

# The Case for Eco-Liability: Post *Okpabi* Justifications for the Imposition of Liability on Parent Companies for Damage caused to the Environment by their Subsidiaries

Eoin Jackson\*

---

## ABSTRACT

*This article seeks to argue for the imposition of liability onto parent companies for the damage to the environment caused by their subsidiaries. 'Eco-liability' will be suggested to be an appropriate means through which firms can be encouraged to engage in sustainable practices. This argument will be made in reference to the recent decision in Okpabi v Royal Dutch Shell,<sup>1</sup> which, although somewhat positive in light of the facts of the case, was too limited in scope to take adequate account of the needs of the environment as a stakeholder. It will be posited that the environment must be recognised as a stakeholder due to its considerable and growing influence over corporate governance and practice. The environment will be considered a secondary stakeholder due to this influence. The independence of the environment as a stakeholder shall be demonstrated through an examination of the legal, social and commercial emphasis that is placed on its status within the corporate environment. Subsequently, this article submits that the environment has needs that should be recognised through an appropriate legal framework. It will be contended that this legal framework cannot be achieved through case law, with the Okpabi judgement representing the limitations on a case-based approach to environmental accountability. It will thus be proposed that statutory eco-liability be introduced, to ensure sufficient accountability exists for corporations that do not operate in a sustainable manner.*

---

\* LLB (Trinity College, Dublin), '23. Managing Editor for Trinity College Law Review. The author would like to acknowledge fellow Trinity students Benjamin Conlon and Matthew O'Shea for their insights and assistance with the initial draft of the piece.

<sup>1</sup> *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3.

## INTRODUCTION

Recent years have seen an increased recognition of the obligation on corporations to act in a manner conducive to creating a sustainable environment. This is reflected in the rise of successful litigation seeking to hold companies accountable for actions that contribute to the climate crisis.<sup>2</sup> This article seeks to argue that this accountability should now be expanded into the realm of limited liability. Specifically, it proposes that a statutory regime be established that allows for a parent company to be held liable for damage to the environment caused by one of their subsidiaries. The justifications and potential criticisms that will be addressed in this article shall make a particular reference to the recent case of *Okpabi v Royal Dutch Shell*,<sup>3</sup> which, it will be submitted, represents a relatively positive step forward for eco-liability, though one that should be caveated by noting how it also illustrates the supremacy of an eco-liability statute

### I. THE ECOLOGICAL FLAWS OF LIMITED LIABILITY – SHAREHOLDER PRIMACY AND THE ENVIRONMENT AS A STAKEHOLDER

In justifying the implementation of eco-liability, it is pertinent to examine the flaws within the current principle of limited liability. Limited liability has been defined by *Keane* as ‘where the liability of the members for the debts and wrongs of the company can be limited to the amount unpaid on the shares which they own in the company’.<sup>4</sup> The doctrine arose as a result of the need to protect the individual shareholder and encourage them to support industrial revolution era corporations in the race to modernisation.<sup>5</sup> Its coupling with the doctrine of separate legal personality has been described as the ‘hallmark of the capitalist

---

<sup>2</sup> *Vereniging Milieudefensie and Others v Royal Dutch Shell plc* [2021] Hague District Court C/09/571932 / HA ZA 19-379 and *Sharma v Minister for the Environment* [2021] FCA 560.

<sup>3</sup> [2021] UKSC 3.

<sup>4</sup> Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) 5.

<sup>5</sup> E.A. French, ‘The Origin of General Limited Liability in the United Kingdom’ (1990) 21(18) *Accounting and Business Research* 15.

economy'.<sup>6</sup> The application of limited liability between a parent company and its subsidiaries is a prime example of this. Treating the parent company as a single economic entity, which would equate to liability being automatically imposed on the parent company, has largely been rejected by the courts.<sup>7</sup> The focus instead is on treating each company, regardless of whether it is a parent company or a subsidiary, as a distinct entity. Therefore, the parent company is treated as effectively identical to any other shareholder.<sup>8</sup>

This approach to conceptualising companies leads to three major criticisms. Firstly, there is no distinction made between the treatment of active and passive shareholders in defining whether a company benefits from limited liability. For example, the individual investor with little day to day engagement with the company, is regarded as having the same loss protection benefit as the parent company, who actively controls a subsidiary.<sup>9</sup> This means there is little nuance as to whether the company as a whole benefits from the lack of distinction.<sup>10</sup> Secondly, the company and the shareholder are treated as if benefit to the latter automatically correlates to benefit to the company as a separate entity.<sup>11</sup> As will be discussed in greater detail, this is not always the case and other stakeholders have equally valid considerations. Finally, it can lead to shareholder primacy, which can result in the exploitation of other stakeholders in the drive to increase shareholder wealth.<sup>12</sup> Consequently, the effects of limited liability on other stakeholders must be examined to assess whether it is beneficial to the company as a whole and assists in the creation of a sustainable business model.

---

<sup>6</sup> Marie-Laure Djelic, 'When Limited Liability was still an Issue' (2013) 34(5-6) *Organization Studies* 595.

<sup>7</sup> *Adams v Cape Industries plc* [1990] 2 WLR 657 and *Re Polly Peck International plc* (in administration) (No 5) [1996] WC2A 2LL.

<sup>8</sup> *ibid.*

<sup>9</sup> *Chandler v Cape Industries plc* [2012] EWCA Civ 525.

<sup>10</sup> Beate Sjøfjell and others, 'Shareholder Primacy: the Main Barrier to Sustainable Companies' in Beate Sjøfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015).

<sup>11</sup> Patrick Ireland, 'Limited liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) *Cambridge Journal of Economics* 837.

<sup>12</sup> Lynn A. Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161 *University of Pennsylvania Law Review* 2003.

A stakeholder has been defined by Clarkson as ‘persons or groups that have or claim ownership in a corporation and its activities, past, present or future’.<sup>13</sup> Stakeholders can further be divided into primary stakeholders, whose continuing participation in the business is necessary for its survival,<sup>14</sup> and secondary stakeholders who influence and affect the company but are not engaged in transactions with the corporation.<sup>15</sup> The environment has been labelled a ‘silent and structural’ stakeholder by some commentators and can be construed as a secondary stakeholder.<sup>16</sup> While it may not constitute a direct element to a business activity, its influence is recognised both commercially and as part of wider social considerations intertwined within stakeholder theory.<sup>17</sup> Its structural nature aligns to this view of the environment as a secondary stakeholder. While it cannot be recognised directly in the same way that a human stakeholder can, its needs can be advocated for by third parties involved with the company.<sup>18</sup> It should be noted, however, that this is different from stating that consideration of environmental interests is derived solely from advocacy by third parties. The third parties are not necessarily stakeholders themselves; they merely act as a conduit through which the influence of the environment can be recognised.<sup>19</sup> A climate activist group for example, does not seek influence over company activities for its own sake, but rather to ensure that the environment has its needs vindicated through appropriate corporate policy.<sup>20</sup>

---

<sup>13</sup> Max B. E. Clarkson, ‘A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance’ (1995) 20 *The Academy of Management Review* 92.

