Corporate Complicity in International Human Rights Violations: The Tort of Negligence as a Civil Remedy in Canadian Courts

Craig A. Brannagan

Abstract

There is currently no Canadian legislation which addresses the commission or complicity of human rights violations abroad by Canadian businesses. The main issue under consideration in this article is whether the potential exists for establishing a body of jurisprudence in Canada through the civil process of tort law that would fill this legislative void and, if so, under what legal pretext such a case might be brought before a Canadian court. This article also examines Canada’s legal obligations under international law to discover whether the State is required to bring legal accountability to Canadian businesses that have allegedly committed or have been complicit in human rights violations abroad. These issues are then considered in light of a case that has been brought before the Quebec Superior Court by a Palestinian village that has been adversely affected by the Israeli Wall and related development of the land adjacent to it.

Introduction

“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.”[1]

The purpose of tort law, or the law of civil remedies, is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.[2] “But even more fundamentally,” reasons Supreme Court of Canada Chief Justice Beverly McLachlin, “it is about recognizing and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognizing important wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be.[3] In order for tort law to continue to serve legal subjects as a legitimate utilitarian instrument, therefore, it must in both principle and in practice respond to the ever-changing dynamics and demands of modern society. “The law and justice system”, it has been said, “are servants of society, not the reverse.”[4]

Arguably the most potent force shaping modern society today is the phenomenon of globalization, and economic globalization in particular. One of the defining characteristics of economic globalization is the internationalization of commercial affairs[5] – a development maneuvered by the principal agent of economic globalization, the transnational corporation (“TNC”). The global activities of TNCs are constituted by a series of complex relationships between the corporation itself and individuals, communities, governments, and even other corporations, across various jurisdictions throughout the world, and invariably impact the lives and rights of human beings. [6] Undoubtedly, the transnational actions of these corporate entities “can affect virtually all internationally recognized rights.”[7] It is the intersection of these concepts – of transnational corporate activity and its impact on international human rights law – which this article considers in the context of Canadian tort law as a possible avenue for victims of gross human rights abuses to pursue civil remedies.
Specifically, this article is concerned with the fact that there is currently no legislation or common law cause-of-action in Canada that addresses directly the commission or complicity of gross human rights abuses abroad by Canadian-based corporations. The issue is whether there is potential to fashion a body of jurisprudence in Canada that would allow for foreign victims of gross human rights abuses to seek civil redress in tort and, if so, under what legal pretext such a case might succeed within the Canadian justice system.

Part I of this article provides a brief background of the relevant international human rights instruments to which Canada is a party, and suggests that these international legal obligations should govern Canada’s actions with respect to the provision of human rights protections, to both Canadian and foreign claimants alike. Part I also provides a summary of a civil suit that was recently brought forth in Montreal, Quebec, which involves two Canadian-based TNCs that are alleged to have been complicit in the commission of human rights violations in the Occupied Territories of Palestine; the case is called Bil’in (Village Council) et al. v. Green Park International Inc. et al. [8]. Part II discusses the contemporary tort law of negligence in Canada, and considers how the case of Bil’in (or a case with a fact pattern similar to it) could make use of the existing common law jurisprudence in order to realize a civil remedy in Canada through the tort of negligence. The article concludes by suggesting that, despite the absence of legislation and the non-existence of a nominate tort addressing human rights violations, Canadian law as it currently stands affords the jurisprudential tools necessary for the adjudication of the extraterritorial commission or complicity by Canadian-based TNCs of gross human rights abuses in Canadian civil courts.

I. The Possibility of Transnational Human Rights Litigation

A. International Human Rights Law & the Call for Effective Remedies

International human rights law transcends State boundaries. Its application has moved well beyond the provincialism of the first-half of the twentieth century, and it is now commonly accepted as a “universal political ideology”. [10] The incarnate form of its genesis resides most prominently within the Universal Declaration of Human Rights of the United Nations. [11] Together with the International Covenant on Civil and Political Rights[12] and the International Covenant on Economic, Social and Cultural Rights[13], these international instruments are collectively known as the “International Bill of Rights.” [14] The International Bill of Rights has been called “a veritable Magna Carta marking mankind’s arrival at a vitally important phase: the conscious acquisition of human dignity and worth.” [15] Significantly, the International Bill of Rights provides that each of its States Parties undertake to “respect and ensure” that “everyone has the right to an effective remedy...” [16] and that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...” [17] In addition to and in conjunction with the International Bill of Rights, various articles of the Charter of the United Nations, [18] the growing body of recognized principles and peremptory norms (jus cogens) of customary international law, [19] and the multilateral conventions that crystallise them, [20] all support the position that the international recognition of and global respect for the international human rights regime [21] is well founded and binding upon States under international law. And though States generally do not dispute the authority of the international human rights regime in principle, the enforcement of human rights principles by States has been less auspicious in the practice of transnational human rights litigation.

