Piercing the Corporate Veil and Delictual Liability: Two Avenues to Impose Liability on Holding Companies

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Abstract

Where someone sustains injuries arising from a subsidiary company's operations, they appear to have two main avenues available to them to hold the holding company liable. Piercing the corporate veil provides one mechanism through which plaintiffs can potentially obtain compensation from the holding company. This article describes and briefly examines the piercing route as well as an alternative solution, namely the imposition of delictual liability on the holding company for the harm suffered. In doing so, particular attention is given to proving wrongfulness in the context of delictual liability. Essentially, the article seeks to investigate whether it would be easier to institute the delictual claim directly against the holding company than attempting to pierce the corporate veil between the holding company and the subsidiary

Keywords

Piercing the veil; company law; law and economics; law of delict; legal and public policy considerations; wrongfulness.

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1 Introduction

The idea that a juristic person has a separate existence from those who incorporate or engage in it is a fundamental company law principle, which was first recognised in *Salomon v Salomon & Co Ltd*.[1] Other characteristics of juristic personality, such as affirmative and defensive asset partitioning, flow from the idea that a company is a separate juristic person. Affirmative asset partitioning refers to the notion that a juristic person is the owner of its own assets, and thus shareholders are not the owners of the company's property.[2] Defensive asset partitioning refers to the idea that a juristic person holds its own liabilities and has limited liability.[3] This means that, among other things, generally, the company's creditors cannot hold the shareholders liable and must therefore look to the company for payment of the company's debts. The principles that relate to separate juristic personality also apply in the context of corporate groups.[4] Each company that comprises the group is a distinct legal entity that possesses separate liabilities and rights.

Holding companies may potentially exploit their existence as a separate juristic personality. Indeed, there are empirical studies that confirm as much.[5] There are several ways in which they could do this. One way would be to structure the assets within the company group in such a way as to ensure that a subsidiary company lacks the financial means to face any successful litigation for their wrongdoing. To illustrate this point, consider

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1 *Salomon v Salomon & Co Ltd* 1897 AC 22 (HL) 51. The principle of separate juristic personality was subsequently recognised in South Africa. For instance, in one of the first cases in South Africa that concerned the company's separate legal personality, *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 550, the court referred with approval to Lord Macnaghten's comments in *Salomon v Salomon & Co Ltd* 1897 AC 22 (HL). Juristic personality is granted to companies in terms of the *Companies Act* 71 of 2008 (hereafter *CA*). S 19(1) *CA* states that a company is a juristic person from the date and time the incorporation of the company is registered.

2 Hansmann and Kraakman 2000 *Yale LJ* 394.

3 Hansmann and Kraakman 2000 *Yale LJ* 395. Limited liability is codified in s 19(2) *CA*.

4 Warren 2016 *MULR* 669. S 1 *CA* defines a group of companies as two or more companies that share a holding company or subsidiary relationship. A holding company is defined in s 1 *CA* as a juristic person or undertaking that controls the subsidiary.

5 Belenzon, Hashai and Patacconi 2019 *Strategic Management Journal* 1614. See s 3.2.2.11 below for an explanation regarding how a holding company can structure the group relationships and activities to ensure that liability from its activities falls on an under-capitalised subsidiary.

the following example. Suppose a South African subsidiary manufactures products that include a hazardous material. Suppose further that the relevant South African holding company is aware of the risk of harm involved in the manufacturing process. However, it fails to ensure that the subsidiary adopts adequate safety precautions and working practices that could prevent foreseeable harm arising from the use of the material. Suppose also that a third-party such as, for example, one of the subsidiary's clients, who frequently visit the subsidiary's premises and interacts with its employees, suffers bodily injuries due to their exposure to the hazardous material, and that they consequently seek compensation for the harm that they have suffered. Finally, suppose that, before taking action, the third-party learns that any litigation against the subsidiary would be futile because it has insufficient assets to satisfy the claim, and that they therefore decide to attempt to hold the South African holding company delictually liable.[6]

This article considers the question whether the third-party's delictual claim against the holding company is likely to succeed. To be successful, the third-party must prove all five requirements for delictual liability on a balance of probabilities to hold the holding company liable: conduct,[7] harm,[8] causation,[9] fault,[10] and wrongfulness.[11] From the outset, and as explained

6 Notably, this dissertation focuses on the holding company-subsidiary-employee relationship, as most English cases on holding company liability have arisen around the relationship between the holding company and its subsidiary's employees. See Warren 2016 *MULR* 676 and the judgments cited in that article.

7 It is trite that a juristic person's conduct can form the subject of a delictual enquiry. In those cases, the acts or omissions of the juristic person's organs or office-bearers are attributed to the juristic person. For instance, the board of directors' decision is regarded as the company's decision. See Loubser and Midgley *Law of Delict* 105. A detailed discussion of conduct, however, falls beyond the scope of this dissertation.

8 It is conceivable that the injured plaintiffs in this practical example and in other similar future examples could suffer patrimonial and non-patrimonial harm. See, for instance, Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 175; Loubser and Midgley *Law of Delict* 91-93. A discussion on harm is, however, beyond the scope of this dissertation.

9 Notably, factual causation may be problematic in cases involving a harmful material where visits more than one site and is exposed to the material at each site. In this factual scenario, however, it is assumed that the client visits only the subsidiary company.

10 A discussion of fault is beyond the scope of this dissertation. It is, however, likely that the plaintiff may experience difficulties in proving fault in the form of negligence, as this type of scenario raises the issue of systemic negligence. See, for instance, *Shabalala v Metrorail* 2008 3 SA 142 (SCA); *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC).

11 Wrongfulness is problematic in this context, as the factual scenario in question concerns an omission. See s 3.2.1 for a further discussion on the legal rules regarding wrongfulness. Wrongfulness is likely to constitute the most problematic element, in particular in the light of English jurisprudence on direct liability claims against holding companies. English cases have generally focused on establishing whether the holding company assumed a duty of care. See, for instance, Van Ho

fully below, it may be said that wrongfulness will deserve specific attention because it will likely constitute the most problematic element in this instance. Moreover, the article will specifically investigate whether it would be easier to institute the delictual claim directly against the holding company than attempting to pierce the corporate veil between the holding company and the subsidiary. Piercing refers to the court's general power to ignore the separate liabilities of the holding company and its subsidiary.[12] If the third-party in this particular case would pursue such a strategy, they would have to show that the subsidiary committed a delict and then argue that the subsidiary's liability must be ascribed to the holding company through piercing.[13]

An examination of these issues is relevant for various reasons. Generally, the discussion of the requirements for delictual liability in a company law context may provide greater understanding of how the various relevant principles potentially interact or, at least, to what extent the contextual factors may be relevant in evaluating wrongfulness. More specifically, attention will be given to the question whether the principle of limited liability is a legal policy consideration that should weigh against recognising wrongfulness in this context. This issue has received no attention from South African delict scholars and is therefore worthwhile to consider. Finally, it is also practically important to determine whether the law of delict could offer an easier way to hold holding companies directly liable than the orthodox route, namely piercing the corporate veil. A positive answer to that question has obvious practical and financial relevance for third parties who may suffer harm in a scenario like the one under investigation.

The next section will briefly describe the piercing doctrine in South Africa, whereafter the application of the requirements for delictual liability in the abovementioned scenario will be evaluated. Such a description of the basic company law principles is relevant, given the multidisciplinary nature and subject of the article. The article deals with the application of delictual principles in a company law context. Not all delict scholars, however, would necessarily be schooled in these principles. As such, it is appropriate to provide the summary in the next section. As explained below, the article will concentrate on the requirement of wrongfulness. Throughout this analysis, the article will adopt a comparative perspective, and will draw, where relevant, on applicable commentary, laws or principles operating in English law, where some of the relevant issues have already received judicial and

2020 *AJIL* 114; *Lubbe v Cape plc* 2000 1 WLR 1545 (hereafter *Lubbe)*; *Connelly v RTZ Corp plc* 1999 CLC 533.

12 *Atlas Maritime Co SA v Avalon Maritime Ltd* 1991 1 WLR 917 para 779.

13 See *Adams v Cape Industries Plc* 1990 2 WLR 657 (hereafter *Adams*) for an illustration of how piercing may operate in the context of a corporate group.

academic attention.[14] Finally, the article will provide an evaluation of the availability and desirability of a delictual claim against a South African holding company, as an alternative to piercing.

