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Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care

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Abstract—This article investigates how human rights considerations are increasingly shaping tort law by focusing on the gradual expansion of the duty of care in business and human rights cases. For decades, victims have attempted to hold parent companies to account for extraterritorial human rights abuses committed by their foreign subsidiaries. Recently, the Supreme Court ruled that UK courts have jurisdiction over such business and human rights cases. These cases are not only jurisdictional. They also contributed to developing the duty of care case law on parental liability. But how much can human rights considerations stretch the boundaries of tort law? The article analyses the case of climate change litigation to assess whether a further development in tort law jurisprudence would be necessary to hold corporations accountable for their contribution to climate change.

Keywords: duty of care, business and human rights, climate change

1. Introduction

For decades, human rights activists have attempted to use tort law to hold parent companies to account in their home states for extraterritorial human rights abuses committed by their affiliates in host states.

Scholars have analysed what this means for human rights, which is increasingly becoming a field crossing the boundaries between public and private law. The question is whether tort law is changing human rights, which no longer fit solely in the public sphere (as values society shares). They are increasingly embracing the private domain to regulate bilateral relations between victims and

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perpetrators. This debate is ongoing as strategic human rights litigation based on tort law is constantly developing.[1]

Less attention is paid to the impact that human rights strategic litigation has on tort law. This article fills this gap by investigating how human rights considerations are increasingly shaping and framing tort law in the UK. It focuses on the gradual expansion of the duty of care in business and human rights cases.

More than 20 years ago, in *Lubbe v Cape plc* and *Connelly v RTZ Corporation plc*,[2] the House of Lords recognised the possibility for courts to assert jurisdiction on transnational cases against multinationals headquartered in the UK. These rulings turned out to be primarily focused on *forum non conveniens*[3] and were never decided on the merits. During the past two decades, a few domestic cases, such as *Chandler v Cape plc* and *Thompson v The Renwick Group plc*,[4] have increasingly clarified how to apply the duty of care in parental liability cases for damage suffered by employees of corporate groups. However, these cases did not address the liability of multinationals headquartered in the UK and harming third parties extraterritorially. Furthermore, the Supreme Court decided two transnational cases, *Vedanta Resources plc v Lungowe* and *Okpabi v Royal Dutch Shell plc*,[5] which ruled that UK courts have jurisdiction over UK parent companies for their failure to take relevant care over the conduct of their foreign subsidiaries.

From the jurisdictional perspective, these rulings are a stepping stone in the development of business and human rights litigation. However, this article argues that *Okpabi* and *Lungowe*, if analysed together with previous cases on parental liability, have done much more than affirm the jurisdiction of UK courts in business and human rights cases. They have also gradually contributed to developing the duty of care case law on parental liability.

The article defines this gradual expansion of the duty of care as a silent revolution because, without ever referring directly to human rights, UK courts have addressed several challenges faced by victims of human rights abuses. This silent revolution enables a wider range of victims to seek damage against UK parent companies, enlarges the number of potential respondents who could owe a duty of care towards extraterritorial victims and ultimately expands the reach of UK tort law overseas.

Despite these remarkable steps forward, the article questions whether this silent revolution would be enough to address increasingly complex cases, such as those combining climate change, human rights abuses and corporate accountability. It

[1] Jan Klabbers, 'Doing the Right Thing? Foreign Tort Law and Human Rights' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001); Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006) 69 MLR 327; Jane Wright, *Tort Law and Human Rights* (2nd edn, Hart Publishing 2017).

[2] *Lubbe & Ors v Cape plc* [2000] UKHL 41; *Connelly v RTZ Corporation plc & Ors* [1998] AC 854 (HL).

[3] According to the *forum non conveniens* doctrine, courts can dismiss a claim because foreign courts would be better placed than them in hearing it. See Daniel Dorward, 'Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs' (1998) 19 University of Pennsylvania Journal of International Economic Law 141.

[4] *Chandler v Cape plc* [2012] (QB), EWCA civ 525; *Thompson v The Renwick Group plc* [2014] EWCA Civ 635.

[5] *Vedanta Resources plc & Anor v Lungowe & Ors* [2019] UKSC 20; *Okpabi & Ors v Royal Dutch Shell plc & Anor* [2021] UKSC 3.

identifies four main challenges (claimant, respondent, causation and harm) that UK courts will likely face in future cases. It argues that, in order to address such complex challenges, UK courts shall move from a silent to a vocal revolution by referring directly to human rights and international law in their rulings.

2. *The Duty of Care: General Principles or Specific Facts?*

This section introduces the duty of care jurisprudence pre-business and human rights cases in order to set the frame for the main argument developed in this article: business and human rights cases have gradually expanded the reach of the duty of care.

One could summarise the history of the duty of care with one question and two contrasting answers. The question is: when does one person owe a duty of care towards another? The conflicting answers are: when several general criteria are met (i.e. a duty of care test) or when a number of factual circumstances, which vary on a case-by-case basis, occur. The dilemma between finding a one-size-fits-all test and recognising the existence of a duty of care by analogy to previous cases has affected the jurisprudence and scholarship of tort law for decades.[6] The issue is also crucial to current business and human rights litigation as the duty of care is used as a tool to hold UK companies accountable for human rights abuses.

In *Caparo Industries plc v Dickman*,[7] considered as the leading case on the duty of care, the House of Lords attempted to address this issue in the most definitive terms. The House of Lords clarified the relationship between general principles and factual circumstances by elucidating the pockets of case law, or categorisation, approach. According to this approach, the authority of each precedent is restrained to the specific pocket it belongs to.[8] After *Caparo*, it seemed that to demonstrate the existence of a duty of care, claimants would have to fit their cases into pockets of case law. This would be possible either by demonstrating that a case belonged to an already established pocket or by establishing a new pocket of case law. In order to develop a new pocket, *Caparo* introduced what scholars have labelled 'the three-stage test'.[9] A duty of care exists based on foreseeability, proximity and what is '[f]air, just and reasonabl[e]'.[10] While introducing the three-stage test, *Caparo* clarified that this was not a general test to determine the existence of a duty of care. Instead, the three stages were flexible factors or labels for courts to take into account when establishing new pockets of cases.

[6] James C Plunkett, *The Duty of Care in Negligence* (Hart Publishing 2018).

[7] *Caparo Industries plc v Dickman & Ors* [1990] HL AC 2, 605. In this case, an investor filed a claim against an accounting company (respondent) because it released an inaccurate statement on one of its corporate clients (the company). As a result, the claimant overpaid for the company's shares in a takeover offer. The House of Lords ruled the accounting company did not owe a duty of care towards the investor because they did not have a direct relationship.

[8] Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 LQR 249.

[9] Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 137–138.

[10] *Caparo* (n 7) 618; Plunkett (n 6) 47–56; Percy Winfield, John Jolowicz and William Rogers, *Winfield and Jolowicz on Tort* (15th edn, Sweet & Maxwell 1998) 96–113; Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.

The Supreme Court further clarified *Caparo*'s approach in the more recent *Robinson v Chief Constable of West Yorkshire Police*.[11] The three-stage test applies only when establishing a new pocket of case law; when a case fits within an already existing pocket of case law, there is no need to refer to *Caparo*.

While *Caparo* attempted to settle the contrast between general principles and specific pockets of precedents, subsequent cases constantly related to both concepts. Indeed, no pocket can establish an authority for future cases in a *vacuum*. As *Caparo* recognised with its three-stage test, the various pockets are based on underlying general principles, such as proximity, foreseeability and fairness.[12] In this sense, the pockets exemplify general principles in a specific context. Therefore, there are several labels or principles that are recurrent in most cases. One of these labels is foreseeability, which seems to be a *condicio sine qua non* to assert a duty of care. But it is also clear that foreseeability alone is not enough for a duty of care to exist. Two other labels that became particularly relevant in parental liability cases are proximity and assumption of responsibility. Several scholars tend to consider either one or the other as 'the' principle or label at the basis of the duty of care.[13] However, in reality, both principles have contributed to shaping the concept of the duty of care.

A. Proximity

In a number of cases, such as the seminal *Donoghue v Stevenson*[14] and *Home Office v Dorset*,[15] the concept of proximity is inherently linked to the one of foreseeability, while in others, like *Caparo*, is intended as a direct relationship between claimant and respondent.

In *Dorset*, a group of prisoners were jailed on an island. They managed to escape, steal and damage some neighbouring yachts. The yachts' owners sued the Home Office for its failure to secure the jail and prevent fugitive prisoners from damaging them. The House of Lords held that the Home Office owed a duty of care to the yachts' owners because it was reasonably foreseeable that they would be damaged by the fugitives attempting to leave the island. The notions of foreseeability and proximity were strictly connected because the fact that the yachts were in the island's proximity made the damage foreseeable.

Any action results in several consequences. However, whilst remote consequences are often unforeseeable, a person could reasonably foresee the effects of their action on their neighbours. The unresolved question is how far one can go

[11] *Robinson* (n 10). This case concerned the duty of care of police officers who collided with a lady while attempting to arrest a suspected drug dealer.

[12] Stapleton (n 8).

[13] Plunkett (n 6) 35–65; Winfield, Jolowicz and Rogers (n 10) 90–132.

[14] *Donoghue v Stevenson* [1932] UKHL 100. In this case, the claimant received a bottle of ginger beer from her friend. She opened the bottle, poured the beer into a glass and drank it. Her friend poured the rest of the beer into a glass to find out that it contained the remains of a dead snail. The claimant felt sick afterwards. The question was whether the manufacturer (the respondent) of the beer owed a duty of care towards the claimant. The House of Lords recognised the existence of a duty of care because the manufacturer could foresee that a beer it produced would be defective and injure a customer.

[15] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

in recognising third parties as neighbours. In other words, if the fugitives of *Dorset* damaged not a neighbouring yacht but a boat on the high seas, would the Home Office have owed a duty of care towards distant boat owners?[16]

One way to address this *conundrum* is to adopt *Caparo*'s approach, according to which claimant and respondent must have a direct relationship to be considered proximate. In this case, the respondent (an accounting company) did not owe a duty of care towards the claimant (an investor relying on an audit report made by the respondent) because it had neither a contract nor any other relationship with that investor. Otherwise, any accounting company could potentially owe a duty of care to an undefined number of investors that relied on its statements.[17]

However, *Caparo*'s approach does not work for all cases. Indeed, *Caparo* limited the focus on the relationship between claimant and respondent to its pocket of case law, without excluding that the relationship could be analysed in different terms in other cases.[18] For example, in *Dorset*, the yachts' owners had no direct relationship with the Home Office. A duty of care came into existence because of the relationship between the respondent (the Home Office) and third parties (the fugitives) who connected the respondent to the claimant. These third parties could be defined as link persons. Proximity was intended as the chain of events that, through these link persons, connected the claimant and the respondent.[19]

In sum, *Caparo*'s categorisation approach recognises the existence of a duty of care based on various triangular relationships between claimant, respondent and link person. Depending on the pocket of case law applicable to a case, the focus on proximity could move from the claimant–respondent relationship (*Caparo*) to the respondent–link person relationship (*Dorset*). In this latter case, the link person's conduct harms the respondent. This indirectly connects the claimant and the respondent in a triangular relationship.

