

# Breakthrough in Parent Company Liability Three Shell Defeats, the End of an Era and New Paradigms

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# Breakthrough in Parent Company Liability

## Three Shell Defeats, the End of an Era and New Paradigms

by

CEES VAN DAM\*

*Two English and two Dutch cases have recently clarified the (potential) liability of parent companies vis-à-vis third parties in relation to damage caused by their subsidiaries. They concern the decisions of the UK Supreme Court in Vedanta v Lungowe and Okpabi v Shell, the Hague Court of Appeal in Oguru v Shell and the Hague District Court in Milieudefensie v Shell (climate change case).*

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The main findings from *Vedanta* and *Okpabi* are that duties of care for parent companies are nothing special and that they need to be assessed at trial, preceded by disclosure. This will lead to more out of court settlements. In *Oguru* and *Milieudéfensie*, the Dutch courts accepted parent responsibility for its subsidiary's operations (section 3).

This article discusses private international law aspects of these decisions (forum and applicable law, sections 4 and 5), instances in which a parent's duty of care is conceivable and the lingering burdens for claimants (section 6), the misinterpretation of *Vedanta* by the Dutch Court of Appeal (section 7), and lessons to be learned by companies as to how to reconcile group management, transparency, and the duty of care risk (section 8).

This article places the case law in the context of business and human rights, which increasingly instrumentalises tort law and company law to enhance human rights protection. The business and human rights context implies a broader concept of risk (not only risks to the company are relevant), and remedy (which is broader than providing monetary compensation) (section 9). The result is a paradigm shift with important consequences for the required skills and knowledge of company managers and company lawyers.

## 1. Introduction

In early 2021, the Hague Court of Appeal in *Oguru* and the UK Supreme Court in *Okpabi* confirmed that parent companies<sup>1</sup> may owe a duty of care as regards the operational activities of their subsidiaries. This did not come as a surprise after the Supreme Court's *Vedanta* ruling of 2019.

More surprising was the judgment of the Hague District Court in May 2021 in *Milieudefensie* (the Dutch branch of Friends of the Earth) in which it ordered parent company Royal Dutch Shell (RDS) to reduce the CO2 emissions of the Shell group and those of its suppliers and customers by 45% by 2030 as compared to 2019. This verdict was RDS' third legal defeat in less than four months' time.

In this article, I discuss the importance of *Vedanta*, *Oguru*, *Okpabi* and *Milieudefensie* and place them in the transnational framework of business and human rights (section 2).

The lawsuits are summarised in section 3, with jurisdiction and applicable law discussed in sections 4 and 5. Section 6 focuses on the duty of care for parent companies, and section 7 analyses the incorrect way in which the Hague Court of Appeal applied *Vedanta*. Section 8 contains lessons companies may learn from the case law. Section 9 indicates what the broader business and human rights context means for tort cases, remedies and the relationship with the Sustainable Development Goals (SDGs).<sup>2</sup>

## 2. Business and human rights

### 2.1 The broader context

Since World War II, the freedom of international trade has been guaranteed by the General Agreement on Tariffs and Trade, and the World Trade Organisation. The fairness of international trade was left to national law. However, many governments are reluctant to hold powerful foreign investors to account because of the economic interests involved. They are also wary of improving social and environmental legislation for fear of damages claims under bilateral investment treaties. This leads to widespread cost externalisation by multinational corporations and causes extensive environmental damage, broken com-

1 I do not use the term 'holding', as it implies a passive attitude towards the subsidiaries, which is not the case in the vertically organised groups at stake here.

2 The case law discussed in this article would not have seen the light of day without the perseverance of the English law firm Leigh Day, the Dutch law firms Prakken d'Oliveira (Channa Samkalden) and Paulussen (Roger Cox) and NGO Milieudefensie.

munities, severe health damage, unsafe working conditions, low wages, slave labour and child labour.<sup>3</sup>

By the end of the 20th century, this problem was identified as an international human rights problem. However, human rights law did not provide an effective legal framework, as only states are considered bearers of human rights obligations.<sup>4</sup>

At the behest of then UN Secretary-General, Kofi Annan, Harvard professor John Ruggie developed the United Nations Guiding Principles on Business and Human Rights (UNGPs). In 2011 they were endorsed by the Human Rights Council.<sup>5</sup> The UNGPs are the first global instrument for fair international trade. The first pillar indicates the states' obligations ensuing from international treaties to prevent, punish and remedy human rights violations through policy, legislation, and case law. The second pillar describes the responsibility of businesses to respect human rights, a form of soft law.<sup>6</sup> The third pillar holds states and businesses jointly responsible for providing access to adequate remedies to victims.

## 2.2 Existing and future legislation

The past decade has seen a steadily growing stream of legislation in the field of transparency and human rights due diligence, not only at national<sup>7</sup> but also at EU level.

EU transparency legislation can be found in the Non-financial Reporting Directive<sup>8</sup> and due diligence legislation in the Timber Regulation<sup>9</sup> and the Con-

3 *Cees van Dam*, *Enhancing Human Rights Protection: A Company Lawyer's Business*, 2017, pp. 55–62.

4 *Eric de Brabandere*, *Non-State Actors and Human Rights*, in: Jean d'Aspremont (ed.), *Participants in the International Legal System*, 2011, pp. 268–283.

5 *Human Rights Council*, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, A/HRC/17/31.

6 *Justine Nolan*, *The Corporate Responsibility to Respect Rights: Soft Law or Not Law?*, in: Surya Deva/David Bilchitz (ed.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, 2013, pp. 1–27.

7 See <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe>.

8 Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. See also the proposal of 21 April 2021 to amend Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM(2021) 189 final).

9 Regulation (EU) of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

flict Minerals Regulation.<sup>10</sup> In 2020, EU-Commissioner Reynders announced the introduction of general due diligence legislation.<sup>11</sup> And this year, the European Parliament put pressure on the Commission with a detailed proposal for a directive.<sup>12</sup>

National due diligence legislation can be found in French Duty of Vigilance Act (2017),<sup>13</sup> the Dutch Child Labour Due Diligence Act (2019),<sup>14</sup> and the German Supply Chain Act (2021).<sup>15</sup>

This existing and proposed legislation is important for parent company liability. First, because of the recent case law, attention will shift to the substance of the parent's duty of care (breach of duty), which may partly be guided by the statutory obligations (section 8.2).

Second, the addressee of reporting and due diligence obligations is usually the parent company, and these obligations extend to the subsidiaries' operating activities. This reinforces the developments in the case law (section 8.2).

And third, this development makes companies addressees of *human rights* obligations. This has consequences for the perception of risk (section 9.1), the character of the harm (section 9.2), the types of remedy (section 9.3), and the relationship with the SDGs (section 9.4).

### 2.3 *Transnational character of business and human rights*

Regulating the behaviour of multinational companies inevitably involves transnational law.<sup>16</sup> Transnational law is polycentric as it comes from different regulators: at global (UN), regional (EU) and national levels. It is also poly-modal: rules can be hard law, soft law, and guidelines, they can be public rules

10 Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

11 See <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies>.

12 Report of the Committee on Legal Affairs of the European Parliament of 11 February 2021, with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

13 Art. L. 225-102-4 Code de commerce.

14 Wet zorgplicht kinderarbeid, Stb. 2019, 401.

15 <https://www.bmz.de/de/entwicklungspolitik/lieferkettengesetz>.

16 *Peer Zumbansen*, Transnational Law, Evolving, in: Jan Smits (ed.), *Encyclopedia of Comparative Law*, 2nd edn., 2012, 899-925; *Stephen Korbin*, "Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights", *Business Ethics Quarterly* 2009, 349-374.

(regulation and tort law) and private rules (from investors and global value chain leaders). Combined with the more advanced normative frameworks of NGOs, and their influence on public opinion, this creates a complex business environment in which norms are fragmented and can overlap or clash (section 8.2).<sup>17</sup>

This is well illustrated by the cases at hand. In *Oguru*, the Hague court applied Nigerian law, which is developed by the Supreme Court in London (section 5.2). In *Okpabi*, the Supreme Court used company documents that Shell had to disclose before the Hague Court of Appeal (section 6.1). And in *Milieudefensie*, the Hague District Court used soft law to constitute the standard of care (section 3.4).

Such a complex regulatory environment underlines the importance for companies to stay ahead of the game, rather than being a follower of regulatory fashion. This does not only lead to lower compliance costs, but also contributes to the creation of long-term value for the company and to the reduction of liability and reputational risks (section 8.2).