2 Piercing the corporate veil

Piercing provides one avenue through which people who sustain injuries arising from the subsidiary's business undertakings can hold the holding company delictually liable. In *Atlas Maritime Co SA v Avalon Maritime Ltd,*[15] Staughton LJ stated that piercing occurs when the court ignores the separate assets, liabilities or activities of the company and its shareholders. It therefore constitutes an exception to the principle of separate juristic personality.[16]

Piercing can occur in terms of the common law, which would involve the application of various common-law principles and policy considerations,[17] or in terms of section 20(9) of the *Companies Act* 71 of 2008 (*CA*). Courts typically emphasise that piercing is an extraordinary remedy and courts are reluctant to give effect thereto.[18] A paramount policy consideration for the court's hesitancy is the reliance placed by third parties on the fact that a company is a juristic entity with its own liabilities and assets.[19] Courts would obviously undermine this reliance if they ignore the concept of separate juristic personality. For instance, if piercing occurs and the court holds a shareholder liable, it will increase their liabilities and negatively affect their estate. This would adversely impact on the shareholder's creditors because the shareholder may no longer be able to pay them. It is therefore easy to see that piercing affects not only those who may be held liable for the company's debts but also those who rely on the separateness of the juristic person and base their business operations and dealings on such understanding.[20] Hence, piercing will be justified in rare cases only, as it may have far-reaching financial and practical consequences.

Courts frequently acknowledge that there is a lack of uniformity and consistency in the application of principles in piercing cases.[21] In *Hülse-*

14 Mak 2015 *Erasmus Law Review* 65.

15 *Atlas Maritime Co SA v Avalon Maritime Ltd* 1991 1 WLR 917 para 779. This definition has been accepted in South African cases. See for instance *Ex Parte Gore* 2013 3 SA 382 (WCC) (hereafter *Gore*) para 3.

16 Cassim, Cassim and Cassim *Contemporary Company Law* 54.

17 See *Hülse-Reutter v Gödde* 2001 4 SA 1336 (SCA) (hereafter *Gödde*); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) (hereafter *Lubner*).

18 See *Lubner* 803 where the court stated that it is a salutary principle that courts should not lightly disregard a company's separate personality. See also *Gödde* para 20; *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 9.

19 Cassim, Cassim and Cassim *Contemporary Company Law* 46.

20 Cassim, Cassim and Cassim *Contemporary Company Law* 54.

21 See *Gore* paras 4, 19-21, 33-34; *Lubner* 802-803 where the court highlighted that it is unnecessary and not advisable to formulate general principles with respect to

Reutter v Gödde (hereafter the *Gödde* case)[22] the court highlighted that the outcome of a specific case will depend largely on a close assessment of the particular facts of the case and relevant policy considerations. Such a variance of facts and relevant policy considerations present a further obstacle to consistency. Further, it is worth emphasising that the courts have no general equitable discretion to pierce the veil.[23] This means that they cannot pierce the veil merely on the basis of fairness.[24]

The test that courts most frequently apply to determine if piercing should occur operates as follows.[25] The veil will be pierced if there is fraudulent, dishonest or other improper conduct involved in the creation or use of the juristic person.[26] The plaintiff must accordingly establish that the shareholder acted fraudulently, dishonestly or improperly and that the fraud, dishonesty or improper conduct was related to separate juristic personality.[27] This test also applies in the context of corporate groups. In the practical example, the third-party will therefore need to show fraud, dishonesty or improper conduct on the part of the holding company in order to hold it liable for the subsidiary's wrongdoing.

Improper conduct is the most relevant standard for determining when courts will pierce the veil.[28] Unsurprisingly, however, it introduces significant uncertainty into the test for piercing, because, unlike dishonesty or fraud, improper conduct does not have a fixed meaning in South African law. The only guidance that the courts have provided is contained in *Lubner*,[29] where it was stated that unconscionable injustice, which was referred to in *Botha v Van Niekerk*,[30] is too strict a test. This means that improper conduct is located somewhere between fairness and unconscionable injustice.

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when courts may pierce the corporate veil. See also *Gödde* para 20 where the court noted that the circumstances in which a court will disregard separate juristic personality are "far from settled". See also Cassim, Cassim and Cassim *Contemporary Company Law* 62-65.

22 *Gödde* para 20.

23 See *Lubner* 804; *Baloyi v Malherbe* 2015 2 All SA 20 (GJ) para 14; *Gore* para 28.

24 *Lubner* 804.

25 This standard test for piercing the corporate veil was first proposed in South Africa in *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A) (hereafter *Shipping Corporation*) 556. It has been applied, for instance, in *Lubner* and *Gore*. Courts note, however, that this is not the only test in the context of piercing the corporate veil. See *Lubner* 804; *Shipping Corporation* 556; *Gödde* para 20. Three possible other tests have crystallised in the courts; however, a discussion of these tests is beyond the scope of this dissertation.

26 *Lubner* 803.

27 See *Lubner*; *Gödde*.

28 See, for instance, *Le'Bergo Fashions CC v Lee* 1998 2 SA 608 (C); *Lubner*; *Shipping Corporation*.

29 *Lubner* 555.

30 *Botha v Van Niekerk* 1983 3 SA 513 (W) 525.

Notably, courts often consider other issues when they apply the standard test for piercing. For instance, in *Lubner*,[31] it was stated that courts must weigh up policy factors to determine if piercing must occur after they have applied the standard test. However, in the subsequent case of *Gödde*, the Supreme Court of Appeal did not refer to the weighing up of policy factors. Instead, the court considered the concepts of unfair advantage and unfair prejudice.[32] The courts, however, have not mentioned these concepts in any other piercing case. It is therefore unclear whether further requirements, such as those mentioned in *Lubner* and *Gödde*, must be met before the court will pierce the veil. All of this means that the most often used test for piercing appears to involve considerable uncertainty.

A particular problematic issue in the context of piercing is whether it should be possible for courts to pierce the veil if the plaintiff has an alternative remedy, such as a delictual claim. As a general rule, if different legal remedies are available to an individual, they can choose which remedy to pursue.[33] Thus, the majority in *Lubner* held that the existence of an alternative remedy should not necessarily preclude piercing.[34] It stated that the plaintiff's failure to pursue another available remedy may be a relevant factor when the court examines policy considerations, but it cannot be of overriding importance.[35] In *Gödde*,[36] however, the court clarified that *Lubner* must be examined in light of its specific facts. It appears that the impropriety of the shareholder's conduct ultimately convinced the majority that the existence of an alternative remedy was not conclusive in *Lubner*. Thus, the judge in *Lubner* did not suggest that the existence of alternative remedies is irrelevant.[37] The court in *Gödde,*[38] therefore, held that the plaintiff must generally use the alternative remedy if one is available on the basis that piercing is an extraordinary remedy. More recent cases, however, appear to follow the *Lubner* approach, namely that the existence of an alternative remedy does not preclude piercing.[39] All in all, it appears that piercing continues to be regarded as an exceptional remedy, and hence the argument that it is subsidiary to other remedies is convincing. If the alternative remedy is sufficient to provide the plaintiff with the relief they seek, they should use the alternative remedy.

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31 However, the court in *Lubner* did not weigh policy factors in any real sense.
32 *Gödde* paras 20-21.
33 *Lubner* 805.
34 *Lubner* 805.
35 *Lubner* 805.
36 *Gödde* paras 22-23.
37 *Gödde* paras 22-23.
38 *Gödde* paras 22-23.
39 See *Gore* paras 24, 28; *Zeman v Quikelberge* 2011 32 ILJ 453 (LC) para 44; *Mohlotsane v Mobile Telephone Network (Pty) Ltd* 2014 35 ILJ 1595 (LC) para 40.

Piercing can also occur in terms of legislation. The court in *Ex Parte Gore* accepted that the statutory piercing remedy in section 20(9) of the *CA* applies alongside the common-law piercing remedy.[40] The statutory test for piercing refers to an "unconscionable abuse of the juristic personality of the company as a separate entity".[41] This test may be interpreted as incorporating the common law test for piercing.[42] The issues involved in the common law test, therefore, also apply to the statutory test.

