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THE CORPORATE GROUP: SYSTEM, DESIGN AND RESPONSIBILITY

CHRISTIAN WITTING*

ABSTRACT. *Lungowe v Vedanta Resources plc presages more liberal criteria for determining when a parent company owes a duty of care to third parties injured by subsidiary activities. It invokes systems language and points to potential parent company liability for omissions in managing the group. This article develops these ideas. It portrays the corporate group in systems-managerial terms. The parent creates group-wide structures and deploys management strategies and integrating mechanisms that facilitate achievement of its purposes. It has a substantial causal influence upon subsidiary acts and omissions. Prima facie the parent cannot avoid extended liability claims by hiding behind the "pure omissions" rule.*

KEYWORDS: *corporate groups, tort, liability, theory.*

I. INTRODUCTION

UK courts uphold what has been described as an "extreme" entity view of corporate groups,[1] which emphasises the separate legal personality of each group company and the limited liability of shareholding companies.[2] As a consequence, veil-piercing doctrine[3] has proven to have little purchase in addressing judgment-proofing practices and facilitating access to parent company assets in order to discharge liabilities incurred by subsidiaries to third parties. However, an alternative route to those assets has opened up in negligence. The Supreme Court decision in *Lungowe v Vedanta Resources plc*[4] promises to break through the "straightjacket" of the *Chandler* criteria[5] for recognising parental duties of care owed to third

* National University of Singapore. Address for Correspondence: Email: lawcwit@nus.edu.sg. Thanks to Ernest Lim, Martin Petrin, Tan Cheng Han, David Tan, Tan Zhong Xing and the two anonymous reviewers for feedback and suggestions. All errors are mine alone.

[1] S. Belenzon, H. Lee and A. Patacconi, "Towards a Legal Theory of the Firm: The Effects of Enterprise Liability on Asset Partitioning, Decentralization and Corporate Group Growth" (2018) National Bureau of Economic Research Working Paper 24720, Appendix, available at http://www.nber.org/papers/w24720 (last accessed 15 September 2021).

[2] E.g. *Adams v Cape Industries plc* [1990] Ch. 433, at 532.

[3] *Prest v Petrodel Resources Ltd.* [2013] UKSC 34, [2013] 2 A.C. 415.

[4] *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 2 W.L.R. 1051, at [56].

[5] *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 W.L.R. 3111, at [80].

parties and to apply "conventional" negligence rules. The decision is notable also because it invokes "systems" language[6] and adverts to the potential for parental liability for omissions in their management of group affairs.[7]

This article develops these ideas and, in doing so, attempts to fill a recognised gap in the literature, which lacks a workable model of the group that simultaneously incorporates insights from law, organisation theory and economics.[8] Taking inspiration from French's work in the individual company context,[9] the article sets out a model of the group constructed upon elements of structure, hierarchy, purpose and the managerial coordination of activities. We see that these features conform to von Bertalanffy's idea of a system, which is a bounded group of elements operating in a purposive way in the coordination of activities.[10] This has significant consequences in liability terms because the systems model allows us to appreciate that parent companies have a significant relationship to, and causal influence upon, subsidiary functions and operations. As such, the parent company cannot be saved from liability to third parties by hiding behind the "pure omissions" rule in negligence and, in a wide range of circumstances, can be considered to be an accessory to torts committed by subsidiaries.

The article proceeds as follows: Section 2 examines the business and social contexts in which issues of corporate group liability arise. Section 3 points to deficiencies in contemporary theories of the group. Section 4 models the fundamental structural and other features of corporate groups, including three major subtypes. Next, Section 5 evaluates the model and confirms that the group is a particular type of system – a *managerial* system. The systems-managerial theory of the group demonstrates why parent companies have a significant responsibility for their part in the causation of harms to third parties. Finally, Section 6 discusses the implications for tort rules in negligence and accessory liability.

II. Context

A. Divisionalisation

The transformation of "advanced economies" from their agrarian roots into industrial powerhouses was the result of both legal and non-legal developments. The transformation was facilitated by rights of incorporation, companies being convenient vehicles for raising capital and containing (through

[6] *Lungowe v Vedanta Resources* [2019] UKSC 20, at [52].
[7] Ibid., at [53]–[54].
[8] M.S. Lacave and M.G. Urtiaga, "Corporate Groups: Corporate Law, Private Contracting and Equal Ownership" (2021) European Corporate Governance Institute – Law Working Paper No. 581/2021, 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826510 (last accessed 15 September 2021).
[9] P. French, *Collective and Corporate Responsibility* (New York 1984).
[10] L. von Bertalanffy, *General System Theory: Foundations, Development, Applications* (New York 1969).

limited liability) risks of business failure. Growth in business size was propelled, in turn, by new technologies that facilitated lower unit production costs through economies of scale, scope ("synergies"),[11] and variety (ability to innovate).[12] The industries, supply chains and organisations that emerged in the late nineteenth century to exploit the new technologies were complex and geographically disparate. Had the new ways of organising business operations not been accompanied by the rapid development of management techniques, growth would have faltered.[13] Starting with US railroads, the management of business was re-imagined and the multidivisional corporate form (M-Form) came to be adopted worldwide.[14]

Compared to the unitary company, managed by its founding entrepreneurs or their successors, the M-Form has several advantages. It facilitates both specialisation and the management of complex, interacting operations. Specialisation involves grouping work functions and/or expertise coherently, which assists knowledge- and skill-accumulation, technical innovation and the development of consistent standards. Management of operations is made easier by divisionalisation. This involves breaking down tasks,[15] which are delegated to subunits organised according to function, product type and/or geographic region.[16] When combined with separate incorporation,[17] the M-Form *group* allows parent company executives to free themselves from day-to-day operations and to concentrate on group-wide business strategies, planning and review.[18] Specialisation, divisionalisation and delegation give rise, in turn, to the need for coordination among subunits. The parent company must design processes so that they interact efficiently. To this end, it deploys group-wide policies and integrating mechanisms.[19]

B. The Corporate Group Comeback

Today, as the Fourth Industrial Revolution unfolds in fast-moving sectors, businesses compete to innovate, manage short product lifecycles,[20] and

[11] A.D. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA 1990), 17.
[12] See K. Lancaster, "The Economics of Product Variety: A Survey" (1990) 9 Marketing Science 189.
[13] A.D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA 1977).
[14] Ibid., ch. 3.
[15] M. Colombo and M. Delmastro, "Delegation of Authority in Business Organizations: An Empirical Test" (2004) 52 Journal of Industrial Economics 53, 56.
[16] *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 W.L.R. 1294, at [156]; Chandler, *Scale and Scope*, 42–46; B. Kim, J. Prescott and S.M. Kim, "Differentiated Governance of Foreign Subsidiaries in Transnational Corporations: An Agency Theory Perspective" (2005) 11 Journal of International Management 43, 50, 52.
[17] The M-Form group is an alternative to an M-Form (divisionalised) single company.
[18] R. Whittington and M. Mayer, *The European Corporation: Strategy, Structure, and Social Science* (Oxford 2000), 68; P. Aghion and J. Tirole, "Formal and Real Authority in Organizations" (1997) 105 Journal of Political Economy 1, 14.
[19] M.J. Hatch, *Organization Theory: Modern, Symbolic, and Postmodern Perspectives*, 3rd ed. (Oxford 2013), 100–02; G. Jones, *Multinationals and Global Capitalism: From the Nineteenth to the Twenty-first Century* (Oxford 2005), 176.
[20] Jones, *Multinationals*, 104–05.

support clients. Innovation is predicated upon knowledge and expertise, of which individual businesses rarely have sole possession.[21] This fact stimulated a shift in organisational dynamics "from command and control to exchange",[22] exchange taking place most conveniently through contract-based networks. Networks are thought to be especially responsive to market developments and opportunities for innovation, cooperation and cost-reduction.[23] As such, from the 1980s, the top-down management model found in the M-Form group seemed to give way.[24] Industrial groups sought more cost-effective off-shore suppliers, span off functions and pooled risks in business networks.[25] Increasingly, independent companies undertook separate functions in the product lifecycle and coordinated activities through detailed contractual provisions.[26]

However, recent history proves that networks have their shortcomings. Joint decision-making creates delay,[27] and the need for intense cooperation with counterparties is vulnerable to conflicts of interest and deficiencies of trust.[28] The need for trust arises from gaps in long-term contracts and opportunities to cheat.[29] Cheating can be debilitating when it affects knowledge-intensive, upstream processes like product development.[30] The need arises continually to monitor adherence by counterparties to network agreements[31] and there is wide scope for disputation.[32] Moreover, it might be difficult to ensure uniform quality standards from contractors undertaking important functions like manufacturing and after-sales service.[33]

The result is that it is recognised now that "firm" *ownership* of processes and inputs can be critical to success in the global value chain.[34] The experience of technology firms – which initially eschewed the M-Form – confirms this in several ways. First, because knowledge and skill are socially embedded, patent licensing does not negate the need for close cooperation between licensor and licensee companies through training,

[21] M. Jennejohn, "The Private Order of Innovation Networks" (2016) 68 Stan. L. Rev. 281, 298; R. Gilson, C. Sabel and R. Scott, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration" (2009) 109 Colum. L. Rev. 431, 434.
[22] Whittington and Mayer, *The European Corporation*, 83.
[23] N. Nohria, D. Dyer and F. Dalzell, *Changing Fortunes: Remaking the Industrial Corporation* (New York 2002), 97.
[24] Hatch, *Organization Theory*, 98–99.
[25] Gilson et al., "Contracting for Innovation", 431.
[26] Jennejohn, "Private Order", 284–85.
[27] Ibid., at 287–88.
[28] G. Teubner, *Networks as Connected Contracts* (Oxford 2011), 11.
[29] Jones, *Multinationals*, 161.
[30] M. Ibarra-Caton and R. Mataloni Jr., "Headquarters Services in the Global Integration of Production" (2018) 24 Journal of International Management 93, 95–96.
[31] Jennejohn, "Private Order", 299.
[32] Teubner, *Networks as Connected Contracts*, 6.
[33] P.T. Muchlinski, *Multinational Enterprises and the Law*, 3rd ed. (Oxford 2021), 63.
[34] Ibarra-Caton and Mataloni, "Headquarters Services", 93.

guidance and technical support.[35] Often, know-how can be commercialised most effectively within the stable environs of a single "firm".[36] Second, patent licensing provides medium-term benefits while threatening innovative capacity. The acquisition of the licensor *itself* secures innovative capacity, which is tacit within teams of engineers and scientists.[37] Third, acquisitions can secure ongoing synergies that come with size and established processes of knowledge exploitation.[38]