B. Assumption of Responsibility

A possible lens of analysis of the duty of care case law is the concept of assumption of responsibility. Assumption of responsibility is based on two elements: first, the respondent must assume responsibility; second, the claimant must rely on this assumption of responsibility. Arguably, one could read *Dorset* as a case in which the respondent assumed responsibility towards neighbouring boat owners. If this is the case, assumption of responsibility may be the underlying general principle that justifies the existence of a duty of care.[20] The problem with this approach is determining when the respondent assumes responsibility towards the claimant.[21]

[16] Winfield, Jolowicz and Rogers (n 10) 92.
[17] Stapleton (n 8) 253–9.
[18] *Caparo* (n 7); Stapleton (n 8).
[19] Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33.
[20] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 MLR 603, 612–16.
[21] Barker (n 10).

In *Hedley Byrne & Co v Heller & Partners Ltd*,[22] the leading case on the matter, the House of Lords ruled that the concept of assumption of responsibility derives from the law of contract, where parties assume responsibility towards each other. In order to transfer this concept to the law of torts, the assumption of responsibility must be voluntary. However, the House of Lords also emphasised that a silent assumption of responsibility could justify the existence of a duty of care.[23] This resulted in UK courts adopting an ambivalent interpretation of assumption of responsibility.

In some cases, such as *Smith v Eric Bush*, the House of Lords recognised assumption of responsibility as the foundation of negligence. In this case, the claimant applied for a mortgage to purchase a house. The bank requested an expert evaluation of the house. Based on this evaluation, the claimant bought the house. However, the house appeared to be defective shortly after the purchase. The issue was whether the valuer assumed responsibility for the claimant despite having no direct relationship with her. The House of Lords ruled for the claimant because the respondent knew the claimant would have reasonably relied on the valuation to purchase the house.[24] Scholars labelled this approach as extended *Hedley Byrne* principle.[25]

In other cases, such as *Customs and Excise Commissioners v Barclay Bank plc*,[26] the House of Lords relied primarily on proximity, while considering assumption of responsibility only as an ancillary element, to determine the existence of a duty of care.[27] In this case, the claimant was granted a freezing injunction over the assets of one of the respondent's clients. The claimant sought the respondent to freeze the assets. The issue was whether or not the respondent owed a duty of care to the claimant to comply with the injunction. The House of Lords ruled that it did not. *Customs and Excise Commissioners* held that unless a claimant and a respondent are sufficiently proximate to each other, the respondent does not assume responsibility towards the claimant.

The comparison between cases such as *Smith* and *Customs and Excise Commissioners* exemplifies how subjective the term 'assumption of responsibility' can be. *Caparo* may have overcome this dichotomy with its pockets of case law

[22] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] AC 465. The claimant, an advertising company, had to purchase some products for a client. The claimant inquired about the client's finances in order to avoid potential losses related to the purchase. The client's bank (the respondent) confirmed its creditworthiness. However, the bank's statement included a liability disclaimer. The claimant purchased the products, but the client became insolvent. The claimant sued the bank because it had incurred losses on the basis of the bank's misstatement. The question was whether the respondent assumed responsibility for the client's creditworthiness. The House of Lords ruled for the bank because it had limited its liability through the disclaimer. However, it also emphasised that if it were not for an explicit disclaimer, the respondent would have assumed responsibility towards the claimant.

[23] Winfield, Jolowicz and Rogers (n 10) 124–32.

[24] *Smith v Eric Bush* [1990] AC 1 831.

[25] Plunkett (n 6) 58–65.

[26] *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28.

[27] See also eg *Williams & Anor v Natural Life Health Foods Ltd & Anor* [1998] UKHL 17. The franchisees sued the managing director and controlling shareholder of the franchisor company. The case analysed the triangular relationship between the shareholder/respondent, the franchisor company and the franchisees/claimants. The House of Lords ruled the relationship between the franchisor company and its shareholder was not sufficiently close for the shareholder to assume responsibility towards the claimants. In order to assume responsibility towards the claimants, the respondent should have had a direct relationship with them.

approach:[28] for some pockets, assumption of responsibility would be the foundation of negligence, while for others, it would be just one of the factors to be considered in order to recognise the existence of a duty of care.[29] However, *Caparo*'s approach limits the predictability of the law. Tort victims whose cases do not clearly belong to a specific pocket are uncertain whether or not the respondent owes a duty of care to them. This would represent a problem in most business and human rights cases, which, given their complexity, hardly fit into a specific pocket of case law.

3. The Gradual Expansion of the Duty of Care

The duty of care case law on corporate groups includes purely domestic cases focused on parental liability and transnational jurisdictional cases.

Chandler[30] and *Thompson*[31] are domestic cases filed by employees of two corporate groups against their parent companies. In both cases, the allegation was that the parent company owed a duty of care towards its subsidiary's employees, who had asbestosis. The Court of Appeal ruled for the claimant in *Chandler* and for the company in *Thompson*.

Okpabi,[32] *Lungowe*[33] and *AAA v Unilever plc*[34] are transnational cases decided only on the issue of jurisdiction. In these cases, the claimants sued a UK parent company for extraterritorial torts committed by its subsidiaries in Nigeria, Zambia and Kenya. In order to assert jurisdiction, UK courts had to assess the arguability of these cases and opine on whether the parent company could owe a duty of care towards the claimants. The Court of Appeal decided all of these cases, which were then appealed to the Supreme Court. However, while the Supreme Court granted leave to appeal *Okpabi* and *Lungowe*, it denied this permission as it pertains to *AAA*.

Given that these are purely jurisdictional cases, at first sight, one may think that they had no significant impact on the duty of care. However, at a closer look, these cases have gradually expanded the reach of the duty of care in two main ways: first, they have refocused the relationship of proximity on claimant and link person (parent and subsidiary) instead of claimant and respondent; and second, they have reconsidered the pockets of case law approach as established in *Caparo*.

A. The Parent–Subsidiary Relationship

Chandler ruled that the parent company owed a duty of care towards the claimant primarily because of the relationship between the parent company and its subsidiary. The focus of the case was on the following four *indicia*: parent and subsidiary

[28] Stapleton (n 8).
[29] Plunkett (n 6) 64.
[30] *Chandler* (n 4).
[31] *Thompson* (n 4).
[32] *Okpabi* (n 5).
[33] *Vedanta* (n 5).
[34] *AAA & Ors v Unilever plc & Anor* [2018] EWCA Civ 1532.

were part of the same business; the parent had superior knowledge of the employees' health and safety in that business; the subsidiary's system of health and safety at work was deficient; and the parent could foresee that the employees would rely on its knowledge to protect them.[35]

This was the first significant case where a court focused on the relationship between parent company and subsidiary, rather than parent company and employee, to establish a duty of care. The Court of Appeal found the two companies to be neighbours because of multiple factors: the parent company sold its asbestos business to its subsidiary; the parent company frequently instructed the subsidiary; and a doctor was conducting research on asbestos in both the parent and its subsidiary. This is not to say that the relationship between the parent company and the employee was utterly absent: a fourth *indicium* referred to the reasonable expectation of protection that employees could have from the parent company. The focus was on the parent and the subsidiary, but such a relationship also entailed a link between the parent company and the employee. In sum, parent, subsidiary and victim must be part of the same chain of events, but the focus was on the relationship between parent and subsidiary, rather than parent and victim.[36]

This approach also influenced the understanding of assumption of responsibility. *Chandler* ruled that the concept of assumption of responsibility is not necessarily based on a voluntary assumption. Rather, it defined a silent assumption of responsibility as a legal attachment of responsibility that the parent company owes towards the employees when it has a sufficient level of influence over its subsidiary.[37] The Court of Appeal referred to *Dorset* as a primary example of attachment of responsibility because the relationship between Home Office and prisoners entailed the Home Office's responsibility towards the claimants. Likewise, in *Chandler*, the attachment of responsibility depended on the parent–subsidiary relationship, which also entailed the parent company's responsibility towards the employee.[38]

Even those cases that ruled against the existence of a duty of care focused their analysis on the relationship between parent company and subsidiary. For instance, *Thompson* emphasised the element of superior knowledge that the parent company should have over the safety of its subsidiary's industrial activities in order to owe a duty of care towards the victim. The Court of Appeal held that a parent company may owe a duty of care when it is better positioned than its subsidiary to protect the employees of the group. However, this was not the case in the Renwick Group.[39] Therefore, the central focus to determine the existence of a duty of care is the relationship of proximity between parent and subsidiary, which must be

[35] *Chandler* (n 4) para 80.

[36] Tim Bullimore, 'Sins of the Father, Sins of the Son' (2012) 28 PN 212; Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary' (2012) 71 CLJ 478; Christian A Witting, *Liability of Corporate Groups and Networks* (CUP 2018) 359–66; *Chandler* (n 4) paras 72–9.

[37] *Chandler* (n 4) para 64.

[38] Petrin (n 20); James Goudkamp, 'Duties of Care and Corporate Groups' (2017) 133 LQR 560.

[39] *Thompson* (n 4) para 37.

established on a case-by-case basis. While *Thompson* and *Chandler* could appear as similar cases because they both dealt with a subsidiary's employee claiming damage against the parent company for asbestosis, in reality, they differed. What mattered was the relationship between parent company and subsidiary, which was profoundly dissimilar in the two cases: in *Chandler*, the parent company actively intervened in the business of its subsidiary, while in *Thompson*, it did not.