<sup>14</sup> *ibid.*

<sup>15</sup> Sandra Benn, Kathleen Bay O’Leary and Russell Abratt, ‘Defining and identifying stakeholders: Views from management and stakeholders’ (2016) 47(2) *South African Journal of Business Management* 1.

<sup>16</sup> Rosel Tan, ‘Protecting the Silent Stakeholder: Giving the Environment a Voice within Company Law’ (2018) 5 *Bristol Law Review* 27.

<sup>17</sup> Sergei D. Dmytriyev, R. Edward Freeman and Jacob Hörisch, ‘The Relationship between Stakeholder Theory and Corporate Social Responsibility: Differences, Similarities, and Implications for Social Issues in Management’ (2021) 58(6) *Journal of Management Studies* 1441.

<sup>18</sup> Tan (n 16).

<sup>19</sup> David Wheeler and Maria Sillanpää, ‘Including the Stakeholders: The Business Case’ (1998) 31(2) *Long Range Planning* 201.

<sup>20</sup> Ruth V. Aguilera and others, ‘The Corporate Governance of Environmental Sustainability: A Review and Proposal for More Integrated Research’ (2021) 47(6) *Journal of Management* 1468.



Provided that it can be demonstrated that the environment retains an independent influence over company activity, it can fall under the definition of a secondary stakeholder.<sup>21</sup> If it were to be merely perceived as a consideration for other stakeholders, then it would need to be demonstrated that the environment only maintains an influence over company activity when its needs are solely accommodated as a result of action from other stakeholders. To refute this potential argument, it will be illustrated that the environment exerts an independent influence on companies from a legal, social and commercial perspective, justifying its categorisation as a secondary stakeholder. The influence of the environment can also be witnessed through recent shifts in attitudes that have seen the corporate world become increasingly aware of its obligations to pursue a sustainable business model.<sup>22</sup> Although short term profits can be derived from its exploitation, long term benefits have been demonstrated to lie in a recognition of balancing profit with fair use of natural resources.<sup>23</sup> As a more holistic approach to stakeholder management arises, it is submitted that the environment should have its needs embedded into the corporate structure of conglomerates.<sup>24</sup>

Further justification of a perception of the environment as a company stakeholder requires an examination of how its needs intertwine with the interests and corporate governance of a modern business. By demonstrating how its needs interact with the commercial activities of the business, the environment can be shown to exert independent influence and, by extension, fall within the definition of a secondary stakeholder. It is clear that companies are becoming obligated to take account of environmental concerns in seeking new methods of finance,<sup>25</sup> or

---

<sup>21</sup> Clarkson (n 13)

<sup>22</sup> Jacob Hörisch, R. Edward Freeman and Stefan Schaltegger, 'Applying Stakeholder Theory in Sustainability Management: Links, Similarities, Dissimilarities, and a Conceptual Framework' (2014) 27(4) *Organization & Environment* 328.

<sup>23</sup> Carly Fink and Tensie Whelan, 'The Comprehensive Business Case for Sustainability' *Harvard Business Review* (Boston, 21 October 2016) <<https://hbr.org/2016/10/the-comprehensive-business-case-for-sustainability>> accessed 13 November 2021.

<sup>24</sup> Hörisch, Freeman and Schaltegger, 'Applying Stakeholder Theory in Sustainability Management: Links, Similarities, Dissimilarities, and a Conceptual Framework' (n 22).

<sup>25</sup> Hanna Ahlström and David Monciardi, 'The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms' (2021) *Journal of Business Ethics*.

when examining paths to business expansion.<sup>26</sup> The Business Roundtable has released a statement indicating that the purpose of a corporation was to ‘create value for all stakeholders’,<sup>27</sup> which includes the protection of the environment through ‘embracing sustainable practices’.<sup>28</sup> These sentiments were echoed by Larry Fink, the Chief Executive Officer (“CEO”) of leading investment company Blackrock, in his annual letter to CEOs. Fink argued for greater recognition of stakeholder capitalism and emphasised the importance of environmental protection to this version of capitalism.<sup>29</sup> Thus, it is apparent that the environment maintains an influence on the activities of corporations. Once again, consideration of environmental interests stems from the assumption of business leaders that it is a stakeholder in its own right,<sup>30</sup> as opposed to being something to be considered as a result of advocacy from different stakeholders. More broadly, shifts in the environment can have significant influence on corporate activity. Extreme weather changes caused by climate change can reduce productivity,<sup>31</sup> impact supply chains and lead to dangerous business conditions.<sup>32</sup> The continued emphasis on environmental protection acknowledges this potential and the potential for the environment to influence activity.<sup>33</sup> While a change to business activity can be in response to pressure from other

---

<sup>26</sup> Knut Haanaes and others, ‘Making Sustainability Profitable’ *Harvard Business Review* (Boston, March 2013) <<https://hbr.org/2013/03/making-sustainability-profitable>> accessed 13 November 2021.

<sup>27</sup> Business Roundtable, ‘Statement on the Purpose of a Corporation’ (*Business Roundtable*, 19 August 2019) <<https://opportunity.businessroundtable.org/ourcommitment/>> accessed 22 August 2021

<sup>28</sup> *ibid.*

<sup>29</sup> Larry Fink, ‘Larry Fink’s 2021 Letter to CEOs’ (*Blackrock*, 2021) <<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>> accessed 21 August 2021.

<sup>30</sup> *ibid.*

<sup>31</sup> Ed Day and others, ‘Upholding labour productivity under climate change: an assessment of adaptation options’ (2019) 19(3) *Journal of Climate Policy* 367.

<sup>32</sup> Øyvind Ihlen, ‘Business and Climate Change: The Climate Response of the World’s 30 Largest Corporation’ (2009) 3(2) *Journal of Environmental Communication* 244.

<sup>33</sup> Mark Anthony Camilleri, ‘Corporate sustainability and responsibility: creating value for business, society and the environment’ (2017) 2 *Asian Journal of Sustainability and Social Responsibility* 59.

stakeholders,<sup>34</sup> the physical need to adjust activity in response to the difficulties caused by climate change,<sup>35</sup> represents the independent influence of the environment.<sup>36</sup> Commercial activity may be adjusted by environmental necessity,<sup>37</sup> but the fact that change is out of necessity further illustrates the level of influence the environment can command. Few other stakeholders can force changes through an extreme manifestation of influence, which can be exemplified by sudden environmental developments: e.g., permanently increased temperatures in a previously mild climate.<sup>38</sup> Consequently, recognition is given to the value of sustainable practices on the basis of the need to create value for stakeholders and avoid the future curtailment of business activity. The validity of the environment as a stakeholder is derived from this recognition and the subsequent value that sustainable practices add to existing business models.<sup>39</sup>

Independent management of environmental concerns through the implementation of these policies implicitly leads to recognition that the environment is an independent stakeholder.<sup>40</sup> Otherwise, there would be no adequate reason why businesses would pursue models of environmental sustainability when, as discussed previously, short term profits, relevant to

---

<sup>34</sup> Antonio Rueda-Manzanares, J. Alberto Aragón-Correa and Sandra Sharma, 'The Influence of Stakeholders on the Environmental Strategy of Service Firms: The Moderating Effects of Complexity, Uncertainty and Munificence' (2008) 19(2) *British Journal of Management* 185.

