QUEEN MARY UNIVERSITY OF LONDON

Corporate Liability Towards Tort Victims in the Personal Injury Context

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Statement of Originality

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Abstract

This thesis examines approaches to establishing liability in corporate groups. It considers the problem that arises when an insolvent subsidiary's tort creditors suffer personal injury, and try to pursue recourse against other group companies – especially the parent company. Courts have tried to provide answers regarding the parent company's liability for the torts of their subsidiaries, but have had limited success. The thesis reveals difficulty in extending liability to the parent company by way of insolvency law provisions, and by piercing the corporate veil. It recounts the hesitation of the courts in broadening their perspective beyond individual companies, so as to take the group itself as the responsible entity. The thesis points, furthermore, to shortcomings in proposals for a new rule of unlimited pro rata liability.

Motivated by the inadequacy of current solutions to this pressing group problem, the thesis explores alternative tort law remedies under an approach suggested by the Supreme Court in the leading cases of *VTB Capital Plc v Nutritek International Corp and others* and *Prest v Petrodel Resources Ltd*. Chapter III discusses the role of tort of negligence in establishing the parent company's liability. The work analyses case law decisions on how to widen the application of negligence in the corporate group context, and compares UK law with relevant United States' and Australian case law. Since this group problem involves multiple legal entities, Chapters IV and V evaluate the possibility of using the doctrine of joint tortfeasance and/or the theory of vicarious liability in establishing the parent company's liability for its subsidiary company's torts. These two doctrines' extensions in corporate tort cases are seldom discussed in the literature. To conclude, tort law solutions, especially the doctrines of tort of negligence and joint tortfeasance based on participations are recommended to be further developed for corporate tort problems.

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Table of Abbreviations

ATCA	US Alien Tort Claims Act
CERCLA	Comprehensive Environment Response, Compensation and Liability Act of 1980
Cork Report	Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558
Co	Company
Corp	Corporation
FCO	Foreign and Commonwealth Office
HRA 1988	Human Rights Act 1988
IA 1986	Insolvency Act 1986
IP	Intellectual Property
Inc	Incorporation
Ltd	Limited Liability Company
LLC	Limited Liability Company
PLC	Public Limited Company
RICO	Racketeer Influenced and Corrupt Organizations Act 1962
UK	United Kingdom
US	United States

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Chapter 1 Introduction

Business operation in a group structure is generally widespread among corporations. With the development of society and economies, a range of issues have emerged among corporate groups, in a way that, traditional company laws are no longer considered adequate to solve the more contemporary problems.[1] In this regard, one problem that has attracted increased academic debates is that of a tort victim with personal injury claims against one group member who now seeks out other elements of the group to satisfy his claim. Courts have attempted to establishing the parent company's liability for the debts of its subsidiaries, but it has always been difficult for them to broaden their focus beyond the individual companies and take the whole group as a single entity.[2] Proposals in favour of corporate tort creditors in this context and for creating the parent company's liability have been made for a long time. Some legal scholars suggested modifications of the limited liability principle.[3] Others called for the regime of unlimited liability for corporate torts.[4] However, none of these attracted widespread support.

In this context, the main research question of my thesis is what the best solution is to create liability in a corporate group, in circumstances where an insolvent or impecunious subsidiary's tort creditors suffer personal injury and try to pursue recourse against other group members, especially the parent company. To answer the question, both the traditional approach based on company law (the doctrine of piercing the corporate veil), and the potential development of tort law approaches to establishing the parent company's liability (the theory of tort

[1] Phillip I Blumberg, 'Transformation of Modern Corporation Law: The Law of Corporate Groups' (2004) 37 Conn L Rev 605, 605.
[2] Michael Gillooly, *The Law Relating to Corporate Groups* (1st edn, The Federation Press 1993) xix.
[3] Ali Imanalin, 'Rethinking Limited Liability' (2011) 7 Cambridge Student L Rev 89.
[4] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 (7) Yale Law Journal 1879.

of negligence, the doctrine of joint tortfeasance, and the theory of vicarious liability in tort) will be discussed.

For the purpose of introducing the background information, theoretical framework, research questions, and methodology, the following topics will be discussed:

(1) The scope of the work.

(2) The rationales for the work.

(3) The development of the work.

1.1 The scope of the work (Introduction to the central problem)

This section will introduce the central problem; it explains what kind of issues will be looked at, why they deserve attention, and demonstrates the purpose of looking at asbestos-related claims against the parent company as a defendant.

Corporate group activities have triggered severe issues relevant to corporate tort creditors. In the meantime, problems of intra-group liability towards this kind of creditors have been raised. Corporate tort creditors face particular difficulties as a result of the use of the corporate structure and the strict application of principles of separate legal personality and limited liability of individual members based on corporate law.[5]

[5] Gillooly (n 2) 91.

The question whether a parent company is liable to the subsidiary's tort creditors arises in the scenario that, manufacturing businesses involving the production of hazardous substances or chemical materials taken by the subsidiaries of a corporate group cause damages to consumers, employees, and even outside parties. Examples include the manufacture and processing of asbestos, mercury compounds, and the manufacture and distribution of defective pharmaceuticals.

The sufferers include the wrongdoing subsidiaries' employees who have no contractual relationship with parent companies. Other affected parties may include residents living around the industries where such toxic substances are produced. The main problem arises when the subsidiary company that undertakes the business is responsible for the harm suffered by tort creditors but is unable to pay compensation duly awarded; therefore, tort victims seek relief from other possible defendants in the corporate group. It is the problem of the principal defendant's impecuniosity that explains the attempts of injury sufferers to claim against other rich elements of the group, and explains the development of common law, which intends to impose responsibility for torts on a wider range of persons.[6] So this thesis focuses on the personal injury cases relevant to corporate group's intra-liability, in particular, the establishment of the parent company's tort liability.

In the United Kingdom, personal injury claims against corporate groups are often brought for damages caused by unsafe workplaces, and environmental pollution. Asbestos exposure is widely acknowledged as one of the most significant causes of occupational-related deaths.[7] Employees working for asbestos-related industries, get more chances to contract asbestosis, lung

[6] ibid.
[7] S Hutchings, J Jones, and J Hodgson, 'Asbestos-related Disease' in The Office for National Statistics, *Occupational Health Decennial Supplement 1979-90 (Series DS)* (The Office for National Statistics 1995) 127.

cancer, or other diseases as a result of asbestos exposure.[8] It has been postulated that asbestos industry workers have a roughly 50-50 chance of contracting related diseases in their later life.[9] The asbestos claims against corporate groups illustrate the common cause of action of corporate tort cases, the courts' attitudes, and the difficulties faced by tort creditors in pursuing satisfactory compensation.

In the United Kingdom, asbestos-related tort litigations against corporate groups can be divided into three categories: (1) claims brought by employees who take part in asbestos manufacture; (2) claims brought by those who have handled the asbestos products, such as employees working for construction, shipbuilding, or unloading asbestos; (3) claims brought by third parties, such as residents living in the areas where such products are manufactured who are affected by the distribution.[10]

Many corporate tort cases, including the asbestos claims, concern multinational activities operating through subsidiaries in developing countries. It is because the safety of the workplace might not be subject to close regulation by local authorities.[11] Parent companies have transferred hazardous work from its original place such as the UK to their subsidiaries in developing countries like South Africa, in order to evade their responsibilities. For instance, in the case of *Sithole and others v Thor Chemical Holdings Ltd*, an English company Thor Chemical Holdings Ltd transferred its mercury compounds manufacturing business to South Africa, since local authorities in the UK were against this environmental harmful business and worried about its health implications.[12]

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[8] Nick Wikeley, *Compensation for Industrial Disease* (1st edn, Dartmouth Publishing 1993) 100.

[9] E R A Merewether and C W Price, *Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry* (1st edition, HMSO 1930) 10.

[10] Nick Wikeley, 'Turner& Newall: Early Organizational Responses to Litigation Risk' (1997) 24 Journal of Law and Society 252, 253.

[11] Jennifer A Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (1st edn, Cambridge University Press 2006) 56.

[12] *Sithole and others v Thor Chemical Holdings Ltd* [1999] EWCA Civ J0203-5, [1999] All ER (D) 102.

Broadly speaking, multinational claims concern two issues: first, the problem of jurisdiction; and second, the substantive rules for establishing liability. In this thesis, the problem of jurisdiction will not be discussed in detail, since at present, local courts are more willing to accept multinational corporation cases, and the focus of this thesis is on the use of tort law principles to ascertain liability in corporate groups.

Establishing legal liability in other group elements beyond the wrongdoing subsidiary in the multinational corporate tort cases is by no means easy. What is worse is the absence of literature and case law.[13] Claimants prefer to bring actions against the parent company or other solvent members in the group. It is necessary to provide explanations for this.

Despite the fact that parent companies usually have more assets to satisfy the relevant claimants, another key point is that actions against a parent company have a great potential to get access to the courts of the parent company's home states such as the United Kingdom or the United States, so that the claimants can enjoy certain procedural advantages.[14] Such common law countries as the United Kingdom, Australia and the United States are able to exercise civil jurisdiction over foreign subsidiaries with their actions, but this is not well accepted in civil law countries.[15] In addition, in common law countries such as the US, claimants are not liable to pay the costs of opponents even if their claims are unsuccessful. This encourages the tort claimants to seek redress based on arguments that are novel and risky. Even more, courts in common law countries have the chance to be creative in dealing with legal problems with regard to multinational corporations, which contributes to the success, especially for claimants bringing novel arguments. Against this, the

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[13] Zerk (n 11) 200.
[14] ibid 201; See also Sarah Joseph, Corporations and *Transnational Human Rights Litigation,* (1st edn, Hart Publishing 2004) 16-17; *Connelly v RTZ Corp plc* [1997] UKHL 30, [1997] 3 WLR 373.
[15] Sarah Joseph, *Corporations and Transnational Human Rights Litigation,* (1st edn, Hart Publishing 2004) 15.

procedural disadvantages of bringing actions in some subsidiary companies' local courts rest on the difficulties in initiating litigations in the relevant cases. For instance, in the case of *Connelly v RTZ Corporation plc and others* the House of Lords observed that it was appropriate to allow the proceedings in the UK, since the legal aid in Namibia was not available to Mr Connelly in his claim.[16] This means that Namibia is not an appropriate forum to litigate the claim and that its courts are incapable of looking after the interest of all parties. In the case of *Busisiwe Ngcobo and Others v Thor Chemicals Ltd*, the claimants filed an application in the UK after they gained unsatisfactory compensation through criminal proceedings in the subsidiary's local court in Natal in South Africa.[17]

Apart from this, the subsidiaries might have limited ability to provide sufficient recovery and might become insolvent individually or all together. Thus, in most asbestos-related claims, the claimants who worked for the South African subsidiaries in mining asbestos chose to bring actions against the parent company since these subsidiary companies were no longer in existence to be sued.[18] The only glimmer of hope in such cases is to seek recourse from the parent company. Even in the circumstance that the subsidiaries are available to be sued, it is almost always the case that the subsidiary companies' native laws and practices are non-supportive in respect of damages recovery for mass torts.[19] Another possible option is to bring actions against other elements of the group, but this has rarely been tried in common law jurisdictions since it may be a radical departure from existing rules.[20]

Consequently, among the limited examples in case law, most are claims

16 *Connelly v RTZ Corporation plc and others* [1997] UKHL 30, [1997] 3 WLR 373 [10]-[12].
17 *Busisiwe Ngcobo and Others v Thor Chemicals Ltd* [1995] TLR 10/11/95 (CA).
18 *Lubbe v Cape plc* [2000] UKHL 41, [2000] 1 WLR 1545.
19 *Connelly* (n 16); *Lubbe* (n 18).
20 Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities, An Interdisciplinary and Comparative Examination*, (1st edn, Edward Elgar Publishing Limited 2008) 77.

pursuing the parent company's liability. Bringing actions against parent companies seems the most reasonable choice for obtaining satisfactory compensation.

To conclude, this thesis frequently makes reference to the asbestos-related disease cases, in which claimants usually bring actions against the parent company in a corporate group, mostly, in the multinational case.

1.2 The rationales for the work

This section presents the rationales for examining the concept of corporate liability in tort. The position of tort creditors will be discussed. The author will explore the difficulties this group of creditors always meet when they are injured by an insolvent subsidiary and intend to pursue recovery from other solvent group elements. This section concentrates on the difficulties of claiming against the parent company, which are bound up with the strict application of the principles of limited liability and separate legal personality. Literature relevant to the corporate group's tort liabilities in English case law will be examined. The limited guidance on this issue provided by English courts further motivates us to explore efficient solutions.

1.2.1 The disadvantageous position of tort creditors

This section explains why tort creditors are in a weak position in debt negotiation with corporate groups, and how their disadvantageous position is magnified in the group structure.

There are many good business reasons why a corporate group is formed and expand its activities. It may be economically efficient or administratively convenient to distribute work in a group of companies.[21] It may be financially beneficial to allocate assets by attracting outside investment without forfeiting overall control, and to distribute liabilities among subsidiaries. In general, the parent company organises group affairs for its benefit and not in the interests of tort creditors.[22] This could be showed in a variety of ways. For instance, the parent company could intervene in decisions relating to the subsidiary's board, in order to serve the best interest of the former; or may allocate business opportunities to the subsidiaries according to the need of the parent or the need of maximising the benefit of the whole group.[23] Furthermore, a parent company could have the choice to refuse to rescue an insolvent subsidiary, even if sufficient funds are available.[24] Tort creditors of subsidiary companies are particularly in a weak position. As Templeman J reasoned in *Re Southard Ltd*:

> A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one on the subsidiary companies, to change the metaphor, turns out to be the runt of litter and declines into insolvency to the dismay of the creditors, the parent company and other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.[25]

In this context, corporate tort creditors are more vulnerable, due to their

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[21] Brenda Hannigan, *Company Law* (4th edn, OUP 2015) 19.
[22] Paul Lyndon Davies, *Gower and Davies' Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 244.
[23] ibid.
[24] ibid.
[25] *Re Southard Ltd* [1979] 3 All ER 556, 565.

involuntary character. Andrew Muscat draws a distinction between the voluntary and involuntary creditor. He takes it that the distinction lies in whether or not the creditor has practical opportunities to assess the risk of dealing with a corporate debtor.[26] Therefore, tort creditors, belonging to the group of involuntary creditors, are in a very weak position in dealing with injuring companies.

Tort creditors will never be able to achieve parity with commercial creditors, and have few approaches available to protect their claims.[27] In more specific terms:

(a) It is difficult to find close relationship between the tort creditors of subsidiary companies and the parent company as a defendant. The contractual creditors might enjoy long-term interests because the parent company agrees to meet the obligations of its subsidiary. However, no such interests exist in respect to tort creditors.[28]

(b) Tort creditors typically have low awareness of injury risks. They are less able to predict the likelihood of injury inflicted upon them, and take appropriate steps such as obtaining insurance or other measures.[29] Tort victims do not possess the knowledge to secure their interests before the harm, such as assessing the solvency of the subsidiary. The potential tort victim cannot identify himself as a claimant in need of security before a tortfeasor breaches the duty; nor can the victim identify the potential tortfeasor.[30]

(c) Tort creditors normally have fewer opportunities of avoiding the risk of harm.

[26] Andrew Muscat, *The liability of the holding company for the debts of its insolvent subsidiaries* (1st edn Dartmouth Publishing company 1996) 183.
[27] Stephen Allen Edwards, 'Tort Claims under the Present and Proposed Bankruptcy Acts' (1978) 11 University of Michigan Journal of Law 417, 435.
[28] Gillooly (n 2) 95.
[29] ibid 94.
[30] ibid 93.

Normally, contractual creditors use contract strategies to extend their reach to group assets to protect their profit, which ensure that they could ignore the principle of separate legal personality. A secured creditor can obtain a security agreement when the obligation to pay arises. This mechanism secures the performance of the obligation to pay a debt. Nevertheless, in the absence of this kind of device, tort victims are in a very weak position in seeking compensation.[31] Even if they could anticipate the harm inflicted, they may have little or no power to influence the relevant activities.[32] This tends to manifest in situations where no prior legal relationship exists between the tortfeasor and the potential tort victim, and in situations where a legal relationship actually exists. In the first circumstance, a tort creditor cannot choose by whom he will be injured or whether he will be injured at all. A common example is that of innocent residents living around the area affected by asbestos exposure. In the second circumstance, a tort creditor might foresee the harm but he has no ability to protect himself. For instance, an employee of an insolvent subsidiary company gets injured in the course of employment and wants to sue the parent company for better compensation but he has no contractual relationship with the parent company. The employee sometimes cannot protect himself because he cannot decide the business operations or any policies created for employees' protections.[33]

1.2.2 The role of principles of limited liability and separate legal personality in corporate tort problems

[31] Abhinav Ashwin, 'Tortious Liability of Company in Winding up: An Analysis' (2005) 26 Company Lawyer 163, 170.
[32] Gillooly (n 2) 94.
[33] Rogers AJA pointed out in *Briggs v James Hardie* (1989) 7 ACLC 841, 864.

Affirmed in the landmark case *Salomon v Salomon & Co Ltd*,[34] separate legal personality is regarded as "the most pervading of the fundamental principles of company law",[35] based on which a company has independent character different from its shareholders even in a one-man company. Since this remarkable decision regarding a one-man company was decided, the use of the separate legal personality principle has gradually evolved in the group context. In a group of companies, each registered company ordinarily is formed under the Companies Act 2006, and acquires its separate legal personality upon incorporation.[36] In a corporate group, if every member exists via legal incorporation, having its own management capability, owning its own property and doing its own business, this company can be treated as an independent legal person, having independent rights and obligations. Under the rule of limited liability, moreover, it is not liable for the debts of others.[37] Only in some special circumstances will separate legal personality be disregarded, resulting in the parent company bearing further obligations.[38] English courts have consistently applied the *Salomon* principle to group entities.

Another prominent company law principle, limited liability, is mainly enshrined in the Insolvency Act 1986 (s74), and the United Kingdom (UK) Companies Acts. UK Companies Act 2006 regulates the definitions of limited and unlimited companies in its first chapter.[39] It is provided in the Section 3 of Companies Act 2006 that:

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[34] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.
[35] Len Sealy, *Sealy & Worthington's Cases and Materials in Company Law* (10th edn, OUP Oxford 2013) 33.
[36] Hannigan (n 21) 41, 54; Companies Act 2006, s 7(1); s 16(2).
[37] Davies (n 22) 37.
[38] Derek French, Stephen Mayson and Christopher Ryan, *Mayson, French & Ryan on Company Law 2013-2014*, (30th edn, OUP 2013) 127.
[39] Companies Act 2006, s 3-6.

> A company is a “limited company” if the liability of its members is limited by its constitution. It may be limited by shares or limited by guarantee. If their liability is limited to the amount, if any, unpaid on the shares held by them, the company is limited by shares.[40]

The basic idea of the limited liability principle is that a company’s debts belong to the company, so that shareholders, or directors are not directly legally liable.[41] In a company limited by shares, no further money would be paid by the shareholders if the shares they have taken are fully paid.[42] The directors, managers or other workers are not liable for a company’s debts, except in some specific circumstances such as wrongful or fraudulent trading.[43] Limitations on liability turn out to be pervasive. To some extent, limited liability is a starting point in corporate law, if not, firms would create it by contract, which is not hard to do.[44]

According to the principles of separate legal personality and limited liability, in corporate groups, where a tort is committed by a subsidiary company, it is the subsidiary itself, not its shareholders or other group members who should be liable. Therefore, torts of one subsidiary will not usually be attributed to another company in the group. A parent company can be considered as a member of its subsidiary company and has its liability limited to the amount invested in the subsidiary. The creditor of one subsidiary, in principle, has no remedy against the parent company, or other members within the group. But this will arise in some specific situations where a direct liability is imposed on the parent company. Examples include situations where a parent company issues a

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[40] Companies Act 2006, s 3.
[41] Davies (n 22) 207.
[42] ibid 40.
[43] Robert Austin, Ford Harold and Ian Ramsay, ‘Company Directors: Principles of Law and Corporate Governance’ (2005) LexisNexis Butterworths Australia <http://ssrn.com/abstract=922641>accessed 10 January 2014.
[44] Frank H Easterbrook and Daniel R Fischel, ‘Limited Liability and the Corporation’ (1985) 52 U Chi L Rev 89, 93.

guarantee, where a parent company is liable for negligence, and where a parent company commits a tort jointly with the wrongdoing subsidiary company.[45] This thesis makes efforts to explore these "specific circumstances", and discusses approaches to the parent company's liability for its subsidiary company's torts, based on the most relevant common law principles.

Any attempts to establishing intra-group liability involve confrontation with the two fundamental principles of company law (limited liability and separate legal personality). Thus, it is necessary to discuss this issue here. As alleged by Andrew Muscat, it is inappropriate to conduct a question of intra-corporate liability without considering the interactions between the principle of limited liability and the remedy.[46]

(1) The objectives of the two company law principles are different from that of tort law

The principle of separate legal personality can be justified by its economic contributions and social functions.[47] Together with the principle of limited liability, separate legal personality serves interests of both society and corporations, by facilitating investment from investor shareholders, and therefore capital formation for society.[48] The principle of limited liability could be justified in various ways. Some scholars believe that limited liability is a privilege conferred by the state as a result of the act of incorporating the business.[49] When the contractual nature of corporate law is considered, limited liability can be counted as a contract guideline between shareholders

45 Muscat (n 26) 31.
46 ibid 34.
47 David Goddard, 'Corporate Personality-Limited Recourse and Its Limits' in Ross Grantham and Charles Rickett (eds), *Corporate personality in the twentieth century* (1st edn, Hart Publishing, 1998) 11.
48 Kurt A Strasser and Phillip Blumberg, 'Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy' (2011) 1(1) Accounting, Economics, and Law Art 4, 6.
49 Lewis D Solomon, Kathleen J Collins, 'Humanistic Economics: A New Model for the Corporate Social Responsibility Debate' (1987) 12 J Corp L 331, 338.

and creditors for maximising wealth.[50] Corporations could further obtain benefits of limited liability at a lower cost.[51] From the perspective of market contributions, Halpern, Trebilcock, and Turnbull, have provided a set of justifications for limited liability.[52] They argue that the principle of limited liability is essential for an organised securities market.[53] Limited liability makes an organised liquid market possible when investors attach different values to shares depending on their wealth.[54] In addition, there are some other popular rationales supporting this principle. The availability of limited liability facilitates both the development of the economy and the corporation itself. In respect of the economy, it is believed that contrary to investments under the regime of unlimited liability, limited liability reduces risks and offers greater expected values by facilitating investments of the middle and working classes.[55] As for the company itself, "limited liability makes diversification and passivity a more rational strategy and so potentially reduces the cost of operating the corporation".[56] For example, limited liability reduces the costs of monitoring agents and other shareholders.[57] Managers are motivated and act efficiently since the regime of limited liability promotes a free transfer of shares.[58] Apparently, all the law attempts to do is to provide maximum freedom to contract and presumably to minimise the transaction costs incurred by parties in achieving mutually desired allocations of risk.[59] No matter how those justifications are perceived, principle of limited liability has been firmly rooted in law and in the economic world.

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50 Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014) 160; Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1985) 11 J Corp L 573, 578.
51 Frank H Easterbrook, *The Economic Structure of Corporate Law* (1st edn, Harvard University Press 1996) 41.
52 Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30(2) The University of Toronto Law Journal 117.
53 ibid 129-131.
54 ibid 130.
55 Larry E Ribstein, 'Limited Liability and Theories of the Corporation' (1991) 50 Md L Rev 80, 128.
56 F Easterbrook and D Fischel, 'Limited Liability and the Corporation' (1985) 52 University of Chicago Law Review 89, 94.
57 Frank H. Easterbrook, *The Economic Structure of Corporate Law* (1st edn, Harvard University Press, 1996) 41.
58 David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 26.
59 Halpern, Trebilcock and Turnbull (n 54) 131.

However, these two bedrock principles in corporate law (separate legal personality and limited liability) imperceptibly become impediments to justice in ways not originally intended.

The two principles undermine the fundamental goals of tort law. The aim of tort law is to provide satisfactory compensation for loss and injury and to deter and punish the wrongdoer. However, tort claimants might only receive a proportion of the compensation owed them because of the doctrine of limited liability.[60] In the tort claims against a company, especially the mass tort cases, a company normally cannot meet the tort liability fully and when insolvency is initiated, tort creditors always get limited compensation, because of the rule of priority under insolvency, and because shareholders' assets are protected by limited liability. When a company limited by share is going into insolvency, the value of the company's assets is less than its liabilities. This means that an insolvent company cannot meet all the debts. In this situation, the company's assets are allocated in the order of priority. A tort creditor, as an unsecured creditor is at a low rank to be paid, and cannot claim against the company's shareholders because they are protected by limited liability.

Tort law intends to allocate liability to parties who are most responsible for injuries caused. By contrast, the company law principle of limited liability facilitates the structuring of relations within groups and shields group assets, and provide protections for shareholders with twin-layer limited liability.[61] Both the personal assets of shareholders and group assets are immune from other members' business failure.[62] The use of group structure further limits liabilities within a group.[63] The two principles prevent both contractual and tortious

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60 Muscat (n 26)180.
61 Christian Witting, 'Liability for Corporate Wrongs' (2009) 28 U Queensland LJ 113,113.
62 Alan Dignam*, Hicks& Goo's Cases & Materials on company law* (7th edn, OUP 2011) 486.
63 Ali Imanalin, 'Rethinking Limited Liability' (2011) 7 Cambridge Student L Rev 89, 89.

claims made against one corporate member from affecting other members and assets elsewhere in the group.[64] Subsequently, tort creditors' weak position is worsened. Company law is deficient in this area, in addressing the unfair position of tort creditors of corporate groups.

(2) Limited liability transfers the risk of business failure from shareholders and the group itself to outside corporate creditors

In relevant commercial activities, corporate groups profit from risk aversion based upon separate legal personality and limited liability. Incorporation provides a chance for shareholders to avoid any serious risks to a large extent, including avoidance of unlimited liability.[65] Incorporation of group subsidiaries could be regarded as a form of insurance, providing a layer of immunity to shareholders in the parent company from exposure to personal liability.[66] The owners of business pay for this insurance when they pay for credit. The experienced businessman can rely on trade protection associations, taking security, obtaining guarantees (etc), but the "little person", such as involuntary creditors who deserve particular protections, are often unconscious of risks.[67]

It is argued that the value of a corporation could arise if outside creditors bear a desirable part of the risk of business failure.[68] Creditors are regarded as risk bearers because they are less risk averse compared to shareholders.[69] However, outside creditors are returned less on their investments because the shareholders take the gains in the first place when the company runs well.[70] Problems of involuntary creditors in the consequence of limited liability need

[64] ibid 89.
[65] Otto Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) The Modern Law Review 7(1-2) 54, 54.
[66] Goddard (n 47) 11.
[67] Davies (n 22) 38-39.
[68] Hansmann and Kraakman (n 4) 1902.
[69] Easterbrook and Fischel (n 56) 91.
[70] ibid.

more attention. The position of tort creditors is the most disadvantageous since limited liability shifts the risk of business failure to them by denying them a remedy.[71] When a defendant subsidiary has sufficient assets to meet its tort claims, we cannot say that limited liability has an obstructive function in tort creditors pursuing reasonable compensations. However, limited liability indeed transfers the losses upon tort victims when the debts exceed the company's payment capacity.[72]

(3) The two company law principles and the doctrine of "piercing the corporate veil" — the response to abuse of privileges

Sometimes shareholders take advantage of the principles of limited liability and separate legal personality and conduct illegally. For instance, a subsidiary company is formed to evade certain statutory prohibitions, or to evade a contractual obligation.[73] Although a company is legally regarded as an independent entity, it does not have all the features of a natural person and cannot always act like a human being.[74] Courts permit the liabilities of a company to be attributed to shareholders (usually controlling shareholders) in certain circumstances when limited liability and separate legal personality are abused. This is the doctrine of piercing the corporate veil. The *Salomon* case explains this doctrine by indicating that: the principle of separate legal entity is only recognised when there is "no fraud and no agency and if the company was a real one and not a fiction or myth."[75] Similarly, in *Littlewoods Mail Order Stores Ltd v IRC*, Lord Justice Denning MR noted that:

71 Muscat (n 26) 181.
72 The Yale Journal Company, 'Should Shareholders be Personally Liable for the Torts of Their Corporation?' (1967) 76 Yale LJ 1190,1195.
73 ibid.
74 George F Canfield, 'Scope and Limits of Corporate Entity Theory' (1917) 17(2) Columbia Law Review 128,131.
75 *Salomon* (n 34) 33.

> A corporation will be looked upon as a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons…incorporation does not fully cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind.[76]

It then follows the question whether the existing exception to the principles of separate legal personality and limited liability – the doctrine of piercing the corporate veil, is sufficient in dealing with corporate tort problems.

The strict obey to limited liability and separate legal personality makes the doctrine of veil piercing applied in a very limited way. The decision in *Salomon*, on the other side, has been described as “shocking” and “calamitous”, and has been criticised, for incorporation was there used to avoid liabilities and evade obligations.[77] However, the House of Lords held that the decision might incur the feel of unfairness,[78] but the unsecured creditors “had only themselves to blame, having had full notice that they were no longer dealing with an individual”.[79]

The case of *Salomon* concerned claims of unsecured creditors who intended to pursue compensation in the insolvency process of the company Salomon Ltd. A business man Salomon transferred his business to Salomon Ltd, and Mr Salomon was the company’s majority shareholder. Mr Salomon gave Salomon Ltd a loan, which is secured by a floating charge over the company’s assets. Mr Salmon sold all his debentures of the company to Edmund Broderip.

76 *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1214 (CA) 1254.
77 Kahn-Freund (n 65) 54.
78 *Salomon* (n 34) 51-54.
79 ibid 45, 53.

Salomon Ltd.'s business was soon failed and went to liquidation. Mr Broderip's right secured by the floating charge so that he was paid prior to the unsecured creditors who were then left nothing from the insolvency of the company. The liquidator claimed against Mr Salomon for that the company Salomon Ltd was just a sham and Mr Salomon should be responsible for the debts of the unsecured creditors. The House of Lords, on appeal, reversed the ruling of the Court of Appeal which declared that Salomon should be liable because of the trust relationship between he and his company (Lindley LJ held that the company was a trustee for Mr Salomon).[80] The House of Lords unanimously held that the company Salomon Ltd was duly incorporated in law and was an independent legal entity enjoying its own rights and liabilities. Subsequently, the principle of separate legal personality was firmly established and followed by latter cases.

The result of the decision has been regarded as an uncompromising precedent in subsequent cases. In the case of *Macaura v Northern Assurance Co*,[81] the court held that, only secured creditors enjoy insurance against company assets; unsecured creditors do not enjoy any such insurance.[82] It may be argued that the weak positon of unsecured creditors in the case of *Salomon* is not because of the inducement of limited liability and separate legal personality, but due to the priority rules in the insolvency procedure and security to the secured creditors given by floating charge. However, the following relevant case law reveals that English courts are reluctant to pierce the corporate veil – they only take this action in very limited circumstances. The high authority of the two bedrock principles of company law makes the courts extremely cautious when piercing the corporate veil, accordingly, posing considerable

80 *Salomon* v *A Salomon & Co Ltd* [1895] 2 Ch 323, 337–340
81 *Macaura* v *Northern Assurance Co Ltd* [1925] AC 619 (HL).
82 ibid 626.

difficulties for both tort claims and contract claims against company shareholders.

The efficiency of the doctrine of piercing the corporate veil in establishing corporate group's liability, and as an approach to rescue corporate tort creditors of an insolvent subsidiary, are mainly discussed in Chapter II.

1.2.3 The approaches to establishing tort liability of corporate groups are seldom discussed in the literature

For a long time, the position of tort claimants has been largely ignored in the debates on corporate liability. Also, the opportunities to establishing a parent company's liability in tort for its wrongdoing subsidiaries were absent. During the 19th century, tort claims against corporations obtained no judicial interest at all. There is a lack of reported cases favouring tort creditors in the early and mid-19th century.[83] It was not until the 1920s that the rising death toll in the United Kingdom, as a result of horrible effects of asbestos exposure to the employees of asbestos textile factories, got public attention.[84] Then, in 1950, *Kelly v Turner & Newall Ltd*[85] became the first well-known English asbestosis claim against the parent company beyond the insolvent subsidiary.

The case of *Adams v Cape Industries plc,*[86] in 1990, pushed the debate to a new prominence. The claimants aimed to disregard the corporate personality and impose liability on the parent company for the torts of its subsidiary

[83] Muscat (n 26) 178. Several Parliamentary reports are referenced here on page 178 of this book, like the Report of the Select Committee on Investments for the Savings of the Middle and Working Classes, (1850) BPP Vol, XIX no. 508; Report of the Select Committee on the Law of Partnership, (1851) BPP Vol XVII no 509; First Report, Royal Mercantile Law Commission, (1854) BPP Vol XXVII no 1791.
[84] W E Cooke, 'Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust' (1924) 2 Br Med J 147. The first case of death as a result of asbestos exposure was documented in medical literature in 1924, as indicated in this text.
[85] *Kelly v Turner & Newall Ltd* [1950] Manchester District Registry of the High Court, Letter K No 5685.
[86] *Adams v Cape Industries* [1990] Ch 433 (CA).

companies. Adams contracted asbestosis as a result of asbestos exposure, and then brought actions in the United States against the relevant subsidiary companies. Since the subsidiaries were not available to meet the judgement, Adams sought to enforce the action against the UK parent company Cape plc. Unfortunately, the English Court of Appeal failed to make the parent company liable to the tort creditors of its subsidiaries, based on the company law doctrine of piercing the corporate veil. Bare guidelines for applying the doctrine in corporate groups were set out in this case, but it was still challenging for tort creditors to attach liability to the parent company based on it. In the later similar personal injury claims made against the parent company of a group, like *Lubbe v Cape plc*,[87] the judge rejected the potential grounds for piercing the corporate veil. Instead, the case gave us another way to engage with the liability by introducing the use of tort law principles, particularly the tort of negligence. Most cases before *Chandler v Cape plc* (2013)[88] did not provide much valuable guidance, but highlighted the possibilities of doing so. The *Chandler* case eventually realized the imposition of a duty of care on the parent company and the Court of Appeal also provided a “four-part test” for future cases. This test was made particularly for determining a parent company’s negligence liability for the health and safety of employees of its subsidiaries; it however provided limited guidance for the courts. So, it is expected that further judicial explanations on the guidance for corporate tort liability can be given in the future by Supreme Court.

English case law contains extremely limited examples as regards the establishment of the parent company’s tort liability for the debts of its subsidiary companies. Approaches normally include disregarding the corporate veil (the principles of separate legal personality and limited), and establishing parent companies’ direct liability based on the tort of negligence.

87 *Lubbe* (n 18).
88 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111.

However, neither of them are mature.

Since corporate tort problems are in a close relationship with the externalities of the principle of limited liability. A group of academic attempts to reach liability is on the reform of the limited liability principle, but this trend of recommendations lack sufficient support of empirical research and evidence. In 1991, Henry Hansmann and Reinier Kraakman proposed a dominant reform called “pro rata unlimited liability” for corporate torts in their article “Toward Unlimited Shareholder Liability for Corporate Torts” on Yale Law Journal. However, this regime is highly controversial and after this, proposals of reform on the limited liability for corporate torts are rarely found.

Corporate tort problems, as introduced in the section 1.1, always concern corporate insolvency. However, the position of tort creditors is ignored in the debate of creditors’ protection in the insolvency process. Relevant insolvency law provisions, section 213 fraudulent trading and section 214 wrongful trading in the Insolvency Act 1986, are mainly made for voluntary creditors. Academic discussions are always made on the efficiency of these provisions for the profits of this group of creditors.

Apart from the absence of judicial examples and guidance, literatures involving recommendations on the approaches to corporate tort problems are very limited. Academic discussions on tort law remedies are particularly sporadic.

This thesis aims to assess the efficiency of the main approaches to corporate tort liability and make recommendations. The approaches based on tort law principles’ extension in the group context will be particularly examined, for the purpose of the maintenance of corporate law principles, and the realisation of finding efficient approaches to corporate tort problems.

1.3 The development of the work

The thesis will be developed broadly in the following order:

(1) In the whole, the main purpose of this thesis is to evaluate the current legal doctrines upon which a tort creditor may successfully claim against a parent company for the torts of the subsidiary. Most importantly, this thesis attempts to make a contribution to the use of tort law approaches in creating liability, especially the parent company's tort liability in corporate groups. This thesis aims to assess the main approaches to the problem, as to when liability could be imposed on a parent company for the debts of a wholly owned subsidiary, rather than to catalogue and discuss every possibility in an exhaustive way.

(2) Based on the introduction to the central problem in the first chapter, especially, the analysis of the impact of the principles of limited liability and separate legal personality on tort claims against corporate groups where the subsidiaries have engaged in tortious conduct, Chapter II will discuss the inroads into the principle of limited liability. Firstly, proposals of pro rata unlimited liability will be discussed based on relevant literatures. Secondly, the statutory provision in Section 214 of the Insolvency Act 1986 (on wrongful trading) will be examined, and its efficiency in dealing with group problems will be assessed. Thirdly, the common law doctrine of piercing the corporate veil as a ground of redress for corporate tort creditors will be assessed.

(3) The thesis is expected to contribute to the discussion of the best solutions

to the group problem in the case of tort victims suffering personal injury, as well as to indicate the use of tort remedies to establish liability in corporate groups. It appears that tort law may provide remedies for claimants when other mechanisms fail to do so. In this circumstance, the author will explore how the relevant tort remedies can be admitted or accepted in legal practice. So, in Chapter III, the author will consider how to establish the parent company's negligence liability, as regards the health and safety of employees of the subsidiary companies; and will assess the tort of negligence as an approach in a comparative perspective, by examining the case law of the United Kingdom, Australia and the United States.

(4) Following the discussion of the extension of tort of negligence in corporate tort cases, the next two chapters are expected to contribute to the literature on establishing corporate group's tort liability based on other tort law doctrines applicable to the group. Thus, Chapter IV will explore the possibility that the parent company or other group members are held jointly and severally liable for corporate tort victims based on the doctrine of joint tortfeasance; will discuss the problems of establishing the joint liability, and the efficiency of the approach. Chapter V will examine whether it is possible to extend the application of the theory of vicarious liability to corporate tort claims, and whether it can serve as an efficient approach to enforce group liability. These latter two theories' extensions in corporate tort problems are seldom discussed in the literature, and have not been applied in English case law.

The whole thesis argues that the traditional approaches are insufficient in establishing the parent company's liability for the debts of its subsidiary companies, especially in the context of personal injury. The proposal of pro rata unlimited liability lacks widespread academic support. There is no proper provision in the Insolvency Act to deal with corporate liability towards tort creditors in the context of insolvency. The common law doctrine of piercing the corporate veil is also argued to be narrow in creating liability beyond the separate legal personality of the company.

It is recommended in this thesis that efforts be made to further develop tort law solutions to some specific corporate group problems when the primary company law approaches are not well accepted and applied by UK courts. The theory of tort of negligence can be properly applied to establish group liability in circumstances where the doctrine of veil piercing fails to do so. However, it is argued that better explanations by the courts on its application to group situation are needed for more possibilities in the future. The doctrine of joint tortfeasance based on participations is particularly recommended as a new possible solution. It is argued in Chapter IV that this doctrine is made for creating liability involving multiple tortfeasors, which happens to be suitable in group situation. Furthermore, the author argues that the participation tests for joint tortfesance can be properly applied in the group context, which should be the most reasonable support for the doctrine's extension.

The theory of vicarious liability in tort is also recommended to be discussed for the development of the law relating to group problems. It is time to discuss the uncertain but pressing issue whether a legal person can be vicariously liable for the tort of another legal person. The author will try to argue that the theory of vicarious liability is not a proper solution to achieve a parent company's liability for the subsidiary's torts, and it might be possible but extremely difficult to establish vicarious liability for another legal person's torts.

The thesis tries to contribute to the discussion of proper solutions to corporate tort problems, and is arguably the first sustained study of the topics of joint liability and vicarious liability in corporate groups.

Chapter 2 Assessment of the unlimited liability regime, statutory protections, and the doctrine of piercing the corporate veil

2.1 Introduction

This chapter provides evaluations of company law in its approaches to creating parent companies' liability, beyond the veil of shareholder's limited liability and company's separate legal personality. The principle of limited liability prevents tort creditors from pursuing recourse on shareholders beyond the company. The proposal of unlimited liability regime is introduced to impose on shareholders a pro rata unlimited liability for corporate torts. In the first part of this chapter the author discusses whether the justifications for this reform of limited liability are reasonable and whether the enforcement of it is feasible. As regards statutory protections on creditors in corporate insolvency, section 214 of the Insolvency Act 1986 should be the most relevant provision which can be extended to create liability on shadow directors in the group situation. To evaluate its feasibility in solving corporate tort problems, the efficiency of the provision itself in creating director's liability, and its extension in a group context will be fully discussed. The last part of this chapter provides an assessment of the most important common law doctrine of piercing the corporate veil based on which a shareholder's liability can be made. The main arguments for piercing the corporate veil, and their extension in group cases are discussed first, after which limitations of the application of this doctrine by UK courts and the limitations of its extension in future group cases are considered.

In this chapter, the author argues that the above three solutions cannot properly solve the corporate tort problems at the present time.

2.2 Evaluation of the pro rata unlimited liability regime

The company law principles of separate legal personality and limited liability isolate the parent company from its wrongdoing subsidiary. It is generally held that the parent company as a shareholder has limited liability and is not liable for its subsidiary's debts. In this context, tort creditors want to rely on the integrated relationship between the subsidiary and parent company to persuade the courts to treat them as one legal person, and impose unlimited liability on the parent company as a shareholder. Suggestions and comments have been made by legal scholars for the reform of the company law principle of limited liability as a solution to the corporate tort problems in the insolvency context.[89] Among them, the most influential proposal is called "unlimited pro rata shareholder liability" for corporate torts introduced by Henry Hansmann, and Reinier Kraakman.[90] They propose that shareholders can be liable for the share of corporate tort debt proportional to their share of equity ownership.[91] In the case of contract claims, the two authors still support the application of limited liability.[92]

A change to the present limited liability regime can be justified for two reasons.

[89] Hansmann and Kraakman, (n 4) 1879. There are several articles questioning limited liability of corporations. For example, Phillip I Blumberg, *Law of Corporate Groups: Substantive Law* (1st edn, Little Brown& Co Law & Business 1987) 681-692. (suggesting abolition of limited liability among firms within "corporate groups"); Trebilcock Halpern & Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law', (1980) 30 U Toronto LJ 117, 148-49 (advocating unlimited liability for small, closely-held corporations in both tort and contract, and suggesting that directors of large, publicly-traded corporations be made personally liable to involuntary creditors).
[90] Hansmann and Kraakman, (n 4) 1879.
[91] ibid 1892-1894.
[92] ibid 1919-1920.

The first is about the undesirable effects of limited liability. As one important constituent of corporate law, it is argued that the principle of limited liability is considered to be laid down without sufficient evaluation and assessment.[93] It has consequently resulted in the institutionalization of corporate irresponsibility.[94] Commentators thus call for initiating the regime of unlimited liability at least in particular circumstances, where corporations are used to escape liability by sitting behind the veil of limited liability.[95] It is well accepted that the principle of limited liability, as discussed in chapter one, was originally made for protecting the interest of shareholders, not outside creditors.[96] It is claimed that corporations take advantage of shareholder's limited liability to evade corporate liability, such behaviour also contributes to the increasing number of tort claims.[97] Limited liability permits cost and risk externalization, which leads to overinvestment in hazardous industries. Many large publicly-traded corporations have converted into highly leveraged closely-held companies with the mergers and acquisitions movements. These companies lack net assets and are under high pressure to maximize cash flow, and therefore, have strong motivations to do business involving risky industries.[98] Corporations sometimes evade obligations and insulate assets by arranging hazardous activities in different subsidiaries. This happens mostly in the tobacco industry and the hazardous waste industry, as well as the asbestos industry. Shareholders may even choose to dissolve the company and transfer assets in case of tort liability attaching. In particular, Henry Hansmann and Reinier Kraakman, in their proposal, admit the distinction between the contractual and the tort creditors, therefore they believe limited liability should be retained for contractual creditors, and recommend applying pro rata

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93 Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) Cambridge Journal of Economics 837, 839.
94 ibid.
95 ibid.
96 Daniel R Kahan, 'Shareholder Liability for Corporate Torts: A Historical Perspective' (2008) 97(4) Georgetown Law Journal 1085, 1087.
97 Hansmann and Kraakman (n 4) 1879, 1881.
98 ibid.

unlimited shareholder liability to specific corporate tort cases.

In the second place, the unlimited liability regime is justified by the benefits it would bring. Firstly, removing the principle of limited liability partly as proposed, and imposing pro rata unlimited shareholder liability on the relevant group member, might circumvent the undesirable impact discussed above on tort creditors. Particularly, it would be efficient in reducing the abusive behaviour such as transferring group assets to avoid tort liability. The enforcement of pro rata unlimited liability would also prevent shareholders of corporate groups from acting without considering the position of tort creditors. The shield of limited liability is removed through this means. Secondly, satisfactory compensation could be achieved through pro rata unlimited liability without threatening investment, corporate business, or the securities market. Such a regime still support the application of limited liability for contractual creditors. This ensures most investments will not be affected, but meanwhile preventing shareholders from externalizing corporate costs and risks on tort creditors.[99] Thirdly, the unlimited liability regime is argued to be feasible because it allocates liability proportionately. Compared with joint liability on shareholders, pro rata unlimited liability in tort is alleged to accumulate recovery from widely dispersed shareholders.[100] In this way, tort claimants could get significant recovery while excessive collection costs would not be imposed on shareholders. Shareholders would seldom be forced into insolvency and would be able to pay since it is unusual that the assessment of compensation against shareholders would exceed the wealth of the investors. That is because substantial shareholdings belong to the wealthiest members or individuals.[101] Fourthly, it is argued that the unlimited liability regime would deter considerable number of accidents in the long term.[102]

[99] Hansmann and Kraakman (n 4) 1880.
[100] ibid 1903.
[101] ibid.
[102] ibid 1094.

I believe that the feasibility of this unlimited liability regime depends on two issues. Firstly, would the reform of the limited liability rule bring more benefits for capital market economies? At least it should not result in confusion, and economic disorder. Secondly, would an unlimited liability regime as a solution to corporate tort problems threaten the existing corporate structure and introduce new problems to corporations? At present, it is still difficult to answer these two questions exactly. The comprehensive comparison of the consequences of limited liability and unlimited liability remains open for debate.

There are clearly strong arguments against the pro rata unlimited liability regime. One is that the enforcement of an unlimited liability regime would have a significantly harmful effect on capital market economies and corporations. Limited liability is always considered to be an encouraging investment in risky businesses and it facilitates liquidity by separating management and share ownership.[103] Muzaffer Eroglu responds in his paper that a change to the most fundamental principle of corporate law will inevitably result in a negative influence on the structures of modern enterprises, even though there is a lack of sufficient empirical research to evaluate the changes on capital markets and corporations when were the rule of limited liability to be partly reformed.[104] He believes the reform of limited liability means abolishing limited liability for corporate shareholders and individual shareholders, and this is unlikely to gain much support.[105]

In respect of the impact on investment and economic efficiency, it is argued by the supporters of the unlimited liability regime that the negative effect of

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[103] Joshua Getzler, 'Disciplining the Corporation Through Tort Liability and Disability', (2010) Law and Finance Workshop paper, University of Oxford.
[104] Eroglu (n 20) 233.
[105] ibid 232.

unlimited liability on capital investment is overshadowed.[106] Mark R Patterson, in his article, reviews earlier experiences related to excess shareholder liability and concludes that it is not that unmanageable for the financial markets.[107] Patterson takes the example of Californian law. California's corporation law used to impose unlimited liability on shareholders.[108] He also suggests that an individual company should have the ability to operate with unlimited liability, such as was the case with one publicly traded company, American Express.[109]

However, California's unlimited liability statute was abolished in 1931, and American Express' unlimited-liability operation was stopped in 1965.[110] In 1992, Professor Grundfest drew out the point that the regime of unlimited liability, as proposed, is unrealistic since liquidity needs modern capital markets, and unlimited liability decreases the company's share price.[111] But then it is noted by Daniel R Kahan that this conclusion is not that convincing since the effect of unlimited liability on the price of the American Express company common stock was negligible.[112] More empirical studies are needed to make a clear comparison between the consequences of unlimited liability and limited liability.

The feasibility of the unlimited liability regime is also doubtful. Professor Janet Cooper Alexander takes the view that if just one country applies the doctrine of unlimited liability for corporate torts while others have not done so, tort claims will not become easier because of the jurisdictional and choice-of-law problems.[113] Thus, it is difficult for a tort creditor to claim against defendant

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[106] Hansmann and Kraakman, (n 4) 1891.
[107] Mark R Patterson, 'Is Unlimited Liability Really Unattainable?: Of Long Arms and Short Sales', (1995) 56 Ohio St LJ 815.
[108] ibid 820; California Civil Code 1923, s 322.
[109] ibid 821.
[110] ibid 822.
[111] Joseph A Grundfest, 'The Limited Future of Unlimited Liability: A Capital Markets Perspective,' (1992) 102 Yale LJ 387, 394.
[112] Kahan (n 92) 1103.
[113] Janet Cooper Alexander, 'Unlimited Shareholder Liability Through a Procedural Lens', (1992) 106 Harv L Rev 387, 387.

shareholders of a corporation founded in a country that does not enforce unlimited shareholder liability for torts.

To conclude, as a solution to corporate tort problems, this proposal lacks feasibility and practicality. Concerns about the unlimited liability regime lie in the uncertainty of the consequences of removing the limited liability principle; and the lack of empirical evidence to support the assumptions of the benefits of the new regime. The principle of limited liability may lead to undesirable effects for tort victims pursuing satisfactory recovery. However, the action of abolishing limited liability will undoubtedly influence investment, especially the industries involving hazardous operations and toxic substance manufacture. A change to the corporate dominating principle would also influence corporate structure and management. In fact, there is no persuasive evidence, such as sufficient empirical data, to support that the unlimited liability regime would bring more benefits or would not result in certain concerns. Besides, any debate on this proposal requires a large extent of thinking, discussion and empirical research and so it would seem clear that the proposal of abolishing limited liability should not be accepted at the present time. This thesis will be concentrating on the discussion of the most appropriate and feasible approach under the existing law.

2.3 Evaluation of statutory protections in the insolvency law for corporate tort creditors

In the UK, company law and insolvency law are mainly used to deal with corporate group issues. Most statutory protections, which are available to remove the shield of limited liability and impose responsibility on the members personally, are relevant to company transactions, tradings, and any other contract activities.[114] Sections 213 and 214 of the Insolvency Act 1986, rather than provisions in the Companies Acts carry the main weight of creditors' protections in relation to insolvency.[115] Principles of separate legal personality and limited liability provide company controllers with motives for defrauding creditors or ignoring creditors' interests.[116] Section 213, dealing with fraudulent trading, and section 214, dealing with wrongful trading, are created for adjusting the undesirable consequences of the two company law principles.[117] These two sections recognize the bad influence on outside creditors resulting from the wrongful behaviour of corporate members sitting behind the shield of limited liability; and the sections are aimed to put directors under a duty to consider creditors' interests when the company is facing various levels of financial problems.[118] Section 213 creates a statutory cause of action when any business of the company is carried on with intent to defraud creditors of the company in the course of the winding up. The section states that "any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make contributions to the company's assets properly."[119] Section 214 makes provision to enable contributions to company's assets for creditors' interests from the directors who should be responsible for the wrongful management of an insolvent company.[120]

Currently, it is difficult to find examples of personal liability being imposed on shareholders or parent companies by corporate law to combat behaviour inflicted on tort creditors when externalizing their debts. Thus, in the discussion

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[114] Davies (n 22) 225.
[115] ibid 236.
[116] ibid 227.
[117] ibid.
[118] Andrew Keay, 'Director's duties to creditors: Contractarian Concerns relating to efficiency and over-protection of creditors ' (2003) 66 Modern Law Review 665, 667.
[119] Insolvency Act 1986, s 213.
[120] Insolvency Act 1986, s 214.

of redress for tort victims who cannot pursue contractual protections, one prominent clue is to enhance statutory protections by making a company's member behind the corporate veil to be personally liable and to contribute to the company's debts. Section 213 and section 214 of the Insolvency Act 1986 are regarded as piercing the corporate veil under statutes, the contravention of which will place liability behind the corporate veil.

