



PARENT COMPANY'S LIABILITY FOR ITS CONTROLLED  
SUBSIDIARIES IN TORT LAW

BY

MISS PARISUT KWANKAEW

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)  
FACULTY OF LAW  
THAMMASAT UNIVERSITY  
ACADEMIC YEAR 2020  
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INDEPENDENT STUDY

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ENTITLED

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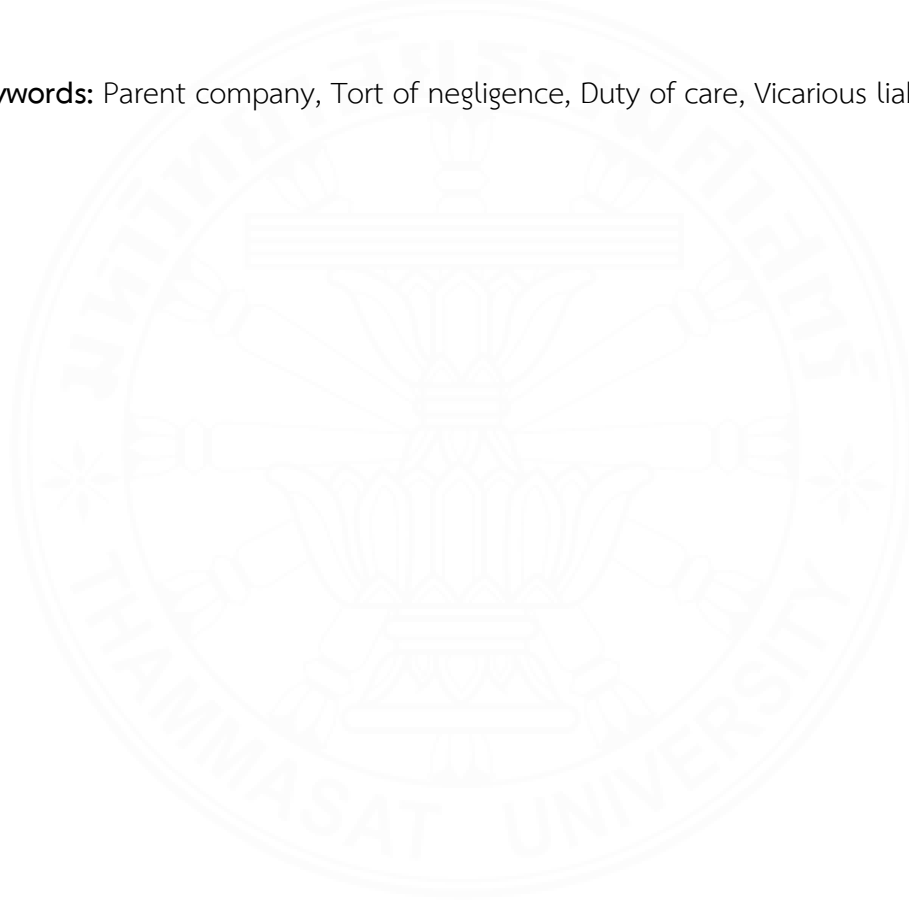
### ABSTRACT

The tortious liability of the parent company regarding the operation within the corporate group involves at least three parties; an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant. The separate legal personality doctrine considers that the parent company and its controlled subsidiaries are different entities that cause the injured person to face difficulties seeking justice. The application of the extended liability can help claimants of the insolvent subsidiaries to satisfy the damages from their parent company. To identify whether the parent company is liable, the Court should clarify the legal ground.

Under Thai law, there are two main approaches of parent company liability for tortious act: (1) Parent company’s direct liability in tort law under the general principle of tort law according to Section 420, and (2) Parent company’s vicarious liability and joint liability with its subsidiary according to Section 425 and 427. However, Thai Courts rarely recognize the tortious liability on the parent company because there is no relationship between the parent company and the third person who suffered harm from the operation within the affiliate companies. Therefore, the parent company is not liable because there is no legal ground to recognize such duty. Consequently, the plaintiff cannot obtain total compensation due to the insolvent subsidiary.

This independent study was prepared to propose the guideline in adopting the negligence principle in Common Law for the Thai Court to interpret and apply the case in the context of tort of negligence. Significantly, section 420 and Thai CCC can properly recognize the parent company's direct liability relating to harm resulting from the business operation in Thai jurisdiction. At the same time, if the relationship is recognized, the parent company can be vicariously liable for the tortious act committed by its controlled subsidiary under the agency law.

**Keywords:** Parent company, Tort of negligence, Duty of care, Vicarious liability

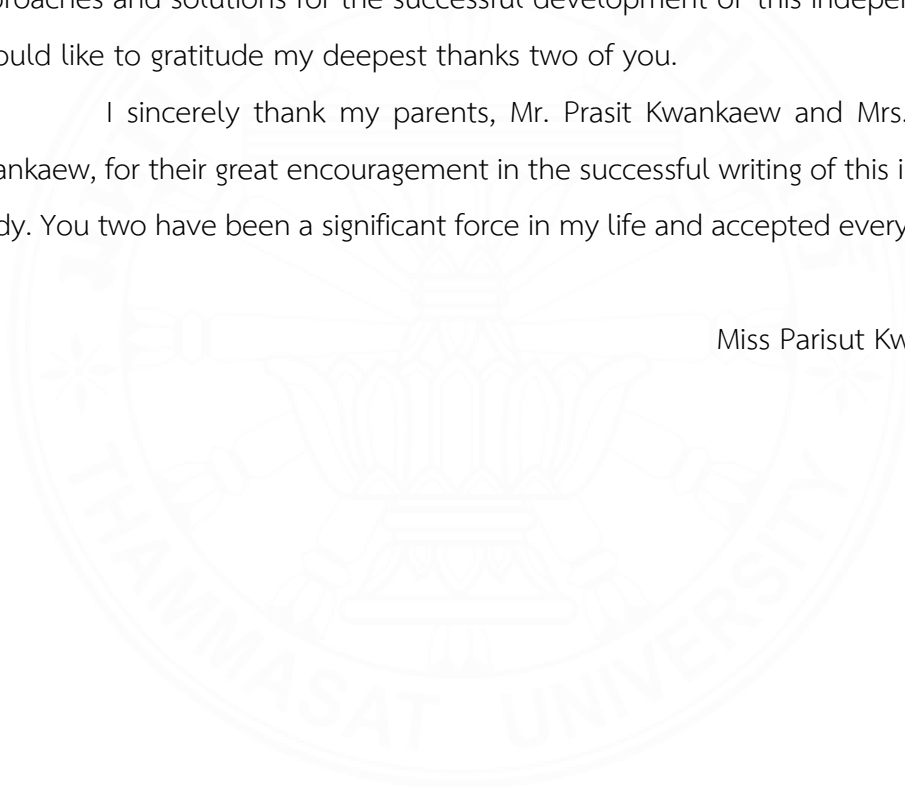


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Miss Parisut Kwankaew



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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background and Problems

The hierarchical structure of corporate groups, which comprises separate legal entities related to one another through a shareholding system, can be found commonly in the operation of many businesses. The structure of shares shows the control power of its parent company. Corporate groups play essential roles in the economic, social, and political aspects. They contribute to the enormous employment opportunities, private investment, political stability, and development of know-how to the society. The ratio of shares can reflex the control power to the subsidiary due to the prosperity of trading. Even though the corporate groups benefit the community, there are problems with the insolvent entity. The complexation of the corporate group causes difficulties for the injured person to claim the damages. Especially in the multination corporation structure, the parent company controls its subsidiaries by the horizontal structure. The parent company and its subsidiaries may situate within the same jurisdiction or different jurisdictions. The share structure of the corporate group.

The separate legal personality doctrine considers the parent company, and its subsidiaries are different entities. As the shareholder of its subsidiaries, the parent company does not hold liability for the conduct of its subsidiaries. The shareholder's limited liability eventually is used as the mechanism for the shareholder to avoid liability in tort law.

Large Thai listed companies invest in neighboring countries such as Cambodia, Laos, Myanmar, and Vietnam (so-called "CLMV" countries)<sup>1</sup> where the breach of Human Rights could be founded committed by the companies. For example,

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<sup>1</sup> Bank of Thailand, 'Statistic of Thai Direct Investment in Foreign Country', [https://www.bot.or.th/Thai/FinancialMarkets/ThaiDirectInvestment/TDI\\_3/Pages/TDI\\_Statistic1.aspx#>](https://www.bot.or.th/Thai/FinancialMarkets/ThaiDirectInvestment/TDI_3/Pages/TDI_Statistic1.aspx#>)  
accessed 30 June 2021

the villagers are forced to leave the concession area, lack remedies to the injured person, the chronic settlement that is inappropriate, lack of remedies to the natural resources, and lack of involvement and access to the information.

The investors settle the foreign company as the subsidiary company in operation under the control of its parent company to invest in the neighboring country. However, when the subsidiary committed the wrongful act, the principal of a separate legal entity is utilized for the parent company and its representative to avoid liability. The injured persons seem to encounter difficulties in executing the parent company to satisfy the remedies. The Sugar Company case in Oddar Meanchey, Cambodia, can represent these difficulties for Thai jurisdiction. According to the case, Thai investors obtain land concessions in Samrong and Chongal, Oddar Meanchey, in North-East Cambodia. The companies are registered as Cambodian Companies. While operating the business in the concession area, the company illegally occupied the land of local people. The destruction of the houses and the killing of villagers' pets, arson in villages, destruction of crops, threats, and arrests of villagers caused the lack of food security and severe poverty for the affected Cambodian people.

The plaintiffs sued Thai Sugar company as the principal of the subsidiary that was a registered Cambodian Company, which is its agent operating in Cambodia on the grounds of the violations against human and environmental rights involving the domestic law of Thailand and Cambodia in both criminal and civil law. They claimed that their rights, such as human rights, environmental rights, and right to their life, body, and properties, have been violated by a Cambodian subsidiary that owned Economic Land Concession (ELC). The subsidiary who performed itself as the representative of Thai Sugar Company injured the individuals and families, including loss of house, loss of farmland, damage to properties, and loss of opportunity to use community forests, causing mental, physical, and mental harm.

Problems are arising out of the case; (1) the limited liability of the shareholder who is a holding company (2) poor measure of the executing the case for covering the damages in total (3) difficulties in accessing of documentation evidence of the parent company

In 2019, there was a landmark case, *Lungowe v Vedanta Resources plc*. The Nchanga Copper Mine is one of the largest in the world, which is situated in Zambia. Approximately 1,800 poor Zambian people living and working near the mine complained that their farm, livestock, and drinking water had been polluted by poison emitted into the water over many years. The discharges ruined their life and health. The Zambians wish to seek compensation from those responsible, namely KCM, the Zambian company, and its parent company, Vedanta, incorporated in the United Kingdom. The Zambian people brought the case as a group action against both companies in the Court of United Kingdom rather than the local Zambia Court, claiming the personal injury, damage to property, and loss of income and use of land due to the pollution caused by discharges from the copper mine. This case raises the controversial question of whether a parent company can be liable for the operations of its subsidiary in the English courts. According to the case, the parent company had sufficient intervention in the management of its subsidiaries that it assumed a duty of care established between it and the plaintiffs. Therefore, the parent company held statutory liability to the injured persons.

The extended statutory tort for the tort committed by the parent company's operation and its controlled subsidiaries can potentially deal with the employee and the bystanders that suffered by the mass-tort resulting from the process of the corporate groups.

In the jurisdiction of Thailand, there are some possibilities to make the parent company liable for the acts of its subsidiaries in Consumer Procedure Case Act B.E.2551 (2008) Section 44. The parent company shall hold accountable when (1) the subsidiary is incorporated or acts in bad faith, or has deceitful behavior against Consumers, or (2) the subsidiary enriches another person with its, and (3) the subsidiary is insufficient to satisfy the claimant.

The Thai Supreme Court also had the decision that influenced applicable Common Law to get the parent company liable for its subsidiaries' conduct. The Court applies the concept of corporate disregard/Piercing the Corporate veil through the principle of good faith. Company B was the listed company and was not the contractor

of the consumer. However, it was the parent company of company A, and they both conduct similar business. Company B was a subsidiary registered with a small amount of registered capital (10 million THB), compared to the parent company's registered capital (250 million THB). Since the subsidiary published the advertisement inviting the public to invest in the real estate project, the two companies cooperate in the business. The parent company and its subsidiary were jointly liable for the breach of contract.<sup>2</sup>

The concept of corporate disregard applied limitedly to Civil cases about consumer rights regarding good and service. However, there is a lack of evidence showing that Thai Law can potentially deal with the case involving the wrongful act committed by the parent company and its subsidiaries.

Thai agency Law can potentially utilize in dealing with tort cases. Section 812 of the Thai Civil and Commercial Code (“CCC”) considers the subsidiary as the agent of its parent company. The parent company shall be liable for any injury resulting from its negligence or non-execution of its agent or an act done without or more than the authority. This provision can potentially apply the concept of the duty of care between the parent company and the personal injured claimant.

Section 425 and 427 of TCCC imposes liability to the parent company that it shall jointly be liable with its agent, the subsidiaries, for the consequences of a wrongful act committed by such agent in the course of business.

The approaches of parent company liability in Common Law can potentially develop the interpretation and application of Thai Law in relation with the corporate groups, which probably involves at least three parties; an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant. The application of the extended liability might be available for personal injury claimants of the insolvent subsidiaries to satisfy the damages from their parent company.

This research theoretically distinguished two main approaches of parent company liability in Common law: (1) parent company’s direct liability in tort law for

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<sup>2</sup> The Decision of the Thai Supreme Court no. 2637-2638/2553

the breach of duty of care, and (2) parent company's vicarious liability and joint liability in tort law. This research has a literature-based research method with descriptive analysis and comparative analysis comparing the concept of liability of parent company and its subsidiary. Also, there is a comparative analysis between Thai agency law and Common law relative to the parent company liability.

## 1.2 Hypothesis

In the jurisdiction of Thailand, there are two main approaches of parent company liability for tortious act: (1) Parent company's direct liability in tort law under the general principle of tort law according to Section 420, and (2) Parent company's vicarious liability and joint liability with its subsidiary according to Section 425 and 427. However, it is still arguable to impose tortious liability on the parent company due to the separate legal entity doctrine. Consequently, the injured person cannot obtain total compensation from the insolvent subsidiary. The tort of negligence, especially section 420 of Thai CCC, can potentially properly recognize the parent company's direct liability relating to harm resulting from the business operation in Thai jurisdiction. At the same time, the parent company can be vicariously liable for the tortious act committed by its controlled subsidiary under the agency law. This enigma can resolve by guiding the application of Thai CCC Section 420 for the direct liability and Section 427 for the vicarious liability so as to provide remedies to the parties suffered by the corporation of parent-subsidiary.

