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Direct Liability and Veil-Piercing: When One Door Closes, Another Opens

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DIRECT LIABILITY AND VEIL-PIERCING: WHEN ONE DOOR CLOSES, ANOTHER OPENS

*King Fung Tsang** & *Katie Ng***

ABSTRACT

Piercing the corporate veil has been substantially limited in English law since *Prest v. Petrodel*. This contraction coincides with the development of the direct liability doctrine which attaches liability directly on the parent company. The authors argue that the shift from using piercing the corporate veil to direct liability is a positive development as it gives English courts a better tool to combat the abuse of separate legal personality. However, compared the English doctrines with their counterparts under the U.S. laws, it is argued that the much broader U.S. piercing doctrine makes the expansion of direct liability doctrine unnecessary in the United States.

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I. INTRODUCTION

In both English and American law, piercing the corporate veil is a judicial remedy created for the purpose of combating abuse of the separate legal personality.¹ Yet, over the past three decades, this doctrine has been

1. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) (“‘Piercing the corporate veil’ refers to the judicially imposed exception to this principle by which courts disregard the separateness of the

developing in two different directions. Under English law, piercing the corporate veil has slowly and steadily been relegated to a very narrow application. The final nail in the coffin was the U.K. Supreme Court's decision in *Prest v. Petrodel Resources Ltd.*,² which essentially limited the doctrine to the evasion of existing liabilities. Further, it will only be applied as a last resort.³ From this perspective, the balance between certainty and equity in company law seems to tip towards the former. Conversely, in the United States, piercing the corporate veil has been said to be the most litigated matter in U.S. law,⁴ despite also often being described as a last resort⁵ that should be applied sparingly.⁶ There is no sign that this is going to change.⁷ Thus, there is a legitimate question as to whether the narrowing in veil-piercing is the right direction for English company law.

However, the narrowing in veil-piercing under English law does not mean that the English courts have given up on holding shareholders liable

corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.").

2. *Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [35].

3. *Id.* at [62]. Lord Neuberger cited *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam) with approval where Justice Munby opined that the court could only pierce the corporate veil "in favour of a party when all other, more conventional, remedies have proved to be of no assistance." *Ben Hashem* at [100]. Lord Mance opined that the situations in which piercing the corporate veil may be available as a final fall-back are "likely to be novel and very rare." *Ben Hashem* at [103]. Lord Clarke expressed agreement with Lord Mance and others in this regard.

4. See Thompson, *supra* note 1.

5. Gregory Allan, *To Pierce or Not to Pierce? A Doctrinal Reappraisal of Judicial Response to Improper Exploitation of the Corporate Form*, J. BUS. L. 559, 561 (2018).

A final point to note is that, since *Prest*, it has been accepted that veil-piercing is a course of last resort, and is only possible through operation of the 'evasion principle', which is triggered when a company is exploited to enable its controlling shareholder to avoid an existing legal obligation.

Id.

6. See, e.g., *Prest* [2013] UKSC 34 at [67]; *Amlin (SA) (Pty) Ltd. v. Van Kooij* 2007 (60) ZAWCHC 1 (SA) at 15 para. 23 (S. Afr.) (holding that piercing the veil "must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants.").

7. See King Fung Tsang, *Applicable Law in Piercing the Corporate Veil in the United States: A Choice with No Choice*, 10 J. PRIV. INT'L L. 227, 235 (2014) (finding more than 300 piercing cases in 2012 alone).

for the abuse of the corporate form. The explicit contraction of the piercing doctrine coincides with an implicit expansion of the doctrine of direct liability.⁸ The doctrine of direct liability allows a court to hold a parent company responsible for the liabilities of its subsidiary through attaching liability on the former directly.⁹ This doctrine is based on tort law.¹⁰ By interfering with the affairs of the subsidiary, the parent company risks being held responsible to third parties who suffered harm from the subsidiary's conduct.¹¹ This principle was developed by Lord Bingham in *Lubbe v. Cape Industry PLC*¹² as *obiter dictum*, applied by Arden L.J. in *Chandler v. Cape PLC*,¹³ and expanded by the U.K. Supreme Court in *Vedanta Resources PLC v. Lungowe*.¹⁴ Most recently, the doctrine was further refined and confirmed by the U.K. Supreme Court in *Okpabi v. Royal Dutch Shell Plc*,¹⁵ which evidenced the intention of the English courts to retain the broadness of direct liability.

Arden L.J. made it crystal clear that the direct liability doctrine is not piercing the corporate veil¹⁶ and rightly so, since the former keeps the separate legal existence of the subsidiary intact.¹⁷ However, the economic

8. Rian Matthews, *Clarification of the Doctrine of Piercing the Corporate Veil*, 28 J. INT'L BANKING L. & REGUL. 516, 520 (2013). "Recent decisions suggest that the courts, whilst unwilling to pierce the corporate veil as such, are increasingly willing to circumvent it through more conventional causes of action where justice demands this and it is consistent with existing principle. For example, in *Chandler v Cape Plc*." *Id.* See also PAUL L. DAVIES & SARAH WORTHINGTON, *GOWER: PRINCIPLES OF MODERN COMPANY LAW* 201 (10th ed. 2016); Martin Petrin, *Assumption of Responsibility in Corporate Groups: Chandler v Cape plc*, 70 Mod. L. Rev. 603, 604 (2013) ("[I]n order to bypass the difficulties associated with veil piercing, claimants after *Adams* began to initiate claims against parent companies on the basis that the parent owed them a direct duty of care.").

9. *Chandler v. Cape PLC* [2012] EWCA (Civ) 525, [70], [80].

10. *Id.* at [70].

11. *Id.* at [64].

12. *Lubbe v. Cape Industries plc* [2000] 1 WLR 1545 (HL) 1555 (appeal taken from Eng.).

13. *Chandler* [2012] EWCA (Civ) 525 at [33], [81].

14. *Vedanta Res. plc v. Lungowe* [2019] UKSC 20, [49], [53].

15. *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3 [147].

16. *Chandler* [2012] EWCA (Civ) 525 [69] ("I would empathetically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil.").

17. *Id.* ("A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.").

effect is the same as piercing the corporate veil; namely, the parent is responsible for the liability of its subsidiary. Accordingly, when standing in the claimant's shoes, it is of little significance whether the corporate veil is pierced or not. In this sense, direct liability is itself just a disguised piercing the corporate veil.

Although the English courts claim that the direct liability doctrine is nothing but an application of the age-old tort principle,¹⁸ it is surely a new avenue through which a court can hold a parent company responsible for a subsidiary's liability. Similar application of tort principle to parent-subsidiary liability, however, can be traced back almost a century in the United States.¹⁹ Despite some expansions of the doctrine in individual states, direct liability in the United States generally remains as an exception to piercing the corporate veil.²⁰ Thus, piercing the corporate veil remains the dominant way to hold parent company responsible for the liability of the subsidiary. In examining the developments of piercing the corporate veil and direct liability in the two countries, it is clear that, despite sharing the same common law tradition, they are going in different directions.

This article is an endeavor to explain the development of direct liability on both sides of the Atlantic. Pushing aside the technical distinction between the doctrines, the critical question is whether these developments are good for English and U.S. law, respectively. This query will be assessed from two separate but related perspectives. First, does direct liability promote equity or correct injustice in a way that cannot be properly addressed by the current veil piercing doctrine? Second, does the direct liability doctrine improve the problem of uncertainty that plagued the piercing doctrine previously?

18. See *Vedanta* [2019] UKSC 20 at [54].

19. See William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 *YALE L.J.* 193, 197-98 (1929).

20. See *Esmark, Inc. v. NLRB*, 887 F.2d 739, 755 (7th Cir. 1989) (“[F]inding that [defendant] was liable as a ‘direct participant’ may be justifiable under a well-established exception to the general rule that the corporate veil will not be pierced in the absence of large-scale disregard of the separate existence of a subsidiary corporation.”). See also *Lozada-Leoni v. MoneyGram Int’l*, No. 20CV68-RWS-CMC, 2020 WL 7000874, at *22 (E.D. Tex. Oct. 19, 2020); *Good v. Am. Water Works Co.*, No. CV 14-01374, 2016 WL 5402230, at *8 (S.D. W.Va. Sept. 25, 2016) (calling direct liability “less widely applied than the doctrine of corporate veil-piercing”); *United States v. All Meat & Poultry Prod. Stored at Lagrou Cold Storage*, 470 F. Supp. 2d 823, 833 (N.D. Ill. 2007); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486-87 (3d Cir. 2001); *Forsythe v. Clark USA*, 836 N.E.2d 850, 854 (Ill. 2005).

Our answers to both questions are affirmative for English law. On the first question, with the narrowing of the piercing the corporate doctrine in England, the expansion of direct liability is both necessary and desirable to equip the English courts with a tool to combat the abuse of corporate form, especially in the context of transnational corporations. On the second question, the direct liability test does not include the vague concept of impropriety and therefore provides more predictable results as courts develop further guidelines on the level of control required to find direct liability. We should therefore call this a positive development in English law. However, the same cannot be said for U.S. law. First, since the U.S. piercing doctrine has a wider breadth and can potentially be applied to many forms of corporate abuse, there is no urgency to expand the direct liability doctrine in the United States. Second, the U.S. direct liability doctrine also contains plenty of uncertainties, particularly with regard to its acceptance in some states. This Article therefore argues that direct liability shall continue play a supplementary role to the piercing doctrine in the United States, especially in states that adopt stricter standard in the piercing doctrine.

Part II of this article traces the downfall of piercing the corporate veil and the simultaneous rise of the direct liability doctrine under English law. Part III outlines how the two doctrines are used by the U.S. courts. Part IV then compares both English doctrines against their counterparts in the United States. Part V assesses the direct liability doctrine from the perspectives of equity and certainty, and whether, together with the existing piercing the corporate veil doctrine, the company law is improved. Finally, Part VI concludes this article.

II. ENGLISH LAW

A. RISE AND FALL OF PIERCING THE CORPORATE VEIL

Under English law, piercing the corporate veil has been an elusive doctrine from its inception.²¹ Neither of the two earliest U.K. cases on this

21. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (2005) (“‘Piercing’ seems to happen freakishly. Like lightening, it is rare, severe, and unprincipled.”); Austin R. Spotorno, *Piercing the Corporate Veil in the UK: The Never-Ending Mess*, 39 BUS L. REV. 102, 102 (2018) (“Predictability and certainty are the distinctive features of English law as one of the leading choices to govern commercial contracts worldwide. Unfortunately, an area which cannot be praised for that is the ‘Doctrine of Piercing the Corporate Veil.’”).

topic adopted the title of “piercing.”²² In fact, the term “piercing the corporate veil” was coined by the courts of the United States.²³ As we will see, on top of its fluidity, the test has remained unclear.

1. A Control Test at the Outset

Despite its ambiguous nature, there is no doubt that the piercing doctrine is a valuable safety valve to the strict limited liability doctrine set in stone by *Salomon v. Salomon*.²⁴ *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council*²⁵ is one illustration of how the rigidity of the limited liability doctrine had been addressed by the piercing doctrine. D.H.N. was the parent company of two subsidiaries, one of which owned land that was used by D.H.N. to operate its business. When the land was subject to a compulsory purchase order, an issue arose as to whether D.H.N. was entitled to compensation for disturbance of its business.²⁶ In reaching his decision, Lord Denning favored the equity element at the expense of certainty and adopted the “single economic unit” doctrine. He recognized the extensive control exerted by the parent company over the wholly-owned subsidiaries:

[W]hen a parent company owns all the shares of the subsidiaries — so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says So here. This group is virtually the same as a partnership in which all the three companies are partners. [Accordingly, t]hey should not be treated separately so as to be defeated on a technical point.²⁷

The “technical point” that Lord Denning refers to is the separate legal existence. The key to break down this technicality is the presence of dominating control exerted by parent company over the subsidiary.

22. See *Gilford Motor Co. v. Horne* [1933] 1 Ch 935; *Jones v. Lipman* [1962] 1 WLR 832.

23. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925).

24. *Salomon v. Salomon & Co.* 75 LT 426 SC (HL) (UK).

25. *D.H.N. Food Distrib. Ltd. v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 at 853 (Eng.).

26. *Id.*

27. *Id.* at 860.

2. Shifting Towards an Impropriety Test

However, D.H.N. proved to be a high-water mark of the piercing doctrine in England.²⁸ The single economic unit doctrine was doubted by the House of Lords soon after in *Woolfson v. Strathclyde Regional Council*.²⁹ Lord Keith pointed out that the ability of a parent company to control a subsidiary should not by itself be sufficient to pierce the corporate veil.³⁰ Instead, “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere façade concealing the true facts.”³¹ Nevertheless, there was still a big question mark over the precise meaning of “mere façade concealing the true facts.”³² One thing that became clear is the insufficiency of mere control

28. Los Watkins & Hamiisi Junior Nsubuga, *The Road to Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil – Part 1*, 31 INT’L CO. & COM. L. REV. 547, 550 (2020) (“This was, perhaps, the high point of the liberal interpretation of circumstances in which the veil of incorporation may be lifted.”).

