# PIERCING THE CORPORATE VEIL:
## Greening Companies' Governance and Shareholder Activism

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**Abstract**

The introduction of corporate criminal liability for environmental harm in various jurisdictions around the world has generated a myriad of legal obligations which engage the body corporate in preventing such harm. Nevertheless ownership of property does not entail a standard benefit and liability condition for corporate shareholders. Whereas commercial investments involve an element of financial risk, resulting in the upward or downturn of a given investment, the corporate veil has created a significant imbalance. Notwithstanding separate legal personality, shareholders exert substantial influence over the direction of a company and whilst they stand to profit from their investment, limited liability means that shareholders are liable only to the extent of that investment. In the environmental context, this presents two major threats. Firstly, companies are encouraged to engage in potentially hazardous behaviour in order to realize maximum profits. Secondly, the consequences of this behaviour is subsidised with the costs in excess of the company's assets placed on the public purse and/or victims of environmental damage.

The law does, under exceptional circumstances, ignore this separation of identities and pierce the corporate veil. This paper seeks to illustrate that removing the insulation offered to shareholders through the veil piercing doctrine will motivate shareholders to exert greater influence over the conduct of their companies. The desire to mitigate the company's potential exposure to environmental liability will cause shareholders to instil environmental values into the corporate structure thereby reducing the volume of potentially hazardous conduct carried out by the company.

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**Introduction**

Jurisdictions regulate the corporate form in a variety of ways, however separate legal personality and limited liability are common to most.[1] Separate legal personality means that the rights and obligations of a company are, at law, distinct from those of the persons who participate in it. Limitation of liability has the corollary effect of limiting the liability of those shareholders to the extent of their actual or promised investment and any potential dividend. As a result, potentially harmful behaviour may be instructed and carried out without repercussion, and the victims of the conduct are often left without an appropriate remedy.[2] The failure of the victims in *Grace*[3], for example, to obtain proper compensation shows that the corporate veil insulates harmful behaviour within corporate organizations. Insulation from consequence means not only that harmful conduct is not curbed, but that it is encouraged in the pursuit of profit.

In recent years, companies' environmental conduct has improved as a direct result of environmental legislation imposing liability upon the officers of the company.[4] Whilst also having environmentally friendly consequences, shareholders and directors can rely on these measures as a means to mitigate liability.[5] Nothwithstanding these developments, much advocacy is still motivated by share price and profit and as such, this insulation permits companies to carry out risky activities with their strategy dependant on whether the company is over or under capitalised. The imposition of personal liability upon shareholders will make the financial motivation personal. In turn this would encourage shareholder activism leading to their direct influence in greening up the boardroom.

This article contributes to the corporate veil doctrine discussion by advocating that veil piercing can realign the economic and rights-based values prevalent in tort law that have been distorted by the doctrine. This comparative study of selected jurisdictions aims to demonstrate that these jurisdictions have inserted personal liability provisions attached to corporate conduct within their environmental legislation, resulting in the introduction of certain environmental measures being adopted within the corporate structure to mitigate

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[1] See for example the Danish Act on Public and Private Limited Companies, part 1, article 1(2) and the Maltese Companies Act, part v, title I, article 67 which both state that the holders of shares in public and private limited companies are not liable for the obligations of the limited liability company, but are liable only to the extent of their contributions'.

[2] See *Priest v. W.R. Grace & Co* No. DV-99-4, (Mont. 11th Dist. 1999).

[3] Ibid; see also Part 1 below.

[4] See DM Ong, 'The Impact of Environmental Law on Corporate Governance; International and Comparative Perspectives' (2001) 12(4) E.J.I.L. 708.

[5] See Section 2 below.

liability.[6] The following analysis argues that shareholders should yield power in a manner that the conduct of the company does not cause third parties to suffer environmental harm and if such harm ensues, liability should extend to all those involved in corporate decision-making. Finally, it seeks to point out that veil piercing will bring about green shareholder activism. In this sense it agrees with other commentators that have advocated veil piercing as the chief counterweight to the inequitable situation that exists[7] but it aims also to address how the method of assigning personal liability could be adopted. In doing so it attempts to distinguish between shareholders that are complicit in the corporate conduct attracting liability; those who are passive and those who are actively green in order to truly encourage green resolutions. The conclusion offers a starting point for such a discussion.