## 1.3 Objective of Study

This independent study serves the objectives, as follows;

- To acknowledge the problem of Thai Law in dealing with the cases involving the wrongful act committed by the parent company and its subsidiaries, especially in the event that the subsidiary is a foreign company; and

- To distinguish the two approaches of parent company liability in Common law: (1) parent company's direct liability in tort for the breach of duty of care, and (2) parent company's vicarious liability and joint liability in tort; and
- To analyze and comparative study laws and principles related to the wrongful act committed by the parent company and its subsidiaries between Thai law and Common Law; and
- To find alternative approaches for interpretation and application of the liability involving an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant under Thai law.

#### **1.4 Scope of Study**

This independent study focuses on civil liability approaches under tort law but does not extend to criminal liability and privacy issues.

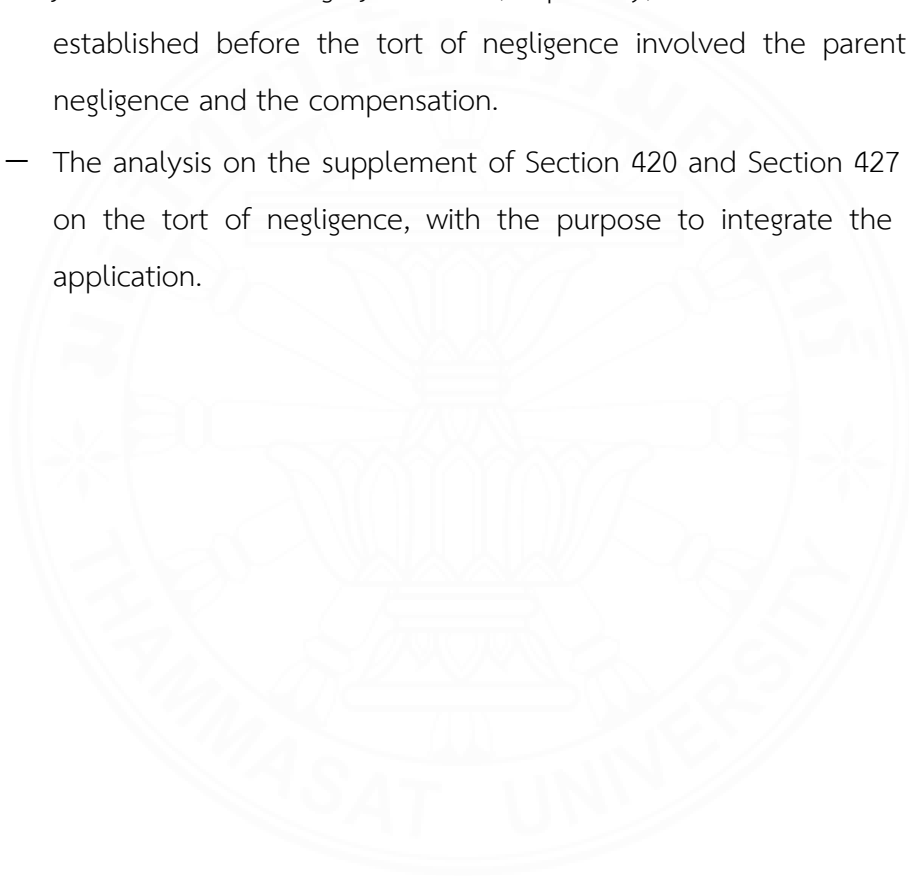
The study of Common Law principles is limited to the tort of negligence and vicarious liability doctrine to extended liability from insolvent subsidiaries to the parent company. This independent study focuses on the Common Law principles limited to the comparative study to Thai Agency Law.

#### **1.5 Research Methodology**

This independent study has been done on the basis of documentary research, both in Thai and English, from various sources, including textbooks, case law, law articles of scholars, electronic files from the university databases, and other credible publications that are accessible physically and online in order to investigate, compare and analyze.

## 1.6 Expected Result

- Understanding the mechanism of the doctrine of the tort of negligence involving the parent-subsidary relationship in Common laws, including in the United States and the United Kingdom.
- A comparative study on how tort of negligence is being applied in Thai jurisdiction and foreign jurisdiction, especially, the elements that need to be established before the tort of negligence involved the parent company's negligence and the compensation.
- The analysis on the supplement of Section 420 and Section 427 of Thai CCC on the tort of negligence, with the purpose to integrate the guidance of application.



## CHAPTER 2

### LIMITED LIABILITY AND CONTROL OF SUBSIDIARY BY PARENT

#### 2.1 Introduction

Under Thai law, a limited company is a business organization that should be observed and investigated more than other organization types. The establishment, management, and close of a company are required by law to disclose to the public.

In Thai company law, a Limited Company is a corporation registered following the provision of Thai CCC as a juristic person to obtain profit and distribute the profit to the shareholder.

#### 2.2 Separate Legal Entity

A company is an entity separate from the shareholders. The company and the shareholder hold right, duties, liabilities, assets, and obligations separated. However, the intensive use of separate entities potentially causes the abuse of corporate form. Therefore, a doctrine for disregarding the separate legal entity will apply to hold the shareholder liable.

Regarding the company law, the company is not the property that belonged to the shareholder. On the contrary, the company itself is the owner of the company, not the shareholder. The shareholder owns only shares and benefits given to them.<sup>3</sup>

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<sup>3</sup> Sophon Ratanakorn, The Commentary on Civil and Commercial Code : Partnerships and Companies (13th edn Winyuchon 2013) (โสภณ รัตนากกร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ : หุ้นส่วนบริษัท พิมพ์ครั้งที่ 13, วิญญูชน 2556)

## 2.3 Limited Liability

In general, shareholders oblige to pay the full value of subscribed shares.<sup>4</sup> There is no liability upon the company or the company's creditors. The shares invested in the company demonstrate the liability of the shareholder. The liability of the shareholders is limited to the amount of unpaid on the shares respectively held by them.<sup>5</sup> When the shareholder paid all subscribed shares, such a shareholder has not owned any liability.

The limited liability encourages people to invest in the company. Hence, the doctrine secured the assets of the shareholder. Despite the unpaid shares, the company creditor cannot claim the shareholder's asset for the company's obligation.

## 2.4 Tortious Liability of the Company

### 2.4.1 The Applicable of Entity Theory in Thailand

Two major corporate theories explain the concept of corporate personality: fiction theory and organic theory. The legal entity theory, which is mainly conformed by the legal system in countries worldwide, may lead to the different concepts instituted in corporate law. The two theories were developed in Germany. They were adopted by many countries, including the United Kingdom and other European countries, to interpret their law and granted the personality of corporations. The concession theory concerns the corporation as a fiction. The legal entity held rights and duties separately from the promoters of the entity. The existence of the corporation depends on the law. According to the political status of the entity, the concession theory provides that the corporation does not have rights unless the State grants its personality. The theory requires state permission to doing a business.<sup>6</sup>

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<sup>4</sup> Thai Civil and Commercial Code Section 1106

<sup>5</sup> Thai Civil and Commercial Code Section 1096

<sup>6</sup> Sthianrapab Naluang, 'Problems of Personality of Corporations Theory Implementation in Thailand' (2013) เสถียรภาพ นาคหลวง, "ปัญหาการใช้ทฤษฎีความเป็นบุคคลของบริษัทในประเทศไทย" วารสารนิติศาสตร์ ปีที่4 ฉบับที่ 1 (2556)

Organic theory, on the contrary, the corporation is not created by law. The law does not give formal it the existence whereby the corporation is independent of the State. The corporation has its existence separated from the shareholders and company directors. The theory confirms that a corporation is a person that possesses its own will and has its capacity. In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*, the Court recognized the company directors as an organ of the company.<sup>7</sup>

Regarding the approach of the theories, the legislation is the instrument to support the existence of a juristic person. Therefore, the act of the company representative can be deemed as the act of the juristic person. The juristic person is held tortious liability on its existence rather than vicariously liable for a wrongful act committed by others.<sup>8</sup>

#### 2.4.2 Corporate Capacity

The legal status of a limited company is a juristic person established by law. Like all juristic people, the company has its objects and owes rights and duties per such objects. Otherwise, the company to unable to act. The *Ultra Vires* rules are provided in Section 66, 67 of Thai CCC. In the Thai legal system regarding corporate law, the principle of *Ultra Vires* Doctrine has been used to draw the scope of the capability of the legal entity. According to Section 66 of Thai CCC, a company has the rights and duties only from the provisions that it can act within the scope of its power and duties or its objects. Two factors recognize the scope of company power and duties. First, the provision of Thai CCC or other law describes its authority and duties. Second, the Memorandum of Association (MoA) limits the scope of the company's power and duties. The company is unable to act without its objections contained in the MoA. The entity can work through its representative. The activities within the scope of the company's power and duties bind the company.

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<sup>7</sup> [1957] 1 QB 159

<sup>8</sup> Civil Procedure Law Division : The Office of The Council of State, 'A new idea of private tortious liability' (2013) ฝ่ายกฎหมายกระบวนยุติธรรมทางแพ่ง สำนักงานกรรมการกฤษฎีกา, “แนวคิดใหม่เกี่ยวกับความรับผิดทางละเมิดของเอกชน”(2556)

With the interpretation of the Thai Supreme Court, the use of *Ultra Vires* is sometimes disregarded to justify the case. The scope of *Ultra Vires* was interpreted further than by letters written in the MoA. And, if the company representative acts beyond the company's power and duties and the company while granted benefits from those acts, the company cannot deny the liabilities by raising the claim regarding the *Ultra Vires*. For example, the company has no objection to the agreement of bailment. Still, suppose the entity engaged in such a contract for a certain period. In that case, the bailor should be liable for the bailment property's damages since the entity benefited from this kind of business for quite an extended period.<sup>9</sup>

### 2.4.3 Corporate Tortious Liability

The company created by fiction theory can have its own will and ability to act in humankind. Apart from contractual liability, the company shall be liable for the damages resulting from the wrongful act committed and compensate the injured person.

A juristic person is liable for the tortious act committed by its representative according to Section 76 Paragraph 1 of Thai CCC. There is a contradicted opinion on the legal ground of tortious liability of a juristic person whether (1) a juristic person is liable upon its act or (2) is jointly liable with its representative.<sup>10</sup>

#### 2.4.3.1 Corporate Direct Liability

Section 66 of Thai CCC states that "A juristic person has rights and duties ... within the scope of its power and duties provided in the MoA, or its object as provided by law." Section 67 states that "... A juristic person enjoys the same rights and is subject to the same duties as a natural person, except for rights and can be enjoyed or incurred only by a natural person. Section 420 states that "A person

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<sup>9</sup> The Decision of the Thai Supreme Court no. 2837/2522

<sup>10</sup> Thanya Suewaja, 'Problems of Application for Tortious Liability of Juristic Person in Thai Civil and Commercial Code (Master of Law Degree Thesis, Thammasat University, 2009) (ัญญา ชีววาจา, ปัญหาการปรับใช้ความรับผิดเพื่อละเมิดของนิติบุคคลตามประมวลกฎหมายแพ่งและพาณิชย์ของไทย) (วิทยานิพนธ์ปริญญาโทบริหารนิติ มหาวชิวิทยาลัยธรรมศาสตร์, 2552)

who, willfully or negligently, unlawfully injures the life, ..., property, or any right of another person, is a tortfeasor who is bound to make compensation.” Therefore, the Supreme Court held that a juristic person could commit a wrongful act itself when acting within the scope of its power and duties.<sup>11</sup>

#### **2.4.3.2 Corporate Vicarious Liability**

The company should be jointly liable regarding Section 306, 420, 427, 1167 of Thai CCC.,<sup>12</sup> where the company representative committed a tortious act. The company representative unlawfully receives money from the third person on behalf of the company resulting in damages to the third person is accounted as a wrongful act. Therefore, as the principal, the company shall jointly be liable with its representative to compensate the injured person.

## **2.5 Corporate Structure**

The hierarchical structure of corporate groups, which comprises separate legal entities related to one another through a shareholding system, can be found commonly in the operation of many businesses. Holding company or the parent company is frequently found in many sectors of industry. Throughout the basic concept of separate entities of the organization, the ratio of shares can reflect the subsidiary's control power.<sup>13</sup>

### **2.5.1 Parent-Subsidiaries Relationship**

The legal terminology of the parent company and subsidiary found provided in the Ministerial regulations No. 4 (B.E. 2535) Issued under the Public Limited Companies Act B.E. 2535 as “Affiliated company”

“Affiliated company” means a public limited company that has a relationship with one or more limited or public companies, in the following manners:

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<sup>11</sup> The Decision of the Thai Supreme Court no. 893/2521

<sup>12</sup> The Decision of the Thai Supreme Court no. 11632/2554

<sup>13</sup> Choudhury B and Petrin M, “Parent Company Liability,” Corporate Duties to the Public (Cambridge University Press 2019)

(1) one company has control over the appointment and removal of directors who has the power to manage wholly or most of the other company

(2) one company holds shares in another company more than fifty percent of the issued shares. If the first company and/or its one or more affiliate companies, or the first company and/or its affiliates in the first tier and/or in the subsequent tiers holding shares of any company totaling more than fifty percent of the issued shares, such company is also regarded as an affiliate of the first company.

To understand the hierarchical structure of the corporate groups throughout this research, the parent company will be the company that owns the power of control over the other company. In contrast, the subsidiary will refer to as a company under control.

The large corporation consisted of a group of companies and networks. The subsidiaries were created for many purposes, including tax reduction, risk management, and expansion of business practice areas. The subsidiaries might also expand the practice area by establishing their subsidiaries to partially operate the business if a company takes over another company without the purpose of acquisition. The company can continue running the industry with the manipulation of the other company. The corporate groups are created by several means where the parent company controls the subsidiary's management. The parent company incurs the control through shareholding in the subsidiaries and it can appoint or remove the subsidiaries' board of directors.

A subsidiary can establish its subsidiaries hierarchically. For example, company A is a major shareholder of company B. Company B is the major shareholder of company C. So, Company A is the parent company of company B. Company B is the parent company of company C. Also, company A is the parent company of Company C.<sup>14</sup>

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<sup>14</sup> .Ibid

### 2.5.2 Difficulties in Assessment of Justice

The arrangement of corporate organization is for many objects, especially to maintain the capital. The subsidiaries are prohibited from holding the shares in their parent company.<sup>15</sup> There is an argument that whether the parent company shall have the liability of its subsidiary when the subsidiary becomes insolvent. The parent company and the subsidiaries should be accounted as one entity, disregarded as the separate entity when the corporation that carries out the business potentially causes the risk to public health and damage to the environment. The parent company might set up the subsidiaries to operate the business to avoid liability if the operation causes damages to others. The personal injured claimant can only claim against the subsidiaries, which probably owns the small asset. On the contrary, the claimant cannot claim the parent company's responsibilities who have actual control.

