JAMES HARDIE AND THE DEVELOPMENT OF PARENT COMPANY LIABILITY: NEW ZEALAND AS A FORUM FOR TRANSNATIONAL HUMAN RIGHTS LITIGATION?

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Abstract

Recent jurisprudence in the United Kingdom and Canada has recognised the possible liability of parent companies for the tortious activity of their subsidiaries domiciled in foreign jurisdictions. "Parent company liability" is thus becoming a litigious avenue through which victims might seek effective legal redress for corporate human rights abuses. In 2019, the New Zealand Court of Appeal (NZCA) endorsed the emerging jurisprudence on parent company liability in the James Hardie litigation. This article critically discusses the decision of the NZCA against the wider global context of corporate impunity for human rights abuses. It examines the recent case law across Australia, the United Kingdom and Canada and the role of internal corporate structures and policies as evidence of a proximate relationship between the parent and subsidiary. It then critically discusses three key policy concerns with the endorsement of parent company liability in New Zealand. Ultimately, this article concludes that the NZCA decision does not represent a dramatic extension of tortious liability, but it does open the doors to a novel form of transnational human rights litigation on New Zealand shores. Overall, the recognition of parent company liability reconciles tort law with the field of 'business and human rights', which has long seen the need to develop stronger mechanisms of legal accountability for corporations operating transnationally.

I. Introduction

Holding multinational corporations accountable for complicity in human rights abuses is an immense legal challenge in the globalised world.[1] In the absence of

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1 Peter Utting "The Struggle for Corporate Accountability" 39 Dev Change 6; and Cedric Ryngaert, "Accountability of Multinational Corporations for Human Rights Abuses" (2018) 14 Utrecht Law Review.

any overarching regime governing the human rights obligations of businesses, human rights defenders have frequently turned to the law of tort in search of legal remedies.[2] The emerging jurisprudence of "parent company liability" is one such tort law mechanism that may increasingly be used to provide victims of human rights abuses with effective legal redress.[3] Parent company liability is a form of direct, rather than vicarious, liability for wrongdoing. However, its application in common law jurisdictions is not without controversy. After the New Zealand Supreme Court endorsed parent company liability in *James Hardie v White* (2019), commentators deemed it a "corporate governance watershed", engendering new challenges for companies operating within complex group structures.[4]

This article critically discusses the trend of parent company liability, and the reasoning of the New Zealand Court of Appeal (NZCA) in the *James Hardie* proceedings, against the wider global context of corporate impunity for human rights abuses. It is broken into three substantive sections. Section II outlines some challenges with attributing appropriate accountability to members of a corporate group, and the limits of current initiatives regulating business and human rights. Section III canvasses the key developments in parent company liability as a pathway to corporate accountability across Australia, the United Kingdom and Canada. Section VI then explains and critically discusses the *James Hardie* proceedings and three key policy concerns that may arise with the endorsement of parent company liability in New Zealand.

Ultimately, this article argues that the decision of the NZCA in *James Hardie* is not a dramatic or surprising extension of tortious liability, nor does it undermine the principles of separate legal personality and limited liability. Rather, the decision was based on an established area of negligence liability, and represents a positive development for the future of human rights litigation in New Zealand.

2 Surya Deva *Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities* (A Working Paper of the ESCR-Net & FIDH Treaty Initiative, 2015); and Liesbeth FH Enneking *Foreign Direct Liability and Beyond: Exploring the role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing, The Hague, 2012).

3 Elizabeth Brumby "Parent company liability in extractive industries: A new frontier for business and human rights" (2018) 36 C&SLJ 185 at 185.

4 *James Hardie Plc v White* [2019] NZSC 39, endorsing the decision in *James Hardie Plc v White* [2018] NZCA 580; and Simpson Grierson "The James Hardie Litigation: A Corporate Governance Watershed Looming" (2019) LawFuel <www.lawfuel.com>.

II. The Global Context: Governing Multinationals and Human Rights

Though multinational corporations (MNCs), or "corporate groups", have emerged as new duty-bearers on the world stage, the state-centrism of international law remains a hurdle to enforcing international obligations directly on private corporations.[5] The legal liability of companies is still predominantly seen as an issue for domestic law. However, at the domestic level, the corporate form often "facilitates the avoidance of appropriate accountability".[6]

A. The Corporate Form

A cornerstone of corporate law, both globally and in New Zealand, is that a company has its own legal personhood.[7] This was confirmed in the United Kingdom in the seminal case of *Salomon v Salomon & Co Ltd*.[8] Under the *Salomon* principle, the law treats a company as a distinct legal person, capable of holding many of the rights and bearing some of the duties of natural persons. Essentially, there is a "veil" between the shareholders and company officers, and the company carrying on the business.

However, this veil does not allow companies to be used for "sham" transactions.[9] Where the corporate form is clearly being abused for fraudulent purposes, judges have been willing to peer behind the corporate veil or even to ignore it altogether.[10] This is termed "lifting" or "piercing" the veil.[11] In New Zealand and abroad, Courts have been willing to lift the corporate veil in commercial cases in order to pool the assets of related companies, particularly where a parent company owns most

5 Surya Deva "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who should 'Bell the Cat'?" (2004) 5 Melb J Int Law 37–49; and John Gerard Ruggie *Just Business: Multinational Corporations and Human Rights* (WW Norton, New York, 2013) at xx. Also called Multinational Enterprises (MNEs), Transnational Corporations (TNCs) and "Corporate Groups". They are somewhat interchangeable. This Article has opted for the terms "MNCs" and "Corporate Groups".

6 Office of the High Commissioner of Human Rights *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc HR/PUB/11/04 (2011) at 30. See also: *Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies* (Report prepared for the Office of the High Commissioner of Human Rights, Independent Expert Study, commissioned May 2013) at 1.

7 Companies Act 1993, s 15.

8 Salomon v Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22.

9 Susan Watson "Corporate legal personality" in Susan Watson, Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, New Zealand, 2018) at 4.6–4.7; and *Jones v Lipman* [1962] 1 WLR 832 at 836 per Russell J.

10 Watson, above n 9, at 4.6.3.

11 At 4.6.4.

or all shares in its subsidiaries.[12] However, in New Zealand this is often limited to liquidation situations and done for the payment of voluntary creditors. The more drastic move of piercing the corporate veil only occurs in an exceptional and "irrational" array of circumstances.[13] Relying on the haphazard concept of veil-piercing is therefore often an ineffective litigation strategy for claimants seeking redress directly against the parent company.[14]

Alternatively, a limited number of cases across New Zealand and the United Kingdom have recognised the personal liability of company directors for torts committed in their capacity as directors.[15] Otherwise stated, the Courts attach tortious liability directly on the person behind the company rather that the company itself, thus avoiding the separate corporate personality rule. This can occur where the company director has held him or herself out as having expertise and has made a negligent misstatement, which the tortious victim then relies upon to their detriment.[16] However, the leading cases in New Zealand both involved one-person companies.[17] By contrast, large MNCs often operate through multiple layers of management. This may make it difficult for tort claimants to prove that they had directly relied on the statements or expertise of the parent company's directors in order to impose personal liability on them. More importantly, in many class-action tort cases it is the *company* claimants feel wronged by, rather than individual directors. Thus, where torts are committed by large MNCs, parent company liability, rather than the personal liability of company directors, is likely to be more satisfying to tort victims. This is especially true in cases where the tortious activity has been occurring for many years under the auspices of the parent company, during which time the constellation of the company's board membership may have undergone multiple changes.

12 At 84: "The courts have sometimes demonstrated a willingness to look upon a group of companies as one economic unit"; and Companies Act 1993, s 271.

13 LCB Gower and P Davies *Principles of Modern Company Law* (6th ed, Sweet & Maxwell, London, 1997) at 138.

14 Gwynne Skinner, Robert McCorquodale and Olivier De Schutter *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (European Coalition for Corporate Justice (ECCJ), December 2013) at 21. Interestingly, an empirical study of Australian veil-piercing cases up to Dec 1999 found that it is less likely to be employed in parent-subsidiary cases compared to cases involving only one or more individual shareholders: Ian M Ramsay and David B Noakes "Piercing the Corporate Veil in Australia" (2001) 19 C&SLJ 250–264. See also Paddy Ireland "Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility" (2010) 34 Camb J Econ 837.

15 For example, see: *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517; *Body Corporate 202254 v Taylor* [2008] NZCA 317; and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. In New Zealand, company directors can also be held personally liable to creditors under s 9 of the Fair Trading Act 1986.

16 Charles Mitchell "*Tort Liability of Company Directors*" 9 KCLJ 131 (1999) at 131.

17 See the *Trevor Ivory*, *Taylor* cases, above n 15; and Mitchell, above n 16. Both cases concerned a one-man company where the director allegedly made a negligent misstatement to the detriment of people relying on the services of their company.

