**MAKING PARENT COMPANIES PAY FOR THE SINS OF THEIR SUBSIDIARIES**

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***Abstract:***

*This paper examines how one particular slice of transnational private regulation – namely, private tort litigation against parent companies of multinational corporate groups – might operate to promote responsible behaviour by such groups. It aims to do three things. The first is to explain the importance of holding parent companies (and especially parents of multinational groups) liable for the harms inflicted by their subsidiaries. Typically, justifications for parental liability have tended to focus on the risk of subsidiary insolvency. By contrast, this paper argues that parental liability delivers a number of other important advantages, and that these arise even where the subsidiary is solvent. Moreover, these advantages are particular important where the subsidiary forms part of a multinational group, and where the subsidiary operates, and causes harm, in a 'host' state whose legal system is significantly less effective in enforcing private rights than is the legal system of the 'home' state in which the parent company is domiciled.*

*Second, the paper reviews recent UK developments in the imposition of liability upon parent companies for injuries caused by their subsidiaries. It notes a flurry of recent case law which both demonstrates the significance of parental liability in the multinational context described above, but also, regrettably shows the restrictive nature of the circumstances in which a parent is now likely to be found liable.*

*Third, and finally, the paper will criticise these developments. It will argue, in particular, that the UK law's emphasis on the exercise of parental control over the subsidiary enables corporate groups too easily to evade the risk of liability. What should matter is the parent's ability to control its subsidiary, not whether it chooses to exercise that control in practice. The paper will illustrate the points above by reference to recent litigation brought by Nigerian tort victims against Royal Dutch Shell Plc and its Nigerian subsidiary.*

*I: Introduction:*

In theory at least, private actions under the law of tort law/delict are a powerful regulatory strategy to reduce, and redress, the wrongful infliction of harm on others. The threat of liability will often have a potent deterrent effect on potential tortfeasors. And, where that threat fails to prevent some injurious activity, those injured will be able at least to secure compensation for the losses they have suffered. Moreover, as a private law action, enforcement will be in the hands of those with the greatest interest in holding wrongdoers to account – those injured and entitled to recompense.

Nevertheless, the effectiveness of tort law in regulating corporate misbehaviour is potentially weakened where the tortfeasor is part of a multinational corporate group, and for at least two reasons. First, *any* limited liability corporation has an incentive to 'discount' its potential liability in tort, given that such liability might be wholly or partly avoided by the company's liquidation. This can result in a denial of compensation to tort victims, and also reduces the deterrent threat which tort law imposes on companies. Companies are in consequence likely to spend sub-optimally on accident prevention, or to continue activities which would be unprofitable if the company were forced to internalise the full (rather than merely the discounted) cost of its potential tort liability.

This first – insolvency related – problem encountered by tort law has led a number of commentators to argue in favour of making *shareholders* liable for the tortious injuries inflicted by their companies. Some of these prescriptions suggest all shareholders – large or small – should be subject to such liability. Others argue in favour of limiting liability to *controlling* shareholders, which would certainly include (but would not necessarily be limited to) a parent company within a corporate group.

The insolvency problem is undoubtedly significant. It is evident in the mass of litigation that has arisen within the asbestos industry, of which UK cases such as *Adams v Cape Industries plc*,[1] *Chandler v Cape Plc*,[2] and *Thompson v The Renwick Group Plc*[3] are illustrative. However, in the context of multinational corporations, the second reason why tort law may prove ineffective is perhaps of equal or even greater importance. This second reason arises primarily for what we might call *jurisdictional* considerations. Suppose the subsidiary operates, and causes injuries, in a 'host' country whose legal system struggles to

[1] [1990] 2 WLR 657.
[2] [2012] 3 All E.R. 640 (CA).
[3] [2014] EWCA Civ 635 (CA).

enforce private rights. Even if the subsidiary is solvent, still its tort victims may find that suing the subsidiary in the courts of the victims' own host state is fraught with difficulties. Such difficulties may arise because of, say, poorly developed procedural rules that hinder the bringing of group actions, problems in securing funding for litigation, disadvantageous rules governing the awarding of costs to successful claimants, the ability of defendants to delay excessively the conclusion of proceedings, or the risks of judicial corruption or influence by those parties with the deepest pockets or political connections. In the face of these impediments to the successful enforcement of tort claims, a corporate group will, once again, discount the value of the tort liability faced by (even their solvent) subsidiaries operating in such countries.