The separate legal personality doctrine considers that the parent company and its subsidiaries are different entities. As the shareholder of its subsidiaries, the parent company does not hold liability for the conduct of its subsidiaries. Moreover, the shareholder has the liability limited to the number of unpaid shares respectively held by them.<sup>16</sup> The shareholder's limited liability eventually is used as the mechanism for the shareholder to avoid liability in tort law. The separate legal personality is used most notably for risk management and asset partitioning. Suppose the subsidiary is liable to compensate for the injured person according to contractual liability or tortious liability. In that case, the creditor of the subsidiary can claim only the asset of the subsidiary.

Due to the prosperity of trading, many business corporations expand the organization across the border. Multinational companies established whereby the parent company domiciles in one country. At the same time, the subsidiaries situate in other countries, multinational companies are involved in the business both by shareholding and internal management. One large company seeks an opportunity to

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<sup>15</sup> The Decision of the Thai Supreme Court no. 3119/2526

<sup>16</sup> Thai Civil and Commercial Code Section 1096

run a business, obtain raw materials and manufacturing by manipulating its subsidiary. The extension of liability can hold the parent company who has the control power, by shareholding. It is more challenging when the problem arises from the multinational corporation where the parent company is domiciled in one jurisdiction and its subsidiary situate in another jurisdiction. It is not only Thai law but also foreign law and international to deal with this situation. Even if the subsidiaries have sole shareholders, it might not be possible to disregard the separate entity of the parent company and its subsidiary.



## CHAPTER 3

### TORT LIABILITY OF PARENT COMPANY IN FOREIGN LAW

#### 3.1 Tort Liability of Parent Company in English Law

The tort of negligence consists of the principle of duty of care fundamentally found in the Common Law system. According to the tortfeasor, the tortfeasor shall owe a duty to compensate the injured person if the damage against the injured claimant is foreseeable.

##### 3.1.1 The Overview of Elements of Tort Law

A tort is a civil wrong committed, whether intentionally or negligently, which causes injury to another person and results in a civil liability on the part of the “tortfeasor.” A tort can be committed both intentionally and by negligence. An intentional tort is a tort committed through deliberation or intention. On the contrary, the tort of negligence is committed through negligence. Unlike tort of negligence, intentional tort has no description. The act which intentionally harms others provides in the specific categories. It can be so-called the law of torts.

##### 3.1.1.1 Tort of Negligence

The general rule for the tort of negligence is described in the “neighbor principle.” A person must take reasonable care to avoid acts or omissions, which is reasonable foresee that such act or omission would cause injury to the neighbor. The neighbor in this principle is a person intimately and directly affected by the act of the other person that is supposed to “reasonably have in contemplation as being so affected when I am directing my mind to acts or omissions which are called in question.”<sup>17</sup>

On the contrary, the negligence in professionals shall be imposed of a higher standard of care. The *Bolam* test can be used in cases involving persons professing to have specific special skills or expertise. A standard of care shall

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<sup>17</sup> [1932] AC 562, HL

be exercised by a reasonably professional in that specialty. If the professional has acted following the common practice of others, this will be strong evidence that he has not been negligent.<sup>18</sup>

An employer requires an employee to work at a workplace that is not equipped with a safe work system. The employee suffers a personal injury at work due to a lack of safety. The employer committed the tort of negligence. The employer fails to exercise due care. Fail to provide a safe working environment for the employee.

### **3.1.1.2 Role of Public Policy in Determining Tort of Negligence**

Even if the elements of ‘reasonable foreseeability and ‘relationship of proximity’ are found established, the English Courts probably held that the defendant is not liable when Public Policy's fact is in consideration. The “public policy” applies in the case to hold that the defendant is not appropriate or unjust to be liable.

The requirement for a duty of care was foreseeability of harm and close and direct proximity. The company director had no day-to-day contact with the money depositor. Therefore, he is not liable due to no proximity to the depositor. The nature of “public policy” results in no guarantee for the plaintiff. It can be accounted as the shortcoming of applying tort of negligence onto the parent company's relationship and its controlled subsidiaries.

### **3.1.1.3 The Doctrine of Res Ipsa Loquitur**

In English law, the plaintiff must prove the defendant's negligence, except for the case where the principle of “*Res Ipsa Loquitur* (the thing speaks for itself)” is applied. *Res ipsa loquitur* allows the plaintiff to question the defendant's liability, asking for more evidence than that the accident occurred when it is such an accident that is unlikely to occur without negligence. The doctrine was used intensively in the Court to favor the claimant injured by the tort of negligence. If the doctrine is satisfied, the burden of proof will reverse to be held by the defendant whereby the negligence incurred “in itself sufficient evidence of negligence.”

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<sup>18</sup> [1957] 1 WLR 582

The doctrine of *res ipsa loquitur* applies when (1) the harm would not ordinarily have occurred without someone's negligence, (2) the things that cause harm was under the exclusive control of the defendant at the time of the tortious act, (3) a reasonable explanation is absent as to how the harm occurs. Lack of exclusive control of the thing causing the injury caused the doctrine unsatisfied. For example, if the train is apart for a while, the train door is "not sufficient under the exclusive control of the railway company." Unlike the immediate fall from the train, the train door is under the sole control of the railway company.

In the context of product liability, the doctrine imposes strict liability on a producer for damage caused by a defective product. The plaintiff does not need to prove negligence on the part of the manufacturer. On the contrary, three elements need to prove to succeed in a claim; (1.) The defective product, (2.) The plaintiff suffered damage, and (3.) The causal link between the defect and the damage. Suppose the person injured by a defective product could not identify the product manufacture before exercising his rights against the distributor. In that case, that distributor must be treated as a manufacturer if the injured person was not informed about the manufacturer's identity or its distributor.

The negligence, according to tort law, shifted to strict liability for two reasons. First, the courts were willing to use the doctrine of *res ipsa loquitur* to help the plaintiff establish negligence once the defect causing damage was proved by other evidence. Second, the manufacturers, owing to their expertise, had to comply with a very high standard of care.

In *O'Byrne v Aventis Pasteur M.S.D. Ltd.*, the pharmaceutical industry did not be liable if he can prove that when running the subsidiary does not in controlled of the parent company. At the relevant time, the State of scientific and technical knowledge was not such that a producer of the product in question might be expected to have discovered the defect if it has existed in the products. Knowledge must be carefully considered to ground liability. In general, the plaintiff must prove the plaintiff's foreseeability to the risk. On the contrary, the application of the doctrine provides a burden of proof on the defendant that the danger is not foreseeable.

Aventis Pasteur SA (“APSA”) was a French company that produced pharmaceutical products, including the antihaemophilia vaccine. While Aventis Pasteur M.S.D. Ltd (“APMSD”) was an English company that APMSA wholly-owned, performed itself as a distributor of the products manufactured by APMSA. APMSA sent an invoice to its subsidiary regarding internal management, and the consumer does not conclusively pay the price. According to the case, the plaintiff consequently suffered from severe brain damage caused by a virus infection, claiming that his injuries resulted from the defective nature of the vaccine. The vaccine had been manufactured by APMSD so that he sought against that company to hold liability.

The Court treated the distributor of goods as a manufacturer when the distributor is a wholly-owned manufacturer's subsidiary. It is under the control of the manufacturer when goods are put into circulation. The goods are put into circulation when they are taken out of the manufacturer's manufacturing process and enter the market where the product can be offered to the public.

According to the case, the two separate entities were not influenced. The Court substitutes the parent company for the subsidiary in proceedings against the subsidiary but not against the parent company. The Court held that the English distributor was a proper defendant to the lawsuit brought by the plaintiff if the manufacturer was able to decide the place and time of the product distribution. In contrast, the distributor would be integrated into the manufacturing process and controlled by the parent, so proceedings against the subsidiary could be deemed proceedings against the parent company.

### **3.1.2 Parent Company Direct liability in Tort Law**

#### **3.1.2.1 Duty of Care of Parent Company to Subsidiary's Employee**

The tort of negligence incurs on the part of the parent company because the employees were injured at work against the employer's negligence. The claimants in the position of subsidiary employees have been injured during the employment and sought against the parent company.<sup>19</sup>

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<sup>19</sup> Lo, Stefan H. C., "A Parent Company's Tort Liability to Employees of a Subsidiary." *Journal of International and Comparative Law* 117 (May 14, 2014)

In *Chandler v Cape Plc* [2012] EWCA (Civ) 525, the Court imposes the duty of care on the parent company when the employees of its subsidiaries suffered from the exposure to asbestos during the operation of the work because the parent company owned “superior knowledge” about the manufacture where the employee worked. Significantly, the superior knowledge is about the risks associated with the nature and management of the business operation of its subsidiary.

The Court of Appeal has upheld a decision of the High Court which found that a parent company directly owed a duty of care to the employee of its subsidiaries. Cape Plc., the parent company of Mr. Chandler, owed a direct duty of care to the employee of its subsidiary to advise on or ensure the safe system of work for its employees. When Mr. Chandler sued the case before the Court, the subsidiary of Cape Plc. was no longer in business operation. In contrast, the Cape Plc. is still in operation.

In 2011, the Court held that Cape Plc. is liable to Mr. Chandler based on the Common Law concept of assumption of responsibility. The parent company is in breach of duty of care when “a systemic failure of which the parent company was well aware.”<sup>20</sup> There was a lack of evidence at trial, only one witness to give oral evidence. He was the doctor when working with Cape Plc. The elements of proximity imposed the duty of care on the part of the parent company, described as follows; (a) Cape business of asbestos products, (b) Relationship between products of parent-subsidiary, (c) Technical assistance given in parent-subsidiary, (d) Contemporary evidence demonstrated that Cape was involved with the health and safety of the subsidiary’s employees, (e) Cape's involvement in the asbestos business of its subsidiary.<sup>21</sup>

The Court applies the duty of care in the asbestos case held that the parent company owed a duty of care to a person with a relationship with its subsidiaries. There are four factors in approaching the “proximity” principle in order to

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<sup>20</sup> [2012]1WLR3111[73]

<sup>21</sup> [2012]1WLR3111[6]

establish a duty on the part of the parent company for the health and safety regime of the employee.

First, the parent company and its subsidiaries share a common business operation concerning injury-causing liability. Regarding the case, the parent company and its subsidiaries share the materials and common management,<sup>22</sup> and both companies operate at the same plant.

Second, the parent company had, or should have, superior knowledge about the risk of the operation on health and safety in the industry. The parent company stipulated the manufacture of asbestos products. Also, the company had conduct research on the risk of asbestos.<sup>23</sup>

Third, the subsidiary's work practices were unsafe, as the parent company knew or should know. Regarding the case, the parent company has full awareness of risk assessment to the subsidiary employee's health and safety.<sup>24</sup>

### **3.1.2.2 Duty of care of Parent Company in the Environmental Tort Claim**

The English Supreme Court has confirmed the authority over an environmental tort claim that an English parent company can be liable in tort for acts or omissions by a foreign subsidiary in *Lungowe v Vedanta Resources plc* [2019] UKSC 20. The Zambian residents brought the case in the English Court against Vedanta Resources Plc ("Vedanta"), an English parent company, and Konkola Copper Mines ("KCM"), its subsidiary in Zambia. The Zambian residents claimed that the KCM, who owned and operated the Nchaga copper mine, discharged waste causing damages to the local Zambian residents, including injuries to body and health, property damage, and loss of income. The damages incurred from negligence and were in breach of Zambian Environmental laws.

In 2015, the Court held that Zambian residents could claim against Vedanta in English Court, although the tortious act alleged in Zambia and the

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<sup>22</sup> [2012]1WLR3111[8]

<sup>23</sup> [2012]1WLR3111[75]

<sup>24</sup> [2012]1WLR3111[77]

claimants and KCM domiciled. The critical question to be considered is whether Vedanta had sufficiently intervened in the mine owned by KMC, its subsidiaries. According to English tort law, Vedanta owed a duty of care to the Zambian residents that the intervention of Vedanta in the operation of the mine of KMC is in connection with the negligence and statutory liability claims. Vedanta shall owe a duty of care to the injured Zambian residences if such intervention can be proof.

The Court of Appeal addressed the possibility of a duty of care between Vedanta, the parent company, and the third party affected by the tortious act committed by KMC, its subsidiary. The "three-fold test" in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is employed for establishing a duty of care in this case. Three elements in establishing the duty of care are as follows; (1) harm can reasonably foresee as a consequence of the defendant's act (2) the defendant, and the injured person must be in a relationship of proximity, and (3) it must be fair, just, and reasonable to impose liability. A parent company would owe a duty of care to the injured person who is directly affected by the act of its subsidiary. There are certain additional circumstances that the required to demonstrate. The duty of care more likely arises where the parent company had "superior knowledge" or expertise on the operation of its subsidiary.

In *Chandler v Cape Plc* [2012] EWCA (Civ) 525, the parent company was assumed a duty of care towards the employees of its subsidiaries whereby the employees suffered from the exposure to asbestos during the operation of the work because the parent company owned "superior knowledge" about the manufacture where the employee worked. Significantly, the superior knowledge is about the risks associated with the nature and management of the business operation of its subsidiary.

According to the Vedanta case, the parent company raised the argument that it did not own the license to operate the mine and did not control the subsidiary's substantial operation. However, there is specific evidence indicating the intervention in management over the subsidiary. It was exposed in a sustainability report showing how Vedanta's board of directors had rigorously observed its subsidiaries and provided them a "governance framework." According to the

shareholder agreement, the parent company must provide its subsidiaries, including employee training, administrative, corporate strategy, and product development and management.<sup>25</sup>

The parent company financed its subsidiaries and provided health, safety, and environment training to its subsidiaries. There were certain publications of the parent company indicating the commitment regarding environmental risks and technical shortcomings in the infrastructure of the subsidiary.

