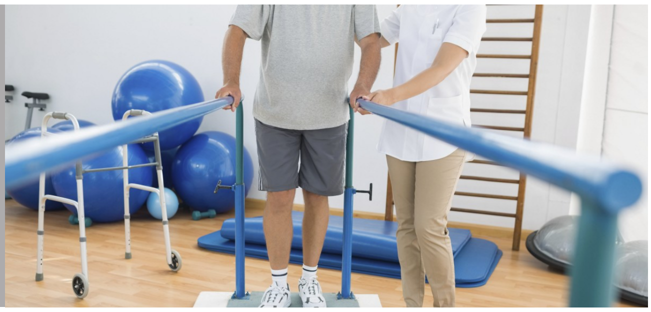
Personal Injury



Developments in parent company liability: Vedanta Resources Plc v Lungowe [2019] UKSC 20

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On 10 April 2019 the Supreme Court handed down its decision in *Vedanta Resources plc v Lungowe*. This decision marks the latest development in the area of parent company liability and the culmination of a line of complex international cases. This article will address the state of the law of parent company liability and how it is affected by the decision in Vedanta.

What is meant by parent company liability is illustrated by the following hypothetical situation. A person, 'C', was employed by a company, 'S', which is the subsidiary of a parent company, 'P'. C was injured in the course of her employment with S but may be unable or unwilling to bring her claim against it. In some circumstances P's actions may make it directly liable to C for the injuries she has suffered, despite the fact that P has no contractual relationship with C. In cases of parent company liability, C argues that P is directly liable to her in virtue of its actions. The claimant may be an employee of the subsidiary or simply someone sufficiently proximate to be harmed by its operations.

It is no anomaly for a duty of care to exist despite an apparently indirect relationship between the parties. In a number of cases the courts have held that a duty of care can exist between a body which gives permission for an activity to proceed and a person harmed in the course of that activity; see for example *Watson v British Boxing Board of Control Ltd* [2000] and *Wattleworth v Goodwood Road Racing Co Ltd* [2004].

The imposition of parent company liability may initially seem to offend against the principle of corporate separateness, a venerable principle of English law that different companies are different legal persons and that one cannot extend the liability of a company to its shareholders. Only in very limited circumstances will the courts permit a claimant to 'pierce the corporate veil' (see *Prest v Petrodel Resources Ltd* [2013]). However, this is no more than a red herring. The parent company is said to be directly liable to the claimant as a result of its own actions, not as a result of its shareholding in the subsidiary. The claimant does not argue that the parent company's relationship with the subsidiary gives rise to a duty of care, but instead relies on the parent company's immediate control of the subsidiary's operations.

Parent company liability cases are analogous to the cases in which the courts have recognised that the director of a company may be personally liable in tort. Per Lord Rodger in *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002], where all the ingredients of a tort are made out against a director, the fact that they were director of the company does not provide any conceivable basis to prevent them being liable for that tort. See also *MCA Records Inc v Charly Records Ltd* [2001]. It is argued in the same way in parent company liability cases that all the ingredients of a tort are made out against the parent company and that it is therefore liable in its own right.

The real issue with parent company liability cases concerns the issue of proximity. In order for the parent company to owe a duty of care to the claimant there must be the requisite proximity between the two, as per the test in *Caparo Industries plc v Dickman* [1990]. It was unclear before the Supreme Court's decision in *Vedanta* exactly what the parent company must have done in order to owe a duty of care to the claimant.

Parent company liability cases

The fact that it is possible for a parent company to owe a direct duty of care to an employee of a subsidiary company was clearly established by the Court of Appeal in *Chandler v Cape plc* [2012]. Mr Chandler worked as a brick loader at a factory which produced asbestos and was employed by Cape Building Products Ltd, which was a subsidiary of Cape plc. Cape Building Products was no longer in existence when Mr Chandler contracted asbestosis as a result of his time as its employee, and so he brought his claim against Cape plc instead.