Broadly speaking, transnational human rights litigation is “the use by transnational human rights advocacy networks of international legal instruments for the protection of human rights.” [22] Moreover, it is “a type of activism that focuses on legal action engaged with [courts] to make domestic legal changes, to reframe or redefine rights, and/or to pressure States to enforce domestic and international laws.” [23]. Transnational human rights litigation is, therefore, largely concerned with bringing international human rights law to bear on the States whose obligation it is “to respect and ensure” that such rights are protected and enforced at the domestic level, through the guarantee of effective remedy. [24]

Despite a thin track record thus far, [25] the importance of transnational human rights litigation cannot be understated. Canadian Supreme Court Justice Ian Binnie recently acknowledged that “the enforcement mechanisms for human rights have lagged”. [26] Citing the “governance gaps” [27] created by economic globalization at the core of a “dis-integrated judicial system”, Justice Binnie argued that “you cannot have a functioning global economy with a dysfunctional global legal system: there has to be somewhere, somehow, that people who feel their rights have been trampled on can attempt redress”. [28] In addition, Justice Binnie noted that the U.S. Alien Tort Claims Act [29] has proven to be “a very effective mechanism” for addressing allegations of
human rights violations by TNCs against foreign plaintiffs, and suggested that a new cause-of-action in Canadian
tort law might be an important way for such disputes to find resolve in Canada. [30]  This suggestion in mind, Justice
Binnie noted that “Superior courts would deal with it, and they would have to deal with the question as to whether
they are the most appropriate court to deal with it [as opposed to other possible fora].  It would depend on the
degree of connection to Canada of the fact situation they are dealing with.”  [31] It is in the context of Justice
Binnie’s comments therefore, that we consider the civil suit of Bil’in Village. [32]

B. The Case of Bil’in Village

On 7 July 2008, Toronto lawyer Mark Arnold filed a Motion Introducing a Suit with the Quebec Superior
Court, on behalf of a Palestinian village called Bil’in and as against two Canadian corporations domiciled in the
Province of Quebec (Green Park International Inc. and Green Mount International Inc.). [33] The following sections
describe the fact pattern of this case in more detail, and consider the legal arguments which Mr. Arnold has chosen
to proceed with as a means for seeking an effective civil remedy for plaintiffs whose rights have allegedly been
violated by the two Canadian defendant corporations.

i. The Plight of Bil’in Village

Bil’in is a Palestinian village located close to the Green Line [34] that separates the occupied West Bank from
Israel. [35] It is one of many communities in the West Bank that Israel’s Barrier [36] (also referred to as “Wall” or
“Fence”) cuts through, resulting in the effective annexation by the State of Israel of land that constitutes part of
“the heart of the West Bank.” [37] According to Al-Haq – an affiliate of the International Commission of Jurists and
an NGO in consultative status with the Economic and Social Council of the United Nations – the private Palestinian
land (including parts of Bil’in Village) that has been annexed by Israel has been used for the purposes of Israeli
settlement construction, including in the construction of the Modi’in Illit settlement in 1996. [38] As Modi’in Illit is
“now the most populated Israeli settlement in the West Bank outside of East Jerusalem, with a current population
of almost 40,000” [39] the Israeli Civil Administration approved in 2007 a planning scheme for the expansion of a
neighbourhood in the Modi’in Illit settlement that would be known as Mattiyahu East. [40] With respect to the
tracts of land annexed from Bil’in Village for the purpose of constructing Mattiyahu East, the Supreme Court of
Israel, acting as the High Court of Justice [“HCJ”], has stated that:

