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VICARIOUS LIABILITY AND CORPORATE GROUPS

by

Tulani Musawenkosi Mafulela

Student number: 679920

Thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy in Law

at the University of the Witwatersrand, Johannesburg

Supervisor: Associate Professor Emile Zitzke

Date: 31 March 2025

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ACKNOWLEDGEMENTS

I have it on good authority that this section of the thesis does not require footnotes, and I am permitted to say what I really think about my "supervisor". There are many enduring lessons that I have picked up along the way. My first lesson was that the process required a lot of self-awareness. For me, I have come to realise that I always had an active imagination. At times, this has served me well. At times, not so much. There has, however, been one person who has always indulged my many meandering thoughts on the law. Not over a cup of coffee or a once-off lunch. But for many years. Listening attentively, advising patiently. Consistently helping me channel my love for the law into concrete results. Only someone genuinely committed to your growth and success can make such a sacrifice. That's Emile for you.

Where I come from, individuals don't make contributions. Only a community can make a contribution. "We" believe that everything that has ever been achieved is built on many small efforts of those around you and those who have come before you. Efforts made on your behalf. Thus, what you are about to read is not my own, but "our" own. My parents, Nelly and Michael Mafulela, made this possible. My dad would have been especially proud of the PhD. His entire life's work was dedicated to the education of his children. Thank you, Mafulela's 'dads side' and the Mpala's 'moms side' who showcase that the pursuit of knowledge is part of who we are. Thank you, Beki and Toni. Thank you to my partner, Kelly. Thank you, Rudo, and Igoki, for setting me up with a solid research system and for teaching me many things about good writing.

As I reflect on the most enriching journey I have yet walked, the journey of the PhD in law. I have many thoughts on what I have picked up along the way. Initially, I expected that by now I would have many answers to the world's most pressing challenges. That has only been half the story. I feel firmly rooted on the foot of the mountain in the same way I felt after my first class at Wits in Introduction to Law. It is true that I have learnt a thing or two about the law. But for me, the most enduring lesson of my journey has not only been about the law. Rather, it has been about the process of how to ask better questions and to probe the purpose of our inquiries.

With that, I offer a final thought for whoever finds themselves reading this thesis. May we never forget that education is not an end in itself, but rather a necessary means to an end. Each of us must determine which purpose our education will serve. My hope is that our education leads us to fruitful inquiry. I hope that the questions we ask will set us free, empower us and most importantly, empower those surrounding us.

ABSTRACT

The corporate form of modern businesses has travelled a long way since a royal charter enacted by parliament was required to start a company. Today, technological advances, the law, and management have made it easy to start, scale, and manage even large, complex multinational corporations (MNCs). Many of these MNCs have adopted corporate groups as part of the preferred methods of organising global enterprise. The reach, size, and breadth of the activities of MNCs and their affiliates are unprecedented in modern history. Some of these advances are laudable for their overall increase in goods and services. However, MNCs are also creating an ever-increasing adverse effect on human rights including harms of a delictual nature.

As it stands, there is a lack of consensus about how best to respond to the legal challenges MNCs present. There is an ineffective patchwork of soft law guidelines, international law, regional law, and state laws that regulate MNCs. All these guidelines and laws largely fail to give adequate legal recourse to delictual harms caused by MNC activities. The Bhopal gas leak disaster in India on 2 December 1984 aptly represents the challenge of bringing MNCs to account for delictual harms.

In this thesis, I inquire into how the law of delict ought to respond to the unique position in which delict claimants find themselves concerning harms committed by MNCs that operate in corporate groups. Such an inquiry should not be confined within the law of delict. There are complex questions about how the law of delict must interact with international and especially private international law principles brought about by the cross-border nature of the delictual harms. There are further questions of how delict interacts with corporate law, legislation, the common law, and most importantly, the transformative Constitution of the Republic of South Africa.

In this thesis, I evaluate the relevant provisions of the Constitution, company law and the law of delict to determine how we might hold corporate groups accountable for delicts. The result is a proposal for the constitutionally-inspired development of the common law of vicarious liability that would enable victims to hold parent companies liable for the delicts of their subsidiaries

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CHAPTER 1: INTRODUCTION

1.1 Background to the research problem

The corporate form of modern businesses has travelled a long way since the days when a Royal Charter enacted by parliament was required to start a company.[1] Today, advances in technology, the law, and management have made it easy to start, scale, and manage even large, complex multinational corporations (MNCs).[2] Many of these MNCs have adopted corporate groups[3] as part of the preferred methods of organising their global enterprises.[4] The reach, size, and breadth of the activities of MNCs and their affiliates are unprecedented in modern history.[5] Some of these advances are laudable for their overall increase in goods and services.[6] However, MNCs are also creating an ever-increasing adverse effect on human rights.[7] Often, when human rights are violated, the law of delict or tort law ought to step in as the mechanism through which reparations are made for those violations.[8] However, several large-scale delicts[9] in various industries, such as mining and manufacturing, have caused concern concerning the scale of harm and the significant barriers to legal recourse for the victims in these cases.[10] Barriers to

[1] R Harris 'The Private Origins of the Private Company: Britain 1862 -1907' (2013) 33 *Oxford Journal of Legal Studies* 339 at 355.
[2] United Nations 'Conference on Trade and Development Division on Investment and Enterprise Transnational corporations' August 2010 at 6, 60, 47–50 available at *https://unctad.org/en/Docs/unctaddiaeia2010v192_en.pdf* last accessed 18 August 2020.
[3] Briefly, a corporate group exists when one entity controls another entity in a manner contemplated in terms in s 1 read with s 2 and s 3 of the Companies Act 71 of 2008; see detailed definition of corporate groups in FHI Cassim et al *Contemporary Company Law* 3 ed (2021) at 255–78.
[4] T Khanna & Y Yafet 'Business Groups in Emerging Markets: Paragons or Parasites' (2007) 106 *Journal of Economic Literature* 331 at 331–5.
[5] See discussion by JG Ruggie 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2017) 12 *Regulation and Governance* 317 at 317–33.
[6] See discussion of global trade done through multinational enterprises in United Nations Conference on Trade and Development *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013) at 135.
[7] JG Ruggie *Just Business: Multinational Corporations and Human Rights* (2013) at 34–58; not all academics agree that there is a link between delicts and human rights violations For a full discussion of this discourse, see E Zitzke, 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *South African Journal on Human Rights* 492. For the purposes of this thesis, I hold the view that delicts involving MNCs are human rights issues.
[8] E Aristova 'Tort litigation against transnational corporations in the English courts: The challenge of jurisdiction' (2018) 14 *Utrecht Law Review* 6 at 7–9; Tort is the term used for delict in Anglo-American law.
[9] For ease of reference and consistency, using the word 'delict' as an area of law should also be understood as referring to its Anglo-American counterpart of tort law.
[10] Amnesty International *Injustice Incorporated: Corporate Abuse & The Human Right to Remedy* (2014) at 113–21; See also H Anderson 'Parent company liability for asbestos claims: some international insights' (2011) 31 *Legal Studies* 547.

legal recourse include 'judgment proofed corporate structures'[11] and ineffective legal doctrines of liability.[12] These barriers have reduced the efficacy of recourse that delict victims ought to have against MNCs when the business of MNCs harms their person or property.

Several notable examples have shown that MNCs can adversely affect the enjoyment of human rights.[13] However, few cases have risen in terms of the scale of harm and lack of recourse to what occurred in India on 2 December 1984:[14] The Bhopal gas leak disaster (Bhopal disaster).[15] In this matter, an American company called Union Carbide Corporation (UCC) set up a corporate subsidiary in India, with UCC as a majority shareholder in the 1960s.[16] The subsidiary company was called Union Carbide India Limited (UCIL).[17] The corporate group, headed by UCC, was involved in manufacturing chemicals and had set up a manufacturing plant in the Madhya Pradesh state of India near a densely populated slum.[18]

On 2 December 1984, toxic gas used in manufacturing started leaking from storage tanks at the manufacturing plant.[19] Approximately 24 000 kilograms of unreacted methyl isocyanate and 11 000 kilograms of reaction products leaked from these tanks.[20] Evidence from later reports shows that the officials had noticed the leaks but had failed to timeously alert the communities or police near the plant so that effective evacuation and other safety preventative measures could be implemented.[21]

Soon, people exposed to the toxins started to pour into hospitals with serious ailments.[22] The exact extent of harm has been contested.[23] Still, Amnesty International, a prominent non-

[11] A 'judgement proofed' company is set up so that it runs with almost no assets; here, it is argued that such companies or groups of companies are incapable of being effectively sued because of how they are set up. See LM LoPucki 'The Essential Structure of Judgment Proofing' (1998) 51 *Stanford Law Review* 147; LM LoPucki 'Virtual Judgment Proofing: A Rejoinder' (1998) 107 *Yale Law Journal* 1413.
[12] Amnesty International op cit note 10 at 118–21.
[13] Ibid at 31–97; For example, the bhopal gas leak disaster in India; in Guyana in 1995, a dam maned by Omai Gold Mines Ltd ruptured allowing the leak of 3.2 billion litres effluent water laced with cyanide and heavy metals into the Omai and Essequibo rivers; in Papua New Guinea, records from 1980 to 2009 showed years of mine waste dumping by Ok Tedi Mining Limited in local rivers.
[14] J Cassels 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 *Osgoode Hall Law Journal* 1 at 1; see legal process that occurred during this time in T Covell 'Bhopal Disaster Litigation It's Not over Yet' (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 279.
[15] See detail of the full narration of the event that occurred in T D'Silva *The Black Box of Bhopal: A Closer Look at the World's Deadliest Industrial Disaster* (2006).
[16] U Baxi 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2015) 1 *Business and Human Rights Journal* 21 at 28–33.
[17] Ibid.
[18] Amnesty International op cit note 10 at 33–41.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

governmental organisation, estimated that between seven and ten thousand people died in the first week alone, with children and the elderly leading in the casualties.[24] In the end, upwards of 570 000 people were exposed to the toxins, leading to a wide range of chronic and debilitating ailments, with many of them still suffering from the consequences of this disaster to this day.[25] This was the human cost alone and excluded the economic and environmental impact of the harm, which is difficult to quantify.

The responses to the disaster were wide-ranging. In the wake of widespread public outcry, the Indian government tightened its law to improve factory safety, environmental protection, and compliance monitoring.[26] Criminal negligence proceedings were also instituted in India.[27] Central to the criminal liability option, India attempted to extradite Warren Anderson, a citizen of the United States who was UCC's Chief Executive Officer at the time of the incident and a key person of interest in the criminal proceedings.[28] For a range of reasons, the extradition was unsuccessful. One such reason was that the bilateral treaties between the United States and India did not accommodate an extradition request.[29]

Another response to the harm was delictual claims that were instituted in both the United States and India.[30] In the United States, the claimants mainly pursued the majority holding company, UCC, through several United States courts.[31] In India, UCIL and UCC were both sued in the courts.[32] In both countries, the claimants faced several obstacles. The claimants' case failed in the United States because they could not rise above the procedural objections of the forum's appropriateness.[33] UCC successfully argued in American courts that the case should be tried in

[24] Ibid at 35.
[25] Ibid.
[26] Ibid; The Factories Act 63 of 1948, as amended by the Factories (Amendment) Act 20 of 1987, incorporates provisions relating to hazardous processes. The Environment (Protection) Act 29 of 1986 accompanied by the Environment (Protection) Rules 1986 and the Hazardous Wastes Management and Handling Rules 1989 and the Public Liability Insurance Act 6 of 1991 also deal with hazardous substances.
[27] Case is described in Amnesty International 'On 3 December 1984, crime No.1104/84 was registered, suo moto, by Station House Officer at Hanumanganj Police Station in India' available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760* last accessed 1 November 2024; see also Amnesty International op cit 10 at 41–2.
[28] Ibid Amnesty International at 41–9.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid; also see at 10 the definition of the forum non conveniens doctrine: 'Forum non conveniens is a doctrine that allows courts to decline jurisdiction on the basis that the venue chosen by the claimant is not the most appropriate venue for proceedings'.

India, where the harm occurred, evidence was based, and most of the claimants resided.[34] This meant that pursuing UCC in United States courts would be difficult.

Any potential judgment debt in India was hard to enforce on UCC, which was outside Indian jurisdiction.[35] However, any effective damages claim had to be pursued against UCC and its subsidiary UCIL. This is because UCC was the controlling holding company and was in a better position to meet the monetary size of the damages claim sought by the claimants.[36] Despite the jurisdictional problems, there was an additional hurdle. The claimants would also need to show why the lawsuit against UCC for the delicts committed in India by UCIL did not amount to an unjustified assault on UCC's rights. Here, two key rights in company law were critical for UCC: the right to limited liability and separate legal personality from UCIL.[37] For the claimants, the delictual litigation presented seemingly insurmountable legal and structural barriers to corrective justice in delict.[38]

In the end, the only recourse left to the claimants of the Bhopal disaster was an out-of-court settlement, which they took.[39] In Indian courts, the victims of the Bhopal disaster had claimed over 3 billion US dollars in damages.[40] After the litigation and settlement, they came out with less than 500 million US dollars.[41] The payment made by UCC was thus much lower than the damages claimed by the claimants in all the civil cases before the courts.[42] Ultimately, the payment was insufficient to cover the total cost of harm to the environment, persons, and property caused by the gas leak.[43] What was clear from the Bhopal disaster is that the claimants had tried all the reasonably possible legal avenues and had come short. The law, as it existed in both India and the United States, failed them. The Bhopal disaster clearly shows several barriers to justice for the harm caused by the chemical leaks.[44]

The claimants in the Bhopal disaster are not the only delict claimants from outside the United States that have failed to get legal recourse in this jurisdiction against parent companies such

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[34] *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986) at 866–7.
[35] Amnesty International op cit note 10 at 48.
[36] Ibid at 49–52.
[37] Ibid at 117–22; for a description of separate legal personality and limited liability see Cassim et al op cit note 3 at 39–46.
[38] For a detailed description and importance of corrective justice in delict see E Zitzke 'Transformative Legal History and the (Re) Classification of the South African Law of Delict' (2023) 26 *Potchefstroom Electronic Law Journal* 1.
[39] Amnesty International op cit note 10 at 48–50.
[40] Ibid.
[41] Ibid at 49 citing *Union Carbide Corporation v Union of India AIR* 1990 SC 273 at 3.
[42] Ibid Amnesty International at 49–52.
[43] Ibid.
[44] Ibid at 113–97.

as UCC. In 2002, several claimants from South Africa sought delictual damages from over fifty corporate entities from the United States (sometimes referred to as the 'Apartheid Litigation').[45] The basis of the claim was that the entities located in the United States were involved in aiding the commission of crimes against humanity, such as forced labour and other discriminatory behaviour during the apartheid era in South Africa.[46] The last application of the Apartheid Litigation was in *Balintulo,* a case dismissed by the court in the United States on procedural grounds in 2015.[47]

In 2013, a court in the United States in the *Kiobel* case dismissed on procedural grounds a claim that had been brought by Nigerian citizens who alleged that corporate entities from the United States aided the Nigerian states in crimes against villagers in Nigeria.[48] In the case of *Daimler AG,* decided in 2014, a court in the United States also dismissed a case brought by Argentinian citizens on procedural grounds.[49] The applicants in *Daimler AG* had alleged that a company based in the United States had been complicit in crimes in Argentina, including torture, illegal detentions, and kidnappings.[50] A review of the most prominent human rights cases against corporations from the United States indicates that these matters are dismissed on procedural grounds.[51] Or settled out of court.[52]

Many prominent cases in Canada that involve similar matters to the Bhopal disaster have also been dismissed on procedural grounds or settled out of court.[53] In the United Kingdom, similar cases have either been dismissed on procedural grounds or settled out of court.[54] South African

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[45] See discussion of litigation history in SH Farbstein 'Perspectives from a practitioner: Lessons learned from the apartheid litigation' (2020) 61 *Harvard International Law Journal* 451 at 458; see also *Digwamaje v. IBM Corp. Complaint, In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).
[46] *Balintulo v Ford Motor Co.,* 796 F 3d 160 (2nd Cir 2015) at 164.
[47] Ibid at 171; see discussion of the case's outcome in Farbstein op cit note 45 at 462.
[48] *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013) at 1678.
[49] *Daimler AG v. Bauman,* 571 U.S. 117 (2014) at 773.
[50] Ibid.
[51] See for example the *In Union Carbide Corp* supra note 34 at 866–7; *Kiobel* supra note 48 at 1436–7; *Nestlé United States, Inc. v. Doe*. 141 S. Ct. 1931 (2021) at 1950–1; see also R Mares 'Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses' in Deva S and Birchall D *Research Handbook on Human Rights and Business* (2020) at 12.
[52] See, for example, *Doe v. Unocal,* 395 F.3d 932 (9th Cir. 2002) at 937; *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88, 94 (2d Cir. 2000) at 108; see discussion on *Doe* and *Wiwa* settlements in S Joseph *Corporations and Transnational Human Rights Litigation* (2004) at 14.
[53] *Das v. George Weston Limited,* 2018 ONCA 1053 para 216–18; see discussion of the trends in Canadian courts in J Terry & S Shody 'Could Canada Become a New Forum for Cases Involving Human Rights Violations Committed Abroad?' (2012) 4 *Commercial Litigation and Arbitration Review* 1.
[54] *Adams v Cape Industries plc* [1990] 2 W.L.R 657 at 572; *AAA & Others v Unilever plc and Unilever Tea Kenya Limited* (2018) EWCA Civ 1532 para 40–1; *Vava & Ors v Anglo American South Africa Ltd* [2013] EWHC 2131 (QB) at 24–5; see also the discourse on the obstacles that delict claimants face when litigating against MNCs S Deva & D Bilchitz *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) at 382–9.

courts are also in line with international trends. In 2023, a South African High Court dismissed on procedural grounds a delictual class action which had been brought to the courts by members of a Zambian community.[55] The basis of the claim was that a South African-based MNC had caused mining-related delictual harm.

Despite a clear trend where most delict claimants are left without an effective legal remedy, the case of *Chandler* from the United Kingdom, which shall be discussed later in the thesis, provides a rare glimpse of hope for delict claimants.[56] In addition to foreign case law, the South African case of *Nkala* may also provide some indication of a way forward.[57] This case involved a class action lawsuit from mining employees who alleged delictual harm from several mining companies. This case was also eventually settled out of court.[58] However, in the procedural case of *Nkala*, the court indicated a willingness to hold companies in corporate groups accountable for delictual harm.[59] This thesis considers what lessons can be drawn from South African and foreign cases.[60]

Considering the bleak position of the victims of corporate harms, Amnesty International unpacks three of the key barriers that permit adverse outcomes for delict claimants. These barriers are in the law, information asymmetries between the various parties to the case, and barriers in what is termed the corporate-state complex.[61] This thesis will primarily examine the legal barriers presented by factual scenarios such as the Bhopal disaster.

Amnesty International correctly puts the legal barriers into two main camps. The first camp of legal barriers exists in how corporations are structured and with the status of these structures

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[55] *Various parties obo minors v Anglo-American South Africa Limited and Others* [2023] ZAGPJHC 1474 at para 335–40; For a detailed case law discussion of involving based corporate harms that have dismissed or settled out of court in South Africa see J Brickhill 'A river of disease: Silicosis and the future of class actions in South Africa' (2020) *South African Journal of Human Rights* 1.

[56] See discussion of recent trends in delictual litigation against MNCs in C Van Dam 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) 5 *European Company and Financial Law Review* 714; Chapter Four of the thesis discusses *Chandler v Cape plc* [2012] EWCA Civ 525; *Chandler* is also discussed in *Vedanta Resources plc v Lungowe* (2019) UKSC 20 para 49–56; see also another case that discusses the principles of fault were MNCs are involved *Okpabi and others v Royal Dutch Shell Plc and another* (2021) UKSC 3.

[57] *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ); other procedural cases related to the same set of facts are not discussed in this thesis, see *Gold Fields Limited v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited* 2015 (4) SA 299 (GJ); *Ex Parte Nkala* [2018] ZAGPJHC 657; *Ex Parte Nkala and Others* [2019] ZAGPJHC 260; *DRDGOLD Limited and Another v Nkala and Others* 2023 (3) SA 461 (SCA); All the cases dealt with different procedural aspects of class actions see detailed discussion in Brickhill op cit note 55 at 3.

[58] Ibid Brickhill.

[59] *Nkala* op cit note 57 at para 71.

[60] The role of *Nkala* in the thesis is discussed in section 2.4 of Chapter Two.

[61] Amnesty International op cit 10 at 113.

in law.[62] This first problem primarily exists at the country level.[63] It ultimately relates to the difficulty of imposing delictual liability on holding companies such as UCC for the delicts of their foreign subsidiaries.[64] This problem is often associated with the challenge of rising above the parent company's corporate law protections of 'separate legal personality' and 'limited liability'.[65]

Briefly, separate personality means that companies can acquire rights and duties independently of their owners and controllers.[66] One key feature of separate personality is the right to limited liability, which allows companies to enjoy perpetual succession, own property and profits, manage debt, and engage in legal proceedings in their own name.[67] When the right to limited liability and separate personality is applied to corporate group structures, these protections have sometimes been used as a shield against the just allocation of liability for human rights violations.[68] This shield allows holding companies to take profits and control their subsidiaries while protected from the full range of liability when the collective activities of the corporate group cause human rights violations.[69] LoPucki terms this state of affairs as a 'judgement-proofed' corporate structure because there is effectively little means of holding the parent company responsible for harms affiliated with their global activities.[70] Therefore, this thesis submits that the first significant issue relates to the inefficiencies of the theories of liability used to attribute delictual liability to parent companies within the corporate group setting.[71]

Amnesty International identifies a second set of legal procedural barriers that exist at the extraterritorial level. Their claim is that private international law prevents access to justice in various ways.[72] One such key obstacle is the issue of court jurisdiction in hearing matters where delictual elements run through more than one nation-state.[73] Here, different states have strict laws on jurisdiction that are not receptive to matters that involve delictual claimants when they come from different states. The net result of this approach is that the victims of delict-based corporate harms are left without recourse to effective legal remedies. A report by the

[62] Ibid at 113–22.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] FHI Cassim et al op cit note 3 at 39–7.
[67] Ibid.
[68] M Petrin 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 *Modern Law Review* 603 at 611–18.
[69] Ibid.
[70] LoPucki op cit note 11.
[71] Amnesty International op cit note 10 at 121.
[72] Ibid 127–53.
[73] Ibid.

International Commission of Jurists also finds similar troubles for claimants regarding procedural law barriers.[74] The report also identifies evidentiary obstacles, lengthy legal proceedings, barriers related to prohibitively high legal costs, and procedural challenges of class action and settlements as barriers.[75] This thesis is primarily concerned with the legal barriers of corporate structures but, where appropriate, considers procedural barriers in law.

1.2 The research problem

1.2.1 Overview of the research problem

The reasons for a lack of effective legal recourse for delict victims of MNCs is a complex problem. In my view, a good starting place in unpacking this problem is to conduct a bird's eye assessment of the primary legal relationships at play and the avenues open to the claimants where they ought to find recourse in law.

The first crucial relationship is between states or between a state and an international organisation that enjoys international legal personality, such as the United Nations. Section 1.2.2 evaluates the legal problems in international law. The second key relationship is between the state and non-state actors that operate outside the state's jurisdiction, such as an MNC.[76] This second relationship exists at the extraterritorial level of states. In section 1.2.3, I seek to assess the legal nature of the relationship between a state and non-state actors such as MNCs. Further, I assess the legal nature of the relationship between state and non-state actors who are legal subjects in more than one jurisdiction. Section 1.2.3 evaluates whether South African law can bring MNCs to account for delictual harm within its national courts. Section 1.2.4 also addresses the last relationship in question between two non-state actors within South African law.

1.2.2 International law and MNC liability

As stated in section 1.2.1, the first avenue open to the claimants is at the intergovernmental or international level. Here, there are several treaty-based remedial efforts that have been made at

[74] International Commission of Jurists *Access to Justice: Human Rights Abuses Involving Corporations in The Netherlands* (2010) at 29–40.
[75] Ibid.
[76] For ease of reference, the term non-state actor refers to a natural and a juristic person who is not the state.

the United Nations with the aim of addressing human rights protections.[77] For example, Article 8 of the Universal Declaration of Human Rights recognises the right to remedy violations of human rights and the responsibility of national courts to ensure that such rights are protected.[78] Amnesty International finds that many key international and human rights treaties contain a right to remedy them.[79]

In international law, the state is the primary duty bearer that must ensure that all of the rights in these legal instruments are respected by both state and non-state actors, such as companies.[80] Further, the key treaty-based remedial mechanisms are crafted with the vertical relationship between the state and its citizens in mind.[81] For example, Conventions on Political and Civil Rights, Rights against Slavery, and Racial Discrimination are all conceptualised as mainly applicable between the state and its citizens and not between two non-state actors.[82]

Baumann-Pauly and Nolan accurately argue that while international law recognises that private parties can violate their provisions, there are no clear direct or horizontal duties that legally mandate corporations to respect human rights in international law.[83] Nolan further argues that treaties primarily impose responsibilities on states to regulate and adjudicate treaty-based human rights violations.[84] However, as seen in the legal outcomes of the Bhopal disaster, states are not always capable of adjudicating and enforcing corporate harms when they have cross-border elements of harm.

The international law system also has courts that operate at the regional and global levels. Two courts are notable and can be described as global courts.[85] The first is the International Court

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[77] International Federation for Human Rights *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (2016) at 14–46.
[78] Article 8 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III). See also the discussion in Amnesty International op cit note 10 at 16.
[79] Amnesty International op cit 10 at 15–20.
[80] Ibid.
[81] D Baumann-Pauly & J Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) at 69–72.
[82] Ibid; see also the discussion of treaty focus on the states in the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 in the preamble, articles 2, 3, 5; the preamble of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; articles 8 and 11 of the Slavery Convention (adopted on 25 September 1926, entered into force 9 March 1927) 60 UNTS 254; the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[83] Ibid Baumann-Pauly & Nolan at 69–72.
[84] Ibid.
[85] M Mahmood *The Role of Courts in Adjudicating Human Rights Violations by Transnational Corporations* (PhD thesis, Middlesex University, 2017) at 70 discussing the ICJ that was established in terms Statute of the International Court of Justice (adopted on 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, and at 88 discussing the ICC that was established in terms of Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

of Justice (ICJ), an organ of the United Nations, and the second is the International Criminal Court (ICC), which is a court established in terms of the Rome statute.[86]

Both the ICJ and ICC are state-centric, which creates challenges for enforcing human rights against corporations.[87] For example, only states and other recognised international organs have standing to bring a matter before the ICJ, and only a state can bring any grievance on behalf of victims against an MNC to the ICJ.[88] The requirement of state-party cooperation at the ICJ significantly limits access to the court because there are scenarios where delict claimants will be unable to convince states to pursue matters on their behalf.

The ICC is also state-centric, and its jurisdiction is limited to the prosecution of natural persons accused of the most serious international crimes, such as genocide and war crimes and other such serious crimes.[89] As it presently stands, juristic persons are excluded from the court's jurisdiction, and only natural persons can be prosecuted in this court.[90] The challenge with this state of affairs is that a delictual matter such as in Bhopal disaster would thus likely not count as a serious international crime as per the narrow basis of matters acceptable before the ICC.

At the international level, delict claimants may seek judicial recourse before regional courts. In the African region, there are two crucial continental courts on the matter of protecting human rights. The first crucial court is The African Court on Human and Peoples Rights (AFCHPR), established in terms of article 1 of the African Charter Protocol.[91] The second crucial court is the Court of Justice of the African Union (CJAU), established in terms of Article 5(1)d of the Constitutive Act of the African Union. However, CJAU never became operational.[92] The challenge with both the AFCHPR and CJAU is that both courts have no direct jurisdiction to

[86] Ibid.
[87] Ibid at 70, 89.
[88] Ibid at 70 discussing article 36 of the Statute of the International Court of Justice.
[89] Ibid at 89 discussing articles 5 and 25 of the Rome Statute.
[90] Ibid.
[91] Ibid at 144–5 where there is a discussion of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted on 10 June 1998, entered into force 25 January 2004) (African Chater); for the establishment of the court see article 1 of the African Charter.
[92] Ibid at 147 discussing article 5(1) d of the Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3. The African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted on 27 June 2014, and signed on 02 April 2019) in an effort to merge both the AFCHPR and the CJAU into one court, referred to as the African Court of Justice and Human Rights, to streamline the process of the prosecution of transnational and international crimes. See also African Union 'The African Court of Justice and Human Rights: homegrown judicial mechanism for international crimes' available at *https://au.int/en/pressreleases/20240625/african-court-justice-and-human-rights-homegrown-judicial-mechanism* last accessed on 9 February 2025.

hear matters involving the human rights violations of corporations.[93] Where companies violate human rights, they can only be held to account indirectly as part of the state's duty to ensure that human rights are protected in the respective countries that are signatories to the court's jurisdiction. For example, in *SERAC*, a case decided by the AFCHPR in 2001, the court held that Nigeria had violated its duty to protect its citizens against environmental harms committed by Shell in its jurisdiction.[94]

The legal outcome in *SERAC* and the jurisdictional limitations in the AFCHPR and CJAU show that in the African region, our courts are also state-centric and in line with the ICC and ICJ. The most critical flaw with regional courts such as the AFCHPR and CJAU and international law more broadly is that it does not impose duties directly on MNCs to respect human rights.[95] International law also does not provide the means nor the power to enforce human rights violations when they are committed by MNCs.[96] It is in this context that indicates a clear gap in global governance for corporate accountability, particularly for MNCs, with respect to human rights violations.[97]

The gaps identified above in international law have led to the rise of a new field that looks specifically at the intersection of business and human rights. A notable contribution of this new field was reached in 2011 when the United Nations Human Rights Council unanimously endorsed a soft law instrument titled the Guiding Principles on Business and Human Rights (GPs framework).[98] The GPs framework argues for a three-pronged approach that insists on the state's duty to protect human rights, the MNC's duty to respect human rights, and victims' right to access judicial and non-judicial remedies.[99] In 2014, this Council established an intergovernmental working group, led by South Africa and Ecuador to explore the viability of

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[93] Article 3 read with article 5 of the African Charter; for a detailed discussion of the jurisdiction of the AFCHPR, see YOJ Reventlow & R Curling 'The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights beyond the African Charter' (2018) 33 *Emory International Law Review* 203.
[94] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (Communication 155 of 1996) [2001] ACHPR 35 at para 69.
[95] See similar opinion by OO Amao 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations' (2008) 12 *International Journal of Human Rights* 761 at 781; for a global perspective of the weaknesses in international law see JG Ruggie 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819 at 824.
[96] Ibid at 834.
[97] Deva & Bilchitz op cit note 54 at 271.
[98] Business & Human Rights Resource Centre 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) available at *https://www.business-humanrights.org/en/pdf-full-text-of-guiding-principles-guiding-principles-on-business-and-human-rights-implementing-the-united-nations-%E2%80%9Cprotect-respect-and-remedy%E2%80%9D-framework* accessed on 14 June 2019.
[99] Ibid.

an international legally binding instrument to regulate the interaction of MNCs violations of human rights.[100]

The field of business and human rights is guided by three main legal policy choices. Firstly, non-binding and voluntary initiatives such as 'corporate social responsibility'.[101] Secondly, a comprehensive, binding treaty regulates MNC's impact on human rights.[102] Thirdly, the GPs framework was endorsed by the United Nations Human Rights Council in 2011.[103] The non-binding GPs framework, as suggested by Ruggie, is predicated on the argument that we must build soft-law norms that enjoy the broadest support so far from the various main stakeholders in the area.[104] These norms, over time, will gradually improve the business footprint on core human rights, and it is from that point that we can start to discuss the viability of any potential binding instrument on business and human rights.[105] These soft law norms are neither self-regulation nor a comprehensive binding treaty, and according to Ruggie, we must be guided by a form of principled pragmatism that accepts gradual progressive wins that are built over time.[106]

To date, the crux of business and human rights efforts has been an argument to push away from soft law into a global treaty specifically focused on the intersection of business and human rights.[107] Efforts towards this binding treaty are still ongoing.[108] My view is that such a treaty is an ideal final destination for every actor who is concerned about the problems identified by this thesis. However, as Ruggie correctly posits, the viability of the prospect of such a global treaty is, at best, a long-term prospect.[109]

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[100] UN Human Rights Council 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' 28 April 2014 available at *https://digitallibrary.un.org/record/771603?ln=en* accessed on 9 May 2021.
[101] J Nolan 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 *Utrecht Journal of International and European Law* 7 at 20.
[102] J Ruggie 'Business and Human Rights - Treaty Road Not yet Travelled' *Global Policy Forum* May 6 2008 available at *https://www.globalpolicy.org/social-and-economic-policy/social-and-economic-policy-at-the-un/un-and-business/32270-business-and-human-rights-treaty-road-not-travelled.html* accessed on 5 January 2021.
[103] Deva & Bilchitz op cit note 54 at the foreword of the book.
[104] Ruggie op cit note 7 at 59–90.
[105] Ibid.
[106] Ibid.
[107] D Bilchitz 'The necessity for a business and human rights treaty' (2016) 1 *Business and Human Rights Journal* 203 at 203–27.
[108] See discussion of current efforts to bring about a binding treaty in JG Ruggie, R Caroline & R Davis 'Ten years after: from UN Guiding Principles to multi-fiduciary obligations' (2021) 6 *Business and Human Rights Journal* 179 at 190.
[109] Ruggie op cit note 7 at 22.

The gaps with the ICC, ICJ, AFCHPR, CJAU, the binding treaty on business and human rights, and soft law instruments such as the GPs framework show that international law has not yet crafted a viable response to the delict challenges posed by MNCs. Yet these efforts cannot be discounted because some of these initiatives can produce the required result of creating viable pathways for delict victims to get recourse. It is submitted that these regional and/or international efforts to craft comprehensive solutions may bear fruit in the future and resolve the unique challenges MNCs present. In the interim, while we wait for a viable solution in international law, my view is that viable legal solutions for delict claimants ought to be sought at the national or extraterritorial level.[110]

1.2.3 MNC liability at the national and extraterritorial level

The second avenue available to delict claimants at the extraterritorial level is judicial mechanisms. These options exist within the realm of cross-border litigation.

Two main avenues exist at this level. The first avenue is the extraterritorial civil liability of MNCs for human rights violations.[111] This area of law has developed mainly in jurisdictions such as the United States, Canada, and the United Kingdom.[112] While this option exists in theory, as stated, one of the most significant barriers that claimants have had to overcome is establishing the jurisdiction of courts at the extraterritorial level.[113] The legal impediments to establishing liability against the holding company within the multinational company's group are substantial.[114] This avenue is also further explored later in this section.

Besides the civil liability route, claimants can also pursue the extraterritorial criminal liability of MNCs in courts.[115] Here, efforts have been made to create criminal liability for these companies before international criminal courts.[116] Efforts have also been made to create extraterritorial corporate criminal liability within countries and in regional courts.[117] These attempts have been predominantly in states such as the United States and Canada.[118] The experience of claimants who have tried to pursue this option has shown considerable

[110] See discussion of liability of MNCs at the nation-state level in Van Dam op cit 56.
[111] International Federation for Human Rights op cit note 77 at 191–268.
[112] Ibid.
[113] Ibid at 193–248.
[114] Ibid at 248–68.
[115] Ibid at 294–366.
[116] Ibid at 294–311.
[117] Ibid at 311–66.
[118] Ibid.

barriers.[119] One must look no further than the Bhopal disaster to understand this option's ineffectiveness. The United States failed to cooperate in handing over Warren Anderson, a key person of interest; he had been a personnel of UCIL at the time of the Bhopal disaster, to face criminal negligence charges in India.[120] Therefore, deeply rooted procedural and political barriers make extraterritorial corporate criminal liability quite challenging to pursue with meaningful prospects of success.[121]

Thus, my discussions in this thesis are limited to the interrogation of the civil liability of MNCs, primarily within the countries in which they operate. To effectively evaluate delictual civil liability, due regard is given to the implications of extraterritorial aspects in private international law. My engagement with the extraterritorial dimension aims to elucidate the nature of the civil liability option in countries where human rights harms occur.

What, then, is the position of law when a delictual action transcends a single jurisdiction, like in the Bhopal disaster? Private international law provides the framework for answering this question and sets out three questions that must be answered: (1) Which jurisdiction is the appropriate forum?[122] That is to say, does the court have jurisdiction to hear the matter? (2) If an appropriate forum is determined, which laws must that court apply to the case?[123] (3) Lastly, after a judgment has been delivered, what rules must guide the recognition and enforcement of that judgment?[124] I shall now deal with these questions below.

As indicated in the Bhopal disaster, the claimants failed to rise above these questions. They failed to show that the courts in the United States were an appropriate forum to adjudicate their matter.[125] In essence, the claimants in the Bhopal disaster failed to rise above the hurdle of the forum non-conveniens doctrine in the host state.[126] From a South African private international law position, the following principles would apply to this area of the law.[127]

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[119] Ibid at 381. Summaries of the key procedural and political hurdles: foreigners' access to justice, political question and act of state doctrine, forum non conveniens and cost of litigation extraterritorial criminal litigation against an MNC.
[120] Amnesty International op cit note 10 at 41.
[121] International Federation for Human Rights op cit note 77 at 381
[122] CF Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) at 158 defines jurisdiction as 'the power vested in the court by law to adjudicate upon, determine and dispose of a matter'; See also MH Watt & L Bíziková et al (eds) *Global Private International Law: Adjudication without Frontiers* (2019) at 1.
[123] Forsyth Ibid at 10.
[124] Forsyth ibid at 387.
[125] *In Re Union Carbide Corp* supra note 34 at 22.
[126] Ibid.
[127] Forsyth op cit note 122 at 156–259.

Traditionally, the rules of jurisdiction have been underlined by several common principles[128] and in part codified in legislation.[129] A core foundational principle is that the national court's powers to enforce jurisdiction are limited to the territorial boundaries of countries.[130] This is logical because courts derive their authority from the state's sovereign power.[131] It follows that generally, rules of jurisdiction have required some link between the geographical boundaries of the state in which the court operates and either the parties or the dispute itself.[132] These links are termed 'jurisdictional grounds', 'connecting factors' or 'rationes jurisdictionis'.[133] These links include residence or domicile (ratione domicilii); where a contract was created, was due for performance or breached (ratione contractus); where a delict took place (ratione delicti commissi); the link can also be established based on the location of the defendant's property (ratione rei sitae).[134] While it is subject to several rules, it is also possible for jurisdiction to be established by way of consent or prorogation by the parties to the dispute.[135]

Courts have also traditionally considered the doctrine of effectiveness when determining jurisdiction.[136] In terms of this doctrine, before a court determines the jurisdictional question, it must satisfy itself that its judgment will be meaningful.[137] That means the court must be in a position to enforce the judgment.[138] If, for example, the assets or property in a civil claim are beyond its enforcement powers, any judgment it gives is essentially a 'theoretical proposition in favour of the plaintiff'.[139] The principles underlying the rules of jurisdiction seek to avoid such eventualities.

A founding premise of the rules of jurisdiction is that courts must generally confine their powers to enforce jurisdiction to the territorial boundaries of the countries where they are located.[140] This principle, however, does have exceptions. Suppose the strength of the jurisdictional grounds of the matter is substantial. In that case, a court under South African law

[128] Ibid.
[129] See discussion E Schoeman 'South Africa: Time for Reform' in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 347 at 348–51.
[130] Ibid at 348.
[131] Forsyth op cit note 122 at 158.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Schoeman op cit note 129 at 348–51.
[136] Forsyth op cit note 122 at 159.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Schoeman op cit note 129 at 349.

is permitted to find jurisdiction even if the matter in question transcends a single jurisdiction.[141] This means, in principle, that courts in South Africa can recognise their extraterritorial competence to hear a matter that transcends their national boundaries.[142]

For claimants seeking legal recourse at the extraterritorial level, the first major hurdle they must overcome is questions of the court's jurisdiction. In the case of an MNC's delict, jurisdiction can be founded in a South African court if the wrongdoing MNC has its offices in South Africa, or if the delict was completed in South Africa if the wrongdoing MNC owns property in South Africa, or where it would otherwise be convenient to establish jurisdiction in South Africa. In other jurisdictions, the principles for establishing jurisdiction may be different.

Regarding jurisdiction, the first outcome is that the home state's court where the foreign holding company is established may refuse jurisdiction based on the forum non-conveniens doctrine. This, as seen in the Bhopal disaster, significantly reduced the odds of a meaningful outcome for victims.[143] Similarly, a South African court may also find that there are insufficient connecting factors or rationes jurisdictionis to ground jurisdiction in South Africa. This could be the case where the MNC defendant is domiciled abroad and/or where the MNC has weak connecting factors to South Africa. In such an eventuality, the claimants have no other jurisdiction to make a case. The proposals of this thesis are limited to scenarios where the court's jurisdiction can be established. Thus, this thesis does not engage options where the delict claimants cannot prove the court's jurisdiction.

A second, different outcome may occur at the jurisdictional level. It is also possible that either one or both the host and home state can accept that they have jurisdiction over the matter. The proposals of this thesis can only be applied when a court of at least one jurisdiction accepts that it has the competence to hear the matter at hand. For the purposes of this thesis, the hypothetical scenario I have in mind aligns with this situation. If that happens, the next question will be, which laws should the court apply? I turn to that question next.

Once the question of jurisdiction is settled, another dimension of the problem must be addressed. This hurdle pertains to the question of which laws must be applied in the jurisdiction that has been picked. The technical term used in private international law for the law that a

[141] Forsyth op cit note 122 at 158 to 159.
[142] See for example *Competition Commission and others v American Natural Soda Ash Corp CHC Global (Pty) Ltd and others; American Natural Soda Ash Corp CHC Global (Pty) Ltd v Botswana Ash (Pty) Ltd and another* [2005] 1 CPLR 121 (CT) para 144.
[143] Ibid.

court chooses is lex causae.[144] The legal principles related to lex causae have historically been described as open and unsettled for the courts to adopt any approach from the available options.[145] This position was changed in 2010 by the decision of *Burchell v Anglin,*[146] which has now settled the matter of the applicable principles of choice of law in delict.[147]

Briefly, and for present purposes, the case of *Burchell* revolved around whether a court in South Africa ought to have applied either the South African law of defamation or the American law of defamation (specifically the law of the state of Nebraska) since the victim was located in South Africa and the wrongdoer was located in the US which is where the defamatory content was communicated to third parties. The litigants and the delict in question undoubtedly transcended both the jurisdictions of South Africa and the United States. In this matter, the court had to first set the principles of law that should apply in these situations. Secondly, the court also had to decide how that ratio ought to apply in the matter before it.

The following is how the court framed the ratio decidendi on the lex cause of defamation cases under South African law of delict.

> 'Internationally, a balancing test is used to determine the jurisdiction with the most significant relationship to the parties and the delict, and then the law of that jurisdiction is applied. I will follow this route. Having decided that the lex loci of the delict is Nebraska, I must now decide whether this is indeed the jurisdiction with the most significant relationship to the parties and the delict. In order to come to this decision, I will endeavour to establish whether our law or Nebraskan law will weigh more heavily on the balancing scale'.[148]

The ratio decidendi, in this case, essentially means that when a court is tasked with a question of lex causae in delict, it must find the legal system with the most real or significant relationship to the delict and the litigants. This choice must also be constitutionally compliant,[149] and may take into account any other traditional considerations or legal principles from different jurisdictions.[150] The court applied this principle to the specific facts and found that the law of Nebraska weighed more heavily on the balancing scale.[151] In coming to this decision, the court

[144] Forsyth op cit note 122 at 325–40.
[145] Ibid 326.
[146] 2010 3 SA 48 (ECG).
[147] FE Marx 'At last a South African proper law of delict: Burchell v Anglin 2010 3 SA 48 (ECG)' (2011) 32 *Obiter* 224 at 225.
[148] *Burchell* supra note 146 para 122.
[149] Ibid para 127.
[150] Ibid para 128.
[151] Ibid para 130.

took into account several considerations that may be used by a court to assess weight on a balancing scale.[152] In what follows, I will discuss just a few.

One of the most significant considerations is what is termed the lex loci delicti, which means where the delict took place.[153] Forsyth also assesses the weight of the lex loci delicti in what he terms the 'sufficient link approach'.[154] According to Forsyth's approach, focus should be placed on the lex loci delicti, and deviation from this principle should only be permitted where more decisive countervailing factors exist.[155]

From the United States, the court in *Burchell* considered the 'centre of gravity approach' as one of the methods used to establish lex causae.[156] Regarding the centre of gravity approach, an officer of the court must decide which law to apply after 'the presiding officer assesses different issues connecting the delict to the law of possible jurisdictions'.[157] This approach appears to be similar or close to the balancing test ultimately argued for by the court in *Burchell*.[158]

Another older and somewhat discredited approach is the 'double actionability approach'.[159] This approach has its roots in the English system of lex causae.[160] Simply put, according to this rule, a plaintiff must have a cause of action under both the law where the court is located, the 'lex fori' and under the law where the delict took place, the 'lex loci delicti'. This requirement must be met before the plaintiff is allowed to claim in any of the jurisdictions. In its original and reformed version, this rule was unfavourable to the plaintiff in most cases.[161] It was challenging to show an actionable claim in two jurisdictions. For this reason, the *Burchell* court did not favour it.[162]

The net result of the lex causae question is that a South African court is permitted at law to apply either South African or foreign law where a matter transcends a single jurisdiction. Which law a court will eventually apply will always depend on the facts and how that court reads the legal principles of lex causae in delict as set out in the *Burchell* case.

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[152] Ibid para 87.
[153] Ibid para 128.
[154] Forsyth op cit note 122 at 339.
[155] Ibid at 339.
[156] *Burchell* supra note 146 para 107.
[157] Ibid para 111.
[158] Ibid para 111; Marx op cit note 135 at 228.
[159] *Burchell* supra note 146 para 97.
[160] Ibid.
[161] Marx op cit note 147 at 227.
[162] *Burchell* supra note 146 para 128.

When it comes to the lex causae,[163] Forsyth makes a good case that both the court in a foreign home state and a South African court are permitted to use South African law in situations where harm is experienced in South Africa, or the cause of action arises in South Africa.[164] This outcome puts the application of the proposals of this thesis at the centre of this extraterritorial outcome for the claimants. This is because the adjustments to the law proposed in this thesis deal with the substantive areas of South African law, with the main area, namely delict.

As it pertains to lex causae, this thesis is limited to a scenario where either a foreign court or a court in South Africa finds that the applicable law to the dispute in question is the South African law of delict.

The third dimension of the problem at the extraterritorial level is the enforcement of judgment debts.[165] Once the matter of jurisdiction and the applicable laws have been settled, an additional hurdle must be addressed. This hurdle pertains to the recognition and enforceability of any judgment debt the court gives. This complexity is logical because while only one court will be tasked with determining and settling the matter, a different court in another jurisdiction may be required to recognise and enforce the judgement.[166]

In the Bhopal disaster, after years of litigation and court cases in both the United States and India, the claimants eventually settled the matter in an Indian court.[167] However, its enforcement and disbursement would prove to be an additional hurdle they must overcome.[168] To this day, some of the victims of the Bhopal disaster have not been compensated as required by the Indian court.[169]

From a South African point of view, foreign judgments are generally not enforceable.[170] However, the Enforcement of Foreign Civil Judgements Act[171] and the Protection of Business Act,[172] read alongside several common-law principles, contain the principles applicable to when this general rule can be relaxed.[173] Whether other countries recognise South African judgments is a separate matter and differs from jurisdiction to jurisdiction. This question must

[163] Forsyth op cit note 122 at 2 and 10.
[164] Ibid at 339.
[165] Watt & Bíziková op cit note 122 at 1.
[166] Forsyth op cit note 122 at 389.
[167] *Union Carbide Corporation* supra note 41 at 3.
[168] Ibid.
[169] Ibid at 30.
[170] Forsyth op cit note 122 at 390–1.
[171] 32 of 1988.
[172] 99 of 1978.
[173] Forsyth op cit note 122 at 387–445.

be determined based on the laws of the state that the claimants wish to have their judgment enforced.[174] In the Bhopal disaster, the relevant states for any potential recognition and enforcement of a judgement were primarily India and the United States. The proposals of this thesis are only applicable where the eventual judgement debt can be recognised and enforced as per South African law or the other jurisdiction where the host state of the parent company of the MNC.

1.2.4 Synopsis of the research problem

The research problem this thesis addresses is the challenge where delict claimants have been harmed by MNC activities and are left with no effective legal remedy. This challenge arises because of the gaps in international law identified in section 1.2.2.

The substantive proposals of this thesis are limited to the following specific scenario. Firstly, this thesis is limited to a scenario where the courts of the foreign state or South Africa find that they have jurisdiction to hear a matter brought by South African claimants in a matter where the facts are similar to that of the Bhopal disaster. Secondly, the research is limited to where such a court finds that the law to be applied is the South African law of delict. Thirdly, my proposals are limited to the factual matrix, and relevant laws permit a pathway where the resultant judgment debt is recognised and enforced in the home state or in South Africa. Fourthly, this study is limited to discussing lex causae applicable to a delictual claim against an MNC operating in a corporate group.

Thus, this thesis focuses on the law of delict in a hypothetical scenario where the Bhopal disaster occurs in South Africa. It is submitted that this inquiry has not received sufficient attention in South African law.

[174] For a detailed description of the principles related to the enforcement of judgements see generally RE Luts *A Lawyer's Handbook for Enforcing Foreign Judgments in the United States and Abroad* (2007), A Reyes *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (2019), and H Kronke, P Nacimiento & D Otto *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010).

1.2.5 Thesis contribution

Hopt has identified three broad ways regulators worldwide have responded to MNCs' regulation within their jurisdictions.[175] The first regulatory response is by way of a specialised, all-encompassing corporate group legislation that deals with all matters in which such MNCs are involved.[176] An example of such legislation can be found in the German Stock Corporation Act.[177] The second regulatory response is by way of reliance on corporate and civil laws.[178] The third is by way of industry-specific legislation or in combination with common law principles in different public and private law areas, such as tax, banking, competition law, and delict.[179]

The current South African approach likely sits somewhere in the middle of the second and third approaches.[180] South African law on MNCs appears to rely on corporate law principles.[181] These corporate law principles are then supplemented by subject-specific regulation in areas such as corporate law, tax, competition law, and labour and environmental law, all in some way regulating MNCs.[182] Stevens has done some preliminary evaluations of whether the law of delict applies to MNC corporate groups, but the overall inquiry into whether this is viable remains sparse.[183] All the areas of law that ought to regulate MNC corporate groups appear siloed from each other and inadequate to respond to the full range of ways in which these companies have been able to and continue to evade liability for the human rights infringements they cause.[184] My review indicates three viable pathways through which South African law can respond to the identified gaps.

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[175] KJ Hopt 'Groups of Companies - A Comparative Study on the Economics, Law and Regulation of Corporate Groups' (2024) *European Corporate Governance Institute - Law Working Paper No. 752/2024*, available at *https://ssrn.com/abstract=4708515* accessed 30 October 2024 at 14–26.
[176] Ibid; See also German Stock Corporation Act of 6 1965.
[177] Hopt ibid at 17–9.
[178] Ibid at 14–7.
[179] Ibid at 14–9.
[180] RA Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (LLD dissertation, University of Stellenbosch, 2011) at 142 and 218.
[181] Ibid.
[182] Ibid.
[183] Ibid at 202; R Stevens 'Circumventing veil piercing: possible delictual liability of a holding company to a creditor of its insolvent subsidiary' (2013) 24 *Stellenbosch Law Review* 93; R Stevens 'Kuwait Asia Bank EC v National Mutual Life Nominees Ltd revisited: the possible vicarious liability of a holding company for the delicts caused by its nominee directors on the board of its subsidiary' 2019 *Journal of South African Law* 78; see also my preliminary study of the problem in T Mafulela *The possible extension of vicarious liability to cover relations between holding companies and their subsidiaries: Is it plausible and desirable under South African Law?* (LLM research report, University of Witwatersrand, 2018).
[184] Stevens op cit note 180 at 26.

The first possible path is articulated by Bilchitz, who persuasively argues that the best path forward is through a global treaty on business and human rights.[185] To date, the negotiations for such a treaty are ongoing.[186] As stated earlier in section 1.2.1, my view is that once this treaty has been negotiated and ratified by nation-states, it may provide an ideal mechanism for the challenges identified in this chapter. However, as it currently stands, such a treaty remains a long-term solution and cannot resolve the challenges presently posed by MNCs.

The second path is articulated by Stevens, who makes a compelling case that due regard must be placed on the principles of liability in company law when dealing with the challenges that MNCs operating in corporate groups face.[187] Stevens argues that applying the veil-piercing doctrine to corporate groups as per South African company law ought to be the primary guide for resolving these gaps.[188] Stevens thus advocates for statutory reform in company law and makes a notable contribution to how such reforms can be made.[189] This thesis explores this avenue.

There is still one more path that may sufficiently rectify the challenges of MNCs. Foreign case law, particularly from the United Kingdom, has indicated that the law of delict can be adjusted to cater to the realities of corporate groups.[190] My view is that South African courts and scholars in the law of delict have not yet seriously considered any response to corporate group liability. Thus, this area largely remains unexplored.[191] It is this gap in law between the intersection of corporate groups and delicts that this thesis primarily focuses on.

The common law of delict in South Africa is often conceptualised as fault and no-fault (or strict) liability.[192] It is possible that the common law already has a remedy to resolve the identified gaps. In such a case, these laws would need to be applied. It is also possible that the South African common law of delict may need to be developed to respond to the reality of MNC activities adequately.

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[185] See Bilchitz D 'The necessity for a business and human rights treaty' (2016) 1 *Business and Human Rights Journal* 203.
[186] Ruggie, Caroline & Davis op cit note 108.
[187] Stevens op cit note 180 at 281–8.
[188] Ibid.
[189] Ibid at 377–80.
[190] See discussion of *Chandler* in Turner op cit note 134.
[191] See similar finding in J Brickhill & Z Mbuyisa 'Multinational Company litigation - South Africa' in R Meeran (ed) *Human Rights Litigation against Multinationals in Practice* (2021) ch 4 at 95 and 97.
[192] J Neethling & JM Potgieter *Law of Delict* 8ed (2020) at 433–5; M Loubser et al *The Law of Delict in South Africa* 3ed (2017) at 457–8.

Where legal development is considered, this thesis also explores lessons from South African case law, foreign law and other relevant global trends. For example, the South African case of *Nkala* and *Chandler* case of the United Kingdom may provide notable contributions to delict-based corporate group liability and will be explored in this thesis.[193] Globally, academics have specifically expressed curiosity regarding whether strict liability can be applied to corporate groups, but this line of inquiry remains largely unexplored.[194] This study intends to fill this gap.

Briefly, vicarious liability is a common-law delictual doctrine that permits the courts to impose delictual liability on one person for the wrongs of another without establishing the fault of the party that is held liable.[195] Traditionally, several relationships have been recognised as having the capacity to create this form of liability, namely, the common employment relationship, agency relationship, and the state as employer of its functionaries.[196] In terms of the underlying policy of the doctrine, the list of relationships that can attract vicarious liability is not exhaustive.[197]

The overarching research question can be reduced to the following: Can and should the doctrine of vicarious liability, located in the South African law of delict, be used to hold a holding company liable for the delicts committed by its subsidiary? This question is inspired by a need to craft novel legal remedies to protect human rights victims from harm caused by the business

[193] *Nkala* is explored in section 2.4 of Chapter Two, and *Chandler* is explored in section 4.2.5 of Chapter Four; for a discussion of the broader relevance of *Chandler* see R Turner 'Revisiting the Direct Liability of Parent Entities Following Chandler v Cape Plc' (2015) 33 *Company and Securities Law Journal* 45, D Ikuta 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 *UCL Journal of Law and Jurisprudence* 60, D Palombo 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil beyond Kiobel v. Royal Dutch Shell' (2015) 4 *British Journal of American Legal Studies* 453, and J Fulbrook 'Chandler v Cape Plc: personal injury: liability: negligence' (2012) 3 *Journal of Personal Injury Law* 135.

[194] T Kravtsova & G Kalinichenko 'The vicarious liability of parent company liability for its subsidiary' (2016) 14 *Journal of Corporate Ownership & Control* 1; WJ Rands 'Domination of a Subsidiary by a Parent' (1998) 32 *Indiana Law Review* 421 at 446–8; X Feng *Corporate Liability Towards Tort Victims in the Personal Injury Context* (PhD thesis, Queen Mary University of London, 2017) at 222–97; LB Scott *Employees to hackers: The shades of blame in vicarious corporate liability* (PhD thesis, The Graduate College at the University of Nebraska, 2016) at 42; M Petrin & B Choudhury 'Group Company Liability' (2018) 19 *European Business Organization Law Review* 771 at 789; see P Morgan 'Vicarious Liability for Group Companies: the Final Frontier of Vicarious Liability?' 2015 *Journal of Professional Negligence* 276 a rare exception of an academic who has seriously considered the viability of the operation of strict liability within the context of corporate groups

[195] J Neethling & JM Potgieter op cit note 192 at 444–54; M Loubser & Midgley et al op cit note 192 at 468–80.

[196] Ibid.

[197] See JM Potgieter 'Preliminary thoughts on whether vicarious liability should be extended to the parent-child relationship' (2011) 32 *Obiter* 189.

of MNCs.[198] I call this scheme of extending vicarious liability to corporate groups hold-sub liability.[199]

The exploration envisaged in this thesis still requires one last crucial legal ingredient: adequate guidance from the Constitution of South Africa. From a South African perspective, assessments of the adequacy of legal regimes cannot be confined to international or private international law, corporate law, or delict.[200] The South African system of constitutional supremacy dictates that the dictates of the South African Constitution must ultimately guide all legal problem-solving.[201] Thus, the last legal ingredient ought to be a jurisprudential approach that assesses legal problem-solving in corporate law, delict, and private international law from the vantage point of the Constitution.

1.3 The jurisprudential approaches of the thesis

1.3.1 International and extraterritorial jurisprudential orientation

My view is that with any complex problem, an ideal starting place is to first commit to a clear and concise way of seeing the world and its problems. In this sense, a clear legal lens provides an appropriate guide to any proposed legal solutions.

My ideological orientation must be understood from two separate but interrelated perspectives: A global and a national dimension. As argued in section 2.2.2, international law has been ineffective in crafting a viable path to make MNCs accountable for human rights violations. However, my view is that they may still provide us with the proper aspirational goals of what we ought to aim for to close the gaps in law identified by this effectively. In this context, I view the growing field of business and human rights as reflecting a notable attempt at the global level that aims to rectify corporate accountability for these types of harms identified in this study.[202]

[198] My initial ideas were sparked by Morgan op cit note 194.
[199] For ease of reference, this paper shall refer to this new relationship between a holding company and its subsidiary company for establishing vicarious liability as 'hold-sub liability'. See in this regard the preliminary groundwork I laid in Mafulela op cit note 183.
[200] The supremacy of Constitutional law is entrenched in s 2 of the Constitution of the Republic of South Africa, 1996.
[201] Ibid.
[202] Deva & Bilchitz op cit note 54 at the book's foreword.

It is in the GPs framework and its values that I seek to ground part of my ideological orientation. The first key ideal I take from Ruggie and the GPs framework is principled pragmatism.[203] What does it mean to be principled and pragmatic, and what are the benefits of the approach when applied to solving complex, multi-layered problems like the one identified in this thesis?

Ruggie describes one key pillar that has guided the crafting of the GPs framework. To achieve this, he argues that any work at the global level must be underpinned by what is termed 'polycentric governance'.[204] At its core, the approach invites one to think about how to map and regulate areas with rapidly changing variables such as cyberlaw.[205] In such areas, the argument is that the law must adopt dynamic regulatory models capable of continuous adaptation.[206] One such approach is then suggested as polycentric governance.[207] The polycentric approach recognises that at the international level, neither states nor any other actor or organisation has the power and authority to make the law independently.[208] International law and global governance are often characterised by legal fragmentation and gaps created by rapid globalisation.[209] Given this state of affairs, the polycentric approach is meant to give us a starting place on how to 'conceptualise and manage complex regulatory schemes'[210] such as regulating MNCs.

