WHEN IS A SUBSIDIARY'S NEGLIGENCE THE PARENT COMPANY'S PROBLEM?

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Abstract

Recognising a duty of care on a parent company for the acts or omissions of its subsidiary poses the difficult issue of accommodating principles of limited liability and separate corporate personality within the paradigm of traditional tort principles. These difficulties mean the law is unsettled. Recent New Zealand and United Kingdom appellate decisions challenge both the conceptual basis for any duty of care as well as the instances where such a duty of care may or may not be owed. This paper clarifies where a parent company may owe a duty of care and on what basis. It argues something more than a parent company's capacity to control its subsidiary is required to give rise to a duty. A parent company's duty of care should be recognised on traditional duty principles governing where A owes C a duty to prevent harm caused by B. This paper identifies four broad situations in which a parent company may owe a duty of care for the acts or omissions of its subsidiary. It concludes by considering the wider applications of a parent company's duty of care, and the implications for the existing approach to recognising a director's duty of care for negligent misstatements.

I. Introduction

Over the last two decades, courts have recognised a duty of care on parent companies for the negligent actions of their subsidiaries. The Court of Appeal considered this duty for the first time in New Zealand in *James Hardie Industries plc v White*.[1] The United Kingdom Supreme Court recently became the first superior court to consider the issue,[2] and is set do so again.[3]

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1 *James Hardie Industries plc v White* [2018] NZCA 580.

2 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 2 WLR 1051 [*Lungowe*].

3 Paul Carsten and Libby George "UK Supreme Court to hear Nigerians' case for pursuing Shell spill claim in England" (24 July 2019) Reuters <www.reuters.com>.

As these two judgments recognise, the duty issue lies "at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and traditional principles of negligence collide".[4] Courts must respect both company and negligence principles, which raises issues of "considerable difficulty and importance".[5] The difficulties in doing so explain why the law is far from settled.[6]

These two cases reinforce that the law is in a state of flux by signalling both significant new instances in which a duty may exist, while questioning existing approaches to the duty issue. It is against this background that this article seeks to clarify where a parent company should owe a duty of care to those harmed by the actions of its subsidiary.

The article first considers the company law context to these claims. Part II argues that the twin principles of separate corporate personality and limited liability require something more than ownership of the subsidiary and the parent's associated ability to control for a duty of care to exist. This avoids difficulties in conceptualising parent liability as piercing the corporate veil or vicarious liability.

Part III considers the basic duty principles that should apply in this area of law. It argues that courts should not approach the issue by solely applying traditional duty formulae. Rather, the United Kingdom Supreme Court correctly emphasises general negligence principles governing where A owes C a duty to prevent harm caused by B. These general negligence principles should guide the development of broad principled categories of circumstances where a parent owes a duty. This will prevent courts fitting novel cases inside existing ill-fitting precedents and more clearly identify why a duty of care exists.

Part IV applies these basic principles of negligence to outline where a parent should owe a duty of care. Sub-Part A argues that, though tortious principles suggest a parent company's capacity to control its subsidiary may support a duty of care, policy considerations limit any duty to where the parent actually controls the relevant subsidiary operation. This control may be direct or through mandatory group policies. In answer to the question of mandatory company policies left open by the Court of Appeal, a duty based on control should only exist where the parent enforces group policies. This does not prevent a duty existing on another principled basis.

4 Martin Petrin "Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*" (2013) 76 MLR 603 at 603.

5 *James Hardie Industries plc v White* [2019] NZSC 39 at [9].

6 *James Hardie Industries*, above n 1, at [62].

Sub-Part B argues that, short of material control, a parent may owe a duty of care for systemically flawed policies or advice. This is because the parent company created the danger of harm that would not otherwise exist.

Sub-Part C argues that a parent may owe a duty of care where it assumes responsibility for its advice, policy, or a subsidiary operation which induces the subsidiary company to rely upon it. This duty extends beyond that currently recognised on the basis of special knowledge and may exist where corporate frameworks induce a similar reliance on the parent. This duty requires courts to extend the subsidiary's reliance to claimants. Courts thus far have yet to acknowledge nor justify this extension, but it is desirable.

Sub-Part D argues that a parent should owe a duty of care where it publicly assumes responsibility to the claimant for managing a subsidiary's operation. This duty may exist even if it does not exercise control or induce its subsidiary to rely upon it doing so. Caution is necessary, however, to ensure that the assumption of responsibility is to claimants that form an identifiable class of people whom reasonably rely upon the parent.

The article concludes by considering the wider applications of the parent company's duty of care in Part V. Though the duty issue is broadly discussed in the context of personal injury and property damage, this approach equally applies to other types of negligence and loss, including liability for subsidiary company misstatements.

Moreover, these duties of care are founded on the practical relationship between companies rather than a parent's shareholding. Similar duties of care may exist on any company showing one of the above relationships with another company. In particular, this may occur in the context of joint ventures or supply chain relationships.

Lastly, this approach gives much-needed impetus to the reassessment of the existing approach to company directors' liability for misstatements made in their capacity as directors. Approaches to an assumption of responsibility and the degree of control in the parent-subsidiary context throw into doubt the approaches espoused in *Body Corporate 202254 v Taylor* and *Williams v Natural Life Health Foods Ltd*.[7]

7 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17; and *Williams v Natural Life Health Foods Ltd* [1998] UKHL 17, [1998] 1 WLR 830.

II. The Company Law Context

Parent-subsidiary claims occur in a company law context. It is a fundamental company law principle that every company has its own separate legal personality. Separate legal personality carries two implications:[8]

> First, the law treats a company as a legal person, capable of enjoying most of the rights and bearing most of the duties that can be enjoyed or borne by a natural legal person. Secondly, this legal personality is the company's own, in that it is separate from the legal personalities of those persons who hold shares in the company.

The Companies Act 1993 recognises these principles. Section 15 provides that a company is a legal entity separate from its shareholders. Section 97 provides that a shareholder is not liable for obligations to the company merely by reason of his or her position as a shareholder. Section 128 provides that a company's business and affairs are managed by or under the supervision of its board. This recognises that, although a company is a legal entity, it lacks physical manifestation and must act through others.[9]

Separate corporate personality is fundamental to the relationship between companies in a group. Each company within a group of companies "is a separate legal entity possessed of separate legal rights and liabilities".[10] This is true even where the parent company exercises such a degree of control over the subsidiary's affairs that it is a "creature" of the parent.[11]

Moreover, by virtue of separate legal personality, a shareholder owes no duty of care to anybody by reason of his or her position as a shareholder. For example, a shareholder controlling the appointment of a director owes no duty of care to company creditors to exercise care to ensure those appointed discharge their duties competently.[12]

The Court of Appeal in *James Hardie Industries* correctly concluded that these principles mean something more than ownership and associated ability to control

8 Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 23.

9 *James Hardie Industries*, above n 1, at [29].

10 *The Albazero* [1977] AC 774 (CA) at 807.

11 *Adams v Cape Industries plc* [1990] Ch 433 (CA) at 536. See also *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (CA) at 306, 312 and 316.

12 *Kuwait Asia Bank EC v National Mutual Nominees Ltd* [1990] 3 NZLR 513 (PC) at 532. See also *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2015] BCC 855 at 860.

is necessary to attach liability for negligence to a parent company.[13] The involvement of separate corporate entities prima facie suggests that a parent assumes no responsibility for its subsidiary's operations.[14] Something more is necessary to establish any parental liability.

The existence of this "something more" should not be conceptualised as lifting or piercing the corporate veil. Lifting or piercing the corporate veil is an exception to separate legal personality. Veil piercing is relevant as some courts frame a parent company's duty of care to those affected by its subsidiary's actions as piercing the corporate veil.[15] This approach should be avoided as veil piercing is an "unprincipled and arbitrary" doctrine,[16] occupying an unclear place in company law.[17]

The mainstream position that imposing a duty of care does not pierce the corporate veil is preferable.[18] As Day argues, liability for breach of duty respects corporate personality.[19] It skirts around the corporate veil rather than pierce it and treats the parent company the same as any other person who can be responsible for another's negligence. Warren argues that, though this may be doctrinally correct, a duty of care inevitably lessens the benefits of separate corporate personality by increasing the scope of a parent company's liability for its subsidiary's actions.[20] To an extent this is true, however it ignores the reality that a person can incur liabilities to a third party out of their relationship with another person. This is simply a consequence of personhood for companies.

