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Disregarding the Salomon *Principle: An Empirical Analysis, 1885–2014*

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Abstract—For over a century UK courts have struggled to negotiate a coherent approach to the circumstances in which the *Salomon* principle –that a corporation is a separate legal entity–will be disregarded. Empirical analysis can facilitate our understanding of this mercurial area of the law. Examining UK cases from 1885 to 2014, we created a final dataset of 213 cases coded for 15 different categories. Key findings confirm historical patterns of uncertainty and a low but overall fluctuating disregard rate, declining recently. Criminal/fraud/deception claims link strongly to disregard outcomes. Private law rates are low but tort claims have a higher disregard rate than contract. Individual shareholders are more susceptible to disregard than corporate shareholders. The English Court of Appeal plays a key role in successful disregard claims particularly in tort. In general, while disregard rates were very context specific, concerns about the diminished sanctity of the *Salomon principle* may be overblown.

Keywords: company law, corporate law, courts, empirical legal studies, veil piercing, veil lifting

1. *Introduction*

In 1897, the House of Lords in *Salomon v Salomon*[1] famously confirmed the sanctity of the validly formed corporation. Its liabilities were its own and not its

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[1] *Salomon v Salomon & Co Ltd* [1897] AC 22. Our data set begins before the *Salomon* decision, as there are earlier precursors to what becomes the *Salomon* principle.

shareholders', whose risk was limited to the amount invested in the corporation. From that principle we have built a form of capitalism in which passive investment and complex liability-limiting corporate group structures have emerged, alongside much simpler close companies, that impact across areas as disparate as commercial shipping and family life.[2] However, the principle has always attracted controversy, both because of its potential to cause injustice by favouring the shareholders over creditors, even involuntary creditors such as tort victims, and its potentially beneficial role in encouraging investment and entrepreneurship.[3] As a result, the principle and its limits are contested by both academic legal scholarship and the judiciary.[4] On the technical side, scholars have gamely tried to grapple with the messy case law and classify decisions that disregard or uphold the corporate form, only to arrive at proposed solutions that are too discrete to be useful[5] or so broad as to be unwieldy.[6] On the critical side, scholars have instead tackled the dysfunctional academic and judicial analysis within this area, and urged root and branch reform in the interests of justice and fairness.[7] Outside that academic discourse, the actual limits to the *Salomon* principle are regularly patrolled by the judiciary, which possesses the power to disregard the corporate form.[8] Given the importance of the liability-limiting effect of the corporate form for the UK economy, the stakes are high whenever the judiciary sit to decide the acceptable limits of using the corporate form, even in a family law case. Too high a bar and

[2] *Prest v Petrodel Resources Ltd* [2013] AC 415 is a Supreme Court family law case where matrimonial assets were held through a corporate structure.

[3] See eg O Kahn-Freund, 'Corporate Entity' (1940) 3 MLR 226; J Lowry, 'Lifting the Corporate Veil' [1993] JBL 41. Other good examples of this type of scholarship are J Armour and S Deakin, 'Recent Case Commentary: The Rover Case (2)—Bargaining in the Shadow of Tupe' (2000) 29(4) ILJ 395; P Friedman and N Wilcox, 'Piercing the Corporate Veil' [2006] NLJ 56; S Griffin, 'Holding Companies and Subsidiaries—the Corporate Veil' (1991) 12(1) Co Law 16; C Howell, 'Salomon under Attack' (2000) 21(10) Co Law 312; P Ozin, and C Badger, 'Financial Crime Update' (2010) 25(4) JIBFL 261; D Petkovic, 'Piercing the Corporate Veil in Capital Markets Transactions' (1996) 15(4) International Banking and Financial Law 41; C Png, 'Lifting the Veil of Incorporation: *Creasey v Breachwood Motors*: A Right Decision with the Wrong Reasons' (1999) 20(4) Co Law 122; A Walters, 'Corporate Veil' (1998) 19(8) Co Law 226; K Wardman, 'The Search for Virtual Reality in Corporate Group Relations' (1994) 15(6) Co Law 179; R Williams and I Lambert, 'Director's Liability for Corporate Breach' (1999) 2 Private Client Business 97.

[4] For differing judicial perceptions of the issue over time see *Wallersteiner v Moir* [1974] 1 WLR 991; *DHN Food Distributors Ltd v Tower Hamlets* [1976] 1 WLR 852; *Re a Company* [1985] BCLC 333; *National Dock Labour Board v Pinn and Wheeler Ltd* [1989] BCLC 647; *Adams v Cape Industries Plc* [1990] Ch 433; *Prest v Petrodel* (n 2).

[5] See C Schmitthoff, 'Salomon in the Shadow' [1976] JBL 305; S Block, 'The Client Who Behaves as though Salomon's Case Was Wrongly Decided' (1979) 5 IBL 119.

[6] P Ziegler and L Gallagher, 'Lifting the Corporate Veil in the Pursuit of Justice' (1990) JBL 292.

[7] M Moore, 'A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' [2006] JBL 180; P Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 Comp Law 168; P Ireland, 'The Rise of the Limited Liability Company' (1984) 12 Int J Soc Law 239.

[8] Exceptions to the *Salomon* principle assume many forms, functions and guises, all of which are complicated by the proliferation of metaphors. The veil of limited liability, for instance, can be lifted, pierced, peeped behind, penetrated, extended or even just plain ignored. S Ottolenghi, 'From Peeping behind the Corporate Veil, to Ignoring it Completely' (1990) 53 MLR 338. We prefer the older phrase 'corporate disregard,' meaning a decision where what is at stake is a decision as to whether the presumption of separate corporate personality should be upheld or disregarded. EM Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 HLR 1145, 1146. We elaborate more on this issue in the methodology section.

injustice and fraud will arguably be encouraged; too low and the entrepreneurial and asset partitioning function will be impaired. Indeed, this dilemma is often made plain in argument in front of a judge.[9]

However, despite, or perhaps because of, the high stakes, the law on corporate disregard within the UK remains confused, even though the senior judiciary have over time sought to lay down various narrow disregard principles.[10] When the corporation will be disregarded—or, in traditional terms, its 'veil' of incorporation will be 'lifted' or 'pierced'—has been described as an 'essentially haphazard and irrational' endeavour.[11] Indeed, in 2013, the Supreme Court described the doctrine as plagued by 'the use of pejorative expressions to mask the absence of rational analysis'.[12] As aptly expressed by one commentator, the law of corporate disregard seems to change 'dependent on the particular judge and what the judge has had for breakfast!'[13]

This is not an article that aims to add to the traditional scholarly legal analysis of the confused principles allegedly at work within the cases. Instead, it uses empirical analysis to examine key aspects of corporate disregard case outcomes over time and to ask questions about important contextual elements of the decisions, such as what role the identity of the parties, type of company, type of claim and level of court, may play in judicial outcomes. This, we consider, may allow some macro-perspective on why the area is so confused and whether there is, or has ever really been, a danger that the *Salomon* principle would be sent 'up in flames'.[14]

This introduction forms section 1 of the article. Section 2 examines the existing empirical disregard work within the UK and other jurisdictions. Section 3 then delineates the methodology and parameters of our empirical study. Section 4 presents our findings. In summary, we found a comparatively low 35.65%[15] overall disregard rate within our study and large fluctuations in the disregard rate between decades, which declines precipitously in the final decade of our data set. In all, we found that key contextual factors were influential in disregard outcomes.

The English Court of Appeal was more likely than any other court to disregard the corporate form, while the Supreme Court was the least likely. This may be indicative of the contested unsettled nature of the law, and may

[9] In *Wallersteiner v Moir* (n 4), for example: 'It was quite wrong, he said, to pierce the corporate veil. The principle enunciated in *Salomon v Salomon & Co. Ltd.* [1897] A.C. 22 was sacrosanct. If we were to treat each of these concerns as being Dr. Wallersteiner himself under another hat, we should not, he said, be lifting a corner of the corporate veil. We should be sending it up in flames.'

[10] See eg *Adams v Cape Industries* (n 4); *Prest v Petrodel* (n 2).

[11] LCB Gower and P Davies, *Principles of Company Law* (6th edn, Sweet & Maxwell 1997) 138.

[12] *Prest v Petrodel* (n 2) 502, citing PB Oh, 'Veil-Piercing' (2010) 89 Tex L Rev 81, 84; *VTB Capital plc v Nutritek Int'l Corp* [2013] 2 AC 337, 383.

[13] N Bourne, *Bourne on Company Law* (6th edn, Routledge 2013) 24.

[14] See n 9.

[15] As we discuss below, we found that, overall, UK courts disregard the corporate form 35.65% of the time, which approximates the 38.46% rate in Australia but is substantially lower than more recent estimate of a 48.51% rate in the United States (Oh (n 12), 84).

have wider implications for the system of precedent. The judiciary were much more likely to disregard the corporate form in a criminal case than in a contractual matter. Indeed, the courts were much more likely to allow a disregard request from government agencies than from companies or individuals. The judiciary were also overall least likely to disregard in private law claims. However, where the disregard request was in the context of a tort case, we found the judiciary and, by an extraordinary margin, the Court of Appeal judges to be more willing to disregard the corporate form than in a contractual claim. The judiciary were also more likely to disregard the corporate form where the shareholder was an individual rather than a corporate entity. As with Mitchell's 1999 English study, we found no example of a successful disregard claim against a dispersed company.[16]

Indeed, outcomes within the claims data seemed particularly context specific, which may be why uniform disregard principles struggle to hold across such widely differing areas of law. While our data on the fluctuating rates of disregard outcomes over time do seem to match the general academic and judicial commentary on the unsettled nature of corporate disregard, this may be because of high rates found in the English Court of Appeal in areas such as tort and crime. In general, our finding of a low overall rate, and particularly in private law cases, would indicate that concerns about the diminished sanctity of the *Salomon* principle may be overblown.[17]

2. *Empirical Scholarship*

Empirical analysis has the ability to reveal counterintuitive patterns and to test our basic assumptions about the world. Yet, there is a meagre amount of empirical analysis within the general UK academic legal literature. What was observed on this issue back in 1937 largely remains true today: 'English legal periodicals have hitherto dealt almost exclusively with the technical aspects of the law treated from such varying points of view as the historical, analytical, or descriptive.'[18] Why this is so is not exactly clear. Empirical analysis demands significant resources and requires skills not commonly taught within our law schools; further, our legal tradition seems to discourage data collection and analysis, with the result that we may not understand or value the potential of this sort of scholarship.[19]

One notable exception to this was triggered in the UK within the area of corporate disregard. In 1991, Robert Thompson published a path-breaking

[16] C Mitchell, 'Lifting the Corporate Veil: An Empirical Study' (1999) 3 Company Financial & Insolvency Law Review 15.