The polycentric approach is, therefore, non-static and aims to allow a diverse group of international actors, organisations, and states to work separately or together on multiple fronts, with the ultimate aim of creating policy and law that increases cooperation and compliance over time.[211] In this line of thinking, no singular effort or plan of action in any one state or organisation can provide all the answers.[212] In a sense, polycentricity speaks to the idea of starting where you are, with what you have and doing what you can, as long as there is an understanding of a focal point or vision.

Ruggie would develop and lobby for the GPs framework with three focal points: the state's duty to protect, the company's obligation to respect, and the victim's right to an effective

[203] Ruggie op cit note 7 at 28–30.
[204] Ruggie op cit note 7 at 87.
[205] See also JD Prenkert & SJ Shackelford 'Business, Human Rights, and the Promise of Polycentricity' (2014) 47 *Vanderbilt Journal of Transnational Law* 451 at 455.
[206] Ibid at 445.
[207] Ibid.
[208] Ibid.
[209] Ruggie op cit note 7 at 78.
[210] Prenkert & Shackelford op cit note 205 at 455.
[211] Ibid at 456.
[212] Ibid.

remedy.[213] From the vantage point of GPs framework, this thesis explores one of the focal points and aims to contribute to the nascent literature on access to remedies for claimants at the state level.

My general orientation is anchored in the idea of small wins that are built into the bigger collective goal. I generally shy away from all-encompassing, universal, and unmovable solutions. My jurisprudential approach is predicated on the idea that pursuing justice and equality must be the primary driver of what we seek. This means that the aim must always be to advance the interest of creating tangible judicial remedies for delict victims. However, we must also be pragmatic and realistic. This means that our approach must be nimble and flexible. As Ruggie puts it, there are no 'silver bullets'.[214]

1.3.2 National jurisprudential orientation

At the country level, in South Africa, I resonate with transformative constitutionalism as understood by the legal jurisprudence of Langa[215] and Moseneke.[216] Ultimately, I view private law arrangements and regulation through the prism of transformative constitutionalism. Here, I believe in its potential to help guide complex structural problem-solving.

Moseneke views the constitutional enterprise as 'transforming our society into a democratic, non-racial, non-discriminatory, egalitarian, socially just and caring society'.[217] Key to this is also the humanisation of the law, particularly private law.[218] The following are some of the key features of transformative constitutionalism.

Langa defined this ideal as:

> 'a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar

[213] The GPs Framework in Business & Human Rights Resource Centre op cit note 98.
[214] Ruggie op cit note 7 at 59, where he argues that no single solution can resolve the challenges MNCs present.
[215] Pius Langa is a former Chief Justice. See his views on transformative constitutionalism in P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.
[216] Dikgang Moseneke is a former Deputy Chief Justice. See his views on transformative constitutionalism in D Moseneke 'The Fourth Bram Fischer Memorial Lecture - Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309.
[217] Ibid at 319.
[218] D Visser & E Reid *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) at 12–37.

> historical position or its particular socio-economic goals but because it envisions a society that would always be open to change and contestation, a society that will always be defined by transformation.'[219]

Klare thought of this ideal as follows:

> 'By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'[220]

Klare uses words such as 'reform', 'not quite a revolution, 'egalitarian', and creating a 'caring' law and society to describe what the constitution says and aims to achieve.[221] This is envisaged to apply equally across the political sphere and private relations.[222]

Langa argues there is no single or stable conceptualisation of transformative constitutionalism.[223] Langa further asserts that the fact that there is no single definition is, in fact, ideal, and it keeps with the spirit of the ideals of transformation.[224] For Langa, the core ideal of transformative constitutionalism is that 'we must change'.[225] But how we are to change and what we must change into are the tough questions.[226] A good starting point is found in the post-amble to the 1993 Constitution. Here, transformative constitutionalism provides a 'historic bridge'. It states the following:

> 'This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex. The pursuit of national unity, the well-being of all South African citizens, and peace require reconciliation between the people of South Africa and the reconstruction of society.'[227]

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[219] Langa op cit note 215 at 354.
[220] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 150.
[221] Ibid.
[222] Ibid.
[223] Langa op cit note 215 at 351.
[224] Ibid.
[225] Ibid at 352.
[226] Ibid.
[227] The post-amble to the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

Langa elaborates on the ideals that must help us move along this 'historic bridge'. The first ideal is substantive equality.[228] In this regard, the key is the tearing down the conditions that impede 'a social and an economic revolution'.[229] Service delivery by the state and the levelling of the skewed 'economic playing field' are key barriers to attaining substantive equality and achieving the social and economic revolution.[230]

Another key pillar of transformative constitutionalism is a shift of legal culture from a 'culture of authority' to a 'culture of justification'.[231] In the legal culture of justification, decisions and exercise of power are only constitutionally acceptable if it is substantively defensible.[232] This defensibility should be underpinned and guided by constitutional values.[233] Langa describes the process that must allow for an approach to adjudication that accepts the indivisibility of law and politics.[234] The legitimacy of a court decision should thus not only be found in the court's authority but also the honesty and cogency of the adjudicator's rationale for a given judgment.[235] Langa argued for this honest and transparent approach.

Langa argues that transformative constitutionalism as an ideal must not be understood as a destination where we can move from one part of the bridge to the other.[236] Instead, Langa argues, 'The value of the bridge lies in remaining on it, crossing it over and over to remember, change and imagine new and better ways of beings'.[237] This means transformation must be understood as a permanent ideal and a worldview open to possibility, dialogue, contestation, and, above all else, a commitment to change and unending improvement.[238] In transformative constitutionalism, we must ground the project of humanising private law and potentially even private international law.[239] Langa invites us not to see the law as a fixed and finite set of rules of principles but rather to see the law as a means to an end. He further invites us to be deliberate about the ends which the law serves.

So, how does transformative constitutionalism apply to the ideological orientation advanced in this thesis? The chief concern of this thesis is the clash between two legal interests: The delict

[228] Langa op cit note 215 at 352.
[229] Ibid.
[230] Ibid.
[231] Ibid at 353.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid at 354.
[237] Ibid.
[238] Ibid.
[239] Schoeman op cit note 129 at 347.

victims whose rights to body and property have been violated and lack recourse to the law when it comes to the business of MNCs. On the other hand, MNCs have legal rights, mainly corporate personhood and limited liability. As shall be argued throughout this thesis, my main proposal is that we should adjust the doctrine of vicarious liability to cover relations within corporate groups. Transformative constitutionalism serves to justify the intent of this exercise.

The ultimate aim of the thesis is that delictual victims harmed by the operations of MNCs must have viable recourse to the law. This is a constitutionally worthy and justifiable goal. This is because the constitution envisages itself as providing a framework of rights that must find tangible application in the lives of its legal subjects. For example, s 9 of the Constitution states, 'Everyone is equal before the law and has the right to equal protection and benefit of the law'. Section 38 of the Constitution also guarantees legal recourse when constitutional rights have been violated in the courts.

Therefore, I assert that this thesis's goal is well aligned with the objective normative value system of the Constitution. Further, I argue that, in principle, it is also justifiable to seek to adjust or change any doctrine of law that unjustly curtails the full protection of delict victims.

The net result of applying the values of transformative constitutionalism to this thesis is that transformative constitutionalism imbues this thesis with the moral authority to argue where necessary for an adjustment or change in the law to meet legitimate constitutional objectives.

In sum, the ideological, legal, and moral space created by transformative constitutionalism will be a key anchor of the arguments used to test for and justify why it is ideal to explore the viability of hold-sub liability. Transformative constitutionalism, therefore, allows for a worldview predicated on the possibilities presented by a reimagination of the law in pursuit of constitutional ends. My jurisprudential approach is guided by these ideals and inspired by the full embrace of this reimagined world. Ruggie's principled pragmatism, coupled with Langa and Moseneke's ideal of transformative constitutionalism, guides the jurisprudential ideology throughout this thesis.

1.4 Research questions

As stated in section 1.2.4, the primary research question is whether the doctrine of vicarious liability, as per South African law of delict, can be used as a basis to hold a holding company liable for the delicts committed by its subsidiary. This question is inspired by the plight of delict

claimants, such as those in the Bhopal disaster. To test this and explore the viability of my research questions, I shall ask five sub-questions. Each of these sub-questions translates into the chapters of this thesis.

1. Why do MNCs that operate in corporate group structures, such as the Bhopal disaster, continue to evade delictual liability for their human rights violations?
2. What role does the South African constitutional law play in understanding a dispute between the rights of delict victims and MNC corporate personality rights?
3. How does South African law regulate MNCs and corporate groups?
4. What are the permissible and viable delict-based remedies for the delictual liability of a parent company towards claimants of wrongs committed by its subsidiaries?
5. How would the proposed scheme of 'hold-sub' vicarious liability work to better protect human rights in cases of MNC human rights violations?

1.5 Chapter overview

1.5.1 Chapter 1: Introduction to the research problem

Chapter One has mapped out the legal and policy terrain from which we see the rise of the problem of corporate complicity in a wide range of human rights violations worldwide. I have examined the current legal architecture of corporate liability at the global, extraterritorial, and national levels. The strengths and weaknesses of the current regulatory landscape have also been analysed. I used a practical case study to provide further context to the problem at hand. In this regard, I discussed the Bhopal disaster. I have also laid out what is within and outside the scope of this thesis. I have ultimately sought to show why it is justifiable to seek out further options to develop South African law to rectify the problems that permit MNCs to evade delictual liability for human rights violations.

1.5.2 Chapter 2: The constitutional position

The research problem of Chapter One pits the rights of flesh and blood human beings against those of juristic persons who operate as MNCs in corporate groups. Consequently, in Chapter Two, I argue that the most appropriate arbiter for this standoff in South Africa is the Constitution of the Republic of South Africa, 1996.

Chapter Two addresses the role of the Constitution in the research problem. Chapter Two argues that the role of the Constitution in the research problem of this thesis must be addressed by asking the following question(s): How does the Constitution regulate non-state actors? Are companies in a corporate group, namely the parent and subsidiary companies, are constitutionally bound to rights violations in factual scenarios such as the Bhopal disaster? If these companies are bound, to what extent is it bound, and what permissible remedies can be generated from a constitutional perspective? Chapter Two only answers the first two of the three questions posed. Chapters Three, Four and Five address the last question of permissible remedies. Chapter Two thus lays out the procedural and substantive processes to be followed in terms of South African law when dealing with the problems identified in this thesis.

1.5.3 Chapter 3: Corporate group liability

Chapter Three provides a more refined description of the legal form of MNCs, including those that operate in corporate groups, as described in the Bhopal disaster. Chapter Three then describes how corporate groups are understood globally and in South Africa. Lastly, Chapter Three analyses the statutory and judicial approach used for corporate groups' liability in several key subject areas of South African law. Chapter Three aims to establish a clear picture of the state of corporate group regulation and liability under South African law.

1.5.4 Chapter 4: Delicts and corporate groups

Chapter Four examines whether the common law of delict adequately responds to corporate group liability. Where gaps in the law exist, this chapter will consider how exactly the common law of delict can be adjusted to appropriately respond to corporate group liability. Chapter Four covers both fault-based and strict liability in delict and evaluates which of the two pathways is better suited to address corporate group liability.

Chapter Four finds that in all the common law options available in delict, the doctrine of vicarious liability provides the most suitable pathway to craft a theory of liability for the relationship between the parent company and its subsidiary. This thesis coins such a scheme of liability as hold-sub liability. In Chapter Five, the doctrinal components of hold-sub liability are developed and are lacking, supplemented with foreign law.

1.5.5 Chapter 5: Towards vicarious liability and corporate groups

Chapter Five will further develop and test the viability of combining a constitutionally charged conception of vicarious liability with a modern corporate group entity. This exercise essentially seeks to assess whether it is legally conceptually sound, just, and equitable, as well as practical and functional, to add the corporate group relationship to those permitted to attract the operation of vicarious liability. Chapter Five also positions this theory of liability or doctrine within the broader context with which it must operate. This context is delict based on extraterritorial liability from a South African perspective.

1.5.6 Chapter 6: Conclusion

Chapter Six concludes with this thesis response to why MNCs operating in corporate group structures, such as in the Bhopal disaster, continue evading delictual liability for human rights violations. This thesis shall argue that the identified legal gap can be partly closed by adjusting the doctrine of vicarious liability so that it can operate within corporate groups.

CHAPTER 2: THE CONSTITUTIONAL POSITION

2.1 Introduction

Chapter One concluded that the Constitution ought to be the primary guide of how to resolve the standoff between delictual claimants and MNCs organised in corporate groups may be resolved.[1]

When the Bhopal disaster is viewed from a South African constitutional perspective, the scale of harm, coupled with the lack of recourse, would share similarities with apartheid-style laws. For example, under apartheid, many miners and mining communities suffered health-related harm and deaths because of mining activities. In similar ways to the Bhopal disaster, there was no meaningful recourse in law for these harms that would have occurred at the hands of mining companies.[2] In these times, universal human values such a respect for human dignity and equality that now exist under South African law were selectively applied primarily against black communities.[3]

The Constitution's preamble seeks to change this previous state of affairs. It emphasises that we: 'Recognise the injustices of our past' and 'Heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights'. Rectifying harms such as the one seen in the Bhopal disaster is thus a crucial purpose of the constitutional vision.[4]

As shown in the discussions of Chapter One, a corporation has the potential to be an imperfect tool if it is the principal legal device used to shield wrongdoers from liability caused by large-scale delictual harms.[5] Equally, the corporation can be a force for good if it is used in alignment

[1] Section 1.3.2 and 1.5.2 of Chapter One; See P Muchlinski *Multinational Enterprises and the Law* (2021) at 3–8 for the definition of a Multinational Corporation (MNC); tort is the term used for delict in Anglo-American law. I will only use delict for the thesis and chapter for ease of reference.
[2] See S Marks 'The silent scourge? Silicosis, respiratory disease and gold-mining in South Africa' (2006) 32 *Journal of Ethnic and Migration Studies* 569; A Cobley 'Powering Apartheid: The Coalbrook Mine Disaster of 1960' (2020) 72 *South African Historical Journal* 80.
[3] Ibid.
[4] Preamble of the Constitution of the Republic of South Africa, 1996.
[5] Section 1.1 and 1.2 of Chapter One: In this chapter, corporations, companies, juristic persons, and corporate personhood are interchangeable.

with our shared constitutional values.[6] The idea of the corporation's usefulness as a tool to manage risk, accumulate capital, and create wealth is undeniable.[7] At the heart of the function of a corporation is its separate legal persona from its managers and investors, to which you can attribute a range of legal rights and duties.[8] These core corporate rights protect the valuable functions of companies for their founders and other stakeholders.[9] Chapter Two does not question the value of this legal device. However, as seen in Chapter One, the legal structure of corporations can be used to deny natural persons a right to effective legal recourse.[10]

Chapter One argued that the Constitution should play a key role in resolving the research problem of this thesis.[11] In order to achieve this aim, Chapter Two asks the following question(s):

1. How does the Constitution regulate non-state actors?[12]
2. Whether companies in a corporate group, namely the parent and subsidiary companies, are constitutionally bound to rights violations in factual scenarios such as the Bhopal disaster?[13]
3. If these companies are bound, to what extent are they bound, and what permissible remedies can be generated from a constitutional perspective?

Chapter Two is divided into four sections. Section 2.1 describes the background of the discussion in Chapter Two. Section 2.2 explains the overall framework through which the Constitution is applied to all legal disputes and how the Constitution handles disputes between two non-state actors. Section 2.2 ends with an argument that the current legal mechanisms employed to address private disputes are unclear and incoherent.

Section 2.3 proposes an interpretive methodology that ought to be used to resolve private disputes at the constitutional level. This interpretive methodology is termed the 'interplay school', and it is argued that it will provide a clear and coherent methodology to address private disputes within the current constitutional framework. Section 2.3 argues that a legal basis for

[6] A De Jonge *Transnational Corporations and International Law Accountability in the Global Business Environment* (2011) at 1.
[7] Ibid.
[8] Ibid; See definitions of corporate personality and limited liability FHI Cassim et al *Contemporary Company Law* 3 ed (2021) at 39–47.
[9] Ibid.
[10] Section 1.1 and 1.2 of Chapter One.
[11] Section 1.3.2 and 1.5.2 of Chapter One.
[12] For ease of reference, the term non-state actor refers to a natural and a juristic person who is not the state.
[13] See section 1.5.2 which also sets out these questions as presented in this Chapter.

the interplay school can be found in three constitutional law cases that have dealt with private law disputes.

Section 2.4 employs the interplay school to answer whether a parent company operating in a corporate group is constitutionally bound to a dispute where there is an allegation of wrongdoing in factual scenarios such as in the Bhopal disaster and *Nkala*.[14] Section 2.4 also addresses the extent to which a parent company is bound to the rights and duties that emanate from the Constitution.

Section 2.5 concludes by addressing the overall implication that the Constitution ought to have on private disputes such as the one raised in this chapter. This overall implication elaborates on the permissible remedies that can be generated from a dispute between a parent company organised in a corporate group and delict victims.

2.2 The South African constitutional framework

2.2.1 Relevant constitutional provisions

The Constitution applies to vertical disputes between the state and citizens as well as between non-state parties horizontally.[15] Two primary provisions in the Constitution regulate the process that ought to be followed when the Constitution is applied to any matter before a court.[16]

The first provision is s 8 of the Constitution, which states that:

> 'Application
> 1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> 2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> 3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
>
> a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the

[14] *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) this case is discussed in section 2.4.1 of Chapter Two.
[15] Section 8 of the Constitution; see also the discussion in I Currie & J de Waal et al *The Bill of Rights Handbook* 6 ed (2013) at 23–31.
[16] Ibid; Currie & de Waal ibid at 30–1.

common law to the extent that legislation does not give effect to that right; and

b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

4. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person'.

The second provision is s 39 of the Constitution, which states:

'Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum -

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b. must consider international law; and

c. may consider foreign law.

2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'.

There are other provisions relevant to the discussion of this chapter.

Section 2 of the Constitution which states:

'Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

Section 7 of the Constitution which regulates the role of rights in the Constitution and states:

'Rights

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'.

Section 38 of the Constitution which states:

'Enforcement of rights

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'.

Section 173 of the Constitution which states:

> 'Inherent power
>
> The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

I submit that in resolving this thesis's research problem, one ought to take into account how these provisions will be applied to a dispute between non-state parties. In section 2.2.2, I describe the traditional approach of constitutional adjudication, which involves an application of these provisions.

2.2.2 Traditional approach of constitutional adjudication

When any person alleges that their fundamental rights contained in the Constitution have been infringed, a court must go through a process prescribed by the Constitution.[17] The currently accepted process prescribes that a court must engage in the procedural, substantive, and remedies stages.[18]

The procedural stage is intended to address several crucial precursory issues, such as whether the matter has been brought before a court with the appropriate jurisdiction, the justifiability and the locus standi of the litigants to the dispute.[19] The guidelines and rules that ought to be employed at the procedural stage for matters of the court's jurisdiction, justifiability, and locus standi of the litigants are relatively straightforward.[20] The more complex part of the procedural stage pertains to the application question, which deals with whether and how the Bill of Rights (BoR) applies to a dispute between non-state actors.[21]

The application question involves determining the reach and scope of the BoR in a particular dispute at hand by clarifying the manner and extent to which the BoR can be utilised to address

[17] Ibid at 29–71.
[18] Ibid.
[19] Ibid.
[20] Ibid; see detailed discussion of procedural steps in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2011) especially at 15–20 and Chapter 7.
[21] D Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy & Development* 21 at 38–43.

a dispute.[22] A court determining the application question must do so by following either the 'direct' or 'indirect' methodology and in accordance with the specific rules that determine the selected methodology.[23]

Currie's and de Waal's principle of avoidance and Du Plessis's principle of subsidiarity provide the most succinct explanation of the methodology of indirectly applying the BoR to a dispute.[24] Briefly, in terms of the indirect approach, the subject area of law or conduct in question is tested against the 'objective normative value system' of the Constitution.[25] Values such as the advancement of human dignity, equality, and freedom are utilised to assess whether law or conduct is aligned with the BoR.[26] Indirect application does not set aside the laws of the subject area that ordinarily regulate the disputes.[27] Rather, these subject area rules are adjusted to the extent that they are incompatible with the 'objective normative value system' of the Constitution.[28]

In terms of the indirect approach, section 39(2) of the Constitution is the primary provision that empowers the court to develop the common law.[29] Section 39(2) places a responsibility on every forum, court, or tribunal to advance the 'objective normative value system' of the Constitution when interpreting any conduct or legislation.[30] Section 39(2), therefore, facilitates an intermediary role where the subject-specific areas that regulate a dispute are read and, where necessary, developed to align with the Constitution's values.[31] The Constitution's role in terms of the indirect approach is primarily to infuse its values and norms into existing legislative and

[22] Currie & de Waal op cit note 15 at 24.
[23] Ibid at 30–1; J Van Der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *South African Journal on Human Rights* 341 at 350.
[24] Currie & de Waal op cit note 15 at 56–70; L Du Plessis 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication' (2006) 17 *Stellenbosch Law Review* 207; Woolman, Bishop & Brickhill op cit note 20 ch 3 especially at 21.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 39; see case discussion in P De Vos et al *South African Constitutional Law in Context* (2014) at 342; IM Rautenbach & R Venter *Rautenbach-Malherbe Constitutional Law* 7 ed (2018) at 267–70.
[30] Ibid.
[31] Ibid.

common law principles.[32] It is further argued that the indirect approach must be favoured over directly applying constitutional rights to private law disputes.[33]

The underlying case used to build the basis of the indirect approach is the interpretation of the Constitution done in *S v Mhlungu*.[34] This case was decided in the interim Constitution where the court stated: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.[35] The above dictum has been termed the *Mhlungu* principle.[36]

The primary utility, as argued, of the *Mhlungu* principle is to avoid an over-reliance on constitutional rights at the expense of unrooting settled, stable, and predictable principles of common law and legislation.[37] This is because when the Constitution is directly applied as per s 8(2) in every private law matter, such an approach prevents legislation or common law principles from developing subject-specific solutions.[38] Therefore, the direct application of the Constitution creates the risk of 'constitutional over adjudication' of our private law.[39] Based on the logic of the *Mhlungu* principle, it is argued that the direct application of the Constitution should be utilised only in exceptional cases.[40] It is not fully clear when these exceptional circumstances are evident.[41] Our courts have shown an inclination towards this position; thus, the more widely accepted view is that one must prefer the indirect approach before embarking on the direct approach.[42]

In disputes where the BoR is applied directly to a dispute, the subject area of law or conduct in question is tested directly with the relevant provision in the BoR.[43] The direct application

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[32] Ibid.
[33] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 26–30; see discussion of case in S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124:4 *South African Law Journal* 762 at 777; Currie & de Waal op cit note 15 at 68–71.
[34] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 59; see also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) para 3–5; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 897 (CC) para 21; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 21; *Minister of Education v Harris* (4) SA 1297 (CC) para 19; see discussion of the cases Currie & de Waal op cit note 15 at 56–70.
[35] Ibid *Mhlungu* para 59; see also Currie & de Waal op cit note 15 at 68–7; Du Plessis op cit note 24 at 208–18.
[36] Du Plessis op cit note 24 at 207; Currie & de Waal op cit note 15 at 68–71.
[37] Ibid Du Plessis at 215–16; Currie & de Waal op cit note 15 at 68–71.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] D Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3 at 8.
[43] De Vos op cit note 29 at 336–8; M Dafel 'The directly enforceable constitution: political parties and the horizontal application of the bill of rights: political rights since 1994 focus' (2015) 31 *South African Journal on Human Rights* 1 at 5.

methodology supplants existing laws that regulate the disputes.[44] In scenarios where a court utilises the direct application methodology and finds that a law or conduct is insufficient to protect the constitutional right in question, such a court is permitted to generate constitutional remedies.[45] Section 8(2) is at the heart of the direct application methodology.[46]

This provision's exact meaning and function have been subject to fierce debate in the judiciary and among scholars.[47] Chapter Two will address this provision separately later in section 2.2.2 of Chapter Two, where it is argued that s 8(2) of the Constitution is the crucial piece to closing the gaps in how the provisions in the BoR are applied to non-state actors.

Once the court has cleared all of the preliminary procedural matters, the next stage in the adjudicative process is to engage with the substance of the dispute at hand.[48] This process entails an interpretation stage and a limitations stage.[49] At the interpretation stage, the court must assess whether a right has been infringed.[50] If the answer is yes, the court must then determine whether such an infringement is justifiable in terms of the procedure set in s 36 of the Constitution.[51]

For the court to evaluate whether a right as contained in the BoR has been violated in terms of the interpretation stage, such rights must first be ascribed a meaning.[52] Section 39 of the Constitution contains crucial rules of interpretation that ought to be utilised to ascertain the meaning of rights.[53]

As per s 39, a court ascribing meaning to provisions in the BoR must primarily be guided by the founding constitutional values and norms, international law, and, where appropriate, foreign law.[54] In addition to the interpretive guides from s 39, a court must determine the meaning of a provision in the BoR based on the text of the clause and its ordinary grammatical meaning.[55] In determining the meaning of words in line with the constitutional norms, a court

[44] Currie & de Waal et al op cit note 15 at 31.
[45] Ibid.
[46] Ibid at 41.
[47] N Friedman 'The South African common law and the Constitution: revisiting horizontality' (2014) 30 *South African Journal on Human Rights* 63 at 63.
[48] Currie & de Waal op cit note 15 at 23–8.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Rautenbach & Venter op cit note 29 at 28–32.
[53] Ibid at 259.
[54] Ibid at 29–30; GE Devenish 'The Theory and Methodology for Constitutional Interpretation in South Africa' (2006) 69 *The Journal of contemporary Roman-Dutch Law* 238 at 240–50.
[55] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 13; see discussion of case in A Klaasen 'Constitutional interpretation in the so-called 'hard cases': Revisiting S v Makwanyane' (2017) 50 *De Jure* 1 at 10–12.

must strive for a purposive, generous, context-sensitive approach to words.[56] Context is intended to mean historical circumstances that lead to the drafting of the Constitution, other provisions in the Constitution as well as the overall scheme of the rest of the Constitution.[57] Provisions in the Constitution must also 'be construed in a way which secures for "individuals the full measure" of its protection'.[58]

When interpreting constitutional provisions, it is important to take into account that the Constitution entrenches the application of the BoR both horizontally and vertically.[59] Our courts must honour the principle that the Constitution is supreme, and all legislation, rules, and principles are subject to constitutional control.[60] Further, all conduct of the state or non-state actors is subject to the same constitutional authority.[61] Our courts are empowered where appropriate to adjust any rule, law, or conduct to align it with the norms of the Constitution.[62] Whereas state conduct is always bound to constitutional provisions, not all conduct by non-state actors and private law disputes are subject to the application of the Constitution.[63] The determination of the extent to which provisions bind non-state actors is largely dependent on how s8 is interpreted.[64]

When provisions in the BoR have been ascribed meaning and tested against the dispute at hand, a court must determine if there has indeed been an infringement of a protected right.[65] The matter can only proceed if the court finds that there has been an infringement.[66] At this stage, a court must then decide if such an infringement constitutes a justifiable limitation of the right that the disputed infringement has limited.[67] Section 36 of the Constitution contains the process that ought to be followed when determining whether an infringement is justifiable.[68] If the court finds that the law or conduct complained of by the applicant is justifiable, then the matter falls away because such an infringement would have been found constitutionally compliant.[69] Only

[56] *S v Zuma and Other*s 1995 (2) SA 642 (CC) para 14–15; Rautenbach & Venter op cit note 29 at 27–9.
[57] *Makwanyane* supra note 55 para 10; Currie & de Waal op cit note 15 at 135–45.
[58] Ibid *Makwanyane* para 10.
[59] H Cheadle & D Davis *South African Constitutional Law: The Bill of Rights* (2002) at 3–4.
[60] Section 2 of the Constitution.
[61] Ibid.
[62] Sections 39(2) and 8(3) of the Constitution; see discussion in L Hawthorne 'The Development Clause Section 39 (2) of the Constitution and the Law of Contract' (2018) 81 *Journal of Contemporary Roman-Dutch Law* 108.
[63] Cheadle & Davis op cit note 59 at 15–8.
[64] Ibid.
[65] Currie & de Waal op cit note 14 at 26–8
[66] Ibid.
[67] Ibid.
[68] De Vos op cit note 29 at 347–56.
[69] Ibid.

when the answer to this is no is a court permitted to engage in the last stage of constitutional adjudication, which is the determination of an appropriate remedy for the unjustifiable infringement of a protected right.[70]

The last stage of the constitutional adjudicative process is the remedies stage.[71] Sections 38, 172, 8(3) and 39 of the Constitution are the primary provisions that regulate the remedies that a court is permitted to generate once it has determined that there has been an unjustifiable limitation of a protected right.[72] Section 38 states that a court must generate 'appropriate relief', which is generally understood as giving courts broad discretion to decide what would be appropriate in each given case.[73] Some of the main remedies generated when rights have been unjustly limited are constitutional remedies, which can entail a declaration of invalidity, declarations of rights, interdicts, and orders for damages.[74] In matters of violations that occur between non-state actors, a court can also take into account additional guidance on appropriate remedies from s 8(3) of the Constitution.[75]

2.2.3 The gaps in the traditional approach to horizontal application of the Bill of Rights

To summarise, the traditional approach to constitutional adjudication follows three main steps: a procedural step, a substantive step and a remedies step. The traditional approach mainly resolves most disputes through the indirect application of the Constitution by testing private law disputes against the values of the Constitution.

The traditional approach to constitutional litigation I have laid out is not universally agreed upon, with many divergent views from our courts and among scholars.[76] The divergence of views can be traced back to *Du Plessis,* a case that decided on a methodology of dealing with horizontality when the interim Constitution was still in force.[77] In recent times, the source of

[70] Ibid at 321.
[71] Ibid.
[72] Currie & de Waal op cit note 15 at 177; see detailed discussion of remedies in Woolman, Bishop & Brickhill op cit note 19 at Chapter 9.
[73] Ibid Currie & de Waal at 180–1.
[74] A Mukheibir 'Constitutional Damages–a Stagnant or a Changing Landscape?' (2023) 26 *Potchefstroom Electronic Law Journal* 1; see also E Zitzke 'Constitutional Damages in South Africa: A Transformative Approach' (2024) 16 *African Journal of Legal Studies* 199.
[75] E Zitzke 'Transforming age-related capacity for fault in delict' (2021) 138 *South African Law Journal* 367 at 380.
[76] Chirwa op cit note 20 at 37–44; M Finn 'Befriending the bogeyman: Direct horizontal application in AB v Pridwin' (2020) 4 *South African Law Journal* 591 at 607–8; T Lowenthal 'AB v Pridwin Preparatory School: progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights* 261.
[77] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); see main discourse of the case in S Woolman & DM Davis 'The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *South African Journal*

the divergent views appears to emanate from the exact function and meaning of s 8 and s 39 of the Constitution and these clauses' relationship with horizontality.[78] There are divergent views on how these two provisions interact with the rights and values contained in the Constitution.[79] There are also divergent views on how and if these two provisions promote or should promote either a direct or indirect application of the Constitution.[80] There is, therefore, a disconnect on how to read s 8 and s 39 harmoniously with each other and within a holistic, purposive interpretation of the Constitution.[81]

Since the advent of our final Constitution, many courts have dealt with the interpretation of s 8 and s 39 of the Constitution.[82] *Pridwin* is an example of a recent court case that has dealt with horizontality but has not set out a coherent methodology on horizontality.[83] Thus, there remains a clear conflict as it pertains to how courts view the process that ought to be followed when a private law dispute is being tested against the Constitution.[84] Over the years, academics have

on Human Rights 361; D Futch 'Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application' (1996) 22 *North Carolina Journal of International Law and Commercial Regulation* 1009; J Van De Walt 'Perspectives on horizontal application: Du Plessis v De Klerk revisited' (1997) 12 *SA Public Law* 1; C Sprigman & M Osborne 'Du Plessis in Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 *South African Journal on Human Rights* 25; Woolman, Bishop & Brickhill op cit note 20 at ch 31 especially 14–29.

[78] D Bhana 'The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351.

[79] Ibid; see also CJ Roederer 'Post Matrix Legal Reasoning Horizontality and the rule of Values in South African Law' (2003) 19 *South African Journal of Human Rights* 57; A Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development'(2010) 127 *SALJ* 611; DM Davis 'The Importance of Reading - A Rebutter to the Jurisprudence of Anton Fagan' (2013) 130 *South African Law Journal* 52.

[80] J Van Der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *South African Journal on Human Rights* 341; I M Rautenbach 'Constitution and contract-exploring" the possibility that certain rights may apply directly to contractual terms or the common law that underlies them' 2009 *Journal of South African Law* 613.

[81]AJ Van Der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77 at 48–97; See the idea of a holistic, purposive interpretation of the constitution in line with *Zuma* supra note 56 para 13–6.

[82] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 29–34; *Carmichele* supra note 29 para 33,44,50–60; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 17–8; *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 54–8; *Mighty Solutions* supra note 13 para 34–44; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 41–5; *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 38–48; *Barkhuizen* supra note 33 para 35, 186; *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) para 67,127–31; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 71–8; *King N.O. and Others v De Jager and Others* 2021 (4) SA 1 (CC) para 20, 42–5; 170–80; *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* 2023 (2) SA 404 (CC) para 2,11,14 and 27.

[83] *Pridwin* ibid; see discussions Finn op cit note 76 at 607–8; see also Lowenthal op cit note 76.

[84] See Woolman op cit note 33; N Ally & D Linde 'Pridwin: Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 *Constitutional Court Review* 1.

attempted to fill in the gaps left by the court's interpretation of s 8 and s 39.[85] Academic positions on how we must read the Constitution and its interpreting case law are also vast and often contradictory. However, two primary schools of thought emerge from closer scrutiny of the arguments in academic discourse.[86]

The first school is best illustrated by Currie and de Waal's principle of avoidance and Du Plessis's principle of subsidiarity, as broadly outlined in section 2.2.1. This first school broadly argues that courts ought to rely on the indirect approach and the direct application of the Constitution should be utilised only in exceptional cases.[87] It is not fully clear when these exceptional circumstances are evident.[88] Friedman terms the first school as the 'dichotomy thesis' (dichotomy school) because the core argument of the first school of thought is the choice between direct and indirect application of the Constitution.[89]

Recently, the principle of subsidiarity has been crystallised as part of the methodology of dealing with horizontal disputes where there is specific legislation that regulates a dispute between non-state actors.[90] Where no legislation exists, the dominant argument is that the indirect approach must be favoured over the direct approach.[91] This means that court practice and the dominant academic opinion is that dichotomy school logic is the preferred methodology for dealing with constitutional disputes between non-state parties. Despite the dichotomy school being the main methodology utilised for horizontal disputes, courts that have utilised its logic have developed precedents that do not always cohere with the settled rules of constitutional interpretation.[92] *Barkhuizen* is an ideal case law illustration of the trouble that emanates from the current use of dichotomy logic and the source of the gaps it generates in constitutional methodology.[93]

[85] Ally & Linde ibid at 13; Friedman op cit note 47 at 64.
[86] Ibid Friedman op cit note 47 at 64–6 coins three schools of thought the validity thesis, remedy thesis, and dichotomy thesis. I, however, only identify two, the dichotomy school and the interplay school.
[87] Ibid.
[88] Ibid.
[89] Ibid at 66.
[90] A Mukheibir 'Esorfranki pipelines (PTY) LTD v Mopani district municipality [2022] ZACC 41' (2024) 45:2 *Obiter* 442 at 448–9.
[91] Currie & de Waal op cit note 15 at 45–7, 67–70.
[92] Woolman op cit note 32.
[93] Ibid at 772–81.

The second school of thought is what I term the 'interplay school'[94] and is best illustrated by its main proponents such as Bhana, Friedman, Cheadle and Davis.[95] The interplay school academics transcend the direct/indirect dichotomy and broadly argue for a coherent approach that strikes a balance between the key seemingly opposing methodologies on horizontality.[96] The interplay school thus dispenses with the direct/indirect dichotomy, and as I shall attest in section 2.3, I am persuaded that the interplay school presents a better path forward.

2.2.4 Illustrating the problems with the dichotomy school: Barkhuizen v Napier 2007 (5) SA 323 (CC)

2.2.4.1 Background to the case

Briefly, the facts are as follows. The plaintiff in the case, Mr Barkhuizen, had taken out a car insurance policy with the local representative of an international insurance syndicate. The local representative's name was Mr Napier, who had been duly authorised by Lloyds underwriters based in London to issue insurance policies in South Africa. The car insurance included in its contract covers the risk of loss that emanates from damage. Late in November, the insured vehicle was involved in an accident, and it was irreparably damaged. Mr Barkuizen attempted to claim the loss of the car, but the insurer refused to satisfy the harm on the basis that the vehicle had been used for a purpose other than what was agreed upon in the insurance contract.

Two years after the insurer had refused to compensate for the loss, Mr Barkhuizen decided to institute a lawsuit in the High Court challenging the grounds invoked by the insurer when it refused to compensate him. The insurer responded with a special plea that relied on a clause in the insurance contract that required the insured to issue the summons within ninety days from the repudiation of the contract. And because Mr Barkhuizen's claim was late, the insurer

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[94] I craft the term 'interplay school' from the word 'interplay' in D Bhana (2013) op cit note 78 at 351, 353, 361, 367, 372 and 373; D Bhana *Constitutionalising contract law: ideology, judicial method and contractual Autonomy* (PhD thesis University of the Witwatersrand 2013) at 8, 15, 22, 28, 30, 32, 34, 39, 46, 58 and 96.

[95] D Bhana 'The development of a basic approach for the constitutionalisation of our common law of contract' (2015) 26 *Stellenbosch Law Review* 3 at 6–9; Bhana (2013) op cit note 78 at 362–75; D Bhana 'The Implications of the Right to Equality in Terms of the Constitution for the Common Law of Contract' (2017) 134:1 *South African Law Journal* 141 at 145–48; see also M Pieterse 'Indirect horizontal application of the right to have access to health care services' (2007) 23 *South African journal on human rights* 157 at 161; Friedman op cit note 59 at 69–78; Roederer op cit note 79 at 62–81; H Cheadle & D M Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *South African Journal on Human Rights* 44 at 56–66; CJ Visser 'Adjudicative subsidiarity, the "horizontality simpliciter" approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality' (2022) 55 *De Jure* 124 at 137–42; E Zitzke 'Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development' (2015) 7 *Constitutional Court Review* 259 at 285–90.

[96] Ibid.

alleged that the basis of Mr Barkhuizen's claim was faulty on contractual and procedural grounds.

Unhappy with the special plea, Mr Barkuizen challenged the clause relied on in the special plea on constitutional grounds. Mr Barkkuizen was of the view that the clause offended public policy as informed by the Constitution by prescribing such a short time to institute legal proceedings. Mr Barkkuizen argued that such a short duration amounted to an assault on his right to access the courts as protected by s 34 of the Constitution. The High Court agreed with Mr Barkkuizen's argument that the clause violated his right as contained in s 34 of the Constitution.[97] On appeal, the Supreme Court disagreed with the High Court and the matter was further appealed to the Constitutional Court.[98]

On behalf of the majority of the Court, Ngcobo J clarified the appropriate approach to be followed when a clause in a contract is challenged based on a provision in the BoR.[99] Ngcobo J considered whether it would be appropriate to directly test the contested contractual clause against s 34 of the Constitution as per the process laid down in s 8(2)-(3).[100] Here, the learned judge opined that the direct application pathway was inappropriate.[101] According to Ngcobo J, it was inappropriate to directly apply a constitutional provision to a contractual clause dispute because it would create difficulties with reconciling the demands of s 8 on the one hand and s 36 and s 172 on the other.[102] The interpretive logic of how exactly s 36 and s 172 cause these difficulties is unclear.[103]

Ngcobo J endorsed the indirect application of the Constitution as the ideal pathway to the horizontal application of the Constitution.[104] This meant that the disputed clause had to be measured against public policy as informed by constitutional values contained in the BoR.[105] Ngcobo J explained that the utility of such an approach is that it maintains the conceptual integrity of the doctrine of pacta sunt servanda while at the same time limiting its application where it is utilised in a manner that is clearly at odds with constitutional values.[106]

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[97] *Barkhuizen* supra note 33 para 7–10.
[98] Ibid para 11–8.
[99] Ibid para 19–22.
[100] Ibid para 23–30.
[101] Ibid.
[102] Ibid.
[103] Ibid para 23–30; Woolman op cit note 33 at 775.
[104] *Barkhuizen* supra note 33 para 30 and para 186.
[105] Ibid para 23–30.
[106] Ibid.

With the proper approach explained, Ngcobo J then tested whether the time limitation clause in Mr Barkuizen's insurance contract was aligned with public policy as informed by the Constitution's values.[107] Ngcobo J found that the clause was aligned with public policy.[108] This is because there was no indication that Mr Barkuizen was forced to enter into the contract or that there was uneven bargaining power between the parties when the contract was concluded.[109] Ngcobo J also based his decision on the fact that no evidence indicated that Mr Barkuizen was unaware of the existence of the time limitation clause in the insurance contract when he entered into the agreement.[110] Based on these reasons, the case was ruled against the applicant, Mr Barkuizen.[111]

At face value, the principles explained by Ngcobo J and the majority court ruling appear to be sensible and accurate applications of the law. However, on closer scrutiny, the approach utilised by Ngcobo J represents a standard but flawed methodology.[112] To illustrate some of the flaws of *Barkuizen* and the dichotomy school, I take issue with three aspects of the constitutional methodology that Ngcobo J utilised in this case.

2.2.4.2 The problem of the redundancy of s 8(2) of the Constitution

The first aspect I take issue with pertains to the two methods of horizontal application. The judgement acknowledges the existence of two pathways to horizontality, namely, the direct and indirect application of the Constitution.[113] Ngcobo J, however, failed to articulate a clear and sensible reason why the direct application pathway was not suitable in this case.[114] According to Ngcobo J, the Constitutional Court had not yet considered the issue of the direct application of the Constitution, and there are many difficulties with this approach.[115] It is not accurate that the matter had not been considered by the Constitutional Court.[116] In 2002, in *Khumalo,* the same court had decided a matter based on the direct horizontal application of the Constitution as per s 8(2)-(3) process.[117] By disregarding *Khumalo* and offering no clear

[107] Ibid para 44–71.
[108] Ibid para 86.
[109] Ibid para 66.
[110] Ibid.
[111] Ibid para 86.
[112] Woolman op cit note at 765.
[113] *Barkuizen* supra note 33 para 20, 23 and 186; De Vos op cit note 29 at 323–45.
[114] Ibid *Barkuizen* para 186; Woolman op cit note at 772–75.
[115] Ibid *Barkuizen* para 23.
[116] Woolman op cit note 33 at 772–75.
[117] Ibid; *Khumalo* supra note 82 para 31–2.

explanation as to why the direct application method was not applicable in *Barkuizen,* Ngcobo J created a precedent that is at odds with previous rulings of the highest court in the land.[118]

The problem with the preference of the indirect application method is that it creates an impression that the court is of the view that the indirect application method is capable of meeting the needs of all legal matters related to constitutionalising our private law.[119] The issue with this aspect of Ngcobo J's logic is that it leaves the direct application pathway with no objective function or practical use in the constitutional framework.[120] Since s 8(2) is the cornerstone of direct horizontality, the direct application and, with it, s 8(2) become redundant and without practical purpose within horizontality.[121] But how can constitutional drafters intend for a provision at the heart of the application clause to be redundant?[122] In *Khumalo,* the court stated that any methodology of interpretation that leads to the redundancy of constitutional provisions is invalid.[123]

The risk of the redundancy of s 8(2) is not trivial.[124] This risk is heightened by the academic's opinion on s 8(2), where, for example, Currie and de Waal have described the provision as opaque and circular.[125] Currie and de Waal further argue that in terms of their 'principle of avoidance', the need to align the private law with the Constitution can almost always be met with the indirect application of the Constitution.[126] Ngcobo J's methodology on s 8(2) is thus in line with the dominant academic position on s 8(2) and, with it, the real risk of the redundancy of the provision.[127]

There is another problem tied to the risk of the redundancy of s 8(2). The function and meaning of s 8(3) is intrinsically tied to s 8(2).[128] The phrase 'in terms of subsection (2)', contained in s 8(3), means that s 8(3) is only operational after a decision has been made regarding the

[118] Woolman op cit note 32 at 772–75.
[119] Currie & de Waal op cit note 15 at 45–7.
[120] Woolman & Davis op cit note 77 at 381; Currie & de Waal op cit note 15 at 50; see also a less explicit argument made in Du Plessis op cit note 24 at 215–16; Friedman op cit note 47 at 79–81.
[121] Ibid.
[122] Others that have also faulted a conceptual reading that risks making constitutional provisions redundant Friedman op cit note 47 at 79–81 and; D Bhana (2017) op cit note 91 at 145.
[123] *Khumalo* supra note 82 para 32.
[124] Ibid; Friedman op cit note 47 at 79–81; Woolman op cit note 33 at 777; Bhana (2017) op cit note 91 at 145.
[125] I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2006) at 50; D Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *South African Law Journal* 754 at 775; see also M Finn *Duties of private persons and the right to equality in South Africa* (PhD thesis, University of the Witwatersrand, Johannesburg, 2023) at 42.
[126] Ibid at 75–8.
[127] Woolman op cit note 33 at 784.
[128] IM Rautenbach 'Engaging the Text of Section 8 of the Constitution in Applying the Bill of Rights to Law Relating to Private Relations' 2002 *Journal of South African Law* 747 at 754.

applicability of s 8(2).[129] The result of this textual design means that no function or meaning can be logically assigned to s 8(3) without first ascertaining the meaning of s 8(2).[130] The result of this design in these provisions makes it such that the redundancy of s 8(2) also inevitably risks the redundancy or misinterpretation of s 8(3).

2.2.4.3 The problem of over-reliance on the indirect application approach

The second problem with Ngcobo J's interpretive logic in *Barkuizen* is related to the court's reliance on the indirect methodology. Ngcobo J stated that there are 'difficulties' with the direct application of the Constitution as per s 8(2)-(3), but these difficulties are not clearly elaborated.[131] The basis often employed by academics and our courts to support reliance on the indirect methodology is the 'principle of avoidance' and the 'principle of Subsidiarity'.[132] The courts have rightly endorsed the principle of subsidiarity as it pertains to disputes involving designated legislation, and it is indeed what s 8(3) of the Constitution envisages the reliance on legislation.[133] However, Woolman is not convinced that our courts must also almost always rely on the indirect approach when the dispute is primarily governed by the common law, as seen in Ngcobo J's approach.[134] The problem is that *Khumalo,* a case decided prior to *Barkuizen,* had already clearly stated that there are circumstances when it is appropriate to apply the Constitution directly to a dispute governed by the common law.[135] Thus, unclear, over-reliance on the indirect approach as done in *Barkhuizen* not only leads to the redundancy problem as argued, it closes off the legitimate influence of Constitutional rights on common law development.[136] The approach taken in *Barkuizen* thus meets the risk that Du Plessis AJ in *Surrogacy* cautioned against when the judge stated:

> 'However, unthoughtful reliance on the principle can undermine the Constitution as our supreme law. The Constitution remains the supreme law, and any law and conduct inconsistent with it can be declared constitutionally invalid. Subsidiarity merely indicates that the existence of the Constitution does not supplant ordinary legal principles'.[137]

[129] Ibid.
[130] Ibid.
[131] *Barkhuizen* supra note 33 para 23.
[132] Currie & de Waal op cit note 15 at 68–71; Du Plessis op cit note 24; *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) at para 53; *King* supra note 82 para 165, and para 182–93.
[133] Section 8(3) a of the Constitution.
[134] *Barkhuizen* supra note 33 para 26; Woolman op cit note 33 at 772–80.
[135] Ibid Woolman discussing *Khumalo* supra note 82 para 33.
[136] Ibid.
[137] *Surrogacy Advisory Group v Minister of Health* 2023 (1) SA 241 (GP) para 31.

My view is that courts must not always be locked into dichotomy logic and over-reliance on indirect application, even when it clearly leads to unsound legal development. In the case of *Barkuizen*, it leads to a clear contradiction between two Constitutional Court cases.

The origin and context of *S v Mhlungu,* a key underlying case that used to justify the 'principle of avoidance' and the 'principle of subsidiary', also requires closer scrutiny.[138] This case was decided in the interim Constitution where the court stated: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.[139] The above dictum has been termed the *Mhlungu* principle.[140] The primary value, as argued, of the *Mhlungu* principle is to avoid an over-reliance on constitutional rights at the expense of unrooting settled, stable, and predictable principles of common law and legislation.[141] This is because when the Constitution is directly applied as per s 8(2) in every private law matter, such an approach prevents legislation or common law principles from developing subject-specific solutions.[142] Therefore, the direct application of the Constitution creates the risk of 'constitutional over adjudication' of our private law.[143] Based on the logic of the *Mhlungu* principle, the first school argues that the direct application of the Constitution should be utilised only in exceptional cases.[144]

The problem with the *Mhlungu* principle, when its context is considered, is that the weight and reach of the dictum are reduced. In *Mhlungu* and several subsequent cases that relied on *Mhlungu*, the matters before the court concerned the jurisdiction of superior courts when the interim Constitution was in force.[145] The focus of these early cases was to delineate constitutional and non-constitutional matters within the framework of the interim Constitution.[146] The core logic taken from these early cases by dichotomy thesis academics is summed up as follows: 'Jurisdictional subsidiarity could be trimmed down should the

[138] Currie & de Waal op cit note 15 at 68–71; Du Plessis op cit note 24 at 207; *Mhlungu* supra note 34 para 59; see also *Zantsi* supra note 34 para 3–5; *Motsepe* supra note 34 para 21; *National Coalition for Gay and Lesbian Equality* supra note 34 para 19.
[139] *Mhlungu* ibid para 59; Currie & de Waal op cit note 15 at 67–71; Du Plessis op cit note 24 at 208–18.
[140] Du Plessis op cit note 24 at 207.
[141] Ibid 215–16.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] In *Mhlungu* supra note 34 para 26 the matter before the court concerned the interpretation of s102 and 241(8) of the Interim Constitution and clauses that regulated court jurisdiction between High Courts, the supreme court and the Constitutional court, In *Motsepe* supra note 34 para 26, *Zantsi v Council of State* supra note 34 at 26, *S v Bequinot* 1997 (2) SA 887 para 26, reference to *Mhlungu* supra note 34 was also based on how to interpret s 102 of the Interim Constitution.
[146] Ibid.

Constitutional Court become South Africa's apex court in all matters'.[147] What is meant by this statement from Du Plessis is that the High Courts and Supreme Court of Appeal should primarily deal with non-constitutional matters and, in turn, act as the custodians of maintaining the sanctity and stability of common law and legislative principles.[148] As the logic goes, only in exceptional cases when a constitutional issue arises must a matter ideally go to the Constitutional Court for review and, where necessary, development.[149] This interpretation is no longer tenable with the introduction of the 17th Constitutional Amendment, which permitted the Constitutional Court to be the highest court on all matters, whether constitutional or not.[150] This means no useful distinction exists between all Superior Courts' responsibility to align the common law with the Constitution. In the context of when *Mhlungu* was decided and taking into account the subsequent changes in our law, it is argued that it is unsound to utilise *Mhlungu* as the legal basis for favouring the indirect approach.

2.2.4.4 The false choice between the application of rights or values

The third problem is that the judges and academics that subscribe to the dichotomy-thesis school firmly believe that a choice must be made between the horizontal application pathway in terms of direct application as per s 8(2) and indirect application as per s 39(2).[151] This is a false choice.[152] A textual reading of s 39 and especially s 39(2) reveals that the clause only addresses how to read the common law rather than when or if the common law should be directly or indirectly applied.[153] The text of s 39(2) is triggered whenever any tribunal, forum, or court is already developing the common law and only sets out the condition that when the common law is being interpreted and adjusted, the Constitution's values must be considered.[154] This process is broad, and s 39(2) must be engaged in every common law case.[155] There is no indication from the text of s 39(2) of the legal conditions for when the common law ought to be developed or whether this process must be conducted by only engaging values.[156] A clause much closer to a condition of when the Constitution ought to be applied to common law is s

[147] Du Plessis op cit note 24 at 213.
[148] Ibid 213–15.
[149] Currie & de Waal op cit note 15 at 67–71.
[150] Constitution 17th Amendment Act of 2012; On the legal effect of the amendment, see C F Swanepoel 'A Critical Perspective on the Constitutional Court's Interpretation of the Seventeenth Amendment of the Constitution: Section 167 (3) and Jiba-Mrwebi' (2021) 84 *Journal of Contemporary Roman-Dutch Law* 472.
[151] Currie & de Waal op cit note 15 at 67–71.
[152] Bhana (2013) op cit note 78 at 361.
[153] Friedman op cit note 47 at 74–6.
[154] Ibid.
[155] Ibid; see also Bhana (2013) op cit note 78 at 372.
[156] Ibid.

8(3), which states that the common law must be developed to 'the extent that legislation does not give effect to that right'.[157] Section 8(3) thus sets out clear criteria for applying and developing the common law when no legislation is available to protect a right.[158] This means that s 8(3) is much closer to the function assigned on s 39(2) of deciding when applying the Constitution to common law is permissible.[159] The mention of s 8(3) is not to pit s 39(2) against s 8(3) but to make the case that the two provisions are much more likely to be complementary as part of a single holistic constitutional reading process than mutually exclusive.[160] On the point of complementarity of s 8(3) and s 39(2), Bhana states 's 39(2) functions distinctly as the broader constitutional backdrop that complements (rather than eclipses) the analysis anticipated by s 8(2) read with s 8(3)'.[161] It is only by seeking out the pathways for complimentary that one avoids the redundancy of any constitutional provision.

There is yet another problem with the argument that s 8(2) and s 39(2) are mutually exclusive and that the law ought to prefer s 39(2) between these two options.[162] The dichotomy school argues that relying on constitutional values as per s 39(2) is a sufficient discharge of constitutionalising private law in most matters where this is necessary.[163] My view is that values are a constant.[164] That is to say, all judicial exercises of our common law must always be carried out within the context of and considering the founding values of the Constitution.[165] A purely private law matter must thus always be ruled with due regard to the founding values as conditioned as per s 39(2).[166] If s 39(2) is constant in all judicial exercises, therefore reliance on the provision risks creating a methodology that is cosmetic and adds nothing meaningful to the process of constitutionalising private law. Woolman terms this aspect of constitutional methodology as 'speaking in values'.[167] Woolman remarks that this approach 'has freed the court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases, unmoored from its precedent'.[168] Roederer also explains the risks of grounding constitutional methodology primarily in values and states that:

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[157] Friedman op cit note 47 at 74–6, Bhana (2013) op cit note 116 at 373.
[158] Ibid.
[159] Ibid; See also IM Rautenbach 'The bill of rights applies to private law and binds private persons' 2000 *Journal of South African Law* 296 at 301.
[160] Ibid Bhana (2013) op cit note 78 at 372.
[161] Ibid.
[162] Currie & de Waal op cit note 15 at 67–71.
[163] Ibid.
[164] Friedman op cit note 47 at 74–6; Bhana (2013) op cit note 78 at 372.
[165] Ibid.
[166] Ibid.
[167] Woolman op cit note 33 at 763.
[168] Ibid.

> ‘The indirect route appears un-law-like, fuzzy with no clear rule. It may be interpreted as requiring, to paraphrase something Dennis Davis might have said, `business as usual with a twist' in other words, the message is to keep doing what you are doing but have in view these fuzzy amorphous constitutional values in the back of your minds when doing so (the very kind of fuzzy thinking that lawyers and judges like to avoid’.[169]

The ‘business as usual’ risk is real and should not be underestimated. Constitutionalising our private law must have much more rigour than a vague infusion of values; otherwise, there is a risk of compromising the core transformative interests that the Constitution is meant to advance.[170] In my view, it is, therefore, that something more must be the basis of a sound judicial process for handling cases when a private law rule is non-compliant with the Constitution.

Ngcobo J’s preferred horizontal methodology leaves a court with at least three main problems: The problem of the risk of the redundancy or misinterpretation of s 8(2)-(3), the faulty theoretical justification for favouring the indirect approach, and the false choice that s 8 and s 39 are mutually exclusive. On these three broad flaws, I am unsatisfied that the dichotomy thesis school is the ideal interpretative pathway for constitutionalising our private law. The dichotomy thesis creates an impression of a piecemeal reading of the Constitution, and many cases that have followed this approach have fallen into the many pitfalls of an incoherent methodology.[171]

The risk of the unprincipled constitutionalisation of our private law appears to be the chief underlying concern that has driven the choices of the courts and academics that favour the indirect approach.[172] Whereas the current indirect methodology contains flaws, the underlying concern of unprincipled constitutionalisation is real and legitimate. The risk of unsound methodology can materialise along a spectrum.[173] On one end, an unprincipled approach can materialise when courts avoid adequately engaging with the substantive implication of the Constitution on private law.[174] Zitzke terms such an approach as ‘constitutional avoidance’.[175] On the other side of the spectrum, this risk can materialise when courts completely disregard

[169] Roederer op cit note 79 at 75; see also Woolman op cit note 33 at 763.
[170] Ibid.
[171] Lowenthal op cit note 76.
[172] Du Plessis op cit note 24 at 215–16.
[173] Zitzke op cit note 91.
[174] Ibid at 259.
[175] Ibid.

any settled principles of common law in favour of inappropriate constitutional remedy.[176] Zitzke terms such an approach as 'constitutional over-excitement'.[177]

Therefore, while the ideal process must have sufficient rigour to move the law away from 'business as usual', there is an equal risk of making a routine case overly complex and, ultimately, making such a methodology also untenable. Our courts have crafted equally bad precedents where they fall on either side of this spectrum.[178] I believe that the key to a balanced and coherent methodology is simply following the precise textual demands of s8(2)-(3).[179] These demands are articulated well in the interplay school.[180]

2.3 A proposed horizontal application methodology centred on s 8(2)-(3) of the Constitution

2.3.1 The case for 'interplay school' as a theoretical approach to horizontality

Bhana articulates the most straightforward account of the interplay school.[181] Bhana states that s 8(1) read with s 39(1)-(2) regulate all laws, including the entire body of common law.[182] All laws must thus reverberate the spirit purpose and objects of the BoR.[183] Section 8(1) read with s 39(1)-(2), therefore, applies to all public and private law at the broader values level.[184]

At a narrower level, s 8(2) provides the critical first step or precursor to horizontality.[185] Section 8(2) must first determine the scope and reach of the Constitution into the affairs of private law or conduct.[186] This initial or preliminary step is per s 8(2) read with s 39(2), s 2, and s 172.[187] This stage determines the applicable constitutional rights and correspondent duties in light of

[176] Ibid.
[177] Ibid at 260.
[178] Ibid at 289–90.
[179] *Khumalo* supra note 82 para 31–4; *Juma Musjid* supra note 82 para 54–60; *Daniels* supra note 82 para 38–49; *AB and Another* supra note 82 para 120–31; Cheadle & Davis op cit note 91 at 56–65; Bhana (2013) op cit note 78 at 367; Friedman op cit 47 note at 70–4; Ally & Linde op cit note 84 at 20, 24; M Pieterse op cit note 91 at 161.
[180] Bhana (2013) op cit note 78 at 351, 353, 361, 367, 372 and 373; Bhana op cit note 90 at 8, 15, 22, 28, 30, 32, 34, 39, 46, 58 and 96.
[181] Bhana (2015) op cit note 91 at 6–9; Bhana (2013) op cit note 78 at 362–75; Bhana (2017) op cit note 91 at 145–48; Pieterse op cit note 91 at 161; Friedman op cit note 47 at 69–78; Roederer op cit note 79 at 62–81; Cheadle & Davis op cit note 91 at 56–66.
[182] Bhana (2015) op cit note 91 at 6–9; Bhana (2013) op cit note 78 at 362–75; D Bhana (2017) op cit note 91 at 145–48.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.

the values enshrined in the BoR.[188] In terms of s8(2), a court must consider the nature of the rights claims in issue and the nature of the duties imposed on non-state actors. A court must then assess whether such rights and duties are capable of application to non-state actors[189] and whether it is also suitable that the Constitution applies to the private law matter in question.[190] Bhana terms this process the scope inquiry.[191]

Bhana describes the scope inquiry as a narrow direct application of the Constitution limited to determining the scope and nature of the rights/duties in a private dispute.[192] Constitutional norms as per s39(2) must always inform this decision.[193] During the scope inquiry, the court's role is to determine whether and to what extent a private person can be bound to the rights and values in the Constitution.[194] This stage must also reveal the substantive content of the disputed rights.[195]

Judges and academics underappreciate the role s 8(2) in constitutional law. However, the requirements of s 8(2) are the key that facilitates the right balance in complex judicial choices of how far the Constitution must be permitted to permeate into private affairs. Thornton asks the following question that reveals the utility of s 8(2): Are political parties bound to the constitutional right to just administrative action?[196] The answer to such a question is not apparent. This is because the constitutional right to just administrative action is traditionally understood as protecting citizens against state action, and it is not always clear if a court should view a political party as an extension of the exercise of state power.[197] Where should the line be drawn regarding imbuing political parties with the total bundle of obligations to just administrative action like the state?[198] Here, s 8(2) plays a crucial role as a precursor to engaging questions of horizontality.[199] This is because s 8(2) provides a sound process that aids a court in choosing whether the non-state actors in question are bound and to what extent

[188] Ibid.
[189] The distinction of 'capable' and 'suitable' as part of s 8(2) inquiry is also emphasised in Cheadle & Davis op cit note 91 at 56–66; Cheadle & Davis op cit note 59 at 16–8; Bhana (2013) op cit note 78 at 365; see also s 8 interpretation in Davis op cit note 79 at 65.
[190] Ibid.
[191] Bhana (2015) op cit note 91 at 7.
[192] Ibid at 6–9; Bhana (2013) op cit note 78 at 362–75; Bhana (2017) op cite note 91 at 145–48.
[193] Ibid.
[194] Ibid.
[195] Friedman op cit note 47 at 69.
[196] L Thornton 'The Constitutional Right to Just Administrative Action—Are Political Parties Bound?' (1999) 15 *South African Journal on Human Rights* 351.
[197] Ibid at 352.
[198] Ibid.
[199] Ibid at 356; Friedman op cit note 47 at 69.

constitutional duties must be imposed in horizontal relationships.[200] As per s 8(2), this delineation makes whatever remedy that is to follow more explicit and straightforward. Based on a similar reading, Friedman correctly terms this role of s 8(2) as 'horizontality simpliciter'.[201] The scope inquiry is thus a crucial but ignored aspect of horizontality.