Courts should also avoid assessing the "something more" as an issue of vicarious liability. Petrin suggests that addressing the issue through vicarious liability rather than a direct duty of care would avoid complex proximity and policy questions.[21]

The Court in *Heys v CSR Ltd* took this approach.[22] Rowland J considered the subsidiary employees sufficiently proximate to the parent company.[23] Proximity,

13 *James Hardie Industries*, above n 1, at [33].
14 William Day "Negligence and the corporate veil: Parent companies' duty of care to their subsidiary employees" [2014] LMCLQ 454 at 457.
15 See *United Canadian Malt Ltd v Outboard Marine Corp of Canada Ltd* (2000) 48 OR (3d) 352 (SC); and *Heys v CSR Ltd* [1988] WASC 236 at 218.
16 Jason Harris and Anil Hargovan "Cutting the Gordian Knot of Corporate Law: Revisiting Veil Piercing in Corporate Groups" (2011) 26 Aust Jnl of Corp Law 39 at 43. See also Stephen M Bainbridge "Abolishing Veil Piercing" (2001) 26 JCorpL 479 at 535.
17 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [80] per Lord Neuberger.
18 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111 at [69]; *CSR Ltd v Wren* (1997) 44 NSWLR 463 (NSWCA) at 485; *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 (NSWCA) at 583; and *James Hardie Industries*, above n 1, at [64].
19 Day, above n 14, at 457.
20 Marilyn Warren "Corporate structures, the veil and the role of the courts" [2016] MULR 657 at 684.
21 Petrin, above n 4, at 613.
22 *Heys*, above n 15, at 236.
23 At 218.

as Warren notes, was assessed through an agency framework.[24] An implicit agency agreement gave the parent company control of the actions at the relevant mine.[25] The Court considered the result the same whether defined in terms of agency or proximity.[26]

Subsequent Australian judgments avoid this vicarious liability approach.[27] They are correct to do so. Petrin acknowledges that attaching vicarious liability to a parent company in these circumstances risks interfering with company law.[28] A subsidiary company is not presumed to act as an agent of its parent company.[29] Even a wholly-owned subsidiary that shares directors with its parent is not its parent's agent.[30] Something more is necessary to make the parent vicariously liable. This likely engages similar control and proximity issues as Rowland J recognised,[31] but courts would not be guided by general tortious principles outlining where one party owes a duty of care for another party's actions. Making parent companies vicariously liable would make respecting the corporate veil more difficult.

III. The Approach to Recognising a Duty of Care in Parent-Subsidiary Relationships

This turns attention to how courts should recognise that "something more" in the parent-subsidiary relationship which justifies a duty of care. Existing judgments primarily emphasise the application of traditional duty formulae.[32] In particular, courts focus on the *Caparo Industries plc v Dickman*[33] proximity and policy inquiries.[34]

In contrast, the United Kingdom Supreme Court, in *Lungowe v Vedanta Resources plc* (*Lungowe*), recently refused to apply traditional duty formulae as the situation did not involve a novel duty.[35] Rather, the Court agreed with comments in *AAA v Unilever plc* that parent company liability is not a distinct category of negligence.[36] There is nothing special about the parent-subsidiary relationship and "the general

24 Warren, above n 20, at 678.
25 *Heys*, above n 15, at 216.
26 At 218.
27 Warren, above n 20, at 679.
28 Petrin, above n 4, at 613.
29 *Salomon v Salomon and Company Ltd* [1897] AC 22 (HL) at 43; and *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 at [138]–[139].
30 *Attorney-General v Equiticorp Industries Group Ltd (in stat man)* [1996] 1 NZLR 528 (CA).
31 *Heys*, above n 15, at 218.
32 See *Thompson*, above n 12, at [28]; *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528, [2018] 1 WLR 3575 [*Vedanta*] at [83]; *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191, [2018] Bus LR 1022 at [84]; and *James Hardie Industries*, above n 1, at [34]–[38].
33 *Caparo Industries plc v Dickman* [1990] UKHL 2, [1990] 2 AC 605.
34 See *Chandler*, above n 18, at [62] and *James Hardie Industries*, above n 1, at [38].
35 *Lungowe*, above n 2, at [56].
36 At [49], citing *AAA v Unilever plc* [2018] EWCA Civ 1532 at [36].

principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all".[37]

As a matter of general principle, A is under no duty to prevent damage caused by B to C or to C's property.[38] A may, however, owe C a duty of care for the actions of B in certain circumstances.[39] Where A is in a position of control over B and should have foreseen the likelihood of B causing harm to C if A failed to take reasonable care when exercising that control, A may owe C a duty of care.[40] Alternatively, A owes C a duty of care if they create a danger of harm which would not otherwise have existed.[41] Lastly, A may owe C a duty of care if A assumed responsibility to prevent harm to C which C relied upon.[42]

The United Kingdom Supreme Court's approach is preferable, given the preceding analysis of separate corporate personality. These cases invariably involve a claim that the parent company owes a duty of care to prevent the harm caused by its subsidiary. As the parent and subsidiary are separate legal personalities, this is clearly analogous to claims that A (the parent) owes C (the claimant) a duty of care to prevent harm caused by the actions of B (the subsidiary). Imposing such a duty involves the application of existing tortious principles rather than a novel duty issue. Of course, proximity and policy remain overarching inquiries, but these principles must guide those inquiries. These principled categories of duty should form the basis from which courts approach this issue.

The United Kingdom Supreme Court expressed reluctance to shoehorn all cases of parent company liability into specific categories.[43] The Court's concerns may be correct with respect to the efficacy of existing categories which tend to be narrow and fact-specific. The Court of Appeal, in *Lungowe v Vedanta Resources plc* (*Vedanta*), identified a duty of care where a parent takes direct responsibility for devising the impugned health and safety policy.[44] The same Court, in *Unilever,* identified a duty where a parent gives relevant risk management advice to its subsidiary.[45] It is difficult to fit novel parent-subsidiary relationships into these fact-specific categories (health and safety policies or risk management advice). For example, where mandatory company policies fit within existing categories, as acts controlling

37 At [54].
38 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18, [1987] AC 241 at 271 per Lord Goff.
39 Stelios Tofaris and Sandy Steel "Negligence liability for omissions and the police" [2016] CLJ 128 at 128.
40 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [99].
41 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC at [37].
42 *Michael*, above n 40, at [100].
43 *Lungowe*, above n 2, at [51].
44 *Vedanta*, above n 32, at [83].
45 *Unilever*, above n 36, at [37].

the subsidiary or taking direct responsibility for devising health and safety policy, or simply giving advice about managing a particular risk, is unclear.

The more generalised *James Hardie Industries* categories solve some of these difficulties.[46] The Court considered a duty may be owed where the parent company:

(a) takes over the running of the relevant part of the subsidiary's business;

(b) has superior knowledge of the relevant aspect of the subsidiary's business which the subsidiary relied upon in circumstances where the parent knew or ought to have foreseen the alleged deficiency in process or product; and

(c) takes responsibility for the policy or advice linked to the wrongful act or omission.[47]

These categories, however, do not capture exactly why a duty of care is imposed. This makes them difficult to apply to novel parent-subsidiary relationships. It is unclear what causes a parent company to take responsibility for the policy or advice, or any subsidiary operation for that matter. Returning to the general categories of where A owes a duty to C to prevent damage caused by B makes recognising the parent's duty of care easier. These categories deal with the exact three-way relationship between claimant, immediate tortfeasor, and defendant in question. This allows courts to draw on a wider body of related caselaw when dealing with novel parent-subsidiary situations.

Moreover, principle-derived categories will reduce the courts' tendency to overly rely on fitting new duty issues into the *Chandler* indicia.[48] Lord Briggs SCJ identified this practice as preventing courts from identifying the legal basis justifying a parent's duty of care.[49] The *Chandler* indicia describe only one particular circumstance where a duty of care exists (assumption of responsibility through induced reliance).[50] It is therefore necessary to identify the exact reason why a duty of care is argued to arise (control, assumption of responsibility or contribution to the risk of harm) and compare the facts to other cases of that nature.

This shows that issues with existing categories do not justify abandoning the idea of categories of duties. Specific categories may be useful for analytical purposes,[51] and that is especially so for principled categories. Courts must emphasise principled categories of circumstances where A owes a duty to prevent harm by B to C when dealing with parent-subsidiary cases.

46 *James Hardie Industries*, above n 1.
47 At [65].
48 *Chandler*, above n 18, at [80].
49 *Lungowe*, above n 2, at [56].
50 See Part IV Sub-Part A.
51 *Lungowe*, above n 2, at [51].

IV. In what Circumstances does a Duty of Care Arise?

By drawing together company law principles, general tortious principles governing where A owes C a duty to prevent harm caused by B, and existing caselaw, this paper argues that a parent may owe a duty of care for its subsidiary's actions in four circumstances. These are:

(a) where the parent exercises material control over the relevant subsidiary operation;

(b) where there are systemic errors in group policies and advice;

(c) where the subsidiary's reliance on the parent means the parent assumes responsibility for policies, advice or subsidiary operations; and

(d) where the parent assumes responsibility for subsidiary operations directly to claimants.

A. Exercising Material Control over the Subsidiary

Courts consistently recognise a duty of care where a parent company manages the relevant part of its subsidiary's business.[52] The conceptual basis for a duty of care in these circumstances is control. The Courts in both *Chandler*[53] and *Lungowe*[54] expressly recognised this applies control principles established in *Home Office v Dorset Yacht Co Ltd*.[55] The determinative element of the parent-subsidiary relationship is whether a relationship of control exists.

Assessing the defendant's liability for the actions of a third party ostensibly under their control requires analysis of two relationships. The first relationship is that between the defendant and immediate wrongdoer.[56] The second is that between the defendant and the claimant.[57]

1 Relationship between claimant and parent company

The relationship between the claimant and parent company is not the determinative issue in parent-subsidiary cases. For the parent to owe a duty of care, there must be a special relationship between the parent and claimant making

52 *James Hardie Industries*, above n 1, at [65]; and *Vedanta*, above n 32, at [83].
53 *Chandler*, above n 18, at [65].
54 *Lungowe*, above n 2, at [54].
55 *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, [1970] AC 1004.
56 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [82] per Tipping J.
57 At [85] per Tipping J.

a duty fair, just, and reasonable.[58] That special relationship requires an assessment of "the nature of the risk which the immediate wrongdoer posed" to the claimant.[59] In other words, the wrongdoer's behaviour must pose a "distinctive added risk" to the claimant.[60]

Here, claimants are those directly proximate to the subsidiary company facing a distinctive added risk compared to the general public. This is clearly the case with claims from a subsidiary employee,[61] or the purchasers of a particular good manufactured by the subsidiary.[62] The main issue is the parent-subsidiary relationship rather than the parent-claimant relationship.

