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Profit and Pain: Examining the obstacles and solutions in company law to enhance corporate accountability

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Abstract:

The Ogale and the Bille communities located in Nigeria, have been subjected to repeated oil spills since 1989, and have lived with chronic oil pollution throughout their lives. As a result of the oil spills caused by a subsidiary of parent company Shell plc, the natural water sources cannot safely be used for drinking, fishing, agricultural, washing or recreational purposes. The Ogale and Bille communities demonstrate an important issue in company law is the protection of the health and environment of communities, particularly in developing countries, that have been exposed to harm caused by thinly capitalised corporations. Limited liability together with the principle of separate corporate personality create an obstacle in holding companies who have instructed their subsidiary's conduct, accountable for harmful activities. This paper in particular aims to canvas whether the law currently protects these stakeholder interests and in what ways it can progress to address this fundamental concern in company law. It is argued that the effect of tort law, directors duties and market factors interact to promote stakeholder interests and encourage corporate accountability.

Key Words: *"Company law", "Tort law", "CSR", "Director's Duties", "Stakeholder Interests".*

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Table of Contents

I. Introduction 4
A. The foundational company law principles……………………………………………5
B. An example of the issue in company law……………………………………………..6

II. Tort Law Approach: Imposing a Duty of Care 8
A. Initial Approach to Liability in the UK:.. 8
B. The Broader Approach……………………………………………………………10
C. Is tort law the appropriate place to further corporate social responsibility?............13
D. Conclusions on use of tort law ……………………………………………………16

III. Company Law 17
A. The Companies Act 1993: Directors Duties …………………………………… 17
B. Purpose of the Legislation ………………………………………………………… 19
C. A chink in the armour - s 131 …………………………………………………… 20
D. Conclusions on s 131 …………………………………………………………………… 20

IV. CSR as an operating market factor 23
A. The normative argument ……………………………………………………………... 23
B. Corporate Social Responsibility (CSR) Movement: Shareholder vs Stakeholder...24
C. The Relevance of Corporate Social Responsibility………………………………26
D. CSR as a Market Factor …………………………………………………………..29

V. Conclusion 29

VI. Bibliography 32

I. Introduction

An important issue alive in company law is the protection of the health and environment of communities, particularly in developing countries, that have been exposed to harm caused by thinly capitalised corporations. Limited liability together with the principle of separate corporate personality create an obstacle in holding companies who have instructed their subsidiary's conduct, accountable for harmful activities. This paper in particular aims to canvas whether the law currently protects these stakeholder interests and in what ways it can progress to address this fundamental concern in company law. This paper looks at three different approaches to furthering corporate responsibility through; tort law claims in negligence, company law, and operating market factors.

A key driver of corporate accountability is the vocal corporate social responsibility movement ("CSR"). The principles of this movement advocate for a stakeholder model approach to corporate governance as a means to address harmful corporate activities. The stakeholder theory promotes the wider operating interests such as employees, creditors, and the community to be taken into account.[1] One of these legal inroads being used by affected stakeholders to enforce accountability, is causes of action against the parent company, imposing a duty of care for the actions of subsidiary companies under certain circumstances. This avenue holds the parent company liable notwithstanding the fundamental principle of separate corporate personality.

The Companies Act 1993 ("CA 1993") may also touch on some purposes of CSR through the partial codification of directors duties. The balance of the legislation is historically and primarily aimed at the free running of business and shareholders value.[2] A chink in this overall purpose is potentially there for groups who promote social responsibility interests through s 131 CA 1993. Section 131 broadly requires each director to "act in good faith and in what the director believes to be the best interests of the company".[3] There is scope within this section to provide for the interests of stakeholders outside of current shareholders. While it is likely an interpretive stretch to suggest that a company's best interests could involve profit sacrifice, the CA 1993 contemplates that a company's interests may

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[1] Shirley Quo "Corporate culture, governance and remuneration: is there a role for corporate social responsibility?" (2019) 40(12) Co Law 384 at 384.
[2] Long Title, Companies Act 1993; and Peter Watts "The attempt to nationalise the company — introducing "stakeholder" ideology into the foundations of company law (2005) 12 CSLB 103.
[3] Companies Act 1993, S 131(1),

extend beyond shareholder profit to benefit other company's stakeholders.[4] When coupled with the tort law remedies, the Companies Act 1993 can be an instrument to protect the stakeholder.

Finally, this paper will look at the normative argument contending that even though there are issues of corporate accountability it is not a free for all. Contributing factors, such as institutional investors, responsible consumers, and, the pressures of CSR, are all factors which directors take into account when implementing principles of best practice in corporate governance. It is argued that the effect of tort law, directors duties and market factors interact in promotion of corporate accountability. Although, none of these three avenues are sufficient in protecting stakeholder interests in isolation.

A. The foundational company law principles:

It has long been established as a foundational principle of corporate law that corporations have a separate legal personality which separates them from shareholders, directors, and other stakeholders.[5] This in turn gives rise to another foundational principle of limited liability whereby the shareholders will not be personally liable for the debts or losses of the company, and together create the "corporate veil.[6] The most recent iteration of the Companies Act 1993 clearly accounts for the principles of limited liability and separate corporate personality. Section 15 states that a company registered under the Act "is a legal entity in its own right separate from its shareholders".[7] The effect of these principles allows corporate structures to be used so as to ensure that the legal liability (if any) will fall on another member of the group rather than the company, even where there may be de facto control.[8] As Slade LJ expressly noted in *Adams v Cape Industries plc,* whether or not this

[4] Julia Maskill "Extending Directors 'Duties to the Natural Environment: Perfect Timing for Greener Companies in Aotearoa New Zealand?" (2016) 22 Auckland UL Rev 281 at 294.
[5] Barnali Choudhury and Martin Petrin *Corporate Duties to the Public* (Cambridge University Press, Cambridge, 2018) at 94.
[6] At 94.
[7] Section 15.
[8] *Adams v Cape Industries plc* [1990] Ch 433 (CA) at 1026.

is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.[9] This should be looked into further to determine whether there are ways to avoid the undesirable consequences through current legal frameworks and by way of reform.