**I. The Veil and How to Pierce It**

Nothing can be so unjust as for a few persons abounding in wealth, to offer a portion of their excess for the formation of a company, to play with that excess, to lend the importance of their whole name and credit to the society, and then, should the funds of the incorporated body prove insufficient to answer all demands, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.[8]

The concept that shareholders are not liable to make good the debts of the company can be traced back to the Romans.[9] Likewise, the doctrine of separate legal personality has long been an essential feature of companies.[10] However the first modern law on limited liability was enacted in New York in 1811. In England, whilst previously possible by Royal Charter or Acts of Parliament, the Limited Liability Act was enacted in 1855. The doctrine of separate legal personality, as espoused in Salomon,[11] elucidates that the corporation is a legal person existing separately from its shareholders and corporate officers and is therefore

[6] This study is not intended to provide any substantial insight into the legal systems which are discussed. Its purpose is to highlight the fact that certain jurisdictions have sought to hold natural persons making up a company liable for its conduct and further highlight that this has caused these persons to carry out measure to counteract this liability.

[7] AJ Dangermanand HJ Schellnhuber ‘Energy systems transformation’ (2013) 110(7) Proceedings of the National Academy of Sciences 549–558.

[8] Editorial, *Times* (London), May 25, 1824.

[9] I Sandor, ‘The Emergence and Development of Limited Liability in the Field of the Company Law’ ch translated from *A társasági jog története Nyugat-Európában (The History of Company Law in Western Europe)* Közgazdasági és Jogi Kiadó. (Budapest, 2005) 177-198.
Sourced <http://www.kre.hu/portal/doc/sic/2009/sic4_16_sandor.pdf>

[10] Ibid.

[11] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

capable of bearing its own rights and obligations. Limited liability creates efficiency by allocating the risk of enterprise to the more efficient risk-bearer in particular circumstances. If failure of the enterprise was to allow creditors to reach the non-business assets of an investor, investment would be discouraged and as such limited liability encourages investment.[12] This ensures that the separateness of the company from its shareholders is respected. However, this allocation of risk to creditors produces gains for society only if the creditors are capable of evaluating that risk and absorbing the consequences arising out of that risk. However, in those situations where liability is shifted to parties that have no choice in dealing with the enterprise (such as victims of environmental torts), risks/costs are effectively shifted from the company to other parts of society.[13] *Priest v. W.R. Grace & Co*.[14] provides an excellent example.[15]

In 1963, Grace & Co ('Grace') acquired Zonolite Co., a company that had been mining in Libby Montana, United States since the early 1920s. Upon acquisition, Grace was aware of the health problems of its newly acquired employees, mainly due to their exposure to asbestos.[16] Nevertheless Grace did nothing to improve the health of its employees. In the late 1980s, a period rife with asbestos related court actions, Grace began to shield the company and its shareholders from actions brought by involuntary creditors by undertaking measures which would ultimately separate Grace from its assets and as such from the injured parties.[17] By 2001, with countless pending lawsuits, a quarter of its assets remained (previously six billion USD), after having allocated its asbestos liability to one of its subsidiaries, Grace filed bankruptcy protection listing a number of domestic subsidiaries and affiliates. Not included in the listing however were Grace's now legally independent international subsidiaries and affiliates.[18] Although some of those diverted assets had been

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[12] FH Easterbrook & DR Fischel, 'Limited Liability & the Corporation' (1985) 52 U Chicago L Review 89, 89.

[13] PI Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 J of Corp L 573, 587- 91.

[14] No. DV-99-4, (Mont. 11th Dist. 1999).