29. *Woolfson v. Strathclyde Regional Council* [1978] HL 95. See Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines*, 34 B.C. INT’L & COMP. L. REV. 329, 339-40 (2011).

30. *Woolfson v. Strathclyde Regional Council* [1978] HL 95 at 96 (Scot.).

The grounds for the decision were (1) that since D.H.N. was in a position to control its subsidiaries in every respect, it was proper to pierce the corporate veil and treat the group as a single economic entity for the purpose of awarding compensation for disturbance . . . I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil.

Id.

31. *Id.*

32. See Gregory Mitchell, “*Veil Piercing*”: *An Unnecessary Doctrine?*, 5 J. INT’L BANKING & FIN. L. 317, 319 (2019).

Lord Sumption noted that previously the basis of the doctrine was that the ‘veil’ could only be pierced where there were circumstances which indicated that the company was a mere ‘sham’ or ‘façade’, used by the wrongdoer to perpetrate/conceal some form of relevant impropriety. As Lord Sumption points out, the problem with this formulation is that it is very difficult to identify what a ‘relevant impropriety’ is because reference to a ‘façade’ or a ‘sham’ begs too many questions.

Id. at 317.

to justify piercing the corporate veil, marking the shift of focus from control to impropriety.³³

Fourteen years after *D.H.N.*, the piercing doctrine received an elaborate examination by Justice Slate in *Adams v. Cape Industries PLC*,³⁴ which for many years was regarded as the leading authority on the principle.³⁵ Cape Industries was an English company that owned some overseas subsidiaries.³⁶ A group of U.S. workers who were employed by the Cape's agent in the United States suffered illness from working in an asbestos factory. They obtained a favorable judgment in United States District Court for the Eastern District of Texas and sought to enforce it against Cape in the English court.³⁷ To iron out the conflict of law issues, the English court had to decide whether Cape had a U.S. presence through its Texas subsidiary.³⁸ During his analysis, Justice Slate clarified that the Court is not free to "disregard the principle of [separate legal personality doctrine set out in *Salomon v. Salomon*] . . . merely because it considers" that justice so requires.³⁹ Instead, the court thought the proper test should be based on distinguishing the evasion of existing liabilities and the avoidance of future liabilities:

We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.⁴⁰

On the facts of this case, the court endorsed the legitimacy of Cape's organizational structure and its expectation that the court would uphold the *Salomon* principle. In making this determination, the court did consider whether the entity was purposely arranged this way to remove the risks of tortious liability while obtaining benefits from the group's

33. *See id.*

34. *See Adams v. Cape Indus. plc* [1990] Ch 433.

35. DAVIES & WORTHINGTON, *supra* note 8.

36. *Adams* [1990] Ch 433 at 435.

37. *Id.* at 443.

38. *Id.* at 533.

39. *Id.* at 537.

40. *Id.* at 544.

asbestos trade in the United States.⁴¹ Thus, scholars have argued that after *Adams*, tort claimants in England have little chance to succeed in piercing the corporate veil.⁴²

3. *Transforming from a Standard-Based to a Rule-Based Test*

Up through *Adams*, the piercing doctrine had gone under a series of narrowing processes, limiting it significantly from what Lord Denning had initially outlined.⁴³ The ball kept rolling in *Prest*, which transformed the doctrine from a standard-based test that broadly addressed impropriety, as seen in *Woolfson*, to a narrow rule-based test involving only the evasion of existing liabilities.

In delivering the most elaborate analysis of the doctrine in *Prest*, Lord Sumption found that most of the “piercing” cases were not true piercing cases.⁴⁴ Instead, a lot of these matters simply involved peeking behind the corporate veil instead of piercing it, which would have required disregarding the corporate existence.⁴⁵ In Lord Sumption’s opinion, only *Jones v. Lipman*⁴⁶ and *Gilford Motor Co. Ltd. v. Horne*⁴⁷ were true piercing cases.⁴⁸ In light of this, he further confined the

41. *Id.*

42. *See Cheng, supra* note 29, at 362.

43. Allan, *supra* note 5, at 572.

The courts also notoriously sought to expand the ambit of the piercing jurisdiction to scenarios outside of the façade/sham exception. Examples include veil-piercing within corporate groups on the ground that such companies operate as a single economic unit, and veil-piercing to satisfy the demands of justice. Although these grounds for veil-piercing quickly foundered under the weight of judicial conservatism, the Court of Appeal has in this millennium pierced the veil for justice’s sake in order to establish that a solicitor owed fiduciary duties not just to the subsidiary that had instructed him, but also to the parent company of the subsidiary’s parent company.

Id.

44. *See Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [28].

45. *Id.*

46. *Jones v. Lipman* [1962] 1 WLR 832.

47. *Gilford Motor Co. v. Horne* [1933] 1 Ch 935.

48. *See Prest* [2013] UKSC 34 at [28]-[30]. *But see id.* at [73]-[74] (explaining, in the concurring judgment delivered by Lord Neuberger, that he regarded *Gilford Motor* as the only true piercing case).

operation of the doctrine to only those matters involving evasion of existing liabilities, such as those discussed in *Adams*.⁴⁹

Prest stands for the principle that veil piercing can only be utilized by a court to deal with abuse of right when an impropriety exists.⁵⁰ “The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose.”⁵¹ It also appears that Lord Sumption was keen to restrict the use of this doctrine so that it would only be used as a “last resort.”⁵² However, his view on evasion of liabilities was not shared by the majority of the Supreme Court.⁵³ Despite their differences of opinion, the one thing that can be said with confidence is that their lordships all recognized the difficulty in developing any other exception to the *Salomon* doctrine aside from the evasion principle.⁵⁴

Absent an agreed approach among the members of the *Prest* Court,⁵⁵ the current English law position nevertheless seems to be Lord Sumption’s evasion principle, which itself is not completely free of ambiguity. Shortly after *Prest*, the English Court of Appeal in *Antonio*

49. *Prest* [2013] UKSC 34 at [28].

50. *Id.* at [18].

51. *Id.*

52. *Id.* at [35] (“I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course.”). See also Allan, *supra* note 5.

A final point to note is that, since *Prest*, it has been accepted that veil-piercing is a course of last resort, and is only possible through operation of the ‘evasion principle’, which is triggered when a company is exploited to enable its controlling shareholder to avoid an existing legal obligation.

Allan, *supra* note 5.

53. Ernest Lim, *Salomon Reigns*, 129 L.Q. REV. 480, 484 (2013) (“Thus, unsurprisingly, none of the judges endorsed Lord Sumption’s formulation of the principle for piercing the corporate veil, except Lord Neuberger.”). See *Prest* [2013] UKSC 34 at [84]-[106].

54. *Prest* [2013] UKSC 34 at [102]-[103].

55. See Watkins & Nsubuga, *supra* note 28, at 600 (attributing the absence of an agreed approach to “the narrowness of the redefinition of the concealment and evasion principles, and rationalising evasion as the true ground for veil-piercing but narrowing its parameters to the company or its company or its controller’s attempt to evade pre-existing legal obligations or liabilities.”).

*Gramsci Shipping Corp. v. Lembergs*⁵⁶ affirmed that “the Court can only pierce the corporate veil when ‘a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.’”⁵⁷ This was the conclusion reached by Beatson L.J. despite knowing that the other members of the *Prest* Court held different opinions.⁵⁸

The U.K Supreme Court recently handed down a fresh judgment that further solidified piercing the corporate veil as an obsolete principle in practice. In *Hurstwood Properties (A) Ltd. v. Rossendale*, the respondent developers owned properties that were subject to non-domestic rates.⁵⁹ The matter arose because the developers had leased those properties to some special vehicle companies (“SPVs”) to avoid the non-domestic rates.⁶⁰ These SPVs were liquidated after they defaulted on the rates payments.⁶¹ The local authorities contended that the arrangement was an abuse of the separate legal personality and therefore called for piercing the corporate veil.⁶² In their discussion of the principle, Lord Briggs and Lord Leggatt opined that “whether the evasion principle is needed or provides the best justification of cases such as *Gilford Motor* and *Jones* is itself open to debate.”⁶³ In particular, they subscribed to Lord Walker’s doubts in *Prest*, which questioned whether “piercing the corporate veil is a coherent principle or rule of law at all, as opposed to simply a label used to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of separate juristic personality of a corporate body.”⁶⁴ In spite of these doubts, their lordships did not find the present case as an occasion to reach any final view, and applied Lord Sumption’s evasion principle against the facts.⁶⁵ They ultimately

56. *Antonio Gramsci Shipping Corp. v. Lembergs* [2013] EWCA (Civ) 730 AC (Eng.).

57. *Id.* at [65].

58. *Id.* at [65]-[66].

59. *Hurstwood Properties v. Rossendale Borough Council* [2021] UKSC 16 (Eng.).

60. *Id.* at [2].

61. *Id.*

62. *Id.* at [63].

63. *Id.* See also *Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [106].

64. *Hurstwood* [2021] UKSC 16 at [71].

65. *Id.* at [71]-[76].

concluded that there was no room for a piercing argument to stand in this particular case.⁶⁶

All in all, since *D.H.N.* in 1976, the piercing doctrine has been slowly and steadily chipped away by the English courts. At first, control was the key criterion, per Lord Denning's formulation, under which the court would simply examine the relationship between the parent and subsidiary.⁶⁷ The House of Lords then shifted into an impropriety test, with subsequent courts gradually turning a broad standard of impropriety into a narrow rule on just evasion of existing liability.⁶⁸ It may be argued that the current law clearly values certainty over equity. In fact, the test has become so "certain" that one could legitimately wonder whether its function is any more than decorative. The classic scenario of veil-piercing, superimposing a company to evade existing liability, can easily be handled by alternative doctrines such as specific performance or agency.⁶⁹ It will no longer need to rely on the last resort of piercing the corporate veil. As far as English law is concerned, the piercing doctrine is now on life support.

B. DIRECT LIABILITY

The downfall of the piercing doctrine coincides with the rise of direct liability. Although the court never applies the two doctrines together in a single case, they can both achieve the same effect, namely, making parent liable to the claimant who suffered damage from the subsidiaries' conducts.

1. Lubbe v. Cape PLC – a Promising Idea

The direct liability doctrine was initially developed through three cases involving Cape Industries. The first was the aforementioned case, *Adams*, which, by affirming the strictness of limited liability and narrowly interpreting the piercing doctrine, left the U.S. tort victims with no compensation.⁷⁰ Although this case did not discuss direct liability as a

66. *Id.* at [75]-[76].

67. *See supra* note 28 and accompanying text.

68. *See supra* Section II.A.2-3.

69. *See Prest* [2013] UKSC 34 at [73], [92].

70. *Adams v. Cape Indus. PLC* [1990] Ch 433.

way to hold parent companies liable, its culling of the piercing rule set the table for a new doctrine to be developed in future cases.⁷¹

Thereafter, the House of Lords decided another highly significant case, *Lubbe v. Cape PLC*.⁷² Cape PLC is an English public company that had invested in asbestos production in South Africa through a chain of local subsidiaries.⁷³ Similar to *Adams*, claimants were employees working for an overseas subsidiary of Cape PLC and suffered personal injury or death as a result asbestos exposure.⁷⁴ However, *Lubbe*'s claimants were in a worse situation because they were locals in South Africa, which had a dearth of legal aid and contingency arrangements, both of which incentivize lawyers to take up such matters. The essence of the case is the allegation that Cape PLC, instead of claimants' employer or factory occupier, owed a direct duty of care towards claimants in its capacity as the parent company.⁷⁵ To resolve this issue, the court observed that its inquiry would involve examining the part played by the parent company in "controlling the operations of the group," the knowledge of its directors and employees, and "what action was taken or not taken."⁷⁶ At last, the House of Lords sided with the claimants, grounding its decision on the factor of control.⁷⁷ In particular, Lord Bingham expressed that direct liability could be attached to the U.K. parent company through tort law: "The plaintiffs' claims raise a serious legal issue concerning the duty of the defendant as a parent company If a duty were held to exist, there would be a serious factual issue whether the defendant was in breach of it."⁷⁸ The duty arose from the parent company's failure to take appropriate steps to ensure adoption of proper working practices and safety precautions while knowing the health risks.⁷⁹ It is notable that Lord Bingham did not refer to this analysis as piercing the corporate veil.⁸⁰ Further, given the fact that it was a *forum non conveniens* case, his view was merely an *obiter dictum*. At that point of time, therefore, direct liability of a parent company was just an idea; however, it was a

71. *Id.* at 546-50 (discussing agency as another pathway).