The facts of *Chandler* were quite unusual: Cape plc required products to be manufactured in accordance with its product specification and had resources that far exceeded those of its subsidiary. Cape plc also retained a group medical adviser and the Court of Appeal found that this adviser must have known about the risks during the period relevant to Mr Chandler's claim. Arden LJ, with the agreement of Moses and McFarlane LLJ, held that Cape plc had assumed a duty of care to advise its subsidiary so that its employees could be provided with a safe system of work (para 78). What gave rise to the duty of care in that case was not any particular action but 'an *omission* to take steps or to give advice' (para 72).

Arden LJ stated that (para 80):

> *'…this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees…'*

Arden LJ also stated that this would include situations satisfying the four indicia set out in para 80. These included:

- the business of the two companies being the same in a relevant respect
- the parent having superior knowledge on some aspect of health and safety
- the parent company's knowing, or having constructive knowledge, that the subsidiary's system of work was unsafe
- that the parent company knew or ought to have foreseen that the subsidiary would rely upon its superior knowledge

These indicia described one particular situation in which parent company liability could exist and provided a set of conditions that were sufficient, but not necessary, for the existence of a duty of care.

Chandler was a relatively small claim involving only a single claimant but was relied upon in three later claims, each of which was on a much greater scale. *Vedanta* arose due to discharges from a Zambian copper mine; *Okpabi v Royal Dutch Shell plc* [2018] arose from oil spills in Nigeria; and *AAA v Unilever plc* [2018] arose from mass post-electoral violence at a tea planation in Kenya. In each of these cases, several thousand claimants brought claims in England against both the subsidiary company, which was based in Africa, and against the parent company, which was domiciled in the UK.

In each of these cases the claimants had effected service out of the jurisdiction on the subsidiary company, which was challenged by the defendants who argued that there was no real triable issue between the parties. This required the court to decide whether there was a real prospect of the claimants showing that a duty was owed under the circumstances of those cases.

Vedanta, covered in greater detail below, was the first of the three to be decided by the Court of Appeal. Simon LJ, who gave the only judgment, held that there was a real issue between the parties.

Next was *Okpabi*. Simon LJ also delivered a judgment in this case, but found in favour of the defendants. He stated that (para 89):

> *'… the issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary…such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.'*

He accepted that the claimants had shown that the Shell Group imposed 'a wide-ranging degree of direction from the centre', but stated that (para 129):

> *'… the argument proved too much; in the sense that what it in fact showed was standardisation of policies and practices across all the operations and in all the countries in which the Shell Group operated…'*

Although he accepted that the parent company had imposed a centralised system of practices, he did not agree that this would be sufficient to give rise to a duty of care. Simon LJ was supported by Sir Geoffrey Vos who, similarly, found that Shell had laid down policies and practices for its subsidiaries but that this was not enough to establish a duty of care.

Sales LJ wrote a dissenting judgment in *Okpabi* finding in favour of the claimants, and then went on to write the only judgment in *Unilever*. There, however, he found in favour of the defendants. He stated that the subsidiary company did not receive relevant advice from the parent company and that it understood it was responsible for devising its own risk management policy and handling the crisis which led to the claims being brought (para 40).

In recent years the law on parent company liability has not only been developing in England and Wales, but also in a number of other jurisdictions. Similar issues were dealt with by the Court of Appeal of New Zealand in *James Hardie Industries plc v White* [2018], in which the claimants sought to hold the defendant liable for products marketed and sold by its subsidiary company, and by the Superior Court of Justice in Ontario in *Choc v Hudbay Minerals Inc* [2013], in which the parent company was argued to have assumed direct responsibility over security personnel involved in alleged human rights violations.