The practical consequences which impact on human rights and environmental harms as a result of foundational company law principles have been criticised for a number of years and faced legal challenges. This can be chartered from the asbestos claims in *Chandler v Cape Plc* in which employees found themselves at serious health risks from the actions of a wholly owned subsidiary whereby under separate legal personality and limited liability, the parent company would not be liable.[10] In response to these concerns, tort law offers a remedy to the affected stakeholders.[11]

B. An example of the issue in company law:

The Ogale and the Bille communities located in the Rivers State, Nigeria, have been subjected to repeated oil spillages since at least 1989. A United Nations Environment Programme found that "it is a fair assumption that most members of the current Ogoniland community have lived with chronic oil pollution throughout their lives".[12] As a result of the oil spills, the natural water sources cannot safely be used for drinking, fishing, agricultural, washing or recreational purposes.[13] Proceedings were issued in 2015 by the Ogale and Bille communities in the United Kingdom against Royal Deush Shell ("RDS") as a defendant domiciled within in the jurisdiction, and its subsidiary, the company responsible Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), a Nigerian registered company.[14] Six years later the UK Supreme Court in *Okpaki & Others*, held the claimants had an arguable case that RDS owed a duty of care to them and that this claim could proceed through the English courts.[15]

[9] At 1026.
[10] Chandler v Cape plc [2012] EWCA Civ 525, [2012] 1 WLR 3111.
[11] Choudhury and Petrin, above n 5, at 98.
[12] United Nations Environment Programme "Environmental Assessment of Ogoniland" (August, 2011) <www.unep.org> at 12.
[13] *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3, at 4.
[14] At [5]-[7].
[15] At [159].

This set of proceedings is just one example of a large company facing legal challenges in light of human rights and environmental concerns in developing countries. The Bodo Community also issued proceedings due to two oil leaking into the water ways over a five week period causing major damage to the environment and wildlife, the loss of incomes, livelihoods and exposure to serious health risks, in the UK. [16] The Dutch Courts have also seen proceedings brought against Shell, whereby four Nigerian farmers (Eric Barizaa Dooh, Fidelis Ayoro Oguru, Alali Efanga and Friday Alfred Akpan) filed claims against RDS and SPDC. Seeking compensation for alleged damage to fish ponds and land caused by oil spills from two underground pipelines and an oil well operated by Shell in the villages of Goi, Ikot Ada Udo and Oruma between 2004 and 2007.[17]

The Ogale and the Bille communities are examples of the types of communities and individuals who have been able to avoid the costs created by separate legal personality and limited liability's practical consequence. When the principles are applied strictly the corporate veil may become a shield for redress when companies and corporations do not engage in responsible conduct. These communities demonstrate how legal claims in tort law can be used as an instrument to remedy the harm.

II. Tort Law Approach: Imposing a Duty of Care

A key device which has been used by affected communities and individuals to enforce companies' accountability has been to impose a duty of care for the actions of subsidiary companies. This avenue holds the parent company liable for damages circumventing the fundamental principle of separate corporate personality.

A. Initial Approach to Liability in the UK:

[16] *The Bodo Community and Others v Shell Petroleum* [2014] EWHC 1973 (TCC), at 6; and Amnesty International "Nigeria: On trial: Shell in Nigeria: Legal actions against the oil multinational" (February, 2020) <www.amnesty.org> at 24.

[17] Lucas Roorda "Broken English: a critique of the Dutch Court of Appeal decision in *Four Nigerian Farmers and Milieudefensie v Shell*" (2021) 12 TLT 145 at 145.

In the context of parent company liability, the case of *Chandler v Cape plc* is widely recognised as being the landmark decision.[18] The facts concerned a claimant who contracted mesothelioma due to the negligence of the employer. The employer was no longer in existence by the time the disease manifested and therefore the claim was brought against the employer's parent company who wholly owned the subsidiary.[19] The Court held "in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees."[20] The Court described an in indicia which would lead to parent company liability of its subsidiaries. The factors formulated (1) the businesses of the parent and subsidiary need to be 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.[21]

A Shift in Approach: Vedanta:

In 2019 the duty of care owed by a parent company was re-examined in the case of *Vedanta v Lungowe*.[22] Close to 2,000 Zambian villagers brought this claim against Konkola Copper Mines and its parent company Vedanta Resources Plc, alleging that their land and water had been damaged by toxic waste caused by the mine, owned by a group of companies, of which Vedanta is the parent.[23] *Vedanta* is closely connected to the case of *Okpabi & Others* in its approach to liability and the ultimate outcome. The Court outlined where a parent may incur a duty of care to those harmed by the activities of the subsidiary as usually being; (1) Where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management; and (2) Where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.[24] It was, however, made clear that the Court was reluctant

[18] *Chandler v Cape Plc*, above n 10.
[19] *Chandler v Cape Plc*; and Choundhury and Petrin, above n 5, at 101.
[20] *Chandler v Cape Plc, at [80].*
[21] *Chandler v Cape Plc, at [80];* and Choundhury and Petrin, above n 5, at 101.
[22] *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20, [2020] AC 1045.
[23] *Vedanta Resources Plc*, above n 22.
[24] At [51].

to 'shoehorn' all cases into solely those specific categories.[25] The claimants in the Court of Appeal had pleaded the case on the question of indicia from *Chandler*.[26] Perhaps most important from *Vedanta* was the view taken that the *Chandler* indicia should only be viewed as examples of possible circumstances where a duty may be incurred rather than a straight-jacket test necessary to make out liability.[27] The alternative approach provided has been labelled the 'Vedanta Routes' in relation to group wide policies as; (i) disseminating defective or inadequate group-wide policies and guidelines; (ii) taking active steps to implement group-wide policies; and (iii) by formulating such policies, holding itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so.[28]

