LEANDER SCHUBERT

WITH GREAT PROFIT COMES GREAT RESPONSIBILITY: INTERNALISING CORPORATE RISK IN NEW ZEALAND VIA ENTERPRISE LIABILITY

LLB(Hons): LAWS521

Te Kauhanganui Tātai Ture | Faculty of Law

2022

Contents

I OVERVIEW 4
II THE EVOLUTION OF THE CORPORATE FORM 5
A Historical Context 5
B Embodiment in Case Law 7
C Corporate Principles in New Zealand 8
D The Impact of Limited Liability and Separate Legal Identity 9
III THE PROBLEM OF LIMITED LIABILITY FOR PARENT COMPANIES 10
IV THE COURTS' RESPONSE AND DIRECT PARENT COMPANY LIABILITY 14
A The Evolution of Direct Parent Company Liability 14
B Summarising the Law 17
V ANALYSING DIRECT PARENT COMPANY LIABILITY IN TORT 22
A Introduction 22
B Internal Coherence 22
C External Consequences 31
D Conclusion 36
VI SECTION 271 OF THE COMPANIES ACT 1993 (POOLING ORDER) 37
VII POTENTIAL SOLUTIONS 39
E Veil Piercing 40
F Removing Limited Liability 40
VIII ENTERPRISE LIABILITY 41
A Enterprise Liability in Brief 41
B Advantages of Enterprise Liability 42
C What is an Enterprise? 44
D Involuntary Creditors 47
IX FURTHER CONSIDERATIONS 49
A Jurisdictional Arbitrage 49
B A Drastic Change? 49
C Jurisdictional Veil 49
X CONCLUSION 50

Abstract

Many large multinational enterprises create thinly capitalised subsidiaries that undertake risky activities. The potential is that the risk is externalised onto involuntary creditors such as tort claimants. Where the subsidiary commits large-scale harm, its assets may be insufficient to provide claimants with proper compensation, yet the parent company that profits in the meantime, is protected behind a corporate veil. This is inefficient. Limited liability is generally an efficiency-enhancing principle; however, the motivating rationales do not apply where the shareholder is a corporate entity, and the creditor is involuntary. This paper considers a number of solutions and assesses their adequacy. Recent developments in direct parent company liability in tort seem promising but they risk violating the doctrine of third-party liability and perversely disincentivise parent companies from supervising and guiding subsidiaries. Veil-piercing and unlimited liability are also considered but they are similarly deficient. This paper suggests that an enterprise liability approach should be introduced in New Zealand, using the existing definition of "related" under the Companies Act. The advantages and potential concerns of such a scheme are surveyed before concluding that an enterprise liability regime is needed to not only promote greater economic efficiency but also greater justice.

Key words: *"Enterprise Liability"; "Parent Company Liability"; "Internalising Risk"; "Externalities"; "Tort Victims"; "Involuntary Creditors"; "Section 271 of the Companies Act 1993".*

I Overview

Toxic emissions from a copper mine leak into the only source of drinking water available to 1,826 rural and poor Zambian citizens.[1] The entity controlling the mine is ultimately owned by a multinational parent company domiciled in England.[2] Since taking over it "became clear that cost cutting was the supreme objective", yet the parent company disputes responsibility for the harm caused.[3]

This paper asks and seeks to address what can be done about corporate groups that profit from their subsidiary's risky behaviours and careless shortcuts but avoid bearing the burden when matters go awry. In particular, what happens when subsidiaries are undercapitalised so that their assets make slim pickings for those who have suffered incredible harm, while all along profits have flowed up the corporate hierarchy?[4]

In doing so, this paper will first traverse the history of the company from joint stock association to incorporation, while detailing the birth of two important company law principles: limited liability and separate corporate personality. These principles are hugely beneficial but are also at the root of our problem.

The commonwealth courts have recognised the problem of company groups externalising risk and in response, they have developed the idea of direct parent company liability. This paper suggests that this approach has serious limitations as the notions of control on which it is based create liability gaps and risk violating existing tort law principles. Additionally, direct parent company liability in tort risks creating perverse incentives that may lead to more harm than good.

---

[1] *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2020] AC 1045 (SC) at [1].

[2] *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528, [2018] 1 WLR 3575 (CA) at [3].

[3] At [84].

[4] Rachel Chambers "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court" (2021) 42(3) U Pa J Int'l L 519 at 533.

Other existing solutions are then considered including the ambit of s 271 of the Companies Act. This provision allows assets between related companies to be pooled during liquidation. It is contended that this provision is not extensive enough and other potential solutions should be investigated.

Veil piercing and unlimited liability are rejected before the notion of enterprise liability is introduced. This paper then examines how enterprise liability is best defined in New Zealand, eventually concluding that the existing definition of "related companies" in the Companies Act should be used for a new statutory regime.[5]

Although the suggestion of a statutory enterprise liability regime seems drastic it is but a small step in the context of the developing direct company liability doctrine and the already existing s 271. Other concerns such as the jurisdictional veil and jurisdictional arbitrage are also addressed. Ultimately, this paper concludes that the imposition of an enterprise liability regime would create a more just and efficient company law landscape.

II The Evolution of the Corporate Form

A Historical Context

Our story starts with an examination of the past. Companies are ubiquitous in New Zealand; in 2021 there were approximately 700,000 registered corporations,[6] but two-hundred years earlier "corporate enterprise was the exception, not the rule".[7] Incorporation was regarded as a rare privilege and it had to be obtained by Royal Charter or an Act of Parliament.[8] The benefit was that it created a distinct legal personality allowing investors to buy and sell shares.[9] Additionally, shareholders could avoid direct and indirect liability for the

---

[5] Companies Act 1993, s 2(3).

[6] Ministry of Business, Innovation & Employment "Latest company statistics" (3 August 2022) New Zealand Companies Office <https://www.companiesoffice.govt.nz>.

[7] Michael Lobban "Joint Stock Companies" in William and others (ed) *The Oxford History of the Laws of England*: *Volume XII 1820-1914 Private Law* (Oxford University Press, Oxford, 2010) at 613.

[8] At 613.

[9] At 613.

company's engagements.[10] From the mid-18th century, the privilege of incorporation was routinely sought by a limited set of firms engaged in building large-scale projects such as public utilities, the quid pro quo was that they would be closely regulated.[11]

As the ability to incorporate was withheld from mainstream commerce, another type of organisation emerged that would similarly allow investment via transferable shares – the unincorporated joint stock association.[12] Shares were sold to investors to raise money, in turn, those investors became partners in the venture.[13] However, this new organisational form was initially treated with suspicion by the judiciary with some judges viewing companies with freely transferable shares as illegal,[14] eager to protect investors against the effects of speculative brokers.[15]

After several speculative bubbles, there were calls for reform.[16] Joint stock companies were already entitled to a distinct legal personality in 1844,[17] but the question of statutory limited liability remained.[18] On the one hand, those against the idea suggested that it was immoral and against natural justice to allow people to limit their liability. [19] In response, proponents for limited liability believed that it was a matter of right based on freedom of contract.[20] Where creditors can voluntarily contract with one another, limited liability can be a logical

[10] Phillip Blumberg "Limited Liability and Corporate Groups" (1986) 11 J Corp L 573 at 579-580.

[11] Lobban, above n 7, at 613.

[12] Blumberg, above n 10, at 581; and Lobban, above n 7, at 616.

[13] "Joint-stock company" Britannica (accessed on 19 Sept 2022) <www.britannica.com>.

[14] Bishop Carleton Hunt *The Development of the Business Corporation in England 1800-1867* (Harvard University Press, Cambridge (Mass), 1936) at 42; Lobban, above n 7, at 618.

[15] Hunt, above n 14, at 42–43; Lobban, above n 7, at 618; and Ron Harris *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press, Cambridge (England), 2000) at 245–246.

[16] Lobban, above n 7, at 623.

[17] At 620.

[18] At 621.

[19] At 625.

[20] At 625.

consequence.[21] Other arguments in favour of limited liability were that it would increase morality and stability by decreasing speculation.[22] Previously, creditors had provided imprudent loans and thereby propped up inefficient businesses knowing that they had recourse to all the shareholders' personal assets.[23]

So in 1855 widespread unlimited liability was afforded to the general corporation after early experiments in granting limited liability to railways proved economically beneficial,[24] yet initially, corporations were not generally permitted to hold shares in other corporations.[25] In the United States, for example, corporate groups remained impossible for half a century.[26] Although tweaks were made along the way, this is the emergence of the corporate form as we know it today.

B Embodiment in Case Law

Fast-forward 40 years, when the strength of corporate principles such as limited liability and separate corporate personality was immortalised in the controversial decision of *Salomon v A Salomon & Co Ltd*.[27] Salomon was the sole proprietor of a boot-making business.[28] His business started suffering, and as a result, he incorporated a limited liability company compromising himself and his family, named Salomon Ltd to which he sold his business for more than it was worth.[29] Mr Salomon also took security over the company's

---

[21] John Armour and others "What is Corporate Law?" in Kraakman and others. (ed) *Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, online, 2017) at 8-9.

[22] John Saville "Sleeping Partnerships and Limited Liability, 1850–1856" (1956) 8(3) Econ Hist Rev 418 at 427.

[23] Lobban, above n 7, at 626.

[24] Blumberg, above n 10, at 584.

[25] Phillip Blumberg "Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity" (2001) 24 Hastings Int'l & Comp L Rev 297 at 302.

[26] At 302.

[27] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) at 23.

[28] At 23.

[29] At 37.

assets.[30] The company went into liquidation, yet Mr Salomon argued that he, as a secured creditor, should be paid ahead of the unsecured creditors.[31] The House of Lords held that as the company was duly and properly incorporated, it should be seen as an independent person in the eyes of law.[32] Therefore, Mr Salomon was not personally liable to pay the debts of the company.[33]

The importance of *Salomon v A Salomon & Co Ltd* endures. Notably, nearly a century later Slade LJ in *Adams v Cape Industries Plc* said:[34]

> [T]he court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

C Corporate Principles in New Zealand

The principles of separate legal identity and limited liability are now embodied in statute in New Zealand.

1 Separate Legal Personality

In New Zealand, a company can be incorporated via registration under the Companies Act.[35] Registering a company creates a legal entity in its own right, separate from its

[30] At 36.

[31] At 36.

[32] At 48–49.

[33] At 42–43, and 52.

[34] *Adams v Cape Industries plc* [1990] 2 WLR 657 at 753.

[35] Companies Act 1993, s 11.

shareholders.[36] As a result, a company is a legal person capable of having most of the rights and duties that a natural legal person has.[37]

2 Limited Liability

Per s 97 of the Companies Act, limited liability provides that a shareholder is not liable for an obligation of the company by reason only of being a shareholder,[38] protecting shareholders from the company's liabilities beyond what they have invested in the company.[39] If a claim against the company depletes a company's assets, the shareholders' personal belongings are not at risk.[40]

D The Impact of Limited Liability and Separate Legal Identity

For some, the decision in *Salomon v A Salomon & Co Ltd* seems unjust.[41] That might be so, but the strength of separate legal identity and limited liability has had an undeniable impact on our society and culture.

Many including the business magazine *The Economist* have dubbed the limited liability company as "one of man's greatest inventions".[42] This is not hyperbole. Limited liability is incredibly efficiency-enhancing because it allows anyone to invest without the fear of financial ruin.[43] This protection frees up large amounts of capital which reduces its cost allowing for more investment.[44] Limited liability also encourages the aggregation of capital

---

[36] Section 15.

[37] Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 23.

[38] Companies Act, s 97.

[39] Armour and others, above n 21, at 9.

[40] At 8.

[41] See Otto Kahn-Freund "Some Reflections on Company Law Reform" (1944) 7 MLR 54.

