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SYMPOSIUM ON NEW PATHWAYS TOWARD SUPPLY CHAIN ACCOUNTABILITY

LIABILITY FOR GREENWASHING IN COMPANY SUSTAINABILITY REPORTS: A NOVEL APPLICATION OF THE ENGLISH TORT LAW DOCTRINE OF ASSUMPTION OF RESPONSIBILITY

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The publication of annual sustainability reports—in which companies describe their sustainability performance and strategies—is now a routine part of doing business, especially for multinational companies. This essay examines the legal implications of inflated, misleading—or even plain false—statements made by UK companies in their sustainability reports regarding their operations and those of their subsidiaries, as well as those of entities in their supply chains. It argues that even when they are not legally mandated, these statements can carry legal significance under English tort law. It explains how in *Vedanta* the UK Supreme Court, applying the doctrine of "assumption of responsibility," held that a company that states in a sustainability report that it is undertaking a specific task to prevent harm caused by a separate entity may thereby incur a duty to perform that task. Should the company fail to perform that task, and harm occur as a result, the company may incur tortious liability for its omission. This ruling has important implications for UK companies that, for both reputational and legal reasons, make statements concerning their responsibility for the conduct of entities in their supply chains. In practice, as a result of this lesser-known aspect of *Vedanta*, the legal position of UK companies with respect to entities in their supply chains may not be very different from that of their EU counterparts subject to the EU Corporate Sustainability Due Diligence Directive (CSDDD).

Sustainability Reporting and Greenwashing

In 2022, KPMG reported that 96 percent of the world's 250 largest companies published annual sustainability reports.[1] One might think that this is a result of legislative requirements.[2] In the EU, for example, it has been mandatory since 2017 for large EU companies to publish sustainability reports on their sustainability policies and due diligence processes relating both to their own operations and those in their supply chains, and this has now been extended to non-EU companies with a large EU subsidiary as well as those with significant turnover in the EU.[3] In practice, these obligations have a global scope and cover most large companies

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[1] KPMG, *Key Global Trends in Sustainability Reporting* (Oct. 2022).

[2] For a worldwide survey of sustainability reporting requirements, see Beate Sjåfjell & Christopher M. Bruner, The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (2019).

[3] EU Non-financial Reporting Directive 2014/95/EU (NFRD), effective in 2017, albeit with a "comply or explain" safe harbor, and EU Corporate Sustainability Reporting Directive 2022/2464/EU (CSRD), effective in 2024, which confined the safe harbor to reporting on value chains for the first three years. The EU Corporate Sustainability Due Diligence Directive 2024/1760/EU (CSDDD), effective from

worldwide.[4] But the KPMG report makes it clear that the practice of sustainability reporting by large companies predates these legislative initiatives, most of which have occurred in the past decade. Indeed, the major increase occurred between 1999 and 2011, when the percentage of the world's 250 largest companies publishing sustainability reports increased from 35 percent to 95 percent.[5] This points to the fact that sustainability reporting has largely come about as a response to market expectations, especially as consumers and investors have become increasingly conscious of companies' sustainability performance.[6] This, in turn, has led to the phenomenon of "greenwashing," whereby companies make exaggerated or even false sustainability claims.

In some cases, "greenwashing" is purely rhetorical. A well-known example is the 2001 rebranding of BP (British Petroleum) to "Beyond Petroleum," a marketing move that did not outlive the 2010 Deepwater Horizon disaster.[7] There is not much that the law can or should say about branding at such a high level of abstraction. At a more concrete level, however, sustainability claims made by companies can—and should—come under greater legal scrutiny. This is the case, for example, when companies make misleading sustainability claims about their products or services.[8] In addition, in the UK, for example, company directors are liable if they knowingly or recklessly provide false or misleading information that results in financial loss to the company, and this "information" includes sustainability reports.[9] However, only the company, and sometimes its shareholders, can sue to recover the financial loss; and it is only the directors, and not the company itself, that can be sued.

