

Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court

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I. INTRODUCTION

Foreign direct liability litigation against businesses is still a growing trend in European domestic courts, going on for over two decades.¹ With absent effective remedies in host states, victims of human rights abuses committed by transnational corporations' subsidiaries try to get access to remedy in the courts of the home states of the parent companies. A crucial factor for whether such cases can succeed, is the viability of the claims against the parent companies allegedly involved in the abuses. The principal legal route that victims have used to hold parent companies liable is through common law negligence claims.

Recently, two related decisions have been issued that together represent a significant development for common law negligence claims against parent companies. In February 2021, the UK Supreme Court issued a decision in *Okpabi and others v Shell*,² holding that

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¹ See, e.g., Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 *Utrecht Law Review* 6; Lucas Roorda, 'Adjudicate This! Foreign Direct Liability and Civil Jurisdiction in Europe', in Angelica Bonfanti (ed.), *Business and Human Rights in Europe* (Abingdon: Routledge, 2018); Daniel Augenstein, 'Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy' (2018) 18 *Human Rights Law Review* 593; Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Antwerp: Intersentia, 2012); and Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1. See also Axel Marx et al, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries* (European Union, 2019) 34, [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) (accessed 15 April 2021).

² *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3.

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the claimants had an arguable case that Royal Dutch Shell (RDS) owed a duty of care to them and that this claim could proceed in English courts. A month earlier, the Court of Appeal of The Hague gave its judgement in the case of *Four Nigerian Farmers and Stichting Milieudéfensie v Shell*.³ The court ruled that Shell's Nigerian subsidiary (SPDC) was liable for damage caused as a result of two oil spills in the Niger Delta, and also held that SPDC's parent company (RDS) owed a limited duty of care to the victims. This piece discusses these two cases, assesses their contribution to the viability of parent company liability claims, and considers some of the challenges that still remain for claimants.

II. FOREIGN DIRECT LIABILITY AND DUTY OF CARE

Foreign direct liability claims against parent companies arguably serve a dual purpose: first and foremost, they serve to hold them accountable for irresponsible business practices for which they bear ultimate responsibility and to obtain remedies for victims. Secondly, they can serve as an 'anchor', to enable claimants to also litigate against foreign subsidiaries as co-defendants. These cases are generally characterized by lengthy procedural litigation, before the cases reach the merits stage – if they do so at all. Early English cases concerned *forum non conveniens* challenges at the jurisdiction stage, in which the defendant companies argued that the case should be stayed in favour of the foreign forum where the harm arose.⁴ The 2005 *Owusu* decision of the European Court of Justice,⁵ however, precluded English courts from applying *forum non conveniens* to claims against English-domiciled parent companies. This prompted a shift in tactics by defendant companies, who in more recent cases have argued that the anchor claim against the parent company, based on the supposed existence of a duty of care, was without merit and only served to bring the subsidiary within home state court jurisdiction.

Whether a duty of care exists under English common law is generally considered to be determined by the threefold test set out in *Caparo v Dickman*.⁶ The legal principles in parent company cases have been analysed by the appellate courts in the UK on numerous occasions over the past 25 years. In the case of *Lubbe v Cape*, Lord Bingham considered that a parent company could indeed incur a duty of care towards foreign claimants,⁷ although the case was settled before a decision on the merits could be reached. The dictum was subsequently applied in *Chandler v Cape*,⁸ where the Court of Appeal determined that the proximity requirement could be fulfilled if the parent had superior expertise upon which its subsidiary relied regarding the impugned harmful activities, but it had failed to deploy that expertise.

³ *Four Nigerian Farmers and Stichting Milieudéfensie v Royal Dutch Shell plc and another* [2021] ECLI:NL:GHDHA:2021:132 (*Oruma*), ECLI:NL:GHDHA:2021:133 (*Goi*) and ECLI:NL:GHDHA:2021:134 (*Ikot Ada Udo*).

