

A HANDBOOK FOR PRACTITIONERS | THE NETHERLANDS

# Civil Liability for Human Rights Violations



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## FREQUENTLY USED ABBREVIATIONS

DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure
ECHR	European Convention on Human Rights

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# THE NETHERLANDS



Protection of human rights is an important principle in the Dutch legal system. The law of non-contractual liability and the general provisions regarding a wrongful act form the basis for most human rights-related lawsuits in the Netherlands. Human rights can be invoked both directly and indirectly in civil litigation, and EU law and the European Convention on Human Rights are frequently relied on to assist with interpretation of Dutch law. Recently, civil liability law has been increasingly used in public-interest litigation to address global challenges such as climate change and accountability of multinational enterprises. The *Urgenda* climate case against the Dutch Government was the first in the world to establish that the State must take measures for the prevention of climate change and that it must reduce its greenhouse gas emissions.

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## INDICES

11/167

Democracy Index  
2021 Ranking

97/100

Freedom House  
2022 Score

8/180

Transparency International  
Corruption Index 2021 Ranking

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



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

## Introduction

1. The Netherlands has a civil law system, meaning that there is a codified system of law. Dutch civil law was originally founded on Roman Law and the Code Napoléon, which was the French Civil Code that applied during the period of French political domination of the Netherlands. The general code of civil law in the country is the [Dutch Civil Code](#) (DCC, *Burgerlijk Wetboek*).<sup>1</sup>
2. The DCC holds several core concepts that are not fixed, including, for example, open norms such as fairness and reasonableness which allow the courts a wide margin of interpretation. The meaning of these core concepts has changed over the years, influenced by Dutch as well as transnational judgments and developments. In particular, EU law and international conventions such as the [European Convention on Human Rights](#) (ECHR) have an influence on the interpretation of Dutch law.<sup>2</sup>
3. In practice, human rights litigation in the Netherlands often involves transnational facts. For example, Dutch multinational companies may cause damage in third countries where they conduct business activities, rather than in the Netherlands itself. In such scenarios, the court will apply the relevant foreign law rather than Dutch law.<sup>3</sup> Thus, in many of these cases, Dutch substantive civil law is not used at all. The Case Scenarios in this Handbook are set in a domestic context, however, and as such do not involve any consideration of foreign law.
4. In civil human rights cases where Dutch law is applicable, the ECHR often plays an overriding role. This is a consequence of the fact that while article 120 of the [Dutch Constitution](#) prohibits Dutch courts from assessing the constitutionality of national legislation and treaties, it allows courts to assess whether domestic laws are compatible with international treaties. If national legislation is considered contrary to an international convention, the international convention will prevail.
5. Civil cases in the Netherlands can be heard in three jurisdictions: district courts, courts of appeal and the Supreme Court (*Hoge Raad*). District courts and courts of appeal decide on the facts and circumstances, whereas the Supreme Court reviews judgments only on points of law.

<sup>1</sup> Dutch Civil Code (DCC, *Burgerlijk Wetboek*), adopted 1 January 1992.

<sup>2</sup> See C Breedveld-de Voogd, AG Castermans, MW Knigge, T Van der Linden & TA Ten Oeve, *Core Concepts in the Civil Code – Continuously in Motion* (Wolters Kluwer 2016).

<sup>3</sup> An example of this is *Millieudéfensie and four Nigerian farmers v Royal Dutch Shell and Shell Nigeria*, ECLI:NL:GHDHA:2021:1825 (The Hague Court of Appeal, 29 January 2019).

# General Questions



Q1

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

The principal legal basis for non-contractual liability under Dutch law is a **wrongful act**, the civil law equivalent of tort in common law systems. Wrongful act suits can be commenced against both the Dutch State itself and non-state actors.

6. Generally, litigants will hold public bodies, corporations and individuals accountable for committing human rights violations through rules of tort or delict law. Section 6:162 of the DCC encompasses the general rule of tort and applies to a very broad range of situations. This section states that a person who commits a wrongful act against another is obliged to compensate for the damage that the other person suffers as a result. The term **'person'** can be applied to individuals, private legal persons and public legal persons. There is thus no difference in the treatment of a case in a civil claim against a public body, or a civil claim against a corporation or an individual. However, if the human rights violation is the result of a decision by an administrative body, an individual may have to follow the route of an administrative objection and appeal, rather than that of a civil procedure.

It is important to note that civil liability claims under the general rule of tort can also be based on the violation of provisions of the ECHR or other human rights treaties.

7. The Netherlands has a partly monist legal system, based on sections 93 and 94 of the Dutch Constitution. In this monist system, a rule of international law can be directly applied if it is considered 'binding on all persons'. Consequently, the ECHR has proved to be a particularly important source of law in civil human rights cases.
8. As regards the three defined harms of this study, section 6:162 of the DCC can be used to bring a civil claim to hold a person accountable for harm suffered. In addition, specific provisions are applicable to the defined harms, which complement the general rule of tort:
  - a. In case of **assault, wrongful arrest, or any other wrongful act of a police officer**, the regional police force or the State can be held liable for the damage suffered on the basis of section 6:170 of the DCC. This section provides for a qualitative liability (*kwalitatieve aansprakelijkheid*)<sup>4</sup> for the person in whose service a subordinate fulfils their duty. In case of detention in custody or pre-trial detention, the State can also be liable under this section (see further discussion in [35] below).

<sup>4</sup> This refers to the legal 'quality' (*hoedanigheid*) of a liable person's relationship with the wrongdoer or source of harm, broadly covering persons such as an employer of an employee, a parent of children, an owner of animals, the owner or possessor of harmful substances, among others.

- b. In case of **environmental harm**, sections 6:175-6:178 of the DCC apply. These sections provide for several strict liabilities (*risico-aansprakelijkheid*) for environmental damage, meaning that liability is solely based on the 'capacity' or 'quality' of the liable party and not on culpability (see further discussion in [27]-[29] below).
- c. In case of **harmful or unfair labour conditions**, an employer may be liable under section 7:658 of the DCC for damage suffered by an employee as a result of harm suffered *in the performance* of their work. Section 7:611 of the DCC applies to harm suffered in the performance of work as well as in activities that are *related to work* (see further discussion in [30]-[34] below).



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

9. We first discuss the requirements of the general rule of tort for a wrongful act and then consider the requirements of the specific provisions for each of the three defined harms.

### Wrongful acts (under DCC s 6:162)

10. For a successful action under section 6:162 of the DCC, five requirements must be met:
- wrongfulness;
  - causality;
  - attribution;
  - damage; and
  - relativity.
11. The general rule is that the plaintiffs in the proceedings must allege and prove the presence of every requirement.<sup>5</sup> These five requirements are further explained below.

#### *Wrongfulness*

12. In principle, according to section 6:162(2) of the DCC, conduct can be wrongful in three situations:
- if it infringes upon a **subjective right**
  - if it violates a **statutory duty**
  - if the conduct is contrary to what is customary in society under unwritten law, the so-called '**unwritten duty of care**'.<sup>6</sup> The unwritten duty of care was articulated for the first time by the Dutch Supreme Court in 1919.

<sup>5</sup> [Dutch Code of Civil Procedure](#) (DCCP) s 150.

<sup>6</sup> *Lindenbaum v Cohen*, ECLI:NL:HR:1919:AG1776 (Supreme Court, 31 January 1919).



