

## A COMPARATIVE REVIEW OF THE ENVIRONMENTAL LIABILITY OF PARENT COMPANIES FOR THE ACTS OF THEIR FOREIGN SUBSIDIARIES

EMWANTA EHIGIATO\*

### ABSTRACT

*This article seeks to examine the liability of parent companies for environmental damages or harms attributable to the operations of their subsidiaries operating in foreign jurisdictions. The issue has attracted judicial pronouncements in several jurisdictions and this article focuses attention on four selected jurisdictions namely, Nigeria, United Kingdom, United States of America and Canada. The general rule is that a parent company is not liable for the acts of its subsidiary and by extension its foreign subsidiary based on the doctrine of corporate personality which is a worldwide company law principle that has held sway over the years. However, the doctrine of corporate personality admits of certain exceptions as the veil of incorporation may be pierced or lifted in certain circumstances to make a parent company liable for the environmental damages caused by its foreign subsidiary. Aside from piercing or lifting the veil, liability could also be directly imputed to the parent company based on specific statutes as well as judicial interpretation of the relationship between a parent company and its subsidiary. Some of these jurisdictions have developed legal principles and legislation to cover the liability of a parent company for the environmental damages of its subsidiary in certain areas. The article concludes by highlighting the circumstances under which a parent company can be held liable for the environmental damages of its foreign subsidiary and makes recommendations on measures to minimize such liabilities.*

### INTRODUCTION

This paper focuses on the environmental liability of parent companies for the acts of their foreign subsidiaries<sup>1</sup> Discussions will be limited to environmental liability<sup>2</sup> as distinct from other liabilities that may be recognized by other branches of law such as contract, employment<sup>3</sup> tort<sup>4</sup> and competition

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\*LL.B, BL, LL.M, MBA, ACIS. Partner, Giwa-Osagie & Co, Lagos

1. A foreign subsidiary is a company incorporated outside the jurisdiction of the parent company. Under Nigerian company law, foreign subsidiaries can legally operate in Nigeria. The law requires that any foreign company wishing to carry on business must register a company in Nigeria. This is in line with section 54(1) of the Companies & Allied Matters Act, Cap C20, LFN 2004 (CAMA). *Agip (Nig) Ltd v Agip Petroli Int'l* (2010) 5 NWLR (Pt 1187) SC 348. The law however recognizes some exceptions to the requirement of local incorporation for foreign companies seeking to do business in Nigeria. See Emwanta Ehigiato, 'Mandatory Incorporation of Foreign Companies in Nigeria: Some Legal Consideration' (2015) 6(1) The Gravitas Review of Business & Property Law 19-27
2. Environmental liability is an obligation predicated on the principle that a polluting party is required to pay for any or all damages caused to the environment by its activities. Under the common law, environmental litigation may be based on negligence, nuisance, strict liability and trespass
3. A parent company may be liable in damages to the employee of a subsidiary company in certain situations like the English case of *Chandler v Cape PLC* (2011) EWCA Civ 525. The Court of Appeal implied a direct duty of care on a parent company to the employee of its South African subsidiary company who contracted asbestosis during the period of his employment. In holding the defendant parent company liable, the court did not rely on the principle of lifting the veil but alluded to a breach of duty of care owed by the defendant to the employee and the defendant was held to be liable for the tort of negligence
4. *Chandler v Cape PLC*, ibid. See Stefan H C Lo, 'A Parent Company Liability to Employees of a Subsidiary' (2014) 1 Journal of International and Contemporary Law 117. It should be noted that environmental liability may arise from tort of negligence, nuisance and the rule in *Ryland v Fletcher* (strict liability)



law.<sup>5</sup> A parent company is generally not liable for the contractual infractions of its subsidiary. A contract is an agreement that is legally enforceable and a subsidiary company can sue and be sued on contracts entered into. In *VTB Capital v Nutritek* (2013) UKSC 5, the English Supreme Court held that there was no principle extending the scope of the doctrine of piercing the veil to purely contractual situations and disapproved of the earlier Court of Appeal decisions in *Gramsci Shopping Corp v Stapanors* (2011) EWHC 333 and *Alliance Bank LSC v Aquanta Corp* (2013) 1 Lloyd's Rep 1. In Nigeria, a parent company may be liable for such contracts if the veil of incorporation is lifted under statutory provisions and case law situations.<sup>6</sup> Also, as a general rule the ownership of shares<sup>7</sup> in one company by another company does not destroy the separate existence or corporate personality<sup>8</sup> of each of the companies. The share owning entity which is called the parent company<sup>9</sup> is generally not liable for the acts or omissions of its subsidiary<sup>10</sup> unless the separate corporate existence of the companies is disregarded or the corporate veil lifted or pierced which may inter-alia arise where there are statutory provisions to that effect, separate corporate existence is a mere sham or where agency can be implied or the subsidiary is a means of concealing the truth or perpetuating fraud.<sup>11</sup>

## AN OVERVIEW OF THE CONCEPT OF CORPORATE PERSONALITY IN SELECTED JURISDICTIONS

The separate corporate existence of a parent and subsidiary company is founded on the concept of corporate personality which along with the doctrine of piercing the veil has attracted judicial pronouncements in many jurisdictions like Nigeria,<sup>12</sup> United Kingdom,<sup>13</sup> United States of America,<sup>14</sup> Australia<sup>15</sup> and Canada.<sup>16</sup>

5. See the decisions of the EU courts, the EU's equivalent of the single economic unit theory in competition law (antitrust) cases to pierce the veil against corporate groups. See the cases of *Akzo Nobel NV v Commission's* (2009) ECR I-8237 and *Stora Kopparbergs Bergslags AB v Commission's* (2000) ECR I-9925. The EC competition law may treat a parent company and its subsidiaries as an economic unit and pierce the veil of incorporation. The rules on competition in articles 81 to 86 of the EC Treaty are rules applying to undertakings and it has been held by the court of first instance that undertakings means that the rules are aimed at economic units which consist of a unitary organization personal, tangible and intangible elements which are pursuing a specific economic aim on a long term basis (*Shell International Chemical Co Ltd v Commission* (case T-11/89) (1992) ECR II-757 at para 311). Where a group of companies forms an undertaking, the whole undertaking may be found to have broken the competition rules. Due to the fact that a group of companies does not have legal personality, the court can choose a principal member of the group to be the addressee of its decision and to be responsible for payment of any penalty (*Provimi Ltd v Roche Products Ltd* (2003) EWHC 961(Comm))
6. See footnotes 48 and 49
7. The owner of shares in a company is called shareholder and section 567(1) of CAMA defines 'share' as 'the interests in a company's share capital of a member who is entitled to share in the capital or income of such company, and except where a distinction between stock and shares is expressed or implied, includes stock'
8. Legal personality implies that a company is an artificial entity distinct from its members and can sue and be sued in its own name. The consequences and effects of incorporation are set out in Section 37 of CAMA
9. A parent or holding company is one which is a member of another company and controls the composition of its board of directors, or holds more than half in nominal value of its equity share capital. This is in line with the provisions of CAMA
10. A subsidiary company is one in which the parent or holding company is a member and controls the composition of its board of directors, or holds more than half in nominal value of its equity share capital
11. See footnotes 48 and 49
12. See the following cases, *Marina Nominees Ltd v FBIR* (1986) 2 NWLR (Pt 20) 48; *Adeniji v The State* (1992) 2 NWLR (Pt 234) 248 CA; *Delta Steel (Nigeria) Ltd v American Computer Technology Inc* (1999) 4 NWLR (Pt 597) 53; *BLGC v Bassey* (2009) 9 NWLR (Pt 1147) 473 CA; *G & T Invest Ltd v Witt & Bush Ltd* (2011) 8 NWLR (Pt 1250) 500 SC and *New Res Int'l Ltd v Oranusi* (2011) 2 NWLR (Pt 1230) 102 CA
13. *Salomon v Salomon* (1897) AC 22; *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* (1915) AC 705; *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* (1951) 2 KB 366; *Bolten(Engineering) Co Ltd v Graham and Sons* (1957) 1 QB 159; *Pty Ltd* (1967) QDR 651; *Lee's Air Farming Ltd and DHN Food Distributors Ltd v Tower Hamlets Lbc* (1976) 3 ALL ER 462; *Adams v Cape Industries Plc* (1991) 1 All ER 929; *Collins Stewart Ltd v Financial Times* (2005) EWHC QB 262; *Chandler v Cape Plc* (n 4) *VTB Capital v Nutritek* (2013) UKSC 5
14. *United States v Bestfoods* 524 US 51,52 (1998); *Tide Line Inc v Eastrade Commodities* 2006 WL 4459297, 2007 A.M.C 252, 265; *Milestone Shipping SA v Eastech Trading LLC* (2011) AMC 968 (S.D.N.Y.); *The Bluewhale* 2013, July 16, N013-019-2-CV
15. See Oscar Shub, Partner Allens Author Robinson 'Separate Corporate Personality. Piercing the Corporate Veil' p1-A paper delivered for FDCC, Lacosta in July 2005, Cesterman 'The Corporate Veil, Crime and Punishment' *The Queen v Denbo Pty Ltd* and Timothy Ian Nadenbousch (1994) 19 Melbourne University Law Review 1064. Also see the following cases, *Briggs v James Hardie & Co Pty Ltd & Ors* (1989) 16 NSWLR 549; *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267
16. See N C Sargent, 'Corporate groups and the corporate veil in Canada' (1988) 17 Man LJ 155; *Manley Inc v Fallis* (1977) 38 CPR (2d) 74; *Bank of Montreal v Canadian West growth Ltd* (1990) 72 Alta LR (2d) 319 on appeal (1992) 2 Alta LR (3d) 221



