal relationship between (i) and (ii), that is, 'that the damage occurred as a direct consequence of the action or omission attributable to the public body'.⁴⁴

37 [Constitutional Court. T-634/2013](#); [Constitutional Court. T-342/2013](#); and [Constitutional Court. T-309A/2013](#).

38 [Constitutional Court. T-160/2021](#). Cristina Pardo Schlesinger.

39 For example, the Constitutional Court has ordered retractions in defamation cases ('*derecho al buen nombre*'), and injunctions as a guarantee of non-repetition. See Decree 2591/1991 art 35.

40 Criminal Code (n 26).

41 Criminal Procedure Code, Law 906 of 2004 art 102; Criminal Code (n 26) art 94 and 96.

42 Supreme Court of Justice. Criminal Cassation Chamber. [SP13300-2017 \(50034\)](#). 30 August 2017. Fernando Alberto Castro Caballero.

43 In criminal law, the presumption of innocence can only be disproved by a beyond-reasonable-doubt standard based on the probative material that establishes the elements of the crime and its connection to the person. But in civil matters and in the comprehensive reparation proceeding, the standard is the 'free evaluation of the evidence' by the judge, who must use the 'rules of sound criticism' to determine the probative weight of the evidence. This 'sound criticism' allows the judge to value the evidence based on the rules of logic, science, and experience.

44 Council of State. Contentious-administrative Chamber. Third Section. [Filing 25000-23-26-000-2005-00883-01 \(38139\)](#). 8 October 2016. Hernán Andrade Rincón.

22. On the other hand, when claimants allege that the public body is liable for an *omission*, they must prove: (i) the existence of a legal obligation to carry out the action through which the damages would have been avoided; (ii) the failure to put into operation the resources available to adequately fulfil such legal obligation; (iii) damages; and (iv) causation.
23. In all cases, the cause of damages should be attributable to the State. Thus, it is not enough to prove the existence of damages and the illegality of what caused them, but also there must be a connection between those illegal damages and the State.⁴⁵ Attribution rests on the conceptualisation of ‘titles of attribution of fault’ (*títulos de imputación*).⁴⁶ The most important of these are:
- i. **Failure in the service** (*falla en el servicio*). This is the main fault attribution theory applicable in State liability cases in Colombia. According to the Council of State, the State has obligations which, when breached, entail liability and create a subsequent obligation to remedy. This is a subjective liability regime because intent or negligence must be proved in order to attribute liability to the State.⁴⁷
 - ii. **Special damage** (*daño especial*). This is another fault attribution theory applicable in State liability cases in Colombia. According to the Council of State, the State must remedy damages caused to claimants through its activities, even when acting lawfully. This liability is, by its nature, strict. This only happens when the balance of public duties is broken and affects the persons in benefit of the State, that is, when the damage suffered is abnormal, excessive, or more burdensome than the normal.⁴⁸
 - iii. **Exceptional risk** (*riesgo excepcional*). This is yet another fault attribution theory applicable in State liability cases in Colombia. According to the Council of State, the State must remedy damages caused when its activity exposes people to a serious and abnormal risk. This liability is, by its nature, strict.⁴⁹

Extra-contractual civil liability

24. The four elements that a claimant must prove before civil courts in an extra-contractual civil liability claim are a) unlawful conduct; b) actual damage or injury; c) causation; and d) attribution of fault:
- **Unlawful conduct** can be an action or an omission.
 - **Damages** must be certain (ie the claimant must prove they have suffered an actual injury),⁵⁰ personal (ie the claimant must have suffered them directly and/or have standing to sue) and legitimate (ie they must affect a vested, valid, legally protected interest).⁵¹ Damages in Colombia fall into two categories: economic and non-economic damages.⁵² Economic damages include actual loss (ie how much

45 [Constitutional Court. C-333/1996](#). Alejandro Martínez Caballero.

46 Colombian law does not provide a comprehensive list of titles of attribution. It is part of the function of the judge to establish the one applicable in each case. This list is not exhaustive.

47 Council of State. Contentious-administrative Chamber. Third Section. [Filing 15,263](#). 19 June 2008. Myriam Guerrero de Escobar.

48 Council of State. Contentious-administrative Chamber. Third Section. [Filing 66001-23-31-000-1997-03613-01 \(16421\)](#). 8 March 2007. Ruth Stella Correa Palacio.

49 Council of State. Contentious-administrative Chamber. Third Section. [Filing 76001-23-31-000-2006-03682-01 \(42992\)](#). 3 December 2018. María Adriana Marín.

50 Supreme Court of Justice. Civil Cassation Chamber. [Filing 11001-31-03-008-2000-00196-01. SC-16690-2016](#). 17 November 2016. Álvaro Fernando García Restrepo.

51 Luis Fernando Ternera Barrios and Francisco Ternera Barrios, ‘[Breves comentarios sobre el daño y su indemnización](#)’ (‘Short Comments on Damage and Indemnification’) (2008) *Revista Opinión Jurídica*, 7(13), 97-112.

52 *ibid.*

money the victim lost);⁵³ loss of profit (known as consequential damages);⁵⁴ and loss of opportunity or chance⁵⁵ (ie the amount the victim would have obtained as a benefit or avoided as a loss).⁵⁶ The Supreme Court of Justice has also recognised non-economic or ‘moral’ damages, such as emotional harm, pain, and suffering.⁵⁷

- To establish whether the **unlawful conduct caused** the alleged damages, judges usually apply analysis in terms of the theory of adequate causation and focus on whether a cause is suitable to determine a result.⁵⁸ The Supreme Court has stated that to assess adequate cause, the judge shall use logic, probability, and rules of rationality.⁵⁹
- **Attribution of fault** can be subjective or objective. For subjective attribution of fault, the conduct must be intentional or negligent.⁶⁰ Objective attribution of fault is exceptional and will only exist under specific circumstances, such as when the defendant is engaged in dangerous activities.⁶¹ The Supreme Court has been consistent in characterising dangerous activities as those with a high potential of causing harm, of an uncontrollable and unpredictable nature, and uncertain as to their effects or potential for destruction.⁶²

Strict liability

25. Colombian law on strict liability for dangerous activities⁶³ provides that a person who performs an abnormally dangerous activity is strictly liable for the damage that such activity causes. This strict liability can apply to environmental harm caused by dangerous activities. **A recent Supreme Court decision (*Tahami & Cultiflores*) held that a company was strictly liable for a flower grower’s crop loss because its logging operations altered the ecosystem.**⁶⁴ In this case, the Supreme Court applied the principle that the ‘polluter pays’ and granted relief to a claimant after the defendant’s ‘alteration of the environment’ resulted in three avalanches that affected a nearby dam and flooded the claimant’s crops.

CCAs

26. A CCA must comply with the same elements described above in [24] for extra-contractual civil liability claims. Unlike PAs (explained in further detail in [27] below), CCAs are not required to address collective rights. Additional requirements are:

53 As an illustration, when the claimant has paid medical bills, including for medicines, therapies, etc as a result of an accident caused by the defendant, the defendant must pay for the costs the claimant has already paid out.

54 This might arise when the victim is not able to work for many months as a consequence of an accident caused by the defendant. Since the victim will not receive a salary, the defendant must pay the expected amount for this period.

55 An example might be when the victim had an important competition coming up and he or she could not participate due to an accident caused by the defendant. The victim lost the chance to participate and potentially to win.

56 Civil Code (n 2) arts 1613 and 1614.

57 When a claimant has lost a close relative in an accident caused by a defendant, the claimant is in principle entitled to claim for emotional pain and suffering.

58 Rodrigo Fuentes Guíñes, ‘Las teorías tradicionales sobre la causalidad’ (2010) *Revista de Derecho y Ciencias Penales* 14, 37.

59 Supreme Court of Justice. Civil Cassation Chamber. [Filing 11001-31-03-028-2002-00188-01](#). 14 December 2012. Ariel Salazar Ramírez.

60 Gilberto Martínez Rave and Catalina Martínez Tamayo, *Responsabilidad civil extracontractual* (Temis 2003).

61 Civil Code (n 2) art 2356.

62 Javier Tamayo Jaramillo, *Tratado de Responsabilidad Civil* (Legis 2007) 859. Among hazardous activities specified are those that involve the use of machines, instruments, apparatus, energy, or substances that have risks or dangers as a result of their installation, their explosive or inflammable nature, or their velocity. Among others, see Arturo Valencia Zea, *Derecho Civil: De las Obligaciones* (Temis 1998) 288.

63 Civil Code (n 2) art 2356.

64 Supreme Court of Justice. Civil Cassation Chamber. [Filing 05001-31-03-001-2015-00658-01, SC3460-2021](#). 18 August 2021. Luis Armando Tolosa Villabona.

- **A minimum number of claimants:** At least 20 people.⁶⁵ Once one member of the group initiates the action, the effects of the process extend to all the members covered by the CCA, except to those who expressly exclude themselves from the group and who can then sue separately.⁶⁶
- **Statute of limitations:** The CCA must be brought generally within two years of the date on which the harm was caused or the injurious action that caused it ceased.⁶⁷ There is an exception when the damage arises because of an administrative act and the legal action intends to void this harmful act. In this scenario, the request must be submitted within four months.⁶⁸
- **Procedure:** When one of the defendants is a public body, the CCA shall be examined by the administrative jurisdiction under its own procedural rules.⁶⁹

PAs

27. According to article 88 of the Constitution, PAs are a primary and non-subsidiary mechanism to protect collective rights and interests.⁷⁰ They can be exercised regardless of whether there are other means of defence available, in contrast to the *tutela* (see [30] below).⁷¹ PAs apply principles of civil liability, such as verification of a contingent or actual collective harm, verification of an action attributable to the defendant (who can be a public or private body or an individual),⁷² and a causal link between the two. They can be used as long as the threat or danger to the collective interest or right persists.⁷³ One of the advantages of a PA is that every citizen, whether a natural or legal person, is entitled to file an action,⁷⁴ and it is not essential that the particular claimant belongs to the affected community. The claimant is also not required to intervene through an attorney.

Labour law and social security mechanisms

28. According to article 216 of the **Labour Code**, when it is proved in court that the employer is liable and at fault for a workplace accident or illness, the employer must compensate the worker accordingly. In parallel, workers may claim the benefits that the Labour Risk **Social Security System** provides, as explained in [15] above.

29. What differentiates the two regimes is the type of liability. The Labour Risk Social Security System is based on a strict liability regime in which the employer's fault does not have to be proved for the worker to receive benefits. But before a labour court judge, a worker must claim that the harm suffered was the result of the employer's action or omission, and was the employer's fault, and, if proved, the worker will receive full compensation for the harm suffered. The *rationale* behind

65 These may be natural or legal persons. Law 472 of 1998 (n 32) art 12. It is permitted for just one person to sue as long as they are a member of the group and act on the group's behalf. See Constitutional Court. [Sentencia C-116/2008](#). Rodrigo Escobar Gil.

66 [Constitutional Court. C-304/2010](#). Luis Ernesto Vargas Silva.

67 Law 472 of 1998 (n 32) art 47.

68 Law 1437 of 2011 art 164.2 para h.

69 Code of Administrative Procedure and Administrative Litigation (n 3) art 164. Although some principles are similar, in administrative matters, the statute of limitations has an important exception: 'If the damage caused to the group comes from an administrative act and the litigation intends to void it, such a request must be submitted within four months of the communication, notification, or publication of the administrative act.'

70 [Constitutional Court. C-459/2004](#); [Constitutional Court. C-088/2000](#); [Constitutional Court. C-036/1998](#); [Constitutional Court. C-215/1999](#).

71 Council of State, Contentious-administrative Chamber, Third Section, Filing 73001-23- 31-2000-8654-01. 1 November 2001.

72 If the violation comes from an authority, or from an individual who exercises administrative functions, the PA must be brought before the administrative jurisdiction. If the violation comes from a corporation or an individual, it must be brought before the civil jurisdiction.

73 Law 472 of 1998 (n 32), art 11; Constitutional Court C-215/1999. Martha Victoria Sanchica Mendez.

74 *ibid* art 12

having this dual process is that if the employer is at fault, the worker should receive damages that go beyond the benefits of the social security system.

Writ for constitutional protection

30. The constitutional remedy of *tutela* may be available under specific circumstances to protect fundamental rights as defined by the Colombian Constitution. According to article 25 of Decree 2591 of 1991,⁷⁵ a judge can impose economic sanctions in a limited range of cases due to a gross fundamental rights violation. The Constitutional Court's precedent has set the following requirements: (i) compensation is only available when there is no other judicial mechanism to compensate for the damage; (ii) compensation is not appropriate when the *tutela* is granted as a temporary measure; (iii) the violation or threat of violation of the fundamental right must be evident and a consequence of the clear and indisputable arbitrary action of the defendant; (iv) compensation must be necessary to ensure the effective enjoyment of the victim's fundamental right; (v) due process must be guaranteed to the defendant; (vi) compensation only covers actual damages, not loss of profit; (vii) when the judge decides that compensation is available, the claimants must establish: what the harm consisted of, why compensation is essential, what event or act caused the harm, causality, and what factors the judge must consider to determine the amount.⁷⁶

Compensation within criminal proceedings

31. In the comprehensive reparation proceeding (see [20]), the criminal conduct being assessed in a criminal case must be the same conduct that caused civil damages.⁷⁷ While deciding this proceeding, the criminal judge will serve as a civil judge and will apply the civil rules of evidence. Similarly, to define compensation, the judge will apply the same substantial rules about extra-contractual liability described above [24].

Q3

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

Public bodies, corporations and/or individuals may face civil liability even when they are not the primary perpetrators of harm, but their conduct contributes to harm. Depending on whether the harm was caused by a dangerous activity (see [35]-[36] below), the harm contribution test will vary.⁷⁸

⁷⁵ [Decree 2591 of 1991](#).

⁷⁶ Constitutional Court. T-160/2021. Cristina Pardo Schlesinger.

⁷⁷ Criminal Procedure Code (n 41) art 107.

⁷⁸ The Supreme Court of Justice has touched on the issue of the plurality of authors in causing harm several times. The Court has explained the scope of art 2344 of the Civil Code, in the following terms: a) When there are several persons responsible for an accident, the obligation to compensate the damages is joint and several. Whoever makes the payment is subrogated in the action against the other(s), according to art 1579 (...); b) On numerous occasions, jurisprudence has defined the scope of the active concurrence of fault in causing harm to another, in the sense of declaring the liability *in solidum* of all those who concurred in culpable or negligent conduct that contributed to the production of harm (...). Such a doctrine flows clearly from arts 2341 and 2344 of the Civil Code (...); c) According to art 2344, when two or more people are responsible for a harm, their liability is joint and several. Supreme Court of Justice, Civil Cassation Chamber, 6 August 1985, Magistrate: Alberto Ospina Botero. Internal quotations omitted. Not available online.

Joint and several liability

32. Joint and several liability exists when two or more individuals participate in harmful conduct. The Supreme Court of Justice recognised that the joint causality rule contained in article 2344 of the Civil Code entails ‘a plural accusation against all authors’.⁷⁹ This notion of ‘joint causality’ or ‘co-authorship’ means that a victim is free to sue any responsible party.⁸⁰

Direct liability for a third party's conduct

33. In certain relations (ie parent-child, school-student, employer-employee),⁸¹ the Civil Code establishes presumed third-party liability for failure to comply with certain duties.⁸² For example, employers are liable for the acts of their employees because of the employer's fault in choosing (*in eligendo*) or supervising (*in vigilando*) the employee. For the employer to be held liable, claimants must show: (1) the employee's negligent conduct or omission; (2) that the damage was caused while the employee was under the employer's supervision; and (3) that the damage was caused while the employee was acting in the course of their employment. There is a debate among scholars on whether this liability should be framed as indirect (because of the conduct of a third party, such as an employee) or direct (because of the conduct of the entity, such as an employer, eg failing to supervise, choose, or educate, depending on the case).⁸³ According to the Constitutional Court,⁸⁴ all theories of indirect liability for third-party conduct may be rebutted, distinguishing it from more stringent tests.
34. Recent jurisprudence⁸⁵ states that corporations are not indirectly but rather *directly* liable for the actions of their employees or contractors. This development favours victims for several reasons. With direct third-party liability, defendants cannot escape liability by proving their diligence in choosing or supervising employees, or by proving that they could not prevent the harm. Current doctrine and jurisprudence agree that the only way to escape liability is for the employer to prove that there was a fortuitous event, *force majeure*, or that the damage was caused by the victim's sole fault. Direct liability is beneficial for victims because the statute of limitations for indirect liability is three years whereas for direct liability it is ten years.⁸⁶ Moreover, under direct liability, claimants do not have to prove a dependent or subordinate relationship between the perpetrator and the liable legal entity, nor do they have to prove the employer's duty to supervise the perpetrator.
35. Many cases before the Supreme Court that relate to corporate liability for agents' actions involve **dangerous activities** and, as a result, trigger **strict liability**.⁸⁷ Under the ‘dangerous activities’ test, fault is presumed and may only be rebutted

79 [Supreme Court of Justice, Judgement 12/14/12, cited by Superior Tribunal of Bogotá, Judgmente 12/07/15, Judge Luis Roberto Suárez González, Filing 110013103007201000567-02.](#)

80 Civil Code (n 2) art 2344.

81 This is the type of liability that is referred to as ‘vicarious’ in some jurisdictions.

82 Civil Code (n 2) art 2347.

83 See Javier Tamayo Jaramillo, *Tratado de Responsabilidad Civil*, (Editorial, Legis: Bogotá DC 2018). ‘Legal persons [ie corporations] are not liable under the institution of third-party liability of article 2347 [of the Civil Code]. Both public law and private law corporations commit their direct responsibility whether due to dangerous activities, proven fault, or service failure, but never due to a third-party action.’

84 [Constitutional Court, C-1235/2005, Rodrigo Escobar Gil.](#)

85 [Supreme Court of Justice, Civil Cassation Chamber, Filing 73411-31-03-001-2009-00042-01, SC13630-2015, 7 October 2015, Ariel Salazar Ramírez.](#)

86 Civil Code (n 2) arts 2358 and 2536.

87 *ibid* art 2356.

by proving a fortuitous event (ie *force majeure*), or that the damage was caused by a third party,⁸⁸ or by the victim's sole fault. Consequently, due diligence does not exonerate the defendant.⁸⁹ In some cases, the Supreme Court has held that parent companies can be co-guardians of a dangerous activity if they have 'control' or 'direction' over the activity.⁹⁰ This is called 'shared guardianship'. According to Supreme Court jurisprudence, whoever controls the activity is responsible for the damage caused.

36. Although guardianship is usually tied to ownership, an owner can prove that they transferred guardianship to another person or entity, or even that control was taken away through theft or other mechanisms. If several persons concurrently and in different ways – depending on their interests or benefits – exercise 'effective control' or 'direction' of the dangerous activity at the same time, they share the legal duties associated with dangerous activities.⁹¹ Even an entity that obtains a benefit from a dangerous activity can be regarded as its guardian.⁹² Therefore, a subsidiary and a parent company can be co-guardians and be jointly and severally liable for a dangerous activity.

Q4

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

Generally

37. Under article 98 of the [Commerce Code](#),⁹³ once a company is legally formed, it acquires the status of a legal person distinct from the individual directors or partners. This rule establishes the separation of corporate assets and debts from shareholder assets and debts, except in the case of corporate forms that establish joint and several liability for all (or some) directors or partners. Only in exceptional cases of insolvency or bankruptcy can a parent company be held accountable for the debts that its subsidiary cannot pay.
38. To link a parent company to a case about its subsidiary, several requirements must be met. First, the parent company and its subsidiary must form a 'business group'.⁹⁴ The essential elements for a business group are: (i) plurality of legal entities; (ii) subordination of the subsidiary⁹⁵ (the subsidiary's decision-making power is compromised, either directly or indirectly); and (iii) the parent company

88 Corte Suprema de Justicia, CAS. CIV. 08-10-1992. Exp 3446. CCXIX 518.

89 In trial, it will be presumed that owners of the entity conducting the dangerous activity had the guardianship duty, but owners can rebut this presumption by proving that they transferred the activity and had no dominion over it. The Supreme Court of Justice listed the following as examples of dangerous activities, but each judge must decide if a case involves a dangerous activity or not: i) railway operations; ii) transformation, transmission and distribution of electrical energy; iii) driving of motor vehicles; iv) aviation; v) crop spraying carried out with toxic substances; vi) factories that generate toxic substances; vii) any operation that arises from the artificial interruption of the flow of water in dams with the purpose of generating electricity; viii) construction or demolition of buildings; and, much less frequently, ix) medical procedures; x) financial activity; and, xi) freight elevators.

90 Supreme Court of Justice. Civil Chamber. Judgment 04/22/97.

91 Supreme Court of Justice. Civil Chamber. Judgment SC-47502018. 10/31/18.

92 Supreme Court of Justice. Civil Chamber. Judgment 05/26/89.

93 Commerce Code (n 12).

94 Law 222 of 1995 art 28.

95 Subordination is defined by art 260 of the Commerce Code.

and subsidiary's unity of purpose and direction (if the parent company imposes key guidelines on the subsidiary). If these three elements are met, the parent company will be liable to the subsidiary's creditors in cases of insolvency or bankruptcy unless it demonstrates that such insolvency or bankruptcy is unrelated to its actions, decisions, or omissions.⁹⁶ The parent company or subsidiary can rebut this presumption by demonstrating that the parent company's decisions have not caused the economic destabilisation of the subsidiary.

39. Although in theory it is possible to include a parent company of a multinational corporation headquartered outside of Colombia in a civil process against its Colombian subsidiary, at least two obstacles exist. First, the [Superintendency of Corporations](#)⁹⁷ has insisted that liability is of a strictly subsidiary and economic nature.⁹⁸ This means that the parent company would only have to pay creditors in Colombia that have been defrauded and only when the subsidiary cannot cover its debts. Second, the multinational corporation can rebut the presumption of liability if it can show that it did not issue any orders that led to the subsidiary's insolvency, or it can prove its absolute independence from the subsidiary's debts.

Piercing the corporate veil

The Superintendency of Corporations describes piercing the corporate veil as ignoring the limitations of responsibility of partners or shareholders to a company and third parties, by making them directly responsible for the obligations of the legal entity. Piercing the veil effectively 'suppresses the main effect of legal personification in the corporation and limited liability, that is, the limitation of the associates in their liability up to the value of their contributions and makes them unlimitedly liable'.⁹⁹

40. To **pierce the corporate veil** to hold shareholders and directors accountable is a challenge in Colombia, as it is in most jurisdictions. Theoretically, it is a straightforward legal avenue, with several statutes providing causes of action to do this.¹⁰⁰ Article 91 of the [Criminal Procedure Code](#),¹⁰¹ for example, establishes that 'at the request of the Prosecutor's Office' the judge may order 'the suspension of legal status or [...] the temporary closure of premises of legal or natural persons, when there are well-founded reasons to infer that they have been wholly or partially dedicated to the development of criminal activities'. Similarly, article 44 of [Law 190 of 1995](#) establishes that judicial authorities 'may lift the corporate veil of legal persons when it is necessary to determine the true beneficiary of the activities carried out by it'.¹⁰²
41. If a corporation commits fraud, judicial authorities may hold shareholders liable for unpaid obligations. Courts may find that a corporation's independent legal liability no longer exists when the corporation was used to circumvent legal

96 Law 1116 of 2006 art 61. [Constitutional Court. C-510/97](#). José Gregorio Hernández Galindo.

97 The [Superintendency of Corporations](#) is the national entity in charge of the surveillance and control of corporations. According to the Constitution, it has jurisdiction over disputes against corporations, and its jurisprudence is widely accepted by the judicial branch.

98 [Superintendency of Corporations](#). Oficio 220-072648. 11 May 2018.

99 Superintendency of Corporations. Oficio 220-025851. 2019; Anzola Gil, Marcela. [Levantamiento del velo corporativo. Panorama y perspectivas. El caso colombiano](#). (Piercing the corporate veil. Panorama and perspectives. The Colombian case) (Editorial, Bogotá DC, Universidad del Rosario 2010).

100 Law 142 of 1994 art 37; Law 222 of 1995 (n 94) art 71.

101 Criminal Procedure Code (n 41).

102 Law 190 of 1995.

restrictions. In such a case, a court may attribute the fraudulent actions to the shareholders.¹⁰³ However, in practice, the corporate veil has rarely been pierced in Colombia.¹⁰⁴ While the Superintendency of Corporations is silent about the circumstances that may lead to piercing the corporate veil, the basic standard is to establish whether the corporation was used to defraud the law or to the detriment of third parties. The statute of limitations for the action that leads to piercing the corporate veil is five years.¹⁰⁵

42. The following conclusions can also be drawn from case law:

- The mere breach of payment does not enable piercing the veil.¹⁰⁶
- The creation of a company with a corporate purpose similar to another one does not necessarily imply a continuation of the company through the other.¹⁰⁷
- The intention to defraud or to use the corporate entity for an illegitimate purpose must always be proved.¹⁰⁸
- Claimants must have a specific interest in the controversy or businesses.¹⁰⁹
- The intentional reduction of the company's assets¹¹⁰ or transferring of assets¹¹¹ may lead to piercing the veil.
- The transfer or theft of assets to avoid the payment of obligations may lead to piercing the veil.¹¹²
- Using a corporation as a mechanism to obtain a benefit contrary to law may lead to piercing the veil.¹¹³

Directors' liability

43. Directors of corporations¹¹⁴ may be held liable both for their actions and their negligent omissions. According to article 23 of Law 222 of 1995, directors are required by law to display the diligence of a 'good businessman'.¹¹⁵ They must act according to the diligence that a professional would use in handling their own business. This degree of diligence is greater than the one required from a 'good paterfamilias' in that directors must act with more than mere prudence. They will be jointly and severally liable for damages that are 'due to fraud or fault they cause to the company, to the partners or to third parties (...) In the cases of non-compliance or excess in their functions, violation of the law or of the

103 In Decision 220-121488 of 2018, the Superintendency of Corporations stated that the statute of limitations to file a veil piercing suit is five years. In Decision 220-025851 of 2019, the Superintendency of Corporations clarified that it is not a figure that has been set for the benefit of associates, managers, and others, but for the protection of economic order and third parties who have contractual relationships with the company.

104 Finding that a business group was created to circumvent the law, the Superintendency of Corporations lifted the corporate veil for the first time in 2013. In many other cases, the intention to defraud could not be proved.

105 Law 222 of 1995 (n 94) art 235.

106 *Caracol Televisión S.A. v Affinity Network S.A.S. et al.*

107 Superintendency of Corporations. Judgment No 800-53. 27 June 2017. *Julio Ramón Gálvez Ospina v Velásquez Candamil S.A.S. et al.*

108 [Superintendency of Corporations. Judgment No 800-55. 16 October 2013. Fondo para el Financiamiento del sector Agropecuario v Mónica Colombia S.A.S.](#)

109 [Superintendency of Corporations. Judgment No 800-3937. 8 July 2015.](#)

110 [Superintendency of Corporations. Judgment No 801-16441. 3 October 2013. RCN Televisión S.A. v Media Consulting Group S.A.S.](#)

111 [Superintendency of Corporations. Judgment No 800-122. 11 December 2017. Panavías Ingeniería & Construcciones S.A. v Agro Repuestos S.A.S.](#)

112 [Superintendency of Corporations. Judgment No 800-4553. 19 March 2015. María Virginia Cadena López v Malci S.A.S. et al.](#)

113 [Superintendency of Corporations. Judgment No 801-17366. 10 December 2012. Cámara de Comercio de Barranquilla v Carcos Mantenimiento de Equipos S.A.S. et al.](#)

114 Under Colombian law, 'administradores'.

115 Law 222 of 1995 (n 94) art 23.

company's statutes, the administrator's fault will be presumed'.¹¹⁶ Directors may be jointly liable whenever they breach their duties or exceed their powers. The Superintendency of Corporations has interpreted the law to mean that a director must be sufficiently informed before making decisions. It considers the failure to implement risk identification and management systems, which allows the company to identify, evaluate, measure, and prevent risks in a timely manner, to be a clear example of a lack of diligence.

44. Third parties that have been injured due to a director's actions or omissions may pursue individual actions against the director(s). Judges tend to respect decisions taken by directors during their activities, but 'such protection cannot be extended to the negligent omissions in which such officials engage'.¹¹⁷ Although a director's legal liability is presumed if they breach their duty, liability does not always include economic damages. Claimants must demonstrate an economic detriment specifically attributable to the directors' actions or omissions to receive economic damages.¹¹⁸

Q5

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

45. Remedies differ depending on whether a victim seeks provisional or definitive remedies. **Provisional remedies** in both civil and labour proceedings can be broad¹¹⁹ and may include 'unnominated provisional measures', such as non-economic measures and injunctions. Under contentious-administrative proceedings, judges may adopt preventive, conservatory, anticipative and suspensive provisional measures if such measures are directly and necessarily related to the lawsuit.¹²⁰
46. Definitive remedies differ under substantive and procedural regulations. In civil claims, judges must provide for *integral* remedies. This includes compensating economic and non-economic damages,¹²¹ but judges do not always order non-economic remedies, even when the harm is non-economic. The Council of State – the highest court in the contentious-administrative jurisdiction – has recognised victims' rights in accordance with international standards. It held that all damages must be repaired and ordered the use of non-economic remedies, adopting an integral restitution/integral reparation standard.¹²²
47. Since PAs are preventive in nature, judges must adopt all necessary measures to prevent violations and protect the collective right or interests, including through the issue of injunctions, or orders to restore, or the creation of teams to supervise orders, etc. If the judge decides that economic compensation is due, it will be granted to the non-guilty public body tasked with protecting the affected collective right or interest, not to the PA claimants.¹²³

¹¹⁶ *ibid* art 24.

¹¹⁷ Superintendency of Corporations, Judgment No 800-85. 8 July 2015.

¹¹⁸ Superintendency of Corporations, Judgment No 801-64. 21 October 2014.

¹¹⁹ General Procedure Code (n 8) art 590.

¹²⁰ Code of Administrative Procedure and Administrative Litigation (n 3) art 229.

¹²¹ Supreme Court of Justice, Civil Cassation Chamber. [Filing 11001-31-03-003-2003-00660-01, SC10297-2014](#). 3 June 2014. Ariel Salazar Ramírez.

¹²² Council of State, Contentious-administrative Chamber, Third Section. [Filing 76001-23-25-000-1996-04058-01 \(16996\)](#). 20 February 2008. Enrique Gil Botero.

¹²³ Law 472 of 1998 (n 32) art 34.

48. In Colombian procedure, congruence is essential. Therefore, in both civil and contentious-administrative procedures, judges may not order remedies that exceed what the claimant requested in the lawsuit (this is known as the *ultra* and *extra petita* decision-making prohibition).¹²⁴ As an exception, labour judges have the possibility of ordering *ultra* and *extra petita* measures.¹²⁵ In PAs, judges also can order *ultra* or *extra petita* measures, applying the principle of proportionality.¹²⁶

Q6

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

Advantages of using civil claims

Statute of limitations

49. Extra-contractual civil liability claims have a longer statute of limitations (see [10] above) than the general two-year statute of limitations for contentious-administrative claims.¹²⁷ As a result, extra-contractual civil liability claims give victims and human rights organisations more time to design and implement complex litigation strategies, find evidence, ask for support, and build networks.
50. In contrast to criminal proceedings, the statute of limitations for civil claims is predictable. In criminal cases, it varies according to the maximum sentence set by law for the specific crime (five to twenty years) with exceptions for some serious human rights violations (thirty years), international crimes or crimes against children's sexual freedom or integrity (no statute of limitations).¹²⁸

Standard of proof

51. The applicable standard of proof for civil, labour and contentious-administrative claims is more advantageous than the standard of proof for compensation actions brought within criminal proceedings. In criminal prosecutions, responsibility must be proved 'beyond reasonable doubt'. In civil and contentious-administrative claims, the standard of proof varies from case to case, but it is generally lower than a criminal test.

Autonomy in the development of litigation

52. In criminal proceedings, the State, represented by the Prosecutor's Office, is the only entity that can bring prosecutions, generally allowing victims limited autonomy in litigation.¹²⁹ In contrast, civil, labour and contentious-administrative claims allow victims complete autonomy in litigation – a major benefit.

¹²⁴ General Procedure Code (n 8) art 281.

¹²⁵ Labour Code (n 17) art 50.

¹²⁶ Council of State. Contentious-administrative Chamber. Second Section. [Filing 08001-33-31-006-2007-00010-01\(AP\)](#), 5 May 2020. Cesar Palomino Cortes.

¹²⁷ According to art 164.2.i of the Code of Administrative Procedure and Administrative Litigation (n 3), when a contentious-administrative reparation process is initiated, the lawsuit should be filed before two years have passed from the day following the day of the events that caused the damage or when the claimant gained or should have gained knowledge of the damage. It is important to clarify that this rule has some exceptions, such as when the case involves forced disappearances.

¹²⁸ Criminal Code (n 26) art 83.

¹²⁹ In Colombia, victims have rights in criminal proceedings, which includes participating in hearings, presenting arguments, and challenging decisions, among others. But their agency is not complete, and the prosecution has the lead role during most of the process. By contrast, in ordinary civil, labour and contentious-administrative reparation claims, the claimants have the lead role in determining their litigation strategy.

Disadvantages of using civil claims

Exclusion of public bodies

53. Public bodies cannot be sued in civil claims. If the harm is caused by both public and private defendants, two separate claims can be brought: a civil claim against the private defendant and a contentious-administrative claim against the public defendant. But if a victim brings a claim only in the contentious-administrative jurisdiction, both public and private bodies can be sued there, gaining the benefit of not having to advance two separate strategies of litigation.

Lack of capacity and resources for litigation

54. While one advantage of a civil claim is the claimant's autonomy, it can also be a barrier. In Colombia, there is no public body that assists victims with civil claims, nor are there public resources to support the collection of evidence, hiring of legal teams, etc. As a result, the **cost of litigation** falls on claimants.

55. Procedural legislation does, however, include assistance for indigent claimants (*amparo de pobreza*). According to article 154 of the General Procedure Code,¹³⁰ a claimant can seek financial assistance if they can show that they cannot cover the expenses of the process without renouncing their own livelihood or that of the person they take care of. If successful, the claimant does not have to pay for litigation costs such as *cauciones*,¹³¹ justice's auxiliaries fees¹³² or the expenses of the other party if the courts finds for the other party. Even so, this only covers the costs related to court proceedings, not the preparatory stage where most expenses are incurred in large cases.

Length of proceedings

56. Civil claims tend to take a long time. Complex cases involving numerous claimants and defendants, technical or scientific evidence, or a large number of testimonies can go on for years. By contrast, in most cases an application for a writ for constitutional protection (*tutela*) would have a first decision in ten days or less and, if challenged, the second decision within twenty days.¹³³ However, a mechanism like the *tutela* is less likely to provide victims with complete redress, as explained in [19] above.

Q7

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

57. The General Procedure Code gives Colombian courts jurisdiction over civil actions against foreign defendants under the following circumstances: if the defendant has a registered domicile or residence in Colombia; if the defendant's residence is unknown, and the plaintiff has registered domicile or residence in Colombia; or if the violation occurred in Colombia.¹³⁴ Under these rules, any human rights violations committed in Colombia, regardless of the defendant's nationality, headquarters, or main place of operations, can be brought to Colombian courts.

¹³⁰ General Procedure Code (n 8).

¹³¹ 'Cauciones' are court-ordered amounts of money that a party must pay if they ask the court to order an injunction or a precautionary measure.

¹³² Justice's auxiliaries fees are fees a party must pay to have an expert testify.

¹³³ All *tutelas* are sent to the Constitutional Court for a discretionary oversight process. If the Court selects a case to study, the judgment will take additional time, normally between six months and a year from the time the case reached the Court.

¹³⁴ General Procedure Code (n 8) art 58.

58. In terms of private companies, the Commerce Code states that if any foreign company initiates permanent operations in the country, it shall establish a subsidiary with a registered address and a legal representative.¹³⁵ This person shall be included as part of any claim against the company.

59. While these rules are codified, the concrete application of these parameters is problematic in transnational civil litigation against foreign defendants, including private companies. Since foreign defendants do not have a duty to maintain property within the country, claims for economic compensation could be futile.

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

60. Further research on civil liability can be done using different resources, most of them available online.

61. For normative sources and jurisprudence:

- The National Constitution, statutes, laws and other relevant regulatory information are available through the [Unified Legal Information System](#), a website administered by the Ministry of Justice.
- Jurisprudence from the Supreme Court of Justice can be found on its [website](#).
- Jurisprudence from the Council of State can be found on its [website](#).
- Jurisprudence from the Constitutional Court can be found on its [website](#).¹³⁶

62. For sources on business and human rights and strategic human rights litigation:

- The [Business and Human Rights Resource Centre](#) documents Colombian cases in its database which is available online.
- Civil society organisations present their cases and collect information about them online. Some examples are [Colectivo de Abogados José Alvear Restrepo](#), [Comisión Colombiana de Juristas](#) and [PAX](#).
- Think tanks and academic institutions also make information available online. Among these are: [Fundación Ideas para la Paz](#), [Centro Regional de Empresas y Emprendimientos Responsables](#), [Instituto de Estudios para el Desarrollo y la Paz](#), [Observatorio Latinoamericano de Derechos Humanos y Empresas](#) and [Centro de Estudios de Derecho, Justicia y Sociedad](#).

63. For sources on civil liability:

- The [Instituto Colombiano de Responsabilidad Civil y del Estado](#) studies civil and State liability and publishes its activities online.

135 Commerce Code (n 12) art 472.

136 The Constitutional Court website contains a [selection of judgements translated into English](#).

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against the police and/or police officers

64. For claims against the police as a public body, given Colombia's rules on State liability explained above in [5],¹³⁷ victims should use the contentious-administrative jurisdiction. Such claims can be brought against both public and private bodies that caused the harm. In this case scenario, because Colombian law precludes suing the police through non-contractual liability claims in the ordinary civil jurisdiction, civil litigation could be used solely against Security Co and/or its personnel. This approach would likely fail or achieve limited results due to the main or principal liability of the police in the case.
65. The contentious-administrative jurisdiction is the primary and preferred legal avenue to bring claims against Colombia's police as a public body (rather than against individual officers) for harms suffered by protesters. Under this framework, the police may be liable for two types of harm: (i) restriction of personal freedom, and (ii) bodily harm (resulting in injury or death) caused by police action.
66. In cases of restriction of personal freedom in the context of judicial proceedings, article 65 of the statutory Law on the Administration of Justice (Law 270 of 1996) provides three scenarios where a person may be entitled to reparations: (i) malfunctioning of the administration of justice, (ii) judicial error, and (iii) unjust restriction of personal freedom. Wrongful damage caused during detention can also be grounds for reparations even if the detention was lawful, eg in cases of torture. In such a case, the victim would have to allege a failure in the service (*falla en el servicio*), a subjective liability standard that considers the officer's intent; or special damage (*daño especial*), a strict liability regime.¹³⁸
67. In cases of bodily harm resulting in injury or death caused by police intervention, the standard is similar: the State (in this case, the police) must repair any wrongful damage caused. In these cases, the failure in the service (*falla en el servicio*)¹³⁹ and special damage (*daño especial*)¹⁴⁰ regimes can be used.

¹³⁷ Code of Administrative Procedure and Administrative Litigation (n 3) art 104.

¹³⁸ Council of State. Contentious-administrative Chamber. Third Section. [Filing 19001-23-31-000-1998-00242-01](#). 24 July 2013. Enrique Gil Botero.

¹³⁹ Council of State. Contentious-administrative Chamber. Third Section. [Filing 76001-23-31-000-2007-01298-01](#). 12 June 2017. Hernán Andrade Rincón.

¹⁴⁰ Council of State. Contentious-administrative Chamber. Third Section. [Filing 19001-23-33-000-2017-00068-01](#). 5 March 2021. Marta Nubia Velásquez Rico.

Claims against Security Co and/or its personnel

68. Security Co and/or its personnel could be sued, alongside public bodies, in the **contentious-administrative jurisdiction**.¹⁴¹ If the claimants choose to sue them, the court will have to determine the proportion of liability attributable to each defendant, in accordance with a causation analysis. The analysis of the involvement of Security Co and/or its personnel and its contribution to the reparations will vary depending on the facts of each case.
69. For **civil claims**, the main avenue to achieve redress for non-contractual damages is through an extra-contractual civil claim, where claimants must prove four elements mentioned above in [24]: (i) unlawful human conduct through an action or omission; (ii) damages; (iii) causation; and (iv) attribution of fault.¹⁴² This applies to Security Co and/or its personnel.



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

70. Given that for the purposes of this exercise contentious-administrative jurisdiction is listed here alongside civil remedies, we believe that it is the best legal avenue to hold perpetrators accountable when a public body (ie the police) is involved. However, if the defendant is only Security Co and/or its personnel, the civil jurisdiction is the only avenue for a claim.



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

71. As stated in [64] above, the main avenue for Case Scenario 1 is the contentious-administrative jurisdiction. The following high-profile cases are of interest.

Restrictions of personal freedom cases

72. In 2013, the Council of State¹⁴³ found the prison security institution liable for torture suffered by an inmate and ordered economic reparations for the harm following a contentious-administrative claim.
73. In 2018, the Council of State unified its jurisprudence on the applicable liability regime for the unjust restriction of personal freedom, modifying a 2013 decision that used a strict liability approach. As a result, currently, liability in contentious-administrative claims is based on fault.¹⁴⁴

¹⁴¹ Council of State, Contentious-administrative Chamber, Third Section. [Filing 05001-23-31-000-1997-01510-01](#). 1 July 2015. Jaime Orlando Santofimio Gamboa.

¹⁴² Supreme Court of Justice, Civil Cassation Chamber. [Filing 11001-31-03-019-2005-00327-01](#). 14 August 2017. Luis Alonso Rico Puerta.

¹⁴³ Council of State, Contentious-administrative Chamber, Third Section. [Filing 19001-23-31-000-1998-00242-01](#). 24 July 2013. Enrique Gil Botero.

¹⁴⁴ Council of State, Contentious-administrative Chamber, Third Section. [Filing 66001-23-31-000-2010-00235-01](#). 15 August 2018. Carlos Alberto Zambrano Barrera.

74. In 2020, the Council of State,¹⁴⁵ after the filing of a CCA, found the entity that runs prisons liable for inhumane conditions in a female penitentiary and ordered economic compensation and other measures guaranteeing non-repetition.

Bodily harm (resulting in injury or death)

75. In 2017, the Council of State¹⁴⁶ found the National Police liable for the homicide of one student and the bodily harm of another student caused by anti-riot units who intervened in a university protest. The Council of State ordered the police to pay for non-economic damages and for violating constitutionally or conventionally protected interests. It also issued an order for integral reparation measures, including the implementation of a human rights training course for the anti-riot units of the National Police and the publication of the judgment.

76. In 2021, the Council of State¹⁴⁷ found the National Police liable for the death of a man that occurred during the intervention of anti-riot units in a protest. The case is unique because the victim was not a participant in the protest and was inside his home. The tribunal found that the police's course of action was lawful since the use of force was not arbitrary. Nonetheless, given the result (the death of the victim) and the fact that the police caused it, the Council of State applied a strict liability regime, condemned the National Police, and confirmed the order requiring the payment of economic damages to the victims.



CaseScenario 2

Q1

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

77. The local community, its representatives, and/or someone acting on their behalf, can bring civil claims against Subsidiary Co and, potentially, against Parent Co. They can choose to bring an extra-contractual civil liability claim or a CCA.

¹⁴⁵ Council of State, Contentious-administrative Chamber, Third Section. [Filing 18001-23-33-000-2013-00216-01 \(AG\)](#). 20 November 2020. Alberto Montaña Plata.

¹⁴⁶ Council of State, Contentious-administrative Chamber, Third Section. Filing 76001-23-31-000-2007-01298-01. 12 June 2017. Hernán Andrade Rincón.

¹⁴⁷ Council of State, Contentious-administrative Chamber, Third Section. Filing 19001-23-33-000-2017-00068-01. 5 March 2021. Marta Nubia Velásquez Rico.

Extra-contractual civil liability claims

78. Claimants must prove **four elements** to establish extra-contractual civil liability of Subsidiary Co: (i) unlawful human conduct (through an action or omission); (ii) damages (certain, personal, and legal); (iii) causation; (iv) attribution of fault (whether subjective or, exceptionally, objective).
- Claimants can allege **strict liability** under the theory of dangerous activities. In *Tahami & Cultiflores*,¹⁴⁸ the Supreme Court applied the ‘polluter pays’ principle and granted relief to a claimant after the defendant’s ‘alteration of the environment’ resulted in three avalanches that affected a nearby dam and flooded the claimant’s crops. This case is relevant here because the Subsidiary Co’s leak flowed into local rivers and destroyed crops.
 - Depending on the facts of the case, including Subsidiary Co’s design of the pipeline, claimants may cite as relevant case law the *Machuca* case (see the *Machuca* case highlighted after [10] above).
79. Parent Co can be linked to the case in four ways: (i) showing that Parent Co was directly involved in the actions that led to the leak and pollution, in which case it would be jointly and severally liable (ie in terms of ‘co-authorship’); (ii) the parent and subsidiary company can be held to be co-guardians of (and therefore jointly and severally liable for) a dangerous activity; (iii) if Subsidiary Co’s assets are insufficient to meet the remedies, claimants could argue that Parent Co should be secondarily liable as long as they can prove that Parent Co’s actions led to Subsidiary Co’s insolvency; (iv) piercing the corporate veil, although it does not seem like a viable avenue in Case Scenario 2.
80. **Statute of limitations.** The local community will have to sue within ten years of the oil spill or of the date on which they first noticed the harms.

Constitutional class action

81. As mentioned in [18] above, a CCA is available for a group of twenty or more claimants who seek reparation for economic and non-economic damages sustained individually by each member of the group. Here, twenty or more claimants of the local community can accumulate their claims and sue Subsidiary Co (and Parent Co, with the limitations explained above) within two years of the oil spill.



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

82. Historically, civil claims have not been the preferred route to hold perpetrators like those in Case Scenario 2 to account in Colombia. Other legal avenues available to the local population include suing in contentious-administrative courts. Many Colombian utility providers are at least partly publicly owned, which explains why contentious-administrative courts end up having exclusive jurisdiction over some relevant cases.

¹⁴⁸ Supreme Court of Justice. Civil Cassation Chamber. [Filing 05001-31-03-001-2015-00658-01.SC3460-2021](#). 18 August 2021. Luis Armando Tolosa Villabona.

83. Affected communities may also seek an injunction to prevent future environmental harm through a **tutela** action. If Subsidiary Co operates without free, prior, and informed consent of affected ethnic communities, a common legal practice is to start a **tutela** action and try to force the company to leave the territory. It is also possible to present a **tutela** or a PA for the protection of the environment, and to ask for injunctive relief and preventive measures. Even if courts take longer to reach a decision, PAs have fewer procedural issues than a **tutela** which is an action of last resort.



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

84. The Superintendency of Corporations has lifted the corporate veil in various cases, such as *Finagro v Grupo Empresarial Mónica Colombia*,¹⁴⁹ and *Panavías Ingeniería & Construcciones S.A. v Agro Repuestos S.A.S.*¹⁵⁰
85. Some CCAs have resulted in reparations for environmental harm, such as *Leonor Buitrago Quintero et al. v Alcaldía de Bogotá (Doña Juana)*.¹⁵¹
86. An extra-contractual civil liability case which resulted in reparation in the context of dangerous activities is *Jose Crispin Sanchez Rodriguez et al. v Sociedad Oleoducto Central S.A.(OCENSA)* (the **Machuca** case highlighted after [10] above).¹⁵²
87. In two cases the lawsuit was successful but civil claims were not the preferred avenue: *Fundepúblico et al. v Dow Química de Colombia S.A.*¹⁵³ and *Pueblo Zenú v Empresa Cerro Matoso S.A.*¹⁵⁴
88. Other relevant cases are: *Cámara de Comercio de Barranquilla v Carcos Mantenimiento de Equipos S.A.S.*¹⁵⁵ and *Harold Alberto Botero Hoyos et al. v Juan Carlos Alonso de Celada Correa, JAC La Esmeralda S.A.S. & Condival S.A.S.*¹⁵⁶



149 Superintendency of Corporations. [Sentencia No 801-64](#). 21 October 2014.

150 Superintendency of Corporations. [Sentencia No 800-122](#). 11 December 2017.

151 Council of State. Contentious-administrative Chamber. Third Section. [Filing 25000-23-26-000-1999-00002-04](#). (AG). 13 February 2013. Enrique Gil Botero.

152 Supreme Court of Justice. Civil Cassation Chamber. [Filing 05736-31-89-001-2004-00042-01](#). SC5686-2018. 19 December 2018. Margarita Cabello Blanco.

153 [Constitutional Court. T-080/2015](#). Jorge Iván Palacio Palacio.

154 [Constitutional Court. T-733/2017](#). Alberto Rojas Ríos.

155 Superintendency of Corporations. [Auto No 801-17366](#). 10 December 2012.

156 Superintendency of Corporations. [Sentencia No 2019-01-372391](#). 15 October 2019.

CaseScenario3

Q1

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

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Claims against Factory Co

89. Workers affected in this case have two main legal avenues at their disposal. These are regulated under different theories of liability, and claimants can generally use them simultaneously depending on the facts. First, workers can claim social security benefits regarding workplace illness or accidents through the social security system without having to prove the employer's fault or negligence. If the employer did not enrol the worker in the Labour Risk Social Security System, workers can present a claim asking for the employer to cover the benefits that the worker would otherwise have received from the system. Second, if the worker believes that the employer was at fault, the worker can bring a claim against the employer in the labour courts, asking for full compensation.

Social Security System

90. As explained above in [15], in cases of workplace illness or accident, social security protection should apply.¹⁵⁷ The concept of workplace illness or accident is essential: if the case can be classified as one of these scenarios, the worker or their family could claim the benefits of the Labour Risk Social Security System. In such cases, the worker has the right to two kinds of benefits: healthcare costs and economic compensation, both regulated by [Law 100 of 1993](#) and [Law 1562 of 2012](#). Regarding labour-related accidents, a worker or their family must only prove its occurrence to receive the benefits from the Labour Risk Social Security System. According to article 3 of Law 1562 of 2012, a labour accident is a sudden event that produces in the worker a bodily injury, a functional or psychiatric disorder, a disability, or death. The definition applies if such an event occurs (i) in relation to the work; (ii) during the execution of orders by the employer; (iii) during the worker's commute to or from the workplace if transportation is provided by the employer; (iv) during labour union work (in determined circumstances a unionist leader can receive leave to fulfil its duties, that is called '*permiso sindical*', which we have translated as labour union work); or (v) during recreation activities on behalf of the employer.

¹⁵⁷ Art 216 of the Labour Code (n 17) refers to the liability regime incurred by the employer for the damages caused by his negligence to the worker. The Supreme Court interpreted that, when a specific breach of the obligations of care and safety on the part of the employer is proved, their fault is presumed.

91. Normally, the Labour Risk Administrator would cover all benefits. However, if the employer did not register the worker in the system (a mandatory requirement), the employer is liable. If Factory Co did not register its workers, the workers or their families would be able to sue the company in the labour courts to claim the benefits that they would otherwise have obtained from the Labour Risk Administrator. To be successful, the claimants would need to prove the facts, that is, the work relationship, the events, its qualification as a workplace accident and, if necessary, their relationship with the worker.

Labour jurisdiction

92. Besides the social security claims, claimants could sue Factory Co in a labour court alleging Factory Co's liability in the workplace accident. In this case, fault liability would be an applicable standard. The worker or their family would have to prove all the elements of liability as well as intent or negligence. If the accident was caused by an action, the claimant must prove: (i) the occurrence of the action; (ii) the harm; and (iii) the causal link between the action and the harm. If the accident was caused by an omission, the claimant must prove: (i) the omission that caused the breach; (ii) the harm; and (iii) the causal link between the breach and the harm. According to article 488 of the Labour Code, the claim would have to be filed within three years.¹⁵⁸

93. Workers and their families could sue Factory Co directly and seek compensation beyond the benefits recognised by the Labour Risk Social Security System. Given that the case involves omissions by the employer, the claimants would have to prove the harm (injury or death, depending on the case), and the causal link between the omissions and the harm, as well as fault.

Claims against Brand Co

94. Colombian legislation would not allow a claim against Brand Co for the accident and resulting harm solely by virtue of Brand Co being a buyer of Factory Co's products. Nonetheless, workers, family members, union members, and activists could employ advocacy strategies, such as pushing for the company to modify its market position, demanding better labour conditions from its vendors, etc.



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

95. The preferred action would be a combination of claiming Labour Risk Social Security benefits in conjunction with suing Factory Co under a standard of fault liability in the labour courts. However, workers can also file criminal complaints against the individuals responsible for the crimes such as bodily injury (in the case of the 58 injured workers) and negligent homicide (in the case of the 76 killed workers).

¹⁵⁸ It is important to note that the starting date for the three years will vary according to the facts of the case. In general, the Labour Chamber of the Supreme Court of Justice has stated that the period starts on the date on which the consequence of the accident became clear. Supreme Court of Justice, Labour Cassation Chamber. [Filing 58378, SL1463-2018](#), 2 May 2018. Carlos Arturo Guarín Jurado.

Once the criminal procedure has ended, if there is a guilty verdict, victims can propose a reparations scheme in the terms explained in [20] above.



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

96. Litigation regarding harmful or unfair labour conditions usually takes the form of individual cases presented by a worker or their family members. One example is a decision of May 2020 in which the Labour Chamber of the Supreme Court of Justice ruled on a cassation appeal regarding a claim presented by the family of a worker who died as a result of a workplace accident. The family alleged that the defendants, one of the most important retail companies in the country and a labour cooperative, were negligent and at fault for the worker's death because of the lack of preventive measures and the non-fulfilment of safety rules.¹⁵⁹ The Court ruled in favour of the claimant and against the defendant companies.



¹⁵⁹ Supreme Court of Justice, Labour Cassation Chamber. [SL1565-2020](#). 27 May 2020. Martín Emilio Beltrán Quintero. A similar case is one concerning a fatal accident that a worker suffered while doing work at heights: Supreme Court of Justice, Labour Cassation Chamber. [SL9355-2017](#). 21 June 2017. Clara Cecilia Dueñas Quevedo.



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Civil Liability for Human Rights Violations



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ENGLAND & WALES



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

INDICES

18/167

Democracy Index
2021 Ranking

93/100

Freedom House
2022 Score

11/180

Transparency International
Corruption Index 2021 Ranking

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



Introduction

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

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

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

³ [R v Lyons](#) [2002] UKHL 44 [27].

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

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

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

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

SPOTLIGHT: COMMON LAW FLEXIBILITY



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

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

⁶ Human Rights Act 1998, c 42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

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

Assault or unlawful arrest and detention

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

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

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

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

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

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

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

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

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

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

Environmental harm

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

²⁰ [2011] UKSC 12.

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

SPOTLIGHT: CIVIL LIABILITY FOR BREACH OF STATUTORY ENVIRONMENTAL STANDARDS



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

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

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

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

Harmful or unfair labour conditions

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

²¹ Water Industry Act 1991, c 56.

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

²³ Employment Rights Act 1996, c 18.

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

SPOTLIGHT: CASE STUDY



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

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

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

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

Corporate liability

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

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

SPOTLIGHT: ORIGINS AND APPLICATION OF THE IDENTIFICATION PRINCIPLE

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

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

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

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

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

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

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

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

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

SPOTLIGHT: VICARIOUS LIABILITY



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

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

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

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

²⁹ [2020] UKSC 13.

³⁰ [2020] UKSC 12.

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

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

Q2

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

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

Negligence

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

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

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

SPOTLIGHT: CHALLENGES POSED BY OMISSIONS



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

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

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

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

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

Trespass to the person

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

³⁵ [2006] UKHL 33.

³⁶ [2004] UKPC 12.

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

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

Nuisance

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

³⁸ *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370 at [74].

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

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

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

⁴² *Burton v Davies* [1953] QSR 26.

⁴³ *Harnett v Bond* [1925] AC 66.

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

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

SPOTLIGHT: PRIVATE NUISANCE



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

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

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

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

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

Rule in *Rylands v Fletcher*

38. This has been described as a 'sub-species' of the law of private nuisance.⁴⁷ It involves strict liability for one-off escapes of dangerous items brought onto land that were likely to harm.
39. This 'rule' which derives from an 19th century case was described more recently in the following terms:

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

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

Unjust enrichment

41. Unjust enrichment is a unifying legal concept whereby a defendant may be obliged to make fair and just restitution for a benefit derived at the claimant's expense. The principal elements are: (1) that the defendant was enriched; (2) at the claimant's expense; (3) the enrichment was unjust; and (4) lack of any defence.⁵⁰
42. The law of unjust enrichment is in an evolutionary state. In general, an unjust enrichment claim will seek to establish a proprietary interest in property held by the defendant. Some claims in England have started to rely on this cause of action in the context of alleged abuses in international value chains, but whether that succeeds remains to be seen.⁵¹

Q3

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

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

⁴⁷ *Transco plc v Stockport Metropolitan BC* [2003] UKHL 61 [9].

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

⁴⁹ *Transco plc* (n 47) [5].

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

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

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

SPOTLIGHT: JOINT TORTIOUS LIABILITY FOR PARTICIPATION IN A COMMON DESIGN

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

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

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

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

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

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

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

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

SPOTLIGHT: EXAMPLES OF JOINT LIABILITY IN TORT

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

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

Q4

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

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

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

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

⁵⁹ [*Kalma*](#) (n 28).

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

SPOTLIGHT: THE *CHANDLER* INDICATORS OF PARENT COMPANY LIABILITY

- a. The business of the parent company was the same in a relevant respect;
- b. The parent had, or ought to have, superior knowledge on some relevant aspect of health and safety in the relevant industry;
- c. The subsidiary's system of work was unsafe as the parent knew, or ought to have known; and
- d. The parent company knew or ought to have foreseen that the subsidiary or its employees would rely on the parent company using its superior knowledge for the employees' protection.

50. In *Vedanta*,⁶¹ however, Lord Briggs explained that *Chandler* merely identified examples and should not be treated as having imposed an unnecessary straitjacket. Lord Briggs offered other examples where liability might arise.

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

The Supreme Court's judgment in *Vedanta*⁶² identifies four illustrative examples when a parent company might be liable for harm caused by a subsidiary's operations. There is, however, nothing special about the parent/subsidiary relationship. Therefore, these routes are of broader application, potentially including the conduct of independent contractors in a supply or value chain. The four examples:

- a. A parent company had, in substance, taken over the management of the relevant activity (including jointly with the subsidiary's management);
- b. A parent company promulgated deficient policies and guidelines to be implemented by a subsidiary;
- c. A parent company took active steps to implement relevant standards; or
- d. A parent company held itself out as supervising and controlling the relevant matters, even if it did not exercise such supervision and control in practice.

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

⁶¹ *Vedanta* (n 12).

⁶² *ibid.*

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

Q5

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

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

⁶³ *Okpabi* (n 13).

⁶⁴ *Begum* (n 14).

SPOTLIGHT: CAUSATION



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

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

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

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

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

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

SPOTLIGHT: EXEMPLARY (OR PUNITIVE) DAMAGES

- In addition to compensatory damages, exemplary or punitive damages⁶⁸ are non-compensatory and can be awarded in two main circumstances.
 - a. First, where there has been oppressive or unconstitutional action by servants of the government (including the police).
 - b. Secondly, where the defendant's conduct was calculated to make a profit that may well exceed the compensation payable to the claimant.

Exemplary damages are not available for negligence or public nuisance, but they are available for a range of other torts.
- Restitutionary damages are another type of damages that can be claimed in respect of proprietary torts. These aim to strip away from a defendant any gains made by committing a tort.

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

AN EXAMPLE OF AGGRAVATED DAMAGES

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

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

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

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

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

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

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

SPOTLIGHT: REMEDIES FOR PRIVATE NUISANCE



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

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

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

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

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

SPOTLIGHT: FURTHER REMEDIES AGAINST PUBLIC AUTHORITIES

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

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

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

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

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

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

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

Q6

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

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

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

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

Q7

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

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

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

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

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

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

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

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

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

⁸² *Spiliada* (n 80).



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

General resources

Open-access

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

Subscription-based

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

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

Harmful or unfair labour conditions

Open-access resources

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

Subscription-based resources

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

Environmental harm

Open-access resources

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

Subscription-based resources

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

Assault or unlawful arrest and detention

Open-access resources

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

Subscription-based resources

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

Corporate, public bodies, and other

Open-access resources

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

Subscription-based resources

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

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against the Police

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

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

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

Claims against Security Co

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



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

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

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



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

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



⁸⁶ *ibid.*

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

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

CaseScenario 2

Q1

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

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Claims against Subsidiary Co

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

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

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

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

Claims against Parent Co

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

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

91 *Vedanta* (n 12).

92 *ibid.*

93 *Okpabi* (n 13).

Q2

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

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

Q3

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

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

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

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

96 [*Okpabi*](#) (n 13).

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

98 [*Vedanta*](#) (n 12).

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

- g. [Amerisur Resources](#) (concerning a claim against a UK parent company following oil pollution in Columbia).¹⁰⁰

93. In a purely domestic UK setting, some examples include:

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



¹⁰⁰ [Bravo & Ors v Amerisur Resources plc](#) [2020] EWHC 2279 (QB).

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

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

¹⁰³ [Dobson](#) (n 71).

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

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

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

CaseScenario3

Q1

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

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Claims against Factory Co

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

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

Claims against Brand Co

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

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

¹⁰⁹ *ibid.*

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

Q2

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

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

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

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

Q3

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

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

111 *Sonae Group Litigation* (n 106).

112 *Colour Quest Ltd* (n 102).

113 *Chandler v Cape plc* (n 60).

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

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



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Civil Liability for Human Rights Violations



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P251	Question 4	6 minutes
P254	Question 5	2 minutes
P255	Question 6	2 minutes
P256	Question 7	1 minute
P256	Question 8	1 minute
P258	Case Scenarios	1 minute
P259	Case Scenario 1	7 minutes
P263	Case Scenario 2	6 minutes
P266	Case Scenario 3	7 minutes



FRANCE



France has a civil law system. The law of civil remedies primarily refers to forms of extra-contractual liability equivalent to tort liability. The French law of civil remedies may be a valuable tool for recovering compensation for human rights violations in certain contexts, for instance, to hold the State accountable where violations concern individual freedoms or occur in the context of specific public activities such as justice or pre-trial detention.

Moreover, in 2017, France passed the so-called Duty of Vigilance Law, which creates specific duties of care for companies with respect to human rights and environmental abuses and provides for civil liability. At the same time, victims of human rights violations often prefer criminal law avenues to obtain redress due to certain procedural barriers hindering access to civil remedies.



IN

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INDICES

22/167

**Democracy Index
2021 Ranking**

89/100

**Freedom House
2022 Score**

22/180

**Transparency International
Corruption Index 2021 Ranking**

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



Introduction

1. France has a civil law system. Most of French law is codified in a comprehensive system of codes, which are constantly updated. These codes govern most areas of law. In civil matters, most of French tort law is governed by only a few rules laid down in the [Napoleonic Civil Code of 1804](#), which is still in force.
2. The 'law of civil remedies', as defined for the purposes of this project, may encompass various private and public legal regimes under French law.
3. The law of civil remedies primarily refers to extra-contractual liability (also known as non-contractual liability) equivalent to tort liability in common law jurisdictions. Extra-contractual liability designates situations of civil liability that occur in the absence of a contract between the parties. It can be divided into general extra-contractual liability regimes (governed by the Civil Code) and special extra-contractual liability regimes (governed by codes, laws, and case law).
4. At the same time, the law of civil remedies can refer to civil compensation sought in the context of criminal proceedings. In accordance with the rules of the French criminal system, victims of criminal offences can seek civil remedies either directly through the criminal court (ancillary civil action) or through subsequent civil proceedings.
5. Finally, while the liability of public bodies that form part of the State is governed by rules of administrative law and decided by administrative courts, in some cases civil courts may rule on the liability of public authorities or order compensation for damage caused by these actors.
6. The French law of civil remedies can be a powerful tool to seek compensation for human rights violations. For example, extra-contractual liability regimes have the potential to hold private actors, such as individuals and companies, accountable when human rights abuse takes place in the context of horizontal relationships. Civil courts can also hold the State accountable in specific situations of abuse, such as violation of individual freedom, or when gross negligence occurs in the context of specific activities, such as pre-trial detention or criminal investigations.
7. Nevertheless, because of the inadequacies of French civil procedural law – in particular the lack of discovery procedure – and the possibility for victims to request civil remedies as part of criminal proceedings, victims of human rights violations will often prefer criminal law avenues in order to obtain remedies.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

GENERAL EXTRA-CONTRACTUAL CIVIL LIABILITY

A victim of human rights violations may be able to bring a civil claim against private persons, including individuals and corporations, under the **extra-contractual civil liability rules**. The [Civil Code](#) recognises different types of extra-contractual liability, including liability for harm caused by one's own act, by others, and by things.

8. Victims may file a **fault-based liability claim** under Civil Code [Articles 1240](#) and [1241](#). Accordingly, when one person causes harm to another, the tortfeasor must compensate for the resulting damage. This rule applies whether the harm is caused by the tortfeasor's fault ([Article 1240](#)), or negligent or imprudent conduct ([Article 1241](#)). Originally, [Article 1240](#) covered intentional faults (*delicts*), while [Article 1241](#) dealt with negligent or imprudent faults (*quasi-delicts*), but this distinction has lost its significance over time. This fault-based liability regime is the most commonly used civil liability regime. It has been invoked by victims of human rights violations, environmental pollution, and modern slavery.¹ It is worth mentioning that following the adoption of the Law on the duty of vigilance of parent and instructing companies ([Duty of Vigilance Law](#)) in 2017,² victims of human rights violations committed within corporate groups or in the context of business outsourcing can now file a fault-based liability claim against the parent or lead company under the conditions set out in Civil Code Articles [1240](#) and [1241](#). This legislation is presented in further detail in [43]-[44] below.
9. Victims of human rights violations may also be able to seek civil remedies under Civil Code [Article 1242](#), which provides for liability for damage caused by other people and things. [Article 1242](#) establishes a general vicarious liability principle as well as special vicarious liability regimes.
10. Under the **general principle of vicarious liability**, a person is liable for damage caused by the acts of others for whom they are responsible. Vicarious liability applies to persons who have authority over the wrongdoer. For a long time, the Court of Cassation refused to see an affirmation of a general principle of vicarious liability in the new [Article 1242](#) (which came into force in 2016). However, in the [Blieck](#) case,³ it reversed its position and recognised that an association managing a care centre was liable for the fault of a disabled person in the care of the centre. Since *Blieck*, the Court of Cassation has applied this liability regime to certain guardians, including persons having custody of individuals with disabilities or minors, and sports associations, for acts of their members. However, it has not established the existence of a general principle of vicarious liability. As a result, the benefit of using this vicarious liability regime to seek redress in the context of human rights violations is limited.

¹ Soc 3 April 2019, 16-20.490 (Court of Cassation, Labour Chamber).

² [Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre \(1\)](#).

³ Cass ass plén 29 March 1991, 89-15.231, *Blieck* (Court of Cassation, Full Court).

11. [Article 1242](#) also establishes **special vicarious liability regimes**. One of them is the liability of employers for damage caused by their employees (*responsabilité des commettants du fait de leurs préposés*). An employer is liable for any damage caused by their employee while performing the functions for which they were hired.
12. [Article 1242](#) also establishes the principle of liability for damage caused by things in one's custody. This liability regime is relevant in cases involving environmental pollution. Please see [30] below for relevant case law.

SPECIAL EXTRA-CONTRACTUAL CIVIL LIABILITY

In addition to the standard rules of extra-contractual liability, France has a number of **special extra-contractual civil liability regimes** based on statutes and case law that govern the reparation of damage and may be useful to victims of human rights violations.

13. In the context of environmental pollution, victims may sue in civil court under the jurisprudential theory of **abnormal neighbourhood disturbance** (*trouble anormal du voisinage*).⁴ This theory seeks to put an end to irregular disturbances caused by 'neighbours', as well as to repair or prevent further damage. It is often used to halt industrial and agricultural pollution. Victims must prove that the trouble exceeds normal neighbourhood inconvenience. One advantage of this theory is that liability is strict, and victims are not required to demonstrate the existence of the neighbour's fault. However, under the anteriority rule, the tortfeasor may be exempt from liability if the activities in question were present before the victims moved into the vicinity. Nonetheless, the Court of Cassation appears to be reconsidering the application of the anteriority rule. In 2021, it ruled that a building owner could initiate civil proceedings about a neighbourhood disturbance that existed on their property before the purchase.⁵
14. In 2016, France added a new category of damage to the Civil Code.⁶ According to the new [Article 1246](#), 'anyone responsible for ecological loss is obliged to repair it'. [Article 1246](#) aims to repair damage to the environment itself, not to humans or their property. Ecological loss is defined as the 'non-negligible harm to the elements or functions of ecosystems or to the collective benefits derived by humans from the environment' (Civil Code [Article 1247](#)). Remediation mechanisms for this type of damage are discussed in greater detail in [48] and [50] below.
15. Workers who have suffered from labour rights violations have access to civil remedies through special compensation and liability regimes provided for by the [Labour Code](#) and the [Social Security Code](#). For instance, Labour Code [Article L4121-1](#) requires employers to protect their workers' safety and health. If a worker is injured in the course and place of employment (a workplace accident), they are automatically entitled to compensation (a lump-sum payment) under occupational injury insurance ([Social Security Code](#) Livre IV). Furthermore, if the accident was caused by the employer's 'inexcusable fault', the victim can seek additional compensation ([Social Security Code](#) Article L452-1). This social security scheme is exclusive and prevents the use of standard civil liability claims. It is only in the

⁴ This theory is of praetorian origin. See [Civ 27 November 1844](#). It has been applied in the field of industrial and agricultural pollution. See [Civ \(3\) 28 June 2018, 17-18.755](#) (Court of Cassation, Civil Chamber).

⁵ [Civ \(3\) 17 November 2021, 17-26.026](#) (Court of Cassation, Civil Chamber).

⁶ [Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages](#).

event of an ‘intentional fault’ that the victim can seek additional compensation against the employer for the full damage suffered, under standard civil liability law ([Social Security Code Article L452-5](#)).

CIVIL COMPENSATION IN CRIMINAL PROCEEDINGS

Victims of criminal offences can seek **civil remedies as part of criminal proceedings** (Code of Criminal Procedure [Articles 2 and 3](#)). In such cases, the criminal court decides on the criminal liability of the indicted person and on the civil remedies to be granted to the victims. The victim may also file an action in a civil court, which must stay proceedings until the criminal court has ruled on the criminal case.

16. The civil court is bound by the outcome of the prosecution or criminal ruling. If the person prosecuted is convicted, discharged, or acquitted in criminal proceedings, the civil court may not contradict what has been decided (principle of *autorité de la chose jugée au criminel sur le civil*). A criminal conviction entails the admission of a civil fault. However, a criminal acquittal does not necessarily imply that there is no civil liability. For instance the facts may not fall within the scope of criminal law but still constitute a civil fault (eg an acquittal based on insanity).
17. A distinction should be made between **unintentional and intentional criminal fault**. Pursuant to the [Code of Criminal Procedure](#) Article 4-1, the absence of unintentional criminal fault does not preclude the exercise of an action before the civil courts to obtain compensation for damage under [Civil Code](#) Article 1241 or in the context of proceedings relating to workplace accidents and occupational diseases. However, the existence of civil fault under [Article 1241](#) or inexcusable fault under Social Security Code [Article L452-1](#) must be established. In the case of intentional criminal fault, the civil judge will generally be bound by the criminal decision.⁷

STATE LIABILITY IN CIVIL COURTS

In France, administrative law rules govern State liability. While general civil liability rules do not apply to the State, there are only limited circumstances when a civil claim can be commenced in relation to the damage caused by public authorities.

18. According to the principle of separation of administrative and judicial powers, which dates back to the French Revolution, France has two separate jurisdictional orders, the judicial order and the administrative order.⁸ Because of this dual legal system, judicial courts cannot hear liability claims against the State, and general civil liability rules do not apply to the State.⁹
19. Nonetheless, judicial courts can hear liability claims against the State in the context of specific public activities, such as justice or pre-trial detention. For example, Code of Judicial Organisation [Article L141-1](#) provides that the State is obliged to repair the damage caused by the defective functioning of the public service of justice. However, this liability is only incurred by gross misconduct (*faute lourde*)¹⁰ or by a denial of justice.

⁷ Civ (2) 23 November 1988, Bull. civ. II, no 225.

⁸ [Loi des 16-24 août 1790 sur l'organisation judiciaire](#), Arts. 10, 12 and 13.

⁹ T confl 8 February 1873, *Blanco* (Conflict Tribunal).

¹⁰ [Crim 15 March 2016, 14-87.237](#) (Court of Cassation, Criminal Chamber).

20. Furthermore, victims of unlawful detention can seek redress from the State through the judicial courts, including civil courts. According to the Constitution [Article 66](#),¹¹ no one may be arbitrarily detained, and the judicial authority, which is the ‘guardian of individual freedom’, ensures that this principle is respected under the conditions laid down by law. In addition, Code of Criminal Procedure [Article 136](#) recognises that judicial courts have exclusive jurisdiction in all cases involving an infringement of personal freedom. This also applies to any civil proceedings directed against the public authority or its agents raising an infringement of personal freedom, such as unlawful deprivation of liberty.
21. Finally, the judicial judge is also competent to order reparation of damage caused by **administrative trespass** (*voie de fait*), which generally refers to an illegal decision or act carried out by the administration that seriously violates individual freedom or a property right (see the case of [L’Action Française](#))¹². Victims of specific human rights violations committed by public bodies can seek compensation on this basis. For example, in March 2022, the Douai Court of Appeal ruled that a prefect’s decision to dismantle a migrant camp in Calais constituted administrative trespass.¹³
22. A distinction must be made between the administration’s liability and that of its agents. Since the [Pelletier case](#),¹⁴ French law has distinguished between service fault and personal fault when damage is caused to third parties. A **service fault** is a fault committed by a public officer while performing their duties, with the resources of the service and without any personal interest. By contrast, a **personal fault** refers to a fault committed while the agent was not on duty (eg an accident caused by a staff member using their personal vehicle outside the performance of their duties).¹⁵ A fault may also be qualified as ‘personal’ while the agent was performing their duties if the conduct was incompatible with the agent’s duties (eg malicious intent or animosity towards a subordinate or a user of the service).¹⁶
23. As a result of this distinction, an action for damages caused by a ‘service fault’ is brought against an administrative or public legal person (eg the police) before the administrative court, while an action for damages caused by a ‘personal fault’ is brought against a public agent (eg police officer) before the civil court.

Q2

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

In France, extra-contractual liability generally requires three elements: damage (*dommage*); the conduct causing damage and giving rise to liability (*fait générateur*); and a causal link between the two (*lien de causalité*). However, the requirements for each of these elements may differ depending on the liability regime.

¹¹ [Constitution du 4 octobre 1958](#).

¹² [T confl. 8 April 1935, Lebon 1227, L’Action Française](#).

¹³ [‘A Calais, le préfet condamné pour le démantèlement d’un camp de migrants’](#) *Libération* (Paris, 30 March 2022).

¹⁴ [T confl. 30 July 1873, Pelletier](#) (Conflict Tribunal).

¹⁵ T confl. 24 July 1947, *Dame Cames*, Lebon 507 (Conflict Tribunal).

¹⁶ Civ (1) 9 December 1986, Bull. civ. I, no 295 (Court of Cassation, Civil Chamber).

24. For the **fault-based liability regime** outlined in Civil Code Articles [1240](#) and [1241](#) to apply (see [8] above), victims must establish three elements: damage; the tortfeasor's fault (whether intentional or negligent); and a causal link between the damage and the tortfeasor's fault.
25. In order to be compensated, victims must first generally demonstrate that they have suffered damage or loss as a result of the violation. However, in the case of specific human rights (eg right to privacy), the French courts accept that the mere finding of violation gives rise to reparation.¹⁷
26. Second, victims must prove that the tortfeasor was at fault. French courts accept that a simple breach of a standard of conduct, whether or not it is spelled out in laws and regulations, is sufficient to establish the tortfeasor's fault, and that a civil fault may result from the tortfeasor's positive act or omission.¹⁸
27. Third, victims must establish a direct and certain causal link between the damage and the tortfeasor's fault, which can be difficult in cases involving environmental pollution. The courts sometimes accept the 'high probability' that the fault caused the damage by establishing factual presumptions.¹⁹ However, in cases of uncertain scientific causality, the precautionary principle does not waive proof of the causal link, and victims must demonstrate 'serious, precise, reliable and consistent presumptions'.²⁰
28. For the **employer's liability for damage caused by their employees** to apply, victims must establish that an employee committed a harmful act while performing their duties. They must also demonstrate a relationship of subordination between the employer and the employee, that is, that the employer has the right to give the employee orders or instructions on how to perform the duties for which they are employed. An employment contract is frequently the source of such a relationship. In the absence of an employment contract, French courts have also accepted that an act committed by an occasional employee or a friend or family member providing temporary assistance to a company director may result in the employer's liability. One advantage for victims is that this is a strict liability regime. Victims are not required to prove the employer's fault, and the employer cannot exonerate themselves by demonstrating that they have not committed any fault.
29. For **liability for damage caused by things in one's custody** to be applicable, victims must prove that damage was caused by a thing over which a person had custody.
30. The **concept of 'thing'** has been broadly interpreted by French courts. A thing can be a solid, liquid, or gaseous substance, as well as a sound or electrical wave. In the context of civil claims for environmental damage, courts have accepted that a thing could be a fuel or a hydrocarbon emitted from a reservoir,²¹ liquid nitrogen fertilisers released into a river,²² or sulphurous gas emissions.²³ Victims must also show that the object was instrumental in causing the damage.

¹⁷ [Civ \(1\) 5 November 1996, 94-14798](#) (Court of Cassation, Civil Chamber).

¹⁸ Civ 27 February 1951, Bull. 77, *Branly* (Court of Cassation, Civil Chamber).

¹⁹ TGI Albertville 26 August 1975, JCP 1976 II, n 18384.

²⁰ Civ (3) 18 May 2011, 10-17.645 (Court of Cassation, Civil Chamber).

²¹ Civ (2) 12 October 2000, 99-10.734 9 (Court of Cassation, Civil Chamber).

²² Nancy 11 April 2000, *Sté coopérative agricole Champagne céréale c/ Collot*.

²³ Civ (2) 5 March 1975, No 72-14.320, 72-14.507 and 72-14.509 (Court of Cassation, Civil Chamber).

31. Finally, they must establish that the person whose liability is sought is the custodian of the thing, in other words, the person with the power to use, direct, and control the thing. This condition creates difficulties in environmental cases, particularly when *res nullius*, or things without a custodian, are involved (such as water and snow). Furthermore, if the owner is presumed to be the thing's custodian, the presumption falls when the owner demonstrates that they have transferred custody of the thing in fact or through a contract. As a result, in environmental cases, this liability regime is rarely applied.

Q3

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

The concept of **complicit or accessory conduct** does not exist as such in French civil liability law. Findings of criminal complicity may however have an impact on civil liability. Indeed, there is a statutory joint and several liability for civil damages resulting from criminal offences (*obligation solidaire* under [Articles 375-2, 480-1 and 543](#) of the Code of Criminal Procedure).

32. As a result, if a victim claims civil remedies as part of criminal proceedings (see [17] above), all perpetrators who are convicted for the offence, as well as their accomplices, will be **jointly and severally liable** for the damage directly caused by the offence. The same applies if a victim claims, before a civil judge, compensation for a damage caused by a criminal offence.
33. In civil proceedings, if the damage suffered by the victim results from the acts or omissions of several tortfeasors, the victim may request compensation of the full amount from any of them (*obligation in solidum*). The joint tortfeasors' respective proportion of liability only affects their mutual relationships but does not affect the extent of their obligation towards the victim.²⁴
34. For this joint and several liability to apply, there must be only one damage (as opposed to several discrete damages respectively attributable to different tortfeasors), but the liability of the different tortfeasors may be based on different grounds.
35. If a tortfeasor paid more than its share to the victim, they are entitled to request the other tortfeasor(s) to pay their own share. To apportion liability between joint tortfeasors, judges have traditionally relied on their respective contribution to the damage, ie on the seriousness of their respective fault.²⁵ More recently, some decisions have relied on other factors to assess contribution to the damage, including, for example, the respective market share of pharmaceutical companies that commercialised a molecule used in a pharmaceutical formulation that gave rise to the damage.²⁶

²⁴ [Civ \(2\) 4 February 1981, 79-12.946](#) (Court of Cassation, Civil Chamber).

²⁵ [Civ \(2\) 25 January 2007, 06-13.611, Etablissement Français du Sang](#) (Court of Cassation, Civil Chamber).

²⁶ [CA Versailles 30 June 2016, 14/04397, Distilbène](#) (Court of Appeal, Versailles).

Q4

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

Pursuant to the principle of legal separation of corporate entities within corporate groups, there is no general principle according to which a company would be vicariously liable for acts and/or omissions committed by a subsidiary.²⁷ The legislation and the courts only recognise the existence of the group and the parent company's liability in an exceptional and fragmented manner.

36. **Bankruptcy law** provides for certain exceptions in cases of asset confusion between a parent company and its subsidiary, or if the subsidiary is deemed fictitious (Articles [L621-2](#), [L631-7](#) and [L641-1](#) of the [Commercial Code](#)). In addition, in certain cases, the parent company may also be regarded as a *de facto* director and may be ordered to pay for its subsidiary's liabilities in case of mismanagement or '*faute de gestion*' (Commercial Code [Article L651-2](#)). Finally, Environmental Code [Article L512-17](#) provides that the parent company may be ordered to pay for environmental rehabilitation measures when it committed serious misconduct that contributed to its subsidiary's bankruptcy.
37. Another exception exists in **labour law** through the concept of co-employment. A parent company may only be regarded as a co-employer in limited circumstances, where 'there exists, beyond the necessary coordination of economic actions between companies belonging to the same group and the state of economic domination that such membership may cause, a confusion of interests, activities and management resulting from the parent company's interference in the economic and social management of its subsidiary'.²⁸
38. Furthermore, two doctrines have been developed by case law: the **appearance doctrine** (*théorie de l'apparence*) and the **interference doctrine** (*théorie de l'immixtion*), pursuant to which a parent company may be held vicariously liable for its subsidiary's acts. These can be compared to the doctrine of 'piercing of the corporate veil'²⁹ in certain common law jurisdictions. According to the appearance doctrine, a parent company may be liable for its subsidiary's obligations towards a third party when the latter could in good faith believe that it was dealing with the parent company. It has only been applied in contractual settings. The interference doctrine requires positive acts of interference in the subsidiary's management.³⁰ Interference is strictly defined.³¹
39. Similarly, there is no general principle according to which a company would be vicariously liable for the acts and omissions of an independent subcontractor.
40. As mentioned at [11] and [28] above, an employer may be vicariously liable for the **fault or negligence of their employee** committed in relation to their functions

²⁷ [Com 26 March 2008, 07-11.619, ADEME v. Elf](#) (Court of Cassation, Commercial and Financial Chamber).

²⁸ [Soc 24 May 2018, 17-15.630](#) (Court of Cassation, Labour Chamber).

²⁹ See discussion in the following project reports: [28] Australia; [29] Bangladesh; [42] Canada; [74] Hong Kong; [36] Malaysia; [44] US; [87] Zambia.

³⁰ [Com 26 February 2008, 06-20.310](#) (Court of Cassation, Commercial and Financial Chamber).

³¹ [Civ \(3\) 25 February 2004, 01-1.764, Marks and Spencer](#) (Court of Cassation, Civil Chamber).

(Civil Code [Article 1242](#) para. 5). For this principle to be applicable, the employee must participate in the activities of their employer and do so under their authority and control (regardless of whether such authority and control are effectively exercised), but an employment contract between them is not necessary. As a result, a company is in principle not vicariously liable for the acts and omissions of an independent subcontractor, unless the above conditions are met in practice.³²

41. However, a parent or lead company may be civilly liable **for its own actions and omissions** under Civil Code Articles [1240](#) and [1241](#). It has been recognised that a parent company may be obliged to pay damages to its subsidiary's employees under Articles [1240](#) and [1241](#) when its own fault contributed to the subsidiary's economic difficulties and therefore to the economic lay-off of its employees.³³
42. The parent company's failure to respect a certain standard of conduct may also amount to a civil fault, triggering civil liability.

SPOTLIGHT: ERIKA CASE

In the landmark [Erika case](#), which was a criminal case against the French company Total and its Panama subsidiary for an oil spill off the coast of Brittany,³⁴ the Court of Cassation relied on the monitoring procedure (vetting) put in place by Total, and its failure to respect this procedure, to find that Total's acts and omissions were committed 'recklessly and with knowledge such damage would probably occur', under the International Convention on Civil Liability for Oil Pollution Damage.³⁵ Such unilateral commitments need to be specific for this attribution of liability.³⁶

43. Direct liability is facilitated by certain **specific legal regimes** that impose special vigilance or due diligence obligations upon the parent or lead company.

SPOTLIGHT: DUTY OF VIGILANCE LAW

The [Duty of Vigilance Law](#) applies to companies incorporated in France that employ more than 5 000 employees in France (including in their subsidiaries), or more than 10 000 employees in France and abroad (including in their subsidiaries). This legislation was based on the insufficiencies of existing soft law instruments (including the United Nations [Guiding Principles on Business and Human Rights](#) and the Organisation for Economic Co-operation and Development (OECD) [Guidelines for Multinational Companies](#)) for preventing human rights and environmental abuses.

³² [Civ \(3\) 8 September 2009, 08-12.273](#) (Court of Cassation, Civil Chamber).

³³ Soc 8 July 2014, 13-15.573, *Sofarec* (Court of Cassation, Labour Chamber).

³⁴ This case was a criminal case. Victims introduced ancillary civil actions to obtain civil compensation for the damage caused by oil pollution.

³⁵ [Crim 25 September 2012, 10-82.938](#) (Court of Cassation, Criminal Chamber).

³⁶ [CA Versailles 22 March 2013, 11/05331, Tramway de Jerusalem](#) (Court of Appeal, Versailles).



It introduced new articles in the Commercial Code ([Articles L225-102-4](#) and [L225-102-5](#)), which require large French companies to establish, publish, and effectively implement a ‘vigilance plan’ (*plan de vigilance*). This vigilance plan must contain adequate and reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of persons, and the environment. It must address risks and violations arising from the activities of 1) the company; 2) the companies it controls, directly or indirectly; and 3) subcontractors or suppliers with which there is an established business relationship, when these activities are related to this relationship. The vigilance measures, which should be developed with the company’s stakeholders, must include, but are not limited to: risk mapping; procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers; appropriate actions to mitigate risks and prevent serious violations; an alert mechanism; and a monitoring scheme to follow up on the measures implemented and assess their efficiency.

The [Duty of Vigilance Law](#) provides for two different enforcement mechanisms. First, any person with legal standing may request a judge to order a company to comply with the legal provisions through an injunction, provided that they first formally requested the company to comply and that the company failed to do so within three months ([Article L225-102-4-II](#)). It is specified that periodic penalty payment may also be requested, that is, fines payable on a daily or on a per-event basis until the defendant complies with the injunction. Second, victims may seek compensation against a company for the damage that could have been prevented had that company respected those requirements, in accordance with general tort principles under Civil Code Articles [1240](#) and [1241](#) (Commercial Code [Article L225-102-5](#)). The duty of vigilance therefore creates a new standard of conduct for companies that, if not satisfied, can amount to the fault or negligence necessary under French civil law to trigger civil liability, if a damage and a causal link between both are established. For that reason, the duty of vigilance has sometimes been compared to a specific, statutory duty of care in common law countries.³⁷

44. So far, seven cases have been initiated against companies under these provisions.³⁸ No decisions on the merits have been rendered. The defendant companies raised jurisdictional objections, claiming that commercial courts, as opposed to civil courts, were competent. After diverging decisions, the Court of Cassation confirmed the competence of civil courts,³⁹ and [Law No 2021-1729 of 22 December 2021](#) designated the Paris Judicial Tribunal as specifically competent in those matters.

37 Parance, B. and Groulx, E., ‘Regards croisés sur le devoir de vigilance et le duty of care’ (2018) 145 *Journal du droit international* 21.

38 These cases have been filed against Total (two cases), EDF, Suez, Casino, La Poste, and Yves Rocher. Formal notices have also been sent to Teleperformance, XPO Logistics, Total and McDonald’s, but have not given rise to court cases so far. The alleged breaches relate to deforestation (Casino), climate change (TotalEnergies), labour rights and freedom to join a union (La Poste, Yves Rocher, Teleperformance, XPO Logistics, McDonald’s), the rights of indigenous people (EDF, Casino) or the right to water (Suez). See ‘Cases’ (Duty of Vigilance radar).

39 [Com 15 December 2021, 21-11.882, Total Ouganda](#).

45. The Labour Code also provides for certain due diligence obligations for companies with respect to the employees of their subcontractors (Labour Code [Articles L3245-2](#), [L. 8222-1 to 5](#) and [L8281-1](#)).

Q5

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

Monetary compensation is the preferred method of reparation. In some situations, other types of remedies, such as reparation in kind or judicial injunctions may be awarded.

46. Victims can seek **civil damages** in civil courts as well as criminal courts if the violation is also considered a criminal offence. The principle of full reparation (*principe de la réparation intégrale*) applies. Courts can order the tortfeasor to compensate the plaintiff's pecuniary loss (ie material and economic damage), non-pecuniary loss, and bodily injury. Victims cannot seek punitive damages under French law.
47. **Reparation** may also be symbolic. French courts may award a *euro symbolique* to recognise that the victim has suffered a wrong or that their right has been violated (eg the climate change case *l’Affaire du Siècle*).⁴⁰
48. In some situations, courts will favour **reparation ‘in kind’** (*en nature*). Reparation in kind aims to undo the damage by immediately and materially restoring the previous situation. For example, Civil Code [Article 1249](#) provides that reparation for ecological loss is primarily provided in kind. If it is not possible to carry out reparation in kind, or if the remedial measures are insufficient, courts will order the person responsible to pay damages, allocated to the reparation of the environment, to the claimant, or, if the claimant cannot take the appropriate measures to this end, the State.
49. Claimants may also use **fast-track proceedings** before civil courts (*référés*) to seek provisional or conservatory measures or injunctive reliefs without (or before) initiating a trial on the merits. For example, claimants may ask the court to order any measures necessary to prevent imminent harm or to put an end to a manifestly unlawful disorder (*référé conservatoire ou de remise en état*).⁴¹
50. Claimants may also seek judicial injunctions on the merits in civil proceedings. For instance, under the [Duty of Vigilance Law](#), any person with legal standing may ask a competent judge to issue an injunction compelling a company to comply with its legal obligations. In the context of the reparation of ecological loss, the judge may prescribe reasonable measures to prevent or stop the harm (Civil Code [Article 1252](#)).
51. Following the court's decision, the judge may order a periodic penalty payment until the decision is enforced (*astreinte*),⁴² and, in certain cases, the publication of the court's decision according to the modalities that the court has defined (such as on the website of the companies) (eg under the Duty of Vigilance Law).

⁴⁰ [TA Paris 3 February 2021, 1904967, 1904968, 1904972, 1904976/4-1.](#)

⁴¹ Code of Civil Procedure, [Article 835](#).

⁴² [Code of Civil Enforcement Procedures, Article L131-1.](#)

Q6

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

52. There are some **advantages** of using civil claims to obtain redress for human rights violations in France:

- General civil liability regimes are broadly defined under French law: a civil fault or negligence is generally easier to prove than a criminal fault.
- A civil plaintiff may be entitled to request an injunction even in the absence of any damage, for instance pursuant the Duty of Vigilance Law or in *référé* procedures (see [49] above). Such preventive injunctions cannot be requested in criminal proceedings.
- The legal standing of non-governmental organisations is more broadly defined in civil procedure than in criminal procedure. According to decisions rendered by civil jurisdictions, 'an association may act in the name of collective interests, as long as these interests are part of its statutory purpose'.⁴³ In contrast, in criminal cases the legal standing of non-governmental organisations has recently been interpreted in a restrictive manner.⁴⁴
- Collective action mechanisms (*actions de groupe*) are available in certain civil law matters (pertaining to consumers, competition, environment, health, discrimination and personal data). These collective action mechanisms – although very limited – do not exist in criminal proceedings.
- Legal costs are to be borne by the losing party. However, the judge is supposed to take account of equity and of the economic situation of the parties, so that a losing party will not necessarily have to pay for the other party's costs (Code of Civil Procedure [Article 700](#)).

53. Having said that, there are several reasons that using civil claims in France may be **less advantageous** than in other jurisdictions

- In the absence of discovery or disclosure procedure in France, the difficulty of accessing key evidence may hinder access to civil remedies. Existing mechanisms – such as Code of Civil Procedure [Article 145](#) – have been shown to be of limited use in cases of environmental abuses caused by corporations.⁴⁵
- The amount of damages granted by civil judges in France tends to be limited when compared with other jurisdictions. This is particularly so as there is no provision for punitive damages.

⁴³ [Civ \(3\) 26 September 2007, 04-20.636](#) (Court of Cassation, Civil Chamber).

⁴⁴ [Crim 7 September 2021](#), 19-87.031, *Lafarge*; [Crim 8 September 2020](#), 19-84.995.

⁴⁵ [Paris CA 17 September 2020, 19/20669 and Civ \(1\) 9 March 2022, 20-22.444, *Perenco*](#) (Court of Appeal, Paris).

Q7

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

54. In the context of transnational civil litigation, private international law rules will determine whether victims of human rights violations can bring a civil claim in France against a foreign defendant. Since France is a Member State of the European Union (EU), French courts must apply the [Brussels I bis Regulation](#), which governs jurisdiction in cross-border civil and commercial litigation when the defendant is domiciled in a EU Member State.⁴⁶
55. According to Brussels I bis Regulation [Article 4\(1\)](#), French courts have jurisdiction to hear claims initiated against **persons domiciled in France**, whatever their nationality. Under [Article 5\(1\)](#), French courts will also have jurisdiction over defendants domiciled in other Member States in the limited circumstances set out in [Articles 7 to 26](#).
56. If the **defendant is not domiciled in a Member State**, French law governs the jurisdiction of French courts (Brussels I bis Regulation [Article 6\(1\)](#)). The concrete application of this rule has proven to be problematic in the context of transnational civil litigation against corporate defendants domiciled in third countries, such as foreign subsidiaries of French companies. Litigants have attempted to bring civil claims against such companies in French courts under the *forum necessitatis* doctrine. However, the Court of Cassation imposed extremely stringent requirements on the application of this doctrine, which have limited the possibility of suing foreign corporate defendants in French civil courts (see the [COMILOG](#) case).⁴⁷

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

Academic and NGO resources

- Cossart, S and Chatelain, L, 'Human Rights Litigation against Multinational Companies in France' in Meeran, R and Meera, J (eds), *Human Rights Litigation against Multinationals in Practice* (OUP 2021).
- Danis-Fâtome, A and Viney, G, 'La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' [2017] *Recueil Dalloz* 1610.
- FIDH, [Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms](#) (3rd edn, 2021).

⁴⁶ [Regulation \(EU\) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters \[2012\] OJ L 351/289.](#)

⁴⁷ [Soc 14 September 2017, 15-26.737 and 15-26.738 \(Court of Cassation, Labour Chamber\).](#)

- Grimonprez, B, 'Pour une responsabilité des sociétés mères du fait de leurs filiales' [2009] *Revue des sociétés* 715.
- Hannoun, C, 'Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017' [2017] *Droit social* 806.
- Hautereau-Boutonnet, M, *Responsabilité civile environnementale* (Dalloz 2020).
- Rouas, V, [*Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries*](#) (University London Press 2022).
- Rouas, V, 'France: Untapping the Potential of Civil Liability to Remedy Human Rights Violations' in Aristova, E and Grusic, U (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

Websites

- [Duty of Vigilance Radar](#)
- [Sherpa](#)
- [International Federation for Human Rights \(FIDH\)](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against the police and/or police officers

57. As stated in [18]-[23] above, judicial courts can hear liability claims against the State in a limited number of situations. Case Scenario 1 presents several situations of abuse to which different legal liability rules may apply. A distinction must first be made between protesters who were injured by police during the protest, and those who were unlawfully arrested and detained following the protest. Another distinction must be made between the administration's liability and that of its agents or public officers.
58. In Case Scenario 1, it is likely that **injured protesters** will only be able to bring a claim against the **police** in **administrative courts**, which have jurisdiction to assess the police's liability for damage caused in the event of an administrative police operation aimed at preventing public disorder.⁴⁸
59. On the other hand, **demonstrators** who have been **arbitrarily detained and/or subjected to ill-treatment in police custody** may seek compensation from the **police** in **civil court** based on Constitution [Article 66](#) and Code of Criminal Procedure [Article 136](#), which recognises that judicial courts have exclusive jurisdiction in all cases involving an infringement of personal freedom.
60. French courts have also ruled that **judicial courts** are competent to assess the liability of the **police** for damage caused during a judicial police operation, such as where the disputed facts occurred while a 'suspect' was in police custody,⁴⁹ or where persons suspected of having committed a criminal offence are detained and abused on police premises.⁵⁰
61. Both injured protesters and demonstrators arbitrarily detained and/or subjected to ill-treatment in police custody can seek civil liability against police officers if they can demonstrate that those officers committed a **personal fault**.

48 CE 11 May 1951, 2542, *Consorts Baud* (Council of State).

49 CE 10 February 1956, Lebon T. 747, *Cts Volmerange* (Council of State).

50 T confli 9 July 1953, Lebon 591, *Dame Vve Grange c/Nardon et autres* (Conflict Tribunal).

62. Finally, victims may seek compensation for damage caused by ‘**administrative trespass**’ before the judicial court (see [21] above). They must establish two cumulative elements under this ground: 1) a manifest irregularity in an administrative decision or its execution, which 2) results in an infringement of an individual freedom or an infringement leading to the extinction of a property right.⁵¹

Claims against Security Co and/or its personnel

63. As mentioned at [11], [28] and [40] above, a company may be civilly liable not only for the damage caused by its own fault or negligence, but also for damage caused by their employees’ fault or negligence in the functions for which it has employed them.
64. To **hold Security Co liable for its own actions**, victims would have to prove that Security Co committed a fault or negligence that contributed to the harm suffered by the victims; ie that the company’s representatives acted in breach of a required standard of conduct, causing harm to the victims. This assessment will depend on the factual circumstances in which Security Co’s own representatives contributed to the human rights violations committed by the police, for instance by giving formal instructions to employees to support the police’s violations.
65. Victims may also rely on **Security Co’s vicarious liability** for the acts of its employees. In such a case, they would need to establish that Security Co’s employees committed a fault or negligence that contributed to the harm that they suffered.
66. The employer will however not be held vicariously liable if the employee, acting without authorisation and for purposes outside their duties, has placed themselves outside the functions for which they were employed (so-called ‘**abuse of function**’ – *abus de fonction*). The concept of abuse of function is strictly interpreted by the Court of Cassation. For instance, a nightclub has been found liable for the damage caused by its bouncers who were convicted of intentional violence by a criminal court.⁵² An intentional fault, even if criminally punished, does not absolve the employer of liability for damage caused by the employee during the usual performance of their duties in the workplace and during working hours, whether it is theft⁵³ or involvement in contraband committed using the company’s vehicle.⁵⁴
67. In the case at hand, it appears that Security Co’s employees supported the police’s violations with equipment and vehicles belonging to the company, in the workplace and during working hours. If the employees’ fault and causation may be established, Security Co could be held vicariously liable.
68. However, under Civil Code Articles [1240](#) and [1241](#), Security Co’s personnel may be held personally liable, either as co-defendants if Security Co can demonstrate an abuse of function, or in a case initiated by Security Co itself against its own employees who overstepped their duties. If Security Co’s personnel acted within the scope of their functions, they cannot be held personally civilly liable.⁵⁵
69. In any event, it may be challenging in the case at hand to establish the direct causal link between Security Co’s potential fault or negligence and/or that its personnel, and the harm suffered by victims.

51 [T confli, 17 June 2013, 3911, *Bergoend v ERDF Annecy Léman*](#) (Conflict Tribunal).

52 [Civ \(2\) 2 May 2011, 10-20.590](#) (Court of Cassation, Civil Chamber).

53 [Civ \(2\) 29 May 1996, 94-15.460](#) (Court of Cassation, Civil Chamber).

54 [Crim 19 February 2003, 02-81.851](#) (Court of Cassation, Criminal Chamber).

55 [Ass plén 25 February 2000, 97-17.378 97-20.152, *Costedoat*](#) (Court of Cassation, Full Court).



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

70. In France, such a case is more likely to be tried in criminal courts, including when civil remedies are pursued. However, criminal decisions tend to dismiss police officers' criminal liability. When civil actions are permitted under the conditions outlined in [18] - [23] above, they can provide a more efficient means of obtaining redress for victims.
71. Following an [investigation](#) of the General Inspectorate of the National Police (IGPN), an administrative judge is the competent authority to hear cases on the functioning of the police. In the case of more serious accusations against police officers, where there may be a criminal offence, the criminal courts are competent.
72. In the case at hand, and based on the [Criminal Code](#), **police officers** could be convicted before the criminal court for torture or acts of barbarism ([Article 222-1](#)), violence ([Articles 222-10, -11, -13, -14](#)) and other potential offences, including non-assistance to a person in danger ([Article 223-6 al 2](#)), and abandonment of a person unable to protect themselves ([Article 223-8](#)). Furthermore, Criminal Code [Articles 432-4 to 432-6](#) punish persons holding public authority who are involved in an infringement of personal freedom or unlawful deprivation of liberty. These convictions could give rise to compensatory damages under the conditions mentioned in [16] - [17] above.
73. The **personnel of Security Co** could be convicted for interference with the exercise of a public function (Criminal Code [Articles 433-12](#) and [433-13](#)), or for complicity in violence or other offences (Criminal Code [Article 121-7](#)).
74. It would be difficult to hold **Security Co** liable in a criminal court. Under Criminal Code [Article 121-2](#), legal persons are criminally liable for offences committed (1) on their behalf and (2) by their organs or representatives. The two conditions do not appear to be met in this case.
75. Protesters could also file an action in administrative court to obtain the State's conviction. The **French government** may be held liable for gross negligence (*faute lourde*) as a result of the national police service's malfunctioning.



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

76. There have been several cases concerning **police violence** during demonstrations. After exhausting all criminal justice system appeals,⁵⁶ the family of Rémi Fraisse, a 21-year-old botanist killed by a grenade thrown by a gendarme, sought compensation from the State. The Toulouse Administrative Court recognised that under Code of Interior Security [Article L211-10](#), the State was liable for damage caused by crimes and misdemeanours committed by open force or violence, by armed or unarmed assemblies or demonstrations, either against persons or property.
77. The *Commission d'indemnisation des victimes d'infractions* of the Paris Judicial Court awarded provisional compensation to Jérôme Rodrigues, a Yellow Vest activist who was injured in the eye during a demonstration in January 2019. The investigating judges indicted a police officer in January 2020 for 'voluntary violence resulting in permanent mutilation or disability', which was aggravated by several circumstances.⁵⁷
78. The European Court of Human Rights (ECtHR) has also issued significant rulings in cases involving police violence. In *Castellani v France*,⁵⁸ it found a violation of Article 3 of the [European Convention on Human Rights](#) (ECHR). The applicant claimed that he was the victim of police violence during his arrest, and that the intervention of the security force (a *groupe d'intervention de la police nationale*) and the use of force were neither necessary nor proportionate. In *Chebab v France*,⁵⁹ the ECtHR found France in violation of ECHR Article 2 (right to life) due to the inadequacy of France's investigation into the use of lethal force against the applicant by the police.
79. There have been many high-profile lawsuits on police brutality in France but, to our knowledge, no cases concerning **companies assisting police officers during a demonstration**.
80. However, a civil lawsuit was brought against multinationals that produced Agent Orange, a highly toxic defoliant used by the US army during the Vietnam War. In May 2021, the Evry Tribunal dismissed the claims of [Tran To Nga](#), a Franco-Vietnamese woman who was suing 14 US multinational agrochemical companies as a victim of 'Agent Orange'.⁶⁰ The court concluded that the defendant companies had 'acted on behalf of and for the order of the US State' and were thus entitled to sovereign jurisdictional immunity. The claimant appealed this ruling.



⁵⁶ [Crim 23 March 2021, 20-82.416](#) (Court of Cassation, Criminal Chamber).

⁵⁷ [See further here](#).

⁵⁸ *Castellani v France* (App [No 43207/16](#), 30 April 2020).

⁵⁹ *Chebab v France* (App [No 542/13](#), ECtHR, 23 May 2019).

⁶⁰ [TJ Evry 10 May 2021, 14/04980](#).

CaseScenario 2

Q1

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

Claims against Subsidiary Co

81. Victims of the oil spill could sue Subsidiary Co under Civil Code [Articles 1240](#) and [1241](#). They would have to show: 1) that they suffered harm as a result of the oil spill; 2) Subsidiary Co's intentional fault, negligence, or imprudence; and 3) that there was a causal link between the harm and Subsidiary Co's fault. While a violation of legal requirements is not required to establish civil fault, in practice, the fault or negligence is usually the result of a violation of environmental obligations.
82. Under Civil Code [Article 1242](#), victims could also sue Subsidiary Co for damage caused by things in its custody. They would have to prove that the damage was caused by oil over which Subsidiary Co had custody. They must establish that Subsidiary Co had the power to use, direct, and control the spilled oil. While this should be simple if Subsidiary Co owns the oil, this presumption could be reversed if Subsidiary Co can show that it transferred custody of the spilled oil in fact or through a contract. Finally, the oil spilled must have been instrumental in causing the damage.
83. Neighbouring victims may be able to hold Subsidiary Co liable under the theory of abnormal neighbourhood disturbances. Proving that the trouble (the oil spill) exceeds normal neighbourhood inconvenience would be easy for victims. Furthermore, under this provision they would not have to prove the existence of Subsidiary Co's fault.
84. If Subsidiary Co's oil operations were present before the victims moved into the vicinity, Subsidiary Co could be exempt from liability under the anteriority rule. However, this may not be the case due to a recent decision of the Court of Cassation (see [13] above).
85. Victims could hold Subsidiary Co and Parent Co jointly and severally liable under the theory of abnormal neighbourhood disturbances (see [13] above) in certain circumstances, such as if Parent Co is Subsidiary Co's franchisor,⁶¹ or the owner of the oil pipelines.⁶²

61 [Civ \(2\) 21 May 1997, 95-17,743](#) (Court of Cassation, Civil Chamber).

62 [Civ \(3\) 22 June 2005, 03-20,068](#) (Court of Cassation, Civil Chamber).

