Cambridge Law Review (2019) Vol IV, Issue ii, 176–184

Vedanta Resources v Lungowe: A Pre-Existing Pocket of Negligence, or a Novel Scenario?

Tan Jin Hsi, Gabriel*

I. Introduction

The respondents, a group of 1,826 Zambian citizens living in the Chingola District in Zambia, had their health and farming activities damaged by alleged toxic emissions from the Nchanga Copper Mine ('the Mine') into watercourses on which they depend for drinking and irrigation. They brought claims in common law negligence and breach of statutory duty against Konkola Copper Mines ('KCM') and Vedanta Resources ('Vedanta'). Vedanata is the parent of a multinational group, incorporated and domiciled in the UK, and holds a significant majority stake of KCM and retains ultimate control of it.

The litigation largely concerns the jurisdiction of the courts of England and Wales to determine these claims against both defendants. The claimants rely upon article 4 of the Recast Brussels Regulation (Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) and para 3.1 of CPR Practice Direction 6B against Vedanta and KCM respectively.

In respect of the latter claim, as noted by the Supreme Court, the respondents had to demonstrate, *inter alia*, that there was 'between the claimant and defendant a real issue which it is reasonable for the court to try'.[1] The Supreme Court thus

* B.A. (Law) (Candidate), Girton College, University of Cambridge.

[1] CPR Practice Direction 6b, para 3.1.

had to decide if there was a real issue in respect of the duty of care claim against Vedanta.

II. Judgment

The judgments of the High Court and the Court of Appeal were largely the same. In both Courts, the point of departure for analysis was the *Caparo*[2] test.[3] In so doing, both Coulson J and Simon LJ appear to have been treating the case as a novel scenario. As clarified in *Robinson*,[4] novel categories of negligence should be developed incrementally, with the Caparo tripartite test used as a framework for inquiry as to whether such an incremental step should be taken. Both judges reached similar conclusions that a duty of care claim was arguable, and hence admissible.[5]

By contrast, in the Supreme Court, Lord Briggs, giving the unanimous judgment of the court, admonished against treating the present case as a novel scenario. Lord Briggs stated that: "the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence… Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations… of the subsidiary."[6]

He continued at [54]: "Once it is recognised that, for these purposes, there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all. They may easily be traced back as far as the decision of the House of Lords in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004".

It is trite law that following *Caparo*, the modern approach of the law of negligence operates on the basis of 'traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes'.[7] Lord Briggs' approach places the

2 *Caparo Industries plc v Dickman* [1990] UKHL 2.
3 *Lungowe v Vedanta Resources plc* [2016] EWHC 975 (TCC) [115]; [2018] 1 WLR 3575 (CA) [83].
4 *Robinson v Chief Constable of West Yorkshire* [2018] AC 736 (SC) [27], [29].
5 *Lungowe v Vedanta Resources* (TCC) (n 3) [121]; *Lungowe v Vedanta Resources* (CA) (n 3) [90].
6 *Vedanta Resources v Lungowe* [2019] UKSC 20 [49].
7 *Caparo* (n 2) 618; *Robinson* (n 4) [29].

case at bar into the same category of situations in which a duty of care is imposed as *Dorset Yacht*.

On the facts, Lord Briggs held that Vedanta assumed responsibility for the maintenance of proper standards of environmental control over the mining activities at the Mine. On this basis, it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial, so that a duty of care may eventually be found.[8]

III. Analysis

Various commentators have discussed the jurisdiction element of the *Lungowe* litigation, but little has been said about Lord Briggs' approach to the duty of care issue.

This approach will be the subject of scrutiny in this note. Three issues fall to be discussed. Firstly, does the *Lungowe* scenario belong in the *Dorset Yacht* category of negligence? Secondly, and more broadly, is it advantageous for this line of cases—including *AAA v Unilever*[9] and *His Royal Highness Okpabi v Royal Dutch Shell Plc*[10]—to remain in the *Dorset Yacht* category? Thirdly, and consequently, would it be more appropriate for the *Lungowe* scenario to be treated as a novel (and separate) category of negligence?

