

A HANDBOOK FOR PRACTITIONERS | MALAYSIA

Civil Liability for Human Rights Violations



AUTHORS

Malik Imtiaz Sarwar

Founding Partner,
Messrs Malik Imtiaz
Sarwar

[PROFILE](#)

Lim Yvonne

Partner,
Messrs Malik Imtiaz
Sarwar

[PROFILE](#)

Khoo Suk Chyi

Associate,
Messrs Malik Imtiaz
Sarwar

[PROFILE](#)

Wong Ming Yen

Associate,
Messrs Malik Imtiaz
Sarwar

[PROFILE](#)

FREQUENTLY USED ABBREVIATIONS

ALA	Atomic Energy Licensing Act 1984
ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
EA	Employment Act 1955
EIA	Environmental Impact Assessment
EQA	Environmental Quality Act 1974
GPA	Government Proceedings Act 1956
NFA	National Forestry Act 1984
OSHA	Occupational Safety and Health Act 1994
SRA	Specific Relief Act 1950
SUHAKAM	Malaysian National Human Rights Commission
TCPA	Town and Country Planning Act 1976
TOL	Temporary Operating Licence

Legal Disclaimer: The information materials and opinions contained in this publication are for general information purposes only, are not intended to constitute legal or other professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. We do not accept any responsibility for any loss which may arise from reliance on information or materials contained in this publication. You should consult a suitably qualified lawyer on any specific legal problem or matter.

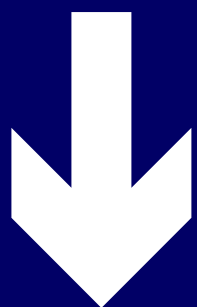
Publication Information: This country report is one of the 19 reports prepared for a [comparative project on civil liability for human rights violations](#) led by the Bonavero Institute of Human Rights. It follows a unified template, and some terms in this report were defined consistently for the purposes of the project. To access other country reports and introduction from the project team, please [click here](#).

All online resources cited and/or referenced in this report were accessed on 1 April 2022. Publication Date: October 2022

Cover photo by Wong Fok Loy (courtesy of iStock).



CONTENTS



RETURN TO THIS
TABLE OF CONTENTS




VIEW THE START OF
THE CURRENT SECTION



INTERACTIVE

TABLE OF CONTENTS

Page	Content	Average Read Time
P4	Overview of Jurisdiction	1 minute 
P5	Introduction	2 minutes
P6	General Questions	1 minute
P7	Question 1	11 minutes
P13	Question 2	4 minutes
P15	Question 3	2 minutes
P17	Question 4	4 minutes
P19	Question 5	1 minute
P20	Question 6	1 minute
P20	Question 7	2 minutes
P21	Question 8	1 minute
P23	Case Scenarios	1 minute
P24	Case Scenario 1	5 minutes
P27	Case Scenario 2	6 minutes
P31	Case Scenario 3	4 minutes



MALAYSIA



Malaysian legal system is rooted in the common law tradition, and English legal principles are applicable in the main. Civil remedies can be sought either by way of judicial review or by way of civil claims (eg for torts). It is arguably open for victims to seek remedies for violation of a fundamental right under the Federal Constitution by making a claim for a constitutional tort, but this has not yet been determined decisively by the courts. The civil liability of a parent company for the wrongful acts or omissions of a subsidiary or independent contractor in a supply chain has not yet been considered. However, the approach laid down by the UK Supreme Court in recent high-profile cases could be potentially adopted by the Malaysian courts.

4

INDICES

39/167

Democracy Index
2021 Ranking

50/100

Freedom House
2022 Score

62/180

Transparency International
Corruption Index 2021 Ranking

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. To the extent explained in this report, Malaysian law does allow victims of the three defined harms to obtain remedies. There is no single piece of legislation that comprehensively provides for such remedies, and recourse is to either the Malaysian common law, in the form of tortious claims, or relevant statutes, where this is provided for.
2. It would be useful to consider an overview of the Malaysian legal system. The system is rooted in the common law tradition in light of the historical relationship with the United Kingdom, which led to the establishment of a Westminster parliamentary system of government in which the written constitution of the country, the [Federal Constitution](#) (Constitution) is the supreme law of Malaysia.¹ As such, parliamentary sovereignty does not feature. As the supreme law,² all executive, legislative and judicial action is tested against it and, if found to have been in contravention, is set aside.
3. Pertinently, Part II of the Constitution guarantees ‘fundamental liberties’ of a nature similar to those forming the subject of the United Nations [Universal Declaration of Human Rights](#).³ Part II is thus a key point of reference in human rights litigation, particularly where this is against public bodies. This is explained in further detail in [10] below.
4. Prior to independence, English law was applicable by reason of the British colonial administration. Post-independence, this was formalised by the [Civil Law Act 1956](#), section 3(1)⁴ which made it a requirement for English law and the rules of equity to be applied as at the prescribed cut-off dates as adapted to local circumstances. The Malaysian common law thus complements written, or enacted, law.
5. The primary basis for claims of civil remedies is through tort law. It has been judicially recognised that Malaysian tort law is still very much based on English common law principles,⁵ and decisions of the highest court in England are highly persuasive.⁶

1 Federal Constitution of Malaysia, first enacted 1957.

2 *Lee Kwan Woh v PP* [2009] 5 CLJ 631 (FC), at 638. A version of this case report is not publicly available. The same applies to a number of other case reports cited in this document. You may be able to download them from a subscription-based legal research tool.

3 Malaysia is, however, a dualist system, and international human rights law (IHRL) only applies where brought into effect by legislation enacted for that purpose. Malaysia has only ratified the following IHRL conventions: [the Convention on the Rights of the Child](#); [the Convention on the Elimination of All Forms of Discrimination against Women](#); and the [Convention on the Rights of Persons with Disabilities](#).

4 [Civil Law Act 1956](#). This online version of the legislation has not been updated to reflect the most recent amendments and is included for general reference only. This is also the case for a number of other pieces of legislation cited in this report. Please access the most recent versions of all legislation from a subscription-based legal research tool.

5 Authors of this report frequently refer to the principles and case law of the English law. To access the project report on civil liability for human rights violations in England & Wales, please follow [this link](#).

6 *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 6 CLJ 346 (FC). A version of this case report is not publicly available. See (n 2).

General Questions



Q1

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

Generally

6. Subject to the requirements of law as to the mode of commencement and such statutory bars as may be applicable, where one of the three defined harms results in actionable wrongdoing, it is possible for an aggrieved person to seek civil remedies against the wrongdoer, be it a public body, corporation or individual. It is not a pre-requisite that these wrongdoings are recognised or categorised as 'human rights violations'.

Mode of commencement

7. Before turning to specific causes of action, it is necessary to briefly consider the mode of commencement to be followed.

In broad terms, civil remedies can be sought either by way of **judicial review**, which would entitle a claimant to seek damages in addition to declaratory or prerogative relief,⁷ or by way of **civil claims** (eg for torts).

Judicial review

8. **Judicial review** is appropriate where it is necessary to determine the validity of a decision, act or omission of a public body that is grounded in the exercise of public law powers. The definition of '**public body**' is not restricted to State entities. The presence of a public law element in the functions, activities, or powers of an entity, such as the national stock exchange⁸ or national electricity supplier,⁹ can render these entities amenable to judicial review.
9. Challenges must be made in the appropriate manner.¹⁰ Judicial review would have to be applied for, with leave, in the High Court.

