

## Parent Cos. Can Expect More Suits Over Foreign Subsidiaries

By **Viren Mascarenhas and Nicolas Franco** (March 25, 2021, 4:30 PM EDT)

Recent decisions by courts around the world demonstrate an increasing tendency to hold corporate actors responsible for alleged misconduct of their overseas subsidiaries. That trend reflects a consensus among courts that liability can properly attach to a parent company where its conduct and policies demonstrate control or direction of the subsidiary.

The effects of this consensus will be substantial. Though no case to date has enforced a damages judgment against a parent company on this basis, at least one appellate court has found liability, on the merits, for the environmental harm caused by its subsidiary.[1]

Multinational companies should be vigilant of this developing area of law and begin preparing for potential litigation at home.

### Background

Liability of a parent company for the overseas acts of its subsidiary has been a matter of contentious debate for many years. In the U.S., for example, the U.S. Supreme Court announced the relevant rule in 2018, in *Jesner v. Arab Bank PLC*, a suit brought against the Arab Bank for its alleged role in facilitating terrorism.[2]

In *Jesner*, the court affirmed dismissal of the litigation, finding no "specific, universal, and obligatory norm of corporate liability [exists] under currently prevailing international law." [3]

In New Zealand, the Court of Appeal also addressed parent liability in 2018, in the context of a defective products claim against an Australian parent company and its New Zealand subsidiary.[4] In *James Hardie Industries PLC v. White*, the court identified a "developing body of principles" from decisions by courts in Australia, the U.K. and Canada, and found that the case against Hardie raised a real issue of fact regarding the parent company's knowledge and coordination of its subsidiary's alleged misconduct.[5]

The court, however, cautioned that "the law is far from settled" as to whether "a duty of care may be imposed upon a parent company for the acts or omissions of its subsidiary." [6]

### Growing Trend Toward Liability

In recent years, courts have signaled a greater receptiveness to claims alleging parent company liability. For example, in 2019, in *Vedanta Resources PLC and Konkola Copper Mines PLC v. Lungowe and Others*, the U.K. Supreme Court recognized the potential for "the liability of parent companies in relation to the activities of their subsidiaries." [7]

The court explained that such liability "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary." [8]

Last month, the U.K. high court affirmed Vedanta's reasoning in *Okpabi v. Royal Dutch Shell PLC*. [9] In *Okpabi*, the court again relied on "ordinary, general principles of the law of tort regarding the imposition of a duty of care" to find that the lower court erred by dismissing the litigation after conducting a mini-trial on contested factual issues and documentary evidence. [10]

The court also concluded that there was a real issue of fact to be tried as to whether (1) Shell managed or jointly managed the relevant activities of the subsidiary, and/or (2) Shell promulgated groupwide safety and environmental policies and took active steps to ensure implementation by the subsidiary. [11]

Also applying the reasoning of Vedanta, the Hague Court of Appeal recently considered the question of parent liability in *Four Nigerian Farmers and Milieudefensie v. Shell*, another case arising from the alleged mismanagement of oil pipelines in Nigeria by Shell and its local subsidiary. [12]

In a January ruling in *Milieudefensie*, however, the court went a step further than the U.K. high court, ultimately finding that Shell was liable on the merits — not merely that the litigation should proceed to permit the disclosure of evidence — and that Shell owed a duty of care with respect to the installation of a leak detection system given its prior, active involvement.

Last year, the Supreme Court of Canada similarly addressed the potential liability of a Canadian parent company for alleged human rights violations conducted by an Eritrean subsidiary in *Nevsun Resources Ltd. v. Araya*. [13]

There, the court explained that, while customary international law "classically" focused on "relations between states," modern international human rights law provides for individual rights which can be violated by, and enforced against, private actors including corporations. [14] Assessing the pleadings at a preliminary stage, the court concluded that parent company liability could exist, and thus allowed the claims to proceed. [15]



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In the U.S., it appears that the Supreme Court may be edging toward a recognition of parent liability through its forthcoming decision in *Nestle USA Inc. v. Doe I*. In *Nestle*, the court recently heard an appeal arising from two cases against Nestle and Cargill Inc., where plaintiffs allege that the companies aided and abetted human rights abuses by purchasing cocoa beans from cocoa plantations in Ivory Coast which relied on child slavery.[16]

Given the justices' questioning of the parties on Dec. 1, 2020, there is reason to think the court may deny the companies' challenges, on the basis that parent companies can be held liable for the misconduct of their foreign subsidiaries abroad.[17]

This growing body of cases permitting litigation against multinational companies in their home jurisdictions creates substantial risk. It is difficult to overestimate the potential damages that might result in the above described, and other similar, litigation.

### Thinking Ahead to Mitigate Parent Company Liability

Given the risk parent companies may face, it would benefit management to assess how to mitigate such liability and improve compliance — especially as much of the most relevant evidence will likely amount to documentary evidence within the parent companies' control. On this, companies should consider two important takeaways.

First, the scope of evidence that may bear upon courts' decisions as to parent liability will be broad, and corporate policies and contracts will feature prominently.

For example, emphasizing the "importance of internal corporate documents" in parent liability cases, the U.K. Supreme Court in *Okpabi* focused on a parent-subsidiary joint operating agreement and policy documents relevant to Shell's operations in Nigeria provided for the appeal.[18]

Likewise, in *Vedanta*, the U.K. high court considered materials published by Vedanta regarding the development and implementation of environmental and sustainability, standards and a management services agreement between the parent company and its subsidiary.[19]

In *Milieudedefensie*, the Hague Court of Appeal's decision relied on, among other evidence, investigation reports, video evidence, expert reports, Shell's health and safety policies, and Shell's compensation policies for certain executives.[20]

Even in *Nevsun*, which relied largely on international law statutes, treatises and articles to assess a legal question, the Supreme Court of Canada discussed the suggestion by some academics that taking evidence might be appropriate to ascertain "new norms of customary international law." [21]

Second, courts will look across jurisdictions to identify what evidence is material in deciding parent liability. This is most clear from the U.K. high court's decision in *Okpabi*.