### 3. *London and The Hague: two cities, four decisions*

#### 3.1 *Vedanta in London*

Nearly 2,000 members of Zambian farming communities alleged that their health and agricultural yields had been affected since 2005 because the waterways they used had been polluted by toxic discharges from a copper mine. This mine was operated by Konkola Copper Mines (KCM), a subsidiary of Vedanta, a parent company incorporated in the United Kingdom.

The Supreme Court's decision concerned a pre-trial procedure in which a claim can be rejected if it is manifestly unfounded. Vedanta argued that the claims were without merit, but the Supreme Court held that the English court had jurisdiction to hear the claims against Vedanta and KCM.<sup>18</sup> Although Zambia was in principle the right place for the proceedings, it would not be possible for the claimants to obtain substantive justice in Zambia (section 4.2).

Vedanta also argued that based on the claimants' allegations, as a parent company it would not owe a duty of care and therefore could not be liable under

17 *John Gerard Ruggie*, "Global governance and new governance theory: Lessons from business and human rights", *Global Governance* 2014, 5–17.

18 *Vedanta Resources PLC and another v Lungowe and others*, 10 April 2019, [2019] UKSC 20 (further: *Vedanta*).

the tort of negligence.<sup>19</sup> However, referring to one of Vedanta's sustainability reports, the Supreme Court considered that it could reasonably be argued that it had assumed responsibility for maintaining environmental standards in the operations of its subsidiaries, in particular KCM. It was therefore arguable that Vedanta owed the claimants a duty of care, so the case could proceed to trial (section 6.2–6.3).

In January 2021, the parties reached an out of court settlement for an undisclosed amount.<sup>20</sup>

### 3.2 *Oguru in The Hague*

#### 3.2.1 *Facts and interlocutory decisions*

In 2008, four Nigerian farmers and Milieudefensie (MD) sued Shell for oil spills in the Niger Delta, two from underground pipelines at Oruma (June 2005, Case A) and Goi (October 2005, Case B), and one from an abandoned oil well at Ikot Ada Udo (August 2007, Case C). The spills caused damage to their health and livelihood. The claims related only to the liability issue; damages will be assessed in a separate procedure.

The claims were against subsidiary Shell Petroleum Development Company of Nigeria (SPDC), current parent company RDS and its predecessors: Shell Petroleum NV in The Hague, and Shell Transport and Trading Company Ltd in London. Until 20 July 2005, the latter two jointly headed the Shell group.<sup>21</sup> Since the restructuring in 2005, RDS (incorporated in London and headquartered in The Hague) is the sole parent company of the Shell group. As RDS is not the old parents' successor, it can only be liable for behaviour as from 20 July 2005 and the old parents only for their behaviour prior to that date.<sup>22</sup>

Next to Milieudefensie, the claimants in case A were Fidelis Oguru and (until his death in 2016) Alali Efanga, in case B farmer and fisherman Barizaa Dooh (after his death his son Eric Dooh) and in case C farmer and fisherman Friday Akpan.

19 This tort requires a duty of care, breach of duty, causation, and damage. The duty functions as a control mechanism: *Cees van Dam*, *European Tort Law*, 3<sup>rd</sup> ed., 2013, sections 503 and 605.

20 <https://www.leighday.co.uk/latest-updates/news/2021-news/legal-claim-by-more-than-2-500-zambian-villagers-in-a-case-against-vedanta-resources-limited>.

21 *Court of Appeal The Hague 29 January 2021, ECLI:NL:GHDHA:2021:132 (Oguru/Shell)*, para. 1.1.b; henceforth: *Oguru*, para. 1.1.b.

22 *Oguru*, para. 3.10.



In 2009, the District Court declared itself competent to hear the case against all defendants. It also ruled that the claimants, including Milieudefensie, had standing.<sup>23</sup> In 2015, the Court of Appeal reached the same conclusions (section 4.3).<sup>24</sup> Both courts held that the claims were subject to Nigerian law.<sup>25</sup>

### 3.2.2 Final decision: overview

In 2013, the District Court dismissed all claims against the parent companies. In Cases A and B, it also dismissed the claims against SPDC because the spills were caused by sabotage. In case C, it held SPDC liable for negligently not preventing the sabotage: the valves of the abandoned oil well could be easily opened with a wrench.<sup>26</sup> It was the first time a western court held a foreign company liable for environmental damage in a non-western country.<sup>27</sup>

Before the Court of Appeal the claimants won Cases A and B, which they had lost in the District Court.<sup>28</sup> In case C, the Court of Appeal held that the leak was caused by sabotage but postponed its final decision until it had heard the parties' submissions about whether the sabotage could have been prevented as well as the remediation of the area.

The Court of Appeal's decisions in Cases A and B relate to the liability of both parents and subsidiaries for the cause of the spills (section 3.2.3), the response to the spills (section 3.2.4) and the remediation of the polluted areas (section 3.2.5).

23 District Court The Hague, 30 December 2009, ECLI:NL:RBSGR:2009:BK8616 (*Doob-Akpan-Oguru-Efanga-MD/Shell*).

24 Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3588 (*Oguru/Shell*); Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3586 (*Doob/Shell*); Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3587 (*Shell/Akpan*).

25 *Oguru*, para. 3.27–3.30.

26 District Court The Hague, 30 January 2013, ECLI:NL:RBSGR:2013:BY9850 (*Oguru/Shell*); District Court The Hague, 30 January 2013, ECLI:NL:RBSGR:2013:BY9854 (*Doob/Shell*); District Court The Hague 30 January 2013, ECLI:NL:RBSGR:2013:BY9854 (*Akpan/Shell*).

27 *Liesbeth Enneking*, “The Future of Foreign Direct Liability?”, *Utrecht Law Review* 2014, 44–54.

28 Court of Appeal The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:132 (*Oguru/Shell*); Court of Appeal The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:133 (*Doob/Shell*), hereinafter: *Doob*.

### 3.2.3 *Final decision: cause of leaks*

Before the District Court, SPDC had successfully argued that the oil spills in Cases A and B were caused by sabotage. In case A, the Joint Investigation Team (JIT) report stated that the hole in the oil pipeline was round and circular with smooth edges, corresponding to damage caused by a drilling rig.<sup>29</sup> In case B, the JIT report stated that a 45 cm transverse cut had been made in the pipeline.<sup>30</sup> This seemed to indicate sabotage, but the expert panel appointed by the Court of Appeal regarded both JIT reports as ‘of very poor quality’.<sup>31</sup>

Under Section 11(5) of the Nigerian Oil Pipelines Act 1956, the operator of an oil pipeline is strictly liable for damage caused by any leakage from the pipeline, unless this was caused by the malicious act of a third person. According to Section 135 of the Nigerian Evidence Act 2011, both in civil and criminal cases such a crime must be proven beyond reasonable doubt. Based on the experts’ report, the Court of Appeal ruled in both cases that, although sabotage was the most likely cause of the leak, this was not established beyond reasonable doubt. Hence, it held SPDC strictly liable for the cause of the spills.

As regards liability of the parent companies, the Court of Appeal considered that this required SPDC’s negligent conduct. As this had not been demonstrated, no duty of care was owed by the parents (section 7.2 explains why this is incorrect).<sup>32</sup>

### 3.2.4 *Final decision: response to leaks*

Based on the tort of negligence, SPDC owed a duty to adequately respond to leaks and shut off the oil supply as quickly as possible. In case A, SPDC took three days to verify the leak and eleven days to stop it. It was routine to only shut off the oil supply after on-site verification, as leak reports were regularly incorrect. Here, verification was delayed due to residents denying SPDC access to the area. The court held that in these circumstances SPDC’s delayed response had not been negligent.

However, the court held SPDC liable for not installing a leak detection system (LDS) on the Oruma pipeline. With an LDS (recommended by the American Petroleum Institute as early as 2001), leaks can be verified remotely, significantly reducing the damage. The court ordered SPDC to install an LDS within

29 *Oguru*, para. 1.1.g.

30 *Doob*, para. 1.1.h. See note 28 (amended).

31 *Oguru*, para. 5.19; *Doob*, para. 5.19.

32 *Oguru*, para. 3.30 and 5.31, *Doob*, para. 3.30 and 5.31.

a year of the ruling, with a penalty of €100,000 per day in case of non-compliance.

The court dismissed liability of the old parents for the response to the spill, because they did not ought to have known that the pipeline was not equipped with an LDS.<sup>33</sup>

However, it held that current parent RDS was aware of a lacking LDS and that, based on *Vedanta*, it was subject to a duty of care (section 7.1). The court ordered RDS to ensure that the Oruma pipeline was equipped with an LDS within one year, subject to a penalty of € 100,000 per day in case of non-compliance. This was the first time a parent company had been held responsible for its subsidiary's operational activities abroad.