Constructing a fence on a part of the lands of Bil’in, and restricting the access of the residents of
Bil’in to other major parts of their lands, by establishing check points and a farming gate for
permits holders only, creates significant difficulties to the residents of Bil’in and significantly
damages their way of life. [...] Therefore, the determined route [of the Barrier] deviates from the
balance between the security needs and the needs and welfare of the residents of Bil’in. [41]

In the same case, the HCJ held that:

...the future intention to develop the eastern part of “Mattiyahu East” is not at all a consideration
to be considered currently. In these circumstances, we were not convinced that it is essential, due
to military-security considerations, to keep the current route which passes on the lands of Bil’in. [42]

Despite these rulings of the Israeli High Court, however, the defendant Canadian corporations Green Park
and Green Mount, which began construction on the annexed lands in 2005, have continued to construct
some 250 residential units in Mattiyahu East, pursuant to rights purchased through contracts of sale for the
individual units with Jewish-Israeli purchasers. [43]

ii. The Motion Introducing a Suit

The case of Bil’in Village is unique in that it is among the first civil suits brought forth in a Canadian
court, by a foreign plaintiff, in which the plaintiff claims that its rights have been violated by a Canadian
corporation, and that civil liability for said violations are to be found under the aegis of international
law. [44] The potential legal corollary that would result from a successful litigation of this type is therefore
immense for moving Canadian civil courts towards accepting universal jurisdiction over Canadian legal
persons alleged of committing or being complicit in the violation of internationally recognized rights.
Taking as its factual starting point that the Village of Bil'in is a part of the West Bank, which forms a part of the Occupied Palestinian Territories (“OPT”) that is and has been occupied by the State of Israel through an act of war, the Motion Introducing a Suit [hereinafter, the “Motion”] claims that the Village’s situation is subject to “the rules and obligations of international law, including international humanitarian law.” Specifically, it is claimed that:

...the defendants, and each of them, on their own behalf and as de facto agents of the State of Israel, are, and have been illegally constructing residential and other buildings and marketing and selling condominium units and/or other built up areas on the land, to the civilian population of the State of Israel, thereby creating a new dense settlement neighbourhood on the lands of the Village of Bil'in. In so doing, the defendants are aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose.

The case of Bil'in Village may very well be the first civil suit in Canada where a claim is based on the complicity of a Canadian TNC in violating the laws of war, or international humanitarian law, and that Canada is the appropriate forum in which to pursue an effective remedy for such international wrongs.

C. Canada's International Human Rights Obligations

Though it has not yet been expressly declared by the Supreme Court of Canada, the international legal instruments to which Canada is party require it to make available domestic civil remedies for victims of international wrongs. And despite the Parliament of Canada’s failure to adopt legislation to that effect, as it is required to do under Article 2(2) and (3) of the ICCPR, the Supreme Court has, nevertheless, made specific declarations about the binding nature of customary international law vis-à-vis Canadian domestic law. In R. v. Hape, for example, the majority of the Supreme Court held that:

...international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. [...] Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

Furthermore, with respect to the “presumption of conformity” of domestic law with international law, which “applies equally to customary international law and treaty obligations”,

...the legislature is presumed to act in compliance with Canada’s obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.

Beyond the fact that courts will look to international law as an interpretive aid, and that Canadian domestic law is presumed to conform to international law, the reality of Canada being a dualist jurisdiction is also relevant to the relationship. In particular, while the Executive Branch of the Federal Government retains the authority to bind the State to international obligations, it is incumbent upon the Legislatures to incorporate treaties into domestic law where they are affected with the appropriate constitutional jurisdiction. Incorporation, therefore, also plays a role in determining whether Canada is duty-bound to fulfill particular international legal obligations. In the pleadings of Bil'in Village, the plaintiffs have claimed that the corporate defendants are in violation of international human rights and international humanitarian law, as found in the Fourth Geneva Convention and the Rome Statute of the International Criminal Court. Even though the Supreme Court of Canada has presumed conformity of domestic law with international law, both the Geneva Convention and the Rome Statute have been domestically incorporated through the Geneva Conventions Act and the Crimes Against Humanity and War Crimes Act, respectively, thereby ensuring that Canada is domestically and internationally obligated to “respect and ensure” that it recognises and enforces the rights enumerated therein.