The second step in horizontality, as per the interplay school, is for a court to determine the appropriate remedy as per s 8(3)(a)-(b).[202] Bhana terms this the form leg of the horizontality.[203] To craft an appropriate remedy as per s 8(3)(a)-(b), a court must investigate whether the legislation applies to the issues of rights tensions.[204] If there is relevant legislation, such legislation must be applied.[205] If there is no applicable legislation or the legislation has gaps, a court must determine whether any common-law remedy exists and covers the dispute.[206] If there is a relevant common-law rule, such a rule must be applied.[207] It is possible that the common-law rule does not exist or exists but is unaligned with the Constitution. In that case, the court can develop the common law rule or craft another appropriate principle to remedy the dispute.[208] An example of a last resort remedy can be constitutional damages.[209] During the form stage, a court primarily engages indirectly with the Constitution.[210] Courts are permitted to resort to a remedy that develops or overrides the common law and legislation when appropriate.[211]

Van Der Westhuizen J in *Mighty Solutions* gave a list of considerations that are ideal when a court is making a decision on whether to develop the common law. In my view, these factors are ideal as a complement to interpreting the needs of s 8(3) read with s 39(2) as part of the form stage. The factors are:

> 'Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether

[200] Thornton ibid at 356.
[201] Friedman op cit note 47 at 72, see also the similar idea of horizontal simpliciter in C J Visser 'Revisiting the constitutionalisation of the common law of personality: transformative constitutionalism and Le Roux v Dey' (2020) 36 *South African Journal on Human Rights* 242 at 243 and 249–51.
[202] Bhana (2015) op cit note 91 at 6–9; Bhana (2013) op cit note 78 at 362–75; Bhana (2017) op cite note 91 at 145–48; Friedman op cit note 47 at 69; Davis op cit note 79 at 65.
[203] Bhana (2013) op cit note 78 at 362–75.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] For a description of Constitutional damages, see E Zitzke 'The *Life Esidimeni* arbitration: towards transformative constitutional damages?' 2020 *Journal of South African law* 419.
[210] Bhana (2013) op cit note 78 at 362–75.
[211] Ibid.

> the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law'.[212]

In terms of s 8(3)(b) of the Constitution, where the application or development of common law envisaged in s 8(3)(a)-(b) results in a limitation of rights, such a limitation must be made in line with s 36. Section 8(3)(a)-(b) should be applied alongside s 39(2), which means that when the steps in s 8(3)a-b are conducted; constitutional norms must always inform such a process. It is in this sense that there is always a simultaneous interplay of the direct and indirect approach, rights and values, s 8(2)-(3) and s 39(2), when the Constitution is being applied to a horizontal dispute.[213] It is on this basis that Bhana argues that a cogent reading of the Constitution transcends the direct and indirect dichotomy.[214] This is because s 8(2)-(3) and s 39(2) have a cooperative relationship that incorporates elements of both direct and indirect application at different stages of horizontality.[215] Not all interplay theorists agree on all the exact details of this process, they however, agree that the process of horizontal application of the Constitution ought to be centred around the interpretive demands of s 8(2)-(3).[216]

The most important utility of the interplay school is that it avoids redundancy of any constitutional provision and generates remedies that prefer an indirect application of the Constitution. Therefore, the interplay school crafts harmony within competing constitutional application/development methodologies. This harmony exists because the scope leg determines who is bound and the extent to which non-state actors are bound to the Constitution.

The remedies/form stage directs a court first to consider legislation and the common law before a court is permitted to develop the existing private law or craft unique constitutional remedies. This harmonious reading permits courts to assign a precise meaning to s 8(2)-(3) while avoiding unprincipled disregard of settled common law principles. The interplay school, therefore, caters to the legitimate concerns that the dichotomy school raises about the risk of unprincipled constitutionalisation of private law.

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[212] *Mighty Solutions CC ta Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) at para 38.
[213] Bhana (2015) op cit note 91 at 6–9; Bhana (2013) op cit note 78 at 362–75; Bhana (2017) op cit note 91 at 145–48; Friedman op cit note 47 at 69–79; Roederer op cit note 79 at 75–81.
[214] Bhana (2013) op cit note 78 at 373.
[215] Ibid.
[216] Bhana (2015) op cit note 91 at 7; Pieterse op cit note 91 at 161; Cheadle & Davis op cit note 91 at 54–64; Friedman op cit note 47 at 68–74; Ally & Linde op cit note 84 at 24; Thornton op cit note 197 at 356.

A crucial question is where exactly the interplay school fits into the broader discourse on horizontality. To answer this question, I elaborate on the key thinker's positions in horizontality and showcase where the interplay school fits within the existing discourse. As stated, the dominant and currently widely accepted position is that of the dichotomy school, as elaborated in section 2.2, which is the currently observed approach employed in horizontality. A closer assessment of dichotomy logic has shown that gaps remain in this methodology. In order to close these gaps, I am persuaded by Bhana, who correctly argues that a better approach ought to be based on harmony between seemingly competing Constitutional provisions and approaches. The interplay school is primarily grounded and largely influenced by this work. The courts have not widely adopted some of these sound suggestions, which indicates that more may still be required.

Bhana is not the only key academic thinker who highlights the weaknesses of the dichotomy school and makes a case that there is a need for an approach that fosters greater harmony between these seemingly competing interests. Several other key scholars, such as Friedman, Roederer, Cheadle and Davis, Visser, Ally and Linde, Zitzke, and Finn, add notable and distinct voices as to how to craft a balanced, harmonious approach along logic similar to that of Bhana.[217] A recent trend among some of these scholars is to focus attention on how the principles horizontally apply to different disciplines of private law and to do so in a manner that largely transcends dichotomy logic.[218] My overall evaluation of this scholarship is that it is all headed towards a progressive direction of crafting coherence and rectifying the weaknesses of the dichotomy logic within horizontality. Where there are methodological differences among these scholars, it is submitted that they are minor and mostly result from the unique needs of the different subject matter areas of private law under review. It is this trend that is different from traditional dichotomy schools, where the interplay school is also located within horizontal discourse.

Something remains missing within the interplay school. My assessment is that the interplay theorists have not presented sufficient examples for how to restore s 8(2) to the discourse on horizontality. Academics such as Thornton, Cheadle & Davis rightly acknowledge that s 8(2)

[217] Friedman op cit note 47; Roederer op cit note 79; Cheadle & Davis op cit note 59; Ally & Linde op cit note 84; Finn op cit note 126 at 27–64; CJ Visser 'Adjudicative subsidiarity, the "horizontality simpliciter" approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality' (2022) 55 *De Jure* 124; E Zitzke 'Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development' (2015) 7 *Constitutional Court Review* 259.

[218] Ibid See Ally & Linde for horizontality in the context of rights of children; see Visser for discourse on horizontality in the context of protection of personality rights in delict; see Finn for discourse on horizontality and the right to equality.

ought to have a key role in horizontal methodology, yet this provision continues to hold an unsettled place within horizontal methodology.[219] This uneasy place of s 8(2) is the gap that the interplay school seeks to aid in closing. The crux of the proposition of the interplay school is that s 8(2) is at the heart of the above-argued harmonious horizontality methodology. Thus, my view is that a more robust argument for the role of s 8(2) is the crucial missing piece to the interplay school.

What the interplay school suggests is that the key to sound horizontality is to centre the discussion back on s 8(2)-(3) and read with s 39(2), as argued by Bhana. In addition to this, the interplay school makes the case that placing s 8(2) at the heart of the broader framework of horizontality will make the case for the alternative of the dichotomy school clearer.

In what follows, the interplay school intends to evaluate three constitutional cases that have dealt with horizontality, namely *Khumalo*,[220] *Juma Musjid,*[221] and *Daniels.*[222] The purpose of the evaluation of these cases is to showcase the core arguments of section 2.3. Firstly, that methodology anchored in s 8(2)-(3) can be harmoniously read with settled common law principles. Secondly, the evaluation of the case law showcases how the unique purpose and role of s 8(2) within the scope leg of horizontality is the missing piece to the better alternative of the dichotomy school. Thirdly, the interplay school ought to be applied as the better approach to the research problem of this thesis.

2.3.2 Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)

The first case that can add insight into the viability of the interplay school is *Khumalo*, a case decided in 2002. Briefly, the facts are as follows. Mr Holomisa, a Member of the South African Parliament and the President of the United Democratic Movement, sued a newspaper (the Sunday World) for defamation. The newspaper had published material that had been critical of Mr Holomisa. The crux of the decision hinged on the legal mechanics that ought to be used by the court to balance a dispute between a claim of defamation on one end and the protection that must be afforded to the media's right to free speech on the other. The matter had worked itself

[219] For arguments that seek to allocate a stable place for s 8(2) within the methodology of horizontality see Thornton op cit note 197 discussing a key role of s 8(2) in administrative law; Cheadle & Davis op cit note 91 at 56–7 discussing a central role for s 8(2) more broadly within all matters of private disputes at the constitutional level; B Meyersfeld 'The South African Constitution and the human-rights obligations of juristic persons' (2020) 137 *South African Law Journal* 439 discussing a key role for s 8(2) within private party conduct and the realisation of socio-economic rights in the Constitution.
[220] *Khumalo* supra note 82.
[221] *Juma Musjid* supra note 82.
[222] *Daniels* supra note 82.

up from the High Court and reached the Constitutional Court. At the Constitutional Court, the applicant was the Sunday World, and the respondent was Mr Holomisa.

Writing for the majority of the Constitutional Court, O'Regan J was tasked with adjudicating a dispute pertaining to two main rights: namely, the right to be protected against defamation and its ties to human dignity and on the other hand, the right to freedom of expression.[223] In addressing this question, the judge considered how and to what extent Sunday World's constitutional protection to freedom of expression was horizontally applicable.[224] It is the approach adopted on this question that indicates the methodology that was employed in *Khumalo* to apply the Constitution to a private dispute. Addressing the question of horizontal application, O'Regan J states the following:

> 'Section 8(1) binds the legislature, executive, judiciary and all organs of state without qualification to the terms of the Bill of Rights. Section 8(2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right'.[225]

The case did not implicate the state, so as per the logic employed, thus only s8(2)-(3) would primarily be applicable to the dispute.[226] O'Regan J then goes on to apply s8(2) to the facts at hand and states the following:

> 'Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution'.[227]

The ruling was thus that s 8(2) is applicable because of the 'intensity' of the right to free speech and the 'potential invasion' that may occur if the right is violated. The use of the words 'intensity' and 'potential invasion' is unclear.[228] *Khumalo* largely remains unclear despite considerable academic and court opinions on the methodology the court followed.[229] What at

[223] Ibid para 17–28.
[224] Ibid para 29.
[225] Ibid para 31.
[226] Ibid.
[227] Ibid para 33.
[228] De Vos op cit note 29 at 338.
[229] Chirwa op cit note 21 at 37–44.

least appears clear in *Khumalo* is that the court states that s 8(2) permits for a direct horizontal application of the Constitution.[230] Despite the lack of clarity, the judgement does contain some indication of why O'Regan J was of the view that the rights in dispute were directly applicable. My view is that this indication can be found in how the judge interprets the textual demands of s 8(2).[231]

As per s 8(2), for a non-state actor to be bound, a court must ask if a right is capable and suitable for horizontal application considering the 'nature of the right', and this question is answered by determining the meaning and function of the right in the dispute.[232] In *Khumalo,* O'Regan J described the meaning and function of freedom of expression as an enabler for 'citizens to make responsible political decisions and to participate effectively in public life'.[233] Based on this function of freedom of speech, the underlying purpose of the right to freedom of expression is its unique role and ability to safeguard citizens' ability to participate in democracy.[234] Freedom of speech protects citizens' rights to be informed and responsible political actors.[235] If it were not for the work done by media houses, which also happen to be juristic persons, these core values would become void of content.[236] Media houses, therefore, do not enjoy the right to free speech for their own sake.[237] Media houses enjoy the right to free speech because they are well placed to ensure citizens have access to the information they need to effectively exercise their right to freedom of speech.[238] This is why the Sunday world and many other juristic persons are entitled to freedom of expression.[239] It is the assigned meaning and function of free speech that made the right ideal for its direct application in the facts of the case.[240]

After detailing the meaning and function of the right to freedom of expression, O'Regan J was convinced that the constitutional right to freedom of expression exercised by the media was of direct application.[241] This was a logical interpretation and speaks to the fact that in most cases,

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[230] Bhana (2013) op cit note 78 at 366; *King N.O.* supra note 82 para 173 citing *Khumalo* supra note 82 para 31–3.
[231] See similar approach in Bhana (2013) op cit note 78 at 364–6; Thornton op cit note 197 at 356–71; Meyersfeld op cit note 221 at 441–44; Woolman, Bishop & J Brickhill op cit note 20 at ch 31 especially 62–70**.**
[232] Cheadle & Davis op cit note 91 at 57–60, Thornton op cit note 197 at 356.
[233] *Khumalo* supra note 82 para 21–5, see especially ft 24 where the court relies on *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) para 7–8; *S v Mamabolo* 2001 (3) SA 409 (CC) para 37.
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid para 33.
[241]Ibid.

a juristic person will be capable of exercising a right and can thus bind another non-state actor who may be threatened to limit the right.

Section 8(2) also requires that a court consider the 'nature of any duty imposed by the right'. Some provisions in the BoR will clearly state that they create duties primarily for state parties.[242] Where provisions do so, it becomes easier to ascertain if applying the disputed right horizontally is suitable. However, where the provision is silent or unclear, it ought to be the court's task to determine if it is ideal and suitable to burden non-state actors with duties that emanate directly from the Constitution.[243] As I have argued, with duties that, for example, emanate from administrative action, the answer to who may be burdened with constitutional duties is not obvious and requires a court's deliberate determination.[244]

In *Khumalo*, Sunday World had argued that the common law of defamation does not sufficiently accommodate their right to exercise freedom of expression.[245] As such, the obligations argued for by the Sunday World would burden Mr Holomisa's protection against defamation. There is no constitutional provision that explicitly protects the right against defamation. The protection against defamation emanates from ties to human dignity, which is a person's self-worth.[246] By tying the right against defamation with human dignity, any burden placed on the rights against defamation would equally be placed on a sense of self-worth and dignity. Human dignity is no ordinary right in the Constitution.[247] It exists as both a right and a founding value and carries a special place in the BoR.[248] O'Regan J recognised the weight and importance of human dignity.[249] Because the protection against defamation was tied to human dignity, O'Regan J had to take into account the burden and duty placed on human dignity before deciding if the respondent was bound to the right to free speech and the extent argued for. My view is that the special place given to human dignity and rights tied to human dignity influenced O'Regan J's decision to directly apply the provisions of the Constitution as per s8(2).[250]

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[242] Currie & de Waal op cit note 15 at 44-9.
[243] Cheadle & Davis op cit note 91 at 56-60; Thornton op cit note 197 at 356.
[244] Thornton ibid 91 at 356.
[245] *Khumalo* supra note 82 para 3-4.
[246] Ibid para 27.
[247] See *Makwanyane* supra note 55 para 328; see also para 144.
[248] Ibid; sections 1,7, and 39(1) of the Constitution recognise human dignity as a founding value; in s10 of the Constitution human dignity is recognised as a right; A Chaskalson 'Dignity as a constitutional value: A South African perspective' (2010) 26 *American University International Law Review* 1377 at 1385.
[249] *Khumalo* supra note 82 para 25-8.
[250] Ibid.

After the process of applying s8(2), O'Regan J went on to consider if the common law of defamation unjustifiably limits the right to free speech.[251] To this question, the justice states: 'If it does, it will be necessary to develop the common law in the manner contemplated by s8(3) of the Constitution'.[252] The court's ruling was ultimately that the common law of defamation did not constitute an unjust limitation to free speech; therefore, no adjustment would be made to the right against defamation.[253] As such, the applicant's case failed on substance.[254]

The crux of the interplay school is that the ideal interpretive method of applying the Constitution to private law disputes must approach constitutional reading from a holistic, purposive, context-sensitive perspective that is guided by the norms as contained in the BoR. Further, the interplay school seeks to craft a methodology that fosters interpretive harmony between right/values and direct/indirect s8(2)-(3)/s39 of the Constitution. Some of these proposals support O'Regan J's methodology in *Khumalo.*

Firstly, O'Regan J's analysis in *Khumalo* indicates the factual circumstances of when s8(2) is applicable. Applying s8(2) will depend on 'the nature of the right and the nature of any duty imposed by the right'. As far as the dispute in *Khumalo* was concerned, there was a strong indication that s8(2) is applicable where the right to freedom of speech is at risk.[255] There is also a strong indication that applying s8(2) is ideal where the burden of applying the right in dispute will rest on rights tied to one of the most important personal rights in the BoR, namely, human dignity.[256]

Secondly, my view is that *Khumalo* indicates that the textual demands of s8(2)-(3) can provide for an ideal interpretive methodology for handling a matter of constitutionalising private law that does not destabilise settled common law principles.[257] This lesson can be deduced because the limited direct application of the Constitution conducted in *Khumalo* did not result in an unprincipled overhaul of settled principles of private common law.[258] Instead, O'Regan J's remedies focused primarily on common law principles prescribed by s8(3).[259] Khumalo's interpretive process indicates that harmony between the narrow direct application per s8(2)-(3)

[251] Ibid para 35–45.
[252] Ibid para 33.
[253] Ibid para 45.
[254] Ibid.
[255] Ibid para 33; see also Meyersfeld op cit note 221 at 446.
[256] Ibid. See *Khumalo* para 25-8 and Meyersfeld at 446.
[257] Friedman op cit note 47 at 72.
[258] Ibid para 33.
[259] Ibid.

and remedies that rely on settled common law principles can exist.[260] This reading of *Khumalo* strengthens the interpretive methodology proposed by the interplay school.

The third lesson pertains to how s39(2) was interpreted in *Khumalo*. Sunday's World application had been based on two independent grounds.[261] The first basis was that the court ought to apply s16 directly to the dispute as per s8(2)-(3).[262] The second basis, as argued, is based on common law as per the application of s39(2).[263] The framing of these grounds was based on the direct/indirect approach.[264] Whereas O'Regan J's interpretation of s8(2)-(3) was aligned with the interplay school, O'Regan J's reading of how s 39(2) interacts with s8(2)-(3) is unclear. This is because the court offered no explanation as to the correct role of s39(2) in the dispute at hand. The result of this silence means that O'Regan J neither supports nor negates the interplay school interpretation of s39(2).

2.3.3 Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC)

The second case that gives us insight into the viability of the interplay school is *Juma Musjid,* a case decided in 2011. The facts of this case are as follows. Juma Musjid Primary School was established in 1957 as a joint government-aided school that taught in line with Islamic religious ethos. The contractual setup was that private property controlled under a school Trust would be used to run a public school. In addition, the Member of the Executive Council for Education (MEC) and the school's Trustees would jointly share the benefits and responsibilities of running the institution. The MEC did not honour their end of the contractual arrangement with the Trustees. The Trustees, dissatisfied with the MEC, eventually brought the matter to the courts, requesting permission to cancel its contractual arrangement with the MEC and evict the learners from its premises.

The crux of the Trustee's argument was that it had a right to evict any persons on its private property.[265] Further, the Trust and its Trustees owed no primary constitutional duties to the learners.[266] The Trustees argued that in terms of s29 of the Constitution, the state and the MEC, as a functionary of the state, owe the learners a primary constitutional duty to receive a basic

[260] See similar argument in Dafel op cit note 43 at 11 and 16; see also Ally & Linde op cit note 84 at 24.
[261] *Khumalo* supra note 82 para 2-4.
[262] Ibid para 2.
[263] Ibid.
[264] Ibid.
[265] *Juma Musjid* supra note 82 para 7.
[266] Ibid.

education.[267] On the other side, the school governing body, parents, and caregivers of the learners argued that the evictions would unjustifiably infringe on the learner's constitutional right to education.[268]

The MEC did not oppose the eviction order but was added to all the court proceedings as a respondent.[269] The High Court and Supreme Court of Appeal agreed with the Trustees and granted the Trust permission to evict the learners.[270] The eviction was granted based on the rei vindicatio, a common law remedy in the law of property.[271] The matter was brought to the Constitutional Court.

At the Constitutional Court, three main questions were before the court,[272] with only one relevant to the present purpose. The relevant question was 'whether the Trustees, when vindicating their property rights, had any constitutional obligations vis-à-vis the learner's right to a basic education'.[273] The problem with the eviction order against the MEC and the learners was that the eviction would also inevitably infringe on the learner's constitutional rights to education.[274] On this question, the courts had to assess the constitutional tension between a juristic person's right to property use and the learner's constitutional right to education.[275] At the lower courts, this question was mainly decided on applying the rei vindicatio, a common law remedy that regulates when it is appropriate to evict persons on private property.[276]

Writing for the Constitutional Court, Nkabinde J held that the outcome of the lower courts was correct, but it was based on insufficient application of the relevant principles of law.[277] Nkabinde J's criticism of the High Court ruling on the point of the constitutional duties owed to the learners by the Trustees is what offers insight into how s 8(2) was interpreted in *Juma Musjid*.

Addressing the gaps in the High Court ruling, Nkabinde J opined that the line between undertakings conducted in private and public spaces is clear in most cases.[278] In factual

[267] Ibid para 15–29.
[268] Ibid.
[269] Ibid.
[270] Ibid para 11–24.
[271] Ibid.
[272] Ibid para 53.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid para 20–3.
[277] Ibid para 54.
[278] Ibid para 54–7.

situations where the line is clear, it is often sufficient to only apply common law principles to the problems of rights tension as was done by the High Court.[279] However, in a dispute such as *Juma Musjid*, where the public/private line is unclear, the lower courts ought to regard the impact that s 8(2) has on the constitutional duties the Trustees owe to the learners.[280] To apply s 8(2) to the current dispute, Nkabinde J was of the view that the High Court ought to have considered the nature of the right to basic education and the duties imposed by this right on the Trustee's right to property.[281] Nkabinde J also offers the following guidelines on how to interpret s 8(2):

> 'It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the ―intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State'.[282]

The interpretive guides of how to read s8(2) offered by Nkabinde J appear just as vague as those provided by O'Regan J in *Khumalo*.[283] What the words 'intensity' and 'coupled with the potential invasion' mean is unclear.[284] Madlanga J, writing extra-curricularly, has also considered the horizontality methodology in *Juma Musjid* and finds that s8(2) contains the possibility of permitting positive obligations on non-state parties.[285] My view of the ideal starting place for understanding the methodology employed in *Juma Musjid* is to follow how Nkabinde J interprets the textual demands of s8(2).[286]

As per s 8(2), for a non-state actor to be bound, a court must ask if a right is capable and suitable for horizontal application considering the 'nature of the right'. This question is answered by determining the meaning and function of the right that a non-state actor seeks to protect with the use of the Constitution.[287] In *Juma Musjid*, applying s 8(2) entailed ascertaining the

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[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid para 58.
[283] Ibid, *Khumalo* supra note 82 para 33.
[284] De Vos op cit note 29 at 338.
[285] M Madlanga 'The human rights duties of companies and other private actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359 at 370–3; for discourse on the positive obligations in *Juma Musjid* supra note 82; see also Meyersfeld op cit note 121 at 465–7.
[286] See similar approach in Bhana (2013) op cit note 78 at 364–6; Thornton op cit note 197 at 356–71; Meyersfeld op cit note 121 at 441–44; Woolman, Bishop & Brickhill et al op cit note 20 at ch 31 especially 62–70.
[287] Cheadle & Davis op cit note 91 at 57–60; Thornton op cit note 197 at 356.

meaning and function of the right to basic education as per s 29.[288] Nkabinde J described the right to basic education as unique among other socio-economic rights in the sense that it must always be realised.[289] This is unique because most other socio-economic rights have 'internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'.[290] As a right that must always be realised, the right to basic education can only be limited in terms of the process set out in s36.

The right to basic education is also tied to South Africa's regional and international treaty obligations in terms of international law.[291] In *Juma Musjid*, the right to basic education was being exercised by children, which meant that the dispute between the Trust and MEC also triggered the children's constitutional right as per s 28 of the Constitution.[292] Nkabinde J was silent on whether the right to basic education was, therefore, directly or indirectly applicable. What is clear from the judgement is that the justice was of the view that the right to basic education was capable of horizontal application as per s 8(2).[293]

In *Juma Musjid*, the duties that the right to basic education would impose would have burdened the Trustee's s 25 constitutional right to property. Section 29 is clear on whether this is suitable. Section 29 envisages that the primary duty bearer of the right to basic education is the state and its functionaries.[294] Based on the wording in s 29, Nkabinde J held that the Trust was not bound to any positive constitutional obligation towards the learners.[295] This meant that the learners were not entitled to expect the Trust to incur costs or other active obligations on its account to ensure that the constitutional obligation to basic education of the learners is met.[296] The active duty to ensure that the learner's right to basic education is realised lies with the state, which must do so per its s 29 duties.[297] This was partly why Nkabinde J found it just and equitable to come to the same outcome as the High Court and granted the Trustees sought eviction order.[298] The result of Nkabinde J's analysis meant that the only difference between the High Court and

[288] *Juma Musjid* supra note 82 para 57.
[289] Ibid para 36–44.
[290] Ibid para 37.
[291] Ibid para 40 citing Article 26 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[292] Ibid para 53.
[293] Ibid para 54.
[294] Section 29(1)(b) of the Constitution.
[295] *Juma Musjid* supra note 82 para 62.
[296] Ibid.
[297] Ibid para 57.
[298] Ibid para 73–80.

the Constitutional Court rulings was that the Constitutional Court ruling was based on a constitutionally compliant basis as per s 8(2)-(3).

Whereas it was clear that non-state actors do not ordinarily owe each other positive constitutional duties, Nkabinde J found that the Trust still owed the leaners negative constitutional obligations.[299] This means the Trust was under a constitutional obligation to respect and not obstruct the enjoyment of the learner's constitutional right to basic education.[300] The basis of this negative obligation comes from well-established precedents that have been recognised within the context of socio-economic rights, such that non-state actors owe each other a negative obligation not to interfere with these rights.[301] Based on this analysis and methodology, Nkabinde J found that it was not suitable to bind the Trust to the constitutional obligation that emanated from the right to basic education in *Juma Musjid.*

In my view, four lessons can be extracted from the procedural parts of Nkabinde J's methodology in *Juma Musjid* as it pertains to the viability of the interplay school. Firstly, Nkabinde J's analysis in *Juma Musjid* indicates the factual circumstances of when s 8(2) is applicable. Applying s 8(2) will depend on 'the nature of the right and the nature of any duty imposed by the right'. In *Juma Musjid,* it was appropriate to invoke s 8(2) when children's rights are implicated in the dispute.[302] In *Pridwin*, the court also invoked s 8(2) as the primary basis of mediating private law rights at the constitutional level where children's rights to basic education were implicated.[303]

Secondly, Nkabinde J ruled that constitutional provisions were directly applicable as s 8(2).[304] But instead of generating constitutional remedies directly from the rights as argued by academics, Nkabinde J endorsed the common law remedy as decided by the lower courts.[305] This result indicates that Nkabinde J implicitly followed the interplays school reading of s 8(2)-(3). A reading that supports the view that following the textual demands as per s 8(2)-(3) does

[299] Ibid para 60.
[300] Ibid.
[301] Ibid para 58 ft 70 citing *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 78; *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 33–4; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para 68–71; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 34; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) para 13; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) para 11.
[302] Ibid at 54–7.
[303] *Pridwin* op cit note 82 para 76–87,107 and 118–31.
[304] Ibid para 54.
[305] Ibid para 88.

not result in an unprincipled overhaul of settled principles of private common law. The interpretive process employed in *Juma Musjid* shows harmony between the application of s 8(2)-(3) and remedies that respect settled common law principles.

Thirdly, Nkabinde J is silent on whether the s 8(2) process followed by the court is a direct or indirect application of constitutional rights. This is aligned with the interplay school belief that the distinction of direct and indirect approaches is not an essential aspect of a sound methodology for constitutionalising our private law. Nkabinde J conducted a relatively sound process of constitutionalising private law without recourse to the direct/indirect dichotomy.

The fourth lesson pertains to the fact that there is not a single mention of s 39(2) in the entire judgement of *Khumalo*. The consequence of this is that the judgement neither supports nor refutes the interplay school interpretation of the role that s 39(2) ought to play in horizontality.

2.3.4 Daniels v Scribante and Another 2017 (4) SA 341 (CC)

The third case that can give us insight into the viability of the interplay school is *Daniels,* a case decided in 2017. The facts in *Daniels* are as follows: The applicant, Ms Daniels, resided as a lawful occupier in a dwelling on property owned by Chardonne Properties CC and managed by Mr Scribante. The company and its manager were the first and second respondents, respectively.[306] Mr Scribante oversaw the company's affairs and acted on its behalf regarding Chardonne Properties CC. Importantly, for present purposes, and forming part of the dispute, was whether the applicant had a legal right to make improvements to her home, which was situated on the property of Chardonne Properties CC.

The upgrades were essential and would be done at Ms Daniel's expense. Ms Daniels wanted to level the floors, pave part of the outside area, and install an indoor water supply, a washbasin, a second window, and a ceiling. Ms Daniels notified Mr Scribante of her intentions. Initially, nothing was said, but Mr Scribante opposed any improvements to the house on the company's property and stated that she needed the respondent's consent to make these improvements.

Ms Daniel's farmland occupation was regulated by the Extension of Security of Tenure Act 62 of 1997 (ESTA). The ESTA was enacted per s25(6) of the Constitution to protect persons who had become illegal occupiers of land due to past discriminatory apartheid property laws.[307] The ESTA thus regulates the stay of occupiers living mainly on rural and semi-rural land and sets

[306] For simplicity, I shall refer to Mr Scibante on behalf of both parties.
[307] See preamble of the Extension of Security of Tenure Act; *Daniels* supra note 82 para 12.

out the rights and duties of these occupiers concerning the land owners.[308] The problem, in this case, was that the ESTA did not have a specific provision dealing with a right to make improvements on occupied property.[309] This meant that Ms Daniel had no right to make the home improvements in terms of common law or existing legislation. Unhappy with the situation, Ms Daniels sought recourse in the courts.

After failing to convince the lower courts that she had a right to make the home improvements, Ms Daniels appealed to the Constitutional Court. At the Constitutional Court, Madlanga J, for the majority, adjudicated on the question of whether Ms Daniels had a constitutional or legislative right that allowed her to make home improvements on the private property of Chardonne Properties CC. The court summed up the nub of the tension as follows: Did Mr Scribante's refusal to permit the home improvements amount to an assault on Ms Daniels's right to security of tenure and, with it, its indispensable pivot to human dignity?[310]

At the Constitutional Court, Mr Scribante provided two arguments as to why Ms Daniels was not entitled to the argument that she had made. The first argument was that in a literal, plain language interpretation of both s 25(6) of the Constitution and the ESTA, nowhere does one find a right to make house improvements on another property.[311] Madlanga J responded that the constitutional framework favours a purposive, context-driven interpretation of legislation.[312] A purposive interpretation also aligned with a reading of s 39(2).[313] This meant that a narrow interpretation of legislation that is void of the context and the constitutional norms was not a permissible defence under the constitutional framework.[314]

Madlanga J then went on to state that what was at stake, in this case, was Ms Daniel's right to live in conditions that were aligned with her constitutional right to dignity.[315] Madlanga J's view was that the narrow interpretation of the applicable laws argued for by Mr Scribante was clearly at odds with Ms Daniel's right to live in conditions aligned with human dignity.[316]

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[308] Ibid.
[309] *Daniels* ibid para 27; see also ZZ Boggenpoel and B Slade 'Where is property? Some thoughts on the theoretical implications of Daniels v Scribante' (2020) 10 *Constitutional Court Review* 379 at 386.
[310] *Daniels* ibid para 2–3.
[311] Ibid para 27.
[312] Ibid para 28–36.
[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] Ibid.

'The respondents have another arrow in their quiver'.[317] This statement by the court was about Mr Scribante's additional argument. The argument was that as a non-state actor, Mr Scribante had no positive constitutional obligation to accommodate Ms Daniel's right to security of tenure and its essential pivot to human dignity on their private property.[318] In terms of this argument, if the court accepted Ms Daniels' position, it would be equivalent to requiring a non-state actor to participate actively in the realisation of constitutional rights belonging to another non-state actor.[319] Mr Scribante offered the example that if Ms Daniel's improvements are allowed, he may be required to compensate Ms Daniels for these improvements when she is evicted in the future.[320] There is an indication that this argument had been built on the refusal by Nkabinde J to hold the Trustees accountable for positive horizontal duties in *Juma Masjid*.[321] Mdlanga J also dismissed this argument and ultimately ruled in favour of Ms Daniels.[322] This decision was based on a finding Ms Daniels right to security of tenure and its pivot to human dignity permitted her to make the home improvements.[323] Further, her rights outweighed any intrusion into the private property rights of Chardonne Properties CC.[324]

Ally & Linde correctly argue that *Daniels* showcases why s 8(2) ought to be crucial as an ideal precursor as part of the scope leg of horizontality.[325] Thus, an ideal starting place to assess *Daniels's* contribution to the discourse on horizontality is to look at how Madlanga J employed s 8(2) to respond to the defendant's second argument.[326]

The meaning and function of the right to security of tenure can be ascertained from two primary sources, s 25(6) of the Constitution and ESTA.[327] The context and purpose of both sources are clear. They aim to reverse the legacy of apartheid laws that were based on race-based land housing ownership.[328] The first paragraphs of the judgment show this purpose:

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[317] Ibid para 37.
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Ibid para 44.
[322] Ibid para 49 and 71.
[323] Ibid at para 49.
[324] Ibid; for further discussion of the case see L Ngwenyama 'The Obligation on Landowners to Accommodate ESTA Occupiers on their Land: Critically Analysing Daniels v Scribante 2017 4 SA 341 (CC)' (2023) 26 *Potchefstroom Electronic Law Journal* 1; Boggenpoel and Slade op cit note 314.
[325] Ally & Linde op cit note 84 at 23–4; see also Cheadle and Davis op cit note 59 at 18–9.
[326] *Daniels* supra note 82 at para 37–53; see also the discussion of *Daniels* use of s 8(2) in Meyersfeld op cit note 221 at 467–75.
[327] *Daniels* ibid para 12.
[328] Ibid para 13–23.

> 'The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives'.[329]
>
> 'There can be no true security of tenure under conditions devoid of human dignity. Though said in relation to the right to life, the words of O'Regan J are apt: "without dignity, human life is substantially diminished".'[330]

The opening statements of the judgement show a clear concern for the material conditions of previously dispossessed people. This dispossession is then tied to the inherent worth of human beings through the right to life and human dignity. Reversing the legacy of apartheid legislation such as the Black Land Act and the Group Areas Act is thus the primary function of both s 25(6) of the Constitution and ESTA. It is this function and meaning that was assigned to s 25(6) of the Constitution and ESTA that made the right to security of tenure capable of horizontal application.[331]

Madlanga J also questioned whether it was suitable to burden Mr Scibante's right to property with the right of security of tenure per s 8(2).[332] In addressing this question, Madlanga J stated:

> 'I see no basis for reading the reference in section 8(2) to "the nature of the duty imposed by the right" to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state"; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; s8(2) does envisage that'.[333]

Madlanga J's interpretation of s 8(2) shows that nothing in the Constitution barred the Court from imposing positive constitutional duties on non-state actors when appropriate.[334] Madlanga J fortified his interpretation of s8(2) with socio-economic rights cases such as *Mazibuko,* where

[329] Ibid para 1.
[330] Ibid para 2 citing *Makwanyane* supra note 55 para 327–8.
[331] Ibid para 49.
[332] Ibid para 38–49.
[333] Ibid para 39.
[334] Ibid.

the courts recognised that imposing positive constitutional duties on non-state actors was appropriate in certain matters.[335]

Madlanga J then evaluated the facts of the case to decide if it was suitable to impose positive obligations on Mr Scribante.[336] Madlanga J conducted a balancing exercise with two rights on opposite sides of the scale.[337] On one end was the potential impact that Mr Scribante would suffer should he be required to compensate Ms Daniels in the event of an eviction.[338] On the other end of the scale was Ms Daniel's right to security of tenure and its pivot to human dignity.[339] Further, Madlanga J took into account the specific context of persons that are occupiers in terms of the ESTA living on private property, and it is the intent of s25(6) of the Constitution and ESTA that such persons be protected by law.[340] Weighing these two competing rights, Madlanga J found that Mr Scribante owed Ms Daniels a positive constitutional duty to accommodate the house improvements.[341] According to the Judge, this was the appropriate way to read s 25(6) and the ESTA in terms of the context of the case.[342] Madlanga J stated the following about the balancing exercise he conducted:

> 'If indeed an occupier is living under conditions that subject her or him to a life lacking in human dignity, the possibility of an order of compensation pales in comparison. The right to security of tenure with the potent cognate right of human dignity are extremely important rights. On the other hand, the possibility of an order of compensation upon the eviction of an occupier, is tenuous at best'.[343]

The remedy decided by the court was thus that Ms Daniels had a right to the home improvements that she sought.[344] Further, the respondents had a direct positive constitutional duty to ensure that her dwelling was habitable in conditions aligned with her right to security of tenure and its pivot to human dignity.[345]

In my view, three lessons can be extracted from Madlanga J's methodology in *Daniels*. Firstly, *Daniel's* judgment indicates the factual circumstances of when s 8(2) is applicable. Section

[335] Ibid para 42; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 48–50.
[336] *Daniels* ibid para 49–55.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid.
[343] Ibid para 51.
[344] Ibid para 54.
[345] Ibid para 66–71.

8(2) was applied to protect the right to security of tenure and its ties to one of the most important personal rights in the BoR, namely, human dignity.[346] O'Regan J's analysis in *Khumalo* also shows that the application of s 8(2) was influenced by the burden that would be imposed on a right with ties to human dignity, namely the right against defamation.[347] There is a similarity here on the rights that have moved the courts to apply s 8(2). The similarity is that when human dignity or rights tied to human dignity are implicated in a private dispute, there is an indication from both *Khumalo* and *Daniels* that a court is likely to apply s 8(2) to such a dispute.

Secondly, even though Madlanga J followed the textual process prescribed in s 8(2)-(3), this did not generate an unprincipled overhaul of the common law remedies applicable to the law of property. Instead, the Constitutional Court made a narrow ruling permitting Ms Daniels to make the requested improvements at her costs and for parties to embark on engagement to facilitate this right.[348] The interpretive process employed in *Daniels,* therefore, shows that harmony can exist between the narrow direct application per s 8(2)-(3) and remedies that rely on settled common law principles that exist in our private law.

Thirdly, *Daniels* also shows harmony between an interpretive method that integrates values and rights. In *Khumalo* and *Juma Masjid*, both these courts were silent on the role of s 39(2) in methodology anchored on s 8(2). In *Daniels,* Madlanga J relies on s 39(2) to interpret the function and meaning of s 25(6) of the Constitution, ESTA, as well as the overall right to security of tenure and its ties to human dignity.[349] This is a clear example of the universal role that s 39(2) must play in all cases dealing with disputes at the constitutional level. This universal application of s 39(2) indicates that sound methodology transcends the direct/indirect dichotomy and channels the true role of s 39(2) towards all cases where parties seek to apply the Constitution horizontally.

The methodology employed in *Daniel's* case showcases the harmony between the direct application and settled principles, harmony between rights and values analysis, and it also shows harmony between s 8(2)-(3) and s 39(2) of the Constitution. Based on all these aspects employed in the case, I assert that *Daniels* represents, in my view, the most cogent methodology on horizontality in case law.

[346] Ibid para 2; *Makwanyane* supra note 55 para 328 and 144.
[347] *Khumalo* supra note 82 para 25–8.
[348] *Daniels* supra note 82 para 66–71.
[349] Ibid para 25 and 29.

2.3.5 Conclusion of the crucial aspects of the interplay school hypothesis in South African case law

Based on the analysis of *Khumalo*, *Juma Musjid*, and *Daniels*, it is submitted that all three cases show various levels of support for the crux of the legal framework of the interplay school. The interplay school posits that the ideal methodology of constitutionalising private law must be built on a holistic, purposive perspective that is guided by the norms contained in the BoR. Further, the interplay school seeks to craft a methodology that fosters interpretive harmony between right and values, direct and indirect, s 8(2)-(3) and s 39 of the Constitution.

The interplay school is divided into two stages: the scope stage as per s 8(2) read with s 39(2), and the form or remedies stage as per s 8(3) read with s 39(2). All three cases analysed expressly or implicitly show support that the interplay school can form the basis for a sound methodology for mediation between the Constitution and private law disputes. This harmony envisaged by the interplay school aligns with how I interpret the true intent of the statement in the *Pharmaceutical Manufacturers* that:

> 'There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.[350]

2.4 Implications of the interplay school on whether and to what extent parent and subsidiary companies within a corporate group are bound to the Constitution

In section 2.4, I now turn to the question of whether, within a South African context, the companies within a corporate group are constitutionally bound to a delictual dispute such as the one raised by the research problem.[351] This question does not exist in isolation. Instead, it is part of a larger process of the horizontal application of the Constitution. From a South African perspective, my view is that the factual scenario in *Nkala* represents the stage of

[350] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44.
[351] See the facts of the Bhopal disaster as per *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986); *Nkala* supra note 13.

litigation where the scope leg must be applied.[352] What follows are the facts in *Nkala* and an application of the interplay school to a scenario involving delictual harms that implicate companies in a corporate group.

2.4.1 Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

Starting in 2015 and ending in 2023, after a settlement, thousands of mineworkers who worked in mines across South Africa sued over eighty mining companies. These companies represent almost the entirety of South Africa's gold mining industry and the class action is one of the largest class actions to date in the country.[353] The applicants claimed delictual damages for silicosis and tuberculosis-related ailments that occurred over many years at the respondents' mines. In a series of cases, the claimants requested the court to certify who could sue and be sued in the class action in question.[354] *Nkala* was, therefore, a procedural case that only dealt with the certification of the applicants and the respondents in question. It was a complex case and a first of its kind to have dealt with many applicants and respondents in a class action in South Africa.[355] After an extensive discussion of law and fact, the court certified the class action, allowing the applicants to take the matter to its substantive aspects.[356] The dispute was settled, and the courts approved the settlement arrangements in 2019.[357]

The unique value of *Nkala* is threefold. Firstly, *Nkala* dealt with the procedural stage of a class action lawsuit of delictual nature which involved an allegation of harms committed by companies in corporate groups.[358] The matter was thus similar to the Bhopal disaster in the sense that it dealt with large-scale harm and complex group structures within the context of a delict.

Secondly, *Nkala* only dealt with the procedural stage of the case. The discussions of Chapter Two, and, in particular, the manner in which to answer the question of scope and reach of the Constitution in private relations, are also largely a discussion of what ought to take place at the

[352] See detailed discussion of other cases such as *Nkala* in J Brickhill 'A river of disease: Silicosis and the future of class actions in South Africa' (2020) *South African Journal of Human Rights* 1.
[353] Brickhill ibid at 3.
[354] See detailed discussion of class action procedure in M Plessis et al *Class Action Litigation in South Africa* 1st ed (2018).
[355] See TL Field 'Exacting silicosis justice through the class action mechanism' (2019) 32 *Mineral Economics* 213.
[356] *Nkala* supra note 13 para 230.
[357] *Ex Parte Nkala and Others* [2019] ZAGPJHC 260 para 5.
[358] For class action procedure see detailed discussion in M Du Plessis et al (eds) *Class Action Litigation in South Africa* 1st ed (2017).

procedural level of a dispute. Thus, it is argued that *Nkala* showcases where in the litigation process the scope leg ought to fit.

Thirdly, *Nkala* dealt with who were the appropriate litigants in the delictual matter. Thus, part of what the court had to decide on was whether parent companies where appropriately cited as litigants alongside their subsidiary company for the purposes of the lawsuit. It is argued that any insight into how the courts view the question of the appropriate litigant is crucial for the evaluation of whom in the corporate group should be answerable for the delict. It is for these reasons that I argue that test the interplay school to the factual matrix of *Nkala*.

In terms of the interplay school, a court must first engage the scope leg of horizontality before the remedies stage. This process entails assessing whether the nature of rights and the nature of the duties created by those rights are capable and suitable for horizontal application. The scope leg of horizontality, as per s 8(2), thus entails a limited direct application of the Constitution to determine if the rights and duties in dispute bind non-state actors. This process must be guided by the purpose and norms in the BoR as per s 39(2). It is argued that this process must have sufficient rigour to assign a viable purpose to all key constitutional provisions tied to sound methodology of horizontal application. However, caution must also be exercised so avoid turning routine judicial processes into an unnecessarily complex exercise.

In *Nkala*, the nature of the rights in question was bodily and psychological harm which had resulted from working conditions that did not adequately protect the miner's health and safety. These rights implicate section 12 of the Constitution. Mojapelo J in *Nkala* described the harm to the miners as follows:

> 'With remarkable consistency, their evidence reveals that the mining companies stripped them of their dignity and concomitantly compromised their health and safety, with such intensity and ferocity that they were effectively dehumanised'.[359]

Mojapelo J linked the nature of the miners' rights to their health, safety and human dignity. As noted in *Khumalo* and *Daniels*, in situations where a right in dispute is tied to human dignity, a court is more willing to invoke s 8(2).[360] This means that in scenarios such as *Nkala*, where large-scale bodily harm has taken place, such rights will likely be capable of direct application as per s 8(2). Such an approach would also be in line with the s 39(2) mandate to consider the founding values of human rights, dignity, equality, and freedom. The bodily harm in question

[359] *Nkala* supra note 13 para 66.
[360] *Khumalo* supra note 82 para 25–8; *Daniels* supra note 82 para 2, 21, 25, 34, 51, and 61.

would have led to the loss of amenities of life, psychiatric injuries, a general loss of bodily integrity, loss of future income and loss of support where other persons relied on the income of the primary injured party.[361] Such harms violate s 12 of the Constitution which protect the bodily and psychological integrity of a person.

As per s 8(2), a court would also be mandated to consider the nature of the juristic person in the dispute before it can burden such a non-state party with constitutional obligations at the horizontal level. The crucial and more difficult question is whether it is ideal and suitable to always bind parent companies to such disputes. In *Nkala,* the answer that the court gave to this question was yes and stated that:

> 'The claim against the parent companies of the respective companies that employed the mineworkers is that they had authority over, advised and guided their respective employing subsidiary company, and were aware that their subsidiary company would accept their direction, guidance or advice, and that that direction, guidance or advice materially impacted upon the health of the mineworkers, especially with regard to them contracting silicosis or TB. The evidence they wish to bring against these companies is the same evidence'.[362]

There is no indication from the judgement that this conclusion was grounded in sound constitutional methodology as posited by the interplay school. My view is that the answer as to whether it is suitable to bind parent companies to disputes in scenarios such as *Nkala* must be sufficiently justified and cannot always be yes. There are many conceivable scenarios where the parent company would be removed entirely and separated from the harms in question and thus justifying a different judicial response. It is precisely the role of s 8(2) to determine whether the rights in dispute are capable and suitable for horizontal application. Whether the answer must be a yes or no must be determined by the textual demands of s 8(2) and guided by the values in s 39(2).

In a *Nkala* scenario, my view is that our values would likely dictate that it is suitable for a parent company to also answer the allegations in question alongside its subsidiary company. In *Nkala*, Mojapelo J found considerable evidence that the parent companies shared employees with their subsidiaries and that the parents had supervised the work of these employees in all affiliated companies.[363] There was also evidence that the parent's supervision was included in

[361] For description of these harms see E Zitzke 'The *Life Esidimeni* arbitration: towards transformative constitutional damages?' 2020 *Journal of South African law* 419 at 424–27.
[362] *Nkala* supra note 13 para 71.
[363] Ibid.

the area of health and safety standards at the subsidiary companies.[364] Such a sharing of employees and supervision would create strong proximity between the miner's harm and the parent company's activities. This proximity would make it suitable and justifiable for the court to bind the parent company to a dispute such as *Nkala*. The nature of the miner's rights and the large scale of harm would, therefore, justifiably tilt the balance against the burden on the parent company to be bound to the dispute. This answer is likely and ideal as far as scenarios such as *Nkala* are concerned.

A crucial question is to what extent a court should justify the decision of who is bound to the rights violations in a dispute. Does this trigger s 36 proportionality and require a substantial engagement of the facts to show that a delict or other harm took place? My view is that the answer is no. This ought to be a limited, value judgment assessment of whether it is reasonable for the defendant to be answerable to the harms in question. Only at the form/remedy leg must the court conduct a full ventilation of all the substantive issues of the dispute. The purpose and intent of s 8(2) in the current scenario is only to ascertain if the parent and subsidiary company ought to be answerable in law to the allegations before it. As far as the nature of harms in *Nkala* and indeed in the Bhopal disaster are concerned, I am of the view that it would be fair, just and equitable to bind both the parent and subsidiary companies to such a dispute. I form this view on the basis of applying the interplay school as per s 8(2) read with s 39(2) of the Constitution. The suitable remedy will be determined at trial as part of the substantive stage of the matter in court.

2.5 Concluding remarks on the Constitution's role in resolving the research problem of the thesis

Chapter Two sought to answer the following three questions: How does the Constitution regulate non-state actors? Within a South African context, is a parent and subsidiary company operating in a corporate group constitutionally bound to a dispute where there is an allegation of wrongdoing in factual scenarios such as the Bhopal disaster and *Nkala*? If these entities are bound, to what extent are they bound, and what permissible remedies can be generated from a constitutional perspective?

As per the interplay school, s 8(2) permits delict claimants to pursue their full bundle of enforceable rights directly against a single corporation or a corporate group. No principle of

[364] Ibid.

private law can impede the operation of a s 8(2) process. That means arguments that corporate groups are separate legal personalities and enjoy limited liability are important but not by themselves determinative of court outcomes. It is entirely at the court's discretion to assess if and to what extent both the subsidiary company and parent company are answerable to the dispute at hand. However, the process argued for by s 8(2) is important because it does not override legislation or the common law remedies.

A ruling that both the subsidiary company and the parent company are answerable in law is not the same as saying that they are liable. A ruling that both companies are answerable also does not mean that such liability will be generated outside of the private law rules, such as company law, which primarily regulates disputes involving companies. Instead, s 8(3) must still determine the extent to which the existing legislative or common law principles fully give effect to the constitutional rights in dispute. In many cases, as illustrated in *Khumalo*, *Juma Musjid*, and *Daniels*, the existing legislative and common law principles are sufficient to give effect to the rights in dispute.[365] However, where the existing legislative principles are insufficient, a court, as per s 8(3), is fully within its mandate to adjust or develop an appropriate remedy. And for the academics and courts that would still worry about an unprincipled overhaul of private law, an additional safeguard is built into the textual demand in s 8(3).

Any remedy generated in terms of s 8(3) must meet the textual requirements of s 36, which regulates the limitation of rights.[366] I submit is that the interplay school provides us with a viable methodology to carry out such an exercise. If the interplay school is applied to the research problem of this thesis, I submit two responses to the outstanding questions posed in Chapter Two.

The first question was whether, within a South African context, a parent and subsidiary company operating in a corporate group are constitutionally bound to a dispute where there is an allegation of wrongdoing in factual scenarios such as the Bhopal disaster and *Nkala*. The answer is that after following the textual demands of s 8(2) read with s 39(2), it is constitutionally permissible to bind both a subsidiary and parent company to a dispute, such as in *Nkala* and the Bhopal disaster.

The second question is, if a parent company is bound, to what extent is it bound, and what permissible remedies can be generated from a constitutional perspective? That answer is

[365] *Khumalo* supra note 82 para 45–7, *Juma Musjid* supra note 82 para 88, and *Daniels* supra note 82 para 66–71,
[366] Section 8(3) of the Constitution.

determined by an application of s 8(3) to the dispute at hand. Chapters Three, Four and Five will address the question of the permissible remedies that can be generated in terms of the research problem of this thesis.

CHAPTER 3: CORPORATE GROUP LIABILITY

3.1 Introduction

This thesis seeks to address the challenge of delict claimants who are harmed by MNC activities but are left with no effective remedy in law. Section 1.2.4 of Chapter One suggested that a suitable solution likely exists between South African corporate law and the law of delict.[1] Chapter Two then outlined the Constitution's role in resolving the research problem of this thesis. Chapter Three builds on Chapter Two and seeks out the appropriate remedy for delict-based corporate group liability. Chapter Three primarily considers whether corporate law can remedy the gaps in law identified in Chapter One. In corporate law, several academics in both foreign law[2] and South Africa[3] have highlighted the challenges of companies operating in MNC groups. Chapter Three takes into account their guidance.

Chapter Three is divided into the following sections: Section 3.1 is the introduction to the chapter. Section 3.2 provides a more refined description of the legal form of the MNC that this thesis is referring to. Section 3.2 then describes how corporate groups are understood globally and in South African corporate law. The purpose of an appraisal of how corporate groups are regulated globally is to discern the typical features of corporate groups worldwide and to compare this with the regulatory path taken in South Africa. Section 3.2 also analyses the judicial approach used for piercing the corporate veil in terms of the South African Companies Act.

Section 3.3 evaluates the judicial approach of corporate group liability in delict. Section 3.4 assesses the judicial approach of corporate group liability in labour law. Other areas in South African law that also regulate corporate groups, such as insolvency, tax, criminal law,

[1] See section 1.2.4 of Chapter One that provides a synopsis of the research problem of this thesis.
[2] H Hansmann & R Kraakman 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; LM LoPucki 'The essential structure of judgment proofing' (1998) 51 *Stanford Law Review* 147; KA Strasser & P Blumberg 'Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy' (2011) 1 *Accounting, Economics, and Law: A Convivium* 1; RM Manóvil *Groups of Companies: A Comparative Law Overview* (2020); P Muchlinski *Multinational Enterprises and the Law* (2021); KJ Hopt 'Groups of Companies - A Comparative Study on the Economics, Law and Regulation of Corporate Groups' (2024) *European Corporate Governance Institute - Law Working Paper No. 752/2024*, available at *https://ssrn.com/abstract=4708515* accessed 30 October 2024.
[3] See RA Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (LLD dissertation, University of Stellenbosch, 2011); FHI Cassim et al *Contemporary Company Law* 3 ed (2021); D Davis et al eds *Companies and Other Business Structures in South Africa* 5 ed (2021).

intellectual property law and consumer protection law, are excluded from the study.[4] It is submitted that the selected areas picked for this chapter should be sufficient to give a representative picture of the state of corporate group regulation and liability under South African law.

Section 3.4 concludes the discussion of the current status of corporate group regulation and liability in both foreign law and South Africa and, where appropriate, propose the best path forward.

3.2 Group regulation and liability in corporate law

The first matter for this chapter is to define an MNC. Lilienthal defines an MNC as a corporation that has its home in one country while conducting its business under the laws and customs of another country.[5] The OECD definition of an MNC is similar to that provided by Lilienthal and is as follows:

> 'These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state, or mixed'.[6]

Thus, an essential feature of an MNC is that a single organisation or group of related juristic entities must have its business interests organised in more than one nation.[7] In addition to the core feature that MNCs operate in more than one jurisdiction, Muchlinski provides a convincing description of their legal nature and states that the legal form of an MNC can be broadly divided into two: a contract-based MNC and an equity-based MNC.[8] Contract-based MNCs can be found in global organisations established through distribution agreements, production agreements, and public-private partnerships.[9] Equity-based MNCs, on the other hand, are usually organised by corporate groups.[10] In this sense, equity means shareholdings in corporate groups.

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[4] Stevens ibid.
[5] Muchlinski op cit note 2 at 5–8.
[6] OECD *OECD Guidelines for Multinational Enterprises* (2011) at 17.
[7] Ibid.
[8] Muchlinski op cit note 2 at 49–76.
[9] Ibid.
[10] Ibid.

As a result of the various legal arrangements by which company shares can be organised, equity-based MNCs also tend to have regional characteristics that depend on the part of the world where the equity-based MNC is formed.[11] For example, Muchlinski identifies the Anglo-American pyramid groups, European transactional mergers, and the Japanese keiretsu.[12] The legal form that MNCs can take is thus broad.[13] In the Bhopal disaster, the legal relationship between UCC and UCIL involved UCC owning the controlling equity in UCIL.[14] The discussions in Chapter Three are limited to the legal form used between UCC and UCIL in the Bhopal disaster, an equity-based MNC organised by a corporate group.

