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# ‘Vicarious liability for group companies: the final frontier of vicarious liability?’

*Phillip Morgan*

This article seeks to explore the pressing unanswered commercial issue: whether or not a parent company can potentially be vicariously liable for its subsidiary’s torts. There are three reasons why this issue is particularly pressing. First, enterprises in hazardous industries, such as the asbestos industry, have deliberately sought to structure themselves to avoid the consequences of tort litigation. Secondly, even in the absence of deliberate structuring, it is possible for tort claims, particularly for environmental harms such as oil spills or for toxic torts, to result in potential tort claims that exceed the value of even large well capitalised and insured subsidiaries. Thirdly, many large enterprises operate as a complex intertwined web of companies within a group, where the relevant tortfeasor and ‘employer’ may be impossible to identify.

The recent advances in vicarious liability provide a solution to these problems. Vicarious liability in England and Wales has so far concerned vicarious liability of a legal (or natural) person for the torts of a natural person. However, vicarious liability is a doctrine ‘on the move’.<sup>1</sup> Whether or not there can be vicarious liability for a legal person is undecided in English law. However, the theory of vicarious liability recently expounded by the Supreme Court, as well as the development of new categories of vicarious liability, point towards vicarious liability for legal persons.

This article argues that a legal (or natural) person may employ, or be in a relationship ‘akin to employment’ with, a legal person for the purposes of vicarious liability. This is not veil piercing. Vicarious liability for companies takes the fiction of personality to its logical conclusion, treating them as a person, whilst fully respecting their limited liability. Vicarious liability offers a potentially powerful tool to hold parent companies to account for the torts of their subsidiaries. Further, dual vicarious liability offers opportunities to claimants facing such corporate structures.

## **Vicarious liability: a doctrine on the move**

Vicarious liability makes one party, A, strictly liable for the torts of another, B. There are two stages to establishing vicarious liability. First, there must be a relationship between A and B which is sufficient to trigger the doctrine; secondly, the tort committed by B must be sufficiently connected with that relationship to render A vicariously liable for the tort.<sup>2</sup>

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1 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 (CCWS), at [19], per Lord Phillips JSC.

2 P Morgan, ‘Vicarious liability on the move’ (2013) 129 *LQR* 139, approved in *Allen & Ors v The Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967 (*Allen*), per Gross LJ at [17].

In recent years, driven by cases concerning institutional abuse, vicarious liability has significantly expanded in scope. The first wave of vicarious liability abuse cases occurred in an employment context and concerned the sufficiency of connection stage in establishing vicarious liability (the second stage). For what acts could an employer be vicariously liable? Influenced by the Canadian jurisprudence,<sup>3</sup> particularly enterprise liability, the House of Lords in *Lister v Hesley Hall*<sup>4</sup> and *Dubai Aluminium Co Ltd v Salaam*<sup>5</sup> expanded the remit of vicarious liability by introducing the 'close connection' test. Prior to *Lister*, cases concerning vicarious liability for sexual abuse had failed on the Salmond test.<sup>6</sup> From *Lister* onwards, sexual abuse could fulfil this second stage.

The paradigm example of vicarious liability occurs in the relationship of employer and employee. Vicarious liability has developed to allow more than one 'employer', or dual vicarious liability.<sup>7</sup> However, even prior to the recent abuse litigation vicarious liability was not limited to employment. It may for instance occur in the context of partnerships, and in 'principal' and 'agent' relationships.<sup>8</sup>

In the light of abuse committed by clergymen and members of religious communities, the focus of the abuse litigation has shifted to the first stage of vicarious liability: what relationships are sufficient to trigger the doctrine, and how much further beyond employment does vicarious liability apply? In declaring vicarious liability to be 'on the move', the Supreme Court has made it clear in *Various Claimants v Catholic Child Welfare Society (CCWS)*<sup>9</sup> that a contract of employment is not required for the doctrine to be triggered, and a relationship 'akin to employment'<sup>10</sup> is sufficient. There is now a degree of uncertainty as to which relationships may trigger vicarious liability.<sup>11</sup>

As the cases concerning the second stage of vicarious liability demonstrate, where abuse cases lead, commercial cases soon follow.<sup>12</sup> *Lister*, a case concerning abuse in a residential school setting, was soon followed by *Dubai Aluminium Co Ltd v Salaam*,<sup>13</sup> a case concerning commercial fraud. The abuse case of *Maga v Birmingham Roman Catholic Archdiocese Trustees*<sup>14</sup> was followed seven months later with the commercial case of *Brink's Global Services Inc v Igrox Ltd*.<sup>15</sup>

Whilst the expansion of the second stage of vicarious liability is now felt in commercial cases, the commercial significance of the expansion of the first stage of vicarious liability is as yet unclear. The impact will however soon be felt. This article seeks to explore the

3 Particularly the Supreme Court of Canada's decision in *Bazley v Curry* [1999] 2 SCR 534 (*Bazley*).

4 [2001] UKHL 22, [2002] 1 AC 215.

5 [2002] UKHL 48, [2003] 2 AC 366, per Lord Nicholls, at [23].

6 *ST v North Yorkshire County Council* [1999] LGR 584.

7 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 (*Viasystems*); *CCWS*.

8 See P Morgan, 'Recasting Vicarious Liability' (2012) 71(3) *CLJ* 615.

9 [2012] UKSC 56, [2013] 2 AC 1.

10 First developed in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] QB 722 (*JGE*).

11 *Cox v Ministry of Justice* [2014] EWCA Civ 132, [2015] QB 107 (*Cox*); *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB); *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB).

12 P Morgan, 'Revising vicarious liability: a commercial perspective' [2012] *LMCLQ* 175, accepted in *JGE*, per Ward LJ at [56].

13 [2002] UKHL 48, [2003] 2 AC 366 (*Dubai Aluminium*).

14 [2010] EWCA Civ 256, [2010] 1 WLR 1441.

15 [2010] EWCA Civ 1207, [2011] IRLR 343.

pressing unanswered commercial issue: whether or not a parent company can potentially be vicariously liable for its subsidiary's torts.<sup>16</sup>

## Tort as a commercial regulator

Tort law (and liability insurance)<sup>17</sup> has a regulatory role to play in society. It improves standards, and helps to eliminate at least some poor practices and operators.<sup>18</sup> Forcing organisations to pay for their torts encourages organisations to control their 'accident costs'<sup>19</sup>, and drives organisations that cause excessive harm into bankruptcy. Tort also corrects harm where individual rights have been violated.<sup>20</sup>

Limited liability can undercut incentives to take care, and discourage optimum investment in safety precautions.<sup>21</sup> The right that the law gives to individuals to create limited liability companies can take away a victim's right to sue an individual. Limited liability can be a way of evading tort liability, allowing, in some cases, the loss to be shifted onto victims, externalising part of the cost of doing business.<sup>22</sup> However, limited liability facilitates modern capitalism,<sup>23</sup> and allows capital markets to function. It encourages investment and capital raising, channelling resources into enterprise, and allows shareholders to spread risk by investing in a range of companies.<sup>24</sup> Further, the availability of limited liability and the concomitant reduction in the regulatory role of tort encourages and facilitates enterprise.<sup>25</sup> Additionally, the asset partitioning generated by incorporation can serve a legitimate purpose in protecting the organisation's funds from unrelated claims brought against its employees.<sup>26</sup>

It is possible for enterprises to structure their operations within a group structure, using ordinary principles of corporate law so as to protect their assets from potential tort claimants. This involves separating out asset holding parent companies from risk generating subsidiary companies, which are 'subsidiaries of straw'. The primary remedy in tort is damages. With 'subsidiaries of straw' defendants, the courts can declare that a tort has been committed, and enter judgment against the subsidiary, but where damages

16 This piece is concerned with corporate groups and does not address the separate issue of private or public sector outsourcing and genuine independent contractors. NB see J Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' (2015) 74 CLJ 109, and J Morgan, 'Vicarious Liability for Independent Contractors?' (2015) PN 235.

17 R Ericson, A Doyle, and D Barry, *Insurance as Governance* (University of Toronto Press, 2003); T Baker and R Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers' Professional Liability' (2013) 60 *UCLA L Rev* 1412.

18 T Koenig and M Rustad, *In Defense of Tort Law* (New York University Press, 2001), pp 2, 3.

19 'Developments in the Law: Nonprofit Corporations' (1991–1992) 105 *Harv L Rev* 1578, 1690. Cf J O'Connell and C Kelly, *The Blame Game, Injuries, Insurance, and Injustice* (DC Heath and Company, 1987), xi.

20 See generally R Stevens, *Torts and Rights* (Oxford University Press, 2007).

21 NB H Hansmann and R Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1990–1991) 100 *Yale LJ* 1879, 1883.

22 R Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vand L Rev* 1, 2.

23 D Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Colum L Rev* 1565, 1565.

24 B Pettet, 'Limited Liability – A Principle for the 21st Century?' (1995) 48(2) *CLP* 126, 142, 148.

25 J Grundfest, 'The Limited Future of Unlimited Liability: A Capital Markets Perspective' (1992–1993) 102 *Yale LJ* 387, argues that it is necessary for the efficient operation of capital markets, and that any other rule could be evaded via arbitrage transactions. Cf Hansmann and Kraakman, *supra*.

