**Tortious Liability of Corporate Groups: From Control to Coordination**

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INTRODUCTION

This paper examines the role that tort law can play in the liability of corporate groups. The main concern is with a scenario in which a subsidiary company becomes insolvent and cannot satisfy debts owed to tort claimants. This problem might arise in cases of mass physical injury, such as where the subsidiary was in the business of asbestos or pharmaceutical manufacture, or in the case of financial losses, such as where the subsidiary mis-sold financial products. The question is whether it is possible, or should be possible, to extend liability beyond the insolvent subsidiary to other elements within the group.

In looking at this issue, the paper begins by briefly examining matters peripheral to tort law, including the statutory rules designed to protect the assets of a company from misuse, directors’ duties, and a recommendation for a new statutory provision to promote redress for personal injury claimants stymied by the insolvency of a subsidiary company. The paper also comments upon two failed doctrines – the veil piercing doctrine and enterprise liability. These are doctrines by which the law has attempted to treat the corporate group as more than a collection of related entities and as having certain responsibilities to outsiders. The problem with these doctrines is their fundamental inconsistency with entity law principles, which require that courts respect the separate entity status of each company within the group.

This paper takes the inquiry into the liability of corporate groups further and suggests where the courts might concentrate their focus in the development of tort remedies.[[3]](#footnote-3) The most obvious place for development is in certain torts capable of encompassing the three party fact situations typical of insolvent subsidiary cases. The torts considered are those of negligence and unlawful means conspiracy. These torts have developed in a way which is entirely consistent with entity law – because they are applicable first and foremost to natural persons. For this reason, tort law presents interesting opportunities for the extension of liability within corporate groups. The tort of negligence has been used to create liability in the parent company for debts of the subsidiary. The article will point out some of the deficiencies in negligence as a means of redress within corporate groups and go on to examine the potential role that unlawful means conspiracy might play in the groups context. The argument is made that courts should move beyond the application of control-based liability in negligence and that they should explore the potential for liability based on coordination of elements within corporate groups. The tort of unlawful means conspiracy – with suitable modification – provides an opportunity to create a form of liability based on coordinated actions that recklessly inflict injury upon third parties.

It should be acknowledged that this area of research, arising at the interface between company law, insolvency law and tort law, is a minefield. It will not be possible to address every potential liability issue relating to corporate groups in the course of this paper, which presents only the broad outlines of an argument. Thus, the paper does not examine doctrines that might be deployed in insolvency legislation, such as pooling of assets (the provisions for which have been criticised as inadequate).[[4]](#footnote-4) Nor does it consider the operation of product liability legislation,[[5]](#footnote-5) (which is, in any case subject to defences that often prove effective in personal injury cases). The paper is not able to examine misleading and deceptive conduct rules[[6]](#footnote-6) relevant as they are in many cases of financial loss. Finally, nothing is said about the principles of joint tortfeasance, which remain under-explored.[[7]](#footnote-7) The paper necessarily abstracts from much of the surrounding law. The focus is, appropriately for this journal, on the ways in which tort law can assist the position of the creditors of insolvent subsidiaries. As will become apparent, the position taken on the tort of unlawful means conspiracy are somewhat experimental in nature.

CONTEXT OF DISCUSSION

The most important cases of relevance to this paper are those involving mass tort claims against subsidiaries, which cannot be satisfied because of the subsidiaries’ decline into insolvency. Examples of such problems include those involving asbestos exposure, defective pharmaceuticals and, in more recent times, claims of financial product miss-selling. In each of these types of case, the scale of tort claims might be very large, threatening the solvency of the company prima facie responsible. A reason for the potential of mass claims in the asbestos and pharmaceutical cases has been the long latency of diseases to which defective products have given rise. This creates the twin problems of establishing knowledge on the part of manufacturers and suppliers and of years going by before manufacture and distribution cease. Insolvency has been widespread amongst the manufacturers of asbestos and amongst defendants to claims of financial product mis-selling. Although these are the most pressing types of case, they are not the only ones in which tort law might play a part. Indeed, for the moment (as we will see), tort law has a greater role to play in cases of ‘personal capitalism’, in which a controlling shareholder (or shareholders) calls the shots in a group of small companies and in which a subsidiary is either under-capitalised or trading while insolvent.

EXISTING CORPORATE LAW PROVISIONS

The problems dealt with in this paper are only *indirectly* addressed by statutory provisions dealing with transactions undertaken by companies that reduce their ability to satisfy creditor claims. These provisions include: Corporations Act 2001 (Cth) Chap 2J, which restricts the circumstances in which the assets of the company might be diminished by transfers to shareholders; Chap 2E, which restricts the circumstances in which financial benefits can be paid to parties related to corporate controllers; and Part 5.7B Division 2, dealing with uncommercial transactions and unfair preferences. The provisions on uncommercial transactions are aimed at preventing transactions in insolvency that would prejudice creditors.

Perhaps of greater relevance are the statutory directors’ duties, which determine the standards of conduct expected of directors in decision making and which aim to prevent insolvent trading. Corporations Act 2001 (Cth) s 588V makes a holding company liable for the debts of a subsidiary in circumstances where there are ‘reasonable grounds for suspecting that the [subsidiary] company is insolvent’ or would become insolvent by incurring further debt and that the holding company or one of its directors should have been aware of those grounds for suspicion. The liquidator of the subsidiary company is empowered to bring proceedings for recovery of the losses of the subsidiary and unsecured creditors.[[8]](#footnote-8) The principal provision is accompanied by s 588G, which imposes a duty upon directors to prevent insolvent trading by their companies.[[9]](#footnote-9) Section 588G creates rights to bring proceedings for compensation against directors for losses caused to the company and to unsecured creditors.[[10]](#footnote-10)

All of these provisions are directed at *ex ante* decision-making by corporate controllers. The provisions might be ineffective in a number of scenarios, including cases where directors are risk-takers (which might include the case of recent banking scandals) or where the risks of injury to consumers arise over a long horizon (such as in the asbestos injury cases). The provisions might have little relevance, moreover, where a subsidiary declines for legitimate business reasons. In any case, although breach of directors’ duties and access to their personal assets might be of real assistance in cases of smaller groups, it is less likely to result in the complete satisfaction of mass tort claims. Thus, the issue of extending liability *ex post* beyond the insolvent subsidiary remains. The proposals presented in this paper are by no means a complete answer to the problems outlined; indeed they are only a first step in thinking through the ways in which tort rules can be adapted to deal with the problems created by insolvent subsidiaries. However, some of the suggestions to be made might prove useful in creating extended forms of liability.

