Should Parent Companies be held responsible for their subsidiaries' wrongs? The case of Shell in Nigeria

By:

Oludara Akanmidu
Chris Riley

March 31, 2020

The question about whether parent companies should be held responsible for their subsidiary's wrongs remains a subject of controversy. In the UK, debate over this issue was prompted by the decision in Chandler v Cape Plc *[2012] 3 All E.R. 640 (CA)*. Chandler was a domestic case as the victims, the subsidiary and parent company were all resident in the UK. On the other hand, a number of recent actions against parent companies have been 'transnational' in character. In Lungowe v Vedanta *[2017] EWCA Civ 1528,* 1,826 Zambian villagers brought an action in the English courts against UK-based Vedanta and its Zambian subsidiary - KCM. The courts in that case had to deal with the question of whether a parent company can be held liable for their subsidiary's wrong. Similarly, in AAA v Unilever Plc *[2018] EWCA Civ 1532*, the English

courts had to make similar determinations when employees and residents of a plantation owned by Unilever Tea Kenya Limited (UTKL), brought an action against the English based parent company (Unilever PLC) as well as its subsidiary, UTKL.

Moving on to the case of Shell in Nigeria, the actions brought against Royal Dutch Shell in respect of its Nigerian subsidiary's oil exploration activities provide a classic example of such transnational parent-subsidiary actions. Shell's relationship with Nigeria dates back to the country's pre-independence era. Shell Petroleum Development Corporation (SPDC) is currently the largest multinational oil and gas company operating in the Niger Delta area of Nigeria. Over the years, its environmental activities in Nigeria have been the subject of media attention. Concerns include the use of gas flaring, dumping of waste products, and frequent and extensive oil spills.

Alongside the environmental degradation, residents' lives have also been severely affected. The residents of Niger Delta region depend on their land and water system for their means of livelihood, health and access to food and clean water. All these have been affected by the environmental degradation.

In recent years, there has been a number of transnational legal actions seeking redress against the parent company, Royal Dutch Shell (RDS), in respect of environmental damages caused by its subsidiary, SPDC, in Nigeria.One of these is the Bodo Litigation which was an action brought by 15,000 members of the Bodo Community in the Niger Delta in respect of oil spillages occurring in 2008 and 2009.

A more recent example is the Okpabi Litigation (*Okpabi v Royal Dutch Shell Plc [2018] EWCA Civ 191).* This action was brought before the UK courts by members of the Ogale and Bille Kingdom. The claims were for damage caused by oil spillages from pipelines and other facilities operated by SPDC in the Niger Delta region. The defendants were both SPDC and RDS. In the Court of Appeal, Lord Justice Simon and Sr Geoffrey Vos emphasised the fact that RDS lacked control over the activities and operations of the subsidiary (SPDC) which had caused the injuries to the claimants. It noted that RDS did not itself carry out oil operations but was purely a holding company. It did not, and could not be

expected to, know much about relevant health and safety issues in Nigeria.

Based on this premise, the court held that the claims against the parent company (RDS) had no real prospect of success. Consequently, the claim against RDS could not be pursued. Rather, the claimants must go back to Nigeria to bring claims against SPDC only.

Overall, research suggests that, for various reasons, it remains difficult to hold multinational parent companies responsible for their subsidiaries' wrongs. The question remains whether there are indeed justifiable reasons for holding parent companies liable for their subsidiaries' wrongs. This question must be answered affirmatively. There are a number of reasons why parent companies should be held responsible for their subsidiaries' wrongs. Three of these will be discussed here.

The first justification for permitting parental liability for subsidiaries wrongs is that it offers jurisdictional advantages to the claimants. It allows the victims who are often resident in developing countries to sue in the courts of a more developed country. This can be advantageous if the courts' rules of procedure in that country (e.g. England) are more favourable to the claimants. Similarly, the claimants' chances of success may be higher as the Judiciary in developed countries tend to have less institutional problems. Nigeria provides a typical example of a country whose judiciary suffers from weaknesses which hinder the attainment of justice.

In each of the transnational actions brought against RDS by residents of Niger Delta, a key motivation for suing the parent company was the desire to secure a jurisdictional advantage. More specifically, in the Okpabi litigation, the claimants argued strongly that the action would proceed in a timelier manner if pursued in England rather than Nigeria. Allowing parental liability therefore offers jurisdictional benefits to claimants.

The second justification for holding parent companies responsible for their subsidiary's wrongs is that it creates greater reputational costs. Suing the parent company resident in a developed country creates a greater reputational threat than an action brought against a subsidiary in a developing country. This

is due to the fact an action against the parent is likely to generate greater publicity than an action against the subsidiary. This is clearly evident from the fact that the actions brought against RDS in England and Netherlands have attracted greater publicity than the various actions instituted against SPDC in Nigeria. Similarly, negative publicity against the parent company is likely to be more damaging to the corporate group than a similar level of publicity against a subsidiary. The fear of reputational harm to the corporate group can provide a strong incentive for parent companies to improve their behaviour irrespective of the jurisdiction where they operate.

Following on from the previous point, the third justification for parental liability is that it promotes accountability. Asides from the compensatory benefit of parental action, the process of passing judgement against a parent company ensures that multinational companies are held accountable for their failings. Suing the parent company allows claimants to access the courts of the more developed country. If those courts function more effectively, this invariably enhances accountability. Similarly, as noted earlier, actions against parent companies generate greater publicity. In fact, publicity itself is an essential element of accountability. Hence, permitting parental liability for subsidiaries wrongs will promotes greater accountability within the corporate group.

Of course, holding parent companies responsible for their subsidiaries wrongs raises various concerns. One of these would be the potential threat it poses to the principle of separate legal personality. Another concern is the possibility that claimants will be encouraged to bring bogus claims against parent companies. While these concerns arevalid, the argument still remains that parental liability for subsidiaries wrongs offers several benefits in terms of deterring wrongful behaviour and ensuring that corporate groups are held accountable for their wrongs wherever they are located.

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