72. *Lubbe v. Cape PLC* [2000] 1 WLR 1545 (HL).

73. *Id.* at 1551.

74. *Id.* at 1550.

75. *Id.*

76. *Id.* at 1555.

77. *Id.* at 1562.

78. *Id.* at 1557.

79. *See id.* at 1551.

80. *See id.* at 1557.

promising one. Lord Bingham opened the door for future cases to achieve the effect of piercing the corporate veil through another route.⁸¹ The significance of this case lies in the endorsement by the House of Lords of the possibility to hold a parent company directly liable, despite former analogous English cases that held otherwise.⁸²

2. *Chandler v. Cape – a Cautious First Step*

The matter was once again brought to the table for discussion in *Chandler*.⁸³ This ground-breaking case is the first to attach direct liability on a parent company. Taking the promising idea from *Lubbe*, the court cautiously designed the requisite circumstances where the law may impose on a parent company the responsibility for the health and safety of its subsidiary's employees.⁸⁴ As will be seen below, while the actual test adopted by the court is built around the level of control exercised by the parent over the subsidiary, the court imposed additional conditions that must be met before direct liability may be attached.

Claimant was an employee of a company called Cape Products, which manufactured bricks and asbestos products.⁸⁵ The asbestos products were produced in an unenclosed part of the site, and toxic dust migrated to another area where the claimant worked.⁸⁶ Claimant contracted asbestosis consequent to exposure to asbestos during his employment.⁸⁷ As a result, he brought an action against Cape, Cape Products' parent company, since the subsidiary no longer existed.⁸⁸ The issue was whether the parent company owed a direct duty to the subsidiary's employees.⁸⁹

81. See *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [40], [62].

82. See *Connelly v. RTZ Corp. plc* [1997] UKHL 30. See also *Ngcobo v. Thor Chem. Holdings* [1995] AC 1 at 2-3.

83. *Chandler* [2012] EWCA (Civ) at [64].

84. *Id.* at [80].

85. *Id.* at [3].

86. *Id.*

87. *Id.*

88. *Id.* at [1].

89. *Id.*

a. Assumption of Responsibility

In general, a party does not owe a duty of care to prevent third parties from harming another.⁹⁰ However, one of the exceptions to this rule is the assumption of liability.⁹¹ The court relied on this basis to hold that Cape had assumed responsibility of Cape Products. This deviation was not created out of the blue.⁹² Instead, Arden L.J. took advantage of the door left opened by Lord Bingham's *obiter dictum* in *Lubbe*:

[A]t page 1555 Lord Bingham expressly contemplated that it might involve as in this case a detailed examination of the relationship between the parties based on the surviving documentary material The basis on which the judge found there was a duty of care on the part of Cape is on the basis of an assumption of responsibility.⁹³

In fact, the principle stemmed from an earlier House of Lords decision in *Dorset Yacht Co. v. Home Office*,⁹⁴ where Home Office was found to owe a duty of care to the owners of moored yachts damaged by borstal boys who escaped from its supervision.⁹⁵ The control exercised by Home Office over the boys gave rise to a special proximate relationship in law between the claimants and Home Office.⁹⁶ Thus, Control exercised by parent company is the most important element of the assumption of

90. See *Smith v. Littlewoods Org.* [1987] AC 241 at 271.

91. *Id.* at 272 (“[A] duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party.”).

92. See *Vedanta Res. plc v. Lungowe* [2019] UKSC 20, [60] (“This was not a case of the assertion, for the first time, of a novel and controversial new category of case.”).

93. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [40], [62].

94. [1970] HL 1004 (Engl.).

95. *Id.* at 1005.

96. *Id.* at 1036.

The conclusion that I have reached is that the officers owed a duty to the company to take such care as in all the circumstances was reasonable with a view of preventing the boys in their charge and under their control from causing damage to the nearby property of the company if that was a happening of which there was a manifest and obvious risk.

Id.

responsibility test.⁹⁷ In addition, through utilizing assumption of responsibility, the court also implicitly incorporated the element of reliance, which is recognized as a necessary component in establishing assumption of responsibility.⁹⁸

b. Creating A New Category of Duty Under *Caparo*

In *Chandler*, the English Court of Appeal carved out a new duty of care by applying the three-stage test derived from *Caparo Industries PLC v. Dickman*.⁹⁹ The three prongs are foreseeability, proximity, and whether it is “fair, just[,] and reasonable” to impose liability.¹⁰⁰ It should be foreseeable that the defendant’s carelessness could cause damage to the claimant; there should exist between the defendant and the claimant a relationship characterized by law as one of “proximity” or “neighborhood”; and the situation should be one where the court considers it “fair, just[,] and reasonable to impose liability.”¹⁰¹ The *Caparo* test needs only be satisfied for the creation of a new category of duty.¹⁰²

Arden L.J. looked at the matter from the perspective of proximity while blending the question on fairness into her consideration.¹⁰³ In applying this test to the facts of *Chandler*, the Court found that the required proximity was established through control.¹⁰⁴ Here, Cape dictated health and safety policies that bound its subsidiary, and Cape had full awareness of the “systemic failure” which allowed migration of asbestos into the area where the claimant worked.¹⁰⁵ Moreover, Cape employed a “group chief chemist” and a “group medical advisor” responsible for product development and researching of asbestos related diseases.

97. See Petrin, *supra* note 8, at 612 (“Under the Court of Appeal’s reasoning, control represents an assumption of responsibility”).

98. *Id.* at 616.

99. *Caparo Indus. v. Dickman* [1990] HL 1 (Engl.).

100. *Id.* at 5.

101. *Id.*

102. See *Robinson v. Chief Constable W. Yorkshire* [2018] UKSC 4, [21]-[29].

103. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [62].

104. *Id.* at [72]-[80].

105. *Id.* at [77].

c. Knowledge as a Key Consideration

However, control is not the only factor the court looked at. Another related factor the court focused on was knowledge. The evidence that established control also suggested that Cape must have had knowledge that only slight exposure to asbestos dust was needed to cause disease. Thus, the knowledge factor contributed to the conclusion that Cape assumed overall responsibility to either advise Cape Products on steps to be taken to provide a safe work environment or “ensure that those steps were taken.”¹⁰⁶ This is so even though Cape itself was not responsible for the actual implementation of the policies.¹⁰⁷

Towards the end of the judgment, Arden L.J. summarized four indicia for this sort of liability to attach:

In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.¹⁰⁸

Amongst all four indicia, the last factor, the discussion of interferences by the parent over the operation of the subsidiary, is particularly important. In effect, “interference” is another way of expressing “control” actually exercised by the parent over the subsidiary. Notably, the control does not have to be over the health and safety policies of the subsidiary.¹⁰⁹ However, Knowledge is also featured prominently in

106. *Id.* at [78].

107. *Id.* at [74].

108. *Id.* at [80].

109. *Id.*

the indicia. It is given an important role as both (2) and (3) relates to knowledge of the parent. Thus, in addition to control, the English court has added knowledge as a key consideration.

d. A New Control Test

In summary, although the emphasis on control appears to bring the law all the way back to the position in *D.H.N.*, this new control test should be distinguished from that discussed in *D.H.N.* There are two important distinctions. First, the new control test is much more stringent. *Chandler* borrowed the framework from tort, particularly the assumption of responsibility factor which incorporated the additional requirement of reliance into the control test.¹¹⁰ Further, in analyzing direct liability as a new category of duty, the courts mandated the application of the *Caparo* test and made the satisfaction of foreseeability and proximity requirements for the establishment of the duty.¹¹¹ Knowledge of the parent is also featured prominently in the application of the test.¹¹² Second, in *D.H.N.*, Lord Denning spoke of the possible exercise of such control on paper, which may or may not be exercised, but here it refers to control actually exercised.¹¹³ This further narrows down the applicability of the control test for direct liability. The more cautious approach in *Chandler* is to be expected as Lord Denning's formulation of the test is so broad that it endangers the separate legal personality, a bedrock of corporate law.

This new control test, however, is still subject to uncertainties as to what will constitute the requisite control for a finding of direct liability.¹¹⁴ The court did give some guidelines. First, it rejected the suggestion of a high threshold. Although Defendant in *Chandler* argued that the principle should be "absolute control" over the subsidiary by the parent, the Court was not convinced.¹¹⁵ In addition, instead of looking at the relationship between parent and subsidiary generally, the control here is "transaction-specific."¹¹⁶ The *Chandler* court was only concerned about the extent to which the control of the parent ended up causing the injury in question.

110. See *supra* Section II.B.2.a.

111. See *supra* Section II.B.2.b.

112. See *supra* Section II.B.2.c.

113. See *supra* Section II.A.1.

114. See Petrin, *supra* note 8, at 612-15.

115. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [66].

116. See *infra* note 134 and accompanying text (showing this term is borrowed from American jurisprudence).

Arden L.J. said that “[t]he parent company is not likely to accept responsibility towards its subsidiary’s employees in all respects but only, for example, in relation to what might be called high advice or strategy.”¹¹⁷ The *Chandler* court further rejected defendant’s suggestion of any sort of threshold test that would restrict the assumption of liability to only matters which are “not normal” in a parent-subsiary relationship.¹¹⁸ This, to the court, was too restrictive a test, as it would not be possible to accurately define what constitutes “normal” given that the operations of company groups vary.¹¹⁹

Overall, the transaction-specific approach is an important distinction, since the direct liability doctrine is based on the tort principle of negligence, unlike piercing the corporate veil. As the *Chandler* court stated, “[t]he development of the law of negligence has to be incremental and the judge was in my judgment correct to hold that the analogous line of cases in negligence to the instant case is the line of authority on the duty of a person to intervene to prevent damage to another.”¹²⁰ Furthermore, the assumption does not have to be voluntary: “The court does not have to find that the relevant party has voluntarily assumed responsibility . . . The word ‘assumption’ is therefore something of a misnomer. The phrase ‘attachment’ of responsibility might be more accurate.”¹²¹

3. Expansion by the U.K. Supreme Court in Vedanta

After *Chandler*, it had become apparent that English courts recognized direct liability of the parent company for the activities of its subsidiary.¹²² This principle has been further approved and expanded by

117. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [66].

118. *Id.* at [67].

119. *Id.*

120. *Id.* at [63].

121. *Id.* at [64].

122. *See AAA v. Unilever PLC* [2018] EWCA (Civ) 1532. This matter considers a case involving a group of employees and former employees of a Kenya-registered subsidiary attempted to sue the English parent company in reliance on direct liability on the part of the parent. *Id.* The English Court of Appeal recognised the possibility of such liability on the part of the parent company but went on to dismiss the claimant’s appeal by reason of proximity. *Id.* *See also* Nicole Finlayson & Charlotte Hill, *Who’s Liable?*, 168 *NEW L.J.* 7816, at 13 (2018) (summarizing and providing commentary on the *Unilever* case).

the U.K. Supreme Court in *Vedanta*, where it found that the direct liability of the parent could go beyond the employees of a subsidiary to people living in the communities surrounding to subsidiary's operation.¹²³ This case was a high-profile litigation initiated in English court by some 1,826 Zambian citizens against a Zambian company (KCM), which operated a local copper mine, and its parent company Vedanta. The claimants had been adversely affected by the pollution and environmental damage resulting from repeated discharge of toxic matters from the copper mine owned and operated by KCM into certain watercourses.¹²⁴ These victims were very poor farmers in rural areas, and the contaminated watercourses were their only water source for drinking and irrigation.¹²⁵ The lower courts had held that Vedanta had sufficiently intervened in the activities of its subsidiary. This point was not disputed by the Supreme Court. The court relied on several findings in reaching this conclusion, including a published report which "stressed that the oversight of all Vedanta's subsidiaries rested with the board of Vedanta itself." The report further described the existence of a management services agreement between Vedanta and KCM under which the former would provide services to the latter.¹²⁶ In connection with the control test of direct liability, the Supreme Court has substantially relaxed the test by removing much of the constraints put into place by the Court of Appeal in *Chandler*.

a. Direct Liability Is Not a New Category of Duty

The Supreme Court rejected Vedanta's argument that its case raised "a novel and controversial extension of the boundaries of the tort of negligence."¹²⁷ The Court posited that it was not a distinct category of liability in the common law of negligence. Crucially, direct or indirect ownership of one company by another merely gives rise to the chance of such liability to appear rather than necessitating it. "Everything depends on the extent to which . . . the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."¹²⁸ Accordingly, the Court determined that the lower courts erred in applying

123. *Vedanta Res. plc v. Lungowe* [2019] UKSC 20.

124. *Id.* at [1].

125. *Id.*

126. *Id.* at [58].

127. *Id.* at [46].

128. *Id.* at [49].

the three-prong test of *Caparo*.¹²⁹ This therefore removed the requirements of proximity and justice from the test, thereby lowering the threshold of direct liability.