⁷ [Courts of Judicature Act 1964](#), Schedule para 1; [Rules of Court 2012](#), Order 53. This online version is included for general reference only. See (n 4).

⁸ *OSK & Partners Sdn v Tengku Noone Aziz Tengku Mahmood & Anor* [1983] 1 CLJ 288 (FC). A version of this case report is not publicly available. See (n 2).

⁹ *Tenaga Nasional Berhad v Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 (CA). A version of this case report is not publicly available. See (n 2).

¹⁰ Leave to commence judicial review must be sought 'promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant' ([Rules of Court](#), Order 53 rule 3(6)). Extensions of time are notoriously difficult to obtain. The merits of the intended challenge are irrelevant to the determination of whether an extension is granted or not (*Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 (FC)). A version of this case report is not publicly available. See (n 2).

10. It is often the case that in determining the validity of such exercises of power, reference is made to relevant provisions of the Constitution, particularly those in Part II. It is also permissible for a claimant to seek to challenge the constitutionality of the statutory source of such powers, if this is appropriate. This is usually done where it is contended that the statutory provision concerned has rendered a fundamental liberty illusory.

Civil claims

11. Typically, civil claims addressing the three defined harms would be made in the first instance at the Sessions Court or the High Court, depending on the amount in dispute or the value of the subject-matter¹¹ (leaving aside for the moment the question of whether it is open to a claimant to seek remedies for infringements of the Constitution by persons other than public bodies).

Choosing the right mode

12. Care must be taken in determining the appropriate mode of commencement. The choice will depend on the nature of the wrongs complained of and intended remedies. Where a civil claim lies in private law or where private law issues predominate, civil claims are more appropriately made. The courts approach the question of mode of commencement strictly,¹² and are not generally sympathetic to collateral challenges of such exercises of power in civil claims.

Possible claims

Assault or unlawful arrest and detention

13. Article 5(1) of the Constitution guarantees that '(n)o person shall be deprived of his life or personal liberty save in accordance with law'. In the main, recognised legal bases for the arrest and detention of a person centre on the statutory powers of enforcement authorities which are nonetheless required to comply strictly with the requirements of law.
14. Civil remedies for these wrongs are made in **tortious claims for trespasses to a person**. These are approached in the same manner as under English law:
- The **tort of assault** or, where there is physical application of force, battery.
 - The **tort of false imprisonment**. If the victim suffered cruel, inhuman and/or degrading treatment or punishment, the claim would additionally be for assault and battery. The victim would also seek exemplary or aggravated damages. The validity of the detention is ultimately tested Article 5(1) of the Constitution.
 - Where the claim is against a public official, there may be a basis for seeking a civil remedy under the **tort of misfeasance in public office** provided that the elements of the cause of action can be made out. It is applicable in the same manner as under English law.¹³

¹¹ [Subordinate Courts Act 1948](#) s 65; [Courts of Judicature Act 1964](#) ss 23 and 24. These online versions of the legislation do not reflect the most recent amendments and are included for general reference only. See (n 4).

¹² *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 (FC); *YKK (Malaysia) Sdn Bhd v Pengarah Tanah dan Galian Johor* [2021] 8 CLJ 179 (FC). A version of this case report is not publicly available. See (n 2).

¹³ *Tony Pua Kiam Wee v Government of Malaysia & Another Appeal* [2020] 1 CLJ 337 (FC), at 364-368.

- There is potentially a legal avenue for compensation as a consequence of an **infringement of Article 5(1) of the Constitution** which prohibits the deprivation of liberty save 'in accordance with law'. This is explored in more detail in [22]-[23] below.

Environmental harm

15. Any discussion on potential claims for civil remedies arising from environmental harm must consider the applicable regulatory frameworks which may be useful in framing potential claims, as well as for providing guidance in defining causal connections or duties of care, or otherwise. The key legislation includes:

- [The Environmental Quality Act 1974](#)¹⁴ (EQA) aimed at the prevention, abatement, and control of pollution, and enhancement of the environment;¹⁵
- [The Town and Country Planning Act 1976](#) (TCPA)¹⁶ and [the Local Government Act 1976](#), both of which relate to, amongst other things, the control and regulation of town and country planning and building permission;¹⁷
- [The National Forestry Act 1984](#)¹⁸ (NFA) which relates to the administration, management and conservation of forests and forestry development;¹⁹ and
- [The Atomic Energy Licensing Act 1984](#) (ALA) which relates to the regulation and control of atomic energy, the establishment of standards on liability for nuclear damage and for matters connected therewith.²⁰

16. Where a decision, act or omission of a public body is the cause of the injury complained of, it may be appropriate to commence judicial review. This would include, for instance, the granting of a development order,²¹ the approval of an Environmental Impact Assessment (EIA)²² or the granting of a temporary licence to construct a rare earth plant.²³

- It is necessary, however, for the claimant to have legal standing by demonstrating that they were '*adversely affected*'.²⁴

14 This online version is included for general reference only. See (n 4).

15 See eg [EQA](#) ss 22-27, 29 and 29A.

16 This online version is included for general reference only. See (n 4).

17 See eg TCPA ss 18-20.

18 This online version is included for general reference only. See (n 4).

19 See eg [NEA](#) ss 32, 40, 47 and 50.

20 See eg [ALA](#) ss 26-27 and 30.

21 *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1 (CA). A version of this case report is not publicly available. See (n 2).

22 *Wong Kin Hoong* (n 10).

23 *Zakaria Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors* [2012] 6 CLJ 681 (HC). A version of this case report is not publicly available. See (n 2).

24 [Rules of Court 2012](#), Order 53 rule 2(4); *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi* [2014] 2 CLJ 525 (FC), at 549. It is also worth noting that the issue of legal standing has often been a barrier to public interest litigation and remains an issue for strategic consideration. A version of this case report is not publicly available. See (n 2).

SPOTLIGHT: CASE STUDY

In the case of *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors*,²⁵ for example, the appellants were the management corporations of several apartments and individual property owners or residents in Taman Tun Dr Ismail. Their interests and complaints concerned a development order granted by the first respondent local authority which involved converting a public park into nine apartment blocks. The respondents sought to argue that the appellants had no legal standing to bring the action. The Court of Appeal held that the appellants did have the requisite standing to initiate judicial review proceedings as they had amply shown that they were adversely affected by the impugned decision in that they were residents, owners and/or occupiers of the properties located within the immediate vicinity of the proposed development, and were users of the park, and the effects of the proposed development were unquestionably irreversible, permanent and far-reaching.

- Leave to commence judicial review must be sought 'promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant'.²⁶

SPOTLIGHT: CASE STUDY

The case of *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor*²⁷ is relevant. Here, the second respondent had been granted mining rights under a lease and was in the process of building a Carbon-In-Leach plant near Kampung Bukit Koman, Raub (Bukit Koman) to process old goldmine tailings using cyanide. The first respondent, the appointed regulatory body under the EQA, had approved the EIA report on 13 January 1997. The applicants were residents in the area who, on 21 March 2008, sought permission to commence judicial review to challenge the decision to approve the construction of the plant and a further decision not to direct the submission of a further EIA report to address concerns raised by the applicants concerning the possible contamination of water sources. Permission was refused on the basis that there was no valid basis to grant the applicants an extension of time. The Federal Court ultimately concluded that the requirement that leave be sought promptly, and in any event within three months from the date from which the decision was communicated, was to be strictly complied with as it related to the jurisdiction of the High Court to grant judicial review, and that extensions could only be granted where the reasons for the delay were justifiable, without regard to the nature of the intended challenge.