Experience with the network form has encouraged many large businesses to reconsider the "make or buy" decision,[39] the logic of transaction cost economics prompting them also to cut out profit-seeking counterparties and to bring transactions back within the "firm".[40] The M-Form's attractiveness has been magnified because, over time, it has acquired "an adaptability that allows it to introduce the flexibility and integration of contemporary networks while keeping its essential principles intact".[41] It follows that its place as the preferred form of large business organisation is secure for the foreseeable future.[42]

C. Entity Rules and Abuse

While the M-Form is advantageous for big businesses, significant problems arise from the ways in which corporate groups *exploit* the rules of separate legal personality and limited liability on which they are constructed. Parent companies delegate responsibility for operations to subsidiary management with little fear of liability.[43] If they so choose, they can avoid assessing risks that subsidiaries undertake and avoid encouraging them to take precautions protective of third parties. Indeed, should subsidiaries encounter difficulties, parents can refuse financial support and walk away. A favoured tactic is the spinning-off of units undertaking risky physical processes or subcontracting them to independent, thinly-capitalised companies.[44] The removal of assets from operating companies results in judgment-proofing and the externalisation of losses.[45] Empirical work confirms that, especially in jurisdictions with few options for extending group liabilities, the conduct

[35] P. Lee, "Innovation and the Firm: A New Synthesis" (2018) 70 Stan. L. Rev. 1431, 1436, 1446–47.
[36] See also Jennejohn, "Private Order", 319.
[37] Lee, "Innovation and the Firm", 1436, 1448–49.
[38] Ibid., at 1449–50, 1460–61.
[39] See O. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" in P. Buckley and J. Michie (eds.), *Firms, Organizations and Contracts: A Reader in Industrial Organization* (Oxford 1996), ch. 6.
[40] But the make or buy choice includes considerations beyond transaction costs: H. Demsetz, "The Theory of the Firm Revisited" (1988) 4 Journal of Law, Economics & Organization 141, 150.
[41] Whittington and Mayer, *The European Corporation*, 69.
[42] Lacave and Urtiaga, "Corporate Groups", 2.
[43] Belenzon et al., "Towards a Legal Theory", 5–7, 33. Of course, they might fear other things, such as reputational damage.
[44] E.g. H. Hansmann and R. Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100 Yale L.J. 1881, 1881, 1884.
[45] L.M. LoPucki, "The Essential Structure of Judgment Proofing" (1998) 51 Stan. L. Rev. 147.

of riskier physical processes is accompanied by extensive divisionalisation, incorporation of subsidiaries and asset-partitioning.[46] In the chemical, asbestos and tobacco industries,[47] judgment-proofing frequently has been used in the shadow of insolvency to protect group assets.[48]

III. Existing Theory

In seeking to address judgment-proofing and related problems, ordinarily it is seen to be necessary to widen the focus beyond "entity law" and to engage with organisation studies and/or economics in order to examine how corporate groups function. Doing so allows us, in turn, to ascertain the types of liability regime that would best address group problems. This article commences its analysis with two theories of the group that are constructed upon economics and organisation studies foundations. These are the competing conceptions of groups as "enterprise" and "differentiated networks".[49] Both will be examined and rejected before proceeding to construct a new model of the group in "systems-managerial" terms.

A. Enterprise Theory

Enterprise theory has its roots in "scientific management",[50] which was an engineering-cum-managerial approach to the problems of industrialisation, including the many deaths and injuries that accompanied it. Early proponents advocated systemised management, better coordination of production flows,[51] and the centralisation of health and safety measures.[52] Legislators took up the last of these challenges, enacting workers' compensation laws[53] that underlined employer responsibilities to workers. From these laws, legal theorists located the enterprise's obligations of repair for injuries caused in its "characteristic" long-run risks,[54] which are "different from those attendant on the activities of the community in general"[55] and in the fact that it

[46] S. Belenzon, N. Hashai and A. Patacconi, "The Architecture of Attention: Group Structure and Subsidiary Autonomy" (2019) 40 Strategic Management Journal 1610, 1614.

[47] J.E. Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-subsidiary Relationships in US, German and EU Law* (Deventer 1994), 271; M. Dearborn, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 Calif L.R. 195, 198; M. Roe, "Corporate Strategic Reaction to Mass Tort" (1986) 72 Virginia. L. Rev. 1, 39–40.

[48] J. Westbrook, "Transparency in Corporate Groups" (2018) 13 Brooklyn Journal of Corporate, Finance and Commercial Law 33, 36.

[49] Differentiation is "segmentation of the organizational system into subsystems": C. Weigelt and D. Miller, "Implications of Internal Organization Structure for Firm Boundaries" (2013) 34 Strategic Management Journal 1411, 1414.

[50] Epitomised by F. Taylor, *The Principles of Scientific Management* (New York 1911).

[51] J.F. Witt, "Speedy Fred Taylor and the Ironies of Enterprise Liability" (2003) 103 Colum. L. Rev. 1, 10–11.

[52] E.g. US Steel's Central Committee on Safety: ibid., at 35.

[53] E.g. Workmen's Compensation Act 1897; Workmen's Compensation Act 1911 (Wisconsin).

[54] G. Keating, "The Idea of Fairness in the Law of Enterprise Liability" (1997) 95 Mich. L. Rev. 1266, 1279, citing *Ira S Bushey & Sons, Inc. v United States* 398 F. 2d 167, 171 (2d Cir. 1968).

[55] Keating, "Idea of Fairness", 1290.

benefits from non-reciprocal risk impositions. These features ostensibly ensure the fairness of requiring enterprises to absorb injury costs.[56] Enthusiasm for enterprise-type reasoning encouraged movement towards strict liability[57] and was influential in the development of liability rules in such (overlapping) areas as employees,[58] abnormally dangerous activities, products,[59] and corporate groups.[60]

With respect to corporate groups, theorists have noted that these businesses undertake well-coordinated activities. Although, as Keating explains, separate entities might, for example, "handle different aspects of the refinement, transportation and sale of gasoline", their activities are functionally integrated and form "a relatively well-organised whole".[61] As such, enterprise theorists have expressed a keen interest in groups. They advocate the imposition of liability upon *any* entities involved in and benefiting from risk-generating activities,[62] including extensions laterally within the group[63] and beyond it to network counterparties.

Although enterprise theory always has been a broad church, so that there are difficulties in generalising about it, one important distinction is between positive and prescriptive treatments of groups. Trying to explain the law in positive terms, Blumberg saw the *corporate group* as a business "conducted collectively by interlinked companies under common ownership and control".[64] Tort and other rules encompass "the collective group" based upon parent company control over subsidiaries, "highly intertwined operational and economic relationships" and the need to meet pressing legal objectives.[65] Enterprise liability could extend not only vertically, but "horizontally to reach the assets of other" subsidiaries.[66]

Prescriptive versions of enterprise theory focus less on the historic exercise of control and more on the forward-looking, preventive role of liability rules. Dearborn would impose presumptive liability upon proof of injury by a mass-tort and some business connection between the insolvent, injuring

[56] E.g. G. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 14 J. Leg. Stud. 461, 466; F. James Jr., "Social Insurance and Tort Law: The Problem of Alternative Remedies" (1952) 27 N.Y.U.L.R. 537, 538.
[57] Keating, "Idea of Fairness", 1287, 1290.
[58] E.g. D. Brodie, *Enterprise Liability and the Common Law* (Cambridge 2010).
[59] E.g. *Vandermark v Ford Motor Co.* 391 P. 2d 169 (Cal. 1964).
[60] E.g. P.I. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York 1993).
[61] Keating, "Idea of Fairness", 1337.
[62] E.g. I. Mevorach, "The Role of Enterprise Principles in Shaping Management Duties at Times of Crisis" (2013) 14 E.B.O.R. 471, 476; G. Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vand. L. Rev. 1285, 1320; C. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 Yale L.J. 1, 8.
[63] I. Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford 2009), 39.
[64] Blumberg, *The Multinational Challenge*, viii–ix.
[65] Ibid., at 92, 232.
[66] H. Hansmann and R. Squire, "External and Internal Asset Partitioning: Corporations and Their Subsidiaries" in J.N. Gordon and W.G. Ringe (eds.), *Oxford Handbook of Corporate Law and Governance* (Oxford 2018), 272.

company and the liability target.[67] The objective would be to place responsibility upon the parent company for unduly risky business activities because of its ability to prevent harms "through oversight [and] protections".[68] In not dissimilar terms, Choudhury and Petrin support an enterprise approach because "[t]ypical group structures include strongly interconnected entities" and "top-down instructions and control. In these structures, it can be difficult … to pinpoint a single entity" the behaviour of which "is the clear cause of a third party's loss. Instead, the group as a whole is more likely responsible" and liability can be justified as a cost of doing business.[69]

Although the Court of Appeal in *Adams v Cape Industries Ltd.*[70] denied that courts could pierce the corporate veil on the basis of enterprise theory, in recent times the Supreme Court has expressed enthusiasm for it in vicarious liability cases.[71] Indeed, the present writer agrees with many of the overall aims of enterprise theory (especially the countering of entity law[72] as the prevailing standard in this area and the pursuit of deterrence) and treats as important some of its central pillars (such as functional integration of activities and the use of the management structure in order to achieve stated aims[73]). However, it is argued that enterprise theory, in its most important applications to groups, suffers from a lack of analytical depth and precision. This is evident in several ways:

(1) There is a long-acknowledged "boundary problem".[74] Economic links "extend throughout the economy"[75] so that, often, enterprise theory provides "no adequate basis for establishing a logical link between any given commercial enterprise's activities and the harm[s] those activities cause".[76] This problem is intensified for some prominent writers, who (probably in response to their then-recent florescence) would extend liability to networks[77] and could end up, therefore, holding "the entire economy" liable.[78] This article draws clear boundaries around corporate groups, which is necessary because of the

[67] Dearborn, "Enterprise Liability", 252–53.
[68] Ibid., at 205.
[69] B. Choudhury and M. Petrin, *Corporate Duties to the Public* (Cambridge 2019), 121.
[70] [1990] Ch. 433, at 538.
[71] *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] A.C. 677, at [40]; *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660, at [23].
[72] E.g. Mevorach, *Insolvency*, 212.
[73] See P. Muchlinski, "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 Cambridge Journal of Economics 915, 920, 922.
[74] Choudhury and Petrin, *Corporate Duties to the Public*, 122; J. Henderson Jr., "The Boundary Problems of Enterprise Liability" (1982) 41 Maryland. L. Rev. 659.
[75] LoPucki, "Essential Structure", 156–58.
[76] J. Henderson Jr., "The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk Management Problems" (2013) 40 Florida State U.L.R. 221, 246.
[77] E.g. Blumberg, *The Multinational Challenge*, 241, 247; Dearborn, "Enterprise Liability", 211.
[78] LoPucki, "Essential Structure", 157–58. This is enterprise liability as loss–spreading because the precision needed in identifying liability targets for deterrence is absent.

different legal issues that arise as between equity-based legal structures (groups) and contract-based structures (networks);

(2) Enterprise liability makes more sense in the kinds of integrated groups to which Keating adverts but less sense with respect to conglomerates that have unrelated business activities.[79] This article attempts to distinguish between the liability of different kinds of group;

(3) Prescriptive versions of enterprise theory, while forward-looking and emphasising preventive measures, have not sufficiently overcome Stone's criticism that, to escape their "black-box" quality, they need to explain explicitly *how* prevention is to occur.[80] Dearborn, for example, hints at an explanation without giving it. This article attempts to provide an explicit explanation of the ways in which corporate group liability can help achieve the law's deterrence purposes;

(4) Blumberg anchored liability in the historic exercise of control over subsidiaries, control serving as a proxy for fault.[81] But this is of questionable wisdom, given the delegation of functions that takes place in groups.[82] A control criterion disincentivises engagement by parent companies in their subsidiaries' affairs[83] and perpetuates judgment-proofing.[84] This article de-emphasises the control criterion.