Today, the corporate veil has become almost synonymous with the doctrine of limited liability. However, they are distinct concepts. Limited liability states that a company's shareholders are only liable to the value of their original capital investment, thus shifting the risk of loss when a company becomes insolvent from its shareholders to its creditors.[18] In a simple company (that is, one with a small number of share-holding investors, who are natural persons) limited liability insulates shareholders from being personally liable for debts incurred by the company. The rationale for this rule is that it promotes positive economic activity by separating out the reward from the risk for investors.[19] The New Zealand Companies Act 1993 reaffirms in its purpose section the "value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk and the taking of business risks".[20]

B. Ring-fencing Legal Liability: The Real Abuse of the Corporate Form

The development of limited liability has been deemed "the final stage of the Industrial Revolution," precipitating a paradigm shift for the way businesses operated worldwide.[21] The twin pillars of limited liability and separate legal personhood allowed MNCs to structure their businesses on a truly global scale. The MNC can now organise itself so that liability from its activities fall on one member of the group alone, while the rest are shielded from its debts and liabilities.[22] This is a far cry from the simple company in *Salomon*.[23] Parent companies in corporate groups are qualitatively different from the investor-shareholders of simple companies who tended to remain separate from management.[24] In these structures, parents may retain a significant degree of control or oversight over the activities of their subsidiaries. Stated simply, it is often merely a "convenient fiction" that units of multinationals are really separate companies.[25] In spite of this, the *Salomon* principle is so entrenched in judicial consciousness that, in the words of Lord

18 *Salomon*, above n 8 at s 97(1).

19 Watson, above n 10 at 2.2.2, and 22; Peter Edmundson and James Mitchell "Knowing Receipt in Corporate Group Structures" (2005) 23 C&SLJ 515 at 529.

20 *Salomon*, above n 8, Long Title.

21 Alexander Fallis "Evolution of British Business Reforms: A Historical Perspective" ICAEW Market Foundations (2017) at 16.

22 Marilyn Warren "Corporate Structures, the Veil and the Role of the Courts" (2016) 40 MULR 657 at 668.

23 At 669.

24 Helen Anderson "Piercing the Veil on Corporate Groups in Australia: The Case for Reform" (2009) 33 MULR 333.

25 The Economist "The Superstar Company: A Giant Problem" in *Leaders Edition* (17 September 2016).

Templeman, it is has become an "unyielding rock" on which complex arguments get "shipwrecked".[26]

Some academics have queried the application of limited liability to corporations holding shares in other corporations, saying this carried the doctrine "unthinkingly beyond the original objective" of insulating investors from debts.[27] These dissenters have challenged the assumption that the benefits of limited liability should be automatically available to parent companies who retain a significant shareholding in, and control over, their subsidiaries.[28] It has been argued that the proposed economic advantages "simply become irrelevant" when transposed from the protection of investors in a simple corporation, to the protection of corporate investor-shareholders in the upper tiers of a multi-layered corporate group.[29] Rather than encouraging positive entrepreneurial risk-taking to the economic benefit of society, it can enable corporate negligence and corner-cutting. When limited liability is applied to multi-layered corporate structures, it "ring-fences" corporations from legal culpability for harmful activity in the wider enterprise, even where they may have played a not-insignificant role in such activity.[30] As a result, human rights scholars have deemed the limited liability of the parent company "one of the largest barriers to victims seeking accountability … for human rights abuses abroad".[31]

Notably, in 1986 Phillip Blumberg expressed serious concerns with the increasing application of the principle to corporate groups. He argued that the insulation of limited liability would generate situations where victims could not seek redress against MNCs for "torts of a magnitude and widespread impact [that was] unimaginable a few years ago".[32] In his view, the combination of multinational corporate groups and complex torts called for a "re-examination of the application of limited liability to corporate groups".[33] Decades later, Peter Muchlinski echoed similar concerns. He suggested that the legal principles of limited liability

26 Lord Templeman "Company Law Lecture – Forty Years On" (1990) 11 Company Lawyer 10 at 10.

27 Phillip Blumberg "Limited Liability and Corporate Groups" (1986) 11 J Corp Law 573 at 575.

28 Warren, above n 22.

29 In 2001 Professor Ian Ramsay and David Noakes observed that the traditional economic justifications for limited liability, for example, shareholders no longer needing to monitor management, promoting the open transfer of shares and allowing diversification, have limited to zero application to parent companies: Ramsay and Noakes, above n 14.

30 Simpson Grierson (Unnamed Commentator), above n 4; and Skinner, above n 15.

31 Skinner, above n 14 at 21: In trans-national tort cases, parent companies can also rely on the doctrine of *forum non conveniens* by arguing that the forum in which the alleged torts occurred is the most appropriate forum for the trial, which tends to impose an extra jurisdictional hurdle on plaintiffs. This legal issue is not covered in this article. On the jurisdiction issue, see: Ekaterina Aristova "Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction" (2018) 14 Utrecht Law Review 6.

32 Blumberg, above n 27, at 577. He specifically referenced instances of dangerous products produced, marketed and sold by MNCs that impaired the health of large classes of workers and consumers.

33 Blumberg, above, n 27.

and separate corporate personality could create injustices in cases of harm to involuntary creditors, through "externalising risks that ought to be internalised by the enterprise, as the better risk taker".[34]

However, despite ample warning from academics, a deep re-examination of the application of these "bedrock" principles to multinational corporate groups has not yet taken place in the business or legal spheres. Anglo-American Courts have not appeared willing to pause and return to a "first principles analysis" of the supposed benefits flowing from the application of limited liability to corporate groups.[35] Meanwhile, MNCs continue to perpetrate, or become complicit in the perpetration of, complex torts rising to the level of human rights abuses in the host states within which they operate through subsidiaries.[36] In the extractive industries, MNCs often carry on business in conflict-ridden regions, risking complicity in human rights abuses committed by the host-state security personnel.[37] Mismanaged transnational mining and extraction activities often spell environmental disaster for local communities in developing countries.[38] Furthermore, MNCs continue to outsource production to jurisdictions that lack strong labour protections, thus frequently becoming complicit in a wide range of human rights abuses caused by slave-like employment contracts and sweatshop working conditions.[39] As Jonathan Clough poignantly stated, there is one set of standards for MNCs in their home states, "but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries".[40] The ability of MNCs to benefit from tortious activity and human rights abuses occurring offshore, while avoiding civil liability, is a use of foundational company law principles that is arguably unsupported by the economic rationale that justified the development of these principles in the first place. Ultimately, it is an abuse of the corporate form.

34 Peter Muchlinski "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 Camb J Econ 915, at 924.
35 Warren, above n 22, at 670.
36 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31 (21 March 2011) Annex art II. Also see: Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy* (Amnesty International, London, 2014) at 117–118.
37 Rae Lindsay "Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles" (2013) 6 JWEL&B at 2.
38 David Hill "Canadian Mining Doing Serious Environmental Harm, the IACHR Is Told" *The Guardian* (London, 15 May 2014).
39 Also see: Corinne Goria (ed) *Invisible Hands: Voices from the Global Economy* (McSweeneys Books, San Francisco, 2014).
40 Jonathan Clough "Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses" (2008) 33 Brooklyn J Intl L 899 at 899.

C. Imposing Accountability: The Limits of Current Mandatory, Voluntary and 'Soft Law' Initiatives

In light of the domestic hurdles to imposing accountability on MNCs for complicity in human rights abuses, an array of mandatory, voluntary, and soft law initiatives have arisen. International Human Rights lawyers have traditionally favoured the "mandatory" approach of crafting a legally binding international treaty.[41] In 2014, the UN Human Rights Council adopted *Resolution 26/9* establishing a new intergovernmental working group (called the Corporate Accountability Working Group (CAWG)) tasked with drafting an international legally binding instrument to regulate multinational corporations.[42] In a Briefing Paper to the working group, Surya Deva suggested that a Treaty regime could incorporate the "Principle of Enterprise Liability" or raise a "Rebuttable Presumption about the Liability of a Parent Company" to overcome the barriers of the corporate form.[43] Deva suggested that the treaty could "encourage states to recognise all companies of a group as one 'enterprise' for the purposes of litigation involving human rights".[44]

The CAWG released the first draft of a business and human rights treaty in 2018, and two revised versions in 2019 and 2020.[45] Though a promising development, international treaties can take decades to negotiate and finally enter into force.[46] Moreover, the recent version of the Draft has been criticised for failing to provide a clear, effective path to legal remedy for victims of human rights abuse.[47] Unsurprisingly, it has also received pushback from the business community, which has historically favoured voluntary measures over mandatory legal regimes.[48] The argument for a voluntary approach rests on the belief that the market mechanisms of investor and consumer behaviour can provide

41 Ruggie, above n 8, at xxxiii.

42 *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc E/CN.4/RES/2005/69 (20 April 2005).

43 Surya Deva, *Briefing Paper for Consultation: Parent Company Liability* ESCR-Net & FIDH Joint Treaty Initiative Project (2015).

44 At 3 and 4.

45 Latest Version: *Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (OEIGWG Chairmanship Second Revised Draft, 6 August 2020).