MODIFIED LIMITED LIABILITY

The literature on corporate liability consists of a number of attempts to fashion a statutory exception to limited liability principles in cases of tortious wrongdoing. A common characteristic of the scholarly writings is their reliance upon a conception of control as a key to shareholder liability.[[11]](#footnote-11) However, it is submitted that the focus upon control as a basis for shareholder liability is mistaken, for a number of important reasons. First, any statutory threshold of control might be difficult to define. However it is defined, there will be attempts to evade legal designation as a controlling party. Second, a *parent company* does not always exercise a high level of control over its subsidiaries. Although such control is often assumed in the literature,[[12]](#footnote-12) in many cases business history tells a different story. Especially in the case of multinational companies, it seems that attempts at exerting a high degree of control over subsidiaries frequently have failed. Thus, Jones documented the history of Unilever and its subsidiaries and found that Unilever exerted minimal control over the operations of its major African subsidiary UAC during the lifetime of that company.[[13]](#footnote-13) Jones found the following facts about the relationship between parent and subsidiary:

From its formation until the mid-1980s UAC operated as a virtually independent company with minimum control by Unilever… UAC retained its own autonomous board, and … an arm’s length agreement was reached between UAC and Unilever. Under the terms of this agreement, UAC had some priority as a supplier of Unilever raw materials, but not a monopoly… The lack of integration of UAC into Unilever was curious, but not exceptional…[[14]](#footnote-14)

Again, although IBM was found to have exercised a high degree of control over its US operations, this was not the case with foreign subsidiaries. ‘National companies were autonomous, staffed largely by nationals, and with little coordination between them’. This only changed from the mid-1960s.[[15]](#footnote-15) Chandler also found that parent companies in branded, packaged goods did not exercise great control over their foreign subsidiaries: ‘Because coordination of purchasing, production, and marketing was achieved most effectively at local levels, there was little need for tight home-office control over management in these subsidiaries. They operated autonomously, gently supervised by the executives of the parent company’s international division’.[[16]](#footnote-16) Finally, and very importantly, Tweedale found that the British asbestos manufacturer Turner and Newall did not exercise a great degree of control over its foreign subsidiaries – describing the foreign operations as ‘decentralised’ in nature. He found that one of the reasons for which foreign subsidiaries had such poor health records was ‘that decentralised structures allow poor health conditions to flourish unchecked’.[[17]](#footnote-17) Although these studies each involved multinationals, it is also the case that control is less likely to be present in both acquired subsidiaries and in subsidiaries conducting businesses of a nature different from that of the parent. In sum, detailed control over the operation of subsidiary companies is less prevalent in companies of real size and scale than the literature has assumed. Third, even where parental control over the subsidiary exists, there are at least two further problems: the claimant might find it very expensive and time-consuming to prove the existence of control; and, even where this hurdle is surmounted, the parent company might be either highly indebted and/or not in possession of the key assets of the group, so as not to be worth suing[[18]](#footnote-18) (a point to be elaborated upon below).

One of the present authors has argued for a different kind of exception to shareholders’ limited liability.[[19]](#footnote-19) The argument is that shareholders who invest in a company should be liable to personal injury claimants who cannot achieve satisfaction from a wrongdoing company. That liability would be pro-rata unlimited liability attaching at the point of knowledge of claims. Liability would attach to both corporate *and* natural person shareholders. There are a number of reasons for this. First, without such a rule, shares would be more valuable in the hands of corporate shareholders than natural person shareholders, creating inequalities and distortions in their prices. Second, without such a rule, the tendency would be for companies to incorporate endless layers of subsidiaries in order to provide the maximum level of protection for favoured natural person shareholders. Otherwise, the tendency would be for larger parcels of shares in risky companies to become more attractive to natural person shareholders in hard-to-reach jurisdictions, claimants thus being defeated by difficulties of enforcement. The simplest rule is a rule that treats all shareholders in the same way. Third, concerns about such a rule would be ameliorated (to some extent) by the reality that holders of small parcels of shares would rarely be called upon to contribute a pro-rata share of damages to personal injury claimants because of potential costs of enforcement and of administration.

A rule of modified limited liability might, should policymakers desire it, be accompanied by a defence available to shareholders where they have taken steps to publicise corporate decision-making which is likely to give rise to unreasonable risks to life and/or health of workers, consumers or other persons and/or where they have taken steps to prevent such activities being conducted – such as writing to the board of directors opposing such activities. Such a defence would encourage some shareholders to take a greater interest in corporate strategy and open up debate about risky activities and products. However, it could also result in the development of very defensive corporate strategies, which would stifle necessary innovation and investment. Such a defence would also undermine the strict nature of modified limited liability and reduce the extent to which shareholders would be required to take responsibility for personal injury claims against insolvent companies. For these reasons, although the possibility of such a defence might be discussed, it is not argued for here.

This paper now proceeds on the basis that the legislature has *not yet* acted to create a statutory exception to limited liability in favour of personal injury claimants. It recognises that no such exception is called for in cases of mere financial loss, against which passive shareholders are entitled to insulate themselves. The paper proceeds to examine other bases of responsibility relevant to cases involving insolvent subsidiaries. These are the corporate veil-piercing and enterprise liability doctrines, both of which are found to be flawed, and the torts of negligence (applicable especially in cases of personal injury) and unlawful means conspiracy (applicable in cases of financial losses).

VEIL PIERCING

In recent times, veil-piercing has been frequently pleaded in cases where claimants have sought to create liability in a parent company or other shareholders. Under this doctrine, a court ostensibly has the power to disregard the separate legal personality of the company and create liability in wrongdoing shareholders. Given that Corporations Act 2001 (Cth) s 516 creates limited liability for the shareholders in a company, a question arises as to the basis upon which courts have created an exception to this provision that appears contrary to its intention. The truth appears to be that veil piercing doctrine involves a surprising disregard of the statute.[[20]](#footnote-20) Unless empowered to do so by legislation, it is arguable that judges cannot ignore the separate legal personality of the company created by registration under the Corporations Act 2001.[[21]](#footnote-21)

Leaving this point aside, the grounds upon which a court might pierce the veil are numerous, although the most frequently litigated grounds include those of fraud, sham company and agency. Each has its problems. Although fraud is ostensibly a strong ground for piercing the corporate veil, the question is why this would be necessary when wrongdoing parties might be sued for either deceit or conspiracy. The sham company argument involves treating a registered company as a non-entity, which is directly contrary to the intentions of the legislature in permitting incorporation. Finally, the agency ground has been subject to adverse comment because the argument that a company might be the agent of one or more of its shareholders is seen as directly contrary to *Salomon v Salomon & Co Ltd*.[[22]](#footnote-22)

Veil piercing within the corporate group cuts across the categories already considered. Each of the grounds of fraud, sham and agency might provide a basis for piercing the corporate veil within the group. The degree of control exerted by the parent company over the subsidiary has been treated as a crucial factor in determining liability, although not decisive in itself.[[23]](#footnote-23) But the reality is that the kind of close control that has been influential in finding liability in cases involving relatively modest corporate groups,[[24]](#footnote-24) is *less* likely to be present in cases of involving companies of real size and scale which give rise to the kinds of mass tort problems with which this article is concerned. Even where it is present, control has not been seen as a legitimate basis for veil-piercing.[[25]](#footnote-25)