There, the court remarked that two policy documents relevant to Shell's operations in Nigeria were only produced in *Okpabi* on appeal, thus "illustrat[ing] the danger of seeking summarily to determine issues which arise in parent/subsidiary cases such as this without disclosure." [22]

The court went on to observe that appellants were able to identify documents "likely to be material to the claims made" with reference to other documents "which the Dutch Court of Appeal ordered" be produced in another proceeding, including assurance letters and audit-related documentation.[23]

Companies should thus think carefully about how they communicate and interact with their subsidiaries. Where parent companies provide policy guidance to their subsidiaries, companies should be cognizant that such guidance — especially when coupled with more active direction — may open the door to parent company liability.

### Conclusion

In an increasingly interconnected marketplace, courts are becoming more receptive to the notion that parent companies can be found liable for the misconduct of their foreign subsidiaries where they control or direct those entities.

This tendency will create substantial litigation risk for multinational corporations, and corporations will need to carefully navigate compliance and mitigate liability.

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[1] *Four Nigerian Farmers and Milieudedefensie v Royal Dutch Shell plc.* (hereinafter, "*Milieudedefensie*") (Hague Court of Appeal, 2021, Nos. 200,126,804 and 200,126,834) (Jan. 29, 2021), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132>.

[2] *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1393 (2018).

[3] *Id.* at 1401.

[4] *James Hardie Industries PLC v. White* [2018], NZCA 580 [para. 2, 6, 10, 11],

<https://forms.justice.govt.nz/search/Documents/pdf/jdo/fb/alfresco/service/api/node/content/workspace/SpacesStore/7fa3d9a7-8fd1-487d-9d72-db51fb32a0a6/7fa3d9a7-8fd1-487d-9d72-db51fb32a0a6.pdf>.

[5] *Id.* at para. 62, 92.

[6] *Id.* at para. 62.

[7] *Vedanta Res. PLC and Konkola Copper Mines PLC v. Lungowe and Others* [2019], UKSC 20 [para. 49], <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>.

[8] *Id.* at para. 49.

[9] *Okpabi v. Royal Dutch Shell PLC* [2021], UKSC 3 [para. 20-23], <https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf>.

[10] *Id.* at para. 25, 102.

[11] *Id.* at para. 26, 153.

[12] A formal, official English language translation of the court's decision in *Milieudefensie* is unavailable at this time. Thus, any reference to the decision here is made based upon the authors' review of an informal translation of the decision, as well as a reading of other commentaries regarding the decision. See, e.g., Rosalind English, UK Human Rights Blog, *Parent Co. Owes Duty of Care in Transnational Cases* (March 1, 2021), <https://ukhumanrightsblog.com/2021/03/01/parent-company-owes-duty-of-care-in-transnational-cases-hague-court-of-appeal/>; Wubeshet Tiruneh, EJIL:Talk! Blog, *Holding the Parent Co. Liable for Human Rights Abuses Committed Abroad* (Feb. 19, 2021), <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/>; Dr. Lucas Roorda, CORE Blog, *Shell in Court, Again: a Short Comparison of the Okpabi and Milieudefensie Judgments* (Feb. 18, 2021), <https://corporate-responsibility.org/shell-court-short-comparison-okpabi-milieudefensie-judgments/>.

[13] *Nevsun Res. Ltd. v. Araya* [2020], 2020 SCC 5 (para. 1-5), <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>.

[14] *Id.* at para. 106, 107, 110, 111.

[15] *Id.* at para. 132.

[16] Petition for Writ of Certiorari, *Nestlé USA Inc. v. Doe I* (No. 19-453), [https://www.supremecourt.gov/DocketPDF/19/19-416/116977/20190925125724473\\_Nestle%20Cert%20Petition%209.25%20Final.pdf](https://www.supremecourt.gov/DocketPDF/19/19-416/116977/20190925125724473_Nestle%20Cert%20Petition%209.25%20Final.pdf).

[17] Transcript of Oral Argument in *Nestlé USA Inc. v. Doe I* at 11-12, 20-21 (Dec. 1, 2020), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-416\\_3ebh.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-416_3ebh.pdf); see also Amy Howe, *ScotusBlog*, *Argument Analysis: Justices Send Mixed Messages on Corporate Liability for Allegedly Aiding Child Slavery Abroad* (Dec 1, 2020, 5:46 pm), <https://www.scotusblog.com/2020/12/argument-analysis-justices-send-mixed-messages-on-corporate-liability-for-allegedly-aiding-child-slavery-abroad/>.

[18] *Okpabi v. Royal Dutch Shell PLC* [2021], UKSC 3 [para. 121, 129, 135].

[19] *Vedanta Res. Plc and Konkola Copper Mines PLC v. Lungowe and Others* [2019], UKSC 20 [para. 55].

[20] *Milieudefensie* at para. 5.13, 7.6, 7.16, 7.18, 7.23.

[21] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5 (para. 99).

[22] *Okpabi v. Royal Dutch Shell PLC* [2021], UKSC 3 [para. 136].

[23] *Okpabi v. Royal Dutch Shell PLC* [2021], UKSC 3 [para. 137].