B. Team-of-Teams Theory

A competing approach to the conceptualisation of corporate groups follows in the tradition of "differentiated network" theory.[85] This theory asserts that, relative to regional headquarters and other group subsidiaries, parent companies have been weakened by modern business practices. This has occurred through delegations of function and the "distance" that develops between group companies upon international expansion. It can be seen in patterns of business interaction, the exercise of power by parent companies being just one example of numerous resource "flows" within and across organisations.[86] Because such "flows" are evident between group companies *and* other market actors, it is thought to be meaningless to distinguish between these business forms. Real, structural power comes from

[79] A. Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (Abingdon 1996), 394–95.
[80] Stone, "Place of Enterprise Liability", 8, 77.
[81] Noted in Dearborn, "Enterprise Liability", 249.
[82] M. Simkovic, "Limited Liability and the Known Unknowns" (2018) 68 Duke L.J. 275, 277, 305.
[83] E.g. G. Skinner, "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law" (2015) 72 Wash. & Lee L. Rev. 1769, 1823.
[84] See e.g. Muscat, *Liability of the Holding Company*, 441.
[85] S. Ghoshal and C. Bartlett, "The Multinational Corporation as an Interorganizational Network" (1990) 15 Academy of Management Review 603.
[86] Ibid., at 609.

companies being positioned at important nodes within networks of business relations.[87]

Harper Ho inclines to this perspective in her theory of the group as a "team-of-teams". She acknowledges the existence of hierarchy and control within corporate groups,[88] but more significant for her is the fact of delegation and the ways in which decisions are arrived at and actions taken. Groups resemble networks with their multiple, interrelated decision centres[89] because power and resources are dispersed so that, even in "controlled groups", subsidiaries enjoy functional autonomy.[90] Subsidiary boards act as "mediating hierarchs" in coordinating group activities. The parent company is just "one player among others".[91]

For at least three reasons, differentiated network theories are not convincing. First, they do not recognise the sense in which organisations and groups are defined by the *boundaries* within which their components operate. Second, they do not recognise the bifurcated nature of control within groups.[92] Attention focuses upon operational control, the assumption being that, when this is absent, subsidiaries have unfettered autonomy and operate like contractual parties. Yet Alfred Sloan is famous for observing that, as President of General Motors, he never gave an order to anyone.[93] Often, control in groups is exercised indirectly on the basis of *authority* relations.[94] "Authority" stems from both hierarchical seniority *and* pursuit of commonly agreed purposes. Authority relations structure thinking[95] and motivate genuine cooperation. Third, differentiated network theories take a view of the group that is contract/economics-focused and fail to heed the building blocks of entity law.[96] In short, this article believes it to be a mistake to conflate corporate groups and networks – even if they closely interact in the modern economy. Each type of business form has distinct characteristics and each calls for different liability solutions.

[87] Ibid., at 616.
[88] V. Harper Ho, "Theories of Corporate Groups: Corporate Identity Reconceived" (2012) 42 Seton Hall L. Rev. 879, 887.
[89] Ibid., at 908.
[90] V. Harper Ho, "Team Production and the Multinational Enterprise" (2015) 38 Seattle U.L. Rev. 499, 507.
[91] Ibid., at 512–13, 522.
[92] The major division is between power and authority-relations: R. Scott and G. Davis, *Organizations and Organizing: Rational, Natural, and Open System Perspectives* (Upper Saddle River 2007), 208.
[93] Manufacturing Intellect, "Alfred P. Sloan Interview on Running a Successful Business" (1954), available at https://www.youtube.com/watch?v=w52SYCtG94 (last accessed 16 September 2021). See also *Dairy Containers Ltd. v NZI Bank Ltd.* [1995] 2 N.Z.L.R. 30, 91.
[94] A. Grimes, "Authority, Power, Influence and Social Control: A Theoretical Synthesis" (1978) 3 Academy of Management Review 724. See also Scott and Davis, *Organizations and Organizing*, 208–09.
[95] Scott and Davis, *Organizations and Organizing*, 212–13.
[96] P. Nell and B. Ambos, "Parenting Advantage in the MNC: An Embeddedness Perspective on the Value Added by Headquarters" (2013) 34 Strategic Management Journal 1086, 1088.

IV. Modelling the Corporate Group

A. Introduction

This article builds upon insights from enterprise law in constructing a theoretical model of the corporate group. It attempts to overcome the deficiencies in existing theory by importing insights from systems theory and from organisation studies, creating a model of the group's managerial structure reminiscent of French's Corporate Internal Decision (CID) Structure. The article, first, identifies fundamental features of the group and incorporates them into a working model. It demonstrates that operations are coordinated through the group executive management structure. Usually, this is not by the exercise of direct, operational control but indirectly through authority relations between group managers, the deployment of integrating mechanisms,[97] and the promotion of group values that elicit cooperative behaviour.[98] Second, the article *builds upon* the working model and demonstrates how groups conform to von Bertalanffy's general systems theory. Systems theory emphasises the group's bounded nature, interconnections between group companies that are maintained through the executive management structure and their pursuit of distinctive group purposes.

B. The Model

We begin with the construction of a model of the corporate group inspired, in part, by French's CID Structure – that is, insofar as he would emphasise the importance of structure, fixed relations between participants and authoritative decision-making processes.[99]

1. Shareholding and capacity to control

Corporate groups are founded upon equity relations and intertwined board and managerial structures.[100] As regards equity relations, companies are related to each other either vertically through multiple levels of corporate shareholdings[101] or horizontally through an individual's common ownership of entities.[102] What is important is the *capacity* to control investee companies on an *ongoing basis*.[103] This need not be by way of majority voting rights. Capacity to control can also be obtained in cases of

[97] S. Watson O'Donnell, "Managing Foreign Subsidiaries: Agents of Headquarters or an Interdependent Network?" (2000) 21 Strategic Management Journal 525, 532.
[98] Ibid., at 531.
[99] French, *Collective and Corporate Responsibility*, 41–51. See also T. Isaacs, *Moral Responsibility in Collective Contexts* (Oxford 2011); E. Bant, "Culpable Corp Minds" (2021) 48 U.W.A.L. Rev. 351.
[100] *Lungowe v Vedanta Resources* [2019] UKSC 20, at [49].
[101] Harper Ho, "Theories of Corporate Groups", 886.
[102] See e.g. *Charterbridge Corporation Ltd. v Lloyds Bank Ltd.* [1970] Ch. 62, 66; *Sea-Land Services, Inc. v Pepper Source* 941 F. 2d 519 (7th Cir. 1991).
[103] *Walker v Wimborne* (1976) 137 C.L.R. 1, 6.

indirect[104] and minority shareholdings.[105] In the larger and medium-size groups that are of especial interest to this paper, subsidiaries typically are wholly owned[106] and might extend down 10 or more levels.[107]

2. Board structure

Intertwined board and executive management structures provide the group's decision-making framework.[108] Subsidiary board composition is determined by either the parent company's holding of a majority of shares in a subsidiary that enables the appointment of a majority of its directors,[109] or shareholder agreements that establish capacity to control and entitle block-holders to proportionate representation.[110] In both cases, courts treat directors as officers of the companies on the boards of which they sit, taking part in *autonomous* decision-making processes.[111] So, although subsidiary directors might act upon group purposes, their decisions are *treated* as decisions of their respective subsidiaries. Having said as much, parent companies do *not* manage groups through the board structure. Boards are constituted according to, and respond to the imperatives of, local laws.[112] Their work consists mostly of mandated "corporate governance" tasks[113] and is otherwise largely *symbolic* of leadership and direction. The fact is that group senior executives dictate board agendas, take responsibility for strategy development and implement formal board decisions[114] at both the parental and subsidiary levels.[115]

3. Executive management

By contrast to corporate governance, *managerial* governance:[116]

> emphasizes those internal processes and structures that regulate operational decisions and business activities undertaken by [a group]'s various subunits . . .. Managerial governance includes the systems that bring about internal adherence within [the group] to a set of strategic goals designed by top management through using corporate power or authority.

[104] See S. Haddy, "A Comparative Analysis of Directors' Duties in a Range of Corporate Group Structures" (2002) 20 Company & Securities Law Journal 138, 140.
[105] See e.g. Companies Act 2006, s. 1159(1).
[106] Belenzon et al., "Towards a Legal Theory", 6.
[107] R. Wieser, *Liability within Corporate Groups* (Bad Frankenhausen 2013), 9–10.
[108] See e.g. *Okpabi v Shell* [2021] UKSC 3, at [147]; Muscat, *Liability of the Holding Company*, 149.
[109] E.g. Companies Act 2006, sched. 3, reg. 4, Model Articles for Public Companies, arts. 20–21.
[110] Companies Act 2005, s. 1159. They are common in large unlisted companies: Lacave and Urtiaga, "Corporate Groups", 24.
[111] *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2014] P.I.Q.R. P18, at [24]–[26]; J. Dine, *The Governance of Corporate Groups* (Cambridge 2000), 43–44.
[112] Y. Luo, "Corporate Governance and Accountability in Multinational Enterprises: Concepts and Agenda" (2005) 11 Journal of International Management 1, 3–5.
[113] Ibid., at 5.
[114] E.g. Chandler, *Scale and Scope*, 191; Muscat, *Liability of the Holding Company*, 58–59.
[115] Y. Du, M. Deloof and A. Jorrinsen, "The Role of Subsidiary Boards in Multinational Enterprises" (2015) 21 Journal of International Management 169, 175.
[116] Luo, "Corporate Governance", 3.

