Multinational Human Rights Litigation in the UK: A Retrospective

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Abstract

This article provides an overview of the key features of multinational human rights litigation in the United Kingdom, including the development of a tort-based parent company duty of care, the principles relating to forum non conveniens and applicable law and other key procedural and practical barriers to victims' access to justice. The article highlights some of the actual and perceived limitations of litigation. It also considers the concurrent development of and mutually reinforcing relationship between MNC tort litigation and the field of Business & Human Rights.

Keywords: barriers to justice, *forum non conveniens*, interplay between MNC litigation and BHR, jurisdiction, parent company liability

I. Introduction

While we mark the 10th anniversary of the UN Guiding Principles on Business and Human Rights (UNGPs), UK human rights litigation against multinationals (MNCs) is now in fact in its 27th year. This article outlines the rationale and legal basis of litigation in the MNC home state courts; the key legal, procedural and practical barriers to justice faced by claimants; the interplay between the cases and the legal principles they entail, within the field of business and human rights; and the perceived limitations of litigation. MNC litigation can constitute a powerful preventative deterrent against corporate human rights abuse in addition to its primary objective of providing redress for victims.

UK human rights litigation against MNCs has developed significantly over the past 25 years. Cases have been brought concerning: environmental harm; occupational injury and disease; corporate complicity in serious human rights abuses by state security; corruption; and exploitation of child labour. The key sectors involved have been mining and oil, as well as the agricultural and chemical sectors, and have arisen mainly in the African continent and also in Latin America. The cases have been directed primarily

¶ Conflicts of interest: The author and his law firm, Leigh Day, have been the legal representatives for the claimants in the key cases described in this article.

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against MNC parent companies and have alleged harm or abuse caused by deficient functions, aspects and policies at subsidiary operations that were controlled, managed, supervised, devised, or advised on by the parent, and/or alternatively, by the omission of the parent to exercise a degree of control or supervision over local operations when it had stated publicly that it would do so.

These characteristics of the UK cases reflect the nature and geographical location of past abuse and exploitation involving UK headquartered and controlled MNCs, in circumstances in which their legal accountability, by regulation, criminal sanction and civil action by victims, was lax, limited, or non-existent. This effective impunity enabled MNCs to operate in host states in a manner that would not have been tolerated in the home state, in which MNC directors and managers were let off scot-free and in which victims were denied justice and redress. Indeed, it is precisely this state of affairs that has underpinned the quest for justice in MNC home courts. However, this in itself entails specific challenges.

Overcoming the jurisdictional and corporate veil barriers to justice in the MNC home courts has hinged on establishing the principle of a tort law-based duty of care owed by the MNC parent company and the fundamental importance of victims' right to access to justice. The principle has been emphatically confirmed by two judgments of the UK Supreme Court in cases against Vedanta plc and Royal Dutch Shell in 2019 and 2021, respectively. The progress achieved in these two key areas has provided victims with a potential avenue to justice in the UK, and a salutary warning to UK MNCs that they can no longer depend on these technical legal barriers as a shield behind which to perpetrate, facilitate or allow, human rights abuses and harm from their overseas operations.

Based on the UK cases, the possibility of imposing a legal duty of care on MNC parent companies has also been pursued in relation to home states, such as Canada and South Africa and this approach is likely to expand further.

The progress in MNC litigation has coincided with the development and expansion of the field of business and human rights (BHR). MNC cases have increasingly been woven into the BHR debate and the principle of human rights due diligence (HRDD), which is central to the corporate duty to respect, in the UNGPs, essentially reflects the tort law duty of care on which the UK MNC parent company cases have largely been based. Conversely, BHR commitments by MNCs, for example to the Voluntary Principles on Security and Human Rights, have been specifically cited in legal cases in support of an alleged duty of care owed by MNCs, as no doubt, in the future, will MNC's endorsement of the UNGPs. The synergy between BHR and MNC cases serves to increase public awareness and investor and reputational pressure on MNCs to resolve cases, but more importantly to avoid conduct that may result in human rights abuse and to implement measures that will reduce the risk of abuse.

While the UK cases represent significant progress in MNC legal accountability, such litigation arguably has significant limitations: only cases satisfying the litigation mould are viable, many instances of corporate abuse are not; the remedy that can be claimed is usually damages, whereas financial redress may not be victims' primary goal; successful cases are invariably settled with a degree of confidentiality without a trial verdict on liability; claims based on allegations of negligence and wrongdoing do not reflect the gravity of the abuse perpetrated and suffered.

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Furthermore, significant barriers to justice still remain in the UK, particularly arising from the financial risk that representing victims in complex, hard fought and protracted MNC litigation presents to victims' lawyers. It is unsatisfactory, but no coincidence, that virtually all the cases have been brought by one firm. Third party litigation funders have shown an increasing interest in this area, but such funding will only potentially be available in certain very high value cases.