Under Nigerian law, courts have discretionary power to grant or reject an injunction, particularly if it can put an end to an unlawful situation or an unlawful omission.<sup>34</sup>

In case B, SPDC had deployed a helicopter for verification a day after the leak was reported. The court considered that this could and should have been done the same day and held SPDC liable for the delay in shutting down the oil supply. It did not order SPDC to install an LDS, as it had already done so when the pipeline was replaced in 2019.

### *3.2.5 Final decision: remediation of soil and ponds*

Under the tort of negligence, the pipeline operator also has a duty to remediate the soil and the ponds, regardless of the cause of the leakage. The parties were in agreement that the extent of the remediation was determined by the Environmental Guidelines and Standards for Petroleum Industry, published by the Nigerian government but they disagreed on their interpretation. The court held that SPDC remediated the area according to the intervention standard and that it was not necessary to restore the soil and water to its pre-polluted state. However, further remediation obligations may arise from SPDC's strict liability for the cause of the spills (section 3.2.3) and for not applying an LDS (section 3.2.4).

33 *Oguru*, para. 7.2.

34 *Oguru*, para. 3.13.

### 3.2.6 *The sequel*

Appeals by both parties are now pending before the Supreme Court. RDS appealed the LDS-order but not SPDC's strict liability, which is now final. Mili-eudensie lodged an appeal against the court's rejection of the old parent companies' liability for the cause of the oil spills (sections 3.2.3 and 7.2).

The Supreme Court will not judge the application of foreign law, as this is considered to be a factual matter rather than a matter of law. There is, however, room for parties to file procedural and argumentative complaints.

Even after the Supreme Court's decision, these disputes may continue because damage and damages are to be determined in a separate procedure, although the parties are already gauging possibilities to settle out of court. As the Court of Appeal did not hold RDS liable for the damage caused, it remains to be seen whether SPDC has sufficient financial resources to pay damages (section 4.1). If not, the claimants are dependent on RDS' goodwill to make sufficient funds available.<sup>35</sup>

### 3.3 *Okpabi in London*

Approximately 40,000 claimants from Nigerian farming and fishing communities in the Niger Delta sued RDS and its subsidiary SPDC for numerous oil pipeline leaks that caused extensive environmental and health damage.<sup>36</sup> The claimants alleged that the spills were caused by SPDC's negligence and that RDS owed the claimants a duty of care.

Like *Vedanta*, *Okpabi* was a pre-trial procedure. The Court of Appeal's majority had sided with Shell and decided that RDS as a parent company was not subject to a duty of care.<sup>37</sup> Since this decision predated *Vedanta*, the Supreme Court's decision in *Okpabi* was not surprising. Its added value was threefold.

First, the Supreme Court held that the majority of the Court of Appeal was wrong in accepting a general principle that parent companies could never be subject to a duty of care by enforcing group-wide policies and guidelines. According to *Vedanta*, there was no such general principle (section 6.2).<sup>38</sup>

35 *S.M. Bartman*, "Some Comments to the Hague Judgment in *Re Friends of the Earth Netherlands v Shell*", *European Company Law Journal* 2021, 47.

36 *Okpabi and others v Royal Dutch Shell and another*, 12 February 2021, [2021] UKSC 3 (further: *Okpabi*).

37 *Okpabi and others v Royal Dutch Shell and another*, 14 February 2018, [2018] EWCA Civ 191.

38 *Vedanta*, nr. 52; *Okpabi*, para. 143–145.

Second, the Supreme Court confirmed settled case law that the duty of care question must not be assessed in a pre-trial procedure but at a trial after disclosure and establishing all relevant facts.<sup>39</sup>

Third, the Supreme Court affirmed that pre-trial proceedings only need to establish whether the pleaded case discloses an arguable claim. The factual averments in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported.<sup>40</sup> The Court of Appeal's majority had overstepped this mark by accepting evidence from Shell witnesses in a mini trial based on very limited disclosure, without giving the claimants the opportunity for cross-examination.<sup>41</sup> The Supreme Court found this 'inappropriate', which can be seen as a serious rebuke.

In light of other evidence available to the Supreme Court, including documents the Hague Court of Appeal had ordered Shell to disclose, it concluded that the alleged facts had not been shown to be demonstrably untrue or unsupported and that there were real issues to be answered in a trial.<sup>42</sup>

### 3.4 *Milieudéfensie in The Hague*

The judgment of the Hague District Court in the climate case against RDS in May 2021<sup>43</sup> was the apotheosis of a turbulent business and human rights spring.<sup>44</sup> The case was brought by Milieudéfensie, Greenpeace and five other NGO's, as well as more than 17,000 individual claimants. This claim was not for compensation but for an injunction to prevent harm from happening.

The court first ruled that the interests of current and future generations of Dutch residents (rather than those of the entire world population) were suitable for bundling in a collective action (Article 3:305a Civil Code). The claims of the 17,000 individuals were declared not admissible, as their interests were duly represented by Milieudéfensie et al. (section 4.2).

The court decided that Dutch law was applicable to the claim (section 5.2). The general Dutch tort law provision is article 6:162 Civil Code, which requires unlawful conduct, *i.e.* the breach of a societal standard of care.

39 *Okpabi*, para. 48.

40 *Okpabi*, para. 107.

41 *Okpabi*, para. 120–125.

42 *Okpabi*, para. 137, 153–154.

43 District Court The Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudéfensie e.a./Royal Dutch Shell*).

44 *Cees van Dam*, "Is This the Real Life? Is This Just Fantasy?", *European Company Law Journal* 2021, 80–83.

To constitute RDS' standard of care, the court used various building blocks. It relied on the UNGPs because they constitute an authoritative and widely supported soft law instrument. In that regard, it considered that it is internationally accepted that companies should respect human rights, regardless of what states do, citing UNGP 13.<sup>45</sup> This does not only concern the company's own operations but also those of their business partners.

The court considered that RDS' control and influence over the Shell group justified an obligation of result to reduce the group's emissions (virtually considering the group as one entity). As regards the emissions of the group's business partners (suppliers and end users), the court subjected RDS to a significant best-efforts obligation, using its influence to limit any consequences as much as possible. This does not affect the business partners' own responsibility for their CO<sub>2</sub> emissions.<sup>46</sup>

The court inferred the reduction level from data of the IPCC (Intergovernmental Panel on Climate Change), which also formed the basis of the Paris Agreement and reflect the best available findings in climate science.<sup>47</sup> The court observed a broad consensus that to limit global warming to 1.5 °C, CO<sub>2</sub> emissions must be reduced by 45% net by 2030 compared to 2010 and by 100% net by 2050.<sup>48</sup> The court concluded that RDS must achieve a net 45% reduction in CO<sub>2</sub> emissions by the Shell group and its business partners relative to 2019.<sup>49</sup> RDS is free to choose how to comply with these obligations.

The court found that RDS' policy for the Shell group was not in line with this reduction target. It also considered that violation of the reduction obligation was imminent. Therefore, it granted the requested injunction and declared it immediately enforceable.

The court rejected RDS's counterarguments. The importance of access to reliable and affordable energy does not affect RDS's reduction obligation. The same goes for the fact that RDS cannot solve the climate problem on its own. The reduction obligation may limit the Shell group's growth, but the interests served by this obligation outweigh Shell's commercial interests.

It is likely that this decision is the start of a development in which companies with a high CO<sub>2</sub> footprint will feel the force of tort law. For a company with an adequate legal department, this ruling should not have come as a surprise. The lesson to be learned is to not interpret legal obligations from the com-

45 Para. 4.4.11–14 and 4.4.17.

46 Para. 4.4.23–24.

47 Para. 4.4.27.

48 Para. 4.4.29.

49 Para. 4.4.32–38.

pany's perspective but from the risk perspective of the right holders (section 9.1).

The District Court's decision was RDS' third legal defeat in four months' time, marking the end of an era in which Shell seemed to get away with its lack of responsibility. In *Okpabi* it argued that it had no control over its subsidiaries' operations (while exercising that control on a detailed basis), in *Oguru* it argued that the oil spills were caused by sabotage (while contributing to a culture of sabotage by poor maintenance, turning an increasingly polluted area into a fertile ground for criminality), and in *Milieudefensie* it argued that it had to wait for legislation (while having lobbied rule makers with incorrect information against exactly that).

This 'blaming others'-behaviour is the fruit of Shell's failing legal and managerial leadership. This will now cost the company many times more than if it had taken an active or proactive approach ten years ago and had developed and implemented an adequate human rights and climate policy (section 8.2).

#### 4. Jurisdiction

##### 4.1 Introduction

If claimants litigate against a multinational's subsidiary in their own country, a fair trial may be doubtful, particularly if the judiciary is not independent or incapable of handling mass claims, or because the local legal profession cannot match the multinational's legal power.