## United Kingdom

One of the most important company law cases of all times is the celebrated English case of *Salomon v Salomon*<sup>17</sup> which had to do with whether the individuals behind a company, in this case the shareholders can be sued in their personal capacity. The House of Lords held that the company is an entirely separate entity from its members and it is responsible for its own actions. This implies that the individuals associated with the company such as shareholders and directors cannot be sued in their personal capacity for acts or omissions of the company. Lord McNaughten stated the position as follows.<sup>18</sup>

...the Company is at law a different person altogether from the subscribers to the memorandum... nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act

Also in the cases of *Lee v Lee's Air Farming Ltd*<sup>19</sup> and *John Shaw & Sons (Salford) Ltd v Shaw*<sup>20</sup> the courts held that the shareholders of a company are separate Legal personalities from the company.

In the words of J. Olakunle Orojo,<sup>21</sup> 'this legal concept affects its structure, existence, capacity, power, rights and liabilities. Although a company is a legal entity and has an independent legal personality, it is, of course an artificial person or entity. Therefore all the operations and activities of the company have to be carried out by its organs or agents'

Denning L.J in *Bolton (Engineering) Co. Ltd. v Graham and Sons*<sup>22</sup> also alluded to the doctrine of corporate personality as follows:

A Company may in many ways be likened to a human body. It has a brain and nerve center, which controls what it does. It also has hands, which holds the tools and act in accordance with direction from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does...

Another illustrative case is *Lennard's Carrying Co. v Asiatic Petroleum Ltd*<sup>23</sup> where Viscount Haldane L.C held as follows:

...a Corporation is an abstraction, it has no mind of its own any more than it has a body of its own; its active and directive will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and center of personality of the Corporation...

17. (1897)AC 22

18. ibid 51

19. (1961)AC 12PC

20. (1935) All ER Rep 456

21. See Olakunle Orojo, *Company Law and Practice in Nigeria* (5<sup>th</sup> ed 2008) 82, 83

22. (1957) 1QB 159

23. (1915)AC 705, 713-714



In another English case *Adams v Cape Industries*<sup>24</sup> there was a restatement of the basic *Salomon v Salomon* principle. The Court of Appeal declined to treat the UK parent company, its subsidiary, and an independent US Corporation through which it marketed asbestos in the USA as a single economic entity or to lift the veil of incorporation as opposed to the case of *DHN Food Distributors Ltd v Toner Hamlets LBC* (1976) 3 All ER 462 CA where Lord Denning opined that '...for all practical purposes the 3 group of companies should be treated as one entity and consequently the payment for distribution should be made to DHN'.<sup>25</sup>

The doctrine of corporate personality was reiterated by the English Supreme Court in *VTB v Nutriteck International Corp*<sup>26</sup> and the court was unanimous in upholding the Court of Appeal's decision that allowing the corporate veil to be pierced so as to treat a third party as a co-contracting was contrary to both authority and principle.

In a recent English case of *Prest v Petrodel*<sup>27</sup> the Supreme Court whilst acknowledging the separate existence of a company from its shareholders held that a property held in trust by a company on behalf of the shareholder cannot be regarded as the company's property and that such property can be used in satisfaction of the sums awarded by a court against the owner of the company in favour of his wife in a divorce proceedings.

### United States of America.

According to Dante Figueroa,<sup>28</sup> Jurisdictions within the United States adopted the traditional view of the corporation that existed at the time of independence from England, which conceived the corporation "as a separate juridical unit".<sup>29</sup> In 1819, U.S. Supreme Court Chief Justice John Marshall defined the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law".<sup>30</sup> In 1839, the Supreme Court of Errors of Connecticut, the predecessor to the Supreme Court of Connecticut, recognized that corporations were "artificial, intangible being[s]" born out of an act of the parties and recognized by the law.<sup>31</sup> Yet another scholar referred to them "as actual persons" that are "dealt with in a quite anthropomorphic manner".<sup>32</sup>

A fundamental corporate law principle which has held sway in the US<sup>33</sup> is that a corporation<sup>34</sup> is a separate entity from its shareholders who are protected under a corporate veil from the liabilities of the corporate entity. By virtue of this concept of limited liability, the shareholder's responsibility for the debts or obligations of a corporation is restricted to the amount invested in the corporation. The fact that parent and subsidiary have common or identical directors and officers does not make the parent liable for the acts or omissions of its subsidiary. There must be actual operating control by the parent or at least a fraudulent intent.<sup>35</sup>

24. (1990) Ch 433. This was discussed in an article titled 'The Principle of Separate Corporate Personality as confirmed by *Salomon v Salomon*' <<http://www.essay.uk.com/coursework/the-principle-of-separate-c>> accessed 30 April 2015
25. See Griffin S, *Company Law Fundamental Principles* (2<sup>nd</sup> edn, 1996) 19
26. (2013) UK SC 5
27. (2013) UK SC 34
28. See Dante Figueroa 'Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America' *Duguesne Law Review* 701
29. See Phillips I. Blumberg, 'The Corporate Entity in an era of Multinational Corporations' (1990) 15 *DEL. J. CORP L.* 283, 322
30. See Robert W. Hamilton, 'The Corporate Entity' (1971) 49 *TEX L. REV.* 979, 980
31. See *FairField Cnty, TPK v Thorp*, (1990) 13 Conn 173, 179 (Conn. 1839) 322
32. See Maurice Wormser, 'Piercing the Veil of Corporate Entity' (1912) 12 *Colum. L. REV.* 496
33. See Schnapf 'Environmental Liability: Managing Environmental Risks in Corporate, Real Estate and Brownfield Transactions' an excerpt from the Article published by Lexis Law
34. It should be noted that companies are called corporations in the US. See also Shittu A. Bello and Ogwezzy C. Michael 'Piercing the Veil of Business Incorporation: An overview of what warrants it' (June 2014) 3(2) *Review of Contemporary Business Research* 117-138 published by the American Research Institute for Policy Development) at p18. According to the writers, the word corporation is derived from the Latin word 'corpus' meaning body or person. The Romans identified a collection of persons considered as a 'corpus' or body out of which the English word for corporation was developed
35. Schnapf (n 33). See also Arthur Machen 'Corporate Personality' (1911) 24(4) *Harvard Law Review* (Part 1) and 5(Part 2) 1-14 and John Dewey 'The Historic Background of Corporate Legal Personality' (1926) 35(6) *Yale Law Review* 1-10



Courts are reluctant to disregard the corporate form but may inter-alia pierce the corporate veil if it determines that the shareholder and the corporate entity are not distinct entities based on the application of applicable principles or when upholding the corporate form will cause injustice.<sup>36</sup>

In *Joslyn Corp. V. T. L Jones & Co, Inc.*,<sup>37</sup> The Fifth Circuit declined to impose liability on a parent corporation where the parent owned 100 percent of the stock of its subsidiary, advanced loans to the subsidiary, shared common directors, and some executives worked in the corporate offices. The court took cognizance of the fact that the subsidiary had strictly adhered to basic corporate formalities by keeping its own books and records, holding frequent shareholder and director meetings, paying its own bills filing its own tax return, and making separate arrangements for employee benefits and remunerations. In addition the contaminated property was owned in the name of the subsidiary coupled with the fact that the daily operations of the two companies were separate. Also, the major shareholders of the subsidiary were not employees of the parent.<sup>38</sup>