Once again, shareholder liability can also address the jurisdictional problem, as it does the insolvency problem. So, if the parent company can itself be held tortiously liable, for permitting its subsidiary to harm others, then claimants will have a separate cause of action against the parent, standing alongside whatever claim they may already enjoy against the subsidiary. And, crucially, claimants will likely be able to bring this parental action in the courts of the parent's home state, thereby side-stepping the weaknesses in the legal system of their own 'host' state.[4] Indeed, claimants will get a double jurisdictional advantage from being able to sue the parent, for the courts of the parent's home state will not only take jurisdiction over the parental claim but also, typically, over the subsidiary claim too.

### *II: Illustration – Nigerian claimants against Royal Dutch Shell Plc*

The above points are well-illustrated by Royal Dutch Shell Plc's ('RDS') relationship with Nigeria, and by some of the litigation to which that relationship has recently given rise. RDS operates in Nigeria primarily through Shell Petroleum Development Company of Nigeria Ltd ('SPDC'), its Nigerian incorporated subsidiary. The environmental damage associated with SPDC's operations has been recorded extensively elsewhere.[5] SPDC itself is, so far as one

[4] The claimants' right to sue a defendant parent company in the state of its domicile in civil and commercial disputes is, for example, conferred by Article 4 of the (Recast) Brussels Regulation: see 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 (Recast)'). Brussels (Recast) came into force on 10th January 2015. Actions commenced before that date are governed by the Brussel (Recast)'s predecessor regulation, Council Regulation (EC) No 44/2001 on 'Jurisdiction and the recognition and enforcement of judgements in civil and commercial matters' ('the Brussels Regulation').

[5] See A.A.Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2(2) *Civil and Environmental Research* 38, at p.41ff. While the Shell group claims that most spills are caused by 'sabotage' or 'theft' (see eg Shell, Annual Report 2016: Environment and Society available at https://reports.shell.com/annual-report/2016/strategic-report/environment-and-society/environment.php#accordion3), a joint investigation by Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD) in Nigeria

can tell, quite solvent, and Nigerian victims of that environmental damage have chosen often to sue SPDC in Nigeria.

Nevertheless, in a number of actions, Nigerian claimants have sued not only SPDC, but also RDS (or, in some cases, RDS's predecessors as parents of the Shell Group). In *Bodo v SPDC*,[6] for example, proceedings were brought, in England, and against both SPDC and RDS, by some 15,000 members of Nigeria's Bodo community, in respect of oil spillages occurring in Nigeria in 2008 and 2009.[7] In the *Oguru* litigation,[8] various groups of Nigerian residents, together with Milieudefensie, the Dutch branch of Friends of the Earth brought proceedings in the Dutch courts against SPDC, RDS, and RDS's two predecessors, SP and STT.[9] And in *Okpabi v RDS Plc*,[10] representatives of many thousands of members of Nigeria's Ogale community and Bille Kingdom brought claims, England, against both SPDC and RDS, for damage caused by oil spillages from pipelines and other facilities operated by SPDC in the Niger Delta.

Given SPDC's own solvency, it does seem that these various parental actions were motivated by concerns other than the possible insolvency of SPDC. First, and probably foremost, the claimants were seeking to secure a jurisdictional advantage – to 'forum shop'. By suing RDS, claimants hoped to have their claims (both against RDS, and against SPDC too) heard in the courts of the country where RDS is domiciled (that is, the UK, or the Netherlands), rather than in Nigeria. Perhaps the clearest example of this use of a parental action for jurisdictional advantage is seen in *Bodo*.[11] Although the claimants began by suing both SPDC and RDS, in return for SPDC's acceptance of English jurisdiction in the claims against it, the claimants agreed to stay the parental action against RDS. The parental action

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casts doubt on those claims; see Amnesty International, *Clean it up: Shell's false claims about oil spill response in the Niger Delta* (London: Amnesty International Ltd, 2015) available at: https://www.amnesty.org/download/Documents/AFR4427462015ENGLISH.PDF.