2 Relationship between subsidiary and parent company

The key issue is what degree of parental control of the subsidiary creates a duty of care. The general approach to assessing the relationship between the defendant and immediate wrongdoer focusses on the concept of control. As Tipping J put the question, "[d]id the defendant have sufficient power and ability to exercise the necessary control over the immediate wrongdoer"?[63]

(a) Overt control

Existing caselaw suggests a parent company only sufficiently controls its subsidiary where it actually controls the relevant subsidiary operation.

Australian courts require control "in the sense that it must bear upon events which affect the particular conduct which causes the breach" of duty.[64] This exists where parent company employees supervise or direct the relevant operation. In *Heys v CSR Ltd*,[65] CSR owed a duty of care to prevent asbestos exposure because CSR employees responsible to a CSR manager controlled the containment of asbestos dust. CSR owed similar duties of care where management staff in charge of relevant subsidiary operations were CSR employees,[66] and where the subsidiary appointed CSR as its managing agent "with full and absolute authority" to manage its business.[67]

New Zealand and Canadian courts recognise duties in similar circumstances. In *United Canadian Malt Ltd v Outboard Marine Corp of Canada Ltd*, a parent company arguably owed a duty of care to prevent contamination to properties neighbouring

58 At [85] per Tipping J.
59 At [85] per Tipping J.
60 *Dorset Yacht Co*, above n 55, at 1070 per Lord Diplock.
61 See for example *Chandler*, above n 18.
62 See for example *James Hardie Industries*, above n 1.
63 *Couch*, above n 56, at [82] per Tipping J.
64 *Heys*, above n 15, at 215.
65 At 215.
66 *Wren*, above n 18, at 484; *Wren v CSR Ltd* (1997) 15 NSWCCR 45 at 52.
67 *CSR Ltd v Young* (1998) Aust Torts Reports ¶81-468 (NSWCA) at 64,952–3.

the subsidiary.[68] The parent "effectively controlled" the subsidiary as it managed, directed and controlled the property's decontamination.[69] In *James Hardie Industries*, the Court held a parent owes a duty of care where it takes over the running of the relevant part of the subsidiary's business.[70] This mirrors the Australian approach.

Arguably, English courts take a wider approach to control-based duties. This possibility stems from Arden LJ's four *Chandler* indicia of where a duty of care may arise.[71] She considered it sufficient that "the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues",[72] even if the parent did not intervene in the allegedly negligent subsidiary operation.

This would make a parent company liable for a particular subsidiary operation, even where the parent did not control the operation.[73] The *Chandler* indicia's focus on what the parent company "knew or ought to have known", Sanger argues, suggests the ability to control rather than actual control is determinative.[74] This would be inconsistent with the actual control approach in Australia, Canada, and New Zealand.

Warren argues that the different outcomes in *Chandler* and *James Hardie & Co Pty Ltd v Hall*[75] illustrate this inconsistency.[76] A duty of care existed in *Chandler*. By contrast, the parent owed no duty in *Hall*.[77] The Court of first instance recognised a duty of care as the holding company's board issued recommendations and instructions that the subsidiary acted upon.[78] On appeal, the New South Wales Court of Appeal held no duty of care existed.[79] It considered imposing a duty would implicitly lift the corporate veil which is only justified where the subsidiary is a mere façade.[80] The case was distinguished from the duty recognised in *CSR Ltd v Wren*,[81] where parent company employees controlled the system of work.[82] Warren argues the cases are factually similar: in both, the parent was in the practice of issuing instructions to their subsidiary, controlled capital expenditure, required the

68 *United Canadian Malt*, above n 15, at [24].
69 At [23].
70 *James Hardie Industries*, above n 1, at [65].
71 *Chandler*, above n 18.
72 At [80].
73 Xue Feng "Corporate Liability Towards Tort Victims in the Personal Injury Context" (PhD Dissertation, Queen Mary University of London, 2017) at 124.
74 Andrew Sanger "Crossing the corporate veil: The duty of care owed by a parent company to the employees of its subsidiary" [2012] CLJ 478 at 480.
75 *Hall*, above n 18.
76 Warren, above n 20, at 683.
77 *Hall*, above n 18.
78 At 559.
79 At 584.
80 At 581 and 584.
81 *Wren*, above n 18.
82 *Hall*, above n 18, at 583.

subsidiary to manufacture products according to parent company specifications, and had superior knowledge of asbestos health risks.[83]

Suggestions that English law takes a wider approach than other jurisdictions are incorrect. Firstly, the *Chandler* indicia do not relate to control. Strictly speaking, the parent company (Cape) owed a duty of care because of the subsidiary's (Cape Products) reliance on its superior knowledge, rather than Cape's exercise of control.[84] The *Chandler* indicia and attendant ideas of a capacity to control should be interpreted as restricted to special knowledge cases (discussed later). They do not apply where the only factor in the parent-subsidiary relationship is control.

Secondly, the *Chandler* and *Hall* judgments are not clearly inconsistent. Warren ignores that the *Hall* judgment is itself problematic. It is difficult to reconcile with *CSR Ltd v Wren* and seems to turn on a different assessment of the facts than in the trial Court, but those different factual assessments are not clearly explained.[85] Any inconsistency between the outcomes in *Chandler* and *Hall* is poor evidence of differing English and Australian approaches.

More importantly, Cape's control over the relevant subsidiary operation justifies a duty of care in *Chandler* on the basis of actual control. In *Chandler*, Cape owed a Cape Products employee a duty of care to prevent mesothelioma caused by the inhalation of asbestos in the Cowley Works factory.[86] Though Cape did not control the implementation of health and safety measures at the Cowley Works factory, it controlled Cape Products' purchase of the Cowley Works plant that Cape previously operated.[87] The negligence in question was not a failure to install or maintain dust extraction machines. Rather, the factory's open-sided design meant it suffered "systemic" health and safety issues.[88] Cape, therefore, controlled Cape Products' purchase of the systemically flawed factory responsible for the plaintiff's mesothelioma. Cape actually controlled the negligent aspect of the operation.

In common law jurisdictions, therefore, direct parental control over the allegedly negligent subsidiary operation creates a duty of care. Capacity to control, or even actual control over unrelated operations, does not create a duty of care.

(b) Exerting control through mandatory company policies

Parent companies increasingly control subsidiaries through mandatory group policies. There is an emerging consensus that a parent may be liable for deficiencies

83 Warren, above n 20, at 683.
84 *Chandler*, above n 18, at [78].
85 *James Hardie Industries*, above n 1, at [45], citing *Wren*, above n 18.
86 *Chandler*, above n 18.
87 At [75].
88 At [74].

in mandatory policies it imposes on its subsidiary.[89] For example, where a parent outlines inadequate health and safety policies that, when implemented by its subsidiary, lead to a subsidiary employee being injured, the parent may owe that employee a duty of care.

No duty of care should arise where a subsidiary voluntarily adopts parent company policies. Where a parent company outlines policies for subsidiaries to implement voluntarily, it does not materially control the subsidiary's operations. Rather, this arrangement appears more analogous to merely co-ordinating operations between group companies which does not support a duty of care.[90]

A duty of care may exist where a parent company makes it mandatory for the subsidiary to adopt a policy. English courts hold that a duty of care only arises where the parent enforces the implementation of mandatory policies by its subsidiary.[91] Mandatory policies should be assessed as an issue of control, rather than one of assumed responsibilities, as the Court appears to do in *James Hardie Industries*.[92] The Court, in *Okpabi v Royal Dutch Shell plc,* correctly distinguished a parent that merely issues mandatory policies and a parent that materially controls its subsidiary's operations.[93] Merely issuing mandatory policies cannot amount to control of the subsidiary's operations sufficient to create a duty of care.[94] This distinction and the basis for such a duty is clearly control.

Group policies may result in a duty of care, therefore, "if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries".[95] In *Lungowe*, the United Kingdom Supreme Court held it arguable that Vedanta (the parent) owed a duty of care for the environmental damage caused by its mining subsidiary KCM.[96] Vedanta provided detailed health and safety and environmental training to KCM. The implementation of policies through training, monitoring, and enforcement meant a duty of care was arguable.[97]

In contrast, it was not arguable in *Okpabi* that Royal Dutch Shell (RDS) owed a duty to parties affected by an oil leak from a pipeline operated by its subsidiary SPDC as part of a joint venture.[98] RDS issued mandatory policies to SPDC as part of its Shell HSSE & SP Control Framework. As Simon LJ reasoned, though the Control

89 See *James Hardie Industries*, above n 1; *Lungowe*, above n 2; and *Okpabi*, above n 32.
90 *Thompson*, above n 12, at [36].
91 *Okpabi*, above n 32.
92 *James Hardie Industries*, above n 1, at [65(c)] and [92(c)].
93 *Okpabi*, above n 32, at [89] per Simon LJ.
94 At [89] per Simon LJ, [205] per Sir Geoffrey Vos C, and [140] and [161] per Sales LJ.
95 *Lungowe*, above n 2, at [53].
96 *Lungowe*, above n 2.
97 At [61].
98 *Okpabi*, above n 32.