The corporate group's executive management structure is depicted in the group organogram, which has a vertical/hierarchical alignment and portrays a chain of formal, executive decision-making powers.[117] The structure is designed by parent company executives in order to facilitate the implementation of group business strategies by ensuring maximum coordination among subunits,[118] higher units having power and authority over lower units. The typical corporate group structure comprises three tiers.[119]

At the apex is a "holding company", which designs management structures,[120] sets high-level strategy and performance goals for subunits,[121] allocates roles, responsibilities[122] and financial resources,[123] and monitors performance.[124] The holding company does *not* exercise detailed, operational control over subsidiaries.[125] Operations are decentralised[126] because: holding company managers work at a distance from individual subsidiaries and cannot easily observe them; they have insufficient technical competence and insufficient time[127] to intervene; and subsidiaries need to maintain responsiveness to local business conditions.[128] When necessary, selective intervention in subsidiary decision-making *is* possible,[129] but this is undertaken (if at all) through joint-planning and cooperation.[130]

Second-tier group companies (whether service companies performing group-wide functions or lead companies within product segments/divisions) have key roles[131] in implementing group strategies.[132] Their boards are likely to adopt group strategies, formally, but divisional managers can

[117] Chandler, *Visible Hand*, 3; H. Mintzberg, *The Structuring of Organizations* (Englewood Cliffs 1979), 37, 42.
[118] J. Galbraith, *Designing Organizations: Strategy, Structure and Process at the Business Unit and Enterprise Levels*, 3rd ed. (San Francisco 2014), 22–23; E. Penrose, *The Theory of the Growth of the Firm*, 4th ed. (Oxford 2009), 18; Mintzberg, *Structuring of Organizations*, 37; A.P. Sloan Jr., *My Years with General Motors* (New York 1963), 431.
[119] D. Chakravarty et al., "Multinational Enterprise Regional Management Centers: Characteristics and Performance" (2017) 52 Journal of World Business 296, 296. See e.g. Iberdrola, *Corporate Governance System* (Iberdrola SA, 25 July 2019), 3.
[120] See especially Mintzberg, *Structuring of Organizations*, 154–56.
[121] Chandler, *Strategy and Structure*, 11.
[122] E.g. *Okpabi v Shell* [2021] UKSC 3, at [156].
[123] Mintzberg, *Structuring of Organizations*, 388–89; Chandler, *Strategy and Structure*, 13.
[124] *Okpabi v Royal Dutch Shell plc.* [2018] EWCA Civ 191, [2018] Bus. L.R. 1022 (C.A.), at [40]. See also Mintzberg, *Structuring of Organizations*, 388–89.
[125] Jones, *Multinationals*, 182.
[126] Recognised e.g. in *Okpabi v Shell* [2021] UKSC 3, at [122], [124]–[125], [140]. This has been the case since A.P. Sloan brought together General Motor's disparate brands: Chandler, *Strategy and Structure*, 130–62.
[127] Chandler, *Scale and Scope*, 623.
[128] Belenzon et al., "Architecture of Attention", 1612, 1616; E. Alfoldi, J. Clegg and S. McGaughey, "Coordination at the Edge of the Empire: The Delegation of Headquarters Functions through Regional Management Mandates" (2012) 18 Journal of International Management 276.
[129] M. Kuntz, *Conceptualising Transnational Corporate Groups for International Criminal Law* (Baden-Baden 2017), 275.
[130] E.g. Sloan Jr, *My Years with General Motors*, 433.
[131] Chakravarty et al., "Multinational Enterprise", 298.
[132] Mintzberg, *Structuring of Organizations*, 133. See also Harper Ho, "Team Production", 505, 518.

implement strategies in the absence of this step because there is no resistance to doing so.[133] Parent company senior managers liaise directly with divisional CEOs and other senior managers[134] and the authority relations between them ensure the cooperation of the latter. Second-tier group companies centralise some decision-making with respect to operations so as, for example, to buy in bulk, allocate discretionary funds among subsubsidiaries, coordinate their work, and lead research and development.[135]

At the third tier, operating subsidiary boards are likely to adopt group strategies formally but, again, management can implement them in the absence of this step.[136] Operating subsidiaries undertake the manufacturing, distribution and sales, including hiring and managing most employees and interacting with other third-tier subsidiaries and external counterparties.[137]

4. Economic unity

To be distinguished from the simple fact, emphasised by enterprise theorists, of economic *interdependence* (which means economic actors are reliant upon each other), corporate groups evince economic *unity*.[138] Unity arises because the financial and other interests of group companies are aligned fully. Vertically integrated groups permit the internalisation of a market for intermediate goods and services, thereby reducing group transaction costs.[139] While the strategic decision-making direction in groups pushes downward,[140] profits move upward to ultimate shareholders and incentive-remunerated senior managers. At each rung of group management, profit-sharing incentives direct behaviour, motivate performance and facilitate evaluation. Unlike networks, groups are free of the conflicts that characterise relations with external counterparties, which are likely to be antagonistic in their sharing of commercial spoils.[141]

5. Groupness

Another feature of corporate groups that distinguishes them from networks is "groupness".[142] Groupness extends beyond use of common trade names, logos and colour schemes. It is reflected in behavioural traits encompassing

[133] *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd. (No 6)* [2010] FCA 704, at [42]; Antunes, *Liability of Corporate Groups*, 91, 103.
[134] Harper Ho, "Team Production", 528.
[135] Chandler, *Scale and Scope*, 232. See e.g. Iberdrola, *Corporate Governance System*, 3.
[136] See Muscat, *Liability of the Holding Company*, 58.
[137] D. Collis, D. Young and M. Goold, "The Size and Composition of Corporate Headquarters in Multinational Companies: Empirical Evidence" (2012) 18 Journal of International Management 260, 263.
[138] See Antunes, *Liability of Corporate Groups*, 159; Muscat, *Liability of the Holding Company*, 402.
[139] R. Coase, *The Firm, the Market and the Law* (Chicago 1988), ch. 2.
[140] Antunes, *Liability of Corporate Groups*, 101.
[141] H. Collins (ed.), "Introduction to Networks as Connected Contracts" in G. Teubner (M. Everson trans.), *Networks as Connected Contracts* (Oxford 2011), 25.
[142] R. Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford 2007), 27.

pursuit of group purposes, group affiliation and the commitment of group managers.[143]

First, groups form for particular purposes that provide direction and meaning to all within them,[144] including the pursuit of opportunities in designated markets, expansion of business reach, lowering of costs and achievement of high company valuations and profits.[145] More specific purposes might extend to becoming the industry leader,[146] achieving engineering excellence, or providing "complete business solutions". Group purposes are implemented through authority relations and integrating mechanisms, such as standardised operating procedures and accepted modes of interaction. Standardised operating procedures subsist in policy documents[147] and operating manuals,[148] training and "indoctrination".[149] They are reinforced through formal monitoring,[150] feedback and discussion.

Second, every manager knows of her own company's hierarchical position within the group's corporate structure. This feeds into awareness of decision-making direction, authority relations, profit and incentive flow direction and promotion pathways. Knowledge and awareness are reinforced by interactions with other group senior managers working in pursuit of group purposes and by integrating mechanisms. The result is a sense of affiliation with the whole group and pro-group attitudes and behaviours.[151] (Although a sense of affiliation might characterise non-managerial employees, this is neither inevitable nor necessary. It is not "necessary" because such employees lack decision-making powers that affect intra-group operations.)

Third, groupness manifests itself in *commitment* to group purposes, which is a marker of any social group. It is the responsibility of executive management to "articulate and inculcate commitment" to agreed purposes.[152] Ordinarily, group purposes are developed on a consultative basis,[153] which results in managerial "buy-in".[154] Commitment to purpose is encouraged by: headquarters-based training;[155] lateral integrating

[143] For qualified empirical support, see D. Vora et al., "Us and Them: Disentangling Forms of Identification in MNCs" (2021) 21 Journal of International Management 100805, 2, 12.
[144] E.g. B. King, T. Felin and D. Whetten, "Finding the Organization in Organization Theory: A Meta-theory of the Organization as Social Actor" (2010) 21 Organization Science 290, 293–94.
[145] E.g. C. Heckscher, "Defining the Post-Bureaucratic Type" in C. Heckscher and A. Donnellon (eds.), *The Post-bureaucratic Organization: New Perspectives on Organizational Change* (San Francisco 1994), 25.
[146] E.g. Iberdrola, *Corporate Governance System*, 4.
[147] See e.g. Volkswagen AG, *Annual Report 2018: Structure and Business Activities* (Stuttgart 2018), 56 et seq.
[148] Antunes, *Liability of Corporate Groups*, 78.
[149] E.g. Mintzberg, *Structuring of Organizations*, 83, 95, 191, 290, 384.
[150] E.g. *Okpabi v Shell* [2021] UKSC 3, at [40].
[151] See Tuomela, *Philosophy of Sociality*.
[152] Scott and Davis, *Organizations and Organizing*, 185.
[153] See e.g. Galbraith, *Designing Organizations*, 42; Sloan Jr, *My Years with General Motors*, 433–34.
[154] M. Gilbert, *A Theory of Political Obligation* (Oxford 2006), 128.
[155] Watson O'Donnell, "Managing Foreign Subsidiaries", 532.

mechanisms, such as rotation of managers through group companies,[156] and work in inter-corporate committees and task forces[157] (knowledge gained from such interactions promoting understanding of how other units work[158] and fostering trust and dependable working relationships);[159] the prospect of promotion up the group hierarchy;[160] gain-based rewards;[161] adoption of group values, such as innovation, trust and openness; and positive inter-personal relations that extend into the social sphere.[162] Commitment is evident when each manager adopts group purposes *as their own* and agrees to stand by them.[163]

In the face of operational complexity, groupness facilitates better coordination of group companies through genuine cooperation. But this has a flip side. When group managers fail to conform to expectations, they become amenable to reproach. This is because collective, purpose-driven activity gives each manager a special *standing* vis-à-vis other managers: "rights against one another to action appropriate to the joint activity and correlative obligations towards one another".[164] These rights include the ability to criticise and impose "sanctions" on poor performers.[165]