[42] "Don't Limit the Revolution" (29 September 2016) The Economist <www.economist.com>.

[43] "Don't Limit the Revolution", above n 42.

[44] Armour and others, above n 21, at 9.

allowing people to take on larger and more audacious projects that would otherwise not be possible.[45]

Furthermore, the security of investing in a limited liability company "reduces the time and energy that shareholders need to spend on monitoring" the companies they invest in, meaning they can invest in many different companies, and diversify their portfolios.[46] Diversification allows for stability in what can otherwise be a volatile business and protects investors.[47]

The trade-off for limited liability is that lenders may be unable to recover their money when a company goes insolvent. Typically, creditors can protect themselves against this risk by performing due diligence or by redistributing the risk they assume by charging higher interest rates, or by ensuring they have priority at liquidation by taking security.[48] However, involuntary creditors such as tort claimants cannot protect themselves in these ways because they do not willingly or knowingly provide the company with debt.[49]

The concept of separate corporate personality has also been generally beneficial. A separate legal personality can help corporate groups facilitate financing, create domestic corporate residences, and simplify purchasing of assets.[50] These benefits are important mechanisms for creating efficiency and enhancing overall societal wealth.

III The Problem of Limited Liability for Parent Companies

Despite their benefits, limited liability and separate legal personality also have adverse side-effects. Corporate groups can take advantage of limited liability to externalise their

---

[45] Barnali Choudhury and Martin Petrin *Corporate Duties to the Public* (Cambridge University Press, Cambridge (England), 2018) at 108.

[46] At 109; and Armour and others, above n 21, at 8–9.

[47] Nick Lioudis "The Importance of Diversification" (15 June 2022) Investopedia <www.investopedia.com>.

[48] Armour and others, above n 21, at 9.

[49] Watts, Campbell and Hare, above n 37, at 49.

[50] Choudhury and Petrin, above n 45, at 97.

risks which decreases efficiency and welfare.[51] For example, companies can undercapitalize subsidiaries that might be a target for claims due to the risky nature of the activities they undertake or the standard at which they do those activities.[52] While the parent's liability is capped at what they have invested in the subsidiary they will still obtain profits equivalent to performing the activity internally. Thus, they can separate the risk from the gain.[53]

The hazard from an economics perspective is that a subsidiary causes more harm than it can repay and so it goes insolvent. In that case, the loss will often be borne by involuntary creditors, typically tort victims.[54] This is inefficient because the risk has been externalised. When a risk is externalised, the loss is not incorporated into the price of the product.[55] The result is that the product is cheaper and so more of it is consumed than if the risk was internalised.[56] Externalising risks means that societal welfare is not maximised.[57] Therefore, limited liability creates a trade-off between the efficiencies mentioned before and the inefficiency of risk externalisation.

It was once dogma that the benefits and side-effects of limited liability and separate corporate personality went hand in hand.[58] The drawbacks were always a necessary incidence of far superior benefits. This is not true.[59] The particular side effect of risk

---

[51] At 108.

[52] Chambers, above n 4, at 533.

[53] Choudhury and Petrin, above n 45, at 120.

[54] Karl Chase, Ray Fair and Sharon Oster *Principles of Economics* (13th ed, Pearson Education, Harlow (England), 2020) at 361–362.

[55] At 361–362; see also *Stovin v Wise* [1996] AC 923 (HL) at 944.

[56] At 361–362.

[57] At 361–362.

[58] Frank Easterbrook and Daniel Fischel "Limited Liability and the Corporation" (1985) 52(1) U Chi L Rev 89 at 91.

[59] Robert Thompson "Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise" (1994) 47 Vand L Rev 1 at 40.

externalisation of corporate groups can be removed while retaining the general benefits of limited liability and separate legal personality.

Limited liability is advantageous as it reduces monitoring costs. Although a benefit for the retail investor, this is not usually a benefit for corporate shareholders. Corporate parents are motivated to keep a close eye on their subsidiaries to ensure they are performing adequately.[60] This is especially true where the parent has heavy involvement in a subsidiary's activities, which is more likely where a parent company has a large shareholding.[61] Therefore, the first benefit of limited liability of reduced monitoring costs is not as relevant where large shareholders are corporates with a keen interest in the company's productivity.

Where the shareholder is involved in the company's business, they can deal with risks more efficiently than creditors. Both parent companies and involuntary creditors could insure themselves against potential risks.[62] However, it is most efficient for parent companies to ensure themselves because they are the "cheapest cost avoider".[63] Companies are more risk neutral, meaning that they will tend not to purchase more comprehensive insurance than necessary.[64] In contrast, for individuals, typically afflicted with loss aversion, losses loom larger than gains and so they over-insure to avoid the experience of a loss.[65] Second, parent companies as active shareholders will have more information and awareness of the risks posed and so will be better able to appropriately assess those risks.[66] Third, a single parent

---

[60] Choudhury and Petrin, above n 45, at 110.

[61] At 110.

[62] James Tocher "Multinational Enterprise and the Incentive to Take Risks: Rethinking Limited Liability for Parent Companies in Cases of Tort" (LLB (Hons) Dissertation, University of Otago, 2016) at 22.

[63] Henry Hansmann and Reinier Kraakman "Towards Unlimited Shareholder Liability for Corporate Torts" (1991) 100 Yale LJ 1879 at 1917.

[64] At 1887.

[65] Daniel Kahneman and Amos Tversky "Prospect Theory: An Analysis of Decision under Risk" (1979) 47(2) Econometrica 263 at 269-270.

[66] Peter Muchlinski "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 Camb J Econ 915 at 923.

company will have larger bargaining and lower transaction costs to purchase insurance compared to large groups of individuals attempting to do so.[67] Overall, it is evident that corporate shareholders will typically be better placed to insure themselves against the potentially harmful conduct their subsidiaries create than victims of the harm who did not assent to the risk. So the burden should fall on them, and not involuntary creditors.

Lastly, managers or directors of a subsidiary will often be employed by or have a close relationship with the wider corporate group as well, meaning that they have a place of refuge if things go wrong. Therefore, managers or directors of a subsidiary are less likely to experience negative personal effects because they will likely be accommodated by the parent company if matters go awry.[68] This creates a moral hazard that encourages riskier and more unethical behaviour which would not be present if corporate shareholders were not protected by limited liability.[69] In effect, corporate shareholding removes the primary motivator of limited liability – risk aversion.[70]

The courts have recently started to implicitly recognise the shortcomings of limited liability for corporate shareholders. They have long been alive to the tensions between involuntary creditors and limited liability; however, they have traditionally favoured limited liability at the peril of involuntary creditors, in particular tort victims.[71] That mood has been changing.

---

[67] Paul Halpern, Michael Trebilcock and Stuart Turnbull "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 UTLJ 117 at 146.

[68] Choudhury and Petrin, above n 45, at 109–110.

[69] At 109.

[70] See generally Jörg Budde and Matthias Kräkel "Limited Liability and the risk-incentive relationship" (2011) 102(2) Journal of Economics 97 at 98-100 and 109; and Christian Gollier, Pierre-François Koehl, and Jean-Charles Rochet "Risk-Taking Behaviour with Limited Liability and Risk Aversion" (1997) 64(2) The Journal of Risk and Insurance 347.

[71] See *Adams*, above n 34.

IV The Courts' Response and Direct Parent Company Liability

A The Evolution of Direct Parent Company Liability

In recent years, the courts have developed the notion of direct parent company liability in tort.[72] By applying legal principles that are supposedly the same as would apply to any third-party duty case,[73] courts have imposed duties of care on corporate shareholders for the actions of their subsidiaries.

During the latter half of the 20th century, courts guarded the principle of limited liability closely. An epitome is the 1990 English Court of Appeal case *Adams v Cape Industries Plc.*[74] In *Adams,* the plaintiffs argued that the English defendant company had caused them injury by exposing them to asbestos via a United States subsidiary.[75] They brought the action in the United States which they won by default as Cape plc did not contest the action.[76] However, when the plaintiffs attempted to enforce their judgment in England they failed.[77] The plaintiffs submitted that, inter alias, the defendant and the subsidiary should be treated as a single economic unit; the submission was rejected.[78] The subsidiary was held to be independent of the parent company as the parent lacked a presence in the United States.[79] The court held that there was nothing illegal in the defendants using their corporate structure to ensure that future legal liabilities to third parties would fall on another member of the group rather than on the defendants.[80] They would not lift the corporate veil.[81]

---

[72] See generally Choudhury and Petrin, above n 45, at 101-105.

[73] *AAA v Unilever plc* [2018] EWCA Civ 1532, All ER (D) 87 (Jul) at [36].

[74] *Adams,* above n 34.

[75] At 779.

[76] At 672.

[77] At 657–658.

[78] At 748.

[79] At 749 and 755.

[80] At 760.

[81] At 760.

Australia saw one of the earliest deviations from this hard-line approach of preserving the distinct identities of companies in a corporate group. Two parallel cases marked the early development of direct liability in tort. *CSR Ltd v Wren* concerned an employee at a domestic subsidiary who suffered injuries due to exposure to asbestos dust and fibre.[82] As the subsidiary had ceased to exist several decades before the claimant developed symptoms, the employee brought claims against his employer's parent company, alleging that it owed him direct duties of care.[83] The New South Wales Court of Appeal held that the parent was liable.[84] It relied on the company's capacity to direct and control the subsidiary as a result of the management staff, responsible for the day-to-day operational aspects of the business, all being staff of the parent company.[85] Thereby the parent assumed responsibility for the working conditions in the factory.[86] Along with the subsidiary, the parent company had a duty to ensure that those persons who were closely and directly affected by the operations of its subsidiary would not be exposed to foreseeable harm.[87] *CSR v Young* concerned similar facts as *Wren* except that the claimant was the child of a miner who worked for CSR and was exposed to asbestos by the father's clothing and the surrounding of the mining town where she had grown up.[88] The Court again found that CSR was liable.[89]

However, only a year later the New South Wales Supreme Court seemed to backtrack in *James Hardie v Hall*.[90] The Court held that an Australian parent company was not liable for asbestos-related damage to the employees of its New Zealand subsidiary.[91] *Wren* was distinguished, the employees of the parent company controlled the day-to-day operations

[82] *CSR Ltd v Wren* [1997] 44 NSWLR 463, BC9707084 at 1 per Beazley and Stein JJA.

[83] At 1-5 per Beazley and Stein JJA.

[84] At 37 per Beazley and Stein JJA.

[85] At 37 per Beazley and Stein JJA; and at 2 per Powell JA.

[86] At 37–38 per Beazley and Stein JJA.

[87] At 20 and 37 per Beazley and Stein JJA.

[88] *CSR Ltd v Young* (1998) 16 NSWCCR 56, BC9800336 at 2-3 per Handley JA.

[89] At 19 per Giles AJA.

[90] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, BC9802005.

[91] At 58 per Sheller JA.

in *Wren* but nothing similar occurred in *Hall*. It was not sufficient that the subsidiary reported directly to the parent company management.[92]

Around the same time, the House of Lords signalled a potential softening of the principles of separate corporate personality and limited liability in England.[93] Lord Bingham raised the possible imposition of a duty in *Lubbe v Cape plc.*[94] In relation to compliance with health and safety measures, a court may make:[95]

> … an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas.

These comments were finally tested at trial in 2012. *Chandler v Cape plc* was a break-through case; it was the first-time that direct company liability was considered as a substantive issue in the United Kingdom.[96] The plaintiff, an employee of the defendant's subsidiary which was adjacent to an asbestos factory, developed asbestosis.[97] The subsidiary had been dissolved since and so Mr Chandler brought the action against the parent company.[98] The Court of Appeal held that if there is sufficient control, then the company may be found to have assumed responsibility towards the subsidiary's employees and incur liability.[99] The appeal was dismissed and Cape was liable.[100]

Chandler was a catalyst for more tort actions against parent companies. Between 2016 and 2021 three United Kingdom cases moved through the court hierarchy and New Zealand

---

[92] At 5 and 16 per Sheller JA.