26 NB The justifications for limited liability operate more strongly in relation to shareholders than for parents of wholly owned subsidiaries: D Brodie, *Enterprise Liability* (Cambridge University Press, 2010), p 64.

are sought and awarded, they cannot be enforced, and the wrongful losses will not be repaired.<sup>27</sup>

The structure is designed to allow an enterprise to have its cake and eat it. If corrective justice insists that the wrongdoer must pay for their wrongs (either directly or through insurance),<sup>28</sup> it is thus very clear that such structures which are designed to prevent this financial redress – and payment of full damages – runs counter to corrective justice, and also blunts any regulatory role played by tort.

The area is a clash of corporate law and the law of tort. Whilst the justifications for limited liability vis-à-vis tort creditors are weaker than limited liability in relation to contract creditors,<sup>29</sup> at least where the tort claimants are outsiders to the company, and whilst limited liability itself in the context of group companies, and also torts has been criticised,<sup>30</sup> it is unlikely that there will be any substantial reform to the doctrine of limited liability in the context of tort. Given the ever decreasing remit of veil piercing within corporate law, if claims are to be made against the parent companies, the answers must be found in the law of tort. Such claims must also respect the foundational doctrines of corporate law. However, before addressing how tort law may adapt, we must look at how corporate law is used to create such a structure, and its inadequacy in dealing with the problem of judgment proofing.

## **Corporate group structure to defeat liabilities in tort**

Corporate group structuring, when used to defeat liabilities, separates assets from risks. It is not a new phenomenon,<sup>31</sup> but has recently come to the fore in the context of toxic torts. It involves a 'symbiotic' relationship between an entity that generates liability risks, and another which holds most of the assets.<sup>32</sup> This protects the assets from judgment creditors, since only the liability generating entity's assets are exposed to claims.

## **Separate legal identity and limited liability within groups**

A company has a separate legal identity to its shareholders and directors.<sup>33</sup> The principle of limited liability means that claims against the company may only be executed against the company's assets, not the assets of the shareholders.<sup>34</sup>

An enterprise may be subdivided into different companies, each with a separate legal identity, but managed together.<sup>35</sup> An economically integrated organisation may determine how many legal identities constitute it, and through doing this erect boundaries around its capital.<sup>36</sup> Most large enterprises consist of 'a string of parent, subsidiary, sub-subsidiary, and associated companies [which] exist behind a single name.'<sup>37</sup>

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27 See S Gilles, 'The Judgment-Proof Society' (2006) 63 *Wash & Lee L Rev* 603, 610.

28 *Ibid*, 679.

29 *Supra*, Pettet, 152–157.

30 Most notably by Hansmann and Kraakman.

31 W Douglas and C Shanks, 'Insulation from Liability Through Subsidiary Corporations' (1929) 39 *Yale LJ* 193.

32 L LoPucki, 'The Essential Structure of Judgment Proofing' (1998–1999) 51 *Stan L Rev* 147, 149.

33 *Aron Salomon v A. Salomon and Company Ltd* [1897] AC 22.

34 P Davies *Introduction to Company Law* (Oxford University Press, Clarendon, 2002), pp 10–11.

35 *Adams v Cape Industries Plc* [1990] Ch 433 (*Adams v Cape*).

36 H Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *MLR* 731.

37 *Supra*, Davies, 61.

This partitions assets. Each company is separate from the others – assets and liabilities belong not to the group, but instead to the individual companies.<sup>38</sup> There are many motives for adopting a group structure, such as: tax purposes, efficiency purposes, to shield assets, to limit the jurisdiction of overseas courts, or to meet regulatory requirements.

Limited liability also operates within a group of companies. As stated by Templeman LJ in *Re Southard & Co Ltd*:<sup>39</sup>

‘[a] parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.’<sup>40</sup>

### Judgment proofing via group structures

Limited liability within groups can be exploited to create a judgment proof structure: a structure where a defendant holds insufficient assets to meet any claim.<sup>41</sup> One example would be by utilising a parent–subsidiary arrangement, where the potential liability generating activity is conducted by a thinly capitalised subsidiary. With contract creditors, such limited liability within a group is simply a default rule; it can be contracted out of, or around. Involuntary creditors, such as tort victims, do not have such opportunities.

A group structure does not by itself render a subsidiary company judgment proof. To achieve this, revenue must be regularly removed from the subsidiary. This is achieved by a number of mechanisms: payment for the leasing of assets used in the business, payments to use the parent’s intellectual property, and for services provided by the parent.<sup>42</sup> In addition the monies can be passed to the parent company through dividends.<sup>43</sup> That these methods can be used to strip a subsidiary of revenue is demonstrated by Starbucks. Accounts filed in London, showed that the United Kingdom subsidiary ran at a loss,<sup>44</sup> whilst Starbucks claimed to investors that the United Kingdom market was a profitable one.<sup>45</sup> This was achieved by extracting revenue from the subsidiary through substantial charges for using intellectual property,<sup>46</sup> and through inter–company loans with high interest rates.<sup>47</sup>

This split structure allows the owners of the risk bearing entity to avoid bearing the risk of loss, instead transferring this risk to tort victims. Limited liability within groups

38 *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero* [1977] AC 774, 807.

39 [1979] 1 WLR 1198.

40 P 1208.

41 L LoPucki, ‘The Death of Liability’ (1996–1997) 106 *Yale LJ* 1, 4: ‘[a] debtor is judgment proof when the debtor has no wealth or holds its wealth in forms not subject to legal process for collection. That is, judgments against the debtor are uncollectible.’ This piece however adopts a broader approach: being judgment proof is where an entity is unable to pay all of the losses for which it is liable. NB: S Shavell, ‘The Judgment Proof Problem’ (1986) 6 *International Review of Law and Economics* 45, 45, 55.

42 L LoPucki, ‘Virtual Judgment Proofing: A Rejoinder’ (1997–1998) 107 *Yale LJ* 1413, 1428.

43 *Ibid.*, 1429.

44 Hansard, (HC), Vol 556, col 118 (7 Jan 2013); Hansard, Session 2012–13, Public Accounts Committee, HC 716, Minutes of Evidence, (12 November 2012).

45 *Ibid.*, Public Accounts Committee, Q190–193; <http://uk.reuters.com/article/2012/10/15/us-britain-starbucks-tax-idUSBRE89E0EX20121015>, (last accessed 7 September 2015).

46 *Ibid.*, Public Accounts Committee, Q211; Hansard, (HC), Vol 556, col 101 (7 January 2013).

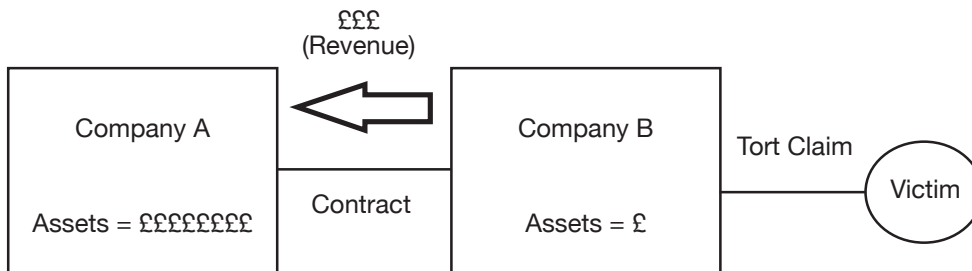
47 *Ibid.*, Public Accounts Committee, Q268–270; Reuters, *supra*.

with a poorly capitalised subsidiary company carrying out the operations or hazardous activities can be combined with secured debt<sup>48</sup> to 'defeat a company's liability entirely.'<sup>49</sup> Such a strategy may have some vulnerability since to maintain the judgment proof status of the subsidiary the parent will have to regularly drain it of assets.<sup>50</sup> This may be open to challenge as a fraudulent conveyance.

Such a structure can be generated by a company selling all of its assets to another company also owned by its shareholders, distributing the cash from these sales to its shareholders through dividends, whilst at the same time contracting to continue to use the assets that it sells; in doing so it creates an entity whose operations remain the same, but which is now judgment proof.<sup>51</sup> This is facilitated by securitisation and sale and leasebacks. This method however has significant transactional costs.<sup>52</sup> Alternatively a parent company may set up a new subsidiary company, which rents its assets (including intellectual property) from the parent, and carries out under contract the operations for the parent. This new entity would be judgment proof as it has started with minimal assets.<sup>53</sup> Such an approach would be less vulnerable to challenge via fraudulent conveyancing doctrines, but would still potentially be vulnerable to piercing of the veil.

Figure 1: Group structure judgment proofing

(Company B is Company A's subsidiary).