In particular, section 214 has been broadened to apply to the corporate group situations. This section originally applied to a director who knew or ought to have known that the company had gone into insolvency at some time prior to the commencement of the winding up, but did not take actions to minimize creditors' losses.[121] The primary aim of it is to prevent directors from externalizing companies' debts and transferring future trading risks to creditors.[122] If considered in a corporate group context, liability under section 214 could extend to a shadow director, which encompasses a parent company when the subsidiary's board can be considered as "accustomed to act" according to the parent company's directions.[123]

The wrongful trading provision was made in the consideration of protecting creditors who experience loss due to the directors' unreasonable behaviour. It was recommended at first by the Cork Committee to provide civil actions for unreasonable trading.[124] Due to the character of risk transfer of limited liability principle,[125] directors have no incentive to take care of creditors' benefits, and even have the opportunity to exploit the regime to their advantage.[126] Section 214 motivates directors to consider the interests of the creditor by making

[121] ibid.
[122] Andrew Keay, 'Wrongful Trading: Problems and Proposals', (2014) 65 Northern Ireland Legal Quarterly 63, 65.
[123] Insolvency Act 1986, s 214 (7), s 215.
[124] Report of the Review Committee on Insolvency Law and Practice (1982) (Cmnd 8558), [1777].
[125] J Freedman, 'Limited Liability: Large Company Theory and Small Firms' (2000) 63 The Modern Law Review 317,329.
[126] H C Hirt, 'The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance' [2004] ECFR 71, 83; P L Davies, 'Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency' [2006] 7 EBOLR 301, 306.

them personally liable.[127] To escape liability, directors must take every step to reduce creditors' potential losses.[128] Actions include attempts to make agreements with creditors, taking professional advice and taking actions to secure financing.[129] The case of *Re Produce Marketing Consortium Ltd (No 2)* illustrates how well it works.[130] In this case, two directors failed to put the company into liquidation in time, as a result of which they were required by the court to make a contribution of £75,000 to company's debts.

It is appreciated that section 214 is made to protect creditors of a company, by putting responsibility on the controllers of the company. Unfortunately, commentators' attitudes towards this section seem not optimistic and they doubt what it has achieved and what it might do in the future.[131] As a statutory approach to make company members contribute to a company's debts, this section does not work as well as had been expected.

(1) The extension of the application of section 214 into group situations seems to be inefficient.

Pursuant to the provision, the concept "director" includes de jure directors, shadow directors[132]and de facto directors[133]. The term "shadow director" comprises parent companies and banks as prominent parties. A shadow director is the person whose instructions the company follows apart from professional advisers or the person who exerts direct control over the board of its subsidiaries.[134]

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127 Davies (n22) 227.
128 ibid 75; Insolvency Act 1986, s 214 (3).
129 Chrispas Nyombi, 'Lifting the Veil of Incorporation Under Common Law and Statute' (2014) 56 International Journal of Law and Management 66,76.
130 *Re Produce Marketing Consortium Ltd (No 2)* [1989] 5 BCC 569 (Ch).
131 Andrew Keay, *Insolvency Law Corporate and Personal* (3rd edn, Jordan Publishing Limited 2012) 659.
132 Insolvency Act 1986, s 214(7) and 251.
133 *Re Hydrodan (Corby) Ltd* [1994] 2 BCLC 180 (Ch).
134 Company Act 2006, s 251.

It is quite difficult to see how a parent company can qualify as a shadow director of the subsidiary company. The mere fact that the subsidiary is wholly owned and the fact that the director of a parent company also serves on the board of the subsidiary cannot make the parent company inevitably a shadow director.[135] There is no specific guidance to define "shadow director". The Cork Committees' proposal for section 214 recommends that anyone who participates in the company's management may acquire personal liability.[136] However, section 214 contains the restriction that only directors (shadow directors) bear personal liability. From the outset, there is controversy as to who may undertake liability for its company's debts.

In the corporate group context, English courts have adopted a limited and inconclusive approach on qualifying shadow directorship under section 214. In the case of *Re Hydrodan Ltd*, Millett J held that the conduct "in which the board did not exercise any discretion or judgment of its own but acted merely in accordance with the directions of others"[137] contributed to the shadow directorship. It was later argued that this illustration may go beyond the initial legislative definition. Paul Davies in his book holds that the degree of cession of autonomy by the subsidiary will depend upon how exactly intra-group relationships are established, such as from the perspective of detailed day-to-day control exercised by the parent company.[138] In the case of *Secretary of State for Trade and Industry v Deverell*,[139] Morritt LJ recommends that it does not have to establish the existence of total control over every aspect of management. The fact that a shadow director exercises real influence over the board of the company's management would be sufficient.[140]

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[135] *Re Hydrodan (Corby) Ltd* (n 132), the judges were prepared to treat the indirect parent as a shadow director of a company, but that was because the directors of the company in question were corporate bodies and so must have received their instructions from elsewhere. Even here, the directors of the indirect parent were held on the facts not to be shadow directors.
[136] ibid.
[137] ibid 183.
[138] Davies (n 22) 232.
[139] *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 (CA).
[140] ibid 350.

It is obvious that the definition of shadow director is uncertain and depends on the facts of each case. Furthermore, the courts have recognized that it is not appropriate to impose liability on a director without proving that he or she is irresponsible.[141] It means that the liquidator should find the evidence that the director has ignored advice or find obvious signs that indicates inevitable failure of the company's business. Those requirements add more difficulties in practice. All in all, the degree of effectiveness afforded by the wrongful trading provisions within a group of companies remains to be seen, the courts are suggested to be cautious.[142]

(2) Section 214 cannot work effectively since it is difficult both to initiate actions under this section, and to satisfy the elements of the section to establishing liability.

Firstly, in fact there is little reported litigation on section 214 since this section should be initiated by the liquidator who normally has insufficient funds to support possible litigation.[143] Since the action has to be brought by the liquidator personally, the liquidator would be liable for any costs incurred, and this largely prevents liquidators from bringing actions.[144] Another difficulty is that most liquidators would be concerned about the costs of litigation to ensure that the funds are not wasted, thereby reducing the dividend payable to creditors.[145] An empirical study of disqualified directors concluded that the most common basis for disqualifying directors was trading while insolvent, but hardly any corresponding proceedings had been brought under section 214.[146] One commentator has drawn a rather depressing conclusion that section 214

[141] Davies (n 22) 232.
[142] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 701.
[143] Davies (n 22) 236.
[144] Keay, *Insolvency Law Corporate and Personal* (n 130) 659.
[145] Keay, 'Wrongful Trading: Problems and Proposals' (n 121) 68.
[146] D Arsalidou, 'The Impact of Section 214(4) of the Insolvency Act 1986 on Directors' Duties' (2001) 22 Company Lawyer 19, 20.

"is of no interest to the liquidator, no benefit to creditors and for wrongdoers it is the impotent progeny of a final legal theory".[147] Andrew Keay also says that section 214 does not offer an efficient tool for liquidators to recover funds for creditors.[148]

Secondly, it is not easy to establishing the elements of section 214. For instance, when it comes to the element concerning "insolvent time",[149] it has been advised that the proper "insolvent time" should be a crisis point in the life of the company, from which liability starts, and the director must be aware of the inevitability.[150] So reliance should be placed on a particular date.[151] This point is crucial for directors to escape liability, and for liquidators to collect evidence. However, in practice it is very difficult to define the most appropriate time when the insolvency is inevitable.[152] In *Re DKG Contractors Ltd*,[153] the "right time" was when the supplier rejected the crucial delivery, which was finally recognized by the court. It was also argued in this case that the "right time" is invoked by two employers' dismissal. In *Re Bangla Television Ltd*, the crisis time was when the heavily indebted company sold all of its assets, leading to the inevitable insolvency.[154] These examples illustrate that there are some signs such as loss of employees, contracts, which indicate the company is on the way to insolvency. But since section 214 gives no more guidance, courts may face difficulties with the different approaches to predicting business failure.[155]

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147 R Schulte, 'Enforcing Wrongful Trading as A Standard of Conduct for Directors and A Remedy for Creditors: Special Case of Corporate Insolvency' (1990) 20 Co Law 80, 88.
148 Keay, 'Wrongful Trading: Problems and Proposals' (n 121) 68.
149 Insolvency Act 1986, s 214(2)(b), states that for a defendant to be liable then "at some time" before the commencement of the winding up the defendant must know or ought to have known that insolvent liquidation could not be avoided.
150 Hicks A and Cooke T E, 'Wrongful Trading-predicting Insolvency' (2007) 5 International themes in business law 282, 285.
151 H Boschma and L Lennarts, 'Wrongful Trading in A Comparative Perspective' in J Wouters and H Schneider (eds), *Current Issues of Cross-Border Establishment of Companies in the European Union* (MAKLU Uitgevers, Antwerpen-Apeldoorn 1995) 205.
152 Arsalidou (n 145) 21; Finch (n 141) 700.
153 *Re DKG Contractors Ltd* [1990] BCC 903 (Ch), [19].
154 *Re Bangla Television Ltd Valentine v Bangla TV and others* [2009] EWHC 1632, [2010] BCC 143 [51]-[57].
155 Cooke and Hicks (n 149) 339.

It is argued that some essential points in the proposal of the Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report) for wrongful trading should have not been changed before it became section 214 of the Insolvency Act 1986.[156] As proposed by the Cork Committee, in addition to liquidators, the receivers, administrators, creditors and even company members were welcome to invoke the claim.[157] However, the final section 214 was amended in a more restrictive way. It also regulates that only directors (shadow directors) could bear personal liability whereas in the Cork Report it is proposed that any person may acquire personal liability if he or she gets involved in the company's management process.[158] The appearance of the wrongful trading provision was originally always considered as an important development, but subsequently its effectiveness was questioned.

To conclude, section 214 as a statutory remedy is proved to be inadequate to meet its initial objective to impose personal liability on company members for the outside creditors, and not feasible to apply in group cases. The problem lies in its inherent defects in the enforcement, and the inconclusive instructions given by the courts on its extension to make a parent company a "shadow director". In fact, it might be quite complicated and difficult for tort creditors to seek recourse by means of the insolvency legislation, since tort creditors were originally excluded from the debate. There is limited support for statutory priority for tort creditors in a winding up in the UK. Unsecured debts, including tort debts, do not enjoy preference and security, but enjoy a relatively small amount of priority. Professor Andrew Keay says in his book that it is regrettable that the unsecured creditors could gain little or nothing in corporation's

[156] Rizwaan J Mokal, 'An Agency Cost Analysis of the Wrongful Trading Provisions: Redistribution, Perverse Incentives and the Creditor's Bargain' (2000) 59 The Cambridge Law Journal 335, 343.
[157] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report), para 1806.
[158] ibid.

insolvency.[159] Pursuant to section 328 of Insolvency Act 1986, debts of ordinary unsecured creditors should be ranked after preferential debts, which should be paid in full first unless there are insufficient assets.[160]

Preferential debts are regulated by Schedule 6 of the Insolvency Act 1986, which are in priority to the debts of other unsecured creditors and floating charge holders.[161] According to the statutory preferential debts in the UK, tort victims should be considered as ordinary unsecured creditors.[162] So, in the context of insolvency law, it is quite difficult for tort creditors to get satisfactory recovery beyond the rule that lower-ranking categories are to be paid after the higher categories.

2.4 Evaluation of the doctrine of piercing the corporate veil

This section examines the second mechanism for creating shareholders' liability beyond the veil of limited liability and separate legal personality in English law.

Given that corporate personality is granted by statute, courts are cautious to pierce the corporate veil and impose liability on the person behind it. Since the 19th century, courts have been willing to pierce the corporate veil in some particular circumstances.[163] Contrary to the careful statutory exceptions, judicial inroads into the two principles proceed in a more indeterminate way.[164]

159 Andrew Keay and Peter Walton, *Insolvency Law Corporate and Personal* (3rd edn, Jordan Publishing Ltd 2012) 525.
160 Insolvency Act 1986, s 328 (2)
161 Roy Goode, *Principles of Corporate Insolvency Law* (3rd edn, Sweet & Maxwell, 2005) 275; Insolvency Act 1986, s 175.
162 Insolvency Rules 1986 rule, s 13.12(2).
163 I Maurice Wormser, 'Piercing the Veil of Corporate Entity' (1912) 12 Colum L Rev 496, 517.
164 Sealy (n 35) 53.

In recent years, the doctrine of piercing the corporate veil has been brought before English courts for reasons such as fraudulent conduct, controller's misrepresentation defrauding a claimant to enter into a contract, and concealing the real position of the controller.[165] To explore the position of the doctrine of veil piercing in imposing shareholder's liability for company's torts and its extension in corporate groups, it is necessary to begin by introducing the arguments for piercing the corporate veil, followed by an assessment of them. Discussions on the limitations of the doctrine in providing recourse for tort victims of corporate groups, as well as the failure to extend its application in this area will be provided afterwards.

It is difficult to apply the doctrine of veil piercing to corporate tort cases. Twelve years before the leading corporate tort case *Adams v Cape plc*,[166] Clive M Schmitthoff had observed that the issue of the parent company's liability for the debts of its subsidiary is one of the most prominent unresolved problems of modern times.[167] If a well-funded parent company has an insolvent subsidiary that cannot meet mass tort liability of negligence, are the tort victims able to seek compensation from the parent company successfully? Normally the common rules say no. *Adams v Cape plc*[168] is such a case, which concerns the tort liability of corporate groups and attempts to override corporate personality to impose liability on the parent company instead.[169] Guidelines for veil piercing in corporate groups were set out in this case, and the court showed the difficulty in creating a parent company's liability for its subsidiary's torts.

In general, there are five common arguments for piercing the corporate veil

[165] Aleka Mandaraka-Sheppard, 'New Trends in Piercing the Corporate Veil: The Conservative Versus the Liberal Approaches' (2014) 35 (1) Business Law Review 2, 2.
[166] *Adams* (n 85).
[167] Clive M Schmitthoff, 'Banco Ambrosiano and Modern Company Law' (1982) JBL 361, 363.
[168] *Adams* (n 85).
[169] Davies (n22) 217.

under case law: (1) the single economic unit argument; (2) fraud and façade; (3) agency; (4) interest of justice; (5) impropriety.

In legal practice, the arguments for veil piercing are vague and unpredictable, and this leaves room for the courts to decide cases without overly careful considerations of precedent and appellate reviews. Up to now the corporate tort cases are still decided on a case-by-case basis: tests for liability are used interchangeably, or in combination.[170] Occasionally, decisions of different cases seem to contradict each other bewilderingly. Courts keep a very formalistic view of the principles of limited liability and corporate legal personality and prefer to disregard them just in particular cases, in which strong control is found over the company, or there is fraud or some other kind of "sharp practice" in company's management.[171] Many veil-piercing cases have been heard in the Court of Appeal formerly.[172] The latest two Supreme Court cases *VTB Capital plc v Nutritek International Corp and others*[173] and *Prest v Petrodel Resources Limited and others*[174] also have strong implications for piercing the corporate veil in group situation.

2.4.1 Assessment of the "single economic unit" argument

The question as to whether the corporate veil should be pierced by disregarding the rule of limited liability and separate legal personality, is one that has come before the courts on many occasions.[175] Some judges disapprove of the abuse of the group structure and purport to distinguish group

[170] Mandaraka-Sheppard (n 164).
[171] Witting, 'Liability for Corporate Wrongs' (n 61) 123.
[172] *Adams* (n 85); *Trustor AB v Smallbone (No.2)* [2001] EWHC 703 (Ch), [2001] 1 WLR 1177; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA); *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769 (CA); *Ord v Belhaven* [1998] 2 BCLC 447 (CA).
[173] *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5, [2013] 2 AC 337.
[174] *Prest v Petrodel Resources Limited and others* [2013] UKSC 34, [2013] 2 AC 415.
[175] Sealy (n 35) 69.

cases from cases involving individuals as shareholders.[176] One formerly prominent argument for veil piercing, evaluated in the leading corporate tort case *Cape*, is the "one single economic unit" argument. It is argued that, in particular circumstances, the court should ignore the separate legal personality and treat the overall business operation as one single economic unit. However, this argument has largely been questioned and examined cautiously by courts in subsequent cases.

The single economic unit argument was advanced successfully as a ground for piercing the corporate veil in the case of *DHN Food Distributors v Tower Hamlet Borough Council* in 1976.[177] Then this argument was brought before the case of *Cape* again, where Slade LJ rejected it as a ground for veil piercing by treating members of a group as a single economic unit. It is necessary to briefly introduce the facts of *Cape* here.

The UK company Cape Industries plc was at the head of a group of wholly-owned subsidiaries. Some subsidiaries mined asbestos in South Africa, and others marketed their products in the US. A number of claimants injured by asbestos exposure brought actions against the parent company Cape and the relevant subsidiaries. In 1974, 462 plaintiffs brought actions in the United States Federal District Court at Tyler, Texas, ("the Tyler 1 actions") against the UK parent company Cape, the South African mining subsidiary NAAC, the wholly owned English marketing subsidiary Capasco and other parties. These actions were settled in 1977, which made NAAC liable. Cape plc and Capasco filed jurisdiction protests. NAAC entered into liquidation in 1978. Cape then promoted a third company CPC to carry on the marketing business of Cape asbestos in the US, and the previous chief executive of NAAC held the shares in CPC. Between 1978 and 1979, more plaintiffs sued against the same

[176] Helen Anderson, 'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil' (2012) 22 Australian Accounting Review 129, 133.
[177] *DHN Food Distributors Ltd* (n 171).

defendants of the Tyler 1 actions in the Tyler court ("the Tyler 2 actions"). Cape plc and Capasco alleged that the court had no jurisdiction over them, and resisted the enforcement of judgements in England.

The case *Cape* concerns whether the presence of NAAC and CPC in Illinois constitute the presence of Cape or Capasco in Illinois. It was alleged by the claimant that the following facts contributed to the argument of single economic unit: the subsidiary company NAAC was created for the purpose of selling goods of Cape plc; the insolvency of NAAC was due to the protection of Cape; the major decisions relevant to NAAC were always made by Cape; Cape exercised control over the board of NAAC.[178] The court accepted all the factual submissions and admitted that Cape as a parent company indeed gave little consideration to corporate formalities between separate members.[179] However, the court still refused to regard the parent company Cape, and its subsidiary NAAC, as one unit and transfer liability between them regardless of the separate legal personality. With no more explanations provided, the court just argued, "there has been no challenge to the judge's finding that the corporate forms applicable to NAAC as a separate legal entity were observed."[180]

According to this case, it seems that there is no possibility that the argument of one single economic unit could succeed and go further as a ground for piercing the corporate veil for corporate tort debts. One single economic unit is more valid as an economic construct than as a legal construct. The Court of Appeal in the *Cape* case seems to be reluctant to admit the existence of one single economic unit in law, even though in practice such form of operation possibly exists. In fact, the attitude of the courts has, at times, changed when distinguishing separate group members.

178 *Adams* (n 85) 537.
179 ibid.
180 ibid.

In the case of *DHN Food Distributors v Tower Hamlets*,[181] the enthusiasm of the courts to pierce the corporate veil and disregard the *Salomon* principle probably reached its peak. Lord Denning wished to treat the group as one single economic entity.[182] In this case, the corporate veil was pierced on the ground that the group proceeded as though they were in partnership.[183] DHN as the parent company, together with other two wholly-owned subsidiaries, ran a grocery business. One subsidiary provided premises and the other provided vehicles. Neither held operations of its own. The premises were to be compulsorily purchased, then DHN claimed for compensation for the interference of business.[184] The Court of Appeal held that:

> The two subsidiaries are bound hand and foot to the parent company and must do just what the parent company says…this group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point.[185]

Subsequently in this case the rule of separate legal personality was disregarded, and it was held that DHN was entitled to claim.

However, the *DHN* case was doubted in subsequent years, and the following cases indicate that the decision is contrary to current trends.[186] Both English and Australia courts do not regard the fact of "control by itself" as a reasonable justification.[187] For instance, in an Australian case the *James Hardie*, the court

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181 *DHN Food Distributors Ltd* (n 171).
182 ibid.
183 ibid 860.
184 ibid 852-854.
185 ibid 860.
186 Sealy (n 35) 69.
187 In New Zealand, it seems, the same applies: see D Goddard, 'Corporate Personality - Limited Recourse and its Limits', in R Grantham and C Rickett (eds), *Corporate Personality in the 20th Century* (1st edn, Hart Press 1998) 11-63.

refused to pierce the corporate veil and consider the group as one single unit simply on the fact of the parent company's control over the subsidiary.[188]

In the latter case of *Woolfson v Strathclyde Regional Council*, Lord Keith was suspicious about the decision of *DHN* case and refused to follow it.[189] He still emphasized that the only reasonable justification was that the subsidiary was a "mere façade concealing the true facts".[190] Lord Keith concluded that:

> I can see no grounds whatever, upon the facts found in the special case, for treating the company structure as a mere façade, nor do I consider that the *DHN* case is, on a proper analysis, of assistance to the appellants' argument.[191]

It is fairly to say that the indications given in *DHN* case are so limited and facts-specific, such as the group relations involving a partnership relationship, and so the argument of a single economic unit seemingly cannot serve more situations in the case of corporate insolvency.

The case of *Albacruz v Albazero* further illustrates the difficulty of treating a group of companies as a single economic entity, under which the liability of one group member can be transferred to another.[192] Roskill LJ in this case held that:

> The rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would ensure beneficially to the same person

[188] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, 579-584; See also *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577.
[189] *Woolfson v Strathclyde Regional Council* [1987] UKHL 5, [1978] SLT 159.
[190] ibid 160.
[191] ibid 162.
[192] *Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants* [1977] AC 774 (HL).

or corporate body.[193]

The insistence of case law on the separateness of corporate members also can be found in the case of *Bank of Tokyo Ltd v Karoon*,[194] in which Robert Goff LJ alleged that the parent company and the subsidiary were one economic entity but distinct from each other in law.[195]

To conclude, the English courts are reluctant to pierce the corporate veil within groups simply relying on the "single economic entity" argument. In the *DHN* case, the corporate veil is disregarded in the special circumstance where the wholly-owned subsidiaries are created with no other purpose but to own the assets of the parent company and the whole group operates like a partnership. This is not common in groups, and there is no corporate tort case following the *DHN*'s decision. Courts are more hesitant to take such an argument against the two fundamental corporate law principles, but are more willing to see the arguments established on a particular statutory exception or the terms of a particular contract.[196] A particular statute or particular terms of a document is possible to justify the "one single economic unit", but beyond this it is impossible to go.[197]

2.4.2 Assessment of the "fraud and façade" argument

"Fraud and façade" as an argument for corporate veil piercing is applied where the company, or subsidiary is created as a sham, to hide the fraud or evade existing obligations. Contrary to the "one single economic unit" argument, courts prefer to pierce the corporate veil on this ground.

193 ibid 807.
194 *Bank of Tokyo Ltd v Karoon* [1987] AC 45n (CA).
195 ibid 64.
196 Davies (n 22) 217.
197 ibid 218.

It is widely acknowledged by courts that the corporate veil can be pierced when the company is proved to be merely a façade concealing the true facts.

In the case of *Cape*, the claimants held that the subsidiaries CPC and AMC in the US were a device or sham for improper use by Cape to avoid tort liability for asbestos injuries and for continuing trade in the US.[198]

The Court of Appeal accepted the view that the subsidiaries CPC and AMC were created to continue the US asbestos market but rejected the argument that CPC was treated as Cape's presence. The Court of Appeal observed that the claimants failed to justify the unlawful purpose for creating the subsidiary companies and the existence of impropriety.[199] The mere recreation of the alternative marketing arrangement by means of establishing new subsidiaries and using a corporate form could not fulfill the "fraud and façade" argument.[200] There was no actual or potential illegality.[201]

The court could not find anything illegal and improper in Cape's arrangement of its affairs. Thus, in fraud cases, what matters is to prove that the sham or "façade" companies are established to hide any fraud or to breach any existing duties. The elements "fraud" and "façade and sham" as exceptions to separate legal personality principle should not be considered separately.[202] It is very difficult, particularly in tort cases, to define and prove what precisely contributes to making a subsidiary a "sham".[203] Unfortunately, in subsequent cases the UK courts did not provide any clear guidance on piercing the corporate veil in corporate tort cases.

198 *Adams* (n 85) 433, 539F.
199 ibid 541A.
200 ibid 541-544.
201 ibid 544C.
202 Nyombi (n 128) 71.
203 Davies (n 22) 204.

The Supreme Court in a commercial case rejected the attempt of the claimants to seek recourse on this basis, and refused to apply the doctrine of veil piercing when any other remedies existed. In the case of *VTB Capital plc v Nutritek International Corp & Ors*, the problem was whether the corporate veil could be pierced to make the company's controller liable under a contract if this controller induced the claimant to enter into that contract with the company.[204]

VTB Capital plc ("VTB") is owned by a Russian bank in majority, but is incorporated and structured in England. VTB contracted a loan agreement with a Russian company, Russagroprom LLC ("RAP"), under which VTB contributed $225 million to RAP for purchasing several Russian dairy companies from Nutritek International Corp ("Nutritek").[205]

VTB submitted that RAP defaulted on the loan and induced VTB to enter into that agreement by fraudulent misrepresentations created by Nutritek, who had always expressed that Nutritek and RAP were distinct from each other. But in fact, they were both ultimately owned by Mr Malofeev, a businessman from Russia. Since RAP was insolvent, VTB claimed against Mr Malofeev and Nutritek for business conspiracy and invoked the doctrine of piercing the corporate veil based on the fact that RAP was just a façade created and arranged by the controller to defraud others.[206]

Unfortunately, the Supreme Court believed that it was contrary to legal principles to regard a third person as a co-contracting party and liable under such a contract.[207] For the issue of veil piercing, the Supreme Court held that

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[204] *VTB Capital plc* (n 172) [3].
[205] ibid [1]-[6].
[206] Ibid [1]-[6].
[207] ibid [238]-[244].

it was improper and irrational in this case to look behind the borrower company RAP and to claim against its owners in contract, and the decision of the precedent case *Antonio Gramsci* was clearly overturned.[208]

(1) In the *VTB* case, the ground of "façade to conceal wrongdoing" is not available as considered by the Supreme Court.

As discussed in the above paragraphs, the crucial question is whether the corporate structure is used as a "sham" or "façade" to conceal any wrongs. Lord Neuberger observed that the evidence provided by VTB for veil piercing cannot sufficiently justify the fact that RAP was created as a façade concealing the true facts.[209] In his view, the "true facts" meant that:

> In reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, in *VTB*, "the true facts" relate to the control, trading performance, and value of the Dairy Companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership)…Neither of these features can be said to involve RAP being used as a "façade to conceal the true facts.[210]

Actually, it is improper to make the company's controller or owner liable under any of the company's contracts by the approach of veil piercing.

There are some similar cases concerning this issue and the decisions are different and extremely controversial. In the case of *Antonio Gramsci Shipping*

[208] ibid [238].
[209] ibid [142].
[210] ibid [142].

Corp v Stepanovs, Burton J observed that the controller behind a corporation could be treated as a contracting party and liable under the company's contract.[211] The Supreme Court in *VTB* believed that the decision of *Antonio* is radical and strongly disapproved of it.[212] The Supreme Court held that the *Antonio*'s decision has raised problems around violating the privity of contract principle by making a non-party liable under a contract. Besides, the decision of *Antonio Gramsci* has also given rise to further uncertainties and is considered as over extending the application of piercing the corporate veil.[213]

In the case of *Antonio Gramsci,* it was observed by Burton J that conditions in *Trustor v Smallbone (No.2)* could justify the doctrine of veil piercing,[214] these were "(1) fraudulent misuse of the company structure, and (2) a wrongdoing committed "dehors" the company."[215]

However, in the High Court decision, Arnold J rejected the findings in *Gramsci* and refused to admit a claim could be made for damages in that context whether the conditions in *Trustor v Smallbone (No.2)* were met or not.[216]

Furthermore, it was concluded by Arnold J that in any event it is impossible to award damages against the parent company for its subsidiary company's breach behaviour by piercing the corporate veil due to privity of contract.[217] However, equitable remedies are available, as alternative remedies, to prevent the parent company from evading contractual liability as substituted.[218]

Lord Neuberger in the Supreme Court agreed with Arnold J for substantially

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211 *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm), [2012] 1 BCLC 56 [60]-[64].
212 *VTB Capital Plc* (n 172) [116].
213 ibid [137].
214 *Trustor AB v Smallbone (No 2)* [2001] EWHC 703 (Ch), [2001] WLR 1177 [32].
215 *Antonio Gramsci Shipping Corp* (n 210) [15].
216 *VTB Capital plc v Nutritek International Corp and others* [2011] EWHC 3107 (Ch) [97].
217 ibid [101].
218 ibid; *Antonio Gramsci Shipping Corp* (n 210) [27].

the same reasons, and expressly overruled *Gramsci* and gave a concise statement regarding the doctrine of veil piercing:

> The fact that there has been no case (until *Gramsci*) where the power to pierce the corporate veil has been extended in the way for which VTB contends in these proceedings does not necessarily mean that VTB's case, in so far as it is based on piercing the veil, must fail… however, it seems to me that strong justification would be required before the court would be prepared to extend it. …On analysis it is an extension, which is contrary to authority and contrary to principle.[219]

Lord Neuberger refused to regard Mr Malofeev as a contracting party, since in fact no actual parties intended to contract with Mr Malofeev, and it would have been wrong to do so even if the subsidiary proved to be just a façade. There was never a moment when Mr Malofeev so conducted himself as to make anyone believe he could be responsible for the contract.[220]

(2) Tort law approaches simplify the issue

In the case of *VTB,* the Supreme Court was reluctant to invoke, and extend the principle of veil piercing and considered it unnecessary to make such an extension.[221] It was held by the Court that the extension was redundant since alternative approaches already existed in tort law, "…if VTB establish that it was induced to enter into the agreements by the fraudulent statements which he is alleged to have made, then Mr Malofeev will be liable to compensate VTB."[222] So in cases like *VTB*, it would be better and simpler to claim against the controller or owner of the company based upon fraudulent

[219] *VTB Capital plc* (n 172) [145].
[220] ibid [140].
[221] ibid [146].
[222] ibid.

misrepresentations in tort law. It is recognized that generally the court is reluctant to allow claimants to enforce agreements by means of breaking through the corporate form. Other than Burton J's judgements in *Gramsci*, it seems that no anyone else intends to go that far.[223]

The UK courts maintain a negative attitude towards the application of piercing the corporate veil. The limited case law on veil-piercing suggests that the argument of "fraud and façade" is difficult to prove unless there is actual illegal behaviour in existence, which is difficult to prove as well. In the latest leading case *Prest v Petrodel Resources Ltd*,[224] Lord Sumption provided two unique principles (the concealment principle and the evasion principle) for further explaining the "fraud and façade" argument. The "concealment principle" means that the court would look behind a company to find the person who was the real actor. Moreover, the "evasion principle", which replaces the old ground of fraud, has become the main principle which justifies the veil piercing and sets out what would be considered as a relevant abusive behaviour. It is now recognized by the Supreme Court that the corporate veil can be pierced only to prevent the abuse of corporate legal personality:

> I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrated by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.[225]

[223] ibid.
[224] *Prest* (n 173).
[225] ibid [35].

The Supreme Court's judgements in *Prest* after the case of *VTB* further explain the old and vague terms of "façade" and "sham", but limit the circumstances for invoking the veil piercing doctrine by introducing the concealment principle and the evasion principle. These two principles will be discussed again later in section 2.4.4 to help to explain the limitations of the extension of this doctrine.

Case studies in this section disclosed that even the most well-accepted "fraud and façade" argument is not easy to apply either in tort or contract cases. In contract cases like *VTB*, it is impossible to make the controller behind the corporate veil liable under a contract of its company because the principle of privity of contract should not be contravened. It is suggested that it is sensible to find liabilities in other causes of action such as fraudulent misrepresentation in tort, the tort of negligence, or other possible torts.[226] For instance, in conspiracy cases, a controller cannot escape from responsibility if it is established that he or she has conspired with the company illegally and so caused the harm.[227]

2.4.3 Assessment of arguments of "impropriety", "agency" and "interests of justice"

2.4.3.1 Impropriety

The impropriety argument requires the fact of impropriety: the company is created or used to proceed with illegal activities or to escape from the impact

[226] David Davies, 'The Decision of the Supreme Court in *VTB v Nutritek*' (2013) 19 Trusts & Trustees 730, 733.
[227] Anthony M Dugdale and Michael Jones, *Clerk& Lindsell on Torts* (20th edn, Sweet & Maxwell 2013) 24-93.

of court orders.[228] The argument of impropriety should be the other well-accepted argument for veil piercing according to the relevant case law. In the case of *Jones v Lipman,* the court found that the company of Mr Lipman was created in an attempt to evade his obligations under the sale contract.[229] Specifically, Mr Lipman changed his mind about selling a house, and in order to avoid a specific order, he conveyed the house to the company he alone owned. The corporate veil was subsequently pierced in this case.

However, the argument of impropriety was rejected in the leading corporate tort case *Cape*. In *Adams v Cape Industries* plc, it was alleged by the claimant that the company was aware of the potential tort liability that was inherent in its business, and had tried to avoid the impact of such liability. But the court still did not regard Cape's use of the corporate structure as being improper.[230] Slade LJ held that:

> We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is a member of a corporate group merely because the corporate structure has been used to ensure that the legal liability in respect of future activities of the group… will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.[231]

The above comments of Slade LJ give rise to disputes on the boundary of the term impropriety. It is not very convincing that the behaviour of the parent company, Cape, is proper and legal, who was in the beginning aware of the tort liability inherent in the business and had strong control over its subsidiary

[228] Davies (n 22) 221.
[229] *Jones v Lipman* [1962] 1 WLR 832 (HC).
[230] *Adams* (n 85) 536.
[231] ibid 544.

company. Unfortunately, the courts have not taken the opportunity to provide any clear guidance on how to reasonably define the boundary of impropriety in such group situations in subsequent cases. Even in the recent Supreme Court case of *VTB*, the court just confirmed the term impropriety as an argument for piercing the corporate veil, but did not clearly explain the scope of impropriety for future group cases. In *VTB*, the Supreme Court confirmed that the corporate veil can only be pierced when there is impropriety. However, impropriety alone is insufficient for veil piercing, it “must be linked to use of the company structure to avoid or conceal liability”.[232]

In the case of *Prest*, it seems that Lord Sumption narrowed the scope of impropriety according to his statements of the two principles. As indicated by Lord Sumption, impropriety will only cover the activities that the person creates or uses a “façade” to evade an existing legal right or liability, or an existing legal restriction subject to him.

As already mentioned in Section 2.4.2 above, Lord Sumption listed two principles: the concealment principle and the evasion principle. As far as Lord Sumption was concerned, the concealment principle “is legally banal and does not involve piercing the corporate veil at all. It is the interposition of a company or perhaps several companies so as to conceal the identity of the real actors.”[233] In these circumstances, where the court simply finds the fact of concealment, and finds the corporate personality is used to hide the identity or position of the true actor, the court’s judgment against the person who does the concealing does not fall within the scope of veil-piercing. And the concealment principle does not involve or rely on the “impropriety” we discussed for the purpose of veil piercing. It is because the “concealment” can be seen as a use of the corporate structure to hide the actions actually belonging to him: for

[232] *VTB Capital* Plc (n 172) [162].
[233] *Prest* (n 173) [28].

example, “a director setting up a limited company to receive secret profits, or money obtained in breach of fiduciary duty. Where this occurs, there will be an equitable claim for the money against both the company and the individual”.[234] So the “concealment” here did not cover the impropriety for veil piercing, and the cases falling into the concealment principle were not actually veil-piercing cases according to Lord Sumption.

Concealment principle was identified by Lord Sumption as a way to determine corporate members’ liability by evoking well established legal principles such as trust law, agency law, or even tort law. For example, the concealment principle might evoke joint liability rules in tort law. According to the doctrine of joint liability, the third party can be involved in the claimed tort jointly with the primary wrongdoer, by procuring, directing or authorising the act. The object of the joint liability doctrine is to extend the scope of potential or possible parties who can be liable for the damages to the tort victims. In accordance with the concealment principle, the doctrine of joint liability might be applied to disturb the corporate personality if there is procurement, direction or authorization by a shareholder. However, it is not appropriate to say that the concealment principle is able to evoke all the tort law rules to extend the shareholder’s liability. The negligence cases may not to be seen as concealment cases. When a tortfeasor is liable in negligence, he or she is directly liable for the tort, and there is no need to prove a concealment relationship for establishing the liability. This is different from the situation of joint liability cases in which a relationship of procuring, directing or authorizing should be proved. Such a relationship may be treated as one which is needed in concealment cases.

However, the introducing of the principles of concealment and evasion has

[234] James Wibberley and Michelle Di Gioia, ‘Lifting, Piercing and Sidestepping the Corporate Veil’, (Work of Guildhall Chambers and Gardner Leader Solicitors <http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf >accessed 22 Mar 2017, 4.

been criticised. Brenda Hannigan notes that “concealment is inherent in many evasion cases, indeed, evasion is commonly achieved through concealment.”[235] Christian Wittting commented that the difference between veil-piercing cases based on evasion and concealment principle is difficult to distinguish.[236] Lord Clarke in the case of *Prest* did not think such a distinction should be made and believed that the two principle needed more arguments, and should not be adopted until further detailed comments has been made for the court.[237]

Lord Sumption only accepted the evasion principle for piercing the corporate veil. This principle, as introduced in the above section, maintains that the corporate veil can be pierced where an individual under an existing legal obligation, or liability, or subject to existing legal restriction, tries to create a “façade”, or use the corporate personality and limited liability to avoid his existing legal obligations. The case of *Jones v Lipman* is regarded as a true veil-piercing case by Lord Sumption. That is why we can conclude from Lord Sumption’s judgements that the scope of impropriety is narrowed to the activities by which the person creates or uses the “façade” to evade the existing legal right, liability, or an existing legal restriction applying to him.

This narrowing ruling on impropriety further limits the circumstances for veil piercing in corporate tort cases. It is normally difficult to establish such impropriety in group cases because usually the parent company bears no existing legal liability for the debt of its subsidiary, and bears no legal liability for the injured employee of its subsidiary company. The influence of introducing the principles of concealment and evasion, and why they limit the extension of the veil piercing doctrine in group cases will be further discussed

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235 Brenda Hannigan, *Company law*, p54-55.
236 Christian Witting, *Liability of Corporate Groups and Networks*, (1st edn, Cambridge Univeristy Press 2018) 317.
237 *Prest v Petrodel Resources Ltd* [2014] 1 BCLC 30[103].

in section 2.4.4.

2.4.3.2 Agency

In corporate groups, a company can act as an agent for its shareholders, and a company member could act as an agent for the parent company or for any other members if authorized. In this context, the parent company would be liable for the behaviour of the agent that falls within the scope of authority.[238] The agency argument was formerly treated as a ground for the doctrine of veil-piercing. Nevertheless, it might be difficult to prove facts to support the agency relationship for veil-piercing. Indeed, the agent relationship between the parent company and the wrongdoing subsidiary is extremely difficult to establish.

An agent is a person who is authorised to act on behalf of the principal in making relations to a third party. An agent includes natural persons, partnerships, corporations, and any other legal entity. Obviously, agency can arise within a corporate group. An agency is normally created under the law of contract, but is not always contractual. It arises as follows:

"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they had agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it… But the consent must have been given by each of them, either expressly or by implication from the words and conduct."[239]

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238 Davies (n 22) 206.

239 *Garnac Grain Co Inc* v *HMF Faure and Fairclough Ltd* [1968] AC 1130.

The classic agency relationship is usually established by express or implied consent. On a basis of this, an agency relationship exists between the parent company and the subsidiary company when there is an agreement (implied or express). In this circumstance, the subsidiary might act as the agent carrying on business on behalf of the parent company, and under its control. The subsidiary company might have the authority to bind the parent company to any contractual obligation.

In the case of *Adams v Cape Industries plc*, the court rejected the agency argument brought by the claimants. There was a lack of authority for subsidiaries to bind the parent company Cape to any contractual obligations. Besides, there was no adequate evidence to support the suggestion that the business of the subsidiaries were not their own business and that Cape were present within the subsidiaries at any time in the US.[240] Specifically, the court considered the agency argument in relation to NAAC and CPC, and declined to accept it for the following reasons. In the first place, NAAC and CPC, both carried on business on their own in the United States of America. Several facts were in favour of this finding. For example, NAAC earned profits and paid taxes thereon; NAAC had its own creditors and debtors, not those of Cape; Cape was treated as NAAC's shareholder and obtained annual dividend.[241] NAAC's functions were to assist and encourage sales and marketing of asbestos in the United States of America for the Cape group. As to CPC, its functions were similar to those of NAAC. CPC, although incorporated and launched with Cape money, was, based on the case facts, a separate legal entity and its substantial part of business was carried on its own. Like NAAC, CPC had no authority to bind Cape to any contractual obligation. Secondly, Cape had no control over the activities of CPC and NAAC. CPC were "left free to sell materials and products other than asbestos fibre and to involve itself in

[240] *Adams* (n 85) 548-549.
[241] *Adams* (n 85) 546.

other commercial activities, and it obviously did so."[242] Besides, both NAAC and CPC bought and sold manufactured textiles on its own behalf as principal.

Even more, it is difficult to construct such agency relationship between the subsidiary and the parent company without an obvious contract.[243] Suppose that the parent company had the intention to avoid tortious liability, it usually would be difficult for the injured tort victims of the overseas subsidiary to find sufficient evidence for any agency relationship. In *Cape*, it seemed acceptable to the court that the group structure was used to ensure the legal liability of the subsidiary fell upon itself.[244] It seemed reasonable for group members to enjoy the benefit of group structure so the court found no reason to pierce the corporate veil in this circumstance.

The main concern is that the criteria of the agency relationship in determining group liability are vague and are decided on a case-by-case basis. There is an absence of case law in this area for corporate tort problems. No clear line is drawn between different courts' decisions so that clearness and predictability are still lacking.[245]

2.4.3.3 The interests of justice

As to the ground of the interests of justice, it is argued that it might be proper to disregard the corporate personality when justice requires, at least in tort cases where the victims suffer severe personal injury. However, courts are still unwilling to rely on this argument. The interests of justice as an exception itself

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242 *Adams* (n 85) 548.
243 Davies (n 22) 207.
244 *Adams* (n 85) 547.
245 Alexander Daehnert, 'Lifting the corporate veil: English and German Perspectives on Group Liability', (2007) 18 International Company and Commercial Law Review 395, 395.

is inherently deficient, providing neither courts nor people engaged in business with well-defined guidance.[246] Although the attitudes of courts to this ground vary from time to time, to this day the general consensus is that we cannot expect too much from this argument to pierce the corporate veil in future cases, including the tort cases.

By 1969, Lord Denning was enthusiastic about encouraging piercing the corporate veil.[247] However, his decision about regardindg the corporate structure as one single economic unit was overruled by subsequent cases. In the *DHN* case, Lord Denning observed that, in some special circumstances, for the purpose of preventing abuse of limited liability and separate legal personality, and for the purpose of justice, the rigid and formal distinction between group members was not necessary: “Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice?”[248]

In *Cape*, the claimants argued that the *DHN* case reflected that “legal technicalities” would result in injustice in group cases, and such technicalities “should not be allowed to prevail”.[249] Nevertheless, the court in *Cape* did not support the interests of justice argument based on the *DHN* case to go that far. Contrarily, the court further established that it was not free to overlook the principle of separate legal personality unless particular statutes or contracts could be cited.[250] Furthermore, the veil could not be pierced based on “what justice would require”.[251] Slade LJ stated in *Adams v Cape*, “The court is not

[246] Davies (n 22) 221.
[247] *Littlewoods Mail Order Stores v IRC* [1969] 1 WLR 1214 (CA); *DHN Food Distributors Ltd* (n 171).
[248] *DHN Food Distributors Ltd* (n 171) 868.
[249] *Adams* (n 85) 536.
[250] ibid.
[251] ibid.

free to disregard the principle of *Salomon…*merely because it considered that justice so requires."[252]

Accordingly this exception remains developing, and further explanation is needed.[253] It is difficult to find cases in which the doctrine of veil piercing is well justified by the interests of justice, beyond the awkward position of offering just one impractical approach to piercing the corporate veil as a reference.

The case of *Creasey v Breachwood Motors Ltd*,[254] where the judge thought it was in the interests of justice, was soon overruled in *Ord v Belhaven Pubs Ltd.*[255]

Breachwood Welwyn Ltd and Breachwood Motors Ltd were two companies sharing common directors and shareholders. Mr Creasey was wrongfully dismissed by Breachwood Welwyn Ltd. Then Mr Creasey brought an action against Welwyn for wrongful dismissal. Shortly afterwards Welwyn stopped its trading and transferred all of its assets to Breachwood Motors company. Motors took over the business and paid off the creditors of Welwyn, apart from enforcing the judgment debt of Mr Creasey. Subsequently Mr Creasey successfully claimed against Motors as a substitute, and Motors Ltd then appealed.

In this case, Richard Southwell QC J held that the common directors of the two companies transferred company assets without considering their duties as directors and disregarded the principle of separate legal personality. The court permitted to pierce the corporate veil and imposed liability on Breachwood Mortors as a substitute.

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[252] ibid.
[253] *Creasey v Breachwood Motors* [1993] BCLC 480 (QB). In the case of *Ord v Belhaven Pubs* [1998] 2 BCLC 447 (CA), the House of Lords considered it was overruled.
[254] ibid
[255] *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447; Sealy (n 35) 54.

This judgment caused considerable criticisms since the Breachwood Motors Ltd did not defend the case, so the decision was not challenged. Actually, the relevant facts were not sufficient to pierce the corporate veil: that the directors breached their duties and the assumption that there was a fraudulent motive for creating the new company to evade the legal obligation (a facade concealing the true facts).[256] The argument of the interests of justice considered by the Court of Appeal in this case is not persuasive. In *Creasey*, the judge considered it reasonable to pierce the corporate veil whenever justice required. But this position is obviously contrary to the decision of *Cape* discussed above. Moreover, there is no basis that the case should fall into the interests of justice due to the inconsistent case law.[257]

In the latter case of *Ord v Belhaven Pubs Ltd*,[258] the decision of *Creasey* was overturned.[259] The court particularly noted that the decision in *Creasy* would never be an authoritative answer.[260] The corporate veil was considered to be pierced in fairly limited situations where there was some impropriety or the corporation was a “sham” concealing the true facts.[261] Similarly to *Creasey*, this case was also about the reorganisation of the company. Ord and the company Belhaven Pubs Ltd were involved in a legal suit about a lease. Due to financial problems, the structure of the group was changed, which led to Belhaven Pubs having no assets to meet the action. Ord then applied to make the parent company of Belhaven liable. The Court of Appeal observed that the reorganization of the company was legitimate. When looking at the argument of the interests of justice, the court in *Ord* overruled the judgment in *Creasy*. In these circumstances, if the court pierces the corporate veil for justice, there is

[256] Thomas B Courtney, *The Law of Companies* (3rd edn, Bloomsbury Publishing Plc 2012) 235.
[257] David Bromilow, ‘*Creasy v Breachwood Motors*: Mistaken Identity Leads to Untimely Death’ (1998) 19 Company Lawyer 198, 198.
[258] *Ord* (n 248).
[259] ibid; Sealy (n 35) 54.
[260] *Ord* (n 248) 458.
[261] ibid 456.

no excuse for the court in *Cape* not to fight for tort victims' compensations. The court in *Cape* takes an extremely strict position on the interests of justice argument. It is undeniable that the case law shows that English courts are hesitate to apply this doctrine in answer to the calls for "common sense", "reality", or "fairness".[262]

2.4.4 Limitations of the extension of the doctrine of piercing the corporate veil

The UK case law provides quite limited guidance on piercing the corporate veil in corporate groups. Courts would be more likely to impose liability on a parent company based on a contractual promise or representation that it would support its subsidiary.[263] Without any oral or written agreements, it is indeed difficult for the courts to impose liability on the parent company for the debts of its subsidiary based on the doctrine of veil piercing.

So far the Supreme Court has twice expressed clearly that extending the application of piercing the corporate veil would depart from the authorities in company law and insolvency law, both crucial for protecting commerce.[264]

Lord Neuberger stated in the case of *VTB Capital plc v Nutritek International Corpn* that, the extension of the use of this doctrine to impose contractual liability to a non-party controller has no possibility of being deployed in future

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262 Sealy (n 35) 53.

263 A plea which failed in *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 WLR 379 (CA), where the "comfort letter" given by the parent company was construed as excluding an intention to create legal relations.

264 Wayne McArdle and Gareth Jones, 'Prest v Petrodel Resources and VTB Capital v Nutritek: A Robust Corporate Veil' (2013) 14(3) Business Law International 295, 296.

cases.[265] Consequently, it is not wise for claimants, especially tort victims to realize corporate liability by means of an extension to piercing the corporate veil. Another prominent case *Prest v Petrodel Resources Ltd*[266] concerning veil-piercing in group situations explores the current boundary of the circumstances of piercing the veil in corporate groups, and further limits the use of the doctrine and illustrates the difficulty of the extension.

The case of *Prest* concerned an allegation that a husband had intended to evade some obligations to his wife through wholly owning or having effective control of the companies to which the residential properties were transferred before the breakdown of the marriage.

In *Prest*, Lord Sumption recognized that it was restrictive for the courts to justify veil-piercing in order to prevent abuse, and the real difficulty lay in the definition of "the relevant wrongdoing", and the term "façade".[267] These vague terms beg too many questions. Lord Sumption therefore introduced the two unique principles, as previously mentioned, to further explain the above concepts. They are the "concealment principle" and the "evasion principle".[268]

Specifically, the concealment principle can be understood as looking behind a company to discover what is being concealed.[269] The evasion principle, unlike the concealment principle, justifies the doctrine of veil piercing by detecting any abusive behaviour where a company is created for evading legal obligations.[270]

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265 *VTB Capital plc* (n 172) [133].
266 *Prest* (n 173).
267 ibid [28].
268 ibid.
269 ibid [28]. According to Lord Sumption, the concealment principle does not involve the piercing of the veil at all. In cases where a company is interposed to conceal the identity of the real actors, the courts will simply look behind it to discover what is being concealed.
270 ibid [34]-[35].

As far as Lord Sumption was concerned, the only circumstance in which veil piercing is permitted is where the defendant is under an existing legal liability or restriction, and consequently the defendant deliberately evades the obligation by means of creating a façade company controlled by him. So the evasion principle should be the only principle to be referred to for piercing the corporate veil.

In the case of *Prest*, it was found by the Supreme Court that there was no evidence to support the view that the action of transferring properties to the company of which he had ownership was intended to evade his obligation to his wife.[271] As a consequence, Lord Sumption declared the companies to be holding the properties on trust for Mr Prest, the controller, who beneficially owned the assets of the company, upon which the court transferred half the value of the properties owned by Mr Prest to Mrs Prest under the Matrimonial Causes Act 1973 section 24.[272]

Lord Sumption set out the condition under which veil-piercing on the basis of the evasion principle could arise:

> There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.[273]

[271] ibid [40].
[272] ibid [49].
[273] ibid [35].

So the modern approaches to piercing the corporate veil clearly recognize that the evidence for control or ownership as to the company alone is far from sufficient for the doctrine; justifications need both control and impropriety proving the company was interposed as a façade to evade the existing legal obligations.[274]

Coming back to the corporate tort case, Cape plc, a multinational asbestos manufacturing company, plays a significant role in the developing of common law in determining a parent company's liability for tort creditors.[275] In *Adam v Cape Industries plc*, the Court of Appeal adopted a remarkably narrow approach to the imposition of the liability on the parent companies. As restated in *VTB*, the Court of Appeal in *Cape* conceded that the most reasonable argument should be "façade and fraud" where there is a "mere façade concealing the true facts".[276]

According to the statements of Lord Sumption in the case of *Prest,* if we intend to impose tort liability on the parent company beyond the subsidiaries, two essential factors should be met. One is that the Cape plc should have been under a certain legal obligation or is subject to an existing legal restriction; the foreign subsidiaries of Cape in the US and South Africa should have been created not for wealth protection or perhaps the avoidance of tax, but to evade or frustrate the tortious liability the Cape originally owed. The second factor is that the parent company should have committed the improper behaviour of evasion, and through being the controller of the subsidiaries, the parent company avoids tortious liability by taking advantage of the principles of limited liability and separate legal personality. However, these conditions are extremely difficult to prove in corporate group cases.