Furthermore, in *Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*,<sup>39</sup> a Federal district court held that although the parent provided some services and exercised some power over the subsidiary, this was within the normal parent/subsidiary relationship and did not warrant piercing the corporate veil. Although the parent had formed its subsidiary expressly for the purpose of insulating the environmental liabilities associated with a particular site in the subsidiary. The government contended that a parent corporation should be held liable whenever it forms a subsidiary to avoid environmental liability. The court rejected this view and held that a parent corporation should be able to put a waste site to productive use by forming a well-capitalized, non-fraudulent subsidiary without exposing all of its corporate assets.<sup>40</sup>

In *United States v Bestfoods*<sup>41</sup> the United States Supreme Court whilst outlining instances of corporate affiliate liability under the Federal Superfund Law, reaffirmed that the liability of owners or operators of contaminated industrial facilities should be governed by traditional principles of corporate separateness and shareholder limited liability.<sup>42</sup>

## Canada

The concept of corporate personality has also elicited judicial pronouncements. In *Aluminum Co of Canada v Toronto*<sup>43</sup> Rand J in the Supreme Court of Canada held that a parent company is distinct from its subsidiary and held that the conditions for treating the business of a subsidiary as the business of its parent company, when taxing the parent company's business income, was that the subsidiary was the puppet of the holding company which in the case before the court it was not.

36. Schnapf (n 33). Sometimes the corporate veil can be pierced where "the interests of justice require" or where there has been impropriety. An example is the Cayman case of *Bonotto and others v Boccaletti and others* (2001) CLLR 120. The defendant had transferred properties from his and his wife's name into the names of companies under his control, to make himself judgment proof. The Judge held "the cases... show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice, irrespective of the legal efficacy of the corporate structure under consideration". See also Gregory Gregory P.O'Hara 'Minimizing Exposure To Environmental Liabilities for Corporate Officers, Directors, Shareholders and Successors' (1990) 6(1) Santa Clara High Technology Journal 3

37. 696 F.Supp.222, 227(W.D.La 1988), aff'd,893 F.2d 80 (5<sup>th</sup> Cir 1990), cert. denied, 111 S.Ct 1017(1991). See also John E Osborn PC 'Managing Environmental Liability' -From Corporation, Parts 1and 11, Vol. Lx111, Nos.14.1 and 15.1, July 15 and August 3, 1992, respectively, Prentice-Hall Newsletter p 8

38. *ibid*

39. 675 F. Supp. 22, 33 (D Mass 1987)

40. Schnapf (n 33)

41. Bestfood's case (n 14)

42. See David M (Max) Williamson and Christopher J. McKenzie 'Corporate Affiliate Liability After *U.S. v Bestfoods*' Toxic Law Report, sourced online

43. (1944) 3 DLR 609 at 614





Canadian courts have consistently followed the case of *Salomon v Salomon & Co.*, rigidly adhering to the doctrine of distinct corporate personality as reflected in the case of *Big Bend Hotel Ltd v Security Mutual Casualty Co.*<sup>44</sup>

In *Kosmopoulos v Constitution Insurance Co. of Canada*,<sup>45</sup> the Supreme Court of Canada summarized the principle of lifting the corporate veil<sup>46</sup> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v Salomon & Co* and when a Court may disregard this principle by lifting the corporate veil and regarding the company as a mere agent or puppet of its controlling shareholder or parent corporation is not based on any consistent principle. The separate entities principle is not enforced when it would yield a result too blatantly opposed to justice, convenience or the interests of the Revenue.<sup>47</sup>

In various jurisdictions, the veil of incorporation may be lifted or pierced by the court which include statutory provisions<sup>48</sup> and case law.<sup>49</sup> Dante Figuero,<sup>50</sup> Cathy and James Krendl in their famous article of 1978 proposed a revised version of the Powell Rule. Their work concentrated on three factors to determine veil piercing in the parent/subsidiary framework: (a) dominance of the parent over the subsidiary; (b) improper purpose; and (c) public policy considerations related to who should bear the risks. This revised exposition of the Powell Rule included the listing of thirty-one factors to be taken into account in any veil piercing analysis. These broad parameters show that there is no rigid test when it comes to the veil piercing analysis. The list is as follows:

1. The shareholder is not a party to the contractual or other obligation of the corporation.
2. The subsidiary is not undercapitalized.
3. The subsidiary does not operate at a deficit while the parent is showing a profit.
4. The creditors of the companies are not misled as to which company they are dealing with.
5. Creditors are not misled as to the financial strength of the subsidiary.
6. The employees of the parent and subsidiary are separate and the parent does not hire and fire employees of the subsidiary.
7. The payroll of the subsidiary is paid by the subsidiary and the salary levels are set by the subsidiary.
8. The labor relations of the two companies are handled separately and independently.
9. The parent and subsidiary maintain separate offices and telephone numbers.
10. Separate directors' meetings are conducted.

44. (1980) 19 BCLR 102 (BCSC)

45. (1987) 1 SCR 2 (SCC)

46. Para 12

47. L.C.B Gower, *Modern Company Law* (4<sup>th</sup> ed, 1979) 112

48. The statutory provisions are contained in various sections of CAMA which includes the following:

-Number of members falling below legal minimum - Section 93

-Number of directors less than two - Section 246(3)

-Personal liability of directors and officers for fraud - Section 290

-Reckless or fraudulent trading Section - 506(1)

-Company not mentioned in a bill of exchange - Section 584(1)(c)

-Holding and subsidiary companies - Sections 336-338

-Investigation into related companies - Section 316

Also see Orojo (n 21) 88-91

49. The circumstances under which the veil of incorporation have been lifted by the Nigerian courts are listed below: company acting as agent for shareholder or as a sham, Group of companies, criminal cases. See Orojo (n 22) 91-95

50. Dante Figueroa 'Comparative Aspects of Piercing the Corporate Veil in the United States and America' *Duguesne Law Review* 225-228



11. The subsidiary maintains financial books and records which contain entries related only to its own operations.
12. The subsidiary has its own bank account.
13. The earnings of the subsidiary are not reflected on the financial reports of the parent in determining the parent's income.
14. The companies do not file joint tax returns.
15. The subsidiary negotiates its own loans or other financing.
16. The subsidiary does not borrow money from the parent.
17. Loans and other financial transactions between the parent and subsidiary are properly documented and conducted on an arm's length basis.
18. The parent does not guarantee the loans of the subsidiary or secure any loan with assets of the parent.
19. The subsidiary's income represents a small percentage of the total income of the parent.
20. The insurance of the two companies is maintained separately and each pays its own premiums.
21. The purchasing activities of the two corporations are handled separately.
22. The two companies avoid advertising as a joint activity or other public relations which indicate that they are the same organization.
23. The parent and subsidiary avoid referring to each other as one family, organization, or as divisions of one another.
24. The equipment and other goods of the parent and subsidiary are separate.
25. The two companies do not exchange assets or liabilities.
26. There are no contracts between the parent and subsidiary with respect to purchasing goods and services from each other.
27. The subsidiary and the parent do not deal exclusively with each other.
28. The parent does not review the subsidiary's contracts, bids or other financial activities in greater detail than would be normal for a shareholder who is merely interested in the profitability of the business.
29. The parent does not supervise the manner in which the subsidiary's jobs are carried out.
30. The parent does not have a substantial veto power over important business decisions of the subsidiary and does not itself make such crucial decisions.
31. The parent and subsidiary are engaged in different lines of business.

It should be noted that the foregoing factors are by no means exhaustive as courts can consider other factors based on the facts of the matter in a bid to do justice to litigants in the interest of fairness and this liberal approach has been continually adopted by the US courts.

It is obvious from the foregoing that the doctrine of corporate personality puts a wall between a company and its shareholders, directors and officers in a manner that ensures that the various parties cannot be liable for the acts of the company except in cases that the wall can be penetrated to impose liability on these categories of persons. There are instances of piercing or lifting the veil of incorporation.<sup>51</sup>

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51. *ibid.* Also see footnotes 48, 49 and 50



## APPLICATION OF THE CONCEPT OF CORPORATE PERSONALITY TO GROUP OF COMPANIES

When applied to a group of companies, it implies that each company in the group is a distinct entity from the others. This principle of distinct personality of the company was extended to the subsidiary of a corporation in *Charter Bridge Corporation v Lloyd's Bank Ltd*<sup>52</sup> where the court inter-alia held that each company in the group is a separate entity and the directors of a particular company are not entitled to sacrifice the interest of that company. Also in *The Alberto*<sup>53</sup> the English Court held that there is no general principle that all companies in a group are to be regarded as one. The fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate rights and liabilities.