C. Subtypes

The foregoing discussion provides the basic model of the corporate group. But subtypes exist that differ in terms of structure and modes of coordination, and which are amenable to liability claims in varying ways. This section highlights them briefly, proceeding from the most decentralised to the most centralised. While most groups are of one subtype or another, conglomerates especially might combine two or more subtypes in their product segments.[166]

1. Conglomerate group

The conglomerate group encompasses a diverse range of businesses and benefits more than other subtypes do from economies of variety. Decision-making is decentralised[167] because parent company executives are generalist managers with a limited understanding of individual business

[156] E.g. Blumberg, *Multinational Challenge*, 140; Mintzberg, *Structuring of Organizations*, 384.
[157] Watson O'Donnell, "Managing Foreign Subsidiaries", 532–33.
[158] Weigelt and Miller, "Implications of Internal Organization Structure", 1415–18.
[159] Vora et al., "Us and Them", 1–2.
[160] Watson O'Donnell, "Managing Foreign Subsidiaries", 542–43.
[161] E.g. Ibarra-Caton and Mataloni, "Headquarters Services", 96; Watson O'Donnell, "Managing Foreign Subsidiaries", 534.
[162] Ibarra-Caton and Mataloni, "Headquarters Services", 95–96.
[163] Gilbert, *Theory of Political Obligation*, 130.
[164] Ibid., at 115.
[165] Ibid. See also C. List and P. Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford 2011), 173.
[166] See also Mevorach, "Role of Enterprise Principles", 475.
[167] Galbraith, *Designing Organizations*, 198.

operations.[168] The parent company is a holding company,[169] which makes strategic decisions involving acquisitions and/or large financial implications,[170] but otherwise restricts itself to monitoring subsidiaries. The parent does not make operational decisions.[171] In order to create clear lines of accountability, individual subsidiaries are housed in segments dealing in like products.[172] Each is led by a second-tier, "segmental" parent company which devises operationally oriented policies and monitors subsidiaries' performance.[173] Given commonalities in producing one "major line",[174] there is *within* each product segment a substantial degree of coordination but only modest levels of lateral coordination *between* segments.

2. Paradigm multidivisional group (PMG)

The PMG features businesses operating in related sectors.[175] For example, a PMG might manufacture automobiles and commercial vehicles, offer vehicle finance and involve itself in energy production.[176] Divisions are organised by reference to product types[177] or, if foreign operations are important, by geographic region and product types.[178] Divisional companies offer "total business solutions" combining products, maintenance/updates and related services.[179] The group parent company is likely to have senior executives with both technical knowledge and operational experience. However, fast-changing market conditions and the need for rapid response times mean that business-planning and product development are undertaken close to markets and customers. Typically second-tier group companies, "divisional" parent companies implement group strategies,[180] develop divisional policies and operating standards and review the performance of third-tier companies.[181] They hire senior divisional personnel, direct research and development and organise large purchasing contracts.[182] Much operational responsibility is devolved to third-tier companies.[183]

[168] Chandler, *Strategy and Structure*, 303.
[169] Galbraith, *Designing Organizations*, 195. The holding company is likely to be modest in size: ibid., at 204; *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528, [2018] 1 W.L.R. 3575, at [12].
[170] Galbraith, *Designing Organizations*, 198, 204.
[171] Ibid., at 195.
[172] Chandler, *Strategy and Structure*, 42, 99.
[173] Galbraith, *Designing Organizations*, 213; Mintzberg, *Structuring of Organizations*, 151.
[174] Chandler, *Scale and Scope*, 613–14; Chandler, *Strategy and Structure*, 2, 9.
[175] A. Colpan and T. Hikino, "Foundations of Business Groups: Toward an Integrated Framework" in A. Colpan, T. Hikino and J. Lincoln (eds.), *The Oxford Handbook of Business Groups* (Oxford 2010), 26.
[176] Volkswagen AG, *Annual Report 2018*, 51 et seq.
[177] Galbraith, *Designing Organizations*, 186, 189.
[178] J. Dunning, *Multinational Enterprises and the Global Economy* (Wokingham 1993), 217; V. Mahnke et al., "How Do Regional Headquarters Influence Corporate Decisions in Networked MNCs?" (2012) 18 Journal of International Management 293, 293–94.
[179] Galbraith, *Designing Organizations*, 265.
[180] See e.g. *Okpabi v Shell* [2021] UKSC 3, at [160].
[181] Galbraith, *Designing Organizations*, 194.
[182] Dunning, *Multinational Enterprises*, 224; Chandler, *Strategy and Structure*, 232.
[183] Mintzberg, *Structuring of Organizations*, 381; Chandler, *Strategy and Structure*, 138.

PMGs make use of lateral integration/ coordination mechanisms between companies undertaking complementary businesses. Basic processes of input purchasing, product manufacture sequencing and distribution are automated.[184] "Concurrent" processes give rise to lateral coordination problems. Such processes cannot be coordinated from top-down and must be undertaken among divisional companies that work simultaneously on design, engineering, procurement and manufacturing tasks.[185] Modest coordination challenges are facilitated by "mutual adjustment" among managers and technical officers.[186] For complex coordination challenges, integration managers with intra-group operational experience and networking skills might be appointed.[187] Alternatively, integration teams might be appointed either in the form of project management teams (for one-off jobs) or standing committees (for longer-term coordination).[188]

3. Integrated group

The integrated group produces closely related products, benefiting from economies of scale and scope. It might be organised by product offerings or by function (manufacturing, sales, distribution, et cetera).[189] Frequently, the parent company will be an operating entity.[190] There is a high degree of overlap between group parent senior executives and those of the subsidiaries,[191] and much direct communication between them.[192] Senior executives who have moved up the ranks are likely to have the technical expertise required to direct business operations.[193] Thus, a group parent company has a greater ability to control subsidiary operations[194] although this recedes as the group grows larger and/or moves into foreign markets.[195] A high degree of coordination can be achieved not only through common business and technical standards[196] but through automated processes.[197]

Smaller-scale integrated groups are formed, not in order to simplify complex management processes, but usually to take advantage of limited

[184] Galbraith, *Designing Organizations*, 39–40.
[185] Ibid., at 11.
[186] "Mutual adjustment achieves the coordination of work by the simple process of informal communication": Mintzberg, *Structuring of Organizations*, 3.
[187] Galbraith, *Designing Organizations*, 101.
[188] Mintzberg, *Structuring of Organizations*, 164.
[189] Dunning, *Multinational Enterprises*, 216; Chandler, *Strategy and Structure*, 12.
[190] E.g. *Chandler v Cape plc* [2012] EWCA Civ 525, at [8].
[191] E.g. *Dairy Containers Ltd. v NZI Bank Ltd.* [1995] 2 N.Z.L.R. 30.
[192] Muscat, *Liability of the Holding Company*, 57, 59. See also *Re Hydrodan (Corby) Ltd.* [1994] B.C.C. 161, 164.
[193] See e.g. Galbraith, *Designing Organizations*, 201.
[194] *Okpabi v Shell* [2021] UKSC 3, at [54].
[195] Penrose, *Theory of the Growth of the Firm*, 46; Chandler, *Strategy and Structure*, 44, 297. See e.g. Iberdrola, *Corporate Governance System*, 51 et seq.
[196] *Okpabi v Shell* [2021] UKSC 3, at [47]–[49].
[197] See Muscat, *Liability of the Holding Company*, 55–56.

liability.[198] These subsidiaries' boards are dominated by parent company management.[199] This might be reflected in explicit "agreements" that the parent company undertake management services for subsidiaries.[200] In numerical terms, smaller integrated groups are the ones most frequently beset by undercapitalisation and insolvency.[201]

V. Systems

Having set out a working model of the corporate group, this article turns to deeper theory. It argues that the model supports a "systems-managerial" approach to group problems, combining insights into the executive management structure with systems analysis. The identification of corporate groups as systems is argued to be a significant counterweight to entity rules and supports extensions of liability from insolvent subsidiaries, in part, because it underlines how lawmakers can influence corporate purposes and operations through the group management structure.

A. General Systems Theory

Ludwig von Bertalanffy developed modern systems theory in order to address methodological shortcomings in scientific study.[202] Scientists had studied living things in isolative and reductionist ways. Von Bertalanffy sought to account for interconnection and complexity.[203] Over time, he recognised that other disciplines suffered from reductionist tendencies[204] and published his *General Systems Theory* in 1969. His ideas have been applied in many fields. Each application accepts that a system is a "set of distinct but interconnected elements or parts that operate as a unified whole" to serve specified purposes.[205] Interconnection is evident in the way that elements function together in the processes that sustain the system.[206] Systems theory, thus, underlines the mistake made when attempting to view system components in isolation because their functions are explained, in part, by the hierarchies that bind them and their relationships to other system components.[207] Purpose, interconnection and functional inter-operation entail "wholeness" among subsystems and their elements[208]

[198] Ibid., at 93–95, 399.
[199] Ibid., at 57.
[200] Ibid., at 56.
[201] Ibid., at 97–98, 312ff.
[202] Von Bertalanffy, *General System Theory*, 11–12, 31, 44–45.
[203] Ibid., at 19, 31; L. von Bertalanffy, "The History and Status of General Systems Theory" (1972) 15 Academy of Management Journal 407, 410–11.
[204] Von Bertalanffy, *General System Theory*, 36–37.
[205] T. Belinfanti and L. Stout, "Contested Visions: The Value of Systems Theory for Corporate Law" (2018) 166 U. Penn. L.R. 579, 599. See von Bertalanffy, *General System Theory*, 34–37.
[206] A. Calnan, "Torts as Systems" (Unpublished, 2018), 11.
[207] Von Bertalanffy, *General System Theory*, 27–28.
[208] Ibid., at 5.

and distinguish systems from their environments, in which other systems, subsystems and elements subsist. Because all living systems must "exchange matter" with their environments, to a greater or lesser degree they are "open".[209] In the continual processes of change that affect them, systems adapt to their environments by self-organising, which, in the present context, means that they develop their own goals, values and ways of working.[210] The latter ensure that systems operate in stable ways and have a continuing existence.[211] The quality of "system-*ness*" is important for identifying correct levels of analysis of problems involving systems and/or subsystems, system boundaries, regular interactions between elements,[212] and relations of cause and effect.