II. The Contemporary Tort Law of Negligence in Canada
Since Lord Macmillan famously declared that “the categories of negligence are never closed,”[59] the creative power of tort law and its ability to innovate within the common law system has prompted the ingenuity of lawyers and plaintiffs alike to explore the waters of this potentially boundless basis of liability. While in practice the boundaries of negligent liability are limited, [60] at the very least “…a cause of action can always be brought for the negligent infliction of harm in cases of harm to life, liberty, physical and mental integrity and property.” [61] In addition, “a company can potentially be held legally responsible for negligence, if it does not take the care required of it by the law of civil remedies.”[62] Indeed, the Government of Canada itself has stated that to the extent that corporate wrongs

...committed outside of Canada also constitute claims of the sort cognizable as a tort, civil law remedies may be available to the foreign plaintiff in Canadian courts. As such, Canadian corporations or their directors and employees may be pursued in Canada for their wrongdoing in foreign countries. Generally, if the defendant is a Canadian corporation incorporated under the laws of Canada, the Canadian court located in the jurisdiction of the defendant would be competent. The plaintiff does not need to be a Canadian resident or citizen. [63]

In Part II, I will explore the contemporary tort law of negligence in Canada, and consider how a civil suit with a fact pattern similar to that of Bil‘in Village could make use of the existing common law jurisprudence in order to realize a civil remedy in Canada through the tort of negligence.

A. Negligence as a Cause-of-Action in Canada

While the tort of negligence exists virtually throughout the common law jurisdictions of the world,[64] there is no general consensus among jurisdictions about the distinct elements of negligence as a cause-of-action.[65] For the purposes of this article, and for simplicity’s sake, negligence as a cause-of-action has been divided into six parts, of which each will be examined briefly in turn, and with reference to the Bil‘in Village fact pattern.[66]

i. Legally Recognizable Loss

In order for negligence law to be invoked in a given situation, the plaintiff must establish that they have suffered some kind of loss which is recognized by law. While “the categories of recoverable loss are not closed and new ones may emerge as different cases arise”,[67] the law explicitly recognizes various types of harm including, but not limited to, life, liberty, physical harm, psychological harm, the loss of property, economic loss, and the loss of reputation. In the case of Bil‘in Village, the legally recognizable losses that the plaintiffs have pleaded include loss of use of personal and communal property, and the resulting loss of income,[68] as well as loss of liberty through a violation of their right to freedom of movement.[69] Within the aegis of legally recognizable losses, therefore, Bil‘in Village appears to have a valid claim as to damages suffered as a result of the defendant corporations “negligently aiding, abetting and assisting the State of Israel in carrying out an illegal purpose.”[70]

ii. Is There a Duty of Care?

Albeit the common law tort of negligence predated the well-known case of Donoghue v. Stevenson,[71] it is still undoubtedly one of the most important cases concerning the tort of negligence. Alongside Lord Macmillan’s famous quote,[72] Lord Atkin has also made a name for himself in the same case. With respect to the issue of whether a duty of care exists, Lord Atkin asks and answers:

Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question...[73]

So what, then, is a duty? According to Lord Atkin, a duty focuses on relationships. Fundamentally, a duty is a legally sanctioned obligation, the breach of which results in the liability of the person owing a duty. It is a question of law in which the judge is required to determine if the defendant is de jure obliged to exercise a reasonable standard of care in favour of the plaintiff. At common law, the Supreme Court has developed and modified a duty test that originated with the case of Anns v. Merton London Borough Council,[74] through the more recent case of Cooper v. Hobart.[75]
Where a novel case proclaiming duty arises, it is necessary to perform the modified Anns/Cooper test. The test has been established as follows:

(1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? [76]

