

## UK Supreme Court in *Okpabi* Clarifies Parent Company Duty of Care Toward Persons Allegedly Harmed by Subsidiaries

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### **Summary:**

In *Okpabi v. Royal Dutch Shell* [2021] UKSC 3 (February 12), the UK Supreme Court reaffirmed that a British parent company may in certain circumstances owe a duty of care, for purposes of liability in a suit for negligence, toward persons affected by the operations of its foreign subsidiary. Specifically, the Court found a real issue to be tried as to whether Shell owed a duty of care to persons affected by spills from its subsidiary's oil pipeline in Nigeria.

The Court's ruling opens a path to "piercing the corporate veil." Whether the parent owes a duty of care is not constrained by formalities, such as the separate corporate identities of parent and subsidiary. The Court clarified that a parental duty of care turns instead on business realities, such as whether the parent shares *de facto* management of a particular activity (e.g., pipeline safety) with its subsidiary.

*Okpabi* is important both for claimants and for multinational companies -- not only those headquartered in the UK, but also in common law jurisdictions that may follow British precedent.

### **Background:**

*Okpabi* reaffirmed and clarified the UK Supreme Court's 2019 judgment in *Lungowe v Vedanta Resources plc* [2019] UKSC 20. *Vedanta* addressed whether a British parent company (Vedanta) owed a duty of care to persons affected by the operation of a copper plant primarily owned and operated by its foreign subsidiary in Zambia. *Vedanta* ruled that the foreign subsidiary could be brought within the jurisdiction of UK courts, as a necessary and proper party to a suit against its UK parent company, provided (1) there is a real issue to be tried against the UK parent as the "anchor" defendant,<sup>1</sup> and (2) even where the foreign jurisdiction would otherwise be the "proper place" for trial,<sup>2</sup> "there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction."<sup>3</sup>

In deciding prong (1) – a real issue to be tried against the parent company -- *Vedanta* set forth the criteria for whether the parent company owes a duty of care toward persons affected by the

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<sup>1</sup> *Vedanta* ¶ 20.

<sup>2</sup> *Id.* ¶ 87. The "proper place" for trial depends on such case-specific factors as, e.g., where the acts at issue primarily occurred, where most claimants and witnesses are located, and which country's laws apply to the claims. *Id.* ¶¶ 85, 87.

<sup>3</sup> *Id.* ¶ 88.

activities of its foreign subsidiary. “Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations ... of the subsidiary.”<sup>4</sup>

In *Okpabi* the Supreme Court clarified the meaning of these criteria. Parental “control” of the subsidiary’s activities need not always be shown. “Shared” or “de facto” management may suffice to trigger a parental duty of care.<sup>5</sup>

The UK trial court had dismissed the complaint against RDS on summary judgment, and accordingly found no jurisdiction over its Nigerian subsidiary. The dismissal was affirmed by a 2-1 court of appeals decision. On the jurisdictional appeal, the UK Supreme Court unanimously reversed, finding a real issue to be tried as to whether RDS owed a duty of care to Nigerians allegedly harmed by the oil spills.

The Supreme Court addressed only the first *Vedanta* prong: whether there was a real issue to be tried against RDS. Because the lower courts had granted summary judgment for RDS and had no need to reach the second prong of *Vedanta* (the risk that claimants could not obtain substantial justice in Nigeria), the Supreme Court in *Okpabi* did not address that second prong.

The Supreme Court found a real issue to be tried against RDS, even though the evidence indicated that the most likely cause of the spills was third party sabotage.<sup>6</sup> The claim was that RDS was negligent in failing to prevent such spills and to limit their environmental impact.<sup>7</sup>

In reaffirming *Vedanta*, the Supreme Court in *Okpabi* made four important clarifications of substance and one of procedure.

### **Substance:**

On substance, the Court clarified that:

- I. ***Ordinary Tort Law:*** The Court reaffirmed that there is no special category or test for a parental duty of care for negligence with respect to acts of corporate subsidiaries. Whether a duty exists “is to be determined on ordinary, general principles of the law of tort regarding the imposition of a duty of care.”<sup>8</sup>

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<sup>4</sup> *Id.* ¶ 49.