## Empirical evidence of judgment proofing?

The empirical evidence of judgment proofing by organisations and companies is disputed.<sup>54</sup>

There is evidence of such structures in some industries. Spin offs have been used in the tobacco industry due to shareholder concern over legal liabilities,<sup>55</sup> and some large oil companies have divested themselves of their shipping subsidiaries in response to liabilities

48 Secured debts are incurred which exceed the liquidation value of the debtor's assets. Once the secured creditors have taken their assets/proceeds nothing remains to pay the unsecured tort claimants, *supra*, LoPucki, 'The Death of Liability', 14.

49 *Ibid*, 21.

50 J White, 'Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability' (1997-1998) 107 *Yale LJ* 1363, 1401.

51 *Supra*, LoPucki, 'Death of Liability', 26.

52 *Ibid*, 25.

53 *Ibid*, 28.

54 *Ibid*, also LoPucki, 'Virtual Judgment Proofing', *supra*, L LoPucki, 'The Essential Structure of Judgment Proofing' (1998-1999) 51 *Stan L Rev* 147; S Schwarcz, 'The Inherent Irrationality of Judgment Proofing', (1999-2000) 52 *Stan L Rev* 1, S Schwarcz, 'Judgment Proofing: A Rejoinder' (1999-2000) 52 *Stan L Rev* 77.

55 *Supra*, LoPucki, 'Death of Liability', 65-66, fn 274-75.



for oil spills.<sup>56</sup> One ship companies also minimise the exposure of assets to claims, and help to prevent sister ship arrest.<sup>57</sup> Further, such structures have been adopted by asbestos producers to insulate their assets from liability.<sup>58</sup> Empirical studies into hazardous industries in the United States show that liabilities have led to a large increase in small companies working in hazardous sectors. This represents an attempt to shield assets from claims.<sup>59</sup> There is also practitioner literature on creating judgment proof structures<sup>60</sup> or on claimants evading judgment proofing<sup>61</sup> which suggests that this phenomenon is real, but there is insufficient evidence as to its extent.

Limited evidence of judgment proofing is inevitable. Where utilised it may be concealed as something else. Further, a multiple entity structure may be utilised for other reasons, for instance to minimise tax liability, yet it may simultaneously minimise the exposure of assets to claims in tort.

### Veil piercing: a solution from corporate law?

Utilising a group structure to evade liabilities may be vulnerable to veil piercing. This disregards the separate legal identities and looks through the company to its shareholders. Empirically contextual factors have played a role in the determination of veil piercing decisions, with veil piercing less likely to occur in the case of tort claims,<sup>62</sup> and in the case of subsidiaries.<sup>63</sup>

The Supreme Court has considered veil piercing on two recent occasions. In *VTB Capital plc v Nutritek International Corpn and others*,<sup>64</sup> Lord Neuberger PSC considered that 'the precise nature, basis and meaning of the [veil piercing] principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply',<sup>65</sup> and noted that 'generally, it may be right for the law to permit the veil to be pierced in certain circumstances in order to defeat injustice'.<sup>66</sup> However, he considered that the claim in *VTB* would be an unprincipled attempt to extend the principles of piercing the veil.<sup>67</sup> This was since the company was not used as a 'façade to conceal the true facts'.<sup>68</sup> He considered that 'abusing the corporate structure' does not permit, by itself, piercing of the veil.<sup>69</sup> The case suggests that veil piercing will not be a regular occurrence.

56 *Supra*, LoPucki, 'Virtual Judgment Proofing', 1417, fn 34.

57 Evading Art 3 of the 1952 Arrest Convention (International Convention Relating to the Arrest of Sea-Going Ships). Note The Senior Courts Act 1981, s 21(4).

58 Note *Adams v Cape*. Also the James Hardie Group in Australia: C Witting, 'Liability for Corporate Wrongs' (2009) 28 UQLJ 113.

59 A Ringleb and S Wiggins, 'Liability and Large-Scale, Long-Term Hazards', (1990) 98 *Journal of Political Economy* 574, (an empirical study focusing on high risk industries in the US).

60 T Youdan, 'Creditor-Proofing Charities: What to Do in Light of the Christian Brothers Decisions' (2005) 42 *Can Bus LJ* 198 (written by a law firm partner).

61 R Keeton, 'Planning Tort Litigation for a Decisive and Enforceable Judgment' (1996–1997) 75 *Tex L Rev* 1645, (written by a Federal District Judge).

62 C Mitchell, 'Lifting the Corporate Veil in the English Courts: An Empirical Study' (1999) *Company Financial and Insolvency Law Review* 15, 23, 27.

63 *Ibid*, 22. This is also reflected in the US experience: J Matheson, 'The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context' (2008–2009) 87 *NCL Rev* 1091, 1114.

64 [2013] UKSC 5, [2013] 2 AC 337 (*VTB*).

65 At [123].

66 At [127].

67 At [158].

68 At [142].

69 At [143].



The Supreme Court in *Prest v Petrodel Resources Ltd and others*<sup>70</sup> confirmed the existence of a veil piercing jurisdiction at common law.<sup>71</sup> Whilst the detailed discussion of veil piercing by the Supreme Court in *Prest* is obiter,<sup>72</sup> it is likely to be followed.

Lord Sumption JSC, giving the leading judgment, agreed that veil piercing was justified where the separate legal personality was being abused for wrongdoing,<sup>73</sup> and that it was necessary to prevent the law being 'disarmed in the face of abuse.'<sup>74</sup> However, he drew the relevant wrongdoing that would trigger veil piercing very narrowly: concealment or evasion.<sup>75</sup> The first he considered not to be veil piercing at all. From the tenor of his judgment this doctrine will rarely be available. The principle of veil piercing was described as a 'limited one'.<sup>76</sup> Lord Neuberger PSC agreed.<sup>77</sup>

Lord Mance JSC, whilst agreeing with Lord Sumption considered that it would be dangerous to foreclose on other future situations for veil piercing that might arise,<sup>78</sup> a point with which Lord Clark JSC also agreed.<sup>79</sup> Lord Mance however considered that such situations would be 'likely to be novel and very rare'<sup>80</sup> and would only apply in the absence of conventional remedies.<sup>81</sup> Baroness Hale JSC and Lord Wilson JSC did not think that all cases of veil piercing could be classified in accordance with Lord Sumption's categories.<sup>82</sup>

What can be taken from these recent decisions is that veil piercing will be rare. This resetting of the veil piercing jurisdiction renders earlier empirical studies on the frequency of veil piercing of limited value. Provided a corporate structure is adopted which is not designed to evade an existing legal obligation, the courts are unlikely to pierce the veil. Future torts are not existing obligations, so if a group is structured so that a lowly capitalised operating company takes the future risk this should not trigger the veil piercing jurisdiction.

The situation may however be different where the group is restructured so as to evade an existing liability.

### ***Adams v Cape: classic judgment proofing***

In *Adams and Others v Cape Industries Plc and Another*<sup>83</sup> the defendant, Cape Industries Plc, an English company, had a number of subsidiary companies, which were engaged in the mining of asbestos in South Africa, and in marketing asbestos in the United States. NAAC, an Illinois incorporated company, was a wholly owned marketing subsidiary in the United States. The second defendant, the wholly owned English company Capasco Ltd, was Cape's worldwide marketing subsidiary. NAAC was subsequently liquidated.

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70 [2013] UKSC 34, [2013] 2 AC 415.

71 At [27], per Lord Sumption JSC.

72 As Lord Neuberger PSC stressed at [63], and Lord Walker JSC at [105].

73 At [27].

74 *Ibid.*

75 At [28].

76 At [35].

77 At [81].

78 At [100].

79 At [103].

80 At [100].

81 *Ibid.*

82 At [92].

83 [1990] Ch 433.

Cape and Capasco faced claims brought in the Federal District Court for the Eastern District of Texas. They took no part in these proceedings, taking the position that the court lacked jurisdiction. As the claims were not defended, the court entered default judgment against the defendants. The claimants attempted to enforce this judgment in England.

The claimants were unsuccessful in their attempt to enforce the judgment in England as the defendants were not present within the United States, or Texas. A wholly owned subsidiary incorporated and operating within the overseas jurisdiction is not enough. Slade LJ applied the 'fundamental principle' of the separate legal personalities of companies within a group,<sup>84</sup> and considered that a court could not simply disregard this principle simply because it is required by justice.<sup>85</sup>

Whilst this appears to conflict with Lord Neuberger's obiter dictum in *VTB*<sup>86</sup> that 'it may be right for the law to permit the veil to be pierced in certain circumstances in order to defeat injustice', this statement was made by Lord Neuberger in response to a submission that there was no veil piercing jurisdiction at common law, and was not intended to be a test or criterion for veil piercing. Further, given the reliance by the Supreme Court in *Prest on Adams v Cape*,<sup>87</sup> the decision undoubtedly remains good law.

In *Adams v Cape* the Court of Appeal ruled that a court is not entitled to pierce the veil, even where the corporate structure has been deliberately created to protect the parent from future liability in tort, by ensuring that such risks fall on a subsidiary. The ability to construct such a structure was considered to be an inherent right, whether or not it was desirable to do so.<sup>88</sup> However, a distinction between existing obligations and future obligations is difficult to draw, since, for example, with asbestos the breach of duty may be in the past (or present), even if the damage, and thus the tort (and duty to compensate), have not yet materialised.