[274] Sealy (n 35) 55.
[275] Alan Dignman and John Lowry, *Company Law* (9th edn, OUP 2016) 35-36.
[276] *Adams* (n 85) 515.

In another case involving Cape plc as a defendant, *Lubbe v Cape plc*,[277] in delivering the judgment of the court, the judge rejected any suggestions concerning veil-piercing as being suitable for extending liabilities. Instead, he gave us another way of thinking, by approaching the question purely from the perspective of tort law. Accordingly, it would be reasonable to circumvent the difficulties of applying the veil piercing doctrine and find other approaches.

Lord Neuberger in *VTB* also emphasized that the doctrine of veil piercing is the last remedy, and this is also approved by Lord Sumption.[278] Other judges in the case of *Prest* concurred with Lord Sumption's judgments but questioned the limitation of the evasion and concealment principle. According to Lord Sumption's formulation, the doctrine of veil piercing should only be invoked "where a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."[279]

Baroness Hale of Richmond held that she was not sure whether it is possible to classify all of the cases relevant to disregarding the separate legal personality as cases of concealment or evasion. She suggested that these two principles may just be examples "of the principle that the persons who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business".[280]

Lord Mance and Lord Clarke expressed that they admitted the existence of the doctrine of piercing the corporate veil, and concerned that its limits are not clear. They both agreed that the appeal should be allowed for the reasons given by Lord Sumption. However, they believed that it is dangerous to set

277 *Lubbe* (n 18).

279 ibid [35].
280 Ibid [92].

such a boundary of the veil-piercing cases and wished to reserve the position for any other situations which may arise. This is an issue questioned by most academic commentators, but it is also believed that any other exceptions would not be easy to establish.[281]

Apparently, the latest leading case *Prest* provides that the law in the area of veil piercing has not been formulated and settled maturely. It is expected to see the application of the formulations provided in *Prest* in further coming claims.[282] As Lord Clarke and Lord Mance commented, other possible exceptions are not definitely rejected, but this will be extremely difficult in the current view. This is why we have almost given up the approaches of extending the circumstances of veil piercing to find liability, and are looking for alternative methodologies. It seems that the court will only “pierce the corporate veil” when all other conventional remedies have proved to be not available.

Courts are encouraged to use alternative approaches to establishing liability

Except for a few very limited circumstances, the doctrine of piercing the corporate veil and its extensions are not welcome in English law due to its running counter to company law principles. If fraud in contractual claims like *VTB* cannot make any progress in extending the application of veil piercing doctrine, could tort claims be treated differently? Many commentators argue that in tort cases, especially those concerning severe personal injury, courts should extend the application of piercing the corporate veil to cover the debts of insolvent subsidiaries.[283] However, both the early case law and the cases in

[281] ibid [92], [102], [103].
[282] Daniel Lightman and Emma Hargreaves, 'Petrodel Resources Ltd v Prest: Where Are We Now?' (2013) 19 Trusts & Trustees 877,879.
[283] Imanalin (n 65); Timothy P Glynn, 'Beyond 'Unlimiting' Shareholder Liability: Vicarious Tort Liability for Corporate Officers' (2004) 57 Vanderbilt Law Review 329; Abhinav Ashwin , ‘Tortious Liability of

recent years such as *VTB* and *Prest,*[284] indicate that it is impossible for tort victims to claim against the parent company or shareholder on the traditional basis of piercing the corporate veil.

What makes *Prest* distinct is the message it conveyed to the lower court that the doctrine of veil piercing should be considered as the last remedy, but alternative approaches such as looking to tort law could be quite promising.[285] By moving from the decision in *Antonio Gramsci Shipping*,[286] the lower courts are encouraged to achieve corporate liability beyond the corporate veil based on other well-developed legal principles or theories, such as the tort of negligence, rather than to be caught up in the doctrine of veil piercing.

2.5 Conclusion

This chapter discussed the efficiency of three prominent categories of approach to the parent company's liability in corporate groups: the proposal of pro rata unlimited liability, statutory exceptions to limited liability in the Insolvency Act 1986 (section 214 on wrongful trading) and the doctrine of piercing the corporate veil under English case law.

In the scenario that limited shareholder liability for corporate torts is questioned constantly for blocking a range of solutions of recourse, the approach of imposing unlimited liability on shareholders for corporate torts called "unlimited pro rata shareholder liability" is proposed by legal commentators. It is justified

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Company in Winding Up : An Analysis' (2005) 26 Comp Law 176.

[284] As in *VTB,* the court was able to reach its decision (and in the case of *Prest* the same decision as was reached at first instance) without piercing the corporate veil and disregarding the separate legal personality of the relevant companies.

[285] May Kim Ho, 'Piercing the Corporate Veil as A Last Resort: Prest v Petrodel Resources Ltd [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1 (2014) 26 Singapore Academy of Law Journal 249, 250.

[286] *Antonio Gramsci Shipping Corp* (n 210).

that the principle of limited liability has inherent drawbacks and threatens the position of tort creditors. As an essential principle of company law, limited liability is created for protecting shareholders and the whole corporate structure and group assets. Without considering the protection of tort creditors, the abuse of limited liability and the possibility of escaping tort liability under the shield of limited liability both further increase the tort occurrence rate. Moreover, the principle of limited liability prevents tort claims against the parent companies for satisfactory compensation beyond the insolvent subsidiaries. It is argued that imposing pro rata unlimited shareholder liability just for corporate torts provides recourse to the unfortunate tort victims who are always left in the cold, but will not have a harmful effect on contract claims, the economies, and corporations. Nevertheless, both the feasibility of the enforcement of the unlimited liability regime, and the outcome of abolishing limited liability cause concerns. The advantages of limited liability in increasing investment and economic efficiency are well accepted in the economic and legal world. Removing limited liability in corporate tort cases will certainly influence investment, especially in hazardous industries. It seems that the proposal of unlimited liability attend to one thing but lose another. Furthermore, due to the lack of empirical research, it is difficult to compare the efficiency of limited liability with that of the pro rata unlimited liability regime. The feasibility of the proposal is also doubtful since there is no persuasive evidence such as empirical data to show that the new regime would bring more benefits or would not result in chaos. Implementation of this unlimited liability regime is based on a long-term preparation and empirical research, and this pushes us to seek other realistic approaches.

As to the statutory inroad into the principle of limited liability, from time to time proposals for statutory provisions to modify the veil within groups have appeared both at community level and domestically, but so far, without a satisfactory result.[287] The insolvency law seem to be made with the assumption that tort claims would infrequently appear in the process of insolvency, and that when such claims were presented they would be in the nature of business torts such as conversion or defalcation rather than personal injury. Consequently, there is a tendency to ignore tort claims in insolvency; there is no statute in English insolvency law or company law specifically dealing with personal injury tort debts regarding corporate groups.[288] Thus, from the perspective of statutory inroad, we just evaluate section 214 of the Insolvency Act 1986 as a clue to enhance statutory protections by making a parent company liable for its insolvent subsidiaries' debts. Section 214, the wrongful trading provision, is made for protecting creditors who experience loss due to the unreasonable behaviour of the directors. Liability currently has extended to a shadow director, which means a parent company has the potential to be the defendant in violation of the provision. Unfortunately, the enforcement of section 214 in making a parent company liable for its subsidiary's debts is less optimistic. Not only the vague boundaries and inconclusive instructions in determining a "shadow director" in the context of a corporate group, but also its original defects in the enforcement such as problems of initiating actions and difficulties in establishing elements to make the action successful, contribute to the inefficiency of the provision in practice. In fact, both the extension of the general creditor protection rules such as fraudulent trading and wrongful trading to shadow directors to deal with particular situations in the group, and the development of distinct rules for corporate torts are expected to be improved.

In the aspect of judicial inroad of limited liability and separate legal personality as a ground for corporate tort recourse, the doctrine of piercing the corporate

[287] Davies (n 22) 244.
[288] Margaret I Lyle, 'Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System' (1983) 61 Texas Law Review 1297, 1304.

veil is deemed to be inadequate. Many lawyers, academic commentators and judges regard the veil piercing doctrine as one possible remedy to resolve injustice brought by the principle of limited liability. However, this doctrine cannot serve such ends. The English courts have not followed any consistent rules on when to pierce the corporate veil over a very long period, which has led to countless arguments. Following the decisions of the two latest leading cases and the evaluations of the prominent arguments for piercing the corporate veil, it seems that the standard of veil piercing has been set even higher, and it is quite difficult to fulfil the elements of veil-piercing tests in personal injury cases. Up until now, both consensual and non-consensual creditors find they are in a weak position in making the "controller" of a group liable by piercing the corporate veil. Historical cases concerning piercing the corporate veil and the latest significant decisions of *VTB* and *Prest* reflect that the doctrine of veil piercing exists, but is applied in a very limited way and could rarely be extended. Courts have less enthusiasm in ascertaining corporate liability by this route. Instead, satisfactory compensation for tort victims can be fulfilled in another way. The Supreme Court encouraged claimants to seek for compensation through other long-standing and efficient principles of English law, such as the tort of negligence. It is supposed that remedies in tort such as pursuing a direct duty of care of the parent company may achieve satisfactory outcomes for tort victims.

Chapter 3 Corporate group's negligence liability

3.1 Introduction

This Chapter examines how UK courts establish negligence liability in circumstances where the insolvent subsidiaries' tort creditors who suffer personal injuries pursue recourse in the whole group; or in situations where the injured claimants bring tort claims against the rich element of the group, such as the parent company. Negligence cases from other countries such as Australia and the United States are discussed as well.

In the first place, this section will provide a general overview of the theory of tort, and more specifically, the tort of negligence, for the purpose of explaining why we turn to use the tort law theory to deal with problems of corporate groups.

In the common law system, which is accepted in England and Wales, the law of tort is considered primarily in the compensation culture. Most civil lawsuits fall under the law of tort. A tort can be simply understood as a civil wrong. More specific definitions have also been made by legal scholars. One sophisticated explanation is provided in Witting's tort law book:

> Tort is that branch of the civil law relating to obligations imposed by operation of law on all natural and artificial persons. These obligations, owed by one person to another, embody norms of conduct that arise outside (or in addition to) contract and unjust enrichment. Tort enables

> the person to whom the obligation is owed to pursue a remedy on his own behalf where breach of a relevant norm of conduct infringes his interests to a degree recognised by the law as such an infringement.[289]

Winfield defines tort as follows, "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages."[290]

Tort law thus can be understood as a body of rights, obligations and remedies for civil wrongs not arising from contractual obligations. Tort law in nature is designed to protect fundamental human interests, and provide remedies for the person who seeks compensation for loss.[291] Thus, tortious liability can be pursued in any context, which should include the corporate group context. A parent company could potentially commit a tort to its subsidiary's employees, or creditors. In this circumstance, the claimant can both bring action against the subsidiary company which is of much relevance to him, and bring action against the parent company who can be proved to have committed tortious conduct to him. This way, a parent company can be capable of bearing liability and debts of its subsidiary company.

In general, three categories of torts are considered in tort law: negligence-based torts, intentional torts and strict liability torts. Among them, negligence-based torts are the largest and the most dynamic group of torts, which include civil wrongs done to people due to the failure of another person's exercise of certain level of care – duty of care. Negligence thus embodies a type of fault, a type of conduct rather than a state of mind: "Negligence qua species of fault refers to a failure to take as much care as the hypothetical

289 Christian Witting and John Murphy, *Street on torts* (14th edn, OUP 2012) 4.
290 W V H Rogers, *Winfield & Jolowicz on Tort* (17th edn, Sweet & Maxwell 2006) 3.
291 Witting, *Street on Torts* (n 280) 4.

reasonable person in the defendant's position would have taken in the circumstances."[292] This means that a natural or legal person who consciously acts in a risky manner can be negligently liable for those risks.

The nature and definition of negligence as a tort provides possibilities for creditors or employees of the subsidiary company to make claims against other group members. There is some degree of overlap between negligence and the concept of intention and recklessness. In other words, it could be possible that a defendant act negligently, and also intentionally or recklessly. In this sense, a parent company can be held negligently liable for its subsidiary company's employees or tort creditors, no matter the loss arises out of the risks run by the parent company intentionally or recklessly.[293] The claimant only has to prove the defendant's failure to act where any reasonable person would have so acted.

There are two other reasons why the tort of negligence can be considered as one potential approach to deal with corporate tort problems. In the first place, negligence is the most common cause of action in the context of personal injury claims, while other regimes are still available. In the UK, common law negligence is usually a claimant's dominating cause of action for work-related and environmental damage related disease claims. Thus, when we are considering personal injury claims against corporate group members, tort of negligence should be allowed in the circumstances that one tort claimant sustains injury as a result of the negligence of a company among the group.

The claimants vary from employees of insolvent subsidiaries injured due to poor workplace environment, to families who lose their relatives as a result of environmental damage caused by subsidiary companies, as well as

[292] Rogers (n 281) 51.
[293] Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32 (1) Sydney Law Review 29, 30.

consumers hurt by unsafe or defective products. In some circumstances, other actions might be brought, such as litigations for breach of statutory duty in health and safety legislations and actions under consumer protection legislation.[294] In most cases, especially in the claims against parent companies or other company members, those are secondary choices to the principal negligent cause.[295]

In the second place, tort law approaches are very flexible and it can be applied in many novel cases, such as some personal injury cases concerning corporate groups. To establishing negligence liability, claimants need to prove some essential elements. As discussed in Chapter II, English courts are usually unwilling to establishing liability to the parent company for the torts of its subsidiary company because of the existence of corporate veil. However, one can establish negligence liability to the parent company for its subsidiaries' employees or other injured parties if the test of tort of negligence for the parent company is satisfied. This could happen when the principal elements for tort of negligence are all established, and the realisation of negligence liability of the parent company will not conflict with the existence of the corporate veil that the courts put much weight on.

To determine liability in tort of negligence for corporate members in personal injury claims, the following principal elements should be established:

(1) Duty of care

To establish the legal liability in negligence, the defendant must have owed a duty of care to the claimant. In cases of personal injury involving corporate

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[294] Consumer Protection Act 1987, which implemented the European Product Liability Directive of 1985 under which producers can be held strictly liable for injury caused by defective products.
[295] Richard Best, 'Liability for Asbestos Related Disease in England and Germany' (2003) 4 (7) German Law Journal 662, 664.

groups, a duty of care should be found among the corporate members, usually a parent company and the injured individuals such as employees or other third parties. In the tort of negligence, the duty of care is pursued with much flexibility, where controversies and difficulties arise.[296] Since the case of *Donoghue v Stevenson*[297] was decided, various ideas about the key concepts such as responsibility and relationship are frequently discussed in negligence tests. This suggests that the choice of test used for the duty of care is very crucial. At present, English courts are in favour of the recommended approach in *Caparo Industries v Dickman,*[298] in determining whether, on the facts of a particular case, a duty of care is owed.

The approach is also named the "three-stage test". A closer examination of the requirements reveal the following elements:

a. Foreseeability: reasonable foreseeability of harm at issue must be found at first in determining a duty of care.

b. The relationship of proximity: there should be a relationship of proximity between the claimant and the defendant. This requirement demands that before determining a duty of care, a certain type of relationship or connection must exist between the tort claimants (e.g. employees) and company members (e.g. parent company). However, principles and rules established in the *Caparo* test tell very little about what can contribute to a relationship of proximity in relevant cases.[299] The proximity relationship is undoubtedly the most difficult part to be established when ascertaining a duty of care.

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[296] Prue Vines, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence' (2000) 23 UNSWLJ 35, 36.
[297] *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562.
[298] *Caparo Industries plc v Dickman* [1990] UKHL 2; [1990] 2 AC 605.
[299] Kirsty Horsey, *Tort Law* (3rd edition, OUP 2013) 63.

c. Reasonable and just: it should be established that it is fair, just and reasonable to find that the defendant owes the claimant a duty to take reasonable care not to cause any damage. Arguably, this element leaves the court with an inevitable "residual discretion as to whether or not a duty of care should be recognized",[300] which add certain complexities to the new area of establishing the tort liability of corporate groups as well.

Existing legal precedents are rarely to be found in the case of establishing negligence liability in corporate groups for personal injuries. Therefore, it leaves considerable room for courts and legal scholars to explore the application of different negligence tests in corporate group situations. In spite of the classic "three-stage test", courts have also considered other approaches to establishing the liability for failure to act.[301] For instance, courts would like to find a special relationship between the injured claimants and the defendants;[302] or to find an assumption of responsibility of a parent company; or other possibilities such a special duty to control land, dangerous products or a kind of behaviour, in order to make the defendant negligently liable for its omission.

Assumption of responsibility

Particularly, the approach of assumption of responsibility is of much importance, and is mainly applied by the courts to establishing parent company's negligence liability. The concept of voluntary assumption of responsibility was firstly mentioned in a claim concerning compensation of

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300 Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 Oxford Journal of Legal Studies 33, 62.
301 Simon Deakin, *Angus Johnston and Basil Markesinis, Markesinis and Deakin's Tort Law,* (7th edn, OUP 2013) 103.
302 *White v Jones* [1995] 2 AC (HL) 207, 273.

economic loss, *Hedley Byrne v Heller*.[303] In this House of Lords case, a Bank was held to be negligently liable for the loss of a regular client because it supplied some ill-conceived information.[304] A responsibility is thus imposed by law on certain types of persons or situations towards those who act upon advice or information; and the person who gives certain information has voluntary assumption of responsibility towards the person so acting. A duty of care is built because the defendant is in close proximity with the claimant who suffers loss by relying on the defendant's wrong information or advice provided negligently. The concept of assumption of responsibility has been accepted and developed by the courts as an approach to establish a duty of care, or to demonstrate a general basis of tort liability in a number of cases. In these cases, a duty of care is reached because of the existence of assumption of responsibility based on "reliance" by the claimant on the defendant's negligently false information or advice.[305]

The courts have also been developing the theory of assumption of responsibility to give rise to a duty of care beyond claims of pure economic loss, to protect individuals from physical harm.[306] One classic judgment was made by the Court of Appeal to create a duty of care based upon the voluntary assumption of responsibility in the case of *Leach v Chief Constable of Gloucestershire*.[307] In this case, a duty of care was built upon the creation of an assumption of responsibility, which was owed by the relevant police to a volunteer who helped to investigate a serial killer case. The volunteer got mental injury during the investigation. The police had a "voluntary assumed responsibility" to advise the claimant to have proper counseling service in the

303 *Hedley Byrne v Heller* [1964] AC 465 (HL).
304 In this case, negligence liability was not determined by the court because of a disclaimer, but it was held to be possible.
305 *Cornish v Midland Bank Plc* [1985] EWCA Civ J0717-6, [1985] 3 All ER 513; *Chaudhry v Prabhakar* [1988] EWCA Civ J0520-3, [1989] 1 WLR 29; *Welton v* North *Cornwall District Council* [1997] 1 WLR 570 (CA).
306 Rogers (n 281) 170.
307 *Leach v Chief Constable of Gloucestershire* [1999] 1 All ER 215 (CA).

process of interrogation. In addition, the claimant had reasonable reliance on the police to offer such information, which led to the responsibility.

The decision of *Hedley Byrne* created an exception to the previous rule that pure economic loss cannot be pursued in tort. Although originally, “assumption of responsibility” was considered in the context of economic loss caused by negligent misstatements, this test is now suggested to be applied more widely.[308] The rule of assumption of responsibility provides a path to a novel tort liability, or a duty of care, based on a special relationship between the claimant and the defendant. This special responsibility would arise when the defendant knows or should have known that the claimant will reasonably rely on his particular advice, information or skill. This principle is thus considered as an approach to establishing parent company’s tortious liability to its subsidiary’s debts in the case of *Chandler v Cape.* The arguments around the role of assumption of responsibility in group cases will be given in later discussion under the case analysis of *Chandler v Cape*.

(2) Breach of duty of care

To impose liability, a duty of care must have been breached by the defendant. In this regard, several elements are taken into account such as severity of the potential harm and the practicable nature of the resort. In the case of corporate groups, for instance, if the parent company has a duty to supervise its subsidiary’s activities, then it should be considered whether the parent company fails to exercise that duty.

(3) Causation and Remoteness

[308] Witting, *Street on Torts* (n 280) 51-52.

To achieve the final element of a claim in the tort of negligence, it should be established that the damage suffered by the claimant is caused by the defendant's breach of duty. This step is considered as first stage "factual causation" when analysing questions of causation in English tort law.[309] The claimant must prove that the physical harm experienced is caused by the defendant's actions or omissions, which have resulted in, or materially contributed to that physical harm. In many cases, "causation" will be based on the same facts used to set up a duty of care, e.g., the level of knowledge within the parent company about the risks associated with the subsidiary's activities.

As regards the second stage (legal causation), normally, defendants will argue based on the foreseeability test, that, the damage is too remote, in order to reduce his or her liability. Therefore, a successful claim should be based on the proof of factual causation and defeat of any remoteness argument.

3.2 Assessment of the application of tort of negligence in English case law

This section examines early examples and the case of *Chandler v Cape*, to reflect the manner in which the tort of negligence in (personal injury) claims against the parent company are identified. Particularly, the element of "proximity" which contributes to a "duty of care" is regarded as the central matter in imposing negligence liability. The application of tort of negligence is proved to be a quite promising approach to provide an effective recourse to corporate injured tort victims. However, at the moment, the formulations available are inconsistent and inconclusive and restricted in fixed

[309] ibid 218.

circumstances. Future judicial guidance and academic research work is needed.

3.2.1 Application of tort of negligence in early examples and *Chandler v Cape plc*

Until the decision of *Chandler v Cape plc,*[310] the UK case law provided no clear guidance on how to ascertain a parent company's negligence liability for injuries to their subsidiaries' employees and other third parties. It is challenging for English courts to impose a duty of care on the parent company directly before the *Chandler* case. Most of cases were refused by English courts for *forum non-conveniens*, or settled between the parties out of court. However, some expressions given by the courts about negligence liability of the parent company are of interest.

Since 1992, a number of cases of mercury poisoning among workers at the South African plant had been noted, including three deaths. Gaining no real satisfaction from criminal proceedings, claims were brought before the English courts by twenty workers. Eventually, two separate group actions were settled out of court after the English courts refused the proceedings for *forum non-conveniens*.[311]

One of the cases is *Busisiwe Ngcobo and Others v Thor Chemicals Ltd*,[312] in which 20 workers sued against the parent company Thor Chemicals Ltd, and its chairman, Desmond Cowley, in an English High Court. The business of the

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[310] *Chandler* (n 87).
[311] See *Busisiwe Ngcobo and others v Thor Chemical Holdings Ltd* [1995] TLR 10/11/95 (CA), and *Sithole v Thor Chemical Holdings Ltd* [1999] EWCA Civ J0203-5, [1999] All ER (D) 102. The *Ngcobo* claim was settled in 1997 for £1.3 million. The *Sithole* claim was settled in October 2000 for £270,000. Halina Ward, 'Governing multinationals: The Role of Foreign Direct Liability' (2001) 18 Briefing Paper 1.
[312] *Busisiwe Ngcobo and others v Thor Chemical Holdings Ltd* [1995] TLR 10/11/95 (CA).

company in South Africa involved manufacturing and reprocessing of mercury compounds, and the employees were often exposed to hazardous and unsafe quantities of mercury vapour or mercury compounds in the course of their work; this was the context of the case. The claimants sought to establishing the parent company's negligence in designing, building up, intervening operation, and supervising the hazardous process, as well as the parent company's failure to protect workers in South Africa when the foreseeability of harm of mercury was obvious.

Even though the Court of Appeal refused the case for *forum non-conveniens*, it admitted that the nature of the claims raised serious issues. Passing aside the jurisdiction issues, Evans LJ, pointed out one of the important disputes related to liability in negligence, which should be "foreseeability". In this regard, one point that should be made clear is that the defendants were aware of the risk of injury to employees and that they negligently failed to take sufficient steps to safeguard their employees in South Africa after the move of the business there.[313]

Since 1997, the number of claims against UK parent companies accepted by UK courts has increased gradually. In *Connelly v RTZ Corp plc*,[314] the House of Lords confirmed that the appropriate forum was England,[315] but the central issues were not resolved, since the Queens Bench gave the judgment that the case was time-barred. Even so, the judgment of Wright J in Queens Bench is worth exploring in further detail, as it shows that the court puts much weight on the issue of corporate tort liability; the case also contains some valuable thoughts on the establishment of duty of care. In particular, the High Court

[313] ibid 2.
[314] *Connelly* (n 16).
[315] ibid; The House of Lords rejected the defendant's application to stay the proceedings on grounds of *forum non-conveniens*, having taken the view that the inability of Mr Connelly to litigate his claim in Namibia (owing to the non-availability of legal aid) meant that Namibia was not a forum in which the action could be filed "more suitably for the interests of all the parties and the ends of justice".

suggested the possibility of hearing claims against the UK parent company, brought by its overseas subsidiary's employees.

Connelly v RTZ Corp plc, concerned a claim for damages against the parent company of the operator of a mine in Namibia. The claimant alleged negligent exposure to uranium dust that caused cancer. The plaintiff was employed for several years by the defendant company as a foreman fitter in a uranium mine in Namibia. On his return to Scotland, the plaintiff developed cancer of the throat, as a result of which he became permanently disabled. Accordingly, the plaintiff issued proceedings against the defendant (parent company) and one of its subsidiaries in England, where they were registered and where he was eligible for legal aid. He claimed that the damage arose from the defendants' negligence in failing to take reasonable steps to protect employees who were exposed to the uranium dust.

Wright J suggested the possibility that the third person could have owed a duty of care to the claimant because of the relationship appeared.[316] "Foreseeability" was the first element to consider in any of these duty of care cases. It was suggested by the court that there should be some evidence to prove that the employer could foresee the damage. Wright J provided the circumstance of "advice by consultant" as an example.[317] The fact that the employer had accepted advice by a consultant on the safety of work system would contribute to the foreseeability.[318] The second point was relevant to the responsibility of the parent company. It was suggested that the employer could not avoid his responsibility to employees even if he transferred the safety construction work such as devising or installing precautions to the third party.[319] This means that despite the independent contractor taking over the

[316] *Connelly* (n 16) 538.
[317] ibid.
[318] *Clay v Crump & Sons Ltd* [1963] EWCA Civ J0730-5, [1964] 1 QB 533.
[319] *Connelly* (n 16) 538.

responsibility for the safety of the workplace of the subsidiaries' employees, the parent company might still be deemed to be involved based on relevant evidence, such as reasonable control.

In this case, the court made it clear that it is possible and acceptable to impose a duty of care on the defendants who undertake certain responsibilities, contributing to the safety procedures:

> The situation would be an unusual one; but if the pleading represents the actuality then, as it seems to me, the situation is likely to comprehend the elements of proximity, foreseeability and reasonableness required to give rise to a duty of care: *Caparo Industries v Dickman*.[320]

It seems to Wright J, that the proximity relationship should be found in relevant evidence that proved the parent company had participated in devising an appropriate policy for the safety system of its subsidiary:

> On a fair reading of his pleading, it seems to me that that is more or less what the amended Statement of Claim alleges – namely, that the first Defendant had taken into its own hands the responsibility for devising an appropriate policy for health and safety to be operated at the Rossing mine, and that either the first Defendant or one or other of its English subsidiaries implemented that policy and supervised the precautions necessary to ensure as so far as was reasonably possible, the health and safety of the Rossing employees through the RTZ supervisors. Such an allegation, if true, seems to me to impose a duty of care on those Defendants who undertook those responsibilities,

[320] ibid.

whatever contribution Rossing itself may have made towards the safety procedures at the mine.[321]

In the early cases, it is apparent that the legal approach to direct negligence does not depend on the amount of shareholding owned by the parent company. What matters should be the sufficient and reasonable involvement in the subsidiaries, evidence of control over the subsidiary's management and knowledge of the unsafe workplace.

Another noteworthy case concerning the issue of intra-group liability is *David Newton-Sealey v ArmorGroup Services Ltd.*[322] The question whether other corporate members have acted in a way, which may lead to a duty of care to the employee of one subsidiary is raised again.

This was a litigation brought by an injured employee against three members of a corporate group. The High Court was asked by the defendants to strike out the claims against them, and the question was whether there was a real prospect of the claimant's success in the case.[323]

The defendants were members of the ArmorGroup of companies, which was a dominant provider of protective security services, training weapons and mine reduction services, whose business expanded to countries suffering civil war, or under a high risk of terrorist activity. The first defendant, ArmorGroup Services Ltd, (hereafter, AG UK), was registered and had its headquarters in London. The second defendant, ArmorGroup Services JerseyLtd (hereafter, Jersey AGJ), was a Jersey company. The third defendant, ArmorGroup International plc, (hereafter, AG plc) was the parent company of the group,

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[321] ibid.
[322] *David Newton-Sealey v ArmorGroup Services Ltd* [2008] EWHC 233(QB).
[323] ibid [2].

incorporated in England and Wales.[324]

The claimant signed a contract to be employed, and provided security services in Iraq with the Jersey company AGJ, but had his interview at the AGUK office and AG plc in London. The claimant was injured in Iraq while at work, and then he claimed against the three defendants above. He argued that despite the presence of Jersey company AGJ, both AGUK and AG plc were liable to him under the contract and the tort of negligence.[325]

The court held that there was no real prospect of the claimant in this case establishing a contract with the two London companies, AGUK and AG plc.[326] The court did not think the evidence given by the claimant such as the place of interview, and the control the two London companies exercised over him could contribute to a contractual intention.[327] Additionally, any internal arrangements, and allocation between members of Armor Group did not give rise to a contractual relationship with the claimant.[328] Thus, in this kind of cases, it is quite difficult to establish a contractual relationship with other members in a group beyond the member with whom the claimant signs the contract.

The court more favourably accepted the cause of action under the tort of negligence, which was significantly helpful for the injured claimants when an attempt to establishing contract liability failed. In the first place, Cranston J, surely held that the claimant's contract was with Jersey Company, who also owed him a duty of care.[329] Also, he further held that the other two defendants were also potentially liable in negligence.[330]

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[324] ibid [4].
[325] ibid [3]-[5].
[326] ibid [17].
[327] ibid [11]-[20].
[328] ibid [20].
[329] ibid [38].
[330] ibid [35] Cranston J noted that, "It seems to me that in the light of this, there is a real prospect of the claimant establishing a duty of care on the part of the AG plc as well as AG (UK)".

Thus, it is quite necessary to explore the judge's reasoning and examine how the negligence liability was ascertained. The central issues involved the existence of a duty of care, breach and causation between the breach of the duty of care and the damage claimed.

As to the element of duty of care, the issue was whether the relationship between the claimant and the two defendants (AG UK and AG plc) imposed on them a duty of care to avoid or prevent the injuries to the claimant. As mentioned by Cranston J, liability can be established in two ways: application of the *Caparo* approach, and the establishment of a special type of relationship between the two sides based on the voluntary assumption of responsibility approach.[331] There is a time-honoured authority that a duty of care for physical injury could be induced by a voluntary assumption of responsibility.[332] In the case of *Henderson v Merrett Syndicates Ltd,*[333] Lord Goff observed that:

> An assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be most advantageous.[334]

The court did not mention the distinction between the two approaches, and regarded them as the same important in establishing a duty of care.

In fact, the evidence in this case are of great help in establishing such a special

[331] ibid [24]-[26].
[332] Rogers (n 281) 170.
[333] *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, [1995] 2 AC 145.
[334] ibid 194.

responsibility. Specifically, from the way the claimant was recruited (the interview occurred in London, not Jersey, was conducted by an employee of AGUK, working for the group as a whole);[335] and the presentation of ArmorGroup in the process (no clear distinction was made between members of the ArmorGroup, nor was it indicated that the claimant was specifically employed by AG Jersey…);[336] the claimant's deployment to Iraq (the initial deployment orders he received on arriving in the Middle East, containing lists of security operatives in Iraq and their deployment, was on AGUK's letterhead, under the ArmorGroup banner…);[337] the conduct of operations there, not least the supply of equipment.

The above evidence made the court believe that ArmorGroup as a whole intended that, although the employee signed recruit contracts with AG Jersey, other parts of ArmorGroup, especially the parent company had "special relationship with and special responsibility for them".[338] This kind of special responsibility contributed to a duty of care of the two defendants in Armor Group.

Cases involving Cape plc as a defendant

Cape plc, incorporated in 1893 in the UK, undertaking the business of mining, processing and selling asbestos products. It acquired South Africa subsidiaries in 1925 to extend its asbestos business there. Since 1948, all the businesses and share holdings were transferred to another South African subsidiary "Asbestos South Africa (Pty) Limited" (CASAP). Cape plc in the UK held all the shares in this subsidiary. Between 1979 to 1989, Cape plc gradually sold its shares in the South African subsidiaries and since 1989 Cape possessed no

335 *David Newton-Sealey* (n 313) [11].
336 ibid.
337 ibid [12].
338 ibid [39].

assets there.

Cape was first sued in 1990, in the case of *Adams v Cape Plc*;[339] the case gained a lot of publicity. The significance of this case was that the Court of Appeal first took the chance to look at the circumstances of piercing the corporate veil in the past, but constricted the way significantly in the future.[340] The judgment of this case left an issue whether the parent company would be liable for the wrongdoing of its subsidiary companies, which had no ability to pay debts or be responsible for the victims of tort. It was subsequently inferred that the company law was deficient in resolving the problems between tort victims and the insolvent defendant company.

Since the case *Cape* denied the application of the veil piercing doctrine in imposing parent company's liability, other claimants began to initiate litigation in the tort of negligence in subsequent cases. It was not until the case of *Lubbe v Cape plc*,[341] that the asbestos-related disease litigations against the parent company brought public attention again and made little progress in establishing parent company's liability in negligence.

In *Lubbe v Cape plc,* Cape plc was sued for negligent control over the management of its subsidiaries in South Africa, in terms of failing to take care, warn of the dangers, and to provide adequate protections to the employees.[342] The proceedings in this case were extra complex, with the problem of jurisdiction hanging over the case from 1988 to 2001, during which some claimants died. Eventually in 2001 this mass tort litigation involving 3000 claimants was settled out of court.

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339 *Adams* (n 85).
340 Alan Dignam and John Lowry, *Company Law*, (9th edn, OUP 2016) 36.
341 *Lubbe* (n 18).
342 *Lubbe* (n 18) [6].

Contrary to the decision in *Adams v Cape plc,* the decision of the House of Lords in *Lubbe* was to allow the litigation to go ahead, and it admitted the possibility of holding a parent company liable in negligence for its subsidiaries' injured employees.

Lord Bingham mentioned the points to be considered in establishing a parent company's duty of care, and divided them into two segments. In the first place, to establish a duty of care, it was important to determine the responsibility of the defendant as a parent company, to ensure that the overseas subsidiaries have proper health and safety procedures.[343] Thus, a special responsibility of the parent company to its subsidiaries' employees should be established. This kind of responsibility could be found in the way the parent company controlled its subsidiaries, and the knowledge the parent company had over its subsidiaries' business and employees' work environment.[344] Relevant evidence involved minutes of meetings, reports of directors and correspondence issues.

Secondly, the establishment of the parent company's duty of care was based on the examination of every individual case. Whether each claimant had substantial damage, and whether the damage was as a result of the parent company's breach of duty should be proved.[345] It was quite complicated and burdensome to investigate each personal case on these issues such as medical examination evidence.[346] So, Lord Bingham noted that, liability in negligence of the parent company was likely to be achieved if the "control" based duty of care was breached, but the investigation would be an onerous task.

[343] ibid [20].
[344] ibid.
[345] ibid [21].
[346] ibid [23].

Chandler v Cape plc

Corporate tort cases involve doctrines of company law and tort law. The imposition of parent company's liability for its subsidiary's tort is always considered to conflict with principles of limited liability and separate legal personality.[347] It took quite a long time for English courts to make progress in establishing liability in negligence among corporate groups before *Chandler v Cape plc.*[348] In this case, the Court of Appeal for the first time held the parent company liable for negligence in asbestos cases, and also provided a new four-part test for future cases.[349]

Mr Chandler was an employee of Cape Building Products Ltd (Cape Products), in the period of 1956 to 1959, and 1961 to 1962. During this time, two different processes in different parts of the site in Uxbridge were carried out by Cape Products. Mr Chandler worked in the site which manufactured bricks, and contended that the asbestos dust polluted the two workplaces when the other site produced Asbestolux. Subsequently, even though the claimant worked as a brick loader, he did not have the chance to avoid the exposure to the asbestos dust and was diagnosed with asbestosis in 2007.[350] Unfortunately, Cape Products no longer existed at that time, and no policy of insurance could satisfy the damages. Then Mr Chandler brought a negligence claim against the UK parent company Cape plc, alleging that Cape Products and Cape plc were joint tortfeasors jointly and severally liable to pay him damages.[351]

Chandler v Cape plc - High Court decision

[347] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Caple plc'* (2013) 76 The Modern Law Review 589, 603.
[348] *Chandler* (n 87).
[349] ibid [40]; the court stated that "it appears that there is no reported case of a direct duty of care on the part of a parent company".
[350] ibid [1-7].
[351] ibid [7].

According to Judge Wyn Williams, his task was to apply the "three-stage test" for a duty of care to the facts of this case.[352] In the first place, he refused the use of "piercing the corporate veil" principle, since there was no evidence that the subsidiary Cape Products was a sham.[353] Then, Wyn Williams J quoted the judgment given by Wright J, in *Connolly v RTZ Corporation Plc*,[354] and expressed his agreement to the possibility that the parent company and another party of one group could assume a duty to the employee of one subsidiary.[355]

Before continuing to examine the High Court's reasoning in *Cape*, it is necessary to firstly introduce the case law exceptions to the general rule of negligence that a party has no duty to prevent a third party causing harm to another. These exceptions are important in assuming a duty of care to a parent company, and are listed in the case of *Smith v Littlewoods Organisation Ltd*:

> A duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender… a duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party.[356]

In the case of *Chandler*, the claimant contended that the defendant parent company not only had a special responsibility for preventing the employees from the exposure to asbestos, but also had a special responsibility as a result of ultimate control over the management of the subsidiaries including its

352 *Chandler v Cape plc* [2011] EWHC 951, [2011] All ER (D) 157 [65].
353 ibid [71].
354 *Connelly* (n 16).
355 *Chandler* (n 343) [67]-[70].
356 *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 272.

asbestos business.[357]

In the view of Wyn Williams J, by applying the *Caparo* test, a duty of care could be imposed in *Chandler*'s case.

As to "foreseeability", Williams J had no doubt in the fact that the defendant had foreseen the risk of injury. It was clear to the defendant at a very early time that the exposure to asbestos could potentially result in life-threatening illness.[358] It was obvious to foresee the risks of working in the unsafe environment with asbestos exposure, and the defendant should have had the knowledge of this.[359]

Determination of proximity issue relationship in this case was the central challenge. Wyn Williams J admitted the existence of proximity, and held that the facts he had found were very convincing. He held that the defendant had the responsibility for "ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos".[360] Further, he proposed that the parent company should take overall responsibility. This special responsibility was based on the evidence of the employment of officers who take responsibility for the health and safety of any group's employees. In addition, instructions on the health and safety policies were all the time given by the parent company.[361] In the end, the court took the view that it would not be unfair or unreasonable to impose the duty if the requirements of foreseeability and proximity were both met.[362]

The "control" exception listed in the case of *Smith v Littlewoods Organisation*

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[357] *Chandler* (n 343) [71].
[358] ibid [73]-[76] Williams J stated that, "By the late 1950s it was clear to the defendant that the exposure to asbestos brought with it very significant risk of very damaging and life threatening illness."
[359] ibid [73].
[360] ibid [75].
[361] ibid [75].
[362] ibid [76].

Ltd on duties of care to third parties is essential for further understanding the degree of control needed in the proximity test. Lord Goff held that when the defendant is in control of a third party that cause the damage, the defendant's duty of care could arise. In the case of *Chandler*, the most contested issue was what level of control by the defendant (Cape plc) over the activities of the subsidiary company (Cape Products) would lead to a duty of care. Wyn Williams J in his High Court judgment has provided indications.

In the case of *Chandler*, the claimant argued that, according to the exception in the *Smith*, there was a special relationship between the defendant and the claimant "based upon the defendant's assumption of responsibility for safeguarding the claimant against the illness from exposure to asbestos; alternatively, the defendant had the ultimate control of those measures which were taken to protect the claimant from the risk of exposure to asbestos."[363] Specifically, the defendant (Cape plc), not the individual subsidiary companies, dictated the health and safety policy for the whole group. Even though it cannot be denied that the subsidiary companies played a part in the implementation of the policy, the actual facts of case persuaded the court that the defendant retained overall responsibility. It is because Cape controlled the policy, and could have intervened and stopped the employees from being exposed to the risk of harm through exposure to asbestos at any stage. This kind of control, in the *Chandler*'s case, is believed to establish a sufficient degree of proximity between the defendant and claimant.

So Wyn Williams J in the High Court judgment defines the concept of control in detail, based on which a special relationship and proximity were established. That is the defendant will retain a duty of care when he has ultimate control over the relevant policy of a third party who cause the damage. Particularly, the

363 *Chandler* (n 343) [71].

implementation of that policy was closely related to the damage.

Chandler v Cape plc - Court of Appeal decision

Cape instituted an appeal, contending that it had no duty of care to its subsidiaries' employees.

In the beginning, Arden LJ mentioned the problem of liability insurance of employer, which was considered to be unhelpful to protect the employees of an insolvent subsidiary in most cases. It was compulsory for Cape Products to carry employer's liability insurance. However, the policy excluded liability related to claims arising from pneumoconiosis, and this exception was extended to cover asbestosis.[364] Thus, Mr Chandler could not obtain compensation under employer's liability insurance.[365]

Arden LJ expressed her agreement with the High Court's analysis and divided the evidence for establishing the duty of care into six threads:

> (a) Origins of Cape Product's asbestos business; (b) Relationship between Cape and Cape Products; (c) Technical assistance given by Cape to Cape Products; (d) Contemporary evidence which was said to demonstrate that Cape was involved with the health and safety of employees of Cape Products; (e) Evidence as to Cape's involvement in the asbestos business of Cape Products; (f) Events subsequent to the relevant period.[366]

Arden LJ endorsed the application of the *Caparo* approach by Wyn Williams J

[364] *Cape plc v Iron Trades Employers Liability Association Ltd* [2004] Lloyd's Rep IR 75.
[365] The relevant employer's liability policy did not respond to claims for damages relating to asbestosis.
[366] *Chandler* (n 87) [6].

in the High Court. According to the relevant evidence, Cape took control over its subsidiary's management and business in some aspects,[367] which provided the basis for assumption of responsibility for Cape plc.[368]

First of all, the evidence considered by Arden LJ definitely grounded the element of "foreseeability". For instance, evidence of thread (b) included: the parent company obviously intervened and instructed product mixes; board minutes of Cape showed that the all the spending of the subsidiary (Cape Products) was under the supervision of Cape; the policy of Cape on subsidiaries and the meeting minutes both showed that the health problems of subsidiary's employees had been reported to Cape.[369] The parent company in this group knew the products, the expenditure, and health condition of its subsidiary.

Foreseeability was fully recognisable, but the difficulty lay in establishing "proximity", which brings focus on the analysis of assumption of responsibility, and the level of control. Similar to the reasoning of the High Court, Arden LJ preferred to consider assumption of responsibility and the concept of control as two crucial points for establishing a special relationship, and responsibility between the parent company Cape and the employees of its subsidiaries.

Assumption of responsibility

According to the Court of Appeal's reasoning, the theory of assumption of responsibility could inform the requirement for proximity.[370]

The special relationship requires demonstrations of reasonable reliance,[371]

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367 *Chandler* (n 87) [46].
368 ibid [31].
369 ibid [72]-[73].
370 Petrin (n 338) 612.
371 *Henderson* (n 324) 194, "assumption of responsibility coupled with the concomitant reliance may give

which may be based on the defendant's actions or omissions.[372] Evidence shows that the behaviours of Cape plc sufficiently lead to a reliance relationship between employees of the whole group and the parent company Cape. Cape, the parent company, had the knowledge of asbestos business superior to its subsidiaries. The following facts could illustrate this: Cape formulated health and safety policy for all of the subsidiaries, including Cape Products, and it hired the chief chemist of scientist for the Cape group as a whole. The group medical officer researched into the relationship between asbestos dust and asbestos-related diseases. All of the evidence indicated that it was reasonable for both the subsidiary and employees of the whole group to rely on the parent company's abundant experience and knowledge of asbestos for all relevant protections.

Concept of Control

Aside from establishing an assumption of responsibility, another way of making a third party liable for the damage is to look for a special responsibility based on "control". In this regard, the parent company may bear a duty to prevent its subsidiaries from causing damage to its employees.

Cape exercised a high level of control over its Uxbridge business. The evidence for this point not only supports the establishment of assumption of responsibility but also contributes to the special responsibility between Cape plc and Cape Products. Cape Products conducted its operations in accordance with Cape plc's products specification, which were mainly supported by the evidence: (c) (Technical assistance),[373] and (e) (Cape's intervention in the subsidiary's asbestos business and products

rise to a tortious duty of care"; *Hedley Byrne* (n 294) 503.
[372] *Chandler* (n 87) [65].
[373] *Chandler* (n 87) [14]-[22].

development).[374]

Four-part test

To potentially help in future cases, Arden LJ laid out a "four-part test" for determining the parent company's special responsibility for the health and safety of its subsidiaries' employees for future purposes. The requirements were expressed as follows:

> (1) the business of the parent and subsidiary were in a relevant respect the same; (2) the parent had, or ought to have had, superior knowledge on some relevant aspects of health and safety in the particular industry; (3) the parent company knew the subsidiary's system of work was unsafe, or ought to have known; (4) the parent had known or ought to have foreseen that the subsidiary or its employees would rely on the parent using that superior knowledge for the employee's protection. Crucially, it would not be necessary to demonstrate that the parent company regularly intervened in the health and safety policies of the subsidiary company to establish a duty of care. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[375]

In these circumstances, a duty of care owed by Cape plc to Cape Products' employees was established.[376] The omissions to provide Cape Products and even the whole group with advice on precautions for a safe workplace, and to

[374] ibid [28].
[375] ibid [80].
[376] ibid [79].

provide employees with a safe work environment were found by the court to constitute negligence.[377]

Distinction between the test advanced by Wyn Williams J and that advanced by Arden LJ

In general, Arden LJ agreed with Wyn Williams J's High Court judgment in *Chandler v Cape*. On this basis, Arden LJ further explained the concept of assumption of responsibility and control. Particularly, Arden LJ introduced a "four-part test" which listed the appropriate circumstances where the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees.

In the High Court judgment, Wyn Williams J focused on the application of the essential exceptions given in the case *Smith v Littlewoods Organisation Ltd*. That is, in special or exceptional circumstances a duty of care might arise. They are: a) where there is a special relationship between the Defendant and Claimant based on an assumption of responsibility by the Defendant; b) where there is a special relationship between the Defendant and the third party based on the control by the Defendant.[378] Specifically, Wyn Williams J defined the degree of control for establishing the special relationship for a duty of care in personal injury cases like *Chandler v Cape*. It was suggested by Wyn Williams J that, when the defendant parent company has ultimate control of the subsidiaries' policies or measures which were taken to protect the Claimant from the risk of harm, a special relationship is established. This means that at any stage the parent company could have intervened and the subsidiary company would have submitted to the intervention. This kind of relationship will satisfy the proximity requirement for a duty of care.

[377] ibid [78].

[378] *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 272.

In the Court of Appeal judgement, Arden LJ found the existence of a duty of care based on an assumption of responsibility. Furthermore, she advanced that this falls within the proximity part, and requirement of fairness, justice and reasonability in the three-stage test to impose liability. This attachment of responsibility is on a basis of reliance, which also require a sufficient degree of intervention by the parent company. Particularly, a "four-part test" is advanced by Arden LJ for future similar cases. Distinct from the test of Wyn Williams J, Arden LJ extended the scope of control which contributes to a sufficient degree of proximity between the parent company and the claimant. Accordingly, "the court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiaries, for example production and funding issues."[379]

Wyn Williams J provided a specific explanation of the concept of control, while Arden LJ further extended the scope of control. Arden LJ's test is more flexible and might be suitable for more cases. She opens a door for determining the parent company's negligence liability in the cases in which facts of intervention of subsidiary company's health and safety policy are not found. Such an extension is reasonable and, should be accepted. It is because what we look at centrally for establishing a duty of care, is a sufficient degree of proximity. A practice of intervening in the management, or trading operations of the subsidiaries, for example production and funding issues might provide a proximity relationship. It depends on the specific cases. In some circumstances, the parent company's involvement in the subsidiary company's business means the relationship between the two companies is characterised by the flow of information between them in certain period. This might make the

379 *Chandler* (n 87) [80].

claimant reasonably rely on the parent company to intervene to prevent the causation of harm caused by the subsidiary company.

3.2.2 Comparisons and evaluations

From previous chapters, we conclude that the group member is a separate legal person and that only in very limited situations will the “veil” of the corporation be disregarded. Alternatively, tort law regulates liability in parent company for the injury suffered where there is a lack of direct contractual relationship. Here tort law to some extent undermines some benefits of separate legal personality and limited liability. The above section explores and discusses how the English courts apply elements of the tort of negligence in personal injury cases as to corporate groups. It is revealed in *Chandler*’s case that the tort of negligence could be well applied to make the parent company liable for injuries to a subsidiary’s employee who has an employment relationship with the subsidiary company but not the parent company. The approach is normally based on the “three-stage test”. In addition, it leaves room for the court to explore other possible guidance for fulfilling the threefold test such as the theory of assumption of responsibility.

As the first requirement of the “three-stage test”, the element of foreseeability is not difficult to satisfy in corporate tort cases. It normally needs to be proven that the parent company is or should have been aware of the risk of injury to employees of subsidiaries or other parties. Thus, they have the chance to be held to have negligently failed to take steps to take care of the employees and other potential tort victims. The relevant facts contributing to the element of foreseeability include that: the parent company is clearly involved in “the design, transfer, set-up, operation, supervision or monitoring of a hazardous process undertaken in its subsidiary";[380] the parent company has been advised by the consultant on the safety of the work processes of subsidiaries;[381] the parent company is obviously involved in the products manufacture of its subsidiaries; the parent company financially supports the toxic product business; and the parent company dispatches doctors to the subsidiary.[382] It is generally not difficult to assume that the parent company has known or ought to have known the problematic business and unsafe workplace of its subsidiaries.

The most difficult and crucial step in establishing the parent company's negligence liability is to build reasonable proximity relationship between the parent company and the employee of the subsidiary company. Attentions are focused on the control and knowledge of the subsidiary operations by the parent company. Interestingly, courts have applied a few different approaches to determine the presence of a duty of care in previous cases. These approaches are based on the element of "control" by the parent company over the subsidiary company and the reliance relationship between the employee of subsidiary and the parent company. For instance, in the case of *David Newton-Sealey v ArmorGroup Services Ltd*, the court provided two available approaches to negligence liability: one was the threefold test, the other was to establishing a special relationship between the parent company and the claimant based on a voluntary assumption of responsibility.[383] In *Lubbe v Cape*, Lord Bingham mentioned that the duty of care was based on the special responsibility that could be found in the way of control exercised by the parent company.[384] The Court of Appeal observed in *Chandler* that the theory of assumption of responsibility contributed to the "proximity" requirement for duty of care; this special responsibility could be satisfied by the reliance of the

[380] *Busisiwe Ngcobo* (n 17).
[381] *Connelly* (n 16).
[382] *Chandler* (n 87) [77].
[383] *David Newton-Sealey* (n 313) [24]-[26].
[384] *Lubbe* (n 18) [20].

subsidiary's employee upon the parent company in taking actions to ensure a safety workplace.[385] Wyn Williams J, further held that the duty of care could also be induced by a special relationship, based on the element of "control". This approach to negligence liability stem from the exceptions to the general rule that a third party bears no duty to prevent a party from causing harm to another, as indicated in the case of *Smith v Littlewoods Organisation Ltd*.[386] Although the approaches to "proximity" requirement in different cases are not exactly alike and even limited in certain circumstances, it is not difficult to conclude that the theory of "assumption of responsibility" based on a reliance relationship, and the special responsibility based on "control" are two essential parts in determining a duty of care. Nevertheless, these two approaches may incur future confusion due to the vague explanations on the specific application both in previous cases and the latest authority, *Chandler v Cape*.