Framework indicated the parent may review the effectiveness of its policies across the Shell group, it did not exercise any control over them.[99] As Sir Geoffrey Vos C put it, RDS merely required a system of supervision be instituted but let SPDC operate that system.[100] In dissent, Sales LJ agreed enforcement was required,[101] but considered it reasonably arguable that RDS exercised control.

The key distinction between these cases is that the parent company only actively controlled the implementation of mandatory policies in *Lungowe*; in *Okpabi*, the parent left implementation and enforcement to the subsidiary. Imposing a duty of care on this basis is consistent with those cases dealing with more overt parent company control. Involvement in implementing company policies is equivalent to directly controlling a subsidiary operation by, for example, having parent company staff in charge of it.

This means factors considered to support the existence or non-existence of a duty in *Vedanta*[102] and *Okpabi* should be ignored.[103] These include:

(a) whether the parent is required by a management and shareholders' agreement to provide ancillary services to the subsidiary; and

(b) whether the parent company provides significant financial support to the subsidiary.[104]

Parental investment or control of ancillary but unrelated operations does not show control of the operation or policy subject to the claim. They are irrelevant.

There is some suggestion that a parent may owe a duty of care for mandatory but unenforced policies. The Court of Appeal in *James Hardie Industries* noted that *Okpabi* limited liability to enforced mandatory policies, but was "not prepared to put the matter so narrowly at this point".[105] The United Kingdom Supreme Court was not persuaded that a parent could never incur a duty of care for group policies it simply expected each subsidiary to comply with.[106] As will be shown, however, these comments refer to duties of care founded on fundamentally different bases compared to control.

Regardless, it is inconsistent with overt control cases for a duty of care to arise from unenforced or unsupervised mandatory policies. A subsidiary may be likely to follow mandatory policies as a matter of course. Equally, however, a company may follow published industry standards as a matter of course. As Sales LJ correctly

99 At [124] per Simon LJ.
100 At [205] per Sir Geoffrey Vos C.
101 At [140] per Sales LJ.
102 *Vedanta*, above n 32.
103 *Okpabi*, above n 32.
104 *Vedanta*, above n 32, at [84]; and *Okpabi*, above n 32, at [197] per Sir Geoffrey Vos C.
105 *James Hardie Industries*, above n 1, at [66].
106 *Lungowe*, above n 2, at [52].

notes, that does not mean the publisher of those standards controls the company's operations.[107] This is no different in the parent-subsidiary context. Like voluntary policies, mandatory policies left to a subsidiary to implement are more analogous to the co-ordination of group operations than actual control. This does not support a duty of care.[108] Enforcement and supervision are necessary for mandatory policies to create a duty of care on the basis of actual control applied in other parent-subsidiary control cases.

(c) Evaluation

This turns attention to the validity of requiring actual control. Requiring actual control appears inconsistent with Tipping J's summary of general principle in *Couch v Attorney-General* which suggests that the power to control creates proximity.[109] The broader interpretation of *Chandler* focussing on the capacity to control, as previously rejected, appears prima facie consistent with this. On this basis, Petrin argues that traditional control principles cannot apply to the parent-subsidiary relationship, given that a parent company is always able to control their subsidiary.[110] Applying general tortious principles would mean a parent is always liable for its subsidiary's negligence.

Petrin's focus on proximity, however, ignores half of the duty issue. Basic principle suggests that the parent may be proximate where it can control its subsidiary, but that ignores the role policy considerations play in the duty issue. Policy considerations justifiably limit a duty of care to where the parent exercises actual control.

Some policy considerations do favour a broader conception of what level of parental control or intervention creates a duty of care. Requiring actual control, and particularly the supervision of group policies, for liability to flow incentivises parent companies to avoid supervising subsidiary operations.[111] A hands-off approach by parent companies to human rights, health and safety, and environmental protection may be more likely as they seek to avoid possible liability for negligence. Critics argue this is contrary to international agreements and norms including the *UN Guiding*

107 *Okpabi*, above n 32, at [140] per Sales LJ.
108 *Thompson*, above n 12, at [36].
109 *Couch*, above n 56, at [82] per Tipping J.
110 Petrin, above n 4, at 613–614.
111 Doug Cassel "*Vedanta v Lungowe* Symposium: Beyond Vedanta–Reconciling Tort Law with International Human Rights Norms" (19 April 2019) Opinio Juris <https://opiniojuris.org>; and Anna Neistat "*Okpabi and others vs Royal Dutch Shell plc and another* UKSC 2018/0068: Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International" (26 April 2018) Amnesty International <www.amnesty.org> at 4.

Principles on Business and Human Rights[112] and *OECD Due Diligence Guidance for Responsible Business Conduct*,[113] which require active parent company supervision.[114]

On balance, however, policy considerations favour a stricter conception of control. First, any broader conception of control would violate the fundamental company law principle of separate legal personality. It is wrong for a parent company to owe a duty of care in these circumstances because, as Petrin argues, a parent is always able to control their subsidiary.[115] Feng argues that a duty should arise where the parent can intervene and the subsidiary will bow to it.[116] This, however, describes any parent-subsidiary relationship where the parent has a majority shareholding. To impose a duty of care would implicitly attach the notion of control, and consequent liability, to the possession of a majority shareholding. This opens the door to non-company majority shareholders being liable for a company's actions,[117] which violates the fundamental principle of separate corporate personality. Control, therefore, must refer to actual control of the operation connected to the claim, rather than control of other aspects of the subsidiary's business. The *Lungowe* judgment, therefore, correctly reaffirmed that the parent's mere ability to control its subsidiary is irrelevant.[118] The focus must instead be on whether the parent in fact controlled the subsidiary's actions.

Secondly, critics likely overstate concerns that parent companies cannot be held to account under a stricter interpretation of requisite parental control. Increasingly, regulatory, commercial and consumer environments demand parent companies implement human rights and environmental protection policies, while appropriately supervising subsidiary compliance. The aforementioned international guidelines are examples of this.[119] Quite simply, a hands-off approach is less commercially viable despite any advantages in avoiding potential liability for negligence.

Moreover, arguments that capacity to control should suffice ignore the other circumstances in which a parent company owes a duty of care. As Lord Briggs SCJ noted, even where a parent company does not enforce group policies or intervene more overtly in an operation, a duty of care may arise.[120] That duty of care is simply

112 *Guiding Principles on Business and Human Rights* UN Doc HR/PUB/11/04 (2011).
113 *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018).
114 Neistat, above n 111, at 4.
115 Petrin, above n 4, at 613–614.
116 Feng, above n 73, at 136.
117 Petrin, above n 4, at 615.
118 *Lungowe*, above n 2, at [49].
119 Robert McCorquodale "*Vedanta v Lungowe* Symposium: Duty of Care of Parent Companies" (18 April 2019) Opinio Juris <https://opiniojuris.org>; and Anil Yilmaz-Vastardis "*Vedanta v Lungowe* Symposium: Potential Implications of the UKSC's Decision for Supply Chain Relationships" (23 April 2019) Opinio Juris <https://opiniojuris.org>.
120 *Lungowe*, above n 2, at [52].

not based on A's control of B but on other general exceptions to the rule that A is not liable to C for damage caused by B.

Therefore, though a parent's ability to control its subsidiary may suggest a proximate relationship exists, it is likely only fair, just and reasonable to impose a duty of care where the parent exercises control over the relevant subsidiary operation. This approach preserves both the spirit of general tortious principles concerning control as well as fundamental company law principles.

B. Systemic Errors in Group Policies and Advice

Attention now turns to those duties of care arising where the parent company does not actually control the relevant subsidiary operation or policy. The first such duty is owed by a parent company to those harmed by systemic errors in policies and advice acted on by the subsidiary. This embraces Lord Briggs SCJ's obiter suggestion that a duty of care may exist in the absence of control or supervision of subsidiary policies where the relevant policy or advice is systemically flawed.[121] As Lord Briggs SCJ explained, group guidelines designed to minimise health or environmental impacts of inherently risky activities may contain systemic errors that harm third parties when implemented by the subsidiary as a matter of course.[122]

This proposition is consistent with the general principle that A may owe C a duty of care to prevent damage by B where A created that danger of harm which would not otherwise have existed.[123] The duty of care does not depend on any control over, or reliance by, the subsidiary company (B).

Systemically flawed group policies must be distinguished from merely ineffective policies. Lord Briggs SCJ referenced the systemically flawed open-sided asbestos factory in *Chandler*.[124] The production process, rather than the lack of sufficient health and safety regulations, caused the plaintiff's sickness. By requiring such a systemically flawed production process, Cape actively created the risk of harm to the claimant. In contrast, where a parent company simply mandates ineffective health and safety policies that do not adequately mitigate an external risk of harm (for example, the inherent risk of asbestos-related disease), the parent fails to mitigate, but does not create, the risk of harm.

It is irrelevant that the parent does not control its subsidiary's adoption of the systemically flawed policy. A social host may owe an intoxicated guest a duty of care

121 At [52].
122 At [52].
123 *Robinson*, above n 41, at [37].
124 *Lungowe*, above n 2, at [52], citing *Chandler*, above n 18.

if the social host contributes significantly to his or her intoxication.[125] This is despite the guest's, much like the subsidiary's, autonomy.

A duty of this type is significant as it is likely easier to prove than duties based on control or assumed responsibilities. In *James Hardie Industries*,[126] the latent defect in the parent company's product specifications would likely create a duty of care without needing to prove the parent controlled production.