Claimants therefore prefer to litigate in the parent company's jurisdiction. This also brings the dispute to the heart of the group, generating media publicity and reputational damage. It also prevents the risk that the subsidiary is not sufficiently capitalised to pay damages.

Under EU law, parent companies can be summoned before the court of their seat or head office.<sup>50</sup> The *forum non conveniens*-defence is not accepted.<sup>51</sup> Whether the court has also jurisdiction over claims against non-EU subsidiaries is determined by national law.

50 Articles 4(1) and 63(1) Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels I).

51 ECJ, 1 March 2005, *Owusu*, C-281/02, ECR [2005] I-01383 (*Owusu/Jackson*).

## 4.2 England

In England, jurisdiction to hear claims against non-EU subsidiaries is determined by the ‘necessary or proper party gateway’. It requires: (a) a real issue to be tried, (b) a real prospect of success for the claim against the subsidiary, (c) that the subsidiary is a proper party to the claim against the parent, and (d) that England is the proper place to hear both claims, or that there is a real risk that the claimants will not obtain substantial justice in the foreign court.<sup>52</sup>

Under (a) *Vedanta* and RDS argued that they did not owe the claimants a duty of care so there was no real issue to be tried. The Supreme Court rejected this argument in *Vedanta* (section 3.1) and *Okpabi* (section 3.3). The same happened to *Vedanta*’s argument that the claimants abused EU law (Brussels I) alleging that their claim against the parent only served to have their claim against the subsidiary heard by an EU court.<sup>53</sup>

Under (d), *Vedanta* had offered to submit to the jurisdiction of the Zambian court so that incompatible outcomes could be avoided. The Supreme Court accepted that Zambia was the proper place for the proceedings,<sup>54</sup> but this did not help *Vedanta*, as the Supreme Court also held that there was a real risk that the Zambian claimants would not obtain justice, as no suitable legal aid was available in Zambia for disputes of this complexity, in particular against KCM, “... with a track record that suggested that it would prove an obdurate opponent.”<sup>55</sup>

## 4.3 Netherlands

Dutch courts are competent to hear cases against non-EU subsidiaries if the connection with the claim against the parent is such that efficiency reasons justify a joint hearing (Article 7(1) Code of Civil Procedure). On this ground, the Court of Appeal declared itself competent to hear the claim against SPDC: the defendants were part of the same group, SPDC’s conduct played an important role in assessing the parents’ liability, the facts related to the same oil spills, and it would prevent diverging decisions by different courts.<sup>56</sup>

52 Para 3.1 Civil Procedure Rules Practice Direction 6B.

53 *Vedanta*, para. 28–41.

54 *Vedanta*, para. 66–87. The claimants could still litigate in England against *Vedanta* only under Brussels I.

55 *Vedanta*, para. 89.

56 Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3588 (*Oguru*); Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3586 (*Dooh*).



The court also held that the claims against RDS were not manifestly unfounded, as it could not rule out that RDS was liable for damage caused by SPDC. Neither did the claimants abuse procedural law, because it was not plausible that the proceedings were only aimed at depriving SPDC of its natural forum.

Shell unsuccessfully contested the claimants' standing. The court ruled that Milieudefensie had standing under Article 3:305a Dutch Civil Code, because it acted on behalf of persons living in the vicinity of the oil spills and represented their interests in line with its legal objectives.

Shell also argued that the claimants were not the exclusive owners of the contaminated land and ponds. The court ruled that the claimants' relationship with the territories was such that they were entitled to file claims. Indeed, ownership concepts differ per country: it may be a collective rather than an individual concept; moreover, land registry is often poor or not existing.

Finally, Shell argued that the eldest son of one of the original claimants who had died in 2012, was not his father's sole heir. The court held that as the eldest son he had inherited his father's estate according to Nigerian customary law.

The last two arguments illustrate that Western legal concepts are not universally applicable in transnational proceedings and that Western companies and their lawyers need to understand this.

## *5. Applicable law*

### *5.1 Applicable procedural law*

As regards applicable law, a distinction must be made between the procedure and the claim's substance.

The procedure is subject to the law of the forum: whether the court has jurisdiction to hear a claim against non-EU subsidiaries is determined by national law (section 4.1). The boundaries between procedure and substance are not sharp, because the jurisdiction issue requires an assessment of whether the substantive claim against the parent is manifestly unfounded. The answer to this question is determined by foreign law (section 5.2).

The claimants' choice for a forum may not only be motivated by the wish to litigate in the parent's country (section 4.1) but also by procedural aspects. Anglo-American systems offer more options to finance legal aid through contingency fees and no-win-no-fee agreements than continental systems.

The most attractive side of Anglo-American procedural law is the trial. Crucially, a trial is preceded by a disclosure by the parties of the documents that are relevant to the claim. This disclosure does not only give claimants access to a much broader factual basis for their claims, but it also brings the company's (dirty) laundry into the court room and potentially on the street. This is so unattractive to companies that they are keen to settle the case before the trial. This disclosure leads to more informational equality of arms between the parties. The power of *Vedanta* and *Okpabi* is that the door to a trial (and hence disclosure) is now relatively easy to open (section 3.3).

In civil law systems the informational inequality can only be corrected to a very limited extent. In the Netherlands, for example, claimants must request the court to order the defendants to submit specific documents, such as about the parent's group management (Article 843a Code of Civil Procedure). This requires the claimants to identify internal company documents, which is often practically impossible.

The absence of disclosure in continental procedures also prevents a momentum for an out-of-court settlement. Where the claimants in *Vedanta* had a strong negotiating position for a settlement before the trial, the interlocutory judgments of the Hague court in 2015 in *Oguru* were non-starters.

## 5.2 *Applicable substantive law*

The law applicable to the substance of a claim is the law of the country where the damage occurs (Article 4(1) Rome II). In *Vedanta* this was Zambian law and in *Oguru* and *Okpabi* Nigerian law. There are some exceptions to this rule,<sup>57</sup> in particular Article 7 Rome II, which was applied in *Milieudefensie*.

Both Zambia and Nigeria are former British colonies that retained the common law after independence. In the case law of these countries, liability of parent companies has not yet been addressed, but the English common law still has authority. This means that although Zambian or Nigerian law formally applies, liability of parent companies is developed by the Supreme Court in London.

In other words, in *Vedanta* and *Okpabi* the Supreme Court interpreted the tort of negligence as it is also to be understood in the former colonies. The days of the Empire have long been gone, but Britannia still rules the common law waves of parent company liability. This is why it is attractive for claimants to

57 Cees van Dam, "Tort Law and Human Rights: Brothers in Arms", *Journal of European Tort Law* 2011, 231–232.

litigate against UK-based parent companies whose subsidiaries violate human rights in other common law countries.

In civil law countries, the application of foreign law is problematic because their courts cannot develop the liability of parent companies in other countries. Here, *Vedanta* provides a useful guideline. When applying foreign law, courts may look for the general liability rules for own conduct and for the conduct of third parties (section 6.3). This approach also gives the court some room to interpret foreign law more dynamically.

In *Milieudefensie*, the claimants invoked Article 7 Rome II, which provides for a choice of law in case of liability for environmental damage. On this ground, the claimants opted for the applicability of Dutch law, arguing that the event causing the damage had occurred in the Netherlands. The court accepted this choice of law, considering that RDS' adoption of the Shell group's corporate policy counts as an independent cause of damage, which can contribute to the (imminent) climate damage.<sup>58</sup>

### 5.3 Comparison of English and continental forums

For claimants, English forums have considerably more advantages than European forums, both in terms of procedure (trial, disclosure, and no-win-no-fees) and substance (liability rules developed by the forum judge). Without any changes, the latter will continue to play a limited role in holding multinational companies to account for failing to respect human rights.<sup>59</sup>

Hence, there is work to be done by the EU and its Member States. A first possibility to close the gap is a broader interpretation of Article 7 Rome II in case of liability for environmental damage, as the Hague District Court did in *Milieudefensie* (section 5.2). More generally, this choice of law provision should no longer be limited to environmental harm but generally extend to human rights violations by companies.<sup>60</sup>

58 Application of art. 4 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter: Rome II) would have led to the same outcome (para. 4.3).

59 The number of cases against parent companies in continental Europe is very limited: *Business and Human Rights Resource Centre*, Lawsuits Database, <https://www.business-humanrights.org/en/from-us/lawsuits-database>.

60 See the Report of the Committee on Legal Affairs of the European Parliament of 11 February 2021, with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), p. 31.