When the Supreme Court came to consider *Vedanta* it was clear that parent company liability could exist in some situations, but unclear exactly what the parent company would have to do to give rise to a direct duty of care. For example, Cape plc had dictated a standard product specification in *Chandler* and the Shell Group had standardised policies and practices across its operations in *Okpabi*, but a duty of care had only been held to exist in the former situation and not the latter. The Supreme Court in *Vedanta* had the opportunity to provide some much-needed clarity in this area.

The Supreme Court's decision in *Vedanta*

Vedanta Resources plc (hereafter referred to as 'Vedanta') was the ultimate parent company of Konkola Copper Mines (hereafter 'KCM') which operated a copper mine in Zambia. Vedanta was the holding company for a number of mining companies including KCM. The claimants argued that Vedanta had exercised sufficient control over KCM's mining operation such that it could be directly liable for the damage caused by harmful effluence from the mine.

At para 84 of the Court of Appeal's judgment, Simon LJ set out several key evidential factors relied upon by the claimants which were said to show sufficient intervention by Vedanta in KCM's mining operation. These included:

- a report by Vedanta stressing the oversight Vedanta exercises over all of its subsidiaries and the existence of a 'governance framework'
- a management and shareholders agreement between Vedanta and *inter alia* employee training services, administrative and financial support services and strategic planning, business and corporate strategy, and planning including product development and management
- provision of detailed and specific training on health and safety management and environmental incidents across Vedanta's subsidiary companies;
- financial support given by Vedanta to KCM

- public statements by Vedanta regarding its commitment to address environmental risks and shortcomings in KCM's mining infrastructure.

The judgment of the Supreme Court in *Vedanta* was delivered by Lord Briggs. There are three particular aspects of his judgment of particular interest and importance. The first of these relates to an argument made by the defendants that the duty of care alleged by the claimants, owed directly by Vedanta to those affected by KCM's mining operation, was a novel duty of care which therefore required particularly careful consideration. Briggs JSC held that this argument failed in limine, saying (para 60):

> *'… this was not a case of the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care, and it therefore required no added level of rigorous analysis beyond that appropriate to any summary judgment application in a relatively complex case.'*

The defendants had argued that the facts could be distinguished from *Chandler* in a number of ways and that the claimants posited the existence of a fundamentally different kind of duty of care, but this argument was summarily rejected by Briggs JSC. His judgment must put to bed any argument that a direct duty of care, owed by the parent company to those affected by the operations of its subsidiary, is in itself novel or controversial.

Secondly, Briggs JSC made some useful remarks with respect to the guidance and, in particular, the four indicia in *Chandler*. In each of the three major parent company liability cases referred to above the claimants attempted to align their case with the guidance in *Chandler* (see, for example, paras 37 and 136 of *Okpabi*, para 31 of the High Court judgment in *Unilever*, and paras 32-33 of the High Court judgment in *Vedanta*). However, *Chandler* was a very particular case on its facts, arising as it did from an omission to advise where the parent company had failed to disseminate crucial safety information to its subsidiary. As such, the indicia in *Chandler* may not have sat easily with the facts in *Vedanta*. Briggs JSC noted that (para 56):

> *'…the Chandler indicia are no more than particular examples of circumstances in which a duty of care may affect a parent. They were so described by Arden LJ when setting them out in the Chandler case. Although this if anything imposed an unnecessary straightjacket, both upon the claimants and the judge…'*

Briggs JSC also says further on in the judgment that the trial judge may have departed from the ideal by 'imposing a straitjacket derived from the *Chandler* case which, if anything, increased rather than reduced the claimants' burden in demonstrating a triable issue' (para 60).

When the only clear guidance on parent company liability was provided by *Chandler*, claimants may have felt the need to comply with the four indicia even in circumstances where the test was not entirely appropriate. There was also a danger that courts could take the *Chandler* indicia as necessary elements of parent company liability. Although that mistake was not made by the Court of Appeal in any of the three main cases referred to above, it does seem to have been the approach of the District Court of the Hague, applying English law, in *Akpan v Royal Dutch Shell* [2013]; see paras 4.31-4.32 in particular.