**SPOTLIGHT: UNWRITTEN DUTY OF CARE**

The 'Cellar Hatch' judgment (*Kelderluik arrest*)<sup>7</sup> of 1965 is considered a landmark-case as regards the unwritten duty of care. A visitor to a café in Amsterdam fell through a cellar hatch that had been left open by an employee of the Coca-Cola corporation during restocking. As a result, the visitor broke his leg. The Supreme Court formulated several considerations to use in assessing the degree of hazardous negligence (*gevaarzetting*). These considerations, which have been consistently repeated in later case law, are as follows:

- the probability that potential victims would not exercise the required attention and due care;
- the chance that accidents would ensue as a result;
- the seriousness of the possible consequences;
- the onerousness of precautionary measures;
- the 'normality' of precautionary measures; and
- the nature of the conduct.

13. Although section 6:162 of the DCC distinguishes **three categories of wrongfulness**, in practice this distinction is not always made, and many situations fall within the scope of more than one category. A human rights infringement may be regarded as an infringement of a subjective right, but it can – even when not directly applicable – also give substance to a claim of a breach of an unwritten duty of care.<sup>8</sup>

**SPOTLIGHT: CASE STUDY**

In the recent climate change case brought against [Royal Dutch Shell by Milieudefensie](#),<sup>9</sup> the District Court in The Hague ordered Shell to reduce its emissions by 45 per cent by 2030, compared to 2019 levels. The court concluded – echoing the famous *Urgenda* case that will be discussed at [27] below – that Shell had an unwritten duty of care to reduce its emissions in order to prevent dangerous climate change. According to the Court, it follows from the unwritten duty of care that Shell is obliged to respect the human rights of Dutch citizens. When assessing this duty, the District Court, among other sources and circumstances, explicitly referred to the [UN Guiding Principles on Business and Human Rights](#) as giving substance to what is considered appropriate social conduct. The Court included the UN principles in its interpretation of Shell's unwritten duty of care because these principles reflect an internationally widely accepted consensus.

<sup>7</sup> *Coca-Cola v Duchateau*, ECLI:NL:HR:1965:AB7079 (Supreme Court, 5 November 1965).

<sup>8</sup> *Milieudefensie and four Nigerian farmers* (n 3).

<sup>9</sup> *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339 (District Court of The Hague, 26 May 2021).

### *Causality*

14. For civil liability under the general rule of tort, a causal connection between the wrongful act and the damage suffered must be established. It is generally accepted that the *condicio sine qua non* test is a minimum requirement for the causal connection. The test (sometimes termed the '**but-for**' test) implies that the damage would not have occurred if the wrongful act had not taken place.<sup>10</sup> However, sole reliance on this doctrine for the assumption of causation would lead to far-reaching liability and consequently further criteria have been developed.
15. The doctrine most widely used is that of **reasonable attribution**. This involves an examination of whether the damages can be reasonably attributed to the liable person as a consequence of the wrongful act. This doctrine does not rely on a single criterion for assuming causation,<sup>11</sup> but takes all facts and circumstances into regard, including the nature of the liability and the extent of the damage. Both the 'but-for' test and the reasonable-attribution criterion can be applied when determining whether a causal connection exists between the wrongful act and the damage.

### *Attribution*

16. Whereas the requirement of wrongfulness relates to the wrongful act itself, the requirement of attribution relates to identifying the person committing the act. In principle, three grounds can be distinguished for attributing a wrongful act or omission to the perpetrator:
  - The person's own fault, meaning that the conduct is a culpable act or omission;
  - Strict liability as laid down in law, eg parental liability for children (sections 6:164–6:169 of the DCC); or
  - Strict liability based on 'generally accepted views' (*verkeersopvattingen*).<sup>12</sup>

The last category is not clearly defined, either in practice or in the literature. In essence, liability based on 'generally accepted views' concerns cases in which the perpetrator cannot actually be blamed. The history of parliamentary deliberations on this matter records references to examples of inexperience: an error made by an inexperienced doctor, or a traffic accident caused by an inexperienced motorist.<sup>13</sup> These actions can be attributed to the doctor/motorist on the basis of the generally accepted view that the injured party should be compensated.<sup>14</sup>

### *Relativity*

17. The requirement of relativity is laid down in section 6:163 of the DCC.<sup>15</sup> This requirement holds that one is only liable for non-contractual damages if the rule that has been violated is specifically intended to protect the claimant from the damages suffered.<sup>16</sup> Relativity comprises three levels. Firstly, the injured party must fall within the scope of the norm that is breached. Secondly, the norm must

10 RJB Boonekamp, '1.2.2 Condicio sine qua non', in AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

11 CH Sieburgh, *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017) para 57.

12 P Memelink, *De Verkeersopvatting* (Boom Juridische uitgevers 2009).

13 CJ van Zeven & JW du Pon, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek. Boek 6, Algemeen gedeelte van het verbintenissenrecht* (Wolters Kluwer 1981) 618-619.

14 DAMHW Strik, *Grondslagen bestuurdersaansprakelijkheid. Een maatpak voor de Board Room* (Wolters Kluwer 2010), para 2.4.

15 DCC s 6:163 reads: 'There is no obligation to pay damages if the norm that has been infringed does not protect the injured party from damages suffered by the injured party.'

16 Channa Samkalden, 'Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order' in Richard Meeran (ed), *Human Rights Litigation Against Multinationals in Practice* (OUP 2021) 209.

extend to the specific damage suffered. Thirdly, the norm must relate to the way in which the harm arose and was suffered.

18. With respect to the first category of wrongfulness (infringement of a subjective right), the requirement of relativity implies that only those entitled to the subjective right can invoke section 6:162 of the DCC. If there is a breach of a statutory duty, it must be considered whether the duty was *intended* to protect the injured party from the damage suffered. In the case of acts or omissions contrary to the unwritten duty of care, relativity can be regarded as being *integral* to the norm.

### **Damages**

19. Finally – and to some extent already included in the requirement of causality – liability presumes a form of damage.
20. In principle, the person who commits a wrongful act is obliged by law to pay compensation if all conditions for civil liability based on section 6:162 of the DCC are met.<sup>17</sup> If the exact damage cannot be assessed, it shall be estimated. Under section 6:97 of the DCC the court estimates the extent of the damage in the way that is most consistent with the nature of the damage caused. Both **pecuniary damage** (section 6:96 of the DCC) and **non-pecuniary damage** (section 6:95 of the DCC) may be eligible for compensation. Non-pecuniary damage in the Netherlands is also referred to as ‘immaterial damage’ (*immateriële schade*).
21. Since 1 January 2019, surviving relatives and next of kin of a victim with serious and permanent injuries as a result of, for example, a traffic accident, medical error, industrial accident, or violent crime, can receive compensation for the pain and suffering they experience as a consequence of the suffering of their relative. This form of compensation is called ‘affection loss’ (*affectieschade*) compensation.

### **Wrongful police/government action**

22. A person can initiate civil proceedings for assault, wrongful arrest and wrongful detention against the police or state officials. If the civil court finds that the action was wrongful, the victim or next of kin can claim compensation for the damage caused by the action. It is important to note that damages can also be granted in criminal proceedings (as discussed at [70]-[72] below).
23. Assault, wrongful arrest, and wrongful detention may constitute a wrongful act within the meaning of section 6:162 of the DCC, which may form the basis to hold a police officer who committed a wrongful act liable. Arrest or detention can be wrongful when these measures are taken in violation of the law, a legal obligation or unwritten social standards of care (eg due care, subsidiarity or proportionality). For example, wrongfulness can be based on the 2012 Police Act (*Politiewet*).<sup>18</sup> The power to use force and the accompanying responsibilities that this entails are strictly regulated by the Act. Section 7 of the Act states that force may only be used if the objective cannot be achieved in any other way. This is called the ‘requirement of subsidiarity’ (*subsidiariteitsvereiste*).