Okpabi:

The case of *Okpabi & Others,* as introduced at the beginning of this paper, expands on and confirms the approach taken in *Vedanta.* On appeal the UK Supreme Court unanimously overturned the Court of Appeal decision, holding that a duty of care could be owed by RDS.[29] It confirmed what was held in *Vedanta*, that the *Caparo* test, and the *Chandler* indicia were not the way to proceed on the question of duty owed by the parent company.[30] The arguments in *Okpabi* were reframed under the '*Vedanta* routes', however, the Court clearly highlighted that even these *'Vedanta* routes', should not be understood as supporting a strict test for finding the duty of care as it will depend on the circumstances of each case.[31]

B. The Broader Approach:

The recent cases of *Okpabi* and *Vedanta* have been argued to have significantly improved the prospects of such cases in the future.[32] When approaching the question of whether a

[25] At [51].
[26] At [54].
[27] At [54].
[28] At [52]-[53]; and Marilyn Croser, Martyn Day, Mariëtte Van Huijstee and Channa Samkalden "Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability" (2019) 5 BHRJ 130 at 133.
[29] *Okpabi and others*, above n 13.
[30] At [25].
[31] At [26].
[32] Lucas Roorda and Daniel Leader "*Okpabi v Shell* and *Four Nigerian Farmers v Shell*: Parent Company Liability Back in Court" (2021) 6 BHRJ 368 at 372.

parent company owes a duty of care for the actions of the subsidiary the UK Courts have emphasised a move away from any stringent test or criteria. The indicia in *Chandler* focused on whether the company *actually* exercised control over the subsidiary's operations. The recent common law developments, however, have broadened the inquiry to include circumstances where a parent company has defectively set group-wide policies, or, holds itself out to exercise control to shareholders even if it in fact does not.[33] While these further circumstances are not in themselves intended to be limited categories, they broaden the incidents where a parent company may incur a duty of care.

In the procedural sense *Okpabi* can also be seen as broadening the opportunity for success in claims of this type. In reviewing the Court of Appeal decision the Supreme Court found that Sales J had been roped into a 'mini-trial' in the context of a summary judgement claim.[34] The Court of Appeal was burdened with masses of evidence which were unnecessary at that procedural stage of the litigation, and a cautionary warning was signalled against such evidential inquiries.[35] This finding can be seen to soften the burden on claimants in regards to both the time and resources committed to a claim at its early stage.

A note on the jurisdictional challenges:

A major hurdle for claims is the legal issue of jurisdiction. The cases of both *Vedanta* and *Okpabi* concerned jurisdiction as primary issues argued. Whether the court can or should decline jurisdiction on the ground of *forum non conveniens* has taken up much of the litigation in this area. The principle of *forum non conveniens* permits a court that accepts the principle in one of its various forms, to decline a jurisdiction that is clearly vested in it, in the exercise of its discretion, either because the forum chosen by the plaintiff is "clearly inappropriate", or because, although the forum selected by the plaintiff may be an appropriate one, there is a "clearly more appropriate forum" in which the case may be tried more suitably in the interests of justice.[36] The issue of jurisdiction took a slightly different form

[33] Roorda and Leader, at 375; and *Vedanta* above n 8, and *Vedanta,* above n 22, at [52]-[53].
[34] *Okpabi,* above n 13, at [126]; and Roorda and Leader, at 373.
[35] *Okpabi*, above n 13, [126].
[36] Peter Nygh "The Liability of Multinational Corporations for the Torts of their Subsidiaries" (2002) 3 EBOR 51 at [59].

in *Okpabi.* While RDS, the anchor defendant, was domiciled in the UK, the claimants applied for permission to serve the claim form on SPDC outside the jurisdiction on the basis that SPDC was a "necessary or proper party" to the claims against RDS for the purposes of the jurisdiction.[37] The UK Supreme Court declined discussing challenges to jurisdiction, which will have to be decided by the High Court, including the challenge to the UK being the appropriate forum for the case against SPDC.[38]

Four Nigerian Farmers and Milieudefensie v Shell

The United Kingdom is not the only European court to have developed its legal approach to parent company liability. The case of *Four Nigerian Farmers and Milieudefensie v Shell,*[39] considered by the Hague Court of Appeal, also aligns itself with the developments seen in the UK. The claim was brought by a group of Nigerian farmers, supported by Dutch NGO Milieudefensie, with respect to three separate oil spills from pipelines and wellheads operated by Shell, located near the Oruma, Goi and Ikot Ada Udo villages in the Niger Delta.[40] The Court held that parent company, Royal Dutch Shell, had a common law duty of care to ensure that particular safety measures were installed in pipelines operated by its Nigerian subsidiary.[41]

Okpabi mirrors the Dutch case in several respects: its facts are very similar as it deals with 1) oil pollution in the Niger Delta as a result of spills allegedly caused by negligent maintenance; 2) with the same defendants; and 3) contains the same legal basis for liability of parent company Royal Dutch Shell.

To conclude, accountability of parent corporations for extraterritorial harms is not just a product of a single norm. As described by Roorda, the law has come from a patchwork of overlapping decisions and legislative initiatives that transcend borders, both territorial and doctrinal.[42] The Court of Appeal's decision in *Four Nigerian Farmers* is an important step, in part due to its links to developments in other jurisdictions.

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[37] *Okpabi,* above n 13, at [10].
[38] *Okpabi*, at [160].
[39] *Four Nigerian Farmers and Milieudefensie v Shell* (The Hague Court of Appeal, 2021).
[40] Roorda, above n 17, at 145.
[41] *Four Nigerian Farmers* at [7.24]–[7.29]; and *Roorda*, above n 17, at 145.
[42] *Roorda,* above n 17, at 150.