II. Analysis of UK Cases Alleging Human Rights Abuses by MNCs

This section will examine MNC human rights cases brought over the past 27 years and provide an overview of the key legal claims and also the court rulings on various critical legal issues raised by corporate defendants.

A. UK Cases by Category of Harm[1]

Court decisions on various points of principle, or settlements, have been made in the cases referred to below.

Occupational injury and disease claims:

- Mercury poisoning claims of 42 South African workers.[2,3] Two of the workers died but only a paltry fine had been imposed in South Africa[4];
- Throat cancer in a worker at the Rossing Uranium Mine, Namibia[5];
- Asbestos-related diseases suffered by 7,500 South African asbestos miners and local residents[6];
- Death caused by breaking a ship dumped in Bangladesh.[7]

Environmental damage claims:

- By 30,000 residents for injuries allegedly caused by toxic waste dumping in Côte D'Ivoire[8];
- By 15,000 fishermen for oil pollution of waterways in Nigeria[9];

[1] All the cases in this article, bar the following identified in footnotes 13, 15, 25, 26, 48 and 50 below were brought by Leigh Day.

[2] *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (Times L Rep 10 November 1995).

[3] *Sithole v Thor Chemicals Holdings Ltd & Desmond Cowley* (Times L Rep 15 February 1995).

[4] 'Thor bosses acquitted, but firm fined R13,500', *Daily News* (SA, 17 February 1995).

[5] *Connelly v RTZ Corporation Plc* [1998] A.C 854.

[6] *Lubbe & Ors v Cape plc* [2000] 1WLR 1545.

[7] *Begum v Maran* [2021] EWCA Civ 326.

[8] *Motto & Others v Trafigura* [2011] EWCA Civ 1150 (12 October 2011).

[9] *Bodo Community v Shell & SPDC* [2014] EWHC 958 (TCC).

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- A claim by 109 Colombian farmers for damage to land allegedly cause by construction of an oil pipeline[10];
- By 2,577 Zambian villagers for land damage allegedly caused by a copper mine in Zambia[11];
- By 270 Colombian peasant farmers for oil pollution damage[12];
- By 200,000 Brazilian victims of the Fundao Dam collapse[13];
- For oil pollution by 40,000 members of Nigerian fishing and farming communities[14];
- A claim in the law of nuisance for damage arising from an oil spill in Nigeria[15].

Security and human rights claims:

- For alleged complicity with state security in the torture and unlawful detention of 33 indigenous environmental protesters at a copper mine in Peru[16]. Several of the victims were prosecuted but no charges were laid by the authorities against the police or the company;
- For alleged complicity with state security in the shooting and killing of 12 villagers stealing rock from a gold mine in Tanzania[17];
- A second case for alleged complicity in human rights violations brought by Peruvian environmental protesters[18];
- For alleged complicity in human rights violations by 142 villagers near a mine in Sierra Leone[19];
- By 218 Kenyan tea pickers for alleged failure to prevent election-related killings, rapes and serious injuries[20];
- Against Gemfields Ltd by 273 community members for direct perpetration of human rights abuses by security guards and operatives at a ruby mine in Mozambique[21];

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[10] *Pedro Emiro Florez Arroyo and others v Equion Energia Limited* (formerly known as BP Exploration Company (Colombia) Limited) [2016] EWHC 1699 (TCC).

[11] *Lungowe & Others v Vedanta & Another* [2019] UKSC 20.

[12] *Bravo & Others v Amerisur Resources plc* [2020] EWHC 125 (QB).

[13] *Municipio De Mariana v BHP Billiton plc & others* [2020] EWHC 2930 (TCC). The court rejected the claim on the basis that it was an 'abuse of process' and 'irredeemably unmanageable', due to duplication and existence of parallel proceedings in Brazil and the number of claimants. NB: this is not a Leigh Day case.

[14] *Okpabi & others v Royal Dutch Shell plc & Anor* [2021] UKSC 3.

[15] *Harrison Jalla & Ors v Shell International Trading & Shipping Co & Anor* [2021] EWCA Civ 63. NB: this is not a Leigh Day case.

[16] *Guerrero & Others v Monterrico Metals plc* [2009] EWHC 247.

[17] *Kesabo v African Barrick Gold Plc & NMGML* [2013] EWHC 4045.

[18] *Vilca & Others v Xstrata Ltd & Another* [2017] Med LR Plus 32.

[19] *Kalma & Others v African Minerals Ltd & Anor* [2018] EWHC 3506.

[20] *AAA & Others v Unilever plc & Anor* [2018] EWCA Civ 1532.

[21] *AAA & Others v Gemfields Limited* (claim number HQ17P04399).

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- For alleged complicity in human rights violations by 85 members of a community living around a plantation in Kenya[22];
- By a whistle blower for constructive dismissal relating to serious deficiencies in an audit in Dubai[23].