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<sup>17</sup> The obligation to pay compensation also arises if all the requirements of one of the specific grounds for liability are met, such as qualitative liability for the person in whose service a subordinate fulfils their duty under DCC s 6:170, or strict liability for environmental damage under sections DCC ss 6:175-6:178. For further explanation, see [27]-[29] below.

<sup>18</sup> Police Act (*Politiewet*), adopted 12 July 2012.

24. Moreover, on the basis of section 6:170 of the DCC, the regional police force or the State can also be held liable for the damage suffered. This section provides for a 'qualitative liability' for the person in whose service a subordinate fulfils their duty. A requirement for liability under this section of the DCC is that the subordinate must have committed an attributable wrongful act; thus, the subordinate himself must be liable.
25. In some cases, an arrest or detention may initially have been lawful, but may later turn out to be wrongful after all. This may be the case, for example, if there was a reasonable suspicion of guilt at the time of the arrest, but the victim is later considered innocent. In these circumstances, the victim does not have to bear the damage resulting from the criminal proceedings; it is an established doctrine in case law that the State is liable for damages in such scenarios.<sup>19</sup>
26. The Supreme Court has identified two possibilities for compensation for a former suspect who has suffered damage as a result of criminal action by the police and the judiciary:
  - i. The first possibility arises where there was no justification for the criminal action from the outset, where this action was in violation of a public law legal norm laid down in law or in unwritten law, including where there was no reasonable suspicion of guilt from the outset within the meaning of section 27 of the [Dutch Code of Criminal Procedure](#)<sup>20</sup> (this is the 'A ground' noted by the Court).<sup>21</sup>
  - ii. The second possibility arises where the innocence of the accused and – consequently – the unfounded nature of the suspicion on which the police action was based, is established retrospectively in the verdict of the criminal court or other documentation concerning the criminal case (this is the 'B ground' noted by the Court).<sup>22</sup>

These grounds can be relied on in civil proceedings under section 6:162 of the DCC.

## **Environmental harm**

27. Parties suffering damages as a result of environmental harm can initiate civil proceedings based on the general rule of tort for a wrongful act (section 6:162 of the DCC). The wrongfulness of an action can be based on the breach of specific environmental law or regulations, but also on breach of international conventions or an unwritten duty of care (as discussed at [12]-[13] above). It was on the latter grounds that Dutch courts held the State accountable for climate change in the landmark *Urgenda* case.<sup>23</sup>

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<sup>19</sup> *Dutch State v B*, ECLI:NL:HR:1990:AD1019 (Supreme Court, 26 January 1990); *Westra v T te V & B te A*, ECLI:NL:HR:1990:ZC0052 (Supreme Court, 23 November 1990).

<sup>20</sup> Code of Criminal Procedure (Wetboek van Strafvordering), adopted 15 January 1921 (as amended 2022).

<sup>21</sup> *Begaclaim v Dutch State*, ECLI:NL:HR:2006:AV6956 (Supreme Court, 13 October 2006).

<sup>22</sup> *ibid.*

<sup>23</sup> *State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court, December 2019).

SPOTLIGHT: THE *URGENDA* CASE

In 2013, Dutch environmental organisation *Urgenda* filed a lawsuit against the Dutch State demanding that the country's CO2 emissions be reduced by at least 25 per cent by 2020 compared to 1990 levels. *Urgenda* argued that the State was infringing upon the subjective right to life (article 2 of the ECHR) and the right to respect for private and family life (article 8 of the ECHR), and that it was violating its unwritten duty of care by not taking sufficient precautionary measures. The District Court granted the injunction, applying the *Kelderluik* case criteria for endangerment as highlighted at [12]. The Court of Appeal upheld the decision, relying more directly on articles 2 and 8 of the ECHR. In 2019, the [Supreme Court](#) confirmed that decision.

28. As in *Urgenda*, the 'collective action' regime pursuant to section 3:305a of the DCC, as further explained in [56]-[59] below, is particularly useful for groups of people suffering, or at risk of suffering, damages due to environmental harm. Under section 3:305a, a foundation or association can initiate civil proceedings on behalf of a specific group of people and/or on behalf of a public interest, such as the environment.<sup>24</sup>
29. A second option for a victim of environmental damage is to rely on the specific provisions for **strict liability** (*risico-aansprakelijkheid*) offered by the DCC. Dutch tort law provides for several strict liabilities for environmental damage. Strict liability is based on the capacity or 'quality' (see footnote 4) of the liable party and thus not on culpability.<sup>25</sup> Section 6:175 of the DCC provides that professional or commercial users of hazardous substances can be held liable if damage is caused by that substance. The term 'substance' includes gases, liquids and solids, regardless of their composition, form or packaging and irrespective of whether they are raw materials, semi-finished products, finished products or waste products. The main benefit of holding a person liable under section 6:175 of the DCC, rather than under the general rule of tort, is that the burden of proof is less onerous. The applicant must prove that the substance causing the damage is a hazardous substance within the meaning of that section. Contrary to the general rules on liability for a wrongful act, the conduct of the (legal) person causing the damage is irrelevant here. In addition, section 6:176 of the DCC creates strict liability for (legal or illegal) landfill operators and section 6:177 of the DCC does so for operators of mining installations. Finally, section 6:178 identifies several liability exclusions, for example if the damage is a result of a natural disaster or if it was purposefully caused by a third party.

<sup>24</sup> Samkalden (n 16) 215. See [56]-[59] for further explanation.

<sup>25</sup> GH Lankhorst, 'Inleidende opmerkingen gevaarlijke stoffen en milieuaansprakelijkheden' in HB Krans, CJJM Stolker & WL Valk, *Tekst & Commentaar Burgerlijk Wetboek* (Wolters Kluwer 2021).

## **Employer's liability**

### *Work situations*

30. Employers can be held liable for damage suffered as a result of harmful or unfair labour conditions on the basis of the general rule in section 6:162 of the DCC (possibly with reference to specific laws or regulations that apply to the employer), as well as on the basis of the more specific section 7:658 of the DCC. The latter provides that an employer may be liable for damage suffered by an employee as a result of an accident, occupational disease, defamation, or damage to the employee's property. The rationale of this provision is that an employer has a duty of care to protect the employee from danger arising from work activities. For a claim under section 7:658 of the DCC to be successful, the employee will have to demonstrate:
- that an employment contract or employment relationship existed at the time the damage was caused;
  - that they have suffered damage; and
  - that they have suffered this damage in the performance of their work (causal relationship).
31. Section 7:658 thus does not apply to cases in which damage is caused by an activity that did not take place in the performance of work.
32. The employer is in principle liable unless they can demonstrate that:
- they have fulfilled the applicable duty of care pursuant to section 7:658(1) of the DCC;
  - fulfilling the duty of care would not have prevented the damage; or
  - the damage suffered was a result mainly of the employee's intentional or deliberate reckless behaviour.
33. The particular circumstances of each case are relevant to determine if an employer has fulfilled their duty of care. According to the Supreme Court, these circumstances include the type of work, the foreseeability of the hazard, the foreseeable inattentiveness of the worker, and the (im)possibility of taking safety measures.<sup>26</sup> It is important to note that the mere possibility of severe damage does not in itself oblige the employer to take measures to prevent such damage.<sup>27</sup> That said, a court in such a case will not easily assume that the employer has fulfilled their duty of care, as the scope of this duty of care is very broad.<sup>28</sup>

### *Non-work situations*

34. Section 7:611 of the DCC can provide a basis for holding an employer liable in cases where damage is caused by an activity that is related to the employee's work but did not actually happen in the performance of their work. Unlike section 7:658, section 7:611 applies to both work and non-work situations. It provides for an obligation to behave as a 'reasonable and fair employer' (*goed werkgever*). A violation of this section by the employer means that the employer has failed to meet their duty of care towards the employee.