<sup>35</sup> Myrja W. Allen and Christopher A. Craig, 'Rethinking corporate social responsibility in the age of climate change: a communication perspective' (2016) 1 *International Journal of Corporate Social Responsibility* 1.

<sup>36</sup> Matias Laine, 'The Nature of Nature as a Stakeholder' (2010) 96 *Journal of Business Ethics* 73.

<sup>37</sup> Sandra Waddock 'We Are All Stakeholders of Gaia: A Normative Perspective on Stakeholder Thinking' (2011) 24(2) *Organization and Environment* 192.

<sup>38</sup> Nardia Haigh and Andrew Griffiths, 'The Natural Environment as a Primary Stakeholder: the Case of Climate Change' (2009) 18(6) *Business Strategy and the Environment* 347.

<sup>39</sup> Stefan Schaltegger, Jacob Hörisch and R. Edward Freeman 'Business Cases for Sustainability: A Stakeholder Theory Perspective' (2017) 32(3) *Organization and Environment* 191.

<sup>40</sup> Mark Starik, 'Should Trees Have Managerial Toward Stakeholder Status for Non-Human Nature' (1995) 14 *Journal of Business Ethics* 207.

shareholders,<sup>41</sup> are derived from its exploitation.<sup>42</sup> While some shareholders may be willing to embrace long term profits through the equitable use of resources,<sup>43</sup> they do not represent the majority,<sup>44</sup> nor would this hypothesis be sufficient to account for the direct recognition granted to the environment by advancing its protection within the corporate framework. There has also been a trend in favour of Environmental Social Governance (ESG) policies that act as an implicit metric through which the environment as a stakeholder is both recognised and assessed within a progressive corporate framework.<sup>45</sup> This framework accommodates environmental interests through the pursuit of sustainable policies for their own sake, as opposed to the sake of other shareholders.<sup>46</sup> While ESG policies can be of interest to shareholders,<sup>47</sup> they provide mechanisms for environmental accountability in their own right,<sup>48</sup> which aligns to the vision of the environment as a stakeholder. Indeed, ESG policies may even be introduced to satisfy the

---

<sup>41</sup> Gregory Jackson and Anastasia Petraki, 'How does Corporate Governance Lead to Short-Termism' in Sigurt Vitols and Nobert Kluge, *The Sustainable Company: A New Approach to Corporate Governance* (European Trade Union Institute 2011).

<sup>42</sup> Sarah Murray, 'How to Take the Long-Term View in a Short-Term World' *Financial Times* (London, 26 February 2021) <<https://www.ft.com/content/5bc1580d-911e-4fe3-b5b5-d8040f060fe1>> accessed 21 August 2021.

<sup>43</sup> David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' (2010) Washington and Lee Legal Studies Paper No. 2010-11.

<sup>44</sup> Collins C. Ajibo, 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2(1) Birkbeck Law Review 37.

<sup>45</sup> Ira Kay and others, 'The Stakeholder Model and ESG' (*Harvard Law School Forum on Corporate Governance*, 14 September 2021) <<https://corpgov.law.harvard.edu/2020/09/14/the-stakeholder-model-and-esg/>> accessed 13 November 2021; and Richard A. Clarke and others, 'The Challenge of Going Green' *Harvard Business Review* (Boston, July-August 1994) <<https://hbr.org/1994/07/the-challenge-of-going-green>> accessed 13 November 2021.

<sup>46</sup> Rogene A. Buchholz, 'The natural environment: Does it count?' (2004) 18(2) *Academy of Management Perspectives* 130.

<sup>47</sup> Ester Clementino and Richard Perkins, 'How Do Companies Respond to Environmental, Social and Governance (ESG) ratings? Evidence from Italy' (2021) 171(2) *Journal of Business Ethics* 379.

<sup>48</sup> Mervyn King, 'Stakeholder collaboration will help companies and society thrive' *Financial Times* (London, 24 May 2021) <<https://www.ft.com/content/8f6f9bc8-2e81-43d0-ad2a-b387de41e0f5>> accessed 13 November 2021.

interest of other stakeholders, such as investors.<sup>49</sup> This does not detract from their ability to recognise environmental influence, but rather shows how no stakeholder exists in a vacuum, and that actions can serve to create value beneficial to the whole of the company.<sup>50</sup> In fact, an investor may be interested in ESG policies for the primary reason that they recognise the environment's independent influence over current and future company activity, and wish to be the third party that acts on behalf of the environment as a stakeholder.<sup>51</sup> Similarly, ESG policies are not the only means of demonstrating the influence of the environment, but can be viewed as an addition to the previously outlined legal and commercial impact of the natural world on business activity. By adding independent economic and social value to environmental considerations,<sup>52</sup> ESG policies act to illustrate the environment's stakeholder interest within the capitalist model.<sup>53</sup> Therefore, the environment both is and should be recognised as an independent stakeholder, whose interests are of relevance when assessing the impact of a business on the community as a whole.

It can therefore be argued that a model of shareholder primacy, which is intertwined with the limited liability principle in a manner that allows for the externalisation of environmental risk to a subsidiary, has a negative impact on the environment as a stakeholder.<sup>54</sup> This is of benefit to the shareholders of the parent company, who are unlikely to suffer loss when only the assets of the subsidiary are affected by any penalty for environmental damage.<sup>55</sup> While there has been an

---

<sup>49</sup> Maya Indriastuti and Anis Chariri, 'The role of green investment and corporate social responsibility investment on sustainable performance' (2021) 8(1) *Cogent Business and Management*.

<sup>50</sup> Miying Yang, Doroteya Vladimirova and Steve Evans 'Creating and Capturing Value Through Sustainability' (2017) 60(3) *Research-Technology Management* 30.

<sup>51</sup> Brett Christophers, 'Environmental Beta or How Institutional Investors Think about Climate Change and Fossil Fuel Risk' (2019) 109(3) *Annals of the American Association of Geographers* 754.

<sup>52</sup> Cathy Driscoll and Mark Starik, 'The Primordial Stakeholder: Advancing the Conceptual Consideration of Stakeholder Status for the Natural Environment' (2004) 49 *Journal of Business Ethics* 55.

<sup>53</sup> Starik, 'Should Trees Have Managerial Toward Stakeholder Status for Non-Human Nature' (n 40).

<sup>54</sup> Carrie Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33(1) *Legal Studies* 141.

<sup>55</sup> *ibid*.

increased promotion of corporate social responsibility (“CSR”), this does not in itself rectify the practice of externalising risk to a subsidiary. Although some effort has been made to mitigate externalisation of risk through the ruling in *Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/Respondents)*,<sup>56</sup> it will be argued in Part II that this has proved insufficient to remove the practice in its entirety or ensure that externalisation takes adequate account of the needs of the environment.