Lord Briggs delivers three remarks in the Vedanta case to approach the principle of proximity in relation to parent company liability, described as follows;

First, the Vedanta case introduced a new category of duty of care to recognize in Common Law and required rigorous analysis more than the fundamental duty of care approach.<sup>26</sup>

Second, the four elements delivered in Chandler v Cape should be satisfied. However, the Chandler case is so specific that the requirement to prove an omission to advise the safety information to the subsidiary where the parent company is fully aware of harm cannot be easily set. The Vedanta case, therefore, delivered elements less than Chandler v Cape. The parent company liability bases on the evidence showing the parent company sufficient intervention. For instance, a report indicating the oversight of the parent company to its subsidiaries, management, and shareholder agreement includes employee training, financial support, and planning on several aspects of the corporate.<sup>27</sup>

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<sup>25</sup> Harry Sheehan, “Developments in parent company liability: Vedanta Resources Plc v Lungowe [2019] UKSC 20” (2019), < <https://www.devereuxchambers.co.uk/resources/blog-pdf/developments-in-parent-company-liability-vedanta-resources-plc-v-lungowe-2019-uksc-20>> accessed on 30 June 2021

<sup>26</sup> [2019] UKSC 20 [60]

<sup>27</sup> [2019] UKSC 20 [56]

Third, the parent company showed in the published document that the supervision and control of its subsidiaries are more than necessary.<sup>28</sup>

In February 2021, there was a significant case, *Okpabi and others v Royal Dutch Shell Plc and another*, where the UK Supreme Court decided against parent companies for the tort of negligence.<sup>29</sup> According to the case, oil spills were caused by the negligence of the pipeline operator. The Shell Petroleum Development Company of Nigeria Ltd (“SPDC”), a Nigerian registered company. SPDC is a subsidiary of the Royal Dutch Shell Plc (“RDS”), a UK-based company parent company. The plaintiffs claimed that RDS owed them a duty of care because it had exclusive control over the SPDC’s operations and/or assumed responsibility for SPDC’s operations. The plaintiffs claimed that the company failed to protect the plaintiff against the risk of foreseeable harm arising from SPDC’s operations. The governing law should be approached based on the England law, and the law of Nigeria are materially the same.

A duty of care arises; “... depends on the extent to which, and how, 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.”<sup>30</sup>

The plaintiffs claimed against the parent company following the Vedanta case that a duty of care arises by elements in Vedanta, as follows:

- (1) The parent takes over the management or joint management of the relevant activity of the subsidiary;

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<sup>28</sup> [2019] UKSC 20 [52]

<sup>29</sup> [2021] UKSC 3

<sup>30</sup> Gibson Dunn: *Okpabi v Shell: Clarification from the English Supreme Court on Jurisdiction and Parent Company Liability* (February, 2021) <<https://www.gibsondunn.com/wp-content/uploads/2021/02/okpabi-v-shell-clarification-from-the-english-supreme-court-on-jurisdiction-and-parent-company-liability.pdf>> accessed on 30 June 2021

- (2) The parent provides defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by the subsidiary;
- (3) The parent promulgates group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary; and
- (4) The parent holds out that it exercises a particular degree of supervision and control of the subsidiary.

### **3.1.3 Vicarious Liability of Parent Company**

The vicarious liability doctrine is a mechanism to impose liability on one person for a tort committed by another. Usually operate in an employment context, the employer-employee relationship exists when the tortfeasor by course of employment injures another person. The employer is vicariously held liable for a tort committed by the employee.

Vicarious liability is a combination of fault and strict liability involving two levels of the relationship among the three actors. The parent company can hold liability parallelly with its controlled subsidiaries. While the subsidiaries committed the tort of negligence on their own, and the parent company was held liable based on vicarious liability.

#### **3.1.3.1 Vicarious Liability in Parent-Subsidiary Relationship**

In English law, it is not necessary to find employment to impose liability on the employer. The vicarious liability might be conferred where the employment relationship is not formally existing, but there are risks undertaken by one party, such as an independent contractor.<sup>31</sup> Akin to employment is the ability to confer vicarious liability outside the context of the work. The English Court extended the vicarious liability where the relationship 'akin employment' exists.<sup>32</sup>

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<sup>31</sup> Reekie Adam, 'The liability of employers for the acts of their employees: a comparative analysis of Section 425 of the Thai Civil and Commercial Code and vicarious liability in English tort law' (Master of Law Degree Thesis, Thammasat University, 2016)

<sup>32</sup> [2012] EWCA Civ 938)

Vicarious liability of the parent company for its subsidiary found existed primarily based on the relationship between the parent company and its subsidiary. There are elements of vicarious liability as followed; (1) a wrongful act or omission of a tortfeasor; (2) some relationship between the factual tortfeasor and a person whom liability is imposed, and (3) some connection between the wrongful act or omission and that relationship.<sup>33</sup>

### 3.1.3.2 The Role of Control Test in Vicarious Liability

The control test is used to justify the relationship. Hence, the vicarious liability appeared where the connections were established. The control test is used in determining the mere existence of the relationship between the parent company and its subsidiaries. In *Short v. J & W Henderson Ltd*, there are four factors to indicate a contract of service; (1) the master's power of selection of is servant, (2) the payment of salaries or other remuneration, (3) the master's right to control the method of doing the work, and (4) the master right of suspension.<sup>34</sup> In an employment agreement, the employee must commit a tort while he acts within the scope of work. Same with the parent company's vicarious liability, the subsidiary must commit a tort within the authority imposed by the parent company who owed the control power through the shareholding.

## 3.2 Tort Liability of Parent Company in U.S. Law

### 3.2.1 Overview of U.S. Tort Law

Like other Common Law jurisdictions, torts in U.S. jurisdiction are acts or omissions that can be committed intentionally or negligently, caused injury or harm to a person. The term "injury" means the violation of legal rights, while the word "harm" means a loss or damages suffered by the injured person.<sup>35</sup>

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<sup>33</sup> Atiyah P.S., *Vicarious liability in the law of torts* (Butterworths 1967)

<sup>34</sup> Kravtsova Tetiana and Kalinichenko Ganna, 'The vicarious liability of parent company liability for its subsidiary', *Corporate Ownership & Control* (2016), 14(1-4), 684-691

<sup>35</sup> Restatement (Second) of Torts § 7 (1965)

The tort of negligence is found in established where a tortfeasor owed the injured person a duty of reasonable care. However, he is in breach of such duty causing the injured person to suffer harm. The violation of the duty of care is the consequence of causing such damages.

There are two elements of duty of care: “Foreseeability,” where a person reasonably foresees the consequence of an act or omission, and “Close and Direct Relationship of Proximity,” where there is a close and direct relationship of proximity between the act or omission and the consequence. In the view of the U.S. Court, the accident is merely caused by the tort of negligence. The doctrine of *res ipsa loquitur* considers that the injury caused by an agency or instrumentality is within the defendant's exclusive control. The doctrine does not apply unless the defendant had sole control of the thing causing harm. The accident is caused by nature that ordinarily would not occur without the defendant's negligence.

In the United States, the product liability is on the basis of the *res ipsa loquitur* doctrine (the thing speaks for itself), and it inherits the strict liability, meaning that the manufacturer shall be liable for the damages to life, body, and property of the injured person if such damages derived from the defect. The Court considers that the proof can reasonably conclude that the unsafe product causes damages to the injured person. Application of *res ipsa loquitur* is available to the plaintiff who shows that (1) a product is the cause of the plaintiff's damage; (2) the dangerous functioning or malfunctioning of the product is of a nature that would not occur without the negligence of the manufacturer; and (3) the product or instrumentality was under the exclusive control of the manufacturer or has not been changed since it left the control of the manufacturer.<sup>36</sup> Products Liability and Safety, Cases and Materials

In *MacPherson v. Buick Motor Co.*,<sup>37</sup> Buick Motor Co. shall be liable for the injured person who did not buy the automobile directly from the manufacturer

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<sup>36</sup> David G. Owen and Mary J. Davis, Products Liability and Safety, Cases and Materials (8th edn 2020)

<sup>37</sup> 111 N.E. 1050, 217 N.Y. 382

but the retail dealer because of the manufacturer's defects and unsafe products. Hence, the defects and unsafety are an imminent danger, compared to poison or gun, which is an inherent danger. Therefore, the manufacturer must have reasonable safety measures to ensure that their products are safe before distributing them through complex arrangements. Consumers are not able to know if a product is defective and that it might cause danger. Strict liability shall be imposed on the fact given in the case instead of the negligence principle. A manufacturer is held liable for injuries caused by a defective automobile if danger was reasonably expected regardless of whether the harm was inherent or imminent. The retailers are not liable, and the injured person can sue the manufacturers directly.

In *Escola v. Coca Cola Bottling Co. of Fresno*,<sup>38</sup> the Court applied the *res ipsa loquitur* doctrine into the case involving product liability that the injuries resulting from the overcharged bottled caused by the defendant's negligence. According to the case, the plaintiff is a restaurant waitress who should serve food and beverage to the customer and had to chill the drink. While the plaintiff was bringing the bottle of Coca-Cola to the refrigerator, the bottle blasted into her hand, causing severe injuries. The plaintiff entirely lost the ability of his hand after the accident. Therefore, she sought against the defendant that the bottle was over-pressured, and the charging of the bottle was under the defendant's exclusive control. Reasoning that "it is a matter of common knowledge that an overcharge would not happen without negligence," the Court held the defendant liable. Following the *res ipsa loquitur* doctrine, the explosion would not occur if the bottle had been adequately made, carefully tested, and charged.<sup>39</sup>

*Res Ipsa Loquitur* doctrine is applied to ease the plaintiff's burden of proof. Hence, the injured person cannot find evidence or determine the cause of the defect or unsafe product because of the lack of knowledge and expertise about the production process as the manufacturer has. The plaintiff has the burden of proof only that the product that caused the accident is defective. The defective product

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<sup>38</sup> 24 Cal.2d 453, 150 P.2d 436

<sup>39</sup> Pound Roscoe, *The Problem of the Exploding Bottle* (1960)

could be either (a 1) Manufacturing defect, (2) defective design, (3) defective packaging, or (4) failure to warn or inadequate warning.<sup>40</sup> According to tort law, the doctrine eases the plaintiff's burden of proof that the plaintiff does not require to prove the negligence. However, he must prove one out of four defects.

### 3.2.2 Parent Company Liability in US Law

The legal grounds for the parent company to be held liable for the obligations of their subsidiaries can be examined by tort law. Tort claimants are the primary concern in Common Law jurisdiction regarding the corporation. In a tort case, the Court most often held that the parent company is liable for the obligation of its subsidiaries.<sup>41</sup>

#### 3.2.2.1 Piercing the Corporate Veil Doctrine in Tort Case

The concept of limited liability disregard of the company in the U.S. was firstly found in *Salomon V. Salomon & Co. Ltd. (1897) A.C. 22*. In this case, the shareholders set up a company to buy their businesses. They issued debentures with all the company's assets as collateral to repay debts to the shareholders. The company's creditors did not receive any reimbursement when the company was bankrupted, even if the shareholder had control of the business. Hence, shareholders' assets and liabilities are separate from the company. The Court holds the shareholders liable, looking beyond the corporate form only from the defeat of fraud or wrong or the remedying of injustice.

In *Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966)*, the Court held that idea of limited liability is valid unless it is necessary to disregard the corporate form "to prevent fraud or achieve equity." Suppose one person benefits his own from the control of the company instead of the corporation's business. The control power concerning "respondeat superior"<sup>42</sup> is the element for consideration. The respondeat

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<sup>40</sup> Restatement (Third) of Torts §219 402A (1994)

<sup>41</sup> Rapakko Timo, *Corporate control and parent firms' liability for their controlled foreign subsidiaries : a study on the regulation of corporate conduct / Timo Rapakko* (Acta Academiae Oeconomicae Helsingiensis Series A, 0356-9969 ; 57, Helsinki School of Economics 1987)

<sup>42</sup> 297 N.Y. 285

superior doctrine in tort law makes an employer or a principal liable for its employee or agent. The general rules of the agency are applied to hold the parent company or the holding company liable for the obligations of a corporation.

Regarding the case, the plaintiff sued against the individual shareholder to be personally liable. The Court held that the parent company, as the shareholder, shall be liable by piercing the corporate veil. However, some dissent comments only regarding the characteristic of a person to be liable. Therefore, the subsidiary is considered the instrumentality of its parent company. And, the subsidiary, as a single corporation, is considered a dummy for its shareholders.

The dual personality of parent and subsidiary is not lightly disregarded. The claimant must prove the facts more than the parent company's ownership resulting from the majority of shares in its subsidiary. For instance, the claimant must prove the abuse of the power of control to employ the officer the directors of the subsidiaries.

In *Lowendahl v. Baltimore Ohio R.R. Co.*, 272 N.Y. 360, there are three conditions to hold a subsidiary as the instrument of the parent company and disregard the separate legal entity. There is the control that is complete domination of the parent company, including finances, policy, and business practice. As the authority mentioned earlier, the corporate entity does not have its independence separated from the choice of the parent company.

The defendant had used the control to commit fraud to perpetrate the breach of duty or a dishonest act in contravention of the injured person's right. The control and breach of duty must proximately cause damages to the injured person. In *Berger v. Columbia Broadcasting System, Inc*, the Court applied the requisite quantum of proof to satisfy *Lowendahl's control* element. The subsidiary is merely the instrumentality of the parent company when these elements present; (1) the board of directors of the subsidiary consisted solely of the employees of the parent company. (2) the organization chart of the subsidiary included the parent company's officers, and (3) all lines of employee authority from the subsidiary passed through the employee of the parent company and other subsidiaries to the chairman of the board of the parent company. Moreover, the examination of record demonstrated that the

relationship between the parent company and its subsidiary could not sustain that the subsidiary is wholly dominated by the corporation's finance, policy, and business practice.

The control test application efficiently provides compensation for most cases where the limited liability of the corporation has been abused. First, the control by the parent to such a degree that the subsidiary has become its mere instrumentality. Second, a fraud or wrong committed by the parent through its subsidiary, such as tort, violation of a statute, or disposing of the subsidiary's property. Third, unjust loss or injury to the claimant, such as insolvency of the subsidiary. The examination requires a degree of control held by a parent company over its subsidiary. There are ten factors of Powell to justify such a degree of control, described as follows;<sup>43</sup>

- (1) The parent company owns all or the majority of shares of the subsidiary.
- (2) The parent company and its subsidiaries have common directors and employees.
- (3) The parent company finances its subsidiary.
- (4) The parent company subscribes to all shares of its subsidiary or caused the subsidiary incorporation.
- (5) The subsidiary is undercapitalized.
- (6) The parent company pays the expenses or losses on the part of its subsidiaries.
- (7) The subsidiary does not have its business object, assets aside from those conferred by the parent company.
- (8) The subsidiary is described in the business plan of the parent company. The business or financial responsibility of the subsidiary is referred to as those owned by the parent company.
- (9) The parent company and subsidiary share common property or assets.

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<sup>43</sup> .Ibid

(10) The directors or the representative of the subsidiary do not independently act for the subsidiary's interest but depending on the order or the interest of the parent company.