For the first part of the test, the Court considers two branches for determination: reasonable foreseeability, and proximity. With respect to the first branch, the Court asks whether the relationship between the plaintiff and defendant was such that the latter could have reasonably foreseen the risk of harm to the former. [77] However, in addition to the question of reasonable foreseeability of harm, the Court then considers the supplementary issue of proximity. In reference to Lord Atkin’s “neighbour” principle (established in Donoghue), McLachlin C.J. and Major J. define “proximity” as “necessary to grounding a duty of care” [78] between the plaintiff and the defendant such that “the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs.” [79] The factors that a court would have to consider in determining proximity include “expectations, representations, reliance, and the property or other interests involved.” [80] Where a reasonably foreseeable risk of harm, supplemented by a proximate relationship, is found, “a prima facie duty of care may be posited.” [81] With reference to Bil’in Village, the plaintiffs would have to satisfy the Court that, (1) the defendant corporations should have reasonably foreseen the risk of harm that was involved in building condominiums on land that was appropriated by the State of Israel through an act of war, and (2) bearing in mind the fact that the villagers of Bil’in had their property appropriated by the State of Israel, the defendant corporations should have recognised the villagers’ legitimate interests by refusing to contract with the State of Israel and/or its citizens, or should have compensated the villagers for the land, accordingly.

At the second part of the Anns/Cooper test, the Court considers the broader questions of policy as they relate to “the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.” [82] These broader policy questions are concerned with, for example, jurisdictional issues, and in particular with the distinction between government policy and execution of policy. Specifically, the Court states that “government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature” and it is “inappropriate for courts to impose liability for the consequences of a particular policy decision.” [83] This policy implication may cause difficulty for a case like that of Bil’in Village. Whereas the foreign policy of a State is generally within the purview of the Executive Branch of government, such as in Canada where this authority lies with the Federal Government, likewise the foreign policy decisions of the Government would not be subject to tort liability. In the context of Bil’in Village, though Canada is subject to all the principles and norms of customary international law, as well as the relevant international instruments noted above, a policy decision of the Department of Foreign Affairs and International Trade [hereinafter “DFAIT”] not to recognize the rights of Bil’in villagers as against Green Park and Green Mount (which would, by extension, be seen as chastising the State of Israel for its policies towards the OPT) could potentially bar the plaintiffs from ever having their case heard on its merits.

iii. The Standard of Care and the “Reasonable Person”

Perhaps the central aspect of a negligence action is the issue of whether a defendant deviated from the standard of care expected of a reasonable person [85]. In other words, where an actor’s conduct falls short of a standard which society could have legitimately expected them to adhere to, liability may be incurred by that actor [86]. But who is the “reasonable person”, and what is the standard of care expected of them? At its most basic, the standard of care of a reasonable person requires “a certain average of conduct” that should be maintained in order for people to live harmoniously (or, at least, civilly) together in society [87]. In a discussion of the standard of care of “a reasonable and prudent man”, Laidlaw J.A. had this to say about who the “reasonable person” is:

I simply say he is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He
does nothing that a prudent man would not do and does not omit to do anything a prudent man
would do. He acts in accord with general and approved practice. His conduct is guided by
considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard
"adopted in the community by persons of ordinary intelligence and prudence." [88]

For the purposes of this article, it must be recalled that, at law, the term “person” does not apply only to natural
persons (i.e. human beings), but also to corporate entities, which are recognized in Canada as having all “the rights,
powers and privileges of a natural person.” [89] Among other things, this legal capacity allows for corporations to
both sue and be sued. A corporation, therefore, must also live up to the standard of care of a “reasonable person”,
as “each legally distinct corporate entity is subject to the laws of the countries in which it is based and
operates”, [90] including the law of civil remedies.

The discussion of a reasonable standard of care includes a discussion of unreasonable risk of harm or
injury that may occur. There are a number of factors that courts may take stock of in determining whether a
person has acted reasonably in the circumstances, including: the magnitude of the risk involved in certain
conduct,[91] the gravity of the potential harm,[92] the purpose of the potential harm,[93] avoidance,[94]
custom,[95] and statutory standards, which is discussed below. In addition, the Supreme Court of Canada in
Reibl v. Hughes,[96] has established a form of a “modified objective standard” that relates to the conduct of the defendant,
and asks what a reasonable person (the objective element) in those particular circumstances (the subjective
element) would have done. To assist in determining what is reasonable in a particular circumstance, the
International Commission of Jurists – of which Supreme Court Justice Ian Binnie is a jurist – has set out two
questions which it believes a corporation should consider to help delineate whether it is acting within the standards
of care required by a particular circumstance. First, did the company know, or should it have known, about the risk
of harm that was involved in its conduct? And second, did the company take sufficient measures in order to
prevent that risk from materialising?[97] Essentially, TNCs must act with due diligence, which “is determined by the
context in which a company is operating, its activities, and the relationships associated with those activities.”[98]