Demands for CSR can often stem from the desires of ‘enlightened’ shareholders, defined as shareholders not strictly focused on profit,<sup>57</sup> as well as external trends favouring a sustainable image for a company.<sup>58</sup> Thus, shareholders can remain at the centre of any CSR policy,<sup>59</sup> while the externalisation of risk can continue and even be somewhat legitimised through the otherwise greenwashed structure of the company. Consequently, stricter and greater legal accountability is needed to protect the interests of the environment as a stakeholder. It will be argued below that this can only be achieved through watering down existing limited liability protections..

## II. THE ENVIRONMENT AS A STAKEHOLDER AND THE STRUGGLE OF TRADITIONAL DUTY OF CARE OF PRINCIPLES

It is argued that the present interpretation of limited liability acts to hinder the interests of the environment as a stakeholder. Limited liability encourages a company to shift potential harm to other stakeholders in the event fault is found with their approach to environmental damage.<sup>60</sup> Research has shown, for example, that firms using hazardous materials have tended to remain small or

---

<sup>56</sup> *Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/Respondents)* [2019] UKSC 20.

<sup>57</sup> Gregory Unruh and Richard Ettenson, ‘Growing Green: Three Smart Paths to Developing Sustainable Products’ *Harvard Business Review* (Boston, 1 June 2010) <<https://hbr.org/2010/06/growing-green>> accessed 13 November 2021.

<sup>58</sup> *ibid.*

<sup>59</sup> Chitru S. Fernando, Mark P. Sharfman and Vahap B. Uysal ‘Corporate Environmental Policy and Shareholder Value: Following the Smart Money’ (2017) 52(4) *Journal of Financial and Quantitative Analysis* 2023.

<sup>60</sup> Pat Akey and Ian Appel, ‘The Limits of Limited Liability: Evidence from Industrial Pollution’ (2020) 76(1) *Journal of Finance* 5.

restructure themselves in such a manner as to create a large number of subsidiaries.<sup>61</sup> This is indicative of an increased awareness of the likelihood that their operations will damage the environment, and accordingly, their reliance on limited liability to offset the costs of damages that could otherwise outweigh returns.<sup>62</sup> Similarly, it has been discovered that the imposition of strict liability laws on parent companies alone has led to polluting firms restructuring themselves into smaller subsidiaries, resulting in an increased frequency of spillages.<sup>63</sup> It is therefore apparent that the externalisation of harm which limited liability encourages internalises harm to the environment. The result is worsened by the globalisation of pollution, with subsidiaries operating in foreign jurisdictions further complicating attempts to hold parent companies accountable.

The negative impact of traditional limited liability principles can be seen in the case of *Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/Respondents)*.<sup>64</sup> The defendants in question had caused a toxic discharge from a mine, leading to severe health issues for more than 1500 Zambian villagers.<sup>65</sup> Here the existence of an internal sustainability report was used to justify the imposition of liability on a parent company for the pollution caused by its subsidiary. This was only possible, however, through a complicated discussion of jurisdictional issues, followed by confirmation that parent-subsidiary liability was not in itself a separate category of negligence.<sup>66</sup> The result is a limited discussion of the importance of holding companies to account for environmental damage, and the particular emphasis that should be placed on this protection in light of the structural nature of the environment as a stakeholder. While it is true that, as argued by Petrin, it will be easier to bring a lawsuit against parent companies for actions caused by their foreign subsidiaries,<sup>67</sup> *Vedanta*

---

<sup>61</sup> Al H. Ringleb and Stephen N. Wiggins, 'Liability and Large-Scale, Long-Term Hazards' (1990) 98(3) *Journal of Political Economy* 574.

<sup>62</sup> *ibid.*

<sup>63</sup> Anna Alberni and David Austin, 'Accidents Waiting to Happen: Liability Policy and Toxic Pollution Releases' (2002) 84(4) *The Review of Economics and Statistics* 729.

<sup>64</sup> *Vedanta* (n 56).

<sup>65</sup> Samantha Hopkins, 'Vedanta Resources plc and Another v Lungowe and Others' (2019) 70(3) *Northern Ireland Legal Quarterly* 371.

<sup>66</sup> *ibid.*

<sup>67</sup> Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 *Economic Business Organisation Law Review* 771.

represents a narrowly defined expansion of jurisdiction grounded in a requirement for a specific set of facts to be present.<sup>68</sup> Access to justice was somewhat improved upon,<sup>69</sup> but only in matters of jurisdiction as opposed to a more direct recognition of the need to vindicate the interests of the environment. Hopkins has posited that the duty of care owed by parent companies was significantly expanded upon,<sup>70</sup> which in turn could lead to significant recognition of environmental interests. However, this argument ignores the emphasis placed by the Court on the voluntary assumption of responsibility through the implementation of a sustainability policy. The duty of care was not so much expanded upon as confirmed to exist where responsibility for one element of the subsidiary was passed onto the parent company. The fact that the element happened to be of an environmental nature had no more bearing on the imposition of liability than if, for example, the element in question had been the hiring practices of the subsidiary. The decisive factor for the Court was whether there was responsibility and control of the sector that caused damage to the victims,<sup>71</sup> and not whether environmental damage was caused by the subsidiary in the first instance, as would be the case under eco-liability.

By forcing the Supreme Court to examine whether liability can even be applied in the first place, the spectrum is shifted away from environmental pollution to a more traditional application of common law negligence principles. Principles, which, by their incremental nature, lack the urgency required to address environmental issues. Such urgency has been reflected in comparative jurisprudence, with both *Urgenda v The Netherlands*<sup>72</sup> and *Royal Dutch Shell v Friends of the Earth Netherlands*<sup>73</sup> relying on the emergency nature of the climate crisis to justify significant restrictions on the capacity of state and commercial actors to continue with their slow pace of reducing carbon emissions. This is relevant insofar as it shows that a Court can be cognisant of the importance of

---

<sup>68</sup> Elvis Ojeda, 'Transnational Corporate Liability Litigation and Access to Environmental Justice: The Vedanta v Lungowe Case' (2021) 6 London School of Economics Law Review 223.

<sup>69</sup> *ibid.*

<sup>70</sup> Hopkins (n 65)

<sup>71</sup> *ibid.*, see also *Vedanta* (n 56) 61.

<sup>72</sup> *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] Rechtbank Den Haag, C/09/456689/HA ZA 13-1396.

<sup>73</sup> *Royal Dutch Shell* (n 2).



environmental accountability. However, *Urgenda* concerned the actions of the state itself and made reference to international obligations that are not directly applicable to a private entity.<sup>74</sup> Similarly *Royal Dutch Shell* was dependent upon domestic climate legislation and did not concern questions of liability.<sup>75</sup> These cases indicate that statutes can be important tools for judicial recognition of environmental interests. Yet, they are of little assistance to an expansion of the *Vedanta* ruling, given the absence of a statute codifying and applying eco-liability to circumstances akin to *Vedanta* or *Okpabi*, as will be discussed further in Part III.