The asbestos cases, to be considered below, might be seen as exceptional in this respect, courts having on a number of occasions found evidence of parental decision-making and control as regards the operation of subsidiary companies. But these cases have complications of their own. Thus, in *CSR v Young*,[[26]](#footnote-26) the New South Wales Court of Appeal found that the subsidiary company Australian Blue Asbestos Ltd *had appointed its parent company CSR as its agent* to enter into transactions on its behalf in management of its business and in the sale and distribution of its products. So, although control was present, this was pursuant to a kind of inverted agency agreement. Decision-making by the parent for the subsidiary was *at the behest* of the subsidiary and, moreover, was *subject to termination* by the subsidiary.[[27]](#footnote-27) And it was not an unusual case. Nominating the parent as agent reflects a desire to avoid duplication of major management roles in companies below the parent. Arrangements of this kind are to be found even amongst the largest of corporate groups.[[28]](#footnote-28) In such circumstances, agency theory tells us that the subsidiary is liable and the agent (the parent company) ‘drops out’.

Australian courts have been reluctant to pierce the veil in corporate groups, even in cases of control and the presence of other veil piercing factors.[[29]](#footnote-29) Piercing occurs less frequently with respect to parent companies than in cases of natural person shareholders.[[30]](#footnote-30) Courts are most willing to pierce the veil with respect to ‘proprietary companies that are closely controlled with shareholders managing the company’,[[31]](#footnote-31) rather than public companies.[[32]](#footnote-32) The reluctance to do so in other cases coheres with the long-standing attitude of the High Court of Australia, which emphasises the need to observe the separate entity principle even within groups of companies.[[33]](#footnote-33) In *Industrial Equity Ltd v Blackburn*,[[34]](#footnote-34) Mason J stated that ‘in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a group, can look only to that company for payment of their debts. They cannot look to company B, the holding company, for payment’.[[35]](#footnote-35)

In these circumstances, the United Kingdom Supreme Court decision in *Prest v Petrodel Resources Ltd[[36]](#footnote-36)* comes as a revelation, but perhaps not a surprise. Lord Neuberger cast real doubt upon the assumed history of veil piercing, stating that the doctrine ‘appears never to have been invoked successfully and appropriately in its 80 years of supposed existence’.[[37]](#footnote-37) Although this case might have spelt the death knell for the doctrine (at least in the UK), the Supreme Court was prepared to recognise the existence of ‘a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company’.[[38]](#footnote-38) Although this leaves the courts with a useful discretion to exercise in unusual future cases, it does not augur well for veil piercing arguments in the corporate group context.

ENTERPRISE LIABILITY

In *Theosophical Foundation Pty Ltd v Commissioner of Land Tax*,[[39]](#footnote-39) Herron CJ stated that ‘a court may in some cases disregard the corporate entity and have regard instead to the economic realities behind the legal façade’.[[40]](#footnote-40) The focus of this head of veil piercing is upon the relationship between the companies in a group ‘and their contribution to the common commercial objective’.[[41]](#footnote-41) This approach to veil piercing is a sub-set of a wider notion of enterprise liability. Enterprise liability has a long intellectual history and manifests itself in a range of arguments related to products liability, vicarious liability and corporate groups.

An early article of importance was that of Adolf Berle, who observed that there were legal cases in which ‘several corporations became in effect a single enterprise and merged their operations, their several entities were disregarded and their respective assets and liabilities pooled in a common pot which represented, substantially, the actual enterprise of which they were parts’.[[42]](#footnote-42) These ideas were taken up by a number of scholars in the following decades, most pertinently by Blumberg writing on corporate groups.[[43]](#footnote-43) Blumberg was cautious not to over-state his arguments about the extent of any principles, but was of the general belief that the reality of a multinational company is that it involves a ‘business being conducted collectively by interlinked companies under common ownership and control’.[[44]](#footnote-44) Such a conception was said to be the basis of a number of specific rules in US law, which permitted the courts to ignore the separate legal personality of constituent companies for a specific legal purpose. Enterprise liability was said to have the purpose of providing an immediate avenue of redress for unpaid creditors and to force constituents of the group to absorb the full costs of their combined activities, so as not to create externalities.[[45]](#footnote-45)

There are various problems with enterprise liability, which substantially weaken its potential in resolving problems of insolvent subsidiary liabilities. At the most general level, there is a lack of criteria in determining whether or not companies are sufficiently economically integrated. This blends into a second problem, which is the potential cost of evidence-gathering and expert opinion in determining that issue. But a more fundamental problem is that it does not seem possible to allow the enterprise liability ‘genie’ only half way out of the bottle. This is to say that the results of an inquiry into economic interdependencies might be that ‘everything is connected to everything else’ and that there is no confining the enterprise to any pre-conceived notion of the corporate group.

The application of enterprise liability principles has been rejected in veil-piercing cases. In *Adams v Cape Industries plc*,[[46]](#footnote-46) the English Court of Appeal quoted with approval a prior dictum that the fundamental distinction between law and economics cannot be bridged so as to create liability in the parent economically integrated with one or more subsidiaries. In *Re Polly Peck International (in administration)*, Robert Walker J adopted a similar analysis focussing on the consequences in law of relations between companies within a group and stated that maintenance of ‘the separate legal existence of group companies is particularly important when creditors become involved’.[[47]](#footnote-47)

Australian courts have not adopted enterprise liability principles in group situations and continue, instead, to consider more specific veil piercing ‘techniques’.[[48]](#footnote-48) The Full Federal Court of Australia in *Commissioner of Taxation v BHP Billiton Finance Limited*[[49]](#footnote-49) observed that the ‘conflation of the activities of separate entities into some fictional “group” or single entity is impermissible’. And the Companies and Securities Advisory Committee recommended against the introduction of enterprise liability principles to deal with tort claims.[[50]](#footnote-50) Indeed, it has been observed that it may not be open to any court below the High Court of Australia to adopt such a theory, given what was said in *Industrial Equity Ltd v Blackburn*[[51]](#footnote-51)about the separateness in law of group companies.

TORT ACTIONS

It is helpful at this point to stand back from the particular problems of veil piercing and enterprise liability to consider why such group doctrines have failed to achieve any real purchase in resolving the problems of corporate groups. The fundamental problem is that the law does not easily handle group liability which is not derived from some agreement or coordination between *individuals*. Company law itself is constructed upon the idea that a company is a separate legal person – separate from both its shareholders, including its controlling shareholders, and its directors. Where directors are liable for misconduct, this is based upon their own individual failures to meet statutory requirements and standards. What applies as between the constituents of a single company applies equally to the constituents of a corporate group. They cannot be treated as monolithic.