In the Nigerian case of *M.O. Kanu & Sons v F.B.N Plc*<sup>54</sup> the legal status of a holding company and its subsidiaries was considered and the Court of Appeal stated as follows:

A holding company and its subsidiaries are each a distinct and separate legal personality. Each owns its own assets and properties...

Also in *Akinkugbe v E.H.N Ltd*<sup>55</sup> the Supreme Court held that: 'The subsidiaries of a company are, in the eye of the law, separate and distinct personalities from the company...'

In the English case of *Cape v Chandler*,<sup>56</sup> the Court of Appeal held a parent company liable for the acts of its foreign subsidiary company based on the following facts. The claimant, Mr. Chandler, had been employed by Cape Building Products Limited (Cape Products), a subsidiary of Cape plc. (Cape), for a period of approximately 18 months in the late 1950s and early 1960s. Consequent on exposure to asbestos during this period of employment, Mr. Chandler subsequently contracted asbestosis (over fifty years later) by which time Cape Products had been wound up. Cape Products had carried employer's liability insurance but the policy specifically excluded cases of asbestosis. Mr. Chandler therefore brought a claim in negligence against Cape, as parent company of Cape Products. The Court held that Cape had indeed assumed responsibility and that it had a duty of care either to advise its subsidiary on the steps it had to take to provide a safe system of work or to ensure that those steps were taken.

The Court in imposing a duty of care, took cognizance of the following circumstances (a) the business of the parent and subsidiary were in a relevant respect the same; (b) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (c) the subsidiary's system of work was unsafe as the parent company knew, or ought to have known; and (d) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.<sup>57</sup> However the court rejected any suggestion that there had been a lifting of the corporate veil in the case and the question was whether the defendant

52. (1970) Ch 62. This case was cited by Orojo (n 21) 82. Also see the following cases; *Marina Nominees Ltd v FBIR* (1986) 2 NWLR (Pt 20) 48; *Lee v Lee's Farming Ltd* (1961) AC 12PC

53. (1977) AC 744CA

54. (1998) 11 NWLR at 21, paras F-G

55. (2008) 12 NWLR (Pt 1098) SC 375 at 395 -396 paras B-C

56. *Chandler's case* (n 4). See also Stefan H.C Lo 'A Parent Company's Liability to Employees of a Subsidiary' (2014) 1 Journal of International and Comparative Law 117. According to Stefan H.C Lo, the Court of Appeal considered that a parent company can be liable in negligence in respect of its own acts or omissions in its involvement in the activities of its subsidiaries

57. See Fergal McLaughlin 'Parent Company Liability for the Actions and Liabilities of their Subsidiaries' (Oct 2012) accessed 11 May 2015





parent company had assumed responsibility through its actions leading to the assumption of a direct duty of care in favour of its subsidiary's employee.<sup>58</sup>

This judgment has implications for companies operating within a group structure and on persons other than just employees of subsidiaries, including any person to whom the subsidiary may be liable and areas other than just health and safety such as claims for environmental damage or damage to property-

The concept of corporate personality is strengthened by the limited liability status of certain incorporated bodies in various jurisdictions.<sup>59</sup> One of the advantages of limited liability is the protection available to equity investors in terms of limiting their liability in the event of corporate failure;<sup>60</sup> this has the potential of promoting the much needed investment particularly in developing economies like Nigeria. Another benefit was captured by Williams A. Voxman in the following words:<sup>61</sup> 'The principle of limited corporate liability is deeply rooted in corporate law and is justified in terms of economic efficiency'. In the words of James A. King,<sup>62</sup> 'Limited shareholders liability arose as a means to encourage private investment by individuals in capitalist ventures and to facilitate the private exchange of those investments'. The principle of limited liability is however not an unmixed blessing as it does create some inefficiencies, for it allows investors to reap all the gains of their investment, while bearing only some of the losses, leaving the burden of any such losses upon third-party creditors of the firm in which the investor has invested.<sup>63</sup> But the efficiencies that are created from the principle obviously outweigh any inefficiency that it may create.<sup>64</sup>

## AN OVERVIEW OF THE CONCEPT OF CORPORATE PERSONALITY IN NIGERIA

The consequences and effects of incorporation are provided in Section 37 of the Companies and Allied Matters Act<sup>65</sup> as follows:

As from the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the member to contribute to the asset of the company in the event of being wound-up as is mentioned in this Act

The Nigerian courts have had occasions to uphold the doctrine of corporate personality and the principle was adopted in the case of *Marina Nominees v Federal Board of Inland Revenue*<sup>66</sup> where Aniagolu JSC

58. *ibid*

59. Such as the UK, the United States of America, Canada and Nigeria. According to David A. Skeel Jr in his article 'Corporate Anatomy Lessons' (2004) 133 Yale Law Journal 1519.1525 limited liability means 'that the shareholders of a corporation generally do not have any liability beyond the capital they have contributed to the corporation in return for their shares, and that limited liability is the attribute most people attribute to the corporate form' See also James McConvill 'Revisiting Holding Company Liability For Subsidiary Company Debts in Australia. A Response to The James Hardie Controversy' 30877 Notre Dame-McConvill (2) 30822 6/07/09, p34

60. See Orojo (n 21) 35

61. See Williams A. Voxman 'Jurisdiction over a Parent Corporation in its Subsidiary's state of incorporation' University of Pennsylvania Law Review 327 (vol.141.327)

62. See James A. King in his article 'Kayser-Roth Joslyn and the problem of Parent Corporation Liability under CERCLA' 25(1) Akron Law Review 126. See also Easterbrook & Fischel, 'Limited Liability and the Corporation' 52, UCH.L. Rev 89 (1985). Judge Easter Brook and Professor Fischel highlighted the advantages of limited liability as follows: (a) allows market prices to impound additional information about the value of firms (b) reduces the costs of monitoring management and shareholders (c) allows more efficient diversification and (d) facilitates optimal investment decisions

63. James A. king, *ibid* 127

64. *ibid*

65. Cap C20, LFN 2004. See also E.T. Yebisi 'The Corporate Veil, its Relevance to Cooperative Societies in Nigeria' (2014) 29 Journal of Law, Policy and Globalization 140 ISSN 2224 (Paper) ISSN 2224-3259 (online)

66. (1986) 2 NWLR (Pt20) 61 SC



(as he then was) stated as follows:

...the truth however is that it is a company registered under the Companies Act having its full legal status on the principles enunciated in *Salomon v Salomon and Co Ltd*<sup>67</sup> and must be subject to all incidents of incorporation.

The certificate of incorporation is required to be made available in proving that a company has legal personality based on the fact of incorporation. In *A.C.B v Emostrate Ltd*<sup>68</sup> the Supreme Court held that:

What was needed to be proved as to the juristic personality of the plaintiff was whether there was evidence that it was duly incorporated.

Shareholders are not the individual owners of the company's property and have no powers as individuals to dispose of the company's property.<sup>69</sup> In *Trenco (Nigeria) Ltd v African Real Estate Ltd*,<sup>70</sup> the Supreme Court held that a corporation is an abstraction having no mind of its own while its active and directing will is vested in the person or somebody who is the very ego and centre of the personality of the corporation.

In *C.B. Ltd v Intercity Bank Plc*<sup>71</sup> the Court of Appeal held that: 'a limited liability company is a different legal entity from its management. It has a separate distinct life and existence. In other words, the officers and members of an incorporated company are covered by the company's veil of incorporation and that veil cannot be lifted for the purpose of attaching legal responsibility or liability to its officers who are carrying on the usual business of the company'.

Also the Supreme Court of Nigeria inter-alia held in *Alade v Alic (Nig) Ltd*<sup>72</sup> that 'The consequences of recognizing the separate personality of a company are to draw a veil of incorporation over the company. One is therefore generally not entitled to go behind or lift this veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud it is a quest to avoid the normal consequences of the statute which may result in grave injustice that the court as occasion demands have to look behind or pierce the corporation veil'

Some of the consequences of incorporation<sup>73</sup> are the ability to engage in business activities,<sup>74</sup> owning property,<sup>75</sup> having perpetual succession,<sup>76</sup> the ability to sue and be sued,<sup>77</sup> formality and publicity required in running the business,<sup>78</sup> nationality, domicile and residence<sup>79</sup> and the application of the doctrine of ultra vires<sup>80</sup> which sets a limit on the activities of a company as per its object clause.