⁴ See *Connelly v RTZ Corporation plc* [1997] UKHL 30 and *Lubbe v Cape plc* [2000] UKHL 41.

⁵ *Owusu v Jackson* (Case C-281/02) [2005] ECR I-1383.

⁶ *Caparo Industries v Dickman* [1990] 2 AC 605, consisting of whether the damage was foreseeable, whether defendant and claimant are in sufficient proximity to each other, and whether it would be 'fair, just and reasonable' to impose a duty of care.

⁷ *Lubbe v Cape plc* [2000] UKHL 41, 20, 26.

⁸ *Chandler v Cape plc* [2012] EWCA Civ 525.

A. *Okpabi v Shell*

In 2019, the UK Supreme Court (UKSC) revisited the question of the duty of care for parent companies in *Vedanta v Lungowe*.⁹ While *Vedanta* at its core concerned a challenge to the jurisdiction of English courts over the Zambian subsidiary of an English company, the UKSC also had to consider the merits of the claim against the English parent. In doing so, the UKSC rejected the argument that a duty of care could only arise in exceptional circumstances which resembled *Chandler*. Instead, the Court outlined a much broader spectrum of ways in which the parent companies could incur a duty of care, which have subsequently become known as the *Vedanta* ‘routes’.¹⁰

The *Okpabi* case consists of two related sets of proceedings, one filed by some 40,000 inhabitants of the Ogale community in Rivers State, Nigeria, and another filed by 2,335 residents of the Bille community in Rivers State.¹¹ The claimants hold both RDS and its Nigerian subsidiary SPDC liable for environmental damage caused by oil spills from pipelines and infrastructure operated by SPDC, which they argue are the result of negligent pipeline maintenance and oil spill response by the operating company. They further argue that RDS owed them a duty of care at common law, as it exercises significant control and direction over its subsidiary, amongst other things by promulgating, monitoring and enforcing group-wide health, safety and environmental policies and standards.

The principal issue in the *Okpabi* proceedings thus far has been the defendants’ jurisdictional challenge against the claimants’ case. The claimants had applied for permission to serve the claim against SPDC, otherwise outside the English courts’ jurisdiction, on the basis that it was a ‘necessary and proper party’ to the claim against anchor defendant RDS. The defendants, however, argued that there was no ‘real issue to be tried’ against RDS, as the duty of care claim had no prospect of success. Both the High Court¹² and the Court of Appeal¹³ agreed with the defendants, holding that based on the publicly available evidence, the claimants did not have an arguable case against RDS, and thus set aside the service of claim against SPDC. The claimants were given leave to appeal to the Supreme Court, following its decision in the *Vedanta* case.

The Supreme Court has now overturned the decision of the Court of Appeal. In a unanimous judgement delivered by Lord Hamblen, the Court reiterated its holding in *Vedanta* that parent companies’ duty of care is not exceptional and should be assessed under ordinary principles of tort law, as illustrated by the non-exhaustive ‘routes’ outlined in *Vedanta* – not by the *Caparo* criteria.¹⁴ It then outlined how both the High Court and the Court of Appeal had conducted an extensive inquiry into the evidence, to the point

⁹ *Vedanta Resources plc v Lungowe* [2019] UKSC 20. See also Marilyn Croser et al, ‘*Vedanta v Lungowe* and *Kiobel v Shell*: The Implications for Parent Company Accountability’ (2019) 5 *Business and Human Rights Journal* 130, 131–132.

¹⁰ *Ibid*, paras 52–53, and Croser et al, note 9, 133.

¹¹ *Okpabi*, note 2, para 3. The case is named for King Emere Godwin Bebe Okpabi, the local leader of the Ogale community, suing for himself and as a community representative.

¹² *Okpabi and others v. Royal Dutch Shell plc and another* [2017] EWHC 89 (TCC).

¹³ *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191.