In South Africa, the Companies Act is the primary statute that defines and regulates corporate groups.[15] Other areas of law that regulate corporate groups, such as tax and competition law, only supplement company law.[16] These supplementary areas typically provide additional regulation principles relevant exclusively to their subject-specific problems.[17]

Section 1 of the Companies Act states that a group of companies or corporate group comes into existence whenever two or more juristic entities create a legal relationship in which one company, termed a holding company, controls another company, termed a subsidiary company.[18] A group of companies thus exists when two or more companies share a holding and subsidiary company relationship.[19] A juristic person becomes a holding company if it controls a subsidiary company as contemplated by the Companies Act.[20]

Section 1, read with s 2 (2)(a) and s 3 of the Companies Act, elaborates on when a holding-subsidiary relationship is created. It is created when one company, either by itself or in combination with other companies, holds or controls the majority of a subsidiary's voting rights

[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] See *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986) at 844; Chapter One describes an American company called Union Carbide Corporation (UCC), which set up a corporate subsidiary in India, with UCC as a majority shareholder which held 50,9% of the equity in the subsidiary company was called Union Carbide India Limited (UCIL). The corporate group, headed by UCC, was involved in the manufacturing of chemicals and had set up a manufacturing plant in the Madhya Pradesh state of India near a densely populated slum.
[15] See s 2 and s 3 of the Companies Act.
[16] See JS Wilcocks & SN Middelmann 'Evaluation of the need to introduce a system of group taxation in South Africa' (2004) 8 *Southern African Business Review* 3; s 4 of the Competition Act 89 of 1998; *Competition Commission v Delatoy Investments (Pty) Ltd and Others* (2016) 1 CPLR 67 (CT) para 83.
[17] Stevens op cit note 3. The author cites examples of competition law, tax, consumer protection, accounting, finance and securities law, insolvency, criminal law, labour law, contract, intellectual property, and delict.
[18] Section 1, read with s 2 and s 3 of the Companies Act.
[19] Ibid.
[20] Ibid.

and the right to remove or appoint directors that serve on the subsidiary board of directors.[21] The Act also envisages that where a company is a wholly-owned company of another company, this creates a subsidiary and holding company relationship.[22] The owning company must be able to exercise all the voting rights and issued securities of the company that it wholly owns to trigger the holding-subsidiary relationship.[23] The Companies Act also envisages that the control required to activate the subsidiary and holding company relationship can be created by other subsidiaries or a combination of subsidiaries, which are then used to control other companies within the group.[24]

Section 2 of the Companies Act also refers to what is termed related or interrelated persons. Persons can be related or interrelated if they are linked, for example, by way of marriage or relationships akin to marriage. Another example where two juristic persons can be related or interrelated is when one entity directly or indirectly controls the board of directors or the election of board members in another juristic person.[25] Cassim et al find that the function of the terms related and interrelated in s 2 of the Companies Act is to ascertain whether parties are acting independently or are being controlled by another.[26] If parties are related or interrelated, there is a risk that they are not working independently.[27] This may harm the interests of other key stakeholders who rely on the independence of related or interrelated companies to protect their interests. The protections offered by this concept are typically applied to the director's duties where there are conflicts of interest and to situations where takeover regulations are used.[28] Cassim et al find that the concepts are broad and not fully defined by the Companies Act.[29] Cassim et al also point out that the breadth of this provision has presented problems in determining who is related or interrelated in complex corporate group structures.[30]

The breadth of legal arrangements that can trigger two entities to become a group of companies in South Africa appears to be in line with international practice.[31] Regarding the Companies Act, the critical feature that turns two separate companies into a group of companies is the

[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Cassim et al op cit note 3 at 274–8.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Manóvil op cit note 2 at 18–21.

existence and exercise of direct or indirect control.[32] International trends show that this control, or, as termed by Manóvil, dominance, can be created by formal arrangements such as shareholding.[33] Control or dominance can also be established by way of contracts or informally, where such control is just factually exercised.[34] The design and scope of what activates groups in the Companies Act provisions consider and incorporate these global trends into the ambit of how it regulates corporate groups.

From a South African corporate law perspective, several legal consequences arise once a group of companies is created.[35] There are special regulations regarding group annual financial statements and other taxation purposes.[36] There are also rules regarding the acquisition of shares within groups, group director's conduct and liabilities, and shares offered to group employees.[37] The law regulates the disposal of a more significant part of assets with groups and financial assistance of companies in a group.[38] Financial assistance includes purchasing shares within the group, inter-company loans, and assistance and loans offered to directors who are part of the group of companies.[39] Group treatment also exists for insolvency purposes.[40] Companies in a corporate group are considered separate and distinct legal entities entitled to the complete protection of limited liability.[41]

In Chapter One, I described the problem of 'judgement proofed corporate structures', which leaves delict claimants with ineffective legal recourse when group activities cause harm.[42] Stevens also highlights the vulnerability of delict claimants as it pertains to corporate groups in South African law.[43] Stevens correctly argues that the true source of the problems associated with group liability emanates from applying limited liability to corporate groups.[44] Stevens argues that historically, limited liability was never developed between two companies.[45]

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[32] Cassim op cit note 3 at 274–8.
[33] Manóvil op cit note 2 at 18–21.
[34] Muchlinski op cit note 2 at 49–52.
[35] Davis op cit note 3 at 83–7.
[36] Ibid.
[37] Davis ibid at 83–7.
[38] Ibid; See s 44, s 45, s 48, s 76, s 115, and s 112 of the Companies Act; for another discussion of director duties within group contexts, see R Stevens 'Liability within company groups' 2016 *Journal of South African Law* 709.
[39] Ibid Davis at 83–7; s 45 of the Companies Act.
[40] N Locke 'The approach of the Supreme Court of Appeal to the enterprise reality in company groups [Discussion of Consolidated News Agencies(Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd 2010 3 SA 382 (SCA)]' (2012) 23 *Stellenbosch Law Review* 3; MC Vadelka *Some problem areas relating to insolvency of company groups and their consolidation: a comparative study* (LLM dissertation, University of Pretoria, 2019).
[41] Ibid.
[42] LoPucki op cit note 2; see similar concerns by Hansmann & Kraakman op cit note 2.
[43] Stevens op cit note 3 at 7–15
[44] Ibid.
[45] Ibid.

Instead, it was designed to be used between a shareholder and a company.[46] Thus, when these principles were being conceptualised, all shareholders were natural persons, and it was never imagined that companies in a corporate group would own other companies.[47] Based on how the limited liability was initially envisaged, it made sense to limit the exposure of unlimited liability for natural persons only to the investments they made in a company.[48] Blumberg also supports a similar account of company law history as described above.[49]

Allowing a holding company to own another company creates the practical result that shareholders of a holding company have two layers of limited liability protection instead of just one, as initially intended by company law.[50] The two layers come about because the holding company itself already provides one layer of separate legal personality protections to its shareholders. Because the holding company is a shareholder in a subsidiary company, it also supplies another layer of limited liability to both the parent company's shareholders and the parent company itself.[51] This unique situation is part of the legal apparatus that makes it difficult for delict victims to seek recourse when harmed by corporate groups. In these corporate structures, assigning responsibility for harm to any one business is said to be almost impossible.[52]

Despite these clear challenges, global practice reflects that most countries have stood firm in respecting traditional core principles of corporate law of separate personality, even where they may appear to create inequities in legal outcomes.[53] In *Bank of Tokyo*, Goff LJ refused to depart from traditional corporate law principles and stated: 'We are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged'.[54] In *Adams,* this court stated:

> 'Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] See PI Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) at 65–119; PI Blumberg & KA Strasser 'Legal Models and Business Realities of Enterprise Groups-Mismatch and Change' (2009) 5 *CLPE Research Paper* 1 at 3–4.
[50] Stevens op cit note 3 at 13–15.
[51] Ibid.
[52] Ibid at 12; LoPucki op cit note 2.
[53]Ibid.
[54] *Bank of Tokyo v Karoon* [1987] AC 45 at 64; see discussion of case TK Cheng 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines' (2011) 34 *Boston College International and Comparative Law Review* 329 at 340.

> fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities'.[55]

The statements from both *Adams* and the *Bank of Tokyo* clearly indicate that equitable outcomes are not the primary concern of the regulation of corporate group structures, but it is rather the maintenance of core corporate law principles such as separate legal personality. From a global perspective, leading literature indicates that there are two leading schools of thought regarding how the law should handle group liability in corporate law.[56] The first one, the dominant school, states that all the companies in a corporate group are distinct entities entitled to the complete protection of limited liability.[57] When the corporate group persona is abused, the doctrine of piercing the veil in corporate law is sufficient to rectify such abuse.[58] Blumberg terms the point of view of this school as based on an 'entity law' approach because of the strict adherence to the separate personalities of companies within a corporate group.[59]

The second school argues that the principles of law require adjustment to reflect the factual and economic reality of how a corporate group's business functions as a single economic unit.[60] Blumberg describes this manner of regulating corporate groups as 'enterprise liability' because of the focus on the unitary nature of corporate activities.[61]

A good example of enterprise logic in case law is *DHN Food Distributors Ltd,* a case decided in the United Kingdom.[62] The court in *DHN Food Distributors Ltd* characterised corporate groups as follows:

> 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says'.[63]

Group liability in foreign law can, therefore, be reduced to a choice between two options: the first choice is what is termed the entity approach, which is driven by the traditional conservative

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[55] *Adams v Cape Industries plc* [1990] 2 W.L.R 657 at 536; see the discussion of the case in Cheng ibid at 340.
[56] Blumberg (1993) op cit note 49 at 65–88.
[57] Ibid.
[58] Ibid.
[59] Ibid at 65–70.
[60] Ibid.
[61] Blumberg (1993) op cit note 49 at 89–96.
[62] *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1976) 1 WLR 852 at 6.
[63] Ibid; see also Cassim et al op cit note 3 at 70.

view of strict adherence to core corporate law principles.[64] The second choice is the enterprise liability approach driven by a focus on assessing the factual and economic reality of how corporate groups function.[65]

From a South African perspective, Stevens has conducted a detailed assessment of ten private and public areas in South African law in search of the best approach to address the unique challenges of corporate groups regulation and liability.[66] Two of Steven's suggestions are likely most suitable for delictual claimants. The first option he considers is through the delict common law doctrine of vicarious liability.[67] The second path is a detailed suggestion that the statutory piercing of the veil in terms of the Companies Act must be adjusted to consider the unique needs of delict-based group liability adequately.[68]

The rest of Section 3.2 thus tests whether Steven's suggestion to make the necessary adjustments to statutes has been heeded by the legislator or the South African courts. Section 3.3 then tests the viability of a solution in terms of the common law of delict.

In terms of the Companies Act, once a company has been duly registered, it acquires a separate legal personality from its founders, and its founders also enjoy the protection of limited liability from the juristic person that they have created.[69] In line with global trends, South African law states that these core corporate rules also equally apply to companies in a corporate group.[70] Separate legal personality can, however, be relaxed under exceptional circumstances when it can be shown that the founders of a juristic person have abused these rights.[71] The result of this relaxing of the distinct legal personality of a company is that the shareholders of the company may be held responsible for the liabilities of the company.[72]

The common law doctrine of piercing has been incorporated into the Companies Act (statutory veil piercing).[73] The statutory veil piercing, like its common law counterpart, permits the law to hold shareholders accountable for harms committed by a company when such shareholders

[64] Blumberg (1993) op cit note 49 at 89–96.
[65] Ibid.
[66] Stevens op cit note 3 at 142–218.
[67] Ibid at 281–8.
[68] Ibid at 286.
[69] Section 19 of the Companies Act, Cassim et al op cit note 3 at 69.
[70] Cassim et al ibid.
[71] Section 20(9) of the Companies Act.
[72] Cassim et al op cit note 3 at 54–90.
[73] See s 20(9) of the Companies Act; there is some disagreement among corporate scholars on the issue of the distinction between the lifting the veil and piercing the corporate veil. See distinction between Cassim et al ibid at 59–62 and AJ Marais 'Misapplications of the South African Common Law "Piercing of the Corporate Veil" Doctrine' (2020) 83(2) *Journal for Contemporary Roman-Dutch Law* 217 at 220–22.

abuse the separate legal personality of the company that they own.[74] Section 20(9) of the Companies Act incorporates the statutory veil piercing as follows:

> 'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may - (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)'.

Olivier correctly advocates for a purposive interpretation of this provision that is aligned with the values of the Constitution as per s 39(2) of the Constitution.[75] In terms of Olivier's approach, s 20(9) should be understood from the vantage point of an assessment of the purpose of the provision, which includes its historical context and the broader policy objectives of the Companies Act.[76] In terms of the purpose of the provision, it is envisaged to dissuade shareholders from abusing the rights attached to the personality of companies.[77] The history of the provision is based on the common law counterpart of the statutory veil piercing and English law influence.[78] In terms of the policy objectives of the Companies Act, this can be sourced from the drafting history of the Act and its primary need to create a statutory framework of South African corporate law that is in line with global trends and compliant with the Constitution.[79] Olivier's suggestion for a constitutionally driven interpretive approach is sound because all statutory interpretation is subject to the interactive guidelines set out in the Constitution.[80] Despite a clear role for the Constitution in this regard, key court decisions that have dealt with the statutory veil piercing as per s 20(9) do not follow Olivier's suggestions.[81]

The statutory veil piercing to groups, a key aspect of when the core rights tied to companies may be relaxed, turns on what is meant by 'unconscionable abuse of the juristic personality' in

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[74] Marais ibid.
[75] E Olivier 'A Purposive Perspective on Piercing the Corporate Veil Under Section 20 (9) of the Companies Act 71 of 2008' (2022) 34 *SA Mercantile Law Journal* 348.
[76] Ibid.
[77] Ibid at 356–7 and 363.
[78] Ibid at 352–5.
[79] Ibid at 356–62.
[80] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
[81] See case law discussion in Olivier op cit note 75 at 366–79.

terms of s 20(9) of the Companies Act.[82] The Act does a disservice by not defining what is meant by unconscionable abuse.[83] This leaves a gap that ought to be filled in by assessing case law that has determined the operational requirements of the common law doctrine of veil piercing.[84] Further guidance on what the unconscionable abuse meant can also be sought from several more recent cases that have interpreted these provisions after the enactment of the Companies Act.[85]

Cassim et al find that the trouble with the common law use of the doctrine of piercing the veil is that there are no clear discernible principles of when courts are willing to pierce the veil.[86] The approach adopted by the courts in South Africa is in line with how the doctrine is applied in foreign law, which also tends to be fact-specific and essentially open-ended in the application.[87] Cassim et al do, however, attempt to make sense of the doctrine by provisioning the following guidance based on crucial cases that have dealt with the common law doctrine of piercing the veil.[88]

The first principle is that courts are of the general view that the separate personalities of the companies, including those in groups of companies, must be respected and protected and that courts are not generally permitted to disregard these principles by piercing the corporate veil.[89]

The second principle is that there are no agreed-upon principles of when the corporate veil may be pierced.[90] This means that each case ought to be decided on its own merits, and courts are not locked into any single category when they are more or less willing to pierce the veil.[91]

The third principle is that in scenarios where the courts pierce the veil, the courts endeavour to employ a flexible, balancing exercise that takes into account the interest to preserve the separate

[82] Ibid at 364–6.
[83] R Cassim 'Piercing the veil under s 20(9) of the Companies Act 71 of 2008: A new direction' (2014) 26 *South African Mercantile Law Journal* 307 at 307.
[84] Cassim et al op cit note 3 at 75–84.
[85] Olivier op cit note 75 at 336–76.
[86] Cassim et al op cit note 3 at 62.
[87] Cheng op cit note 54 at 331.
[88] Cassim et al op cit note 3 at 62–5; see similar case discussion in M Sibanda 'The Piercing of the Corporate Veil and Creditor Protection' (2022) 1 *African Journal of Law and Justice System* 25 at 28.
[89] *Ebrahim and Another v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 22; see also the discussion of *Ebrahim* in Cassim et al ibid at 62–5.
[90] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 802–5; Cassim et al ibid.
[91] Ibid.

identity of the juristic person in question with the other policy considerations that seek to relax these core protections of corporate law.[92]

Fourthly and the final principle is that court trends, however, show that courts may pierce the veil, where it can be shown that the corporate person has been used for fraud, dishonesty, or some other improper conduct.[93]

At common law, Cassim et al identify a few clear examples of when South African courts have accepted that there has been an abuse of the separate legal personality of a juristic entity. In *Robinson's* case, the court pierced the corporate veil where a company director used the juristic personality to evade the proper functioning of fiduciary duties owed to companies by directors in terms of the company law.[94] In *Robinson*, a director had breached his fiduciary duties by exploiting for himself a commercial opportunity that belonged to the company. The court thus pierced the veil and held the director accountable for abusing his position.[95]

In *Die Dros's* case, the court also pierced the corporate veil.[96] The courts pierced the corporate veil where the separate juristic personality was used to evade clear agreed-upon contractual duties.[97] In *Die Dros*, Mr. Van der Westhuizen used the juristic personality of a close corporation that he was a member of to evade the consequences of a restraint of trade between him and Dros Restaurant. The court pierced the veil of this close corporation and held Mr. Van der Westhuizen personally liable for the violation of the restraint of trade that was in place between the parties.[98]

In terms of case law that has dealt with what 'unconscionable abuse' as per the statutory veil piercing in terms of s 20(9) of the Companies Act entails, Olivier summarises the critical points in these cases as follows: In *City Capital*, the court acknowledged that it was acceptable to take guidance from the common law doctrine of veil piercing on the grounds of fraud, dishonesty, or any other conduct that is improper.[99] In *Butcher Shop* and *Xulu*, Olivier summarises these

[92] *Die Dros (Pty) Ltd & another v Telefon Beverages CC & others* 2003 SA 207 (C) para 23; for further discussion see Cassim et al ibid at 63.
[93] Cassim et al ibid; *Cape Pacific Ltd* supra note 90 at 802–5; see also A Marais 'Supreme Court of Appeal Refuses "Reverse" Piercing of the Corporate Veil' (2024) 15 *Business Tax and Company Law Quarterly* 1 at 8.
[94] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 172–77 and 264; see also Cassim et al ibid 55–9.
[95] Ibid.
[96] *Die Dros* supra note 92; for further elaboration see Cassim et al ibid.
[97] *Die Dros* ibid at 24.
[98] Ibid.
[99] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* 2018 (4) SA 71 (SCA) para 24 and 29; see also Olivier op cit note 75 at 375.

cases as stating that where shareholders exercise absolute control over a juristic person, this, on its own, is not sufficient to pierce the veil.[100] The strongest and currently recognised basis for when it is permissible to apply the statutory veil piercing is where there is clear evidence of fraud, dishonesty, or some other recognised improper behaviour.[101]

The critical question is how courts understand statutory veil piercing and its interpretive aids from the common law doctrine when asked to pierce the veil within the context of corporate groups. *Ex parte Gore* is crucial for this purpose because it is one of the few cases to apply statutory veil piercing within the corporate group context.[102]

3.2.1 Ex parte Gore

Ex parte Gore concerned several applicants in their capacity as liquidators of 41 companies. The companies were part of the group referred to as the King Group. The holding company in the King Group was called King Financial Holdings Limited. Three brothers collectively held many of the shares of most of the companies in the group and sat on all the boards of all the companies in the group. The group was involved in financial services and had commercial and residential properties.

The problem emanated from how the three brothers conducted the affairs of the corporate group. The three directors treated the various companies in the group as one company, moving the companies' funds around without proper regard for record-keeping. Further, these directors had also made fundamental misrepresentations to the shareholders of the individual companies. Because of how the affairs of the King Group were being managed, Binns-Ward J, in the *Gore* case, was asked to disregard the corporate personality of the entire group and create liability for the holding company.[103] The question before Binns-Ward J was whether the court could apply the statutory veil piercing as per s 20(9) in order to reach the financial assets of the parent company.[104]

[100] *Department of Agriculture, Forestry and Fisheries and Another v B Xulu & Partners Incorporated and Others* [2022] 1 All SA 434 (WCC) para 10; *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* 2023 (5) SA 68 (SCA) para 45; see further Olivier ibid.
[101] *Butcher Shop* ibid at 43–4.
[102] *Ex Parte Gore NO and Others* 2013 (2) All SA 437 (WCC); for further insight see the discussion of *Ex Parte Gore* in Cassim et al op cit note 3 at 76–7.
[103] *Ex Parte Gore* ibid para 2.
[104] Ibid para 1–4.

Binns-Ward J granted the relief sought by the applicants and found that the conduct of the group's directors amounted to an unconscionable abuse of the group of companies.[105] In the main, the judge found the brother's handlings of the group's affairs to be 'inept and dishonest', characterised by a complete disregard for separate juristic personalities of any of the companies in the group.[106] The judge also found that the whole group was a sham and granted the relief sought, ruling that assets of the holding company were jointly liable alongside its subsidiary companies for the financial loss suffered by the claimants.[107]

Ex Parte Gore provides several positive and negative implications on whether delict claimants will be able to use the statutory veil piercing to get recourse against groups. On the positive side, *Ex parte Gore* provides a clear example of our court's willingness to apply statutory veil piercing within group contexts. In respect of how the provision must be read and, in particular, what is meant by 'unconscionable abuse' as per s 20(9), Binns-Ward J found that the statutory veil piercing should be read as containing a 'wide ambit'.[108] This means that the provision must be understood as capable of accommodating a broad set of factual circumstances and is not an exceptional remedy that can only be deployed as an avenue of last resort.[109] As per Binns-Ward J, what is required is that the claimants showcase that there is an abuse of the separate juristic personality of a company.[110] This interpretive guide is ideal because it theoretically creates sufficient interpretative room for delict claimants to be able to utilise the statutory veil piercing because of this broad threshold.

However, on closer scrutiny, some substantial challenges impact whether the statutory veil piercing, as interpreted by *Ex parte Gore*, can be the panacea for the delict claimants. The 'wide ambit' that Binns-Ward J assigned to s 20(9) carries a negative side. A 'wide ambit' brings a lack of clarity on what courts will accept within or outside the ambit of applying a particular provision. Binns-Ward J stated that the statutory veil piercing would be appropriate when it can be shown that the juristic person is a ''sham', 'device', 'stratagem'' as well as 'conceivably much more'.[111] The challenge with Binns-Ward J's approach is that it is similar to the open-ended and vague logic utilised in the common law application of the doctrine.[112] It is vague

[105] Ibid para 35–7.
[106] Ibid para 13.
[107] Ibid para 15.
[108] Ibid para 32.
[109] Ibid para 27–8
[110] Ibid.
[111] Ibid para 34.
[112] See similar words used in *Cape Pacific Ltd* supra note 90 para 31.

because the Companies Acts and its interpreting case law all rely on unclear expressions such as 'sham' and 'device' to describe other unclear expressions, namely, unconscionable abuse. The trouble with this approach is that at the end of such a process, little is left in terms of clear, tangible guidelines as to when courts are willing to relax corporate law principles.

My view is that the statutory veil piercing is theoretically capable of accommodating delict claimants in scenarios where there is a clear abuse of the entities in a corporate group. This is because the statutory veil piercing has been applied where fraud, dishonesty, or some other recognised improper conduct has occurred.[113] Thus, where delict claimants can show that their harm was tied to the fraudulent use of the company, there is no reason why they cannot successfully rely on the statutory veil piercing as the basis of corporate group liability. However, there are a number of challenges that may hinder the ability of delict claimants to fully rely on the statutory veil piercing.

The first challenge for delict claimants is that there appears to be some level of consensus in common law and statutory veil piercing cases that the existence of fraud, dishonesty and improper conduct is a strong indicator of when the statutory veil piercing is appropriate.[114] Binns-Ward J's assessment in *Ex parte Gore* is in line with this approach.[115] The problem with this approach is that it is an assessment that places primary focus on the state of mind and activities of corporate founders as opposed to the harm that took place and what is equitable for the applicants in the case. This type of conceptualising of the key issue is, in my view, inherently insufficient and unbalanced, particularly in scenarios where delict claimants are concerned. It is unfair because not all delictual matters will have clear links to fraud or dishonesty. Many delicts occur by accident, and there may be no clear abuse of the corporate personalities of any of the entities within a corporate group. In circumstances where delict claimants cannot show a clear abuse of the corporate personality, the viability of reliance on the statutory veil piercing, in most likelihood, becomes slim. Thus, a key challenge with the statutory veil piercing is that it is fundamentally concerned with ensuring that juristic persons are correctly used as opposed to the demands of corrective justice or equity.[116] This is supported by the cases that have applied the statutory veil piercing, which has not shown a primary

[113] Olivier op cit note 75 at 375.
[114] Marais op cit note 93 at 6–8.
[115] *Ex Parte Gore* supra note 102 para 28.
[116] See discourse on the description and importance of corrective justice in private law in E Zitzke 'Transformative Legal History and the (Re) Classification of the South African Law of Delict' (2023) 26 *Potchefstroom Electronic Law Journal* 1.

concern for corrective justice in their assessment of when it is suitable to apply the statutory veil piercing.[117]

There is a second challenge that will affect delict claimants, which is that the approach in *Ex parte Gore* on statute and common law interpretation appears completely severed from any constitutional guidance. This is troubling because the Constitution is designed with the capability and intent to influence both public and private law disputes.[118] Olivier persuasively showcases that there is ample room to incorporate a constitutionally driven, purposive interpretation into a reading of s 20(9).[119] Yet there is no indication that *Ex parte Gore* contemplated any role for constitutional methodology or guidance.[120] The overall impression of the judgement is that the Companies Act is completely severed from the influence of the Constitution and its transformative vision.[121] This approach is at odds with the purpose of the Companies Act, which acknowledges constitutional supremacy and the role of the Constitution within corporate law.[122] The challenge with the methodology in *Ex Parte Gore* is that it deprives private law of an opportunity to showcase how private law exists as part of a much larger single system of law that is only subject to constitutional control.[123] It is this defective approach of denying private law of constitutional influence that Zitzke would aptly term as 'constitutional avoidance'.[124]

The Constitution has a clear role in interpreting the statutory veil piercing. For example, the matter of lack of recourse for delict claimants should not be viewed as purely a matter of corporate law subject to s 20(9). Rather, this matter ought to adequately take into account the delict claimant's right to remedy as per s 38 of the Constitution, which guarantees effective remedy. Thus, by cutting off statutory interpretation from the Constitution, our courts risk

[117] See evaluation of the primary basis of when courts are willing to apply the statutory veil piercing in Olivier op cit note 75 at 375.
[118] See discussion of the need to read company law in line with the Constitution in BM Mupangavanhu 'Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008' (2019) 22 *Potchefstroom Electronic Law Journal* 2.
[119] See Olivier op cit note 75.
[120] Ibid.
[121] For discussion of the intersection of private law and transformative constitutionalism see D Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3; see also M Madlanga 'The human rights duties of companies and other private actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359.
[122] Section 7(a) of the Companies Act; see discussion of this provision in Mupangavanhu op cit note 118 at 5.
[123] For discourse on the single system of law see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44.
[124] E Zitzke 'Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development' (2015) 7 *Constitutional Court Review* 259 at 259.

losing sight of key considerations contained in our Constitution. Such an approach thus contradicts the clear role of the Constitution, as argued in Chapter Two.

Before the decision in *Ex parte Gore*, Stevens had already identified the challenges associated with the common law doctrine of veil piercing.[125] In response to the challenges associated with the doctrine, Stevens suggested that the Companies Act should incorporate a separate provision within its ambit that creates a clear and transparent delictual basis of group liability.[126] This is a sound suggestion, but to date, there is no indication from the legislator or case law that it is under consideration.[127] Steven's suggestion for statutory reform on this matter has thus not been answered.

In foreign law, empirical studies conducted by Thompson also show that experience in the United States shows that courts in that jurisdiction are less willing to pierce the veil where delict claimants are concerned.[128] Similarly, although without empirical evidence, Cheng argues that courts in the United Kingdom have taken a very conservative approach to delict claimants in terms of permitting the application of the doctrine of veil piercing in that jurisdiction.[129] South Africa is thus likely to follow this trend based on the current approach to statutory veil piercing, which is influenced by English law.[130] The current challenges of group liability in South African corporate law, in my view, necessitate an evaluation of group liability in delict.[131]

In section 1.2.5 of Chapter One, I argued that one of the potential paths to rectify delict-based corporate group liability was to evaluate whether the corporate and the Companies Act could resolve this challenge. My findings in section 3.2 show that there are circumstances where corporate law can come to the aid of delict claimants. However, section 3.2 also noted a number of challenges with the statutory veil piercing, which justifies an inquiry into whether this problem ought to be addressed from the perspective of the law of delict.

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[125] Stevens op cit note 3 at 281–8.
[126] Ibid.
[127] Ibid.
[128] RB Thompson 'Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors' (1998) 13 *Connecticut Journal of International Law* 379 at 385–8.
[129] Cheng op cit note 54 at 341.
[130] See, for example, *Ex Parte Gore* supra note 102 para 1, 4, and 20 discussing *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5 a case from the United Kingdom.
[131] The evaluation of these three areas of private law is primarily guided by the case discussion structure in Stevens op cit note 3 at 185–203.

3.3 Group liability in delict

In terms of delictual options, the first basis of liability that can be used by claimants is a delict-specific statute.[132] My position is that this may be a viable pathway for group liability where a specific statute protects a right and there is a basis within such statute for a claim. This thesis acknowledges the viability of a statutory solution but does not evaluate this option.

The second option available to delict claimants is to pursue the common law option. In what follows, I will engage the case law in delict that has dealt with group liability and evaluate the approach that has been taken by the courts here. In Chapter Four, I then embark on a systematic evaluation of all the options that would be available to delict claimants.

3.3.1 Wambach (AD)

The dispute in *Wambach* was based on the following facts.[133] In September of 1987, Wambach was driving his bakkie on a highway when he hit a car driven by an employee of Maizecor Industries (Pty) Ltd (MI). The accident caused significant harm to MI's vehicle. As a result, MI sued Wambach for negligence and damage to the car in the court a quo. The claim was successful, and MI was awarded R76 567 20 in damages.

Wambach, unhappy with this ruling, appealed to the Appellate Division. At the Appellate Division, the critical question was the identity of the owner of the vehicle that Wambach collided with. Wambach argued that MI was not the owner of the car and had no locus standi to sue. In effect, Wambach argued that if MI is not the real owner of the vehicle, the question of negligence becomes irrelevant. The car was registered under Maizecor Bemarkingsmaatskappy (Pty) Ltd (MB) in terms of a hire purchase agreement and not in MI's name. For tax purposes, the car was also considered an asset in the name of Silgro Voere (Pty) Ltd (SV). To complicate things further, all three companies were part of the Maizecor Group,

[132] For example, statutory delictual liability as per Section 8 of the Civil Aviation Act 13 of 2009; Section 108 of the Post and Telecommunications-related Matters Act (previously Post Office Act) 44 of 1958; Section 17 of the Genetically Modified Organisms Act 15 of 1997; Section 30 of the National Nuclear Regulator Act of 47 of 1999; Section 61 of the Consumer Protection Act 68 of 2008; Section 99 of the Protection of Personal Information Act 4 of 2013; Section 60 (1) of the South African Schools Act 84 of 1996; see the complete discussion of these statutes in J Neethling & JM Potgieter *Law of Delict* 8ed (2020) at 456–9; M Loubser et al *The Law of Delict in South Africa* 3ed (2017) at 541–65.

[133] *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (AD).

and the plaintiff, MI, was the group's holding company. MB and SV were, therefore, subsidiary companies within the Maizecor Group.

The Appellate Division in *Wambach* was tasked with answering the question of whom, within the Maizecor Group, was the real owner of the damaged vehicle. The Appellate Division ruled that the court a quo should have granted absolution from the instance because MB is the only prima facie contracting party for the sale of the vehicle.[134] This means that only MB can sue Wambach for the damage to the car.

The decision of the Appellate Division in *Wambach* was correct because MB was the company that had purchased the vehicle, and only its name was on the sale agreement. The only logical reason MI argued it was appropriate to sue on behalf of MB is that MI was under the impression that the law recognised the Maizecor Group as a single enterprise and allowed it to sue on the group's behalf.

The parent's logic in *Wambach* is that the parent company considers itself a single enterprise alongside its subsidiary company. The court rejected the request by the parent company in *Wambach* because it violates traditional principles of corporate law. Therefore, the Appeal Court's approach to corporate groups in *Wambach* shows that the court is strictly aligned with entity law principles, namely separate legal personality and limited liability. As it stands, courts dealing with delict matters in South Africa do not recognise enterprise liability. For delict claimants, this case shows that in delictual matters where there is a request to pierce the corporate veil for delictual harm, the odds of success are likely slim.

3.3.2 Nkala

In Chapter Two, I argued that a parent company in the position of Anglo America in the *Nkala* would be bound to the dispute.[135] For present purposes, *Nkala*, as part of the procedural aspects of the case, held that the parent companies in question were to be part of the class action and equally answerable for the harms in question.[136] What guided the court in *Nkala* to come to this conclusion was driven by enterprise logic. The court makes several points that show that it was guided by the business and economic reality of the relationship between the subsidiary

[134] *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (AD) para 7–12.
[135] See discussion of the facts in section 2.4.1 of Chapter Two discussing *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ).
[136] Ibid *Nkala* para 71.

companies and the parent companies as opposed to the legal form of the respondents. The court pointed out that the parent company exercised authority over the subsidiary company.[137] The parent authority was evident in how the subsidiary company followed the parent's directions on matters about the mineworker's health and safety protocols at the company.[138] The parent company went beyond just guidance and directing the health and safety processes of the subsidiary.[139] The parent company actively participated in the implementation of its health and safety guidelines in the subsidiary's business.[140] Considering the above factors, the court ruled that: 'Parent companies on the whole, would have to engage with all this evidence, which the mineworkers intend to lead in one trial action only'.[141] The court's ruling was that all the parent companies of the mines in question would need to be added to this class action as a defendant alongside their subsidiary companies. The case was thus allowed to proceed on the merits.

The *Nkala* case is a welcome progressive case that aids in developing a path for group liability in delict. However, a significant limitation remains. The case dealt only with the procedural matter of class action and not on the case's merit on substance. This means that the principles of delictual liability in South Africa have not yet been tested in factual situations and on the case's merits. In the Bhopal disaster and after years of litigation, the case was eventually settled, depriving the law of answers to how the courts would have dealt with delict-based group liability. Similarly, to date, the *Nkala* settlement deprived the law of delict with the perfect factual scenario to test which applicable laws ought to guide group liability in delict.

The crucial lesson for delict claimants that can be drawn from *Wambach* and *Nkala* is that there is no fixed position on whether a court dealing with a delictual matter can pierce the veil in group cases. Further, there appears to be a schism between the two decisions on corporate groups in delict. On one hand, *Wambach* appears to be well aligned with entity law principles, whereas *Nkala* is aligned with enterprise law principles.

In section 1.2.5 of Chapter One, I argued that the common law of delict may be capable of providing delictual claimants with a viable avenue for legal recourse against corporate groups. My findings in section 3.3 of this chapter show that there is no clear position on the matter of

[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.

corporate group liability in delict.[142] This thus, represents a gap in the law of delict. This gap necessitates exploring whether the law of delict requires legal development. As per *Mighty Solutions*, when one is considering the development of the common law, an initial starting point is to '(a) determine exactly what the common law position is'.[143] It is submitted that sections 3.2 and section 3.3 have established the legal position of delict based corporate group liability in both corporate law and in delict. From a South African law perspective, Steven's research has shown that a key private law area that has dealt with corporate group liability is labour law.[144] I argue that in order to proceed, it is crucial to draw lessons from this area of South African private law.

3.4 Group liability in labour law

As stated, Stevens identifies several labour law cases decided by South Africa's specialised labour courts that dealt with corporate group liability.[145] These cases showcase that from as far back as the 1980s, where South African labour courts have been grappling with the challenges of group liability. In these cases, the courts were mainly asked to answer whether an employee could hold more than one company liable for labour violations if that company was part of a group. Essentially, these labour courts were asked to answer questions about what we might call group liability for labour violations.

Stevens makes two key observations after the evaluation of these labour cases. Firstly, labour cases have failed to develop clear guidelines for when they are willing to pierce the veil of companies in a corporate group where labour violations occur.[146] Secondly, there is evidence of the use of enterprise logic as a basis for labour law liability.[147] My view is that there is a necessity for a second review of these labour cases but from the perspective of evaluating

[142] For a literature review that indicates that the law of delict has not yet dealt with corporate group liability see J Brickhill & Z Mbuyisa 'Multinational Company litigation - South Africa' in Meeran R (ed) *Human Rights Litigation against Multinationals in Practice* (2021) ch 4 at 95 and 97.
[143] *Mighty Solutions CC ta Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para 38.
[144] Stevens 185–94; In section 3.4, I follow Stevens' structure of looking at labour law cases in South Africa. I, however, add one new case to this initial study the case of *Mohlotsane v Mobile Telephone Network (Pty) Limited* (2013) JOL 31073 (LC); see also another case that is mentioned in section 3.4 which is *Public Investment Corporation Ltd v Bodigelo* (128/2013) 2013 ZASCA 156 taken from the literature review in R Stevens 'Kuwait Asia Bank EC v National Mutual Life Nominees Ltd revisited: the possible vicarious liability of a holding company for the delicts caused by its nominee directors on the board of its subsidiary' 2019 *Journal of South African Law* 78 at 84.
[145] Ibid.
[146] Stevens op cit note 3 at 206.
[147] Ibid.

lessons for delict claimants. I submit two reasons why there is utility in these labour cases for delict claimants.

Firstly, if these labour cases have indeed utilised enterprise logic as suggested, why have they done so? More importantly, how have they gone about such development? These questions are important because there is a trend in foreign law to observe the strict adherence towards entity law principles. Labour courts may thus have unexplored lessons for the enterprise basis of liability. The need for such a review is strengthened because of *Mohlotsane,* a recent case in labour law that has also dealt with group liability.[148] Another recent case under this section is *Bodigelo.*[149] This labour case does not deal with corporate groups, but my review indicates that it may shed further light on future possibilities as it pertains to group liability in South Africa. There is, thus, potentially new jurisprudence in labour law that may shed light on corporate group liability in South African law.

Secondly, if there are some crucial unexplored lessons in these cases, can they lead the way for the future development of group liability in other areas of South African law, such as delict.[150] This is an important question, given that I have already observed that the statutory veil piercing may not be an adequate remedy for some delictual matters. It is because of these two reasons that I revisit Steven's labour cases and argue that there are potential lessons that they hold that may aid the understanding of how South African courts have navigated group liability to date.

3.4.1 Media Workers

Media Workers was decided by Fabricius J in 1986.[151] In this case, a few employees were dismissed following what the employer termed a strike, and Fabricius J was tasked with deciding whether this was a fair dismissal. But before Fabricius J could decide on the fairness of the dismissal, a preliminary issue had to be decided as to who had been the real employer of

[148] *Mohlotsane* supra note 144.
[149] *Public Investment Corporation Ltd v Bodigelo* (128/2013) 2013 ZASCA 156; see further discussion of potential for group liability in Stevens op cit note 141 at 84.
[150] See preliminary work that considers how the law of delict ought to approach corporate group liability in South Africa R Stevens 'Circumventing veil piercing: possible delictual liability of a holding company to a creditor of its insolvent subsidiary' (2013) 24 *Stellenbosch Law Review* 93; see also my study of the problem in T Mafulela *The possible extension of vicarious liability to cover relations between holding companies and their subsidiaries: Is it plausible and desirable under South African Law?* (LLM research report, University of Witwatersrand, 2018).
[151] *Media Workers Association of SA, The & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 ILJ 313 (IC) at 314.

these dismissed employees.[152] My position is that the answer to this latter question carries insight into how the courts approach questions of group liability in labour law.

In their pleadings, the employees cited two companies that were 'closely associated companies' as the first and second respondents.[153] At trial, the first respondent contended that it had been wrongly cited as a party to the dispute because at no point in time had it been the employer to the applicants.[154] The first respondent also argued that they were, in reality, a separate, distinct company unrelated to the affairs of the applicants.[155] The employment relationship between the second respondent and the applicants was clear, and no contention was raised against adding this entity to the dispute.

The applicants disagreed with the first respondent's contention. They insisted that the factual reality of the relationship between the applicants and the first respondent amounted to an employer-employee relationship.[156] The applicants allege that Mr Kuiper, who was at the time the managing director of both respondent companies, conducted the affairs of both companies in a way that created an impression that the two juristic entities were, in fact, a single organisation under one controlling mind.[157] The applicants explained it as 'Mr Kuiper's business operated as an indivisible unit and that the indiscriminate guise of particular companies whether in existence or not was merely an aspect of his modus operandi'.[158] The applicants urged Fabricius J to 'look to justice and to the real cause of any dispute and the real nature of the transaction beyond the mere professions of any particular party'.[159]

Fabricius J read the applicant's case as a request by the applicants that it should pierce the corporate veil of the associated companies to assign liability to the persons who managed and owned the companies.[160]

Fabricius J, after considering 'a well mixed blend of common sense and a sense of equity', 'overwhelming impression' and the 'realities of the situation'[161] found that the first respondent

[152] Ibid.
[153] Ibid. The facts of the case do not indicate whether the companies were in fact in a holding/subsidiary relationship, or they were just simply related companies. The impression that is created from the description given is that they were simply related companies. The term used by the court is 'closely associated companies'.
[154] Ibid at 314–15.
[155] Ibid
[156] Ibid
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid.

was also an employer of the applicants alongside the second respondent. Fabricius J appears persuaded by the applicant's argument that the two entities were intimately integrated in all the respects mentioned by the employees. Fabricius J's assessment here was informed by enterprise logic.

Fabricius J also clarified that the first respondent's liability is 'not strictly speaking amount to a 'piercing of the corporate veil''.[162] Stevens argues that this approach lacks clarity and amounts to: 'The court sidestepped having to deal with piercing of the corporate veil'.[163] I agree with Stevens that Fabricius J did not sufficiently clarify why the judgement did not constitute a piercing of the corporate veil. I do, however, think that Fabricius J's approach was correct, and piercing the corporate veil would have been inappropriate in the matter. The crucial question before Fabricius J was whether the first respondent was an employer of the applicants. The focus was thus correctly placed on this relationship. Piercing the corporate veil would have required a different approach. It would have required an assessment of looking through the first respondent to assess the activities of the second respondent. This, in my view, would have been the wrong focus point. Fabricius J indeed considered the intimate relationship between the first and second respondents. It is, however, submitted that the learned judge only did so to evaluate the true nature of the relationship between the applicant and the first respondent. In that sense, Fabricius J was correct not to focus on piercing the corporate veil, as argued by Stevens.

Another approach could have aided Fabricius J's assessment of whether the first respondent was the employer of the applicants. Several tests already exist in labour law that are employed to evaluate whether there is an employment relationship between two parties.[164] For example, the dominant impression test looks at some factors, including the right to supervise work, the level of independence when tasks are performed, who supplies the tools for work and the right to discipline.[165] The dominant impression test and its underlying factors would have been easy

[162] Ibid.
[163] Stevens op cit note 3 at 186.
[164] R Oberholzer & J Christiaan Beer 'A Critical Analysis of the Concept of an Independent Contractor in South Africa' (2006) 39 *De Jure* 664 at 667–73.
[165] Ibid; *Stein v Rising Tide Productions* CC [2002] 2 All SA 22 (C) at 28. Some academics identify different tests based on a reading of case law. For example, Neethling-Potgieter at 446, based on a reading of *Midway Two Engineering & Construction Services BK v Transnet Bpk* 1998 (3) SA 17 (SCA), para 23, argues that the courts have since moved from the dominant impression test to a separate multifaceted test. On the other hand, K Newaj 'Re-evaluating the employment status of Uber drivers in South Africa: lessons from the United Kingdom and New Zealand' (2023) 55 *Comparative and International Law Journal of Southern Africa* (2 & 3) 1 at 6 cites *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC) para 10 were the court cites the 'reality test' as the true test of evaluating who the real employer is for the purposes of liability. For the purposes of this thesis, I argue that whichever term is used is the true test. What matters is that courts must

to assess in the facts before Fabricius J. But to be clear, this is not the legal reasoning that the judge used in this case.

There are some clear lessons from *Media Workers* for delict claimants. The first is that the courts in labour matters do take into account the business and economic reality of two intimately tied corporations for liability. Secondly, liability for such entities does not always have to rely on the piercing of the corporate veil but can be established through the direct responsibility of those two or more organisations.

3.4.2 SA Allied Workers

A year after the *Media Workers* case, the *SA Allied Workers* case was decided by John J in 1987.[166] In *SA Allied Workers,* John J also had to decide on a preliminary question as to who the true employer of applicants was and who was alleging a breach of labour law regulations. In this case, an 'umbrella company' disputed its labour law liability on the basis that it had no relationship with the applicants. The applicants coined a phrase that constituted the basis of their argument: *'*in mind and management, the first and second respondents are one and the same'.[167] To support their view, the applicants presented several facts to the court. These facts spoke to the nature of the relationship between the two respondents, showing how these two juristic persons were, in reality, one company. The main shareholder in the first respondent also has the most significant shareholdings in the second respondent.[168]

The two respondents presented a single persona to the world.[169] This can be seen from the business brochure they collectively distributed, which, according to the applicants, created an impression that the businesses were working as a single company.[170] Parts of the brochure would read 'our people' and mention all the employees that belonged to all four companies that make up the group.[171] The applicants also drew similarities with the *Media Workers* case.[172] They asserted that the employees of all the companies in the group would offer the same service and were located on the same premises.[173] At times, the management within the

take into account the holistic nature of the relationship, and in this thesis, the preferred term is the dominant impression test.

[166] *SA Allied Workers Union & others v Contract Installations (Pty) Ltd & another* (1988) 9 ILJ 112 (IC).

[167] Ibid at 112.

[168] Ibid 114–16.

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] Ibid.

group would be interchangeable and very fluid.[174] The respondents denied that the group operated as a single entity and dismissed some of the applicants' arguments as 'meaningless and incomprehensible'.[175]

John J agreed with the applicants and appears to have been guided by a sense of equity and enterprise liability logic in the decision as to why the corporate group is liable for the labour violations. The judge was particularly impressed by the phrase 'in mind and management, the first and second respondents are one and the same'.[176] John J calls it a 'colourful phrase neatly summarises the factual position'.[177] John J also shows influence from enterprise logic because he relies on the *DHN* case, and as stated, *DHN* is a primary authority for enterprise liability.

Stevens correctly takes issue with the fact that John J primarily relies on equity and enterprise considerations to make a ruling on the liability of two separate entities.[178] I agree with Stevens that the ruling was faulty, but for additional reasons. The primary challenge is that John J strayed further away from the lessons from *Media Workers.* Companies can be intimately related in terms of their activities, but this alone is not a sound basis for legal liability. What courts ought to do is still evaluate and focus on the separate relationships in question before making a finding on liability.

Evaluating relationships separately, as per the approach in Media Workers, has two advantages. Firstly, it allows courts to avoid the troubles associated with piercing the corporate veil, and secondly, it also fully respects the separate personalities of the companies in question. These advantages are evident because, in scenarios where more than one juristic entity is found to be an employer, the court can simply state so without having to pierce the veil of the entities in question. Thus, this respects treating companies separately because liability is based on each entity's relationship with the applicant, and it also avoids having to deal with aspects around piercing the corporate veil.

There are some clear lessons from *SA Allied Workers* for delict claimants. Labour cases are not strictly constrained by entity law principles, namely separate personality and limited liability. Even though how they interpret these principles is faulty, there is a clear indication that they take into account enterprise logic and equitable outcomes. *SA Allied Workers* also shows that

[174] Ibid.
[175] Ibid.
[176] Ibid at 114–15.
[177] Ibid at 115.
[178] Stevens op cit note 3 at 187–8.

labour courts do not focus on utilising the piercing of the corporate veil as the preferred doctrine for corporate group liability.

3.4.3 Paper Printing Wood

Two years after the *SA Allied Workers* case, *Paper Printing Wood* was decided by Ehlers J in 1989.[179] This case involved facts that share a resemblance with the first two mentioned cases in labour law. As part of the matter, Ehlers J had to examine a preliminary question of whether the parent company was also the applicant's employer for labour law purposes.

Before deciding on the matter, Ehlers J described the principles explained in both *SA Allied Workers* and *Media Workers.* Ehlers J ruled in favour of the applicants.[180] The finding was that it would be equitable for the parent company to be jointly and severally liable alongside the subsidiary company for any labour non-compliance.[181] The ruling in favour of the applicants was based on the fact that Kaycraft, the subsidiary in question, was wholly owned by Sterns, the parent company that was cited as the second respondent.[182] At some stage, the labour union representing the applicants had entered into a recognition agreement with Kaycraft and Sterns.[183] According to the records before Ehlers J, this agreement had been negotiated by one of the directors of Stern and on behalf of both the subsidiary company and the holding company.[184] Through their claim, the applicants persuaded the judge that all the critical strategic decisions were being made at the level of the holding company, including the decision to close the subsidiary company and, with it, the result of having to dismiss the applicants from their employment.[185]

Lastly, Ehlers J took into account a key clause in the abovementioned recognition agreement that stated, 'Those affected employees will be advised that every effort will be made to redeploy them in other areas of the group'.[186] Ehlers J's view of this clause was that 'it would appear that both companies incur liability in event of retrenchment'.[187] Based on all these factors,

[179] *Paper Printing Wood & Allied Workers Union & others v Kaycraft (Pty) Ltd & another* (1989) 10 ILJ 272 (IC). There are two judges in this case Ehlers J and Basson J but for simplicity I only refer to Ehlers J.
[180] Ibid at 283–4.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.

Ehlers J found it equitable to hold the parent company jointly and severally liable for the dismissals.[188]

The factors considered by Ehlers J in the *Paper Printing Wood* case clearly show that the court was primarily persuaded by the business and economic reality of the relationship between Kaycraft and Sterns. The most unambiguous indication that enterprise logic was guiding Ehlers J on the reliance on the precedent set in the English case of *DHN.*[189] *DHN* is one of the few cases that have acknowledged and used enterprise logic to create group liability.[190] Ehlers J made the following statement, which clearly shows that the learned judge was influenced by enterprise logic:

> 'In conclusion, the court is of the opinion that it would prima facie be fair not to treat the second respondent, Sterns, as the holding company, and the first respondent, Kaycraft, as the wholly owned subsidiary of Sterns, separately so as to succeed on a technical point'.[191]

There are some lessons from *Paper Printing Wood* for delict claimants who wish to seek legal recourse against corporate groups. There is clearly a trend of labour cases that prioritise equity considerations and enterprise liability logic as far as corporate group liability is concerned. Further, labour cases are also equally not strictly applying core corporate law principles such as separate personality and limited liability in their deliberations on group liability. This shows a different approach to corporate group liability than the one in corporate law that is focused on statutory veil piercing.

3.4.4 Boumat Ltd

The *Boumat Ltd* case was decided by Goldstein J in 1992.[192] *Boumat Ltd* is another matter where a preliminary part of the dispute concerned who constituted an employer for labour law violations. In this matter, Boumat Ltd was a controlling company for the Boumat Group.[193] The Boumat group consisted of several related companies, including Plumbware Eastern Cape (Pty) Ltd (Plumbware). The applicant, (Mr Vaughan), was appointed as the Managing Director of Plumbware Eastern Cape (Pty) Ltd by one William Nicholas.[194] Not so long after his

[188] Ibid.
[189] Ibid at 282–84.
[190] Ibid at 282 discussing *DHN Food Distributors Ltd* supra note 62 at 6; see also Stevens op cit note 3 at 95–7.
[191] Ibid.
[192] *Boumat Ltd v Vaughan* (1992) 13 ILJ 934 (LAC). Goldstein J was sitting with Landman J and Strydom J, however, for simplicity, this discussion will only refer to Goldstein J.
[193] Ibid at 935–6.
[194] Ibid.

appointment, the Boumat Group sought to terminate Vaughan's employment owing to the poor performance of the companies under his care.[195] With this background, Goldstein J was asked to determine the real employer of Vaughan.[196]

Counsel for Boumat Ltd insisted that Vaughan was only under the employ of Plumbware and not the holding company, Boumat Ltd.[197] Boumat Ltd's counsel also insisted that any finding that created an employment relationship between Vaughan and Boumat Ltd would constitute a violation of the principle of the corporate separateness between Plumbware and Boumat Ltd.[198] Boumat Ltd's counsel based his position on the fact that the contracts of employment were only signed between Plumbware and Vaughan.[199] Counsel insisted that because of all these facts, Goldstein J was not entitled in these circumstances to ignore the separate juristic personality of the companies within the group.[200] In response, Goldstein J stated the following:

> 'There is merit I think in Mr Loxton's answer to this. He submitted on behalf of Vaughan that the evidence in the record indicates a contractual relationship of employment between Boumat Ltd and Vaughan and that there is no evidence of a contractual relationship of employment between Vaughan and Plumbware. Certainly there is very little evidence of such a relationship. The record is silent, for example, as to who acted for Plumbware when such a relationship came into being and as to when and where such a relationship was born. I see nothing wrong in principle with A employing B to found a company C and run it as managing director without B ceasing to be in A's employ. Moreover, in my view it is clear that Vaughan assisted Boumat Ltd in carrying on or conducting its business. Clearly, Boumat Ltd's business was to generate profits through its control of companies within the group including Plumbware. Both Vaughan and Boumat Ltd thus satisfy the requirements contained in the underlined portions of the definitions I have quoted'.[201]

Goldstein J, in the *Boumat Ltd* case concluded that the holding company was equally answerable alongside its subsidiary for any labour law violations that may have taken place.[202] The holding company's liability was based on Goldstein J's finding that both the holding company and the subsidiary company were employers of the managing director of one of its

[195] Ibid.
[196] Ibid.
[197] Ibid at 938.
[198] Ibid.
[199] Ibid 938–9.
[200] Ibid.
[201] Ibid at 938–9.
[202] Ibid.

subsidiaries.[203] In arriving at this conclusion, Goldstein J relied on a reading of who constitutes an employer and employee in s 1 of the Labour Relations Act no 28 of 1956 (LRA 1956).[204] The LRA 1956 permitted a single employee to have more than one employer so long as both employers met the ambit of what constitutes an employer. According to s 1 of the LRA 1956, an employer is anyone 'whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate'. This provision has now been replaced by s 213 of the LRA 1995, which provides that an employee is:

> '"employee " means – (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee"'.

As per s 1 of LRA 1956, Goldstein J held that Boumat Ltd had sufficient control of Vaughan's work and remuneration for the learned judge to conclude that Boumat Ltd was a second employer of the applicant.[205] Goldstein J also found that Boumat Ltd conducted its affairs through the whole corporate group and that Boumat Ltd also extracted profits from the entities under its control.[206] All of these factors and considerations persuaded Goldstein J that Boumat Ltd ought to be equally responsible for the labour violations.

The *Boumat Ltd* case does not mention the role of equity, nor does it rely heavily on the precedent set in the cases that preceded it.[207] Instead, Goldstein J depends more on the definition of employer-employee as per s 1 of the LRA 1956.[208] Goldstein J's judgement, therefore, breaks from early judgments that relied heavily on enterprise liability informed by a court's sense of equity to ground group liability. Goldstein J also does not discuss whether its ruling amounts to the piercing of the veil.

Goldstein J's reliance on the LRA 1956 provides a much more stable legal footing from which to ground the basis of corporate group liability in labour law than in the earlier labour cases.[209] Goldstein J's reliance on the LRA 1956 is also sound because it removes the need for a court

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[203] Ibid.
[204] Section 1 of the Industrial Conciliation Act 66 of 1956 (LRA 1956) which defined an employee, has since been replaced by s 232 of the Labour Relations Act 66 of 1995 (LRA 1995).
[205] Ibid.
[206] Ibid.
[207] Precedent set in the earlier the cases of *Media Workers, SA Allied Workers,* and *Paper Printing Wood.*
[208] Ibid
[209] The earlier cases are *Media Workers, SA Allied Workers,* and *Paper Printing Wood.*

to address questions of the implications of limited liability or piercing of the corporate veil. This is because the holding company's liability is not based on piercing the veil but on the parent's direct liability as a recognised employer in terms of the LRA 1956. There is, therefore, no limitation on the holding company's right to limited liability. Goldstein J's reliance on the LRA 1956 is sound because there is no need to rely on a court's sense of equity or an unacknowledged enterprise liability logic. Lastly, Goldstein J's basis of liability is pragmatic in that it provides a legal path for an equitable result for group liability without unduly disturbing key corporate law principles, such as the separate legal personality of companies in corporate groups.

For delict claimants, the key takeaway from *Boumat Ltd* is that there are scenarios where corporate group liability can be successfully established from a statutory basis other than the statutory veil piercing as per s 20(9) of the Companies Act. In scenarios where such an option exists, it ought to be pursued.

3.4.5 Sage

Two years after *the Boumat Ltd* case, *Sage* was decided by Shear J in 1994. As with all the other cases of this nature, the court had to decide on a preliminary point regarding who was the employer of the applicant. This was before delving into the substantive matters of the case. *Sage* shares several similarities with the cases that preceded it in this area of the law. In *Sage*, the corporate group in question was named Fourwinds Group of companies. Within the Fourwinds Group, there were about ten companies. From 1983 until 1993, the applicant worked in different capacities for three companies in the Fourwinds Group. The applicant was a manager for the whole group and had been employed in sales as part of Fourwinds Transport Co (Pty) Ltd (Fourwinds Ltd), the respondent in this case. The other relevant company that the applicant had worked for was Fourwinds International (Pty) Ltd (International). In the applicant's eyes, he was employed by both Fourwinds Ltd and International and was thus of the view that both companies should be collectively responsible for any labour law violations. Fourwinds Ltd insisted that International was the only applicant's employer at the time of the retrenchment, and it alone should be a party to the proceedings.

To determine the nature of the relationships in question, Shear J considered the following key pieces of evidence: The applicant continued to receive his salary from the respondent even after

the time when Fourwinds Ltd claimed the applicant was no longer under his service.[210] The applicant's severance package was also drawn from Fourwinds Ltd bank accounts. Fourwinds Ltd claims this was done for tax purposes.[211] Also, when the applicant was supposed to be under the sole employ of International, the applicant contends that emails from Fourwinds Ltd created an impression that he was still responsible for reporting to Fourwinds Ltd.[212]

Based on the above considerations, Shear J stated that none of the above considerations create a conclusive picture of the applicant's real employer. Shear J found that it was acceptable business practice for another company to be responsible for the salaries of an employee and another for his work.[213] Further, there was nothing particularly conclusive that there was a culture of shared workspaces and facilities between International, Fourwinds Ltd, and the applicant.[214] Shear J's assessment of the evidence pointed towards a conclusion that only International was the real employer of the applicant at the time of retrenchment. However, Shear J then conclusion the following instead:

> 'However, when read together, the totality of evidence would certainly lead one to a picture of not such a rigid line between the respective companies within the group. It may be rigid from a pure legal or accounting point of view, but from the point of employees, and even management, going about their daily business, I am not so certain that the distinction is as rigid as respondent would have me believe'.[215]

Shear J's response shows hesitation in coming to a single conclusion. It is still unclear whether Shear J was regarding Fourwinds Ltd as the applicant's employer or not. It is the eventual ruling on the fairness of the retrenchment that Shear J finds that Fourwinds Ltd was ultimately held liable for the unfair retrenchment in question.[216] In my view, Shear J's approach to the question of who the real employer is in the *Sage* case is confusing, given that *Boumat Ltd* had elaborated a clear path forward on how the courts in labour law ought to deal with the question of group liability. For delict claimants, *Sage* introduces uncertainty because Shear J does not commit to a clear and stable position on the approach to be taken in group liability.

[210] *Sage v Fourwinds Transport Co (Pty) Ltd* (1994) 15 ILJ 1149 (IC) at 1152.
[211] Ibid.
[212] Ibid.
[213] Ibid at 1153.
[214] Ibid.
[215] Ibid.
[216] Ibid at 1160.

3.4.6 Board of Executors Ltd

The *Board of Executors Ltd* judgment was decided by Satchwell J in 1997.[217] In many ways, this case is also like all the other labour cases dealing with group liability that came before it. Satchwell J had to decide on who the real employer of the applicant was within a corporate group. Four related entities were tied to these proceedings. Board of Executors Ltd (BOE Ltd) was incorporated in 1987 and was set up to hold the Board of Executors 1838 (BOE 1838). BOE 1838 was thus a wholly owned subsidiary of the applicant BOE Ltd. BOE Ltd also wholly owned another subsidiary company, Board of Executors Merchant Bank (Pty) Ltd (BOEMB). Together, these companies, termed as the BOE group were among the respondents in the dispute.