## Reversing transactions and claims against directors

The strategy of judgment proofing may also be disrupted through attempts to reverse the transactions through which the subsidiary has dissipated its wealth.

Section 238 of the Insolvency Act 1986 (IA 1986) deals with transactions at an undervalue. It can be invoked by the liquidator or administrator of an insolvent company. It is used to render transactions which were made at an undervalue during a two year period<sup>89</sup> prior to insolvency proceedings vulnerable,<sup>90</sup> where at the time of entering into the transaction the company was 'unable to pay its debts within the meaning of section 123' of IA 1986, or that it became unable to pay 'in consequence of that transaction.'<sup>91</sup> A defence is provided at section 238(5) where the company that entered into the transaction did so in good faith, for business purposes, and that there 'were reasonable grounds for believing that the transaction would benefit the company.'<sup>92</sup>

84 *Adams*, at P532.

85 *Ibid*, at P536.

86 *VTB*, at [127].

87 *Prest*, at [21]–[22], per Lord Sumption JSC.

88 *Adams*, at P544.

89 IA 1986, s 240(1)(a).

90 J Armour, 'Transactions at an Undervalue', in J Armour and H. Bennett, (eds), *Vulnerable Transactions in Corporate Insolvency*, (Hart, 2003), P 37, [2.1].

91 IA 1986, s 240(2).

92 IA 1986, s 238(5). Note, 'interests acquired by third parties in good faith in reliance on the validity of the transaction will not be disturbed.' Armour, *supra*, p 38, [2.6].

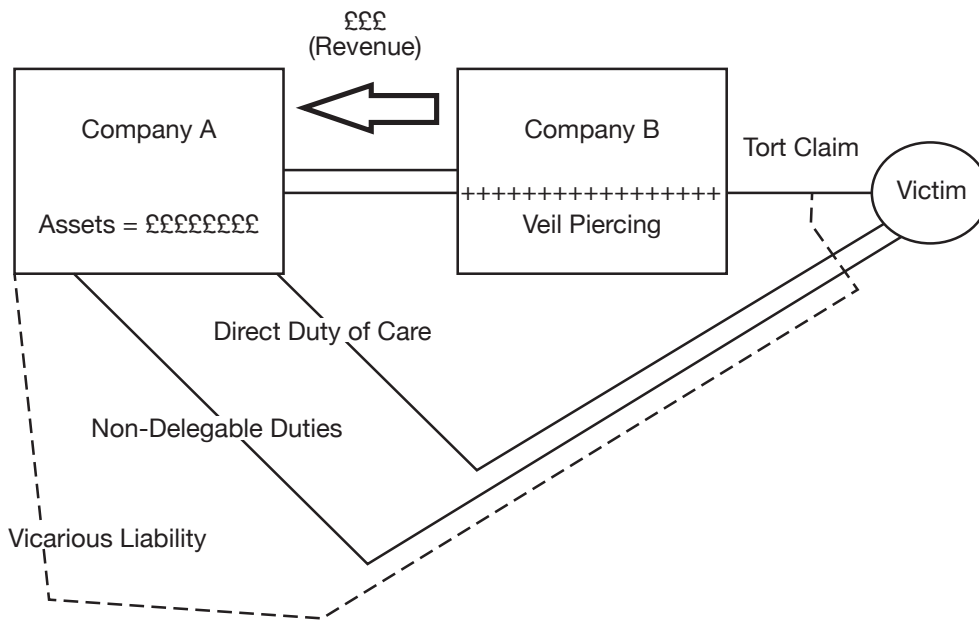
Further, there may be attempts to disrupt such a strategy by tort claimants through challenging the transactions entered into by the impecunious subsidiary through section 423 of IA 1986 which can be utilised by any prejudiced person.<sup>93</sup> This provision is used in relation to transactions at an undervalue, which have been effected for the *purpose* of putting assets beyond the reach of persons making or who may make a claim, or to prejudice their interests in relation to the claim.<sup>94</sup> There is no need for there to be insolvency for the provision to be used.<sup>95</sup> Complex Insolvency Act proceedings, in addition to the claim in tort against the subsidiary, make such actions unattractive from a claimant's perspective.

This asset strategy also potentially exposes the directors of the undercapitalised company to personal liability.<sup>96</sup> However, few directors (if any) would be able to pay judgments in tort for the type of claims that these structures are designed to discourage or avoid. It may also be possible to argue for these purposes that in some cases the parent company is a shadow director of the subsidiary.

Corporate law and insolvency law provide few avenues to a tort victim injured by a judgment proofed subsidiary. We must now turn to how the law of tort may adapt to such structures.

Figure 2: Vulnerabilities of group structure judgment proofing

(Company B is Company A's subsidiary)



93 IA 1986, s 424.

94 IA 1986, s 423(3).

95 *Supra*, Armour, p 97, [3.7].

96 IA 1986, ss 214, 212.

## Direct duties in tort

It is possible to attempt to defeat group company judgment proofing structures through direct duties.

This is (to use our diagram above) where company B commits a tort against the victim, but the victim, rather than suing company B, sues company A directly, not for company B's tort, but for a breach of an independent duty of care owed by company A to the victim.

Such claims are conceptually distinct from veil piercing. The entities are separate: '[t]here is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.'<sup>97</sup> Instead one looks at whether the parent company has taken on a direct duty towards the victim.<sup>98</sup> In establishing the existence of this duty of care judgment proofing, and the insolvency of the subsidiary are excluded considerations.<sup>99</sup>

The case law on using a direct duty of care to bring an action against a parent company is limited.<sup>100</sup> In the leading case of *Chandler v Cape*,<sup>101</sup> where such a claim was successful, Arden LJ was careful to set a very narrow ratio. The claimant, a former employee of Cape Building Products Ltd, brought an action in negligence against the parent company Cape plc. Cape Products was judgment proof, and its employer's liability insurance did not cover asbestosis. The issue the Court of Appeal had to grapple with was whether Cape plc owed a duty of care to the claimant.<sup>102</sup>

The Court of Appeal agreed that Cape plc was entitled to structure its operations so that they were carried out by other group members.<sup>103</sup> They considered that whilst there is 'in general no duty to prevent third parties causing damage to another',<sup>104</sup> such a duty arose in this case<sup>105</sup> since Cape plc had assumed a duty to the subsidiaries employees 'to advise on, or to ensure, that they had a safe system of work',<sup>106</sup> and that this duty had been breached.

Arden LJ stated:

'this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include... where ... (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.'<sup>107</sup>

97 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111, per Arden LJ, at [69].

98 [2012] EWCA Civ 525, [2012] 1 WLR 3111, at [70].

99 At [71].

100 *Lubbe and Others v Cape PLC* [2000] 1 WLR 1545, HL, (obiter), *Connelly v RTZ Corp PLC & Anor* [1999] CLC 533, QBD, (strike out: decided duty of care point was arguable), *Ngcobo v Thor Chemicals Holdings Ltd*, Times, November 10, 1995, CA (obiter, and in the context of a strike out).

101 [2012] EWCA Civ 525, [2012] 1 WLR 3111.

102 At [33].

103 At [37].

104 At [63], citing *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270, per Lord Goff.

105 *Ibid.*

106 At [81].

107 At [80].

This is a narrow ruling, applying only to the employees of the subsidiary. However, as agreed by the Court of Appeal in *David Thompson v The Renwick Group plc*:<sup>108</sup> 'this formulation [is] descriptive...rather than exhaustive'.<sup>109</sup> It is easy to envisage that this could be applied by analogy to the users of a subsidiary's services. The court noted in *Chandler v Cape* that 'at no relevant point in time did Cape cease to be an operating company itself or merely hold the shares in its subsidiaries as if it were an investment holding company'.<sup>110</sup> A more carefully structured group structure designed to limit liability would do precisely that. Careful structuring of the group, and the holding of the assets by a non-operating company, can minimise the risk of any direct action against the asset-rich entity.

Bullimore argues that the decision 'threatens to drive a coach and horses through the notion of separate corporate personality'.<sup>111</sup> This is, with respect, incorrect. The decision respects the separate legal identity of the entities: it respects the core principles of company law. An analogy here can be drawn to an employment situation where an employer may be in breach of a direct duty of care to a person who is also the victim of the tort of one of their employees. The employer's duty being to properly select, train and monitor their employee tortfeasor.<sup>112</sup> This is a separate duty of care to any of those owed by the employee to the victim, it is a direct claim. In this situation no person would argue that this is in effect a veil piercing of a natural person (the employee), or does not respect the separate legal personality of the employer company and the employee. They remain two separate persons in law.