On the whole, piercing provides one tool to address the abuse of separate juristic personalities within corporate groups, and may potentially be an option for a person in the position of the third-party in the above factual scenario. However, there are only a few reported South African cases in which the courts have successfully pierced the corporate veil. This is likely due to the strict piercing rules and courts' insistence that it remains an exceptional remedy.[43] Notably, there are no judgments where the corporate veil between a holding company and subsidiary has been successfully pierced to hold a holding company liable for its subsidiary's debts.[44] This seems to indicate that this potential route may not be successful for the third-party in the scenario. At the same time, and from a comparative perspective, it may be noted that a recent empirical study confirmed that courts in England also remain relatively reluctant to pierce the veil.[45] Over the past three decades, English courts have adopted an increasingly conservative approach to piercing.[46] This means that piercing currently has a very narrow scope and is used as a last resort only in England.[47] Indeed, it was clear from *Adams* that English courts will seldom hold holding companies liable for their subsidiary's actions on the basis of piercing. Accordingly, victims' focus shifted towards a new mechanism to hold holding companies liable after *Adams*: plaintiffs in England began to institute tortious actions against holding companies on the basis that the holding

40 *Gore* paras 24, 31, 34.

41 S 20(9) *CA*.

42 There are two possible interpretations of this section; however, a discussion of these interpretations falls beyond the scope of this article. For the purpose of this article, it will be accepted that the statutory test incorporates the common law test for piercing. See *Gore*; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C); Cassim 2014 *SA Merc LJ* 307-337.

43 Cassim, Cassim and Cassim *Contemporary Company Law* 54.

44 A search of the law reports revealed that only three reported South African cases mentioned the topic of piercing in the context of a corporate group, namely *Al-Kharafi & Sons v Pema* 2010 2 SA 360 (W); *Shipping Corporation*; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 4 SA 615 (T). No piercing occurred in these cases.

45 Dignam and Oh 2019 *OJLS* 18-19.

46 See Tsang and Ng 2022 *Fordham J Corp & Fin L* 143; Witting 2021 *CLJ* 581.

47 Tsang and Ng 2022 *Fordham J Corp & Fin L* 143.

companies owed them a duty of care.[48] In other words, the contracting of the piercing doctrine in England coincided with the expansion of the principle of direct liability based on tort law.[49] This means that the types of situations that piercing covered can therefore now often be addressed using tort law.[50]

Against this background, the next section will focus on a related question, namely the potential to impose direct delictual liability on holding companies and, in particular, the challenges associated with proving wrongfulness within this context. As alluded to earlier, the description of basic relevant principles that can be found in the next section is justified by the multidisciplinary approach and subject matter tackled in this particular article.

3 Delictual claims against holding companies

3.1 The nature of a delictual claim against a holding company

In this section, the attention shifts to determine whether someone in the position of the third-party in the factual scenario could potentially hold a South African holding company directly liable in delict, and without piercing the veil.[51]

In the practical example, the plaintiff claims that they suffered harm due to the holding company's failure to ensure that the subsidiary adopted proper practices and safety precautions while working with hazardous materials. This particular scenario, therefore, concerns a failure to act, which is relevant because the causation of harm arising from an omission is not *prima facie* wrongful for the purposes of delictual liability.[52] This means that the plaintiff must prove wrongfulness on a balance of probabilities. Wrongfulness is therefore brought squarely into focus. As such, the remainder of this article will focus only on wrongfulness, because it will likely be the most problematic requirement for delictual liability in this context.

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48 See Petrin 2013 *MLR* 604*; Connelly v RTZ Corp plc* 1999 CLC 533; *Lubbe*; *Newton-Sealey v ArmorGroup Services Ltd* 2008 EWHC 233 (QB); *AAA v Unilever PLC* 2018 EWCA Civ 1532*; VTB Capital plc v Nutritek International Corp* 2012 EWCA Civ 808.

49 Tsang and Ng *2022 Fordham J Corp & Fin L* 144.

50 See *VTB Capital plc v Nutritek International Corp* 2012 EWCA Civ 808 para 95.

51 It appears that there are currently no South African reported cases where individuals who suffered harm at the subsidiary level have attempted to hold a South African holding company liable based on its negligent and wrongful conduct which caused harm. A search of the law reports revealed only two cases where the concepts of "delict", "holding" and "subsidiary" were mentioned, namely *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A). However, neither case concerned a delictual claim against the holding company based on the injuries that the plaintiff suffered while working for the subsidiary.

52 Loubser and Midgley *Law of Delict* 184.

3.2 Wrongfulness

3.2.1 The nature of the wrongfulness enquiry

The Constitutional Court in *Le Roux v Dey* formulated a new approach to wrongfulness.[53] It highlighted that wrongfulness ultimately depends on a judicial value judgment of whether it would be reasonable for the court to impose liability on the defendant for the harm they caused in the specific case. The answer to this legal question hinges on public and legal policy considerations, which include constitutional rights and values as major legal considerations.[54]

The wrongfulness investigation requires the court to conduct a global exercise.[55] It must weigh up all relevant policy considerations and conclude whether it would be reasonable to impose liability.[56] In the process, it must attempt to ensure that wrongfulness fulfils its function of keeping liability within bounds.[57]

Against this background, English jurisprudence on attaching direct liability to holding companies under the tort of negligence is useful to examine. The English law of torts involves a system of many distinct torts where each tort has its own requirements.[58] The tort of negligence is arguably the main tort, and it covers scenarios where an individual causes loss or harm due to negligence.[59] For liability to ensue, the plaintiff must prove that the defendant breached the duty of care that they owed the plaintiff, which resulted in harm to the plaintiff.[60] While England is a different jurisdiction with a different legal system and socio-economic, cultural and political context to South Africa, insight from English laws can nevertheless be instructive.[61] English law does not have a wrongfulness requirement. Nevertheless, Brand JA stated in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* that the duty of care issue straddles the

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53 *Le Roux v Dey* 2011 3 SA 274 (CC) para 122. For the purpose of this article, the approach to wrongfulness as the Constitutional Court formulated it in *Le Roux v Dey* will be adopted. A debate, however, exists in South African law regarding the correct approach to wrongfulness. See Fagan 2005 *SALJ* 90-141; Brand 2013 *THRHR* 57-69; Scott 2016 *TSAR* 754-769; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC). This debate, however, falls outside the scope of this dissertation.

54 *Le Roux v Dey* 2011 3 SA 274 (CC) para 122.

55 Loubser and Midgley *Law of Delict* 171.

56 *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) para 22.

57 *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) para 20.

58 Loubser and Midgley *Law of Delict* 2.

59 Van Dam *European Tort Law* 226.

60 Rogers *Winfield and Jolowicz on Tort* 731.

61 See, for example, *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833-834; *Carmichele v the Minister for Safety and Security* 2001 4 SA 938 (CC) (hereafter *Carmichele*) para 46; *Gore* para 19.

negligence and wrongfulness investigations in South African law.[62] As such, the policy considerations that English courts highlight when they determine whether or not to recognise a duty of care may also be relevant under the South African wrongfulness enquiry.

3.2.2 An analysis of the relevant policy considerations

The following policy considerations may be applicable in the context of the practical example.[63]

3.2.2.1 Fear of unlimited liability

One consideration that the courts have examined under the wrongfulness enquiry relates to the broader socio-economic consequences attached to the imposition of liability on the defendant.[64] Courts will therefore consider whether a successful delictual claim will open the floodgates for litigants to institute similar claims in the future.[65] In the practical example, someone in the position of the plaintiff, i.e. one client of the subsidiary who suffered personal injuries while visiting the subsidiary for business-related reasons, arguably forms part of a limited class of individuals that is known or discoverable to the holding company.[66] The court's decision to recognise wrongfulness will therefore not expose the defendant to unlimited liability in a situation like this.[67] This means that courts may be more willing to recognise wrongfulness.

3.2.2.2 Additional burden on the defendant

The court may also consider whether the decision to impose liability on the holding company will in the future impose an additional burden on the

62 *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) para 11.

63 Thus, this article will not include a discussion of certain policy considerations that are raised in other contexts. For instance, the defendant's state of mind, breach of a statutory duty and the issue of accountability are not mentioned. In principle, the existence of a statutory duty on the holding company would make it easier for the court to impose delictual liability; however, the existence of such legislation will depend on the facts. For a detailed discussion on the consideration of breach of a statutory duty, see Loubser and Midgley *Law of Delict* 279-281.

64 See *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) (hereafter *Van Duivenboden*) para 19; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) (hereafter *Van Eeden*) paras 20-23; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 23; *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832F.