Consumer law and company law are useful, but limited, means of preventing companies from "greenwashing" in their sustainability reports, and these reports are only an indirect means by which companies can be held to account for the adverse impacts caused by their conduct, or in their supply chains. When it comes to companies' direct liability for harms caused by them or those in their supply chains, two alternative routes have been developed. One, discussed by other contributions to this symposium, is to create a statutory liability for failure to prevent adverse human rights and environmental impacts, as has most notably been done by the EU's CSDDD and its predecessors in France and Germany.[10] The other is by means of tort law, an approach that has been developed by courts in several countries.[11] This essay focuses on how this latter approach has been developed in England.

2027 to 2029, makes it mandatory to report on sustainability due diligence processes, including with respect to supply chains, for all EU companies and also for non-EU companies without an EU subsidiary if they have an EU turnover of €450m.

[4] *See* Elena Philipova, *How Many Companies Outside the EU are Required to Report Under Its Sustainability Rules?*, London Stock Exchange Group (June 2023).

[5] KPMG, *supra* note 1.

[6] *See, e.g.*, Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution – Shareholders Are Getting Serious About Sustainability*, 97 Harv. Bus. Rev. 106 (2019).

[7] Scott Carpenter, *After Abandoned "Beyond Petroleum" Re-brand, BP's New Renewables Push Has Teeth*, Forbes (2020).

[8] See, e.g., the proposed EU Green Claims Directive, currently going through the EU legislative system; there are also regulatory initiatives to prevent greenwashing in the financial services sector discussed, for example, in Sebastiaan Niels Hooghiemstra, *EU "Rule-Based" ESG Duties for Investment Funds and Their Managers Under the European "Green Deal,"* in Research Handbook on Environmental, Social and Corporate Governance (Thilo Kunz ed., 2024). For recent developments in the UK's regulatory framework on greenwashing, see Chris Warren-Smith, Carl A. Valenstein & Michelle Page, *Forging a United Front: UK Regulators Take Steps to Combat Greenwashing*, Morgan Lewis (Mar. 4, 2024).

[9] See especially s414C(7)(b) and s414CB(1)-(2), enforced by s463 of the Companies Act 2006.

[10] *See* Humberto Cantú Rivera, *The UN Supply Chain Treaty Negotiations: Between Transnational Civil Litigation and Public Law Beyond Borders*, 118 AJIL Unbound 284 (2024); Jowita Mieszkowska, *The Unintended Consequences of the EU Corporate Sustainability Due Diligence Directive*, 118 AJIL Unbound 291 (2024).

[11] *See* Carsten Koenig, *Human Rights or Private Rights? – Effective Protection of Victims in Global Supply Chains*, 118 AJIL Unbound 269 (2024).

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Vedanta*: Liability as a Result of an "Assumption of Responsibility"*

The leading English authority is the 2019 UK Supreme Court case *Vedanta v. Lungowe*, which held that a UK parent company (Vedanta) was potentially liable for damage caused by its Zambian subsidiary as a result of toxic water discharges at a copper mine in Zambia.[12] This case is well-known for its findings on the liability of a parent company for its involvement in the operations of its subsidiaries. However, a key part of the ruling concerns the liability of a parent company for failing to do something that it had said in a sustainability report that it would do. A subsequent UK Supreme Court case, *Okpabi v. Shell*,[13] recognized this as a distinct route to liability, which the Supreme Court called "*Vedanta* route 4."[14] The statement at issue was contained in Vedanta's 2012–13 Sustainable Development Report, "Embedding Sustainability." It read as follows:

> Maintaining aquifer quality is the core aim driving our water policies and standards—an inability to fulfil a local community's water requirements, or causing permanent damage to an aquifer, would seriously restrict our ability to operate. In this regard, *we have a governance framework to ensure that surface and ground water do not get contaminated by our operations*. Our *environmental policies and management standards are mandatory across the Group* and address contaminated land management concerns: the standards require operations to prevent contamination of land and water.[15]