Entity principles are fundamental to the imposition of civil liability and this means that civil liability can extend beyond the insolvent subsidiary only upon grounds which are substantially analogous to those applicable to natural persons. The torts to be examined in the remainder of this paper were developed with natural persons in mind, so that their ability to bind elements within a corporate group involves less stretching of concepts – although argument will be made for one exception to this proposition. Two tort doctrines will be reviewed: conspiracy and negligence. These actions accommodate three party claims involving the injured claimant, the insolvent subsidiary and another ‘element’ within the corporate group. They are capable of pleading in cases of agreement or coordination between elements of a corporate group. However, they also differ from each other in that they represent, respectively, intentional tort and negligence-based liability. The major stumbling block in proving unlawful means conspiracy, as we shall see, will be in proving that an intention to injure was present. Unlawful means conspiracy is likely to be applicable in claims involving financial losses only, while negligence can be pleaded in cases involving all major heads of loss recognisable in tort. We will focus upon use of negligence for the redress of personal injury claims.

NEGLIGENCE

Negligence is a familiar tort, the elements of which need not be explored in detail here. What is important is that negligence has been invoked in exactly the kinds of case with which this article is concerned. The key issue has revolved around a single element of the tort – the duty of care. In a number of breakthrough cases, courts in various jurisdictions have recognised that a duty of care might be owed by a parent company to a subsidiary’s employees and other affected parties.

*CSR Ltd v Wren*[[52]](#footnote-52) is an illustration.[[53]](#footnote-53) The New South Wales Court of Appeal held that CSR Ltd, which was the parent company of Asbestos Products Ltd (APL), was liable in negligence to one of APL’s employees for failing to take care in making his workplace safe so that he contracted asbestos-caused mesothelioma. The claimant, who had been involved in the physical handling of asbestos slurry, had had no recourse against APL because that company had been liquidated many years earlier. The crucial holding was that CSR had owed a duty of care to the employee, based upon the foreseeabililty of injury in the early 1950s (given the literature then available on the link between asbestos and lung diseases)[[54]](#footnote-54) and sufficient proximity between the parties. This proximity arose on the basis of the complete overlap between CSR and APL management,[[55]](#footnote-55) and the pervasive influence of CSR over the operations of APL,[[56]](#footnote-56) including the organisation of its work.[[57]](#footnote-57) The Court found that there were no reasons of policy for denying recognition of a duty of care.[[58]](#footnote-58) From the point of view of a tort scholar, both the reasoning and the result in the case are essentially unimpeachable.

In *CSR v Young*,[[59]](#footnote-59) the New South Wales Court of Appeal went even further in holding that CSR Ltd had owed a duty of care to its subsidiary’s (Australian Blue Asbestos Ltd’s) employee’s children – in other words, to third parties affected by its failure to take care in the manufacture and distribution of asbestos. The asbestos dust in the outback town of Wittenoom was pervasive. As a toddler, around the year 1960, the claimant had crawled around in asbestos tailings. As an older child, she had played in a backyard covered in tailings, which were also to be found at the local school, near the hospital, and in the roads. The claimant had been no safer insider her home, having inhaled asbestos dust from her father’s clothing. She eventually succumbed to mesothelioma and died at age 35. The Court of Appeal recognised a duty of care owed to the claimant based on foreseeability (for reasons similar to that in the *Wren* case)[[60]](#footnote-60) and on the pervasive control and influence over the entire town of Wittenoom which it exercised. ‘In truth’, Wittenoom was ‘”a company town”, existing to serve the working population and families of the mine and mills’.[[61]](#footnote-61) In its obiter holding, the Court of Appeal stated that this duty of care was, indeed, owed to the residents of Wittenoom as a whole.[[62]](#footnote-62)

The liability of a parent company for negligence impacting upon a subsidiary’s employees was recently recognised in English law, upon grounds which are very similar to those in the *CSR* case. In *Chandler v Cape Industries,*[[63]](#footnote-63)Mr Chandler was an employee of Cape Building Products Ltd for periods of time in 1959, 1960 and 1961. He worked outdoors loading bricks. Asbestos was produced at the site in a factory with open sides, and dust from the factory migrated into the area where he worked. Fifty years later he developed the lung disease asbestosis. By this time, the company for which he had worked was no longer in existence. Moreover, previous cases had held that UK insurers were not liable for employer’s liability insurance for causation of pneumoconiosis – and this exception had been judicially held to include liability for asbestosis. Thus, there was no point in suing Cape Building Products’ insurer. Its parent company had been Cape plc. The evidence was that Cape Products, after its acquisition by Cape plc, ‘became a part of an integrated group of companies headed by Cape’.[[64]](#footnote-64) The claimant sued Cape plc in negligence – alleging that Cape plc had owed him a duty of care when he was an employee of Cape Building Products Ltd.

The Court of Appeal held that such a duty of care had been owed. The steps in the reasoning to this conclusion were as follows. First, it was recognised that this was an omissions case. Although Arden LJ stated that, in general, there is no obligation imposed upon one to intervene to prevent damage arising to another, there are exceptions to this principle.[[65]](#footnote-65) Second, her Ladyship observed that one line of exceptional cases, concerned with assumptions of responsibility, was perhaps more correctly explained as concerned with ‘attachment’ of responsibility by the courts.[[66]](#footnote-66) This is on the basis (no doubt correct) that ‘[w]hether a party has assumed responsibility is a question of law’.[[67]](#footnote-67) It was this line of cases that she held to be relevant to the facts at hand. Her Ladyship then observed:

There is nothing in … the general law to support the [idea] that the duty of care can only exist in these cases if the parent company has absolute control of the subsidiary. Moreover, if a parent company has responsibility towards the employees of a subsidiary there may not be an exact correlation between the responsibilities of the two companies. The parent company is not likely to accept responsibility towards its subsidiary’s employees in all respects but only for example in relation to … high level advice or strategy.[[68]](#footnote-68)

Third, Arden LJ noted the following important points, which would go to establishing proximity of relationship between Cape plc and Mr Chandler:

The configuration of the asbestos factory dated back to the time when Cape introduced its Pluto board manufacturing business into the Cowley Works. By installing its business there, it must have implicitly undertaken a duty of care to ensure that its business was carried on without risk to the employees in the other business of Cape Products carried on at the Cowley Works. In due course, it required Cape [Products] to purchase this business. Nonetheless, despite the sale, it maintained a certain level of control over the asbestos business carried on at Uxbridge. Products were for instance to be manufactured in accordance with its product specification. Product development, with a group chief chemist, was carried on in the Central Laboratory at Barking. Cape moreover had superior knowledge about the asbestos business. It was in a substantial way of business and its resources far exceeded those of Cape Products. Dr Smither [the group medical adviser] was doing research into the link between asbestos dust and asbestosis and related disease…

Cape concedes that the system of work at Cape Products was defective. The judge inevitably found as a fact – and there is no appeal from this – that Cape was fully aware of the “systemic failure” which resulted from the escape of dust from a factory with no sides. Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge, most particularly the employees engaged in the brick making process.[[69]](#footnote-69)

In these circumstances, Arden LJ held that it was appropriate for the court to ‘find that Cape 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’.[[70]](#footnote-70) Her ladyship then set out a summary of the decision for future purposes:

[I]n 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 of ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee’s protection. For the purpose of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[[71]](#footnote-71)

It is submitted that, again, this case represents a proper development of the English law. The facts do seem to have supported the imposition of a duty of care owed by the parent company to the subsidiary’s employees. The main trouble with the case concerns the reasoning process employed, in particular the invocation of ‘assumption of responsibility’ type reasoning. Of course, this problem is somewhat alleviated by Arden LJ’s proper explanation that duties of care in tort are imposed and not the subject of subjective acceptance or denial.