A. Does the *Lungowe* scenario belong in the Dorset Yacht category of negligence?

The *Dorset Yacht* type of negligence can be broadly described as an exceptional situation wherein negligence liability is imposed on the basis of a 'pure omission' exceptional because it contravenes the general principle that liability should not arise from purely omitting to do something.[11] The exception attaches liability to a person for the actions of a third-party which causes harm to the claimant. The lynchpin of this pocket of negligence, as was made clear in *Smith v Littlewoods*, is the special relationship between the defendant and the third-party, by virtue of which the former is responsible for controlling the latter.[12] This is exemplified by the facts of *Dorset Yacht*. Several borstal boys were working on an island under the control and supervision of three officers. One night, the officers left the boys to their own devices. The boys left the island and boarded, cast adrift,

8 *Vedanta Resources v Lungowe* (SC) (n 6) [61].

9 *AAA v Unilever* [2018] EWCA Civ 1532.

10 *His Royal Highness Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191.

11 *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) 247.

12 *ibid* 272; Michael A Jones, Anthony M Dugdale, Mark Simpson (eds), *Clerk & Lindsell on Torts* (22nd Ed, Sweet & Maxwell 2017) 8–55.

and damaged the plaintiff's yacht which was moored offshore. The Court held that because the officers had a responsibility to control the boys, they were liable for their misdemeanours, and thus owed the plaintiff a duty of care.[13]

At first blush, *Lungowe* appears to be an analogous case. As Lord Briggs rightly points out, parent and subsidiary are separate legal entities. The parent-subsidiary relationship does not attract liability per se, merely presenting an opportunity for control.[14] But one must take care to ask this question in a substantive manner—namely, whether the parent was controlling the aspect of the subsidiary which caused the harm. In short, the touchstone of the duty of care here is, like in *Dorset Yacht*, the control party A exercises over the actions of party B which gives rise to the harm.

However, the problem is that control can exist in many forms; it is a loose descriptor for many different types of special relationships between the defendant and the third-party in which it may be suitable to impose a duty of care. We have to be specific about the nature and extent of control. A recurring theme in the cases inhabiting the *Dorset Yacht* category of negligence is the custodial relationship between the defendant and the third-party, typified by physical custody of the latter.

In *Ellis v Home Office*,[15] the plaintiff, when a prisoner at Winchester Prison, suffered injuries as a result of an assault by another prisoner and sued the Home Office in negligence. In possessing physical custody of the third-party, the control the defendant had over him was immediate and absolute. A similarly high level of control can be found in *Carmarthenshire County Council v Lewis*,[16] wherein the third-party, a four-year-old boy, was attending a nursery school under the management of the appellant council. While not being attended by a teacher, the child ran into the road and caused an accident on the highway to a driver trying to avoid him. The child was in the physical custody of the school while he was in attendance, and the teachers undertook full responsibility for the safety and welfare of their students. In *Home Office*, the borstal boys, who caused damage to the plaintiff's yacht, were in the physical custody and supervision of borstal officers.

In fact, Lord Diplock's judgment in *Dorset Yacht* positions physical custody at the front and centre of the duty of care to be recognised. He held that:

> A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the *legal right to detain C in penal custody*

[13] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL) 1034, 1038, 1039, 1071.
[14] *Vedanta Resources v Lungowe* (SC) (n 6) [54].
[15] *Ellis v Home Office* [1953] 2 QB 135 (CA).
[16] *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL).

> and to *control his acts while in custody*; (2) that A is *actually exercising his legal right of custody of C* at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortious act A has the *legal right to control the situation of B or his property as respects physical proximity* to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did.[17] [Emphasis added]

Criteria (1), (2), (3) and (4) above strictly require some form of physical detention of the third-party by the defendant. Lord Diplock had also decided the case as a "rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis v Home Office*… and *D'Arcy v Prison Commissioners*… as giving rise to a duty of care on the part of the *custodian* to exercise reasonable care in *controlling* his detainee". [emphasis added].[18] It would surprise him today if he was told that his judgment was understood as only requiring the defendant to exercise some measure of control, loosely understood, over the third-party, absent any physical detention. The essence of this pocket of negligence, therefore, is physical custody, not merely control.

But even if we do not understand the *Dorset Yacht* line of cases so narrowly and stick with a 'control' in an open-ended sense, the pattern that emerges here cannot be ignored. Physical custody is a recurring theme in the cases inhabiting this pocket of negligence. At the very least, this underscores the high threshold of control necessary for an individual to be held liable for the actions of another.