65 Loubser and Midgley *Law of Delict* 184.

66 White 2020 *VUWLR* 174.

67 *Maran (UK) Ltd v Begum* 2021 EWCA Civ 326 paras 62-64, 124.

holding company in its normal activities.[68] If it would, the court will be hesitant to impose liability.[69]

In applying this consideration, Neethling and Potgieter argue that the court will be required to analyse the benefit that society gains from the defendant's activities.[70] In a situation like the one described in the hypothetical above, the holding company incorporates a subsidiary to manufacture a product that consumers desire. The holding company's managers invest in a project that involves risk yet has a positive net present value.[71] This represents a beneficial use of capital, which implies that society benefits from the holding company's activities.[72] However, at the same time, the holding company's decision to allocate manufacturing operations to the subsidiary also exposes the public to a risk of harm. This risk is realised when members of the public (as well as the subsidiary's own employees) are exposed to the harmful material in the products and sustain injuries as a result.

The court's decision to impose liability may have certain regulatory consequences, which means that it may become more difficult for holding companies like the defendant to act in a particular way in a specific context.[73] The imposition of liability may also signal to the defendant (and other actors within the particular context) that it is wrong to fail to ensure that its subsidiary adopts proper working practices, that the consequential causing of harm may be labelled wrongful, and that liability may follow. As such, the defendant will be required to act positively in the future.[74] For instance, the possibility of delictual liability may incentivise holding companies to issue proper health and safety policies and ensure subsidiaries comply with all of the relevant health and safety regulations and policies.[75] The holding company may therefore need to increase its involvement in its subsidiary to ensure all of this.[76] In our view, it would be reasonable to require holding companies like the defendant to take these steps, especially given their size and financial position, as well as the fact that they stand to gain most from their risky enterprises.[77] They should be able to easily factor the costs involved in workplace safety into their

68 See *Van Duivenboden* para 19; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 26.
69 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 229.
70 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 229.
71 Ramsay and Noakes 2001 *C&SLJ* 29. Notably, the holding company is willing to make this investment, as it enjoys limited liability in relation to the subsidiary's debts. Thus, it will lose only its investment if the subsidiary's business fails.
72 Ramsay and Noakes 2001 *C&SLJ* 29.
73 See Ahmed 2022 *J Priv Int Law* 60; Witting 2021 *CLJ* 610.
74 Witting 2021 *CLJ* 610.
75 Witting 2021 *CLJ* 610.
76 Witting 2021 *CLJ* 610.
77 White 2020 *VUWLR* 174.

business operations, and make the necessary adjustments.[78] Indeed, while it is important to ensure that these companies can continue to operate economically within their environments, they must ensure that they take appropriate measures to limit the risk(s) of harm associated with their economic activities.

Economic considerations also bolster the legal argument that the court's decision to impose liability will merely require the holding company to take the necessary steps that it should arguably already be taking. Limited liability creates a moral hazard, namely the incentive to transfer the cost of risk-bearing activities to creditors.[79] This occurs, as limited liability means that victims may bear the risk of loss if the company's assets are insufficient to compensate them for the harm that they suffered.[80] This means that the shareholders profit from the company's activities; however, they do not bear the entire costs if the company's business fails, as the creditors bear part of the costs involved in the company's activities.[81] This externalisation of risk is undesirable since it creates social costs.[82]

In the practical example, risk is externalised from the group to the involuntary victim.[83] These individuals may not be in a position to conclude contracts in order to protect themselves against the risk of harm. Thus, they may be insufficiently compensated for their harm. This means that they are likely to be ill-equipped risk-bearers. Limited liability, therefore, imposes costs on individuals who are likely to be poorly equipped risk-bearers, which is contrary to notions of efficient risk allocation.[84]

The court's decision to impose liability on the holding company may reduce the risk of moral hazard, as it encourages the holding company to pay greater attention to reducing risks instead of externalising it from the group to the involuntary delictual victims.[85] Therefore, economic arguments reinforce the idea that it is not onerous to expect the holding company to take reasonable steps to ensure that its subsidiary takes safety precautions. This means that the court's decision to impose liability will not impose an unwarranted additional burden on the defendant. This policy consideration therefore weighs in favour of recognising wrongfulness.

78 White 2020 *VUWLR* 174.
79 See Landers 1975 *U Chi L Rev* 614; Stone 1980 *Yale LJ* 70.
80 See Muchlinski 2010 *Camb J Econ* 918; Petrin and Choudhury 2018 *EBOR* 774; White 2020 *VUWLR* 159.
81 See White 2020 *VUWLR* 159; Petrin and Choudhury 2018 *EBOR* 780.
82 Warren 2016 *MULR* 685.
83 Warren 2016 *MULR* 685.
84 See Muchlinski 2010 *Camb J Econ* 923; Mendelson 2002 *Columbia L Rev* 1203 1217-1225.
85 Muchlinski 2010 *Camb J Econ* 923.

3.2.2.3 The vulnerability concern

Another relevant legal consideration in this case is whether the plaintiff is vulnerable or not.[86] This requires a court to examine whether the plaintiff had any other practical and effective remedies that he could have pursued.[87] If the delictual action is the only remedy available to the plaintiff, the court will be more willing to recognise wrongfulness.[88]

In a situation like the one described in the scenario above, the delictual action against the holding company is not the only remedy available to a plaintiff in the position of the third party, who may also argue that the court should pierce the veil between the holding company and its subsidiary. Thus, a potential problem arises in this case, as both the piercing test and wrongfulness analysis may require the court to consider whether an alternative remedy exists.[89]

The fact that the plaintiff has the alternative remedy of piercing available to him, however, should not constitute a determinative policy factor against recognising wrongfulness. This argument is based on two considerations. Firstly, the court should attach little weight to this policy consideration given the general rule that a party should be able to choose which remedy to institute if more than one remedy is available.[90] Secondly, piercing is an exceptional remedy that courts rarely grant due to its strict requirements.[91] Thus, it would operate very harshly against the plaintiff if the court viewed the plaintiff's alternative remedy of piercing as a compelling policy consideration against imposing liability.

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86 See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 2 SA 510 (C); *Holtzhausen v ABSA Bank Ltd* 2008 5 SA 630 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA); *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 25; *Carmichele*; *Van Eeden* para 19.

87 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 229.

88 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 229.

89 See s 2 for a detailed discussion of the issue of alternative remedies in the context of piercing.

90 *Lubner* 805. Notably, it appears that the courts in certain cases, such as *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 502 form the view that a plaintiff should have pursued his contractual remedy if one was available. This, however, may lead to severe results since the court arguably places a very onerous burden on the plaintiff to contemplate and cater for all possible future scenarios when he contractually arranges his affairs.

91 Cassim, Cassim and Cassim *Contemporary Company Law* 54. See s 2 for an explanation of why piercing is an exceptional remedy, which means that it is arguably also subsidiary to other remedies.

3.2.2.4 Prior conduct that creates a risk or danger

The court may also be more willing to impose liability if the defendant created a risk or danger through its own prior conduct.[92] In a situation like the one described in the practical example, the holding company's earlier decision to allocate a dangerous activity to the subsidiary may be regarded as prior conduct that created a new source of danger.[93] The holding company creates this risk by failing to address the subsidiary's risky behaviour in a responsible way itself. The court may therefore find that the holding company should have taken sufficient steps to limit the risk associated with this potentially hazardous situation. Thus, this consideration may operate in favour of recognising wrongfulness.

The court may also find that the holding company created a new danger if it issued systemic flawed policies that were aimed at minimising the health impacts of its subsidiary's operations.[94] The Supreme Court highlighted this factor in the English case of *Lungowe v Vedanta Resources plc* (hereafter *Vedanta*).[95] It referred to *Chandler v Cape plc* (hereafter the *Chandler* case)[96] to illustrate how this consideration may operate. In *Chandler*,[97] the holding company had sold its asbestos business to its subsidiary. The wholly owned subsidiary, therefore, manufactured bricks and asbestos products.[98] The products were made in an open-sided factory, and the subsidiary took no measures to prevent asbestos dust from migrating from the factory to the area where some of the subsidiary's employees, including Chandler, worked.[99] As a result, Chandler was exposed to asbestos and suffered personal injuries.[100] He successfully instituted a claim against the

92 See *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) para 25.

93 See Witting 2021 *CLJ* 608; *Maran (UK) Ltd v Begum* 2021 EWCA Civ 326 paras 62-64, 124.

94 Wilson 2020 *Canta LR* 173. In this way, the holding company failed to take proper steps to ensure that the subsidiary took adequate precautions to protect its employee's health. It is, however, also conceivable that the plaintiff could argue that the case concerns negligent positive conduct. If the plaintiff is successful in this argument, it would have large ramifications for the case. For instance, the case would no longer concern an omission that resulted in personal injuries. Hence, the plaintiff would no longer need to prove wrongfulness. For the purposes of this dissertation, however, it is assumed that the defendant's conduct will be categorised as a failure to issue and implement proper guidelines, and thus the case concerns an omission rather than defective active conduct. See Loubser and Midgley *Law of Delict* 107 for a further discussion on the issues regarding the distinction between positive and negative conduct.