<sup>26</sup> *Bayar v Wijnen*, ECLI:NL:HR:2005:AU3313 (Supreme Court, 5 November 2005), para 3.3.2.

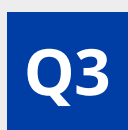
<sup>27</sup> *Werink v Hudepohl*, ECLI:NL:HR:1994:ZC1576 (Supreme Court, 9 December 1994).

<sup>28</sup> *Maatzorg v van der Graaf*, ECLI:NL:HR:2008:BD3129 (Supreme Court, 12 December 2008).

### *Damage caused by the employee*

35. In terms of section 6:170(1) of the DCC, employers can also be held liable by third parties for the damage caused by an employee's wrongful act or omission. Three requirements must be met:

- An error or fault must have been made by an employee, also referred to as an 'attributable wrongful act' in terms of section 6:162 of the DCC.
- The employee must be the employer's subordinate, meaning that the employer has the right to give orders or instructions to the employee.
- There must be a connection between the fault and the task assigned to the employee.



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

There is no special rule or regime for secondary liability in Dutch wrongful act law. However, the DCC contains several provisions on determining liability in cases concerning multiple tortfeasors.

### **No general principle of complicit or accessory conduct**

36. Complicit or accessory conduct is recognised in Dutch **criminal law** rather than Dutch **civil law**. Dutch civil law does not have a general doctrine on liability for complicit or accessory conduct. Acts that constitute complicity under criminal law may also be 'wrongful' under section 6:162 of the DCC if damage is caused as a result and if the other criteria for civil liability are met. The general rules of Dutch tort law concern fault-based liability, which means that a natural or legal person is only liable for damage caused by their *own* intentional or negligent behaviour. When public bodies, corporations or individuals are not the primary perpetrators of a harmful act, civil liability can only be successful if their conduct in itself *directly* contributed to the harm suffered. However, *indirect* involvement in the commission of abuse – for example by the provision of goods and services, purchase of raw materials and products or financing harmful behaviour – cannot constitute civil liability as such if those criteria are not independently met.

**SPOTLIGHT: CASE STUDY**

This principle concerning accessory liability in Dutch law is underscored by a recent case of 23 November 2021 before the District Court of The Hague.<sup>29</sup> Two foundations and an NGO argued that the Dutch State committed a wrongful act by allowing the export of military goods to Egypt. The wrongfulness was argued with reference to the fact that Egypt, including the Egyptian Navy, violates human rights on a large scale. Consequently, the claimants argued, there was a plausible risk that the proposed supply of military goods to Egypt would contribute to, or even be used directly in, violations of fundamental human rights, violations of international (humanitarian) law and/or be in conflict with State's obligations under the Arms Trade Treaty. The District Court rejected these arguments. The Court considered that the worrisome human rights situation in Egypt was 'a given'. However, the fact that the goods may potentially be used in such way that they contribute to human rights violations was not sufficient reason to withhold the export permit.<sup>30</sup> The appellants have appealed this decision.

## Liability for collective behaviour

37. Despite the lack of a principle of accessory conduct, in certain circumstances, a person can commit a wrongful act by facilitating another person who is committing a wrongful act. **Liability for collective behaviour** (*groepsaansprakelijkheid*) is enshrined in section 6:166 of the DCC and probably comes closest to complicit or accessory liability. In a case where one of the (legal) persons belonging to a group unlawfully causes damage, each of the persons of this group can be held jointly and severally liable. Two requirements must be met: the risk of causing damage should have restrained the person being sued from participating in the group conduct, and the wrongful conduct can be attributed to them.<sup>31</sup> The degree of involvement in the wrongful act by the individual group member is not necessarily important.<sup>32</sup> But it should be noted that liability for collective behaviour is not a form of qualitative liability for the conduct of others. It is a form of liability for a person's own wrongful act.<sup>33</sup>

## Multiple liable persons

38. Section 6:102 of the DCC regulates the concurrence of liability of different persons for the same damage. The different persons are then jointly and severally liable towards the injured party. This is mainly so that the injured party does not have to face the difficulty of determining for which part of the damage they should address each of the liable persons. For section 6:102 of the DCC to apply, the 'but-for' test of causality between those different events and the entire damage must be passed.

29 *Pax and others v Dutch State*, ECLI:NL:RBDHA:2021:12810 (District Court of The Hague, 23 November 2021).

30 *ibid*, para 4.11.

31 RJB Boonekamp, '2. Aard groepsaansprakelijkheid' in: CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).

32 *TVM v defendants*, ECLI:NL:HR:2015:2914 (Supreme Court, 2 October 2015).

33 RJB Boonekamp, '2. Aard groepsaansprakelijkheid' in CJJM Stolker (n 31); RJB Boonekamp, '7. Individuele toerekenbaarheid' in: CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).



If the damage would not have been the same if a specific event or the action of a specific party was absent, ie if that party's contribution had merely led to additional damage, liability will normally not be established severally, but pro rata.

39. Two categories can be distinguished:

- Damage may be the consequence of different events for which different persons are liable. For example, the damage may be the consequence of the wrongful acts of several persons for which they are each separately liable under section 6:162 of the DCC.
- It may also be that the damage is the result of one and the same event for which different persons are liable. For instance, a child of 14 or 15 years of age is liable under section 6:162 of the DCC, and the parent who cannot excuse themselves is liable under section 6:169 of the DCC for the conduct of the child.<sup>34</sup>

### Alternative causality

40. Alternative causation may be invoked if there is uncertainty about the causal relationship, ie when there are multiple behaviours, but it is not clear which behaviour caused the injury.

41. Section 6:99 of the DCC refers to such a situation. The section reads as follows: 'If the damage is a consequence of two or more events for each of which another person is liable, and it is certain that the damage was caused by at least one of these events, the obligation to compensate the damage rests on each of these persons, unless he proves that it was not caused by an event for which he himself is liable.'

42. Thus, the causal link is presumed to be present unless the defendant proves otherwise. Section 6:99 of the DCC was created with the intention of accommodating the victim. After all, it would be unreasonable if the injured party were not able to recover damages in the absence of proof of which act was causal to the damage.

#### SPOTLIGHT: CASE STUDY

An important judgment delivered in the context of section 6:99 of the DCC concerns the case of the *DES daughters*.<sup>35</sup> Plaintiffs in this case – the so-called 'DES daughters' – suffered from cancer as a result of their mothers' ingestion of the medication DES (Diethylstilbestrol) during pregnancy. None of the daughters could prove which manufacturer produced the DES that was ingested by their mothers. The Dutch Supreme Court considered that section 6:99 of the DCC was applicable and ruled that suing one of the manufacturers was sufficient in this case. The Supreme Court ruled that if the damage caused may be the result of the actions of several persons and it is certain that it was caused by at least one of those actions, all of these persons shall be liable, unless one of them proves that the damage was not caused by their action.

34 RJB Boonekamp, 'Art. 6:102 BW, aant. 1.2', in: AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

35 *DES Daughters v Bayer et al*, ECLI:NL:HR:1992:ZC0706 (Supreme Court, 9 October 1992).

## SPOTLIGHT: CASE STUDY

An example of a case in which an appeal to section 6:99 was unacceptable by standards of reasonableness and fairness is [Nefalit v Karamus](#).<sup>36</sup> Mr Karamus was exposed to asbestos at work. He developed a form of lung cancer and there was no scientific consensus on the cause. Based on an expert opinion, the probability that the asbestos caused the lung cancer was estimated at 55 per cent. Thus, 45 per cent would have been on Karamus's own account, for which Nefalit could not be held liable following section 6:101 of the DCC (own fault). The probability that the cancer was not caused by asbestos exposure was too high for liability to fall within the DES-margin. The Supreme Court resolved this by formulating the doctrine of proportional liability.