3.2.2.1 Problems concerning the "assumption of responsibility"

(1) The relationship between the "proximity" requirement and the "assumption of responsibility" test

The Court of Appeal in *Chandler* held that the use of assumption of responsibility could fall wtin the proximity requirement of the *Caparo* test. However, the combined use of these two theories by Arden LJ in *Chandler* seems to invoke some confusion. In some early cases, the approach of assumption of responsibility to find the parent company's negligence liability is regarded as different from the approach of applying the *Caparo test*. For instance, in the case of *Newton-Sealey v Armor Group Services Ltd*,[387] the

385 *Chandler* (n 87) [75].
386 *Smith* (n 347).
387 *David Newton-Sealey* (n 313).

claimant and the defendant suggested different solutions to achieve the parent company's duty of care. The claimant argued for the application of the threefold test while the defendants held that it was better to use the approach of assumption of responsibility to ascertain the loss of the claimants.[388] The court did not answer the question on the difference between these two approaches, and held that the difference between these two may not change the outcome. There should be a real prospect of the claimant succeeding, either by establishing elements in the *Caparo* test, or based on the voluntary assumption of responsibility approach.[389]

Interestingly, the assumption of responsibility test is also considered by the court as very similar in determining the relationship of two parties to the "proximity" approach in some circumstances.[390] In the case of *Commissioners of Customs and Excise v Barclays Bank plc*, the House of Lords noted that "assumption of responsibility" could be a type of proximity.[391] It is suggested by Christian Witting that:

> …the assumption of responsibility test is of real relevance in those few cases in which the evidence suggests that the defendant has voluntarily, subjectively assumed a responsibility for certain legal obligations owed to the claimant. In such a case, a court is able to recognize the existence of a duty of care consistent with the defendant's intentions. In all other cases, the law should focus upon application of the *Caparo* three stage test—and this goes for financial losses just as much as for other types of loss.[392]

388 ibid [26].
389 ibid.
390 Witting, *Street on Torts* (n 280) 51.
391 Witting, *Street on Torts* (n 280) 52; *Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28, [2006] 1 CLC 1096 [5], [35].
392 Witting, *Street on Torts* (n 280) 52.

In the personal injury claims against the parent company, represented by cases involving Cape Industries, the approach of assumption of responsibility is of much relevance, no matter whether it is considered as an independent approach to negligence liability or regarded as a test helping to establish "proximity". This is because the fourth requirement of the Arden J's "four-part test" for establishing parent company's negligence liability is of much relevance with the theory of assumption of responsibility. As provided by Arden J, the fourth requirement for negligence liability is that: "(4) the parent had known or ought to have foreseen that the subsidiary or its employees would rely on the parent using that superior knowledge for the employee's protection."[393] So, to establish the parent company's negligence liability for its subsidiary company's employee, this requirement with the other three in the "four-part test" should all be met. Interestingly, according to the theory of assumption of responsibility, if the fourth requirement is met, the parent company's negligence liability can also be established, because an assumption of responsibility based on reliance between the defendant and claimant has implicitly been proven.

The test of assumption of responsibility could be regarded as an independent test when it is applied mainly in the claims concerning pure economic loss. On a basis of assumption of responsibility, a duty of care is established because of the existence of reliance by the claimant on the defendant's negligently false information or advice. This approach has then been developed by courts more widely in some physical injury cases. This reliance closely connects the defendant and claimant and establishes a special relationship. Arden LJ in the Court of Appeal advanced that assumption of responsibility could fall within the second (proximity) and third (just and reasonable) part of the three-stage test. That means it is regarded as a part of the general proximity test in the case of *Chandler v Cape*. Thus, in some specific personal injury cases like *Chandler v*

[393] *Chandler* (n 87) [80].

Cape, or other novel cases in which a duty of care is not easy to establish, particularly, the proximity relationship is difficult to find, the test of assumption of responsibility can be regarded as one essential part to invoke the proximity relationship. In fact, the proximity test has no fixed content in its use in establishing a duty of care. So, it is reasonable to believe that the proximity relationship can be invoked when we find the assumption of responsibility is settled. Just as Lord Oliver pointed out in *Caparo*:

"Proximity is, no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists."[394]

It is expected that the courts would further engage with the theory of assumption of responsibility in establishing parent company's negligence liability in corporate tort cases.

(2) Reliance for assumption of responsibility

The establishment of assumption of responsibility lies in the existence of a special relationship based on reliance. It is the concept of reliance that causes problems and controversies.

The extension of the concept of reliance made by the Court of Appeal in the *Chandler* case is questioned by some legal commentators. Normally, to establish the assumption of responsibility, it is necessary to demonstrate that the injured parties have reasonably relied on the parent company to take care of them. Interestingly, in *Chandler*, the court held that the reliance of subsidiary

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[394] *Caparo Industries Plc* (n 289) 633.

of the injured employees on the parent company would count.[395] Commenting on this case, Martin Petrin observed that, extensions of this nature seldom happened, and might only be suitable in very limited circumstances.[396]

As far as I am concerned, now that the court has declared that only the reliance of subsidiary on the parent company would suffice, it might not be that important to prove the reasonable reliance between the injured employees of the subsidiary and the parent company. The injured employee is not aware of the parent-subsidiary structure, and the parent company's involvement in the health and safety activities of the subsidiary, since they are vulnerable tort victims who cannot easily identify the potential tortfeasor. It is difficult for them to know clearly the corporate structure and the trading process or any policies and activities engaged between the parent company and the subsidiary company. This may be the reason why the Court of Appeal in *Chandler*'s case extended the circumstance of reliance.

In the case of *Newton-Sealey*, different from *Chandler*'s case, the assumption of responsibility was established based on the reliance between the injured claimant and the parent company; this is because the claimant was given the impression that the group act as a whole.[397] Specifically, the claimant was recruited in the London parent company but not the Jersey subsidiary company; [398] no clear distinction was made between members of the ArmorGroup nor was the claimant told to be employed by AG Jersey;[399] the deployment order received by the claimant was on AGUK's letterhead, under the ArmorGroup banner.[400] Compared with the situation in *Chandler*, the claimant of *Newton-Sealey* had opportunities to know more about the parent

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395 ibid [80], "(4) the parent had known or ought to have foreseen that the subsidiary or its employees would rely on the parent using that superior knowledge for the employee's protection."
396 Petrin, (n 338) 617.
397 ibid.
398 *David Newton-Sealey* (n 313) [11].
399 ibid
400 ibid [12].

company and most importantly, had been given the impression and information that the group act as a whole. Contrarily, the claimants in *Chandler*'s case are in a weaker position in pursuing recourse. It should also be noted that the extension made by the Court of Appeal in *Chandler* belong to the "four-part test", and only suitable in the claims against the parent company in a negligence liability for the health and safety of its subsidiary company's employees. But we are still not sure whether this extension would lead to future confusions, since the court has not explained this in detail.[401] Furthermore, the court added some complexities on this part by holding that the reliance relationship can be achieved without showing that the parent company intervenes in specific trading operations relevant to the safety and health issues.[402] Therefore, further explanations by courts are needed in this area.

3.2.2.2 Problems concerning the concepts of "control" and proximity

In the case of *Chandler v Cape*, the Court of Appeal found that Cape plc owed a duty of care, particularly based on the element of control. However, issues around the concept of control have arisen. There is an argument that, the element of control is one extremely important part when considering the potential limitations of applying the tort of negligence in asbestos related cases.[403] The concept of control is not defined very well by the court. It seems that courts in similar litigation regarded the concept of control as a decisive element, but relevant examinations are somewhat ambiguous and results vary

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[401] Petrin (n 338) 617.

[402] *Chandler* (n 87) [80], "The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."

[403] Christian Witting and James Rankin, 'Tortious Liability of Corporate Groups: From Control to Coordination' (2014) 22 Tort Law Review 91,101.

in different cases and jurisdictions.[404]

The Court of Appeal attaches equal importance to the control based theory and the rule of assumption of responsibility for establishing a duty of care. It is the definition of the concept "relevant control" appeared in *Chandler*'s case that has caused great disputes.

According to the Court of Appeal, a parent company's negligence liability is not based on the absolute control over its subsidiaries. Neither judgments nor statutes provided a submission that duty of care exists on the basis of absolute control of the subsidiaries.[405]

In the opinion of Arden LJ, the intervention of group management and involvement in its subsidiary's operations and business can be viewed as the "relevant control" that can contribute to the negligence liability. The relevant actions included that, Cape issued instructions on corporate products and products' development, and Cape supervised over its subsidiary's capital expenditures.[406] Arden LJ also added her comments on control in the fourth stage of the *Chandler*'s "four-part test":

> Crucially, it would not be necessary to demonstrate that the parent company regularly intervened in the health and safety policies of the subsidiary company to establish a duty of care. It would be sufficient that the parent company had a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[407]

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404 Linn Anker-Soensen, 'Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches' (2014) 14 Nordic & European Company Law 28, 29.
405 *Chandler* (n 87) [66].
406 ibid [73], [75].
407 ibid [80].

According to Arden LJ, it is not necessary to justify the parent company's control specifically by interventions in the subsidiary's health and safety polices. The parent company's involvement in trading operations alone would lead to the result. This explanation is somewhat different from the relevant conceptions of "control" in the early cases and questioned by commentators.

In the case of *Connelly v RTZ*, it was considered by the court that the proximity could be established through the parent company's control in devising an appropriate policy for the safety system of the subsidiary.[408] In *Newton-Sealey v ArmorGroup Services Ltd*, the court held that there was a special relationship based on the assumption of responsibility, and a special responsibility based on the parent company's control, which were both relevant to the duty of care.[409] Specifically, the "relevant control" could be found in the way that the ArmorGroup operated, leading the claimant to believe that he was working for the whole group.[410] In *Lubbe v Cape*, Lord Bingham mentioned that negligence could be proved if the "control" based duty of care was breached. But he did not explain how to identify the relevant control clearly, and just mentioned that "control" was to be found in the parent company's knowledge, and the court could investigate the reports of directors and business correspondence between the parent company and the subsidiary.[411]

Compared with the expressions of early cases, the definition of control was broadened in *Chandler*'s case. This would benefit the tort victims by leaving room for future discussions. It is also believed that the attitude of the Court of Appeal, in this case, illustrates that parent companies' active role cannot be overlooked when considering group liability.[412] However, the definition of the

[408] *Connelly* (n 16).
[409] *David Newton-Sealey* (n 313) [39].
[410] ibid [12].
[411] *Lubbe* (n 18) [20].
[412] Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary", (2012) 71 (3) CLJ 478, 480.

"relevant control" for establishing a parent company's negligence liability is always a challenge. It might be thought that a parent company's control or intervention in areas unrelated to health and safety would contribute to the establishment of negligence. Some commentators even have the concern that the parent company's liability could be invoked "when there is no nexus between the parent's involvement and the harm that a claimant suffered."[413]

As far as I am concerned, the extension of the scope of control advanced by Arden LJ is reasonable. The test of control, could be regarded as an independent test, as explained in the paragraph about exceptions for establishing a duty of care in the case of *Smith v Littlewoods Organisation Ltd.* At the same time, the test of control could also be used as a part of the general proximity test to impose negligence liability, for example, in the case of *Chandler v Cape.* The judgment of Arden LJ in this case indicated that in future corporate personal injury cases, in which the proximity relationship between the parent company and the subsidiary company's injured employees is difficult to establish, test of control could be considered as an approach.

The test of control provides a real basis for establishing proximity between the defendant and claimant. Wyn Williams J in *Chandler*'s first instance judgment gave us a specific definition on the degree of control required to establish a sufficent proximity. It is that the parent company's ultimate control over the subsidiaries' policy or advice on health and safety issues. Arden LJ made an extension that the parent company's control over the subsidiary company's business, like trading issues might lead to a proximity relationship. As the concept of "proximity" is not a fixed expression, but a description of circumstances, there is no need to reject any other situations or formats of the parent company's control. We only need to prove that the degree of control

[413] Petrin, (n 338) 613.

could reasonably explain a close connection between the parent company and the harm suffered by the subsidiaries' employees. In some specific cases, the parent company's control over the trading operations of the subsidiary company might lead to a sufficient proximity. For example, the parent company's intervention on relevant product, or funding issues would stop the happening of harm, and the parent company is able to intervene in the relevant issues at any stage and the subsidiary companies will definitely bow to it.

There is no need to worry about that the extension would lead to chaos in establishing parent company's negligence liability. Three cases after *Chandler v Cape* have further considered the degree of control in establishing a duty of care. These cases demonstrated that English courts are very careful in deciding these types of international corporate tort claims. What courts look at is the causal connection between the degree of control and the claimed harm. Besides, the first limb "foreseeability" and the third limb "fairness and reasonability" in the *Caparo* test are also essential parts considered by courts for a duty of care.

The following relevant corporate tort cases are *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* (*Lungowe v Vedanta*),[414] *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* (*Okpabi v Shell*),[415] and *AAA & Ors v Unilever Plc & Anor* (*AAA v Unilever*).[416] These cases all concern mass tort claims against an English parent company and its foreign subsidiaries. Courts' decisions are centrally based on evaluations of proximity relationships, particularly the extent of control exercised by the parent company over the

[414] *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528.

[415] *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* ; [2017] EWHC 89 (TCC); [2018] EWCA Civ 191.

[416] *AAA & Ors v Unilever Plc & Anor* [2017] EWHC 371 (QB)

subsidiaries. As the author concluded on a basis of the case *Chandler v Cape*, courts in the following cases are looking at the close connection between the extent of control and the claimed damage. The following cases, further explain courts' attitudes on the concept of control and provide specific examples on the degree of control that may lead to a duty of care.

Different from the cases of *Chandler* v *Cape, Lungowe v Vedanta* and *Okpabi v Shell*, *AAA v Unilever* is a claim in which the claimant sought to impose liability on the defendant parent company for the criminal acts of third parties. In the other three cases, by contrast, the loss and damage suffered by the claimant were caused by tortious conduct of the defendant and the subsidiary company.

In the case of *AAA v Unilever*, the claimants were victims of ethnic violence carried out by armed criminals on the Plantation during the 2007 Kenyan presidential election. The first defendant, Unilever Plc (UPLC) is an English company; and the second defendant, Unilever Tea Kenya Limited (UTKL), is a Kenyan company that operated the tea Plantation in Kenya. UPLC is the ultimate holding company of UTKL. The claimants alleged that the defendants should be negligently liable for the violence, and owed a duty of care to protect the claimants from the risk of violence.[417]

Mrs Justice Laing found that the real issue was whether the claim against the defendants had arguable merit. The Kenyan law follows the law of England and Wales on the determination of negligence liability, and the approach of applying the *Caparo* test was accepted. However, as Laing J considered, there is no such a duty of care held by the parent company for the violence that occurred in the Plantation. Both the first limb and third limb were not met in the test. It was held that the post-election violence in Kenya was not foreseeable by its English

[417] *AAA* (n 415) [1].

parent company, and it was not foreseeable that law and order would break down generally and that the Kenyan police would fail to protect the claimants.[418] When considering the second step of the *Caparo* test, the court believed that the facts of this case were a long way from that of *Chandler v Cape.* Particularly, there was no close geographical link between the UPLC and UTKL. Furthermore, UTKL was even not a direct subsidiary company of UPLC.[419]

The case of *AAA v Unilever*, provides an example that illustrates the application of the "four-part" test in *Chandler* case cannot be extended too far. As to the issue of control, the court may also consider the shareholding of the parent company when evaluating the proximity relationship between the parent company and the subsidiary, although it should not be a decisive element.

In the case of *Lungowe v Vedanta*, the Court of Appeal confirmed that it was reasonable to hear the case in England, and it was arguable that the parent company owed a duty of care to third parties affected by the operations of the subsidiaries. In this case, a Zambian company Konkola Copper Mines Plc (KCM) owned and operated the Nchanga copper mine in Zambia. Vedanta Resources Plc (Vedanta) is KCM's UK registered parent company. In July 2015, 1,826 Zambian residents of the Zambian city of Chingola (claimants) brought civil proceedings against Vedanta and KCM, alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, caused by the pollution of discharges from the Nchanga copper mine since 2005.

In 2016, Judge Coulson, in the first instance allowed the claim to be tried in English courts. The judge recognized that Vedanta was the real architects of

418 *AAA* (n 415) [102]- [106].
419 *AAA* (n 415) [104].

the environmental pollution, and that there was a real issue between the claimants and Vedanta based on the claimants' arguments of the overall control exercised by Vedanta over Zambian's mining operations.[420]

Lord Justice Simon, sitting in the Court of Appeal, provided his position when analyzed the proximity limb of the *Caparo* test. He set examples of the circumstances of control, based on which, subject to the *Caparo* test, a duty of care may arise. LJ Simon held that, "…such a duty of care arises when the parent company has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or controls the operations which give rise to the claim."[421]

More specifically, the High Court and Court of Appeal's conclusion that the control exercised by Vedanta give rise to a duty of care was made on a basis of some essential factors. For example, the Vedanta issued a report which stressed that the oversight of all the subsidiaries rested with the parent company's board and clearly mentioned the problems of discharges into water.[422] Under the KCM's Management and Shareholder Agreement with Vedanta, Vedanta was required to undertake studies into the mining projects. Vedanta also provided very detailed training across the whole group on a range of health and safety management issues, and environmental incidents. There was also evidence from a former KCM employee who alleged that Vedanta have high degree of control over KCM's operational affairs, such as working practices and cost cutting.[423]

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420 *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) [77].
421 *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528 [83].
422 *Dominic Liswaniso Lungowe & ors* (n417) [84].
423 ibid.

The above facts strongly convinced the court that Vedanta's control over the mining operation and safety and health issue of KCM would give rise to Vedanta's responsibility to the residents affected by KCM's mining program.

The other recent case *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [424], also concerns environmental tort claims against the UK parent company. The decisions of this case, however, stand in contrast to that of *Lungowe v Vedanta.* Both the High Court and Court of Appeal found that the Nigerian claimants could not properly demonstrate the parent company owed a duty of care to third parties affected by its Nigerian subsidiary company, and confirmed that English courts did not have jurisdiction to hear this claim. This case, further explains the position of the parent company's control in establishing a duty of care.

The claim was filed by Nigerian claimants from the Ogale community against an English parent company Royal Dutch Shell (RDS) and its Nigerian subsidiary company the Shell Petroleum Development Company (SPDC). The claimants sought compensation for the damage caused by serious oil leaks from the defendant's pipelines and associated infrastructure in and around their community. RDS was incorporated in the United Kingdom and was the parent company of the Shell group. SPDC was an operation company incorporated in Nigeria, and was the operator of a joint venture agreement between itself and other three Nigeria companies. However, RDS did not involve in this joint venture. The claimant alleged that RDS owed them a duty of care, because it had assumed a responsibility to protect the claimants from the environmental harm, and exercised a high level of control over the operation of SPDC.

[424] *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* ; [2017] EWHC 89 (TCC); [2018] EWCA Civ 191.

The High Court in London dismissed the claim, and held that the duty of care of the parent company was not arguable. With regard to the second limb of the proximity test, the court noted that RDS did not control the material operation of SPDC which gave rise to the claimed harm. Specifically, RDS did not hold shares in SPDC. It held shares in another company Shell Petroleum NV, which holds shares in SPDC. RDS did not conduct oil operations and was prohibited from doing this by Nigerian law. The activities which resulted in the damage were carried out by SPDC, as part of the joint venture.[425] As found by Justice Fraser in the High Court, the evidence was inadequate to support a high level of control by RDS over SPDC's operations. RDS had no superior knowledge of the business of SPDC, so there was no reason for the affected party to rely on RDS to protect them from the harm.[426]

On appeal, Simon LJ agreed with the judgment of the High Court, and treated the degree of control in the proximity limb as the principal issue. The claimants argued that RDS had a central role in designing, implementing and monitoring environmental and security policies of the entire group. With respect to this, Simon LJ held that the policies mentioned by the claimants were too general to satisfy the proximity test. He noted the distinction between "(1) instances where a parent company exercises control over the material operations of a subsidiary and; (2) instances where a parent company issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards."[427] Simon LJ considered that the case fell in the second category. The issuing of mandatory policies through the group does not mean that the parent company exercises a high level control of the operations of a subsidiary company.[428]

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425 *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* ; [2017] EWHC 89 (TCC) [114].
426 Ibid.
427 *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 [89].
428 ibid.

Moreover, the Shell Group, according to the document titled the 'Shell Control Framework', is organised "both through legal entities and on Business and Function lines."[429] The documents relied on by the claimants were just short extracts from a relative long group files. Those extracts had to be read in a proper context. For example, the sentences like, "consistent standards around the world", and "common treatment across the Shell Group", were just practices shared across a group operation world widely. The evidence provided by the claimants could not demonstrate that RDS had a centralised decision-making level of control over its subsidiary companies.

It is necessary to note the differences of the level of control between the case of *Okpabi*, and cases of *Chandler v Cape* and *Vedanta*. In *Chandler v Cape*, the parent company had completely control over the health and safety system of its subsidiary company. Cape, as the parent company, had the ultimate control of those measures which were taken to protect the claimant from the risk of exposure to asbestos. This degree of control, as held by the Court of Appeal, was sufficient to establish a special relationship for a duty of care. It was because at any stage the parent company could have intervened and the subsidiary company would have submitted to the intervention. In the case of *Vedanta*, the parent company exercised a high level of control over the subsidiary company KCM's mining operation and infrastructure. The control of the parent company involved the specific mining operation, which give rise to the damage to the community citizens. In the case of *Okpabi*, it is obvious that, on a basis of the case facts, the parent company RDS had no specific control over particular operation which led to, or had close connection with the damage. The fact that RDS issued mandatory policies across the Shell group, was not enough in the opinion of the majority of the Court of Appeal. SPDC, as

429 *Okpabi and others* (n423) [118].

the subsidiary company retained autonomy on the imposition of those group policies and practices. The claimants could not demonstrate that RDS has active involvements in the subsidiary company's operation which resulted in the claimed damage.

To conclude, as considered by the English courts in recent corporate tort cases, the degree of control that satisfies a proximity relationship for a duty of care should be: (1) the parent company has the ultimate control of those measures (for example, the health and safety policies) which were taken to protect the claimant from the risk of suffering the damage; (2) the parent company has control over the material operations of the subsidiary which give rise to the harm. Particularly, the only fact that the parent company issues general and mandatory requirements and policies across all subsidiary companies is not very enough to establish a duty of care.

More precise explanations on these crucial concepts for parent company's negligence liability are still expected in future cases.

3.2.2.3 Limitations of the "four-part test"

In *Chandler*'s case, the Court of Appeal provided guidelines in a "four-part test" for determining the parent company's duty of care in respect of the health and safety of its subsidiary's employees.[430] Regardless of the controversies on the concept of assumption of responsibility and control in the relevant guidelines, this test would have a profound influence in future cases. By providing such a test, the Court of Appeal draw public attention to this specific group problem. The decision for the first time successfully applied tort law principles to impose

[430] *Chandler* (n 87) [80].

liability on a parent company despite of the separate legal personality of the group members. Tort claimants in such cases hence get appropriate avenues to realise satisfactory compensation, and the group liability problem in such similarly specific circumstances can be resolved. However, it is argued that this "four-part" test is limited in certain circumstances, and may not meet further needs. The case *David Thompson v The Renwick Group plc*[431] in 2014 fully demonstrates the limitation of the current four-part test.

The Court of Appeal took a different attitude in the *Thompson* case this time when compared with *Chandler v Cape*. The companies, Arthur Wood Ltd and David Hall Ltd were two fellow subsidiaries of the parent company Renwick Group Ltd. The claimant Thompson worked for Arthur Wood Ltd as a laborer unloading raw asbestos from 1969 to 1975. Since 1975 Arthur Wood Ltd was acquired by David Hall & Sons Ltd and Mr Thompson began to work for the new company, but his asbestos unloading work continued while accepting a new driving work. From 1973, the parent company began to appoint directors to its subsidiary David Hall Ltd. The parent company's director, R, who had an "extremely modest shareholding" in the parent company, was appointed to the David Hall Ltd in 1976.[432] Mr Thompson developed asbestos cancer called pleural thickening and made claims against the two subsidiary companies, but neither of them could meet the satisfactory judgment. Therefore, Mr Thompson brought an action against the parent company Renwick Group Ltd. In the first instance, the judge imposed a duty of care on the parent company based on the relevant control exercised by the parent company through director R.[433] However, the Court of Appeal then overruled that decision.

The Court of Appeal's analysis reflects problems inherent in the "four-part test", and the limitations of the current approach.

[431] *David Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2014] 2 BCLC 97.
[432] ibid [16]-[18]
[433] ibid [21].

The failure of *Thompson*'s case could be found in two aspects. In the first place, the facts of *Thompson*'s case failed to fulfill the "four-part test" in *Chandler*. The evidence provided by the claimants in *Thompson* fell short of the guidelines from the test. In *Chandler*, there was extremely clear evidence to support the test. For instance, Cape hired a medical advisor to do research regarding asbestos dust and asbestos disease for the whole group, and got involved in the asbestos business of its subsidiary company.[434] However, according to Tomlinson LJ in *Thompson,* the appointment of director R did not mean that the parent company took control of the subsidiary: "There is no basis upon which it can be concluded that in running the affairs of David Hall, Mr Rushton was acting on behalf of the Renwick Group Ltd."[435]

Other evidence provided in *Thompson* such as "the business of the employer emerged with the business of another subsidiary",[436] and "Mr Thompson was given a new vehicle and used documents in the course of the employment upon which the name of the parent company clearly appeared,"[437] were insufficient to meet the conditions of the four-part test.

The key point of *Chandler* is that the parent company had superior knowledge over the health and safety issues in the particular industry. Contrarily, as alleged by the defendants, Renwick Ltd was not in a similar position as Cape, who engaged in the international asbestos business for a century.[438] As a parent company, Renwick Ltd, had no superior knowledge over the asbestos business of its subsidiary companies, because Renwick acquired the two companies at a much later time. Before the acquisition, the claimant already

434 *Chandler* (n 87) [75].
435 *David Thompson* (n 402) [26].
436 ibid [19].
437 ibid [15]-[20].
438 Julian Fulbrook, 'Thompson v Renwick Group Plc: Liability: Personal Injury, Health and Safety at Work' (2014) 3 JPI Law 135, 137.

had contacts with raw asbestos for years. It is believed that owning shares in the subsidiaries should be considered different from having superior knowledge in a particular business. The fact that sharing one director, or appointing a director who has dominant shares in the parent company, is unlikely to sufficiently provide a proximity relationship between the parent company and the injured subsidiary employees.

In the second place, neither the assumption of responsibility nor the special responsibility based on relevant control, can be established in this case. As to the element of "reliance", there was no evidence to demonstrate that the parent company should have had knowledge of the unsafe workplace of the employee, superior to what the subsidiary company should have.[439] So, there was no point for the subsidiary to rely on the parent company to provide particular protections to its employees. As to the element of "control", the co-ordination of business between subsidiaries could not unconditionally lead to the assumption that the parent company controls the group business and had a duty of care to the subsidiary's employees.[440] Tomlinson LJ finally observed that the evidence provided was very limited and fell far short of what was required in the "four-part test".

We may question whether this kind of evidence in *Thompson* is useless in establishing the parent company's negligence liability at all. At least from the perspective of the "four-part test", the evidence provided by the claimants of *Thompson*'s case is not enough. It is because the "four part" test does not list other circumstances that may give rise to a duty of care. Tomlinson LJ also commented on *Chandler*'s test by saying that "the test is not exhaustive but descriptive only."[441] The four-part test in *Chandler* is considered to be quite

[439] Company Law Newsletter, 'Parent Did Not Assume Duty of Care to Employee of Subsidiary' (2014) Co LN 355, 7-8.
[440] ibid.
[441] *David Thompson* (n 402).

"Cape specific" as to the facts.[442] However, the corporate groups' operating methods are different.[443] The *Chandler* case would encourage further tortious claims against the parent company. However, the court may choose to take a conservative attitude to determine a duty of care if the facts of a new case vary from the experience of earlier cases. It is expected that English courts in future cases can broaden the "four-part" test properly for different corporate situations, and provide more guidelines on the role of assumption of responsibility and control in establishing the negligence liability.

3.3 Application of tort of negligence in other countries

3.3.1 Australian cases

Asbestos cases occupy a considerable portion of personal injury claims against corporate groups in Australia. The approaches to establishing group liability in asbestos cases hence provide a general view of how the Australian courts deal with corporate tort problems.

Australia has witnessed a high number of asbestos cases. Around seven thousand Australians have died from mesothelioma since 1945, and the number is predicted to rise to 18000 by 2020.[444] The incidence of asbestos-related disease in Australia is undoubtedly regarded as a severe

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[442] Fulbrook (n 409) 137.

[443] Stephen Griffin, 'Duty of Care Issues in A Holding-Subsidiary Company Relationship' (2014) Co LN 356, 356.

[444] Davidson Peter Prince, 'In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (12 Parliamentary Library Department of Parliamentary Services Research Note 2004) < http://www.aph.gov.au/binaries/library/pubs/rn/2004-05/05rn12.pdf > accessed 20 November 2014.

disaster, which contributes to the large quantity of asbestos-related claims.[445] Compensation claims have been targeted at giant corporate groups such as James Hardie Group, CSR, and BHP Billition. Generally, claims are initiated in the tort of negligence against the relevant parties. As time progresses, different challenges are arising in the litigation.

Generally speaking, litigations against other group members for the debts of one insolvent subsidiary are rarely successful, based on the traditional fault-based system of bringing negligence claims. However, the successful claims in negligence against parent companies or other solvent companies appeared much earlier in Australia than in the UK. So the reasoning in these corporate group cases by Australian courts is worth discussing, and this will contribute to a broader narrative on group liability problem.

The majority of jurisdictions in Australia have somewhat analogous test on negligence. Australian law is derived from English common law, and the development of the rule of negligence was influenced by the landmark case of *Donoghue v Stevenson*,[446] in 1932, which concerned a consumer's claim against a ginger beer manufacturer for the mental shock induced by drinking a bottle of beer with the remains of a snail. Before 2001, the successful negligence claims in Australia were decided on the basis of the test that is similar to the *Capraro* test in English tort law. Three elements needed to be proved by the claimants to get recovery from their loss: (1) the existence of duty of care; (2) breach of that duty; (3) causation of damage.

Australian courts used to follow the three-stage test to establish a duty of care, but have adopted a new approach called "salient features" since *Sullivan v*

[445] ibid.
[446] *Donoghue* (n 288).

Moody[447] in 2001. In this case, the claimant sued the government officials negligently charging the claimant for child sexual assault, but in fact the claimant did not commit the alleged conduct. The claim was rejected in the decision of the High Court of Australia because of insufficient arguments for foreseeability and proximity. In addition, the imposition of a duty of care would have conflicted with statutory regulations for child protection. In terms of the method to be adopted in duty of care cases, the Court held:

> What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*[448] does not represent the law in Australia. Lord Bridge himself said that concepts of proximity and fairnesss lack the necessary precision to give them utility as practical tests, and 'amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a give scope'[449].[450]

Although the concept of "salient features" was not actually mentioned in the *Sullivan* case*,* it was then confirmed in later cases.[451] Since the three-stage test is regarded as limited in certain circumstances by Australia courts, the courts have been well developing the salient feature approach to establish duties of care, particularly in novel cases. This approach demands that courts search for "salient features" to establish a duty of care. The "salient features" are determined based on courts' judgments about the overall weightiness of the factors found in the authoritative decisions from previous cases to

447 *Sullivan v Moody* [2001] HCA 59.
448 *Caparo Industries Plc* (n 289) 617-618.
449 ibid.
450 *Sullivan* (n 418) [49].
451 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597.

present.[452] According to the relevant case law, the salient features may include but not limited to: 1) foreseeability of harm;[453] 2) the degree and nature of control able to be exercised by the defendant to avoid the harm;[454] 3) the degree of vulnerability of the claimant to harm from the defendant's conduct, including the capacity and reasonable expectation of a claimant to take steps to protect himself/herself, degree of reliance by the claimant upon the defendant;[455] 4) any assumption of responsibility by the defendant;[456] 5) indeterminate liability;[457] 6) policy considerations .[458]

The salient features test indeed opens a door for some novel cases so that the court could consider a duty of care by reference to these "features", rather than spending time on explaining the concept of "proximity". The flexibility given by the test makes it simple for the law to develop alongside the fast changing social and commercial world.

English courts are unwilling to "pierce the corporate veil" and impose upon the parent company tort liability for its subsidiary's debts except in very limited circumstances. Although the salient features test has not been applied in corporate group cases yet by Australian courts, it is expected that the *Sullivan v Moody* test would be adopted in such cases. The use of this test might prove to be a very flexible method for determining the duty issue, and the decided cases may provide an interesting reference for English courts. For example, it might provide indications of more circumstances of proximity.

Negligence liability could be established based on the salient feature test in corporate tort cases. Take the case of *Chandler v Cape* as an example.

452 Christian Witting, 'The Three-Stage Test Abandoned in Australia-or Not?' (2002) 118 LQR 214, 217.
453 *Haley v London Electricity Board*［1965］AC 778.
454 *Home Office v Dorset Yacht Company* [2010] EWCA Civ 981, [2010] 2 CLC 277.
455 *Butterfield v Forrester* [1809] 103 ER 926 (KB).
456 *Commonwealth v Introvigne* [1982] HCA 40.
457 *Adeels Palace Pty Ltd v Moubarek* [2009] HCA 48.
458 *Sullivan* (n 418) [49].

Referring to the Australia's salient features test, the parent company Cape in the UK case of *Chandler v Cape* would be potentially liable in tort to the employees of the subsidiary as well. According to the facts of *Chandler*, the foreseeability element will be firstly established, and the subsequent features would be satisfied as well, which includes: 3) the degree and nature of control able to be exercised by the defendant to avoid harm; 4) the degree of vulnerability of the claimant to harm from the defendant's conduct, including the capacity and reasonable expectation of a claimant to take steps to protect himself/herself, degree of reliance by the claimant upon the defendant; 5) assumption of responsibility by the defendant.

This hypothetical application suggests that the salient features test could be applied in corporate group liability cases. What of the cases regarding parent company liabilities that have been decided by the Australian courts? Before 2001, relevant Australian cases were still based on the three-stage test. The corporate tort claims in Australia based on this test provide valuable indications in creating a parent company's negligence liability as well.

One major defendant in the Australian's asbestos-related claims was CSR Ltd. During the 1970s, increasing numbers of victims were dying as a result of the exposure to asbestos dust in the course of employment in CSR Ltd and its subsidiaries, but without any compensation. Two early claims against CSR Ltd failed, and the tort claimants died before the determinations.[459] Battles to realise justice for tort claimants in asbestos cases continue, and some of the cases are successful, in which the parent company's tort liability is established. In the early case of *Barrow and Heys v CSR Ltd*[460] in 1988, the parent company CSR was alleged to have owed a duty of care to two employees of its subsidiary company. Both the claimants contracted mesothelioma and claimed

[459] The cases of Cornelius Maas and Joan Joosten.
[460] *Barrow and Heys v CSR Ltd*, (Unreported) Supreme Court of Western Australia, 4 August 1988 (Rowland J).

damages against the subsidiary, ABA, and the parent company, CSR, for their negligence in failing to protect the plaintiff from the exposure to unsafe levels of dust containing asbestos fibre, which led to the diseases. The case on the one hand showed the potential difficulties of tort litigation faced by the victims of asbestos-related diseases,[461] on the other hand, the case gave an example of the grounds the court accepted for establishing a parent company's duty of care.

In *Barrow and Heys*, several grounds for establishing a duty of care were discussed before the Western Australian Supreme Court. Particularly, Rowland J focused on the control exercised by CSR over ABA, on the basis of which he found a duty of care. The existence of a duty of care and the violation of it lay in the nature of the relationship between the parent and subsidiaries, and the degree of control.[462] His Honour held that there must be control "in the sense that it must bear upon events which affect the particular conduct which causes the breach."[463] It was then found that evidence of control such as the control of managerial appointments applied directly to the day-to-day affairs of the subsidiary: the mill and dust control at the mill were tasks allocated to CSR employees who were responsible only to the Head of the Building Materials Division of CSR; the control over funding of ABA's operation; the control over the subsidiary's budget.[464] A duty of care was hence created based on the ultimate control of the parent company.

In *Wren v CSR Ltd & Another*,[465] the court provided a clearer reasoning, which may represent the attitude of Australian courts to the asbestos cases at that time. The plaintiff, Norman Wren, was employed by Asbestos Products Pty Ltd (Asbestos Products) for about 12 months, from early or middle-1950 to the

[461] Gillooly (n 2) 98.
[462] ibid 112.
[463] *Barrow and Heys* (n 431) 215.
[464] ibid 217.
[465] *Wren v CSR Ltd& Another* (1997) 15 NSWCCR 45.

early or middle part of 1951. On 29 March 1994, Colonial Sugar Refining Co Ltd (CSR) purchased the company Asbestos Products Ltd. The mine at Wittenoom in Western Australia was conducted by Australian Blue Asbestos Ltd (ABA), which subsequently became Midalco Pty, the second defendant. The plaintiff alleged that CSR controlled Asbestos Products Ltd and ABA, so directly as to be responsible in law for its negligent acts and omissions. Each defendant raised defences under sections 14 and 51 of the Limitation Act 1969, and alleged that the claim was out of the limitation period. The arguments were however rejected by the court, given the nature of mesothelioma - a person does not have it until shortly before symptoms begin to manifest. So, the statement of claim was within the limitation period.[466]

The court did not think that the plaintiff's injury was as a result of the failure of ABA to place a warning upon asbestos bags. This is because the element of proximity relationship could not be established between the plaintiff and ABA. In the court's opinion, only employees who were in close contact with asbestos bags were in a relationship of proximity with ABA. However, the plaintiff did not ordinarily carry the bags. Neither did he open them, nor have direct contact with them. Thus, the court ruled in favour of ABA.[467]

As to the parent company, the court held that CSR owed a general duty of care to adopt and put in place any of the recommended safeguards and precautions repeatedly.

The element of foreseeability was found by analysing the conditions of the workplace, which was so bad that it was sufficient to constitute a risk of injury, and it was foreseeable for CSR.[468] The dust was visible in the atmosphere of the factory each day, it accumulated on flat surfaces. Cleaning the factory was

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[466] ibid.
[467] ibid 49-51.
[468] ibid 48-49.

not a daily event but took place on Fridays. No masks or ventilators or extraction devices were supplied, and no warning was given to the plaintiff. Everyday, the plaintiff's clothes were dusty and his hair, hands, and face were covered in asbestos cement dust. This condition prevailed throughout the course of his employment.[469]

From 1928, CSR maintained a technical library. There was sufficient material in CSR's library before the plaintiff was employed by Asbestos Products. This technical library was available to Asbestos Products as well, to make the subsidiary company aware that asbestos dust was dangerous and that it was a carcinogen.[470]

O' Meally J, held that mesothelioma was an asbestos disease like asbestosis and carcinoma. It was a foreseeable risk against which the plaintiff ought to have been guarded.

As to the element of proximity, the court held that it could be well established on the basis of the nature of the relationship between CSR and Asbestos Products. It arose on the important fact that "CSR's influence over Asbestos Products was dominant, pervasive, constant and controlling."[471] Specifically, this was reflected on CSR's board level and day-to-day activities of control: not only did CSR own all the shares in Asbestos Products, but also the operations of Asbestos Products were directed by CSR staff. Therefore, if Asbestos Products were liable to the plaintiff, so were CSR, which is the mind and directing will of AP.[472]

It was also found that there was no policy reason for denying recognition of a

469 ibid.
470 ibid.
471 ibid 52.
472 ibid.

duty of care. Thus, CSR had an obligation to ensure that no foreseeable risks of injury were created to its own employees who worked at Asbestos Products, or to the employees of Asbestos Products, and CSR failed to carry out that obligation. In its appeal case, *CSR Ltd v Wren*,[473] the Court of Appeal agreed with the decision of the Dust Diseases Tribunal of New South Wales. Besides, the Court of Appeal added that the proximity relationship was based on the fact that the management staff in charge of the subsidiary's activities were actually employees of the parent and, thus, had "assumed responsibility" for the working conditions of the subsidiary.[474] That responsibility would definitely give rise to a duty of care owed by CSR Ltd to the plaintiff, which was co-extensive with the duty owed by an employer to an employee.[475]

Another Australian case in which a parent company was held to owe a duty of care was *CSR Ltd v Young*.[476] In this case, the court held that CSR Ltd owed a duty of care to a third party, the children of one employee of CSR's subsidiary company. This means that negligence liability could also be established on the fact that the parent company failed to take the expected reasonable care in supervising the distribution of asbestos.[477]

The foreseeability was obvious, and proximity of relationship could also be found in the evidence that the parent company had been appointed the subsidiary's managing agent "with full and absolute authority to do all things necessary for the proper management and control of the business and undertaking of the subsidiary".[478] In this circumstance, CSR had a duty of care to avoid foreseeable injury, not only to the people who worked at the factory, but also to the residents of Wittenoom, who had a great potential to develop

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473 *CSR Ltd v Wren* (1997) 44 NSWLR 463.
474 ibid 486.
475 ibid.
476 *CSR Ltd v Young* (1998) Aust Tort Rep 81-468.
477 Witting and Rankin, (n 390) 99.
478 *CSR Ltd v Young* (n 447) 64,952.

asbestos-related diseases.[479]

It is not difficult to find that a duty of care in each of these cases exists in particular situations where a high level of control is exercised by the parent company. In other words, it is not conclusive that parent companies owe a general duty of care to employees of subsidiaries if short of such control.

Speaking of personal injury cases relevant to corporate groups in Australia, another giant corporate group which cannot be ignored is James Hardie, a major defendant in Australian asbestos claims, which had a dominant asbestos market position from the 1930s until the mid-1980s.[480] James Hardie, established factories in many parts of Australia such as Camellia, New South Wales (NSW), Victoria, Western Australia, and Queensland. The earliest action for damages against James Hardie in New South Wales was brought in the 1930s.[481] In 1989, in *Briggs v James Hardie and Co Pty Ltd*,[482] the New South Wales Court of Appeal rejected an application to hold James Hardie liable for its subsidiary's debts by piercing the corporate veil. In this case, Mr Briggs worked for Asbestos Mines Pty Ltd and contracted asbestosis. Briggs sought compensation from James Hardie & Co Pty Ltd, which was a joint owner of Asbestos Mines and later became the sole owner. Briggs claimed that Asbestos Mines was the agent of James Hardie and beyond the corporate veil, James Hardie was the controller of Asbestos. The court refused to pierce the corporate veil, because, as Rogers A-JA demonstrated, current case law does not clearly draw a boundary on that doctrine, also, simply because "the parent company had a capacity to exercise control over its subsidiary and had on

[479] ibid 64,953-64,957.

[480] Australian Council of Trade Unions, 'James Hardie Asbestos Victims Compensation Background Facts' (2007) <www.actu.asn.au/Images/Dynamic/attachments/5055/James%20H > accessed 01 Dec 2014.

[481] Tim Hammond, 'Asbestos Litigation in Australia: Past Trends and Future Directions', (World asbestos report on Global Asbestos Congress 2004), <http://worldasbestosreport.org/conferences/gac/gac2004/PL5-05.php> accessed 01 Dec 2014.

[482] *Briggs v James Hardie and Co Pty Ltd* (1989) 16 NSWLR 554.

occasions exercised that capacity" is insufficient.[483] However, for the purpose of recovering from the parent company, the court assumed that there is a possibility of applying tort law doctrines, especially the tort of negligence.[484] The amount of control exercised by the parent company is likely to be crucial to the final outcome. However, at that time, (10 years before the appearance of *CSR* cases), the assumption that the control by parent companies increased the risk of injury had not been confirmed for establishing a parent company's tort liability.

Acutally, James Hardie group had known the safety problems affecting the employees since the 1960s. In 2001, Medical Research and Compensation Foundation was established as a trust to meet the relevant liabilities; this was owned by a company limited by guarantee separate from the group. In 2009, it was found by the NSW Supreme Court that the controller and main directors of the group misled the Stock Exchange about the group's ability to satisfy asbestos claims.[485] Then, the ruling was overturned by the NSW Court of Appeal.[486] The litigation was finally ended up before the High Court, in a suit by ASIC against the controller of the group, in 2012.[487] The High Court found the liability of parental directors and officers based on the statutory provisions—ascertaining the duty of directors based on civil penalty provisions of Corporation Act 2001-Section 180(1), which requires directors of corporations to behave in the scope of reasonable degree of care and diligence.

The *James Hardies* case was a case in which legal responsibility arose from state legislation. The legislation places an obligation on government inspectors to ensure compliance by asbestos mine operators, with safety precautions in

483 ibid 557.
484 ibid 556.
485 *ASIC v Macdonald* (No 11) [2009] NSWSC 287, *ASIC v Macdonald* (No 12) [2009] NSWSC 714.
486 *Morley v ASIC* [2010] NSWCA 331; *James Hardie Industries NV v ASIC* [2010] NSWCA 332.
487 *ASIC v Hellicar* [2012] HCA 17; *Shafron v ASIC* [2012] HCA 18 (High Court of Australia).

the operation of their mines.[488] However, the *James Hardies* case did not provide a comprehensive solution to corporate tort problems. The case reflected the conflict of interests between the company's shareholders and outside tort creditors. An appropriate solution was expected to deal with the mass tort litigations against big corporate groups. This was not only for remedying corporations' unsecured creditors, but also for the maintenance of dominant corporate principles of limited liability and separate legal personality.

However, the application of tort of negligence in the personal injury cases relevant to corporate groups is quite limited in Australia. The establishment of a duty of care, depends on the existence of foreseeability and proximity. It is apparent that both English and Australia case law emphasise the role of control in establishing parent company's negligence liability. However, the facts of each case may vary, and the manner of operation found in CSR which contributed to the liability may not be found in other cases.[489] It is obvious that the establishment of a duty of care owned by the parent company for its subsidiary's torts is restricted in very limited circumstances - where a high standard of control is exercised by the parent company over the relevant aspect of the subsidiary's illegal activities. The limitations inherent highlight the need to develop a more predictable and consistent approach.

3.3.2 United States' cases

In the United States, corporate group liability, especially the liability of a parent company for the debts of its subsidiaries, is frequently litigated.[490] These litigations have raised enormous arguments, comments and suggestions. In

488 A further example of where a third party to an employment contract was found to owe a duty of care to an employee is provided by *Gordon v James Hardie and Co Pty Ltd* (1987) Aust Torts Reports 80-133.
489 Witting and Rankin (n 390) 101.
490 Robert B Thompson, 'Piercing the Veil within Corporate Groups: Corporate Shareholders as Mere Investors' (1999) 13 CONN J INTL L 379, 383.

the US, each state has its own liability laws, and these kinds of actions are usually based on legal theories such as the tort of negligence, strict liability, breach of warranty, or piercing the corporate veil.

Considerations of corporate tort cases involving asbestos in the US can be traced back to the 1930s.[491] One early case was *Pauline Lasin plaintiff v Johns Manville Corporation*, in US District Court of New Jersey in February 1929.[492]

Pauline was a widow who brought a negligence claim against the parent company Johns Manville (JM). Pauline's husband, John Lasin, died of asbestosis, and her lawyer advised her to institute an action against JM for $40000. JM admitted that John's death was as a result of exposure to asbestos, but alleged that the parent company had no culpability. It was also submitted by the defendant that Lasin's death was also due to his own negligence in that he failed to take reasonable care of himself by wearing a face mask. Finally the case was settled out of court on the condition that JM could give some charitable compensation to Pauline, similar to most asbestos cases at that time.[493]

In fact, in the US, tens of thousands of corporate personal injury cases involving toxic material manufacture faced the same problems for a long time.[494] *Borel v Fibreboard Paper Products Corp*,[495] was the first case in the US in which a duty of care (in an asbestos-related case) was imposed on a third party beyond the injured claimant's employer. In *Borel*, the US court found that

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491 Barry I Castleman, *Asbestos: Medical and Legal Aspects* (3rd edn, NYIF 1990) 145-146.
492 *Pauline Lasin plaintiff v Johns Manville Corporation* US District Court of New Jersey, November 1929. Geoffrey Tweedale, *Magic Mineral to Killer Dust Turner & Newall and the Asbestos Hazard* (1st edn, OUP 2000) 264.
493 ibid.
494 Jock Mcculloch, Geoffrey Tweedale, *Defending The Indefensible: The Global Asbestos Industry and its Fight for Survival* (1st edn, OUP 2008) 50.
495 *Borel v Fibreboard Paper Products Corp* 493 F2d 1076 (5th Cir OLD 1974).

the manufacturer had the duty but failed to provide the workers with adequate warnings, which led to the defendant's negligence and strict liabilities. However, it is a pity that the situation of this case is not that helpful in considering the relationship between the parent companies and subsidiaries. But it successfully provided a possibility to establish negligence liability on a third party beyond the claimant's employer, and hence encourage the development of solutions to corporate tort problems in further cases.

In the multinational claims, US courts are popular forums for personal injury litigations against international corporations.[496] However, similar to the situation in UK, it is not easy for the claims involving transnational corporations to get to trial in the US courts, where there is inherent lack of experience in resolving the transnational corporate tort problems.

As early as 1984, in the "Bhopal accident" in India, the plaintiffs brought a negligence claim against the US parent company, Union Carbide Corporation (UCC), based on the parent company's involvement in the subsidiary's business, which manifested in the parent company's design and construction of their Indian subsidiary's safety supervising system.[497] However, these arguments were never properly tested in a US trial, for *forum non-conveniens*. Although some victims of *Bhopal* also attempted to bring litigation against UCC and its chairman under the US Alien Tort Claims Act (ATCA), these ATCA-based proceedings were dismissed on the grounds that they were barred by the settlement orders of the Supreme Court of India.[498]

The ATCA confers judicial authority on the "US district courts in respect of any civil action by an alien for a tort only committed in violation of the law of nations

[496] Sarah Joseph, *Corporations and Transnational Human Rights Litigation,* (1st edn, Bloomsbury Publishing 2004) 16-17.
[497] Kim Fortun, 'Remebering Bhopal, Re-figuring Liability' (2000) 2 Interventions 187,198.
[498] Sarah Joseph (n 467) 72.

or a treaty of the United States".[499] Any corporate member, including the parent company, can be held liable under ATCA if their "civil actions" breach the "law of nations", or violate the obligation applicable directly to a private individual or corporate member under common transnational law.[500] In the legal practice, proceedings under ATCA are infrequent and most of them are based upon allegations of "corporate complicity" in breaching human rights law.[501]

Instead of bringing actions under ATCA, initiating a claim under tort law as an alternative way may be more attractive for the claimants who intend to sue against foreign parent companies, to pursue compensation for physical injuries or remediation for environmental damage.[502] Even though the general principles of corporate law are opposed to normal allegations of the parent company's liability for the subsidiary's employees, claims based on negligence have a greater potential to be successful than any other approaches.

In the US, claims against parent companies are not uncommon. Under US law, the injured employees could get compensation against their direct employers through Worker's Compensation Act, which varies from state to state. Employers' Liabilities are imposed on the existence of employment relationship and injuries occurring in the course of employment. Furthermore, the employees could both sue their employers under the Worker's Compensation Act, and also claim against a third party beyond the employer under the tort of negligence.[503] This rule applies only if specific independent act of negligence

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[499] Alien Tort Statute (28 USC) § 1350.
[500] *Doe v Unocal* 963 F Supp 880 (CD Cal 1997) and *Beanal v Freeport McMoRan* 969 F Supp 362,378 (ED La 1997).
[501] C Forcese, 'ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act' (2001) 26 YJIL 487,488.
[502] Michael Anderson, 'Transnational Corporations and Environmental Damages: is tort law the answer?' (2002) 41 Washburn LJ 399, 407.
[503] California Labor Code 2016, s 3852; *Waste Management Inc v Superior Court of San Diego County* (2004) 119 Cal App 4th 105, 109.

exists. The tortfeasor could even be the parent company.[504]

The California Supreme Court has described the theory of negligence as follows:

> The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking.[505]

The US Second Restatement of the Law of Torts indicates that liability for the acts of third parties may potentially arise where either:

> (a) A special relation exists between the actor and the third person, which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other [i.e. the plaintiff] which gives the other a right to protection.[506]

In consequence, a parent company can owe a duty of care to the subsidiary's employee or other affected parties beyond the separate legal personality. The problem is how to identify the existence of negligence of the parent company. The claimant could demonstrate that the parent company assumed a duty of care to provide a safe workplace for its subsidiary's employees.[507]

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[504] *Waste Management Inc v Superior Court of San Diego County* (2004) 119 Cal App 4th 105,111.
[505] *Paz v State of California* (2000) 22 Cal 4th 550, 558.
[506] US Second Restatement of the Law of Torts, s 315.
[507] *Waste Management Inc* (n 475) 110.