[6] *Bodo Community v SPDC* [2014] EWHC 1973 (TCC).

[7] The initial claims were for damages only, but after the defendants accepted English jurisdiction, the claims were extended to include an injunction to compel the defendant to clean up the environmental damage caused.

[8] The Court of Appeal's judgements are reported as: ECLI:NL:GHDHA:2015:3588 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9850); Court of Appeal of The Hague, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3586 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9845); and Court of Appeal of The Hague, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3587, MenR2016/29 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013: BY9854).

[9] RDS has been the ultimate holding company within the Shell group since 2005. Prior to that, two other companies – the Dutch company Shell Petroleum NV ('SP') and the English company Shell Transport and Trading Company Ltd ('STT') – jointly acted as ultimate holding companies within the Shell group.

[10] [2018] EWCA Civ 191.

[11] *Bodo Community v SPDC* [2014] EWHC 1973 (TCC).

seemed to have served its purpose, once the defendants agreed that the claim against the subsidiary could be heard in the claimants' preferred forum, England.

In both *Oguru* and *Okpabi*, the reports do not reveal whether the claimants would have agreed to forego the parental claims in return for respectively Dutch, or English, jurisdiction over the subsidiary claims. Nevertheless, securing the jurisdiction of those countries' courts was clearly a significant part of the decisions to pursue the parents. In *Okpabi*, for example, the claimants argued strongly before Fraser J that the action would proceed in a timelier manner if pursued in England rather than Nigeria.[12] And other transnational tort litigation against parent companies shows a similar determination to secure the jurisdiction of the home state of the parent company.[13]

Whilst 'forum shopping' may have been the claimants' main motivation for suing the parent(s) within the Shell group, other considerations may also have favoured the parental actions. So, an action against RDS might avoid doctrinal limitations that Nigerian law applies to claims against the subsidiary SPDC. It may be that the actions that Nigerian tort victims can bring against the subsidiary, SPDC, are, in some respects, limited by certain statutory provisions found in the (Nigerian) Oil Pipelines Act 1956 ('OPA'). That Act empowers the state to licence operators of oil pipelines in Nigeria, and provides for licence holders to pay compensation for damage caused by pipelines they operate. But it also excludes certain heads of loss for which compensation will be payable (shock and fear; annoyance, inconvenience, discomfort and illness, distress and anxiety) and seems to preclude the award of aggravated or exemplary damages. By contrast, an action against the parent would not be subject to the OPA, and would not therefore be subject to those exclusions.

A third possible motive we identify concerns the greater reputational threat to a multinational group that a claimant can create by choosing to sue its 'Western' domiciled parent company, rather than suing only a subsidiary domiciled in a developing host state. There are at least two reasons for this greater reputational threat, we suggest. They are that, first, an action against the parent is likely to generate *greater publicity* than would an action against the subsidiary and, second, that any given level of (negative) publicity against the parent is likely to be more *damaging* to the corporate group than is a similar level of (negative) publicity against a subsidiary.

[12] *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC) para121.
[13] See for example *Lubbe v Cape Plc* [2000] CLC 45, *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 and *AAA v Unilever Plc* [2017] EWHC 371 (QB).

The fourth motive is perhaps the most controversial. It has echoes of the first 'jurisdictional' motive noted above, namely the claimants' desire to have the case heard in a jurisdiction more favourable to the claimants. But this fourth motive turns from the interests of the claimants to the interests of their lawyers. If the lawyers practice in the jurisdiction of the parent's home state, then they have an interest in ensuring that litigation proceeds there. In *Okpabi*, the law firm acting on behalf of the claimants – namely Leigh Day – did indeed face criticism from RDS in *Okpabi* for the 'business model' it was allegedly employing, 'in which novel claims are asserted against UK-domiciled parents . . . in order to bring fundamentally foreign claims into the jurisdiction in which the claimants' law firm is admitted to practice'.

*III: The development of UK law on parental liability for subsidiary torts*

So far, we have shown how the ability of tort claimants to secure reparation for the injuries they suffer will likely be enhanced if parent companies face their own liability. And this is especially true where tort victims reside in host states whose legal systems struggle to provide effective compensation.