C. Assumption of Responsibility where the Subsidiary Relies on the Parent Company

Even where a parent company's policies or advice are not systemically flawed, the parent may owe a duty of care to those harmed by policies or advice it assumes responsibility for to its subsidiary. Alternatively, this duty may arise where a parent company assumes responsibility to manage particular subsidiary operations like health and safety (which the parent then omits to manage, otherwise a duty of care would be owed on the basis of actual control). Though this assumption of responsibility is to the subsidiary, it should extend to third-party claimants. This means the parent company would owe them a duty of care.

1. Assumptions of responsibility generally

Assumption of responsibility is a troublesome concept. There are conflicting theories as to its relationship with traditional duty questions of proximity and policy.[127] For this reason, Petrin criticises reference to an assumption of responsibility in *Chandler*[128] as collapsing assumption of responsibility, proximity, control and fairness issues into one pragmatic inquiry.[129]

In parent–subsidiary cases, however, assumption of responsibility acts as a complement to, rather than substitute for, proximity and policy enquiries. Concepts of proximity, policy and assumed responsibility "tend to run together".[130] Whether the parent assumes responsibility is not a separate inquiry. This is consistent with a finding of assumption of responsibility being a conclusion rather than an argument.[131] Reference to an assumption of responsibility should, therefore, be understood as a useful label for the type of special relationship creating a duty of care.[132]

125 Childs v Desormeaux 2006 SCC 18, [2006] 1 SCR 643 at [44].
126 *James Hardie Industries*, above n 1.
127 Day, above n 14, at 456; and Stephen Todd "Professional negligence in 2018: The year in review" (2019) 35 PN 6 at 15.
128 *Chandler*, above n 18, at [62].
129 Petrin, above n 4, at 612.
130 *Okpabi*, above n 32, at [144] per Sales LJ. See also *Chandler*, above n 18, at [62].
131 Todd, above n 127, at 15.
132 At 17.

2. Deemed assumption of responsibility to the subsidiary

In existing cases, parent companies owe a duty of care where they assume responsibility for advice or policies given to a subsidiary, or for managing a subsidiary operation. As the Court of Appeal in *James Hardie Industries* stated, a parent may owe a duty of care:[133]

> … where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the parent knew or ought to have foreseen the alleged deficiency in process or product.

This draws upon the four indicia outlined by Arden LJ in *Chandler* that a parent may owe a duty of care where:[134]

> … (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection … The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.

This is a deemed assumption of responsibility. Deemed assumption of responsibility refers to circumstances where the law dictates responsibility is assumed,[135] rather than a defendant assuming it.[136] Broadly, the law recognises a special relationship of reliance justifies finding an assumption of responsibility. This may occur where the defendant foresees or ought to foresee the plaintiff would reasonably place reliance on their advice,[137] or where the defendant induces the claimant to rely on them carrying out an act.[138]

133 *James Hardie Industries*, above n 1, at [65(b)].
134 *Chandler*, above n 18, at [80].
135 *Attorney-General v Carter* [2003] 2 NZLR 160 at [23].
136 *Michael*, above n 40, at [100].
137 Todd, above n 127, at 17.
138 *Stovin v Wise* [1996] AC 923 (HL) at 944.

A parent company, therefore, is likely deemed to assume responsibility where it is foreseeable the subsidiary will reasonably rely upon its policies and advice, or management of a particular subsidiary operation (like health and safety).

In the above passages, both the *James Hardie Industries* and *Chandler* judgments correctly recognise reliance is foreseeable where the parent company has special knowledge or experience upon which the subsidiary will rely. Imposing a duty on a parent with special knowledge or experience is consistent with assumptions of responsibility for both misstatements,[139] and professional services.[140] In assessing whether the parent-subsidiary relationship makes reasonable reliance foreseeable, whether a parent's knowledge and expertise makes them well placed to protect the claimant is likely significant.[141]

Whether the parent and subsidiary carry on the same business may be relevant as the *Chandler* indicia suggest,[142] but it should not be treated as determinative. In *James Hardie Industries*, for example, both the parent and subsidiary manufactured building products.[143] The parent had special knowledge due to its centralised development laboratories.[144]

Superior knowledge may also exist even if the parent and subsidiary do not carry on the same business. In *Unilever*, the claimants argued the parent (Unilever, a consumer goods business) gained superior knowledge of the risks of election violence in Kenya from a risk consultancy report.[145] Though too general to constitute special knowledge,[146] a more specific report may have given Unilever superior knowledge of potential risks to its subsidiary's (UTKL) workforce. Placing undue focus on the parent's business may turn the inquiry into a binary question of whether the parent and subsidiary carry on the same business. This risks company groups structuring themselves to easily escape liability.[147]

The existence of special knowledge, however, should not automatically mean a parent ought to foresee its subsidiary's reliance on it. Courts must consider divisions of responsibility between parent and subsidiary. In *Unilever*, Unilever required UTKL to devise a risk management policy.[148] UTKL clearly understood it was responsible for the contents of that policy. UTKL framed the policy at its own operational level using its own personnel experience to manage local risks.[149] Even

139 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at 502–503 per Lord Morris.
140 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) at 180 per Lord Goff.
141 *Vedanta*, above n 32, at [83] per Simon LJ.
142 *Chandler*, above n 18, at [80].
143 *James Hardie Industries*, above n 1, at [84].
144 At [87] and [89].
145 *Unilever*, above n 36, at [14].
146 At [33].
147 Day, above n 14, at 455.
148 *Unilever*, above n 36, at [29] and [40].
149 At [30].

if Unilever possessed special knowledge, it does not seem foreseeable that UTKL would reasonably rely on Unilever's special expertise given the group policies clearly made risk management a subsidiary responsibility. This acts somewhat like a disclaimer in cases of misstatements.[150] Whether this disclaimer of responsibility is effective likely turns on whether it means the subsidiary's reasonable reliance was not foreseeable.

The focus on the subsidiary's reasonable reliance in *James Hardie Industries* suggests it is determinative as to whether a parent assumes responsibility to its subsidiary.[151] This is incorrect. In his critique of Lord Wilson SCJ's adoption of this approach in *NRAM Ltd v Steel*,[152] Todd emphasises that reasonable reliance goes to foreseeability but cannot displace broader assessments of proximity and policy factors.[153] This includes the closeness of the relationship and the purpose of the advice or undertaking.[154] The same approach must apply to parent–subsidiary cases.

Where a parent provides a subsidiary with company policies or advice created with its superior expertise, this special relationship is relatively easy to recognise by analogy to the assumption of responsibility for negligent words or advice more generally. The parent uses its special knowledge to formulate policy or advice for the purpose of the subsidiary relying on it and enacting it. For example, health and safety policies are intended to be enacted by a subsidiary. The subsidiary's reliance on the parent's special knowledge when enacting these policies or advice corresponds to the parent's purpose in supplying them.

This approach explains the majority's rejection of a duty of care in *Okpabi*.[155] In *Okpabi*, the relevant policies were considered high-level guidance based on the centralised accumulation of a wide range of expertise.[156] Essentially, the parent created the group policies for the purpose of providing subsidiaries high-level guidance rather than specific operational guidance. The parent, therefore, did not assume responsibility for a particular subsidiary relying on the high-level policies for a different purpose (using them as specific operational policies).

This inquiry should focus on the content and purpose of group policies, rather than the number of subsidiaries to which they apply. Sir Geoffrey Vos C suggests a parent is less likely to assume responsibility for group policies applying to all subsidiaries, as it likely established a network of subsidiaries to avoid assuming responsibility for their actions.[157] This reasoning is flawed. Whether a parent intends

150 See *Hedley Byrne*, above n 139, at 504 per Lord Morris.
151 *James Hardie Industries*, above n 1, at [65].
152 *NRAM Ltd v Steel* [2018] UKSC 13, [2018] 1 WLR 1190.
153 Todd, above n 127, at 14–15.
154 *Caparo Industries*, above n 33, at 638 per Lord Oliver. See Todd, above n 127, at 14–15 and 17.
155 *Okpabi*, above n 32.
156 At [123] per Simon LJ and [198] per Sir Geoffrey Vos C.
157 *Okpabi*, above n 32, at [195]–[196] per Sir Geoffrey Vos C.

to assume responsibility is irrelevant to whether the law deems responsibility assumed.[158] If every subsidiary reasonably relies on the parent's special expertise for the purposes the parent company created the policy, each subsidiary seems sufficiently proximate to its parent for that parent to have assumed responsibility for that policy to each of them.

Defining what parent-subsidiary relationship is sufficiently close for a parent to assume responsibility for managing a subsidiary operation, which it then omits to manage, is more difficult.

The *Chandler* indicia suggest that a pattern of parental intervention suffices. This is correct. Where a parent with special knowledge is in the practice of intervening in subsidiary affairs, it induces that subsidiary into expecting its parent to intervene and apply that special knowledge where necessary.

Even in the absence of earlier intervention, the division of responsibility and expertise between parent and subsidiary may create a sufficiently close parent-subsidiary relationship. In the *Chandler* example, even if Cape did not previously intervene in Cape Products' operations, its employment of a group medical researcher would still give it superior knowledge of asbestos-related health issues.[159] By structuring group operations so that Cape carried out asbestos research for the group, Cape induced Cape Products to rely on it to formulate necessary health and safety procedures with that superior knowledge. The parent-subsidiary relationship deprived the subsidiary of superior expertise it may otherwise have sought to gain. Gaining that expertise was a task instead allocated to the parent. This is similar to the centralisation of product research by a parent company in *James Hardie Industries*.[160] The allocation of tasks between parent and subsidiary can create a sufficiently close relationship for the parent to assume responsibility for a particular subsidiary operation even where there is no pattern of previous interventions.