Another case that confirmed this approach while ruling against the existence of a duty of care is *AAA v Unilever plc*. In this jurisdictional case, the Court of Appeal had to determine the arguability of the case. The Court ruled that a duty of care would come into existence if the parent company interfered in the management of its subsidiary. However, this condition did not materialise in *AAA*. Therefore, the parent company owed no duty of care towards the victims.[40] Again, despite *AAA* ruling in favour of Unilever, it recognised that the duty of care depends primarily on the parent–subsidiary relationship rather than claimant–respondent.[41]

Okpabi and *Lungowe* also confirmed this approach.[42] They both clarified that the duty of care might depend on the parent–subsidiary relationship. In *Okpabi*, the claimant identified four *indicia* to identify if a parent company owes a duty of care: whether the parent takes over the management of its subsidiary; whether the parent poorly advises its subsidiary; whether the parent establishes safety/environmental group-wide policies and ensures their implementation by its subsidiary; and whether the parent has a relevant degree of control and supervision of its subsidiary. The Supreme Court found these four routes helpful.[43] As in *Chandler*, in *Okpabi* and *Lungowe* the focus is on the parent–subsidiary relationship, but this necessarily entails also a connection between the parent company and the claimant. In both cases, the Supreme Court mentioned that, even in the absence of effective control, if a parent company publicly commits to supervise its subsidiary, it might owe a duty of care towards a third party who relied on such public statements.[44] A third party could be any person whose human rights were abused by the subsidiary. The focus on the claimant's reliance on the statements made or actions taken by the parent company points to the concept of assumption of responsibility.[45] It entails that the parent company may be responsible, once it takes a public commitment, not only for its actions, but also for its failures to act and prevent the damage perpetrated by the subsidiary. This focus on the parent company's omissions was already present in *Chandler*,[46] but became even more evident in *Okpabi* and *Lungowe*.[47] It represents a gateway to potentially widen a

[40] *AAA* (n 34) paras 37–41.

[41] Uglješa Grušić, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74 CLJ 30.

[42] *Vedanta* (n 5) para 44.

[43] *Okpabi* (n 5) para 26.

[44] ibid 148; *Vedanta* (n 5) para 53.

[45] Barker (n 10).

[46] *Chandler* (n 4) paras 72–9.

[47] Andrew Sanger, 'Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries' (2019) 78 CLJ 486; *Vedanta* (n 5) para 53; *Okpabi* (n 5) para 148; Mark Wilde, 'Extraterritorial Liability of Parent Company for the Torts of Its Subsidiary: Okpabi and Others v Royal Dutch Shell' (2021) 37 JPN 142; Samantha Hopkins and others, 'Okpabi and Others v Royal Dutch Shell plc and Another [2021] UKSC 3' [2021] 72 NILQ 148.

parent company liability for any damage inflicted by its corporate group on third parties, ie any victim of human rights abuses.

The emphasis on the parent–subsidiary relationship makes *Okpabi* and *Lungowe* similar to historical precedents such as *Donoghue* and *Dorset*. In these cases, the relationship between the respondent and the link person established the duty of care. Such a relationship was sufficiently close for the respondent to reasonably foresee the possible damage that the link person could cause to the tort victim and, at the same time, for the claimant to believe that the respondent assumed responsibility for the link person's actions. No direct relationship between the claimant and the respondent was required. Their relationship was indirect and based on a chain of events.[48] *Okpabi* and *Lungowe* translated this triangular relationship into parental liability cases: the relationship between parent and subsidiary must be such for the parent to reasonably foresee the damage that the subsidiary could cause to a third party, and for the claimant to reasonably believe that the parent assumed responsibility for the actions of its subsidiary.

This change of focus, from the claimant–respondent relationship to the parent–subsidiary one, raises an obvious question: do these duty of care cases overrule *Caparo*? The answer is no. It is true that *Caparo* focused on the claimant–respondent relationship, but it also clarified that such emphasis was relevant to its particular pocket of case law. In cases belonging to other pockets, the main factor to be considered could be assumption of responsibility, rather than the relationship between claimant and respondent. Following this logic, one could believe that it is necessary to frame a parent–subsidiary pocket of case law and apply such a framework to future cases to determine when a parent owes a duty of care towards third parties for the actions of its subsidiary.[49]

B. Beyond the Pockets of Case Law Approach

The main question left to analyse is: to which pocket do parental liability cases belong?

A possible answer would be that parental liability cases have established a novel pocket of case law based on the factors considered in *Chandler* and *Thompson*. Much of the litigation on parental liability has, in fact, focused on defining and framing this pocket of case law. However, based on *Robinson*, the cases of *Lungowe*[50] and *Okpabi*[51] closed the door to this avenue by clarifying that the parental liability cases did not establish a novel pocket of case law and, therefore, the *Caparo* three-stage test did not apply.

If they do not establish a new pocket of case law, in which existing pocket would parental liability cases fit? The Supreme Court did not address this question.

[48] Witting (n 19).

[49] Goudkamp (n 38); Witting, *Liability of Corporate Groups and Networks* (n 36) 359–66; Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart Publishing 2020) 77–93.

[50] Suzanne Chiodo, 'UK Supreme Court Rules that English Companies Can Be Sued for Actions of Foreign Subsidiaries in the Interests of "Substantial Justice": Vedanta Resources v Lungowe [2019] UKSC 20' (2019) 38 CJQ 300; *Vedanta* (n 5) paras 46–62.

[51] *Okpabi* (n 5) para 151.

However, there are reasons to believe that, instead of necessarily fitting parental liability cases into a pocket, the Supreme Court would apply the general principles of tort law established before *Caparo*.

First, in *Lungowe*, the Supreme Court ruled that, to determine the existence of a parent company's duty of care, courts need to start their analysis from *Dorset*,[52] a case decided 20 years before *Caparo*, and often identified by scholars as an attempt to establish general principles on the duty of care.[53]

Second, in *Okpabi*, the Supreme Court reinforced *Lungowe*'s reference to general tort law principles. Most specifically, the claimant indicated four routes[54] to establish whether the parent company owed a duty of care towards its subsidiary. While the Supreme Court admitted that such routes could be helpful *indicia*, it stressed that they were not a test for this pocket of cases, in the same way in which the *Chandler*'s *indicia* were not a test for parental liability in the employment context. The Supreme Court emphasised that, following the general principles of tort law, there may be a variety of circumstances that could indicate a parent company owes a duty of care.[55]

Third, in *Robinson*, the question of how to define various pockets of case law was pivotal. Indeed, while the Lords agreed that the three-stage test of *Caparo* would not apply to already established pockets, they disagreed on the boundaries of such pockets. For instance, Lord Mance pointed out the difficulties of fitting precedents into fixed categories.[56]

Therefore, one could interpret this in two ways.

First, perhaps not every duty of care case must necessarily fit into an established or novel pocket of case law. Beyond the dichotomy between novel and established pockets, there could also be a third avenue: applying the general principles of tort law. In this scenario, there would be cases that clearly fit into an established pocket, cases that may frame a novel pocket and cases that do not fit into either box. This approach would widen the possible application of tort law to business and human rights cases that, given their novelty and complexity, are unlikely to fit into an established pocket of case law.

Second, a more orthodox interpretation would include parental liability cases within a broad pocket of third-party liability to which *Dorset* could belong.

No matter the interpretative approach one could take, lower courts would have to start their analysis on the merits of *Okpabi* and *Lungowe*[57] from *Dorset*

[52] *Vedanta* (n 5) [54]; *Dorset* (n 15).

[53] Plunkett (n 6) 39–47; Petrin (n 20) 612–16; Winfield, Jolowicz and Rogers (n 10) 90–113.

[54] These include the existence of group-wide policies implemented by the subsidiary, the parent company control of its subsidiary and the parent company interference in the management of its subsidiary. See *Okpabi* (n 5) para 26.

[55] ibid 27; *Vedanta* (n 5) paras 56–9.

[56] *Robinson* (n 10) paras 82–97; Simon Deakin, 'Liability in Negligence in Providing a Public Good: Really Not So Different?' (2019) 78 CLJ 513.

[57] Note that this is a hypothetical as it pertains to *Lungowe* because the parties reached a settlement. 'Vedanta & Konkola Copper Mines Settle UK Lawsuit Brought by Zambian Villagers for Alleged Pollution from Mining Activities' (Business & Human Rights Resource Centre) < www.business-humanrights.org/en/latest-news/vedanta-konkola-copper-mines-settle-uk-lawsuit-brought-by-zambian-villagers-for-alleged-pollution-from-mining-activities/> accessed 18 July 2023.

and the four routes already indicated as helpful by the Supreme Court. The factors belonging to a pocket are mere *indicia* or headings that help judges assess if a duty of care exists in a specific context.[58] Therefore, courts may use both general principles and pockets of case law as useful interpretative tools when deciding a case.[59]

4. *The Effects of the Gradual Expansion of the Duty of Care on Business and Human Rights*

The use of tort law to address businesses' accountability for human rights abuses has initiated a silent revolution within tort law. The revolution is silent because UK courts carefully refrained from pointing directly at human rights considerations in their case law.[60] The reasons behind this careful approach could be found in UK constitutional history. The UK is a dualist country that recognises the primacy of the Parliament and national law over international law. However, UK courts have gradually incorporated human rights law, as part of customary international law, into the common law, *de facto* avoiding the need for a legislative act specifically transforming human rights law into national law.[61] Since 1998, with the adoption of the Human Rights Act (HRA), UK courts have formally become obliged to both take into account any decision made by the European Court of Human Rights (ECtHR) '[s]o far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen'[62] and act in a way that is compatible with the rights enshrined in the European Convention on Human Rights (ECHR).[63] The HRA raised a number of complex questions concerning the use of human rights law in UK courts. Particularly relevant to tort law is the extent to which UK courts shall implement the ECHR between private parties, bearing in mind that, on the one hand, the ECHR obliges only states to respect human rights, but, on the other hand, according to consistent ECtHR's jurisprudence, domestic courts, as states' public authorities, shall implement the ECHR in practice at the national level.[64] Constitutional scholars and judges debate whether this means that UK courts could create new causes of action to implement the ECHR among private parties or should instead refrain from such judicial creativity and limit themselves to using already existing causes of action

[58] As it pertains to cases of economic loss, Jane Stapleton had already raised a similar critique in 1991. Stapleton (n 8).

[59] Plunkett (n 6) 35–78.

[60] Note that UK courts took this approach despite the human rights and international law arguments submitted by some litigators. Robert McCorquodale, 'Vedanta v Lungowe Symposium: Duty of Care of Parent Companies' (Opinio Juris, 18 April 2019) <https://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/> accessed 4 January 2023.

[61] This has been the subject of academic debates for decades. See Murray Hunt and Peter Duffy, *Using Human Rights Law in English Courts* (Hart Publishing 1997) 1–43.

[62] Human Rights Act 1998, s 2.

[63] ibid 6.