The attractive Parent Company

Peter Nygh, lists a number of reasons why the parent company is the attractive defendant, rather than the subsidiary itself.[43] The case of *Lubbe v Cape*[44] offers one reason being when the subsidiaries have been closed and no longer available to be sued. There the asbestos mines and mills in South Africa had all been closed and as noted by Lord Hope were longer present or available to be sued.[45] Even where a subsidiary is still in operation there may also be limited assets available for recovery or unfavourable law - either in terms of liability or damages. Nygh also highlights that even where the subsidiary has assets and favourable law to support the claim, the legal environment of a country may not be suitable due to resourcing.[46] A number of factors can contribute to this including the legal expertise available to present the case, and further, without an effective legal aid system the plaintiffs may be without a means to bring the claim.

C. Is tort law the appropriate place to further corporate social responsibility?

The recent case examples in Europe of *Vedanta, Okpabi* and *Four Nigerian Farmers* demonstrate that tort law might be a useful tool to enforce corporate responsibility. This section will examine whether claims in negligence is the most appropriate area of law to implement CSR, and whether this has been the case in New Zealand.

Corporate social responsibility and the law of torts share similar aims. Tort law is a mechanism which compensates and controls risks.[47] In a successful tort claim the victims of irresponsible conduct bring forth their action seeking damages for the harm. This brings with it the duality of recognising the victim with compensation and also determining the harmful activities of corporations given the reputation, litigation and compensation costs.[48] One of the advantages is its flexibility both in regards to the circumstances of a particular claim

[43] See generally Nygh, above n 36.
[44] *Lubbe and others v Cape plc* [2000] 4 All ER 268, [2000] 1 WLR 1545 (HL).
[45] At 283.
[46] Nygh, above n 26, at 55.
[47] Bastian Reinschmidt "The law of tort: a useful tool to further corporate social responsibility?" (2013) 34 Co Law 103 at 106.
[48] At 106.

and more generally to the social, economic and legal developments. The adaptiveness of tort law in the context of corporate groups liability can be illustrated through the development to the duty of care originally in *Chandler* and later adjusted in *Vedanta* and *Okpabi.*

The key difficulty of using tort law to hold parent companies liable for the conduct of subsidiaries is the conflicting intersection with the foundational principles of company law. The doctrines of separate legal personality and unlimited liability form the "corporate veil" thereby shielding the parent liabilities of the subsidiaries. When tort law interferes and finds liabilities for the conduct of subsidiaries the conflict between tort and company law principles is apparent. The well-established principle of separate legal personality therefore places a relatively firm restriction on courts when faced with claims such as that of *Okpabi*. In cases such as *Vedanta*, the response by the Court has been to found liability on the high degree of integrated management oversight.[49] It offers an option of reconciling the conflicting principles but also creating a perverse incentive. This is because the more actions a parent company takes to ensure human rights compliance throughout its group of companies, the more likely it will be to incur legal liability.[50] As noted earlier in this paper, litigating through tort law in claims such as *Okpabi* bring jurisdictional hurdles that have to be overcome as well as time drain, as litigation is spread over decades. Further, tort law only comes into effect as a compensatory measure once the harm has occurred, while a general deterrent, it does not on the whole effectively operate as preventative to risky conduct.[51] Injunctions could be said to be a preventive tool, however as noted by Reinschmidt, an injunction tends to halt the continuance of an activity rather than provide any halt to their initiation.[52]A final criticism of the use of tort law is the stretch of its fundamental elements to a duty of care. In imposing a duty of care there must be proximity between the claimant and defendant, in which the harm is reasonably foreseeable.[53] Proximity concerns the closeness of the connection between the parties in terms of their physical, temporal, relational and causal proximity.[54] The notion of proximity requires the isolation of facts that in Lord Atkin's words indicate that the defendant's act or omission

[49] *Vedanta Resources Plc,* above n 22, at [53].
[50] Roorda and Leader, above n 32, at 376.
[51] Reinschmidt, above n 47, at 106.
[52] At 106.
[53] *Smith v Fonterra* [2021] NZCA 552; [2022] 2 NZLR 284, at [96].
[54] At [101].

closely and directly affected the plaintiff and that the parties are in this sense neighbours.[55]

In imposing a duty of care on the parent company the proximity element becomes stretched. The approach by the UK Courts has been to justify the proximity through the close managerial oversight of the subsidiary by the parent company which they are instructing.[56] In New Zealand the Court of Appeal in *Smith v Fonterra* considered a claim for negligence arising against seven New Zealand companies.[57] Each of the companies were either involved in an industry which released greenhouse gases into the atmosphere or manufactured and supplied products which released greenhouse gases when they were burned.[58] Seeking common law action three causes of action were pleaded in tort: public nuisance, negligence and a proposed new tort described as breach of duty.[59] The context of the claim is not subsidiary and parent company complexities, but does relate the use of tort law as a tool in addressing environmental harms. The Court of Appeal when addressing the duty of care question found that the claim failed on the proximity factors. It was argued by the plaintiff that a proximate relationship could be found through knowledge of actual risk to an identifiable class.[60] This was rejected due to the connection not being either physical or temporal. Further, where a causal relationship may be evidence of proximity between the parties, on the facts of *Smith*, the Court was not persuaded in this respect either.[61] This demonstrates that while traditional company law principles can be a barrier to establish corporate liability, this is also the case for tort law's own fundamental principles and specifically proximity in imposing a duty of care.