43. Under the doctrine of **proportional liability**, uncertainty regarding causation is divided between plaintiff and defendant in proportion to their own share. On the one hand, it would be unjust to place the liability entirely on the victim by relying on their own fault (which applies under section 6:101 of the DCC). On the other hand, it would also be unacceptable to shift the uncertainty of causality entirely onto the defendant (section 6:99 of the DCC). The doctrine of proportional liability is based on a fairness consideration that underlies sections 6:99 and 6:101 of the DCC. The doctrine is applied with restraint due to the lack of a clear legal basis.<sup>37</sup>

Q4

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

Under Dutch law it is possible for a parent company to be held liable for the wrongful acts and omissions of its subsidiary or of an independent contractor in a supply chain, either under the general tort rule or under specific legislation. Several high-profile cases in the Netherlands have concerned liability of Dutch parent companies for human rights and environmental abuses committed by their subsidiaries abroad. However, foreign law was applicable in these cases as the law of the place where the harm occurred. To date, there is no precedent establishing supply chain liability of a (parent) company.

<sup>36</sup> *Nefalit v Karamus*, ECLI:NL:HR:2006:AU6092 (Supreme Court, 31 March 2006).

<sup>37</sup> *Fortis v Bourgonje*, ECLI:NL:HR:2010:BO1799 (Supreme Court, 24 December 2010).

## Legal doctrines related to the general tort rule

44. Firstly, a parent company may be liable in terms of section 6:162 of the DCC if the plaintiff demonstrates that the parent company has committed or is committing a wrongful act by acting in violation of a statutory duty, infringing a subjective right or by failing to comply with its unwritten duty of care (see [12]-[13] above). The alleged breach of a duty of care may lie in a concrete action by the parent company or in an omission by them to adequately supervise or intervene in the activities of the subsidiary.
45. Duties of care may entail obligations to investigate, which means that a plea of lack of knowledge by the parent company may not be accepted.<sup>38</sup> Thus, holding a parent company liable on the basis of its unwritten duty of care revolves around the principles of knowledge and control; if the parent company had, or should have had, knowledge of the breach by its subsidiary and if the parent company was in a position to intervene, then the parent company may also have had a duty of care to do so.
46. A second option is to hold a parent company liable on the basis of the so-called **'breakthrough liability'** (*doorbraak van aansprakelijkheid*) doctrine. According to this doctrine, a parent company and its subsidiary are 'identified' or 'equated' (*vereenzelviging*) with each other. It follows that the parent company is also liable for the wrongful acts of its subsidiaries. This doctrine is similar to the doctrine of **'piercing the corporate veil'** that is recognised in common law jurisdictions.<sup>39</sup> In practice the 'breakthrough liability' doctrine is generally not used for human rights violations, but rather in cases related to debts of the subsidiary. The Supreme Court has ruled that the 'breakthrough liability' doctrine can only be accepted in exceptional circumstances, such as abuse.<sup>40</sup> This doctrine is therefore very rarely upheld by a Dutch court.<sup>41</sup>

## Adoption of corporate social responsibility legislation

47. In the past few years, several initiatives have been undertaken to promote the adoption of **corporate social responsibility legislation**. For example, the Child Labour Duty of Care Act (*Wet Zorgplicht Kinderarbeid*)<sup>42</sup> was one of the first enforcement instruments to be introduced in the field of business and human rights. It was passed in the Lower House of Parliament in 2017 and is expected to come into force in 2022. The Act establishes companies' responsibilities to prevent child labour in their supply chain. Companies are required to investigate whether there is a 'reasonable suspicion' that child labour occurs in their operations and supply chain and to set out a plan of action to prevent or combat it. Dutch companies as well as foreign companies are obliged to submit a statement to the appointed Dutch regulatory authority twice a year, describing the steps they have taken.<sup>43</sup> However, the law does not provide for a direct legal ground for civil liability. A civil claim on the basis of this law would not meet the relativity criterion (see [17]-[18] above). Civil liability would thus need to be asserted on

38 KJO Jansen, '9.1.9.2: Verscherpt schuldbegrip' in CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2020).

39 L Enneking et al, 'Privaatrechtelijke Handhaving in Reactie op Mensenrechtenschendingen door Internationaal opererende Ondernemingen' [2011] NTM|NJCM-Bull 36/5, 547. See also discussion in the following project reports: [28] Australia; [29] Bangladesh; [42] Canada; [74] Hong Kong; [36] Malaysia; [44] US; [87] Zambia.

40 Supreme Court, 7 October 2016, ECLI:NL:HR:2016:2285; Supreme Court, 13 October 2000, ECLI:NL:HR:2000:AA7480.

41 Enneking (n 39).

42 For an English summary and timeline of events with regards to the Act, see <https://www.business-humanrights.org/en/latest-news/dutch-senate-votes-to-adopt-child-labour-due-diligence-law>.

43 Samkalden (n 16) 212.

the basis of the general framework discussed in [9]-[21] above.

48. In 2021, members of Parliament proposed a new law encompassing a general duty of care as well as specific due diligence obligations for multinational corporations.<sup>44</sup> If established, this law would also replace the Child Labour Duty of Care Act. Finally, other initiatives have been taken at EU-level<sup>45</sup> that are likely to influence the adoption of national legislation over time.

**Q5**

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

### Compensation for pecuniary and non-pecuniary damage

49. Both pecuniary damage (section 6:96 of the DCC) and non-pecuniary damage (section 6:95 of the DCC) may be eligible for compensation (see [19]-[21] above).

### Injunction or prohibition

50. Another possible remedy is an injunction or prohibition in terms of section 3:296 of the DCC. Section 3:296 states that 'he who has a duty to another person to give, to do or to refrain from doing something, is ordered to do so by the court, at the request of the entitled party'. This section provides the basis for a contractual performance claim, but also for an injunction on the basis of other legal obligations. On the basis of this section, for example, the Dutch government can be ordered to comply with its positive obligations pursuant to international human rights conventions (as was seen in the *Urgenda* judgment, discussed at [27] above). Under section 3:296 of the DCC (as opposed to section 6:162), the proof of the existence of damage or culpability is not required since the injunction may also serve to prevent such damage. The only requirements are that the defendant has a legal duty towards the plaintiff, and that there is sufficient reason to assume that the defendant will not voluntarily perform that duty.

### Declaration of rights

51. A court may give a declaratory judgment in terms of section 3:302 of the DCC. This provides that a party directly involved in a legal relationship at issue may claim a declaration of rights concerning that legal relationship. It is accepted that in human rights cases, the explicit acknowledgment of the wrongfulness of behaviour may in itself be a form redress.<sup>46</sup> Plaintiffs in the case against Royal Dutch Shell and Shell Nigeria of 29 January 2021<sup>47</sup> sought such a declaration, because a direct claim for damages was not possible under the applicable collective redress provisions at the time.<sup>48</sup> A declaration of law allows victims to claim damages on an individual basis in follow-up proceedings.

44 ['Wetsvoorstel verantwoord en duurzaam internationaal ondernemen'](#) (11 March 2021).

45 ['European Parliament resolution with recommendations to the Commission on corporate due diligence and corporate accountability'](#) (2020/2129(INL)) (10 March 2021).

46 SD Lindenbergh, '1.16 Vergoeding in de vorm van een verklaring voor recht', in AT Bolt (ed), *Groene Serie Schadevergoeding* (Wolters Kluwer 2021).

47 For a more elaborate discussion of this case, see para [55] of this report.

48 *Milieudefensie and four Nigerian farmers* (n 3). See also para [55] of this report.