[64] Wright (n 1) 67–77; *Verein Klimaseniorinnen Schweiz & Ors v Switzerland* [2024] ECHR 53600/20 [639]; *Duarte Agostinho & Ors v Portugal & 32 Ors* [2024] ECHR 39371/20 [215]; *Affaire Communaute Genevoise D'Action Syndacale (CGAS) v Switzerland* [2023] ECHR 21881/20 [138–46].

in tort.[65] While these questions are particularly divisive in a dualist system, like the UK, which tends to separate in unequivocal terms international and domestic laws, the rise of human rights strategic litigation and the increasing use of tort law as a tool to implement human rights in the private sphere[66] have also raised criticism from international legal scholars. Several academics analysed how tort law is fundamentally changing the notion of human rights from values shaped by society and belonging to the public sphere to tools used in private bilateral quarrels between victims and perpetrators.[67] Thus, both the use of human rights law in a tort case and the use of tort law to achieve human rights goals could be considered, at a minimum, controversial.

This article argues that, despite their careful attitude, avoiding any direct reference to human rights law, UK courts managed to expand the reach of the duty of care with the ultimate result of addressing a number of business and human rights pivotal issues. With an incremental approach, they broadened the list of potential claimants and respondents in business and human rights cases, and extended the reach of UK tort law extraterritorially.

A. Who Can Be a Claimant?

The Bible teaches that everyone should treat their neighbour as they would like to be treated.[68] This could be, in a nutshell, the origin of the duty of care. UK courts have incorporated this biblical precept in tort case law. A duty of care is owed towards a neighbour. However, the definition of proximity and the relationship that there should be between neighbours are still unclear. For instance, in *Dorset* a fundamental element was that the damaged yachts were proximate to the island from which the prisoners escaped. Therefore, tort victims and the Home Office could be regarded as neighbours. Who could be considered, by analogy, a neighbour of parent companies in corporate group claims? According to human rights, the answer arguably is: every human being affected by the corporate group.[69] In

[65] Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824; William Wade, 'Horizons of Horizontality' (2000) 116 LQR 217; Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48; David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

[66] Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing 2018); Harold Koh, 'Transnational Public Law Litigation' (1991) 100 Yale LJ 2347; Dalia Palombo, 'Transnational Business and Human Rights Litigation: An Imperialist Project?' (2022) 22 Human Rights Law Review 26.

[67] Klabbers (n 1); Wright (n 1); Teubner (n 1).

[68] Matthew 22:39.

[69] Most specifically, human rights as sociological and philosophical concepts could be conceptualised as originating from empathy and solidarity. Thus, every human being could be considered a neighbour to others because we are all part of one human family. Rowan Cruft, Matthew Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (OUP 2015); Sally Scholz, 'Solidarity as a Human Right' (2014) 52 Archiv des Völkerrechts 49; Pamela Slotte and Miia Halme (eds), *Revisiting the Origins of Human Rights* (CUP 2015); Costas Douzinas, *The End of Human Rights: Critical Thought at the Turn of the Century* (Hart Publishing 2000); Christopher Roberts, *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American and African Regional Human Rights Systems* (CUP 2022). However, from the international legal perspective, while every person is entitled to human rights, only states have obligations to respect, protect and fulfil those human rights. States' obligation to protect people from human rights abuses entails their positive obligation to ensure that corporations respect human rights. Palombo, *Business and Human Rights* (n 49); Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 BHRJ 203.

contrast, the answer of tort law varies based on the factual circumstances of each case.

However, the parental liability cases indicate that courts are increasingly pointing to the human rights answer. Given that proximity should focus on the parent–subsidiary relationship, once this relationship is strong enough for a third party to reasonably assume that the parent is responsible for the activities of its subsidiary, then the duty of care can be established. If this is the case, whether the tort victim is an employee or simply another person detrimentally affected by the parent company's activities should not matter. *Chandler* has already laid out this approach, and the Supreme Court confirmed it by asserting jurisdiction over cases where the parent company had no direct relationship with the affected tort victim, such as *Okpabi* and *Lungowe*.[70] These cases could pave the way to extraterritorial litigation initiated by any distant person damaged by a British multinational.

This approach also comes with a potential downside. It could become a pernicious incentive for parent companies to avoid human rights due diligence in respect of their corporate groups. The parental liability cases clarified that it is the level of control or supervision that a parent company exercises over the management of its subsidiary to establish a duty of care. If proximity equals potential liability, parent companies may opt to outsource their production and get involved as little as possible in the group's activities to avoid liability. They may refuse to put in place due diligence measures aimed at preventing human rights abuses in their corporate group. In addition, those companies that have never taken due diligence measures are now better positioned than those which did. Indeed, they can argue that they have never been involved in the activities of their subsidiaries and, therefore, owe no duty of care towards potential victims damaged by their corporate group. Thus, according to some scholars, *Lungowe* and *Okpabi* could trigger a race to the bottom, and parental liability cases may frustrate the goal that business and human rights advocates want to achieve.[71] Others argue that this race to the bottom could be avoided if the duty of care was informed by human rights soft law, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs),[72] insofar as it clarifies businesses' human rights responsibility in respect of their corporate groups.[73]

[70] Goudkamp (n 38).

[71] Sanger, 'Parent Company Duty' (n 47); Hopkins and others (n 47); Cees van Dam, 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) 18 ECFR 714; Kim Bouwer, 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 15 CCLR 188; Kim Bouwer, 'Global Perspectives on Corporate Climate Legal Tactics: UK National Report' (2024) 18 <www.biicl.org/documents/12174_global_perspectives_on_corporate_climate_legal_tactics_-_uk_national_report_v1.pdf> accessed 15 May 2024.

[72] The UNGPs are soft law principles unanimously adopted by the Human Rights Council and endorsed by businesses worldwide. See John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2011) 29 Netherlands Quarterly of Human Rights 224; Nicola Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability' (2011) 29 Netherlands Quarterly of Human Rights 159; Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 Journal of Human Rights 162; Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' in Jena Martin and Karen Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (CUP 2015).

[73] Surya Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface' (2021) 6 BHRJ 336, 342–6.

B. Who Can Be a Respondent?

Lungowe and *Okpabi* also opened the door to a wider range of respondents. One of the difficulties for tort victims is that UK companies often have no equity relationship with the other entities of a multinational group.[74] When a parent–subsidiary relationship is missing, *Chandler* and the other parental liability cases used to be of no help, as they were arguably establishing a specific pocket of case law around the parent–subsidiary relationship.

However, the approach taken by the Supreme Court in *Lungowe* and *Okpabi* with a focus on the general principles established in *Dorset* could open the possibility of suing UK companies for extraterritorial torts committed not only by their subsidiaries, but also, potentially, by their supply chains. In both cases, the Supreme Court emphasised the various relationships that could establish a duty of care. There seems to be no requirement for a company to be a holder of equity in another one to owe a duty of care towards a tort victim. In fact, the proximity between any two companies could create a duty of care as long as a claimant could rely on company A assuming responsibility for the activities of company B.[75] In this regard, the reference to group-wide environmental and safety policies is essential. It raises the question of whether group-wide policies directed at supply chains could be a sufficient basis to establish a duty of care for the conduct of companies that are not subsidiaries of the group.[76]

This interpretation has already had an impact. For instance, in *Begum v Maran (UK) Ltd*,[77] the Court of Appeal confirmed the High Court's dismissal of an application for summary judgment regarding the arguability of a duty of care claim, while remitting to the High Court a statutory barrage issue based on article 26 of the Rome II Regulation. For the purpose of this article, the interesting part of the decision concerns the dismissal of the summary judgment application. The Court of Appeal confirmed the High Court's dismissal because the claimant, while likely to face hurdles at trial, had reasonable prospects of success against Maran Ltd, a UK company. The respondent had a contract with a Liberian company to provide ship-breaking services in Bangladesh. The claimant's husband, who had no direct relationship with the respondent, died at work in one of these ship-breaking operations. The claimant relied on both *Dorset* and *Donoghue* to argue her realistic prospect of success against the respondent. The Court of Appeal found that the respondent could arguably owe a duty of care towards the claimant because it chose to supply the vessel's breaking operations to a Bangladeshi company (instead of a more expensive Chinese one), allegedly knowing that this would entail workers being deprived of minimum safety during the dismantling operations. Thus, the Court of Appeal believed the claimant had prospects of

[74] Michael Sharpston, 'International Sub-Contracting' (1975) 27 Oxford Economic Papers 94.
[75] Sanger, 'Parent Company Duty' (n 47); Hopkins and others (n 47).
[76] Penelope Bergkamp, 'Models of Corporate Supply Chain Liability' (2018–19) 55 Jura Falconis Jg. 161.
[77] *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326; Russel Hopkins, 'England and Wales: The Common Law's Answer to International Human Rights Violations' in Ekaterina Aristova and Ugljesa Grusic (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

success against a UK company that had contractual, rather than equity, relations with third parties whose actions resulted in her husband's death.[78]

C. Jurisdiction

Lungowe and *Okpabi* could be perceived as milestones in jurisdictional terms because they recognised claimants could have arguable cases against UK parent companies for extraterritorial abuses committed by their subsidiaries.

In both cases, the Supreme Court ruled that having a trial on the relationship between tort victim, parent company and subsidiary at the jurisdictional stage is unnecessary. The decision on arguability shall be a summary judgment test, assessing whether there are some significant reasons to dismiss a case before it is tried in court. The Supreme Court specifically mentioned that it would be hardly possible to rule whether a parent company owes a duty of care towards tort victims without the benefit of disclosure.[79]

At first sight, the Supreme Court seems to reproduce a traditional principle, according to which the respondent shall disclose to the claimant documents relevant to the allegations. However, the application of this principle to the business and human rights context means requiring UK companies to disclose critical information concerning the relation with, and the activities of, their subsidiaries. Several companies may be uncomfortable with publicly disclosing information about their corporate structure, which could reveal their disregard for human rights and the environment. Thus, they may be willing to settle their cases. Indeed, since the jurisdictional decision in *Lungowe*, the parties settled without reaching the merits of the case. Commentators have described *Lungowe* as a victims' victory.[80] In the long run, if disclosure becomes the norm, it could push parent companies to oversee the human rights and environmental standards implemented by their subsidiaries in order to avoid negative publicity.

Furthermore, this approach substantially lowered the burden on victims to engage in costly and time-consuming litigation at the jurisdictional stage. In both *Lungowe* and *Okpabi*, the Supreme Court stressed that the cost and time of litigation were unreasonable.[81] The Supreme Court seemed well aware of the barriers

[78] The same approach was adopted in a case concerning alleged child labour perpetrated by a supply chain starting in the UK and ending in Malawi. *Josiya & Ors v British American Tobacco plc & Ors* [2021] EWHC 1743 (QB). The allegations include that tobacco farmers exploit child labour in Malawi and sell the tobacco to multinational companies headquartered in the United States. These companies then process the tobacco and sell it to UK-incorporated companies (the defendants). The High Court refused a motion to strike out proceedings because it found that the claimants had an arguable claim.