B. Jurisdiction and *Forum Non Conveniens* (FNC)

The first UK MNC cases – *Connelly v Rio Tinto*, *Ngcobo v Thor Chemicals* and *Lubbe v Cape plc* – began in 1994/1995. The English courts had jurisdiction as the claims were brought against the parent companies, which were domiciled in England. FNC was, however, a major issue. Whilst in a commercial context, FNC entails a zero-sum game between businesses trying to have the dispute heard in the forum which is likely to produce the best outcome for them, in a human rights context, FNC for victims is generally all or nothing, that is access to justice is only available in practice in the MNC home courts.

In the Cape plc case, nearly 1,000 of the 7,500 claimants died during the protracted FNC dispute. The decisions of the House of Lords (now Supreme Court) in *Connelly* (1997) and *Lubbe* (2000) established and applied the principle that if it would result in a denial of substantial justice, the absence of funding for legal representation and expert assistance in the victims' local courts would suffice to deny a defendant's FNC motion even where the local courts were the appropriate forum for the case.[24] Note that this principle has not as yet been adopted in Canada, Australia or the United States where FNC was applied to the detriment of the Indian victims of the 1984 Bhopal chemical explosion[25] and the Ecuadorian claimants who sued Texaco for oil pollution.[26]

In the European Union, the governing regime for claims in tort is the 'Brussels Recast Regulation'. This provides, by Article 4, a general mandatory rule that defendants must be sued in the country in which they are domiciled[27]. Other EU states did not apply the FNC principle and have interpreted the mandatory rule strictly.

In 2005, the European Court of Justice put to rest the application of FNC with respect to UK domiciled companies by deciding that FNC was inconsistent with Article 4 (or rather Article 2 as it was then).[28] Thereafter, cases for example against Trafigura[29] and Monterrico Metals[30] were not plagued by FNC tactics and delays; but FNC remained an issue in relation to claims where a foreign subsidiary is joined as a co-defendant. In those circumstances the principle laid down in Connelly and Lubbe came into play.[31]

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22 *AAA v (1) Camelia plc (2) Linton Park plc and Robertson Bois Dickson Anderson Ltd.*

23 *Rihan v Ernst & Young Global Ltd & Others* [2020] EWHC 901.

24 *Connelly v RTZ Corporation plc* [1998] A.C 854; *Lubbe v Cape plc* [2000] 1 WLR 1545.

25 Union Carbide Corporation Gas Plant Disaster at Bhopal (1986) 634 F. Supp. 842.

26 *Aguinda v Texaco, Inc*, 142 F Supp 2d 534, 554 (SDNY 2001); *Aguinda v Texaco, Inc*, 303 F 3d 470, 480 (2d Cir 2002).

27 Pursuant to Article 63 (formerly Article 60), a corporation is domiciled in the place of (a) its statutory seat, (b) central administration or (c) principal place of business.

28 *Owusu v Jackson Case* C-281/02 [2005] ECR I-1383.

29 *Motto & Others v Trafigura*, note 8.

30 *Guerrero & Others v Monterrico Metals plc* [2009] EWHC 247.

31 *Vedanta Resources plc & Another v Lungowe & Others* [2019] UKSC 20.

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As of 31 December 2020, the transition period for the UK's exit from the UK ended and Brussels Regulation no longer applied. The UK has applied to join the Lugano Convention,[32] which would effectively reinstate the position with respect to jurisdiction under Brussels. However, pending accession to Lugano, FNC has returned as a potential barrier to UK MNC litigation.[33]

C. Parent Company Duty of Care

Most of the UK cases (apart from against Trafigura and the Bodo Shell case) have been against the MNC parent company. From the outset, the fundamental principle underlying these cases has been to overcome the corporate veil barrier on the basis of the alleged direct negligence of the parent company for its own acts and omissions.[34] More specifically, that the degree of involvement and oversight of the parent company in functions pertaining the MNCs overseas subsidiary operations that were relevant to the creation or prevention of the risk of harm, combined with the parent company's actual or constructive knowledge of the risk, imposed on the parent a duty to take reasonable steps to prevent the harm from materializing.

The Connelly, Thor Chemicals and Cape plc cases did not reach trial and therefore did not establish any binding precedent for a parent company duty of care; however, the courts did expressly acknowledge, in each of these cases, that the existence of such a duty was clearly arguable.[35] The wider implications of the cases were recognized immediately in the financial world.[36] Also, as a result the notion of a parent company duty – or 'foreign direct liability' – began gaining increasing wider traction from around 2000 onwards.[37] Moreover, they laid the foundation for, and were expressly cited in the later decisions in the cases that did confirm the principle, namely the Chandler and Vedanta cases.[38]

The Chandler case in 2012 was the first trial verdict imposing liability on an MNC for breach of a parent company duty, albeit involving a UK subsidiary and UK claimant. Liability was imposed on the parent company based on its negligent omission to advise on precautionary measures to protect the health of workers at its subsidiary. A duty of care to provide such advice stemmed particularly from the parent company's awareness of the risks to the workers, its superior knowledge of health and safety and its awareness that the subsidiary was relying on the parent to provide that superior knowledge. The decision

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[32] EUR-Lex - 22007A1221(03) - EN - EUR-Lex.