The developments in each of the foregoing cases are no doubt important. However, the question arises whether they are sufficient or whether tort can do more to provide an appropriate liability regime involving corporate groups. The problems that remain in corporate group cases are still significant. First, there is, as adumbrated, no guarantee that a parent company will be any more solvent than a subsidiary. Indeed, the ability of parent companies to move assets around in a group might mean that the most valuable assets are in a subsidiary separate from the operating entity which injures. The tort of negligence has, to date, been applied only in the context of the vertical relationship between parent companies and their subsidiaries. It has not been used to create ‘side-ways’ actions between companies in a group – for example, based on the coordination of two subsidiaries.

Second, there are potential limitations in the application of negligence in the case of asbestos manufacture and distribution, especially where control is used as an important criterion of parent company liability. Not all asbestos operations have been undertaken in the manner found in the cases we have considered involving CSR Ltd and Cape plc. Thus, as already alluded to, business historians have found that the British asbestos manufacturer Turner and Newall exercised very little supervision of its foreign subsidiaries.[[72]](#footnote-72) Moreover, decisions to recognise duties of care owed by parent companies based on control create incentives to delegate decision-making to subsidiaries themselves. This will be so especially as regards health and safety issues affecting subsidiaries’ employees, customers, and bystanders.[[73]](#footnote-73)

Third, the typical fact situation found in asbestos cases is unlikely to re-appear in the next generation of mass tort claims, which might involve pharmaceutical companies, mobile phone manufacturers and the like. These cases do not necessarily involve obviously dangerous processes of manufacture and distribution. The risks, such as they are, would appear to lie primarily in the consumption and use of these items. Moreover, pharmaceutical companies often operate in a more arm’s length relationship with their subsidiaries and associated companies, which undertake the developmental work, but which might be substantially funded by pharma groups – especially in the latter stages of development and in the commercialisation of products.

Fourth, the duty of care rules undoubtedly are more liberal in cases of personal injuries than in cases of financial losses, meaning that negligence is of limited reach. No cases have yet held that a parent company is liable for purely financial losses suffered by a subsidiary’s employees or customers. In cases of financial loss, moreover, the Civil Liability Acts create proportional liability[[74]](#footnote-74) – thereby reducing the utility of negligence actions and making a tort such as conspiracy potentially much more attractive.

Finally, a greater level of responsibility for losses – including allowance for remote damage – is probably called for in cases of true recklessness than negligence allows for. This is the issue to be considered next.

UNLAWFUL MEANS CONSPIRACY

A tort of renewed interest in the corporate group context is that of conspiracy. The reasons for this are several. First, conspiracy is a tort that has been developed to deal with agreements between natural persons and has a role to play in a liability regime that takes the personhood of the company seriously. Second, conspiracy hinges upon agreement and ensures that liability is extended *beyond the actor who injures* to those who entered into the agreement and did something to further it. This leads to a third point, that conspiracy is apt to create liability in all of those in a corporate group who fulfil the required elements. It is an appropriate means by which to extend liability beyond insolvent subsidiaries in cases of financial claims. Finally, this is a tort that would seem to be an appropriate alternative to veil-piercing arguments based on fraud.

Tortious conspiracy arises where at least two persons agree upon a course of action with an aim of injuring another and where the latter suffers loss as a consequence of the wrong committed.[[75]](#footnote-75) It comes in two forms.[[76]](#footnote-76) Conspiracy by *lawful* means arises when persons combine to act with the predominant purpose of injuring another and when they do injure that other.[[77]](#footnote-77) Given the requirement of *predominant* purpose, it is unlikely to be an important type of conspiracy in commercial contexts and nothing more will be said about it.

Conspiracy by *un*lawful means is related, but features some important differences, the most obvious of which relates to the intention necessary to commit the tort. The use of unlawful means results in a lesser requirement that the intention to injure be merely one of the purposes of the conspirators.[[78]](#footnote-78) Under the traditional formulation of the rule, the unlawful means must be ‘aimed at’ or ‘directed’ against the claimant.[[79]](#footnote-79) The basis of responsibility embodied within this tort is less stringent than that inherent in the cases on veil piercing as a result of fraud; but more stringent than that of negligence. It represents a mid-way point between these two standards of liability and might be argued to permit a widening of the net of recovery within corporate groups without overly-deterring future investment. Helpfully in cases concerning corporate parties, it has been affirmed that a ‘court is entitled to have regard to the overt acts pleaded, and to infer from those acts that there was an agreement to further the common object of the combination’.[[80]](#footnote-80)

However, this is not to say that such an intention is easy to prove in the context of commercial operations. Although the veil-piercing cases do demonstrate that situations arise where smaller company controllers engage in intentionally injurious conduct, this is far less likely to arise in the case of anything other than criminal organisations of any size. And, although recent cases demonstrate real recklessness in such things as the rating of financial instruments, this does not amount to intention to injure – despite the equivalence of recklessness and intention in other areas of law.[[81]](#footnote-81) In this sense, the utility of unlawful means conspiracy (as well as that of the tort of deceit) is undermined by the restricted nature of the intention requirement.

But the question might be asked whether the law *ought* to develop in a way that allows recklessness to be equated with intention for the purposes of inter-corporate conspiracy. Given that intention to injure is extremely difficult to prove in companies of any size, the appropriate rule in such a context might be an objectively-ascertained recklessness-standard of liability. Such a development might make more sense than forcing claimants to bring actions in negligence – where a ‘duty of care’ to avoid causation of injury must be proved against every single defendant to be made liable for the financial losses in question. Indeed, one might think that such a development would be eminently possible, given the historic role of the action on the case as permitting suits where ordinary tort rules were deficient and where the justice of the case called for a remedy.