Q6

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

### Advantages

#### *Party autonomy*

52. One important advantage of a civil procedure is the principle of party autonomy: it is up to the claimants to decide what claims, grounds and remedies to bring to the attention of the court. Criminal cases in the Netherlands are brought solely by the Public Prosecutor, and although victims may be heard and allowed to pursue a claim in that context too, the initiative, scope and success of the case depends on the choices of the prosecutor. Moreover, in administrative procedures, the scope of the legal review is determined by the specific administrative decision that is under debate. This, depending on the concrete circumstances, may leave victims of human rights violations more restricted in the legal grounds and claims they may rely on and often results in a less complete assessment by the courts.

#### *The law of tort is flexible*

53. Dutch civil law is characterised by many open norms that require interpretation by the courts, such as the principles of reasonableness and equity. The standard of due care of section 6:162 of the DCC too, is an open standard that can be interpreted in many ways. The law of tort is therefore flexible and adaptable in the face of societal changes. Moreover, an indirect horizontal impact of human rights conventions (in particular those provided by the ECHR), and even of soft law sources such as the [UN Guiding Principles on Business and Human Rights](#) or the [OECD Guidelines for Multinational Enterprises](#) can be achieved with the use of section 6:162 of the DCC. Consequently, victims of human rights violations under Dutch civil law can easily be accommodated at least as regards their substantive legal basis.

#### *Willingness to handle international cases and apply international legal concepts*

54. The Dutch judiciary does not shy away from handling international or transnational cases, and Dutch courts have shown themselves to be equally comfortable applying local and international legal concepts. This is illustrated by the *Urgenda* case,<sup>49</sup> wherein the Courts relied on articles 2 and 8 of the ECHR, as well as the Shell Climate Change case,<sup>50</sup> wherein the Court referred to the [UN Guiding Principles on Business and Human Rights](#).

55. In January 2021, following a claim initiated by Milieudefensie and brought partly as a class action, Shell Nigeria was ordered by The [Hague Court of Appeal](#) to pay damages to Nigerian farmers because of oil spills in Nigeria. The Court of Appeal also concluded that the Shell parent company had breached its duty of care by failing to ensure that a leak detection system was installed in the pipeline of its Nigerian subsidiary. While this case cannot be considered exemplary for Dutch civil law, since Nigerian law applied, it illustrates the willingness of Dutch courts to engage with facts and concepts that originate outside their own jurisdiction.

<sup>49</sup> *Urgenda* (n 23).

<sup>50</sup> *Milieudefensie v Royal Dutch Shell* (climate change case) (n 9).

*Collective redress*

56. The Netherlands has a strong tradition of **public interest litigation**, which often takes the form of a collective action on the basis of the same legal provision that applies for mass claims for compensation. Section 3:305a of the DCC defines as a collective action a lawsuit commenced by a foundation or an association on behalf of a group of people and/or on behalf of a public interest, such as the environment.<sup>51</sup> This provision was recently changed to better accommodate class actions, allowing for claims for compensation as well as other types of redress which were absent previously. Several requirements must be met, eg the purpose of the relevant organisation, according to its articles of association, must be to represent the interest of a specified group of people with a common interest; the organisation must represent this group outside of legal proceedings through its other activities, and the procedure must have a sufficiently close connection with the Dutch jurisdiction.
57. In practice, the collective redress regime is particularly useful for communities or groups of people suffering damages as a result of human rights violations or environmental harm. For example, the oil spills case against Royal Dutch Shell and Shell Nigeria was initiated by the Dutch environmental organisation Milieudefensie on behalf of the local Nigerian victims of oil pollution.<sup>52</sup>
58. With the introduction of the new Mass Claims Settlement Act (*Wet afwikkeling massaschade in collectieve actie (WAMCA)*), it is now possible to claim damages in a collective redress procedure. The WAMCA applies to actions brought after the Act came into force on 1 January 2020, and with respect to events occurring on or after 15 November 2016. Prior to the activation of the WAMCA, the old section 3:305a(3) of the DCC prevented the possibility of monetary compensation. Only a declaratory judgment could be claimed under section 3:305a. The new law encompasses stricter criteria for representative organisations in mass claims; a milder regime applies in so-called 'idealistic' cases (ie public interest litigation) that do not include a claim for monetary compensation.
59. While the new law thus appears to facilitate access to remedy for victims of human rights violations, it has simultaneously created additional burdens for foreign victims, most importantly in view of the newly introduced requirement that the action must have a sufficiently close connection with the Dutch jurisdiction.

**SPOTLIGHT: CASE STUDY**

In 2020, the Dutch environmental NGO Both ENDS, on behalf of local communities in Indonesia, demanded in summary proceedings that the Dutch company Boskalis disclose information about the environmental scoping and consequences of a dredging project it had conducted through its Indonesian subsidiary in the port of Makassar. The District Court of Rotterdam declared the collective action of Both ENDS inadmissible because the action had an insufficiently close connection with the Dutch jurisdiction.<sup>53</sup>

51 Samkalden (n 16) 215.

52 *Milieudefensie and four Nigerian farmers* (n 3).

53 *Both ENDS v Boskalis*, ECLI:NL:RBROT:2020:8228 (District Court of Rotterdam, 18 September 2020).

## Disadvantages

### *Burden of proof*

60. Pursuant to section 150 of the [Dutch Code of Civil Procedure](#) (DCCP), the basic rule is that the party who asserts a fact must prove it. In practice, this can be difficult to achieve, particularly in cases concerning foreign corporate liability where the relevant documentation is often in the hands of the corporation. Dutch legal procedure lacks a pre-trial discovery opportunity such as that available to the parties in the Anglo-Saxon legal systems. Parties are obliged to ‘fully and truthfully’ disclose facts that are relevant to the case (section 21 of the DCCP), but this obligation is not clearly defined and there are often no consequences if the obligation is breached.<sup>54</sup>

### *Legal costs and lengthiness of proceedings*

61. Civil litigation is costly. Court fees and legal costs in case of loss are relatively low, but lawyers’ fees and other expenses such as translation and travel costs are high.<sup>55</sup> Moreover, the overall length of civil proceedings can be very long, particularly when a case concerns a foreign direct liability claim or any other transnational element, or when a judgment is appealed. By way of illustration, it took 12 years of litigation before the Court of Appeal delivered its judgment in the Milieudéfensie case.<sup>56</sup> The length of proceedings can drive up legal costs. But at the same time, Dutch and foreign claimants may be entitled to State-subsidised legal aid under the Dutch legal aid regime.<sup>57</sup>

### *Private international law obstacles*

62. Human rights litigation in the Netherlands often involves transnational facts.<sup>58</sup> Rules of private international law, in connection to applicable rules of Dutch legal procedure, have proved to be an obstacle when initiating civil proceedings in the Netherlands. Many of these hurdles have already been signaled above. Furthermore, as discussed below, jurisdictional issues may arise if a defendant is not located in the Netherlands. Moreover, a court in principle has to apply foreign law if the damage occurred in another country (eg as regards the standard of proof required), while it must apply Dutch procedural law in terms of access to and the assessment of evidence.

**Q7**

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

63. The most important set of rules in this regard is included in the [Regulation \(EU\) No. 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis regulation). If this regulation (or any other international rule on jurisdiction) is not applicable,<sup>59</sup> then sections 1-14 of the DCCP apply.<sup>60</sup>

54 Samkalden (n 16) 223. In the case of *Milieudéfensie and four Nigerian farmers* (n 3), the Court of Appeal found that Shell had breached its obligation pursuant to DCCP art 21 and weighed that in its assessment of the evidence.

55 *ibid*, 227.

56 *Milieudéfensie and four Nigerian farmers* (n 3).