That parent liability can be avoided by careful structuring is reinforced by *Thompson*. In *Thompson* the claimant's employment involved the hand bailing of raw asbestos. The relevant employers were judgment proof and neither had liability insurance that would cover the claim.<sup>113</sup> He thus brought a claim against their parent holding company, the Renwick Group plc, arguing that they owed him a direct duty of care. This was decided as a preliminary issue. His claim failed on appeal. Renwick did not conduct any business save holding the shares of other companies.<sup>114</sup> Further this was not a situation where the parent company was better placed in terms of superior knowledge and expertise of the risk, nor would the subsidiary rely on the parent to deploy this knowledge.<sup>115</sup> This is since at the relevant time the hand bailing of raw asbestos was appreciated to be hazardous and it did not require expertise to know this.<sup>116</sup>

It was irrelevant that the parent had appointed a director of the subsidiary who was responsible for health and safety at the subsidiary, since the actions of that director were in pursuance to his duties owed to the subsidiary. That the parent appointed him did not mean that he was acting for them; he would not by virtue of his appointment alone owe them any duties.<sup>117</sup> Whilst there was an interchangeable use of depots and a shared use of resources within the group, this was considered to be 'no more than a finding that these

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108 [2014] EWCA Civ 635, [2014] 2 BCLC 97 (*Thompson*).

109 At [33], per Tomlinson LJ.

110 *Chandler*, at [8], per Arden LJ.

111 T Bullimore, 'Sins of the father, sins of the son' (2012) *PN* 212, 214.

112 Eg *Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158.

113 *Thompson*, at [2].

114 *Ibid.*, at [37], per Tomlinson LJ.

115 *Ibid.*

116 *Ibid.*, at [38].

117 *Ibid.*, at [24]–[25].

companies were operating as a division of the group carrying on a single business', that did 'not mean that the legal personality of the subsidiaries separate from that of their ultimate parent was not retained and respected.'<sup>118</sup>

*Thompson* demonstrates that utilising a holding company can effectively reduce exposure to liability, and produce an effective judgment proof solution. Such a structure will not guarantee that the asset holding entity will not be the target of litigation, although the risk of judgment being entered against it can be minimised.<sup>119</sup>

## Vicarious liability?

Vicarious liability is not limited to employment relationships, and exists in other forms, for example within partnerships, and also in relationships of 'principal' and 'agent', and a newly developing category of 'akin to employment'.<sup>120</sup> The current vicarious liability authorities in England concern the liability of a natural or legal person A, for the torts of a natural person B.

But is it possible for a legal person A, to be vicariously liable for the torts of another legal person B?

Within England and Wales, whether or not there may be vicarious liability for a legal person has attracted little attention, save for a brief suggestion by corporate law scholar Petrin in a casenote on *Chandler v Cape* stating that vicarious liability of parent companies for subsidiaries could be more straightforward than relying on direct duties,<sup>121</sup> and a brief reply by Witting stating that such an approach would be an 'unlikely development ... given the underlying theory of vicarious liability'.<sup>122</sup>

*Adams v Cape* acknowledged the possibility of vicarious liability for a legal person. In that case counsel attempted to establish Cape/Capasco's presence in the United States by relying on *Miller v BC Turf Ltd*,<sup>123</sup> a British Columbia case concerning jurisdiction where a company was held to be present in the jurisdiction due to the fact that an employee (for whom they could be vicariously liable) was present in the jurisdiction discharging the firm's contract. Counsel in *Adams v Cape* argued that the capacity (or possible capacity) of the subsidiary to render Cape/Capasco vicariously liable led to jurisdictional presence. Whilst the court in *Adams v Cape* was 'not persuaded' by this jurisdictional argument,<sup>124</sup> they did not examine or decide the issue of vicarious liability for a legal person. Thus in England and Wales the issue has been acknowledged, but left open.

There are however indications of acceptance of vicarious liability for legal persons in Canada. In *Ontario Ltd v Sagaz Industries Canada Inc*,<sup>125</sup> the Canadian Supreme

118 *Ibid.*, at [38].

119 Note C Witting and J Rankin, 'Tortious Liability of Corporate Groups: From Control to Coordination' (2014) 22 *TLR* 91: unlawful means conspiracy should develop to deal with such situations. It is presently unlikely to succeed due to the intention requirement.

120 See generally, *supra*, Morgan, 'Recasting Vicarious Liability'.

121 M Petrin, 'Assumption of responsibility in corporate groups: Chandler v Cape Plc' (2013) 76(3) *MLR* 603. P Nygh, 'The Liability of Multi-national Corporations for the Torts of Their Subsidiaries' (2002) 3 *EBOLR* 51, 66, briefly states that the principle of the corporate veil precludes vicarious liability for the subsidiary on the basis of agency.

122 C Witting, *Street on Torts* (14th edn, Oxford University Press, 2015), p 633.

123 (1970) 8 *DLR* (3d) 383.

124 P 529–30.

125 2001 SCC 59, [2001] 2 *SCR* 983.

Court had to consider the question of whether an individual, and a company (AIM), were employees of the appellant (another company) or independent contractors for the purpose of vicarious liability. Whilst on the facts of the case they were held to be independent contractors, since they were in business on their own accounts, the judgment of the Canadian Supreme Court is advanced on the assumption that there could be vicarious liability for a legal person. The court looked at the totality of the factors in deciding that AIM was an independent contractor, and at no point was its corporate status seen as a factor. However, despite this assumption in the case, there is no decisive decision in Canada on the point. In *Choc v Hudbay Minerals Inc.*,<sup>126</sup> a first instance strike out decision of the Ontario Superior Court of Justice, 'passing reference' was made in the case to vicarious liability of the parent company. Carole Brown J, in allowing a claim against the parent company to proceed, considered vicarious liability to be 'in essence, the same as the attempt to pierce the corporate veil'.<sup>127</sup> This point was not argued, and for the reasons advanced below veil piercing and vicarious liability are very different.

## Vicarious liability theory

Much has been written on the theoretical justifications for vicarious liability.<sup>128</sup> However, rather than take a normative position on what the justification for vicarious liability *should* be, this article instead focuses on the justifications actually *used* in the most recent leading Supreme Court decision on vicarious liability, and seeks to demonstrate that the justifications that represent the current understanding of the English courts point towards vicarious liability for some group companies. If vicarious liability is on the move, then to determine what the position is for group companies the directions are best taken from the helmsmen themselves.

In *CCWS*, Lord Phillips sought to set out the policy arguments and justifications for vicarious liability. He stated that 'the policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.'<sup>129</sup> He invoked insurance and loss spreading, a deep pockets argument, acting on behalf of employer, enterprise and risk creation, and control justifications, for the doctrine,<sup>130</sup> all of which are versions of some of the ten justifications put forward by Atiyah.<sup>131</sup> In considering the relevant connection required to the tort (the second stage of vicarious liability), Lord Phillips appeared to focus on enterprise risk liability.

It is advanced that all of the current policy justifications for vicarious liability used by the Supreme Court point towards vicarious liability for legal persons.

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126 [2013] OJ No 3375, 2013 ONSC 1414.

127 At [43].

128 Leading treatments include P Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967), pp 12–28; Stevens, *Torts and Rights*, *supra*, pp 257–259; J Neyers, 'A Theory of Vicarious Liability' (2005–2006) 43 *Alta L Rev* 287; Giliker, *Vicarious Liability in Tort*, *supra*, pp 227–254; D Brodie, 'Enterprise Liability: justifying vicarious liability' (2007) 27 *OJLS* 493; D Brodie, *Enterprise Liability*, *supra*.

129 At [34].

130 At [34]–[35].

131 *Supra*, Atiyah, pp 12–28.



## Enterprise/risk creation

The basic tenet of enterprise liability is that with benefits come burdens. An enterprise introduces risks into society; if those risks materialise then the enterprise should pay for them.<sup>132</sup>

The theory has proved highly influential in recent expansions in the law of vicarious liability.<sup>133</sup> Stevens criticises the use of enterprise liability in vicarious liability on the basis that it cannot account for vicarious liability on the part of non-profit organisations.<sup>134</sup> Brodie responds to such criticisms that ‘charities still run risks for the benefit of the organisation’, and that the criticism only stands ‘if profit is viewed in a purely financial sense’.<sup>135</sup> Stevens is correct in so far as he criticises the formulation of financial profit based enterprise liability suggested in *Dubai Aluminium*<sup>136</sup> which uses the concept of ‘business enterprise’, but he solely focuses on a concept of financial profit based enterprise liability taken from Stapleton’s work on product liability.<sup>137</sup> This is not the approach used in the Canadian authorities upon which the English jurisprudence is based: *Bazley v Curry*,<sup>138</sup> the seminal case that invoked enterprise liability to expand the law of vicarious liability concerned a non-profit organisation. The version of enterprise liability used in *CCWS* also relates to a non-profit organisation.