In this case, Mr. McCafferty, the respondent, was employed by three companies within the BOE Group. In the court a quo, the BOE Group had attempted to make the case that only BOEMB was the employer of Mr. McCafferty.[218] The court a quo held that even though Mr McCafferty's contractual relationship was with BOEMB, it was, in fact, the holding company BOE Ltd that had authorised the retrenchment of the respondent on behalf of the BOE Group.[219] The ruling in court a quo was based on a similar approach to *Media Workers, SA Allied Workers,* and *Paper Printing Wood.* The court a quo in *Board of Executors Ltd* relied on a sense of equity grounded in enterprise liability logic.[220]

Unsatisfied with the court a quo's outcome, BOE Ltd appealed to the Labour Appeal Court before Satchwell J.[221] The question before Satchwell J was to decide on who Mr McCafferty's real employer was at the time of his retrenchment. Satchwell J considered who is an employee as per s 1 of the LRA 1956. Satchwell J then relied on the common law tests used in labour law to further assess if there is an employment relationship between two parties. The first common law test was the right of the employer to supervise and control the employee. The second common law test is termed the dominant impression test. According to the dominant impression test, the court must conduct a balancing assessment of 'those factors which may

[217] *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC).
[218] Ibid at 953–61.
[219] Ibid.
[220] Ibid at 953.
[221] Ibid. Satchwell J, sitting with Antrobus and Mpofu, Assessors. For ease of reference, I will only mention Satchwell J.

tend to indicate the object of the contract'.[222] Satchwell J also mentioned that the terms of the contract can also indicate the nature of the relationship that the parties envisaged.[223]

Based on s 1 of the LRA 1956 and the three common law tests, Satchwell J ruled that BOE Ltd was Mr McCafferty's employer at the time of his retrenchment. The following evidence was used as the basis for this ruling. From the onset of his employment, Satchwell J found that Mr McCafferty always 'functioned physically and practically within the environs of BOE 1838'.[224] Accordingly, he was 'under the day-to-day control and supervision of BOE 1838 personnel'.[225] Mr. McCafferty's employment benefits were managed under a 'generic titled BOE'.[226] During Mr McCafferty's time at BOE Ltd and later at BOEMB, BOE Ltd had given him shares as part of his incentives and remuneration. The regional group director and not the representatives of BOE Ltd informed Mr McCafferty that his employment with BOEMB was being terminated. The arrangements for this termination of employment were also handled by representatives of the group and not of BOEMB. Satchwell J concluded that Mr McCafferty's work was under the direction of both BOEMB and BOE Ltd. Satchwell J further found that it was BOE Ltd and not BOEMB that ultimately decided to terminate his employment. Based on all these key factors, Satchwell J found that at the time of his retrenchment, Mr McCafferty had been under the employ of both BOEMB and BOE Ltd. Satchwell J concluded as follows:

> 'I have referred throughout this judgment to all the factors which may, if taken together, indicate there was indeed an employment relationship between respondent and each of BOE 1838, BOEMB and BOE Ltd. The dominant impression is that there were three employers of respondent at the relevant time. Insofar as BOE Ltd is concerned, BOE Ltd was the employer which exercised the ultimate control over respondent's employment and determined that his productive capacity was no longer required by 'the organization' and which then acted upon that determination by officially conveying that decision and thereafter facilitating its implementation'.[227]
>
> 'It is beyond doubt that it was appellant, BOE Ltd, which terminated the employment of respondent. The correspondence speaks for itself. The surrounding facts admit of no other interpretation'.[228]

[222] Ibid at 955.
[223] Ibid.
[224] Ibid at 967.
[225] Ibid.
[226] Ibid.
[227] Ibid at 970.
[228] Ibid at 967.

Satchwell J, therefore, concluded that the respondent had three employers, including the holding company, BOE Ltd. This means that BOE Ltd was equally answerable alongside its subsidiary for the unfair retrenchment.

In my view, *Board of Executors Ltd* presents the best engagement of group liability in labour law.[229] There are three main reasons why I assert this. Firstly, Satchwell J did not rely on equity and enterprise liability as per *Media Workers*, *SA Allied Workers,* and *Paper Printing Wood* as the primary basis of group liability. Rather, Satchwell J only used these considerations to inform the reading of existing statutory provisions and common law tests. This, in my view, is the best approach for group liability. As stated, when equity and enterprise considerations are used as the primary basis of group liability, they risk unduly destabilising settled corporate law principles such as separate personality and limited liability.

There is another reason why *Board of Executors Ltd* is an ideal case precedent on group liability in labour law. Satchwell J directly addressed the matter of where piercing of the corporate veil fits into group liability in labour law. Satchwell J ruled that there was no ground to disregard the separate juristic personalities within the group of companies. Satchwell J found no evidence of *unconscionable abuse* in this case.[230] Satchwell J was able to create corporate group liability against BOE Ltd without piercing the veil because the parent company's liability is based on direct liability as the respondent's employer. Satchwell J's reliance on direct liability meant that there was no need to engage with whether the court was empowered to pierce the corporate veil. I find this to be a pragmatic approach to group liability. Satchwell J's use of direct liability allows the court to come to an equitable result without the need to discuss how the ruling will affect limited liability or piercing of the corporate veil as applied to corporate groups. In terms of the approaches used in labour law for group liability, I am most persuaded by the approach employed in *Boumat Ltd* and *Board of Executors Ltd.* Both cases, in my view, represent a legally stable, pragmatic path for group liability. This legal path is equitable and does not disturb the workings of limited liability within the corporate group setting.

For delict claimants, *Board of Executors Ltd* provides an ideal path for how to approach the matter of group liability. There is a pragmatic middle ground. One that finds pathways for group liability when it is equity to do so. This suggested path will not unduly disturb settled principles of corporate law. Further, a path that takes into account the enterprise reality of

[229] See also Stevens op cit note 3 at 190.
[230] *Board of Executors Ltd* supra note 217 at 962.

corporate groups as well as the existing principles in an area of the law. *Board of Executors Ltd* also indicates that group liability does not need to rely exclusively on the piercing of the corporate veil as the basis of liability.

3.4.7 Mohlotsane

Mohlotsane, a case decided by Molahleni J in 2013, is a recent case that gives insight into the Labour Court's current attitude towards corporate group liability in labour law.[231] Ms Mohlotsane, the applicant, is one of five other employees who worked in the finance department at MTN SA, a large, well-known telecommunications company with companies across Africa and the world. The employees in question were dismissed from their employment for reasons of operational requirements as per the retrenchment process laid out in s 189 of LRA 1995.

Molahleni J stated that before dealing with the question of the fairness of the dismissals, it must first address 'the relationship between Group and MTN SA and what its impact, if any, that had on the fairness of the dismissal'.[232] Molahleni J then went on to identify the critical aspects of the applicant's case. The applicants had asked Molahleni J to pierce the corporate veil of the companies within the group because, according to the applicants, the separate juristic personalities of the companies within the group had been used to dismiss them unlawfully.[233]

Concerning piercing the corporate veil, Molahleni J reiterated the company law principles related to this remedy. Firstly, all the companies in a group are recognised by law as separate, distinct entities.[234] This means that the MTN Group and the subsidiary company, MTN SA, were separate juristic entities.[235] The separate juristic personality of these companies can only be disregarded if the requirements of s 20(9) of the Companies Act, which regulates when a court can pierce the corporate veil of a company, are met.[236] The applicants in *Mohlotsane* relied on two cases that they argued bore relevance to their claim.

The first case that the applicants relied on was *Chandler*.[237] *Chandler* was decided in 2012 by the Court of Appeal in the United Kingdom. The claimants in *Chandler* had suffered ailments

[231] *Mohlotsane* supra note 144.
[232] Ibid para 28.
[233] Ibid.
[234] Ibid para 29–30.
[235] Ibid.
[236] Ibid.
[237] *Chandler v Cape plc* [2012] EWCA Civ 525. The case is discussed in detail in section 4.2.5 of Chapter Four.

associated with asbestos exposure at the mines of the subsidiary company.[238] The victim's delictual harm had been caused by a subsidiary company that had been dissolved before they could institute a claim against that subsidiary company. Molahleni J considered the circumstances in *Chandler,* where that court held that the parent company owed a duty of care to the workers of its subsidiary. This meant that the parent company was held responsible for the harm in question.

The second case the applicants relied on is the *Gore* case discussed earlier.[239] Molahleni J considered the statutory veil piercing as regulated by s 20(9) of the Companies Act and how it was used in *Gore* within the context of corporate groups.

Molahleni J took both cases into account and concluded that:

> 'The uncontested facts as they stand in this matter suggest very strongly that the lines between the two entities are blurred and at least in as far as the employment relations are concerned, Group seems to have full control over MTN SA. As stated earlier, Group refused the arrangement of a takeover but was prepared and engaged in the process of mapping in certain employees and subjecting others to interviews. However, Group having not been afforded an opportunity to respond (through joinder), the corporate veil cannot be uplifted to place any liability on it in as far as the fairness or otherwise of the applicant'.[240]

The above paragraph reveals several points on how Molahleni J views the relationship between the group and the subsidiary company. Molahleni J found that the MTN Group had complete control of MTN SA employment relations in the case. As understood by Molahleni J, this control was evident in how matters of takeover bids, planning and recruitment, and allocation of employees of MTN SA were subject to the Group's dictates. After having detailed the nature of the relationship between the Group and MTN SA, Molahleni J remained silent on rule on the appropriateness of piercing the corporate veil in this case. The reason given is one of a technical procedural nature. Molahleni J stated that 'Group having not been afforded an opportunity to respond (through joinder), the corporate veil cannot be uplifted to place any liability on it'.[241] What is confusing is that Molahleni J does not engage any of the sound precedents that *Boumat* and *Board of Executors Ltd* set on the matter of group liability in labour

[238] *Mohlotsane* supra note 144 para 31.
[239] Ibid para 32–4.
[240] Ibid para 34.
[241] Ibid.

law. I contend that the clear approach from *Board of Executors Ltd* ought to have been taken into account by Molahleni J in deciding on a matter of group liability in labour law.

There is a crucial lesson to be learnt by delict claimants from *Mohlotsane.* The dismissive approach in *Mohlotsane* on the matter of statutory veil piercing indicates that the odds of recourse against corporate groups based on the statutory veil piercing are slim. This is further complemented by findings from section 3.2 that courts are rarely willing to offer recourse based on piercing the corporate veil. This must then be contrasted with the many other labour law precedents where the courts were willing to offer recourse against corporate groups when the basis of liability was direct liability as opposed to piercing the corporate veil. It is on this basis that I contend that any future claims by delict claimants against corporate groups must sparingly rely on the statutory veil piercing. It is further argued that delict claimants ought to rather take lessons of group liability from the better approach as elaborated in *Board of Executors Ltd.*

3.4.8 Bodigelo

In *Bodigelo*, the Public Investment Corporation Ltd (PIC) was the applicant.[242] The PIC is a state functionary responsible for public sector investments, and in this matter, the PIC had seconded Mr Bodigelo to offer services on several boards of companies in which it had invested public monies.[243] The companies that Mr Bodigelo was seconded to paid his board fees to the PIC, and in turn, the PIC would then pay Mr Bodigelo.

Dissatisfied with this arrangement, Mr Bodigelo approached the court and requested the court to direct that these board fees be paid directly to him. The Court ruled in favour of the PIC on the basis that the evidence indicated that Mr Bodigelo's appointment to the boards of the investee companies was on the basis that Mr Bodigelo was an employee of the PIC.[244] The case does not involve a corporate group, but it does showcase the continued challenges that arise when more than one juristic entity is tied to the same labour law responsibilities.

I do not take issue with the ruling that the PIC was entitled to the board fees. What I am interested in is the question that Stevens asks, namely, would the PIC be liable in delict if Mr

[242] *Bodigelo* supra note 149.
[243] Ibid para 3. There were four companies which Mr Bodigelo was assigned namely: DCD-Dorbyl (Pty)Ltd, Blue Label Investments (Pty) Ltd, Kulungile Metals Group (Pty) Ltd and Global Roofing Solutions (Pty) Ltd (investee companies).
[244] Ibid para 13–6.

Bodigelo harms a third party while acting in the interest of the PIC?[245] Asked differently, would the PIC take responsibility for such delictual harm or claim that such an employee was acting as an employee of the company to which they had been seconded? There is a credible risk that in such a hypothetical scenario the PIC would attempt to not take responsibility for the delictual harm but rather hide behind separate legal personality and limited liability. Such an approach would be aligned with how the other defendants in labour cases discussed above raised a preliminary issue that they were not the real employers of the applicants. It is this ability of companies to claim the benefits of corporate personality as claimed by the PIC and have a credible basis to shy away from an equitable share of responsibility when harms occur that makes group regulation and liability a challenge for the victims of harm.

Stevens rightly suggests that the *Bodigelo* ruling ought to open the possibility that the PIC may be held vicariously liable where this director commits a delict while acting on the boards of these various companies.[246] This is because the PIC successfully indicated that a director working in another company was its employee. When such a director commits a delict while acting for the PIC, the PIC would be at risk of being held vicariously liable for such harm.[247] Stevens, however, does not fully test the doctrinal basis of how such a parent-subsidiary vicarious liability would work.[248] I believe answers to this hypothetical scenario are important for delict claimants to better understand the options available to them when litigating against corporate groups. In Chapters Four and Five, I consider whether pursuing a delictual claim for group liability is viable and whether lessons from labour law can aid such an option.

3.4 Concluding remarks on how South African law regulates corporate group liability

Chapter Three made several key contributions to the thesis. Firstly, it gave a comprehensive description of the key terms of the discussion at hand. The key terms that require detailed descriptions are MNC, corporate groups, separate juristic personality, limited liability, group liability and enterprise basis of liability. Chapter Three then describes the legal form of the MNC that is dealt with for this thesis. It is made up of the following: One parent company that

[245] See Stevens op cit note 141 at 84 and 87–9 for discussion on *Bodigelo*.
[246] Ibid.
[247] Ibid.
[248] Ibid.

is incorporated in a foreign jurisdiction and owns a majority of the shares in one subsidiary company incorporated in terms of South African company law.

The global trends show that group regulation is largely based on the strict adherence to core corporate law principles of separate legal personality and limited liability within groups or the termed entity principles. The call for enterprise logic that has been made by academic commentators such as Strasser & Blumberg has not been heeded. Global trends of corporate group liability as per common law or statutory veil piercing indicate that the doctrine is largely open-ended and fact-specific. This indication can be deduced from foreign courts' insistence not to lay out clear fixed principles for when they are willing to pierce the corporate veil. This global context leads the discussion of how South Africa approaches group regulation and liability.

I have shown that South African corporate law is the main area of law relied on to lay the foundation of group regulation. In corporate law, the founding premise of group regulation is based on the strict adherence to the principles of separate juristic personality and limited liability, and this ought to be equally applied to companies in a group. This corporate law approach is the foundational position of how groups are regulated, which is also evident in all the areas of private law evaluated in Chapter Three, namely, corporate law, delict and labour law.

A less clear answer from the review of South African law is the circumstances under which these foundational principles of corporate law can be relaxed where delictual harm is caused by corporate groups. The overwhelming impression of the review is that different areas of South African private law appear to have taken different approaches, which ranges along a spectrum. The spectrum starts from a conservative approach that respects entity principles to a liberal approach that recognises the unitary character of corporate group activities.

In South African corporate law, group liability is largely located on the conservative end of the spectrum. In terms of corporate law, for third parties to get recourse against corporate actors in terms of the statutory veil piercing, they need to show fraud, dishonesty or other improper conduct. Examples of improper conduct are the disregard for a clear contractual obligation or the violation of a clear statutory provision. Theoretically, these grounds appear wide, but case law indicates that the courts are rarely willing to depart from the strict adherence to entity principles. This finding is based on a review of the case law as it relates to liability in terms of the statutory veil piercing and its common law interpretive guidelines.

In several early labour cases, the courts respected entity principles but were inclined towards the use of the liberal enterprise liability logic as a basis for group liability. In early labour cases, courts have also used equity considerations to create a basis for group liability. In some of the labour law cases, such as *Board of Executors Ltd* and *Boumat Ltd,* the courts managed to strike a good balance between the traditional rules of corporate law and the need to create an equitable path in group liability. This approach has, however, not been observed by later labour judgements such as *Mohlotsane*. This indicates a schism of different approaches to group liability within the same area of law. It is, therefore, unclear where on the spectrum labour courts will fall in the future. Despite this, my overall impression is that the totality of jurisprudence in labour law provides excellent guidance for any future development of group liability in South Africa.

In terms of corporate group liability in delict, the first basis of liability that can be utilised by claimants is delict-specific statutes. This thesis acknowledges the viability of a statutory solution but does not evaluate this option. In terms of the common law of delict, there have been few cases dealing with delictual liability in South Africa. The two *Wambach* and *Nkala* cases that have been analysed show a schism in the law on what the best approach should be as it pertains to group liability. *Wambach* adopted an entity approach to corporate group liability where whereas *Nkala* adopted an enterprise liability approach. It is, therefore, my view that the law of delict is still open for further legal development in the area of corporate group liability. It is this space Chapter Four and five intends to fill by suggesting how the common law of delict should approach corporate group liability.

The approach taken in the law of delict should be constitutionally compliant. This is because the Constitution holds an unquestioned place as the final arbiter of rights balances under South African law. From a constitutional lens, the rules that underpin corporate functionality cannot be divorced from the interests of the broader society they serve. In *Bernstein,* the Constitutional Court stated:

> ‘The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any

person engaging in these activities should expect that the benefits inherent in this creature of a statute will have concomitant responsibilities'.[249]

At present, the societal interest is that delictual victims require a viable path to seek group liability. Section 1.2.5 of Chapter One argued that foreign law, particularly from the United Kingdom, may provide insight into the appropriate responses to group liability. Chapters Four and Five further consider what paths South African law of delict can take as it pertains to group liability.

[249] *Bernstein & others v Bester NO & others* 1996 (2) SA 751 (CC) para 85, see also *Nova Property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA) para 16.

CHAPTER 4: DELICT AND CORPORATE GROUPS

4.1 Introduction to the viable remedies to resolve the research problem of the thesis

The law of Delict is primarily viewed as part of South African private law regulating a party's compensation where recognised legal interests have been infringed upon.[1] Delict aims to maintain harmony, balance, and corrective justice between community members.[2] To achieve corrective justice and communal harmony, delict provides remedial protection for legal interests tied to the patrimonial aspects of a person's estate.[3] Delict also provides remedial protection for non-patrimonial harm, such as personality rights.[4]

Loubser et al argue that the best way to conceptualise the structure of delict is to divide this area of law along fault-based liability and no-fault based liability.[5] Loubser et al correctly posit that this distinction provides for a workable structure to resolve delict-based problems even where there are specific legislative regimes such as the Road Accident Fund and other statutory regimes in insurance, medical aid, and social security.[6]

In terms of fault-based liability, delict follows a generalising approach.[7] The generalising approach is a single universal set of principles showing that any protected interests have been

[1] J Neethling & JM Potgieter *Law of Delict* 8ed (2020) at 3–7 and 8–16; M Loubser & Midgley (eds) et al *The Law of Delict in South Africa* 3ed (2017) at the preface and 5–7; These two cited texts are the main books relied on in Chapter Four of this research mainly because they are the most recent texts that deal with delict as a holistic discipline. Chapter Four acknowledges crucial older texts which provide additional historical perspectives on delict but has decided that they are not essential for the discussions in this chapter. See RG McKerron *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* (1971); PQR Boberg *The Law of Delict* (1989); JC Van Der Walt and JR Midgley *Principles of Delict* (2016).

[2] Ibid; see discourse on the importance of corrective justice in delict and private law and public law aspects of delict in E Zitzke 'Transformative Legal History and the (Re) Classification of the South African Law of Delict' (2023) 26 *Potchefstroom Electronic Law Journal* 1.

[3] Neethling & Potgieter op cit note 1 at 5–6; Loubser & Midgley op cit note 1 at 9–14.

[4] Neethling & Potgieter ibid at 8–16; Loubser & Midgley ibid at 22–4.

[5] Loubser & Midgley ibid at 21; see Neethling & Potgieter ibid at 3–7 and 433 where these academics argue for a different approach where delict should be based on fault principles and only utilise strict liability as a rare exception.

[6] Loubser & Midgley ibid at 21 referring to statutes that have delictual aspects such as Road Accident Fund Act 56 of 1996; South African Social Security Agency Act 9 of 2004; Criminal Procedure Act 51 of 1977; Health Professions Act 56 of 1974; Medical Schemes Act 131 of 1998; Compensation for Occupational Injuries and Diseases Act 130 of 1993.

[7] Loubser & Midgley ibid at 19–20; Neethling & Potgieter op cit note 1 at 4–6.

infringed.[8] These principles, therefore, show where a delict has occurred as per fault-based principles.[9]

The generalising approach requires that five delict elements must be successfully applied before a court can make a finding that a delict has been committed.[10] These five elements are that there was an act, such that the act was wrongful, and the claimant also needs to show culpability, causation, and harm.[11] A finding that a delict has occurred goes against the general rule that any person who suffers patrimonial harm must bear such loss on their own.[12] It is only where a court finds that a delict has been committed that the loss is shifted from the claimant to the wrongdoer.[13] The roots of the modern law of delict stretch from Roman-Dutch law and English influence to modern-day legislation, and now, with the advent of the Constitution, it is under constitutional normative control.[14] Such rich common law roots, coupled with the influence of the Constitution, have meant that it is not always a straightforward exercise to neatly identify the sources and remedies in delict.[15] The purpose of Chapter Four is to evaluate whether these common law principles of delict can be applied to corporate groups.

For Chapter Four, the case study of the Bhopal disaster remains an ideal reference point to evaluate what the common law delictual remedy is meant to resolve.[16] The Bhopal disaster is supplemented with a key case from Chapter One, *Chandler*, a foreign case to decide on delict-based liability within corporate groups.[17] The delictual claim instituted against UCC and UCIL, as described in Chapter One, left out considerable complexity as it relates to the relationships at play. On closer scrutiny, the Bhopal disaster involved a three-level relationship.[18] The first level is the relationship between UCC and UCIL, the parent-subsidiary relationship, where parties are related to each other through shareholding or equity in a corporate group setting. At the second level is the relationship between UCIL and the delictual claimants. The third level

[8] Ibid.
[9] Ibid.
[10] *MTO Forestry (Pty) Ltd v Swart NO* [2017] 3 All SA 502 (SCA) at 12–9; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) para 12–7; see also the recent Constitutional Court case that my view, supports the generalising approach: *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para 121–6; see also the discussion of the generalising approach in Loubser & Midgley ibid at 25 and; Neethling & Potgieter ibid at 4–6.
[11] *MTO Forestry (Pty) Ltd* ibid para 12–19; *Telematrix* ibid para 12–7; see also *De Klerk* ibid para 121–6.
[12] *Telematrix* ibid para 12; see discussion of this case in Neethling & Potgieter op cit note 1 at 3–4.
[13] Loubser & Midgley op cit note 1 at 7; Neethling & Potgieter op cit note 1 at 4–6.
[14] Loubser & Midgley ibid at 4 and 50–55; Neethling & Potgieter ibid at 8, 17–24.
[15] Loubser & Midgley ibid at 19–21.
[16] The facts relied on are from *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986).
[17] *Chandler v Cape plc* [2012] EWCA Civ 525; See discussion of this case in Section 1 of Chapter One.
[18] See idea and detailed description of the three-level relationship in T Kravtsova & G Kalinichenko 'The vicarious liability of parent company liability for its subsidiary' (2016) 14 *Journal of Corporate Ownership & Control* 1.

is the relationship between the claimants and UCC. For Chapter Four, the term corporate group considers all the above three levels of the relationships (the three-level relationship).

The purpose of why Chapter Four acknowledge the different levels of the relationships at play in the Bhopal disaster is so that the delictual remedy employed to resolve the research problem of this thesis is based on a more precise description of the gaps in the law. Chapter Four primarily focuses on the relationship between the parent company and delict claimants. However, this relationship exists within the context of the two other relationships, namely between the claimants and the subsidiary and between the subsidiary and the parent company. Thus, it is submitted that it is difficult to seek out a delictual remedy that operates between claimants and the parent company without due regard to the other two levels of the relationships in question.

Chapter Three shows that other areas of private law, such as corporate law and labour, have all responded to this corporate group or the parent-subsidiary relationship in unique ways that cater to the needs of these areas of law.[19] Chapter Four now aims to evaluate whether the common law of delict can respond in a constitutionally compliant manner to corporate group liability. My view is that there are two main possibilities from which the stated aims of Chapter Four can be achieved.

The first possibility is that the law of delict may already have a remedy in place, and what is required is to apply this remedy to resolve the problems at hand. This outcome would not contradict the findings of Chapter Three, which state that the South African law of delict has not yet held a parent company operating within a corporate group accountable for delictual harm. These findings do not conclusively show that such a remedy does not exist in delict common law. It is still plausible that there is a viable doctrine or theory of liability capable of rectifying the current problem, which does not need any legal development. If such a common law doctrine exists, that would be the ideal way to resolve the problem of this thesis.

The second possibility is that there is no remedy in the common law of delict, or a partial remedy can be developed and deployed to the problem at hand. Chapter Three has shown that no case law in delict has adequately dealt with the problems associated with corporate groups. Thus, this second outcome is the more likely state of affairs in delict. Thus, my view is that there are likely no viable delict paths, and what will ultimately be required is the development

[19] Section 3.4 of Chapter Three.

of the law. Still, such development must take place in a manner capable of responding to the unique nature of corporate group settings.

Chapter Four is divided into three further sections that aim to evaluate which of the two paths best suits resolving the problem identified by this thesis. Section 4.2 provides a broad overview of the most viable remedy for fault-based liability in the law of delict. Section 4.3 focuses on the viability of utilising a strict or no-fault basis of delict liability to corporate groups. Section 4.3 commences with the origin and policy basis of strict liability and the current case law that has regulated strict liability in the pre-and-post-final Constitution eras. Section 4.3 then looks at all the relationships where strict liability is recognised in legislation and the common law. The utility of evaluating these relationships is to explore which of these relationships are most analogous to the corporate group. Such an exploration thus aims to assess where corporate group liability can be best accommodated in delict. Section 4.4 will be the conclusion.

Chapter Four is primarily descriptive in that it describes the delict as it currently exists. Chapter Four will also be exploratory in that it goes through all the different aspects of delict in search of a doctrine or theories of liability most suitable for corporate group liability. Ideally, Chapter Four will find a complete common law doctrine or theory of liability that can cater to corporate groups. However, in the absence of such a complete doctrine, the conclusion of Chapter Four will be to suggest where within delict it is most suitable to develop the law to cater for delict-based corporate group liability.

Based on the outcomes of Chapter Four, Chapter Five will follow either one of two pathways to address the problems associated with corporate groups. Chapter Four may find an existing delictual remedy that can be utilised to rectify the problem at hand. If that is the case, Chapter Five will use a practical case study to show how exactly that existing remedy can resolve problems associated with corporate groups in light of the Bhopal disaster. On the other hand, Chapter Four might find that delict requires development. If the latter scenario is the state of affairs, Chapter Five will show how such development is best approached and the practical outcomes of the Bhopal disaster.

4.2 Fault-based liability and corporate groups

The five delictual elements in terms of the generalising approach describe liability that is based on fault-based liability.[20] As per the remedies stage of the interplay school, if a court finds that there is no viable remedy in legislation to resolve the research problem of this thesis, such a court must investigate whether there is a viable remedy in common law.[21] The applicable common law of this thesis is the law of delict. If the Loubser et al approach is utilised, it is advisable for a court to frame delict problem-solving by first considering fault-based liability in terms of the general elements of a delict.

Chapter One has argued that it is best to test the viability of imposing liability on both the parent and its subsidiary company in order to give equitable redress to delict claimants.[22] The crucial question is whether the generalising fault-based approach is capable of this. In a scenario where the claimants would need to prove fault-based liability on more than one potential wrongdoer, the concept of joint wrongdoers would need to be relied on.[23]

Traditionally, the concept of joint wrongdoers had been largely regulated by common law, but now the Apportionment of Damages Act (ADA) primarily regulates the principles to be applied to the concept of joint wrongdoers.[24] In terms of s 2 of the ADA, two or more persons may be held delictually liable for the same delict.[25] For these two or more persons to be liable, they must individually commit a separate distinct delict towards the claimant.[26] This means that each separate wrongdoer must meet the five delictual elements as per the fault-based generalising approach before they can be held liable as the joint wrongdoer.[27]

Once all the separate delicts are proven, the ADA guides the formulas that can be taken into account by a court when it decides the compensation that must be paid by each of the wrongdoers.[28] In terms of the principles applicable to joint wrongdoers, a plaintiff is at liberty to sue the wrongdoers in a single action or sue one of them.[29] A court is also at liberty, depending on what is just and fair, to separately decide to hold that the wrongdoers are jointly

[20] Ibid at 19–21.
[21] See the discussion of the interplay school in section 3.3 of Chapter Three.
[22] Section 2.3 of Chapter One.
[23] Loubser & Midgley op cit note 1 at 535–9; Neethling & Potgieter op cit note 1 at 319.
[24] 34 of 1956.
[25] Ibid; ADA s2.
[26] Loubser & Midgley op cit note 1 at 535–9; Neethling & Potgieter op cit note 1 at 319.
[27] Ibid.
[28] Ibid.
[29] Ibid.

or severally liable for the harm in dispute.[30] Further, where a court makes a finding that there are two wrongdoers in respect of a single delict, liability from such a delict is joint and several.[31] This means that the claimants can elect to enforce the full damages claim, which can be sought from one of the wrongdoers or both.[32] In scenarios where the damages claim is sought from a single wrongdoer, the wrongdoer who has settled the full damages award is permitted in law to sue for a pro-rata claim from the co-wrongdoer who has been let off by the claimant.[33] Ultimately, courts in such cases enjoy wide discretion in terms of s 38 of the Constitution to impose the appropriate remedy.[34]

The concept of joint wrongdoing can be applied to corporate group contexts when both the parent and subsidiary company are found to have committed a delict jointly. What would be required in such a scenario is proof that both entities have met the requirements of the fault-based generalising approach. Another scenario is where only the subsidiary or parent company committed a delict. In such a scenario, the concept of joint wrongdoing will not be applicable. Whether delict claimants can show the existence of joint liability or liability of a single wrongdoer will ultimately depend on the outcomes of the application of the generalising approach. This is because, in either scenario, the delict claimants must show all five elements against the party they accuse of a delict. I now turn to discussing the prospects of the delict claimants' ability to apply these principles to the parent and subsidiary companies.

4.2.1 Harm and corporate groups

In order for claimants to meet the requirements of the generalising approach, they must show what damage, harm or injury took place.[35] Neethling and Potgieter define damage or harm as 'the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law'.[36] Damage is the harm or injury that the victim has suffered and is a requirement of delict. This should not be confused with damages (ending with an 's'), which is the remedy sounding in money that is employed by the courts in order to achieve restorative

[30] Ibid.
[31] Loubser & Midgley ibid; Neethling & Potgieter ibid.
[32] Ibid.
[33] Ibid.
[34] See courts inherent powers of appropriate relief as per s38 of the Constitution of the Republic of South Africa, 1996.
[35] See explanation in TJ Scott 'Revisiting the Elements of Delict-The Mashongwa Judgments' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 551 at 562.
[36] Neethling & Potgieter op cit note 1 at 255–7.

justice for harm.[37] The latter, damages, is defined as '"a monetary equivalent" of loss "awarded to a person with the object of eliminating as fully as possible [her or] his past as well as future damage'.[38]

Chapter One also has already described the harm in the Bhopal disaster.[39] The nature of harm in such cases is tied to impairment of psychological and physical integrity because of the bodily harm in question. South African law of delict recognises both patrimonial harms, where harm has reduced a person's estate, for example, financial loss for damage to property.[40] The law of delict also recognises non-patrimonial harm, which compensates for pain and suffering and personality rights infringement. Showing harm or injury has clear, long-standing principles and should apply without difficulty to corporate groups.

4.2.2 Conduct and corporate groups

Next, for claimants to meet the requirements of the generalising approach, they must also show the existence of the element of conduct.[41] The element of conduct is defined as a 'voluntary human act or omission'.[42] This means that the element carries three aspects as captured in its definition: voluntary, human, and act or omission.[43] Conduct can be in the form of a positive act (commission)[44] or in the form of a failure to act where the law requires them to do so (omission).[45] An example where the law recognises that a person has failed to act is when such a person has control over a fire and lets it injure others.[46] In the Bhopal disaster, the act, event, or activity that caused the harm in question would be met by showing that toxic chemicals were released into the environment, injuring other parties. This form of conduct would constitute a commission.

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[37] See discussion of the confusion in Scott op cit note 35 at 562.
[38] *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC) para 37; see discussion of this case in Neethling & Potgieter op cit note 1 at 256. The latter damage is often interchangeable in case law with words such as harm, loss, and injury. The use of these words in Chapter Four is limited to damage the element of delict, and all of the terms harm, loss, injury and damages are interchangeable.
[39] Section 1 of Chapter One.
[40] Loubser & Midgley op cit note 1 at 80; Neethling & Potgieter ibid at 257–60.
[41] *De Klerk* supra note 14 para 121–6.
[42] *Transnet Limited t/a Metrorail and Others v Harrington NO and Another* (A341/07) [2008] ZAWCHC 60 at 28–9; see also the discussion in Neethling & Potgieter op cit note 1 at 27; Loubser & Midgley op cit note 1 at 95.
[43] Ibid.
[44] *Minister of Safety and Security v Van Duivenboden 2002* (6) SA 431 (SCA) at 12.
[45] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 58; see also *Judd v Nelson Mandela Bay Municipality* (CA149/2010) [2011] ZAECPEHC 4 para 6–9.
[46] See an example of facts in *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* [2000] 4 All SA 545 (A).

The second aspect of the element of conduct is that the act or activity must be voluntary.[47] This means that the actor must have controlled their muscular activities towards the harm-causing event.[48] One of the common defences that can be used to negate the voluntary aspect of conduct is the defence of automatism.[49] If a person causes harm while in their sleep or during an epileptic fit, the voluntary aspect of the definition will not have been met, and thus, there will be no conduct and delictual liability.[50] Companies do not carry any physical form and thus only act through natural persons.[51] Thus, the law would permit a juristic person to adduce evidence that shows that its personnel who acted to cause harm did so while in a state where they did not have control of their bodily movements.[52] The second aspect of conduct, namely, voluntariness, can thus hypothetically act as a defence to both the subsidiary and parent company where these entities can show evidence that meets the defences recognised in law for voluntariness. The defence of automatism is rarely successfully utilised to escape delictual liability.[53]

The third aspect of the delictual element is that a human being must have executed the harm-causing activities.[54] Juristic persons can act and be liable for the delict.[55] However, as stated, juristic persons as legal fictions need a human being to execute any activities on behalf of the juristic person for the purposes of legal responsibility.[56] Thus, only a natural person or group of natural persons can execute the activities that are attributed to a juristic person for the purposes of delictual liability.[57]

The distinction that a natural person can direct their own muscular movements towards harm, but a juristic person can only act through the activities of a natural person is a subtle but crucial difference. It is submitted that this difference can tip the scales heavily against delict claimants

[47] Neethling & Potgieter op cit note 1 at 28; Loubser & Midgley op cit note 1 at 969; see also R Ahmed 'The Influence of Reasonableness on the Element of Conduct in Delictual or Tort Liability-Comparative Conclusions' (2019) 22 *Potchefstroom Electronic Law Journal* 1.
[48] Ahmed ibid at 6.
[49] See *Molefe v Mahaeng* 1999 (1) SA 562 (SCA); see discussion of the leading case of *Molefe* in J Burchell 'Onus of Proof in the Aquilian Action: A Wrong Turning' (1999) 116 *South African Law Journal* 729.
[50] See case discussions in Ahmed op cit note 48 at 6; Neethling & Potgieter op cit note 1 at 28–31; Loubser & Midgley op cit note 1 at 96–9; see also M Blackbeard 'Epilepsy and Delictual Liability' (1996) 59 *Journal for Contemporary Roman-Dutch Law* 425.
[51] Neethling & Potgieter ibid at 27.
[52] See defences in Ahmed op cit note 48 at 6.
[53] Neethling & Potgieter op cit note 1 at 28.
[54] Ibid at 27; Loubser & Midgley op cit note 1 at 96.
[55] *Khumalo and Others v Holomisa* 2002 (8) BCLR 771 (CC) para 29–34.
[56] NP Swartz 'An Appraisal of the Vicarious Liability of Juristic Persons (Minister of Police) in the Law of Delict with a Constitutional Developmental Imprint of K. v Minister of Safety and Security' (2016) 9 *Journal of Scientific Research and Reports* 1 at 2–4.
[57] Ibid.

when the unique nature of corporate groups is considered. I submit three reasons this presents unique challenges for delict claimants litigating against corporate groups.

Firstly, the implication that only human beings can act on behalf of a juristic person means that the basis of the juristic person's liability is always through legal attribution by way of the activities of a human being behind the company.[58] The doctrine of vicarious liability discussed in section 4.3.6 is the primary mechanism through which this legal attribution between a juristic person and a natural person takes place in delict.[59] For the purposes of section 4.2, this legal attribution must be viewed in the context of delicts committed solely by human beings where the conduct in question does not ordinarily require the courts to engage aspects of legal attribution. Stated differently, the legal aspects of conduct where juristic persons are implicated are always more complicated because they always involve at least two parties.[60]

Secondly, In South African procedural law, the burden of making out a delictual claim sits with the claimant as the plaintiff who is seeking relief in law.[61] However, the unique legal features within corporate groups mean that the evidence showing which juristic person directed the harm-causing activities will not be easily obtainable. Ochei, Ezeani, and Anderson have conducted a study of foreign cases similar to the Bhopal disaster as they pertain to the procedural mechanisms employed by MNCs to evade delictual liability.[62] Ochei's findings were that a key hurdle that delict claimants face is that evidence disclosure processes largely permit ample leeway for MNCs to unduly frustrate the releasing of evidence required to show the harm-causing activities in court proceedings.[63] This problem is compounded when the potential wrongdoers are spread across many jurisdictions, as was the case in the Bhopal disaster. From an evidentiary perspective, the law is set up in such a manner that the claimants must somehow get into the internal affairs of two or more juristic persons in a corporate group in order to figure out which natural person directed the persons who eventually led to their loss.

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[58] For the discussion that only a human being can act for the purposes of the liability of a company, see Neethling & Potgieter op cit note 1 at 27–8.
[59] See the full discussion in section 4.3; briefly, the doctrine of vicarious liability describes the delictual basis of liability where one person is held on a no-fault basis for the liability of another.
[60] For similar attribution in delict see discussion of legal attribution of liability where animals are involved in *Jooste N.O. v Minister of Police and Another* 1975 (1) SA 349 (E); see discussion of this case in Loubser & Midgley op cit note 1 at 96; Neethling & Potgieter op cit note 1 at 27.
[61] *Nel v Phalafala* [2014] JOL 32036 (GSJ) para 4; *Sono v Kelly's Shoes* [2007] JOL 19072 (CCMA) para 4.
[62] See discussion of oil spill cases in the Niger Delta such as *Oguru v Shell and the Hague District Court in Milieudefensie v Shell* (2021), *Wiwa v Royal Dutch Petroleum Co*., 226 F.3d 88, 94 (2d Cir. 2000), and *Bodo Community v Shell Petroleum Development Company of Nigeria* Case No HQ11X01280 in NV Ochei, EC Ezeani, & C Anderson 'Mechanisms used by multinational oil companies to derail human rights and environmental litigations arising from the Niger Delta' (2023) 15 *African Journal of Legal Studies* 185.
[63] Ochei, Ezeani, & Anderson ibid at 192–8.

It is submitted that this state of affairs is what makes showing the element of conduct difficult within corporate group settings.

In the Bhopal disaster, a report by Amnesty International found that UCC frustrated the investigation into the Bhopal disaster.[64] For example, UCC alleged that the gas leak was likely caused by a disgruntled employee.[65] However, despite such a claim, UCC refused to give Indian authorities the name of the person that they suspected likely caused the gas leak on December 2 1984.[66] Without key information, such as which human beings in the corporate organisation acted to cause harm, it is very difficult for delict claimants to show all the requirements of conduct and make a case against all the potential wrongdoers, including against the parent company. Thirdly is the implication of the distinction between commission and omission as it pertains to showing conduct within corporate group activities. In a factual scenario such as the Bhopal disaster, the facts show that the UCC's conduct can be described as an omission because it advised UCIL to set up a faulty chemical power plant. For UCIL, their conduct can be described as a commission for their role, which led to the gas leak. In such a scenario, delict claimants are more likely to pin down positive conduct on the part of UCIL as opposed to omission, which is a failure to prevent harm. This is because the harm-causing activities are more closely related to the subsidiary company than to the parent company. Thus, even when delict claimants can pin down specific human actors for the purposes of showing conduct, they are more likely to be able to pin such a human being to the subsidiary company only.

South African claimants will need to show the element of conduct for the purposes of the fault-based generalising approach, and there are three likely key challenges that they need to overcome. The first challenge is that showing conduct against a juristic person will always be a matter of legal attribution through its human actors. Secondly, the evidence required to make their case will likely be difficult to obtain as far as the harm that is carried out by entities that are part of a corporate group. Thirdly, the challenge will be to show that the activities of the parent company have met the requirements of the element of conduct.

[64] Amnesty International *Injustice Incorporated: Corporate Abuse & The Human Right to Remedy* (2014) at 35–7.
[65] Ibid.
[66] Ibid.

4.2.3 Causation and corporate groups

In order for claimants to meet the requirements of the generalising approach, they must also show the existence of the element of causation.[67] This element requires that there should be a strong causal link between the conduct of the wrongdoer and the resultant damage.[68] The element of causation is tested through two legs, namely factual and legal causation.[69] The court must first test the factual causation leg, which generally utilises the theory of the conditio sine qua non or the but-for test.[70] The essence of the theory asks: would the plaintiff still have suffered a loss if the defendant's conduct was hypothetically removed from the chain of events?[71]

In the *Lee* case, the Constitutional Court described the conditio sine qua non test as follows:

> 'In the case of "positive" conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts'.[72]

In a hypothetical application of the factual causation leg to the Bhopal disaster, the facts indicate a positive act on the part of UCIL and an omission on the part of UCC. For UCIL's conduct, the question to be asked is whether, if the gas leak had never occurred at the chemical plant, would the Bhopal disaster and its resultant harm have occurred. The activities that led to the gas leak are, therefore, hypothetically removed from the causal chain of events in order to test if harm would have likely occurred. In the Bhopal disaster, factual causation likely exists because if the gas leak had been hypothetically removed from the causal chain of events, no harm would have occurred.

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[67] *De Klerk* supra note 10 para 24–32 and 121–6.
[68] Neethling & Potgieter op cite note 5 at 215–6; ARG Mundell 'Causation in Delict: Do the Means Justify the Ends' (1987) 50 *Journal of Contemporary Roman-Dutch Law* 379.
[69] *Minister of Police v Skosana* 1977 (1) SA 31 (A) para 34–44; *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 37–55.
[70] *Lee* ibid; see also the factual causation test in *International Shipping Company (Pty) Ltd. v Bentley* [1990] 1 All SA 498 (A) at 64–6; for discussion of factual causation see A Meerkotter 'The Dudley Lee Case: A new approach to factual causation and its implications for transformative jurisprudence' (2015) 30 *Southern African Public Law* 273.
[71] Neethling & Potgieter op cite note 5 at 226-30; Loubser & Midgley op cit note 1 at 103–10.
[72] *Lee* supra note 69 at para 41; the *Lee* judgement has been criticised for adding new and unnecessary aspects to the test of factual causation. See, for example, the criticism of aspects related to increased risk as a consideration for testing factual causation in A Price 'Factual causation after Lee' (2014) 131 *South African Law Journal* 491.

The conditio sine qua non test prescribes a different question for when the conduct in question is an omission. For the purposes of the case study in Chapter Four , the form of conduct would be a hypothetical omission by UCC. The question to be asked here is what the outcome would have been had the reasonable conduct of the defendant been added to the causal chain of events? For UCC, the reasonable conduct was, for example, to advise on and build a chemical plant with sufficient safety mechanisms in place. When this question is asked, it is not clear whether UCC would have been the factual cause of the gas leak disaster. It is very possible that human error or intent could have still caused the gas leak in a chemical plant that has been correctly built. Thus, UCIL would likely meet the factual causation leg, but UCC would likely not. The factual causation leg of the test is, therefore, wide, in the sense that most events would often be tied in one way or the other to the harm and thus meet the factual causation leg.[73]

In order to narrow the overall test of causation, a second leg must be met, namely the legal causation.[74] It is submitted that where conduct can be established, the application of factual causation, therefore, ought to be straightforward when applied to corporate groups. This is because factual causation is purely a question of fact that can either clearly be shown or lacks depending on the factual matrix in question, as indicated in the hypothetical scenario of the Bhopal disaster.

Once the factual causation leg is positively established to be present, next is the legal causation leg. The legal causation leg is utilised to limit the defendant's liability to what is fair and just to attribute to them.[75] The primary challenge that legal causation seeks to resolve is to ensure that liability is imposed on a party for harm where their conduct is sufficiently close to the victim's harm. The flexible approach is utilised in this regard and is made up of several theories that are employed as indicators of what may be just and equitable to impose on the defendant.[76]

In terms of the flexible approach, a court dealing with the matter of legal causation ought to be guided by a range of policy considerations in order to determine what is fair, just, and reasonable in a particular circumstance.[77] This determination will often take into account at least one or more of the traditional theories of legal causation, namely, the adequate causation

[73] Ibid *Lee*.
[74] Ibid.
[75] *S v Mokgethi* 1990 1 SA 32 (A) at para 40–41; Neethling & Potgieter op cit note 1 at 230–54; Loubser & Midgley op cit note 1 at 123–35; see also J Neethling and JM Potgieter 'Wrongfulness and legal causation as separate elements of a delict: Confusion Reigns' 2014 *Journal of South African Law* 889.
[76] Neethling & Potgieter op cit note 1 at 230–54; Loubser & Midgley ibid at 123–35.
[77] Neethling & Potgieter ibid at 234.

theory, the direct consequence theory, the fault theory, the reasonable foreseeability theory, and the novus actus interveniens.[78] No single theory or policy consideration reigns supreme, and a court must ultimately determine whether there is an adequately strong link between the conduct in question and the harmful consequence to impose liability.[79]

For present purposes, my view is that one such theory of legal causation may be particularly relevant for a hypothetical scenario such as the Bhopal disaster. The theory of novus actus interveniens posits that in the process of looking at what is fair to impute on the defendant, the court must look at possible independent events that occurred after the defendant's act that either contributed to/or caused the harm in question and that break the factual causal chain of harm.[80] For example, a wrongdoer might have mistakenly started a fire, but a second individual switched off the fire alarm system and starts another fire in the same building.In such a scenario, what is required is to inquire into whether the activities of the second wrongdoer broke the factual causal chain of the conduct and harm of the first wrongdoer.

A hypothetical application of the Bhopal disaster to a novus actus interveniens illustrates the relevance of this particular theory. In the Bhopal disaster, the claimants alleged that both UCC and UCIL employees had actively participated in the design, implementation, and running of the plant, which eventually caused harm.[81] This meant that the harm in the Bhopal disaster likely resulted from an intimately collaborative effort between at least two juristic and many natural persons. At the factual causation leg, all the parties that participated in harm would likely meet the test. However, a challenging question at the legal causation stage is what would be fair and just regarding the harm caused by intimately collaborative tasks such as in the Bhopal disaster. Where would a claimant or, indeed, a court start to work out what broke the causal chain of events and what is fair and just from a legal causation perspective? Delict has dealt with cases with multiple actors, so in principle, the claimants can make their case against corporate groups.[82] But the novus actus interveniens poses a significant hurdle for delict claimants to overcome. It is uncertain if the challenges of the novus actus interveniens can be

[78] Neethling & Potgieter ibid at 233–54; Loubser & Midgley ibid at 123–35.
[79] Neethling & Potgieter ibid.
[80] *Mafesa v Parity Versekeringsmaatskappy Bpk (in likwidasie)* 1968 (2) SA 603 (O); see case discussion of *Mafesa in* Loubser & Midgley op cit note 1 at 134; see also PQR Boberg 'Reflections on the Novus Actus Interveniens Concept' (1959) 76 *South African Law Journal* 280.
[81] *In re Union Carbide Corp* supra note 1 at 853–9.
[82] See example of discussion of group delicts in CFC Van Der Walt 'Delictual Liability for Harm Brought about by Unknown Members of a Group' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 421; J Neethling 'The case of the three hunters, or delictual liability for alternative causes' (2003) 120 *South African Law Journal* 263.

overcome when fault-based liability is pursued to resolve the problem of fault-based corporate group liability. Thus, the existence of various actors does not make establishing legal causation impossible, but it makes such a process challenging for delict claimants.

4.2.4 Fault and corporate groups

Another hurdle that delict claimants must surmount when applying the generalising approach to corporate groups will be to show the delictual element of fault.[83] The element of fault is described as 'legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully'.[84] A crucial preliminary step in fault is to determine if a party has the capacity or capability to act with fault.[85] In other words, at the time of the delict, did the actor possess an ability to distinguish between what is right and wrong and to act in line with such an appreciation.[86] The factors that can affect a wrongdoer's capacity to understand the difference between right and wrong include intoxication, age, and mental health.[87]

Fault exists in one of two forms.[88] The first form of fault is known as intentional wrongdoing or dolus, where the wrongdoer wilfully and consciously directed their activities towards injuring another person's property or person.[89] The second form of fault is known as negligence or culpa and exists where the wrongdoer acts with carelessness or imprudence.[90] For the purposes of showing fault, it is generally sufficient to show either one of these forms.

Oftentimes, negligence is easier to prove, and in *Kruger*, the court set the standard test for negligence as requiring the following:

> 'For the purposes of liability *culpa* arises if- (*a*) a *diligens paterfamilias* in the position of the defendant- (i) would foresee the reasonable possibility of his conduct injuring another in his

[83] See description of fault in E Zitzke 'Transforming age-related capacity for fault in delict' (2021) 138 *South African Law Journal* 367; J Neethling & JM Potgieter 'Foreseeability: Wrongfulness and negligence of omissions in delict–the debate goes on MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)' (2018) 43 *Journal for Juridical Science* 145.
[84] Neethling & Potgieter op cit note 1 at 155–7; Loubser & Midgley op cit note 1 at 138–40.
[85] Ibid.
[86] *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) para 15; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 399–400; See discussion of cases in Loubser & Midgley ibid 139–41.
[87] Loubser & Midgley ibid at 140–44.
[88] Ibid at 175; Neethling & Potgieter op cit note 1 at 159–68.
[89] Loubser & Midgley ibid at 144–53; Neethling & Potgieter ibid at 159–64.
[90] See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430; J Scott 'The Definition of Delictual Negligence Revisited: Three Recent Judgments of the Supreme Court of Appeal' (2000) 33 *De Jure* 358; Neethling & Potgieter ibid at 155–72; see also R Ahmed 'Contributory intent as a defence excluding delictual liability'(2014) 131 *South African Law Journal* 88.

person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (*b*) the defendant failed to take such steps'.[91]

The negligence test in *Kruger* thus requires weighing up the harm-causing activities of the wrongdoer with the standard of the reasonable person. The tests require a fact-based assessment of what the reasonable person would regard as reasonably foreseeable and what would be reasonably preventable. In scenarios where such steps have been taken, no liability can ensue. Equally, a failure to take those steps will lead to a finding of negligence and fault on the part of the wrongdoer.

In the Bhopal disaster case that was brought before Keenan J in the United States, the delict claimants alleged that prior to the gas leak on 2 December 1989, two gas leaks had occurred at the same chemical plant in previous years. The first gas leak occurred on 24 December 1981, and the second leak occurred on 9 February 1982. The claimants alleged that on both occasions, deaths and injuries occurred. It was further alleged that not enough health and safety precautions were taken to avoid future harms of a similar nature. In a hypothetical application of the Bhopal disaster, in scenarios where such allegations can be proved, my view is that these two accidents would be a key indicator of showing both reasonable foreseeability and preventability.

In terms of the first leg of the negligence test, the crucial question is whether a reasonable person in the position of UCIL and UCC would have foreseen that the gas leak would have taken place. My view is that it is very likely that if similar harm had occurred on two occasions, there would be clear evidence of a history of such gas leaks and a likelihood that future harms would occur.[92] Thus, delict claimants would be able to meet the requirements of this leg of the negligence test when applied to the Bhopal disaster. It is further submitted that the foreseeability leg of the negligence test would be met for both UCC and UCIL because both parties were likely aware of the accidents and the reasonable prospect that there may be future gas leaks that may cause harm.

The second leg of the negligence test would ask whether a reasonable person in the position of UCIL and UCC would have taken steps to prevent the gas leak and the resultant harm to the

[91] *Kruger* ibid at 430.
[92] See Neethling & Potgieter op cit note 1 at 176–8; Loubser & Midgley op cit note 1 at 158–9 for the academic discussion of the two theories or approaches are utilised to show whether harm was reasonably foreseeable, the abstract or absolute approach and the concreate or relative approach, for present purposes the distinction between the two is not engaged in Chapter Four.

claimants of the Bhopal disaster. There are four factors that courts take into consideration when evaluating this leg of the negligence test.[93] Firstly, the courts look at the extent of the risk.[94] This means that courts do not expect one to take preventative steps for risks of harm that are unlikely. Secondly, the courts look at the gravity of the consequences of the risk should it materialise.[95] A risk can be likely but trivial.[96] This means that courts only expect a person to prevent serious risks that can cause considerable harm to the other party. Thirdly, the courts also look at the utility of the wrongdoer's conduct.[97] This means that courts consider whether one's conduct would have prevented the victim's harm. Fourthly, courts also consider the cost of preventing harm.[98] This means courts do not expect a person to take preventative steps when such steps are prohibitively expensive. These factors should be considered in the hypothetical application of fault to the Bhopal disaster.

In the Bhopal disaster, the two previous accidents indicated that the risk of a future gas leak was likely, and the consequences of such risk were serious if they had materialised.[99] The seriousness was evident because of the reported injuries and deaths of the previous accidents.[100] The more challenging question is what actions would have prevented harm and at what cost for both UCIL and UCC. Both these questions do not lend themselves to clear answers. Whilst it was clear that gas leaked from the chemical plant and caused harm, there has never been consensus regarding the broader circumstances that led to the gas leak. For example, UCC argued that it was human error and intentional sabotage that caused the leak, whereas the victims pointed towards the failure of safety systems and faulty design of the plant.[101] In scenarios where it is unclear what led to the harm, it is also equally difficult to show what steps would have prevented the harm and how much cost and effort would have been required to prevent harm.

The claimants in a hypothetical Bhopal disaster case will likely be unable to show that there were clear steps that UCC and UCIL could have taken to prevent harm, and they failed to take

[93] *Ngubane v South African Transport Services* 1991 (1) SA 756 (AD) at 36 where the court laid down all four primary considerations for testing the reasonable preventability leg of fault; see also Neethling & Potgieter ibid 5 at 180–4; Loubser & Midgley ibid at 161–7.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] See facts of these two accidents in *In re Union Carbide Corp* supra note 1 at 853–9.
[100] Ibid.
[101] Amnesty International op cit note 64 at 35–7.

such steps. In sum, the test of negligence would likely show that UCC and UCIL were not at fault in the gas leak disaster.

4.2.5 Wrongfulness and corporate groups

Delict claimants, as per the requirements of the fault-based generalising approach, must also show the existence of the element of wrongfulness.[102] This element has been subject to considerable debate and varying viewpoints from both the courts and scholars.[103] In my view, two recent Constitutional Court judgements give a sufficient summary of the key purpose and process of testing wrongfulness. In *Loureiro*, Van Der Westhuizen J states that:

> 'The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'. [104]

In *Country Cloud*, Khampepe J states that:

> 'Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability'.[105]

> 'The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault'.[106]

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[102] *De Klerk* supra note 10 para 121–6.
[103] See Loubser & Midgley op cit note 1 at 178 citing the dominant differing views A Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *South African Law Journal* 90; J Neethling 'The conflation of wrongfulness and negligence: is it always such a bad thing for the law of delict?: note' (2006) 123 *South African Law Journal* 204; RW Nugent 'Yes, it is always a bad thing for the law: a reply to Professor Neethling' (2006) 123 *South African Law Journal* 557.
[104] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53.
[105] *Country Cloud Trading CC v Member of the Executive Council, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 20.
[106] Ibid para 21.

From Van Der Westhuizen J in *Loureiro*, wrongfulness looks at the conduct and evaluates whether such conduct is acceptable or not based on the 'legal convictions of the community'.[107] The law considers that there is no general legal duty upon all community members not to cause harm to each other and, where harm does occur, to evaluate whether it is reasonable in the particular circumstance to impose delictual liability. Van Der Westhuizen J further cautions against mixing the element of fault with that of wrongfulness. In wrongfulness, the 'subjective state of mind is not the focus', whereas in fault, it 'focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person'.[108]

From Khampepe J in *Country Cloud*, there is a clear cost and benefit assessment that is tied to the wrongfulness inquiry. There are scenarios where liability should be limited and where it may lead to an unjustifiable burden on members of the public to care for the loss suffered by others. It is also clear from *Country Cloud Trading* that the influence of the values of the Constitution ought to play a part in all the aspects of the wrongfulness assessment.

Loubser et al propose that the practical assessment of wrongfulness can either focus on whether there has been an infringement of a right or whether there has been a breach of a legal duty to protect someone else from harm.[109] One can distinguish these two approaches based on the conduct in question. The first approach can be understood in terms of a scenario where there is positive conduct that causes harm. The second approach can be understood in terms of an omission, where the wrongdoer fails to protect another person from harm when they have a legal duty to do so. Both scenarios hypothetically find application in the present scenario of the Bhopal disaster. Section 4.2.2 indicated that the most viable basis of conduct is positive conduct on the part of UCIL and an omission on the part of UCC.

When wrongfulness is tested in cases of commission and omission, such an inquiry can be divided into two phases.[110] The first phase is to evaluate whether there is a prima facie case of wrongfulness, and the second phase is to evaluate if that prima facie case can be rebutted based on the recognised defence.[111]

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[107] Ibid.
[108] *Loureiro* supra note 103 para 53.
[109] Loubser & Midgley op cit note 1 at 183–6; Neethling & Potgieter op cite note 1 at 93; see also the discussion by Neethling & Potgieter at 5 where point out a different approach taken been courts in cases of pure economic loss, namely financial loss that is not directly related to harm on the person or property.
[110] See approach in *Country Cloud* supra note 104 para 20–6.
[111] Ibid.

In scenarios where there is harm from positive conduct, such as activities that lead to the release of toxic gas, the court automatically presumes that a prima facie case of wrongfulness has been shown by the claimants.[112] In order for the defendant to escape liability, they can show the existence of one of the recognised defences.[113] These defence are: the harm occurred as a result of private defence, the applicant consented to harm, a statutory authority, some other official authority permitted the harm, harm was out of recognised necessity, harm resulted from provocation, or that the harm was permitted by nuisance law.[114] The defence are evaluated in light of acceptable conduct as informed by the convictions of the community and constitutional norms.[115]

When the above wrongfulness process and rules are applied to UCILs positive conduct, UCILs hypothetical commission of actions that led to harm is rebuttably presumed wrongful. Thus, where the element of conduct can be successfully shown on the part of UCIL, a rebuttable case of wrongfulness is established, and a ground of defence, as listed above, can rebut the finding that UCIL's harm-causing activities were wrongfulness.