B. Groups as Systems

Theory recognises the hierarchic nature of systems and their subsystems.[213] It has been accepted, for example, that "the individual is a part of a group, which is part of an organization, which is part of a national economy, which in turn is part of the larger global system".[214] The question is whether the corporate group has a place in the socio-organisational hierarchy. The idea to be pursued is that the group is a system situated in the socio-organisational hierarchy between the individual organisation and the world of commerce, which includes the networks that the group interacts with. Certainly, in *Lungowe v Vedanta Resources plc*, Lord Briggs J.S.C. alludes to corporate groups as comprising both systems of work and manufacture and recognises the potential for system errors.[215] Systems ideas have been adverted to in the groups literature also[216] without being developed. If the ideas are cogent, focus upon the group as the correct *level* of analysis is likely to be important when recurring problems prove to be of a *system-type*.[217]

Chandler treated modern, multi-unit businesses as having emerged in "the years of system building" that began with US railroads.[218] This was the point at which the size and scale of that industry became so large that new structures and management methods were required to coordinate

[209] N. Luhmann, *Introduction to Systems Theory* (Cambridge 2002), 28; von Bertalanffy, *General System Theory*, 39.
[210] Belinfanti and Stout, "Contested Visions", 603–04.
[211] Ibid., at 599–600.
[212] L. LoPucki, "The Systems Approach to Law" (1997) 82 Cornell L.R. 479, 482–83, 487.
[213] Von Bertalanffy, *General System Theory*, 27–28, 194–95, 198.
[214] A. Montuori, "Systems Approach" in M. Runco and S. Pritzker (eds.), *Encyclopedia of Creativity*, vol. 2 (London, Burlington and San Diego 2011), 416.
[215] [2019] UKCSC 20, at [52].
[216] Antunes, *Liability of Corporate Groups*, 115–16; Blumberg, *The Multinational Challenge*, 73–75.
[217] Belinfanti and Stout, "Contested Visions", 605, 609; Scott and Davis, *Organizations and Organizing*, 17–18; F. Kast and J. Rosenzweig, "General Systems Theory: Applications for Organization and Management" (1972) 15 Academy of Management Journal 447, 455–56.
[218] Chandler, *The Visible Hand*, 145, 147.

operations. Application of theory in light of our model of the group confirms the system quality of the corporate groups that flourished in the wake of the railroads in order to cope with the challenges of mass production and distribution.[219] This is evident in: constitutive structures that unify companies into "wholes" (corporate groups), especially equity-based ownership and group management; connections between elements (segments, divisions, senior managers) as seen in unified managerial decision-making, functionally arranged processes and use of integrating mechanisms; purposive behaviours, such as the incentivisation of managerial performance at all levels; and the characteristics of "groupness" found among executive managers in their attitudes, motivations and pursuit of group purposes.

Together, these features evidence system boundaries. Boundaries are important for two reasons.[220] First, they signify the extent and limits of parent company *influence* over activities. Identifying the parent's influence in designing the group structure, allocating functional responsibilities to segments/companies,[221] and fostering group norms,[222] allows us to trace cause and effect (for example, with respect to harms that arise).[223] Second, and relatedly, we can better appreciate the extent of *problems* stemming from group operations and their impact in the world of commerce. Group operations, which are the product of conscious design and decision-making, often conflict in problematic ways with those of government (which desires to regulate and tax) and other commercial and social actors (who desire, for example, to profit or to claim for injuries caused).

Understanding levels and boundaries is crucial, in turn, to questions of responsibility and the design of liability rules. This is where the study of systems-related problems comes into its own. First, systems analysis helps us to appreciate that – whatever entity law might imply – group companies do not behave as independent actors. One cannot understand any individual group company unless one understands its relationship to the group. Each group company is part of a hierarchy, has a functional role, is governed by group policies, subject to group funding constraints and so on. Second, systems analysis can help to reveal system malfunctions.[224] In the group context, we observe the regular use of groups in order to separate risky operations from assets. When large liabilities threaten poorly capitalised operating subsidiaries, the parent might choose not to re-capitalise the subsidiary so that costs of business are externalised. Repeated externalisations of this kind reflect the system's instinct to

[219] Ibid., chs. 6–11.
[220] Scott and Davis, *Organizations and Organizing*, 152.
[221] *Chandler v Cape plc* [2012] EWCA Civ 525, at [8], [75].
[222] LoPucki, "Systems Approach to Law", 489.
[223] See e.g. I. Anabtawi and S. Schwarcz, "Regulating Systemic Risk: Towards an Analytical Framework" (2011) 86 Notre Dame L. Rev. 1349.
[224] LoPucki, "Systems Approach to Law", 499.

survive, in particular, so that managers can pursue "a lifetime career involving a climb up the hierarchical ladder".[225] Third, an intervention might be devised to confront problems.[226] Systems analysis helps in modelling the impact of the intervention[227] in order to predict its efficacy. For example, understanding the systems-managerial nature of the group facilitates hypotheses about how deterrence measures can be achieved through identified pathways of influence. In the present context, this should assist in reviewing the appropriateness of both legislation constituting and regulating groups and common law rules which respond to their machinations.

VI. Liability

A. Implications of Systems-managerial Theory

Finally, we arrive at discussion of liability rules. Here it is contended that the identification of corporate groups as systems has implications for the development of statutory, regulatory and common law. Two general implications warrant immediate discussion before we consider relevant liability rules.

First, theory illuminates the deficiencies of operational control as a talisman of extended liability within corporate groups. Ordinarily, we associate a "control" pre-requisite in liability rules with the operation of things *external* to the responsible person: whether employees or agents, or articles that can cause damage. As regards employees and agents, control by one over another speaks of capacity to *avoid harm-doing by that other*. Reasoning by analogy, courts have treated the historic exercise of control as crucial in three-party cases involving parent company negligence[228] and veil-piercing.[229] But, it is easier to find evidence of direct, operational control in smaller groups than in larger groups. As groups grow in size and complexity, the parent company exercises less operational control. Its influence is mediated by second- and lower-tier subsidiaries and becomes indirect and diffuse.[230] This can be problematic in a judicial system predicated upon proof of cause and effect, and partly explains the limited success to date of negligence[231] and veil-piercing[232] in larger corporate groups. The complications are likely to increase with "smart" contracting between

[225] Chandler, *The Visible Hand*, 8–9.
[226] Ibid.
[227] Von Bertalanffy, *General System Theory*, 34, 200. See e.g. Anabtawi and Schwarcz, "Regulating Systemic Risk", 1406ff.
[228] E.g. *Lungowe v Vedanta Resources* [2019] UKSC 20, at [49]; *Okpabi v Shell* [2021] UKSC 3, at [141]–[142].
[229] F. Gevurtz, "Groups of Companies" (2018) 88 Am. J. Comp. L. 181, 205.
[230] See also Mevorach, "Role of Enterprise Principles", 489.
[231] E.g. *Thompson v The Renwick Group* [2014] EWCA Civ 635.
[232] K. Strasser, "Piercing the Veil in Corporate Groups" (2005) 37 Conn. L. Rev. 637, 639–40.

entities and increased automation.[233] Yet the systems approach provides a basis for a more forward-looking responsibility that is not reliant upon the historic exercise of operational control, for which specific evidence ordinarily is required linking some parent company action or decision with third-party harms. When such questions arise, systems-managerial theory might help short-circuit the need for evidence of some types of control because the theory locates subsidiaries not externally, beyond the parent company, but within group boundaries and recognises the economic unity of group companies. This is not a revolutionary stand: in both criminal law[234] and tort law,[235] lack of *self*-control rarely is a constraint upon responsibility. And within the intra-organisational relationship of employer and employee, lack of meaningful control by the former over the latter rarely affects the result.[236]

Second, a normative implication is that either the whole group or the parent company ought to have greater *responsibility* for the negative consequences of group operations. Given that the present writer neither subscribes to will-theory nor believes that corporate liability need conform to models of liability used for human beings, "responsibility" need not be confined to that which is coterminous with culpability for historic harm-doing. To give corporate/group responsibility real substance, it is preferable to turn, where possible, from an *ex post* and backward-looking notion of responsibility (often devoid of substance) to an *ex ante*, forward-looking notion[237] – that is, to encourage a proactive *taking* of responsibility for the acts and omissions of group companies so that injuries to third parties will be avoided. This could be achieved through (1) greater use of strict liability rules and doctrines because the lack of a no-fault escape route ensures a constant pressure to avoid injury causation and (2) a more nuanced application of the omissions rule in negligence. Certainly, a court with jurisdiction over a parent company and applying such rules or doctrines will have *opportunities* to influence the group's (including its individual components'[238]) purposes, internal logics and methods of operation.[239] The key will be to work through senior management, given that managers have an inherent interest in the perpetuation of their employer groups.[240]

[233] E.g. M.E. Diamantis, "The Extended Corporate Mind: When Corporations Use AI to Break the Law" (2020) 98 N.C.L.R. 893, 895, 899.
[234] R.A. Duff, "Who Is Responsible, for What, to Whom?" (2005) 2 Ohio State J. Crim. L. 441, 456.
[235] *Dunnage v Randall* [2015] EWCA Civ 673, [2016] Q.B. 639; P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 67.
[236] E.g. *Lister v Hesley Hall Ltd.* [2002] 1 A.C. 215.
[237] See Cane, *Responsibility in Law and Morality*, 30–33.
[238] B. Ewing, "The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility" (2015) 8 J. Tort L. 1, 24.
[239] *Empirical evidence* demonstrates that regulatory/tort law has its greatest deterrent effect among medium- and large-size organisations: L. Friedman, *Impact: How Law Affects Behavior* (Cambridge, MA 2016), 137.
[240] Roe, "Corporate Strategic Reaction", 10, 13.

B. Current Liability Alternatives

The device of non-statutory or common law veil-piercing is no option for extending corporate group liabilities. English doctrine has been narrowed so that recovery is available only for evasions by shareholders of their own prior legal obligations through the exercise of control over interposed entities.[241] *Prest v Petrodel Resources Ltd.*[242] confirms the restrictive approach evident since *Adams v Cape Industries plc*.[243] Indeed, *Adams* illustrated how parent companies structure group relations and activities in order to insulate assets from potential liabilities. The Court of Appeal was cognisant of Cape's scheme to sever connections to the US by distributing asbestos through "independent" intermediary companies.[244] Yet it refused to lift the corporate veil on the "mere" basis that a company structure had been used to ensure that legal liability in respect of future group activities fell on under-capitalised intermediaries.[245]

By contrast to common law veil-piercing law, the parent company's responsibility *could* be addressed through a legislative scheme containing clear exceptions to limited liability. There is good argument for the enactment of strict liability rules,[246] which have a place beyond mere cost internalisation. They help to carve out clear spheres of forward-looking responsibility and induce responsible parties to be proactive so as either to reduce activity levels or else avoid harms through increased precaution-taking[247] (as the prescriptive enterprise theorists would argue for). In conformity to such thinking, some scholars have argued for strict liability exceptions to limited liability.[248] At present, however, the very fact of entity law means that the strict liability of the parent company for injuries caused by subsidiaries will be difficult to achieve. Designing an appropriate rule will be a task for the future – hopefully with the use of the systems-managerial model.