[17] See n 12 ; see also FG Rixon, 'Lifting the Veil between Holding and Subsidiary Companies' (1986) LQR 415.

[18] Editorial Committee, 'Editorial Notes' (1937) 1 MLR 1.

[19] See HM Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 881.

empirical study of American corporate disregard decisions.[20] Thompson's study presented a broad assortment of data combed from approximately 1600 cases, ranging from descriptive information about cases, such as the type of court and litigant, to more interpretative information, such as a court's reasons for why a corporate form had or had not been disregarded. Finding an overall disregard rate of 40.18%, Thompson saw no evidence of success against public companies and, far more perplexing, corporate disregard claims not only appeared to prevail more often against individual rather than corporate shareholders, but also to arise and prevail more often in contract than in tort.[21] Thompson's empirical approach provided a different, systematic way to see how corporate disregard cases were being adjudicated from a variety of angles. This, in turn, has inspired others to construct new data sets, not only to test Thompson's results,[22] but also to see how the doctrine is applied within other, specific contexts.[23]

Thompson's empirical approach has been replicated within studies of corporate disregard cases in Australia, Canada, China, and Hong Kong.[24] And in 1999, inspired by Thompson's study, Charles Mitchell analysed a data set of 290 English corporate disregard cases.[25] Mitchell found a relatively high 47.24% overall disregard rate, and that attempts to disregard the corporate entity arise and prevail more frequently in claims lying in contract rather than tort.[26] Moreover, Mitchell found that the rate of corporate disregard has not varied significantly over time, vacillating by no more than 8% of the overall rate. This included in the 1990s, when he found that even after the Court of Appeal's decision in *Adams v Cape Industries Plc*[27] had appeared to close off disregard options, this had not 'ushered in a new era of legal formalism in the English courts'. Indeed, disregard rates rose rather than fell after the case.[28]

[20] RB Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 Cornell L Rev 1036.

[21] ibid 1058.

[22] T Richmond McPherson III and NS Raja, 'Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil' (2010) 45 Wake Forest L Rev 931; L Hodge and AB Sachs, 'Piercing the Mist: Bringing the Thompson Study into the 1990s' (2008) 43 Wake Forest L Rev 341.

[23] Moreover, Thompson's methodology has propelled the development of studies that devise a way to chart the course of corporate disregard requests prior to trial by examining court dockets, or that deploy automated text analysis for exploring whether corporate disregard decisions reflect particular policy goals. See KF Tsang, 'The Elephant in the Room: An Empirical Study of Piercing the Corporate Veil in the Jurisdictional Context' (2016)12 Hastings Bus LJ; JH Matheson, 'The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent–Subsidiary Context' (2009) 87 NC L Rev 1091; CL Boyd and DA Hoffman, 'Disputing Limited Liability' (2010) 104 Northwestern University Law Review 853; J Macey and J Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' (2014) 100 Cornell L Rev 99.

[24] MF Khimji and CC Nicholls, 'Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study' (2015) 41 Queen's LJ 207; H Huang, 'Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?' (2012) 60 Am J Comp L 743; TK Cheng, 'The Lifting of Corporate Veil Doctrine in Hong Kong: An Empirical, Comparative, and Development Perspective' (2011) 40 Common Law World Review 207; IM Ramsay and DB Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 C&SLJ 250.

[25] Mitchell (n 16).

[26] See Figure 5 and surrounding text.

[27] *Adams v Cape Industries* (n 4).

[28] *Adams v Cape Industries* (n 4) 25.

Despite the significance of these results, as well as their importance in the wider common law world, Mitchell's work remains strangely underappreciated domestically, perhaps because of the general aversion to empirical work.

Our study draws and expands upon Mitchell's work and others, along with numerous methodological refinements, to try to understand key contextual elements of how corporate disregard requests are being adjudicated. In the process, we also hope to demonstrate some of the broader utilities of content analysis and contribute to the overall body of empirical legal research within the UK.

3. *Methodology*

Our study spans 13 decades of UK cases, from 1885 up to and including 2014.[29] Corporate disregard opinions were drawn from Westlaw[30] and LexisNexis,[31] as well as multiple print sources. All the cases contained within Charles Mitchell's 1999 English study were also examined.[32] Within the electronic databases, combinations of four search phrases were used: 'disregard! /s (entity entities)', 'pierc! /s veil', 'lift! /s veil' and 'Salomon /s Salomon';[33] these searches are more comprehensive than any other empirical study of this topic, in the UK or elsewhere.[34]

All these searches yielded 909 cases in the initial data set, which was then refined in a number of ways. The data set was first pared to contain only cases from UK courts applying UK law. Secondly, as we noted earlier, the area of corporate disregard is permeated by metaphorical terms, such as lifting, peeping, and piercing, with the consequence that the same term may be used inconsistently or inexactly across numerous judicial opinions over time. As Lord Sumption observed in *Prest v Petrodel*:[35] "'Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.' Accordingly, each case within the data set was examined carefully by both authors for relevance. Cases lacking a meaningful reference to a corporate disregard doctrine or outcome were set aside, as were those decided for procedural reasons, such as interlocutory matters or jurisdiction, because they did not reflect reliable outcomes or reasoning.[36] Cases that arguably had a

[29] The earliest decision within our final data set is *Farrar v Farrars Ltd* [1888] 40 Ch D 395. However, searches were performed in databases containing decisions that date back to 1558.

[30] The Westlaw searches were performed in the 'UK Reports All' database, which contains reported and unreported decisions from the UK dating back to 1865.

[31] The LexisNexis searches were performed in the 'UK Cases Combined Courts' database, which contains reported and unreported decisions from the UK dating back to 1558.

[32] See Mitchell (n 16) 24–8.

[33] The exclamation mark within the search terms is a wildcard that nets different permutations of a term.

[34] Compare with Mitchell (n 16) 18 (using only the following two search terms in LexisNexis: 'corporate w/5 veil' and 'salomon w/5 salomon').

[35] *Prest v Petrodel* (n 2), 8.

[36] But see Mitchell (n 16) 24, table 8.

corporate disregard effect were also set aside because the judge, without substantive consideration, excluded corporate disregard as a possibility.[37] Also excluded were cases applying reverse piercing,[38] successor liability[39] and transfers within bankruptcy,[40] as they are doctrinal derivatives of veil-lifting.

The final data set comprised 213 cases, which were coded for both descriptive and interpretative data. Basic factual information about each case was collected, such as the year of decision, whether or not it was reported, and whether the corporate form was disregarded. Some of the factual information was recorded in categorical ways, such as whether the company in dispute was a close private company or a listed or non-listed public limited company, and whether the plaintiffs and shareholders were either an individual or an entity. With respect to the court, information about the specific body, division and subdivision were compiled, and whether it was at the trial, intermediate appellate or supreme level was also recorded.[41]

Although spanning a larger time frame, drawing from broader search terms and UK rather than just English data, our final data set was approximately 25% smaller than Mitchell's study.[42] In part, this was because of a difference in how the studies handled cases that involve multiple decisions. It is important to note that Mitchell's data were cumulative, so included and examined all decisions at each court level for a single case. For a Supreme Court case, this would include three separate disregard decisions, whereas ours would include only one. Our data set was not cumulative but included only the most recent, relevant decision from a case, excluding any other decisions involving the same underlying dispute.[43] Our choice to do this was based on a concern that counting multiple decisions from a common case can distort the aggregate results by giving a misleading picture of the disregard outcomes over time and by multiplying data on, *inter alia*, the identity of the plaintiffs and defendants,[44] as well as the types of substantive claims. In order to address the relationship between the court levels, we compiled data on whether the most recent relevant decision affirmed or reversed a prior decision about whether to disregard; further, in cases where a court applied separate analysis to different co-defendant corporations or individuals, we created separate entries for the

[37] eg *Chandler v Cape Plc* [2012] 1 WLR 3111.
[38] See *In re H R Harmer Ltd* [1959] 3 All ER 689 (QB).
[39] See *Davis v Elsby Bros* [1959] 1 WLR 170.
[40] See *Gonville's Trustee v Patent Caramel Co* [1912] 1 KB 599.
[41] The intermediate appellate comprises appeal decisions from trial in England, Wales, Scotland and Northern Ireland. It includes decisions by all divisions of the English Court of Appeal; supreme comprises decisions by the UK Supreme Court/House of Lords and in one unusual case the Judicial Committee of the Privy Council, where it acted in a domestic capacity on shipping issues.
[42] See Mitchell (n 16) 18–19 (describing construction of data set of 290 cases dated no later than September 1998). Our study is a UK one including England, Wales, Scotland and Northern Ireland, while Mitchell's is based on the English and Welsh jurisdiction.
[43] See eg *Mubarak v Mubarik* [2000] WL 1720346 (High Ct (Fam)); 2000 WL 1881278 (Ct App (Civ)); [2007] EWHC 220 (Fam); [2009] EWHC 220 (Fam).
[44] We maintain the use of plaintiff and defendant within this study as it reflects the terminology in the vast majority of our data set and in all other common law studies in the area.

same opinion.[45] Thus, there were 213 cases within the data set, but 216 observations.

Data were also collected on all the substantive claim(s) explicitly mentioned by a court. Information about whether a corporate disregard request lay in contract, criminal, fraud, deception, statutory or tort law was collected, as was the specific type of sub-claim, such as negligence or strict liability.[46] The claims were also sub-divided into categories that facilitated the ability to examine the asymmetry between contract and tort. Claims involving contracts were recorded according to whether the bargaining parties were an individual and/or an organisation, using a scheme designed to measure bargaining power.[47] We also recorded whether claims involving torts were intentional torts against person versus property,[48] negligence, strict liability or tortious interference.[49] Claims in fraud or deception were specified as careless misrepresentation, deceit (non-tortious), fraudulent representation or fraudulent transfer.[50]

All substantive claims data were coded on a non-exclusive basis. A request to disregard the corporate form can be grounded in a case that involves multiple substantive claims, and those claims may be related not only to each other, but also to the court's ultimate disposition. Like Thompson, Mitchell apparently treated substantive claims on an exclusive basis, such that a case was coded to have no more than one substantive claim.[51] In contrast, we recorded all of the substantive claims and sub-claims that were present within a case; this non-exclusive approach permits examination of whether different combinations of substantive claims have a relationship with a court's decision to disregard the corporate form, as well as a less mediated perspective on this aspect of corporate disregard cases.