Claims against Parent Co

86. Pursuant to the principles of legal separation of corporate entities, Parent Co would in principle not be vicariously liable for the acts or omissions of Subsidiary Co.
87. In the present case, we assume that no bankruptcy proceedings have been introduced against Subsidiary Co, and that Parent Co has not abnormally interfered in the management of its subsidiary, so that no exception to the general principle of separation of legal entities seems to apply (see [36]-[38] above).
88. However, Parent Co could be held civilly liable for its own acts and omissions if those amount to a civil fault or negligence that directly contributed to the damage. In particular, if Parent Co is subject to the **Duty of Vigilance Law** ([Articles L225-102-4](#) and [5 Commercial Code](#)), victims may be able to request civil remedies directly against Parent Co, or against Parent Co and Subsidiary Co as co-defendants. In order to do so, they will need to establish the following elements:
 - Parent Co is indeed subject to the provisions on the Duty of Vigilance, which only apply to companies that employ more than 5 000 employees in France or 10 000 employees worldwide.
 - Parent Co has exclusive control over Subsidiary Co, as specified under Commercial Code [Article L333-16 II](#), or maintains an established commercial relationship with it.
 - Parent Co has failed to respect the legal requirements, in that it has failed to take adequate measures to identify risks to and prevent violations of the environment, health and safety, and human rights, resulting from Subsidiary Co's activities; or that it has failed to effectively implement those measures.
 - The harm could have been avoided if Parent Co had indeed complied with the legal requirements.
89. It is important to note that the Duty of Vigilance Law does not create a new civil liability regime, but it does create new, specific obligations that not only concern the corporations' activities, but also the activities of its subsidiaries, suppliers and subcontractors, thereby facilitating the claimant's ability to prove that the parent company has committed a fault giving rise to liability.
90. If Parent Co is not subject to the Duty of Vigilance Law, it may still be possible to demonstrate that it committed a civil fault or negligence under Civil Code Articles [1240](#) and [1241](#). It will notably depend on whether Parent Co has failed to respect certain general standards of conduct, whether its own public statements regarding its environmental commitments are specific enough, and whether it may be established that the damage could have been prevented if the company had respected those standards or specific commitments (see the *Erika* case in [42] above).

Remediation of pure environmental damage

91. According to Civil Code [Article 1246](#), anyone who is responsible for ecological loss, defined as the non-negligible harm to ecosystem elements or functions, or to the collective benefits derived by humans from the environment, must repair it. [Article 1246](#) aims to repair environmental damage rather than damage to persons or property. It applies to both natural and legal persons who are responsible for ecological loss.

92. In Case Scenario 2, Subsidiary Co and/or Parent Co could be obliged to repair the ecological loss caused by the oil spill. However, only a limited number of public authorities and environmental NGOs can bring a claim under Civil Code [Article 1246](#). In particular, the action for compensation for ecological loss is limited to action by 'associations approved or created for at least five years at the date of the introduction of the proceedings and which have as their object the protection of nature and the defence of the environment'. This seems to exclude associations of local residents affected by instances of pollution which are often created following environmental disasters.

Q2

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

93. Subsidiary Co could face criminal charges under the Criminal Code for criminal offences against individuals, such as endangering people's lives ([Article 223-1](#)).
94. Subsidiary Co could also face criminal charges under the Environmental Code. For example, [Article L216-6](#) punishes the act of discharging into water substances whose action or reactions cause harm to health or damage to flora or fauna. Furthermore, [Article L432-2](#) punishes discharges into rivers of substances that have destroyed or harmed fish. As mentioned before, the local population could claim civil compensation in the context of those criminal proceedings or in subsequent civil proceedings.

Q3

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

95. The *Erika* case (see [42] above) is a landmark environmental case in France. Total, France's largest oil company, was charged for maritime pollution along with its subsidiaries and a number of companies and individuals. International conventions limited the liability for maritime pollution to the shipowner, its manager, or its captain. However, the Court of Cassation found that Total had indeed committed a reckless act within the meaning of the [Civil Liability Convention 69/192](#). This fault gave rise to its civil liability and justified its joint and several liability to pay compensation.
96. In 2019, 10 000 tonnes of chemicals burned at Lubrizol's factory and NL Logistics, two industrial sites in Rouen. The fire caused no casualties, but did cause a soot fallout in five administrative departments. The Lubrizol fire is regarded as one of France's most significant industrial disasters since the AZF fertiliser factory explosion in Toulouse in 2001. In 2021, Lubrizol was charged with releasing harmful substances into water.⁶³

⁶³ Laurent Radisson, '[Lubrizol : la mise en examen de l'industriel confirmée](#)' *Actu-environnement.com* (Paris, 30 June 2021).

CaseScenario 3

Q1

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

Claims against Factory Co

97. In order to assess whether civil claims could be brought against Factory Co, it is necessary to distinguish between those violations that may be regarded as work accidents under French law, and other violations.
98. A **work accident** is defined as any accident that occurred as a result of or during work and caused immediate or delayed physical injury (Social Security Code [Article L411-11](#)). In Case Scenario 3, the deaths and serious injuries of workers, as well as the reported physical abuses for non-compliance with production targets could be regarded as work accidents. Work accidents may give rise to different compensations: benefits in kind for health expenses resulting from the accident; daily allowances for prescribed medical leaves, temporary incapacity for work benefits, permanent disability pensions; as well as pensions for certain next of kin. These compensations are paid by the French Social Security Fund, and victims are not entitled to rely on general civil liability law to claim compensation directly from their employer.
99. Victims are only entitled to an increased lump sum compensation (*majoration*) and damages for other harms caused by the workplace accident if they can demonstrate the employer's **inexcusable fault** (Social Security Code [Article L452-1](#)). Employers have been required to ensure the safety and health of their employees at work since the decision of the Court of Cassation in the [Asbestos](#) case. A breach of this obligation is considered an inexcusable fault 'when the employer had or should have known the risks that the employee was facing and did not take necessary measures to protect them from those risks'.⁶⁴
100. Factory Co was aware of the risks that its employees faced. Local trade unions had alerted the company to the lack of emergency procedures, ineffective fire safety equipment, and limited emergency medical supplies. Factory Co also appears to have failed to take the necessary measures required by the Labour Code. Injured employees, their next of kin, as well as their survivors should be able to demonstrate Factory Co's inexcusable fault and obtain not only the lump sum benefits mentioned above, but also additional compensation for other losses. However, they may not be able to obtain full compensation for all losses, even in case of inexcusable fault, as only some losses can give rise to an increased lump sum.

⁶⁴ [Soc 28 February 2002, 00-13,546](#) (Court of Cassation, Labour Chamber).

101. In case of **intentional fault** of the employer, victims are entitled to claim compensation directly from their employer for the full damage suffered (Social Security Code [Article L452-5](#)), and the Social Security Fund may recover from the employer all the benefits it has paid to the employee.
102. In the case at hand, the employees who suffered physical abuse for non-compliance with production targets may be entitled to claim full compensation for the damage suffered.⁶⁵
103. The other reported violations (sexual harassment of female workers, compulsory unpaid overtime) would not be regarded as work accidents. The competent French employment tribunal (*Conseil des Prud'hommes*) would have jurisdiction to hear those claims, as they relate to an employment contract.
104. Sexual harassment is prohibited both by Criminal Code [Article 222-33](#) and Labour Code [Articles L1153-1 ss](#) (subsequent Articles). Victims may seek compensation through a civil action in the context of criminal proceedings or, in the absence of criminal proceedings, before the competent employment tribunal. In the case at hand, if the sexual harassment was not committed by a company's representative, victims will either have to demonstrate (i) that Factory Co failed to take necessary measures to ensure their health and safety against sexual harassment or/and, (ii) that Factory Co is liable under Civil Code [Article 1242](#), para 5 (liability of the employer for acts of its employee).

Claims against Brand Co

105. Under Social Security Code [Article L454-1](#), if the work accident is caused by a third party, the victim is entitled to rely on general provisions of civil liability to claim full compensation for the damage. The same applies if the work accident was caused both by the employer's fault and by a third party.⁶⁶ No previous claim against the employer is required.⁶⁷
106. In the case at hand, Brand Co may be considered a third party. Indeed, the co-employment doctrine does not seem to apply: the conditions described in [37] above do not seem to be met.
107. The victims may therefore claim full compensation to Brand Co if they can demonstrate that it committed a civil fault that caused or contributed to their damage. In particular, the victims may be able to rely on Commercial Code [Article L225-102-4 and 5](#) (pertaining to Duty of Vigilance).
108. First, the victims will need to demonstrate that Brand Co employs enough employees to be subject to these provisions, which only apply if the company and its subsidiaries in France employ more than 5 000 employees, or if the company and its subsidiaries in France and worldwide employ more than 10 000 employees.
109. Second, they will need to show that Brand Co's duty of vigilance applied to the activities of Factory Co that gave rise to the violations, ie that Factory Co was a supplier with whom Brand Co maintained an established commercial relationship and that those activities related to that relationship.

65 [Civ \(2\) 4 February 2010, 09-13.332](#) (Court of Cassation, Civil Chamber).

66 [Soc 22 December 1988, 85-17.473](#) (Court of Cassation, Labour Chamber).

67 [Civ \(2\) 4 April 2013, 12-13.921](#) (Court of Cassation, Civil Chamber).

110. Third, victims will have to prove that Brand Co failed to comply with its legal duty of vigilance, ie that it failed to take adequate measures in its vigilance plan to identify the risks to and prevent the violations to human rights, the health and safety of individuals, and fundamental freedoms resulting from Factory Co's activities, and to implement those measures effectively.
111. Finally, causation will have to be shown between the damages suffered by the claimants and Brand Co's lack of vigilance, ie that those damages could have been avoided had Brand Co complied with its obligations.
112. If Brand Co is not subject to those provisions, it may be more complex to demonstrate a civil fault which could result from a violation of the different due diligence obligations spelled out in the Labour Code (see [45] above), or through a failure to respect general standards of conduct or Brand Co's own specific commitments (see [42] above).



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

113. Given the seriousness of the reported violations, this case would probably be tried in criminal courts. As previously mentioned in [4] above, victims and/or their families may participate in criminal proceedings as civil parties. However, with respect to work accidents, the civil liability regime provided for in the Social Security Code is exclusive, meaning that victims may not claim compensation during criminal proceedings, unless the employer committed an intentional fault, or a third party is liable.
114. A number of criminal offences could be identified against Factory Co, including sexual harassment (Criminal Code [Article 222-3](#)), endangerment of other people's lives ([Article 223-1](#)) or manslaughter ([Article 221-6](#)).
115. Brand Co could also be held criminally liable if it is established that it failed to respect an obligation of care or safety within the meaning of Criminal Code [Article 121-3](#) relating to non-intentional offences (carelessness, negligence or failure to comply with an obligation of care or safety) and the deliberate endangerment of other people's life.



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

116. In September 2001, an explosion occurred at the AZF chemical factory in Toulouse, which was operated by the company Grande Paroisse, killing thirty-one people, injuring many more, and causing extensive property damage. Grande Paroisse was a subsidiary of Atofina, which at the time handled all of Total's chemical activities. In October 2017, the Paris Court of Appeal found the director of AZF's

plant guilty of manslaughter and involuntary injury. Grande Paroisse was fined EUR 225 000 for its actions. The decision was upheld in cassation.⁶⁸

117. Sherpa and ActionAid France filed a criminal complaint against electronics company Samsung over labour conditions in its factories in China, Korea and Vietnam (the original indictment was annulled in April 2021).⁶⁹ Sherpa and Ethique sur l'étiquette also filed a criminal case against Auchan in connection with the 2013 Rana Plaza collapse in Bangladesh.⁷⁰ However, both complaints were based on the prohibition of misleading commercial practices under French consumer law. This legal basis can only allow consumers (rather than direct victims) to seek compensation. In the [Samsung](#) case, the organisations' complaint was found inadmissible for lack of legal standing. In the [Auchan](#) case, the investigative judge dismissed the case in April 2022, claiming a lack of evidence. The appeal is pending.
118. As detailed in [44] above, so far seven cases have been filed under the Duty of Vigilance Law, including on the basis of allegations regarding workers' rights. Only one of these cases relates to alleged violations occurring in a company's supply chain, rather than violations resulting from the activities of subsidiaries. In 2021, NGOs brought a case against supermarket Casino for failing to properly identify risks and prevent human rights and environmental abuses in its beef supply chain in the Amazon.⁷¹ The case is still pending.



⁶⁸ [Crim 17 December 2019, 17-87,465](#) (Court of Cassation, Criminal Chamber).

⁶⁹ [‘Samsung target of a lawsuit that would expose human rights violations’](#) (Sherpa).

⁷⁰ [‘Auchan and the Rana Plaza, deceptive business practices?’](#) (Sherpa).

⁷¹ [‘Casino Guichard-Perrachon’](#) (Duty of vigilance radar, 6 July 2021).



A HANDBOOK FOR PRACTITIONERS | GERMANY

Civil Liability for Human Rights Violations



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Rights



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FREQUENTLY USED ABBREVIATIONS

AGG	General Act on Equal Treatment (<i>Allgemeines Gleichbehandlungsgesetz</i>)
ArbSchG	Occupational Health and Safety Act (<i>Arbeitsschutzgesetz</i>)
ArbStättV	Workplace Ordinance (<i>Arbeitsstättenverordnung</i>)
BGB	Civil Code (<i>Bürgerliches Gesetzbuch</i>)
GG	Basic Law of the Federal Republic of Germany (<i>Grundgesetz für die Bundesrepublik Deutschland</i>)
LkSG	Supply Chain Due Diligence Act (<i>Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten</i>)
StPO	Criminal Procedure Code (<i>Strafprozessordnung</i>)
VersG	Law on Assemblies and Processions (<i>Versammlungsgesetz</i>)
ZPO	Civil Procedure Code (<i>Zivilprozessordnung</i>)

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GERMANY



The German law of delict is a potential tool for claimants seeking to claim damages for human rights violations. However, significant procedural hurdles hinder access to effective remedies. Litigation involving corporate defendants with complex business structures or supply chains is particularly problematic. However, the German Supply Chain Due Diligence Act 2021 is a promising legislative development. Without creating new avenues for civil remedy, the law expands corporate duties of care and potentially enables liability under the general law of delict. A separate regime of civil liability applicable to the State is another characteristic feature of German law.



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INDICES

15/167

Democracy Index
2021 Ranking

94/100

Freedom House
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10/180

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. In Germany, human rights claims under the law of civil remedies can arise through the law of delict – a legal body similar to the common law of torts. German law of delict is governed by [ss 823 et seq of the Bürgerliches Gesetzbuch](#) (BGB – the German Civil Code)¹ and protects against a range of violations that are also addressed by human rights law. However, procedural hurdles such as the burden of proof on the claimant, high discovery and trial costs, and expensive legal expertise make human rights damage claims rare in practice and hard to achieve. The most promising legislative development, despite explicitly leaving out a civil remedy pathway, is the [German Supply Chain Due Diligence Act](#) of 2021,² which expands corporate duties of care and thus enables liability for neglecting these duties of care under the general law of civil remedies.

¹ German Civil Code (*Bürgerliches Gesetzbuch*) (BGB). For an English translation, see Federal Ministry of Justice, '[German Civil Code: BGB](#)'.

² Supply Chain Due Diligence Act 2021 ([Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten](#)) (LkSG). The law was passed on 16 July 2021 and will successively come into force from 1 January 2023.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking here...

Q1

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

German law of delict is based on the principle that not all types of negligently caused losses warrant civil liability. It protects only against certain types of damages and penalises only certain types of behaviour.

2. The centrepieces of German law of delict relating to liability of private persons are BGB [§ 823\(1\)](#), [§ 823\(2\)](#) and [§ 826](#). These sections are complemented by a number of special provisions, such as that contained in [BGB § 832](#) which establishes liability of a person under a duty of supervision, or [BGB § 836](#) concerning liability of landowners for certain violations. According to [BGB § 832\(1\)](#), any person who is required by law to supervise a person in need of supervision [...] shall be liable to pay compensation for any damage that this person unlawfully causes to a third party. [BGB § 836](#) stipulates that if a person is killed, the body or health of a person is injured, or an object is damaged, as a result of the collapse of a building or other work connected to a plot of land, or as a result of the detachment of parts of the building or work, the owner of the plot of land is obliged to compensate the injured person for the resulting damage if the collapse or detachment is the result of faulty construction or poor maintenance. The obligation to compensate shall not apply if the owner has observed the reasonable care required for the purpose of averting the danger. The rules in BGB [§§ 823\(1\), 823\(2\), 826, 832](#) and [836](#) address only the liability of private actors, but as they do not differentiate between natural and legal persons; they apply to both individuals and companies.³
3. [BGB § 823\(1\)](#) protects a list of **'absolute rights'**, ie rights that grant legal protection to everyone. These are, namely, the rights to life, bodily integrity, health, freedom of movement and property. It further includes an open-clause formulation of the so-called **'other rights'** which is among a variety of general norms found in the BGB that are open to interpretation and are therefore especially susceptible to human rights claims.⁴ 'Other rights' in [§ 823\(1\)](#) however, do not provide a catchall for every other possible right – rather, 'other rights' denotes only those with an explicitly absolute character, such that they cannot be partially restricted, similar to the right to property mentioned above.
4. Depending on the exact harm resulting from assault, violations of the rights to life, bodily integrity, health and property can be claimed. Harm arising from unlawful arrest or detention may amount to the violation of the right to freedom of movement. In order to claim damages, the victim must claim that violation of any of the rights to life, bodily integrity, health and property occurred. Instances of harmful or unfair labour conditions may affect the rights to life, bodily integrity or health, for example. The environment itself does not fall within the scope of German law of delict and violations of absolute rights must be claimed in this regard.

³ For a company, an act of its managing body is treated as an act of the company ([BGB § 31](#)).

⁴ Leonhard Hübner and Luca Kaller, 'Germany: Tort Law's Potential to Remedy Human Rights Violations' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

Further, it seems possible to invoke an infringement of the right to 'privacy and the free development of one's personality' (*Allgemeines Persönlichkeitsrecht*), that is generally recognised as an 'other right' protected by [BGB s 823\(1\)](#).

If the alleged tortfeasor is the **State**, liability can only be established according to a specific set of rules.

5. The liability of State actors is exclusively regulated in [BGB s 839](#). Additionally, [article 34](#) of the Basic Law of the Federal Republic of Germany⁵ can be invoked to pursue claims of damage caused by government actions (*Staatshaftung*). [BGB s 839](#) foresees the possibility of claiming purely economic losses.

Germany has enacted specific legislation that aims at remedying particular kinds of human rights violations and sometimes includes civil remedies as compensation.

6. Beyond the general laws of delict, there are some **statutory provisions** governing particular areas that include civil remedies. For instance, in cases of discrimination, the General Act on Equal Treatment ([AGG s 15](#))⁶ stipulates a provision for a separate damages claim. Another example is the Law on Liability for Defective Products ([ProdHAftG s 1](#))⁷ according to which the manufacturer of a product is obliged to compensate an injured party for the resulting damage if a defect in their product causes death, bodily injury or damage to property.

Q2

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

BGB s 823(1) and (2)

7. According to [BGB s 823\(1\)](#), any person who intentionally or negligently causes unlawful injury to the life, bodily integrity, health, freedom, property or any other rights of a person may be liable to compensate the other party for the resulting damage.
8. Beyond identifying a violation of a particular right, however, [BGB s 823\(1\)](#) further requires the establishment of a breach of a tortious duty of care. While a duty of care is usually breached by a direct harmful action, determining the violation of a right tends to be a more complex matter when there is an instance of omission, or indirect harm. The duty of care is established on a case-by-case basis, although some scenarios have emerged in German jurisprudence where such a duty of care can be generally assumed. This includes a duty of care for those who create or control a hazard, as they will have the duty to protect others from its consequences. Further, if one assumes responsibility for performing a certain task,

⁵ Basic Law of the Federal Republic of Germany ([Grundgesetz für die Bundesrepublik Deutschland](#)) (GG).

⁶ General Act on Equal Treatment ([Allgemeines Gleichbehandlungsgesetz](#)) (AGG).

⁷ Law on Liability for Defective Products ([Gesetz über die Haftung für fehlerhafte Produkte, Produkthaftungsgesetz](#)) (ProdHAftG).

a duty of care in a reasonable performance of that task will be assumed. Lastly, those who profit from a certain (hazardous) activity might face a tortious duty of care (*Vorteilsziehung*).⁸

9. According to [BGB s 823\(2\)](#), liability to compensate damage requires that there has been a breach of a statute intended to protect individual interests (so-called ‘**protective laws**’). If the statute recognises that a breach may occur without fault, then the obligation to compensate only exists where fault is established. The statutes that are relevant here include any with direct legal effect in Germany that protect individual interests, and, as a result, foreign legislation is not applicable.⁹ The typical examples of ‘protective laws’ are the rules of criminal law and some statutory provisions (eg environmental and labour protection laws).
10. Some of the ‘protective laws’ that are relevant to [BGB s 832\(2\)](#) can be applied to the three defined harms.
 - Assaults can amount to a crime according to the German Criminal Code ([StGB ss 223 et seq](#))¹⁰ and unlawful imprisonment is prohibited by [StGB s 239](#).
 - In the case of environmental pollution, if someone’s property is harmed intentionally, the relevant criminal offence is found in [StGB s 303](#). The StGB itself also establishes offences for environmental pollution (see [ss 306 et seq](#) and [ss 324 et seq](#)).
 - Further, a number of labour laws are also considered ‘protective laws’ such as those covering youth employment ([JArbSchG](#))¹¹ and occupational safety ([ArbSchG](#))¹². These fall within the scope of [BGB s 832\(2\)](#).

BGB s 826

11. According to [BGB s 826](#), a person who intentionally causes damage to another in a manner contrary to morality is obliged to compensate the damage. To meet the test of ‘immorality’, an act or omission must violate the ‘sense of decency of all those thinking fairly and justly’ (*gegen das Anstandsgefühl aller billig und gerecht Denkenden verstoßend*).¹³ Unlike the other norms of delict, [BGB s 826](#) enables injured parties to claim pure economic losses, but it contains strict limitations as it requires intent in relation to the harm done, as well as immorality.

BGB s 831

12. [BGB s 831](#) stipulates that a person who appoints another to perform a task is obliged to compensate the damage that this person unlawfully causes to a third party while performing the task. The norm is similar to the common law concept of vicarious liability,¹⁴ but is much narrower in its application than the concept in

8 For a detailed overview, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, ‘Introduction to Sec 823 et seq’ in Christian Grüneberg, Gerd Brudermüller, Jürgen Ellenberger, Isabell Gotz, Sebastian Herrler, Hartwig Sprau, Karsten Thorn, Walter Weidenkaff, Dietmar Weidlich, and Hartmut Wicke (eds), *Bürgerliches Gesetzbuch* (CH Beck 2021) para 11.

9 BGH NJW-RR 2014, 639 (Federal Court of Justice weekly law report); Hartwig Sprau, ‘Sec 823’ in Grüneberg et al (n 8) para 57.

10 Federal Ministry of Justice, German Criminal Code (*Strafgesetzbuch*) (StGB).

11 Federal Ministry of Justice, Youth Employment Protection Act (*Jugendarbeitsschutzgesetz*) (JArbSchG).

12 Federal Ministry of Justice, Occupational Health and Safety Act (*Arbeitsschutzgesetz*) (ArbSchG).

13 See, for instance, BGH, NJW 2014, 1098 (Federal Court of Justice). See also Hartwig Sprau, ‘Sec 826’ para 4 and ‘Sec 138’ para 2 in Grüneberg et al (n 8). For a detailed account, see Gerhard Wagner ‘Sec 826’ in Franz Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (CH Beck 2020) para 9.

14 See, for instance, discussion in the following project reports: [41] Canada; [22]–[23] England & Wales.

English tort law in that it does not follow the idea of *respondeat superior*. A textbook example of a relationship covered by [BGB s 831](#) is that of a master and his journeyman, where the former closely oversees and controls the work of the latter. Importantly, according to [BGB s 831\(1\)2](#), the principal has the possibility of legal exculpation when the appointing party can prove that they have carefully selected and supervised the agent who caused the damage. While the norm here is for the burden of proof to be placed on the principal as the alleged tortfeasor (this is an exceptional pattern for civil law where the burden of proof is conventionally placed on the claimant), the requirements for exculpation are rather easily achieved.¹⁵

BGB s 839 and GG Art 34

13. [BGB s 839](#) and [GG Art 34](#) operate together to impose liability on the State for damage caused by government actions (*Staatshaftung*). [BGB s 839\(1\)](#) stipulates that if a civil servant intentionally or negligently violates the official duty incumbent upon them towards a third party, they shall compensate the third party for the resulting damage. If the official is only guilty of negligence, a claim may only be made against him if the injured party is unable to obtain compensation in another way.
14. [BGB s 839](#) therefore imposes personal liability on civil servants when acting in their official capacity only. If they are not acting in such a capacity, the general rules of [BGB ss 823 et seq](#) apply. It must be noted that, taken in isolation, [BGB s 839](#) is insufficient to find the State liable for the actions of its civil servants. [GG Art 34](#) assigns the personal liability of the civil servant to the State. Thus, [BGB s 839](#) read in conjunction with [GG Art 34](#) enables a civil claim against the State.¹⁶ If a civil servant breaches an official duty owed to a particular individual (instead of a duty owed to the public at large), [BGB s 839](#) declares them liable for any damage caused as a result.
15. Whilst [BGB s 839](#) covers pure economic loss (giving it a significantly wider scope than [s 823\(1\)](#)), it also restricts liability in a number of ways.¹⁷ First, if the civil servant has merely acted negligently, they may only be held liable if the injured person cannot obtain compensation through other means (see further [BGB s 839\(1\)2](#)). Second, if the civil servant breached their official duties in deciding a legal dispute, they are only liable for damages if this breach of duty also constitutes a criminal offence (see further [BGB s 839\(2\)](#)). Once liability is established in terms of [BGB s 839](#), [GG Art 34](#) assigns this personal liability to the State. The State is therefore effectively vicariously liable for the actions of its civil servants.¹⁸

¹⁵ For a more detailed assessment, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, ‘Sec 831’ para 10 and ‘Sec 138’ para 2 in Grüneberg et al (n 8).

¹⁶ Patrick Reinert, ‘Sec 839’ in Wolfgang Hau and Roman Poseck (eds), *Beck’scher Online Kommentar BGB* (CH Beck 2022) paras 2–7.

¹⁷ *ibid* para 1.

¹⁸ For an example of the restrictive interpretation of these norms, see BVerfG, DÖV 2013, 946 (Federal Constitutional Court) (Varvarin); European Center for Constitutional and Human Rights (ECCHR), ‘[NATO Airstrike on Varvarin Bridge](#)’.

Q3

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

BGB s 830 assists with attributing the acts of one tortfeasor to another. The provisions cover liability of the tortfeasors where the defendants knowingly acted together as **joint tortfeasors**, **instigators** and **abettors**.

16. [BGB s 830\(1\)](#) stipulates that if several persons have caused damage by a tortious act committed jointly, each is responsible for the damage. The same applies if it cannot be determined which of several participants caused the damage by their act. In terms of [BGB s 830\(2\)](#), instigators and abettors are treated as equivalent to accomplices.
17. [BGB s 830\(1\)1](#) and [BGB s 830\(2\)](#) open up the possibility of claiming damages from everyone involved in a tortious act and attributing responsibility accordingly.¹⁹ These sections require that all tortfeasors knowingly acted together, whether as accomplices, abettors or instigators. This means that neither [BGB s 830\(1\)1](#) nor [BGB s 830\(2\)](#) apply to a situation where several tortfeasors acted independently. However, a separate section, [BGB s 830\(1\)2](#) can apply in such circumstances.²⁰ This section makes it easier to establish a causal connection between a particular person's act and the harm done when multiple persons are involved and it is unclear which particular act caused the harm. In essence, the provision makes it easier to prove such causal link.
18. According to case law, [BGB s 830\(1\)1](#) and [BGB s 830\(2\)](#) are dogmatically the civil law counterpart to [StGB ss 25](#), and are therefore to be measured against the same requirements.²¹ Accordingly, an aider and abettor is a person who intentionally assists another in a deliberately committed tort ([BGB s 823\(1\)](#), [s 823\(2\)](#) and [s 826](#), in comparison with [StGB s 27\(2\)](#)).²² The concept of providing assistance is to be understood broadly, and therefore any contribution to the act that promotes the commission of the main tortious act, and is relevant to its commission, is sufficient.²³ Any form of assistance can be considered – even mere psychological support is sufficient.²⁴ According to case law, it is not a prerequisite that the contribution of the participant was a *conditio sine qua non* for the main offence, ie that the success of the offence could not have been materialised without the contribution of the participant. Instead, it is sufficient that the contribution facilitated the main perpetrator's execution of the offence.²⁵ To prove intent, the conscious factual promotion of another's act is sufficient.²⁶ A communicative understanding between the principal offender and the accomplice is not required.²⁷

¹⁹ See BGH NJW 1953, 499 (Federal Court of Justice).

²⁰ See BGH NJW 1959, 1772 (Federal Court of Justice).

²¹ Gerhard Wagner, 'Sec 830' in Säcker et al (n 13) para 9.

²² *ibid* para 24.

²³ BGH ZIP 2010, 786 (Federal Court of Justice).

²⁴ BGH ZIP 2012, 1552 (Federal Court of Justice).

²⁵ See BGH NJW 2012, 3439, 3441 (Cologne Higher Regional Court). For the discussion, see Wagner (n 21) para 25.

²⁶ *ibid* para 16.

²⁷ *ibid* para 24.

Q4

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

There is no case law in Germany on the question of whether a parent company can be liable under the law of civil remedies for the actions of a subsidiary or independent contractors in the supply chain, but some basic principles can be outlined.

19. The general rules of the law of delict apply to corporate actors. Company law does not limit the application of the law of delict, which means there is essentially **no corporate immunity in the law of delict**. According to Hübner and Kaller,²⁸ there are three main scenarios in which a parent company's duty of care over its subsidiary can be established – and thus its potential liability under the German law of civil remedies for wrongful acts or omissions:

- If the subsidiary or supplier is effectively run as a department of the parent company;
- If the parent company has actively intervened in the management of its subsidiary or supplier;
- If the parent company imposes detailed rules and guidelines relating to the relevant activity.

Further, the parent company can be liable for the actions of its subsidiaries or suppliers if it is aware of the latter's human rights violations but chooses not to act to prevent or change the situation. These scenarios are best addressed in terms of [BGB s 830](#).

SPOTLIGHT: GERMAN SUPPLY CHAIN DUE DILIGENCE ACT OF 2021

The most notable legislative development in the field is the [German Supply Chain Due Diligence Act](#) of 2021.²⁹ The new law imposes wide-ranging due diligence obligations on companies with a registered office or headquarters in Germany. It will initially cover companies with 3,000 or more employees, and from 2024 onwards, companies with 1,000 or more employees. The companies covered by the Act must make reasonable efforts to ensure that there are no violations of human rights in their own business operations and in the supply chain. Compliance with the human rights due diligence obligations requires publication of an annual report which should also be submitted to the competent authority. The Act does not provide for any extension of civil liability, but it does expand the parent company's duty of care in relation to its group operations and supply chains. It is possible for parent companies to be held liable under the general principles of civil liability for neglecting their duties of care under the Act.³⁰

²⁸ Hübner and Kaller (n 4).

²⁹ LkSG (n 2).

³⁰ For an overview of the new law in English, see Sebastian Rünz, 'Overview of the German Supply Chain Due Diligence Act' (Taylor Wessing, 28 July 2021). Accessed 10 March 2022. For an academic discussion of the expansion of the duty of care for the German law of delict, see Eva-Maria Kieninger, 'Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz: zur Rechtsprechung in den Sachen Vedenta, Okpabi und Hamida Begum' (2021) 67(6) [Recht der Internationalen Wirtschaft](#) 331.

Q5

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

20. Available remedies are either to claim damages for a harm done, or in the case of a continuous harm, to seek a cease-and-desist order/injunctive relief according to BGB [§ 1004](#) and [§ 823](#).
21. The aim of a **claim for damages** would be, according to [BGB § 249\(1\)](#), to restore the conditions that would exist if the circumstance giving rise to the obligation to pay damages had not occurred. Thus, the normatively desired remedy would be restitution in kind. However, [BGB § 249\(2\)](#)¹ continues that if damages are owing because of injury to a person, or because of damage to an object, the creditor may demand the amount of money required for this. This could be relevant for all three defined harms, depending on the consequences of the harm.
22. [BGB § 253\(1\)](#) stipulates that for **non-material damages**, where restitution in kind is naturally impossible, compensation in money may be claimed for damage other than pecuniary damage, but only in cases which are specified by law. [BGB § 253\(2\)](#) further explains that if damages have to be paid because of an injury to body, health, or freedom of sexual self-determination, equitable compensation in money can also be claimed for damage that is not pecuniary damage.

Q6

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

23. The **advantage** of using civil claims for human rights protection is that, in theory, civil claims may be a means to secure damages or, in some cases, a cease-and-desist order. But this route has some disadvantages. Most significantly, the **burden of proof** is on the claimants (except under [BGB § 831](#)).
24. Furthermore, **pre-trial discovery** for civil lawsuits does not exist in Germany, and trial discovery in civil proceedings remains minimal.³¹ Under German administrative law which regulates matters relating to government, [VwVfG § 24](#)³² stipulates that it is up to the relevant authority – the defendant in a legal case – to investigate the facts ex officio. The deficiency in discovery in civil law is especially problematic in transnational cases, where persons harmed by corporate wrongdoing or negligence have to prove the corporate connection between operating entity and controlling entity, as well as the actual control of the latter over the former. Additionally, any abuses committed by members of the corporate group, such as explicit wrongdoing or negligence by the controlling entity in a foreign jurisdiction, must be credibly presented and evidenced.

31 See Miriam Saage-Maaß, 'Human Rights Litigation against Multinational Companies in Germany' in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021).

32 Federal Ministry of Justice, Administrative Procedure Act ([Verwaltungsverfahrensgesetz](#)) (VwVfG).

25. Another disadvantage is that the **cost structure** of civil proceedings is unfavourable to the claimant. Generally, there is the risk of bearing the cost of the proceedings if the litigation is unsuccessful. But further, while the rules of civil procedure ([ZPO s 78](#))³³ make it compulsory to have legal representation in the regional courts (*Landgericht*) and higher regional courts (*Oberlandesgericht*) as well as before the Federal Court of Justice,³⁴ compensation sums are generally low and lawyers may not be able to recover all costs from the defendant, even if they have won the case.³⁵

Q7

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

26. Jurisdiction over foreign (ie non-EU) defendants will be determined under the German laws on civil jurisdiction. German civil law will be rarely applicable to cases involving foreign defendants and/or overseas wrongs. The only exception is when a company incorporated outside the EU, has its main administration, that is the location where central management decision are taken and implemented, in Germany (or the EU).³⁶

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

27. There are a number of **legal commentaries and summaries of jurisprudence** that provide insight on the German law of civil remedies. Among these are:

- [Jauernig Bürgerliches Gesetzbuch](#)
- [Münchener Kommentar zum Bürgerlichen Gesetzbuch](#)
- [Grüneberg Bürgerliches Gesetzbuch](#)

There are also **online databases** which can be accessed for a fee. The most common are:

- [Beck-online](#): This platform is Germany's largest specialist publisher of legal literature and makes a large portion of its print titles available online, including journals, books, and commentaries, including those mentioned above.
- [juris – Das Rechtsportal](#): This online platform combines legal information with a research tool. Case law, laws and regulations are linked to a constantly growing collection of specialist literature.

Additionally, there are **databases** where no fee is charged:

- [dejure.org](#): This platform offers laws, case law and news as well as articles from the Federal Law Gazette.
- [gesetze-im-internet.de](#): This is a platform run directly by the German Federal Government and it makes almost the entire database of current Federal law available free of charge.

33 Federal Ministry of Justice, German Code on Civil Procedure (*Zivilprozessordnung*) (ZPO).

34 In spite of the general rule that in principle lower courts have jurisdiction (see [ZPO s 1](#) and [s 23\(1\)](#) of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*) (GVG)), this is only if the dispute value is below EUR 5,000. If the dispute value is above this amount, the regional court has jurisdiction (see [GVG s 71\(1\)1](#) and [ZPO s 23\(1\)](#) No 1).

35 See further Saage-Maaß (n 31) 254, 273.

36 BGH, Verdict of 15.03.2010, 2010-II ZR 27/09.

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against the police and/or police officers

28. **Civil servants:** In terms of [BGB s 839](#), a civil servant is liable for damages caused by the intentional or negligent breach of an official duty owed to the third party. [BGB s 839](#) covers civil servants, ie employees of the State who have been duly appointed to civil service. Police officers fall within this definition, see *Bundespolizeibeamtenengesetz* ([BpolBG s 2](#)) in conjunction with *Bundesbeamtenengesetz* ([BBG s 10](#) for federal police or *Beamtenstatusgesetz* ([BeamStG s 8](#) for state police). [GG Art 34](#) expands the concept of civil servant to include all persons who perform tasks of public administration.
29. **Official duty protecting third parties:** A further prerequisite for liability is that the civil servant violates an official duty incumbent upon them vis-à-vis the third party. The term 'official duty' is to be understood broadly and includes every duty of conduct that the public official has in the exercise of his office. This includes the duty to act in accordance with the law ([GG Art 20\(3\)](#)).³⁷
30. Accordingly, police officers may only use the coercive powers granted to them if the relevant legal requirements are met and they must strictly adhere to the procedural rules provided by law, particularly in the case of measures such as detention.³⁸ Included in such official duties is the requirement to refrain from unjustified tortious acts ([BGB s 823](#)). Any unjustified injury to body or health, or unjustified deprivation of freedom of movement, therefore constitutes a breach of official duty.³⁹
31. The duty in question must also be incumbent on the public official in relation to the injured third party. Participants in a demonstration belong to a legally protected group and must be protected precisely from injuries to their bodies and infringements of their freedom of movement. Officers must obey the procedural rules during custody, as these norms are intended not only to ensure that custody proceeds properly, but also to protect individual rights during the time of custody.

³⁷ Hartwig Sprau, 'Sec 839' in Grüneberg et al (n 8) para 32.

³⁸ Such strict procedural safeguards can arise from criminal prosecution (see Federal Ministry of Justice, Code of Criminal Procedure (*Strafprozessordnung*) (StPO)) or administrative interventions to avert dangers to the public (*Gefahrenabwehr* – see police state laws). These include the right of the person concerned to contact a relative or a trusted person (state police laws) or to consult a defence attorney ([StPO s 127b\(1\)2](#) in conjunction with [StPO s 114b\(2\)1](#)) and the duty to have the lawfulness of the detention reviewed by a judge after 48 hours at the latest, [GG Art 104\(2\)3](#).

³⁹ Hartwig Sprau, 'Sec 839' in Grüneberg et al (n 8) para 37.

32. **Breach of official duty:** Further, the duty in question must be breached. Generally, a violation of rights can be justified if an enabling norm exists that permits police interventions such as the use of force or detainment. Then, the obligation of the public authority to respect the physical integrity and the freedom of the affected demonstration participants does not come into play ([BGB s 823\(1\)](#)). However, torture and ill-treatment – the use of force while a person is in police custody or detention – can never be justified as these violate the inalienable right to personal integrity, a part of human dignity ([GG Art 1\(1\)](#)). In the present case, a breach of the official duty would be established.
33. The same applies with regard to the use of beatings and tear gas, as well as to the detention itself. While both the federal and the state police laws contain enabling provisions in this regard, their requirements were not met in Case Scenario 1. At the time of the breach of official duty, the protesting individuals took part in a public assembly which was held for the common purpose of criticising a controversial reform and thus for the purpose of forming public opinion. It therefore qualified as an assembly within the meaning of the law on public gatherings ([VersG s 1\(1\)](#)).⁴⁰ For the period that the assembly is under way, up to the point of dissolution, the applicability of VersG restricts or displaces police law and police competence. Once the assembly is dissolved, police law and police competence apply again. A peaceful assembly such as in the present case, however, does not meet the requirements for dissolution and, accordingly, police were not allowed to use any force against demonstrators or to take individual participants into custody.
34. Detention without charge does not in itself constitute a breach of official duty, as long as it does not last longer than 48 hours (see [GG Art 104\(2\)3](#) and [StPO s 128\(1\)](#)). The prerequisite for lawful detention is that the prescribed conditions for detention are met for the entire duration of the detention. Any detention beyond the legally stipulated duration constitutes an unlawful deprivation of liberty and thus a breach of official duty.⁴¹ The same applies to an arrest for the purpose of criminal prosecution when there is no urgent suspicion of a criminal offence ([StPO s 127\(2\)](#) in conjunction with [StPO s 112\(1\)](#)).
35. The procedural obligations regarding custody or detention (including notification of a trusted person, lawyer or defence counsel) constitute inalienable rights of the person. Failure to grant these provisions therefore also represents a breach of official duty.
36. **Fault:** This violation also occurred in obvious disregard of the obligations of the [VersG](#). It is therefore to be assumed that the officials at least accepted that they were acting in breach of their official duties.
37. **No exclusion of liability under [BGB s 839\(1\)2](#):** If only negligent action can be proven, [BGB s 839\(1\)2](#) contains a special rule according to which the public official (and thus also the authority employing them) are only liable if the injured party has no other means of compensation. In the present case, such a possibility for remedy could lie in action against Security Co as the supporter of the breach of official duty (see [BGB s 830\(2\)](#)). The claim for compensation against Security Co must have the specific purpose of assigning liability to Security Co, so that Security Co will carry the cost of damages as an aider or abettor. This provision on aiders and abettors

⁴⁰ Federal Ministry of Justice, Law on Assemblies and Processions ([Versammlungsgesetz](#)) (VersG).

⁴¹ OLG München, Verdict of 20.06.1996-1 U 3098/94 (Munich Higher Regional Court).

does not relieve the perpetrator (in this case, the police) of their liability. Rather, it intends that other responsible parties can be held liable to compensate damages of the injured party.⁴² Accordingly, even if Security Co is liable, there is no exclusion of liability of police.

38. **No exclusion of liability according to [BGB s 839\(3\)](#):** The claim for compensation in Case Scenario 1 may not be excluded under [BGB s 839\(3\)](#). According to this section, the obligation to pay compensation does not apply if the injured party intentionally or negligently failed to use a legal remedy to avert the damage. Legal remedy is to be understood broadly. It includes those legal remedies that are directly intended to remedy or rectify a breach of official duty which has already occurred.⁴³ [BGB s 839\(3\)](#) is therefore inapplicable if remedies exist which would have had a preventive effect or would have had the effect of remedying the damage but not averting it.⁴⁴ In Case Scenario 1, however, both the beatings and the release of tear gas were used on the day of the demonstration. The associated breach of official duty can neither be remedied nor corrected retrospectively. The detention of the demonstrators also ended with their release. The only legal remedy therefore remains a lawsuit with the aim of having the unlawfulness of the police action established. The damage that has occurred has already been finally sustained.
39. **Damage and potential claimants:** The damage caused by the breach of official duty must be compensated in accordance with [BGB s 839](#). Here, the damaging party must restore the condition that would hypothetically have existed without the damaging event, ie if the breach of official duty had not occurred.⁴⁵ If the officials had behaved correctly, in particular if they had not used beatings or tear gas, costs for subsequent visits to the doctor, for example, would not have been incurred. In addition, it would have been possible for the injured parties to pursue their employment the next day, so there would not have been any loss of earnings through sick leave or detention ([BGB s 252](#)). Non-material damages that demonstrators suffered are also compensable ([BGB s 253\(2\)](#)).
40. The amount of monetary compensation deemed appropriate and 'fair' is at the discretion of the court ([ZPO s 287](#)) which must take into account all relevant circumstances of the individual case. When exercising its discretion, the court must take into account, in addition to the particularities of the individual case, that comparable injuries should result in approximately the same compensation, even if this is only possible to a limited extent in the case of individual rights. Since there are no binding prescripts, the compensation tables for 'pain and suffering' (*Schmerzensgeldtabellen*) which are based on an evaluation of numerous court decisions can be considered for guidance in addition to the court's case law.
41. The type, intensity and duration of the infringement suffered must be included in the decision-making process, must influence the amount of compensation, and must always form the decisive element in its assessment. If the liability to pay compensation is based exclusively on strict liability (*Gefährdungshaftung*) and if this also extends to compensation for non-pecuniary damage, the discretion of the court is limited by upper limits of liability as laid down in the law (*Haftungsgrenzen*).⁴⁶

⁴² Sprau (n 39) para 54.

⁴³ *ibid* para 69.

⁴⁴ *ibid*.

⁴⁵ *ibid* para 77.

⁴⁶ For a more detailed account, see Hartmut Oetker 'Sec 253' in Säcker et al (n 13) para 36.

42. According to [BGB s 839](#), the opponents of the claim are the officials who took the actions themselves. In principle, therefore, [BGB s 839](#) establishes personal liability of the officials. Under the conditions of [GG Art 34](#), however, the public body that entrusted the officials with the office during the performance of which the breach of official duty occurred is liable instead of the officials.⁴⁷
43. **Burden of Proof:** The burden of proof falls to the injured parties with regard to both the official status of the police officers, or their actions in the exercise of a public office entrusted to them, as well as in regard to the breach of official duty.⁴⁸ In addition, the demonstrators must prove the occurrence of damage and its causation by the breach of official duty (causality).⁴⁹ However, since the obligation to refrain from unlawful acts serves precisely to prevent damage to bodily integrity and deprivation of freedom of movement, the causal connection is supported by prima facie evidence.⁵⁰ The illegality of the police actions as well as the fact that the officers acted culpably is indicated by the proof of an objectively given breach of official duty.⁵¹ It is therefore the task of the employing authority to demonstrate and prove that there was a basis for authorisation of the actions of the officers and that the requirements for this basis were fulfilled.
44. **Other legal bases for claims:** Other claims against state agents based on the law of delict beyond [BGB s 839](#) cannot be considered, because tortious liability for civil servants is conclusive in this respect. In particular, liability of the State for the actions of civil servants under [BGB s 823\(1\)](#) in conjunction with [BGB s 31](#) or [s 89](#) or [s 831](#) is ruled out.⁵² However, claims under state police laws may arise.⁵³

Claims against Security Co and its employees

45. Security Co and its employees cannot be held liable solely on the basis of their individual contribution to providing the officers with vehicles, equipment and water. This alone did not cause a violation of legal rights to the detriment of the demonstrators. Rather, an encroachment on the rights of the demonstrators only occurred because the police officers acted against the demonstrators.
46. If the requirements of [BGB s 830\(1\)](#) are met, Security Co and its employees can be held fully liable in the external relationship vis-à-vis the victims for the damage caused by the police measures. A prerequisite for the liability of Security Co and its employees is, however, that the conduct of the police officers, which must have constituted an unlawful tort, occurred intentionally. Both the main perpetrator and contributors must have had intent regarding the violation of the legal right as well as regarding the unlawfulness of their act. In Case Scenario 1, it would therefore be necessary to prove that both the officers and Security Co and their employees have recognised and at least accepted that the conditions of the authorisation for the use of force and the detention were not met, ie that the police measures were unlawful. If they are only charged with (gross) negligence in this respect, according to case law, there is no liability as an accessory.⁵⁴

47 Sprau (n 39) para 25.

48 *ibid* para 84.

49 *ibid*.

50 *ibid* ('*Anscheinsbeweis*').

51 *ibid*.

52 *ibid* para 3.

53 *ibid* para 2a.

54 BGH NJW 2005, 3137, 3139 (Federal Court of Justice).

Q2

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

47. The injured parties could bring an action in an administrative court against the police. As the violation will have ended by the time a claim can be filed, protesters can file a petition for a declaratory order (*Fortsetzungsfeststellungsklage*) before the administrative court with the goal of a declaratory judgment. The aim of such a petition is to have the court declare that police conduct in regard to the demonstration was unlawful, in order to avoid similar interventions in the future.

Q3

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

48. The most prominent successful civil liability lawsuit against police is probably the case of the 'Stuttgart 21', where police used water cannons to curb a protest, which led to blindness of a person.⁵⁵

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⁵⁵ VG Stuttgart, Verdict of 18 November 2015-5 K 1265/14 (Administrative Court Stuttgart).

CaseScenario 2

Q1

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

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Claims against Security Co

49. **Rights violation:** First, rights must be violated. The rights explicitly named in [BGB s 823\(1\)](#) include the rights to property, health and bodily integrity. Causing respiratory problems and skin injuries to members of the surrounding population thus constitutes a violation of rights within the meaning of [BGB s 823\(1\)](#). The same applies to the contamination of farmland as a violation of property rights at the expense of the respective owner of the land, as does the destruction of the harvest, as crops become part of the land through their connection to the soil ([BGB s 946](#)). In contrast, fish swimming in the wild are no one's property, because wild animals are ownerless, [BGB s 960\(1\)1](#). Therefore, the death of fish does not constitute a violation of property. The same applies to pollution of rivers and groundwater.⁵⁶
50. Currently, rights to environmental goods such as air, water and soil do not enjoy the protection of [BGB s 823\(1\)](#) as 'other rights'. This means that oil-related pollution and the associated impairment of the supply of food and water cannot be claimed by the surrounding population.⁵⁷
51. **Act of injury:** Subsidiary Co has allowed oil from its production facilities to penetrate the surrounding area, and therefore violated a safety obligation that was incumbent upon it as the operator of the production facility. It controlled the source of the danger of leaking oil. Accordingly, it was incumbent upon Subsidiary Co to take suitable measures to ensure that third parties did not suffer any damage from the operation of the plant. Subsidiary Co therefore committed an act of injury by way of omission.⁵⁸

56 This is because, according to [WHG s 4\(2\)](#), neither groundwater nor surface waters, which, according to the definition in [WHG s 3\(3\)](#), also include rivers, are capable of being owned. See Water Management Act (*Gesetz zur Ordnung des Wasserhaushalts*). Nothing else follows from [BGB s 946](#), since free-flowing water and groundwater are not physically tangible objects and thus not 'things' within the meaning of [BGB s 90](#). Further, while everyone has the right to use surface waters within the framework of public use, this does not fall under ownership of property, as it lacks the characteristic of exclusivity. For the same reason, public use does not constitute any other right within the meaning of [BGB s 823\(1\)](#). See BGH NJW 1971, 886 (Federal Court of Justice).

57 There is, however, a dispute in the literature. Those against such a qualification of air, water and soil as an 'other right' in [BGB s 823\(1\)](#) argue that these goods are not assigned to individual persons but to the general public for use, so that they lack the exclusivity function otherwise required for classification as other rights. At the same time, it cannot be ignored that the surrounding population is particularly dependent on the use of the affected water and land, and is therefore also affected by its pollution in a prominent manner. In cases where the pollution does not result in a violation of one of the absolute rights mentioned in [BGB s 823\(1\)](#), a legal protection gap may arise. However, the legislature seems to want to close this gap by public law means, rather than through private law: see the Environmental Damage Prevention and Remediation Act (*Gesetz über die Vermeidung und Sanierung von Umweltschäden*) ([USchadG](#)) s 5 (regarding duty to avert danger) as well as [USchadG s 6](#) (concerning a duty to clean up), which exclude the damage that is privately suffered and concentrate on the damage to the environment itself. See Gerhard Wagner, 'Sec 823', para 355 in Säcker et al (n 13) para 355; Christine Godt, Haftung für Ökologische Schäden (Drucker & Humboldt 1997) 149 ff.

58 BGH NJW 2014, 2104, 2105 Rn 8 (Federal Court of Justice); Wagner (n 57) para 453.

52. **(Quasi-)Causality:** Both the pollution of the farmland and the associated destruction of the harvest can further be directly attributable to the contamination from the leaking oil and are thus quasi-causal. This is because both would have been prevented if Subsidiary Co had prevented the oil from leaking in accordance with its duty to ensure safety. The same applies to the violation of health and bodily integrity of the surrounding population, for these would not have occurred either if the Subsidiary Co had prevented the oil from spilling.
53. **Illegality:** All violations of rights also happened unlawfully. While the owner of a property must accept certain emissions, this only applies to insignificant or customary impairments ([BGB 906 \(1\), \(2\)](#)). The spill of oil certainly exceeds this threshold.
54. **Fault and causality:** Subsidiary Co culpably disregarded the safety obligation incumbent upon it, which was causal for the damage to occur. This is due to the finding that Subsidiary Co failed to take reasonable safety measures and disregarded its duty of care.⁵⁹
55. **Damage:** Subsidiary Co must therefore compensate the injured parties for the damage resulting from the infringement of their legal rights. In accordance with the principle of *in rem restitution* ([BGB s 249\(1\), \(2\)](#)), this includes medical treatment costs for those injured as well as relief from the seepage of oil through remediation of the affected farmland.

Claims against Parent Co (under BGB s 831)

56. **Unlawful damage:** Unlawful harm according to [BGB s 831\(1\)](#) has been done as explained in [49] above.
57. **Subsidiary Co as vicarious agent:** The unlawful damage was caused by Subsidiary Co, not Parent Co. Parent Co would only be liable for this if Subsidiary Co were Parent Co's vicarious agent. A vicarious agent is a person who only acts within the legal scope and obligations of the principal and is bound by the principal's instructions.
58. Such a relationship of superordination-subordination, including being bound by instructions, is conceivable in a group, even if they are independent legal entities. However, it is the exception. This is because the purpose of outsourcing to the subsidiary is precisely to relieve the parent company by having the subsidiary perform the task independently. In accordance with the case law of the [German Federal Court of Justice](#) (BGH), the subsidiary is therefore only bound by instructions if it carries out its activities in an organisationally dependent position because the parent company can restrict or withdraw the activities of the subsidiary at any time, or determine these in terms of time and scope.⁶⁰ Subsidiaries, however, typically have an independent management which makes business decisions according to its own considerations of expediency.

⁵⁹ Wagner (n 57) para 447.

⁶⁰ BGH NJW 2013, 1002, 1003 (Federal Court of Justice).

59. This is the case in Case Scenario 2. Although Parent Co is responsible for the overall management of the X Group's business, Subsidiary Co manages the project assigned to it autonomously, ie makes organisational decisions itself. The fact that Parent Co could theoretically exert more influence since it holds 100 per cent of the shares in Subsidiary Co, and thus controls it, does not change the independence of Subsidiary Co according to case law. This is because the actual circumstances are decisive for the classification as a vicarious agent, not the potential influence.⁶¹ In addition, even if Parent Co were to use its dominant position and exert more operational influence on the business, the subsidiary would continue to operate in its own legal sphere, not in that of the parent company since responsibility for the individual project is assigned to them.

Claims against Parent Co (breach of an organisational duty)

60. In principle, [BGB § 831](#) conclusively regulates any case in which a damaging party is liable for the conduct of a third party for its own fault of not properly selecting and monitoring its agents. There has been discussion about making an exception to this principle as far as liability for human rights violations is concerned.⁶² However, even if one were to assume that Parent Co exercised actual control over Subsidiary Co, a further prerequisite for liability would be that the parent company has breached its organisational duty in a culpable, ie negligent, manner. This is because liability for breach of an organisational duty is not a liability based on attribution, but a liability based on one's own fault.⁶³ It would therefore not be sufficient in Case Scenario 2 to prove that Subsidiary Co culpably failed to organise its business in such a way as to prevent oil from leaking. Rather, Parent Co would have to be reproachable for not having adequately supervised Subsidiary Co and its dutiful execution.

61. A further exception seems conceivable for cases in which a parent company transfers tasks to a subsidiary which – as in Case Scenario 2 regarding oil production – cause considerable damage in the event of an accident. In such cases, the parent company benefits from the profits of the subsidiary but is at the same time shielded from the latter's liabilities in the event of damage. It therefore seems likely that the outsourcing serves the purpose of shifting the obligation to pay compensation such that it falls to third parties.⁶⁴ However, such constructions at the expense of third parties are not explicitly provided for in the German Civil Code, [BGB § 328](#).⁶⁵

61 *ibid.*

62 In this context, it must be noted that this would represent a considerable breach of the principle of the legal entity and the associated principle of separation if liability within the group were to extend beyond the boundaries of the acting company; see Wagner (n 57) para 110. Ultimately, this would mean that all companies within a group would merge into a joint liability mass. Exceptions exist at least for cases in which the parent company exercises actual control over the conduct of the subsidiary and thereby breaches a duty of care. See Mathias Habersack and Peter Zickgraf, 'Deliktsrechtliche Verkehrs- und Organisationspflichten im Konzern' (2018) 182 *Zeitschrift für das Gesamt Handels- und Wirtschaftsrecht* 252, 288 ff.; Holger Fleischer and Stefan Korch, 'Konzerndeliktsrecht: Entwicklungsstand und Zukunftsperspektiven' (2019) *Der Betrieb* 1944, 1946 ff. Whether this can be assumed in the present case, however, appears questionable. Although Parent Co has assumed the overall management of the X Group, the subsidiaries are independently responsible for the respective projects. It is true that no instruction is required in the individual case (see [BGB § 831](#)). What is required, however, are organisational measures which have actually been taken and which apply throughout the group. A mere lack of exercise of control powers is not likely to be sufficient, as this would establish nothing other than joint liability for the corporate group for any culpable conduct on the part of the subsidiary.

63 See Wagner (n 57) para 113.

64 See for issuing investments, Wagner (n 57) para 112. For delegation on traffic safety obligations, see BGH NJW 2006, 3628, 3629 (Federal Court of Justice).

65 For a nuanced discussion, see Gerhard Wagner 'Haftung für Menschenrechtsverletzungen' (2016) 80(4) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 717, 766.

Q2

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

62. Possible alternative legal pathways to hold the perpetrators to account would be [USchadG s 5ff](#)⁶⁶ or [BlmSchG s 14](#).⁶⁷ Both laws establish specific duties of care toward the environment and formulate damages as remediable.

Q3

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

63. There are no high-profile lawsuits known to the author.

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66 Federal Ministry of Justice, Environmental Damage Prevention and Remediation Act ([Gesetz über die Vermeidung und Sanierung von Umweltschäden](#)). (USchadG).

67 Federal Ministry of Justice, Federal Emission Control and Protection Act '[Bundesimmissionsschutzgesetz – Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge](#)' (BlmSchG).

CaseScenario 3

Q1

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

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CS

295

Claims against Factory Co

(Inadequate implementation of fire safety standards)

64. **Establishing breach of contractual obligation under [BGB s 280\(1\)](#), [BGB 241\(2\)](#):** the surviving employees or their heirs (then in conjunction with [BGB s 1922](#)) are entitled to claim damages against Factory Co arising from the employment contract, according to [BGB s 280\(1\)](#) in conjunction with [BGB 241\(2\)](#). Factory Co as immediate employer is obligated to consider the rights and legal interests of its employees ([BGB 241\(2\)](#)). The employer's duty of care ([BGB s 618\(1\)1](#)) includes maintaining the workplace in such a way that the employees are protected against threats to life and health.
65. The threshold for the employer's duty of care and resulting obligations can be found, inter alia, in the Occupational Safety Law (ArbSchG) and the Workplace Ordinance (ArbStättV).⁶⁸ While these norms are of general public legal applicability, according to [BGB s 618\(1\)1](#) they permeate any individual employment relationship (so-called *Drittwirkung*) and therefore establish a private-law obligation that the employer owes to each individual employee. The employer's general duty of care under [BGB s 618\(1\)1](#) is concretised via the public-law occupational health and safety standards.⁶⁹ A violation of the duties of the ArbStättV therefore also constitutes a breach of duty of care towards each individual employee. The only prerequisite for this is that the regulation that has been violated is one that protects third parties, ie that its purpose is to protect the individual employee.⁷⁰ [ArbStättV s 3a\(1\)1](#) obliges the employer to ensure that workplaces are set up and operated in such a way that hazards to the safety and health of employees are avoided as far as possible and any remaining hazards are kept to a minimum. An almost identical obligation arises from [ArbSchG s 4\(1\)](#).⁷¹

68 Federal Ministry of Justice, Occupational Safety Law ([Arbeitsschutzgesetz](#)) (ArbSchG), and Workplace Ordinance ([Arbeitsstättenverordnung](#)) (ArbStättV).

69 BAG NZA 2009, 102, 103 para 13a (Federal Labour Court); BAG NZA 2009, 775, 776 para 24, 25 (Federal Labour Court).

70 BAG NZA 2009, 102 (Federal Labour Court).

71 This general obligation includes maintaining safety equipment, in particular fire alarm and fire extinguishing equipment, and signalling systems, and having them checked for proper functioning at regular intervals, [ArbStättV s 4\(3\)](#). The employer is also obliged to ensure that traffic routes, escape routes and emergency exits are kept clear so that they can be used at all times; to take precautions in such a way that employees can get to safety immediately in the event of danger and can be rescued quickly; and to draw up an escape and rescue plan if the location, extent and type of use of the workplace make this necessary. Exercises must be carried out in accordance with this plan at appropriate intervals ([ArbStättV s 4\(4\)](#)). Finally, [ArbStättV s 4\(5\)](#) obliges the employer to provide means and equipment for first aid when setting up and operating workplaces, and to have them regularly checked for their completeness and usability. A very similar canon of duties results from [ArbSchG s. 10\(1\)1](#) according to which the employer must take the measures necessary for first aid, firefighting and evacuation of employees, depending on the type of workplace and activities as well as the number of employees, and, in accordance with [ArbSchG s 10\(1\)3](#), must ensure that the necessary connections to external agencies are established in case of emergency, especially in the areas of first aid, emergency medical care, rescue and firefighting.

66. The standards of the ArbStättV and the ArbSchG not only serve to ensure an orderly process within the company but are also intended to ensure the protection of each individual employee against risks to their health.⁷² If the preliminary investigation can be substantiated, according to which the Factory Co did not ensure adequate fire protections and workers suffocated as a result, Factory Co breached its duty of care toward workers and can therefore be held liable.
67. **Reversal of the burden of proof:** [BGB s 280\(1\)2](#) provides for a reversal of the burden of proof in favour of the injured party. In this instance, Factory Co must prove it was not responsible for the accident. According to the facts of the case, Factory Co cannot present such exculpatory evidence and therefore is at fault.
68. **Causality:** Further, a causal link between the breach of duty of the employer and death and injuries of employees must be established. According to established case law, proof of causality is supported by prima facie evidence since the purpose of fire-safety obligations outlined above is precisely to prevent injuries and death of employees from fire or smoke.⁷³ Since this danger was realised in the present case, general life experience suggests that the disregard of the above-mentioned obligations was causal for the occurrence of the injuries and death.
69. **Damages calculation:** The resulting obligation to pay compensation for the surviving employees includes compensation for the costs of medical treatment ([BGB s 249\(1\), \(2\)](#)), as well as appropriate compensation for pain and suffering ([BGB s 253](#)). Presuming that the deceased employees did not incur any medical costs, compensation for pain and suffering could no longer fulfil its reparation and satisfaction function in relation to them. The heirs of the deceased employees can therefore claim the costs of a funeral ([BGB s 844\(1\)](#)), maintenance ([BGB s 844\(2\)](#)), and compensation for non-material damage for the emotional suffering caused by the loss of the deceased. The latter, however, is not available to the heirs, but only to persons who were in a special relationship of proximity to the deceased, eg close relatives ([BGB s 844\(3\)](#)).

Claims against Factory Co

(under [BGB s 823\(1\) and \(2\)](#))

70. The same damages claim arises from [BGB s 823\(1\) and \(2\)](#).⁷⁴

Claims against Factory Co

(Violations of physical integrity, sexual self-determination and for compulsory, unpaid overtime)

71. **Making use of [BGB: s 280, s 241, s 618\(1\)](#):** The employment contract existing between Factory Co and its employees obligated Factory Co to respect the physical integrity of its employees ([BGB s 241\(2\)](#)), and to actively protect it ([BGB s 618\(1\)](#)). Further arising from the employment contract is the duty of

⁷² BAG NZA 2009, 775, 776 para 26 (Federal Labour Court).

⁷³ This is standard practice when a protective law or duty of care exists that is intended to prevent hazards typical of the kind that has been realised in the damage that has occurred. See Ulrich Foerste 'Sec 286' para 27 in Hans Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (CH Beck 2021), and in particular for damages resulting from fire, see *ibid* for further reference to case law.

⁷⁴ Life, health and bodily integrity are absolute legal interests within the meaning of [BGB s 823\(1\)](#). Factory Co has violated these by disregarding its obligations under the ArbSchG and the ArbStättV and thus violated its duty to ensure fire-safety. This violation also occurred unlawfully for lack of justification. Subject to proof of fault – which falls to the claimants within [BGB s 823](#) – Factory Co must pay damages according to the above standards. The same claim also arises from [BGB s 823\(2\)](#). This is because the standards of the ArbSchG and the ArbStättV are mandatory legal standards and their purpose is to protect not only the general public, but also the individual employee to precisely avert the risks of injury and death that have occurred in the present case. The above-mentioned standards therefore constitute protective laws which Factory Co has violated.

Factory Co to protect the sexual self-determination of its (female) employees. The latter follows from [AGG s 7\(3\)](#),⁷⁵ according to which discrimination by employers or employees constitutes a breach of contractual obligations. Finally, the [ArbZG](#)⁷⁶ obliges Factory Co to employ its employees for only eight hours per day ([ArbZG s 3](#)). Only exceptionally are ten hours also permitted. Routinely exceeding the eight-hour day is prohibited. This obligation also serves to protect each individual employee, as can be seen from [ArbZG s 1\(1\)](#), according to which the law is intended to ensure the safety and health protection of employees in the Federal Republic of Germany. It therefore influences the employment relationship and each employee can assert a violation individually. Factory Co has violated its duty of care toward the assaulted and exploited employees by allowing physical and sexual violence at the workplace, and by making employees work mandatory overtime. Provided that Factory Co cannot exculpate itself ([BGB s 280 \(1\)2](#)), it must compensate the damage resulting from the above-mentioned breaches of duty.

72. **Provisions of [AGG s 15\(1\)](#):** An identical claim remedying sexual harassment ([AGG s 2\(1\)1–s 4\(3\)4](#)) arises from [AGG s 15\(1\)](#), which provides for a special damages claim for employees in the event of violations of the AGG. This includes compensation for material ([AGG s 15\(1\)](#)) and non-material ([AGG s 15\(2\)](#)) damages. However, there is a strict time limit of two months for the assertion ([AGG s 15\(4\)](#)).
73. **Provisions of [BGB s 823\(1\) and \(2\)](#) or [BGB s 831](#):** Identical claims further arise from [BGB s 823\(1\) and \(2\)](#) since health and bodily integrity, as well as sexual self-determination, are protected legal rights whose injury justifies a claim for damages. The only difference is that the claimant needs to substantiate the claim in [BGB s 823](#), whereas [BGB s 280\(1\)2](#) stipulates a reversal of the burden of proof. The conduct of its employees must be attributed to Factory Co in terms of [BGB s 31](#) or it will be liable for its own fault, since it did not select or supervise its (managing) employees to the extent required ([BGB s 831](#)). In addition, [StGB s 184i](#), and [StGB s 223\(1\)](#) and [ArbZG s 3](#) constitute protective laws, the violation of which also gives rise to claims for damages according to [BGB s 823\(2\)](#).

Civil claims of employees against Brand Co according to [BGB s 831\(1\)](#)

74. A claim in terms of [BGB s 831](#) would require that Factory Co is the vicarious agent of Brand Co. A vicarious agent is someone who acts within the legal sphere of the principal (here Brand Co) according to their instructions. Given the narrow interpretation of the relationship between vicarious agent and principal in German civil law, the requirement of [BGB s 831](#) is essentially impossible to establish for supplier relationship between two separate legal persons.
75. In Case Scenario 3, one could argue that a relationship of control exists between Factory Co and Brand Co that is similar to vicarious liability's principal-agent relationship, as Brand Co is the main purchaser of Factory Co's products. It is therefore not far-fetched to assert that Brand Co economically, and therefore factually, controls Factory Co as it can de facto exert influence similar to instructions. However, the mere possibility to issue instructions does not suffice for vicarious liability. Rather the actual circumstances are decisive for the classification as a vicarious agent.

⁷⁵ Federal Ministry of Justice, Equal Treatment Act ([Allgemeines Gleichbehandlungsgesetz](#)).

⁷⁶ Federal Ministry of Justice, Working Hours Act ([Arbeitszeitgesetz](#)).

76. The same problem occurs when aiming to establish liability of Brand Co due to organisational fault in terms of [BGB s 823\(1\)](#) and [BGB s 31](#). Even if [BGB s 831](#) fails due to the lack of a principal-agent relationship, everyone remains obliged to organise their business in such a way that third parties do not suffer any damage from its operation. However, this organisational obligation ends at the boundaries of one's own organisation, ie it does not include one's suppliers.⁷⁷
77. There has been discussion about making an exception to this principle as far as liability for human rights violations is concerned, although a piercing of the veil here would constitute a far-reaching break with the fundamental principles of legal entity and separation if the organisational duty were to be extended beyond the company to completely independent companies.⁷⁸ In addition, even if such an extension were permitted, it would still have to be proven that Brand Co has culpably – ie negligently – breached its organisational duty in the present case. This is because liability for breach of an organisational duty is not a liability based on attribution, but a liability based on one's own fault.⁷⁹



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

78. Importantly, many damage claims against employers arising from contract ([BGB s 280\(1\)](#)) or through the law of delict [BGB s 823](#) are excluded due to [SGB s 104\(7\)](#), according to which employers are only liable if they intentionally caused the damage.⁸⁰ The preferred route in such legal cases is therefore through employment law, as statutory accident insurance will cover (much of) the costs arising from injury at work. Further, criminal action can be pursued against any employer who, contrary to [ArbStättV s 3a\(1\)1](#) does not ensure that a workplace is set up or operated in the manner prescribed therein ([ArbStättV s 9\(1\)2](#)). In addition, regulatory action can be instigated for violations of the [ArbZG](#).



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

79. The Karachi-based Ali Enterprises factory burned down in 2012, killing more than 255 workers. The Pakistani factory's biggest client was the German discount retailer KiK which, according to own statements, had bought at least 70 per cent of the textiles the factory produced in 2011. KiK stated that it was its business that enabled the Pakistani manufacturing firm to grow into a major company.

⁷⁷ Wagner (n 57) para 110.

⁷⁸ For reference and summary of the discussion, see Gerhard Wagner, 'Haftung für Menschenrechtsverletzungen in der Lieferkette' (2021) ZIP 1095.

⁷⁹ Carsten König, 'Deliktshaftung von Konzernmuttergesellschaften' (2017) 217 (4-5) Archiv für die zivilistische Praxis 611, 671; Wagner (n 65).

⁸⁰ Social Security Act ([Sozialgesetzbuch](#)) (SGB).

On the initiative and with the support of the [European Center for Constitutional and Human Rights](#) and [medico international](#), four of the Pakistani employees affected by the factory fire [sued KiK in a German court](#).

80. In March 2015, they filed a civil lawsuit against KiK at the Regional Court in Dortmund seeking EUR 30,000 each in compensation. In January 2019, the court dismissed the case, finding that it had exceeded the statute of limitations. KiK originally agreed to waive potential statutory limitations, but later rescinded its offer. The case was thus decided on procedural grounds, not merit. Questions about corporate liability remain unresolved. Although, importantly, Pakistani civil law, not German civil law was applicable in the case. The civil claim of the four Pakistani plaintiffs against German retailer KiK was the most prominent case in this regard and prompted a broad legal debate about liability for suppliers under German civil law.⁸¹



81 LG Dortmund, Verdict of 10.01.2019-7 O 95/15 (Dortmund Regional Court).



A HANDBOOK FOR PRACTITIONERS | **HONG KONG**

Civil Liability for Human Rights Violations



 **OAK**
FOUNDATION

Bonavero
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of Human
Rights



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FREQUENTLY USED ABBREVIATIONS

BORO	Hong Kong Bill of Rights Ordinance (Cap 383)
CAPO	Complaints Against Police Office
CFI	Court of First Instance
ECO	Employees' Compensation Ordinance (Cap 282)
FIUO	Factories and Industrial Undertakings Ordinance (Cap 59)
HKSAR	Hong Kong Special Administrative Region
ICCPR	International Covenant on Civil and Political Rights
IPCC	Independent Police Complaints Council
LegCo	HKSAR Legislative Council
NPCSC	Standing Committee of the National People's Congress of the People's Republic of China
OSHO	Occupational Safety and Health Ordinance (Cap 509)
PSLA	Pain, suffering and loss of amenity

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HONG KONG



Hong Kong is a special administrative region that exists as part of the People's Republic of China under the 'One Country, Two Systems' principle. Until 2047, the legal system of Hong Kong is one of common law inherited from the British colonial government. The judge-decided case law is augmented through ordinances enacted by the Legislative Council. The Basic Law and the Hong Kong Bill of Rights Ordinance are the primary statutory sources of fundamental human rights in Hong Kong, but they apply to and bind only public bodies. Civil claims against private actors are commenced based on the common law of torts and statutory remedies.



IN

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INDICES

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**Democracy Index
2021 Ranking**

43/100

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2022 Score**

12/180

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. The legal system of Hong Kong is one of common law, inherited from the British colonial government that governed Hong Kong as a crown colony from 1842 to 1997. Upon the resumption of sovereignty of Hong Kong by the People's Republic of China in 1997, and under the principle of 'One Country, Two Systems' (1C2S), Hong Kong was designated as a 'special administrative region' of the People's Republic of China and was to enjoy a 'high degree of autonomy'. Fundamental to the 1C2S principle was the promise that the Hong Kong Special Administrative Region (HKSAR) was to retain its governmental, political and economic systems for 50 years, ending in 2047. This means that the systems implemented by the British colonial government, including the common law legal system, the rule of law, an independent judiciary, and a tradition of protecting human rights, are to remain untouched during this period. Furthermore, all laws in force in Hong Kong at the time of the Handover are to remain in force in the post-Handover period, being the common law, rules of equity, ordinances, subordinate legislation and customary law, with limited exceptions.¹
2. While the HKSAR is a common law jurisdiction, the common law, comprised primarily of judge-decided case law, is augmented by way of ordinances (legislative instruments) that are enacted by the HKSAR Legislative Council (LegCo). The Special Administrative Region's ordinances and subordinate legislation can be accessed through [a bilingual, free and searchable database](#). Additional sources of law in the HKSAR include national law of the People's Republic, [the Basic Law](#) (which is the HKSAR's constituting document) and interpretations of the Basic Law by the Standing Committee of the National People's Congress of the People's Republic of China (NPCSC), customary law and international law.
3. [The HKSAR has an independent judiciary](#)² that is responsible for the administration of justice and the exercise of judicial power. It is comprised of courts that hear both civil and criminal matters. The highest court is the Court of Final Appeal (CFA) that hears appeals from the High Court (comprised of the Court of Appeal and the Court of First Instance) and has the power of final adjudication.³ There are also district courts, magistrates' courts and specialist courts such as the Family Court and the Coroner's Court as well as tribunals with jurisdiction over specific areas of the law such as the Labour Tribunal.

¹ Basic Law art 8.

² Basic Law art 82. See also: Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (3rd edn, Hong Kong: Hong Kong University Press 2021) at [11.041-11.067].

³ Basic Law art 82 and Court of Final Appeal Ordinance (Cap 484).

Hearings and trials are typically open to the public unless there is a reason for them to be closed (eg when hearing matters relating to children) and media reporting is permitted save where it would amount to contempt⁴ or is prohibited by statute.⁵ Judicial decisions are publicly reported and are accessible by way of [a bilingual, free and searchable database](#) maintained by the judiciary.

4. The Basic Law and the [Hong Kong Bill of Rights Ordinance \(Cap 383\)](#) (BORO) are the two primary statutory sources of fundamental human rights in the HKSAR. The Basic Law is the primary source of law of the HKSAR and it identifies and defines the limits of governmental responsibility and powers. It also sets out protections of fundamental rights and freedoms including, for example, freedom of speech and association, of assembly, or procession and of demonstration.⁶ Given these characteristics, the Basic Law is commonly referred to as Hong Kong's 'mini-constitution'⁷ and its constitutional status has been judicially recognised.⁸
5. The BORO brings together the rights and protections afforded under the [International Covenant on Civil and Political Rights](#) (ICCPR) into a single law and as a domestic enactment, it means that the ICCPR's rights and protections are capable of enforcement in HKSAR courts. Part II of the BORO, titled 'The Hong Kong Bill of Rights' sets out in 23 articles, more or less word-for-word⁹ mirroring the rights as contained in the text of the ICCPR.¹⁰
6. The Basic Law and the BORO apply to and bind only the HKSAR Government and public authorities. This means that the Basic Law and the BORO have vertical but not horizontal effect; the former referring to laws that are applicable to the relationship between the organs of government and the people, and the latter referring to laws that are applicable to conduct between private individuals, including legal persons such as companies.

⁴ For further information on contempt in HKSAR courts see: [Halsbury's Laws of Hong Kong](#), 110 – Contempt of Court.

⁵ For example: Magistrates Ordinance (Cap 227) s 87A 'Restrictions on reports of committal proceedings'. See also: [Halsbury's Laws of Hong Kong](#), 110 – Contempt of Court at [110.015].

⁶ Basic Law art 35.

⁷ See for example: Albert HY Chen, 'Constitutional Adjudication in Post-1997 Hong Kong' [2006] 15 PAC RIM L & POL'y J 627 at [628].

⁸ *HKSAR v Ma Wai Kwan, David* [1997] HKLRD 761 (CA) at 788; *Ng Ka Ling v Director of Immigration* [1999] 1 HKC 291 (CFA) at 310.

⁹ There are certain ways in which the BORO deviates from the ICCPR. For example, the BORO does not include a provision parallel to ICCPR art 1 that guarantees the right to self-determination. Certain of the differences originate with reservations made by the UK upon its original ratification of the ICCPR and others were part of the legislative drafting and unrelated to the reservations. See Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Hong Kong University Press 2015) at [16.019-16.020].

¹⁰ BORO ss 9-13, reflect the reservations made. For example, at BORO s 13 it states that BORO art 21 (Right to participate in public life) is not to be interpreted as requiring the 'establishment of an elected Executive or Legislative Council in Hong Kong'.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking here...

Q1

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

It is possible for civil claims to be brought within the HKSAR against the government and public bodies, corporations and individuals when one of the three defined harms occurs. There are limitations, conditions and exceptions that will apply to most claims and some of these are set out below. Generally, though, where an aggrieved person suffers an injury or damages as a result of any of the three defined harms, they can file a legal claim in the HKSAR courts against the wrongdoer(s) on the basis that the wrongdoer(s) breached the common law and/or statutory law.

7. The common law of the HKSAR provides that where a person has sustained harm to their interests or rights due to a wrongdoer's unlawful acts or omissions, they can seek compensation by way of damages as well as other remedies against the wrongdoer who owed them a duty of care. These wrongs, as distinct from other areas of law such as contract and equity, are referred to collectively as 'torts'.
8. A separate and/or additional head of claim that could be lodged by a plaintiff suffering damage or loss as a result of any of the three defined harms carried out by a governmental or public body would be a claim that there was a breach of a fundamental human right protected in either or both the Basic Law and the BORO.

Preconditions to commencing a claim in the HKSAR courts

A claimant (referred to as the plaintiff(s), in other words, the person who sues) may only bring a claim in a civil court in the HKSAR when certain preconditions are met. These include that there must be at least two persons involved, a claimant and a respondent (referred to as the defendant(s), in other words, the person who is sued); all parties to a claim must possess legal personality; the plaintiff must have standing to sue; and, finally, the plaintiff must commence the claim within a specified period of time.

9. **Legal personality.** The general rule is that any person,¹¹ natural or artificial has the requisite legal personality to be a plaintiff or a defendant in a civil claim. This general rule, however, is subject to extensive exceptions that may apply based on the different parties involved as well as the legal rights and duties that attach to them.
10. **Natural persons.** A natural or private person can sue or be sued in their own name in the courts of the HKSAR. There are, however, basic limitations placed upon private persons commencing civil claims where they have not yet reached the full legal age¹² or are a mentally incapacitated person.¹³

¹¹ The definition of a 'person' can be found in the Interpretation and General Clauses Ordinance (Cap 1) s 3.

¹² In Hong Kong, a person is of 'full age' from the age of 18 years. See the Age of Majority (Related Provisions) Ordinance (Cap 410) s 2(1) and Interpretation and General Clauses Ordinance (Cap 1) s 3.

¹³ In this context, 'mentally incapacitated person' means a mentally disordered person or a mentally handicapped person within the meaning of the Mental Health Ordinance (Cap 136) who, by reason of the mental disorder or mental handicap, is incapable of managing and administering his property and affairs. (Rules of the High Court (Cap 4A) O 80).

11. **Corporations.** An incorporated company¹⁴ has the capacity and the rights, powers and privileges of a natural person¹⁵ of full age.¹⁶ Whilst not a physical person, an incorporated company is an artificial person (sometimes referred to as a 'legal person') with a personality separate and distinct from its members.¹⁷ It can commit torts and be held vicariously liable for torts committed by its agents in the course of their employment and, it can sue and be sued in its own name.¹⁸
12. **Unincorporated associations, partnerships¹⁹ and sole proprietorships** are also capable of having legal personality. Unincorporated associations (such as LegCo) are required to sue by way of a representative proceeding.²⁰ Where an unincorporated association is a defendant to an action, it is appropriate for a responsible officer (such as a Treasurer or Chairman) to be the named party.²¹ Where two or more persons are carrying on business as partners in the HKSAR, they may be named as individual parties to a claim or they can sue and be sued in the name of the firm.²² A sole proprietor must sue in his personal name, but where he is a defendant, he may be sued under his trading name.²³
13. **Government and public bodies.** Caution should be taken with respect to the liability of governmental and public bodies as this is an area of legal complexity. One such complexity arises with respect to governmental liability for negligence in the exercise of its statutory powers, specifically, whether a duty of care is owed in a given situation. It is generally accepted that the government and/or a public body may be liable in negligence, nuisance, trespass or any other tort only where they exercise their power without reasonable care²⁴ or where they exceed the scope of their discretion in relation to the exercise of a statutorily granted power.²⁵ It could also be the case that a duty of care is specifically excluded by way of legislation.²⁶
14. Notwithstanding the above limitations, the **HKSAR government** is subject to liability in tort as if it were a private person of full age²⁷ for tortious acts committed by its servants or agents.²⁸ For example, secretaries of government departments and police officers²⁹ are servants or agents of the government and the government will thus be held liable for their tortious acts or omissions. The government will also be held liable for breaches of an employer's common law duties owed towards its servants or agents,³⁰ breaches of common law duties attaching to the ownership, occupation, possession or control of a property³¹ and any failure to comply with a statutory duty binding upon it, including its officers.³²

14 An 'incorporated company' is one that is duly registered under the Companies Ordinance (Cap 622) s 71(1).

15 The definition of a 'person' is found in the Interpretation and General Clauses Ordinance (Cap 1) s 3.

16 Companies Ordinance (Cap 622) s 115. Age of Majority Ordinance (n 12) and Interpretation and General Clauses Ordinance (Cap 1) s 3.

17 *Salomon v Salomon and Co Ltd* [1897] AC 22.

18 *Foss v Harbottle* (1843) 2 Hare 461; *Re Hodges* (1873) 8 Ch App 204. See also: Rules of High Court (Cap 4A) O 5 r 6.

19 See generally: Rules of High Court (Cap 4A) O 81.

20 *ibid* O 15 r 2(1).

21 *Hong Kong Kam Lan Koon v Realray Investments Ltd* [2004] 2 HKC 673 (CFI).

22 Rules of High Court (Cap 4A) O 81 r 1.

23 *ibid* O 81 r 9.

24 *Linky Chance Ltd v Commissioner for Television and Entertainment Licensing* (unreported 15 December 2006 HCA 2127/2003).

25 *Anns v Merton London Borough Council* [1978] AC 728; *Yuen Kun Yeu v Attorney-General* [1987] HKLR 1154 (HKPC); *Ng Kuen Wai Trading as Willie Textiles v Deloitte Touche Tohmatsu* (unreported 2 March 2000 HCA 7266/1998).

26 See for example: Buildings Ordinance (Cap 123) s 37, Boilers and Pressure Vessels Ordinance (Cap 56) s 64, Land Survey Ordinance (Cap 473) s 33; and Land Drainage Ordinance (Cap 446) s 49.

27 Crown Proceedings Ordinance (Cap 300) s 4(1).

28 *ibid* s 4(1)(a).

29 *Kimmy Suen King-on v A-G* [1987] HKLR 331 at [333] (CA). See also *Fung Yiu Bun v Commissioner of Police* (unreported HCAL 2350/2001, 30 May 2002) (CFI) and *Chan Tak Keung v Commissioner of Police* (unreported HCAL 315/2000, 13 July 2002).

30 Crown Proceedings Ordinance (Cap 300) s 4(1)(b).

31 *ibid* s 4(1)(c).

32 *ibid* s 4(2).

15. The government and public bodies can, in addition to being sued under the law of tort, be sued for breach of human rights protections found in the BORO³³ and the Basic Law.
16. Decisions and acts of the government and public bodies are also subject to **judicial review**. The primary grounds on which such decisions are reviewed are illegality,³⁴ irrationality³⁵ and/or procedural impropriety added.³⁶
17. **Limitation periods.** Claims must be commenced³⁷ within a stipulated 'limitation period'.³⁸ Where a claimant seeks to commence a claim outside of the limitation period, his claim will be time barred subject to certain enumerated extensions and exclusions.³⁹
18. In general, civil actions for a simple claim in contract or tort are subject to a six-year limitation period. Where the claim is an action for damages for negligence, nuisance or breach of duty, and the damages claimed by the plaintiff consist of or include damages in respect of personal injuries, the relevant limitation period is three years.⁴⁰
19. **Standing.** In order to commence a claim for civil remedies a plaintiff must have standing to do so. This means that he has a vested legal interest⁴¹ in the proceedings. In a tort claim, for example, this would be the person who has been injured by the wrongdoer (also referred to as a 'tortfeasor').



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

Arrest or unlawful arrest and detention

20. 'Assault or unlawful arrest and detention' in the HKSAR constitute wrongs that fall under a category of torts designated as 'trespass to the person' and are regarded as intentional or deliberate torts. They are designated in the common law as the torts of assault, battery and false imprisonment. Trespassory torts are actionable per se meaning that there does not need to be demonstrable damages in order to commence a claim and a plaintiff will be entitled to nominal damages, in any event.⁴²

³³ BORO s 6.

³⁴ *Noise Control Authority & anor v Step In Ltd* [2005] 1 HKLRD 702 (CFA); *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 4 HKLRD 115(CFI).

³⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [2004] QB 1044.

³⁶ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Epoch Group Limited v Director of Immigration* [2011] HKCU 480 (CFI).

³⁷ 'Commencement' occurs when a writ or originating summons is issued.

³⁸ For more information on the limitation of actions in the HKSAR, see: Dave Lau, *Civil Procedure in Hong Kong: A Guide to the Main Principles* (4th edn, Sweet & Maxwell 2017) [13]–[26].

³⁹ Limitation Ordinance (Cap 347) s 3(2) and Part III.

⁴⁰ *ibid* s 4 and s 27.

⁴¹ It should be noted that the HKSAR continues to maintain both a common law and criminal prohibition on champerty (a form of maintenance, where a third-party pays some or all of the litigation costs in return for a share of the proceeds) and maintenance, subject to limited statutory exceptions. The prohibition against maintenance precludes third parties from funding an unconnected party's litigation or assisting to maintain the litigation, by providing, for example, financial assistance.

⁴² *R (Lumba) v Secretary of State for Home Department* [2012] 1 AC 245; and *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 19 HKPLR 402 (CFA).

21. **Assault.** The tort of assault is where a person reasonably apprehends imminent harmful or offensive bodily contact.⁴³ Examples of an assault include: brandishing a weapon,⁴⁴ approaching a person with a clenched fist⁴⁵ or a verbal threat of immediate violence.⁴⁶
22. **Battery** is defined as the intentional, direct and immediate infliction of unwanted, harmful or offensive bodily contact.⁴⁷
23. In the context of arrest, an arresting police officer may be susceptible to a civil claim for the tort of battery if it can be proved that the underlying arrest was unlawful, meaning the arrest was made: without legal justification; without providing to the arrested person the reasons for the arrest; or is affected by the use of excessive force. In such a case, the arrest itself becomes a battery.⁴⁸
24. **False imprisonment** is committed where a person unlawfully and intentionally or recklessly restrains another person's freedom of movement from a particular place or within a particular space.⁴⁹ It is not necessary that the restraint of freedom of movement be for a prolonged period of time as even a short period will suffice.
25. In order to establish a case of false imprisonment, the claimant need only prove to a civil standard⁵⁰ that he was imprisoned by the wrongdoer. The burden then shifts to the wrongdoer to prove a justification for the imprisonment.
26. Additional torts include the non-trespassory torts of malicious prosecution and misfeasance in public office.
27. **Malicious prosecution**, whilst similar to, is distinct from false imprisonment. False imprisonment arises as a result of a direct act on a person's freedom, whereas malicious prosecution involves an indirect and non-immediate interference with the person.
28. The necessary ingredients of a claim in malicious prosecution are: the tortfeasor initiated a prosecution of a criminal charge against the claimant; the proceedings concluded in the claimant's favour; there was an absence of reasonable and probable cause for the proceedings; the tortfeasor acted with malice; and the claimant suffered damages as a result.⁵¹
29. **Misfeasance in public office.** In order to substantiate a claim of misfeasance in public office, the plaintiff would have to prove the following to a civil standard of proof:
 - The conduct must be that of a public officer exercising power in their capacity;
 - The officer must either intend to injure the plaintiff by his acts, or knowingly or recklessly act beyond his powers; and
 - Damage must be caused such that the public officer knew that the act would likely result in such damages.

43 *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736 (CA); *Home Office v Wainright* [2002] QB 1334.

44 *Genner v Sparks* (1704) 1 Salk 79.

45 *Stephens v Myers* (1830) 4 C & P 349.

46 *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736 (CA).

47 *Collins v Wilcock* [1984] 3 All ER 374; *Abid Saeed v Secretary for Justice* [2015] 20 HKPLR 182 (DC) [180]–[186].

48 *Leung Kwok Hung v Secretary for Justice* [2009] 4 HKLRD 247 (CFI).

49 *R v Chan Wing Kuen and Another* [1995] 2 HKCLR 6 (CA).

50 The relevant civil standard of proof in the HKSAR is 'on a balance of probabilities'.

51 *Kowloon Dairy Ltd v Ku Yuk Shing* [1968] HKDCLR 57 (DC).

30. Key to proving a claim in misfeasance in public office is being able to prove the necessary mental element of malice; it is not enough that the wrongdoer was negligent.
31. **Breaches of the BORO and/or the Basic Law.** Where the wrongdoer is the HKSAR government or its agents, servants or officers, plaintiffs can also claim for breaches of the BORO and the Basic Law. In deciding whether an act or measure of the HKSAR government is unconstitutional, the courts will first determine if the act or measure restricts a constitutionally protected right or freedom. Once this is established, the court then subjects the restriction of the engaged right or freedom to a four step proportionality analysis in order to evaluate if the restriction is permissible under the BORO or the Basic Law. In doing so, the court will ask the following:
- i. Does the restriction pursue a legitimate aim?
 - ii. If so, is it rationally connected with the legitimate aim?
 - iii. Is the restriction no more than reasonably necessary to achieve the legitimate aim?
 - iv. Has a reasonable balance has been struck between the societal benefits promoted and the inroads made into the protected rights, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual?⁵²

Environmental harm

32. **Negligence** occurs where a wrongdoer, through carelessness, carries out an act that causes loss or damage to another. The ingredients of a claim in negligence are:
- The wrongdoer owes the victim a duty of care;
 - The wrongdoer breaches the duty of care;
 - The victim suffers an injury or damage as a result; and
 - The injury or damage suffered is connected to the wrongdoer's breach.
33. **The duty of care.** Whether a duty of care is owed is assessed against three criteria:⁵³ first, does a sufficiently proximate relationship exist between the claimant and the wrongdoer; second, was the harm reasonably foreseeable; and third, would imposing a duty of care in the circumstances be fair, just and reasonable?
34. **Breach of the duty of care.** As to whether one has breached the duty of care is a question of whether the wrongdoer's conduct fell below that which was reasonably expected of them in the circumstances. The standard of reasonableness is assessed objectively.⁵⁴
35. **Damages and causation.** The final ingredient of a claim in negligence is that injury or damage was sustained. This is the harm or loss suffered by the plaintiff as a result of the defendant's breach. It must be the case that the harm or losses suffered are connected to the defendant's breach. In assessing this, the court will apply the 'but for' test that asks, as a matter of fact, would the plaintiff's losses have occurred 'but for' the defendant's breach.⁵⁵ The damages claimed must also be foreseeable and not too remote.

⁵² *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 [134]–[135].

⁵³ *Caparo Plc v Dickman* [1990] 2 AC 605. See also: *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* [2011] 2 HKLRD 223 (CFA).

⁵⁴ *Glasgow Corp v Muir* [1943] 2 All ER 44 (HL). See also: *Wong Wai Ming v Hospital Authority* [2000] 3 HKLRD 612 (CFI).

⁵⁵ *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. See also: *Cheng Kin Ping v Woo Cho Wing & Cheung Ming Wo* [2000] 4 HKC 158 (CFA).

36. **Burden of proof.** The plaintiff bears the burden of proving the ingredients of negligence to a civil standard. This means that the plaintiff does not have to prove each ingredient to a standard of certainty but rather must show, for example, with respect to the breach, that it was more likely than not that the defendant breached the duty of care.
37. **Nuisance** arises when an activity unduly interferes with a neighbouring landowner or tenant's comfortable and convenient enjoyment of his land. Nuisances can be divided into three categories: private; public; or statutory.
38. **Private nuisance.** A private nuisance is one where an act or omission connected with the use or occupation of the land causes unreasonable interference with the plaintiff's use and enjoyment or interest in his land. The unreasonable interference with the claimant's enjoyment of land must be substantial⁵⁶ and the extent, degree, and duration of the interference will generally be considered (although it is not a requirement for the interference to endure for a substantial period of time to establish a claim).⁵⁷
39. The ingredients of a claim in nuisance are:
- The plaintiff has a legal right in the land;
 - The defendant has by an act or omission interfered with the plaintiff's enjoyment of the land;
 - The interference is unreasonable; and
 - The plaintiff has actual damage
40. **Public nuisance.** A public nuisance is distinct from a private nuisance in that it consists of causing inconvenience or annoyance to members of the general public and neither the plaintiff nor the defendant need have an interest in or relationship with any land. Public nuisance is both a **common law offence** and a **tort**. The former is an action that is commenced by the Secretary for Justice, on behalf of the public, to restrain or abate the public nuisance. The latter is an action brought by an individual who has suffered particular damage over that suffered by the public at large. The elements of a claim for the offence of public nuisance are the same as those for the tort.⁵⁸
41. To establish a public nuisance, one must prove:
- That it endangers the life, safety, health, property or comfort of the public or obstructs the public in the exercise or enjoyment of any right that is common to members of the public;
 - The act or omission complained of was committed by the defendant(s);
 - The defendant's conduct caused a foreseeable injury to the plaintiff (member of the public); and
 - The defendant(s) knew or ought to have known that his conduct would result in a nuisance that presented a real risk of harm to the public.⁵⁹
42. Once the nuisance is proved and it is proved that it was caused by the defendant, the burden shifts to the defendant to justify or excuse his actions.⁶⁰

⁵⁶ *ACL Electronics (HK) Ltd v Bulmer* [1992] 1 HKC 133 (CA).

⁵⁷ *Chan Fei-lung v Mansion Products Ltd* [1989-91] CPR 51 (HC).

⁵⁸ *Leung Tsang Hung & anor v Incorporated Owners of Kwok Wing House* [2007] 4 HKLRD 654 [12]

⁵⁹ *ibid* [12]–[23].

⁶⁰ *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the public highway names, the westbound carriageway of Argyle Street between the junction of Tung Choi Street and Portland Street and / or other persons hindering or preventing the passing or repassing of Argyle Street* (unreported HCA 2086/2014, HCA 2104/2014, 20 October 2014) [12].

43. **Statutory nuisances** are nuisances that would otherwise be public or private nuisances but that have been designated by statute as a nuisance. For example, section 12 of the Public Health and Municipal Services Ordinance (Cap 132) provides a list of matters that constitute statutory nuisance, one of which is ‘the emission of dust, fumes or effluvia from any premises in such a manner as to be a nuisance’. Section 127 sets out the provisions for securing abatement of such nuisances.
44. **Trespass to land** consists in any unjustifiable intrusion by one person upon land in the possession of another; the slightest crossing of the boundary is sufficient. Trespass differs from nuisance in that it is a direct injury as opposed to a consequential injury, and is actionable without proof of damage, whereas damages must be proved in nuisance.
45. **The rule in *Rylands v Fletcher***.⁶¹ This rule imposes strict liability on a person who has made a non-natural use of land by accumulating something that is not naturally there and likely to do mischief if it escapes. Whether a particular use of land is ‘natural’ depends on whether a hazardous escape is foreseeable.

SPOTLIGHT: CASE STUDY

A defendant operated a bleaching and dyeing factory above the plaintiffs’ basement property that was used for storing raw materials and antique furniture. The defendant maintained 21 water tanks in its property as well as a sunken pool for the purposes of carrying out its business. Coloured water escaped from the defendant’s property and flooded the plaintiffs’ property with approximately three feet of liquid. The court found that there was foreseeable damage suffered by the plaintiffs due to the escape of water collected on the defendant’s land. Because the collection of water on the defendant’s property was non-natural, the defendant was found liable pursuant to the rule in *Rylands v Fletcher* and was to pay to the first plaintiff nominal general damages of HKD 100 (approximately USD 12.74) and to the second plaintiff special damages in the amount of HKD 757,720 (approximately USD 96,546).⁶²

46. Liability under the rule is subject to licence and/or exemption. Perpetrators may be exempted from liability because they have obtained the relevant types of licences or exemptions related to the discharge.
47. **Environmental tort for marine oil spills.** Environmental torts arise from legislation that sets out the ingredients of a particular environmental harm, thereby giving potential claimants a right to lodge a legal claim and, if successful, a right to compensation. The sole environmental tort in the HKSAR is created by the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414) (MSO).⁶³

⁶¹ The *Rylands* rule is discussed in further detail in [38]–[40] of the English report. To access all country reports, please [click here](#).

⁶² *Wong Ching Chi & anor v Full Yue Bleaching & Dyeing Co Ltd* [1994]3 HKC 606 (HC).

⁶³ The MSO incorporates into Hong Kong law the provisions of the International Convention on Civil Liability for Oil Pollution Damage 1992. The MSO makes the owners of vessels carrying oil (distinct from a ship leaking or discharging bunker oil used for its own power) liable for pollution caused by the discharge or escape of oil and mandates that ships carrying more than 2,000 tons of oil be insured against liability to compensate for damage caused by oil pollution. Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 411) s 15.

48. Liability under the MSO is strict, subject to enumerated defences,⁶⁴ and arises when a shipowner either permits an actual oil discharge⁶⁵ or where a discharge is threatened.⁶⁶
49. Losses for the environmental tort created under the MSO are for pollution damage.⁶⁷ Liability is limited under the MSO.⁶⁸ However, where losses exceed the limits set out in the MSO, claimants can access compensation from 'The International Oil Pollution Compensation Fund'.⁶⁹

Harmful or unfair labour conditions

50. **Employer's liability in negligence.** At common law, an obligation is implied into every contract of employment that an employer is to take reasonable care of the safety of its employees whilst at work.⁷⁰ The scope of the duty is affirmative, meaning that the employer is obliged to actively ensure the safety of his employees.
51. The duty of care arises when the employee is in the course of employment or engaged in an activity that is incidental to employment.⁷¹ It is non-delegable. Thus, the employer cannot claim to have delegated the responsibility to an employee or another person to evade liability.
52. The duty of care is four-fold⁷² and requires the employer to:
- Employ competent employees and supervisors;
 - Provide and maintain a safe place of work, including a safe means of access and egress to the place of work;
 - Provide and maintain adequate plant and appliances; and
 - Provide a safe system of work.
53. The standard of care is the same as for normal negligence, ie the standard of a reasonable employer having regard to all the circumstances including the unique characteristics of the employee in question. This includes consideration of the employee's level of skill and training. As with traditional negligence, in determining the standard of care, foreseeability of the risk of injury is key to the assessment.
54. **Breach of statutory duty.** To succeed in an action for breach of statutory duty, an injured worker must show the following:
- That the harm caused falls within the ambit of the legislation;
 - That they are within the class of persons protected by the legislation;
 - That the statutory duty(ies) applies to the defendant;
 - That the activity that gives rise to the injury and the injury itself falls within the purpose and ambit of the legislation; and
 - That the relevant provision was breached according to its terms.

⁶⁴ *ibid* s 7.

⁶⁵ *ibid* s 6(1).

⁶⁶ *ibid* s 6(1A).

⁶⁷ *ibid* s 2.

⁶⁸ *ibid* ss 9(2), 12.

⁶⁹ For details of The International Oil Pollution Compensation Fund, see Part III of the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 411) Part III.

⁷⁰ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57; *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209 (CA); *Cathay Pacific Airways Ltd v Wong Sau Lai* [2006] 2 HKLRD 586 (CFA).

⁷¹ *Jerry Chen v Whirlpool (Hong Kong) Ltd* (2007) 10 HKCFAR 619.

⁷² *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

55. Breach of statutory duty can be asserted as the sole cause of action, or in addition to other tortious causes of action the employee might have against their employer. It depends on the construction of the relevant legislation, such that the court requires proof that the legislature intended for the statute to create a cause of action.
56. A legislative intention to create a cause of action is more likely to be proved if it can be shown that:
- The legislation is intended to benefit a class of persons as opposed to the public generally;
 - The legislation does not otherwise provide a remedy for a breach of its provisions;
 - A breach of statutory duty action is the only civil remedy available to an injured worker; or
 - That the breached provision on which the cause of action rests is provided in primary, not secondary legislation.
57. Two ordinances that are relevant to workplace safety are the Occupational Safety and Health Ordinance (Cap 509) (OSHO) and the Factories and Industrial Undertakings Ordinance (Cap 59) (FIUO). The OSHO imposes a duty upon occupiers to keep the premises safe and without risks to health for all persons employed at those premises.
58. The FIUO sets out duties analogous to those found under the OSHO, but which apply to proprietors of a factory or an industrial undertaking.

Statutory compensation for employees with workplace injuries and/or occupational diseases

59. **Employees' compensation.** In addition to tort claims, injured employees are entitled to compensation where they are injured or killed as a result of a workplace accident or where they suffer from one of the enumerated occupational diseases. The statutory basis for employees' compensation is found in the Employees' Compensation Ordinance (Cap 282) (ECO).
60. An injured employee can claim both their entitlements under the ECO and commence a civil action seeking civil damages, often under the torts of negligence, occupiers' liability and/or breach of statutory duty. However, any damages recovered in a separate civil action will be subject to the rule against double recovery.
61. Any attempt by an employer to seek to limit or otherwise contract out of liability to an employee for workplace injuries is barred by statute.⁷³
62. Compensation under the ECO is provided on a no-fault and non-contributory basis. By law, all employers must possess a mandatory minimum amount of insurance coverage to meet their liability should their employee suffer an injury or illness in the course of employment⁷⁴ and failing to do so is a criminal offence.⁷⁵

⁷³ Employees' Compensation Ordinance (Cap 282) s 30 and Employment Ordinance (Cap 57) s 70.

⁷⁴ Employees' Compensation Ordinance (Cap 282) s 40.

⁷⁵ *ibid* s 40(2).

63. To be eligible for compensation, the injured employee must meet the following three conditions:

- That they are an ‘employee’;⁷⁶
- That the employee suffered a personal injury or death by accident; and
- That the personal injury/death arose ‘out of and in the course of employment’.⁷⁷

Q3

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

64. **Multiple tortfeasors.** As a matter of common law, a claimant in the HKSAR can claim against multiple tortfeasors for damages or injuries suffered.⁷⁸ This is referred to as ‘joint and several liability’. Under this doctrine, multiple tortfeasors can act by way of a concerted action (joint) or independently (several). It is the case at common law that joint and several tortfeasors are individually liable to the plaintiff for the entirety of the damages sustained.⁷⁹

65. **Joint tortfeasors** are any number of persons, who by their combined action, cause the same damage to the plaintiff. The classic inquiry to establish whether parties are joint tortfeasors is to ask, ‘would the same evidence support a cause of action against each of the parties?’⁸⁰

66. **Examples of joint tortfeasors** include: an agent and his principal (where the agent commits a tort on behalf of his principal);⁸¹ an employer and his employee (where the employee commits a tort in the course of his employment); and an independent contractor and his principal (where the independent contractor commits a tort for which his principal is liable).

67. **Several (or concurrent) tortfeasors** can fall into one of two categories: tortfeasors acting separately and causing different damage or acting separately and causing the same damage to the plaintiff.

68. **Contribution between multiple tortfeasors.** A tortfeasor’s right to contribution from a co-tortfeasor is governed by the Civil Liability (Contribution) Ordinance (Cap 377).⁸²

69. **Vicarious liability** is a legal principle derived from common law. Under vicarious liability, a party may be held partly or wholly responsible for the wrongful act(s) of another even though they are not directly at fault.⁸³ There are two elements

76 *ibid* ss 2(1), 5(1). As to how to identify an ‘employee’, see: *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951 [973] (CFA).

77 *Yan Tong Kan v Gammon (HK) Ltd* [1981] HKDCLR 1; *Chan Lap Sin v Gold Lion Productions Co* (unreported DCEC300/1990, 6 June 1995).

78 *Clark v Newsam* (1847) 1 Exch 131; *So Cheung (t/a Cheung Kee Firm) v Lau An* [1931–32] 22 HKLR 22 (HC).

79 *Clark* (n 78).

80 *Brunsdon v Humphrey* (1884) 14 QBD 141 [147].

81 *Wong Wai Hing* (n 46).

82 Civil Liability (Contribution) Ordinance (Cap 377) s 3(1). See *Aberdeen Winner Investments Company Limited v The Incorporated Owners of Albert House* [2004] 3 HKLRD 910 (CA).

83 Historically, the HKSAR courts have applied what is commonly called the ‘Salmond test’ in deciding whether vicarious liability would apply, so called as it is found in the seminal text *Salmond: The Law of Torts* (1st edn, 1907). This test has been supplanted by the ‘close connection test’ – a more modern view espoused in *Lister v Helsey Hall Ltd* [2001] 2 All ER 752 (HL) as followed in *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 (CFA).

at the heart of the principle: first, the existence of a relationship between the two parties; and second, the wrongful act is connected to this relationship. A unique feature of vicarious liability is that the primary tortfeasor (ie the actual wrongdoer) will be liable to the party who has suffered loss concurrently with the vicariously liable party.

70. For a claim in vicarious liability to be successful a claimant must be able to show first, that there is a primary tortfeasor and second, that the nature of the relationship between the primary and secondary (vicariously liable party) tortfeasor is such that it is reasonable for the courts to impose vicarious liability. For vicarious liability to apply, there must be a relationship generally characterised as a master-servant relationship. Two categories of relationship fall into this categorisation and they are the relationship of principal and agent, and the relationship of employer and employee.⁸⁴ Because the principle of vicarious liability depends upon an underlying relationship of master-servant, an independent contractor will be solely liable for any unlawful acts or omissions on its part⁸⁵ subject to limited exceptions.
71. **Vicarious liability of HKSAR government for acts of its agents and/or employees.** The government will be held vicariously liable for torts committed by its servants or agents.⁸⁶ Rules applicable to vicarious liability regarding an employee-employer or agent-principal relationship will apply equally to the government save and except where the wrongdoer is acting in execution of a judicial process.⁸⁷

Q4

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

72. In the HKSAR, the principle of **separate corporate personality**⁸⁸ is applied. This means that as a general rule, a parent company will not be held liable for any wrongs of its subsidiaries. Thus, the notion of a group of companies forming a 'single economic unit' is unknown in the HKSAR.⁸⁹ Each company in a group of companies will usually be liable as a distinct legal entity from the parent company.
73. There are exceptions to this general principle that can be found in statute⁹⁰ or the common law.⁹¹ One such situation is referred to as 'piercing' or 'lifting the corporate veil'.