The Supreme Court went on to restate the test to be solely a matter of control:¹³⁰ “In the present case the crucial question is whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants”¹³¹ This put control at center stage of the direct liability analysis.

b. Rejecting Pigeon-Hole Rules

The U.K. Supreme Court regarded the four indicia set out in *Chandler* by Arden L.J. as “no more than particular examples of circumstances in which a duty of care may affect a parent.”¹³² This effectively removed knowledge of parent company as a necessary consideration in finding direct liability. Likewise, the court also acknowledged this view on the categorization of cases in *AAA v. Unilever PLC*,¹³³ while simultaneously refusing to develop more specific rules for the parent’s direct liability:

For my part, I would be reluctant to seek to shoehorn all cases of the parent’s liability into specific categories of that kind, helpful though they will no doubt often be for the purposes of analysis. There is no

129. *Id.* at [56].

130. *Id.* at [44].

131. *Id.*

132. *Id.* at [56].

133. *AAA v. Unilever PLC* [2018] EWCA (Civ). *See also Vedanta* [2019] UKSC 20 at [51].

Sales LJ thought that cases where the parent might incur a duty of care to third parties harmed by the activities of the subsidiary would usually fall into two basic types: (i) Where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary’s own management; (ii) Where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

Vedanta [2019] UKSC 20 at [51].

limit to the models of management and control which may be put in place within a multinational group of companies.¹³⁴

Taken together, these comments connote that the court should not be strait-jacketing itself with restrictive rules. The court's refusal to pigeon-hole the direct liability test changes the law from bright line rules back to a broad standard, interestingly resembling piercing the corporate veil back in the time of *Woolfson*.¹³⁵

4. Further Expansion in Okpabi

In the latest direct liability case, *Okpabi*, the U.K. Supreme Court adopted an even broader approach.¹³⁶ The court reemphasized that there is no pigeon-hole rule and confirmed that control may be satisfied by holding out.

By way of background, this proceeding stemmed from numerous oil spills which were alleged to have occurred because of the negligence of the oil pipelines operator, a Nigerian subsidiary of Respondent RDS.¹³⁷ Consequently, “natural water sources [located] in the appellant communities [could not] be safely used for drinking, fishing, agricultural, washing or recreational purposes.”¹³⁸ Claimants argued that RDS directs, controls, and intervenes in the management of subsidiary's operation, and therefore owed them a duty of care. The Supreme Court observed several errors of law in the Court of Appeal's analysis and clarified certain principles.

a. Further Rejecting Pigeon-Hole Rules

Disapproving of the Court of Appeal's attempt to establish a categorical rule, the U.K. Supreme Court refused to do so. Lord Hamblen rightly remarked the argument that “the promulgation by a parent company of group wide policies or standards can never in itself give rise to a duty of care . . . is inconsistent with *Vedanta*.”¹³⁹ This is in line with Lord Brigg's refusal to recognize there being such a “limiting principle.” Similarly, although the Supreme Court was fine with the appellants

134. *Vedanta* [2019] UKSC 20 at [51].

135. *See supra* notes 29-34 and accompanying text.

136. *See Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3.

137. *Id.* at [4]-[5].

138. *See id.*

139. *Id.* at [7].

presenting their arguments with reference to the four *Vedanta* indicia,¹⁴⁰ it emphasized that they were no more than “convenient headings.”¹⁴¹

b. Holding Out May Be Sufficient

Lord Hamblen sought to give more guidelines on the control test. In the same vein as *Vedanta*'s holding,¹⁴² “the issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity” which may or may not be demonstrated by the parent controlling the subsidiary. Building on this control test, the Supreme Court expanded the concept of control beyond the actual exercise of control, again with reference to *Vedanta*. A specific example of a case in which a duty of care may arise regardless of the exercise of control is provided in *Vedanta* route (4):¹⁴³

[T]he parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.¹⁴⁴

This expansion of holding out is analogous to promissory estoppel and no doubt makes direct liability even broader.

In summary, from the promising idea in *Lubbe* to eventual refinements in *Vedanta* and *Okpabi*, English courts have steadily recreated a tool to counter abuse of the corporate form that focuses on control. The two recent Supreme Court cases show a clear intention by the court to revert the test to a broad, standard-based approach instead of shackling it to a bright line rule.

140. *Id.* at [26].

141. *Id.* at [27].

142. *See Vedanta Res. plc v. Lungowe* [2019] UKSC 20, [49].

143. *See id.* at [26]. The other three routes argued by the claimants are “(1) RDS taking over the management or joint management of the relevant activity of SPDC; (2) RDS providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by SPDC; (3) RDS promulgating group-wide safety/environmental policies and taking steps to ensure their implementation by SPDC.” *Id.* at [26]. The UK Supreme Court however noted that these routes were just “convenient headings” and do not constitute any new test in finding duty of care. *Id.* at [27].

144. *See id.* at [148] (citing Lord Briggs in *Vedanta* [2019] UKSC 20 at [53]).

C. DIFFERENCES BETWEEN PIERCING THE CORPORATE VEIL AND DIRECT LIABILITY UNDER ENGLISH LAW

Although results yielded by applying the principle of direct liability are in effect identical to that of piercing the corporate veil, judges have quite robustly and expressly rejected defining the situation as such.¹⁴⁵ The vehement insistence to distinguish the two concepts leaves one to ponder the precise differences between them.

To begin with, the principle of direct liability only applies to tort cases.¹⁴⁶ In other words, it is a creative application of tort law to solve a company law problem. All landmark cases on direct liability boil down to the same storyline: claimants were tort victims who sued the tortfeasors' parent companies with deeper pockets by attempting to establish a duty of care owed by them.¹⁴⁷ In *Lubbe*, the claimants were residents who suffered personal injuries or death as a result of the exposure to asbestos.¹⁴⁸ In *Chandler*, the action was started by a group of employees who endured personal injuries, again, due to their exposure to asbestos. In contrast, all kinds of disputes give rise to the stream of piercing corporate veil cases, ranging from contractual to matrimonial disputes.¹⁴⁹

Second, the key test for applying direct liability is the level of control instead of impropriety.¹⁵⁰ As discussed in the foregoing,¹⁵¹ assumption of responsibility by the parent company is required to trigger application of direct liability. Assumption of responsibility in turn depends on the extent of control exerted by the parent company.¹⁵² Consequently, it is unnecessary to delve into intention of the parent company in setting up the company or the purpose of adopting a particular management structure when determining direct liability.

145. See *Chandler v. Cape PLC* [2012] EWCA (Civ) 525, [69].

146. Assumption of liability is a doctrine of tort law. Consistent with that categorization, all cases of direct liability to date are tort cases.

147. See generally *Chandler* [2012] EWCA (Civ) 525; *Vedanta* [2019] UKSC 20; *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3.

148. *Lubbe v. Cape plc* [2000] 1 WLR 1545, at 1550 (HL).

149. See, e.g., *Gilford Motor Co. v. Horne* [1933] 1 Ch 935 (explaining that the dispute arose out of a non-competition clause contained in an employment contract); *Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [35] (dealing with a matrimonial action); *Lee v. Lee's Air Farming Ltd.* [1960] All ER 420 (PC) (appeal taken from the Court of Appeal of New Zealand) (dealing with a claim for an employee's compensation).

150. See *supra* notes 133-34 and accompanying text.

151. See *supra* Section II.B.2.a.

152. See *Petrin, supra* note 8, at 612.

Third, contrary to piercing the corporate veil, direct liability requires no distinction between evasion and avoidance of liability, which was itself an unsettled position in *Prest*.¹⁵³ To establish direct liability, so long as the required level of control is found, it is irrelevant whether the subsidiary was set up before the liability was incurred.¹⁵⁴ There is no need for any “injustice” or blameworthiness that characterizes evasion.¹⁵⁵

Thus, as far as tort law is concerned, direct liability can be seen as an alternative to the narrowing piercing the corporate veil doctrine. In fact, bypassing piercing the corporate veil is not an unfamiliar concept and has occurred in other contexts, such as in two Hong Kong cases penned by Lord Millett.¹⁵⁶

Sui Kwan v. Kwan Lai concerns a jurisdictional dispute in the liquidation context.¹⁵⁷ In this case, there was a winding up petition before the Hong Kong Court against the ultimate holding company of two Hong Kong subsidiaries that operated a renowned local restaurant for decades.¹⁵⁸ The ultimate holding company was incorporated in the British Virgin Islands (BVI) which held the operating Hong Kong companies through a chain of subsidiaries and ran no substantial business by itself.¹⁵⁹ The complicated corporate structure led on a discussion of whether the Hong Kong Court had jurisdiction to make a winding up order against the BVI parent company under the relevant statute.¹⁶⁰ The Court of Final Appeal held that the Hong Kong Court had jurisdiction since the BVI parent company had sufficient connection with Hong Kong.¹⁶¹ Central to this discussion, the court found that it is possible to establish sufficient connection between a company and a jurisdiction through its shareholders or subsidiaries.¹⁶² In effect, this practice is a form of overlooking the separate legal personality between the two entities. Though Lord Millett specifically held that this was not an attempt “to lift the corporate veil” and the holding “d[id] not ignore the fundamental principle that a

153. See Allan, *supra* note 5.

154. See Petrin, *supra* note 8, at 612.

155. *Id.*

156. See *Sui Kwan v. Kwan Lai*, [2015] 18 H.K.C.F.A.R. 501 (the judgment was coauthored with Ma CJ); *Waddington Ltd. v. Chun Hoo*, [2008] 11 H.K.C.F.A.R. 370.

157. [2015] 18 H.K.C.F.A.R. 501.

158. *Id.* at 513.

159. *Id.*

160. *Id.* at 523-26.

161. *Id.* at 526.

162. *Id.* at 524-25.

company is separate and distinct from its shareholders,” the end results were of no practical difference.¹⁶³

The other case on point is *Waddington Ltd. v. Chun Hoo*.¹⁶⁴ This is a Hong Kong case on multiple derivative actions.¹⁶⁵ The Court of Final Appeal was faced with the issue of whether a member of a holding company could bring proceedings against its related company’s director.¹⁶⁶ It was in Lord Millet’s opinion that “the question is simply one of [*locus standi*],”¹⁶⁷ and on such question “the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it.”¹⁶⁸ Under this set of facts, the court held that depletion of a subsidiary’s assets caused indirect but real loss to the parent company and thus allowed the proceedings to carry on.¹⁶⁹ Most crucially, Lord Millet again declined to recognize this as an exercise of piercing the corporate veil, despite the practical effect of allowing members of a related company to stand in the shoes of the members of the relevant company.¹⁷⁰

III. U.S. LAW

This Part provides a brief summary of the piercing the corporate veil and the direct liability doctrines under U.S. law. Since both doctrines about governed by state laws, they have not been developed in stages as clearly as their English counterparts.

A. PIERCING THE CORPORATE VEIL

Although there is variation among states, the relevant U.S. law concerning piercing the corporate veil can be summarized into a three-pronged standard: the “mere instrumentality” test, the “injustice” test, and the “proximate cause” test.¹⁷¹ In conjunction with this formulation are

163. *Id.* at 524.

164. [2008] 11 H.K.C.F.A.R. 370.

165. *Id.* at 376.

166. *Id.* at 388.

167. *Id.* at 398.

168. *Id.*

169. *Id.*

170. *Id.* at 394-95.

171. See STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:6 (2020-2021).

laundry lists of characteristics and behaviors that courts have employed to help decide whether the tests are satisfied.¹⁷²

The first test, mere instrumentality, necessitates the subsidiary being excessively controlled by its parent company such that the business entity has “no separate mind or will of its own.”¹⁷³ However, it has been repeatedly affirmed in different cases that mere control is not the whole picture.¹⁷⁴ There must exist some kind of inappropriateness and actual harm caused to the plaintiff, which leads to the remaining two tests.¹⁷⁵

The second test, the injustice test, entails a parent company’s use of the subsidiary as a channel that is somehow unjust, fraudulent, or wrongful towards the plaintiff.¹⁷⁶ More intuitively titled, this “fairness”¹⁷⁷ prong looks to the fundamental issue of fairness in the context of the facts and asks whether an inequitable result will occur if the business entity is not pierced.¹⁷⁸ In contemplating the factors and scenarios relevant in this inquiry, Professor Frederick Powell outlined numerous instances of injustice where that would be sufficient to fulfill this prong.¹⁷⁹ These circumstances include the use of the subsidiary by the parent in a way that amounts to fraud, violation of a statute, and commission of a tort.¹⁸⁰ As these extensive lists of potential considerations show, the flip side of having such an expanded system is the “messiness” that comes with it.¹⁸¹

The third and final test, that of proximate cause, requires the plaintiff to have actually suffered some harm. It is less important than the first two tests and some states formulate their rules without incorporating it.¹⁸²

172. See Christopher W. Peterson, *Piercing the Corporate Veil by Tort Creditors*, 13 J. BUS. & TECH. L. 63, 72 (2017).

173. *United States v. Tailwinds Sports Corp.*, 51 F. Supp. 3d 9, 62 (D.D.C. 2014).

