A PARENT COMPANY’S TORT LIABILITY TO EMPLOYEES OF A SUBSIDIARY

Stefan HC Lo*

I. Introduction

Chandler v Cape plc\(^1\) appears to be the first reported case in the UK dealing squarely with the question of a parent company’s tort law duty of care to an employee of its subsidiary company. Where an employee of a subsidiary company suffers injury as a result of an unsafe workplace, liability in negligence under the common law prima facie rests with the subsidiary company and not with a parent company because each company in a corporate group is a separate legal entity even if the group operates as a single economic unit.\(^2\) However, a shareholder can be held liable in tort where he is personally involved in the conduct constituting a tort.\(^3\) It is on this basis that the Court of Appeal in Chandler v Cape considered that a parent company can be liable in negligence in respect of its own acts or omissions in its involvement in the activities of its subsidiary.

This article will examine some relevant Australian judicial decisions which were not referred to by the Court of Appeal in Chandler v Cape. The Australian decisions and Chandler v Cape diverge in certain respects, and it is not clear whether the UK Court of Appeal would have been swayed by the reasoning of the Australian judges had the Australian cases been considered. Through a comparison of the UK and Australian cases, this article assesses whether Chandler v Cape provides a welcome development in the law. Some concerns have been raised by commentators as to the appropriateness of imposing a duty of care on parent companies in light of the company law doctrines of limited liability and separate entity.\(^4\) However, the present writer’s view is that Chandler v Cape is to be lauded as it seeks to ensure that corporate controllers who are responsible for wrongful or negligent conduct do not escape liability.

While the present writer disagrees with the narrow basis on which the Australian courts imposed a duty of care on a parent company for torts of its subsidiaries, an analysis of the Australian reasoning is helpful in isolating the relevant legal issues and identifying the doctrinal basis for such liability.

---

* BA LLB (Hons I), LLM (University of Sydney); Senior Government Counsel, Department of Justice, Hong Kong; Legal Practitioner, Supreme Court of New South Wales, Australia; Research Affiliate, Ross Parsons Centre of Commercial, Corporate and Taxation Law, University of Sydney Law School, Australia

1 [2012] 1 WLR 3111.
3 Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 AC 465.
II. The Decision in Chandler v Cape

Cape plc (Cape) was involved in the production of asbestos from the 19th century and had several factories in the UK. In 1945, Cape acquired a majority of the shares in a company (later renamed Cape Products), and in 1953, the outstanding shares. Cape Products owned two factories in a site in Uxbridge. One of the factories, previously used for making cement pipes, was empty by 1945. The other was used for making bricks. Cape installed a plant in the empty factory for the production of asbestos products. Initially Cape, as a tenant of Cape Products, was itself engaged in asbestos goods manufacture at the premises, but in 1956 the business was sold to Cape Products, which became operationally integrated in the group of companies headed by Cape.5

The claimant was employed by Cape Products from 1959 to 1962 and contracted asbestosis as a result of his exposure to asbestos. During that time, Cape Products carried on both the manufacture of bricks and the manufacture of asbestos products at the two factories. The claimant was employed to stack and load bricks. Most of his work took place in the open air, and he was constantly exposed to asbestos dust escaping from the building where asbestos products were manufactured. That building had no sides, and no attempt had been made to prevent escape of asbestos dust except to install extraction fans close to the production machinery but that was inadequate for their intended purpose.6

Despite the sale of the asbestos business at Uxbridge to its subsidiary, Cape continued to be involved in the business. This included provision of technical know-how to Cape Products, such as issuing instructions about product mixes. The board of Cape also took certain decisions about the expansion of the business of Cape Products, and Cape Products could not incur capital expenditure without parent company approval. Health and safety issues were dealt with at both subsidiary and parent company levels, with Cape appointing a group medical adviser who had some responsibilities for the health and safety of the group’s employees generally and had visited Cape Products’ factory to discuss an asbestosis case.7

The principal issue before the court was whether Cape owed a direct duty of care to the employees of its subsidiary company to advise on, or ensure, a safe system of work for them.8 The trial judge applied the three-stage test in Caparo Industries plc v Dickman9 (foreseeability, proximity, and that it is fair, just and reasonable that the law should impose a duty) and held that the test was satisfied with Cape having assumed responsibility for the health and safety of the employees of Cape Products.10

The Court of Appeal agreed. Delivering its unanimous decision, Arden LJ noted that the trial judge had found that there was a duty of care on the part of Cape on the basis of an assumption of responsibility, and further observed that

5 Chandler (n.1), [7]–[10].
6 See the judgment at first instance: Chandler v Cape Plc [2011] EWHC 951 (QB) [1]–[5], [62] (Wyn Williams J).
7 Chandler (n.1), [19]–[26].
8 Ibid., [1].
9 [1990] 2 AC 605.
10 Chandler (n.1), [30]–[31].
this falls within the second and third parts of the *Caparo* test, namely proximity and the requirement that it is fair, just and reasonable to impose liability.\textsuperscript{11} Arden LJ emphasized that whether a party has assumed responsibility is a question of law, and the question does not depend on the person having voluntarily assumed responsibility. For this reason, her ladyship considered that the phrase “attachment” of responsibility is a more accurate description of the concept.\textsuperscript{12}

In the circumstances of the case, the Court of Appeal held that Cape had assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken.\textsuperscript{13} In arriving at this conclusion, the court took into account the following:

1. Cape was in the practice of directing Cape Products on certain matters in its operations.
2. Cape was the original proprietor of the asbestos business later operated by Cape Products. Although the business was sold to the latter, Cape retained a certain level of control over the asbestos business. For example, products were to be manufactured by Cape Products in accordance with the specifications of Cape.
3. The group medical adviser (whether or not formally appointed as such) was engaged in research, done both at Cape and its asbestos-producing subsidiaries, about the relationship between asbestos production and asbestosis.
4. Cape conceded that the system of work at Cape Products was defective. There was no appeal from the finding of fact by the trial judge that Cape was fully aware of the systemic failures in the production practices at the factory which led to exposure of asbestos dust to workers, and that Cape knew that the asbestos business was carried on in a way which risked the health and safety of employees of Cape Products.\textsuperscript{14}

Arden LJ concluded her judgment with the following observation:

In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or

\textsuperscript{11} *Ibid.*, [62].
\textsuperscript{12} *Ibid.*, [64].
\textsuperscript{13} *Ibid.*, [78].
\textsuperscript{14} *Ibid.*, [73]–[79].