84 *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 (CFA); *Yeung Mei Ho v Tam Cheuk Sing & anor* [2015] 2 HKLRD 483 (CA).

85 *Salsbury v Woodland* [1970] 1 QB 324; *Sattar KA v Goodrich Transportation (HK) Ltd & anor* [2019] HKLRD 538 (DC); *Wan Tsz Nok v Hung Fai Electrical Engineering Ltd* (unreported HCPI 1117/2004, 17 November 2008).

86 Crown Proceedings Ordinance (Cap 300) ss 4 & 13. See for example: *Kimmy Suen King On v Attorney General* [1987] HKLR 331 (CA) for trespassory torts committed by police and for which the HKSAR Government was held vicariously liable as their employer.

87 *Fu Lok Man v Chief Bailiff of the High Court* [1999] 2 HKLRD 835 (CA).

88 *Salomon* (n 17).

89 *Peregrine Investments Holdings Ltd (In Liquidation) v Asian Infrastructure Fund Management Co Ltd* [2003] 1 HKLRD 209 (CFI); *China Ocean Shipping Co v Mitsui Bussan Kaisha Ltd* [1995] 3 HKC 123 (CA); *Winland Enterprises Group Inc v Wex Pharmaceuticals Inc* [2012] 2 HKLRD 757 (CA); *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 (CA).

90 For example, under the Criminal Procedure Ordinance (Cap 221) s 101E, where it is proved that an offence was committed by a company with the consent or connivance of a director or other officer concerned in the management of the company, that person will be guilty of the same offence.

91 The common law exceptions are based on either the principle of policy or on the principle that devices used to perpetrate frauds or evade legal obligations will be treated as nullities, or on a presumption of agency or trusteeship.

74. **Piercing the corporate veil.** There are limited circumstances in which the HKSAR courts may be willing to pierce or lift the corporate veil and hold a parent company liable for the acts of its subsidiaries.⁹² HKSAR courts will only do so to prevent a corporate entity from seeking to evade its legal obligations, or seeking to abuse the principle of separate corporate liability and frustrate the enforcement of the law.⁹³ This would include, for example, where the subsidiary is a façade or a puppet of the parent company and is being used to perpetrate a fraud.⁹⁴
75. **Agency.** Another exception to the principle of separate corporate personality can be found under the law of agency whereby a subsidiary company can be found to be acting as the agent of the parent company⁹⁵ or vice versa. The agency relationship in such a situation can be express or implied.⁹⁶

Q5

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

Remedies for common law claims

76. Remedies available to a claimant in a civil claim under the law of tort include damages, injunction, declaration and abatement. Another distinct remedy relevant for this report is the writ of *habeas corpus ad subjiciendum*.
77. **Damages** represent financial compensation for any loss or injury sustained, the objective being to restore the victim, to the extent that money can do so, to the position that they were in prior to the tort being committed.
78. In order to be successful, tort claims must meet the 'but for test'. This means that the plaintiff must prove a causal link between the defendant's tortious act and the plaintiff's injuries and/or losses. In making this determination, the court asks, 'but for the defendant's breach of duty would the plaintiff have suffered the damages alleged?'. The plaintiff is to prove his damages on the civil standard of a balance of probabilities.
79. Related to the question of causation is remoteness. Only damages that are reasonably foreseeable are capable of compensation.⁹⁷
80. **Damages for trespassory torts.** Whilst damages are primarily compensatory in nature, in trespassory torts, compensation can include damages that go beyond compensating for the injuries suffered. For trespass to the person, pecuniary losses, in addition to any bodily injury claim, will focus on the indignity and/or suffering that the assault, battery or false imprisonment has caused. In assessing this head of damages, the court will look at the circumstances of time and place and the manner of the indignity.

92 For a survey of cases in which the HKSAR courts have 'pierced the corporate veil' see: Thomas K Cheng, 'The Lifting of Corporate Veil Doctrine in Hong Kong: An Empirical, Comparative and Development Perspective' [2011] 40 *Common Law World Rev* 207.

93 *China Ocean Shipping Co v Mitsui Shipping Co Ltd* [1995] 3 HKC 123 (CA) [127C-D] and *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 [487]. For a recent discussion of the characteristics of such a device to evade the law or frustrate its enforcement, see: *Global Alliance Logistics (HK) Ltd v Premiere Logistics (HK) Ltd and anor* [2022] HKDC 289 [18].

94 *Winland Enterprises Group* (n 89) [54].

95 *Smith, Stone & Knight Ltd v City of Birmingham* [1939] 4 All ER 116; *Re FG (Films) Ltd* [1953] 1 All ER 615.

96 *Yue Tai Plywood & Timber Co Ltd v Far East Wagner Construction Ltd* [2001] 2 HKLRD 446 (CFI).

97 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering (The Wagon Mound No 1)* [1961] AC 388 (PC); *Overseas Tankship (UK) Ltd v Miller SS Co Pty (The Wagon Mound No 2)* [1966] 2 All ER 709 (PC); *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264; *Yuen Kun-Yeu & ors v A-G* [1986] HKLR 783 (CA).

81. The relevant remedies for a trespass to land would be compensatory damages, typically assessed by reference to the diminution in value of the land as a result of the trespass. This diminution may be assessed by reference to the cost of repair and reinstatement of the land to the condition it was in immediately prior to the trespass. A plaintiff can also claim for exemplary and punitive damages.
82. **Damages for a personal injury.** In a claim for bodily harm, the injured party can be compensated for both pecuniary losses (also called 'general damages') and non-pecuniary losses (also called 'special damages'). Pecuniary losses are intended to compensate a victim for their 'pain, suffering and loss of amenity' (PSLA). The 'pain and suffering' component, as the name suggests, is to compensate a claimant for the physical pain and discomfort suffered by them due to the injury/injuries sustained. 'Loss of amenity' refers to compensating a claimant for the diminution of the claimant's quality of life due to the injury sustained. Non-pecuniary losses are intended to compensate a victim for out-of-pocket expenses incurred as a result of the injury such as loss of earnings and medical expenses.
83. **Damages for a fatal claim.** It is possible for the estate of a deceased person to claim damages for the person's death that includes PSLA (where the death was not instantaneous), funeral expenses and/or loss of future accumulation of wealth and loss of society or services.⁹⁸ This claim is for recovery of the deceased's pre-death pecuniary and non-pecuniary losses.
84. Additionally or alternatively, the dependents of a deceased person may make a fatal tort claim on behalf of the deceased person and claim for those damages that the deceased would have been entitled to had he not died. This claim is for pecuniary losses, bereavement (to be claimed only by a spouse or parent)⁹⁹ and expenses (eg funeral expenses) associated with the death.
85. **Damages for a public nuisance.** It is key to a claim in public nuisance that the claimant has suffered special damages, such that his annoyance and inconvenience must be greater than that suffered by the general public.
86. **Aggravated damages** can be also awarded by HKSAR courts. These are compensatory in nature and are awarded where there are aggravating features associated with the facts of the case, where the award of general damages is insufficient to fully compensate the victim.
87. Aggravated damages may be available for actions in trespass to the person but are not generally available in other tort claims including negligence, occupiers' liability and breach of statutory duty.¹⁰⁰ In the case of trespass to the person, aggravated damages are intended to compensate the victim for injury to feelings, dignity and pride or for mental discomfort and distress suffered. For example, aggravated damages may be awarded where the circumstances of an arrest are humiliating or the arresting officer was insulting, high-handed and/or oppressive in carrying out the arrest.¹⁰¹
88. **Exemplary damages.** These damages are punitive and not compensatory in nature. They are awarded to signal the court's displeasure with the tortfeasor's conduct as well as to act as a deterrent to both the tortfeasor and to others to refrain from engaging in similar conduct.¹⁰²

98 Fatal Accidents Ordinance (Cap 22) and Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 20(1).

99 Fatal Accidents Ordinance (Cap 22) s 4.

100 *Rookes v Barnard* [1964] AC 1129.

101 *A v Director of Immigration* [2009] HKCU 311 [42]–[45].

102 See *Clerk & Lindsell* [5.36]–[5.37].

89. Exemplary or punitive damages are available in limited circumstances, including where they are authorised by statute, where the wrongdoer's conduct was calculated to make a profit that exceeds the compensation payable to the victim and where the underlying tort involves oppressive, arbitrary or unconstitutional action by a public servant.¹⁰³
90. **Injunction** is an order of the court that compels the wrongdoer to cease their unlawful conduct. An injunction can be **prohibitory**, in that it requires the wrongdoer to cease committing a continuing tort, or **mandatory**, such that it requires the wrongdoer to carry out a positive act. An injunction is distinct from damages in that it is an equitable remedy and not granted as of right. An injunction will not be granted where damages are the more appropriate remedy or the harm that the claimant has suffered is minor. Injunctions can be sought, for example, to prevent or stop a public or private nuisance.
91. **Declaration.** A declaration is an equitable remedy whereby the court makes a pronouncement or statement on the legal position between the parties. Courts are to grant declaratory relief where to do so is 'just and convenient', having regard to all the circumstances of the case.
92. **Abatement** refers to the summary removal or remedy of a nuisance without having to commence legal proceedings. Abatement is suitable for straightforward claims and where the private or public nuisance arises from an act of commission. Where a plaintiff opts for abatement, they are then precluded from claiming damages, save for those sustained prior to the abatement.
93. **Writ of *habeas corpus*.** Any person whose liberty is restrained can make an application to the court for a writ of *habeas corpus ad subjiciendum*, or simply *habeas corpus*.¹⁰⁴ When deciding whether to grant the writ, the burden rests with the applicant to show a prima facie case of unlawful detention. Once established, the burden then shifts to the respondent to show, based on clear and cogent evidence, that either there is no detention or that the detention is lawful.¹⁰⁵ The relevant standard of proof is to a civil standard, having regard to the circumstances of the case. If it is found that the detention is unlawful or unjustified, the court will order the person's immediate release.

Remedies for constitutional claims

94. Judicial review is the process by which the HKSAR Court of First Instance (CFI) exercises its supervisory jurisdiction over those who are charged with the performance of public acts and duties. Judicial review is a remedy of last resort¹⁰⁶ and thus an application can be refused by the court where the applicant has failed to first exhaust other remedies available to him. The court can also refuse a remedy where there has been delay in lodging the application or where the applicant has suffered no injustice or the relief sought by the applicant will serve no practical purpose.

¹⁰³ *Rookes v Barnard* [1964] AC 1129. See also: Rick Glofcheski, *Tort Law in Hong Kong* (3rd edn, Sweet & Maxwell 2012) [17.1.2.4].

¹⁰⁴ High Court Ordinance (Cap 4) s 22A.

¹⁰⁵ *Re W (Habeas Corpus: Third Party Application)* [2006] 1 HKC 468 (CFI).

¹⁰⁶ *Yeung Chun Pong and ors v Secretary for Justice* (No 4) [2008] 3 HKLRD 1 (CA) [74]-[75].

95. The modern law and procedure relating to judicial review in the HKSAR has abolished the common law prerogative writs of mandamus, prohibition, *certiorari* and *quo warranto* and replaced them with equivalent statutory orders.
96. Injunctions and declarations can also be sought by way of judicial review rather than in an ordinary action provided that the context of the claim is one of public law, that is, concerned with claims between private individuals and the government and/or public bodies.
97. **Orders available on judicial review.** Currently, the orders that can be sought by way of a judicial review in HKSAR courts are:
- An order of **mandamus**¹⁰⁷ to require a public law respondent to perform a function or duty imposed by public law;
 - An order of **prohibition**¹⁰⁸ to prevent a public law respondent from acting or continuing to act in such a way as to abuse its jurisdiction or offend against natural justice;
 - An order of **certiorari**¹⁰⁹ to quash a decision already made by a decision-making body amenable to judicial review and which is invalid as contravening the requirements of public law;
 - An **injunction**¹¹⁰ to restrain a person from acting in an office to which he is not entitled;
 - A **declaration**,¹¹¹ and
 - An **injunction** to restrain unlawful acts about to be, or which are in the process of being committed
98. **Damages and judicial review.** Applicants can choose to seek only non-monetary remedies on judicial review, however, they are entitled to seek, in addition to the above-outlined orders, ‘damages, restitution or recovery of a sum due’.
99. ‘Damages, restitution or recovery of a sum due’ can only be sought alongside a request for other orders, and cannot be the sole remedy sought.¹¹² The court determining the matter must be satisfied that the damages sought by the applicant could have been awarded at the time of making the application had the proceedings been commenced by a private law action, because there is no separate right to claim damages as a matter of public law.¹¹³

107 High Court Ordinance (Cap 4) s 21I and Rules of the High Court (Cap 4A) O 53 r 1(1)(a).

108 *ibid* s 21J.

109 *ibid* s 21I.

110 High Court Ordinance (Cap 4) s 21J and Rules of the High Court (Cap 4A) O 53 r 1(1)(b).

111 High Court Ordinance (Cap 4) s 21K(2) and Rules of the High Court (Cap 4A) O 53 r 2.

112 High Court Ordinance (Cap 4) s 21K(4) and the Rules of the High Court (Cap 4A) O 53 r 1(3).

113 High Court Ordinance (Cap 4) s 21K(4) and the Rules of the High Court (Cap 4A) O 53 r 7(1)(b).

SPOTLIGHT: CASE STUDY

Applicants, who were detained by the government pending their assessment under the [UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), filed a judicial review as to the constitutionality of their continued detention. It was held by the Court of Appeal that their detention was unlawful and in breach of the BORO. The Court ordered the matter transferred to the CFI for an assessment of damages for their unlawful detention, including general, aggravated and exemplary damages.¹¹⁴

100. **Constitutional damages.** The BORO at section 6 provides that a competent court or tribunal can award a remedy or relief for a breach, violation or threatened violation of the BORO. HKSAR courts have determined, however, that section 6 does not give rise to an independent claim to a person for damages for breach of the BORO.¹¹⁵ Claimants who have been affected by a breach of the BORO can assert any such breaches in aid of a separate and existing cause of action for which the court has power to grant remedies, relief and/or to make any other order. For example, a claimant can claim breaches of the BORO in aid of a claim for damages for a false imprisonment. Any damages awarded, however, are for the false imprisonment and not the breach of the BORO.
101. Claimants also are precluded from seeking 'constitutional damages' by way of asserting that a breach of the BORO constitutes the tort of breach of statutory duty.¹¹⁶

SPOTLIGHT: CASE STUDY

The case of *Abid Saeed v Secretary for Justice*¹¹⁷ involved a Pakistani national who was arrested after allegedly illegally entering the HKSAR. He sought non-refoulement on the basis of the risk of cruel, inhuman or degrading treatment. He was consequently subjected to a series of detentions, body strip searches and handcuffing. He sued the Secretary for Justice, alleging false imprisonment, trespass to the person and breaches of the BORO and the Basic Law.¹¹⁸ The Court found in favour of the plaintiff on the basis of false imprisonment (for the detentions) and trespass to the person (for the handcuffing and strip searches). The Court also found that the strip searches constituted a breach of the BORO and the Basic Law. However, it declined to award 'constitutional damages' in addition to what had already been awarded for the tort claims. The Court stated that the issue of whether 'constitutional damages' were available in the HKSAR 'remains an open question'.¹¹⁹

¹¹⁴ *A & ors v Director of Immigration* [2008] 4 HKLRD 752 (CA).

¹¹⁵ *Tsui Kin Kwok Johnnie v Commissioner of Police* (unreported CACV 38/2010, 20 July 2011); *Ho Chee Sing James v Secretary for Justice* [2015] 4 HKLRD 311 (CFI).

¹¹⁶ *Ho Chee Sing* (n 115).

¹¹⁷ [2015] 1 HKLRD 1030 (DC).

¹¹⁸ BORO arts 3, 6(1), 14 and Basic Law arts 28, 39, 41.

¹¹⁹ *Abid Saeed v Secretary for Justice* [2015] 1 HKLRD 1030 (DC) [331]. See also: *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* [2011] HKCU 1956 (DC) and *Ho Kin Man v Commissioner of Police* [2013] 1 HKC 13 (CFI).

Q6**What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?****Advantages**

102. The principal advantages of using civil claims for human rights protection in the HKSAR derive from the nature of the HKSAR's legal system as one founded upon the rule of law, having an independent judiciary, open and transparent legal processes and domestic protection of human rights enforceable in HKSAR courts. Civil justice reform also means that mediation and settlement are actively encouraged, resulting in the possibility for earlier and less expensive resolution of a claim.
103. Access to justice in the HKSAR, whilst admittedly not perfect, is assisted by the use of specialised, easy-to-access tribunals, with a tradition of both the Bar and the Law Society providing pro bono legal services and a generous legal aid system.

Disadvantages

104. The following are disadvantages of using civil claims for human rights protection:
- **Prohibitive cost of litigation.** The HKSAR maintains a separated practice meaning that a litigant is typically obliged to pay for both a solicitor and a barrister, sometimes more than one barrister if the matter is complex. Additionally, the HKSAR courts follow the rule that costs are to follow the event, meaning that the losing party is obliged to pay the legal costs of the successful party. This can be prohibitive for litigants of limited or no means and who are unable to access legal aid, particularly where the defendant is well funded. This rule is, however, subject to a public interest exception¹²⁰ or where the applicant is successful in securing a protective costs order.¹²¹
 - **Complexity of litigation.** The filing of a civil claim is subject to numerous rules, regulations, practices and procedures, all of which must be strictly adhered to. Constitutional claims are similarly complex, necessitating legal advice and representation (of both a solicitor and a barrister). The complexity impacts on the cost as well as the time required to bring a matter to resolution.
 - **Access to justice** is negatively affected by the prohibition against lawyers in the HKSAR taking on cases on a 'no win, no fee' basis or agreeing to be compensated for their fees as a percentage of any moneys recovered.¹²²
 - **Mixed or hybrid claims.** Whilst the Labour Tribunal has exclusive jurisdiction over all employment law claims, its jurisdiction specifically excludes claims in tort and discrimination, meaning that employees who have a hybrid claim, ie a claim under the law of employment as well as a claim in tort or under equal opportunities legislation, will be forced to commence two separate claims in two separate forums.

120 *Chu Hoi Dick v Secretary for Hong Affairs* (No 2) [2007] 4 HKC 428 (CFI) [29].

121 *R (Corner House Research) v Secretary for State for Trade and Industry* (1998) 193 CLR 72; *Designing Hong Kong Ltd v Town Planning Board (Secretary for Justice, intervening)* (2019) 24 HKPLR 1 (CFA).

122 *Winnie Lo v HKSAR* [2012] HKEC 263 (CFA). See also the discussion on the prohibition of champerty and maintenance in HKSAR (n 41).

- **Requirement of an employment relationship.** In order to access the Labour Tribunal, one must be in an employment relationship. Therefore, where a victim is not legally employed, they will have no option but to pursue their claims in the traditional civil courts and thus, will not have access to the benefits of having their claim dealt with by the Labour Tribunal.

Q7

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

105. Whether a civil claim can be brought in the HKSAR against a foreign defendant will depend upon complex procedural and substantive law. Rules of civil procedure in the HKSAR confer 'long arm jurisdiction' on the HKSAR courts so long as the claim is 'founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction'.¹²³ The answer turns on whether the HKSAR is the *forum conveniens*, ie whether the HKSAR is the most appropriate forum for the trial of the action. The answer will differ for torts that took place within the HKSAR and those that took place outside of the HKSAR. In either situation, if the HKSAR courts assume jurisdiction over the matter, the plaintiff will need to seek leave from the court to serve the proceedings outside of the HKSAR in accordance with the relevant rules of civil procedure.¹²⁴
106. **Torts committed in the HKSAR.** Where a foreign defendant commits a tort within the HKSAR's jurisdiction, the claimant can commence proceedings in the HKSAR courts on the basis that the HKSAR is the *forum conveniens*.
107. **Torts committed outside of the HKSAR.** There are two distinct situations that can arise where the tort occurs outside of the HKSAR. The first situation is where the tort occurred outside of the HKSAR but the damages were sustained within the HKSAR. In such a case, the HKSAR courts can assume jurisdiction over the matter.¹²⁵
108. The second situation, where both the tort and the damages occurred outside of the HKSAR, is more complex. If such a claim is filed in the HKSAR courts, the defendant is likely to seek a stay of proceedings based on *forum non conveniens*, arguing that the HKSAR is not the natural forum. In deciding whether to stay the claim, the HKSAR courts would apply a three-part test derived from the English *Spiliada* test.¹²⁶ First, the applicant must show that: (i) the HKSAR is not the natural and appropriate forum for the trial of the action, and (ii) that there is another, more suitable forum. Once the applicant establishes this first stage, the respondent must then show that they will be deprived of a legitimate, personal or juridical advantage if the trial of the action is heard outside of the HKSAR. The third part of the test is for the court to balance the advantages of the claim proceeding in another court against the disadvantages to the respondent as well as whether substantial justice will be done by the matter proceeding in another jurisdiction.

¹²³ Rules of High Court (Cap 4A) O 11 r 1(1)(f). The Rules of High Court (Cap 4A) O 11 r1(1)(a) – (p) set out, in addition to claims in tort, a list of situations in which the HKSAR courts may permit service of a writ out of jurisdiction, with leave of the court. This is subject to the exceptions set out in O 11 r1(2).

¹²⁴ Rules of High Court (Cap 4A) O 11 r 1(1)(f).

¹²⁵ *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 (SC); *Fong Chak Kwan v Ascentic Ltd & ors* [2020] HKCFI 679.

¹²⁶ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 as adopted and applied in HKSAR courts in *The Adhiguna Meranti* [1987] HKLR 904 (CA) and *Louvet v Louvet* [1990] 1 HKLR 670 (CA).



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

For free access to Hong Kong caselaw:

- [Hong Kong Legal Information Institute](#)
- [The Judiciary of the HKSAR website](#)
- [Department of Justice – Notable Decisions \(civil, criminal and judicial review\), 2016-2021](#)

For free access to the laws of Hong Kong:

- [Hong Kong e-legislation](#)

For accessible information on making legal claims in Hong Kong:

- [Community Legal Information Centre \(CLIC\)](#)

For information on labour and employment law and claims:

- [Labour Department](#)
- The 'concise guides' published by the Labour Department on topics like the [Employment Ordinance \(Cap 57\)](#), the [ECO](#) and the [statutory minimum wage](#) are also recommended.
- [Labour Tribunal](#)
- Justice Without Borders: [Just Compensation: A Toolkit for Cross-Border Access to Justice for Migrant Domestic Workers in Hong Kong & Precedent Bank](#)
- Justice Centre: [Research on human trafficking, forced labour and modern-day-slavery](#)

For reports on human rights in the HKSAR:

- [EU Annual Report on Human Rights and Democracy in the World: 2021 Country Updates \(19 April 2022\)](#)
- Constitutional and Mainland Affairs Bureau: [The Government of the HKSAR reports under the UN Human Rights Council Universal Periodic Review](#), (ICCPR, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination – various)
- US State Department: [2021 Country Reports on Human Rights Practices: China \(Includes Hong Kong, Macau, and Tibet\) – Hong Kong, 12 April 2022](#)
- US State Department: [2021 Trafficking in Persons Report: Hong Kong](#) (undated)
- Foreign, Commonwealth & Development Office: [Six-monthly report on Hong Kong: 1 July to 31 December 2021 \(31 March 2022\)](#)
- UN Human Rights Committee: [Concluding observations on the fourth periodic report of Hong Kong, China \(27 July 2022\)](#)

- Human Rights Watch: [Dismantling a Free Society: Hong Kong One Year after the National Security Law \(undated\)](#)
- Amnesty International – [Hong Kong \(various\)](#)
- Council on Foreign Relations: [Hong Kong's Freedoms: What China Promised and How It's Cracking Down](#) (19 May 2022)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

Potential claims against the police

109. Potential claims could be made against individual police officers for their acts of 'violence and brutality', beating and teargassing of protesters, unlawfully detaining of protesters, torturing and other ill-treatment of protesters whilst in detention (unlawful actions undertaken in the course of official police conduct). The applicable claims in tort would fall under trespass to the person (assault, battery and false imprisonment).
110. In the case of the protesters being unlawfully detained, particularly if the detention is tainted by an underlying unlawful arrest, this would likely amount to a false imprisonment.¹²⁷ Use of excessive force is likely to constitute the torts of assault and battery.
111. **False imprisonment.** In the context of protests, protesters (such as those in the Case Scenario 1) could find themselves in a variety of situations that constitute a confinement or a *de facto* confinement that may amount to false imprisonment. This may include a number of scenarios, including being confined to designated areas for the purposes of carrying out the public protest or for the protection of persons and/or property, by the use of 'kettling'¹²⁸ and other crowd control measures, through to being restrained by the police in the course of an eventual or actual arrest. Whilst these situations amount to false imprisonment, such police actions will be lawful if they are performed in order to prevent an anticipated breach or actual breach of the peace, so long as they are reasonably necessary and proportionate in the circumstances.
112. The tort of false imprisonment can also be committed by making an unlawful arrest or by detaining a person for longer than is necessary or justifiable. Conversely, where an act would otherwise constitute trespass to the person, it may be justified on the ground that it was carried out in furtherance of a lawful arrest (ie there is clear legal authority for the arrest), at common law or under statutory authority. Police officers in the HKSAR have wide powers of arrest, both

¹²⁷ Clayton and Tomlinson, *Civil Actions Against the Police* (3rd edn, Sweet & Maxwell 2004) 157.

¹²⁸ 'Kettling' is a measure used by police whereby protesters are corralled into confined spaces for the purposes of crowd control or other police actions.

with¹²⁹ and without a warrant,¹³⁰ subject to the requirement that the person effecting the arrest had a reasonable suspicion that an arrestable offence had occurred.¹³¹

113. Where an arrest is effected under a warrant issued under the Magistrates Ordinance (Cap 227)¹³² or the Police Force Ordinance (Cap 232)¹³³ the police officer who carries out the arrest will not be liable for false imprisonment even where the warrant and/or the consequent arrest are found to be irregular.
114. **Misfeasance in public office.** If the police conduct was carried out with malice toward the protesters, this could also amount to the tort of misfeasance in public office.
115. **Vicarious liability.** The government or a public body (the Commissioner of Police, for example) could be held vicariously liable for the above-outlined claims based on their relationship of employment with the individual police officers. This is subject to the 'close connection test',¹³⁴ which requires that the police conduct occurred within or was incidental to the police officers' employment.
116. It should be noted that in the HKSAR, plaintiffs in similar cases to Case Scenario 1 tend to rely solely on a claim in vicarious liability against the government, rather than naming both the government and the individual officers involved.¹³⁵ There are good strategic reasons for doing this including the desirability of proceeding against the defendant with the deepest pockets and avoiding the complexity of managing litigation against multiple defendants (and the associated cost consequences if the claim is unsuccessful).
117. **Breaches of the BORO and/or the Basic Law.** The above claims, whilst based in tort, could also seek to rely on related breaches under the BORO and the Basic Law. However, as the HKSAR does not currently recognise the concept of 'constitutional damages' (ie financial compensation for breach of a fundamental human right protected under the BORO and/or the Basic Law), no separate head of damages will be awarded above and beyond what would already have been awarded by the court for the tort claims.
118. **Judicial review of police conduct.** Affected protesters could apply to the CFI for leave to judicially review the legality and constitutionality of the police conduct under relevant legislation,¹³⁶ the Basic Law¹³⁷ and/or the BORO.¹³⁸ Due to the nature of judicial review, the respondents could not be the individual officers but rather a governmental body.

129 There are a number of ordinances in the HKSAR that authorise arrest with a warrant. For the purposes of this report, the relevant ordinance is the Magistrates Ordinance (Cap 227) ss 31 and 72–74 and the Police Force Ordinance (Cap 232) s 53.

130 There are a number of ordinances in the HKSAR that authorise arrest without a warrant, such as the Criminal Procedure Ordinance (Cap 221) s 101, the Public Health and Municipal Services Ordinance (Cap 132), the Gambling Ordinance (Cap 148) and the Police Force Ordinance (Cap 232) s 50.

131 Regarding the common law requirement of legal authority for an arrest, see: *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105. For the statutory legal authorisation for an arrest, see (n 132–133).

132 Magistrates Ordinance (Cap 227) s 9 & 31.

133 Police Force Ordinance (Cap 232) ss 53 & 60.

134 *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 (CFA): the 'close connection test', as formulated by Bokhary PJ, is that a connection between the employee's unauthorised tortious act and his employment is so close as to make it fair and just to hold his employer vicariously liable.

135 *Wong Weng Chi v The Secretary for Justice for and on Behalf of the Commissioner of Police* [2020] HKCU 1737 (DC).

136 Public Order Ordinance (Cap 245) s 46 (on the restrictions on use of force) and the Criminal Procedure Ordinance (Cap 211) s 101A (on use of force in making an arrest).

137 Basic Law art 27 (freedom of peaceful meeting).

138 BORO arts 2 (right to life), 3 (right to be free from CIDTP) and 17 (right to freedom of peaceful meeting).

Potential claims against the Security Co

119. It is possible that Security Co could be joined to any claim against the police as a joint or concurrent tortfeasor. A second possibility open to a plaintiff would be to commence a separate claim against Security Co for damages arising from Security Co's negligence, if any, related to the supply of equipment.
120. **Joint tortfeasor.** As a joint tortfeasor, the plaintiff would need to establish that the Security Co and the police engaged in a concerted action to do or secure an act that constituted a tort. Proving a concerted action between the police and Security Co to commit an act that ultimately constituted a tort in this fact pattern seems unlikely. Moreover, it is not clear that adding Security Co as a tortfeasor to a claim against the police and/or the government would advance the plaintiff's overall claim and consequent compensation. It could be argued that adding Security Co as a joint tortfeasor would only serve to increase the complexity of the litigation and potentially expose the plaintiff to a costs order against two rather than one defendant, should they be unsuccessful.
121. **Negligence.** It might be possible to claim against Security Co for a defect or characteristic of the equipment that was provided to the police that in turn harmed the plaintiff. For example, in the HKSAR during the 2019 protest, it was alleged that liquid emitted by water cannons used by the police contained blue dye and other unknown ingredients that caused skin and eye irritation.¹³⁹ In such a situation, it would be possible for an affected person to commence a claim in negligence against the manufacturer, exporter/importer and/or supplier of the blue dyed water assuming that they could demonstrate all the ingredients necessary to prove negligence.¹⁴⁰



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

122. While civil claims would be the preferred route for holding perpetrators under Case Scenario 1 to account, there are certain non-judicial avenues available to the protesters. They include:
- [The Criminal and Law Enforcement Injuries Compensation Scheme](#). The compensation scheme is designed to provide monetary compensation to someone who suffers an injury as a result of a criminal act or by a law enforcement officer using a weapon in the execution of their duty.
 - **Complaints against police officers.** The HKSAR maintains a two-tier mechanism for handling complaints against police officers. The first stage is handled by the [Complaints Against Police Office \(CAPO\)](#), a unit of the Hong Kong Police Force, and the second stage is handled by the [Independent Police Complaints Council \(IPCC\)](#).

¹³⁹ Emily Tsang, 'Indelible blue dye fired from water cannons by Hong Kong police – protesters adjust with new clothes and removal tips' South China Morning Post (Hong Kong, 1 September 2019).

¹⁴⁰ *Kristan Bowers Phillips v Initial Environmental Services Ltd & ors* [1997] HKCU 594 (CFI). See also: *Lam Mo Bun (suing through his next friend Yung Mei Wa) v Hong Kong Aerosol Company Ltd t/a Ho Kam Ching t/a Milkyway Medicine Co & anor* [2001] 1 HKLRD 540 (CFI).

SPOTLIGHT: THEMATIC STUDY

In 2019, the IPCC resolved to conduct a [‘thematic study’](#) reviewing the widespread protests that occurred across the HKSAR precipitated by the HKSAR Government’s introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (Thematic Study). While complaints had been lodged with the CAPO arising from the protests, the study was exceptional in that it was not part of the normal two-tier complaints process. As part of the process, the HKSAR government appointed an International Expert Panel to assist the IPCC in its work. On 8 November 2019, the Panel issued a [position statement](#), and on 12 December 2019 resigned from the process. The Panel stated in its 12 December 2019 resignation that after analysing the IPCC’s capability to conduct the inquiry, the Panel had found that ‘a crucial shortfall was evident in the powers, capacity and independent investigative capability of IPCC...’ In the absence of these experts, the Thematic Study ultimately concluded that while there were areas for improvement, police actions taken during the study period were appropriate overall.

- **Public inquiry.** LegCo may, in the exercise of its powers under the Legislative Council (Powers and Privileges) Ordinance (Cap 382), conduct an inquiry into any particular matter or incident. The Chief Executive in Council may appoint one or more commissioners to inquire into the conduct or management of any public body, the conduct of any public officer or into any matter whatsoever which is, in his opinion, of public importance under the Commissions of Inquiry Ordinance (Cap 87).

SPOTLIGHT: CASE STUDY

A notable and recent [inquiry was conducted after drinking water was found to be contaminated with lead](#). The Chief Executive in Council approved the creation of a Commission of Inquiry to inquire into the incidents of excess lead found in residential drinking water. The Commission held public hearings, heard testimony from witnesses and issued a [final report with findings and recommendations](#).

Q3

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

- *CB v Commissioner of Police & anor* [2021] HKCU 5023
- *K v Commissioner of Police & anor* (unreported, CACV 33/2020, 21 April 2021)
- *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653
- *Yeung Tsz Chun v Commissioner of Police* [2020 HKCFI 2882]

- *Leung Kwok Hung v Secretary for Justice* (No 2) [2020] 2 HKLRD 771
- *Wong Weng Chi v The Secretary for Justice and on Behalf of the Commissioner of Police* [2020] HKCU 1737
- *Wong Chi Fung v Secretary for Justice* [2018] HKCU 3566
- *Tsang Kin Chiu v Commissioner of Police* [2015] 4 HKLRD 71
- *Yeung May Wan & ors v HKSAR* [2005] 2 HKLRD 212
- *Tze Yam v Commissioner of Police* [2011] 3 HKLRD 369



CaseScenario 2

Q1

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

123. Civil claims available to affected individuals as against Subsidiary Co include:

- **Negligence.** A claim in negligence could be asserted on behalf of those persons who have sustained health issues due to the oil entering the food and water supply. This is subject to the requirements of a claim in negligence (see [32]-[36] above). A claim of this nature would require establishing a causal link between the oil spills and the breathing problems and skin lesions.
- Similarly, those whose personal property has been damaged could lodge a claim in negligence, subject to proof of causation and the requirement that the damages claimed are foreseeable and not too remote.
- **Private nuisance and the rule in *Rylands v Fletcher*.** Claims based on the torts of private nuisance, and the rule in *Rylands v Fletcher* could be asserted by those persons who have suffered losses arising from damage to their land and/or their property caused and/or contributed to by the nuisance. As noted above at para [46], if the extraction activity by Subsidiary Group, noted to be a 'licence holder', was subject to a lawful licence, this would act to render the rule in *Rylands v Fletcher* inapplicable against Subsidiary Co.
- **Public nuisance.** The unlawful interference with the rights of the public in connection with the local rivers could constitute a public nuisance according to the circumstances. Such a case would have to be brought by the Secretary for Justice on behalf of the public.

- A private individual could lodge a claim in public nuisance but in order to succeed, they must show that they suffered a ‘particular, direct and substantial’ injury above and beyond that suffered by the general public.¹⁴¹
- **Liability of Parent Co** would depend upon whether it can be shown that Parent Co meets the criteria for corporate liability as a parent company of Subsidiary Co. Please see the criteria set out above at [72]-[75].

Q2

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

124. A civil claim remains the preferred route for holding perpetrators in Case Scenario 2 to account. However, should civil remedies not be available (for example, where the intended claimants do not have standing or are unable to establish causation) it would be open to the local community or a representative to persuade relevant and responsible agencies to investigate and undertake enforcement action against Subsidiary Co. This might be done, for example, under the Water Pollution Control Ordinance (Cap 358) to convict Subsidiary Co of the offence of prohibited discharge into the waters of the HKSAR¹⁴² and order Subsidiary Co to restore the affected waters.¹⁴³

Q3

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

125. There are no ‘high-profile’ lawsuits in the HKSAR that are comparable to Case Scenario 2. The majority of environmental claims in the HKSAR focus on judicial review of governmental and/or public body’s decision-making, acts and/or omissions with respect to the natural environment or to criminal prosecutions by the government against wrongdoers for breaches of environmental protection legislation.

SPOTLIGHT: CASE STUDY



A case in point is that of *Chan Ying Wah v Bachy Soletanche Group Ltd and anor*,¹⁴⁴ where the claimant alleged that the defendant permitted saltwater (which it used for drilling) to escape from the defendant’s land onto the plaintiff’s land, causing damage to the plaintiff’s crops. The plaintiff claimed against the defendant in negligence, nuisance and the rule in *Rylands v Fletcher*. The plaintiff’s claim was allowed and he was compensated HKD 291,971 (USD 37,307), being the value of the damaged crops.

141 *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the public highway & ors* [2014] 6 HKC 298 (CFI).

142 Water Pollution Control Ordinance (Cap 358) ss 8 and 9.

143 *ibid* ss 13.

144 [2005] 2 HKLRD 176 (CFI).

CaseScenario3

Q1

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

126. It is possible for affected individuals to assert civil claims against Factory Co. However, there does not appear to be a basis in HKSAR law on which to assert a civil claim against Brand Co as it is merely an end-user of Factory Co's products.
127. Potential claims against Factory Co include: negligence, breach of statutory duty, and liability as occupier of the work premises.
128. **Negligence.** Injured employees could claim against Factory Co in negligence for breach of the four-fold non-delegable duty of care owed by employers to its employees (see [52] above).
129. **Fatal claim.** For deceased workers, at common law, no right exists permitting the family or legal representative of the deceased employee to claim damages from the wrongdoer.¹⁴⁵ This situation, however, is redressed by way of the Fatal Accidents Ordinance (Cap 22) that permits a claim by the deceased's dependants and the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) that permits a claim to be brought by the deceased's estate.
130. **Breach of statutory duty.** A claim for breach of statutory duty may be brought alone or alongside an action for negligence or occupiers' liability. It should be noted that some legislation will specifically exclude civil liability for breach of its provisions. For example, section 19(a) of the FIUO specifically states that it does not confer a right of action in civil proceedings for failure to comply with sections 6A, 6B and 6BA. A claim for breach of statutory duty is not to be confused with a breach of a tortious duty created by statute, for example, the statutory tort of sexual harassment.¹⁴⁶
131. **Occupiers' liability.** Occupiers' liability is a branch of general negligence law. The common law regarding occupiers' liability has largely been codified in the HKSAR by the Occupiers Liability Ordinance (Cap 314) (OLO).
132. Where an occupier fails to maintain the premises in a condition that is safe for visitors it will be held liable for the injuries or damage to property suffered by a visitor. Whilst employees are more likely to bring a claim for negligence and/or breach of statutory duty before pursuing a claim under the OLO, there may be practical reasons for an employee making a claim under occupiers' liability.

¹⁴⁵ *Baker v Bolton* (1808) 170 ER 1033.

¹⁴⁶ Sex Discrimination Ordinance (Cap 480) ss 2(5), 2(7), 2A, 39-40 and 76.

For example, occupiers' liability may be more appropriate or relevant in cases where the employee has difficulties in identifying the employer, in establishing an employment relationship or where the employer is not in charge of the worksite or workplace.

133. **Statutory compensation for workplace accidents.** As set out above at [59]-[63] injured employees are entitled to compensation where they are injured or killed by an accident or where they suffer from any of the enumerated occupational diseases set out in the ECO.



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

134. Injured workers in the HKSAR who meet the eligibility conditions for employees' compensation can access the compensation provided for under the ECO via a [process handled by the Labour Department](#). Employees' compensation is the primary route of compensation for injury, occupational disease or death arising from a workplace accident. Any dispute as to a worker's eligibility for, or the amount / manner of payment of, employees' compensation is to be dealt with by way of a claim lodged with the District Court.¹⁴⁷ Where a worker files a separate personal injury claim against the employer or a third party, such a claim is filed with the appropriate civil court.¹⁴⁸
135. As noted above, injured workers can also seek additional compensation from a wrongdoer (including parties who are not their employer) by way of a personal injury claim in the civil courts of the HKSAR, subject to the rule against double recovery. As such, the preferred route for holding the perpetrators accountable for the breaches outlined in Case Scenario 3 would be a combination of an employees' compensation claim (where the employee is eligible) alongside a potential civil claim.
136. As additional routes of redress, affected workers could approach the police for criminal investigation and prosecution of the wrongdoers and/or the Labour Department for investigation and enforcement action under relevant legislation for [occupational health and safety](#) breaches regarding the state of the workplace as well as [for the accident \(ie the fire\) itself](#).¹⁴⁹

¹⁴⁷ ECO ss 3, 10(12), 10A(8), 18(1), 18A(d), 21, 26(2).

¹⁴⁸ ECO ss 25, 26.

¹⁴⁹ The Labour Department is responsible for enforcing the Occupational Safety and Health Ordinance (Cap 509) and the Factories and Industrial Undertakings Ordinance (Cap 59) and their respective regulations. This work is carried out by Occupational Safety Officers who are tasked with investigating accidents, providing advice to employers and employees on workplace hazards and enforcing the legislation and regulations.

Q3

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

137. There are no 'high profile lawsuits' in the HKSAR that are directly on point or are relevant to Case Scenario 3. Given the HKSAR's characteristics, high profile lawsuits that are relevant to Case Scenario 3 are more likely to arise as a result of industrial accidents on construction sites and with respect to migrant workers.

SPOTLIGHT: THE HONG KONG-ZHUHAI-MACAO BRIDGE



During the construction of the Hong Kong-Zhuhai-Macao Bridge (the Bridge) between 2010 and 2018, several workplace accidents and fatalities occurred.¹⁵⁰ It was reported in local media that workers on the Bridge referred to it as the 'Bridge of Death'.¹⁵¹ On 23 April 2016 a fence became dislodged and fell into the sea, drowning a construction worker who was hooked to the fence at the time of the accident. The contractor responsible was subsequently convicted of a number of offences under the FIUO.¹⁵² In [another accident](#) on 29 March 2017, a temporary working platform fell from the Bridge, resulting in the drowning of two workers and injuries to three others. Ultimately, [three contractors pleaded guilty](#) to offences under the OSHO, FIUO and the Construction Sites (Safety) Regulations and were fined a total of HKD 614,000 (approximately USD 78,224)¹⁵³ and two subcontractors were convicted of occupational health and safety violations and fined HKD 30,000 (approximately USD 3,822) each.¹⁵⁴ At least one of the deceased workers received employees' compensation as well as bereavement, dependency and special damages awarded in a separate civil trial.¹⁵⁵

138. **Migrant workers.** [Five per cent of the HKSAR's population is comprised of migrant workers](#), primarily women engaged in domestic work. Cases of workplace abuse encountered by migrant workers and which are 'high profile' include:

- *AM v Director of Immigration & ors* [2022] HKCFI 1046
- *ZN v Secretary for Justice & ors* (2020) 23 HKCFAR 15
- *Lubiano Nancy Almorin v Director of Immigration* [2018] HKLRD 1141 (CFI)
- *Tutik Lestari Ningsih v Law Wan Tung* [2018] HKDC 211
- *Erwiana Sulistyaningsih v Law Wan Tung* (unreported DCPI569B/2015 & DCPI569/2015, 4 December 2017 & 21 December 2017)

150 Exact figures are unknown, however, it is estimated that over the course of construction 10 workers died and in excess of 600 workers were injured. See Kanis Leung, ['World's longest sea crossing is finally finished, but Hong Kong-Zhuhai-Macao bridge has come at a high cost'](#) *South China Morning Post* (Hong Kong, 19 October 2018), accessed 20 August 2022.

151 Ellie Ng, ['Gov't "regrets" fatalities at Hong Kong-Zhuhai-Macao bridge project, as workers demand halt to "murders"'](#) *Hong Kong Free Press* (Hong Kong, 12 April 2017, accessed 20 August 2022). Stephen Vines, ['How many more people have to die for the sake of a bridge?'](#) *Economic Journal* (Hong Kong, 14 April 2017, accessed 20 August 2022).

152 *HKSAR v Gammon Construction Ltd* [2020] HKCA 752.

153 The Government of the HKSAR Press Release, ['Contractors fined for violation of safety legislation'](#) (1 February 2019, accessed 20 August 2022).

154 Cannix Yau, ['Companies that provided workers for construction of Hong Kong-Zhuhai-Macao Bridge fined HK\\$30,000 each over fatal 2017 accident'](#) *South China Morning Post* (Hong Kong, 24 August 2020); Stephen Vines, ['How much is a life worth? Not much, if measured by fines for employment negligence in Macau bridge construction'](#) *Hong Kong Free Press* (Hong Kong, 30 August 2020, accessed 20 August 2020).

155 *Gurung Gam Bahadur, the administrator of the estate of Gurung Anel alias Gurung Anal, deceased v United Construction & Manpower Service Ltd & anor* [2022] HKCFI 2163.



A HANDBOOK FOR PRACTITIONERS | INDIA

Civil Liability for Human Rights Violations



 **OAK**
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FREQUENTLY USED ABBREVIATIONS

NHRC	National Human Rights Commission
SHRC	State Human Rights Commission
PIL	Public Interest Litigation
CPCB	Central Pollution Control Board
SPCB	State Pollution Control Board
NGT	National Green Tribunal
CPC	Code of Civil Procedure, 1908
IPC	Indian Penal Code, 1860
SRA	Specific Relief Act, 1963
CrPC	Code of Criminal Procedure, 1973

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INDIA



A jurisdiction of paradoxes, the legal framework in India presents a contrasting picture that is both a progressive, liberal, pro-poor, and rights-friendly regime, but also, one that is affected by longstanding structural issues involving delays, the pendency of cases, complex procedural rules, and poor enforcement. The Indian Constitution provides a robust structure of fundamental rights and constitutional remedies, including the directive principles of state policy to enforce fundamental rights within the jurisdiction. The Indian Supreme Court's interventions to develop constitutional torts offer a key avenue to make monetary compensation for human rights violations possible. At the same time, an underdeveloped body of tort law creates a lacuna in the availability of civil remedies. This gap is filled, to an extent, by a vast statutory and regulatory framework that has codified civil remedies within its ambit. These three distinct forms of civil remedy present valuable opportunities for litigants seeking to pursue civil claims for human rights violations, but the structural challenges mentioned above present obstacles for them as well.

INDICES

46/167

Democracy Index
2021 Ranking

66/100

Freedom House
2022 Score

85/180

Transparency International
Corruption Index 2021 Ranking

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



Introduction

1. India is a quasi-federal, common-law jurisdiction with an adversarial dispute resolution system which offers several routes for claims for civil remedies for human rights violations.
2. India's primary human rights protections and obligations stem from Part III of the [Constitution of India](#) (the Constitution). Fundamental rights are constitutionally entrenched and they cover a wide spectrum of civil and political rights, including the right to equality; the right to non-discrimination on grounds of religion, race, caste, sex, or place of birth; the right to equality of opportunity; the abolition of untouchability; the right to freedom of speech and expression; freedom of assembly; freedom to form associations; freedom of movement; freedom of profession, occupation, trade or business; protection against arbitrary and excessive punishment; the right to life and personal liberty; protection against arbitrary arrest and detention; the right against exploitation; the right to freedom of religion; the protection of the interests of minorities; and the right to constitutional remedies.
3. India has also ratified several international human rights conventions,¹ including the International Covenant on Civil and Political Rights; the International Convention on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Rights of Persons with Disabilities; and the Optional Protocols to the Convention on the Rights of the Child. However, in stark contrast, India has not ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the Optional Protocol to the Convention against Torture; the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty; the Convention for the Protection of All Persons from Enforced Disappearance; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.²

¹ United Nations Human Rights Treaty Bodies, '[Ratification Status for India](#)' (OHCHR).

² *ibid.*

4. As a dualist system, international law is not automatically incorporated within India's domestic legal system; an Act of Parliament is necessary for implementing any treaty, agreement or convention under international law into domestic law.³ However, the Supreme Court of India (Supreme Court) has held that 'international conventions and norms are to be read into (fundamental rights) in the absence of enacted domestic law occupying the field when there is no inconsistency between them'.⁴
5. A jurisdiction of seemingly infinite paradoxes,⁵ the legal framework in India presents a contrasting picture that is both a progressive, liberal, pro-poor, rights friendly regime, but also one that is marred by longstanding structural issues involving delays, pendency of cases, complex procedural rules, and poor enforcement. Against this background, this report outlines the key features of the Indian legal system and highlights how civil remedies can be sought for human rights violations.

3 [Art 253](#) of the Constitution reads: 'Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'.

4 *Vishaka v State of Rajasthan*, (1997) 6 SCC 241. See also, Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 Indian Journal of International Law 25; and Prabhash Ranjan, '[How India Has Approached Customary International Law](#)' (*Indian Express*, 11 January 2022).

5 Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(2) Indiana Journal of Global Legal Studies 555.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

6. Claims can be brought under the law of civil remedies against public bodies, corporations and individuals. There are three distinct routes for civil remedies: under constitutional law, statutory law, and under tort law. Depending on the route, the forum that is petitioned has different powers of remedial intervention.⁶ Under the **constitutional law** route, the Supreme Court or any of the High Courts can exercise their writ jurisdiction under [article 32](#) and [article 226](#) of the Constitution to enforce the fundamental rights enshrined under Part III of the Constitution.⁷ Under the **statutory law** route, a complaint can be either filed with a statutory body such as the National Human Rights Commission (NHRC) or a State Human Rights Commission (SHRC), or specialised courts and tribunals (such as the National Green Tribunal, Labour Courts or the Industrial Tribunal) can be petitioned. Under the **tort law** route, claims will lie with civil courts or district courts on the basis of subject matter, and on the basis of territorial, pecuniary and appellate jurisdiction.
7. The Indian judicial system is a single integrated system.⁸ Judicial pronouncements by the Supreme Court are binding precedents on all courts, judicial authorities, and tribunals in India. All appeals from civil courts and tribunals usually lie with the concerned High Court, but in the case of certain specialised tribunals, these lie directly with the Supreme Court. Under [article 136](#) of the Constitution, the Supreme Court can also, in its discretion, grant special leave to appeal any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal within the territory of India.
8. The *nature* of the right that forms the basis of the civil claim will also determine the remedial intervention, procedure and the appropriate forum that will be petitioned. The three defined harms dealt with in this report are (a) assault or unlawful arrest and detention of persons; (b) environmental harm; and (c) harmful or unfair labour conditions. While each of the defined harms are instances of violation of fundamental rights (especially the right to life and personal liberty under [article 21](#)), the claimant's right can also stem from statute or common law.
9. The Constitution also provides for protection against the three defined harms under the Directive Principles of State Policy (Directive Principles). Although the Directive Principles are not justiciable per se, they play a critical role in lending context to the judicial interpretation of fundamental rights. Key provisions for environmental rights include [article 48A](#), which requires the State to protect and

6 Mary Kozlovski, '[A Brief Introduction to the Indian Judicial System and Court Hierarchy](#)' (2019) Briefing Paper 12 University of Melbourne: Asian Law Centre 2.

7 [Art 32](#) of the Constitution reads: '(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, *including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part'. (author's emphasis). Similarly, [art 226\(1\)](#) of the Constitution reads: 'Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warrant, and certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.'

8 See also Ashish Bhan and Mohit Rohatgi, '[Legal Systems in India: Overview](#)' (Thomson Reuters Practical Law, 1 March 2021); and Anupama Hebbar, Pritha Sri Kumar Iyer and Sita Kapadia, '[Litigation and Enforcement in India: Overview](#)' (Thomson Reuters Practical Law, 1 April 2021).

improve the environment and to safeguard the forests and wildlife of the country,⁹ and [article 51A\(g\)](#), which places a duty on every citizen of the country to protect and improve the environment.¹⁰ Some of the key fundamental rights for labour and employment conditions under the Constitution include [article 16](#), which mandates equal opportunity for all citizens in matters relating to employment and prohibits discrimination on any grounds in respect of employment; [article 23](#), which prohibits human trafficking and forced labour; and [article 24](#), which prohibits child labour. Provisions within the Directive Principles include [article 39](#), which provides for the right to an adequate means of livelihood and for equal pay for equal work; [article 42](#), which provides for just and humane conditions of work and maternity relief; [article 43](#), which provides for living wage for workers, and [article 43A](#), which provides for participation of workers in management of industries.

Constitutional law: constitutional torts as civil remedies

10. Rights-based litigation under Indian constitutional law comprises the mainstay of human rights litigation in India. Since the 1980s, the Supreme Court has consistently expanded the extent of the Constitution's protections for various fundamental rights. This expansion of protection did not occur in isolation. Rather, the combined effects of multiple legal, social, political and institutional factors prompted the courts to play a proactive role in filling in the regulatory gaps in fundamental rights litigation.¹¹ These developments – both substantial and procedural – have expanded the scope of rights that are now recognised as falling within fundamental rights; the types of remedial intervention at the courts' disposal; the degree of accessibility; and the extent to which fundamental rights are made enforceable.

Horizontal application of fundamental rights

11. One of the key expansions in fundamental rights litigation in India has been in the development of the horizontal application of fundamental rights under the Constitution.¹² Traditionally, as a general rule, constitutional rights have regulated the relationship between an individual and the State and are enforceable vertically against the State. But the horizontal application of fundamental rights makes constitutional rights enforceable against private parties. The Supreme Court, by liberally interpreting article 12 of the Constitution and by expanding the nature of obligations upon the State to protect fundamental rights,¹³ has extended the application of fundamental rights to private actors as well as to entities that are an extension of the State – that is, entities that are an agency or instrumentality of the State.

12. Instances where the Supreme Court has enforced a horizontal application of fundamental rights include:

⁹ [Art 37](#) of the Constitution reads: 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

¹⁰ Note, however, that fundamental duties are *not* enforceable. See Express News Service, '[Explained: What are the Fundamental Duties of India's Citizens?](#)' (*Indian Express*, 23 February 2022).

¹¹ Surya Deva, 'India: Constitutional Torts "Ruling the Roost"?' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022) 210.

¹² Gautam Bhatia, '[Horizontality under the Indian Constitution: A Schema](#)' (*Indian Constitutional Law and Philosophy Blog*, 24 May 2015). See also Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

¹³ [Art 12](#) of the Constitution reads: 'In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities (author's emphasis) within the territory of India or under the control of the Government of India.'

- a. cases against private parties where the *private* act was classified as an act of the State;
 - b. cases against the State to require the State to regulate private parties to enforce a fundamental right; and
 - c. cases against private parties where the private act is challenged on constitutional grounds.
13. In instances relating to para [12](a), the Supreme Court has held that cases where private bodies in their structure or function are so closely connected to the State that they qualify as '*other authorities*' under [article 12](#), such private bodies can be equated with the State for the purposes of enforcement of fundamental rights. The threshold of qualification is established through the *control test* or the *function test*. In the former, the court looks at the extent to which a private actor is under the functional, financial, or administrative control or domination of the State;¹⁴ in the latter, the Court looks at whether the function of the private actor lies in the nature of duties and functions of the State.¹⁵
14. In instances covered by para [12](b), the Supreme Court has sought to cast a positive obligation on the State to regulate private actors to enforce fundamental rights. For instance, in *Vishakha v State of Rajasthan*,¹⁶ the Court held that the State's failure to pass sexual harassment legislation to regulate public and private workplaces had resulted in the violation of a petitioner's rights under [article 14](#) (Right to Equality), [article 19](#) (Freedom of Speech and Expression) and [article 21](#) (Right to Life and Personal Liberty) of the Constitution. The Court stepped into the shoes of the State and issued the *Vishakha* guidelines to act as temporary guidelines until legislation was passed. In doing so, the Court brought private actors under the ambit of the State's purview, through an enforcement of fundamental rights.
15. Instances covered by para [12](c) include cases brought in terms of [article 15](#) (Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth), [article 17](#) (Abolition of Untouchability), and articles 23 and 24 where the Constitution specifically prohibits horizontal rights violations. This was seen in *People's Union for Democratic Rights v Union of India* where the Court held that the import of article 24 (and also articles 21, 17 and 23 of the Constitution) is wide and unlimited.¹⁷ The ruling was significant in its implications for forced labour in whatever form it is manifested, whether by private actors or by the State and its agencies. Similarly, in *Consumer Education and Research Centre v Union of India*, the Court noted that '[t]he State, be it Union or state government, or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness' under article 21's right to life, especially in context of the right to health and environment.¹⁸
16. As a result, the expansion of the notion of 'State' in article 12 implies that while all fundamental rights can be enforced against the State and all public sector companies, fundamental rights that are expressly horizontal in their application

14 *Pradeep Kumar Biswas v Indian Institute of Chemical Engineering* (2002) 5 SCC 111.

15 *BCCI v Cricket Association of Bihar* (2015) 3 SCC 351 [33].

16 *Vishakha* (n 4).

17 *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

18 *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.

or have been judicially interpreted to be horizontal in application, can also be enforced against private actors.¹⁹

Locus standi and monetary compensation

17. Further expansions in fundamental rights litigation in India came with the relaxation of standing rules under the constitutional courts' writ jurisdiction and the judicial development of the doctrine of constitutional torts. Under the rubric of public interest litigation (PIL), the Supreme Court, in the early 1980s, sought to relax the requirement of locus standi to allow third parties to petition the Court's plenary jurisdiction under article 32 in any way or form for relief.²⁰ Consequently, the Supreme Court has also interpreted its powers to allow it to consider *suo motu*, thereby eliminating any requirement for standing or even the need for a case to arise as necessary prerequisites of its writ jurisdiction.²¹
18. Along with the relaxation of standing rules, the Supreme Court also expanded the nature of remedies that could be awarded in fundamental rights litigation. In addition to the writ remedies that were already available under article 32, the Supreme Court expanded its ambit to also award monetary compensation for violations of fundamental rights. One of the earliest cases where monetary compensation was awarded was in *Rudul Sah v State of Bihar*. In this case concerning the unlawful detention of the victim for fourteen years in prison after he had been acquitted in court, the Supreme Court held that there was a necessity to award remedies that could offer a 'palliative' for victims in certain instances of fundamental rights violations in a way that other remedies could not.²²
19. This was also seen in *Bandhua Mukti Morcha v Union of India* (a case concerning bonded child labour) where the Supreme Court emphasised the scope and extent of its remedial powers and observed that its writ jurisdiction does not merely confer power to issue a direction, order or writ for the enforcement of fundamental rights, but it also lays a *constitutional obligation* on the Court to protect the fundamental rights of the people and for that purpose it has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights.²³ As a result, the monetary compensation that came to be awarded under the constitutional tort model had both compensatory and punitive or exemplary elements to it. The compensation awarded in this case was in recognition of negligent State action or omission that had resulted in a violation of the claimant's fundamental rights. In *Rudul Sah*, for instance, an award of INR 30,000 (~USD 369) was made in 1983.
20. Constitutional tort actions have become a key route to civil remedies for human rights violations in India. While earlier cases of constitutional tort actions had involved deliberate or intentional State action (such as in cases of unlawful detention²⁴ and torture of prisoners²⁵), the Supreme Court has also extended liability to situations to where the State has *omitted* to take any action.²⁶

19 Deva (n 11).

20 Shyamkrishna Balganesh, 'The Constitutionalization of Indian Private Law' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 686.

21 *ibid.*

22 *Rudul Sah v State of Bihar* (1983) 4 SCC 141.

23 *Bandhua Mukti Morcha v Union of India* 1984 AIR 802.

24 *Bhim Singh v State of Jammu & Kashmir* (1984) Supp SCC 504; *Sebastian M Hongray v Union of India* (1984) 1 SCC 339.

25 *Nilabati Behera v State of Orissa* (1993) 2 SCC 746; *Khatris v State of Bihar* 1981 SCC 1 627.

26 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

Moreover, the Court has extended the ambit of constitutional tort actions to cases of private individuals acting in a private capacity, if they have violated the victims' fundamental rights.²⁷

Substantive expansion of Article 21

21. Following *Rudul Sah* which expanded the remedies available under article 32, constitutional tort cases involving custodial violence and unlawful arrest and detention saw monetary compensation commonly awarded to the victim. While cases of assault, unlawful arrest or unlawful detention of persons already fell squarely within the ambit of article 21, the availability of a monetary remedy for these violations added a new dimension to the constitutional tort cases. For instance, in *Sebastian Hongray v Union of India*,²⁸ the Supreme Court awarded exemplary damages in light of the failure of the writ of *habeas corpus* to produce the bodies of two persons who were unlawfully detained by army personnel in Manipur. Damages of INR 100,000 each (~USD 1,229) were awarded to the victims' families.
22. In *Bhim Singh v State of Jammu and Kashmir*, the Supreme Court awarded INR 50,000 (~USD 615) to the victim for unlawful detention, whilst noting malicious intent and mischief on the part of the State in detaining the victim. In *Nilabati Behera v State of Orissa*, which involved the death of the victim in police custody, the Supreme Court highlighted the distinction between the liability in tort and the constitutional liability of the State for violating the victim's fundamental rights that merited an added obligation on the courts to adequately remedy the violation.²⁹ In *Nilabati Behera*, the victim's mother was awarded INR 150,000 (~USD 1,843).
23. One of the key developments in constitutional torts arose from cases concerning environmental harm. Here the confluence of tort law principles within the remit of fundamental rights adjudication under the courts' writ jurisdiction has resulted in a complex, developed environmental rights jurisprudence. Article 21 has been interpreted by the Supreme Court to be not limited to a mere animal existence;³⁰ rather, it includes the right to a pollution-free environment as well.³¹ For instance, in *T Damodar Rao v SO Municipal Corporation, Hyderabad*, the Andhra Pradesh High Court held that environmental pollution would be a violation of the fundamental right to life and personal liberty under article 21.³²
24. The Supreme Court has also routinely incorporated and developed the doctrines concerning the 'polluter pays' principle;³³ the 'precautionary principle';³⁴ 'sustainable development';³⁵ the 'doctrine of trust'³⁶ and 'intergenerational equity'³⁷ within article 21 of the Constitution to incorporate the right to environment.

27 *Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465.

28 *Sebastian Hongray* (n 24).

29 *Nilabati Behera* (n 25).

30 *Kharak Singh v State of Uttar Pradesh* (1964) 1 SCR 232, and *Francis Coralie Mullin v The Administrator, Union of India* 1981 AIR 746.

31 *Subhash Kumar v State of Bihar* AIR 1991 SC 420.

32 *T Damodar Rao v SO Municipal Corporation, Hyderabad* AIR 1987 AP 171 (Andhra Pradesh High Court).

33 *Indian Council for Enviro-Legal Action v Union of India* 1996 AIR 1446.

34 *Vellore Citizen Welfare Forum v Union of India* (1996) 5 SCR 241. The Supreme Court noted that the precautionary principle has three conditions: first, the State and statutory authorities must anticipate, prevent and attack the causes of environmental degradation; second, where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; third, the onus of proof is on the actor, developer or industrialist to show that the actions are environmentally benign.

35 *ibid*. The Supreme Court also held that remediation of the damaged environment is part of sustainable development and that as such, the polluter is liable to pay the cost to the individual victims of a damaged environment as well as for the cost of reversing the damaged ecology.

36 *MC Mehta v Kamal Nath* (1997) 1 SCC 388. The Supreme Court noted that: 'The State is the trustee of all natural resources which are, by nature, meant for public use and enjoyment. The public at large is the beneficiary of the sea, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.'

37 *Goa Foundation v Union of India* (2014) 6 SCC 590. The Supreme Court held that the four principles of intergenerational equity, sustainable development, precautionary principle and polluter pays principle – are a part of article 21 of the Constitution. See also Rahul Basu, 'Intergenerational Equity Case Study: Iron-Ore Mining in Goa' (2017) 11(5) *Economic and Political Weekly* 18.

For instance, in *Indian Council for Enviro-Legal Action v Union of India*, the Supreme Court applied the 'polluter pays' principle to find the private chemical manufacturing plant absolutely liable for the damage caused to the environment and liable to compensate the victim population.³⁸ The Court held that the responsibility for creating the hazardous situation, and therefore for repairing the damage, was squarely on the chemical manufacturing plant. The final compensation amount that was to be paid by the company (after 15 years of non-compliance) was INR 37.385 crores (~USD 4,59 million), including compounded interest from the date of the original judgement, plus costs up to INR 10 lakhs (~USD 12,288).³⁹

25. Similarly, in *MC Mehta v Union of India (Oleum gas leak case)*,⁴⁰ the Court determined the standard of 'absolute liability' to apply in cases of hazardous or inherently dangerous activities, without exceptions. It also held that the quantum of compensation to be awarded in such cases of absolute liability will inevitably depend on the 'magnitude and capacity of the enterprise' in order to have a deterrent effect.⁴¹
26. In another *MC Mehta v Union of India (Tanneries case)*,⁴² the Supreme Court ordered the closure of 30 tanneries which had failed to undertake the minimum steps that were required for the primary treatment of industrial effluents. In *MC Mehta v Union of India (Ganga pollution case)*,⁴³ the Supreme Court once again expanded the interpretation of article 21 (in the context of articles 48A and 51A(g)) and issued injunctive orders against polluters of the river Ganga.⁴⁴
27. The Supreme Court has also recognised the right to livelihood as a critical component of article 21. For instance, in *Olga Tellis v Bombay Municipal Corporation*, the Court observed that if the right to livelihood is not treated as a part of article 21, then the easiest way to deprive a person of their right under article 21 would be to deprive them of their livelihood. In *People's Union for Democratic Rights v Union of India*,⁴⁵ concerning deplorable employment conditions of child labour, the Supreme Court noted that forced labour, in whatever form it may manifest, would violate articles 24 and 23, as well as article 21. In this, the Court held that article 21 also includes the right to live with human dignity, especially in the context of dignity of livelihood and employment conditions. The Court widely interpreted 'force' to hold that labour that is supplied as a result of force or compulsion falls squarely within the definition of forced labour, regardless of whether or not a contract was entered into or if remuneration was being paid or not.⁴⁶
28. In *Bandhua Mukti Morcha*, the Supreme Court further contextualised bonded labour and observed that labour conditions need to be read in the context of the power dynamics between the labourer and their employer.⁴⁷ The duty to protect the health and safety of workers is equally applicable to the State and to private industries.⁴⁸

³⁸ *Indian Council for Enviro-Legal Action* (n 33).

³⁹ *ibid.*

⁴⁰ *MC Mehta v Union of India* (1987) 1 SCR 819 (*Oleum gas leak case*).

⁴¹ *ibid.*

⁴² *MC Mehta v Union of India* (1987) 4 SCC 463 (*Tanneries case*).

⁴³ *MC Mehta v Union of India* (1988) 1 SCC 471 (*Ganga pollution case*).

⁴⁴ See also *Susetha v State of Tamil Nadu* (2006) 6 SCC 543 (which held that the right to water is closely tied to the right to a quality life under article 21); *Andhra Pradesh Pollution Control Board v MV Nayudu* (1999) 2 SCC 718 (which held that environmental rights can be traced back to article 21).

⁴⁵ *People's Union for Democratic Rights* (n 17).

⁴⁶ *ibid.* See also, Gautam Bhatia, '[Equal Freedom and Forced Labour](#)' (*The Hindu*, 12 May 2020).

⁴⁷ *Bandhua Mukti Morcha* (n 23).

⁴⁸ *Kirloskar Brother Ltd v Employees' State Insurance Corporation* (1996) 2 SCC 682.

29. The combined effect of (a) a liberal interpretation of 'State'; (b) the horizontal application of fundamental rights (c) a substantive expansion of article 21; and (d) the judicial creation of monetary remedies has meant that constitutional courts are routinely petitioned as a forum for civil remedies for human rights violations claims against the State, private actors and individuals. It is important to note that although the nature of the remedy that is awarded is compensatory and monetary, it does not preclude the claimant from also approaching the civil courts under tort law as a parallel, alternative, or complementary forum for civil remedies for human rights violations.⁴⁹

Statutory provisions

30. There is no single, unified legislation in India that provides for civil liability of the State, individuals, or corporations for human rights violations.⁵⁰ In the specific context of the defined harms, the claimant can approach civil courts or special tribunals as set up under different statutes, to seek limited civil remedies.
31. In terms of statutory bodies, the **National Human Rights Commission** is a key statutory institution that is responsible for human rights compliance in India.⁵¹ Established under the [Protection of Human Rights Act, 1993](#), the NHRC is a recommendatory body. The reports of the Commission are placed before Parliament and action is accordingly taken by the Government. The NHRC has the power to inquire into violations of both civil and political rights, and economic, social and cultural rights. It has the power to inquire, *suo motu* or on a petition presented to it by a victim or any person on behalf of the victim, or on a direction or order of any court, into a complaint of a violation of human rights or its abetment.⁵² It also has the power to inquire into a complaint of negligence in the prevention of such violation by a public servant.⁵³ It can intervene in any proceeding in a court that involves any allegation of violation of human rights.⁵⁴ It can visit any institution that is under the control of a state government (such as prisons or jails) to take account of the living conditions of inmates;⁵⁵ it can review constitutional safeguards and provisions that seek to protect human rights, and it can recommend measures for effective implementation;⁵⁶ and it can review factors that inhibit an effective enjoyment of human rights⁵⁷.
32. In terms of NHRC's powers of inquiry, it has all the powers that a civil court has under the Code of Civil Procedure 1908 to inquire into any complaint of a human right violation that is made.⁵⁸ In particular, the NHRC can summon and enforce attendance of witnesses, and examine them on oath;⁵⁹ it can enforce discovery

49 *ibid.*

50 Deva (n 11) 205.

51 Monthly statistics for [May 2022](#) noted that 8,348 cases were registered, 9,212 cases were disposed, and 14,410 cases were pending. Combined monetary relief up to INR 4,200,000 (~USD 51,609) was recommended in 13 cases of human rights violations.

52 [S 12\(a\)](#) of the Protection of Human Rights Act, 1993. See also, Operational Guidelines, '[How to File an Online Complaint](#)' (NHRC). The complaint procedure requires details of the complainant, victim(s), the incident, and the nature of relief that is sought. Complaints can also be filed [online](#) on the NHRC website.

53 *ibid.*

54 *ibid* s 12(b).

55 *ibid* s 12(c).

56 *ibid* s 12(d).

57 *ibid* s 12(e).

58 *ibid* s 13(1).

59 *ibid* s 13(1)(a).

and production of any document;⁶⁰ it can receive evidence on affidavits;⁶¹ it can requisition any public record or copy from any court or office;⁶² and it can determine commissions to be set up for examination of witnesses or documents.⁶³ NHRC also has the power to require any person, subject to any privilege, to furnish information on issues that the NHRC considers useful, relevant or subject to any inquiry.⁶⁴ It can also make use of the services of any officer or agency under the central or state government during an investigation of a complaint.⁶⁵

33. In terms of remedial intervention, the NHRC has the power to recommend compensation or damages or interim relief⁶⁶ to the complainant or to the victim or to their family.⁶⁷ It can also recommend prosecution of public servants who are found guilty of human rights violations and also for abetment of violations and negligence in the prevention of such violations.⁶⁸

SPOTLIGHT: REMEDIAL INTERVENTION BY THE NHRC

Examples of successful remedial intervention include the NHRC's investigation of the [Nandigram violence in 2007](#). The violence arose from the clashes between the state government and organised protesters who were against the acquisition of their land for the construction of a chemical factory that was to be specifically set up within a special economic zone.⁶⁹ While some protesters died due to indiscriminate police shooting, many were injured and some were also raped.⁷⁰ Amongst other structural recommendations, the NHRC recommended that the next of kin of the deceased were to be treated as being among those who were injured, and be awarded compensation of around INR 500,000 (~USD 6,144)⁷¹ for each of the families of those who died in the shooting; compensation of INR 200,000 (~USD 2,459) for each of the women who were raped;⁷² INR 100,000 each (~USD 1,229) for each of the victims who were injured in the shooting;⁷³ and compensation ranging from INR 20,000 to INR 6,000 (~USD 246 to USD 74) for damage sustained to any property.⁷⁴

34. The NHRC has also sought to highlight the [prevalence of silicosis](#) in specific industries where it has noted deplorable conditions of labour, especially in construction, glass manufacture, mining, tunnelling, stone work and sand blasting.

60 *ibid* s 13(1)(b).

61 *ibid* s 13(1)(c).

62 *ibid* s 13(1)(d).

63 *ibid* s 13(1)(e).

64 *ibid* s 13(2).

65 *ibid* s 14(1).

66 *ibid* s 18(c).

67 *ibid* s 18(a).

68 *ibid* s 18(a)(ii).

69 NHRC Press Release, '[Some Important Interventions of NHRC](#)' (NHRC, 21 August 2008).

70 *ibid*.

71 *ibid*.

72 HT Correspondent, '[Compensation Paid to Nandigram Firing Victims](#)' (*Hindustan Times*, 31 December 2007).

73 *ibid*.

74 NHRC Press Release, '[Commission's 12-point Recommendations on Nandigram Violence](#)' (NHRC).

Among other key recommendations, the NHRC recommended monetary compensation for victims, along with other preventative, rehabilitative and remedial measures, including medical relief.

35. However, the NHRC is a curious structure. Despite having wide powers of inquiry, investigation and remedial intervention, the NHRC has often been labelled a 'toothless tiger'.⁷⁵ Criticisms levelled against the NHRC range from the limits to its remedial intervention and its lack of independence from the government⁷⁶, to structural issues that severely impede its functioning.⁷⁷ The NHRC can only make recommendations to government, with no room for appeal if these, including recommendations concerning the award of remedies, are not taken up.⁷⁸

Environmental harm

36. The key statutes and rules that regulate environmental laws are: [Water \(Prevention and Control of Pollution\) Act, 1974](#), the [Air \(Prevention and Control of Pollution\) Act, 1981](#), the [Environment \(Protection\) Act, 1986](#), the [E-Waste \(Management\) Rules, 2016 \(amended in 2018\)](#), the [Batteries \(Management & Handling\) Rules, 2001](#), the [Bio-Medical Waste Management Rules, 2016](#), the [Plastic Waste Management Rules, 2016](#), the [Solid Waste Management Rules, 2016](#), the [Construction and Demolition Waste Management Rules, 2016](#), the [Hazardous and Other Waste \(Management and Transboundary Movement\) Rules, 2016 \(amended in 2019\)](#), the [Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989](#), the [Environment Impact Assessment Notification, 2006](#), the [Wildlife \(Protection\) Act, 1972](#), the [Forest \(Conservation\) Act, 1980](#), the [Public Liability Insurance Act, 1991](#), the [Biological Diversity Act, 2002](#) and the [National Green Tribunal Act, 2010](#).
37. The key regulatory authorities for enforcing environmental rights and protections are the **Central Pollution Control Board (CPCB)**, the **State Pollution Control Boards (SPCBs)**, the **National Green Tribunal (NGT)**,⁷⁹ the High Courts and the Supreme Court. While each statute has a different schema of penalties and liability provisions for defaulting private actors and individuals, monetary compensation for environmental harms can be imposed by the regulatory bodies, the National Green Tribunal and the courts.
38. The CPCB, for instance, computes environmental compensation that is to be levied on a defaulting industry. The formula is calculated on the basis of the anticipated severity of pollution (in terms of the pollution index), the duration of violation (number of days), the scale of the operation (in terms of micro/small/medium/large industry), and the location (in terms of proximity to large habitation).⁸⁰
39. Similarly, the NGT as well as the High Courts and the Supreme Court can award compensation in instances of environmental harms. The NGT has jurisdiction

75 Gargi Verma, '[Need More Power to become a 'Toothful' Tiger: NHRC Chief HL Dattu](#)' (*Indian Express*, 14 February 2020). See also, Apurva Vishwanath, '[NHRC Turns 25 – And That's Pretty Much All It Has Achieved](#)' (*The Print*, 16 October 2018) and Jade Lyngdoh, '[The Tiger That Lost Its Teeth](#)' (*The Telegraph*, 21 December 2021).

76 Sania Abbasi, '[For an Already Diminished NHRC, Justice Mishra's Appointment Spells Further Doom](#)' (*The Wire*, 6 June 2021).

77 R Venkataraman, '[NHRC Has Been Reduced to a Toothless Tiger: Supreme Court Points Out the Loopholes](#)' (*Catch News*, 17 July 2017) and Gautam Bhatia, '[Giving Human Rights Commissions More Teeth](#)' (*The Hindu*, 14 April 2021).

78 Verma (n 75).

79 The National Green Tribunal was set up by the [National Green Tribunal Act, 2010](#) for the 'effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment, and giving relief and compensation for damages to person and property and for matters connected therewith or incidental thereto.'

80 Els Reynaers Kini and Gautambala Nandeshwar, '[Environmental Law and Practice in India: Overview](#)' (Thomson Reuters Practical Law, 1 December 2021). For more on the calculation of environmental compensation, see Tavinderpal Sidhu and Kshitez Kaushik, '[India: Formula to Compute Environmental Compensation](#)' (*Mondaq*, 14 January 2020). Calculated environmental compensation ranges from INR 5,000 to INR 10,000,000 (~USD 62 to ~USD 122,923,500).

over all civil cases that entail a substantial question related to the environment⁸¹ (including enforcement of any legal right relating to the environment)⁸² or any cause of action that arises out of the Water (Prevention and Control of Pollution) Act, 1974, the Water (Prevention and Control of Pollution) Cess Act, 1977, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the Public Liability Insurance Act, 1991 and the Biological Diversity Act, 2002.

40. The NGT can order (a) relief and compensation to the victims of pollution and other environmental damage; (b) restitution for property damaged; and (c) restitution of the environment.⁸³ Any compensation awarded by the NGT⁸⁴ will be in addition to any relief that the claimant can get under the Public Liability Insurance Act, 1991.⁸⁵ Codified under [section 91](#) of the Code of Civil Procedure, 1908 (CPC) as public nuisance, the common law tort of nuisance also offers a legal basis for civil remedies for environmental harm.

Harmful or unfair labour conditions

41. Depending on the type of industry, nature of work undertaken, number of employees, location of the industry, and workplace conditions of the employees, different statutes for labour law can be accessed by a claimant seeking civil remedies under that statute. Statutes include the [Industrial Disputes Act, 1947](#), the [Trade Unions Act, 1926](#), the [Minimum Wages Act, 1948](#), the [Payment of Wages Act, 1936](#), the [Payment of Bonus Act, 1965](#); the Labour Welfare Fund Acts (of respective states), the [Factories Act, 1948](#), the [Industrial Employment \(Standing Orders\) Act, 1946](#), the Shops and Commercial Establishments Act (of respective states), the [Contract Labour \(Regulation and Abolition\) Act, 1970](#), the [Inter-State Migrant Workmen \(Regulation of Employment and Conditions of Service\) Act, 1979](#), the [Plantation Labour Act, 1951](#), the [Mines Act, 1952](#), the [Dock Workers \(Safety, Health & Welfare\) Act, 1986](#), the [Equal Remuneration Act, 1976](#), the [Bonded Labour System \(Abolition\) Act, 1976](#), the [Child and Adolescent Labour \(Prohibition & Regulation\) Act, 1986](#), the [Beedi and Cigar Workers \(Conditions of Employment\) Act, 1966](#), the [Sexual Harassment of Women at Workplace \(Prevention, Prohibition and Redressal\) Act, 2013](#) and the [Apprentices Act, 1961](#).
42. Within the organised sector, the main social security legislation includes the [Employees Compensation Act, 1923](#) (for accidents during the course of employment), the [Employees State Insurance Act, 1948](#) (for health benefits), the [Maternity Benefit Act, 1961](#), the [Payment of Gratuity Act, 1972](#) and the [Employees Provident Fund Act, 1952](#) (for retirement benefits). Since 2020, the Government of India has consolidated individual statutes into four distinct labour codes: [Code on Wages, 2019](#), the [Code on Social Security, 2020](#), the [Occupational Safety, Health and Working Conditions Code, 2020](#) and the [Industrial Relations Code, 2020](#). To date, the new labour codes have not yet been implemented.

81 [S.2\(m\)](#) of the National Green Tribunal Act, 2010 reads: 'Substantial question relating to environment' shall include an instance where – (i) there is a direct violation of a specific statutory environmental obligation by a person by which – (a) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or (b) the gravity of damage to the environment or property is substantial; or (c) the damage to public health is broadly measurable; and (ii) the environmental consequences relate to a specific activity or a point source of pollution.

82 *ibid* s 14(1).

83 *ibid* s 15(1).

84 For NGT's formula for compensation see, *Paryavaran Suraksha Samiti v Union of India* (28 August 2019, National Green Tribunal – Principal Bench, New Delhi). For the heads under which the NGT can grant compensation or the heads under which damage may be claimed, see National Green Tribunal Act, 2010, [sch.II](#).

85 [S.15\(2\)](#) of the National Green Tribunal.

43. The primary judicial bodies and agencies that can hear claims pertaining to labour law include the Supreme Court; the High Courts; labour courts, industrial tribunals and the National Tribunal (for adjudicating labour disputes); the regional or the chief labour commissioner (for enforcing provisions in relation to payment of salaries, gratuities, contract labour, employee compensation and working conditions among other things); the Directorate of Factories (for enforcing provisions relating to health and safety in factories); the Provident Fund Commissioner (for enforcing issues in relation to the Provident Fund); and the chairperson of the Employees' State Insurance Corporation (for enforcing provisions related to employees' state insurance among other things).
44. In terms of available statutory monetary remedies, [section 3](#) of the Employees Compensation Act, 1923 mandates that the employer is liable to pay compensation to the employee if they suffer personal injury or certain occupational diseases as a result of accidents arising out of or in the course of employment. This provision also notes that if an employee contracts an occupational disease that is peculiar to that employment, and if the disease has arisen out of and in the course of their employment, the contracting of such occupational disease will be deemed to be an 'injury by accident' under the Workmen's Compensation Act, and will merit compensation accordingly.⁸⁶ Similarly, [section 1A](#) of the Fatal Accidents Act, 1855, provides another legal basis for compensation to the family of a person who has died, for loss due to their death by an actionable wrong.

Tort law

45. The third route for a claimant to seek civil remedy in India is through tort law. Based on principles developed by common law and statutory instruments, the law of torts administered in India today is the English law, as is found suitable to Indian conditions. While decisions of the English courts are not binding upon Indian courts, they continue to have persuasive authority.
46. Tort law principles are supplemented with codified, specialised liability regimes for civil redress mechanisms for the specific context of activities that commonly produce accidental harm to life and property.⁸⁷ Examples of such specialised codes include the [Motor Vehicles Act, 1988](#) for compensation for motor vehicle accidents (the Motor Vehicles Act is also often used to calculate compensation for victims of custodial deaths and custodial violence),⁸⁸ the [Employees Compensation Act, 1923](#) for compensation for workplace injuries, and the liability provisions of the [Railways Claims Tribunal Act, 1987](#) and the [Consumer Protection Act, 2019](#) that deals with products (and services) liability.

SPOTLIGHT: EVOLUTION OF ABSOLUTE LIABILITY IN BHOPAL GAS TRAGEDY

On the night of 2 December 1984, over 40 tons of highly noxious gases, including methyl isocyanate escaped from a storage tank in a pesticide manufacturing plant of Union Carbide India Limited, a subsidiary of the Union Carbide Corporation.⁸⁹ The toxic gases engulfed the densely populated city of Bhopal in India and resulted in one of the worst industrial catastrophes in modern times.

⁸⁶ *ibid* s.3(2).

⁸⁷ Balganes (n 20).

⁸⁸ See Usha Ramanathan, 'Tort Law in India' (2001) Annual Survey of Indian Law 615; and Mohamed Imranullah S, 'Kin of Custodial Torture Victim Get INR 30 Lakh' (The Hindu, 7 September 2019).

⁸⁹ FP Staff, 'Bhopal Gas Tragedy: Remembering India's Worst Industrial Disaster as Victims Still Await Justice' (Firstpost, 3 December 2021).

Over 3,000 people were killed instantly, and over 20,000 people have died since then as a result of their exposure to the gases in the immediate aftermath.⁹⁰ An estimated 574,000 people were poisoned that night, with many more being grievously injured, suffering from total, partial, temporary or permanent disability with instances of prolonged pain, cancer, stillbirths, miscarriages, and lung and heart diseases.⁹¹ The consequences also extended to severe impacts on the environment and on animal life.

Against the backdrop of the disastrous Bhopal Gas Tragedy, as it came to be known (see para [61]), the principle of absolute liability emerged to ensure that enterprises engaging in inherently dangerous industries do not evade liability. The rule of absolute liability, a key tort law principle, is now applied by courts to extend strict liability to enterprises engaging in hazardous activities. Unlike strict liability, there are no defences permitted under absolute liability. The distinction between strict and absolute liability is also reflected in the quantum of damages that can be awarded to the claimants – while under the strict liability principle, damages are compensatory; absolute liability cases, as in the *Oleum gas leak* case, are awarded with exemplary damages.⁹²

47. The codification of only some aspects of tort law into specialised liability regimes has created a disjointed and underdeveloped body of law that often lacks doctrinal coherence.⁹³ Due to several institutional and structural factors, there continues to be a great paucity of tort litigation in India.⁹⁴

Q2

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

48. To seek monetary compensation under constitutional law, the claimant has to file a writ petition in a High Court or the Supreme Court, establishing their case that their fundamental rights are affected or violated by the action of any State or government authority or body. The claimant's petition has to present the facts of their case, the questions of law, and the nature of writ or remedy that is sought.⁹⁵ If the case concerns a larger public interest, a public interest litigation petition can be filed.⁹⁶ In case of a public interest litigation, there is no defined format for a petition. A letter to the Supreme Court would also be considered to be a petition.⁹⁷

90 Hannah Ellis-Petersen, '*Bhopal's Tragedy Has Not Stopped: The Urban Disaster Still Claiming Lives 35 Years On*' (*The Guardian*, 8 December 2019).

91 *ibid.*

92 Surya Deva, '*Background Paper for India's National Framework on Business and Human Rights*' (Ethical Trading Initiative 2016) 27.

93 See R Ramamoorthy, 'Difficulties of Tort Litigants in India' (1970) 12(2) *Journal of the Indian Law Institute* 313.

94 CM Abraham and Sushila Abraham, 'The Bhopal Case and the Development of Environmental Law in India' (1991) 40(2) *International and Comparative Law Quarterly* 334, 354. Marc Galanter, 'Legal Torpor: Why So Little Has Happened in India after the Bhopal Tragedy' (1985) 20(2) *Texas International Law Journal* 273.

95 The format of a Writ Petition can be found [here](#).

96 Akshatha M, '*A Guide to Filing a Public Interest Litigation (PIL)*' (*Citizen Matters*, 2 August 2017).

97 *Bandhua Mukti Morcha* (n 23). The Court observed that the framers of the Constitution deliberately did not lay down any particular form for enforcing fundamental rights, nor did they stipulate that any proceedings should conform to any rigid patterns or straight-jacket formula, in the context of the socioeconomic realities of India, where poverty, ignorance, illiteracy, deprivation and exploitation are pervasively present. As such, any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating because it would place enforcement of rights beyond the reach of the common man. See also SCO Team, '*More Frequent Use of Suo Motu Petitions?*' (*Supreme Court Observer*, 24 March 2020).

49. The Supreme Court has also released [guidelines](#) for the nature of cases that would be categorised as public interest litigation. The categories include (but are not limited to): (1) bonded labour; (2) neglected children; (3) non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of labour laws; (4) petitions from jails complaining of harassment, seeking premature release/parole, seeking release, concerning custodial death, transfer from prisons, release on personal bond and speedy trials as a fundamental right; (5) petitions against police for refusing to register a case, harassment by police and death in police custody; (6) petitions from persons belonging to Scheduled Caste and Scheduled Tribes and economically disadvantaged classes complaining of harassment or torture of villagers by co-villagers or by police; (7) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance; and (8) riot victims.
50. To seek civil remedies under statutory or tort law, and unless there is a specific statutory procedure to seek relief, a plaint has to be instituted under the CPC. The plaint shall include inter alia: (a) the name of the court in which the suit is brought; (b) the name, description and place of residence of the claimant; (c) the name, description and place of residence of the defendant, so far as they can be ascertained; (d) the facts constituting the cause of action and when it arose; (e) the facts showing that the court has jurisdiction; and (f) the relief that the claimant claims.⁹⁸ Every plaint has to specifically state the relief that the claimant claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just, to the same extent as if it had been asked for.⁹⁹
51. Under principles of tort law, to establish **negligence** the claimant has to establish that the defendant party was negligent. In that, the initial burden of proof is on the claimant who has to establish a prima facie case against the defendant.¹⁰⁰ The claimant has to prove that the defendant owed a duty of care; that the defendant breached the said duty; and that the claimant suffered the damage as a consequence thereof. However, direct evidence of the negligence is not necessary; this can also be inferred from the circumstances of the case, provided that the claimant has established a prima facie case, either by direct or circumstantial evidence, that the defendant was negligent.¹⁰¹
52. To establish **battery** as an intentional tort, the claimant has to establish that (i) there was use of force; and (ii) that the force was used without any lawful justification. Here, the amount of force used is not relevant.¹⁰² Even if the force used is trivial and it does not cause any physical hurt or damage, the wrong is still constituted.¹⁰³ This also includes force that is used without bodily contact or with use of a secondary object. Passive obstruction will not constitute a use of force. Furthermore, the force used should be intentional and without any lawful justification. Unintentional harm or harm caused by accident will not constitute battery.¹⁰⁴ Similarly, voluntarily suffered harm will not constitute battery.¹⁰⁵ Battery is also a criminal offence under [section 350](#) of the Indian Penal Code, 1860 (IPC) as criminal force.

⁹⁸ See [Order VII, Rule 1](#) of the CPC.

⁹⁹ *ibid* [Order VII, Rule 7](#).

¹⁰⁰ Ramesh K Bangia, *Law of Torts*, 21st edn (Allahabad Law Agency 2008) 275.

¹⁰¹ *ibid*.

¹⁰² *ibid* 153.

¹⁰³ *ibid*.

¹⁰⁴ *ibid* 154.

¹⁰⁵ *ibid*.

53. To establish **assault** as an intentional tort, the claimant has to establish that there was a reasonable apprehension of infliction of battery to the claimant by the defendant.¹⁰⁶ In this, the wrong comprises an attempt to do the harm, rather than the harm in itself. The test is whether an apprehension has been created in the mind of the claimant that they will be inflicted with battery. Verbal threat would not amount to assault, unless it creates reasonable apprehension in the claimant's mind that immediate force will follow.¹⁰⁷ Another element to establish assault is that the defendant should have a prima facie ability to do the harm. Assault is also a criminal offence under [section 351](#) of the IPC.
54. To establish **false imprisonment** as an intentional tort, the claimant has to establish that there was total restraint of the claimant's liberty.¹⁰⁸ To constitute the tort of false imprisonment, the claimant has to be completely deprived of his liberty to move beyond certain limits.¹⁰⁹ If the restraint is only partial or if there are reasonable means of escape, then the wrong would not be constituted. Here, the duration of the restraint is irrelevant. The restraint also does not necessarily have to be confined within four walls of a building. However, if the claimant has voluntarily put themselves in a situation in which they are restrained, the defendant would not be liable. To refute the claim, the defendant must establish that there was lawful justification for the claimant's detention.¹¹⁰ Wrongful confinement is also a criminal offence under [section 340](#) of the IPC.
55. To establish a tort of **nuisance**, the claimant has to establish (i) unreasonable interference; (ii) interference with the use or enjoyment of land; and (iii) damage.¹¹¹ An act, which is otherwise reasonable, will not be deemed as unreasonable interference solely due to the sensitivity of the claimant.¹¹² Furthermore, interference with the use or enjoyment of land can be established by either showing (i) injury to the property itself; or (ii) injury to the comfort or health of the occupants of the property.¹¹³ For the latter, it must be a substantial interference to the comfort and convenience of the occupants.¹¹⁴ Finally, there has to be actual damage as a result of the nuisance.¹¹⁵ Nuisance is also a criminal offence under [section 268](#) of the IPC, as public nuisance.

Q3

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

56. In terms of liability for the conduct of third parties, the concept of **vicarious liability** is recognised under tort law. When an agent commits a tort in the course of performance of their duty as an agent, the principal will be vicariously liable

¹⁰⁶ *ibid* 155.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid* 157.

¹⁰⁹ *ibid* 158.

¹¹⁰ *ibid* 162.

¹¹¹ *ibid* 198.

¹¹² *ibid* 200.

¹¹³ *ibid* 203.

¹¹⁴ *ibid* 207.

¹¹⁵ *ibid* 208.

for the tort, on the basis of the existing **principal-agent** relationship.¹¹⁶ Both, the agent and the principal can be held liable for the same cause of action. They will be considered joint tortfeasors and their liability will be joint and several.¹¹⁷ However, the employer is not liable for the acts of an independent contractor, except if (a) the employer has authorised the doing of an illegal act, or has subsequently ratified the act; or (b) in cases of absolute liability, such as in the case of extra-hazardous work which has been entrusted to an independent contractor. In these exceptions, the employer becomes a party to the wrongful act, and therefore will be held liable as a joint tortfeasor.¹¹⁸

57. **Joint and several liability** will also apply in the case of a **master-agent** relationship or in the case of partnership, where the wrongful act is done by one partner in the course of business.¹¹⁹ The principle of vicarious liability is also recognised under constitutional torts where the State is vicariously held liable for the tortious acts of its employees in the course of their employment.¹²⁰
58. Furthermore, courts in India do not follow any distinction between joint and independent tortfeasors. Thus, if two or more persons are responsible for a common or single damage, regardless of whether they were acting independently or jointly, but in furtherance of a common design, they are termed **composite tortfeasors** and their liability is joint and several.¹²¹ The judgment against composite tortfeasors is usually for a single sum, without any apportionment of liability or damages in accordance to the fault of the various tortfeasors.¹²²

Q4

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

59. The extent to which a parent company can be held liable under the law of civil remedies for the wrongful acts or omissions of its subsidiaries or contractors in a supply chain is limited in India.
60. Although narrow in scope and limited only to corporations that are engaged in hazardous or inherently dangerous industries, India has recognised a form of **enterprise liability** that treats all companies in a group as a single enterprise and holds the single enterprise responsible for harm caused by any individual company within the group. This negates the idea of separate legal personality of any single entity within the group and allows for the parent company to be held liable for the wrongful acts and omissions of its subsidiaries. In the aftermath of the Bhopal Gas Tragedy, where the gas leak by the Bhopal plant of Union Carbide India Limited was the action of the subsidiary of an American parent company Union Carbide, the Indian government argued that a multinational enterprise should 'necessarily assume responsibility' for the harm caused by it, especially given the scale of damage caused, and the difference in asset holding between the subsidiary and the parent company.

¹¹⁶ Ramesh K Bangia, *Law of Torts*, 23rd edn (Allahabad Law Agency 2013) 76.

¹¹⁷ *ibid.*

¹¹⁸ Bangia, (n 100) 93.

¹¹⁹ *ibid.*

¹²⁰ See *Chandrima Das* (n 27); *Shyam Sunder v State of Rajasthan* AIR 1974 SC 890; and *Nilabati Behera* (n 25).

¹²¹ Bangia, (n 100) 69.

¹²² *ibid* 349.

61. In response, and consequently in the *Oleum gas leak* case, the Supreme Court observed and adopted a theory of enterprise liability. The Court noted two issues: first, the damages to be paid should be proportional not just to the size of the harm, but also to the size of the enterprise that committed that harm, in order to have a deterrent effect. Second, in cases of hazardous industries, the entire economic unit or enterprise that controlled the plant could be held liable. The Court stated:

*'We are of the view that 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 ... owes an absolute and non-delegable duty to the community that no harm results to any one on account of the dangerous nature of the activity it has undertaken ... If the enterprise is permitted to carry on the hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident.'*¹²³

SPOTLIGHT: UNION CARBIDE CORPORATION V UNION OF INDIA

In *Union Carbide Corporation v Union of India*,¹²⁴ the Madhya Pradesh High Court cited the *Oleum gas leak* case while inquiring whether Union Carbide Corporation (Union Carbide) was liable for the actions of its subsidiary, Union Carbide India Limited.¹²⁵ Union Carbide argued that it was only a shareholder and that it did not exercise control over any action of its subsidiary, which owned and operated the Bhopal plant. Union Carbide also argued that the corporate veil could not be pierced unless it was found that 'the corporation had been set up to evade or defraud the government revenue or shareholders.'¹²⁶ In response, the Court held that the scope of limited liability and piercing of the corporate veil had to adapt to economic changes in the modern world, and especially so in a case of 'a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of multitude of disaster victims.'¹²⁷ The Court noted that it was irrelevant to inquire into whether Union Carbide actively managed the affairs of its subsidiaries. Majority-share ownership meant that Union Carbide not only controlled the composition of the Board of Directors of the Indian subsidiary, but it also had full control over the management of the Indian subsidiary – and that in itself satisfied the doctrine of enterprise liability as was stated in the *Oleum gas leak* case.

62. In *Indian Council for Enviro-Legal Action* as well, the Supreme Court stressed the need to contextualise the doctrine of enterprise liability, taking account of the costs and challenges of rapid economic growth and industrialisation.¹²⁸ This line

¹²³ *Oleum gas leak* case (n 40).

¹²⁴ *Union Carbide Corporation v Union of India*, Civil Revision No 26 (1988) (Madhya Pradesh High Court).

¹²⁵ *ibid* 373-375.

¹²⁶ *ibid* 349.

¹²⁷ *ibid* 379. See also, Abhi Raghunathan, 'The Grand Trunk Road from *Salomon* to *Mehta*: Economic Development and Enterprise Liability in India' (2012) 100(2) *Georgetown Law Journal* 571.

¹²⁸ See also *Indian Council for Enviro-Legal Action* (n 33).

of reasoning on enterprise liability was further expanded in *State of Uttar Pradesh v Renuagar*,¹²⁹ where the Supreme Court observed the need to look at piercing the corporate veil in the context of the economic reality of the situation instead of assuming the formal, legal reality of the parent-subsidary relationship.¹³⁰ Consequently, the Supreme Court has held that 'the corporate veil indisputably can be pierced when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest'¹³¹ and the corporate veil can be pierced 'to get behind the smoke-screen and discover the true state of affairs'.¹³²

Q5

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

63. The most commonly sought remedy for victims of the three defined harms through constitutional litigation is monetary compensation for a constitutional tort violation of the victim's fundamental rights, or an award of a writ remedy, or a combination of both. Under articles 32 and 226 of the Constitution, the Supreme Court and the High Courts have the power to issue directions or orders or writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the fundamental rights.
64. The Supreme Court and the High Courts can also seek to remedy fundamental rights violations through a continuing *mandamus* or a structural interdict or a structural injunction. In other words, the court will provide relief to the claimant through a series of ongoing orders for the defendant to comply with. Continuing *mandamus*, as a remedy, is usually awarded in cases of structural violations that require the court to monitor compliance, seek periodic reports and ensure implementation of its orders by the relevant authorities. It is routinely observed in cases of environmental harm such as in *Indian Council for Enviro-Legal Action v Union of India* (concerning pollution caused by chemical industrial plants),¹³³ *Delhi Vehicular Pollution Case* (concerning air pollution in Delhi and surrounding regions),¹³⁴ and *TN Godavaraman v Union of India* (concerning deforestation of the Nilgiris forests).¹³⁵
65. Damages awarded by the courts under tort law principles can be 'substantial' or exemplary. While **substantial damages** are aimed at compensating victims, **exemplary damages** are intended to have a deterrent effect. In the *Oleum gas leak* case, the Supreme Court noted that in order to measure the quantum of compensation payable by a company involved in hazardous or inherently dangerous activities, the compensation 'must be correlated to the magnitude and capacity of the enterprise' in order to have a deterrent effect.¹³⁶

129 *State of Uttar Pradesh v Renuagar* (1988) 1 SCR 627.

130 See also *Delhi Development Authority v Skipper Construction Co (P) Ltd* (1996) 4 SCC 622; *Pushpanjali Farm Owners and Residents Association v Ansal Properties and Industries Ltd* 2012 (3) CPC 290 (National Consumer Disputes Redressal Commission); *State of Rajasthan v Gotan Lime Stone Khanji Udyog* (2016) 4 SCC 469.

131 *Kapila Hingorani v State of Bihar* (2003) 6 SCC 1 [27].

132 *Workmen Employed v Associated Rubber Industry Ltd* (1985) 4 SCC 114 [3]-[5].

133 *Indian Council for Enviro-Legal Action* (n 33).

134 *MC Mehta v Union of India* AIR 2002 SC 1696.

135 *TN Godavaraman v Union of India* (1996) 9 SCC 982.

136 *Oleum gas leak case* (n 40).

66. In addition to compensation, civil courts may also issue **temporary injunctions** or **interlocutory orders** as under [Order XXXIX](#) of the CPC; **permanent or perpetual injunctions** under [section 37](#) and [section 38](#) of the [Specific Relief Act, 1963](#) (SRA); a **mandatory injunction** under [section 39](#) of the SRA; or a **declaratory order** under [section 34](#) of the SRA.
67. Section 37 of the SRA provides that temporary injunction can continue until a specified time, or until further orders by the court. Temporary injunctions may be granted at any stage of a suit, and are regulated by the CPC. In contrast, **perpetual injunctions** can only be granted by the decree made at the hearing on the merits of the suit. A perpetual injunction, under section 38 of the SRA, prevents the defendant from asserting a right or from committing an act that would be contrary to the rights of the plaintiff. Under section 39, mandatory injunctions can compel any party to a claim to perform any requisite act that the court is capable of enforcing in order to prevent the breach of an obligation. Finally, under section 34 of the SRA, a court can also grant declaratory orders as to the status or the rights of the plaintiff.

Q6

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

68. The hybrid constitutional tort claim, which combines a tort claim against a State or private actor to enforce fundamental rights, has become a mainstay of civil remedies for fundamental rights violations in India. When juxtaposed against the conventional tort law route for civil remedies, the **advantages** that can be observed are: (a) constitutional tort claims have a relatively expedited litigation process and are therefore cost effective; (b) claims are less formal with greatly accessible institutional rules for bringing the claim; (c) since the constitutional courts' writ jurisdiction is being petitioned, it does not require an elaborate factual record – instead, the claim can be disposed of based on the evidence presented in the affidavit without any need for the court to require further testimony;¹³⁷ and (d) the scope of remedial intervention by the courts is varied and wide under the ambit of articles 32 and 226 of the Constitution.
69. On the other hand, the **disadvantages** of bringing civil claims as a means of human rights protection in India remain closely connected to the structural issues that plague the legal system. A number of issues continue to deter a successful enforcement of rights including severe pendency of cases,¹³⁸ increasing legal costs and expenses to bring a claim; complex procedures and formalities; sluggish progress of claims;¹³⁹ a limited number of judges; and a top-heavy justice system where lower courts are routinely bypassed in favour of the constitutional courts' appellate and original jurisdictions.¹⁴⁰ The current system of civil remedies through constitutional tort litigation comes with procedural, normative and institutional

137 *Association of Victims of Uphaar Tragedy v Union of India* (2003) 2 ACC 114 (Delhi High Court).

138 Jyotika Sood, 'Pendency in Indian Courts Rising by 2.8% Annually: Report by Delhi-based Non-Profit' (*Outlook*, 20 October 2021).

139 Akshat Jaithalia and Aayush Maheshwari, 'The Agonizing Pace of the Indian Judiciary' (*Jurist*, 14 May 2020).

140 Nick Robinson, 'Top-heavy Justice' (*Indian Express*, 17 December 2012). See also, Robert Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control' (1992) 16(1) *Justice System Journal* 19.

costs,¹⁴¹ which in turn further exacerbate the existing structural difficulties in the Indian legal system. The system also lacks a legal and normative framework for monetary compensation.¹⁴² The quantum of compensation awarded varies drastically from case to case and from court to court, despite having similar fact patterns. Moreover, the compensation amount is itself generally paltry and limited, with costs of litigation often far exceeding the award itself. Inevitably, the occurrence of the three defined harms thus remains an endemic reality for India.¹⁴³

Q7

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

70. Civil claims can be brought against a foreign defendant in India, as long as the requirements for invoking the jurisdiction of a court under the CPC are met. The CPC notes that where a suit is for compensation for a wrong done to the claimant or to movable property, the suit is to be instituted within the local limits of the petitioned court's jurisdiction; or the place where the defendant resides, carries on business or personally works for gain.¹⁴⁴ For immoveable property, the appropriate court would be that within which the immoveable property is situated.¹⁴⁵
71. While the sovereignty of foreign defendants, especially foreign state-owned entities, is generally recognised, an exception is carved out under [section 86\(1\)](#) of the CPC. It states that no foreign state or entity may be sued in any court that would otherwise be competent to hear the suit, except with the prior consent of the central government. Such consent from the central government can be given with respect to a specific suit, or to several specified suits or with respect to all suits of any specified class or classes. [Section 86\(2\)](#) also notes that such consent will not be given unless it appears that (a) the foreign State or entity has itself instituted a suit in the court against the person desiring to sue it; or (b) if the foreign State or entity, by itself or another, trades within the local limits of the jurisdiction of the court; or (c) if the foreign State or entity is in possession of immovable property that is situated within those limits of the court.
72. In terms of procedure, before a claim is brought against a foreign defendant, the claimant has to seek the central government's consent to do the same. However, this would also vary from case to case. For instance, in some specific instances, it has been recognised by the Supreme Court that if there has been an express or implied waiver of privilege by the foreign defendant, then there would not be any need to get the central government's consent before bringing a civil claim against the foreign defendant.¹⁴⁶ In such cases, the Court held that the specific statute under which the claim arises would supersede the general provisions of the CPC.

141 Rehan Abeyratne, 'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (2018) 54(1) Texas International Law Journal 1, 8.

142 Asian Legal Resource Centre, '[India: Remedies to Human Rights Violations a Mirage](#)' (25th Session of the Human Rights Council, 8 March 2013).

143 Amnesty International, '[India: Excessive Use of Force, Arbitrary Detention and Punitive Measures Against Protesters Must End Immediately](#)' (Amnesty International India, 14 June 2022); Martina Igini, '[5 Biggest Environmental Issues in India](#)' (Earth.Org, 17 June 2022); Shweta Tambe, Chandan Kumar and Sundara Babu Nagappan, '[Woes of India's Migrant Workforce](#)' (The Leaflet, 4 May 2022);

144 [S.19](#) of the CPC.

145 *ibid* [s.16](#), [s.17](#) and [s.18](#).

146 *Ethiopian Airlines v Ganesh Narain Saboo* MANU/SC/0975/2011.

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

73. The authors recommend the following resources to learn more about civil liability for human rights violations in India.