Nevertheless, an unavoidable set of concerns exists about the objectivity of any content analysis such as this. Our data set is constructed from reported and unreported judicial decisions, so omits cases that are not available in official reports; further, the data set contains only decisions that reached final disposition, so our study does not reflect any of the corporate disregard requests that have been arbitrated, mediated, settled or dismissed, an unknown universe that has been estimated to comprise as much as 'ninety-nine percent

[45] See eg *Yukong Lines Ltd of Korea v Rendsburg Investments Corp* [1998] BCC 870, which involves two different types of shareholders.

[46] The specific sub-claims are: careless misrepresentation, deceit (non-tortious), fraudulent misrepresentation, fraudulent transfer, intentional tort with person, intentional tort with property, material misrepresentation, negligence, strict liability, and tortious interference with contract.

[47] See M Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press 1986) 82.

[48] See WL Prosser and others, *Prosser and Keeton on the Law of Torts* (5th edn, West Publishing Co 1984).

[49] Tortious interference comprises decisions involving tortious interference with contract as well as tortious interference with business relations.

[50] See J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (28th edn, OUP 2002) 236–75; PS Atiyah, *Atiyah's Introduction to the Law of Contract* (5th edn, OUP 1995) 257–65.

[51] See Thompson (n 20) 1058, table 9 (depicting different types of substantive claims for 1572 cases, while the entire data set comprises approximately 1600 cases); Mitchell (n 16) 24, table 8 (depicting different types of substantive claims for 174 cases, while the entire data set comprises 290 cases).

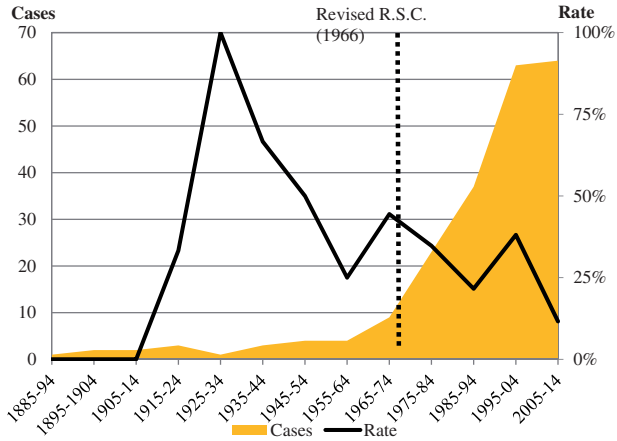

Figure 1. Disregard cases and decade rate.

of all claims for damages'.[52] The increasing digitisation of cases over the last few decades may also have had an impact on our data set, which we discuss further in section 4.

Accordingly, one should bear in mind that our results are susceptible to selection bias.[53] Some of the outcomes of our study may be affected by litigants' estimates and perceptions of the strength of *Salomon* as a sacrosanct precedent.[54] As our data timeline in Figure 1 demonstrates, that early case is accurately described as having an 'iron grip' on UK company law,[55] as the House of Lords established a strong presumption against corporate disregard for a good part of the 20th century. This may have caused, for large parts of the data set's time period, litigants to forgo or abandon suits seeking to disregard the corporate form. The ability to restore a dissolved or struck off company under the provisions of section 1029 of the Companies Act 2006 may also mitigate against creditors having to pursue a corporate disregard action. Moreover, some workers in Britain who sustain a personal injury have their

[52] See JF Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 Am UL Rev 1567, 1612. Scotland and Northern Ireland have similar rates of settlement to England and Wales. Unfortunately, completely reliable settlement data for UK cases are not available. See S Cooper and S Morris, *Personal Injury Litigation, Negotiation and Settlement* (Legal Studies Research Branch Scottish Executive 2002) ch 5, para 5.5; B Fox and others, 'Litigation and Enforcement in UK (Northern Ireland)' (2015) <http://uk.practicallaw.com/7-579-4505_para_30>.

[53] See generally GL Priest and B Klein, 'The Selection of Disputes for Litigation' (1984) 13 JLS 1.

[54] *Salomon v Salomon* (n 1); reversing the Court of Appeal, the House of Lords found that companies are entities legally distinct from their incorporators. See J Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 CLJ 284.

[55] D Prentice, 'Some Aspects of the Law Relating to Corporate Groups in the United Kingdom' (1999) 13 Connecticut Journal of International Law 305, 320, 316; see also *Williams and Humbert Ltd v W & H Trade Marks (Jersey)* [1986] AC 368, 397 (HL).

legal fees covered by trade unions,[56] which may increase the probability that plaintiff workers will receive a settlement offer.[57] Similarly, compared with other jurisdictions, the existence of the National Health Service may mute the full effect of the *Salomon* decision where involuntary creditor tort victims are concerned.[58]

The fee-shifting rule is also present for a significant part of our study's time period.[59] Although the theories and empirical evidence on the effect of fee shifting are mixed,[60] there is some basis to believe that requiring losing litigants to pay for both sides' legal fees results in more suits by plaintiffs with stronger cases.[61] Unfortunately, without any comprehensive data on non-filed or settled cases, or litigants' resources, the magnitude of selection bias in the UK courts remains unknown. It should, however, be borne in mind when interpreting this and any case based empirical study's findings.

Our content analysis also involves degrees of choice. After planning and constructing our initial data set, we decided to approach cases involving multiple decisions in a different way than Mitchell's and Thompson's studies. Mitchell's cumulative approach to include all the decisions at any court level as a case proceeds, for instance, may illuminate the decision-making patterns between the different courts, while our non-cumulative focus on only the final, relevant decision aims to illustrate more the changing shape of the finally determined outcome over time.[62] Thus, our decision about how to handle multiple decisions involving the same request results in a different empirical portrait than that provided by Mitchell and Thompson, and those differences should be taken into account when examining and interpreting results from the studies. For these reasons, we make no claim that our corpus of corporate disregard cases, or the empirical results that we present, embody an absolute truth.

[56] See HM Kritzer, 'A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases' (1989) 14 L & Soc Inquiry 157, 173–7; HM Kritzer, *Let's Make a Deal: Understanding the Negotiation Process in Ordinary Litigation* (University of Wisconsin Press 1991) 93–7.

[57] This insurance scheme, therefore, might disproportionately discourage certain kinds of tort cases from reaching the courts. See HG Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press 1987) 168; Kritzer, 'A Comparative Perspective' (n 56) 174. The regulatory activities of the Health and Safety Executive (HSE) may also have a role in diminishing the number of underlying torts that might otherwise arise. On the activities of the HSE over the past 40 years see HSE, 'HSWA 40 and Beyond' <www.hse.gov.uk/aboutus/40/index.htm> accessed 17 July 2018.

[58] Tort rates in the UK historically have been comparatively low. See BS Markesinis, 'Litigation-Mania in England, Germany, and the USA: Are We So Very Different?' (1990) 49(2) CLJ 233; E McGaughey, '*Donoghue v Salomon* in the High Court' [2011] JIPL 249.

[59] See eg Kritzer, 'A Comparative Perspective' (n 56) 173–7.

[60] See HM Kritzer, 'Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?' (2002) 80 Tex L Rev 1943, 1983.

[61] See JW Hughes and EA Snyder, 'Litigation and Settlement under the English and American Rules: Theory and Evidence' (1995) 38 JLE 225, 248–9; AM Polinsky and DL Rubinfeld, 'Does the British Rule Discourage Low-Probability-of-Prevailing Plaintiffs?' (1998) 27 JLS 519.

[62] We do, however, also gather the affirm and reverse data for our cases, so the relationship between the courts is examined.

Nor are we claiming that our data or results were obtained in a purely objective manner. Our study examines raw information that was extracted and coded from corporate disregard opinions. With some information, the process was mechanical, such as identifying the relevant court and then associating it with one of three possible jurisdictional levels or whether a court affirmed the lower court or not. With other information, though, the process involved more complex coding decisions. For instance, in recording all the substantive claims within a case, we decided to use a system comprising five possible types of substantive claims and ten different sub-claims; as a result, there is an embedded choice within our recorded data about how many types of (sub-)claims should be used and also how a given substantive claim should be classified. That choice also exists within Thompson's and Mitchell's studies, which used a system of, respectively, four possible types of substantive claims and seven possible categorical obligations.[63]

This, however, should not be regarded as a defect of or within the coding process. On the contrary, utilising categories for substantive claims facilitates the ability to organise information and to focus analysis. In the way that biological taxonomies allow organisms to be grouped together and ranked in a systematic way, classifying fraudulent transfer claims, for instance, within the broader, but conventional category of fraud or deception permits us to see how corporate disregard requests fare in those cases, as well as compare them with those lying in contract and/or tort. Admittedly, our decision to recognise fraud or deception as a distinct category does complicate one's ability to evaluate our results versus those from Thompson's and Mitchell's studies, both of which elected not to recognise that category and to code substantive claim data on an exclusive basis.

Nothing about our approach is inherently arbitrary or imprecise. Some have speculated that the different outcomes from various disregard studies in the United States are entirely the product of coding decisions.

> Regardless of whether fraud falls into contract or tort as a doctrinal matter, from an empirical standpoint this coding scheme is purely arbitrary: it reflects the coder's choice alone ... The coder has determined the result, not the data.[64]

According to this criticism, a degree of discretion injects imprecision and subjectivity within how certain qualitative features of judicial opinions are recorded within a data set. If correct, these concerns would not be confined simply to disregard studies, but would apply to virtually every existing empirical study in the universe of qualitative content analyses of judicial opinions.

These concerns, however, are overplayed in our view, and seem to misunderstand the overall enterprise of empirical analysis. No one truly knows whether all

[63] See Thompson (n 20) 1058 (contract, criminal, tort and statute); Mitchell (n 16) 18–19 (admiralty (in rem), contractual, criminal, equitable wrongdoing, procedural, statutory (tax, etc), tortious).
[64] Macey and Mitts (n 23) 112–13.

the differences between those studies, or ours here, are attributable to coding differences. Absent the ability to access or replicate the exact study, even an attempt to reverse-engineer results cannot establish definitively whether the variations completely reflect subjective choices or whether they may be due in part to differences in the scope and shape of the raw information.[65] More broadly, manual coding is necessary and not an irredeemably biased or corrupt process that precludes quality empirical analysis.[66]

Even if information from judicial opinions could be collected and coded by an entirely automated procedure, there are still elements of choice and subjectivity that permeate not only how data are classified, but also how results are interpreted and presented.[67] In our view, the attempt to weed out any vestige of human discretion and judgment from content analysis is misdirected. The ultimate objective of any empirical study is to contribute to an overall understanding of the world, and precisely because that world is complex, our understanding of it is enhanced by the ability to discern, process and share information in different ways.[68]

4. *Results*

This section presents the most notable results from our data collection and analysis. We first present general findings about trends within the entire data set. Then we present specific findings about substantive claims and the English Court of Appeal.