[33] Communication COM (2021) 222 final of the European Commission dated 4 May 2021 and entitled 'Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention' expresses the view that 'the EU should not give its consent to the Accession of the United Kingdom to the Lugano Convention'

[34] R Meeran, 'Process Liability of Multinationals: Overcoming the Forum Hurdle' (November 1995) *Journal of Personal Injury Litigation* 170–185.

[35] *Ngcobo v Thor Chemicals Holdings Ltd v others*, January 1996 unreported; *Lubbe & Others v Cape* [1998] C.L.C. 1559; *Connelly v RTZ* [1999] CLC 533.

[36] 'The Risks of Being a Multinational', *Financial Times* (25 July 1997).

[37] Halina Ward, 'Corporate accountability in search of a treaty? Some insights from foreign direct liability' (May 2002). *The Royal Institute of International Affairs Sustainable Development Programme Briefing Paper No 4.*

[38] *Chandler v Cape plc* [2012] EWCA Civ 525; *Vedanta Resources plc & Another v Lungowe & Others* [2018] WLR 3575.

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prompted a warning in *The Economist.*[39] Nevertheless, MNCs argued that the application of the decision was limited to cases involving work-related injuries to employees of UK subsidiaries.

The pinnacle so far is the 2019 Supreme Court judgment in Vedanta. The core test is that:

> Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates that the parent had such an opportunity.[40]

The judgment confirmed that there is no specific category of negligence that applies to MNC parent companies but that the question of whether a duty of care should be imposed depends on the fact in accordance with the general tort law principles. The court referred to four scenarios in which a duty of care might be imposed:

- 'where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management';
- Where a parent has given defective advice or provided defective group-wide environmental/safety policies which the subsidiaries have implemented as a matter of course;
- Where the parent has taken active steps to ensure that group-wide policies are implemented by subsidiaries;
- Where the parent holds itself out publicly as exercising a degree of control or supervision of its subsidiaries even if it does not in fact do so.

A further blow to MNC impunity was delivered by the UK Supreme Court in the *Okpabi* case in February 2021. The claim was based *inter alia* on an alleged duty of care on the part of Royal Dutch Shell arising from its significant control over its Nigerian subsidiary and its assumption of responsibility of subsidiary operations through RDS' group-wide mandatory policies. Consistent with its judgment in Vedanta, the court reversed the decision of the Court of Appeal, ruling that the lower court: had applied too much focus to the issue of control of the subsidiary rather than management of aspects of its activities; was wrong to decide that group-wide policies could not give rise to a duty of care; and should not have treated the issue of parent company liability as a special category. Importantly, the Supreme Court was critical of the lower court for imposing too high a bar at the stage of a jurisdictional challenge in circumstances in which the claimants had not had the benefit of discovery/disclosure of documents.[41]

The case of *Rihan v Ernst & Young* was the first MNC case relating to overseas activities to succeed following a full trial. Applying the principles laid down in

[39] 'The sins of the sons – a little-noticed court case with big implications', *The Economist* (26 May 2012).

[40] *Vedanta Resources plc & Another v Lungowe & Others* [2019] UKSC 20 at §49.

[41] *Okpabi & Others v Royal Dutch Shell plc & Anor* [2021] UKSC 3.

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Vedanta, the High Court held that the UK parent company of the auditors were not merely global service companies as they contended but had taken responsibility for risk management and compliance across the group.[42]

In March 2021, the Court of Appeal ruled that a UK company that had sold a ship to a third party which had arranged for the ship to be beached in Bangladesh, owed a duty of care to a worker who suffered fatal injuries breaking up the ship. In doing so, it applied an established exception to the principle that a defendant is not liable for the acts of a third party, in circumstances where the defendant has created the danger:

> 'The appellant [Maran] arguably played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel in Chattogram entailed.'
> 'It was not a case where there was merely a risk that the shipbreaker would fail to take reasonable care for the safety of its workers. On the contrary, this was a certainty, as the defendant knew.'
> 'The appellant could, and should, have insisted on the sale to a so-called "green" yard, where proper working practices were in place.'[43]

D. Applicable Law

The English decisions represent the position in English law whereas under the Rome II Regulation (which continues to apply in the UK as retained EU law[44]), the applicable substantive law will, unless a claim has a manifestly closer connection with another country, be that of the place where the damage occurred, that is the MNC host state.[45] English law is however relevant in states with English law-based systems or which follow English law, hence why English law was relevant in the Zambian claims against Vedanta, claims by villagers shot at a gold mine in Tanzania[46] and the Nigerian oil pollution claims against Royal Dutch Shell.[47] For the same reason the Nigerian oil pollution claim against Shell that succeeded before the Hague Court of Appeal was also effectively governed by English law,[48] as will the Kabwe Zambian lead poisoning class action that was instituted in South Africa[49] (provided it is certified).