Under section 324A of the US Second Restatement of the Law of Torts, the establishment of negligence liability is composed of the duty, breach of duty, proximate cause, and damages elements of a negligence action.

The negligence theory has been accepted by the US federal and state courts for a considerable time to determine the responsibility of parent companies, dominant shareholders, and directors.[508]

Many elements are involved in establishing negligence liability, including the causation of risk,[509] element of reliance, as well as control, which are quite similar to the crucial elements of negligence in the UK. Cases in the US become much more complex and troublesome since laws differ according to jurisdictions. In addition, the same legal concept or theory are understood differently sometimes in different states. For instance, the "control" element under proximate cause, which is regarded as an extremely crucial element to illustrate "proximate cause", has left many problems to be resolved. In the US case law, interestingly, the degree of control for establishing negligence liability was understood differently in different jurisdictions.

In 2007, the Illinois Supreme Court gave a landmark decision. It acknowledged that the "direct participation" could be a feasible element for creating tort liability under Illinois law. Consequently, corporate liability could be imposed without applying the doctrine of veil piercing. From a plaintiff's perspective, the doctrine of piercing the corporate veil is an unattractive option when attempting to reach the deep pockets of a parent company because this doctrine has still not developed with great certainty in the US. Differences exist from state to

[508] *United states v Bestfoods* (1998) 524 US 51. A parent company could be held liable for its action that violate the Comprehensive Environmental Response, Compensation and Liability Act of 1980; *Esmark Inc v NLRB*, 887 F 2d 739, 757 (7th edn, CIR 1989) A parent company was directly liable for participating in the unlawful conduct of its subsidiary.

[509] Noted by the California Supreme Court, the parent company's involvement must have increased the risk of harm.

state such as the emphasis on the evidence of veil-piercing.[510] Some states like Florida, keep a conservative attitude and remain reluctant to apply this doctrine.

In this Illinois case of *Forsythe v Clark USA Inc*,[511] the parent company, Clark USA, was brought before the court for negligence, since its subsidiary's employee died in a workplace fire. This negligence claim was based on the parent company's overall budgetary strategy.[512] It was alleged that the parent company, Clark USA, breached its duty to exercise reasonable care under the tort of negligence, and Clark USA had or should have had the knowledge that a cost-cutting strategy would lead to the subsidiary company to make unqualified employees act as maintenance mechanics. Subsequently, Clark USA should be liable for the two employee's deaths.[513]

The Illinois Supreme Court acknowledged that the control and involvement in the subsidiary's business contributed to the fact that the parent company participated in its subsidiary's tortious conduct, particularly, if a parent company was involved in its subsidiary's decision making. In this case, this was evident in the parent company's cost-cutting measures imposed on its subsidiary, and the proximate cause lay in the lack of sufficient funds for a safe operating system which resulted in the injuries.

Actually, in this case, the court provided limited circumstances in which a duty of care could be imposed on. This included situations in which the parent company had direct participation into the finance, management, or business of the subsidiary, which led to the injury, such as the budget control.

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[510] Cindy A Schipani, 'The Changing Face of Parent and Subsidiary Corporations: Enterprise Theory and Federal Regulation' (2005) 37 Conn L Rev 691,700.
[511] *Forsythe v Clark USA Inc* 864 N E 2d 227 (Ill 2007).
[512] ibid 231.
[513] ibid.

As regards the concept of control for negligence liability, other jurisdictions have different understandings. In the case of *Waste Management Inc v Superior Court of San Diego County*,[514] the court set a clear limit on parent corporations' liability for exercising budgetary control over subsidiaries.

In *Waste Management*, the employee's family brought actions against the parent company for negligence, alleging that Waste Management (WM) prevented the subsidiary from replacing out-dated garbage trucks, one of which subsequently killed WMCI (the subsidiary)'s employee.[515] The claimant alleged that it was the budgetary control over the subsidiary that caused the death.[516] The court noted that a valid negligence claim required the parent company to have owed a duty to the subsidiary's employee.[517] However, the court placed the burden of providing for the safety of the subsidiary's employees solely on the subsidiary corporation.[518] Consequently, the parent company owed no duty to provide a safe working environment. The court also held that the plaintiff could have recovered on a direct liability theory, but budgetary control was not sufficient to impose direct liability on the parent corporation.[519]

Another case, *Coastal Corp v Torres*,[520] was in favour of the position of the court in the *Waste Management* case. The facts of this case was very similar to the above two cases. The claimant in this case also sued in negligence, arguing that the parent company controlled maintenance, turnaround and inspection matters at the subsidiary, through the budget control.[521] This allegation was rejected by the court, which believed that a parent corporation

514 *Waste Management Inc* (n 475).
515 ibid 105.
516 ibid 107.
517 ibid 109.
518 ibid 109-110.
519 ibid 111-112.
520 *Coastal Corp v Torres* 133 SW 3d 776 (Tex App 2004).
521 ibid 778.

was only liable where a specific control over the activity existed and resulted in the accident, but budgetary management should not be included in the scope of specific control.[522]

More generally, the parent company's tort liability is a new territory for the US courts. It is a cause of concern that the decisions in these kinds of cases in different jurisdictions in the US may lead to confusion and difficulties for courts in future cases. The courts fail to construct their liability rules carefully enough to avoid confusion. Sometimes, judgments from different jurisdictions may add a layer of complexity to an already complex area of law.[523] Unfortunately, similar to the UK and the Australia case law, in the US, the application of tort of negligence in the litigations for personal injury against the parent company or other relevant members in a corporate group is still a developing area, which lacks thoughtful approaches that could make broader improvements.

3.3.3 Comparisons

Compared with UK case law, the application of tort of negligence in creating parent company's liability is in a developing phase in Australia and the United States as well. Generally, Australia has considerably high rates of asbestos litigation. Australian courts had opportunities to consider corporate tort claims 10 years before *Chandler v Cape.* The decisions of the cases involving CSR Ltd as a defendant provided valuable indications. Cases like *CSR v Wren*[524] and *CSR v Young*,[525] reflected the approaches of Australian courts in determining the parent company's negligence liability.[526] The concept of

[522] ibid 779.
[523] Stephen M Bainbridge, 'Abolishing LLC Veil Piercing' (2005) U Ill Law Rev 77, 78.
[524] *CSR Ltd v Wren* (n 444).
[525] *CSR Ltd v Young* (n 447).
[526] Stefan H C Lo, 'A Parent Company's Tort Liability to Employees of A subsidiary' (2014) 1 Journal of International and Comparative Law 117, 118.

control was still the crucial point of examination. The formulations for liability establishment are based on a conservative approach of the *Caparo* test. Since the decision in *Sullivan v Moody*,[527] in 2001, Australian courts have adopted a new approach named "salient features" to find a duty of care. This new test for negligence liability has not been applied in group situations in question, but is expected to conform to *Sullivan*.

In the United States, corporate tort liability is also a common and frequently litigation field. The US Second Restatement of the Law of Torts guides the establishment of negligence liability, which is composed of: duty, breach of duty, proximate cause, and damages elements; while this instrument also outlines the circumstances of company's negligence liability for the acts of a third party. Elements such as causation of risk, reliance, and control, are crucial in creating the liability as well in the US.

It can be concluded that the approaches in establishing the parent company's negligence liability are considered prudently and narrowly by courts in all the three countries. They all attach much importance to the elements of "reliance" and "control" in creating sufficient proximity. Similar to English case law, the understanding and definition of "reliance" and "control" for creating negligence liability in Australian and US case law are inconclusive and need to be further elaborated upon.

In Australian case law, the evidence of control is decisive to the claims' results. It is found that "the relevant control" could be: control of managerial appointments in everyday affairs, control over funding of the subsidiary's operations, control over the subsidiary's budget;[528] parent company's obvious dominant, pervasive, constant, and controlling influence over the subsidiary,

[527] *Sullivan* (n 418) 59.
[528] *Barrow and Heys* (n 431) 217.

embodied as the parent company's day-to-day activities control.[529]

In the US case law, complexity lies in the different understandings of the "relevant control" for liability imposing in different jurisdictions and states laws. In one prominent case, *Forsythe v Clark USA* Inc,[530] decided in Illinois Supreme Court, the element of control was manifested in the budget control and involvement in the subsidiary's business. Specifically, the parent company enforced cost-cutting measures on its subsidiary, and the proximate cause was on the basis of insufficient funds for a safe operating system. However, in other similar cases such as *Waste Management*,[531] decided by the Courts of Appeal of California, and the Court of Appeals of Texas case *Coastal Corp v Torres*,[532] only the specific control over the activity leading to the claimed injuries count. Budgetary management was not regarded as sufficient or even relevant to the scope of "specific control".[533]

The approaches to parent company's negligence liability in Australia and the US are on a case-by-case basis. Similar to the UK, high requirements are set for the "control behavior" in Australia and the US. The Court of Appeal in the English case *Thompson v Renwick Group Ltd*,[534] refused to impose a duty of care on the parent company based on that the parent company appointed a director having its dominant shares in the subsidiary company. Similarly, in the Australian case of *CSR Ltd v Wren,* the claimed evidence for proximity rested on the fact that the management staff in charge of the subsidiary's activities were employees of the parent company.[535] Different from the case of *Thompson*, in *CSR Ltd*, the court imposed negligence liability on the parent company, not because the management staff of the subsidiary was appointed

[529] *Wren* (n 436) 52.
[530] *Forsythe* (n 482).
[531] *Waste Management Inc* (n 475).
[532] *Coastal Corp* (n 491).
[533] *Waste Management Inc* (n 475); *Coastal Corp* (n 491) 779.
[534] *David Thompson* (n 402).
[535] *CSR Ltd* (n 444) 486.

by the parent company, but because relevant facts revealed that the parent company was embodied by the subsidiary through the appointment of the staff. The sufficient proximity between the parties lay in the complete overlap between the parent company and the subsidiary's management.[536]

In many corporate tort cases, the courts are conservative when applying the tort of negligence in creating the parent company's liability. However, we do not need to concern about whether the application of tort of negligence will conflict with the basic principles of limited liability and separate legal personality, which are significant obstacles when applying the doctrine of piercing the corporate veil in these kinds of cases.

Courts are not reluctant to impose negligence liability on parent companies. Attention is required when considering whether the parent company's involvement in the management or operations of its subsidiary company has overstepped the constitutional rights under the company's articles of association as a dominant shareholder. However, parent companies are generally granted some distinct rights than other shareholders such as delivering instructions over their subsidiary companies. Thus, the most difficult issue in applying the tort of negligence in creating liability is how to define whether a parent company's control over its subsidiary company goes beyond its rights to do so. This is the question that is expected to be answered by courts in future cases.

3.4 Conclusion

[536] Christian Witting and James Rankin (n 390) 99.

In recent years, courts in the UK, the United States, and Australia have favourably accepted the use of tort of negligence in establishing liability for corporate torts. The long and gloomy period seems to be fading, when courts always hang over the jurisdiction issues and refuse to face the problem directly. The courts have showed their willingness to the application of tort of negligence in claims against the parent company and other solvent elements in a corporate group. In all the three countries, compared with other solutions (such as insurance regimes, doctrine of piercing the corporate veil in company law, and strict liability in some statues), tort remedies, especially negligence-based mechanisms, are more attractive, reasonable, and feasible. But the application of the elements of negligence by courts is not yet mature: there is a lack of uniform and recognised rules in one country; courts are expected to provide more practical features for creating a negligence liability; and the vague definitions and boundaries of some essential concepts such as "control", "reliance", "proximity" and "assumption of responsibility", open the floodgate to future confusion. Therefore, whether the parent company and other elements of a corporate group could be negligently liable in tort for the employees of one subsidiary or other affected parties will still be established on a case-by-case basis.

Chapter 4 Parent company's joint liability in tort

4.1 Introduction

This chapter considers an alternative way to create parent company's liability for the tort of its subsidiaries, on the basis of the joint liability theory.

As discussed in Chapter 2, English courts have been reluctant to pierce the corporate veil. The Supreme Court in the latest veil-piercing case, *Prest v Petrodel Resources Ltd,*[537] observed that the circumstances for veil-piercing are very limited and the extension of this doctrine will be extremely difficult in the current view. In this context, the Supreme Court in *Prest* commented that lower courts should try to apply orthodox principles which could apply with full force as between separate legal entities. The doctrine of joint tortfeasance probably can meet this expectation, especially on providing compensations and loss distribution in situations involving multiple tortfeasors. Even if a claimant cannot get recovery against the principal tortfeasor due to unexpected excuses such as the latter being insolvent or having a defence, joint liability for other tortfeasors may attach to the principal tortious act.

The theory of tort of negligence as a relatively efficient mechanism makes it easier for corporate tort victims to obtain satisfactory awards of damages from the parent company.[538] However, as discussed in Chapter 3, the "four-part test" created by the Court of Appeal seems to be too "Cape specific" and is not sufficient for future needs of different cases. Indeed, tort law has developed some other mechanisms for making one party account for another's wrong.

[537] *Prest* (n 173).
[538] *Chandler* (n 87).

Compared with the approach of establishing a direct duty of care on the parent company, it might be easier to pursue the parent company's joint liability with its subsidiary company in some circumstances. The "four-part test" introduced in *Chandler*'s case is just suitable for certain circumstances, as laid out by Arden LJ. The court held that the parent company would be liable for the health and safety of the employees of a subsidiary, where:

> "(1) the business of the parent and subsidiary were in a relevant respect the same; (2) the parent had, or ought to have had, superior knowledge on some relevant aspects of health and safety in the particular industry; (3) the parent company knew the subsidiary's system of work was unsafe, or ought to have known; (4) the parent had known or ought to have foreseen that the subsidiary or its employees would rely on the parent using that superior knowledge for the employee's protection. Crucially, it would not be necessary to demonstrate that the parent company regularly intervened in the health and safety policies of the subsidiary company to establish a duty of care. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."[539]

In *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* (*Lungowe v Vedanta*),[540] *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* (*Okpabi v Shell*), as discussed in Chapter 3, English courts has extended the circumstances in which a parent company could be liable in negligence for the

539 ibid [80].
540 *Dominic Liswaniso Lungowe & ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528.

third parties affected by its subsidiary companies' activities. Particularly, the courts require that the parent company should have control over the subsidiary's material operations, or specific operations which give rise to the claimed damage.

The doctrine of joint tortfeasance, provides more opportunities and possibilities of considering a parent company's liabilities when the above situations are not available or difficult to establish.

In the consideration of laws dealing with three parties' issues, joint liability theories in tort law seem quite promising to provide tort claimants with alternative attempts to widen liability and seek deeper pockets. Sometimes, even though the tort liability cannot be established against the "third party" directly, the third person/legal individual could be involved in some way in the commission of the tort under the theory of joint liability. For instance, the third party can be involved in the claimed tort jointly with the primary wrongdoer, by procuring, directing or authorising the act. The joint liability doctrines can attach to torts of all kinds, including intentional torts, intellectual property torts, breach of statutory duty, and negligence. The object of the joint liability doctrines is to extend the scope of potential or possible parties who can be liable for the damages to the tort victims. A claimant will be at an advantaged position if he could prove that the damage he suffered was single and indivisible and caused by several persons, thereby reducing the risk that one of the defendants becomes insolvent. Furthermore, a claimant may just bring actions against the "easiest defendant", which means that the law allows the claimant to receive the total sum of damages more easily by claiming against just one defendant for the whole sum. The defendant then may take proceedings against any other tortfeasors who are responsible via the Civil Liability (Contribution) Act 1978. This mechanism is quite attractive for the claimant because it provides them with the chance to obtain the whole compensation, rather than having to claim against multiple defendants and make successive actions.

Joint liability theory has been described as an “obscure and under-theorized” area of law,[541] but this situation leaves room for further development and the possibility to extend liability based on it.

Thus, this chapter explores the possibilities of using joint liability doctrines in creating liability in corporate groups. Particularly, this chapter argues that joint liability doctrine provides a great potential to realise the parent company’s liability for the same tort with their subsidiaries.

First of all, there is a need to introduce the theory of joint liability. In circumstances where several tortfeasors cause different and independent damages to one claimant, and lead to distinct injuries, the torts are several and each tortfeasor should be liable for his own fault. If multiple tortfeasors’ acts cause a single and indivisible damage to the claimant, then the claimant is entitled to bring actions against some or all of tortfeasors for compensation. On this occasion, every tortfeasor is jointly and severally liable.

Joint liability in tort arise generally in two ways. When several tortfeasors act with the same common goal and cause the single and indivisible damage, they are joint tortfeasors. A defendant can be held jointly liable, for instance, by procuring, or authorising the commission of a tort of another defendant. Additionally, joint liability can arise from the tort committed by an agent or employee (Vicarious liability). The cause of action against each defendant is the same, as well as the supporting evidence. A court has discretion on the amount of damages, and the claimant then can take proceedings against one

[541] Hazel Carty, ‘Joint Tortfeasance and Assistance Liability’ (1999) 19 Legal Studies 489, 489.

or all parties together for recovery.

Where several persons act independently but their tortious actions happened to contribute to the same harm, they are said to be several concurrent tortfeasors.[542] As the same with joint tortfeasance rules, the claimants have the choice to sue one or all defendants. The benefit is that the tort claimants do not have to be concerned about arguments of damage amounts allocation between co-defendants, who should undertake the burden of apportionment based on the fraction of their responsibility for the injury.[543]

The asbestos cases particularly attract academic discussions in the context of joint liability. In this kind of cases, it is very difficult to decide whether there is a single and indivisible harm, or whether the harms are of different types and can be apportioned among different tortfeasors.[544] Courts are cautious in the apportionment of responsibility in this kind of cases, and are normally prefer to, if possible, allocate the responsibilities proportionately according to the level of harm the defendants make, or else equally distribute the contributions between the defendants.[545] In one category of asbestos cases, the tort claimants may have suffered asbestos exposure at different times when working for different employers, and suffered asbestos-related diseases. The courts are normally uncertain on the allocation of responsibilities, because it is not quite clear whether different periods of risk of attracting the disease should be viewed as separate types of harms. The difficulty lies in the causal link between the defendant's omission and the claimed damage. In effect, the causation of different types of asbestos-related diseases varies from multiple exposures to single asbestos exposure. Mesothelioma could develop just after

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542 *Fitzgerald v Lane* [1989] 1 AC 328*, Vision Golf v Weightmans* [2006] EWHC 1766 (Ch).

543 Horsey (n 290) 567.

544 Witting, *Street on Torts* (n 280) 664; *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 WLR 1027; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229; *Fairchild v Glengaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

545 Witting, *Street on Torts* (n 280) 664; *Bank View Mills Ltd v Nelson Corpn* [1942] 2 All ER (CA) 477, 483.

one single exposure, while another asbestos-related cancer like asbestosis develops due to accumulation of amounts of exposure. Particularly, in some cases the claimant might have suffered both asbestosis and mesothelioma. It is not unusual to attract multiple asbestos-related diseases.[546] In this case, it is quite difficult to determine the responsible person or persons accurately in the victim's long-period working life.

The UK House of Lords accepted proportionate joint liability in this kind of cases because they had created an easier test for causation in *Fairchild* case.[547] This is a leading causation case in tort concerning the asbestos disease. The House of Lords here approved that the causation for joint liability could be met on a basis of the test of "materially increasing risk of harm". In the case that the claimant worked for a number of different employers, an appropriate test is to evaluate whether the defendant had materially increased the risk of harm to the injured person. This test has the potential to be applied in group situations, when several group members have employed the claimant and the potential defendant (for example the parent company) had materially increased the risk of harm to the claimant.

The approval of the House of Lords in the *Fairchild* test illustrates that in the novel cases involving multiple defendants, joint and several liability could be imposed and the defendant has only proportionate liability for the part which he materially increased the risk of harm. It was then questioned whether the solvent members should bear the risk of other defendants going insolvent. The House of Lords ruled that the solvent employer should not, in the case of *Barker v Corus*.[548]

However, under the pressure of various mesothelioma claims from unlawful

546 Compensation Act 2006, s 3.
547 *Fairchild* (n 513).
548 *Barker* (n 513).

exposure to asbestos, the government introduced the Compensation Act 2006, to provide guidance just applicable to cases involving Mesothelioma.[549] In this kind of cases where the tort claimant is diagnosed with mesothelioma, former employers who have exposed the victim to asbestos dust should be held jointly and severally liable.[550] Criticisms arise due to the special treatment of mesothelioma. Arguments against this resultant regime are made because of the unfair consequences of the employers who may only provide minor contribution. On the contrary, as the law stands, the picture is quite attractive and beneficial for tort claimants who not only contract mesothelioma, but also any other asbestos-related disease. This special regime has introduced proposals to extend the scope of realising joint and several liability for other personal injuries in relation to multiple tortfeasors.

However, the idea of proportionate liability is controversial on whether the solvent tortfeasor should pick up the proportion for which the insolvent tortfeasor was materially responsible, and the relevant provision in Compensation Act is just applied in mesothelioma cases. So this chapter will not further discuss the idea of proportionate liability in group situation. The well-developed doctrine of joint tortfesance based on defendant's involvement will be mainly examined, as well as its extension in group cases.

4.2 Doctrine of joint tortfeasance

In common law, tortfeasors responsible for the same harm are divided into two general categories: joint tortfeasors and several tortfeasors, as introduced above. This section will evaluate the possibility of creating the parent

549 Witting, *Street on Torts* (n 280) 665.
550 *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229 [1]; *Fairchild* (n 513).

company's liability based on the doctrine of joint tortfeasors. Firstly, the author will undertake a review of the doctrine.

Distinct from several concurrent tortfeasors, where several independent persons cause separate torts but all of them combine to lead to one damage, joint tortfeasors are held liable for the same tort on a basis of the same cause of action.[551] Joint tortfeasance embraces a considerable range of cases. It is not easy to clearly define the scope of joint tortfeasance because the theory of joint and several liability is an area that is still evolving. As to the definition of joint tortfeasors, Scrutton LJ, adopted the following words from John Frederic Clerk's book *Clerk and Lindsell on Torts*:

> Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design…but mere similarity of design on the part independent actors, causing independent damage, is not enough; there must be concerted action to a common end.[552]

However, this definition has been argued in later cases to lack clarity. At different times, the courts have noted that the concept of common design formulated in the case of *Kourse* is quite narrow.[553] An anomalous exception to the "common design" is that an employer or principal can be held vicariously liable for his employee, or agent's tort. In this regard, the employer and employee, master and servant, principal and agent are joint tortfeasors. It is generally well accepted that the category of joint tortfeasance includes vicarious liability, authorisation, procurement, breach of a joint duty, and concerted action to a common design.[554] When considered broadly, joint

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[551] Deakin, Johnston, and Markesinis, (n 292) 880.
[552] *The Kourse* [1924] P140 (CA) 156.
[553] *Mutua v Foreign and commonwealth Office* [2012] EWHC 2678 (QB); *Fish & Fish Ltd v Sea Shepherd UK and others* [2015] UKSC 10, [2015] AC 1229.
[554] Witting, Street on Torts (n 280) 661-662; Deakin, Johnston, and Markesinis (n 292) 880; Edwin Peel

tortfesance can be reached by two possible routes: a "relationship link" or a "participation link".[555] Hazel Carty, uses this approach to explain the doctrine of joint tortfeasance in her article, as have other legal scholars.[556]

Examples of joint liability based on the "relationship links" include vicarious liability, the liability of an employer, and the liability of an independent contractor.[557] To establishing joint liability based on a relationship link, the relationship between the tortfeasors, such as the relationship of employer and employee, principal and agent; as well as the elements contributing to the tort complained of by the claimants should be both proved.

Different from the "relationship link" basis, to achieve joint liability according to the "participation link" test, a reasonable and sufficient participation of the joint tortfeasor should be clearly justified. Currently, it is generally believed that elements of authorisation, procurement, and concerted actions are three well-accepted participation links contributing to joint liability. However, the scope of these concepts is not sufficiently clarified. It is because of the uncertainty and obscureness of the scope of these links, that we have some space to explore whether the scope of these concepts could be extended reasonably to connect the parent company and its subsidiary company. This issue is crucial in the present chapter.

The issue of vicarious liability in the context of group companies seems to be more complicated. It is an unresolved question whether the parent company could be held vicariously liable for the tort of its subsidiaries. So far English law has not decided whether a legal entity could be held vicariously liable for

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and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell Press 2014) 677.
555 Carty (n 510) 489.
556 Carty, ibid 489; Paul S Davies, *Accessory Liability* (1st edn, Hart Publishing 2015) 178; Joachim Dietrich, 'Accessorial Liability in the Law of Torts' (2011) 31 Legal Studies 231,235; Simon Baughen, 'Accessory Liability at Common Law and in Equity- 'The Redundancy of Knowing Assistance' Revisited' (2007) 11 Lloyd's maritime and commercial law quarterly 545.
557 *Clark v Hoiser & Dickson Ltd* [2003] EWCA Civ 1467 (CA).

another legal person. This important topic will be discussed in the next chapter. This chapter will mainly discuss the "participation links" based joint tortfeasance.

4.2.1 Concerted action

"Concerted action" as a participation link, or a test for joint tortfesance is mentioned in the leading case of *The Koursk*.[558] In this case, Scrutton LJ, clearly acknowledged that, "…to be joint tortfeasors… there must be concerted action to a common end."[559] It was accepted and then developed into a category of test for joint tortfeasance: when one person commits the tort in concert with another "in furtherance of a common design"[560], they are joint tortfeasors.

This classic definition of joint tortfesance was previously enjoyed high authority in joint liability cases. "A further common design" has however become a technical standard in evaluating joint tortfeasance. A typical application was found in the case of *Brook v Bool*, in which a landlord and his lodger were held jointly liable because they acted in concert to look for an escape of gas with a naked light but the lodger negligently caused an explosion.[561] In this case, the court found that both tortfeasors have acted for a common purpose. In the case of *Unilever plc v Chefaro,* Glidewell LJ, observed that, not only must there be an agreement between the potential defendants, but there should be some act in furtherance of the common end to show joint liability.[562] The court in *Sandman v Panasonic UK Ltd,* noted that no joint liability will be found if the

558 *The Koursk* [1924] P140 (CA).
559 ibid 156.
560 ibid.
561 *Brook v Bool* [1928] 2 KB 578 (DC).
562 *Unilever plc v Chefaro* [1994] FSR 135 (CA) 138,141.

two parties just acted in concert, unless it was proved that the joint tortious act was for a further common end.[563]

Although well-accepted, the application of “concerted action for a common end” as a test for liability has always been criticised. In the case of *Mutua v Foreign and Commonwealth Office*,[564] McCombe J, suggested the potential of achieving joint liability of the British government, represented by the Foreign and Commonwealth Office (the “FCO”), for the five Kenyan nationals who were allegedly mistreated in detention camps in Kenya when it was a British colony, during the Mau Mau uprising in the 1950s. McCombe J, recognised that there might be a system of torture of detainees as part of a common design shared by the colonial government in Kenya and the British Government. The British Government might have authorised or approved a policy under which detainees in the colony of Kenya were mistreated. In this case, although it is not obviously convincing that the British Government and the Kenya Colonial Government shared the common design to ill-treat the detainees in the detention camps of Kenya, McCombe J, indicated that the scope of “common design” might be extended.[565] Maybe the “similar design” in some special circumstances like in this case, could be included in the scope of joint design, however, English courts have not accepted this kind of view and there is no any precedent on this issue.

However, just as Bankes LJ, alleged in *The Koursk*, “it would be unwise to attempt to define the necessary amount of connection”,[566] each case should be determined on its own merit. In this regard, it is reasonable to just define the legal elements of joint tortfeasance generally but not to restrict them to certain conducts, because the formulation would be very sensitive to the facts of

563 *Sandman v Panasonic UK Ltd* [1998] FSR 651(Ch) 664.
564 *Mutua* (n 522).
565 ibid.
566 *The Koursk* (n 527).

different cases. Thus, it would be quite feasible to extend the pre-existing formulation, and establish joint liability in group cases, and any other novel circumstances.

In the case of *Unilever v Gillette*, Mustill LJ, suggested to expand the boundary of the test as following:

> Whether (a) there was a common design between the primary and secondary parties to do acts which…amounted to infringements, and (b) the secondary party has acted in furtherance of that design…this idea does not, as it seems to me, call for any finding that the secondary party has explicitly mapped out a play with the primary offender. Their tacit agreement will be sufficient.[567]

In *Unilever v Gillette,* the concept of "common design" was not confined to fixed behavior. The implied "joint design" between joint tortfeasors such as any tacit agreement would make sense.

In the case of *Fish & Fish Ltd v Sea Shepherd UK*,[568] the Supreme Court reconsidered "concerted action" as a test of joint tortfesance, and indicated that the boundary of the concept "common design" might be broader, but the court at the same time set out some new restrictions relevant to the assessment of liability. This case involved corporate groups. Although not in the context of personal injury, it still provides a view of constant attempts by tort claimants to widen liability in seeking for deeper pockets.

The claimant, Fish & Fish Ltd, operated a fish farm off the shore of Malta. The claimant alleged that its vessel, used for fishing and transporting tuna, was

[567] *Unilever v Gillette* [1989] EWCA Civ J0622-3, [1989] RPC 583, 608.
[568] *Fish & Fish Ltd* (n 522).

attacked by a vessel named "Steve Irwin", commanded by the third defendant, Mr Watson. As a result of the attack, a cage of tuna was rammed and the fish inside was released. Mr Watson is a United State citizen. He founded the second defendant Sea Shepherd Conservation Society (SSCS) in 1997, based in Washington, USA, which is the parent organisation of Sea Shepherd entities including the first defendant, Sea Shepherd UK (a registered charity limited by guarantee), the registered owner of "Steve Irwin". Mr Watson, is the director of the first defendant Sea Shepherd UK, and the leader having overall strategic control of SSCS.

The claimant brought actions in trespass and conversion against the first defendant, Sea Shepherd UK, the second defendant, SSCS – the parent company based in US, and the third defendant, Mr Watson, implying that they were all joint tortfeasors. The claimant alleged that the attack was performed as a part of the second defendant SSCS's campaign against illegal fishing of Bluefin tuna, and that the attack was committed under the common design among the three defendants.

During the trial, the first defendant, Sea Shepherd UK, was found not capable of being liable for the tort committed. Hamblen J, dismissed the allegation that Sea Shepherd UK could be held vicariously or directly liable for the loss. The judge in the preliminary trial held that Sea Shepherd UK exercised minimal importance in committing the tort. However, the Court of Appeal took a different view and observed that Sea Shepherd UK was jointly liable for the tort committed, for the reason that "it was not necessary whether or not what the Sea Shepherd UK did should have been of any real significance to the commission of the tort".[569] Then Sea Shepherd UK appealed to the Supreme Court.

[569] ibid [18].

The Supreme Court allowed the appeal from Sea Shepherd UK by a majority of three to two. All five judges agreed on the test for liability, but they held different opinions on the application of the test to the facts of this case. Lord Neuberger and Lord Kerr, concurred to the lead judgments delivered by Lord Toulson, while Lord Sumption and Lord Mance provided dissenting opinions.

This case is much relevant to the application of joint tortfesance principles in the context of corporate groups. It provides the court with a platform to revisit and confirm the latest test of joint tortfeasance, and to present the inherent controversial points.

The main issue of this case is whether the contribution of Sea Shepherd UK (SSUK), as a separate legal entity from SSCS, to its parent organisation's anti-fishing campaign and subsequently to the tort, is of minimal importance.

As to the test for joint tortfeasance, Lord Toulson recognised that a defendant will be jointly liable for the tort of other principal tortfeasor if he: "(i) acts in a way which furthers the commission of the tort by the principal; and (ii) does so in pursuance of a common design to do or secure the doing of the acts which constitute the tort."[570]

It seems that the judges had no any dissenting views on the test of joint tortfeasance. Lord Sumption expressed his agreement that a defendant will be jointly liable if: "(i) he has assisted the commission of the tort by another person; (ii) it is pursuant to a common design; and (iii) an act is done which is, or turns out to be tortious."[571]

[570] ibid [21].
[571] ibid [37].

Although such formulation (of the test) was adopted in this case, it is however unwise to define the connection needed between the defendant and the tort committed by other joint defendants, since the liability determination is quite fact-sensitive.[572] In addition, the case raises controversies on the issue whether sufficient (not minimal) assistance under a common design is necessary to be proven.[573]

Comments

The majority of the Supreme Court concurred to the view that the contribution of the joint tortfeasor should not be minimal in the commission of the tort.[574] This position is contrary to the decision of the Court of Appeal, in which Beatson LJ believed that:

> It was not necessary that what the first defendant did should have been of any real significance to the commission of the tort. The purpose of scrutinizing what the first defendant did was simply to decide whether it was possible to infer a common design.[575]

In the Supreme Court, the justices differed in the application of the test of joint liability. In this case, Lord Sumption and Lord Mance, consistently observed that the appellant SSUK's participation in relation to fundraising and recruitment of volunteers, though small, could not be regarded as so trivial that it was to be ignored in the eyes of the law.[576] Subsequently, it would be possible to establishing a joint liability between the parent entity and its subsidiaries if relevant facts are found that cannot be said to be ineffective. This is because, currently, no consistent rules are made to determine the

[572] ibid [56].
[573] ibid [57].
[574] ibid [70].
[575] ibid [18].
[576] ibid [50]-[51].

"effective contribution" in commission of tort.

This suggests that the determination of joint tortfeasance depends on the court's discretion. In the opinion of Lord Sumption, the assistance of a joint tortfeasor should be material but should not be restricted to be significant, because no justification has ever required that it should be more than deminimis. Lord Sumption broadened the scope of the test, by suggesting that "significant assistance" in furtherance of the common design should not be considered as the only effective fact for liability.

It should also be noted that the decision of the Supreme Court simply indicates the failure to make SSUK jointly liable, and that the case cannot be sued in England and Wales. Acts of the US parent organisation (SSCS) obviously would not be condoned. Mr Watson, who commanded Steve Irwin to undertake anti-fishing activity, described himself as the leader with overall strategic control of the parent organisation, and the director of SSUK. Facts of this nature, which are based on the overall "control" by the leader of the parent organisation would sufficiently support a common design and action in furtherance to it.

Application into group cases

Having reviewed the latest test of joint tortfeasance, this section considers the possibility of applying the current test in group situations.

The reason why we consider to establishing the parent company's liability on a basis of joint liability theory is that it makes it possible to add potential defendants to fully compensate claimants. When the test for joint liability is satisfied, the responsibility will be attributed to anyone who has ever shared the common design and actions in furtherance of it. Therefore, to make a parent company jointly liable with its subsidiaries, there should be sufficient connections between the parent company's actions and the claimed torts, both of them are in furtherance of a common design. The parent company must have been effectively involved in the commission of the tort, and mere facilitation without a common design does not make it a joint tortfeasor. Particularly, the two essential elements, "common design" and "acts in furtherance of it", should be both satisfied according to specific facts on a case-by-case basis. As suggested in the *Fish & Fish* case, this is a one stage test, rather than a two-stage test.[577]

In the *Fish & Fish* case, the Supreme Court listed nine relevant factors for the overall assessment of the involvement of other parties in the commission of the principal tort, and observed that, "…the presence or absence of a single factor may not of itself be determinative nor is the list exhaustive."[578] The factors indicated below are of much relevance to the group situation:

> …the extent to which the other party exercises or can exercise control over the tortious actor, and does so in relation to the commission of the tort; the extent to which the other party is responsible for the conception, formulation and planning of the common design; the extent to which the designs of the tortious actor and the other party are conterminous; the extent to which the commission of the particular tort was an inevitable or intended consequence of the common design; whether the other party is present at the time and/or place of the commission of the tort.[579]

Based on the above factors, we assume that the parent company or the directors of the parent company can be held jointly liable when they exercise

[577] ibid 1229, 1232.
[578] ibid.
[579] ibid.

certain degree of control over the principal tortfeasor. Circumstances of control may include that the parent company or parent company's director controls a majority votes on the board of the subsidiary company, or has a major influence over the board members of the subsidiaries. In this regard, a parent company's joint liability may be established if the parent company's influence over its subsidiary company's board meeting is in relation to the subsidiary's relevant policy, and leads to personal injuries.

Particularly, the court should take note of the overlapping directors in the parent company and the subsidiary companies. The overlapping directors can "wear two hats", in which they can act in different guises when sitting on different boards. The courts need to take a realistic view about whether this happens.

In *Chandler v Cape plc*, the Court of Appeal determined negligence liability of the parent company, Cape, but failed to talk about the application of joint liability theory in this case. As initially asked by the relevant claimants (in *Chandler v Cape*), we question whether Cape can be held jointly liable for its subsidiary's negligence.

In this case, the crucial facts upon which the Court decided to establishing a duty of care on the parent company are: Cape Industries as a parent company was found to be highly involved in the management and business of its subsidiary (Cape Products), and also involved in the group employees' safety policy making.[580] Specifically, the court found that, Cape's influential control over its subsidiary rested on the following facts:

> Cape's board minutes show that Cape Products could not incur

[580] *Chandler* (n 87) [72]-[77].

capital expenditure without parent company approval; Cape was clearly in the practice of issuing instructions about the products of the company such as about products mixes.[581]

It is obvious that Cape exercised a high degree of control over some aspects of its subsidiary, which could make Cape responsible for the subsidiary's tort. According to the nine factors listed by the Supreme Court in *Fish & Fish*, the extent of exercising control by a parent company over the tortious subsidiary, could be counted as an effective element for joint tortfeasance. Therefore, we may assume that the material control exercised by Cape over Cape Product's asbestos business and group safety policy, could contribute to a common design with Cape Products. In addition, Cape's significant contribution to the decision making of the Cape Products' business and the employee's health and safety policy could sufficiently be given as the parent company's involvement in the commission of the tort of Cape Products. Thus, it is reasonable to make Cape jointly liable for its subsidiary's negligence in this case.

Based on the above discussion, we conclude that the parent company could be held jointly liable with their subsidiaries when: (1) the parent company exercises absolute control over the subsidiaries' business or the parent company exercises certain control over the subsidiaries in relation to the tortious act claimed. For example, the parent company exercises control over the health and safety policy making for the subsidiaries' employees; (2) the parent company materially contributes to the commission of the tort. For instance, the parent company exercises high involvement in certain acts with the subsidiary, which further leads to the tortious act claimed by the victims; (3) the relevant control and involvement in furtherance of the commission of the

[581] *Chandler* (n 87) [72]-[73].

tort could be given as part of a common design.

To summarise, limited courts' authorities are found to make parent companies jointly held liable with their subsidiaries in personal injury contexts. However, some English cases are of much relevance in determining the parent company's joint liability. These cases indicate some relevant factors in assessing whether a parent company could be a joint tortfeasor.

The US case of Amoco Cadiz

Generally, US courts are more willing to accept the application of joint liability theory in corporate tort cases. Some cases are found to be determined as intra-group liability cases, in which liabilities are imposed on parent companies for subsidiaries' torts.[582] Particularly, these cases involve environment damage and workplace injury, where courts are exposed to, and have to be aware of the public pressure.[583] The decision in the case of *The Amoco Cadiz,*[584] given by the US District Court explains how a joint tortfeasance approach works.

Amoco Cadiz, was a vessel carrying a cargo of light crude oil from Iran to Western Europe. It was owned by Amoco Transport Co., (ATC), and designed and constructed in Spain by the company Astilleros Espanoles SA. On 16 March 1978, the vessel rolled heavily because of a severe storm and grounded on the rocks off the coast of France. After unsuccessful attempts to repair the steering gear, a salvage tug owned and operated by Bugsier Reederer Und Bergungs A.G. tried to offer help to *Amoco Cadiz* by towing the vessel. The assistance failed soon and the vessel grounded. The oil cargo on

582 Phillip I Blumberg, 'The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporate Liability', (1995) 28 Conn L Rev 295, 332.
583 ibid.
584 *The Amoco Cadiz* [1984] 2 Lloyd's Rep 304.

Amoco Cadiz was discharged and more than around 200,000 tons of light crude oil leaked into the ocean, polluting hundreds of miles of the French coastline.

The French claimants, including the Republic of France, French municipalities and businesses, brought actions against Amoco Group and the Spanish vessel constructing company, Astilleros Espanoles SA, in the US District Court for the Northern District of Illinois. The French claimants brought negligence claims against ATC (the owner of the vessel Amoco Cadiz), Amoco International Oil Co., (AIOC), and their parent company, Standard Oil Co., (Standard). The claimants alleged that the accident of *Amoco Cadiz* was caused by the negligence of the relevant parties in the Amoco Group in the course of building, maintenance, and operating the vessel.

Judge Frank McGarr, imposed liability on both of the subsidiaries and the parent company, Standard. He observed that, in the first place, ATC as the owner of *Amoco Cadiz*, "had failed to meet the burden of proving that it was free from privity and knowledge with respect to the negligence which proximately caused the grounding of the vessel."[585] As to another subsidiary, AIOC, Frank McGarr J, concluded that this party was negligently liable on the basis that it exercised complete control over the operating, maintaining and repair of the vessel, as well as training of her crew. In this regard, AIOC has a duty to make sure that the vessel was properly maintained.[586] Particularly, Standard, as the parent company was determined as a joint tortfeasor with ATC and AIOC for their negligent acts which led to the damage, and to be solely liable as well.[587]

Judge Frank McGarr observed that:

[585] ibid 305.
[586] ibid.
[587] ibid.

> Standard, as a multinational corporation was responsible for the tortious acts of its wholly owned subsidiaries, AIOC and Transport; Standard itself was initially involved in and controlled the design, construction, operation and management of *Amoco Cadiz* and treated the vessel as if it were its own so that Standard was liable for its own negligence and that of AIOC and Transport to the French claimants.[588]

The high involvement of the parent company, Standard, in the vessel's management, and its control over the subsidiaries' decision-making mechanism were given as sufficient connections between the parent company, the subsidiaries and its negligent acts.

The judgment given by Judge McGarr in this case was quite favourable to the claimants, and in the long run, to the future potential claimants.[589] The decision of *Amoco Cadiz* provides the possibility that the parent company would not be able to avoid liability if it makes decisions which have significant influence over its subsidiaries' business. In this case, the parent company was made liable due to its decisions on the construction, operation and maintenance of the shipping business of its subsidiary. It was also suggested that the parent company's liability could be established on the basis of integrated management.[590] Unfortunately, case law in this area is quite limited and is not able to provide sufficient guidance to support the fact of "integrated management" as a sufficient factor to create joint liability.

In the case of *Larry Bowoto v Chevron Corp*,[591] the court declined to hold the

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[588] ibid 338.
[589] N J J Gaskell, 'The Amoco Cadiz: (II) Limitation and Legal Implications', (1985) 3 J Energy & Nat Resources L 225, 242.
[590] Peter T Muchlinski, *Multinational Enterprises & The Law* (2nd edn, OUP 2007) 311.
[591] *Larry Bowoto v Chevron Texaco Corp* 312 F Supp 2d 1229 (ND Cal 2004); *Larry Bowoto v Chevron Corporation* 481 F Supp 2d 1010 (2007).

parent company liable even though a high degree of integrated management was found. The claimants from Nigeria brought actions against the US parent company Chevron Corp, alleging that the parent company should be liable for the torts of its Nigerian subsidiary. The claimants, Nigerian citizens were injured because of the serious human rights abuses of the Nigerian military personnel. It was alleged by the claimants that the subsidiary company Chevron Nigeria Ltd supported the actions of the Nigerian military and the injuries arose from its complicity with the Nigerian military. The US parent company Chevron Corporation was alleged to be responsible for the injuries as well because of the high degree of involvement in communication with the subsidiary in the course of the incident, and the high number of parent company's employees in the subsidiary. The claimants believed that these evidence supported a high degree of control and agency relationship. These factors would have contributed to the parent company's liability under the 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO).[592]

In the discussion of the indirect liability of the parent company, the court believed that the high degree of control of the parent company was not sufficient to contribute to the agency relationship to achieve a parent company's liability under the theory of agency.[593] The court held that to establish the liability in this case under the RICO, the claimants should have argued that the parent company benefited from the wrongful behaviour (RICO violations) through their agents (Nigerian subsidiary).[594]

In the concluding part of this summary judgment, the court noted that many cases were quite arguable and still unresolved in connection with this motion.

[592] Racketeer Influenced and Corrupt Organizations Act, 1962(c): "it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."
[593] *Larry Bowoto v Chevron Corporation* [2007] 481 F Supp 2d 1010, 1018.
[594] ibid 1152-1155.

The court admitted that the results were sad, maybe even tragic, but as a matter of law the decision had to be for the defendants.[595]

If we compare the judgments of the *Chevron Corporation* case and the *Amoco Cadiz* case, it is not difficult to find that the success of the latter rests on sufficient evidence to support the existence of high involvement or active participation in the relevant business/incident of the subsidiary, which provides a causal link between the parent company's actions and the occurrence of the tort. In addition, this kind of evidence supports the combined relationship between the parent and the subsidiary company, based on which a parent company's liability could be achieved under the doctrine of joint tortfeasance.

Thus, in the majority of the relevant cases where courts avoid to hold the parent company liable based on the doctrine of veil piercing, agency relationship, or on the existence of relevant control (because of the extremely high adherence to the separate legal entity principle), alternatives of joint tortfeasance theory on a basis of parent company's concerted actions, procurement or authorisation can be tried to create the liability. Particularly, the active participations in the subsidiary's business and the relevant incident that causes the claimed tort, can reasonably contribute to the liability.

The amount of control

As to the amount of control required to establishing a parent company's liability, US courts have developed checklists about the degree of control necessary to create a parent company's liability. In particular, Illinois courts have listed eleven elements as indicators of parent company's dominance. These elements are:

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595 ibid 1128.

> (1) the parent corporation owns all or most of the capital stock of the subsidiary; (b) the parent and subsidiary corporations have common directors or officers; (c) the parent corporation finances the subsidiary; (d) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (e) the subsidiary has grossly inadequate capital; (f) the parent corporation pays the salary or other expenses and losses of the subsidiary; (g) the parent corporation has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (h) in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (i) the parent corporation uses the property of the subsidiary as its own; (j) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation; (k) the formal legal requirements of the subsidiary are not observed.[596]

US courts are inclined to establishing the parent company's liability on a basis of substantial existence of the elements. A considerable number of corporate tort cases can be found in the United States compared to other countries.[597] The doctrine of veil piercing has been regarded as a dominant approach to establishing the parent company's liability in the United States.[598] However, courts' decisions in this field are inconsistent.[599] "Veil-piercing jurisprudence" is described as one of the most serious limitations of the US law.[600] In this

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596 *Steven v Roscoe Turner Aeronautical Corp* 324 F 2d 157 (7th Cir 1963) 161.
597 Karl Hofstetter, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends', (1990) 39 ICLQ 576, 591.
598 ibid 592.
599 Phillip I Blumberg, *Law of Corporate Groups: Substantive Law* (1st edn, Little Brown & Co Law & Business 1987) 681.
600 ibid 136.

scenario, other equivalent approaches such as enterprise liability doctrine, statutory laws and tort law have the chance to be applied as alternatives.[601] This chapter will not evaluate the application of the doctrine of veil piercing in the US, which is still a developing area of law. However, the explanations on the concept of control in the US veil-piercing cases are worth referring to. This is because the proof of high involvement and intense control of the parent company are also crucial to the joint liability's establishment. The cases of the two different areas (veil-piercing cases and joint tortfeasance cases) to some degree overlap on the consideration of the element control to establish a parent company's liability. The "control" element is extremely important to the proof of connection between the parent company and the torts of its subsidiaries.

Phillip I Blumberg summarises a "three-factor" test to be fulfilled as required in establishing the parent company's liability: 1) dominating control; 2) use of control to commit fraud or wrong; 3) proximate causation of creditor damage.[602]

This "three-factor" test in determining the amount of control provides a very valuable reference for the problem (i.e., how much control could contribute to the participation links such as concerted action, or authorisation to establish joint tort liability) in realising a parent company's joint tort liability. When considering the concept of control, the two different mechanisms, "Veil-piercing doctrine" and "joint tortfesance doctrine" indeed have overlapping operations, and it may be preferable to make a cross-reference.

In the case of *Amoco Cadiz*, Standard as the parent company was determined as a joint tortfeasor with ATC and AIOC for their negligent acts which led to the

[601] ibid 105.
[602] ibid 112-117.

damage. The reasoning provided by the court is as follows:

> Standard itself was initially involved in and controlled the design, construction, operation and management of *Amoco Cadiz* and treated the vessel as if it were its own so that Standard was liable for its own negligence and that of AIOC and Transport to the French claimants.[603]

If we apply the "three-factor" test in this case, it is clear that according to the facts of this case, the requirement of control is fulfilled. The degree of control in this case obviously belongs to the "third element" in the "three-factor" test: the degree of control of the parent company Standard is a proximate cause of the claimed damage.

In the US veil-piercing cases, according to the long checklists developed, the US courts have considerable discretion in determining the parent company's liability. Accordingly, the parent company's interference for liability has not yet well defined.[604] However, joint tortfeasance theory can be regarded as a functionally equivalent approach. Joint tort cases are all quite fact sensitive. If we could establish reasonable participation links between the potential joint tortfeasor and the claimed damage, it could sufficiently establish a joint tort liability. It is unnecessary to make any fixed rules from the perspective of tort law.

4.2.2 Procurement

As introduced above, procurement, authorisation, and concerted actions are

[603] *The Amoco Cadiz* (n 553) 338.
[604] Hofstetter, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends' (n 566) 593.

revealed by case law as three major participation links contributing to joint liability.

It is generally accepted that the concept of "procurement" includes a wide range of conducts such as promoting the claimed tortious act,[605] incitement, inducement,[606] persuasion, and encouragement.[607]

A simple case illustrating the inducement leading to joint tortfesance is *Brook v Bool*.[608] In this case, a landlord was identified by the court as a joint tortfeasor because he invited/promoted the tenant to detect a gas escape in the house and the tenant negligently caused an explosion.

The authoritative decision concerning the legal rules about "procurement" is provided in *CBS Songs v Amstrad plc*.[609] In this case, Lord Templeman held that a defendant is a joint tortfeasor if he procures a breach of copyright and this infringement leads to the claimed damage.[610] His Lordship observed that: "The joint tortfeasor intends and procures and shares a common design that the infringement shall take place…a defendant may procure an infringement by inducement, incitement or persuasion."[611]

In this case, the defendant Amstrad was not regarded as a joint tortfeasor by the court because the behaviour of Amstrad did not amount to "procurement". Lord Templeman observed that "offering for sale machine which may be used for unlawful copying, and advertising the attractions of their machine to any purchaser who may decide to copy unlawfully" could not constitute

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605 *Brook* (n 530).
606 *CBS Songs v Amstrad Consumer Electronic plc* [1988] AC 1013 (HL) 1058.
607 *News Group Newspapers Ltd v Society or Graphical and Allied Trades* [1987] ICR 181 (QB) 214.
608 *Brook* (n 530)
609 *CBS Songs* (n 575).
610 ibid.
611 ibid 1058.

procurement.[612] This statement has found acceptance in the later cases.[613] It has been held that sales and advertisements of a lawful product which may be used for unlawful purposes cannot be "procuring". The acts of Amstrad may be similar to "facilitation", but it is generally believed that mere facilitating the doing of a wrongful act cannot contribute to joint tortfesance. A joint tortfeasor must have procured (induced, incited, persuaded, or encouraged) a particular tortious act, which results in the claimant's damage.