This situation that the control is used to commit fraud against the injured person and there is an injury or loss is when the tort law is applied. The principal can be held liable for a tort committed by its controlled agent. The three conditions have appeared in the case where the concept of limited liability has been abused. The concern of involuntary constituencies of corporations is rising. The voluntary creditors can adjust their risk. There are involuntary private tort claimants who are unsatisfied with the compensation in corporate insolvency. It can be expected that the Court primarily awards the equitable remedy of piercing a corporate veil in the case of involuntary constituencies.

The Court especially emphasized two out of ten factors in the control test; an undercapitalization of the subsidiary and a failure to follow corporate formalities. The undercapitalization of the subsidiary has been examined at the time of incorporation. Limited liability is mainly concerned when a corporation has incurred losses and become undercapitalized. The improper conduct of the corporation can be examined through the test of three elements. Eventually, the Court required that the fraud or unjust conduct resulted from the abuse of the concept of limited liability. The injured person cannot recover from the parent company directly unless the injured person has exhausted the compensation against the subsidiary.

### **3.2.2.2 Parent Company's Liability in Agency and Tort Law**

The Court distinguished the case where the corporate veil of the parent company is pierced. The corporate entity is held liable only for the character of the person who will be held liable. The conclusion is that a subsidiary is considered as a factual fragment of a parent company, and such a fragment can be saved as a dummy for its shareholder.

The agency law is applicable to hold the shareholder of the company, who acted as the principal, liable for the tort liability of the subsidiary. When

a shareholder committed a tort on his own, he will be personally responsible for the tort.<sup>44</sup>

### **(1) Subsidiary as an Agent**

The term “Agency” is described as “The fiduciary relation of the manifestation of consent that one person shall act on behalf and subject to the control, and consent of the other.”<sup>45</sup> The agency's fiduciary duty exists when the principal manipulates the agent to perform service the principal controls or right to control the physical conduct of the agent to perform service accordingly.<sup>46</sup>

The liability of the shareholder can incur from the doctrine of respondeat superior. The master shall be liable for the torts of its servant committed while acting in the scope of their employment.<sup>47</sup> The term vicarious liability imputes negligence and the doctrine of respondeat superior. They all refer to the same doctrine of imposing liability upon a principal of an agency relationship.

The vicarious liability in relation to the master and the servant subjects the performance of service upon the right to control by the master. Therefore, an independent contractor or a non-servant agent is excluded from the vicarious liability.

The general rule of vicarious liability is applicable limited for the acts of a servant, which primarily appeared in employment situations. A subsidiary is merely not be deemed as the servant. It is possible that a subsidiary does not have its own will and act without the shareholder's control who rendered the property and employee. The control test can be satisfied that the subsidiary is not independent and could be considered a servant.

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<sup>44</sup> Ibid.

<sup>45</sup> Restatement (Second) of Agency §1 (1958)

<sup>46</sup> Restatement (Second) of Agency §2.1 (1958)

<sup>47</sup> Restatement (Second) of Agency §219 a(1) (1958)

The Restatement of Agency defines “non-agent independent contractor” as “a person who contracts to act on behalf of another and subjected to be controlled, except for the aspect of physical conduct.”<sup>48</sup>

The corporation is controlled by the majority of voting shares owned by the other corporation. Despite the power of control, situations where a subsidiary has “no real existence or asset” and a subsidiary’s existence is for fraud and illegal conduct. Vicarious liability appears around the relationship between the principal and the third party. The principal, by the agreement, manipulates the agent to perform the business of the principal. The master held liable for the tortious act, including the omission, of his servants when acting in the scope of the course of business

The liability of the contract is different from tort. The principal's liability is subjected to the agreement made by an agent who acts within the scope of authority. The third party is agreed to conclude the contract with the understanding that the principal is the contractual party.

The absence of authorization to perform work and lack of duty of care will not be held the principal liable for physical harm caused by the negligent conduct of the non-servant agent. Hence, the physical behavior of a non-servant agent is not controlled by the principal. The agent shall solely hold the liability for the injured person. There are two exceptions to the general rule; (1) liability based on exceptions to the nonliability rules and (2) liability based on the apparent authority of a non-servant agent to act for the principal

## **(2) Apparent Authority**

Apparent authority concerns the perception of the third party who acts reasonably within the scope of the agent's authority. A principal is held liable for tort caused by “reliance upon the statement or other conduct within an agent’s apparent authority.”<sup>49</sup> The concept of apparent liability and agency are related. They

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<sup>48</sup> Restatement (Second) of Agency §14 comment b (1958)

<sup>49</sup> White TW, 'Reliance on Apparent Authority as a Defense to Criminal Prosecution' (1977) 77 Columbia Law Review 775

both depend on manifestations by the principal to a third party, and the third party reasonably believes that the principal authorizes the agent.<sup>50</sup>

The power to affect legal relations of another person in transactions with the third party expressed or implied as the agent arising out from and following other's manifestations to the third party. The previous conduct of the principal can consider the relationship. However, such conduct cannot prove with mere statements. There are factual elements such as the similarity of the nature of business between the agent and the principal. A similar practice in the operation of the company is a crucial factor in determining the agency relationship. The act of principal putting agent in the position that leads the third party to reasonably believe agent has authority can be expressed or implied, in writing, or orally, or by any other conduct of the principal. The interpretation renders the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

A principal is liable for a non-servant agent who committed the tortious act within the agent's apparent authority. The principal is responsible for the lack of care and skill where the third party is induced to rely on the care and skill of an apparent agent. The concept is used only to an extent as if the apparent agent were a non-servant agent.

### **3.2.2.3 Tort of Negligence**

With a significantly close relationship with its subsidiary, the parent company can be liable due to the employment agreement, especially for the conduct of negligence. Hence, the employer has duties to select a competent, skillful, and careful contractor. Most importantly, the work performance involves a foreseeable risk of harm to the third party to provide necessary precautions. The employer owed a duty to exercise reasonable care to protect the third party.<sup>51</sup>

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<sup>50</sup> 437 F.2d 308 (3d Cir. 1971)

<sup>51</sup> Restatement (Second) of Tort §410 and 414

Furthermore, the employer owed a duty to cease unnecessary, dangerous practices when the employer has been informed about such hazardous practices. The employer owned a duty to reasonable inspection after the work finished to secure safety



## CHAPTER 4

### TORT LIABILITY OF PARENT COMPANY UNDER THAI LAW

#### 4.1 Tort Claim Under Thai Law

The general principle of Thai law's wrongful act or tort liability can be found under Section 420 of the Thai CCC. A person who will be regarded as a tort is an intention or negligence action against the other. Without any legal ground, and caused another person to injure his life, body, health, liberty, property, or any right. The tortfeasor who commits a tortious act shall be liable to the injured person for the compensation.<sup>52</sup> The due date for the compensation of the wrongful act is the date the unlawful act happened, so the injured person can file a complaint without notice.<sup>53</sup>

A tortious act causing damages to another person is a kind of debt in which the tortfeasor owes a liability to compensate the injured person. Section 420 is a general principle for tort liability. Tort liability consists of four elements, as follows;

- (1.) The unlawful act
- (2.) The intentional act or negligence
- (3.) The injured person suffers damages
- (4.) Causation between the act of the tortfeasor and the damages

Suppose provisions are provided explicitly for incidents, such as the Carriage of Goods by Sea Act, B.E. 2534. (1991) prescribed the carrier's tort liability and the limitation to the liability, the specific provision shall enforce instead of the general provision in Thai CCC. Suppose the specific tortious act is directly mentioned by law, such as the construction that violates Building Control Act B.E. 2522 (1979). In that case, such an act is considered an unlawful act under tort law.

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<sup>52</sup> Thai Civil and Commercial Code Section 420

<sup>53</sup> The Decision of the Thai Supreme Court no. 884/2515

#### 4.1.1 Unlawful Act

The unlawful act in some situations might be an offense against the State. An individual cannot personally claim the compensation unless the wrongful act also causes damages for the personal injured claimant. For example, the cable instruction without the authority from the office of public relation cannot be claimed by an individual<sup>54</sup> unless an individual is a personal injured claimant who suffers from nuisance to the land possession. The landlord can claim compensation for the wrongful act.

The corporate entity can enjoy the same rights and is subject to the same duties as a natural person, such as the right in his land,<sup>55</sup> except for rights and can be incurred only by a natural person. Therefore, a juristic person can commit a wrongful act on its own within the scope of its power and duties.

While Section 420 provides the general principle of a tort, Section 421 extended the term “unlawful act.” A person who exercises his right in a way that can only cause injury to another person is also considered a tortfeasor.<sup>56</sup> Unlawful act in Section 420 of Thai CCC is directly adopted from the German Civil Code.<sup>57</sup> The definition provided broadly to the act, without any legal ground, resulting in damages whole absolute rights of a person, including life, body, health, liberty, property, or any other right of a person can be considered the act committed unlawfully.

A wrongful act can incur even when the operation of the business conforms with its authority. If the right is exercised in a way that can only cause injury to another person, it is also considered a tortfeasor. For example, the factory authorized by the officer to operate the business caused a nuisance to the

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<sup>54</sup> The Decision of the Thai Supreme Court no. 10391/2553

<sup>55</sup> The Decision of the Thai Supreme Court no. 193/2507

<sup>56</sup> Thai Civil and Commercial Code Section 421

<sup>57</sup> Lipstein K, “Manual of Foreign Law. Vol. I. General Introduction and Commercial Law. [London: H.M. Stationery Office. 1950. Xxvi and 287 and (Index) 9 Pp. 25s. Net.]” (1951) 11 The Cambridge Law Journal 161

neighborhood can be brought the case to the Court to prohibit the operation.<sup>58</sup> An entity authorized by the irrigation department can construct the dam about the authority and avoid damages to the bystander. A person injured by such conduct can bring the case before the Court to seize the operation.

The tortious act must be committed against another person. It means that there is a movement with conciseness. Also, nonmovement with consciousness can be accounted for if a person owed a duty to prevent the consequence. An intentional act is an act with the consciousness that intends to cause damages to another. The result of such a tortious must be foreseeable even though it is more than the foreseeability of the tortfeasor.

#### **4.1.2 Tort of Negligence**

The tort of negligence holds a person who has no intention for the tortious act to be liable. The term “Negligence” is employed from the definition in the Thai Criminal Code, which means an act unintentionally committed. On the contrary, a person acts without the standard of care that might be expected from a person under such conditions and circumstances, especially when he could exercise such care but did not do so sufficiently.<sup>59</sup>

##### **4.1.2.1 Varying Standard of Care in Negligence**

Considering whether a person properly exercises reasonable care, the law indicates the standard of care to be employed. According to contractual liability, the general level of the standard of care is as “a reasonable person/ a prudence person.” Comparing with the business situation in which both parties owned one another according to the contract (not the personality of the debtor oneself), the person shall exercise the particular skill if such skill is required. Standard of care regarding tort law is provided in the Thai CCC section 420 that tort of negligence arises from exercising lower than the standard of care required by law.

The standard of care is comparatively presumed to diagnose the liability of the tortfeasor. The level of the standard of care according to tort and

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<sup>58</sup> The Decision of the Thai Supreme Court no. 1435/2515

<sup>59</sup> Thai Penal Code Section 59 Paragraph 4

contract is different. In tort cases, the comparison is under a prudence person in the circumstances and the condition of the tortfeasor (so-called “*in abstracto*”). Therefore, the level of care differentiates in different cases. Unlike the standard of care according to contract, the standard of care in tort law fluctuates. The standard of care of a minor is less than a major person.

The person who is comparatively presumed to be the standard to hold the liability in a tort case is a person who has physical attributes equivalent to a person who causes damages with the average mind of those who have such physical attributes. Such a person is presumed as a person in the same circumstance as the tortfeasor. The presumed person is the diagnosis *in abstracto*. Therefore, the mental condition of the tortfeasor is not in account.

#### 4.1.2.2 Standard of Care in the Professional Negligence Claim

The standard of care has different levels varied by the average upon the circumstances and business practice of the corporation. The standard of care is closely related to liability issues at several degrees. In the context of the corporate entity, the liability shall be held at the level according to its business's operation by average compared to other companies in relevant areas of business. For example, the bailment business shall owe the standard of care at the level of “a person of ordinary prudence would take of his own property”<sup>60</sup> until it delivers the property.

A prudent person is a person under such conditions and circumstances who might exercise such care. A prudence person comparatively considers the same or similar manner a man has done in the same or similar case.

For example, for the car deposit with remuneration where the defendant owns a small garage that is a rowhouse close to the roadside, the garage owner should provide a fence and security guard at night. The defendant had locked the car's door and wheel. Therefore, the defendant had exercised a standard of care as a prudence person.<sup>61</sup>

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<sup>60</sup> Thai Civil and Commercial Code Section 323 Paragraph 2

<sup>61</sup> The Decision of the Thai Supreme Court no. 10082/2551

On the contrary, if the defendant owns a big department store, the facilities such as merchandise, security, and convenience are provided to attract customers. The car park service is one such facility; therefore, the defendant has a standard of care and safety on the customer's property. The defendant did not provide a security guard nor any security measure to take care of the customer's car but only attached the CCTVs to record cars go in and out of the department store. The defendant exercised a lower standard of care, so he held liability to the customer based on the tort of negligence.<sup>62</sup> In performance with remuneration, the tortfeasor should exercise a standard of care of a prudent person even in a small amount. Regarding the law of evidence, the tortfeasor is assumed to know his assignment as a person on the same/similar circumstance that performs the identical/similar assignment.

A business corporation that specializes in certain areas, such as the bank and surgery medical clinic, owed the standard of care for whom in the profession. The standard of such business is higher than the standard owed ordinary person. The business in specialist areas bears higher expectations to the public for this action of professions in the industry. Therefore, the company has a higher liability. The corporation in this level shall consist of acting honestly, acting in the customer's best interest, having the knowledge and training, and the ability to consider possible risks.

As a person will be acting as a professional, the customer's expectation would have higher expectations than any other person. The customer's expectation shall be but not limited. In Thai law, this kind of professional standard of care can be found in section 659, paragraph three; "If the depositary professes a particular trade, business or calling, he is bound to exercise the degree of care and skill usual and requisite in such trade, business or calling"

There are certain Court decisions where the Court has held that a profession shall act as its degree of care and skill. The signature on the withdrawal note is not identical but like the signature in the bank book. The bank's

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<sup>62</sup> The Decision of the Thai Supreme Court no. 6099/2560

employee acted in gross negligence by giving money to Mr. A. If the bank were careful and served as the bank professional, the employee would have known that it was a fake signature resulting in defendant no. 2 could not come with the money from the plaintiff's account.<sup>63</sup> The plaintiff and entered into a money deposit agreement with defendant no. 2, the bank. Defendant no. 1, the defendant's employee no. 1, had given the money to someone else who is not the plaintiff causing damages to the plaintiff. Though defendant no. 1 was not negligence, and defendant no. 2 was not liable for tort, as the depository professes, defendant no. 2 shall be responsible as per section 659 paragraph 3.<sup>64</sup>

#### 4.1.2.3 Foreseeability in Tort of Negligence

The foreseeability can be accounted as the principle considering the liability of tort of negligence under Thai law. However, in calculating the amount of the compensation in a tort incident, the tortfeasor shall be liable for the unforeseeable amount if the damage is the direct consequence of the wrongful act.