A. *General Results*

This study finds an overall corporate disregard rate over the period 1885–2014 of 35.65%. This is considerably lower than the 47.24% rate found by Mitchell's 1999 study[69] and lower than the US rates of Thompson in 1991 (40.18%) and Oh in 2010 (48.51%), but is similar to the rates found in Canada and Australia.[70] Despite academic and judicial concerns, the UK

[65] Indeed, an attempt to do just that failed to replicate Thompson's results. See Oh (n 12) 127.

[66] 'Coding is a near-universal task in empirical legal studies. No matter whether their data are quantitative or qualitative, from where their data come, or how they plan to analyze the information they have collected, researchers seeking to make claims or inferences based on observations of the real world must code their data': L Epstein and AD Martin, 'Quantitative Approaches to Empirical Legal Research' in Cane and Kritzer (n 19) 911.

[67] cf Macey and Mitts (n 23) 142 ('[O]ur coding scheme is *relatively* objective and thus *likely* to lead to little variation between coders'; emphasis added).

[68] See HM Kritzer, 'The Data Puzzle: The Nature of Interpretation in Quantitative Research' (1996) 40 American Journal of Political Science 1.

[69] Mitchell (n 16) 20, table 1.

[70] See Ramsay and Noakes (n 24) 250 (finding a 38.46% rate in Australia); Khimji and Nicholls (n 24) (finding a 36.03% rate in Canada). See also Thompson (n 20) 1048 (reporting a 40.18% rate in US); Oh (n 12) (reporting a more recent US rate of 48.51% rate).

Table 1. Disregard by study decade

Years	*n*	% of total	Disregard rate (%)
1885–1894	1	0.46	0.00
1895–1904	2	0.93	0.00
1905–1914	2	0.93	0.00
1915–1924	3	1.39	33.33
1925–1934	1	0.46	100.00
1935–1944	3	1.39	66.67
1945–1954	4	1.85	50.00
1955–1964	4	1.85	25.00
1965–1974	9	4.17	44.44
1975–1984	23	10.65	34.78
1985–1994	37	17.13	21.62
1995–2004	63	29.17	38.10
2005–2014	64	29.63	11.63

courts thus seem relatively averse to disregarding the corporate form in accordance with the presumption formulated in *Salomon*.[71]

Nevertheless, despite what appears a low overall chance of success, the number of corporate disregard cases has increased in each and every decade since the 1950s and there is sometimes wide fluctuation in the rates over the decades.

Figure 1 depicts the number of disregard cases, represented by the shaded area, and the rate at which the corporate form has been disregarded, represented by the solid line, over time. The heavy weight of the *Salomon* decision can be observed in the low number of disregard cases throughout the first half of the 20th century, when the rules of the Supreme Court did not allow the House of Lords to directly overturn previous decisions such as *Salomon*. Unlike Mitchell's finding of a tight rate of disregard over time, vacillating by no more than 8%, our study found broad fluctuations between decades (see Table 1[72]), which might be the root of general academic and judicial perceptions of the confusing and changing nature of disregard cases.[73] The data begin to change in the 1960s in terms of both number of cases and disregard rates.[74] This is particularly evident in the run up to 1966, when changes to the Rules of the Supreme Court allowed the House of Lords to

[71] Note, though, that Mitchell's (n 16) higher disregard rates may be attributable to the central difference in methodology between the studies, because multiple outcomes were recorded by Mitchell for a single case whereas this study has only the single final outcome recorded.

[72] While the first data point within our final dataset is *Farrar v Farrars Ltd* [1888] (n 29), searches were performed in databases containing decisions that date back to 1558. We use 1885 as the start point to ensure an even decade study up to 2014.

[73] See Mitchell (n 16); see also n12.

[74] In the early decades, the low numbers are likely signifiers of the strength of the *Salomon* doctrine throughout this period, so it should be borne in mind that analysis of the early cases carries a small numbers caveat.

overrule its previous decisions, as well as a wider loosening of precedent, particularly in the Court of Appeal.[75] Indeed, decisions from 1970 onwards comprise almost 90% of the total data set, with a 35.75% disregard rate, while almost 44% of the cases are from the new millennium, with a comparatively higher 43.16% disregard rate.[76] Despite its 19th-century provenance, corporate disregard, in terms of the weight of decisions, appears to be a relatively modern phenomenon.

The reasons for the more modern surges in litigation from the 1990s onwards are not entirely clear, but may partly relate to the English Court of Appeal decision in *Adams v Cape Industries*,[77] which attempted to severely narrow the possibility of corporate disregard. Similar to Mitchell's finding,[78] our data also reveal a counterintuitive increase in the disregard rate in the study decade after *Adams* from 21.62% to 38.10% (Table 1). Additionally, our data show the triggering of a remarkable litigation wave, where the number of cases nearly doubles from the previous decade (Table 1 and Figure 1).

There are numerous plausible triggers for the post-1990s corporate disregard litigation boom, that work either separately or together. The boom could partly be attributable to the Courts and Legal Services Act 1990 and the subsequent Woolf reforms in 1999, which may have freed up the senior courts for more complex corporate disregard cases while also, as was intended, facilitating small business access to the courts.[79]

Wider societal and economic changes may also have had an impact. While shipping cases tended to consistently exhibit careful liability limitation planning throughout our entire study period, it is only from the mid-1990s onwards that general liability planning appears more widespread within the case data, both in the traditional private law arena and outside it. Family law cases involving matrimonial assets of very wealthy individuals being placed within contested corporate structures are a particularly notable part of this expansion. In terms of its underlying facts, *Prest v Petrodel* is not all that unusual within our data.[80] So one of the reasons for the rise of disregard litigation may be the growth in the prevalence of liability and tax planning through corporations, both generally and outside its traditional commercial sphere.

The *Adams* decision was also widely perceived as a poorly reasoned and unfair policy decision[81] that may have triggered a wave of litigation to correct

[75] *The Practice Statement* [1966] 3 All ER 77. See *Davis v Johnson* [1979] AC 264; H Carty, 'Precedent and the Court of Appeal: Lord Denning's views explored' (1981) 1 LS 68.

[76] The increase in cases does not appear to be the product of unreported decisions, which are available electronically from 1980 but account for only five observations within this data set. Interestingly, though, the corporate disregard rate for the overall data set is less than that within unreported decisions, which suggests that they may be used for potentially reversible rulings.

[77] *Adams* (n 4).

[78] Mitchell (n 16) 20.

[79] See L Mackay, 'Litigation in the 1990s' (1991) 54 MLR 171; S Sedley, 'Improving Civil Justice' (1990) 9 CJQ 348; R Thomas 'Civil Justice Review—Treating Litigants as Consumers' (1990) 6 CJQ 51.

[80] See n 12.

[81] J Parkinson, *Corporate Power and Responsibility* (OUP 1993) 363–4.

it, fuelled additionally by disputes linked to the end of the 1980s' economic boom. Only five years earlier, in 1985, the Court of Appeal had come to the exact opposite conclusion to *Adams*.[82] Practitioners may have understood that, as we examine below, the English Court of Appeal was still generally amenable to disregard arguments.

Another element in the increase in disregard cases may be that more cases are available to us from the 1990s onwards. Over the past few decades, the proliferation of legal research services has resulted in expanded electronic databases; this, combined with increased digitisation, may have resulted in a general systemic increase in decisions, including corporate disregard cases. We investigated the number of cases within the UK databases of LexisNexis and Westlaw to see if such an increase could be discerned. Overall, a significant expansion in the total number of all available UK cases occurs from the middle of the first decade of the new millennium. This pattern of expansion does not match our corporate disregard data, which started to rise decades earlier. Our database is also a filtered one, with cases only appearing in it once filtered for eligibility and significance, so in that sense the number of cases that find their way from the unfiltered mass into the final data set is unlikely to mirror a general increase in available cases.[83] While we cannot entirely dismiss the impact of digitisation and general expansion, we have investigated and filtered to the extent that is possible.

To return to our generalised results, a much clearer matter from the general data patterns is that corporate disregard occurs exclusively against corporations where shareholdings are not dispersed.

Mitchell's study found no successful disregard actions against a UK 'public' company.[84] To get a better sense of what was occurring with companies in our data set, we examined their legal status and shareholdings and divided them into close/private,[85] public/public limited company[86] and sub-categories of listed and non-listed public limited companies. Overall, public limited companies[87] accounted for only 16, or 7.40%, of the 216 corporations against which disregard actions were brought.[88] Only 8 (3.70%) of the 216 corporations were public limited companies listed on a stock exchange and had a dispersed shareholding. The low numbers of public limited companies, and

[82] *Re a Company* (n 4); '[T]he court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.'

[83] Additionally, we ran searches in both LexisNexis and Westlaw, so the relative restrictive scope of each database was of no likely consequence.

[84] See Mitchell (n 16) 20.

[85] One of the companies within the private close dataset is a state commercial trading company. Although it is an unusual type of private company it is not listed and has one shareholder and so we have included it in the close/private dataset.

[86] Or European equivalent.

[87] In the UK, only a public limited company can sell shares to the public. It can do this by listing on a stock exchange, but it doesn't have to, so not all public limited companies are listed companies.

[88] There are 213 cases within the data set but 216 observations, as different defendants within some cases were treated differently for disregard purposes.

Table 2. Disregard by corporation type

Corporation	*n*	Disregard rate (%)
Close/private	200	38.00
Public/public limited company	16	12.5
plc (listed)	8	0.00
plc (non-listed)	8	25.00

listed ones in particular, within the data set may indicate that key elements of a successful disregard claim may be absent for these types of corporations.

Public limited companies used as a separate disregard rate group had a low 12.5% disregard rate. However, that low percentage was driven by listed public limited companies, which had a 0% disregard rate. This 0% rate comports with all UK as well as North American empirical studies of corporate disregard involving corporations with dispersed shareholdings.[89] In the United States, this is explained by the lack of requisite control in public corporations due to their dispersed shareholding, and is similarly plausible in the UK, context given ours and Mitchell's findings.[90] Although the vast majority of the companies within our data set are not listed entities, a wider contextual factor that may be impacting here is the general nature of share ownership in the UK within listed companies. Although there are disputes about when exactly the process of dispersal became complete, broadly, by the 1970s, UK listed companies emerged as dispersed entities.[91] This is not the case in Australia, where families in particular still retain significant holdings in listed companies,[92] and disregard patterns for public companies are very different. For example, Ramsay and Noakes, in their Australian study of 104 disregard cases, found 18 examples of attempts to disregard a public company, and in 4 cases this was successful.[93] This may further suggest that ownership patterns matter for disregard outcomes. This also links to another finding in our study that echoes both Thompson and Mitchell (Figure 4), that individual shareholders are more susceptible to disregard than corporate shareholders. As we discuss further

[89] See Mitchell (n 16) 21–2. See also Oh (n 12) 110, table 3; Thompson (n 20) 1047 and fn 9; Khimji and Nicholls (n 24) 232. But see Ramsey and Noakes (n 24) 268, table 3 (reporting successful Australian veil-piercing in four public companies).