[93] See for example *Connelly v RTZ plc (No 3)* [1999] CLC 533.

[94] *Lubbe v Cape plc* [2000] 1 WLR 1545.

[95] At 276.

[96] *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111 (CA) at [2].

[97] At [1].

[98] At [4]–[6].

[99] At [64]–[65] and [80].

[100] At [81].

had its first major direct parent liability case. These cases elucidated the law applicable today. In *AAA v Unilever* the English Court of Appeal rejected the contention that the claimants who were victims of serious violence at their employer's plantations during a time of political unrest were owed an arguable duty by the employer's ultimate parent company.[101] Then in 2018, the New Zealand Court of Appeal in *James Hardie Industries plc v White* was tasked with deciding whether purchasers of allegedly defective cladding products sold by a New Zealand subsidiary could sue the holding companies for the weather damage to their properties.[102] They permitted the claims to go to trial.[103] A year later, the United Kingdom Supreme Court in *Vedanta Resources plc v Lungowe* was concerned with the repeated discharge of toxic matter from a copper mine into the drinking water of Zambian communities.[104] The English parent company owned the Zambian subsidiary that oversaw the mine.[105] The question was whether there was a real issue to be tried for the case to go to trial.[106] The Court unanimously held that there was.[107] They held the same in *Okpabi v Royal Dutch Shell plc.*[108] The claimants brought an action for the environmental damage of oil spills in their communities that were caused by the supposed negligence of the pipeline operator a Nigerian subsidiary of Royal Dutch Shell an English Company.[109]

B Summarising the Law

As illustrated above, the last decade has seen a plethora of cases dealing with direct company liability and its viability as a mechanism for holding parent companies responsible for the actions of their subsidiaries. Early cases such as *Lubbe*[110] and *Connelly*

---

[101] *Unilever*, above n 73.

[102] *James Hardie Industries plc v White* [2018] NZCA 580, [2019] 2 NZLR 49.

[103] At [127].

[104] *Vedanta* (SC), above n 1, at [1].

[105] At [2].

[106] At [13].

[107] At [102].

[108] *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294 at [160].

[109] At [3]–[8].

[110] *Lubbe*, above n 94.

v RTZ plc,[111] demonstrated that a parent company could be liable for the actions of its subsidiary.

It has now been established that direct parent company liability is not a novel duty but can simply be established using the existing framework developed in third-party cases.[112] Per Sales LJ in *Unilever*:[113]

> A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary.

Thus, there is nothing special or conclusive about the bare parent-subsidiary relationship.[114] And given the variety of "models of management and control which may be put in place within a multinational group" it is not wise to shoehorn all cases of the parent's liability into specific categories.[115] Nevertheless, they will no doubt often be helpful for analysis.[116]

The Court of Appeal in *Chandler, Vedanta* and *Okpabi* had applied the three-stage duty of care test derived from *Caparo Industries plc v* Dickman.[117] That test requires a court to consider foreseeability, proximity, and whether imposing a duty is fair, just and reasonable.[118] This test is only to be applied when a court is dealing with a novel category

---

[111] *Connelly,* above n 93.

[112] *Unilever,* above n 73, at [36].

[113] At [36].

[114] *Vedanta* (SC), above n 1, at [54].

[115] At [54].

[116] At [54].

[117] *Chandler,* above n 96, at [62]; see *Vedanta* (SC), above n 1, [56]; and *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191 at [24].

[118] *Vedanta* (SC), above n 1, [56].

of common law negligence liability.[119] Indeed, where the "existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness" is "unnecessary and inappropriate".[120] As a direct parent company duty is not a novel duty, the Supreme Court in *Vedanta* held that the previous courts' application of the *Caparo* test was the wrong approach.[121] This was restated by Lord Hamblen in *Okpabi*:[122]

> Fourthly, it is now apparent that the Court of Appeal was wrong to analyse the case by reference to the threefold test set out in *Caparo*. As stated in *Vedanta*, the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. The general principles which determine such liability 'are not novel at all'.

Chandler was the first court to outline a proper test as to when a parent company may be liable for the actions of its subsidiary. It is not a definitive test of when a parent company may be liable, rather the "indicia are no more than particular examples of circumstances in which a duty of care may affect a parent".[123] And although Arden LJ considered that she was creating a novel duty of care at the time, the test must now merely be regarded as an expression of third-party liability principles.[124] Therefore, a parent company *may* be liable where:

1. the businesses of the parent and subsidiary are in a relevant respect the same;[125]
2. the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;[126]
3. the subsidiary's system of work is unsafe as the parent company knew, or ought to have known;[127] and

[119] At [1].

[120] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 (SC) at [26].

[121] At [56].

[122] *Okpabi* (SC), above n 108, at [151] (citations omitted).

[123] *Vedanta* (SC), above n 1, at [56].

[124] See *Vedanta* (SC), above n 1, at [54] and [56].

[125] *Chandler*, above n 96, at [80].

[126] At [80].

[127] At [80].

4. the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employees' protection.[128]

The Court of Appeal in *Vedanta* modified the first limb by requiring that the parent is "well placed, because of its knowledge and expertise to protect the employees of the subsidiary" as well as be in the same business.[129]

Although claims should not be confined to categories,[130] the courts have put forward a number of headings to conceptualise claims. In *Okpabi* the Supreme Court referred to '*Vedanta* routes 1-4' to categorise when a parent company may be liable. The categories were:

1. where the parent takes over the management or joint management of the relevant activity of the subsidiary;[131]
2. where the parent provides defective advice and/or promulgates defective group-wide safety/environmental policies which were implemented as of course by the subsidiary;[132]
3. where the parent promulgates group-wide safety/environmental policies and takes active steps to ensure their implementation by the subsidiary;[133]
4. the parent holds out that it exercises a particular degree of supervision and control of the subsidiary.[134]

[128] At [80].

[129] *Vedanta* (CA), above n 2, at [83].

[130] *Vedanta* (SC), above n 1, at [54].

[131] *Okpabi* (SC), above n 108, at [26].

[132] At [26].

[133] At [26].

[134] At [26].

The New Zealand Court of Appeal also set out its own test of when a parent company may be liable. Although the United Kingdom and Australian law will likely be persuasive, the current New Zealand position is that a parent company may be liable:[135]

a. where the parent takes over the running of the relevant part of the business of the subsidiary;
b. where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the parent knew or ought to have foreseen the alleged deficiency in process or product; and
c. more generally where the parent takes responsibility (irrespective of superior knowledge or skill) for the policy or advice which is linked to the wrongful act or omission.

Most of the cases thus far have concerned employees afflicted by disease as a result of working in proximity to asbestos.[136] In *CSR Ltd v Young*, that category was widened to others who were closely affected by the subsidiary's activities such as the child of an employee.[137] *Vedanta* and *Okpabi* illustrate that claimants can be communities of people who live sufficiently close to the subsidiary’s activities to be affected by the harm. *James Hardie Industries* stands apart by allowing a claim by purchasers of a product to claim for property damage that some would categorise as economic loss.[138]

---

[135] *James Hardie Industries,* above n 102, at [65] (citations omitted).

[136] See for example *Chandler v Cape plc*, above n 96; *CSR Ltd v Wren,* above n 82*;* and *James Hardie v Hall,* above n 90.

[137] *CSR Ltd v Young*, above n 88.

[138] See Tom White “Nothing to See Here? The Extension of Parent Company Liability in James Hardie Industries Plc v White” (2020) 51 VUWLR 155 at 156.

V Analysing Direct Parent Company Liability in Tort

A Introduction

The development of direct parent company liability has engendered much scholarly discussion.[139] It has been well received by human rights academics who see it as a potential tool to hold large organisations to account and provide redress to victims.[140] Although there is overlap, the law of torts and in particular negligence are distinctly different to human rights. To evaluate the merits of the development the following analysis will consider its impact on the internal coherence of third-party negligence and the external consequences that it creates.

B Internal Coherence

The analysis of the internal coherence is predicated on the notion that direct parent company liability presents no special relationship between parent and subsidiary companies,[141] and a duty analysis would merely apply the principles that govern any third-party relationship in tort.[142] The implications are twofold: (1) the principles in the third-party cases decided before the advent of parent company liability must logically lead to the heads of liability developed by the courts; and (2) the law developed under the heading of parent company liability can be applied to any third-party negligence situation, not limited to scenarios where companies are involved.

---

[139] See for example Lucas Roorda and Daniel Leader "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court" (2021) 6(2) BHRJ 368; Dr Chris McGrath "Implications of the United Kingdom's Approach for Parent Company Liability in Australia" (2021) 38 C&SLJ 577; Tara Van Ho, "Vedanta Resources Plc v Lungowe [2019] UKSC 20" (2020) 114(1) AJIL 110; Wilson, above n 153; and White, above n 138. These are only a select few and reference to others can be found throughout this paper.

[140] See for example Elizabeth Brumby "Parent Company Liability in the Extractive Industries: A New Frontier for Business and Human Rights" (2018) 36 C&SLJ 185; and Talia Siataga "*James Hardie* and the Development of Parent Company Liability: New Zealand as a forum for transnational Human Rights Litigation" (2021) 28 Canta LR 77.

[141] *Vedanta* (SC), above n 1, at [54].

[142] *Unilever,* above n 73, at [36].

In applying an established duty of care category, as is the case in a parent company case, a court cannot rely on fairness or reasonableness factors as a basis for discarding established principles; nor can the court assess the case on its broader merits.[143] Therefore, the law on third-party negligence will be briefly outlined and then compared to the new 'routes' of liability suggested in the case law.

The law generally aims to maintain individual autonomy[144] yet there are three broad categories where A (the defendant) may owe a duty to B (the plaintiff) for the harm caused to them by C (the wrongdoing third-party):

(1) where the defendant assumed responsibility for the wrongdoer's actions, including where the defendant has induced the plaintiff to rely on them;[145]
(2) where the defendant has created or increased the risk of harm to the plaintiff;[146]
(3) where the defendant has taken control of the particular activity or danger.[147]

1 Where the defendant has taken control

Control by the defendant parent over the wrongdoing subsidiary's activity is one avenue outlined by the courts to establish liability. For example, the New Zealand Court of Appeal in *James Hardie Industries* held that a parent company could be liable where the parent takes over the running of the relevant part of the business of the subsidiary.[148] Similarly, in *Okpabi*, the United Kingdom Supreme Court mentioned that one route to establishing a duty was to show that the parent had taken over the management of the relevant activity of

[143] *Robinson¸* above n 120, at [26].

[144] *Stovin v Wise,* above n 55, at 944; and also see Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (Ed) *Todd on Torts* (8th ed, Thomson Reuters New Zealand, Wellington, 2019) at 165.

[145] Todd, above n 144, at 189, 196 and 205.

[146] At 196; and also see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) at 272–273.

[147] Todd, above n 144, at 192; *Smith v Littlewoods,* above n 146, at 272–273; and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, [1970] 2 All ER 294 at 297–303.

[148] *James Hardie Industries,* above n 102, at [65].

the subsidiary.[149] However, both these formulations seem to focus only on the relationship between the parent company and the wrong-doing company. Typically, there are two important relationships that need to be considered when control is used as a method of establishing third-party liability. The first is the relationship between the defendant and the wrongdoer, and the second is that between the defendant and the claimant.[150] The Courts likely omitted the relationship between claimant and defendant given that both judgments were merely considering whether there was an arguable case, and it was unlikely to be an issue on the preliminary facts. A deeper analysis will be needed in a case before trial. So what type of relationship is required between the plaintiff and the defendant?