D. Conclusions on use of tort law:

Tort law through claims of negligence can be seen to be an avenue used by affected community groups and individuals to enforce corporate accountability. In this respect it overlaps with the aims of CSR. Tort law protects the interests of CSR that require companies

[55] Stephen Todd (ed) Todd on Torts (8th ed, Thomson Reuters, Wellington, 2019), at [5.3.02]; as cited in *Smith v Fonterra*, at [101].
[56] *Vedanta Resources Plc,* above n 22, at [52]-[53].
[57] *Smith v Fonterra,* above n 53.
[58] At [3].
[59] At [6].
[60] At [102].
[61] At [104].

to adhere to human rights and environment protection. The violation of CSR principles such as the protection of the company's employees, its consumers or the environment can constitute torts such as negligence. Where a duty of care can be established it overcomes the limiting principle of separate legal personality and operates both as a compensation mechanism and as a mechanism to control risk. In conclusion, tort law is not successful in absolute terms given the valid criticisms of using negligence for this end. The circumstances in which the duty of care will be established are limited and fact specific. While the English Courts have been open to judicial increments in how the duty of care is approached, however, New Zealand has been hesitant in stretching the proximity requirement.[62] Further, tort law comes into effect as a compensatory measure once the harm has occurred, while as a general deterrent, it does not on the whole effectively operate as a way to prevent risky conduct.[63] Notwithstanding these valid criticisms when tort law is viewed in conjunction with other mechanisms such as legislation, and CSR's normative influence on companies, it offers an important element to corporate accountability. Tort law allows for judicial increments which are flexible with new harms and offers a specific remedy in which stakeholders can be protected and compensated.

III. Company Law

A. The Companies Act 1993: Directors Duties

The Companies Act 1993 sets out the principles of limited liability and separate corporate personality. Section 15 states that a company registered under the Act "is a legal entity in its own right separate from its shareholders".[64] Section 16(1)(a) then allows a company "full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction".[65] Limited liability is further expressed in s 97 of the CA 1993. This is expressed in s 97(1) "Except where the constitution of a company provides that the liabil-

[62] See *Smith v Fonterra,* above n 53.
[63] Reinschmidt, above n 47, at 106.
[64] Companies Act 1993, s 15(1).
[65] Companies Act 1993.

ity of the shareholders of the company is unlimited, a shareholder is not liable for an obligation of the company by reason only of being a shareholder."[66] Section 97(2) of the CA 1993 goes on to place clear limits on a shareholder's liability to the company.[67] These were summarised by Watts, as the result of either arrangements that are not commonly made between a company and its shareholders, or of exceptional circumstances.[68] Apart from these rare situations, a shareholder will be exposed to liability to the company only in the case of an unlimited company. [69]

As stated at the beginning of the paper, these principles of separate legal personality and unlimited liability have created obstacles in enforcing accountability for harms incurred as a result of parent companies instructing subsidiaries on risky activities. The CA 1993 in assessing the liability of the subsidiary rather than the parent company allows to promote purposes of CSR in when establishing accountability for directors. This is through the partial codification of the duties and assessing the liability of directors under Part 8 of the Act.[70]

The duties provided for in the CA 1993 are codified by the statute, expressed as being mandatory, and it is unlikely that they were intended to be waivable.[71] A director in a New Zealand incorporated company under the CA 1993 must at a minimum:[72]

- act in good faith and in the best interests of the company; [73]
- exercise powers for a proper purpose; [74]
- exercise due care, diligence, and skill that a reasonable director would exercise in the same circumstances; [75]
- comply with the Companies Act and the company's constitution; [76]

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[66] Companies Act 1993, s 97(1).
[67] Companies Act 1993, s 97(2).
[68] Companies Act 1993, s 97(2); and Peter Watts, Neil Campbell and Christopher Hare Company Law in New Zealand (2nd ed, LexisNexis, Wellington, 2016) at 41.
[69] Watts, Campbell and Hare, at 41.
[70] Companies Act 1993, ss 131-138A.
[71] Watts, Campbell and Hare, above n 68, at 374.
[72] The Companies Act ss 131-138.
[73] Companies Act, s131.
[74] Section 133.
[75] Section 137.
[76] Section 134.

- not engage in reckless trading;[77] and
- avoid incurring obligations unless satisfied that the company will be able to honour them when required to do so.[78]

In these obligations of directors found in the Companies Act 1993 a link can be made to the promotion of accountability in CSR. The duty to act in good faith is generally owed to the "company".[79] The difficulty lies in establishing the company's interest and whether this is limited to shareholders, or extendings to other stakeholders, which the CSR agenda more widely takes account of.

B. Purpose of the Legislation

It is likely that on balance shareholder primacy has remained with the enactment of the current Companies Act through both the directors powers and duties.[80] Shareholders' primacy flows from the shareholders initiate the company's existence, have the (largely) unfettered power to liquidate the company at any stage and have the means of controlling what it does while it remains in existence.[81] Peter Watts notes longstanding dicta which support the shareholder primacy view such as:[82]

> [The directors' power] … must be exercised … not arbitrarily or at the absolute will of the directors, but honestly in the interests of the shareholders as a whole: *Australian Metropolitan Life Assurance Co Ltd v Ure*.[83]
>
> [T]he phrase, "the company as a whole", does not … mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body: *Ngurli Ltd v McCann*.[84]

[77] Section 135.
[78] Section 136.
[79] Companies Act 1993, s 169(3); and Watts, Campbell and Hare, above n 68, at 375.
[80] See argument by Watts, Campbell and Hare, at 384-385.
[81] At 376.
[82] At 376.
[83] *Australian Metropolitan Life Assurance Co Ltd v Ure* (1932) 33 CLR 199 at 217.
[84] *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 at 730.