95 *Lungowe v Vedanta Resources plc* 2019 UKSC 20 (hereafter *Vedanta*) para 53.

96 2012 EWCA Civ 525 (hereafter *Chandler*).

97 *Chandler* para 8.

98 *Chandler* para 3.

99 *Chandler* para 3.

100 *Chandler* para 3.

holding company on the basis that it owed a duty of care to its subsidiary's employees to ensure a safe and healthy workplace.[101]

The Supreme Court in *Vedanta* noted that the holding company in *Chandler* had created a new risk of harm when it required its subsidiary to use a systemically flawed production process.[102] The Supreme Court stated that the holding company would also have created a new risk of harm if the unsafe system of work had been part of a group-wide policy, which the subsidiary later applied, provided that the policy applied to an inherently dangerous undertaking.[103] South African courts may therefore also take this consideration into account when assessing whether the holding company created a new risk of danger.

3.2.2.5 Control over dangerous objects or situations

The court is also more likely to impose liability if the defendant actually exercised control (or had the right, duty or ability to exercise control) over a dangerous object or situation.[104] In the practical example, the court may find that the holding company exercised control over the subsidiary and, thus, maintained a level of control over a dangerous situation, namely the risk-bearing activity that the subsidiary undertook.

English cases dealing with tort claims instituted against holding companies directly appear to focus on the control that the holding company exercised over its subsidiary. The Court of Appeal in *Chandler* held that a duty of care existed mainly based on the holding company's control over its subsidiary.[105] In that case, Arden LJ rejected the submission that the holding company must exercise absolute control over the subsidiary in order for a duty of care to arise.[106] The court took the view that it is not necessary to show that the holding company actually controlled the daily running of the subsidiary's business operations.[107] Nevertheless, it was stressed that the court must be satisfied that the holding company had relevant control over the subsidiary's business.[108]

101 *Chandler* para 80.
102 *Vedanta* para 52.
103 *Vedanta* para 52. Policies that are systemically flawed must, however, be differentiated from merely insufficient policies. In cases where the holding company mandates ineffective policies, the policies fail to reduce the risk of harm adequately. Thus, the court should not find that the holding company created a new risk of harm. See Wilson 2020 *Canta LR* 180 for a discussion of this issue.
104 See, for instance, *Van Eeden* para 18.
105 *Chandler* para 80.
106 *Chandler* para 66.
107 *Chandler* para 66.
108 *Chandler* para 46.

On the facts, the court held that the holding company had exercised sufficient control over its subsidiary.[109] This decision was based on the following factors. First, the holding company had issued health and safety policies that bound the subsidiary.[110] The holding company had also analysed safety and health issues for the group and employed a group chief chemist and group medical advisor who was responsible for conducting research into asbestos-related diseases.[111] The holding company also regularly issued instructions to the subsidiary.[112] Furthermore, the asbestos products were manufactured in line with the specifications and instructions issued by the holding company.[113] The subsidiary also needed to obtain the holding company's approval before it could incur capital expenditure.[114] In addition, product development was implemented in the holding company's central laboratory under the director of the group chief chemist. These considerations may therefore also be relevant when a South African court analyses whether the holding company in the practical example exercised control over its subsidiary.

The policy consideration of control over dangerous objects or situations may, however, be problematic in this context, as control is implicit in the relationship between a holding company and its subsidiary.[115] Petrin notes that the nature of a vertically structured corporate group means that the holding company will typically exercise a substantial amount of control over its subsidiary.[116] As such, it may be argued that the policy consideration of control over a dangerous situation may become less important if courts interpret the concept of control broadly since it will always be present when the case concerns a holding company and a subsidiary that undertakes a risky activity. However, in order to ensure that this policy consideration does not become redundant, South African courts should take note of Briggs SCJ remarks in *Vedanta*.[117] Briggs SCJ stressed that the holding company's ownership of its subsidiary merely creates the opportunity for the holding company to control its subsidiary's operations.[118] Briggs SCJ highlighted that the question of whether the holding company assumed a duty of care

109 *Chandler* para 75.
110 *Chandler* para 76.
111 *Chandler* para 61.
112 *Chandler* para 61.
113 *Chandler* para 75.
114 *Chandler* para 44.
115 Cassim, Cassim and Cassim *Contemporary Company Law* 262. This is also clear from the wording of s 1 *CA*, which defines a holding company as a juristic person or undertaking that "controls" the subsidiary. Thus, any subsidiary by definition falls under the control of its holding company.
116 Petrin 2013 *MLR* 613.
117 *Vedanta* para 49. Notably, the case was limited to the jurisdictional issue regarding whether an arguable case against the holding company existed; however, Lord Briggs SCJ made *obiter* statements regarding the substantive issues.
118 *Vedanta* para 49.

towards the plaintiff depends on the degree to which and the manner in which the holding company used the opportunity to intervene in, take over, control, advise or supervise the management of the relevant operations of its subsidiary.[119]

In *Okpabi v Royal Dutch Shell* (hereafter *Okpabi*)[120] the Supreme Court confirmed that the crucial issue in this context is the degree to which the holding company is involved in the management of the relevant operation of its subsidiary. It held that it was arguable that a duty of care existed based on factors such as the close structure within the group and the extended responsibilities of the holding company's senior management over the group's undertakings.[121] South African courts should therefore interpret the concept of control in light of the courts' remarks in *Vedanta* and *Okpabi*.

Courts should also consider indirect methods of control that are aimed at influencing the subsidiary's decision-making process when they analyse whether the holding company exercised control over its subsidiary. For instance, the holding company may exercise control over the subsidiary through the allocation of funds, product specifications, group structuring and relations, lines of reporting and the appointment of senior managers.[122] These methods are especially prevalent in large corporate groups.[123]

The Supreme Court in *Vedanta* also recognised a holding company may exert indirect control over its subsidiary by issuing compulsory group-wide policies and taking active steps to ensure that its subsidiary implements the policies.[124] On the facts, the court held that it was arguable that the holding company assumed a duty of care, as it took active measures through, for example, training the subsidiary's personnel, to ensure that the subsidiary implemented mandatory group policies.[125]

Against this background it may, therefore, be said that the extent of the holding company's control over its subsidiary may likely be an important consideration when South African courts assess wrongfulness. The courts may, however, struggle to determine the precise level and nature of control that triggers delictual liability.[126] The experience from English law also

119 *Vedanta* para 49.

120 *Vedanta* para 147. Notably, this case concerned the issue of jurisdiction, and thus the court did not reach a decision on the case's substantive merits.

121 *Vedanta* paras 158-160.

122 Witting 2021 *CLJ* 607.

123 Witting 2021 *CLJ* 607.

124 *Vedanta* para 49. Notably, the case was limited to the jurisdictional issue regarding whether an arguable case against the holding company existed; however, Lord Briggs SCJ made *obiter* statements regarding the substantive issues.

125 *Vedanta* para 49.

126 This problem has been encountered in English law. See, for instance, Petrin and Choudhury 2018 *EBOR* 783.

indicates that it is likely that the plaintiff will need to provide a significant amount of evidence regarding the relationship between the holding company and subsidiary in order to establish that the holding company controlled the subsidiary.[127] This is particularly difficult when the case involves events that occurred years ago.[128]

3.2.2.6 Constitutional rights, norms and values

Furthermore, if the defendant has infringed the plaintiff's constitutional rights, it will be a legal consideration weighing in favour of imposing liability.[129] In the practical example, the client sustains personal injuries arising from the subsidiary's business activities. Various constitutional rights will be violated in this instance, including the employees' right to human dignity in section 10 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*), their right to freedom and security in section 12 of the *Constitution* and potentially their right to life in section 11 of the *Constitution*. These infringements will weigh in favour of imposing liability.