Acting on behalf of the employer, and control, also link to this wider notion of enterprise liability. It is not an economic model of liability, rather a moral one. There is a moral notion underpinning the doctrine of vicarious liability that where I assign a purposeful role to another, I am liable for that other if I have the power (legal or factual) to control exactly how they carry out this role (even if I do not exercise this power and would never exercise it), and I can exercise sufficient control over the day-to-day side. The language of control and integration is often used here. This purposeful role may be called an enterprise, although this language can be slightly misleading, as it carries unnecessary financial baggage, or imports ideas of joint enterprise.<sup>139</sup> Despite this criticism ‘enterprise’ liability is the language used by the courts and literature.

The concept of enterprise liability has influenced a number of areas of the law of tort, particularly workmen’s compensation and product liability. However, it is not argued that enterprise liability is the foundation of tort law, or vicarious liability; rather it is considered that this concept can be invoked in considering the parameters of vicarious liability. This is particularly so given the prominence which has been placed upon the theory in the leading cases. Both the economic and moral notions of enterprise liability point towards vicarious liability within corporate groups. The parent introduces the risk generated by the subsidiary, and takes the benefit of its success through extraction of its revenues and profits. In economic terms the group is the enterprise. ‘Company’ and ‘enterprise’ are not synonymous: an enterprise may take a multi-corporate form.<sup>140</sup> Indeed the idea of a group constituting a single enterprise is also taken into account in competition law,<sup>141</sup> in

132 *Bazley*, per McLachlin J, at [31].

133 *Supra*, Brodie, *Enterprise Liability*, p 1.

134 *Supra*, Stevens, *Torts and Rights*, p 259. Note also Neyers, *supra*.

135 *Supra*, Brodie, *Enterprise Liability*, p 11.

136 At [21], per Lord Nicholls.

137 J Stapleton, *Product Liability* (Butterworths, 1994), pp 186–193.

138 *Supra*.

139 Morgan, ‘Vicarious liability on the move’, *supra*.

140 S Deakin, ‘“Enterprise–Risk”: The Juridical Nature of the Firm Revisited’ (2003) 32 *ILJ* 97, 98.

141 *Viho Europe BV v Commission of the European Communities* C-73/95 P [1996] ECR I-5457, [1997] 4 CMLR 419.

accountancy through group accounting, and further in taxation a group may be treated as a single entity for some purposes. Here vicarious liability ensures that the price of the goods or services reflects the social costs of their production. However, enterprise liability, in its moral form, whilst also pointing towards vicarious liability additionally points to limits to corporate vicarious liability: a control element is required.

However, care should be taken in utilising enterprise liability by itself. Tort law is more complex. Further, enterprise liability taken to its logical extension, as used by some United States courts and writers, may lead to strict product liability,<sup>142</sup> group liability,<sup>143</sup> or shareholder liability for company torts. These represent a radical re-writing of the law of tort and corporate law. Thus, whilst enterprise liability may point towards liability for group companies, this by itself cannot be decisive. Instead it is merely one of the policy factors to be considered. However, with the moral notion of enterprise liability profit alone is not enough to trigger liability, otherwise shareholders too would be liable for a company. An investor's interest is insufficient, even if that investor is the parent company.

### **Loss spreading and insurance**

Reaching a solvent parent company directs the claim towards an entity with deeper pockets. Deep pockets may be one of the motives behind the development of vicarious liability;<sup>144</sup> after all, employers are generally more able to meet a claim in tort than their employees. However, mere wealth, by itself, is insufficient to justify the imposition of vicarious liability. The deep pockets argument cannot explain many of the features of tort, or vicarious liability, since it ultimately collapses into state liability. However, *if* courts apply this policy rationale to vicarious liability then such a rationale additionally points towards vicarious liability for companies.

Loss spreading involves spreading the cost of liabilities over a large group, over a period of time.<sup>145</sup> This may occur in the context of a company through insurance, and by passing on the cost of premiums to consumers through higher prices, shareholders via reduced dividends, and/or employees through wage reduction.<sup>146</sup>

By itself, loss spreading cannot explain the law of tort, or vicarious liability: it does not explain the narrow range of injuries covered by tort,<sup>147</sup> it cannot explain why we have a requirement for a breach of duty for losses to be compensated, nor why a wrongdoer should pay, and why vicarious liability itself requires a tort. If loss spreading is the goal of tort, then it is obvious that there are other more effective and efficient systems that might be used.<sup>148</sup> Loss spreading regimes are often adopted as alternatives to tort,<sup>149</sup> and if taken in isolation and to its ultimate conclusion loss spreading ultimately leads to state liability.<sup>150</sup>

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142 *Supra*, Brodie, *Enterprise Liability*, p 4.

143 M Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 *Cal L Rev* 195.

144 *Supra*, Atiyah, p 22.

145 *Ibid*, p 23.

146 *Supra*, Giliker, *Vicarious Liability in Tort*, 236.

147 *Supra*, Stevens, p 323.

148 P Cane, *Atiyah's Accidents Compensation and the Law* (8th edn, Cambridge University Press, 2013), 413.

149 Eg The New Zealand Accidents Compensation Corporation.

150 *Supra*, Stevens, p 258. Cf R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013), ch 10.

Indeed loss spreading points towards a distributive justice, rather than a corrective justice model of tort.

Whilst loss spreading is not used in isolation as a justification for tort, it still has value and it has been combined with some of the other policy objectives behind tort; for instance, in the United Kingdom the compensation system for road traffic accidents utilises tort, but every effort is made to ensure that the liabilities are paid for by insurers, even in the case of uninsured drivers.<sup>151</sup> Loss spreading is also taken into account at the establishing a duty of care stage.<sup>152</sup> Thus whilst loss spreading is not the overriding rationale of tort, it is a policy consideration that is taken into account in designating the parameters of liability, alongside other policies. Indeed it is clear from the history of vicarious liability that loss spreading has influenced the courts in their development of the doctrine.<sup>153</sup>

Loss spreading again points towards vicarious liability within corporate groups. This is since it broadens the range of liable parties; it also circumvents the judgment proofing strategy which concentrates loss on tort victims, by finding another solvent, and/or insured entity within the group. However, care too must be taken here – loss spreading also points towards the primacy of tort over the corporate veil in all circumstances, something which this piece does not advocate.

It can therefore be concluded that the current theories utilised in *CCWS* in shaping the doctrine of vicarious liability point towards vicarious liability for companies.

## Evidence

There is an additional practical litigation policy behind vicarious liability within a corporate context. It is sometimes difficult to identify exactly *who* committed the tort. Where it is clear that the tortfeasor is one of a small group of employees, all employed by the same employer, the tort victim does not need to identify the exact tortfeasor to be able to bring a claim against the employer through vicarious liability.<sup>154</sup> This is the case even though a claim against the tortfeasor employee is not possible, since their identity is not known. Vicarious liability therefore may function as a powerful pleading and evidential tool. It may also reduce litigation costs in that it is not necessary to prove exactly which of the employer's employees committed the tort.

The power of this evidential tool is increasingly diminished given the increasing fragmentation of an enterprise within a web of companies within corporate groups. Where the employees of the group companies work together on the same project, whilst it may be possible to identify a small group of employees potentially responsible for the harm, given that they may formally work for different 'employers', vicarious liability cannot be used in the same way as a pleading/evidential tool as where the tort is committed by one of a small group of employees employed by the same firm. This is since it may not be clear who employs the responsible person, since the exact identity of the responsible person is unknown. To take an example, employees of different companies within a group work together on a product/service. One of them was negligent, but the identity of the negligent employee is unknown. The claim against any of the companies would likely be struck out. If however they were all employed by the same company the claim

151 In this case the compensation is via the Motor Insurers' Bureau.

152 *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.

153 *Supra*, Merkin and Steele, chr 10.

154 *Supra*, Atiyah, p 20.

would succeed. If vicarious liability is permitted for companies, then a parent company which controls the process would be vicariously liable, since all of the potential entities (the companies) are within a sufficient relationship for stage one of vicarious liability, thus the evidential tool would continue to be of practical use.

However, whilst superficially attractive, this evidential argument also points towards vicarious liability for independent contractors, particularly given the role of outsourcing within the modern enterprise. This evidential argument taken to its logical conclusion is a disguised deep pocket and loss spreading argument. It assumes that where there is a loss, and there is no obvious defendant, that one capable of shouldering the burden and spreading the loss more effectively than the victim should be found.

## Objections

Witting considers that vicarious liability for companies is an unlikely development due to the underlying theory behind the doctrine. Witting acknowledges deep pockets and enterprise liability theories for vicarious liability, although he primarily justifies the doctrine according to institutional deterrence. He states that most defendants are institutions, which may assess risks, plan activities, and take precautions.<sup>155</sup>

Whilst deterrence theory is not widely accepted as the theory for vicarious liability,<sup>156</sup> it is submitted that all three justifications mentioned by Witting point towards vicarious liability for companies. Enterprise liability and deep pockets, as shown above, both point towards vicarious liability for companies. With deterrence a corporate group, or parent company, may conduct the very same risk assessments and precautions as any individual company within a group. Indeed the parent company will often have better resources and greater expertise to conduct risk assessments, better planning capabilities, and superior knowledge of industry safety, than any individual subsidiary within the group, alongside the ability to instruct subsidiaries as to precautions. This is demonstrated by the facts of *Chandler v Cape*. Therefore deterrence may best operate at the parent level. With judgment proofing the subsidiary has attempted to render itself tort proof; the deterrence feature of tort is thus minimised. Tort provides little incentive/deterrence to the judgment proof. Deterrence however is re-established where the profiting parent company may be targeted. Thus institutional deterrence actually points towards vicarious liability for parent companies in such cases, rather than the opposite. It enhances deterrence by making the parent pay for the costs of its enterprise, and reduces the efficacy of a structure designed to prevent it from paying for the negative externalities of its operations.