3. Voluntary assumption of responsibility to the subsidiary

Alternatively, a defendant may expressly and voluntarily assume responsibility for a task where they undertake to exercise reasonable care when performing a task in a manner analogous to, but short of, a contract.[161]

A parent company may voluntarily assume responsibility for a specific subsidiary operation. Lord Briggs SCJ suggests that a parent may incur a duty of care where it holds itself out as exercising a degree of supervision or control over its

158 *Michael*, above n 40, at [100].
159 *Chandler*, above n 18.
160 *James Hardie Industries*, above n 1.
161 *Carter*, above n 135, at [25].

subsidiary in published materials, even if not exercising that control.[162] For example, group governance frameworks may state the parent company is responsible for monitoring and supervising health and safety procedures. Responsibility is not assumed because the parent requires compliance with these policies as is suggested in *James Hardie Industries*.[163] Rather, the parent ought to foresee that the subsidiary will rely on the undertaking of responsibility in the governance frameworks, even if the parent company has no special expertise. Moreover, this framework induces the particular subsidiary to rely on the parent creating a sufficiently close relationship. There is clearly scope to recognise an assumption of responsibility by parent companies beyond existing "special knowledge" cases recognised by the courts.

4. Reliance by the subsidiary

Where a party assumes responsibility for a task, they generally only owe a duty of care to those who actually reasonably rely upon that undertaking.[164] Petrin argues that the Court in *Chandler* failed to inquire whether the employee or subsidiary actually reasonably relied upon the parent.[165] Rather, *Chandler* suggests focus should be on whether the parent is in the practice of intervening in subsidiary operations.[166] This suggests a form of inferred reliance: where a parent possesses special knowledge and is in the practice of intervening in its subsidiary's affairs, reliance by the subsidiary is inferred.

Petrin argues inferring reliance risks making a parent company liable where it routinely instructs its subsidiary in ancillary matters (like funding), even though such instructions are unrelated to the allegedly negligent operation (like health and safety procedures).[167]

Petrin and the Court in *James Hardie Industries* correctly reject notions of inferred reliance in favour of proof of actual reliance.[168] This point can be illustrated using the *Unilever* example previously discussed.[169] Even if Unilever had relevant superior knowledge and was in the practice of intervening in UTKL's financial matters, it is clearly wrong to assume, as the *Chandler* indicia do, that Unilever's hypothetical superior knowledge and previous interventions would make UTKL rely on it. UTKL understood the very opposite to be true. Proof the subsidiary reasonably relies on the parent company is necessary.

162 *Lungowe*, above n 2, at [53].
163 *James Hardie Industries*, above n 1, at [65(c)] and [92(c)].
164 *Henderson*, above n 140, at 186 per Lord Goff.
165 Petrin, above n 4, at 617.
166 At 618.
167 At 618.
168 *James Hardie Industries*, above n 1, at [65].
169 *Unilever*, above n 37.

5. Extending the subsidiary's reliance to the claimant

This assumption of responsibility is made to, and relied upon by, the subsidiary rather than the claimant. To impose a duty of care, therefore, the parent's assumption of responsibility and subsidiary's reliance on it must extend to cover the claimant. Petrin criticises the application of "derivative reliance" in this type of claim.[170] Derivative reliance, he argues, is rarely accepted and was previously limited to contractual or fiduciary relationships.[171] The key example is *White v Jones*, where a lawyer who undertook to complete his client's will owed the will maker's beneficiaries a duty of care.[172]

Petrin is correct that the Court in *Chandler* did not clearly recognise nor justify this application of the *White v Jones* approach. Nor have subsequent courts. Though this nonjustification is problematic, it can be argued that the extension of derivative reliance to parent-subsidiary cases is supportable. It can be hard to predict where courts will adopt this derivative reliance,[173] but the same justifications as in *White v Jones* suggest a parent company owes a duty of care to a claimant harmed by the subsidiary's reliance on its parent.

The first justification is the special relationship between the parent company and claimant. In *White v Jones*, Lord Browne-Wilkinson emphasised an assumption of responsibility may exist in the case of a special relationship short of a fiduciary relationship.[174] Though the beneficiaries did not rely on the solicitor's actions, the solicitor knew that their economic welfare depended on his actions.[175]

With regards to a parent company-claimant situation, the parent assumes responsibility over a particular aspect of the subsidiary's operations (for example, health and safety procedures). There is clear proximity to the claimant, who forms part of the identifiable class of people that the policy or advice is intended to prevent harm to (in the context of health and safety procedures protecting claimant employees,[176] or environmental policies preventing harm to neighbouring land owners).[177] The same is true of those who could be harmed by failing to carry out an operation responsibility was assumed over (for example, employees injured by a failure to create health and safety procedures). Though the claimant does not rely on the parent company's actions, he or she knows their welfare depends on

170 Petrin, above n 4, at 617.
171 At 617; and WVH Rogers *Winfield & Jolowicz on Tort* (18th ed, Sweet & Maxwell, London, 2010) at 213–218.
172 *White v Jones* [1995] 2 AC 207 (HL).
173 Sebastian Allen "*White v Jones*: what if the claimant was not the client?" (2012) 18 Trusts and Trustees 390 at 401.
174 *White v Jones*, above n 172, at 271 per Lord Browne-Wilkinson.
175 At 275 per Lord Browne-Wilkinson.
176 See for example *Chandler*, above n 30; and *Unilever*, above n 6336.
177 See for example *Okpabi*, above n 32.

its actions. There is a special relationship between the parent company through its reliant subsidiary to the identifiable class of claimants. This is consistent with Lord Browne-Wilkinson's recognition of a duty of care in *White v Jones*.

Arguably this analysis only applies to the conferring of a benefit rather than the preventing of harm as in the present cases.[178] In *Goodwill v British Pregnancy Advisory Services*,[179] the Court rejected a duty to prevent harm. This suggests only a duty to confer a benefit may be owed. That case, however, concerned the medical context. Allen argues a policy desire to protect medical professionals led to the result.[180] Parent-subsidiary cases do not animate similar policy concerns of protecting companies: imposing a duty of care does not pierce the corporate veil. The parent, therefore, is likely to be sufficiently closely related to the claimant to justify a finding that it assumes responsibility to prevent harm to him or her.

Broader policy justifications also point to the extension of the duty of care to claimants. First, the vulnerability of claimants is significant in the application of the *White v Jones* approach. An assumption of responsibility did not extend to a businessperson able to protect their own interests without reliance on the defendant's advice in *Brownie Wills v Shrimpton*.[181]

Feng justifies extending a duty of care to the claimant on the basis that subsidiary employees are vulnerable as they do not understand the parent-subsidiary corporate structure, making them unable to identify the potential tortfeasor.[182] This reasoning is unconvincing. A claimant must supply evidence of that corporate structure to prove the parent assumed responsibility for the subsidiary operation.

Rather, claimants in existing cases are vulnerable because they rely on the subsidiary to protect them, which in turn relies on its parent. This is broadly the case in employment relationships,[183] and may equally apply to third parties such as customers[184] and neighbouring landowners.[185] Claimants in existing cases are of a class unable to protect themselves. This supports extending the assumption of responsibility to them.

Secondly, no duty exists where the defendant's duty to a claimant conflicts with the duty it assumes to the other party.[186] Conflicting duties meant a doctor who negligently carried out a pre-employment medical check for an employer owed

178 Allen, above n 173, at 400.
179 *Goodwill v British Pregnancy Advisory Services* [1996] 1 WLR 1397 (CA).
180 Allen, above n 173, at 401.
181 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA). See also Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 207.
182 Feng, above n 73, at 131.
183 See for example *Chandler*, above n 18; and *Unilever*, above n 36.
184 See for example *James Hardie Industries*, above n 1.
185 See for example *Okpabi*, above n 32.
186 *White v Jones*, above n 172, at 276 per Lord Browne-Wilkinson; Allen, above n 173, at 395; and Andrew Robertson "Policy-based reasoning in duty of care cases" (2013) 33 LS 119 at 126.

no duty of care to the claimant who did not receive a job.[187] This is likely not the case in claims against parent companies. For example, assuming responsibility to provide appropriate health and safety policies to a subsidiary does not conflict with assuming the same responsibility to subsidiary employees. Any obligations owed to the subsidiary are co-extensive with the duty owed to those harmed by the subsidiary's reliance on its parent.

The final justification to consider is that of Lord Goff in *White v Jones*.[188] Lord Goff argued the law should impose a duty of care on A where the person with a valid claim (B) suffers no loss, but the person suffering loss (C) has no claim.[189] The duty of care exists to fill a "lacuna in the law".[190] This reasoning is circular as it assumes A is under a legal duty to act differently creating the need for a remedy.[191] Courts do, however, take it into account.[192]

Lord Goff's reasoning suggests that whether the claimant can access an effective remedy is relevant. Where the subsidiary is wound up, a claimant suffers loss as a result of the parent company's negligence but cannot claim against the wound-up subsidiary. Where the subsidiary is not wound up, a claimant could sue the subsidiary as in *James Hardie Industries*.[193] Arguably, therefore, there is no lacuna in the law where the subsidiary in question is still trading. Damages may not be recoverable where a subsidiary is insolvent. The fact that a defendant is insolvent, however, does not mean another party should owe a duty of care.