[90] See eg FA Gevurtz, *Corporation Law* (Thompson Reuters 2000) 78–9. Mitchell's study finds that controlling shareholders were publicly dispersed in 20.69% of cases and parent companies in 34.48% of cases: Mitchell (n 16) 22. No data were published on whether these parent companies were closely or publicly held.

[91] J Scott and C Griffe, *Directors of Industry: The British Corporate Network 1904–76* (Polity Press 1984) ch 4; J Scott, *Corporate Business and Capitalist Classes* (OUP 1997) 89–90; L Hannah, 'The Divorce of Ownership from Control from 1900: Re-calibrating Imagined Global Historical Trends' (2007) Business History 404; B Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2009) ch 7; B Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 JLS 459.

[92] A Dignam and M Galanis, 'Australia Inside/Out: The Corporate Governance System of the Australian Listed Market' (2004) 28(3) MULR 21.

[93] See Ramsey and Noakes (n 24) 23.

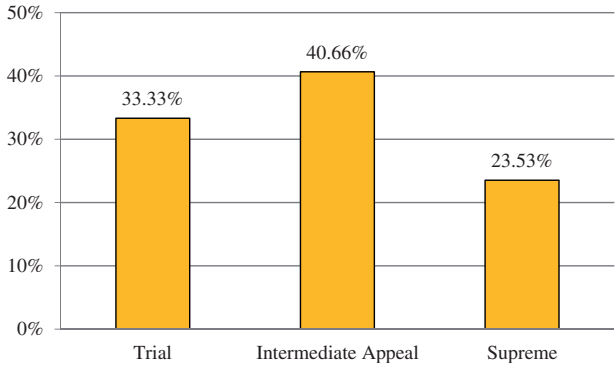

Figure 2. Disregard by court level.

below in Figure 7, apart from in tort and marginally in fraud or deception cases, this holds true even where the claim is being pursued by a government agency against a corporation.

The disregard picture for non-listed public limited companies is somewhat more complex, as they have a 25% disregard rate. Although we are dealing with low numbers, in the two successful public limited company disregard cases there was a clear identifiable controller at the heart of the disregard outcome. Indeed, all the non-listed public limited companies are similar to close private companies, with only a small number of shareholders in each, and with no immediately obvious control characteristic distinguishing them from a private close company. The non-listed public limited companies as a group do, however, exhibit much more complexity in terms of the group structures that they are part of. So, although they are similar to close companies, the formation as a public limited company, at a significantly higher capital formation cost,[94] may be a signal that public limited company status indicates a higher level of liability limitation planning, with perhaps an optimistic eye to a public share sale in the future, than a private company despite an identifiable controller being present in both. In turn, this might explain the lower disregard rate for this group versus the close/private group as the judiciary may be reluctant or unable to set aside a well-planned liability-limiting group structure, as Mitchell found evidence of in his English study[95] and Matheson in the United States.[96]

Figure 2 depicts the corporate disregard rates by court level, with each case being recorded only once at the highest level of final disposition. It is clear

[94] £50,000 for a public limited company versus a nominal amount for a private company. Although £50,000 is the minimum share capital, only 25% of it needs to be paid up, which reduces the figure to £12,500.
[95] See Mitchell (n 16) 22.
[96] Matheson (n 23) 1097.

from the figure that corporate disregard claims succeed most often within the intermediate appellate courts.[97] Notably, the presumption against corporate disregard is strongest within the Supreme Court.

We can observe from Figure 2 that the intermediate appellate court is a prominent driver of corporate disregard. Appellate court disregard rates feature in a number of empirical studies. In his US study, Thompson found no significant difference between the rates of the court levels.[98] Oh found that US state intermediate appellate disregard rates were higher than the trial level, but intermediate appellate disregard rates were lower at the federal level.[99] Matheson, studying disregard in the parent–subsidiary context, found appellate courts disregarded twice as often as trial courts in decisions in the United States.[100] In Canada, there was no significant difference between court levels, while in Australia, the appeal courts were less likely to disregard than the trial level.[101] Mitchell found a lower rate of disregard, at 40.71%, present in the English Court of Appeal than the overall rate within the study of 47.24%. Indeed, the Supreme Court had only a slightly higher rate of 42.86%. Mitchell did, however, find a very high disregard rate of 56.67% in the decade of the 1970s, which he thought likely attributable to the English Court of Appeal, and specifically to Lord Denning's activities.[102]

In order to explore if the English Court of Appeal might be behind the fluctuating general rates of disregard, we broke down its rates by study decade.[103]

As Table 3 reveals, beginning in 1965, disregard rates reached 50.00%, rising to 83.33% in the mid-1970s to mid-1980s. Until this point, the rates are drawn from small numbers, but by 1985 we see much bigger numbers, and the rate declines sharply to 15.00% in the late 1980s, during the early *Adams* period, before rising back to 68.42% in the post-*Adams* period and declining to 47.37% in our most recent decade. Apart from the 1985–1994 period, these are extremely high recent disregard rates, based on solid numbers of cases. They reveal, as Mitchell suggested, that the English Court of Appeal is a driver of high disregard rates and may be one of the sources of general academic and judicial concern about corporate disregard. Given that the Supreme Court has the lowest rate of disregard within the court levels and the Court of Appeal has the highest, particularly within recent decades, there appears to be a clash

[97] The largest number of trial court decisions was from the High Court (King's or Queen's Bench Division), which adjudicated 53 cases, with a 32.08% corporate disregard rate. The Chancery Division, which might seem to be the more logical province for corporate disregard claims, adjudicated 29 cases, with a 27.59% corporate disregard rate.

[98] Thompson (n 20) 1050.

[99] Oh (n 12) 112.

[100] Matheson (n 23) 1092.

[101] Khimji and Nicholls (n 24); Ramsey and Noakes (n 24) 32.

[102] See Mitchell (n 16) 20.

[103] Until the 1970s, there were very few cases, so the usual small numbers caveat is present, though with an important rider. In the area of corporate disregard, the small numbers themselves are a potential signifier of the strength of operation of the *Salomon* doctrine throughout this period to effectively stifle disregard actions.

Table 3. Disregard by the English Court of Appeal by decade

Decade	*n*	% of total	Disregard rate (%)
1885–1894	1	1.32	0.00
1895–1904	1	1.32	0.00
1905–1914	0	0.00	—
1915–1924	2	2.63	50.00
1925–1934	0	0.00	—
1935–1944	1	1.32	100.00
1945–1954	2	2.63	0.00
1955–1964	1	1.32	0.00
1965–1974	4	5.26	50.00
1975–1984	6	7.89	83.33
1985–1994	20	26.32	15.00
1995–2004	19	25.00	68.42
2005–2014	19	25.00	47.37

within the system of precedent, which may similarly be linked to the academic and judicial literature on how unclear the law in the area is.[104] Indeed, the drop in the overall rate at the end of our study period both in the overall rate and the rate of the Court of Appeal may be attributable to attempts by the senior judiciary to narrow the disregard precedent significantly.[105] We return to the particular phenomenon of the English Court of Appeal in section 4C below.

As observed in Table 4, we found evidence at both the intermediate and supreme levels that UK courts are prone to an 'affirmed' effect, in which appellate courts have a tendency to defer to lower court decisions.[106] Specifically, over 66.67% of the decisions by the intermediate appellate courts and 70.59% of the decisions by the supreme appellate courts result in an affirmance of the lower court's decision; accordingly, there would appear to be a strong disincentive for losing parties to seek an appeal. However, examination of the disregard rates reveals a more nuanced portrait of a potential appellant's probabilities for success. Intermediate appellate courts exhibit an asymmetrical disregard rate when they affirm (45.90%) as compared with when they reverse (30.00%); this disparity is in stark contrast to the disregard rates for supreme appellate courts, which have roughly comparable disregard rates whether they affirm or reverse an appeal. The import of the asymmetry within intermediate appellate courts indicates that where a

[104] See n 13.
[105] See eg the views of Lords Neuberger and Sumption in *Prest v Petrodel* (n 2).
[106] On the affirmed effect see eg C Guthrie and TE George, 'The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals' (2005) 32 Fla St UL Rev 357.

Table 4. Disregard by jurisdiction and disposition, affirm or reverse

Jurisdiction disposition	*n*	Disregard rate (%)
Trial	108	33.33
Intermediate appellate	91	40.66
Affirm	61	45.90
Reverse	30	30.00
Supreme appellate	17	23.53
Affirm	12	25.00
Reverse	5	20.00

disregard claim has been successful at trial, the defendant should be quite wary of their chances of overturning it at the intermediate appellate court level, as appeals tend to result more often in an affirmance, and when that occurs, the disregard claim is upheld at a 45.90% rate, which exceeds the 35.65% overall rate for our entire data set and is virtually akin to the toss of a coin. As we explore further in section 4C, this elevated disregard rate seems to be driven by decisions within the English Court of Appeal.

We also found that who is bringing the action may also play a part in the disregard outcome. Figure 3 depicts how each type of plaintiff does at each judicial level.

Overall, government plaintiffs prevail 56.41% of the time, whereas corporate and individual plaintiffs prevail 30.91% and 31.34% of the time, respectively. In terms of the disregard patterns for government plaintiffs at each court level, government plaintiffs are very successful at the appeal and supreme levels, but curiously not at the trial level, given, as we observe in section 4B, that these actions are predominantly criminal in nature. Judicial expertise should also

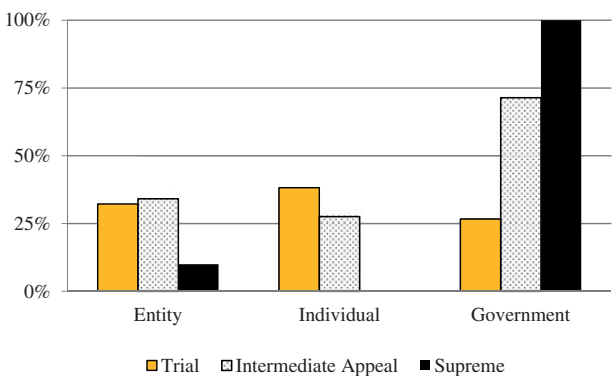

Figure 3. Disregard by plaintiff and court level.