Books

- Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).
- C Raj Kumar and K Chockalingam (eds), *Human Rights, Justice, and Constitutional Empowerment* (Oxford University Press 2007).
- RK Bangia, *Law of Torts* (21st edn, Allahabad Law Agency 2008).
- Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (Oxford University Press 2000).
- MP Jain, *Indian Constitutional Law* (LexisNexis 2010).
- SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press 2003).
- SK Verma and KK Verma (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000).
- Ratanlal and Dhirajlal, *The Law of Torts* (LexisNexis 2020).
- CK Takwani, *Civil Procedure with Limitation Act, 1963* (Eastern Book Company 2020).
- Surya Deva, 'India: Constitutional Torts 'Ruling the Roost?' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux* (Hart Publishing 2022).

Journal articles

- Shyamkrishna Balganesh, 'The Constitutionalization of Indian Private Law' (2016) Faculty Scholarship at Penn Law 1557.
- Rehan Abeyratne, 'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (2018) 54 Texas International Law Journal 1.
- Usha Ramanathan, 'Tort Law in India' (2001) Annual Survey of Indian Law 615.
- CM Abraham and Sushila Abraham, 'The Bhopal Case and the Development of Environmental Law in India' (1991) 40(2) International and Comparative Law Quarterly 334.
- KC Joshi, 'Compensation Through Writs: Rudul Sah to Mehta' (1988) 30(1) Journal of the Indian Law Institute 69.
- R Ramamoorthy, 'Difficulties of Tort Litigants in India' (1970) 12(2) Journal of the Indian Law Institute 313.

Reports

- Centre for Social Justice, Common Cause, Prayas, Daksh, Vidhi Centre for Legal Policy and Commonwealth Human Rights Initiative, '[India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid](#)' (Tata Trusts, 2019).
- Surya Deva, '[Background Paper for India's National Framework on Business and Human Rights](#)' (Ethical Trading Initiative 2016).
- International Commission of Jurists, 'Access to Justice: Human Rights Abuses Involving Corporations' (ICJ 2011).

Websites

- [NHRC, How to file an online complaint – operational guidelines](#)
- [NHRC, format for complaint registration](#)
- [Human Rights Commissions Network – online complaint filing](#)
- [Format of writ petition in the Supreme Court of India](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1



CS

368

Q1

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

74. A writ petition under articles 32 and 226 of the Constitution could be brought in any High Court or in the Supreme Court against the police for an enforcement of the protesters' fundamental rights, especially under article 19(1)(b) and article 21 that encapsulate the fundamental right of the protesters to assemble peacefully and without arms, and the right to life to personal liberty. Given the number of victims in this case scenario, the claim can also be brought as a public interest litigation.
75. Alternatively, as described in [52]-[54] individual claimants can also bring a civil suit against the police and Security Co under the law of torts for assault, battery and false imprisonment.¹⁴⁷ To establish battery, there should have been a use of force, and the force should have been intentional and without any lawful justification. The claimant does not need to prove that there was any harm from the use of force.¹⁴⁸ Assault is established if any act of the defendant (in this case, the police or the private security company) causes the claimant to have reasonable apprehension of infliction of battery.¹⁴⁹ The private security forces can be implicated as joint tortfeasors in such a suit.

Q2

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

76. A claim for monetary compensation under the writ jurisdiction of the constitutional courts would be the preferred route for holding perpetrators in Case Scenario 1 to account since there has been a prima facie violation of the protesters' fundamental rights.
77. However, alternatively, individual claimants can also seek to bring a criminal complaint against the police and Security Co under [section 107](#) (Abetment of a Thing), [section 349](#) (Force), [section 350](#) (Criminal Force) and [section 351](#) (Assault) of the IPC. The punishment would be a fine, imprisonment or both.

¹⁴⁷ Bangia, (n 100) 153-164.

¹⁴⁸ *ibid* 153.

¹⁴⁹ *ibid* 155.

Q3

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

78. *People's Union for Democratic Rights v State of Bihar*¹⁵⁰ remains an important precedent for Case Scenario 1. In this case, around 600-700 protesters, mostly belonging to economically disadvantaged classes, had assembled to hold a peaceful meeting, when they were subject to indiscriminate shooting by the police who had opened fire on the crowd. The Supreme Court awarded monetary damages of INR 20,000 (~USD 246) for every case of death and INR 5,000 (~USD 62) for every case of injury.
79. In *Uttarakhand Sangharsh Samiti v State of Uttar Pradesh*,¹⁵¹ the Allahabad High Court awarded compensation of INR 25,000 (~USD 307) to injured protesters; INR 1,000,000 (~USD 12,292) to the families of those who died due to police brutality; INR 1,000,000 (~USD 12,292) to women who were raped; INR 500,000 (~USD 6,146) to women who were molested; and INR 50,000 (~USD 615) to those who were unlawfully detained by the police. The Court emphasised that the compensation awarded was distinct from and in addition to any remedy in private law for damages in tort that could be awarded to any victim who sought private relief against personal injury. In both of these cases, the emphasis was on the violation of fundamental rights by agents of the State. Another important case relevant to this case scenario in terms of corporate (or private party) complicity with the State in the violent suppression of the civil society protests against Enron's Dabhol power plant project in Maharashtra.¹⁵²
80. Instances of unlawful arrests, detention and violence against peaceful protesters are a frequent occurrence in India.¹⁵³



¹⁵⁰ *People's Union of Democratic Rights v State of Bihar* AIR 1987 SC 355.

¹⁵¹ *Uttarakhand Sangharsh Samiti v State of Uttar Pradesh* MANU/UP/1607/1996.

¹⁵² Amnesty International, '[India: The Enron Project in Maharashtra: Protests Suppressed in the Name of Development](#)' (16 July 1997).

¹⁵³ Human Rights Watch, '[Stifling Dissent: The Criminalization of Peaceful Expression in India](#)' (24 May 2016); Amnesty International, '[India: Government Must Stop Crushing Farmers' Protests and Demonizing Dissenters](#)' (9 February 2011); Human Rights Watch, '[India: Deadly Force Used Against Protesters](#)' (23 December 2019).

CaseScenario 2

Q1

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

81. A writ petition under articles 32 and 226 of the Constitution could be brought in any High Court or in the Supreme Court against Parent Co and Subsidiary Co. The right to live in a healthy environment is an established interpretation of article 21 of the Constitution. Given the nature of the violation, the extent of possible damage and the number of victims in this case scenario, the claim could also be brought as a public interest litigation. As discussed in [60] and [61], under the doctrine of enterprise liability and the exceptions to the doctrine of piercing the corporate veil, Parent Co can be held liable for violation of the claimants' right to life under article 21 of the Constitution. Claimants can also bring civil suits under tort law for nuisance, trespass, negligence and strict liability. To establish trespass, there should have been an intentional invasion of the claimants' physical possession of property; and such interference should have been direct in nature.
82. In addition, the claimants can file a civil suit under [section 91](#) of the CPC for public nuisance. Specific to the nature of harm caused by Subsidiary Co's actions, the claimants can also file civil suits under statutory provisions, including (but not limited to) the Air (Prevention and Control of Pollution) Act, 1981, with Rules; the Water (Prevention and Control of Pollution) Act, 1974, with Rules; the Water (Prevention and Control of Pollution) Cess Act, 1977; Hazardous Waste (Management, Handling & Transboundary Movement) Rules, 2008; Hazardous and Other Wastes Rules, 2016; Solid Waste Management Rules, 2016; Public Liability Insurance Act, 1991, with Rules; Oil Mines Regulations, 1984, under the Mines Act, 1952; Environment Impact Assessment Notification, 2006; and the Environment Protection Act, 1986, with Rules. Section 16 of the Environment Protection Act, for instance, notes that where an offence has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.



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

83. Alternatively, claimants can also file a criminal complaint against Parent Co and Subsidiary Co under [section 268](#) (Public Nuisance), [section 269](#) (Negligent Act Likely to Spread Infection of Disease Dangerous to Life), [section 277](#) (Fouling of Water of Public Spring or Reservoir) and [section 278](#) (Making Atmosphere Noxious to Health) of the IPC. [Section 290](#) and [section 291](#) of the IPC enlist the punishments for public nuisance. [Section 11](#) of the IPC defines 'person' as including any company or association or body of persons, whether incorporated or not. Chapter X ([sections 133-143](#)) of the Code of Criminal Procedure, 1973 (CrPC) provides for the procedure for enforcement and remedies for public nuisance. For instance, the CrPC empowers a magistrate to restrain any person from carrying out an act that may give effect to public nuisance. In addition, section 91 of the CrPC prescribes that a suit may be filed to obtain suitable relief or injunction for any cause of action affecting or likely to affect public nuisance. [Section 426](#) (Punishment for Mischief), [section 430](#) (Mischief by Injury to Works of Irrigation or by Wrongfully Diverting Water), [section 431](#) (Mischief to Injury to Public Road, Bridge, River or Channel) and [section 432](#) (Mischief by Causing Inundation or Obstruction to Public Drainage Attended with Damage) of the IPC also punishes pollution caused by mischief.



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

84. In terms of its precedent value to environmental cases, the *Oleum gas leak* case remains a key case relevant to Case Scenario 2. With an expanding understanding of article 21, the doctrine of enterprise liability and the doctrine of absolute liability, the case is a cornerstone in holding Parent Co and Subsidiary Co accountable.¹⁵⁴ In terms of exemplary damages, the Supreme Court imposed a fine of 1 billion rupees (~USD 12.29 million) against Sterlite, a subsidiary of the UK based Vedanta Resources, for polluting the environment in the state of Tamil Nadu.¹⁵⁵
85. Another case of successful judicial intervention was in the case of Coca-Cola's Mehdiganj plant in Uttar Pradesh, where authorities ordered the closure of the bottling plant for over-extracting groundwater and for releasing pollutants above set limits.¹⁵⁶ In another location, Coca-Cola closed down its operation in the Plachimada plant in Kerala due to protracted protests from the local community against its over-extraction and pollution of the environment.¹⁵⁷ It is also important to note that in this case, the plant was situated in the midst of agricultural land that historically belonged to the local indigenous tribal community of the region.

¹⁵⁴ *Oleum gas leak* case (n 40).

¹⁵⁵ BBC News, '[Sterlite: Vedanta Smelter in India Fined 1bn Rupees for Pollution](#)' (2 April 2013).

¹⁵⁶ AFP, '[Indian Officials Order Coca-Cola Plant to Close For Using Too Much Water](#)' (Guardian, 18 June 2014).

¹⁵⁷ The Hindu Net Desk, '[Water Wars: Plachimada v Coca-Cola](#)' (The Hindu, 15 July 2017).

In addition, the Supreme Court's decision against Vedanta Resources concerning its mining plant in the Niyamgiri hills is another important case study.¹⁵⁸ The Supreme Court, in its order, held that the affected communities must be consulted about the project before it could go ahead. Amongst a wide range of human rights violations, Vedanta's presence has greatly affected the identity and livelihood of the deeply isolated Dongria Kondh tribe, through forcible evictions, water pollution, air pollution, and displacement of the indigenous population.¹⁵⁹ Other high profile examples of civil society unrest against polluting industries include the protests against the setting up of the steel plant by Jindal Steel Works in Odisha;¹⁶⁰ against the South Korean steel plant of the Pohang Steel Company in Odisha;¹⁶¹ and against the Kudankulam Nuclear Power Plant in Tamil Nadu.¹⁶²

86. While liberal government policies and patronage have increased the growth of extractive industries, the sector continues to be opaque and largely unaccountable for its environmental and social impacts.¹⁶³ With extractive industries rapidly expanding to ecologically and culturally sensitive areas of the country, instances of backlash from local communities¹⁶⁴ are occurring more frequently in response to issues of illegal mining, lack of proper social and environmental impact assessments, direct and indirect industry-induced displacements, human rights violations and systemic corruption at all levels of government.¹⁶⁵ Often, environmental concerns are dismissed when weighed against the need for development.¹⁶⁶



158 Jo Woodman, '[India's Rejection of Vedanta's Bauxite Mine is a Victory For Tribal Rights](#)' (*The Guardian*, 14 January 2014).

159 OECD Watch, '[Survival International v Vedanta Resources plc](#)' (2009).

160 Sumedha Pal, '[As Anti-Jindal Protests Continue in Odisha's Dinkia, Villagers Face Police Violence, Arrests](#)' (*The Wire*, 18 January 2022); Satyasundar Barik, '[Activists Allege Police Brutality Near Proposed Odisha Steel Project Site](#)' (*The Hindu*, 15 April 2022).

161 Priya Ranjan Sahu, '[As POSCO Exits Steel Project, Odisha is Left with Thousands of Felled Trees and Lost Livelihoods](#)' (*Scroll.in*, 22 March 2017).

162 Vidhi Doshi, '[The Lonely Struggle of India's Anti-Nuclear Protesters](#)' (*The Guardian*, 6 June 2016); Human Rights Watch, '[India: End Intimidation of Peaceful Protesters at Nuclear Site](#)' (11 May 2012).

163 Human Rights Watch, '[Out of Control: Mining, Regulatory Failure and Human Rights in India](#)' (14 June 2012).

164 For a case study relevant to Case Scenario 1 and Case Scenario 2 see Tehelka Bureau, '[Enron: A History of Human Rights Abuse in India](#)' (14 December 2020). See also, Richard Wachman, 'Vedanta Bosses Clash With Protesters Over Pollution and Human Rights' (*The Guardian*, 27 July 2011); BBC News, '[The Grassroots Movement That Shut Down an Indian Copper Plant](#)' (29 May 2018).

165 Ritwick Dutta, R Sreedhar, and Shibani Ghosh, '[India: Development at a Price – Increasing Transparency and Accountability in the Extractive Industries](#)' (2012) Revenue Watch Institute and Transparency International Initiative. See also, Rajib Dutta, '[Assam: Oil Leak from ONGC Pipeline Spills Into Farmland in Sivasagar](#)' (*Times of India*, 24 June 2021); Suhasini Raj, '[Oil Spill Near Chennai, India, Threatens Wildlife](#)' (*New York Times*, 3 February 2017); Malavika Vyawahare, '[Chennai Oil Spill Could Severely Impact Marine Life, Environmentalists Say](#)' (*Hindustan Times*, 6 February 2017); and Abhijit Singh, '[Chennai Oil Spill Underlines Uncomfortable Truths](#)' (*Observer Research Foundation*, 7 Feb 2017).

166 Swansy Afonso, Rajesh Kumar Singh, and Debjit Chakroborty, '[Modi Govt's Environment Rules Overhaul Sparks Fears of Return to Grim Past](#)' (*Business Standard*, 9 September 2020) and Rohini Mohan, '[Narendra Modi's War on the Environment](#)' (*Al-Jazeera America*, 10 April 2015).

CaseScenario3

Q1

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

87. From the facts presented in Case Scenario 3, the claimants would have a claim against Factory Co under the writ jurisdiction of the constitutional courts under articles 32 and 226 of the Constitution. As discussed in [27], the Supreme Court has held that the duty to protect the health and safety of workers is applicable to the State and to private industries, and that any instance of forced or bonded labour has to be looked at within the context of the circumstances and conditions in which the worker was made to work. The repeated and systemic exploitation of the workers by Factory Co means that the claimants will have a prima facie case for violation of their fundamental rights under articles 14, 16, 21 and 23 of the Constitution. Given the number of persons affected by the working conditions at Factory Co, the claim can also be brought as a public interest litigation. In terms of the specific nature of the abuse, the claimants have a claim against Factory Co under articles 21 and 23 for compulsory unpaid overtime, a claim under article 21 for poor workplace safety that was directly responsible for the deaths and injuries sustained by the victims in the fire, and a claim under articles 14 and 16 for discrimination on grounds of sexual harassment at workplace.
88. The claimants can also file a civil suit against Factory Co under the law of torts for negligence for poor workplace safety conditions (lack of emergency procedures, ineffective fire safety equipment and few emergency medical supplies, barred windows, closed emergency exits, broken smoke alarms) that resulted in the workers suffocating and being burned alive. Factory Co can also be held liable under the law of torts for assault and battery for the physical abuse sustained by the workers. Brand Co may also be implicated as a joint tortfeasor, depending upon the nature of the contractual arrangement between Brand Co and Factory Co, and the extent to which Brand Co had a say in the employment conditions of the workers.
89. In addition, and based on the nature of harm caused by Factory Co's actions and the nature of the contractual agreement between the claimants and Factory Co, individual claimants can also file civil suits under statutory provisions,¹⁶⁷ including

¹⁶⁷ Briefly, the Industrial Disputes Act, 1947, restricted for the purposes of 'workmen' alone, lays down the principles and processes of industrial disputes, industrial action, regulation of retrenchment, layoffs, closure, transfer of undertakings, constitution of work committees, and changes in service conditions of workmen. The (state-specific) Shops and Establishments Act regulates the service conditions of employees engaged in shops and commercial establishments (including most private companies). It regulates hours of work, payment of wages, overtime, leave, holidays and other conditions of service. The Payment of Wages Act, 1936 regulates the mode and method of payment of wages to certain categories of employees and to those employed in factors and industrial establishments. Factories Act, 1948 regulates the working conditions in factories where manufacturing operations are undertaken. It has extensive provisions regarding the health, safety and welfare of workers in factories. The Minimum Wages Act, 1948 provides for the payment of minimum rates of wages to employees working in specific kinds of employment (including conditions for overtime pay) as fixed by the Government. The Contract Labour (Regulation and Abolition) Act, 1970 provides for regulation of contract labour in establishments and provides for its abolition in certain circumstances. Finally, the Workmen's Compensation Act, 1923 provides for compensation to workers who have encountered injuries due to an accident during their employment.

(but not limited to) the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; the Factories Act, 1948, and the local Shops and Establishments statute (specific to the state in which Factory Co is established); the Minimum Wages Act, 1948; the Payment of Wages Act, 1936; the Bonded Labour System (Abolition) Act, 1976; the Contract Labour (Regulation & Abolition) Act, 1970; the Industrial Disputes Act, 1947; and the Employees Compensation Act, 1923.

90. Under the Factories Act, 1948, Factory Co is obligated under [section 38](#) (Precautions In Case of Fire) to take all practicable measures to prevent the outbreak of fire and its spread, both internally and externally and to provide and maintain (a) a safe means of escape for all persons in the event of a fire, and (b) the necessary equipment and facilities for extinguishing fire.¹⁶⁸ It also notes that Factory Co is obligated to take all effective measures to ensure that in every factory, all workers are familiar with the means of escape in case of fire and have been adequately trained in the routine to be followed in such cases. [Section 59](#) (Extra Wages for Overtime) also entitles workers to payment for overtime work. As a result, claims concerning the general health,¹⁶⁹ safety¹⁷⁰ and welfare conditions,¹⁷¹ particularly the lapses in the fire safety and prevention mechanisms, can be brought against Factory Co under [section 92](#) (General Penalty for Offences), [section 93](#) (Liability of Owner of Premises in Certain Circumstances) and [section 94](#) (Enhanced Penalty After Previous Conviction) of the Factories Act, 1948.
91. Similarly, claims can also be brought under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, against the perpetrators. Under this Act, workplace includes both the organised and the unorganised sector.¹⁷² It mandates employees to set up committees (in case of private companies) or empowers local government officials (in case of the informal sector) to hear complaints, conduct inquiries and recommend remedial action to be taken against the defendants.¹⁷³
92. The Act also lays down how compensation amounts are determined. The compensation shall have regard to: the mental trauma, pain, suffering and emotional distress caused; the loss in career opportunities due to the incident of sexual harassment; medical expenses incurred by the victim for physical or psychiatric treatment; the income and financial status of the defendant; and the feasibility of payment in lump sum or in instalments.¹⁷⁴ The Act also mandates the duties of the employer, inter alia, to provide a safe working environment at the workplace and to assist the claimant in pursuing a criminal complaint against the defendant under the IPC.¹⁷⁵
93. As discussed in [44], the Employees Compensation Act, 1923, holds the employer liable for compensation for any personal injury caused to an employee by an accident that arises out of and in the course of their employment. Injured claimants

¹⁶⁸ Under [section 93](#) of the Factories Act, 1948, the owner of the premises of the factory is also liable for any contravention of the provisions of this Act in respect of precautions as to fire.

¹⁶⁹ *Ibid*, [ss 11-20](#) deals with obligations on the factory owner and manager with regards to the health of the workers.

¹⁷⁰ *Ibid*, [ss 21-41](#) deals with obligations concerning safety of the workers.

¹⁷¹ *Ibid*, [ss 42-50](#) deals with obligations concerning welfare of the workers.

¹⁷² [S 2\(p\)](#) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH).

¹⁷³ See also, Human Rights Watch, "[No #MeToo for Women Like Us: Poor Enforcement of India's Sexual Harassment Law](#)" (14 October 2020); Anoo Bhuyan and Shreya Khaitan, "[Eight Years On, India's Law To Prevent Workplace Sexual Harassment is Marred by Poor Data Collection](#)" (Scroll.in, 23 February 2021).

¹⁷⁴ [S 15](#), POSH (n 172).

¹⁷⁵ *Ibid* s [19](#).

and dependents of deceased workers at Factory Co will therefore have a claim for compensation under [section 22](#) of the Act.¹⁷⁶

94. As described in [56]-[58], the concepts of vicarious liability and joint and several liability are recognised in tort law in the case of master-agent relationships or in the case of partnerships. Depending on the nature of the agreement between Factory Co and Brand Co, Brand Co can also be held liable for negligence. However, as discussed in [59]-[62], the extent to which Brand Co can be held liable for the wrongful acts or omissions of Factory Co is limited. Nonetheless, legal precedent stresses the need to contextualise the doctrine of enterprise liability in the context of the economic reality of the factual situation. To that extent, the court may be persuaded to pierce the corporate veil to hold Brand Co accountable, especially in light of the relative size of Brand Co in juxtaposition to Factory Co.



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

95. Alternatively, claimants can also file a criminal complaint against perpetrators at Factory Co for sexual harassment under [section 354](#) (Assault of Criminal Force to Women with Intent to Outrage Her Modesty), [section 354A](#) (Sexual Harassment and Punishment for Sexual Harassment), [section 354B](#) (Assault or Use of Criminal Force to Woman with Intent to Disrobe), [section 354C](#) (Voyeurism), [section 354D](#) (Stalking), [section 509](#) (Word, Gesture or Act to Insult the Modesty of a Woman) of the IPC. Sexual Offences under the IPC are cognisable offences, with simple or rigorous punishments varying from a fine, to imprisonment ranging from one to seven years, or both.
96. Claimants can also file a criminal complaint against perpetrators at Factory Co for criminal negligence under [section 304A](#) (Causing Death by Negligence), [section 337](#) (Causing Hurt by Act Endangering Life or Personal Safety of Others) and [section 338](#) (Causing Grievous Hurt by Act Endangering Life or Personal Safety of Others) of the IPC and also for any physical abuse endured under section 349 (Force), section 350 (Criminal Force) or section 351 (Assault) of the IPC.
97. Finally, claims can also be brought against Factory Co under [section 22](#) of the Minimum Wages Act, 1948, which provides that any employer who pays any employee less than minimum rates of wages fixed for that employee's class of work, or less than the amount due to him, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

¹⁷⁶ The Employees Compensation Act, 1923, also provides a scheme for calculating compensation that is based on earning capacity under sch I of the Act.



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

98. As discussed in [27], *People's Union for Democratic Rights case*¹⁷⁷ and *Bandhua Mukti Morcha*¹⁷⁸ are key judgments concerning the rights of workers in India. Both of these judgments sought to contextualise forced labour with regard to the working conditions of employees. Interpreting a right to work and live with dignity within the ambit of article 21 of the Constitution, these cases have concretised the need to hold non-compliance of labour laws as a contravention of the workers' fundamental rights. An example of [successful intervention](#) by a state government was illustrated in Rajasthan, where the state government set up a Mine Workers Welfare Board to work for the mine workers' welfare and safety, and to minimise occupational health hazards from silicosis.
99. More than half of India's workforce is in the informal and unorganised sector. In terms of employment share, the unorganised sector employs 83 per cent of the work force, with 17 per cent in the organised sector.¹⁷⁹ Over 92 per cent of informal workers in the economy are without any of the social security benefits of written contracts, paid leave, maternity benefits and other key welfare benefits. In an attempt to hold brands liable for abysmal working conditions in factories, the Asia Floor Wage Alliance and local labour unions have filed legal complaints against H&M to the labour department in Bengaluru, Karnataka. The complaint has sought to hold H&M jointly liable for labour abuses at a supplier factory since the brand had 'total economic control over the workers' subsistence, skill and continued employment.'¹⁸⁰ An investigation by the Worker Rights Consortium also found that the management of Shahi Exports Pvt Ltd, a factory that makes apparel for Columbia Sportswear and apparel for Benetton, H&M and Abercrombie & Fitch, had repressed and retaliated against workers' exercise of their fundamental rights, including using beatings, death threats, gender- and religion-based abuse and expulsion of workers.¹⁸¹ Moreover, with increasing instances of fires at factories, cases of holding factory owners or managers accountable for negligence have also increased.¹⁸²

¹⁷⁷ *People's Union for Democratic Rights* (n 17).

¹⁷⁸ *Bandhua Mukti Morcha* (n 23).

¹⁷⁹ SV Ramana Murthy, 'Measuring Informal Economy in India: The Indian Experience' (14 November 2019) IMF Seventh Statistical Forum. See also, The Wire Staff, '[Nearly 81% of the Employed in India Are in the Informal Sector: ILO](#)' (*The Wire*, 4 May 2018).

¹⁸⁰ Annie Kelly, '[Top Fashion Brands Face Legal Challenge Over Garment Workers' Rights in Asia](#)' (*The Guardian*, 9 July 2021).

¹⁸¹ Worker Rights Consortium, '[Workers Who Were Beaten Return to Columbia Supplier Factory in India, Now Violent Managers and Supervisors Must Go](#)' (28 June 2018).

¹⁸² PTI, '[Chemicals Factory Fire: Four Including Owner, Manager Arrested for Negligence](#)' (*Firstpost*, 13 March 2018); HT Correspondent, '[Fire at Panchkula Factory: Owner Booked for Negligence](#)' (*Hindustan Times*, 4 November 2021); Express News Service, '[A Day After Hapur Factory Fire, Police Register Case Against Factory Owner and Manager](#)' (*Indian Express*, 5 June 2022).

100. Instances of labour exploitation remain routine in India.¹⁸³ Despite the existence of an extensive regulatory and statutory regime, this includes workers being forced to stay overnight to complete orders, sleeping on factory floors, not being paid minimum wages,¹⁸⁴ not being allowed to take toilet breaks, not being allowed to drink water or have lunch on their shifts, increased workloads,¹⁸⁵ instances of sexual abuse,¹⁸⁶ and increasing instances of informal contract work, amongst other examples of exploitation. It is also important to note that pro-industry policies have further widened the scope for labour exploitation, especially with some suspension of the provisions of labour laws to help industries recover from losses in the wake of the Covid-19 lockdowns.¹⁸⁷



183 Siddharth Kara, 'Tainted Garments: The Exploitation of Women and Girls in India's Home-Based Garment Sector' (Blum Center for Developing Economies 2019); and Rajini Vaidyanathan, '[Indian Factory Workers Supplying Major Brands Allege Routine Exploitation](#)' (BBC News, 17 November 2020). See also, Gaurav Vivek Bhatnagar, '[In NCR Industrial Heartland, Workers Continue to Lose Limbs, Livelihood in Auto Sector Mishaps](#)' (The Wire, 29 January 2022).

184 Rebecca Ratcliffe, '[Major Western Brands pay Indian Garment Workers 11p an Hour](#)' (The Guardian, 1 February 2019); Worker Rights Consortium, '[Sweeping Minimum Wage Violations in Karnataka, India](#)' (14 October 2021).

185 Gethin Chamberlain, '[India's Clothing Workers: "They Slap Us and Call Us Dogs and Donkeys"](#)' (The Guardian, 25 November 2012).

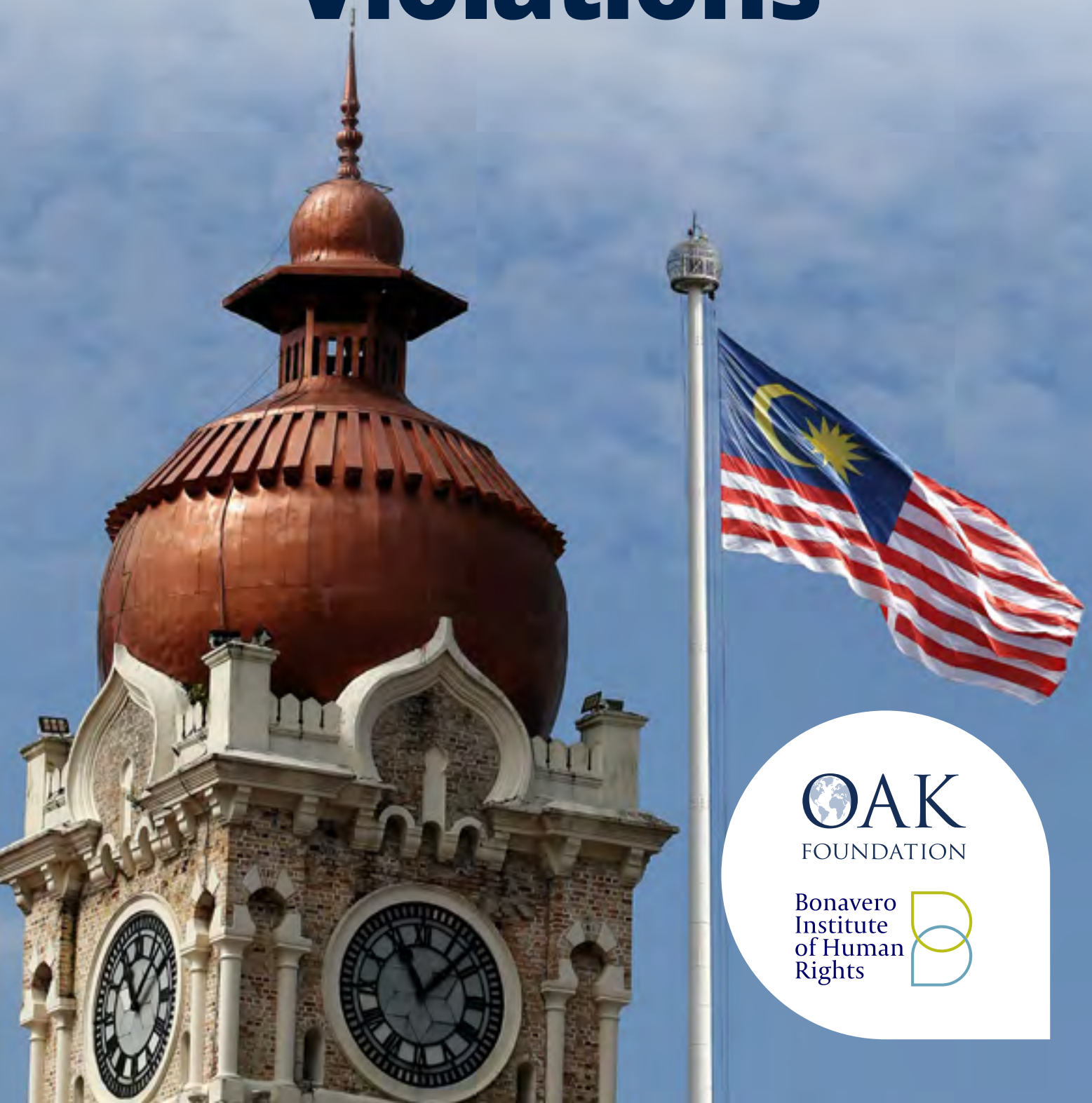
186 Annie Kelly, '[Female Workers at H&M Supplier in India Allege Widespread Sexual Violence](#)' (The Guardian, 9 March 2021).

187 Reuters, '[India's Workers Face "Race to the Bottom" of Labour Standards](#)' (Al Jazeera, 13 May 2020); Niharika Chopra, '[The Cost of Covid-10 Lockdown: Rise in Bonded Labour and Human Trafficking in India](#)' (Outlook, 13 April 2020).



A HANDBOOK FOR PRACTITIONERS | MALAYSIA

Civil Liability for Human Rights Violations



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FREQUENTLY USED ABBREVIATIONS

ALA	Atomic Energy Licensing Act 1984
ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
EA	Employment Act 1955
EIA	Environmental Impact Assessment
EQA	Environmental Quality Act 1974
GPA	Government Proceedings Act 1956
NFA	National Forestry Act 1984
OSHA	Occupational Safety and Health Act 1994
SRA	Specific Relief Act 1950
SUHAKAM	Malaysian National Human Rights Commission
TCPA	Town and Country Planning Act 1976
TOL	Temporary Operating Licence

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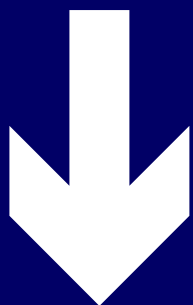
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MALAYSIA



Malaysian legal system is rooted in the common law tradition, and English legal principles are applicable in the main. Civil remedies can be sought either by way of judicial review or by way of civil claims (eg for torts). It is arguably open for victims to seek remedies for violation of a fundamental right under the Federal Constitution by making a claim for a constitutional tort, but this has not yet been determined decisively by the courts. The civil liability of a parent company for the wrongful acts or omissions of a subsidiary or independent contractor in a supply chain has not yet been considered. However, the approach laid down by the UK Supreme Court in recent high-profile cases could be potentially adopted by the Malaysian courts.



IN

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INDICES

39/167

Democracy Index
2021 Ranking

50/100

Freedom House
2022 Score

62/180

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. To the extent explained in this report, Malaysian law does allow victims of the three defined harms to obtain remedies. There is no single piece of legislation that comprehensively provides for such remedies, and recourse is to either the Malaysian common law, in the form of tortious claims, or relevant statutes, where this is provided for.
2. It would be useful to consider an overview of the Malaysian legal system. The system is rooted in the common law tradition in light of the historical relationship with the United Kingdom, which led to the establishment of a Westminster parliamentary system of government in which the written constitution of the country, the [Federal Constitution](#) (Constitution) is the supreme law of Malaysia.¹ As such, parliamentary sovereignty does not feature. As the supreme law,² all executive, legislative and judicial action is tested against it and, if found to have been in contravention, is set aside.
3. Pertinently, Part II of the Constitution guarantees ‘fundamental liberties’ of a nature similar to those forming the subject of the United Nations [Universal Declaration of Human Rights](#).³ Part II is thus a key point of reference in human rights litigation, particularly where this is against public bodies. This is explained in further detail in [10] below.
4. Prior to independence, English law was applicable by reason of the British colonial administration. Post-independence, this was formalised by the [Civil Law Act 1956](#), section 3(1)⁴ which made it a requirement for English law and the rules of equity to be applied as at the prescribed cut-off dates as adapted to local circumstances. The Malaysian common law thus complements written, or enacted, law.
5. The primary basis for claims of civil remedies is through tort law. It has been judicially recognised that Malaysian tort law is still very much based on English common law principles,⁵ and decisions of the highest court in England are highly persuasive.⁶

1 Federal Constitution of Malaysia, first enacted 1957.

2 *Lee Kwan Woh v PP* [2009] 5 CLJ 631 (FC), at 638. A version of this case report is not publicly available. The same applies to a number of other case reports cited in this document. You may be able to download them from a subscription-based legal research tool.

3 Malaysia is, however, a dualist system, and international human rights law (IHRL) only applies where brought into effect by legislation enacted for that purpose. Malaysia has only ratified the following IHRL conventions: [the Convention on the Rights of the Child](#); [the Convention on the Elimination of All Forms of Discrimination against Women](#); and the [Convention on the Rights of Persons with Disabilities](#).

4 [Civil Law Act 1956](#). This online version of the legislation has not been updated to reflect the most recent amendments and is included for general reference only. This is also the case for a number of other pieces of legislation cited in this report. Please access the most recent versions of all legislation from a subscription-based legal research tool.

5 Authors of this report frequently refer to the principles and case law of the English law. To access the project report on civil liability for human rights violations in England & Wales, please follow [this link](#).

6 *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 6 CLJ 346 (FC). A version of this case report is not publicly available. See (n 2).

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Generally

6. Subject to the requirements of law as to the mode of commencement and such statutory bars as may be applicable, where one of the three defined harms results in actionable wrongdoing, it is possible for an aggrieved person to seek civil remedies against the wrongdoer, be it a public body, corporation or individual. It is not a pre-requisite that these wrongdoings are recognised or categorised as 'human rights violations'.

Mode of commencement

7. Before turning to specific causes of action, it is necessary to briefly consider the mode of commencement to be followed.

In broad terms, civil remedies can be sought either by way of **judicial review**, which would entitle a claimant to seek damages in addition to declaratory or prerogative relief,⁷ or by way of **civil claims** (eg for torts).

Judicial review

8. **Judicial review** is appropriate where it is necessary to determine the validity of a decision, act or omission of a public body that is grounded in the exercise of public law powers. The definition of '**public body**' is not restricted to State entities. The presence of a public law element in the functions, activities, or powers of an entity, such as the national stock exchange⁸ or national electricity supplier,⁹ can render these entities amenable to judicial review.
9. Challenges must be made in the appropriate manner.¹⁰ Judicial review would have to be applied for, with leave, in the High Court.

⁷ [Courts of Judicature Act 1964](#), Schedule para 1; [Rules of Court 2012](#), Order 53. This online version is included for general reference only. See (n 4).

⁸ *OSK & Partners Sdn v Tengku Noone Aziz Tengku Mahmood & Anor* [1983] 1 CLJ 288 (FC). A version of this case report is not publicly available. See (n 2).

⁹ *Tenaga Nasional Berhad v Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 (CA). A version of this case report is not publicly available. See (n 2).

¹⁰ Leave to commence judicial review must be sought 'promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant' ([Rules of Court](#), Order 53 rule 3(6)). Extensions of time are notoriously difficult to obtain. The merits of the intended challenge are irrelevant to the determination of whether an extension is granted or not (*Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 (FC)). A version of this case report is not publicly available. See (n 2).

10. It is often the case that in determining the validity of such exercises of power, reference is made to relevant provisions of the Constitution, particularly those in Part II. It is also permissible for a claimant to seek to challenge the constitutionality of the statutory source of such powers, if this is appropriate. This is usually done where it is contended that the statutory provision concerned has rendered a fundamental liberty illusory.

Civil claims

11. Typically, civil claims addressing the three defined harms would be made in the first instance at the Sessions Court or the High Court, depending on the amount in dispute or the value of the subject-matter¹¹ (leaving aside for the moment the question of whether it is open to a claimant to seek remedies for infringements of the Constitution by persons other than public bodies).

Choosing the right mode

12. Care must be taken in determining the appropriate mode of commencement. The choice will depend on the nature of the wrongs complained of and intended remedies. Where a civil claim lies in private law or where private law issues predominate, civil claims are more appropriately made. The courts approach the question of mode of commencement strictly,¹² and are not generally sympathetic to collateral challenges of such exercises of power in civil claims.

Possible claims

Assault or unlawful arrest and detention

13. Article 5(1) of the Constitution guarantees that '(n)o person shall be deprived of his life or personal liberty save in accordance with law'. In the main, recognised legal bases for the arrest and detention of a person centre on the statutory powers of enforcement authorities which are nonetheless required to comply strictly with the requirements of law.
14. Civil remedies for these wrongs are made in **tortious claims for trespasses to a person**. These are approached in the same manner as under English law:
- The **tort of assault** or, where there is physical application of force, battery.
 - The **tort of false imprisonment**. If the victim suffered cruel, inhuman and/or degrading treatment or punishment, the claim would additionally be for assault and battery. The victim would also seek exemplary or aggravated damages. The validity of the detention is ultimately tested Article 5(1) of the Constitution.
 - Where the claim is against a public official, there may be a basis for seeking a civil remedy under the **tort of misfeasance in public office** provided that the elements of the cause of action can be made out. It is applicable in the same manner as under English law.¹³

¹¹ [Subordinate Courts Act 1948](#) s 65; [Courts of Judicature Act 1964](#) ss 23 and 24. These online versions of the legislation do not reflect the most recent amendments and are included for general reference only. See (n 4).

¹² *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 (FC); *YKK (Malaysia) Sdn Bhd v Pengarah Tanah dan Galian Johor* [2021] 8 CLJ 179 (FC). A version of this case report is not publicly available. See (n 2).

¹³ *Tony Pua Kiam Wee v Government of Malaysia & Another Appeal* [2020] 1 CLJ 337 (FC), at 364-368.

- There is potentially a legal avenue for compensation as a consequence of an **infringement of Article 5(1) of the Constitution** which prohibits the deprivation of liberty save 'in accordance with law'. This is explored in more detail in [22]-[23] below.

Environmental harm

- Any discussion on potential claims for civil remedies arising from environmental harm must consider the applicable regulatory frameworks which may be useful in framing potential claims, as well as for providing guidance in defining causal connections or duties of care, or otherwise. The key legislation includes:
 - [The Environmental Quality Act 1974](#)¹⁴ (EQA) aimed at the prevention, abatement, and control of pollution, and enhancement of the environment;¹⁵
 - [The Town and Country Planning Act 1976](#) (TCPA)¹⁶ and [the Local Government Act 1976](#), both of which relate to, amongst other things, the control and regulation of town and country planning and building permission;¹⁷
 - [The National Forestry Act 1984](#)¹⁸ (NFA) which relates to the administration, management and conservation of forests and forestry development;¹⁹ and
 - [The Atomic Energy Licensing Act 1984](#) (ALA) which relates to the regulation and control of atomic energy, the establishment of standards on liability for nuclear damage and for matters connected therewith.²⁰
- Where a decision, act or omission of a public body is the cause of the injury complained of, it may be appropriate to commence judicial review. This would include, for instance, the granting of a development order,²¹ the approval of an Environmental Impact Assessment (EIA)²² or the granting of a temporary licence to construct a rare earth plant.²³
 - It is necessary, however, for the claimant to have legal standing by demonstrating that they were '*adversely affected*'.²⁴

14 This online version is included for general reference only. See (n 4).

15 See eg [EQA](#) ss 22-27, 29 and 29A.

16 This online version is included for general reference only. See (n 4).

17 See eg TCPA ss 18-20.

18 This online version is included for general reference only. See (n 4).

19 See eg [NEA](#) ss 32, 40, 47 and 50.

20 See eg [ALA](#) ss 26-27 and 30.

21 *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1 (CA). A version of this case report is not publicly available. See (n 2).

22 *Wong Kin Hoong* (n 10).

23 *Zakaria Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors* [2012] 6 CLJ 681 (HC). A version of this case report is not publicly available. See (n 2).

24 [Rules of Court 2012](#), Order 53 rule 2(4); *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi* [2014] 2 CLJ 525 (FC), at 549. It is also worth noting that the issue of legal standing has often been a barrier to public interest litigation and remains an issue for strategic consideration. A version of this case report is not publicly available. See (n 2).

SPOTLIGHT: CASE STUDY

In the case of *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors*,²⁵ for example, the appellants were the management corporations of several apartments and individual property owners or residents in Taman Tun Dr Ismail. Their interests and complaints concerned a development order granted by the first respondent local authority which involved converting a public park into nine apartment blocks. The respondents sought to argue that the appellants had no legal standing to bring the action. The Court of Appeal held that the appellants did have the requisite standing to initiate judicial review proceedings as they had amply shown that they were adversely affected by the impugned decision in that they were residents, owners and/or occupiers of the properties located within the immediate vicinity of the proposed development, and were users of the park, and the effects of the proposed development were unquestionably irreversible, permanent and far-reaching.

- Leave to commence judicial review must be sought 'promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant'.²⁶

SPOTLIGHT: CASE STUDY

The case of *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor*²⁷ is relevant. Here, the second respondent had been granted mining rights under a lease and was in the process of building a Carbon-In-Leach plant near Kampung Bukit Koman, Raub (Bukit Koman) to process old goldmine tailings using cyanide. The first respondent, the appointed regulatory body under the EQA, had approved the EIA report on 13 January 1997. The applicants were residents in the area who, on 21 March 2008, sought permission to commence judicial review to challenge the decision to approve the construction of the plant and a further decision not to direct the submission of a further EIA report to address concerns raised by the applicants concerning the possible contamination of water sources. Permission was refused on the basis that there was no valid basis to grant the applicants an extension of time. The Federal Court ultimately concluded that the requirement that leave be sought promptly, and in any event within three months from the date from which the decision was communicated, was to be strictly complied with as it related to the jurisdiction of the High Court to grant judicial review, and that extensions could only be granted where the reasons for the delay were justifiable, without regard to the nature of the intended challenge.

²⁵ *Perbadanan Pengurusan Trellises* (n 21).

²⁶ *Rules of Court 2012*, Order 53 rule 3(6).

²⁷ *Wong Kin Hoong* (n 10).

17. Where the harm complained of is caused by the acts or omission of persons, and there is no need for the determination of the validity of any exercise of a public law power, it would be appropriate for aggrieved persons to make a tortious claim for the following:

- **The tort of nuisance**, in the same way as these torts would be actionable under English law, namely:
 - i. In **private nuisance**, for wrongful interference with a person's use or enjoyment of land or of some right connected with land. It is necessary for the claimant to establish that they have an interest in the land and this is typically understood as either ownership or a right to occupation;
 - ii. In **public nuisance**, for an act or omission which interferes with or disturbs or annoys a person in the exercise or enjoyment of their right as a member of the public, subject to proof of special damage. In the absence of special damage, public nuisance is still actionable by the Attorney General, or by two or more persons who have obtained the consent of the Attorney General;²⁸ and
 - iii. Strict liability under the rule in **Rylands v Fletcher**²⁹ in the manner that the rule is applied under English law.
- The tort of **negligence**. Negligence is actionable in the same manner as under English law, including the considerations on categories of duty of care and causation; or
- The tort of **breach of statutory duties**. This is actionable in the same manner as under English law and provides a civil remedy to a claimant as a result of a breach of a public statute. A claim for breach of statutory duties can be brought against any wrongdoer, including a public body, if that person was under a statutory duty imposed for the benefit or protection of a particular class of individuals, and has injured a person within that class.

SPOTLIGHT: CASE STUDY

In the case of *Puncak Niaga (M) Sdn Bhd & Anor v Syarikat Sidhu Beradek Sdn Bhd & Anor*,³⁰ the claimants were in the business of operating water treatment plants and distributing treated water to its consumers. They sought damages from the defendants for losses suffered as a result of contamination of a water catchment area caused by spillage of crude palm oil attributable to the defendants. The High Court concluded that there was a general duty, imposed by the EQA section 25, to not pollute the river and water catchment area, and any aggrieved person was entitled to make a civil claim.

²⁸ [Government Proceedings Act 1956 \(GPA\)](#) s 8(1). This online version is included for general reference only. See (n 4).

²⁹ (1985) H & C 774.

³⁰ [2014] 6 CLJ 382 (HC). A version of this case report is not publicly available. See (n 2).

Harmful or unfair labour conditions

18. Articles 6(1) and (2) of the Constitution respectively prohibit slavery and all forms of forced labour.
19. The key legislation concerning labour conditions includes:
 - The [Employment Act 1955](#) (EA) which provides the minimum terms and conditions of service such as payment of wages³¹ rest days, work on rest days, hours of work, entitlement to holidays, annual leave and sick leave;³²
 - [The Occupational Safety and Health Act 1994](#)³³ (OSHA) which requires employers to take specified measures to promote the safety, health and welfare of persons at work, and to mitigate against the possibility of accidents, dangerous occurrences and occupational hazards;³⁴
 - The [Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007](#) (ATIPSOM) which criminalises acquiring or maintaining the labour or service of a person through coercion, and the exploitation of such person through forced labour or services, slavery or practices similar to slavery, and servitude;³⁵ and
 - The [Penal Code 1936](#) (Revised 1997), which criminalises slavery³⁶ and forced labour.³⁷
20. Subject to the requirements indicated in [16] above, where a decision, act or omission of a public body is the cause of the injury complained of, it may be appropriate to commence judicial review.
21. Where the harm complained of is caused by the acts or omission of persons, and there is no need for the determination of the validity of any exercise of a public law power, it would be appropriate for aggrieved persons to make a tortious claim for the following:
 - The tort of negligence; or
 - The tort of breach of statutory duties.

Constitutional infringement

22. It is arguably open for victims to seek civil remedies for violation of a fundamental right under the Constitution by making a claim for a **'constitutional tort'**, **'constitutional monetary compensation'**, or **'breach of a constitutional right'**.³⁸ However, this has not as yet been determined decisively.

³¹ EA, Part III.

³² *ibid* ss 59-60F.

³³ This online version is included for general reference only. See (n 4).

³⁴ See eg [OSHA](#) Part IV and its subsidiary legislation.

³⁵ [ATIPSOM](#) ss 12-15A, 18-24, 26A-26K.

³⁶ Penal Code 1936 ss 370 and 371.

³⁷ *ibid* s 374.

³⁸ [Koperal Zainal Mohd Ali & Ors v Selvi Narayan & Anor](#) [2021] 3 MLJ 365 (FC), the dissenting judgment of Nallini Pathmanathan FCJ, at 395; [Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor](#) [2021] 2 CLJ 579 (FC), the dissenting judgment of Tengku Maimun CJ, at 754; and [Ketua Polis Negara & Ors v Nurasmira Maulat Jaffar & Ors and Other Appeals](#) [2018] 1 CLJ 585 (FC), the dissenting judgment of Zainun Ali FCJ, at 628-631.

23. The courts have yet to fully endorse infringements of the Constitution as giving rise to a distinct cause of action. The possibility has been considered in a number of minority appellate decisions, mostly in connection with claims for deaths in custody.³⁹

SPOTLIGHT: CASE STUDY

The example of *Koperal Zainal Mohd Ali & Ors v Selvi Narayan & Anor*,⁴⁰ concerns the case of Chandran a/l Perumal, who died while in police custody at a detention facility. In his verdict, the coroner found that the police had acted inhumanely towards Chandran, by deliberately depriving essential medication, amongst others. The High Court held that Chandran's constitutional right to life under the Constitution Article 5(1) had been infringed. It also found liability against the appellants in the tort of negligence, entitling the estate to damages, including exemplary damages in the sum of RM 200,000 (USD 45,516), for the wrongful death. On appeal in the Federal Court, however, the majority held that the wording of Civil Law Act section 8(2) precluded an award of exemplary damages in estate claims, including claims concerning the constitutional right to life. The High Court's award of exemplary damages was thus substituted with an award for aggravated damages. In a dissenting judgment, Nallini Pathmanathan FCJ found that exemplary damages were available to Chandran for the infringement of his constitutional right pursuant to the remedies available under [Courts of Judicature Act](#) 1964, Schedule para 25. As a result, the court may mould the relief required to compel observance of the constitutional right, particularly in circumstances of oppressive, arbitrary or unconstitutional acts by servants of the State.

Q2

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

Judicial review

24. The primary grounds on which **judicial review** can be sought are the same as that under English law:⁴¹
- Illegality. Under Malaysian law, this would include a challenge on the ground that a provision of the Constitution had been infringed;
 - Irrationality or *Wednesbury*⁴² unreasonableness; and
 - Procedural impropriety.

³⁹ *ibid.*

⁴⁰ *Koperal Zainal Mohd Ali* (n 38).

⁴¹ *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374.

⁴² *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680.

Civil claims

Civil claims in torts of trespass to person, nuisance, negligence and breach of statutory duties

25. As noted above in [5], English legal principles are applicable in the main.

26. Furthermore, where **negligence** is concerned:

- The categories of a duty of care are not closed, although the courts have been slow to recognise new ones, particularly where claims for pure economic loss are concerned.
- Causation is established in the same manner as under English law. This applies equally where claims for pure economic loss are concerned.⁴³
- The law remains under-developed where claims for environmental harm are concerned.
- As for harmful or unfair labour conditions:
 - i. Malaysian law recognises a common law duty on employers to provide a reasonably safe system of work and to take reasonable care of their employees.

SPOTLIGHT: CASE STUDY

In the case of *Gelau Anak Paeng v Lim Phek San & Ors*,⁴⁴ the plaintiff, an employee of the defendants, was instructed to clean the rollers on the moving belts which conveyed clay that was later made into bricks. The plaintiff was found with an injured hand caught in the roller, and he contended that the defendants had not provided safety precautions to protect him from injury. The High Court held that there was a common law duty on employers to take reasonable precautions to protect their workers against danger. The employer is not obliged to insure their workers and protect them against all risks, however, they are obliged to provide a reasonably safe system of work and to take reasonable care of their employees.

- ii. Malaysia has ratified the Protocol of 2014 to the Forced Labour Convention of the International Labour Organisation (ILO), known as [Protocol 29](#). The provisions of Protocol 29 are consistent with the prohibition against slavery and forced labour under Articles 6(1) and (2) of the Constitution and the provisions of the Penal Code and the ATIPSOM referred to in paragraph [19] above. Malaysia has also endorsed the [UN Guiding Principles on Business and Human Rights](#), the [UN Global Compact](#), and the [Roundtable of Sustainable Palm Oil Standards](#).

⁴³ *The Co-operative Central Bank Ltd v KGV & Associates Sdn Bhd* [2008] 2 CLJ 545 (FC). A version of this case report is not publicly available. See (n 2).

⁴⁴ [1986] 1 MLJ 271 (HC). A version of this case report is not publicly available. See (n 2).

iii. In determining the standard of care required of a given situation, the Malaysian courts would be open to referring to international standards that the Malaysian government has endorsed, including those identified above. This is even more so where the employer concerned has represented itself to have adopted or endorsed those frameworks. The standard of care expected of employers would evolve accordingly.

27. Where claims for **breach of statutory duties** are concerned, it is principally relevant to determine whether Parliament had intended that a duty was enforceable.
- A pertinent question would be whether the statute concerned intends to give a right of action in tort. OSHA section 59, for example, prohibits a separate right of action in any civil proceedings.
 - The courts will scrutinise the intention of Parliament in the enactment of the statute in order to ascertain if a duty of care arises on a case-by-case basis.

Civil claims against the Federal/State Governments and public bodies

28. Common law tort claims can be made against the Federal and State Governments for vicarious liability. However, regard must be had to the [Government Proceedings Act 1956](#) (Revised 1988),⁴⁵ in particular, sections 5 and 6(1). Section 5 permits tortious claims against governments for the wrongful acts of public officers. It is however to be read subject to section 6(1), which has been interpreted as obliging a claimant to join the primary tortfeasor as a defendant.⁴⁶
29. This interpretation has created difficulties more so for the requirement under the [Public Authorities Protection Act 1948](#) section 2(1)(a) which requires a claim to be commenced 'within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof' failing which it is time-barred.

Q3

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

Generally

30. Subject to the further discussion that follows, Malaysian law recognises **joint liability, vicarious liability**,⁴⁷ **joint tortfeasorship** and **lawful and unlawful means conspiracy** in the same manner as English law. To the extent that the complicit or accessory conduct complained of meets the requirements of these bases of claim, they are actionable.

⁴⁵ This online version is included for general reference only. See (n 4).

⁴⁶ [Kerajaan Malaysia & Ors v Lay Kee Tee & Ors](#) [2009] 1 MLJ 1 (FC), at 14.

⁴⁷ [Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby \(the administrator of the estate and dependent of Kugan a/l Ananthan, deceased\) and Another Appeal](#) [2015] 1 MLJ 353 (CA). A version of this case report is not publicly available. See (n 2).

SPOTLIGHT: CASE STUDY

An example to consider is the case of *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby* (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal.⁴⁸ This case concerned Kugan Ananthan, whose death was initially misreported by the police as being that he had collapsed after drinking water. No reference was made to the external signs of beatings on his body, which were only reported after his family procured a second autopsy. Although the police officer's acts of assault were unauthorised by the third defendant (who was the Officer in Charge of the Police District), the Court held that the unauthorised acts were nonetheless carried out during the ordinary course of his duties. As a result, the police officer's unauthorised acts had become so connected with his own authorised acts that the Court found that the Officer in Charge must be held vicariously liable for the unlawful actions of the lower-ranking police officer.

31. Rights of action against, and contribution against joint and several tortfeasors are preserved by the [Civil Law Act 1956](#) section 10.⁴⁹

Joint liability

Not acting in concert

32. Where several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage against independent tortfeasors.⁵⁰

Acting in furtherance of a common design

33. The joint liability of a party who had assisted the principal tortfeasor in the commission of a tortious act, and the decision of the UK Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK and others*⁵¹ (*Fish & Fish*), have yet to be considered by the Malaysian courts.
34. It appears though, that the principles stated in *Fish & Fish*⁵² would be accepted by a Malaysian court. The issue of joint liability pursuant to a common design was considered in a decision of the High Court of Singapore of 1972, *Wah Tat Bank Ltd & Ors v Chan Cheng Kum & Ors*.⁵³
35. Furthermore, the decisions in *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department*,⁵⁴ *The Kursk*,⁵⁵ and *CBS Songs Ltd v Amstrad Consumer Electronics Plc*,⁵⁶ in which the UK Supreme Court relied on in *Fish & Fish*, have been cited with approval by the High Court in *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)*,⁵⁷ a decision which concerned joint liability.

⁴⁸ *ibid.*

⁴⁹ See (n 4).

⁵⁰ *Malaysia National Insurance Sdn Bhd v Lim Tiok* [1997] 2 CLJ 351 (SC) (*Lim Tiok*), per Edgar Joseph Jr FCJ, at 375; *Tetuan Khana & Co v Saling Lau Bee Chiang & Ors and Other Appeals; Malayan Banking Bhd (Intervener)* [2019] 3 CLJ 56 (CA) per Idrus Harun JCA (as he then was) at [167], applying *Lim Tiok*. Versions of these case reports are not publicly available. See (n 2).

⁵¹ [2015] AC 1229.

⁵² As stated by Lord Toulson, at [21]-[22] and by Lord Sumption, at [37]-[39].

⁵³ [1972] 2 MLJ 81. A version of this case report is not publicly available. See (n 2).

⁵⁴ [1998] 1 Lloyd's Rep 19.

⁵⁵ [1924] P 155.

⁵⁶ [1988] AC 1013.

⁵⁷ [2012] 9 MLJ 464 (HC). A version of this case report is not publicly available. See (n 2).

Q4

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

As a general rule, the Malaysian courts apply the principle of separate legal entity to companies. This would apply equally to companies within a group of companies.⁵⁸

Piercing the corporate veil

36. The general rule is however subject to certain exceptions. The Malaysian courts have in some instances applied the UK Supreme Court's case *Prest v Petrodel Resources Ltd*⁵⁹ in permitting the **corporate veil to be lifted or pierced**. This is more usually done where actual or equitable fraud is established, or where a company is interposed so that its separate legal personality will defeat the enforcement of a pre-existing legal right against its controller.⁶⁰
37. More specifically, where labour claims are concerned, the courts have applied the principle of 'common employer' and there being 'an essential unity of group enterprise', though is still understood as an instance of the corporate veil being pierced.⁶¹

Parent company liability

38. The question of whether this approach would be applied in claims made against parent companies for the wrongdoings of subsidiaries or where there is supply chain supervision has not yet been considered.⁶²
39. Having said that, where parent company liability is concerned, there does not appear to be good reason for the Malaysian courts not to adopt the approach laid down by the UK Supreme Court in *Vedanta Resources Plc v Lungowe*⁶³ and *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another*,⁶⁴ especially where the duty of care is concerned. The issue of parent company liability is not a novel category, as the Malaysian courts have acknowledged the possibility that a parent company might owe a duty of care directly to the employees of those subsidiaries, for their health and safety.⁶⁵

58 *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557 (FC), at [42]; *Tengku Dato Ibrahim Petra Tengku Indra Petra v Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641 (FC) at [170].

59 [2013] 2 AC 415.

60 *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Others* [2021] 3 MLJ 622 (FC).

61 *Ahmad Zahri Mirza Abdul Hamid* (n 58), at [42] to [45].

62 *Ong Leong Chiou* (n 60). The Federal Court declined to answer the question of the applicability of the piercing of the corporate veil doctrine where joint tortfeasor liability was sought to be established, because the question conflated and misapprehended the facts and the law. However, the Federal Court affirmed the judgment of the High Court which allowed a commercial claim on the basis of the principle of 'group enterprise'.

63 *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

64 *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

65 *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58 (FC), citing *Chandler v Cape plc* [2012] 3 All ER 640 and *Thompson v Renwick Group plc* [2014] EWCA Civ 635.

SPOTLIGHT: CASE STUDY

In *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd*,⁶⁶ the appellant was an expatriate consultant for AIMS Data Centre 2 Sdn Bhd (ADC). Upon renewal of the appellant's contract with the respondent, it sought to remove the appellant's entitlement to a performance bonus scheme, which led to an early release from his contract. He challenged this for being a dismissal without just cause or excuse. The Federal Court was of the view that ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise' that permitted the corporate veil to be pierced in order to establish or identify the true labour relationship between parties. Hence, the appellant's employment with both defendants was considered to be continuous.

40. Parent companies can thus be made jointly liable with a subsidiary in the manner described above. The key consideration is whether the parent company had acted in concert with the primary tortfeasor towards a common end resulting in the same damage in the same cause of action.⁶⁷ In one instance, a parent company was found to be jointly liable with its subsidiary for damage caused by discharge of industrial effluents by the subsidiary. The parent company was found to have been directly involved in the operations of the subsidiary.

SPOTLIGHT: CASE STUDY

The example of *Petronas Gas Bhd v DWZ Industries (Johor) Sdn Bhd & Anor*⁶⁸ is relevant here. The claimant is a publicly listed company with the principal business of separating natural gas into components and transporting, distributing such components and sale of industrial utilities. It is the owner of land that was expressly used for gas and petroleum substance gas lines and related facilities including a pipeline network constructed below ground. The first defendant occupied and ran a factory on land belonging to its parent company. That factory was situated adjacent to the claimant's land. The High Court concluded that the parent company was jointly liable as it was the owner of the land and directly involved in the operations of its subsidiary's factory (primarily through the involvement of two common directors in the day-to-day operations of the factory, which the court concluded was sufficient basis to impute knowledge).

⁶⁶ *ibid.*

⁶⁷ *Wah Tat Bank Ltd* (n 53); *Sime Darby Bhd* (n 57). Versions of these case reports are not publicly available. See (n 2).

⁶⁸ [2021] 7 MLJ 283 (HC). A version of this case report is not publicly available. See (n 2).

Liability for wrongs of independent contractors

41. Although generally, an employer is not liable for the negligence of an independent contractor, Malaysian law recognises that in some instances, a duty of care is not delegable.⁶⁹ The approach to determining whether that duty is delegable is the same as under English law. It bears mentioning that the Malaysian courts have accepted that a duty of care cannot be delegated in cases of strict liability and where a statute imposes that duty on the employer.⁷⁰
42. Separately, it stands to reason that employers could be made liable if they conduct themselves in a manner that attracts joint liability in the manner described in [32] to [35] above.

Q5

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

Judicial review

43. The nature of the possible reliefs is indicated by [Courts of Judicature Act 1964](#), Schedule para 1⁷¹ and the [Rules of Court 2012](#), Order 53 rule 2. In addressing the three defined harms, a claimant might seek a quashing order, mandamus, declaratory relief, monetary compensation and an injunction.
44. The courts have a wide discretion to mould the appropriate relief in judicial review.⁷²

Civil claims

45. Claimants would be entitled to remedies akin to those under English law. This includes:
- **Damages** (general and special) and, where appropriate, aggravated or exemplary damages (this is more the case in claims in respect of the first defined harm);⁷³ and
 - **Preventive or injunctive relief.**⁷⁴ Such relief is not available against the Federal and State Governments.⁷⁵

69 *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia & Anor* [2015] 7 CLJ 849 (CA). A version of this case report is not publicly available. See (n 2).

70 *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 3 CLJ 205 (SC). A version of this case report is not publicly available. See (n 2).

71 See (n 4).

72 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Mohd Sobri Che Hassan* [2020] 1 CLJ 595 (FC).

73 Due to statutory restrictions, a death in police custody cannot be the subject of a claim for exemplary damages but can be compensated with aggravated damages. See *Koperal Zainal Mohd Ali* (n 38).

74 Governed by [the Specific Relief Act 1950 \(SRA\)](#) Part III and [Rules of Court 2012](#), Order 29.

75 [GPA](#) s 29(a) and [SRA](#) s 54(d). This has been applied equally to interim injunctions. *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676 (CA). A version of this case report is not publicly available. See (n 2).

Q6**What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?****The preferred choice**

46. The only means of redress available to victims of human rights violations lies in civil claims and, where appropriate, judicial review. With the exception of ATIPSOM identified in [19] above with respect to human trafficking, criminal proceedings do not result in any form of compensation to victims.
47. Although Malaysia has established a National Human Rights Institute in accordance with the [UN Paris Principles Relating to the Status of National Institutions](#) – [the Malaysian National Human Rights Commission \(SUHAKAM\)](#)⁷⁶ – its role is limited to capacity building and the conduct of inquiries.⁷⁷ Where human rights infringements are disclosed by such inquiries, SUHAKAM is merely empowered to refer the matter to the relevant authority with recommendations. In practice, this results in little or no action, a state of affairs made evident by the failure on the part of the Government or the Royal Malaysian Police to take any steps to address damning findings by SUHAKAM of the involvement of the police in the disappearances of two religious freedom activists.⁷⁸ Their families have had to commence civil claims.
48. Although civil claims can, theoretically, be costly, this has been ameliorated by lawyers prepared to work on a ‘no win, no fee’ basis,⁷⁹ or even on a pro-bono basis, at times with the support of NGOs. Additionally, the Malaysian Bar has its own legal aid scheme.

Q7**Can civil claims be brought against a foreign defendant and if so, what are the rules for that?**

49. Civil claims can be brought against a foreign defendant, without leave of court, if the foreign defendant has a place of business in Malaysia.⁸⁰
50. However, where the foreign defendant does not have a presence in Malaysia, leave must first be sought by the claimant from the High Court to serve a notice of a writ on the foreign defendant who is out of jurisdiction.⁸¹ In granting leave, a Malaysian court will assume jurisdiction.
51. In order for the High Court to grant leave, the claimant must demonstrate that it fulfils one or more of the jurisdictional gateways set out under [Rules of Court 2012](#), Order 11 rule 1. With respect to the three defined harms, the relevant gateways would be:

⁷⁶ Established by the [Human Rights Commission of Malaysia Act 1999](#) (SUHAKAM Act).

⁷⁷ SUHAKAM Act 1999 Part III.

⁷⁸ SUHAKAM's final decision on the Public Inquiry into the Disappearance of Pastor Raymond Koh and Amri Che Mat (2019) is available at this [link](#).

⁷⁹ Note however, in terms of the [Legal Profession Act 1976](#) s 112, Malaysian lawyers are not permitted to take on work on a contingency basis.

⁸⁰ Courts of Judicature Act 1964 s 23(1).

⁸¹ [Rules of Court 2012](#), Order 11 rule 1.

- where the civil claim is founded on a tort committed within the jurisdiction;⁸² or
- where the civil claim is properly brought against an ‘anchor defendant’ within the jurisdiction and the foreign defendant is a ‘necessary or proper party’ to that claim.⁸³

52. Additionally, a claimant must further demonstrate that:

- It has a good cause of action, and shows in what place or country the defendant is, or probably may be found.⁸⁴ A court is entitled to refuse leave if the case is not a proper one for service out of the jurisdiction;⁸⁵ and
- The Malaysian courts are the proper forum (*forum conveniens*). The applicable legal principles where *forum conveniens* is concerned are the same as those under English law.

53. The legal principles applicable to the granting of leave to serve out of jurisdiction, including those relevant to the establishing of jurisdictional gateways, mirror those under English law.

54. Once served, a defendant may dispute jurisdiction and seek the appropriate orders (Order 12 rule 10(1)). Alternatively, it is open to such a defendant to apply to stay proceeding on the basis that the court should not assume jurisdiction over the action by reason of Malaysia not being the proper forum for the dispute.⁸⁶

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

55. Further research on human rights violations, though not necessarily focused on civil liability, can be undertaken with the relevant authorities and NGOs. International NGOs which cover Malaysia include [Amnesty International](#), [Human Rights Watch](#), [Greenpeace](#) and [WWF](#). In addition, some local bodies are listed below:

- [Human Rights Commission of Malaysia \(SUHAKAM\)](#)
- Committees of the Malaysian Bar ([Human Rights](#); [Environment and Climate Change](#); [Industrial and Employment Law](#); [Migrants, Refugees, and Immigration Affairs](#))
- [Suara Rakyat Malaysia \(SUARAM\)](#)
- [Lawyers for Liberty](#)
- [Center to Combat Corruption and Cronyism \(C4\)](#)
- [KOMAS](#)
- [Malaysian Nature Society](#)
- [Malaysian Trades Union Congress Tenaganita](#)
- [Joint Action Group for Gender Equality](#)
- [Women’s Aid Organisation](#)

⁸² *ibid* Order 11 rule 1(G).

⁸³ *ibid* Order 11 rule 1(J).

⁸⁴ *ibid* Order 11 rule 4(1).

⁸⁵ *ibid* Order 11 rule 4(2).

⁸⁶ *ibid* Order 12 rule 10(2).

56. The following literature regarding the human rights in Malaysia may be of assistance:

- [2021 Country Report on Human Rights Practices](#): Malaysia, issued by the US Department of State (Bureau of Democracy, Human Rights and Labor);
- [Constitutional Law and Human Rights in Malaysia](#), edited by Khairil Azmin Mokhtar;
- [Human Rights Law: International, Malaysian and Islamic Perspectives 2012](#), by Abdul Ghafur Hamid;
- [Human Rights Reports](#), issued by SUARAM;
- [Amnesty International Report 2021/2022](#), by Amnesty International;
- [Human Rights Watch World Report 2021, Malaysia](#), by Human Rights Watch.

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CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

Claims against the police

57. Civil claims could be brought against the police, and the Federal Government for vicarious liability.⁸⁷ The key causes of action relevant to Case Scenario 1 would be for **assault, battery, unlawful arrest or false imprisonment and breaches of statutory duty**,⁸⁸ the elements of which have been explained in [14] above. Compensation in this respect would generally be for damages, be it general, specific, aggravated or exemplary.

58. Where claims for **false imprisonment** are concerned, it should additionally be noted that:⁸⁹

- The Criminal Procedure Code section 28 states that no police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable.
- Article 5(4) of the Constitution requires an arrested person to be brought without unreasonable delay and, in any event, within 24 hours before a magistrate. A magistrate has the authority under Criminal Procedure Code section 117 to authorise further detention to facilitate investigations.
- A proviso to article 5(4) of the Constitution provides that those non-citizens arrested under the law relating to immigration need to be brought before a magistrate within 14 days.

59. The making of a remand order by a magistrate is a **material consideration**. It would have the effect of rendering the detention lawful for the period provided for by the order.

- This would however leave it open to a claimant to make a claim in connection with any detention prior to the making of the remand order.

⁸⁷ It ought to be borne in mind that in any claim in tort against the Government, the government officer who was responsible for the alleged tortious act must be made a party, and his liability must be established before the Government could be made vicariously liable as principal pursuant to GPA ss 5 and 6 (*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663 (FC), at [16]).

⁸⁸ The principal statutes where the police are concerned are the [Criminal Procedure Code](#) and the Police Act 1967.

⁸⁹ *In Re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471 (HC), at 478. A version of this case report is not publicly available. See (n 2).

- However, a remand order would not be treated as a bar if the claimant was assaulted or tortured during that period. In such cases, a court would consider the remand order as having been abused and would permit a collateral attack on it.⁹⁰

Claims against Security Co personnel

60. A civil claim could be made against Security Co and its personnel if the basis for their **joint liability** could be established. The discussion in [32]-[35] above concerning joint liability refers, in particular, on the availability of recourse for joint liability on the basis of a common design.

Q2

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

61. Where the police personnel had acted wrongfully, it would be open to claimants to lodge complaints of misconduct with the Enforcement Agency Integrity Commission, which is regulated by the [Enforcement Agency Integrity Commission Act 2009](#).
62. If the conduct complained of involves criminal offences, a police report can be lodged against the perpetrators, following which the police may commence investigations, and the matter may be referred to the Public Prosecutor to decide whether to commence criminal prosecution.⁹¹

Q3

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

63. There are a number of decisions of the Malaysian courts that are relevant to Case Scenario 1.

On wrongful arrest and false imprisonment:

- In *Dr Sanusi Bin Osman & Ors v Datuk Ismail Bin Che' Ros*,⁹² the police had arrested and detained the plaintiffs who were the organisers and participants of the Asia Pacific Conference on East Timor (APCET II). The arrests were made after a mob of unruly demonstrators from an organisation called Barisan Bertindak Rakyat Malaysia had barged into the conference and failed to disperse. The High Court held that the arrests and detentions by the police were unlawful and awarded general damages. This was ultimately upheld by the Court of Appeal.⁹³

⁹⁰ [Hassan Marsom & Ors v Mohd Hady Ya'akop \[2018\] 7 CLJ 403 \(EC\)](#), at [103] and [108]-[121].

⁹¹ See for instance Penal Code s 166 which provides for the offence of a '[p]ublic servant disobeying a direction of the law, with intent to cause injury to any person'.

⁹² [2011] 3 MLJ 274. A version of this case report is not publicly available. See (n 2).

⁹³ See news report at this [link](#).

- In *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors*,⁹⁴ the appellant, a member of parliament, was arrested outside her residence by a group of police officers on the instructions of their superior officer. The Court of Appeal concluded that the respondents failed to establish that the arresting officer had reasonable and substantive grounds to support the arrest of the appellant and held that the arrest and the subsequent detention was unlawful. The appellant was further awarded exemplary and aggravated damages, alongside general damages.
- In *Fadiah Nadwa Fikri & Ors v Konstabel Fauziah Mustafa & Ors*,⁹⁵ the police arrested participants in a candlelight vigil outside a police station. The plaintiffs, who were lawyers from the Legal Aid Centre, had arrived at the police station to render legal assistance to the detainees but were themselves arrested. They brought a claim for false imprisonment against the police officers and succeeded. The High Court awarded general damages for breach of constitutional rights, false imprisonment and detention, as well as aggravated and exemplary damages for the appalling and oppressive conduct of the defendants.

On assault and torture by police personnel during custody:

- *Hassan Bin Marsom & Ors v Mohd Hady Bin Ya'akop*⁹⁶ concerned allegations of false imprisonment and custodial assault against the respondent who was suspected to be involved in a crime (but eventually found to not be involved). The Federal Court held that where assaults were committed and injuries were inflicted under the pretext of using remand orders, this amounted to misuse and abuse of power and thus making the detention to be unlawful.
- *Ketua Polis Negara & Ors v Nurasmira Maulat Bt Jaffar & Ors*,⁹⁷ concerned three different appeals brought by dependents of three deceased individuals whose deaths were caused by the police (one pertained to death during crossfire and two pertained to death in custody). The questions of law that were before the Federal Court concerned the award of damages. The Federal Court ultimately held that exemplary damages were not available for custodial deaths under the Civil Law Act 1956 sections 798 and 899, even where the death of the deceased was the result of a breach of the constitutional right to life. However, it is worth noting that in the dissenting judgment, Zainun Ali FCJ held that the State or an instrument of the State which has committed the wrong has the effect of depriving the victim of his life in a manner not in accordance with the law and that the victim should be entitled to an award of exemplary damages.
- *Kerajaan Malaysia v Ambiga Sreenevasan & Ors*,¹⁰⁰ arose out of the 'Bersih' protest for electoral reform. This was a civil suit brought by the Government against the organisers of the protest. Although the court dismissed the Government's claim, it upheld a counterclaim (within the same suit) by one of the organisers and awarded general and aggravated damages for the injuries he suffered as a result of the wrongful assault he had been subjected to whilst in police custody.

On police malfeasance: Decisions relating to this have been noted above, see discussion in [23] and [30].

94 [2016] 6 MLJ 352 (CA). A version of this case report is not publicly available. See (n 2).

95 [2014] MJU 1903 (HC). A version of this case report is not publicly available. See (n 2).

96 [2018] 5 MLJ 141 (FC).

97 [2017] MJU 1764 (FC).

98 This provision permits persons to seek compensation for loss occasioned by death where such death is caused by wrongful act, neglect or default.

99 This provision provides for scenarios in which a cause of action vesting in a person, including damages recoverable, shall survive for the benefit of his estate in the event of death.

100 [2016] 5 MLJ 721 (CA). A version of this case report is not publicly available. See (n 2).

CaseScenario 2

Q1

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

≡

CS

405

Claims against public bodies

64. It is possible for judicial review to be sought to quash licences or permits issued by the relevant regulatory authorities to Subsidiary Co. Alternatively, where circumstances warranted intervention by the regulatory authority and it failed to take appropriate action, mandamus can be sought. Where it can be shown that the injury and loss suffered was a direct consequence of the acts or omissions of the said authority, monetary compensation could also be sought.
65. An application for judicial review would be subject to the requirements indicated in 16] above, such as the necessity for the claimant to be 'adversely affected' and the need for leave to commence judicial review to be sought within the permitted time period.

Claims against Subsidiary Co

66. A civil claim could be brought against the Subsidiary Co for the following causes of action (see also [17] above):
- Aggrieved persons, be they owners or occupiers of adjacent lands affected by the pollution, could make claims for
 - i. Negligence. It stands to reason that claims for pure economic loss could also be maintained;¹⁰¹
 - ii. Nuisance, including for strict liability under the rule in *Rylands v Fletcher*;¹⁰²
 - iii. Breaches of the following statutory duties:
 - a) Duty not to pollute soil or inland waters;¹⁰³
 - b) Duty not to discharge oil or waste into Malaysian waters;¹⁰⁴
 - c) Duty not to obstruct or interfere with any river;¹⁰⁵
 - d) Duty not to pollute rivers.¹⁰⁶
 - Representative actions can be brought where numerous persons have the same

¹⁰¹ The elements are the same as that under English law.

¹⁰² *Kerajaan Malaysia* (n 100).

¹⁰³ EQA ss 24 and 25.

¹⁰⁴ *ibid* ss 27 and 29.

¹⁰⁵ *Waters Act 1920*, s 5(1)(b).

¹⁰⁶ *ibid* s 7A.

interest in the legal proceedings. In such cases, the civil claim can be made by one or more, as 'representing all or as representing all except one or more of them'.¹⁰⁷

Claims against Parent Co

67. A civil claim could potentially be made against Parent Co despite the wrongful acts having been committed by Subsidiary Co, on the basis of the matters discussed in [38]-[40] above, in particular the likely adoption of the approach of the UK Supreme Court in *Vedanta*¹⁰⁸ and *Okpabi*.¹⁰⁹ We note that the UK Supreme Court in *Vedanta* and *Okpabi* recognised that a duty could be owed by a parent company in the following circumstances (also referred to as the *Vedanta* routes):

- i. Route 1: A parent company takes over the management or joint management of the relevant activity of its subsidiary;
- ii. Route 2: A parent company provides defective advice and/or promulgates defective group-wide safety/environmental policies which are then implemented as of course by its subsidiary;
- iii. Route 3: A parent company promulgates group-wide safety/environmental policies and takes active steps to ensure the implementation of those policies by its subsidiary;
- iv. Route 4: A parent company holds out that it exercises a particular degree of supervision and control of its subsidiary.

68. The facts of Case Scenario 2 disclose that the Parent Co is responsible for the overall management of the group's extractive business, the operations of which are carried out by its subsidiaries including Subsidiary Co. Parent Co had also held out to its shareholders that the group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations.

- On its face, the facts would appear to fall within any of the *Vedanta* routes.
- We note, however, that the decision in *Vedanta* concerned a procedural dispute over whether litigation relating to pollution in Zambia could be tried in the English courts. A major issue was whether the claims disclosed a real triable issue against the English parent company. Though that was answered in the affirmative, it remains to be seen how, at trial, the *Vedanta* routes are applied.
- As explained at [5] above, English decisions are highly persuasive where tortious claims are concerned and thus there does not appear to be good reason not to adopt the approach laid down in those cases and their subsequent development.

69. For completeness, it should be noted that if Parent Co were outside jurisdiction, the requirements of service out of jurisdiction would have to be complied with.¹¹⁰

¹⁰⁷ Rules of Court 2012, Order 15 rule 12(1).

¹⁰⁸ *Vedanta* (n 63).

¹⁰⁹ *Okpabi* (n 64).

¹¹⁰ Rules of Court 2012, Order 11.

Q2

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

70. Complaints can be lodged with the [Department of Environment](#), which could take the appropriate action. Additionally, criminal prosecution may be initiated by the Public Prosecutor where appropriate. The matters described could potentially amount to criminal offences under the EQA¹¹¹ and the Waters Act 1920.¹¹²

Q3

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

71. As mentioned in [38] above, Malaysian case law has yet to consider liability in the context of parent company liability. However, Malaysian courts have considered lawsuits similar to Case Scenario 2 insofar as Subsidiary Co is concerned, these have been indicated above (see [16]-[17] above). Other notable cases include the following:

Action in judicial review for environmental pollution affecting a local population:

- In *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors*,¹¹³ the Atomic Energy Licensing Board (the second respondent) had pursuant to the ALA granted the fourth respondent a temporary operating licence (TOL) to carry out mining operations in the area where the applicants were residing. The applicants initiated a judicial review application in the High Court to quash the second respondent's decision to grant the TOL. At the leave stage, the applicants' application for a stay order, or alternatively an interlocutory injunction against the second respondent, to prevent it from issuing further licenses, permits, or approvals with respect to the fourth respondent's activities was dismissed. The Court of Appeal concluded that an injunction, interlocutory or permanent, could not be granted against the government by virtue of GPA section 29 and SRA 1950 section 54. The court further concluded that the orders sought would interfere with the public duty of the second respondent under the ALA.

Regarding claims in civil proceedings:

- In *Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors*,¹¹⁴ the first respondent, a public authority, granted Lynas Malaysia Sdn Bhd (the third respondent) a TOL pursuant to the ALA to construct a plant to extract rare earth from the processing of raw material for lanthanide concentrates. The applicants were residents of the neighbouring area and sought to quash the granting of the TOL on the grounds that it was in breach of the EQA and the constitutional guarantees under the Constitution, articles 5, 8 and 13. The judicial review was ultimately dismissed at the leave stage on the ground that there was a domestic remedy available.

¹¹¹ s 34B(4).

¹¹² s 15.

¹¹³ *Tan Bun Teet* (n 75).

¹¹⁴ *Zakaria bin Abdullah* (n 23).

- In *Petronas Gas Bhd v DWZ Industries (Johor) Sdn Bhd & Anor*,¹¹⁵ the defendant factory operator had constructed an illegal bypass on the plaintiff's land, in order to discharge effluent into a nearby river. Leakage from the bypass onto the plaintiff's land resulted in corrosion of the gas pipeline belonging to the plaintiff. The discharge of industrial effluent onto neighbouring land was found actionable in trespass, private nuisance, the rule in *Rylands v Fletcher*, and negligence. The High Court concluded that the parent company was jointly liable as it was directly involved in the operations of its subsidiary's factory. However, the basis for liability of the parent company was not explored in great detail, in particular the circumstances in which the duty of the parent company was said to arise and the nature of the duties owed.
- The pollution of rivers in Malaysia is a long-standing concern. However, civil claims are rare. We have discerned from media reports that representative actions have been initiated in respect of the pollution of the Kim Kim River and the Gong River on the ground that alleged illegal chemical dumping had caused adverse effects on the population residing near the rivers.¹¹⁶ It was contended that amongst the symptoms complained of by victims, including children, were 'vomiting, nausea, dizziness, short of breath, eye irritation, chest pain, sore throat and cough' which were consistent with adverse effects of exposure to a mixture of the 'toxic gases acrolein, acrylonitrile, methyl mercaptan and benzene'.¹¹⁷ The status of the legal proceedings is uncertain.



¹¹⁵ *Petronas Gas Bhd* (n 68).

¹¹⁶ BERNAMA, '[Adopt Drastic Strategies to Tackle River Pollution](#)' (BERNAMA, 3 January 2022).

¹¹⁷ For more information on the study conducted on the river pollution, See: Academy of Sciences Malaysia, '[ASM Report: Lessons from Sungai Kim Kim, Pasir Gudang](#)' (Academy of Sciences Malaysia, 5 April 2019).

CaseScenario 3

Q1

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

≡

CS

409

Claims against Factory Co

72. A civil claim could be brought by the affected employees and/or their dependents against Factory Co for the following causes of action:

- Negligence;
- Breach of the following statutory duties (see [19] above):
 - i. Duty to comply with the conditions of service provided for under the EA, including minimum terms and conditions of service and payment of wages for overtime work;¹¹⁸
 - ii. Duty to ensure the safety, health and welfare of the employees including the duty to formulate a safety and health policy;¹¹⁹ and
 - iii. Duty to inquire into complaints of sexual harassment at the workplace.¹²⁰
- In the instance of sexual harassment, the tort of sexual harassment.¹²¹
 - i. Reference to sexual harassment is made in [EA](#) section 2 which defines sexual harassment as 'any unwanted conduct of a sexual nature, whether verbal, nonverbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.'
 - ii. The definition satisfies the main elements of the tort of sexual harassment, namely:¹²²
 - a) a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person;
 - b) such conduct is tainted with some constant and objectionable sexual hallmarks; and
 - c) such conduct is calculated and does cause alarm, fear, distress, disturbance or annoyance to the victim.

¹¹⁸ EA Part XII.

¹¹⁹ OSHA ss 15 to 18.

¹²⁰ EA Part XV.

¹²¹ *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282 (FC). A version of this case report is not publicly available. See (n 2).

¹²² *ibid* at [46].

Claims against Brand Co

73. Bringing a claim against Brand Co is not as straightforward.

- As indicated in [38] above, the question of whether direct claims can be made against companies for the wrongdoings of its supply chain has not as yet been considered by the Malaysian courts. In principle, however, if the conduct complained of on the part of Brand Co satisfies the elements of the various torts considered in [14], there is no reason why a suit could not be brought.
- The facts do not appear to disclose that Brand Co was acting in concert with Factory Co such as to attract a claim for joint liability, or that it had conducted itself in a manner that warrants the corporate veil of Factory Co to be lifted in the manner discussed in [36]-[37] above with respect to companies being interposed to avoid liability.
- However, there may be basis to bring a claim by reference to the principles set out by the UK Supreme Court in *Vedanta*¹²³ and *Okpabi*.¹²⁴ *Vedanta* route 4 would appear to be of relevance given that, on the facts, Brand Co had held itself out as having committed to responsible business practices and human rights standards. However, this would turn on whether Brand Co had any say in the affairs of Factory Co, and the extent of this, in connection with the production of the clothes supplied to Brand Co.



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

74. A complaint may be lodged with the [Department of Occupational Safety and Health](#), which could investigate and possibly initiate criminal prosecution. The matters described could potentially amount to criminal offences under OSHA.¹²⁵

75. An employee, or dependents of an employee will also be entitled to benefits under the [Employees' Social Security Act 1969](#) in the event of an employment injury or death as a result of an employment injury, provided that the employee is an 'insured person' within the meaning of the Act.

76. A complaint of sexual harassment may be made to the Director General of Labour by an employee against any employer, in this instance, Factory Co, pursuant to EA section 81D. Where the Director General of Labour decides that sexual harassment is proven, the complainant may terminate his contract without notice, and will be entitled to applicable wages, termination benefits and indemnity.

¹²³ *Vedanta* (n 63).

¹²⁴ *Okpabi* (n 64).

¹²⁵ OSHA s 19.



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

77. There do not appear to have been any claims in Malaysia on facts similar to those in Case Scenario 3.
78. The mistreatment and death of migrant workers in Malaysia is a serious concern. Legal proceedings are however uncommon, in part due to the involvement of agencies of the Federal Government and concerns about bringing claims against them.
- Irene Fernandez, founder and director of human rights organization Tenaganita, was arrested in 1996 for reporting that detained illegal immigrants suffered from malnutrition and torture. Seven years after her arrest, she was sentenced to one year imprisonment, but she appealed, and was set free on bail. However, her civil rights were restricted. As a convicted person, she was barred from standing as parliamentary candidate in the 2004 Malaysian elections and she could not travel outside the country freely. Eventually in 2008, Malaysia's Public Prosecutor dropped his opposition to Fernandez' appeal due to the discovery of 'systematic errors' manifested in the court records.¹²⁶
 - More recently in July 2021,¹²⁷ Heidy Quah, founder of non-governmental organisation Refuge for the Refugees, was charged with making a Facebook posting on alleged mistreatment of refugees at the immigration detention centre. The trial has yet to commence.



¹²⁶ See further [here](#).

¹²⁷ See further [here](#).



A HANDBOOK FOR PRACTITIONERS | MEXICO

Civil Liability for Human Rights Violations



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MEXICO



Human rights violations are not often addressed through civil litigation in Mexico, mostly because constitutional procedures have traditionally been the preferred avenue. In addition, a separate liability regime has been established for suing cases involving public bodies. Any claims against the State for actions or omissions leading to human rights violations must proceed through administrative procedures. However, use of civil claims has become more common as a result of private litigation for harms suffered, notably in the business and human rights context. In the recent years, Mexico has seen a number of interesting cases relating to civil liability for human rights violations.



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INDICES

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**Democracy Index
2021 Ranking**

60/100

**Freedom House
2022 Score**

124/180

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction*

1. Human rights violations have not traditionally been addressed through civil litigation in Mexico. Because human rights obligations have generally been interpreted as State obligations, and they have been most commonly explored in relation to State actions or omissions, other routes – notably constitutional mechanisms, dating back to the 1850s – have been the preferred legal avenue for pursuing reparation. However, holding wrongdoers accountable for civil liability for human rights violations has become more common as a result of private litigation for harms suffered, notably in the context of human rights in the business sphere. This has led to innovative precedents that connect different branches of law.
2. These precedents have been reinforced by the constitutional human rights reform of 2011 which established that international human rights treaties have the same legal standing as the Constitution. While some judges still apply international human rights norms unevenly, the 2011 reforms facilitated the integration of human rights considerations and standards in arguments before the courts, and in judicial analysis. This has seen some courts (including the Supreme Court) embrace a human rights perspective in legal fields where this has not traditionally been the case, prompting something of a legal revolution which finds alignment and intersection between different branches of law and the constitutional human rights paradigm.
3. As in other civil law jurisdictions, civil liability in Mexico depends on the fulfilment of three requirements: the breach of an obligation; damage suffered as a result of that breach; and a nexus between them. This is a general rule that applies at both the federal and the state levels, with the Federal Civil Code¹ and the 32 state civil codes establishing the same requirements for the determination of civil liability. Thus, whether it is a federal or a state court that has jurisdiction over a case, the applicable legal principles are generally the same.
4. Civil liability principles are the basis for different procedures, including extra-contractual liability claims,² environmental protection claims, and even for pecuniary claims against the State. However, different legal avenues can be explored depending on the facts of the situation, which allows for important judicial developments in a variety of legal fields. As will be explored throughout the report, Mexico has seen a number of interesting cases relating to civil liability for human rights violations.

* Note that some web resources referenced in this report may not be accessible from outside of Mexico.

1 [Código Civil Federal](#), 31 August 1928.

2 Extra-contractual liability (also known as non-contractual liability) designates situations of civil liability that occur in the absence of a contract between the parties. The term is widely used in the civil law jurisdictions.

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Under Mexican law, civil remedies are available whenever a private person (whether an individual or a group) causes harm to another. As a result, individuals may sue other individuals for extra-contractual harm and they may also sue companies in cases where their failure to prevent a wrongful act results in harm that can be characterised as a human rights violation. However, they cannot always sue public bodies for harms arising from situations that may, on the face of it, be comparable to those in which they can sue individuals, groups or companies. For a claim to be brought against public bodies, individuals must resort to administrative law instead of civil law. Each element is explained further below.

Claims against individuals

5. Theoretically, any harm suffered by a person may give rise to a claim under the law of civil remedies, including in relation to the three defined harms identified in this research. The Federal Civil Code³ provides in article 1910 that any person who wrongfully harms another person has a duty to repair the damage, unless he or she can demonstrate that the damage was the result of the fault or negligence of the victim. This means that any instance of assault or unlawful arrest and detention, environmental harm, or harmful or unfair labour conditions may be actionable in terms of **extra-contractual liability**. However, in practice such situations often don't give rise to claims for three reasons:
 - Environmental harms are normally not attributed to specific individuals, but rather to legal persons (see [6] below).
 - With the exception of domestic workers, harmful or unfair labour conditions are similarly not routinely argued against individuals. Additionally, such claims are more often brought under labour law which in Mexico is widely codified, with a distinct procedure.
 - Assault or unlawful arrest and detention are not often performed by private individuals, but by public security forces. However, in a hypothetical case where an individual causes such harms, the Federal Civil Code and its local counterparts make provision for remedy. As will be seen below, there have been some instances in which claims have been allowed against individuals.

³ Mexico is a federal republic, and each of its 32 states has a civil code applicable within its jurisdiction in addition to the Federal Civil Code. The state civil codes very closely follow the provisions of the Federal Civil Code in relation to extra-contractual civil liability. For the purpose of this study, the scope of analysis is limited to the federal level, and thus, to the Federal Civil Code.

Claims against corporations

6. While not as frequently as in other jurisdictions, extra-contractual liability claims can be brought against corporations for involvement in the three defined harms, as well as for other harms. Of the three defined harms, two have been the subject of analysis and litigation in recent years: environmental harm, and harmful or unfair labour conditions.
7. In relation to **environmental harm**, the Federal Law on Environmental Liability (Environmental Liability Law) stipulates in article 10 that any individual or legal person who, through actions or omissions, causes direct or indirect environmental harm will be liable to repair it, or where this is impossible, to undertake 'environmental compensation'. In addition, actions shall be taken to prevent further environmental damage. Article 24 provides that any legal person will be liable for the environmental harm caused by its employees or contractors, a provision that may expand the scope of corporate liability.
8. The law sets out a mixed liability regime, where both '**subjective**' and '**objective**' liability are considered.⁴ This is also the case for general civil liability rules. Article 11 of the Environmental Liability Law establishes that environmental liability will be of a 'subjective' nature (that is, where the conduct of the wrongdoer is relevant for the determination of liability), and when damage results from wilful conduct, it will entail an economic sanction. Article 12 provides for an 'objective' liability regime that applies if the environmental harm is the result of any action or omission related to dangerous materials or toxic waste, the use of ships in coral reefs, the performance of highly dangerous activities, or any conduct stipulated in article 1913 of the Federal Civil Code.⁵ As a result, the law adopts a dual perspective that favours a broad protection of the environment. The Federal Code of Civil Procedure sets out the possibility for bringing a **collective claim** for environmental harm in article 578, through three types of action: class actions; collective actions *stricto sensu*; and homogeneous individual claims. The collective action provisions of article 578 also apply to other cases that may relate to collective or diffuse rights. The three types of action are explained in [42] below.
9. Regarding **harmful or unfair labour conditions**, as explained in [5] above, the substantive and procedural rights are normally determined under the Federal Labour Law. However, it may be possible to bring an extra-contractual liability claim in relation to harmful or unfair labour conditions, on the basis of article 1910 of the Federal Civil Code or its local counterparts.

⁴ In many civil law jurisdictions, including Mexico, the subjective liability regime rests on a fault-based approach, and thus the conduct of the party that had a duty to prevent harm will be assessed for the purpose of determining liability. On the other hand, the objective liability regime is based on an obligation of result, where conduct (including the adoption of preventive measures) is irrelevant for the purpose of liability. While there is some resemblance to the strict and absolute liability regimes in common law systems, they are not exactly equivalent.

⁵ Article 1913 of the Federal Civil Code provides that 'objective' civil liability will apply whenever a person uses inherently dangerous machinery, instruments, tools, or substances that are inherently dangerous as a result of the speed they develop, their explosive or flammable nature, the amount of electricity they use, or analogous causes.

SPOTLIGHT: CASE STUDY

A recent judgment by the Supreme Court⁶ analysed the case of a woman who died while working on her shift at a company called Ralston Purina Mexico. The company did not notify the authorities until several hours after the death had taken place and failed to provide information to her family about the circumstances of her death. The daughter of the employee brought a civil claim against the company on the basis of extra-contractual liability due to: the lack of adequate health and safety measures in the workplace; the unjustified delay of the company in finding her mother and giving notice to the authorities about her death; the lack of clarity on the circumstances, cause and place of her death; and the lack of attention, support and information given to the family. She argued that the wrongful death of her mother was the result of a failure by the company to take adequate preventive measures, that it led to emotional distress, and that it implied wrongful conduct by the company for their negligence and ill intent.

In an interesting analysis the Court addressed issues such as the 'dynamic burden of proof',⁷ and the transversal character of human rights which extends their applicability to civil litigation. In conclusion, the Court decided that the company was negligent prior to, during and immediately after the death of the plaintiff's mother, and that it had to prove that it acted with due diligence in relation to the death of its employee.⁸ As a result, the case was remanded to a lower court, for it to adjudicate on the basis of the Supreme Court's reasoning. This and other examples show that extra-contractual liability may, in some cases, be useful to bring claims against companies for harmful or unfair labour conditions. This broadens the scope for litigation for human rights violations.

10. The case of **State-Owned Enterprises (SOEs)**, however, may be somewhat varied. Here the legal avenue for liability for two large Mexican SOEs is relevant. Petróleos Mexicanos (PEMEX, an oil company) and Comisión Federal de Electricidad (CFE, an electricity company), are deemed to have different legal avenues through which a plaintiff can bring claims against them. In the case of PEMEX, damage caused by its exploration activities and any environmental (or health) damage caused by it in other ways has been addressed by the courts in terms of environmental liability which is broadly based on principles of civil liability, as explained above. However, because the activities of the electricity provider CFE give rise to issues relating to service-provision contracts, the courts have considered that the correct legal avenue to seek remedy in any dispute concerning this SOE is through administrative law. For cases that are *not* of a contractual nature – such as injuries suffered as a result of unsafe electricity installations – the legal avenue for claims against the SOE has not been fully determined, with civil liability, administrative law and constitutional protection as potential options.

6 First Chamber of the Supreme Court, [Amparo Directo en Revisión 5505/2017](#) (13 January 2021). Due to privacy concerns, the name of the plaintiff is not revealed.

7 The concept of the 'dynamic burden of proof' refers to the possibility that a judge may shift the burden of proof on an ad hoc basis. Rather than establishing fixed and immutable criteria regarding the responsibility of a party to provide evidence, it allows judicial discretion to consider the circumstances of the case.

8 *Amparo Directo en Revisión 5505/2017* (n 6), para 142.

Claims against public bodies

11. Public bodies may not be sued in Mexico under the law of civil remedies. A **separate liability regime** has been created for such cases, deriving explicitly from article 109 of the Constitution, which stipulates the right to obtain redress for harmful conduct committed by the State (in Spanish, the *responsabilidad patrimonial del Estado*, which loosely translates as the 'pecuniary' or 'financial' liability of the State).⁹ As a result, any claims against the State for actions or omissions leading to human rights violations must proceed through administrative law.

Q2

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

12. As explained in [8] above, extra-contractual civil liability can be of a subjective (fault-based) or an objective nature. In both cases, **three elements** must coincide for a claimant to seek remedy: the existence of an unlawful act; a harm (damage) suffered by one of the parties; and a nexus linking the wrongful act with the harm suffered.¹⁰
13. Under article 1830 of the Federal Civil Code, an act is unlawful if it is contrary to the laws of public order or morality. Under that premise, an act or omission becomes unlawful when (i) the liable party fails to comply with any incumbent legal obligation; and/or (ii) the said party breaches a generic duty of care that is required or expected (negligence).
14. Article 1910 of the Federal Civil Code establishes the elements required for extra-contractual civil liability to be determined, stating that any person who causes harm to another person as a result of an unlawful act has an obligation to repair the damage, unless it can be demonstrated that the damage resulted as a result of the fault or inexcusable negligence of the victim.
15. Article 1916 of the Federal Civil Code establishes the concept of '**moral**' damage, understood as a negative impact on a person's feelings, beliefs, decorum, honour, reputation, private life, physical aspect, or on the consideration of that person by others. The article also stipulates that there will be a presumption of moral damage when there is an unlawful impact on the liberty or physical or mental integrity of a person. In addition, whenever a person suffers moral damage, the duty to repair shall consist of monetary compensation regardless of the existence of material damage. The same will apply to any person who incurs objective liability (as a result of damage caused by the use of dangerous instruments or substances), as well as the State and its public officials.

⁹ Article 109 of the Constitution sets out that the State shall bear direct and objective liability for irregular administrative activities that cause harm to the property or rights of private individuals. It refers to the Federal Law on Pecuniary Liability of the State which stipulates that any claim shall be presented in accordance with the Federal Law on Administrative Litigation Procedure.

¹⁰ First Chamber of the Supreme Court, *Amparo Directo* 50/2015, 3 May 2017.

16. These three elements are established in both federal and local civil codes, and in the case law of Mexico's Supreme Court,¹¹ as the Court has stated in different judgments.¹² The rules of civil liability – including extra-contractual liability – must be interpreted in accordance with article 1 of the Constitution, which provides that all authorities (even judicial ones) must act on the basis of a *pro persona* interpretation, that is, they must interpret any provision of law through a human rights lens that implies applying the rules in a sense that is most beneficial to the parties.

Q3

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

17. While the Federal Civil Code of Mexico does not foresee a specific civil liability regime for the three defined harms, as long as they can be framed as extra-contractual liability, it recognises civil liability for the actions of third parties (**joint and several liability**). Article 1917 provides that whenever several persons have caused a damage, they will bear joint and several liability to the victim. This provision is complemented by article 1918 which provides that legal persons are liable for the damages caused by their legal representatives in the exercise of their functions. However, no specific reference to 'complicity' exists in Mexican civil law. This is a concept that is typically reserved for criminal law. Because of this, no distinction is made in the analysis of the conduct of a principal or secondary perpetrator for the purpose of the determination of civil liability.
18. However, article 24 of the Environmental Liability Law provides that legal persons will bear liability for the environmental harm caused by their representatives, managers, directors, employees and any person exercising control of their operations, including third parties hired for a given purpose, in which case, joint and several liability may be found.

Q4

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

Parent company liability for human rights harms is a construct that has not seen much prevalence in Mexican civil law. However, some interesting and promising developments can be identified, notably in federal courts.

¹¹ For a recent compendium and analysis on the subject, see Carlos De La Rosa Xochitiotzi and Velia Fernanda Márquez Rojas, [Derecho de daños: Responsabilidad extra-contractual](#), Cuadernos de jurisprudencia No 1 (Mexico City, SCJN 2020).

¹² See the examples of *Amparo Directo en Revisión* 5505/2017 (n 6); *Amparo Directo* 50/2015 (n 10).

19. Firstly, federal case law has addressed the question of liability of a company for the acts of another related company under the rationale of [piercing the corporate veil](#).¹³ In different scenarios, federal courts have found that piercing the corporate veil may be justified in preventing an [abuse of the corporate legal personality](#)¹⁴ or whenever actions are committed in contravention of the principle of [good faith](#).¹⁵ However, none of the aforementioned instances was in cases related to human rights harms.
20. An exception to this can be found in a judgment in a labour case, where a federal court considered that joint and several liability can be attributed to [corporate groups](#) that constitute an **economic unit** (defined as a parent company and several subsidiaries controlled by the former).¹⁶ In this instance, the Federal Circuit Court ruled that in order to protect the employee against the complexity of identifying who his employer was – as a result of a multiplicity of contracts between different companies providing personnel and those benefitting from it – it was necessary to lift the corporate veil.

SPOTLIGHT: CASE STUDY

Beyond cases attempting to pierce the corporate veil, a relevant example can be found in the case of [Richter v Google Inc et al](#). In this case, a prominent lawyer in Mexico City sued the parent company, two Mexican subsidiaries, and the director of operations of Google Mexico for their failure to prevent the misuse of their Blogger platform to disseminate libellous claims against the plaintiff. The case involved several legal considerations which included the *pro persona* interpretation of international rules, a focus on the resulting right to remedy, issues of freedom of expression on technological platforms, and failure to act with due diligence while being explicitly aware of a prejudicial act being done which affected the plaintiff. An important element was that the different Mexican courts seized with the case determined that Google Inc could be tried before Mexican courts, because the lawsuit had been served against it in Mexico and Google Inc had appeared before them, and because the damage happened in Mexico. A second instance judgment¹⁷ sentencing the company to pay USD 250 million in moral and punitive damages was passed in June 2022, although it is expected that Google will appeal the judgment.

13 Fourth Collegiate Tribunal on Administrative Law of the First Circuit, *Amparo en Revisión 360/2006*, 18 June 2008.

14 Fifth Collegiate Tribunal on Civil Law of the First Circuit, *Amparo Directo 740/2010*, 15 December 2011.

15 *ibid.*

16 First Collegiate Tribunal on Civil and Labour Law of the Seventeenth Circuit, *Amparo Directo 226/2016*, 9 June 2016.

17 Eight Appeals Chamber on Civil Law, *Ulrich Richter Morales et al v Google Inc. et al*, Toca 627/2021/53, 13 June 2022.

Q5

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

21. Article 1915 of the Federal Civil Code determines that victims may select the mode of reparation, choosing between **restitution** (where possible) or **compensation**. It further stipulates that whenever harm leads to death, or permanent or temporary disability, the amount of reparation will be determined in accordance with the Federal Labour Law, thereby creating a specific regime for certain circumstances linked to harmful or unfair labour conditions. These would be the general elements of reparation that the law of civil liability contemplates. However, the Environmental Liability Law provides important alternatives for remedy in the case of environmental harm. For example, under article 13 of the law, environmental reparation must include measures to ensure restitution, while article 17 determines that environmental compensation entails adopting measures to ensure environmental improvement. While the provisions of this law add important options for environmental cases, in broad terms, the law of civil liability does not provide for integral reparation.
22. While there are limitations to reparation under the law of civil remedies, the [General Law of Victims](#)¹⁸ does provide for the different elements of integral reparation, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Thus, in a claim on extra-contractual liability, it would be possible to invoke articles 26 and 27 of the General Law of Victims (which define the elements of integral reparation) in order for the judge to address other elements of reparation, notably satisfaction or rehabilitation.
23. At the end of the day, under the Mexican Constitution, all authorities are expected to integrate the *pro persona* principle in their actions in order to protect human rights. This constitutional directive also means that the analysis in judgments and advisory opinions of the Inter-American Court of Human Rights and other international human rights bodies provide guidance for the actions of authorities. With this in mind, it would be potentially possible for a civil judge to adjudicate a case while making reference to the elements of integral reparation. Through a recent judicial doctrine, the Mexican Supreme Court has reinforced the theory of the transversal character of human rights, which implies that when interpreting any law, including the laws of civil liability, human rights must be duly considered. Therefore, it would be logical for any civil court to take into account some elements that would in principle otherwise be foreign to the logic of civil liability.

¹⁸ Ley General de Víctimas, 9 January 2013.