A second possibility is the introduction of due diligence legislation, such as the French Act on the Duty of Vigilance (section 2.2). This Act basically codifies UNGPs 17–21 and requires large companies to conduct due diligence to identify and mitigate human rights violations in their business activities and those of their direct business relations (subsidiaries, suppliers and subcontractors). Compared to the common law, civil law systems know fewer restrictions on liability for breach of statutory (due diligence) duty.<sup>61</sup> Although damages and causation will not always be easy to determine, the establishment of the violation of a due diligence obligation may give claimants a stronger hand to reach an out of court settlement. The pending French cases on liability of companies for breach of their duty of vigilance may shed more light on this development.<sup>62</sup>

## 6. Parent company liability

### 6.1 Authority of parents over their subsidiaries

Vedanta and RDS argued that (1) they were not involved in their subsidiaries' operations, and (2) a parent's duty of care can only arise in very exceptional situations. Both arguments failed.

Vedanta argued that as an indirect owner of KCM it was not involved in the mine's operations. And RDS claimed it was a holding company that only consulted with its subsidiaries on corporate governance and strategy, that did not interfere in its subsidiaries' operations, and that each subsidiary was autonomous and responsible for the health, safety, and environmental practices.<sup>63</sup> This argument lacked credibility, if only because it raised the question of why the CEO of a parent with such a limited role would be worth an annual remuneration of over \$10 million.

In fact, the parent companies had been economical with the truth. Vedanta's sustainability report showed that it had assumed responsibility for maintaining environmental standards in its subsidiaries' operations, including the KCM

61 *Van Dam* (fn. 21), sections 902–904.

62 The first case concerns Total's alleged failure to comply with its duty of vigilance in its mining activities in Uganda: <https://www.amisdela terre.org/affaire-total-ouganda-une-nouvelle-etape-malgre-une-justice-au-ralenti>. The other case concerns the reduction of Total's greenhouse gas emissions: <https://www.theguardian.com/world/2020/jan/27/french-ngos-and-local-authorities-take-court-action-against-total>.

63 *Okpabi and others v Royal Dutch Shell and another*, 14 February 2018, [2018] EWCA Civ 191, para. 51.

mine. Vedanta implemented these standards through training, monitoring and enforcement.<sup>64</sup>

According to its HSSE Control Framework, RDS systematically and in detail monitors the health, safety and environmental practices of its subsidiaries. For example, oil spills exceeding 1,000 litres had to be reported to RDS' Executive Committee within 24 hours.<sup>65</sup> The bonus rules for this Committee were linked to the number and sizes of oil spills.<sup>66</sup> Hence, the parent's involvement went beyond corporate governance and strategy and included setting operational standards and closely monitoring their compliance.

In vertically (top-down) organised groups like Vedanta and Shell, the parents provide advice, consent and material approval and this is followed by the subsidiary's formal approval. Executive Vice Presidents and Vice Presidents at Shell's subsidiaries derive their authority from the parent.<sup>67</sup> Formally, the subsidiary decides, but materially it rubber stamps and implements the parent's decisions, even if the parent does not have formal control but factually exercises it. What the parent wants, the parent gets.

Subsidiaries are like dogs on the leash. As long as the subsidiary follows the parent, it may look like the subsidiary acts independently. But as soon as this is not the case, operational control and supervision become apparent, revealing that the subsidiary does not have a will of its own and that it is in fact the parent's agent or subordinate (section 6.4).

In *Milieudefensie*, RDS did not dispute that its policy for the Shell group affects the Shell group's CO2 emissions (para. 4.3.6). However, the implementation of this policy (and hence the reduction obligation) is only feasible because RDS, as the court rightly pointed out, exercises far-reaching control over its subsidiaries and their operations. Indeed, after the revelations in the other Shell cases, RDS had lost the credibility to argue otherwise.

Obviously, not every group is organised in the same vertical way: "At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganization of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant."<sup>68</sup>

64 *Vedanta*, para. 61.

65 *Okpabi*, para. 55–56.

66 *Oguru*, para. 7.18.

67 *Okpabi*, para. 43.

68 *Vedanta*, para. 51.

## 6.2 *A parent's duty of care is nothing special*

The parents' second argument was that they could only owe a duty of care in exceptional situations. Combined with the made-up narrative of the powerless parent (section 6.1), they sought to create a factual immunity: the parent can do no wrong, echoing the legal immunity public bodies used to enjoy: the King can do no wrong.<sup>69</sup> Tort law and human rights law have shattered this public body immunity and parent companies will now suffer the same fate.

Parent company liability can be based on two grounds: piercing the corporate veil and the tort of negligence. The first basis, for which a very high threshold applies, is of minor importance in business and human rights.<sup>70</sup> Here, the tort of negligence is key.

Vedanta and Shell had argued that a parent's duty of care would imply a controversial extension of the tort of negligence. In *Okpabi*, this argument surprisingly impressed the Court of Appeal (section 3.3) but *Vedanta* made clear that such a duty was nothing new or special and could be assessed on the basis of the general principles of tort law: "A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party (...) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."<sup>71</sup>

This means that the parent company's duty of care is not governed by *Caparo*.<sup>72</sup> This case provides the test for novel situations, where there is no precedent, no established relationship and no applicable general principle.<sup>73</sup>

69 *Van Dam* (fn. 21), section 1801-2.

70 *Daniel Augenstein*, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, 2010, pp. 62 et seqq.

71 *Vedanta*, nr. 50, citing Lord Sales in *AAA and Others v Unilever plc*, 4 July 2018, [2018] EWCA Civ 1532, para. 36.

72 *Caparo Industries plc v Dickman*, 8 February 1990, [1990] 2 AC 605; *Van Dam* (fn. 21), section 503-3.

73 *Robinson v Chief Constable of West Yorkshire Police*, 8 February 2018, [2018] UKSC 4.

### 6.3 Potential duties of care of parent companies under English law

When does a parent company owe a duty of care under the English tort of negligence? First, it is important to keep in mind the words of Lord Briggs in *Vedanta*: “I would be reluctant to seek to shoehorn all cases of the parent’s liability into specific categories (...). There is no limit to the models of management and control which may be put in place within a multinational group of companies.”<sup>74</sup>

At least three avenues to a duty of care are conceivable: the parent’s own behavior (*Donoghue v Stevenson principle*), the parent’s assumption of responsibility vis-à-vis the claimants (*Hedley Byrne principle*) and the parent’s failure to prevent the subsidiary from causing harm, despite its control over it (*Dorset Yacht principle*).<sup>75</sup>

The *Donoghue v Stevenson principle*<sup>76</sup> concerns cases in which someone causes foreseeable damage to persons or property by an act. If a company owns all or a majority of the shares in another company (the essence of a parent-subsidiary relationship), this allows the parent to exercise control over the subsidiary’s operations. In such a case, a duty of care for the parent’s own behaviour depends on “...the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”<sup>77</sup>

However, the parent’s control over the subsidiary is only one factor in this assessment because control over a subsidiary and the actual management of part of its activities are not the same. A subsidiary may retain formal control, but in fact delegate part of its management to the parent’s representatives (section 6.2).<sup>78</sup>

Based on the *Donoghue v Stevenson principle*, a parent may owe a duty of care if it (a) takes over the management of a subsidiary’s activity or exercises it jointly with the subsidiary, (b) provides (defective) advice and/or issues (defective) group-wide safety and/or environmental policy, which are subsequently

74 *Vedanta*, para. 51.

75 *Michael and Another v Chief Constable of South Wales Police*, 28 January 2015, [2015] UKSC 2, para. 97–100.

76 This is a reduced version of Lord Atkin’s speech in *Donoghue v Stevenson*, 26 May 1932, [1932] AC 562; *Van Dam* (fn. 21), section 503-1.

77 *Vedanta*, para. 49.

78 *Vedanta*, para. 49; *Okpabi*, para. 146–148.

implemented by the subsidiaries,<sup>79</sup> or (c) issues group-wide safety and/or environmental policy and takes active steps to ensure its implementation.<sup>80</sup>

Control over the subsidiary does not in itself create a duty of care for the parent to intervene,<sup>81</sup> but this could be different in two situations. First, the Hedley Byrne principle regards situations where the parent company assumes responsibility for the subsidiary's activities, even if in fact it does not.<sup>82</sup> This may follow from the annual report or a sustainability report, as was the case in *Vedanta* (section 3.1).<sup>83</sup>

Second, the Dorset Yacht principle regards situations where the parent company exercises control over its subsidiary and could have prevented it from causing foreseeable personal injury or property loss to third parties if it had acted with reasonable care.<sup>84</sup> The parent's control over the subsidiary and the subsidiary's negligent conduct are therefore only in Dorset Yacht situations a necessary condition for the parent's duty of care.