The process to be followed for UCC as far as wrongfulness is concerned is different. The law presumes that conduct in the form of an omission is prima facie lawful.[116] This means that wrongfulness can only be established if the claimants can show that the defendant was under a legal duty to prevent their harm.[117] There are several policy and statutory considerations that go into the court's evaluation of whether a legal duty to protect some existed in a particular circumstance.[118] In the present circumstance, the crucial question would be whether a parent company in the position of UCC would have owed a legal duty to the Bhopal disaster victims.

My literature review conducted in Chapter Three indicated that South African case law has not yet seriously considered the joint or individual delictual liability of a parent company for harms related to its own activities or in conjunction with activities of the subsidiary company.[119] A likely reason why there is no such case law in South Africa is that our courts have not yet been

[112] Ibid para 22.
[113] Loubser & Midgley op cit note 1 at 204–28; Neethling & Potgieter op cite note 1 at 106–53,
[114] Ibid.
[115] *Loureiro* supra note 103 para 53.
[116] *Country Cloud* supra note 104 para 20–6.
[117] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 43.
[118] Loubser & Midgley op cit note 1 at 186–96; Neethling & Potgieter op cite note 1 at 60–90.
[119] See discussion in Section 3.3 of Chapter Three.

presented with a clear opportunity to test fault-based principles within scenarios that involve corporate groups.[120]

In foreign law, *Chandler,* a case decided in the United Kingdom, is a rare exception where a parent company was held delictually liable for the wrongs committed by the activities of its subsidiary company.[121] My view is that *Chandler* can offer insight into what South African courts should consider when delict-based fault principles are applied to group contexts.[122] This case is crucial because it can offer insights into how South African law ought to engage whether a legal duty exists for delict claimants on the part of a parent company.

Briefly, the facts in Chandler were as follows. The applicant, Mr Chandler, was a brick loader employed by Cape Building Products Ltd (Cape Products), a wholly owned subsidiary of the parent company in the matter (Cape plc). Both Cape Building Products Ltd and Cape plc were incorporated in England. A delictual matter arose when Mr Chandler contracted asbestosis and sought damages from Cape plc. The claim against Cape plc was that it had negligently failed in its duty of care to maintain a safe working environment for wholly owned subsidiary employees and that such a failure ought to attract delictual liability. When Mr Chandler filed for damages, Cape Building Products Ltd was no longer existing. As a result, the only viable defendant was Cape plc, the holding company of Cape Building Products Ltd. In the High Court, Cape plc had lost and challenged that decision in the Court of Appeal.

In the High Court, the issue was framed as 'whether Cape owed a direct duty of care to the employees of its subsidiary company to advise on or ensure a safe system of work for them'.[123] The general rule of delict in the United Kingdom is that no one is under a duty to prevent harm to third parties.[124] There are exceptions to this rule where 'a relationship between the parties which gives rise to an imposition or assumption of responsibility'.[125] The assumption of

[120] See J Brickhill & Z Mbuyisa 'Multinational Company litigation - South Africa' in R Meeran (ed) *Human Rights Litigation against Multinationals in Practice* (2021) Chapter 4, at 95 and 97 where Brickhill & Mbuyisa's review, shows that there is little case law jurisprudence were delict claimants have not seriously pursued damages against corporate groups; see also my findings from section 3.3 of Chapter Three.
[121] *Chandler* supra note 17 para 80–1; see case discussion in M Petrin 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 *Modern Law Review* 603.
[122] For another example of delict-based fault liability in corporate group contexts see an example of joint liability of a case in the United States *In re Amoco Cadiz,* 20 Env't Rep. Cas. (BNA) 2041 (N.D. I1. 1984) at 35–7; -see case discussion in NJJ Gaskell 'The Amoco Cadiz: (I) Liability Issues' (1985) 3 *Journal of Energy & Natural Resources Law* 169; NJJ Gaskell 'The Amoco Cadiz: (II) Limitation and Legal Implications' (1985) 3 *Journal of Energy & Natural Resources Law* 225.
[123] *Chandler* supra note 17 para 1; Cape, as stated by the High Court, refers to Cape plc in this chapter.
[124] Ibid *Chandler* para 6–25 citing *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18 at 270.
[125] *Chandler* ibid citing *Smith* ibid para 272.

responsibility is created when one is under a duty to care to avoid harm to another.[126] The relevant legal principle on when one is under a duty of care was developed in *Caparo Industries plc.*[127] According to *Caparo Industries plc*, a party is under a duty of care to protect another party from harm when three factors are present. The first requirement is that the harm should have been foreseeable.[128] The second requirement is 'that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity or neighbourhood'.[129] The last requirement is 'that the situation should be one in which the court considers it fair, just and reasonable'.[130] In applying the three factors of *Caparo Industries plc,* namely, fair, just and reasonable, to the facts at hand, the High Court found that Cape plc owed Mr Chandler a duty of care.[131] It also found that by failing to ensure his safety at the workplace of its subsidiary, it had breached that duty and was liable for damages suffered by Mr Chandler.[132]

Sitting in the Court of Appeal, Arden LJ agreed with the High Court's assessment of the law and its findings.[133] Arden LJ made several adjustments regarding how the *Caparo Industries plc* test should be applied within the corporate group setting. Firstly, Arden LJ collapsed the last two test requirements into one.[134] This means that the requirement of proximity, fairness, just, and reasonableness were considered a single requirement for liability.[135] Secondly, the parent company's control over its subsidiary can indicate that the parent has assumed responsibility to protect the third party.[136] Thirdly, Arden LJ gave four factors that can be considered in determining whether a parent company is under a duty of care towards the third parties that have a relationship with its subsidiary company. These four factors are as follows:

> '(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew,

[126] Ibid.
[127] Ibid para 31–2 citing *Caparo Industries plc v Dickman* [1990] 2AC 605.
[128] Ibid at 31–2 citing *Caparo Industries plc* ibid at 618.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Ibid para 72–81.
[134] Ibid.
[135] Ibid; see also R Turner 'Revisiting the Direct Liability of Parent Entities Following Chandler v Cape Plc' (2015) 33 *Company and Securities Law Journal* 45 at 50 and Petrin op cit note 120 at 609.
[136] *Chandler* supra note 17 at 3111; see also M Petrin & B Choudhury 'Group Company Liability' (2018) 19 *European Business Organization Law Review* 771 at 776.

> or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues'.[137]

The duty of care test clearly shows a test that is built on a mix of factual, legal, and normative factors. Arden LJ assessed the extent to which Cape plc intervenes in the business of Cape Products and the fact that the parent-subsidiary companies are in the same industry. Arden LJ also considered the foreseeability of harm and Cape plc's superior knowledge regarding harm-causing activities at Cape Products. These factors were then employed to ground the finding that there was sufficient strong proximity between the delict victim and the parent to make it fair, reasonable, and just to impose liability on the parent for the delicts of its subsidiary.[138]

Chandler's comparative utility for the South African law of delict is two-fold. Firstly, *Chandler* indicates that in foreign law, it is possible for a court to utilise fault-based delict principles to assess the delictual liability within corporate group contexts. If South African courts were to make a similar finding to that in *Chandler*, it would thus be aligned with practice in other jurisdictions.

Secondly, *Chandler* offers a lesson for South African law on how one may show that a parent company owed a legal duty in terms of the wrongfulness test to take measures to avoid the claimant's harm. In terms of the second lesson, care must be taken to avoid conflating the duty of care test in the United Kingdom and the generalising approach of South Africa because they are two different tests.[139] Despite the differences in the tests, my view is that the generalising approach can extract some utility from the approach of group liability in delict in the *Chandler* case. What is particularly important are the four factors considered in *Chandler*. It is submitted that a court should consider these factors by deciding on the wrongfulness test for entities within corporate groups. In what follows, I consider how the lessons in *Chandler* can aid a court to apply the wrongfulness test within the corporate group context.

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[137] *Chandler* ibid para 80–1.
[138] Ibid.
[139] See caution of risks associated with conflating English law principles with South African delict principles in Neethling & Potgieter op cit note 1 at 103.

The conduct of UCC in the Bhopal disaster and Cape plc in *Chandler* would be described in South African law as an omission.[140] The rules of testing wrongfulness state that in such a scenario, such omissions are prima facie lawful unless the claimants can show a 'pre-existing duty' to protect against harm.[141] That means that unless a party can show a legal responsibility to protect the claimants, a failure to protect another person against harm on its own is lawful behaviour in South African law. To determine whether such a legal duty existed, courts employ a 'flexible criterion of the legal convictions of the community and legal policy'.[142]

The traditional approach to assessing the flexible criterion is to evaluate whether the facts fall under a crystallised factor or clear examples of where a legal duty exists.[143] For example, a crystalised factor is that it is accepted that harm from an omission is likely wrongful if there is a clear statute or rule of law, such as the Firearms Control Act, that imposes requirements for extra caution in certain scenarios, such as where there is handling of firearms.[144] Ultimately, the flexible criterion demands that these crystalised factors must be supplemented by other considerations as per the 'legal convictions of the community' as informed by the norms of the Constitution.[145] The tests that have been developed for wrongfulness also recognise several defences, such as consent and statutory authority, that a defendant can invoke to escape liability.[146]

When these principles of wrongfulness are applied to corporate groups, *Chandler* provides several considerations as to what a court may consider when testing for the existence of a legal duty as per the wrongfulness test. For example, in *Chandler*, the basis of liability was partly based on the fact that Cape plc had policies and practices in place that permitted its employees to intervene in the business of Cape Products.[147] It is submitted that this consideration is compatible with the wrongfulness test as it can show a scenario where it is fair to impose a legal duty to prevent harm. When a parent company intervenes in the affairs of its subsidiary, it is fair and just for the law to expect it to ensure that such interventions do not lead to harm.

[140] See discussion in 4.2.2.2 of this Chapter.
[141] *Country Cloud Trading* supra note 104 para 22.
[142] Neethling & Potgieter op cit note 1 at 65.
[143] Ibid at 66–89.
[144] Ibid see discussion of an example of The Firearms Control Act 60 of 2000 at 74–8.
[145] *Loureiro* supra note 103 para 53.
[146] For a full discussion, see Neethling & Potgieter op cit note 1 at 106–47; Loubser & Midgley op cit note 1 at 203–228.
[147] See case discussion *Chandler* supra note 17 para 70–81.

Thus, when such interventions are taken, a legal duty should be placed on the parent company to protect third parties from harm.

In *Chandler*, Arden LJ also considered that the parent and subsidiary companies were in the same industry.[148] This is not a strong indicator of a legal duty and should not be incorporated into the wrongfulness inquiry for the parent company. It would not be equitable to create a legal duty on the parent company for simply engaging in similar business activities with its subsidiary company.

In *Chandler,* Arden LJ also looked at the foreseeability of harm and Cape plc's superior knowledge regarding harm-causing activities at Cape Products.[149] This consideration is compatible with the wrongfulness test and should constitute a strong factor for the existence of a legal duty on the part of the parent. In scenarios where a parent company sets policies for the subsidiary company and has knowledge of risks of harm associated with specific activities, this should serve as a good indicator to place a legal duty on such a parent company to avert harm associated with such activities.

Another key consideration could be added to these hypothetical scenarios of *Chandler* and the Bhopal disaster in South Africa. The role of the constitutional norms in the wrongfulness test. In terms of the element of wrongfulness, a strong case also exists within the factual matrix of the Bhopal disaster. South African courts utilise a constitutionally infused *boni mores* criterion as the test for showing this legal element.[150] The test asks whether, considering all the surrounding circumstances of the matter, the convictions of the community would regard the defendant's infringement of the plaintiff's rights as unreasonable.[151]

The constitutional rights violated in the Bhopal disaster also need to be considered in whether UCC's activities can be regarded as wrongful. In the Bhopal disaster, there was physical and psychological harm in violation of s 12(1) of the Constitution, which protects persons against all forms of violence. There is also a violation of s 12(2), which protects physical and psychological harm. There is also a violation of the right to life as per s 11 of the Constitution that was implicated as a result of the deaths. There is also a violation of the right to human dignity as per s 10 of the Constitution because of the negatively impacted living conditions left

[148] Ibid.
[149] Ibid.
[150] *Loureiro* supra note 103 para 53; *Country Cloud* supra note 104 para 20–6.
[151] Ibid.

behind in the aftermath of the harm to the living environment and the reduced amenities of life. I believe the limitation on all these constitutional rights would weigh in favour of a finding that UCC's omission is wrongful. This is because such large-scale harms create a greater need for legal recourse, including against those who failed to take precautionary measures to avoid such harms.

There is further evidence that the harm would offend the community's impression of acceptable conduct. This is because the Bhopal disaster was not the first accident at the plant.[152] Two accidents had taken place before the 1984 accident.[153] It is not clear what had been learned from those accidents regarding safety measures and what had been implemented to avoid further harm.[154] However, any evidence concerning the circumstances of all three accidents will be a good example of what can be considered in the wrongfulness inquiry. Such accidents point towards a legal duty on UCIL to take more precautions that should have been taken to avoid future harm emanating from the plant. When the totality of the constitutional rights implicated in the case is considered, coupled with the degree of carelessness evident in the plant operations, there is a high probability that the wrongfulness test would be met in the facts of the Bhopal disaster.

All the considerations from *Chandler* and the Bhopal disaster, as indicated above, can aid a court in evaluating whether a legal duty exists on the part of the parent company. If the court finds that there was no legal duty on the part of the parent company to prevent the claimant's harm, there can be no liability. If, on the other hand, a legal duty can be shown, a parent company in our hypothetical scenario can still raise a ground of defence as described above in the scenario of UCILs potential liability.

It is submitted that *Chandler* provides unique utility for the present inquiry into the element of wrongfulness of a parent company in the position of UCC. *Chandler* indicates the existence of foreign case law where a parent company was found to have been under a legal duty to avoid harm to third parties that corporate group activities have harmed. In South Africa, these lessons indicate when a failure to act within corporate groups can be considered wrongful. Thus, applying wrongfulness to corporate groups should, as a general rule, be a viable proposition.

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[152] *In re Union Carbide Corp* supra note 16 at 855.
[153] Ibid.
[154] Ibid.

The fact that there is a viable path for showing this legal element should be distinguished from the likelihood of success. Showing a legal duty on the part of the parent company will be difficult. This is because the delict claimants would need to engage all three levels of the relationship and show a sufficiently strong independent relationship between them and the parent company. This will be challenging. Ultimately, much will still depend on the exact factual matrix presented to a court. Feasibility of success will also depend on whether crystalised factors exist in the facts and the strength of the defences that the other party will raise.

4.2.6 Evaluation of the application of fault-based liability to corporate groups

In Chapter Three, I concluded that there is a need for the common law of delict to develop an appropriate response to corporate group liability. Section 4.2 has evaluated the viability of applying the fault-based generalising approach to corporate groups. The Bhopal disaster was employed as a hypothetical set of facts to test the results of utilising the generalising approach as envisaged. Section 4.2 found a mix of positive and negative results as far as the viability of utilising the generalising approach to hold corporate groups liable in delict.

On the positive side, section 4.2 found that the elements of harm, the factual causation leg of causation, the reasonable foreseeability leg of the negligence test and wrongfulness can be successfully applied to both the parent and subsidiary company that is part of a corporate group. On the negative side, section 4.2 found that the element of conduct, the legal causation leg of the causation and the reasonable preventability leg of the negligence test contain notable challenges as far as applying these elements to corporate group contexts.

My theoretical conclusion is that employing fault-based liability principles for corporate groups is tentatively viable if the unique challenges associated with the identified elements can be overcome. I find that the most feasible case in a hypothetical Bhopal disaster scenario is against a company in the position of UCIL, namely a subsidiary company. In my estimation, the likelihood of utilising the fault-based generalising approach to hold a parent company liability for corporate group activities is slim. Many of the principles of fault-based liability were not developed with corporate groups in mind and are thus ill-suited to respond to juristic entities organised this way adequately. These limitations necessitate looking at strict liability as the alternative for direct-based corporate group liability.

4.3 Strict or no-fault liability and corporate groups

Apart from fault-based liability, the other broad branch of common law, under delictual liability, is a strict or no-fault liability.[155] The traditional view among academics is that a delict must ordinarily be based on the fault of the wrongdoer.[156] This is because some academics consider it unconscionable that anyone should be held liable in delicts where there was no intent or negligence on the part of the delictually liable party.[157] Conceptions of liability that are based on no-fault liability are, therefore, sometimes considered unstable in their justification because they insist that liability can occur without fault.[158] At a fundamental level, these concerns are well-founded and based on the difficult question of why someone should, without fault, be responsible for a delict committed by another person's activities.[159] In my view, strict liability goes against core philosophical tenets of delict that each person must be viewed as an individual in law and is ultimately responsible for only their own affairs.[160] Still, no-fault liability or strict liability exists in all common law jurisdictions and many others outside the common law world and is a well-settled basis of delictual liability.[161]

The origins of strict liability can be traced to at least three thousand years ago under German law and Roman law roots.[162] The first stories of strict liability pertained to the goring ox, where ancient law would impose liability on the owner of such an ox where the ox damaged or ate another person's property.[163] It was not required that the owner of the ox was negligent or intended that the ox cause harm to their neighbour's property.[164] What was essential for the law was that he was the owner and thus ought to be liable for the animal's harm.[165] This basic

[155] JC Van der Walt 'Strict liability in the South African law of delict' (1968) 1 *Comparative and International Law Journal of Southern Africa* 49; Loubser & Midgley op cit note 1 at 455–81; Neethling & Potgieter op cit note 1 at 433–60.
[156] Van der Walt ibid at 50–1; Loubser & Midgley ibid at 458; Neethling & Potgieter ibid at 433.
[157] Ibid.
[158] JM Potgieter 'Preliminary thoughts on whether vicarious liability should be extended to the parent-child relationship' (2011) 32 *Obiter* 189 at 189–92.
[159] Ibid.
[160] A common example of the importance of individual responsibility in delict comes from the classic delictual maxim, res perit domino, which means that each person must bear their loss unless they can show a delict see *Telematrix* supra note 10 at 468 where the court describes this maxim.
[161] MM Botha & D Millard 'The past, present and future of vicarious liability in South Africa' (2012) 45 *De Jure* 225 at 226–8; S Wagener 'The relationship (s) giving rise to vicarious liability in South African law' (2014) 131 *South African Law Journal* 178 at 178–9; for literature of the doctrine in foreign law see A Gray *Vicarious Liability Critique and Reform* (2018); P Giliker *Vicarious Liability in Tort: A Comparative Perspective* (2010); P Giliker *Vicarious Liability in the Common Law World* (2022).
[162] T Kravtsova & G Kalinichenko op cit note 18 at 685–6 citing NP Miller 'An Ancient Law of Care' (2004) 26 *Whittier Law Review* 3; see also Van der Walt op cit note 154 at 50–1.
[163] Kravtsova & Kalinichenko ibid.
[164] Ibid.
[165] Ibid.

logic eventually extended to harm caused by a slave, a man's wife, children, and his employees.[166] During its Roman development, the concept of paternal power and responsibility would be the basis for the liability.[167] Under the Roman word of paterfamilias, or the male head of a household, such a person was considered liable for all acts caused by those under his house.[168]

The South African principles that regulate strict liability can be traced primarily from English, German, and Roman law.[169] In South Africa, strict liability has significantly evolved from its origin in English, Roman, and German law. Current law now recognises harm caused by animals, state functionaries, employees, objects thrown, poured, or falling from a building, and harm from damage caused by objects in the possession of a thief.[170] The doctrine of vicarious liability is one of the forms of strict liability in delict.[171] This doctrine recognises strict liability for harm caused by the agency or employment relationship.[172] Further, specific South African statutes incorporate strict liability.[173] Strict liability is thus widely applied as the basis of delictual liability in some relationships under South African law.[174]

As stated, strict liability exists as an anomaly of delict, which is often dominated by a fault-centric basis of liability.[175] The challenge of Chapter Four is testing whether strict liability can be a sound basis for holding a parent company liable in delicts committed by its subsidiaries. Academic commentators who have presented arguments for the introduction of strict liability regimes in different contexts often appeal to either the underlying theoretical justifications for strict liability or the existing rules as the analogical basis of extending strict liability.[176] For example, Potgieter utilises the theories of strict liability to make a compelling argument that the parent and child relationship must be placed within the ambit of strict liability.[177]

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[166] Ibid.
[167] Ibid.
[168] Ibid; Giliker (2010) op cit note 160 at 7.
[169] Van der Walt op cit note 156 at 50–1; PQR Boberg 'Oak Tree or Acorn - Conflicting Approaches to Our Law of Delict' (1966) 83 *South African Law Journal* 150 at 165.
[170] Wagener op cit note 160; Loubser & Midgley op cit note 1 at 457–66; Neethling & Potgieter op cit note 1 at 435–60.
[171] Loubser & Midgley op cit note 1 at 457–66; Neethling & Potgieter op cit note 1 at 435–60.
[172] Ibid; see complete discussion of this doctrine in section 4.3.6 of Chapter Four.
[173] See discussion in Chapter Three section 3.3.
[174] Loubser & Midgley op cit note 1 at 457–66; Neethling & Potgieter op cit note 1 at 435–60.
[175] Neethling & Potgieter ibid at 3–4.
[176] For arguments based on the theories of strict liability, see Potgieter op cit note 157; for arguments based on existing principles of strict liability, see Giliker (2010) op cit note 160 at 196.
[177] Potgieter ibid.

For the purposes of Chapter Four, the critical question is whether strict liability can be extended to corporate groups, and there are a number of views on this question. In South Africa, Steven suggests that it ought to be theoretically viable to apply strict liability within corporate groups.[178] The suggestion is based on the tests of liability and case law as opposed to the theories behind the rules. Stevens ultimately leaves it as an open question for further exploration.[179] From a foreign law perspective, Kravtsova and Kalinichenko also look at the viability of strict liability within corporate groups but place more emphasis on the theories of strict liability.[180] Morgan also considers whether strict liability should be applied to corporate groups through a discussion of both the theories of liability and the tests for compatibility with corporate groups.[181]

My own evaluation is that the practical tests of strict liability will likely explain how to make strict liability compatible with corporate groups, whereas the theories of strict liability may explain why strict liability ought to be compatible with corporate groups. When I apply my mind to the purposes of Chapter Four, I come to the view that a fuller picture of strict liability ought to commence with a focus on the justifications or theories of liability of why strict liability in the first place before discussing the principles of how strict liability can be tested. My suggested approach will likely align with the purposive interpretation of the law encouraged by the Constitution, which encourages inquiry into the reasons why rules exist.[182] This is because, from a South African perspective, all the remedies developed in South African private law ought to be ultimately guided by the norms of the Constitution.[183]

As per the suggested approach, what follows is an assessment of the compatibility between the main theories utilised to justify strict liability and corporate groups. These main theories under evaluation are agency considerations, evidentiary considerations, equity and fairness considerations, and enterprise or risk creation considerations. Many of these theories are based on the employment relationship as the basis for strict liability.

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[178] R Stevens 'Kuwait Asia Bank EC v National Mutual Life Nominees Ltd revisited: the possible vicarious liability of a holding company for the delicts caused by its nominee directors on the board of its subsidiary' 2019 *Journal of South African Law* 78; see detailed discussion of Steven's position in section 3.2 of Chapter Three.
[179] Ibid.
[180] Kravtsova & Kalinichenko op cit note 18 at 685–7.
[181] P Morgan 'Vicarious Liability for Group Companies: the final frontier of vicarious liability?' (2015) *Journal of Professional Negligence* 276.
[182] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) at 136–8.
[183] See s39 of the Constitution that dictates key considerations when developing the common law.

4.3.1 Agency considerations as justification for strict liability

Gray convincingly argues that the German and English roots of strict liability were primarily based on an express and implied right of a master or employer to command his employees as the true legal basis for imposing strict liability.[184] Such an express or implied command meant that the employer was liable because someone had acted on their behalf and thus under agency logic.[185] What follows are some different variants of this underlying logic that have since emanated from this basic agency-based logic and were employed to justify vicarious liability.

Strict liability has been justified in terms of the identification theory.[186] Under this theory, when the employee commits a delict, he does not have complete agency.[187] Such an employee is just regarded as the arm of the employer, and it is the employer who is regarded to have committed the delict and not the employee.[188] It is thus regarded fair that a master should be liable for what has been done by the metaphorical hand that belongs to him.

Strict liability has been justified in terms of the control test.[189] This theory suggests that employers have a right to control the work and conduct of the employee.[190] This right to control the work of the employee makes it equitable to impose vicarious liability on the employer.[191] Control appears to be understood as a command given by the master, and this is the basis of strict liability. In *DHN,* a case decided in the United Kingdom, the court characterised the parent control over its subsidiary company as so complete that it found it equitable to impose liability on the parent for the subsidiaries' activities.[192]

I contend that Gray's command theory of agency logic can provide a sound reason as to why, in some matters, strict liability can be logically extended to corporate groups. For example, in *DHN*, the courts found that the relationship between the parent and subsidiary companies was set up in such a manner that the parent company exercised complete control over the subsidiary company's affairs. Theoretically, it is logical to consider the subsidiary company as being

[184] A Gray op cit note 160 at 17 and 23–8.
[185] Ibid; see also agency logic in AO Sykes 'The economics of vicarious liability' (1983) 93 *Yale Law J*ournal 1231 at 1233–46.
[186] PS Atiyah *Vicarious liability in the law of torts* (1967) at 19–20; Potgieter op cit note 157 at 189–92.
[187] Ibid.
[188] Ibid.
[189] Atiyah ibid at 15–8; Potgieter ibid at 92.
[190] Ibid.
[191] Ibid.
[192] Section 3.2 Chapter Two; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1976) 1 WLR 852 at 6; see discussion of *DHN* in FHI Cassim et al *Contemporary Company Law* 3ed (2021) at 70.

under the command of the parent company, and thus, the subsidiary company becomes analogous to the parent agent as opposed to an independent actor.[193] In scenarios where the behaviour of the subsidiary company is entirely based on the express or implied command that it has received from the parent company, this ought to logically serve as a sound justification for why the parent company must be strictly liable for harms that emanate from such controlled activities. My evaluation of agency considerations is that they are strong and ought to be given a primary role as justifications for any extension of strict liability to corporate groups in South African law common law of delict.

4.3.2 Evidentiary considerations as justification for strict liability

Strict liability has been justified in terms of evidentiary considerations, otherwise termed 'evidence theory' or the 'theory of pleading convenience'.[194] The basic logic of the argument is that there are scenarios where it is difficult or even impossible for the plaintiff to gather the evidence required to claim the harm that they have suffered.[195] It is based on this that the law must impose strict liability on the defendant because they are the ones with more access to the evidence required to assess the merits of the plaintiff's claim.[196]

Morgan argues that evidentiary considerations are a good reason to impose strict liability on the parent-subsidiary relationship.[197] In complex, multi-tier corporate structures spread across the world, Morgan argues that it is often difficult, if not impossible, for the claimants to gather evidence of how the corporate group operates.[198] It would also be difficult for claimants to show with precision who is responsible for the delicts in question. The argument is thus that imposing vicarious liability aids in reducing the costs of litigation for the claimants, making it easier for them to get legal recourse. Morgan thus argues that imposing vicarious liability on the parent reduces the cost of evidence collection, identifying, and laying a claim on a parent company.[199] This argument fits into my findings in section 4.2, where I argued that the evidence required to prove fault-based delictual elements such as conduct will be high. Evidentiary

[193] Section 3.2 Chapter Three; Cassim et al ibid at 70 discussing *DHN* ibid.
[194] Atiyah op cit note 185 at 20–1; Gray op cit note 160 at 149–50.
[195] Ibid.
[196] Ibid.
[197] Morgan op cit note 180 at 292–3; see also X Feng *Corporate Liability Towards Tort Victims in the Personal Injury Context* (PhD thesis, Queen Mary University of London, 2017) at 253–6.
[198] Ibid.
[199] Ibid.

justifications may thus serve to equalise this burden on claimants by making the parent companies' liability strict and thus shifting some of the evidentiary responsibilities to them.[200]

The evidentiary theory also has major weaknesses. Gray argues that evidentiary theory practically creates a reverse onus of proof for the defendant and may be difficult to justify.[201] In most legal systems, including in South Africa, it is the plaintiff who must make their case and not the defendant who must defend every matter brought against them.[202] Equity considerations in procedural law dictate that a party who is bringing a matter to court should indicate the basis of their claim.[203] Gray thus argues that the fact that evidentiary considerations go against procedural rules weakens it as a justification to ground the existence of strict liability in law.[204] I disagree with Gray's criticism because there are scenarios where it is impossible for the claimants to get a hold of internal company records for the purposes of showing who harmed them.[205] In such scenarios, there are good policy reasons not to strictly observe the tenets of procedural law. Morgan makes this argument as it relates to corporate groups and argues that in scenarios where harms are related to companies in a corporate group, evidentiary considerations are crucial to establish the identities of those who committed the harm in question. I am persuaded by Morgan's logic and would argue that any extension of strict liability in corporate group settings should be grounded by evidentiary considerations as a primary factor for liability.

4.3.3 Equity and fairness considerations as justification for strict liability

Strict liability has been justified for reasons that I broadly term equity and fairness considerations. This is because equity and fairness logic justifies strict liability based on what is fair and reasonable. For example, strict liability has been justified as a form of rough justice or on the grounds that it is a socially convenient mechanism to give recourse to a victim who has suffered delictual harm.[206]

[200] Ibid.
[201] Gray op cit note 160 at 149–50;
[202] CRM Dlamini 'The Burden of Proof: Its Role and Meaning' (2003) 14 *Stellenbosch Law Review* 68 at 85–8.
[203] Ibid.
[204] Gray op cit note 160 at 149–50.
[205] See discussion Ochei, Ezeani, & Anderson op cit note 62 at 192–8.
[206] Potgieter op cit note 157 at 192; Loubser & Midgley op cit note 1 at 468.

Strict liability has been imposed on an employer for the delicts of his employees and has been justified in terms of the old maxim culpa in eligendo.[207] In terms of this maxim, an employer must be liable for the wrongs of their servant because they are the ones responsible for picking an incompetent employee who has caused a delict.[208] In terms of the maxim, the acts of the employee are regarded as the acts of the employer.[209] In *Feldman,* it was described as the 'hoary explanation of culpa in eligendo'.[210]

My view is that culpa in eligendo is not an ideal consideration to extend to corporate groups. This is because when its logic is applied to corporate groups, it risks creating the impression that the law frowns upon a shareholder for simply setting a separate juristic person, namely a subsidiary company. My view is that it would be inappropriate for the law to create such an impression that merely setting up a business is sufficient reason to bear the burdens of delicts that have been committed by another.

Strict liability has been justified in terms of the interest or profit theory.[211] In terms of this theory, a person must be responsible for harm from activities that have been of benefit to him/her.[212] The logic is that it is fair to impose vicarious liability where one party obtains a profit from certain activities and must bear the loss when harm falls on a member of the public as a result of their employee's delict.[213] The negligence of the party that is additionally liable is not crucial for the purposes of strict liability. What is considered is that he/she must bear the burden of the activity that has benefited them.[214]

Strict liability has been justified in terms of the theory of loss distribution.[215] The logic employed in this theory is that an employer can bear some of the loss that the claimant has suffered.[216] This is justifiable because employers can get insurance to cover the financial loss

[207] *Feldman (Pty) Ltd v Mall* 1945 AD 73 at 738; *S v Poole* [1975] 2 All SA 194 (N) at 199; Potgieter op cit note 157 at 191.
[208] Ibid.
[209] Ibid.
[210] *Feldman* ibid at 738; Potgieter ibid at 191.
[211] Potgieter ibid at 191; Atiyah op cit note 185 at 17–8; Neethling & Potgieter op cit note 1 at 434.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] *Feldman* supra note 206 at 740; see also Potgieter ibid at 191; Atiyah op cit note 185 at 22–8; C McIvor 'The use and abuse of the doctrine of vicarious liability' (2006) 35 *Common Law World Review* 268 at 283–8.
[216] Ibid.

on many business activities.[217] The ability of the employer to cover harm through insurance thus makes such loss distribution equitable and fair.[218]

Strict liability has been justified based on the theory of solvency or deep pockets.[219] This theory posits that employers are often financially more capable than their employees when dealing with the damage that will result from the harm.[220] The employer is thus often solvent and more likely to satisfy the damages award owed to the claimant.[221]

The theories of profit, deep pockets, solvency, and loss distribution share similar logic and concerns, which is that a party that benefits and is in a better position to meet judgment debts must be burdened with the responsibility of harm from the activities that benefit them. This core logic finds some application as a policy basis of strict liability in the parent-subsidiary relationship.[222] Morgan contends that the parent company, as a major shareholder of one or many subsidiaries, is often in a much better position to meet the monetary sums of delictual claims.[223] Parent companies are oftentimes more financially solvent than their subsidiaries and in a better position to shoulder the burden of compensating the delict claimant.[224] The deep pockets theory thus has normative elements of distributive and corrective rough justice.[225]

I am persuaded by Gray's view that the deep pockets theory is 'deeply unprincipled reasoning'.[226] This is because the fact that someone has the financial resources to meet a judgment debt should not itself be a reason why someone ought to be held liable for a wrong they did not commit.[227] Despite this obvious shortcoming, recent judgments in foreign law have employed this logic to justify strict liability.[228] Neyers argues that the deep pockets theory is faulty logic because it does not explain why the employer must be the one to compensate for

[217] Ibid.
[218] Ibid.
[219] Gray op cit note 160 at 151–3.
[220] Ibid.
[221] Ibid.
[222] Morgan op cit note 180 at 289–93; see a similar idea in Feng op cit note 196 at 237–60.
[223] Ibid; see similar discussion LM LoPucki 'The essential structure of judgment proofing' (1998) 51 *Stanford Law Review* 147.
[224] Ibid.
[225] Ibid.
[226] Gray op cit note 160 at 151.
[227] Ibid.
[228] Ibid at 150; *R v Director of Public Prosecutions; Ex Parte Kebilene* [2000] 2 AC at 326 and 386; *R v Lambert* [2002] 2 AC at 545 and 608–9; *R v Johnstone* [2003] 1 WLR at 1736 and 1750; *Sheldrake v Director of Public Prosecutions* [2005] 1 AC at 264 and 309; see ibid at 151 citing *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC at 15.

the loss and not anyone else.[229] Neyers, for example, makes the case that nation-states often have deeper pockets than employers, so the logic is that the party with the deeper pockets ought to follow the state rather than the employer.[230] It is also possible that the subsidiary company itself has more financial resources than its parent company. In such a case, the deep pockets logic fails to account for this. One clear advantage that deep pockets theory may provide is that it permits delict claimants to seek recourse from whichever party is most financially capable of compensating them for their loss. However, I ultimately disagree with Morgan's arguments and do not think that the deep pockets theory should have any role towards an assessment of the suitability of extending strict liability to corporate groups.

Similar problems exist with loss spreading as a basis of liability. Neyers argues that loss spreading cannot account for scenarios where no insurance exists or the employer is poor and simply has no means to compensate for the harm.[231] In such scenarios, the logic of loss spreading becomes difficult to justify because there is no one to whom to spread the loss.

In cases such as in the Bhopal disaster, where delict victims have settled out of court, the settlements were paid out by both the parent companies and the subsidiary.[232] This, in my view, serves as some indication that parent companies, as well as the victims, view it as equitable for parent companies to share some of the burden of the delictual harm. The parent company can also take out insurance to cover the compensation claim.[233] Such insurance cover serves as a form of equitable loss spreading such that the whole burden of loss is not borne by the victims of a delict.[234] Considerations tied to resource sharing, as proposed by the theories of profit, deep pockets, solvency, and loss distribution, are, in my view, difficult to justify. Such considerations must thus be used sparingly and at the supplementary level to justify the extension of strict liability towards corporate groups.

Neyers utilises what he terms the indemnification theory as a theory of justification for the imposition of strict liability.[235] According to the indemnification theory, an employer indemnifies his employees against harm that such employees cause to the members of the

[229] JW Neyers 'A theory of vicarious liability' (2005) 43 *Alberta Law Review* 287 at 292–3.
[230] Ibid.
[231] Ibid at 10–11.
[232] T Covell 'Bhopal Disaster Litigation It's Not over Yet' (1991) 16 *North Carolina Journal of International Law and Commercial regulation* 279 at 279.
[233] Morgan op cit note 180 at 291.
[234] Ibid.
[235] Neyers op cit note 228 at 303; see similar ideas Giliker (2010) op cit note 160 at 30–3.

community where such harm occurs in the furtherance of the employment objectives.[236] This indemnity is built into the contract between the employer and the employee, either expressly or implicitly.[237]

Neyer's indemnification theory finds logical application in corporate groups. In scenarios where it is clear that the parent company has, either expressly or by implication, contractually indemnified the subsidiaries' activities, the claimants ought to be compensated by the parent company. The basis of liability will not focus on delict but on the clear contractual undertaking to insure against harm caused by the subsidiary company. Therefore, if the contract covers such harm, the law of delict will simply serve as enforcement of a clear contractual undertaking between parties. This, in my view, is a stable and logical justification for extending vicarious liability to parent companies.

Strict liability has been justified as a form of deterrence.[238] The logic utilised here is that employers are well placed to ensure that they encourage their employees to take the necessary precautions that avoid the commission of delicts.[239] Employers are also well placed to discipline their employees who do not protect against delicts.[240] Strict liability is, therefore, a deterrence to the employer who avoids their duty to monitor their employees and ensure that their work is done in a manner that does not cause harm to others.[241]

Morgan argues that vicarious liability has a role to play in deterring delict harms caused within group contexts.[242] The argument is that parent companies are well placed to influence, control, and guide the subsidiaries away from business practices that cause delicts on third parties. It is further argued that unless the parent companies are held liable alongside these subsidiaries, there is no incentive placed on the parent companies to exercise the influence or control that they have over their subsidiaries. If vicarious liability were to be imposed on the parent companies, this would act as a deterrent on parent companies that avoid supervising and encouraging subsidiaries to conduct themselves in a manner that avoids the commission of

[236] Ibid J W Neyers at 305–11.
[237] Ibid.
[238] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 38 citing *Bazley v Curry* [1999] 2 SCR 534; *Majrowski v Guy's and St. Thomas's NHS Trust* [2006] 3 WLR 125 at 8.
[239] Potgieter op cit note 157 at 191; see also Giliker (2010) op cit note 160 at 237–45.
[240] Ibid.
[241] Ibid.
[242] Morgan op cit note 180 at 293; see also similar idea Feng op cit note 196 at 250–3; Kravtsova & Kalinichenko op cit note 3 at 686–7.

delicts.[243] This would serve as a disincentive for corporate groups from structuring themselves into multi-tiered corporate structures for the sole purpose of avoiding harm.[244] The reason this would be disincentivised is that the theory of vicarious liability would not focus on the complex structures but would impose liability on the party that most closely resembles the parent company, irrespective of the chosen corporate structures.[245]

Morgan raises notable points, but I am not convinced that deterrence is a sound basis for extending strict liability to corporate groups. The basic logic of deterrence is that the employer ought to take sufficient precautionary measures to avoid harm to third parties.[246] The problem with deterrence logic is that it is an expression of the employer's fault and thus operates contrary to the underlying logic that liability must be strict or on a no-fault basis.[247] Further, if this was the basis of liability, it ought to follow that the employer would escape liability where they can prove that they took the requisite precautions.[248] However, the deterrence basis does not permit such evidence that can negate liability.[249] It is for these reasons that I think deterrence must not be part of the rationale for whether it is suitable to extend strict liability to corporate groups.

My assessment of the theories under equity and fairness is that they are among the theories that are the most difficult to defend as a theoretical basis for strict liability. The words 'rough justice', 'deep pockets', and 'convenience' do not appear to be words that can be readily justifiable in a constitutional era based on equality and human dignity.[250] Rather, the logic appears to be taken from a pre-constitutional erawhen some of the laws in South Africa were primitive and unbalanced.

When equity considerations are viewed from the perspective of justifying strict liability, these considerations have a lot of shortcomings. These criticisms will naturally weaken equity considerations as a basis for extending strict liability within corporate groups. However, despite the weaknesses of equity logic, the law of delict is influenced by equity considerations.[251] For

[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Potgieter op cit note 157 at 191; see also Giliker (2010) op cit note 160 at 237–45.
[247] Neyers op cit note 228 at 293–6.
[248] Ibid.
[249] Ibid.
[250] Section 36 of the Constitution.
[251] *K* supra note 237 para 21; see also *Carmichele* supra note 45 at para 51.

example, deterrence considerations were taken into account in the case of *K*.[252] Therefore, despite the weaknesses of equity and fairness considerations, they ought to have a limited place in the decision of whether strict liability should be extended to corporate groups. This role should, however, not be a primary one but only a supplementary role.

4.3.4 Enterprise liability or risk creation considerations as justification for strict liability

Strict liability has been justified for reasons that I broadly term enterprise liability or risk creation (enterprise risk).[253] The underlying logic of enterprise risk is that where a party creates risks or abnormal danger by undertaking certain activities in the community, where such risks materialise, it is fair to impose the burden of liability on that party.[254] Enterprise risk arguments tend to carry both economic dimensions and equity or fairness dimensions.[255] For example, the enterprise risk logic used by some labour judgments in Chapter Three is primarily influenced by economic logic as the basis of corporate group liability in labour law.

In South Africa, Neethling argues that enterprise risk is utilised for three purposes within discussions of strict liability.[256] Firstly, enterprise risk is employed as a justification for strict liability, secondly as a formulation of the principles of strict liability, and thirdly as a factor of meeting the requirements of strict liability within specific relationships recognised by the doctrine.[257] For present purposes, the focus is on the first utility of enterprise risk, namely as a justification for strict liability.

There is some academic support for the argument that enterprise risk logic ought to be utilised as a justification for strict liability within corporate groups.[258] Morgan argues that enterprise risk can be employed as justification for the imposition of vicarious liability within the parent-subsidiary company relationship.[259] Morgan also argues that where a parent company benefits

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[252] *K* ibid para 38 citing *Bazley* at para 26.
[253] See differing accounts D Brodie *Enterprise Liability and the Common Law* (2010); S Ozer 'The Role of Enterprise Risk within Vicarious Liability: Courageous or Unprincipled Judicial Reasoning' (2012) 2 *Southampton Student Law Review* 143; J Neethling 'Risk-Creation and the Vicarious Liability of Employers' (2007) 70 *Journal of Contemporary Roman-Dutch Law* 527.
[254] *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at 31–4; *Stallion Security (Pty) Limited v Van Staden* 2020 (1) SA 64 (SCA) at 27–31; *K* supra note 237 at para 28; *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 118.
[255] P Morgan 'Recasting vicarious liability' (2012) 71 *Cambridge Law Journal* 615 at 618.
[256] Neethling op cit note 252 at 528.
[257] Ibid.
[258] Morgan op cit note 180 at 290–1; Feng op cit note 196 at 240–6; Kravtsova & Kalinichenko op cit note 18 at 687; see also Petrin op cit note 122 at 612–3.
[259] Morgan ibid at 289–93; see also Feng ibid at 240–6.

from an enterprise, they should equally shoulder the burdens of such benefits.[260] The basis of enterprise risk within the context of the parent-subsidiary relationship is thus that the parent controls the subsidiary, and these two entities are well integrated into each other, thus creating risks as a unit as opposed to two separate companies.[261]

The enterprise risk finds more justification when the business of the parent and subsidiary is the same and where the parent company is a major or only shareholder in the business of the subsidiaries.[262] Where the parent company is a major or sole shareholder of the subsidiary, this indicates that the parent company is a major beneficiary of the subsidiary's business.[263] Where the parent and subsidiary company are in the same business, it is often the case that the parent company will have greater expertise in this industry and will be instrumental in leading and directing the harm-causing activities of the subsidiary business.[264]

Bent supports enterprise risk logic as a basis of strict liability where parties are involved in what is termed ultra-hazardous activities.[265] These businesses are typically associated with nuclear activities, underground operations such as mining or other similar activities.[266] The logic employed is that the entities operating in these areas must naturally take extra care to protect the community.[267] And when they fail, it is thus fair to impose liability on both entities as joint risk creators and joint benefactors of such risks.[268]

Neyers and Gray, each in their own right, take issue with aspects of enterprise or risk logic.[269] Gray and Neyers argue that enterprise logic does not justify crucial limits of how strict liability operates.[270] For example, Gray argues that enterprise liability makes broad and unsubstantiated assumptions around loss spreading.[271] Gray argues that enterprise risk logic does not practically

[260] Ibid.
[261] For the idea of integration and control as a basis of liability see *Competition Commission v Delatoy Investments (Pty) Ltd and Others* (2016) 1 CPLR 67 (CT) para 32, and 40–4; *Deputy Sherriff Harare v Trinpac Investments (Private) Ltd & another* [2012] JOL 28241 (ZH) at 1–4; Morgan ibid at 290.
[262] Feng op cit note 196 at 244–5 discussing *Chandler v Cape plc* [2012] EWCA Civ 525 at 80.
[263] Kravtsova & Kalinichenko op cit note 18 at 687.
[264] Feng op cit note 196 at 244–5.
[265] MA Bent 'Exporting Hazardous Industries: Should American Standards Apply' (1987) 20 *New York University Journal of International Law and Politics* 777 at 779 and 791.
[266] J S Charme 'Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability' (1989) 4 *Journal of Law and Technology* 75 at 75.
[267] MA Bent op cit note 264 at 783.
[268] Ibid at 791.
[269] Neyers op cit note 228 at 297–300; A Gray op cit note 160 at 123–45.
[270] Neyers ibid; Gray ibid at 127–8.
[271] Gray ibid at 139–41.

test the ability of the enterprise to absorb the total cost risks associated with the scope of what is termed an enterprise.[272]

Neyers also argues that enterprise logic cannot logically account for strict liability that operates within charities where such charities do not receive an enterprise benefit.[273] Charitable work is altruistic; thus, the argument that those who receive the benefit must bear the loss would not fit neatly into how charities practically work.[274] Yet courts have held that charities such as religious organisations can be strictly liable partly based on enterprise logic.[275]

I am of the view that Gray and Neyers have identified sensible weaknesses of enterprise or risk logic. These weaknesses reduce the viability of extending strict liability to corporate groups. Despite these weaknesses, courts still utilise enterprise risk logic to justify why strict liability must apply to many scenarios in foreign and South African law.[276] The courts that utilise enterprise logic are not limited to delict but also extend to other areas such as competition law and are therefore firmly rooted in both South African law and foreign law.[277]

My overall evaluation of enterprise risk logic is that the courts are not always clear on whether enterprise logic is the theory behind the rule or the rule itself. There appears to be a mix between the two. I posit that enterprise logic is more useful when conceptualising a rule than as a theory of justifying a rule. Thus, I contend that enterprise logic has no role as a theory of strict liability but may be helpful as part of the rules.

4.3.5 Mixed basis as justification for strict liability

The assessment of the compatibility between the main theories utilised to justify strict liability and corporate groups has produced various results. It is submitted that the most substantial basis for extending strict liability to corporate groups is agency considerations. Agency logic

[272] Ibid.
[273] Neyers op cit note 228 at 297–300; see also Feng op cit note 196 at 246.
[274] Neyers ibid.
[275] *JGE* supra note 253 at 47–52; see discussion of case in K Calitz 'The liability of churches for the historical sexual assault of children by priests' (2014) 17 *Potchefstroomse Elektroniese Regsblad* 2452 at 2456–59.
[276] Gray op cit note 160 at 111–2; P Giliker 'Vicarious Liability 'On the Move': The English Supreme Court and Enterprise Liability' (2013) 4 *Journal of European Tort Law* 306; D Brodie 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 *Oxford Journal of Legal Studies* 493; WE Scott 'The theory of risk liability and its application to vicarious liability' (1979) 12 *Comparative and International Law Journal of Southern Africa* 44; K Calitz 'Vicarious liability of employers: reconsidering risk as the basis for liability' 2005 *Journal of South African Law* 215.
[277] *Delatoy Investments* supra note 260 at *para* 38–63; see also A Kalintiri 'Revisiting parental liability in EU competition law' (2018) 43 *European Law Review* 145.

is one of the oldest and most stable legal principles in South Africa and many jurisdictions in foreign law and thus fits this purpose. At the core, where a parent company gives an express or implied mandate to a subsidiary company to perform certain activities on its behalf, it is logical and principled that such a parent should bear the burden of such a mandate. This is because the law would regard the parent company as the actor who has deployed another to act on its behalf. Thus, it is not the subsidiary who has acted but the parent company through the hand of another.

Another strong theoretical justification is evidentiary considerations. Section 4.2.2 argued that a significant impediment that will hinder the claimant's ability to show the existence of the element of conduct would be the claimant's ability to access the requisite evidence of who caused the harm within a corporate group. Evidentiary considerations close this gap by considering the unique circumstances that delict claimants face when litigating against organisations within a corporate group.

Equity considerations are weak considerations for the purposes of Chapter Four. Despite being favoured by the courts, fairness and equity considerations such as deep pockets and loss distribution are difficult to justify. The only notable exception is Neyer's indemnification theory, which provides better logic as justification for the extension of strict liability to corporate groups. The reason equity and fairness theories are difficult to justify is because they are associated in one form or another with unprincipled resource sharing. It is thus argued that equity and fairness considerations should be used sparingly and as a secondary basis to justify the extension of strict liability to corporate groups.

My evaluation shows that enterprise risk logic ought to form part of the weak theoretical justifications for extending strict liability to corporate groups. Ideas of risk creation are theoretically applicable to corporate groups, but they should only be limited to a secondary role in the assessment of whether it is justifiable to extend strict liability to corporate groups.

The assessment in 4.3.1 indicates that none of the theories that have been utilised by the court to justify the existence of strict liability can stand alone as a good and sound policy basis for imposing strict liability on corporate groups. However, taken together, they may be capable of providing a starting point for justifying extending strict liability to new relationships. My view of what ultimately appears to plague the discussions on the justifications of strict liability pertains to the boundaries of strict liability.[278] How far exactly does strict liability expose a

[278] JA Henderson 'The Boundary Problems of Enterprise Liability' (1981) 41 *Maryland Law Review* 659.

party to legal liability? How are the boundaries of strict liability to be justified by the courts? Questions such as these appear difficult to answer in a coherent and logical manner. If strict liability is extended to corporate groups, the problem of boundaries is compounded because corporate structures are often vast and more complex than the traditional relationships where strict liability is applied.[279] The boundaries problem is, therefore, one of the crucial questions that need to be addressed when discussing the suitability of strict liability in corporate groups.

Some academics consider the viability of utilising a mixed basis justification of strict liability, which incorporates all the justifications of strict liability to craft a balanced outcome.[280] Recent judgments in South Africa seem to also favour a mixed basis as justification for strict liability.[281] This mixed approach does not always make a clear-cut distinction between the justifications of vicarious liability and the rules that regulate where strict liability is imposed.[282] For example, in the cases of *K* and *F*, a mixed basis of strict liability that is based on common law, constitutional, and legislative basis has been employed by the courts to justify strict liability between the state and its functionaries.[283] Based on recent trends of strict liability in South Africa, the viability of extending strict liability to corporate groups will most likely have to be based on a mixed basis justification.

In sum, I am in favour of a mixed justification approach. This approach is ideal because none of the existing theories employed to justify strict liability makes for a sound basis for strict liability. However, if taken together, under a mixed basis, these justifications may make strict liability a viable basis for crafting a remedy for the problem at hand. I am also in favour of this approach because it is the approach that is most likely to have sufficient flexibility to accommodate the unique needs of corporate groups and claimants and may efficiently respond to the boundaries problem.

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[279] For discussion of corporate structures see P Muchlinski *Multinational Enterprises and the Law* (2021) at 49–79.
[280] Neyers op cit note 228 at 300; Kravtsova & Kalinichenko op cit note 18 at 687.
[281] *K* supra note 237 para 22–3;
[282] Ibid para 23–4 citing *Feldman* supra note 206 at 741; *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) at 296–7; *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) para 9–10; *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (AD) at 211.
[283] *K* Supra note 237 at para 18 and 48–58; *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 52–81; for discussions of state liability see AB Wessels 'The role played by trust in imposing vicarious liability on the state for the intentionally committed violent crimes of police officers' 2018 *Journal of South African Law* 868; J Neethling 'Vicarious liability of the State for rape by a police official: regspraak' 2011 *Journal of South African Law* 186; J Scott 'Vicarious liability of the state for intentional police delicts: A noteworthy "concealed" deviation case' 2020 *Journal of South African Law* 164.

So far section 4.3 has described the origin of strict liability and evaluates whether the policy or theoretical justifications of strict liability are capable of addressing the relationship between delictual claimants and corporate groups. That process did not address the practical tests that ought to go into showing whether the requirements of strict liability have been met to apply no-fault liability to corporate groups. These theoretical justifications and practical tests are thus equally important and mutually reinforce the assessment of what is viable in delict.

Section 4.3.6 shall engage the practical tests utilised in the existing relationships where strict liability has been recognised at common law. Regarding relationships recognised under strict liability, delict recognises strict liability for harm caused by animals, objects thrown, poured, falling from a building, and stolen property.[284] Under strict liability is the doctrine of vicarious liability, which recognises liability for the motor car owner and driver relationship, liability in the agency relationship, and liability for the employment relationship.[285] My evaluation of these relationships indicates that only two are relevant to the discussion. These apply the doctrine of vicarious liability in the agency and employment relationship. In what follows, I evaluate what lessons these two relationships may hold for corporate group liability in delict.

4.3.6 The doctrine of vicarious liability and corporate groups

Boberg has described the doctrine of vicarious liability as 'the most comprehensive and far-reaching innovations we have taken from English law'.[286] This doctrine permits the delicts committed by one party to be imputed onto another party.[287] Vicarious liability thus also operates in contradiction to the general rule in delict that a person may only be liable for a delict if he was at fault and wrongfully caused the harm in question.[288]

Vicarious liability arises primarily because of the relationship between the party that commits the delict and the vicariously liable party and is based on several legal and policy justifications.[289] Fault need not be shown on the part of the party that is held liable based on vicarious liability.[290] To date, several relationships have been recognised in South Africa as

[284] Loubser & Midgley op cit note 1 at 457–64; Neethling & Potgieter op cit note 1 at 433–56.
[285] Academics often make a distinction between strict liability employment relationship and when liability for the state and its functionaries, this chapter considers the liability of the state as either based on agency or employment.
[286] Boberg op cit note 168 at 169.
[287] Atiyah op cit note 185 at 3.
[288] *Telematrix* supra note 10 para 12; Neethling & Potgieter op cit note 1 at 3–4
[289] Atiyah op cit note 185 at 3–10.
[290] Ibid at 3.

having the capacity to attract this form of legal liability.[291] These relationships are the employment relationship, agency relationship, motor car owner-and-driver relationship, and partnership relationship.[292] Vicarious liability has also been recognised between the state and its many functionaries.[293]

4.3.6.1 Vicarious liability as per the agency relationship and corporate groups

Any time one person contracts another person to carry out acts on their behalf, the law regards this relationship as one of agency.[294] The person who has authorised another is called the principal, and the person who acts or represents on behalf of another is called the agent.[295] In private law, the principles of agency are more associated with contract law and commercial undertaking where, for example, a juristic person requires a natural person as an agent to act on its behalf through a contract of mandate.[296] An essential feature of the agency relationship is that the agent is imbued with the power to alter the principal's legal relationships with third parties as far as the mandate that the agent is given.[297]

Kopel identifies four requirements of when an agency relationship comes into existence under South African law.[298] Firstly, the principal must exist at the time when the agency agreement is concluded.[299] Secondly, the agent must have the contractual capacity to be an agent.[300] Thirdly, the agent must obtain valid authorisation from the principal to act on their behalf.[301] Lastly, it must be clear to third parties that the agent is acting on behalf of the principal and not for their own sake.[302]

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[291] Wagener op cit 160.
[292] Ibid.
[293] State Liability Act 20 of 1957 s1; see discussion L Boonzaier 'State liability in South Africa: A more direct approach' (2013) 130 *South African Law Journal* 330 at 332.
[294] *Gowan v Bowern* 1924 AD 550 at 569; see discussion in AJ Kerr *The Law of Agency* 4 ed (2006) at 3.
[295] Kerr ibid 3.
[296] PG Watts & FMB Reynolds *Bowstead and Reynolds on Agency* 20 ed (2014) at 15.
[297] Ibid at 1–3.
[298] S Kopel *Guide to Business Law* 7 ed (2022) at 442.
[299] *Mccullogh Appellant v Fernwood Estate Ltd Respondent* 1920 AD 204; see discussion of this case in Kopel ibid at 442.
[300] For contractual authorisation see *Malamed and Another v Cleveland Estate Malamed and Another vs Vorner* 1984 (3) SA 155 (A) para 120; see also Kerr op cit note 293 at 5.
[301] Kopel ibid; see also the discussion of the rules and challenges pertaining to the validity of contractual authorisation in agency CJ Pretorius 'Authority by Representation - A Rule Lacking a Theory: A Reappraisal of Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)' (2021) 2021 *Acta Juridica* 297.
[302] Kopel ibid.

In terms of the application of agency within the doctrine of vicarious liability, the plaintiff must prove three requirements before a principal is strictly liable for the actions of their agent.[303] The first is that there needs to be a relationship of agency between the defendant and the agent, as defined by Kopel above.[304] The second is that the agent must commit a delict, and third, the delict must be committed within the scope of what the agent had been authorised to do by the principal.[305]

There are two possible hypothetical pathways from which the doctrine of vicarious liability can be applied as per agency within the corporate group context. The first is when a natural person who is an agent of either the parent or subsidiary company commits a delict. In such a scenario, it is submitted that the existing rules of the doctrine ought to be capable of finding a basis for delictual liability on the part of the juristic person, who is the principal of the agent.[306] If the agent's principal is the parent company, the parent's strict liability would be incurred in its own right. This means such strict liability is not tied to the parent's relationship with the subsidiary company. Such a hypothetical delict by the parent's agent would thus be based only on the parent's own relationship with the wrongdoer-agent. In terms of this hypothetical scenario, the ordinary rules of vicarious liability would apply and thus require that: Firstly, there is an agency relationship between such an agent and the parent company, which would be determined based on the four requirements that Kopel identifies. Secondly, the agent must commit a delict based on the fault-based generalising approach. Thirdly, the agent's delict must have been committed within the course and scope of the activities authorised within the contractual mandate of the parents' business.

It is submitted that there are scenarios where it is viable to apply the existing rules of vicarious liability as per agency relationship as a basis for the parent or subsidiary company's liability. It is further submitted that in a scenario where there is only one principal of the wrongdoer-agent, such liability ought to be straightforward to test as it pertains to either the parent or subsidiary vicarious liability. In scenarios where the delict claimants pursue this option, liability will likely only be against either the parent or subsidiary but not both because there will only be one principal of the wrongdoer agent.

[303] Neethling & Potgieter op cit note 1 at 453.
[304] Ibid.
[305] Ibid.
[306] Ibid at 453 for rules of agency as a basis of vicarious liability.

The second hypothetical scenario is where the subsidiary company is viewed as the agent of the parent company for the purposes of applying the doctrine of vicarious liability. This form of liability is essentially liability as the three-level relationship, as discussed in section 4.1. My review indicates that there is no South African court that has yet recognised the agency relationship as a valid basis to impose strict delictual liability for corporate groups.

An initial challenge with this second hypothetical basis of liability is that juristic persons cannot ordinarily be regarded as agents of other juristic persons.[307] Thus, at best, the idea of agency between two juristic persons is better understood as a quasi-agency because any possible extension of agency principles between two juristic persons can only be similar to agency and not agency as understood in its ordinary application.

