

Product Liability - United Kingdom

Chandler v Cape clarifies duty of care owed by parent companies

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Introduction
Facts
Comment
Practical steps

Introduction

Although the majority of UK product liability claims are pursued in contract or under the Consumer Protection Act 1987 (which implements the EU Product Liability Directive (85/374/EEC) in the United Kingdom), claims in negligence remain an important legal option for claimants where there is no direct contractual nexus or where a claim under the act is not possible for limitation or other reasons.

Negligence in this context refers to the careless act of a person that causes damage to another and for which the person is held liable to pay compensation. In order to establish negligence it must be proved that:

- the defendant owed a duty of care to the claimant;
- the defendant breached that duty by failing to take reasonable care; and
- the breach caused the damage that is the subject of the complaint.

Whether a duty of care exists is determined by considering the nature of the relationship between the parties, and in particular whether the relationship is "sufficiently proximate".⁽¹⁾

Negligence claims are commonly brought against the manufacturer of a faulty product, but it is rare to bring a claim against its parent company because of the difficulties of establishing that the parent owes the injured party a duty of care. The recent decision in *Chandler v Cape plc*⁽²⁾ was, in the words of Lady Justice Arden of the Court of Appeal, "one of the first cases in which an employee has established at trial liability to him on the part of his employer's parent company". The decision potentially extends the law in this area, making it easier to establish parent company liability. While this case related to liability under the statutory regime for health and safety, the decision was based on the duty of care owed by the parent company to the employee and could therefore be applied equally to the consideration of whether a parent company owes a duty of care to a consumer in a negligence case.

Facts

The case involved an employee, Mr Chandler, of Cape Building Products Ltd, who contracted asbestosis as a result of his work for the company. Cape Products was not in existence at the time of the claim, having been dissolved some years earlier, and had no relevant insurance policy that covered claims for asbestosis. Therefore, Chandler brought a claim against Cape plc, Cape Products' parent company, for personal injuries suffered as a result of his employment. It was accepted that the system of work was unsafe and that Cape Products had failed in its duty of care to Chandler. However, Cape argued that it did not owe a duty of care to an employee of its subsidiary and claimed that it was not liable for the acts of that subsidiary.

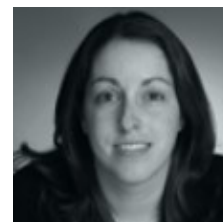
The judge at first instance disagreed, finding that there was "a systematic failure of which [Cape] was well aware". Cape appealed the decision, but by its decision in April, the Court of Appeal dismissed the appeal and upheld the first instance finding. The court made clear that its decision was not based on "piercing the corporate veil" and that no liability was imposed on the parent company because of the corporate structure of the companies. Instead, the court considered whether the parent company's actions amounted to taking on a direct duty of care for the subsidiary's employees.

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The court found that Cape had accepted responsibility for the health and safety of the employees of its subsidiary and had control over the subsidiary's business in relation to health and safety procedures. In particular, Cape knew about the unsafe working practices at Cape Products, but took no steps to improve that situation. Because of its superior knowledge about the nature and management of asbestos risks, the court found that Cape had assumed a duty of care to advise Cape Products on what steps it had to take to provide employees with a safe system of work or to ensure that those steps were taken. In this case, Cape had breached that duty.

Comment

Although the Cape Products case related to liability under health and safety legislation, the principles set out by the Court of Appeal in its decision potentially have much wider application. The decision demonstrates that in certain circumstances the law may impose on a parent company a duty of care to its subsidiary's employees and establishes principles that could be extended to other fields, such as liability to consumers in negligence. Applying the guidance of the court, such a duty of care is likely to be imposed where:

- the businesses of the parent and subsidiary are in a relevant respect the same;
- the parent has or should have superior knowledge of some relevant aspect of the particular industry or product;
- the subsidiary's system of work was unsafe or was likely to cause harm, as the parent company knew or should have known; and
- the parent knew or should have foreseen that the subsidiary, its employees or consumers would rely on its using that superior knowledge for employees' or consumers' protection.

Many multinational companies organise their businesses on a worldwide basis, with responsibility for certain activities (eg, research and development, marketing materials or warnings) managed centrally. In these circumstances, it is easy to see how the Cape Products test could be met and liability in negligence established against a parent company if the parent has superior knowledge of the product or its manufacture, and either had some control over the operations of the subsidiary or should have shared its superior knowledge with the subsidiary.

Practical steps

With the possible implications of this decision in mind, what can parent companies do to limit their exposure? For business reasons and to ensure efficiency, many large organisations may choose to centralise certain group functions. Although this carries with it some risk that the parent company will be found responsible for those corporate systems, it may be possible to minimise liability by defining the acts and responsibilities of each entity so that – for example – the relevant information is provided in order to assist the subsidiary in meeting its own obligations. If services are provided by a parent company to a subsidiary, this should be done pursuant to a written agreement or procedure that sets out the responsibilities of the different companies and of the managers implementing the policy.

Where a parent company chooses to exercise a high degree of control over the actions of its subsidiaries, steps should also be taken to demonstrate that the parent has complied with any duty of care that may be found to exist. For example, if a parent company becomes aware of a breach of procedures by the subsidiary, or finds that the subsidiary is not taking account of particular information or advice, it must take steps to attempt to rectify the situation and ensure compliance as soon as possible. The Cape Products decision also emphasises the importance of sharing information about safety concerns. Companies should have procedures in place to ensure, so far as possible, consistency in worldwide product information and warnings. The fact that another subsidiary or corporate entity provides more detailed or explicit warnings of product risks that can arise and cause injury is often relied upon as evidence that a product is faulty or defective; ensuring consistency of warnings is one practical way of demonstrating the appropriate dissemination of information about product risks.

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Endnotes

(1) The test is set out in *Caparo Industries plc v Dickman* ([1990] 1 All ER 568):

- The damage to the claimant must be foreseeable.
- There must be a sufficiently proximate relationship between the parties.
- It must be just and reasonable to impose such a duty.

(2) [2012] EWCA Civ 525.

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