²⁵ *Perbadanan Pengurusan Trellises* (n 21).

²⁶ [Rules of Court 2012](#), Order 53 rule 3(6).

²⁷ *Wong Kin Hoong* (n 10).

17. Where the harm complained of is caused by the acts or omission of persons, and there is no need for the determination of the validity of any exercise of a public law power, it would be appropriate for aggrieved persons to make a tortious claim for the following:
- **The tort of nuisance**, in the same way as these torts would be actionable under English law, namely:
 - i. In **private nuisance**, for wrongful interference with a person's use or enjoyment of land or of some right connected with land. It is necessary for the claimant to establish that they have an interest in the land and this is typically understood as either ownership or a right to occupation;
 - ii. In **public nuisance**, for an act or omission which interferes with or disturbs or annoys a person in the exercise or enjoyment of their right as a member of the public, subject to proof of special damage. In the absence of special damage, public nuisance is still actionable by the Attorney General, or by two or more persons who have obtained the consent of the Attorney General;²⁸ and
 - iii. Strict liability under the rule in **Rylands v Fletcher**²⁹ in the manner that the rule is applied under English law.
 - The tort of **negligence**. Negligence is actionable in the same manner as under English law, including the considerations on categories of duty of care and causation; or
 - The tort of **breach of statutory duties**. This is actionable in the same manner as under English law and provides a civil remedy to a claimant as a result of a breach of a public statute. A claim for breach of statutory duties can be brought against any wrongdoer, including a public body, if that person was under a statutory duty imposed for the benefit or protection of a particular class of individuals, and has injured a person within that class.

SPOTLIGHT: CASE STUDY

In the case of *Puncak Niaga (M) Sdn Bhd & Anor v Syarikat Sidhu Beradek Sdn Bhd & Anor*,³⁰ the claimants were in the business of operating water treatment plants and distributing treated water to its consumers. They sought damages from the defendants for losses suffered as a result of contamination of a water catchment area caused by spillage of crude palm oil attributable to the defendants. The High Court concluded that there was a general duty, imposed by the EQA section 25, to not pollute the river and water catchment area, and any aggrieved person was entitled to make a civil claim.

28 [Government Proceedings Act 1956 \(GPA\)](#) s 8(1). This online version is included for general reference only. See (n 4).

29 (1985) H & C 774.

30 [2014] 6 CLJ 382 (HC). A version of this case report is not publicly available. See (n 2).

Harmful or unfair labour conditions

18. Articles 6(1) and (2) of the Constitution respectively prohibit slavery and all forms of forced labour.
19. The key legislation concerning labour conditions includes:
 - The [Employment Act 1955](#) (EA) which provides the minimum terms and conditions of service such as payment of wages³¹ rest days, work on rest days, hours of work, entitlement to holidays, annual leave and sick leave;³²
 - [The Occupational Safety and Health Act 1994](#)³³ (OSHA) which requires employers to take specified measures to promote the safety, health and welfare of persons at work, and to mitigate against the possibility of accidents, dangerous occurrences and occupational hazards;³⁴
 - The [Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007](#) (ATIPSOM) which criminalises acquiring or maintaining the labour or service of a person through coercion, and the exploitation of such person through forced labour or services, slavery or practices similar to slavery, and servitude;³⁵ and
 - The [Penal Code 1936](#) (Revised 1997), which criminalises slavery³⁶ and forced labour.³⁷
20. Subject to the requirements indicated in [16] above, where a decision, act or omission of a public body is the cause of the injury complained of, it may be appropriate to commence judicial review.
21. Where the harm complained of is caused by the acts or omission of persons, and there is no need for the determination of the validity of any exercise of a public law power, it would be appropriate for aggrieved persons to make a tortious claim for the following:
 - The tort of negligence; or
 - The tort of breach of statutory duties.

Constitutional infringement

22. It is arguably open for victims to seek civil remedies for violation of a fundamental right under the Constitution by making a claim for a **'constitutional tort'**, **'constitutional monetary compensation'**, or **'breach of a constitutional right'**.³⁸ However, this has not as yet been determined decisively.

31 EA, Part III.

32 *ibid* ss 59-60F.

33 This online version is included for general reference only. See (n 4).

34 See eg [OSHA](#) Part IV and its subsidiary legislation.

35 [ATIPSOM](#) ss 12-15A, 18-24, 26A-26K.

36 Penal Code 1936 ss 370 and 371.

37 *ibid* s 374.

38 [Koperal Zainal Mohd Ali & Ors v Selvi Narayan & Anor](#) [2021] 3 MLJ 365 (FC), the dissenting judgment of Nallini Pathmanathan FCJ, at 395; [Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor](#) [2021] 2 CLJ 579 (FC), the dissenting judgment of Tengku Maimun CJ, at 754; and [Ketua Polis Negara & Ors v Nurasmira Maulat Jaffar & Ors and Other Appeals](#) [2018] 1 CLJ 585 (FC), the dissenting judgment of Zainun Ali FCJ, at 628-631.

23. The courts have yet to fully endorse infringements of the Constitution as giving rise to a distinct cause of action. The possibility has been considered in a number of minority appellate decisions, mostly in connection with claims for deaths in custody.³⁹

SPOTLIGHT: CASE STUDY

The example of *Koperal Zainal Mohd Ali & Ors v Selvi Narayan & Anor*,⁴⁰ concerns the case of Chandran a/l Perumal, who died while in police custody at a detention facility. In his verdict, the coroner found that the police had acted inhumanely towards Chandran, by deliberately depriving essential medication, amongst others. The High Court held that Chandran's constitutional right to life under the Constitution Article 5(1) had been infringed. It also found liability against the appellants in the tort of negligence, entitling the estate to damages, including exemplary damages in the sum of RM 200,000 (USD 45,516), for the wrongful death. On appeal in the Federal Court, however, the majority held that the wording of Civil Law Act section 8(2) precluded an award of exemplary damages in estate claims, including claims concerning the constitutional right to life. The High Court's award of exemplary damages was thus substituted with an award for aggravated damages. In a dissenting judgment, Nallini Pathmanathan FCJ found that exemplary damages were available to Chandran for the infringement of his constitutional right pursuant to the remedies available under [Courts of Judicature Act](#) 1964, Schedule para 25. As a result, the court may mould the relief required to compel observance of the constitutional right, particularly in circumstances of oppressive, arbitrary or unconstitutional acts by servants of the State.

Q2

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

Judicial review

24. The primary grounds on which **judicial review** can be sought are the same as that under English law:⁴¹

- Illegality. Under Malaysian law, this would include a challenge on the ground that a provision of the Constitution had been infringed;
- Irrationality or *Wednesbury*⁴² unreasonableness; and
- Procedural impropriety.

³⁹ *ibid.*

⁴⁰ *Koperal Zainal Mohd Ali* (n 38).

⁴¹ *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374.

⁴² *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680.

Civil claims

Civil claims in torts of trespass to person, nuisance, negligence and breach of statutory duties

25. As noted above in [5], English legal principles are applicable in the main.

26. Furthermore, where **negligence** is concerned:

- The categories of a duty of care are not closed, although the courts have been slow to recognise new ones, particularly where claims for pure economic loss are concerned.
- Causation is established in the same manner as under English law. This applies equally where claims for pure economic loss are concerned.⁴³
- The law remains under-developed where claims for environmental harm are concerned.
- As for harmful or unfair labour conditions:
 - i. Malaysian law recognises a common law duty on employers to provide a reasonably safe system of work and to take reasonable care of their employees.