174. See, e.g., *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 205 (1981) (“[I]t must further appear that observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice”).

175. *Id.*

176. See PRESSER, *supra* note 171.

177. See Peterson, *supra* note 172, at 71-72; *d’Elia v. Rice Dev.*, 147 P.3d 515, 521 (Utah Ct. App. 2006).

178. *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982).

179. See PRESSER, *supra* note 171.

180. *Id.*

181. *Id.*

182. *Id.*

B. DIRECT LIABILITY

1. U.S. Direct Liability Doctrine

In the United States, alongside the popular doctrine of piercing the corporate veil, is also the well-established principle of direct liability. Almost a century ago, then-Professor and later Judge William O. Douglas and Professor Carrol Shanks co-wrote an article titled *Insulation from Liability Through Subsidiary Corporations*, which stated that a parent company would usually not be responsible for its subsidiary's liability if it complied with four standards relating to corporate relationships:

- (1) A separate financial unit should be set up and maintained (2) The day to day business of the two units should be kept separate
- (3) The formal barriers between the two management structures should be maintained (4) The two units should be represented as being one unit.¹⁸³

Compliance with these standards would also save the parent from having its subsidiary's veil being pierced because it would help the parent avoid getting caught into the control prong.¹⁸⁴

However, the article also identified an exception to the separate legal personality based on direct liability even if the four standards of corporate formalities are met.¹⁸⁵ This is when “the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management.”¹⁸⁶ This point was further deliberated by Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit:

One corporation may, however, become an actor in a given transaction, or in part of a business, or in whole business, and, when it has, will be legally responsible. To become so it must take immediate direction of the transaction through its officers, by whom alone it can act at all.¹⁸⁷

Over the years, there have been plenty of cases applying this doctrine. For example, Professor Phillip Blumberg highlighted a number

183. William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 *YALE L.J.* 193, 196-97 (1929).

184. *Id.*

185. *Id.* at 208.

186. *Id.*

187. *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929).

of intellectual property cases applying this direct liability principle.¹⁸⁸ Yet, the most important development of the doctrine came when the U.S. Supreme Court expressly recognized it in *United States v. Bestfoods*.¹⁸⁹ Justice Souter, who delivered the judgment, cited Justice Douglas and Professor Shanks' abovementioned opinion.¹⁹⁰ To successfully hold the parent directly liable, the Court posited that the "critical question" is "whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."¹⁹¹ The Court added, however, that a normal level of control exercised will not suffice for this purpose.¹⁹² Rather, an "eccentric" or abnormal level of control is the key.¹⁹³ In addition, common management or directorship will not generally cause a finding of direct liability, and an officer who wears two hats would be assumed to have picked up a role in the subsidiary.¹⁹⁴ *Bestfoods* is a case concerning violations of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁹⁵ After the decision, courts sought to apply the direct liability doctrine in other federal statutes.¹⁹⁶ For example, in *Pearson v. Component Technology Corp.*, the Third Circuit dealt with a labor relations dispute arising under the Worker Adjustment and Retraining Notification Act.¹⁹⁷

188. See Phillip I. Blumberg, *The Law of Corporate Groups: Problems of Parent & Subsidiary Corporations Under Statutory Law of General Application*, 273-74, 298-99, 321-22, 338-42 (1989), cited in *Esmark v. NLRB*, 887 F.2d 739, 756 (7th Cir. 1989).

189. 524 U.S. 51 (1998).

190. *Id.* at 61.

191. *Id.* at 72.

192. *Id.* (asserting no direct liability will be found on the basis of control that is "consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures").

193. *Id.* ("The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.").

194. See *id.*

195. *Id.* at 51.

196. See *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989) (applying direct liability in the context of the National Labor Relations Act).

197. 247 F.3d 471 (3d Cir. 2001). See also *City of New York v. Exxon Corp.*, 112 B.R. 540 (S.D.N.Y. 1990) (applying direct liability in the context of environmental law violation and founding liability on the parent based on its "degree of control over and actual participation by the corporate officer or shareholder in the affairs of the corporation.").

In *Forsythe v. Clark USA, Inc.*,¹⁹⁸ the Illinois Supreme Court expanded the direct liability doctrine into a general principle beyond the context of federal statutes.¹⁹⁹ The *Forsythe* judgment carefully examined important authorities and gave further guidance on the application.²⁰⁰ The case arose from a refinery fire that killed two workers who were eating in a lunchroom across the street.²⁰¹ The deceaseds' families sued the parent company (Clark USA) that owned the refinery under the doctrine of direct liability.²⁰² Plaintiffs alleged that Clark USA ordered extreme budget cuts which led to unreasonable cost cutting in the maintenance department and eventually the accident.²⁰³ Clark USA argued that overseeing budget is an exercise of normal level of control expected of a parent, an argument supported by the *Bestfoods* Court, where such behavior was expressly held to be an acceptable shareholder practice that did not impose direct liability.²⁰⁴ However, the Illinois Supreme Court disagreed holding that Clark USA's mandate of the "survival mode" budget plan which led to reduced safety measures should be regarded as "eccentric" under the standard set out in *Bestfoods*.²⁰⁵ Accordingly, Plaintiffs had made sufficient allegations to fend off a summary judgment and have the case remanded.²⁰⁶

In establishing this decision, the *Forsythe* Court identified two key elements of establishing direct liability: first "a parent's specific direction or authorization of the manner in which an activity is undertaken"²⁰⁷ and, second, foreseeability that injury would result from such direction.²⁰⁸ It is noteworthy, however, that in the concurring judgment, Justice Freeman attempted to play down the potential floodgate effect on limited liability by opining that the decision "does not alter the bedrock principle of

198. 224 Ill. 2d 274 (2007).

199. Prior to the case, direct liability was generally applied in finding liability of the parent company under federal statutes. *See Pearson*, 247 F.3d at 487 ("[D]irect liability is rarely used independently to hold parents liable for their subsidiary's actions.").

200. *Forsythe v. Clark USA*, 224 Ill. 2d 274, 282-92 (2007).

201. *Forsythe v. Clark USA*, 361 Ill. App. 3d 642, 643-44 (2005).

202. *Id.* at 644.

203. *Forsythe*, 224 Ill. 2d at 278.

204. *Id.* at 282.

205. *Id.* at 290.

206. *See id.* at 293-95.

207. *Id.* at 290.

208. *See id.*

limited liability for corporate shareholders, and that direct participant liability is a very narrow exception to this general principle.”²⁰⁹

In addition, direct liability focuses on a particular act of the subsidiary resulting from the control of the parent, but not general domination by the parent. The latter would fall into the instrumentality prong of piercing the corporate veil under U.S. law.²¹⁰ As the Illinois Court of Appeals stated, direct liability “does not depend upon large-scale disregard of corporate formalities, but is transaction-specific.”²¹¹ The Third Circuit even determined that direct liability was “function[ing] essentially as a kind of ‘transaction-specific’ alter ego theory.”²¹² That said, without the injustice prong, this analogy is hardly helpful, if not misleading since injustice is an essential element to the piercing doctrine under U.S. law.²¹³

2. A U.S. Alternative: The Good Samaritan Rule

Under U.S. law, there is another body of law that holds parent companies liable for the actions of a subsidiary.²¹⁴ This is known as the “Good Samaritan Rule” and it is based on Section 324A of the Restatement Second of Torts (“Restatement Second”).²¹⁵ The Restatement Second has been adopted in most states.²¹⁶ It has a longer history than the U.S. direct liability rule and has been said to trace all the

209. *Id.* at 302-03.

210. *See* Good v. Am. Water Works Co., No. 14-01374, 2016 WL 5402230, at *9 (S. D. W. Va. Sept. 26, 2016).

211. *United States v. All Meat and Poultry Prod. Stored at Lagrou Cold Storage*, 470 F. Supp. 2d 823, 833 (N.D. Ill. 2007).

212. *See Am. Water Works Co.*, 2016 WL 5402230, at *9.

213. *See supra* notes 176-81 and accompanying text.

214. Despite the similarities between direct liability and the “Good Samaritan” rule, courts clearly regard them as separate doctrines. *See, e.g.,* Born v. Simonds Intern., 26 Mass.L.Rptr. 416, at *5 (Supp. Ct. 2009) (recognizing that the plaintiff only relied on direct liability but not the Good Samaritan Rule nor piercing the corporate veil).

215. RESTATEMENT (SECOND) OF TORTS § 324A(b) (AM. L. INST. 1965).

216. *See* Nicole Rosenkrantz, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for Their Negligence*, 37 B.C. L. REV. 1061, 1061 (1996). *See also* Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1352-53 (D. Md. 1982) (noting that, even though Maryland had not specially endorsed Section 324A of the Restatement Second, the court had no difficulty finding the Good Samaritan Rule applied in Maryland).

way back to the English case *Coggs v. Bernard*.²¹⁷ In that case, a person who volunteered to move casks of brandy was found liable to the owner when he spilt much of the brandy during transport.²¹⁸ To satisfy the rule in the parent-subsidary context, there must be an undertaking by the parent to the subsidiary to perform certain acts, and it is foreseeable that the parent's negligence in performing the act will lead to harm to the third party.²¹⁹ Whether such an undertaking exists is a question of fact, and courts generally look at a number of factors, including the parent's scope of involvement, the extent of its authority, and its underlying intent.²²⁰ The threshold to find the undertaking is a high one.²²¹ In *Muniz v. National Can Corp.*,²²² the First Circuit said it would not "lightly assume that a parent corporation has agreed to accept this responsibility . . . the subsidiary's employee must show some proof of a positive undertaking by the parent corporation."²²³

In addition, the plaintiff must prove one of three elements: (1) the parent's failure to exercise reasonable care increased the risk of such harm; (2) that the parent had undertaken to perform a duty owed by the subsidiary to the third party; or (3) the harm was suffered because of reliance of the plaintiff or the subsidiary upon the parent's undertaking.²²⁴ Like direct liability, the Good Samaritan doctrine is based on tort and does not require piercing the corporate veil to find liability on the part of the parent.²²⁵ Despite the long-lived status of the rule, it is said to be a "rarely

217. (1703) 92 Eng. Rep. 107; 2 Ld. Raym. 909. See Annette T. Crawley, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 GA. L. REV. 223, 234 (1999) (cited in approval by the Louisiana Supreme Court in *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1128 (La. 2004)).

218. *Coggs* (1703) 92 Eng. Rep. at 107.

219. RESTATEMENT (SECOND) OF TORTS § 324A(b) (AM. L. INST. 1965). See *Rick v. RLC Corp.*, 535 F. Supp. 39 (E.D. Mich. 1981) (finding no liability on the parent for plaintiff's failure to prove parent specifically agreed or intended to provide services for the primary benefits of the plaintiffs).

220. *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1131 (La. 2004).

221. See *Davis v. Liberty Mut. Ins. Co.*, 5 Cir.1976, 525 F.2d 1204, 1208.

222. 737 F.2d 145 (1st Cir. 1984).

223. *Id.* at 148.

224. See *id.*

225. See *Rosenkrantz*, *supra* note 216, at 1087.

Despite the common element of control, these two paths to shareholder liability are quite different. Whereas Section 324A focuses on a parent corporation's independent duty owed to the plaintiffs, veil piercing focuses on the relationship between the parent

used and relatively insignificant cause of action”; however, it gained popularity in the 1980s as employees used the doctrine bring claims against employers concerning occupational safety.²²⁶ Even so, these cases were not always successful due to the high standard required by the doctrine.²²⁷ As stated by the court in *Amfac Foods v. International Systems & Controls Corp.*,²²⁸ “disregard of a legal established corporate entity is an extraordinary remedy which exists as a last resort.”²²⁹ More recently, in *Bujol v. Entergy Services*, the Louisiana Supreme Court held that, to satisfy the Good Samaritan doctrine, it is necessary to prove that the parent’s undertaking is not just supplemental but supplants the subsidiary’s duty to the plaintiffs.²³⁰ In that case, Plaintiff’s claim failed because the Court found that the subsidiary had its own safety management in place and set its own safety rules, while the parent did not compel the subsidiary to comply with the guidelines it set.²³¹

corporation and the subsidiary, particularly, whether the two corporations were maintained as separate legal enterprises. Unlike veil piercing, Section 324A is not based on a parent’s control over its subsidiary but rather on a parent’s affirmative rendering of services to its subsidiary Even if the subsidiary was not formed or used for an improper, fraudulent or unjust purpose, the subsidiary corporation may be disregarded and the parent shareholder may be subject to liability under Section 324A.