The recent Supreme Court judgment of *Madsen-Ries* canvasses the scheme of the Companies Act pointing to the traditional view that it is that this requirement is fulfilled by directors acting in the best interests of the shareholders as a whole.[85] The Court does not go further than simply identifying the main competing stakeholder model, whereby the interests of those with some stake in the company and its business are considered.[86] The Court for the purposes of the appeal did not need to decide which of the competing models of corporate governance is correct, other than to say, no matter which view is taken on the best interests of the company, maintaining solvency is vital.[87]

The balance of the legislation is tipped toward facilitating the free running of business. The purposes of the Act which can be gathered from the Law Commission's draft and the Act's long title is to to encourage efficient and responsible management of companies and recognise the value of the limited liability company as a means of attaining the economic and social benefits of the aggregation of capital for productive purposes, the spreading of economic risk and the taking of business risks.[88] The Companies Act 1993 does not depart far from its predecessors. In the preamble of the Law Commission's Report there was acknowledgment of the policy balance between the need to strive to achieve a balance between ensuring accountability and making the position of directors so onerous that people with appropriate skills are dissuaded from retaining or taking up directorships.[89]

C. A chink in the armour - s 131

The balance of the Companies Act operates to facilitate the free running of business and expressly restates the foundational company law principles of limited liability and separate legal personality. There may however be a chink in the armour through s 131 of the Act which potentially runs counter to those staple principles. Section 131, in its first two subsections, provides: [90]

[85] *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100; [2021] 1 NZLR 43.
[86] At [29].
[87] At [30].
[88] Companies Act 1993, Long Title.
[89] Law Commission Company Law: Reform and Restatement (NZLC R9, 1989) at 14.
[90] Companies Act 1993, s 131.

> 131. Duty of directors to act in good faith and in best interests of company
>
> (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.
>
> (2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

Section 131 has garnered some debate as to its effect on the director's duty and the interpretive scope of the section. The difficulty of the s 131 is in whether the Act is capable of supporting wider interests than that of the immediate shareholder. As stated in Maskill's research paper, if Parliament had intended to impose an agency model of shareholder primacy it could have provided that the company's "best interests" are equivalent to the best interests of the shareholders.[91] The long title of the CA 1993 provides that the value of the company is a means of achieving not only economic benefits but also *social* benefits. This language and the equivocal scope which can be given to s 131 provides an opening for groups who promote social responsibility interests to argue that directors must have regard to such interests and to seek to have a Court review decisions on that basis.[92]

The Supreme Court in *Madsen-Rise* confirmed that s 131, which requires a director to act in the best interests of the company, is a subjective test and that the courts will be hesitant to interfere in the decisions of directors.[93] The Court did note exceptions to the subjective test as including where:[94]

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91 Julia Maskill, above n 4, at 293.

92 Companies Act 1993, Long Title,; and Watts, above n 2.

93 *Masen-Rise*, above n 85, at [109].

94 At [133]; and as expressed in "Supreme Court releases decision on breach of directors 'duties" (25 September 2020) Duncan Cotterill at <www.duncancotterill.com>.

- there is no evidence of actual consideration by the directors of the best interests of the company;
- in an insolvency or near-insolvency situation, there is a failure to consider the interests of creditors;
- there is a conflict of interest, or the action was one no director with any understanding of fiduciary duties could have taken; or
- a director's decisions are irrational.

The case was largely confined to the director's decision making in an insolvency context, whereby the defendant had failed to consider the interests of all creditors.[95] As discussed above the Court did not find it necessary to determine on the competing shareholder and stakeholder models when applying s 131, and the Act.[96] The acknowledgment of both however demonstrates that neither is settled.

The difficulty in stretching s 131 to include external stakeholder interest is the Act in s 132 that provides for employees which are typically included as a group of stakeholders. Watts holds a different view that the Companies Act was not intended for directors to have particular regard to the interests of external stakeholders in the company beyond what is provided for in s 132.[97]

D. Conclusions on s 131

The Companies Act through the partial codification of directors duties can be seen to promote some of the interests of socially responsible governance. The Act in balance is tipped towards the free running of business and states unsurprisingly the foundational principles of limited liability and separate legal personality. Section 131 however is equivocal in its effects on requiring directors to consider external stakeholders. It would likely be going too far to suggest that a company's best interests could involve profit sacrifice, especially considering the Supreme Court's statement that solvency will always be certain as the company's primary interest. It is evident that the CA 1993 contemplates that a company's

[95] At [31].
[96] At [31].
[97] Watts, above n 2.

interests and director's duties may extend beyond shareholder profit to benefit wider society. Coupling this with the tort law remedies, the Companies Act can be an instrument of protecting the interests for stakeholders.

IV: CSR as an operating market factor:

A. The normative argument:

The first two parts of this paper have highlighted the Companies Act and tort law may address the difficulties of limited liability and legal personality. This part however looks at the normative argument that even though there are issues of corporate accountability there are factors, such as institutional investors, responsible consumers and pressures of CSR, which directors take into account to promote good corporate governance. From the various definitions given on CSR it is traditionally viewed as a voluntary measure implemented through policies, reporting and/or 'soft law' techniques. CSR has been described as "the voluntary commitment by business to manage its activities in a responsible way".[98] As well as, in the terms of: "the voluntary integration by the companies of their social and environmental preoccupations in their commercial activities and their relations with the stakeholders".[99] Although voluntary, the International Criminal Court's view of CSR is that it has now formed part of the requirements of doing business in today's global economy.[100] This 'requirement' is seen in the rephrasing of Milton Friedman's stance "The business of business is business.", to the Porter and Crammer take, "The business of business is responsible business." (2006).[101]

B. Corporate Social Responsibility (CSR) Movement: Shareholder vs Stakeholder

The origins of the debate can be traced back to the 1930s with Adolf Berle and Merrick Dodd. In the Havard Review Berle advocated for a "shareholder primacy" view, and

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[98] Xavier Dieux and Francois Vincke "Corporate social responsibility, illusion or promise?" (2005) 1 I.B.L.J 13 at 17.
[99] At 17.
[100] At 17.
[101] Catherine Pedamon "Corporate social responsibility: a new approach to promoting integrity and responsibility" (2010) 31 Co Law 172 at 172.

Dodd the “stakeholder theory”.[102] While slightly self defining the shareholder primacy viewpoint makes the shareholder the key in director decision making.In its strict form, and advanced by economist Milton Friedman, shareholder primacy is viewed as; “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits".[103] It is unlikely that sole profit maximisation would be explained in such strident terms today but is arguably still the dominant ideology.