SPOTLIGHT: CASE STUDY

In the case of *Gelau Anak Paeng v Lim Phek San & Ors*,⁴⁴ the plaintiff, an employee of the defendants, was instructed to clean the rollers on the moving belts which conveyed clay that was later made into bricks. The plaintiff was found with an injured hand caught in the roller, and he contended that the defendants had not provided safety precautions to protect him from injury. The High Court held that there was a common law duty on employers to take reasonable precautions to protect their workers against danger. The employer is not obliged to insure their workers and protect them against all risks, however, they are obliged to provide a reasonably safe system of work and to take reasonable care of their employees.

- ii. Malaysia has ratified the Protocol of 2014 to the Forced Labour Convention of the International Labour Organisation (ILO), known as [Protocol 29](#). The provisions of Protocol 29 are consistent with the prohibition against slavery and forced labour under Articles 6(1) and (2) of the Constitution and the provisions of the Penal Code and the ATIPSOM referred to in paragraph [19] above. Malaysia has also endorsed the [UN Guiding Principles on Business and Human Rights](#), the [UN Global Compact](#), and the [Roundtable of Sustainable Palm Oil Standards](#).

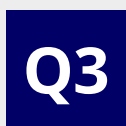
⁴³ *The Co-operative Central Bank Ltd v KGV & Associates Sdn Bhd* [2008] 2 CLJ 545 (FC). A version of this case report is not publicly available. See (n 2).

⁴⁴ [1986] 1 MLJ 271 (HC). A version of this case report is not publicly available. See (n 2).

- iii. In determining the standard of care required of a given situation, the Malaysian courts would be open to referring to international standards that the Malaysian government has endorsed, including those identified above. This is even more so where the employer concerned has represented itself to have adopted or endorsed those frameworks. The standard of care expected of employers would evolve accordingly.
27. Where claims for **breach of statutory duties** are concerned, it is principally relevant to determine whether Parliament had intended that a duty was enforceable.
- A pertinent question would be whether the statute concerned intends to give a right of action in tort. OSHA section 59, for example, prohibits a separate right of action in any civil proceedings.
 - The courts will scrutinise the intention of Parliament in the enactment of the statute in order to ascertain if a duty of care arises on a case-by-case basis.

Civil claims against the Federal/State Governments and public bodies

28. Common law tort claims can be made against the Federal and State Governments for vicarious liability. However, regard must be had to the [Government Proceedings Act 1956](#) (Revised 1988),⁴⁵ in particular, sections 5 and 6(1). Section 5 permits tortious claims against governments for the wrongful acts of public officers. It is however to be read subject to section 6(1), which has been interpreted as obliging a claimant to join the primary tortfeasor as a defendant.⁴⁶
29. This interpretation has created difficulties more so for the requirement under the [Public Authorities Protection Act 1948](#) section 2(1)(a) which requires a claim to be commenced 'within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof' failing which it is time-barred.



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

Generally

30. Subject to the further discussion that follows, Malaysian law recognises **joint liability, vicarious liability,**⁴⁷ **joint tortfeasorship** and **lawful and unlawful means conspiracy** in the same manner as English law. To the extent that the complicit or accessory conduct complained of meets the requirements of these bases of claim, they are actionable.

⁴⁵ This online version is included for general reference only. See (n 4).

⁴⁶ [Kerajaan Malaysia & Ors v Lay Kee Tee & Ors](#) [2009] 1 MLJ 1 (FC), at 14.

⁴⁷ [Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby \(the administrator of the estate and dependent of Kugan a/l Ananthan, deceased\) and Another Appeal](#) [2015] 1 MLJ 353 (CA). A version of this case report is not publicly available. See (n 2).

SPOTLIGHT: CASE STUDY

An example to consider is the case of *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby* (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal.⁴⁸ This case concerned Kugan Ananthan, whose death was initially misreported by the police as being that he had collapsed after drinking water. No reference was made to the external signs of beatings on his body, which were only reported after his family procured a second autopsy. Although the police officer's acts of assault were unauthorised by the third defendant (who was the Officer in Charge of the Police District), the Court held that the unauthorised acts were nonetheless carried out during the ordinary course of his duties. As a result, the police officer's unauthorised acts had become so connected with his own authorised acts that the Court found that the Officer in Charge must be held vicariously liable for the unlawful actions of the lower-ranking police officer.

31. Rights of action against, and contribution against joint and several tortfeasors are preserved by the [Civil Law Act 1956](#) section 10.⁴⁹

Joint liability

Not acting in concert

32. Where several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage against independent tortfeasors.⁵⁰

Acting in furtherance of a common design

33. The joint liability of a party who had assisted the principal tortfeasor in the commission of a tortious act, and the decision of the UK Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK and others*⁵¹ (*Fish & Fish*), have yet to be considered by the Malaysian courts.

34. It appears though, that the principles stated in *Fish & Fish*⁵² would be accepted by a Malaysian court. The issue of joint liability pursuant to a common design was considered in a decision of the High Court of Singapore of 1972, *Wah Tat Bank Ltd & Ors v Chan Cheng Kum & Ors*.⁵³

35. Furthermore, the decisions in *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department*,⁵⁴ *The Kursk*,⁵⁵ and *CBS Songs Ltd v Amstrad Consumer Electronics Plc*,⁵⁶ in which the UK Supreme Court relied on in *Fish & Fish*, have been cited with approval by the High Court in *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)*,⁵⁷ a decision which concerned joint liability.

48 *ibid.*

49 See (n 4).

50 *Malaysia National Insurance Sdn Bhd v Lim Tiok* [1997] 2 CLJ 351 (SC) (*Lim Tiok*), per Edgar Joseph Jr FC, at 375; *Tetuan Khana & Co v Saling Lau Bee Chiang & Ors and Other Appeals; Malayan Banking Bhd (Intervener)* [2019] 3 CLJ 56 (CA) per Idrus Harun JCA (as he then was) at [167], applying *Lim Tiok*. Versions of these case reports are not publicly available. See (n 2).

51 [2015] AC 1229.

52 As stated by Lord Toulson, at [21]-[22] and by Lord Sumption, at [37]-[39].

53 [1972] 2 MLJ 81. A version of this case report is not publicly available. See (n 2).

54 [1998] 1 Lloyd's Rep 19.

55 [1924] P 155.

56 [1988] AC 1013.

57 [2012] 9 MLJ 464 (HC). A version of this case report is not publicly available. See (n 2).

Q4

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

As a general rule, the Malaysian courts apply the principle of separate legal entity to companies. This would apply equally to companies within a group of companies.⁵⁸

Piercing the corporate veil

36. The general rule is however subject to certain exceptions. The Malaysian courts have in some instances applied the UK Supreme Court's case *Prest v Petrodel Resources Ltd*⁵⁹ in permitting the **corporate veil to be lifted or pierced**. This is more usually done where actual or equitable fraud is established, or where a company is interposed so that its separate legal personality will defeat the enforcement of a pre-existing legal right against its controller.⁶⁰
37. More specifically, where labour claims are concerned, the courts have applied the principle of 'common employer' and there being 'an essential unity of group enterprise', though is still understood as an instance of the corporate veil being pierced.⁶¹

Parent company liability

38. The question of whether this approach would be applied in claims made against parent companies for the wrongdoings of subsidiaries or where there is supply chain supervision has not yet been considered.⁶²
39. Having said that, where parent company liability is concerned, there does not appear to be good reason for the Malaysian courts not to adopt the approach laid down by the UK Supreme Court in *Vedanta Resources Plc v Lungowe*⁶³ and *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another*,⁶⁴ especially where the duty of care is concerned. The issue of parent company liability is not a novel category, as the Malaysian courts have acknowledged the possibility that a parent company might owe a duty of care directly to the employees of those subsidiaries, for their health and safety.⁶⁵

58 *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557 (FC), at [42]; *Tengku Dato Ibrahim Petra Tengku Indra Petra v Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641 (FC) at [170].