Id. See also Andrew J. Natale, *Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine – A Parent Corporation’s Duty to Provide a Safe Workplace for Employees of its Subsidiary*, 57 U. CIN. L. REV. 717, 728-29, 734 (1988).

226. See Rosenkrantz, *supra* note 216, at 1062.

227. See *id.* at 1063.

228. 654 P.2d 1092 (Or. 1982).

229. *Id.* at 1098.

230. See *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1136 (La. 2004).

Section 324A might be met if a parent only takes over one aspect of the subsidiary’s duty to provide a safe workplace, such as for the . . . safety of a particular piece of equipment rather than safety of the entire plant, but it is still necessary that the parent supplant the subsidiary’s duty with respect to that aspect completely.

Id. See also *Root v. Stahl Scott Fetzer Co.*, 88 N.E.3d 980, 991 (Ohio Ct. App. 2017); *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1355 (1982).

231. See *Bujol*, 922 So.2d at 1136.

IV. COMPARISON BETWEEN ENGLISH AND U.S. LAWS

In this Part, the piercing doctrine of English and U.S. laws will first be compared. This comparison is essential as the piercing doctrines shape the development of direct liability within their respective jurisdictions. This is followed by a comparison between English direct liability doctrine and its U.S. counterpart. Finally, the English direct liability doctrine will be compared with the similar Good Samaritan Rule.

A. PIERCING THE CORPORATE VEIL

1. *The Injustice Prong*

The inadequacy of weight given to equity under the current English piercing doctrine is especially ostensible when compared with the U.S. position. To begin, the scope of the U.S. piercing doctrine is significantly wider than that under English law. As opposed to the English evasion principle, for example, it is not necessary for the “errant” party to have willfully wronged the other party or engaged in anything amounting to fraud in their relationship for the doctrine to apply under U.S. law: “[t]he essence . . . is simply that an individual businessman cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.”²³²

Equity is the main theme that underpins the entire U.S. piercing doctrine.²³³ Many scholars have agreed that the U.S. courts generally yield the just result.²³⁴ Undoubtedly, the U.S. courts have expanded the piercing doctrine significantly beyond the parameters outlined by the English courts.

2. *The Instrumentality Prong*

Compared to the English law of piercing, the instrumentality prong resembles the now defunct test under *D.H.N.*, though the focus is actual control rather than *de jure* control.²³⁵ Regarding the second prong, the current English rule is much narrower, as it covers only the evasion

232. *Labadie Coal Co. v. Black*, 672 F.2d 92, 100 (D.C. Cir. 1982).

233. *See* Tsang, *supra* note 7, at 247.

234. *See* Peterson, *supra* note 172, at 94.

235. *See* PRESSER, *supra* note 171. None of the questions in Powell’s laundry list involves *de jure* control.

scenario, which is just one of the many scenarios that the injustice prong usually covers.²³⁶ Yet, the English test is much easier to satisfy if the case falls into the evasion scenario, and there is no need to prove excessive control.²³⁷

3. *The Proximity Prong*

The proximity prong is not a stated requisite for establishing piercing under English law. However, the prong is also relatively unimportant under U.S. law; there has been criticism of its elusive nature and some U.S. jurisdictions have disapproved of its use.²³⁸ For example, Illinois adopted a two-prong test that requires proof of excessive control and injustice, while omitting the proximity requirement.²³⁹

Despite having to overcome the hurdles of instrumentality and proximity, plaintiffs in the United States manage to pierce the corporate veil of many more subsidiaries than their English counterparts.²⁴⁰ Given the very narrow scope of the piercing doctrine in England and the requirement that it must only be utilized as the last resort, this technical comparison is not the most relevant in practice. Ultimately, the most meaningful distinction between them is that the U.S. doctrine is very much alive, and the English is essentially a vestigial organ. Since *Prest*, there has yet to be a successful piercing case in England.²⁴¹ In the United States however, piercing the corporate veil not only has long been considered the most litigated matter,²⁴² it also has a high success rate.²⁴³ There is no sign that the piercing doctrine is slowing down in the United States.

236. *Id.* The evasion envisaged under English law can be fit with one of the seven scenarios set out by Powell, namely, whether the parent's use of the subsidiary amount to actual fraud.

237. *See* *Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [28].

238. *See* PRESSER, *supra* note 171.

239. *Id.* at § 2:14.

240. *See* Thompson, *supra* note 1.

241. *See* *Hurstwood Properties v. Rossendale Borough Council* [2021] UKSC 16 (Eng.) (serving as the latest failed attempt to pierce corporate veil).

242. *See* Thompson, *supra* note 1.

243. *Id.* at 1048 (finding that the veil piercing success rate is 40.18%).

B. DIRECT LIABILITY

1. Comparing Direct liability Between English and U.S. Laws

At first glance, it appears as though the U.S. direct liability principle is quite similar to its English counterpart. First, both are based on tort law. For example, subsequent cases have made it clear that direct liability cannot be applied to contracts,²⁴⁴ and rightly so since that would “make a corporation that is not a signatory to a contract a de facto party to the contract.”²⁴⁵ Second, the test is based on actual control exercised by the parent.²⁴⁶ Third, the control in question is transaction-specific.²⁴⁷

However, the U.S. principle may not be as “direct” as the English doctrine. Unlike in England, direct liability in the United States is not an individual investigation into the act of the parent company that caused harm to the plaintiff. Such individual investigation would render it unnecessary to consider the action of the subsidiary.²⁴⁸ Rather, the U.S. doctrine is about how the parent, through the use of its control, manipulated the subsidiary to commit the tortious act:²⁴⁹

In these cases the shareholder or parent corporation was not held “directly” liable for its own independently wrongful acts. The parent corporation did not, side-by-side or concurrently with its subsidiary, directly cause an injury to the third-party/victim There was no allegation that the parent did anything directly to the third party. Instead the parent only acted against the third party’s interests through the agency of the subsidiary. The owner’s liability was based on its control of its subsidiaries’ actions from “behind the scenes.” Thus the

244. See *Northbound Grp. v. Norvax*, 795 F.3d 647, 651-52 (7th Cir. 2015); *Bos. Fish Mkt. v. EMS-USA Insulated Door*, No. 12C6751, 2013 WL 2421744, at *3 (N.D. Ill. June 3, 2013). See also *Todd v. Xoom Energy Md.*, No. GJH-15-154, 2016 WL 727108, at *7 (D. Md. Feb. 22, 2016); *Phillips v. WellPoint*, No. 10-CV-00357, 2012 WL 6111405, at *10 (S.D. Ill. Dec. 10, 2012).

245. *Cima v. Wellpoint Health Networks*, 556 F. Supp. 2d 901, 906 (S.D. Ill. 2008). For the English position, see *supra* notes 146-49 and accompanying text.

246. See *Golbert v. Aurora Chi. Lakeshore Hosp.*, No. 19-CV-08257, 2021 WL 952528, at *3 (N.D. Ill. Mar. 11, 2021). For the English position, see *supra* notes 150-52 and accompanying text.

247. *Esmark v. N.L.R.B.*, 887 F.2d 739, 756 (7th Cir. 1989). See also *Forsythe v. Clark USA*, 224 N.E.2d 274, 284 (Ill. 2007). For the English position, see *supra* notes 116-17 and accompanying text.

248. See *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 487 (3d Cir. 2001).

249. *Esmark*, 887 F.2d at 739.

parent was not held “direct liable”; it was liable derivatively for transactions of its subsidiary in which the parent interposed a guiding hand.²⁵⁰

It is also for this reason that direct liability, like piercing the corporate veil, is not recognized as a cause of action under U.S. law.²⁵¹ Having said that, this difference is more theoretical than substantive since both approaches examine control and lead to the parent being liable to the third party. The real deviation lies in how courts define the level of control that will trigger direct liability. This is illustrated by *Forsythe*.

It is unclear if English courts would find Clark USA directly liable under the English direct liability test. As stated above, the English Court of Appeal in *Chandler* rejected a threshold test requiring abnormal control.²⁵² Effectively, the English court preferred a more liberal standard than the “eccentric” control required under the U.S. direct liability rule. This makes the English doctrine seemingly broader than the U.S. direct liability doctrine.

2. Comparing English Direct Liability and U.S. Good Samaritan Rule

Looking at the substance of the English direct liability rule, it seems to be broad enough to cover the facts in *Bujol*, which applied the Good Samaritan Rule. First, the basis of the English rule is *Dorset Yacht Co.*²⁵³ As highlighted above, the Home Office had control of the boys.²⁵⁴ Unlike

250. *Id.* at 756.

251. *United States v. All Meat and Poultry Prod.* Stored at Lagrou Cold Storage, 470 F. Supp. 2d 823, 833 (N.D. Ill. 2007). One commentator has argued that direct liability resembles veil-piercing not only in the result, but elements considered including the injustice prong: “The second veil piercing factor—the fiction of separate entities is a fraud, injustice, or promotes inequitable consequences—incorporates the concept inherent in tort law of remedying the consequences of an unjustifiable action.” See Matt Schweiger, *Forsythe v. Clark USA, Inc.: Contradictions in Parent Corporation Liability in Illinois*, 58 DEPAUL L. REV. 1083, 1105-06 (2009). While there is some truth in this statement, all laws seek to address injustice. This is too much a stretch to say that the two doctrines are similar in terms of the text when one expressly requires the presence of injustice while the other does not.

252. *See Chandler v. Cape plc* [2012] EWCA (Civ) 525, [66].

253. *Dorset Yacht Co. v. Home Office* [1970] HL 1004 (AC) at 1026 (Engl.).

254. *Id.*

The facts which I think we must assume are that this party of trainees were in the lawful custody of the governor of the Portland Borstal

in *Coggs*, where there was a voluntary acceptance of extra responsibility, the Home Office in *Dorset Yacht Co* had supervisor responsibility from the outset.²⁵⁵ In addition, the actual test focuses simply on control without any express requirement on undertaking, unlike what is stipulated under Section 324A of the Restatement Second. For example, one of the four indicia identified in *Chandler* was the parent's superior knowledge of the relevant industry,²⁵⁶ even though the knowledge factor is no longer considered a prerequisite.²⁵⁷ However, the Louisiana Supreme Court has made it clear that such superior knowledge would not create a duty on the parent.²⁵⁸ To put it another way, plaintiffs in situations similar to *Chandler* are unlikely to establish assumption of duty under the Good Samaritan Rule in the United States. Accordingly, without the requirement of an explicit assumption of duty, English direct liability is substantially broader than the Good Samaritan Rule. It follows that a parent company under the English rule may not seek to prevent liability by avoiding the prescription of any group policy that might be interpreted as covering the employees or other third-party creditors in the first place.

C. A SUMMARY OF THE COMPARISON

In summary, unlike either the U.S. direct liability rule or the Good Samaritan Rule, which both require affirmative acts by the parent, English courts seem to have taken the doctrine a step further by considering the parent's omission to be sufficient for finding direct liability.²⁵⁹ However, there are a limited number of authorities on the subject, with only *Chandler* making it to trial.²⁶⁰ Further, with the U.K. Supreme Court's decision in departing from the *Caparo* test in *Chandler*, it is still very

institution and were sent by him to Brownsea Island on a training exercise in the custody and under the control of the three officers with instructions to keep them in custody and under control.

Id.