But how readily is liability imposed on parents? We focus here on the position in the UK. There are, in principle, two ways in which liability might arise. The first is through the doctrine of veil piercing. The general rule, to which veil piercing forms an exception, is that each company within a corporate group is a separate legal entity. As such, no company within the group is responsible for liabilities incurred by other separate entities, notwithstanding that they are also members of the group. Parents are not liable for the obligations of their subsidiaries, nor vice versa. If, however, the courts are prepared, exceptionally, to pierce the veil that separates the (subsidiary) company from its (parent) shareholder, then a consequence of so doing *might* be that the parent will be liable for the debt (here, the tort liability) of the subsidiary.

UK law has, however, traditionally adopted a restrictive approach to the circumstances when the veil might be pierced. It is true that, for a short period, UK courts' attitude seemed to be becoming rather more liberal or 'interventionist', with intimations that the veil might be pierced where a group of companies operated as a 'single economic unit'. But even in that brief period where this judicial attitude was arguably evident, the veil was pierced more for the benefit of the members of the group than for the benefit of claimants against it. In other words, it was pierced to allow *members* of corporate groups *to escape* the disadvantages that they would suffer from a rigid application of the 'separate entity' approach, rather than to permit claimants against one entity within the group to seek recovery from another entity within the group. In any event, more recent case law (*Adams v Cape Industries plc; Prest v Petrodel Resources Ltd*) has made quite clear that the veil simply cannot be pierced on the single economic unit ground. Tort victims of the subsidiaries, then, must look to the second way in which parental liability might be crafted.

This second way turns to developments in the law of torts, rather than in corporate law. It is based on the argument that a parent owes its own duty of care to safeguard the welfare of those who might be injured by the negligence of the parent's subsidiaries. This argument was advanced in earlier UK cases (*Ngcobo v Thor Chemicals Holdings Ltd;*[14] *Connelly v RTZ plc;*[15] *Lubbe v Cape plc*).[16] Those cases, for different reasons, did not rule on whether a parent did indeed owe such a duty of care, but each intimated that it was at least arguable that such a parental duty existed.

The key, seminal, case was *Chandler v Cape plc*.[17] Here, the UK Court of Appeal held that such a duty might, in appropriate circumstances exist. It identified four 'indicia' that would be most relevant in determining the existence of such a duty. These were '(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection'.

The decision in *Chandler* was undoubtedly a cause for celebration amongst those who wished to see parent companies held to account for the behaviour of their subsidiaries. True, *Chandler* was a 'domestic case', in that it concerned an English company, and its English incorporated subsidiary, operating in England and injuring an English claimant. The motive for the parental action there was entirely the first of the problems noted in our introduction, namely the insolvency of the subsidiary. Nevertheless, the potential implications of the *Chandler* judgement for multinationals (including its jurisdictional consequences) were apparent.

Sadly, *Chandler* increasingly appears as a somewhat exceptional decision. Subsequent cases have, it seems, either reduced the circumstances in which the *Chandler* 'indicia' will be satisfied, or else introduced more restrictive criteria to determine when a parental duty will arise. Either way, these post-*Chandler* refinements to the doctrine are making it much easier for a well-advised parent company to avoid liability.

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[14] [1995 WL 1082070].
[15] [1998] AC 894.
[16] [2000] 1 WLR 1545.
[17] [2012] 3 All E.R. 640 (CA). See also *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635 (CA)

In *Thompson v The Renwick Group Ltd*,[18] the court focused on the first two of the *Chandler* indicia, namely that the business of the parent is the same as that of the subsidiary, and that the parent knows more than the subsidiary about relevant health and safety issues in that industry. The court in *Thompson* held that these criteria would not be satisfied where a parent company was simply a holding company, which operated in the industry only 'indirectly', through its separate subsidiaries. This restrictive reading of *Chandler* was applied at first instance in the *Okpabi* litigation. Shell had challenged the jurisdiction of the English courts to hear the claims against itself and SPDC. The court's ruling on that challenge ultimately turned on whether or not the claim against RDS had any real prospect of success. At first instance, Fraser J ruled that it did not. He did so on the basis that RDS was a pure holding company. It did not itself carry out oil extraction, transportation, or refining etc activities in Nigeria (or elsewhere).[19]