Q6

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

24. Human rights violations are not often addressed through civil litigation, mostly because **constitutional procedures** (notably *amparo*, a form of injunction that gives rise to mandatory precedents) have traditionally been the preferred avenue. The **amparo procedure** is used to test whether a judgment conforms to constitutional provisions, and is normally brought before the federal courts. Through an *amparo directo en revisión*, the Supreme Court may, exceptionally and at its discretion, select a case for review where it concerns the direct interpretation of a constitutional provision or human right. The *amparo directo en revisión* is a constitutional procedure that originated in the 1850s under Mexican constitutional law, and was later adopted by several other Latin-American jurisdictions.
25. In Mexico, human rights violations have traditionally been understood to involve an action or omission by the State; as a result, human rights obligations by private actors have not often been the focus of analysis. While this has started to change in recent years, the topic has not been widely debated or studied, resulting in a general lack of understanding of the interrelation between human rights and private law. As has been explained, however, there is no actual limitation that prevents a victim from resorting to civil litigation for human rights violations.
26. The **advantages** of the current legal framework are:
 - There is relative legal certainty provided by existing procedures, as these are clearly stipulated by law and the courts have experience working within this framework. The use of civil litigation for human rights violations may be an important addition to current practice, despite the fact that it may also lead to some uncertainty because this would involve the inclusion of non-pecuniary elements which have not traditionally been the focus of civil litigation.
 - Because of the ‘transversal effect’ of human rights that has been referred to above at [23] and the logic of the *pro persona* principle, civil judges may need to include a human rights perspective in civil litigation, thereby widening the possible avenues for remedy available to victims of human rights violations. This could, in principle, also facilitate further judicial dialogue with courts in different countries that use similar judicial mechanisms.
27. However, there are also several **disadvantages**:
 - Not all elements of reparation are available or suitable under civil liability regimes; while restitution, compensation and satisfaction may be regularly considered within the scope of civil litigation, other forms of reparation (such as rehabilitation and guarantees of non-recurrence) are typically foreign to such judicial mechanisms. Thus, the scope of reparation could be potentially limited, and would not create a precedent with a general effect affecting other cases.
 - The doctrine of the inversion or shifting of the burden of proof has not yet been introduced into Mexican civil legislation. Despite [recent judicial precedents](#) on the topic that would render it viable, and its explicit reference in the Escazú

Agreement,¹⁹ its absence from domestic law still suggests it is not considered part of Mexican legal practice.

- Not all human rights may be adequately protected through civil litigation, especially as the requirement to show harm may not be easily achieved in all types of human rights violations.

28. A final point that should not be neglected is the possibility that the losing party – which may be the victims of a human rights violation – would have to pay damages and fees under a civil litigation regime. This situation would not normally arise under constitutional protection mechanisms such as *amparo*. This could potentially be a deterrent for the use of civil litigation for human rights violations.

Q7

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

29. The rules on international civil litigation are not particularly explicit (or clear) in Mexico's federal laws. Under the rules on jurisdiction of the Federal Code of Civil Procedure,²⁰ whenever a personal or collective legal action is pursued against a defendant, the appropriate forum will be that of the defendant's place of domicile.²¹ If that person is a foreign defendant whose place of domicile is outside of Mexico, this would imply the recognition that the competent court would be that of their place of domicile. Beyond that specific reference, the focus of the Federal Code of Civil Procedure on international civil litigation mostly concerns the international judicial cooperation and assistance that Mexico may provide to foreign judiciaries, with few references to Mexican courts acting in those cases.²²
30. However, the Federal Civil Code sets out that Mexican laws are applicable to any person that is present in the country, as well as to any action or circumstances that occurs in its territory or under its jurisdiction.²³ This, if interpreted in accordance with the *pro persona* principle set down in article 1 of the Constitution, could lead judicial authorities to determine that they may exercise jurisdiction over foreign defendants, as explained in the discussion of *Richter v Google Inc* in the highlighted case study following paragraph [20].

19 The *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, also known as the *Escazú Agreement*, is a recently adopted regional treaty that addresses the human rights obligations of States in the context of environmental matters. It is in force, although several Central and South American states have yet to ratify it.

20 *Código Federal de Procedimientos Civiles*, 24 February 1943.

21 *ibid* art 24 s IV.

22 *ibid* arts 543-577.

23 *ibid* art 12.

Q8

Can you recommend resources for further consultation to anyone interested in exploring how civil liability for human rights violations operates in your jurisdiction?

31. The topic of civil liability for human rights violations has not been generally addressed in legal literature or policy reports, etc. However, some preliminary literature and reports have been published recently that address the topic from a domestic and international perspective:
 - Humberto Cantú Rivera, 'Mexico', in Catherine Kessedjian and Humberto Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Cham Springer 2020).
 - Humberto Cantú Rivera et al, 'México', in Humberto Cantú Rivera (ed), *Experiencias latinoamericanas sobre reparación en materia de empresas y derechos humanos* (Bogotá, Konrad Adenauer Stiftung 2022).
32. Furthermore, a recent and relevant work has been published by Mexico's Supreme Court on extra-contractual civil liability, with some references to the case law of the Court in relation to human rights:
 - Carlos De La Rosa Xochitiotzi and Velia Fernanda Márquez Rojas, [*Derecho de daños: Responsabilidad extra-contractual*](#), Cuadernos de jurisprudencia No 1 (Mexico City, SCJN 2020).



CaseScenarios

1 Case Scenario

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

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

2 Case Scenario

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

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

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

3 Case Scenario

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

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



CaseScenario 1

Q1

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

33. The law of civil remedies does not allow a claim to be brought against public bodies, authorities, or public enterprises, which includes X Country police in the case scenario. For reference to the available legal avenues for a claim against the police, see discussion below under Question 2 at [38]-[40].
34. Nonetheless, under general principles of the law of civil remedies, a **claim against Security Co** and its personnel may in fact be pursued if some elements concur. Specific regulations for private security companies²⁴ in Mexico do not contain provisions for civil liability, so general rules are applicable. The general elements of extra-contractual civil liability are:
- An unlawful or illicit act or omission.
 - The existence of damages or harm.
 - The causal connection (causation) between the act or omission and the damage or harm.
35. General civil liability rules recognise corporate liability for the acts of a company's personnel or dependents,²⁵ as well as for acts of other legal persons that cause damage or harm as a result of their business relationship with the company, who may be held jointly and severally liable to the victim for reparation.²⁶
36. In Case Scenario 1, while there is no evidence that personnel of Security Co were involved in the violence that injured protesters, there is evidence of logistical assistance provided to X Country police. For a civil action to proceed, after the determination of the existence of a wrongful act and the resulting breach of an obligation (such as a duty to prevent harm) that resulted from it, a strong causal connection (causation) between the act and the final harm or damages must be argued and proved.

24 [Ley Federal de Seguridad Privada](#), 6 July 2006. Articles 25 and 32 of the law impose important obligations on private security providers, including that (a) the services must be provided under the terms and conditions stipulated in the Government authorisation; (b) they must keep and provide a list of the equipment used to provide the service, which includes vehicles, armour, weaponry, and communications; (c) the personnel must be prepared and properly trained to perform their activities; and (d) the personnel must avoid at all times participating in, tolerating or permitting acts of torture, ill-treatment, cruel, inhuman or degrading acts, even when ordered to do so by a superior or when special circumstances are invoked, such as threats to public security.

25 *Código Federal de Procedimientos Civiles* (n 20) art 1924.

26 *ibid* art 19.

37. In the present case, this could be argued: (i) if Security Co provided services without Government authorisation; (ii) if the vehicles utilised to detain the protesters were the ones provided by Security Co; or (iii) if the equipment was used for purposes of ill-treatment or torture.



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

38. Regarding X Country police, there are four main legal avenues that can be pursued:

- **Pecuniary liability of the State:** Recognised as a right in article 109 of the Mexican Constitution, individuals are entitled to compensation for damages caused by the irregular activity of the State. This right is guaranteed through a two-part administrative procedure. It first must be brought before the authority that committed the violation, which studies the case and determines if the claim is viable. If the victim is not satisfied with the decision arising from the assessment in the first instance, the claim can be reviewed via administrative trial, and eventually through an *amparo* procedure.
- **Amparo claim:** Since the acts performed by X Country police violate human rights recognised under the Constitution and international treaties, an *amparo* lawsuit can be filed.
- **Criminal complaint:** A criminal case can be brought against X Country police officials, under the presumed charges of abuse of authority and torture.
- **Ombudsperson system:** A complaint can be filed against X Country police at the National Human Rights Commission.

39. The last three opportunities for recourse can also serve as the initial step that will enable access to Mexico's National System for Attention to Victims ([Sistema Nacional de Atención a Víctimas](#), SNAV), where they can apply for registration on the National Register of Victims. The National System for Attention to Victims is an administrative agency of the Executive Branch that was created as a result of the adoption of the General Law of Victims. It seeks to contribute to integral reparation for people who have been the subject of human rights violations or criminal activity. Once a judge, a prosecutor's office or the national or local human rights commission has determined that a person is a victim of a human rights violation or of a crime, the person can be registered on the National Register of Victims and have access to various forms of reparation.

40. Regarding Security Co and its personnel, other than the described civil action, a criminal case can be followed only for the torture claims, if sufficient causal connection can be found and proven.



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

41. No similar cases could be identified under current search engines and platforms.

CaseScenario 2

Q1

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

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Legal avenues

42. There are various legal avenues available to pursue a claim for damages arising from environmental harm. These can be differentiated according to: (i) the legal good or interest protected; and (ii) the possible remedies allowed. The Federal Code of Civil Procedure recognises three types of actions that are classified according to the rights affected and the origin of the claim:²⁷

- **Class action:** This is an avenue available to a group of persons to protect collective rights or interests, who seek to obtain restitution or reparation, as appropriate. A legal nexus between the collective group and the defendant is not necessary.
- **Collective action *stricto sensu*:** This is an avenue available to a defined (or definable) group that permits a demand for reparation consisting of one or more actions or abstentions, and for repair of the damages suffered by the members of the group individually. It derives from an existing legal nexus between the collective and the defendant that has been established by law.
- **Homogeneous individual claim:** This avenue is available to protect individual rights and interests that have a collective impact. It would be used to obtain a judicial injunction forcing a third party to comply with a contract or its termination, with the applicable consequences and effects.

The choice of legal avenue also influences the possible remedies that can be determined in the ruling on the case.²⁸

Remedies

43. In terms of available remedies for environmental harms, collective actions can lead to the restitution of things to the state they were in prior to the damage. This would amount to a broad remedy for the collective. However, such collective actions do not contemplate individual compensation, or moral or punitive damages.

²⁷ Código Federal de Procedimientos Civiles (n 20) art 581.

²⁸ *ibid* arts 604 and 605.

44. The amendment to article 4 of the Constitution that was passed in 2012 concerned environmental rights. The change led to the creation of the Federal Law on Environmental Liability (see [7]-[8]) which established a special environmental liability claim that is pursued through civil procedure. However, it only recognises environmental remediation as a possible outcome.
45. Therefore, even though both actions (class actions and actions under the Environmental Liability Law) have the same procedural avenue (civil procedure), they protect different legal goods or interests, and offer different possible remedies. A third possible avenue for remedy includes individual claims under civil law.
46. In summary, the possible legal avenues for remedies are:
 - Class or collective action.
 - Claim under the Federal Law of Environmental Liability.
 - Individual civil liability claim.

Persons with legal standing as claimants and defendants.

47. The Federal Code of Civil Procedure recognises the legal standing of the following in starting a **class or collective action**:²⁹ (i) the Federal Administrative Environmental Authority; (ii) a common representative of the collective; (iii) non-profit private legal entities; and (iv) the Federal Attorney General.
48. Furthermore, according to the Federal Law of Environmental Liability,³⁰ a claim can be brought by: (i) persons living in the community adjacent to the damage caused to the environment; (ii) non-profit Mexican private legal entities, when they act on behalf of an inhabitant of such communities; and (iii) administrative environmental authorities.
49. Individual civil claims can be pursued directly by the harmed party.
50. In Case Scenario 2, the claim can be brought against Parent Co and Subsidiary Co under both procedures (under the Civil Code and under the Environmental Liability Law). In class actions or individual lawsuits, the fact that Parent Co is the sole shareholder of Subsidiary Co and is responsible for its overall management has great relevance. Under these conditions, the piercing of the corporate veil may be requested but its implementation will be ultimately decided by the judge.
51. Article 24 of the Environmental Liability Law establishes that legal entities are responsible for environmental harm caused by their representatives, administrators, employees, or whoever exercises control ('functional dominance') over the company's operations. It also states that whoever uses, determines, or hires a third party to carry out the conduct that causes the environmental damage shall be jointly and severally liable.

²⁹ Código Federal de Procedimientos Civiles (n 20) art 585.

³⁰ Ley Federal de Responsabilidad Ambiental art 28.

52. The general elements required to determine civil liability in environmental damage claims are the same as those that apply in Case Scenario 1 (an unlawful or illicit act or omission; the existence of damages or harm; and the causal connection (causation) between the act or omission and the damage or harm. See [34] above). However, environmental harm is considered to involve a subjective form of civil liability, so to meet the requirements of liability the harm needs to arise from an unlawful or illicit act or omission, with proper causation. The exception to this is if the harm falls under the objective liability recognised by law, which would be applied if it arises as a result of the following activities:

- Any activity related to hazardous waste.
- The use or operation of vessels on coral reefs.
- Any activity considered of high risk.
- Any nuclear harm.³¹
- Any activity performed with high-risk machines and/or substances.³²

53. In general terms, the key elements to determine the civil liability of Parent Co and Subsidiary Co under this example are the following:

- To identify and establish the damages or harms, determine the persons with legal standing to bring the claim, and the burden of proof for each one.
- To define which legal avenue to pursue, or if both are deemed possible, to verify the fulfilment of legal prerequisites.
- To present to the court all possible evidence that demonstrates the legal and practical relationship between Parent Co and Subsidiary Co.
- To define the unlawful or illicit act or omission that would be claimed against Parent Co and Subsidiary Co.
- To present to the court as much evidence as possible of the environmental harm, and to show the relationship of the claimants to the damage.



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

54. In addition to the previously described legal avenues, current legislation allows for administrative and criminal procedures to be brought. In addition, an *amparo* claim can be filed in relation to the omission to act by environmental or other authorities, and against concessions, permissions, or administrative authorisations given to the persons who conducted the actions that gave rise to the harm.

³¹ [Ley de Responsabilidad Civil por Daños Nucleares](#), 31 December 1974, art 4.

³² [Código Federal de Procedimientos Civiles](#) (n 20) art 1916.



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

55. Judgment, [Amparo Directo 816/2019](#), (First Collegiate Circuit Court of the Fifth Region Auxiliary Centre, 17 January 2020).

Date of last review: 21 May 2022.

Case background: A non-profit legal entity filed a class action against the local Municipal Water and Sewerage Board relating to its operation of a water treatment plant that consistently spilled sewage into the Rio Baluarte, in El Rosario, Sinaloa. The first instance judge ruled in favour of the plaintiff but did not rule on the fulfilment of all the remedial benefits claimed because he considered that some of them were not viable under the type of procedure followed.

Legal precedent: The Circuit Court confirmed the first instance judgment because national legislation establishes that different remedies are available through different legal avenues (class actions and environmental liability). It therefore considered that the plaintiff could not seek remedies in one type of procedure that were only available in a different procedure. Nonetheless, it determined that in this case, all benefits that were claimed should be analysed and studied, and it remanded the case back to the court of first instance.

Relevance: The case set a precedent on the different legal avenues to pursue a claim for damages derived from environmental harm.

56. Judgment, [Amparo Directo 36/2017](#), (First Chamber of the Supreme Court of Justice, 03 July 2019).

Date of last review: 21 May 2022.

Case Background: On 6 August 2014, 40,000 cubic meters of acidified copper sulfate was released into the Sonora River basin. The substance escaped from the facilities of the Buenavista del Cobre mine belonging to Grupo México, located in the municipality of Cananea, Sonora. The toxic spill entered the Tinajas stream, from where it flowed into the Bacanuchi and Sonora rivers, until it reached the Molinito dam, which supplies water to the city of Hermosillo.

A non-profit legal entity filed a class action seeking various measures as remedy. The first instance judge dismissed the claim, stating that legal prerequisites weren't met. The non-profit filed an *amparo* claim, arguing the unconstitutionality of the procedure among other claims.

Legal precedent: The Supreme Court (i) decided that the procedure established by law was in fact constitutional, but because of the nature of the claim (as a class action), its application should be less strict; and (ii) set the available remedies that could be determined in the ruling on the case, deciding to partially revoke the dismissal of the lawsuit and to allow proceedings to continue.

Relevance: The case established a precedent on the different legal avenues to pursue a claim for damages derived from environmental harm.

57. Judgment, [Amparo en Revisión 501/2014](#), (First Chamber of the Supreme Court of Justice, 11 March 2015).

Date of last review: 21 May 2022.

Case Background: In 2012, an amendment to article 4 of the Constitution was passed which affected environmental rights, leading to the adoption of secondary legislation (the Federal Law on Environmental Liability) in 2013. This law established a special environmental liability claim, which is followed through civil procedure.

The plaintiff filed an *amparo* claim, arguing that procedural sections of the Environmental Liability Law were unconstitutional.

Legal precedent: The Court upheld the constitutionality of the law but determined that the rules for when to start computing the statute of limitations on a claim needed to be interpreted according to the Constitution. Thus, it stated, the statute of limitations would begin when the damages occur, or as soon as they are known to the plaintiffs.

Relevance: The case set a precedent on the different legal avenues to pursue a claim for damages derived from environmental harm, particularly clarifying the statute of limitations for undertaking legal action.



CaseScenario3



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

58. In Case Scenario 3, a civil claim against Brand Co is not viable. Mexico does not have current due diligence or supply chain legislation that enables the pursuit of such claims, and the capacity to influence a third party's behaviour that is not 'controlled' by a given company cannot be equated to giving rise to legal liability.
59. On the other hand, under general rules of extra-contractual liability, a claim against Factory Co can be pursued, on the same basis as a claim against Security Co in Case Scenario 1 (explained below in [64]).
60. Workplace health and safety conditions are thoroughly legislated under Mexican law.

61. Starting at the Constitutional level, article 123, sections I, XIII, XIV and XV, set the maximum daily working hours at eight, and also state that employers: (i) must provide employees with formal training; (ii) are liable for occupational accidents and diseases of their employees; and (iii) are obliged to comply with hygiene and safety standards on the premises of the establishment, and to take appropriate measures to prevent accidents in a way that protects the health and life of its workers.
62. The Federal Labour Law has special chapters covering workplace health and safety conditions, and occupational accidents and diseases, and there are other administrative laws and regulations which contain provisions that are also applicable. Furthermore, social security provisions for occupational accidents and diseases are legislated.
63. Mexico has a labour jurisdiction that also addresses social security matters, and administrative authorities that are in charge of workplace health and safety have the capacity to impose sanctions. Accordingly, all matters related to workplace environments, occupational accidents, and safety/hygiene conditions are routinely addressed under labour law and in the special labour courts, which are limited to applying labour legislation and cannot impose remedies other than those contained in this legislation.
64. Under various precedents, Mexico's Supreme Court has set out that a harmful act can create multiple obligations for the liable party and can open all regulated legal avenues that do not contradict each other. This implies that if the employer follows all health and safety procedures and workplace regulations, no civil liability is created. However, a failure to comply with relevant legislation translates into an unlawful or illicit act in itself, which can give rise not just to labour claims, but to civil liability litigation.
65. It is important to note that labour legislation does not recognise remedies for moral or non-pecuniary damages nor punitive damages. Also, the identification of the damaged party is crucial, since direct or indirect victims, in this case relatives or dependants, may have legal standing of their own regardless of the employer/employee relationship.
66. In summary, the key elements needed to establish the liability of Factory Co would be the following:
 - i. Identify and establish the damages or harms, the persons with legal standing, and the burden of proof for each one.
 - ii. Define the unlawful or illicit act or omission that would be argued against Factory Co, in particular any workplace condition and environmental legislation that was ignored.
 - iii. Present as much evidence as possible of the Factory Co conditions and causes of the fire.

Q2

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

67. Regarding Brand Co, no feasible legal avenues can be identified. For Factory Co, apart from the civil liability avenue, the following causes of action can be pursued:

- Administrative procedure through the work and safety authorities.
- Criminal Procedure.
- Trial under labour law in the labour courts.

Q3

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

68. The judgment in *Amparo Directo en Revisión 5505/2017*³³ has been referenced above in the case highlight following paragraph [9]. It is one of the judgments that most clearly integrates different elements of corporate civil liability for human rights violations, including the reversal of the burden of proof and an analysis based on the lack of preventive measures and due diligence by the defendant.

69. Judgement, *Amparo Directo 69/2012*, (Second Chamber of the Supreme Court of Justice, 29 January 2014).

Date of last review: 21 May 2022.

Case background: The plaintiff filed a labour lawsuit arguing that he was discriminated against and unlawfully terminated from his employment due to his sexual preference and medical condition. Apart from the labour claims, he also pursued remedy through the same procedure for moral damages.

Legal precedent: The Supreme Court decided that moral damages cannot be pursued in trials under the labour jurisdiction, and should be pursued through other legal avenues such as civil liability claims.

Relevance: The case set a precedent regarding civil liability claims against companies for workplace discrimination.

³³ See (n 6).

70. Judgment, [Amparo Directo 47/2013](#), (First Chamber of the Supreme Court of Justice, 7 February 2014).

Date of last review: 21 May 2022.

Case background: While working as a government employee, the plaintiff filed a complaint about a lack of payment for overtime. As a result of the complaint, she faced retaliation, which she argued constituted ‘mobbing’ or harassment at work.

Legal precedent: The Court determined that a harmful act, even with one set of facts, can create different types of obligations for the liable party, and may lead to multiple different legal avenues if they don’t contradict each other. As a result, the Court set out the possibility for reviewing a ‘mobbing’ claim through a civil liability procedure, with the corresponding adjustments in relation to the burden of proof.

Relevance: The case set a precedent over civil liability claims against companies for workplace discrimination and harassment.





A HANDBOOK FOR PRACTITIONERS | THE NETHERLANDS

Civil Liability for Human Rights Violations



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FREQUENTLY USED ABBREVIATIONS

DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure
ECHR	European Convention on Human Rights

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THE NETHERLANDS



Protection of human rights is an important principle in the Dutch legal system. The law of non-contractual liability and the general provisions regarding a wrongful act form the basis for most human rights-related lawsuits in the Netherlands. Human rights can be invoked both directly and indirectly in civil litigation, and EU law and the European Convention on Human Rights are frequently relied on to assist with interpretation of Dutch law. Recently, civil liability law has been increasingly used in public-interest litigation to address global challenges such as climate change and accountability of multinational enterprises. The *Urgenda* climate case against the Dutch Government was the first in the world to establish that the State must take measures for the prevention of climate change and that it must reduce its greenhouse gas emissions.

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2021 Ranking

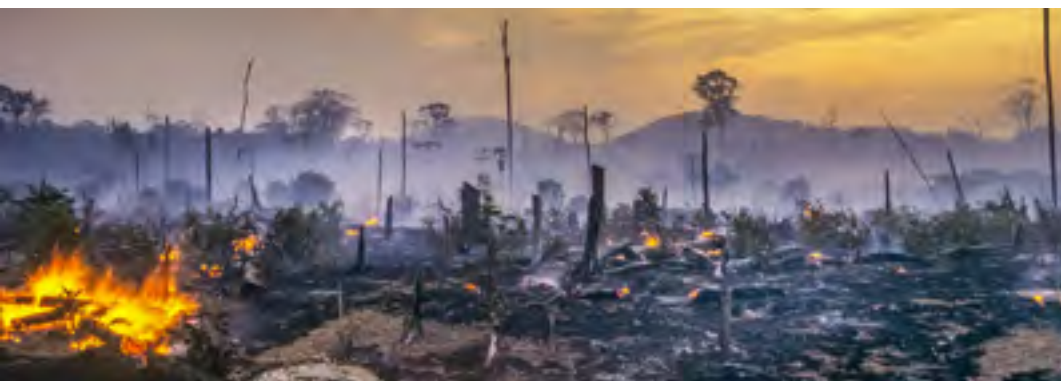
97/100

Freedom House
2022 Score

8/180

Transparency International
Corruption Index 2021 Ranking

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS



IN

444

Introduction

1. The Netherlands has a civil law system, meaning that there is a codified system of law. Dutch civil law was originally founded on Roman Law and the Code Napoléon, which was the French Civil Code that applied during the period of French political domination of the Netherlands. The general code of civil law in the country is the [Dutch Civil Code](#) (DCC, *Burgerlijk Wetboek*).¹
2. The DCC holds several core concepts that are not fixed, including, for example, open norms such as fairness and reasonableness which allow the courts a wide margin of interpretation. The meaning of these core concepts has changed over the years, influenced by Dutch as well as transnational judgments and developments. In particular, EU law and international conventions such as the [European Convention on Human Rights](#) (ECHR) have an influence on the interpretation of Dutch law.²
3. In practice, human rights litigation in the Netherlands often involves transnational facts. For example, Dutch multinational companies may cause damage in third countries where they conduct business activities, rather than in the Netherlands itself. In such scenarios, the court will apply the relevant foreign law rather than Dutch law.³ Thus, in many of these cases, Dutch substantive civil law is not used at all. The Case Scenarios in this Handbook are set in a domestic context, however, and as such do not involve any consideration of foreign law.
4. In civil human rights cases where Dutch law is applicable, the ECHR often plays an overriding role. This is a consequence of the fact that while article 120 of the [Dutch Constitution](#) prohibits Dutch courts from assessing the constitutionality of national legislation and treaties, it allows courts to assess whether domestic laws are compatible with international treaties. If national legislation is considered contrary to an international convention, the international convention will prevail.
5. Civil cases in the Netherlands can be heard in three jurisdictions: district courts, courts of appeal and the Supreme Court (*Hoge Raad*). District courts and courts of appeal decide on the facts and circumstances, whereas the Supreme Court reviews judgments only on points of law.

¹ Dutch Civil Code (DCC, *Burgerlijk Wetboek*), adopted 1 January 1992.

² See C Breedveld-de Voogd, AG Castermans, MW Knigge, T Van der Linden & TA Ten Oeve, *Core Concepts in the Civil Code – Continuously in Motion* (Wolters Kluwer 2016).

³ An example of this is *Millieudéfensie and four Nigerian farmers v Royal Dutch Shell and Shell Nigeria*, ECLI:NL:GHDHA:2021:1825 (The Hague Court of Appeal, 29 January 2019).

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

The principal legal basis for non-contractual liability under Dutch law is a **wrongful act**, the civil law equivalent of tort in common law systems. Wrongful act suits can be commenced against both the Dutch State itself and non-state actors.

6. Generally, litigants will hold public bodies, corporations and individuals accountable for committing human rights violations through rules of tort or delict law. Section 6:162 of the DCC encompasses the general rule of tort and applies to a very broad range of situations. This section states that a person who commits a wrongful act against another is obliged to compensate for the damage that the other person suffers as a result. The term '**person**' can be applied to individuals, private legal persons and public legal persons. There is thus no difference in the treatment of a case in a civil claim against a public body, or a civil claim against a corporation or an individual. However, if the human rights violation is the result of a decision by an administrative body, an individual may have to follow the route of an administrative objection and appeal, rather than that of a civil procedure.

It is important to note that civil liability claims under the general rule of tort can also be based on the violation of provisions of the ECHR or other human rights treaties.

7. The Netherlands has a partly monist legal system, based on sections 93 and 94 of the Dutch Constitution. In this monist system, a rule of international law can be directly applied if it is considered 'binding on all persons'. Consequently, the ECHR has proved to be a particularly important source of law in civil human rights cases.
8. As regards the three defined harms of this study, section 6:162 of the DCC can be used to bring a civil claim to hold a person accountable for harm suffered. In addition, specific provisions are applicable to the defined harms, which complement the general rule of tort:
 - a. In case of **assault, wrongful arrest, or any other wrongful act of a police officer**, the regional police force or the State can be held liable for the damage suffered on the basis of section 6:170 of the DCC. This section provides for a qualitative liability (*kwalitatieve aansprakelijkheid*)⁴ for the person in whose service a subordinate fulfils their duty. In case of detention in custody or pre-trial detention, the State can also be liable under this section (see further discussion in [35] below).

⁴ This refers to the legal 'quality' (*hoedanigheid*) of a liable person's relationship with the wrongdoer or source of harm, broadly covering persons such as an employer of an employee, a parent of children, an owner of animals, the owner or possessor of harmful substances, among others.

- b. In case of **environmental harm**, sections 6:175-6:178 of the DCC apply. These sections provide for several strict liabilities (*risico-aansprakelijkheid*) for environmental damage, meaning that liability is solely based on the 'capacity' or 'quality' of the liable party and not on culpability (see further discussion in [27]-[29] below).
- c. In case of **harmful or unfair labour conditions**, an employer may be liable under section 7:658 of the DCC for damage suffered by an employee as a result of harm suffered *in the performance* of their work. Section 7:611 of the DCC applies to harm suffered in the performance of work as well as in activities that are *related to work* (see further discussion in [30]-[34] below).

Q2

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

9. We first discuss the requirements of the general rule of tort for a wrongful act and then consider the requirements of the specific provisions for each of the three defined harms.

Wrongful acts (under DCC s 6:162)

10. For a successful action under section 6:162 of the DCC, five requirements must be met:
- wrongfulness;
 - causality;
 - attribution;
 - damage; and
 - relativity.
11. The general rule is that the plaintiffs in the proceedings must allege and prove the presence of every requirement.⁵ These five requirements are further explained below.

Wrongfulness

12. In principle, according to section 6:162(2) of the DDC, conduct can be wrongful in three situations:
- if it infringes upon a **subjective right**
 - if it violates a **statutory duty**
 - if the conduct is contrary to what is customary in society under unwritten law, the so-called '**unwritten duty of care**'.⁶ The unwritten duty of care was articulated for the first time by the Dutch Supreme Court in 1919.

⁵ [Dutch Code of Civil Procedure](#) (DCCP) s 150.

⁶ *Lindenbaum v Cohen*, ECLI:NL:HR:1919:AG1776 (Supreme Court, 31 January 1919).

SPOTLIGHT: UNWRITTEN DUTY OF CARE

The 'Cellar Hatch' judgment ([Kelderluik arrest](#))⁷ of 1965 is considered a landmark-case as regards the unwritten duty of care. A visitor to a café in Amsterdam fell through a cellar hatch that had been left open by an employee of the Coca-Cola corporation during restocking. As a result, the visitor broke his leg. The Supreme Court formulated several considerations to use in assessing the degree of hazardous negligence (*gevaarzetting*). These considerations, which have been consistently repeated in later case law, are as follows:

- the probability that potential victims would not exercise the required attention and due care;
- the chance that accidents would ensue as a result;
- the seriousness of the possible consequences;
- the onerousness of precautionary measures;
- the 'normality' of precautionary measures; and
- the nature of the conduct.

13. Although section 6:162 of the DCC distinguishes **three categories of wrongfulness**, in practice this distinction is not always made, and many situations fall within the scope of more than one category. A human rights infringement may be regarded as an infringement of a subjective right, but it can – even when not directly applicable – also give substance to a claim of a breach of an unwritten duty of care.⁸

SPOTLIGHT: CASE STUDY

In the recent climate change case brought against [Royal Dutch Shell by Milieudefensie](#),⁹ the District Court in The Hague ordered Shell to reduce its emissions by 45 per cent by 2030, compared to 2019 levels. The court concluded – echoing the famous *Urgenda* case that will be discussed at [27] below – that Shell had an unwritten duty of care to reduce its emissions in order to prevent dangerous climate change. According to the Court, it follows from the unwritten duty of care that Shell is obliged to respect the human rights of Dutch citizens. When assessing this duty, the District Court, among other sources and circumstances, explicitly referred to the [UN Guiding Principles on Business and Human Rights](#) as giving substance to what is considered appropriate social conduct. The Court included the UN principles in its interpretation of Shell's unwritten duty of care because these principles reflect an internationally widely accepted consensus.

⁷ *Coca-Cola v Duchateau*, ECLI:NL:HR:1965:AB7079 (Supreme Court, 5 November 1965).

⁸ *Milieudefensie and four Nigerian farmers* (n 3).

⁹ *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339 (District Court of The Hague, 26 May 2021).

Causality

14. For civil liability under the general rule of tort, a causal connection between the wrongful act and the damage suffered must be established. It is generally accepted that the *condicio sine qua non* test is a minimum requirement for the causal connection. The test (sometimes termed the '**but-for**' test) implies that the damage would not have occurred if the wrongful act had not taken place.¹⁰ However, sole reliance on this doctrine for the assumption of causation would lead to far-reaching liability and consequently further criteria have been developed.
15. The doctrine most widely used is that of **reasonable attribution**. This involves an examination of whether the damages can be reasonably attributed to the liable person as a consequence of the wrongful act. This doctrine does not rely on a single criterion for assuming causation,¹¹ but takes all facts and circumstances into regard, including the nature of the liability and the extent of the damage. Both the 'but-for' test and the reasonable-attribution criterion can be applied when determining whether a causal connection exists between the wrongful act and the damage.

Attribution

16. Whereas the requirement of wrongfulness relates to the wrongful act itself, the requirement of attribution relates to identifying the person committing the act. In principle, three grounds can be distinguished for attributing a wrongful act or omission to the perpetrator:
 - The person's own fault, meaning that the conduct is a culpable act or omission;
 - Strict liability as laid down in law, eg parental liability for children (sections 6:164–6:169 of the DCC); or
 - Strict liability based on 'generally accepted views' (*verkeersopvattingen*).¹²

The last category is not clearly defined, either in practice or in the literature. In essence, liability based on 'generally accepted views' concerns cases in which the perpetrator cannot actually be blamed. The history of parliamentary deliberations on this matter records references to examples of inexperience: an error made by an inexperienced doctor, or a traffic accident caused by an inexperienced motorist.¹³ These actions can be attributed to the doctor/motorist on the basis of the generally accepted view that the injured party should be compensated.¹⁴

Relativity

17. The requirement of relativity is laid down in section 6:163 of the DCC.¹⁵ This requirement holds that one is only liable for non-contractual damages if the rule that has been violated is specifically intended to protect the claimant from the damages suffered.¹⁶ Relativity comprises three levels. Firstly, the injured party must fall within the scope of the norm that is breached. Secondly, the norm must

10 RJB Boonekamp, '1.2.2 Condicio sine qua non', in AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

11 CH Sieburgh, *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017) para 57.

12 P Memelink, *De Verkeersopvatting* (Boom Juridische uitgevers 2009).

13 CJ van Zeven & JW du Pon, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek. Boek 6, Algemeen gedeelte van het verbintenissenrecht* (Wolters Kluwer 1981) 618–619.

14 DAMHW Strik, *Grondslagen bestuurdersaansprakelijkheid. Een maatpak voor de Board Room* (Wolters Kluwer 2010), para 2.4.

15 DCC s 6:163 reads: 'There is no obligation to pay damages if the norm that has been infringed does not protect the injured party from damages suffered by the injured party.'

16 Channa Samkalden, 'Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order' in Richard Meeran (ed), *Human Rights Litigation Against Multinationals in Practice* (OUP 2021) 209.

extend to the specific damage suffered. Thirdly, the norm must relate to the way in which the harm arose and was suffered.

18. With respect to the first category of wrongfulness (infringement of a subjective right), the requirement of relativity implies that only those entitled to the subjective right can invoke section 6:162 of the DCC. If there is a breach of a statutory duty, it must be considered whether the duty was *intended* to protect the injured party from the damage suffered. In the case of acts or omissions contrary to the unwritten duty of care, relativity can be regarded as being *integral* to the norm.

Damages

19. Finally – and to some extent already included in the requirement of causality – liability presumes a form of damage.
20. In principle, the person who commits a wrongful act is obliged by law to pay compensation if all conditions for civil liability based on section 6:162 of the DCC are met.¹⁷ If the exact damage cannot be assessed, it shall be estimated. Under section 6:97 of the DCC the court estimates the extent of the damage in the way that is most consistent with the nature of the damage caused. Both **pecuniary damage** (section 6:96 of the DCC) and **non-pecuniary damage** (section 6:95 of the DCC) may be eligible for compensation. Non-pecuniary damage in the Netherlands is also referred to as ‘immaterial damage’ (*immateriële schade*).
21. Since 1 January 2019, surviving relatives and next of kin of a victim with serious and permanent injuries as a result of, for example, a traffic accident, medical error, industrial accident, or violent crime, can receive compensation for the pain and suffering they experience as a consequence of the suffering of their relative. This form of compensation is called ‘affection loss’ (*affectieschade*) compensation.

Wrongful police/government action

22. A person can initiate civil proceedings for assault, wrongful arrest and wrongful detention against the police or state officials. If the civil court finds that the action was wrongful, the victim or next of kin can claim compensation for the damage caused by the action. It is important to note that damages can also be granted in criminal proceedings (as discussed at [70]–[72] below).
23. Assault, wrongful arrest, and wrongful detention may constitute a wrongful act within the meaning of section 6:162 of the DCC, which may form the basis to hold a police officer who committed a wrongful act liable. Arrest or detention can be wrongful when these measures are taken in violation of the law, a legal obligation or unwritten social standards of care (eg due care, subsidiarity or proportionality). For example, wrongfulness can be based on the 2012 Police Act (*Politiewet*).¹⁸ The power to use force and the accompanying responsibilities that this entails are strictly regulated by the Act. Section 7 of the Act states that force may only be used if the objective cannot be achieved in any other way. This is called the ‘requirement of subsidiarity’ (*subsidiariteitsvereiste*).

¹⁷ The obligation to pay compensation also arises if all the requirements of one of the specific grounds for liability are met, such as qualitative liability for the person in whose service a subordinate fulfils their duty under DCC s 6:170, or strict liability for environmental damage under sections DCC ss 6:175–6:178. For further explanation, see [27]–[29] below.

¹⁸ Police Act (*Politiewet*), adopted 12 July 2012.

24. Moreover, on the basis of section 6:170 of the DCC, the regional police force or the State can also be held liable for the damage suffered. This section provides for a 'qualitative liability' for the person in whose service a subordinate fulfils their duty. A requirement for liability under this section of the DCC is that the subordinate must have committed an attributable wrongful act; thus, the subordinate himself must be liable.
25. In some cases, an arrest or detention may initially have been lawful, but may later turn out to be wrongful after all. This may be the case, for example, if there was a reasonable suspicion of guilt at the time of the arrest, but the victim is later considered innocent. In these circumstances, the victim does not have to bear the damage resulting from the criminal proceedings; it is an established doctrine in case law that the State is liable for damages in such scenarios.¹⁹
26. The Supreme Court has identified two possibilities for compensation for a former suspect who has suffered damage as a result of criminal action by the police and the judiciary:
 - i. The first possibility arises where there was no justification for the criminal action from the outset, where this action was in violation of a public law legal norm laid down in law or in unwritten law, including where there was no reasonable suspicion of guilt from the outset within the meaning of section 27 of the [Dutch Code of Criminal Procedure](#)²⁰ (this is the 'A ground' noted by the Court).²¹
 - ii. The second possibility arises where the innocence of the accused and – consequently – the unfounded nature of the suspicion on which the police action was based, is established retrospectively in the verdict of the criminal court or other documentation concerning the criminal case (this is the 'B ground' noted by the Court).²²

These grounds can be relied on in civil proceedings under section 6:162 of the DCC.

Environmental harm

27. Parties suffering damages as a result of environmental harm can initiate civil proceedings based on the general rule of tort for a wrongful act (section 6:162 of the DCC). The wrongfulness of an action can be based on the breach of specific environmental law or regulations, but also on breach of international conventions or an unwritten duty of care (as discussed at [12]-[13] above). It was on the latter grounds that Dutch courts held the State accountable for climate change in the landmark *Urgenda* case.²³

¹⁹ *Dutch State v B*, ECLI:NL:HR:1990:AD1019 (Supreme Court, 26 January 1990); *Westra v T te V & B te A*, ECLI:NL:HR:1990:ZC0052 (Supreme Court, 23 November 1990).

²⁰ Code of Criminal Procedure (Wetboek van Strafvordering), adopted 15 January 1921 (as amended 2022).

²¹ *Begaclaim v Dutch State*, ECLI:NL:HR:2006:AV6956 (Supreme Court, 13 October 2006).

²² *ibid.*

²³ *State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court, December 2019).

SPOTLIGHT: THE *URGENDA* CASE

In 2013, Dutch environmental organisation *Urgenda* filed a lawsuit against the Dutch State demanding that the country's CO₂ emissions be reduced by at least 25 per cent by 2020 compared to 1990 levels. *Urgenda* argued that the State was infringing upon the subjective right to life (article 2 of the ECHR) and the right to respect for private and family life (article 8 of the ECHR), and that it was violating its unwritten duty of care by not taking sufficient precautionary measures. The District Court granted the injunction, applying the *Kelderluik* case criteria for endangerment as highlighted at [12]. The Court of Appeal upheld the decision, relying more directly on articles 2 and 8 of the ECHR. In 2019, the [Supreme Court](#) confirmed that decision.

28. As in *Urgenda*, the 'collective action' regime pursuant to section 3:305a of the DCC, as further explained in [56]-[59] below, is particularly useful for groups of people suffering, or at risk of suffering, damages due to environmental harm. Under section 3:305a, a foundation or association can initiate civil proceedings on behalf of a specific group of people and/or on behalf of a public interest, such as the environment.²⁴
29. A second option for a victim of environmental damage is to rely on the specific provisions for **strict liability** (*risico-aansprakelijkheid*) offered by the DCC. Dutch tort law provides for several strict liabilities for environmental damage. Strict liability is based on the capacity or 'quality' (see footnote 4) of the liable party and thus not on culpability.²⁵ Section 6:175 of the DCC provides that professional or commercial users of hazardous substances can be held liable if damage is caused by that substance. The term 'substance' includes gases, liquids and solids, regardless of their composition, form or packaging and irrespective of whether they are raw materials, semi-finished products, finished products or waste products. The main benefit of holding a person liable under section 6:175 of the DCC, rather than under the general rule of tort, is that the burden of proof is less onerous. The applicant must prove that the substance causing the damage is a hazardous substance within the meaning of that section. Contrary to the general rules on liability for a wrongful act, the conduct of the (legal) person causing the damage is irrelevant here. In addition, section 6:176 of the DCC creates strict liability for (legal or illegal) landfill operators and section 6:177 of the DCC does so for operators of mining installations. Finally, section 6:178 identifies several liability exclusions, for example if the damage is a result of a natural disaster or if it was purposefully caused by a third party.

²⁴ Samkalden (n 16) 215. See [56]-[59] for further explanation.

²⁵ GH Lankhorst, 'Inleidende opmerkingen gevaarlijke stoffen en milieuaansprakelijkheden' in HB Krans, CJJM Stolker & WL Valk, *Tekst & Commentaar Burgerlijk Wetboek* (Wolters Kluwer 2021).

Employer's liability

Work situations

30. Employers can be held liable for damage suffered as a result of harmful or unfair labour conditions on the basis of the general rule in section 6:162 of the DCC (possibly with reference to specific laws or regulations that apply to the employer), as well as on the basis of the more specific section 7:658 of the DCC. The latter provides that an employer may be liable for damage suffered by an employee as a result of an accident, occupational disease, defamation, or damage to the employee's property. The rationale of this provision is that an employer has a duty of care to protect the employee from danger arising from work activities. For a claim under section 7:658 of the DCC to be successful, the employee will have to demonstrate:
 - that an employment contract or employment relationship existed at the time the damage was caused;
 - that they have suffered damage; and
 - that they have suffered this damage in the performance of their work (causal relationship).
31. Section 7:658 thus does not apply to cases in which damage is caused by an activity that did not take place in the performance of work.
32. The employer is in principle liable unless they can demonstrate that:
 - they have fulfilled the applicable duty of care pursuant to section 7:658(1) of the DCC;
 - fulfilling the duty of care would not have prevented the damage; or
 - the damage suffered was a result mainly of the employee's intentional or deliberate reckless behaviour.
33. The particular circumstances of each case are relevant to determine if an employer has fulfilled their duty of care. According to the Supreme Court, these circumstances include the type of work, the foreseeability of the hazard, the foreseeable inattentiveness of the worker, and the (im)possibility of taking safety measures.²⁶ It is important to note that the mere possibility of severe damage does not in itself oblige the employer to take measures to prevent such damage.²⁷ That said, a court in such a case will not easily assume that the employer has fulfilled their duty of care, as the scope of this duty of care is very broad.²⁸

Non-work situations

34. Section 7:611 of the DCC can provide a basis for holding an employer liable in cases where damage is caused by an activity that is related to the employee's work but did not actually happen in the performance of their work. Unlike section 7:658, section 7:611 applies to both work and non-work situations. It provides for an obligation to behave as a 'reasonable and fair employer' (*goed werkgever*). A violation of this section by the employer means that the employer has failed to meet their duty of care towards the employee.

²⁶ *Bayar v Wijnen*, ECLI:NL:HR:2005:AU3313 (Supreme Court, 5 November 2005), para 3.3.2.

²⁷ *Werink v Hudepohl*, ECLI:NL:HR:1994:ZC1576 (Supreme Court, 9 December 1994).

²⁸ *Maatzorg v van der Graaf*, ECLI:NL:HR:2008:BD3129 (Supreme Court, 12 December 2008).

Damage caused by the employee

35. In terms of section 6:170(1) of the DCC, employers can also be held liable by third parties for the damage caused by an employee's wrongful act or omission. Three requirements must be met:

- An error or fault must have been made by an employee, also referred to as an 'attributable wrongful act' in terms of section 6:162 of the DCC.
- The employee must be the employer's subordinate, meaning that the employer has the right to give orders or instructions to the employee.
- There must be a connection between the fault and the task assigned to the employee.

Q3

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

There is no special rule or regime for secondary liability in Dutch wrongful act law. However, the DCC contains several provisions on determining liability in cases concerning multiple tortfeasors.

No general principle of complicit or accessory conduct

36. Complicit or accessory conduct is recognised in Dutch **criminal law** rather than Dutch **civil law**. Dutch civil law does not have a general doctrine on liability for complicit or accessory conduct. Acts that constitute complicity under criminal law may also be 'wrongful' under section 6:162 of the DCC if damage is caused as a result and if the other criteria for civil liability are met. The general rules of Dutch tort law concern fault-based liability, which means that a natural or legal person is only liable for damage caused by their *own* intentional or negligent behaviour. When public bodies, corporations or individuals are not the primary perpetrators of a harmful act, civil liability can only be successful if their conduct in itself *directly* contributed to the harm suffered. However, *indirect* involvement in the commission of abuse – for example by the provision of goods and services, purchase of raw materials and products or financing harmful behaviour – cannot constitute civil liability as such if those criteria are not independently met.

SPOTLIGHT: CASE STUDY

This principle concerning accessory liability in Dutch law is underscored by a recent case of 23 November 2021 before the District Court of The Hague.²⁹ Two foundations and an NGO argued that the Dutch State committed a wrongful act by allowing the export of military goods to Egypt. The wrongfulness was argued with reference to the fact that Egypt, including the Egyptian Navy, violates human rights on a large scale. Consequently, the claimants argued, there was a plausible risk that the proposed supply of military goods to Egypt would contribute to, or even be used directly in, violations of fundamental human rights, violations of international (humanitarian) law and/or be in conflict with State's obligations under the Arms Trade Treaty. The District Court rejected these arguments. The Court considered that the worrisome human rights situation in Egypt was 'a given'. However, the fact that the goods may potentially be used in such way that they contribute to human rights violations was not sufficient reason to withhold the export permit.³⁰ The appellants have appealed this decision.

Liability for collective behaviour

37. Despite the lack of a principle of accessory conduct, in certain circumstances, a person can commit a wrongful act by facilitating another person who is committing a wrongful act. **Liability for collective behaviour** (*groepsaansprakelijkheid*) is enshrined in section 6:166 of the DCC and probably comes closest to complicit or accessory liability. In a case where one of the (legal) persons belonging to a group unlawfully causes damage, each of the persons of this group can be held jointly and severally liable. Two requirements must be met: the risk of causing damage should have restrained the person being sued from participating in the group conduct, and the wrongful conduct can be attributed to them.³¹ The degree of involvement in the wrongful act by the individual group member is not necessarily important.³² But it should be noted that liability for collective behaviour is not a form of qualitative liability for the conduct of others. It is a form of liability for a person's own wrongful act.³³

Multiple liable persons

38. Section 6:102 of the DCC regulates the concurrence of liability of different persons for the same damage. The different persons are then jointly and severally liable towards the injured party. This is mainly so that the injured party does not have to face the difficulty of determining for which part of the damage they should address each of the liable persons. For section 6:102 of the DCC to apply, the 'but-for' test of causality between those different events and the entire damage must be passed.

29 *Pax and others v Dutch State*, ECLI:NL:RBDHA:2021:12810 (District Court of The Hague, 23 November 2021).

30 *ibid*, para 4.11.

31 RJB Boonekamp, '2. Aard groepsaansprakelijkheid' in: CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).

32 *TVM v defendants*, ECLI:NL:HR:2015:2914 (Supreme Court, 2 October 2015).

33 RJB Boonekamp, '2. Aard groepsaansprakelijkheid' in CJJM Stolker (n 31); RJB Boonekamp, '7. Individuele toerekenbaarheid' in: CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).

If the damage would not have been the same if a specific event or the action of a specific party was absent, ie if that party's contribution had merely led to additional damage, liability will normally not be established severally, but pro rata.

39. Two categories can be distinguished:

- Damage may be the consequence of different events for which different persons are liable. For example, the damage may be the consequence of the wrongful acts of several persons for which they are each separately liable under section 6:162 of the DCC.
- It may also be that the damage is the result of one and the same event for which different persons are liable. For instance, a child of 14 or 15 years of age is liable under section 6:162 of the DCC, and the parent who cannot excuse themselves is liable under section 6:169 of the DCC for the conduct of the child.³⁴

Alternative causality

40. Alternative causation may be invoked if there is uncertainty about the causal relationship, ie when there are multiple behaviours, but it is not clear which behaviour caused the injury.

41. Section 6:99 of the DCC refers to such a situation. The section reads as follows: 'If the damage is a consequence of two or more events for each of which another person is liable, and it is certain that the damage was caused by at least one of these events, the obligation to compensate the damage rests on each of these persons, unless he proves that it was not caused by an event for which he himself is liable.'

42. Thus, the causal link is presumed to be present unless the defendant proves otherwise. Section 6:99 of the DCC was created with the intention of accommodating the victim. After all, it would be unreasonable if the injured party were not able to recover damages in the absence of proof of which act was causal to the damage.

SPOTLIGHT: CASE STUDY



An important judgment delivered in the context of section 6:99 of the DCC concerns the case of the *DES daughters*.³⁵ Plaintiffs in this case – the so-called 'DES daughters' – suffered from cancer as a result of their mothers' ingestion of the medication DES (Diethylstilbestrol) during pregnancy. None of the daughters could prove which manufacturer produced the DES that was ingested by their mothers. The Dutch Supreme Court considered that section 6:99 of the DCC was applicable and ruled that suing one of the manufacturers was sufficient in this case. The Supreme Court ruled that if the damage caused may be the result of the actions of several persons and it is certain that it was caused by at least one of those actions, all of these persons shall be liable, unless one of them proves that the damage was not caused by their action.

³⁴ RJB Boonekamp, 'Art. 6:102 BW, aant. 1.2', in: AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

³⁵ *DES Daughters v Bayer et al*, ECLI:NL:HR:1992:ZC0706 (Supreme Court, 9 October 1992).

SPOTLIGHT: CASE STUDY



An example of a case in which an appeal to section 6:99 was unacceptable by standards of reasonableness and fairness is [Nefalit v Karamus](#).³⁶ Mr Karamus was exposed to asbestos at work. He developed a form of lung cancer and there was no scientific consensus on the cause. Based on an expert opinion, the probability that the asbestos caused the lung cancer was estimated at 55 per cent. Thus, 45 per cent would have been on Karamus's own account, for which Nefalit could not be held liable following section 6:101 of the DCC (own fault). The probability that the cancer was not caused by asbestos exposure was too high for liability to fall within the DES-margin. The Supreme Court resolved this by formulating the doctrine of proportional liability.

43. Under the doctrine of **proportional liability**, uncertainty regarding causation is divided between plaintiff and defendant in proportion to their own share. On the one hand, it would be unjust to place the liability entirely on the victim by relying on their own fault (which applies under section 6:101 of the DCC). On the other hand, it would also be unacceptable to shift the uncertainty of causality entirely onto the defendant (section 6:99 of the DCC). The doctrine of proportional liability is based on a fairness consideration that underlies sections 6:99 and 6:101 of the DCC. The doctrine is applied with restraint due to the lack of a clear legal basis.³⁷

Q4

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

Under Dutch law it is possible for a parent company to be held liable for the wrongful acts and omissions of its subsidiary or of an independent contractor in a supply chain, either under the general tort rule or under specific legislation. Several high-profile cases in the Netherlands have concerned liability of Dutch parent companies for human rights and environmental abuses committed by their subsidiaries abroad. However, foreign law was applicable in these cases as the law of the place where the harm occurred. To date, there is no precedent establishing supply chain liability of a (parent) company.

36 *Nefalit v Karamus*, ECLI:NL:HR:2006:AU6092 (Supreme Court, 31 March 2006).

37 *Fortis v Bourgonje*, ECLI:NL:HR:2010:BO1799 (Supreme Court, 24 December 2010).

Legal doctrines related to the general tort rule

44. Firstly, a parent company may be liable in terms of section 6:162 of the DCC if the plaintiff demonstrates that the parent company has committed or is committing a wrongful act by acting in violation of a statutory duty, infringing a subjective right or by failing to comply with its unwritten duty of care (see [12]-[13] above). The alleged breach of a duty of care may lie in a concrete action by the parent company or in an omission by them to adequately supervise or intervene in the activities of the subsidiary.
45. Duties of care may entail obligations to investigate, which means that a plea of lack of knowledge by the parent company may not be accepted.³⁸ Thus, holding a parent company liable on the basis of its unwritten duty of care revolves around the principles of knowledge and control; if the parent company had, or should have had, knowledge of the breach by its subsidiary and if the parent company was in a position to intervene, then the parent company may also have had a duty of care to do so.
46. A second option is to hold a parent company liable on the basis of the so-called **'breakthrough liability'** (*doorbraak van aansprakelijkheid*) doctrine. According to this doctrine, a parent company and its subsidiary are 'identified' or 'equated' (*vereenzelviging*) with each other. It follows that the parent company is also liable for the wrongful acts of its subsidiaries. This doctrine is similar to the doctrine of **'piercing the corporate veil'** that is recognised in common law jurisdictions.³⁹ In practice the 'breakthrough liability' doctrine is generally not used for human rights violations, but rather in cases related to debts of the subsidiary. The Supreme Court has ruled that the 'breakthrough liability' doctrine can only be accepted in exceptional circumstances, such as abuse.⁴⁰ This doctrine is therefore very rarely upheld by a Dutch court.⁴¹

Adoption of corporate social responsibility legislation

47. In the past few years, several initiatives have been undertaken to promote the adoption of **corporate social responsibility legislation**. For example, the Child Labour Duty of Care Act (*Wet Zorgplicht Kinderarbeid*)⁴² was one of the first enforcement instruments to be introduced in the field of business and human rights. It was passed in the Lower House of Parliament in 2017 and is expected to come into force in 2022. The Act establishes companies' responsibilities to prevent child labour in their supply chain. Companies are required to investigate whether there is a 'reasonable suspicion' that child labour occurs in their operations and supply chain and to set out a plan of action to prevent or combat it. Dutch companies as well as foreign companies are obliged to submit a statement to the appointed Dutch regulatory authority twice a year, describing the steps they have taken.⁴³ However, the law does not provide for a direct legal ground for civil liability. A civil claim on the basis of this law would not meet the relativity criterion (see [17]-[18] above). Civil liability would thus need to be asserted on

38 KJO Jansen, '9.1.9.2: Verscherpt schuldbegrip' in CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).

39 L Enneking et al, 'Privaatrechtelijke Handhaving in Reactie op Mensenrechtenschendingen door Internationaal opererende Ondernemingen' [2011] NTM|NJCM-Bull 36/5, 547. See also discussion in the following project reports: [28] Australia; [29] Bangladesh; [42] Canada; [74] Hong Kong; [36] Malaysia; [44] US; [87] Zambia.

40 Supreme Court, 7 October 2016, ECLI:NL:HR:2016:2285; Supreme Court, 13 October 2000, ECLI:NL:HR:2000:AA7480.

41 Enneking (n 39).

42 For an English summary and timeline of events with regards to the Act, see <https://www.business-humanrights.org/en/latest-news/dutch-senate-votes-to-adopt-child-labour-due-diligence-law/>.

43 Samkalden (n 16) 212.

the basis of the general framework discussed in [9]-[21] above.

48. In 2021, members of Parliament proposed a new law encompassing a general duty of care as well as specific due diligence obligations for multinational corporations.⁴⁴ If established, this law would also replace the Child Labour Duty of Care Act. Finally, other initiatives have been taken at EU-level⁴⁵ that are likely to influence the adoption of national legislation over time.

Q5

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

Compensation for pecuniary and non-pecuniary damage

49. Both pecuniary damage (section 6:96 of the DCC) and non-pecuniary damage (section 6:95 of the DCC) may be eligible for compensation (see [19]-[21] above).

Injunction or prohibition

50. Another possible remedy is an injunction or prohibition in terms of section 3:296 of the DCC. Section 3:296 states that 'he who has a duty to another person to give, to do or to refrain from doing something, is ordered to do so by the court, at the request of the entitled party'. This section provides the basis for a contractual performance claim, but also for an injunction on the basis of other legal obligations. On the basis of this section, for example, the Dutch government can be ordered to comply with its positive obligations pursuant to international human rights conventions (as was seen in the *Urgenda* judgment, discussed at [27] above). Under section 3:296 of the DCC (as opposed to section 6:162), the proof of the existence of damage or culpability is not required since the injunction may also serve to prevent such damage. The only requirements are that the defendant has a legal duty towards the plaintiff, and that there is sufficient reason to assume that the defendant will not voluntarily perform that duty.

Declaration of rights

51. A court may give a declaratory judgment in terms of section 3:302 of the DCC. This provides that a party directly involved in a legal relationship at issue may claim a declaration of rights concerning that legal relationship. It is accepted that in human rights cases, the explicit acknowledgment of the wrongfulness of behaviour may in itself be a form redress.⁴⁶ Plaintiffs in the case against Royal Dutch Shell and Shell Nigeria of 29 January 2021⁴⁷ sought such a declaration, because a direct claim for damages was not possible under the applicable collective redress provisions at the time.⁴⁸ A declaration of law allows victims to claim damages on an individual basis in follow-up proceedings.

⁴⁴ ['Wetsvoorstel verantwoord en duurzaam internationaal ondernemen'](#) (11 March 2021).

⁴⁵ ['European Parliament resolution with recommendations to the Commission on corporate due diligence and corporate accountability'](#) (2020/2129(INL)) (10 March 2021).

⁴⁶ SD Lindenbergh, '1.16 Vergoeding in de vorm van een verklaring voor recht', in AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

⁴⁷ For a more elaborate discussion of this case, see para [55] of this report.

⁴⁸ *Milieudefensie and four Nigerian farmers* (n 3). See also para [55] of this report.

Q6**What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?****Advantages***Party autonomy*

52. One important advantage of a civil procedure is the principle of party autonomy: it is up to the claimants to decide what claims, grounds and remedies to bring to the attention of the court. Criminal cases in the Netherlands are brought solely by the Public Prosecutor, and although victims may be heard and allowed to pursue a claim in that context too, the initiative, scope and success of the case depends on the choices of the prosecutor. Moreover, in administrative procedures, the scope of the legal review is determined by the specific administrative decision that is under debate. This, depending on the concrete circumstances, may leave victims of human rights violations more restricted in the legal grounds and claims they may rely on and often results in a less complete assessment by the courts.

The law of tort is flexible

53. Dutch civil law is characterised by many open norms that require interpretation by the courts, such as the principles of reasonableness and equity. The standard of due care of section 6:162 of the DCC too, is an open standard that can be interpreted in many ways. The law of tort is therefore flexible and adaptable in the face of societal changes. Moreover, an indirect horizontal impact of human rights conventions (in particular those provided by the ECHR), and even of soft law sources such as the [UN Guiding Principles on Business and Human Rights](#) or the [OECD Guidelines for Multinational Enterprises](#) can be achieved with the use of section 6:162 of the DCC. Consequently, victims of human rights violations under Dutch civil law can easily be accommodated at least as regards their substantive legal basis.

Willingness to handle international cases and apply international legal concepts

54. The Dutch judiciary does not shy away from handling international or transnational cases, and Dutch courts have shown themselves to be equally comfortable applying local and international legal concepts. This is illustrated by the *Urgenda* case,⁴⁹ wherein the Courts relied on articles 2 and 8 of the ECHR, as well as the *Shell Climate Change* case,⁵⁰ wherein the Court referred to the [UN Guiding Principles on Business and Human Rights](#).
55. In January 2021, following a claim initiated by Milieudefensie and brought partly as a class action, *Shell Nigeria* was ordered by The [Hague Court of Appeal](#) to pay damages to Nigerian farmers because of oil spills in Nigeria. The Court of Appeal also concluded that the Shell parent company had breached its duty of care by failing to ensure that a leak detection system was installed in the pipeline of its Nigerian subsidiary. While this case cannot be considered exemplary for Dutch civil law, since Nigerian law applied, it illustrates the willingness of Dutch courts to engage with facts and concepts that originate outside their own jurisdiction.

⁴⁹ *Urgenda* (n 23).

⁵⁰ *Milieudefensie v Royal Dutch Shell* (climate change case) (n 9).

Collective redress

56. The Netherlands has a strong tradition of **public interest litigation**, which often takes the form of a collective action on the basis of the same legal provision that applies for mass claims for compensation. Section 3:305a of the DCC defines as a collective action a lawsuit commenced by a foundation or an association on behalf of a group of people and/or on behalf of a public interest, such as the environment.⁵¹ This provision was recently changed to better accommodate class actions, allowing for claims for compensation as well as other types of redress which were absent previously. Several requirements must be met, eg the purpose of the relevant organisation, according to its articles of association, must be to represent the interest of a specified group of people with a common interest; the organisation must represent this group outside of legal proceedings through its other activities, and the procedure must have a sufficiently close connection with the Dutch jurisdiction.
57. In practice, the collective redress regime is particularly useful for communities or groups of people suffering damages as a result of human rights violations or environmental harm. For example, the oil spills case against Royal Dutch Shell and Shell Nigeria was initiated by the Dutch environmental organisation Milieudefensie on behalf of the local Nigerian victims of oil pollution.⁵²
58. With the introduction of the new Mass Claims Settlement Act ([*Wet afwikkeling massaschade in collectieve actie \(WAMCA\)*](#)), it is now possible to claim damages in a collective redress procedure. The WAMCA applies to actions brought after the Act came into force on 1 January 2020, and with respect to events occurring on or after 15 November 2016. Prior to the activation of the WAMCA, the old section 3:305a(3) of the DCC prevented the possibility of monetary compensation. Only a declaratory judgment could be claimed under section 3:305a. The new law encompasses stricter criteria for representative organisations in mass claims; a milder regime applies in so-called 'idealistic' cases (ie public interest litigation) that do not include a claim for monetary compensation.
59. While the new law thus appears to facilitate access to remedy for victims of human rights violations, it has simultaneously created additional burdens for foreign victims, most importantly in view of the newly introduced requirement that the action must have a sufficiently close connection with the Dutch jurisdiction.

SPOTLIGHT: CASE STUDY

In 2020, the Dutch environmental NGO Both ENDS, on behalf of local communities in Indonesia, demanded in summary proceedings that the Dutch company Boskalis disclose information about the environmental scoping and consequences of a dredging project it had conducted through its Indonesian subsidiary in the port of Makassar. The District Court of Rotterdam declared the collective action of Both ENDS inadmissible because the action had an insufficiently close connection with the Dutch jurisdiction.⁵³

51 Samkalden (n 16) 215.

52 *Milieudefensie and four Nigerian farmers* (n 3).

53 *Both ENDS v Boskalis*, ECLI:NL:RBROT:2020:8228 (District Court of Rotterdam, 18 September 2020).

Disadvantages

Burden of proof

60. Pursuant to section 150 of the [Dutch Code of Civil Procedure](#) (DCCP), the basic rule is that the party who asserts a fact must prove it. In practice, this can be difficult to achieve, particularly in cases concerning foreign corporate liability where the relevant documentation is often in the hands of the corporation. Dutch legal procedure lacks a pre-trial discovery opportunity such as that available to the parties in the Anglo-Saxon legal systems. Parties are obliged to ‘fully and truthfully’ disclose facts that are relevant to the case (section 21 of the DCCP), but this obligation is not clearly defined and there are often no consequences if the obligation is breached.⁵⁴

Legal costs and lengthiness of proceedings

61. Civil litigation is costly. Court fees and legal costs in case of loss are relatively low, but lawyers’ fees and other expenses such as translation and travel costs are high.⁵⁵ Moreover, the overall length of civil proceedings can be very long, particularly when a case concerns a foreign direct liability claim or any other transnational element, or when a judgment is appealed. By way of illustration, it took 12 years of litigation before the Court of Appeal delivered its judgment in the Milieudefensie case.⁵⁶ The length of proceedings can drive up legal costs. But at the same time, Dutch and foreign claimants may be entitled to State-subsidised legal aid under the Dutch legal aid regime.⁵⁷

Private international law obstacles

62. Human rights litigation in the Netherlands often involves transnational facts.⁵⁸ Rules of private international law, in connection to applicable rules of Dutch legal procedure, have proved to be an obstacle when initiating civil proceedings in the Netherlands. Many of these hurdles have already been signaled above. Furthermore, as discussed below, jurisdictional issues may arise if a defendant is not located in the Netherlands. Moreover, a court in principle has to apply foreign law if the damage occurred in another country (eg as regards the standard of proof required), while it must apply Dutch procedural law in terms of access to and the assessment of evidence.

Q7

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

63. The most important set of rules in this regard is included in the [Regulation \(EU\) No. 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis regulation). If this regulation (or any other international rule on jurisdiction) is not applicable,⁵⁹ then sections 1-14 of the DCCP apply.⁶⁰

54 Samkalden (n 16) 223. In the case of *Milieudefensie and four Nigerian farmers* (n 3), the Court of Appeal found that Shell had breached its obligation pursuant to DCCP art 21 and weighed that in its assessment of the evidence.

55 *ibid*, 227.

56 *Milieudefensie and four Nigerian farmers* (n 3).

57 www.raadvoorrechtsbijstand.org/english.

58 This point has been discussed at para [3] above.

59 Which is the case if the foreign defendant is from a non-European state.

60 Samkalden (n 16) 208.

64. The principal rule is that a tort claim can be brought against a foreign defendant if the harmful event occurred or may occur in the Netherlands (according to section 6(e) of the DCCP and article 7(2) of the Brussels I-bis regulation). If the harmful *event* did not occur in the Netherlands but the *damage* did occur there, a claim may be brought against a foreign defendant under this rule too.
65. If neither the event nor the damage occurred within the Netherlands and several parties are held liable, section 7 of the DCCP may provide a basis for jurisdiction. Section 7 DCCP states that a Dutch judge has jurisdiction in cases against foreign defendants if these cases are so closely connected to a case against a Dutch defendant that for reasons of efficiency they should be dealt with together. Unlike article 8 of the Brussels I-bis regulation, section 7 of the DCCP does not explicitly require that 'it is expedient to hear and determine [the cases] together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. In practice, Dutch courts may take this factor into account, in addition to other relevant matters such as whether the cases against the different defendants are based on the same facts and/or legal grounds.⁶¹

SPOTLIGHT: CASE STUDY

In the *Milieudefensie* case,⁶² it was argued by Shell that (i) the cases against the Dutch parent company and the Nigerian subsidiary SPDC were not sufficiently connected to allow the Dutch court to assume jurisdiction on the basis of section 7 of the DCCP, and that (ii) claimants had abused procedural law by suing the Dutch parent company with the alleged purpose of establishing jurisdiction as regards its Nigerian subsidiary (SPDC), while the case against the parent company – according to Shell – was evidently ill founded. Therefore, Shell argued, the claim against the parent company could not serve as an 'anchor claim' for the purpose of applying section 7 of the DCCP. Both arguments were dismissed by the [District Court](#) and subsequently by the [Court of Appeal](#) when they assumed jurisdiction over both defendants.

Similarly, in the *Kiobel v Shell* case, the [District Court](#) asserted that it had jurisdiction over RDS and SPNV, both based in the Netherlands, and also over STTC (an English company) and SPDC based on the connectedness between the claims, since they referred to the same factual situation. This ruling concerned a claim brought by four widows of the *Ogoni 9* against Shell and its subsidiaries, which the plaintiffs held jointly responsible for violations of fundamental rights by the Nigerian regime. The plaintiffs' spouses were sentenced to death by a special tribunal in November 1995 and subsequently hanged.⁶³

⁶¹ *ibid.*

⁶² *Milieudefensie and four Nigerian farmers* (n 3).

⁶³ *Kiobel v Shell*, ECLI:NL:RBDHA:2019:4233 (District Court of The Hague, 1 May 2019).

66. Section 9 of the DCCP adds as a ground for jurisdiction either a tacit choice of forum (section 9a) or the principle of **'forum necessitates'**. The latter applies when no jurisdiction can be established based on sections 2 to 8 of the DCCP and it is shown that a procedure outside the Netherlands is impossible (section 9b), or when a case is sufficiently linked to the Dutch legal sphere, and it is unacceptable to require the claimant to submit its case to a judge of a foreign State (section 9c).⁶⁴

Q8

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

Literature

- LFH Enneking, '[Netherlands country report](#)' in *European Commission study on Human Rights Due Diligence in the Supply Chain* (European Commission 2020)
- LFH Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria', in *Human Rights in the Extractive Industries – Transparency, Participation, Resistance* (Springer 2019)
- Channa Samkalden, 'Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order' in Richard Meeran (ed), *Human Rights Litigation Against Multinationals in Practice* (OUP 2021)
- L Roorda, 'The Netherlands: A Wide Open Window for Human Rights Norms?' in Ekaterina Aristova & Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux* (Hart Publishing 2022).

Research

- [Erasmus Research Platform on Sustainable Business & Human Rights](#)
- [The Netherlands Institute for Human Rights](#)

Documents issued by the Dutch government

- [Revision of the National Action Plan on Business and Human Rights](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

Claims against police

67. The protesters could argue that the **police officers** are liable as their violence and brutality can constitute a wrongful act within the meaning of section 6:162 of the DCC. The protesters would have to prove the five requirements: wrongfulness, causality, accountability, damage and relativity. Normally, the protester would argue that the use of force was in violation of the requirement of subsidiarity as enshrined in the Police Act and developed in police instructions. They may also attest that the actions violated their fundamental rights, including their right to physical integrity.
68. In addition, the protesters can hold the **police force** liable. Under the 2012 Police Act, the regional unit has control over their police officers. The regional unit forms part of the national police force, which – following section 26 of the 2012 Police Act, is a legal person. Thus, if an officer makes a mistake, a claim can be directed against the national police (regional unit) on the basis of section 6:170 of the DCC. A claim under section 6:170 of the DCC will only be successful if the protesters can prove that the police officers committed an attributable wrongful act.

Claims against Security Co

69. A claim against Security Co on basis of section 6:162 DCC is unlikely to succeed. Security Co did not itself assault the protestors, but merely supplied the police with vehicles and equipment. There does not appear to be any causality between these supplies and the wrongful acts, nor can the wrongful acts be attributed to Security Co. Holding Security Co liable implies liability for an accessory conduct, which is not a general principle in Dutch tort law.



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

70. In the case of wrongful acts arising from custodial detention or pre-trial detention, the DCPC is applicable. The protesters can invoke sections 530 and 533 of the DCPC if damage has been suffered as a result of custodial detention or pre-trial detention and the case has ended without the imposition of a penalty or punitive measure. These sections are not applicable to (unlawful) arrest.
71. Section 533 determines in which cases compensation for pre-trial detention may be sought, and what can qualify as 'damage'. Section 530 determines that costs for travel, accommodation, legal aid and subsistence incurred in connection with the prosecution and hearing of the case may be reimbursed by the State. Damages are remedied on the basis of fixed amounts, which are laid down in the so-called LOVS-orientation points.⁶⁵ Normally, this is an easier and more efficient route to obtain compensation, although it is restricted to the indicated events. If the protesters cannot invoke sections 530 or 533 of the DCPC, they would have to institute civil proceedings.
72. If the protesters did receive a penalty or punitive measure, they may still be compensated for procedural faults. For example, section 359a of the DCPC allows for the attachment of legal consequences to procedural irregularities in preliminary investigations. One of the possible legal consequences is a reduction of the sentence.



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

73. There are numerous examples in case law of violence by government actors (not necessarily the police). Somewhat distinct perhaps from the facts in Case Scenario 1, the Court of Appeal in The Hague found in 2021 that the Dutch State was not liable for the deaths of two hostage-takers who hijacked a train near the village of De Punt in 1977. Nine armed Moluccan youths hijacked the train near the village in the province of Drenthe. In the process, 54 passengers were taken hostage. The State put an end to the hijacking by using force. Eight people were killed. Among other things, the court found that the marines who used force were of the sincere belief that the hostage-takers could still pose a danger to them during the operation.⁶⁶

⁶⁵ 'Oriëntatiepunten voor straftoemeting en LOVS-afspraken' (de Rechtspraak, January 2022).

⁶⁶ *Moluccan train hijackers v Dutch State*, ECLI:NL:GHDHA:2021:950 (Court of Appeal of The Hague, 1 June 2021).

CaseScenario 2

Q1

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

74. As the local community is a specified group with a common interest, the community may use the collective action regime of section 3:305a of the DCC to bring a civil claim against Parent Co or Subsidiary Co. This allows that a Dutch (or potentially foreign) foundation or association can act as a claimant on behalf of local victims. Alternatively, the local victims may also each individually authorise a lawyer (or other person) to act on their behalf. Finally, the victims may choose to initiate legal proceedings on behalf of a few individual claimants only, seeking (at least) a declaration of law. Such a declaration may subsequently be used by other victims to obtain compensation. This scenario however may bring additional risks in terms of, for example, time limitations and financial hurdles.

Claims against Subsidiary Co

75. The local community may choose to rely on different legal grounds when bringing civil claims against Subsidiary Co for the damage suffered to their rivers and farmland, community and health. Firstly, the local community could consider bringing a claim against Subsidiary Co on the basis of the general rules on tort (section 6:162 of the DCC). The local community must first prove that Subsidiary Co acted unlawfully, for example by breaching environmental law or regulations, by violating applicable (human) rights, or by acting in violation of the applicable duty of care. In this case, all damage suffered by the local community is caused by soil contamination. The [Act for Soil Protection](#)⁶⁷ can then constitute the legal basis for demonstrating that Subsidiary Co violated human rights and acted unlawfully. Section 13b of the Act for Soil Protection provides for a duty of care for anyone performing activities that can potentially have an impact on the quality of the soil. This Act requires that all reasonable measures are taken to prevent the contamination of land or soil or water. In addition, the local community must demonstrate that the other four requirements under section 6:162 of the DCC discussed in [10]-[21] above are also met.

76. Alternatively, or in addition, the local community can rely on section 6:175 of the DCC, which provides for several **strict liabilities for environmental damage** caused by hazardous substances.⁶⁸ Under this section, the claimant does not need

⁶⁷ Act for Soil Protection (*Wet bodembescherming*), adopted 3 July 1986.

⁶⁸ These provisions were discussed at [29] above.

to establish all aspects of negligence as encompassed in section 6:162 of the DCC. The local community has to prove that the oil extracted by Subsidiary Co can be considered hazardous on the basis of the concrete facts and circumstances of the case. It can do so on the basis of the 'open standard' that the substance poses a special danger of a serious nature to persons or property. The interpretation of this standard is up to the judge in a concrete case.⁶⁹ Section 6:175(4) of the DCC provides that if the hazardous substance caused damage in the form of soil contamination, liability rests on the (legal) person who, at the beginning of the event leading to the contamination, is designated by section 6:175(1) as the liable person. Here, this is Subsidiary Co. If the judge determines that the oil in question can indeed be considered a hazardous substance, the local community can receive compensation for the damage to their rivers and farmland and the costs of restoring it, as well as for the damage to their health.⁷⁰

Claims against Parent Co

77. Holding Parent Co legally liable for the damage caused by Subsidiary Co's extractive project will likely be more difficult. Subsidiary Co is the legal person who had direct control over the project and thus is responsible for its implementation. The case description suggests that Parent Co is only responsible for the 'overall management' of X Group's business and that it has only formulated very general business principles. To establish liability, a more concrete involvement in either the specific subsidiary's activities and/or (environmental) Group policies and compliance will probably be required for a court to assume the existence of a duty of care. In addition, a civil court is unlikely to accept liability of Parent Co for Subsidiary Co's wrongful act on the basis of the doctrine of 'breakthrough liability'.



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

78. The civil route appears to provide the most options for local victims to hold one or both perpetrators to account. Subsidiary Co may also be bound by public regulations regarding the use of hazardous substances. If it fails to comply with these regulations, those whose interest is at stake may request enforcement from the supervising authorities. While this may overlap with the possibility of a civil injunction, this route will not include any form of compensation.

⁶⁹ L Bergkamp et al, *Wettelijke aansprakelijkheid voor milieugevolgen Onderzoek naar wijzigingen in het milieuaansprakelijkheidsrecht in de periode 2010-2015* (Maastricht University 2016) 98.

⁷⁰ E Bauwm '32: Beperking tot persoons- en zaakschade?' in CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2021).



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

79. One high-profile lawsuit relevant for Case Scenario 2 may be the *Urgenda* case,⁷¹ which was discussed earlier at [27] above. Whereas that was a case against the State which argued that the State had violated a duty of care to its citizens, largely the same reasoning was applied in the recent *Shell Climate Change* case, in which the [District Court of The Hague](#) ordered the company to reduce its CO2 emissions by 45 per cent by the end of 2030 relative to its 2019 levels (see above at [54]). However, the facts of Case Scenario 2 most closely resemble the *Milieudefensie* case, concerning oil spills from Shell's operations in Nigeria, which resulted in liability for both the subsidiary and the parent company.⁷² That case, however, was not decided on Dutch law, but on the basis of Nigerian law.



CaseScenario3



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

Claims against Factory Co

80. The injured employees can hold Factory Co liable for the damage they have suffered either on the basis of section 6:162 of the DCC and/or on the basis of section 7:658 of the DCC. The general rules of tort of section 6:162 have been discussed in [10]-[21] above. Apart from its general responsibility as regards its employees, Factory Co has also acted in conflict with its statutory duties as encompassed in public regulations regarding safety at the workplace. In the context of section 7:658 of the DCC, the employees must claim and, in the event of a dispute, prove that an employment relationship existed at the time the damage was caused; that they have suffered damage; and that they have suffered this damage in the performance of their work. On the basis of the facts presented, this will not be problematic.

⁷¹ *Urgenda* (n 23).

⁷² *Milieudefensie and four Nigerian farmers* (n 3).

Claims against Brand Co

81. In order for Brand Co to be liable, it must be established that Brand Co had an autonomous duty of care as regards the employees of Factory Co. In this regard, claimants must first show that Factory Co was or should have been aware of the situation and that it should have intervened to prevent more harm. If a duty of care can be established, there must also be causality between the breach of that duty and the harm done to the victims. Since Brand Co (i) is a public advocate for responsible business practices; (ii) was informed about the situation by civil society organisations, and (iii) is the major purchaser of Factory Co's clothes, it may be argued that Brand Co, at the very least, had a responsibility to investigate the situation and – aware of the wrongdoings – halt its business relationship with Brand Co (or take other measures) in order not to facilitate further human rights violations. Soft law principles like the [OECD Guidelines for Multinational Enterprises](#) may give further substance to such an unwritten duty of care. As such, Brand Co may have committed a wrongful act in firstly, entering into a business relationship without proper due diligence, and/or secondly, maintaining that relationship without taking further measures even when it was aware of or should have been aware of the situation.



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

82. If the goal is to compensate the damages suffered, a civil claim is the preferred route. If the goal is to seek retribution, criminal proceedings may be an option as well. Prosecution of legal persons (and potentially of the specific people responsible for the situation) is possible in the Netherlands on the basis of section 51 of the [Criminal Code](#).



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

83. In 2008, the Supreme Court issued an important [judgment](#) with regards to the extent of employers' duty of care. During the loading of a truck, one of two loading doors slammed shut, hitting an employee on the head. He sustained injury and claimed compensation in terms of section 7:658 of the DCC for the damage suffered. The Supreme Court held that the mere possibility of serious damage does not oblige the employer to take measures to prevent it. The assessment of which obligations the employer has in a specific case must take account of all the relevant circumstances of the case.⁷³ The injured employee's claim was rejected.

⁷³ *Lagraw v van Schie*, ECLI:NL:HR:2008:BB7423 (Supreme Court, 8 February 2008).



A HANDBOOK FOR PRACTITIONERS | **RUSSIAN FEDERATION**

Civil Liability for Human Rights Violations



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RUSSIAN FEDERATION

Under Russian law, human rights violations may be remedied by actions in tort. The legislative framework provides for a wide scope of application for this remedy. Recent trends in case law, such as compensation for pure economic losses, recognition of indirect causation, and more liberal approaches to the amounts of damages awarded, have expanded on the statutory provisions. Russian tort law has become fertile ground for efficient human rights protection to flourish. And yet, this potential is somewhat hindered by institutional obstacles and a lack of appetite for litigation among citizens.



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**Democracy Index
2021 Ranking**

19/100

**Freedom House
2022 Score**

136/180

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



Introduction*

1. The Russian legal system is part of the European (Romano-Germanic) law family. Its main sources of law are laws and regulations adopted by the country's various authorities according to their competence.
2. Russia is a federation with several levels of government: the national federal level; the level of the constituent entities (regions) of the federation; and the municipal level. Each level adopts regulations within the scope of its competence. Protection of human rights and remedying their violations is predominately regulated at the federal level.
3. The main sources of law at the federal level are i) the Constitution; ii) universally recognised principles of international law and international treaties ratified by Russia; iii) federal constitutional laws; and iv) federal laws adopted by the Parliament. For each area of law there is usually an applicable 'code' – a comprehensive federal law containing the main principles and the most important legal provisions for the respective field, for instance the Civil Code,¹ the Labour Code,² the Criminal Code,³ and the Administrative Offence Code.⁴
4. The most important international treaties ratified by Russia in the context of human rights are the [International Covenant on Civil and Political Rights](#) (the 'ICCPR') and the [International Covenant on Economic, Social and Cultural Rights](#). For the last two decades Russia has been a party to the [European Convention on Human Rights](#) (the 'ECHR'), providing victims of human rights violations in Russia with an option to elevate their cases to the European Court of Human Rights (the 'ECtHR') after local remedies are exhausted. However, on 16 September 2022 Russia will cease to be a party to the ECHR, and applications to the ECtHR against Russia will no longer be possible.⁵ Previously, Russian courts have occasionally referred to ECtHR judgments for their persuasive authority on human rights matters. However, it appears unlikely that this practice will survive after Russia's status as a party to the ECHR ceases.

* Note that government-sponsored resources may not be accessible from outside of Russia.

1 The Russian Civil Code consists of four parts, each part being enacted by a separate federal law: [Federal Law No 51-FZ dated 30.11.1994](#) (Part One); [Federal Law No 14-FZ dated 26.01.1996](#) (Part Two); [Federal Law No 146-FZ dated 26.11.2001](#) (Part Three); [Federal Law No 230-FZ dated 18.12.2006](#) (Part Four). For the most up-to-date professional English translation, see PB Maggs and AN Zhiltsov (trs, eds), [Civil Code of the Russian Federation. Parts 1–4](#) (Statut, 2020). Another translation is available [online](#).

2 [Federal Law No 197-FZ dated 30.12.2001](#).

3 [Federal Law No 63-FZ dated 13.06.1996](#).

4 [Federal Law No 195-FZ dated 30.12.2001](#).

5 Resolution of the European Court of Human Rights on the consequences of the [cessation of membership of the Russian Federation](#) to the Council of Europe in light of article 58 of the European Convention on Human Rights dated 22 March 2022.

5. The Russian judicial system is comprised of two main court branches: the **courts of general jurisdiction** which deal predominantly with criminal cases and civil cases involving individuals, and **commercial ('arbitrazh') courts** which deal predominantly with commercial disputes involving legal entities and individual entrepreneurs. The human rights cases fall mainly to the jurisdiction of the courts of general jurisdiction. Proceedings in the courts of general jurisdiction are governed by the Civil Procedure Code (the '**Civil Procedure Code**'),⁶ while proceedings in the commercial courts are governed by the Commercial Procedure Code.⁷ Each branch has courts of first instance, appeal, and cassation. The highest court for both branches is the Supreme Court of the Russian Federation (the '**Supreme Court**').⁸
6. **Resolutions of the Plenum and Presidium of the Supreme Court** are legally binding for the lower courts.⁹ Other judicial acts of the Supreme Court (including most of its judgments in individual cases), as well as judgments of lower courts of general jurisdiction and commercial courts, are not binding per se but may be cited as persuasive authorities. In the latter scenario it is usually relevant whether case law on a particular matter is uniform and consistent.
7. The Constitutional Court of the Russian Federation (the '**Constitutional Court**') – the third branch of the judicial system – is tasked with ensuring that federal laws and other regulations of the federal government are consistent with the Constitution. Judgments of the Constitutional Court which provide an interpretation of federal laws, or which declare them to be inconsistent with the Constitution are binding on all authorities.

6 [Federal Law No 138-FZ dated 14.11.2002.](#)

7 [Federal Law No 95-FZ dated 24.07.2002.](#)

8 Prior to 2014, the Supreme Commercial Court was the highest court for the commercial courts branch. However, in 2014, the Supreme Commercial Court was dissolved, and its functions passed to the Supreme Court.

9 Certain judicial acts of the Plenum and Presidium of the Supreme Commercial Court remain binding as well.



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Actions in tort

8. The most common civil remedy for a human rights violation under Russian law would be an action in tort governed by the Civil Code. Article 1064(1) of the Civil Code reads:

'Harm caused to the personality or the property of an individual, as well as harm caused to the property of a legal entity shall be fully compensated by the person who caused such harm.'

This formula is known as the general tort rule (or '*general delict*') which means that, unless special rules provide otherwise, *any* harm inflicted by a wrongful and intentional or negligent behaviour should be compensated by the tortfeasor.

9. '*Personality*' in this rule comprises any personal rights and includes human rights. Consequently, any harm caused by a wrongful infringement of a victim's human rights is actionable under tort law.
10. This rule generally applies irrespective of whether a tortfeasor is a public body, legal entity, or an individual.
11. A successful action in tort under article 1064(1) of the Civil Code requires the existence of four elements, namely **harm**, **wrongfulness**, **causation**, and **fault** (each will be outlined at [24]-[30] below).
12. The Civil Code and other federal laws provide for special tort rules that are applicable in certain contexts and have predominance over the general tort rule. Such rules may eliminate or specify elements of tort which are absent in the general tort rule, or they may simply reaffirm or refer to the general tort rule as being applicable to certain scenarios without any substantive modification. If a case does not fall within any of the special tort rules (or if a special rule expressly or implicitly refers to the general tort rule without modification), it is actionable under the general tort rule. We outline below some of the special rules, which are potentially applicable to the case scenarios considered in this report.

Assault or unlawful arrest and detention

13. Articles 16 and 1069 of the Civil Code provide that actions in tort may be brought against the State, State bodies, and their officials. Article 1069 reads:

'Harm caused to an individual or a legal person as a result of illegal actions (or omissions) of State bodies, local government bodies, or officials of these bodies, including as the result of the issuance of an act of a State body or an act of a local government body not corresponding to a statute or other legal act, is subject to compensation. The harm shall be compensated at the expense respectively of the Treasury of the Russian Federation, the treasury of a region of the Russian Federation, or the treasury of a municipal formation.'

14. Article 1070 of the Civil Code provides that harm caused by investigative and prosecution authorities and courts as a result of, inter alia, illegal accusation or arrest is compensable on a faultless basis (while the general rule is that a person may escape liability by proving that they are not at fault). This type of liability is called 'strict liability'. For example, a prison inmate who was granted a provisional release was awarded moral damages under article 1070 for a two-week delay in his release.¹⁰

Environmental harm

15. Article 75 of the [Federal Law on Protection of the Environment](#) No 7-FZ dated 10.01.2002 (the '**Law on Protection of the Environment**') sets out that breaches of environmental regulations may be remedied, amongst others, through actions for compensation of harm (other remedies include administrative, disciplinary, and criminal actions).

Articles 77 and 79 of the Law on Protection of the Environment distinguish between direct harm to the environment (**public environmental harm**) and reflective harm to private persons' health and property resulting therefrom (**private environmental harm**). Public environmental harm is compensated to respective local budgets, whereas private environmental harm is compensated to respective individuals.

16. Actions for compensation of public environmental harm may be initiated by a wide range of applicants (federal, state, and municipal government bodies; prosecutors; individuals; public associations; and non-profit organisations acting in the sphere of environmental protection). In practice such actions are mainly pursued by public authorities and are more common than actions for compensation of private environmental harm. For example, in the infamous Norilsk-Taimyr case, the claim was filed by the Federal Service for Supervision of Natural Resources (see [98] below).
17. Article 79(2) of the Law provides that private environmental harm shall be compensated in accordance with civil law legislation. This provision refers to the rules on actions in tort as provided in the Civil Code: the general tort rule applies unless the case falls under any specific rule.

¹⁰ Ruling of the Supreme Court No [53-KAD21-11-K8](#) dated 22.09.2021.

18. Article 1079 of the Civil Code provides for a potentially applicable specific rule. It reads that a harm caused by an **'ultrahazardous activity'** is compensable on a faultless (strict liability) basis. Ultrahazardous activities may include, for example, operation of motor vehicles and railways, the conducting of construction works, use of high-voltage electrical or atomic energy, explosive substances (the list is not exhaustive). It is often the case that public and private environmental harm is caused by an ultrahazardous activity (eg operation of an oil-well or treatment of hazardous waste).

Harmful or unfair labour conditions

19. Article 419 of the Labour Code provides that violations of labour regulations may be remedied, amongst others, through compensation claimable via the following two types of action (other remedies can be sought through administrative, disciplinary, and criminal actions).
20. The first type is the **regular civil action in tort** governed by the rules of the Civil Code. There are no specific tort rules for remedying harmful or unfair labour conditions, hence the general tort rule will apply.
21. The second type is an action for **compensation for harm inflicted at work** governed by Chapter 38 of the Labour Code. It applies to four defined case scenarios: unlawful restriction of access to work, harm to employee's property, delay in payment of wages, and compensation of moral damages to employees. Authorities diverge on how these provisions interact with the rules on tort. For instance, the Supreme Court has held that tort law does not apply to actions concerning unlawful restriction of access to work,¹¹ whereas with regard to the other case scenarios the courts refer to tort rules from time to time.¹²

SPOTLIGHT: LAW ON SOCIAL INSURANCE

The Federal Law on Compulsory Social Insurance against Accidents at Work and Occupational Diseases No 125-FZ dated 24.07.1998 (the '[Law on Social Insurance](#)') provides that employers shall insure the defined categories of employees against industrial accidents and work-related diseases. Insurance premiums are paid by employers, and employees are entitled to insurance compensation if an accident occurs. Having a claim against an insurer would not render a claim against an employer impossible, as long as the employee does not become overcompensated. Therefore, an employee may claim compensation from the employer for harm not compensated by the insurer. For example, under article 8(3)(2) of the Law on Social Insurance the statutory insurance does not cover compensation of moral damages, and a victim may thus resort to a direct claim against an employer for compensation of such harm.

¹¹ Judgment of the Supreme Court [No GKPI11-2044](#) dated 25.01.2012.

¹² An example of this is the ruling of the Supreme Court [No 49-KG21-2-K6](#) dated 15.03.2021.

Other remedies – *actio negatoria*

22. ***Actio negatoria*** (an action for protection against violations of rights in property not connected with deprivation of possession) may serve the purpose of human rights protection for the three defined harms. It may provide an eventual victim with an injunction and thus hinder prospective violations. For instance, in a dispute between two neighbours, a claimant who was allergic to bees asked for an injunctive relief which required dismantling the respondent's apiary. The Supreme Court granted the injunction under the rules of *actio negatoria*.¹³ Such actions naturally have a limited sphere of application and are extremely rare in practice, hence we will not comment on them further in the following sections.

Interaction between civil and criminal proceedings

23. Narratives of fact which make the basis for a civil action in tort may also be a basis for a **criminal action**. Instead of commencing civil proceedings, a victim may choose to first request the initiation of criminal proceedings, and then bring a civil claim for compensation of damages within the criminal proceedings. If the alleged perpetrator is convicted, the victim will get their harm assessed and compensation awarded just as they would in regular civil proceedings. The strategic benefit of resorting to criminal action in the first instance is that the investigating authorities naturally have greater means for proving violations by perpetrators, and victims may then rely on facts proved by the investigating authorities to argue their civil cases. The downside is that victims lose control over the process (as control is assumed by investigators and prosecutors) and the path to compensation may actually get much longer.



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

A general action in tort presupposes existence of four elements, namely harm, wrongfulness, causation, and fault.¹⁴ Specific tort rules may eliminate or modify some of the elements or add new ones (see for instance [14] and [18] above). The burden of proving the respective elements lies with the claimant, save for fault, which is presumed under article 1064(2) of the Civil Code, and hence the burden to disprove fault is shifted onto the respondent (see [29] below).

Harm

24. Harm means 'any detraction from a legally protected tangible or intangible benefit, any adverse change in a legally protected benefit that may be either material or non-material (intangible)'.¹⁵ The definition is broad, so effectively any diminution in a claimant's right may be considered a 'harm'. There are debates as to what harm is compensable in pure economic loss cases (see [25] below).

13 Ruling of the Supreme Court [No 37-KG19-4 dated 28.05.2019](#).

14 Resolution of the Constitutional Court [No 36-P dated 18.11.2019](#).

15 Ruling of the Supreme Court [No 81-KG14-19 dated 27.01.2015](#).

Wrongfulness

25. Wrongful conduct is deemed to be established if the offender's actions (or omissions) violate the aggrieved party's rights (eg rights *in rem*, personal rights, contractual rights) and even economic interests (thus leading to the idea of compensability of pure economic losses), or if the offender's conduct violates a statute or good-faith standards. Proving wrong is usually straightforward since harmful conduct is commonly considered wrongful¹⁶ unless a respondent can prove some justifying circumstances (such as self-defence or a state of necessity). The position is usually more nuanced in cases where pure economic loss is sought. (Discussion of **pure economic loss** cases is intentionally omitted here and elsewhere in this commentary as such cases fall outside the scope of the defined case scenarios under consideration.)
26. Under article 1064(3) of the Civil Code, harm caused by lawful actions is only compensable in cases provided for by law. For instance, policemen are not liable for harm inflicted upon citizens and organisations by their use of physical force, special means (as defined by the legislation, namely electroshock devices, water cannons, service animals, etc), or firearms, if the use was carried out on the grounds and in the manner established by federal laws (article 18(9) of the Federal Law on Police No 3-FZ dated 07.02.2011 (the '[Law on Police](#)').

Causation

27. It shall be demonstrated that it was the respondent who caused the harm. The Supreme Court commonly holds that a causal link between a respondent's acts and a claimant's harm exists if such harm is an ordinary consequence of the wrongdoing, or if a respondent's behaviour considerably increased the likelihood of the harm.¹⁷ Causation must be proved with a reasonable degree of certainty: for example, in a case where it was presumed that a victim was contaminated with hepatitis in the course of a blood transfusion and not elsewhere;¹⁸ or in another case when the probable cause of harm (a pipeline leakage) occurred on territory controlled by the respondent, it was presumed that it was the latter who had caused the harm.¹⁹

Fault

28. It shall be demonstrated that the action which caused harm was committed with the respondent's fault. Fault is usually understood as a tortfeasor's deviation from the standard of conduct imposed on an actor in a similar factual context. Although intention and negligence are traditionally distinguished, the gravity of the tortfeasor's fault may play some role only in determining the amount of moral damages. Therefore, existence of fault in the form of negligence would be sufficient for an action in tort.
29. In the vast majority of instances, wrongfulness of conduct implies the presence of fault. There is hence an overlap between the two. That is why article 1064(3) of

¹⁶ An example is the Resolution of the Supreme Commercial Court [No 4515/10 dated 27.07.2010](#).

¹⁷ Resolution of the Plenum of the Supreme Court [No 7 dated 24.03.2016, para 5](#).

¹⁸ Bulletin of case law by courts of the Krasnoyarsk region with regards to improper provision of medical services dated 24.04.2006, section 'Forensic report on the case'. It can be accessed via legal database service Consultant (see para [79] in this report).

¹⁹ Resolution of the Commercial Court of the North-Western District dated 20.08.2013 in case [No A56-4092/2012](#).

the Civil Code establishes the **presumption of fault** of the person who caused harm, ie the claimant is not required to establish the wrongdoer's fault as a separate element of the burden of proof – it is sufficient to demonstrate that the respondent's conduct was wrongful (or simply harmful, since existence of harm, in turn, commonly leads to assumption of wrong). However, with this assumption in place, it is still conceivable that a respondent may prove that they were not at fault (although this is difficult in practice).

30. Furthermore, there are specific tort rules which eliminate the criterion of fault, so that the absence of fault on the part of the wrongdoer does not exclude their liability (in so-called faultless or strict liability cases). Examples of this are harm caused by an ultrahazardous activity (article 1079 of the Civil Code, see [18] above) or harm caused by a product (paragraph 3, chapter 59 of the Civil Code).

Q3

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

31. The general rule on **multiple tortfeasors' liability** is contained in article 1080(1) of the Civil Code, which reads as follows:

'Persons who have jointly caused harm shall be jointly and severally liable to the victim.'

32. We outline below certain typical cases and solutions developed through case law.

Case one (tortfeasors united by intent)

33. In this scenario several persons act with a common intent to cause harm. The harm may be directly inflicted by just one or some of the wrongdoers, while others may have contributed to the result in another way. The outcome prevailing in case law is that as long as a wrongdoer intended to inflict the harm and has in some way contributed to it, they shall be liable for the harm jointly and severally with other tortfeasors. An example might be if two persons were beating up a victim, and a third one was serving as a lookout, all three of them would be deemed joint tortfeasors, with no distinction being made as to whether physical harm was inflicted on the victim by any particular wrongdoer. The joint nature of the wrongdoers' acts in such cases is evidenced by their concurrence, coordination, and commitment to implementing the intent common to all the participants.²⁰

Case two (independently acting tortfeasors causing common and inseparable result)

34. In this scenario, the harm is a common (inseparable) result of the unrelated wrongful acts of several persons. Unlike in case one above, the tortfeasors did not act with a common intent to inflict harm, but their acts ultimately and jointly contributed to a given result. Case law is rather ambiguous: either all contributing tortfeasors may be held jointly and severally liable (provided that the causal contribution of each tortfeasor was considerable), or several (proportionate) liability may be implemented.

²⁰ See the following examples: Resolution of the Plenum of the Supreme Court [No 49 dated 30.11.2017, para 9](#); Resolution of the Plenum of the Supreme Court [No 53 dated 21.12.2017, para 22](#).

SPOTLIGHT: CASE STUDY

In one relevant case, two persons – one who wrongfully took possession of someone else’s car and left it on a road, and another who subsequently took the car from where it had been left, dismantled it, and sold it as spare parts – were held jointly and severally liable for the harm caused.²¹ In another case, several liability was established for a person who negligently left a car with keys inside, and a thief, who took advantage of the situation, drove the car away and ran over a pedestrian.²²

Case three (customer-contractor situations)

35. In this scenario a customer engages a contractor to perform works which cause harm to a victim. The outcome prevailing in case law is that the customer and the contractor shall be held jointly and severally liable for the harm caused by the contractor. However, the customer may be released from liability if they can prove that the contractor has exceeded the scope of the assignment.²³

SPOTLIGHT: CASE STUDY

In a case considered by the Supreme Commercial Court a customer was held liable for the harm caused by their contractor who was instructed by the former to source and store stones for the construction of a filtering dam. On his own initiative, the contractor extracted nearby stones from ancient burial structures which were considered an archaeological monument.²⁴

36. The Civil Code provides for an important exception to the above rule: in terms of article 1068 of the Civil Code, if the person that actually caused harm is an employee (rather than an independent contractor), the compensation shall generally be recovered from the employer only, provided that the harm is caused by the employee in the course of their employment (their official, professional) duties. If the employee has violated instructions given by the employer, or the employee followed their own intent to commit a wrong, the employer will still be liable for the harm caused by the employee. But under article 1081(1) of the Civil Code, an employer who has paid compensation for the harm caused by their employee may claim recovery of their costs from the employee, subject to certain labour law limitations (for instance, under article 241 of the Labour Code an employee may not be ordered to compensate more than their average monthly salary, unless certain exceptions apply).

21 Resolution of the Constitutional Court [No 7-P dated 07.04.2015](#), which led to the adoption of article 1080(3) of the Civil Code.

22 See eg Resolution of the Plenum of the Supreme Court [No 1 dated 26.01.2010, para 24](#); Ruling of the Supreme Court [No 78-KG20-18 dated 18.05.2020](#).

23 [Plenum No 49](#) (n 19), para 9.

24 Resolution of the Supreme Commercial Court [No 6773/11 dated 10.11.2011](#).

Q4**When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or an independent contractor in a supply chain?**

37. The general rule under Russian law is that a **parent company is not liable for debts of its subsidiary**, and vice versa. This rule is embodied in article 56 of the Civil Code:

'The founder of (or a participant in) a legal person or the owner of its property shall not be liable for the obligations of the legal person, and the legal person shall not be liable for the obligations of the founder (or participant) or owner, with the exception of cases provided by the present Code or another statute.'

38. However, there are certain exceptions to this rule, and we list those of them which may potentially be employed by victims of human rights violations in the defined scenarios.

Exception one

39. The parent company may be liable as an **accomplice**. Russian law exploits a rather broad concept of multiple tortfeasors and is ready to expand liability of accomplices provided that they shared common intent with the direct tortfeasors (see [33] above). Application of this exception is rather fact-specific, and to the best knowledge of the authors there has not yet been a case where it was actually applied. There is hence a degree of uncertainty as to how Russian courts will treat an attempt to shift liability to a parent company under this exception.

Exception two

40. In the context of **bankruptcy**, a parent company or other persons who controlled the actions of a subsidiary may be held liable to the subsidiary's creditors if the creditors are not able to get satisfaction from the bankrupt company, provided that the shortfall of assets occurred because of the controlling persons' acts or omissions (article 61.11 of the Federal Law on Insolvency (Bankruptcy) No 127-FZ dated 26.10.2002 (the '[Law on Insolvency](#)'). This type of liability is called 'subsidiary liability', ie it is secondary to the (primary) liability of the bankrupt company. The claimant will have to prove that the respondent was a controlling person, that full repayment of debts by the bankrupt company is impossible, and that the bankruptcy was caused by the controlling person's acts or omissions. Regulations and case law relating to subsidiary liability are vast, complex, and nuanced. There are further 'subsidiary liability' scenarios other than the one outlined above (see section III.2 of the Law on Insolvency). Claims for subsidiary liability have become a widespread practice in recent years. The courts have lowered thresholds of proof, thus enabling more claims to be satisfied.

Exception three

41. Here a parent company is not an accomplice, but it **siphons off assets** from its subsidiary to avoid actual enforcement of liability. There is recent case law establishing liability in tort for the intentional siphoning off of assets and facilitation thereof.

SPOTLIGHT: CASE STUDY



In a relevant case, an insolvent company had an outstanding tax debt. The company's sole member and director, and his wife, gifted their valuable properties to their sons, arguably to avoid the 'subsidiary liability' for the debts of the company. The tax authority filed a tort claim against, inter alia, the couple's children. The Supreme Court stated that the children shall be jointly and severally liable for the debts of the bankrupt company if it is established that, by acquiring the properties, they had the intention of making it impossible for the creditors of the bankrupt company to obtain their consideration in full.²⁵

Piercing the corporate veil

42. The doctrine of '**piercing the corporate veil**', as it is known in other jurisdictions, does not appear in Russian law. Simply put, the task of the 'piercing' doctrine is achieved under Russian law either by the rules on subsidiary liability in a bankruptcy context, or by certain corporate law rules which, for example, empower minority shareholders to recover from majority shareholders damages caused to the company by the latter (article 53.1 of the Civil Code). The first set of rules, under the Law of Insolvency, is outlined above in [40], and the second set of rules, under the Civil Code, is not applicable to the case scenarios under analysis, hence its description is intentionally omitted here. Notwithstanding this, one may find occasional reference to the 'piercing' doctrine in case law, or the irregular application of its underlying ideas without the doctrine being expressly named. It remains to be seen whether these sporadic practices will become an established path.
43. An independent contractor in a supply chain may be liable as an accomplice in terms of exceptions one and three outlined in [39]-[41] above. Furthermore, articles 1095-1098 of the Civil Code set out the **liability of a producer** for harm resulting either from design, formulation, or other defects in goods, works, or services, or from unreliable or insufficient information on goods, works, or services (product liability cases). Product liability under Russian law is 'strict', ie it does not depend upon a respondent's fault (see [30] above).

Q5

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

44. The primary remedy in an action in tort is monetary compensation in the form of damages. We outline below various types of damages which a claimant may seek.

²⁵ Ruling of the Supreme Court [No 305-ES19-13326 dated 23.12.2019](#); See also Ruling of the Supreme Court [No 301-ES17-19678 dated 19.06.2020](#).

Pecuniary damages

45. Article 15(2)(1) of the Civil Code provides that pecuniary damages may comprise compensation for actual harm (loss of or injury to the claimant's property) and compensation for lost profit (income that was not received and which the claimant would have received under the usual circumstances, had their rights not been violated).
46. Further specific rules determine the composition of claimable damages in certain scenarios. We outline here those of them which are potentially relevant to the three defined harms.
47. Pecuniary damages may comprise the following items in case of harm to health (article 1085(1) of the Civil Code):
 - Loss of victim's earnings (income) that they had, or could definitely have had;
 - Costs of medical treatment, additional nutrition, acquisition of special vehicles, etc; and/or
 - Costs of retraining.
48. In the event of death, pecuniary damages may comprise the following items:
 - Burial expenses (article 1094 of the Civil Code); and/or
 - Damages due to the loss of a breadwinner: Family members of a deceased who are incapable of working (in particular their minor children or elderly parents), as well as the dependants of a deceased, shall be entitled to demand that the person who caused their death make monthly payments equal to the share in the deceased's earnings that was falling on the respective claimant (articles 1088, 1089 of the Civil Code).
49. The aforementioned damages will normally be awarded if the respective costs have not been fully compensated or may not be fully compensated through other means.

All Russian citizens are subject to compulsory health insurance and are thereby entitled to receive certain medical treatment. Furthermore, employees are subject to compulsory social insurance against industrial accidents and work-related diseases. They are thereby entitled to claim compensation from their insurer if an insured event occurs. Consequently, damages are only claimable to the extent that relevant free-of-charge treatment or compensation has not been provided via general or industrial health insurance.

50. However, the Supreme Court gave a restrictive construction to this rule:

'... if the victim who needs these types of assistance and has the right to receive them free of charge was actually deprived of the opportunity to receive such assistance in a high-quality and timely manner, the court has the right to satisfy the victim's claims to recover the costs actually incurred from the respondent [ie the tortfeasor].'²⁶

²⁶ [Plenum No.1](#) (n 21), para 27.