46 Ruggie, above n 8, at xxii. Also see Frances Williams "Interview Transcript: Louise Arbour" *Financial Times* (London, 9 January 2008), where Arbour, then UN High Commissioner for Human Rights, states that it would "be frankly very ambitious to promote only binding norms considering how long this would take and how much damage [to victims] could be done in the meantime".

47 See: John Ruggie "Opinion: Comments on the 'Zero Draft' Treaty on Business and Human Rights" *Business and Human Rights Resource Centre* (20 Aug 2018).

48 See: Joanna Kyriakakis "The Debate about having a debate about a business and human rights treaty" (17 February 2015) Castan Centre for Human Rights Law <http://castancentre.com>.

disincentives for unethical or negligent corporate activity.[49] The Corporate Social Responsibility (CSR) movement is firmly set within the parameters of the voluntary approach. CSR advocates encourage MNCs to voluntarily internalise human rights standards through non-binding codes of conduct.[50] Today there are several global CSR initiatives, the 1999 UN Global Compact being the largest, with over 12,000 signatories in 160 countries.[51]

While the uptake of CSR initiatives is not yet universal, it is rare for an MNC today to not have some form of internal self-regulation concerning human rights, either through due diligence policies, supply chain monitoring, or internal codes of conduct.[52] However, critics of the voluntary approach have argued that CSR initiatives have not translated into effective forms of redress for victims of corporate complicity.[53] There is also a risk that voluntary measures relying on the goodwill of the corporation can become "camouflage", delaying real reform.[54] At the end of the day, it is argued, for-profit enterprises will not regulate themselves into competitive disadvantage.

Sitting partway between the mandatory and voluntary initiatives are a number of soft law standards developed to pressure MNCs to comply with international human rights.[55] So far, the most significant and wide-reaching of these has been the "Protect, Respect, and Remedy" Framework crafted by Secretary-General John Ruggie at the request of the UN Office of the High Commissioner on Human Rights.[56] The Framework is comprised of the following three pillars:[57]

> I. States have a duty to protect against human rights abuses committed by third parties, including business enterprises;
>
> II. Business enterprises have a responsibility to respect human rights; and

49 Eric Engle "Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?" (2008) 40 Willamette L Rev 103 at 3.

50 For example, see: Kimberley Process <www.kimberleyprocess.com>; the Extractive Industries Transparency Initiative <https://eiti.org>; and see Voluntary Principles on Security and Human Rights <www.voluntaryprinciples.org>.

51 See: UN Global Compact "Who we are" <www.unglobalcompact.org>.

52 A recent study found that the majority of publicly listed oil and gas companies have adopted human rights policies, either independently or combined with wider CSR policies: Lindsay, above n 38.

53 Deva, above n 43.

54 At 8.

55 For example, see: Organisation for Economic Cooperation and Development (OECD) *OECD Guidelines for Multinational Enterprises 2011 Edition* (OECD Publishing, Paris, 2011).

56 Office of the High Commissioner of Human Rights, above n 6.

57 *Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights* UN Doc A/HRC/8/5 (7 April 2008) (emphasis added).

III. Victims of business-related human rights abuses need access to effective remedies.

This Framework laid the groundwork for the UN Guiding Principles on Business and Human Rights (UNGPs), which were unanimously endorsed by the UN Human Rights Council in June 2011. The UNGPs were the first guidance on the subject of Business and Human Rights that the Human Rights Council adopted. Their adoption was also the first time that the Council had endorsed a normative text which governments had not negotiated themselves.[58] Nevertheless, the UNGPs remain soft law and, as such, are not legally binding and suffer many of the same limits of voluntarism. Clearly, other pathways to corporate accountability through the black letter of the law are needed.

III. Parent Company Liability as a Pathway to Corporate Accountability

A small but growing number of claims have been brought against parent companies for the human rights abuses of their foreign subsidiaries via the duty of care principle under the tort of negligence.[59] In these cases, claimants have used the company's internal governance structure, risk management strategies, codes of conduct, and publicly expressed commitments to voluntary and soft law initiatives, as evidence that the parent company assumed a duty of care towards them.

There are significant advantages to suing a parent company under the tort of negligence for human rights violations. In many cases, the judicial system of the host state where the subsidiary is incorporated may not be able to provide victims access to effective legal redress.[60] The host state may be unwilling to investigate alleged abuses, or even be complicit in them. The parent may also be a source of compensation to victims where a subsidiary lacks financial resources.[61] Under tort, compensatory and general damages can be awarded for personal injury and property damage, or loss of property, economic interests, and liberty.[62] Furthermore, though

58 Ruggie, above n 8, at xx.
59 Madeleine Conway "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40 QLJ at 742. While previously, claims were taken in tort against US-domiciled parent companies under the Alien Tort Claims Act (ACTA) 1789, the efficacy of transnational human rights litigation under ACTA remains uncertain. See the decision in *Kiobel v Royal Dutch Petroleum Co* (2013) 133 S; and see Roger P Alford "The Future of Human Rights Litigation after Kiobel" (2014) 89 Notre Dame L Rev 1749.
60 Skinner, above n 14 at 9.
61 Helen Anderson "Piercing the Veil on Corporate Groups in Australia: The Case for Reform" [2009] 33 MULR 333.
62 See Bill Atkin "Remedies" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016).

the principal purpose of compensatory damage is to remedy the loss, a finding of liability in tort can also "vindicate a victim's right to be free of the interference complained of".[63]

A finding of liability in the duty of care rests on well-established legal tests and principles. In the seminal English case of *Anns v Merton (Anns)* Lord Wilberforce espoused the following two-stage examination:[64]

> (1) First ask whether between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that it gives rise to a prima facie duty of care, and that in the reasonable contemplation of the former, their actions are likely to cause the latter damage.
>
> (2) Secondly, it is necessary to evaluate general considerations of policy which might necessitate reducing the scope of liability.

New Zealand courts employ a duty formula involving a two-step internal/external inquiry broadly similar to that in *Anns*.[65] The first stage considers issues of foreseeability and proximity, and at the second stage Courts will ask whether it is fair to impose a duty of care with regards to "the effect on non-parties and on the structure of the law and on society generally".[66] This leaves scope for the courts to reject imposing a duty of care for reasons of public policy. The Canadian approach is similar to that of the United Kingdom and New Zealand, the *Anns* test being affirmed by the Supreme Court of Canada.[67] However, the High Court of Australia deviated from the both the *Anns* approach in *Perre v Apand*, where all but one judge rejected the salience of any proximity criterion.[68]

However, after the *Anns* decision, the United Kingdom courts struggled to constrain potential categories of liability, particularly for cases where the claimant suffered economic loss un-associated with physical damage or personal injury, and cases concerning the acts and omissions of public authorities.[69] In the fallout

63 At 1306.
64 *Anns v Merton London Borough Council* [1078] AC 728.
65 Stephen Todd *The Law of Torts in New Zealand* (8th ed, Thomson Reuters, Wellington, 2019) at [5.2.03]. See this section for fuller explanation of the internal and external stages of the inquiry.
66 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, at [294] per Cooke P; and *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324, at [58] per Glazebrook J; and at [156] per Blanchard J.
67 See *Kamloops (City of) v Nielson* [1984] 2 SCR 2 (affirmed again by the Supreme Court of Canada in *OdhAVJI Estate v Woodhouse* 2003 SCC 69 [2003] 3 SCR 263, at [52]).
68 *Perre v Apand* [1999] HCA 36, (1999) 198 CLR 180: Kirby J, dissenting, favoured the three stage English test in *Caparo*.
69 The fallout of *Anns* is discussed by Lord Reed at [23] in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.

of *Anns*, the House of Lords looked again at the duty of care in *Caparo Industries PLC v Dickman (Caparo).* In attempting to restrain excessive liability and allow for a more cautious, incremental development of categories of duties, the House of Lords created what is now called the "tripartite test" for establishing whether such a duty exists. The three elements of the *Caparo* tripartite test are: foreseeability of damage; a sufficiently proximate relationship between the alleged tortfeasor and the claimant; and whether it is "fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".[70]

The *Caparo* test departs from the *Donoghue* and *Anns* judgements, which both start from the assumption that a duty of care is owed unless there is sufficient reason to judge otherwise. In contrast, *Caparo* begins with the assumption that there is no duty owed without the satisfaction of the three-stage test. In *Robinson v Chief Constable of West Yorkshire Police* (*Robinson*), Lord Reed cautioned the application of the *Caparo* test to all claims in the law of negligence.[71] The notion that a court will only impose a duty of care "where it considers it fair, just and reasonable to do so on the particular facts" was, in his view, mistaken.[72] Properly understood, the tripartite test in *Caparo* need only be employed in novel circumstances, where "established principles do not provide an answer [and] the courts need to go beyond those principles in order to decide whether a duty of care should be recognised".