¹⁴ *Okpabi*, note 2, para 25, and further elaborated on in paras 140–152.

where this amounted to ‘mini-trials’.¹⁵ A mini-trial, the Supreme Court noted, was inappropriate at the jurisdictional stage before claimants even had access to disclosure and critical evidence provided by internal company documents. Instead, the Court of Appeal should have restricted itself to ascertaining whether the claimants’ case against RDS was demonstrably untrue or unsupportable.¹⁶ According to the UKSC, that was clearly not the case; on the contrary, the claimants had sufficiently demonstrated that there was a ‘real issue to be tried’, and the case against RDS was allowed to proceed.¹⁷

B. *Four Nigerian Farmers and Stichting Milieudefensie v Shell*

The case of *Four Nigerian Farmers and Stichting Milieudefensie v Shell* in the Dutch Court of Appeals is both factually and legally closely related to the *Okpabi* case. It encompasses three claims made by Nigerian farmers, supported by the non-governmental organization (NGO) Milieudefensie, regarding three separate oil spills from Shell-operated pipelines and wellheads in the Oruma, Goi and Ikot Ada Udo villages, respectively. The claimants sued both RDS and SPDC as co-defendants, alleging that the spills were caused by negligent maintenance by the defendants, and resulted in extensive damage to the claimants’ farmlands and fishing grounds. The defendants denied the allegations, arguing that the spills were caused by sabotage and that, in any event, they had adequately responded to the spills by shutting off the pipelines, closing off the leaks and cleaning the polluted soil. Initially, the District Court had only upheld the claim of farmer Friday Alfred Akpan relating to the Ikot Ada Udo spill, holding that the spills were indeed likely caused by sabotage, but that in this case the defendants had not taken sufficient measures to protect the infrastructure against such sabotage.¹⁸

The Court of Appeal reversed the judgement of the District Court, decided the *Oruma* and *Goi* cases on the merits,¹⁹ and delivered an interlocutory decision in the *Ikot Ada Udo* case.²⁰ It held that in the former two cases, SPDC was subject to strict liability under applicable Nigerian statutory law for damage resulting from the oil spills. The only possible defence was to prove ‘beyond a reasonable doubt’ that the spills were caused by criminal acts like sabotage, which the court ruled the defendants had not been able to do. Furthermore, the court found SPDC’s responses to the spills negligent under common law standards, ruling that the installation of a so-called ‘Lead Detection System’ (LDS) would have enabled the defendants to shut off the pipelines and stop the spills earlier. Lastly, the court found that following its active intervention with its subsidiary after 2011, RDS had a duty of care towards the claimants, to ensure the installation of an LDS in the

¹⁵ Ibid, para 103–140.

¹⁶ Ibid, para 153.

¹⁷ Ibid, paras 154–160.

¹⁸ *Friday Alfred Akpan and others v Shell and another* [2013] ECLI:NL:RBDHA:2013:BY9845.

¹⁹ *Four Nigerian Farmers*, ECLI:NL:GHDHA:2021:132 (*Oruma*) and ECLI:NL:GHDHA:2021:133 (*Goi*). Jurisdiction and applicable law had already been determined in an interlocutory decision, see *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another* [2015] ECLI:NL:GHDHA:2015:3588.

²⁰ *Four Nigerian Farmers*, ECLI:NL:GHDHA:2021:134 (*Ikot Ada Udo*). The court agreed in this case with the District Court’s finding that the cause of this particular spill was sabotage, and ordered the parties to produce further evidence on the extent of the defendants’ precautionary measures, and the consequences of this particular spill.

Oruma pipeline. It rejected all further claims, including the negligence claim against RDS regarding the cause of the spill, and the claims regarding inadequate clean-up. Damages were reserved for later hearings.