With respect to the question of where standards of care are to be found, it is generally understood that
custom, legislation, and common law may each be indicative of the factors to be considered in a specific case. As
the Village of Bil’in has pleaded in its case against Green Park and Green Mount, statute may provide such a
standard. While there is no recognized nominate tort of statutory breach at common law in Canada, the Supreme
Court has followed the lead of the United States in simply subsuming statutory breach into the civil law of
negligence.[99] In Saskatchewan Wheat Pool, Dickson J. stated that “to be relevant at all, the statutory breach must
have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be
evidence of negligence on the part of the defendant.” [100] This is precisely the approach that the plaintiffs have
taken in Bil’in Village, where they have pointed to the Fourth Geneva Convention, the Rome Statute of the
International Criminal Court, the Geneva Conventions Act and, inter alia, the Crimes Against Humanity and War
Crimes Act, as evidence of statutory breach, and therefore also of negligence (or delict, as it is called in
Quebec).[101] Specifically, the standard of care that is required by these statutes, the breach of which Bil’in Village
is arguing that the damages incurred by them have flowed from, is that in times of war an occupying Power (Israel)
shall not transfer its own population into the territory it occupies (the OPT, and the Village of Bil’in, in particular). In
this case, therefore, the standard of care of a reasonable person is respecting the laws of war as they are exist under
international humanitarian law.

iv. Causation between Wrongful Act and Damage Incurred

In addition to the aforementioned, a plaintiff must establish on a balance of probabilities (i.e. 50% + 1) that
a causal link exists between the wrongful act of the defendant and the damage(s) incurred by the plaintiff. In Snell
v. Farrell,[102] Sopinka J. defined causation as “an expression of the relationship that must be found to exist
between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter
out of the pocket of the former.”[103] The test that is generally applied to issues of causation is the “but for” test,
which has most recently been reaffirmed by the Supreme Court in Resurfice Corp. v. Hanke,[104] in which
McLachlin C.J., citing Major J. with approval, held that “the general, but not conclusive, test for causation is the ‘but
for’ test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the
defendant.” [105]

However, the Chief Justice also reinforced the “material contribution” test in Resurfice, which fills in the
gaps where the “but for” test fails. To satisfy the “material contribution” test, two requirements must be met. First, “it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test.” And second, “it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered from that injury.”

For Bil’ in Village, the plaintiffs would therefore have to prove that the damages they have incurred are a direct result of the corporate defendants’ actions (under the “but for” test), or show that it is impossible for them to show that the harms sustained would not have occurred but for the negligence of the defendants (i.e. that the Government of Israel’s actions somehow prevent the plaintiffs from proving this), and then prove that the defendants nevertheless owed a duty of care to the Village of Bil’in. It seems likely that the latter of the two tests – the “material contribution” test – would be applicable in a common law court.

v. Proximate Cause and Remoteness

Proximate cause, or remoteness, is another means by which courts may limit liability for negligent conduct. According to Allen M. Linden, “the remoteness problem is concerned with whether the defendant, whose conduct has fallen below the accepted standard of the community, should be relieved from paying for damage that his conduct helped to bring about.” The main function of this stage is to draw a line in cases where strange or bizarre consequences of a series of events have resulted, in which is would be inappropriate to attach blame to the defendant. It appears unlikely, considering the relatively straightforward fact pattern of the case as described above, that any meaningful issue of remoteness would arise in the case of Bil’in Village. Nevertheless, if some issue of remoteness or proximity was to arise, the due diligence required by TNCs acting abroad would be greatly encouraged. In the words of Professor Linden, “if there remains any prophylactic power in tort law, it would be strengthened by forcing entrepreneurs to pay for all the costs of their negligent activities, including the unforeseeable results, so that they will be stimulated to exercise greater care.”

vi. Availability of Defences to the Defendant

Perhaps the most easily recognizable defence for the corporate defendants in Bil’in Village is that of forum non conveniens. Simply put, the doctrine of forum non conveniens addresses whether another court is a more appropriate forum in which to hear a claim. The test for this doctrine is set out in Amchem Products Inc. v. British Columbia (Workers’ Compensation Board) by Sopinka J., where

…it is necessary to] determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. [...] Under this test the court must determine whether there is another forum that is clearly more appropriate. [...] In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed.