A. Australian Parent Company Liability Case Law

A seminal development for the doctrine of parent company liability in Australia was the New South Wales Court of Appeal decision in *CSR Ltd v Wren.*[73] The plaintiff in *Wren* was a factory worker who developed mesothelioma while working for the Asbestos Products Pty Ltd (Asbestos Products), a wholly owned subsidiary of CSR. At the relevant time, all of the directors on the board of Asbestos Products were concurrently employed staff of CSR. Because Asbestos Products had been liquidated, the plaintiff advanced his duty of care claim directly against CSR. In determining whether CSR owed a duty of care to the plaintiff as an employer to an employee, the Court looked at the internal governance structures and practices of the parent and subsidiary. Because the whole of Asbestos Products' management staff were also CSR staff, and had responsibility for the operation of the subsidiary, the CA found that CSR had a duty directly to the plaintiff.[74] Moreover they considered that, in this case, the imposition of tortious liability on the parent would not undermine the

70 *Caparo Industries PLC v Dickman* [1990] 1 All ER 568 at 574.
71 *Robinson*, above n 69, at [21]–[29].
72 At [21]
73 *CSR Ltd v Wren* (1997) 44 NSWLR 463.
74 At [485], per Beazley and Stein JJA.

Salomon principle. The relationship between CSR and its subsidiary was unusual and "over and above that expected in the case of a holding company".[75]

Though *Wren* endorsed a form of parent company liability, this case was distinguished on the facts a year later by another CA decision in *James Hardie v Hall (Hall)*.[76] *Hall* concerned a New Zealand plaintiff who had suffered from exposure to asbestos dust at his workplace, and sought damages from both his New Zealand employer and two related NSW companies, one of which had a 95 per cent shareholding in the subsidiary. In his submissions, the plaintiff had relied upon the previous decision in *Wren*. However, the CA distinguished *Wren* on the facts and interpreted its imposition of parent company liability narrowly. Significantly, Sheller JA seemed to affirm the view that parent company liability is a form of veil-piercing, only appropriate in special circumstances where the parent company is a "mere façade".[77] Australian courts have thus far narrowed the scope of parent company liability to cases involving an unusually high degree of parent-subsidiary integration.

B. United Kingdom Case Law

Chandler v Cape plc is the foundational case for the tortious liability of parent companies in the United Kingdom.[78] Like the Australian authorities, this case also concerned the liability of a parent company (Cape plc) for an employee of their subsidiary (Cape Products), after he developed asbestosis during the course of his employment.[79] Although previous United Kingdom cases had considered the issue of parent liability, *Chandler* was the first to firmly recognise that a parent company can owe a duty of care towards the employee of its subsidiary, and award the claimant damages.[80]

Comparing *Chandler* and *Wren*, it is clear that the United Kingdom Court of Appeal has taken a more generous approach to defining the circumstances that may give rise to parent company liability.[81] In *Chandler*, the emphasis of the leading judgment given by Arden LJ was on the "proximity" stage in the *Caparo* tripartite test.[82] Arden LJ held that it was not necessary for a parent company to exercise absolute control of the subsidiary for a duty of care to arise. For example, it was enough that minutes

75 At [470].
76 *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554.
77 At [584].
78 Ryan Turner "Revisiting the Direct Liability of Parent Entities following *Chandler v Cape plc*" (2015) 33 C&SLJ at 45.
79 *Chandler v Cape plc* [2012] 1 WLR 3111.
80 For example, parent company liability was previously considered in *Connelly v RTZ* [1999] CLC 533 and *Lubbe v Cape* [2000] UKHL 41.
81 Warren, above n 22, at 683.
82 *Chandler*, above n 80, at [66].

from Cape Products' board meetings showed that their decision-making was occasionally subject to approval by the board of the Cape plc.[83] Moreover, though Cape Products was responsible for the day-to-day implementation of health and safety measures, Cape plc also considered health and safety issues relevant to the whole group of companies.[84]

Although this case did not contain any transnational element, legal commentators at the time pointed out (rightly) that the ruling in *Chandler* would have an influence in the context of trans-border litigation against MNCs.[85] A recent series of transnational civil disputes between 2017 and 2021 has helped to further clarify the position in the United Kingdom. The focus here is on the leading Supreme Court decisions in the litigation of *Lungowe v Vedanta Resources* and *Okpabi v Royal Dutch Shell.*

1. *Lungowe v Vedanta Resources (Vedanta)*

Like *Okpabi*, *Vedanta*[86] concerned a mass tort claim against a United Kingdom-domiciled parent company for environmental damage occurring offshore. A group of Zambian nationals from poor farming communities brought claims in England alleging that both their health and farming activities had been damaged by repeated discharges of toxins from a copper mine into their community waterways. The first defendant was Vedanta Plc (Vedanta), a company incorporated in England and listed on the London Stock Exchange. The second defendant was its subsidiary Konkola Copper Mines (KCM), the immediate owner of the mine. Rights pertaining to health, water, food, cultural life, and a healthy environment were put at risk by KCM's activities. The claim against Vedanta was made on the basis that it had:[87]

(1) a sufficiently high level of supervision and control of the activities at the mine;

(2) a sufficient knowledge of the likelihood those activities would cause toxic escapes into surrounding watercourses, as to incur a duty of care to the claimants; and

(3) in published material had asserted responsibility for the establishment of group-wide environmental

83 At [12], [73].

84 At [19]–[20].

85 R Meeran "Tort Litigation against Multinational Corporations for Human Rights Abuses: An Overview of the Position Outside the United States" (2011) 3 City U LR at 10.

86 *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528; and *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

87 *Lungowe v Vedanta Resources plc* [2019] UKSC 20 at [55]; and *Lungowe v Vedanta Resources plc* [2016] EWHC 975 (TCC) at [78]–[89]

> control and sustainability standards, the monitoring and enforcement of these standards, and their implementation throughout the group by training.

Vedanta and KCM applied for a declaration that the English court did not have jurisdiction to consider claims by Zambian citizens for personal injury caused in Zambia.[88] The first instance decision of Coulson J denied their application, holding that England was the most appropriate place to try the claims and that the claimants would "almost certainly not get access to justice if these claims were pursued in Zambia".[89] Coulson J's decision was upheld on appeal. Simon LJ presented the unanimous judgement of the Court of Appeal, holding that the claim against KCM had a real prospect of success. Regarding the claim against Vedanta, he considered that its success would depend on whether the circumstances satisfied the three-part test of foreseeability, proximity and reasonableness outlined in *Caparo*. In his view, their claim could not be dismissed as not properly arguable at the jurisdiction stage of proceedings.[90]

Lord Briggs presented the unanimous judgement of the Supreme Court. While the Court dismissed the appeal against the CA's decision, they disagreed with Simon LJ's contention that the tripartite *Caparo* test was the starting point in this case. Lord Brigg's observed that this case did not concern a "novel category of common law negligence liability".[91] He rejected the respondent's submission that parent company liability involved a "controversial extension of the boundaries of the tort of negligence".[92] Rather, the duty of care owed by a parent company to its subsidiaries had previously been considered in earlier cases and the general principles to determine such liability were "not novel at all".[93] Lord Brigg's held that there is "no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities".[94] In reaching this conclusion, he approved the previous decision of Sales LJ in the 2018 case of *AAA v Unilever plc (Unilever).*[95] In *Unilever*, the Court of Appeal considered that *Chandler* did not "lay down a separate test, distinct from general principle, for the imposition of a duty of care in relation to a parent

88 Based on r 6.37(3) of the United Kingdom Civil Procedure Rules: "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim."
89 As summarised in *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 152 at 807.
90 At 805.
91 *Lungowe v Vedanta Resources plc* [2019] UKSC 20 at [56].
92 At [46], [49].
93 At [54].
94 At [50].
95 *AAA v Unilever plc, Unilever Tea Kenya Ltd* [2018] EWCA Civ 1532.

company", it merely gave "helpful advice".[96] However, he did identify two basic types of situations where a duty of care might be imposed on a parent company. The first situation, reminiscent of the scenario in *Wren*, was where the parent had in substance taken over the management of the subsidiary. The second was where the parent had given "relevant advice" to the subsidiary for managing a particular risk.[97]

Following this line of reasoning, Lord Briggs found that the foundational building blocks of tortious liability may be present in a parent/subsidiary relationship where the parent takes control of the management of the operations of the subsidiary business, or where the parent has taken active steps to see that its group-wide policies "are implemented by relevant subsidiaries".[98] On whether the parent had taken control or otherwise sufficiently intervened in the management of its subsidiaries' activities, Lord Briggs stated that it was a "pure question of fact" and that the "proof of that particular pudding would depend heavily upon the contents of documents internal to each of the ... companies".[99] This is because, in reality, "there is no limit to the models of management and control which may be put in place within a multinational group of companies".[100] Significantly, in the case of group businesses "carried on [in management terms] as if they were a single commercial undertaking," Lord Briggs considered that the "boundaries of legal personality and ownership within the group" may become irrelevant.[101]