Although less specific than the indicia in *Chandler*, Sales LJ indicated two categories of cases where parent company liability may exist in his judgment in *AAA v Unilever*. He refers to cases (para 37):

i. where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of… the subsidiary's own management; or

ii. where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

Briggs JSC addresses these two categories directly, saying that (para 51):

> *'I would be reluctant to seek to shoehorn all cases of the parent's liability into specific categories of that kind, helpful though they will no doubt often be for the purposes of analysis. There is no limit to the models of management and control which may be put in place within a multinational group of companies.'*

The message of Briggs JSC's judgment in this respect is clear: there is no specific set of factors that must exist for there to be parent company liability, nor are there any set categories into which such a case must fall.

Briggs JSC's rejection of specific categories of parent company liability is complemented by several indications regarding circumstances which could give rise to parent company liability (the third matter of particular interest in his judgment). There are, at least, three such situations referred to in Briggs JSC's judgment. The first of these relates to the imposition of group-wide policies: at para 52 he explains that the defendants' counsel had sought to persuade him that:

> *'… a parent could never incur a duty of care in respect of the activities of a subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them.'*

In the same paragraph, however, he explains that there is no such limiting principle and that group guidelines may be shown to contain systemic errors which cause harm to third parties. He notes that the imposition of an unsafe system of work in *Chandler* gave rise to a duty of care and that the same may be true of group-wide policies as well as requirements directed at a single subsidiary.

The second indication given by Briggs JSC is that even where group-wide policies do not themselves give rise to a duty of care, the same result may arise (para 53):

> *'… if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries.'*

What this suggests is that a parent company may not only be directly liable for harm caused as a result of flawed policies or systems it has designed, but also by a failure properly to implement and enforce policies or systems it has designed even when they are not flawed.

Third, in the same paragraph Briggs JSC states that the parent may incur the relevant liability if (ibid):

> *'in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so.'*

The three potential factors referred to by Briggs JSC are each specifically relevant to *Vedanta*, however, his statements are not explicitly limited to the facts in that case but are expressed in the abstract such that his comments could also apply to other cases with similar facts. As such, these comments provide valuable guidance as to how the courts may approach the issue of proximity in relation to parent company liability in the future.

Briggs JSC's comments in relation to the imposition of group-wide policies are particularly interesting in the light of *Okpabi*. At para 89 Simon LJ wrote that:

> *'The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary…such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.'*

This is certainly in tension with Briggs JSC's indication at para 52 of *Vedanta* that systemically flawed group-wide policies may give rise to parent company liability. Similarly, Sir Geoffrey Vos stated that (para 205):

> *'The promulgation of group standards is not, in my view, enough to prove the 'imposition' of mandatory design and engineering practices. There was no real evidence to show that these practices were imposed even if they were described as mandatory. There would have needed to be evidence that RDS took upon itself the enforcement of the standards, which it plainly did not.'*

Briggs JSC, however, refers to the implementation of policies and the enforcement of those policies separately (at paras 52 and 53 respectively) and implies that the policies may of themselves give rise to a duty of care when they are systemically flawed.

Conclusion

Following Briggs JSC's judgment in *Vedanta,* there can be no doubt that parent company liability has been recognised and accepted by the courts of England and Wales as an instance of common law negligence and not some new species of liability.

The Supreme Court has also rejected the suggestion that parent company liability must fall into one of several specific categories, both refusing to 'shoehorn' all cases of parent company liability into the categories suggested by Sales LJ in *Unilever,* or to restrict such claims to the 'straitjacket' of the *Chandler* indicia.

Finally, the three situations Briggs JSC indicated may suffice for the existence of parent company liability can be added to the guidance in *Chandler* and *Unilever*, hopefully providing adequate clarity for claimants seeking to bring similar claims in the future.

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