The application of the doctrine of joint tortfeasance in corporate cases has often been discussed in the literature with particular regard to widening the concept of "procurement".[614] The case law reveals that if a director or shareholder has authorised, directed or procured the tortious act, he would be held jointly liable, even though he has not committed the claimed act.[615]

In the leading case of *C Evans Ltd & Sons v Spritebrand*,[616] instead of applying the doctrine of piercing the corporate veil, the claimants tried to make the director personally liable for the torts of the company under the test of procurement for joint tortfeasance. The claimants, C Evans and Sons Ltd, sued the first defendant Spritebrand Ltd and the second defendant Paul Anthony Sullivan (the director of the first defendant), for jointly infringing the claimant's copyright. C Evans and Sons Ltd were designers, manufacturers and suppliers of scaffolding components. They alleged that the defendant company had reproduced and authorised others to reproduce their works under sections 1(2) and 3(5) (a) of the Copyright Act 1956. In addition, the claimants alleged that the claimed tortious acts of the defendant company

[612] ibid.
[613] *Grower and others v British Broadcasting Corporation* [1990] FSR 607 (Ch); *Fish & Fish Ltd* (n 522).
[614] Carty (n 510) 492-493; Helen Anderson, *Directors' Personal Liability for Corporate Fault* (1st end, Kluwer Law International 2008) 232-234; Brenda Hannigan, *Company Law* (4th edn, OUP 2016) 75-76.
[615] *C Evans Ltd v Spritebrand* [1985] 1 WLR 317 (CA); *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 (CA); *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 456 (HL) 488; *MCA Records Inc v Charly Records Ltd* [2003] 1 BCLC 93 (CA).
[616] *C Evans Ltd* (n 584).

were acts that the director personally authorised, directed and procured.[617] In support of the alleged joint tortfeasance, the claimants relied on the following evidence:

> The director had at all material times been a director and managing executive of the company, in which capacities he had at all material times decided what scaffolding components the company would manufacture; and that he had at all material times implemented, assisted the company to implement and instructed the officers, servants and agents of the company to implement his decisions.[618]

The defendant applied to strike out the action on the ground that the claimant had no reasonable cause of action, and that there were no facts to support the argument that the director either knew that the claimed acts were tortious, or that the director was reckless as to whether or not the acts were likely to be tortious.[619]

The judge rejected the submission and dismissed the defendant's appeal and held that:

> Where a company director was sought to be made liable for tortious acts of his company, the extent of his personal involvement in the company's tort had to be carefully examined, but that where the director had authorised, directed, and procured the acts complained of it was not an essential precondition of his liability that he knew that the acts thus authorised were tortious, or was reckless as to whether or not they were likely to be tortious, unless the primary tortfeasor's state of mind or knowledge was an essential ingredient of the particular tort

[617] ibid 318.
[618] ibid 319.
[619] ibid 318.

alleged.[620]

The case of *C Evans* provides an important guidance on the “procurement test” for determining a director’s joint liability with his company while circumventing the doctrine of piercing the corporate veil. The guidance has been followed in later cases but with some difficulties. The central problem lies in defining the facts and extent of involvement of the director in the claimed torts on which the procurement and authorisation rely.[621]

Extension in the group situation

English courts have accepted and developed the “procurement test”, on the basis of which a director can be held jointly liable for the company’s wrongful acts. In respect of the establishment of the procurement, the court in the case of *MCA Records Incv Charly Records Ltd* provided valuable statements:

> A director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company, that is to say, by voting at board meetings. That is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company-for example by voting at general meetings and by exercising the powers to appoint directors.[622]

[620] ibid.
[621] Hannigan, *Company Law* (n 583) 75-76.
[622] *MCA Records Inc & Anor v Charly Records Ltd & Ors* [2000] EWCA Civ J1116-1, [2002] BCC 650 [49].

In the case of *MAC Records v Charly Records*, the issue in question was whether Mr Jean Luc Young (JY) was jointly liable with Charly Records Ltd, for the copyright infringement of one of MCA Records' sound recordings. The claimants alleged that JY was jointly liable with Charly Records Ltd (CRL) for personally authorising, procuring, and directing the acts of CRL, and also on the basis that JY was a shadow director of CRL, even though he did not hold the position as a director.[623] JY appealed against Rimer J's decision on establishing the joint liability. The Court of Appeal however dismissed the appeal on a very reasonable ground.

This case again applied the test of procurement by referring to the decisions of *C Evans* and *CBS Songs v Amstrad plc*. More specifically, in the case of *MAC Records,* the Court of Appeal reaffirmed the "procurement test" on which a joint liability could be achieved. Chadwick LJ, observed that to make a person jointly liable with the primary infringer while he does not commit or participate directly in those acts, it should be found that this person procured or induced those acts to be done by the primary defendant, or alternatively, he jointly acted in concert to secure the doing of the tortious acts.[624]

The cases relevant to the "procurement test" for joint tortfeasance sufficiently reveal that it is possible and reasonable to make a director, even de facto or shadow director jointly liable for the company's tort; under the UK law for instance, a parent company can be held to be a shadow director. Following this position, "procurement test" could be applied to group cases, for instance, to establishing a parent company's joint liability. Excerpts from the case of *MAC Records* provides reasonable support:

> …there is no reason why a person who happens to be a director or a

[623] ibid.
[624] ibid [53].

> controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances were such that he would be so liable if he were not a director or controlling shareholder. If, in relation to the claimed wrongful acts, the individual as a joint tortfeasor with the company arose from his participation or involvement in ways which went beyond the exercise of constitutional control, then there was no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control.[625]

Obviously, this quote indicates that if a person has exercised control beyond the constitutional organs of one company, he would be liable even if he were not a director or a controlling shareholder. Relevant comments are also given by Brenda Hannigan in her book *Company Law* that, if we assumed that A was the individual who would be held jointly liable, and B was the primary tortfeasor, the issue in question is whether or not A's participation in the acts of B be such as to give rise to liability as a joint tortfeasor if A were not a director of B.[626] The issue we are looking at would not be whether or not the relationship between A and B is that A is the director of B.

Accordingly, a parent company, as a legal person/a legal individual, could be held jointly liable with other group elements if it had procured, directed, authorised the claimed tortious acts. In other words, if it acted beyond its role to procure or direct the other subsidiary's tortious act that leads to the claimant's damage, there is no reason to let it escape the relevant liability. Furthermore, the parent company can be held as a shadow director of the subsidiary company. This makes the argument more understandable.

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625 ibid [50].

626 ibid [41]; Hannigan, *Company Law* (n 583) 76.

Notably, the same difficulty would arise on the factual analysis of the defendant parent company's conduct. The challenge to courts is how to define the "procurement" behaviour, particularly the extent of the involvement of the parent company, based on which its personal joint liability is predicated.

The relevant decisions on the director's joint liability with the tortious company provided some indications. Any fact that supports a causal connection between the parent company and the claimed damage primarily committed by the other joint defendant would be relevant. For instance, the parent company beyond its constitutional role, is involved in control of the crucial decisions related to the company's tortious act, or decisions influential to day-to-day activities.

In the case of *MAC Records*, for instance, the alleged joint tortfeasor JY did not hold a directorship in the other joint defendant company CRL, but JY used his power of control over CRL to make sure that the infringed recordings were copied and issued to the public. The judge in this case held that the documents showed that JY exercised the ultimate influence over CRL.[627] The decisions as to strategy, which carry everyday activities were made by JY.[628] It is clear from the findings that JY procured the tortious act of the company and joined together with the company in concerted action to ensure its performance. In another relevant case, *Koninklijke Philips Electornics NV v Prico Digital Disc GmbH*,[629] the "procurement test" was established from the defendant director's day-to-day running of the defendant company, and his decisions were crucial in the commission of the tortious actions; for example, the defendant director, Mr Kuo, negotiated exclusive supply agreement for the sale of the infringing products, and was the only person who would take the crucial

[627] *MCA Records Inc & Anor* (n 591) [54].
[628] ibid [56].
[629] *Koninklijke Philips Electornics NV v Prico Digital Disc GmbH* [2003] EWHC 2588, [2004] 2 BCLC.

decision in respect to the tortious act.[630] The judge believed that Mr Kuo's activities extended beyond mere participation in board meetings as a business manager of the company. He supervised the infringing act and was in control of the commercial decisions related to the claimant.[631]

Another case, *Società Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd*,[632] has demonstrated that the managing director and sole shareholder could be held jointly liable with his company. The factual analysis in this case provides an example of the "causal connection" between one individual/ legal individual and the tortious act committed by another joint defendant. Specifically, the managing director or sole shareholder can be held jointly liable when his behaviour constitutes an omission, and where he acts in a manner that facilitates the tortious act complained of.

The claimant, *Società Esplosivi Industriali SpA* (SEI) was incorporated as a manufacturer of military explosives, munitions and weapon systems. Ordance Technologies (UK) Ltd (OTL) was the first defendant, who was claimed to have committed a design right tort with the third defendant, Mr Stephen Keith Cardy, the managing director and sole shareholder of OTL. OTL was found to be a tortfeasor in the first trial,[633] and the issue in question in the second trial was Mr Cardy's personal liability with OTL. Mr Cardy was the only director and shareholder of OTL, and was involved in the day-to-day discussions of the manufacture of their one warhead work (DPM), by which OTL was alleged to have infringed the design right owed by SEI. In this case, one issue was that Mr Cardy gave no instructions on whether or not to use SEI's technology in their DPM program meetings, while Mr Cardy knew that the use of the

[630] ibid [3].
[631] ibid [18].
[632] *Società Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd* [2007] EWHC 2875, [2008] 2 All ER 622.
[633] ibid.

technology in their work would infringe SEI's design right.[634] All the evidence pointed to the fact that Mr Cardy knew that unless he took appropriate steps, the infringement would occur, i.e., if the manufacture team was told nothing but to proceed with creation of DPM work.[635] However, the issue in question was whether this factual basis implied that Mr Cardy intended, procured and shared a common design with OTL's infringement. Should Mr Cardy's failure to prevent his company's tortious acts be enough to make him jointly liable? The court believed that it is not fair to say that he shared a common design only based on one of such omission.[636] However, in this particular case, Mr Cardy was guilty of more than an omission. The crucial evidence was that he did not say anything about the breakdown in the relationship between SEI and OTL. Besides, he stated that there was absolutely no problem with SEI. The court observed that, based on the relevant facts, Mr Cardy's behaviour was a form of encouragement or procurement.[637]

The decision in this case provides another possibility to construct joint liability in the corporate scenario. Particularly, if it is not enough to put responsibility only on one omission, or on the closed relationship between the potential joint tortfeasor and the tortious company, "encouragement" could be inferred from the legal individual's promises or behaviour, which indicates that the tort or damage would not happen. This factual basis, could be included into the "encouragement concept", and lead to joint liability.

4.2.3 Authorisation

"Authorisation" as a basis for joint liability was mentioned in the case of *C*

634 ibid [94]-[95].
635 ibid [95].
636 ibid [96].
637 ibid [102].

Evans & Sons Ltd v Spritebrand Ltd and Another.[638] In this case, Slade LJ observed that it was capable of creating a good cause of action against the director of a tortious company, without proof of knowledge or recklessness, when the director had authorised, directed and procured the tortious act committed by the company.[639] In this case, the defendant company committed the tortious act under the direction and control of the director, in reproducing the claimant's drawings without his licence or consent.[640] In the *C Evans*' case, Slade LJ quoted from Palmer's Company law: "So, too, if by the order of the directors, a trespass is committed, a patent infringed, or another wrongful act committed, the directors who are parties to it are personally liable."[641]

Some other cases can also be found to support the possibility of a director's joint liability with its tortious company based on authorisation. In the case of *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*, two directors were sued to be liable for an explosion at the company where explosives were manufactured. The court held that they were responsible because the company was under their sole control.[642] Lord Buckmaster, observed that the individuals and the company could be held responsible when the wrongful act of the company was directed by and under control of the governing director:

> If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences.[643]

This case was then followed by the case of *Performing Right Society Ltd v*

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[638] *C Evans Ltd & Sons* (n 584).
[639] ibid 318.
[640] ibid 319.
[641] ibid 323; Sir Francis Beaufort Palmer, *Palmer's Company Law Vol.1* (23rd edn, Sweet & Maxwell 1982) 65-05.
[642] *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 456 (HL) 476.
[643] ibid.

Ciryl Theatrical Syndicate Ltd, where Atkin LJ referred to Lord Buckmaster's decision and believed that the direction and control of the director could be found both expressly and impliedly.[644]

Another case that approves the application of the "authorisation" test for joint liability in corporate contexts was *CBS Songs v Amstrad Consumer Electronic plc.*[645] In this case*,* Lord Templeman reaffirmed "authorisation" as a ground for creating liability as a joint tortfeasor, and further widened the definition of "authorisation" by equating it to sanction, approval, and countenance.[646]

The claimants in *CBS Songs* alleged that the defendants should be jointly liable with the members of the public who infringed their copyright, by reproducing their records on blank tapes. The defendant company, Amstrad, was claimed to have authorised the public infringement of CBS Songs' copyright, by manufacturing, advertising and selling "hi-fi" systems which facilitate the speed of recording from prerecorded cassettes to blank tapes.

The majority of the Court of Appeal took the view that the defendant's acts could not be said to be "authorisation", but at the same time the court approved that it is a tort at common law to authorise, or procure another to commit a tort.

Extension in the group situation

"Authorisation" as a ground to establishing joint liability is widely applied in intellectual property and nuisance cases. It is recognised as a form of joint tortfeasance, either on its own or together with procurement. In *Markesinis and Deakin's Tort Law*, it is described in the joint liability chapter that, "tortfeasors are joint in cases of express authorization or instigation; principal and agent;

644 *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1(CA) 14.
645 *CBS Songs* (n 575) 1013.
646 ibid 1054.

vicarious liability…".[647] Hazel Carty regards the "authorisation" test as different from the "procurement test".[648] She also believes that "authorisation" as a test could be extended to apply in corporate situations, especially to establishing the liability of company directors.[649] Paul Davies, in his book *Accessory Liability,* also discusses the "authorisation" and "procurement" tests in two different parts. He regards authorisation as a form of participatory liability distinct from other kinds of participation links.[650] It is reasonable to impose joint liability on any defendant who participates in another's tort on the basis of the "authorisation" test. Several high authorities have extended the use of this test in corporate context to make the director jointly liable with his company, while circumventing the doctrine of piercing the corporate veil.[651] Under this scenario, it might be feasible to extend the application of the authorisation test into group situations and to create joint liability when the parent company authorises and directs the tortious acts committed by its subsidiary companies.

Current case law does not reject the possibility of applying authorisation test in group cases.It is certainly not impossible, and would indeed be quite promising to bring actions for joint liability based on the authorisation or procurement tests in the group context, in proper situations. As regards the constitution of authorisation, the general answer would be that it will depend on the exact facts of every single case.[652] In the previous cases, the courts have taken their discretion in deciding joint liability based on "authorisation". The concept of authorisation has not been fixed and there is no hard and fast rule here. As indicated by Paul Davies, this test permits courts to look behind the concept and any form of words used.[653] The fact that the court is willing to consider the

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[647] Deakin, Johnston, and Markesinis, (n 292) 880.
[648] Carty (n 510) 495.
[649] ibid.
[650] Davies (n 525) 191.
[651] *C Evans Ltd & Sons* (n 584); *Rainham Chemical Works Ltd* (n 611) 456; *Right Society Ltd* (n 613); *CBS Songs* (n 575) 1013.
[652] ibid 193.
[653] ibid.

substance of the defendant's conduct but not stick to a fixed definition makes the test more approachable in dealing with group problems.

The question of authorisation was argued in the case of *CBS Songs v Amstrad Consumer Electronic plc*,[654] which also provided indications of the extent to which this test is useful in group circumstances.

In this case, the claimants relying on section 1(1) and 1(2) of the Copyright Act 1956 contended that people who have authorised other persons to copy should be held to be infringers. The authorisation would be based on the consideration that infringing a copyright is a tort, and tort doctrines will apply.

The meaning of the authorisation that is said to constitute infringement is explained in section 2 of the Copyright Act 1956: "Authorization meant to grant, or purport to grant, expressly or by implication, the right to do the act complained of."[655]

To "authorise" could also be understood as "sanction, approve and countenance" based on its ordinary dictionary meaning in some early cases.[656]

In fact, in most cases, including the intellectual property cases, the court is dealing with "unauthorised authorisation", which means that in practice the authorisation is issued by someone having no authority in law,[657] and the performance of it is different. Sometimes, a "purported grant of permission", and "invitation together with the provision of at least some of the means for doing it" would constitute an authorisation.[658] In the *CBS Songs v Amstrad*

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[654] *CBS Songs* (n 575) 1013.
[655] ibid; Copyright Act 1956, s 1(1) s 1(2).
[656] *CBS Songs* (n 575) 1021; *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 (Ch) 109; *Performing Right Society Ltd* (n 613) 9; *Moorhouse v University of New South Wales* [1976] RPC 151, 159.
[657] *CBS Songs* ibid 1021.
[658] ibid 1022.

case, the court noted that a defendant's act of selling, manufacturing and advertising recorders to the public without taking measures to discourage unlawful copying cannot constitute authorisation. According to the understanding of the Copyright Act 1956, Amstrad only authorised the use of the record, but did not authorise the tortious act complained of.[659] The Court of Appeal found some factors influential to the decision and in favour of the defendants:

> (a) the absence of any power in the defendants to authorize or control the activities of people using their audio systems after they had left their hands;
> (b) the absence of any purported exercise by the defendants of any such power;
> (c) the incongruity of the suggestion that defendants might have granted or purported to grant to all the users of their audio systems the right to make unlicensed tape-recordings of musical works protected by copyright.[660]

Referring to the above factors, we can make a proposition that if the facts (conditions) which are said to be absent in (a) and (b), are all established; and if defendants also have granted or purported to grant the tortfeasor the right to commit the tort, a joint liability can be achieved. Specifically, the reason why the Court of Appeal was in favour of the defendants was that some crucial facts (conditions) were absent. So, if these crucial facts all exist in the case, a joint liability can be created. For example, in the case of *CBS Songs v Amstrad*, if there is the existence of any power in the defendants to authorise or control the activities of people using their audio systems after the systems had left their hands; and there is the existence of any purported exercise by the

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[659] ibid 1033.
[660] ibid.

defendants of any such power; and the defendants have granted or purported to grant to all the users of their audio systems the right to make unlicensed tape-recordings of musical works protected by copyright, the defendant Amstrad probably cannot escape from the joint liability.

So the above statements of the Court of Appeal broaden our understanding of "authorisation", and provide an entry point to extend the application of the test in group situations.

If a parent company has the power to authorise and control the tortious activities of its subsidiary, and has any purported exercise of such power, and also might have granted the subsidiary (as a tortfeasor) the right to commit the tort, can we establish the "authorisation", and subsequently the parent company's joint liability? The answer might be yes.

In favour of the defendant, the Court of Appeal also held that the defendant company cannot be a joint infringer because the "defendant had no control over or interest in the use of a tape recorder once it had been sold."[661]

Taking the court's view into consideration, we could assume that it would be very helpful to establish the parent company's authorisation if it is proved that the parent company has control over particular tortious activity committed by the subsidiary, or has some benefits from the tortious activity.

The Australia case of *Moorhouse v University of New South Wales*[662] has offered some support to the idea that exercising relevant control would potentially constitute authorisation by a parent company.

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[661] ibid 1013, 1014.
[662] *Moorhouse v University of New South Wales* [1976] RPC 151.

In this case, the High Court of Australia held that the University of New South Wales was jointly liable with the person who infringed the copyright of Moorhouse, by using the photocopying machine of the university. Gibbs J in this case held that:

> A person who has under his control the means by which an infringement of copyright may be committed—such as a photocopying machine—and who makes it available to other persons, knowing, or have reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.[663]

In another case, *RCA Corporation v John Fairfax & Sons Ltd*[664] cited in the judgment of *CBS Songs v Amstrad*, Kearney J in the Federal Court of Australia provided the following statement:

> A person may be said to authorize another to commit an infringement if the one has some form of control over the other at the time of infringement or, if he has no such control, is responsible for placing in the other's hands materials which by their nature are almost inevitably to be used for the purpose of infringement.[665]

The two cases above provide the possibility to establishing joint liability on the basis of having some form of control that contribute to the authorisation behavior.

Lord Templeman in *CBS Songs* stated that, no matter what arguments may be

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663 ibid 159.
664 *RCA Corporation v John Fairfax & Sons Ltd* [1982] RPC 91 (SC Aus).
665 *CBS Songs* (n 575) 1055; *RCA Corporation* ibid 100.

made about this position, Amstrad would not fit because it had no control at all over the use of their models after selling them and had no control over the interest made by others through the copyright infringement.[666] It could be inferred from Lord Templeman's position that although the propositions on control mentioned in the above two cases seem to be stated too widely for him, he still did not totally reject the arguments for the extension in the two cases and did not totally dismiss the extension of these ideas to particular cases in which the proper factual analysis is made.

According to the above discussions, we can make a proposition that it is not unreasonable to establishing parent company's joint liability with the tortious subsidiary based on the authorisation test in particular cases in which certain types of control exist.

The following situations would be of much relevance: (1) the parent company exercises relevant degree of control over the tortious action (activity) of the subsidiary, or the parent company has some benefits from the tortious activity; (2) the parent company has the power to authorise and control the tortious activities of their subsidiary, and has any purported exercise of such power; and might have granted the subsidiary the right to commit the tortious activity; (3) the tort is committed by the means that the subsidiary is under certain degree of control; (4) the parent company makes the business available to the subsidiary, with knowledge or having reason to suspect that it is likely to lead to tort commission; or (5) the parent company can be said to authorise the subsidiary to commit a tort if the parent has some types of control over the subsidiary at the time of the commission of the tort.

In this context, the extent of "control" may be different in different cases, but it

[666] *CBS Songs* ibid 1054.

will be reasonable to establish authorisation if there is a clear causal connection between the exercise of control of the parent company and the subsidiary's torts that lead to the claimed damage.

The position that control would be amount to authorisation has also been discussed in Paul Davies' book *Accessory Liability*.[667] In this book Paul Davies brings out one proposition that:

> …where the defendant enjoys some degree of control over the primary tortfeasor, then there is some support for the argument that a failure to prevent the tort may be equivalent to authorization.[668]

Paul Davies uses two cases to support his argument. In the case of *Performing Right Society v Ciryl Theatrical Syndicate Ltd*,[669] Bankes LJ observed that:

> The court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred.[670]

In another supporting case, *Moore v Drinkwater*, [671] authorisation was inferred from the negative behaviour that a landlord knew a broker distrained on his tenant's fixtures but did nothing to prevent the wrongful act. The landlord's control over the property and the presence at the time of the tort commission amounted to authorisation.[672]

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[667] Davies (n 525) 194.
[668] ibid.
[669] *Performing Right Society* (n 613).
[670] ibid 9.
[671] *Moore v Drinkwater* [1858] 175 ER 659 (HC).
[672] Davies (n 525) 194.

This extension could be well applied in the *Chandler's* case.[673] The Court of Appeal imposed a direct duty of care on the parent company Cape for the health and safety of its subsidiary's employees. The parent company's negligence lay in the assumption of responsibility based on the special relationship between the parent company and the subsidiary and its employees, and the special responsibility arising from "control" by the defendant company. Consequently, the parent company had a duty to prevent its subsidiary from causing damage to another.

Above are the arguments made by the Court of Appeal in favour of the claimant, Chandler. Viewed from a different perspective, it is not difficult to infer that Cape could be both directly liable on negligence, and jointly liable with its subsidiary on the basis of authorisation.

In the first place, according to Paul Davies' proposition, if the parent company enjoys some degree of control over the primary tortfeasor, then it is possible to believe that the failure to prevent causing damage would be equivalent to authorisation. The facts in this case were that, the parent company, Cape, maintained a high level of control over the asbestos business of its subsidiary and safety policy making of the whole group; Cape had superior knowledge over the health problem in this particular industry; Cape knew that its subsidiary's system of work was unsafe. Subsequently, Cape's control relevant to the asbestos business and involvement in the health and safety program of the whole group clearly demonstrate that it would have known that the health of its subsidiary's employees might be severely compromised due to the subsidiary's negligence, but did not take steps to prevent such harms. This would be equivalent to authorisation, and subsequently contributes to joint tort

[673] *Chandler* (n 87).

liability.

In the second place, according to the factors derived from the *CBS Songs* case discussed above, and the extension made with the five factors listed above, Cape would be made jointly liable for its indirect authorisation of the subsidiary's tort (assuming that the subsidiary itself is negligent). The decisive and influential bases are:

(1) Cape had the power to authorise and control the tortious activities of its subsidiary;
(2) Cape was highly involved in its subsidiary's business; knew or should have reason to suspect that the asbestos business would lead to personal injury, but let the business go on in the subsidiary;
(3) Cape had control over both asbestos business of the subsidiary and workplace safety policy making of the whole group at the time the claimed damage occurred.

In consequence, the above elements may provide a reasonable causal connection between the parent company's form of control and the claimed tort by the subsidiary. All of these make Cape's joint liability based on the authorisation test convincing.

4.3 Conclusion

The doctrine of joint tortfeasance is promising in its extension to manage corporate tort problems, where multiple legal individuals are involved. The essential approach to establishing joint liability in group situation is discussed from the perspective of justifying reasonable and sufficient participation links between different group elements: concerted action, procurement, and authorisation. The uncertainty of the scope of these concepts provides room for further exploration of the possibility of extension and development of the law for group issues. All of the three participation tests for joint tort liability are well accepted in common law and could be expanded to connect the parent company and subsidiary for the same tort as well.

This part of the work concentrates on the extension of the tests of concerted action, procurement, and authorisation in corporate group cases. Current English case law does not provide obvious directions, and the courts always circumvent the issue of imposing parent company's liability based on this developing theory. However, there are still some cases, particularly some English intellectual property cases which are of much relevance, and from which we can reasonably make an extension.

All of the three participation links have a great potential to apply in creating the parent company's liability. As discussed separately in three parts, the difficulty and the crucial step of the three tests (concerted action, procurement, authorisation) is how to define the parent company's behavior as "concerted action", "procurement", or "authorisation". In other words, the question is: what contributes to a parent company's concerted action/ procurement/ authorisation that leads to the claimed joint tort, hence the claimed damage?

Based on the relevant cases above, the concept of "control" should arguably be the decisive element, which contributes to establishing the parent company's participation in the commission of the same tort with its subsidiaries. In the leading case of *Fish & Fish*,[674] the Supreme Court lists nine relevant

[674] *Fish & Fish Ltd* (n 522).

factors for the overall assessment of involvement of a potential joint tortfeasor, and one of the factor is listed as "the extent of control exercised by the defendant joint tortfeasor". This is an important case where we can get strong support that the extent of control could be the entry point. Then, in the US case of *Amoco Cadiz*,[675] the court firstly observed that the relevant control of the parent company over its subsidiary could help to achieve parent company's joint liability.

It is not difficult to make a conclusion that the parent company's joint tort liability lies in the sufficient evidence to support the existence of high involvement/active participation in the relevant business/conduct of the subsidiary, which provides reasonable causation between the parent company's actions and the commission of the tort.

Apart from the crucial concept of "control", the parent company's joint liability could also be realised from the extension of directors' liability. It has been developed (by the case law) that if a director or shareholder has authorised, directed or procured the tortious act, he would be held jointly liable, even though he has not personally committed the claimed act. The extension is made with the support of cases such as *MCA Records*[676] – a joint liability can be imposed on a shadow director, or even an individual who does not hold the director position at all. In this regard, the following extension could be made: if a parent company acted beyond its role to procure, direct or authorise other subsidiary's tortious act that leads to the claimant's damage, there is no reason to let him escape from the liability.

In respect of the constitution of the participation link, the general answer would be that it will depend on the exact facts of every single case. Fortunately, there

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[675] *The Amoco Cadiz* (n 553).
[676] *MCA Records Inc & Anor* (n 591).

is no hard rule here, and the tests permit courts to look behind the concept of concerted action, procurement, and authorisation, and to consider the substance of the defendant's conduct.

Therefore, the forms of procurement or authorisation may vary in different cases. Following the conclusion that the "control" concept should be the entry point, one extension may be reached on the basis of Paul Davies' work *Accessory Liability*: the failure to prevent causing damage would be equivalent to authorisation when the parent company enjoys some degree of control over the primary tortfeasor. The *Chandler v Cape* case would be a good example to illustrate the possibility of realizing the parent company's joint liability based on this theory.

It is worth indicating here that, the amount of control should be the crucial basis upon which the participation links are forged in corporate cases.

In the cases of *CBS Songs*, *Moorhouse v University of New South Wales*, and *RCA Corporation v John Fairfax & Sons Ltd*, several propositions were provided to establish joint liability; also, several factors were indicated in favour of the claimants to create a joint liability. From these propositions, the following elements can be extracted for the extension of a parent company's joint liability: (1) the parent company exercises relevant degree of control over the tortious action (activity) of the subsidiary, or the parent company has some benefits from the tortious activity; (2) the parent company has the power to authorise and control the tortious activities of their subsidiary, and has any purported exercise of such power; and might have granted the subsidiary the right to commit the tortious activity; (3) the tort is committed by the means that the subsidiary is under certain degree of control; (4) the parent company makes the business available to the subsidiary, with knowledge or having reason to suspect that it is likely to lead to tort commission; or (5) the parent company can be said to authorise the subsidiary to commit a tort if the parent has some types of control over the subsidiary at the time of the commission of the tort.

These situations all reasonably support the establishment of the authorisation test, and hence the parent company's joint liability. Even though there is no fixed standard to measure the "guilty control", we can make one general conclusion that it would be reasonable to find liability if there is a clear causal connection between the performance of control of the parent company and the subsidiary's torts that lead to the claimed damage.

Furthermore, the US courts have developed a checklist of eleven elements as regards the degree of control necessary to evidence parent company liability. The courts are inclined to establish the parent company's liability on the basis of substantial existence of the elements. These elements include the parent company's financial control over and support for the subsidiary, majority ownership of the capital stock of the subsidiary, sharing dominant directors, as well as the parent company's control over the acts of the directors or executives of the subsidiary. Although the lists of factors are provided in "veil-piercing" cases, they are quite valuable in the consideration of various forms of control that constitute the parent company's participations. The two different fields tend to overlap in the determination of control to establish the liability.

Chapter 5 Parent company's vicarious liability for its subsidiaries' tort

5.1 Introduction

Since the 1990s, significant development has taken place in relation to vicarious liability theory,[677] and more light has been shed on the intersection between tort and corporate law. The theory of vicarious liability has shown its importance in liability determination in the corporate law context. This theory belongs to the system of joint and several liability, and is also one category of strict liability. The most prevalent understanding of strict liability in tort is that the liability is determined regardless of fault.[678] Distinct from fault-based liability such as negligence, here, no element in the act is labelled as "fault".[679] As one way to claim against one defendant for the other's tort, the theory of vicarious liability makes one person or legal person liable for the tort of another "regardless of fault". It deals with cases involving multiple numbers of defendants, and therefore, increases the probability of targeting an insured defendant who has the ability to compensate, making him jointly liable. It therefore can be utilised to establish liability in well-funded defendants rather than impecunious ones,[680] and can be applied in cases where it is insufficient to find personal duty. The most typical example of vicarious liability can be found between employer and employee, where an employer is vicariously liable for the torts of his or her employees when the tort is committed within the course and scope of employment. In addition to this, relationships such as

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677 Graeme Lockwood, 'The Widening of Vicarious Liability: Implications for Employers' (2011) 53 (2) IJLM 149,149.
678 Peter Cane, *Responsibility in Law and Morality* (1st end, Hart Publishing 2002) 82.
679 Allan Beever, *A Theory of Tort Liability* (1st end, Hart Publishing 2016) 31.
680 Phillip Morgan, 'Vicarious Liability on the Move' (2013) 129 LQR 139, 139.

principal and agent, and partners are other categories giving rise to vicarious liability.

The reasons why the theory of vicarious liability is considered in this chapter are presented here. In the first place, it is much relevant to the theme of the whole thesis. The main research question of the thesis is how to establish parent company's liability for the torts of its subsidiaries in the personal injury context. Tort law as a regulating and constructing tool, has particular relevance in developing an alternative liability regime. As one way to achieve joint liability, and particularly based on the defendants' relationship but not on fault, the theory of vicarious liability deserves further consideration. Secondly, different from the tort of negligence, the realisation of vicarious liability is based on the requirements of relationship. This may provide solutions in particular circumstances where it is difficult to find a personal duty of care, but it would be reasonable and fair and just to achieve liability on a basis of the joint tortfeasors' relationship. For instance, in most corporate cases, the operation and organisation of different legal entities in one corporate group are complex and it is impossible for the claimant to collect evidence and identify relevant tortfeasor and employer.[681] Thirdly, the boundary of vicarious liability has been expanded by the Supreme Court during the past few years, and the development of this theory suggests that it might be possible to impose vicarious liability in group situation, which means that it is the time to consider the possibility that a legal person can be made vicariously liable for another legal entity's tort. Traditionally, a company will be liable in tort as a result of its contribution or involvement in fault. Vicarious liability for a company always happens where its agent or employee commits a tortious act in the course of agency or employment. Now it has been understood that the degree of relationship which triggers vicarious liability beyond the employment is

[681] Phillip Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (2015) 31(4) Journal of Professional Negligence 276, 280.

somewhat uncertain, especially since the introduction of the relationship test referred to as "akin to employment". Thus, it leaves room for courts and commentators to further consider how far vicarious liability may be imposed beyond the relationship of employment if the age of vicarious liability for non-contractual work is coming. Fourthly, the nature of vicarious liability provides us with more courage to broaden its scope, and consider alternative means for obtaining compensation. The theory of vicarious liability is growing from social convenience and justice, rather than established legal principles.[682] It has been acknowledged by the UK courts that vicarious liability is the creation of different judges who held different ideas of its rationales or policies.[683]

This chapter discusses whether the theory of vicarious liability can be applied to achieve parent company's liability.

Relevant UK case law

The issue whether a parent company can be vicariously liable for its subsidiary's tort has rarely been brought before UK courts. In cases relevant to the parent company's liability determination, the company law doctrine "piercing the corporate veil" has been considered. In the leading case of *Adams v Cape Industries plc*,[684] the assumption that the parent company Cape might be vicariously liable and be present in the UK jurisdiction was brought by the claimant, but was met with no response then.[685]

Nevertheless, the development of UK case law involving vicarious liability, to some degree, provides a forum to discuss the possibility of the parent

682 *Imperial Chemical Industries v Shatwell* [1965] AC 656 (HL) 685.
683 Glanville Williams, 'Vicarious Liability and The Master's Indemnity' (1957) 20(3) MLR 220, 231.
684 *Adams* (n 85).
685 ibid 529; Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 288.

company's vicarious liability for its subsidiaries' torts. The concept of vicarious liability is not a static one, but has changed from time to time to provide just solutions to new problems and to adapt to novel challenges. The UK courts have taken advantage of some Canadian decisions to expand the boundary of vicarious liability's imposition. Lord Steyn extended the test of vicarious liability in the case of *Lister v Hesley Hall* in 2001 while referring to the cases of *Bazely v Currie* and *Jacobi v Griffiths*, which have been described as "luminous and illuminating" decisions to further expand the test.[686] In *Lister*, the House of Lords established the "relative closeness" test, which expanded the requirement that the tort has to be committed in the course of employment. Closeness of connection between the tort and relationship of employment is expected to be found for the purpose of establishing vicarious liability. The reasoning in *Lister* is then followed by other abuse cases. Particularly, the application of the "close connection" test in *Dubai Aluminium Co Ltd v Salaam,*[687] suggests that this new test in *Lister* can be used in the commercial context as well. Then in the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, by introducing the rule of "dual vicarious liability", the court acknowledged that the relationship of employment is not restricted to finding an old-fashioned employee.[688] The definition of the vicariously responsible "employer" was expanded and the UK courts from then accepted the possibility that two employers could be vicariously liable for one tort.

The test of vicarious liability is gradually developing in a more flexible way. It is not difficult to find that UK courts are constantly seeking for new liability mechanisms in response to particular or special circumstances and social changes. In the case of *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the Court of Appeal finally admitted that, "the time has come

686 *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Bazely v Currie* [1999] 2 SCR 534 (Supreme Court of Canada); *Jacobi v Griffiths* [1999] 2 SCR 570 (Supreme Court of Canada).
687 *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366.
688 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2005] 4 All ER 1181.

emphatically to announce the law of vicarious liability has moved beyond the confines of a contract of service."[689] The Court of Appeal was prepared to say that vicarious liability could be established where the relationship of the "employer" and "employee" is "akin to employment".[690] The decision of *JGE* brings one pressing question before the courts and commentators: what kind of relationship beyond employment is able to trigger vicarious liability, and is it just and fair to impose vicarious liability when the relationship between the possible defendant and the tortfeasor is so close in character to that of employer and employee?

Following *JGE*, the Supreme Court in another leading case *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* (*CCWS*),[691] further supports that the category of relationship "akin to employment" is able to give rise to vicarious liability. The *CCWS* case encourages us to consider whether or not the requirement of "akin to employment" can be applied in particular situations where a legal person works for an organisation or corporation without having a contract of employment. The historical cases in the UK, although does not show the possibility that one legal person vicariously liable for another legal person, they actually open a door for expedient solutions to particular problems and some bold developments.

Relevant literatures

Few literatures could be found on the research of parent company's vicarious liability. As regards the controversial cases involving group liability like *Chandler v Cape*, discussions are on the doctrine of piercing the corporate veil,

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689 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2012] 4 All ER 1152 [73].
690 ibid [60].
691 *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [2013] 2 AC 1.

and the recent compelling alternative rule of tort of negligence. Before the appearance of Philip Morgan's article,[692] which strongly explains a rationale for the imposition of parent company's vicarious liability in the current legal context, this area was rarely mentioned and supported by legal scholars. In one case note of *Chandler v Cape*, Petrin discussed the efficiency of the tort of negligence in determining a parent company's liability for its subsidiary's employees who were injured because of the poor workplace environment. When considering any alternative rule, Petrin expresses that the theory of vicarious liability might be more straightforward in dealing with the liability issue between the parent company and subsidiaries in certain circumstances.[693]

Lez Rayman-Bacchus and Philip R Walsh, in their book *Corporate Responsibility and Sustainable Development* mentioned that the expansion of vicarious liability in imposing the parent company's liability for a subsidiary's tort would be a sustainable development.[694] Karl Hofstetter, when considering parent companies' liability law in the context of ecological damage, particularly presents his optimistic views on the function of vicarious liability. Specifically, he believes that the theory of vicarious liability may function as a remedy for some particular risk externalisation in relation to tort creditors of subsidiary companies, who are not able to bear the burden of proof to investigate the complex group organisation, and obtain compensation for bearing the risk of limited liability.[695] Additionally, Hofstetter regards vicarious liability as a vehicle, which can be "fine-tuned flexibly and restricted to specific situations", in combination with proper prerequisites and defences ("taking due account of

[692] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 276.
[693] Petrin (n 338) 603.
[694] Lez Rayman-Bacchus and Philip R Walsh, *Corporate Responsibility and Sustainable Development: Exploring the nexus of private and public interests* (1st edn, Routledge 2016) 221.
[695] Karl Hofstetter, 'The Ecological Liability of Corporate Groups: Comparing US and European Trends' in Teubner G, Farmer L, and Murphy D, *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organazation* (1st edn, Wiley Chichester 1994) 99.

the involvement of the parent at the subsidiary and its relative monitoring cost"), for determining the parent company's liability.[696] Philip Morgan in his latest article makes a great contribution in the discussion of vicarious liability for group companies.[697] He justifies his position by demonstrating that the underlying rationales for vicarious liability point towards vicarious liability for parent company.[698] Further more, he argues that the current test for vicarious liability is not restricted to the old fashioned format of employment.[699]

Recent decisions involving vicarious liability such as *JGE* and *CCWS* indicate that the relationship requirements for triggering vicarious liability may be expanded. Muzaffer Eroglu, in his book strongly argues against the imposition of parent company's vicarious liability for its subsidiary's tort.[700] In his opinion, the absence of case law in this area should be the best proof of the weakness of vicarious liability, and difficulties arise from the fact-specific inquiry into the structure and relationship between the parent company and the subsidiary.[701] Eroglu believes that, to establish liability, it should be straightforward to rely on the fact of parent company's breach of general duties.[702] He takes the case of *Amoco Cadiz* as an example, in which joint liability was imposed on the parent company because of close control over its subsidiary (on the problematic vessels' construction and routine checks).[703] However, the example of *Amoco Cadiz* case just proves that the parent company can be held jointly liable with its subsidiary when closely involved in the torts of its subsidiary. The case cannot sufficiently demonstrate why the doctrine of vicarious liability cannot be applied in group situations. The imposition of vicarious liability is based on the relationship and does not require participation by the defendant parent

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696 ibid.
697 Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651).
698 ibid 290-293.
699 ibid 295-297.
700 Eroglu (n 20) 140-144.
701 Eroglu (n 20) 141.
702 ibid.
703 Eroglu (n 20) 141-143.

company in the commission of the subsidiary's tort. As discussed in Chapter 4, the author argues that the doctrine of joint tortfeasance based on the defendants' participation in the same tort would play a role in the cases where the parent company's tort liability is considered. As another way to potentially achieve joint liability, the theory of vicarious liability deserves to be considered.

The research question of this chapter is whether the theory of vicarious liability can be applied to determine group liability, particularly the parent company's liability for its subsidiary's tort. To answer this question, the following topics will be discussed: Firstly, whether or not the underlying justifications for vicarious liability will point towards its application in a group situation. In other words, is it fair, just and reasonable for the parent company to bear the risk of its subsidiary's negligence in suitable situations? Secondly, can a subsidiary company be an employee? Thirdly, is it possible that the relationship between the parent company and the subsidiary is "akin to employment"? Fourthly, how should the close connection test be applied in a group situation? Finally, can vicarious liability serve as an effective means of enforcing group liability?

5.2 The theory of vicarious liability

This section briefly examines how the theory of vicarious liability works in the current legal context, with the purpose of arguing that it is worthwhile to further consider the boundary of vicarious liability for group liability.

Vicarious liability is one mechanism created to remedy harm and deter future wrongs. During the past 10 years, the Supreme Court of England and Wales, the Supreme Court of Canada, and the High Court of Australia have tried to explain and apply the doctrine of vicarious liability in leading cases. This doctrine represents an approach to responsibility that makes the potential defendant liable for another's torts.[704] Vicarious liability has also been regarded as alien to the traditional focus on general rules of individual liability, which advocate that one individual can only be responsible for the wrong he or she commits against another.[705] Surprisingly, this topic does not attract as much attention as expected, even though the vicarious liability theory is a longstanding part of the common law of tort and the nature of the theory is unique and different from other basic rules of tort law.

Different from other approaches to joint liability, vicarious liability is a category of strict liability and relationship based liability. The defendant is considered vicariously liable irrespective of any fault element such as intention or negligence. It should be noted that although vicarious liability does not require proof of fault, it is not correct to believe that the liable defendant is definitely in fact without fault. This mechanism of attributing responsibility can be regarded as a way to provide easy protection and a lower evidence threshold for particular claimants in certain circumstances. Coming back to the central issue of this thesis, when considering liability attribution from the perspective of vulnerable tort creditors of corporate groups, especially those which have large and complex webs of entity structure, the vicarious liability for group companies is of unique interest and different from the tort of negligence and the joint tortfeasance theory based on defendant's involvement.

The concept of vicarious liability signifies the liability which is imposed on the potential defendant for damage caused to the claimant by the tort such as negligence of a third party.[706] The claimant normally brings action against both the third party who commits the tort and the potential defendant. This would make them jointly liable for the same damage. When considering vicarious

704 Paula Giliker, *Vicarious Liability in Tort* (2nd edn, CUP 2013) 1.
705 ibid 2.
706 Peel and Goudkamp (n 523) 639.

liability, there is no need to demonstrate the potential defendant's involvement in the joint tort, or investigate any breaches of duty by the defendant. The only requirement is the particular relationship of the defendant and the third party, and on a basis of, or referable in a certain manner to this relationship, the damage occurs.[707] The relationships that trigger vicarious liability encompass several formats, such as partner's vicarious liability for each other's acts, and the principal's liability for the acts of their agents. In the current legal background, and in the vast majority of cases, it is generally understood that the relationship of employer and employee under a contract of employment, or "akin to employment" will give rise to vicarious liability. The traditional expressions to describe this relationship are "master and servant", but these two concepts were replaced by employer and employee. Recently, English courts have adopted the expression "akin to employment", when identifying the relationship. Even though the expressions have changed with time and appearance of new cases, they all reflect the essence of the relationship: the third party is serving the interest of the defendant. It could be understood that the purpose of the doctrine of vicarious liability is to ensure that the employer bears his or her own risks or costs of damage caused by the business when the employees or servants serve the employer's interest.[708]

In this context, vicarious liability is gradually developing to encompass dual vicarious liability, which means that more than one employer can be vicariously liable for one "employee" who has committed a negligent act whilst working for both of them. The representative case is *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*.[709] In that case, one worker (the tortfeasor) was supplied by the company, Cat Metalwork, but also worked under the supervision of another company S & P. At the first instance, Cat Metalwork was made vicariously liable for its employee's negligent act. Then Cat Metalwork

[707] ibid.
[708] ibid 640.
[709] *Viasystems (Tyneside) Ltd* (n 658).

appealed to make S & P vicariously liable as well. In the Court of Appeal, May LJ reviewed the authorities and held that dual vicarious liability is not bound by any historical case.[710] This case is a classic example for the legal possibility of dual vicarious liability. It shows that neither the "transfer of a contract of employment", nor "the entire and absolute control" is a necessary prerequisite of vicarious liability. It is a situation of shared control of the tortfeasors' work.[711] The Court of Appeal was in favour of looking at the occurrence of the tort and asking who was entitled or obliged to give orders.

The development of dual vicarious liability and the rule of "akin to employment" undoubtedly indicate that the imposition of vicarious liability moved from the old-fashioned formats of "employer" and "employee". The new approaches and ideas of vicarious liability provide forum to discuss the possibility of vicarious liability playing a role in group liability determination. The occurrence of the tort, for example the negligent act of one employee of a subsidiary, the relationship between the parent company and the subsidiary, and the relationship between the parent company and the tortfeasor are to be considered in light of the recent developments.

Liability for an agent's torts is usually based on scope of authority, which is similar to, but not the same as the scope of employment. The conflation of agency and vicarious liability has been criticised by English academic commentator, Giliker, who emphasises that agency is a primary liability while vicarious liability is a secondary.[712] This chapter will however not talk about agency based liability, but focus on the more acceptable and developed employment based vicarious liability. In the context of the vicarious liability based on employment relationship, the question is whether a parent company could be held vicariously liable for another legal entity's tort.

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710 *Viasystems (Tyneside) Ltd* (n 658) [20]-[39].
711 Peel and Goudkamp (n 523) 650.
712 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, CUP 2010) 16-18.

Test of vicarious liability

The test for vicarious liability focuses on relationship. It can be generally concluded that the potential defendant (D) will be vicariously liable to the claimant for the wrongful act of a third party (A) only when the below conditions are established by the claimant:

(1) A has committed a tort against the claimant;
(2) The relationship between D and A is able to trigger vicarious liability according to the current recognised rules;
(3) There are connections between A's tortious act and the above mentioned relationship between D and A.[713]

As to the employment relationship that triggers vicarious liability, a two-stage test is applied. In the first place, there should be an employment relationship to trigger the doctrine; secondly, the tort committed by the employee is in the course of the employment.[714]

As for the first stage, it is not very straightforward to meet the relationship requirement, and there is no any restricted and single test for it. Traditionally, courts look at the level of control the employer exercised over its employee.[715] In modern conditions, it is now recognised that the significance of control points towards employer's control over what the employee does, but no longer "how he does".[716] This is because in the modern patterns of work, employers on many occasions cannot control the method of doing work (how he does) of the sophisticated employees, such as the work of doctors in hospital. Apart

[713] David Howarth and others, *Hepple and Matthews' Tort Law* (17th end, Hart Publishing 2015) 1065.
[714] Witting, *Street on Torts* (n 280) 624; Morgan, 'Vicarious Liability on the Move' (n 650) 140.
[715] Peel and Goudkamp (n 523) 644; *Yewens v Noakes* (1880) 6 QBD 530 (CA) 532.
[716] Witting, *Street on Torts* (n 280) 626; Peel and Goudkamp (n 523) 645; *The Catholic Child Welfare Society* (n 661) [36].

from the element of control, courts also considered other factors including the degree of the worker's integration into employer's business, regularity of work, provision of tools and equipment of work.[717] The further development of the relationship requirement is the acceptance of "akin to employment" relationship. England and Wales courts now make an extension that, it is not the employment contract, but the characteristics of the relationship that make the relation "akin to employment", and it would be fair, just and reasonable to trigger vicarious liability for the torts of the "employee". This approach was firstly confirmed and adopted by the Court of Appeal in the case of *JGE*.[718]

The second stage, also named the connection requirement, has also evolved. In the latest case *CCWS*,[719] the Supreme Court reaffirmed this requirement after its introduction in the case of *Lister.*[720] The essence of the connection requirement comes from the Canadian case *Bazely v Curry*.[721] English jurisprudence has endorsed this Canadian case. In the case of *Bazely v Curry*, the court summarised as follows:

> …there must be a strong connection between what the employer was asking the employee to do and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.[722]

The introduction of the close connection requirement for employer's vicarious liability makes it possible that the employer is vicariously liable for its employee's acts of sexual abuse[723] and for commercial fraud[724].

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717 Witting, *Street on Torts* (n 280) 626.
718 *JGE* (n 659).
719 *The Catholic Child Welfare Society* (n 661).
720 *Lister* (n 656).
721 *Bazely v Curry* [1999] 2 SCR 534 (Supreme Court of Canada).
722 ibid [42].
723 *Lister* (n 656).

The evolution of the tests for vicarious liability provides courts and commentators with the possibility that the old-fashioned employment relationship for vicarious liability can be expanded. Even if the extensions would bring criticisms, the majority of the judgments suggests several essential elements for the relationship of employment or the relationship “akin to employment”, based on which vicarious liability can be imposed on particular situations. These kinds of elements include control, integration, and organisation.[725] The discussion of the parent company’s vicarious liability for its subsidiary’s tort will undoubtedly benefit from these developments, because the relationships within corporate groups are in fact about control, integration, and organisation. The tests open a door for creating vicarious liability in corporate groups. Even though there is no direct precedent, we cannot say that it is impossible.

Distinction from the tort of negligence and the joint tortfeasance doctrine based on involvement

The need to explore the extension of vicarious liability for group situations also lie in its distinction from establishing liability through the tort of negligence and the doctrine of joint tortfeasance based on defendants’ involvement of fault. In the case of *Chandler v Cape*, the defendant parent company was held liable for negligence regarding the health and safety of its subsidiary’s employee. In circumstances of this nature, the defendant is directly liable to the victim for damage caused by a third party and the defendant owes the claimant a duty which has been broken by the defendant. Thus, to establishing a parent company’s direct liability for its subsidiary’s tort, the parent company’ breach of duty must be proved, and the focus is on the assumption of responsibility of

[724] *Dubai Aluminium Co Ltd* (n 657).
[725] David Neild, ‘Vicarious Liability and The Employment Rationale’ (2013) 44 VUWLR 707, 714.

the defendant to the claimant. On the other hand, however, vicarious liability is "a legal shorthand" for the rule that gives rise to liability on a basis of relationship between the defendant and the tortfeasor, rather than the claimant.[726] The characteristic of vicarious liability makes this doctrine attractive in some group cases where a relationship of proximity between the parent company and the victim of subsidiaries is difficult to find.

When we are talking about vicarious liability, it should be noted that vicarious liability is included in the category of joint liability, where multiple tortfeasors are responsible for the same tort. This is the true essence of joint tortfeasance, different from joint and several tort liability where several independent torts contribute to one damage. Joint tortfeasance could be divided into two branches. The first category of situation to trigger joint liability is when a particular relationship between the tortfeasors/parties is found (Vicarious liability). Also, joint liability will be given when two or more tortfeasors have certain degree of involvement in the same tort. The difference is that the former does not require any participation but has a relationship condition, while the latter requires significant involvement. In chapter 4 the author has discussed the application of the doctrine of joint tortfeasance based on defendants' participation in fault to establish liability in group situation. The author finds that the key approach to establishing joint liability in the group situation is discussed from the perspective of justifying reasonable and sufficient participation links between different group elements: concerted action, procurement, and authorisation. The three participation tests for joint tort liability are well accepted in common law and could be expanded to connect the parent company and subsidiary for the same tort as well. Having concluded as such, the author intends to further consider the situation of joint liability based on the particular relationship.