III. IMPLICATIONS FOR FUTURE LITIGATION

As mentioned above, whether a parent company can owe a duty of care to persons affected by operations of its subsidiary – whether as an employee, or as an external party affected by harmful effects like pollution – has been the central question in a long line of case law. These cases have mostly been filed in English courts, based on English precedent also applied to other common law jurisdictions like Nigeria,²¹ Zambia²² or Kenya.²³ This precedent has also been invoked by foreign courts in cases where the applicable law was the common law, such as in the *Four Nigerian Farmers* case.²⁴ As with the *Okpabi* case, the feasibility of the claim against the parent company was not just crucial for the anchor claim proceeding, but also for the jurisdictional prospects of the claim against the subsidiary as a ‘necessary and proper party’ to the claim against the parent.

A. Broader Scope of the Duty of Care

The *Okpabi* decision, especially when read in conjunction with *Vedanta*, has significantly improved the prospects of such cases in the future. Part of the relevance of the decision lies in its confirmation and clarification of *Vedanta* as the appropriate approach to determine whether a parent company incurred a duty of care. Under *Vedanta*, a duty of care is not limited to fixed and stringent criteria, but 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 [...] of the subsidiary.’²⁵ This not only includes cases where the parent company actually exercised control over aspects of a subsidiary’s operations, as in *Chandler*, but also where it sets defective group-wide policies, or holds itself out to exercise sufficient control to third parties like shareholders but then fails to do so.²⁶

This significantly broadens the spectrum of situations where a parent company could incur a duty of care, and also means that claimants do not have to ‘shoehorn’ their case into the *Chandler* model.²⁷ Parent companies, especially in strongly integrated corporate groups like Shell, do set group-wide operational policies and emphasize this integration to outside parties, if only for reasons of brand protection. The Supreme Court moreover

²¹ As in *Okpabi*, note 2.

²² As in *Vedanta*, note 9.

²³ *AAA v Unilever plc* [2018] EWCA Civ 1532.

²⁴ *Four Nigerian Farmers*, note 19, para 1.3 and *Four Nigerian Farmers*, note 3, paras 3.2–3.3.

²⁵ *Vedanta*, note 9, para 49, cited in *Okpabi*, note 2, para 146.

²⁶ *Okpabi*, note 2, paras 25–26, citing *Vedanta*, note 9, para 49.

²⁷ Compare *AAA*, note 23.

emphasized that the *Vedanta* routes should also not be considered as fixed or a legal test;²⁸ other situations could be imagined where a duty of care could arise, beyond the *Vedanta* routes.

The relevance of a broader view on when a company can incur a duty of care is emphasized when comparing the *Okpabi* decision with the Dutch Court of Appeal's judgement in *Four Nigerian Farmers*. On the one hand, this is the first decision on the merits by a European domestic court where a parent company was found to have incurred a duty of care towards third state claimants.²⁹ That in and of itself is of course a major step in the development and feasibility of duty of care litigation. In doing so, however, the Court of Appeal still relied on the more restrictive *Caparo* criteria and did not consider the *Vedanta* routes. Moreover, the Court adds that in order for a parent company to incur a duty of care, the subsidiary must itself have been at fault – a requirement not found in the relevant English case law. As the subsidiary's liability in *Four Nigerian Farmers* was in part based on strict liability under Nigerian statutory law rather than on negligence, the court ruled that the parent company could not incur a duty of care to the claimants for that part of the conduct.

B. Easier Access to Disclosure

The *Okpabi* case is also significant for lowering the evidentiary burden on claimants in the early stages of the proceedings. Recall that the lower courts had required the claimants to significantly substantiate the case at the jurisdiction stage, so that they felt it necessary to serve a significant amount of evidence, including documentary evidence and witness statements. Both the High Court and the Court of Appeal criticized the volume of evidence which was served by both parties and yet descended into an impermissible 'mini-trial' and made 'findings' regarding the strength of that evidence. This, incidentally, is not exceptional for the *Okpabi* case; in the *Vedanta* case, and particularly in the *AAA v Unilever*³⁰ case, the claimants' arguments were subject to extensive scrutiny by the respective courts and in the case of the latter, subsequently struck out.