Lord Briggs, who wrote the leading judgment, with which the rest of the judges agreed, attributed legal significance to Vedanta's statements. He said:

> it seems to me that the parent [Vedanta] may incur the relevant responsibility to third parties [the Zambian villagers] if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission [Vedanta's omission to exercise supervision and control] may constitute the abdication of a responsibility which it [Vedanta] has publicly undertaken.[16]

In essence, the UK Supreme Court determined that Vedanta could be held responsible under tort law for "holding itself out" as doing something that it then did not do, namely, exercising supervision and control over its Zambian subsidiary, when that omission caused harm to third parties (the Zambian villagers). The same would no doubt also apply to other statements made by companies in their sustainability reports, such as statements that the company is exercising due diligence in its supply chain, when, in fact, it is not, and harm occurs as a result.

To understand the significance of the UK Supreme Court's statement, it is necessary to appreciate that it relies on an English tort law doctrine—"assumption of responsibility"—which is not universally adopted in the common law world, and which, even in England, is the subject of some debate.[17] This doctrine holds that even though a person is not normally liable for harm caused to a third party by a wrongdoer, that person may incur a duty of care if that person voluntarily assumes a relevant responsibility that is not then properly discharged. Thus, a person who

[12] Vedanta Resources PLC v. Lungowe [2019] UKSC 20 (UK). The case did not reach the merits as Vedanta settled.

[13] Okpabi v. Royal Dutch Shell PLC [2021] UKSC 3 (UK).

[14] *Id.*, paras. 26, 148. The other "routes" to liability were: (1) a parent company taking over the management or joint management of the relevant activity of the subsidiary (*Vedanta* route 1); (2) a parent company providing defective advice and/or promulgating defective group-wide policies that it knew or ought to have known would be implemented by the subsidiary (*Vedanta* route 2); and (3) a parent company promulgating group-wide policies and taking active steps to ensure their implementation by the subsidiary (*Vedanta* route 3).

[15] Vedanta Resources Plc, *"Embedding Sustainability": 2012–13 Sustainable Development Report*, 43 (emphasis added).

[16] *Vedanta v. Lungowe*, *supra* note 12, para. 53 (emphasis and bracketed text added). See also para. 61.

[17] Donal Nolan, *Assumption of Responsibility: Four Questions*, 72 Current Legal Prob. 123 (2019).

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sees a thief stealing another person's property normally has no duty to intervene, but if that same person had previously offered to safeguard the property, a failure to do so could give rise to liability on the basis of an "assumption of responsibility."[18]

At this point, matters become complicated. Even among those who support the doctrine of assumption of responsibility, many would limit its scope to situations in which the victim knowingly relies on the responsibility that has been assumed by the tortfeasor. But there have also been instances where a duty of care has been incurred in the absence of reliance by the victim. Donal Nolan, based on a review of the case law, gives the example of a doctor who undertakes to provide medical care for an unconscious patient, but does so in a manner that causes harm.[19] On Nolan's view, reliance is not necessary, and what triggers a duty of care is simply that a concrete task has been commenced, in this case the provision of care to the unconscious patient.[20] This can explain the UK Supreme Court's willingness to find Vedanta potentially liable for "holding itself out" as doing something, which it did not then do, even though the victims that suffered the resulting harm (the Zambian villagers) were entirely unaware of Vedanta's statements.

Some have taken the UK Supreme Court to mean that Vedanta's statements were merely evidence of Vedanta's negligence, and that it was not Vedanta's statements themselves that created an independent duty of care. For example, in *Rihan v. Ernst & Young*, the court referred to *Vedanta* and said that "'assumption of responsibility' describes the undertaking by a parent company of a supervisory role over the activities of a subsidiary."[21] However, Vedanta never assumed any supervisory role, and the UK Supreme Court never suggested that—other than as a result of Vedanta's statements—it was under any duty to do so. Indeed, in the passage quoted above, the UK Supreme Court made it clear that it was Vedanta's statement in its sustainability report, not anything else, that was capable of generating its duty of care.[22]