3.2.2.7 Special relationship between the plaintiff and defendant

The court will also examine whether a special relationship existed between the plaintiff and the defendant, and whether it may be said that the plaintiff placed reliance and trust in the defendant.[130] The Court of Appeal applied a similar consideration in *Chandler*.[131] It highlighted that liability may be imposed where the holding company knows or should foresee that the victims of harm (which in that case was the subsidiary's employees) will rely on it using its superior knowledge regarding industry-specific safety and health issues to protect them.[132] The court highlighted that a holding

127 Warren 2016 *MULR* 686.

128 Warren 2016 *MULR* 686.

129 See *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) para 19; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) para 33; *Van Eeden* para 8; *Van Duivenboden*; *Carmichele.*

130 See *Van Eeden* para 23, *Van Duivenboden* paras 19-21, *Carmichele* para 41; *Mukheiber v Raath* 1999 3 SA 1065 (HHA) 1076. Notably, the practical example does not involve a contractual relationship, professional person or public official. The above-mentioned case law regarding special relationships is therefore not directly applicable to this scenario. Nevertheless, it can be argued that the plaintiff's reliance on the holding company in the practical example should also be worthy of protection. Hence, this policy consideration may be relevant.

131 *Chandler* para 80.

132 *Chandler* para 80. The court also stated that it is sufficient if the subsidiary itself relied on the holding company using its superior knowledge to protect the employees; however, this derivative reliance has been criticised. See, for instance, Petrin 2013 *MLR* 617.

company's practice of intervening in its subsidiary's trading operations may lead the employees to rely on it intervening to ensure a safe work system.[133]

The court's comments in *Vedanta* also provide insight into how South African courts may approach this policy consideration.[134] Briggs SCJ highlighted that a duty of care may arise when a holding company portrays itself as exercising supervision and control over its subsidiary.[135] For instance, published materials, such as the group's governance framework, may state that the holding company is in charge of overseeing the subsidiary's health and safety procedures. Third parties may therefore arguably rely on the holding company acting in accordance with the issued statements to safeguard their health.[136] And it may be said that the holding company will damage this reliance if it fails to ensure that the subsidiary's work system is safe.

3.2.2.8 Knowledge or reasonable foresight

The court may also consider whether the defendant had actual knowledge or reasonably could have foreseen that the plaintiff may suffer harm as a result of its omission.[137] In *Lubbe,*[138] Lord Bingham made the *obiter* comment that the direct liability analysis will likely involve an examination of what the holding company's employees and directors knew or should reasonably have known. In *Chandler*,[139] the Court of Appeal also highlighted that a duty of care may arise when the holding company has or should have knowledge of a relevant dimension of safety and health in the specific industry, and it knows or should know that its subsidiary's system of work is unsafe. The court held that the holding company was fully aware of the asbestos factory's systemically flawed design.[140] The evidence regarding the holding company's control over its subsidiary also implied that the holding company must have possessed knowledge regarding the risk that

133 *Chandler* 80. Thus, it is unnecessary to show that the holding company regularly intervenes in the subsidiary's health and safety policies specifically. The holding company can, for example, intervene in the subsidiary's production or funding operations only. This is criticised in Petrin 2013 *MLR* 618.

134 *Vedanta* para 53.

135 *Vedanta* para 53.

136 *Vedanta* para 53.

137 See *Van Eeden* para 24; *Carmichele* para 63; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) para 28. Notably, the court in *MTO Forestry (Pty) Ltd v Swart* 2017 5 SA 76 (SCA) para 18 held that reasonable foreseeability should not be a legal consideration with respect to wrongfulness; however, the Constitutional Court has not confirmed these statements. Thus, the current legal position is that reasonable foreseeability is a legal consideration under the wrongfulness enquiry.

138 *Lubbe* 276. Notably, this was a procedural case concerned with the issue of jurisdiction.

139 *Chandler* para 80**.**

140 *Chandler* para 78.

asbestos posed to the employees' health.[141] The court therefore stated that it should be foreseeable that the holding company's negligent conduct could result in harm to the subsidiary's employees.[142]

It may therefore be said that a holding company that exercises control over its subsidiary is likely to know (or at least reasonably should have known) about the risks involved in the subsidiary's business.[143] Moreover, a holding company is also likely to have actual knowledge of these risks if it operates the same business as its subsidiary.[144] This occurs, for example, where a holding company manufactures the same product as its subsidiary. A holding company in a small and integrated group is also likely to possess actual knowledge of these risks since its senior managers typically have operational experience.[145]

A holding company – like the one in the practical example – that knows (or reasonably should know) about the health risks involved in the subsidiary's business will likely know (or reasonably foresee) that third parties like the client in question (as well as for example employees of the subsidiary) may suffer harm if it fails to intervene to ensure a safe working environment given its knowledge of the subsidiary's working conditions. All in all, this consideration appears to weigh in favour of imposing liability.

The Court in *Thompson v The Renwick Group plc* (hereafter *Thompson*)[146] also stated that a holding company's knowledge may be relevant in the context of direct liability claims. Thompson was employed by the Renwick Group and sustained injuries after he was exposed to asbestos at work.[147] He instituted proceedings against the holding company. The court noted that the holding company's role in the subsidiary was restricted to holding shares in the subsidiary, and it mainly invested in companies in the leisure industry.[148] Against this background the court concluded that there was no basis for finding that the holding company had or ought to have had special expertise or knowledge regarding asbestos-related safety issues.[149] This consideration formed part of the totality of evidence that led the court to refuse to impose a duty of care on the defendant.[150]

141 *Chandler* para 78.
142 *Chandler* para 78.
143 *Chandler* para 57.
144 *Chandler* para 73.
145 Witting 2021 *CLJ* 607.
146 *Thompson v The Renwick Group plc* 2014 EWCA Civ 635 (hereafter *Thompson*) para 1.
147 *Thompson* para 1.
148 *Thompson* para 15.
149 *Thompson* para 37.
150 *Thompson* para 39.

A court in South Africa may, however, reach a different conclusion regarding whether a holding company like the one in *Thompson* should have reasonably foreseen the risk of harm.[151] For instance, it is arguable that the harm is reasonably foreseeable in the practical example even if the holding company's role in the subsidiary is limited to holding shares in it, which means that it lacks actual knowledge of harm. The guidelines that are used to determine foreseeability in South Africa are as follows: the likelihood of risk and the degree of harm if the risk is realised.[152] In the example scenario used in this article, the subsidiary's system of work is unsafe and it fails to adopt adequate safety measures that would ensure that third parties do not become exposed to the hazardous material and suffer harm. The likelihood that harm may occur if the holding company fails to ensure that the subsidiary implements safety precautions is therefore reasonably high. The extent of the harm which may crystallise if the risk does manifest is also serious because third parties may suffer grave injuries if they are exposed to the dangerous material. Harm is therefore reasonably foreseeable despite the court's remarks in *Thompson*.

Nevertheless, *Thompson* is valuable since it highlights that the holding companies' actual knowledge or reasonable foresight regarding the risks involved in the subsidiary's business as well as the subsidiary's working conditions should be assessed on a case-by-case basis.

3.2.2.9 Creating an expectation

The court will also enquire whether the defendant through its conduct created an expectation on the part of the plaintiff that it would protect the plaintiff's interests or rights.[153] In a factual scenario like the one presented in the practical example above, the holding company's practice of intervening in its subsidiary or its public statements regarding the oversight it exercises over its subsidiary may create an expectation on the part of third

151 An analysis of reasonable foresight should arguably be confined to the negligence enquiry rather than the wrongfulness analysis. See *MTO Forestry (Pty) Ltd v Swart* 2017 5 SA 76 (SCA) para 18. Thus, a detailed analysis of reasonable foreseeability falls beyond the scope of this dissertation. For a more in-depth discussion of reasonable foresight, see Loubser and Midgley *Law of Delict* 154; *Kruger v Coetzee* 1966 2 SA 428 (A) para 30; *Lee v Minister for Correctional Services* 2013 2 SA 144 (CC) para 18; *Van Duivenboden* para 12; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) para 45.

152 Loubser and Midgley *Law of Delict* 154. Although these guidelines have crystallised in establishing foreseeability in the context of negligence, there is no reason to suggest that they could not also apply in the context of wrongfulness.

153 See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 526; *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk* 2010 4 SA 455 (SCA) para 12.

parties that the holding company will intervene to protect their rights.[154] This policy factor may therefore weigh in favour of recognising wrongfulness.