For now, we will examine the use of current rules and doctrines in extending liability within groups for causation of injury to third parties (subsidiary employees, customers and bystanders) in order to test the utility of systems-managerial theory. Moreover, although it supports a "whole

[241] *Prest v Petrodel Resources* [2013] UKSC 34. Veil piercing might be abolished completely in the UK: *Hurstwood Properties (A) Ltd. v Rossendale BC* [2021] UKSC 16, [2021] 2 W.L.R. 1125, at [71]–[72].
[242] [2013] UKSC 34.
[243] [1990] Ch. 433.
[244] Ibid., at 539–40.
[245] Ibid., at 544.
[246] J. Arlen and R. Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes" (1997) 72 N.Y.U.L. Rev. 687; D. DeMott, "Organizational Incentives to Care About Law" (1997) 60 Law & Contemp. Probs. 39, 54.
[247] M. Caulfield and W. Laufer, "Corporate Moral Agency at the Convenience of Ethics and Law" (2019) 17 Georgetown J.L. & Public. Pol'y. 953, 965; M. Geistfeld, "The Coherence of Compensation-Deterrence Theory in Tort Law" (2012) 61 DePaul L. Rev. 383, 406–07.
[248] E.g. C.A. Witting, *Liability of Corporate Groups and Networks* (Cambridge 2018), ch. 9; Hansmann and Kraakman, "Toward Unlimited Shareholder Liability".

group" responsibility[249] for the problems of insolvent subsidiaries (which could be important when there is limited evidence about which group company caused harm), the focus in what follows will be upon extending liability upwards to parent companies and laterally between subsidiaries.

C. Tort Liability Rules

Tort law has great potential in the groups context because its application does not undermine the entity rules that protect the parent company in the way that common law veil-piercing would. Indeed, tort liability arguably *reinforces* separate legal personality rules because extensions of liability underline the legal capacity of both the insolvent subsidiary and the liability target. Moreover, the application of *fault*-based tort rules to parent companies does not undermine the reasons for limited liability (protection of passive shareholders), which normally constitute a barrier to extended liability of parent companies.

The contention is that systems-managerial theory can assist in understanding why it could be justifiable to extend liability from an insolvent subsidiary to other group companies using tort law. Fault-based tort rules respond to coordination problems through prohibitions and the application of the reasonableness standard. Such rules can be applied to groups in ways that make use of existing subsystems (including group corporate governance[250] and compliance efforts), practices, expertise and knowledge.[251] The idea would be to: induce effective *ex ante* allocations of responsibility for implementing precautions against risks and hold group companies to account *ex post* for their failures; induce selective interventions in the operation of subsidiaries (whether by the exercise of control or by cooperative arrangements); and have in place a "backstop duty of care". There might be reasons also for imposing tort obligations laterally as between *co-subsidiaries*, which would be useful in devolved corporate groups and preliminary comment will be made about how this might be done. Given recent Supreme Court interest in these matters, we discuss both negligence and accessory liability.

1. Negligence

Chandler v Cape plc[252] held that a parent company owed a duty of care to subsidiary employees after the parent intervened in subsidiary health and safety practices.[253] Although this was a positive development, the facts

[249] Luo, "Corporate Governance", 10.
[250] See e.g. *In re Caremark International Inc. Derivative Litigation* 698 A. 2d 959 (Del. Ch. 1996).
[251] See R. Van Loo, "The New Gatekeepers – Private Firms as Public Enforcers" (2020) 106 Viriginia. L. Rev. 467.
[252] [2012] EWCA Civ 525.
[253] Ibid., at [18]–[26].

were unusual because the parent company located subsidiary operations on its own land.[254] Medium and large-size corporate groups rarely operate with such literal overlaps. Given that the proximity criteria for the imposition of a duty identified by the court were specific to the facts of the case, they cannot be taken to govern all cases.[255] In *Vedanta Resources plc v Lungowe*,[256] the Supreme Court intimated that parent companies might owe duties to those affected by subsidiary activities where they "supervise" subsidiary management,[257] impose harmful policies upon subsidiaries regarding hazardous operations,[258] and train subsidiary personnel.[259] The latter suggestion especially signifies greater judicial recognition of indirect control methods as a basis of parent company liability. There was a strong suggestion,[260] further, that the parent company could be held liable for omissions, including citation of the classic omissions case of *Home Office v Dorset Yacht Company*.[261] *Dorset Yacht* indicates that a duty of care can arise where there are special relations between A and B, such that A has a right of control over B (which *need not* be exercised) and it is foreseeable that, if A fails to take care, damage to C is the very kind of thing likely to happen.[262]

Needless to say, there is work to be done in adapting negligence rules to the corporate group context. The following tentative prescriptions are tailored to the identification of groups as systems and to the nuances of the different group subtypes to which the rules will apply.

First, courts should recognise their own forward-looking role in imposing both responsibility and proper standards of care upon groups. This means moving away from "assumption of responsibility" reasoning, which is a restrictive approach to duty issues (because it appears to create a hurdle higher than the normal concept of proximity) and is inappropriate when harms are the product of systems, their design and the exercise of indirect control. It is especially inappropriate when the operation of those systems causes personal injuries.[263] In all these cases, it is necessary for courts to *impose* responsibility through parent company duties of care so that responsibility means something substantive. (Nevertheless, to the extent that they remain relevant, assumptions of responsibility are more likely to be evident in integrated and smaller groups, such as where the parent company promulgates specific health and safety policies for application in subsidiaries

[254] Ibid., at [7]–[8].
[255] *Lungowe v Vedanta Resources* [2019] UKSC 20, at [56].
[256] Ibid.
[257] Noted in Choudhury and Petrin, *Corporate Duties to the Public*, 95.
[258] *Lungowe v Vedanta Resources* [2019] UKSC 20, at [49], [51]–[53].
[259] Ibid., at [53].
[260] Ibid. See also *Okpabi v Shell* [2021] UKSC 3, at [153]; *Chandler v Cape plc* [2012] EWCA Civ 525, at [65].
[261] [1970] A.C. 70.
[262] Ibid., at 1037–39, 1055.
[263] Choudhury and Petrin, *Corporate Duties to the Public*, 113.

because this means substituting parent company assessments of what is appropriate for subsidiary discretion.[264])

Second, courts should be alive to the multiple ways in which proximity (such as would support duties of care) arises between group companies and injured subsidiary employees, customers and bystanders.[265] Assuming that proximity indicates pathways to harm between classes of person,[266] our study of group subtypes suggests the following:

(1) The proximity factor *operational control* by the parent company is more likely to be found in integrated and smaller groups. It is less likely to be found in conglomerates and other large groups in which the lack of sub-industry expertise and the impossibility of managing operations from a distance force the decentralisation of responsibilities. More prevalent in such groups is a systemic alignment of group companies towards group purposes[267] and the exercise of indirect control (through group structuring and relations,[268] group strategies and policies,[269] the appointment of senior managers, the allocation (or withholding) of funds,[270] product specifications,[271] training and indoctrination, and lines of reporting[272]). These features are designed to have – and succeed in having – a significant causal influence upon decisions made by subsidiary companies and upon failures in care. *Okpabi v Royal Dutch Shell plc*[273] is evidence that this is now understood, with its multitude of pleadings of specific managerial actions as the basis for proximity between the group parent and third-party claimants;

(2) The proximity factor *knowledge of risk*[274] is more likely to be found within integrated and smaller groups, where senior executives have operational experience and understand industry-specific risks and required responses;[275]

(3) Proximity might be evident in *lateral interactions* between group companies, which would be significant for liability purposes when they are mismanaged. Lateral interactions are present between subsidiaries in PMGs and in integrated groups. In the former, they are likely to be coordinated by human integration managers, while in the latter

[264] *Okpabi v Shell* [2021] UKSC 3, at [7], [26].
[265] Cf. B. Walker Smith, "Proximity-driven Liability" (2014) 102 Geo. L.J. 1777.
[266] C. Witting, *Street on Torts*, 16th ed. (Oxford 2021), 43.
[267] R. Burton and B. Obel, "The Science of Organizational Design: Fit Between Structure and Coordination" (2018) 7 Journal of Organization Design 5, 3.
[268] *Chandler v Cape plc* [2012] EWCA Civ 525, at [75]; *Okpabi v Shell* [2021] UKSC 3, at [45].
[269] *Okpabi v Shell* [2021] UKSC 3, at [46].
[270] Antunes, *Liability of Corporate Groups*, 76.
[271] *Chandler v Cape plc* [2012] EWCA Civ 525, at [75].
[272] *Okpabi v Shell* [2021] UKSC 3, at [51].
[273] [2021] UKSC 3.
[274] *Chandler v Cape plc* [2012] EWCA Civ 525, at [77]–[78].
[275] *Okpabi v Shell* [2021] UKSC 3, at [33].

they are more likely to be automated. Lateral interactions arise also within conglomerate product segments, which might be structured as "mini" integrated groups. Where risks of harm arise from one subsidiary working with another group company (especially one undertaking risky physical processes), proximity might be found in cooperative acts that facilitate harm-doing, contractual provisions which set out ways of working and agreed standards and so on.