51. **The burden to prove the amount of damages** being sought lies with the claimant. Current case law holds that a claimant must prove the amount of damages with a reasonable degree of approximation, and does not have to strive for a perfect precision. If the amount of damages cannot be established with a reasonable degree of approximation, this does not suffice for rejecting a claim – instead, the court itself should establish the sum of damages considering all the circumstances of the case and the principles of equity and adequacy.²⁷
52. Russian courts are known to be conservative when it comes to assessment of damages and normally tend to determine awards as being less rather than more than amounts claimed.

Non-pecuniary damages

53. Infringement of ‘personal non-pecuniary rights’ will empower the victim to claim moral damages, ie compensation for physical and mental suffering experienced by the individual.
54. ‘Personal non-pecuniary rights’ comprise such values as life and health, dignity and inviolability, honour and good name, business reputation, inviolability of private life and private home, personal and family privacy, freedom of movement, privilege of correspondence (the list is not exhaustive).
55. Russian courts mostly award nominal sums for moral damages.

Disgorgement of profits

56. Article 15(2)(2) of the Civil Code sets out the following rule:

‘If the person who has violated a right has received income thereby, the person whose right has been violated has the right to demand – along with other losses – compensation for forgone benefit in a measure not less than such income.’

57. While some scholars view this as providing for a remedy that is akin to disgorgement of profits, case law is scarce and uncertain. The Supreme Court seems reluctant to deviate from the compensatory nature of the law of damages and tends to either ignore the provision or feature it in a classic loss-of-profit analysis (that is, the tortfeasor’s profits would be treated as the victim’s lost profit, and the former may be allowed to prove that the latter would not have gained such profits).²⁸
58. This remedy might apply in the context of an independent contractor in a supply chain: a contractor, knowingly tolerating human rights violations by its suppliers, may arguably be disgorged of its profit. However, to the best of the authors’ knowledge, there has been no case to this effect yet and its implications remain vague.

²⁷ [Plenum No.7](#) (n 16), para 4.

²⁸ An example of this is found in the Ruling of the Supreme Court [No.309-ES17-15659](#) dated 23.01.2018.

Compensation in kind

59. Article 1082 of the Civil Code provides that a claimant may choose to sue a respondent for **compensation in kind** (eg by claiming an object of the same kind and quality, by claiming that the damaged things be repaired, etc). Such reliefs are rarely sought in practice, case law is scarce, and thus this remedy remains to be tested in courts.
60. A special type of compensation in kind is prescribed for public environmental harm cases involving environmental rehabilitation in kind (article 78(2) of the Law on Protection of the Environment). Particular forms of such compensation may be prescribed in federal or municipal laws, such as lands revitalisation (article 13(5) of the Land Code of the Russian Federation)²⁹ and compensatory planting of greenery (article 4 of the [Moscow Law on Greenery Protection No 17](#) dated 05.05.1999) among others.

Other types of remedies

Punitive damages

61. There are no punitive damages for the three defined harms under Russian law.

Apology

62. The Supreme Court held that courts do not have powers to order an apology in cases concerning harm to dignity, honour, and business reputation.³⁰ This position is arguably applicable to the three defined harms as well.
63. Article 136(1) of the Criminal Procedure Code of the Russian Federation³¹ provides that a public prosecutor shall submit an apology to a wrongly prosecuted person. Article 9(3) of the Law on Police provides that police shall submit an apology to a person whose rights and freedoms were violated by a police officer. One rarely encounters such apologies in practice though.

Injunctive relief

64. Injunctive relief is available under Russian law as a remedy in tort (article 1065 of the Civil Code) or *actio negatoria* (article 304 of the Civil Code). This remedy may find wide application in the context of environmental harm, where a court may suspend operations of an enterprise which harms or may harm the environment.³²

Declaratory relief

65. A claimant may simply ask the court to recognise the violation of their rights and abstain from claiming further reliefs (eg article 150(2) of the Civil Code). Such applications are rare in practice and their scope of application remains to be tested in courts.

²⁹ Federal Law [No 136-FZ dated 25.10.2001](#).

³⁰ Resolution of the Plenum of the Supreme Court [No 3 dated 24.02.2005, para 18](#).

³¹ Federal Law [No 174-FZ dated 18.12.2001](#).

³² [Plenum No 49 \(n 19\), para 24](#).

Q6

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

66. Since Russian courts are overloaded, especially the courts of general jurisdiction where violations of human rights are commonly tried, judges may not have sufficient time to deal with complex cases. Furthermore, as there are many different courts in Russia that operate at different levels and in different territories, the practices of lower courts in different regions may be diverse. The means for keeping practices coherent are limited.
67. There are critics who argue that Russian courts lack independence and tend to take the side of public authorities in their disputes with individuals and businesses.³³ Legislative bodies and the judiciary have sought to address these concerns by implementing reforms, most recently in 2018-2019.³⁴

SPOTLIGHT: ASSESSMENT OF DAMAGES

When it comes to assessment of damages, courts tend to award less than the amount claimed, rather than more. Awards of moral damages are especially low. For instance, compensation for one day of unlawful detention is typically rated at around RUB 2,000 (EUR 28),³⁵ and instances of severe harm to health (eg quadriplegia) are assessed, depending on facts, roughly in a range between RUB 400,000 (EUR 5,634) and RUB 1.5 million (EUR 21,127). There have been attempts by the legislature and the Supreme Court to change this (for instance, see Spotlight box after [106] below), but reforms are implemented at a slow pace.

68. Common drivers of human rights actions in other jurisdictions have not taken deep root in Russia. **Class actions** are not widely practiced (the relevant legislation is new³⁶ and is yet to be tested). Case law on lawyer's **contingency fees** has diverged in the last two decades, ranging from complete denial to cautious acceptance. A recent trend in the Supreme Court has been to uphold contingency fee arrangements.³⁷ However, it remains to be seen whether the lower courts will follow this position in practice.
69. A positive factor is that **court fees** are relatively low and the litigation process is relatively fast (a claimant may get a judgment in the court of first instance in four to six months from the application date). In the authors' experience, courts are generally empathetic to actions involving human rights violations, although this may differ in politically and socially sensitive cases. The rate of human rights

33 International Commission of Jurists, [Report on State of Judicial System in Russia](#) (2010); Kudrin's Centre of Strategic Development, [Report on Improvement of the Judicial System in Russia](#) (2018).

34 The reform was implemented in several steps by, among others, the Federal Law [No 265-FZ dated 29.07.2018](#), the Federal Law [No 451-FZ dated 28.11.2018](#), and the Federal Law [No 191-FZ dated 18.07.2019](#).

35 All figures in Euro have been converted from Roubles at the rate of EUR 1 = RUB 71. Numbers have been rounded up.

36 It was introduced by the Federal Law [No 191-FZ dated 18.07.2019](#), and the changes came into force on 01.10.2019.

37 Ruling of the Supreme Court [No 305-ES16-20063 dated 20.04.2017](#).

claims is relatively low: an educated guess would be that this is probably due to the issues listed above and the fact of Russian society being relatively non-litigious.

70. There are certain advantages and disadvantages in **evidence practices** in civil proceedings. Courts tend to use their powers to order disclosure of documents by parties to the case or third parties somewhat restrictively. On the other hand, courts are generally willing to rely on expert evidence and may accept an abbreviated logic as to causation.
71. Alternatives to (or extension of) civil proceedings are as follows:
 - Criminal proceedings (see [23] above).
 - Administrative proceedings (results of such proceedings may be used as an issue preclusion in civil proceedings).
 - Complaint to a prosecutor's office. (If the prosecutor is interested in a case, they may initiate a civil action against a tortfeasor in the interests of a victim. The prosecutor may then use their public powers to collect evidence and plead the case. Prosecutors play the primary role where rights and interests of a wide range of individuals are affected, such as in an environmental context.)
 - Complaint to the federal ombudsman, the Russian Commissioner for Human Rights, or a regional ombudsman (although the efficiency of these is widely questioned).
72. Until recently, victims could complain to the European Court of Human Rights. However, this option will cease to be available from 16 September 2022 (see [4] above). Nevertheless, by virtue of the ICCPR to which Russia is a party, certain human rights cases can still be elevated to the Human Rights Committee.

Q7

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

73. The jurisdiction of Russian courts over disputes involving foreign parties is established in chapter 44 of the Civil Procedure Code. The most relevant scenarios for the purposes of this report include the following situations:
 - The respondent organisation is situated within the territory of the Russian Federation or the respondent citizen has their place of residence in the Russian Federation (article 402(2) of the Civil Procedure Code).
 - The management body, an affiliate, or a representative of the foreign person is situated within the territory of the Russian Federation (article 402(3)(1) of the Civil Procedure Code).
 - The respondent has property situated within the territory of the Russian Federation (article 402(3)(2) of the Civil Procedure Code).
 - In a case concerning harm resulting from a serious injury, other harm to health, or harm resulting from the death of a breadwinner, the harm has occurred within the territory of the Russian Federation, or the claimant has their place of residence in the Russian Federation (article 402(3)(4) of the Civil Procedure Code).

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

74. The most detailed and recent account of Russian law in English is A Yagelnitskiy, 'Basics of Russian tort law' in Mauro Bussani (ed) [Comparative Tort Law: Global Perspectives](#) (2nd edition, Edward Elgar Publishing 2021).
75. **Leading textbooks in Russian:**
 - EA Sukhanov (ed), [Civil Law: Volume 4](#) (Faculty of Law, Moscow State University 2020)
 - BM Gongalo (ed), [Civil Law: Volume 2](#) (Faculty of Law, Moscow State University 2017)
 - AP Sergeev (ed), [Civil Law: Volume 3](#) (Faculty of Law, Moscow State University 2016)
76. **Some insights on damages and other civil remedies**, as well as on state liability may be found in this commentary on the general provisions of the Civil Code:
 - AG Karapetov (ed), [Key Provisions of Civil Law: Article-by-Article Commentary to Articles 1–16.1 of the Civil Code of the Russian Federation](#) (Digital format in public domain; print edition Statut 2020). A volume of commentary on tort law provisions is currently in writing and is expected to be released soon.
77. **Doctrinal sources are scattered, but the following articles in legal periodicals are useful:**
 - D Epikhina, '[Liability for Jointly Caused Damage](#)' (2018) The Commercial Litigation Review 8
 - E Evstigneev, '[Issues of Fault and Causation in Tort Law](#)' (2020) Civil Law Review 1
 - A Markelova, '[Damage on the Part of Public Authorities: Proof and Recovery](#)' (2017) Commercial Case Law for Lawyers No 8
 - V Mikhailov, '[Theories of Causation and the Establishment of Limits of Liability](#)' (2019) Civil Law Review 4
 - O Petrol and A Yagelnitskiy, '[On the Issue of Liability of State for the Harm Caused by Proceedings in Administrative Case: Case comment on the judgment of RF SC No. 305-ES15-8490 of 19.11.2015](#)' (2016) The Commercial Litigation Review 1
 - G Sudarev, '[Some Difficulties in Delimitating the Fault of the Injured Party](#)' (2020) Civil Law Review 3
 - N Tololaeva, '[Trends in Russian Jurisprudence in the Context of the European Debate on 'Real' and 'Fake' Solidary Obligations](#)' (2016) Civil Law Review 3
 - A Yagelnitskiy, '[Trends in Damages Cases](#)' (2019) Statute 3

78. **With regards to human rights violations in general** and the three defined harms in particular, the following sources may be of use:

- N Kostenko (ed), [Human Rights in the Russian Federation: A Collection of Reports on the Events of 2018](#) (2018)
- N Kolotova, N Varlamova and T Vasil'eva (eds), [Human Rights between the Past and the Future](#) (2021)
- S Kolmakov, [Constitutional Freedom of Assembly in the Legislation of Post-Soviet Countries](#) (2021)
- N Kichigin, [Legal Framework for Environmental Harm Compensation](#) (2017)
- A Lushnikov and M Lushnikova, [Labour Rights in the 21st Century: Current State and Development Trends](#) (2015)

79. Most texts of federal laws and judicial decisions in Russian are accessible via legal database services with a paid subscription, such as [Consultant](#) and [Garant](#). The texts of federal laws are also published on [pravo.gov.ru](#), whereas the texts of judicial decisions can be found on [kad.arbitr.ru](#) (for commercial courts), [bsr.sudrf.ru](#) (for courts of general jurisdiction), and [sudact.ru](#) (for both).³⁸

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³⁸ Note that government-sponsored resources may not be accessible from outside of Russia.

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

Claims against police

80. Injured, tortured, or unlawfully arrested protesters may bring an action in tort against the police under articles 1064, 1069, and 1070 of the Civil Code. Article 1070 is rarely applicable in practice, as police tend to detain protesters under a procedure termed 'administrative detention' instead of 'arrest' (detainment is an enforcement measure intended to identify a person, investigate an alleged administrative offence, or prevent one, whereas arrest is an administrative punishment and is longer-term).
81. First, the claimant will need to prove harm, wrongful behaviour, and causation between the harmful behaviour and the harm (fault will be presumed or eliminated if article 1070 applies). Wrongfulness is often the key hurdle for the claimant: they need to prove that actions of the police were unlawful, which may be a high threshold in practice. First, the police are generally entitled to apply 'administrative detention' if they have grounds to believe that there are circumstances justifying detainment, and it cannot be required that at the moment of detainment a competent executive possesses all the evidence necessary for resolution of the case on the merits.³⁹ Consequently, police are usually allowed a margin of flexibility in the detainment of protesters, which makes it difficult to prove that the action of detainment was unreasonably exercised.
82. Second, police are generally entitled to apply force proportionate to the situation (articles 19-23 of the Law on Police), hence collateral injuries are often tolerated (unless one can prove that the use of force was disproportionate). Consequently, police are usually allowed a margin of flexibility as to use of force and it may be difficult to prove excessiveness.
83. Third, further violations in the course of detainment (like detainment without charge in excess of statutory limits, denial of access to a lawyer, ill-treatment in detention, torture, or other types of degrading treatment) may be self-standing grounds for action in tort. Many claims based on such violations fail for lack of acceptable evidence.

39 Resolution of the Constitutional Court [No 9-P dated 16.06.2009](#).

84. Compensable damages in cases of injury will generally consist of moral damages and medical costs. In cases of unlawful detention, only moral damages will usually be compensated. However, a victim may be able to prove that their detention resulted in further inconveniences (eg an arrested lawyer missed an important hearing). But there is always a risk that a court will consider the causation to be too indirect and decline the claim, at least in part. Awarded damages are usually small, close to nominal.

Claims against Security Co

85. As for Security Co (and/or its personnel), a claim against it may be filed as against an accomplice to the actions of the police under article 1080 of the Civil Code. As stated in [31]-[36] above, one of the commonly applied scenarios requires proof that Security Co shared the common intent with the police to cause harm by unlawful behaviour. Such proof appears to be difficult to support in this situation. Security Co would have had sound reasons for assisting the police under the assumption that the police would be acting lawfully, or they may have had no knowledge of what the assistance was for. In order to hold Security Co liable, one would need to demonstrate that Security Co should have realised that the police would be acting unlawfully, and that Security Co shared this intent by aiding the police. We have not located cases where an accomplice is held liable along with the police in similar circumstances.



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

86. Protesters may choose alternative routes identified in [71] above. For a criminal case approach, the following crimes may be applicable: excess in using official powers (article 286 of the Criminal Code); intentional infliction of injuries to health (articles 111-112, 114-115 of the Criminal Code); or obstruction of a meeting, assembly, demonstration, procession, or picketing, or obstruction of participation therein (article 149 of the Criminal Code). For an administrative case approach, the following administrative liability scenarios may apply: violation of the legislation on meetings, rallies, demonstrations, processions, and picketing (article 5.38 of the Administrative Offence Code); and battery (article 6.1.1 of the Administrative Offence Code). However, law enforcement authorities would normally be unwilling to investigate and prosecute cases against their own colleagues.



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

87. There are many cases relevant to Case Scenario 1, and many are politically and socially sensitive. We will outline some trends and give examples below.

88. There have been some cases that were decided, fully or partially, in favour of claimants. In one case, a woman who participated in the rally known as the '[March of Dissenters](#)' refused to show the police the contents of her belongings and did not comply with the officer's instruction to proceed to the police bus. In order not to be forcibly removed she sat on the pavement. However, three officers lifted her off the ground, took her by the arms and put her into a police car, and then put her into the bus where she spent the next three hours. Afterwards, she was taken to a police station where within an hour she began to feel unwell. (This later proved to be hypertensive emergency.) An ambulance took her to the hospital. She was awarded compensation for moral sufferings in the sum of RUB 10,000 (EUR 141 – just 10 per cent of what she claimed), and her claim for medical expenses was denied.⁴⁰
89. There have also been cases that were decided against claimants. In one case, a one-woman picketer was detained and administrative proceedings were initiated against her for violation of the regulated picket organisation procedure. Although these proceedings were dismissed by a court, compensation for moral damages was denied since the picketer reportedly failed to prove that she had endured any physical or moral sufferings. The court held that 'the dismissal of the administrative proceedings is not per se a basis for the conclusion regarding the official's fault for inflicting moral damages upon [the picketer], since the official's actions of drawing up an administrative offence protocol *did not violate any personal non-pecuniary rights* [of the picketer]'.⁴¹
90. The courts enjoy a significant margin of flexibility as to how facts are assessed so that decisions may be completely at variance even in largely identical situations. Nonetheless, according to the [official data](#) of the Judicial Department at the Supreme Court for 2021, out of 3,230 claims for compensation for harm resulting from illegal actions of investigative and prosecution authorities, court compensation (full or partial) was awarded in 2,115 cases, that is *approximately 65 per cent of cases*.
91. Some notable judgments have been issued by the ECtHR. For instance, in [Kazantsev and others v Russia](#),⁴² the Court found, inter alia, violations of article 3 ECHR in that the applicants were beaten up by unidentified police officers on the day of the 'March of Dissenters' rally (15 April 2007). In [Kasparov and others v Russia](#),⁴³ the Court found that '[the applicants] dispersal and arrest constituted an interference with their right of peaceful assembly, as did the ensuing administrative charges brought against them'.

SPOTLIGHT: CASE STUDY

There are cases where public authorities and operators of public services have successfully claimed damages from protest organisers for economic losses caused by the protests. For example, in one case the organisers of a protest were obliged to pay damages of RUB 1.2 million (EUR 16,901) to a state-owned company operating bus networks to compensate for transport downtime resulting from the protests.⁴⁴

40 Ruling of the Nizhny Novgorod Regional Court in case No 33-5041 dated 24.05.2011. For examples of other cases that were decided in favour of the claimants see the Ruling of the Ryazan Regional Court in case No 33-2302 dated 26.11.2014; and the Ruling of the St Petersburg City Court in case No 33-15741/2016 dated 26.07.2016.

41 Ruling of the Third Cassation Court in case No 2-3392/2020 dated 12.07.2021. For examples of other cases decided against the claimants, see the Ruling of the Third Cassation Court in case No 88-1053/2020 dated 03.02.2020; and the Ruling of Moscow City Court in case No 33-4535/20.

42 No 61978/08, 16 June 2020.

43 No 51988/07, 13 December 2016.

44 Judgment of Koptevsky District Court in case [No 2-1598/2019 dated 10.09.2019](#).

CaseScenario 2

Q1

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

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Claims against Subsidiary Co

92. Russian law distinguishes between direct harm to the environment (public environmental harm) and reflective harm suffered by private individuals as a result of environmental deterioration (private environmental harm). Actions for compensation for the **public environmental harm** may be initiated by a wide range of applicants (federal, state, and municipal government bodies, prosecutor, individuals, public associations, and non-profit organisations acting in the sphere of environment protection). If successful, compensation is paid to the respective local budget (see Spotlight box after [15] above).
93. Claims for compensation for **private environmental harm** may be brought by persons or groups of persons who suffered the harm. Claims may be brought through an opt-in class action mechanism (although use of class actions is scarce in practice) (see [68] above). The claimant(s) will need to prove harm, wrongful behaviour, and a causal link between the behaviour and the harm (fault will be presumed). If harm is caused by or because of an 'ultrahazardous activity', it will be deemed a case of strict liability, and the respondent will not be able to exclude its liability by proving that no fault was present on its part.
94. Claimants may experience difficulty in proving causation in these cases. In the context of public environmental harm cases, the Supreme Court has held that when a respondent exceeds standards for permissible environmental impact the causation is presumed and the burden of disproving it switches to the respondent.⁴⁵ It remains to be tested whether courts will be receptive to this approach in private environmental harm cases.

Claims against Parent Co

95. Parent Co may be found liable either as an accomplice to the wrongdoing (should common intent be proven), or for siphoning off assets from the Subsidiary Co to avoid liability, or, in context of Subsidiary Co's bankruptcy, as a controlling person which caused bankruptcy of the Subsidiary Co (see [39]-[41] above).

⁴⁵ [Plenum No 49](#) (n 19), para 7.

Q2

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

96. Victims may choose additional routes enumerated in [71] above. Chapter 26 of the Criminal Code and Chapter 8 of the Administrative Offence Code may apply.

Q3

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

97. We are not aware of high-profile lawsuits in the private environmental harm context.

98. There are several noteworthy public environmental harm cases. For instance, Norilsk-Taimyr energy company was obliged to pay more than RUB 146 billion (EUR 2 billion) because of a [fuel spill into the Ambarnaya river](#).⁴⁶ This was a record amount awarded. In another case, Rosekoprompererabotka was obliged to pay compensation in the amount of RUB 3.4 billion (EUR 47.9 million) for illegal disposal of waste on the land in the Priobskoye oil field.⁴⁷

99. In 2018-2020, [protests in Shiyes against the construction of a massive landfill](#) which would have led to pollution of surface and underground waters (and through them, pollution of the White Sea), attracted lots of public attention, was widely covered by mass media, and proved fruitful. In 2020, all the already-built facilities were declared unauthorised constructions and they were ordered to be demolished.⁴⁸

////////////////////////////////////

46 Judgment of Krasnoyarsk Region Commercial Court in case [No A33-27273/2020 dated 12.02.2021](#).
47 Resolution of the Tenth Commercial Court of Appeal in case [No A40-176281/17 dated 16.12.2020](#).
48 Judgment of Arkhangelsk Region Commercial Court in case [No A05-2324/2019 dated 16.01.2020](#).

CaseScenario3

Q1

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

100. Claimants may sue Factory Co in tort due to its failure to observe labour safety requirements and thus creating conditions for the accident to occur. As in Case Scenarios 1 and 2, the liability elements to be established by the claimants will be harm, wrongful behaviour, and a causal link between the latter and the former (fault will be presumed).
101. The harm would consist of the following:
 - *For claimants who were injured:* loss of income, additional expenses (medical treatment etc) and non-pecuniary (moral) damages resulting from the harm to personal rights (in this case, health).
 - *For claimants whose beloved ones perished:* burial expenses, damages due to loss of the breadwinner (provided that additional criteria are met, namely that claimants are unable to work or are dependents of the deceased), and non-pecuniary (moral) damages for moral sufferings resulting from the death of the close relatives.
102. Claims for medical treatment may be excluded if victims could have obtained such treatment in a high-quality and timely manner free of charge under mandatory health insurance mechanisms (see [50] and preceding Spotlight box above). Victims will also be entitled to payments under compulsory social insurance against industrial accidents and work-related diseases.
103. A claim against Brand Co will most likely fail since its involvement does not appear sufficient to qualify as the actions of an accomplice: it was not an active participant in human rights violations committed by Factory Co (even if it was aware of them) and Brand Co and Factory Co did not share a common intent.
104. If it is shown on facts that Brand Co created incentives for Factory Co to pursue its abusive policy, it may, in principle, be a sufficient ground for an action against Brand Co as an accomplice. However, we are not aware of any relevant case law to date.

Q2

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

105. Victims may choose additional routes enumerated in [71] above. Criminal liability for violation of labour protection rules entailing, by negligence, death of two or more persons (article 143(3) of the Criminal Code) may apply.

Q3

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

106. We are not aware of any high-profile case relevant to Scenario 3.

SPOTLIGHT: NOSOV CASE



The *Nosov* case, decided by the Supreme Court, although not high-profile, is notable for its development of the law.⁴⁹ In this case, a watchman guarded a construction site surrounded by a fence with a six-metre gap (contrary to labour safety requirements). A robber entered the construction site through the gap and murdered the watchman who attempted to stop him. The relatives of the deceased sued his employer in tort for compensation of moral damage. The Supreme Court held that the employer's failure to prevent unhindered access to the site materially contributed to the ultimate result, making the employer liable in tort. Consequently, despite the actions of the murderer being the direct cause of the harm, the negligent inaction of the employer contributed to (or, rather, occasioned) the harm, which the Supreme Court held sufficient to hold the employer liable. After a second round of litigation the *Nosov* case once again came to be reviewed by the Supreme Court, which considered the sum of RUB 250,000 (EUR 3,521) in compensation for moral sufferings resulting from the death of a close relative to be inadequately low.⁵⁰

⁴⁹ Ruling of the Supreme Court [No 83-KG18-12 dated 06.08.2018](#).

⁵⁰ Ruling of the Supreme Court [No 83-KG19-12 dated 14.10.2019](#).



A HANDBOOK FOR PRACTITIONERS | SOUTH AFRICA

Civil Liability for Human Rights Violations

INKUNDLA YOMGAQOSISEKO
INKANTOLO YOMTHETHOSISEKELO
KHOTO YA VUMOTIWA
INKANTOLO YEMTSETFOSISEKELO
KGOROTSHENO YA MOLAOTHEO
INKANTOLO YOMTHETHOSISEKELO
CONSTITUTIONAL COURT
LENGOTLA LA DINYWE LA MOLAOTHEO
KHOTHE YA ODAYOTSWA
KONSTITUSIONELE
YOMTHETHOSISEKELO

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[PROFILE](#)

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FREQUENTLY USED ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1997
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
LRA	Labour Relations Act 66 of 1995
NEMA	National Environmental Management Act 107 of 1998
ODIMWA	Occupational Diseases in Mines and Works Act 78 of 1973
PAJA	Promotion of Administrative Justice Act 3 of 2000

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SOUTH AFRICA



The law of civil remedies in South Africa has the potential to foster human rights accountability. A broad range of constitutional rights applies not only to public authorities but, in a growing number of instances, to private parties. There are well-established civil law doctrines of direct, accessory, vicarious and veil-piercing liability. However, challenges remain. The costs of litigation are a serious disadvantage. There are also general delays associated with litigation.



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**Democracy Index
2021 Ranking**

79/100

**Freedom House
2022 Score**

70/180

**Transparency International
Corruption Index 2021 Ranking**

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. The Republic of South Africa has a mixed legal system.¹ Roman-Dutch civil law (prior to codification) was introduced in the early days of colonialism. Over time, as England took over and colonised territories previously controlled by the Dutch and their successor Republics, English common law had a marked influence in the legal system (in civil procedure and public law), and in the development of substantive private law. The 'third grace' of South Africa's legal system is indigenous customary law, which has gained proper recognition since the end of apartheid.
2. From its Roman-Dutch heritage, South Africa's civil law of remedies is governed by the law of delict, which is applicable to both private and public bodies. The law of delict is covered by three general actions rather than by specific torts (as in common law jurisdictions). The principles of delict are predominantly sourced in case law. And while actions are Roman-Dutch in origin, South African courts often cite cases from other Commonwealth jurisdictions in developing the law.
3. South Africa's Constitution² (the Constitution) is the supreme law. It contains a Bill of Rights, protecting amongst others the rights to life, personal freedom, dignity, bodily security, psychological integrity, property, privacy and freedom of expression. The courts are constitutionally required to develop the common law by promoting the 'spirit, purport and objects' of the Bill of Rights.³ Claims for the civil violation of these constitutionally protected rights have been given effect through the law of delict, by their **indirect rather than direct application**.⁴ The Constitution also mandates courts to consider international law when interpreting the Bill of Rights.⁵ The international law considered by the courts includes binding and non-binding instruments, as well as decisions and comments of courts and bodies responsible for their enforcement and interpretation.⁶
4. Parliament has also enacted legislation giving effect to and protecting various rights, as well as providing remedies for the breach of such rights. This includes in the labour and employment context, as well as in environmental protection.⁷ Other statutes, which do not explicitly give effect to rights, may also provide remedies for civil wrongs.⁸
5. Finally, South Africa has a constitutional right to administrative justice,⁹ (which is also given effect in statute¹⁰) and the courts have strong powers of judicial review over all exercises of public power. This branch of law also provides remedies for civil wrongs in certain contexts.

1 See, generally, Reinhard Zimmerman and Daniel Visser 'Introduction: South Africa as a Mixed Legal System' in Reinhard Zimmerman and Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co Ltd 1991) 1.

2 [Constitution of the Republic of South Africa](#), 1996.

3 [Constitution s 39\(2\)](#).

4 *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) [56].

5 Constitution s 39(1)(b).

6 *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) [35].

7 Which are discussed in detail in [6], [17]–[18] below.

8 For example, the [Road Accident Fund Act 56 of 1996](#) creates a statutory compensation scheme funded by a fuel levy. The Fund is obliged to compensate any person for any loss or damage they have suffered as a result of a bodily injury or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle in South Africa where the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle.

9 Constitution s 33.

10 [Promotion of Administrative Justice Act 3 of 2000](#) (PAJA).

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

6. Yes, such a claim can be brought in terms of the law of delict against both private and public bodies, and certain statutory remedies may also be available under the [Labour Relations Act 66 of 1995](#) (LRA), the [Basic Conditions of Employment Act 75 of 1997](#) (BCEA) or the [National Environmental Management Act 107 of 1998](#) (NEMA).
7. There are three causes of action in delict at common law. The **Aquilian action** provides a remedy to obtain damages to compensate for patrimonial loss caused by another's wrongful and intentional or negligent positive conduct or, in certain circumstances, by omission.¹¹ The **action for pain and suffering** allows a victim to recover damages for non-patrimonial loss for bodily injuries, such as pain or disfigurement. The **actio iniuriarum** remedies intentional violations of common law personality rights to reputation (defamation), dignity (violation of privacy), and bodily integrity (assault or wrongful arrest and imprisonment).¹² Damages are compensatory and not punitive in nature.¹³
8. As mentioned, these actions apply both to private parties (whether natural or juristic persons¹⁴) and to public bodies, although the precise application of the principles varies depending on the harm at issue and the body being sued.
9. It is important to emphasise that juristic entities are both beneficiaries of rights and duty-bearers of rights under South Africa's Constitution.¹⁵ The courts have accordingly imposed obligations upon companies in a variety of contexts. For example, mining companies and their directors may in some circumstances be bound by the right to a healthy environment.¹⁶ And where private persons purchase property in order to develop it, the right to housing may bind them to continue housing illegal occupiers where their immediate eviction would lead to homelessness.¹⁷
10. In the labour and employment context, section 23 of the Constitution entrenches a right to 'fair labour practices'. The LRA and the BCEA give effect to this right. Other statutes regulate harmful labour conditions and provide for compensation to be paid from statutory schemes.¹⁸ The LRA proscribes unfair dismissals and unfair labour practices,¹⁹ and provides a variety of remedies.²⁰ This includes compensation²¹ which is limited to either 12- or 24-months remuneration, depending on the nature of the dismissal or practice.²²

11 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A. An English translation of the judgment is available: *Minister of Police v Ewels* [1975] ZAENGTR 2 (23 May 1975).

12 Alistair Price, 'South Africa: Civil Liability for Constitutional Wrongs' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022) 289, 297.

13 JC van der Walt and JR Midgley, *Principles of Delict* (4th edn, LexisNexis 2016) para 192.

14 A juristic person is one that is recognised by the law and that is capable of acquiring rights and incurring obligations and capable of suing and being sued. This includes companies and corporations.

15 Constitution ss 8(2), (3) and (4). See, generally, Mbuyiseli Madlanga, 'The Human Rights Duties of Companies and other Private Actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359.

16 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).

17 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

18 See *Compensation for Occupational Injuries and Diseases Act 130* of 1993 (COIDA) and *Occupational Diseases in Mines and Works Act 78* of 1973 (ODIMWA).

19 LRA Ch VIII.

20 LRA s 193.

21 LRA s 193(1)(c) and (4).

22 LRA s 194.

11. Section 24 of the Constitution guarantees the right to a safe environment, and imposes obligations on the State to protect the environment through reasonable legislative and other measures. NEMA is the principal statute giving effect to this constitutional right. Section 28 of NEMA provides for environmental liability.
12. Civil wrongs may potentially also be remedied by the award of direct constitutional damages where it is necessary and 'appropriate'²³ to protect and enforce the rights in the Bill of Rights. However, the courts are ambivalent about this remedy, and its application is limited as the common law of delict is usually broad enough to provide the relief that would be 'appropriate' for a breach of constitutional rights.²⁴
13. The law of unjust enrichment provides for remedies where one party is enriched at the expense of another.²⁵ Where a claim cannot be established in delict, but a claimant can demonstrate that another party has been enriched at their expense, this may provide a remedy. In proceedings for the judicial review of administrative action, compensation may be awarded where a government decision is set aside, but only in extraordinary circumstances.²⁶ Negligent exercises of public power do not generally give rise to delictual liability.²⁷

Q2

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

Suing in delict

14. In order to establish Acquilian liability, the plaintiff must demonstrate that the defendant's wrongful and intentional or negligent conduct or omission caused the plaintiff harm or loss which is not too remote.²⁸ The action for pain and suffering has the same elements.²⁹ The *actio iniuriarum* also has the same elements, save that the element of fault requires intention.³⁰
15. The element of wrongfulness or unlawfulness is normative in nature. The courts consider whether there is a legal duty to avoid or prevent loss. A positive act which causes harm is presumed to be wrongful. A negligent omission which results in harm, by contrast, is generally presumed to be lawful (ie not wrongful).³¹ But a negligent omission will be regarded as wrongful where the legal convictions of the community having regard to all relevant circumstances require that there is a legal duty to act to avoid loss.³² Intentional harm-causing acts or omissions

²³ Constitution s 38 provides for a 'right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief (author's emphasis) ...'.

²⁴ *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) [60]–[69].

²⁵ Daniel Visser, *Unjustified Enrichment* (Juta & Co Ltd 2008).

²⁶ PAJA s 8(1)(c)(ii)(bb).

²⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC).

²⁸ Anton Fagan, *Acquilian Liability in the South African Law of Delict* (Juta & Co Ltd 2019) ix.

²⁹ Van Der Walt and Midgley (n 13) paras 2–3.

³⁰ *ibid.*

³¹ *Minister of Safety & Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA) [12].

³² *ibid* [13]. Claims for pure economic loss – financial loss with no physical harm to a claimant's person or property – are similarly presumed to be lawful, and will be held to be wrongful where that is required by the legal convictions of the community, as informed by the values and norms of the Constitution – see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73, 2006 (1) SA 461 (SCA) [13].

are more readily found to be wrongful.³³ For example, intentional and dishonest exercises of public power may give rise to delictual liability.³⁴ The element of wrongfulness ultimately depends on a judicial determination on whether it would be reasonable to impose liability in the circumstances. Such judicial determination of reasonableness depends on considerations of public and legal policy.³⁵ The Constitution embodies an '**objective value system**' which informs this inquiry.³⁶ Values underpinning the Bill of Rights³⁷ and broader constitutional principles such as accountability³⁸ are applied in this analysis. In this way, rights are indirectly applied in civil claims.

16. In order to establish liability, the wrongdoer's conduct or omission must be the **factual cause** of the claimant's loss. The traditional 'but-for' test is usually applied to establish a causal link or the absence of such a link.³⁹ The question is whether the loss would have occurred in the absence of the negligent conduct or omission. If that is so, then the conduct or omission is not a factual cause of the loss. The element of **remoteness or legal causation** requires, in addition, that the culpable conduct or omission be linked sufficiently closely to the loss, which is determined by considerations of legal and public policy.⁴⁰ In this way, not all conduct which is the factual cause of harm results in liability and the remoteness element acts as a limiting factor where imputing liability would be untenable. It is a flexible test which consider various factors, including the foreseeability of loss and the proximity of the conduct and loss. While wrongfulness and remoteness both require considerations of legal and public policy, they are distinct elements. Foreseeability is considered in the remoteness inquiry, but not in the inquiry into wrongfulness.⁴¹

Statutory claims

17. The LRA provides a wide definition of what will constitute a dismissal, and the circumstances in which it will be unfair,⁴² and defines unfair labour practices.
18. NEMA, as mentioned, empowers the State to recover costs from a polluter. A private party wishing to claim damages for environmental harm, could sue in delict. If criminal proceedings are pursued by the State and the polluter is convicted, the criminal court would be empowered to award damages to compensate a person for loss suffered.⁴³

Constitutional damages

19. The law governing the award of constitutional damages remains undeveloped. Thus far, the apex courts have held that two considerations are relevant: first, the **existence of an alternative remedy** that would vindicate the infringement of the rights; and second, whether that alternative remedy is **effective or appropriate**

33 *Minister of Finance and Others v Gore NO* [2006] ZASCA 98, 2007 (1) SA 111 (SCA) [88]–[89].

34 *ibid.*

35 *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC) [122].

36 *Carmichele* (n 4) [56].

37 *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36, 2016 (3) SA 528 (CC).

38 *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA) [20].

39 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134, 2009 (2) SA 150 (SCA) [30].

40 *ibid* [30]–[31].

41 *MTO Forestry (Pty) Ltd v Swart NO* [2017] ZASCA 57, 2017 (5) SA 76 (SCA) [18].

42 LRA ss 186, 187 and 188.

43 NEMA s 34(1), (2) and (3).

in the circumstances.⁴⁴ While alternative remedies do not preclude the award of constitutional damages, they are a weighty factor against them.⁴⁵ Given the relatively flexible character of both the Aquilian action and the *actio iniuriarum*, notably through the element of wrongfulness, the law may be developed to cover new circumstances and give effect to constitutional values. The Constitutional Court has also held recently that constitutional damages are unlikely to be appropriate to address violations of socio-economic rights, which are better addressed through the assessment of the reasonableness of measures taken by the State to give effect to those rights⁴⁶ (which may include the right to a safe environment).

Q3

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

20. South African law recognises vicarious and accessory liability, and also holds the State liable for the wrongful conduct of others in certain instances.
21. All private and public employers may be held **vicariously liable** for their employees' delicts committed in the course of their employment. There must be a 'sufficiently close' link between the employee's actions for their own interests and the purposes and the business of the employer.⁴⁷ For example, the Minister of Safety and Security was held liable in delict for damages suffered by a claimant who had been raped by three uniformed and on-duty policemen when she had accepted a lift home from them. The Constitutional Court made the finding that there was a sufficiently close link because: the policemen in question and the Minister (their employer) owed a duty to protect members of the public; the claimant had placed her trust in the police officers; and their conduct consisted of both positive actions (in brutally raping the claimant) and omissions (in failing to protect her).⁴⁸
22. **Accessory liability** arises where a party is not the immediate perpetrator of the delict, but instigated or aided it.⁴⁹ It also applies in respect of statutory wrongs.⁵⁰
23. As mentioned, the State has been held liable for negligent failure to protect against crimes committed by third parties. So where a passenger on a train was robbed, beaten up and thrown out of a door in the carriage which did not close, the state-owned entity in charge of the train was held liable, for having failed to post a guard in the train and to ensure that the doors of the carriage closed.⁵¹
24. South African law also recognises a principle of joint and several liability, where **joint wrongdoers** are held liable for the harm caused by their joint wrongdoing.⁵²

44 *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) [103].

45 *ibid* [104].

46 *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45, 2022 (8) BCLR 985 (CC) [177].

47 *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC) [32].

48 *ibid* [50]–[52].

49 *McKenzie v Van der Merwe* 1917 AD 41 (AD) at 51.

50 Price (n 12) 302.

51 *Mashongwa* (n 37).

52 Van der Walt and Midgley (n 13) paras 220–222.

Q4

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

25. South African corporate law recognises that in certain instances the **corporate veil** may be pierced so that the shareholders of a company (whether that be natural persons or other juristic entities) are held liable for the debts of the company, including its delicts. The common law as supplemented by a statutory provision⁵³ empowers the courts to pierce the veil where there has been fraud, dishonesty or a similar illegitimate use of the concept of juristic personality that adversely affects a third party in a manner which should not be countenanced.⁵⁴ The courts balance the imperative to preserve separate legal personality and the abuse of separate legal personality, and they look to substance rather than form.⁵⁵
26. Liability has also (rarely) been imposed for the wrongdoing of sub-contractors. A principal is, however, only liable for the wrongs of an independent contractor where the **principal is at fault**.⁵⁶ That is, a principal is only liable where it owed a duty to a third party and acted negligently towards the third party. The liability is Aquilian in nature, and it is the conduct of the principal itself which gives rise to liability. In other words, the principal is not held liable vicariously for the conduct of the contractor. A claimant would have to demonstrate that the principal was negligent in appointing the sub-contractor which resulted in the harm or loss claimed.
27. In principle, a holding company could also be held liable for its own conduct in not preventing wrongs committed by subsidiary companies (where a duty to do so is established) on this basis.

SPOTLIGHT: CASE STUDY

At the time of preparing this report, [an application to certify a class action](#) against Anglo American SA Ltd, a South African mining company, is pending before the High Court. The claimants contend that Anglo American is liable for lead poisoning suffered by women and children who lived in proximity to the Kabwe lead mine in Zambia between 1925 and 1974, when a subsidiary of Anglo American controlled the mine. Anglo American's duty of care to the claimants is asserted on the basis of its knowledge of lead pollution risks, its control of the mine, and its investments in and oversight and support of the mine.

53 [Companies Act 71 of 2008](#) s 20(9).

54 *Ex parte Gore NNO* [2013] ZAWCHC 21, 2013 (3) SA 382 (WCC) [35].

55 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1995] ZASCA 53, 1995 (4) SA 790 (AD) 803H.

56 *Chartaprops 16 (Pty) Ltd v Silberman* [2008] ZASCA 115, 2009 (1) SA 265 (SCA) [28].

Q5

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

28. The delictual actions give rise to various remedies. The most common remedies are the **awarding of compensatory damages** and **issuing of interdicts** (injunctions) to prevent anticipated wrongdoing or stop ongoing wrongdoing.⁵⁷ An **apology** is available in defamation actions.⁵⁸
29. In the case of wrongful arrest, a claimant may have a claim arising from all three of the delictual actions if the claimant can establish patrimonial loss, a violation of their common law right to dignity, and physical harm.
30. As mentioned already, NEMA provides certain **remedies for environmental degradation**. Anyone who causes or may cause 'significant pollution or degradation of the environment' is under a duty to take reasonable measures to prevent or minimise the pollution or degradation, failing which the party may be held liable for the costs of remedying the environmental harm. The State is empowered to remedy the degradation of pollution, and to claim the costs for this from the party at fault. General delictual actions provide remedies for private individuals who suffer loss due to environmental damage, which will be informed by the constitutional right to a healthy environment.
31. If the state fails to take reasonable legislative and other measures to address harms to the environment, a public law case could be instituted to challenge such conduct, and to seek **public law remedies**. This might, for example, include requiring the Minister responsible for the environment to adopt regulations governing greenhouse gas emissions in industry.⁵⁹
32. In the employment context, the LRA provides other **remedies for unfair dismissals and unfair labour practices** in addition to compensation. These include orders to reinstate employees.⁶⁰
33. In relation to workplace injuries, the [Compensation for Occupational Injuries and Diseases Act 130 of 1993](#) (COIDA) and other similar statutes, provide a '**no-fault**' **system** where an employee may claim compensation from a statutory scheme set up for this purpose. Compensation is capped and calculated by an administrative official in accordance with formulae set out in the statute. COIDA also extinguishes an employee's common law claim for compensation against their employer. By contrast, the [Occupational Diseases in Mines and Works Act 78 of 1973](#) (ODIMWA) also creates a statutory compensation scheme, but it does not extinguish the employer's common law liability for additional compensation.⁶¹

⁵⁷ Price (n 12) 291.

⁵⁸ *ibid.*

⁵⁹ *Trustees for the time being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 208.

⁶⁰ LRA s 193.

⁶¹ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3, 2011 (3) SA 237 (CC).

SPOTLIGHT: CASE STUDY

Mr Mankayi, a mineworker, instituted an action for delictual damages against his employer AngloGold Ashanti Ltd. He contended that AngloGold had breached its legal duty under the common law and statute to provide a safe and healthy environment in which to work. He contended that while he was entitled to claim compensation under ODIMWA (and had done so) he was not precluded from suing AngloGold at common law. While COIDA extinguishes an employee's common law claim against their employer, Mr Mankayi pointed out that this did not apply to him as ODIMWA barred him from claiming benefits under COIDA. While the High Court and Supreme Court of Appeal had found that COIDA barred his claim, the Constitutional Court agreed with Mr Mankayi's contentions and held: that COIDA did not apply to him as an employee; and that his common law claim against his employer had not been extinguished.⁶²

Q6

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

Advantages

34. From the discussion above, it should be apparent that the law of delict is the primary means by which civil claims may be pursued to obtain monetary redress for human rights violations. The **flexibility** of the common law and the influence of constitutional values – including those underpinning the rights under discussion – provide scope for remedying a wide range of civil wrongs.
35. South African courts have also developed a **class action procedure**.⁶³ This procedure has been used effectively by current and previously employed mineworkers in the gold mining industry, and their dependants, to claim compensation from mining houses for having contracted silicosis and tuberculosis during their employment with the mines.⁶⁴

⁶² *ibid.*

⁶³ *Children's Resources Centre Trust v Pioneer Foods* [2012] ZASCA 182, 2013 (2) SA 213 (SCA); *Mukadam v Pioneer Foods* [2013] ZACC 23, 2013 (5) SA 89 (CC).

⁶⁴ *Nkala v Harmony Gold Mining Company Limited* [2016] ZAGPJHC 97, 2016 (5) SA 240 (GJ); *Ex Parte Nkala* [2019] ZAGPJHC 260.

SPOTLIGHT: CASE STUDY

In May 2018, five mining groups representing 32 companies and 82 mines, agreed to pay R5 billion to settle a class action brought by thousands of mineworkers who contracted tuberculosis and silicosis, and their dependants. This litigation was preceded by test cases and parallel litigation which established the class action procedure in South African law (setting out the test for certification) and established that ODIMWA does not extinguish mineworkers' common law claims for compensation against mining groups. The mining groups vigorously opposed certification of the class action as it concerned losses stretching over many decades and affected the whole industry. The settlement was eventually reached after certification.⁶⁵

36. In South African civil procedure, legal costs are usually ordered against the losing party in the proceedings. The Constitutional Court has however developed a principle which provides that **costs ordinarily will not be awarded against a private party** who unsuccessfully litigates against the State, where the party **asserts constitutional rights or raises genuine constitutional issues**.⁶⁶ This excludes litigation that is frivolous, vexatious or manifestly inappropriate.⁶⁷ The Constitutional Court has recently emphasised that this principle applies also when a private party asserts constitutional rights against the State by suing in delict.⁶⁸ Thus, victims of rights violations should not be dissuaded from pursuing civil claims due to the risk of an adverse costs order.
37. A further advantage is that section 38 of the Constitution grants **standing** to a wide variety of persons to institute legal proceedings concerning the violation of human rights, including persons acting in the public interest.

Disadvantages

38. The **costs** of litigation are a serious disadvantage and may impede access to justice. This can be remedied if lawyers work on a contingency or pro bono basis.
39. There are also general **delays** associated with litigation. Certifying a class action, for example, can take many years and requires many hours of legal work. Even once a class action is certified and settled, payment of claims to the victims of rights violations may also be delayed. Even simple claims may take years to be finalised. For example, while the High Court approved the R5 billion silicosis settlement in July 2019, two years after the trust had been set up to administer the compensation process, payment had still not been made to a large proportion of the claimants.⁶⁹
40. Another disadvantage of pursuing civil claims is that in most circumstances, they are **individualistic and backwards looking** (ie aimed at rectifying past wrongs), and do not necessarily result in fewer rights violations in future. Other constitutional remedies, such as supervisory orders concerning Government social programmes,⁷⁰ may be more suited to addressing systemic problems.

65 Jason Brickhill, 'A river of disease: Silicosis and the future of class actions in South Africa' (2021) 37 *South African Journal on Human Rights* 31.

66 *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14, 2009 (6) SA 232 (CC) [21]–[25].

67 *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45, 2017 (1) SA 645 (CC) [18]–[23].

68 *AK v Minister of Police* [2022] ZACC 14.

69 Thabo Molelekwa, 'Silicosis: Can they just pay me before I die?' *Mail & Guardian* (Johannesburg, 3 May 2021).

70 Kent Roach and Geoff Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

Q7**Can civil claims be brought against a foreign defendant and if so, what are the rules for that?**

41. Yes, delictual claims may be pursued against foreign defendants in South African courts. This may be achieved in two ways.⁷¹
42. First, a plaintiff may obtain an order from a South African court attaching assets of the foreign party⁷² to found or confirm the court's jurisdiction.⁷³ Jurisdiction is 'founded' if the only basis on which the court will have jurisdiction is the attachment of assets. Jurisdiction is 'confirmed' or strengthened by attaching assets where there is another basis or ground for the court to assert jurisdiction, such as the delict being committed within the court's geographical jurisdiction. The purpose of the procedure is to ensure that an asset is available to be executed in compensation in the event that the claimant succeeds. There are limits. A foreign plaintiff cannot attach a foreign defendant's assets to assert a South African court's jurisdiction if there is no other jurisdictional link to the court (for example, if the alleged wrong occurred outside the court's geographical jurisdiction). Thus, only a plaintiff domiciled and resident in South Africa⁷⁴ may seek the attachment of a foreign defendant's assets to found the South African's court's jurisdiction.
43. Second, the foreign defendant may submit or consent to the South African court's jurisdiction. If there are no other grounds for the court to assert jurisdiction, the consent will only be effective if the plaintiff is domiciled and resident in South Africa.

Q8**Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?**

44. [SAFLII](#) is an open-access resource which publishes judgments in all cases from South Africa's apex courts, as well as most of the important judgments from the High Courts. Links are provided to the judgments on SAFLII discussed in this chapter.
45. South Africa has a number of public interest law firms, NGOs and independent public bodies operating in various sectors and addressing various human rights issues. Their websites contain a wealth of information pertaining to ongoing and finalised human rights claims and other human rights resources. These include:
- [Legal Resources Centre \(LRC\)](#)
 - [Southern Africa Litigation Centre \(SALC\)](#)
 - [Centre for Environmental Rights \(CER\)](#)

⁷¹ See, generally, Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel, *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Juta & Co Ltd 2009) Ch 3.

⁷² A 'peregrinus'.

⁷³ An attachment *ad fundandam jurisdictionem* or *ad confirmandam jurisdictionem*. The principles are summarised in *Federation Internationale de Football Association v Sedibe* [2021] ZASCA 113, [2021] 4 All SA 321 (SCA) [24]–[27].

⁷⁴ An 'incola'.

- [Centre for Applied Legal Studies \(CALS\)](#)
- [Lawyers for Human Rights \(LHR\)](#)
- [South African Human Rights Commission \(SAHRC\)](#)
- [Equal Education Law Centre](#)
- [Ndifuna Ukwazi](#)

46. **Websites:**

- [Miners' silicosis litigation](#)
- [Kabwe lead poisoning litigation](#)

47. **Useful academic texts include:**

- Anton Fagan, *Aquilian Liability in the South African Law of Delict* (Juta & Co Ltd 2019)
- JC Van Der Walt and JR Midgley, *Principles of Delict* (4th edn, LexisNexis 2016)
- Max Du Plessis et al (eds), *Class Action Litigation in South Africa* (Juta & Co Ltd 2017)
- Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta & Co Ltd 2018)
- Alistair Price, 'The Influence of Human Rights on Private Common Law' (2012) 129 *South African Law Journal* 330
- Alistair Price, 'South Africa: Civil Liability for Constitutional Wrongs' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022)
- Jason Brickhill, 'A river of disease: Silicosis and the future of class actions in South Africa' (2021) 37 *South African Journal on Human Rights* 31



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

48. The victims could sue the Minister of Police and also Security Co in delict, based on the principles of vicarious liability.
49. Claims against the Minister of Police could be instituted based on **Aquilian action** for patrimonial loss suffered by the victims – including medical expenses and loss of earnings caused by the arrest – and also based on action for pain and suffering insofar as the victims suffered from bodily injury. These actions provide effective remedies to vindicate the right not to be tortured.⁷⁵
50. A claim under the *actio iniuriarum* could also be instituted for unlawful arrest and unlawful detention. The victims would have to establish that the officers intentionally deprived them of their liberty.⁷⁶ As the deprivation of liberty is assumed to be wrongful, the police would bear the onus to show why the action was not wrongful.⁷⁷
51. A claim in delict could also be pursued against Security Co. The victims would have to plead and establish that Security Co owed them a duty of care not to provide vehicles, equipment and water to the police in the circumstances of the case. A claim could potentially also be pursued on the basis that Security Co aided the immediate perpetrator of the wrong, the police.
52. Claims could in principle also be instituted against the individual police officers and the employees of Security Co. However, it may be difficult to execute upon any judgment debt against these employees.

Q2

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

53. Civil claims would be the ordinary route for holding the perpetrators to account.

⁷⁵ Constitution s 12(1)(d). See *Fose* (n 24) [67].

⁷⁶ *De Klerk v Minister of Police* [2019] ZACC 32, 2021 (4) SA 585 (CC) [14].

⁷⁷ *ibid.*

54. Other avenues could possibly be pursued alongside the civil claims, such as lodging complaints with the Independent Police Investigative Directorate (IPID),⁷⁸ the independent police watchdog, or the Private Security Industry Regulatory Authority.⁷⁹

SPOTLIGHT: POLICE VIOLENCE



ViewFinder, an investigative journalism platform, has reported that IPID has failed properly and effectively to investigate complaints of police violence, and has in some instances even reportedly covered up police brutality.⁸⁰ Where oversight bodies fail, civil claims may be the only accountability mechanism available to victims.



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

55. In August 2012, 44 mineworkers were killed by the South African Police in the event that has come to be known as the Marikana massacre, which occurred during a strike at the Lonmin Platinum Mine in the North West Province. The mineworkers had demanded a monthly wage of ZAR 12,500 from their private employer (equivalent to USD 1,500 at the time). The families of the deceased, and other mineworkers who lost income, instituted claims against the South African Government. These claims are slowly being settled.⁸¹



⁷⁸ Established in terms of Constitution s 206(6) and [Independent Police Investigative Directorate Act 1 of 2011](#).

⁷⁹ Established in terms of the [Private Security Industry Regulation Act 56 of 2001](#).

⁸⁰ Daneel Knoetze, ['IPID's cover-up of police brutality in SA'](#) ViewFinder (Cape Town, 7 October 2019).

⁸¹ Khaya Koko, ['Marikana lawsuits to be finalised by end of August'](#) Mail & Guardian (Johannesburg, 10 August 2022).

CaseScenario 2

Q1

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

56. A civil claim in delict could be instituted against Subsidiary Co. The victims would have to establish that the oil spill was the factual cause of the harm to their health, drinking supply and food security. In this regard, the Constitutional Court has developed the 'but-for' test for factual causation to introduce a causal principle of liability for negligently exposing others to a risk of harm, where that harm eventuates.⁸²
57. Parent Co could be sued on two bases. First, the victims could demonstrate that Parent Co incorporates separate legal entities for each of its projects to avoid liability for negligent wrongdoing in the execution of a project. If that were possible, a court may pierce the veil of Subsidiary Co's separate juristic personality and hold Parent Co liable for its debts. Second, the victims could plead that Parent Co owed them a legal duty to ensure that its subsidiary took appropriate steps to ameliorate any environmental risks, and negligently failed to comply with that duty. In that case, Parent Co would be held liable for its own wrongdoing.

Q2

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

58. In addition to civil claims, victims could pursue litigation under NEMA. They could apply to court to issue a directive to require Subsidiary Co and Parent Co to take specific measures.⁸³ Failing to comply with such directive is an offence under the Act.⁸⁴
59. If Subsidiary Co and Parent Co were convicted of such offence, the court could award damages in favour of the victims. The responsibility for pursuing a criminal case would, however, primarily rest with the State.

82 *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC).

83 NEMA s 28(12) read with s 28(4) and (5).

84 *ibid* s 49A(1)(g).



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

60. The class action proceedings against Anglo American in respect of lead poisoning at the Kabwe Mine in Zambia is a high-profile case which is currently ongoing before the Gauteng Division of the High Court in Johannesburg, South Africa. (See Spotlight case following para [27] above.)



CaseScenario3



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

61. The surviving workers and the dependants of the deceased workers would not have a claim in delict against Factory Co. This is because section 35 of COIDA extinguishes such a claim. The constitutionality of this provision has been confirmed by the Constitutional Court.⁸⁵ This is because workers would have a claim for compensation under COIDA.
62. However, as COIDA only excludes the liability of the 'employee's employer',⁸⁶ a claim against Brand Co could potentially be pursued. The victims would have to demonstrate that Brand Co owed them a legal duty that has been violated. In other words, the victims would have to demonstrate that Brand Co's failure to take steps to prevent, address, and remedy adverse human rights impacts in its supply chain (including by Factory Co) was wrongful. This would depend on a variety of factors.

⁸⁵ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18, 1999 (2) SA 1 (CC).

⁸⁶ COIDA s 35(1).

Q2

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

63. COIDA extinguishes the delictual claim of an employee or their dependant against the employer, as it creates a scheme for compensation. The accident would have 'aris[en] out of and [been] in the course of an employee's employment' and would have resulted in the employees' deaths and personal injuries.⁸⁷ Section 22 provides for a right of compensation in terms of the Act.
64. The victims could also complain to the Department of Employment and Labour, which has statutory powers to investigate and institute formal inquiries into the tragedy.⁸⁸

Q3

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

65. While there are no high-profile lawsuits, harmful workplace environments in the textile industry are often reported in the media.⁸⁹

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⁸⁷ COIDA s 1, definition of 'accident'.

⁸⁸ [Occupational Health and Safety Act 85 of 1993](#) ss 31–33.

⁸⁹ Mercury Reporters '[Newcastle textile industry workers conditions resemble 'modern day slavery'](#)' *The Mercury* (Durban, 20 February 2019).



A HANDBOOK FOR PRACTITIONERS | **TURKEY**

Civil Liability for Human Rights Violations



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FREQUENTLY USED ABBREVIATIONS

Civil Code	Turkish Civil Code No 4721
Convention	European Convention on Human Rights
CPC	Civil Procedure Code No 6100
ECHR	European Court of Human Rights
TCC	Turkish Commercial Code No 6102
TCO	Turkish Code of Obligations No 6098

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TURKEY



INDICES

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Democracy Index
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Turkey is a civil law jurisdiction. While human rights are primarily protected under the Constitution and international treaties to which Turkey is a party and has ratified, civil law remedies are regulated under various domestic laws. Turkish law on civil liability is thus not automatically triggered in the face of human rights violations; however, the general or specific provisions of civil liability serve as a ground for compensation if the relevant human rights violation caused harm to a third party in a non-contractual relationship. There is no specific legislation or court decision in Turkey concerning civil liability of corporate entities for human rights abuses arising from their operations. Although Turkey has not yet established a National Action Plan to implement the [UN Guiding Principles on Business and Human Rights](#), article 9.3.b of Turkey's [Action Plan on Human Rights](#), introduced by the Republic Ministry of Justice in 2021, refers directly to the UN Guiding Principles on Business and Human Rights, and to the implementation of national guiding principles with regard to business and human rights.

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS



IN

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Introduction

1. Turkey (officially the Republic of Türkiye) is a civil law jurisdiction, characterised by a hierarchy of norms led primarily by the Constitution of Turkish Republic¹ ([Constitution](#)), domestic codes and international treaties that are ratified and enacted in domestic law, and secondary legislation. While there is no precedent case law system similar to common law jurisdictions, the decisions of the Joint Chambers of the Supreme Court are binding, having the force of law; other judicial decisions have a guiding nature and can be relied on in litigation.
2. As part of the law of civil remedies, Turkish Civil Code No 4721 ([Civil Code](#))² and Turkish Code of Obligations No 6098 ([TCO](#)),³ are separate codes which are in essence interrelated with each other. According to article 5 of the [Civil Code](#), general provisions of the [Civil Code](#) and the [TCO](#) shall apply to all civil law relations, to the extent appropriate. Turkish Commercial Code No 6102 ([TCC](#)),⁴ a further separate code, states in article 1 that it is an inseparable part of the [Civil Code](#). Turkish civil law is based on these three main codes, which are to be read and interpreted together.
3. Under Turkish law, human rights protection is traditionally based on the Constitution, the international treaties to which Turkey is a party and the laws enacted for ratification of these treaties. Human rights violations do not automatically trigger civil law remedies, because Turkish law provisions on civil liability do not specifically regulate human rights violations. However, to the extent that a human rights violation constitutes a harm caused by a third party in a non-contractual (extra-contractual) relationship, the general or specific provisions on civil liability may be triggered. In the Case Scenarios below ([40] onwards), the three defined harms (assault or unlawful arrest; environmental harm; and harmful or unfair labour conditions) will give rise to civil liability based on general provisions on tort, strict liability of the polluter based on specific provisions in [Environmental Law No 2872](#),⁵ and vicarious liability of the employer based on specific provisions in the [TCO](#). However, for wrongful acts committed by public bodies or public officials, administrative law will also apply in certain circumstances as explained in [7] below.
4. General tort liability under Turkish law is regulated in the [TCO](#). According to article 49 of the [TCO](#), anyone who harms another person by acting with fault or negligence, which is unlawful, is obliged to compensate the relevant damage. The elements of general tort liability are as follows: (1) an act or omission, (2) fault, (3) unlawfulness, (4) causation, and (5) damage.

¹ [Constitution of the Turkish Republic](#) No 2709, OJ 20.10.1982/17844. English translation is available at: <https://www.anayasa.gov.tr/en/legislation/turkish-constitution>.

² [Turkish Civil Code](#) No 4721, OJ 08.12.2001/24607 (Civil Code) English translation is available at: <https://rm.coe.int/turkish-civil-code-family-law-book/1680a3bcd4>.

³ [Turkish Code of Obligations](#) No 6098, OJ 04.02.2011/27836 (TCO).

⁴ [Turkish Commercial Code](#) No 6102, OJ 14.02.2011/27846 (TCC).

⁵ [Environmental Law No 2872](#), OJ 11.8.1983 /18132 (Environmental Law).

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

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Q1

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

Under Turkish law, it is possible to initiate legal action for **civil remedies** in respect of the three defined harms resulting in human rights violations against public bodies, corporations, and individuals, provided that the criteria sought by law are present in the relevant case.

5. **Civil claims** can be brought against a person who has allegedly committed a harmful act (or omission), or if the relevant person has acted in the capacity of a representative of a legal entity (eg a corporation or a public body). In the latter case, civil claims can be sought against the relevant legal entity.
6. Under article 50 of the [Civil Code](#), legal entities are liable for the wrongful acts of their 'bodies'. For this reason, in the event that an individual has committed a tortious act in their capacity as a 'body' of a legal entity (eg as a member of the board of directors), while performing their duty, the relevant legal entity might also be held liable for damages along with the individual who has committed the act. Additionally, in the event that the tortious act was committed by an employee while performing their professional duty, the employer shall be held liable for the damage incurred according to article 66/1 of the [TCO](#).

Civil claims against public officers

7. Two different scenarios should be distinguished concerning civil claims against public officers:
 - If a public officer committed abuse outside their civil service (eg outside their working hours), a claim can be made under the **general provisions of tort law**;
 - If the abuse was committed by the public officer while performing their civil service (eg within working hours and using their powers in professional capacity) then a **claim for damages** can be addressed to the relevant public body before the administrative courts. This is based on article 129/5 of the [Constitution](#), which regulates that the harms incurred by individuals as a result of wrongful actions by public officers will be compensated by the State.⁶ The public body may then have recourse to action against the relevant public officer based on the **general provisions of tort law**.

⁶ See also the The Constitution art 40/3 (n 1).

SPOTLIGHT: CASE STUDY

The Supreme Court has previously ruled that this constitutional provision does not exclude civil liability; instead it regulates State liability for violations by public officials, which, in the Supreme Court's opinion, provides more security for both the victims and for public officials.⁷ Article 13 of the [Civil Servants Law](#)⁸ further regulates that any person who has suffered a harm due to the performance of a public duty may sue the relevant public body, instead of the personnel who performed the harmful duty. According to Supreme Court decisions on this subject, there must be a functional link between the 'performance of duty', 'use of authority' and the harm incurred in order to impose **civil liability** for the wrongful action of the public official, and the damage must have arisen due to the relevant performance of duty and use of authority while performing a public service.⁹

Liability for dangerous activities

8. According to **strict liability** for dangerous activities under article 71 of the [TCO](#), which provides a specific provision for civil liability, the owner of a business and the operator, if any, are **jointly and severally liable** for losses arising from the activities of the enterprise which poses a significant danger. If consideration of the materials and equipment used in the activity leads to the conclusion that it is capable of causing frequent or severe harms, even if all care expected from an expert is taken, that enterprise is deemed to be a significantly dangerous enterprise.

Liability for polluting the environment

9. A **strict liability** provision for polluting the environment is regulated under the [Environmental Law](#), which furnishes a specific ground in addition to the general tort law provisions under the [TCO](#). Article 28 of the [Environmental Law](#) stipulates that those who pollute the environment and harm the environment are responsible for the damage caused, without requiring any fault. The polluter's liability for compensation is reserved within the general provisions of tort liability (article 28/2 of the [TCO](#)). Thus it is possible to claim damages for harm caused by pollution based on strict liability under the [Environmental Law](#), or based on general tort liability under the [TCO](#). The Environmental Law provision is based upon the 'polluter pays' principle, whereby the polluter's liability will be established unless it is able to prove that the causal link was broken in the relevant case.

⁷ General Civil Chamber, Supreme Court, Decision dated 25.02.2015 and numbered E 2013/1235, K 2015/849. A version of this case report is not publicly available. The same applies to a number of other case reports cited in this document. You may be able to download them through a subscription-based legal research tool.

⁸ [Civil Servants Law No 657](#), OJ 23.7.1965/12056.

⁹ General Civil Chamber, Supreme Court, Decision dated 25.02.2015 and numbered E 2013/1235, K 2015/849 (n 7).

Vicarious liability of the employer

10. Article 66 of the [TCO](#) regulates **vicarious liability** for employers concerning harms suffered by third parties due to the actions of their employees while performing their work. If the employer can prove that they have shown due care for prevention of the incurred harm in terms of choosing the employee, providing instructions on the work, and supervising and monitoring the employee, then they will not be liable. Furthermore, in the case of a business enterprise, the employer shall be liable for the harm caused by the operations of the relevant enterprise unless they prove that the organisation of the work can prevent the relevant harm. The employer is entitled to have recourse to action against an employee who caused harm on a pro rata basis of their liability.

Civil claims in criminal proceedings

11. Civil and criminal legal proceedings are separate and independent from each other, even though certain torts (eg an act causing injury) are also criminal offences. Under article 74 of the [TCO](#), civil courts are not bound by a criminal court's findings or decisions on the existence or the degree of fault, nor on its determination of the relevant damage. Similarly, a criminal court's decision on acquittal is not binding on a civil court. Civil courts may make independent decisions on civil liability regardless of a prior criminal court judgment on the same facts. If a claimant has brought civil claims for damages arising from an act which is subject to criminal proceedings, the claimant cannot request the civil court to await the decision of the criminal court. On the other hand, civil claims for damages can be made at criminal proceedings by way of filing a request for intervention. In the event that the criminal court rejects the request for damages or decides to award an amount lower than the claim, this decision will be binding on a civil court.

Q2

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

The civil remedies for the three defined harms can be based on **general tort liability** provisions under the [TCO](#). Article 49/1 of the [TCO](#) requires the presence of the following elements in order to establish tort liability: (1) **an act or omission**, (2) **fault**, (3) **unlawfulness**, (4) **causation**, and (5) **damage**. Hence, in establishing tort liability, it is required that a person commits an act (or omission), in fault (or negligence), which is unlawful, and which causes a damage to a third party.

Act or omission

12. The damage might be caused by a positive act or a failure to act (ie an omission) of the tortfeasor.

Fault

13. There are different interpretations of the concept of fault in the Turkish legal doctrine:

- The **subjective** approach focuses on the personal characteristics of the tortfeasor – such as their abilities, physical and psychological condition, education, and profession – and considers the special circumstances surrounding the commitment of the tortious act in the establishment of fault.¹⁰
- The **objective** approach focuses on a hypothetical person bearing the same characteristics as the tortfeasor, and assesses the existence of fault based on what the relevant hypothetical person would do under normal circumstances.¹¹ The objective approach to fault is generally considered more suitable to achieve legal certainty as it limits the possibility for engaging in a moral condemnation of the act based on the subjective qualities of the wrongdoer.¹²

14. Fault can be distinguished as intention or negligence. However, unlike in criminal law, this distinction has no impact on the attribution of liability, but only on the amount of compensation to be decided upon by the judge.

Unlawfulness

15. Unlawfulness refers to the commitment of an unlawful act or omission. Turkish legal doctrine largely defines ‘unlawfulness’ as a behaviour that conflicts with mandatory legal norms that either prohibit harming others or dictate certain actions required to prevent harm to others.¹³ Violation of norms that are mandatory in nature and that protect personal rights or rights *in rem* will constitute unlawfulness. The violation of the domestic laws of a foreign country would not, in principle, constitute unlawfulness; in other words, any violated norm should be part of Turkish domestic law.¹⁴ On the other hand, article 90/5 of the [Constitution](#) establishes the principle of the supremacy of international conventions ratified by Turkey over domestic law. According to this provision, international conventions, duly put into effect, shall have the force of law, and in case of a conflict between domestic laws and the provisions of such international conventions that concern fundamental rights and freedoms, the provisions of the international conventions shall prevail.

16. Establishing the element of unlawfulness is especially challenging when the tortious act is committed by way of an omission, as in that case it will be necessary to prove that there was a specific legal norm that imposes the obligation to act in a certain manner, and that the relevant person has omitted to take the required action; otherwise, it will not be possible to construct the element of unlawfulness.¹⁵

10 Fikret Eren, *Borçlar Hukuku Genel Hükümler (General Provisions of Law of Obligations)*, (21st edn, Yetkin 2017) 595; Başak Baysal, *Haksız Fiil Hukuku: BK m. 49-76 (Tort Law: Articles 49-76 TCO)* (1st edn, On İki Levha Yayıncılık 2019) 60-61.

11 Eren (n 10), 595; Baysal (n 10) 61.

12 Baysal (n 10) 62.

13 Eren (n 10) 611.

14 It should be noted that all international agreements that are duly ratified by the Turkish Parliament and adopted by law are deemed to form part of domestic law (Constitution arts 90/1, 90/4).

15 Yeşim M Atamer, *Haksız Fiillerden Doğan Sorumluluğun Sınırlandırılması, Özellikle Uygun Nedensellik Bağ ve Normun Koruma Amacı Kuramları (Limitation of Liability for Damages Caused by Torts – Especially the Theories of Adequate Causality and the Protection Scope of the Violated Norm)* (1st edn, Beta 1996) 25; Baysal (n 10) 87.

Causation

17. Tort liability can arise only in cases where a causal link exists between the act (or omission) and the damage. According to the theory of adequate causation, which is predominantly adopted in Turkish legal doctrine, the damage would arise as an objective consequence of the chain of events in the normal course of life.¹⁶ The chain of causation will be deemed discontinued in cases of (i) *force majeure*, (ii) victim's fault and/or (iii) a third party's fault. In order to break the chain of causation, the victim's fault and the third party's fault should be in the form of intention or gross negligence.¹⁷

Damage

18. Damage is another element required for the establishment of tort liability. Damage has been defined in legal doctrine and jurisprudence as a detriment to someone's assets, rights or person, without the consent of the owner. Damage in the narrower sense refers only to **pecuniary** (material) losses, while damage in a broader sense covers **non-pecuniary** (immaterial) losses alongside pecuniary (material) ones.

Q3

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

Turkish law recognises joint and several liability, which, according to article 61 of the [TCO](#), will occur:

- if two or more people **jointly cause a common harm** to a third party (eg when the perpetrators are liable on the same legal ground), or
- if they are liable for the **same harm due to different reasons/grounds of liability** (eg when one is liable under strict liability and the other under general tort provisions).

19. The act of each joint perpetrator should be individually unlawful and should have a causal link with the common damage caused.

20. The injured party can have recourse to anyone who caused/inflicted the damage or who is responsible. Each person who is **held jointly and severally liable** for the harm shall be ordered to pay the amount of compensation that pro rata corresponds to their contribution in the occurrence of the relevant harm, by considering all conditions and circumstances, especially the severity of the fault and of the danger caused thereby.¹⁸

21. Joint and several liability in tort claims is also acknowledged by decisions of the Supreme Court.

¹⁶ Baysal (n 10) 204.

¹⁷ Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler, Law of Obligations General Provisions* (22nd Edition, Ankara 2018) 413.

¹⁸ TCO art 61/1.

SPOTLIGHT: CASE STUDY



In a mining accident in Soma, Turkey in 2013, 301 mine workers lost their lives. The relatives of the deceased workers brought civil claims requesting pecuniary (loss of support) and non-pecuniary damages. The civil court found Turkish Coal Enterprises (TCE), the licensee of the mine, as well as Soma Coal Enterprises Inc, the employer, and the operator of the mine, jointly and severally liable under article 61 of the [TCO](#), hence responsible to pay damages to claimants. The Supreme Court upheld the judgment of the civil court confirming joint and several liability of the licensee of the mine and the employer.¹⁹

Q4

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

Corporate groups

22. Under Turkish Law, a corporate group will be deemed to exist in cases where there is a relationship based on dominance or control between two or more companies (or three group companies in case the parent is an enterprise, which could be a real person or a legal entity), which may be formed directly or indirectly, by owning a majority of voting rights, by having the right to procure the appointment of the decision-making majority of the management body, by contract, or otherwise (article 195/1 of the [TCC](#)).
23. Despite the detailed definition of a corporate group and various grounds for claims and liability identified in the [TCC](#), Turkish law does not accommodate any legal grounds for effectively addressing a **parent company's civil liability** for wrongful acts or omissions of its subsidiaries. In fact, the provisions concerning corporate groups mainly aim to regulate an **'inward-facing' liability**, which concerns the protection of the subsidiary's interests against the parent company's and group's interests. As per article 202/1 of the [TCC](#), if the parent company misuses its dominance or control over its subsidiary by causing losses in its assets, it shall cover these losses within the same financial year, or otherwise the subsidiary's creditors who were not able to collect their receivables may request that the parent company pay the relevant amount to the subsidiary. This provision, however, aims to prevent any misuse by a parent company of its subsidiary's resources and it concerns only cases where a loss was caused in the subsidiary's assets by parent company instructions or decisions. Thus, it does not offer any suitable ground for claims of civil remedy based on the three defined abuses. Claims that concern a more **'outward-facing' responsibility** (ie a parent company's liability towards the victims of wrongful acts by its subsidiaries) are not covered by the corporate group provisions.

¹⁹ 21st Civil Chamber, Supreme Court, Decision dated 12.06.2019 and numbered E 2018/7138, K 2019/4233. A version of this case report is not publicly available (n 7).

Separate legal personality and limited liability

Turkish law recognises the fundamental principles of **separate legal personality** and **limited liability for companies**. In article 329 of the [TCC](#), the principle of limited liability is accepted for joint stock companies. Accordingly, the responsibilities of the shareholders are solely to the company and are limited to the amount of capital they have undertaken to pay.

Piercing the corporate veil

24. The concept of **piercing the corporate veil** has not been regulated under Turkish legislation, but it has been recognised by Turkish legal doctrine and the Supreme Court under specific circumstances. The predominant opinion in Turkish legal doctrine is that the corporate veil can only be pierced where the separate legal personality of the subsidiary has been misused, which is considered by taking into account the good faith principle provided for in article 2 of the [Civil Code](#) and the prohibition of misuse of a right.²⁰ Accordingly, if the parent company is deemed to have intentionally disregarded the separate legal personality for the purpose of circumventing the law or escaping other liabilities, the corporate veil can be pierced. However, this theory is applied very restrictively under Turkish jurisprudence, in particular only in cases where there is a link between the misuse of corporate structure and the relevant company debts and only when the relevant damages cannot be collected directly from the subsidiary.²¹
25. In light of the explanations above in [24] on the principles of separate legal personality and **limited liability**, along with the restricted application of **piercing of the corporate veil** doctrine, and the absence of provisions regulating parent company liability for civil remedies in relation to the acts of its subsidiaries, it currently seems challenging to construe an effective legal ground for this type of liability under Turkish law.

Q5

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

Since the three defined harms might be covered under general tort liability provisions in Turkish law, **pecuniary** and/or **non-pecuniary damages** can be claimed, depending on the specifics of each case.

20 İpek Sağlam, *Opinion on Legal Entity – Sustainability Nexus*, (Marmara University Law Faculty, Journal of Legal Research 26 (2) (2020)) 1122; Veliye Yanlı, *Anonim Ortaklıklarda Tüzel Kişilik Perdesinin Kaldırılması ve Pay Sahiplerinin Ortaklık Alacaklılarına Karşı Sorumlu Kılınması (Piercing the Corporate Veil and the Responsibility of Shareholders Against Company's Creditors in Joint Stock Companies)* (Beta 2000), 70-72.

21 Supreme Court decisions that support the restrictive interpretation of piercing of the corporate veil: 3rd Civil Chamber, Supreme Court, Decision dated 3.12.2019 and numbered E 2019/593, K. 2019/9655; 11th Civil Chamber, Supreme Court, Decision dated 11.12.2017 and numbered E 2016/5148, K. 2017/7084. Versions of these case reports are not publicly available (n 7).

Pecuniary damages

26. First, the three defined harms might result in material harms – for example, a decrease in the value of one's property against one's own will. In each of the three cases, the harm caused to the body and health of the victims might result in material harms. The victims might incur costs due to hospitalisation or treatment, and loss of income if they are no longer able to attend their work. These would all negatively impact their assets. For the purposes of determining the amount of compensation, the judge will consider the element of fault – of the tortfeasor as well as the fault of the victim, if any.

Non-pecuniary damages

27. In addition to the pecuniary damages, the three defined harms would potentially also result in non-pecuniary damages. In cases where the victim's personality rights have been infringed, the victim might be granted non-pecuniary damages as a separate compensation from pecuniary damages. According to the Supreme Court judgments, the life, health, physical integrity, mental integrity of the person, and other physical, emotional, and social personality values that cause the person to feel sadness or pain when intervened are the personal rights that may be subject to a claim for non-pecuniary damages. In the case of the three defined harms, it might be possible to establish the grounds for this claim, considering that victims in each of these cases would most likely be facing threats to life and health that might trigger the relevant moral state required for a successful claim in this respect.

SPOTLIGHT: CASE STUDY

 Council of State, which is the highest administrative judicial authority in Turkey, upheld the decision of the court of first instance in the case in which a claimant's request for non-pecuniary damages was accepted after a gas bomb capsule used by the police hit the claimant's face when the claimant was caught between the police and the demonstrators during a protest.²² The court of first instance determined that the harm was caused by fault in public service, and accepted the claim for non-pecuniary damages, evaluating the loss of work capacity, the consequences of the injury on the later life of the claimant, and the sadness and the pain they felt. In another decision of the Council of State, in a lawsuit filed by a claimant who was injured in the police intervention during the Gezi Park protests in 2013, the request for non-pecuniary damage was accepted as lawful.²³

²² 10th Chamber, Council of State, Decision dated 10.11.2020 and numbered E 2015/2238, K 2020/4683. A version of this case report is not publicly available (n 7).

²³ 10th Chamber, Council of State, Decision dated 07.03.2016 and numbered E 2015/3946, K 2016/1140. A version of this case report is not publicly available (n 7).

Injunctive relief

28. According to article 389 of the Civil Procedure Code No 6100 ([CPC](#)),²⁴ in cases where there is a concern that the acquisition of a protected right will become significantly more difficult or completely impossible due to the change caused by the claimed harm, or that an inconvenience or serious damage will arise due to delay, injunctive relief may be given on the subject of the dispute.²⁵



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

29. There are several potential legal avenues to seek judicial redress for the three defined harms in Turkey:

- **Administrative proceedings** can be initiated in the case of (i) assault, unlawful arrest and detention, and (ii) environmental harm, provided that there is a link to the administrative authorities. This would be the case, for instance, if the assault, unlawful arrest and detention were conducted by a police officer, or if the environmental harm were caused by the activities of a corporation that were allowed by the ministry or any other public authority through a wrongful or otherwise unlawful decision.
- The alternative of **criminal action** might be relevant for all the three defined harms, considering that the acts would most likely qualify as criminal acts under Turkish law. It is, however, worth noting that criminal liability is personal under Turkish law;²⁶ therefore, legal entities cannot be held criminally liable. The exception to this general rule is that safety measures may be imposed as sanctions on private legal entities.²⁷ Moreover, in a criminal action it would not be possible to draw any advantage for tort victims such as compensation of damages that would otherwise be possible. Therefore, this might be considered a complementary method to support civil claims, rather than a substitute approach.
- Filing **civil claims** under general tort liability or special tort provisions may be the most viable solution for an effective remedy for the victims. An important factor that might affect the feasibility of civil liability claims is that the statute of limitations is two years starting from the date on which the victim became aware of the loss and aware of the person liable for damage, and in any case, ten years, starting from the date the act was committed.²⁸ This differs from criminal actions, where the limitation is a minimum of eight years from the date the crime was committed, and this time period may increase depending on the severity of the penalty associated with it.²⁹

²⁴ [Civil Procedure Code No 6100](#), OJ 4.2.2011/27836 (CPC).

²⁵ CPC art 389 (n 24).

²⁶ The Constitution art 38/7 (n 1); Turkish Criminal Code No 5237 art 20/1, OJ 12.10.2004/25611 (Criminal Code).

²⁷ Criminal Code arts 20/2, 60.

²⁸ TCO art 72.

²⁹ As per Criminal Code art 68 (n 26), unless it is otherwise regulated, the statute of limitations is 30 years for crimes of aggravated life imprisonment, 25 years for life imprisonment crimes, 20 years for crimes of at least 20 years of imprisonment, 15 years for crimes of 5-20 years of imprisonment and 8 years for crimes of maximum 5 years of imprisonment or of judicial monetary fine.

30. **Legal aid** is available in civil, criminal and administrative judicial proceedings. Not only Turkish citizens, but also foreigners can benefit from legal aid subject to the condition of reciprocity, and provided that the claimant can successfully prove that they have no financial means to cover legal expenses and lawyers' fees.³⁰ The Treasury covers the lawyers' fees, and legal expenses shall be paid by the party who loses the case. However, the legal aid system in Turkey is currently criticised for not being sufficiently objective and transparent in the appointment and monitoring of lawyers, and for offering an insufficient budget.³¹
31. There are also state-based **non-judicial grievance mechanisms** in place to file human rights complaints. These mechanisms are mostly advisory and have no enforcement power, hence they are often insufficient to provide effective access to remedy:
- The [Human Rights and Equality Institution of Turkey \(HREI\)](#) is a public institution, established by [Law No 6701](#)³² to put in place a national mechanism for the protection of equality and human rights. HREI is responsible ex officio for investigating, adjudicating and following up on allegations of human rights violations. The Board of Directors is authorised to decide on such violations and to impose administrative penalties. However, the administrative penalties specified in the law refer only to equality violations, and exclude other human rights violations (article 25 of [Law No 6701](#)). Additionally, matters that fall within the jurisdiction of judicial authorities are exempt (article 17/4 of [Law No 6701](#)). HREI is criticised by human rights organisations for lacking impartiality and independence in practice, as all its members are appointed by the President and their appointments can be terminated with the approval of the President or the appointed minister.³³
 - The country's **Ombudsman** office is authorised to monitor, investigate and assess administrative acts and actions in terms of law and equity, with a human rights-based justice perspective. But matters falling under the jurisdiction of judicial authorities are exempt from the oversight of the Ombudsman. The Ombudsman's decision is not binding, but is rather issued on a comply-or-explain basis.
 - The General Directorate of Foreign Investment and Incentives of the [Ministry of Industry and Technology](#), is currently the [OECD national contact point \(NCP\)](#) in Turkey. Accordingly, its mandate is to promote the [OECD Guidelines for Multinational Enterprises](#) (2011) and it acts as a non-judicial grievance mechanism in relevant complaints. However, unfortunately, the Turkish NCP has so far been ineffective in Turkey due to its being based in a single ministry. As such, it does not have any significant engagement from other ministries or from stakeholder organisations, thus reducing its ability to tackle a wide range of issues.³⁴

30 CPC art 334-340 and [Lawyers Act No 1136](#) arts 178-179, OJ 07.04.1969/13168.

31 İdil Elveriş, 'Türkiye'de Adli Yardım, Karşılaştırmalı İnceleme ve Politikalar' ('Legal Aid in Turkey, Policy Issues and a Comparative Perspective, Round Table Discussion') in İdil Elveriş, Sercin Kutucu and İmrihan Yaşar (eds), *Türkiye'de Adli Yardım Sisteminin Değerlendirilmesi (Analysis of Legal Aid System in Turkey)*, (1st edn, İstanbul Bilgi University 2005) 48-49, 51.

32 [Law on Human Rights and Equality Institution of Turkey No 6701](#), OJ 20.4.2016/29690.

33 For a critical analysis of the HREI and the Ombudsman, please see the [National Human Rights Institutions as a Human Rights Protection Mechanism. The Cases of The Ombudsman and Human Rights and Equality Institution of Turkey Report](#).

34 OECD, [Progress Report on National Contact Points for Responsible Business Conduct](#), Meeting of the OECD Council at Ministerial Level, Paris (22-23 May 2019), 5.

Q7

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

32. In principle, there are **no limitations** under Turkish law on bringing civil claims against a foreign defendant. However, the rules on jurisdiction would affect whether Turkish courts would have jurisdiction in a claim with a foreign defendant.
33. As per article 40 of the [Turkish Code on Private International and Procedural Law No 5718](#),³⁵ the international jurisdiction of Turkish courts is determined by the rules of domestic law. The **nationality of the litigious parties** is not important to the extent that the Turkish courts have jurisdiction in terms of Turkish law. The rules on jurisdiction are regulated under different codes, including the [Civil Code](#), the [CPC](#) and the [TCC](#). In cases that fall within the scope of the relevant provisions, Turkish courts will have **international jurisdiction**. It is also required that the relevant dispute have **a connection with Turkey** (eg the nationality of one of the parties, or the place of the relevant act or damage).
34. According to the general rule on jurisdiction under article 6 of the [CPC](#), the courts of the **place of residence** of the defendant shall have jurisdiction. Thus, a foreign defendant shall be sued before the courts of the country where they reside. But this is a non-exclusive jurisdiction clause, which renders it possible to initiate proceedings in alternative jurisdictions stipulated by special rules of jurisdiction.
35. There is a special rule on jurisdiction in civil liability in article 16 of the [CPC](#). This provides that the courts of the place where (i) the tortious act is committed, or (ii) the damage has occurred or might possibly occur, or (iii) the victim is residing shall also have jurisdiction. In light of this, claimants have the choice to bring civil claims against a foreign defendant before Turkish courts if either the place of the tortious act, or the damage, or the claimant's residence, is located in Turkey. This provision is important as without it, claimants would not be able to bring civil actions against a foreign defendant before Turkish courts.
36. It should also be noted that the doctrine of ***forum non conveniens*** (the common law doctrine allowing a court to dismiss a civil action where an appropriate and more convenient alternative forum exists) is applied quite restrictively in Turkish law. If there is no other competent jurisdiction, Turkish courts can assume jurisdiction due to a *force majeure* (such as a legal or practical impossibility) or for reasons of public policy. However, this is limited to cases where foreign claimants cannot initiate legal action before foreign courts due to any cause connected to the Turkish authorities and should be assessed on a case-by-case basis.
37. In order to enforce a Turkish court decision in the country where the foreign defendant resides, the court decision must be **recognised and enforced** in the relevant foreign country. In the absence of an international agreement on recognition or enforcement of court decisions to which Turkey is a party, recognition and enforcement will take place under the domestic law of the defendant's place of residence.

³⁵ [Turkish Code on Private International and Procedural Law No 5718](#), OJ 12.12.2007/26728.

Q8**Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?**

38. Turkey does not yet have a National Action Plan to implement the [UN Guiding Principles on Business and Human Rights](#) that was unanimously adopted in 2011 by the Human Rights Council. There is also no specific legislation or court decision in Turkey concerning civil liability of corporate entities for human rights abuses arising from their operations. Nevertheless, the country's 2021 [Action Plan on Human Rights](#) makes direct reference to the UN Guiding Principles on Business and Human Rights in Goal 9.3.b, stating that a national set of guiding principles concerning business and work life will be prepared and awareness-raising activities will be conducted in line with these principles. The Ministry of Labour and Social Security has been designated as the responsible body to take the relevant actions envisaged under Goal 9.3.b. This may be deemed to imply a particular focus on 'work life'. According to the [implementation schedule](#) for the Human Rights Action Plan, Goal 9.3.b was among the activities targeted to be fulfilled within a year. This period has already passed, with no publicly announced action having been taken.
39. Although resources on business and human rights are very limited, there are numerous reports and academic studies on civil liability. Below is a list of some useful resources in civil liability and human rights:

Theses & Articles

- Cigdem Cimrin, 'A Right-Based Approach to Companies' Human Rights Responsibility: Human Rights Due Diligence' (PhD thesis, Istanbul Bilgi University, Graduate Programs Institute, Public Law Department 2020)
- Pinar Kara, 'Tort Liability in Corporate Groups: A Comparative Analysis with Particular Focus on Turkey' (PhD thesis, Istanbul Bilgi University, Graduate Programs Institute, Private Law Department 2021)
- Elif Oral, 'Legal Grounds for Holding Transnational Corporations Directly Responsible for Human Rights Violations under Public International Law' (PhD thesis, Galatasaray University, Social Sciences Institute, Public Law Department 2015)

Books and Book Chapters

- Yesim M Atamer, *Haksiz Fiillerden Dogan Sorumlulugun Sinirlendirilmesi (Limitation of Liability for Damages Caused by Torts – Especially the Theories of Adequate Causality and the Protection Scope of the Violated Norm)* (Beta Basim Yayin 1996)
- H Aydin and W Langley (eds), *Introducing Human Rights in Turkey* (Springer 2021)
- Başak Başoğlu, *Çevre Zararlarından Doğan Hukuki Sorumluluk (Civil Liability arising from Environmental Damages)* (1st edn, Vedat Kitapçılık 2016)
- Basak Baysal, *Haksiz Fiil Hukuku: BK m. 49-76 (Tort Law: Articles 49-76 TCO)* (On İki Levha Yayıncılık 2019)

- Erdem Büyüksagis, XXXII. Turkey. *European Tort Law Yearbook* (De Gruyter Publishing 2014)
- Eren Fikret, *Borçlar Hukuku Genel Hükümler (General Provisions of Law of Obligations)* (21st edn, Yetkin 2017)
- Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (Edward Elgar Publishing 2008)
- Zeynep Derya Tarman, 'Turkey' in Catherine Kessedjian & Humberto Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Springer International Publishing 2020)

Reports

- Amnesty International (2020) [Turkey](#)
- Center for Spatial Justice (2022) [An Overview of Corporate Responsibility on Human Rights in Turkey](#)
- Council of Europe (2019) [Commissioner for Human Rights of the Council of Europe. Country Report, Turkey](#)
- Human Rights Watch (2020) [World Report: Turkey](#)
- Lexology, Getting the Deal Through (2020) [Business and Human Rights in Turkey](#)
- Ministry of Foreign Affairs (2021) [National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21](#)
- Ministry of Justice of the Republic of Turkey (2021) [Action Plan on Human Rights](#)

Databases

- [Lexpera](#)
- [Kazancı](#)
- [Supreme Court Decision Database](#)
- [Council of Higher Education Thesis Center](#)
- [Human Rights Monitoring Resource Hub](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

40. Under Turkish law, protesters can sue both the police and Security Co for **pecuniary and/or non-pecuniary damages** due to their unlawful arrest and/or injuries.

Claims against police

41. As explained in [7] above, claims concerning the actions of the **police** will be brought against the **relevant public authority**. This would be the Ministry of Interior Affairs in Case Scenario 1.
42. The police in Case Scenario 1 have apparently committed **wrongful acts** within the scope of their public duty. It will be deemed that there is a direct link between the public authority of the police, the performance of a public service and the harms suffered by the protesters. Accordingly, the abuse will be deemed a **fault of public service** and the **administration** will be sued due to the wrongful acts of its public officials. The administration may then have recourse to action against the relevant public officer based on the general provisions of tort law as explained in [7] above.

Claims against Security Co

43. In order to determine whether there may be any potential **civil liability for Security Co staff**, the provision of vehicles, equipment and water to police should be assessed in terms of the elements of tort liability. It might be difficult to prove that the mere action of providing water to police constitutes an **unlawful act** with a **causal link** to the **harm** suffered by the protesters due to police violence. Hence it would be challenging, if not impossible, to successfully claim civil liability for the personnel due to the provision of water to police. Having said that, if it can be proved that the police used high-pressured water on the protesters, which caused physical harm, and that Security Co staff provided a large amount of water to the police knowing of such intended use, then the analysis in [44]-[46] below will be relevant to hold Security Co liable.
44. It would be necessary to check if equipment and vehicles provided by Security Co were used by the police to engage in violent acts towards the protesters and harm them in any way. If the answer is affirmative, it might be claimed that the police

and Security Co staff acted in complicity and that their actions have **jointly caused harm** to the protesters. Accordingly, they would be **jointly and severally liable** for the damage caused.

45. In this context, for the staff of Security Co to be held **jointly and severally liable** for the harm together with the police, the staff and the police should have a **common fault**. In other words, their actions should aim for the same unlawful result, which is, in this case, violating the physical integrity of the protesters through the acts of violence. All elements of tort liability must also be present in the acts of both the police and the personnel of Security Co.
46. If the tort liability of Security Co staff is established, Security Co might also be held liable for the damage incurred under the objective liability provision of article 66 of the [TCO as an employer](#). This provides that the employer will be obliged to compensate the damage caused by their staff to others during the performance of the work assigned to them, **without need to prove employer's fault**. In the case of such a claim, the employer might escape liability if it can prove that it has shown the care required to prevent the relevant damage by its selection, instruction, monitoring and supervision of the relevant employee/s. In the case of a business enterprise, the employer shall also have to prove that the organisation of the enterprise is suitable for preventing the damage. Otherwise, the employer shall be obliged to compensate the damage caused by the activities of the enterprise.



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

47. Measures such as arrest, detention, capture and seizure are called 'protective measures' in criminal proceedings. If such measures are not implemented in accordance with the Criminal Procedure Law No 5271 ([CPL](#)),³⁶ unjust detention, capture or arrest will occur. In this case, the protesters who have been detained, captured and arrested unjustly will be entitled to file a **lawsuit against the State** for recovery of their **pecuniary and non-pecuniary losses** in **criminal courts** (article 141 of the [CPL](#)) (see [7] above). However, the effectiveness of this remedy is contested, as it does not put an end to the unjust implementation of the so-called protective measures, but merely offers a possibility of compensation. The European Court of Human Rights (ECHR) has held in claims of breach of article 5.1(c) of the [European Convention on Human Rights](#) (Convention) that although article 141 of the CPL merely offers the possibility of compensation, it is still considered to be efficient and the claimants should exhaust available domestic legal remedies before applying to the ECHR³⁷. It should be noted, however, that the ECHR handles this issue cautiously, and it may release the applicants from the requirement to exhaust domestic legal remedies in cases where unjust detention (and thus a violation of article 5.1(c) of the Convention) is determined.³⁸

³⁶ [Criminal Procedure Law No 5271](#), OJ 17.12.2004/25673.

³⁷ *Demir v Turkey*, 51770/07 [2012] ECHR (16.10.2012).

³⁸ *Mergen and Others v Turkey*, 44062/09, 55832/09, 55834/09, 55841/09, 55844/09 [2016] ECHR (31.05.2016); *Lütfiye Zengin and Others v Turkey*, 36443/06 [2015] ECHR (14.05.2015).

48. On the other hand, in the event that the courts of first instance do not rule in favour of the protesters, an **individual application** can be made to the Constitutional Court based on claims of violation of human rights. The **Constitutional Court** might rule for a retrial if it determines that the alleged violations were present in the relevant case. If the ruling of the Constitutional Court goes against the protester, then, having exhausted all judicial remedies under Turkish law, an application can be made before the ECHR.
49. The physical injuries suffered by the protesters due to the acts of the police might be considered as wilful injury, provided that the police fail to prove that they have acted within the limits and the requirements of their duty. The crime of wilful injury is the infliction of harm by inflicting pain on a person's body, by committing an act that causes the deterioration of a person's health or ability to perceive (articles 86-87 of the Turkish Criminal Code No 5237 ([Criminal Code](#))).³⁹ In this respect, protestors can file **criminal complaints** against the **police** in relation to the **crime of injury**.



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

50. In the Gezi Park protests in 2013, the victims filed lawsuits for pecuniary and non-pecuniary damages before administrative courts in relation to injuries and other harms caused by gas canisters used during the police intervention. As explained in [7] above, the relevant public body, in this case the Ministry of Internal Affairs, should be responsible for damages caused by the unjust acts of the police in the performance of their duties. Accordingly, various lawsuits were brought against the Ministry by those injured due to **the police intervention**. In some of these lawsuits, civil claims for damages for victims were approved by the Council of State, albeit with a reduced amount.⁴⁰ **Impunity** is considered a major problem in such cases in Turkey. A recent high-profile example is the lawsuit filed by the family of a protester who was shot dead by the police during Gezi resistance protests in Ankara. Here the Constitutional Court has found no violation, stating that the judicial fine imposed on the police officer that was set just above the lower limit was proportionate.⁴¹



39 Criminal Code (n 26).

40 10th Chamber, Council of State, Decision dated 07.03.2016 and numbered E 2015/4045, K 2016/1139; 10th Chamber, Council of State, Decision dated 07.03.2016 and numbered E 2015/3946, K 2016/1140; 10th Chamber, Council of State, Decision dated 05.10.2020 and numbered E 2015/4284, K 2020/3434). A version of this case report is not publicly available (n 7).

41 It is worth noting that the President of the Constitutional Court submitted a dissenting opinion in this case, stating that there was a violation of the deceased person's right to life and that the imposition of a judicial fine close to the lower limit led to impunity. See [Cem Sarisülük and Others](#), Constitutional Court, 2015/16451 (15.12.2021), OJ 04.03.2022/ 31768/.

CaseScenario 2

Q1

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

51. According to article 113 of the [CPC](#) which regulates **class actions**, associations or other legal entities may file a lawsuit on their own behalf, within the framework of their status, in order to protect the interests of their members or members of the community they represent, in order to determine the rights of the persons concerned, or to eliminate an unlawful situation, or to prevent the violation of the future rights of the persons concerned.⁴² Under Turkish law, only **legal entities** are allowed to initiate class actions. The aim of the lawsuit should be the protection of the **collective legal interests** of the members of the association or legal entity. In other words, a class action cannot be filed in order to protect personal interests. However, article 46/1 of the [Code on the Establishment and Rules of Procedure of the Constitutional Court](#)⁴³ **prevents filing of class actions before the Constitutional Court**. For example, the Constitutional Court found the application of an environmental organisation seeking ecological protection in the face of plans for a hydroelectric power plant to be built in Turkey to be inadmissible. It ruled that the NGO did not have the capacity to file a constitutional complaint, as its rights as a legal entity were not violated, and as an admissible claim should refer to the violation of a personal right.⁴⁴ This situation prevents NGOs bringing lawsuits before the Constitutional Court with claims of unconstitutionality.

52. In Case Scenario 2, any **legal entity** (such as an NGO) can file a **class action** representing the local community in the area, provided that the lawsuit is filed: (i) by an association or other legal entity, (ii) within the framework of the legal status of the association or the legal entity, and (iii) within the scope of protecting collective legal interests.

General tort liability

53. It will be necessary to examine whether the criteria for tort liability exist in respect of both Parent Co and Subsidiary Co. Considering that the alleged harms occurred due to the activities of Subsidiary Co, the analysis for tort liability will be relatively straightforward. Accordingly, it will be assessed whether Subsidiary Co knew or

42 CPC art 113 (n 24).

43 [Code on Establishment and Rules of Procedures of the Constitutional Court No 6216](#), OJ 03.04.2011/27894. English translation is available at: <https://www.anayasa.gov.tr/en/legislation/law-on-constitutional-court/>.

44 Constitutional Court, 2013/1212 (12.09.2013).

could possibly have known the risks of oil leakage into local rivers and farmland, whether it had taken the measures required to **eliminate or mitigate these risks**, and also if there was an appropriate causal link between its activities and the damage that occurred. Taking into account the experience of the X Group in extraction of oil, it would be reasonable to expect that Subsidiary Co was aware of the risks of leakage and yet did not take the required measures for prevention. Therefore, Subsidiary Co could be held liable to compensate the harms suffered by the local community due to the leakage of oil from its project site.

54. The responsibility of Parent Co would be more challenging to address successfully. There is no provision or case law in Turkish law that would impose a duty of care on a parent company towards third parties that might suffer harms due to the activities of subsidiaries, including transnational ones. As also mentioned at [24] above, the grounds for piercing the corporate veil are very limited and not adequate in Case Scenario 2.

Liability for dangerous activities

55. Referring to our explanations on **strict liability for dangerous activities** (article 71 of the [TCO](#)) in [8] above, Subsidiary Co would be deemed liable for damages as the operator of an enterprise that is engaged in dangerous activities – the extraction of oil would be deemed dangerous within the aim and context of this provision.
56. As for **Parent Co**, the situation would be more complicated. To claim Parent Co's liability under the strict liability for dangerous activities, it would be necessary to prove that Parent Co had acted as the owner of the relevant enterprise, which was actually operated by Subsidiary Co. We assume that in this case the owner of the enterprise is Subsidiary Co. However, in light of an opinion in Turkish legal doctrine,⁴⁵ it might be possible to claim that Parent Co had control over the relevant enterprise's important financial and operational decisions and therefore was the beneficial owner; hence, it could be held liable under article 71 of the [TCO](#) as the owner of the enterprise. This would still be a rather difficult argument to prove in practice, and it has not been tried before.

Strict liability under Environmental Law

57. **Liability of Subsidiary Co** and **Parent Co** might also be considered in terms of the strict **liability of polluters**, which is regulated under the [Environmental Law](#) and explained in more detail in [9] above. Unless Subsidiary Co can effectively prove that the **causal link** between its oil excavation activities and the environmental pollution was broken, it will be held strictly liable as the polluter. Proving the discontinuation of a causal link could be challenging, as the required analysis might also reveal other elements of tort liability, such as fault, which is not required to establish a polluter's strict liability. For instance, if Subsidiary Co claims that the leakage of oil occurred due to third party sabotage, it might be relevant to question whether as an experienced business owner it should have foreseen the risk of sabotage and whether it should have taken the required measures for prevention – hence it might be argued that the relevant questions should refer to the element of fault rather than causation and Subsidiary Co could be held liable regardless.

45 Başak Başoğlu, *Çevre Zararlarından Doğan Hukuki Sorumluluk (Civil Liability Arising From Environmental Damages)* (1st edn, Vedat Kitapçılık 2016) 199-200; Pinar Kara, *Tort Liability in Corporate Groups: A Comparative Analysis with Particular Focus on Turkey* (PhD Thesis, 2021) 228-229.

58. The liability of the **Parent Co** would be more difficult to demonstrate. However, article 2 of the [Environmental Law](#) does not delimit the definition of ‘polluter’ as the owner or the operator of the enterprise that caused the pollution. Thus, while under normal circumstances Subsidiary Co would *prima facie* be the polluter, in a case where the pollution occurred due to the activities of an enterprise carrying out dangerous activities, it might be possible to adopt a similar interpretation as suggested in [56] whereby a joint liability is established for Parent Co as the owner (who receives economic benefit) and Subsidiary Co as the operator of the enterprise.⁴⁶ However, this might be difficult to prove in practice.



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

59. In addition, and as complementary mechanisms to civil law remedies, **administrative and criminal action** is also possible in Case Scenario 2.

Administrative fines

60. Article 8 of the [Environmental Law](#) prohibits leaving waste or other substances in the environment that will harm the environment or be in violation of the standards and methods for disposal set out in the relevant regulations. Administrative fines will apply for violations of this norm and for polluting the environment, including polluting soil and water.

Criminal sanctions

61. Moreover, under article 181/1 of the [Criminal Code](#), a person who deliberately disposes of waste or harmful residues in the soil, water or air in violation of the technical procedures for disposal determined by the relevant laws, and in a way that harms the environment, shall be sentenced to imprisonment of six months to two years. If the act of polluting the environment is committed in relation to wastes or residues that may cause diseases for humans or animals that are difficult to treat, cause atrophy of reproductive ability, and change the natural characteristics of animals or plants, the sentence shall be imprisonment of not less than five years and a judicial fine (article 181/4 of the [Criminal Code](#)).⁴⁷

⁴⁶ Başoğlu (n 45) 199-200; Kara (n 45) 228-229.

⁴⁷ If the crimes are committed negligently, the sentences will be a judicial fine, imprisonment of two months to one year, or imprisonment of one year to five years respectively (Criminal Code art 182).

Q3

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

62. The use of cyanide in the activities of a gold mine operating in the Bergama-Izmir region in the 1990s led to protests by local people. Due to the fact that article 113 of the [CPC](#) was not in force and there was no class action mechanism in Turkish law at the time, the villagers of Bergama filed a lawsuit under the 'joinder of parties' system. Pursuant to article 43 of the previous [Turkish Civil Procedure Law No 1086](#),⁴⁸ more than one person could file a lawsuit together as co-claimants through this system if the subject matter of the cases consisted of a common right. The joinder of parties mechanism, now regulated under article 57 of the [CPC](#), makes it possible for persons with common cause to be accepted as co-claimants if the facts and legal reasons that form the basis of the cases are the same or similar to each other.
63. The court of first instance dismissed the case filed by the villagers of Bergama seeking the cancellation of the mining licence of the company. Thereafter, the Council of State considered reports on the environmental effects of cyanide and decided that its use posed a risk to the environment and to human health, and that it would not be in the public interest to allow the gold mine to be operated for purely economic reasons. It reversed the decision of the court of first instance.⁴⁹ In line with the decision of the Council of State, the lower court decided to cancel the mining license of the company.
64. Despite the decisions of both bodies to cancel the company's mining licence, its operations and the use of cyanide continued as the Turkish State continued to issue the required operations permits. In various applications made to the ECHR by the villagers of Bergama (joined under [Taskin and Others v Turkey](#)), decisions were taken regarding the violation of the right to a fair trial and right to respect for private and family life of the applicants due to the non-implementation of court decisions and the continuation of mining activities despite court decisions.⁵⁰

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48 [Civil Procedure Code No 1086](#) (abolished), OJ 02.07.1927/622.

49 6th Chamber, Council of State, Decision dated 13.05.1997 and numbered E 1996/5477, K 1997/2312). A version of this case report is not publicly available (n 7).

50 [Taskin and Others v Turkey](#), 46117/99 [2004] ECHR (10.11.2004).