In *Couch v Attorney General,* the majority held that there must be a special relationship between the defendant and the plaintiff.[151] This requires an evaluation of the "nature of the risk which the immediate wrongdoer posed" to the plaintiff.[152] Wilson posits that showing this is unlikely to be an issue in most parent company liability cases.[153] Claimants who are the employees or purchasers of goods are likely to be able to show that they are at a larger risk of the subsidiary's actions than the general public.[154] Wilson is likely correct that this will often be the case, but there will also be times when victims of the subsidiary's wrongdoing will be too remote.

For the requisite relationship to be established "there needs to be an immediate risk to a known or identifiable" claimant or class of claimants.[155] Thus, where a psychiatric patient formerly undergoing compulsory treatment subsequently killed a woman with whom he formed a relationship, the health authority that released him was not liable to the family

---

[149] At [54].

[150] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [87]; and per Lord Diplock in *Dorset Yacht,* above n 147, at 326.

[151] At [104].

[152] At [85].

[153] Nic Wilson "When is a Subsidiary's Negligence the Parent Company's Problem?" (2020) 26 Canta LR 161 at 170.

[154] At 170.

[155] Todd, above n 144, at 203.

members who suffered nervous shock.[156] This is even though the authority released the patient negligently[157] and the doctor responsible for the release was fraudulently passing herself off as a registered psychiatrist.[158] Wild J emphasised that the deceased victim was not under threat at the time of the release, and it was impossible to distinguish the plaintiffs from the public at large.[159] Similarly, although a parent company may initially have control over a subsidiary, the requisite relationship between parent and victim may subside as the parent relinquishes control after initially establishing the subsidiary. In such a case, the parent would not be liable according to existing tort principles, even though they may have inadequately mitigated the subsidiary's capability to commit harm. Overall, the requisite relationship between the defendant and plaintiff cannot be ignored nor will it necessarily be easy for some claimants to show its existence.

Whether the defendant 'controlled' the wrongdoer is an even more complex analysis. Tipping J in *Couch* suggests that a "failure of the defendant to exercise an *available power of control* over the immediate wrongdoer" would be sufficient to satisfy this relationship.[160] Similarly, in *Michael v Chief Constable of South Wales Police* the United Kingdom Supreme Court stated that liability for the actions of another can be incurred where:[161]

> "D was in a *position* of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control."

This is problematic given that most companies with a majority shareholding are in "a position of control" over their subsidiaries with the ability to appoint and remove directors

---

[156] *Maulolo v Hutt Valley Health Corp Ltd* [2002] NZAR 375 (HC).

[157] At [12].

[158] At [6].

[159] At [23].

[160] *Couch,* above n 150, at [81] (emphasis added).

[161] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [99] (emphasis added).

or alter the company's constitution.[162] Using this standard would create indeterminate liability and overreach the court's constitutional mandate,[163] and the courts have already acknowledged that this is beyond their purview. In *James Hardie Industries* the Court of Appeal rejected the notion that a parent company owed a duty merely because it has the ability via its shareholding to control its operations.[164]

So a mere ability to control a subsidiary cannot be the applicable test. Some level of actual control is needed. Deciding whether a parent company sufficiently controlled the subsidiary's actions will prove to be a difficult assessment. For example, in *CSR v Wren* the parent company has held to be liable when they placed employees of the parent company into the operations of the subsidiary,[165] but in *Hall v James Hardie* it was insufficient that an employee of the parent company was placed in the subsidiary as an employee.[166] In both situations, the parent company had de facto control over the subsidiary's activities by putting particular workers in certain managerial positions, but the cases led to opposite outcomes due to differences in de jure control.

In sum, by simply applying the existing 'control' framework for third-party liability the courts risk opening the floodgates to inordinate liability, or it must be acknowledged that companies are unique and that the concept of control applies differently to companies than it does otherwise. Despite this, the courts maintain that there is "nothing to see here".[167]

2 *Where the defendant assumes responsibility*

Control is not the only avenue by which a person can be liable in negligence for the action of another. A second "general exception applies where D assumes a positive responsibility

---

[162] Ministry of Business, Innovation & Employment "What it means to be a shareholder" <companies-register.companiesoffice.govt.nz>.

[163] *Okpabi* (SC), above n 108, at [82].

[164] *James Hardie Industries plc,* above n 102, at [63].

[165] *CSR v Wren*, above n 82, at 37 per Beazley and Stein JJA, and at 2 per Powell JA.

[166] *James Hardie v Hall,* above n 90, at 5 and 16 per Sheller JA.

[167] See White, above n 138.

to safeguard" the claimant.[168] The term 'assumption' is "something of a misnomer"[169] because in truth responsibility will often be "imposed by the court rather than assumed by D".[170] Often this heading of liability will involve scenarios where the defendant has induced the plaintiff to rely on them and as a result suffered harm or incurred a loss which they would not have otherwise.[171] Arden LJ's test in *Chandler* is an apt demonstration; a parent can be liable where, alongside other considerations, they "knew or ought to have foreseen that the subsidiary or its employees *would rely on its* using that superior knowledge for the employees' protection".[172] To establish reliance it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary.[173] The court will look at the relationship between the companies more widely. The element may be established where "the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues".[174]

Alcock notes that Arden LJ's gloss has the danger of making "all but investment holding company parents liable for torts really committed by their subsidiaries".[175] Involvement in funding and production is common in many corporate groups and even if responsibility is "attached", it is tenuous to say that corporate groups are 'assuming' responsibility for health and safety when they provide funding. The Court in *Michael* warned that the concept of 'assumption of responsibility' "should not be expanded artificially".[176] And there is good reason to be cautious in developing new heads of liability. Alcock queries, would Arden

---

[168] *Michael,* above n 161, at [100].

[169] *Chandler*, above n 96, at [64].

[170] *Michael*, above n 161, at [100].

[171] Todd, above n 144, at 189, 196 and 205.

[172] *Chandler,* above n 96, at [80] (emphasis added).

[173] At [80].

[174] Alistair Alcock "Chapter 7: Legal Personality" in Lord Millet, Alcock and Todd (eds) *Gore-Browne on Companies* (45th ed, LexisNexis, London, 2004) at [14].

[175] At [14].

[176] *Michael,* above n 161, at [100].

LJ's approach make controlling individuals "such as Mr Salomon personally liable for the torts of his company?".[177]

The broad umbrella of 'assumption of responsibility' has provided shelter for several other potential routes of liability developed in recent parent company liability cases. Notably, *James Hardie Industries* provides a catch-all category that provides that a parent company may be liable "more generally where the parent takes responsibility (irrespective of superior knowledge or skill) for the policy or advice which is linked to the wrongful act or omission".[178] Similarly, in *Okpabi* Lord Hamblen noted that a parent company may be liable where the parent holds out that it exercises a particular degree of supervision and control over the subsidiary.[179] Neither test is at odds with the preceding case law but they are also so vague in formulation that they provide little guidance to both the parties or to those members of the wider public who have an interest.

A more specific assumption of responsibility was outlined by the New Zealand Court of Appeal when they seemingly adopted the approach in *Chandler* in determining that a parent company may be liable where they have "superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the parent knew or ought to have foreseen the alleged deficiency in process or product".[180] In applying this test, the Court found an arguable case that James Hardie Industries was responsible for the alleged misstatement,[181] as the James Hardie logo was on the New Zealand subsidiary's website and technical literature.[182] This was an interesting decision as negligent misstatement is a particular type of negligence. The courts have generally proceeded with

---

[177] Alcock, above n 174, at [14].

[178] *James Hardie Industries,* above n 102, at [65].

[179] *Okpabi* (SC), above n 108, at [126].

[180] *James Hardie Industries*, above n 102, at [65]; although they did not cite *Chandler* see White, above n 138, at 173.

[181] At [97].

[182] At [96]–[97].

caution where a financial loss was caused by negligent words.[183] A number of policy reasons underpin this: first, advice may be "off the cuff" and it is generally easier to misspeak than to 'misdo'; second, words have the capacity to inflict loss on a limitless range of plaintiffs; and third, it may undermine the "hallowed principles of contract", especially the need for consideration.[184]

The classic test for negligent misstatement by an advisor was outlined by the House of Lords in *Caparo Industries plc v Dickman*.[185] The test requires that: (1) the adviser knows the purpose for which the information is being given, (2) the adviser knows that the advice will be communicated to the advisee, specifically or as a member of an ascertainable class, (3) the adviser knows the advisee will likely act on the advice without independent inquiry, and (4) and it is so acted upon to their detriment.[186]

The test for general parent company advice devised by the Court of Appeal in *James Hardie Industries* is far broader than *Caparo*. Discounting the fact that under the Court's analysis it seems unnecessary for the statements to be made by the defendant,[187] the new category disregards element (2) of the *Caparo* test. Customers or potential customers, as the claimants in *James Hardie Industries* were, are unlikely to constitute an "ascertainable class". In fact, Lord Reid in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* stated:[188]

> It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate 'consumer' who acts on those words to his detriment.

[183] Todd, above n 144, at 230.

[184] At 230.

[185] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 638; This test was subsequently adopted in New Zealand by the Court of Appeal in *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [55].

[186] At 638.

[187] For this reason the Peters J, the High Court judge, disposed of the negligent misstatement cause of action, see *James Hardie Industries*, above n 102, at [14].

[188] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575 (HL) at 581.

The doctrine of negligent misstatement is tightly circumscribed. For example, where the managing director and owner of a business lent credibility to misrepresentations made by it, the director was not personally liable for those misrepresentations.[189] This is despite the marketing brochure drawing heavily on the director's experiences and the director having generated the financial predictions provided to the plaintiffs.[190] In contrast, the Court in *James Hardie Industries* creates a broad test for parent companies, despite expressly citing the proposition that there is no special relationship of responsibility between parent and subsidiary companies.[191] White suggests that by applying a unique set of rules to the parent-subsidiary relationship the Court is implicitly lifting the corporate veil.[192]

3 Where the defendant creates the danger

The third situation in which a person can be liable for the actions of a third party is where the defendant creates a danger.[193] A classic example is found in *Haynes v Harwood* where the defendant was liable when they left their horse unattended which was set off by a "mischievous child" and ran into the plaintiff.[194] Wilson suggests that this 'creating the danger' principle is consistent with Lord Brigg's proposition that a parent may owe a duty of care where:[195]

> Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties.

The principle was stated even more broadly in *Okpabi*. The mere issuance of a mandatory policy, in their view, could give rise to a duty.[196] It is irrelevant that the parent does not

---

[189] *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL).

[190] Todd, above n 144, at 241.

[191] At [59] citing *Unilever Plc*, above n 73.

[192] White, above n 138, at 167.

[193] *Robinson*, above n 120, at [37]; and *Smith v Littlewoods*, above n 146, at 272–273.

[194] *Haynes v Harwood* [1935] 1 KB 146.

[195] *Vedanta* (SC), above n 1, at [52]; and Wilson, above n 153, at 177.

[196] *Okpabi*, above n 108, at [143]–[144].

control its subsidiary's adoption of the systematically flawed policy,[197] it is about the creation of danger.[198] However, courts have declined to impose a duty where a host provides a guest with alcohol, who later drives from the party in a drunken state and causes injury.[199] A guest does not "park his autonomy at the door",[200] nor does a subsidiary relinquish their autonomy where the parent furnishes materials or knowledge. The pursuit of a common economic goal that eventually accrues to the parent would intuitively seem to be a material factor but alas, there is nothing special about the parent-subsidiary relationship.[201]

Not only does the "defective policy" route fit awkwardly within the existing third-party framework, but it also rings alarm bells for other stakeholders who are not parent companies. Given the rise of shareholder resolutions,[202] there is a risk that liability could attach to individual shareholders where shareholders vote for a policy that results in harm.[203] This would seriously undermine the current conception and perception of limited liability and deter investment.