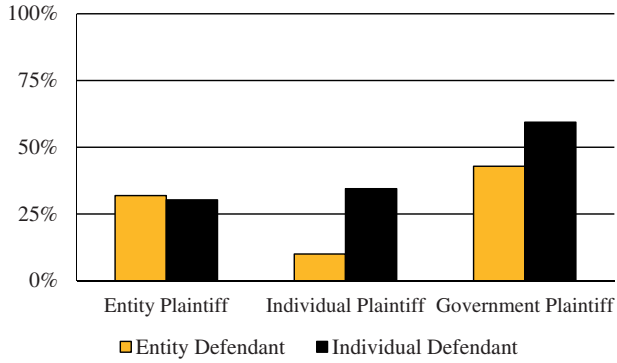

Figure 4. Disregard by plaintiff and defendant shareholder.

match the claim closely at the trial level. In other words, these are non-commercial judges[107] who are refusing to disregard the corporate form at the trial level in an action brought by a government agency. This indicates that, at trial level at least, an assumption that a criminal claim and a criminal expert judge would be more likely to lead to a disregard outcome would be incorrect, even though general disregard rates, as we will observe, are high for criminal claims. Government resources versus entity and individual resources may be one key factor here, as government agencies have the resources to pursue an appeal to its final determination.

Even more curiously, we found, as did the Thompson, Khimji and Nicholls, Mitchell, Oh, and Ramsay studies, that individual shareholders tend to be more susceptible to disregard than their entity counterparts.[108]

Figure 4 depicts the disregard rate for different types of plaintiffs, broken down by whether the defendant shareholder is an entity or an individual; as the figure evinces, corporate disregard claims are more successful against individual defendant shareholders than entity shareholders, where the plaintiff is an individual or government entity. Where an entity is the plaintiff, the disregard rates are virtually the same whether the shareholder is an individual (30.30%) or an entity (31.91%). Again, we observe high disregard rates where a government agency is the plaintiff, but we also observe a much lower disregard rate where the shareholder is an entity. These results are also roughly in line with the dynamics for each level of court exhibited in the overall data set.

[107] The commercial background and experience of a judge may bring certain technical commercial skills and/or awareness of the importance of the *Salomon* decision to bear. A non-commercial background may be a signal for absence of commercial experience and/or for the placing of less emphasis on the importance of the *Salomon* decision versus, say, fairness or interest of justice considerations.

[108] Mitchell (n 16) 21–2. See also Oh (n 12) 110; Thompson (n 20) 1055; Khimji and Nicholls (n 24); Ramsey and Noakes (n 24) 38.

Table 5. Disregard by plaintiff and shareholder types

Plaintiff–shareholder	*n*	Disregard rate (%)
Entity plaintiff	110	30.91
Entity–entity	47	31.91
Entity–individual	66	30.30
Individual plaintiff	67	31.34
Individual–entity	10	10.00
Individual–individual	58	34.48
Government plaintiff	39	56.41
Government–entity	7	42.86
Government–individual	32	59.38

Table 6. Disregard by jurisdiction and plaintiff type

Jurisdiction–plaintiff	*n*	Disregard rate (%)
Trial	108	33.33
Entity	59	32.20
Individual	34	38.24
Government	15	26.67
Intermediate appellate	91	40.66
Entity	41	34.15
Individual	29	27.59
Government	21	71.43
Supreme appellate	17	23.53
Entity	10	10.00
Individual	4	0.00
Government	3	100.00

In Table 7,[109] where we break the results down by court and shareholder type, we can observe a strikingly similar pattern at the Court of Appeal and Supreme Court levels. Further, the results with regard to individual and entity shareholder disregard rates comport with Mitchell's study, as well as every other common law study,[110] and remain one of the most puzzling findings in

[109] In Table 7 the number of cases at the trial level is less than the number of total entity and individual cases because there were multiple cases involving both types of shareholders. In Table 5 the number of cases for a specific plaintiff type may be less than the total number of cases by shareholder type because there are cases involving multiple types of shareholders.

[110] See Mitchell (n 16) 22, table 4 (reporting a 48.33% disregard rate for individual shareholders versus 42.00% for corporate shareholders). See also Matheson (n 23) 1114 (reporting a rate of 20.56% for 360 parent-subsidiary cases); Oh (n 12) 110, table 4 (reporting a rate of 51.69% for 2047 individual shareholder cases versus 41.17% for 889 corporate parent cases); Ramsey and Noakes (n 24) 269, table 5 (reporting a rate of 42.37% for 59 individual shareholder cases versus 32.56% for 43 corporate parent cases); Thompson (n 20) 1055, table 7 (reporting a rate of 43.13% for 339 individual shareholder cases versus 37.21% for 237 corporate parent cases).

Table 7. Disregard by jurisdiction and shareholder type

Jurisdiction–shareholder	*n*	Disregard rate (%)
Trial	108	33.33
Individual	85	32.94
Entity	26	34.62
Intermediate appellate	91	40.66
Individual	61	45.90
Entity	30	30.00
Supreme appellate	17	23.53
Individual	10	30.00
Entity	8	12.50

the empirical evidence on corporate disregard, given general academic normative claims that disregard is more easily justified in an entity shareholder context.[111] Additionally, it contradicts claims that courts do not differentiate on the basis of the type of shareholder involved.[112] Resources may play a part in that a defendant corporate shareholder may have greater resources to bring to defending a disregard claim, and so too may the role of an individual shareholder as an identifiable controller, similar to the finding that disregard occurs exclusively against non-dispersed companies.

B. *Results by Claim*

Corporate disregard is a remedy that arises after a party asserts a substantive claim,[113] that is subject to discretionary characterisation and selection by a plaintiff. Accordingly, there is a degree of independence about the extent to which the success of a corporate disregard claim reflects the nature of an originating cause of action.[114] Nevertheless, the contextual nature of the substantive claim may have a bearing on disregard rates and may shed some light on why uniform disregard principles have been so elusive. The voluntary nature of a contractual relationship may, for example, mitigate against a disregard outcome compared with an involuntary tort victim or a criminal or other claim involving fraud or deception. We therefore examined disregard rates by claim.

[111] See eg SM Bainbridge, 'Abolishing Veil Piercing' (2001) 26(3) J Corp L 528; JM Landers, 'A Unified Approach to the Parent, Subsidiary, and Affiliate Question in Bankruptcy' (1975) 42(4) U Chi L Rev 599; FH Easterbrook and DR Fischel, 'Limited Liability and the Corporation' (1985) 52(1) U Chi L Rev 111; DW Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91(6) Colum L Rev 1619.

[112] See Gower and Davies (n 11) 133; Bainbridge (n 111) 528. But see Oh (n 12) 111–12; *Dole Food Co v Patrickson* [2003] 538 US 468.

[113] See Tables 5–7.

[114] See PB Oh, 'Veil-Piercing Unbound' (2013) 93 BUL Rev 89.

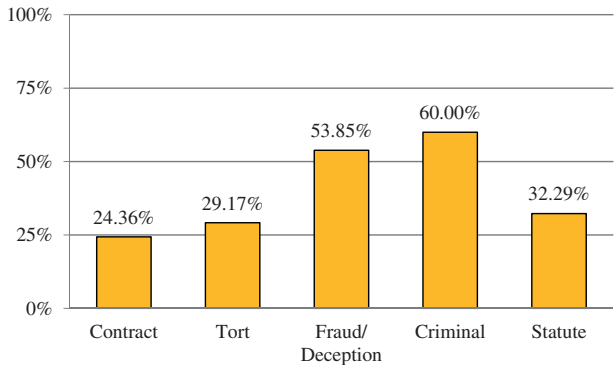

Figure 5. Disregard by claim.

In private law terms, corporate disregard claims are grounded in contract rather than tort by a substantial margin. This result comports with other major empirical studies of corporate disregard,[115] and the disparity in the number of claims in contract over tort cannot be accounted for by plaintiff characterisation of contract or tort claims as fraud or deception claims.[116] Notably, corporate disregard claims within our study, unlike the outcome in both the Thompson and Mitchell studies, prevail more in tort than in contract, reviving the possibility that in a contextual and normative sense, the involuntary creditor presence may be impacting.[117]

Our additional finding that corporate shareholders are almost uniquely susceptible to disregard in tort cases and the exceptional disregard rate for tort found in the Court of Appeal, discussed in section 4C, also indicates that the contextual dynamics of tort disregard cases are different than other areas.

An important part of the disregard story concerns fraud or deception. As Table 8 shows, the 53.85% corporate disregard rate for fraud or deception claims is substantially higher than that for the entire data set.

Among fraud or deception claims, fraudulent representation is the most frequent sub-claim, yet it features a lower corporate disregard rate of 40.00%;

[115] See Mitchell (n 16) 24, table 8. Similar results obtain within studies of foreign corporate disregard opinions. See Oh (n 12) 128–9, table 8 (reporting 1730 contract claims and 400 fraud claims in US data set); Ramsey and Noakes (n 24) 269, table 6 (reporting 20 contract claims and 14 tort claims in Australian data set); Thompson (n 20) 1058, table 9 (reporting 779 contract claims and 226 tort claims in US data set).

[116] Fraud or deception claims can be recharacterised as contract or tort claims (and vice versa), but the lines for recharacterisation are not always so clear. See TC Galligan Jr, 'Contortions Along the Boundary between Contracts and Torts' (1994) 69 Tul L Rev 457, 462–3 (identifying multiple considerations for determining whether a claim should be characterised as lying in contract or tort).

[117] See Mitchell (n 16) 17; H Hansmann and R Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) Faculty Scholarship Series 5035 <http://digitalcommons.law.yale.edu/fss_papers/5035> accessed 17 July 2018. Data for the frequency of contract and tort claims within the entire UK system are not available, so there is no way to know whether the population of claims for corporate disregard is representative.

Table 8. Disregard by claim and sub-claim

Claim–sub-claim	*n*	Disregard rate (%)
Contract	78	24.36
Individual–individual	0	—
Individual–organisation	25	24.00
Organisation–organisation	53	24.53
Tort	24	29.17
Intentional tort–person	0	—
Intentional tort–property	5	20.00
Negligence	18	27.78
Tortious interference	2	50.00
Criminal	50	60.00
Fraud or deception	26	53.85
Careless misrepresentation	1	100.00
Deceit (non-tortious)	8	62.50
Fraudulent representation	15	40.00
Fraudulent transfer	2	100.00
Statute	96	32.29
Bankruptcy	7	57.14
Commercial	6	33.33
Corporation	9	22.22
Employment	8	12.50
Housing	7	14.29
Administration of justice	3	66.67
Marital	13	46.15
Real property	16	31.25
Tax	6	33.33
Other	21	28.57

the disparity is noteworthy because a fraudulent representation claim can be characterised as lying in either contract or tort, so the depressed success rate for fraudulent representation may suggest that plaintiffs have elected to allege fraud or deception rather than a contract or tort claim.[118]

Figure 6 features the corporate disregard rate for the different types of plaintiffs according to substantive claim, and shows that government plaintiffs enjoy tremendous success with corporate disregard in fraud or deception, criminal[119] and statute claims. Not surprisingly, the highest concentrations of

[118] See n 116.