[79] William Day, 'Piggyback Jurisdiction and the Corporate Veil' (2019) 135 LQR 551; Chiodo (n 50).

[80] AfricaNews, 'Vedanta to Compensate Zambian Villagers for Polluting Their Water' (*Africanews*, 19 January 2021) <www.africanews.com/2021/01/19/vedanta-to-compensate-zambian-villagers-for-polluting-their-water/> accessed 11 July 2021; Ben Ye, 'Okpabi v Shell and Nestle USA v Doe: Trend and Divergence on Parent Company Liability for Human Rights Abuse in the United Kingdom and United States' (2021) 54 NYU J Int'l Law & Pol 261; Dam (n 71).

[81] Day (n 79); Margherita Cornaglia 'Vedanta Resources plc v Lungowe [2019] UKSC 20' [2019] European Human Rights Law Review 309.

in terms of access to justice that victims of extraterritorial abuses committed by multinationals have to bear.[82]

Furthermore, *Lungowe* raised an issue as it pertains to cases where a claimant would sue a parent company and its subsidiary at the same time. The respondent agreed to submit itself to the jurisdiction of the Zambian courts. This meant that both the subsidiary and the parent company could be adjudicated in Zambia instead of the UK. The question then arose as to whether Zambia was the appropriate forum to file a complaint against both the UK parent company and its Zambian subsidiary in order to avoid duplication of judgments. Both the Court of Appeal and the Supreme Court agreed that they had jurisdiction over the parent company on the basis of the Brussels I Regulation, and the case against both the subsidiary and the parent company should be litigated in the same country. However, they disagreed on which of the two countries would be the appropriate forum: the Supreme Court thought it was Zambia, whereas the Court of Appeal thought it was the UK.[83] Nevertheless, the Supreme Court upheld the Court of Appeal's ruling on a different basis: the potential lack of substantial justice in Zambia. Thus, UK courts had jurisdiction over both the parent and the subsidiary because Zambia was unlikely to provide substantial justice to the claimants.[84] This decision is in continuity with *Lubbe*, where, more than 20 years ago, the House of Lords ruled that victims would not have enjoyed substantial justice in South Africa against a transnational corporate group headquartered in the UK.[85]

In *Lungowe*, the Brussels I Regulation secured the jurisdiction of UK courts on the parent company.[86] The question of the Zambian forum arose only because the claimant sued both the parent and the subsidiary at the same time, and the respondent agreed to submit itself to the jurisdiction of Zambia. This issue would not have arisen had the claimant sued only the UK parent company.[87] However, Brexit revived the *forum non conveniens* jurisdictional doctrine because the Brussels I Regulation no longer applies to companies incorporated in the UK.[88] Thus, the

[82] Skinner and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business | ICAR' (2013) < https://corporatejustice.org/publications/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/> accessed 15 May 2024; Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here' (2003) 19 Connecticut Journal of International Law 1; Angela Lindt, 'Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?' (2020) 4 Journal of Legal Anthropology 57; Veerle Van Den Eeckhout, 'Corporate Human Rights Violations and Private International Law: The Hinge-Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor?' (2012) 4 Contemporary Readings in Law and Social Justice 178.

[83] *Lungowe & Ors v Vedanta Resources plc & Anor* [2017] EWCA Civ 1528; *Vedanta* (n 5). This approach to *forum non conveniens* was further developed as it pertains to *lis pendens* cases in *Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor* [2022] EWCA (Civ) 951.

[84] Day (n 79); Chiodo (n 50).

[85] *Lubbe* (n 2).

[86] *Vedanta* (n 5) para 16; Case C-281/02 *Andrew Owusu v NB Jackson* [2005] ECR I-01383; CJS Knight, 'Owusu and Turner: The Shark in the Water?' (2007) 66 CLJ 288.

[87] Day (n 79).

[88] According to the *forum non conveniens* doctrine, courts can dismiss a claim because foreign courts would be better placed than them in hearing it. Dorward (n 3); Lorna Gillies, 'Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts' (2020) 2020 JBL 161; Mukarrum Ahmed, 'Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications' (2022) 18 JPIL 56; Tibisay Morgandi, 'Parent Company Liability, Forum Non Conveniens and Substantial Justice' (2022) 11 Cambridge International Law Journal 118.

substantial justice test, which was relevant in *Lungowe* only to the duplication of judgment issue, might become the jurisdictional test for any case filed against a UK parent company leading a multinational group.

The High Court of Justice has already adopted this test in a post-Brexit case, *Limbu v Dyson*.[89] Following precedents such as *Spiliada Maritime Corporation v Cansulex Ltd*,[90] decided before the adoption of the Brussels I Regulation, the court ran a *forum non conveniens* analysis in *Limbu*: Malaysia was the appropriate forum because it was the most connected to the case, and there were no exceptional circumstances indicating the failure of the Malaysian judicial system to provide substantial justice to the claimants.[91] This is the first business and human rights case dismissed on *forum non conveniens* grounds after Brexit and is likely to be appealed. But if the *Limbu*'s approach is confirmed, it would *de facto* jeopardise the encouraging steps that *Lungowe* and *Okpabi* took in terms of lowering the jurisdictional burden on victims and limiting the cost and time of transnational litigation against UK parent companies.[92]

5. *Looking Forward: Climate Change Litigation?*

Having analysed how business and human rights considerations have gradually expanded the reach of the duty of care, it remains to consider how far this can go. The question is whether the gradual expansion of the duty of care is good enough to respond to increasingly complex crises that are determined, to a large extent, by corporate activities. Climate change is the most pivotal and iconic of such crises, with the carbon major industries contributing to a significant percentage of global emissions.[93] Thus, climate change litigation is increasing across the world.[94] For instance, in the UK, the non-governmental organisation ClientEarth has already attempted to use company law to limit Shell's emissions, but to no avail. ClientEarth became a shareholder of Royal Dutch Shell plc (RDS) and filed a derivative lawsuit against its directors, alleging that a failure to curb emissions would not be in RDS's best interest. The case was dismissed.[95]

Would a different litigation strategy based on tort (instead of company) law be more successful? In other words, could tort law be stretched further to encompass

[89] *Limbu & Ors v Dyson Technology & Ors* [2023] EWHC 2592 (KB).

[90] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL); Ahmed (n 88); Morgandi (n 88).

[91] Gillies (n 88).

[92] Ekaterina Aristova, 'The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens' (Conflict of Laws, 11 November 2023) <https://conflictoflaws.net/2023/the-jurisdiction-puzzle-dyson-supply-chain-liability-and-forum-non-conveniens/> accessed 12 April 2024.

[93] See eg Matthew Taylor and Jonathan Watts, 'Revealed: The 20 Firms behind a Third of All Carbon Emissions' *The Guardian* (9 October 2019) <www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions> accessed 15 July 2023.

[94] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 AJIL 679; Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 OJLS 841; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 WIREs Climate Change e580.

[95] *ClientEarth v Shell plc & Ors* [2023] EWHC 1137 (Ch); *ClientEarth v Shell plc & Ors* [2023] EWHC 1897 (Ch). Note that, unlike the duty of care case law (filed against UK companies), *ClientEarth* was filed against the board of directors alleging their personal liability for acting against RDS's interest.

corporations' responsibility to limit their carbon emissions? A number of tort scholars have indeed attempted to respond to this question and identified several challenges to the use of tort law in climate change litigation, which could be summarised in the following four categories: the claimant, the respondent, the causation and the harm challenges.[96] The sections below will explain these challenges and analyse how the parental liability cases could help address them.

A. The Claimant Challenge

The concept of proximity is connected to the one of foreseeability. A respondent shall be able to foresee that their conduct would result in potential harm to another person. Typically, the respondent will be able to foresee such harm towards a person who is sufficiently proximate (ie a neighbour) to them.[97] Thus, tort law recognises the respondent's neighbours as potential claimants. The claimant challenge is that everyone could become a potential claimant in a climate lawsuit because climate change affects every living being on the planet. If fully developed, this argument would completely eliminate the concept of proximity from the duty of care equation and result in a diffuse responsibility scheme.[98]

The gradual expansion of the duty of care could contribute to addressing the claimant challenge. *Lungowe* and *Okpabi* clarified that proximity does not necessarily entail a direct relationship between claimant and respondent. Proximity could be triangular, including a respondent, its subsidiary and a claimant. It could correspond to the chain of events that links the parent company's assumption of responsibility for its subsidiary with the harm suffered by the claimant.

This argument paves the way for any victim of climate change to fit into the category of 'neighbour' of a UK multinational, provided that such a company could reasonably foresee the detrimental climate impact it had on the victim's life and would assume responsibility in respect of this climate impact. This scenario seems quite realistic, given that some multinationals are so huge in size and transnational in activities that they may foreseeably impact the lives of millions of people. However, foreseeability alone would not be sufficient for a company to be held liable. A claimant would also have to demonstrate that such a company assumed responsibility with respect to the climate change harm they suffered.

B. The Respondent Challenge

While any emission could theoretically result in climate change harm, it is not possible to determine which emission caused specific damage to a claimant.

[96] Douglas Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41 ELR 1; Martin Spitzer and Bernhard Burtscher, 'Liability for Climate Change: Cases, Challenges and Concepts' (2017) 8 JETL 137; Monika Hinteregger, 'Environmental Liability' in Emma Lees and Jorge Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019); Monika Hinteregger, 'Climate Change and Tort Law' in Eva Schulev-Steindl and others (eds), *Climate Change, Responsibility and Liability* (Nomos Verlagsgesellschaft 2022).

[97] Plunkett (n 6) 35–65; Winfield, Jolowicz and Rogers (n 10) 90–132.

[98] Kysar (n 96).

Rather, with climate change, '[e]ach emission contributes to a *single* global process that causes *all* harms'.[99] Thus, climate change raises a diluteness problem, ie the respondent challenge: no polluter could be considered as the one responsible for climate change harm, but at the same time, all polluters could be potential respondents in a climate lawsuit.