C External Consequences

Now that the internal coherence of parent company liability in tort has been analysed, the law can be assessed on policy and normative levels. To start, this 'external analysis'[204] will consider whether the developments satisfactorily solve the problem of risk externalisation

---

[197] At [143]–[145].

[198] Wilson, above n 153, at 177.

[199] *Childs v Desormeaux* 2006 SCC 18, [2006] 1 SCR 643.

[200] At [45].

[201] *Vedanta*, above n 1, at [54].

[202] "What's behind the exploding number of shareholder resolutions on corporate purpose?" *The Economist* (4 May 2022).

[203] Companies Act 1993, s 105; and David Raudkivi "Shareholder Activism & Engagement in New Zealand" (2020) Lexology <www.russellmcveagh.com>.

[204] The division between an 'internal' and 'external' is broadly inspired by *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [149].

by parent companies. Does the law capture people or entities that it should not capture such as individual shareholders; and does it fail to capture entities or people that it ought to?

Control will likely prove to be a prominent route to parent liability. However, making control a key factor in the duty analysis could lead to arbitrary distinctions between smaller and larger groups. According to Witting, operational control is a deficient mechanism for extending liability within corporate groups, because it is easier to find evidence of direct, operational control in smaller groups than in larger groups.[205] Naturally, this seems unjust. As Simon LJ protests in *Okpabi* "why should the parent of a large group escape liability just because of the size of the group?"[206] Larger organisations should be held to the same standard as smaller ones. Additionally, the evidential advantages that tort law affords larger companies in this respect seem to create perverse competitive benefits for companies that likely already have significant market power.

Choudhury and Petrin also question whether control is an appropriate mechanism to hold parent companies liable. The duty of care requirement in a negligence claim constrains the extent of liability.[207] But it also constrains the ability to achieve economic alignment so that risk equals reward. This is not so important between individuals, but it is important for companies where the social responsibility is to increase profits.[208] Just because a parent company did not exercise control, that should not disqualify it from being subject to claims.[209] As Lord Hoffman put it in *Stovin v Wise*, "the efficient allocation of resources usually requires an activity should bear its own costs" and thus "liability to pay compensation for loss caused by negligent conduct acts as a deterrent… and reduces

---

[205] Christian Witting "The Corporate Group: System, Design and Responsibility" (2021) 80(3) CLJ 581 at 602.

[206] *Okpabi* (SC), above n 107, at [100].

[207] Todd, above n 144, at 152.

[208] Milton Friedman "A Friedman Doctrine" *New York Times* (online ed, New York, 13 September 1970); Baron Edward Thurlow also quipped that "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?" as cited in Meredith Dearborn "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 CLR 195 at 249.

[209] Choudhury and Petrin, above n 53, at 106.

externalities".[210] The current law of negligence is unable to adequately internalise the costs of parent companies due to their unique nature without radically departing from previous precedents or creating complications if the law were to be applied elsewhere. It is telling that in other 'economic situations' such as where employers are liable for the actions of the employee, liability is not incurred through an elaborate scheme of third-party negligence but through strict vicarious liability.[211]

Another adverse effect of liability based on involvement is that it will disincentivise parents from providing information that could be beneficial to all stakeholders.[212] Human rights academics Roorda and Leader acknowledged that *Vedanta* and *Okpabi* have created a situation where "the more a parent company does to ensure human rights compliance throughout its group of companies, the more likely it will incur legal liability."[213] Similarly, Croser has noted that Supreme Court's decision "appears to catch parent companies in the horns of a dilemma".[214]

Others have rejected that this is a problem, arguing that companies may be liable for negligent oversight regardless.[215] Tara van Ho makes two further points. The first is that many institutional investors demand businesses to disclose their policies and practices, and companies that fail to disclose risk losing those investors.[216] However, the efficacy of ESG[217] investing is still in doubt, both in terms of returns and ESG outcomes, so it is

[210] *Stovin v Wise*, above n 55, at 944.

[211] See David Neild "Vicarious Liability and the Employment Rationale" (2013) 44 VUWLR 707.

[212] Choudhury and Petrin, above n 45, at 106.

[213] Roorda and Leader, above n 139, at 376.

[214] Marilyn Croser and others, "Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability" (2020) 5(1) BHRJ 130 at 134.

[215] Peter Nestor and Jonathan Drimmer "How Companies Should Respond to the Vedanta Ruling" (30 April 2019) BSR <www.bsr.org>.

[216] van Ho, above n 139, at 114–115.

[217] 'ESG' stands for Environmental, Social, and Governance. It typically manifests as a set of standards for a company's behavior used by socially conscious investors, see Thomas Brock "What Is Environmental, Social, and Governance (ESG) Investing?" (27 September 2022) <www.investopedia.com>.

unlikely that non-ESG businesses will lose investment any time soon.[218] Second van Ho notes that in dangerous industries group-wide policies are required to obtain operating licenses.[219] Although this may be true, dangerous industries are only a small part of the problem, and businesses in other industries will be disincentivised. Nevertheless, Nestor and Drimmer maintain that there is in fact no disincentive for parent companies to guide their subsidiaries despite tort law developments. They argue that the legal exposure of being involved in the group is lesser than the inefficiency of leaving a subsidiary to its own devices.[220] However, the case law tells another story.

Thompson v The Renwick Group plc was a case similar to and decided only shortly after *Chandler.*[221] Like in *Chandler,* the plaintiff had been exposed to asbestos while employed by a subsidiary of the defendant. However, the Court distinguished *Chandler* on the basis that the parent company only held shares in the subsidiary and so could not be deemed to have "superior knowledge".[222] This is even though the parent company had appointed an individual as the director of its subsidiary company "with responsibility for health and safety matters".[223] In *Chandler,* it was the employees of the *parent company* that provided the health and safety policy directly to the subsidiary. The difference between these cases illustrates that it is possible to retain the efficiency created by the superior knowledge of certain individuals in the corporate group while avoiding liability. Comparing the two cases, the defendant in *Chandler* was penalised for taking a closer interest in the health and safety of the group's employees. On this basis, the parent is encouraged to take a *laissez-faire* approach.

---

[218] Sanjai Bhagat "An Inconvenient Truth about ESG Investing" (31 March 2022) Harvard Business Review <https://hbr.org>.

[219] van Ho, above n 139, at 114–115.

[220] Nestor and Drimmer, above n 215.

[221] *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2014] All ER 98 (CA).

[222] At [37].

[223] At [24].

The law will likely develop on a case-by-case basis,[224] but the associated uncertainty will have adverse effects. Despite providing some tentative routes to establish liability, the United Kingdom Supreme Court in both *Vedanta* and *Okpabi* has been cautious in explicitly outlining how existing third-party cases might support the claimants' action.[225] This lack of clarity has negative consequences for both potential claimants and defendants. Claimants will be deterred from bringing an action; without a clear path to liability, taking on a multinational company through the courts is an expensive experiment. Second, uncertainty can undermine the ability to plan and so reduces business efficiency.[226] It is ironic then that the promulgation of negligence categories was designed to avoid inconsistency and uncertainty.[227]

The practicality of parent company liability in tort should also be considered. Roorda and Leader note that "these cases are generally characterised by lengthy procedural litigation, before the cases reach the merits stage – if they do so at all."[228] Not only does litigation take time but it is also costly. Victims of environmental harm such as those in *Vedanta* and *Okpabi* may not have large amounts of resources. In fact, among other reaons, the claimants in *Vedanta* wanted to bring their action in England because they could not enlist lawyers on a conditional fee agreement in Zambia.[229] Further, harms like environmental degradation will encounter collective action problems that make it harder to coordinate complex litigation.[230] Getting to a substantive result is a long journey. One prominent Dutch case took over a decade to solve.[231]

---

[224] Nestor and Drimmer, above n 215.

[225] Bar a vague allusion to *Dorset Yacht* per Lord Briggs JSC in *Vedanta* (SC), above n 1, at [54].

[226] Scott Baker and Alex Raskolnikov "Harmful, Harmless and Beneficial Uncertainty in Law" (6 June 2017) University of Oxford Faculty of Law <www.law.ox.ac.uk>.

[227] *Robinson*, above n 120, at [26].

[228] Roorda and Leader, above n 139, at 369.

[229] *Vedanta* (SC), above n 1, at [90].

[230] Keith Dowding "Incentives and disincentives of collective action" Encyclopaedia Britannica <www.britannica.com>.

[231] Roorda and Leader, above n 139, at 375 in reference to *Four Nigerian Farmers and Milieudefensie v Shell.*

These litigation concerns are exacerbated by evidentiary difficulties. In most situations, information will be in the possession of the defendant,[232] and the necessary internal documents will only come to light upon disclosure.[233] This is even though internal documents are essential in making a case.[234] Moreover, where the harm is latent, as it typically is in asbestos cases, evidence will be even more difficult to obtain.[235] McGrath also highlights that plaintiffs will have to avoid being "overwhelmed by a mountain of one-sided evidence thrown at the court by a large multinational to kill the litigation before disclosure and trial have occurred".[236] Indeed, the Supreme Court in *Okpabi* severely criticised the trial judge and the Court of Appeal for conducting "mini-trials".[237] The fact that the *James Hardie Industries* action collapsed mid-trail is illustrative of the difficulties of making a case in court.[238] In sum, the complex nature of a third-party tort action which requires evidence of "something more" will curtail the relief that parent company liability promises to provide.[239]

D Conclusion

Direct parent company liability in tort is an exciting development. It reflects the courts' intentions to internalise the harms that corporate groups inflict on individuals who cannot protect themselves. The risk, however, is that the development compromises the doctrine of third-party negligence liability. The link to past cases is tenuous at best, and the

---

[232] Filip Gregor "The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts" (December 2014) Access to Justice <http://www.bhrinlaw.org> at 9.

[233] Roorda and Leader, above n 139, at 374.

[234] At 374.

[235] Marilyn Warren, "Corporate Structures, the Veil and the Role of the Courts" (2016) 40 Melbourne University Law Review 657 at 686.

[236] McGrath, above n 139, at 581.

[237] *Okpabi,* above n 108, at [159]–[162].

[238] "Leaky home owners lose case against James Hardie" (12 August 2021) Radio New Zealand <www.rnz.co.nz>.

[239] *Stovin v Wise*, above n 55, at 944.

implication for non-companies is severe. The development is also an ad-hoc solution that will fail to deliver consistently just and efficient outcomes. A better solution is needed.

VI Section 271 of the Companies Act 1993 (Pooling Order)

Another way for claimants in New Zealand to gain compensation for harm suffered at the hands of a subsidiary from a parent company is via s 271 of the Companies Act. Section 271 allows a court to order a company related to a liquidated company to pay the liquidator if it is just and equitable to do so.[240] An application for such an order can be made by a creditor,[241] and the definition of creditor includes those with claims for damages.[242] Therefore, an involuntary creditor such as a tort victim could apply for a s 271 order.

Although this provision seems to address the problem of undercapitalised subsidiaries engaging in risky behaviour that may lead to liquidation, it hinges on the court's discretion and only applies in the limited instances of insolvency. The mere fact that a company is related is not enough to grant an order under s 271.[243] So in exercising its discretion of whether it is just and equitable to make a pooling order, the court must have regard to the related company's management of the company in liquidation, its conduct towards the creditors of the liquidated company, the circumstances that gave rise to the liquidation, and such other matters as the court thinks fit. [244]

The courts have only considered s 271 on a handful of occasions. In *Mountfort v Tasman Pacific Airlines of NZ Ltd* the High Court granted a pooling order, holding that the directors had effectively been trading while insolvent and so they had forfeited the privilege of separate legal personality.[245] The parent had ordered the subsidiary to pay it $650,000 although it was insolvent, therefore it had unlawfully improved its financial position at the

[240] Companies Act 1993, s 271.