57 [www.raadvoorzrechtsbijstand.org/english](http://www.raadvoorzrechtsbijstand.org/english).

58 This point has been discussed at para [3] above.

59 Which is the case if the foreign defendant is from a non-European state.

60 Samkalden (n 16) 208.

64. The principal rule is that a tort claim can be brought against a foreign defendant if the harmful event occurred or may occur in the Netherlands (according to section 6(e) of the DCCP and article 7(2) of the Brussels I-bis regulation). If the harmful *event* did not occur in the Netherlands but the *damage* did occur there, a claim may be brought against a foreign defendant under this rule too.
65. If neither the event nor the damage occurred within the Netherlands and several parties are held liable, section 7 of the DCCP may provide a basis for jurisdiction. Section 7 DCCP states that a Dutch judge has jurisdiction in cases against foreign defendants if these cases are so closely connected to a case against a Dutch defendant that for reasons of efficiency they should be dealt with together. Unlike article 8 of the Brussels I-bis regulation, section 7 of the DCCP does not explicitly require that ‘it is expedient to hear and determine [the cases] together to avoid the risk of irreconcilable judgments resulting from separate proceedings’. In practice, Dutch courts may take this factor into account, in addition to other relevant matters such as whether the cases against the different defendants are based on the same facts and/or legal grounds.<sup>61</sup>

#### SPOTLIGHT: CASE STUDY

In the *Milieudefensie* case,<sup>62</sup> it was argued by Shell that (i) the cases against the Dutch parent company and the Nigerian subsidiary SPDC were not sufficiently connected to allow the Dutch court to assume jurisdiction on the basis of section 7 of the DCCP, and that (ii) claimants had abused procedural law by suing the Dutch parent company with the alleged purpose of establishing jurisdiction as regards its Nigerian subsidiary (SPDC), while the case against the parent company – according to Shell – was evidently ill founded. Therefore, Shell argued, the claim against the parent company could not serve as an ‘anchor claim’ for the purpose of applying section 7 of the DCCP. Both arguments were dismissed by the [District Court](#) and subsequently by the [Court of Appeal](#) when they assumed jurisdiction over both defendants.

Similarly, in the *Kiobel v Shell* case, the [District Court](#) asserted that it had jurisdiction over RDS and SPNV, both based in the Netherlands, and also over STTC (an English company) and SPDC based on the connectedness between the claims, since they referred to the same factual situation. This ruling concerned a claim brought by four widows of the *Ogoni 9* against Shell and its subsidiaries, which the plaintiffs held jointly responsible for violations of fundamental rights by the Nigerian regime. The plaintiffs’ spouses were sentenced to death by a special tribunal in November 1995 and subsequently hanged.<sup>63</sup>

61 *ibid.*

62 *Milieudefensie and four Nigerian farmers* (n 3).

63 *Kiobel v Shell*, ECLI:NL:RBDHA:2019:4233 (District Court of The Hague, 1 May 2019).



66. Section 9 of the DCCP adds as a ground for jurisdiction either a tacit choice of forum (section 9a) or the principle of **'forum necessitates'**. The latter applies when no jurisdiction can be established based on sections 2 to 8 of the DCCP and it is shown that a procedure outside the Netherlands is impossible (section 9b), or when a case is sufficiently linked to the Dutch legal sphere, and it is unacceptable to require the claimant to submit its case to a judge of a foreign State (section 9c).<sup>64</sup>



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

### *Literature*

- LFH Enneking, '[Netherlands country report](#)' in *European Commission study on Human Rights Due Diligence in the Supply Chain* (European Commission 2020)
- LFH Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria', in *Human Rights in the Extractive Industries – Transparency, Participation, Resistance* (Springer 2019)
- Channa Samkalden, 'Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order' in Richard Meeran (ed), *Human Rights Litigation Against Multinationals in Practice* (OUP 2021)
- L Roorda, 'The Netherlands: A Wide Open Window for Human Rights Norms?' in Ekaterina Aristova & Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux* (Hart Publishing 2022).

### *Research*

- [Erasmus Research Platform on Sustainable Business & Human Rights](#)
- [The Netherlands Institute for Human Rights](#)

### *Documents issued by the Dutch government*

- [Revision of the National Action Plan on Business and Human Rights](#)



# 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 the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

## Claims against police

67. The protesters could argue that the **police officers** are liable as their violence and brutality can constitute a wrongful act within the meaning of section 6:162 of the DCC. The protesters would have to prove the five requirements: wrongfulness, causality, accountability, damage and relativity. Normally, the protester would argue that the use of force was in violation of the requirement of subsidiarity as enshrined in the Police Act and developed in police instructions. They may also attest that the actions violated their fundamental rights, including their right to physical integrity.
68. In addition, the protesters can hold the **police force** liable. Under the 2012 Police Act, the regional unit has control over their police officers. The regional unit forms part of the national police force, which – following section 26 of the 2012 Police Act, is a legal person. Thus, if an officer makes a mistake, a claim can be directed against the national police (regional unit) on the basis of section 6:170 of the DCC. A claim under section 6:170 of the DCC will only be successful if the protesters can prove that the police officers committed an attributable wrongful act.

## Claims against Security Co

69. A claim against Security Co on basis of section 6:162 DCC is unlikely to succeed. Security Co did not itself assault the protestors, but merely supplied the police with vehicles and equipment. There does not appear to be any causality between these supplies and the wrongful acts, nor can the wrongful acts be attributed to Security Co. Holding Security Co liable implies liability for an accessory conduct, which is not a general principle in Dutch tort law.

**Q2**

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

70. In the case of wrongful acts arising from custodial detention or pre-trial detention, the DCPC is applicable. The protesters can invoke sections 530 and 533 of the DCPC if damage has been suffered as a result of custodial detention or pre-trial detention and the case has ended without the imposition of a penalty or punitive measure. These sections are not applicable to (unlawful) arrest.
71. Section 533 determines in which cases compensation for pre-trial detention may be sought, and what can qualify as 'damage'. Section 530 determines that costs for travel, accommodation, legal aid and subsistence incurred in connection with the prosecution and hearing of the case may be reimbursed by the State. Damages are remedied on the basis of fixed amounts, which are laid down in the so-called LOVS-orientation points.<sup>65</sup> Normally, this is an easier and more efficient route to obtain compensation, although it is restricted to the indicated events. If the protesters cannot invoke sections 530 or 533 of the DCPC, they would have to institute civil proceedings.
72. If the protesters did receive a penalty or punitive measure, they may still be compensated for procedural faults. For example, section 359a of the DCPC allows for the attachment of legal consequences to procedural irregularities in preliminary investigations. One of the possible legal consequences is a reduction of the sentence.

**Q3**

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

73. There are numerous examples in case law of violence by government actors (not necessarily the police). Somewhat distinct perhaps from the facts in Case Scenario 1, the Court of Appeal in The Hague found in 2021 that the Dutch State was not liable for the deaths of two hostage-takers who hijacked a train near the village of De Punt in 1977. Nine armed Moluccan youths hijacked the train near the village in the province of Drenthe. In the process, 54 passengers were taken hostage. The State put an end to the hijacking by using force. Eight people were killed. Among other things, the court found that the marines who used force were of the sincere belief that the hostage-takers could still pose a danger to them during the operation.<sup>66</sup>

65 'Oriëntatiepunten voor straftoemeting en LOVS-afspraken' (de Rechtspraak, January 2022).

66 *Moluccan train hijackers v Dutch State*, ECLI:NL:GHDHA:2021:950 (Court of Appeal of The Hague, 1 June 2021).