67. *Salomon's case* (n 14)

68. (2002) FWLR (Pt 104) 540

69. See *Philips v Abou Diwan* (1976) 2 FRCR 24

70. (1978) ILRN 146. See also the following cases, *Adeniji v The State* (1992) 4 NWLR (Pt 234) 248 CA; *Delta Steel (Nigeria) Ltd v American Computer Technology Inc* (1999) 4 NWLR (Pt 597) 53

71. (2009) 15 NWLR (Pt 1165) CA 445 at 462 paras F-G

72. (2010) 19 NWLR (Pt 1226) SC111 at 130 paras F-H

73. See Elizabeth Pollman 'Reconceiving Corporate Personhood' (2011) (4) Utah Law Review P1638

74. *Lighting Improvement Co Ltd v Commissioners of Inland Revenue* (1923) AC 723

75. *Macaurea v Northern Assurance Co Ltd* (1925) AC 619

76. *Rel Noel Tedman Holdings Pty Ltd* (1967) QdR 561

77. *Sotiminu v Ocean SteamShip (Nigeria) Ltd* (1987) 4 NWLR (Pt 67) 691; *Provincial Chemists (Nigeria) Ltd v Umaru & Others* (1986) FHCR 196

78. For example, all special resolutions passed by the company must be registered with the Corporate Affairs Commission in line with Section 237 of CAMA

79. The Nigerian legal system is largely based on the English law and in both countries the law of the country in which a company is incorporated determines its nationality, consequently a company incorporated in Nigeria is a Nigerian company. The place where the registered address of a company is located is its domicile or residence. See Orojo (n 21) 87

80. The doctrine of ultra-vires is codified in section 39 of CAMA



## PARENT COMPANY ENVIRONMENTAL RELATED MATTERS IN SELECTED JURISDICTIONS.

### NIGERIA

In Nigeria most of the parent company environmental related cases have arisen from the activities of subsidiaries of multinational companies in the oil and gas sector. A few of the cases relating to pollution in the oil and gas sector in Nigeria are discussed below.

An example is *Wiwa v Royal Dutch Petroleum, Wiwa v Anderson, and Wiwa v Shell Petroleum Development Company*.<sup>81</sup> These were three law suits filed in New York, USA, by the Center for Constitutional Rights (CCR) and co-counsel from Earth Right International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria due to the pollution of their environment from the activities of a multinational oil company through its local subsidiary. The lawsuits were brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum Development Company (SPDC). The defendants were charged with complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. The cases were brought under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA).

Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil production in 1958. Pollution resulting from the oil production contaminated the local water supply and agricultural land upon which the region's economy is based. It was alleged that Royal Dutch/Shell for many years worked with the Nigerian military regime to suppress demonstrations that were carried out in opposition to the oil company's activities, and in the execution of nine Ogoni civil rights activists in 1995 by the Federal Military Government of Nigeria based on alleged charges of murder of some indigenes of Ogoni land.

On June 8 2009, the eve of trial, the parties in *Wiwa v Shell* agreed to a settlement for all three of the lawsuits. The settlement provided a total of \$15.5 million to compensate the plaintiffs, established a trust for the benefit of the Ogoni people, and covered some of the legal costs and fees associated with the case. The implication of the settlement is that Royal Dutch Petroleum, the parent company accepted liability for the alleged wrongful acts of the Nigerian Subsidiary, Shell Petroleum Development Company (SPDC). Although the claims were in respect of human rights violations they cannot be divorced from the issue of environmental damage which was the genesis of the agitations and protests that led to the alleged cases of human rights violations.

In another case, *Friday Akpan and others v Shell Petroleum Development Corporation*<sup>82</sup> filed in the Hague, a Dutch court ruled that Royal Dutch Shell's Nigerian subsidiary was responsible for a case of oil pollution in the Niger Delta and ordered it to pay damages in a decision that could open the door to further litigation. The district court in The Hague (The Netherlands) said SPDC, a wholly-owned subsidiary, must compensate one farmer, Mr Friday Akpan, but dismissed four other claims filed against the Dutch parent company. Four Nigerians and campaign group Friends of the Earth filed suits in 2008 in The Hague, where Shell has its global headquarters, seeking reparations for lost income from contaminated

81. See Center For Constitutional Rights <<http://ccrjustice.org.wiwa>> accessed 8 May 2015

82. C/09/337050/HA2A09-1580, Judgement of the District Court of The Hague delivered on 30<sup>th</sup> January 2013 <<http://www.vanguardngr.com/2013/01/dutch-court-finds-shell-guilty-of-oil-pollution-in-nigeria/#sthash.hmc5h3Dt.dpuf>> This case was also reported in the Vanguard Newspaper of January 31, 2013



land and waterways in the Niger Delta region, the heart of the Nigerian oil industry. The case provides useful possibilities for holding multinational companies responsible for infractions of foreign subsidiaries and other Nigerians affected by pollution might now be able to sue in the Netherlands.

On the possible liability of the parent company for the negligent act of the Nigerian subsidiary the court held that the circumstances that can create a duty of care on the part of a parent company according to *Chandler v Cape* occurred here. One identical circumstance is that the parent (RDS) knew and knows that the subsidiary's (SPDC's) business operations involve health risks for third parties. However, the businesses of RDS and SPDC are not essentially the same, because RDS formulates general policy lines from The Hague and is involved in worldwide strategy and risk management, whereas SPDC is involved in the production of oil in Nigeria. The court concluded that the special circumstances based on which the parent company was held liable in *Chandler v Cape*<sup>83</sup> were not so similar to those in the subject case. The District Court was of the opinion that *Chandler v Cape*<sup>84</sup> does not create any precedent in the subject case. The court further held that there was nothing to show that RDS in The Hague as parent company assumed the obligation to intervene in SPDC's policy regarding the prevention of and response to sabotage of oil pipeline facilities in Nigeria. The court was of the opinion that the general fact that RDS made the prevention of environmental damage caused by operations of its (sub-) subsidiaries the main focus of its policy and that to some extent, RDS was involved in SPDC's policy, did not constitute sufficient reason to rule that under Nigerian law, RDS assumed a duty of care in respect of the people living in the vicinity of the oil pipe line and oil facilities of SPDC. Those circumstances do not mean that any proximity was created between RDS in The Hague and those people living in the vicinity in Nigeria. The District Court consequently dismissed all the claims initiated against RDS.

Apart from case law, Nigerian statutory law provides a basis for the liability of a parent company for the environmental damages caused by their subsidiaries. An example is Section 27 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,<sup>85</sup> 2007 which provides that where any offence against the NESSRA Act or any regulations made thereunder has been committed by a body corporate every person concerned with the management of that body corporate shall, on conviction, be liable to a fine not exceeding N1,000,000.00 for such offence. From the foregoing if it is established that a parent company is actively involved in the management of the company based on the application of the principles enunciated in *Chandler v Cape*<sup>86</sup> a parent company can be liable under the aforementioned section for any environmental offence committed by its subsidiary. This will include paying compensation for any damage resulting from such breach thereof or to repair and restore the polluted environmental area to an acceptable level as may be approved by the Federal Environmental Protection Agency. This is an example where the corporate veil will be lifted where a company wants to hide under the corporate veil to pollute the environment.<sup>87</sup>

## UNITED KINGDOM

Some of the English cases on environmental liability of a parent company have already been discussed in this article such as *Adam v Cape*<sup>88</sup> and *Cape v Chandler*.<sup>89</sup> From the reported cases it is clear that a parent company can be held liable in negligence for the environmental damage attributed to its foreign

83. *Chandler* (n4)

84. *Chandler* (n4)

85. No.57,2007

86. *Chandler* (n4)

87. See Akinola Bukola 'A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law' NLII Working Paper Series 002p 11

88. *Adam* (n24)

89. *Chandler* (n4)



subsidiary based on the principles enunciated in *Cape v Chandler*. The relevant consideration is whether the parent company can be regarded as having assumed a direct responsibility for the act of its subsidiary based on its involvement in the activities of the subsidiary or whether the subsidiary can be regarded as the agent of the parent company based on course of conduct or the representation made by the parent company<sup>90</sup>