In the absence of a dedicated scheme of eco-liability, *Vedanta* struggles to reconcile traditional liability principles with the overarching need to hold the parent company to account. This need for accountability can be derived from the fact that, when considering the environment to be a structural stakeholder, and the broader urgency of the climate crisis, it is argued that this stakeholder should maintain a position of priority in the legal hierarchy. While this is somewhat achieved through the recognition of jurisdiction, the emphasis on the ‘group wide policy’ to identify a duty of care leaves a great deal of scope for ambiguity.<sup>76</sup> For example, were a parent company to provide a disclaimer absolving them of supervision of the group wide policy, or the subsidiary consciously and deliberately ignores the policy, it is unclear how this ruling could be expanded to encompass liability for the parent company. Traditional liability would arguably see this as too broad an expansion of the ruling, subject to a possible emphasis on the public policy element intertwined within the *Caparo* test.<sup>77</sup> By contrast, the establishment of eco-liability would allow for a statutory exception to ordinary duty of care principles without compromising on the coherence of tort law due to its narrowly defined nature. It could be argued that the *Caparo* test grants some

---

<sup>74</sup> Marc A Loth, ‘Too Big to Trial? Lessons from the Urgenda case’ (2021) 23 Uniform Law Review 336.

<sup>75</sup> Benoit Mayer, ‘Milieudéfensie v Shell: Do oil corporations hold a duty to mitigate climate change?’ (EJIL: Talk!, 3 June 2021) <<https://www.ejiltalk.org/milieudéfensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>> accessed 17 August 2021.

<sup>76</sup> Elena Blanco, ‘Reflections on Vedanta’s Supreme Court Decision on Jurisdiction’ (2019) 16 Manchester Journal International Economic Law 110.

<sup>77</sup> *Caparo Industries Plc v Dickman* [1990] UKHL 2, 2 AC 605.

leeway to create an eco-liability regime through incrementalism.<sup>78</sup> However, this is unlikely to be achieved at a pace conducive to the immediate need for increased accountability. Incremental expansion is dependent upon a slow reformulation of case law to achieve the desired application of liability.<sup>79</sup> In the meantime, drastic action is required to curtail polluting business activities.<sup>80</sup> Such a rapid remodelling of liability would therefore be more appropriately achieved through the swift passing of an eco-liability statute.

Thus, *Vedanta* represents a traditional approach to liability that, while positive in terms of the outcome of the case, is not conducive to a straightforward application of liability, in circumstances where a subsidiary has caused environmental damage in the absence of direct evidence of parent company control. An eco-liability regime would achieve this expansion without compromising on common law principles of negligence. The justifications for this regime have become even more apparent in the aftermath of *Okpabi v Royal Dutch Shell*.<sup>81</sup>

### III. *OKPABI V ROYAL DUTCH SHELL*: TWO STEPS FORWARD, ONE STEP BACK.

It is submitted that *Okpabi v Royal Dutch Shell* represents and compounds the previous conservatism witnessed in *Vedanta*. In a similar vein to *Vedanta*, the case concerned environmental damage to a Nigerian tribe caused by oil spills from a subsidiary of the UK domiciled company Royal Dutch Shell plc. The question was once again one of jurisdiction; whether the parent company could be held liable for the damage caused and therefore whether the case could be determined

---

<sup>78</sup> Ken Oliphant, 'Against Certainty in Tort Law' in Stephen GA Pitel, Jason W Neyers, Erika Chamberlain (eds), *Tort Law Challenging Orthodoxy* (Hart Publishing 2013).

<sup>79</sup> Mark Cannon QC, 'The Caparo Illusion: The Three-Stage Test Has Gone - What Happens Next?' (4 New Square, 13 August 2019) <<https://www.4newsquare.com/wp-content/uploads/2019/09/The-Caparo-Illusion-by-Mark-Cannon-QC-and-Joshua-Folkard-of-4-New-Square-Chambers.pdf>> accessed 22 August 2021.

<sup>80</sup> IPCC, 'Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (Cambridge University Press, 2021).

<sup>81</sup> [2021] UKSC 3.

by a UK Court. In ruling that Royal Dutch Shell could be held liable, the Court determined that the level of control exerted by the company over its subsidiary justified the imposition of liability.

In one sense, *Okpabi* serves as the best-case scenario under the current limitations of relying on traditional duty of care principles. By confirming the ruling in *Vedanta*, it leaves open the possibility that a parent company who has clearly been using a subsidiary as a means of externalizing risk, while maintaining internal control can suffer some form of penalty. The emphasis on active governance over internal corporate structure is a logical method of circumventing limited liability, with the presence of sustainability policies establishing a useful starting point of any evidentiary investigation.<sup>82</sup>

However, *Okpabi* also reinforces the difficulties that *Vedanta* could potentially face were any attempt to be made to directly confront the environmental issues at stake. It was noted that establishing liability of the parent company for the activities of a subsidiary is not ‘a novel category of negligence’.<sup>83</sup> Therefore, ‘control is just the starting point’ when it comes to identifying whether a duty of care exists.<sup>84</sup> While this can result in positive outcomes where the parent company has been an active participant in the pollution caused by its subsidiary, it arguably encourages a greater degree of separation designed to absolve the parent company of responsibility where they lack such control. Indeed, *Okpabi* arguably tightens the standard by noting that ‘control of a company and de facto management are two different things’.<sup>85</sup> If de facto management of a subsidiary is required to assert liability for the parent, it is submitted that this facilitates the wider externalisation of risks in a manner likely to encourage greater independence within these subsidiaries. Such greater independence would be justified on the basis that it would avoid a parent company being perceived as the de facto manager, thus leading to an avoidance of liability under the *Okpabi* standard. The independence of subsidiaries is not in itself a negative outcome. However, there is evidence to suggest that subsidiaries with a higher degree of

---

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid* [151].

<sup>84</sup> *ibid* [147].

<sup>85</sup> *ibid.*

independence are prone to higher carbon emissions.<sup>86</sup> The subsidiary is also unlikely to have the same financial resources necessary for full compensation of the victims of pollution,<sup>87</sup> thus exacerbating existing issues around remedying environmental injustice.<sup>88</sup> Additionally, there is not the same incentive on the parent company to ensure that its business model is operating in a sustainable manner. Any centralisation of environmental authority could potentially lead to a lawsuit in a similar vein to those that occurred in *Vedanta* and *Okpabi*.<sup>89</sup> This in turn could lead to greater systemic errors within environmental matters that result in a higher likelihood of pollution, due to the continuation of the use of independent subsidiaries.<sup>90</sup> Thus, the environment both globally and as a corporate stakeholder will remain disproportionately impacted by this implicit encouragement to maintain subsidiaries that operate in as independent a manner as possible.

From a jurisdictional perspective, it is helpful that the Court recognised its capacity to rule on the case in question. If the Court acknowledges that parent companies can be held accountable in their domiciled jurisdiction, this at least shows a willingness to engage in environmental matters occurring in more vulnerable parts of the world. While environmental issues were not the focal point of the discussion on jurisdiction, the Court does note the presence of group-wide environmental policies and the knowledge Royal Dutch Shell had of the oil spills in making its determination. If a statutory regime of eco-liability were to be imposed, it could solve many of these jurisdictional complexities; allowing for greater judicial discussion over the nature and extent to which liability should apply to the parent company.