To be deemed as a wrongful act, there must be damages to an injured person. If there is no consequence due to the unlawful act, there is no tort committed.<sup>65</sup> The right damaged by others considers as a tortious act is limited to the absolute right that belonged to a person, not extended to *jus in personum* or right established to a party to the contract. The damages that can be compensated under tort law include corporal damages, such as the medical fee and the inability to work, and moral damages that can calculate in the certain amount. Furthermore, the number of injuries is not limited to the actual damages resulting from the wrongful act but includes the foreseeable future damages.<sup>66</sup> The compensation of other persons besides the tortfeasor cannot be accounted for to avoid liability.<sup>67</sup>

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<sup>63</sup> The Decision of the Thai Supreme Court no. 880/2546

<sup>64</sup> The Decision of the Thai Supreme Court no. 268/2556

<sup>65</sup> The Decision of the Thai Supreme Court no. 2296/2551

<sup>66</sup> The Decision of the Thai Supreme Court no. 935/2518

<sup>67</sup> The Decision of the Thai Supreme Court no. 5207/2550, 5897/2554

#### 4.1.2.4 Tort Liability of Land Occupier

“Nuisance” in Section 1337 of Thai CCC can result in tort liability besides the liability according to the landlord's right. The rice mill emitted polluted gases and dust, causing the villagers to suffer from air pollution. Therefore, the villager can sue the mill’s owner for compensation resulting from tort liability.<sup>68</sup>

The manufacturer of cars used the instruments such as electronic drills, chain saw, and forge, causing nuisances to the bystanders. Even though the manufacturer’s owner obtained the authority to conduct the business, the owner shall operate without causing a nuisance to the other person. The Court prohibited the owner from using the instruments, which caused nuisances.<sup>69</sup>

The business operation of manufacturer of cement plates and pipes excessively caused dust pollution. The bystanders suffocated the dust and potentially caused dust asthma. The nuisance caused by the manufacture was more than the estimation according to the condition and the workplace situation. The Court ordered the prohibition on the business's operation, and the manufacturer shall compensate the bystanders monthly until the day that the manufacture can prevent the damage.<sup>70</sup>

#### 4.1.3 Liability for Omission in Tort Law

The act against another person is not limited to physical movement but also includes the omission. The omission, regarded as a wrongful act, is the omission of the person's duty. The duty might be resulting from the law, contract, the previous act, or the relationship in fact between the tortfeasor and the injured person.

For example, the contractor of the officer who constructed the state highway does not instruct the signboard of construction causing the car accident. The officer’s contractor committed an unlawful act.<sup>71</sup> The officer shall be jointly liable with

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<sup>68</sup> The Decision of the Thai Supreme Court no. 168/2467

<sup>69</sup> The Decision of the Thai Supreme Court no. 1435/2515

<sup>70</sup> The Decision of the Thai Supreme Court no. 258/2517

<sup>71</sup> The Decision of the Thai Supreme Court no. 1399/2546

the contractor as the principal. The officer cannot avoid the liability arguing that the contractor carries the work. Hence, the officer owed the penalty by law.<sup>72</sup>

The factory that manufactured the ceramic plate caused dust pollution to the land neighborhood and caused health deprivation. The Court, therefore, ordered the factory to restrain from committing further nuisance and compensate the injured person.<sup>73</sup> Also, noise pollution resulting in drills, chain saw, causing nuisance excessively to the neighborhood, can be prohibited by Court order.

The causation between the act of the tortfeasor and the injuries is the damages to the other person. An act in which must be done to prevent consequences. Therefore, a person is not held liable for damages when he does not have the duty to avoid the result, in which it is not be informed and unable to foresee.

## 4.2 Interpretation of Tortious Liability of Parent Company

The legal system of Thai Jurisdiction is fundamentally based on the Civil Law system. The authority of law can be found in writing with the characteristic of certainty and clarity.<sup>74</sup> Generally, the Court decision is not the source of the law in the Civil Law system. Therefore, it does not have authority.

According to Section 4 paragraph 1 of Thai CCC, the legislation primarily establishes that “The law must be applied in all cases which comes within the letter and spirit of any of its provisions.” Considering the parent company's liability in the context of a tort case, the principle in Title V of the Civil and Commercial Code can ap to hold the parent company liable for tort claimants. The possible assessment is whether (1) direct liability of the parent company and (2) the parent company is vicariously liable for the conduct of its subsidiaries.

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<sup>72</sup> The Decision of the Thai Supreme Court no. 1978/2528, 3057/2530

<sup>73</sup> The Decision of the Thai Supreme Court no. 258/2517

<sup>74</sup> Somyot Chuathai, Philosophy of Law (19th edn Winyuchon 2016) (สมยศ เชื้อไทย, นิติปรัชญา พิมพ์ครั้งที่ 19, วิญญูชน 2559)

### 4.3 Direct Liability of Parent Company under Thai Law

Under Thai law, the shareholder of the limited company and public company have liability limited to the number of shares owned by the shareholder but have not been paid, showing that the monetary liability is limited, equivalent to the number of unpaid shares. The principle of separated legal entity found established whereby the shareholder held liability towards the company. However, it has no direct liability towards the third party.

To apply tort law directly to the parent company who committed a tortious act by using its subsidiaries as the instrumentality, each element with regards to general rules of tort must be satisfied.

#### 4.3.1 Piercing Corporate Veil Doctrine

The concept of limited liability can be deemed the veil between the shareholder and the injured person involved as the third party. For these reasons, the company establishes its subsidiaries and has the control power as the major shareholder of the subsidiaries. A joint venture can also be a choice of incorporation of the activity. When the tort incident takes place, in the case that the subsidiaries have a nonsufficient asset or become insolvent, the subsidiaries will go for dissolvent or bankruptcy.

Tort law in the jurisdiction of the United States preserves the limited liability of a company unless there is a necessity to disregard its corporate form "to prevent fraud or achieve equity. The abuse of corporation control to further his own rather than the corporation's business and upon the principle of respondeat superior<sup>75</sup> can be accounted as fraud. It can be said that the Court is more willing to pierce the veil. There are three elements described in *Lowendahl v. Baltimore & O.R.R. Co.* to hold a subsidiary as a fragment of its parent company and disregarded the separate legal entity concept, as follows; (1) The majority control by shares for many aspects such as finances, policy and business practice with no separate will from its subsidiary

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<sup>75</sup> *Lowendahl v. Baltimore Ohio R.R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62 (N.Y. App. Div. 1936)

(2) Such control must be used to committed fraud or violation of statutory of the third party's right (3) The control and breach of duty must cause or likely cause damages

Thai Supreme Court also had the decision with influenced applicably Common Law to get the parent company to jointly liable for the conduct of its subsidiaries. The Court applies the principle of Piercing the Corporate veil through good faith in Section 5 of Thai CCC to disregard the corporate form “to prevent fraud or achieve equity.” The Court assumed the control power of the parent company on its subsidiary upon the circumstances such as published the advertisement inviting the public to invest in the real estate project. The two companies are in the same area of business. The parent company and its subsidiary were jointly liable for the breach of contract.<sup>76</sup>

In Thai Supreme Court Decision No. 2637-2638/2553, the Thai Supreme Court decided to impose the liability on the parent company to be jointly liable with its subsidiaries. The Court applies the concept of corporate disregard/Piercing the Corporate veil through the principle of good faith. Company B was the listed company and was not the contractor of the consumer. However, it was the parent company of company A, and they both conduct similar business. Company B was a subsidiary registered with a small amount of registered capital (10 million T.H.B.), compared to the parent company's registered capital (250 million T.H.B.). The subsidiary published the advertisement inviting the public to invest in the real estate project, and it considered that the two companies are in cooperation in the business. The parent company and its subsidiary were jointly liable for the breach of contract.

The Court held that the parent company is liable because its merit can be liable with its subsidiary due to the business carried out by both the parent company and its subsidiary. Therefore, the parent company can act with its subsidiaries be regarded as its instrumentality.

A similar approach for the piercing corporate veil doctrine can be found in Consumer Procedure Case Act B.E.2551 (2008) Section44, providing the

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<sup>76</sup> The Decision of the Thai Supreme Court no. 2637-2638/2553

assessment of the parent company's liability for the acts of its subsidiaries. The parent company shall hold liable when (1) the subsidiary incorporated or acts in bad faith, or has deceitful behavior against Consumers, or (2) the subsidiary enriches another person with its, and (3) the subsidiary is insufficient to satisfy the claimant.

There are some possibilities to employ the piercing corporate veil doctrine in Thai jurisdiction. However, the approaches applied limitedly to Civil cases involving the claim upon the consumer rights towards the corporation of good and service. Still, there is a lack of evidence showing that Thai Law can potentially deal with the case involving the tortious act committed by the parent company and its subsidiaries.

Regarding the jurisprudence of Thai Law, the piercing corporate veil is not appropriate in applying the context of tort cases. Hence, the ground of tort liability provides the general principle of tort as the liability based on fault, found in Title V of the Civil and Commercial Code.

#### **4.3.2 Tort of Negligence**

The parent company might set up its subsidiaries deliberately undercapitalized to shield itself from tort liability. In contrast, the parent company gains benefits as a shareholder from the hazardous activities undertaken by the subsidiary. The parent liability is connected with tort cases where tort law can deal with the parent-subsidiary relationship. For instance, (1) duties owed to insolvent subsidiary employees (2) duties owed to the third party, consumers, and bystanders. Tort law established the direct liability of the parent company to the third person. These create the possibility for the claimant to sue the parent company to satisfy their damages.

The statutory interpretation applies the duty of care doctrine in the specific circumstance where an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant are involved in a tort case.

The specific relationship between the parent company and subsidiaries is recognized where the parent company owned “superior knowledge” about the manufacture where the employee worked. The superior knowledge is about

the risks associated with the nature and management of the business operation of its subsidiary. The parent company is assumed the duty of care to prevent harm to the other party, for instance, the employee and the bystander.

In the tort case, the duty is only recognized in the case of omission, where a person owed a duty to prevent harm to other persons but omitted to do so. The duty might be resulting from the law, contract, the previous act, or the relationship in fact between the tortfeasor and the injured person.

In dealing with the case involving the wrongful act committed by the parent company and its subsidiaries, establishing the duty of care in Common Law can potentially confer the appropriate approach, the extended liability in the case of an unsatisfied personal injury claim. The extended statutory tort for the tort committed by the parent company's operation and its controlled subsidiaries can potentially satisfy the compensation to the personal injured claimant, for instance, the employee and the bystanders that suffered by the mass-tort resulting from the operation of the corporate groups.

The elements given in the asbestos case can potentially use in determining the duty of care whereby a special relationship between two parties is recognized by law.

The duty of care is the element of the tort of negligence that purely provides in Common Law Jurisdiction. Also, the Civil Law system does not address the duty of care in the case involving the wrongful act committed by the parent company and its subsidiaries because the Thai legal system is fundamentally based on the legislation. In considering the parent company's liability in the context of a tort case, the Court can potentially employ the specific factor to interpret the general principle of a wrongful act under Section 420 of Thai CCC. The tort of negligence under Thai law consists of four elements as follows; (1.) The unlawful act, (2.) The intentional act or neglect, (3.) The injured person suffers the damages, and (4.) Causation between the act of the tortfeasor and the damages

#### 4.3.2.1 Failure to Comply with Standard of Care in the Professional Negligence Claim

The levels of standard of care vary by the average upon the circumstances and business practice of the corporation. In the context of the corporate entity, the liability shall be held at the level according to its business's operation by average compared to other companies in relevant areas of business.

The tortious act is arising out of intentional acts or negligence. Under Thai law, the standard of care can be implied as to the inability to perform reasonable care resulting in the tort of negligence. The parent company processes know-how in relevant business. Therefore, the standard of professions in an industry could be assumed to perform its care and skill level.

However, the standard of care in professional standards is rarely used in most fields of the industry. The professional standard of care in tort law is limitedly recognized, which indicates specific circumstances and limited business areas, such as the bank and the medical clinic.

#### 4.3.2.2 Omission to Prevent Harm

The principle of the criminal law is employed to consider the tortious liability incurred where a person owed a duty to prevent harm to other persons, however intentionally or negligently, omits to conclude such duty.<sup>77</sup> The duty might be resulting from the law, contract, the previous act, or the relationship *in facto* between the tortfeasor and the injured person. The injured person who suffers damages can claim compensation again the tortfeasor if the damage is resulting from the omission.

##### (1) Parent Company to the Employee

To ground duty on the part of the parent company, the specific relationship between the parent company and subsidiaries must be proved.

In *Chandler v Cape Plc [2012] EWCA (Civ) 525*, the parent company was assumed a duty of care towards the employees of its subsidiaries

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<sup>77</sup> Thai Criminal Code Section 59 Paragraph 5

because the parent company owned “superior knowledge” about the manufacture where the employee worked. Significantly, the superior knowledge is about the risks associated with the nature and management of the business operation of its subsidiary.

Four factors in the interpretation of proximity to imposing the duty of care on the part of the parent company can be applied for the understanding of the duty to prevent harm of the parent company, described as follows.

First, the claimant must prove that the parent company and its subsidiaries share common business operations concerning injury-causing liability. For instance, the parent company and its subsidiaries share common materials and common management, and both companies operate at the same building.

Second, the claimant must prove that the parent company had superior knowledge about the risk of the operation on health and safety in the industry. For instance, the parent company owned the know-how of the business and researched the risk of the products.

Third, the claimant must prove that the subsidiary’s work practices were unsafe, as the parent company knew or should know. For instance, the parent company is aware of risk assessment to the subsidiary employee’s health and safety.

Lastly, the claimant must prove that the parent company knows or should foresee that the subsidiaries and its employees rely on “the superior knowledge” of the parent company to prevent health and safety. The factor can be satisfied by proof of intervention in the business operation of the subsidiaries, such as funds or materials provided by the parent company. Regarding Thai law, the duty to prevent harm can be imposed by the tort of negligence when the breach of duty, as a result, injures the innocent person. The parent company involved in high-risk business knows/ought to know that its subsidiaries conform with the risk management practices provided by the parent company.