The gradual expansion of the duty of care could help address the respondent challenge. *Lungowe* and *Okpabi* opened the door to a variety of relationships that could establish the duty of care of a company towards a third party.[100] The essence of the duty of care lies in the control that the UK company has over the harm inflicted on a victim. Thus, a pivotal element in assessing whether the UK company owes a duty of care towards a third party harmed by its subsidiary is to analyse the control exercised over the group and its input on group-wide policies.[101] Indeed, the Supreme Court in *Okpabi* specifically pointed at environmental group-wide policies as potential *indicia* to identify whether a company assumed responsibility for the activities of its group.[102]

If one stretches this argument further, a UK company could also assume responsibility over third parties when it commits to a decarbonising path. For instance, assume a carbon major commits to net zero by 2050. The company publishes such a plan on its website to advertise itself as a green company. Arguably, a potential victim of climate change could rely on the company's commitment to decarbonise. If the company fails to deliver on its decarbonising commitment, its failure will have a foreseeable impact on that victim. Thus, environmental or decarbonising commitments assumed by UK multinationals could be a potential basis to demonstrate the existence of a duty of care.

C. The Causation Challenge

In order to prove a respondent liable for damage, a claim must also pass a 'but for test'. In essence, had the respondent acted with care, the claimant would not have suffered any damage. The 'but for test' works in most scenarios concerning human rights abuses perpetrated by corporations. In *Lungowe* and *Okpabi*, UK courts have not yet addressed this issue because the cases were jurisdictional only, but one could imagine that, moving forward to the merits, the question would be: had Vedanta Resources plc or RDS taken appropriate care to oversee its subsidiary's conduct, would the victims have still suffered damage? In the affirmative, Vedanta Resources plc or RDS could not be liable for such damage.

This 'but for test' does not work for climate change because even if one imagines eliminating the emissions of a carbon major industry, climate change would still harm victims. The causation challenge could be defined as follows: it is foreseeable that the emissions of one company will contribute to climate change, but

[99] ibid 37.
[100] See eg *Begum* (n 77); Bergkamp (n 76).
[101] Hopkins (n 77).
[102] *Okpabi* (n 5) para 26.

there is no way to definitively demonstrate that a respondent's emission causes damage to a claimant.[103]

The gradual expansion of the duty of care is relevant to addressing the causation challenge. Indeed, *Chandler* was an asbestos case, where an employee filed against the parent company after working, over 50 years before, for its subsidiary. The 'but for test' could not be conclusively applied to this case because the claimant could theoretically have contracted asbestosis outside his workplace and/or for a combination of reasons not necessarily based on his employment. However, given that Cape plc assumed responsibility for the health and safety of its subsidiary's employees, was aware that its subsidiary's employees were at risk of contracting asbestosis due to a technical aeration problem and failed to adequately address the problem,[104] the Court of Appeal held Cape plc liable for the harm the claimant suffered.

Chandler is not an outlier in the asbestos context. Courts often treat causation in asbestos cases in more flexible terms because overwhelming scientific evidence demonstrates how asbestos exposure causes cancer. Thus, even if the 'but for test' is not applicable to a man contracting cancer years after asbestos exposure, sufficient scientific evidence demonstrates that his work caused that cancer.[105] A seminal case in this respect is *Fairchild v Glenhaven Funeral Services Ltd*,[106] where three employees worked with asbestos for different employers. None of the former employers took sufficient care to ensure their employees would work in a safe environment. As a result, the three employees contracted cancer. The claimants filed against the employers. However, they were not able to demonstrate which of the asbestos exposure caused cancer. Thus, while all employers breached their duty of care, no alleged negligence was meeting the 'but for test'. Nevertheless, given that the employers breached their duty of care and there was overwhelming scientific evidence asbestos exposure causes cancer, the House of Lords held that each employer could be liable for the damage suffered by the employees.

For this reason, tort scholars have already identified asbestos precedents as a possible basis to overcome the causation challenge also in the climate change context.[107] Indeed, like with asbestos, scientific evidence is increasingly demonstrating the anthropogenic causes of climate change and, most specifically, the impact of carbon majors' emissions on people. For instance, the Philippines Human Rights Commission wrote a report gathering overwhelming scientific evidence demonstrating that carbon majors are, alongside states, responsible for climate change, which is resulting in human rights abuses harming people and the environment.[108]

[103] Kysar (n 96); Hinteregger, 'Climate Change and Tort Law' (n 96); Hinteregger, 'Environmental Liability' (n 96).

[104] Cape plc knew the subsidiary had a defective system (enabling dust to escape) which could have harmed its subsidiary's employees, and it employed scientific and medical officers to oversee the health and safety of its subsidiary's employees. *Chandler* (n 4) paras 72–9.

[105] Jane Stapleton, 'The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims' (2009) 74 Brook L Rev 1011.

[106] *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22.

[107] Hinteregger, 'Climate Change and Tort Law' (n 96); Kysar (n 96).

[108] Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report' (2022); 'Philippines: Landmark Decision by Human Rights Commission Paves Way for Climate Litigation' <www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/> accessed 16 December 2020.

One could imagine a tort case filed against a UK-incorporated carbon major which adopted a net zero climate target plan but failed to deliver on its commitment. For instance, the company invested in more lucrative oil exploitation projects instead of decarbonising. Even assuming this could be considered as a breach of the company's duty of care towards a victim of climate change, the claimant would still be unable to meet the 'but for test'. However, given the overwhelming scientific evidence demonstrating the causal link between carbon majors' emissions and climate change, this hypothetical case could look sufficiently similar to asbestos precedents. Thus, a court may feel compelled to disapply the 'but for test' and hold the UK carbon major liable for its contribution to climate change.

D. The Harm Challenge

Climate change will result in harm to future generations. However, future harm is no damage to anyone. Indeed, several climate change cases are filed to prevent devastating damage from happening. This is the harm challenge: a victim cannot seek damage against a company for harm that has not yet materialised.[109]

The gradual expansion of the duty of care does not help address the harm challenge, but tort scholars[110] have proposed a possible path to encompass future harm: seeking injunctive relief, instead of damage, for a breach of a duty of care. While this path is uncommon in the UK, which is reticent in granting injunctions in non-property-related cases, there are a number of promising US cases where a claimant successfully sought an injunction for a breach of a duty of care.[111]

Scholars argue that injunctions could be the answer to the harm challenge because they aim to prevent future harm rather than seek reparation for already inflicted harm.[112] Thus, they could be ideally used in climate change cases. For instance, a climate change victim could file a suit against a carbon major, requesting the company comply with the net zero targets it assumed responsibility for. A court could then order the company to stick to its decarbonising plan in order to prevent future harm.

[109] The impact of the harm challenge on climate change cases could be illustrated by an iconic UN Human Rights Committee (HRC) decision. Mr Teitiota, a Kiribati citizen, sought asylum in New Zealand because Kiribati is becoming increasingly inhabitable due to climate change. New Zealand denied asylum to Mr Teitiota and extradited him to Kiribati. Mr Teitiota filed a communication against New Zealand with the HRC, claiming that the extradition put his life in danger. While recognising that Mr Teitiota's life was potentially endangered by climate change, the HRC decided against him. The alleged future harm had not yet materialised and, therefore, New Zealand's decision to extradite him was consistent with the law. Indeed, in a 10- to 15-year span, it would still be possible for the international community to tackle climate change and save Kiribati from becoming inhabitable. *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2728/2016* [2020] HRC CCPR/C/127/D/2728/2016.

[110] John Murphy, 'Rethinking Injunctions in Tort Law' (2007) 27 OJLS 509; Nicholas J McBride, 'Duties of Care: Do They Really Exist?' (2004) 24 OJLS 417.

[111] Murphy (n 110); McBride (n 110); *Ayers v Jackson* [1987] 2d NJ 525; *Friends for All Children v Lockheed Aircraft* [1984] F2d 816. See eg *Shimp v New Jersey Bell Telephone Co* [1976] 145 NJ Super 516. In this case, the Superior Court of New Jersey issued an injunction requiring an employer to impose a non-smoking policy at work. Scientific evidence was pivotal in this context: passive smoke kills, and failing to set a non-smoking policy means to risk employees' safety, which would likely result in future damage.

[112] Hinteregger, 'Climate Change and Tort Law' (n 96); Hinteregger, 'Environmental Liability' (n 96); Spitzer and Burtscher (n 96); Kysar (n 96).

6. *From Silent to Vocal Revolution*

This article has defined the UK gradual expansion of the duty of care as a silent revolution because courts have been reluctant to refer directly to human rights, but have indeed extended the duty of care to address human rights abuses committed by UK businesses worldwide. However, it is unclear how far courts can go with a silent revolution. The four challenges identified above (claimant, respondent, causation and harm) make it difficult to further stretch the duty of care to the point of holding corporations accountable for climate change.

But what would happen if UK courts directly refer to human rights and international law in interpreting the duty of care? A recent article by Lord Lloyd-Jones[113] highlights the increasing reliance of UK courts on international law, especially the ECHR, not only to decide questions of international law, but also to interpret national law. While judicial engagement with international law is more common in cases traditionally belonging to the public sphere,[114] references to international law are also made in private law cases.[115] Indeed, as the gradual expansion of the duty of care case law demonstrates, the boundaries between the private and public spheres are increasingly blurring.[116] Thus, it would not be inconceivable for UK courts to refer directly to human rights or international law in a prospective duty of care case concerning human rights abuses caused by climate change.

Dutch courts have already explored this avenue by interpreting Dutch tort law in light of the ECHR and the Paris Agreement. The comparison with the Dutch case law is relevant because it reveals the arguments UK judges are likely to be confronted with in future climate change litigation. Nevertheless, it should be noted that Dutch and UK tort laws cannot be equated as they pertain to separate legal systems.

In *Urgenda v The State of the Netherlands*,[117] the Dutch Supreme Court upheld the District Court and Court of Appeal judgments[118] interpreting the negligence standard of care (Book 6, section 162 of the Dutch Civil Code) in connection with the Netherlands' obligations enshrined in the ECHR and the Kyoto Protocol. Accordingly, it held that the Netherlands breached its duty of care because it failed to limit its emissions by at least net 25% by the end of 2020.[119]

[113] Lord Lloyd-Jones, 'International Law before United Kingdom Courts: A Quiet Revolution' (2022) 71 ICLQ 503.

[114] eg *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade & Ors* [2019] EWCA Civ 1020; *Regina v Bartle & Ors Regina v Evans & Anor* [1999] UKHL 17; *Al-Skeini & Ors v Secretary of State for Defence* [2007] UKHL 26.

[115] eg *The Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11.

[116] Duffy (n 66); Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012).

[117] *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] Supreme Court of the Netherlands 19/00135; Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 TEL 339.

[118] *Stichting Urgenda v The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)* [2015] Hague District Court C/09/456689; *Stichting Urgenda v The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)* [2018] Hague Court of Appeal C/09/456689.