It is noteworthy that this tort-based approach – alleging a parent company duty of care – would also seem to be gaining traction in Canadian law, without any direct reference to the English cases.[50]

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42 *Rihan v Ernst & Young Global Ltd & Others* [2020] EWHC 901.

43 *Begum v Maran* [2021] EWCA Civ 326.

44 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834).

45 Article 4 of the Rome II Regulation on the Law Applicable to Non-Contractual Obligations.

46 *Kesabo v African Barrick Gold plc & NMGML* [2013] EWHC 4045.

47 *Okpabi & Others v Royal Dutch Shell plc and SPDC* [2018] WLR(D) 9.

48 *Akpan v Royal Dutch Shell & SPDC*, Court of Appeal of The Hague, 18 December 2015.

49 www.childrenofkabwe.com (accessed 29 March 2021).

50 *Choc v Hudbay Minerals Inc* [2013] ONSC 1414.

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Regarding claims arising from damage in civil law countries, English law will have little relevance. Thus, claims against Monterrico Metals[51] and Xstrata Ltd,[52] relating to alleged corporate complicity in perpetrating injuries to environmental protesters in Peru, were subject to the provisions of the Peruvian Civil Code. Perhaps unsurprisingly, the laws of other countries do seem to potentially cater for the possibility of parent company liability. In the Monterrico and Xstrata cases, for example, it was alleged that under article 1981 of the 1984 Peruvian Civil Code that the parent company was vicarious liable, in its capacity as a principal giving for the conduct of its subsidiary and mine security employees, acting under its orders, who committed the human rights abuses.

E. Proving Parent Company Duty of Care

In *Okpabi,* the Supreme Court cited with approval the following statement in the House of Lords judgment in *Lubbe v Cape plc*:

> The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by Page 33 directors and employees on visits overseas and correspondence.[53]

Consequently, effective access to internal corporate documents is essential for victims' access to justice. In England, sophisticated procedures and protocols for e-disclosure enable complex word search combinations to be applied to elicit relevant documents, speedily and cost-effectively from vast amounts of documents stored on an array of devices held by many individuals often located in different countries.[54] Disclosure in other European jurisdictions is generally far more restricted.

F. Joinder of MNC Local Subsidiaries as Co-Defendants

Suing the subsidiary as well as the parent has the advantage that it is more straightforward legally, no corporate veil being involved and that it should enable more effective access to internal corporate documents in the possession of the subsidiary. Procedural rules in the UK permit the joinder of co-defendants most relevantly in the present context provided

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51 *Guerrero & Others v Monterrico Metals plc & Another* [2009] EWHC 2475 (QB).

52 *Vilca & Others v Xstrata Ltd & Another* [2017] Med LR Plus 32.

53 *Lubbe & Ors v Cape plc* [2000] 1WLR 1545.

54 See for example *Vilca & 21 Others v Xstrata Limited & Another* [2016] EWHC 389(QB).

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there is 'real issue' which it is reasonable to try as between the claimants and the parent company and the subsidiary is 'a necessary or proper party' to the claim.[55] Most of the UK cases have however been brought against the parent company only. In the early years this was to reduce the risk of an FNC stay, the concern being that suing the subsidiary would shift the focus of the claim to the host state. In light of the recent Supreme Court judgments in *Vedanta* and *Okpabi*, an MNC can avoid joinder of the subsidiary if the UK parent agrees to submit to the jurisdiction of the host courts. However, this will not prevent joinder if the claimants can demonstrate that they would be unable to secure access to justice in their local courts.[56]

G. Foreign Act of State Immunity

Prior to 2017 MNCs alleged to have effectively been complicit in human rights violations allegedly directly perpetrated by public security had argued that the cases were not justiciable by virtue of the foreign act of state doctrine,[57] a form of immunity designed to avoid courts reviewing the legitimacy of the acts of foreign states. However, in 2017 the UK Supreme Court decided that this principle would not be engaged where the claim did not legally affect a foreign state or 'where fundamental human rights are in play'.[58] It is noteworthy that the Canadian Supreme Court also rejected the foreign act of state argument in *Nevsun.*

III. MNC Litigation and Business and Human Rights

BHR and multinational human rights litigation have developed over broadly the same time frame from the mid-1990s, and have been mutually reinforcing. In the first few years there was resistance, including from within prominent NGOs to the notion that corporations could have human rights obligations and to whether cases based on allegations of negligence should, notwithstanding their subject matter, properly be characterized as human rights cases. However, over time these cases became an integral focus of the BHR debate. The Human Rights Due Diligence duty (which is the central element of the Corporate Duty to Respect human rights) of the UNGPs essentially corresponds to a tort law duty of care.[59]

The placing of MNC cases at the heart of BHR has provided a focus for pressure to be applied by civil society on business, on investors in business and on governments to ensure that compliance with human standards by business is real and not simply 'lip service'.[60] Being implicated in human rights abuse can have serious reputational and financial ramifications especially for a business whose supply chains involve consumers. A graphic example of this is the suspension by UK supermarkets of purchases of avocados

[55] *Vedanta Resources plc & Another v Lungowe & Others* [2019] UKSC 20.