[726] ibid 708.

5.3 Discussion of policy justifications of vicarious liability in the corporate group context

The policy justifications are leading theories considered by courts and commentators to explain the existence of vicarious liability. The evolution of the theory of vicarious liability is accompanied by discussions of various policy rationales. These rationales have been met with controversy and not a single one is considered to be perfectly satisfactory.[727] However, courts have concluded that the vicarious liability is justified where all these rationales are combined. The leading justifications which have evolved through case law and legal comments include the rationale of enterprise liability, compensation/deeper pocket theory, loss spreading theory, theory of control, and deterrence argument.

The question in this chapter is whether the parent company could be held vicariously liable for its subsidiary's tort. Unfortunately, there is no any specific case involving the issue whether one legal entity can be vicariously liable for another legal entity. In this context, one departure point to answer the question is to evaluate whether the leading justifications for the existence of vicarious liability can well explain its extension in the group situation. This depends on the nature of vicarious liability. English courts have already got a clear understanding of it. Lord Pearce held that, "the doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice".[728] Similar comments can be found in other judgments:

[727] Howarth and others (n 683) 1066.
[728] *Imperial Chemical Industries* (n 652) [11].

> Vicarious liability is the creation of many judges who have different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends.[729]

In this sense, the discussion of the imposition of vicarious liability cannot proceed without understanding its policy rationales. These policy reasons also contribute to the extension of the scope of vicarious liability. The primary justifications for vicarious liability have already been provided in some leading Canadian cases and recent UK Supreme Court cases. In respect of the theory of vicarious liability, two Canadian cases are quite influential and have been endorsed by English courts. They are *Bazley v Curry*[730] and *Jacobi v Griffiths*.[731] In the case of *John Doe v Bennett*,[732] McLachlin CJ observed that:

> In Bazley, the court suggested that the imposition of vicarious liability may usefully be approached in two steps. First a court should determine whether there are precedents which unambiguously determine whether the case should attract vicarious liability. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.[733]

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729 Williams (n 653) 231; this statement was quoted by Lord Millett, in the case *Lister and others v Hesley Hall Ltd*, see *Lister and others* (n 656) [65].
730 *Bazley* (n 691).
731 *Jacobi v Griffiths* [1999] 2 SCR 570 (Supreme Court of Canada).
732 *John Doe v Bennett* [2004] 1 SCR 436 (Supreme Court of Canada).
733 ibid [20].

In this leading Canadian case, the judge has already demonstrated an approach to address the question of the extension of circumstances of imposing vicarious liability.

In the case of *Bazley*, it was indicated that,

> Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer.[734]

In the recent leading case of *CCWS*, the Supreme Court sought to extend the doctrine of vicarious liability to situations where the relationship between the defendant and the wrongdoer is "akin to employment". To accomplish the argument, Lord Phillips laid out five rationales.[735] The first one is the theory of compensation/deeper pockets. It means that the employer is more likely to have the ability to compensate the victim than the employee and be insured against any liability. The next two justifications focus on the point of the relationship between the wrongdoer and the defendant's business. One is that the tort is committed due to the activity taken by the wrongdoer on behalf of the

[734] *Bazley* (n 691) [15].
[735] *The Catholic Child Welfare Society and others* (n 661) [35].

"employer". The other is that vicarious liability is imposed for the policy reason that the employee's activity is likely to be part of the business of the "employer". The fourth rationale is called the theory of enterprise risk. It means that by employing the "employee" to do the activity, risks of the tort have been created. The final policy justification for imposing vicarious liability is based on the control over the "employee" by the "employer".

Apart from the above justifications, the theory of loss spreading and pleading convenience are invoked and recognised by courts and legal scholars as well. Among the above mentioned policy reasons, some of them may provide strong justifications for the extension of vicarious liability in group situation, however, some may not be very convincing. Referring to the above judgments, this section will evaluate whether the recognised leading rationales for vicarious liability can justify its extension to a parent company's vicarious liability for its subsidiary company's tort. The author will evaluate them one by one, following which their interaction with the corporate law principles of separate legal personality and limited liability will be discussed.

5.3.1 Theory of enterprise risk

The theory of enterprise risk has been acknowledged by both English and Canadian authorities as a strong rationale for the existence of vicarious liability, together with other justifications. It is also generally believed by legal commentators that an enterprise cannot properly disclaim liability for any damages caused by intentional behaviours or accidents which are said to be characteristic of the business activities. John Fleming in his book states that, "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise."[736] Given that it is an inevitable commercial behaviour that employees or agents who act on behalf of their employers or principals may cause damages to third parties, it is reasonable for the employers to bear any losses caused by those activities, and accept the risks of incurring legal liability.[737] This is because the employers or principals generally benefit from the work or activities of their employees. It is fair to place loss created by an activity on the person who benefits from it.[738]

For the purpose of justifying vicarious liability, the Canadian courts have expressed that the person who created a risk also had a responsibility to those who were harmed by this risk.[739] In the leading Canadian vicarious liability case of *Bazley v Curry*, the court believed it was fair and just to impose liability on the employer because the enterprise of the employer "created or exacerbated" the claimant's risk of suffering injury.[740] In this case, the Canadian Supreme Court imposed vicarious liability on a non-profit organisation for an employee who committed sexual misconduct. The court went beyond the traditional "Salmond test" in deciding a non-profit organisation's vicarious liability, and clarified two steps for vicarious liability when there are no precedents to refer to. In the first place, the court has to consider whether or not the policy justifications can be applied to vicarious liability. Secondly, it has to be considered whether the tortious act is sufficiently connected to the employment relationship.[741] The Court believed that it was proper to impose vicarious liability where there was significant connection between the creation or enhancement of a risk and the damage introduced therefrom, even though the employer did not desire the damage when they started the work.[742]

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[736] John Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) 410.
[737] Lockwood (n 647) 150.
[738] Lewis N Klar, *Tort Law* (5th end, Carswell 2012) 673.
[739] *Bazley* (n 691) [30].
[740] ibid [47].
[741] *Bazley* (n 691) 535.
[742] ibid 536.

The comments from the Supreme Court of Canada reasonably explain how the theory of enterprise risk helps to justify vicarious liability in the situation where previous case law has no conclusive decisions. In the relevant *Bazley v Curry* case, when considering whether a non-profit organisation can be vicariously liable for its employees, the Canadian Supreme Court observed that courts should focus on whether the employer's enterprise materially introduced the risk of the sexual assault and hence the harm.[743] Then the court said that the test for vicarious liability must not be applied mechanically. Instead, courts should always keep sensitive to the policy rationales which justify the existence of vicarious liability.[744] Additionally, trial judges need to investigate specific duties of employees and this is for determining special opportunities for wrongdoing.[745] To conclude, the court emphasised that:

> The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition the sexual abuse. The employer's enterprise created and fostered the risk that led to the ultimate harm.[746]

Now that the Supreme Court of Canada permits liability in non-profit organisations where enterprise risk justifies vicarious liability, it can be assumed that the parent company's vicarious liability is possible if this policy reason can be applied. The parent company might be vicariously liable for its subsidiary's tort if it is demonstrated that the parent company's business materially increases or enhances the risk of harm introduced by the subsidiary. In this circumstance, if there is any "intimate private control, the parental

[743] ibid.
[744] ibid.
[745] ibid.
[746] ibid 537.

relationship and power required by any special terms” in creating a special environment that introduced or nurtured the risk of harm, the responsibility can be established for fairness and future deterrence. Looking back at the Cape related cases, the so-called “special environment” might be found where particular fairness and future deterrence are needed.

UK courts have shown particular respect to the Canadian authorities on vicarious liability. Following their illuminating judgments, UK courts have commented favourably on the enterprise risk theory as well.

In the case of *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd*, Rix LJ observed that vicarious liability should be imposed on the basis that those who obtained profits from the activities of their employees should compensate the person harmed by such activities, including those caused by the employee’s negligence. This is because the employer is in a better position to organise, control, and bear that risk than employees.[747] So it is reasonable to impose responsibility on an employer if his enterprise creates the risk of harm, and most importantly, the employer is able to organise and control that risk.

In the case of *JGE v The trustees of the Portsmouth Roman Catholic Diocesan Trust*, the Court of Appeal stated that,

> Fairness demanded that the employment enterprise employing others to advance its own economic interest should bear the burden of providing a just and practical remedy for wrongs perpetrated by their employee. That is fair to the injured person. It is also fair to the employer because it is right and just that the person who creates the risk should bear the loss when the risk ripens into harm…[748]

[747] *Viasystems (Tyneside)* (n 658) [55].
[748] *JGE* (n 659) [47].

In the case of *The Catholic Child Welfare Society and others v Various Claimants (FC), The Institute of the Brothers of the Christian Schools and others* (*CCWS*), where the Supreme Court confirmed that relationships “akin to employment” would make it fair, just, and reasonable to impose vicarious liability despite the lack of a contract of employment, policy considerations especially enterprise risk informed a wider approach to vicarious liability. The Supreme Court agreed that vicarious liability arises on a basis of policy that the person who introduce the risky enterprise into the community is properly liable when any risk occurs and results in damage to persons.[749] Furthermore, when considering the establishment of the stage two, where it has to prove the necessary “close connection” between the relationship and the tort, Lord Phillips strongly endorsed a so-called “enterprise risk test”:

> Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.[750]

In the context of corporate groups, where the parent company’s business is the same as that of its subsidiary company, for example in many Cape related cases, the theory of enterprise risk could be used to explain the parent company’s vicarious liability; *Chandler v Cape* can be taken as an example. Although the case was determined in negligence, the facts of the case could

[749] *The Catholic Child Welfare Society and others* (n 661) [66].
[750] ibid [86].

have inspired the claimant to claim for vicarious liability. The case opens a door for commentators to explore alternative approaches to the parent company's liability. Petrin in his case note of *Chandler v Cape* indicates that vicarious liability doctrine might be more straightforward in determining liability.[751] This would not be on the basis of employment, but on a relationship akin to employment and justified by the enterprise risk theory.

When looking at the specific facts of *Chandler v Cape*, it is not difficult to find that the existence of the parent company's liability can be explained if based on the enterprise risk theory. In *Chandler*'s case, the parent company's enterprise created the risk of harm to its subsidiary's employee, and at the same time the parent company was able to control that risk. The specific facts were: the business of the parent company (Cape), and its subsidiary company (Cape Products) were in a relevant respect the same; the parent company Cape had the superior knowledge of the asbestos industry, and the relevant aspects of the health and safety issues related to asbestos industry; the parent company Cape had day-to-day control over its subsidiary Cape Products' asbestos business, and knew the unsafe workplace environment of the subsidiary would probably lead to damage to the employees. Furthermore, Cape regularly intervened in the health and safety policies of the subsidiary and also intervened in its trading operations.[752]

Based on the above circumstances, it can be demonstrated that the parent company had intense control over its subsidiary's business, and also benefited from its subsidiary's asbestos business. To some degree, its subsidiary's asbestos business can be regarded as the parent company's own enterprise, which introduces risk of harm to its subsidiary's employees. Thus, in special situations like this, enterprise risk theory has its position in explaining the

[751] Petrin (n 338) 603.
[752] *Chandler* (n 87) [80].

imposition of vicarious liability.

However, it should be noticed that the policy reason as one of the elements for liability in special circumstances as stated in *Bazley v Curry,* is not sufficient for vicarious liability. A connection requirement must be needed as well. Just as emphasised in case *Bazley*, the policy reasons underlying the existence of vicarious liability are served only where “the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong.”[753]

Moreover, the enterprise risk theory has its own deficiency in explaining the existence of vicarious liability. It is generally believed that vicarious liability is imposed because the defendant introduces the risky enterprise into the public as well as taking benefit on its success. The scope of the concept “benefit” is somewhat limited on financial profits in most situations. Criticisms subsequently arise on the aspect that the theory of enterprise liability is deficient in explaining vicarious liability for non-profit organisations.[754] Even though the Canadian authority *Bazley v Curry* provides one exception that a non-profit organisation is vicariously liable for one of its employees who committed sexual misconduct because the organisation enhanced the risk of damage, this example is somewhat extreme and deviates from the original parameters of the theory that people who enjoy the benefits should also take responsibilities. Therefore, it is not convincing that a non-profit organisation should be vicariously liable based on the enterprise risk theory.

5.3.2 Theory of deep pockets and compensation

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[753] *Bazley* (n 691) [37].
[754] Robert Stevens, *Torts and Rights* (1st end, OUP Oxford 2007) 259.

The solvency of the defendant, and the likely wealth of an employer as a defendant, have had an unconscious influence on the development of the legal principles, which include the principle of vicarious liability. We have known that the enterprise risk rationale was introduced for the purpose of striking a balance between the benefits an enterprise owns and the social costs it should pay. Differently, the deep pockets and compensation theory as policy reasons for vicarious liability are considered from the position of innocent claimants. The rules ensure that innocent claimants have a solvent defendant.[755] Compared with employees, employers have deeper pockets, and are in a position to provide satisfactory compensation or to insure against legal responsibility. Fleming emphasised that, "a master is a more promising source of recompense than his servant who is apt to be a man of straw."[756] Some legal scholars have argued that: "If there were no vicarious liability, much of tort law would be stultified, for it would be impracticable (and wasteful) for many employees to insure themselves against liability incurred in employment."[757]

The theories of compensation and deeper pockets have been considered as policy reasons to justify vicarious liability in many special circumstances such as vicarious liability for a non-profit organisation, and vicarious liability for the employee's acts of sexual abuses. For instance, in the case of *Bazley v Curry*, faced with the absence of precedents, the Supreme Court of Canada found vicarious liability; its imposition and traditional domain were primarily justified by compensation, deterrence and loss internalisation.[758]

In the legal practice, justifications explained by courts for imposing vicarious liability are various. They generally depend on the facts of every individual

[755] Howarth and others (n 683) 1067.
[756] Fleming (n 706) 339.
[757] Peel and Goudkamp (n 523) 642.
[758] *Bazley* (n 691) [29].

case, and what the court emphasises. When the courts find no precedent to refer to, for the purpose of explaining the existence of legal liability, they try to apply the most relevant policy rationale. The theory of compensation and deeper pockets might be the most convincing policy reasons for vicarious liability of a parent company. Just like the situation in the cases of *Bazley v Curry* and *Lister v Hesley Hall Ltd*, where the employee who commits the tortious act can no longer be sued or has become insolvent, reaching a "deeper pocket" and better compensation could drive the claim against the employer. Similarly, the purpose of a satisfactory compensation and seeking "deeper pockets" justify the parent company's vicarious liability for the torts of its insolvent subsidiary.

However, theories of fair compensation and "deeper pockets" just provide supplemental supports for the imposition of the parent company's vicarious liability. These two theories cannot sufficiently justify vicarious liability alone. The deeper pockets theory is believed to fail to demonstrate why the recognised law of vicarious liability cannot apply to all cases in determining vicarious liability of all of the employers.[759] Referring to one comment of Philip Morgan, deep pockets theory is not able to explain features of vicarious liability by itself.[760] And it would be the same for fair compensation theory. The policy reasons should be considered all together for explaining the existence of the vicarious liability. In this sense, these two theories cannot be the decisive factors for developing a principled rule in group situations, but provide motivations that partly inform its development.

[759] Klar (n 708) 675.
[760] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 291.

5.3.3 Theory of loss spreading

Vicarious liability can be justified that it works as a tool of loss-spreading, whereby the economic loss that results from the employee's tortious acts can be spread through multiple ways, such as insurance.[761] Economic efficiency is therefore achieved. Compared with employees, employers are able to shift the losses more easily through insurance or regulating the price of goods and services.[762] In general, the liability cost would be distributed by means of increasing prices on goods or services. It is therefore believed that in most cases, an employer who is vicariously liable to pay for its employee's wrongdoing does not have to pay out of his pocket in practice.[763]

In the context of corporate groups, the theory of loss-spreading can also justify the existence of vicarious liability. In the case of company employers, the cost of liabilities will be spread over a period of time to the whole community. As said above, the liability is normally distributed by charging consumers a higher price. However, not all the consumers are individuals. When the company plays a role of an employer, it spread cost to consumers. When the business enterprise plays a role of a consumer, it is able to spread the cost in turn, by purchasing other employer's products and services while supplying goods and services themselves.[764] In this way, large sums are distributed to the public. Moreover, the parent company is able to pay insurance premiums, and further arrange its internal debts. Sometimes the parent company itself is able to operate as a self-insurer. This is because large enterprises have the ability to digest the liability cost internally, by reducing the dividend of shareholders, and making a smaller wage increase to employees. Thus, in practice, we could say that the liability cost of a parent company can be distributed both internally and

[761] Horsey (n 290) 327; *Lister* (n 656) [56].
[762] Klar (n 708) 674.
[763] Mark Lunney and Ken Oliphant, *Tort Law Text and Materials*, (5th edn, OUP 2013) 802.
[764] ibid.

externally. It is rather efficient to distribute loss and risks via the parent company, instead of an insolvent subsidiary. In addition, Philip Morgan argues that based on the loss-spreading theory, the application of vicarious liability in group situation "circumvents the judgment proofing strategy by finding another solvent and insured defendant."[765]

It is accepted that compared with the insolvent subsidiary, the parent company is more likely and able to spread the loss. However, similar to other justifications, the theory of loss-spreading cannot alone demonstrate vicarious liability. It is deficient to make a parent company vicariously liable for its subsidiary company only because the parent company has stronger ability to spread the loss.

5.3.4 Theory of deterrence

Deterrence has been listed in case law as one of the most important policy reasons for vicarious liability. Fleming in his book regarded two fundamental policies as the heart of vicarious liability: (1) the imposition of a just and practical remedy for the harm; (2) the deterrence of future harm.[766] In *London Drugs Ltd v Kuehne & Nagel International Ltd,* La Forest J identified the policy concerns to include compensation, deterrence, and loss internalisation.[767] In the case of *Bazley v Curry*, the Supreme Court of Canada identified two underlying rationales of "just and fair compensation" and "deterrence" for vicarious liability.[768] This theory justifies vicarious liability by explaining that employers are in the best position to reduce the accidents emerging in the work place, and intentional torts of employees by efficient organisation,

[765] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 292.
[766] Fleming (n 706) 410.
[767] *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 (SC Can) [45].
[768] *Bazley* (n 691) 536-537.

discipline, and supervision. Vicarious liability prevents the happening of wrongdoing by deterring employers from participating in hazardous enterprises, from employing inexperienced workers, and from overlooking the unsafe workplace environment. Employers who fail to encourage employees to pay close attention to dangerous actions and the safety of others, or fail to provide proper supervision in a risky business should not be surprised when vicarious liability is incurred.

The doctrine of vicarious liability deters future harms when other doctrines fail to do this. For example, failure to take care of the workplace environment may not be sufficient to reach a direct duty of care against the employer. As Wilkinson J observed in the companion appeal's trial judgment:

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.[769]

Approaches to liability based on fault like negligence liability, need more investigations on supporting evidence. By contrast, as one category of strict liability, vicarious liability of employers is easier to be achieved, and therefore, effectively encourages employers to take better care of the employees and their work, and consequently reduces future harms.[770]

However, this theory is accompanied with concerns as well. The goal of

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[769] ibid [32].
[770] Lunney and Oliphant (n 733) 804.

deterrence can not always be reached in practice. The law does not make employers vicariously liable for all the torts of their employees. A "close connection" requirement should be considered. In this way, employers would not be held liable if the employees torts are not so closely connected with employment. As observed by McLachlin J in the case of *Bazley v Curry*, "Where vicarious liability is not closely and materially related to risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer."[771]

On the whole, the twin policy goals of fair compensation and deterrence are regarded as two meaningful motivations for the development of vicarious liability. The theory of deterrence definitely supports parent company's vicarious liability for its insolvent subsidiary's torts when the relationship between the parent company and subsidiary is akin to employment and the tort is closely connected with this relationship. When looking at most cases related to hazardous industries engaged in by groups of companies, such as Cape related cases, we find it necessary to warn these enterprises to take care of the employees working at unsafe workplaces, and third parties who will be potentially affected by the industries. It is not a rare group of cases where the subsidiary goes into insolvency and is left with large numbers of tort creditors without compensation. Philip Morgan lists three reasons why the un-compensated situation of tort creditors from group companies is so pervasive and needs attention.[772] Firstly, enterprises involving hazardous industries, in many cases have deliberately restructured themselves to escape tort claims. Secondly, tort claims against group companies related to environmental damage such as oil spills and asbestos pollution always lead to tort litigation which severely affects even insured subsidiaries. Thirdly, the employers of large enterprises can be difficult to identify, which makes it

[771] *Bazley* (n 691) [7].
[772] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 276.

problematic for tort claimants to adduce evidence. Specific to this pervasive legal issue, it is indeed pressing to call for approaches to deter future harms. The extension of vicarious liability on parent companies in particular circumstances would satisfy this need.

5.3.5 Theory of control and pleading convenience

At one time, it was believed that the control between employers and employees gave rise to vicarious liability when the employer failed to prevent the torts from occurring.[773] This ground was rather widespread at the time when employment relationships normally derived from factory owners and unskilled hands. However, in the current work environment, employers no longer control the manner of work. So the ground of control here is deficient in justifying a employment relationship. Now the significance of control has changed from controlling methods of working to directing what the employee does.[774] The theory of control as one ground for vicarious liability is designed for the sake of the innocent claimants. Employers must accept the burden of business that they have controlled for their own benefit. Alternatively, it is assumed that the person at the position of controlling others may be best placed to provide compensation and spread losses as well. Moreover, this would stimulate the obligated party to be cautious with respect to the risks introduced from the enterprise under its control.[775]

However, rather than being a justification, the control concept has gradually evolved as a test to determine the "connection requirement" to establishing vicarious liability. The ground of control has affected the interpretation of the

773 Peel and Goudkamp (n 523) 645.
774 ibid; *The Catholic Child Welfare Society* (n 661) [36].
775 Giliker (n 682) 244.

conditions for vicarious liability.[776] When considering its complicated position, the concept of control may be better regarded as one important, but not necessary reason for vicarious liability. However, it might be a good reason for the parent company's vicarious liability in the context of corporate groups. In a number of cases, where a group of companies run the same business and have tight connections, the concept of control is particularly important in the imposition of liability. For example, in the case of *Chandler v Cape*,[777] the parent company maintained a great level of control over the subsidiary's asbestos business, involving supervising product manufacture and development, having a practice of intervening in the trading, finance operations, and production funding issues of the subsidiary. If the parent company has such a great level of control over the subsidiary company, it is not unreasonable to assume that the parent company should bear certain liability for the relevant torts of the subsidiary. This is because through the tight day-to-day control over the subsidiary, the parent company is acting as a master in the traditional sense, and should take the burden of the business it controlled.

Another practical justification for vicarious liability, particularly in the context of the corporate group, is the theory of pleading convenience. When it is difficult to identify the tortfeasor, or the tortfeasor cannot be sued any more, the doctrine of vicarious liability would be an efficient approach to provide compensation and to reduce litigation costs. Sometimes, it is difficult to identify who is at fault, but you can alternatively identify whose employee is responsible.

Pleading convenience, sometimes called "evidence theory", is a justification for vicarious liability, although it may not be decisive for the doctrine's application

[776] ibid.
[777] *Chandler* (n 87).

in group situations. But it partly explain the extension. If vicarious liability is introduced to the group situation where the relationship between the parent company and the subsidiary company is akin to employment, the tort victim of an insolvent subsidiary will not have to worry about the identification of the tortfeasor, and issue of jurisdiction when the group of companies is transnational. The tort claimants can sue the parent company with pleading convenience.

Philip Morgan suggests another situation where the theory of evidence/pleading convenience points towards vicarious liability in groups of companies. This theory explains the necessity of the extension of vicarious liability in groups of companies on a basis of some common group pleading problems. It is common that employees of the group of companies work on several projects together. When the tort is committed by one of a small group of employees working on the same project, it is difficult to identify the responsible employer.[778] Another example is that employees of different companies of one corporate group work on the same project, and one or some of them commit a tort, such as negligence, but it is unknown who does the wrongful act. In this case, it is impossible to sue any employer/individual company within the group.[779] Morgan makes the assumption that if vicarious liability is accepted in the group situation, the problem can be solved when it is proved that "the parent company which controls the process of the project and all of the potential entities are within a sufficient relationship for stage one of vicarious liability."[780] Morgan provides some possible situations where it is convenient to sue the parent company if the doctrine is extended. However, new concerns might arise such as the difficulty in identifying the control of the parent company over the project undertaken by employees of several

[778] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 286.
[779] ibid.
[780] ibid.

subsidiaries.

5.3.6 Concerns about the justifications for the corporate group situation

The doctrine of vicarious liability has been developed by judges who have different explanations on the justifications or policy reasons.[781] Every single justification we discussed above has its own deficiency in explaining the imposition of vicarious liability, but the multitude of rationales together may justify the existence of the doctrine. Referring to John Fleming's famous quote: "Vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognized as having its basis in a combination of policy considerations."[782]

The justifications discussed above cohere with the evolution of the doctrine in different jurisdictions. The High Court of Australia has notably in the case of *Hollis v Vabu Pty Ltd* emphasised the theory of deterrence in reducing further accidents and risks.[783] In the case of *New South Wales v Lepore*, risk, loss distribution, compensation, and risk prevention were all adopted as relevant factors.[784] English courts regarded the theory of enterprise risk, loss spreading and compensation as the most relevant underlying reasons. These justifications are highlighted in the famous case of *Lister v Hesley Hall*[785] and *Dubai Aluminium Co Ltd v Salaam*[786]*.* In the recent leading case of *CCWS,* enterprise risk theory was utilised particularly for broadening the notion of "course of employment". This indicates that the underling rationales for vicarious liability are of great practical significance or concern, which inform

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[781] Giliker (n 681) 229.
[782] Fleming (n 706) 410.
[783] *Hollis v Vabu Pty Ltd* [2001] HCA 44, (2001) 207 CLR 21 [53].
[784] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511 [44].
[785] *Lister* (n 656) [65].
[786] *Dubai Aluminium Co Ltd* (n 657) [107].

courts in their construction of the doctrine. Courts sometimes start from interpreting the underlying rationales to make the doctrine capable of adapting and developing to meet new social needs. Case law provides examples of broadening the scope of the doctrine by balancing the policy interests. English courts have extended the liability for intentional torts, and broadened the meaning of "employer" and "employee" by referring to the enterprise risk theory. When looking back at the arguments made above, we have to admit that the primary and supplementary rationales together, are able to justify the vicarious liability of group companies.

However, we have the following concerns. In the first place, we concern about whether these reasons for the extension of liability in group situation will conflict with the principles of limited liability and separate legal personality. It is not convincing that a parent company can be held strictly liable for its subsidiary's tort just due to the policy reasons. Every rationale itself, such as enterprise risk, loss spreading, compensation, deterrence, control, and pleading convenience for parent company's vicarious liability in fact conflicts with the principles of limited liability and separate legal personality. When a company is incorporated, it is treated as a separate legal entity distinct from its promoters, directors, members, and employees, and hence, the concept of the corporate veil, separating those parties from the corporate body, has arisen.[787] Corporate personality has been described as the "most pervasive of the fundamental principles of company law", which constitutes the bedrock principle upon which a company is regarded as a "person" distinct from the shareholders constituting it.[788] The case law has given strong recognition of the legal personality of companies. The concept of the company as a separate legal personality can be justified by its economic contributions, social functions

787 Goddard (n 47) 11.
788 Sealy (n 35) 33.

and policy rationale.[789] It is difficult to establishing parent company's strict liability to its subsidiaries without any fault but just based on policy reasons. Even the most convincing theory of enterprise risk cannot do this. Enterprise risk theory explains that as it is an inevitable commercial behaviour that employees or agents act on behalf of their employers or principals and may cause damage to third parties, it is reasonable for the employers to bear any losses caused by those activities, and accept those risks of incurring legal liability. However, we cannot make the assumption that the parent company should bear legal liability because its subsidiary company's activities contribute considerable benefits for the parent. This is far from enough. Similarly, it is not sufficient to establishing strict liability without any fault on the parent company just for future accidents prevention, for realisation of victims' compensation, or loss distribution. To what extent may an innocent parent company be forced to pay its subsidiary's debt? It is extremely difficult to draw the line. The only conclusion we get is that the policy rationales are able to provide justifications for the imposition of parent company's vicarious liability in a secondary way. But the legal principles must have a great degree of clarity and definition, as expressed *Lister v Hesly Hall*:

> …an exposition of policy reasons for a rule is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be.[790]

Only in the circumstance that the relationship between the parent company and its subsidiary company is "akin to employment", can the policy rationales point liability towards parent company as we argued previously. When in the

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[789] Goddard (n 47) 11.
[790] *Lister* (n 656) [60].

specific case that the parent company acts as an employer, and the employee of the subsidiary is akin to the parent's employee, it is difficult to say that the application of vicarious liability is impossible. This is because the approach to establishing liability is on the basis of tort law principle. Vicarious liability is made for imposing liability based on relationships. To some degree, the extension of vicarious liability to the group situation emphasises the different parties in the group relationship, because it provides the opportunity to make a legal entity vicariously liable for another legal person. Just as argued by Morgan:

> Such a principle would be to respect the fiction that the legal person has a separate legal identity, and take it to its natural consequences. Indeed it would make a legal person more like a natural person – thus respecting this cardinal principle of corporate law and taking it to its logical conclusion.[791]

We assume that a parent company cannot be vicariously liable for all the torts of its subsidiary companies because of policy reasons behind corporate personality, but in particular circumstances where the existence of a relationship akin to employment is found, the extension may be proper. It should be recalled that, the tort of negligence has been accepted by English courts to provide a basis for the direct liability of a parent company for its subsidiary's debts in certain situations. This tort law approach is not regarded as inconsistent with the principle of limited liability and separate legal personality. So we may wonder about the possibility of another tort law doctrine of vicarious liability in creating a parent company's liability. As it is well-known, under the company law doctrine of veil-piercing, a parent company can be held liable for its subsidiary's debts in particular

[791] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 289.

circumstances based on the parent company's fault. As shown in the recent leading veil-piercing case of *Petrodel Resources Ltd v Prest*,[792] the only circumstance for veil piercing is where the defendant is under an existing legal liability or restriction, and consequently the defendant deliberately evades the obligation by means of creating a façade company controlled by him. This indicates that although English courts are reluctant to pierce the corporate veil for the purpose of complying with the principle of limited liability and separate legal personality, they do admit exceptional cases.

Finally, we conclude that on the basis of the cumulation of several underlying rationales for vicarious liability, the realisation of parent company's liability for its subsidiary's tort is possible. To respect the principle of limited liability and separate legal personality, the discussion of whether policy reasons is able to explain parent company's vicarious liability must be closely connected with the requirements to establish vicarious liability. In the first place, the relationship between the parent entity and the subsidiary should be "akin to employment", and secondly, the "connection requirement" must be met. In the group situation, if the two tests have been met according to the facts, policy reasons behind the doctrine cannot be an obstacle to vicarious liability due to the social need, as we discussed above.

Now we conclude that the justifications for vicarious liability are able to explain the doctrine's extension in group situation only when the relationship between the parent company and its subsidiary is "akin to employment", and the subsidiary's tort is so closely connected with this relationship. In the next section, the author will discuss whether it is possible to establish the relationship requirement and the connection requirement in group of companies, and how it can be realised.

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[792] *Petrodel Resources Ltd* (n 173).

5.4 The possibility of applying vicarious liability tests in the corporate group context

The doctrine of vicarious liability in tort has evolved over time to meet social needs. It is a doctrine that plays a significant role in providing compensation to tort victims. Paula Giliker has acknowledged in her book that:

> Vicarious liability is thus a compromise: a private law mechanism which seeks to provide solutions to the needs of victims and reflects increasing awareness of the need to respond to the risks posed to society by industrialization and technological advances.[793]

Vicarious liability is believed to continue to develop and change in conformity to the constant evolution of social values. The question whether one legal person is able to be vicariously liable for another legal person's tort is posed in the context of modern group company structures and corporate behaviours. English courts give us reasons to consider the extension of vicarious liability by seeking a more generous scope of the concept of "course of employment" and a broader meaning of relationship that gives rise to vicarious liability beyond the traditional format of employment relations. As to the problem of vicarious liability for group companies, although there is a lack of clear case law instructions and sufficient legal comments, previous court decisions and recent developments are of much assistance. In the corporate group context, there are two different situations. One is that the parent company is sued for the torts of the employees of one subsidiary. In this situation, dual vicarious liability is

[793] Giliker (n 682) 253.

considered and the employment relationship between the parent company and the tortious employee of the subsidiary is expected to be found. It is not difficult to determine the parent company's vicarious lability in this context if the requirement for "akin to employment" relationship and the close connection requirement can be established. The discussion on the dual vicarious liability will be made in the 5.4.1 section.

The other situation is that the parent company is sued for the torts of its subsidiary company. In this situation, vicarious liability might be applied where the relationship between the parent company and the subsidiary is "akin to employment". In this case, the subsidiary, as a legal person is equivalent to an employee. Where the difficulty lies, and indeed what this chapter focuses on is the second situation. This is because it is uncertain whether a legal person can be vicariously liable for another legal person. To answer the question, the author will firstly consider whether the relationship between the parent company and the subsidiary is one that is capable of giving rise to vicarious liability. Specifically, the core question is whether the relationship between the parent company and subsidiary company might be "akin to employment". Secondly the author will discuss what connection must exist between the tortious act and the relationship between the subsidiary and the parent company.

5.4.1 Relationship requirements for vicarious liability in the group situation

The employment relationship features certain rights and obligations. Various legislation impacts upon the matter, such as employment law, labour law, and human rights law. However, the definition of "employee" is not static.

Expansion of the definition of employment relationship was undertaken in the case of *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*.[794] In the first place, in this case, the court distinguished the definition of the concept of "employee" in vicarious liability from those in other areas of law. Ward LJ, in *JGE* observed that the concept of employment for the purpose of vicarious liability should be distinguished from the concepts in areas such as employment law, and taxation.[795] In these areas, a legal entity (a company) has not been mentioned to have the capacity to be an employee.[796] However, as observed by Ward LJ, the format of contract is no longer restricted to employment relationship.[797] Furthermore, to dissolve this restriction, the category of "akin to employment" to create vicarious liability was developed in this case. It is indicated that, it is the function rather than format that determines the employment relationship that is able to give rise to vicarious liability. Consequently, the scope of employee is also extended, and a company as a legal entity has no reason not to be included as an employee for the purpose of vicarious liability.

The forms of employment, and business structures have changed in the last few decades. These unprecedented changes are believed to result in the growth of employment forms which becomes more difficult to define.[798] Commentators and judges have acknowledged that the idea of employment relationship has jumped out of the restriction of contract of service. It is stated in Edwin Peel and James Goudkamp's tort book that:

> It is perfectly possible to say that, while there is no ongoing relationship between the defendant(D) and the tortfeasor(A)

[794] *JGE* (n 659).
[795] ibid [59].
[796] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 295.
[797] *JGE* (n 659) [60].
[798] Lockwood (n 647) 151.

amounting to a contract of service, A is D's employee/servant at least for the purpose of vicarious liability, while he is actually working.[799]

JGE's approach to determine vicarious liability based on the relationship "akin to employment" was approved by the Supreme Court in the recent leading case of *The Catholic Child Welfare*. In this case, the Supreme Court emphasised that the relationship of employment is not confined to a contract of service in the strict sense, although it is the most common situation.[800] Several tests have been quoted or introduced by courts and commentators to define a relationship of employment. Some of them may not carry the matter much further, such as the test of control or some tests used to distinguish the employee and an independent contractor, but they are still helpful for the discussion of the relationship of employment in group situations. It is currently believed that, a composite approach, in which different elements of the relationship will be considered together, is expected to be taken.[801] So, for the purpose of considering the possibility of parent company's vicarious liability, we should in the first place check the essential tests for employment relationship, and discuss whether the relationship between the parent company and its subsidiary can meet those tests.

It is acknowledged that the current method for determining the employment relationship is not to rely on one single test, but to apply multiple relevant elements, which include control, profit ownership, equipment ownership, and the risk of damage the tortfeasor takes. The list of tests is not exhaustive. The application of tests is believed to depend on the specific features of the relationship in each case.[802]

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799 Peel and Goudkamp (n 523) 646.
800 *The Catholic Child Welfare Society* (n 661) [47].
801 Peel and Goudkamp (n 523) 646; *Stevenson, Jordan and Harrison Ltd v Macdonald and and Evans* [1952] 1 TLR 101 (CA) 111.
802 Howarth and others (n 682) 1073.

5.4.1.1 Test of control

Control as a test for employment relationship has long been treated as one touchstone of employment. This test was well suited at the time when business owners had skills and knowledge of production, and the skills were handed down by oral tradition from business owners to unskilled hands.[803] McKenna J in the case of *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance,* outlined the importance of the control test in making the other an employer, and provided classical ideas on the traditional meaning of the concept of control:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant.[804]

In the opinion of McKenna J, control should be an important distinguishing factor of the relationship of employment. In latter years, when social and economic conditions became increasingly complex, and when the different forms of work, such as labour-only sub-contracting, and zero hours contracts arose, the control test was set out in more limited terms than before.[805] According to these limits, it is no longer treated as a single and significant test for employment.

Although not regarded as a single test, the concept of control is considered as one essential element to realise the new form of employment relationship in

[803] O Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 MLR 504,505-506.
[804] *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (QB) 151.
[805] Howarth and others (n 683) 1037.

recent leading cases. Considering the need for a new understanding of employment relationship, the scope of control test was broadened as well. In the case of *JGE*, the court emphasised that the question of control should be understood in a wider sense, rather than merely asking whether the employer controls the employee's work.[806] Control as a test, notwithstanding that its role was reduced before, would be a more essential concept than some others to test the relationship for vicarious liability. The test can be considered as one of several essential tests for determining the relationship "akin to employment" in the current modern legal practice. In the case of *Market Investigations Ltd v Minister of Social Security*, the court outlined a three-step test for establishing the employment relationship, and the first one is to evaluate whether an employer has control and direction over the relevant employee.[807]

In the *JGE* case, the court listed five essential tests to indicate vicarious liability, and the test of control was the first to be considered. In this case, the court provided a broad new meaning of control for further use:

> The question of control should be viewed in a wider sense than merely enquiring whether the employer has the legal power to control how the employee carries out his work. It should be viewed more in terms of whether the employee is accountable to his superior for the way he does the work so as to enable the employer to supervise and effect improvements in performance and eliminate risks of harm to others.[808]

The judgment in this case provided multiple ways to look at the control test for modern legal situations. According to the court, one way to look at the control test, is to examine whether the employee is controlled in every detail of how

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806 *JGE* (n 659) [76].
807 *Market Investigations Ltd v Minister of Social Security* [1962] 2 QB 173 (QB) 184-185.
808 *JGE* (n 659) [76].

things should be done. Another way is to examine whether the employee is asked to achieve detailed result. A wider way to look at control is to "examine the degree to which the employee is accountable to the employer, or to what extent he is subject to the managerial procedures of the employer in relation to such matters as quality of work, performance, and productivity etc."[809]; and to examine "the degree of managerial control which is exercised over the activity and this may depend on how far a person is integrated into the organization of the enterprise."[810]

The decision of *JGE* was approved by the Supreme Court in the case of *CCWS.* In the case of *CCWS*, Lord Phillips confirmed that although the control test was no longer regarded as the critical test for vicarious liability, there was one area of the law of vicarious liability where this test was particularly important. That is the area of dual vicarious liability and the area of vicarious liability without a contract of service.[811] For most cases in this area, one cannot find the employment contract against the defendant who is not a permanent employer. The Supreme Court's decision in the case of *CCWS* greatly supports the application of this doctrine in group situations, where the injured claimant of one subsidiary may sue the parent company through "dual vicarious liability" or by simply relying on the theory of "akin to employment".

In the *CCWS* case, the Institute of the Brothers of the Christian Schools (the Institute), in civil law, was an unincorporated association of its members, founded by lay brothers of the Catholic Church. However, this institute was deemed as having corporate features such as a hierarchy of authority.[812] The problem considered in this case was whether the Institute was vicariously liable in law for the alleged acts of physical and sexual abuse of children

[809] ibid [72].
[810] ibid.
[811] *The Catholic Child Welfare Society* (n 661) [37].
[812] ibid [2].

committed by its members at St. Williams, in Yorkshire.

It was alleged that the children were physically and sexually abused by the staff at the school between 1958 to 1992. The first group of defendants were the managers of the school. The school was founded in 1865 by a group of Catholic benefactors, and since 1982, it was managed by the Catholic Child Welfare Society. The second group of defendants consisted of members of the Institute and the Institute. One brother from the Institute called Brother James and some other brothers were claimed to have committed abusive acts against the school boys when teaching in the school.

The first group of defendants accepted the judgment given by the High Court that they were vicariously liable for the actions of their employees, but appealed to the Supreme Court on the basis that the Institute of the Brothers of the Christian Schools should share the vicarious liability. The Institute was alleged to be vicariously liable for the brothers belonging to it who taught at the School and abused the children there.

The Supreme Court allowed the appeal and indicated that it was fair, just and reasonable to impose vicarious liability on the Institute for the abuse committed by its members. In this case, Lord Phillips confirmed the synthesis of two stages for establishing vicarious liability provided by Hughes LJ in the Court of Appeal:

i) consider the relationship of the first defendant and the second defendant to see whether it is one that is capable of giving rise to vicarious liability;
ii) the requirement of an examination of the connection between the

second defendant and the act or omission of the wrongdoer.[813]

To establishing the first step, the control test was considered. Lord Phillips referred to the cases involving dual vicarious liability such as *Wharton & Down Construction Syndicate Ltd*,[814] and *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd*,[815] in which a very stringent test was imposed making a transfer of vicarious liability almost impossible in practice. According to the decisions, focus should be on those possessing the right to "control the way in which the act involving negligence was done",[816] and "the inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it."[817] In *CCWS,* Lord Phillips considered control as one of the four essential elements to establishing vicarious liability. More specifically, the defendant Institute in this case exercised control over the teaching brothers by issuing directions, requirements and determining the position of work in the course of the employment.

In the corporate group context, dual vicarious liability might be considered in the situation where the parent company is sued for the torts of the employees of one subsidiary. In this situation, a relationship akin to employment is expected to arise between the parent company and the tortious employee of the subsidiary. In another situation, vicarious liability might also be applied where the relationship between the parent company and the subsidiary is "akin to employment". In this case, the subsidiary, as a legal person is equivalent to an employee. According to the previous discussion of the control test, we can draw a conclusion that in these two circumstances, the control test would be significant. In respect of the control test applied in the group situation, we will look at the degree to which the parent company (as an employer) is

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813 ibid [21].
814 *Wharton & Down Construction Syndicate Ltd* [1893] 1 QB 629 (QB).
815 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 (HL).
816 *The Catholic Child Welfare Society* (n 661) [38].
817 ibid.

accountable to the subsidiary company (as an employee), or to what extent is the subsidiary company (as an employee) subject to the managerial procedures of the parent company (as an employer) in relation to such matters as quality of work, performance, and productivity.[818] Furthermore, we will examine the degree of managerial control of the parent company which is exercised over the activity related to the tort, and this may depend on how far the subsidiary company's business is integrated into the organisation of the parent company's business.

5.4.1.2 Tests of organisation, integration and entrepreneur

These three tests, together with the control test were introduced and emphasised in the case of *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust.*[819] Although there is no employment relationship if judging the issue on conventional lines, the bishop can however be vicariously liable when the relationship is akin to employment. The Court of Appeal extended the scope of the doctrine, and concluded that the "time has come emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service."[820] In the Court of Appeal, Ward and Davis LJ found it possible to describe the relationship between the bishop and the priest as being "akin to employment". Ward LJ achieved this by treating the ministry of the Roman Catholic Church as a business carried on by the bishop, by finding that the priest carried on that business under a degree of control by the bishop and by finding that the priest was part and parcel of the organisation of the business and integrated into it.

818 *JGE* (n 659) [72].
819 *JGE* (n 659).
820 *JGE* (n 659) [55].

The tests of control, organisation, integration, and entrepreneur were introduced by Professor Richard Kidner in his article,[821] and emphasised by LJ Ward as essential and decisive tests for determining the "relationship akin to employment" for vicarious liability.[822]

The organisation test is to examine how central the tort, or the activity leading or closely relevant to the damage is to the employer's business from the point of view of the business or enterprise objectives. Specifically, we have to look at the person who is engaging in that tort or activity, and it is believed that the more relevant the tort/activity is to the objectives of the employer's business, the more appropriate it is to attribute the tort/risks of the activity to that business.[823] The integration test is closely connected with the organisation test and also a part of the entrepreneur test. It asks whether the tort or activity is integrated into the business or organised structure of the enterprise.[824] The entrepreneur test examines whether the person is in business on his own account. An employee has no chance to behave as an independent entrepreneur. As confirmed by Ward LJ, "even if a person's activity is peripheral to the enterprise and even if he is not for managerial purposes regarded as part of the organization, a person could still be regarded as an 'employee' if it is clear that in relation to that business he is not acting as an entrepreneur".[825] It should be noted that to determine the imposition of vicarious liability, the four tests should be considered together because every single one is intimately involved in the other three. Based upon these four tests, Ward LJ added that the relationship between the defendant and the tortfeasor should be so "close in character to one of employer/employee that it is just and

821 Richard Kidner, 'Vicarious Liability: For Whom Should the Employer Be Liable?' (1995) 15 LS 47.
822 *JGE* (n 659) [72].
823 ibid.
824 ibid.
825 ibid.

fair to hold the employer vicariously liable."[826]

Ward LJ applied the above tests to the specific facts of the *JGE* case, and concluded that the priest was in a relationship with his bishop which was close enough and so akin to employer and employee as to make it just and fair to impose vicarious liability.[827]

It is worth mentioning that the relationship between the priest and the bishop cannot meet all of the requirements of a conventional employment relationship. For example, the priest is not directly paid a salary by his bishop. However, Ward LJ emphasised that even though the priest could not match every facet of becoming an employee, but various features made it very close to it.[828]

In the case *CCWS*, again, Lord Phillips ignored some differences between the true relationship of the teaching brothers and defendant Institute and the typical relationship of employer and employee. According to his Lordship, neither of those differences was material.[829] For instance, the teaching brothers had no contract of service with the Institute, and they were not paid a salary, the Institute catered for the teaching brothers from the Institute's funds. Lord Phillips confirmed the tests applied by Ward LJ in case *JGE*, and imposed vicarious liability based on the essential elements of the employment relationship. Those elements believed by Lord Phillips to be essential include (1) the teaching activity was under the control of the Institute; (2) the teaching activity was in furtherance of the objective of the business of the Institute; (3) the working manner was under the direction of the Institute rule.[830]

These two leading cases provide a strong indication that vicarious liability can

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826 ibid [73].
827 ibid [81].
828 ibid [80].
829 *The Catholic Child Welfare Society* (n 661) [58].
830 ibid [56].

be realised based on several essential elements that point towards employment relationship, and furthermore if these essential elements are found, some differences between the conventional employment relationship and the relationship “akin to employment” can be ignored.

According to the tests for ascertaining the relationship akin to employment confirmed in recent leading cases, it would be reasonable to assume that in particular circumstances, for the purpose of vicarious liability, a parent company and the subsidiary company could be in a relationship akin to employment. The tests of control, organisation, integration, and entrepreneur might be met in some complex group situations. When the parent company has day-to-day control over certain activities of the subsidiary company which result in the damage, and at the same time the activity is exercised in furtherance of the parent company’s business, or the activity is part of or integrated into the organised structure of the parent company’s business, and the subsidiary does not undertake this business on its own account, the relationship between the parent company and the subsidiary can fall into the scope of a relationship “akin to employment” defined in the *JGE* and *CCWS* case. Of course, there might be difficulties in the collection of proper evidence to fulfill the tests of control, organisation, integration and entrepreneur.

Taking the Cape related cases as examples again. Petrin, in his case note on *Chandler v Cape* mentioned that it would be more straightforward to impose parent company’s vicarious liability than relying on direct duty of care.[831] In this context, it is worth considering whether the above essential tests could be met in the *Chandler v Cape* case*.* The test of control can definitely be met in this case because sufficient evidence suggested that the parent company had day-to-day control over the subsidiary’s asbestos business, and also took

[831] Petrin (n 338) 603.

control over its subsidiary's management in some aspects.[832] The second test of organisation and the third test of integration can be met as well. In this case, Arden LJ in the Court of Appeal listed several categories of evidence on the intimate relationship between the parent company Cape and the subsidiary Cape Products, for the purpose of establishing duty of care. Among these categories of evidence, origins of the subsidiary Cape Product's asbestos business, and evidence as to Cape's involvement in the asbestos business of Cape Products show that the subsidiary company's asbestos business can be regarded as helping to meet its parent company's asbestos business objectives, and can be regarded as integrated into its parent company's business as well. The problem lies in the last test of entrepreneur. As a subsidiary company, Cape Products was not found as a façade to just carry on the business of its parent company. Cape Products was totally a separate legal entity, owning its properties, taking profits and responsible for its own debts. It is difficult to say that Cape Products was doing business on behalf of its parent company Cape. So in the *Chandler v Cape* case, it is not sufficient to establish a relationship akin to employment. Is there any circumstance that the subsidiary company lose its separate legal personality and carry on business or activities just on behalf of its parent company? It is difficult to say no. It does happen in the business world that a subsidiary company is established as a façade to escape legal responsibility or to do business just for the interests of its parent company. However, this will bring the issue back to the same tough question for the doctrine of veil-piercing again, the question about in what circumstance a subsidiary is regarded as a "façade", lose its separate legal personality, and just carry on business on behalf of its parent company. This is a much more complex issue than proving whether a priest works on behalf of his bishop, or teaching brothers work on behalf of their Institute.

[832] *Chandler* (n 87) [46].

Another problem as to the issue whether the relationship between the parent company and the subsidiary can be "akin to employment" regards the legal personality of the subsidiary company. Vicarious liability is a doctrine that is applied to liability for torts of natural persons/individuals. The question whether the subsidiary company, or a corporation/organisation, as a legal individual, could behave as a natural individual in corporate relations is controversial and ambiguous.

Morgan, in his article argues that a company can be in a position of employee. According to recent leading cases, the employment contract is not necessary in determining employment relationship for the purpose of vicarious liability.[833] Secondly, vicarious liability applies to the torts of a legal entity because this extension indeed "respects the fiction that the legal person has a separate legal identity, and takes it to its natural consequences…it would make a legal person more like a natural person—thus respecting the principle of corporate law and taking it to its logical conclusion."[834]

Morgan's arguments are inspiring, however, still cannot sufficiently support the feasibility of vicarious liability for a subsidiary's torts. According to the leading cases of *CCWS* and *JGE*, vicarious liability can be realised without the contract of employment. However, this extension still applies only in relationships between a legal person/natural person and a natural person in accordance with the current case law. It can be regarded as a breakthrough which increases the possibility that a legal entity can be vicariously liable for another legal individual's torts, but not a decisive step which is able to absolutely lead to the result.

[833] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 295.
[834] ibid 297.

5.4.2 The close-connection test for vicarious liability in the group situation

When the first requirement of employment relationship is satisfied, the employer will be vicariously liable if it is then proved that the wrongdoing is committed "in the course of the employment" of the employee. The same is true when the relationship between the defendant and the tortfeasor has a close connection with the tort. This "close connection" test was introduced in the decision of the House of Lords in *Lister v Hesley Hall*.[835] The close connection test will be met when the relationship between the tortfeasor and the defendant is "akin to employment", and the tort is closely connected with this relationship.[836] The Supreme Court in the *CCWS* case, after reviewing the precedent authorities, confirmed that the close connection test can be fulfilled when the relationship between the tortfeasor and the defendant is akin to employment, and the existence of the relationship increased the risk of the damage occurring.[837]

The judgment of the famous Canadian case *Bazely v Curry* was quoted in *CCWS*:

> …there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.[838]

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[835] *Lister* (n 656).
[836] *The Catholic Child Welfare Society* (n 661) [62].
[837] *The Catholic Child Welfare Society* (n 661) [86].
[838] *Bazely* (n 687) [42]; *The Catholic Child Welfare Society* (n 661) [64].