[119] This figure was established in the Fourth Intergovernmental Panel on Climate Change (IPCC) assessment report (AR4). 'The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change'. 'IPCC—Intergovernmental Panel on Climate Change' <www.ipcc.ch/> accessed 15 July 2023. The IPCC publishes periodic reports on the climate science indicating, among other things, the emission reduction pathways countries shall take in order to fulfil the Kyoto Protocol and Paris Agreement's goals.

The Grand Chamber of the ECtHR confirmed the approach taken by the Dutch Supreme Court in a trilogy of historical cases decided in April 2024: *Careme v France*, *Duarte Agonstinho v Portugal* and *Verein Klimaseniorienen v Switzerland*.[120] Despite different factual circumstances, in each case, the applicants requested the ECtHR hold various European states in violation of the ECHR for their failure to protect them from the detrimental consequences that climate change had on their rights. While *Careme* and *Duarte* were dismissed on preliminary grounds, the Grand Chamber decided *Klimaseniorienen* on its merits in the victims' favour. According to *Klimaseniorienen*, article 8 of the ECHR prescribes that states have a '[p]rimary duty … [t]o adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change'.[121] In this context, both immediate and intermediate state action is required to achieve net neutrality. These mitigation measures have to be taken in accordance with the Paris Agreement 1.5 degrees Celsius target. To quantify Switzerland's carbon budget, the ECtHR referred to the IPCC reports.[122]

There is a lot to unpack in this historical case, but perhaps the most significant finding for the purpose of this article is that, in mitigating the effects of climate change, '[t]he competent domestic authorities, be it at the legislative, executive or judicial level',[123] have a restrained margin of appreciation as it pertains to '[t]he necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respec[t]',[124] while they have a wider margin as it pertains to the choice of means for the state to meet those goals.[125] Moreover, the Grand Chamber found that Switzerland violated article 6 of the ECHR (access to court) because domestic Swiss courts dismissed the applicant's climate case without taking it seriously. Therefore, national courts shall consider climate change cases as human rights cases and apply the standards indicated in *Klimaseniorienen* to their rulings. Considering that section 2 of the HRA requires UK courts to take into account any ECtHR ruling when it is relevant to domestic proceedings, UK courts would have a limited margin of appreciation in applying the duty to mitigate climate change, as defined in *Klimaseniorienen*, to future cases. This does not necessarily mean that UK courts will have to implement *Klimaseniorienen* in their tort case law because the UK has a wide margin of appreciation regarding the choice of means. For example, UK courts could implement *Klimaseniorienen* in accordance with sections 6–9 of the HRA, which establish domestic remedies alternative to tort causes of actions that could be used against public authorities violating the ECHR.[126] However, these

[120] *Klimaseniorinnen* (n 64); *Duarte* (n 64); *Careme v France* [2024] ECHR 7189/21.
[121] *Klimaseniorinnen* (n 64) para 545.
[122] ibid 547–74.
[123] ibid 550.
[124] ibid 543.
[125] ibid 543–50.
[126] Jenny Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606; Wright (n 1) 77–94; *Regina v Secretary of State for the Home Department ex parte Greenfield (FC)* [2005] UKHL 14.

HRA remedies refer to public authorities only and cannot be used against private parties, such as corporations.

In both *Klimaseniorienen* and *Duarte*, the ECtHR stressed the fundamental role of domestic courts in fighting climate change. The Grand Chamber capitalised on its consistent jurisprudence, allocating a primary role to national courts and a subsidiary role to the ECtHR in implementing the ECHR, and required courts to engage with climate cases seriously.[127] A fundamental question that the ECtHR did not directly answer is whether domestic courts will have to implement *Klimaseniorienen* also between private parties, including corporations. However, the ECtHR's consistent jurisprudence has always been that states' positive duties entail the obligation to implement the ECHR among private parties. This includes the obligation of national courts to implement the ECHR in cases filed against private industries when their activities have a detrimental effect on human rights.[128] There is no reason to believe that the positive duty to mitigate climate change would be treated differently from any other positive duty under the ECHR. Nor is there reason to doubt that corporate activities contributing to climate change would be treated differently from any other private conduct threatening the rights enshrined in the ECHR.

But how could UK courts take into account *Klimaseniorienen* in the context of a potential duty of care case concerning corporate climate liability? While we do not yet know how the novel ECtHR's jurisprudence could be incorporated in a domestic corporate climate case, the Dutch experience could shed light on this. Indeed, capitalising on *Urgenda*, Milieudefensie filed and won a case in the Hague District Court against RDS. In *Milieudefensie v Royal Dutch Shell plc*,[129] the Hague District Court interpreted the negligence standard of care established in Book 6, section 162 of the Dutch Civil Code in conjunction with the ECHR, the UNGPs and the Paris Agreement. The Hague District Court ruled that, according to the IPCC SR15 report (detailing possible pathways to meet the Paris Agreement's goals), the Netherlands had an obligation to limit its emissions by at least net 45% by the end of 2030. This obligation could be met only if carbon majors, like Shell, reduce their emissions to the same proportions. The failure to fulfil these reduction goals would impair the human rights of Dutch residents, who are suffering the consequences of climate change. Therefore, considering the obligations of RDS under Dutch tort law, those of the Netherlands under the Paris Agreement and the human rights abuses that would result from the failure to meet such obligations, the Hague District Court issued an injunction for RDS to reduce its emissions by at least net 45% by the end of 2030.[130] This included the emissions

[127] *Klimaseniorinnen* (n 64) paras 635–40; *Duarte* (n 64) paras 215–28.

[128] *Cordella & Ors v Italy* [2019] ECHR 54414/13 and 54264/15; *Lopez Ostra v Spain* [1994] ECHR 16798/90; *Fadeyeva v Russia* [2005] ECHR 55723/00; *Pavlov & Ors v Russia* [2023] ECHR 31612/09; *Moreno Gomez v Spain* [2005] ECHR 4143/02; Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) 59–73; Palombo, *Business and Human Rights* (n 49) 137–42.

[129] *Vereniging Milieudefensie & Ors v Royal Dutch Shell Plc* [2021] Hague District Court, C/09/571932/HA ZA 19-379.

[130] ibid.

of RDS and its subsidiaries, supply chains and end consumers.[131] Central to the case was the control exercised by RDS over its group and its group-wide policy assumed in the context of the reduction effort required by the Paris Agreement. The case is pending in front of the Court of Appeal, which decision will likely become a historical step towards or against the development of climate corporate accountability.[132] Indeed, the case has already become relevant to UK litigation. In *ClientEarth v Shell plc*, the allegations included that RDS's board of directors did not comply with the decision of the Hague District Court.[133]

But how does this jurisprudence combining tort law, human rights and climate change address the four challenges identified above (claimant, respondent, causation and harm) if compared to the gradual expansion of the duty of care?

A. The Claimant Challenge

The gradual expansion of the duty of care paves the way to address the claimant challenge: if two parties that have never met could be considered neighbours because A assumed responsibility towards B by adopting a health and safety policy that impacts B's health and safety,[134] then a carbon major that adopted an emissions reduction plan could reasonably assume responsibility towards any person affected by its failure to reduce such emissions.

Human rights law helps corroborate this argument by providing evidence that climate change violates the rights of people. The Dutch courts in *Milieudefensie* and *Urgenda* and the ECtHR in *Klimaseniorienen* relied on scientific evidence demonstrating that climate change could result in the violation of the right to respect for private and family life enshrined in the ECHR.[135] Thus, if people's rights are at risk because of climate change, they could arguably be considered the end recipients of a chain of events that started when a polluter contributed to climate change. In this sense, victims whose rights are detrimentally affected by climate change could be regarded as neighbours of a major polluter.

It should be noted that the claimant filed a public interest class action in both *Milieudefensie* and *Urgenda*, under Book 3, section 305a of the Dutch Civil Code.[136] However, the UK does not provide the same class action option for tort victims.[137] Thus, one could question whether UK courts would be as open as

[131] ibid 4.4.37–4.4.39. Note that the Hague District Court distinguished between obligations of result and best efforts for RDS: it must reduce its and its subsidiaries' emissions by at least net 45% by the end of 2030, while it shall do its best to influence the emissions reduction of its supply chains and end users by net 45% by the end of 2030.

[132] Eoin Jackson, 'The Case for Eco-Liability: Post Okpabi Justifications for the Imposition of Liability on Parent Companies for Damage Caused to the Environment by Their Subsidiaries' (2021) 7 LSE Law Review 61; Dam (n 71). Most recently, Milieudefensie has also announced the filing of a case against. ING, 'ING Targeted by Climate Activists Who Successfully Took Shell to Court and Won' (*Bloomberg.com*, 19 January 2024) <www.bloomberg.com/news/articles/2024-01-19/ing-targeted-over-climate-change-inaction-by-dutch-ngo> accessed 13 April 2024.

[133] *ClientEarth* [2023] EWHC 1137 (Ch) (n 95); *ClientEarth* [2023] EWHC 1897 (Ch) (n 95).

[134] *Chandler* (n 4).

[135] *Milieudefensie* (n 129) para 4.4; *Urgenda* (n 117) para 5; *Klimaseniorinnen* (n 64) paras 538–74.

[136] *Urgenda* (n 117) para 2.3.2; *Milieudefensie* (n 129) para 4.2.

[137] R Mulheron, 'Further Impetus for a Statutory Class Action, Post-Lloyd v Google' (2023) 42 CJQ 10; Deborah Hensler, 'So You Are Thinking about Adopting a Class Action Regime? Lessons from the US' (2023) 42 CJQ 3; Paul Balen, 'Group Actions, Aims, Aspirations and Alternatives: A Historical Global Perspective' (1995) JPIL 196.

Dutch courts to receiving a tort complaint filed by an undetermined number of people, ie any victim detrimentally affected by climate change.

Klimaseniorienen helped address this issue with respect to cases filed against states, but the same logic could also apply to cases filed against corporations. The ECtHR ruled that although under the ECHR *actio popularis*[138] is not allowed, an association regularly registered in the territory of a Council of Europe state (eg Switzerland) and representing the interests of a group of individuals (eg senior women) within the state's jurisdiction is entitled, on behalf of that group, to obtain a remedy in national courts and, after exhausting domestic remedies, to file a complaint with the ECtHR.[139]

Even if they apply different concepts, the Dutch Supreme Court, the Hague District Court and the ECtHR agree that an association representing a group of individuals has standing to file climate cases in domestic civil courts insofar as it represents the interest of people living within the domestic jurisdiction. Thus, the category of claimants would be determined by a sort of 'jurisdictional test'. First, the association has to be registered within the interested jurisdiction (ie the Netherlands or Switzerland), and second, the interests represented by the association have to be those of (Dutch or Swiss) residents.[140] Given that UK courts are bound to implement *Klimaseniorienen*, it is arguable that they will have to recognise standing for UK associations representing the interests of UK residents affected by climate change. This would represent a step forward in addressing the claimant challenge.