[56] As per *Connelly v RTZ Corporation plc* [1998] A.C 854; *Lubbe v Cape plc* [2000] 1 WLR 1545.

[57] For example, this was argued in *Vilca & Others v Xstrata Ltd.*

[58] *Belhaj v Straw & Ministry of Defence* [2017] UKSC 3.

[59] D Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1:2 *Business and Human Rights Journal* 179–202.

[60] 'Zambia: Anglo American must be held to account for industrial scale lead poisoning in Kabwe' (23 February 2021), *Amnesty International UK*, press statement.

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from plantations in Kenya. This stemmed from evidence in a claim against parent company Camelia PLC and its subsidiary, Kakuzi PLC, by 79 individuals alleging serious human rights abuse by security guards employed by Kakuzi.[61] A speedy settlement ensued.[62]

The recent public flotation of Deliveroo provides a dramatic illustration of the potential commercial impact of significant court decisions that concern human rights. A UK Supreme Court judgment in March 2021 ruled that Uber drivers were entitled to statutory employment protection as workers, rather than as Uber had contended, as independent contractors.[63] The ruling was widely interpreted as signalling a recognition of the exploitation of gig economy workers and the need for them to provide legal protection. Institutional investors stated publicly that they would refrain from taking up the share offering on the grounds that they considered the Deliveroo model to be risky in view of the Uber judgment but also on ethical grounds.[64] These factors were regarded as important in the far lower than expected share value on the flotation.[65]

Businesses should anticipate that human rights standards that are adopted even on a voluntary basis may give rise to legal liability.[66] Moreover, as per the Vedanta judgment, the omission on the part of a parent company to exercise a level of supervision and control over subsidiary operations, to which it has publicly committed, may give rise to liability. Similarly, public endorsement of the UNGPs could translate into a legal binding duty of care.

IV. Actual and Perceived Limitations of UK MNC Litigation

Whilst MNC litigation may be of considerable value in the prevention and remedy of corporate human rights abuse it is obviously not a panacea for these objectives. It is subject to limitations in terms of scope and viability and is focused on the interests and rights of claimants, which may not necessarily perfectly coincide with perceived wider public interest, although concerns regarding the latter may often be debatable.

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61 Emily Dugan, "'Rape, beatings and death" at Kakuzi, the Kenyan farm that helps feed the UK's avocado habit. Court papers allege guards at a British estate in Kenya that supplies Tesco, Sainsbury's and Lidl have committed human rights abuse' *Sunday Times* (11 October 2020); Patricia Nilsson, 'Tesco drops avocado supplier after allegations of rights abuse', *Financial Times* (11 October 2020).

62 'UK firm pays £4.6m to settle claims of "rape and murder" at Kakuzi avocado farm', *Sunday Times* (14 February 2021).

63 *Uber BV & Others v Aslam & Others* [2021] UKSC 5.

64 'Aviva and Aberdeen Standard spurn Deliveroo flotation over riders' rights', *Money Marketing* (25 March 2021).

65 'Deliveroo stumbles to London float with pricing at bottom end', *City AM* (30 March 2021).

66 'It is, I understand, common ground that there can be considerable tension between members of the local community, the operators of the mine and local security forces in areas where a mine is set. Police suppression of protests occurs and again it is not unknown for that to involve considerable violence. As a result, the "Voluntary Principles on Security and Human Rights", which is a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights, have been adopted by many mining companies over the years including Xstrata. The principles have the backing of the United Nations … the very fact that lives were lost and serious injuries occurred is enough to weigh heavily in the balance even if the damages recoverable are relatively modest … the defendants subscribe to the Voluntary Principles to which I have referred and (not his words, but mine) something more than lip-service to those principles is demanded' (*Vilca & 21 Others v (1) Xstrata Ltd & Another* [2016] EWHC 389 (QB para 12)).

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A. Viability

Clearly, an existing cause of action (or one that the courts can be persuaded to develop) by the victim against the MNC that covers the factual circumstances is essential. In many instances, human rights abuse, for which an MNC might be regarded as morally responsible, for example because it profited from the abuse in question, have firm legal basis for a claim.