In *Adam v Cape*<sup>91</sup> the English House of Lords ruled on whether South African residents could sue in English Courts for tort damages arising in the South African asbestos mines owned by a subsidiary of an English parent corporation. More than three thousand South Africans sought to sue London-based Cape PLC for negligent control of its South African subsidiaries. Cape PLC owned the South African holding company, Cape Asbestos South Africa (Pty) Limited (“CASAP”), which in turn owned the asbestos mines in South Africa’s Northern Cape Province. The claim involved asbestosis and cancers attributable to exposure to asbestos in the CASAP mines before 1979. Cape PLC ended its operations in South Africa in 1979. The House of Lords unanimously decided that all the claimants could sue the parent company in England. The House of Lords found that this case concerns the responsibility of the parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. The Court noted that the parent company and its subsidiaries and assets are no longer present or available to be sued in South Africa.<sup>92</sup>

## UNITED STATES OF AMERICA

The principles on liability of a parent company in the USA for the environmental damage of its subsidiary are exemplified by the following cases:

### a. Re Oil Spill By The Amoco Cadiz<sup>93</sup>

The Amoco Cadiz tanker grounded on the coast of France in 1978 and spilled its cargo of crude oil, damaging the marine environment. The plaintiffs sued the owner of the Amoco Cadiz, Amoco Transport Company (“Amoco Transport”), and its American parent Standard Oil Company (“Standard Oil”) in the Northern District Court of Illinois (the jurisdiction of Standard Oil). The Court held that Amoco Transport, a Liberian corporation, was merely a nominal owner of the Amoco Cadiz and that Standard Oil controlled the design, construction, operation and management of the tanker and treated it as if it belonged to Standard Oil. Standard Oil was found liable in tort for its negligent supervision of its subsidiaries. Furthermore the Court was of the opinion that Standard Oil should not be treated differently from its subsidiaries, which were treated as mere “instrumentalities”. The negligence of the subsidiaries was consequently assigned directly to the parent.<sup>94</sup>

### b. In Re Union Carbide Gas Plant Disaster at Bhopal, India in December 1984<sup>95</sup>

The Government of India and victims of the 1984 factory explosion in Bhopal, India sued New York based Union Carbide Corporation in the U.S. Federal Court. The factory was owned by Union

90. The veil of incorporation can be pierced in various jurisdictions based on the application of agency principle. It is essential to a holding of agency that the subsidiary be performing acts for the parent if it is to be treated as the act of the parent, and that it be doing so under the parent's control. *Mueller v Seaboard Commercial Corp.*, 5 N. J. 28, 73 A. 2d 905 (1950); *Mangan v Terminal Transportation System, Inc.*, 157 Misc. 627, 284 NYS 183 (1935); *Ross v Penna. Ry. Co.*, 106 NJL 536, 148 Atl. 741 (1930)

91. Adam (n 24)

92. See Waldemar Braul and Paul Wilson 'Parent Corporation Liability For Foreign Subsidiaries' P7-COMM/ENV10000/608549.13

93. The Oil Spill By The Amoco Cadiz off the Coast of France on March 16, 1978. MDL Docket No 376 ND III. 1984, American Maritime Cases. 2123-2199

94. See Waldemar Braul and Paul Wilson (n 92) 2

95. F Sup. 842 (SDNY 1986) affd & mod. 809 F2d 195 (2<sup>nd</sup> District, 1987)





Carbide India Ltd whose majority shareholder was the Union Carbide Corporation. The New York Court declined jurisdiction to hear this tort claim, pointing out that the Indian legal system is in a far better position than the American Courts to determine the cause of the tragic event and thereby fix liability. The Court noted that the majority of witnesses and evidence were in India and cited the potentially heavy administrative burden on the American tribunal and the high cost to American taxpayers as further factors for hearing the claims in India. The Court however ruled that Union Carbide must agree to satisfy any judgment rendered by an Indian Court.<sup>96</sup> Thus the Court recognized the potential liability of the parent company for the negligent act of its subsidiary.

**c. *United States v Bestfoods*<sup>97</sup>**

Under the United States' Comprehensive Environmental Response, Compensation and Liability Act<sup>98</sup> (CERCLA), any person owning or operating a facility at the time a hazardous substance is discharged to the environment in an unapproved manner is strictly liable for the removal and remediation costs associated with the resulting clean-up. The statute and its legislative history offer minimal guidance on who is considered an operator, and the Courts have reached mixed conclusions about when parents become liable as "operators".<sup>99</sup> The US Supreme Court's 1998 decision in *United States v Bestfoods*, while not involving a foreign subsidiary, is a good source of guidance for anticipating parent-subsidiary liability. The Court held, as a basic principle, that a parent corporation cannot be found liable under CERCLA for a subsidiary's environmental practices merely as a result of its active involvement in the subsidiary's general affairs subject to two exceptions. An exception is where the parent company is derivatively liable. That is, the corporate veil between the parent and subsidiary may be pierced where the corporate form would otherwise be misused to accomplish wrongful purposes (e.g., fraud or illegality).<sup>100</sup> However the Court found no wrongful purpose in this case. The element for piercing the corporate veil, which requires injustice or fraud to justify disregarding the corporate form, can be satisfied when there is inadequate capitalization for the debts normally associated with business or where the corporate form has been used to misrepresent or defraud creditors.<sup>101</sup>

Another exception is where the parent corporation is directly liable as an operator based on the parent's relationship to the facility (not merely based on the parent's financial or legal relationship to the subsidiary). The test for direct liability of a corporate parent is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.<sup>102</sup> The Court gave several examples to contrast accepted norms with "eccentric" acts.<sup>103</sup>

According to Michelle De Blasi<sup>104</sup> the Court in *Bestfoods* found that a company that provides active supervision and control over matters relating to a release of hazardous substances to the environment can be found directly liable as an operator of the facility. For direct operator liability, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.<sup>105</sup>

96. See Waldemar Braul and Paul Wilson (n 92)

97. 118 S.Ct. 1876 (1998)

98. 94 Stat. 2767, as amended, 42 USC 9601 et seq

99. See Waldemar Braul and Paul Wilson (n 92)

100. See Michelle De Blasi a 'Liability of Parent Corporations, Officers, Directors and Successors. When can CERCLA Liability Extend Beyond Company?' Arizona State Law Journal 483

101. Schnapf (n 34) 2

102. *ibid*

103. *ibid*

104. See Michelle De Blasi a 'Liability of Parent Corporations, Officers, Directors and Successors. When can CERCLA Liability Extend Beyond Company?' Arizona State Law Journal p 482

105. *ibid*



In the US a number of cases hold that a parent corporation may be liable as an operator if it is so pervasively involved in the operations of a particular facility owned by a subsidiary. These cases require active involvement by the parent corporation and not merely ownership or ability to control that is necessarily inherent with ownership.<sup>106</sup>

The leading case for imposing operator liability on parent corporations is *United States v Kayser-Roth*.<sup>107</sup> In that case, the United States Court of Appeals for the First Circuit specifically rejected the Fifth Circuit's holding in *Joslyn* and ruled that parent corporation could be liable as an operator without piecing the corporate veil. The appellate court agreed with the district court that Kayser-Roth had exhibited overwhelming pervasive control over the affairs of a defunct subsidiary, Stamina Mills. Among the actions influencing the court were that Kayser-Roth had (a) exerted total monetary control over the subsidiary's fiscal operations, including account supervision, payment of bills, collection of account receivables, borrowing money, preparing budgets, and determining executive compensation; (b) all leasing, buying, or selling real estate had to be approved by the parent; (c) required governmental contacts-including environmental matters-be funneled through the parent; (d) any capital transfer or expenditures over \$5,000 also had to be approved; and (e) placement of personnel in nearly all of Stamina's director and officer positions. Kayser had control over environmental matters, including approving installation of the remediation equipment. However, the court said exercise of control over environmental matters was not necessary to establish operator liability if there was sufficient pervasive control over other operations.

In *John S. Boyd Co. v Boston Gas Co.*,<sup>108</sup> the First Circuit once again held a parent corporation liable as an operator. The actions leading to liability included that the parent holding company, NEES: (a) continually maintained a presence among the officers and directors of the subsidiary, Lynn Gas; (b) the president of Lynn Gas was also the president of a division of NEES; (c) the president of Lynn Gas had been appointed by the chairman of NEES and reported directly to NEES officials; (d) NEES selected the directors of Lynn Gas; (e) a senior officer of NEES approved the budget of Lynn Gas; (f) NEES had to approve all Lynn Gas expenditures over \$5,000; (g) NEES' service affiliate, NEPSCO, provided extensive financial services to Lynn Gas, including controlling its checking account, handling oil purchases, and maintaining Lynn Gas property; and (h) NEPSCO employees were among the officers and directors of Lynn Gas.