Furthermore, the duty can be provided by law in some cases. For instance, the term “Employer” under Occupational Safety, Health, and Environment Act, B.E. 2554 (2011) includes an entrepreneur who allows any person to

work for or to provide benefit for or in him, whether the work or provision of benefit a part of a whole of the production process or business under the responsibility of the entrepreneur. The parent company that shares the workplace with the subsidiary obliges to prevent the environments that potentially cause a danger to health or hygiene with the appropriate control, supervision, and management of occupational safety, health, and environment. Not having legal relations under an employment contract with an employee directly but allows any person to work in his place, the company has the same duties as the employer, such as providing management and operation on safety, health, and environment or inform employees of the dangers of work and distribute work manuals to employees.<sup>78</sup>

## **(2) Parent Company Liability for the Mass-tort Claim**

The landmark case of parent company liability for the mass-tort claim is *Lungowe v Vedanta Resources plc [2019] UKSC 20*. The Nchanga Copper Mine is one of the largest in the world, which is situated in Zambia. Around 1,800 poor Zambian people living and working near the mine complained that their farm, livestock, and drinking water had been polluted by poison emitted from the mine into the water over many years, ruined their life and health. The Zambians wish to seek compensation from those responsible, namely KCM, the Zambian company, and its parent company, Vedanta, incorporated in the United Kingdom. The Zambian people brought the case as a group action against both companies in the Court of United Kingdom rather than the local Zambia Court, claiming the personal injury, damage to property, and loss of income and use of land due to the pollution caused by discharges from the copper mine. This case raises the controversial question of whether a parent company can be liable for the operations of its subsidiary in the English courts. According to the case, the parent company had sufficient intervention in the management of its subsidiaries that it assumed a duty of care established between it

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<sup>78</sup> Completed issue no. 301/2013 Memorandum of Office of the Council of State, The criminal prosecution of the employer under Occupational Safety, Health, and Environment Act, B.E. 2554 (2011)

and the plaintiffs. Therefore, the parent company held statutory liability to the injured persons.

Unlike the parent company's duty of care in *Chandler v Cape*, there is a specific relationship between the parent company and subsidiaries, the Chandler case is so detailed that the requirement to prove an omission to advise the safety information to the subsidiary where the parent company is fully aware of harm cannot be easily set.

In *Lungowe v Vedanta Resources plc [2019] UKSC 20*, the Court delivered elements less than *Chandler v Cape*. The parent company liability bases on the evidence showing the parent company sufficient intervention. For instance, a report indicating the oversight of the parent company to its subsidiaries, management, and shareholder agreement includes employee training, financial support, and planning on several aspects of the corporate. Significantly, the parent company showed in the published document that the supervision and control of its subsidiaries are more than necessary.

However, Vedanta does not deliver the specific factors to hold the parent company's direct liability for its controlled subsidiaries. The burden of proof of the subsidiaries may weigh upon the severity of the tort committed by the subsidiary. The burden of proof should not obstruct the legal proceeding where the violations are against human rights and environmental rights that impact many injured persons are so severe.<sup>79</sup>

In 2021, there was a significant case, *Okpabi and others v Royal Dutch Shell Plc and another*, where the UK Supreme Court held a decision against parent companies for the tort of negligence.<sup>80</sup> The Court held that a duty of care; "... depends on the extent to which, and how, the parent availed itself of the

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<sup>79</sup> Mares Radu, 'Liability within Corporate Groups: Parent Company's Accountability for Subsidiary Human Rights Abuses' (November 2019). Forthcoming in S. Deva (ed.) Research Handbook on Human Rights and Business (Edward Elgar, 2020)

<sup>80</sup> [2021] UKSC 3

opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”

The elements to be proved before the Court are following the Vedanta case, described as follows:

- The parent takes over the management or joint management of the relevant activity of the subsidiary;
- The parent provides defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by the subsidiary;
- The parent promulgates group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary; and
- The parent holds out that it exercises a particular degree of supervision and control of the subsidiary.

To provide the guidance for Thai Court, the principle of the criminal law can be interpreted to hold the parent company liable for tort of negligence. The parent company owed a duty to prevent harm to other persons when the abovementioned elements can be proved. However, the parent company negligently omits to conclude such duty and caused damages to the third person.<sup>81</sup> Therefore, the injured person who suffers damages can claim compensation against the parent if the damage is resulting from the omission.

#### **4.4 Vicarious Liability of Parent Company in Thai Law**

##### **4.4.1 Parent-Subsidiary Relationship in Agency Law**

###### **4.4.1.1 Overview of Thai Agency Law**

The general principle of Thai agency law is provided in Section 797 of Thai CCC. Agency is a contract whereby a person, called the agent, has authority to act and agrees to act on behalf of another person, called the principal.

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<sup>81</sup> Thai Criminal Code Section 59 Paragraph 5

The characteristic of an agency agreement is that the agent perform itself to the third party on behalf of the principal. Helping for a favor is not accounted for in the agency agreement. If such a person committed any wrongful act to the third person, he should solely be liable to the injured person.

For example, A asked B to drive to the pharmaceutical for his favor. B, with A in his car, negligently hit the injured person with his car. The asking for one person to do an endorsement is not an agency agreement because it is not the course of business acts on behalf of the principal to the third party. B was not jointly liable with A to the injured person.<sup>82</sup>

A drove a car to the market to buy meat for B's restaurant. The car accidentally hit the injured person. It is not deemed that A acts on behalf of B under the agency agreement. Hence, it is not the authority to act on behalf of B. B, according to Section 427 and Section 797 of Thai CCC, which is not jointly liable.

The Supreme Court of Thailand has decided that begging or asking someone, who is not an employee, a favor to drive a car is not deemed an act about agency agreement. The car driver is not the agent. On the contrary, the Court eventually decided that a car driver is an agent who acts with authority. The car driver is the agent of the car owner.

For example, A drove B's car whereby B is drunken and sat beside A in the car. It can be deemed that A acted on behalf of B and for his course of business. A is the implied agent of B.

Assignment to someone to drive a car or boat to transport the passengers in the business course is considered an agency agreement. The principal benefits from such business, so the principal shall be liable for a tort committed by the agent who acts within the course of business. The driver is the agent who has the authority to act on behalf of the principal.

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<sup>82</sup> The Decision of the Thai Supreme Court no. 1980/2505

#### 4.4.1.2 Establishment of Agency Relationship

The law does not require the form of the agency agreement. The agency agreement can be made orally. There are two categories of the agency established by contract.

- (1.) The agreement expressly describes the agency relationship. The principal and the agent mutually agree to enter into the agency agreement.
- (2.) The implied agency agreement. When the agency agreement is not concluded expressly, a circumstance suggests that the two parties have consented to participate in the agency agreement to perform or run the business.

#### **Supreme Court Decision No.2258/2527**

Company C rents the bus from Company B while Mr. A is the bus driver. Mr. A is the employee of Company B. Mr. B drives to the bus for Company C. There is the fact that Mr. A can only drive the bus on the route appoint by Company C. It can be deemed that Mr. A is Company C's agent. Therefore, as the principal, Company C shall be jointly liable for tort liability committed by Mr. A, its agent, according to Section 427 and 425 of Thai CCC.

There are some remarks on the implied agent. The implied agent does not need to conclude in writing as required in Section 798 of Thai CCC. The act within the scope of the course of business obliges the principal towards the third party according to Section 820 of Thai CCC, resulting in the agent's release of his liability.

In general, the relationship between parties involved in the agency agreement can be established according to Section 798 of Thai CCC. If the act towards the third party obliges to conclude in writing, the appointment should conclude in writing. On the other hand, if it is required evidence in writing, the appointment must also be evidenced in writing.

Section 798, the implied agent Section 797 paragraph 2, the unnamed principal Section 806, and the dummy agent in Section 821 are not required to conclude the agency agreement.

An incompetent person (ex. a minor) can also be the agent to conclude the act on behalf of the principal.<sup>83</sup> The representative of a company, such as the company director, is a person who expresses the company's act according to Section 70 of Thai CCC. It can be deemed that the act of a director is the act of the company. The company representative is not the agent of the company.

#### 4.4.1.3 Dummy Agent

Thai CCC Section 821 defines “dummy agent” as “a person who holds out another person as his agent or knowingly allows another person to hold himself out as his agent.” The principal is liable to third persons in good faith in the same way as such person was his agent.”

According to Section 797 Paragraph 1, a dummy agent has disregarded the agency agreement that the dummy agency does not require to conclude in writing.<sup>84</sup>

In Section 821, the law provided the liability of a principal towards a third person. The third person can claim compensation against the principal. However, the third person cannot sue the agent, and the principal cannot sue the third person under this provision.

There are two categories of dummy agents; (1) A person who holds out another person as his agent, and (2) knowingly allows another person to hold himself out as his agent.

The essential element of a dummy agency is that the third person shall involve in the business with the misleading that the principal operates the business.<sup>85</sup>

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<sup>83</sup> The Decision of the Thai Supreme Court no. 598/2506

<sup>84</sup> The Decision of the Thai Supreme Court no. 8794/2557

<sup>85</sup> The Decision of the Thai Supreme Court no. 1085/2506

### Supreme Court Decision No. 7673/2550

Company A is the owner of a taxi car where the company name and company mark are showed on both sides of doors. The public understands that the vehicle is from Company A. Company A allows B to use the taxi car to obtain benefits. It can be deemed that Company A holds out B as its agent for transportation. Company A shall be liable to an injured person in good faith as B was its agent according to Section 821. Moreover, Company A shall be jointly liable for a tort committed by B according to Section 427 and 425.

#### 4.4.2 Role of Agency Law in Parent-Subsidiary Liability

Section 425 and Section 427 of the Thai CCC provide tort liability in the Agency agreement. The description of the agency agreement provides that a principal shall be liable for the consequences of a wrongful act that the agent committed in the course of business.

The business carried out by the agent is regarded as the business of the principal. The principal shall be liable for any consequence resulting from the operation of the company. Therefore, if the agent committed a wrongful act, the principal held the liability for the result of a tort incident resulting from the operation of the business carried out by its agent. The principal and its agent are jointly liable according to Section 291 of Thai CCC. The injured person can claim compensation for a wrongful act from both the principal and the agent or one of them.<sup>86</sup> However, the principal is entitled to reimbursement from its agent according to Section 296 and Section 426 of Thai CCC.

On the contrary, if the agent does not commit a wrongful act, it lacks information because the principal conceals it. The principal might solely be liable for the injured person due to the course of business resulting in damages.<sup>87</sup>

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<sup>86</sup> The Decision of the Thai Supreme Court no. 5444/2537

<sup>87</sup> Jitti Tingsaphat Fund, The Commentary on Civil and Commercial Code - Management of Affairs (without mandate), Undue Enrichment, Wrongful Acts (Section 395-452) (3th edn Winyuchon 2018) (กองทุนศาสตราจารย์จิตติ ดิงศภัทย์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วย จัดการงานนอกสั่ง ลาภมิควรได้ ละเมิด บรรพ 2 พิมพ์ครั้งที่ 13, วิญญูชน 2561)

According to the employer-employee relationship, the agent's course of business can be deemed the principal's course of business. According to Section 807, the agent obliges to the order of its principal. Therefore, the principal is liable for the tort incident committed by its agent.<sup>88</sup>

Section 820, stating “acts ... has done within the scope of his authority under his agency.” limits the agent's liability. Therefore, the principal is not liable for the act beyond the scope of the authority provided by the agency agreement.<sup>89</sup>

No legal ground provides that the agent shall hold the liability for a tort committed by the principal's employee who works for a course of employment. The agency agreement limits the authority imposed on the agent to conclude the transaction or any act resulting in the change in the legal status with the third party.

Section 821 of Thai CCC states “A person who holds out another person as his agent or knowingly allows another person to hold himself out as his agent. Such person is liable to third persons in good faith in the same way as such person was his agent.” The principal shall be a liability for a tort committed by its dummy according to Section 821.<sup>90</sup>

### **Supreme Court Decision No. 562/2553**

The employee of company B damages the cable while controlling a backhoe, questioning the Court to consider whether company A is jointly liable since company A is not the owner of the backhoe and the person who caused damages is not its employee. Company A is a party to the construction contract with the Department of Highways. The agreement prohibits the company from hiring its subcontract. In breach of contract, company A gave the work to company B. Company A held the liability to the department for the violation of an agreement. The company admitted the subcontract is its agent who acted on behalf of Company A, the principal.

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<sup>88</sup> The Decision of the Thai Supreme Court no. 976/2550

<sup>89</sup> The Decision of the Thai Supreme Court no. 434/2538

<sup>90</sup> The Decision of the Thai Supreme Court no. 3116/2523, 1071/2532

Company B caused damages to the injured person. Therefore, Company A is liable for the injured person as the principal according to Section 427 Thai CCC.

**Supreme Court Decision No. 4845/2555**

Department store A had the regulation for the customer to park the car in the department store area. The customer must take a card from company B's security guards, and they should return the car when leaving the car park. The customer parks the car themselves free of charge. However, department store A has a car park area with security services that confers the customer understanding that the standard of department store A to provide services and safety to the customer's property. Department store A performed itself as the principal of company B and authorized the charge of security. The employer of the Company committed the tort of negligence, causing customer loss of property. Department store A, a principal of B and company B's employee, the agents who are in charge of security, shall be jointly liable according to Section 427 and Section 420

**Supreme Court Decision No. 2116/2553**

Company A operated the development project of condominium whereby the construction of building, utilities and equipment as described in the advertisement. Company A hired Company B to install the fire alarm system. Company A held liable to adjust the system and ensure that the system will function properly. Company B, the contractor, can be deemed an agent of company A to install the fire alarm system. Company B's employee committed the tort of negligence, causing damages to property. Company B is vicariously liable for its employee according to Section 425. Company A is jointly responsible with Company B regarding Agency law according to Section 427 and 425.

Under Thai tort law and agency law, the two companies hold parallelly liable for the same tortious act committed by the employee, the contractor, or the officer of one company. The legal ground of application is that both companies found employment or agency relationships while the tortfeasor injured a person according to a course business.

Considering the vicarious liability regarding agency law does not require much intimate relationship between the parent company and its subsidiary. The perception of the third person can recognize the relationship between the tortfeasor and the companies. The contractor who performs the partial course of business can be deemed the company's agent. The Court mostly holds the parent company to be jointly liable for the tortious act committed by the tortfeasor to award the compensation to the injured person in a satisfying amount.