[241] Section 271

[242] Sections 240 and 303.

[243] Section 272.

[244] Section 272.

[245] *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104 at [97]-[99].

expense of the subsidiary's unsecured creditors.[246] Thus a pooling order was granted to remove the injustice of the cash transfer.[247] Baragwanath J maintained that mere participation by a holding company in the management of a subsidiary company would not be sufficient to justify a pooling order, nor would a cash swap of unneeded funds.[248] In *Steel and Tube Holdings Ltd v Lewis Holdings Ltd*, the Court of Appeal upheld the High Court's decision to grant a pooling order where the parent largely managed the subsidiary and treated the two entities as a single economic unit.[249] The directors of the subsidiary had not separated their management of the subsidiary from that of the parent.[250]

It is hard to ascertain what the ambit of s 271 is given the broad guidelines outlined in s 272 and the limited case law. However, the focus on control in both *Steel & Tube Holdings* and s 272(1)(a) suggests that an element of control will often be an important touchstone, and 'mere participation' will not be enough. This could lead to the same problems encountered by the direct parent company liability outlined above. The provision may lead courts to focus on culpability rather than internalising risks. Pavlovich and Watson say the provision will be "read narrowly" suggesting it will be of limited application.[251]

One limitation of s 271 is that overseas companies cannot be required to pay the debts of a New Zealand company.[252] Another is that s 271 is confined to situations of liquidation. This is a problem because involuntary creditors may not be known at the time of insolvency or during the lifetime of the company. For example, in *Chandler,* the plaintiff claimed

---

[246] At [49].

[247] At [49].

[248] At [86].

[249] *Steel & Tube Holdings Ltd v Lewis Holdings Ltd* [2016] NZCA 366 at [29] and [79].

[250] At [29].

[251] Alison Pavlovich and Susan Watson "Director and shareholder liability at Pike River Coal" (2017) NZLJ 122 at 125.

[252] Rodney Craig "Chapter 3: Limited Liability and Corporate Personality" in *Morison's Company Law* (Lexis Nexis, 2021) at [3.6].

against the parent company because the subsidiary was wound-up by the time the harm materialised.[253]

Reasons for claiming against a parent company other than reaching a larger asset pool, include discovery advantages, access to a fair justice process, and legal assistance such as legal aid. In *James Hardie Industries,* the ultimate holding company possessed important information such as the "receipt of profits from the sale of defective products."[254] Adding the parent companies to the proceedings could help uncover valuable information during the discovery process. Further, in *Vedanta*, the plaintiffs would have found it hard to access justice if they were not permitted to serve English proceedings out of jurisdiction because they could not obtain legal aid or adequate legal representation in Zambia.[255] Both examples illustrate that there are a variety of reasons for adding parent companies to an action, it should not be constrained to liquidation.

To conclude, s 271 is useful but to properly internalise the harms created by corporate groups a more comprehensive statutory regime is required that allows for the reliable internalising of risk generated by corporate groups.

VII Potential Solutions

Academics have proposed a number of mechanisms to enable claimants who have unjustly suffered harm to recover from corporate groups where the direct harm causer is not a viable target for one reason or another.

---

[253] *Chandler*, above n 96, at 640-641.

[254] *James Hardie Industries*, above n 102, at [15].

[255] *Vedanta* (SC), above n 1, at [90].

E Veil Piercing

Lifting the corporate veil is a description of the consequence of rules that can blur the separation of a corporate and the shareholders, including making shareholders liable for the company's obligations.[256]

Veil-lifting rules can be found in statutes, contracts, and through the court's inherent jurisdiction.[257] Section 271 of the Companies Act is an example of statutory veil piercing. Generally, the court will only wield its inherent jurisdiction to lift the corporate veil if the company is a façade.[258] This "applies when a person is under an *existing* legal obligation" and tries to evade that obligation by use of a company.[259] The issue here is that tort actions will rarely be an *existing* legal obligation when the company is created.[260] These strict legal requirements are the reason why veil piercing has fallen out of favour.[261]

F Removing Limited Liability

As a solution, Tocher suggests creating a legislative framework that removes limited liability for subsidiaries.[262] This solution would provide tort victims with adequate redress by allowing them to pursue corporate shareholders while otherwise maintaining many of the benefits that limited liability confers.

However, Choudhury and Petrin worry that this approach would not provide adequate protection against judgment proofing. A corporate group may choose to over-capitalise a sister company meaning that the parent will have little capital to satisfy debts incurred by

---

[256] Watts, Campbell and Hare, above n 37, at 60.

[257] At 60 and 67. Note there is some controversy about the court's inherent jurisdiction, see for example at 69.

[258] *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at 20 per Lord Sumption.

[259] At 20 (emphasis added).

[260] Choudhury and Petrin, above n 45, at 99.

[261] See Brumby, above n 140, at 190; and Choudhury and Petrin, above n 45, at 99.

[262] See Tocher, above n 62.

the first subsidiary.[263] However, Tocher posits that such concerns are inflated because the parent company must have at least one asset, namely the shareholding in the sister company that should be highly valued given the sister company's over-capitalisation, which in turn can be used to satisfy the debts.[264]

There are two issues with Tocher's analysis. The first is that it requires the subsequent parent company to go insolvent, which may lead to insolvency priority issues.[265] He rebuts this by suggesting that the threat of liquidation would mean that a group would likely provide the necessary funds to support the parent company in jeopardy.[266] The second issue with Tocher's analysis is that there are numerous ways of judgment-proofing against unlimited liability for corporate parents that are part of a group. For example, the assets could be shifted to a related company that is not linked via shareholding but trades on favourable terms.[267]

Removing limited liability for corporate shareholders is a good start to internalising corporate risk but enterprise liability can provide a more holistic response to group liability that vitiates the concerns of judgment-proofing that would otherwise remain.

VIII Enterprise Liability

A Enterprise Liability in Brief

Enterprise liability treats all companies in a group as a single enterprise, and where harm is caused by one part of the enterprise, the other companies in the group are also liable.[268]

---

[263] Choudhury and Petrin, above n 45, at 121.

[264] Tocher, above n 62, at 31.

[265] At 31-32.

[266] At 31-32.

[267] Various potential structures are discussed by Christian Witting in *Liability of Corporate Groups and Networks* (Cambridge University Press, Cambridge (England), 2017) at 4.

[268] Choudhury and Petrin, above n 45, at 116.

This is an extended form of veil piercing, where liability can flow in any direction including, vertically and horizontally, for example from one sister company to another.[269]

From the outset, it should be noted that this paper only advocates for enterprise liability insofar as it exposes corporations but not individuals. Individual investors should still be protected from excessive liability meaning that the provision of cheap capital would continue.[270] Nor would individual investors be disincentivised from diversifying their investments. Furthermore, enterprise liability should only apply where the claim is by an involuntary creditor – someone who did not have the opportunity to assess the risk beforehand such as a tort victim.

B Advantages of Enterprise Liability

The main advantage of enterprise liability is that it brings the legal reality of corporate groups closer to their economic reality.[271] If an enterprise permits a company to undertake a dangerous activity for profit, it is fair and efficient to presume that they are willing to burden the corresponding risk.[272]

Second, it is often more efficient and cheaper for the corporate group to deal with the risk they create than it is for communities to remedy the loss after the fact.[273] For example, pollution can be difficult for a community to remedy as it requires collective action which can incur significant coordination costs.[274] Internalising the risk will incentivise corporate groups to take preventative measures. Overall, it is economically beneficial if involuntary creditors can hold parent companies to account.[275]

---

[269] At 116.

[270] Choudhury and Petrin, above n 45, at 109-110.

[271] Adolf Berle Jr "The Theory of Enterprise Entity" (1947) 47 Colum L Rev 343 at 344.

[272] Choudhury and Petrin, above n 45, at 117.

[273] Meredith Dearborn "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 CLR 195 at 255.

[274] Dowding, above n 230.

[275] Dearborn, above n 273, at 256.

Enterprise liability's holistic approach will also make it harder to judgment-proof companies.[276] Enterprise liability pools the assets of all related companies whether a parent or sister company, whereas other approaches such as merely removing limited liability for corporate shareholders can be circumvented.[277] Enterprise liability's wider reach will make it more likely that involuntary creditors can access sufficient assets to satisfy their debt.

Further, the holistic nature of enterprise liability alongside its strict liability provides for greater litigation efficiency. Harmful wrongdoing may arise collectively from the actions of the group and attributing causal effect to one entity within the group may be artificial or impossible.[278] An enterprise liability approach can avoid these problems as the group is considered as one unit. In addition, it will reduce the evidentiary and technical difficulties in proving intangible concepts such as 'control' or an 'assumption of responsibility'.

The introduction of enterprise liability is consistent with developments overseas. For example, France passed its *Loi de Vigilence* in 2017 which requires large companies to undertake due diligence regarding the companies they control and all their contractors and suppliers, or be subject to legal penalties.[279] Similarly, Germany's *Konzernrecht* treats parent and subsidiaries as a single economic unit under certain circumstances.[280] In fact, enterprise liability is already in use in competition and accounting law in the United States.[281]

Although there are numerous benefits, the efficacy of an enterprise liability regime depends heavily on how it is implemented. When are companies considered to be part of the same

---

[276] Choudhury and Petrin, above n 45, at 116 and 121.

[277] See Tocher, above n 62, at 31.

[278] Choudhury and Petrin, above n 45, at 121.

[279] Dr Daniel Sharma "Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia" (26 March 2021) DLA Piper <www.dlapiper.com>.

[280] Dearborn, above n 273, at 215–216.

[281] Gregor, above n 232, at 24; and Dearborn, above n 273, at 231–233.

group and therefore liable for each other's actions? Given that many corporate groups are international enterprises, who can bring an action against whom and where?

C What is an Enterprise?

There is a continuum of enterprise liability. On the one end, a control-based approach would look more akin to the tort liability explored above; on the other, is a pure economic conception – "you profit, you pay".[282]

Some like, Choudhury and Petrin suggest a two-tiered system. Liability based on shareholding for traditional groups and vicarious liability for non-traditional groups that do not have explicit shareholder relationships. They suggest that tort victims should have redress against the entire group and any individual company that forms part of that group.[283] Their approach would use equity ownership and/or voting rights to establish the existence of a group but they maintain that it is not otherwise reliant on whether control existed or was properly exercised.[284] One avenue is to adopt existing legislative definitions such as the definition of "subsidiary" and "holding company" outlined in the United Kingdom Companies Act 2006. [285]

If such an approach were adopted in New Zealand, an apt starting point may be to adopt the definition of "related" per s 2(3) of the Companies Act which is used to determine whether companies are sufficiently connected to be liable for each other's debts under s 271.[286]

A company can be related to another company in several ways. Companies are related where there is a parent-subsidiary relationship.[287] Such a relationship exists where one

---

[282] Dearborn, above n 273, 247.

[283] Choudhury and Petrin, above n 45, at 120.

[284] At 121.

[285] See Companies Act 1993, s 5.

[286] Section 2(3).

[287] Section 2(3)(a).

company either controls the composition of the other company's board,[288] controls the exercise of a majority of the votes at a meeting,[289] has a majority shareholding, or is entitled to a majority of the dividends.[290] Companies are also related where more than half of the shares are held by the other company and companies related to it.[291] Third, companies may be related where the businesses of the companies are not readily identifiable from each other.[292] And lastly, companies are related if they are both related to another company.[293] In short, the general theme is that the Companies Act deems companies related where one has majority control over the other or where they receive a majority of the benefit (i.e. via dividends).