The most extensive examples of operator liability may be some cases that have appeared to impose operator liability on parent corporations on the parent's ability to control its subsidiary. In *Idaho v Bunker Hill*<sup>109</sup> and *United States v Nicolet Inc.*,<sup>110</sup> Federal District Courts found that while employees of the parent companies did not actually exercise control over hazardous waste activities, the parent corporations were familiar with the practices and had power to control both the disposal and resulting release of the hazardous substances as well as the ability to abate the contamination. In the latter case the parent company was held directly liable without resort to piercing the corporate veil analysis.<sup>111</sup>

106. Schnapf (n 33)

107. 910 F.2d 24 (1<sup>st</sup> Cir. 1990). See also John E. Osborn (37) p 8

108. 992F.2d401 36 ERC1737, 61 USLW2779, 143(decided in 1993)

109. 16 ELR 20879.N0s.83-3161 et al, 635F Supp.1064/25ERC1624

110. 857 F.2d202(3<sup>rd</sup> Cir.1988)

111. See John E.Osborn (n 37) p 8



## CANADA

The principles in parent-subsidary environmental liability in Canada were espoused in the following cases:

### a. *Atlantic v Environmental Appeal Board*

An important Canadian parent-subsidary environmental case is *Beazer and Atlantic v. Environmental Appeal Board*,<sup>112</sup> decided by the British Columbia Supreme Court in late 2000. The litigation concerned a 1997 order by the British Columbia environmental regulator. The order directed a Pittsburgh company to remediate a contaminated site formerly owned by its subsidiary. The subsidiary no longer existed at the time of the order; it was amalgamated after the contaminating activities took place. The regulator therefore issued the order jointly against the successor company and the parent company, expressly stating that the parent corporation was a past operator of the site. The Waste Management Act states that an operator means a person who is or was in control of or responsible for any operation located at a contaminated site.

On appeal to the Environmental Appeal Board, the Board found that the parent corporation had used numerous types of control over the subsidiary corporation, including some which had a direct effect on the operations at the subsidiary's site. As a result, the Board concluded that these controls collectively placed the parent corporation into the shoes of an operator. The British Columbia Supreme Court upheld the decision of the Board. The Court held that the Board correctly found that there were many indications of actual control of the site by the foreign parent corporation and, collectively, the effect of the control was to render the parent an "operator" of the site and thus was properly named in the remediation order. The Court also clarified that the parent corporation was not an "owner".

### b. *United Canadian Malt Ltd v Outboard Marine*

Also in 2000, the Ontario Superior Court of Justice, in *United Canadian Malt Ltd. v Outboard Marine Corp. of Canada*,<sup>113</sup> permitted a tort claim to proceed against an American parent corporation. The plaintiff claimed that its property had been contaminated by leachate originating from property formerly owned by a (still-operating) Canadian subsidiary of an American corporation. The plaintiff claimed damages against the Canadian subsidiary, its individual directors and officers and the American parent corporation. The Court acknowledged that the claim against the American parent corporation was in essence "an attempt by the plaintiff to pierce the corporate veil and thereby secures liability on the parent Corporation for the actions of its subsidiary. The Court noted that the plaintiff had a debatable case that the parent "controlled" the subsidiary by the following activities: the American parent "managed, directed and controlled" the closure and clean-up of the property; the American parent, in other contexts, had represented that it was responsible for the environmental problem, that the Canadian subsidiary had no authority to deal with the problem and, that any and all decisions regarding the problem would be made by the American parent alone; and the American parent, subsequent to the discovery of the contamination problem, stripped all of the assets out of the Canadian subsidiary. As a result, the plaintiff's case was allowed to proceed to trial (which has not yet been held)

### c. *Recherches Internationales QUEBEC v Cambior Inc*

The case of *Recherches Internationales Quebec v Cambior Inc.*<sup>114</sup> involved a Canadian parent and

112. (2000), Vancouver Registry Doc. L001638(B.C.S.C)

113. (2000) 34 CELR (N.S.) 116

114. (1998) Q.J. No 2554



environmental claims arising from its subsidiary in Guyana. In 1998, 23,000 Guyanese attempted to sue Cambior Inc. in a Quebec class action for \$69million for damages from the 1995 release of 3.2 billion litres of cyanide-laced waste into the Essiquibo River. Omai Gold Mines Limited, a Guyanese corporation, owned the mine at the time. Montreal-based Cambior Inc. owned 65% of the Guyanese corporation.

The Court held that it had jurisdiction to hear the class action, if granted, because Cambior had significant control over the foreign mine (i.e. it had apparently made decisions in Quebec relating to the construction and operation of the mine, and financed the study which determined that the mining project would be economically feasible). This finding, however, was not a potent victory for the claimants. The Court found that the Guyana Courts would be a more convenient forum for hearing the tort claim. The Court noted, for example, that the mine and spill effects were in Guyana, the claimants live there, witnesses to the disaster resided mostly in Guyana, and the voluminous documentary evidence was developed in Guyana.<sup>115</sup>

### COMPARISON OF JUDICIAL APPROACHES ON ENVIRONMENTAL MATTERS IN THE VARIOUS JURISDICTIONS

In all the jurisdictions considered, basic tenet of traditional company law is that a company is a separate entity from its shareholders who are shrouded under a corporate veil from the liabilities of the corporate enterprise. Under this concept of limited shareholder's liability, the shareholder's responsibility for the debts or obligations of a corporation is limited to the amount of the investment in the corporation.<sup>116</sup> However, a number of courts have held parents liable under statutory<sup>117</sup> and tortious liability<sup>118</sup> provisions for the hazardous waste activities of their subsidiaries.

In the UK, parent company's liability had been established on the basis of the parent company being deemed to have assumed liability based on the level of control of the subsidiary's activities as evident by the cases of *Adam v Cape*<sup>119</sup> and *Chandler v Cape*.<sup>120</sup> The courts have considered the responsibility of the parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. The courts pay attention to the parent's role in the operations of the subsidiaries, whether directors and employees of the parent had knowledge, what actions were taken or not taken by the parent and whether the defendant owed a duty of care to the employees of the subsidiary companies.<sup>121</sup>

The Courts in imposing a duty of care on the parent have taken cognizance of the following circumstances<sup>122</sup> (a) the business of the parent and subsidiary were in a relevant respect the same; (b) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (c) the subsidiary's system of work was unsafe as the parent company knew, or ought to have known; and (d) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.

115. Waldemar Bräul and Paul Wilson (n 92) 6

116. See Thomas K. Cheng 'The Corporate Veil Doctrine Revisited. A Comparative Study of the English and the US Corporate Veil Doctrines' (2011) 34 BC Int'l and COMP.L Rev 329 <<http://Lawdigitalcommons.bcedu/iclr/vol/34/iss2/2>> 330-412

117. Example is the CERCLA in the US

118. Example is the tort of negligence under which parent companies have been held liable for the environmental sins of their subsidiaries in the UK and Canada. See the various UK, Canadian and Nigerian cases discussed in this article on the application of negligence in holding parent and subsidiary companies liable for environmental damages.

119. *Adam* (n 24)

120. *Chandler* (n 4)

121. *Adam* (n 24)

122. *Chandler* (n 4)



In the US, the decisions imposing liability on parent corporations generally fall into two categories. Some cases impose "owner" liability on parent corporations. These cases are commonly referred to as the "indirect" liability approach because they focus on the relationship of the parent corporation to its subsidiary. The other line of cases, commonly referred to as the direct liability cases, holds that parents may be liable as CERCLA "operators" of a facility because of their involvement in the business affairs of their subsidiary. The factors usually considered by courts using the traditional state veil piercing analysis in making a parent liable for the environmental sins of its subsidiary include the following:<sup>123</sup> inadequate capitalization in light of the purpose of the subsidiary, extensive or pervasive control by the parent shareholders, intermingling of the subsidiary properties or accounts with the parent, subsidiary fails to observe corporate formalities and separateness, siphoning of subsidiary funds, the companies share common shareholders, directors, and officers, the companies have common business departments.