Although the hierarchical structure of the parent-subsidiary relationship is rarely recognized, the approach of vicarious liability in the context of agency law under Thai CCC can satisfy the injured person because the injured person is entitled to claim all parties who vicariously liable.



## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusion

The Supreme Court recognized the capacity of a juristic person that a juristic person can commit a wrongful act on its own within the scope of its power and duties according to Section 66, 67, and 420. Therefore, the plaintiff can claim compensation concerning tort liability against the juristic person directly.

The approaches of parent company liability in Common Law can potentially develop the interpretation and application of Thai Law in relation with the corporate groups, which probably involves at least three parties; an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant. The application of the extended liability might be available for personal injury claimants of the insolvent subsidiaries to satisfy the damages from their parent company.

There are two main approaches of parent company liability in Tort law: (1) parent company's direct liability in tort law for the breach of duty of care, and (2) parent company's vicarious liability and joint liability in tort law.

#### **Parent company's direct liability for the breach of duty of care**

The parent company's direct liability in tort law concerns two doctrines; piercing corporate veil doctrine and Court interpretation in applying breach of duty of care in specific circumstances.

According to the piercing corporate veil doctrine, the Thai Courts recognize the doctrine to hold the parent company liable directly through the principle of good faith in Section 5 of Thai CCC. However, the approaches applied limitedly to Civil cases involving the claim upon the consumer rights towards the corporation of good and service. Still, there is a lack of evidence showing that Thai Law can potentially deal with the case involving the wrongful act committed by the parent company and its subsidiaries.

Regarding the jurisprudence of Thai Law, the piercing corporate veil is not appropriate in applying the context of a tort case. Hence, the ground of tort liability provides the general principle of tort as the liability based on fault, which is in Title V of the Civil and Commercial Code.

Likewise, establishing the duty of care in Common Law can potentially confer the appropriate approach in dealing with the case involving the wrongful act committed by the parent company, its subsidiaries, and the unsatisfied personal injury claimant. The extended statutory tort for the tort committed by the parent company's operation and its controlled subsidiaries can potentially satisfy the compensation to the individual injured claimant, for instance, the employee and the bystanders that suffered by the mass-tort resulting from the operation of the corporate groups.

Even though the duty of care is the tort of negligence purely provides in Common Law Jurisdiction. Thai Law address this principle in the case involving the wrongful act committed by the parent company and its subsidiaries. Hence, the Thai legal system is fundamentally based on legislation. In considering the parent company's liability in the context of a tort case, the Court can potentially employ the specific factor to interpret the general principle of a wrongful act under Section 420 of Thai CCC. The approaches for statutory interpretation in applying the duty of care doctrine in the specific circumstance where an insolvent subsidiary company, a solvent parent company, and an unsatisfied claimant are involved in the tort case.

### **Parent company's vicarious liability and joint liability in tort law**

Vicarious liability in Civil law and Common law shares many common characteristics. However, the US Court applies the instrumentality doctrine to pierce the corporate veil in tort cases more frequently than the English Court. The principal-agent relationship is recognized as the factor of excessive control or domination of the parent company to pierce the corporate veil. At the same time, the tortious act itself can be deemed unlawful.

Under Thai law, the vicarious liability regarding agency law does not require much intimate relationship between the parent company and its subsidiary to hold

the two companies vicariously liable for a tort committed by a tortfeasor. The subcontractor or the contractor who performs the partial course of business of the principal can be deemed an agent. The Court mostly holds the parent company to be jointly liable for the tortious act committed by the tortfeasor to award the compensation to the injured person in a satisfying amount.

Although the hierarchical structure of the parent-subsidary relationship is rarely recognized, the approach of vicarious liability in the context of agency law under Thai CCC can satisfy the injured person because the injured person is entitled to claim all parties who vicariously liable.

## 5.2 Recommendations

According to the research, there are deficiencies in Thai law in dealing with tort liability resulting from the parent company's operation and its controlled subsidiaries. The extended statutory tort can potentially satisfy the compensation to the injured personal claimant, for instance, the employee and others.

The parent company can directly hold liability through the interpretation of Thai CCC Section 420. the Court can employ the specific factor delivered in *Chandler v Cape Plc* and *Lungowe v Vedanta Resources Plc* to impose the duty to prevent harm on the part of the parent company and hold tort liability on the ground of omission resulting in the tort of negligence

Four factors in the *Chandler v Cape* case can utilize in considering the parent's duty to prevent harm to the employees of the subsidiaries. The parent company owed a duty to prevent harm where (1) the parent-subsidary share common character of business, (2) the parent company has superior knowledge in health and safety regimes, (3) the parent knows or ought to know the malpractice of the subsidiary (1) the parent company can foresee that subsidiary would rely on its superior knowledge.

Considering the violations against human and environmental rights, the Thai Court can employ the principles delivered in *Lungowe v Vedanta Resources plc*.

to ease the burden of proof where the intervention of the parent company in the management of its subsidiaries is more than necessary.

To provide the guidance for Thai Court, the principle of the criminal law can be interpreted to hold the parent company liable for tort of negligence. The parent company owed a duty to prevent harm to other persons. However, the parent company negligently omits to conclude such duty and caused damages to the third person.<sup>91</sup> Therefore, the injured person who suffers damages can claim compensation against the parent if the damage is resulting from the omission. The elements to be proved before the Court are in accordance with the Vedanta case, described as follows:

- (1.) The parent company takes over the management or joint management of the relevant activity of the subsidiary;
- (2.) The parent company provides defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by the subsidiary;
- (3.) The parent company promulgates group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary; and
- (4.) The parent holds out that it exercises a particular degree of supervision and control of the subsidiary.

Furthermore, the alternative approach of vicarious liability in the hierarchical structure of the parent-subsidiary relationship should be recognized. Since the legal entity can exercise the same rights and be subject to the same duties as a natural person, it can establish the agency relationship. If such a relationship can be proved before the Court, the parent company held vicariously liable as the principal of the subsidiaries.

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<sup>91</sup> Thai Criminal Code Section 59 Paragraph 5

## REFERENCES

### Books and Articles

Atiyah P.S., *Vicarious liability in the law of torts* (Butterworths 1967)

Cernic Jernej Letnar, *Human rights law, and business: corporate responsibility for fundamental human rights* (Europa Law Pub. 2010)

Choudhury B and Petrin M, “Parent Company Liability,” *Corporate Duties to the Public* (Cambridge University Press 2019)

David G. Owen and Mary J. Davis, *Products Liability and Safety, Cases and Materials* (8th edn 2020)

Civil Procedure Law Division : The Office of The Council of State, 'A new idea of private tortious liability' (2013) ฝ่ายกฎหมายกระบวนยุติธรรมทางแพ่ง สำนักงานกรรมการกฤษฎีกา, “แนวคิดใหม่เกี่ยวกับความรับผิดทางละเมิดของเอกชน”(2556)

Hadden T, *Company Law, and Capitalism* (Weidenfeld and Nicolson 1977)

Jitti Tingsaphat Fund, *The Commentary on Civil and Commercial Code - Management of Affairs (without mandate), Undue Enrichment, Wrongful Acts (Section 395-452)* (3th edn Winyuchon 2018) (กองทุนศาสตราจารย์จิตติ ดิงศรัทย์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วย จัดการงานนอกสั่ง ลาภมิควรได้ ละเมิด บรรพ 2 พิมพ์ครั้งที่ 13, วิญญูชน 2561)

Kravtsova Tetiana and Kalinichenko Ganna, 'The vicarious liability of parent company liability for its subsidiary', *Corporate Ownership & Control* (2016)

Lo, Stefan H. C., "A Parent Company's Tort Liability to Employees of a Subsidiary." *Journal of International and Comparative Law* 117 (May 14, 2014)

Mares Radu, 'Liability within Corporate Groups: Parent Company's Accountability for Subsidiary Human Rights Abuses' (November 2019). Forthcoming in S. Deva (ed.) *Research Handbook on Human Rights and Business* (Edward Elgar, 2020)

Murphy Damien, 'Holding Company Liability for Debts of its Subsidiaries: Corporate Governance Implications' (1998)

Pauer Nada Ina, *The single economic entity doctrine and corporate group responsibility in European antitrust law* (International competition law series, Kluwer Law International 2014)

Petrin Martin, Barnali, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013)

Pound Roscoe, *The Problem of the Exploding Bottle* (1960)

Rands WJ, 'Domination of a Subsidiary by a Parent' (1998)

Sheikh Saleem, *Corporate social responsibilities: law and practice* (Cavendish Pub. 1994)

Stianrapab Naluang, 'Problems of Personality of Corporations Theory Implementation in Thailand' (2013) เสถียรภาพ นาทหลวง, “ปัญหาการใช้ทฤษฎีความเป็นบุคคลของบริษัทในประเทศไทย” วารสารนิติศาสตร์ ปีที่4 ฉบับที่ 1 (2556)

Somyot Chuathai, *Philosophy of Law* (19th edn Winyuchon 2016) (สมยศ เชื้อไทย, นิติปรัชญา พิมพ์ครั้งที่ 19, วิญญูชน 2559)

Sophon Ratanakorn, *The Commentary on Civil and Commercial Code: Partnerships and Companies* (13th edn Winyuchon 2013) (โสภณ รัตนากร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ : หุ้นส่วน บริษัท พิมพ์ครั้งที่ 13, วิญญูชน 2556)

White TW, 'Reliance on Apparent Authority as a Defense to Criminal Prosecution' (1977)

Witting Cristian A., 'Conceptions of Group and Network Liability' in Witting CA (ed), *Liability of Corporate Groups and Networks* (International Corporate Law and Financial Market Regulation, Cambridge University Press 2018)

Lipstein K, "Manual of Foreign Law. Vol. I. General Introduction and Commercial Law. [London: H.M. Stationery Office. 1950. Xxvi and 287 and (Index) 9 Pp. 25s. Net.]" (1951)

### **Dissertations**

Rapakko Timo, *Corporate control and parent firms' liability for their controlled foreign subsidiaries : a study on the regulation of corporate conduct / Timo Rapakko* (Acta Academiae Oeconomicae Helsingiensis Series A, 0356-9969 ; 57, Helsinki School of Economics 1987)

Reekie Adam, 'The liability of employers for the acts of their employees: a comparative analysis of Section 425 of the Thai Civil and Commercial Code and vicarious liability in English tort law' (Master of Law Degree Thesis, Thammasat University, 2016)

Thanya Suewaja, 'Problems of Application for Tortious Liability of Juristic Person in Thai Civil and Commercial Code (Master of Law Degree Thesis, Thammasat University, 2009)

(สัญญา ชื่อวจา, ปัญหาการปรับใช้ความรับผิดเพื่อละเมิดของนิติบุคคลตามประมวลกฎหมายแพ่งและพาณิชย์ของไทย) (วิทยานิพนธ์ปริญญาโทมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 2552)

### Electronic Files

Bank of Thailand, “Statistic of Thai Direct Investment in Foreign Country”,  
<[https://www.bot.or.th/Thai/FinancialMarkets/ThaiDirectInvestment/TDI\\_3/Pages/TDI\\_Statistic1.aspx#](https://www.bot.or.th/Thai/FinancialMarkets/ThaiDirectInvestment/TDI_3/Pages/TDI_Statistic1.aspx#)>

Harry Sheehan, “Developments in parent company liability: Vedanta Resources Plc v Lungowe [2019] UKSC 20” (2019), <<https://www.devereuxchambers.co.uk/resources/blog-pdf/developments-in-parent-company-liability-vedanta-resources-plc-v-lungowe-2019-uksc-20>>

Gibson Dunn: Okpabi v Shell: Clarification from the English Supreme Court on Jurisdiction and Parent Company Liability (February,2021) <<https://www.gibsondunn.com/wp-content/uploads/2021/02/okpabi-v-shell-clarification-from-the-english-supreme-court-on-jurisdiction-and-parent-company-liability.pdf>>

### Legislations

Civil and Commercial Code B.E. 2468 (1925)

Thai Penal Code B.E. 2499 (1956)

Consumer Procedure Case Act B.E.2551

Ministerial regulations No. 4 (B.E. 2535) Issued under the Public Limited Companies Act B.E. 2535

Restatement (Second) of Torts (1965)

Restatement (Second) of Agency (1958)

### Thai Supreme Court Decision

The Decision of the Thai Supreme Court no. 2837/2522  
The Decision of the Thai Supreme Court no. 893/2521  
The Decision of the Thai Supreme Court no. 11632/2554  
The Decision of the Thai Supreme Court no. 3119/2526  
The Decision of the Thai Supreme Court no. 884/2515  
The Decision of the Thai Supreme Court no. 10391/2553  
The Decision of the Thai Supreme Court no. 193/2507  
The Decision of the Thai Supreme Court no. 1435/2515  
The Decision of the Thai Supreme Court no. 10082/2551  
The Decision of the Thai Supreme Court no. 6099/2560  
The Decision of the Thai Supreme Court no. 880/2546  
The Decision of the Thai Supreme Court no. 268/2556  
The Decision of the Thai Supreme Court no. 2296/2551  
The Decision of the Thai Supreme Court no. 935/2518  
The Decision of the Thai Supreme Court no. 5897/2554  
The Decision of the Thai Supreme Court no. 1435/2515  
The Decision of the Thai Supreme Court no. 258/2517  
The Decision of the Thai Supreme Court no. 1399/2546  
The Decision of the Thai Supreme Court no. 1978/2528, 3057/2530  
The Decision of the Thai Supreme Court no. 2637-2638/2553  
The Decision of the Thai Supreme Court no. 2258/2527  
The Decision of the Thai Supreme Court no. 7673/2550  
The Decision of the Thai Supreme Court no. 562/2553  
The Decision of the Thai Supreme Court no. 4845/2555  
The Decision of the Thai Supreme Court no. 2116/2553

## Case Law

HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159

Donoghue v Stevenson [1932] AC 562, HL

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582  
Cassidy v Ministry of Health [1951] 2 KB 343

Chandler v Cape Plc [2012] EWCA (Civ) 525

Easson v LNER [1944] 2 KB 421

Gee v Metropolitan Railway (1873) LR 8 QB 161

Lungowe v Vedanta Resources plc [2019] UKSC 20

Caparo Industries Plc v Dickman [1990] 2 AC 605 is

E v English Province of Our Lady of Charity [2012] EWCA Civ 938 (12 July 2012)

International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 79 N.E.2d  
249 (N.Y. 1948) Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966)

Lowendahl v. Baltimore Ohio R.R. Co., 247 App. Div. 144, 287 N.Y.S. 62 (N.Y. App. Div.  
1936)

Okpabi and others v Royal Dutch Shell plc and another [2021] UKSC 3

Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971)

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