Having regard to the evidence,[19] the most that can be said is that (1) Vedanta had overall oversight of KCM's activities, with a particular governance framework to prevent surface and ground water contamination by their operations, (2) Vedanta had a duty to provide various services and undertake feasibility studies into mining projects in accordance with accepted environmental practices, and (3) Vedanta was responsible for the provision of environmental and safety training to its subsidiaries. But Vedanta never had direct involvement with the Mine. 'Support', 'guidance', 'supervision' and 'oversight' (albeit to a high degree) are the words that come to mind, but it would be a stretch to say Vedanta 'controlled' the mining

[17] *Dorset Yacht* (n 13) 1063–4.
[18] *ibid* 1071.
[19] *Lungowe v Vedanta Resources* (CA) (n 3) [84].

operations which gave rise to the claims, at least not in the same sense exemplified by *Dorset Yacht*, *Carmarthenshire v Lewis*, and *Ellis v Home Office*.

By grouping the *Lungowe* case together with the *Dorset Yacht* line of cases, Lord Briggs compared the cases at a remarkably high level of abstraction. He, like many others, understood 'control' in a loose, open-ended sense. There was little regard for the specificity of control which the three cases featured, and, by extension, the high standard of control required. 'Control' becomes an umbrella term describing many different types of special relationships between defendants and third-parties, each of which warranting an exception to the pure omissions principle. It is not a precise term with which we can benchmark the duty of care in pure omissions cases, as it ideally should be.

It has to be recognised that *Lungowe* is, in an essential respect, different from other cases which co-exist in this sphere of negligence. At best, it exists on the periphery; at worst, it does not belong. Either way, it has to be acknowledged that recognising a duty of care in *Lungowe* would be an incremental expansion of the law. The only question is how big that incremental step is; this depends on how narrowly we construe the *Dorset Yacht* duty of care, and how different we think *Lungowe* is from that.

B. Is it advantageous for parent-subsidiary-claimant scenarios to remain in the *Dorset Yacht* pocket of negligence?

Here, we take a step back and look at the larger picture, including other cases featuring the same factual matrix as *Lungowe*. It would not be advantageous to analyse such cases through the prism of control supplied by *Dorset Yacht*, because it would be difficult for a duty of care to arise in such cases. As Sir Geoffrey Vos C mentioned in *Okpabi*, "it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures it if intended itself to assume responsibility for the operations of each of those subsidiaries. The corporate structure itself tends to militate against the requisite proximity".[20]

A tour d'horizon of the relevant cases supports this argument. In *Lungowe*, both the Court of Appeal and the Supreme Court found a duty of care claim to be arguable, but the facts of the case are exceptional. The parent company explicitly took charge of particular problems with discharges into water and the mine in Zambia, abiding to a governance framework to prevent such contamination. It undertook a contractual obligation to provide geographical and mining services to KCM. It was required to procure feasibility studies into mining projects in

[20] *His Royal Highness Okpabi* (n 10) [196].

accordance with accepted environmental standards. It provided environmental and technical training.[21]

Other cases remain a far cry from that. Rather than exercising effective control over the particular operation which gave rise to the claim, the parent companies in those cases merely exercise overall control of the subsidiary's operations. In *AAA v Unilever*, the claimants were workers and residents on a tea plantation in Kenya operated by the Kenyan operating company (UKTL), which was owned by a UK-registered parent company (Unilever). Following outbreaks of violence in 2007, the claimants claimed UKTL and Unilever had breached a duty of care to them in failing to take steps to prevent the violence, during which mobs killed, raped, and injured the appellants and their families. The parent company, Unilever, had "ultimate responsibility for the management, general affairs, direction and performance of the business as a whole",[22] but it was the subsidiary, UTKL, which prepared its own "crisis and emergency management" policy, and was not subject to the direction or advice of Unilever.