Like Cambior, therefore, Bil’in Village will almost inevitably face a forum non conveniens argument by the defendants. However, as per the Israeli High Court of Justice’s decision in Bargil v. Government of Israel, the issue of Israeli settlements is “unjusticiable” as “intervention in questions of policy that are in the jurisdiction of another branch of Government” are inappropriate, in conjunction with the “predominantly political nature of the issue.” Because the HCJ is unwilling to adjudicate on matters related to the Israeli settlement policies, it appears as though the only effective recourse to remedy for the Bil’in villagers would be that of Canadian courts, where the corporate defendants are domiciled. Whether this approach will be seen as acceptable to Canadian judges, however, will depend on a number of factors, not least of which will include the political leanings of the Federal Government of the day and its relationship with Israel.

IV. Conclusion

Undoubtedly, economic globalization and the proliferation of TNCs have affected most aspects of human life. Whereas a Canadian corporation would once produce goods or provide services strictly within Canada, and sometimes only within a single province, the liberalization of economic policies, the growth of high technologies,
and innovations in the corporate structure have all combined to shape a brave new world in which States’ borders seem to be a thing of the past. TNCs can now and do move freely, investing and divesting capital at their whim and, at times, working with foreign governments to achieve common ends. However, it is in this context that internationally recognized rights must now, more than ever, be recognized, protected, and enforced by States which are host to the transience of the globalized corporate structure. This burden weighs most heavily on those States which boast a strong foundation for the rule of law, where legal systems are largely fortified against corruption and are mostly insulated from the influence of political elites. And yet, Canada – as a legally advanced society – has not yet taken the appropriate steps to realizing avenues for victims of human rights abuses to seek civil remedies for harms committed against them.

In the case of Bil‘in Village, which has briefly been discussed in this article, the possibility for Canadian courts to act in honour of the State’s international obligations is available. Though the Bil‘in case is being brought forward in the civil law jurisdiction of Quebec, Bil‘in would have a chance of success in common law Canada, as well. Based on the considerations of the common law tort of negligence cited above, it appears as though Bil‘in’s most difficult hurdle would relate to the foreign situs of the plaintiffs. The policy considerations of the Anns/Cooper test would likely work to the advantage of the defendants, as the courts would be reluctant to step on the feet of elected legislators, while judges themselves may be weary to hear the merits of a case which may be better served in another jurisdiction. Despite these potential drawbacks, however, Canadian courts should strengthen their capacities to hear such complaints, and to become advocates for the kind of access to justice that victims of gross human rights violations deserve.

References:

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Holt C.J., Ashby v. White (1703) 1 Sm LC (13th edn) 253.


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Ahmed Issa Abdallah Yassin, Head of Bil’in Village Council v. the Government of Israel et al., [2007] HCJ 8414/05


Secondary Material: Monographs


Secondary Material: Articles & Reports


Canada, Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, Mining in Developing Countries and Corporate Social Responsibility (Ottawa: House Publications, 17 October 2005) at Recommendation 4, (emphasis original) online: ode=1&DocId=2030362&File=0>.


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**International Materials**


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**Other Materials: Lectures and Papers Presented**