59 [2013] 2 AC 415.

60 *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Others* [2021] 3 MLJ 622 (FC).

61 *Ahmad Zahri Mirza Abdul Hamid* (n 58), at [42] to [45].

62 *Ong Leong Chiou* (n 60). The Federal Court declined to answer the question of the applicability of the piercing of the corporate veil doctrine where joint tortfeasor liability was sought to be established, because the question conflated and misapprehended the facts and the law. However, the Federal Court affirmed the judgment of the High Court which allowed a commercial claim on the basis of the principle of 'group enterprise'.

63 *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

64 *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

65 *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58 (FC), citing *Chandler v Cape plc* [2012] 3 All ER 640 and *Thompson v Renwick Group plc* [2014] EWCA Civ 635.

SPOTLIGHT: CASE STUDY

In *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd*,⁶⁶ the appellant was an expatriate consultant for AIMS Data Centre 2 Sdn Bhd (ADC). Upon renewal of the appellant's contract with the respondent, it sought to remove the appellant's entitlement to a performance bonus scheme, which led to an early release from his contract. He challenged this for being a dismissal without just cause or excuse. The Federal Court was of the view that ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise' that permitted the corporate veil to be pierced in order to establish or identify the true labour relationship between parties. Hence, the appellant's employment with both defendants was considered to be continuous.

40. Parent companies can thus be made jointly liable with a subsidiary in the manner described above. The key consideration is whether the parent company had acted in concert with the primary tortfeasor towards a common end resulting in the same damage in the same cause of action.⁶⁷ In one instance, a parent company was found to be jointly liable with its subsidiary for damage caused by discharge of industrial effluents by the subsidiary. The parent company was found to have been directly involved in the operations of the subsidiary.

SPOTLIGHT: CASE STUDY

The example of *Petronas Gas Bhd v DWZ Industries (Johor) Sdn Bhd & Anor*⁶⁸ is relevant here. The claimant is a publicly listed company with the principal business of separating natural gas into components and transporting, distributing such components and sale of industrial utilities. It is the owner of land that was expressly used for gas and petroleum substance gas lines and related facilities including a pipeline network constructed below ground. The first defendant occupied and ran a factory on land belonging to its parent company. That factory was situated adjacent to the claimant's land. The High Court concluded that the parent company was jointly liable as it was the owner of the land and directly involved in the operations of its subsidiary's factory (primarily through the involvement of two common directors in the day-to-day operations of the factory, which the court concluded was sufficient basis to impute knowledge).

⁶⁶ *ibid.*

⁶⁷ *Wah Tat Bank Ltd* (n 53); *Sime Darby Bhd* (n 57). Versions of these case reports are not publicly available. See (n 2).

⁶⁸ [2021] 7 MLJ 283 (HC). A version of this case report is not publicly available. See (n 2).

Liability for wrongs of independent contractors

41. Although generally, an employer is not liable for the negligence of an independent contractor, Malaysian law recognises that in some instances, a duty of care is not delegable.⁶⁹ The approach to determining whether that duty is delegable is the same as under English law. It bears mentioning that the Malaysian courts have accepted that a duty of care cannot be delegated in cases of strict liability and where a statute imposes that duty on the employer.⁷⁰
42. Separately, it stands to reason that employers could be made liable if they conduct themselves in a manner that attracts joint liability in the manner described in [32] to [35] above.

Q5

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

Judicial review

43. The nature of the possible reliefs is indicated by [Courts of Judicature Act 1964](#), Schedule para 1⁷¹ and the [Rules of Court 2012](#), Order 53 rule 2. In addressing the three defined harms, a claimant might seek a quashing order, mandamus, declaratory relief, monetary compensation and an injunction.
44. The courts have a wide discretion to mould the appropriate relief in judicial review.⁷²

Civil claims

45. Claimants would be entitled to remedies akin to those under English law. This includes:
- **Damages** (general and special) and, where appropriate, aggravated or exemplary damages (this is more the case in claims in respect of the first defined harm);⁷³ and
 - **Preventive or injunctive relief.**⁷⁴ Such relief is not available against the Federal and State Governments.⁷⁵

69 *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia & Anor* [2015] 7 CLJ 849 (CA). A version of this case report is not publicly available. See (n 2).

70 *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 3 CLJ 205 (SC). A version of this case report is not publicly available. See (n 2).

71 See (n 4).

72 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Mohd Sobri Che Hassan* [2020] 1 CLJ 595 (FC).

73 Due to statutory restrictions, a death in police custody cannot be the subject of a claim for exemplary damages but can be compensated with aggravated damages. See *Koperai Zainal Mohd Ali* (n 38).

74 Governed by [the Specific Relief Act 1950 \(SRA\)](#) Part III and [Rules of Court 2012](#), Order 29.

75 [GPA](#) s 29(a) and [SRA](#) s 54(d). This has been applied equally to interim injunctions. *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676 (CA). A version of this case report is not publicly available. See (n 2).

Q6

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

The preferred choice

46. The only means of redress available to victims of human rights violations lies in civil claims and, where appropriate, judicial review. With the exception of ATIPSOM identified in [19] above with respect to human trafficking, criminal proceedings do not result in any form of compensation to victims.
47. Although Malaysia has established a National Human Rights Institute in accordance with the [UN Paris Principles Relating to the Status of National Institutions](#) – [the Malaysian National Human Rights Commission \(SUHAKAM\)](#)⁷⁶ – its role is limited to capacity building and the conduct of inquiries.⁷⁷ Where human rights infringements are disclosed by such inquiries, SUHAKAM is merely empowered to refer the matter to the relevant authority with recommendations. In practice, this results in little or no action, a state of affairs made evident by the failure on the part of the Government or the Royal Malaysian Police to take any steps to address damning findings by SUHAKAM of the involvement of the police in the disappearances of two religious freedom activists.⁷⁸ Their families have had to commence civil claims.
48. Although civil claims can, theoretically, be costly, this has been ameliorated by lawyers prepared to work on a ‘no win, no fee’ basis,⁷⁹ or even on a pro-bono basis, at times with the support of NGOs. Additionally, the Malaysian Bar has its own legal aid scheme.

Q7

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

49. Civil claims can be brought against a foreign defendant, without leave of court, if the foreign defendant has a place of business in Malaysia.⁸⁰
50. However, where the foreign defendant does not have a presence in Malaysia, leave must first be sought by the claimant from the High Court to serve a notice of a writ on the foreign defendant who is out of jurisdiction.⁸¹ In granting leave, a Malaysian court will assume jurisdiction.
51. In order for the High Court to grant leave, the claimant must demonstrate that it fulfils one or more of the jurisdictional gateways set out under [Rules of Court 2012](#), Order 11 rule 1. With respect to the three defined harms, the relevant gateways would be:

⁷⁶ Established by the [Human Rights Commission of Malaysia Act 1999](#) (SUHAKAM Act).

⁷⁷ SUHAKAM Act 1999 Part III.

⁷⁸ SUHAKAM's final decision on the Public Inquiry into the Disappearance of Pastor Raymond Koh and Amri Che Mat (2019) is available at this [link](#).