Since the theory of vicarious liability points towards vicarious liability for subsidiary companies this article must now consider the possible applicable forms of vicarious liability in such cases.

## Applicable forms of vicarious liability

The author has previously argued that all forms of vicarious liability can be rationalised into a single form.<sup>157</sup> This argument becomes stronger as courts expand and develop the range

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155 *Supra*, Witting, *Street on Torts*, p 649.

156 *Supra*, Giliker, *Vicarious Liability in Tort*, pp 241–43, *supra* Atiyah, pp 15–17.

157 *Supra*, Morgan, 'Recasting Vicarious Liability'.

of relationships that satisfy the first stage of establishing vicarious liability. Nevertheless, courts continue to utilise nominate forms of vicarious liability, so the following argument is cast in these terms. It seeks to demonstrate that vicarious liability for companies can fit into existing forms of vicarious liability.

## Agency

There are suggestions in *Adams v Cape* that an agency relationship may be present between companies, sufficient to constitute presence for the purposes of jurisdiction. If an agency relationship is present for such purposes an argument could also be made for vicarious liability to be imposed.

There may be vicarious liability of a 'principal' for the acts of his 'agent'. This is a confusing label to give this category of vicarious liability: it has nothing to do with the law of agency in the sense meant by commercial lawyers.<sup>158</sup> In *Launchbury v Morgans*,<sup>159</sup> Lord Wilberforce accepted 'that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable,' and that either expression reflects a judgment of value'.<sup>160</sup>

Agency is an ad hoc grouping of vicarious liability, with little underlying principle, save that these are relationships to which courts think vicarious liability should apply. They are then given the convenient label of 'principal' and 'agent'. Such cases are typically found in the motoring context, where an individual who has lent a motor vehicle to another is found vicariously liable for that other's wrong, or in the fraud context.<sup>161</sup> However, the concept is not so restricted, and cases exist outside of these contexts.<sup>162</sup>

However, there seems little underlying principle behind the category. One starts to agree with Rogers that the operation of vicarious liability in the context of principal and agent rests on 'ad hoc judgment[s] that for one reason or another the principal ought to pay'.<sup>163</sup>

Given that the theory of vicarious liability currently advanced by the courts points to vicarious liability for companies, 'agency' may be a convenient label to apply to such cases. However, this is not recommended: the resort to the concept of agency is uncertain and unpredictable. Agency is a conclusion rather than a characteristic which triggers vicarious liability. Whilst agency is available as a mechanism to deal with some unusual cases it should not become the norm. The category also gives little guidance as to when vicarious liability should apply within the setting of a corporate group. The advantage to using the employment category or 'akin to employment' category in its place is that this would be consistent with the recent employment/akin to employment case law; further, the factors that these cases utilise to assess whether or not an individual stands in a sufficient relationship to trigger vicarious liability could equally be used to assess inter-corporate relationships.

158 P Watts and F Reynolds (eds.), *Bowstead and Reynolds on Agency* (20th edn, Sweet and Maxwell 2014), §8–187.

159 [1973] AC 127.

160 P 135.

161 *Supra*, Morgan, 'Recasting Vicarious Liability', 625–6.

162 *League Against Cruel Sports Ltd v Scott and Others* [1986] QB 240; *'Thelma' (Owners) v University College School* [1953] 2 Lloyd's Rep 613; *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15; *Thomas and Others v National Union of Mineworkers (South Wales Area) and Others* [1986] Ch 20; *Moores v Bude-Stratton Town Council* [2001] ICR 271, (EAT); *S v Attorney General* [2003] NZCA 149.

163 W Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet and Maxwell 2000), p 976.

## Employment and 'akin to employment'

As a matter of employment law a company cannot be an employee. This however does not matter for the purposes of vicarious liability. 'Employment' in vicarious liability is not necessarily 'employment' for all other purposes. Many tests used to determine employment status for vicarious liability come from other areas of the law. These areas have different policies to vicarious liability; for example, the policy of who is an employee for the purposes of National Insurance is different to the policy of who is an employee for the purposes of health and safety regulation, which in turn has a different policy to vicarious liability.<sup>164</sup> This was recognised in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*<sup>165</sup> where the court made it clear that 'employment' for the purposes of vicarious liability has broken away from 'employment' in other contexts, such as taxation, unfair dismissal, and sex discrimination.<sup>166</sup>

As stated by Ward LJ in *JGE*, employment in vicarious liability focuses on function rather than form.<sup>167</sup> First, to be an employee for the purposes of vicarious liability there is no need for a contract of employment with the employer, as demonstrated by the dual vicarious liability cases, and the transfer of employment cases, where an entity is held vicariously liable for an actor with whom it does not have a contractual relationship.<sup>168</sup> Indeed there is no need for a contract at all for vicarious liability to be triggered, as demonstrated by the evolving 'akin to employment' category.<sup>169</sup>

The language of employer and employee imports the understanding that the second party, the employee, needs to be a natural person. After all, a contract of service, requires a natural person, not a legal entity. To require this in vicarious liability is to import unnecessary baggage from employment law. We have already seen that 'employment' in vicarious liability, and employment for the purposes of employment law, are very different. Instead, with the former, we need to look at the functions of vicarious liability, and produce a functional definition. It is submitted that on this basis one can 'employ' a company for the purposes of vicarious liability.

Vicarious liability emerged in the era of master and servant<sup>170</sup> – one natural person employing another. It continued in the era of the limited company,<sup>171</sup> the legal fiction of the company being a 'person' taking the place of the individual employing master. There is nothing holding back taking the legal fiction of corporate personality to its logical conclusion that a legal person can also be the employee.

The technicalities of employment law are increasingly of little importance in the law of vicarious liability, particularly since the introduction of the category of vicarious liability of 'akin to employment'. Currently this category has been used for religious ministers and prisoners, but such a category may also be used for companies, even if

164 E McKendrick, 'Vicarious Liability and Independent Contractors: A Re-Examination' (1990) 53 *MLR* 770, note R Kidner, 'Vicarious liability: for whom should the 'employer' be liable?' (1995) 15 *LS* 47. Cf *supra*, Deakin, 'Enterprise-Risk', 109.

165 [2012] EWCA Civ 938, [2013] QB 722.

166 *JGE*, per Ward LJ, at [59].

167 At [60].

168 *Viasystems*.

169 *JGE*; *CCWS*; *Cox*.

170 J Baker, *An Introduction to English Legal History* (Butterworths, 2002), pp 410, 419. D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), pp 69–70, 181–84.

171 Note, *supra*, Atiyah, p 381. M Lobban, 'The Development of Tort Law' in W Cornish, et al, *The Oxford History of the Laws of England, Volume XII, 1820–1914, Private Law*, (Oxford University Press, 2010), pp 894–99.



they are not technically 'employed' due to being legal, but not natural, persons. The contract between the companies, or the functional control exercised by one company over another, may be analogous to employment, i.e. akin to employment.

Ward LJ in *JGE* referred to this new form of vicarious liability being a 'new ballgame'<sup>172</sup>. He stated that 'the relationship between the defendant and the tortfeasor should be so close to a relationship of employer/employee that, for vicarious liability purposes, it can fairly be said to be akin to employment.'<sup>173</sup> With this in mind Ward LJ identified the broad characteristics of the employer/employee relationship. His approach was approved by the Supreme Court in *CCWS*.<sup>174</sup> He considered that there is no single test, but rather a range of factors need to be considered which include whether or not the work is carried out under supervision and direction rather than on one's own account, control, whether or not the work is an integral part of the alleged employer's business, and the risk of profit and loss – who stands to gain from the work.<sup>175</sup> In particular the degree of managerial control and integration into the organisation was highlighted: to what extent is there subjection to managerial control over such matters as performance, work quality, and productivity.<sup>176</sup>

None of these features are restricted to the relationship of a legal/natural person employing a natural person. It is advanced that they would also pertain to a relationship between two legal persons. Is the second legal person controlled by and integrated into the defendant legal person's organisation? Is the work an integral part of the defendant's organisation? Who gains from the work? It is easy to see how the relationship between two legal persons could likewise be analysed in this way.

Merely being a subsidiary of a parent company is not enough to fulfil this akin to employment criteria. For instance, acquiring a subsidiary with legacy liabilities would not make the new parent vicariously liable. The question is instead whether or not vicarious liability was present at the time of the tort. Mere ownership at the time of the tort (for instance by being the majority or absolute shareholder) is likewise insufficient, passive investment is not enough. Instead the key issues are those of control and integration. Indeed one company may control another and integrate it into its enterprise, even where that company is not their subsidiary.