Third, although the Supreme Court in *Lungowe* intimated the potential for parent company liability for omissions, little analysis exists of omissions in the group context. One reason for this is the general confusion about what omissions liability is.[276] We can glide over many of the problems because of the peculiar nature of the relationships between parent companies and their subsidiaries that stems from their being elements in managerial systems. Systems-managerial theory is helpful in analysing omissions in the following ways:

(1) Because omissions liability is dependent upon *prior relations/connections* between parties,[277] it is necessary to take an inter-temporal view of harm-causing events[278] encompassing the ways in which a parent company (earlier in time) designs the system that constitutes the corporate group, including: the structuring of the group, appointment of senior managers at the subsidiary level (who are willing to serve the purposes of the parent in order to gain promotion within the group management hierarchy), implementing group policies and processes for accomplishing tasks and setting performance targets. The result of these design choices is that parent companies have an enduring relationship of cause and effect with respect to events within the group that (later in time) manifest themselves in either systemic or one-off failures. The *Lungowe* case appears to foreshadow greater judicial amenity to arguments of a systemic (design) nature;

(2) Courts must be careful about (mis-)characterising group cases as involving "pure omissions" and denying liability just because final acts in chains of harm causation are undertaken by subsidiary companies. A "pure omission" is said to arise in "any case where X seeks to make Y liable for harm caused by Z, when Y's actual involvement in the relevant events was negligible or non-existent".[279] Courts that take account of final acts only, and seek proof of operational control over those acts, can be argued to reason falsely because

[276] See P. Smith, "Omission and Responsibility in Legal Theory" (2003) 9 Legal Theory 221.
[277] Ibid., at 234–40; S. Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L.Q.R. 484, 503–07.
[278] G.R. Sullivan and A.P. Simester, "Omissions, Duties, Causation and Time" (2021) 137 L.Q.R. 358, 362.
[279] *Kalma v African Minerals Ltd.* [2020] EWCA Civ 144, at [128].

the parent company's influence over a subsidiary inevitably will be substantial, if not pervasive. Of course, this assumes that causation inheres in a sequential chain. But it might be preferable to think of causation in omissions cases as involving webs of factors.[280] Insofar as this is correct, it is argued that the systems approach helps to reveal the pervasive causal influences of the parent company on subsidiary decisions and actions;[281]

(3) In cases of physical harm-doing, courts should pay heed to the extent to which the parent company has undertaken *causally significant positive acts* that include allocating risky physical processes to subsidiaries (such as the development of volatile chemical compounds),[282] setting strategy, deploying integrating mechanisms,[283] and (often at the same time) utilising judgment-proofing strategies so that subsidiaries are unable to satisfy substantial liability claims. In many cases, history demonstrates that the inability of subsidiaries to meet liability claims is preordained[284] and part of the overarching harm causation process. Related parent company actions include the siphoning of funds that otherwise might be used for the implementation of safety measures[285] and/or paying tort creditors. These actions ensure, in a way typical of malfunctioning systems, that financial losses amplify physical harms;

(4) Finally, to the extent that courts resist omissions liability based on *policy* arguments expressed in *Stovin v Wise*,[286] such as the "Why pick on me?" and indeterminacy arguments, clearly these are of no salience in the group context. The same is true of the concern that arises in public authority omissions cases that liability awards reduce the ability of these defendants to fulfil their primary functions.[287] Policy favours the imposition of liability upon causally responsible parties.

Indeed, the parent company's inevitable relationship to harm-doing by subsidiaries arguably justifies a presumptive duty of care owed to those who might be affected by the negligence of subsidiaries when conducting risky physical processes.[288] Given that limited liability rules have no

[280] M.M. Mello and D.M. Studdert, "Deconstructing Negligence: The Role of Individual and System Factors in Causing Medical Injuries" (2008) 96 Geo. L.J. 599, 609.
[281] See also ibid.
[282] Such positive acts might create a relevant "source of danger": *Maran (UK) Ltd. v Begum* [2021] EWCA Civ 326, at [62]–[64], [124].
[283] *Lungowe v Vedanta Resources* [2019] UKSC 20, at [53].
[284] In more egregious cases, judgment proofing happens *after* liabilities arise: e.g. S. Lo, *In Search of Corporate Accountability: Liabilities of Corporate Participants* (Newcastle 2015), ch. 2; *Chemours Company, The v DowDuPont, Inc.* (Ch. Del. 30 March 2020) (affd., Supr. Ct. Del. 15 Dec 2020).
[285] *Forsythe v Clark USA, Inc.* 864 N.E. 2d 227 (Ill. 2007).
[286] [1996] A.C. 923, 943–44.
[287] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53.
[288] Cf. Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; Muchlinski, *Multinational Enterprises*, 320–22; Choudhury and Petrin, *Corporate Duties to the Public*, 113–14.

place in protecting shareholders from the consequences of their positive acts in the causation of physical harms and recognising the multiple ways in which parent companies influence the operation of subsidiaries, the presumptive duty should extend to all such cases. Such a presumptive duty, the exact content of which (beyond the requirement of reasonableness) must be determined at the standard/breach stage of negligence, would create incentives in the parent company to do what is reasonable to encourage subsidiaries to take precautions against risks of physical harm.[289]

2. Accessory liability

Rules on joint tortfeasance might provide another avenue of recovery. Joint tortfeasance arises when two or more persons are legally responsible for the commission of a tort and their actions cause the *same* damage. The claimant need bring action against only the most solvent party in order to obtain full damages. If another jointly liable party is worth suing, the defendant to the main action can bring proceedings for "contribution".[290] Here we discuss a particular type of joint tortfeasance: accessory liability on the basis of a common design. Parties to a common design are liable for all of its consequences even though they have not participated in all relevant acts and "even though as to some of the incidents [they might] not have anticipated that they would happen".[291] Especially important in the group context is the fact that a common design can arise on the basis of mere *cooperation* to a common end; there is no need for actual agreement.[292] Given the ways in which groups work as systems, the common design head of joint liability could have a wide application.

In *Fish & Fish Ltd. v Sea Shepherd UK*,[293] which concerned a small-scale "corporate group", the Supreme Court decided that liability for a common design could be extended beyond a primary tortfeasor when: D2 assists D1 in the commission of acts amounting to a tort and D2's assistance is more than merely facilitative in nature;[294] there is a common design between D2 and D1, consisting in "agreement" that they work towards a common end;[295] and D2 commits the tort regarding which D2's acts are a contributing cause.[296] The most difficult issue concerns the

[289] See K.E. Sørensen, "The Legal Position of Parent Companies: A Top-down Focus on Group Governance" (2021) 22 E.B.O.R.
[290] Civil Liability (Contribution) Act 1978, s. 1(1).
[291] J. Dietrich and P. Ridge, *Accessories in Private Law* (Cambridge 2015), 133, citing *Schumann v Abbott and Davis* [1961] S.A.S.R. 149, 155. See also *Glaxo Wellcome UK Ltd. v Sandoz Group* [2017] EWCA Civ 227, [2017] F.S.R. 32, at [31].
[292] *Unilever plc v Gillette (UK) Ltd.* [1989] R.P.C. 583, 609.
[293] *Fish & Fish Ltd. v Sea Shepherd UK* [2015] UKSC 10, [2015] A.C. 1229.
[294] Ibid., at [21], [23], [37], [49], [57], [58].
[295] Ibid., at [23], [37], [55].
[296] P. Davies, *Accessory Liability* (Oxford 2015), 12–13; Dietrich and Ridge, *Accessories in Private Law*, 38

"common design" requirement. Lord Sumption J.S.C. held that there must be a shared *intention* to commit the acts which prove to be tortious,[297] while Lord Neuberger P.S.C. and Lord Toulson J.S.C. would have accepted knowledge in D2 of D1's intention to commit a tort.[298] The latter is more consistent with doctrine.[299] Subsequently, in *Glaxo Wellcome UK Ltd. v Sandoz Group*,[300] the Court of Appeal interpreted the rules liberally and cautioned against permitting groups to escape their legal obligations by dividing functions temporally between different subsidiaries.[301] It accepted that each of four companies in an integrated group had the common intention and design of selling an inhaler with a chosen design and get-up so as to create confusion about its origins, arguably committing the tort of passing off. It was significant that each company had a functional role to play in the development, testing, marketing and sale of the product.

The potential role of accessory liability in the group context is apparent. So is the role of the systems-managerial model of the group in illuminating its application. For example, the model is useful in highlighting the importance of "group purposes" in explaining D2's involvement in the commission of wrongs. The identification of such purposes as motivations could be used either to inform the intention/knowledge requirement or as a substitute for such a requirement in explaining the commission of wrongful acts in corporate group cases. This could entail the liability of parent companies as accessories. Indeed, the doctrine appears to be easier to apply to lateral interactions at the subsidiary level than is the tort of negligence. An example applicable to either an integrated group or a conglomerate product segment might involve a subsidiary undertaking research on, and the development of, a product with respect to which there are known problems and in which D1 commits a breach of statutory duty. A second subsidiary (D2) that manufactures the product or markets the product despite knowledge of the essential facts that constitute the tort could be liable for injuries based on a common design.

Expanded accessory liability is justified by several considerations: First, the accessory that takes action according to a common design "enhances" the risk of wrongdoing by D1 by promoting the decision to commit the wrong in the first place, by increasing the capacity of D1 to commit the wrong, or by assisting in the wrongdoing.[302] D2 "ought not to be able to hide behind the fact that he did not himself commit the primary wrong".[303] Second, there are two inter-locking policy reasons for

[297] *Fish & Fish Ltd. v Sea Shepherd UK* [2015] UKSC 10, at [44]. See also *Kalma v African Minerals Ltd.* [2020] EWCA Civ 144, at [99] (intent can be inferred).
[298] Ibid., at [27], [60], respectively.
[299] Dietrich and Ridge, *Accessories in Private Law*, 4, 12–13, 29, 43–60, 93–4, 116–17, 127–30.
[300] *Glaxo Wellcome UK Ltd. v Sandoz Group* [2017] EWCA Civ 227, [2017] F.S.R. 32.
[301] Ibid., at [30].
[302] Dietrich and Ridge, *Accessories in Private Law*, 37, 122.
[303] Ibid., at 15–16.

application of the doctrine in this context: accessory liability widens the net of liability, enhancing the protection of important interests,[304] and it is a deterrent to coordinated wrongdoing.[305] "Deterrence is particularly relevant in this area as the conduct of the accessory is calculated *ex ante*: a conscious decision is taken by the accessory, so an opportunity to deter the accessory from becoming 'involved' in the primary breach clearly exists."[306] This is of especial significance in a liability regime that accepts indirect influence as a contributing cause under the common design head[307] and that is being re-oriented (as we saw in the negligence context) towards greater responsibility for the management of interactions. Third, the doctrine permits the extension of liability for the commission of wrongs to promote full recovery of compensation by injured parties.

VII. Conclusions

This article has developed ideas from *Lungowe v Vedanta Resources plc* as the basis for theorising the corporate group and suggesting how theory can help think through real-world problems involving insolvent subsidiary liabilities. The corporate group has been described in systems-managerial terms. The significance of this is that the system is a bounded group of companies that work together in pursuing common purposes. In the group context, that system is structured around a managerial hierarchy. It is designed by the parent company and operates according to group strategies, policies, integrating mechanisms and corporate values. Although the characterisation of corporate groups as systems might not be useful in resolving every problem involving them, it provides an important perspective upon liability issues. Perhaps the most important finding is that the parent company has a relationship to its subsidiaries and their activities that makes it difficult for it to argue that, as regards the injurious activities of subsidiaries, it was not proximate and/or that its part in the causation of harm was that of a pure omission.

[304] Ibid., at 16.
[305] Ibid., at 17.
[306] Davies, *Accessory Liability*, 16.
[307] *Fish & Fish Ltd. v Sea Shepherd UK* [2015] UKSC 10, at [57].