# CaseScenario 2

Q1

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

74. As the local community is a specified group with a common interest, the community may use the collective action regime of section 3:305a of the DCC to bring a civil claim against Parent Co or Subsidiary Co. This allows that a Dutch (or potentially foreign) foundation or association can act as a claimant on behalf of local victims. Alternatively, the local victims may also each individually authorise a lawyer (or other person) to act on their behalf. Finally, the victims may choose to initiate legal proceedings on behalf of a few individual claimants only, seeking (at least) a declaration of law. Such a declaration may subsequently be used by other victims to obtain compensation. This scenario however may bring additional risks in terms of, for example, time limitations and financial hurdles.

## **Claims against Subsidiary Co**

75. The local community may choose to rely on different legal grounds when bringing civil claims against Subsidiary Co for the damage suffered to their rivers and farmland, community and health. Firstly, the local community could consider bringing a claim against Subsidiary Co on the basis of the general rules on tort (section 6:162 of the DCC). The local community must first prove that Subsidiary Co acted unlawfully, for example by breaching environmental law or regulations, by violating applicable (human) rights, or by acting in violation of the applicable duty of care. In this case, all damage suffered by the local community is caused by soil contamination. The [Act for Soil Protection](#)<sup>67</sup> can then constitute the legal basis for demonstrating that Subsidiary Co violated human rights and acted unlawfully. Section 13b of the Act for Soil Protection provides for a duty of care for anyone performing activities that can potentially have an impact on the quality of the soil. This Act requires that all reasonable measures are taken to prevent the contamination of land or soil or water. In addition, the local community must demonstrate that the other four requirements under section 6:162 of the DCC discussed in [10]-[21] above are also met.

76. Alternatively, or in addition, the local community can rely on section 6:175 of the DCC, which provides for several **strict liabilities for environmental damage** caused by hazardous substances.<sup>68</sup> Under this section, the claimant does not need

<sup>67</sup> Act for Soil Protection (*Wet bodembescherming*), adopted 3 July 1986.

<sup>68</sup> These provisions were discussed at [29] above.

to establish all aspects of negligence as encompassed in section 6:162 of the DCC. The local community has to prove that the oil extracted by Subsidiary Co can be considered hazardous on the basis of the concrete facts and circumstances of the case. It can do so on the basis of the 'open standard' that the substance poses a special danger of a serious nature to persons or property. The interpretation of this standard is up to the judge in a concrete case.<sup>69</sup> Section 6:175(4) of the DCC provides that if the hazardous substance caused damage in the form of soil contamination, liability rests on the (legal) person who, at the beginning of the event leading to the contamination, is designated by section 6:175(1) as the liable person. Here, this is Subsidiary Co. If the judge determines that the oil in question can indeed be considered a hazardous substance, the local community can receive compensation for the damage to their rivers and farmland and the costs of restoring it, as well as for the damage to their health.<sup>70</sup>

## **Claims against Parent Co**

77. Holding Parent Co legally liable for the damage caused by Subsidiary Co's extractive project will likely be more difficult. Subsidiary Co is the legal person who had direct control over the project and thus is responsible for its implementation. The case description suggests that Parent Co is only responsible for the 'overall management' of X Group's business and that it has only formulated very general business principles. To establish liability, a more concrete involvement in either the specific subsidiary's activities and/or (environmental) Group policies and compliance will probably be required for a court to assume the existence of a duty of care. In addition, a civil court is unlikely to accept liability of Parent Co for Subsidiary Co's wrongful act on the basis of the doctrine of 'breakthrough liability'.



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

78. The civil route appears to provide the most options for local victims to hold one or both perpetrators to account. Subsidiary Co may also be bound by public regulations regarding the use of hazardous substances. If it fails to comply with these regulations, those whose interest is at stake may request enforcement from the supervising authorities. While this may overlap with the possibility of a civil injunction, this route will not include any form of compensation.

<sup>69</sup> L Bergkamp et al, *Wettelijke aansprakelijkheid voor milieugevolgen Onderzoek naar wijzigingen in het milieuaansprakelijkheidsrecht in de periode 2010-2015* (Maastricht University 2016) 98.

<sup>70</sup> E Bauwm '32: Bepanking tot persoons- en zaakschade?' in CJJM Stolker (ed), *Groene Serie Onrechtmatige Daad* (Wolters Kluwer 2021).

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

79. One high-profile lawsuit relevant for Case Scenario 2 may be the *Urgenda* case,<sup>71</sup> which was discussed earlier at [27] above. Whereas that was a case against the State which argued that the State had violated a duty of care to its citizens, largely the same reasoning was applied in the recent *Shell Climate Change* case, in which the [District Court of The Hague](#) ordered the company to reduce its CO2 emissions by 45 per cent by the end of 2030 relative to its 2019 levels (see above at [54]). However, the facts of Case Scenario 2 most closely resemble the *Milieudefensie* case, concerning oil spills from Shell's operations in Nigeria, which resulted in liability for both the subsidiary and the parent company.<sup>72</sup> That case, however, was not decided on Dutch law, but on the basis of Nigerian law.



# CaseScenario3

**Q1** Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.

## Claims against Factory Co

80. The injured employees can hold Factory Co liable for the damage they have suffered either on the basis of section 6:162 of the DCC and/or on the basis of section 7:658 of the DCC. The general rules of tort of section 6:162 have been discussed in [10]-[21] above. Apart from its general responsibility as regards its employees, Factory Co has also acted in conflict with its statutory duties as encompassed in public regulations regarding safety at the workplace. In the context of section 7:658 of the DCC, the employees must claim and, in the event of a dispute, prove that an employment relationship existed at the time the damage was caused; that they have suffered damage; and that they have suffered this damage in the performance of their work. On the basis of the facts presented, this will not be problematic.

<sup>71</sup> *Urgenda* (n 23).

<sup>72</sup> *Milieudefensie and four Nigerian farmers* (n 3).

## Claims against Brand Co

81. In order for Brand Co to be liable, it must be established that Brand Co had an autonomous duty of care as regards the employees of Factory Co. In this regard, claimants must first show that Factory Co was or should have been aware of the situation and that it should have intervened to prevent more harm. If a duty of care can be established, there must also be causality between the breach of that duty and the harm done to the victims. Since Brand Co (i) is a public advocate for responsible business practices; (ii) was informed about the situation by civil society organisations, and (iii) is the major purchaser of Factory Co's clothes, it may be argued that Brand Co, at the very least, had a responsibility to investigate the situation and – aware of the wrongdoings – halt its business relationship with Brand Co (or take other measures) in order not to facilitate further human rights violations. Soft law principles like the [OECD Guidelines for Multinational Enterprises](#) may give further substance to such an unwritten duty of care. As such, Brand Co may have committed a wrongful act in firstly, entering into a business relationship without proper due diligence, and/or secondly, maintaining that relationship without taking further measures even when it was aware of or should have been aware of the situation.



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

82. If the goal is to compensate the damages suffered, a civil claim is the preferred route. If the goal is to seek retribution, criminal proceedings may be an option as well. Prosecution of legal persons (and potentially of the specific people responsible for the situation) is possible in the Netherlands on the basis of section 51 of the [Criminal Code](#).



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

83. In 2008, the Supreme Court issued an important [judgment](#) with regards to the extent of employers' duty of care. During the loading of a truck, one of two loading doors slammed shut, hitting an employee on the head. He sustained injury and claimed compensation in terms of section 7:658 of the DCC for the damage suffered. The Supreme Court held that the mere possibility of serious damage does not oblige the employer to take measures to prevent it. The assessment of which obligations the employer has in a specific case must take account of all the relevant circumstances of the case.<sup>73</sup> The injured employee's claim was rejected.

<sup>73</sup> *Lagrauw v van Schie*, ECLI:NL:HR:2008:BB7423 (Supreme Court, 8 February 2008).