#### 6.4 Does *Vedanta* go too far or not far enough?

For the traditional German approach, *Vedanta* may go too far. Wagner writes that under German law, liability of parent companies for damage caused by their subsidiaries is inconceivable for two reasons. First, German tort law only recognises duties of care (*Sorgfaltspflichten*) in relation to one's own behaviour.<sup>85</sup> Second, the *Rechtsträgerprinzip* (legal entity principle) in company law prevents imposing duties on parent companies vis-à-vis subsidiaries. Parent

79 Zie voor (a) en (b): Sales LJ in *AAA v Unilever*, Lord Briggs in *Vedanta*, para. 51.

80 These are three of the four *Vedanta* routes described by the claimants in *Okpabi* (para. 26–27). The fourth route is the *Hedley Byrne*-principle. The Supreme Court considered the *Vedanta* routes convenient headers but they should not be understood as supporting any special duty of care tests because there is no such special test.

81 *Vedanta*, para. 49.

82 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, 28 May 1963, [1964] AC 465; *Van Dam* (fn. 21), section 503–4.

83 *Vedanta*, nr. 61. See already *Lubbe v Cape plc*, 20 July 2000, [2000] 1 WLR 1545 (HL) and *Chandler v Cape*, 25 April 2012, [2012] EWCA Civ 525.

84 *Home Office v Dorset Yacht Co Limited*, 6 May 1970, [1970] AC 1004; *Van Dam* (fn. 21), section 808–3.

85 *Gerhard Wagner*, “Haftung für Menschenrechtsverletzungen”, *RabelsZeitschrift* 2016, 757–759. According to Wagner, the stricter liability rules for damage caused by others (§ 831 and 832 BGB) are the exceptions confirming the rule, although it would be arguable that if these stricter rules apply, the principle would be equally applicable under fault liability.



company liability for damage related to subsidiaries, would throw overboard the differentiated attribution of property rights and liabilities in the group.<sup>86</sup>

This approach is too cautious. First, Wagner rightly points out that in areas like reporting, tax law and competition law, the differentiated attribution has already been thrown overboard without causing problems.<sup>87</sup> Hence, the *Rechtsträgerprinzip* is not the law's fate but the law's choice. Second, the UK Supreme Court, not known to be a revolutionary regarding the principles of company law, accepted in *Vedanta* that a parent company may owe a common law duty of care for damage caused by its subsidiary. Third, duties of care of a parent company are also conceivable based on its own behaviour (such as their active involvement in managing the subsidiary's operations). None of these situations concern integrating the behaviour of several independent legal entities.

The question is therefore rather whether *Vedanta* goes far enough. Although the Supreme Court considered a parent's duty of care to be nothing special (section 6.2), this does not mean that claimants will no longer encounter problems to establish such a duty. The liability risk for parent companies is increasing but for claimants the threshold to sue multinationals is still very high in terms of time and money.<sup>88</sup> The reality remains that most human rights violations by multinational corporations are not addressed through any form of dispute resolution, let alone that injured persons receive an adequate remedy.<sup>89</sup>

This discussion goes to the heart of company law. Legal entities are essential tools for managing entrepreneurial risks and protecting the entrepreneur. This argument is less powerful if the investor is itself a company and, even more so, the parent company of a group that practically acts as one commercial entity. Risk externalisation through legal entities is easier to justify towards voluntary (commercial and contractual) creditors than towards involuntary third parties who are not able to manage or pass on the risk. This is particularly poignant, if they suffer personal injury, property damage or environmental damage be-

86 Wagner (fn 85), pp. 759–761.

87 Wagner (fn 85), pp. 762–765.

88 Van Dam (fn. 85), pp. 228–232.

89 Over the past decade, the Business and Human Rights Resource Centre has registered only 204 lawsuits worldwide: <https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability>. About a third of them are in the United States, based on the Alien Tort Statute. In *Kiobel v. Royal Dutch Petroleum Co.*, 17 April 2013, 569 U.S. 108 (2013) its remit was limited to cases that sufficiently touched and concerned the territory of the United States: see Julian G. Ku, “Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute”, *American Journal of International Law* 2013, 835–841.

cause of the subsidiary's conduct. These are exactly the business and human rights cases.

In these cases, the protection parent companies derive from the externalisation of the risks of their activities using subsidiaries is disproportionate. As a result, the parent benefits from the subsidiaries' advantages, but its burdens are borne by vulnerable individuals and communities. This justifies liability of parent companies for their externalised costs.

Over the past decades, various proposals have been made in this respect. Antunes suggested that the parent should be liable for the subsidiary's obligations arising from management decisions.<sup>90</sup> Mendelson argued that liability should be based on control rather than share ownership.<sup>91</sup> And Witting argues for a proportionate strict and personal liability of all shareholders for personal injury caused by the company.<sup>92</sup> This latter idea can already be found in Hansmann and Kraakman.<sup>93</sup>

In recent decades, groups have become more vertically organised, and their activities are more often carried on as if they were a single commercial entity, making the boundaries of legal personality and ownership within the group irrelevant.<sup>94</sup> If the subsidiary's decisions are determined by decisions at group level, they are the parent's subordinates (section 6.1). This justifies the parent's strict liability.<sup>95</sup> For groups that publish consolidated financial statements, this would not make a relevant financial difference, unless one considers it fair for a group to pass on the group's operational costs to vulnerable individuals and communities.<sup>96</sup>

In *Miliendefensie*, the District Court created a *de facto* strict liability, by imposing on RDS an obligation of result for the whole Shell group. This is appropriate where a parent company has created a complex myriad of legal entities

90 *Jose Antunes*, *The Liability of Corporate Groups*, 1994, pp. 67–68.

91 *Nina Mendelson*, "A Control-Based Approach to Shareholder Liability for Corporate Torts", *Columbia Law Review* 2002, 1203.

92 *Christian A. Witting*, *Liability of Corporate Groups and Networks*, 2018.

93 *Henry Hansmann en Reinier Kraakman*, "Toward Unlimited Shareholder Liability for Corporate Torts", *Yale Law Journal* 1991, 1879–1934.

94 *Vedanta*, para. 51.

95 *Van Dam* (fn. 21), section 1606–1607; *Christian Witting*, "Modelling organisational vicarious liability", *Legal Studies* 2019, 694–713; *Tetiana Kravstova and Ganna Kalinichenko*, "The vicarious liability of parent company for its subsidiary", *Corporate Ownership & Control* 2016, 684–691; *Phillip Morgan*, "Vicarious liability for group companies: the final frontier of vicarious liability", *Professional Negligence* 2015, 277.

96 *Filip Gregor/Hannah Ellis*, *Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses*, 2008, pp. 11–20.

over which it exercises decisive control in the interest of the whole group. Here, the strict liability is not for damage caused, but for damage not prevented.

## 7. *Vedanta* misunderstood in *Oguru*

### 7.1 *How the court could have come to the same decision if it had interpreted Vedanta correctly*

The only case in which a parent company has been held responsible for its subsidiary's operations is *Oguru* (section 3.2.4). The Hague Court of Appeal based its decision on *Vedanta* (sections 3.2 and 5.2).

The court considered that *Vedanta* meant applying *Caparo*. To this test, it added an element of *Chandler v Cape*, namely that the parent company knew or should have known about the risk (SPDC's slow response to the spills). This led the Court of Appeal to the following test: "... if the parent knows or should know that its subsidiary is unlawfully<sup>97</sup> causing damage to third parties in an area in which the parent interferes with the subsidiary, the starting point is that the parent owes third parties a duty of care to intervene."<sup>98</sup>

This test is incorrect for several reasons. First, *Caparo* is only intended for new cases (section 6.2), and according to *Vedanta* parent company liability is not (section 3.1). Second, *Oguru* was, just like *Vedanta*, not a *Chandler* type of case. And third, it followed from *Vedanta* that a parent's duty of care does not require the subsidiary's negligent conduct. This is only the case in *Dorset Yacht* situations (section 6.3).

However, the court could have reached the same result based on a correct interpretation of *Vedanta*. The factual basis for the court's ruling was that at least from 2010, RDS was specifically and intensely involved in the question of whether the Nigerian pipelines, including the Oruma pipeline, should be equipped with an LDS. Also since 2010, the number of worldwide oil spillages was linked to the Executive Committee's variable remuneration. The court concluded that the members of this Committee were actively involved in SPDC's handling of the LDS issue and thus in its management.<sup>99</sup> On this basis, the court could have held that the safety of the oil pipelines was jointly mana-

97 This concept is unknown in the *common law*: *Van Dam* (fn. 21), section 605-3.

98 *Oguru*, para. 3.30–3.31; see also para. 7.1.b.