B. The Respondent Challenge

The gradual expansion of the duty of care also sets the bases to address the respondent challenge. As ruled in *Lungowe* and *Okpabi*, once a company assumes responsibility for its group's activities, it could arguably owe a duty of care towards a third party harmed by such activities.

A direct reference to international law would help to argue that a UK carbon major could assume responsibility towards people harmed by climate change. With the Paris Agreement, the UK recognised that climate change harms people and the planet. Therefore, limiting emissions below 2, and preferably 1.5, degrees Celsius compared to pre-industrial levels is necessary. As part of each country's effort to reduce its share of emissions, several states, including the UK, urge carbon majors to adopt appropriate policies to reduce their emissions.[141]

[138] It could be defined as the equivalent of a class action under international law. William Aceves, 'Actio Popularis—The Class Action in International Law' (2003) U Chi Legal F 353.

[139] *Klimaseniorinnen* (n 64) paras 458–537.

[140] ibid 502; *Urgenda* (n 117) para 2.3.2; *Milieudefensie* (n 129) para 4.2.

[141] For instance, the Netherlands adopted a climate agreement signed by several stakeholders, including companies, civil society organisations and governmental agencies, to meet the Paris Agreement's goal 'Climate Agreement' (28 June 2019) <www.government.nl/documents/reports/2019/06/28/climate-agreement> accessed 16 July 2023. In a similar vein, the UK adopted an industrial decarbonisation strategy, 'Industrial Decarbonisation Strategy (Accessible Webpage)' (*GOV.UK*) <www.gov.uk/government/publications/industrial-decarbonisation-strategy/industrial-decarbonisation-strategy-accessible-webpage> accessed 16 July 2023.

Indeed, following the Netherlands' path for energy transition, RDS put together group-wide policies aimed at net zero by 2050.[142] On the basis of these commitments, RDS's soft responsibility under the UNGPs and the control RDS exercised over its corporate group's emissions, the Hague District Court ordered RDS to cut its emissions by at least net 45% by the end of 2030.[143]

Should a carbon major also commit to such emission cuts in the context of an industrial group-wide strategy aimed at meeting the Paris Agreement's goals, UK courts could also consider this an assumption of responsibility towards people harmed by climate change. Obviously, an assumption of responsibility as a basis to establish a duty of care under UK law cannot be equated with a negligence standard of care under Dutch law because the two concepts are different. However, it is still arguable that a carbon major net zero's commitment could result in an assumption of responsibility towards victims harmed by climate change. A claimant would have to demonstrate that a respondent assumed responsibility to limit its emissions and failed to deliver, ie breached its duty of care, and that such a breach substantially contributed to the harm the claimant suffered due to climate change.

C. The Causation Challenge

Asbestos cases demonstrate how the gradual expansion of the duty of care can address the causation challenge. Scientific evidence has so overwhelmingly demonstrated that asbestos exposure results in cancer that UK courts no longer consider it necessary for claimants to prove a strict 'but for test' in such cases.[144]

The ECtHR and Dutch courts applied the same logic in the context of climate change. The Grand Chamber in *Klimaseniorienen*, the Dutch Supreme Court in *Urgenda* and the Hague District Court in *Milieudefensie* interpreted the ECHR in light of overwhelming scientific evidence enshrined in climate change international and national law[145] to prove the causal link between emissions and human rights abuses resulting in harm. As it pertains to Shell's emissions, the Hague District Court interpreted the negligence standard of care by combining the IPCC SR15 report, in conjunction with RDS's group-wide policies and soft responsibilities under the UNGPs.[146] This evidence combined established the

[142] See eg 'Oil Majors Pledge Net Zero Target, Update Goals to Cut Methane, Carbon Intensity' (20 September 2021) <www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/092021-oil-majors-pledge-net-zero-target-update-goals-to-cut-methane-carbon-intensity> accessed 16 July 2023; 'Achieving Net-Zero Emissions | Shell Global' <www.shell.com/powering-progress/achieving-net-zero-emissions.html> accessed 16 July 2023.

[143] See *Milieudefensie* (n 129) paras 4.4.37–4.4.39.

[144] See Lord Nicholls of Birkenhead: 'In an area of the law already afflicted with linguistic ambiguity I myself would not describe this process of legal reasoning as a "legal inference" or an "inference of causation". This phraseology tends to obscure the fact that when applying the principle described above the court is not, by a process of inference, concluding that the ordinary "but for" standard of causation is satisfied. Instead, the court is applying a different and less stringent test. It were best if this were recognised openly.' *Fairchild* (n 106) para 45; Stapleton, 'The Two Explosive Proof-of-Causation Doctrines' (n 105).

[145] Paris Agreement 2016; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; Dutch Climate Act 2019.

[146] *Milieudefensie* (n 129).

causal link between RDS's emissions and the human rights abuses suffered by Dutch residents negatively impacted by climate change.

The reasoning adopted by Dutch courts and the ECtHR is not dissimilar from the argument of UK courts in asbestos cases. Thus, it would not be inconceivable for UK courts to also use the overwhelming scientific evidence on climate change, the Paris Agreement, the Climate Change Act[147] and the IPCC reports to overcome the causation challenge. Provided that a claimant would demonstrate the existence of a duty of care, they would not also have to pass the 'but for test'.

D. The Harm Challenge

The ECtHR faced the harm challenge in both *Duarte* and *Klimaseniorienen.*

The applicants in *Duarte* were a group of young individuals requesting the ECtHR hold several European states responsible for the existing and future impact climate change has and will increasingly have on their lives. The ECtHR dismissed the case on preliminary grounds and did not get to its merit.[148] However, the focus on future harm still influenced the ECtHR's parallel ruling *Klimaseniorienen*. Indeed, in this case, the ECtHR mentioned several times that the fight against climate change necessarily entails intergenerational burden sharing. Thus, the current generation cannot refrain from addressing climate change now because future generations will suffer its most damaging consequences.[149]

Moreover, in *Klimaseniorienen*, the ECtHR ruled that article 6 of the ECHR guarantees the rights not only to file a case, but also to obtain a decision by national courts. Swiss courts failed to engage with the case seriously: they rejected it on preliminary grounds and did not assess its merits. They held, *inter alia*, that there was still time for states to prevent future harm originating from climate change. The ECtHR rejected this approach and ruled:

> [T]he notion of imminent harm or danger, cannot be applied without properly taking into account the specific nature of climate change-related risks, including their potential for irreversible consequences and corollary severity of harm. Where future harms are not merely speculative but real and highly probable (or virtually certain) in the absence of adequate corrective action, the fact that the harm is not strictly imminent should not, on its own, lead to the conclusion that the outcome of the proceedings would not be decisive for its alleviation or reduction. Such an approach would unduly limit access to a court for many of the most serious risks associated with climate change.[150]

On this basis, the ECtHR ruled Switzerland violated the ECHR because it did not provide adequate access to court to the applicant. Thus, in light of

[147] UK Climate Change Act 2008.

[148] *Duarte* (n 64).

[149] *Klimaseniorinnen* (n 64) paras 419–20; Aoife Nolan, 'Inter-Generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klimaseniorinnen Decision' (*EJIL: Talk!*, 15 April 2024) <www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/> accessed 21 April 2024.

[150] *Klimaseniorinnen* (n 64) para 614.

Klimaseniorienen, domestic courts shall decide climate change cases despite the harm challenge.

But how could national courts implement *Klimaseniorienen* in a tort law case? The Dutch Supreme Court and the Hague District Court addressed such a challenge by issuing injunctions ordering the Netherlands and RDS to limit their emissions in accordance with the IPCC reports. To date, there are no examples of UK courts issuing comparable injunctive reliefs in the context of a breach of a duty of care. However, this is not uncommon in other jurisdictions.[151] As scholars have already argued,[152] climate change could indeed become a fertile ground for UK courts to consider granting injunctive reliefs for breaches of a duty of care.

7. Conclusion

Human rights are objective indicators of the detrimental impact businesses have on people and planet. However, human rights alone do not provide the causes of actions for people to hold corporations accountable for their abuses.[153] Can tort law fill this gap by providing an avenue for victims of human rights abuses to sue corporations?

Yes, it can. The gradual expansion of the duty of care in the UK is a tangible example of how UK tort law could incrementally provide remedies to victims of human rights abuses perpetrated by corporations. Today, it is conceivable for a distant claimant to file a complaint against a UK multinational for damage inflicted via its subsidiary in the Global South. This used to be unthinkable. This article defined such incremental expansion of the duty of care as a silent revolution because UK courts carefully avoided any direct reference to human rights or international law. In other jurisdictions, such as the Netherlands, courts have instead opted for using human rights and international law as pivotal interpretative tools to apply tort law in business and human rights cases. This approach has recently enabled the Hague District Court to use tort law to hold a carbon major accountable for its climate change impact.

While UK courts have definitively positioned themselves on the right path to address business and human rights challenges with the silent duty of care revolution, the Dutch experience underscores the importance of pointing directly at human rights and international law in order to fully address them. UK courts should take this into consideration when addressing increasingly complex cases combining human rights and tort law.[154] There is an elephant in UK courtrooms when deciding duty of care cases. This elephant is named human rights. Avoiding

[151] *Shimp* (n 111); Murphy (n 110); McBride (n 110); *Ayers* (n 111); *Friends for All Children* (n 111).

[152] Hinteregger, 'Environmental Liability' (n 96); Hinteregger, 'Climate Change and Tort Law' (n 96); Kysar (n 96); Spitzer and Burtscher (n 96).

[153] Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale LJ 443; Peter Muchlinski, *Multinational Enterprises and the Law* (3rd edn, OUP 2021).

[154] See how business, human rights and climate change languages could interconnect to ensure businesses contribute to reducing emissions. Kristian Høyer Toft, 'Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology' (2020) 5 BHRJ 1; Nicola Jägers, 'UN Guiding Principles at 10: Permeating Narratives or Yet Another Silo?' (2021) 6 BHRJ 198.

the elephant will not change the fact that these tort law cases do not concern solely a bilateral quarrel between a claimant and a respondent. They raise fundamental human rights questions concerning the protection of collective interests. Tort law is used in these cases as a tool to hold corporations accountable for human rights abuses. If this is accepted, we can start a conversation about how to interconnect human rights and tort law so that they nourish each other's roots in a coherent manner to effectively address pivotal problems, such as climate change.