Ultimately, the Supreme Court found that the facts and materials the claimants had directed the Court's attention to showed that it was well arguable that there was an assumption of responsibility on the part of Vedanta over the operations of KCM.[102]

2. *Okpabi v Royal Dutch Shell (Okpabi)*

The *Okpabi v Royal Dutch Shell*[103] litigation concerned citizens of Nigeria (some 42,000 people) seeking damages from Royal Dutch Shell (RDS), a United Kingdom-domiciled company, for environmental pollution caused by oil leaks. They argued both Royal Dutch Shell and its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Ltd (SPDC), were liable under the tort of negligence for the faulty pipelines and infrastructure that had resulted in the oil leaks.[104] The ongoing pollution caused by the alleged mismanagement of the defendants also gives rise to various human rights breaches, including the right to health, the right to water, the

96 At [37], per Sales LJ.
97 At [37].
98 *Lungowe*, above n 92, at [53].
99 At [44].
100 At [51].
101 At [51].
102 As above at [61].
103 *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191; and *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.
104 *HRH Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 at 1.

right to adequate food, the right to cultural life and the emerging third generation right to a healthy environment.[105] The claimants argued that RDS had both assumed responsibility for, and taken control over, pipeline security in Nigeria.[106] The evidence submitted in support of this included the "Shell Control Framework" outlining group-wide business principles applicable to all companies within the Shell Group, sustainability reports issued by RDS, and the "Shell Code of Conduct".[107] The first instance decision of Fraser J in the High Court held there was "no arguable case" that RDS owed a duty of care to the appellants for the actions of its subsidiary.[108]

(a) Court of Appeal decision

Though the majority of the Court of Appeal upheld Fraser J's decision, the Court was divided over whether the documentation provided as evidence by the appellants was sufficient to show an arguable case that RDS owed them a duty of care. After reviewing the documentation, which described RDS's control and expertise over the handling of the risk of oil spills in the Niger Delta, both Simon LJ and Vos CJ held that there was no arguable case that a sufficient degree of proximity existed between RDS and SPDC to give rise to a duty of care.[109]

On the issue of proximity, Simon LJ discussed the importance of distinguishing between a parent company that "controls, or shares control of" the material operations of its subsidiary, and a parent company that only issues group-wide mandatory policies "in order to ensure conformity with particular standards".[110] The latter, he claimed, "cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care".[111] Vos CJ agreed with Simon LJ that the issue of proximity was the central legal question in this case.[112] However, he adopted a slightly different approach.[113] Pertinent to Vos C's decision, though not to Simon LJ's, was the indiscriminate nature with which the parent in this case laid down its group-wide policies, and the fact that the policies were not tailored to SPDC specifically.[114] He emphasised that the "detailed policies and practices [did not appear to be] tailored specifically for

105 *Universal Declaration of Human Rights* GA Res 217A (1948), art 27; International Covenant on Social, Economic and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 11(1) and art 12; and see Marcos A Orellana "The Case for a Right to a Healthy Environment" (1 March 2018) HumanRightsWatch <www.hrw.org>.
106 *HRH Okpabi*, above n 105, at [36].
107 At [8]–[9].
108 *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 at [122].
109 *HRH Okpabi*, above n 105, at [23], per Simon LJ; and at [36], per Vos C.
110 At [89].
111 Simon LJ addressed the key issue of proximity at [86]–[129].
112 At [193].
113 At [194].
114 At [36], per Vos C.

SPDC" but instead applied "without distinction" to all RDS subsidiaries and joint ventures.[115] He considered that a parent company's establishment of a wide network of overseas subsidiaries, complete with their own management structures, indicates that the parent does not intend to "assume responsibility for the operations of each of those subsidiaries".[116] "The corporate structure itself" stated Vos CJ, "tends to militate against the requisite proximity".[117]

Sales LJ agreed with the distinction made by Simon LJ between a parent which controls the material operations of a subsidiary, and a parent which "simply issues mandatory policies as group-wide operating guidelines".[118] The latter, he concluded, would function equivalent to a body which publishes general industry-wide standards. However, he dissented from the views of Simon LJ and Vos CJ. Sales LJ held that the documentary evidence presented "a good arguable case [that in some respects] RDS [did] have superior knowledge and expertise than SDPC".[119] In his view, the evidence presented by the claimants revealed "a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in the Niger Delta", which he held was potentially sufficient to show that RDS was liable in negligence for the acts of its subsidiary.[120] Sales LJ highlighted the significance of the organisation of the Shell group, as set out in the RDS Control Framework. This showed that rather than being organised simply according to corporate status, the group of companies were constructed along "Business and Functional" lines, which created an "integrated, consistent process" through with authority was delegated from RDS to other Shell companies.[121]

Moreover, he argued that further evidence may emerge if the matter was allowed to proceed to full trial that further supported their claim.[122] The claimants appealed this decision to the Supreme Court. As *Vedanta* and *Okpabi* concerned similar factual scenarios, and many of their proceedings transpired concurrently,[123] the Supreme Court delayed its deliberation of *Okpabi* pending the final outcome in *Vedanta*.[124] In *Vedanta*, the parent company attempted to rely on the CA majority decision in *Okpabi*. However, Lord Briggs rejected their submission that the CA decision in *Okpabi* had created any general limiting principle that a parent company

115 At [194], [195].
116 At [196].
117 At [196].
118 At [24], per Sales LJ.
119 At [196].
120 At [165].
121 At [155].
122 At [33], per Sales LJ.
123 *Lungowe v Vedanta Resources plc*, above n 90, at [797]–[798]: the Court of Appeal in *Vedanta* discussed the first instance decision Fraser J in *Okpabi*.
124 *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 at [19].

could never incur a duty of care merely by issuing group-wide policies with the expectation that the subsidiary would comply.[125]

(b) Supreme Court decision

The 2021 UKSC decision in *Okpabi is* the latest development in the English body of case law on parent company liability. The decision considered two principle legal issues. Firstly, whether the CA had materially erred in law, and secondly, whether Vos CJ and Simon LJ were wrong to conclude that there was no real issue to be tried against RDS. To the first issue, the appellants contended that the majority judgement of the CA had erred in its consideration of what constitutes an arguable case at the interlocutory stage, and its approach to "both contested factual issues and to the relevance … of likely future disclosure".[126] Added to this, they argued that the majority judgement had erred in its analysis of the overall analytical framework for determining whether a duty of care had arisen by relying on the tripartite test in *Caparo*.[127]

(c) Errors in Law

Lord Hamblen presented the leading judgment of the Supreme Court on both issues. To the alleged errors in law, he focused on the approach by the majority of the CA to determining whether the appellants had an arguable claim, and specifically the CA's treatment of internal corporate documents as evidentiary material.[128] He disagreed with the apparent assumption of the CA majority, namely that because the documentation provided by the claimants "did not provide evidence of the exercise by RDS of control over the operations of SPDC, it followed that further documentation provided on disclosure would be unlikely to do so".[129] Instead, he affirmed that whether RDS had sufficiently intervened in the activities of its subsidiary was a "pure question of fact", and the appellants would likely only be able to access internal documentation material to their claims at the substantive stage.[130] Thus, Lord Hamblen agreed with the dissenting judgement of Sales LJ, holding that the majority had been wrong to determine there was no arguable case on the basis of the limited number of internal corporate documents available.[131]

125 At [52].
126 At [101].
127 At [101].
128 At [102]; documentary evidence discussed at [126]–[140].
129 At [134].
130 At [132], quoting Lord Briggs in *Lungowe*, above n 92, at [44] and [137].
131 At [139].

For these reasons, Lord Hamblen held that the majority of the CA had erred in their interlocutory examination. This was enough to establish an error in law, but Lord Hamblen went on to further comment on the analytical framework the CA adopted. In the light of the Supreme Court's decision in *Vedanta*, he stated that relying on the tripartite test in *Caparo* as a starting point was clearly not the correct approach.[132] *Okpabi* raised no novel issues of law, and did not need to be assessed as if the court were establishing a new category of negligence liability.[133] Rather, it was to be decided "on ordinary, general principles of the law of tort regarding the imposition of a duty of care".[134]

(d) Real Issue to be Tried

Following *Vedanta*, the correct approach to determining the existence of a "real issue to be tried" against RDS, depended on the extent to which RDS had "availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations" of SPDC.[135] On this issue, Lord Hamblen considered that the majority of the CA were overly focused on the question of whether RDS controlled SPDC. Simon LJ particularly appeared to have considered control a crucial criterion for parent company liability.[136] By contrast, Lord Hamblen held that "control is just a starting point".[137] Whether or not the parent sufficiently shared or intervened in the management of the relevant activities of the subsidiary was the real issue, and that "may or may not be demonstrated by the parent controlling the subsidiary".[138] Moreover, he observed that "[i]n a sense, all parents control their subsidiaries".[139]

The appellants accordingly recast their legal argument for a real issue to be tried in light of *Vedanta*, arguing that the organisation structure of the Shell group was akin to the "group businesses" described by Lord Briggs at para 51 of the *Vedanta* judgment.[140] They contended that RDS's duty of care arose through what they described as the "*Vedanta* routes".[141] These routes were:

132 At [25].
133 At [25], [151]; see also Lord Briggs in *Lungowe*, above n 92 at [49] and [54].
134 At [25].
135 At [25].
136 At [146]. See, for example, *Okpabi*, above n 105, at [124]–[127] per Simon LJ; and [125]; and [205] per Vos C.
137 At [147].
138 At [147].
139 At [147].
140 At [157].
141 At [26].