⁷⁹ Note however, in terms of the [Legal Profession Act 1976](#) s 112, Malaysian lawyers are not permitted to take on work on a contingency basis.

⁸⁰ Courts of Judicature Act 1964 s 23(1).

⁸¹ [Rules of Court 2012](#), Order 11 rule 1.

- where the civil claim is founded on a tort committed within the jurisdiction;⁸² or
- where the civil claim is properly brought against an ‘anchor defendant’ within the jurisdiction and the foreign defendant is a ‘necessary or proper party’ to that claim.⁸³

52. Additionally, a claimant must further demonstrate that:

- It has a good cause of action, and shows in what place or country the defendant is, or probably may be found.⁸⁴ A court is entitled to refuse leave if the case is not a proper one for service out of the jurisdiction;⁸⁵ and
- The Malaysian courts are the proper forum (***forum conveniens***). The applicable legal principles where *forum conveniens* is concerned are the same as those under English law.

53. The legal principles applicable to the granting of leave to serve out of jurisdiction, including those relevant to the establishing of jurisdictional gateways, mirror those under English law.

54. Once served, a defendant may dispute jurisdiction and seek the appropriate orders (Order 12 rule 10(1)). Alternatively, it is open to such a defendant to apply to stay proceeding on the basis that the court should not assume jurisdiction over the action by reason of Malaysia not being the proper forum for the dispute.⁸⁶



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

55. Further research on human rights violations, though not necessarily focused on civil liability, can be undertaken with the relevant authorities and NGOs. International NGOs which cover Malaysia include [Amnesty International](#), [Human Rights Watch](#), [Greenpeace](#) and [WWF](#). In addition, some local bodies are listed below:

- [Human Rights Commission of Malaysia \(SUHAKAM\)](#)
- Committees of the Malaysian Bar ([Human Rights](#); [Environment and Climate Change](#); [Industrial and Employment Law](#); [Migrants, Refugees, and Immigration Affairs](#))
- [Suara Rakyat Malaysia \(SUARAM\)](#)
- [Lawyers for Liberty](#)
- [Center to Combat Corruption and Cronyism \(C4\)](#)
- [KOMAS](#)
- [Malaysian Nature Society](#)
- [Malaysian Trades Union Congress Tenaganita](#)
- [Joint Action Group for Gender Equality](#)
- [Women’s Aid Organisation](#)

82 *ibid* Order 11 rule 1(G).

83 *ibid* Order 11 rule 1(I).

84 *ibid* Order 11 rule 4(1).

85 *ibid* Order 11 rule 4(2).

86 *ibid* Order 12 rule 10(2).

56. The following literature regarding the human rights in Malaysia may be of assistance:

- [2021 Country Report on Human Rights Practices: Malaysia](#), issued by the US Department of State (Bureau of Democracy, Human Rights and Labor);
- [Constitutional Law and Human Rights in Malaysia](#), edited by Khairil Azmin Mokhtar;
- [Human Rights Law: International, Malaysian and Islamic Perspectives 2012](#), by Abdul Ghafur Hamid;
- [Human Rights Reports](#), issued by SUARAM;
- [Amnesty International Report 2021/2022](#), by Amnesty International;
- [Human Rights Watch World Report 2021, Malaysia](#), by Human Rights Watch.



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](#)



Case Scenario 1

Q1

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

Claims against the police

57. Civil claims could be brought against the police, and the Federal Government for vicarious liability.⁸⁷ The key causes of action relevant to Case Scenario 1 would be for **assault, battery, unlawful arrest or false imprisonment and breaches of statutory duty**,⁸⁸ the elements of which have been explained in [14] above. Compensation in this respect would generally be for damages, be it general, specific, aggravated or exemplary.
58. Where claims for **false imprisonment** are concerned, it should additionally be noted that:⁸⁹
- The Criminal Procedure Code section 28 states that no police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable.
 - Article 5(4) of the Constitution requires an arrested person to be brought without unreasonable delay and, in any event, within 24 hours before a magistrate. A magistrate has the authority under Criminal Procedure Code section 117 to authorise further detention to facilitate investigations.
 - A proviso to article 5(4) of the Constitution provides that those non-citizens arrested under the law relating to immigration need to be brought before a magistrate within 14 days.
59. The making of a remand order by a magistrate is a **material consideration**. It would have the effect of rendering the detention lawful for the period provided for by the order.
- This would however leave it open to a claimant to make a claim in connection with any detention prior to the making of the remand order.

⁸⁷ It ought to be borne in mind that in any claim in tort against the Government, the government officer who was responsible for the alleged tortious act must be made a party, and his liability must be established before the Government could be made vicariously liable as principal pursuant to GPA ss 5 and 6 (*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663 (FC), at [16]).

⁸⁸ The principal statutes where the police are concerned are the [Criminal Procedure Code](#) and the Police Act 1967.

⁸⁹ *In Re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471 (HC), at 478. A version of this case report is not publicly available. See (n 2).

- However, a remand order would not be treated as a bar if the claimant was assaulted or tortured during that period. In such cases, a court would consider the remand order as having been abused and would permit a collateral attack on it.⁹⁰

Claims against Security Co personnel

60. A civil claim could be made against Security Co and its personnel if the basis for their **joint liability** could be established. The discussion in [32]-[35] above concerning joint liability refers, in particular, on the availability of recourse for joint liability on the basis of a common design.



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

61. Where the police personnel had acted wrongfully, it would be open to claimants to lodge complaints of misconduct with the Enforcement Agency Integrity Commission, which is regulated by the [Enforcement Agency Integrity Commission Act 2009](#).
62. If the conduct complained of involves criminal offences, a police report can be lodged against the perpetrators, following which the police may commence investigations, and the matter may be referred to the Public Prosecutor to decide whether to commence criminal prosecution.⁹¹



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

63. There are a number of decisions of the Malaysian courts that are relevant to Case Scenario 1.

On wrongful arrest and false imprisonment:

- In *Dr Sanusi Bin Osman & Ors v Datuk Ismail Bin Che' Ros*,⁹² the police had arrested and detained the plaintiffs who were the organisers and participants of the Asia Pacific Conference on East Timor (APCET II). The arrests were made after a mob of unruly demonstrators from an organisation called Barisan Bertindak Rakyat Malaysia had barged into the conference and failed to disperse. The High Court held that the arrests and detentions by the police were unlawful and awarded general damages. This was ultimately upheld by the Court of Appeal.⁹³

⁹⁰ [Hassan Marsom & Ors v Mohd Hady Ya'akop \[2018\] 7 CLJ 403 \(FC\)](#), at [103] and [108]-[121].

⁹¹ See for instance Penal Code s 166 which provides for the offence of a '[p]ublic servant disobeying a direction of the law, with intent to cause injury to any person'.

⁹² [2011] 3 MLJ 274. A version of this case report is not publicly available. See (n 2).

⁹³ See news report at this [link](#).

- In *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors*,⁹⁴ the appellant, a member of parliament, was arrested outside her residence by a group of police officers on the instructions of their superior officer. The Court of Appeal concluded that the respondents failed to establish that the arresting officer had reasonable and substantive grounds to support the arrest of the appellant and held that the arrest and the subsequent detention was unlawful. The appellant was further awarded exemplary and aggravated damages, alongside general damages.
- In *Fadiyah Nadwa Fikri & Ors v Konstabel Fauziah Mustafa & Ors*,⁹⁵ the police arrested participants in a candlelight vigil outside a police station. The plaintiffs, who were lawyers from the Legal Aid Centre, had arrived at the police station to render legal assistance to the detainees but were themselves arrested. They brought a claim for false imprisonment against the police officers and succeeded. The High Court awarded general damages for breach of constitutional rights, false imprisonment and detention, as well as aggravated and exemplary damages for the appalling and oppressive conduct of the defendants.