The Supreme Court was emphatic in its view that this practice is inappropriate at the jurisdictional stage where the claimants should not have to be required to present more than an arguable claim. It clarified that the evidential burden on claimants is significantly lower than postulated by the lower courts. For a claim to be dismissed at the jurisdiction stage it would have to be shown that the claim was 'demonstrably untrue or unsupported'.³¹ In that respect, this lower level of scrutiny is more reflective of practice in other states. Indeed, the test applied by the Dutch Court of Appeal in its

²⁸ *Okpabi*, note 2, para 27.

²⁹ As further discussed in Lucas Roorda, 'Wading through the (polluted) mud: the Hague Court of Appeals rules on Shell in Nigeria', *Rights as Usual* (2 February 2021), <https://rightsasusual.com/?p=1388> (accessed 15 April 2021). See also Marx et al, note 1, 20–30. The *COMILOG* case mentioned in the study as a successful outcome for the claimants has since been overturned.

³⁰ *AAA*, note 23, paras 13–34.

³¹ *Okpabi*, note 2, para 107.

interlocutory decision on jurisdiction in *Four Nigerian Farmers*,³² was whether the anchor claim was manifestly ill-founded and without any chance of succeeding.

The Supreme Court makes it plain that courts cannot place unrealistic evidential burdens on claimants in parent company liability cases prior to trial, when so much of the evidence will turn on internal corporate documents which will only become available upon disclosure. Proving that a parent company exercised sufficient control over a subsidiary to incur a duty of care requires insight into the internal structure of a company, knowledge of decision-making procedures and governance frameworks, and how these have been applied in practice. Internal company documents are thus essential to making a case, which can only be obtained through disclosure proceedings.

IV. REMAINING CHALLENGES

The broadened scope of parent company liability opens up possibilities, but the extent of those possibilities will need to be seen in future cases. One interesting and novel case in this regard is the recent *Begum v Maran* litigation on shipbreaking practices in Bangladesh.³³ In a 2021 decision, Justice Jay held that the widow of a Bangladeshi shipbreaking worker had an arguable claim against a British shipping company, that the company owed a duty of care to the worker based on its influence over where and how its vessels would be dismantled.³⁴ This case could clarify whether and to what extent a company could incur a duty of care, in cases where the victim was harmed by actions of a foreign business relation rather than a subsidiary. The decision is currently under appeal.

Another issue concerns jurisdiction. Recall that anchor claims, such as the claims against RDS in the *Okpabi* and *Four Nigerian Farmers* cases, also serve to bring the foreign subsidiary within the jurisdiction of the home state court. In *Okpabi*, the UKSC expressly did not discuss other challenges to jurisdiction, which will have to be decided by the High Court; this includes the challenge to England being the appropriate forum for the case against SPDC.³⁵ *Vedanta* actually allows defendants greater scope to argue that the claim against the foreign subsidiary should be heard in the foreign jurisdiction, provided the UK domiciled parent company is willing to submit to that jurisdiction.³⁶

Whether this is a significant issue depends on whether the joinder of their foreign subsidiary is important to the claimants in any particular case. Given the increased scope of litigation against parent companies, which have a leading position in adjusting the business practices of a corporate group or supply chain, it could be argued that litigating against the subsidiary is less important to victims who are seeking remedy. However, the case against the subsidiary can in some cases be considerably easier to prove, for example

³² *Four Nigerian Farmers*, note 19, paras 2.2 and 2.7.

³³ *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Ltd* [2021] EWHC 1846 (QB).

³⁴ *Ibid*, para 83.

³⁵ *Okpabi*, note 2, para 160.