The meaning of ‘unlawful means’ has long been a matter of controversy in the economic torts. In Australia, it appears that unlawful means relevant to the corporate groups context might consist of either a breach of directors’ duties[[82]](#footnote-82) or breach of a contractual provision.[[83]](#footnote-83) In *Revenue and Customs Commissioners v Total Network SL*,[[84]](#footnote-84) the House of Lords held that the unlawful act in unlawful means conspiracy need not be independently actionable by the claimant against at least one of the conspirators.[[85]](#footnote-85) Sufficient unlawful means might reside in the commission of a crime – in this case the common law crime of cheating the revenue – for which there is no corresponding action in tort. This has widened the reach of the tort in the UK and is consistent with developments in Australian law.[[86]](#footnote-86) Lord Walker remarked that ‘the range of possible conspiracies [is] so wide and varied that it would be unwise to attempt to lay down any general rule’ as to the circumstances in which it applies.[[87]](#footnote-87) This dictum indicates the potential for this tort to be of some significance in resolving disputes within corporate groups.

Being an action on the case, the tort of unlawful means conspiracy is complete only upon the causation of some form of recognised damage. An advantage of a successful pleading is that, unlike the case in negligence, damages are not limited by the remoteness rule. Damages are available for all financial losses flowing directly from the commission of the tort.[[88]](#footnote-88) In an appropriate case, given the presence of an intention to injure, it may be appropriate to award exemplary damages. All of the conspirators are liable for the loss that eventuates, even if only one of their number carries out the unlawful act that directly injures the claimant’s interests.[[89]](#footnote-89) In this fact lies a primary advantage of a pleading in conspiracy: liability can be extended beyond the defendant (including a corporate defendant) who carries out the unlawful act. [[90]](#footnote-90) This is especially important in the absence of agreement in Australian tort law as to the general existence and extent of accessorial liability.[[91]](#footnote-91)

Unlawful means conspiracy might be capable of pleading in a variety of cases involving agreement between entities and/or persons within corporate groups. Perhaps its greatest use would be in establishing ‘sideways’ liability within the corporate group – that is, amongst entities and persons which are not in a vertical relationship (such as that of parent company and subsidiary). Where important assets in a group are housed in a non-operating entity, so that the ability of the parent company to provide redress (through either a statutory exception to limited liability, veil-piercing or vicarious liability) is restricted, the claimant could seek to establish liability in another subsidiary. This kind of action would be quite useful if the standard of liability were reduced from intention to injure to recklessness in the causation of injury. And there are good reasons to think that this would be an appropriate standard as between corporate entities. The result would be a far greater flexibility in creating liability in the corporate group, centred upon coordinated action. Needless to say, unlawful means conspiracy is also capable of application beyond the corporate group itself, so as to encompass agents and independent contractors agreeing with the now-insolvent subsidiary to take actions which injure.

CONCLUSIONS

In the final analysis, it would seem that there is great attraction in a tort liability regime applicable to corporate groups in the following way: strict liability of companies for the torts of their employees; a negligence-based liability of the parent company for torts to employees, customers and by-standers affected by the conduct of the subsidiary; and a recklessness-based tort of unlawful means conspiracy, applicable as between other entities and persons coordinating their activities within and beyond the group. This would reflect a stricter liability as between vertically-related parties, and a more restrictive type of liability as between parties horizontally related.