*Okpabi* is perhaps as far as the Court can go without compromising traditional concepts of tortious liability. The warning against conducting a ‘mini

---

<sup>86</sup> Don Grant and Andrew W Jones, ‘Are Subsidiaries More Prone to Pollute? New Evidence from the EPA’s Toxics Release Inventory’ (2003) 84 *Social Science Quarterly* 162.

<sup>87</sup> Stefan Lo, ‘Piercing of the Corporate Veil for Evasion of Tort Obligations’ (2017) 46 *Common Law World Review* 42.

<sup>88</sup> Maria Adebawale, *Using the Law: Access to Environmental Justice Barriers and Opportunities* (Capacity Global Ltd 2004).

<sup>89</sup> Ojeda (n 68).

<sup>90</sup> Grant and Jones (n 86).

trial’ during a discussion on jurisdiction is perhaps an indicator that the courts themselves are uncertain as to what extent they can pierce the veil to allow for parent companies to be held responsible.<sup>91</sup> The emphasis as to the extent to which the parent company supervised the activities of the subsidiary is a practical method of reconciling limited liability with reality. Yet, it may not go far enough to ensure an urgent shift in favour of recognising the importance of the environment as a stakeholder. The Court is slow to expand on what was already confirmed in *Vedanta* and does not perceive environmental matters as sufficient to justify a distinct category of negligence. *Okpabi* shows that, in the absence of statutory guidance, it is unlikely that the Court can pursue eco-liability, with a specific focus on the damage caused to the environment as opposed to the question of whether liability can even be said to apply in the first place. Further, it lacks the expansiveness that would be needed for a large-scale application of liability centred around whether the subsidiary caused damage to the environment. Case law as a means of imposing eco-liability is impaired by this relative conservatism. By contrast, a statute is more capable of imposing eco-liability in a rapid manner that is conducive to a higher degree of accountability for parent companies. Therefore, it is necessary to analyse the effects that the introduction of an eco-liability statute would have on future jurisprudence.

#### IV. ANALYSING THE PARENT COMPANY LIABILITY FOR ENVIRONMENTAL DAMAGE BILL

In assessing what statutory eco-liability would look like, it is pertinent to examine the Parent Company Liability for Environmental Damage Bill proposed by the Chancery Lane Project.<sup>92</sup> This Bill represents a progressive effort to outline what eco-liability would look like and what mitigation measures could be put in place to mitigate any areas of unfairness.

Under the proposed Bill there would be a new offence of causing gross environmental damage. Section 1 of the Bill states that ‘A relevant commercial organisation (‘C’) is guilty of an offence under this section if a subsidiary

---

<sup>91</sup> *ibid* 120.

<sup>92</sup> ‘Parent Company for Environmental Damage Bill’ (The Chancery Lane Project, 28 March 2021) <<https://chancerylaneproject.org/model-laws/1530-2/>> accessed 27 July 2021.

undertaking causes, or is reckless as to causing, Gross Environmental Damage, whether in the United Kingdom or another jurisdiction'.<sup>93</sup> A company found guilty of this offence can be subject to heavy fines of up to 20 million Euros or 4% of the company's annual turnover.<sup>94</sup> The Bill does provide however that 'it is a defence for C to prove that C had in place adequate procedures designed to prevent subsidiaries of C from undertaking such conduct'.<sup>95</sup>

The Bill is quite clear in its objective of preventing companies from externalising environmental risks to foreign subsidiaries to avoid accountability. The inclusion of recklessness as a possible means of holding the company liable would also lead to a higher degree of scrutiny over the subsidiary. This is due to the additional risk of loose enforcement of sustainable practices eventually leading to heavy fines. The stigma factor of being subject to an investigation as to whether a company was guilty of this offence would add to the deterrent factor. This in turn would encourage a greater emphasis on either appropriate accountability mechanisms of subsidiaries by parent companies or the internalising of environmental risks to assert full control. The encouragement of the relevant Secretaries of State to publish guidelines also allows for flexible adjustments of the term 'gross environmental damage offence' to encompass new and developing means of pollution.<sup>96</sup> The relative degree of independence granted to the Secretaries of State in this regard allows for the expertise of their departments to be used to identify these developing methods of pollution and adjust guidelines accordingly.

The Bill does perhaps suffer from its brevity. For example, there is no specific definition of the term 'gross environmental damage'. The expression 'gross' would imply that any and there may be some form of minimum threshold of environmental damage that must be met. If this is the case, then the Bill would benefit from setting out what this threshold is or how the term 'gross' intertwines with the broader offence. In the absence of this, there could be scope for ambiguity where it is unclear as to the extent of the damage caused by the subsidiary.

---

<sup>93</sup> *ibid* Section 1.

<sup>94</sup> *ibid* Section 8.

<sup>95</sup> *ibid* Section 3.

<sup>96</sup> *ibid* Sections 4-7.

This problematic ambiguity is particularly relevant where the damage of the subsidiary may not have immediately apparent effects but is instead exacerbating global warming. An oil spill will have clear victims and a chain of causation that can, as evidenced in *Okpabi*, be linked to the parent company through a complex legal manoeuvre. However, excessive oil production may not appear *prima facie* harmful, despite the fact it will have an objectively worse impact on the environment as a whole.<sup>97</sup> It could be argued that this attempt to hold companies accountable for their negative impact on climate change may leave far too much uncertainty in the law. This could be mitigated through the publication of the aforementioned guidelines by the Secretaries of State, particularly in the wake of the upcoming COP 26 global climate change conference,<sup>98</sup> which should provide further indication as to the extent to which governments are expected to hold businesses liable for their actions, or lack thereof on climate change.<sup>99</sup>

The defence provided by the proposed Bill appears designed to prevent a parent company being unfairly penalised where they have attempted to appropriately supervise their subsidiaries' environmental activities. This would be effective in encouraging compliance with higher standards of oversight, while acknowledging that subsidiaries can still act as independent operators in a manner unpredictable to the parent company. At the same time, strict liability offences have been shown to be effective in the historical context of policing pollution.<sup>100</sup> It is thus submitted that a defence of this nature is not entirely necessary when implementing eco-liability. Similarly, a strict liability offence, applied to the parent company for the action of its subsidiaries, would require an even greater degree of scrutiny conducive to reducing environmental risks.<sup>101</sup> This can be connected to the fact that strict liability serves a broader public objective to reduce

---

<sup>97</sup> United Nations Environment Programme (UNEP), 'The Production Gap Report' (UNEP, 2020) <<https://productiongap.org/2021report/>> accessed 13 November 2021.

<sup>98</sup> John Vogler, 'The International Politics of COP 26' (2021) 136 *Scottish Geographical Journal* 31.

<sup>99</sup> *ibid.*

<sup>100</sup> Neil Hawke, 'Crimes against the Environment' (1987) 16 *Anglo-American Law Review* 90.