<sup>5</sup> ¶ 147. The Court explained that “control is just a starting point. The issue is the extent to which the parent did take over *or share* with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and *de facto management* of part of its activities are two different things. A subsidiary may maintain *de jure* control of its activities, but nonetheless delegate *de facto* management of part of them to emissaries of its parent.” (Emphasis added.)

<sup>6</sup> ¶ 1.

<sup>7</sup> ¶¶ 5, 7, 33 and 34.

<sup>8</sup> ¶¶ 25, 149.

II. ***At Least Four Routes:*** The Court clarified that *Vedanta* set forth four “routes” to find a parental duty of care toward persons affected by the acts of a subsidiary.<sup>9</sup> A parental duty of care can be found where:

- (1) The parent takes over the management or joint management of the relevant activity of the subsidiary;
- (2) The parent provides defective advice and/or promulgates defective group-wide safety/environmental policies which are implemented as of course by the subsidiary;
- (3) The parent promulgates group-wide safety/environmental policies and takes active steps to ensure their implementation by the subsidiary, and
- (4) The parent holds out that it exercises a particular degree of supervision and control of the subsidiary.

While recognizing these four “routes,” the Court clarified that they are only “convenient headings” and not “special or separate parent/subsidiary duty of care tests.” It is not appropriate “to shoehorn all cases of the parent’s liability into [the four] specific categories.”<sup>10</sup>

III. ***Reality, not Formality:*** In evaluating whether a parental duty of care exists, the Court looked to business and functional reality, not to the formalities of the separate corporate identity of parent and subsidiary.<sup>11</sup> Shell globally is organized and operates along business and functional lines, even while structured as separate corporations for legal and tax purposes.<sup>12</sup> Decisions on environmental precautions and safety, including prevention and remediation of pipeline spills, are generally shaped in practice by the group’s business and functional executives, and only later confirmed by the heads of the affected separate corporation within the Shell group. As the Court explained, “Whilst ‘formal binding decisions’ are taken at corporate level, these are taken on the basis of prior advice and consent from the vertical Business or Functional line and organisational authority generally precedes corporate approval.”<sup>13</sup>

IV. ***Policy Direction, Oversight and Control:*** The claim against RDS focused on *Vedanta* routes (1) and (3), namely that RDS (1) through its business and functional executives, exercised direction, control and oversight of environmental management generally, and pipeline precautions in particular, by Shell’s Nigerian subsidiary, and

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<sup>9</sup> ¶ 26.

<sup>10</sup> ¶ 27.

<sup>11</sup> ¶ 150.

<sup>12</sup> ¶¶ 156-57.

<sup>13</sup> ¶ 157.

(3) promulgated group-wide safety/environmental policies and took active steps to ensure their implementation by its Nigerian subsidiary.<sup>14</sup>

Reviewing both the pleadings and the evidence, the Supreme Court found that claimants had sufficiently pled a duty of care by RDS under these two headings to raise a real issue of fact which deserved to be tried.<sup>15</sup>

The Court articulated a more relaxed version of the test under *Vedanta* route (1). Parental “control” of the subsidiary’s activities need not always be shown. “Shared” or “de facto” management may suffice to trigger a parental duty of care.<sup>16</sup>

The Court did not address routes (2) or (4), except to note under route (2) that claimants had not pled that RDS’ environmental and pipeline safety standards and policies were systematically in error.<sup>17</sup>

### **Procedure:**

On procedure, the Court held that:

- V. ***Summary Judgment on Pleadings:*** Summary judgment on whether there is a real issue to be tried as to the parent company’s duty of care should focus on the claim as pled. If the claim adequately pleads a duty of care, no evidence should be heard, except where facts alleged are “demonstrably” untrue or unsupportable.<sup>18</sup> Defendant companies should not generally present evidence to refute the claim.<sup>19</sup>

Internal company documents, which claimants may not possess at the summary judgment stage, could well be probative at a later trial.<sup>20</sup> The Supreme Court referred to internal company documents such as those ordered to be produced by the Dutch Court of Appeals in related litigation against RDS.<sup>21</sup>

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<sup>14</sup> ¶ 153.