Choudhury and Petrin argue that adopting clear a definition, such as the one above, avoids complications and ad hoc results that ensue when a deep factual analysis is required.[294] Similarly, Tocher suggests that the definition of "subsidiary" provided by the Companies Act provides a "nice compromise between a flat cut-off percentage of shareholding, and an entirely contextual test of control".[295]

A share-based approach would remove limited liability for all shareholders in any company classified as a subsidiary. Proponents of this approach, such as Hansmann and Kraakman, suggest adopting a pro-rata unlimited liability.[296] The risk is that such an approach will deter small, passive corporate investors who can often be crucial sources of capital.[297] For example, a pro-rata unlimited approach would have tremendous implications for investment and retirement funds on which many ordinary people rely. It would

[288] Section 5(1)(a)(i).

[289] Section 5(1)(a)(ii).

[290] Section 5(1)(a)(iv).

[291] Section 2(3)(b).

[292] Section 2(3)(d).

[293] Section 2(3)(e).

[294] Choudhury and Petrin, above n 45, at 122.

[295] Tocher, above n 62, at 27.

[296] Hansmann and Kraakman, above n 63, at1892.

[297] Tocher, above n 62, at 27.

disincentivise diversification and may require those investment companies to pay expensive liability insurance premiums.

Overall, a rule that uses an existing definition that combines both an objective, quantitative measure of association alongside a slightly more subjective element of control would be the most viable approach. In this regard, the definition of 'related' may be an adequate candidate for an enterprise liability scheme in New Zealand.

However, Choudhury and Petrin fear that purely looking at traditional groups "fails to address situations where entities can be said to be sufficiently connected even in the absence of equity ownership or rights to control voting or board composition".[298] For example, where there is an exclusive supplier-customer relationship, the customer may benefit from a supplier's cheap prices which were only achievable by externalising certain risks.[299] They contend that vicarious liability may be a viable mechanism by which this approach could be implemented.[300] An in-depth analysis by Morgan demonstrates that vicarious liability for legal persons such as companies is a tenable step in light of recent developments in the law.[301] In *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the England and Wales Court of Appeal considered a range of factors including whether or not the work is carried out under supervision and direction of the employer, the extent of managerial integration, and whether or not the work is an integral part of the alleged employer's business, and who stands to gain from the work.[302] By simply replacing 'employer' with 'parent company', it is conceivable how vicarious liability might apply. This approach to some degree reflects s 2(3)(d) of the Companies Act which dictates

[298] Choudhury and Petrin, above n 45, at 123.

[299] At 123–124.

[300] At 124.

[301] See generally Phillip Morgan "Vicarious liability for group companies: the final frontier of vicarious liability?" (2015) 31(4) Professional Negligence 276 at 295.

[302] *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] QB 722 at [64]–[70]. The approach was adopted by the United Kingdom Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1.

that companies are "related" if "the businesses of the companies have been so carried on that the separate business of each company is not readily identifiable".[303] Although the *JGE* test could be applied, it is looser and less clear which creates an undesirable lack of ex ante certainty as to whether a group has formed.[304]

Given the ambiguity in assessing vicarious liability, it is better not to incorporate it into statute. The courts should be left to further refine and adapt the doctrine as is relevant. The limited version reflected in s 2(3)(d) would be sufficient for introducing an enterprise liability regime in New Zealand.

D Involuntary Creditors

Dearborn provides a two-pronged test for enterprise liability.[305] There must be an "economically integrated enterprise", and tort creditors.[306] The first prong has been examined above, and the second will be considered now.

Dearborn suggests that enterprise liability should be limited to situations of mass tort, human rights violation, or environmental harm.[307] Further, these terms should be defined narrowly.[308] She cites the need to alleviate business concerns in developing this prescriptive test.[309] However, this is unnecessary. Where the harm is small such as where the subsidiary commits a tort against an individual, the subsidiary will in most cases be able to pay the compensatory damages as they would anyway, independent of enterprise liability. Enterprise liability only comes into practical effect where there is large-scale harm and larger asset pools need to be accessed.

---

[303] Section 2(3)(d)

[304] Choudhury and Petrin, above n 45, at 123–124.

[305] Dearborn, above n 273, at 251.

[306] At 251.

[307] At 251

[308] At 255

[309] At 255

The present author suggests the term "involuntary creditor" should be used to decide who can benefit from enterprise liability. The term refers to those individuals who are owed money by another entity or person without having agreed to be in that position.[310] They are "any creditor that lacks the ability to protect itself *ex ante*."[311] This inability is typically the result of a lack of information.[312] Tort victims are the quintessential example as they do not know that they will be injured or suffer loss. But they are only one type, other types of involuntary creditors include those who are owed a payment under a statutory or regulatory regime for the wrongdoing of another such as environmental or tax creditors.[313] Although some involuntary creditors may also have a contractual relationship with the tortfeasor, they should still be allowed to claim in the spirit of concurrent liability in contract and tort.[314]

Limiting enterprise liability to involuntary creditors means that many of the benefits of separate legal personality will be maintained. However, it has also led to criticism. Some commentators note that it would be odd for a legal unit not to enjoy rights that are traditionally recognised as fundamental,[315] and it is strange that in some situations, rights would apply to single entities and at other times those rights would apply to the group.[316] However, the situation in which the group is treated as one can be delineated by careful statutory crafting, and the distinction has already been made as is exemplified by s 271.

[310] Choudhury and Petrin, above n 45, at 109.

[311] Stephanie Ben-Ishai and Stephen Lubben "Involuntary Creditors and Corporate Bankruptcy" (2012) 45(2) UBC Law Rev 253 at 256-257.

[312] At 256-257.

[313] At 257.

[314] See *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL) at 193–194.

[315] Phillip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, New York, 1993) at 237.

[316] Tocher, above n 62, at 31.

IX Further Considerations

A Jurisdictional Arbitrage

There is a risk that if New Zealand were to implement an enterprise liability regime companies may decide to move jurisdiction.[317] Jurisdictional arbitrage is where companies move to countries with more favourable laws; this has been a concern with reforms in Europe in relation to human rights due diligence laws.[318] However, many large corporations already exercise jurisdictional arbitrage for tax reasons which are likely to be a far larger factor in deciding where and whether to incorporate in a certain country.[319] It is unlikely that an enterprise liability scheme will be a large consideration for companies in New Zealand, especially given that s 271 already exists, and the harms imposed by companies on involuntary creditors are not planned nor anticipated.

B A Drastic Change?

Admittedly, enterprise liability might seem to be a drastic innovation in New Zealand. However, given the evolution of direct company liability in tort, it seems that the law is heading toward parent company liability in some shape or form. The question is whether a clear, principled approach will be taken or if it must evolve ad-hoc through the courts. Second, the existence of s 271 means that corporate groups are already at risk of being liable for the debts of subsidiaries and other related companies. Nonetheless, there should be significant forewarning were enterprise liability to be implemented to allow corporate groups to adjust.

C Jurisdictional Veil

Many corporate groups operate internationally. New Zealand can either be the "host" country – where the subsidiary of a foreign-based multinational enterprise is incorporated

---

[317] Janet Dine "Jurisdictional arbitrage by multinational companies: a new national law solution?" (2012) 3 JHRE 44.

[318] Gregor, above n 232, at 11.

[319] John Prebble "Tax Avoidance, International Tax Arbitrage, and New Zealand as a Haven for Foreign Capital and Income" (2010) 16 Revue Juridique Polynesienne 169.

here, or New Zealand can be the "home country" of the parent company of a multinational enterprise. [320] Where the harm occurs overseas, the applicable law determining whether a wrong has been committed will usually be the law of that country,[321] but claimants should be permitted to bring the claims against parent companies based in New Zealand without having to establish that New Zealand is forum conviens.[322] Although allowing foreign individuals to bring claims in New Zealand may seem a burden on the New Zealand courts and taxpayer funds, this decision accords with the "cost of doing business" rationale that underpins enterprise liability.[323] The New Zealand government gains from the activities of overseas subsidiaries by taxing the profits that accumulate here, therefore New Zealand should provide a forum for wrongs resulting from those activities to be rectified.

X Conclusion

To maximise societal welfare company law needs an exception. Limited liability has allowed corporate groups to externalise the risks on unwitting victims which is both unjust and inefficient. Corporate groups achieve this by thinly capitalising subsidiaries while burdening them with the riskiest activities.[324] The benefits that normally result from limited liability such as lower monitoring costs do not apply where the shareholder is a corporate entity.[325] Further, unlike voluntary creditors, involuntary creditors, cannot protect themselves against the risks that limited liability creates.[326] Therefore, they should be able to pursue their claim not only against a subsidiary but also against other related companies in a corporate group who profit from their relationship with the wrongdoing company.

---

[320] Blumberg, above n 315, at 169; also see Chambers, above n 4, at 528-9 for an explanation of the 'jurisdictional veil'.

[321] See Pawson *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed).

[322] David Goddard *Laws of New Zealand* Forum Conviens: Introduction (online ed) at [26]–[28].

[323] Choudhury and Petrin, above n 45, at 121.

[324] Chambers, above n 4, at 533.

[325] Choudhury and Petrin, above n 45, at 110.

[326] Watts, Campbell and Hare, above n 37, at 49.

The New Zealand Court of Appeal has recently followed the commonwealth judicial community in allowing for direct parent company liability in tort.[327] The United Kingdom Supreme Court, which is at the forefront of developing the law in this area,[328] maintain that parent-company liability is not a novel duty and there is nothing special about the subsidiary-parent relationship.[329] Although the development of parent company liability is a step in the right normative direction their approach risks undermining both tort and company law. The proposed parent company routes to liability are logically detached from previous third-party case law. There is also a risk that the newly developed principles will have unintended liability implications for non-company persons. Lastly, this new development could potentially exacerbate the problem by disincentivising companies from providing oversight.

New Zealand's s 271 of the Companies Act is a rudimentary mechanism for involuntary creditors to receive compensation. It is limited to a narrow set of situations and applies only in liquidation. Similarly, piercing the corporate veil is an exceptional doctrine and cannot be relied upon to alleviate the problem of corporate risk externalisation.[330]

To create a system that will fully and consistently internalise the risk posed by subsidiary companies to involuntary creditors the legislature will have to craft a new statutory regime outlining a limited form of enterprise liability. The benefits are that it will align the costs of an enterprise with its profits and provide a more efficient mechanism for victim compensation.

Although, there may be concern that this would present a drastic change to New Zealand company law, in actuality it is but a small tweak given its specific application, the growing prominence of parent company liability, and the pre-existence of s 271. Nevertheless, it is a tweak that would lead not only to greater economic efficiency but also to greater justice.

---

[327] *James Hardie Industries*, above n 102.

[328] *Vedanta* (SC), above n 1; and *Okpabi*, above n 108.

[329] See *Vedanta* (SC), above n 1, at [54] and [56].

[330] See Easterbrook and Fischel, above n 58; *Prest,* above n 258; and see Brumby, above n 140, at 190;

XI Bibliography

A Cases

1 New Zealand

Boyd Knight v Purdue [1999] 2 NZLR 278 (CA).

Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725.

James Hardie Industries plc v White [2018] NZCA 580, [2019] 2 NZLR 49.

Maulolo v Hutt Valley Health Corp Ltd [2002] NZAR 375 (HC).

Mountfort v Tasman Pacific Airlines of NZ Ltd [2006] 1 NZLR 104.