Okpabi tells the same tale. Following oil spills in Nigeria, claims were brought against the Nigerian operating company (SPDC) and its UK-registered parent (RDS), which was the parent of many subsidiaries worldwide (the Shell group). It was SDPC that was licensed in Nigeria to carry out the activities with which the spills were associated. The most that RDS did was issue mandatory policies, standards, practices, and a system of supervision and oversight across all its subsidiaries in the shell group, SPDC included,[23] but this was far from exercising material control.[24]

Following the recent surge of litigation involving parent companies and their subsidiaries—from *Chandler v Cape*[25] to *Lungowe*—multi-national corporations around the world would likely be scrambling to distance themselves as much as they reasonably can from the operations of their subsidiaries, so as to minimise the control they exercise and hence the liability they would incur should things go pear-shaped. This would make it even harder than it already is for a duty of care,

[21] *Lungowe v Vedanta Resources* (CA) (n 3) [84].
[22] *AAA v Unilever* (n 9) [17].
[23] *His Royal Highness Okpabi* (n 10) [86].
[24] *ibid* [122]–[123].
[25] *Chandler v Cape* [2012] 1 WLR 3111; [2012] EWCA Civ 525.

on the basis of control, to be found moving forward. Should we continue down the lane of control, the prospect of redress for such victims looks bleak.

C. Would it be more appropriate for *LUNGOWE* to exist in a novel (and separate) category of negligence?

Various difficulties with Lord Briggs' approach in *Lungowe* have been demonstrated. Perhaps this explains why in *Thompson v Renwick*,[26] *Lungowe v Vedanta Resources* (in the Court of Appeal), and *Okpabi*, the Caparo factors were used, treating the case like a novel scenario.[27] It is suggested that, in the Supreme Court, *Lungowe* should have been treated the same.

One significant advantage to such an approach is the opportunity for the court to finally discuss the policy implications of recognising a duty of care in this area of law. When new cases fall within established categories of negligence, discussion about policy considerations—the fairness, justness, and reasonableness of finding a duty of care—become otiose, as clarified in *Robinson*.[28] And so it was not surprising for the UK Supreme Court to make no mention of the policy implications of finding a duty of care owed by Vedanta to the claimant.

But this area of law is a minefield of policy arguments. The issue of opening the floodgates to indeterminate liability, for instance, rears its ugly head yet again, especially if companies are, like the parent company in *Okpabi*, establishing mandatory policies and standards across all their subsidiaries across the world.[29] If a duty of care can be found in respect of the activities of one subsidiary, on that same basis, duties of care can potentially be found in respect of the activities of all its subsidiaries. There are also glaringly obvious implications this will have on the corporate structures of multi-national companies across the world. Some discussion about the economic advantages and disadvantages to finding the *Lungowe* duty of care is warranted.

Moreover, treating *Lungowe* separately from *Dorset Yacht* would achieve more rigour in the categorisation of situations in which a duty of care is found in this area of the law. On an abstract level, control is, like in Home Office, the kernel of the duty of care here. But control comes in many forms. It would not be splitting hairs to see that the control between the borstal boys and the officers is of a different nature from the control between Vedanta and KCM, the former relationship

[26] *Thompson v Renwick* [2014] EWCA Civ 635.

[27] *Thompson v Renwick* (n 26) [28]; *Lungowe v Vedanta Resources* (CA) (n 3) [83]; *His Royal Highness Okpabi* (n 10) [84]–[85].

[28] *Robinson* (n 4) [26].

[29] *His Royal Highness Okpabi* (n 10) [121].

defined by physical custody and close monitoring, the latter relationship defined by technical assistance and corporate responsibility over operations.

In this light, the new *Lungowe* category of negligence can still be broadly defined in terms of control, but in carving this new category the courts must be precise about what type of control they are looking out for. Helpful parameters can be found in *AAA v Unilever*, where Sales LJ, outlined two scenarios in which a duty of care would arise in this line of situations. Firstly, where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of, or jointly with, the subsidiary's own management, or secondly, where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.[30]

On the other side, the courts should be more specific in defining the parameters of the *Dorset Yacht* pocket of negligence. Rather than loosely grouping these cases as the 'control' cases, the courts can afford to be more precise about the nature of control which defines that category, perhaps by alluding to the presence of physical custody or the custodial relationship between defendant and third-party.

IV. Conclusion

There are evident difficulties with Lord Briggs' categorisation of *Lungowe* into the *Dorset Yacht* pocket of negligence. It has been suggested that the *Lungowe* scenario, and other cases like it, should form a separate category of negligence. This would give more definition to the parameters of these categories of negligence and provide their respective 'control' benchmarks greater precision. More importantly, it would give the courts an opportunity to discuss the policy implications of finding a duty of care.

Okpabi is on its way to the Supreme Court, and it is hoped that the court will make some amends at that point. But given the recency of the *Lungowe* judgment, which was unanimous, it is unlikely that much will change.

[30] *AAA v Unilever* (n 9) [37].