Before one applies the ordinary rules of vicarious liability to this quasi-agency relationship within corporate groups, another hurdle must be surmounted. How would one test or show the existence of a quasi-agency between a subsidiary company and a parent company? In other words, how would one show that the subsidiary company is akin to an agent or a quasi-agent of a parent company for the purposes of vicarious liability? Cassim et al posit that it is viable to show the existence of an agency relationship between a parent and subsidiary company for the purposes of justifying why it is appropriate to apply the common law doctrine of piercing the corporate veil in a given scenario.[308] What this means is that at common law, a court would pierce the veil of a subsidiary company and hold the parent liable if such a subsidiary company was found to be in an agency relationship with the parent company.[309] In support of this argument, Cassim refers to two cases to make the point. The first case is the foreign decisions of *Smith Stone,* where an English court developed a six-part test to assess whether a subsidiary company was acting as an agent of its parent company.[310] The test was as follows:

> 'The first point was: Were the profits treated as the profits of the company? when I say "the company" I mean the parent company-secondly, were the person conducting the business appointed by the parent company? Thirdly was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done

[307] For the point that companies are rarely considered agents of other companies see Watts & Reynolds op cit note at 293; this point is further illustrated in the discussion to follow on *Smith Stone and Knight Ltd v Birmingham corporation* (1939) 4 All ER 116 (*Smith Stone*) and of *Adcock-Ingram Laboratories Ltd v SA Druggists Ltd & Another; Adcock-Ingram Laboratories Ltd v Lennon Ltd* 1983 (2) SA 350 (T) (*Adcock*) a South African case taken from the a literature review in FHI Cassim et al *Contemporary Company Law* 3 ed (2021) at 75.
[308] Cassim et al ibid at 73–5.
[309] Ibid.
[310] Ibid discussing *Smith Stone* supra note 306 at 5.

> and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control?'.[311]

The six-part test provides an ideal foreign law comparison, but the crucial question that remains is whether the six-part test in *Smith Stone* is compatible with the ordinary principles of agency as understood by the South African courts. Here, Cassim identified a second case from South Africa: *Adcock*.[312] In *Adcock*, the facts concerned an intellectual property dispute where part of the contest was a preliminary issue of whether there was an agency relationship between a parent company and a subsidiary company that were both incorporated in terms of South African law. Druggist, the parent company, argued that Lennon, a wholly owned subsidiary, was its agent for the purpose of exercising the rights tied to a trademark.[313] In support of this argument, Druggist stated the following: Firstly, it controlled Lennon, one of its directors was on the board of Lennon, and the managing director of Lennon had been appointed subject to the approval of the board of Druggist.[314] Druggist argued that it had the power to dismiss this managing director. Further, the druggist controlled the finances of Lennon and the products sold by Lennon.[315]

Nicholas J, writing for the court, accepted the viability of the proposition by Druggist that Lennon can be its agent but stated that Druggist failed to do was to present this claim in the prescribed formats of court documents.[316] Nicholas J went further to address the merit of the Druggist argument and stated that there was insufficient evidence to show an agency relationship between the two entities.[317] The fact that Druggists exercised control of Lennon was insufficient for the court to rule that agency existed between the parties. Ultimately, the ruling was that there was no contract between the parties that specified an agency relationship between Druggists and Lennon.[318]

Cassim et al discuss *Smith Stone* and *Adcock* from a corporate law perspective and conclude that the decisions show when it may be appropriate to apply the common law doctrine of piercing the corporate veil within corporate group settings.[319] My view is that these same cases

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[311] *Smith Stone* ibid.
[312] *Adcock-Ingram Laboratories Ltd* supra note 306.
[313] Ibid para 69.
[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.
[319] Cassim et al op cit note 191 at 73–5.

can be used to test the viability of quasi-agency in the corporate group context. From a delict perspective, it is clear that both cases show that the proposition for quasi-agency within the corporate group context is accepted by courts in both the United Kingdom and South Africa. This is because in *Smith Stone,* the court developed the six-part test, and in *Adcock,* Nicholas J did not say that it is legally unsound for two juristic persons to be in an agency relationship. Rather, Nicholas J stated that what Druggist failed to do was to make out a case that Lennon was its subsidiary. Therefore, both cases show that quasi-agency can exist within the context of corporate groups. There is also some limited indication that courts in the United States accept this proposition.[320] Still, the recognition of quasi-agency does not per se show the likelihood of a South African court applying agency rules to the doctrine of vicarious liability within corporate groups. Further hurdles likely remain for quasi-agency as a basis of vicarious liability.

As stated, the crucial question is how South African courts will receive agency as a basis for applying the doctrine of vicarious liability within corporate groups as per quasi-agency. The first question the courts would have to answer is whether there is an agency relationship between the parent-subsidiary relationship. In foreign law, the six-part test in *Smith Stone* speaks to the control that the parent exercised over the subsidiary as the primary basis of the agency relationship. From a South African law perspective, Nicholas J in *Adcock* has refused to accept control as a primary basis of indicating the existence of an agency relationship between the two entities. Between the approaches taken in *Smith Stone* and *Adcock*, delict disputes will likely follow Nicholas J's position from *Adcock* in the refusal to accept control as a primary basis of showing the existence of an agency relationship between two entities.

An example of strong evidence of agency between two juristic entities that appears acceptable to Nicholas J is a contract stating that the subsidiary company is an agent of the parent company.[321] Without such a contract, the grounds for showing that a parent and subsidiary company are in a quasi-agency relationship are likely slim. It is thus submitted that the key hurdle that delict claimants would need to overcome would be to show that the contractual relationship between a parent and subsidiary company is one based on quasi-agency. In

[320] *Bowoto v. Chevron Texaco Corp.,*312 F. Supp. 2d 1229 (N.D. Cal. 2004) at 1235; R Chambers 'Parent Company Direct Liability for Overseas Human Rights Violations Lessons from the UK Supreme Court' (2021) 42 *University of Pennsylvania Journal of International Law* 519 at 548–9.
[321] *Adcock* supra note 306 para 69.

scenarios where this is shown, the other requirements of vicarious liability as per the agency relation would likely be easier to test whether they exist or not.

In scenarios where a delict victim can rise above the hurdle of showing an agency relationship between a parent and subsidiary company, the claimants could need to overcome two more hurdles before quasi-agency can be recognised as a basis of vicarious liability. The delict claimants would also need to show that the subsidiary company has committed a delict.[322] Such a delict can be shown where the employee or agent of the subsidiary company committed a delict in terms of the fault-based generalising approach or by applying the existing rules of vicarious liability. Companies can be liable for the delicts of those who act on their behalf. Thus, it is submitted that this leg of the test can be viably met.[323]

Lastly, for the delict claimant to use vicarious liability as applied to quasi-agency in corporate groups, they would also need to show that the subsidiary delict was committed within the scope of the parent and subsidiary companies' mandate.[324] The agency contract between the parent and subsidiary company would ideally indicate the content of the mandate between a parent and subsidiary company. *Adcock* gives an example of how to conceptualise what could count as within and outside the course and scope of the mandate of the quasi-agency relationship for the purposes of imposing liability on the parent company. For example, in a scenario where Druggist had succeeded in showing that Lennon was its agent for the purposes of the trademark in dispute, it would logically follow that any delictual harm that emanated from the use of such a trademark would be within the course and scope of the mandate between Druggist and Lennon. Conversely, where harm is outside the use of the trademark, such harm would be outside the course and scope of the mandate between the two companies. Thus, there would be a viable claim of vicarious liability against Druggist where a third party has suffered harm because of the use of such a trademark.

In section 4.3.1, my findings were that the agency's justification of strict liability was compatible with corporate groups. The next logical question is how one goes about testing the rules of vicarious liability against the parent-subsidiary company relationship. The first step is to ascertain whether the relationship can be regarded as an ordinary agency or quasi-agency. On this question, there is an indication from foreign law that a parent and subsidiary can be

[322] This would be tested according to the general principles of applying the doctrine of vicarious liability to the agency relationship see Neethling & Potgieter op cit note 1 at 453.
[323] Ibid at 27.
[324] Ibid at 453 for principles of course and scope in agency.

regarded as being in an agency relationship.[325] In South African law, my reading of *Adcock* indicates that Nicholas J also recognised that two juristic entities could be in an agency relationship.

If the parent-subsidiary relationship can meet quasi-agency, the next step is to ask whether they can meet the rest of the requirements for vicarious liability. From a South African perspective, the tests for vicarious liability in the agency relationship are clear, stable and long-standing. It is submitted that applying vicarious liability in corporate groups as per a quasi-agency relationship should be a viable proposition in terms of the South African law of delict.

There is a need to distinguish between theoretical viability and the likelihood of success of vicarious liability as per quasi-agency in corporate groups. It is submitted that the current rules of the doctrine of vicarious liability and existing case law support the viability of quasi-agency. However, my overall impression is that it would still be a difficult option for delict claimants to pursue. The difficulty is that before the court can find that there is a quasi-agency relationship between the parent and its subsidiary, the claimants are likely required to show a clear contractual mandate between the two entities that indicate this state of affairs. As discussed in section 4.2.2, delict claimants do not always have access to the internal records of corporate groups. Worse still, some contracts are not explicitly stated on paper as showcased in *Adcock* but are rather implied or verbal. Such verbal or implied contracts would likely require access to internal records such as board resolutions and many other internal records of the different entities within the corporate group. When these challenges are tallied, showing that there is an agency relationship in a corporate group is a difficult task.

There are further difficulties. The claimants must also show that the subsidiary company committed a delict. The delict claimants would need to show that the delict was within the course and scope of the agency mandate between the two companies. This aspect will also likely require evidence of an explicit contractual undertaking between the two companies showing what is within and outside the mandate relationship. This, too, will be difficult to show, and examples such as *Adcock*, where a parent company insists that its subsidiary is an agent, will be rare, if not bizarre, in the context of a delict. Lastly, quasi-agency would be a new relationship of vicarious liability within our law, and such a legal development would need to be constitutionally justified per the application of s 8(3), s 38 and s 39(2) of the

[325] *Smith Stone* supra note 306 at 5; see discussion of this case in Cassim et al op cit note 191 at 73–5.

Constitution.[326] When all these obstacles are tallied, the proposition of vicarious liability as per quasi-agency becomes difficult.

In sum, there are, therefore, two potential pathways to apply the doctrine of vicarious liability to corporate groups as per the agency relationship. The first is where the parent company is liable for the delicts of its own agent, and the second is where the parent company is liable for the delict of its subsidiary company. Currently, South African law only recognises the first option, and it is thus the viable path to establish strict liability based on common law agency principles. This leaves a gap in law that needs to be explored. This gap ought to explore whether delictual liability should take into account harms tied to two juristic entities who are in an agency relationship.

4.3.6.2 Vicarious liability as per the employment relationship and corporate groups

In terms of the doctrine of vicarious liability, an employer can be held liable on a no-fault basis for the delicts of their employee.[327] For an employer to be found vicariously liable for the delicts of his employee, three requirements must be met.[328] The first requirement is that there should be an existing employment relationship between the two parties.[329] The second requirement is that the court must find that the employee committed a delict in terms of the five elements of a delict.[330] The last requirement is that the employee's delict must have been committed within the course and scope of the employment relationship.[331]

Courts often test the first requirement of vicarious liability by referring to the difference between the employment relationship locatio conductio operarum and a contract for a piece of work or task locatio conductio operis carried out by an independent contractor.[332] With an employment relationship, the employer controls what work is to be done and has authority over how work is to be carried out.[333] On the other hand, an independent contractor is given a task and independently controls how they work and how the task is to be carried out.[334] An employer

[326] Section 3.3 of Chapter Three.
[327] *Mkize v Martens* 1914 AD 382 at 390; *Feldman* supra note 206 at 735.
[328] See what the court terms the standard test in *K* supra note 237 para 9.
[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] *Smit v Workmans Compensation Commissioner* 1979 1 SA 207 (A) para 61–2; *Gibbins v Williams, Muller, Wright & Mostert Ingelyf* 1987 2 SA 82 (T) para 90; see further discussions of these cases in Loubser & Midgley op cit note 1 at 468–70. and; Neethling & Potgieter op cit note 1 at 445.
[333] Ibid.
[334] *Smit* ibid para 61–2; Neethling & Potgieter op cit note 1 at 455.

is held vicariously liable for the work done by his employee, whereas a principal is not liable for the work done by the independent contractor.[335] A principal can, however, be liable for the work done by the independent contractor where such a principal has a legal duty to protect the third party and fails to do so.[336] In such a scenario, the principal is not vicariously liable for the harm but can only be directly liable for their own delict.[337] For example, the principal's legal duty to protect a third party can be established where the principal controlled harm-causing activities that caused the independent contractor's delict.[338] The principal can also be liable for the delicts of the independent contractor where they reasonably foresaw the risk of danger from the contractor's activities and the principal took no precaution to avert harm from materialising.[339] Outside of scenarios where the principal's own legal duty to act can be established, a principal cannot be liable for harm caused by an independent contractor.[340] The distinction between an employee and an independent contractor is thus crucial for vicarious liability in the employment relationship.

The dominant impression test, or the multi-faceted test, is utilised to distinguish between an employee and an independent contractor.[341] With either test, the focus is not on a single factor but on looking at the relationship as a whole as informed by several factors.[342] Courts look at the nature of the work between the parties and the control exercised concerning how work assignments are executed.[343] Courts also look at how payments are made for services rendered, who controls, authorises, or directs the work, and whether there is evidence of economic or social dependence between the parties.[344] For example, interdependence can exist where the

[335] *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009 (1) SA 265 (SCA) para 6.
[336] *Langley Fox Building Partnership (Pty) Ltd v De Valence* [1991] 3 All SA 736 (AD) at 740 and 746; *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 428 and 431–2; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373; see discussion Neethling & Potgieter op cit note 1 at 455–6.
[337] J Scott 'The possibility of a principal's liability for the delict of an independent contractor-Saayman v Visser 2008 5 SA 312 (SCA) and Chartaprops 16 (Pty) Ltd v Silberman 2009 1 SA 265 (SCA)' (2009) 73 *Journal of Contemporary Roman-Dutch Law* 667 at 669–70.
[338] Ibid.
[339] Ibid.
[340] *Langley Fox Building Partnership (Pty) Ltd* ibid at 746
[341] *Stein v Rising Tide Productions CC* [2002] 2 All SA 22 (C) para 27–8, at *Beya & others v General Public Service Sectoral Bargaining Council & others* (2015) 36 ILJ 1553 (LC) para 48–50; see also Wagener op cit note 160 at 179–84.
[342] Ibid.
[343] *Colonial Mutual Life Assurance Society Ltd* supra note 335 at 434–6; *Stein* ibid para 23; see the discussions in Loubser & Midgley op cit note 1 at 470–3 and Neethling & Potgieter op cit note 1 at 445–7.
[344] Ibid.

employee's medical aids, pension funds, work tools or equipment, applicable working hours, use of premises, and paid vacation are linked to the employer.[345]

The difference between employment contracts and those of independent contractors can also be deduced from the basis of the termination of the contracts.[346] Employment contracts often terminate when a certain time frame has lapsed or when the employee has passed on.[347] The independent contact's terms of work are often based on the completion of a specified task.[348] Employment contracts often follow a right of dismissal, whereas independent contractors do not.[349] Employees are often precluded from working for someone else, whereas independent contractors are at liberty to source tasks from multiple sources.[350]

Courts also look at whether there is a piece of work that the task can be carried out by a specific person or if it can be carried out by another person when deciding whether a relationship is one of employment or between a principal and a contractor.[351] In an employment relationship, the task is often associated with a specific individual, whereas a contractor can delegate the tasks assigned to them.[352] Once the overall impression is that the relationship between the parties is that of employment or resembling the qualities of employment, such a relationship is regarded as meeting the second requirement of vicarious liability.[353]

A corollary issue arises for the present discussion of vicarious liability as per the employment relationship: What is the difference between an agent and an independent contractor for the purposes of applying vicarious liability? This question is important because both the agent and contractor independently carry out the principal work, and it is unclear why one and not the other creates liability for the principal. Wicke provides a sensible response and argues that an answer can be found in the difference between the authority that is given to the agent and what an independent contractor is permitted to do.[354] A principal does not give an independent contractor legal authority to alter their relationship with third parties, whereas an agent is given

[345] Loubser & Midgley ibid at 469–72; R Oberholzer and JC Beer 'A Critical Analysis of the Concept of an Independent Contractor in South Africa' (2006) 39 *De Jure* 664 at 670.
[346] Oberholzer & Beer ibid at 670.
[347] Ibid.
[348] *Colonial Mutual Life Assurance Society Ltd* supra note 335 para 426.
[349] *Stein* supra note 340 para 28; Loubser & Midgley op cit note 1 at 471.
[350] Ibid; see also Oberholzer & Beer op cit note 344 at 667–71.
[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] H Wicke 'Vicarious Liability for Agents and the Distinction between Employees, Agents and Independent Contractors' (1998) 61 *Journal of Contemporary Roman-Dutch Law* 609.

the power to speak for the principal and contract on their behalf.[355] For this reason, it is sensible that the agent's mandate binds the principal with both the benefits and liabilities of the activities within the scope of the authority given to the agent.[356] The piece of work given to an independent contractor does not come with any authority to act on behalf of or bind the principal to the contractor's activities and how the task is carried out. Thus, any responsibility for injury to a third party associated with the work of an independent contractor ought to be borne by the contractor alone.

The second requirement of vicarious liability as per the employment relationship is often the most straightforward. Before an allegation of vicarious liability can be made against an employer, it must be shown that the employee committed a delict in terms of the fault-based generalising approach.[357] Once it is shown that there is a delict, the claimant is then at liberty to pursue the employer as a joint wrongdoer in addition to the employee.[358]

The third requirement for testing the doctrine of vicarious liability is to ask if the delict has been committed within the course and scope of the employment relationship (course-scope-leg).[359] Oftentimes, this is the most difficult requirement because some employees commit the delicts whilst partly engaged in their own affairs and the business of the employer or when the delict was intentionally committed.[360] These difficult cases are termed deviation cases, and the Constitutional Court has settled the rules that ought to apply on the course-scope-leg. In *K,* O'Regan J states that:

> 'The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is

[355] Ibid at 617.
[356] Ibid.
[357] See Section 4.2 of this Chapter.
[358] Ibid.
[359] *Rabie* supra note 253 at 130; *Feldman* supra note 206 at 736.
[360] Scott op cit note 282; J Scott 'Vicarious Liability: A Positive Development in Resolving Deviation Cases' 2020 *Journal of South African Law* 338.

> "sufficiently close" to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights'.[361]

The test to be applied in deviation cases as set out entails two stages, a subjective and an objective leg. In terms of the initial subjective leg, a court must take into account the wrongdoer's intent when the delict was committed.[362]

The objective leg can form an independent basis for meeting the course scope leg. In terms of this leg, it asks if there is an adequately strong link between the employee's delict and the business of the employer to make it just and equitable to impose liability on the employer.[363] The objective leg contains a mix of legal and factual inquiry and, in my view, forms an important overriding consideration of when the course and scope requirement has been met. In terms of the objective leg, courts also ought to take into account the normative framework of the constitution as per s 39(2) of the Constitution.[364]

In *K* and *F,* the courts ultimately ruled that a delict intended to advance the sole interests of the employee can still be sufficiently linked to the business of the employer for the purposes of satisfying the course-scope-leg.[365] Once all three requirements of vicarious liability are met, the delictual liability of the employee is imputed on the employer.[366]

It is submitted that there are two possible hypothetical pathways from which the doctrine of vicarious liability can be applied as per the employment relationship within the corporate group context. The first is when a natural person who is an employee of either the parent or subsidiary company commits a delict. This ought to be a straightforward path of liability.

In terms of the first pathway of liability, a delict claimant would need to apply the three requirements of vicarious liability to either the parent or subsidiary company. The first requirement of vicarious liability is that there must be an employment relationship. South African labour law ought to guide how this is approached as far as corporate groups are concerned. In Chapter Two, an evaluation of labour law cases decided in South Africa found that in several of them, the Labour Courts ruled that a parent company and its subsidiary

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[361] *K* Supra note 237 para 31 citing the standard test initially developed in *Rabie* at 130.
[362] Ibid.
[363] Ibid.
[364] *K* ibid para 15–20; *F* supra note 282 para 74–82.
[365] *K* ibid para 24–33; *F* ibid para 90; the approach has not always been widely accepted, see the most notable critic of this approach in A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 156.
[366] Neethling & Potgieter at 444–53; Loubser & Midgley op cit note 1 at 467–80;

company can be employers of a single person.[367] It is, therefore, not unique to South African law that a natural person contracted to a subsidiary company can also be held to be employed by the parent company on the application of labour law.[368] This opens up the viability of dual vicarious liability in hypothetical scenarios where the subsidiary and parent company are considered the employers of the same natural person who has committed the delict.

The next requirement would be that an employee of one or two entities in a corporate group committed a delict. This is a straightforward inquiry that applies the fault-based generalising approach.

Based on the first hypothetical basis of liability, the outstanding matter is how the courts ought to apply the third requirement of vicarious liability, which looks at whether the delict was committed within the course and scope of the employer's work. This is the requirement that is most likely to be the most difficult task before the court. The Constitutional Court has, however, developed the course-scope-leg of vicarious liability with a view of meeting complex scenarios in order to determine if a delict is sufficiently linked to the business of the employer.[369] The fact that there are two potential employers would, in my view, not make a substantial difference in the existing legal tests that have already been developed by the courts to evaluate the course and scope requirement.

There is a second hypothetical pathway of liability as per vicarious liability in terms of the employment relationship. The second hypothetical scenario is where the subsidiary company is viewed as the employee of the parent company for the purposes of applying the doctrine of vicarious liability. This form of liability is conceptualised on the three-level relationship, as discussed in section 4.1. Writing from a foreign law perspective, Morgan makes the case that corporate group liability can be based on what he termed as a relationship 'akin to employment' (quasi-employment).[370]

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[367] See Section 3.4 of Chapter Three discussion of M*edia Workers Association of SA & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 ILJ 313 (IC) at 314–5; *SA Allied Workers Union & others v Contract Installations (Pty) Ltd & another* (1988) 9 ILJ 112 (IC) at 119; *Paper Printing Wood & Allied Workers Union & others v Kaycraft (Pty) Ltd & another* (1989) 10 ILJ 272 (IC) 282–4; *Sage v Fourwinds Transport Co* (Pty) Ltd (1994) 15 ILJ 1149 (IC) at 1151–3; *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC) at 956–61 and 967–70.

[368] Ibid.

[369] *K* supra note 237 para 32 citing the standard test initially developed in *Rabie*.

[370] Morgan op cit note 180 at 295–6; for the purposes of South African law, quasi-employment is more aligned with the use of words of what is similar within a South African context.

Quasi-employment is crucial because two juristic entities cannot be regarded as being in an employment relationship 'in strictu sensu'.[371] Thus, the designation of quasi-employment speaks to sufficient similarity to employment rather than sameness. Morgan justifies this designation by referring to an English court judgement in *JGE,* which extended the traditional employment relationship criterion to capture quasi-employment scenarios.[372] In *JGE,* the court utilised this designation as a basis for imposing vicarious liability for a matter involving sexual assaults by members of religious organisations.[373] The challenge in JGE was that the relationships in religious organisations resembled employment but did not fit neatly into the traditional statutory definitions. For this reason, the court had to designate quasi-employment for the purposes of affirmative finding of vicarious liability.

Another good example of akin to employment logic can be deduced from *Barclays Bank,* a case decided by the United Kingdom Supreme Court. In *Barclays Bank,* another sexual assault involved a medical doctor who was closely affiliated with a bank in a relationship that was quasi-employment. In this case, the court stated that the essence of quasi-employment entailed:

> 'the existing framework underlying the doctrine so as to accommodate the more diverse range of relationships which might be encountered in today's context. These relationships, when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships, and thus make it appropriate for vicarious liability to be imposed'.[374]

The above statement from *Barclays* states that courts must not be unduly restricted by the traditional use of the term employment. Rather, what is crucial is whether the relationships between any two parties 'possess the same fundamental qualities' of the employment relationship.[375] In factual scenarios where these qualities exist for new relationships, Morgan argues that a court must designate that as quasi-employment, and this ought to be sufficient to meet the requirements of vicarious liability.[376] It is this extension of quasi-employment that Morgan convincingly argues can be analogous to the parent-subsidiary relationship within corporate groups.[377]

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[371] Ibid at 295.
[372] Ibid citing *JGE* supra note 253 para 59–60.
[373] Ibid.
[374] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at 2.
[375] Ibid.
[376] Morgan op cit note 180 at 294–6.
[377] Ibid.

The key question is whether South African courts will recognise the parent-subsidiary relationship as analogous to employment or as a form of quasi-employment. Morgan's argument is essentially liability in the three-level relationship, as discussed in section 4.1. It is at the three-level relationship because the legal link between the claimant and the parent company is through the subsidiary company. Thus, the claimant needs to show that the subsidiary company caused harm, and they would also need to show quasi-employment between the subsidiary company and the parent company.

The two hypothetical options I explore in section 4.3.6.1 and section 4.3.6.2 still have auxiliary matters that impact the viability of vicarious liability as per agency or employment to corporate groups. These auxiliary matters have positive and negative implications on the viability of either option.

Regarding the considerations that negatively impact vicarious liability as per the employment relationship, it will likely not always be straightforward for the court to distinguish between the employees and independent contractors factually. Further, it will also not be straightforward to test whether, in a given set of facts, the matter shows borrowed servants and agents of the parent company or within the corporate group for the purposes of vicarious liability. All these categories share close similarities with employees and are crucial to determining the limits of liability. Apart from the Labour Court decisions from Chapter Two, little exists regarding jurisprudence for agency and independent contractor relations within corporate groups.

It will not always be straightforward for courts to determine if and when it will be appropriate to impose dual vicarious liability where both the parent and subsidiary company are tied to the harm-causing activities. These are all complex and challenging questions of both law and fact and represent circumstances that South African courts have not yet been asked to respond to. Ultimately, the difficulty is that when all the rules for all these relationships and categories were conceptualised in law, the intent was not to cover corporate group liability. All these considerations should be tallied before a final assessment of the suitability of vicarious liability as per the employment relationship applied to corporate group contexts.

There are also considerations that favour the first hypothetical option, which is simply to apply the existing rules of vicarious liability on the parent company in scenarios when it is an employer of the wrongdoer. A notable advantage of this path is that it permits the existing rules of vicarious liability to be applied within corporate group contexts. Another advantage is that

the tests in labour law, have already been applied to employees in corporate groups, and there is ample jurisprudence that a parent company can be found to the employer of personnel that also works for the subsidiary company. Further, the Constitutional Court has also developed tests that can cater for complex scenarios where it is difficult to determine the course-and-scope requirement of vicarious liability.[378] My overall impression is that the application of existing rules of vicarious liability as per the employment relationship to corporate groups will likely be a viable proposition.

In terms of the considerations that negatively impact the second option, my reviews in Chapters One and Three indicate that no South African case has ever held a parent company vicariously liable for the delicts of its subsidiary company.[379] This line of inquiry, therefore, remains theoretical and currently untested. Despite being untested, my view is that corporate group liability based on quasi-employment is still worth pursuing. This is because there will likely be scenarios where the existing rules of vicarious liability will not be able to offer adequate recourse for delict claimants.

4.3.6.3 Borrowed servants, employees with two employers, dual vicarious liability and corporate groups

What follows are the general principles for borrowed servants, employees with two employers, and dual vicarious liability, as well as a review of these designations for applying vicarious liability in corporate groups.

In the common law of delict, there are scenarios where an employee appears to have more than one employer, and the question becomes how the principles of vicarious liability operate in these scenarios. Atiyah provides some sound primary principles and guidelines when dealing with these scenarios.[380]

The first scenario described is that where an employee hires an employee, whom Atiyah describes as a sub-servant.[381] Here, the courts must determine whether the employer of the primary employee will be liable for the harm of the sub-servant who was hired without their authorisation or authority. Atiyah offers the answer that only the employee must be vicariously

[378] See discussion of *K* supra note 237 para 32.
[379] Section 2.4 of Chapter One and Section 3.3 of Chapter Three; See similar finding in Brickhill & Mbuyisa op cit note 119 at 95 and 97.
[380] Atiyah op cite note 185 at 147–64.
[381] Ibid at 147–9.

liable for the harm of the sub-servant.[382] Atiyah argues that the employer should only be liable for the harms of the sub-servant when they have given the primary employee authority to hire the sub-servant.[383] If such authority existed at the time of the hire, it is logical to state that it is the employer who hired the sub-servant, and it is thus logical that they ought to be vicariously liable under the regular operation of vicarious liability.[384]

Atiyah also makes the distinction between a sub-servant and a joint service. With joint service, two masters hire a single employee for different purposes.[385] Atiyah suggests that in these scenarios, the employer whose tasks were completed at the time of the delict ought to be vicariously liable.[386] My view of this suggestion by Atiyah is that it appears well in line with the basic logic of the course and scope requirement, which also looks at whether the delict was committed in the furtherance of the employer's business.[387] This means the distinction between a sub-servant and a joint service can be met by applying the course and scope requirements.

South African case law recognises the scenario of borrowed servants where the primary employer lends or hires out their employees to a temporary employer.[388] The crucial legal question in these cases is who ought to be vicariously liable where the lent employees commit a delict. In terms of the SCA judgment in *Midway Two Engineering*, the court held that the primary employer is liable for the harms committed by the hired employee.[389] The only defence available to the primary employer is to show that at the time of the delict, it is the temporary employer who had complete control of the employee who committed the delict.[390] In *Midway Two Engineering,* the court held that the temporary employer was vicariously liable for the delict caused by the borrowed servant.[391] The court held that the temporary employer was the one that had the most proximity to the delict in question based on the risk-creating activities that were associated with the temporary employer.[392]

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[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid at 149–52.
[386] Ibid.
[387] *K* supra note 237 at para 24.
[388] R Zimmermann, D Visser, K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 629–30; Loubser & Midgley op cit note 1 at 470.
[389] Ibid; *Midway Two Engineering & Construction Services BK v Transnet Bpk* 1998 (3) SA 17 (SCA) para 22–3.
[390] Ibid.
[391] Ibid.
[392] Ibid.

Courts in the United Kingdom and Canada have introduced yet another category to be considered. These courts have accepted the concept of dual vicarious liability.[393] My research reveals that South African courts have not yet considered the viability of this category, but the logic and principles employed in foreign law appear sound. If more than one employer meets the criterion of the principles of vicarious liability, the law in these jurisdictions sees no reason why both employers cannot be held vicariously liable.[394] It can also occur that both these employers are so intertwined in the employee's work that it is difficult to distinguish them for the purposes of liability.

My view is that the broad category of dual vicarious liability, borrowed servants or employees with two employers, shares some analogues to the context of corporate groups. This is because dual liability has the underlying problem of imposing liability between two potential employers. In corporate groups, a similar challenge exists where the law ought to impose liability between the parent company and its subsidiary. Thus, I believe that the principles applicable to dual vicarious liability and borrowed servants provide insight from which to craft a delict-based approach for corporate group liability.

I submit that a case from Chapter Three can aid in the evaluation of the principles of borrowed servants. In Chapter Three, I discussed the *Bodigelo* case and asked whether the PIC would be liable for Mr Bodigelo's activities whilst acting on its behalf in the investee companies of the PIC.[395] To my mind, rules under borrowed servants are most suitable for testing PIC's potential delict-based liability in a scenario such as the *Bodigelo* case.[396] For present purposes, *Bodigelo* illustrates the possible outcomes when principles under section 4.3.6.3 are applied to corporate groups.

The principle of borrowed servants describes the rules of vicarious liability where a primary employer temporarily borrows from another employer their employee.[397] When applied to the scenario of *Bodigelo,* the crucial question would be whether the PIC is open to vicarious

[393] P Giliker 'Vicarious Liability 'On the Move': The English Supreme Court and Enterprise Liability: A Commentary on Various Claimants v Catholic Child Welfare Society [2012] United Kingdom Supreme Court 56' (2013) 4 *Journal of European Tort Law* 306 at 307 citing *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 at 46 and 48–49; *E v English Province of our Lady of Charity and another* [2013] 3 WLR. 958 at 77.
[394] Ibid.
[395] See facts of *Public Investment Corporation Ltd v Bodigelo* (128/2013) [2013] ZASCA 156 (*Bodigelo*) in section 3.4.8 in Chapter Three.
[396] Loubser & Midgley op cit note 1 at 470
[397] Ibid.

liability, where Mr Bodigelo commits a delict while carrying out board functions at the investee company. The following questions will apply to test the logic of borrowed servants. Mr Bodigelo would need to commit a delict as per the requirements of the generalising approach to meet the first requirement of vicarious liability. Secondly, the PIC claimed that Mr Bodigelo was their employee, so the second requirement of an employment relationship between the wrongdoer and the liable party was to be met. The question would be concerning the third requirement of vicarious liability. The critical question would be whether Mr Bodigelo's delict was committed in the course and scope of the investee company or within the course and scope of PIC's work. In terms of borrowed servants, the default principle is that the work done by the employee with two employers is attributed to the first or main employer.[398] This means that where Mr Bodigelo commits a delict, it is generally viewed as conducted within the course and scope of the primary employer, namely the PIC. The only exception is where the primary employer can escape liability where it can show that at the time of the delict, the employee was controlled and supervised by the secondary employer.[399]

I contend that the logic above applies to the third requirement of vicarious liability, namely that the delict must be committed within the scope of the parent company's business. In scenarios where the PIC is hypothetically replaced with the parent company, the principle of the parent's company liability under borrowed servants would be clear and stable. The principle would be that where the parent company assigns its personnel to the subsidiary, should such employees commit a delict. The parent would be vicariously liable for such harm. This is because the employee is assumed to be under the employment of the parent, and any harm that they cause is assumed to have been done to further the parent's business. In the PIC scenario, Mr Bodigelo was advancing the PIC's business in the investee companies to ensure that these companies were run efficiently and to protect the PIC's investment in them.[400]

The parent company ought to be allowed to escape liability, where it can show that it transferred all control and supervision of the employee to the subsidiary at the time of the delict. This would mean that at the time of the delict, the subsidiary had stepped into the shoes of the primary employer, and thus, only the subsidiary should be open to the risk of vicarious liability. The subsidiary's liability would be fair because the employee's delict would have been

[398] Ibid citing *Midway Two Engineering* para 23.
[399] Ibid; see also Wagener op cit note 160 at 187–8 citing *Midway Two Engineering* ibid para 28; *Chatwin v Central South African Railways,*1909 TH 33 at 50–1.
[400] *Bodigelo* supra note 391 para 2.

committed during activities authorised by the subsidiary and thus within the course and scope of only the subsidiary's business. Such an interpretation of the rules of borrowed servants would still likely place the onus of showing who supervised and controlled the employee at the time of the delict on the parent company as the primary employer. Where a parent fails to show this transfer of control and supervision to the subsidiary, it is fair to assume the employee's delict-causing activities had been authorised within the course and scope of the parent's business. My view is that this is the simplest explanation to support Stevens' correct assertion that *Bodigelo* opened the PIC to vicarious liability.[401]

The rules of dual vicarious liability from the United Kingdom also ought to be applied in a scenario such as *Bodigelo*. A court can find that the case is not of borrowed servants but rather of dual employers, namely both the parent and subsidiary. In such a scenario, there ought to be no reason in law that the course-and-scope requirement should be conceptually limited to just one employer. There may be good reasons in law to impose joint vicarious liability of both the subsidiary and parent company towards the same delict and employee. Rules such as these already exist for fault-based liability, and it is submitted that they ought to be extended to strict liability where it is ideal to do so. It is submitted that dual vicarious liability is suitable within the complexity posed by corporate group liability.

Theoretical viability and likelihood of success must always be separated. Scenarios such as *Bodigelo*, where a parent company claims personnel that works for another company, are rare in law. In the absence of such an admission by a parent company, factually showing that the wrongdoer in question is a borrowed employee of a parent company remains difficult. Further, all the challenges of showing the normal rules of parent company liability as per the employment relationship in section 4.3.6.2 will likely be experienced when the option of borrowing servants is pursued. In sum, the rules of borrowed servants and dual vicarious liability share similar challenges as with the application of traditional rules of vicarious liability as per employment relations, as discussed in section 4.3.6.2.

4.3.7 Evaluation of the application of strict or no-fault liability to corporate groups

Chapter Four stated that it aims to find a delict-based common law remedy that is capable of resolving the Bhopal disaster case study. Section 4.3.6 evaluated a number of different relationships where strict or vicarious liability has been recognised and found that there are two

[401] Stevens op cite note 178 at 84.

bases of delictual liability that are likely able to cater for parent-subsidiary company relationships. That is the application of the doctrine of vicarious liability as per the ordinary agency and the employment relationship.

In the Bhopal disaster, the plaintiffs before Keenan J in the United States stated that UCC's employees were key in the designs and operation of the faulty plant at UCIL.[402] What the claimants alleged was that given the active role of UCC employees, it was fair to impose delictual liability on UCC.[403] From a South African perspective, in terms of vicarious liability, a potential option may be the application of the doctrine of vicarious liability as per the employment relationship. The challenge for this basis is that the claimants must pinpoint who caused the harm in question. This is not always possible to show the natural persons responsible for the harm when corporate group harm is concerned, as in the Bhopal disaster.[404] In scenarios where the case is based on the existing rules, the first hurdle is that the claimants must show that one of UCC's employees was responsible for the delict per the generalising approach or vicarious liability based on the employment relationship. If this cannot be shown, the odds of utilising fault-based liability as a basis for a corporate group's liability become slim. If the claimants show that the subsidiary borrowed the servants, then only the subsidiary can be liable, and the parent will be absolved of liability. Based on the allegations made in the United States before Keenan J, it is submitted that the application of vicarious liability as per the employment relationship would have been incapable of creating a viable basis of delictual liability against UCC, the parent company.

There are two relationships recognised under the doctrine of vicarious liability that can be applied to the Bhopal disaster, namely agency and employment. The claimants did not allege that the subsidiary company or the employees of UCC were agents of UCC. Thus, vicarious liability, as per existing rules of agency, would be an inappropriate basis of liability. The employment relationship is also unlikely to come to the aid of the claimants if they cannot show that the employees of UCC were the ones responsible for the harm. To my mind, this justifies seeking out further development in law so as to cater to residual cases where the existing law is incapable of adequately accommodating delict claimants.

[402] *In Re Union Carbide Corp* op cit note 16 at 853–9.
[403] Ibid.
[404] Ibid.

4.4 Concluding remarks on the most viable basis of corporate group liability as per the common law of delict

Chapter Four set out to answer the following question: What is the most appropriate common law basis in delict capable of resolving corporate group liability as per the interplay school? Chapter Four has found two broad paths to answer this question: fault-based liability and strict or no-fault liability.

The first path is to pursue fault-based liability as per the generalising approach. Here, the parent company is directly liable as per the fault principles regarding the generalising approach. Such liability would require the application of the five elements of delict and can show individual liability for the parent company or joint liability alongside its subsidiary. All five delictual elements need to be proved in separate or joint liability. In foreign case law, *Chandler* provides a rare example of when this is a viable path for delict claimants to pursue. In terms of applying all five elements of the generalising approach, chapter four argued that the *Chandler* case provided ideal facts of a matter that involved delict-based corporate group liability, and it was ideal to utilise this case to conceptualise likely outcomes in South African law. After a description and application of all five elements of the generalising approach to corporate groups, Chapter Four found that it is viable to apply all five elements of the generalising approach to corporate groups.

A notable and likely challenge with the generalising approach may emanate from the delictual elements of conduct. Conduct is primarily a factual assessment, which would require showing which activities within the corporate group were responsible for the harm in question. My conclusion is that delict claimants may face challenges with accessing the internal records of the activities of corporate groups to show who within it was most proximate to their harm. Chapter Four also found that the challenges with showing conduct also negatively impact showing the elements of causation and wrongfulness for the purposes of fault-based corporate group liability.

Chapter Four also found a second path capable of addressing corporate group liability. That of strict liability. Applying strict liability to corporate groups has revealed a complex picture. To explore the options presented by strict liability, one must take guidance from the spirit of

pragmatism and ideals of transformative constitutionalism.[405] When pragmatism is considered, one is encouraged not to fixate on a single all-encompassing solution but to consider a range of options that all lead towards viable solutions for delict claimants, depending on the specific circumstances of the facts at hand.

A review of the theories or policy reasons used to justify the imposition of strict liability finds that agency considerations are the strongest and most applicable to corporate group contexts. Evidentiary and risk considerations are also applicable within corporate group contexts. Equity considerations should take a secondary role in justifying strict liability in corporate groups. These justifications are not mutually exclusive and ought to be utilised together as a mixed justification for strict corporate group liability in the common law of delict.

A more difficult question is, what rules should make up the actual test of strict liability in corporate groups? This question compels one to ask whether corporate group liability should be subject to a new set of tests or should it be modelled against existing tests in agency, employment or other relationships where strict liability is recognised as common law. My findings show that at least two relationships are recognised under the doctrine of vicarious liability, where delict claimants can sue parent companies. It is submitted that the existing rules of vicarious liability under the agency relationship and under the employment relationship can already form a basis to sue a parent company for delictual harm in some cases. However, Chapter Four distinguishes between theoretical viability and likelihood of success. These two forms of vicarious liability can theoretically be extended to corporate groups. However, there are challenges that negatively impact their likelihood of success.

For vicarious liability under agency relationships, the claimants may need to show a clear contractual undertaking by the parent company that the subsidiary company is its agent for a specific mandate. The agency option is difficult to prove without evidence of such a contract. For vicarious liability as per the employment relationship, there is a challenge that contains a mix of factual and legal aspects. The challenge is that the distinction between an ordinary employee, a borrowed servant, an independent contractor, and an agent may be difficult to draw when applied within the corporate group context. There will be cases where the line is easy to draw, as seen in a number of judgments from labour law in chapter two. It will also be easy for the parent company to accept and clarify the existing state of affairs, as seen in

[405] See the discussion of transformative constitutionalism in section 1.3.2 of Chapter One.

Bodigelo and *Adcock*. However, in many other cases, the legal and factual distinction between these designations will be challenging to establish.

Chapter four thus finds that there are at least three options that claimants suing a parent company can pursue in terms of the common law of delict. The first is fault-based liability as per existing rules of the generalising approach. The second is under the doctrine of vicarious liability as per the agency relationship. The third is also under the doctrine of vicarious liability as per the employment relationship.

The plight of Bhopal-style claimants primarily motivated this thesis's inquiries. My review indicates that none of the existing liability doctrines can fit neatly into aiding the Bhopal disaster claimants from a South African law of delict perspective. The legal elements of conduct will likely be challenging to show, and this will reduce the odds of success for fault-based liability. UCC did not own up to any personnel or enter into clear agency contracts; thus, this option may be difficult to pursue. There were allegations that UCC and UCIL shared personnel. What is unclear is whether such sharing would rise to the level where a finding can be made that UCC was the employer of such personnel. In the Bhopal disaster, the primary relationship between UCC and UCIL was the majority equity that UCC had in UCIL. This means that all three of the current options will still come short of giving delict claimants a viable and likely option to utilise.

If all three options are insufficient, there may be some utility in conceptualising a fourth option. This fourth option must operate as a catch-all for all the residual cases where the three options identified will be insufficient to meet the need for effective remedy. My view is that the fourth option ought to be modelled on a combination of applying the doctrine of vicarious liability to a version of quasi-employment and quasi-agency, as suggested by Morgan. Chapter Five thus evaluates whether it is viable to develop a fourth option.

Chapters One and Two argued that legal evaluations at their core, ultimately matters of constitutional compliance as dictated by the transformative vision of the Constitution.[406] In terms of fulfilling the mandate of the remedies stage of the interplay school, Chapter Two argued that a unique place ought to be given to the considerations from *Mighty Solutions* when

[406] Section 1.3.2 of Chapter One and Section 2.5 of Chapter Two.

considering matters of common law development.[407] The utility of *Mighty Solutions* is that it fits as part of a holistic, context-sensitive, values-driven, purposive interpretation and development of the common law of delict as per the remedies stage of the interplay school.[408]

As per the guidance from *Mighty Solutions*, common law legal development must assess the following: ascertain what the existing principles are and the reasons for the existence of these principles, evaluate alignment between these principles and constitutional norms, determine how these principles may be adjusted if they misalign with the Constitution, assess any other broader implications for the suggested alignment.[409] The factors from *Mighty Solutions* have guided Chapter Four's review of whether there is a need for legal development in the common law of delict. The finding here was that there is indeed a need for the development of the law. Chapter Four found that the precise place in delict to make such a legal development of the law was within the common law doctrine of vicarious liability. Chapter Four has not considered how such a development affects the broader context of the law. This question thus remains outstanding for discussion in Chapter Five.

In sum, Chapter Four tentatively finds three potential pathways to rectify the research problem of the thesis. However, in light of the difficulties of applying all three options to the facts of the Bhopal disaster, Chapter Five further explores a new fourth option.

[407] *Mighty Solutions CC ta Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) at 38; For a detailed discussion of the role of the case in this thesis, see section 2.3.1 of Chapter Two and section 5.3.4.4.
[408] Ibid.
[409] Ibid.

CHAPTER 5: TOWARDS VICARIOUS LIABILITY & CORPORATE GROUPS

5. 1 Introduction to viable remedies to resolve the research problem of the thesis

Chapter Four assessed how best the common law of delict ought to respond to the challenge of delict-based corporate group liability.[1] The chapter found at least three common law options that delict claimants can pursue to get legal recourse against a parent company and its subsidiary.[2] The first is fault-based liability as per existing rules of the generalising approach. Chapter Four found that the generalising approach can theoretically be applied as a basis of liability against both the parent and subsidiary company. However, the chapter noted considerable difficulty with this option, especially as it pertains to its application as a basis of the parent company's delictual liability. The second option from Chapter Four, as it pertains to corporate group liability, is to apply the existing rules of the doctrine of vicarious liability as per the agency relationship. This option provides a viable basis for the parent and subsidiary company's delictual liability. The third option from Chapter Four is also under the existing rules of the doctrine of vicarious liability as per the employment relationship. As per the chapter, the three viable options are based on a direct relationship between a natural person whose activities caused the delict and the parent or subsidiary company at a two-level relationship.[3] This means that delictual liability will only likely be imposed on the parent or subsidiary company but not both when one pursues these options.

Chapter Four also found that there will likely be residual cases where all three of these options may still be insufficient. This insufficiency necessitates the legal development of a fourth option based on vicarious liability. This fourth option will be a basis of delictual liability for

[1] The Bhopal primarily facts relied on in Chapter Four are sourced from *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986) at 844 (*In re Union Carbide Corp*).
[2] See section 4.4 in Chapter Four.
[3] A two-level relationship describes a scenario where liability for harm will only be imposed on either the parent or subsidiary company in terms of existing liability in delict. See the discussion in section 4.1 in Chapter Four; T Kravtsova & G Kalinichenko 'The vicarious liability of parent company liability for its subsidiary' (2016) 14 *Journal of Corporate Ownership & Control* 1 at 686–90.

the parent and subsidiary company at a three-level relationship.[4] Chapter Five will show how such legal development is best approached and the practical outcomes of a Bhopal disaster. This fourth option is the gap that Chapter Five responds to.

Section 2.3 of Chapter Two argued for the interplay school as the preferred methodology for constitutional adjudication between non-state actors. As per the remedies stage of the interplay logic, when a court holds the view that the best path forward is to develop the common law, such a process must be led by the dictates of s 8(3), read with s 39(2), s 172, and s 173 of the Constitution.[5] Practically, Chapter Two argued that *Mighty Solutions* presents unique guidelines of what an ideal remedy ought to consider.[6] Van Der Westhuizen J described these factors as:

> 'Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law'.[7]

In terms of taking adequate guidance from *Mighty Solutions*, Chapter Four has already tentatively considered guides (a) to (c).[8] Chapter Five further considers (d) 'precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law'.[9]

Chapter Four suggested that the fourth option should be developed by adjusting the doctrine of vicarious liability.[10] The suggested fourth basis of liability ought to be made up of a combination of both quasi-agency and quasi-employment as applied to the doctrine of vicarious liability. This new basis of vicarious liability is termed hold-sub liability.

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[4] Ibid; a three-level relationship describes a scenario where liability for harm factors in three interrelated relationships: the parent-subsidiary relationship, the relationship between the subsidiary company and the delict claimants, and the relationship between the parent company and the delict claimants.
[5] Section 2.3 of Chapter Two.
[6] *Mighty Solutions CC ta Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) at para 38; this case is discussed in section 2.3.1 of Chapter Two and will be addressed in 5.3.4.4 of Chapter Five.
[7] *Mighty Solutions* ibid para 38.
[8] Section 4.4 in Chapter Four.
[9] Ibid.
[10] See discussion of quasi-agency and quasi-employment in section 4.3.6 in Chapter Four.

Hold-sub liability is primarily built up from the work of Morgan,[11] Kravtsova & Kalinichenko,[12] and Stevens,[13] which I also originally elementarily developed in my LLM research report.[14] Chapter Five will be divided into three more sections that will test the viability of hold-sub liability. Section 5.2, which will ask the following questions:

1. Is the policy basis employed in vicarious liability compatible with the conception of hold-sub liability?

2. Is the requirement that there should be an employment/agency relationship compatible with hold-sub liability?

3. Is the requirement that there should be a commission of a delict compatible with hold-sub liability?

4. Is the requirement that the delict must be commissioned within the scope of the employment/agency relationship compatible with hold-sub liability?

Section 5.2 intends to argue that the answers to the above questions provide an ideal prerequisite to test if hold-sub liability is viable. Section 5.3 applies the formulated questions of hold-sub liability to the Bhopal disaster. The purpose of this exercise is to further test the viability of the envisaged hold-sub liability in a practical scenario that is most relevant to the entire thesis, namely the problem of the unique vulnerability of the claimants in the Bhopal disaster. Section 5.4 of Chapter Five concludes with a response to the question of what the most ideal remedy in law is to resolve the research problem of this thesis as per the remedies stage of the interplay school.

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[11] P Morgan 'Vicarious Liability for Group Companies: the Final Frontier of Vicarious Liability?' (2015) *Journal of Professional Negligence* 276 at 276.

[12] Kravtsova & Kalinichenko op cit note 3.

[13] Stevens R 'Kuwait Asia Bank EC v National Mutual Life Nominees Ltd revisited: the possible vicarious liability of a holding company for the delicts caused by its nominee directors on the board of its subsidiary' (2019) 1 *TSAR* 78.

[14] See term initially developed in T Mafulela *The possible extension of vicarious liability to cover relations between holding companies and their subsidiaries: Is it plausible and desirable under South African Law?* (LLM dissertation, University of Witwatersrand, 2018); see also similar ideas in WJ Rands 'Domination of a Subsidiary by a Parent' (1998) 32 *Indiana Law Review* 421 at 446–8; X Feng *Corporate Liability Towards Tort Victims in the Personal Injury Context* (LLD thesis, Queen Mary University of London, 2017) at 222–97; LB Scott *Employees to hackers: The shades of blame in vicarious corporate liability* (LLD thesis, The Graduate College at the University of Nebraska, 2016) at 42; M Petrin & B Choudhury 'Group Company Liability' (2018) 19 *European Business Organization Law Review* 771 at 789.

5.2 Assessing the most viable theories and rules within the doctrine of vicarious liability to extend to the parent-subsidiary company relationship

5.2.1 Introduction

Building on Chapter Four, two initial logical questions ought to be answered as they pertain to hold-sub liability.[15] The first question is which of the theories utilised to justify strict or vicarious liability is best suitable to the parent-subsidiary company relationship. The second question is whether the parent-subsidiary company relationship ought to have its unique requirements or should be doctrinally developed on what has been utilised in other relationships that have been recognised under the doctrine of vicarious liability. These questions are important because in all the other relationships where vicarious liability is recognised, the law has developed underlying theories to justify why that relationship is recognised, and the rules of liability within these relationships.

In terms of the first question, Chapter Four found that the strongest theory or policy reasons used to justify the imposition of strict liability are agency considerations followed by evidentiary considerations and supplemented where appropriate by risk considerations.[16] Chapter Four also argued that equity considerations should also occupy a secondary role in justifying strict liability in corporate groups.[17] These theories and policies are not mutually exclusive and ought to be utilised together as a mixed justification for strict corporate group liability in the common law of delict.[18]

Chapter Four argued that none of the theories that have been utilised by the court to justify the existence of strict liability can stand alone as a good and sound policy basis for imposing strict liability on corporate groups.[19] However, taken together, they may be capable of providing a starting point for justifying the extension of strict liability to new relationships.[20] Chapter Four also concluded that the most pressing problem associated with the theories of strict liability is that they do not adequately address the boundaries problem.[21] This means that hold-sub liability

[15] Section 4.4 in Chapter Four that sets out the links with Chapter Five.
[16] Ibid section 4.3.1.
[17] Ibid.
[18] Ibid.
[19] Ibid section 4.3.5.
[20] Ibid.
[21] Ibid where Chapter Four described the boundaries problem as posing difficult questions such as: How far exactly does strict liability expose a party to legal liability? How are the boundaries of strict liability to be justified by the courts? In the context of corporate groups, the problem of boundaries is compounded because

in Chapter Five must respond to the boundaries problem of strict or vicarious liability, as pointed out in Chapter Four.

In terms of the second question, namely, what the principles of strict liability between a parent and its subsidiary should be, Chapter Four provided some guidance. Chapter Four found that this question ought to take guidance from the principles of liability in the agency relationship, the employment relationship, dual vicarious liability, and borrowed servants.[22] Morgan, writing from the legal perspective of the United Kingdom, makes a compelling case that the parent-subsidiary relationship is best accommodated within the requirements of quasi-employment.[23]

In addition to quasi-employment, Morgan also indicates that the parent-subsidiary company relationship can theoretically be accommodated within the requirements of vicarious liability as it is applied to the agency relationship.[24] In South Africa, vicarious liability, as applied to an agency relationship, carries three requirements:[25] An agency relationship between the parties, a delict committed by the agent, and that the delict was commissioned within the scope of the agent's mandate.[26]

Chapter Four argued that both foreign and domestic cases indicate that courts have recognised that two juristic persons can be in an agency relationship.[27] In Chapter Five, I submit that lessons from this case law can be utilised to evaluate the nature of the relationship between a parent and subsidiary for the purpose of developing the legal basis of hold-sub liability.

The next logical consideration would be whether the practical tests of hold-sub liability ought to be developed on the requirements for the employment relationship or the agency relationship. My view is that there will likely be similarities between the doctrinal framework required for parent-subsidiary liability and vicarious liability as applied in the employment relationship or through the agency relationship. Both bases of liability would require that there

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corporate structures are often vast and more complex than the traditional relationships where strict liability is applied.

[22] Ibid discussion in section 4.3.6.

[23] Morgan op cit note 11 at 276; see also Feng op cit note 14 at 285–90. The authors use the term akin to employment but for the purposes of this thesis the term that will be used is quasi-employment.

[24] Morgan ibid at 294; see also Feng at 80–2.

[25] J Neethling & JM Potgieter *Law of Delict* 8 ed (2020) at 453; see also M Loubser & R Midgley et al *The Law of Delict in South Africa* 3 ed (2017) at 467.

[26] Ibid at 453.

[27] Section 4.3.6 of Chapter Four discussion of *Smith Stone and Knight Ltd v Birmingham corporation* (1939) 4 All ER 116 at 5; *Adcock-Ingram Laboratories Ltd v SA Druggists Ltd & Another*; *Adcock-Ingram Laboratories Ltd v Lennon Ltd* 1983 (2) SA 350 (T); FHI Cassim et al *Contemporary Company Law* 3 ed (2021) at 73–5.

be a commission of a delict.[28] Both theories of liability require that there should be an employment relationship or an agency relationship between the wrongdoer and the vicariously liable party.[29] Both theories require that such a delict is either within the course of what is quasi-employment or within a mandate.[30] My view is that the evidentiary material required for both these requirements will largely be the same.[31]

Hold-sub liability will add a new relationship to the existing relationships recognised under the common law doctrine of vicarious liability, namely the relationship between a parent and subsidiary company. In that sense it is a new basis of vicarious liability. My preference is, however, to model the development of hold-sub liability primarily with the influence of quasi-employment.[32] This is because there is an indication that there are more relevant South African cases on the employment relationship than in the agency.[33] For example, the development of hold-sub liability should take a cue from the ample labour cases on corporate group liability from Chapter Three.[34] The development of the tests for hold-sub liability is, therefore, primarily influenced by lessons from the employment relationship and, where appropriate, supplemented by lessons from the agency relationship, dual liability, and borrowed servants.[35]

5.2.2 Hold-sub liability and the requirement that there should be a commission of a delict

For a principal or an employer to be liable in terms of the doctrine of vicarious liability, a plaintiff needs to show that an agent or an employee committed a delict.[36] Within the context of hold-sub liability, it must be shown that a delict has already been attributed to the subsidiary company. It is submitted that the requirement that the subsidiary company commits a delict is ideally a precursory question of the parent's liability. Where it cannot be shown that the subsidiary company committed a delict, the question of the vicarious liability of the parent company cannot logically arise per hold-sub liability.

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[28] Neethling & Potgieter op cit note 25 at 444–53.
[29] Ibid.
[30] Ibid.
[31] Ibid at 453.
[32] *Barclays Bank v. Various Claimants* [2020] UKSC 13 at 2.
[33] See for example contrast between cases in A Fagan 'The Confusions of K' (2009) 126 *SALJ* 156 Neethling & Potgieter op cit note 25 at 453; see also difference between labour cases in section 3.4 of Chapter Three and agency cases in section 4.3.6 of Chapter Four.
[34] Ibid section 3.4 of Chapter Three.
[35] See discussion of dual liability and borrowed servants in section 4.3.6 of Chapter Four.
[36] Neethling & Potgieter op cit note 25 at 447.

In scenarios where the parent becomes liable through its own agents or employees, such liability is not the envisaged hold-sub liability but based on the existing principles of delictual liability as per the three delict-based causes of action as discussed in Chapter Four.[37] Thus, it is envisaged that hold-sub liability can only be based on the subsidiaries' delict.[38]

Chapter Four found that it is viable for delict claimants to show the existence of all five delictual elements of the generalising approach against the parent or its subsidiary in separate or joint liability.[39] There is a second way that the requirement that there should be a commission of a delict can be met for the purposes of hold-sub liability. The claimants can pursue the existing rules of the doctrine of vicarious liability by showing that the employee or agent of the subsidiary company committed a delict while acting in the course and scope of the subsidiaries' business.[40]

The basis of showing that the subsidiary company committed a delict can, therefore, be either fault-based or vicarious liability (as per the ordinary rules in the agency or employment relationship). In terms of the practical application of fault or strict liability, Chapter Four also described the likely challenge that should be anticipated when all these options are pursued against companies in corporate groups.[41] The liability of the subsidiary company also ought to be viewed at the two-level relationship between the subsidiary company and the delict claimants. Thus, at this point, the question of the parent company's liability will not yet be an issue and will only be answered after this initial step has been met.

5.2.3 Hold-sub liability and the requirement that there should be an employment/agency relationship

The second requirement of vicarious liability as applied to the employment relationship is that there should be an employment relationship between the wrongdoer and the party that is held vicariously liable.[42] When this requirement is taken to the parent-subsidiary relationship, the legal nature of the subsidiary company is ordinarily incapable of being an employee of another in ways that a natural person can be the employee of a juristic or a natural person.[43] Even

[37] See discussion in section 4.3.6 of Chapter Four.
[38] Ibid see discussion of the differences.
[39] Ibid section 4.2.
[40] Section 4.3.6 of Chapter Four.
[41] Ibid section 4.3.7.
[42] Ibid at 444–53; Loubser & Midgley op cit note 25 at 468–80.
[43] Morgan op cit note 11 at 295–7.

though a juristic person cannot be an employee in the traditional sense, Morgan believes that parent-subsidiary company relationships can fit into quasi-employment.[44] Chapter Four discussed *Barclays Bank* and *JGE,* two cases from the United Kingdom that recognised quasi-employment for the purposes of meeting the requirements of vicarious liability.[45] The essence of that discussion was that whenever any two legal subjects are in a relationship that resembles the essence of an employment relationship, such a relationship ought to be capable of meeting the second requirement of vicarious liability.[46] The primary utility of quasi-employment is, therefore, the logic that has been utilised by English courts to transport the underlying triggers of what constitutes the traditional employment relationship to new and different relationships.[47] The argument is thus that the parent-subsidiary relationship should fit into the logic of quasi-employment if that relationship resembles features of the traditional employment relationship.[48]

To factually test if the parent-subsidiary relationship can fit quasi-employment, Morgan argues that focus ought to be placed on the level of control exercised by the parent on the subsidiary.[49] Morgan also argues that a court must also assess the extent to which the business of the two entities is integrated into each other.[50] The extent of control exercised between the entities, as well as their levels of integration, should thus indicate whether the parent-subsidiary relationship is quasi-employment.