255. See Petrin, *supra* note 8, at 613-14.
256. See *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [80].
257. *AAA v. Unilever PLC* [2018] EWCA (Civ). See also *Vedanta Res. plc v. Lungowe* [2019] UKSC 20, [51].
258. See *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1133 (La. 2004).
259. See *Vedanta* [2019] UKSC 20 at [49].
260. *Vedanta* and *Okpabi* are all cases dealing with jurisdiction. *Vedanta Res. plc v. Lungowe* [2019] UKSC 20; *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3.

much a question as to how the English courts will apply the ever more elusive direct liability test.²⁶¹

Following *Forsythe*, there have been a number of cases applying the direct liability doctrine. Given the Illinois Supreme Court's strong adoption of the doctrine, it is not surprising that many of the relevant direct liability cases are from Illinois.²⁶² For example, in *Golbert v. Aurora Chicago Lakeshore Hospital*,²⁶³ it was alleged that the parent company of a hospital was liable to patients who suffered sexual abuses while under the hospital's care.²⁶⁴ The court attributed direct liability to an aggressive budget plan by the parent that resulted in a failure to install surveillance cameras or train the staff properly.²⁶⁵ The motion to dismiss was therefore denied.²⁶⁶ The direct liability doctrine also makes an appearance in West Virginia where the West Virginia Supreme Court approved of *Forsythe* and applied its analysis of the doctrine in *Good v. American Water Works Co.*²⁶⁷ That being said, the direct liability test is not universally welcomed. Some states, such as Mississippi and New York, have either doubted or reluctantly applied the standard doctrine, and have been especially hesitant of the test as articulated in *Forsythe*.²⁶⁸

261. See *supra* Section II.B.3.

262. See, e.g., *Golbert v. Aurora Chi. Lakeshore Hosp.*, No. 19-CV-08257, 2021 WL 952528 (N.D. Ill. Mar. 11, 2021). See also *Santora v. Starwood Hotel & Resorts Worldwide*, No. 05 C 6391, 2007 WL 3037098 (N.D. Ill. Oct. 16, 2007); *Northbound Grp. v. Norvax*, 795 F.3d 647 (7th Cir. 2015); *Cima v. Wellpoint Health Networks*, 556 F. Supp. 2d 901 (S.D. Ill. 2008); *Non-Surgical Orthopedics P.A. v. Allscripts Healthcare Solutions*, No. 18 C 566, 2019 WL 2357030 (N.D. Ill. June 4, 2019); *Bos. Fish Mkt. v. EMS-USA Insulated Door*, No. 12 C 6751, 2013 WL 2421744 (N.D. Ill. 2013); *Phillips v. WellPoint*, No. 10-CV-00357-JPG, 2012 WL 6111405 (S.D. Ill. Dec. 10, 2012); *Grady v. Ocwen Loan Servicing*, No. 11-CV-1531, 2012 WL 929928 (N.D. Ill. Mar. 19, 2012); *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036 (2009).

263. No. 19-CV-08257, 2021 WL 952528.

264. *Id.* at *2

265. See *id.* at *4.

266. *Id.*

267. No. CV 2:14-013742016, WL 5402230 at *3.

268. See *Melton Properties v. Illinois Cent. R.R. Co.*, No. 18-CV-79 DMB-JMV, 2019 WL 6039967, at *6-7 (N.D. Miss. Nov. 14, 2019) (noting that *Forsythe* is not binding in Mississippi and opted not to decide on whether Mississippi would recognize a forced-action theory of direct liability). See also *Gunther v. Capital One*, 703 F. Supp. 2d 264, 277 (E.D.N.Y. 2010) ("It is the basic rule of the corporate form that shareholders are not liable for the acts of a corporation unless there is a reason to lift the corporate veil. This is not avoided by merely asserting that a shareholder authorized, ratified, or directed the actions of the corporation."); *Born v. Simonds Intern., Corp.*, 26 Mass.L.Rptr. 416, at

Like piercing the corporate veil, direct liability remains a matter of state law. Similarly, the Good Samaritan Rule has not gained universal acceptance in the United States. There are probably even fewer states adopting that rule.²⁶⁹ However, more recently, since the Louisiana Supreme Court formally adopted the rule, there have been an increasing number of Louisiana cases applying it.²⁷⁰ Thus, while there are some recent expansions of the two doctrines in individual states, a wholesale favoring of direct liability over piercing the corporate veil in the United States, as has occurred in England, is unlikely.

V. ASSESSMENT OF DIRECT LIABILITY

Even though the direct liability doctrines under U.S. and English laws are trending in different directions, the comparison in Part IV shows that they are substantially similar to be categorized under the same umbrella. This Part further analyzes the direct liability doctrine from the perspectives of equity and certainty, two of the key considerations when piercing the corporate veil.

A. EQUITY

For years, Professors Henry Hansmann and Reinier Kraakman advocated that involuntary creditors do not have the ability to assess the risks they took in dealing with a firm nor to “contract out” limited liability if those risks seemed excessive.²⁷¹ On that account, they asserted that in tort cases, a proportional liability should be attached to the shareholder instead of limited liability.²⁷² It has been argued that if this concept is considered in tandem with the piercing doctrine, courts should be more

*6 (Supp. Ct. 2009) (“[The Massachusetts] court has some unease as to whether the Illinois Supreme Court fairly applied the teaching of *Bestfoods*, in adopting its theory of direct participant liability and applying it to the summary judgment record in *Forsythe*.”).

269. See *Muniz v. Nat’l Can Corp.*, 737 F.2d 145, 147-48 (1st Cir. 1984) (finding the Good Samaritan Rule valid under Puerto Rican law).

270. Although the Louisiana Court stated that the Good Samaritan Rule had a long history in the United States, Louisiana Supreme Court had never encountered a case involving the Rule until *Bujol* in 2004. See *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1128 (La. 2004). For a subsequent Louisiana case applying the rule, see *Root v. Stahl Scott Fetzter Co.*, 88 N.E.3d 980 (Ohio Ct. App. 2017).

271. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 *YALE L.J.* 1879, 1880 (1991).

272. *Id.* See also Ewan McGaughey, *Donoghue v. Salomon in the High Court*, *J. PERS. INJ. L.* 249, 260-61 (2011).

lenient when it comes to tort creditors and more willing to pierce the corporate veil; this is particularly true, the commentator contends, when compared with contract creditors who could conduct “self-help,” such as asking for a guarantee or security from the shareholder.²⁷³ Yet, despite calls for flexibility, empirical research in the United States and England shows that courts have not been more willing to pierce the corporate veil in tort cases than contract cases.²⁷⁴

In the United States, while some courts have stated that piercing the corporate veil is more difficult in the case of contract law,²⁷⁵ others have expressly stated that they will apply the same standard to both tort and contract cases.²⁷⁶ Direct liability (including the Good Samaritan Rule) can be an additional avenue for tort creditors to access justice against the parent company. It is therefore not surprising that direct liability and the Good Samaritan Rule flourished in states with stricter piercing rules. By way of example, it has been said that Illinois’ piercing rule is one of the stricter in the nation.²⁷⁷ Since the Illinois Supreme Court adoption of the direct liability rule in *Forsythe*, Illinois courts have been actively applying it.²⁷⁸ This is also the case for the Louisiana courts since the Louisiana Supreme Court adopted the Good Samaritan Rule in *Bujol*.²⁷⁹ Both have

273. See Thompson, *supra* note 1, at 1059.

274. *Id.* (empirical study of the U.S.). There is new empirical evidence that this might have been changed in both jurisdictions; Peter Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 90 (2010); Alan Dignam & Peter Oh, *Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014*, 39 OXFORD J. LEGAL STUD. 16, 39 (2019). See generally Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 CO. FIN. & INSOLVENCY L. REV. 15 (1999) (empirical study of England).

275. See *e.g.*, *Northbound Grp. v. Norvax*, 795 F.3d 647, 652 (7th Cir. 2015) (“[C]ourts should apply even more stringent standards to determine when to pierce the corporate veil than they would in tort cases.”) (internal citation omitted).

276. See *Labadie Coal Co. v. Black*, 672 F.2d 92, 100 (D.C. Cir. 1982).

277. See PRESSER, *supra* note 171, at § 2:14 (“Illinois follows the familiar two-part test for piercing the veil, and the courts of the state appear to apply the test in a relatively conservative manner, so that it is comparatively difficult to pierce the corporate veil.”).

278. See *supra* note 262.

279. See *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1128 (La. 2004) (“Louisiana courts have declared that the strong policy of Louisiana is to favor the recognition of the corporation’s separate existence, so that veil-piercing is an extraordinary remedy, to be granted only rarely.”). See also James Dunne, *Taking the Entergy out of Louisiana’s Single Business Enterprise Theory*, 69 LA. L. REV. 691, 691 (2009) (“Traditionally, veil-piercing has been used sparingly in Louisiana and only in cases where either fraud or misuse of the corporate form has taken place.”).

a rather low success rate in piercing the corporate veil.²⁸⁰

It is evident from the discussion of the authorities in Part II that the English courts felt obliged to tie their own hands with the separate legal personality developed in the 1897 case *Salomon v. A. Salomon*.²⁸¹ Limited liability has remained the prevailing rule for 29 years since Hansmann and Kraakman's work. Admittedly, the English piercing rule is unsatisfactory when assessed on the basis of equity.²⁸² The direct liability doctrine therefore saves the day by carving an easier path for tort victims to receive compensation while staying in line with Hansmann and Kraakman's theory, even if it must be done through a different avenue. The principle of direct liability is a more accessible solution than the traditional piercing doctrine in the sense that the former does not require proof of foul play.²⁸³ All it takes is excessive control by the parent company.²⁸⁴ In fact, since piercing the corporate veil in England has come to a dead end, direct liability offers the only practical route for plaintiffs in most cases.²⁸⁵ This is particularly the case for transnational corporations. Of the five cases dealing with direct liability in England, four of them involved English parent companies and their subsidiaries in Africa.²⁸⁶ They clearly present a need for a legal principle to hold irresponsible parent companies liable with the downfall of piercing the corporate veil. Direct liability is the solution found by the English courts.

B. CERTAINTY

The other significant aspect of the direct liability principle that needs examination is the extent to which the application of the principle will reach consistent and predictable results. This Section will start with the assessment on English law, followed by the same on U.S. law.

280. See King Fung Tsang, *The Interdependence of Conflict of Laws and Piercing the Corporate Veil*, 53-55, 89 (2016) (S.J.D. thesis, Georgetown University Law Center) (on file with the author) (comparing with the general piercing rate of 35.25 percent, Illinois and Louisiana have a piercing rate of 27.45 percent and 31.82 percent).

281. In England, *Salomon v. A. Salomon & Co. Ltd.* [1897] AC 2 is the leading case that establishes the concept of separate legal personality.

282. The English perception of the role of justice in corporate veil cases reflects a more formalistic approach to judicial decision-making. See Cheng, *supra* note 29, at 354.

283. See Petrin, *supra* note 8, at 612.

284. *Id.*

285. See *supra* notes 67-69 and accompanying text.

286. See *Lubbe v. Cape Industry PLC* [2000] 1 WLR 1545 (HL) (appeal taken from Eng.), *AAA v. Unilever PLC* [2018] EWCA (Civ) 1532, *Vedanta Resources plc v. Lungowe* [2019] UKSC 20, *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3.

In comparison with the existing rule of piercing the corporate veil, under English law, the result of the direct liability doctrine's application is less-than-certain. After Lord Sumption's attempt to render the doctrine toothless in *Prest*, English courts have consistently refused to pierce the corporate veil.²⁸⁷ In contrast, the English Supreme Court has kept the door open for expansion of direct liability.²⁸⁸ To achieve its purpose, the Court has repeatedly refused to develop limiting principles that would confine the general application of the control prong.²⁸⁹ There has not been any articulation of a bright line test concerning precise degree of control that would suffice for finding the assumption of responsibility.²⁹⁰ The four indicia laid out in *Chandler*²⁹¹ are perhaps the most elaborated elements of the discussion. Still, the Supreme Court in *Vedanta* expressly held that these indicia are no more than examples.²⁹²

Thus, when assessing certainty through the lens of predictability of results, on the surface, the piercing doctrine takes the prize.²⁹³ However, it could be argued that the proper comparison would be considering how piercing the corporate veil is applied in similarly situated tort cases. In that scenario, the court would have to delve deeply into the intention of the parent company in setting up the subsidiary,²⁹⁴ since there must exist

287. The most recent rejection is *Hurstwood Properties v. Rossendale Borough Council* [2021] UKSC 16 (Eng.).

288. See *supra* Section II.B.3-4

289. See *supra* Sections II.B.3-4.a.

290. *Id.*

291. *Chandler v. Cape plc* [2012] EWCA (Civ) 525, [80].

292. *Vedanta* [2019] UKSC at [56].

293. See Pey Woan Lee, *The Enigma of Veil-Piercing*, 26 INT'L CO. & COM. L. REV. 28 (2015) ("In *Prest*, Lord Sumption sought to resolve this tension [between certainty and equity] by first acknowledging, at a general level, the importance of both ends, but ultimately he ascribes far greater weight to certainty through a highly restrictive definition of 'abuse.'). See also Daisuke Ikuta, *The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc*, 6 UCL J.L. & JURIS. 60, 82 (mentioning arbitrariness and legal uncertainty as the most frequent criticism against direct liability).

294. Watkins and Nsubuga state the following:

However, the difficulty in considering whether the company is indeed, a 'mere façade' would seem to be dependant on particular facts of the case. It does seem clear that the motivation of the individual director is important when considering any misconduct with regard to the company. Misconduct may or may not be contemporaneous with the

an element of impropriety.²⁹⁵ Typically, there will be evidence that cuts both ways. Some facts might point towards the subsidiary being a mere façade, while others might suggest the contrary, requiring the court to make a thorough inquiry. Theoretically, assessment of evidence as to control exercised is arguably more objective than that of intention. Even the distinction that Lord Sumption himself drew, between veil-piercing on the ground of evasion and the concealment principle, has been described as “difficult to appreciate, if not conceptually flawed.”²⁹⁶ In addition, as reflected in the reasoning of subsequent piercing the corporate veil cases, it seems that the courts still feel uncertain as to the status of the evasion principle. For instance, in *Hurstwood*,²⁹⁷ discussed above, the court applied the evasion principle against the facts even though the Supreme Court still questioned its continued existence.²⁹⁸ In truth, the precise test has not been ironed out and there is still puzzlement among the courts.²⁹⁹ Therefore, while it could be said that a piercing the corporate veil submission before an English court is likely to fail, the certainty of such a result is not based on a settled test or reasoning.