North Shore City Council v Attorney-General [2012] NZSC 49, [2012] 3 NZLR 341.

Steel & Tube Holdings Ltd v Lewis Holdings Ltd [2016] NZCA 366.

Trevor Ivory Ltd v Anderson [1992] 2 NZLR 517.

2 Australia

CSR Ltd v Wren [1997] 44 NSWLR 463, BC9707084.

CSR Ltd v Young (1998) 16 NSWCCR 56, BC9800336.

James Hardie & Co Pty Ltd v Hall (1998) 43 NSWLR 554, BC9802005.

3 Canada

Childs v Desormeaux 2006 SCC 18, [2006] 1 SCR 643.

4 England and Wales

AAA v Unilever plc [2018] EWCA Civ 1532, All ER (D) 87 (Jul).

Adams v Cape Industries plc [1990] 2 WLR 657.

Caparo Industries plc v Dickman [1990] 2 AC 605 (HL).

Chandler v Cape plc [2012] EWCA Civ 525, [2012] 1 WLR 3111 (CA).

Connelly v RTZ plc (No 3) [1999] CLC 533.

Dorset Yacht Co Ltd v Home Office [1970] AC 1004, [1970] 2 All ER 294.

Haynes v Harwood [1935] 1 KB 146.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, [1963] 2 All ER 575 (HL).

Henderson v Merrett Syndicates Ltd (No 1) [1995] 2 AC 145 (HL).

HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc [2021] UKSC 3, [2021] 1 WLR 1294.

JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938, [2013] QB 722.

Lungowe v Vedanta Resources plc [2017] EWCA Civ 1528, [2018] 1 WLR 3575 (CA).

Michael v Chief Constable of South Wales Police [2015] UKSC 2, [2015] AC 1732.

Okpabi v Royal Dutch Shell [2018] EWCA Civ 191.

Okpabi v Royal Dutch Shell Plc [2017] EWHC 89 (TCC), [2017] Bus LR 1335.

Prest v Petrodel Resources Ltd [2013] 3 WLR 1.

Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4, [2018] AC 736 (SC).

Salomon v A Salomon & Co Ltd [1897] AC 22 (HL).

Smith v Littlewoods Organisation Ltd [1987] AC 241 (HL).

Stovin v Wise [1996] AC 923 (HL).

Thompson v The Renwick Group plc [2014] EWCA Civ 635, [2014] All ER 98 (CA).

Various Claimants v Catholic Child Welfare Society [2012] UKSC 56, [2013] 2 AC 1 (SC).

Vedanta Resources plc v Lungowe [2019] UKSC 20, [2020] AC 1045 (SC).

Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830 (HL).

B Legislation

Companies Act 1993.

C Books and Chapters in Books

Alistair Alcock "Chapter 7: Legal Personality" in Lord Millet, Alcock and Todd (eds) *Gore-Browne on Companies* (45th ed, LexisNexis, London, 2004).

Allen Linden *Canadian Tort Law* (9th ed, Butterworths, Toronto, 2011).

Barnali Choudhury and Martin Petrin *Corporate Duties to the Public* (Cambridge University Press, Cambridge (England), 2018).

Bishop Carleton Hunt *The Development of the Business Corporation in England 1800-1867* (Harvard University Press, Cambridge (Mass), 1936).

Christian Witting *Liability of Corporate Groups and Networks* (Cambridge University Press, Cambridge (England), 2017).

David Goddard *Laws of New Zealand* Forum Conviens: Introduction (online ed).

John Armour and others "What is Corporate Law?" in Kraakman and others (ed) *Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, online, 2017).

John C P Goldberg and Benjamin C Zipursky *Recognizing Wrongs* (The Belknap Press of Harvard University Press, Massachusetts, 2020).

Karl Chase, Ray Fair and Sharon Oster *Principles of Economics* (13th ed, Pearson Education, Harlow (England), 2020).

Michael Lobban "Joint Stock Companies" in William and others (ed) *The Oxford History of the Laws of England*: Volume *XII 1820-1914 Private Law* (Oxford University Press, Oxford, 2010).

Rodney Craig "Chapter 3: Limited Liability and Corporate Personality" in *Morison's Company Law* (Lexis Nexis, online ed, 2021).

Ron Harris *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press, Cambridge (England), 2000).

Pawson *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed).

Peter Cane *The Anatomy of Tort Law* (Hart Publishing, Oxford, 1997).

Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016).

Phillip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, New York, 1993).

Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007).

Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (Ed) *Todd on Torts* (8th ed, Thomson Reuters New Zealand, Wellington, 2019).

D Journal Articles

Alison Pavlovich and Susan Watson "Director and shareholder liability at Pike River Coal" (2017) NZLJ 122.

Christian Gollier, Pierre-François Koehl, and Jean-Charles Rochet "Risk-Taking Behaviour with Limited Liability and Risk Aversion" (1997) 64(2) The Journal of Risk and Insurance 347.

Christian Witting "The Corporate Group: System, Design and Responsibility" (2021) 80(3) CLJ 581.

Daniel Kahneman and Amos Tversky "Prospect Theory: An Analysis of Decision under Risk" (1979) 47(2) Econometrica 263.

David Neild "Vicarious Liability and the Employment Rationale" (2013) 44 VUWLR 707.

Dr Chris McGrath "Implications of the United Kingdom's Approach for Parent Company Liability in Australia" (2021) 38 C&SLJ 577.

Elizabeth Brumby "Parent Company Liability in the Extractive Industries: A New Frontier for Business and Human Rights" (2018) 36 C&SLJ 185.

Ernest Weinrib "Thinkings about Tort Law" (1992) 26 Val U L Rev 717 at 721.

Frank Easterbrook and Daniel Fischel "Limited Liability and the Corporation" (1985) 52(1) U Chi L Rev 89.

Henry Hansmann and Reinier Kraakman "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100 Yale Law Journal 1879.

Janet Dine "Jurisdictional arbitrage by multinational companies: a new national law solution?" (2012) 3 JHRE 44.

John Prebble "Tax Avoidance, International Tax Arbitrage, and New Zealand as a Haven for Foreign Capital and Income" (2010) 16 Revue Juridique Polynesienne 169.

John Saville "Sleeping Partnerships and Limited Liability, 1850–1856" (1956) 8(3) Econ Hist Rev 418.

Jörg Budde and Matthias Kräkel "Limited Liability and the risk-incentive relationship" (2011) 102(2) Journal of Economics 97.

Lucas Roorda and Daniel Leader "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court" (2021) 6(2) BHRJ 368.

Marilyn Croser and others, "Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability" (2020) 5(1) BHRJ 130.

Marilyn Warren, "Corporate Structures, the Veil and the Role of the Courts" (2016) 40 Melbourne University Law Review 657.

Meredith Dearborn "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 CLR 195.

Nic Wilson "When is a Subsidiary's Negligence the Parent Company's Problem?" (2020) 26 Canta LR 161.

Otto Kahn-Freund "Some Reflections on Company Law Reform" (1944) 7 MLR 54.

Peter Muchlinski "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 Camb J Econ 915.

Phillip Blumberg “Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity” (2001) 24 Hastings Int’l & Comp L Rev 297.

Phillip Blumberg “Limited Liability and Corporate Groups” (1986) 11 J Corp L 573.

Phillip Morgan “Vicarious liability for group companies: the final frontier of vicarious liability?” (2015) 31(4) Professional Negligence 276.

Rachel Chambers “Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court” (2021) 42(3) U Pa J Int’l L 519.

Robert Thompson “Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise” (1994) 47 Vand L Rev 1.

Sarah Coleman and Jonathan Friedler “The Road to Reform in the Wake of Kiobel: Multinational Corporations and Socially Responsible Behaviour” (2014) 13 J Int’l Bus & L 191.

Scott Baker and Alex Raskolnikov “Harmful, Harmless and Beneficial Uncertainty in Law” (6 June 2017) University of Oxford Faculty of Law <www.law.ox.ac.uk>.

Stephanie Ben-Ishai and Stephen Lubben “Involuntary Creditors and Corporate Bankruptcy” (2012) 45(2) UBC Law Rev 253.

Talia Siataga “*James Hardie* and the Development of Parent Company Liability: New Zealand as a forum for transnational Human Rights Litigation” (2021) 28 Canta LR 77.

Tara Van Ho, “Vedanta Resources Plc v Lungowe [2019] UKSC 20” (2020) 114(1) AJIL 110.

Tom White “Nothing to See Here? The Extension of Parent Company Liability in *James Hardie Industries Plc v White*” (2020) 51 VUWLR 155.

E Internet Materials

American Lung Association "Asbestosis Symptoms and Diagnosis" (24 March 2020) <www.lung.org>.

"Cross-border guide to parent company liability for foreign subsidiaries" (May 2021) Norton Rose Fulbright < www.nortonrosefulbright.com>.

David Raudkivi "Shareholder Activism & Engagement in New Zealand" (2020) Lexology <www.russellmcveagh.com>.

Dr Daniel Sharma "Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia" (26 March 2021) DLA Piper <www.dlapiper.com>.

"Don't Limit the Revolution" (29 September 2016) The Economist <www.economist.com>.

Jesse Wilson and Richard Massey "When can a parent company be liable for damage caused by its subsidiary? UK Supreme Court offers insight" (16 February 2021) Bell Gully <www.bellgully.com>.

"Joint-stock company" Britannica (accessed on 19 Sept 2022) <www.britannica.com>.

Keith Dowding "Incentives and disincentives of collective action" Encyclopaedia Britannica <www.britannica.com>.

"Leaky home owners lose case against James Hardie" (12 August 2021) Radio New Zealand <www.rnz.co.nz>.

Milton Friedman "A Friedman Doctrine" *New York Times* (online ed, New York, 13 September 1970).

Ministry of Business, Innovation & Employment "Latest company statistics" (3 August 2022) New Zealand Companies Office <https://www.companiesoffice.govt.nz>.

Ministry of Business, Innovation & Employment "What it means to be a shareholder" <companies-register.companiesoffice.govt.nz>.

Nick Lioudis "The Importance of Diversification" (15 June 2022) Investopedia < www.investopedia.com>.

Peter Nestor and Jonathan Drimmer "How Companies Should Respond to the Vedanta Ruling" (30 April 2019) BSR <www.bsr.org>.

Sanjai Bhagat "An Inconvenient Truth about ESG Investing" (31 March 2022) Harvard Business Review <https://hbr.org>.

Scott Baker and Alex Raskolnikov "Harmful, Harmless and Beneficial Uncertainty in Law" (6 June 2017) University of Oxford Faculty of Law <www.law.ox.ac.uk>.

Simone Cooper "Parent company liability for negligence of subsidiary" (31 January 2019) Legalwise <legalwiseseminars.com.au>.

Thomas Brock "What Is Environmental, Social, and Governance (ESG) Investing?" (27 September 2022) <www.investopedia.com>.

"Union Carbide/ Dow lawsuit (re Bhopal, filed in India)" (14 June 2018) Business & Human Rights Resource Centre < www.business-humanrights.org>.

"What's behind the exploding number of shareholder resolutions on corporate purpose?" *The Economist* (4 May 2022) <www.economist.com>.

F Other Sources

Filip Gregor "The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts" (December 2014) Access to Justice <http://www.bhrinlaw.org>.

James Tocher "Multinational Enterprise and the Incentive to Take Risks: Rethinking Limited Liability for Parent Companies in Cases of Tort" (LLB (Hons) Dissertation, University of Otago, 2016).

Surya Deva "Briefing Paper for Consultation: Parent Company Liability" (ESCR-Net & FIDH Joint Treaty Initiative Project, Geneva, 2016).

Word Count: The text of this paper (excluding cover page, abstract, table of contents, footnotes, and bibliography) comprises 11,998 words.