3.2.2.10 Reasonable preventability

The court may also examine whether the harm was reasonably preventable.[155] The following guidelines have been developed to determine reasonable preventability: the extent of risk that the defendant's conduct created; the gravity of harm if the risk occurs; the burden connected with preventing the harm; and the social utility involved in the defendant's conduct.[156] The first two factors must be weighed up against the last two.[157]

In the practical example, the holding company's failure to ensure the safety of the subsidiary's employees and other third parties such as the client in question created a significant risk of severe harm. The holding company's conduct of failing to exercise oversight over the subsidiary's manufacturing process (which involves a hazardous material) also has no social utility.

The cost involved in eliminating the risk of harm may be significant.[158] For instance, the holding company will need to incur costs involved in monitoring the subsidiary and ensuring that it complies with proper health and safety standards. In the practical example, however, it is assumed that the holding company has the financial means to incur the costs involved in ensuring that the subsidiary adopts safety measures. Thus, the high risk of serious harm outweighs the costs associated with taking preventative measures. Reasonable preventability, therefore, does not pose a problem on these facts; however, it may present a challenge in the context of other factual scenarios.

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154 See s 3.2.2.7 for a more detailed explanation. Special relationship and creating an expectation are two distinct policy considerations. However, in this practical example, an expectation is created out of the special relationship between the holding company and employees. Thus, the expectation policy consideration is based on the same facts as the special relationship consideration, namely the holding company's practice of intervention in the subsidiary and its public statements.

155 Reasonable preventability is a core component of the negligence enquiry. Courts are likely to investigate reasonable preventability to a full extent when they assess negligence. See Loubser and Midgley *Law of Delict* 180. A detailed examination of reasonable preventability is therefore beyond the scope of this dissertation. See *Shabalala v Metrorail* 2008 3 SA 142 (SCA); *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC) for a more detailed discussion of systemic negligence.

156 Loubser and Midgley *Law of Delict* 156. These guidelines have emerged in the context of negligence; however, these factors can also be used in the context of wrongfulness.

157 Loubser and Midgley *Law of Delict* 156.

158 This assertion is in line with the argument in White 2020 *VUWLR* 174 in which it is stated that a holding company is generally able to incur costs involved in ensuring workplace safety at the subsidiary level.

3.2.2.11 Limited liability

Another policy consideration that may be relevant in this context relates to the fact that the holding company is a separate legal entity from its subsidiary. In *Okpabi,*[159] the Supreme Court highlighted that it is insufficient for the holding company to refer to its separate juristic personality as an argument against recognising a duty of care. Nevertheless, South African courts may be reluctant to impose liability if it will unduly interfere with the principle of separate juristic personality and its associated characteristics as well as undermine the strict restrictions placed on piercing.[160]

Before discussing this matter further, it should be recalled that the purpose of a delictual claim is not to make the holding company liable for the subsidiary's obligations. Instead, the idea is to impose liability directly on the holding company based on its own harm-causing conduct.[161] This means that, when determining the matter, the court will focus on the holding company's conduct. It also means that delictual liability arguably reinforces company law principles, because the notion that the subsidiary and holding company are separate persons would underlie, and be reinforced by, the court's analysis.[162] One might therefore understand why Arden LJ, in *Chandler,*[163] asserted that claims seeking direct liability do not raise the issue of piercing.

Delictual liability and piercing can, however, achieve the equivalent economic result, namely that the holding company is liable and must compensate the plaintiff.[164] A successful delictual claim will increase the extent of the holding company's liabilities. On this basis, some scholars, such as Warren, argue that imposing delictual liability may have the practical impact of reducing the advantages of limited liability in the context of corporate groups.[165] It is therefore necessary to examine limited liability's value in the context of corporate groups and delictual claims in order to determine whether courts will view the principle of limited liability as a policy consideration weighing against imposing liability.[166]

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159 *Okpabi v Royal Dutch Shell* 2021 UKSC 3 para 150.

160 See Petrin 2013 *MLR* 619; Petrin and Choudhury 2018 *EBOR* 777.

161 Stevens 2013 *Stell LR* 94.

162 See Witting 2021 *CLJ* 605; Day 2014 *LMCLQ* 457.

163 *Chandler* para 37.

164 Tsang and Ng 2022 *Fordham J Corp & Fin L* 144-145.

165 See Warren 2016 *MULR* 684; Petrin and Choudhury 2018 *EBOR* 777; White 2020 *VUWLR* 167.

166 Notably, the principle of limited liability was created in the nineteenth century before corporate groups emerged. Thus, it was not conceived for the context of groups; however, courts have applied the principle of limited liability to them without an in-depth consideration of whether the rationale for limited liability applies equally to natural and juristic person shareholders. See Muchlinski 2010 *Camb J Econ* 926; Warren 2016 *MULR* 669.

In this context it may be worthwhile to recall the principal economic reasons that justify limited liability. First, it reduces the risks involved in the shareholders' investments, as it ensures that the shareholders' only risk is the loss of their original investments.[167] Limited liability, therefore, provides protection to shareholders, as it insulates their assets from the company's debts. Limited liability, therefore, decreases shareholders' costs, because it allows them to spend less time and fewer resources on monitoring the board of the company in which they invested.[168] This means that limited liability encourages shareholders to make passive investments and efficiently diversify their share portfolios.[169] It also encourages investors to undertake risk-bearing projects.[170] It may be said that limited liability, therefore, leads to an increase in the capital available for investment,[171] and that it helps to facilitate the aggregation of capital and stimulates investment.[172] It may also promote innovation, entrepreneurship and the efficient functioning of stock markets.[173]

These justifications, however, generally do not apply when shareholders are juristic persons. For instance, monitoring costs are less significant in the context of corporate groups, as holding companies can easily oversee, manage and obtain information from their subsidiaries.[174] The issues of diversification and risk avoidance are also less important for juristic person shareholders than natural person shareholders.[175]

Furthermore, based on their analysis of the concept of moral-hazard, Hansmann and Kraakman argue that limited liability cannot be justified in the context of corporate groups.[176] Limited liability may incentivise the holding company to structure the group so that an under-capitalised subsidiary undertakes risky operational activities.[177] Thus, the subsidiary conducts excessively risky activities and insufficiently invests in safety precautions.[178] This means that the moral-hazard that flows from the

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167 See Petrin and Choudhury 2018 *EBOR* 779; Muchlinski 2010 *Camb J Econ* 917.

168 See Petrin and Choudhury 2018 *EBOR* 779; Warren 2016 *MULR* 669; Ramsay and Noakes 2001 *C&SLJ* 6.

169 See Easterbrook and Fischel 1985 *U Chi L Rev* 97; White 2020 *VUWLR* 158.

170 Easterbrook and Fischel 1985 *U Chi L Rev* 97.

171 See Muchlinski 2010 *Camb J Econ* 917; Cheffins *Company Law* 499; Mendelson 2002 *Columbia L Rev* 1217.

172 See Petrin and Choudhury 2018 *EBOR* 779; White 2020 *VUWLR* 158.

173 See Easterbrook and Fischel 1985 *U Chi L Rev* 99; Muchlinski 2010 *Camb J Econ* 915; Warren 2016 *MULR* 669; Ramsay and Noakes 2001 *C&SLJ* 6.

174 Petrin and Choudhury 2018 *EBOR* 781.

175 Petrin and Choudhury 2018 *EBOR* 781.

176 Hansmann and Kraakman 2000 *Yale LJ* 431. See also s 3.2.2.2 for a detailed explanation of the moral-hazard issue.

177 See White 2020 *VUWLR* 159; Petrin and Choudhury 2018 *EBOR* 771.

178 White 2020 *VUWLR* 159.

principle of limited liability may be larger when the case concerns corporate rather than natural person shareholders.

The justifications for limited liability are also less compelling when the case concerns the victims of delictual claims.[179] Limited liability allows a company to externalise the risk of its activities through imposing losses upon delictual victims.[180] Ramsay argues that this is inefficient for two reasons.[181] Firstly, companies are not incentivised to exercise adequate care in respect to delictual victims.[182] Secondly, delictual victims are poor risk-bearers.[183] Limited liability in the context of delicts therefore appears inefficient.[184]

The imposition of delictual liability on a holding company thus does not appear to undermine the reasons for limited liability given that the justifications for limited liability are less persuasive in the context of corporate groups and delictual claims.[185] As a result, the court should not view limited liability as a policy consideration against recognising wrongfulness.