In other recent case law addressing the parental duty of care, the courts have tended to emphasise more the requirements of 'proximity' and 'reasonableness' which claimants must show when establishing novel duties of care in English tort law. In the court of appeal decision in *Okpabi*, for example, the court suggested that RDS, the Shell parent company, would owe a duty of care to those injured by its subsidiary's operations only if Shell either exercised control over its subsidiary activities, or else was responsible for the practices and policies which caused harm.[20] Similar observations were made in *Lungowe v Vedanta Resources plc*[21] and *AAA v Unilever plc*.[22]

## *IV: Critique: a failure of corporate accountability*

The development of the law post-*Chandler* means that parent companies are likely to be held liable for their subsidiaries' torts only in the rarest of cases. A well-advised corporate group can effectively insulate the parent from the threat of tortious liability for harm caused by its subsidiaries. The group can be structured to ensure that the parent, whilst domiciled in a developed country where tort litigation can be effectively pursued, nevertheless acts only as a pure holding company, carrying out no operations itself within the relevant industry. It can also ensure that all available evidence suggests that it does not exercise direct control over its subsidiaries in a way sufficient to incur any duty of care.

[18] [2014] EWCA Civ 635 (CA).
[19] [2017] EWHC 89 (TCC), at paras.116-117.
[20] *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191; see especially the judgements of Lord Justice Simon at paras. 127-129 and of Sir Geoffrey Vos at paras.205-6.
[21] [2017] EWCA (Civ) 1528 at para.83.
[22] [2018] EWCA Civ 1532.

This ability to avoid tortious liability should be a matter of concern. It allows groups to avoid liability by concentrating the riskiest activities in thinly capitalised subsidiaries which can be permitted to fail in the face of substantial tortious liabilities. And it denies claimants the chance to vindicate their tortious claims in the courts of the home state.

Limiting parental liability to those situations where the parent has exercised control over its subsidiary seems indefensible, on both consequentialist and deontological grounds. The consequentialist argument for shareholder liability has focused on the economic benefits that are likely generated where shareholders can be held liable for their companies' torts.[23] The argument turns on the incentive, which the threat of shareholder liability imposes on companies, to internalise fully their own tortious liabilities. This incentive is economically desirable regardless of whether the shareholder happens to be exercising control over its subsidiary. It is true that some versions of this economic argument suggest that the beneficial consequences of shareholder liability are likely at their greatest where the shareholder has the potential to control the company.[24] Yet this 'control-based analysis' turns on *the ability* of the shareholder to control the company – not *the fact* that that the shareholder *has* exercised control in respect of the particular events giving rise to the company's torts.

Nor can it plausibly be argued that it is morally unfair to hold a shareholder liable if she has not herself controlled the particular events giving rise to the company's own torts. Deontological arguments for shareholder liability turn on the moral responsibility which shareholders share for wrongdoing by their company.[25] This moral responsibility, it can be argued, arises as a result of the financial support which shareholders provide to the company, and their foreseeability of harm to third parties. Again, it might be argued that larger shareholders provide much greater financial support than smaller ones. And it might also be argued that shareholders that are large enough to enjoy the ability to control the company are both more likely to know of the company's harmful behaviour and to have the means to prevent it. But what matters here – in the judging the moral culpability of the shareholder – is not that they actually exercised control, but they had *the power* to do so. Claims by the shareholder – and especially by a powerful parent company – that they were not controlling their subsidiary

[23] See eg H.Hansmann and R.Kraakman, 'Toward Unlimited Liability for Corporate Torts' [1991] 100 *Yale L.J.* 1879; D.W.Leebron, 'Limited Liability, Tort Victims, and Creditors' [1991] 91 *Columb. L.Rev*. 1565; N.A.Mendelson, 'A control-based approach to shareholder liability for corporate torts' [2002] 102 *Columb L.Rev.* 1203.
[24] See in particular Mendelson, *ibid*.
[25] See eg J.Crowe, 'Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs' [2012] 75 *M.L.R.* 159; C.A.Witting, *Liability of Corporate Groups and Networks* (Cambridge: CUP, 2018).

should be seen not as an excuse, and a reason for the parent to escape liability, but rather as a matter of condemnation, and a reason for holding them in breach of their duty.