1) RDS taking over the management or joint management of the relevant activity of SPDC;
2) RDS providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by SPDC;
3) RDS promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC, and
4) RDS holding out that it exercises a particular degree of supervision and control of SPDC.

Lord Hamblen noted that these were convenient headings, they should not be regarded as "supporting any special or separate parent/subsidiary duty of care tests".[142] In support of their claims, the appellants relied particularly on two internal documents obtained, namely the RDS Control Framework and the RDS HSSE Control Framework.[143] Lord Hamblen further relied upon and adopted the analysis and dissenting judgement of Sales LJ, which he stated was generally to be preferred to that of the majority judgement.[144] Thus, he held that the evidence presented, and the likelihood of relevant documents being disclosed at substantive proceedings, was "sufficient to raise a real issue to be tried".[145]

C. Canadian Case Law

1. *Choc v Hudbay Minerals Inc (Hudbay)*

There is yet to be a defining case such as *Wren* or *Chandler* in Canada.[146] However, the ongoing *Choc v Hudbay Minerals Inc* litigation provides insight into how Canadian courts will treat parent company liability.[147]

In *Hudbay,* the plaintiffs, indigenous Mayan Q'eqchi' from Guatemala, brought three related actions against a Canadian domiciled mining company, Hudbay

142 At [27].
143 At [30], [36].
144 At [155].
145 At [154].
146 Warren, above n 22, at 682.
147 *Choc v Hudbay Minerals Inc* [2013] ONSC 1414. There is a long and complex litigation history against Hudbay Minerals, the latest being *Caal Caal v Hudbay Minerals Inc* [2020] CarswellOnt 544, [2020] ONSC 415, 314 ACWS (3d) 278. This website is dedicated to updating the progress: "*Choc v Hudbay Minerals Inc* and *Caal v Hudbay Mineral Inc*" <www.chocversushudbay.com>. There are two other cases in which foreign claimants have brought an action in Canada against a Canadian parent company for alleged violations of internationally protected human rights at the offshore mine of an operating subsidiary: *Garcia v Tahoe Resources Inc* [2015] BCSC 2045 and [2016] BCCA 320; and *Araya v Nevsun Resources Ltd* [2020] SCC 5 (CanLII).

Minerals Inc (HMI), and its wholly controlled Guatemalan subsidiary, Compania Guatemalteca De Niquel (CGN). They claimed that security personnel working for CGN, allegedly under the control and supervision of HMI, committed human rights abuses in Guatemala from 2007 and 2009. The allegations of abuse included the shooting and killing of villagers, and sexual violence against women, by mining company security personnel during their forced removal from their village of Lote Ocho, as directed by Skye Resources (which was subsequently acquired by HMI).[148] The plaintiffs framed their claims under the tort of negligence. They asserted that a parent company could be held liable "for its own actions and omissions in another country" and that this involved "a straightforward application of established and well-recognized tort law".[149] The defendants characterised these claims as attempts to pierce the corporate veil, and argued that the plaintiffs had failed to establish appropriate grounds for doing so.

At the Ontario Superior Court of Justice, Amnesty International made submissions on behalf of the claimants, drawing the Court's attention to international norms, authorities and standards which supported the view that a duty of care may be imposed on a parent company where its subsidiary is found to be involved in gross human rights violations.[150] Amnesty specifically highlighted the development of voluntary codes of conduct as well as international soft law mechanisms such as OECD Guidelines for Multinational Enterprises, the UN Protect Respect Remedy Framework and the UNGPs.[151] Following the general test of foreseeability, proximity, and residual policy considerations, Amnesty International claimed: 1) HMI knew there was a risk that violence could occur; 2) the relationship between HMI, CGN and the plaintiffs was sufficiently proximate, and the fact that HMI had adopted the Voluntary principles on Security and Human Rights was used as evidence of this fact; and 3) on considerations of policy, the plaintiffs argued that:[152]

> [T]ort law should be evolving to accord with globalization, and local communities should not have to suffer without redress when adversely impacted by the business activity of a Canadian corporation operating in their country.

148 *Choc v Hudbay Minerals Inc* [2013] ONSC 1414, at [4]–[6] and at [9]: as a result of the amalgamation, HMI inherited all the legal liabilities of Skye Resources.
149 At [50].
150 At [32].
151 At [34].
152 At [33] and [39].

The Court held in favour of the plaintiffs, finding that they had established the requisite elements of their claim of direct negligence as against HMI.[153] Particularly salient to the proximity criterion was evidence that HMI had repeatedly made public statements recognising its relationship with the local indigenous farming villages.[154] The Judge recognised that there were "clearly competing policy considerations in recognizing a duty of care in … this case".[155] However, this alone was not enough to show that the plaintiff's claim would fail the *Anns* test and be prevented from moving to full trial.[156]

IV. Parent Company Liability in New Zealand: the *James Hardie* Litigation

Until the 2018 Court of Appeal and the 2019 Supreme Court decisions in the *James Hardie* litigation, parent company liability for a duty of care was a largely untouched area of law in New Zealand.[157] In reaching its decision, later confirmed by the Supreme Court, the NZCA looked to the authorities canvassed above and drew particular attention to the discussion of Sales LJ in *Okpabi* and *Unilever*.[158]

A The Proceedings

The *James Hardie* litigation involved a mass class-action lawsuit against the companies within the James Hardie corporate group, by home and building owners who claimed they suffered damage caused by defective cladding products manufactured and supplied by companies within the James Hardie group.[159] The group consists of four operating companies and three holding companies. The holding companies were James Hardie Industries plc (JHI), the ultimate parent of the Group domiciled in Ireland; James Hardie New Zealand Holdings (JHNZH), the

153 At [54].
154 At [67].
155 At [74].
156 At [74]. This case is still ongoing before the Canadian Courts: Centre for Business and Human Rights "Is justice possible in Canada or Guatemala for Hudbay Minerals mining repression?" (12 Jun 2019) <www.business-humanrights.org>. On 21 January 2020, Hudbay Minerals lost its attempt to block the Mayan Q'eqchi' Plaintiffs from amending their lawsuit to add new details about the violence allegedly perpetrated by mine company private security forces, military and police: See Centre for Business and Human Rights "*Choc v HudBay Minerals Inc & Caal v HudBay Minerals Inc*" (Jan 2020) <business-humanrights.org>. In 2021, an ex-security chief of the mine pleaded guilty to the murder of an indigenous leader: see Centre for Business and Human Rights "Guatemala mine's ex-security chief convicted of Indigenous leader's murder" (7 Jan 2021) <www.businesshumanrights.org>.
157 *James Hardie Plc v White* [2018] NZCA 580; and *James Harde Plc v White* [2019] NZSC 39.
158 *James Hardie Plc v White* [2018] NZCA 580 at [59]. The UKSC judgement in *Vedanta* had not yet been delivered.
159 At [1]–[9].

immediate parent of James Hardie New Zealand (an operating company); and RCI Holdings Pty Ltd (RCI).[160]

The first cause of action against the entire James Hardie group was that they had breached their duty of care.[161] The plaintiffs alleged that in making, supplying and promoting the products, the holding companies owed them a duty of care to "take all reasonable steps to ensure that the products would not cause damage, would be weathertight, and would comply with applicable legal and building standards" and specifically that JHNZH, RCI and JHI had breached their duty by permitting this damage to occur.[162]

JHNZH and RCI (the New Zealand-based parent companies) applied for a summary judgment that the cause of action against them could not succeed as they were merely "passive holding companies and under no duty to the plaintiffs".[163] JHI (the Ireland-domiciled holding company) protested the jurisdiction of the New Zealand courts to determine the proceeding against it.

Thus, this case turned on whether the claimants could prove they had a serious issue to be tried on the merits.[164] Just as Lord Brigg's was mindful of the fact that the "proof of the pudding" may exist in internal company documents not available to claimants before substantive proceedings, the Court of Appeal in *James Hardie* was hesitant to make a definitive judgment on the duty issue at the jurisdiction stage. They preferred to see the claim to move to substantive proceedings where "new evidence may come to light" during the discovery process.[165] In deciding whether there was a serious claim to be tried against the James Hardie parents, the Court of Appeal extensively considered the jurisprudence across Australia, Canada, and the United Kingdom. The NZCA did not follow the Australian approach of narrowing its scope, but rather extracted three categories of circumstances giving rise to parent company liability, predominantly from the discussions in *Chandler*, *Okpabi*, *Unilever* and *Vedanta.* The categories are:[166]

> (a) where the parent takes over the running of the relevant part of the business of the subsidiary;
> (b) where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the

160 At [6].
161 At [12].
162 At [12].
163 At [76] and [111].
164 At [21].
165 At [21].
166 At [65], per Winkelmann J.

> parent knew or ought to have foreseen the alleged deficiency in process or product; and
>
> (c) more generally where the parent takes responsibility (irrespective of superior knowledge or skill) for the policy or advice which is linked to the wrongful act or omission.