Alternatively, there may be a sound legal basis for a claim but the prospects of obtaining the necessary factual evidence – in the form of internal documents and/or witnesses willing to testify against the MNC due to fear of physical or financial reprisals in the host state. In certain cases, such fears will deter victims from advancing claims in the first place.

Effective legal representation is essential for victims in MNC litigation. Victims' lawyers in MNC litigation invariably act on a contingency ('no win no fee') basis. Given the complexity, uncertainty of outcome and duration, the magnitude of costs and resources entailed (and the cash flow burden this creates) combined with the heavyweight legal and technical resources invariably at the disposal of an MNC, taking on such cases is a daunting and financially risky endeavour for victims' lawyers who are consequently likely to be deterred from cases with too many difficult legal and evidential hurdles.

A related issue is financial viability. Lawyers acting on a contingency basis will generally only be willing to act provided, if the case is successful, their legal costs will be paid. The general rule is that the loser pays the winner's costs. Therefore, in principle if the case succeeds, the MNC should pay the claimants' lawyers. The corollary is that assessment of an MNC's ability to pay damages and costs is a prerequisite of embarking on and continuing with legal action.

The potential inability to pay may arise due to the parlous financial state of the MNC. In the Cape plc case, for example, the settlement of the litigation reflected what Cape could afford to pay rather than the actual value of the claim and legal costs.[67] On occasions, the potential inability to pay may arise from financial rearrangements by the MNC. These may be designed to frustrate the claims. For example, during the litigation Thor Chemicals transferred assets to an overseas subsidiary (and changed its name to Guernica plc, 'in view of the fascist nature of the attacks against it' according to its Chairman). Had it not been for an order sought under the Insolvency Act for a declaration that the transfer was unlawful, Thor would have succeeded in its objective of halting the case.[68]

On other occasions, the financial rearrangements may have the effect of frustrating a case even though this was not their purpose. Prior to notification of the proceedings, Monterrico Metals had, for genuine commercial reasons, relocated its headquarters to Hong Kong and announced an intention to delist. The consequence would have been to dissipate assets beyond the reach of claimants, rendering UK proceedings pointless. The claimants' position was protected by a worldwide freezing injunction (supported by an

[67] R Meeran, 'Cape pays the price as justice prevails', *The Times* (15 January 2002).

[68] *Sithole & Others v Thor Chemicals Holdings & Anor* [2000] WL 14211830.

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ancillary freezing injunction granted by the High Court of Hong Kong in aid of the UK injunction).[69]

There is also a principle of 'proportionality' under which the legal costs of a case should not exceed the damages, the logic being that a person paying their own legal costs would not pursue a case if this was not so. In such complex, protracted and expensive litigation, this factor combined with the provision of the Rome II Regulation, stipulating that assessment of damage will generally be governed in these cases by the law of the MNC host state[70] has the potential to create a powerful disincentive to victims' lawyers. Fortunately, under the procedural rule in question, the 'complexity of the litigation' and 'wider factors', including 'public importance', are relevant in the determination of whether the costs that have been incurred are 'proportionate'.[71]

B. Settlement of Cases

Settlement, often on confidential terms, rather than trial of cases arouses concern on the part of academics and campaigners. While this is understandable from a wider public interest perspective, there are good reasons why victims may decide to resolve their claims on this basis.

They may be desperately in need of money for themselves and their families, payment of which settlement will accelerate and possibly enhance if it is on confidential terms. Furthermore, settlement removes the risk of losing at trial, which is always a possibility no matter how compelling the evidence. Irrespective of whether they personally would prefer a case to go to trial, claimants' lawyers of course have a professional duty to act in their clients' best interests.

Nonetheless, cases that do not reach trial frequently have a wider benefit. Virtually none of the cases referred above went to trial and yet they established principles and created a legal and international environment that has important wider value for victims. Mr Connelly's case was sadly struck out, but the principle laid down by the House of Lords in his case enabled access to justice for the Cape plc and Vedanta claimants.

The development of the law on parent company duty, mainly through cases, which were not tried, including the Vedanta case, emphasizes the point. The freezing injunction judgment obtained in the Monterrico case was relevant eleven years later to the granting of the freezing injunction against Amerisur.[72] An anti-suit injunction obtained in the case against African Barrick Gold, when the company instituted proceedings in Tanzania in a (failed) attempt to shift the determination of liability from the English court to the Tanzanian court (referred to as the 'Tanzanian Torpedo') has deterred MNCs from attempting the same stunt in other cases.[73]

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[69] *Guerrero & Others v Monterrico Metals plc & Anor* [2009] EWHC 2475 (QB).

[70] Article 15(c) read with Article 4 Rome II Regulation.

[71] Under Civil Procedure Rule 44, 'the court will only allow costs which are proportionate to the matters in issue' and costs are proportionate 'if they bear relationship to: the sums in issue in the proceedings; the complexity of the litigation: any wider factors involved in the proceedings, such as reputation or public importance'.