99 *Oguru*, para. 7.18–7.21.

ged by RDS and SPDC<sup>100</sup> and that RDS owed the claimants a duty of care to ensure that an LDS would be installed.

### 7.2 *Liability of former parents for cause of oil leaks*

The Hague Court of Appeal also ruled that SPDC was strictly liable for the cause of the oil spills (section 3.2.3). These happened in 2004 and 2005 when the Shell group was jointly headed by Shell Petroleum N.V. and Shell Transport and Trading Company Ltd. (section 3.2.1). The court held that they did not owe a duty of care for the cause of the spills, because SPDC had not acted unreasonably or negligently. Here, the court followed an interpretation of *Vedanta* provided by Shell, namely that the subsidiary's negligence is a condition for the parent's duty of care.<sup>101</sup>

This interpretation is incorrect: such a condition only exists in *Dorset Yacht* situations (section 6.3). But even if one follows this incorrect interpretation, it is unclear why the court did not consider the possibility that SPDC was also liable under the tort of negligence for not taking sufficient measures to prevent the sabotage.

Under a correct interpretation of *Vedanta*, it would have been conceivable that the old parents owed a duty of care regardless of SPDC's negligent behaviour, particularly if the parents' involvement in SPDC's operations was of such an intensity that it amounted to joint management. Given that the court had considered that the parents' involvement before and after the restructuring of the Shell group in 2005 was organised in much the same way, a duty of care could indeed have been established.<sup>102</sup>

## 8. *Lessons from the case law*

### 8.1 *Group management, transparency, and duty of care*

In *Vedanta*, the Supreme Court ruled that the fact that the parent had assumed responsibility in its sustainability report for enforcing environmental standards among its subsidiaries made it arguable that it owed third parties a duty of care. This seemed to penalise Vedanta for its commendable transparency and triggers the question what the advice to parent companies should be.

100 This is also known as the first Vedanta route (section 6.3).

101 *Oguru*, para. 3.33 *in fine* and para. 5.31.

102 *Oguru*, para. 7.6–7.9.

*Maintaining that subsidiaries operate independently*

This is not a promising option for vertically organised groups. The case law has shown that parents often manage their subsidiaries closely, also operationally. Now this toothpaste is out of the tube, it's hard to get it back in<sup>103</sup> and it is unlikely that courts will accept that subsidiaries operate independently, unless there are specific indications otherwise.

*Stop interfering with subsidiaries' operations*

This is not wise advice either. If a subsidiary performs sub-optimally, corporate governance will require the parent to monitor the subsidiary more closely and intervene if necessary. The parent cannot afford to create the impression that the subsidiary is losing control over its operations and that the parent is losing control over its group. It was therefore wise for Vedanta and the Shell parents to interfere with their subsidiaries' operations. Either the parent allows a subsidiary and thus the group to function sub-optimally, implying that its directors do not take their duties seriously, or they take these duties seriously and run the risk that this will put the parent company under a duty of care. For a reasonably acting parent director, the choice will not be difficult.

*Not disclosing information about group management*

This advice is at odds with the Non-Financial Reporting Directive.<sup>104</sup> Parent companies of groups with 500 employees or more must disclose the main sustainability and human rights risks associated with the group's business activities and those of its business relationships, products, or services, as well as indicate how these risks are managed. The parent has some leeway to avoid that its statements may be interpreted as assuming responsibility towards third parties but given the many other ways in which a parent's duty of care can be constituted (section 6.3), this may be of little help to the company.

The parent company may also choose to report that it does not have a sustainability and human rights policy. However, this is not a realistic option because investors, governments, and civil society demand transparency. In other words, parent companies do not have much choice than to firmly move forward in transparency, "... in the knowledge that talk is no longer cheap when it comes to the management of human rights and environmental issues in the corporate group".<sup>105</sup>

103 Attributed to Bob Haldeman (1926–1993), the White House Chief of Staff under President Nixon.

104 Directive 2014/95/EU.

105 *Marilyn Croser/Martyn Day/Mariëtte van Huijstee/Channa Samkalden*, "Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability", *Business & Human Rights Journal* 2020, 135.

### 8.2 *The reasonably acting parent company*

The above case law mainly concerns the duty of care. If a parent owes a duty, it also needs to be established that it breached its duty. The breach test is that of the reasonably acting parent company.<sup>106</sup> What this specifically means was hardly discussed in the case law until the decision in *Milieudefensie* (section 3.4).<sup>107</sup>

The level of care expected from a reasonably acting parent company will be strongly influenced by the UNGPs and the OECD Guidelines for Multinational Enterprises.<sup>108</sup> This means that companies must respect human rights by (a) not causing or facilitating negative human rights impacts through their own operations, and remedy such impacts if they occur; (b) making efforts to prevent or mitigate adverse human rights impacts directly associated with their activities, products or services through their business relationships, even if they did not contribute to them (UNGP 13). The OECD due diligence cycle provides a more specific interpretation of these due diligence obligations.<sup>109</sup>

In *Milieudefensie*, the court specified the standard of care by following the reduction paths of the authoritative IPCC (section 3.4). In other areas of business and human rights, it may be harder to find such a broadly applicable specification of the standard of care.

### 8.3 *Beyond compliance: leadership from the top*

An increasing number of companies include sustainability and human rights in their strategy and operations, irrespective of any legal obligations. Protecting the reputation has traditionally been an important motive but given the devel-

106 Van Dam (fn. 21), section 805–812.

107 Van Dam (fn. 21), section 1608.

108 See also *Nicolas Buenol/Claire Bright*, “Implementing human rights diligence through corporate civil liability”, ICLQ 2020, 789–818; *Doug Cassel*, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence”, *Business and Human Rights Journal* 2016, 179–202; *Cees van Dam/Filip Gregor*, “Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care: Three Scenarios,” in Juan José Álvares Rubio/Katerina Yiannibas (ed.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, 2016, pp. 119–138.

109 See for example *Cees van Dam/Martijn Scheltema*, *Options for enforceable IRBC instruments*, 2020, pp. 15–29.

opments in legislation and case law, limiting liability risks is now an equally important reason. Conducting thorough due diligence is an important way to manage, mitigate and avoid these risks.<sup>110</sup> It also contributes to protecting the company's market value and creditworthiness, preventing its activities from becoming more expensive, delayed, or having to be terminated, and improving relationships with investors, shareholders, business partners and other stakeholders.

An important condition for a successful sustainability and human rights policy is that it is led from the top: the board of the parent company, in particular the CEO. Here it is worth noting that the announced due diligence legislation (section 2.2) may not only impose obligations on the parent company, but also on its directors. This would serve to integrate long-term interests, sustainability, stakeholder interests and broader social interests into the corporate interest, to counterbalance the shareholder interest that is perceived to be too great.

Leadership from the top is essential for an effective sustainability and human rights practice and to avoid it from being treated as just another branche in the compliance tree. It requires a (pro)active attitude to shape an autonomous corporate policy, with stakeholders as equal partners, in which responsibility is not shifted to others but where responsibility is shared with subsidiaries, suppliers and customers.

This approach also implies a new form of *legal* leadership and expertise: lawyers looking beyond the legal and reputational risks for the company by limiting and removing the risks for individuals and communities (section 9).<sup>111</sup>

## 9. *Back to the context: business and human rights*

### 9.1 *Whose risks are we talking about?*

The business and human rights context (section 2) goes beyond the traditional boundaries of tort law and company law and has consequences for the type of risk (section 9.1), the nature of the harm (section 9.2) and the content of the remedy (section 9.3), also in the light of the Sustainable Development Goals (section 9.4).

What matters in the context of business and human rights is not only the risk to the company but the risk to rightholders (individuals and communities) of

110 *Björn FASTERLING*, "Due Diligence as Risk Management: Social Risk Versus Human Rights Risks", *Journal of Business and Human Rights* 2017, 225–247.

111 *Van Dam* (fn. 4), pp. 18–25.

being harmed by corporate conduct.<sup>112</sup> Obviously, both risk concepts overlap to some extent but using the wrong risk lens may cause major problems if essential risks to rightholders are overlooked. Where business and human rights are now increasingly identified with ESG (Environmental, Social and Governance) risks, these factors are not only about the non-financial risks for the company, but primarily about those for the rightholders.