CaseScenario 3

Q1

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

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Liability of Factory Co

65. Considering that the fire occurred at the factory while the employees were at the workplace carrying out work determined by the employer, it is possible to consider it an **occupational (work-related) accident** under [Labour Law No 4857](#).⁵¹ In occupational accidents, the liability of the employer can be based on both tortious acts and breach of contract, and these two responsibilities can coexist.
66. In the event that occupational accidents are caused by failure to comply with occupational safety measures, a non-compliant employer is held responsible on the grounds that the employer has acted in violation of its duty of supervision. The **employer's obligation to supervise the employee** is defined as the obligation to take protective/preventive measures against work and workplace risks that may harm the material and moral integrity of the employee. The legal grounds for the employer's obligation to supervise the worker, which is the basis of the **contractual responsibility**, are the employment contract, the [TCO](#) and the regulations related to [Labour Law](#).
67. While the claimant is obliged to prove the fault of the defendant in claims based on tort, the burden of proof is reversed in claims filed due to **breach of contract**. In other words, in such cases, the defendant is obliged to prove his/her faultlessness. While the statute of limitations for tort claims is two years from the date on which the victim became aware of the loss and ten years from the date of the commitment of the tortious act, claims based on breach of contract are subject to a ten-year statute of limitations. It is, therefore, possible to state that claims based on breach of contract would be **more advantageous** for claimants in this case.
68. On the other hand, the basis and scope of legal **liability of employers** is still quite controversial under Turkish law. There are conflicting decisions of the Supreme Court and disagreement in legal doctrine as to whether the employer's responsibility is **fault liability** or **strict liability**. For this reason, each case is evaluated within the framework of its own conditions, and the characteristics and risks of the work done at the workplace. Fault refers to the employer's violation of the obligations imposed on them. However, the employer is obliged to take all

⁵¹ [Labour Law No 4857](#), OJ 10/6/2003/25134 4857.

the measures that are not only in accordance with the written rules in the legislation, but also in accordance with the unwritten measures necessitated by technology. Failure to take such wide-ranging measures and the employer's failure to act meticulously in this regard is regarded as a **fault**, and the resulting damage should be compensated by the employer.

69. Furthermore, if it might be possible to consider the factory as an **enterprise that poses a significant danger**, the **employer's strict liability** pursuant to article 71 of the [TCO](#) might also be claimed. The conditions for this were explained in [9] and [56].
70. Employees who were harmed in the fire may request both **pecuniary and non-pecuniary damages** from Factory Co, as the employer, based on tort and/or breach of contract.

Liability of Brand Co

71. As for Brand Co's responsibility, it might be alleged that a **subcontractor and principal employer relationship** exists between Factory Co and Brand Co. According to article 2 of the [Labour Law](#), the connection between an employer and a subcontractor who undertakes to carry out work in auxiliary tasks related to the production of goods and services, or in a certain section of the main activity due to operational requirements, or for reasons of technological expertise in the establishment of the main employer (the principal employer), and who engages employees recruited for this purpose exclusively in the establishment of the main employer, is called 'the principal employer-subcontractor relationship'. The principal employer is jointly liable with the subcontractor for the obligations ensuing from occupational accidents.
72. For a legally **valid principal employer-subcontractor relationship**, the subcontractor must employ the workers *only* for performing the job it has taken from the relevant principal employer (Brand Co in Case Scenario 3). If such an exclusive relationship exists between Brand Co and Factory Co, Brand Co may be considered as the principal employer and may be held liable for damages. However, proving this exclusive relationship would be difficult in Case Scenario 3, as Factory Co does not exclusively manufacture for Brand Co.

Social security mechanism

73. In addition to claims for damages addressed against the employer in the event of an occupational accident or disease, the following monetary benefits can be provided by the **Turkish Social Security Institution** to insured workers or their relatives, in accordance with article 16 of the [Social Security and General Health Insurance Law No 5510](#):⁵²
 - Daily compensation to the insured throughout the period of temporary incapacity for work,
 - Financing of permanent incapacity income to the insured,
 - Contribution of income to the relatives of the insured person who died as a result of an occupational accident or disease,

52 [Social Security and General Health Insurance Law No 5510](#), OJ 16.06.2006/26200.

- Marriage allowance to the daughter of an insured person who died as a result of an occupational accident or disease,
 - Funeral allowance for an insured person who died because of the occupational accident and occupational disease.
74. If the occupational accident or disease occurred as a result of the employer's intention or an act contrary to the occupational safety legislation of the insured, the sum of (i) the payments made by the Social Security Institution to the insured or their relatives and (ii) the first cash capital value of the income of the insured shall be imposed on the employer. This payment amount shall be limited to the amounts that the right holders may request from the employer (article 21/1 of [Social Security and General Health Insurance Law No 5510](#)).



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

75. In the event of the death of an employee who is exposed to an occupational accident due to failure to take occupational health and safety measures, those who are deprived of the employee's support can claim compensation from the employer, through **compensation for loss of support** (article 53/3 of the [TCO](#)). Not only family members or close relatives of the deceased but also others might claim compensation for loss of support, as long as the required conditions are fulfilled (eg those who live in the same house with the deceased or those who have been receiving regular support from the deceased).
76. In the event of the injury of an employee who is exposed to an occupational accident, **pecuniary damages** can be claimed from the employer. In this case, the cost of medical treatment for the injury and the loss of income during the time that the worker cannot work can be claimed as pecuniary damages. In addition, these losses can also be claimed if a worker has lost productive capacity compared to their situation before the accident, or if the likelihood of gain in their profession has decreased after returning to working life. Those injured as a result of occupational accidents can also claim **non-pecuniary damages** for deterioration of their mental state.
77. Furthermore, if an occupational accident resulting in the death or injury of the worker has occurred due to the employer or other relevant persons acting contrary to their occupational health and safety obligations, these persons will also be held criminally liable. **Criminal liability** of the employer or other relevant persons depends on the presence of negligent acts, such as not taking occupational safety measures in the relevant workplace.
78. An alternative way to hold Brand Co liable for damages is to resort to a **voluntary mediation** with support from the relevant trade union. A settlement might be sought with Brand Co with the support of campaigns by workers and unions. This method might be advantageous for the victims as it will be less costly and potentially faster than judiciary proceedings.

79. Finally, a complaint against Brand Co can be raised with the **NCP**. However, as mentioned at [33] above, this is a non-mandatory and advisory procedure, which will not be binding on the defendant.



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

80. There have been a number of decisions of the Supreme Court and the Court of Cassation concerning the liability of employers, pecuniary and non-pecuniary damages, and compensation for loss of support following occupational accidents in Turkey. In 2005, five workers, including some child labourers, lost their lives and four workers were injured in a fire that broke out in a textile factory where workers were employed without insurance, the required occupational health and safety measures were not taken, and the workers were locked up on night shifts. In addition to adjudicating a criminal case brought against the employer, the court decided that the employer would pay pecuniary and non-pecuniary damages to the workers' families in line with their claims.⁵³
81. It would be relevant to also note the example of a **non-judicial mechanism** concerning the **responsibility of the brand** in relation to its supplier, although this case does not involve an occupational accident. Bravo Tekstil, which manufactured goods in Turkey for big international brands such as Inditex, Next and Mango, went bankrupt in July 2016. The company was abruptly closed, and its owner fled the country. Its employees, who were unable to receive salaries during the company's bankruptcy process, started an international campaign to demand that Inditex cover their unpaid salaries and severance payments. However, Inditex stated that all payments had been made to Bravo Tekstil on time, that there was no outstanding payment, and that the failure to pay the employees' salaries should be the responsibility of Bravo Tekstil. As a result of the global impact of the workers' campaign over nearly two years, and the signatures of 309,000 consumers, a fund was created by three of the brands that purchased products from Bravo Tekstil. Through this, the employees were able to receive their rights. Although out-of-court and non-judicial, this case was the first in Turkey where brands agreed to cover the receivables of employees of a local supplier in their global supply chain.

⁵³ 30th Civil Chamber, Court of Cassation, Decision dated 25.02.2019 and numbered E 2017/3353, K 2019/96. A version of this case report is not publicly available (n 7).



A HANDBOOK FOR PRACTITIONERS | **UKRAINE**

Civil Liability for Human Rights Violations

 **OAK**
FOUNDATION

Bonavero
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FREQUENTLY USED ABBREVIATIONS

CC	Civil Code of Ukraine
CPC	Civil Procedure Code of Ukraine
CSO	civil society organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Law on Illegal Acts	Law No 266/94-VR 'On the Procedure for the Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts'
LC	Labour Code of Ukraine

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UKRAINE



Ukrainian legislation enshrines a broad catalogue of human rights and freedoms, but it often does not provide detailed rules for the remedies available to an aggrieved person. The main provisions on civil liability are to be found in the Civil Code of Ukraine and include the rules on so-called general delict and special delicts. Overall, the Ukrainian law of civil remedies has the potential to be a vehicle for remedying human rights violations. But significant obstacles remain such as the lack of a class action mechanism, the absence of a comprehensive theory of causation and a limited range of rules allowing a claimant to hold a perpetrator liable for the acts of a third person. In addition, Ukrainian legislation currently does not impose human rights due diligence obligations on businesses.

INDICES

86/167

Democracy Index
2021 Ranking

61/100

Freedom House
2022 Score

122/180

Transparency International
Corruption Index 2021 Ranking

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



Introduction

1. Ukraine is a signatory to a number of international human rights treaties.¹ In accordance with Article 9 of the [Constitution](#), these international agreements, which have been approved as binding by Parliament, constitute an integral part of domestic law. The influence of the [European Convention on Human Rights](#) (ECHR) is especially prominent. The Convention itself and the case law of the European Court of Human Rights (ECtHR) are widely applied by Ukraine's national courts.
2. Human rights and fundamental freedoms are enshrined in Section II of the Constitution of Ukraine. The Constitution guarantees the right to compensation for damage caused by illegal decisions, acts or omissions of public bodies and their officials (Article 56). Additionally, most of these human rights are reiterated in Book II of the [Civil Code of Ukraine \(CC\)](#) where they are called 'personal non-pecuniary rights'.
3. Violations of internationally recognised human rights do not constitute a special kind of tort in Ukraine. Victims therefore must rely on the general provisions of tort law, which is a part of the law of non-contractual obligations. The main provisions of tort law are embraced in Chapter 82, 'Compensation of Damage', of the CC. This includes a so-called 'general tort' which is an overarching rule allowing victims to claim compensation in any case where damage is inflicted as a result of wrongful actions or omissions (CC Articles 1166 and 1167), and so-called 'special torts' which are addressed by provisions governing tort obligation in particular cases. Some of the 'special torts' are addressed by separate legislation.² Several 'special torts' specifically concern instances where damage is caused by public bodies or their officials (CC Articles 1173-1176).
4. In general, Ukrainian tort law has the potential to be a vehicle for remedying human rights violations. But there are some notable obstacles preventing it from being used to address all situations. In particular, there is no mechanism for class actions that might be required in certain situations, especially in instances of environmental pollution. Among the doctrinal hurdles in Ukrainian tort law there is an absence of a comprehensive theory of causation and there is a limited range of rules that allow holding someone liable for damage which is not the direct consequence of his or her own actions. At present, national legislation does not impose human rights due diligence obligations on businesses.³ As a result, it is difficult for victims to substantiate claims against wrongdoers whose involvement in human rights violations is indirect.

1 For a list of international human rights treaties ratified by Ukraine, see Olena Uvarova, '[Business and Human Rights: National Baseline Assessment](#)' (Yaroslav Mudryi National Law University, Ministry of Justice of Ukraine, Danish Institute for Human Rights, 2019) 4.

2 See the [Law 'On Liability for Damages Caused by Product Defects'](#) (19 May 2011, No 3390-VI), the [Law 'On Civil Liability for Nuclear Damage and its Financial Provision'](#) (13 December 2001, No 2893-III) and the [Law 'On The Procedure for Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts'](#) (1 December 1994, No 266/94-VR).

3 Uvarova (n 1) 8, 15, 17.

General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Basic provisions of Ukrainian tort law are set out in the Civil Code and address the general principles of compensation for damage caused (**general tort**) or peculiarities of compensation for damage caused in certain circumstances (**special torts**). Some special torts are also addressed in separate laws. The State is not excluded from the ambit of the CC. Furthermore, there are provisions specifically concerning the civil liability of public bodies.

Assault or unlawful arrest and detention

5. These actions do provide grounds for a claim for compensation. However, such a claim would be based on different provisions of tort law depending on whether the damage was caused by a public body or private actor. Additionally, (in the case of damage caused by a public authority) it would depend on whether the damage was inflicted during the performance of duties relating to an **official investigation** or **proceedings** against the victim (eg in relation to criminal or administrative charges); or if it was inflicted without any connection to official proceedings.
6. When public bodies commit violations against a person during the conduct of an official investigation in a criminal or an administrative offence case, the damage caused by unlawful arrest, detention and other procedural measures is subject to compensation under [CC Article 1176](#)⁴ and under the special [Law No 266/94-VR](#) 'On the Procedure for the Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts' (the [Law on Illegal Acts](#)).⁵
7. If the unlawful actions of public bodies are not related to official proceedings, ie when those actions constitute arbitrary violence (such as the use of brutal force to disperse a rally), the [Law on Illegal Acts](#) is not applicable. In such a case, a claim for damages can be based on Article 56 of the [Constitution](#), and on Articles 1173 (damage caused by a public body) and 1174 (damage caused by officials of a public body) of the [CC](#). When the violation of a human right has caused injury or death, special rules for calculating the damage are provided in [CC Chapter 82 § 2](#) (Articles 1195-1208).

Environmental harm

8. The right to compensation for environmental harm is provided for in a number of acts. This includes the [Constitution](#), the provisions of which are directly applicable.⁶ Under Article 50 of the [Constitution](#), everyone has the **right to a safe and healthy environment** and to compensation for damage caused by violation of this right.

4 The title of Art 1176 is 'Compensation for damage caused by unlawful decisions, actions or omissions of operative investigation bodies, pre-trial investigation bodies, prosecutor's offices and courts'.

5 Law No 266/94-VR (24 November 2021, No 4652-VI).

6 [Constitution of Ukraine](#), art 8, para 2. See also Resolution of the Plenary Supreme Court of Ukraine, 'On the Application of the Constitution of Ukraine in the Administration of Justice' (1 November 1996, No 9).

The right to a safe and healthy environment is also set out in [CC](#) Article 293. According to [CC](#) Article 275, this right is subject to protection by all remedies available under the general provisions of the [CC](#).⁷ Among those remedies are compensation for damage,⁸ the cessation of the infringing act,⁹ and restoration of the status quo that existed before the infringement (*restitutio in integrum*).¹⁰

9. The right to compensation for environmental harm is also provided for in the provisions of special environmental legislation. Under the [Law 'On Environmental Protection'](#), every citizen of Ukraine has the right to sue government agencies, enterprises, institutions, organisations and citizens, and can seek compensation for damage caused to their health and property as a result of negative impact on the environment.¹¹ Article 69 of the [Law 'On Environmental Protection'](#) further provides that damage caused as a result of the violation of environmental legislation is subject to compensation in full. In particular, persons who have suffered such damage are entitled to compensation for lost income for the period necessary to restore health, to restore the quality of the environment and to restore natural resources to a state suitable for their intended use.

Harmful or unfair labour conditions

10. Damage caused to an employee, including injury, illness and death, is compensated through insurance under the **state social security mechanism**,¹² and not through the tort law. Reimbursement is made by the Social Insurance Fund of Ukraine. Events insured include job-related accidents and occupational diseases. Various pieces of legislation specify in detail the conditions and the procedure for compensation in different circumstances.¹³
11. However, insurance payments do not include compensation for **non-pecuniary (moral) damage**.¹⁴ Such damage is compensated on the grounds of tort law. A claim in this case would be based on [CC](#) Articles 23 and 1167 (general provisions on the right to compensation for non-pecuniary damage), and Article 237-1 of the [Labour Code of Ukraine](#) (LC), according to which moral damage should be compensated whenever violation of the employee's rights entails moral suffering, loss of normal life ties and requires him/her to make additional efforts to organise their life.

Compensation for real estate destroyed in the armed conflict

12. The law of civil remedies in Ukraine has been also instrumental as a means of redress for victims in cases beyond the project's main scope and three defined harms. In particular, this applies to compensatory claims for real estate destroyed in the armed conflict in Eastern Ukraine.¹⁵

⁷ [CC](#) ch 3.

⁸ *ibid*, art 16, para 2, subpara 9, 10; [CC](#), arts 22, 23.

⁹ *ibid*, art 16, para 2, subpara 3.

¹⁰ *ibid*, subpara 4.

¹¹ [Law 'On Environmental Protection'](#) (25 June 1991, No 1264-XII), art 9, para 1, subpara (z).

¹² [Law 'On Labour Protection'](#) (14 October 1992, No 2694-XII), art 9.

¹³ [Law 'On Labour Protection'](#); [Law 'On Mandatory State Social Insurance'](#) (23 September 1999, No 1105-XIV); Resolution of the Cabinet of Ministers of Ukraine, '[Procedure for the Investigation and Accounting of Safety Incidents, Occupational Diseases and Occupational Accidents](#)' (17 April 2019, No 337); Resolution of the Directorate of the Fund of Social Security, '[Procedure for Awarding, Recalculation and Making Insurance Payments](#)' (19 July 2018, No 11); Resolution of the Cabinet of Ministers of Ukraine, '[The List of Occupational Diseases](#)' (8 November 2000, No 1662); Resolution of the Cabinet of Ministers of Ukraine, '[The Procedure for Determining the Average Wage \(Income, Gains\) for the Purpose of Calculation of Payments within Mandatory State Social Insurance](#)' (26 September 2001, No 1266).

¹⁴ [Law 'On Mandatory State Social Insurance'](#), art 36, para 8.

¹⁵ Bohdan Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022) 342-343.

SPOTLIGHT: CASE STUDY

Armed conflict in the Donetsk and Lugansk regions has been ongoing since 2014.¹⁶ One of the questions addressed by case law was whether the tremendous damage caused to a great number of persons and legal entities as a result of heavy weapons use can be compensated and, if so, at whose expense. Many claims were commenced under Article 19 of the Law on Combatting Terrorism, seeking compensation for the damage caused by the destruction of housing or other real estate. The Grand Chamber of the Supreme Court concluded that Article 19 cannot serve as grounds for legitimate expectation to be compensated at the State's expense for damaged real estate in the Anti-Terrorist Operation Zone.¹⁷ The Grand Chamber emphasised the distinction between the negative and positive obligations of the State. The case was referred for a new trial, and the court of first instance held that the State had violated its positive obligations by not setting a compensation mechanism in place for more than five years. On this ground the plaintiff was awarded compensation (although the value of the destroyed property was significantly higher than the compensation for damage awarded).¹⁸

Q2

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

There are four elements of tort: wrongfulness, damage, causation and fault. Although this formula is not expressly provided for in the CC, the courts consider it implied in CC Article 1166. If at least one element is absent, a person cannot be held liable for tort.

13. As a general rule, there are four elements of liability in tort: **wrongfulness, damage, causation** and **fault**. The **burden of proof** is allocated to the plaintiff for the first three elements (wrongfulness, damage and causation), while the defendant disproves their fault (in civil law, presumption of fault operates).¹⁹ To disprove their fault, the tortfeasor must show that they have taken all measures in their power to prevent damage.
14. The definition of **compensable damage** is provided in [CC](#) Articles 22 and 23. It includes pecuniary and moral (non-pecuniary) damage. Pecuniary damage embraces both actual losses and lost profits.

¹⁶ United Nations General Assembly, 'Resolution Adopted by the General Assembly on 27 March 2014: 68/262 Territorial Integrity of Ukraine' (UNGA, A/RES/68/262).

¹⁷ Case No 265/6582/16-ts (Judgment of the Grand Chamber of the Supreme Court, 4 September 2019) [32].

¹⁸ Case No 265/6582/16-ts (Judgment of the Ordzhonikidze District Court of Mariupol city (Donetsk region), 27 April 2021).

¹⁹ [CC](#), arts 614, 1166.

15. The set of tort liability preconditions (the four elements described in [13]) can vary depending on the features of a particular situation. This applies to the three defined harms within the scope of the project.

Assault or unlawful arrest and detention: unlawful procedural measures

16. When damage is caused by unlawful procedural measures taken within a criminal case or an administrative offence case (see [6] above), the damage is subject to compensation regardless of the fault or non-fault of the officials who carried out the relevant procedural measures.²⁰ Thus the set of preconditions here includes only three elements (it excludes fault).
17. **Proof of unlawfulness** is an important distinguishing feature in this case. The [Law on Illegal Acts](#) contains an exhaustive list of circumstances that can evidence the unlawfulness of procedural measures that have been undertaken. Under Article 2 of this law, the right to compensation shall arise:
- in the event of an acquittal by a court;
 - 'where a court establishes the following in a verdict or other judicial decision (except for a decision ordering new consideration [of a criminal case]): the fact that there has been unlawful notification of suspicion of a crime; [and/or] that there has been unlawful remand and detention in custody; [and/or an] unlawful search [and] seizure in the course of criminal proceedings; [and/or] unlawful attachment of property; [and/or] unlawful suspension from work and other procedural actions restricting a citizen's rights; [and/or] unlawful conduct of operational search activities' (Article 2(1-1));
 - in the event of criminal proceedings being terminated for the reason that no crime has been committed, for the absence of *corpus delicti*, or for the lack of evidence to prove the accused's guilt in trial [where] all possible means to obtain such evidence have been exhausted;
 - in the event of proceedings for an administrative offence being terminated.
18. If one of the above-mentioned circumstances exists, the State cannot avoid liability by contending that law enforcement agencies have exercised all due diligence and have made a good-faith mistake (**no-fault liability regime**). If the person is acquitted, or if proceedings are terminated on 'exonerative' grounds, all procedural measures conducted within the respective proceedings are ipso facto considered to be unlawful and give rise to a claim for damages.

Assault or unlawful arrest and detention: arbitrary violence

19. When a claim is based on general provisions concerning liability of public bodies and their officials (such as when the damage is inflicted without any relation to criminal proceedings or to an administrative offence case as clarified in [7] above), liability of the State does not depend on the fault of responsible officials (as explained above in terms of [Law on Illegal Acts](#)).

²⁰ CC, art 1176; [Law on Illegal Acts](#), art 1, para 2.

20. However, in this case the victim may encounter difficulty in proving unlawfulness in terms of CC Articles 22 and 23. This is due to the fact that the use of disproportionate force by law enforcement officers is generally considered to constitute a crime under Article 365 of the [Criminal Code of Ukraine](#) (abuse of power by a law enforcement officer). To substantiate a tort claim for damages, a victim would effectively assert that a crime was committed by law enforcement officers. It seems extremely unlikely that court would satisfy such a claim in the absence of a verdict in a criminal case against the responsible law enforcement officers.
21. Damage in this case is determined in accordance with the general rules.²¹

Environmental harm

22. In the case of environmental harm, the plaintiff must prove wrongfulness, damage and causation. In this type of case, a defendant can often be defined as an actor whose operations constitute 'a source of increased danger'.²² Where this is applicable, the defendant is subject to a special regime of strict liability, where they cannot avoid liability by proving that they are not at fault. The only way to avoid liability is to show that the harm is the result of irresistible force or the victim's own intentional actions.²³
23. Damage in this instance is defined in accordance with the general rules.
24. Plaintiffs in environmental cases may face difficulty proving wrongfulness and causation. The courts tend to find wrongfulness only where there are official reports by public bodies (such as the State Environmental Inspectorate) which monitor and document the emission of pollutants without permit, or violations of maximum allowable concentrations.²⁴ With regard to causation there are no exceptions to the general rule that causation must be proved by the plaintiff, and there can be no lowering of the standard of proof in this regard.

Harmful or unfair labour conditions

25. With regard to compensation for non-pecuniary damage (see [10]-[11] above) caused by the violation of an employee's rights, Article 36, paragraph 8, of the [Law 'On Compulsory State Social Insurance'](#) refers to the [CC](#) and [LC](#). This should mean that the damage is reimbursed according to the general provisions, and the regular formula of preconditions applies (wrongfulness, damage, causation and fault).
26. Yet, in one of its judgments,²⁵ the Ukrainian Supreme Court interpreted [LC](#) Article 237-1 in a quite unexpected way. The Court treated it as an extension of the social insurance mechanism rather than as a rule of tort law. The Court concluded that even if injury was caused by a breach of safety rules by the employee himself, the employer was nonetheless liable for non-pecuniary damage. It stated that a causal nexus (between the injury and the employer's wrongful conduct) was not necessary in this case. According to this decision, the only thing that matters is that the incident should have taken place in relation to the employee's job function.

²¹ [CC](#), art s 22, 23, 1166, 1167.

²² For the definition, see [CC](#), art 1187, para 1.

²³ [CC](#), art 1187, para 5.

²⁴ Case No [2012/4613/2012](#) (Judgment of the Civil Cassation Court, 25 February 2019); cf Case No [283/518/17-ts](#) (Judgment of the Civil Cassation Court, 18 November 2020).

²⁵ Case No [212/7705/16-ts](#) (Judgement of the Civil Cassation Court, 25 April 2018).

Q3

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

A person may be held liable for the wrongful act or omission of another person only in cases expressly provided for by law. The cases of vicarious liability are limited. With regard to accessory liability, CC Article 1190 states that persons whose joint actions or omissions caused damage shall be held liable *in solidum*.

Tort liability for joint actions

27. Tort liability for **aiding** and **abetting** is not known in Ukrainian law. Yet, [CC](#) contains a fairly broad rule in Article 1190 which addresses liability for damage caused by **joint actions**. According to this, persons who cause damage by joint actions or omissions shall be liable *in solidum*. At the request of the victim, the court may determine liability in proportion to the degree of tortfeasors' respective fault.
28. The scope of Article 1190 depends on what is meant by the 'joint actions'. If interpreted widely, 'joint actions' include any form of complicity in the infliction of harm, including indirect involvement (aiding and abetting) which may consist in providing various types of assistance to the direct perpetrator (such as financial, other material assistance or assistance in the form of advice, etc), or encouraging the direct perpetrator. With such a broad interpretation, [CC](#) Article 1190 could serve as a basis for imposing tort liability on those whose involvement in human rights violation is indirect.
29. On the other hand, a narrow interpretation of 'joint actions' is also conceivable. In this interpretation, 'joint actions' would mean that there is more than one 'principal offender' (in criminal law parlance) in the tort. Interpreted this way, [CC](#) Article 1190 would not allow a victim to make a claim against those whose involvement in human rights violations is indirect.
30. Currently, [CC](#) Article 1190 is applied to a rather limited range of cases – when damage is caused by a **crime committed in complicity**,²⁶ and in traffic cases when damage is caused to third parties as a result of the **collision of several vehicles**.²⁷ The High Specialized Court for Civil and Criminal Cases has only made a cursory attempt to define 'joint infliction' of damage, noting that the harm must be indivisible, and the actions of perpetrators must be interdependent and collective, or committed with common intent.²⁸ However, it cannot be ruled out that the courts, in response to new challenges, may have to reconsider their approach and adopt a broader interpretation of 'joint actions'.

26 Case No [0909/4190/12](#) (Judgement of the Civil Cassation Court, 26 September 2018); Case No [753/21343/14-ts](#) (Judgement of the Civil Cassation Court, 4 June 2021); Case No [740/967/16-ts](#) (Judgement of the Civil Cassation Court, 29 May 2019).

27 Resolution of the Plenary High Specialized Court of Ukraine for Civil and Criminal Cases, '[On Some Issues Concerning the Application of Legislation Regarding Compensation for Damage Caused by the Source of an Increased Danger](#)' (1 March 2013, No 4) [8]; Case No [242/5392/16-ts](#) (Judgement of the Civil Cassation Court, 5 December 2018); Case No [668/12293/15-ts](#) (Judgement of the Supreme Court, 2 March 2020).

28 Resolution of the Plenary High Specialized Court of Ukraine for Civil and Criminal Cases, '[On Some Issues Concerning the Application of Legislation Regarding Compensation for Damage Caused by the Source of an Increased Danger](#)' (1 March 2013, No 4) [8].

Vicarious liability

31. The rules on **vicarious liability** are defined exhaustively in [CC](#). According to [CC](#) Article 1172: (1) an employer is responsible for the damage caused by an employee;²⁹ (2) a commissioner of the work is responsible for the damage caused by a contractor;³⁰ and (3) an entrepreneurial company is responsible for the damage caused by its shareholder while conducting business activity on behalf of the company.³¹ It should be noted that clause (2) refers only to contractor agreements, and does not apply to contracts for the supply of goods. Thus, if the connecting 'link' in the supply chain is a contract for the supply of goods (rather than a contractor agreement), [CC](#) Article 1172 does not permit holding the buyer liable for the human rights violations committed by the seller.
32. Moreover, [CC](#) Article 1172 mentions only that the contractor 'acts on the commissioner's assignment'. However, the Supreme Court has concluded in some cases³² that for the Article 1172 to apply, the contractor has to act not only on the commissioner's assignment but also under the control of the latter. As a result, the commissioning company can potentially avoid liability if it can prove it did not have control over the contractor performing the work.

Q4

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

As a general rule, shareholders are not liable for the debts of the company.

33. The general principle envisaged in Ukrainian law is that 'a legal entity and the participants of such a legal entity are separate entities, and accordingly do not fulfil each other's obligations'.³³ This presumption, as a general rule, is in no way affected by the relationship of dependence of one company on another.
34. The doctrine of '**piercing the corporate veil**', which exists in common law jurisdictions and allows in appropriate circumstances making a shareholder liable for the acts of a company,³⁴ is not recognised in the Ukrainian legal doctrine and court practice. Courts mention it purely in the context of the possibility of a shareholder going to court to protect the interests of the company.³⁵
35. In the area of tax law, the Ukrainian legal system has an example of the **doctrine of 'due diligence'**. Relevant legislative provisions were introduced into the [Tax Code of Ukraine](#) only in 2020, but this doctrine gained its active application much earlier, and was formed by court practice. According to this doctrine, taxpayers need to take responsibility for the preparation of the evidence base that would confirm the exercise of due diligence in choosing a counterparty in financial transactions.

29 CC, art 1172, para 1.

30 *ibid* para 2.

31 *ibid* para 3.

32 Case No [904/5489/18](#) (Judgement of the Supreme Court, 16 April 2020).

33 Dissenting Opinion of Vasyl Krat in Case No [522/1423/16-ts](#) (Judgement of the Supreme Court, 27 November 2019).

34 See discussion in the following project reports: [28] Australia; [29] Bangladesh; [42] Canada; [74] Hong Kong; [36] Malaysia; [44] US; [87] Zambia.

35 Case No [916/1914/20](#) (Judgement of the Supreme Court, 30 June 2021).

36. According to the Supreme Court,³⁶ business activities are carried out by a business entity at its own risk. Therefore, in financial legal relationships, participants must exercise reasonable caution, and the negative consequences of choosing an unscrupulous counterparty would be borne by such participants. Accordingly, a company must be prepared to answer the court's questions about reasonable precautions taken in selecting a business entity to receive goods, namely whether there was verification of: registration and permits; the presence of business reputation; solvency of the counterparty; risk of non-fulfilment of obligations and guarantees of their fulfilment; physical, technical and technological capabilities to perform actions that constitute the content of the business transaction; the counterparty having the necessary resources, qualified personnel, fixed assets including premises (office and warehouse-own or leased); and the ability to carry out transactions with the appropriate quantity of a particular product in a timely manner.³⁷
37. The requirement that the taxpayer must further prove why it chose this particular counterparty is based on decisions of ECtHR, in particular the case of *Bulves AD v Bulgaria*, which states that the VAT payer should not bear liability for abuses committed by its supplier if it did not know about such abuses and could not have known about them.³⁸
38. Accordingly, there is a potential for further elaboration of the concept of human rights due diligence which would include the matter of the parent company's responsibility for the human rights impact of the subsidiary. For now, however, it is necessary to note that there are presently no indications of potential legal reforms in this area.

Q5

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

Assault or unlawful arrest and detention

39. Where procedural measures within a criminal investigation or administrative offence case have been found to be illegal (see [6] and [17] above), a person is entitled to compensation for both pecuniary and moral damage. The procedure for calculating damage is determined by the [Law on Illegal Acts](#). If property was confiscated, it has to be returned or its value has to be reimbursed.³⁹ A person fired from a job or position due to illegal conviction, or who is dismissed from office due to illegal prosecution, must be reinstated in their former position.⁴⁰ If a citizen has been deprived of military or other rank, as well as state awards, due to an illegal conviction, their rank must be restored and the awards returned to them.⁴¹
40. When damage is caused outside of a criminal investigation or administrative offence investigation (as outlined in [7] above), the appropriate remedy is compensation for pecuniary and moral damage on the basis of general Civil Code provisions.⁴²

36 Case No [826/15729/17](#) (Judgement of the Supreme Court, 4 December 2019).

37 Case No [560/2231/19](#) (Judgement of the Supreme Court, 2 November 2021).

38 *Bulves AD v Bulgaria* App No 3991/03 (ECtHR, 22 January 2009).

39 [Law on Illegal Acts](#), art 4.

40 *ibid*, art 6.

41 *ibid*, art 10.

42 [CC](#), arts 22, 23, 1166, 1167 and [CC](#), arts 1173, 1174 – whenever the damage is inflicted by public bodies or their officials.

Environmental harm

41. With regard to environmental harm, the list of available remedies is broader. CC defines a right to a safe environment as a personal non-pecuniary right.⁴³ In terms of [CC](#) Article 275, non-pecuniary rights may be vindicated by any remedy provided for in the general provisions of [CC](#).⁴⁴ Article 16 lists available remedies including inter alia compensation for pecuniary damage; compensation for non-pecuniary damage; termination of an action that violates the right; and restoration of the situation that existed before the violation. The latter remedy, however, is often understood as restoring the legal rather than the factual status quo.
42. If the environmental harm entails deterioration of the natural properties of the land, the available remedies are also governed by the [Land Code of Ukraine](#). Article 152, para 3, subpara (b), outlines available remedies which include restoring the qualities of the land that existed before the violation, as well as preventing the commission of actions that violate rights or preventing actions that create a danger of rights violation.
43. To safeguard property rights (which may be relevant in various contexts, including environmental harm), [CC](#) provides for the possibility of so-called preventive protection. It allows some measures to be taken even before a plaintiff's right has been actually infringed. It applies whenever the plaintiff has reasonable suspicions that a violation of their right/s is about to occur. In terms of [CC](#) Article 386, para 2, the owner who has reason to anticipate the possibility of violation of their property rights by another person may apply to the court asking to prohibit the commission of actions that may violate their right or asking to take certain other actions to prevent such a violation.
44. A broad rule that allows courts to order defendants to take active measures is provided for in [CC](#) Article 276 which deals with the protection of personal non-pecuniary rights. According to this article, the perpetrator of violations of personal non-pecuniary rights is obliged to take the necessary actions for their immediate restoration. If the proper actions have not been taken, the court may order the perpetrator to restore the violated right and to compensate for non-pecuniary damage caused by the violation. Under [CC](#) Article 279, if a person does not comply with an order by the court to take appropriate action to eliminate the violation of personal non-pecuniary rights, they may be fined in accordance with the [Civil Procedure Code of Ukraine](#) (CPC).⁴⁵

Harmful or unfair labour conditions

45. With regard to the violation of employees' rights, the proper remedy is compensation for non-pecuniary damage. Other payments are made through the social insurance mechanism as explained in [10] and [11] above.

⁴³ [CC](#), art 293.

⁴⁴ [CC](#), ch 3.

⁴⁵ [Law 'On Enforcement Proceedings'](#) (2 June 2016, No 1404-VIII), arts 63, 7.

Q6

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

Unfortunately, while the legislation of Ukraine enshrines a fairly complete catalogue of human rights and freedoms, in a number of cases, there is still a lack of effective civil law remedies to safeguard those rights.

Advantages

46. A claim for damages under civil law is a universal remedy. Its application is not limited to prescribed situations, and compensation for damage can thus potentially be sought in all cases involving human rights violations.

Disadvantages

47. A claim for damages saddles the plaintiff with a **burden of proof** that sometimes may be difficult to discharge. As outlined in [13] above, the claimant must prove three elements: wrongfulness, causation, and damage.
48. The limited range of vicarious liability case law and the underdeveloped doctrine of tort liability for joint actions are two other obstacles to the effective vindication of human rights violations through civil claim. As a result, actors who have indirect involvement in human rights abuses can often get away with it.
49. As a general rule, a civil claim cannot be brought against a parent company of a corporate group, even if it exercises control over a subsidiary whose activities have resulted in a human rights violation.
50. There is no mechanism for class action in procedural law, even though it may be required in the particular context of protecting environmental rights. However, there are some other routes available to protect collective interests. These include consolidating several lawsuits in one proceeding,⁴⁶ and allowing a lawsuit to be filed by a civil society organization (CSO) or other body authorised by law to represent the interests of the claimants.⁴⁷ These routes, however, do not allow plaintiffs to optimise costs and collection of evidence in the way that a class action mechanism might allow.

Q7

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

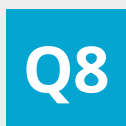
51. According to Article 76 of the Law 'On Private International Law', Ukrainian courts have jurisdiction over a case with a foreign defendant if the dispute concerns compensation for alleged damage which has been inflicted on the territory of Ukraine (paragraph 3) or if the plaintiff claiming compensation for damage is a

⁴⁶ CPC, art 50.

⁴⁷ [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#) (Aarhus, Denmark, 25 June 1998), art 9; CPC, arts 56, 57; CC, art 293, para 2; Law 'On Environmental Protection', art 21, subpara (zh); Case No [12-rp/2013](#) (Judgement of the Constitutional Court of Ukraine, 28 November 2013) [2.6].

natural person domiciled in Ukraine (paragraph 5). In jurisprudence, there is no high-profile example of these provisions being applied to cases of alleged human rights violations by transnational corporations or by foreign corporations. Most cases using these provisions concern traffic accidents,⁴⁸ including instances where trains have derailed due to the negligent maintenance of a wagon by its foreign owner.⁴⁹

52. Yet, under Ukrainian law the rules of Article 76 can be overturned by a bilateral or multilateral international treaty providing other principles on courts' jurisdiction.



Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

Legislation and case law

- [Legislation of Ukraine](#)
- [Register of Courts' Judgments](#)
- [Supreme Court's Jurisprudence Analysis](#)
- [Database of Supreme Court's Legal Positions](#)
- [Digest of Supreme Court's jurisprudence in environmental cases](#)

Useful links

- [Business and Human Rights in Ukraine](#)
- [Business and Human Rights National Baseline Assessment](#) (in Ukrainian)
- [Website of Ukrainian Helsinki Human Rights Union](#)

Academic literature

- Olena Uvarova and Katerina Buryakovska, [Handbook of Business and Human Rights](#). (Holembovska, 2019).
- Bohdan Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in Ekaterina Aristova and Uglješa Grušić (eds), [Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions](#) (Hart Publishing, 2022).
- Bohdan Karnaukh, '[Compensation of Damage Caused by Another Person \(Article 1172 of the Civil Code of Ukraine\)](#)' (2020) Entrepreneurship, Economy and Law 11, 29.
- Bohdan Karnaukh, '[Tort Liability of Public Authorities under the Civil Code of Ukraine](#)' (2021) Entrepreneurship, Economy and Law 3, 19.

⁴⁸ See Case No [916/3878/19](#) (Judgment of the Economic Court of Odesa Region, 2 July 2020) and Case No [159/2893/15-ts](#) (Judgment of Kovel'skyi Interdistrict Court of Volyn Region, 15 November 2018).

⁴⁹ See Case No [922/4834/15](#) (Judgment of the Economic Court of Kharkiv Region, 17 December 2015) and Case No [914/2612/16](#) (Judgment of the Economic Court of Lviv Region, 2 February 2017).

CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

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Claims against police: unlawful procedural measures

53. Among the special provisions envisaging compensation for damage inflicted by public bodies contained in [CC](#) (Articles 1173-1176), Article 1176 applies to Case Scenario 1 as it concerns compensation for damage caused by unlawful decisions, actions or omissions within criminal proceedings, proceedings in administrative offence cases or civil proceedings. The provisions of [CC](#) Article 1176 are further developed and detailed in the [Law on Illegal Acts](#).⁵⁰
54. The [Law on Illegal Acts](#) provides an exhaustive list of unlawful actions that may serve as grounds for civil liability of public bodies. It encompasses:
- unlawful conviction; unlawful notification of suspicion of a crime; unlawful remand and detention in custody; unlawful search [and] seizure in the course of criminal proceedings; unlawful attachment of property; unlawful suspension from work and other procedural actions restricting the citizen's rights;
 - unlawful administrative arrest or correctional labour; unlawful confiscation of property; [an] unlawful fine; and
 - the unlawful conducting of operational investigation measures.
55. The [Law on Illegal Acts](#) also squarely sets out the conditions under which the above-mentioned actions should be deemed unlawful (see [17] above).
56. Thus, the [Law on Illegal Acts](#) is applicable if, firstly, certain procedural measures within criminal proceedings or within proceedings in an administrative offence case have been taken against the victim and, secondly, if these measures were found to be unlawful in the course of relevant proceedings.
57. This means that only the protesters who have been officially prosecuted (charged, arrested, taken into custody, etc) will be able to turn to the [Law on Illegal Acts](#), and then only if the relevant procedural measures were declared unlawful in one of the documents listed in Article 2 of the [Law on Illegal Acts](#).

⁵⁰ The law is supplemented by the Statute on the Application of Law 'On the Procedure for Compensation of Damage Caused to a Citizen by Unlawful Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts' (4 March 1996, No 6/5/3/41).

58. Liability under [CC](#) Article 1176 and the [Law on Illegal Acts](#) does not depend on fault of the particular public officials or law enforcement officers.⁵¹ But in cases falling within the scope of the [Law on Illegal Acts](#), finding a person not guilty or terminating the proceedings on 'exonerative'⁵² grounds ipso facto entails an irrefutable conclusion that all the procedural measures applied in the course of the respective proceedings were unlawful.
59. Pursuant to Article 3 of the [Law on Illegal Acts](#), a citizen shall be entitled to recover or be compensated for:
- i. the salary and other income which he or she has lost as a consequence of the unlawful actions;
 - ii. the property ... which has been confiscated by the court or seized by the bodies of inquiry or the pre-trial investigation authorities, or which has been attached;
 - iii. the fines paid as part of the execution of a sentence; [or] the court fees and other expenses paid by the citizen;
 - iv. the sums paid by the citizen for legal assistance;
 - v. non-pecuniary damage.
60. The [Law on Illegal Acts](#) regulates in detail the procedure for calculating each of the above. In particular, the amount of compensation for non-pecuniary damage must be no less than one minimum wage⁵³ for each month of being under investigation or trial.

Claims against police: arbitrary violence

61. The [Law on Illegal Acts](#), however, does not apply to protesters who have suffered harm if the brutal force was used in circumstances that were not part of the execution of official procedures. This would apply, for example, in beatings, the use of tear gas, torture, inhuman or degrading treatment. [CC](#) Article 1176, para 6, provides that such damage is 'compensated on general grounds'. 'General grounds' in this context refers to the general provisions on civil liability of public bodies and their officials ([CC](#) Articles 1173 and 1174).
62. Under [CC](#) Article 1174, damage caused to a natural or legal person by unlawful decisions, actions or omissions of public officials shall be reimbursed by the State or local government regardless of the public official's fault.
63. There is no presumption that would ease the burden of proof for the victim where the use of excessive force has taken place outside the scope of procedural measures. And since the use of excessive force by law enforcement officers usually constitutes a criminal offence,⁵⁴ the injured protesters can get compensation (from law enforcement officers) only if the perpetrators are prosecuted and found guilty.⁵⁵

⁵¹ See [CC](#), art 1176, the [Law on Illegal Acts](#), art 1, para 2.

⁵² 'Exonerative' grounds are those enlisted in the [Law on Illegal Acts](#), art 2, para 1, subpara 2.

⁵³ From 1 January 2022, minimum wage amounts to UAH 6,500 (approximately USD 220).

⁵⁴ It may be an abuse of powers by law enforcement officers ([Criminal Code of Ukraine](#), art 365), obstruction of the lawful activities of trade unions, political parties and CSOs ([Criminal Code of Ukraine](#), art 170), or wrongful obstruction of an organisation or of the holding of meetings, rallies, marches and demonstrations ([Criminal Code of Ukraine](#), art 340).

⁵⁵ This is due to the fact that standards of proof for criminal and civil cases are not distinguished in Ukrainian law. See generally Bohdan Karnaukh, 'Standards of Proof: A Comparative Overview from the Ukrainian Perspective' 2021 2(10) Access to Justice in Eastern Europe 25.

Claims against Security Co

64. If interpreted broadly, (see [28] above), [CC](#) Article 1190 could serve as a basis to hold Security Co liable for aiding law enforcement agencies in their actions which inflicted damage. But to date there have been no instances of such a broad understanding of Article 1190 in jurisprudence.
65. Narrow application of Article 1190 (see [28] above) should be seen as a gap in tort law doctrine, since the wording of the article itself allows for fairly wide judicial discretion. One way of conceivably bridging the gap could be to draw parallels between [CC](#) Article 1190 and the concept of complicity in criminal law. Having proved that joint infliction of harm in the context of [CC](#) Article 1190 is a civil law equivalent of criminal complicity (Articles 27, 28 of the [Criminal Code of Ukraine](#)), one could possibly substantiate holding Security Co liable for indirect involvement in the damage caused by human rights violations. However, at present there are no such cases which have used this approach.



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

66. Filing a civil claim allows victims to obtain compensation for damage suffered. Other measures can be pursued as well, but they will have a different legal effect (eg finding perpetrators guilty of a criminal offence and punishing them. See [63] above). In this regard it should be noted that Article 128 of the Criminal Procedure Code allows the filing of a civil claim within criminal proceedings.
67. An alternative route for obtaining compensation was provided for those who suffered in mass protests known as '[Euromaidan](#)' (see [68] below). In this case, the government established a special mechanism for recognising the victims' status and fixing amounts of compensations payable without the need to go to court.⁵⁶

⁵⁶ See the Law '[On Establishing Government Aid to Injured Participants of Mass Civil Protests and Their Family Members](#)' (21 February 2014, No 745-VII) and the Resolution of the Cabinet of Ministers of Ukraine '[Some Issues Concerning Social Security of Injured Participants of the Revolution of Dignity](#)' (28 February 2018, No 119).



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

68. In Ukraine, circumstances similar to Case Scenario 1 occurred in events that unfolded between 21 November 2013 and 21 February 2014.⁵⁷

SPOTLIGHT: EUROMAIDAN



Following the decision of the Cabinet of Ministers of Ukraine to suspend preparations for signing the Association Agreement with the European Union, a number of protests were staged throughout Ukraine. The largest of these took place in Kyiv. These mass protests became known as ‘Euromaidan’ and/or ‘Maidan’. They marked the beginning of the [Revolution of Dignity](#). Authorities tried to disperse protesters by force, using truncheons, teargas, flashbang grenades, water cannons, rubber bullets, and eventually firearms. More than a hundred protesters were killed and more than a thousand were injured. The protesters were detained, arrested, taken into custody, many were accused of criminal offences (mass disorder) and many were prosecuted. However, over time the accused protesters were acquitted, and investigations were commenced against law enforcement officers involved in illegal actions. The acquitted protesters thus obtained the right to claim compensation. The courts upheld their claims⁵⁸ on the grounds of [CC](#) Article 1176 and [Law on Illegal Acts](#). Thirty-nine participants in those events also filed applications to the ECtHR⁵⁹ alleging violations of [ECHR](#) Articles 2; 3; 5 sections 1, 3; 8 and 11. However, the ECtHR concluded that applicants who received compensation in national courts had lost their status as victims.⁶⁰ Their applications were found inadmissible on that ground.



⁵⁷ For the overview of the events, see [Shmorgunov v Ukraine](#) App nos 15367/14 and 13 others (ECtHR, 21 January 2021).

⁵⁸ See Case No [200/10801/14-ts](#) (Judgment of the Babushkinskyi District Court of Dnipropetrovsk, 24 December 2014); Case No [200/10799/14-ts](#) (Judgment of the Babushkinskyi District Court of Dnipropetrovsk, 24 December 2014); Case No [753/24154/15-ts](#) (Judgment of the Darnytskyi District Court of Kyiv, 6 September 2018); Case No [756/2925/17](#) (Judgment of the Obolonskyi District Court of Kyiv, 29 March 2018); Case No [592/5801/14-ts](#) (Judgment of the Kovpakivskyi District Court of Sumy, 3 December 2014); Case No [756/2925/17](#) (Judgment of the Supreme Court, 18 April 2019).

⁵⁹ See [Shmorgunov](#) (n 57); [Lutsenko and Verbytskyi v Ukraine](#) App Nos 12482/14 and 39800/14 (ECtHR, 21 January 2021); [Kadura and Smaliy v Ukraine](#) App Nos 42753/14 and 43860/14 (ECtHR, 21 January 2021); [Dubovtsev v Ukraine](#) App Nos 21429/14 and 9 others (ECtHR, 21 January 2021); [Vorontsov v Ukraine](#) App Nos 58925/14 and 4 others (ECtHR, 21 January 2021).

⁶⁰ [Dubovtsev](#) (n 59).

CaseScenario 2

Q1

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

Claims against Subsidiary Co

69. As mentioned in [8] above, the Constitution guarantees everyone the right to a safe and healthy environment, and to compensation for damage caused by the violation of this right. The [Constitution](#) also demands that the use of property should not harm the rights, freedoms and dignity of citizens, the interests of society, or worsen the environmental situation and natural qualities of the land.⁶¹
70. Potentially a claim could be brought against Subsidiary Co under [CC](#) Articles 270 and 282. These guarantee an individual the right to demand the elimination of a danger created as a result of business or other activities that threaten life and health. In accordance with [CC](#) Article 293, an individual has the right to an environment that is safe for life and health; the right to accurate information about the environment, the quality of food and household items; as well as the right to collect and distribute this information.
71. In accordance with the [Law 'On Environmental Protection'](#) Article 9,⁶² every citizen of Ukraine has the right to a safe and healthy environment. [Article 69](#) stipulates that damage caused as a result of the violation of environmental legislation is subject to compensation, usually in full without the application of penalties and regardless of the fee for environmental pollution and deterioration of natural resources. In addition, persons who have suffered such damage are entitled to compensation for income lost for the time necessary to restore health, to restore environmental quality, and to restore natural resources to a condition suitable for their intended use.
72. However, there are several key barriers to access to civil remedies for claimants in Case Scenario 2.

⁶¹ Art 41, para 7.

⁶² [Law 'On Environmental Protection'](#) (26 June 1991, No 1268-XII).

Appropriate plaintiff

73. The local community, ie the residents of the relevant territory, cannot be the plaintiff in the case. Potentially, there are several options for deciding who may initiate a civil lawsuit in the interests of the local community:

- i. **Local governments (municipal bodies).** Local governments act on behalf of and in the interests of local communities. The executive bodies of local councils have the power to make appeals to the courts to declare illegal the acts of executive authorities, other local governments, enterprises, institutions and organisations restricting the rights of territorial communities.⁶³ However, the courts assume that a more specific law, the [Law 'On Environmental Protection'](#) applies. This stipulates that local councils are responsible for the state of the environment in their territory and, within their competence, must monitor compliance with legislation on environmental protection. The courts are following the position that 'the law in these legal relations connects the activities of local councils as a subject of power, and not a representative body of the local community'.⁶⁴
- ii. **Civil society (environmental) organisations.** The [Law 'On Environmental Protection'](#)⁶⁵ explicitly establishes the authority of civil society organisations (CSOs) that operate in the field of environmental protection to file lawsuits for damages caused as a result of violations of environmental legislation, including damage to health of people and damage to property of organisations. But, in practice, this opportunity is also associated with several insufficiently defined procedural points:
 - a. [Courts](#) often assume that a CSO can file a lawsuit in the interests of its members, but not in the interests of all affected residents of the community;
 - b. It is unclear in which order of proceedings – civil or commercial⁶⁶ (in Ukraine there are separate civil, commercial and administrative courts) – the case should be considered by the court.
- iii. **A resident of the community in an individual capacity.** The [Law 'On Environmental Protection'](#)⁶⁷ stipulates that every citizen of Ukraine has the right to file lawsuits against state bodies, enterprises, institutions, organisations and citizens for compensation for damage caused to their health and property as a result of the negative impact of actions on the environment. Examples of such individual lawsuits in situations where the local community is negatively affected may be found in the court practice of Ukraine.⁶⁸

Key elements of liability

74. The **biggest barrier to access to justice** in cases related to environmental damage caused to the local community by companies is the requirement that plaintiffs should prove wrongfulness, damage and causation. The situation is greatly complicated by the fact that state regulatory authorities issue companies with documents that record their compliance with the established norms, and

63 [Law 'On Local Self-government in Ukraine'](#) (21 May 1997, No 280/97-BP).

64 [Law 'On Environmental Protection'](#), art 15.

65 Art 21, para 1, subpara g.

66 Case No [367/4695/20](#) (Judgment of the Grand Chamber of the Supreme Court, 23 March 2021).

67 [Law 'On Environmental Protection'](#), art 9, para 9.

68 Unified State Register of Court Decisions, ['Register of Courts' Judgments'](#) (Doc No 76654523).

the courts perceive such documents as indisputable proof of the absence of a violation by the company. At the same time, it is recorded in many sources, that the relevant spheres of state control are 'extremely corrupt'.⁶⁹ This creates a situation where companies rely on formally valid documents since there is a presumption of their legality.

75. Ukraine's failure to fulfil its commitment to protect human rights from negative impacts on the environment has been recognised, including at the level of the ECtHR.⁷⁰
76. In past court cases, the failure by public bodies to fulfil their obligation to identify and record the negative impact of the actions of companies on the environment has meant that the plaintiff has had to bear the additional burden of finding a body of alternative evidence of such negative impact (plaintiffs conduct surveys among residents about companies' impacts, measure air/soil/water quality, order expert conclusions etc). However, even with such alternative evidence available, courts often prefer official documents provided by the state authorities.⁷¹
77. The second element which causes significant problems in practice, is the requirement to prove the causal link between the harm to the plaintiff and the company's activities. In one case the plaintiff referred to the fact that the company had located its plant in the immediate vicinity of his house, had not complied with the instructions arising from a sanitary-epidemiological inspection and had stored mineral fertilisers in violation of the established requirements. The plaintiff referred to the fact that he was recognised as a person with disabilities. However, the Court pointed out the lack of proof of a causal link between the company's actions and negative consequences for the plaintiff's health.⁷²
78. In another case, the plaintiff appealed to the Court and asked it to oblige a company to house its grain terminal in a stone building, install noise and dust collectors, reconstruct the conveyor, carry out protective work on her house, and pay UAH 100 000 (approximately USD 3,387) in moral damage because for several years she had endured moral suffering as she could not sleep, breathe and rest normally, and had also fallen ill with cancer. The claims were motivated by the fact that the grain terminal was built in the immediate vicinity of the house where the plaintiff lives. The terminal created vibration, noise and dust which exceeded the permissible sanitary and environmental standards and interfered with the residents of the building, including the plaintiff. The Court's reason for refusing to satisfy the claim was given as the lack of proof of a causal link between the actions of the defendant company and the impact on the health of the plaintiff. Moreover, according to the Court, 'the plaintiff's arguments, including those concerning the location of the grain terminal within the sanitary protection zone, at a distance of 60 metres instead of 100 metres from the residential area, do not refute these conclusions'.⁷³
79. In some cases, courts also conclude that 'the plaintiffs have not proved that the intensity and duration of the harmful effects of activities are so significant that they directly affect their lives or health, and outweigh the environmental risks inherent in life in every modern city'.⁷⁴

69 Centre for Social Expertise, ['Corruption in Housing, Public Health and Sanitary and Epidemiological Services in Ukraine Commissioned by the World Bank'](#).

70 *Hrymkovska v Ukraine* App no 38182/03 (ECtHR, 21 July 2011); *Dubetska v Ukraine* App no 30499/03 (ECtHR, 10 February 2011).

71 Case No [372/2085/16-ts](#) (Judgment of the Civil Cassation Court, 12 October 2020).

72 Unified State Register of Court Decisions, ['Register of Courts' Judgments'](#) (Doc No 34677395).

73 *ibid* (Doc No 14571238).

74 *ibid* (Doc No 80017085).

Claims against Parent Co

80. The legislation of Ukraine is based on the general rule that 'a legal entity and the participants of such a legal entity are separate entities, and accordingly do not fulfil each other's obligations'.⁷⁵



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

81. Filing a civil claim allows victims to obtain compensation for damage suffered. Other measures can be pursued as well, but they will have a different legal effect (eg an administrative fine). One avenue would be to file a complaint with authorised state bodies or to send such a complaint to the Parliamentary Commissioner for Human Rights.
82. Current Ukrainian legislation entrusts the monitoring of companies' observance of environmental protection legislation to certain authorised state bodies (primarily, the State Ecological Inspectorate).⁷⁶ Among the measures applied to companies that violate the law and cause damage to the environment is provision for compensation to the State for such damage. The amount of damage is determined in accordance with a formalised environmental damage compensation [Methodology](#).⁷⁷
83. Accordingly, such claims take place exclusively in a procedure intended for public (non-private) benefit and are not intended to compensate for damage caused to the local community or to individuals.



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

84. The procedure for assessing environmental damage claims was the subject of consideration by the Grand Chamber of the Supreme Court in 2021.⁷⁸ Although the Grand Chamber stated in its decision that 'a CSO may protect in court the individual non-property and property rights of both its members and the rights and legally protected interests of others who have applied to it for such protection',⁷⁹ in a situation such as Case Scenario 2, and in all similar cases, CSOs represent the interests of only their members.⁸⁰

⁷⁵ See [33]-[38] above.

⁷⁶ State Ecological Inspectorate of Ukraine, 'Our Mission and Functions', www.dei.gov.ua/posts/1955.

⁷⁷ Order on the [Methodology for determining the amount of damage caused by pollution and littering of land resources due to violations of environmental legislation in the order of the Ministry of Environment](#) (4 April 2007, No 149).

⁷⁸ The circumstances of this case were as follows: The plaintiff, a CSO, appealed to the Commercial Court for damages caused by the fact that 'for a long time the respondent companies have been engaged in economic activities for the extraction of iron ore, explosives, cast iron, steel, ferroalloys, coke and coke products in violation of environmental norms, rules, regulations, resulting in material damage and moral damage to villagers ... deposition of dust and gas emissions from dumps, tailings and sinter plants. Due to the man-caused impact on the quality of drinking water, air and soils, the residents of Novoselivka have a number of related chronic diseases, their homes are subject to destructive processes due to landslides and floods, flooding and leaching by return waters generated by nearby mining-defendants'. At the same time, the CSO indicated that it was acting in the interests of those community members who were members of this organisation, and the amount of compensation it required would be distributed proportionally among the members of the organisation (48 villagers in total). Case No [904/6125/20](#) (Judgment of the Grand Chamber of the Supreme Court, 15 June 2021). See [7.13] of the decision.

⁷⁹ *ibid* [7.5], [7.10].

⁸⁰ Case No [904/6125/20](#) (Judgment of the Grand Chamber of the Supreme Court, 15 June 2021).

85. In order to substantiate the competence of a CSO to apply on behalf of its members to the court in cases of violation of their rights due to the negative impact of companies on the environment, the court would refer to the practice of the ECtHR.⁸¹
86. In the case referred to above in [84]-[85], one year had passed between commencement of the initial claim by the CSO in the court of the first instance and the decision of the Grand Chamber of the Supreme Court (ie the case had passed through all courts, up to the highest court). During this time, only the procedural question of the need to consider the case under civil procedure had been solved. This is a good illustration of the procedural barriers in this category of cases.
87. In another high-profile case, a CSO was set up specifically to represent the interests of residents of an area affected by damage to the environment by certain companies. The organisation included 2,225 people who were named in a lawsuit seeking non-pecuniary damage. The case ended with the conclusion of an amicable agreement.⁸²
88. The issue of the causal link between a company's actions and a negative impact on people living in the immediate vicinity of the company's production facilities was also the subject of a Supreme Court opinion.⁸³ The relevant legal position of the Supreme Court is included in the Digest of Judicial Practice of the Supreme Court in disputes arising in the field of environmental protection and environmental rights⁸⁴:
- '... the evidence available in the case does not indicate that the plaintiff's health was harmed by the defendants' activities and that there was a causal link between her illnesses and the defendants' possible emissions of harmful substances into the atmosphere. ... The only basis for civil liability for damages is an offence, which includes as constituent elements: damage, wrongful act of the person who caused it, the causal link between them, as well as the guilt of the perpetrator'.⁸⁵*
89. As a result, in court practice in Ukraine, there are only isolated cases in which plaintiffs succeed in disputes with companies about their negative impact on the environment, whereas there are numerous examples of court refusals to satisfy claims due to unproven key elements of liability.
90. There is a much better chance of obtaining compensation for damage caused by a company's impact on the environment in situations where an employee of the company is prosecuted for a specific act that led to harm (for example, if a court judgement establishes the use by an employee of the company of banned chemicals or their use in gross violation of the established limits).⁸⁶ However, this approach significantly limits the victims' access to remedies. It also does not provide for the concern that environmental cases are often associated with long-term company operations undertaken without standards of responsible behaviour, rather than a single gross violation by a particular employee, in the actions of which is a *corpus delicti*.

⁸¹ *ibid.*

⁸² Case No [754/8602/18](#) (Judgement of the Civil Cassation Court 4 November 2020).

⁸³ Case No [178/69/17](#) (Judgement of the Civil Cassation Court, 8 April 2019).

⁸⁴ [Digest of the Jurisprudence of the Supreme Court in Disputes Arising in the Field of Environmental Protection and Environmental Rights](#) (Kyiv, 2019).

⁸⁵ Case No [2012/4613/2012](#) (Judgement of the Civil Cassation Court, 25 February 2019).

⁸⁶ Case No [709/588/16-ts](#) (Judgment of the Civil Cassation Court, 27 November 2019).

CaseScenario3

Q1

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

≡

CS

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Claims against Factory Co

91. Pecuniary damage is reimbursed by the state since all employees are subject to state insurance. This conclusion is confirmed by judicial practice, including high-profile lawsuits.
92. Insurance against accidents at work and occupational diseases that cause disability form part of compulsory state social insurance. An insured event is an accident at work or an occupational disease that caused the insured person physical or mental injury in the circumstances specified in Article 14 of the Law on Compulsory State Social Insurance. Meeting these specifications gives rise to the insured person's right to receive material support and/or social services. An accident investigation or an investigation into an occupational disease (such as poisoning) serves as the basis for payment to the victim of costs for medical care; professional, social and medical rehabilitation; as well as insurance.
93. Accordingly, the courts conclude that the obligation to compensate the employee for damage caused to the employee is fully imposed on the Social Insurance Fund.⁸⁷
94. However, this does not exclude the possibility of going to court with a claim for compensation for moral damage against the company. The courts do recognise the validity of such claims. In such cases, courts state that 'the following circumstances are subject to obligatory clarification on compensation for moral (non-pecuniary) damage: the presence of damage, illegality of the act of its perpetrator, the presence of a causal link between the damage and the act of the perpetrator and the fault of the latter'. In the presence of a recorded fact of an accident, this requirement is usually not a problem.

Claims against Brand Co

95. The CC⁸⁸ stipulates that 'the charterer indemnifies the damage caused to another person by the contractor, if he acted on behalf of the charterer'. When it comes to a company that manufactures clothing to the order of the brand, this provision is applicable.⁸⁹

⁸⁷ Case No [180/500/13-a](#) (Judgement of the Supreme Court, 22 May 2018); and Case No [127/20705/16-ts](#) (Judgement of the Civil Cassation Court, 24 May 2021).

⁸⁸ CC, art 1172, para 2.

⁸⁹ See also the decision in Case No 382/1331/16-ts (proceedings No 61-28945sv18) (Judgment of the Supreme Court, 24 October 2019).

96. An additional argument could be used. Good faith is one of the fundamental principles of civil law.⁹⁰ The principle of good faith implies the need for honest and fair conduct by subjects in the performance of their legal duties, and in the exercise of their subjective rights.
97. The actions of participants in civil and corporate relations must meet a certain standard of conduct, characterised by honesty, openness, and respect for the interests of the other party to the contract or the relevant legal relationship.



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

98. As mentioned previously (see [84]-[85] above), the obligation to compensate the employee for damage is fully imposed on the Social Insurance Fund (see also [9]-[10] above).



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

99. To support the argument on good faith (see [96]-[97]), one may rely on the ruling of the Supreme Court of 10 April 2019 in Case No [390/34/17](#) stating that in Ukrainian law the doctrine of *venire contra factum proprium* (prohibition of contradictory conduct) is manifested, in particular, in the qualification of certain behavioural acts (so-called implicit actions) by a person, and is based on the Roman maxim '*non concedit venire contra factum proprium*' (no one can act contrary to their previous behaviour), which is based on the principle of good faith.
100. Behaviour is contrary to good faith and fair business practice if it does not comply with the party's prior statements or conduct, provided that the other party to the relationship has reasonably relied on those statements or prior conduct.⁹¹



⁹⁰ CC, art 3, para 6.

⁹¹ A similar legal position is expressed in many other judgments. See, for instance: Case No [461/9578/15-ts](#) (Judgment of the Grand Chamber of the Supreme Court, 25 May 2021); Case No [910/4569/21](#) (Judgment of the Supreme Court, 17 February 2022); Case No [918/302/21](#) (Judgment of the Supreme Court, 18 January 2022).



A HANDBOOK FOR PRACTITIONERS | UNITED STATES OF AMERICA

Civil Liability for Human Rights Violations



 **OAK**
FOUNDATION

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FREQUENTLY USED ABBREVIATIONS

ATS	Alien Tort Statute
FLSA	Fair Labor Standards Act
FTCA	Federal Tort Claims Act
IIED	Intentional Infliction of Emotional Distress
Section 1983	42 U.S. Code § 1983
TVPA	Torture Victim Protection Act
TVPPRA	Trafficking Victims Protection Reauthorization Act

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UNITED STATES OF AMERICA



The US legal system provides statutory and common law remedial schemes at the national, state, and local levels. Section 1983 is the primary vehicle for the vindication of constitutional rights in both federal and state courts. Civil liability can be also achieved through claims under the Alien Tort Statute (ATS), the Torture Victim Protection Act and conventional tort litigation. The ATS has been for some time the most prominent vehicle for bringing human rights lawsuits against state and non-state actors before US courts, but the trend of limiting the scope of the ATS by the US Supreme Court has led to dismissal of many cases brought against non-citizens for conduct occurring outside the US. Human rights protections in US law are not ordinarily based on international law. The US has been hesitant to accept international human rights obligations or ratify the major human rights treaties.

INDICES

26/167

Democracy Index
2021 Ranking

83/100

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27/180

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



Introduction

1. The US legal system provides remedies for human rights violations at the national (federal), state and local level. This complex web of overlapping sources of rights protection requires human rights practitioners to refer to multiple sources for effective representation.
2. Human rights protections in US law are not ordinarily based on international law.¹ The United States has repeatedly failed to ratify vital [human rights treaties](#) or has attached reservations [limiting the domestic impact](#) of the treaties, and judicial doctrine has limited the application of customary international law as domestic law.² As a result, human rights litigation in the United States almost exclusively arises from domestic sources of law.
3. The Constitution of the United States³ recognises many human rights, including the rights of personal freedom and freedom of speech, for example. State constitutions also provide their own guarantees of human rights and, depending on the state, might provide a more robust recognition of human rights than that of the Constitution of the United States.⁴ In some circumstances, international law has had an indirect impact on domestic law, and US domestic law is consistent with international human rights protections. However, there are some notable exceptions.
4. The US Constitution, generally speaking, is not a self-executing basis for civil claims. The US Supreme Court held that there could be damages claims against federal officials based directly on violations of the Constitution in *Bivens*,⁵ but in the last 40 years has repeatedly narrowed the circumstances in which federal courts will recognise such claims. Congress has provided statutory tort remedies based on the actions of federal officials in the [Federal Tort Claims Act](#) (FTCA)⁶ subject to many limitations and exceptions. However, Congress has provided for civil remedies for constitutional violations and some statutory violations committed by state and local actors in 42 U.S. Code § 1983 ([Section 1983](#)).⁷

1 Roxanna Altholz, 'Chronicle of a Death Foretold: The Future of US Human Rights Litigation Post- Kiobel' (2014) 102(6) *California Law Review* 1495, 1514.

2 Human Rights Watch, '[United States Ratification of International Human Rights Treaties](#)', (2009); United Nations Human Rights Office of the High Commissioner, '[Status Of Ratification](#)'.

3 [Constitution of the United States](#).

4 See Loretta H Rush and Marie Forney Miller, 'A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties' (2018) 82(4) *Albany Law Review* 1353, 1380.

5 *Bivens v Six Unknown Named Agents*, 403 US 388 (1971) (Supreme Court) (SC).

6 [28 U.S. Code §§ 2671–80](#); See generally Kevin M Lewis, '[Federal Tort Claims Act \(FTCA\): A Legal Overview](#)' (Congressional Research Service, 20 November 2019).

7 Civil Action for Deprivation of Rights, [42 U.S. Code § 1983](#).

[Section 1983](#) is the primary vehicle for the vindication of constitutional rights in both federal and state courts. There are many other statutory and common law remedial schemes at the national, state, and local levels. These remedial schemes vary greatly from state to state and are too varied to cover in an introduction like this. Some remedial schemes do implement international human rights more directly. These include the Alien Tort Statute (ATS),⁸ the Torture Victim Protection Act (TVPA),⁹ and the Trafficking Victims Protection Reauthorization Act (TVPRA)¹⁰ as well as state statutes such as the New York State Human Rights Law.¹¹

5. Practitioners must approach human rights litigation in the United States mindful of the different tools, causes of actions, and remedies found in state and federal constitutions, common law, and statutes.

8 Alien Tort Statute, [28 U.S. Code § 1350](#).

9 [Torture Victim Protection Act of 1991](#), Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (codified at 28 U.S. Code § 1350).

10 [Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. No. 110-457, 122 Stat. 5044 (codified at 18 U.S. Code §§ 1581-1596).

11 [New York City Human Rights Law](#), NYC Admin Code §§ 8-301, 8-401-04, 8-502 (2017).



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

Assault or unlawful arrest and detention of persons

6. There are civil remedies against public bodies, corporations, and individuals at every level of the US legal system for these violations. These remedies are subject to some exceptions and limitations depending on the basis for the legal claim. If committed 'under the colour of law',¹² such actions would violate the US and most state constitutions. Many states provide remedies in their statutory or common law for such actions. If corporations or individuals act in concert with state officials in such matters, they may also violate constitutional provisions. If not, these violations can almost always be remedied based on state or local statutory or common law.

Section 1983

7. Section 1983 provides a statutory [cause of action](#)¹³ against state or local actors who violate federal constitutional or statutory rights while acting [under the colour of law](#).¹⁴ Among the rights enforceable under Section 1983 is the right against unreasonable search and seizure under the Fourth Amendment of the US Constitution. This provides the basis for victims of [assault or unlawful arrest and detention](#) to pursue a claim against police and their agents under Section 1983.¹⁵ It should be noted that Section 1983 claims are subject to defences, immunities and other limitations which may restrict the circumstances in which remedies are available. In particular, the US Supreme Court has expanded the doctrine of qualified immunity to restrict the availability of Section 1983 remedies unless a defendant has violated 'clearly established' law.¹⁶ It should also be noted that, generally, [state governments cannot be sued](#) under Section 1983 or sued in federal court because of the Eleventh Amendment.¹⁷ However, municipalities, local government entities like cities and counties, may be sued under Section 1983.¹⁸

¹² 'Under the colour of law' is a legal term of art traditionally understood to mean that the wrongdoer 'exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'. *West v Atkins*, 487 U.S. 42, 48 (1988) (SC).

¹³ Martin A Schwartz, '[Section 1983 Litigation](#)' (2014) Federal Judicial Center.

¹⁴ See generally Michael Avery, David Rudovsky and Karen M Blum, *Police Misconduct: Law and Litigation* (3rd edn, Thomson/West 2003).

¹⁵ *Manuel v City of Joliet, Ill.*, 137 S.Ct. 911 (2017) (SC); *Savino v City of New York*, 331 F.3d 63 (2d Cir. 2003) (US Court of Appeals, Second Circuit).

¹⁶ See generally *Ashcroft v al-Kidd*, 563 US 731 (2011) (SC); Joanna C Schwartz, 'How Qualified Immunity Fails' (2017) 127(1) Yale Law Journal 1.

¹⁷ *Pennhurst State School and Hospital v Halderman*, 465 U.S. 89, 100-01 (1984) (SC); *Employees v Missouri Public Health & Welfare Department*, 411 U.S. 279, 280 (1973) (SC).

¹⁸ *Monell v New York City Dept of Social Services*, 436 U.S. 658, 690 (1978) (SC).

SPOTLIGHT: SECTION 1983

Perhaps the most important civil rights statute in the United States is Section 1983. Passed in 1871 as a part of the '[Ku Klux Klan Act](#)', the statute was intended to protect recently freed slaves in the South from violence, intimidations, and deprivations by white-led state governments. In theory, Section 1983 would provide a federal remedy to override unconstitutional state laws and insert a layer of federal government protections between Jim Crow-era southern governments and African Americans. Following the retreat of Reconstruction, however, Section 1983 and its promise as a shield and sword against the violent and oppressive excesses of white southern governments went unfulfilled.

Only in 1961 did Section 1983 begin to emerge as a tool to check the abuses of state officials in [Monroe v Pape](#). *Monroe* opened the door to federal court houses in states where unconstitutional conduct often went unremedied. Importantly, *Monroe* established that a federal remedy was available under Section 1983 even if a remedy was theoretically available under state law. Further, *Monroe* established that even state officials acting illegally were acting 'under the color of law' under Section 1983. Finally, *Monroe* provided guidance to future courts by recognising that Section 1983 operated within 'the background of tort liability', thus allowing tort principles, such as secondary liability and causation, to be imported directly into Section 1983 litigation. With the door open, Section 1983 litigation has expanded to permit liability against not just state agents, but also [municipalities and local government entities](#).

This steady expansion following *Monroe*, however, has been met with some hostility from the US judiciary, particularly the Supreme Court. In response to an increase in Section 1983 and other civil rights claims against state actors, the Supreme Court has limited the remedy dramatically through judicially-created doctrines such as qualified and absolute immunity. Additionally, though this limitation pre-dated the expansion of Section 1983, the Supreme Court has held that state governments enjoy sovereign immunity from civil liability under the [Eleventh Amendment of the Constitution](#).

ATS claims

8. It is possible that ATS claims may be brought by aliens who are subjected to assault or unlawful arrest and detention within the United States. The ATS grants US district courts [original jurisdiction](#) over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.¹⁹ These require, however, that the claims also rise to the level of customary

¹⁹ [28 U.S. Code § 1350](#).

international law violations,²⁰ and the Supreme Court has recently added the requirement that the facts of such cases must 'touch and concern' the United States.²¹ There is disagreement among US courts concerning the [mens rea requirement](#) for an ATS claim.²² This trend of limiting the scope of the ATS has led to dismissal of many cases brought against non-citizens for conduct occurring outside the United States.²³

Bivens claims

9. A [Bivens](#) claim may be available against federal government officials who subject victims to assault or unlawful arrest and detention.²⁴ *Bivens* itself provided a cause of action in response to a violation of the Constitution's proscriptions against unreasonable search and seizures.²⁵ The Supreme Court has since sharply limited the circumstances in which it will recognise *Bivens* claims arising from the US Constitution, but there will likely continue to be such remedies for these violations.

Statutory and common law tort claims

10. US tort law in all States will provide civil remedies to individuals subjected to assault or unlawful arrest or detention, regardless of whether the perpetrator is a public or private actor. Such claims are governed by the relevant State's tort law, including the State's defences and immunities. Claims involving the acts of federal employees may be brought against the US under the FTCA, which borrows the substantive law of the state in which the injury occurred.²⁶ It should be noted that the FTCA is subject to various additional [limitations and immunities](#).²⁷

Battery

11. The tort of **battery** provides a cause of action against a defendant who acts intentionally to cause harmful or offensive contact with the victim.²⁸ In cases of excessive use of force by police, battery claims are often alleged alongside constitutional claims for the injury to the unlawfully detained individual.²⁹

Assault

12. The tort of **assault** provides a remedy against police and private actors who act to intentionally cause the victim reasonable apprehension of immediate harmful or offensive conduct.³⁰ An assault claim may be brought where, for example, a client is unlawfully arrested or detained and placed in reasonable apprehension of harmful or offensive conduct.³¹

20 *Sosa v Alvarez-Machain*, 542 U.S. 692, 732 (2004) (SC). Successful ATS claims must be based on the same level of evidence and specificity of 18th century norms recognised in Blackstone's time (eg piracy, attacks on Ambassadors). *ibid* 724.

21 *Kiobel v Royal Dutch Petroleum Co*, 569 U.S. 108, 124 (2013) (SC) (holding ATS claims must 'touch and concern the ... United States with ... sufficient force to displace the presumption against extraterritorial application').

22 Srish Khakurel, 'The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute' (2018) 59(8) *Boston College Law Review* 2953, 2966-2969; also cf *Presbyterian Church of Sudan v Talisman Energy, Inc* 582 F.3d 244 (2d Cir. 2009) (US Court of Appeals, Second Circuit) (purpose standard) with *Mehinovic v Vuckovic*, 198 F. Supp 2d 1322 (N.D. Ga. 2002) (US District Court, Northern District of Georgia) (knowledge standard).

23 *Doe v Cisco Systems, Inc*, 66 F.Supp. 3d 1239, 1247 (N.D. Cal. 2014) (US District Court, Northern District of California, San Jose Division); *Kaplan v Central Bank of the Islamic Republic of Iran*, 961 F.Supp.2d 185, 205 (D.D.C. 2013) (US Court of Appeals, District of Columbia Circuit).

24 *Bivens* (n 5); but see *District of Columbia v Carter*, 409 U.S. 418, 424-25 (1973) (SC) (holding Section 1983 unavailable against federal officials).

25 *Bivens* (n 5) 389; See *Carlson v Green*, 446 U.S. 14, 17 (1980) (SC) (extending *Bivens* Eighth Amendment cruel and unusual punishment).

26 *Tekle v US*, 511 F.3d 839 (9th Cir. 2006) (US Court of Appeals, Ninth Circuit); *Arrington v US*, 473 F.3d 329, 336-38 (D.C. Cir. 2006) (US Court of Appeals, District of Columbia Circuit).

27 Lewis (n 6).

28 Restatement (Second) of Torts § 13 ([American Law Institute](#), Philadelphia).

29 *Raiche v Pietroski*, 623 F.3d 30, 40 (1st Cir. 2010) (US Court of Appeals, First Circuit); *Lund v Henderson*, 22 F.Supp.3d 94, 105 (D. Mass. 2014) (US District Court, District of Massachusetts).

30 Restatement (Second) of Torts (n 28) § 21.

31 *Kennedy v Town of Billerica*, 617 F.3d 520, 539 (1st Cir. 2010) (US Court of Appeals, First Circuit).

False imprisonment

13. The tort of **false imprisonment** provides a cause of action against an actor whose conduct leads another to be confined by physical force or barriers.³² False imprisonment actions may be brought against police officers where the arrest was not privileged, meaning where the arrest was unlawful.³³

Intentional Infliction of Emotional Distress (IIED)

14. The tort of **IIED** imposes liability on defendants who through extreme and outrageous conduct intentionally, or in some cases recklessly, cause another severe emotional distress.³⁴ The extreme and outrageous nature of the conduct may arise from an abuse of one's power, particularly that of a police officer.³⁵ In claims against police for assault or unlawful arrest and detention, IIED claims can find success when pleaded alongside other claims such as battery or assault where the officer's conduct is deemed sufficiently outrageous.³⁶

Environmental harms

15. Environmental law in the United States relies heavily on federal and state regulation. The preservation of private rights and the assertion of private remedies are often pursued through regulation and community involvement. The courts have been restrictive in [recognising the standing](#) of environmental organisations to bring such cases, particularly if they cannot identify [concrete, redressable injuries](#) in fact.³⁷ However, civil claims may be brought against human rights violators whose conduct results in environmental harm through conventional tort law, Section 1983 claims, and various state claims. Environmental ATS claims have not been successful.³⁸

Section 1983

16. Scholars have long argued that Section 1983 can be a [useful tool](#) to remedy environmental harms.³⁹ In response to the [Flint Water Crisis](#), litigants brought Section 1983 claims alleging that the conduct of state officials violated their rights under the Constitution.⁴⁰ These claims would likely have to show that the state conduct was so discriminatory against historically disadvantaged groups as to give rise to an equal protection violation under the Fourteenth Amendment.⁴¹

32 Restatement (Second) of Torts (n 28) § 35.

33 *Posr v Doherty*, 944 F.2d 91, 97 (1991) (US Court of Appeals, Second Circuit) (permitting liability for false arrest of protester).

34 Restatement (Second) of Torts (n 28) § 46.

35 *Carter v District of Columbia*, 795 F.2d 116, 139 (D.C. Cir. 1986) (US Court of Appeals, District of Columbia Circuit); *Greene v Shegan*, 123 F.Supp.3d 88, 92 (D.D.C. 2015) (US District Court, District of Columbia); Restatement (Second) of Torts (n 28) § 46, comment e.

36 *Bender v City of New York*, 78 F.3d 787, 791 (2d Cir. 1996) (US Court of Appeals, Second Circuit); *Barbosa v Conlon*, 962 F.Supp.2d 316, 334 (D. Mass. 2013) (US District Court, District of Massachusetts); *Taylor v State*, 617 So.2d 1198, 1204 (La. App. 1993) (US Court of Appeal, Louisiana, Third Circuit).

37 *Lujan v Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (SC); *Juliana v United States*, 947 F.3d 1159, 1171-73 (9th Cir. 2020) (US Court of Appeals, Ninth Circuit).

38 *Flores v Southern Peru Copper Corp*, 343 F.3d 140, 161-71 (2d Cir. 2003) (US Court of Appeals, Second Circuit); *Beanal v Freeport-McMoran, Inc.*, 197 F.3d 161, 166-67 (5th Cir. 1999) (US Court of Appeals, Fifth Circuit); *Sarei v Rio Tinto Plc*, 650 F.Supp.2d 1004, 1025 (C.D. Cal. 2009) (US District Court, Central District of California).

39 Julia Prochazka, '[Back to its Roots: How §1983 Must Return to its Origins to Provide a Remedy for the Inupiat Against Oil Drilling in Alaska's Arctic Circle](#)' (2017) 12(3) Northwestern Journal of Law and Social Policy 130, 134-35.

40 Anthony Cavender, '[Sixth Circuit Holds that Some Official Actions Taken in the "Flint Water Crisis" Could Be Constitutional Due Process Violations](#)' (2019) JDSUPRA; *Guertin v Michigan*, 912 F.3d 907, 926-27 (6th Cir. 2019) (US Court of Appeals, Sixth Circuit); *Boler v Earley*, 865 F.3d 391 (6th Cir. 2017) (US Court of Appeals, Sixth Circuit); *Mays v Snyder*, 916 N.W.2d 227, 240 (Mich. Ct. App. 2018) (Court of Appeals, State of Michigan).

41 The Fourteenth Amendment has been interpreted as creating substantive due process claims for individuals whose civil rights have been violated.

Statutory and common law tort claims

17. The tort of **nuisance** imposes liability on perpetrators whose conduct causes environmental harms affecting public health and safety.⁴² A nuisance can be public or private,⁴³ but individuals may only bring private nuisance claims. A private nuisance imposes liability on a defendant whose conduct interferes with another's use or enjoyment of their land.⁴⁴ Remedies for nuisance claims include monetary damages or injunctive relief and can be pursued in federal or state court.⁴⁵ Plaintiffs can seek monetary damages for environmental harm or injunctive relief to prevent the continuance of environmentally harmful conduct.⁴⁶
18. The tort of **negligence** imposes liability on a tortfeasor who negligently harms another. Negligence claims arise when perpetrator's conduct falls below a reasonable standard of care⁴⁷ and such claims have been brought in environmental disaster litigation like the lawsuits against Exxon concerning the [Exxon-Valdez oil spill](#).⁴⁸

Harmful or unfair labour conditions

TVPPRA claims

19. The TVPPRA provides causes of action against perpetrators and beneficiaries of trafficking and forced labour.⁴⁹ Specifically, the victims must prove that the defendant was either the perpetrator or knowingly benefited from participation in a venture they knew or should have known engaged in [forced labour or trafficking](#).⁵⁰ Remedies under the TVPPRA include civil damages, punitive damages, and damages for injuries and emotional distress.⁵¹ The TVPPRA explicitly provides for [extra-territorial jurisdiction](#) where the human trafficking crimes occurred abroad.⁵² Courts have interpreted [Section 1595](#) of the TVPPRA of 'evinced a clear indication of extraterritorial effect' sufficient to apply certain conduct committed abroad.⁵³ Section 1596 provides that 'the courts of the United States have extraterritorial jurisdiction over an offence (or any attempt or conspiracy to commit an offence)' under the TVPPRA⁵⁴ where the offender is a US national, a lawful permanent resident, or the offender is present within the US regardless of nationality.

42 *Jordan v Luippold*, 114 P.2d 917, 918 (Okla. 1941) (Supreme Court of Oklahoma) (finding both a public and private nuisance).

43 Restatement (Second) of Torts (n 28) § 821A.

44 Restatement (Second) of Torts (n 28) § 821D; See *Smith v Carbide & Chemicals Corp*, 507 F.3d 372, 379 (6th Cir. 2007) (US Court of Appeals, Sixth Circuit); *Pruitt v Allied Chemical Corp*, 523 F.Supp. 975, 976 (E.D. Va. 1981) (US District Court, Eastern District of Virginia).

45 Restatement (Second) of Torts (n 28) § 821B, comment i.

46 *Cox v City of Dallas, Texas*, 256 F.3d 281, 289–91 (5th Cir. 2001) (US Court of Appeals, Fifth Circuit) (ordering an injunction inter alia to monitor dump sites for health risks and remediate site to non-hazardous conditions).

47 Restatement (Second) of Torts (n 28) § 821B.

48 Steven Mufson, '[BP's 'gross negligence' caused Gulf oil spill, federal judge rules](#)' (2014) *Washington Post*; *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (US Court of Appeals, Fifth Circuit); *Exxon Shipping Co v Baker*, 554 U.S. 471 (2008) (SC).

49 *Barrientos v CoreCivic Inc*, 951 F.3d 1269, 1272 (11th Cir. 2020) (US Court of Appeals, Eleventh Circuit); *Adia v Grandeur Management Inc*, 933 F.3d 89, 94 (2019) (US Court of Appeals, Second Circuit).

50 [15 U.S. Code § 1589](#).

51 [18 U.S. Code § 1595](#); *Ditullio v Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (US Court of Appeals, Ninth Circuit); *Rana v Islam*, 210 F.Supp.3d 508, 516 (S.D.N.Y. 2016) (US District Court, Southern District of New York).

52 This explicit provision of [extra-territorial application](#) overcomes US doctrines developed to limit the extra-territorial reach of U.S. laws, such as the presumption against extra-territoriality.

53 See *Roe v Howard*, 917 F.3d 229, 240–43 (4th Cir. 2019) (holding [18 U.S. Code § 1595](#) of the TVPPA satisfied the RJR Nabisco two-step framework to determine the extra-territorial application of US law).

54 This extra-territorial jurisdiction extends to violations under 18 U.S. Code §§ 1581, 1583, 1584, 1589, 1590, or 1591. [18 U.S. Code § 1596\(a\)](#).

ATS claims

20. As stated in [8] above, the ATS provides a cause of action for torts in violation of customary international law or the treaties of the United States.⁵⁵ Forced labour or human trafficking both violate customary international law. Generally, however, successful forced labour claims have involved fact patterns including trafficking, physical violence, and/or confinement.⁵⁶ By comparison, claims alleging only poor working conditions have been unsuccessful, as not rising to the level of violations of the law of nations.⁵⁷

FLSA claims

21. The [Fair Labor Standards Act \(FLSA\)](#)⁵⁸ provides federal guidelines to regulate minimum wage, overtime, record keeping, and child labour standards across the United States. The FLSA provides a [cause of action](#)⁵⁹ to employees against their employers who act in violation of the [minimum wage](#)⁶⁰ or [maximum hours](#)⁶¹ provisions of the FLSA. The private cause of action provides for mandatory [attorneys' fees and costs](#).⁶² The FLSA also contains [civil penalties](#) for violations of its [child labour provisions](#).⁶³

Q2

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

Section 1983 claims

22. A plaintiff bringing a claim under [Section 1983](#) must prove that: (a) the defendant deprived the plaintiff of a federal right;⁶⁴ and (b) when depriving the plaintiff of their federal rights, the defendant was acting under the colour of law.⁶⁵

23. Generally, Section 1983 claims may only be brought against individuals acting under the colour of state law, such as police officers, state executive officers, and even elected officials.⁶⁶ However, Section 1983 liability may be pursued against a municipality (local government) where the violative conduct '[implements or executes](#) a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers'.⁶⁷

⁵⁵ Alien's Action for Tort, [28 U.S. Code § 1350](#).

⁵⁶ *ibid*; *Aragon v Che Ku*, 277 F.Supp.3d 1055, 1067–69 (D. Minn. 2017) (US District Court, District of Minnesota); *Adhikari v Daoud & Partners*, 697 F.Supp.2d 674, 687 (S.D. Tex. 2009) (US District Court, Southern District of Texas); *Licea v Curacao Drydock Co*, 584 F.Supp.2d 1344, 1361–63 (S.D. Fla. 2008) (US District Court, Southern District of Florida).

⁵⁷ See *Velez v Sanchez*, 693 F.3d 308, 321–23 (2d Cir. 2012) (US Court of Appeals, Second Circuit); *Roe v Bridgestone Corp*, 492 F.Supp.2d 988, 1015–19 (S.D. Ind. 2007) (US District Court, Southern District of Indiana).

⁵⁸ See [Fair Labor Standards Act](#), Pub. L. No. 52 Stat. 1060 (1938) (FLSA), codified as amended at 29 U.S. Code §§ 201–19 (2014).

⁵⁹ Penalties, [29 U.S. Code § 216\(b\)](#).

⁶⁰ Minimum wage, [29 U.S. Code § 206](#).

⁶¹ Maximum hours, [29 U.S. Code § 207](#).

⁶² § 216(b) (n 59); *Wright v Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960) (US Court of Appeals, Fourth Circuit) ('With respect to the counsel fee, the court has no discretion to deny it; the law's requirement of an award is mandatory and unconditional.')

⁶³ Child labour provisions, [29 U.S. Code §§ 212](#), 216; FLSA (n 58); *Lynnville Transp, Inc v Chao*, 316 F.Supp.2d 790 (S.D. Iowa 2004) (US District Court, Southern District of Iowa). The FLSA does not provide for a damages remedy for violations of its child labour provisions. See *Breitweiser v KMS Industries Inc*, 467 F.2d 1391 (5th Cir. 1972) (US Court of Appeals, Fifth Circuit).

⁶⁴ Federal rights include those guaranteed by the Constitution or statutory rights unambiguously recognised by Congress as creating such a right. *Gonzaga v Doe*, 536 U.S. 273, 280 (2002) (SC).

⁶⁵ See *Gomez v Toledo*, 466 U.S. 635, 640 (1980) (SC).

⁶⁶ States are immunised from such claims under the [Eleventh Amendment](#) and suits may proceed only upon waiver or consent of the state.

⁶⁷ *Monell* (n 18) .

24. Finally, private actors may be liable under Section 1983 for acting under the colour of law where: (a) the private actor has a '[symbiotic relationship](#)' with the state;⁶⁸ (b) the private actor performs a [traditionally public function](#);⁶⁹ (c) the private actor has a '[sufficiently close nexus](#)'⁷⁰ with the state; (d) the private actor and the state engaged in [joint action](#);⁷¹ or (e) the private actor and the state were [pervasively entwined](#).⁷²

Bivens claims

25. A plaintiff bringing a *Bivens* claim must prove that: (a) the defendant violated the plaintiff's constitutional rights; and (b) the defendant was acting under the colour of law.⁷³

ATS claims

26. A plaintiff bringing a claim under the [ATS](#) must prove that: (a) the defendant committed a tort in violation of customary international law or US treaties that [touch and concern](#) the United States;⁷⁴ and (b) as a result of defendant's conduct, the plaintiff suffered an injury.

TVPRA claims

27. The [TVPRA](#) allows claims against both direct perpetrators and those who financially benefit from forced labour, forced child labour, and human trafficking.
28. A plaintiff bringing a forced labour claim against the defendant under a perpetrator theory must prove that: (a) the defendant knowingly [provided or obtained the labour](#) of the plaintiff; (b) the defendant coerced the plaintiff to perform said labour through: (i) force, physical restraint, or threats of force or physical restraint; (ii) serious harm or threats of serious harm; (iii) abuse or threatened abuse of law or legal process; (iv) any scheme, plan or pattern intended to cause the plaintiff to believe that, if the plaintiff did not perform such labour, plaintiff or another person would suffer serious harm or physical restraint.⁷⁵
29. A plaintiff bringing a trafficking claim under a beneficiary theory must prove that: (a) the defendant knowingly benefited financially or by receiving anything of value; (b) from participation in a venture; and (c) the defendant knew or recklessly disregarded the fact that the venture was engaged in forced labour or human trafficking.⁷⁶

Statutory or common law tort claims

Battery claims

30. A plaintiff bringing a tort claim of **battery** must prove that: (a) the defendant acted with intent to cause harmful or offensive contact⁷⁷ with the victim; and (b) the

68 See *Burton v Wilmington Parking Authority*, 365 U.S. 715, 724–25 (1961) (SC); cf *Moose Lodge No. 107 v Irvis*, 407 U.S. 163, 175 (1972) (SC); *Rendell-Baker v Kohn*, 457 U.S. 830, 842–43 (1982) (SC).

69 *ibid* at 842.

70 *Blum v Yaretsky*, 457 U.S. 991, 1004 (1982) (SC); *Jackson v Metropolitan Edison Co*, 419 U.S. 345, 351 (1974) (SC).

71 *Adickes v Kress & Co*, 398 U.S. 144, 152 (1970) (SC).

72 *Brentwood Academy v Tennessee Secondary School Athletic Assn*, 531 U.S. 288, 296–98 (2001) (SC).

73 *Case v Milewski*, 327 F.3d 564, 566 (7th Cir. 2003) (US Court of Appeals, Seventh Circuit) (finding the elements for a *Bivens* claim are the same as a § 1983 claim).

74 *Kiobel* (n 21).

75 See pertinent provisions on forced labour, [18 U.S. Code §§ 1589, 1595](#); and eg *Barrientos* (n 49) 1272–73.

76 Civil Remedy, [18 U.S. Code §§ 1589, 1595](#); see *Ricchio v McLean*, 853 F.3d 553, 556–58 (1st Cir. 2017) (US Court of Appeals, First Circuit); *AB v Marriott International, Inc*, 455 F.Supp.3d 171, 181 (E.D.Pa. 2020) (US District Court, Eastern District of Pennsylvania).

77 Harmful or offensive conduct need not be excessively injurious and can be thought of as conduct that is offensive to a reasonable sense of personal dignity. Restatement (Third) of Torts § 3(b) (*American Law Institute*, Philadelphia).

defendant's conduct caused harmful contact with the plaintiff's person directly or indirectly.⁷⁸

31. Because police officers, unlike ordinary citizens, sometimes have the right to use some force in the performance of their duties, state law tort claims against police officers for battery may require establishing that the use of force was unreasonable.⁷⁹

Assault claims

32. A plaintiff bringing a tort claim of **assault** must prove that: (a) the defendant acted with the intent to cause harmful or offensive contact, or an imminent apprehension of such contact; and (b) as a result of defendant's conduct, the plaintiff was put in immediate apprehension of such contact.⁸⁰

False imprisonment claims

33. A plaintiff bringing a tort claim of **false imprisonment** must prove: (a) the defendant acted with the intent to confine the plaintiff within fixed boundaries; (b) the defendant's conduct directly or indirectly resulted in the plaintiff's confinement; and (c) the plaintiff was conscious of the confinement or harmed by it.⁸¹
34. To satisfy element (b) confinement may be shown to be by either a physical barrier, force or threat of force, the failure of the perpetrator to act, or the improper assertion of legal authority.⁸²

IIED claims

35. A plaintiff bringing a tort claim of **IIED** must prove that: (a) the defendant engaged in extreme and outrageous conduct; (b) the defendant acted intentionally or recklessly; (c) the defendant's extreme and outrageous conduct caused the victim emotional distress; and (d) as a result of the defendant's conduct, the plaintiff suffered severe emotional and/or mental distress.⁸³
36. Conduct is extreme and outrageous under element (a) when it is 'beyond the bounds of human decency such that it would be regarded as intolerable in a civilised community'.⁸⁴

Nuisance claims

37. A plaintiff bringing a tort claim of **private nuisance** must prove that (a) the defendant's conduct was the legal cause of an invasion of the plaintiff's interest in the private use and enjoyment of land; (b) the defendant's invasion was intentional;⁸⁵ and (c) the defendant's invasion was unreasonable.⁸⁶

⁷⁸ Restatement (Second) of Torts (n 28) § 13.

⁷⁹ In California, for example, California Penal Code section 835a permits police officers to use reasonable force, and for this reason the state requires proof that an officer's contact was unreasonable to support a battery claim. See [Edson v City of Anaheim, 63 Cal. App. 4th 1269, 1272 \(1998\)](#) (California Court of Appeal, Fourth District of California, Division Three).

⁸⁰ Restatement (Second) of Torts (n 28) § 21.

⁸¹ Restatement (Second) of Torts (n 28) § 35.

⁸² *Enright v Groves*, 560 P.2d 851 (Colo. Ct. App. 1977) (Colorado Court of Appeals, Division Three).

⁸³ Restatement (Second) of Torts (n 28) § 46.

⁸⁴ Restatement (Third) of Torts (n 77) § 46, comment d.

⁸⁵ Negligence or recklessness may also establish liability. See Restatement (Second) of Torts (n 28) § 822.

⁸⁶ *ibid.*

Negligence claims

38. A plaintiff bringing a tort claim of **negligence** must prove that: (a) the defendant owed a legally recognised duty to the plaintiff; (b) the defendant breached this duty; (c) the defendant's negligent conduct caused the plaintiff's injury; (d) the defendant's negligent conduct proximately caused the plaintiff's injury; and (d) the plaintiff suffered a legally cognisable injury.⁸⁷

Q3

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

39. The law of the United States recognises **aiding and abetting** and **conspiracy liability** as a form of complicit or accessory conduct that could be applicable in relation to the three defined harms. Secondary liability in the form of conspiracy and aiding and abetting developed as common law tort principles and are applicable in both common law tort claims and statutory claims that incorporate tort law.⁸⁸
40. Conspiracy and aiding and abetting liability is cognisable in common law tort claims and various statutory claims. Such liability may be imposed on an indirect tortfeasor for tort claims such as nuisance or trespass resulting from environmental damage similar to that in Case Scenario 2 or assault and battery claims arising in Case Scenarios 1 and 3. Additionally, various civil and human rights statutes discussed as remedies for all three Case Scenarios import conspiracy liability from traditional tort law. These statutes include Section 1983⁸⁹ and the TVPA⁹⁰. Section 1985, passed in conjunction with Section 1983, provides a civil action against state actors who conspire to interfere with civil rights.⁹¹ State statutory claims may also import conspiracy and aiding and abetting liability,⁹² and a practitioner should research the relevant state statutes to determine the cognisability of conspiracy liability in the relevant jurisdiction.⁹³

Aiding and abetting

41. In purely domestic cases, aiding and abetting has three elements: (a) the defendant must aid a third party that performs a wrongful act that causes an injury; (b) the defendant must be generally aware of their role as part of an overall illegal or tortious activity at the time that they provide assistance; and (c) the defendant must knowingly and substantially assist the principal violation.⁹⁴ Aiding and abetting liability is cognisable under both TVPA and ATS,⁹⁵ but there is division over what legal standards apply. A [split](#) has developed among the various circuits of the federal judiciary concerning the *mens rea* required to impose liability.⁹⁶

87 Restatement (Second) of Torts (n 28) § 281.

88 *Meyer v Holley*, 537 U.S. 280, 285-86 (2003) (SC); see *Chavez v Carranza*, 559 F.3d 486, 498-99 (6th Cir. 2009) (US Court of Appeals, Sixth Circuit), certiorari denied, 558 US 822 (2009) (SC) (recognising ordering, aiding, abetting, command responsibility and conspiracy liability under the TVPA).

89 See eg *Dennis v Sparks*, 449 U.S. 24, 28-29 (1980) (SC); *Adickes* (n 71) 150-52.

90 *Carranza* (n 88) 499.

91 Conspiracy to Interfere with Civil Rights, [42 U.S. Code § 1985](#); see eg *Griffin v Breckenridge*, 403 U.S. 88, 103 (1971) (SC).

92 For example, California's Fair Employment Housing Act imposes liability for aiding and abetting and conspiracy liability. California Gov. Code § 12940(i); see *Smith v. BP Lubricants USA Inc*, 64 Cal. App. 5th 138, 146 (2021) (California Court of Appeal, Fourth District, Division Three).

93 [Civil Rights Laws and Resources](#), FindLaw.

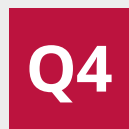
94 *Halberstam v Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (US Court of Appeal, District of Columbia Circuit); see Restatement (Second) of Torts (n 28) § 876(b); see also *Central Bank, NA v First Interstate Bank of Denver, NA*, 511 US 164, 181 (1994) (SC) (recognising Halberstam as a 'comprehensive opinion' on aiding and abetting liability).

95 *Carranza* (n 88) 499. See also Restatement (Second) of Torts (n 28) § 876(b).

96 *Khakurel* (n 22).

Conspiracy

42. Conspiracy liability is generally applicable in every jurisdiction in the United States. The elements required to impose conspiracy liability differ from jurisdiction to jurisdiction. Practitioners bringing claims in a particular jurisdiction should research the relevant legal test for the relevant jurisdiction. Generally, however, conspiracy liability may be imposed on an actor for harm inflicted on a third party by the tortious conduct of another if the indirect actor '(a) does a tortious act in concert with the other or pursuant to common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.'⁹⁷



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

43. Traditional common law in the United States permits a parent company to be held liable for the wrongful act and/or omissions of a subsidiary or independent contractor under both an agency and alter ego theory.

Alter ego/piercing the corporate veil

44. To hold a parent company liable for the wrongful acts of a subsidiary, a plaintiff must establish two elements: (a) that there is such a unity of interest and ownership that the separate personalities no longer exist and (b) that failure to disregard their separate identities would result in fraud or injustice.⁹⁸

Agency principles

45. Under common law agency principles, a parent company may be held liable for the conduct of its subsidiaries and agents.⁹⁹ Some of the principles of liability include actual or apparent authority, ratification, wilful participation, and vicarious liability.

Direct liability – actual and apparent authority

46. The authority of the subsidiary may be either actual or apparent. To prove a subsidiary had actual authority to bind the parent company, a plaintiff must show that the parent company manifested to the subsidiary its desire that the subsidiary should act on the parent's behalf, and the subsidiary manifested assent or otherwise consented so to act.¹⁰⁰ By contrast, a plaintiff alleging apparent authority must prove that the plaintiff reasonably believed the subsidiary had authority to act on the parent company's behalf, and that this belief was traceable to the parent company's conduct.¹⁰¹

⁹⁷ Restatement (Second) Second of Torts (n 28) § 876.

⁹⁸ *Doe v Unocal Corp*, 248 F.3d 915, 926 (9th Cir. 2001) (US Court of Appeals, Ninth Circuit).

⁹⁹ *Chowdhury v Wordtel Bangladesh Holding, Ltd*, 746 F.3d 42, 53 n.11 (2d Cir. 2014) (US Court of Appeals, Second Circuit); *Bowoto v Chevron Texaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004) (US District Court, Northern District of California); Restatement (Third) of Agency § 1.01 (*American Law Institute*, Philadelphia).

¹⁰⁰ *Transamerica Leasing, Inc v La Republica de Venezuela*, 200 F.3d 843, 849–50 (D.C. Cir. 2000) (US Court of Appeal, District of Columbia Circuit); Restatement (Third) of Agency (n 99) § 2.01.

¹⁰¹ *Transamerica Leasing* (n 100) 850; see Restatement (Third) of Agency (n 99) § 2.03.

47. Proving an agency relationship is challenging. It is not enough, for example, to show a parent-subsidary relationship,¹⁰² ownership, or overlapping management.¹⁰³ Instead, courts look to whether the parent manifests its desire to the subsidiary to act on the parent's behalf, and the subsidiary manifests assent or otherwise consents so to act.¹⁰⁴
48. Finally, a parent company can be bound by the acts of a subsidiary where the parent company ratifies the subsidiary's conduct.¹⁰⁵ A parent company ratifies the acts of their subsidiary by (a) manifesting assent that the subsidiary's act shall affect the parent company's legal relations of (b) conduct justifying a reasonable assumption that the parent company so consents.¹⁰⁶ Put another way, 'if the principal engages in conduct that could be explained only by the principal's agreement to be bound by the agent's act, then the principal has ratified the act'.¹⁰⁷

Vicarious liability

49. Under vicarious liability principles, parent companies can be held liable for the acts and omission of their employees or agents for conduct that occurs in the scope of their employment.¹⁰⁸ To hold a principal vicariously liable a plaintiff must show (a) that the principal had control or the right to control the conduct of the agent's work and (b) the agent was acting in the scope of their employment.¹⁰⁹

Q5

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

50. The law of remedies in the United States provides flexible options that a practitioner must consider. A basic underlying concept of American remedies is the goal of restoring the harmed party to their rightful position, ie the position the injured party would have been in but for the wrong committed. The availability of remedies will depend on the jurisdiction and the claims asserted.

Damages

51. Damages are usually available for these violations. Damages may be either compensatory or punitive. Compensatory damages are damages tailored to specifically compensate the plaintiff for the injury suffered. Compensatory damages may provide remuneration for both economic and non-economic injuries. Economic injuries include, for example, medical and hospital bills incurred, or financial losses suffered. Non-economic damages may seek to compensate an individual who suffered trauma or some reputational harm. Punitive damages are intended to deter future misconduct and to punish egregious conduct.

¹⁰² *Manchester Equipment Co v American Way & Moving Co*, 60 F.Supp.2d 3, 7 (E.D.N.Y. 1999) (US District Court, Eastern District of New York); also *Motorsport Engineering, Inc v Maserati SPA*, 316 F.3d 26, 30 (1st Cir. 2002) (US Court of Appeals, First Circuit).

¹⁰³ *United States v Bestfoods*, 524 U.S. 51, 62 (1998) (SC).

¹⁰⁴ Restatement (Third) of Agency (n 99) § 1.01.

¹⁰⁵ *GDG Acquisitions LLC v Government of Belize*, 849 F.3d 1299, 1308 (11th Cir. 2017) (US Court of Appeals, Eleventh Circuit); Restatement (Third) of Agency (n 99) § 4.01.

¹⁰⁶ Restatement (Third) of Agency (n 99) § 4.01(2).

¹⁰⁷ *GDG Acquisitions* (n 105) 1309–10.

¹⁰⁸ Restatement (Third) of Agency (n 99) § 7.01, 07; See eg *Arguello v Conoco, Inc*, 207 F. 3d 803 (5th Cir. 2000) (US Court of Appeals, Fifth Circuit).