From a South African perspective, one ought to apply the underlying logic of the dominant impression test to the parent-subsidiary relationship.[51] This is because the dominant impression test is what is utilised in South Africa to show if a relationship is one of traditional employment between a natural and juristic person.[52] This test is thus the close analogy between a parent and subsidiary company for the purposes of quasi-employment. The aim of such a process ought to be to factually assess if the control and integration within the parent-subsidiary relationship

[44] Ibid.
[45] Section 4.3.6 of Chapter Four discussing *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at para 59–60; *Barclays* supra 32 at 2.
[46] For the essential features of the employment relationship see discussion of dominant impression test in section 3.4 of Chapter Three.
[47] Morgan op cit note 11 at 295–7.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] *Beya & others v General Public Service Sectoral Bargaining Council & others* (2015) 36 ILJ 1553 (LC) at 48–50.
[52] Ibid.

creates an impression that the relationship is quasi-employment or closer to a relationship resembling a principal-independent contractor.[53]

In scenarios where the dominant impression indicates that the relationship resembles an independent contractor, hold-sub liability must logically fail. This is a logical result because, in our law, the general rule is that independent contractors do not create liability for their principals. Therefore, if the relationship between a parent and subsidiary is factually shown to be at arm's length, there ought to be no liability for the parent company. Conversely, in scenarios where the court finds that the dominant impression of the parent-subsidiary relationship is of quasi-employment, it must also follow that the second leg of hold-sub liability must be considered as met.

The next sensible question is how exactly a South African court is supposed to factually test for control and integration to show that the parent-subsidiary relationship is quasi-employment. I contend that labour cases on corporate group liability discussed in Chapter Three provide an ideal starting place for how to show quasi-employment in parent-subsidiary relationships.[54] Lessons should also be extracted from foreign case law.[55] My view is that these labour cases support Morgan's logic that focus should be placed on control and economic integration as part of the basis of the parent company's liability for its subsidiaries' delicts.[56]

1. The first factual indicator is where a parent and subsidiary company share key business operations such as business premises and paying each other's employees.[57]

2. The second is where the parent company owns all or a majority of the equity in the subsidiary company. [58]

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[53] Morgan op cit note 10 at 295–7.
[54] Section 3.4 of Chapter Three discussed South African labour cases as per an initial review of these same cases done in RA Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (LLD thesis, University of Stellenbosch, 2011) at 185–94; section 5.2.2 will evaluate lessons from *Media Workers Association of SA, The & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 ILJ 313 (IC); *SA Allied Workers Union & others v Contract Installations (Pty) Ltd & another* (1988) 9 ILJ 112 (IC); *Paper Printing Wood & Allied Workers Union & others v Kaycraft (Pty) Ltd & another* (1989) 10 ILJ 272 (IC); *Boumat Ltd v Vaughan* (1992) 13 ILJ 934 (LAC); *Sage v Fourwinds Transport Co (Pty) Ltd* (1994) 15 ILJ 1149 (IC); *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC).
[55] *Smith Stone* supra note 27 at 5; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 at 6; see also the discussion of these cases in Cassim et al op cit note 27 at 50–3.
[56] Morgan op cit note 11 at 296.
[57] *SA Allied Workers* supra note 54 at 114–6; M*edia Workers* supra note 54 at 314–5; *Sage* supra note 54 at 1151–3; *Board of Executors* supra note 54 at 956–61 and 967–70.
[58] *Paper Printing Wood* supra note 54 at 282–4; *DHN* supra note 55 at 6.

3. The third is where employees are required to report to, supervise, or work for both the parent and subsidiary company.[59]

4. The fourth indicator is where the parent and subsidiary companies share key personnel, such as managers and directors.[60]

5. The fifth is where the parent company negotiates with third parties on behalf of the subsidiary company.[61]

6. The sixth indicator is where the parent and subsidiary company share a single corporate group identity.[62]

7. The seventh indicator is where the parent company does not respect the separate personality of the subsidiary company and treats the profits of the subsidiary as its own.[63]

The above factors extracted from South African labour cases provide ideal guidance for a court tasked with transporting the requirement of quasi-employment to the parent-subsidiary relationship. These factors should ideally be considered together and alongside the dominant impression test. This is, however, not intended to be a closed list but a guideline of what courts ought to consider to factually test if there is business integration, or control, between two or more juristic entities.

My overall impression of the considerations from South African and foreign cases is that there is support for Morgans's argument that control and integration can form a sound basis for testing whether the parent-subsidiary relationship is quasi-employment.[64]

Once a court factually assesses the level of control and business integration between a parent and its subsidiary, it ought to make one of two findings. The first finding is that the facts show a relationship akin to a party that has outsourced service to an independent contractor. If the relationship resembles that of a principal and independent contractor, the general rule that no liability can be imposed for the delicts committed by the contractor in the completion of the

[59] *Media Workers* supra note 54 at 314–5; *Board of Executors* supra note 54 at 956–61, 967–70.
[60] *Board of Executors* supra note 54 at 956–61 and 967–70; *Paper Printing Wood* supra note 54 at 282–4; *Media Workers* supra note 54 at 314–5.
[61] *Paper Printing Wood* ibid at 282–4; *Board of Executors* ibid 956–61, 967–70.
[62] *SA Allied Workers* supra note 54 at114–6; *Board of Executors* ibid at 956–61, 967–70.
[63] *Smith Stone* supra note 27 at 5.
[64] Morgan op cite note 11 at 290.

outsourced mandate ought to be applied. Applied to the parent-subsidiary relationship, if such a finding is made, a court is permitted to find that the parent company is not liable for the delict in dispute.

The second finding is that a court tasked with factually determining the nature of the relationship between a parent and subsidiary company may also find that the relationship is one of quasi-agency. In *Adcock,* the court indicated that it is possible for two juristic persons to enter into an agency contract.[65] Thus, the most obvious manner to test for quasi-agency is where there are clear contractual undertakings that indicate this state of affairs. In *Smith Stone,* a court in the United Kingdom developed the following six-part test to assess whether a subsidiary company was acting as an agent of its parent company:

> 'The first point was: Were the profits treated as the profits of the company? when I say "the company" I mean the parent company-secondly, were the person conducting the business appointed by the parent company? Thirdly was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control?'.[66]

The six-part test indicates that control and integration can also lead to findings of agency relationship between two juristic entities. It content that these two cases provide guidance on how to evaluate wat constitutes quasi agency relationship between the parent and subsidiary companies.

It will be useful for clarity if the court determines whether the relationship in question is one of quasi-agency or quasi-employment and the basis of such a judicial choice. In scenarios where the parent and subsidiary company share the same name or where the subsidiary utilises an industry license of the parent, this ought to be a good indication of mandate and a relationship closer to that of quasi-agency. Conversely, where the parent and subsidiary share key personnel and expertise or operate in the same industry, these can be indicators of quasi-employment. Ultimately, my view is that it will not affect the development of sound principles of hold-sub liability or the outcome of its application where the court does not proclaim whether the relationship is quasi-employment or quasi-agency. I posit that it will often suffice for a

[65] *Adcock* supra note 27 at 69; see discussion of the case in Section 4.3.6.1 of Chapter Four.
[66] *Smith Stone* supra note 27- at 5; see discussion of the case in Section 4.3.6.1 of Chapter Four.

court to stick to the quasi-employment terminology as a generic catch-all phrase for when the parent-subsidiary relationship indicates tight control and economic integration.

5.2.4 Hold-sub liability and the requirement that the delict must be committed within the course and scope of the employment relationship

5.2.4.1 Straightforward cases of the course-and-scope requirement

The last requirement of hold-sub liability is that the delict must have been done within the course and scope of the quasi-employment or quasi-agency relationship.[67] This requirement ought to be understood and applied in terms of the logic utilised in vicarious liability as per the traditional employment relationship.[68] Within the employment relationship, an employer can only be vicariously liable where it had authorised the employee to carry out the delict-causing activities.[69] As long as the act that caused the delict was intended to advance the employer's authorised work, such an employer ought to be liable.[70] The course and scope requirement and underlying logic must be transported to the parent-subsidiary company relationship to test the viability of hold-sub liability. This transportation must primarily be based on how South African courts currently understand the requirement. South African courts have had trouble applying the course and scope requirement, and the difficulty ranges on a spectrum between straightforward and hard cases.[71]

The crux of the course-and-scope requirement is that the harm-causing activities ought to have been within what the agent or employee was authorised to do or otherwise advanced the employer's business.[72] The challenge is how one conceptualises this requirement within the context of corporate group activities. Courts often conceptualise this requirement in terms of the easy and hard cases, with the hard cases termed deviation cases.[73]

For the purposes of hold-sub liability in straightforward cases, the course-and-scope requirement ought to be satisfied where there is an existing quasi-agency or quasi-employment relationship that is openly recognised by both the parent and subsidiary company. An example

[67] Morgan op cite note 11 at 295–6 and 299; Feng op cit note 14 at 261–80; see also M Campbell 'Vicarious liability: analysing relationships akin to employment' (2023) 39 *Journal of Professional Negligence* 153.
[68] Loubser & Midgley op cit note 25 at 468–80; Neethling & Potgieter op cit note 25 at 444–53.
[69] Ibid.
[70] Ibid.
[71] Neethling & Potgieter ibid at 447–53.
[72] Ibid.
[73] Loubser & Midgley op cit note 25 at 473.

of quasi-agency between two juristic persons can be deduced from the facts and outcomes in the cases of *Smith Stone* and *Adcock.*

In *Smith Stone,* the parent company successfully alleged and proved in court that it was in a quasi-agency relationship with the subsidiary company.[74] In *Smith Stone,* the agency relationship was based on the fact that the parent companies had given the subsidiary company a mandate to carry out certain business activities through a business premise that they both shared.[75] It is submitted that in scenarios such as *Smith Stone,* where an agency relationship between a subsidiary and parent is clearly established, any harm that is caused within the ambit of such a mandate should be logically attributed to the parent company. It should be logical and straightforward that harms caused by a subsidiary whilst carrying out a clearly stated mandate from the parent company should be attributed to the parent company as the party that has issued the mandate that caused the harm in question.

Adcock is another example of a straightforward case of showing the course-and-scope requirement in corporate groups. In *Adcock*, the court refused to recognise a quasi-agency relationship between the parent and subsidiary companies.[76] However, Chapter Four argued that where the parent company has successfully proved that its wholly owned subsidiary was an agent for the purposes of a shared trademark, it would be logical to attribute any harm affiliated with the use of such trademark to the parent company.[77] It is logical because the harm would have occurred because of the parent company's mandate that had been issued to the subsidiary company to utilise a trademark in the interest of the parent company.[78] What makes such a scenario straightforward is that both the parent and subsidiary companies would have openly shown that there is a quasi-agency relationship. Furthermore, the basis of an agency relationship is the subsidiary's mandate to use the trademark on behalf of the parent company. Therefore, any harm that occurs because of the subsidiary's use of such a trademark should logically be considered as taking place within the course and scope of the parent's business.

The course-and-scope requirement in hold-sub liability ought to be distinguished between the course-and-scope for the parent's vicarious liability outside its relationship with the subsidiary company. The discussion of *Smith Stone* and *Adcock* represents the course-and-scope

[74] Cassim et al op cit note 27 at 73–5 discussing *Smith Stone*.
[75] Ibid.
[76] *Adcock* supra note 27 para 69.
[77] Section 4.3.6 of Chapter Four.
[78] Ibid.

requirement in hold-sub liability at the three-level relationship that involves the parent-subsidiary company relationship.[79] In *Bodigelo*, the PIC successfully argued that a director of its investee companies was its employee.[80] Chapter Four argued that in a hypothetical scenario where this employee of the PIC commits a delict, the PICs may be vicariously liable in terms of the principles of borrowed servants.[81] For Chapter Five, such liability is at a two-level relationship because the PIC's hypothetical liability would be based on its own relationship with its employee. The scenario of *Bodigelo* would thus fall outside the ambit of hold-sub liability, which requires either quasi-agency or quasi-employment at a three-level relationship, as argued in *Smith Stone* and *Adcock*.

Smith Stone and *Adcock* will likely represent straightforward cases showing the course-and-scope leg of hold-sub liability. This is because it is highly unlikely that many other parent companies will openly accept that the key personnel in the board of subsidiaries are their agents or employees. It is also unlikely that a parent company will claim that another juristic person within a group of companies is its quasi-agent or employee. Therefore, to develop sound principles for difficult cases much more is still required within what should go into the course-and-scope requirement of hold-sub liability.

5.2.4.2 Hard cases of the course-and-scope requirement

Regarding the course-and-scope requirement, courts have termed the difficult matters as deviation cases.[82] There is a spectrum of deviation that exists. On one end, a deviation is where an employee carries out a task to which they are authorised but do so by conduct or means that they were not authorised to use.[83] Under such circumstances, an employer is still held liable because the employee is carrying out their work.[84] On the other end of a deviation is where unauthorised means or conduct is used to achieve an outcome outside the scope of the employee's work. In these later cases, an employer is not liable.[85]

[79] See discussion of the two-level and three-level relationship in Chapter Four section 4.1.
[80] See discussion of case in section 3.4.8 of Chapter Three and section 4.3.6 of Chapter Four.
[81] The principle of borrowed servants describes the rules of vicarious liability where a primary employer temporarily borrows from another employer their employee. See the complete discussion in section 4.3.6.3 of Chapter Four.
[82] See *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 130 (Rabie); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at 31(*K*); *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) at 46 (*F*).
[83] Loubser & Midgley op cit note 25 at 475.
[84] Ibid.
[85] Ibid.

Courts have settled the standard test that ought to apply in deviation cases. It entails two stages, a subjective and an objective leg.[86] In terms of the initial subjective leg, the courts ought to take into account the subjective intent of the wrongdoer.[87] In terms of the objective leg, it can form an independent basis for meeting the course scope leg.[88] The objective leg asks if there is an adequately strong link between the employee's delict and the business of the employer to make it just and equitable to impose liability on the employer.[89] The objective leg takes into account a mix of legal and factual considerations.[90] In terms of the legal aspects of the inquiry, courts ought to take into account the normative framework of the constitution as per s 39(2) of the Constitution.[91] In *K* and *F,* the courts ruled that a delict intended to advance the sole interests of the employee can still be sufficiently linked to the employer's business to satisfy the course-scope-leg.[92]

The question of whether a sufficiently strong link exists is often a question of the nature and extent of the deviation from authorised work.[93] The following are the main factors developed by courts to determine whether the delict is sufficiently connected to the business of the employer for purposes of liability:

1. The standard test has been met where claimants have shown the existence of risk creation on the part of the employer. Risk creation for the purposes of the course and scope requirement exists where the employer creates an environment that leads to harm or where the employer enlarges an already existing risk of harm.[94] Risk creation can also be understood in terms of circumstances where an employee's opportunity to commit the delict was created by the employer.[95]

[86] See discussion of *K* supra note 82 para 32 citing the standard test initially developed in *Rabie* supra note 82 at 372.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] *K* ibid para 15–20; *F* supra note 82 at 74–82.
[92] Ibid. See *K* para 24–33 and *F* para 90; the approach has not always been widely accepted, see the most notable critic of this approach in Fagan op cit note 33.
[93] *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) para 5.
[94] *Stallion Security (Pty) Limited v Van Staden* 2020 (1) SA 64 (SCA) para 22–32; J Neethling 'Risk-Creation and the Vicarious Liability of Employers' (2007) 70 *Journal of Contemporary Roman-Dutch Law* 527 at 533–8; see also K Calitz 'Vicarious liability of employers: reconsidering risk as the basis for liability' 2005 *TSAR* 215.
[95] *Stallion* ibid para 36.

2. The standard test has been met where the third party trusted the employer because of certain special circumstances, such as the office of a police officer and that resulted in harm.[96]

3. The standard test has been met where a statute recognises explicitly the relationship between the harmed third party and the employer in question.[97] For example, the police have a statutory duty to ensure that they protect the members of the public. Thus, harm committed by the police can be found to be within the course of the duty to protect the public because of the existence of the statute.[98]

4. Broad constitutional norms must inform the factual and legal links between the employee's conduct and the business of the employer for the purposes of the standard test. For example, in *K*, *F*, and *Grobler*, the courts were partly moved by the unique vulnerability that women have in South African society, which necessitates a greater need for legal mechanisms to protect this group.[99]

5. Louser et al favour a multi-faceted approach that takes into account several factors, including the following: whether the employer is the appropriate risk absorber, whether the employer's equipment or property was used in the delict, whether the employer has authorised or prohibited the harm causing activities, the extent to which the employer or employee benefited from the delict.[100] The courts have also insisted that there are no hard rules that can be utilised to guide the exercise of the judicial choice of what establishes the legal and factual links within the standard test.[101]

The challenge for the development of hold-sub liability is how to extend underlying principles of the standard test to corporate groups in order to cater for hard cases. My assessment is that a multi-faceted approach ought to be favoured for the course and scope leg of hold-sub liability. Further, this multi-faceted approach ought to primarily be anchored in risk creation as the

[96] *K* supra note 82 at para 51–7; *F* supra note 82 at para 62–8; see also AB Wessels 'The role played by trust in imposing vicarious liability on the state for the intentionally committed violent crimes of police officers' (2018) *Journal of South African Law* 868.
[97] *K* ibid para 51.
[98] Ibid para 18 citing the preamble to the South African Police Service Act 68 of 1995.
[99] Ibid para 18, 38–9; *F* supra note 82 para 142, 171–2; *Grobler v Naspers Bpk en 'n ander* [2004] 2 All SA 160 at 41; see also K Calitz & C de Villiers 'Sexual abuse of pupils by teachers in South African schools: the vicarious liability of education authorities' (2020) 137 *SALJ* 72.
[100] Loubser & Midgley op cit note 25 at 478.
[101] *F* supra note 82 at 152.

primary factor of evaluating whether the subsidiary's delict is sufficiently linked to the business of the parent company. The rest of the factors ought to be utilised as supplementary factors.

In terms of foreign law, my review shows that there are also no examples of the application of strict liability involving corporate groups.[102] The most proximate case of delictual liability in foreign law is *Chandler,* as discussed in Chapter Four, which dealt with fault-based liability.[103]

Foreign law academics have also weighed in on the matter of the most suitable approach for the potential application of strict liability in corporate groups. For example, Feng suggests that the course-and-scope requirement of vicarious liability within the corporate group context ought to be approached from the perspective of enterprise risk creation.[104] Feng utilises the facts from *Chandler,* where Cape Plc introduced great risk to society by controlling the harm-causing activities at Cape Products.[105] Feng thus argues that risk creation from this vantage point is the link between the harm-causing activities at the subsidiary and the parent's business.[106] Such an approach would be aligned with South African cases that have applied risk-creation logic to link the harm-causing activities of the wrongdoer to the business of the vicariously liable party.[107] Risk creation logic would also align with the policy basis of vicarious liability, as discussed in Chapter Four.[108] It is thus submitted that a focus on risk creation is a viable indicator of what can be utilised to test whether the subsidiaries' conduct meets the course-and-scope requirement of hold-sub liability.

Kravtsova & Kalinichenko have also considered how to approach the course-and-scope requirement of vicarious liability within the corporate group context.[109] Kravtsova & Kalinichenko suggest that the focus should be placed on the nature of authority that the parent company, in its capacity as a shareholder, places on either the subsidiary company itself or the board or directors of the subsidiary company.[110] If the authority is aligned with the harm-causing activities, the parent ought to be liable, and if the directors or company act outside such

[102] For a literature review that indicates that the law of delict has not yet dealt with corporate group liability see J Brickhill & Z Mbuyisa 'Multinational Company litigation - South Africa' in Meeran R (ed) *Human Rights Litigation against Multinationals in Practice* (2021) ch 4 at 95 and 97.
[103] For a discussion of fault principles see section 4.2 of Chapter Four especially *Chandler v Cape plc* [2012] EWCA Civ 525 at 32 and 62–3; *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 61 and 633.
[104] Feng op cit note 14 at 276–80.
[105] Ibid at 279; *Chandler* supra note 103 at 87.
[106] Ibid 280.
[107] *Stallion* supra note 94 para 22–32.
[108] See discussion in section 4.3.4 of Chapter Four.
[109] Kravtsova & Kalinichenko op cit note 3 at 686.
[110] Ibid.

authority, no liability should be imposed on the parent company.[111] For example, authority can exist when the parent company supervises the employee who causes the delict or when the parent company remunerates such an employee. Authority can exist where the subsidiary's delict occurred on its premises. It is submitted that focus on the nature of authority in the parent-subsidiary relationship ought to be a viable legal indicator of what can be used to meet the course and scope requirement in hold-sub liability.

My evaluation of Feng, Kravtsova and Kalinichenko is that they correctly advocate that risk creation and the existence of authority in the parent-subsidiary relationship is a sound consideration for strict liability in the corporate group context.[112] I thus contend that the views of these academics further fortify my suggestion for the multi-faceted approach that is primarily anchored in risk creation as the test to be applied when evaluating the course and scope leg of hold-sub liability.

5.2.5 Concluding remarks on the legal basis of hold-sub liability

The main hypothesis of this section is that it is viable to extend vicarious liability to the parent-subsidiary basis based on the requirements of vicarious liability in the employment relationship. Hold-sub liability is the term used to describe this legal development of South African law. For hold-sub to be developed along the requirements of the vicarious liability in the employment relationship, three legal tests must be met. The first legal test is that the subsidiary must have committed a delict in terms of all the five elements of fault-based liability. This part of the test can be met when the subsidiary company is held vicariously liable for the claimant's harm.

The second legal test is that there must be a quasi-employment relationship between the parent and subsidiary company. To show that the relationship in question is quasi-employment, a court must look to factors that show the level of control exercised by the parent company over its subsidiary and the level of business integration between the two entities.[113] This ought to primarily be a fact-based inquiry that takes into account all the considerations taken from the cases discussed in section 5.2.2.

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[111] Ibid.
[112] See discussion in Feng op cit note 14 at 276–80; Kravtsova & Kalinichenko ibid at 686.
[113] Morgan op cit note 11 at 295–7.

The third legal test for hold-sub liability is that the subsidiary's delict must have been commissioned within the course and scope of the parent's business.[114] This means that there needs to be a sufficiently strong link between the activities that caused the delict and the parent's business.[115] As per *K* and *F*, this link must be based on a mix of factual, legal, and normative factors as informed by the values of the Constitution.[116] The third legal test for hold-sub liability ought to take into account all the considerations from the straightforward and hard cases from sections 5.2.4.1 and 5.2.4.1.

5.3 Applying hold-sub liability to the Bhopal disaster

5.3.1 Introduction

The question of this section is, what would be the legal outcome if a hypothetical Bhopal disaster were to occur in South Africa and the court had to apply hold-sub liability to the matter? Section 5.3 aims to further illustrate the doctrinal basis of hold-sub liability by testing its core legal components against the factual matrix of the Bhopal disaster.

The facts utilised in section 5.3 are from Keenan J's judgement in the U.S. District Court for the Southern District of New York.[117] In this case, Keenan J dealt with the issue of whether the United States was the appropriate forum for the Bhopal disaster claimants to pursue their matter as per the principles forum non conveniens inquiry.[118] As part of this process, Keenan J partly engages in the trialability of the matter and the sources of proof against UCC and UCIL.[119] It is these sources of proof that I shall use to test the doctrinal framework argued for in hold-sub liability. Other sources will also be used where appropriate to complement the factual findings of the case.

5.3.2 Did UCIL commit a delict?

The first legal requirement of hold-sub liability asks if the subsidiary has committed a delict in terms of all the five elements of fault-based liability.[120] This part of the test can be met when the subsidiary company is held vicariously liable for the claimant's harm. Meeting this first

[114] Feng op cit note 14 at 270–89.
[115] Ibid.
[116] *K* supra note 82 at 15–20; *F* supra note 82 at 74–82.
[117] *In re Union Carbide Corp* supra note 1 at 844 and 853–9.
[118] Ibid 844.
[119] Ibid 853–9.
[120] See definition of a delict Loubser & Midgley op cit note 25 at 3–10.

requirement in the Bhopal disaster would need evidence that there was a wrongful, culpable act that caused the claimant harm.[121]

Chapter Four engaged all five elements as it pertained to a hypothetical scenario of UCIL's delictual liability as per the fault-based generalising approach. That chapter found that such liability would be viable, but fault-based liability would have notable challenges. For the purposes of hold-sub liability, all the elements of the fault-based generalising approach ought to be met for it to be sensible to continue the inquiry into the parent company's liability.

UCIL's liability can also be based on vicarious liability per wrongs committed by its employees or agents. For hold-sub liability, if the subsidiary's liability cannot be shown, there cannot be any basis for the parent company's liability through hold-sub liability. If, on the other hand, it can be shown that the subsidiary company is delictually liable, the inquiry moves to the next stage of hold-sub liability. This stage evaluates whether there is a relationship of quasi-employment between the parent and subsidiary company. For the purposes of Chapter Five, I hypothesise that a court evaluating this stage of hold-sub liability finds that UCIL is liable in delict.

5.3.3 Was the relationship between UCC and UCIL quasi-employment?

The next aspect of hold-sub liability is that there must be a quasi-employment relationship between the parent and its subsidiary.[122] This ought to be a factual assessment that is based on the dominant impression of the nature of the relationship between the parent and subsidiary. The assessment must examine the extent of control and business integration in the relationship.[123] The more control and integration, the more likely the relationship between the parent-subsidiary is quasi-employment.

The level of control and business integration can be seen by how much shareholding exists between the two entities.[124] Where the parent company wholly owns the subsidiary, this creates an impression of more control and integration between the entities.[125] The court can also look at the company policies to determine the true state of affairs between the two entities,[126] for

[121] Ibid.
[122] Morgan op cit note 11 at 295–7.
[123] Ibid.
[124] *Chandler* supra note 103 at 80; *DHN Food Distributors Ltd* supra note 55 at 6.
[125] Ibid.
[126] *Newton-Sealey v Armor Group Services Ltd* [2008] EWHC 233 (QB) at 6–8.

example, the day-to-day management practices of the two entities.[127] Whether the entities operate in the same industry.[128] Whether the entities share personnel, premises, or any other essential business tools.[129] Sharing of business name and branding and how crucial business decisions are taken.[130] If key business decisions were taken by the subsidiary, this ought to create an impression that the relationship is closer to an arms-length relationship and the parent company should not be liable under hold-sub liability.[131] Equally, most business decisions of the subsidiary, such as recruitment and overall strategy, may be taken over by the parent company or the personnel under its control. When this is the scenario, this ought to create an impression that there is a relationship of quasi-employment between the two juristic entities.[132]

It was a common cause that UCC owned 50.9% percent of shares belonging to UCIL. This made UCC the majority shareholder of UCIL.[133] The level of influence and control that UCC gained over the affairs of UCIL was contested since UCIL was not a wholly owned entity of UCC.[134] This can lead to an impression of a relationship that is at arm's length since UCIL was not a wholly owned subsidiary of UCC. It was a common cause that UCC and UCIL were in the same chemical manufacturing industry.[135] This can lead to an impression that the entities were in a quasi-employment relationship as there is a higher likelihood that the businesses of the two entities will share integration because they are in the same industry. It was also accepted by both parties that in 1973, two crucial agreements were signed between UCC and UCIL that were related to the design and construction of the UCIL plant.[136] The extent to which these agreements gave UCC control and supervision of the affairs of UCIL was contested.[137] UCC played some role in the training of key UCIL personnel.[138] The plaintiff furnished the court with evidence of personnel that had gone for training in the United States on a plant owned and operated by UCC.[139] The plaintiffs also furnished the court with the evidence associated with Mr Couvaras, an engineer from UCC who was a key project manager at UCIL.[140] The court

[127] *Media Workers* supra note 54 at 314–5; *SA Allied Workers* supra note 54 at 114–6; *Paper Printing Wood* supra note 54 at 282–4.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] *In re Union Carbide Corp* supra 1 note at 844.
[134] Ibid at 853–9.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.

was told that Mr Couvaras was responsible for the design processes and staffing of contractors at UCIL.[141] If the plaintiff's account is true, this evidence can show a court how much integration and control existed between the two entities. This integration or control would result from a group operating in the same industry coupled with shared personnel and possibly business designs, tools, and safety policies. In an Indian High Court, and based on a reading of these factors, Seth J found that UCC:

> 'had real control over the enterprise which was engaged in carrying on the particular hazardous and inherently dangerous industry at the Bhopal plant and as such [UCC] was absolutely liable (without exceptions) to pay damages/compensation to the multitude of gas victims'.[142]

Seth J's ruling was later overturned by the Supreme Court's settlement ruling, but it indicates an assessment of the merit of the level of control and integration that existed between UCC and UCIL.[143] Seth J's ruling also clearly took into account the danger created by the activity and risk considerations as part of the basis of liability. Despite being overturned, Seth J's ruling gives a judicial impression of the true nature of the relationship between UCC and UCIL. A finding such as this ought to be utilised to strengthen the impression that the relationship between the parties is quasi-employment.

A court engaged in the second leg of hold-sub liability must thus factually determine the dominant impression created by the parent-subsidiary relationship. If the overall impression is closer to an arms-length relationship between the two entities, then it is closer to an independent contractor. If the impression is that the relationship is at arm's length, there ought not to be any liability for a parent company. Equally, where there is clear evidence that the parent company is in full de jure or de facto control of the subsidiary coupled with high integration between the two entities, this ought to lead the court to a ruling that the entities are in a relationship of quasi-employment. I would argue that the Bhopal disaster gives one an indication that there was likely sufficient control and integration between UCC and UCIL for the purposes of the second legal leg of hold-sub liability.

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[141] Ibid.
[142] T Covell 'Bhopal Disaster Litigation It's Not Over Yet' (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 279 at 287; *Union Carbide Corporation vs Union of India Etc* 1990 AIR 273.
[143] Covell ibid at 287–93.

5.3.4 Was UCIL's delict committed within the course and scope of UCC's business?

The last requirement of hold-sub liability is that the delict must have been committed within the course and scope of the relationship of quasi-employment. This means that the conduct of the subsidiary must have been done in a manner that is sufficiently linked with the business of the parent company or otherwise authorised by it. This link ought to be shown through a mix of factual, legal, and normative factors in terms of the objective leg of the standard test.[144] The evaluation of whether the subsidiary's delict was committed within the course and scope of the parent company's business ought to be a multi-faceted approach that considers several policy factors as per the discussion in section 5.2.4 of both straightforward and hard cases.

In straightforward cases, section 5.2.4.1 argued that courts ought to consider circumstances where the parent and subsidiary companies openly indicate that the subsidiary is a quasi-employee or quasi-agent of the parent company. In hard cases, section 5.2.4.1 argued that an ideal starting place to resolve this is to conduct a factual assessment focusing on risk creation and other factors, such as the role of trust serving as a subsidiary factor.

As stated in section 5.2.4.1, the link between the wrongdoer's delict and the business of the liable party can be based on risk creation.[145] The logic from risk creation would be that the parent company, for its benefit, provided the subsidiary with the opportunity to cause harm.[146] Thus, because of the risk created by the parent, the subsidiary's delict is considered to have occurred within the business of the parent company.[147] The link can be created by a consideration of the unique vulnerability of particular victims in South Africa.[148]

The link can be created if there is a relationship of trust between the delictually liable party and the claimants.[149] In foreign law, there is an indication that the link can be created by the exercise of authority where there is evidence that the parent company took over the management of the activity that caused the delict either completely or in consultation with the subsidiary's

[144] *K* supra note 82 para 22; *F* supra note 82 para 95.
[145] *Stallion* supra note 94 para 22–32; Neethling op cit note 94 at 533–8; see also Calitz op cit note 94; See also another detailed discussion of the risk issue in A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 156.
[146] Ibid.
[147] Ibid.
[148] *K* supra note 82 para 18 and 38–9; *F* supra note 82 para 142 and 171–2; *Grobler* supra note 99 para 41; Calitz & de Villiers op cit note 99.
[149] *K* supra note 82 para 51–7; *F* supra note 82 para 62–8; see also Wessels op cit note 96.

management.[150] The link can also be established where the parent company advises the subsidiary on how to manage delict-causing activities.[151]

The third leg of hold-sub liability, as applied to the Bhopal disaster, would inquire into who was the main party responsible for the design, building, implementation, and monitoring of the safety standards at the plant in Bhopal. In other words, who exercised primary authority over the harm-causing activities? If UCIL exercised primary authority over these activities, it would logically follow that the gas leak cannot reasonably be attributed to UCC. Equally, it can be shown that UCC took a leading role in matters about the safety standards at UCIL. It ought to follow that it is just and equitable for the court to rule that the delict was within the business of UCC. This question will be largely a factual question but can contain a mix of normative and legal elements as per *K* and *F*.[152]

The two agreements, partly dealing with design, building, and monitoring safety, were signed between UCC and UCIL and will show who exercised primary authority over the safety standards at UCIL. These contracts may have allocated these responsibilities to UCC personnel. In such a case, UCC would have contractually undertaken that these activities would be done correctly. Further, UCC would have assumed the responsibility of ensuring that these activities are done correctly and do not create undue risks to the broader community. The substantive content of these agreements could thus show the extent to which UCC was contractually bound to the affairs of UCIL and thus responsible for ensuring that harm does not occur. These agreements could also show which activities UCC had been contracted to assist. If these agreements or the factual implementation show that UCC was intimately tied to the harm-causing activities, this ought to be a consideration pointing towards the delict being committed within the course and scope of UCC business.

In *In re Union Carbide Corp*, the plaintiffs alleged that Mr Couvaras, an engineer from UCC, had played the following role at UCIL:

> ‘Mr. Couvaras allegedly "assumed responsibility for virtually every aspect of the detailing of the process design," and approved detail reports of "not only UCIL but also independent

[150] *Vedanta Resources plc v Lungowe* [2019] UKSC 20 (*Vedanta*) at 51 citing *AAA & Others v Unilever plc and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 *(Unilever Plc)* at 37.
[151] Ibid.
[152] *K* supra note 82 para 22; *F* supra note 82 para 95.

> contractors, including Humphreys & Glasgow Consultants Private Ltd. and Power Gas Limited" of Bombay, India'.[153]

Assuming that the evidence of Mr Couvaras's involvement at UCIL is accurate, several legal and normative considerations will be triggered. Mr Couvaras's activities could raise the possibility that UCC assumes responsibility for protecting the community from risks related to the design and recruitment of safety standards at UCIL through these key personnel.

The court dealing with the third leg of hold-sub liability can also rely on the legal logic of borrowed servants.[154] If it is shown that Mr Couvaras was supervised and controlled by UCC, this would indicate that he acted in the interest and authority of UCC business. Risk creation can also be applied in the Bhopal disaster.[155] If, however, Mr Couvaras or those under his supervision were responsible for the gas leak, it would be logical and fair to view the risk-creating activities as attributable to UCC. This would be logical because the opportunity to harm the public would not have come from UCIL only but from key personnel who were hired by the parent company to supervise and control the harm-causing activities.

It would be permissible to consider the question of the trust relationship between UCC and members of the public.[156] It is possible that the facts of the matter would indicate that UCIL presented to the public that it had adequate safety standards because of its relationship with UCC, an experienced chemical producer based in the United States. Where such representations are made, and possibly coupled with the parent company's knowledge, this ought to be a relevant normative consideration that further places the delict in question closer to the ambit of the parent's company's business.

The plaintiff's facts presented to Keenan J indicated that two prior accidents at the same plant had occurred in the previous five years before the Bhopal disaster.[157] In both the previous accidents, several employees were injured at the plant.[158] The court could assess how the parent responded to these accidents. If the parent responded as a passive investor, that would show that the relationship is indeed at arm's length; this ought to factually indicate that the parent company introduced unacceptable risk into the community. Conversely, where the parent's

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[153] *In re Union Carbide Corp* supra note 1 at 856.
[154] Loubser & Midgley op cit note 25 at 470 citing *Midway Two Engineering & Construction Services BK v Transnet Bpk* 1998 (3) SA 17 (SCA) at 23.
[155] *Stallion* supra note 94 para 22–32; Neethling op cit note 94; Calitz op cit note 94.
[156] *K* supra note 82 para 51–7; *F* supra note 82 para 62–8; see also Wessels op cit note 96.
[157] *In re Union Carbide Corp* supra note 1 at 853–9.
[158] Ibid.

response is to put in place and monitor safety measures, such measures ought to mean that any future harm ought to be attributable to the parent company for possibly defective advice. This is because the parent company's participation in the harm-causing activities created a considerable risk to the community.

Ultimately, there can be no closed list as it pertains to the factors that a court can take into account to assess whether there is a strong enough link between the subsidiary's delicts and the parent's business for the scope and course leg of hold-sub liability. The assessment of the Bhopal disaster shows what may constitute sound considerations for testing the third leg of hold-sub liability. Considering all three legal legs of hold-sub liability, it is submitted that UCC would have been found vicariously liable for the harm caused by UCIL.

5.3.5 The role of the remedies stage of the interplay school and the limitation of rights in the Bhopal disaster

5.3.5.1 Introduction

Until this point, Chapter Five has largely focused on the doctrinal basis of hold-sub liability. Chapter Five has thus far made the case for why hold-sub liability is a viable common law development of the law of delict. However, what will ultimately determine the viability of hold-sub liability is the constitutional process as per the remedies stage of the interplay school as introduced in Chapter Two.[159] Briefly, the first 'scope stage' of the interplay school requires the court to first determine who and to what extent private parties are bound to the Bill of Rights.[160] Chapter Two argued that in the facts of a Bhopal disaster or *Nkala*, a parent and subsidiary company are bound to the dispute as per the scope leg of the interplay school in terms of s 8(2) read with s 39(2) of the Constitution.[161] To arrive at this conclusion, I took into account the nature of the rights and duties that were applicable in the scenario. Further, I found that these entities would be bound to the dispute because the harm in the scenarios limited the claimants' constitutional rights as contained in s 10, s 11, s12 and s 38.[162]

After the scope stage is the remedies stage that inquires into the most suitable remedy as per s 8(3), read with s 36, s 38, s 39(2), s 38 and s 172 of the Constitution.[163] This stage must also

[159] See interplay school section 2.3 of Chapter Two.
[160] Ibid.
[161] Ibid at section 2.4.
[162] Ibid.
[163] Ibid at section 2.3.

be guided by the factors from *Mighty Solutions*.[164] It is here where the viability of hold-sub liability must also fit. Section 5.3.5 shows how all these provisions and considerations fit together into a single harmonious methodology for determining the appropriate remedy. As part of the interplay school, a four-part process ought to primarily guide how to adequately follow the demands of s 8(3) of the Constitution.[165]

In terms of the s 8(3) process, firstly, the court must determine if there is legislation that gives effect to the right in question.[166] The right in question is the bundle of constitutional rights of delict claimants. Chapter Three recognised that in certain circumstances, there may be statutes that appropriately give full effect to the delict claimant's rights in dispute.[167] Where no legislation exists that gives full effect to rights, the process, as per 8(3), permits a court to move to the next stage.

The second requirement of s 8(3) is that the court must determine if there is an existing common law rule that gives effect to this bundle of rights.[168] Chapter Four has found three potential common law rules in the law of delict.[169] Namely, fault-based liability as per the generalising approach and vicarious liability as per the employment and agency relationship.[170] If a court finds that one of these three options is viable to give effect to the delict claimants' bundle of rights, the common law remedy that the court picks ought to be applied.[171] It is only when a court finds that all three of these options are not viable a court is permitted to consider the development of the common law as part of the third stage of s 8(3) of the Constitution.

Chapter Four argued that there are hypothetical scenarios where the court may find that the three possible options are not sufficient to give effect to the bundle of rights of the delict claimants, making it ideal to inquire into a fourth option.[172] It is at this stage that a court must assess whether hold-sub liability is the appropriate relief among all the options available as per s 38 of the Constitution. Further, a court must ensure that its findings are within its powers as per s 172 and that the norms and values of the Constitution are taken into account as per s

[164] *Mighty Solutions* supra note 6 para 38.
[165] The process is taken from the interplay scholars in section 2.3 Chapter Two discussing H Cheadle & D Davis *South African Constitutional Law: The Bill of Rights* (2002) at 20–2.
[166] Ibid.
[167] Section 3.3 of Chapter Three.
[168] Section 2.3 of Chapter Two.
[169] Section 4.4 in Chapter Four.
[170] Ibid.
[171] As per section 8(3) of the Constitution read in terms of the interplay school in 2.3 of Chapter Two.
[172] Section 4.4 in Chapter Four.

39(2).[173] Thus, the discussion of the content of hold-sub liability in sections 5.2 and 5.3 must meet the textual demands of s 8(3), as read with s 38, s 172, and s 39(2) of the Constitution. Still, there is a final stage as per s 8(3).

The final stage of the s 8(3)(b) process is that a court must take into account the demands of s 36 of the Constitution, which permits the limitation of constitutional rights.[174] Hold-sub liability advances the constitutional rights of delict claimants; thus, s 36 does not apply in the Bhopal disaster. The remedies stage framework also takes into account broader legal and policy interests that should be factored in when developing hold-sub liability. For example, the implications of hold-sub liability on the corporate law principles of separate legal personality and limited liability.

5.3.5.2 Analysis of the role of Mighty Solution in the remedies stage of the interplay school

There are more practical guidelines for the proposals of the remedies stage of the interplay school. These guidelines emanate from the recommendations from *Mighty Solution* on the practical considerations of the development of the law.[175] As per *Mighty Solutions*, an inquiry into developing the law should start off with a determination of what the current legal position of the law is and the reasons for the current status of the law.[176] Chapter One evaluated the current status of MNC liability in international law and private international law and found that there were gaps in the law.[177] Chapter Three evaluated the current legal position of group liability in corporate law, delict and labour law and also found gaps in the law.[178] Chapter Three also evaluated the underlying rationale that motivates corporate group relation and liability in corporate law, the main area of the law that regulates corporate groups in South Africa.[179]

Mighty Solutions recommends that legal development also needs to consider whether current legal rules are aligned with the values and norms of the Constitution.[180] Chapter Three found that the underlying rationale for group regulation and liability from a corporate law perspective is based on two entity law principles, namely, separate legal personality and limited liability of

[173] Section 2.3 in Chapter Two.
[174] As per section 8(3) of the Constitution read in terms of the interplay school in section 2.3 of Chapter Two.
[175] *Mighty Solutions* supra note 6 at para 38.
[176] Ibid.
[177] Section 2 of Chapter One.
[178] Sections 3.2, 3.3 and 3.4 of Chapter Three.
[179] Sections 3.2 ibid.
[180] *Mighty Solutions* supra note 6 at para 38.

juristic entities in a group.[181] The strict application of these principles protects the useful functionality of the juristic entities in a corporate group and thus serves a useful function.[182] I, however, submit that in circumstances where these principles provide a shield from which corporate groups and entities within them can hide from harm committed by their activities, these principles offend the values and norms of the Constitution.[183] It is in these circumstances that it becomes appropriate to develop the common law of delict in line with the arguments of Chapter Five. *Mighty Solutions* recommends that common law legal development should also consider the specific interventions required by the common law to bring it in line with constitutional norms.[184] Hold-sub liability is a proposal aimed at closing the existing gaps in delict-based corporate group liability.

Mighty Solutions also recommends that common law legal development should take into account how the proposed common law development affects the wider areas of the law.[185] Bainbridge and Henderson argue that the reason why limited liability is firmly embedded in every single jurisdiction on the planet is because it is, in fact, 'one of mankind's greatest ideas'.[186] It is argued that this simple legal mechanism makes it possible to facilitate risk-taking between shareholders and corporations and is an indispensable legal invention that drives modern corporations today.[187] Without the protection offered by limited liability, the personal assets of shareholders would be permanently exposed to judgment debts accumulated by the juristic person. In such a world, the incentive to start any enterprise would be greatly diminished.[188] Limited liability is, therefore, one of the most vital principles in corporate law.[189] When hold-sub liability is developed, courts should consider this broader societal interest that may be impacted by expanding the ambit of corporate group liability. In response to the logic of Bainbridge and Henderson, I contend that hold-sub liability does not permanently expose the assets of parent companies to judgment debts. Instead, it extends settled principles of delict to corporate groups in a constitutionally compliant manner. Further, the requirements of hold-

[181] Sections 3.2 in Chapter Three.
[182] Separate personality and limited liability is protected in Section 19 of the Companies Act; see discussion in Cassim et al op cit note 26 at 40–6.
[183] See the discussion of a 'judgement proofed' company is set up so that it runs with almost no assets; here, it is argued that such companies or groups of companies are incapable of being effectively sued because of the way they are set up. See LM LoPucki 'The Essential Structure of Judgment Proofing' (1998) 51 *Stanford Law Review* 147; LM LoPucki 'Virtual Judgment Proofing: A Rejoinder' (1998) 107 *Yale Law Journal* 1413.
[184] *Mighty Solutions* supra note 6 para 38.
[185] Ibid.
[186] SM Bainbridge & MT Henderson *Limited Liability: A Legal and Economic Analysis* (2018) at 302.
[187] Ibid.
[188] Cassim op cit note 27 at 40–6.
[189] Ibid.

sub are intended to limit the scope of liability. Thus, hold-sub liability does not open parent companies to unlimited liability. In sum, a court should consider the broader implications of hold-sub liability as described by Bainbridge and Henderson. However, when constitutionally viewed, this consideration, on its own, cannot be a sound basis to limit the rights of delict claimants in favour of the entities in corporate groups. *Mighty Solutions*, therefore, showcases another practical way to evaluate the proposals and approaches in Chapter Five.

5.5 Concluding remarks on the most viable remedy to resolve the research problem of this thesis as per the interplay school

The main proposal of Chapter Five is that to give full effect to the rights of delict claimants who corporate group activities have harmed, the law of delict ought to consider the suitability of developing the common law of delict as per the proposal of hold-sub liability. Chapter Five developed the doctrinal basis for the hold-sub liability and argued that hold-sub liability must be conceptualised along a similar basis of vicarious liability in the employer-employee relationship. To test the viability of hold-sub liability, the following questions were asked:

1. Is the policy basis of the doctrine of vicarious liability compatible with the conception of hold-sub liability?

2. Is the requirement that there should be an employment relationship compatible with hold-sub liability?

3. Is the requirement that there should be a commission of a delict compatible with hold-sub liability?

4. Is the requirement that the delict must be commissioned within the scope of the employment relationship compatible with hold-sub liability?

Chapter Five then applied hold-sub liability to the research problem of this thesis by utilising the Bhopal disaster to further test the viability of the envisaged hold-sub liability in a practical scenario. Chapter Five showed that the viability of hold-sub liability from a constitutional lens ultimately hinges on two main aspects. The first is that the parent company cannot show that the limitation of rights is justifiable as per s 36 of the Constitution. Secondly, there are no other mechanisms to give full effect to the rights in question, thereby necessitating the development of the common law of delict in the direction of hold-sub liability.

Chapter Five concludes that the application of hold-sub liability will be ideal in scenarios such as the Bhopal disaster, where it is envisaged that it will provide adequate recourse for delict claimants. Chapter Five ultimately suggested that hold-sub liability must be viewed from the vantage point of the Constitution, where the rights of delict claimants should also be balanced against the rights of the parent companies within corporate groups.

CHAPTER 6: CONCLUSION

6.1 The research problem of the thesis

This thesis was motivated by the plight of the delict claimants in the Bhopal disaster and others who may find themselves in a similar situation in the future.[1] I sought to address the legal challenges that permit MNCs to escape delictual liability in scenarios where they should be held accountable for harm. Many facets of the law impede delict claimants from effectively litigating against MNCs.[2] The challenge I focused on in this thesis was the obstacles in the corporate group structures of MNCs, particularly in the theories or doctrines of liability utilised to remedy delict violations.[3]

6.2 Research contribution and key findings

My contribution in Chapter One is to the discourse on the need for a delict-based remedy capable of operating within the context of private international law as part of the lex causae.[4] In Chapter One, I showed the existence of legal gaps in international law, regional law in Africa and private international law from a South African perspective.[5] Chapter One also demonstrated the importance of committing to a particular jurisprudential orientation as one explores the avenues of how the law ought to respond to challenges.[6] The jurisprudential position argued for in Chapter One is principled pragmatism and transformative constitutionalism.[7]

The substantive proposals of this thesis were limited to the following specific scenario. Firstly, this thesis was limited to a scenario where the courts of the foreign state or South Africa find that they have jurisdiction to hear a matter brought by South African claimants in a matter where the facts are similar to that of the Bhopal disaster. Secondly, the research was limited to where such a court finds that the law to be applied is the South African law of delict. Thirdly,

[11]The facts of the thesis are based on *In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986); see Section 1 of Chapter One.
[2] Amnesty International *Injustice Incorporated: Corporate Abuse & The Human Right to Remedy* (2014) at 113–6.
[3] Section 1.2.4 of Chapter One.
[4] Ibid.
[5] Section 1.2.2 and 1.2.3 of Chapter One.
[6] Section 1.3 of Chapter One.
[7] Ibid.

my proposals were limited to the factual matrix, and relevant laws permit a pathway where the resultant judgment debt is recognised and enforced in the home state or South Africa. Fourthly, this study was limited to discussing lex causae applicable to a delictual claim against an MNC operating in a corporate group.

In Chapter One, I integrated several legal discourses that apply to the research problem. These are international law, private international law, the new field of business and human rights law, corporate law, delict and constitutional law. Integrating all these areas of law from the vantage point of delict-based corporate group's harms is novel from a South African perspective.

My contribution in Chapter Two is to constitutional law, where I address the Constitution's role in the thesis's research problem.[8] In Chapter Two, I argued that the challenge of this thesis is primarily a constitutional problem.[9] I showcased the weaknesses of the dichotomy school, which is currently the widely accepted methodology among our courts for applying the Constitution to disputes between non-state parties.[10] I demonstrated these gaps in the dichotomy school by evaluating the ruling made in the *Barkuizen* case. This key constitutional case evaluated the relationship between two non-state actors in the law of contract.[11] My findings showed that the primary weakness of the dichotomy school is that it misinterprets the role and purpose of s 8(2) of the Constitution.[12]

In Chapter Two, I proposed the interplay school as the alternative theoretical approach to applying the Constitution to disputes between non-state parties.[13] The interplay school illustrates the constitutional processes that should be followed when the interplay school is applied to the research problem.[14] The interplay school suggested a two-pronged constitutional application to a private party dispute.[15] At the first leg, termed the scope stage, the adjudicating court must ascertain whether the private parties to the dispute are bound by the rights contained in the Constitution. Sections 8(2), read with s 2, s 39(2) of the Constitution, direct this first stage.[16] If the parties are bound, the second leg, termed the remedies stage, inquiries into the

[8] Section 2.1 of Chapter Two.
[9] Ibid.
[10] Section 2.2.3 of Chapter Two.
[11] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) discussed in section 2.2.4 of Chapter Two.
[12] Ibid.
[13] Section 2.3 of Chapter Two.
[14] Ibid.
[15] Ibid.
[16] Ibid.

appropriate remedies that can be generated from the dispute.[17] Section 8(3), read with s 38, s 39(2), and s 172, directs the remedies stage.[18] In addition to the applicable constitutional provisions, I argued that there should be a unique role allocated to *Mighty Solutions* in evaluating the suitability of the legal development of the common law.[19]

In Chapter Two, I applied the scope stage of the interplay school to the case study of *Nkala*.[20] I argued that *Nkala* is the appropriate case to test the legal outcomes that would result from applying the Constitution as per the interplay school to the research problem of the thesis.[21] Applying the scope stage of the interplay school to *Nkala*, I found that parent and subsidiary companies in a dispute such as *Nkala* or the Bhopal disaster would be bound to the delictual dispute.[22] Chapter Two's main contribution is that it offers an account of the role of the South African Constitution in matters of delict-based corporate group harms.

My contribution in Chapters Three, Four and Five addressed the remedies stage of the interplay school as applied to the problem of delictual harm by corporate groups.[23] In Chapter Three, as part of the remedies stage, I evaluated whether existing legal principles of group regulation abroad and in South Africa adequately aid delictual claimants.[24] In Chapter Three, I demonstrated that foreign and South African corporate law does not sufficiently respond to delict-based corporate group harms.[25] This gap in the law further justifies why it is appropriate to pursue remedies within the law of delict. In Chapter Three, I also evaluated labour law cases that dealt with corporate group liability in South Africa. My findings in that labour law had developed notable jurisprudence that should be considered when developing delict-based corporate liability doctrines.[26]

My contribution in Chapter Four was to the law of delict. In this Chapter, I illustrated the plausible delictual remedies that can be generated in a hypothetical dispute between UCC, UCIL and delict claimants within the context of South African law of delict.[27] In Chapter Four,

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[17] Ibid.
[18] Ibid.
[19] *Mighty Solutions CC ta Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para 38 discussed in section 2.3.1 of Chapter Two.
[20] *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) discussed in section 2.4 of Chapter Two.
[21] Ibid.
[22] Ibid.
[23] Section 2.5 of Chapter Two.
[24] Section 3.1 of Chapter Three.
[25] Section 3.2 Ibid.
[26] Section 3.4 Ibid.
[27] Section 4.1 of Chapter Four; Section 5.1 of Chapter Five.

my findings were that the existing law of delict can accommodate three viable options.[28] The first option is that a parent or subsidiary company can be liable in delict based on the fault-based generalising approach.[29] A parent and subsidiary company can also be liable in terms of the principles of strict liability as per the employment relationship and as per agency.[30] In such a scenario, the legal basis of the parent or subsidiary company's liability would be based on its own employee or agent who has committed a delict.[31]

Chapter Four tested whether any of the three options would adequately remedy the delictual claim in the hypothetical Bhopal disaster claim.[32] My findings were that all three options would be inadequate in the hypothetical application of the Bhopal disaster.[33] In Chapter Four, I ultimately argued that the gap between the three options justifies considering how the law of delict may be adjusted to cater to the residual cases that also require a delict-based remedy.[34] My main contribution to Chapter Four is to offer the first in-depth evaluation of how current delict principles apply to corporate groups in South African law.

My main contribution in Chapter Five is responding to the gap left in Chapter Four by suggesting a fourth option that ought to be utilised to hold a parent company delictual liable where it is suitable to do so.[35] This fourth option was termed hold-sub liability and was doctrinally developed within the common law doctrine of vicarious liability.[36] In Chapter Five, I develop hold-sub liability by combining the underlying logic of strict liability as per the employment relationship and vicarious liability as per agency.[37]

In Chapter Five, I practically illustrated how hold-sub liability can be applied as a basis of strict liability in the circumstances similar to the Bhopal disaster.[38] In Chapter Five, I provided a further perspective on the viability of hold-sub liability by evaluating the practical guidelines

[28] Section 4.4 ibid.
[29] Section 4.2 ibid.
[30] Section 4.3 ibid.
[31] Ibid.
[32] Section 4.3.7 ibid.
[33] Ibid.
[34] Ibid.
[35] Section 5.1 of Chapter Five.
[36] Ibid.
[37] Ibid.
[38] Section 5.3 ibid.

in *Mighty Solutions* of when it is appropriate to develop the common law.[39] My findings were that the evaluation of *Mighty Solutions* further supports developing hold-sub liability.[40]

This thesis contributes to a largely ignored question in South African law: The question of how the common law of delict should respond to harms committed by corporate group activities. This thesis does not answer this question from a purely corporate law or delictual position. Instead, the methodology I employ is primarily anchored in constitutional methodology.

Chapter One indicated three main legal pathways delict claimants can utilise to litigate against MNCs organised by corporate groups. My findings in this thesis are that the following are the primary avenues applicable to a delictual claim against MNCs set up by way of corporate groups:

1. The first option is a ground of liability per the statutory veil piercing as per s 20(9) of the Companies Act.[41]

2. The second option is a ground of liability per delict-specific legislation that applies to the harm in question.[42]

3. The third option is a ground of liability per fault-based liability in the generalising approach and can be against one or more entities in a group.[43]

4. The fourth option is a ground of liability per the ordinary rules of strict liability regarding the employment relationship. This option can be pursued against one or more entities in a corporate group.[44]

5. The fifth option is a ground of liability per the ordinary rules of strict liability in the agency relationship.[45] This option can be pursued against one or more entities in a corporate group.[46]

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[39] *Mighty Solutions* supra note 19 discussed in Section 5.3.5.2 ibid.
[40] Ibid.
[41] Section 20(9) of the Companies Act 71 of 2008 discussed in section 3.2 of Chapter Three.
[42] Section 3.3 ibid where this thesis acknowledges statutory options but places such discussions outside the ambit of this thesis; for a list of examples of statutes that contain a delictual basis of liability see J Neethling & JM Potgieter *Law of Delict* 8ed (2020) at 456–9; M Loubser et al *The Law of Delict in South Africa* 3ed (2017) at 541– 65.
[43] Section 4.2 of Chapter Four.
[44] Section 4.3 ibid.
[45] Ibid.
[46] Ibid.

6. I recommend a sixth option is a new proposed ground of liability developed from a combination of a quasi-employment or quasi-agency relationship between the parent and subsidiary companies.[47] This new ground of liability is termed hold-sub liability.[48]

I recommend that the judicial decision on the suitability of either of these options should be based on applying the interplay school to the dispute.[49] Thus, the Constitution mediates who is bound to the dispute and what remedies, if any, a court can generate to protect delict claimants.[50]

6.3 Reflection on the future

I am of the view that this thesis's substantive findings on delict-based corporate group liability will have many factual scenarios where they will find practical application in the future. The first is in the extractive industry in South Africa. Many delictual harms have occurred and are likely still in the future. Harms such as mercury poisoning, mining-related cancers, asbestos-related diseases, and toxic waste dumping harm water tables and the land.

The findings of this thesis will also find application in harms related to oil extraction, nuclear activities, railways, the aviation industry in product liability, and many other harms resulting from manufactured products, including health care. The findings of this thesis will also have a practical application where corporations are complicit in harms related to torture, unlawful detentions, and state security killings.

This thesis's substantive findings on delict-based corporate group liability have more future application areas. There is the risk of corporate-based delictual harm in the delictual harm may also be caused within the realm of pure economic loss and by autonomous systems developed by artificial intelligence. What is clear is that there are many areas from which the four delict-based theories of liability can find future application.

I think Ruggie had the most clear-eyed view of the challenges presented by corporate participation in human rights violations.[51] Ruggie argued that there are no 'silver bullets', and efforts must always be viewed as part of a more extensive long-term incremental process that

[47] Section 5.1 of Chapter Five.
[48] Ibid.
[49] Section 2.3 of Chapter Two.
[50] Section 2.1 ibid.
[51] JG Ruggie *Just Business: Multinational Corporations and Human Rights* (2013).

leads to a place where the law becomes effective over time.[52] Ruggie suggests that efforts in this area must be both principled and pragmatic.[53] This is the spirit from which this thesis is written. From a South African perspective, all legal outcomes must ultimately be aimed at constitutionally compliant outcomes. Thus, the integration of principled pragmatism and transformative constitutionalism ought to lead all future efforts of holding MNCs accountable for delictual harms.[54]

[52] Ibid at 59.
[53] Ibid at 28.
[54] For discourse on transformative constitutionalism, see P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

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