³⁶ *Vedanta*, note 9, para 82, and Croser et al, note 9, 134. Whereas the risk of irreconcilable judgements would in previous cases automatically lead to cases proceeding in English courts, the UKSC held that it could no longer be used as a 'trump card' in favour of English jurisdiction.

because of a strict liability standard in host state law – as in *Four Nigerian Farmers*.³⁷ Moreover, as a result of Brexit, the UK is now outside of the Brussels jurisdictional regime, with no concrete indications as to when it will re-join by acceding to the Lugano Convention.³⁸ So even cases against English-domiciled parent companies, brought after 31 December 2021, may again be subject to jurisdictional challenges.

Litigating in jurisdictions that are still within the scope of the Brussels regime, like in the Netherlands, may be an enticing alternative, and the Hague Court of Appeal judgement in *Four Nigerian Farmers* may in that respect pave the way for more cases coming into Dutch courts.³⁹ It should nevertheless be noted that continental European jurisdictions, like the Dutch system, are less conducive to foreign direct liability litigation than common law systems from a practical perspective. Funding options are much more limited, as contingency fees and no-cure-no-pay arrangements are prohibited,⁴⁰ and disclosure rules – so vital for arguing a parent company duty of care – are far more stringent than in most common law systems.⁴¹ Moreover, even without the application of *forum non conveniens*, and even without ‘mini-trials’ as in *Okpabi*, the *Four Nigerian Farmers* case still took over a decade to resolve.⁴² Lastly, even while the court found Shell liable, remedies will still have to be determined, either through a settlement or through a separate hearing on damages.

V. CONCLUSION AND OUTLOOK

In summary, there are three key points of principle that emerge from these cases. First, the feasibility of cases concerning parent company liability has significantly increased, following the broadening of the scope of the duty of care in *Vedanta* and *Okpabi*, and the lower burden on claimants in the jurisdictional phase of the proceedings. Second, that broadened scope needs to be properly understood by foreign courts applying common law as well. A ‘two track’ approach in the application of *Vedanta* between English court and non-English courts applying English law would be undesirable, creating legal uncertainty for claimants and defendants alike. Third, even with these more attainable standards, victims litigating against parent companies and/or foreign subsidiaries as co-defendants can still encounter significant barriers before obtaining effective remedies.

³⁷ Note that, as foreign law will generally be applicable law in such cases, claims will have to be argued under host state law. While strict liability for operators of dangerous installations – like oil infrastructure – is relatively common, strict liability for foreign parent companies is arguably rare.

³⁸ While the UK has applied for accession to the Lugano Convention, this is currently opposed by the European Commission. See Jim Bunsden and Kate Beioley, ‘Brussels opposes UK bid to join legal pact, splitting EU states’, *Financial Times*, <https://www.ft.com/content/7aad8362-ef75-4578-81eb-38b5d2c51223> (accessed 15 April 2021).

³⁹ Note that the defendants can still appeal the interlocutory decision on jurisdiction to the Netherlands Supreme Court.

⁴⁰ Besluit van het college van afgevaardigden van 4 december 2014 tot vaststelling van de verordening op de advocatuur, Stb. 2014, nr. 429 (Verordening op de Advocatuur), art 7.7.

⁴¹ There are no separate disclosure or discovery proceedings in Dutch civil procedure; parties can request insight into specific documents. See Wetboek van Burgerlijke Rechtsvordering, art 843a.

⁴² Note that two of the original claimants had died during the proceedings, and the case was continued by their next of kin.

The policy context in the countries where these cases are filed is, however, rapidly changing. The EU, as well as several EU member states, are now considering mandatory human rights due diligence legislation, containing obligations for parent companies to ensure human rights compliance in their business activities, corporate groups and supply chains. As part of these obligations, parent companies will be required to implement and monitor human rights policies, and report on human rights risks identified in their activities. Such a policy development is to be welcomed, as it would address the perverse incentive that *Vedanta* and *Okpabi* have created: namely, the more a parent company does to ensure human rights compliance throughout its group of companies, the more likely it will incur legal liability. However, how mandatory disclosure and reporting will interact with the emerging jurisprudence on parent company will have to be the subject of further research.