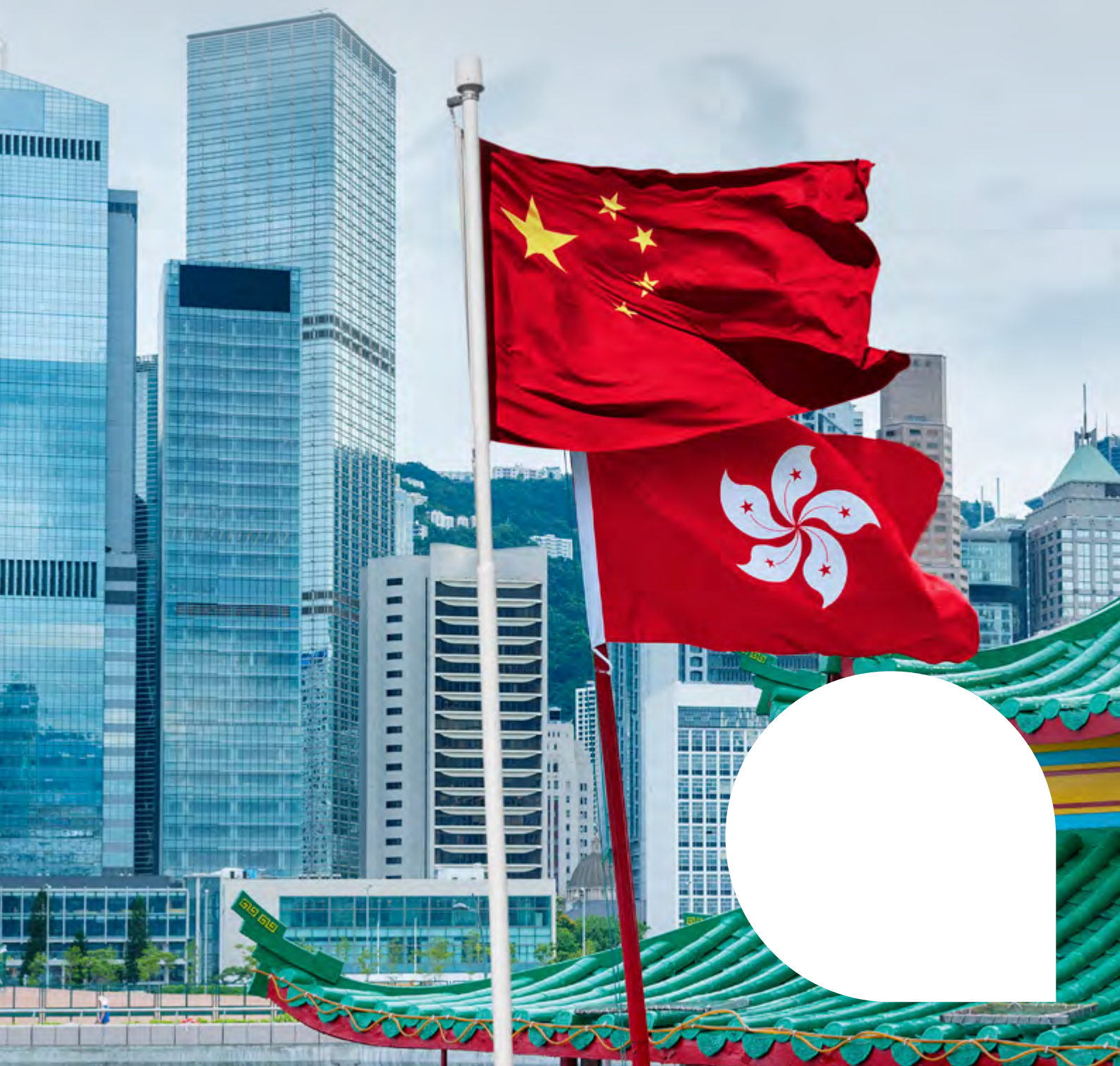


A HANDBOOK FOR PRACTITIONERS | HONG KONG

Civil Liability for Human Rights Violations



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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.

4

INDICES

85/167

Democracy Index
2021 Ranking

43/100

Freedom House
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12/180

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 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



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 Wainwright* [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 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



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 Mitrans Shipping Co 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



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 Bussan Kaisha 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 211 and Rules of the High Court (Cap 4A) O 53 r 1(1)(a).

108 *ibid* s 211.

109 *ibid* s 211.

110 High Court Ordinance (Cap 4) s 211 and Rules of the High Court (Cap 4A) O 53 r 1(1)(b).

111 High Court Ordinance (Cap 4) s 211K(2) and Rules of the High Court (Cap 4A) O 53 r 2.

112 High Court Ordinance (Cap 4) s 211K(4) and the Rules of the High Court (Cap 4A) O 53 r 1(3).

113 High Court Ordinance (Cap 4) s 211K(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 r 1(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 r 1(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)



Case Scenarios

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).

Case Scenario 3

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 Sulistyanyingsih 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 Anel, deceased v United Construction & Manpower Service Ltd & anor* [2022] HKCFI 2163.