[119] Within the criminal category, the person and entity plaintiff cases capture, for example, situations where as part of a criminal action a related challenge involving corporate disregard is brought to the use of specific state powers.

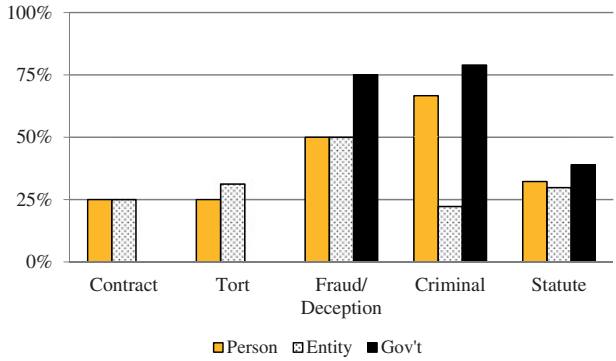

Figure 6. Disregard by claim and plaintiff type.

corporate disregard requests by government agencies lie in criminal and statute claims, where government agencies prevail almost two-thirds of the time whenever they seek to disregard the corporate form. As we discuss below with regard to the English Court of Appeal data, the primary driver of government plaintiff high disregard rate on appeal is the criminal or fraudulent element within those cases rather than the presence of a statutory provision. As such, a key part of the disregard story lies in the high rate of disregard in criminal, fraud or deception claims. In short, although the senior judiciary outwardly express that disregarding the corporation is a uniform action across all areas of law with uniform restrictive normative principles, from our data it operates differently depending on the contextual elements of the claim.

The tort data in particular provide an interesting insight into this contextual–normative dynamic. Specifically, corporate disregard claims grounded in tort stand out when examined by the type of shareholder involved.

Figure 7 breaks down each type of claim's corporate disregard rate by the type of shareholder. It shows that, contrary to the general proposition, tort claims have a uniquely high disregard rate where the shareholder is an entity. There may be a link here to the tort versus contract presence or absence of involuntary creditors already mentioned above, whereby we found the rate of disregard in tort to be higher than in contract. Certainly, the dynamics of corporate disregard in tort seem to be different than other areas, except possibly fraud or deception claims, where involuntary creditors are also present, which is almost neutral as to the type of shareholder. Overall, the context of the claim seems to be impacting on disregard outcomes, which in turn may mitigate against uniform disregard principles operating across all areas of law and may play a part in the perception of an erosion of the *Salomon* principle.

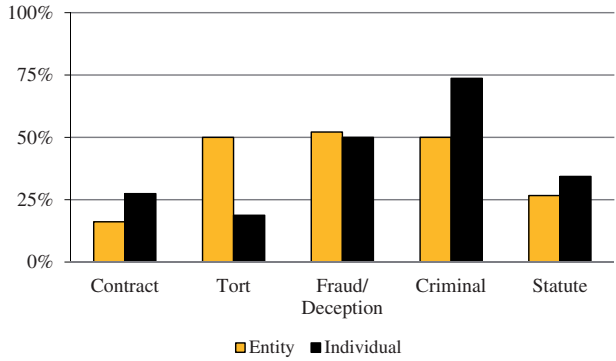

Figure 7. Disregard rate by claim and shareholder type.

C. *Results for the English Court of Appeal*

As we discussed earlier, corporate disregard claims prevail most often at the intermediate appellate level and the data for the intermediate appellate level are dominated by the English Court of Appeal. In total, 83.52% of intermediate appellate decisions in our data set are from the Court of Appeal, and its overall disregard rate of 44.74% is higher than the overall data set disregard rate of 35.19%. Before we turn directly to the Court of Appeal, we need to set the context for its decisions by examining the affirmed patterns at the overall appeal level as there is, as we considered in Table 4, strong evidence of a general 'affirmed' effect.[120]

Figure 8 shows the disregard rate at different appellate levels, broken down by whether the lower court's disregard decision was affirmed or reversed. As Figure 8 shows, at both levels, the disregard rate is higher for decisions to affirm, which manifests deference towards lower court decisions, even where that decision is a disregard one.

Figure 8 shows that courts at the intermediate appellate level have substantially higher disregard rates than their peers at the Supreme Court level, and this is true whether the decision is to affirm or reverse. Figure 8 also shows that intermediate appellate courts affirm cases that disregard the corporate form at a 45.90% rate, which is higher than the 35.65% overall data set rate and for any level of court. At the same time, intermediate appellate courts seem to exhibit an 'affirmed effect', in that over 66% of the lower court

[120] Unpacking affirm rates and their meaning is difficult. The trial court deals with the full facts and the law and appeals from trial tend to be allowed on relatively narrow grounds, so the restrictive nature of the appeal from trial would plausibly tend to favour an affirm outcome. A higher disregard rate at the intermediate appellate level may simply be symptomatic of the fact that it is dealing with a higher number of disregard outcomes fed to it from the trial court, rather than indicating deference to a fellow judge. See Guthrie and George (n 106).

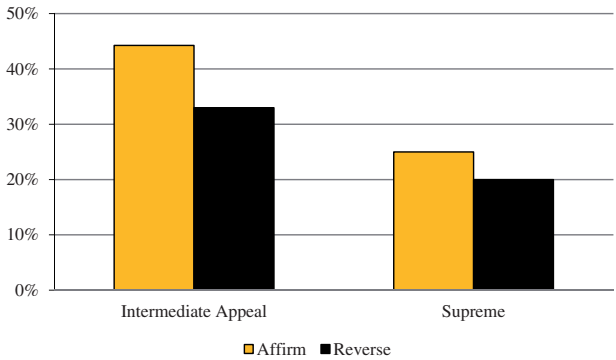

Figure 8. Disregard by jurisdiction and disposition.

cases ended up being affirmed; and when a lower court decision is affirmed, it is typically in favour of the plaintiff. These results, when combined, indicate that defendants have a disincentive to appeal successful trial court corporate disregard decisions, because they are affirmed 45.90% of the time, which is tantamount to the toss of a coin.[121] And the driver of those outcomes for intermediate appellate courts has come principally from the English Court of Appeal.

Figure 9 compares the corporate disregard rate for the English Court of Appeal versus the entire data set, as well as all other intermediate appellate courts from the 1950s to the present,[122] a period that spans approximately 90% of our total data.[123] In general, corporate disregard requests have enjoyed substantially more success with the English Court of Appeal than with any other court in our data set, the lone exception to this being the period from 1990 to 1994, when *Adams v Cape Industries* seemed to create a temporary aversion to disregarding the corporate form. Moreover, as we noted earlier, government plaintiffs enjoy particular success before the English Court of Appeal.

Figure 10 shows that veil-lifting requests by government plaintiffs prevail almost twice as often as any other kind of plaintiff in the English Court of Appeal. The prevalence of criminal, fraud or deception claims involving government agencies plays a strong role in this, but even given this possible

[121] To the extent that litigants act selectively, the overall higher frequency and rate of success of corporate disregard claims at the intermediate appellate level might suggest substantial conflict with trial court precedents; similarly, the lower frequency of claims and rate of success might suggest clear and stable precedent for the Supreme Court. However, our data also find that significant conflict occurs between the Court of Appeal and the Supreme Court. See Priest and Klein (n 53) 405 ('as long as the parties' expectations of success are unbiased, appellate litigation will occur principally where there exists the greatest conflict of precedents').

[122] Other appellate court includes both intermediate appellate courts (excluding the Court of Appeal) and the Supreme Court.

[123] The number of corporate disregard cases overall, and particularly from the Court of Appeal prior to 1950, is far too small to sustain a reliable depiction or comparison, although as we have noted before that it may indicate the strength of the *Salomon* principle in that early period.

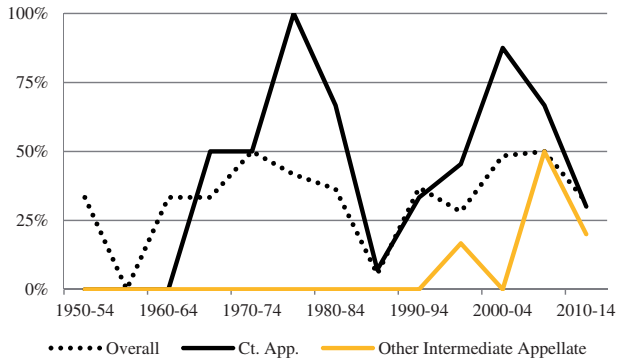

Figure 9. Disregard by court type over time, 1950–2014.

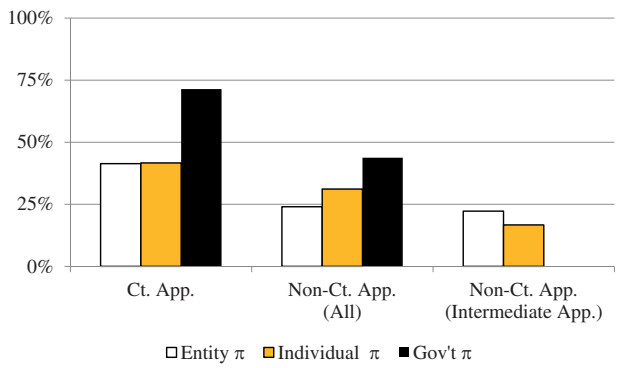

Figure 10. Disregard by court and plaintiff.

claim-driven dynamic, the English Court of Appeal is out of step with the other court levels.

As Figure 11 shows, government corporate disregard requests succeed substantially far more often with criminal, fraud or deception claims before the English Court of Appeal than any claims before any other courts.[124] As we noted in Figure 3, government plaintiffs are not particularly successful at the trial court level, but they enjoy much greater success at the appeal level. While at least part of the reason for that may be that resources matter, our data suggest that they also have a strong incentive to appeal beyond the trial level. We also found that while English Court of Appeal disregard rates in contract were roughly comparable to the overall rate (26.32% as opposed to the overall rate of 24.17%), the rate in tort was exceptionally high, at 71.43%, as opposed

[124] There were no tort claims by government plaintiffs and the corporate disregard rate for contract claims was 0.00% for government plaintiffs in all courts.