Arguably, this suggests a duty of care should only be owed where the subsidiary is wound up and the claimant has no effective remedy. But this would introduce significant complexity into the law. A parent would owe no duty of care while its subsidiary is trading, only to then become liable when the subsidiary winds up. Claimants would be incentivised to delay proceedings in the hope an insolvent subsidiary is wound up. This may produce arbitrary outcomes where limitation periods come into effect.

More significant, however, even where a subsidiary is not wound up, a duty of care must be owed to a claimant so that the parent company's assumption of responsibility to the subsidiary is enforceable. This draws on Allen's interpretation of Lord Goff's reasoning as meaning no duty exists where B can bring a claim in respect of the same loss C suffers.[194]

187 *Kapfunde v Abbey National plc* [1999] ICR 1 (EWCA).
188 *White v Jones*, above n 172.
189 At 268 per Lord Goff.
190 At 259–260 per Lord Goff.
191 Allen, above n 173, at 393.
192 See *Gorham v British Telecommunications plc* [2000] 1 WLR 2129 (CA) at 2140; and *Rhind v Theodore Goddard* [2008] EWHC 459 (Ch) at [37].
193 *James Hardie Industries*, above n 1.
194 Allen, above n 173, at 395.

Where the subsidiary is wound up, as in *Chandler*,[195] it cannot bring any claim against its parent in respect of the same loss the claimant suffered. The same is true where the subsidiary is not wound up: if a subsidiary employee suffered personal injury, the subsidiary cannot sue the parent for that personal injury.

Moreover, the subsidiary likely cannot claim against its parent company for the loss it suffers if sued by the claimant for negligence. The subsidiary's loss is likely a relational financial loss suffered because of its relationship to the immediate victim of a negligent act.[196] The subsidiary incurs this loss due to its relationship with the claimant which gives rise to a duty of care (for example, an employer–employee relationship). The claimant suffers personal injury or property damage. He or she is the immediate victim of the parent's negligence. Relational consequential financial loss is not recoverable.[197] The subsidiary does not stand in the shoes of the claimant (who retains a claim against the subsidiary). It is not, therefore, a recoverable relational transferred loss.[198] The subsidiary would not be able to bring a claim against the parent company in respect of its negligence when carrying out its assumed responsibilities.

Significantly, this means even where the parent company assumes obligations to its subsidiary, the subsidiary cannot ensure the parent carries out those responsibilities in a competent and diligent manner. To fill this lacuna in the law and ensure the parent does carry out the responsibilities it assumes, therefore, it is necessary to impose a duty of care on the parent which it owes to those damaged by its negligence (the claimants).

Ultimately, even where a claimant may have a viable claim against the subsidiary company, that subsidiary company has no ability to ensure the parent company carries out its assumed responsibilities with due care. The only way to ensure the parent acts with appropriate care to prevent harm to vulnerable parties immediately affected by its assumed responsibilities is to impose a duty of care on the parent which is owed to those individuals. Future courts should adopt this justification in answer to Petrin's criticism.

D. Assumption of Responsibility by the Parent directly to Claimants for Managing Relevant Subsidiary Operations

The previous analysis focussed broadly on where a duty of care arises out of the parent-subsidiary relationship. Even if this relationship does not create a duty

195 *Chandler*, above n 18.
196 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 at [252].
197 At [252]–[262].
198 *Riddell v Porteous* [1999] 1 NZLR 1 (CA). See *Todd on Torts*, above n 181, at 262–269.

of care, in certain circumstances a parent company's direct relationship to the claimants should create one.

Lord Briggs SCJ suggested that:[199]

> ... the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.

Similar comments are found in the Canadian case *United Canadian Malt*:[200]

> ... if it can be established that the American parent corporation voluntarily assumed responsibility for the contamination problem, that could give the plaintiff the basis for a direct claim against it for damages suffered by the plaintiff through the failure ... to properly remedy the problem.

A duty of care in these circumstances is supportable. A parent company should owe a duty of care to the claimant in these circumstances as it assumes responsibility for a particular task. That task may be specific; for example, managing health and safety procedures in subsidiary operations. Alternatively, that task may be to supervise the subsidiary company and prevent harm to the claimants.

The scope of Lord Briggs SCJ's duty should be clarified. It must be foreseeable that the claimant will reasonably rely on the defendant's assumption of responsibility.[201] This differs from the earlier analysis that the claimant's reliance is irrelevant where the parent assumed responsibility to the subsidiary company. Where the assumption of responsibility is directly to the claimant, the parent–subsidiary relationship is not the basis for proximity. Therefore, the claimant's foreseeable reasonable reliance, and actual reliance, on the parent's assumption of responsibility is material rather than the subsidiary's reliance.

Analysis of parent company statements in *Choc v Hudbay Minerals Inc* illustrates what may suffice.[202] The parent company (Skye/Hudbay) publicly stated that it was meeting with local representatives to manage a land conflict between its subsidiary

199 *Lungowe*, above n 2, at [53].
200 *United Canadian Malt*, above n 15, at [24].
201 *Carter*, above n 135, at [25].
202 *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, (2013) 116 OR (3d) 674.

and those occupying the subsidiary's land.[203] It also stated that it had an ongoing relationship with the occupiers and was committed to reaching a fair settlement for them.[204] The Court approached the duty issue as one of proximity, emphasising factors including "(a) a close causal connection, (b) the parties' expectations and (c) any assumed obligations".[205] It held Skye/Hudbay's public representations gave rise to expectations on the part of the claimants.

Though the Court imposed a duty of care on the basis that these expectations and the parties' interests created sufficient proximity, it essentially found it foreseeable the claimants would reasonably rely on Sky/Hudbay's assumed responsibility. This was the result of their legitimate expectation that Sky/Hudbay would ensure the subsidiary company treated them fairly. Analysis along these lines better justifies a duty of care in these circumstances.

Lord Briggs SCJ's suggested duty of care, however, must be limited to claimants sufficiently proximate to the parent company. Particularly significant here is the general rule that a defendant must assume responsibility to an identifiable person or class of persons to whom a duty may exist.[206]

The existence of a duty of care in *Hudbay Minerals* is consistent with this.[207] Hudbay/Skye's public statements clearly identified the occupiers as the identifiable class to whom Hudbay/Skye assumed a responsibility and thereby a duty of care, to prevent human rights abuses during their removal.

The Court's comment in *James Hardie Industries* that the parent company's use of its reputation to sell the defective product is relevant should be understood in a similar manner.[208] Purchasers of a defective product form a known and identifiable class to whom a duty of care may be owed.

Therefore, Lord Briggs SCJ is likely correct in finding it arguable that Vedanta, in published materials, assumed responsibility for maintaining proper environmental standards with respect to mining operations subject to the claim.[209] Vedanta publicly stated it was committed to addressing environmental problems with the KCM mining infrastructure.[210] Those particularly at risk from water contamination from that mining operation likely form an identifiable class to which responsibility is assumed, rather than to the public at large.

203 At [67].
204 At [67].
205 At [69].
206 Todd, above n 181, at 208.
207 *Hudbay Minerals*, above n 202, at [67].
208 *James Hardie Industries*, above n 1, at [91].
209 *Lungowe*, above n 2, at [61].
210 *Vedanta*, above n 32, at [84].

Lord Briggs SCJ's suggestion that Vedanta assumed responsibility for all subsidiary environmental protection practices,[211] however, seems to go too far. The only evidence to support such a duty was a Vedanta report stating its board oversaw subsidiary operations with reference to water contamination governance frameworks.[212] Such a broad duty is not clearly assumed towards an identifiable class of people. This would depend on how specific the express undertaking is, to which subsidiary operations it may apply and to what extent certain classes of people may be identified as particularly at risk.

Ultimately, parent companies may owe duties to those to whom they assume responsibility directly. In assessing this type of duty issue, however, courts must carefully identify whether the assumption of responsibility is made to an identifiable class of person.

V. Wider Implications for other Duties of Care in Company Contexts

Now that these duties of care are outlined, future possible applications of them will be considered. The implications of the approach taken to duty issues in the company law context will also be addressed.

A. Other Forms of Negligence

Previous analysis focussed on negligent damage to property or personal injury. Petrin argues that extending the *Chandler* approach to pure economic loss and other negligence claims may open the floodgates as the test is "dangerously broad".[213] The Court in *James Hardie Industries*, however, applied these principles to actions for misstatements[214] and a failure to warn of negligent manufacture.[215] Significantly, the Court also applied these principles in the context of defective building materials which arguably extends to and, at the very least, engages similar policy concerns, as a claim for pure economic loss.[216]

The Court is correct to apply these principles to other forms of negligence. They should also apply to a duty to prevent pure economic loss. Part IV shows that the

211 *Lungowe*, above n 2, at [61].
212 *Vedanta*, above n 32, at [84].
213 Petrin, above n 4, at 619.
214 *James Hardie Industries*, above n 1, at [97].
215 At [95].
216 See *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [63]–[68]; and *Todd on Torts*, above n 181, at 338–341.

instances where a parent company may owe a duty of care to those damaged by its subsidiary are not dangerously broad as Petrin suggests.

Fear of indeterminate liability "tends to be a potent policy concern" in claims for pure financial loss.[217] Parent-subsidiary cases likely do not engage this fear. Applying these principles to other forms of negligence and loss may extend the ambit of liability, but it does not do so indeterminately. The parent simply becomes liable to the same extent the subsidiary is liable to the claimants.