¹⁰⁹ Restatement (Third) of Agency (n 99) § 7.07.

Restitution

52. Restitution is an equitable remedy that requires defendants to disgorge financial gains where the defendant's retention of the gains would constitute unjust enrichment. Unlike the somewhat mechanical formulae of damages, restitution is pursued under equitable considerations of fairness and justice. The proper nomenclature and identity of a restitutionary claim is dependent on the jurisdiction the case arises in, though typical formulations include unjust enrichment, subrogation, and disgorgement. Equitable cases lie solely before a judge, and no jury is empanelled to decide the merits of equitable claims.

Injunctions

53. Injunctions either order a defendant to take some action or prohibit a defendant from taking some action. Injunctions are often sought to legally prevent a party from interfering in a specific legal interest of another by forcing compliance with a court order. A defendant who violates an injunction is subject to sanction via the remedy of contempt which may impose fines or possibly even imprisonment depending on the gravity of the violation. In appropriate cases, preliminary injunctive relief is available to prevent a future injury.

Declaratory relief

54. Declaratory relief results in a judicial statement of the parties' legal position with respect to the matter under consideration. While declaratory relief does not require certain actions by plaintiff or defendant, it legally recognises the rights expressed therein. Such a declaratory judgment may be used in the future to enforce the rights and obligations of others who violate the rights judicially recognised in the declaratory judgment and may be the basis for future injunctive relief.



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

Advantages

Multiple avenues and sources of rights and remedies

55. The discussion above demonstrates the variety of civil remedies (state or federal; statutory or common law) available to address human rights violations in the United States. The result of this variety, in many cases, is a recognised remedy applicable to the violation suffered by a victim, with a developed body of precedents to develop a sound claim. In some cases, the claim may not fit well within, say, a federal Section 1983 claim because the right enshrined in the Constitution is limited. However, state constitutions often contain more comprehensive protections of rights which can provide a remedy unavailable through federal law.
56. Another valuable outcome of the variety of sources of law and rights, is the availability of multiple forums to pursue claims. At the outset of litigation, an advocate must decide whether to bring a claim in state or federal court. Many competing considerations may shape this decision.

57. The defendant, however, has some say in what venue the case is litigated. For example, claims based on federal law, like Section 1983 claims or TVPRA claims, may be removed to federal court on a motion from either party. The possibility of removal may shape the claims an advocate should pursue. If, for example, the conduct was clearly violative of [rights protected by state law](#)¹¹⁰ and the state law provides a remedy, an advocate may wish to pursue only the state law claims if they feel their chances of success are [greater in state court](#).¹¹¹

Fee-shifting statutes

58. The issue of funding is an important consideration when bringing a claim, and the legal system of the United States provides avenues to potentially support costly litigation. Generally, parties in the United States pay their own expenses rather than the 'loser pays' formula followed by most civil law systems. The Supreme Court has [upheld this 'American Rule'](#) and it is still followed today.¹¹² Despite the American Rule, both the federal government and states have adopted fee-shifting statutes allowing plaintiffs to recover fees incurred while pursuing human rights claims.

59. Congress has passed fee-shifting statutes that allow for recovery of attorneys' fees in [civil rights cases](#), [TVPRA cases](#), [FLSA cases](#), and [cases brought against the US or US officials](#).¹¹³ Courts retain discretion to award attorneys' fees, though successful plaintiffs are [presumptively entitled to fees](#).¹¹⁴ Attorneys' fees may be awarded to successful defendants, but the granting of such fees is rare and only appropriate where the plaintiff's claim was [frivolous, unreasonable, or without foundation](#).¹¹⁵

Disadvantages

Immunities

60. Human rights litigation in the US is most seriously undermined by the broad swath of immunities granted to public officials and entities. The scope of liability describes the conduct or circumstances covered by the immunity; the application of the immunity refers to who, exactly, can assert said immunity; and the level of immunity describes how much immunity a defendant enjoys, whether it be absolute or qualified or limited to some remedies, but not others.

61. **Absolute immunity** shields a variety of state actors from any liability for conduct undertaken in the scope of their official duties.¹¹⁶ Absolute immunity applies to actors functioning in [legislative](#), [prosecutorial](#), or [judicial](#) capacities.¹¹⁷ An actor shielded by absolute immunity is shielded from potential civil claims and courts will not inquire into '[considerations of intent and motive](#)'.¹¹⁸

110 See generally Seth Davis and Christopher A Whytock, '[State Remedies for Human Rights](#)' (2018) *Boston University Law Review* 98 (2).

111 See generally Paul Hoffman and Beth Stephens, 'International Human Rights Cases under State Law and in State Courts' (2013) 3(1) *UC Irvine Law Review* 9.

112 *Alyeska Pipeline Service Co v Wilderness Society*, 421 U.S. 240, 270 (1975) (SC).

113 18 U.S. Code § 1595 (TCPA Fees); 28 U.S. Code § 2412 (FTCA Fees); 29 U.S. Code § 216 (FLSA Fees); 42 U.S. Code § 1988 (Civil Rights Fees).

114 See Independent Federation of *Flight Attendants v Zipes*, 491 U.S. 754, 760–62 (1989) (SC); *Newman v Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (SC).

115 *James v City of Boise*, 577 U.S. 306, 306–07 (2016) (SC); *Hughes v Rowe*, 449 U.S. 5, 14 (1980) (SC).

116 *Burns v Reed*, 500 U.S. 478, 486–87 (1991) (SC).

117 *Bogan v Scott-Harris*, 523 U.S. 44, 49–53 (1998) (SC) (Legislative Immunity); *Van de Kamp v Goldstein*, 555 U.S. 335, 343 (2009) (SC) (Prosecutorial Immunity); *Stump v Sparkman*, 435 U.S. 349, 364 (1978) (SC) (Judicial Immunity).

118 *ibid*, *Bogan* at 55.

62. The most confronted immunity in civil rights litigation is **qualified immunity**. Qualified immunity extends to state actors who do not violate a clearly established right.
63. When confronting assertions of [qualified immunity](#),¹¹⁹ advocates must prove that (a) plaintiff's rights were violated; and (b) that the right was [clearly established](#)¹²⁰ at the time of the violation.
64. Unfortunately, courts do not consider rights 'clearly established' simply because they are enumerated in the Constitution or by statute. Instead, courts consider 'whether it would be clear [to a reasonable officer](#) that his conduct was unlawful in the situation he confronted'.¹²¹ Further, a clearly established right must be defined with an appropriate level of specificity, particularised to the context of the case.¹²² The level of specificity has led to seemingly absurd results.¹²³ The analysis essentially requires plaintiffs to identify a prior case which is both legally and material similar.
65. While Section 1983 liability may extend to private actors, it is less settled whether private actors may assert qualified immunity. Courts evaluating the issue often look towards the [history, principles and justifications](#) of qualified immunity to determine whether the extension of such immunity is warranted.¹²⁴ Courts may also consider the [profit motive](#) of companies as well as the nature of the private actors' [relationships with the government](#).¹²⁵ These considerations have thus far led to varied results that [lack clarity or consistency](#).¹²⁶

Access to justice

66. While the fee-shifting statutes outlined in [58]-[59] above create some potential financing for litigation, America's legal system suffers from acute access-to-justice issues. In the United States, legal services are often treated like a commodity available only to those who can afford the fees. As a result, low-income people must often confront a legal system [without adequate representation](#).¹²⁷ While American law demands representation for individuals [facing criminal charges](#),¹²⁸ no such requirement exists for [civil representation](#).¹²⁹ Some states, however, provide for a [right to counsel in civil cases](#).¹³⁰ In addition to the lack of recognised rights, legal service corporations, once a vibrant source of representation, have seen funding curtailed over the years.

119 [Harlow & Butterfield v Fitzgerald](#), 457 U.S. 800, 818 (1982); See '[Qualified Immunity](#)', Equal Justice Initiative.

120 [Ashcroft](#) (n 16) 735; [Harlow](#) (n 119).

121 [Saucier v Katz](#), 533 U.S. 194, 202 (2001) (SC).

122 [Ashcroft](#) (n 16) 742.

123 [Schwartz](#) (n 16) 2.

124 [Filarsky v Delia](#), 566 U.S. 377, 383 (2012) (SC); [Richardson v McKnight](#), 521 U.S. 399, 404 (1997) (SC).

125 *ibid* [Richardson](#) at 413.

126 GS Buchanan, '[State Action and the Public/Private Distinction](#)' (2010) 123(5) *Harvard Law Review* 1248, 1270–76.

127 [2017 Justice Gap Report](#) (Legal Services Corporation).

128 [Gideon v Wainwright](#), 372 U.S. 335, 342–43 (1963) (SC).

129 [Turner v Rogers](#), 546 U.S. 431, 448 (2011) (SC).

130 Laura K Abel and Max Rettig, '[State Statutes Providing for a Right to Counsel in Civil Cases](#)' (2006) *Clearinghouse Review Journal of Poverty Law and Policy* 245.



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

67. Civil claims can be brought against foreign defendants so long as a US court has jurisdiction over the defendant. Recent Supreme Court decisions have, however, curbed the exercise of jurisdiction over foreign defendants generally.¹³¹

Personal jurisdiction

68. Plaintiffs bringing a civil claim against a foreign defendant must first demonstrate that a US court has personal jurisdiction over the defendant. There are two forms of personal jurisdiction: general jurisdiction over a defendant for all claims, and specific jurisdiction over conduct-linked claims. Recent Supreme Court cases have imposed heightened barriers to establishing jurisdiction.
69. In [Daimler v AG Bauman](#), human rights plaintiffs brought a civil claim against Daimler for the conduct of their Argentine subsidiary during the 'Dirty War' in Argentina. The Supreme Court rejected the plaintiffs' reliance on the ubiquitous [presence of Daimler](#)¹³² and its products in the US market, holding that general jurisdiction could not be established because the claims did not relate to Daimler's conduct within the US. The Supreme Court similarly curbed the [exercise of specific jurisdiction](#).¹³³ This trend of limiting the [exercise of jurisdiction](#)¹³⁴ of foreign defendants highlights a trend to restrict access to US courts. This trend has resulted in the dismissal of civil claims against foreign defendants.¹³⁵

Liability of corporations under the ATS and TVPA

70. While ATS and TVPA civil claims may be brought against foreign individual defendants, they may not be brought against foreign corporate defendants. In [Jesner v Arab Bank, plc](#), the Supreme Court held that foreign corporations were [not liable under the ATS](#).¹³⁶ The Supreme Court similarly held, in [Mohamad v Palestinian Authority](#), that corporations were [not subject to liability under the TVPA](#).¹³⁷

Presumption against extraterritoriality

71. Perhaps the most difficult hurdle to clear in bringing claims against foreign corporations for foreign conduct is the presumption of extra-territoriality.¹³⁸ Beginning with [Kiobel v Royal Dutch Petroleum Co](#), the Supreme Court held that the presumption against extraterritoriality must be rebutted to bring a civil claim based on foreign conduct. The Kiobel Court, however, left open the possibility that some ATS claims remained viable where they 'touch and concern' the

131 See eg [Daimler AG v Bauman](#), 571 U.S. 117 (2014) (SC); see generally Carolina Nuche, '[Piercing the Jurisdictional Veil: Holding Corporations Accountable for Human Rights Violations after Kiobel and Daimler](#)', (2017) 4 *St Thomas Journal Of Complex Litigation* 1.

132 '[Daimler AG v Bauman](#)', 128 *Harvard Law Review* 311, 313–15 (2014).

133 *Bristol-Myers Squibb Co v Superior Ct of California, San Francisco Cnty*, 137 S. Ct. 1773, 1781–87 (2017) (SC).

134 Nuche (n 131) 2–7.

135 *Krishanti v Rajaratnam*, 2014 WL 1669873, at *7 (DNJ 2014) (US District Court, District of New Jersey); Gwynne Skinner, '[Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New \(Post-Kiobel\) World](#)' (2014) 46 *Columbia Human Rights Law Review* 158, 192.

136 [Jesner v Arab Bank, plc](#), 138 S.Ct. 1386, 1403 (2018) (SC).

137 [Mohamad v Palestinian Authority](#), 566 US 449, 451–52 (2012) (SC); Lyle Denniston, '[Anti-torture law given narrow scope](#)' (2012) SCOTUS blog.

138 Common law claims such as tort claims do not need to rebut the presumption against extraterritoriality.

United States with sufficient force to overcome the presumption. The scope of the 'touch and concern' test has yet to be determined, though the domestic conduct alleged must include more than allegations of ['general corporate activity'](#).¹³⁹ The presumption is not impenetrable. A line of cases has recognised that foreign corporations may be held liable for conduct committed within the US which aids and abets a violation cognisable under the ATS.¹⁴⁰

Other limitations

72. Beyond the presumption against extraterritoriality, statutory and common law civil claims against foreign defendants may still be dismissed on the basis of comity, *forum non conveniens*, the act of state doctrine, or other doctrines meant to curb the application of US law to foreign defendants engaged in foreign conduct.
73. Under the amorphous doctrine of [international comity](#), a court may decline to exercise jurisdiction in deference to the legislative, judicial, or executive acts of another country.¹⁴¹ The doctrine is ill defined and varies across the country. However, the rise of a doctrine of ['international comity abstention'](#) in cases such as *Mujica v Airscan* could provide courts with another means of declining to exercise jurisdiction over both foreign and domestic defendants.¹⁴²
74. The **act of state doctrine** permits a court to decline to exercise jurisdiction over a claim against a foreign corporation in deference to the sovereign acts of a foreign government concerning conduct within their own territory. The [factors considered](#) include the impact of the issue on US foreign relations, the degree of codification or consensus regarding the area of international law at issue, and the continuing existence of the government which perpetrated the act.¹⁴³
75. Finally, under the doctrine of ***forum non conveniens***, a defendant may seek to dismiss a case where it is more 'convenient' to litigate the case in the country where the conduct occurred, even if US courts have jurisdiction.¹⁴⁴ Courts consider the utility of domestic litigation to both parties, the availability of an alternative forum, the burden on the defendants, and other public and private factors.¹⁴⁵

¹³⁹ [Nestlé USA, Inc v Doe](#), 141 S.Ct. 1931, 1937 (2021) (SC).

¹⁴⁰ *Mastafa v Chevron Corp*, 770 F.3d 170, 181 (2d Cir. 2014) (US Court of Appeals, Second Circuit).

¹⁴¹ William S Dodge, ['International Comity in American Law'](#) (2015) 115(8) *Columbia Law Review* 2071.

¹⁴² *Mujica v AirScan, Inc*, 771 F.3d 580, 597 (9th Cir. 2014) (US Court of Appeals, Ninth Circuit); See Maggie Gardner, ['Abstention at the Border'](#) (2019) 105(1) *Virginia Law Review* 63.

¹⁴³ *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 427–28 (1964) (SC); See *WS Kirkpatrick & Co Inc v Environmental Tectonics Corporation, International*, 493 U.S. 400, 408–10 (1990) (SC).

¹⁴⁴ [Gulf Oil Corp v Gilbert](#), 330 U.S. 501, 507 (1947) (SC).

¹⁴⁵ [Wiwa v Royal Dutch Petroleum Co](#), 226 F.3d 88, 101 (2d Cir. 2000) (US Court of Appeal, Second Circuit); [In re Chiquita Brands Int'l, Inc](#), 190 F.Supp.3d 1100, 1116 (S.D. Fla. 2016) (US District Court, Southern District of California) (finding Colombia was not an adequate alternative forum where plaintiffs faced threats).



Can you recommend resources for further research and consultation to anyone interested in learning more about liability for human rights violations in your jurisdiction?

Articles

- Joanna C Schwartz, '[How Qualified Immunity Fails](#)', 127 Yale L.J 2 (2017).
- Laura K Abel and Max Rettig, '[State Statutes Providing for a Right to Counsel in Civil Cases](#)' (2006) Clearinghouse Review Journal of Poverty Law and Policy 245.

Books and book chapters

- Michael Avery et al, *Police Misconduct: Law and Litigation* (3d edn, Thomson/West, November 2021).
- Sheldon H Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (2021-2022 edn, West Group).

Databases

- [FindLaw](#)
- [Legal Information Institute – Cornell Law School](#)
- [Justia](#)
- [US Protest Law Tracker](#)

Relevant organisations

- [ACLU](#)
- [Center for Constitutional Rights](#)
- [EarthRights International](#)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

76. Civil claims could be brought against both the police and Security Co. In both instances, the protesters may have Section 1983 claims as well as common law negligence claims against state actors, and *Bivens* and FTCA claims against federal police.
77. Typically, the protesters would bring Section 1983 claims (or Bivens claims in the case of federal law enforcement) against the police officers responsible for their injuries or unlawful arrest.¹⁴⁶ The protesters could also bring conventional tort claims of assault, battery, and false imprisonment against state police officers, and FTCA claims for the actions of federal police officers.¹⁴⁷ Should the protesters hope to pursue claims in a state court, many states have remedies for injuries or unlawful arrests perpetrated by the police.¹⁴⁸
78. Protesters alleging a [Section 1983](#) claim must prove by a preponderance of evidence that: (a) the police deprived the plaintiff of a federal right; and (b) the police were acting under the colour of law.¹⁴⁹
79. Protesters may allege that their First Amendment rights, which include the right to free speech and association, were violated by the unlawful suppression of their protest.¹⁵⁰ Protesters may also allege Fourth Amendment violations due to their unlawful detention without charge¹⁵¹ and the use of excessive force.¹⁵² Protesters, as pretrial detainees (held without charge), may also allege violations of the Due Process Clause of the [Fourteenth Amendment](#) due to [torture](#) or other [deplorable prison conditions](#).¹⁵³

¹⁴⁶ Abel and Rettig (n 130) 271-72.

¹⁴⁷ For elements of tort claims, see the response to Question 2 above (paras [22]-[38]).

¹⁴⁸ Some states have adopted [anti-protest statutes](#).

¹⁴⁹ Gomez (n 65).

¹⁵⁰ *Don't Shoot Portland v City of Portland*, 465 F.Supp.3d 1150, 1155-56 (D. Or. 2020) (US District Court, District of Oregon) (a First Amendment claim that police chilled protected political speech). See the [Don't Shoot Portland complaint](#).

¹⁵¹ *Fogarty v Gallegos*, 523 F.3d 1147, 1155-58 (10th Cir. 2008) (US Court of Appeals, Tenth Circuit).

¹⁵² *Shamir v City of New York*, 804 F.3d 553, 557 (2d Cir. 2015) (US Court of Appeals, Second Circuit) (recognising an excessive force claim against a police officer); *Don't Shoot Portland* (n 150) 1155 (a Fourth Amendment claim of excessive force involving tear gas).

¹⁵³ See *Richko v Wayne County, Mich.*, 819 F.3d 907, 915 (6th Cir. 2015) (US Court of Appeals, Sixth Circuit).

80. Depending on the tort claims plaintiffs bring, they must establish the elements of the specified tort as outlined above in [30]-[38]. For example, a protester bringing a tort claim of battery must prove that (a) the police officers acted with intent to cause harmful or offensive contact with the victim; and (b) the police officers' conduct caused harmful contact with the plaintiff's person directly or indirectly.¹⁵⁴
81. A protester could also bring a so-called [Monell](#) claim against the police department or the municipal government. To establish departmental or municipality liability under *Monell* the protesters must prove that the conduct of the police officers was the result of policies and regulations of the police department or municipal body.¹⁵⁵
82. A claim may also be brought against Security Co depending on its role in the actual injuries of the protesters and its relationship with the police. For example, a Section 1983 civil claim may be brought against Security Co if the protesters can show that Security Co was acting as an agent of the state.¹⁵⁶
83. Alternatively, Security Co may be directly liable for torts committed by its employees. Injured protestors could bring traditional tort claims such as battery, assault, and false imprisonment for injuries resulting from the conduct of Security Co employees acting within the scope of their employment.

Q2

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

84. Civil claims would likely be the preferred route.

Q3

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

85. Protesters successfully sought injunctions against the use of tear gas and other police methods during the anti-police violence protests in 2020.¹⁵⁷ Successful claims were also brought against the City of Seattle for constitutional violations against those [protesting against the World Trade Organization in 1999](#).¹⁵⁸

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¹⁵⁴ Restatement (Second) of Torts (n 28) § 13.

¹⁵⁵ [Monell](#) (n 18).

¹⁵⁶ For a discussion of the relationships that may subject private actors to Section 1983 liability, see the discussion of 42 U.S. Code § 1983 in response to Question 2 at paras [22]-[24].

¹⁵⁷ [Black Lives Matter Seattle-King Cnty v City of Seattle](#), 466 F.Supp.3d 1206 (W.D. Wash. 2020) (US District Court, Western District of Washington at Seattle); [Don't Shoot Portland](#) (n 150) 1155-56.

¹⁵⁸ [Hankin v City of Seattle](#), Public Justice.

CaseScenario 2

Q1

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

86. Individuals harmed by the oil spill could bring civil claims against both Parent Co and Subsidiary Co. Due to the specifics of the case scenario, most claims would be brought under the [Oil Pollution Act \(OPA\)](#).¹⁵⁹
87. The OPA [imposes liability](#) on a 'responsible party for a ... vessel or a facility from which oil is discharged ... into or upon navigable waters or adjoining lines'.¹⁶⁰ Following a spill the government shall, where appropriate, designate the 'Responsible Party'.¹⁶¹ Responsible Parties are liable for removal costs incurred by both the government and private individuals so long as those actions are consistent with the National Contingency Plan.¹⁶²
88. Damages are also [available for individuals](#) who suffer injury to real or personal property, loss of subsistence use of natural resources, and economic losses due to injury or the loss or destruction of property.¹⁶³
89. Generally, the OPA [limits the financial liability](#) of Responsible Parties.¹⁶⁴ However, this limited liability is unavailable in cases of gross negligence, wilful misconduct, or the violation of an applicable law or regulation.
90. Under the OPA, liability would likely be limited to Subsidiary Co as the designated 'Responsible Party', though that is a determination that would be made by the federal government. In the case of the BP Oil Spill highlighted after paragraph [94] below, the tanker that caused the spill was owned by Transocean but operated by BP. The Coast Guard designated both Transocean and BP as 'Responsible Parties'.
91. If the government only designated Subsidiary Co as the responsible party, then only Subsidiary Co would be liable under the OPA. However, injured parties could seek to impose liability on Parent Co through theories of agency or piercing the corporate veil, as discussed in [44]-[45] above.¹⁶⁵ The fact that Parent Co is the sole shareholder of Subsidiary Co, alone, is insufficient to impose liability on Parent Co.

¹⁵⁹ [Oil Pollution Act](#) of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990), codified as amended 33 U.S. Code §§ 2701-2761 (1994 & Supp. III 1997).

¹⁶⁰ Elements of Liability, [33 U.S. Code § 2702\(a\)](#).

¹⁶¹ Designation of Source and Advertisement, [33 U.S. Code § 2714](#).

¹⁶² Elements of Liability, [33 U.S. Code § 2702\(b\)\(1\)](#).

¹⁶³ *ibid* § 2702(b)(2).

¹⁶⁴ Limits on Liability, [33 U.S. Code § 2704](#).

¹⁶⁵ *ibid* 11-12.

Q2

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

92. The OPA contains sections which mandate the creation of **claims funds** following oil spills. These funds are typically funded by both the responsible party and the government. Claimants can seek funds through the claims process and forgo litigation. Claims funds are typically supervised by appointed Special Masters who manage the fund and the claims processing apparatus. A client injured by Subsidiary Co's oil spill must review the availability of a claims fund, its processes, and any limitations before deciding to engage in litigation that may prove costly.
93. Additionally, political pressure on local and federal politicians can lead to a more fully funded compensation fund as well as better clean-up and rehabilitation initiatives. As a socially conscious company, Parent Co, like BP before it, is susceptible to public pressure and will seek to preserve its reputation. Collective action and community pressure should be applied on both government officials and Parent Co itself.

Q3

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

94. On 24 March 1989, the [Exxon Valdez oil tanker](#) ran aground in Prince George Sound, Alaska, spilling an estimated 11 million gallons of oil into the sound and affecting more than 1,300 miles of the shoreline, impacting the environment, local industries, and communities.¹⁶⁶ The jury returned a verdict against Exxon for USD 507.5 million in compensatory damages and USD 5 billion in punitive damages.¹⁶⁷ Following an appeals process, the punitive damages award was lowered to USD 507.5 million.¹⁶⁸

SPOTLIGHT: CASE STUDY



The most prominent post-OPA litigation arose following the BP oil spill in the Gulf of Mexico in 2010.¹⁶⁹ On 20 April 2010, the Deepwater Horizon oil rig, located 44 miles off the coast of Louisiana, exploded before sinking into the sea. Following the explosion, [an estimated 130 million gallons](#) of oil flowed into the Gulf of Mexico. The spill caused unprecedented harm to the environment as well as to individuals whose livelihoods, homes, and health suffered as a result. The damages caused by the oil spill led to numerous suits against BP and other responsible corporations. Under the OPA, the Gulf Coast Claims Facility was established to process more than [USD 6 billion](#) allocated to over 600,000 businesses and individuals. In March 2012, a final settlement was reached which replaced the GCCF, resulting in an [estimated USD 7.8 billion fund](#) to settle the remaining private claims.

¹⁶⁶ *'Exxon Valdez'*, NOAA Damage, Remediation and Restoration Program.

¹⁶⁷ *In re Exxon Valdez*, 236 F.Supp.2d 1043, 1050 (D. Alaska 2002) (US District Court, District of Alaska).

¹⁶⁸ *Exxon Shipping Co v Baker*, 554 U.S. 471, 515 (2008) (SC).

¹⁶⁹ *ibid*; *In re Exxon Valdez* (n 167) 1050.

CaseScenario3

Q1

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

≡

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Claims against Factory Co

95. The individuals working in Factory Co have a variety of cognisable tort claims depending on the injury suffered.¹⁷⁰ Workers subjected to physical abuse or sexual harassment may also have claims of assault, battery, or intentional infliction of emotional distress. All of those injured in the fire or due to other inadequate safety measures may also bring claims of negligence. Finally, survivors of the workers who died in the fire may bring wrongful death claims.
96. Beyond the general tort claims, various statutory claims are available depending on the specific injury suffered. First, workers subjected to compulsory labour, overtime or otherwise, may have viable [claims under the TVPRA](#).
97. The [key elements](#) of such a claim are: (a) Factory Co knowingly provided or obtained the labour of the workers; and (b) Factory Co coerced the workers to perform said labour through: (i) force, physical restraint, or threats of force or physical restraints; (ii) serious harm or threats of serious harm; (iii) abuse or threatened abuse of law or legal process; (iv) any scheme, plan or pattern intended to cause the plaintiff to believe that, if the plaintiff did not perform such labour, the plaintiff or another person would suffer serious harm or physical restraint.
98. Second, female workers subjected to sexual harassment may bring [hostile work environment claims](#).¹⁷¹ The key elements to a hostile work environment claim are: (a) the female workers were discriminated against because of their gender; and (b) the discrimination was '[sufficiently severe or pervasive](#) to alter the conditions of the victim's employment and create an abusive working environment'.¹⁷²
99. Finally, employees at the factory may [bring claims](#)¹⁷³ for their unpaid overtime wages under the FLSA. The key elements in a [FLSA unpaid overtime claim](#) are: (a) the workers were in an employment relationship with Factory Co; (b) Factory Co was engaged in interstate commerce; and (c) the workers worked over 40 hours per week but were not paid overtime wages.

¹⁷⁰ For a discussion of the different key elements of various tort claims, see the response to Question 2 (paras [22]-[38] above).

¹⁷¹ Unlawful employment practices, [42 U.S. Code § 2000e-2\(a\)\(1\)](#).

¹⁷² [Meritor Savings Bank, FSB v Vinson](#), 477 US 57, 67 (1986) (SC).

¹⁷³ Penalties, [29 U.S. Code § 216\(b\)](#).

Claims against Brand Co

100. Insofar as Factory Co coerced labour through force or other means, workers may have a beneficiary claim against Brand Co under the TVPRA. The key elements are: (a) Brand Co knowingly benefited financially or by receiving anything of value; (b) from participation in a venture with Factory Co; and (c) Brand Co [knew or recklessly disregarded](#) the fact that its venture with Factory Co engaged in forced labour.¹⁷⁴
101. The workers, or the community more generally, may also bring a consumer fraud case against Brand Co. Under various [state consumer fraud statutes](#),¹⁷⁵ Brand Co may be liable for material misstatements about its support for human rights while benefiting from inhumane labour practices.¹⁷⁶

Q2

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

102. Various laws in the United States regulate the conditions of labour in areas ranging from workplace safety to compensation. In the period preceding the fire at Factory Co, for instance, employees may have brought complaints under the [Occupational Health and Safety Act](#).¹⁷⁷ In response to such a complaint, the government may take steps to investigate the claim and inspect the workplace to ensure compliance with safe workplace conditions.

Q3

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

103. There are numerous cases raising these issues in the United States. **ATS** and **TVPRA** claims, though not all successful, have been brought against Nestlé and other companies benefitting from forced labour and other human rights violations.¹⁷⁸ In *John Doe v Apple*, TVPRA claims have been brought on behalf of the guardians of 14 children who were killed in a tunnel collapse while mining cobalt in the Democratic Republic of Congo.¹⁷⁹ Consumer claims have also been brought against Starbucks and other companies benefitting from the conditions in the chocolate

174 See provisions on forced labour in [18 U.S. Code §§ 1589](#), 1595; also [Ricchio v McLean](#), 853 F.3d 553, 556–58 (1st Cir. 2017) (US Court of Appeals, First Circuit).

175 [Consumer Protection in the States: A 50-State Evaluation of Unfair And Deceptive Practices Laws](#), (2018) National Consumer Law Center.

176 [Myers v Starbucks Corp](#), 536 F.Supp.3d 657, 665–667 (C.D. Cal. 2021) (US District Court, Central District of California); [Sud v Costco Wholesale Corp](#), 229 F.Supp.3d 1075 (N.D. Cal. 2017) (US District Court, Northern District of California). See [a sample complaint from Myers](#).

177 29 C.F.R. § 1903.11(a).

178 In *Doe v Unocal Corp*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) (US District Court, Central District of California) plaintiffs brought ATS claims for human rights violations including forced labour. Though the case was at first dismissed, the case was eventually settled. For other claims that are still ongoing, see eg *Keo Ratha v Phatthana Seafood Co Ltd*, CV 16-4271-JFW (ASx), 2017 WL8293174, *4 (C.D. Cal. 21 Dec 2017) (US District Court, Central District of California, Western Division); *Nestlé USA, Inc v John Doe I*, *Cargill, Inc v John Doe I*, Nos 19-416, 19-453, 2020 WL 2749081 (2021) (SC).

179 *Doe 1 et al v Apple Inc*, No 1:19-cv-03737 (D.D.C. filed 15 Dec 2019) (US District Court, District of Columbia). As of publication the litigation is ongoing and unresolved.

industry, for fraudulently presenting their products as ethically sourced.¹⁸⁰ Claims alleging hostile work environments or unsafe working conditions for domestic employees are also common, with a Northern California jury returning a multi-million-dollar verdict in a hostile work environment case brought against [Tesla](#).



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180 *Myers* (n 176) 665–667.



A HANDBOOK FOR PRACTITIONERS | **ZAMBIA**

Civil Liability for Human Rights Violations



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Institute
of Human
Rights



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FREQUENTLY USED ABBREVIATIONS

EMA 2011	Environmental Management Act 2011
MMDA 2015	Mines and Mineral Development Act 2015
ZEMA	Zambia Environmental Management Agency

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ZAMBIA



The Zambian legal system is based on the English legal system where English common law and some statutory laws are recognised as part of Zambian law. In addition, Zambia has adopted a comprehensive strict liability regime for environmental harm, but few civil claims are commenced in the courts owing to multiple barriers to access to justice, and procedural challenges. The civil liability of a parent company for the wrongful acts or omissions of a subsidiary or independent contractor in a supply chain has not yet been considered. In the absence of Zambian authorities, the courts would follow relevant English jurisprudence.

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51/100

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS



IN

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Introduction

1. Zambia is a common law jurisdiction. The Zambian legal system is based on the English legal system where English common law and some statutory laws are recognised as part of Zambian law.¹ In addition, practice and procedures in England apply in Zambia when local rules do not provide for any point of practice or procedure. Thus, the Supreme Court of Zambia applies the law and practice observed in the English Court of Appeal when local rules do not provide for any point or practice.
2. The Zambian Court of Appeal applies the English Supreme Court Practice 1999 (White Book) and the practice observed in the English Court of Appeal before 31 December 1999. Likewise, the default practice and procedure in the High Court of Zambia is also the English Supreme Court Practice 1999 (White Book). This report focuses on civil remedies for (i) assault or unlawful arrest and detention of persons, (ii) environmental harm, and (iii) harmful or unfair labour conditions. The modes of commencing civil claims in Zambia are outside the scope of this report. It briefly describes the above harms and the elements that must be proved to establish liability. Finally, it applies the law and elements to the Case Scenarios.

¹ The author of this report frequently refers to the principles and case law developed by the English courts. To access the project report on civil liability for human rights violations in England & Wales, please follow [this link](#).



General Questions

1

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

2

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

3

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

4

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

5

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

6

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

7

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

8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking [here](#)...

Q1

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

An overview of sources of law in Zambia

3. The [Constitution of Zambia](#)² provides for the sources of Zambian law. Article 7 states:

'The Laws of Zambia consist of–

- (a) this Constitution;
- (b) laws enacted by Parliament;
- (c) statutory instruments.
- (d) Zambian customary law, which is consistent with this Constitution; and
- (e) the laws and statutes which apply or extend to Zambia, as prescribed.'

4. Under article 7(e) of the Constitution, the [English Law \(Extent of Application\) Act](#)³ (Extent of Application Act) and the [British Acts Extension Act](#)⁴ (Extension Act) were enacted to prescribe the extent to which English law applies to Zambia. The Extent of Application Act s 2 as amended by the [English Law \(Extent of Application\) \(Amendment\) Act No 6 of 2011](#)⁵ provides that:

'Subject to the provisions of the Constitution of Zambia and to any other written law–

- (a) the common law; and
- (b) the doctrines of equity; and
- (c) the statutes which were in force in England on 17th August 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) any statutes of later date than that are mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise, shall be in force in the Republic.'

5. Chapter 2, part 2(3) of the [Interpretation and General Provisions Act](#)⁶ defines common law as the 'Common Law of England'. Therefore, **English common law**, doctrines of equity, the statutes which were in force in England on the 17 August 1911, and English statutes selected under the [Extension Act](#) s 2 are in force in Zambia subject to the [Constitution](#) and any other Zambian written law. Among the English statutes extended to Zambia is the Statute of Limitation Act 1939 of England.

6. In Zambia, the Constitution is the supreme law, and any other law that is inconsistent with it is void to the extent of the inconsistency. The case of *Mulundika and Others v The People*⁷ confirm this position. No law, including the English common law

² Constitution of Zambia 1996 as amended by Act No 2 of 2016.

³ English Law (Extent of Application) Act 4 of 1963 as amended by Acts No 24 of 1973 and 1 of 1991 [Chapter 11 of the Laws of Zambia].

⁴ British Acts Extension Act [Chapter 10 of the Laws of Zambia].

⁵ [English Law \(Extent of Application\) \(Amendment\) Act No 6 of 2011](#).

⁶ Interpretation and General Provisions Act 1964 [Chapter 2 of the Laws of Zambia].

⁷ [\(1995-1997\) Z.R.20](#).

and statutes extended, can override the Constitution. Zambian written law takes precedence over English law. However, English law, such as the Statute of Limitation Act 1939 of England, binds Zambian courts in the absence of conflicting Zambian written law. The cases of *Ruth Kumbi v Robson Kaleb Zulu*⁸ and *Isaac Lungu v Mbewe Kalikeka*⁹ confirm the above position.

It is important to note that while Zambian courts are bound to apply principles of English common law because it is part of Zambian law, they are not bound by English court decisions. However, in Zambia, English court decisions are highly persuasive, particularly those from superior courts.

7. The cases of *Harton Ndove v National Education Company of Zambia Limited*,¹⁰ *Director of Public Prosecutions v Jack Lwenga*,¹¹ *Chuzi v The People*,¹² *Miller v Attorney General*,¹³ and *Bank of Zambia v Caroline Anderson and Another*,¹⁴ establish the above position. Zambian courts usually follow the persuasive English decisions unless there are factual distinctions or compelling reasons warranting departure. Moreover, Zambian courts consider subsequent English decisions and those from other common law. Again, they will only depart from them if there are factual distinctions or compelling reasons to depart from such decisions. The Supreme Court of Zambia established this position in *Nyimba Investment Limited v Nico Insurance Zambia Limited*.¹⁵

General observations

8. Matters taken to court are divided into two general categories, namely civil and criminal matters. Civil remedies are sought under civil matters. Civil claims and liability may be based on **common law**, **statutory law**, and **the Constitution**. Civil liability for the torts of assault, unlawful arrest and detention, negligence, nuisance, the rule of *Ryland v Fletcher*,¹⁶ trespass, and breach of statutory duty are established based on English common law principles. In addition, civil liability for environmental harm and harmful or unfair labour conditions is based on statutory law. Liability for unlawful arrest, detention and harmful or unfair labour conditions may be based on the Constitution. Some statutory law such as legislation relating to the environment and public health creates criminal liability. In general, Zambia law follows English law in awarding damages.

Assault or unlawful arrest and detention

9. Persons who have experienced an attack inflicting physical harm or unwanted physical contact, credible threat of injury, restricted movement or detention can bring a civil claim against public bodies, corporations or individuals based on the

⁸ SCZ Judgment No 19 of 2009.

⁹ SCZ Appeal No 114 of 2013.

¹⁰ (1980) Z.R. 184 (H.C.).

¹¹ (1983) Z.R. 37 (H.C.).

¹² (1967) Z.R. 100 (CA).

¹³ (1983) Z.R. 66.

¹⁴ (1993-1994) Z.R. 47 (SC).

¹⁵ Selected Judgment No 12 of 2017.

¹⁶ [1868] LR3 HC330.

torts of trespass against the person¹⁷ in the form of assault, battery, and false imprisonment. The common law tort of negligence is also available. Zambian courts apply English common law principles in determining these torts.

10. A claim of **assault** may be available when a person is caused to apprehend the immediate infliction of unlawful physical contact. The person causing such apprehension must have the capacity to carry out the intention.¹⁸
11. A claim of **battery** may be available when a person intentionally 'directly applies physical force on the other person'.¹⁹
12. A claim of **false imprisonment** may be available if a person 'unlawfully and either intentionally or recklessly restrains another person's movements from a particular place'.²⁰ The restraint must be total for any time, even if it's a short period. However, there is no basis for a claim of false imprisonment for a justifiable arrest or restraint based on 'reasonable and probable cause'.²¹
13. A claim of **negligence** may be available when a person breaches a duty of care owed to the claimant, resulting in the claimant suffering reasonably foreseeable actual harm. In *Faindani Daka v the Attorney General*,²² a claim was made against the police for negligent use of force. The police officers approached four young men seen behind a house and informed them they were suspects in a theft case. The young men denied the allegation and one of them offered to take the police to his house, which was nearby, to check for the alleged stolen items. The police rejected his request, and one of the officers shot him dead. The Court held that the police officer owed the deceased a duty of care and was liable in negligence for discharging his firearm, which caused death.
14. The claim of **unjustified and excessive use of force** may be available when police officers or private security officers use force (for example, against unarmed people), resulting in death or injury. In *Albert Mwanaumo and 5 Others v NFC Mining Plc and 2 Others*,²³ five employees of China Nonferrous Metal Industry (NFC) Mining Plc were shot during a protest concerning labour conditions. The mine police were overwhelmed during the protest and called in Zambian police for help. While a trade union officer addressed the protesting crowd, the head of the mine police shot into the crowd, killing one mine worker. Furthermore, he called and instructed a Chinese mine worker to shoot at a crowd that was gathered near China House, about a kilometre from the mine. The Chinese mineworker opened fire into the crowd, injuring four people who suffered gun wounds. The High Court found that the head of the mine police and the Chinese mine worker used unjustified and excessive force against an unarmed crowd and held that their action amounted to unlawful and wrongful shooting.
15. **Limitation of liability for law enforcement:** Under *Penal Code Act* s 78,²⁴ an authorised officer, a police officer, or any other person acting in aid of such authorised person or police officer is allowed to use force reasonably necessary

¹⁷ Zambian courts rely on learned authors of *Clerk and Lindsell on Torts* and *Winfield & Jolowicz on Tort* when deciding tort matters.

¹⁸ *Chief Chanje v Paul Zulu* (Appeal No 73/2008) [2012] ZMSC 23, citing *Stephen v Myers* [1830] 2 ALL ER 850.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *Attorney General and Others v Phiri (Selected Judgment No 28 of 2017)* [2017] ZMSC 63, 975-6.

²² [1991] ZMHC 2.

²³ (2006/HK/385) [2011] ZMHC 1.

²⁴ *The Penal Code Act* [Chapter 87 of the Laws of Zambia].

to disperse rioters and is not liable in civil proceedings for harm or death caused to any person by use of such force. Before such force can be used, the procedure under Penal Code Act s 77, which involves making a proclamation in the name of the President of the Republic of Zambia to command the group to disperse, must be followed.²⁵

16. A person unlawfully arrested or detained may bring an action based on **constitutional tort**. Article 13(4) of the [Constitution](#) provides that '[a]ny person who is unlawfully arrested or detained by any other person shall be entitled to compensation thereof from that other person.' Further, beating and other forms of battery may amount to torture or inhuman and degrading treatment prohibited under article 15 of the [Constitution](#) which provides that '[n]o person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment'. Thus in [Attorney General v Felix Chris Kaleya](#),²⁶ the Supreme Court stated that '[t]here is no law which authorises the police to beat up members of the public whom they have detained for investigation, and any assault by police in these circumstances must necessarily be viewed as a serious matter'.

SPOTLIGHT: CASE STUDY

In [Attorney General and 3 Others v Masauso](#),²⁷ an accused man successfully claimed damages for assault, battery, and false imprisonment after police officers detained him on a theft charge. They only informed him of the charge against him the following day. Police officers beat him while he was in detention, resulting in his hospitalisation for a month. The Supreme Court held that the police officers' conduct amounted to the torture of a suspect in police custody, which courts will not condone under article 15 of the Constitution.

Environmental harm

17. A civil claim for environmental harms can be brought against public bodies, corporations and individuals based on statutory and common law causes of action. **Key statutes** include the Environmental Management Act 2011²⁸ (EMA 2011), the Petroleum (Exploration and Production) Act 2008²⁹ (Petroleum Act 2008) and the Mines and Mineral Development Act 2015³⁰ (MMDA 2015).

EMA 2011

18. Some provisions of the EMA 2011 may be the basis of civil claims when they have been or are likely to be violated.
19. EMA 2011 s 4 grants every person living in Zambia the right to a clean, safe, and healthy environment. This right includes access to various environmental elements for recreational, educational, health, spiritual, cultural, and economic purposes.

²⁵ *ibid.*

²⁶ (1982) Z.R. 1(S.C.) 4.

²⁷ SCZ Selected Judgment No 28 of 2017.

²⁸ [Environmental Management Act No 12 of 2011](#).

²⁹ [Petroleum \(Exploration and Production\) Act No 10 of 2008](#).

³⁰ [Mines and Minerals Development Act No 11 of 2015](#).

20. EMA 2011 s 4(3) establishes a right to bring a civil claim against a person whose act or omission is likely to cause harm to human health or the environment. Such an action can be brought by an individual, a group, or a non-governmental organisation on behalf of victims or the public. In [*Moses Lukwanda and 9 Others v Zambia Airforce Projects Limited and 7 Others*](#),³¹ eight headmen, a princess of the Soli people and the Chalimbana Headwater Conservation Trust Limited commenced a civil action against the Zambia Airforce Projects Limited (99 per cent owned by the government), four private investors, two government agencies and the Attorney General, challenging a building project in Lusaka Forest Reserve No 27 on the basis that it posed a threat to the Chalimbana River Catchment and the Greater Lusaka Aquifer system. They contended that the Basoli People and the general public had a right to access clean and uncontaminated water for consumption, and further that the plaintiffs and the general public had a right to a clean, safe and healthy environment under EMA 2011 s 4.
21. In granting the injunction, the Court confirmed that the right to a clean, safe, and healthy environment in terms of EMA 2011 s 4 'makes it abundantly clear that an aggrieved person may commence an action concerning any perceived disobedience to the provisions of the Act'.
22. EMA 2011 s 32 prohibits unlicensed waste discharge into the environment.
23. EMA 2011 s 35 creates a legal duty to report any unlawful discharge of contaminants or pollutants that may cause or are likely to cause adverse effects. A civil claim can be brought against anyone who violates this provision.
24. EMA 2011 s 38 establishes a legal duty on any person who discharges a pollutant or contaminant to take the most appropriate measure for minimising any adverse effects on the environment. A civil claim can be brought against anyone who breaches this legal duty.
25. EMA 2011 s 46 prohibits water pollution. A civil claim can be brought against a public body, a corporation, or an individual for discharging or applying any poisonous, toxic, eco-toxic, obnoxious, or obstructing matter, radiation, or other pollutants or permitting any person to dump or release such matter or contaminant into the aquatic environment in contravention of water pollution control standards established by the Zambia Environmental Management Agency (ZEMA).
26. Under EMA 2011 s 54, a civil claim can be brought against a public body, a corporation, or an individual for violating the prohibition on collecting, storing, treating, and disposing of waste in a manner that causes or creates a significant risk of causing an adverse effect.
27. Under EMA 2011 s 110(1), any person can sue for damages where an act or omission contravenes any provisions of the EMA 2011. Alternatively, a person may sue under EMA 2011 s 110(1) regarding an act or omission that is likely to have an 'adverse effect'. This position is different from negligence, which requires proof of actual harm or damage. The idea here is to protect the environment before it is too late.

31 CAZ/08/323/2019.

28. On the issue of proving damages, the Court of Appeal stated in [Moses Lukwanda and 9 Others v Zambia Airforce Projects Limited and 7 Others](#)³² that:

'In this regard I would state that disputes to do with damage to the environment reside in a hallowed place and should enjoy the principles that apply to loss of land where one does not have to prove irreparable injury. Section 4(1) of the Zambia Environmental Management Act No [12] of 2012 states that,

"Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment" and section 6(a) says as follows,

"The following principles shall be applied in achieving the purpose of this Act: (a) the environment is the common heritage of present and future generations."

In my view one does not need to prove that damage to the environment will result in irreparable injury because once damaged, the environment, like land cannot be quite restored to its original state and the damage may result in untold suffering for generations.'

29. EMA 2011 s 2 defines 'adverse effect' as 'any harmful or detrimental effect on the environment, whether actual or potential, that-(a) impairs, or may impair, human health; and (b) results in, or may result in, an impairment of the ability of people and communities to provide for their health, safety, cultural and economic wellbeing'.
30. Thus, any act or omission which actually or potentially impairs human health, or which results in the impairment of the ability of people and communities to provide for their health, safety, culture, and economic wellbeing, would be subject to an action for damage under EMA 2011 s 110(1). In *Sepiso Stengu v Puma Energy Zambia PLC and ZEMA*,³³ Judge Sitali ruled that:

'The provisions of section 110(1) of [EMA 2011] are clear and unambiguous. Section 110(1) permits a person to sue for damages for an act or omission that contravenes the provisions of the act, which act or omission is likely to have an adverse effect whether or not the person or any other person has suffered or is likely to suffer any loss or harm as a result of the act or omission'.³⁴

The Petroleum Act 2008

31. According to the [Petroleum Act 2008](#) s 71(1), a petroleum exploration or petroleum development and production licence holder 'shall be strictly liable for any harm or damage caused by exploration or development and production operations and shall compensate any person to whom the harm or damage is caused'.
32. Under Petroleum Act s 71(2), 'liability shall attach to the person who directly contributes to the act or omission which results in the harm or damage'.
33. Under Petroleum Act s 71(3), '[w]here there is more than one person responsible for the harm or damage, the liability shall be joint and several'.

³² CAZ/08/323/2019 R33.

³³ (2012/HP/268).

³⁴ *ibid* R5.

34. According to Petroleum Act s 71(5), liability extends to:
- (a) any harm or damage caused directly or indirectly by the exploration and development and production operations to the economy or social cultural conditions;
 - (b) any negative impact on the livelihood or indigenous knowledge systems or technologies of any community;
 - (c) any disruption or damage to any production or agricultural system;
 - (d) any reduction in yields of the local community;
 - (e) any air, water or soil contamination or damage to biological diversity;
 - (f) any damage to the economy of an area or community; or
 - (g) any other consequential disorder.
35. On standing, Petroleum Act s 71(7) states that '[a]ny person, group of persons or any private or state organisation may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions– (a) in that person's or group of person's interest; (b) in the interest of or on behalf of, a person who if, for practical reasons, unable to institute such proceedings; (c) in the interests of, or on behalf of, a group or class of person whose interests are affected; (d) in the public interest; (e) in the interests of protecting the environment or biological diversity'.

MMDA 2015

36. The [MMDA 2015](#) is equally relevant to claims for environmental harms and has similar provisions to the Petroleum Act 2008.
37. According to MMDA s 87(1), a mining licence holder 'shall be strictly liable for any harm or damage caused by mining operations or mineral processing operations and shall compensate any person to whom harm or damage is caused'.
38. Under MMDA s 87(2), 'liability shall attach to the person who directly contributes to the act or omission which results in the harm or damage'. Therefore, a person who is not the holder of a mining licence can still be liable if they directly contribute to the act of the licence holder that causes harm or damage.
39. MMDA s 87(3) states that '[w]here there is more than one person responsible for the harm or damage, the liability shall be joint and several'.
40. Under MMDA s 87(5), liability extends to:
- (a) any harm or damage caused directly or indirectly by the mining or mineral processing operations to the economy or social cultural conditions;
 - (b) any negative impact on the livelihood or indigenous knowledge systems or technologies of any community;
 - (c) any disruption or damage to any production or agricultural system;
 - (d) any reduction in yields of the local community;
 - (e) any air, water or soil contamination or damage to biological diversity;
 - (f) any damage to the economy of an area or community; or
 - (g) any other consequential disorder.

41. MMDA s 87(7) grants the right to bring a civil claim to any person, group of persons or any private or state organisation, similar to that given under Petroleum Act s 71(7) (see [35] above).
42. Indeed, the provisions of the EMA 2011, Petroleum Act 2008, and the MMDA 2015 demonstrate that Zambia has an excellent strict liability law for environmental harm³⁵ that may make claims based on common law negligence unnecessary. However, few civil cases are brought as a result of the challenges associated with access to justice, as explained in [98] below.

Common law of negligence

43. Common law negligence can be the basis for a civil claim due to environmental harms in Zambia. Zambian negligence law is like the English common law. The English case of *Donoghue v Stevenson*³⁶ is still good law and is often the starting point in Zambia.

SPOTLIGHT: CASE STUDY

In *Mopani Copper Mines Plc v Miti (Suing in his capacity as Administrator of the Estate of the late Geoffrey Elliam Miti) & Others*,³⁷ the courts considered the liabilities of Mopani Copper Mine Plc (MCM), then-subsubsidiary of Glencore Plc, for emitting sulphur dioxide from its smelter into the atmosphere, which Mrs Miti inhaled before dying from acute respiratory failure. The Supreme Court explained that '[t]o succeed in a claim for negligence, a litigant must show that a defendant owed him/her a duty of care; which duty of care was breached by the defendant resulting in harm to him or her; and the harm was reasonably foreseeable'.³⁸ The Supreme Court upheld the trial court's judgment that MCM owed a duty of care in the community where it operated its smelter, and it breached its duty of care when it emitted high volumes of sulphur dioxide into ambient air, which exceeded statutory limits, thereby resulting in Mrs Miti's death. The Court held MCP liable and awarded damages of one million Zambian Kwacha (approximately USD 57 011.45).

44. The Supreme Court has clarified, in the case of *Michael Chilufya Sata v Zambia Bottlers Limited*,³⁹ that to establish a tort of negligence, the defendant's actions or omissions must result in actual damage to the plaintiff and that there is no right of action for nominal damages in negligence.
45. To be awarded damages for personal injury due to the defendant's negligence, the plaintiff must produce medical evidence to prove the injury. Zambian Courts cannot award damages for personal injury without medical evidence. The cases

³⁵ *Vedanta Resources Plc & Another v Lungowe and Others* (2019) UKSC 20; [2020] AC 1045 [63]; *Doris Chinsambwe and 65 Others v NFC Africa Mining* [2014] HK 374.

³⁶ (1932) AC 562.

³⁷ (Appeal 154 of 2016) [2020] ZMSC 79.

³⁸ *ibid* [9.5].

³⁹ SCZ No 1 of 2003.

of [Attorney General v Frank Moyo](#),⁴⁰ [Continental Restaurant and Casino Ltd v Arida Mercy Chula](#)⁴¹ and [Konkola Copper Mines and Others v James Nyansulu and Others](#)⁴² all confirm the need to produce medical evidence for personal injury claims.

46. This was demonstrated in [Konkola Copper Mines and Others v James Nyansulu and Others](#). Konkola Copper Mines (KCM), a subsidiary of Vedanta Resources Plc, discharged highly toxic effluents from its tailings dam into the water sources for the local community when the mine's tailings pipeline ruptured. The community consumed the contaminated water resulting in various illnesses. The High Court found KCM liable in common law negligence and breach of statutory duty for discharging the toxic effluent into the community's water sources and awarded global damages. On appeal, the Supreme Court upheld the trial Court's judgment on liability but set aside the award for damages because only 12 out of 2001 plaintiffs produced the required medical report to support their claim for personal injury. The Supreme Court directed that the matter be taken to the Registrar to assess damages for the 12 plaintiffs who produced medical evidence.
47. At common law, a person may be strictly liable under the tort in *Rylands v Fletcher*⁴³ when they bring anything on land that can cause harm if it escapes. The High Court confirmed this position in [James Nyansulu & 2000 Others v Konkola Copper Mines Plc & Others](#),⁴⁴ when it quoted Lord Blackburn's statement in *Ryland v Fletcher* that:

*'the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and he is prima facie answerable for all the damage which is the natural consequence of its escape'.*⁴⁵

Nuisance

48. Zambia applies the English common law principles of the tort of nuisance as established by *St Helen's Smelting Co v Tipping*,⁴⁶ *Clerk and Lindsell on Torts*,⁴⁷ and *Winfield & Jolowicz on Tort*.⁴⁸ This is confirmed in the cases of *Doris Chinsambwe and 65 Others v NFC Africa Mining*⁴⁹ and [National Hotels Development Corporation T/A Fairview Hotel v Ebrahim Motala](#).⁵⁰ Nuisance can be either public or private. A claim of **public nuisance** may be available when an act or omission causes unreasonable interference with the use and enjoyment of a right belonging to the claimant as a member of the public.⁵¹ To sue for public nuisance, the claimant must demonstrate special harm above what the other members of the public have suffered.
49. A claim of **private nuisance** may be available when an act or omission causes unreasonable interference with the use and enjoyment of the lawful occupant's land or their proprietary rights. To succeed in private nuisance, the claimant must have sufficient interest in the land, at least be occupying the land.⁵²

⁴⁰ SCZ Judgment No 9 of 2007 [2007] ZMSC 09.

⁴¹ SCZ Judgment No 28 of 2000.

⁴² (Appeal 1 of 2012) [2015] ZMSC 33.

⁴³ [1868] L.R.3 H.C.330; see also Percy Henry Winfield, JA Jolowicz and WWH Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 16th edn 2002) 549.

⁴⁴ (2007/HP/1286) [2011] ZMHC 114.

⁴⁵ *ibid* J13.

⁴⁶ [1865] UKHL J81.

⁴⁷ See (n 17).

⁴⁸ See (n 17).

⁴⁹ [2014] HK 374.

⁵⁰ SCZ Judgment 10 of 2002 [2002] ZMSC 129.

⁵¹ *ibid*.

⁵² Winfield et al (n 43); *Doris Chinsambwe* (n 35).

Harmful or unfair labour conditions

50. A claim for harmful or unfair labour conditions can be brought against public bodies, corporations and individuals under common or statutory law. An employer owes the employee a duty of care under both common and statutory law to take reasonable steps to ensure the employee's health, safe working environment and well-being. In [Lafarge Cement PLC vs Patrick Mandonga](#),⁵³ the Supreme Court advised that employment creates a legal relationship from which certain rights and duties flow and that 'a breach of a legal duty owed by one to another would entitle the innocent party to legal relief'.⁵⁴

Statutory causes of action

[Workers' Compensation Act No 10 of 1999](#)

51. Under the Workers' Compensation Act 1999 s 6,⁵⁵ a civil claim can be brought against an employer when an injury is caused or a disease is contracted by a worker due to negligence, breach of statutory duty or other wrongful act or omission of the employer. A claim can be brought against an employer when the injury is caused, or disease contracted by a worker due to the negligence, breach of statutory duty, or other wrongful act or omission of any person for whose act or default the employer is responsible for.

[Occupational Health and Safety Act No 36 of 2010](#)

52. The Occupational Health and Safety Act 2010 ss 6(1) and (2)(a)⁵⁶ create a legal duty for an employer to 'ensure, so far as is reasonably practicable, the health, safety and welfare of the employees of the employer at a workplace' and to 'provide plant and systems of work that are, so far as is reasonably practicable, safe and without any risks to human health and maintain them in that condition'. In [China State Construction and Engineering Corporation Zambia v Mwape Kaimba](#),⁵⁷ the respondent, while working at the appellant's construction site was struck on the head by a tower crane operated by the appellant's employee, resulting in injuries. The Court of Appeal held that 'it is the employer's duty to ensure that the working environment for its employees is secure and safe'⁵⁸ and that providing protective clothing would not discharge the employer from the obligation to adhere to legal requirements.⁵⁹
53. Further, [Occupational Health and Safety Act 2010](#) s 17(1)(a) imposes a legal duty on an employer at the workplace to 'take reasonable care of the employee's own health and safety and that of others who may be affected by the employee's acts or omission at the workplace'. A breach of the above duty by the employer can be a basis for civil action.

⁵³ Selected Judgment No 15 of 2017 [2017] ZMSC 35.

⁵⁴ *ibid* 518.

⁵⁵ [Workers' Compensation Act No 10 of 1999](#).

⁵⁶ [Occupational Health and Safety Act No 36 of 2010](#).

⁵⁷ Appeal No 64/2019.

⁵⁸ *ibid* [45].

⁵⁹ *ibid* [43].

[Constitution of Zambia](#)

54. Article 14 of the [Constitution](#) prohibits slavery and forced labour, stating '[n]o person shall be held in slavery or servitude'⁶⁰ and '[n]o person shall be required to perform forced labour'.⁶¹
55. Further, article 24 prohibits the exploitation of persons under the age of fifteen years, stating that 'no young person shall be employed and shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral development'.⁶²
56. Therefore, a person subjected to slavery, forced labour, or child labour may make a civil claim by filing a petition under the Protection of Fundamental Rights Regulations 1969, as read with article 28 of the Constitution, against anyone who violates articles 14 and 24 of the [Constitution](#).
57. **Note:** The [Employment Code](#) No 3 of 2019 prohibits the employment of children under the circumstances listed in ss 81, 82, and 84, and creates criminal sanctions for violations of those proceedings. No case has been found where an aggrieved person instituted civil proceedings.

Common law causes of action

58. An employee who suffers injury or contracts disease due to the employer's negligence can bring a civil action for damages against the employer for such failure. Such action is independent of the proceedings under the [Workers' Compensation Act 1999](#) or any other statute (see [51]-[53] above).
59. In [China State Construction and Engineering Corporation Zambia v Mwape Kaimba](#) described in [52] above, the Court of Appeal stated that 'it is the view of this Court that section 6 of the Workers' Compensation Act ... does not proscribe a claimant from bringing a civil action against the employer independently'.⁶³
60. In [Mwamba v Metal Fabricators of Zambia Ltd](#),⁶⁴ the plaintiff sought aggravated damages for personal injuries sustained from electrocution while working in the defendant's substation. He claimed he suffered the injuries because the defendant failed to provide a safe working environment, competent workmates, and a safe working system. The Court held that the defendant breached its common law duty by failing to ensure a safe working system. The Court also held that the defendant ought to have ensured its work layout was done in a manner that eliminated the danger. Further, the Court reiterated that employers are liable for the damage due to the fault or negligence of their employees caused in the course of their employment.

⁶⁰ Constitution, art 14(1).

⁶¹ *ibid*, art 14(2).

⁶² *ibid*, art 24(1).

⁶³ *China State Construction* (n 57) [57].

⁶⁴ (2005/HN/ 279); [2011] ZMHC 109.

Q2

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

Assault, battery, and false imprisonment

61. **Assault:** an intentional or reckless act that causes someone to be put in fear of immediate physical harm ([Stephens v Myers](#),⁶⁵ [Fowler v Lanring](#),⁶⁶ [Turberville v Savage](#),⁶⁷ and [Chief Chanje v Zulu](#)⁶⁸).

Elements to be established:

- A reasonable apprehension of harm;
- The defendant's act must be intentional;
- Immediate apprehension or fear; and
- Reasonable belief that the defendant has present capacity to effect the harm.

62. **Battery:** the intentional or reckless application of physical force to someone without their consent or lawful justification ([Pursell v Hone](#),⁶⁹ [Scott v Shepherd](#),⁷⁰ [Chief Chanje v Zulu](#),⁷¹ [Attorney General and Others v Masauso Phiri](#),⁷² and [Attorney General v Felix Chris Kaleya](#)⁷³).

Elements to be established:

- Use of direct and immediate force: The amount of force used is immaterial; the least touching of another in anger is considered a battery.
- Intention: The plaintiff must prove the use of force was intentional. An involuntary act cannot be considered a battery.
- Absence of actual or implied consent: There is no battery if the force used is permitted or authorised under law⁷⁴ or if the touch is acceptable in everyday life.⁷⁵

63. **False imprisonment:** the unlawful restriction of a person's freedom of movement from a particular place ([Bird v Jones](#),⁷⁶ [Attorney General and Others v Masauso Phiri](#),⁷⁷ [Attorney General v Kakoma](#),⁷⁸ [Gaynor v Cowley](#),⁷⁹ [Daniel Chizoka Mbandangoma v The Attorney General](#),⁸⁰ [Mubita Mubanga v The Attorney General](#),⁸¹ [Daniel Nyondo v ZESCO Limited and The Attorney General](#),⁸² [Richman Chulu v Monarch \(Z\) Limited](#),⁸³ and article 13(4) of the [Constitution](#)).

65 (1830) 172 ER 735.

66 (1959) 1 QB 42.

67 (1669) 1 Mod Rep 3.

68 [Chief Chanje](#) (n 18).

69 (1898) 3N and P 564.

70 96 Eng. Rep. 525 (K.B. 1773).

71 [Chief Chanje](#) (n 18).

72 [Masauso Phiri](#) (n 21).

73 [Felix Chris Kaleya](#) (n 26).

74 [Wilson v Pringle](#) [1986] 2 All ER 440.

75 [Collins v Wilcock](#) [1984] 1 WLR 1172.

76 7 Ad. & El. (N.S.) 742, 115 Eng. Rep. 688 (1845).

77 [Masauso Phiri](#) (n 21).

78 (1975) Z.R. 212 (S.C.).

79 (1971) Z.R. 50.

80 (1979) Z.R. 45.

81 (1979) Z.R.234.

82 2009/HK/642.

83 (1983) Z.R. 234.

Elements to be established:

- The total restraint of the liberty of a person: There must be a total restraint and not a partial one. If the victim/plaintiff has ways of escape open to them, it is not false imprisonment.
- The restraint must be unlawful: The period for which the detention continues is immaterial. But it must not be lawful.

Environmental harm**Claims under EMA 2011**

64. Claims under EMA 2011 ss 4(3) and 110: Threats to the right to a clean, safe, and healthy environment (see [20] above).

Elements to be established:

- A person's right to a clean, safe, and healthy environment is threatened or likely to be threatened.
- The act or omission.
- Causation (likely to cause harm to human health or the environment).

65. Claims under EMA 2011 ss 35 and 110: failure to report to the ZEMA the discharges of a contaminant or pollutant into the environment (see [23] above).

Elements to be established:

- Discharge of a contaminant or pollutant into the environment.
- Unlawful cause of an adverse effect or the likelihood of causing an adverse effect.
- Failure to report to ZEMA.

66. Claims under EMA 2011 ss 54 and 110: Collecting, storing, treating, and disposing of waste in a manner that causes or creates a significant risk of causing an adverse effect (see [26] above).

Elements to be established:

- The collection, transportation, sorting, recovering, treating, storing, disposing of, or other management of waste.
- In a manner that results in an adverse effect or creates a significant risk of an adverse effect occurring.

67. Claims under EMA 2011 ss 46 and 110: Discharging or applying any poisonous, toxic, eco-toxic, obnoxious, obstructing matter, or pollutant into the aquatic environment (see [25] above).

Elements to be established:

- The discharge of or permitting of someone to discharge any poisonous, toxic, eco-toxic, obnoxious, or obstructing matter or pollutant or permitting any person to dump or discharge such matter or pollutant into the aquatic environment.
- In contravention of water pollution control standards established by ZEMA under EMA 2011 s 46.

Claims under MMDA 2015

68. Claims under MMDA 2015 s 87(1): A mining licence holder causing harm or damage by mining or mineral processing operations (see [37] above).

Elements to be established:

- The holder of a mining licence.
- Strict liability (*mens rea*).
- Direct or indirect causation by mining operations/mineral processing.
- Any harm or damage.

69. Claims under MMDA 2015 ss 87(5)(a)-(g): The mining licence holder causes 'harm or damage caused directly or indirectly ... to the economy or social cultural conditions ... negative impact on livelihood ... disruption or damage to any production, or agricultural system reduction in yields of the local community ... air, water or soil contamination... damage to biological diversity, damage to the economy of an area or community... consequential disorder' through mining operations or mineral processing operations (see [40] above).

Elements to be established:

- The holder of a mining licence.
- Strict liability (*mens rea*).
- Direct or indirect causation by mining operations/mineral processing.
- Any of the following harms or damage: (a) harm or damage caused directly or indirectly to the economy or social cultural conditions; (b) any negative impact on livelihood' (c) disruption or damage to any production or agricultural system; (d) reduction in yields of the local community; (e) air, water or soil contamination or damage to biological diversity; and (f) damage to the economy of an area or consequential community disorder.

Claims under Petroleum Act 2008

70. Petroleum Act 2008 s 71(1): A petroleum exploration or petroleum development and production licence holder is strictly liable for any harm or damage caused by exploration or development and production operations (see [31] above).

Elements to be established:

- The holder of a petroleum exploration or development and production licence.
- Strict liability (*mens rea*).
- Direct or indirect causation by exploration or development and production operations.
- Any harm or damage.

71. Petroleum Act 2008 s 71(5)(a)-(g): The holder of a petroleum exploration or petroleum development and production licence, through exploration or development and production operations, causes 'harm or damage caused directly or indirectly ... to the economy or social cultural conditions ... negative impact on livelihood ... disruption or damage to any production or agricultural system ... reduction in yields of the local community ... air, water or soil contamination ... damage to biological diversity, damage to the economy of an area or community ... consequential disorder' (see [34] above).

Elements to be established:

- The holder of a petroleum exploration or development and production licence.
- Elements 2- 4 are the same as set out in [68]-[69] above under MMDA 2015 s 87(1).

Negligence under common law

72. See *Donoghue v Stevenson*,⁸⁴ *Mithi v Mopani Copper Mines Plc* and the *Attorney General*,⁸⁵ [*Mopani Copper Mines Plc v Miti \(Suing in his capacity as Administrator of The Estate of The late Geoffrey Elliam Miti\) & Others*](#),⁸⁶ and [*Attorney General v George Mwanza and Whiteson Mwanza*](#),⁸⁷ and [*Mwansa v Zambia Breweries PLC*](#).⁸⁸

Elements to be established:

- The defendant owed the plaintiff a duty of care.
- The defendant breached its duty of care to the plaintiff.
- The defendant's failure caused the plaintiff harm.
- The harm suffered was foreseeable.

73. **Note:** In *Mopani Copper Mines Plc v Miti*, in which Mrs Miti died from acute respiratory failure after inhaling toxic fumes emitted by the Mopani smelter, the appellant invited the Court to apply the test established by the UK House of Lords in [*Caparo Industries plc v Dickman*](#)⁸⁹ in which the claimant must prove: (i) that harm was reasonably foreseeable; (ii) that there was a relationship of proximity; and (iii) that it is fair, just, and reasonable to impose a duty of care. However, the Zambian Supreme Court did not apply this test. No case has been found where duty was established based on the *Caparo* three-stage test. However, in [*Perfect Pools Limited v Barclays Bank Limited*](#),⁹⁰ the High Court was referred to and applied the *Caparo* three-stage test and found, at J20, that it 'would not be fair, just and reasonable [to] impose a duty of care on the defendant'.

Tort in *Rylands v Fletcher*

74. See *James Nyansulu & 2000 Others v Konkola Copper Mines Plc & Others*.⁹¹

Elements to be established:

- Strict liability.⁹²
- The nature of the dangerous thing.⁹³
- Escape.
- Reasonably foreseeable damage.

84 *Donoghue* (n 36).

85 *Mithi v Mopani Copper Mines Plc and the Attorney General* (2014/HB/028) unreported.

86 (Appeal 154 of 2016) [2020] ZMSC 79.s

87 Selected Judgment No 38 of 2017.

88 (Appeal 153 of 2014) [2017] ZMSC 42.

89 (1990) 2 AC 605.

90 2013/HP/1388.

91 *James Nyansulu & 2000 Others* (n 44).

92 The Court found in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1993] ABCLR 12/09 that strict liability in *Rylands v Fletcher* must be reasonably foreseeable.

93 Factual inquiry of whether '(1) 'the condition of 'escape' from the land of something likely to do mischief if it escapes,' and (2) 'the condition of 'non-natural' use of the land'. Winfield et al (n 43) 554-555.

Nuisance

75. See *St Helen's Smelting Co v Tipping*,⁹⁴ and *Doris Chinsambwe and 65 Others v NFC Africa Mining*,⁹⁵ and Public Health Act 1930 s 64.

Elements to be established:

- Unreasonable interference with the use and enjoyment.
- Of the lawful occupant's land or their proprietary rights.

Harmful or unfair labour conditions

Claims under [Workers' Compensation Act 1999](#)

76. Workers' Compensation Act 1999 s 6: Injury caused or disease contracted by a worker due to the negligence, breach of statutory duty or other wrongful act or omission of the employer or of any person for whose act or default the employer is responsible (see [51] above).

Elements to be established:

- The employer-employee relationship creating a statutory duty of care in favour of the employee.
- A breach of statutory duty to take reasonable steps reasonably possible to ensure the employee's health, safe working environment and well-being.
- Injury caused or disease contracted by a worker due to the breach of duty.

Claims under [Occupational Health and Safety Act 2010](#)

77. Occupational Health and Safety Act s 6(1) and [China State Construction and Engineering Corporation Zambia v Mwape Kaimba](#):⁹⁶ The employer's failure to 'ensure, so far as is reasonably practicable, the health, safety and welfare of the employer's employees at a workplace' (see [52] above).

Elements to be established:

- The employer-employee relationship creating a statutory duty of care in favour of an employee.
- A breach of statutory duty through failure to ensure, as far as is reasonably practicable, the health, safety, and welfare of the employer's employees at a workplace.
- Injury suffered by an employee due to the breach of duty.

78. Occupational Health and Safety Act 2010 s 6(2)(a) and [China State Construction and Engineering Corporation Zambia v Mwape Kaimba](#):⁹⁷ The employer's failure to provide plant and systems of work that are, as far as is reasonably practicable, safe and without any risks to human health and maintain them in that condition (see [52] above).

94 [1865] UKHL J81.

95 [2014] HK 374.

96 Appeal No 64/2019.

97 *ibid.*

Elements to be established:

- The employer-employee relationship creating a statutory duty of care in favour of an employee.
- A breach of statutory duty through failure to provide plant and safe systems of work and without any risks to human health and maintain them in that condition.
- Injury suffered by an employee due to the breach of duty.

79. Occupational Health and Safety Act 2010 s 17(1)(a); [China State Construction and Engineering Corporation Zambia v Mwape Kaimba](#):⁹⁸ Concerning the employer's failure to take reasonable care of the employee's health and safety and that of others who may be affected by the employee's acts or omission at the workplace (see [53] above).

Elements to be established:

- The employer-employee relationship creating a statutory duty of care in favour of an employee.
- A breach of statutory duty through failure to take reasonable care of the employee's health and safety and that of others who may be affected by the employee's acts or omission at the workplace.
- Injury suffered by an employee or another person at the workplace due to the breach of duty.

Claims under the [Constitution of Zambia \(Amendment\) Act 2016](#)

80. The Constitution article 14(2): Concerning the requiring, engaging, or subjecting of a person to perform forced labour (see [54] above).

Elements to be established:

- The identity of the person.
- The requirement, engagement, or subjection of another person to perform forced labour.

81. The Constitution article 24: Concerning a young person employed, caused, or permitted to engage in any occupation or employment prejudicial to the young person's health or education or interferes with a young person's physical, mental, or moral development (see [55] above).

Elements to be established:

- A person under the age of fifteen years.
- Employed, caused, or permitted to engage in any occupation or employment.
- Occupation or employment that is prejudicial to a young person's health or education or that interferes with a young person's physical, mental, or moral development.

98 *ibid.*

Q3

Does the law of your jurisdiction recognise civil liabilities for complicity or accessory conduct (similar concept) concerning the three defined harms?

82. In Zambia, public bodies, corporations, and individuals may face civil liability if their conduct contributes to harm suffered by the victims. They may also be held vicariously liable.
83. The Law Reform (Miscellaneous Provisions) Act s 9,⁹⁹ permits proceedings against and contribution between joint and several tortfeasors. The cases of *Attorney General v Kapwepwe*¹⁰⁰ and *Duncan Sichula and Muzi Transport Freight and Forwarding Limited v Catherine Mulenga Chewa (Married Woman)*¹⁰¹ confirm this position.
84. Under Petroleum Act 2008 s 71(2) and MMDA 2015 s 87(2), 'liability shall attach to the person who directly contributes to the act or omission which results in the harm or damage'. This means that persons other than licence holders may be held liable for their direct contribution to the harm the licence holders' activities cause.
85. Under rules of **vicarious liability**, a party may be held responsible for the negligence or tortious acts of another. This is common when a master/servant, employer/employee, or principal/agent relationship exists. In *Giorgio Fraschini and Motor Parts Industries v Attorney General*,¹⁰² the Supreme Court held that an employer is liable for the negligent acts of its employee committed in the course of employment even if the employee acted in disobedience of the employers' instruction. Similarly, in *Industrial Gases Limited v Waraf Transport Limited and Mageehaid*,¹⁰³ the Supreme Court held that '[a]s long as the wrong is committed by an employee in the course of his employment, the general rule is that the employer will be vicariously liable'. Thus, in *Albert Mwanaumo and 5 Others v NFC Mining Plc and 2 Others*,¹⁰⁴ where five employees of China Nonferrous Metal Industry (NFC) were shot by and at the instruction of the mine police during a protest, NFC was held vicariously liable for the unlawful and wrongful shooting.
86. Vicarious liability does not depend on whether the servant or agent serves under a contract of service or as an independent contractor. In *Dr Sultanova Zumrad v Kasamba Kalinda and Another*,¹⁰⁵ involving the death of a baby during delivery due to poor communication between a visiting consultant doctor and the Teba Hospital nurses, the Supreme Court held that 'Teba Hospital was vicariously liable for the acts or omissions of the appellant (if any) and its servants or agents, committed in the course of their duties, whether they were independent contractors or servants under a contract of service'.¹⁰⁶

⁹⁹ [Law Reform \(Miscellaneous Provisions\) Act](#) [Chapter 74 of the Laws of Zambia].

¹⁰⁰ (1974) Z.R. 207 (S.C.) [1974] ZMSC 23.

¹⁰¹ (SCZ Judgment No 8 of 2000) [2000] ZMSC 10.

¹⁰² (1984) Z.R. 29 (S.C.).

¹⁰³ SCZ Judgment No 2 of 1997.

¹⁰⁴ *Albert Mwanaumo* (n 23).

¹⁰⁵ (Appeal 201 of 2015) [2018] ZMSC 310.

¹⁰⁶ *ibid* J 374-375

Q4

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

Currently, no Zambian authority guides on a parent company's liability for the wrongful acts and/or omissions of a subsidiary or an independent contractor in the supply chain. All that exists are cases dealing with piercing the corporate veil. Therefore, Zambian courts would follow relevant English jurisprudence on parent company responsibility for the wrongful acts or omissions of their subsidiaries or independent contractors.

87. **Piercing the corporate veil** 'entails overlooking the veil of incorporation and facing the persons (natural or judicial) who own the corporate entity'.¹⁰⁷ The corporate veil may be pierced based on statutory law or common law in Zambia.
88. Several statutes provide instances when the corporate veil may be pierced. For example, the [Corporate Insolvency Act](#) No 9 of 2017 s 175¹⁰⁸ permits the court to hold liable a person who knowingly uses the corporation's business for a fraudulent purpose or with an intent to defraud creditors.
89. Under common law, Zambian courts may pierce the corporate veil if satisfied that (1) the corporate veil is used to conceal the actual situation of the corporation, (2) the corporate veil is used to avoid existing obligations, (3) the corporate veil is used for an improper or fraudulent purpose, and (4) that other methods of recovery are not available.

SPOTLIGHT: CASE STUDY

The principles above were applied in the case of [Madison Investment, Property and Advisory Company Limited v Kanyinji](#),¹⁰⁹ in which the respondent was employed as a managing director for Perfect Milling Company Limited (Perfect Limited), which was owned by Madison Investment Property and Advisory Company Limited (Madison), both companies being part of the Madison group of companies. In this case, although the Court of Appeal found that Madison indicated its assumption of responsibility to the respondent for its subsidiary and was involved in the management of its subsidiary, Madison did not do much to create a relationship with the respondent. The Court of Appeal applied the principles developed in the English cases of [Prest v Petrodel Resources Ltd](#)¹¹⁰ and [Re Southard Ltd](#).¹¹¹ It thus held that '[o]wnership and control of a company are not, of themselves sufficient to justify the piercing of the corporate veil'.

¹⁰⁷ [Madison Investment, Property and Advisory Company Limited v Kanyinji](#) (Appeal 10 of 2016) [2018] ZMSC 348, 1747.

¹⁰⁸ Corporate Insolvency Act No 9 of 2017.

¹⁰⁹ *Madison* (n 107), 1780.

¹¹⁰ (2013) UK SC 34.

¹¹¹ (1979) 1 WLR 1189.

Liability of a parent company under English common law

90. In the absence of Zambian authority on the liability of a parent company for their subsidiary's wrongful acts and/or omissions, Zambian courts would follow relevant English case law, particularly those from appellate courts. Thus, a Zambian court would most probably follow the recent decision of the Supreme Court of England and Wales in *Vedanta Resources Plc & the Another v Lungowe and Others*,¹¹² and *Okpabi and Others v Royal Dutch Shell Plc and Another*¹¹³ on the liability of the parent company for activities of its subsidiary.

91. In *Vedanta Resources Plc*, Lord Briggs guided that 'the liability of parent companies concerning the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence' and that whether a duty of care arises 'depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'.¹¹⁴

92. The UK Supreme Court reaffirmed the above position in *Okpabi* where Lord Hambleton stated:

*'As stated in Vedanta, the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence (para 49). The general principles which determine such liability "are not novel at all" (para 54). Such a case does not involve "the assertion for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care". That means that it "requires[s] no added level of rigorous analysis beyond that appropriate to any summary judgment application in a relatively complex case" (para 60)'.*¹¹⁵

93. In the *Vedanta* and *Okpabi* cases, the UK Supreme Court set out the following four non-exhaustive routes through which a duty of care may arise in the context of the parent and subsidiary company relationships:

- Where the parent company takes over the management or joint management of the relevant activities of its subsidiary,
- Where the parent company provides relevant defective advice and/or promulgates defective group-wide policies which were implemented as of course, by its subsidiary,
- Where the parent promulgates relevant group-wide policies and takes active steps to ensure their implementation by its subsidiary, and
- Where the parent holds itself out as exercising a particular degree of supervision and control.

94. Depending on the facts, a Zambian court may consider any of the above non-exhaustive routes to establish a duty of care against a parent company for the activities of its subsidiary and consequently hold the parent liable for its subsidiary's wrongful acts and/or omissions.

95. **Note:** The *Vedanta* case is highly relevant because Vedanta Resources Plc's subsidiary, Konkola Copper Mine (KCM) was held liable in *Konkola Copper Mines and Others v James Nyansulu and Others* as mentioned earlier in [46]. However, only 12 out of

¹¹² *Vedanta* (n 35).

¹¹³ (2021) UKSC 3.

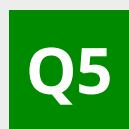
¹¹⁴ *Vedanta* (n 35) [49].

¹¹⁵ *Okpabi* (n 113) [151].

2001 plaintiffs were entitled to damages because the rest did not provide medical evidence to support their claims for personal injury as required under Zambia law. Having succeeded on liability, the plaintiffs would have probably received different remedies if they relied on various provisions of the EMA 2011 and MMDA s 123¹¹⁶ for various damages or injuries other than personal injury.

Liability of parent company for an independent contractor in the supply chain

96. In the absence of Zambian authority on parent company liability for wrongful acts or omissions of an independent contractor in the supply chain relationship, a Zambian court may follow English jurisprudence relating to the developing law of negligence involving third parties, particularly the exception to the general rule that a defendant will not be liable in tort for injury resulting from a third party's intervention. For example, in *Hamida Begum (on behalf of MD Khalia MD Khalil Mollah) v Maran (UK) Limited*,¹¹⁷ Lord Justice Coulson referred to *Clerk and Lindsell on Torts*, 23rd edition, at [7-60], which states that the exception exists 'where the defendant is responsible for the state of danger which may have been exploited by the third party'. Thus, it might be arguable that an independent contractor in the supply chain may be held liable for actively creating a situation of danger, thereby knowingly exposing those connected to the situation (such as workers in the supply chain) to significant danger due to their association with the situation.



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

97. The following remedies are available in Zambia to victims of the three defined harms.

Assault, battery, and false imprisonment

- Compensation for damages.

Environmental harm

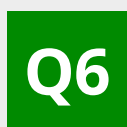
- Compensation for damages / injury to persons.
- Order of remediation, rehabilitation, reinstatement or clean-up of the atmosphere, soil, or water (EMA s 4(4)).
- Cost of reinstatement, rehabilitation, or clean-up measures (Petroleum Act 2008 s 71(4); MMDA 2015 s 87(4)).
- Injunction.
- Relocation of or provision of alternative land to affected communities.
- Compensation for (a) any costs and medical expenses; (b) for any disability suffered; and (c) for loss of life (Petroleum Act 2008 s 71(9); MMDA 2015 s 87(9)).
- Any other appropriate order that would suit the end of justice under the circumstances.

¹¹⁶ [Mines and Mineral Development Act No.11 of 2008](#).

¹¹⁷ [2021] EWCA Civ 326.

Harmful or unfair labour conditions

- Monetary compensation.
- Medical compensation.
- Statutory remedies under the Workers' Compensation Act No 10 of 1999.
- Damages for pain and suffering, loss of amenities, permanent disability, and loss of future prospective earnings.
- Declaratory order, cessation order and compensation for forced or child labour (article 28 of the Constitution).



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

98. Despite legal, practical, and financial challenges for commencing civil claims (particularly mass tort claims), civil remedies remain a favourable means of seeking redress for assault, unlawful arrest and detention, environmental harm, harmful or unfair labour conditions and violation of human rights. Civil proceedings are party-driven, and courts are empowered to award remedies meeting the demands of justice. The compensation for damages goes to the claimants.

Advantages

- The court can issue declaratory judgments confirming and expanding existing rights.
- Courts can grant injunctions to prevent further violations. In the case of *Moses Lukwanda and 9 Others v Zambia Airforce Projects Limited and 7 Others*,¹¹⁸ an injunction was used to protect the environment.
- Judgments are recognised and enforceable. This is different from other non-judicial mechanisms that may require the commencement of civil action to enforce them.
- Accessibility of the judicial system: indigent persons can litigate in person (ideal for non-complex matters).
- Civil procedure is not overly complicated, and court filing fees are affordable.
- Civil claims properly developed as public interest cases can archive broader impact beyond the immediate concerns of the victims, including developing the law through courts.
- Courts can grant various orders to suit the ends of justice, including compensation.
- EMA 2015 s 110(4) prohibits adverse costs.
- Environment-related statutes contain strict liability provisions for environmental damage, thus making it easier to prosecute.

Disadvantages

- Limitation periods can make it impossible to commence civil proceedings.
- Environmental matters are costly due to the evidence required. Poor communities would unlikely afford the funding required to conduct environmental examinations and produce expert evidence.
- The requirement for medical evidence in personal injury claims makes seeking a remedy for personal injury difficult. *Konkola Copper Mines and Others V James Nyansulu and Others*¹¹⁹ is a good example.
- Litigating for environmental harm is difficult because the information needed to prove the case is often held by the defendant or regulator and not accessible to the victims.
- Lack of access to legal representation for complex mass tort cases due to costs and funding challenges.
- Illiterate victims may not know about their rights and how to enforce them.
- Due to delays, even if the matter successfully commenced, it might be challenging to maintain over several years.
- Courts above the High Court level are not easily accessible to communities in remote areas as these courts are only located in provincial towns, which may be far away from impacted communities.

Q7

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

99. Under Zambian procedural rules, claimants can bring a civil claim in Zambia against foreign-based¹²⁰ defendants if the matter falls within the categories listed under [High Court Rules](#) Rule 15 Order 10. Among others, a foreign defendant can be sued if the action is founded on a tort committed within Zambia or when the foreign defendant is a necessary or proper party to a civil claim properly brought against another person duly served within Zambia.
100. To bring a civil claim against a **foreign defendant**, the claimants must first prepare the originating court process and then apply to the High Court for leave to issue the originating process for service outside Zambia. A draft originating process must be attached to the application for leave to issue the originating process for service outside Zambia. When the High Court grants leave, the claimants must issue the originating process. Once issued, the claimant must then apply for leave to serve outside Zambia and proceed to serve the originating process after obtaining leave to serve outside Zambia. This position is confirmed in the cases of *Leopold Walford (Z) Limited v Unifreight*,¹²¹ *John Santos Velasquez Incaquihue and Anor v Burga and Another*,¹²² *J&M Advocates (Suing as a firm) v Glencore International AG*¹²³ and *Phillip K. R. Pascall, Arthur Mathias Pascall, Clive Newall, Martin R. Rowley, First Quantum Minerals Limited and FQM Finance Limited v ZCCM Investments Holdings Plc.*¹²⁴

¹¹⁹ (Appeal 1 of 2012) [2015] ZMSC 33.

¹²⁰ The High Court Act [Chapter 27 of the Laws of Zambia].

¹²¹ (SCZ Judgment No 23 of 1985) [1985] ZMSC 20.

¹²² (2017/HKC/ 4) [2017] ZMHC 357.

¹²³ (2019/ HP /1785) [2020] ZMHC 292.

¹²⁴ Court of Appeal No 92 of 2018.

Q8

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

101. The following sources are recommended for further research and consultation:

- The Zambian Judiciary website: <https://judiciaryzambia.com/>
- Parliament of Zambia: <https://www.parliament.gov.zm/>
- Employment and Labour Laws and Regulations Zambia 2022 (Global Legal Group 2022): <https://iclg.com/>
- Litigation and Dispute Resolution Laws and Regulations Zambia 2022 (Global Legal Group 2022): <https://iclg.com/>
- Laws of Zambia (Blackhall Publishing): <https://zambialaws.com/>
- Winnie Sithole Mwenda and Chanda Chungu, *A Comprehensive Guide to Employment Law in Zambia* (University of Zambia 2021)



CaseScenarios

1

Case Scenario

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

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

2

Case Scenario

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

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

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

3

Case Scenario

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

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



CaseScenario 1

Q1

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

≡

CS

655

Claims against the police

102. Injured or unlawfully arrested protesters may bring a civil claim against the police for assault, battery, false imprisonment, and negligence. Claims for assault may be available for protesters that apprehended the police's immediate infliction of physical harm, such as seeing the police throwing teargas canisters or charging at protesters with batons. An action for battery may be available for protesters who experienced direct physical harm such as being kicked or struck with batons, gun butts, or teargassed. An action for false imprisonment may be available for protesters who were unlawfully detained. Protesters who were detained for several days without a charge will be able to establish that their detention was unlawful. Once the detained protesters prove that they were detained, it will be up to the police to provide justification by showing that they had reasonable and probable cause for the arrest and detention.¹²⁵

Constitutional torts

103. Protesters unlawfully arrested, detained, and subjected to violence and brutality may have a constitutional remedy for, among others:

- Right to life (article 12)
- Right to liberty (article 13)
- Unlawful arrest or detention (article 13(4))
- Right not to be subjected to torture or inhuman and degrading treatment (article 15)
- Right to instruct a lawyer of own choice (article 18 (2)(d))
- Right to freedom of expression (article 20) and
- Right to freedom of assembly and association (article 21).

104. Protesters can petition to protect fundamental human rights under article 28 of the Constitution, contending that the police violated articles 12 to 21 of the Constitution. As the Supreme Court established in [Resident Doctors Association of Zambia and Others v The Attorney General](#),¹²⁶ 'the High Court is at large to make

¹²⁵ Phiri (n 21).

¹²⁶ (SCZ Judgement No 12 of 2003).

any order, including an order for compensation against anybody for breach of the provisions contained in articles 11 to 26 of the Constitution. An aggrieved party is also at liberty to seek remedies for tortuous injuries arising from such breach’.

105. **The immunity of law enforcement** may be an obstacle that the protesters must overcome to succeed in their claims. Under the [Penal Code s 78](#),¹²⁷ an authorised officer, a police officer, or any other person acting in aid of such authorised person or police officer who is authorised to use force reasonably necessary to disperse rioters is not liable in civil proceedings for harm or death caused to any person by use of such force. Therefore, protesters in Case Scenario 1 must show that the police never followed the procedure stipulated in the Penal Code s 77 for making a proclamation for protesters to disperse peacefully.

Claims against Security Co

106. Security Co would unlikely be held liable for the assault, battery, false imprisonment, and constitutional torts that the police committed against protesters simply because they provided the police with vehicles, equipment, and water on several occasions. Without more, the court will likely find that merely providing vehicles, equipment and water does not establish a duty of care. The court may likely apply the standard in *Caparo Industries plc v Dickman*,¹²⁸ as the High Court did in *Perfect Pools Limited v Barclays Bank Limited*,¹²⁹ to find that injury suffered by protesters was not reasonably foreseeable and further that it ‘would not be fair, just, and reasonable [to] impose a duty of care’ on Security Co in Case Scenario 2.

Critical elements of liability

107. The critical elements of liability needed to hold the police or Security Co liable for assault, battery and false imprisonment are the same as those shown in [61]-[63] above. Elements of liability needed to hold the police or Security Co liable for constitutional torts are also those in [61]-[63] above.¹³⁰



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

108. The available mechanisms relevant in this case include:

- The Human Rights Commission is empowered to ensure the observance of articles 11-28 of the Constitution (article 230(2) of the Constitution of 2016). It can investigate the violation of human rights (the Constitution article 230(3)(a)), take appropriate steps to redress such violations (the Constitution article 230(3)(b)), and resolve disputes through negotiations, mediation, and conciliation.

¹²⁷ The Penal Code Act [Chapter 87 of the Laws of Zambia].

¹²⁸ *Caparo* (n 89).

¹²⁹ 2013 /HP/1388.

¹³⁰ As a general rule, the elements of liability for the constitutional torts are similar to common law torts.

- The Police Public Complaints Commission is empowered to receive and investigate complaints against the police (the Constitution article 237(2)(a)), including action resulting in serious injury or death (the Constitution article 237(2)(b)).



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

109. In the context of protest, a good example of a high-profile case is the *Resident Doctors Association of Zambia and Others v The Attorney General*.¹³¹ The petitioners held a peaceful public procession to raise awareness about the deplorable situation in public hospitals and the poor conditions of service for doctors. During the peaceful protest, they were intercepted by the police, forced to sit down, and then bundled into a police truck and taken to the police station, where they were detained until later that night. The Supreme Court held that the police's action and conduct violated the petitioners' rights to freedom of expression, assembly and association contrary to articles 20 and 21 of the Constitution. The Court also held that the manner in which the police handled the petitioners by bundling them in the police truck, taking them to the police station and detaining them until later in the night amounted to false imprisonment, humiliation and inconvenience, and awarded the petitioners general and aggravated damages.
110. Another relevant example is the case of *Albert Mwanaumo and 5 Others v NFC Mining Plc and 2 Others*,¹³² described in [14] above.
111. Action for assault, battery and false imprisonment can be brought not only against the police but also against individuals and corporations. The case of *Chief Chanje v Zulu*¹³³ mentioned in [61]-[62] above was a successful case of a claim of assault against an individual while *Albert Mwanaumo and 5 Others v NFC Mining Plc and 2 Others*¹³⁴ involved individuals and a corporation.
112. For example, in *Winstone Simposya v Aric Masauso Phiri and 3 Others*,¹³⁵ the plaintiff claimed that the security officers for his employer, a private company and the state police unlawfully detained him on two separate occasions. For the first incident, the plaintiff proved that he reported for work at midnight on 30 September 2001 and knocked off at 7am on 1 October 2001. However, as he conducted a handover to the morning shift crew, the first defendant, a security officer for his employer, called him to the security office where the security officer detained him from 7am to 10am. When he was released, he went home. At 2pm, the first defendant came with a police unit, picked him up and took him to Chilanga Police Station, where he was handed over to a Mr Nyimbiri, a police officer, who detained him for five days from 1 to 5 October 2001, when he was released without being charged.
113. Concerning the second detention in the same case, the plaintiff reported for work on 20 June 2003 at midday. Instead of knocking off at 9.30pm, he continued working until 7am the following day, when he handed over to the morning shift crew.

¹³¹ (SCZ) Judgement No 12 of 2003) [2003] ZMSC 92.

¹³² *Albert Mwanaumo* (n 23).

¹³³ *Chief Chanje* (n 18).

¹³⁴ *Albert Mwanaumo* (n 23).

¹³⁵ Appeal No 158/2009 [2014] ZMSC 48.

After knocking off and whilst at home, the first defendant picked him up and took him to Musamba Police Post, where the first defendant handed him over to the third defendant, a police officer, telling him that the plaintiff was a suspect in a break-in at the Buffer Store. The third defendant then detained the plaintiff and only released him the following day at 2.30pm, again without charging him.

114. Regarding the first defendant, who was the security officer for the second defendant, a private company, the Supreme Court confirmed that a private individual can be held liable if he either unlawfully detains another person or hands over the other to a police officer who in turn detains that person or participates in the arrest or detention of another person. Consequently, the Supreme Court held that the defendants unlawfully detained the plaintiff on both occasions.



CaseScenario 2

Q1

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

Claims against Subsidiary Co

115. Negligence could be established against Subsidiary Co because it owed a duty of care to the local community near its project site to properly secure the site to ensure the oil did not leak and flow into and pollute the local community's farmland and rivers. By causing the local community's crops to be destroyed, fish in the river to be killed, and community members to experience breathing problems and skin lesions due to the oil that leaked from its project, Subsidiary Co breached the duty of care it owed to the local community.
116. The destruction of crops on the farmland, the death of fish in the local river and the personal injury due to carelessness in managing its oil were reasonably foreseeable. The community will need to provide specific evidence of the value of the loss of crops and fish; otherwise, that will have to be assessed by the Deputy Registrar.¹³⁶ As described in [46] above, for affected community members to recover damages for difficulties in breathing and skin lesions, they must produce medical evidence.

¹³⁶ *Georgina Mutale (T/A GM Manufactures Limited v Zambia National Building Society)* (2002) Z.R. 19.

117. Strict liability based on the rule in *Ryland v Fletcher* maybe be available for the community as an alternative to a claim of common law negligence. To succeed, the claimants must prove that Subsidiary Co's use of its land for oil extraction was unnatural and that the oil is likely to cause mischief if it leaks. The claimants can demonstrate the significant damage to their farmland, crops and waterways, their personal injury experience and further that such damage was a natural consequence of the leaking oil that flowed into their cultivated farmland, and the river they depended on as a source of water and fish.
118. However, claimants cannot plead negligence and strict liability in the same case, as established in [Rabson Kamanga v Zambia Electricity Supply Corporation¹³⁷ and ZESCO v Justine Chishimba¹³⁸](#).
119. A private nuisance may be established if the leaked oil damaged or caused unreasonable interference with the community members' use and enjoyment of the lawful occupation of the farmland or their proprietary rights. To succeed, the claimant must demonstrate sufficient interest in the farmland, at least occupying or possessing the land.¹³⁹ However, they need not prove title to the farmland. Exclusive possession will suffice.¹⁴⁰
120. A public nuisance may be established if the leaking oil damaged or caused unreasonable interference with the use and enjoyment of the right to farmland or river accruing to the claimants as members of the affected public. However, to sue for public nuisance, the claimant must demonstrate special harm above what the other public members have suffered.¹⁴¹
121. EMA 2011 s 110 establishes a civil cause of action for any action or omission that contravenes EMA 2011. Leaking oil into the local farmland and rivers to such an extent that it destroys crops, killed fish and caused community members to experience breathing difficulties and skin lesions most likely threatens the right to a clean, safe and healthy environment under EMA 2011 s 4(3). It would also amount to discharging a poisonous, eco-toxic, obnoxious or pollutant substance into the aquatic environment in contravention of water pollution control standards under EMA s 46; and it would amount to a failure to take appropriate measure to mitigate the adverse impact of the oil leakage under EMA s 38.
122. The [Petroleum Act 2008](#) is relevant to Case Scenario 2, with far-reaching application. Under the Petroleum Act 2008 s 71(1), Subsidiary Co, as licence holder, can be held 'strictly liable for any harm or damage caused by exploration or development and production operations and shall compensate any person to whom the harm or damage is caused'. Under s 71(4), compensation includes the 'cost of reinstatement, rehabilitation or clean-up measures' for the leaked oil. Under s 71(5), the liability of Subsidiary Co can extend to 'harm or damage caused directly or indirectly ... to the economy or social cultural conditions ... negative impact on livelihood ... disruption or damage to any production or agricultural system ... reduction in yields of the local community ... air, water or soil contamination ... damage to biological diversity, damage to the economy of an area or community'. The damage to crops and fish and the personal injuries experienced are also addressed in [Petroleum Act 2008](#) s 71.

¹³⁷ (Appeal 106 of 2006) [2007] ZMSC 131.

¹³⁸ (Appeal 131 of 2013) [2014] ZMSC 90.

¹³⁹ WWH Rogers, MA, *Winfield & Jolowicz on Tort* 16th edn (2002) 523; *Doris Chinsambwe and 65 Others v NFC Africa Mining* [2014] HK 374 at J16.

¹⁴⁰ *Hunter v Canary Wharf Ltd* (1997) 2 ALL ER 426 at 434.

¹⁴¹ *Doris Chinsambwe* (n 49).

123. Section 71(7)(c) of the [Petroleum Act 2008](#) effectively permits group claims or class action when it provides that a group of persons can bring a claim 'in the interest of, or on behalf of a group or class of persons whose interest are affected'.

Claims against Parent Co

124. The analysis of Subsidiary Co's liability also applies to Parent Co. However, challenges relating to the corporate structure must be overcome and hence the focus below is on that structure.
125. As stated in [90] above, in the absence of Zambian authority on the liability of parent company for their subsidiary's wrongful acts and/ or omissions, a Zambian Court would follow relevant English case law, particularly the most recent decision of the Supreme Court of England and Wales in *Vedanta Resources Plc & Another v Lungowe and Others*,¹⁴² and *Okpabi and Others v Royal Dutch Shell Plc and Another*¹⁴³ on the liability of a parent company for activities of its subsidiary. The analysis in [91]-[95] above on the parent company's liability would be applicable in this case.
126. In *Vedanta* and *Okpabi*, the Supreme Court set out the four non-exhaustive routes through which a duty of care may arise in the parent and subsidiary company relationships. One of those routes is when the parent holds itself out as exercising a particular degree of supervision and control. The community, in this case, may argue that Parent Co's shareholder report statement that 'the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations' amounted to it holding itself out as exercising a particular degree of supervision and control over Subsidiary Co's activities.
127. The [Petroleum Act 2008](#) s 71 may apply in this case, although there is no guidance yet from courts in Zambia. Under Petroleum Act 2008 s 71(2), 'liability shall attach to the person who directly contributes to the act or omission which results in the harm or damage'. Under s 71(3), '[w]here there is more than one person responsible for the harm or damage, the liability shall be joint and several'. Thus, depending on the extent of Parent Co's intervention, control, advice, and supervision in Subsidiary Co's extractive projects, the community may be able to establish that Parent Co directly contributed to the leakage of the oil that damaged their crops, killed fish and caused the personal injury.
128. The critical elements of liability needed to hold the perpetrators liable are the same as those listed in [66], [69], [72]-[73], [74], and [76]-[77] above.



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

129. Alternative avenues would include a complaint to the State environmental agency, ZEMA, which has the power to investigate and prosecute perpetrators violating the provisions of EMA 2011.

¹⁴² *Vedanta* (n 35).

¹⁴³ *Okpabi* (n 113).



Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 2?

130. High-profile lawsuits in Zambia that are relevant to Case Scenario 2 include: [*Konkola Copper Mines and Others v James Nyansulu and Others*](#), described in detail in [46] above, which involved the discharge of highly toxic effluents into the water sources for the local community when the mine's tailings pipeline ruptured; [*Mopani Copper Mines Plc v Miti \(Suing in his capacity as Administrator of The Estate of The late Geoffrey Elliam Miti\) & Others*](#), described in [43] above which concerned the death of Mrs Miti, from acute respiratory failure after she inhaled sulphur dioxide emitted by the Mopani smelter; and *Doris Chinsambwe and 95 Others v NFC Africa Mining*.¹⁴⁴
131. The *Doris Chinsambwe* case, involved a claim for damages for nuisance and negligence occasioned when the tailings dam of NFC Africa Mining polluted the local stream and caused flooding, damaging the plaintiff's crops. The High Court established the plaintiffs were occupiers and farmers conducting farming activities along the Musakashi stream, even though none produced documentation of ownership of the land on which they conducted farming activities. The Court also established that NFC Africa Mining was a mining firm whose tailings dam was on the Musakashi stream and that it discharged its mining effluent in the stream. The Court also established that NFC Africa Mining polluted the water in the Musakashi stream, and that the pollution affected the aquatic life and water taste and had had health impacts on the local communities that depended on the stream. The Court also determined that the water from the tailings dam caused the flooding that submerged and damaged the community's crops.
132. The Court held that the NFC Africa Mining owed a duty of care to the community in ensuring that water levels from its tailings dam were properly maintained to prevent overflow that would cause flooding downstream. In addition, the Court also held that NFC Africa Mining also owed a duty of care in ensuring that the mining effluent it discharged into Musakashi stream did not chemically pollute the stream. Further, the Court held that NFC Africa Mining breached its duty of care when it caused the community's gardens to be flooded with water from its tailings dam. The Court also held that NFC Africa Mining caused a nuisance because the flooding from its tailings dam disturbed the community's enjoyment of their land. The Court further determined that NFC Africa Mining's breach of duty caused damage to the community's crops, resulting in their loss. NFC Africa Mining was thus held liable for both negligence and nuisance and was ordered to pay damages to the community for their failure to be assessed by the Registrar of the High Court.



144 *Doris Chinsambwe* (n 35).

CaseScenario3

Q1

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

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Claims against Factory Co

133. Claimants can bring a civil claim against Factory Co based on breach of statutory duty and common law negligence.
134. Claimants may be able to establish that the deaths of 76 workers and the injury of 58 were caused by the carelessness of Factory Co which maintained barred windows; closed emergency exists; had non-functioning smoke alarms; and by the failure of its supervising employees to implement safety and evacuation protocols in violation of s 6 of the Workers' Compensation Act 1999. Claimants may also argue that the deaths of 76 workers and the injury of 58 others were caused by poor workplace safety, in contravention of the Occupational Health and Safety Act 2010 ss 6(1) and (2), because Factory Co maintained barred windows, closed emergency exists, and non-functioning smoke alarms. Moreover, the claimants may establish that the compulsory unpaid overtime they were subjected to amounted to forced labour, contrary to the Constitution's article 14(2).
135. A common-law negligence claim may be brought against Factory Co using the critical ingredients for negligence described in [72] above.

Claims against Brand Co

136. No Zambian authority has been found on liability in supply chains. It also seems highly unlikely that duty of care can be established based on the *Donoghue v Stevenson* principles mentioned in [43] above. It will be difficult for claimants to prove sufficient proximity between Factory Co's workers and Brand Co. Brand Co ought to have had the deceased and injured reasonably in its consideration when placing orders for clothes from Factory Co.
137. However, claimants may rely on the developing law of negligence involving third parties. A Zambian court may be persuaded by the English Court of Appeal decision in *Hamida Begum (on behalf of MD Khalia MD Khalil Mollah) v Maran (UK) Limited*,¹⁴⁵ in which Lord Justice Coulson dealt with the exception to the general rule that a defendant will not be liable in tort for injury resulting from a third

¹⁴⁵ *Begum* (n 117).

party's intervention.¹⁴⁶ In this case, Lord Justice Coulson referred to *Clerk and Lindsell on Torts*, 23rd edition, at [7-60], which states that the exception exists 'where the defendant is responsible for the state of danger which may have been exploited by the third party'. On the creation of duty of care under the general exception, Lord Justice Coulson stated:

'the Appellant arguably played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to significant dangers which working on this large vessel in Chattogram entailed ... The Zuma Yard's failure to provide any safety harnesses or any other proper equipment, and the tragic consequences of their not doing so, were entirely predictable'.¹⁴⁷

138. Similarly, in Case Scenario 3 the claimants may argue that Brand Co played an active role by purchasing the majority of Factory Co's clothing, knowingly exposing Factory Co's workers such as the deceased and injured to the significant dangers which working in a factory with poor work safety entails. With sufficient facts, the price Brand Co paid for the purchase and the way it made the orders (how urgently these were demanded, for example) may make it foreseeable that Factory Co will operate under poor workplace safety and must exploit its workforce through compulsory unpaid overtime to meet Brand Co's orders.

Q2

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

139. Mediation, negotiation, and raising grievances through trade unions and the Labour Commission may be alternative avenues. If Brand Co continues to not act responsibly, advocacy aimed at encouraging its key shareholders to divest their investment or the purchasers to avoid its brand may be an effective strategy.

Q3

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

- *China State Construction and Engineering Corporation Zambia v Mwape Kaimba*, Appeal No 64/2019.
- *Lafarge Cement PLC v Patrick Mandona*, Appeal No 220/2013 (Selected Judgment No 15 of 2017).
- *Mwamba v Metal Fabricators of Zambia Ltd* (2005/H.N./ 279); [2011] ZMHC 109.

¹⁴⁶ *ibid* [52].

¹⁴⁷ *ibid* [64].





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