**7641 words as at 7 on 16 June 2014**

1. \* University of Exeter, School of Law. I thank the participants in a Law School Research Seminar at Exeter, held on 23 October 2013, for their views and feedback. [↑](#footnote-ref-1)
2. † Legal Counsel, Australian Unity; Research Assistant Melbourne Law School, 2008-2009. The opinions expressed in this paper are those of the authors alone and should not be taken to represent the views of Australian Unity. The writing of this paper was generously assisted in by the Australian Research Council, Discovery Project No. 86544. [↑](#footnote-ref-2)
3. Such avenues have been explored in, eg M Petrin, ‘Assumption of Responsibility in Corporate Groups: Chandler v Cape plc’ (2013) 76 MLR 603; P Edmundson, ‘Side-Stepping Liability in Corporate Groups Using the Tort of Interference with Contract’ (2006) 30 MULR 62; P Edmundson and P Stewart, ‘Liability of a Holding Company for Negligent Injuries to an Employee of a Subsidiary: *CSR v Wren*’ (1998) 6 Torts LJ 123. As far as the authors know, this is the first article that focuses on the tort of conspiracy within the corporate group context. [↑](#footnote-ref-3)
4. H Anderson, ‘Parent company liability for asbestos claims: some international insights’ (2011) 31 LS 547. The main problem is that these provisions do not assist creditors unless all companies within a group are to be wound up. Thus, the provisions, in Corporations Act 2011 (Cth), Pt 5.6 Div 8, do not assist in cases of ‘strategic’ subsidiary insolvencies. [↑](#footnote-ref-4)
5. Competition and Consumer Act 2010 (Cth), Schedule 2, Part 3-5. [↑](#footnote-ref-5)
6. Competition and Consumer Act 2010 (Cth), Schedule 2, Part 2-1. [↑](#footnote-ref-6)
7. See recent comment in *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700. [↑](#footnote-ref-7)
8. Corporations Act 2001 (Cth), s 588W(1). [↑](#footnote-ref-8)
9. A parent or other company within a group might be treated as a director for these purposes where the board of the subsidiary is accustomed to act on the directions of that other company. Corporations Act 2001 (Cth), s 9. See *Standard Chartered Bank of Australia v Antico* (1995) 38 NSWLR 290, 328. [↑](#footnote-ref-9)
10. Corporations Act 2001 (Cth), ss 588J-K. Compensation is payable, in the first instance, to the company. [↑](#footnote-ref-10)
11. See, eg, N Mendelson, ‘A Control-Based Approach to Shareholder Liability for Corporate Torts’ (2002) 102 Colum LR 1203; J Crowe, ‘Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs' (2012) 75 MLR 159. See also H Anderson, ‘Piercing the Veil on Corporate Groups in Australia: The Case for Reform’ (2009) 33 MULR 333 (argument in favour of the application of directors’ duties to parent companies). [↑](#footnote-ref-11)
12. Eg, *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567, 572 and 577 (Rogers A-JA, in the latter case assuming ‘complete dominion and control’); JE Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law* (1994), 5; H Anderson, ‘Piercing the Veil on Corporate Groups in Australia: The Case for Reform’ (2009) 33 MULR 333, 336 and 353-4. [↑](#footnote-ref-12)
13. G Jones, *Merchants to Multinationals: British Trading Companies in the Nineteenth and Twentieth Centuries* (2000), 106. [↑](#footnote-ref-13)
14. G Jones, *Merchants to Multinationals: British Trading Companies in the Nineteenth and Twentieth Centuries* (2000), 106. [↑](#footnote-ref-14)
15. G Jones, *Multinationals and Global Capitalism: From the Nineteenth to the Twenty-First Century* (2005), 177. [↑](#footnote-ref-15)
16. AD Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (1990), 161. [↑](#footnote-ref-16)
17. G Tweedale, *Magic Mineral to Killer Dust: Turner and Newall and the Asbestos Hazard* (1999), 293. [↑](#footnote-ref-17)
18. As to the latter point, see L LoPucki, ‘The Death of Liability’ (1996) 106 Yale LJ 1. [↑](#footnote-ref-18)
19. C Witting, ‘Liability for Corporate Wrongs’ (2008) 28 UQLJ 113. [↑](#footnote-ref-19)
20. See *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427, 435, where Lord Diplock stated that ‘one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language’. With respect, this must be correct. [↑](#footnote-ref-20)
21. This would be to use the veil piercing doctrine in a way which obscures legal principles: *Theosophical Foundation Pty Ltd v Commissioner of Land Tax* (1966) 67 SR (NSW) 70, 83 (Sugarman JA). [↑](#footnote-ref-21)
22. [1897] AC 22. See comment in *Premier Building and Consulting Pty Ltd (recs apptd) v Spotless Group Ltd* (2007) 64 ACSR 114, 186-92 (Byrne J); *Repatriation Commission v Harrison* (1997) 78 FCR 442, 447 (Tamberlin J); *Hadoplane Pty Ltd v Edward Rushton Pty Ltd* [1996] 1 Qd R 156, 162, 164 and 167; *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577 (Rogers AJA); *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, 274 (Full Court); *Dalco v Federal Commissioner of Taxation* (1988) 82 ALR 669, 682; Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000), 17; J Harris and A Hargovan, ‘Cutting the Gordian knot of corporate law: Revisiting veil piercing in corporate groups’ (2011) 26 Aust J Corp L 39. [↑](#footnote-ref-22)
23. *Premier Building and Consulting Pty Ltd (recs apptd) v Spotless Group Ltd* (2007) 64 ACSR 114, 186-92 (Byrne J); *Repatriation Commission v Harrison* (1997) 78 FCR 442, 447 (Tamberlin J); *Hadoplane Pty Ltd v Edward Rushton Pty Ltd* [1996] 1 Qd R 156, 162, 164 and 167; *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577 (Rogers AJA); *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, 274 (Full Court); *Dalco v Federal Commissioner of Taxation* (1988) 82 ALR 669, 682; Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000), 17. [↑](#footnote-ref-23)
24. Eg, *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679. See IM Ramsay and D Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 C&SLJ 250, 263. [↑](#footnote-ref-24)
25. J Harris and A Hargovan, ‘Cutting the Gordian knot of corporate law: Revisiting veil piercing in corporate groups’ (2011) 26 Aust J Corp L 39, esp 49-50. [↑](#footnote-ref-25)
26. (1998) Aust Torts Reports ¶81-468, 64,952-3. [↑](#footnote-ref-26)
27. (1998) Aust Torts Reports ¶81-468, 64,952-3. [↑](#footnote-ref-27)
28. Eg *Commissioner of Taxation v BHP Billiton Finance Ltd* [2010] 182 FCR 526, [14] (findings of fact). [↑](#footnote-ref-28)
29. Eg, *Premier Building and Consulting Pty Ltd (rec apptd) v Spotless Group Ltd* (2007) 64 ACSR 114; *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254, 266-7 (Young J). See IM Ramsay and DB Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 C&SLJ 250, 257. [↑](#footnote-ref-29)
30. IM Ramsay and D Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 C&SLJ 250, 263. See also P Oh, ‘Veil-Piercing’ (2010) 89 Tex LR 81, 110; R Thompson, ‘Piercing the Corporate Veil: An Empirical Study’ (1991) 76 Cornell LR 1036, 1038 and 1047; C Mitchell, ‘Lifting the Corporate Veil in the English Courts: An Empirical Study’ (1999) 3 CfiLR LR 15, 22. [↑](#footnote-ref-30)
31. IM Ramsay and D Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 C&SLJ 250, 263. [↑](#footnote-ref-31)
32. Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000), 17; C Mitchell, ‘Lifting the Corporate Veil in the English Courts: An Empirical Study’ (1999) 3 CfiLR 15; PI Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (OUP, 1993), 123-4. [↑](#footnote-ref-32)
33. *Walker v Wimborne* (1976) 137 CLR 1, 6-7 (Mason J). See also *Equiticorp Finance Ltd (In Liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 97-9 (Kirby P); *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254, 266-7 (Young J). [↑](#footnote-ref-33)