In *Lister v Hesley Hall*, Lord Millett also commented on the "risk test" as follows:

> The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.[839]

This kind of explanation of close connection test is described as referring to the "enterprise risk approach" *in Markesinis and Deakin's Tort Law* as well.[840] Lord Phillips of the Supreme Court in the *CCWS* case, acknowledged that the extension of the enterprise risk rationale had been broadened to this extent. According to his Lordship, the creation of risk is not simply a policy consideration. Although "creation of the risk" itself is not sufficient to trigger vicarious liability, it would always be included in the criteria that give rise to such liability.[841] In this case, the initial intention of developing the law of vicarious liability this far is to ensure that there is a remedy for the sexual abuse victims, which is provided by those who should bear the responsibility.[842] For this reason, the "risk test" is introduced and confirmed to establish the necessary close connection between the relationship akin to employment and the abuse. Now that the "creation of risk" has been considered by the Supreme Court as one criterion for vicarious liability, this principle should have broader applicability based on the same underlying reasoning. Referring to the explanation and reasoning provided in precedent cases, particularly in the Supreme case *CCWS*, a broader understanding of the risk test is concluded as follows:

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839 *Lister* (n 656) [65].
840 Deakin, Johnston, and Markesinis (n 292) 554.
841 *The Catholic Child Welfare Society* (n 661) [87].
842 ibid.

> Vicarious liability can be imposed where a defendant, whose relationship with the tortfeasor put it in a position to use the tortfeasor to carry on its business or to further its own interest, has done so in a manner which has created or significantly facilitated the risk that the victim would suffer the relevant harm. The relationship akin to employment has enhanced the commission of the tort or the happening of the damage. This involves a strong causative link.[843]

The risk test is then followed by a non-abuse case *Cox v Ministry of Justice*[844] in 2014, which fully illustrates its extended use. In *Cox*, the Court of Appeal held that the Ministry of Justice was vicariously liable for the prisoner's negligence. A catering manager at a prison was injured when a prisoner, who was carrying out paid work loading food supplies onto trolleys for the kitchen, negligently dropped a heavy bag on her. Applying the test in *CCWS*, it was found that the Ministry was better able to compensate the claimant, the engagement of the prisoner to do the specific work created the risk of the injury being caused to the claimant and the prisoner was under the Minister's control.

The risk test is also able to explain the close connection between the relationship of the parent and subsidiary company, and the torts of the subsidiary company in cases where negligence is committed in group situation. More specifically, the risk test can be applied in many group cases involving environmental pollution and personal injury, where the relationship between the parent company and the subsidiary, and the business they carry on together, has significantly facilitated toxic substance exposure which results in severe damage to the subsidiary's employees and third parties. This is because many enterprises in hazardous industries, such as the asbestos industries, try to restructure themselves in the corporate group structure to

[843] ibid [86].
[844] *Cox v ministry of Justice* [2014] EWCA Civ 132, [2015] QB 107.

escape tort claims. In this case, the parent company and its subsidiary company have a special relationship beyond the relationship among independent individual legal entities.

The Cape related cases provide a good example to illustrate this kind of special relationship. In *Chandler v Cape* case, Cape had been involved in the business of asbestos production from the 19th century and had some factories in the UK; in 1953, it acquired the outstanding shares of Cape Products, the subsidiary company, and appointed a manager to manage Cape Products as "a branch of Cape".[845] Cape Products contributed a great value to Cape's business.[846] Cape Products then became a part of the organisational structure, integrated into a group companies headed by Cape. In 1965, Cape as the parent company approved Cape Products to have a separate administration as to management, production, and sales, but "in accordance with company policy". This is understood as "inconsistent with Cape Products being able to be in charge of its own management systems."[847] At relevant times Cape Products was directed by directors of Cape, and most of the board meetings of this subsidiary were held in London, at the parent company Cape's head office. Even though Cape tried to make Cape Products act as an independent company in a large corporate group, Cape's board still "took an interest in issues relating to the management by subsidiaries of their own business."[848] Cape constantly provided technical assistance and appointed the experts employed by Cape itself to provide support towards product development and health and safety issues in Cape Products. It was recorded in a number of the board minutes that Cape as a parent company had high involvement in the asbestos business of Cape Products, such as taking decisions on the expansion of the subsidiary's business.[849]

[845] *Chandler* (n 87) [7].
[846] ibid.
[847] ibid [10].
[848] ibid [13].
[849] ibid [27].

It is not difficult to conclude that Cape controlled at least some aspects of the business of Cape Products according to the relationship between the parent company Cape and the subsidiary Cape Products. This is also the conclusion from the Court of Appeal's judgment:

> It is the fact that Cape Products had acquired its asbestos business from Cape and, when it suited it, Cape intervened in the management of Cape Products' business; the experts employed by Cape was involved in the health and safety issue of the whole group.[850]

What is of great importance is that the damage happened due to the unsafe working environment of the subsidiary, and happened during the period when Cape was highly involved in Cape Products' asbestos business.

The parent company Cape put the subsidiary in a position to undertake the asbestos business for its own interest, and such business significantly enhanced the risk of the damage. According to the risk test, it is reasonable to conclude that the subsidiary's negligence has very close connection with the special relationship between the parent company and the subsidiary. Thus, it is possible to apply the close connection test in the corporate group context.

5.5 Further evaluation of the extension of vicarious liability in the group situation

[850] ibid [30].

5.5.1 Policy reasons

The underlying rationales for vicarious liability explain the doctrine's existence, as well as the doctrine's development in accordance with the social changes and needs. A proper remedy for the tort victims of an insolvent or impecunious subsidiary against a solvent parent company is a real social need. The primary justifications for vicarious liability, such as the theory of enterprise risk, loss spreading, compensation, deterrence, control and pleading convenience, to some degree create the potential of the parent company's vicarious liability for its subsidiary. All the rationales together justify this assumption in a plausible way. However, do these explanations for parent company's vicarious liability conflict with the bedrock principles of limited liability and separate legal personality in corporate law? Unlike legal principles which have better clarity, we have to admit that all the policy rationales just play a role in a supplementary way. From this point of view, in general circumstances, the two corporate law principles are huge obstructions in the way.

The only case in respect of a parent company's vicarious liability for its subsidiary company's tort is found in 1972, a reported decision by the Nova Scotia Supreme Court in Canada.[851] The action was brought by the Council in the Right of the Province of Nova Scotia (the Crown) against Waverley Construction Company Limited, for the destruction of a bridge caused by the negligent work of Douglas Adshade, employed by Waverley's wholly owned subsidiary company Tidewater Construction Company Limited. To establishing vicarious liability on the parent company Waverly, the claimant tried to argue for an agency relationship between Tidewater and Waverley. However, the court found it would be very difficult to determine the parent company liability

[851] *The Queen v Waverley Construction Co Ltd; Tidewater Construction Co Ltd, Third Party* (1972) 30 DLR (3d) 224.

based on vicarious liability. At that time, no relevant case law had ever held that a parent company could be held vicariously liable for the negligence of a servant of its subsidiary on the ground of agency. It was necessary to prove that the subsidiary company was carrying on the business relevant to the damage on behalf of the parent company. The court found no sufficient evidence to support such a complex relationship, and the court noticed that it would be inconsistent with the rigid corporate law principles if imposed vicarious liability on the parent company.[852]

As we discussed previously, the relationship between the parent company and the subsidiary should have the possibility to be akin to employment, and therefore lead to parent company's vicarious liability. Morgan, in his article argues that vicarious liability does respect the principle of separate legal personality.[853] Vicarious liability can apply to the torts of a legal entity because this extension indeed "respects the fiction that the legal person has a separate legal identity, and takes it to its natural consequences…it would make a legal person more like a natural person—thus respecting the principle of corporate law and taking it to its logical conclusion."[854] As he explained, vicarious liability is a doctrine, by extending its scope, one can be held vicariously liable for another legal person's tort. This process can be regarded as a natural consequence of a separate legal entity who behaves more like a natural person.[855]

However, Morgan's argument still cannot sufficiently explain that the imposition of vicarious liability for a legal individual's tort does not conflict with the principle of separate legal personality. When one company is incorporated, it enjoys a separate legal personality distinct from its shareholders. This is the

852 ibid 230.
853 Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 297.
854 ibid.
855 ibid.

bedrock concept that forms company law along with “Limited Liability”. The concept of corporate personality stresses that as a legal person, a company is not an agent or trustee of its shareholders, but has a unique identity.

In a corporate group, a company has its unique registration number distinct from other companies. It can behave as a legal person, with a directing mind and will, to seek the best interests and benefits of the company itself. The argument from Morgan that “…it would make a legal person more like a natural person” is not convincing because actually the purpose of the creation of separate legal personality of a company is in nature, to some degree, different from the concept of “a natural person”. A natural person can behave as an employee, who works with directors and shareholders for the purpose of maximising the company’s benefits and completing the company’s objectives. However, the purpose of being a separate legal entity is to be distinct from its shareholders, and to be a “person” to have its own rights and bear its own responsibilities, moreover, to maximise its own interests. If a company behaves as an employee of its parent company, it will definitely lose its corporate personality because as an employee this company should do business for the benefits and objectives of its parent company. A legal person is not equivalent to a natural person who can behave as an employee to work totally for the benefits and objectives of his employer, and the purpose of creating the principle of separate legal personality is not to make a corporate entity behave like a natural person but to give it some “features” like a natural person. One company will definitely lose its corporate personality if it works on behalf of its parent company and for the interests and missions of its parent company. In practice, the function and objective of the separate legal personality of a company will be more complicated, or to say, to some degree different from a natural person’s independent personality. In practice, it is extremely difficult to take away a company’s separate legal personality, and this is one hurdle to realising the parent company’s vicarious liability.

Furthermore, when considering the parent company's vicarious liability we must pay attention to the statutory hurdle in the Insolvency Act 1986, the principle of limited liability. The principle of limited liability, along with the principle of separate legal personality, is another bedrock of company law. It means that a limited liability company can only be sued up to the degree that the company's own assets are exhausted. Shareholders of the company enjoy limited liability regarding the company's debts up to the extent of their investment. Creditors cannot turn to claim against the shareholders for further debts if the shareholder has met his commitments. The statutory existence of limited liability can be traced to the Insolvency Act of 1986, section 74 (d): "in the case of a company limited by shares, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member."[856]

In the context of corporate groups, limited liability operates like a shield to protect group members from paying excessive amount of money. Like the individual shareholder, other corporate group members will not be asked to pay more than the amount unpaid on the shares in respect of which they are liable as shareholders. According to this policy, the parent company is not to be fully liable for the debts of its subsidiaries beyond its investment commitments. However, the realisation of parent company's vicarious liability will definitely be a strike against traditional company law system and even for the economic market. The realisation of vicarious liability of the parent company for its subsidiary company's tort means that the parent company will be strictly liable for its subsidiary's tort debts as an employer regardless of its limited liability. Even in the situation that a subsidiary totally loses its corporate personality and runs the business on behalf of its parent company and for the

[856] Insolvency Act 1986, s 74(d).

final interests and objectives of its parent company, in other words, behaves like an employee, it is unknown whether it is proper to remove limited liability. We are not sure whether the benefits brought by limited liability in the whole corporate group, investment and economic market will be reduced when such a strict liability based on employment relationship between corporate members is accepted. This is a huge concern that cannot be ignored.

5.5.2 Realisation of the relationship akin to employment

When considering the extension of vicarious liability theory more deeply, we find that the decisive question as to the liability determination is whether the subsidiary company can meet the requirements of being an employee of its parent company. This is where the difficulty lies. The underlying rationales for vicarious liability are actually closely connected with the requirements (tests) of the liability determination. In the context of corporate groups, we cannot firmly say that the extension of vicarious liability will conflict with the two corporate law principles. However, to respect the separate legal personality and limited liability of corporate shareholders, the discussion of whether the underlying rationales can support the existence of parent company's vicarious liability must be in the context of realising the relationship akin to employment according to the current case law.

There is no direct precedent on the issue of parent company's vicarious liability for its subsidiary's tort in UK case law. But the tests for the relationship akin to employment provided in recent leading cases indicate one way to bridge the relationship between the parent company and its subsidiary company for the imposition of vicarious liability. As discussed in section 5.4, the essential tests for relationship requirement include test of control, organisation, integration, entrepreneur, and test of just and fair. The first three tests are not difficult to meet. As regards the test of control, we examine the degree of managerial control of the parent company exercised over its subsidiary's activity. Specifically, we examine to what extent the parent company is accountable to the subsidiary company, and to what extent the subsidiary is subject to the managerial procedures of the parent company in relation to the activity that leads to damage. The control test is also closely connected with how far the subsidiary company's business is integrated into the organisation of the parent company's business, interests and objectives. The extension of the tests into group situation and the central position of the test of control, organisation and integration are also emphasised in Morgan's article:

> Control via internal corporate law process, such as through appointing directors and board votes, must be ignored as internal mechanisms of corporate governance. However, control through contractual means, or in fact, may be taken into account.[857]

However, as to the test of organisation and integration, there is a concern that organisation and integration cannot sufficiently explain the employment relationship in group of companies because these two concepts are actually two features of the corporate group. It is not strange that the parent company and subsidiary company have common interests, business objectives and that is why we call it corporation. The test of organisation and integration should adjust to the specific situation of group cases. For the purpose of establishing a relationship akin to employment, we can look at whether the subsidiary acquires the business (closely relevant to damage) from the parent company, and whether the business is totally in the furtherance of the interests of the

[857] Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (n 651) 297.

parent company, or whether the integrated behaviour makes the subsidiary totally lose its separate legal personality.

Another concern is about the test of entrepreneur, which examines whether the person is doing business on his own account. This would be the significant obstacle to realising the relationship akin to employment between the parent company and the subsidiary company. It is extremely difficult to prove that a subsidiary is not carrying on business on his behalf. As stated by Cooper J A, in the case of *Waverley*, "the issue here involves not a question of taxation nor occupation of property but rather the vicarious liability of a parent company for the negligence of the subsidiary company".[858] In the *Waverley* case, the claimant referred to the case *Smith, Stone & Knight Ltd v City of Birmingham*, in which Atkinson J held that:

> The parent company, the claimant, was entitled to compensation for the removal on the compulsory acquisition of the premises occupied by its subsidiary company. The question, was whether or not the subsidiary company was carrying on the parent company's business of its own.[859]

In the case of *Smith, Stone & Knight Ltd v City of Birmingham*, Atkinson J was in favour of the claimant, and found that the subsidiary company was totally doing business on behalf of his parent company and lost its separate legal personality. Atkinson J found that:

> The parent company had complete control over the operations of the subsidiary. There was no tenancy agreement of any sort with the subsidiary company; they were just there in name. Apart from the

858 *The Queen* (n 821) 233.
859 *Smith, Stone & Knight Ltd v City of Birmingham* [1939] 4 ALL ER 116 (KB) 118.

> name, it was really as if the manager appointed to the subsidiary by the parent company was managing a department of the company. The subsidiary company never declared a dividend; they never thought of such a thing, and their profit was in fact treated as the parent company's profit.[860]

Atkinson J provided some clues on how to determine whether a subsidiary was carrying on its own business. These clues may be good indications for the application of the test of entrepreneur in the group situation. Furthermore, Atkinson J gave six points for the determination of the issue: who is really carrying on the business? These points are:

> (1) Were the profits treated as the profits of the parent company? (2) Were the persons conducting the business appointed by the parent company? (3) Was the company the head and the brain of the trading venture? (4) Did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? (5) Did the parent company make the profits by its skill and direction? (6) Was the company in effectual and constant control?[861]

These six points would be of great help for considering the relationship between the parent company and subsidiary company here, particularly the first point. In the *Waverley* case, although the court was not sure about the feasibility of this six-point test, Cooper JA still applied the first point to the case's facts and concluded that the profits of Tidewater, the subsidiary, were not treated as profits of Waverley. Furthermore, as pointed out by Cooper JA, Waverley was not involved in the specific contract entering process of the business of Tidewater with the Highway construction, which led to the damage.

[860] ibid 119-120.
[861] ibid 121.

If the tests for the relationship akin to employment for vicarious liability provided by the case *JGE* and confirmed by the Supreme Court in *CCWS* can be extended to apply in the corporate group situation, the test of entrepreneur will be the most difficult to satisfy. This is because the determination of a subsidiary company doing business on his parent company's behalf is extremely difficult in modern corporate patterns and relations. Proof of the specific points, as laid out by Atkinson J, is out of the question in most cases. Even if in the Cape group, in which the parent company had extremely close connections with its subsidiaries, the court never firmly removed the separate legal personality of its subsidiary. In *Chandler v Cape*, as we know, Cape Products behaved as a branch in operating the asbestos business of the parent company Cape. However, since Cape Products became a part of an integrated group of companies headed by Cape, it remained the owner of its own assets and handled its own sales and dealings with third parties.[862] Thus, it can never be held that Cape Products was treated as a division or branch. That is why the court established parent company's liability on a basis of tort of negligence, not the doctrine of veil-piercing.

It may not be very difficult to establish that a priest is carrying on his bishop's business, and does his job to further the interests and objectives of his bishop's business. That is because the priest himself cannot be regarded as an entrepreneur in a common sense. However, the situation becomes much more complex in the context of corporate groups, and a subsidiary's behaviour is much more complicated than that of a priest or teaching brothers. It could happen that the subsidiary company loses its separate legal personality as in some cases of veil-piercing, but that will be a rare situation. That will be the main reason why it is possible, but very difficult to realise a relationship akin to

[862] *Chandler* (n 87) [11].

employment between the parent company and the subsidiary company.

5.5.3 Concerns about the enforcement and efficiency of vicarious liability in the group situation

Compared with the corporate law doctrine of piercing the corporate veil which requires some form of illegitimate conduct and the removal of separate legal personality, tort law approaches seem to be more flexible and creative in establishing parent company's liability.

The tort of negligence has been confirmed by the Court of Appeal in the case of *Chandler v Cape,* as an effective cause of action against the parent company for its subsidiary's tort. The establishment of negligence liability on the parent company requires an assumption of responsibility based on the special relationship between the two companies. The concept of control is regarded as the essential element for realising proximity relationship. As indicated in *Chandler v Cape*, the following patterns of control are decisive: the control over the specific asbestos business which leads to the damage, and control over the health and safety policies and issues for the whole group which makes the employees of the whole group rely on the parent company to exercise protections. Referring to the "four-part" test and the discussion of the control concept given by the Court of Appeal, it is not legally contentious to pursue a remedy against the parent company from the point of tort of negligence.

The doctrine of joint tortfeasance based on the multiple defendants' involvements in the same tort, is also very promising in its extension to group situations. The key approach to establishing joint liability in the group situation is discussed from the perspective of justifying reasonable and sufficient participation links (concerted action, procurement, authorization) between different group companies. All the three participation tests for joint tort liability are well accepted in common law and could be expanded to connect the parent company and the subsidiary company for the same tort as well. Based on the research of the relevant cases, the concept of “control” could also be the decisive element, which contributes to establish the parent company’s participation in the commission of the same tort with its subsidiaries. The amount of control should be the crucial basis, on which the participation links rely in the corporate situation. Referring to the conclusion of chapter 4, we get the proposition that the following elements relevant to control are of great help in group cases: the parent company exercises relevant degree of control over the tortious behaviour of the subsidiary, and also has control over the interests or benefits made through the tort or made along with the happening of the tort; the parent company has the power to authorise and control the tortious activities of their subsidiary, and has purported to exercise such power; the parent company can be said to authorise the subsidiary to commit a tort if the parent has some form of control over the subsidiary at the time of the tort being committed.

When considering the possible application of the doctrine of vicarious liability in group cases, it is not difficult to find that the concept of control again becomes a decisive element. For the purpose of establishing a relationship akin to employment between the parent company and its subsidiary company, the element of control is a crucial part to be discussed to meet the tests. However, the requirement of the degree of control for vicarious liability’s extension in group situation would be extremely high. This is because vicarious liability is a category of strict joint liability based on relationship. Although it does not need the participation links, fault involvement, or the requirement of foreseeability of the damage and proximity relationship for duty of care, it needs strict requirements on relationship. Particularly, in order to meet the test of entrepreneur for ascertaining a relationship akin to employment between the parent company and the subsidiary, the level of control over the subsidiary would depend not merely on the control over the specific involvement in the tort, or control over significant shares, it would need the degree of control that destroys separate legal personality.

To discuss this tough question, we can refer to one US statute, The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), under which the US courts are able to create parent company liability for environmental damage caused by its subsidiary's industry.[863] This route has been used by the US courts as an alternative to the doctrine of piercing the corporate veil, which requires losing of separate legal personality and illegitimate conduct.[864] Under the CERCLA, to impose a strict parent company's liability, the US courts try to constitute the parent company as an "owner or operator" of its subsidiary's industry based on specific provisions.

The specific provisions derive from the CERCLA section 107 (a), which imposes liability on:

> (1) the owner and operator of a vessel or a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or

[863] The Comprehensive Environment Response, Compensation, and Liability Act of 1980 (CERCLA 42 US Code) § 9601-9657 (1982).
[864] Hofstetter, 'The Ecological Liability of Corporate Groups: Comparing US and European Trends' (n 665) 99.

> incineration vessel owned or operated by another party or entity and containing such hazardous substances…[865]

In the relevant cases, to establishing the strict liability of the parent company, courts try to prove that the parent and its subsidiary have a very close relationship and the parent exercised massive control over the subsidiary's management and operations and thus constituted an "owner or operator" for purposes of CERCLA.[866] The District Court of Rhode Island in *United States of America v Kayser-Roth Corporation,* noted that a parent company could not be regarded as the "owner or operator" just based on the status of shareholder. However, the facts of pervasive control over its subsidiary company would contribute to the decision, such as the "total monetary control including collection of accounts payable; its restriction on the subsidiary's financial budget; its directive that subsidiary-governmental contract including environment matters be funneled directly through the parent company Kayser-Roth; its placement of Kayser-Roth personnel in almost all the subsidiary company's director and officer position, as means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out".[867] In another famous case *Lowendahl v Baltimore Ohio RR Coporation,* the New York court described the required level of control in the following words:

> Control, not merely majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transactions attacked so that the corporate entity had at the time no separate mind, will or existence of its own.[868]

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865 CERCLA 42 US Code, s 107 (a).
866 *United States of America v Kayser-Roth Corporation* 724 F Supp 15 (DRI 1989).
867 *United States of America* (n 836) [12].
868 *Lowendahl v Baltimore Ohio RR Corporation* 247 App Div 144 (NY App Div 1936) 157.

The above references clearly show that for the purpose of parent company's strict liability for the environmental damage caused by its subsidiary company, the relationship requirement based on the element control is extremely high. It can be assumed that the same type of requirement might be needed in the discussion of the UK common law vicarious liability's extension in group cases.

It is very difficult to find a relationship akin to employment between the parent company and the subsidiary, and subsequently, difficult to avoid the conflict with the corporate law principles of separate legal personality and limited liability. It seems that the doctrine of tort of negligence, and joint tortfesance based on the defendant's participation in the same tort, are more efficient and promising approaches as regards determining the parent company's liability.

5.6 Conclusion

Vicarious liability is not a static concept and has been adjusted over centuries to meet social challenges and needs. It is challenging to create a strict liability mechanism which is fair and just in striking a balance between protecting employers' interests and providing remedies for victims harmed by employer's business.[869] Referring to the extension of this doctrine in recent leading cases, we cannot deny the possibility that the relationship between the parent company and the subsidiary company could be akin to employment for the purpose of vicarious liability. The underlying rationales of vicarious liability may also properly explain the doctrine's extension in group cases, but liability only arise in the condition that the relationship and close connection requirements are all met. The "close connection" test may not be a significant obstacle

[869] *JGE* (n 659) [81].

because the “enterprise risk test”, which is of great help to connect the claimed tort and the relationship between group companies, has been introduced in precedents and enhanced in the recent Supreme Court case of *CCWS*. The risk test, if possible, can explain the close connection between the relationship of the parent and subsidiary company and the torts of subsidiary company such as negligence.

Particularly, the risk test can be met in many group cases related to environmental pollution and personal injury, where the relationship between the parent company and the subsidiary, and the business they carry on together has significantly facilitated the happening of toxic substance exposure which results in severe damage to the subsidiary’s employees or third parties. However, the two-stage tests for vicarious liability belong to one synthetic system. While the “close-connection” test can be well satisfied in proper group cases, the relationship requirement is more contentious in its application in group situations. Similar to the situation of the doctrine of piecing the corporate veil, it will be very rare for a subsidiary company to lose its separate legal personality and carry on business on behalf of the parent company, and therefore, behave as an employee. So, we conclude that there is the possibility that the parent company might be vicariously liable for its subsidiary’s tort in particular situations, where the subsidiary company does business on behalf of, and for the benefit of its parent company. However, the construction of strict liability needs higher relationship requirements. So it is a significant problem whether the court would be willing to overlook the corporate separate personality and make a principled approach.

The discussion of the law relating to vicarious liability cannot be without considerations of different strands of policy reasons and social needs. However, I agree with what Justice Ward said in the case of *JGE*, that, “a coherent development of the law should proceed incrementally in a principled way, not as an expedient reaction to the problem confronting the court."[870] Compared to the tort of negligence, and joint tortfeasance based on defendant's involvement, the parent company's vicarious liability for its subsidiary's tort has significant difficulties in its enforcement and efficiency, and therefore, it is difficult to impose it in a principled way.

[870] *JGE* (n 659) [54].

Chapter 6 Conclusion

The thesis began with the consideration of the parent company's liability for the debts of its subsidiary companies in the context of corporate insolvency. The main problem arises in personal injury cases, in which corporations cause harms to their employees, consumers, and third parties. Claims arise out of the insolvency of the subsidiary company which is not able to provide satisfactory compensation towards relevant tort creditors. Therefore, courts have been trying to look at the possibility of creating parent company's liability for the debts of it's insolvent subsidiary. This research project was motivated by the following elements: the intense relationship between the tort creditors and the defendant companies, the disadvantageous position of tort creditors compared with commercial creditors in pursuing compensation against corporate groups, difficulties of broadening liability beyond individual companies, and the absence of efficient approaches to the parent company's liability in the literature.

It was argued in Chapter 2 that neither the statutory inroad to the principles of limited liability and separate legal personality, nor the common law doctrine of piercing the corporate veil is efficient in dealing with corporate tort problems. Chapter 3 and the subsequent chapters discussed tort law approaches as alternatives to break through the limitations of traditional company law solutions. This thesis took up the challenge to evaluate the well-developed common law principles in establishing corporate liability. Chapter 3 concluded that the principle of tort of negligence would be a proper remedy for corporate tort victims, based on which a parent company's liability could be established. Further, the author sought to make a contribution to the literature on extending liabilities of corporate groups through two other doctrines: the joint tortfeasance and vicarious liability in tort. These latter two approaches are seldom discussed in the literature, and have not been well applied in English case law. Conclusions are made that: (1) the doctrine of joint tortfeasance is quite promising in its extension to deal with corporate tort problems involving multiple legal individuals. The participation tests for the determination of joint liability can be extended to connect the parent company and the subsidiary company for the same tort. (2) Vicarious liability as one category of strict joint liability, has more stringent requirements of relationship and connection between the claimant and the defendant. It might be possible to make the parent company vicariously liable for its subsidiary's tort in particular situations, where the subsidiary company does business on behalf of its parent company and behaves like an employee. However, it cannot be overlooked that the court is reluctant to pierce the veil of corporate personality. Construction of a strict joint liability between a parent company and its subsidiary companies will particularly look at the relationship requirement, which would be rarely capable of proof.

The motivation to evaluate tort law approaches to establishing liability, rests on the limitations in the traditional ways in addressing the problem. Chapter 2 engaged with three prominent and traditional answers to the parent company's liability in corporate groups: the proposal of pro rata unlimited liability, statutory exceptions to limited liability in the Insolvency Act 1986 (section 214), and the common law doctrine of piercing the corporate veil. Assessments of these three approaches revealed the current gaps and the need for alternative answers.

In situations where the parent company is not liable for its subsidiary's debts because the separate legal personality isolates legal individuals in a group and the limited liability principle makes every member liable in a limited amount for its capital investment, legal scholars doubt the limited shareholder's liability for corporate torts. Henry Hansmann and Reinier Kraakman, proposed a regime called "unlimited pro rata shareholder liability" for corporate torts, which suggested that shareholders would be liable for the share of corporate tort debts proportional to their share of equity ownership.[871] Justifications were provided from the aspects of undesirable effect of limited liability on tort claims against companies and benefits of the reform. The unlimited liability regime was argued to be efficient in reducing abusive behaviours in a group structure such as transferring group assets to avoid tort liability. The regime was also believed to be feasible because of its nature of proportionately allocating liability. Tort claimants thus could get recovery while excessive collection of costs would not be imposed on shareholders. Moreover, it would have the effect of deterrence, to prevent the members of a corporate group from behaving without adequate consideration of tort victims. However, concerns of the unlimited liability regime appear to be reasonable. The consequences of removing limited liability are uncertain, and there is a lack of empirical evidence to fully support the supposed benefits. Notably, one consequence could be predicted: the reform of dominating company law principle in this way will definitely threaten investment in industries involving hazardous operations and toxic substance manufacture. In this case, our focus should turn to the development of more feasible and realistic approaches.

Statutory protections consequently attract our attention. Rather than the Companies Act, sections 213 and 214 of the Insolvency Act 1986 carry the main weight of creditors protection in relation to insolvency. Particularly, section 214 is regarded as a statutory provision of piercing the corporate veil, which applies to a director who knew or ought to have known that the company has gone into insolvency at some time prior to the commencement of the winding up, but did not take actions to minimise creditors' losses.[872] The recent development on the interpretation of this section is that, "director", in

[871] Hansmann and Kraakman, 'Toward Unlimited Liability for Corporate Torts' (n 4) 1892-1894.
[872] Insolvency Act 1986, s 214.

this provision can be extended to a shadow director, which should include a parent company when the subsidiary company is accustomed to act according to the directions of the parent company. Section 214 thus can be regarded as an approach to enable contribution by the parent company for its subsidiary company's debts in the winding up. However, this statutory remedy has not been proven as efficient as expected in dealing with group problems and rarely covers the situation of tort claims. This conclusion depends on the inherent defects of section 214 in its enforcement, and inconclusive and inadequate case law on parent companies as shadow directors.

In the first place, it is difficult to succeed in both bringing actions and satisfying the conditions of establishing liability under section 214. The reported cases are few in number because the action should be brought by the liquidator personally who will be liable for any costs incurred. This to a large extent prevents liquidators from bringing actions. In the second place, since section 214 provides no clear instructions on the essential elements for establishing liability, such as the "insolvency time", or "business failure", courts are troubled by technical issues. Particularly, this section lacks specific indications on qualifying a parent company as a shadow director of a subsidiary company. Moreover, it seems that tort creditors, included in the category of unsecured creditors could gain extremely limited compensation in corporate insolvency process. This is all because of the rule of priority in the winding up which decides that lower ranking categories of creditors are to be paid after higher categories.

Compared with the proposal of pro rata unlimited liability regime, and the insolvency law remedies, the judicial inroad of corporate legal personality – the doctrine of piercing the corporate veil is more successful in achieving the parent company's liability for its subsidiaries debts. The concern is that this doctrine is applied in very limited circumstances by English courts and could rarely be extended into tort claims. In general, arguments for veil-piercing that have been listed by English courts are inconsistent and the decision is made on a case-by-case basis: tests for veil-piercing are used interchangeably, or in combination. Courts keep a very formalistic attitude towards the principle of limited liability and separate legal personality, which makes them extremely careful in the veil-piercing cases.

Historical cases show that English courts prefer to pierce the corporate veil when it is found that the company is merely a façade concealing the true facts. The latest case law further narrows the scope of applying the doctrine. Lord Neuberger in *VTB Capital plc v Nutritek International Corp and others,*[873] emphasised that the doctrine of veil piercing should be the last remedy, which was then approved by the Supreme Court's decision in *Prest v Petrodel Resources Ltd* (*Prest*).[874] In the case of *Prest*, the Supreme Court approved that the only circumstance for veil piercing was where the defendant was under an existing legal liability or restriction, and consequently the defendant deliberately evaded the obligation by means of creating a façade company controlled by him.[875] When considering the rule in corporate group context, the modern approaches clearly recognise that the evidence for control or ownership as to the company alone is far from sufficient. Corporate veil is only to be pierced when both control and impropriety are found to exist. But English courts have been reluctant to widen the circumstances in which the veil is pierced, no matter whether in commercial claims or tort claims. In the prominent commercial veil piercing case of *VTB Capital Plc v Nutritek International Corp and others*, the Supreme Court clearly held that the extension of the doctrine would depart from authorities in company law and insolvency law. Lord Neuberger thus rejected the extension of the doctrine to

873 *VTB Capital plc* (n 172).
874 *Prest* (n 173) [35].
875 ibid.

impose contractual liability to a non-party controller.[876] As to tort claims based on the doctrine of veil piercing, the Court of Appeal had previously rejected the arguments for the parent company's liability in the case of *Adams v Cape Industries plc*[877] long before. Furthermore, the latest Supreme Court decision in *Prest* narrows the rule in a more rigid way. If we intend to impose tort liability on the parent company for its subsidiary, as indicated by Lord Sumption's principles, Cape plc has to be under certain legal obligation or subject to an existing legal restriction; besides, the foreign subsidiaries of Cape should be created not for the wealth protection or maybe avoidance of tax, but only to evade Cape's tortious liability.

Moreover, the parent company must has engaged in an improper behaviour of evasion or concealment to avoid tortious liability. The above conditions are very difficult to establish in most corporate group cases. That is why the Supreme Court encouraged lower courts to look for alternative methodologies based on well-developed legal principles, such as the tort of negligence, rather than to be caught in the inconclusive and unsettled doctrine.

In response to the problem of lacking efficient approaches to establishing corporate tort liability, and to the need of providing proper protection mechanisms for unsecured creditors, this thesis aims to evaluate three most relevant tort law approaches. In Chapter 3, the author pointed out that the negligence based mechanism is well-accepted by English courts, as well as in Australia and United States. Such an approach creates direct liabilities for corporate faults in some specific circumstances, and its current applications by courts prove its feasibility.

The reason to consider negligence based remedy is that the nature of tort law

[876] *VTB Capital plc* (n 172) [133].
[877] *Adams* (n 85).

is to protect fundamental human interests and to provide remedies for persons seeking compensation for loss. Tortious liability can be pursued in group context if the elements for a tort liability are all met. A parent company is capable of bearing liability for its insolvent subsidiary company when it is proved that the parent company has jointly or independently committed tortious conducts against an employee of the subsidiary or a third party. Any concern about consistency with the principles of limited liability and separate legal personality subsequently can be ignored. Furthermore, the tort of negligence is the most popular ground in personal injury claims against corporate group members in historical case law. This is because of its flexibility, which makes the tort available for many novel cases.

To assess the efficiency of the tort of negligence in establishing group liability beyond the corporate veil, the author mainly discussed the development and limitations of the negligence-based approach in UK case law, as well as adding comparisons with that in Australian and US cases.

English courts have not provided clear answers about how to establish a parent company's liability in negligence until the appearance of the *Chandler v Cape* case.[878] Before that, most personal injury claims against both subsidiary and parent companies were settled out of court or refused on the ground of *forum non-conveniens*. Even in the early cases,[879] in which claims were brought for parent company's negligence in intervening operations, supervising working processes, or failure in protecting subsidiary's employees when foreseeability of harm was obvious, English courts did not address the claims directly, but just admitted the possibility that the parent company can be involved in the direct negligence based on reasonable control, management, knowledge over unsafe work environment, and participation in devising

[878] *Chandler* (n 87).
[879] *Busisiwe Ngcobo* (n 17); *Connelly* (n 16).

policies for the safety systems of the subsidiary company.

The courts provided some indications of the approach to parent company's negligence liability in two cases in the 2000s. The House of Lords mentioned two issues to be considered in achieving a duty of care in the case of *Lubbe v Cape.*[880] Lord Bingham expressed that the investigation of the special responsibility of the defendant as a parent company for the safety of its subsidiary's employees should be the first issue. Secondly, liability in negligence of the parent company would likely be achieved if a "control" based duty of care were breached. In another case, *Newton-Sealey v ArmorGroup Services Lt*,[881] it was mentioned that apart from the *Caparo* approach, a duty of care could also be induced by a voluntary assumption of responsibility, which required concomitant reliance between the defendant and the claimant irrespective of whether there was a contractual relationship between the parties.

Examples of negligence cases before 2012 illustrate that English courts regarded the tort of negligence as a reasonable approach to make parent companies liable for individuals who also have primary relationship with relevant subsidiary companies. However, the guidance provided by the courts was insufficient.

Since the appearance of the decision of the Court of Appeal in *Chandler v Cape,* clear approaches to negligence liability in this group situation have become available. A negligence liability for group members is normally based on the *Caparo Industries plc v Dickman* three-stage test.[882] The Court of Appeal also assimilated the theory of assumption of responsibility into the requirement for proximity relationship in this prominent case. As the first

[880] *Lubbe* (n 18).
[881] *David Newton-Sealey* (n 313).
[882] *Caparo Industries plc* (n 289).

requirement of the three-stage test, “foreseeability” was not difficult to meet. The relevant facts could be that the parent company was clearly involved in the “design, transfer, set-up, supervising of a hazardous process undertaken in its subsidiary”;[883] the parent company’s obvious knowledge over the business of its subsidiary, or the financial support to the business.

The most difficult and controversial part of the test for duty of care was the establishment of “proximity” relationship between the defendant parent company and the claimant. The finding of a special relationship between the parent company and the subsidiary company based on control, or a special responsibility based on reliance, has been admitted to be the essential ways to establish a proximity relationship, and consequently a duty of care. However, early examples and the latest cases have shown that the explanations for these approaches to negligence liability still lack clarity and may cause future confusions.

One problem relates to the relationship between the test of assumption of responsibility and the proximity within the three-stage test. The confusion is whether the test of assumption of responsibility is able to induce a duty of care in group cases on its own, or it should be included into the second stage of proximity requirement within the three-stage test. As decided by the Court of Appeal in the *Chandler* case, the assumption of responsibility is one element contributing to the proximity relationship, and afterwards, the third stage causation and remoteness are still required to prove. As indicated by Christian Witting, “the assumption of responsibility test is of real relevance in those few cases in which the evidence suggests that the defendant has voluntarily, subjectively assumed a responsibility for certain legal obligations owed to the claimant. In all other cases, the law should focus upon the three-stage test.”[884]

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[883] *Chandler* (n 87) [77].
[884] Witting, *Street on Torts* (n 280) 52.

In the corporate group cases, a clearer explanation with respect to the approach of assumption of responsibility is needed. This demand also comes from the vague interpretation of the element of reliance based on which the special relationship for assumption of responsibility can be achieved.

Another problem is the uncertainty about the degree of control required for establishing a duty of care. The Court of Appeal has broadened the concept of control. It is not necessary to find the parent company's control over the health and policies of the subsidiary; the parent company's involvement in trading operations can lead to a duty of care in specific cases. This explanation in the *Chandler* case is different from that in the early examples and has triggered confusion. This will benefit tort claimants by leaving room for individual case discussions in the future. However, authoritative and consistent explanations are also expected.

Arden LJ, in the *Chandler* case particularly laid out a "four-part" test for determining the parent company's special responsibility for the health and safety of its subsidiary's employees for future purposes. This test on the one hand provides an authoritative approach to parent company's negligence liability and will encourage further tortious claims; on the other hand, it is believed by some commentators to be too descriptive and "Cape specific" as to the facts.

In addition to the UK case law, parent company's negligence liability has been considered and developed in Australian and United States jurisdictions as well. The approaches to liability in these three countries are quite similar and have the same emphasis. The concepts of "control" and "reliance" in contributing to sufficient proximity relationship are regarded as the decisive elements for the success of liability in all of the three countires. The difference lies in different explanations to these essential factors. Australian courts have adopted an extremely rigorous approach in determining the negligence liability. The parent company's domain, pervasive, constant, and controlling influence over the subsidiary is required to find a sufficient proximity. In the US, complexity lies in different interpretations of the concept of "control" in different jurisdictions. The approaches to liability in all of the three countries are still developing. Negligence liability is decided on a case-by-case basis. Courts are not reluctant to impose negligence liability on the parent company if the relevant tests have been met. It still leaves room for future authorities and commentators to provide reasonable and consistent guidance to cover more circumstances.

Apart from the tort of negligence, two other potential solutions to the corporate tort problems, based on tort law, were provided in Chapter 4 and Chapter 5. Chapter 4 explored the possibility of using the doctrine of joint tortfeasance in creating liability in corporate groups. It was argued that the doctrine of joint tortfeasance can be developed as an approach to realise the parent company's liability for the same tort of its subsidiary company. The theory of joint tortfeasance was originally designed for liability determination involving multiple tortfeasors. A third party can be involved in the claimed tort jointly with another wrongdoer by procuring, directing, or authorising the doing of it. It was concluded in Chapter 4 that these participation links to realise joint liability can probably be extended in corporate group cases to make a parent company jointly liable with the subsidiary company. The joint liability in the group situation can be realised by proving reasonable and sufficient participation links between different group members. The links include concerted action, procurement and authorisation, which are all well accepted in common law, and it is possible to connect the parent company and subsidiary for the same tort.

Chapter 4 generally focused on the extension of the tests of concerted action, procurement, and authorisation in corporate group cases. Although there was very few personal injury cases to refer to, some other group cases were however of much relevance, and based on which we can reasonably make an extension. The research then turned to examine what contributes to a parent company's concerted action, procurement, and authorisation that leads to a joint liability. The relevant cases, especially the leading corporate case of *Fish & Fish,* reveal that the concept of control (the extent of control exercised by the defendant joint tortfeasor) should be the decisive element, which contributes to establish the parent company's participation in the commission of the same tort with its subsidiary company. Specifically, the evidence for joint tortfeasance should demonstrate the existence of a parent company's high involvement/active participation in the relevant business or conduct of the subsidiary, which should also provide reasonable causation between the parent company's controlling behaviour and the happening of the tort.

Based on the group cases like *MCA Records Inc v Charly Records Ltd*,[885] we can also conclude that if a parent company acted beyond its role to procure, direct or authorise a subsidiary's tortious act that leads to the claimant's damage, a joint liability can be found to exist. This extension is made on the procurement test that if a director or shareholder has authorised, directed or procured the tortious act, he would be held jointly liable. According to the case of *MCA Records*, the "director" here can be extended to a shadow director, or even the individual who does not hold the director position at all.

As to the test of authorisation, extension can also be made for corporate group cases. This can be justified based on Paul Davies's book of *Accessory liability*: the failure to prevent causation of damage would be equivalent to authorisation when the parent company enjoys some degree of control over the primary

[885] *MCA Records Inc* (n 584).

tortfeasor. The case of *Chandler v Cape*[886] will be the best illustration to hold a parent company jointly liable with its subsidiary company based on this theory.

Particularly, on a basis of several leading cases like *CBS Songs v Amstrad Consumer Electronic plc,*[887] *Moorhouse v University of New South Wales*,[888] and *RCA Corporation v John Fairfax & Sons Ltd*,[889] the author extracts five elements which have been proposed in these cases to establish joint liability, and extended by the author into the relationship of the parent and subsidiary company. The following elements are expected to provide an indication relevant to the extension of the authorisation test in group situations: (1) the parent company exercises relevant degree of control over the tortious action (activity) of the subsidiary, or the parent company has some benefits from the tortious activity; (2) the parent company has the power to authorise and control the tortious activities of their subsidiary, and has any purported exercise of such power; and might have granted the subsidiary the right to commit the tortious activity; (3) the tort is committed by the means that the subsidiary is under certain degree of control; (4) the parent company makes the business available to the subsidiary, with knowledge or having reason to suspect that it is likely to lead to tort commission; or (5) the parent company can be said to authorise the subsidiary to commit a tort if the parent has some types of control over the subsidiary at the time of the commission of the tort.

English courts have not applied the doctrine of joint tortfeasance in personal injury claims against a parent company. In the case of *Chandler v Cape plc*,[890] the claimant brought an action based on the theory of joint liability, but this issue was circumvented by the court. Fortunately, this possibility was not declined by the court, and the advantage of this remedy is that the tests for joint

886 *Chandler* (n 87).
887 *CBS Songs* (n 575).
888 *Moorhouse v University of New South Wales* (n 626).
889 *RCA Corporation* (n 634).
890 *Chandler* (n 87).

tortfeasance permit courts to look behind the concept of concerted action, procurement, and authorisation, and to figure out the substance of the defendant's conduct.

In Chapter 5, the author considered the possibility of parent company's vicarious liability for its subsidiary company's tort. Vicarious liability belongs to the system of joint liability, and is also one category of strict liability. As one way to achieve joint liability, this theory makes one strictly liable for the torts of another based on the relationship but not the existence of fault. As a special category of joint liability to provide a solution where it is difficult to find a personal duty, the theory of vicarious liability thus deserves further consideration. Recent UK case law has revealed that the boundary of vicarious liability has been broadened, and this chapter argued that it is time to consider whether a legal person can be vicariously liable for another legal entity's tort. The research was then divided into two general segments. In the first part, the author considered whether the leading justifications for the existence of vicarious liability can well explain its extension in corporate group cases. In the second part, the author discussed the possibility of vicarious liability's tests being applied in group situations.

It can be concluded that the underlying rationales of vicarious liability are altogether able to explain the theory's extension in group cases, but liability should be conditioned on the relationship and close connection requirements being met. That is because not a single rationale can perfectly explain the theory, and the courts have drawn the thread that vicarious liability should be justified on the basis of a combination of all the rationales. Particularly, the consideration of rationales is from the perspective of social and policy grounds, so the rationales alone cannot justify the existence of vicarious liability, but contribute to explain the rationality when the tests for liability are satisfied.

However, not all the relevant policies are in favour of the theory's application in group cases. One prominent problem is that it is very difficult to say that the realisation of vicarious liability for a company's tort does not contradict the policy of limited liability. If a company behaves as an employee of its parent company, it will definitely lose its corporate personality, because as an employee, this company should do business totally for the benefits and objectives of its parent company. A legal person is not equivalent to a natural person, and the purpose of creation of a legal person is not to make it behave like a natural person but to give it some "features" like a natural person. In practice, it is extremely difficult to determine that a company loses its corporate personality, and this is one hurdle to realising the parent company's vicarious liability.

As to the application of the two-stage test for vicarious liability in the group situation, it is concluded that while the "close-connection" test can be well-satisfied in proper situation, it is still extremely difficult to meet the relationship requirement. Even though in recent leading cases, the Supreme Court has broadened the test in a way that a relationship "akin to employment" but without a real contract relationship will suffice, it is difficult to prove the relationship "akin to employment" between the parent company and the subsidiary company. One reason provided by the author is that the test of entrepreneur for ascertaining a relationship akin to employment can rarely be met. This is because this test examines whether the person is in business on his own account. However, in a real group relationship, it will be a rare moment that a subsidiary company loses its separate legal personality and carries on business on its parent company's behalf, and behaves as an employee. Another reason is that the requirement of "akin to employment" in a parent-subsidiary relationship will drag the discussion back to the same problem faced by the enforcement of the doctrine of piercing the corporate veil. The courts again are worried about its conflict with the corporate law principles of limited liability and separate legal personality.

Particularly, emphasis should be given to the issue of “control”, which is central to the determination of parent company’s negligence liability, joint liability and the discussion of vicarious liability.

The element of control is considered as decisive in constructing a direct duty of care of the parent company to its subsidiary companies’ employees, or to third parties affected by the tortious acts of the subsidiaries. The central question is what degree of control can lead to a sufficient proximity relationship for a duty of care. It could be generally concluded that, to establishing a duty of care, there should be a tight causal link between the level and format of control exercised by the parent company and the claimed damage. A majority shareholding, or a complete control is not strictly required by English courts. Recent corporate tort claims provide us an opportunity to draw out some specific and practical guidelines on the extent of “control”, based on which a duty of care can be reasonably established.

In *Chandler*’s case, the parent company Cape had ultimate control over the health and safety polices and measures which were taken to protect the claimants from the risk of exposure to asbestos. This degree of control, as held by the Court of Appeal, is sufficient to construct a special relationship for a duty of care. In the case of *Vedanta*, the parent company exercised a high level of control over the subsidiary company KCM’s mining operation and infrastructure, which gave rise to the damage to the community citizens. In the case of *Okpabi*, the parent company RDS had no specific control over particular operation which led to, or had a close connection with the damage. The fact that RDS issued mandatory policies across the Shell group, was not enough in the opinion of the majority of the Court of Appeal. SPDC, as the subsidiary company retained autonomy with respect to the imposition of those group policies and practices. The court required proof of active involvements in the subsidiary company's operation.

To draw a brief conclusion, as considered by English courts in recent corporate tort cases, the level or format of control that would satisfy a proximity relationship for a duty of care should be: (1) the parent company has a high level of control over the measures and policies (for example, the health and safety policies) which are taken to protect the claimant from the risk of suffering the damage; (2) the parent company exercises control over the subsidiary's material or specific operation, which give rise to the harm. It should be noted that the mere fact that the parent company issues general and mandatory requirements and policies across all subsidiary companies is not very enough to construct a duty of care; (3) the parent company has intensive and day-to-day control over the management of the subsidiary company.

When considering establishing the parent company's joint liability with its subsidiary companies, the element of control is also a crucial basis upon which the participation links (concerted action, procurement, and authorization) are forged in corporate cases. The parent company's control is one of the entry points to find "concerted action" and "authorization".

To demonstrate that the parent company has concerted action with the subsidiary, in accordance with *Amoco Cadiz*, the author summarises following factors which are helpful: (1) the parent company exercises domination control; (2) the parent company exercises specific control over the design, construction, operation, and management of a project of the subsidiary which gives rise to the damage.

Based on the cases of *CBS Songs*, *Moorhouse v University of New South Wales*, and *RCA Corporation v John Fairfax & Sons Ltd*, the author drew out some propositions involving control, which are helpful to establishing the authorisation link for joint liability. They are : (1) the parent company exercises a relevant degree of control over the tortious action (activity) of the subsidiary, or the parent company obtains some benefits from the tortious activity; (2) the parent company has the power to authorise and control the tortious activities of their subsidiary, and initiates any purported exercise of such power; and might have granted the subsidiary the right to commit the tortious activity; (3) the tort is committed by the means that the subsidiary is under a certain degree of control; (4) the parent company makes the business available to the subsidiary, with knowledge or having reason to suspect that it is likely to lead to commission of a tort; or (5) the parent company can be said to authorise the subsidiary to commit a tort if the parent has some types of control over the subsidiary at the time of the commission of the tort.

As regard to the establishment of vicarious liability, the test of control is also considered as one of several essential tests for determining the relationship "akin to employment" in the current legal practice. According to the recent leading case *JGE v English Province of Our Lady of Charity*, the test of control could be understood in a wider way. It is to "examine the degree to which the employer is accountable to the employee, or to what extent he is subject to the managerial procedures of the employer in relation to such matters as quality of work, performance, and productivity etc."[891]; and to examine "the degree of managerial control which is exercised over the activity and this may depend on how far a person is integrated into the organization of the enterprise."[892] This is a new way of evaluating an employment relationship for determining vicarious liability and its extension in corporate group cases.

The concept of control, as summarised above, plays a central role in

[891] ibid [72].
[892] ibid.

determining negligence liability, joint liability, and vicarious liability in corporate group cases. The requirements of the level and format of control for establishing those liability are different, and vary depending on the facts of every single case. There is no fixed standard to measure the required level of “guilty control” to establishing the liability. However, we can make one general conclusion that it would be reasonable to find liability if there is a clear causal connection between the performance of control of the parent company and the subsidiary’s torts that lead to the claimed damage.

The final conclusion would be that, compared with the remedies based on the tort of negligence and joint tortfeasance based on the defendant tortfeasor’s participation, the theory of vicarious liability has potential shortcomings as a principled approach. It might be possible that the parent company is vicariously liable for its subsidiary’s tort in special circumstances where the subsidiary behaves as an employee and carries on business on behalf of its parent company. However, this will be extremely rare. Therefore, it is recommended in this thesis that the tort of negligence and joint tortfeasance in corporate group cases be further developed, to cover more novel circumstances such as some personal injury cases against the parent company. Because the company law doctrine of piercing the corporate veil still has a degree of uncertainty, more appropriate solutions are expected, not only for the remedy of corporations’ unsecured creditors, but also for the maintenance of dominant corporate law principles and for the balance between corporate responsibilities and unsecured creditors’ protections. Tort law approaches will provide the answer.

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