[72] *Bravo & Others v Amerisur Resources plc* [2020] EWHC 125 (QB).

[73] *Kesabo v African Barrick Gold plc & NMGML* [2013] EWHC 4045.

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Finally, settlements can achieve wider benefits that it would not be possible for a court to award. A striking example of this was the case against Gemfields in which the settlement included provision for the establishment of an independently supervised non-judicial human rights grievance mechanism for the benefit of local people who were not claimants in the case.[74]

C. Damages as the Remedy

In addition to legal accountability, monetary redress is very often victims' primary goal, but this is not always so. Where a local subsidiary company is joined as a co-defendant, depending on the local applicable law, a remedy beyond damages may be realistic.[75] Nevertheless, while it may not be possible to bring a civil claim in the MNC home courts against the parent company, for example for closure on an operation or clean-up of pollution (as opposed to the cost of clean-up) overseas, a damages claim can lead to such improvements by virtue of the public pressure around a case or as part of the terms of a settlement. The Gemfields settlement and the Kakuzi case, referred to above, illustrate how important benefits that are not claimed for can be achieved.

D. Prevention of Human Rights Abuse

While a key purpose of damages claims is to compensate for harm caused, deterrence is also a function of tort law. Requiring an MNC to defend high profile human rights litigation in which: its conduct is scrutinized in detail; it is made to divulge internal corporate documents; its directors and employees may be cross-examined; it will incur substantial reputational damage and legal costs and potentially pay out substantial damages, can undoubtedly constitute a powerful deterrent. This is clear from cursory internet searches of briefing documents on MNC cases produced by corporate law firms, as well as discussions with MNC lawyers.

E. Alleging Negligence

A further frequently expressed criticism about the use of tort law in MNC human rights cases is that the language of negligence does not adequately reflect the gravity of harm or conduct involved. Precisely this point was made in the landmark judgment of the Supreme Court of Canada in *Nevsun* where, in addition to negligence, allegations of violations of customary international law including crimes against humanity, slavery, forced labour and inhuman and degrading treatment were made.[76] An additional point is that MNCs and their investors are likely to take greater heed of alleged human rights abuse than alleged negligence. These criticisms have force and validity, but overlook important factors.

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[74] https://www.miningweekly.com/article/gemfields-agrees-settlement-of-58m-pertaining-to-claims-by-leigh-day-2019-01-29/rep_id:3650 (accessed 29 March 2021).

[75] See for example the claim for the cost of clean-up sought against SPDC, the Nigerian subsidiary of Royal Dutch Shell, by the Bodo fishing community.

[76] *Nevsun Resources Ltd v Araya* 2020 SCC 5.

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The key objective of claimants is usually to win their case and obtain redress. Given that these cases are complex and hard fought on any basis, claimants opt for the easiest route to success. Creating unnecessary legal hurdles will significantly reduce the prospects of success, which is not in victims' best interests. Serious environmental cases for example are properly recognized as human rights cases; however, pleading them as such would be very risky. Even if legal allegations are characterized in the language negligence and wrongdoing, the severity of the facts speak for themselves. The case against Cape plc was based on negligence but the facts of what had occurred were graphically portrayed in legal documents and in public and no-one would have been under any illusions about this. Finally, as noted above, in the UNGPs themselves the corporate duty to respect human rights effectively reflects a tort law duty of care.

V. Conclusion

Back in early 1995, during one of the first hearings in an MNC human rights case in England, the judge asked why a group of South African Thor Chemicals workers was suing in the English court. That question would never be asked nowadays as such claims are now well established in the UK legal system. Whereas claims were initially hamstrung and delayed over issues of *forum non conveniens* and the purported impermeability of the corporate veil, these barriers have now been substantially broken down, paving the way for MNC legal accountability and redress for victims. Progress in this regard has been greatly assisted by the symbiosis between the litigation and rapidly developing field of BHR, which in turn has led to pressure on MNCs to respect human rights of stakeholders and not just the pockets of their shareholders. MNCs disregard this progress at their financial and reputational peril.

At the same time, MNC litigation is not a panacea. It is only feasible in certain circumstances and can be too blunt an instrument to achieve the objectives of victims. The complexity and expense of cases means there is a huge inequality of arms between victims and MNCs. The legal hurdles are challenging in themselves. Overcoming them requires access to and evaluation of detailed internal corporate documents. Corporate witnesses able to shed light on the true position are rarely forthcoming. Effective legal representation is crucial for the victims, but the legal, procedural and practical barriers have so far deterred all but one firm from undertaking these cases as an area of practice. Third party litigation funders are showing more interest; however, hedge funds will only be attracted in cases where a percentage share of the overall damages will translate into a multiple of their investment in the costs of a case.

Hopefully, the recent decisions in Vedanta and Okpabi will encourage more lawyers to represent victims in these cases to increase the scope of victims' redress and deter MNC conduct that results in human rights abuses overseas.

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