Just as with a natural person where one asks if they are an employee, akin to an employee, or an independent contractor, one can do the same with a company. Being a legal person does not preclude this question; indeed it is to respect the legal fiction of personality and take it to its logical conclusion.

One can imagine a situation where the subsidiary is indistinguishable to outsiders from the parent, its employees wearing the uniform of the parent, directed by and integrated amongst the parent's staff, and controlled by the parent's management, working on activities integral to the parent's business. In such circumstances the company is 'akin to an employee' and vicarious liability of the parent for the subsidiary is likely to be present. However, to respect the separate legal identity of the companies, in the case of a subsidiary, control via internal corporate law processes, for instance through appointing directors and board votes, must be ignored as internal mechanisms of (the subsidiary's) corporate

172 At [60].

173 At [62].

174 *CCWS*.

175 At [64]–[70].

176 At [72], citing, Kidner, *supra*, 63–64.



governance. However, control through contractual means, or in fact, may be taken into account – and is the same process in assessing whether or not an individual is akin to an employee. Of course this is not limited to subsidiaries; one may exercise sufficient control over, and integrate into one's organisation, an entity that one does not own.

## Corporate law objections?

Enterprise liability based parent company liability in tort<sup>177</sup> does not respect limited liability. Unless limited liability is to be substantially reformed, and this is a matter for the legislature, tort liability needs to respect the separate legal identity and limited liability of the companies. Treating the group as a single entity does not. Whilst limited liability originally developed around individual shareholders, it plays an important role within corporate groups, encouraging new and advanced spin offs. You are allowed to game limited liability, but corporate law steps in with veil piercing where the conduct is egregious. Any tort solution needs to respect the fact that the companies are separate legal persons.

Vicarious liability, however, does respect the separate identity and limited liability of each of the companies. A natural person has a separate legal identity from any other, and also has limited liability, in the sense that whilst (as with a limited company) his personal liability is unlimited, the buck for that person's individually committed torts stops with him. One is only liable for one's own torts. Vicarious liability is an exception to that principle. It applies where a legal person or natural person is held vicariously liable for another's torts. A legal person (or a natural person) can be vicariously liable for a natural person. There is no veil piercing or violation of corporate law principles here. The law recognises that these persons have separate legal identities. Why not, by extension, can a legal person (or natural person) not be vicariously liable for a legal person? Such a principle would be to respect the fiction that the legal person has a separate legal identity, and take it to its natural consequences. Indeed it would make a legal person more like a natural person – thus respecting this cardinal principle of corporate law and taking it to its logical conclusion. If one stands in a relationship vis-à-vis a company, where, if that company were a person, you would be vicariously liable for them, then why should vicarious liability not be present in the case of a legal person? This would truly respect the separateness of the company.

In the tort context the buck stopping with the tortfeasor is the core of limited liability. In this way limited liability is replicating what happens with a natural person. Vicarious liability for a company therefore does not violate limited liability, or a company's separate identity, just as it does not violate these principles when a company is held vicariously liable for a natural person, or directly liable.

However, vicarious liability for a company does require a reconceptualisation of the doctrine in some cases to take into account the legal fiction of personality. In most cases vicarious liability for a company would be a form of double vicarious liability, which is unlike the current version of vicarious liability. A company can only act through natural persons, so for a legal person to be vicariously liable for another legal person in many cases it would be to hold A vicariously liable for B, who is in turn vicariously liable for its own employees, so that A's vicarious liability for B is premised on B's own vicarious liability for C. In some cases, however, this would not be the case, and it would only be 'single' vicarious liability, for instance where the tort is that of the company (B), and not

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177 As proposed by Dearborn, *supra*. Note also the arguments made by India in the Union Carbide litigation.

the employee (C). This occurs for instance when only the company assumes a duty of care towards the defendant and the individual actor does not assume personal responsibility: an example of this is *Williams v Natural Health Foods Ltd*.<sup>178</sup> Here there is no employee tort. This would also be the case where an action is attributed to the company itself.

## Dual vicarious liability: a route around?

Whilst vicarious liability for legal persons remains controversial, vicarious liability additionally offers an alternative route around a judgment proofed structure.

Vicarious liability may be 'dual', where more than one entity is vicariously liable for another's torts.<sup>179</sup> So for instance, in *CCWS* both the managers of the school and also the Institute were vicariously liable for the acts of the Brothers. Vicarious liability has moved away from the law of master and servant: the notion of a bilateral contractual relationship between two persons, of work in exchange for wages. This was first apparent in the transfer of employment cases: the language of transfer was a fiction since there was no transfer of contract.<sup>180</sup> This shift has also been reinforced by the development of dual vicarious liability.

Vicarious liability offers an opportunity to bypass the judgment proofing structure through dual vicarious liability. This provides an opportunity to impose liability upon a parent company for the torts of the employees, or agents of the subsidiary. In *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd*<sup>181</sup> which introduced dual vicarious liability into English law, work was carried out by a fitter and fitter's mate who were supplied to the second defendants by the third defendants, and under the supervision of a fitter working for the second defendants. The Court of Appeal held that both the second and third defendants were vicariously liable for the fitter's mate's negligent act.

*CCWS* confirmed the approach taken by Rix LJ in *Viasystems* who took an integration approach. Instead of focusing on control Rix LJ considered that the test should look at 'whether or not the employee in question is so much part of the work, business or organisation of both employers that it is just to make both employers answer.'<sup>182</sup>

Thus dual vicarious liability, which looks to function, not form, is ideal for dealing with the evolving and increasingly complex web of companies within corporate groups. It is highly suited to multilateral work settings where often no single bilateral employer can be identified, particularly where employment functions are shared between multiple entities.<sup>183</sup> Indeed many group company employees might not know which of the group companies (if any) their employer is. Dual vicarious liability allows the regulatory function of tort, and vicarious liability, to apply to the 'employer' on a functional basis, targeting the conduct that tort wishes to control/regulate. The actual employer on the face of the contract of employment is irrelevant for this purpose.

Thus dual vicarious liability offers an opportunity to bring an action against the asset holding entity in place of, or in addition to, the judgment proofed entity. However,

178 [1998] 1 WLR 830.

179 *Viasystems*; *CCWS*.

180 *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, 443 per Denning LJ.

181 [2005] EWCA Civ 1151, [2006] QB 510.

182 At [79].

183 For a thoughtful article on the implication of this change in the workplace on employment law see J Prassl, 'The notion of the employer' (2013) 129 *LQR* 380.

it is not a panacea for claimants, since careful structuring and policies will prevent such a claim from being successful, particularly if the parent company distances itself from the operations of the undercapitalised subsidiary, and does not involve itself with the subsidiaries' staff.

If vicarious liability for companies is accepted, dual vicarious liability also has an additional role to play within the context of vicarious liability for group companies. Many large enterprises, particularly multi-nationals, do not simply consist of parent and subsidiary company. There may be a complex web of subsidiaries and sub-subsidiaries. Dual vicarious liability means that it is not just the immediate parent of a sub-subsidiary who may be targeted, but also any other group companies which exert sufficient control over the company, and into whose work, business, or organisation the company is sufficiently integrated. Again, this is not a panacea to the judgment proofing problem since careful structuring will ensure that the risk generating entities are not controlled by or integrated into the activities of the asset holding entities.

With multi-national companies with overseas judgment proofed subsidiaries, the issue of enforcing overseas judgments in England is an issue for the conflicts of laws, not domestic vicarious liability. If the parent company is sued in England for the torts of its overseas subsidiaries it is up to the conflicts of law to determine jurisdiction, the law governing the tort, and the system of vicarious liability applicable.

## Conclusion

Complex corporate structures pervade the commercial world. In some cases the structure is adopted to avoid the consequences of tort litigation, by creating a judgment proof entity which takes the risk of the enterprise. Even outside of this situation large claims may exceed the value of a subsidiary company, and further it may also be impossible to identify the relevant tortfeasor and employer where group companies operate as a complex intertwined web.

Tort law thus needs to adapt if it is to retain its regulatory function. Direct claims are in their infancy, but offer possible relief in exceptional cases. The advances in vicarious liability too are now such that they can be utilised to bypass such a structure. It is argued that the theory of vicarious liability utilised by the Supreme Court in *CCWS*, along with the newly developing categories of vicarious liability, point towards vicarious liability for legal persons.

A legal or natural person can employ, or be in a relationship akin to employment with, a legal person. Indeed such a development respects the core principles of corporate law, and takes the legal fiction of personality to its logical conclusion – whilst fully respecting the limited liability of a company.

In some situations, but not all, a parent company will stand in a sufficient relationship with its subsidiary to trigger vicarious liability. One needs to examine the nature of the relationship between the two, and ask the same questions that one would consider when considering the relationship between a legal or natural person, and a natural person.

The development of dual vicarious liability too offers some relief around a judgment proof structure, and is highly suited to multilateral work settings.

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