Where a parent-subsidiary relationship exhibits control, reliance or a broader assumption of responsibility, a duty of care should not be denied simply because the type of negligence or loss is different. Moreover, applying a consistent approach to these issues across distinct types of negligence promotes certainty and consistency which is important in the corporate context.

B. Other Company Relationships

It should be clear by now that these duties of care do not rely on a parent-subsidiary relationship. A parent-subsidiary relationship merely proves the parent's opportunity to intervene, control, supervise or advise the subsidiary.[218] As a result, the lack of a shareholding relationship does not prevent a duty of care existing. The practical relationship between the two companies must simply exhibit the features previously discussed.

This may occur in a joint venture. In *Okpabi*,[219] the subsidiary SPDC was a minority shareholder in a joint venture operating the pipeline subject to proceedings. Sir Geoffrey Vos C considered this made the subsidiary's ability to prevent the alleged breaches "at least questionable", compared to the parent's 80 per cent majority shareholding in the tortfeasor subsidiary in *Vedanta*.[220] On the facts, SPDC and its parent may not have materially controlled joint venture operations. This conclusion, however, should not turn on whether a majority shareholding exists. The majority shareholder may provide the capital, whereas the minority shareholder provides the expertise. In those circumstances, the minority shareholder may owe a duty of care because it materially controls the joint venture or because the joint venture relies upon its special expertise.

Alternatively, a duty may arise in a supply chain relationship. Sanger initially suggested this following the *Chandler* judgment.[221] Subsequent developments in more recent cases, particularly with respect to control exerted through mandatory

217 *Todd on Torts*, above n 181, at 270.
218 *Lungowe*, above n 2, at [49].
219 *Okpabi*, above n 32.
220 At [197] per Sir Geoffrey Vos C, citing *Vedanta*, above n 32.
221 Sanger, above n 74, at 480.

group policies, make this highly likely. As Yilmaz-Vastardis argues, in supply chain relationships the lead purchasing company may exercise sufficient control over the supplier's business to create a duty of care.[222] Supplier contracts often include codes of conduct including health and safety, labour and environmental standards analogous to mandatory group policies. Lead purchasers often provide training and supervision via their own audits. In these circumstances, a duty of care is likely to arise given the control exerted through training, supervision and enforcement.

Yilmaz-Vastardis references supply chain contracts which merely require a supplier get an audit certificate, rather than have the purchaser carry out its own supervisory audit.[223] This alone likely does not impose a duty of care, given that a duty does not arise where the supervision of mandatory standards is required but is left to the subsidiary or, in this case, supplier.[224] This conclusion would be subject to any wider system of control the lead purchaser exercises through separate enforcement mechanisms. For example, it may constitute sufficient control if the lead purchaser took enforcement action where the audit certificate noted problems with supplier practices.

Yilmaz-Vastardis also ignores that short of lead purchaser control, a purchaser imposing standards may owe a duty to third parties to ensure they are not systemically flawed. Regardless, principles established in parent-subsidiary cases may apply to companycompany relationships outside that of parent-subsidiary.

C. Liability of Directors

The approach to the parent company's duty of care should inform the approach to making company directors liable for misstatements. The House of Lords and Court of Appeal have both held that the director of a company cannot be liable for their negligent misstatements unless they personally assumed responsibility for those statements.[225] This continues to be the position today. Though rejecting elements of the Court of Appeal's reasoning, William Young P in *Body Corporate 202254 v Taylor* more recently held an assumption of responsibility is necessary if it is an element of the tort in issue (for example, a negligent misstatement).[226]

222 Yilmaz-Vastardis, above n 119.
223 Yilmaz-Vastardis, above n 120.
224 *Okpabi*, above n 32, at [205] per Sir Geoffrey Vos C.
225 *Williams*, above n 7, at 835–837 per Lord Steyn; and *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
226 *Taylor*, above n 7, at [33]–[34] per William Young P.

Some criticise this approach.[227] The approach to duty issues and assumption of responsibility in the context of parent-subsidiary relationships reinforce these criticisms.

The treatment of assumption of responsibility as an element of proximity in parent-subsidiary relationships is not, as Day suggests, consistent with its treatment in *Williams* and *Taylor*.[228] *Williams* and *Taylor* treat assumption of responsibility as a threshold requirement separate to the proximity issue.[229] Parent-subsidiary cases treat assumption of responsibility as part of the proximity inquiry. This is significant, given Witting's argument that the House of Lords consciously deviated from normal duty principles in *Williams* to protect the separate legal personality of company and director.[230] Imposing a duty of care on a parent company raises similar policy considerations but whether the parent personally assumed responsibility is not asked as a separate inquiry. This is the case even when considering the parent's liability for its subsidiary's misstatements.[231] This indicates the way the "elements of the tort" approach treats an assumption of responsibility is unjustifiable even in the company law context.

Approaches in parent company duty cases are more consistent with the "degree of control" test outlined by Hardie Boys J. Prior to the *Trevor Ivory* judgment, Hardie Boys J held a director liable for economic loss caused by faulty foundations because he supervised their construction.[232] As he stated, "[i]t is not the fact that he is a director that creates the control, but rather the fact of control, however derived, may create the duty.[233]

This clearly echoes the *James Hardie Industries* approach in making a parent liable for its subsidiary's misstatement.[234] It is not the fact that the parent company is the parent that creates the control, but rather the fact of control over making the misstatement that creates the duty. Several subsequent New Zealand courts have applied the degree of control test.[235] Given the degree of control test is more

227 See Stephen Todd "Tort Law" [2008] NZLRev 747 at 751–756; *Todd on Torts*, above n 181, at 396–402; and Victoria Stace "Directors' liability in negligence to third parties: challenging the assumption of responsibility approach" (2016) 16 OUCLJ 183.

228 Day, above n 14, at 458.

229 Stace, above n 227, at 187–188.

230 Christian Witting "What are we doing here? The relationship between negligence in general and misstatements in English law" in Kit Barker, Ross Grentham and Warren Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing, Oxford, 2015) 223 at 237.

231 See *James Hardie Industries*, above n 1, at [97].

232 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

233 At 595.

234 *James Hardie Industries*, above n 1, at [95].

235 Stace, above n 227, at 192. See *Dicks v Hobson Swan Construction* [2006] NZHC 1657; *Chee v Stareast Investment Ltd* HC Auckland CIV-2009-404-005255, 1 April 2010; *Body Corporate 314950 v James Hardie New Zealand* [2013] NZHC 1744; and *Taylor*, above n 7, at [126]–[129] per Chambers J.

consistent with the recognition of a parent company's duty of care, the *Williams* and *Taylor* approach should be abandoned.

VI. Conclusion

It should be clear by now that imposing a duty of care on a parent company to those damaged by its subsidiary's acts or omissions rests on two foundational sets of principle.

The first set comprises the dual company law norms of separate corporate personality and limited liability. These principles dictate that something more than the mere capacity to control, owing to shareholding, must exist to support a duty of care. Recognising a duty in this manner avoids the complexities of piercing the corporate veil or holding the parent vicariously liable.

To identify where that something more exists, courts should refer to the second set of principles. Namely, principles of tort guiding where A owes C a duty of care to prevent harm inflicted by B. Though proximity and policy remain the overarching issues facing courts, parent-subsidiary cases are not entirely novel duty issues, but new applications of these well-established principles. These principles give us four principled categories of instances in which a parent company owes a duty of care for its subsidiary's acts or omissions.

The first is where a parent materially controls its subsidiary's operations. Company law dictates that this control must be actual rather than potential. To owe this control-based duty with respect to mandatory company policies, the parent must enforce those policies.

That is not to say that Lord Briggs SCJ erred in suggesting unenforced company policies may incur a duty of care. Rather, a parent may owe a duty of care under one of the other exceptions to the general rule that it is under no duty to prevent its subsidiary from causing damage to others.

Such a duty of care exists where there are systemic errors in the parent's policy or advice which the subsidiary implements as a matter of course. This duty may avoid the need to provide significant evidence of the parent-subsidiary relationship making it particularly attractive to claimants.

Alternatively, a duty of care may exist where the parent company assumes responsibility for group policies, advice, or subsidiary operations. This responsibility may be deemed assumed where the subsidiary will foreseeably rely on the parent's superior expertise. As argued, however, the existence of superior expertise alone does not create a duty of care. A close relationship is needed, which may exist through a pattern of intervention, as courts recognise, or through the division of

responsibility between parent and subsidiary. Alternatively, a parent may voluntarily assume responsibility in company policies. Regardless, this assumed responsibility may extend to the claimants. Though courts have thus far ignored this application of derivative reliance, it is justifiable.

Even where none of the above parent-subsidiary relationships exist, a parent may owe a duty of care if it assumes responsibility for a subsidiary operation directly to an identifiable class of people to which the claimant belongs, in circumstances where the claimant's reasonable reliance on that undertaking is foreseeable.

Proceedings applying these principles to other types of negligence and loss are likely, and welcome. Perhaps more significantly, these principled categories can apply beyond parent-subsidiary relationships in existing caselaw. These duties of care are based on real world relationships rather than shareholdings. They may equally apply to joint ventures and supply-chain relationships which exhibit similar characteristics. This will potentially re-write the allocation of risk in these company-company relationships.

Perhaps most significantly, this approach should influence the approach to other duty issues that touch on issues of separate corporate personality. As argued above, this reconciliation of company and tort law principles suggests the prevailing approach to director liability for misstatements needs rethinking. Courts would do well to emulate the approach to duties of care in parent-subsidiary relationships in future director liability cases. The same can be said of other novel instances pitting duty principles against company law.