It is important to recognize that not *all* statements about a company's sustainability policies and practices are capable of incurring a *Vedanta*-style duty of care, but only those that reflect the undertaking of a concrete task. In *Vedanta*, the company was not stating that it *will* have policies in place to prevent harm, but that it *does* have policies in place to prevent harm. This also shows the limits of the *Vedanta*-style duty of care. A statement about goals, or mere promises to act in the future, will not qualify. This distinction may be illustrated by two statements from Shell's 2014 Sustainability Report that are likely to come under scrutiny in *Okpabi v. Shell*, currently being litigated on the merits. The first is this: "It is Shell's goal as a global company to achieve no harm and no leaks from its operations. In Nigeria, there will be no celebrations until this goal is reached."[23] This statement is aspirational, expressing a goal rather than a factual claim about current practices. This statement itself would not give rise to a duty of care. However, Shell's 2014 Sustainability Report also states as follows: "[W]e continue to invest in improving the reliability and maintenance of our facilities to help reduce operations spills."[24] This statement is markedly different, as it reflects the undertaking of a concrete task, rather than future goals or ambitions. If

[18] *Id.* at 141.

[19] *Id.*

[20] *Id.* at 133.

[21] Rihan v. Ernst & Young [2020] EWHC 901 (UK), para. 484 (QB). The same interpretation is given in Stuart Bruce, *Evolving Expectations on Business Responsibilities for the Environment*, *in* NAVIGATING THE NEW CONTENTS OF INTERNATIONAL PUBLIC POLICY: COMPLIANCE IN ENVIRONMENT AND HUMAN RIGHTS (Lauro Da Gama E. Souza Jr., María Inés Sola & Patrick Thieffry eds., 2023).

[22] *See also* Carrie Bradshaw, *Corporate Liability for Toxic Torts Abroad:* Vedanta v. Lungowe *in the Supreme Court*, 32 J. ENVTL. L. 139, 148 (2020); Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L COMP. L. Q. 789, 811–12 (2020).

[23] Royal Dutch Shell Plc, *Sustainability Report*, 35 (2014).

[24] *Id.* at 48.

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Shell is not, in fact, investing in "improving the reliability and maintenance" of its facilities, liability could arise on the basis of a *Vedanta*-style assumption of responsibility. Whether it does remains to be seen.

Conclusion

The UK Supreme Court's application of the doctrine of assumption of responsibility to statements made in sustainability reports gains its force from the fact that, as mentioned above, it is the practice of large companies to publish sustainability reports—and, moreover, not only on their own operations or those of their subsidiaries, but also on their supply chains more generally. This is partly due to market expectations and UK statutory requirements. Moreover, if they have large EU subsidiaries or large EU turnovers, they will be required to report on their sustainability policies and processes, including in their supply chains, under EU law. Putting these elements together, as soon as a UK company undertakes to perform a concrete task in a sustainability report, it may now be subject to a duty to perform that task, irrespective of any other obligation to do so.

This has implications for a UK company's responsibility for the conduct of its business partners in its supply chain. As *Vedanta* also explained, a company may incur a duty of care with respect to the conduct of another entity when it intervenes in the management of that entity, or when it formulates group-wide policies covering that entity's operations.[25] Such entities are much more likely to include subsidiaries than unrelated business partners in the company's supply chain. However, a *Vedanta*-style assumption of responsibility can reach the conduct of entities in a company's supply chain, again provided that the company has made undertakings with respect to their conduct. This will be the case for most large UK companies, either for reputational reasons or because they are captured by EU reporting obligations.[26] In this way, if UK-based companies undertake, for example, to exert influence over their business partners or even terminate business relationships when necessary to avoid or mitigate adverse impacts, they may incur a duty to act accordingly. Ironically, UK companies may therefore already be subject to obligations similar to those that will become binding for their EU competitors under the CSDDD when it comes into effect in 2027.

[25] *See* note 14 *supra*.

[26] *See* note 3 *supra*.

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