<sup>15</sup> ¶¶ 153-59.

<sup>16</sup> ¶ 147. The Court explained that “control is just a starting point. The issue is the extent to which the parent did take over *or share* with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and *de facto management* of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent.” (Emphasis added.)

<sup>17</sup> ¶ 153.

<sup>18</sup> ¶ 22, ¶ 107.

<sup>19</sup> ¶ 22.

<sup>20</sup> ¶¶ 126-34

<sup>21</sup> ¶ 137. In *Akpan v. RDS*, the Dutch Court of Appeals ordered RDS to disclose to claimants’ counsel specific audit reports, assurance letters, incident reports, and documents with respect to the relevant oil pipelines, relating to

## **Key Lessons:**

The main lessons for claimants and for multinational companies headquartered in the UK, or in other common law jurisdictions that may treat *Vedanta* and *Okpabi* as precedent, are as follows:

1. ***Duty of Care:*** To the extent parent companies of multinational enterprises adopt, supervise and enforce group-wide environmental and safety policies applicable generally to entities and subsidiaries in the corporate group, including through management which may be *de facto* or may be shared with the subsidiary, these actions may give rise to a duty of care toward persons allegedly harmed by the operations of foreign subsidiaries.
2. ***Third Party Fault:*** The fact that harm may have been caused by a third party is not necessarily a defense. If the parent or subsidiary did not take reasonable measures to prevent and contain such harm, they may be found liable in negligence.
3. ***Settlement Pressure:*** If the parent company is sued in its home jurisdiction for negligence in a well-pled claim, summary judgment will likely be denied, and the door opened to discovery of internal company documents and eventual trial. Well-pled claims will thus enhance the bargaining power of claimants to pressure defendant companies to settle.<sup>22</sup>
4. ***Hands Off or Diligent Oversight?:*** Parent companies seated in jurisdictions applying *Okpabi* face two stark alternatives. One would be to try to avoid a duty of care altogether, by relinquishing direction, oversight or shared management of high-risk operations of subsidiaries.

This approach is probably not viable. It would run counter to the widely endorsed UN *Guiding Principles on Business and Human Rights*, which call on companies to exercise due diligence with regard to the human rights risks (including environmental and safety risks) posed by their operations. Such a “hands off” approach would also run afoul of the growing number of mandatory human rights due diligence laws being enacted in numerous jurisdictions. It could also raise potentially costly reputational risks. And in the end, it might not work, because laws and jurisprudence could evolve to erect a parental duty of care even in the absence of extensive oversight of subsidiaries.

An alternative approach may be more prudent from a business standpoint as well as more socially responsible. This is to exercise diligent policy and operational oversight over

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the extent of the parent company’s supervision and the subsidiary’s implementation of that supervision. See Cees van Dam, *Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case* (2016), ¶¶ 28-30.

<sup>22</sup> Perhaps not by coincidence, *Vedanta* was recently settled for an undisclosed sum. *Legal claim by more than 2,500 Zambian villagers in a case against Vedanta Resources Limited*, Leigh Day, quoting joint statement with Vedanta issued 18 January 2021 (“settlement of all claims”).

operations of subsidiaries which pose human rights risks (including environmental and safety risks). In doing so, a parent company should take every reasonable management measure to prevent those risks from materializing, and to minimize their impact if, despite prior precautions, they do arise.

Granted, under *Vedanta* and *Okpabi*, a company exercising such diligent and reasonable oversight may be *more* likely to owe a *duty of care* toward persons allegedly harmed by its subsidiary's acts or omissions. However, and more important, the diligent parent company is *less* likely to be found *liable* for negligent breach of its duty of care. If sued, the company is better positioned to present a defense – its prudent oversight and shared management -- which could not only avoid liability, but also enhance its reputational capital.