Footnotes

jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations...”[30] Ibid. It should also be noted that on 10 December 2007, M.P. Peter Julian introduced Bill C-492 “An Act to amend the Federal Courts Act (the International Promotion and Protection of Human Rights Act, or the IPPHRA)”. According to Professor Nick Milanovic of Carleton University, the proposed Bill is “explicitly modeled on the ATS in the United States. Like the ATS, the IPPHRA would allow the federal courts to hear and decide claims for violations of international law that occurred outside of Canada. Specifically, the legislation would allow non-citizens to sue for gross violations of basic human, environmental or labour rights when these injuries were committed outside the country.” See Nick E. Milanovic, “A Canadian Alien Tort Statute? A Brief History of the Universal Jurisdiction and Canadian Civil Courts: Strategic Directions Conference, University of Ottawa, 7-8 November 2008) [unpublished] 5.[31] Schmitz, supra note 23.[32] Bil’in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc., and Annette Laroche, (2008) Court No. 500-17-044030-081 (Qc. Sup. Ct.) [Bil’in Village].[33] Hereinafter “Green Park” and “Green Mount”. [34] The “Green Line” refers to the internationally-recognized 1949 Armistice Demarcation Line that was drawn to separate Israel from its neighbours, after the 1948 Arab-Israeli War (which included Israel, Egypt, Jordan, Lebanon and Syria). See Resolution of 16 November 1948, SC Res. 62, UN SC, 381st Mtg. UN Doc. S/1080 (1948) 30.[35] Al-Haq, Communiqué, “From Palestinian Olive Groves to Canadian Courtrooms: Resisting Israel’s Land Annexation Policies in the West Bank” (28 October 2008) 1.[36] The International Court of Justice has concluded that “by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated regime, Israel has violated various international obligations incumbent upon it”. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] I.C.J. Rep. 136 at ¶ 143.[37] Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, “The West Bank Barrier” OCHA-oPT, online: Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory .[38] Al-Haq, supra note 35 at 1, n. 2.[39] at 1.[40] Ibid.[41] Ahmed Issa Abdallah Yassin, Head of Bil’in Village Council v. the Government of Israel et al., [2007] HCJ 8414/05, as cited in Israel, Ministry of Justice – Department for Human Rights and Foreign Relations, The Security Fence, 5 at ¶ 15, online: .[42] at ¶ 14.[43] Al-Haq, supra note 35 at 2.[44] Perhaps the only other civil lawsuit related to human rights violations which has been brought against a TNC is the case of Recherches Internationales Quebec v. Cambior Inc., [1998] Q.J. No. 2554 (Qc. Sup. Ct.) [Cambior]. Cambior involved what Maughan J. referred to as “one of the worst environmental catastrophes in gold mining history”, wherein the dam of an effluent treatment plant of a gold mine in Guyana ruptured, releasing some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants into Guyana’s main waterway, the Essequibo. See Cambior at ¶ 1. This suit was ultimately granted Cambior its request for declinatory exception on the basis of a forum non conveniens argument.[45] While the term “universal jurisdiction” has mostly been used in reference to the administration of criminal law, there is a growing movement among lawyers, activists and academics to extend the realm of universal jurisdiction to civil courts, which would allow for victims of gross human rights abuses to seek civil remedies in national courts. The Ottawa-based Canadian Centre for International Justice (CCIJ) is one such organization. An operable definition of “universal jurisdiction” in the context of this article is: the exercise of jurisdiction by a nation’s courts over internationally wrongful acts committed either abroad by its nationals, or against its nationals, or against its national interests, and where such internationally wrongful acts are similarly proceeded against. See Stephen Macedo, ed., The Princeton Principles on Universal Jurisdiction (Princeton: Program in Law and Public Affairs, 2001) 23.[46] Bil’in Village, supra note 32 (Further Amended and Particularized Motion Introducing a Suit of 6 November 2008, at ¶ 11 and 12) [Bil’in Village Motion].[47] at ¶ 9.[48] Jennifer Besner and Amir Attaran, “Civil Liability in Canada’s Courts for Torture Committed Abroad: The
Unsatisfactory Interpretation of the State Immunity Act 1985 (Can)” (Paper presented to the Universal Jurisdiction and Canadian Civil Courts: Strategic Directions Conference, University of Ottawa, 7-8 November 2008) (2008) 16 Tort L. Rev. 1 at 2,[49] Article 2(2) of the ICCPR states that “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Article 2(3) of the ICCPR provides that where persons whose internationally recognized rights are violated, States Parties to the Covenant must ensure that: (a) they are provided an effective remedy; (b) the person’s effective remedy shall include the determination of the right thereto by a competent judicial, administrative or legislative authority, with an eye to developing the possibilities of judicial remedy; and (c) that such competent authorities shall enforce such remedies where granted. See ICCPR, supra note 13 at Art. 2(2) and (3)(a),(b),(c).[50][51]

About the Author

Craig A. Brannagan holds a B.A. (Hon.) in Political Science from the University of Windsor and an M.A. in International Law & the Settlement of Disputes from the University for Peace. He is currently completing an LL.B. at the Faculty of Law, University of Windsor. He has twice been published in the University for Peace’s Peace & Conflict Monitor, and wrote his Master’s thesis for the United Nations Department of Political Affairs.

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