Change of corporate behaviour (due diligence) is of great importance. It is, however, not an end but a means to achieve results ‘on the ground’, in the daily lives of individuals and communities: terminating negative human rights impacts and creating positive human rights impacts.<sup>113</sup> Companies are therefore wise to not rely on their own wisdom when identifying and addressing human rights risks, but to inform themselves through genuine stakeholder management. The problems are often too complex for a company to find and implement a sustainable solution. Entering into partnerships and working at eye level with stakeholders prevents the company from acting in a postcolonial way (‘we know what’s best for you’), with all the knock-on problems such an attitude will bring.<sup>114</sup>

### 9.2 *Damage versus violating human rights*

In principle, tort law is about compensating damage suffered as a result of negligent conduct. Business and human rights, however, is about providing remedies for violations of human rights. These concern all internationally recognised human rights, in particular but not limited to those enshrined in the International Bill of Rights<sup>115</sup> and the ILO Declaration on Fundamental Principles and Rights at Work (UNGP 12). This means that the relevant risks in business and human rights go beyond health and safety issues at stake in tort law. They may also concern, for example, the right to education, the right to equal treatment and the rights of indigenous peoples. Tort law is increasingly instrumentalised to also protect these human rights (see also section 9.3).

112 UNGP 17, Commentary: “Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”

113 *Kendyl Salcito/Mark Wielga*, “What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?”, *Business and Human Rights Journal* 2018, 113–121.

114 *Rob van Tulder/Rianne van Asperen*, *Wicked Problems Plaza. Principles and Practices for Effective Stakeholder Dialogue*, 2017.

115 The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.



This is reflected in *Milieudefensie*, in which the court deduced from the Dutch Supreme Court's *Urgenda* decision<sup>116</sup> that Articles 2, and 8 ECHR protect against the consequences of dangerous climate change as a result of global warming due to CO2 emissions (para. 4.4.9–10).

Human rights risks are not only about 'objective' injustice, but also about what individuals and communities perceive as injustice. This may not only be based on tort or contract, but also on explicit or implicit promises and community practices or notions of fairness.<sup>117</sup> Concepts of fairness are partly culturally determined and do not necessarily correspond to Western concepts (section 4.3). This not only makes risk assessment and risk management complex, but also demonstrates the importance of stakeholder consultation with those directly involved, as well as independent complaint mechanisms, so that disputes can be settled in a sustainable way.

### 9.3 Compensation versus human rights remedy

In tort law, the main remedy is monetary compensation. Alternatively, an injunction is possible (section 3.4), but this is closely linked to damage caused or to be caused. Because human rights violations are broader than causing damage in the traditional sense of tort law (section 9.2), the remedies are also broader than financial compensation.

Two recent settlements of claims against Camellia, the parent company of an agricultural conglomerate, show that such broad human rights remedies are also possible after a tort claim.<sup>118</sup> One of the cases concerned human rights violations (murder, rape, violence and deprivation of liberty) against female residents by guards employed by a Kenyan company in the Camellia group. The settlement did not only include financial compensation for the victims, but also various measures to enhance human rights protection, such as the construction of roads to give communities better access to local amenities, the deployment of more female security personnel, and a project to help local com-

116 HR 20 December 2020, Nederlandse Jurisprudentie 2020/41 (*Staat/Urgenda*).

117 UNGP 25, Commentary.

118 Settlement of claims against Camellia Plc of allegations of serious human rights abuses in Kenya: <https://www.leighday.co.uk/latest-updates/news/2021-news/settlement-of-claims-against-camellia-plc-of-allegations-of-serious-human-rights-abuses-in-kenya>. Leigh Day settles claims against the Camellia Group arising out of rape and other forms of gender-based violence on Malawian tea estates: <https://www.leighday.co.uk/latest-updates/news/2021-news/leigh-day-settles-claims-against-the-camellia-group-arising-out-of-rape-and-other-forms-of-gender-based-violence-on-malawian-tea-estates>.

munities generate revenue. The capstone was a complaints mechanism with independent oversight to settle new cases of human rights violations.<sup>119</sup>

These settlements not only provide a safer environment for the affected communities and individuals, but also lower operational risks for the group. They also demonstrate that the company not only seeks to benefit from local natural resources and the local workforce, but that it is prepared to share its benefits with the local communities. This is an essential part of the company's social license to operate.<sup>120</sup>

#### 9.4 United Nations Sustainable Development Goals (SDGs)

The Camellia settlements (section 9.3) illustrate the close connection between the UNGPs, due diligence legislation and the SDGs.<sup>121</sup> The SDGs are not obligations, but goals to protect and enhance human rights. They are a joint and urgent responsibility of governments, businesses, and civil society. Where the UNGPs, due diligence legislation and tort law embody the idea of 'do no harm', the SDGs invite to 'do good'.

In the corporate world, the SDGs are more popular than the UNGPs, because they offer opportunities to profile the company in a positive way. However, SDG engagement often takes place in a non-strategic way and is insufficiently aligned with the company's core activities. As a result, the return on SDG investments often lags behind. It is therefore important not only to align the SDGs with the company's core activities, but also with the most important human rights risks in its activities.<sup>122</sup> This intrinsically links the UNGPs and the SDGs. This way, due diligence is not only an instrument to manage human rights risks, but also *opportunities* to contribute to enhancing human rights protection, and contributing to the SDGs in a more efficient, meaningful, and effective manner.

In *Milieudefensie*, the court included the SDGs as a consideration for the standard of care. RDS had pointed to SDG 7 ("Ensure access to affordable, reliable,

119 Jonathan Kaufman/Katherine McDonnell, "Community-Driven Operational Grievance Mechanisms", *Business and Human Rights Journal* 2016, 127–132.

120 Joana Nabuco/Leticia Aleixo, "Rights Holders' Participation and Access to Remedies", *Business and Human Rights Journal* 2019, 147–153.

121 Shift, *Business, Human Rights and the Sustainable Developments Goals. Forging a Coherent Vision and Strategy*, 2016.

122 Jan Anton van Zanten/Rob van Tulder, "Analyzing companies' interactions with the Sustainable Development Goals through network analysis: Four corporate sustainability imperatives", *Business Strategy and the Environment* 2021, 1–25.

sustainable and modern energy for everyone”) but the court considered that this SDG does not affect the objectives of the Paris Agreement. This also follows from SDG 13 (“Take urgent action to combat climate change and its impacts”) and recital 8 of the Paris Agreement, which emphasise the intrinsic link between tackling dangerous climate change, equitable access to sustainable development and eradicating poverty. The court concluded that the SDG 7 does not constitute a reason for RDS not to comply with its reduction obligation (para. 4.4.40–42).

### 10. Concluding observations

*Vedanta*, *Oguru*, *Okpabi* and *Milieudéfensie* have changed the course of parent company liability. In *Oguru* and *Milieudéfensie*, parents were held responsible for their subsidiaries’ activities. And after *Vedanta*, common law claims against parent companies must be assessed at trial, preceded by disclosure. It is expected that the number of settlements with parent companies will considerably increase (section 3).

This applies in particular to parent companies in the United Kingdom with subsidiaries in former British colonies that retained the common law system. For these countries, the UK Supreme Court develops the rules for parent company liability (section 5).

Claims are usually filed in the parent company’s jurisdiction. The law of the forum decides whether its subsidiaries may be summoned before the same court. Relevant issues are the connection between the two claims, and whether the claimants are able to obtain justice in their own country (section 4). The procedural advantages of the common law system (disclosure and trial) and its material advantages (a Supreme Court led development of tort law) currently make London the most attractive forum for victims of human rights violations by multinational companies. Continental jurisdictions have some options to catch up (section 5).

The substantive message from the case law is that parent company liability is nothing special and may be based on the parent’s own behaviour or on failing to prevent damage caused by the subsidiary. However, this increase of the parent’s liability risks alone is not sufficient for effective human rights protection (section 6).

In *Oguru*, the Hague court misinterpreted *Vedanta* but it could have reached the same decision as regards the order imposed on RDS. Moreover, it could have ruled that the old Shell parents owed a duty of care to prevent the cause of the oil spills (section 7).

After *Vedanta*, parent companies have to reconcile group management, transparency and the duty of care risk. It will no longer benefit a parent company to argue that its subsidiaries operate independently, to argue that it does not interfere with its subsidiaries' operations, or to not publish information about group management activities (section 8).

The broader business and human rights agenda of respecting human rights goes beyond not causing damage. Its focal point is protecting the human rights of individuals and communities. This has consequences for the risk concept and for the remedy to be offered, which is broader than monetary compensation for damage caused. In this sense, the SDGs are the flipside of the responsibility to respect human rights (section 9).

Parent company liability is a fundamental component of the larger business and human rights agenda (section 2). The starting point is a broader concept of risk: the focus is no longer just on the risk for the company, but also on the risk for individuals and communities. And the task is no longer to externalise these risks but to manage them in such a way that they are removed, not only for the company but also for the affected individuals and communities. This is a paradigm shift that comes with many challenges and dilemmas. But it is a shift that is unavoidable. Not only for people and planet, but also for peace and prosperity. And hence, for the sustainability of the company.