<sup>101</sup> Dinah L Shelton, 'Strict Liability in International Environmental Law' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Dispute* (Brill Academic Publishers 2007).

environmental harm,<sup>102</sup> aligning with the more specific goal of reaching net zero carbon emissions in the UK by 2050.<sup>103</sup> While it was noted above that previous strict liability offences did lead to an increased externalisation of risk, this only applied where strict liability operated in the context of offences committed by the parent company.<sup>104</sup> Were it to be applied to the broader corporate structure i.e., the parent company and its subsidiaries, the loophole caused by externalisation would be removed and there is likely to be a more positive result in terms of environmental accountability. However, it may be unfeasible to implement such a policy given the unprecedented level of potential litigation stemming from the absence of a defence measure.<sup>105</sup> If a parent company can be held liable without any means of defence, it may open the floodgates to a high volume of claims any time an environmental issue arises within the corporate structure.<sup>106</sup> The focus shifts from appropriate accountability to finding means through which to address a potentially endless stream of compensation claims.<sup>107</sup> Consequently, the defence as outlined above offers a potential appropriate balance between adequate scrutiny and the avoidance of floodgate concerns.

The statue proposed by the Chancery Lane Project illustrates the potential scope and effectiveness of an eco-liability regime. The Bill, while brief in nature, directly addresses the need for the environment to have its interests vindicated through increased accountability. At the same time, the defence measures suggested by the Chancery Lane Project would alleviate concerns about unfair punishment of parent companies who genuinely seek to prevent their subsidiaries from damaging the environment. It is acknowledged, however, that there remain several lingering issues that must be addressed to justify the implementation of eco-liability. These issues will be refuted in greater detail in Part V.

---

<sup>102</sup> *ibid.*

<sup>103</sup> Karen Turner, Antonios Katris and Julia Race, 'The need for a Net Zero Principles Framework to support public policy at local, regional and national levels' (2021) 35 *Local Economy: The Journal of the Local Economy Policy Unit* 627.

<sup>104</sup> UNEP, *Environmental Liability and Compensation Regimes: A Review* (2003) <<https://wedocs.unep.org/20.500.11822/29241>> accessed 13 November 2021.

<sup>105</sup> Francis Kevin Heathcote Maher and Robert C Evans, "'Hard" cases floodgates and the new rhetoric' (1985) 8 *University of Tasmania Law Review* 96.

<sup>106</sup> Marin K Levy, 'Judging the Flood of Litigation' (2013) 80 *The University of Chicago Law Review* 1007.

<sup>107</sup> Alan Wharam, 'Opening the Floodgates' (1974) 3 *Anglo-American Law Review* 65.



## V. REFUTING CONCERNS REGARDING THE IMPLEMENTATION OF ECO-LIABILITY

There are several concerns that could stem from the creation of a statutory eco-liability regime. These concerns include the potential risk of legal uncertainty and possible unfairness to the parent company where a subsidiary breaks environmental guidelines. There is also the traditional allegation that any attempt to limit the scope of limited liability has a disproportionately negative impact on investment.<sup>108</sup>

Legal uncertainty is a central concern with any attempt to compromise traditional limited liability principles.<sup>109</sup> It is argued however that this can be mitigated through the imposition of eco-liability via a statute as opposed to the complex legal tricks seen in *Vedanta* and *Okpabi*. By operating within a narrowly defined parameter, coupled with an appropriate degree of statutory guidance, there is no reason eco-liability would lead to excessive uncertainty should any conflict arise. This is particularly relevant in light of the increased codification of sustainable corporate governance and the encouragement of mechanisms designed to promote sustainable business models.<sup>110</sup>

The concern surrounding unfairness to the parent company largely stems from traditional *Caparo* duty of care principles.<sup>111</sup> It could be argued that allowing a parent company to assume liability for the actions of a subsidiary that had disobeyed environmental guidelines would penalise companies who at least attempt to implement sustainable practices.<sup>112</sup> However, this scenario would ignore the incentive effect eco-liability would have on companies to increase supervision over their subsidiaries. Tortious liability does have an ability to

---

<sup>108</sup> Akey and Appel (n 60)

<sup>109</sup> J William Callison, 'Rationalizing Limited Liability and Veil Piercing' (2003) 58 *The Business Lawyer* 1063.

<sup>110</sup> Anna Devine, 'Rise of ESG Renews Debate Over Whether Passive Funds Can Deliver' *Financial Times* (London, 25 June 2021) <<https://www.ft.com/content/6f79355b-afe7-486a-b103-cb92cba91aed>> accessed 13 November 2021.

<sup>111</sup> Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 *Oxford Journal of Legal Studies* 33.

<sup>112</sup> Hopkins (n 65).

encourage greater supervision.<sup>113</sup> However, this would be achieved at a slower rate than is necessary for the immediate need for increased environmental accountability.<sup>114</sup> More than mere guidelines would be needed to avoid any potential legal implications, and parent companies would be more likely to implement strict enforcement of ESG policies. Additionally, if the Chancery Lane Project Eco-Liability Bill is accepted in its present version, the defence for a parent company that took adequate measures to supervise their subsidiary would mitigate allegations of unfairness.

Similarly, while it could be unfair to hold the parent company accountable, it would be even more unfair if only the assets of the subsidiary company were to be made available as compensation for environmental damage. The first perception of unfairness relies on an individual notion that no single entity should have to take responsibility for something that, according to individualism, is not their fault.<sup>115</sup> This overlooks the potential for a more holistic concept of a company that borrows elements from both the single economic entity doctrine, which removes the distinction between a parent company and subsidiaries,<sup>116</sup> and the outlined gradual shift towards stakeholder capitalism.<sup>117</sup> As was outlined in Part I, there has been a trend towards viewing a company as having a purpose beyond just the creation of value for shareholders.<sup>118</sup> Such a neo-collectivist attitude would undoubtedly blur the lines of limited liability. It is submitted that this blurring is justified on the basis of a higher standard of scrutiny being required to avoid the sacrifice of obligations towards the environment as a stakeholder. There has already been litigation that acknowledges the urgency of the climate

---

<sup>113</sup> *ibid.*

<sup>114</sup> Bruce Lindsay, 'Climate of Exception: What Might a Climate Emergency Mean in Law' (2010) 38 *Federal Law Review* 255.

<sup>115</sup> Muhammad Waqas, 'Separate Legal Entity of Corporation: The Corporate Veil' (2016) 3 *International Journal of Social Sciences and Management* 1.

<sup>116</sup> Franco Jumbo, 'Current Approaches to Separate Legal Personality of a Company in Ireland, the State of Delaware and Nigeria' (LLM thesis, University of Limerick 2018)

<sup>117</sup> Dominic Barton, Dezső Horváth and Matthias Kipping, *Re-Imagining Capitalism* (Oxford Scholarship Press Online 2016).