In its defense, the looseness of the principles of control for direct liability is for a good cause. As analyzed in the previous Section, direct liability arose to bring justice on behalf of claimants who suffered from

incorporation, but relevant to the instant case, and the misconduct and use of the company must have some correlation or link in legal terms.

See Watkins and Nsubuga, *supra* note 28, at 552.

295. Watkins and Nsubuga continue to state the following:

Misconduct or impropriety can range quite widely. For instance, it may be an unusual case, such as that of public policy as in the case of *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.*, where the veil was required to be lifted in order to discover the identity and possible involvement of enemy Germans in the company during the First World War. It may be fraud, where the incorporation has been used to conceal criminal activities.

See id.

296. CHRISTIAN A. WITTING, *LIABILITY OF CORPORATE GROUPS AND NETWORKS* 317 (2018). *See also* Ariel Mucha, *Piercing the Corporate Veil Doctrine Under English Company Law After Prest v. Petrodel Decision* 14-15 (Allerhand Inst., Working Paper No. 19/2017) (criticising the dubious nature of the decision).

297. *Hurstwood Properties v. Rossendale Borough Council* [2021] UKSC 16, [71]-[72].

298. *Id.* at [71].

299. *Id.*

abuse of the *Salomon* principle, which the piercing doctrine fails to entertain.³⁰⁰ The doctrine's purpose of combating corporate abuse makes flexibility its inevitable companion. Despite being two entirely different rules, an analogy can be drawn from the flexibility of the United States piercing doctrine. Most courts in the United States subscribe to the contract-tort dichotomy when it comes to piercing the corporate veil, implicating a more flexible application of the doctrine for tort creditors, with reference to the totality of the circumstances test.³⁰¹ The justification for this leeway is that "its equitable nature demands that it be flexible."³⁰² Along the same line, as it is an equitable principle at heart, it is quite right for the English courts to maintain the flexibility in direct liability as much as possible. As this area of law continues to develop, there will be more helpful guidance and examples from courts and scholars alike. Again, it is suggested that the English court could consider the laundry lists of factors developed by U.S. courts in certain states, which are helpful for the courts as they make their determinations.³⁰³

Moreover, under the current principle, determination of direct liability cases is highly fact-sensitive,³⁰⁴ which is also a reason there should not be standardized criteria, as it would straight-jacket the courts. As Arden LJ observed, it is simply not possible to say in all cases what is or is not a normal incident of that relationship.³⁰⁵ Consequently, the Court refused to employ a threshold test for assumption of responsibility that would restrict the principle to abnormal incidents of the relationship between a parent and subsidiary.

300. See *supra* Section V.A.

301. See Peterson, *supra* note 172, at 73.

302. See Peterson, *supra* note 172, at 83. See also Jane C. Schlic, Comment, *Piercing the Nonprofit Corporate Veil*, 66 MARQ. L. REV. 134, 141 (1982) (explaining the justification).

303. See, e.g., *Att'y Gen. v. M.C.K. Inc.*, 736 N.E.2d 373, 381 n.19 (Mass. 2000) (setting out a laundry list of 12 factors to consider for the purpose of piercing the corporate veil).

304. *Thompson v. Renwick Group plc* has demonstrated how fact-sensitive the determination of direct liability is. Even though there was appointment by the parent of a director to the subsidiary in charge of health and safety at the subsidiary; links between the parent and subsidiary, including, common paperwork used within the group, provision of taxi by the parent to transport the plaintiff; use of lorry that was in parent's livery; and co-operation amongst different subsidiaries of the parent. See *Thompson v. Renwick Group plc* [2014] EWCA (Civ) 635, [19]. The Court still held that these facts were far removed from that of *Chandler*. *Id.* at 29.

305. See *Chandler v. Cape PLC* [2012] EWCA (Civ) 525, [67].

Being too rigid in formulating the principles also draws the risk that corporations will design tactics in order to circumvent liability.³⁰⁶ For instance, if the court established a criterion that “employment of group medical officer will be regarded as assumption of responsibility,” it is likely that the very next advice the group attorney would give would be to lay off such officer.³⁰⁷ Since many of these group-wide policies are there to protect the well-being of employees, tactics that try to get away with responsibility may harm the benefits potentially available to claimants.

Another confusion is the relevance of the *Caparo* threefold test in analyzing direct liability. On the one hand, the Court of Appeal in *Chandler* grounded the development of direct liability on the *Caparo* test, with the detailed application outlined above.³⁰⁸ On the other hand, in more recent cases the U.K. Supreme Court frowned on the lower court’s approach in analyzing the case with the *Caparo* test.³⁰⁹ In the Supreme Court’s opinion, the liability of parent companies in relation to their subsidiaries is not, in itself, a distinct category of liability in common law negligence, and that the general principles on which this liability is found are not novel at all.³¹⁰ Instead, it was thought that the principles could be traced back as far as the decision of the House of Lords in *Dorset Yacht*.³¹¹

Taking a step back to revisit *Caparo*, the biggest message conveyed by the House of Lords was that future developments of the duty of care should be made in an incremental and cautious way. During an evaluation of the duty of care, a case should be compared with factually analogous precedents where a duty of care was established. If the case before the court appears to be novel, amounting to an expansion of existing duty of care, the court should apply the threefold test.³¹² Therefore, it could be said that the *Dorset Yacht* Supreme Court simply found the element of control akin to that exerted by parent companies on subsidiaries and, in doing so, recognized the assumption of responsibility as an existing category of duty of care by comparing it with a precedent. The distinction in views between the Supreme Court and the Court of Appeal perhaps lies

306. See Andrew Sanger, Case and Comment, *Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries*, 78 CAMBRIDGE L.J. 486, (2019).

307. See Petrin, *supra* note 8, at 619.

308. See *Chandler* [2012] EWCA (Civ) at [62]-[63].

309. See *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20 [56]; *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3 [151].

310. See *supra* note 127.

311. See *Vedanta* [2019] UKSC 20 at [54].

312. *Caparo Indus. v. Dickman* [1990] HL 1 at 5 (Engl.).

in the reason that Arden LJ did not find this line of cases analogous with *Dorset Yacht*. Nevertheless, their approaches are not contradictory in principle, and subsequent cases now have the endorsement by the highest court in England that this is an established duty of care.

Much of the same problem on uncertainty discussed above applies to the direct liability rule in the United States. Like its English counterpart, the doctrine was criticized for its unpredictability. In *Golbert*, the court commented that the application of direct liability is “tricky,” since it requires the court to distinguish between eccentric control and normal control exercised by investors.³¹³ Similarly, the Good Samaritan Rule was said to be “so complicated and fact-specific as to make it virtually impossible for anyone to predict in advance whether their volunteer activities will or will not be protected from liability.”³¹⁴ In addition, while direct liability and the Good Samaritan Rule are both principles derived from tort, no court seems to have been able to clearly discern the difference between them.³¹⁵ On principle, direct liability focuses on control, while the Good Samaritan Rule does not formally require such a focus.³¹⁶ However, in the context of the parent-subsidary relationship, commentators have argued that control is implicitly the gist of the Good Samaritan Rule.³¹⁷ This emphasis on control in direct liability and the Good Samaritan Rule may sometimes overlap with the control

313. See *Golbert v. Aurora Chi. Lakeshore Hosp.*, No. 19-CV-08257, 2021 WL 952528, at *3 (N.D. Ill. Mar. 11, 2021).

314. See Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1644 (2007).

315. One Massachusetts state court clearly looks at them as separate rules. *Born v. Simonds Intern.*, 26 Mass.L.Rptr. 416, at *5 (Supp. Ct. 2009).

Before turning to [direct liability], it is useful to point out certain theories of parent corporation liability that [the plaintiff] has expressly stated he is not relying upon . . . [He] does not contend that [the parent company] assumed a duty to protect him from unsafe condition ‘by affirmatively undertaking to provide a safe working environment at the subsidiary.’

Id.

316. See RESTATEMENT (SECOND) OF TORTS § 324A(b) (AM. L. INST. 1965).

317. See *Bujol v. Entergy Servs.*, 922 So.2d 1113, 1131 (La. 2004) (highlighting that courts have considered “the scope of the parent’s involvement, the extent of the parent’s authority” in determining whether there is an undertaking by the parent to assume subsidiary’s duty).

prong of the piercing doctrine, even though both direct liability and the Good Samaritan Rule are transaction-specific, whereas the piercing doctrine looks at the corporate relationship as a whole.³¹⁸ For example, *My Bread Baking Co. v. Cumberland Farms*³¹⁹ was cited by *Forsythe* as one of the authorities on direct liability.³²⁰ However, the case has long been regarded in Massachusetts as authoritative on piercing the corporate veil, not direct liability.³²¹ This is because the court did not refer to either principle by name and merely analyzed the control exercised by the parent over the subsidiary in its assessment of parent's liability. On application, it seems that direct liability may have an easier chance to succeed given the strictness of the Good Samaritan Rule. Finally, as highlighted above, some courts have reservations about the direct liability doctrine.³²² This gives rise to forum shopping opportunity and could lead to uncertain results. Thus, the uneven practices on direct liability and the Good Samaritan Rule among the states makes improving the level of certainty of these principles in the United States much more difficult when compared with the English courts, which can follow the lead of the U.K. Supreme Court that have clearly shown a strong interest in further developing the direct liability doctrine.

VI. CONCLUSION

This paper compares the developments of the direct liability principle across the Atlantic. It starts with an examination of the simultaneous curtailing of the piercing the corporate veil doctrine and expansion of the direct liability principle in England, exclusively in the context of tort cases. Both principles evolved for the same purpose—to curb the abuse of separate legal entities and restore fairness for the claimants who are adversely affected as a result. This Article reviewed landmark cases that exemplified the basis upon which the English courts grounded themselves in establishing this non-novel liability. In conclusion, direct liability has evolved as an alternative and even better

318. See *supra* Part IV.

319. 353 Mass. 614 (1968).

320. *Forsythe v. Clark USA*, 864 N.E.2d 227, 238 (Ill. 2007).

321. See, e.g., *Born v. Simonds Int'l Corp.*, 26 MASS. L. RPTR. 416, at 5.

322. See *supra* note 268 and accompanying text.

solution to the earlier piercing doctrine due to its satisfaction of two criteria, equity and certainty.

First, direct liability carries an element of equity that has been overlooked by the current piercing doctrine under English law. This equity element of direct liability was evinced by the provision of a more accessible and practical solution to tort victims who were left out in the cold by the narrow doctrine of piercing the corporate veil. Moving on to certainty, we detailed that there have been doubts and challenges in this respect. Yet, since a determination of direct liability eases the court from consideration of intention and impropriety, it was concluded that this evolving principle still improves this aspect of the law.

On the United States side, direct liability can be seen as a supplement to the piercing doctrine, which is much broader and more alive than its English counterpart. On equity, despite the U.S. piercing doctrine's incorporation of the injustice prong, direct liability still offers a potentially easier alternative to tort creditors without having to prove the injustice that is required in the piercing doctrine.³²³ There is no need to prove total domination of the subsidiary by the parent, all it takes is eccentric control in the activities leading to injury. On certainty, direct liability suffers from the same problem as the English principle, given its fact-specific nature. However, such fact-intensive inquiry is commonplace in corporate law disputes, and courts in the United States have extensive experience dealing with them. Balancing between its advantage in equity and limited shortcoming in certainty, it is suggested that direct liability is a good supplement to the piercing doctrine in U.S. jurisdictions that use a traditional, rather than a strict, piercing rule. The same can be said about the Good Samaritan Rule, which is also based in tort and involves much of the same inquiry on transaction-specific control by the parent. On the other hand, if a state already has a broad piercing rule, then the direct liability doctrine will be less necessary. Therefore, it is unlikely that direct liability will have vast development in the United States the way it has had in England over the last few years.

All in all, the law shall always find a way to tackle abuse of the corporate form. Direct liability and piercing the corporate veil can both achieve that end to various extents, and the United States status quo shows that one may not necessarily be better than the other. They can, in fact,

323. *Esmark v. N.L.R.B.*, 887 F.2d 739, 754-755 (7th Cir. 1989) (finding direct liability on the facts which would not have supported an argument of piercing the corporate veil).

complement each other. However, given that the English courts have practically given up on the piercing doctrine, it is the authors' conviction that there has been a significant improvement of the English company law since creation of direct liability.