A number of courts have used the more relaxed federal common law standard and have focused on the kind of control exerted by the parent company over its subsidiary. In some liberal cases under CERCLA the court found that the parent company's control was "pervasive" and "all encompassing" and placed to special significant on the corporate structure.<sup>124</sup>

In *Colorado v Idardo Mining Co*<sup>125</sup> the Court held that the parent was liable as an owner/operator based on the considerations that the parent (a) has the power to make timely discoveries (b) has the power to direct the activities of the persons who control the mechanisms which caused the pollution, and (c) has the capacity to prevent and abate the damage.<sup>126</sup>

In Canada, the Ontario Superior Court of Justice, in *United Canadian Malt Ltd v Outboard Marine Corp. of Canada*,<sup>127</sup> allowed a tort claim to proceed against an American parent corporation based on the fact that the parent company exercised control over the activities of its foreign subsidiary. Also in the Canadian case of *Recherchés Internationales Quebec v Cambior Inc*<sup>128</sup> the Court was satisfied that it had jurisdiction to hear the class action, if granted, because the parent company had significant control over the foreign mine (i.e. it had apparently made decisions in Quebec relating to the construction and operation of the mine, and financed the study which determined that the mining project would be economically feasible).

Canadian courts have also relied on statutes in imposing environmental liability on parent companies such as the Waste Management Act<sup>129</sup> which inter-alia states that an operator is a person who is or was in control of or responsible for any operation located at a contaminated site. This statute was applied by the British Columbia Supreme Court in *Beazer and Atlantic v Environmental Appeal Board*<sup>130</sup> to make the parent liable as there were many control measure which rendered the parent an operator within the meaning of the Waste Management Act.

In Nigeria there is a dearth of cases on the liability of a parent company for the environmental damages caused by its subsidiary and the reason for this may not be unconnected with the fact that the country is a

123. Larry Schnapf (Excerpt) 'Environmental Liability. Managing Environmental Risks in Corporate, Real Estate and Brownfield Transactions' (published by Lexis Law Publishing) 2-3

124. John E. Osborne, (n 37) p 8. Also see the following cases, *United States v Kayser-Roth* and *United States v Nicolet* (n 109)

125. 707 F. Supp. 1227 (D.C 1989), reversed on other grounds, 32 E.R.C. 1001(10<sup>th</sup> Cir. 1989)

126. John E. Osborn PC, Supra P8

127. *United Canadian Malt Ltd* (n 115)

128. *Recherchés Internationales Quebec* (n 116)

129. R.S.B.C 1996, c. 482, as amended

130. Supra





developing economy and the level of industrialization is relatively less than in the developed economies like the United States and Canada. Furthermore there are no specific legislation targeted at parent companies like the CERCLA in the US and the Waste Management Act in Canada.

However Section 27 of the National Environmental Standards and Safety Regulations Agency Act though not specifically dealing with parent company liability may be used to impute liability to a parent company.<sup>131</sup>

In the Akpan's case the parent company was able to avoid liability based on the fact the environmental degradation caused by the subsidiary was considered to be too remote as a causative factor that could be traced to the parent company and the court in the Hague concluded that the proximity test was not satisfied.<sup>132</sup> However the subsidiary was held liable in negligence for the damages occasioned by the pollution to farmlands in the Niger Delta area of Nigeria.

## CONCLUSION AND RECOMMENDATIONS

In conclusion, this article examined the environmental liability of parent companies for the acts or omission of their subsidiaries. In order to promote understanding of the subject, some basic terms were explained in the article, such as subsidiary, parent company, foreign subsidiary and environmental liability. Other essential terms like corporate personality and the doctrine of lifting the veil were also discussed and the approach adopted was comparative drawing from practices in selected jurisdictions. The following major conclusions may be reached from the legal principles, statutes and case law analyzed in this article.

Firstly, the doctrine of corporate personality is universally acknowledged and has been applied in many judicial decisions across the jurisdictions in a bid to shield the owners and officers of the company from the company's acts or omissions and this doctrine is reinforced by limited liability which is a tonic to commercial growth.

Also the veil of incorporation may be pierced or lifted when the circumstances warrant and various veil piercing methods are employed across the selected jurisdictions such as statutory and case law.

Furthermore, environmental liability of parent company is recognized across the selected jurisdictions and the approaches are substantially similar but the American system appears to be the most robust in terms of the available literature and the use of legislative tool to create liability such as CERCLA.

The Nigeria legal system seems to be the least developed in the area of parent company environmental liability which is attributable to the fact that the other jurisdictions are more advanced in terms of economic development and law. The Nigerian judiciary in the process of consideration of parent subsidiary environmental related cases could seek guidance from judicial pronouncements in the selected jurisdictions. Such foreign authorities will however not be binding but only persuasive as Nigeria has its own local peculiar circumstances.

The under listed practical measures should be taken by parent companies and groups to minimize potential liability.<sup>133</sup>

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131. *ibid* (n 91)

132. *ibid* (n 88)

133. See Herbert Smith LLP 'Parent Company Liability for Environmental Health and Safety Incidents and the Implications of *Chandler v Cape Plc*' Energy and Environmental e-bulletin (17<sup>th</sup> May 2012 London) 5



All groups need to consider the potential liability risk that may arise when a parent involves itself in the affairs of a subsidiary, and in particular where environmental policies and procedures are being set or influenced on a group-wide basis. Group-wide governance in relation to environmental matters should be vigorously exercised and in the proper fashion.

Furthermore there should be adequate line management and reporting lines to ensure that group-wide policies and procedures are followed by all group companies; Group and subsidiary environmental audits may be vital but how these are conducted and followed up to closeout actions identified, and how this information is documented are very important. Groups should also consider the nature and scope of environmental reporting and other communications from subsidiaries to the parent and the extent to which these may or may not be protected by legal privilege in the relevant jurisdictions.

In implementing group-wide environmental governance, and to minimize the liability of parent companies, parent companies should take care not to go too far so as to control and direct, or be seen to control and direct, the day-to-day management of environmental affairs of their subsidiaries as this could risk the parent assuming liability.

In ascertaining the liability of a parent company various principles have been employed by the court such as the issue of significant or pervasive control, the assumption of direct responsibility and the application of agency. Statutory interventions have also been employed in imputing liability to a parent company. It is suggested that these measures should continue to be applied by the courts with greater flexibility taking cognizance of the facts of the matter under consideration. A parent company should be made liable for the environmental damages caused by its subsidiary based on the principle of strict liability and negligence in tort if the parent company is completely in charge of the activities of the subsidiary or where the parent company can be regarded to have assumed a direct responsibility based on its conduct or representation to injured persons. Also in appropriate circumstances agency relationship should be implied and the parent company estopped from denying the existence of the agency.

The courts should also explore the possibility of relying on general equitable principles and the concept of bad faith in imputing liability to a parent company if it is established that the subsidiary was set up with the primary purpose of shielding the parent company from its obligations. Thus bad faith could be implied if the subsidiary is intentionally starved of resources or assets so that any judgment obtained against the subsidiary will be worthless.

The principle of "Equal Access to National Remedies" could also be used in imputing liability to a parent company. This principle enables victims of environmental damage to institute claims in the state or country of the polluter which may be a parent company. This means that a Nigerian can institute a claim against a subsidiary company in the state where the headquarter of the parent is located.<sup>134</sup>

An act of wrongdoing on the part of the parent company, either through its own actions or through the actions of the board of the controlled subsidiary could also form the basis for a parent company's liability. In this regard, directors' duties to act with care and diligence and in good faith could be a model of liability for parent companies facing veil-piercing.<sup>135</sup> A breach of this duty may constitute a veritable ground for parent company's liability.

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134. See *Friday Akpan v Shell Petroleum Development Corporation* (n 82)

135. See Helen Anderson 'Piercing the Veil on Corporate Groups In Australia. The Case For Reform' (2009) 33 Melbourne University Law Review 336



Finally application of the Landers model<sup>136</sup> of proper behavior for a corporate group may be used to ascertain the parent's liability. The model requires that the parent structures the subsidiary to have a realistic potential for profitability. The parent should adequately capitalize its subsidiary, avoid treating it as a department or a division, and avoid co-mingling or stripping its assets. Otherwise the parent company will become liable for the subsidiary's acts or omission. Though this standard may be incompatible with profit maximization motive, adherence to this informal norm of good conduct is the price that a parent corporation should be required to pay to preserve its limited liability.

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136. See Williams J.Rands 'Domination of a Subsidiary by a Parent Company' 32 (421) Indiana Law Review 456