The elusively defined “stakeholder theory” in contrast argues that directors’ decision making must balance the competing interests of all stakeholders.[104] Stakeholders are referred to as those who "bear some form of risk as a result of having invested some form of capital, human or financial, or something of value, in a firm", and, without whose participation a company cannot survive.[105] This, therefore, encompasses a wide range of interests non-exhaustively including; employees, creditors, and community.[106] The debate under CSR, moves to shift the decision-making considerations beyond being shareholder motivated, to include those wider operating interests.

The nature of varying interest gives rise to one of the key arguments against stakeholder ideology - the requirement of balancing. While it is likely a stakeholder would be viewed in the context of each corporation, questions remain as to how those interests are realised especially where conflicts arise. Berle’s observation argued that stakeholders' interests are attractive, but no guidelines exist for how it could be achieved.[107] Speaking in 1930, the position of practical difficulties in rectifying the varying interests still remains a concern if the stakeholder ideology is implemented as the dominant theory.

C. The Relevance of Corporate Social Responsibility

The CSR movement is arguably gaining “voice” and cannot be easily ignored by corporations, multi-national or otherwise. There are differing views as to CSR’s relevance which

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[102] Quo, above n 1, at 384.
[103] Milton Friedman "The Social Responsibility of Business is to Increase its Profits" *The New York Times Magazine* (New York, 13 September 1970); as discussed by Quo, above n 1, at 384.
[104] Quo, above n 1, at 384.
[105] Amy J Hillman and Gerald D Keim "Shareholder Value, Stakeholder Management, and Social Issues" (2001) 22 Strat.Mgmt.J 125.
[106] Quo, above n 1, at 384.
[107] Min Yan “Why not stakeholder theory” (2013) 34 Co Law 148 at 150.

ultimately may depend on the corporate's structure. On the one end of the spectrum is the view of CSR as an unavoidable consideration in decision making, which even proponents of the shareholder viewpoint must consider given its effects on a corporation's bottom line.[108] Working examples can be seen through British Petroleum (BP), Goldman Sachs, and the recent example of DGL. Best Global Brands index reported BP's disappearance from idex being attributed to the Mexico oil disasters, Goldman Sachs credible financial result failed to move its position on the index due to public backlash against the Bank's ethics.[109] The New Zealand example of Chief Executive of DGL faced controversy after sexist comments made towards Nadia Lim (Celebrity Chef), DGL's share prices fell close to 30 percent compared to a 7 percent fall for the broader New Zealand market.[110] These examples can be used to show CSR's gaining importance however it is still noted by some as being simply a matter of corporate management subject to shareholder and public pressure. In the context of multinational corporate groups this is likely even more so whereby "corporate boundaries are increasingly ambiguous, and with that ambiguity the locus of corporate responsibility becomes more uncertain."[111] This later viewpoint of CSR's relevance may be attributed to the historical lack of legal/regulatory effect to CSR.

Also relevant to the discussion of CSR is the closely related ESG discussion. ESG is the broad term that refers to the inclusion of environmental (E), social (S) and governance (G) criteria into decisions taken by companies as a manifestation of responsible or sustainable investment practices at its core ESG relates to investors' portfolio decisions.[112] ESG can also be viewed in a broader sense, where it relates to the influence of environmental, social and governance criteria in organisational decision-making at any level.[113] It however is often reliant on self reporting where "the sheer variety, and inconsistency, of the data and measures, and of how companies report them." [114] While not the focus of this paper, ESG is important to flag as a relevant dialogue, particularly in this section.

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[108] Shirley Quo "Corporate social responsibility and corporate groups: the James Hardie case" (2011) 32 Co Law 249 at 249.
[109] At 249.
[110]" DGL Group - whose CEO made derogatory comments about Nadia Lim - to quit NZX" *Radio New Zealand* (New Zealand, 27 May 2022).
[111] Andrew Johnstona and Kerrie Sadiqaa "Beyond Country-by-Country Reporting: A Modest Proposal to Enhance Corporate Accountability" 27 NZULR 569 at 537.
[112] Paulo Câmara and Filipe Morai*s The Palgrave Handbook of ESG and Corporate Governance* (eBook ed, Palgrave Macmillan Cham London, 2022) at 4.
[113] At 4.
[114] At 233.

The cases outlined at the beginning of the paper, and their expansions of parent company duties for the actions subsidiaries, is arguably one example of integrating corporate social responsibility into the law.

D. CSR as a Market Factor

The social responsibilities of companies and the way these activities influence performance, particularly focusing on institutional investors has become an important aspect of CSR's influence. Institutional investors can be said to shape managerial attention through a process of "legitimacy".[115] In the context of investor collective action, all three dimensions of legitimacy may be at play: an ESG or CSR issue can have moral dimensions (e.g. child labor), the management of ESG issues point to pragmatic aspects and concrete cost savings (e.g. energy efficiency), and lack of cognitive legitimacy from the corporations' side is usually the reason for justifying the engagement process in the first place.[116] Engagement highlights the interplay between investors' legitimacy engagement and the legitimacy of ESG claims shaped by the group of investors.[117]

A recent empirical study examined financial performance in the relationship between CSR and institutional investors, using 29 commercial banks over a nine year period (2009–2017).[118] With little empirical data on the connection to date, specific to the issue of this paper, the results demonstrated that CSR has a positive impact on the financial performance, which subsequently affects institutional investors.[119] The caveat is that with or without the CSR variable, financial performance itself is still a dominating preference for institutional investors.[120] The next question which naturally follows is regardless of

[115] Susanne Young and Stephen Gates *Institutional Investors' Power to Change Corporate Behaviour: International Perspectives* (eBook ed, Emerald Publishing, Bingley, 2013), at 25.
[116] At 26.
[117] At. 26.
[118] Shafat Maqbool and Nasir Zamir *Corporate social responsibility and institutional investors:the intervening effect of financial performance* (Emerald Publishing, Bingley, 2020).
[119] At 2.
[120] At 11.

whether it may be a variable affecting the bottom line, are director's business decisions actually influenced by CSR?