The Court qualified this by insisting that the mere fact of coordination within a corporate group would not be enough to establish that control by or reliance upon the parent existed.[167] The Court also stated that they were not prepared to make any narrow statements about the effect of a parent publishing CSR guidelines or policies which it requires the subsidiary to adhere to. Rather, they claimed that whether such guidelines brought the parent within the requisite proximity to the subsidiary should be decided within the facts of a particular case.[168] Regarding the documentary evidence before them, they found a "sufficient evidential narrative" of direct involvement by JHI in the New Zealand subsidiary businesses, and were satisfied that this brought it within the categories outlined above.[169] Thus, there was a serious issue to be tried against JHI as well as its subsidiaries.

The Court of Appeal rejected the submission by James Hardie that parent company liability would be inconsistent with the foundational principles of separate legal personality and limited liability. The Court was not convinced that recognising a duty of care beholden on the parent amounted to "piercing the corporate veil", either by disregarding the separate legal entity of the parent or their limited liability as a shareholder.[170] In fact, Winkelmann CJ highlighted that one consequence of the separate legal entity principle was that "as with all legal entities, a company's actions are capable of having legal consequences for it".[171] A duty of care can naturally fall on a parent company, as it can any other party. Therefore, rather than piercing the corporate veil, parent company liability circumvents it, or as Winkelmann CJ stated: [172]

> It is not clear to us why the law should shield the parent from the consequences of actions taken to support a subsidiary that bring it into such proximity with a claimant so as to justify the imposition of a duty of care.

167 At [50].
168 At [66], per Winkelmann J.
169 At [93].
170 At [63].
171 At [63].
172 At [63]

The NZCA dismissed the James Hardie's appeals, and their decision was upheld on appeal by the New Zealand Supreme Court. Both courts left the question of whether the holding companies did in fact owe a duty of care to the claimants to be determined in substantive proceedings.[173] Unfortunately for the claimants, part way through the substantive proceedings in the High Court the litigation lenders withdrew their funding, and the case was brought to an end.[174] However, the outcome of the substantive proceedings (or lack thereof) does not dimmish the weight of judicial approval for the principles of parent company liability.

B. Analysis and Discussion

The factual scenarios in *James Hardie* and the overseas jurisprudence relied upon by the Court of Appeal were markedly different. The United Kingdom and Canadian cases concerned alleged human rights violations of a graver nature that the provision of defective cladding products, and concerned communities that were more vulnerable and impoverished.[175] One could criticise the Court of Appeal's reliance on the United Kingdom and Canadian case law on this basis.[176] However, the key legal discussions in those jurisdictions, namely of the parent-subsidiary relationship, the corporate veil and duty of care formulae, were deeply relevant to the legal issues before the New Zealand courts. Furthermore, like the previous cases, the Court in *James Hardie* was essentially dealing with the issue of whether parent corporations, when incorporating subsidiaries abroad, may be brought into a tortious relationship with local communities, consumers, and employees in the jurisdictions of those subsidiaries. Essentially, it was a return to Lord Atkin's foundational question of "*who, then, in law is my neighbour*"?[177]

Significantly, parent company liability may not be reserved only to parent/subsidiary cases. In *Vedanta*, the Court looked at the substance of the relationship rather than the form, and emphasised that the parent/subsidiary relationship simply allowed for more opportunity for control. Conceivably, the duty of care could extend to any business relationship or arrangement where the same high threshold

173 At [127], per Winkelmann J.

174 Rob Stock "Shock end to James Hardie class lawsuit prompts calls for controls over litigation lenders" (8 August 2021); and Business Wire "James Hardie Settles Weathertightness Case" (3 August 2021) <www.businesswire.com>.

175 That being so, though the *James Hardie* claims were not articulated in human rights language, there were underlying rights violated, such the right to adequate housing: International Covenant on Social, Economic and Cultural Rights, above n 106, art 11(1)

176 For example, a student contributor to the Victoria University Wellington Law Review argues that the Court of Appeal in *James Hardie* "failed to acknowledge the fundamentally different sets of facts and underlying policy considerations" of the overseas authorities, including *Vedanta* and *Okpabi*: T White "'Nothing to See Here? The Extension of Parent Company Liability in *James Hardie Industries plc v White*" (2020) 51 VUWLR at 156.

177 *Donoghue v Stevenson* [1932] AC 562 (HL) at 580, per Lord Atkin.

of control and integration is met.[178] While not a wholesale return to a "first principles analysis" of the application of limited liability to corporate groups, it is a recognition that the *de jure* separation of corporate entities does not always reflect their *de facto* realities. In other words, the bounds of tortious liability are finally catching up to the decades-long reality of global business. Though a parent is ostensibly a separate legal person from their subsidiary or affiliate, organisational practices may render this distinction irrelevant when it comes to responsibility for harm done within the wider group. Overall, this is a positive development for those seeking effective remedies for those harmed by corporate complicity in human rights abuses. By reducing the traditional hurdles to claimants bringing an action against corporate groups, parent company liability reconciles tort law with international human rights norms.[179]

However, the Court must still consider the wider effect on society and overall fairness of imposing such a liability.[180] While it is encouraging against the global context of corporate impunity, there are salient policy concerns with extending liability to parent companies in New Zealand that will be explored below.

1. Judicial activism

National action plans and legislative reform play a critical role in realising access to effective legal remedy for business-related human rights harm.[181] To this end, Deva has suggested that States adopt a "Direct Duty of Care Approach" via statute.[182] Arguably, corporate regulation and pathways to legal remedy are matters best left to State legislatures. For example, States could take action by: creating mandatory human rights due diligence requirements for domestic corporations contracting abroad in high-risk areas; amending company law legislation to require that a parent or holding company be presumed "related" for a pooling of assets in payment of damages awarded against the subsidiary; or implementing Modern Slavery legislation.[183] The introduction of parent company liability may be viewed as Courts taking over the role of regulating big business for desirable social objectives, which

178 For further discussion on this, see: Madeleine Conway "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40 QLJ 741–780; and Alison Gray, Justin Lambert and David Wahl "Potential Liability for Canadian Corporations with Foreign Affiliated Corporate Entities" (2014) 30 BFLR 147.

179 Doug Cassel "*Vedanta v Lungowe* Symposium: *Vedanta* – Reconciling Tort Law with International Human Rights Norms" (19 April 2019) Opinio Juris <http://opiniojuris.org>.

180 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at [294] per Cooke P.

181 Skinner, McCorquodale and Schutter, above n 14, at 31.

182 Deva, above n 43 at 3.

183 New Zealand is currently considering the latter option: Stewart Sowman-Lund "Close to a hundred NZ companies sign letter calling for 'modern slavery' law" (16 March 2021) The Spin-Off <https://thespinoff.co.nz>.

ultimately require moral and political, rather than judicial, legitimation.[184] This, in turn, might be criticised as a form of judicial activism

However, as the NZCA highlighted in *James Hardie*, well-established elements of negligence liability may be present in circumstances of parent company liability. It is difficult to see how a parent company being brought into a tortious relationship with involuntary creditors is beyond the appropriate purview of the judiciary. Furthermore, even where a socio-economic issue may be better dealt with by the legislature, the common law can still offer solutions. In his report, John Ruggie advised the Human Rights Council that that "no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors".[185] The judiciary, as an interpreter and developer of law, is certainly a relevant actor.

2. Excessive liability

Tort law has historically been concerned not only with protection of the vulnerable, but with not imposing an unfair burden of liability on tortfeasors.[186] Even if not rising to the level of judicial activism, the endorsement of parent company liability may be criticised for imposing excessive liability on companies, beyond the goals of tortious responsibility. As highlighted in the *Robinson* judgment, one of these goals is to incrementally develop categories of liability in accordance with established principles of law.[187] English common law has traditionally confined a duty of care, because otherwise, to paraphrase Cardozo CJ in *Ultramares Corp v Touche (1932),* alleged tortfeasors may be exposed to an indeterminate class of liability.[188] Of the three circumstances outlined by the New Zealand Court of Appeal as giving rise to parent company liability, the "superior knowledge" and "policy and advice" categories are the most likely to be criticised as imposing excessive or indeterminate liability. Do these categories mean that, merely by having superior expertise or providing advice, a parent company may be liable for the negligence or misfeasance of its subsidiary?