On assault and torture by police personnel during custody:

- *Hassan Bin Marsom & Ors v Mohd Hady Bin Ya'akop*⁹⁶ concerned allegations of false imprisonment and custodial assault against the respondent who was suspected to be involved in a crime (but eventually found to not be involved). The Federal Court held that where assaults were committed and injuries were inflicted under the pretext of using remand orders, this amounted to misuse and abuse of power and thus making the detention to be unlawful.
- *Ketua Polis Negara & Ors v Nurasmira Maulat Bt Jaffar & Ors*,⁹⁷ concerned three different appeals brought by dependents of three deceased individuals whose deaths were caused by the police (one pertained to death during crossfire and two pertained to death in custody). The questions of law that were before the Federal Court concerned the award of damages. The Federal Court ultimately held that exemplary damages were not available for custodial deaths under the Civil Law Act 1956 sections 798 and 899, even where the death of the deceased was the result of a breach of the constitutional right to life. However, it is worth noting that in the dissenting judgment, Zainun Ali FCJ held that the State or an instrument of the State which has committed the wrong has the effect of depriving the victim of his life in a manner not in accordance with the law and that the victim should be entitled to an award of exemplary damages.
- *Kerajaan Malaysia v Ambiga Sreenevasan & Ors*,¹⁰⁰ arose out of the 'Bersih' protest for electoral reform. This was a civil suit brought by the Government against the organisers of the protest. Although the court dismissed the Government's claim, it upheld a counterclaim (within the same suit) by one of the organisers and awarded general and aggravated damages for the injuries he suffered as a result of the wrongful assault he had been subjected to whilst in police custody.

On police malfeasance: Decisions relating to this have been noted above, see discussion in [23] and [30].

94 [2016] 6 MLJ 352 (CA). A version of this case report is not publicly available. See (n 2).

95 [2014] MLJU 1903 (HC). A version of this case report is not publicly available. See (n 2).

96 [2018] 5 MLJ 141 (FC).

97 [2017] MLJU 1764 (FC).

98 This provision permits persons to seek compensation for loss occasioned by death where such death is caused by wrongful act, neglect or default.

99 This provision provides for scenarios in which a cause of action vesting in a person, including damages recoverable, shall survive for the benefit of his estate in the event of death.

100 [2016] 5 MLJ 721 (CA). A version of this case report is not publicly available. See (n 2).

CaseScenario 2

Q1

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

Claims against public bodies

64. It is possible for judicial review to be sought to quash licences or permits issued by the relevant regulatory authorities to Subsidiary Co. Alternatively, where circumstances warranted intervention by the regulatory authority and it failed to take appropriate action, mandamus can be sought. Where it can be shown that the injury and loss suffered was a direct consequence of the acts or omissions of the said authority, monetary compensation could also be sought.
65. An application for judicial review would be subject to the requirements indicated in 16] above, such as the necessity for the claimant to be 'adversely affected' and the need for leave to commence judicial review to be sought within the permitted time period.

Claims against Subsidiary Co

66. A civil claim could be brought against the Subsidiary Co for the following causes of action (see also [17] above):
- Aggrieved persons, be they owners or occupiers of adjacent lands affected by the pollution, could make claims for
 - i. Negligence. It stands to reason that claims for pure economic loss could also be maintained;¹⁰¹
 - ii. Nuisance, including for strict liability under the rule in *Rylands v Fletcher*;¹⁰²
 - iii. Breaches of the following statutory duties:
 - a) Duty not to pollute soil or inland waters;¹⁰³
 - b) Duty not to discharge oil or waste into Malaysian waters;¹⁰⁴
 - c) Duty not to obstruct or interfere with any river;¹⁰⁵
 - d) Duty not to pollute rivers.¹⁰⁶
 - Representative actions can be brought where numerous persons have the same

¹⁰¹ The elements are the same as that under English law.

¹⁰² *Kerajaan Malaysia* (n 100).

¹⁰³ EQA ss 24 and 25.

¹⁰⁴ *ibid* ss 27 and 29.

¹⁰⁵ [Waters Act 1920](#), s 5(1)(b).

¹⁰⁶ *ibid* s 7A.

interest in the legal proceedings. In such cases, the civil claim can be made by one or more, as 'representing all or as representing all except one or more of them'.¹⁰⁷

Claims against Parent Co

67. A civil claim could potentially be made against Parent Co despite the wrongful acts having been committed by Subsidiary Co, on the basis of the matters discussed in [38]-[40] above, in particular the likely adoption of the approach of the UK Supreme Court in *Vedanta*¹⁰⁸ and *Okpabi*.¹⁰⁹ We note that the UK Supreme Court in *Vedanta* and *Okpabi* recognised that a duty could be owed by a parent company in the following circumstances (also referred to as the *Vedanta* routes):
- i. Route 1: A parent company takes over the management or joint management of the relevant activity of its subsidiary;
 - ii. Route 2: A parent company provides defective advice and/or promulgates defective group-wide safety/environmental policies which are then implemented as of course by its subsidiary;
 - iii. Route 3: A parent company promulgates group-wide safety/environmental policies and takes active steps to ensure the implementation of those policies by its subsidiary;
 - iv. Route 4: A parent company holds out that it exercises a particular degree of supervision and control of its subsidiary.
68. The facts of Case Scenario 2 disclose that the Parent Co is responsible for the overall management of the group's extractive business, the operations of which are carried out by its subsidiaries including Subsidiary Co. Parent Co had also held out to its shareholders that the group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations.
- On its face, the facts would appear to fall within any of the *Vedanta* routes.
 - We note, however, that the decision in *Vedanta* concerned a procedural dispute over whether litigation relating to pollution in Zambia could be tried in the English courts. A major issue was whether the claims disclosed a real triable issue against the English parent company. Though that was answered in the affirmative, it remains to be seen how, at trial, the *Vedanta* routes are applied.
 - As explained at [5] above, English decisions are highly persuasive where tortious claims are concerned and thus there does not appear to be good reason not to adopt the approach laid down in those cases and their subsequent development.
69. For completeness, it should be noted that if Parent Co were outside jurisdiction, the requirements of service out of jurisdiction would have to be complied with.¹¹⁰

¹⁰⁷ Rules of Court 2012, Order 15 rule 12(1).

¹⁰⁸ *Vedanta* (n 63).

¹⁰⁹ *Okpabi* (n 64).

¹¹⁰ Rules of Court 2012, Order 11.

Q2

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

70. Complaints can be lodged with the [Department of Environment](#), which could take the appropriate action. Additionally, criminal prosecution may be initiated by the Public Prosecutor where appropriate. The matters described could potentially amount to criminal offences under the EQA¹¹¹ and the Waters Act 1920.¹¹²

Q3

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

71. As mentioned in [38] above, Malaysian case law has yet to consider liability in the context of parent company liability. However, Malaysian courts have considered lawsuits similar to Case Scenario 2 insofar as Subsidiary Co is concerned, these have been indicated above (see [16]-[17] above). Other notable cases include the following:

Action in judicial review for environmental pollution affecting a local population:

- In *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors*,¹¹³ the Atomic Energy Licensing Board (the second respondent) had pursuant to the ALA granted the fourth respondent a temporary operating licence (TOL) to carry out mining operations in the area where the applicants were residing. The applicants initiated a judicial review application in the High Court to quash the second respondent's decision to grant the TOL. At the leave stage, the applicants' application for a stay order, or alternatively an interlocutory injunction against the second respondent, to prevent it from issuing further licenses, permits, or approvals with respect to the fourth respondent's activities was dismissed. The Court of Appeal concluded that an injunction, interlocutory or permanent, could not be granted against the government by virtue of GPA section 29 and SRA 1950 section 54. The court further concluded that the orders sought would interfere with the public duty of the second respondent under the ALA.