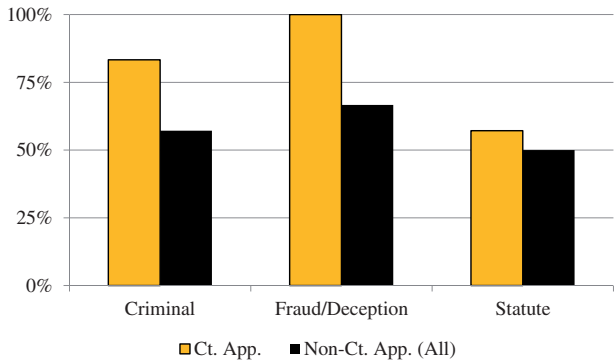

Figure 11. Disregard by claim and disposition for government plaintiffs.

to the overall rate for tort of 29.17%. As such, along with the disregard rates in government claims, a strong driver of the overall high disregard rates is the Court of Appeals treatment of disregard in tort cases. Once again, this flags the contextual erosion of the one-size-fits-all restrictive normative corporate disregard proposition. As we considered earlier, one possible factor in this treatment is the presence of involuntary creditors, though why this impacts so exceptionally in the Court of Appeal is unclear.

In sum, the data present an arresting portrait of the English Court of Appeal. Overall, decisions disregarding the corporate form have occurred 44.74% of the time at the English Court of Appeal, which hardly comports with the oft-expressed judicial aversion to corporate disregard; and more recently, between 2000 and 2014, corporate disregard claims have prevailed at the Court of Appeal at a rate of 62.96%, although that rate began dropping towards the end of that period. However, context seems to matter, in that government plaintiffs are extraordinarily successful in criminal, fraud or deception claims, and there are exceptionally high disregard rates in tort cases. As we suggested in section 4B, this contextual aspect may be one of the reasons why a unified set of normative disregard principles developed primarily for commercial application but operating across disparate areas of law may be so difficult to hold to. The remainder of the equation is that the English Court of Appeal generally appears more likely to affirm a disregard outcome from trial and to be active in reversing cases, particularly those that initially preserved the corporate form. While we would stress the possibility that the dynamics of the English Court of Appeal may also be reflective of appellant, rather than judicial, behaviour, part of the reason for the elevated rates may be that the Court of Appeal is pursuing a more independent precedential role than is often acknowledged.[125] In terms

[125] In the 1970s, the Court of Appeal explicitly pursued a more independent role in terms of precedent under Lord Denning and, while it lost that particular constitutional battle, it may retain a functional independence,

of the overall concern that at times there has been widespread erosion of the *Salomon* principle, apart from in contract claims, it does seem as if the Court of Appeal's decisions have contributed in a very real way to that perception.[126]

5. *Conclusion*

The House of Lords' decision in *Salomon v Salomon* established a bedrock principle in UK law that continues to exert powerful influence to this day. However, over time, the extent of its influence has ebbed and flowed, with concerns repeatedly expressed about the dangers of its erosion and the confused nature of its jurisprudence. Within this empirical analysis, we have sought to track the case outcomes over time and examine key contextual aspects of each decision, such as what role the identity of the parties, the type of company, the type of claim and the level of court may play in judicial outcomes. In doing so, we made a number of important observations.

We found a UK disregard rate of 35.65%. This is much lower than Mitchell's English study in 1999 (47.24%), in line with the Australian rate of corporate disregard (38.46%), below Thompson's 1991 US study (40.18%) and is way below Oh's more recent US study (48.51%). As such, the UK courts seem relatively reluctant to disregard the corporate form. Unlike Mitchell's finding of a stable rate, vacillating no more than 8% over his study decades, we found that the disregard rate has fluctuated appreciably from decade to decade. This broadly matches the academic and judicial perception of the changing reliability of the *Salomon* principle over time.[127] However, the rate had begun dropping in our final study decade, which may be attributable to the Supreme Court 2013 decision in *Prest v Petrodel*, where certain senior judges attempted to outline, once again, a one-size-fits-all narrow normative corporate disregard doctrine. A short-lived drop in the disregard rate occurred after the Court of Appeal decision in *Adams and Cape Industries*,[128] where a similar earlier normative narrowing was attempted by the senior judiciary; on that occasion, however, the rate did not remain low for long, so only time will tell if the recent low rate of disregard sticks. Our long-term historical pattern of disregard rates, which shows that the *Salomon* principle remained largely intact until the 1960s but fluctuated in the decades thereafter, would suggest that a settled low rate is unlikely, particularly given our other findings from the data.

Exploring the role of the individual court levels, we found that disregard rates were highest at the intermediate appeal level and lowest at the Supreme

given that most cases do not go beyond it to the Supreme Court. See *Davis v Johnson* (n 75); H Carty, 'Precedent and the Court of Appeal: Lord Denning's views explored' (1981) 1 LS 68. Within our data, 70.37% of all appellate decisions (ie intermediate and supreme) end at the Court of Appeal.

[126] See n 13.

[127] See n 12; A Dignam and J Lowry, *Company Law* (OUP 2018) ch 3.

[128] *Prest v Petrodel* (n 2) and *Adams* (n 4).

Court level, while those same courts exhibited a strong affirmed effect. This observation raises wider questions about the operation of precedent in the UK court system, at least within the corporate disregard cases. In common with other studies, we found that corporate disregard occurs exclusively against non-dispersed companies, which we suggest may be because the requisite levels of shareholder control are not present in listed companies. However, other factors, such as liability limitation planning and resources, may be impacting as well. This is important, as it was also reflected in our findings that disregard was more prevalent where the shareholder was an individual rather than a corporation, which may indicate identifiable controlling individuals and/or a judicial aversion to disregarding part of a group structure are key parts of corporate disregard claim outcomes.

Within our data, another key part of the disregard rate story is the high levels of corporate disregard found in cases with a criminal, fraud or deception claim. We found that government plaintiffs were very successful at the Appeal and Supreme Court levels, which in turn may be linked to the predominance of criminal, fraud or deception elements in those cases and the resources they could bring to pursuing appeals. Interestingly, government plaintiffs were much less successful at the trial court level, where the expertise of the judge was most likely to match the claim. As such, the high rates present in certain claims, such as criminal, fraud or deception claims, clearly have a complex dynamic and are not simply driven by the nature of the claim being non-commercial.

While, in Thompson's and Mitchell's studies, contract cases had a puzzlingly higher rate than tort, in our study tort had a higher disregard rate and an exceptionally high rate in the Court of Appeal. Importantly, we also found a very different approach to corporate shareholders in tort cases, in that, unlike the general situation, they were much more susceptible to disregard than individual shareholders. This is an important result, as it indicates that there may be a difference in judicial treatment of voluntary versus involuntary creditors—as theoretical commentators suggest that, in a normative sense, there should be.[129]

While the Supreme Court may pronounce that there are uniform normative disregard principles that can be followed, our overall data show that disregard outcomes are context specific across criminal, fraud, deception, contract and tort claims, where separate normative dynamics seem to operate depending on the area of law.[130] This may be one of the reasons uniform disregard principles struggle to operate across widely disparate areas of law, and it might perhaps be wiser for the senior judiciary to recognise and embrace the contextual disparity. Overall, though, concerns in the general disregard literature that are focused on the commercial effect of eroding the *Salomon* principle may be overblown,

[129] See n 117. It should be noted that involuntary creditors are also found in fraud cases where the patterns of disregard of corporate versus individual shareholders are virtually neutral.

[130] See n 12.

given that overall the private law disregard rates for claims in contract and tort are relatively low, at 24.36% and 29.17%, respectively. The principle, at least in core private law terms, appears a long way from concerns that the judiciary might send it 'up in flames'.[131]

However, another notable feature of our analysis focused on the activity of the English Court of Appeal, as 83.52% of the intermediate appellate cases in our data set are decided there. If there is a danger sign with our data that the *Salomon* principle is being eroded, then it is that the data indicate that the English Court of Appeal has had very high disregard rates over many decades, with an overall disregard rate of 44.74%, compared with the overall data set disregard rate of 35.65%. Since 2000, corporate disregard claims have prevailed at the Court of Appeal at a rate of 62.96%, although this rate was declining at the end of the study. Although we found evidence of a general affirm effect within the appeal courts, affirms in the Court of Appeal had a relatively high disregard rate and reversals on appeal principally came from the English Court of Appeal in favour of corporate disregard. Context again seems to matter, in that while disregard rates in contract were low, a strong driver of Court of Appeal rates is that those in tort are exceptionally high, and government plaintiffs appear to have great success in the English Court of Appeal when their claims are grounded in crime, fraud or deception. This may be an important reason why perceptions of erosion of the *Salomon* principle are present. Why the English Court of Appeal is more open to successful disregard outcomes is not clear, but it may be another indicator that unitary corporate disregard principles are difficult to work with across a wide range of very disparate legal areas. It may also be that the Court of Appeal has a more independent precedential role than acknowledged, or that the behaviour of its appellants is impacting.

By its nature, academic legal scholarship evolves over time. Traditional doctrinal scholarship continues to be an important source for understanding our common law, but we now have the means to utilise different methodologies by which to identify and examine particular legal phenomena. While empirical legal studies present challenges, we believe that they can provide insights, observations and patterns that potentially enrich discourse not only among academics and practitioners, but also in the judiciary.[132]

[131] See n 9.

[132] Indeed, the value of such scholarship has not escaped the view of the last two Supreme Court presidents: 'as judges we will often benefit from the perspective brought by academic experts to a particular subject and the rigorous examination which they have subjected it to. That perspective can often provoke ideas, which can be tested in court, but which would not otherwise have come to light in proceedings. In that way we improve the means by which, to borrow from Oliver Wendell Holmes, we ensure that the law develops through experience': Lord Neuberger, 'Judges and Professors—Ships Passing in the Night?' (Max Planck Institute Hamburg, 9 July 2012), <www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Speeches/mr-speech-hamburglecture-090720 12.pdf> accessed 17 July 2018. Noting that she 'agree[s] with Lord Neuberger that the life-blood of the common law is experience and common sense', Lady Hale has supported embracing 'the study of law in its wider context'. Lady Hale, 'Should Judges Be Socio-legal Scholars?' (Socio-Legal Studies Association 2013 Conference, 26 March 2013) <www.supremecourt.uk/docs/speech-130326.pdf> accessed July 17 2018.

Our study has focused on various aspects of corporate disregard that extend beyond the purview of any individual court or any single case. While we believe our data are important in their findings, we do not think they amount to incontrovertible final proof with regard to corporate disregard within the UK. The totality of the data shows that matters in the area of corporate disregard are even more complex and context specific than has generally been understood. This is an important finding in itself, which we hope will aid judicial development of the case law. Given the uncertain dynamics in the case law, this should be a continuing conversation, not the final word.