<sup>118</sup> Thomas A Hemphill, Keith E Kelley and Francine Cullari, 'The Ascendancy of Stakeholder Capitalism: What is its Meaning for Corporate Governance?' (2021) 46 *Journal of General Management* 262.

crisis,<sup>119</sup> which in turn acts as a justification for this higher standard of scrutiny.<sup>120</sup> Were the individual perception of unfairness to be adhered to, this would have broader and worse ramifications for both the environment and wider stakeholders, in the sense that there may be insufficient assets owned by the subsidiary to ensure adequate compensation for environmental damage. Thus, the traditional (as opposed to a holistic) view of unfairness is not the best metric by which to assess the ramifications of a curtailed limited liability regime. When viewed through a more holistic lens rather than the traditional one, as is increasingly becoming the norm among businesses,<sup>121</sup> it becomes clear that the traditional perception of unfairness is an insufficient reason to justify the continuation of the present application of limited liability.

With regard to the negative impact on investment, the argument seems to ignore the increased profit that lies in pursuing sustainable business models. There has been rapid growth in the demand for sustainable finance, which has been coupled with increased regulation across Western markets designed to promote and encourage sustainable capitalism.<sup>122</sup> This encouragement is set to increase, particularly in light of sustainability discussions at the 2021 G7 summit and the impending COP 26 conference.<sup>123</sup> Further, there has been a shift in comparative jurisprudence to holding polluting companies to account for their actions, leading to increased business costs for recalcitrant businesses. *Royal Dutch Shell v Friends of the Earth Netherlands*, for example, saw a Dutch Court order the Royal Dutch Shell and its subsidiaries to reduce their carbon emissions by 45% by 2030.<sup>124</sup> A failure to do so will lead to further litigation and heavy penalties for any fossil fuel company. Consequently, eco-liability merely acts as an additional incentive to

---

<sup>119</sup> *Royal Dutch Shell and Sharma* (n 2).

<sup>120</sup> Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 *Business and Human Rights Journal* 93.

<sup>121</sup> Doug Sundheim and Kate Starr, 'Making Stakeholder Capitalism a Reality' *Harvard Business Review* (Boston, 22 January 2020) <<https://hbr.org/2020/01/making-stakeholder-capitalism-a-reality>> accessed 13 November 2021.

<sup>122</sup> S M Shafiul Alam and K M Zahidul Islam, 'Examining the Role of Environmental Corporate Social Responsibility in building Green Corporate Image and Green Competitive Advantage' (2021) 6 *International Journal of Corporate Social Responsibility* 1.

<sup>123</sup> Vogler (n 98).

<sup>124</sup> *Royal Dutch Shell* (n 2).

pursue environmentally friendly investments that are already being encouraged under existing commercial ventures.<sup>125</sup> Specifically, an eco-liability statute represents a continuation of policies that promote sustainable business models and can be aligned with wider regulation of the green economy.<sup>126</sup> Any negative impact on investment would only affect companies who are already at risk due to an inability to adjust to modern markets' desire for green commerce.<sup>127</sup>

These concerns would also ignore the increased likelihood of parent companies internalising these environmental risks to avoid a loss of oversight over an element to their business that they are now to be held accountable for under either scenario. If a parent company is conscious that they have a legal obligation to enhance environmental safeguards, it would be logical to pursue this through internal mechanisms that can be assessed directly by the relevant directors.<sup>128</sup> Coupled with the already discussed rise of sustainable investment,<sup>129</sup> it is apparent that the benefits of eco-liability on both an individual business and the market as a whole refute or outweigh any challenges that could be posed by critics.

## CONCLUSION

In conclusion, it has been argued that statutory liability should be imposed on parent companies for environmental damage caused by their subsidiaries. The term eco-liability is used to demonstrate how such liability is needed in line with the recognition of the environment as a silent and structural stakeholder. The environment's position as a stakeholder can be justified on the basis of its

---

<sup>125</sup> Jana Hojnik, Mitja Ruzzier and Maja Konecnik Ruzzier 'Transition towards Sustainability: Adoption of Eco-Products among Consumers' (2019) 11 Sustainability 4308.

<sup>126</sup> Fabiano de Andrade Correa, 'The Role of Law in the Green Economy: Challenges and Opportunities for the Liberalization of Environmental Goods and Services' (2013) 5 World Bank Legal Review 147.

<sup>127</sup> Judith Evans, 'Green Gold How Sustainability Became Big Business for Consumer Brands' *Financial Times* (London, 27 November 2020) <<https://www.ft.com/content/ce523ca1-c8c2-43e7-86ad-ffa5d6605d2c>> accessed 13 November 2021.

<sup>128</sup> Nick Grant, 'Mandating Corporate Environmental Responsibility by Creating a New Directors' Duty' (2015) 17 Environmental Law Review 252.

<sup>129</sup> Shipeng Yang, Fabrizio Ferraro and Juan Almandoz, 'The Rise of Socially Responsible Investment Funds: The Paradoxical Role of the Financial Logic' (2019) 64(2) Journal of Administrative Science Quarterly 466.

increasing influence on business activities both commercially and in line with modern corporate governance. This in turn results in falling within the definition of a secondary stakeholder provided by Clarkson and others,<sup>130</sup> thereby consolidating evidence of its status as an independent stakeholder that must have its interests protected. The rulings in *Vedanta* and *Okpabi* illustrate how current principles of limited liability struggle to achieve a sufficiently wide-ranging degree of liability to incentivise business to increase environmental oversight. While the cases are not without merit, they lack the ability to ensure appropriate protection of the environment when the latter is considered a stakeholder that must have its interests prioritised in the face of severe climate change.<sup>131</sup>

The Bill proposed by the Chancery Lane Project does offer a positive example of how this struggle could be overcome through legislation, though some additional detail and amendments may be required in order to enforce an effective eco-liability regime. Nevertheless, a statute would offer greater clarity for businesses seeking to implement higher standards of environmental protection, with the suggested defence measure preventing an unfair penalisation of parent companies who implement adequate environmental procedures. There are also concerns surrounding uncertainty and the discouragement of investment were an eco-liability regime to be introduced. However, these can be addressed through the use of a statute, as opposed to case law, in order to provide greater guidance on the law. More broadly, the shift towards stakeholder capitalism and ESG based investment practices illustrates how eco-liability is a continuation of existing policy models designed to promote sustainable business activity. Eco-liability is a logical extension of accountability to reflect this green commercial environment. Its adaptation should therefore be welcomed as a sign of progressive oversight by both the legislature and the Courts seeking to enforce greater environmental accountability.

---

<sup>130</sup> Thomas Thijssens, Laury Bollen and Harold Hassink, 'Secondary Stakeholder Influence on CSR Disclosure: An Application of Stakeholder Salience Theory' (2015) 132 *Journal of Business Ethics* 872.

<sup>131</sup> Shailesh Haribhakti and Thara TK, 'Climate Change, State Emergency and Stakeholder Pursuit' *The Economic Times* (India, 1 September 2021) <<https://economictimes.indiatimes.com/industry/renewables/climate-change-state-emergency-and-stakeholder-pursuit/articleshow/85829542.cms>> accessed 13 November 2021.