Regarding claims in civil proceedings:

- In *Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors*,¹¹⁴ the first respondent, a public authority, granted Lynas Malaysia Sdn Bhd (the third respondent) a TOL pursuant to the ALA to construct a plant to extract rare earth from the processing of raw material for lanthanide concentrates. The applicants were residents of the neighbouring area and sought to quash the granting of the TOL on the grounds that it was in breach of the EQA and the constitutional guarantees under the Constitution, articles 5, 8 and 13. The judicial review was ultimately dismissed at the leave stage on the ground that there was a domestic remedy available.

¹¹¹ s 34B(4).

¹¹² s 15.

¹¹³ *Tan Bun Teet* (n 75).

¹¹⁴ *Zakaria bin Abdullah* (n 23).

- In *Petronas Gas Bhd v DWZ Industries (Johor) Sdn Bhd & Anor*,¹¹⁵ the defendant factory operator had constructed an illegal bypass on the plaintiff's land, in order to discharge effluent into a nearby river. Leakage from the bypass onto the plaintiff's land resulted in corrosion of the gas pipeline belonging to the plaintiff. The discharge of industrial effluent onto neighbouring land was found actionable in trespass, private nuisance, the rule in *Rylands v Fletcher*, and negligence. The High Court concluded that the parent company was jointly liable as it was directly involved in the operations of its subsidiary's factory. However, the basis for liability of the parent company was not explored in great detail, in particular the circumstances in which the duty of the parent company was said to arise and the nature of the duties owed.
- The pollution of rivers in Malaysia is a long-standing concern. However, civil claims are rare. We have discerned from media reports that representative actions have been initiated in respect of the pollution of the Kim Kim River and the Gong River on the ground that alleged illegal chemical dumping had caused adverse effects on the population residing near the rivers.¹¹⁶ It was contended that amongst the symptoms complained of by victims, including children, were 'vomiting, nausea, dizziness, short of breath, eye irritation, chest pain, sore throat and cough' which were consistent with adverse effects of exposure to a mixture of the 'toxic gases acrolein, acrylonitrile, methyl mercaptan and benzene'.¹¹⁷ The status of the legal proceedings is uncertain.



115 *Petronas Gas Bhd* (n 68).

116 BERNAMA, '[Adopt Drastic Strategies to Tackle River Pollution](#)' (BERNAMA, 3 January 2022).

117 For more information on the study conducted on the river pollution, See: Academy of Sciences Malaysia, '[ASM Report: Lessons from Sungai Kim Kim, Pasir Gudang](#)' (Academy of Sciences Malaysia, 5 April 2019).

CaseScenario 3

Q1

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

Claims against Factory Co

72. A civil claim could be brought by the affected employees and/or their dependents against Factory Co for the following causes of action:

- Negligence;
- Breach of the following statutory duties (see [19] above):
 - i. Duty to comply with the conditions of service provided for under the EA, including minimum terms and conditions of service and payment of wages for overtime work;¹¹⁸
 - ii. Duty to ensure the safety, health and welfare of the employees including the duty to formula a safety and health policy;¹¹⁹ and
 - iii. Duty to inquire into complaints of sexual harassment at the workplace.¹²⁰
- In the instance of sexual harassment, the tort of sexual harassment.¹²¹
 - i. Reference to sexual harassment is made in [EA](#) section 2 which defines sexual harassment as 'any unwanted conduct of a sexual nature, whether verbal, nonverbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.'
 - ii. The definition satisfies the main elements of the tort of sexual harassment, namely:¹²²
 - a) a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person;
 - b) such conduct is tainted with some constant and objectionable sexual hallmarks; and
 - c) such conduct is calculated and does cause alarm, fear, distress, disturbance or annoyance to the victim.

118 EA Part XII.

119 OSHA ss 15 to 18.

120 EA Part XV.

121 *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282 (FC). A version of this case report is not publicly available. See (n 2).

122 *ibid* at [46].

Claims against Brand Co

73. Bringing a claim against Brand Co is not as straightforward.

- As indicated in [38] above, the question of whether direct claims can be made against companies for the wrongdoings of its supply chain has not as yet been considered by the Malaysian courts. In principle, however, if the conduct complained of on the part of Brand Co satisfies the elements of the various torts considered in [14], there is no reason why a suit could not be brought.
- The facts do not appear to disclose that Brand Co was acting in concert with Factory Co such as to attract a claim for joint liability, or that it had conducted itself in a manner that warrants the corporate veil of Factory Co to be lifted in the manner discussed in [36]-[37] above with respect to companies being interposed to avoid liability.
- However, there may be basis to bring a claim by reference to the principles set out by the UK Supreme Court in *Vedanta*¹²³ and *Okpabi*.¹²⁴ *Vedanta* route 4 would appear to be of relevance given that, on the facts, Brand Co had held itself out as having committed to responsible business practices and human rights standards. However, this would turn on whether Brand Co had any say in the affairs of Factory Co, and the extent of this, in connection with the production of the clothes supplied to Brand Co.



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

74. A complaint may be lodged with the [Department of Occupational Safety and Health](#), which could investigate and possibly initiate criminal prosecution. The matters described could potentially amount to criminal offences under OSHA.¹²⁵

75. An employee, or dependents of an employee will also be entitled to benefits under the [Employees' Social Security Act 1969](#) in the event of an employment injury or death as a result of an employment injury, provided that the employee is an 'insured person' within the meaning of the Act.

76. A complaint of sexual harassment may be made to the Director General of Labour by an employee against any employer, in this instance, Factory Co, pursuant to EA section 81D. Where the Director General of Labour decides that sexual harassment is proven, the complainant may terminate his contract without notice, and will be entitled to applicable wages, termination benefits and indemnity.

¹²³ *Vedanta* (n 63).

¹²⁴ *Okpabi* (n 64).

¹²⁵ OSHA s 19.



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

77. There do not appear to have been any claims in Malaysia on facts similar to those in Case Scenario 3.
78. The mistreatment and death of migrant workers in Malaysia is a serious concern. Legal proceedings are however uncommon, in part due to the involvement of agencies of the Federal Government and concerns about bringing claims against them.
- Irene Fernandez, founder and director of human rights organization Tenaganita, was arrested in 1996 for reporting that detained illegal immigrants suffered from malnutrition and torture. Seven years after her arrest, she was sentenced to one year imprisonment, but she appealed, and was set free on bail. However, her civil rights were restricted. As a convicted person, she was barred from standing as parliamentary candidate in the 2004 Malaysian elections and she could not travel outside the country freely. Eventually in 2008, Malaysia's Public Prosecutor dropped his opposition to Fernandez' appeal due to the discovery of 'systematic errors' manifested in the court records.¹²⁶
 - More recently in July 2021,¹²⁷ Heidi Quah, founder of non-governmental organisation Refuge for the Refugees, was charged with making a Facebook posting on alleged mistreatment of refugees at the immigration detention centre. The trial has yet to commence.



126 See further [here](#).

127 See further [here](#).