34. (1977) 136 CLR 567. [↑](#footnote-ref-34)
35. (1977) 136 CLR 567, 577. [↑](#footnote-ref-35)
36. [2013] 2 AC 415. [↑](#footnote-ref-36)
37. [2013] 2 AC 415, [79]. [↑](#footnote-ref-37)
38. [2013] 2 AC 415, [35] (Lord Sumption). [↑](#footnote-ref-38)
39. (1966) 67 SR (NSW) 70. [↑](#footnote-ref-39)
40. (1966) 67 SR (NSW) 70, 75-6. [↑](#footnote-ref-40)
41. *Premier Building and Consulting Pty Ltd (rec apptd) v Spotless Group Ltd* (2007) 64 ACSR 114, 191 (Byrne J). [↑](#footnote-ref-41)
42. AA Berle, ‘The Theory of Enterprise Entity’ (1947) 47 Colum LR 343, 349. [↑](#footnote-ref-42)
43. PI Blumberg, *The Multinational Challenge to Corporation Law : The Search for a New Corporate Personality* (1993). A summary of his position is available in PI Blumberg, ‘The Transformation of Modern Corporation Law: The Law of Corporate Groups’ (2005) 37 Conn LR 605. [↑](#footnote-ref-43)
44. PI Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993), viii-ix. [↑](#footnote-ref-44)
45. M Dearborn, ‘Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups’ (2009) 97 Cal LR 195, 212. [↑](#footnote-ref-45)
46. [1990] 1 Ch 433, 538 quoting *Bank of Tokyo Ltd v Karoon (note)* [1987] AC 45, 64 (Goff LJ). [↑](#footnote-ref-46)
47. [1996] 2 All ER 433, 448. See also *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, 457 Hobhouse LJ). [↑](#footnote-ref-47)
48. Pervasive enterprise liability principles have not been adopted in any common law jurisdiction: Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000), 157. For attempted use of enterprise liability in Australia, see, eg, *Premier Building and Consulting Pty Ltd (rec apptd) v Spotless Group Ltd* (2007) 64 ACSR 114. See also *Briggs v James Hardie & Co Pty Ltd* (1989) 5 NSWLR 549, 576-77 (Rogers AJA). [↑](#footnote-ref-48)
49. [2010] 182 FCR 526, [37] (The Court). [↑](#footnote-ref-49)
50. Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000), chap 4. [↑](#footnote-ref-50)
51. (1977) 137 CLR 567, according to the NSW Court of Appeal in *Briggs v James Hardie & Co Pty Ltd* (1989) 5 NSWLR 549, 576. See also *Walker v Wimborne* (1976) 137 CLR 1, 6-7 (Mason J). [↑](#footnote-ref-51)
52. (1997) 44 NSWLR 463. No argument was made at trial about piercing the veil: ibid 466. [↑](#footnote-ref-52)
53. See also E McGaughey, ‘*Donoghue* v *Salomon* in the High Court’ (2011) 4 J of Personal Injury L 249. [↑](#footnote-ref-53)
54. (1997) 44 NSWLR 463, 477. [↑](#footnote-ref-54)
55. (1997) 44 NSWLR 463, 469 and 485. [↑](#footnote-ref-55)
56. (1997) 44 NSWLR 463, 470 and 483-4. [↑](#footnote-ref-56)
57. (1997) 44 NSWLR 463, 484. [↑](#footnote-ref-57)
58. (1997) 44 NSWLR 463, 485. [↑](#footnote-ref-58)
59. (1998) Aust Torts Rep ¶ 81-468. [↑](#footnote-ref-59)
60. (1998) Aust Torts Reports ¶81-468, 64,953-7. [↑](#footnote-ref-60)
61. (1998) Aust Torts Reports ¶81-468, 64,957. [↑](#footnote-ref-61)
62. (1998) Aust Torts Reports ¶81-468, 64,953. [↑](#footnote-ref-62)
63. [2011] 1 WLR 3011. [↑](#footnote-ref-63)
64. [2011] 1 WLR 3011, [10]. [↑](#footnote-ref-64)
65. [2011] 1 WLR 3011, [63]. [↑](#footnote-ref-65)
66. [2011] 1 WLR 3011, [64]. [↑](#footnote-ref-66)
67. [2011] 1 WLR 3011, [64]. [↑](#footnote-ref-67)
68. [2011] 1 WLR 3011, [66]. [↑](#footnote-ref-68)
69. [2011] 1 WLR 3011, [77]. [↑](#footnote-ref-69)
70. [2011] 1 WLR 3011, [78]. [↑](#footnote-ref-70)
71. [2011] 1 WLR 3011, [80]. [↑](#footnote-ref-71)
72. G Tweedale, *Magic Mineral to Killer Dust: Turner and Newall and the Asbestos Hazard* (1999), 293. [↑](#footnote-ref-72)
73. M Petrin, ‘Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*’ (2013) 76 MLR 603, 618. [↑](#footnote-ref-73)
74. Eg, Civil Liability Act 2002 (NSW), s 34. [↑](#footnote-ref-74)
75. *Crofter Hand-Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 445 (Visc Simon LC) and 461 (Lord Wright); *McKernan v Fraser* (1931) 46 CLR 343, 407 (Evatt J). The agreement need be no more than tacit in nature: H Carty, *An Analysis of the Economic Torts* (2nd ed, 2012), 127. [↑](#footnote-ref-75)
76. There is, however, debate about whether this separation is viable; there might simply be a ‘spectrum’ of liability for ‘harmful combinations’: H Carty, *An Analysis of the Economic Torts* (2nd ed, 2010), 124. [↑](#footnote-ref-76)
77. *McKernan v Fraser* (1931) 46 CLR 343, 362 (Dixon J). Liability for conspiracy in the US follows the same basic patterns as in Australia, except that only a small number of States recognise lawful means conspiracy: TJ Leach, ‘Civil Conspiracy: What’s the Use?’ (1999) 54 U Miami LR 1, 8-11. [↑](#footnote-ref-77)
78. *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 681 (Handley JA). See discussion in PR Edmundson, ‘Conspiracy by unlawful means: Keeping the tort untangled’ (2008) 16 Torts LJ 189, who notes that ‘the tort is not yet at the stage where the precise scope of its elements can be [stated] with confidence: ibid 189. [↑](#footnote-ref-78)
79. *Lonrho plc v Fayed* [1992] 1 AC 448, 467 (Lord Bridge). See also R Lewis, ‘Economic Torts: Where Are We Now?’ [2008] Bus LR 216, 217. [↑](#footnote-ref-79)
80. *CC Containers Pty Ltd v Lee* [2011] VSC 537, at [13]. [↑](#footnote-ref-80)
81. P Cane, *Responsibility in Law and Morality* (2002), 81. [↑](#footnote-ref-81)
82. *Chen v Karandonis* [2002] NSWCA 412, [28]; *Beach Petroleum NL v Johnson* (1993) 43 FCR 1, 22-3. Compare *Terranora Leisure Time Management Ltd v Harris* [2004] 1 Qd R 93, 98-9. [↑](#footnote-ref-82)
83. *Stanley v Layne Christensen Co* [2006] WASCA 56, [47]. Caution is required, though, in making generalisations: PR Edmundson, ‘Conspiracy by unlawful means: Keeping the tort untangled’ (2008) 16 Torts LJ 189, 202-4; J O’Sullivan, ‘Unlawful Means Conspiracy in the House of Lords’ [2008] CLJ 459, 461. Note, also, that case law places restrictions upon a pleading of inducing breach of contract against a company and its directors: *O’Brien v Dawson* (1942) 66 CLR 18, 32 (Starke J); *Said v Butt* [1920] 3 KB 497. The reason for this is to prevent the creation of an indirect liability in directors for breach of contract: RP Austin, HAJ Ford and IM Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005), 614. [↑](#footnote-ref-83)
84. [2008] 1 AC 1174. An excellent attempt at mapping out an appropriate operation for the economic torts as a whole is made in S Deakin and J Randall, ‘Rethinking the Economic Torts’ (2009) 72 Mod LR 519. [↑](#footnote-ref-84)
85. [2008] 1 AC 1174, [44]-[45] (Lord Craig), [56] (Lord Scott), [95] (Lord Walker), [120]-[121] (Lord Mance), [217] and [227] (Lord Neuberger), over-ruling *Powell v Boladz* [1998] Lloyd’s Rep Med 116. [↑](#footnote-ref-85)
86. See, eg, *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169, [16]; *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678; PR Edmundson, ‘Conspiracy by unlawful means: Keeping the tort untangled’ (2008) 16 Torts LJ 189, 2001-3. [↑](#footnote-ref-86)
87. [2008] 1 AC 1174, [96]. [↑](#footnote-ref-87)
88. Damages are ‘at large’: *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489. [↑](#footnote-ref-88)
89. *Credit Lyonnais v ECGD* [1998] 1 Lloyd’s L Rep 19. [↑](#footnote-ref-89)
90. A similar point is noted in NK Katyal, ‘Conspiracy Theory’ (2003) 112 Yale LJ 1307, 1334; TJ Leach, ‘Civil Conspiracy: What’s the Use?’ (1999) 54 U Miami LR 1. [↑](#footnote-ref-90)
91. J Dietrich, ‘Accessorial liability in the law of torts’ (2011) 31 LS 231, 240. [↑](#footnote-ref-91)