A close reading of the case law shows that such a concern is not warranted. The New Zealand courts, like the English courts, have clearly highlighted that their formulation of categories of circumstances that may give rise to tortious liability, should not be read as new categories of negligence liability. Moreover, in all cases

184 This is one definition of "judicial activism" given in Campbell T "Judicial Activism – Justice or Treason" [2003] 2 Otago LR 307 at 310.
185 Office of the High Commissioner of Human Rights, above n 6, at 77.
186 Atkin, above n 62, at [5.4.02] and [5.4.03].
187 *Robinson*, above n 69, at [21] and [25].
188 *Ultramares Corp v Touche* [1932] 174 NE 441.

the burden remained on the plaintiffs to provide sufficient evidence that the parent and subsidiary had, at least ostensibly, the requisite relationship to bring the parent into proximity with the tort claimants. The documentary evidence presented, including CSR statements and group-wide policies, formed only part of the corpus of facts illuminating the substance of the *de facto* relationship between the parent and the subsidiary.

Moreover, New Zealand company law has long recognised that it may be just and equitable to pool the assets of a parent/holding company and its subsidiary in liquidation proceedings, where "the businesses of the companies have been so carried on that the separate business of each company, or substantial part of it, is not readily identifiable".[189] When determining the nature of the businesses, courts "must have regard" to the extent to which the parent company took part in the running of the subsidiary.[190] However, courts are not restricted only to considering whether the parent took over the subsidiary's management. Under s 272 of the Companies Act, the Court has discretion to consider "any other matters" they think fit to determining the relationship between the companies.[191] It is not clear why the matters a New Zealand court can consider for the purposes of establishing a relationship between a parent company and tort claimants should be narrower than the matters they may turn to in liquidation proceedings for the payment of voluntary creditors.

Ultimately, parent company liability does not inherently impose an "unfair burden" on parent or holding companies. It merely acknowledges that the substance of their relationship with a subsidiary is capable of bringing them into proximity with claimants affected by that subsidiary's activities. Neither are the "superior knowledge" and "advice" categories excessive, but in fact capture a dynamic seen frequently on the world stage, where in the running of their business the subsidiary relies heavily on the technical or corporate expertise of a larger parent or holding company.[192]

3. Effects on corporate governance and uptake of CSR in New Zealand?

Undeniably, parent company liability has wide-reaching consequences for corporations operating in a group structure. By holding that a parent can enter into

189 Companies Act 1993, s s2(3), 271(a) and 272.
190 Section 272.
191 Section 272.
192 A quintessential example of this if the infamous *Chevron (Texaco) v Ecuador* litigation, where an Ecuadorian company heavily relied on the American holding company (Texaco, later acquired by Chevron), even calling Texaco their "professor". Judith Kimerling "Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective" (2013) 1 Stan J Complex Litig 241 at 247–248.

a tortious relationship with claimants via "actions taken to support a subsidiary", it circumvents the corporate veil rather than lifting or piercing it. But while it does not directly undermine the principle of separate corporate personality enshrined in the Companies Act, it may nullify some expected benefits of limited liability and increase legal risk for the companies in the top tiers of multi-layered corporate groups. That being so, restraining the corporate form from being abused to avoid *appropriate* accountability does not inherently deny the value of the company as a means of achieving economic efficiency.

Beyond high-level debates on the principles of company law, there are two practical and policy concerns with widening the tortious liability of parent companies. Firstly, it may encourage MNCs to reincorporate their headquarters in jurisdictions with less onerous legal mechanisms, depriving their nation of valuable investments.[193] Secondly, corporate groups may attempt to avoid the burden of a duty of care by "watering down" their corporate governance activities and group-wide CSR policies.[194] This may result in less efficient business practices, or alternatively, less uptake of CSR initiatives.

However, the first concern is unlikely to materialise in a New Zealand context. The key corporate groups headquartered in "New Zealand Inc" are deeply ingrained in New Zealand's industries and image, to the point where relocation would be impracticable. To the second concern, as one commentator pointed out, it is unlikely that "accepted group management and corporate governance structures can be adapted to reduce the potential widened legal risk".[195] Group-wide policies are essential for the effective and efficient governance of corporate groups. Similarly, CSR initiatives are more or less a global expectation, for both consumers and increasingly investors.[196] It is unlikely that corporate groups will risk a loss of efficiency, nor the reputational loss of pulling back on CSR commitments. The more likely corporate response is that corporate boards of parent and holding companies will simply accept the risk of tortious liability as a "price to pay" for the operational efficiency of the group.[197] In this way, the emerging jurisprudence of parent company liability forms a natural nexus between corporate voluntarism and legal liability: by accepting the former, corporations may be opening themselves up to the latter.

193 For more discussion on this, see: Halina Ward "Governing Multinationals: The Role of Foreign Direct Liability" (2001) Briefing Paper No 18, Royal Institute of International Affairs.
194 Simpson Grierson, above n 4.
195 Simpson Grierson, above n 4.
196 Lindsay, above n 37.
197 Simpson Grierson, above n 4.

C. Summary: New Zealand as a Forum for Human Rights Litigation

While New Zealand companies do not loom as large on the world stage as corporations domiciled in Canada or the United Kingdom, New Zealand is not immune from hosting corporate groups complicit in offshore human rights violations, nor are New Zealand businesses free from affiliation with foreign companies responsible for human rights violations. For example, in the infamous 2007–2008 *Sanlu* scandal, more than 300,000 infants across China fell ill from drinking milk contaminated with melamine.[198] From a human rights perspective, the provision and attempted cover-up of this defective product was a grave violation of the right to life, the right to health, and the right of children to development as codified in the Convention of the Rights of the Child.[199] New Zealand's Fonterra Cooperative Group (Fonterra) had a 43 per cent share in *Sanlu* at the time. In 2010, eight parents sought compensation from Fonterra via the Small Claims Tribunal in Hong Kong. However, they were unable to advance a claim against Fonterra as it was considered "merely a shareholder".[200] Clearly, the facts in *James Hardie* were a reverse of the situations before the United Kingdom and Canadian Courts, in that the claimants were attempting to tie a foreign parent company to domestic proceedings concerning harm occurring within New Zealand's jurisdiction. However, the endorsement of parent company liability in *James Hardie* opens a new pathway through which foreign claimants may claim against New Zealand-domiciled parents for torts occurring offshore via subsidiaries, as in *Vedanta* and *Okpabi*. Hypothetically, had the *Sanlu* scandal occurred post-*James Hardie*, barring the difficulties of cross-border litigation, the parents may have been able to advance a claim in New Zealand directly against Fonterra.

V. Conclusion

The jurisprudence of parent company liability is still in its infancy, and has only just reached New Zealand's shores. However, there is a demonstrable judicial willingness to hold parent companies domiciled in their jurisdiction liable for the actions or omissions of foreign subsidiaries, or vice versa. The emergent case law tells us the following:

198 Geoff Cumming "Contaminated by toxic trade" (NZ Herald, 19 Sep 2008);
199 Convention of the Rights of the Child 1577 UNTS 3 (opened for signature on 20 November 1989, entered into force on 2 September 1990) art 6(1)–(2).
200 *Zhou v Fonterra Brands (China) Ltd* (2010) Small Claims Tribunal, Hong Kong Special Administrative Region, SCTC15980/10; SCTC15981/10; SCTC15982/10; SCTC15983/10 at 9.

(a) A parent company will not be found to be responsible for acts or omissions of its subsidiary merely by virtue of its status as a parent. However, the New Zealand Court of Appeal has identified three general categories of circumstances where a duty of care can be imputed to a parent company. These are not to be understood as novel categories of negligence liability.

(b) Parent company liability is capable of circumventing the insulation of the corporate form and limited liability without needing to "pierce the corporate veil". This is indeed a watershed moment for corporate groups, but it does not undermine the foundational *Salomon* principle of separate legal personality as it was adopted in relation to simple corporations. Rather, it limits the moral hazards associated with the unbridled application of limited liability to complex corporate structures.

(c) The Court of Appeal in *James Hardie* has left open the possibility that the adoption of internal policies and public statements regarding codes of conduct, may in certain circumstances, constitute evidence of sufficient proximity to establish an arguable case that the parent owed a duty of care to the claimants vis-à-vis the subsidiary.

(d) Though claimants will need to provide evidence of a sufficiently proximate relationship between the parent company and the subsidiary at an early stage of proceedings, courts will take into account the fact that further evidence to support the claimants' case may not be available to them until substantive proceedings.

While not a silver bullet solving corporate complicity in human rights abuses, parent company liability can be used to crystallise standards created by voluntary and soft law initiatives through the black letter of the law. Despite being a creature of tort rather than a traditional human rights law mechanism, this novel application of the duty of care may indeed achieve human rights outcomes. *Vedanta* and *Okpabi*-style litigation is a potential avenue through which victims of corporate related human rights abuses might pursue an effective legal remedy, as envisioned by the third pillar of Ruggie's Protect, Respect, Remedy framework. After *James Hardie*, New Zealand is poised to become a forum where this form of human rights litigation plays out.