Deegan and Shelley reviewed the submissions into the Australian Government Inquiry into Corporate Social Responsibility.[121] Within that review submissions were canvassed on why businesses [they] would consider other stakeholders when making business decisions, an example of a response by ANZ Bank stated: [122]

> ANZ Bank: There are already social and market forces in place…which make it an imperative for companies to consider the interests of all of their stakeholders in order for their business to remain sustainable over the longer term.

Deegan and Shelley categorised this as reflective of the positions taken by the majority of the business corporations' response on the justification for taking account of wider stakeholders.[123] McBarnett, also noted the shift in Deutsche Shell Petroleum business policies and incorporating the 'three bottom lines' approach after the succession of widely known human rights disasters in the Niger Delta. [124] Classifying the market factors (such as PR, or institutional investment) as contextual CSR drivers, beyond the legal sanctions.[125]

Taking these studies and testimonials from companies themselves it can be demonstrated that beyond the legal framework CSR can operate as a regulator as it forces, particularly listed companies, towards more responsible investment. Corporate law can be said to be restricted by the foundational company law principles of limited liability and separate legal personality. Even where tort law has made indents, the duty of care has its own limitations to ensuring accountability. Institution investment and other market factors, however, impact the bottom line which directors must take into account, and act accordingly. The sub-

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[121] Craig Deegan and Marita Shelly "Corporate Social Responsibilities: Alternative Perspectives About the Need to Legislate" (2014) 4 J Bus Ethics 499.
[122] At 509.
[123] At 509.
[124] Doreen McBarnett "Human Rights, Corporate Responsibility and the New Accountability" (2004) 20 IBET 63, at 64-64.
[125] At 66.

missions by Deegan and Shelley make it apparent that companies would prefer a free market whereby CSR is completely voluntary.[126] From the humanitarian and environmental issues canvassed at the beginning of this paper it is clear that the impact of institutional investment should not operate in a silo, it does however, have an impact on responsible corporate action. Tort law demonstrates a link between legal incorporation of CSR, as does the legislation in how directors act in the best interests of the company. When the institutional investment is also taken into account the three can operate together as a means of attempting to overcome some of the difficulties inherent with limited liability and separate legal personality.

V. Conclusion

In concluding this paper it is helpful to return back to the people and communities which give rise to the issue which has been in focus. Most members of the the Ogale and the Bille communities located in Nigeria have lived with chronic oil pollution throughout their lives. It is said by these communities that as a result of the oil spills, the natural water sources cannot safely be used for drinking, fishing, agricultural, washing or recreational purposes. Irrevocable damage has been done by a corporation to the environment and wildlife, the loss of incomes, livelihoods and exposure to serious health risks. Under a traditional legal position in the above example Shell Petroleum actions which were conducted through subsidiary companies in Nigeria were not liable for damage which caused human and environmental harms. This is due to the foundational company law principles of separate legal personality and limited liability. Notwithstanding the presence of these principles, this paper has aimed to investigate the ways in which stakeholder interests can still be advanced through tort law, directors duties and market factors impact on listed companies. All three of these angles align with principles of the CSR movement. It is unlikely they will be successful in isolation but in each separate context more autonomy is provided to stakeholders in enforcing a response to the harms caused by parent companies.

Tort law through claims of negligence can be seen to be an avenue used by affected community groups and individuals to enforce corporate accountability. Tort law protects the

[126] Deegan and Shelley, above n 121, at 509.

interests of CSR that require companies to adhere to human rights and environment protection. The violation of CSR principles such as the protection of health of the company's employees, its consumers or the environment can be a source of torts such as negligence. There are clear limits to using claims of negligence in this way such as the arduous litigation process and the extent to which principles of proximity can be stretched. However, where a duty of care can be established it circumvents the limiting principle of separate legal personality.

The English Courts have been open to judicial increments in how the duty of care is approached. In the context of the New Zealand cases such *Smith v Fonterra* there has been a slower uptake from the judiciary in opening negligence to claims challenging the principles of separate legal personality and limited liability. There is certainly room for further developments in this area. Overall, tort law, when viewed in conjunction with other mechanisms such as legislation, the power of shareholders and CSRs normative influence on companies, is an important element to corporate accountability. Tort law allows for judicial increments which are flexible with new harms and offers a specific remedy in which stakeholders can be protected and compensated.

The Companies Act 1993 affirms the settled principles of separate legal personality and limited liability however the legislation also may to action some purposes of CSR in the partial codification of directors duties. The balance however of the legislation is tipped toward facilitating the free running of business. A chink in this overall purpose is potentially there for groups who promote social responsibility interests through s 131 of the CA 1993. Section 131 broadly requires each director to "act in good faith and in what the director believes to be the best interests of the company".[127] The scope of this s 131 is still unsettled. There is potential for its effects to extend to requiring directors to consider external stakeholders rather than simply current shareholders. It would likely be an interpretive stretch to suggest that a company's best interests could involve profit sacrifice. It is however evident that the Act contemplates that a company's interests may extend beyond shareholder profit to benefit wider society. Coupling this with tort law remedies, the Companies Act can be an instrument to enforce responsibility for stakeholders.

[127] Companies Act 1993.

Beyond the legal framework CSR can operate as a regulator when it forces, particularly listed companies, towards more responsible investment. Corporate law can be said to be restricted by the foundational company law principles of limited liability and separate legal personality. Even where tort law has made indents, the duty of care has its own limitations to ensuring accountability. Institution investment and other marker factors however impact the bottom line which directors must take into account, and act accordingly. This looks at the issue from a different perspective with a focus on the financial impact irresponsible conduct can achieve in producing a reaction of responsibility. Even where the current law is restrictive given the company law principles, there are contributing factors which directors must take into account in making business decisions.

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