3.2.3 Evaluation of wrongfulness

All in all, there is no single policy consideration that dictates, in principle, against imposing liability directly on a holding company in a situation like the one described in the practical example. Of course, the facts of each case will determine which policy considerations should be taken into account, and which policy considerations should carry the most weight in the court's assessment. It will ultimately be up to the court to weigh up all the relevant factors and conclude whether it would be reasonable to impose liability.

4 Evaluation

The law of delict appears to offer an alternative method for individuals to obtain compensation from holding companies instead of piercing. Seeking to impose delictual liability directly on holding companies in scenarios like the one described above may present various challenges. For instance, it may necessitate fact-specific and lengthy, costly litigation. This occurs, as courts will recognise wrongfulness only if the plaintiff places sufficient

179 See Thompson 1991 *Cornell L Rev* 1040; Hansmann and Kraakman 2000 *Yale LJ* 429; Lo 2017 *CLWR* 42.

180 See Thompson 1991 *Cornell L Rev* 1040; Muchlinski 2010 *Camb J Econ* 923; Petrin and Choudhury 2018 *EBOR* 780. See s 3.2.2.2 for a discussion on risk allocation.

181 Ramsay 1999 *Conn J Int Law* 373.

182 Ramsay 1999 *Conn J Int Law* 373.

183 Ramsay 1999 *Conn J Int Law* 373. See s 3.2.2.2 for an explanation of why delictual victims are poor risk bearers.

184 Lo 2017 *CLWR* 56; Halpern, Trebilcock and Turnbull 1980 *UTLJ* 126; Easterbrook and Fischel 1985 *U Chi L Rev* 110; Ramsay 1999 *Conn J Int Law* 373; Millon 2007 *Emory LJ* 1317.

185 Witting 2021 *CLJ* 605.

evidence and facts in front of it that allow it to conclude that it is reasonable to impose liability.[186] This means that the plaintiff must present convincing legal and public policy considerations to allow a court to recognise wrongfulness in a novel context.

The use of policy considerations under the wrongfulness enquiry may also promote legal uncertainty.[187] For instance, courts may struggle to define the level of control that triggers liability. Furthermore, judges may highlight different policy considerations or attach different weights to the relevant considerations. Their interpretation of the same policy consideration may also vary. Thus, judges may reach different conclusions on the same facts.

Nevertheless, a delictual claim appears to avoid many of the difficulties associated with piercing. For instance, a delictual claim upholds the principle of separate juristic personality and its associated characteristics, while piercing constitutes an exception to these fundamental principles. Furthermore, the enquiry into wrongfulness does not centre on the vague concept of improper conduct, which is open to interpretation and, therefore, may result in uncertainties as well as time-consuming and expensive litigation.[188] The requirements for establishing delictual liability also appear more certain than the test for piercing.[189] For instance, it is clear which policy considerations the court is likely to consider when assessing wrongfulness. In contrast, piercing involves a highly fact-sensitive enquiry, and there is uncertainty regarding which additional aspects, like unfair prejudice, courts may consider when applying the standard test.

In the context of the factual scenario, a delictual claim may provide an easier solution than piercing given that there appear to be no compelling policy considerations against recognising wrongfulness.[190] In contrast, piercing is an exceptional remedy of last resort that involves strict rules.

5 Conclusion

Someone in the position of the third-party in the practical example who sustained injuries arising from the subsidiary's operations appear to have two main avenues available to them to hold the holding company liable.

186 Loubser and Midgley *Law of Delict* 240.

187 These problems may, however, also arise in the context of piercing if courts follow the test in *Lubner*.

188 Muchlinski 2010 *Camb J Econ* 923.

189 See, for instance, the issues regarding the additional aspects, like unfair prejudice, that courts consider when applying the standard test as well as the highly fact-sensitive nature of the piercing enquiry in s 2.

190 Certain considerations – in particular, control, limited liability and reasonable preventability – may involve difficulties; however, these are only three considerations that the court will consider when conducting its global exercise to determine if wrongfulness is established. Also, reasonable preventability should rather be examined under the negligence enquiry.

Piercing provides one mechanism through which plaintiffs can obtain compensation from the holding company. In the practical example, the court will pierce the veil between the holding company and its subsidiary in order to ascribe the subsidiary's liability to the holding company. Piercing is an exceptional remedy that involves a lack of uniformity and principles.[191] The standard test for piercing examines whether there has been dishonesty, fraud or improper conduct in the use or creation of the juristic person.[192]

South African courts are reluctant to pierce the veil.[193] As such, the plaintiff may prefer to institute a delictual claim against the holding company in order to hold it directly liable. The plaintiff must prove all five elements of the delict on a balance of probabilities to succeed with his claim.[194] In a case like the one considered in this article, the element of wrongfulness may be the most difficult to prove, given that the case concerns an omission. This is because harm arising from an omission is not *prima facie* wrongful, and the plaintiff will be tasked to present convincing policy considerations to allow the court to conclude that it is reasonable to impose liability on the defendant.[195]

The following policy considerations may be applicable in the practical example. Firstly, the courts will note that recognising wrongfulness will not expose the defendant to unlimited liability. The imposition of liability will also not place an additional burden on the defendant, as it is reasonable to expect the defendant to ensure safety and adherence to health and safety policies and regulations at the subsidiary level. The court may recognise that the alternative remedy of piercing is available. However, it was pointed out that this does not by itself weigh against recognising wrongfulness, especially given the fact that piercing appears to be a subsidiary and exceptional remedy. The court may also note that the defendant's prior conduct of allocating a risky activity to the subsidiary or issuing systemically flawed mandatory policies created a risk of danger. Furthermore, the court may find that the defendant controlled the subsidiary and thus exercised control over a dangerous situation in the form of the subsidiary's risk-bearing operations. The policy consideration of constitutional rights is also relevant, as this case implicates the plaintiff's rights to dignity, freedom and security and life. There may also be a special relationship between the plaintiff and defendant given that the plaintiff places reliance and trust in the defendant. Furthermore, the defendant's actual knowledge or reasonable foresight that the plaintiff may sustain injuries due to the defendant's omission may be relevant. The nature and structure of the group may influence whether the

191 Cassim, Cassim and Cassim *Contemporary Company Law* 54.
192 *Lubner* 803.
193 See *Lubner* 803; *Gödde* para 20; *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 9.
194 Loubser and Midgley *Law of Delict* 43.
195 Loubser and Midgley *Law of Delict* 184.

defendant has this knowledge. The court may also examine whether the defendant created an expectation on the part of the plaintiff that it would intervene to protect the plaintiff's interests. This expectation may be present if the defendant regularly intervened in the subsidiary or issued public statements regarding the control it exercised over the subsidiary. Lastly, the court may consider whether recognising a delictual claim will violate the principle of limited liability. A delictual claim focuses on the holding company's conduct, and thus it appears to uphold the principle of separate juristic personality. It may be argued that a successful delictual claim nevertheless has the practical effect of reducing the benefits of limited liability; however, it is clear that the imposition of delictual liability does not undermine the economic rationale for limited liability. This means that there are no policy considerations which, in principle, weigh against recognising wrongfulness.

Notably, the law of delict appears to offer a satisfactory way for a delictual victim to hold a holding company liable. While it may entail complex litigation and promote a degree of legal uncertainty, it overcomes many of the difficulties associated with piercing. Furthermore, it appears to align with and respect fundamental company law principles. It also avoids the use of certain vague concepts and involves a more predictable test than piercing. Finally, it respects the idea that piercing is a remedy of last resort and thus should be subsidiary to other remedies.

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AJIL	American Journal of International Law
C&SLJ	Company and Securities Law Journal
CA	Companies Act 71 of 2008
Canta LR	Canterbury Law Review
Camb J Econ	Cambridge Journal of Economics
CLJ	Cambridge Law Journal
Colum L Rev	Columbia Law Review
CLWR	Common Law World Review
Conn J Int'l L	Connecticut Journal of International Law
Cornell L Rev	Cornell Law Review
EBOR	European Business Organization Law Review
Emory LJ	Emory Law Journal
Fordham J Corp & Fin L	Fordham Journal of Corporate and Financial Law
J Priv Int Law	Journal of Private International Law
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MULR	Melbourne University Law Review
MLR	Modern Law Review
OJLS	Oxford Journal of Legal Studies
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Chi L Rev	University of Chicago Law Review
UTLJ	University of Toronto Law Journal
VUWLR	Victoria University of Wellington Law Review
Yale LJ	Yale Law Journal