[15] For an in depth analysis and commentary see JC Heenan, 'Graceful Maneuvering: Corporate Avoidance of Liability through Bankruptcy and Corporate Law' (2004) 65 Montana L Review 99 – 133.

[16] M Bowker, *Fatal Deception: The Terrifying True Story of How Asbestos is Killing America* (Rodale 2003) states that the asbestos manufacturing industry knew of the dangers of asbestos by the 1930's. Here he cites an occupational disease report published in National Underwriter magazine holding that 'any process involving asbestos is considered especially hazardous, for the asbestos fibres appear to be difficult to expel from the lungs'.

[17] Heenan above (n. 15) at 104.

[18] Ibid.

recovered through actions designed to enforce the debtor/creditor relationship, Grace kept much of its assets out of reach.

The Grace case highlights the crucial need of stakeholder involvement in greening the operations of a body corporate. Shareholders exert substantial influence over the direction of a company and whilst they stand able to make excessive profit, they are liable only to the extent of their investment often leaving the party suffering the harm without a remedy. The law does allow however, by way of exception, the shareholders to be found liable for the company's obligations. In a time of increasing large scale environmental disasters, veil piercing has been applied so as to reach additional deep pockets to finance damage payments and costs related to environmental damage.

Piercing the corporate veil refers to the judicially imposed exception to the principles of separate legal personality and limited liability, by which courts disregard the separateness of the company and hold a shareholder responsible for the company's action as if it were the shareholder's own.[19] The circumstances under which the Court will do so will vary according to jurisdiction. This discussion will give a brief explanation of the doctrine as applied in two leading jurisdictions in company law, namely England and the United States. These two jurisdictions are also economic powerhouses, commanding major investment and within which the majority of multinational corporations have a presence. The following comparative analysis of British and U.S. caselaw involving the piercing of the corporate veil does not as such, involve cases of liability from environmental harm. It serves to demonstrate however the reasons behind the application of the doctrine, therefore shedding some light as to whether piercing the veil could be equally applied to ensure that limited liability is not used by individuals within the corporate body to skive responsibility for environmental harm.

There is a substantial difference between veil piercing doctrine in the United States and England, and between the willingness of the courts in each jurisdiction to apply it. In the United States the doctrine seems accepted and academic discussion focuses on a manner by which to reconcile the often contradictory case law.[20] On the other hand, in England, the discussion centres on its applicability with the general perception that the English Courts do not favour its application unless under the most exceptional of circumstances.[21] Veil piercing doctrine in England can be seen to diverge across three periods.[22] The first period from

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[19] RB Thompson, 'Piercing the Corporate Veil: An Empirical Study', (1991) 76 Cornell L Review 1036. Available at: http://scholarship.law.cornell.edu/clr/vol76/iss5/2

[20] TK Cheng, 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines', (2011) 34(2) British Columbia Int'l & Comp L Review 329-412.

[21] Ibid.

[22] Ibid.

*Salomon* to around the early 1940s where different approaches to the doctrine had been tested.

In *Re Darby, ex parte Brougham*, the veil was pierced because of misrepresentation.[23] In *Gilford Motor Company vs. Horne*[24], the veil was pierced for attempting to evade a legal obligation. During this period, the English courts experimented with common law concepts to resolve issues of corporate personality and failed to create a generally applicable framework.[25] One exception was *Smith, Stone and Knight v. Birmingham* in which the Court attempted to set guidelines for any given case.[26] Nevertheless, these guidelines were largely forgotten in subsequent English case law in lieu of traditional common law concepts.

The second era lasted between the Second World War and the late 1970s in which veil piercing was championed by Lord Denning who espoused the single economic theory. In *Littlewoods*[27] he showed his support for the doctrine:

> *The doctrine laid down in Salomon v. Salomon has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But this is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.*

The third era began with *Woolfson v. Strathclyde Regional Council*[28] in which the Court questioned whether the Court of Appeal in *DHN*[29] properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating

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[23] *Re Darby, Brougham*, [1911] 1 K.B. 95 at 103 (Eng.).

[24] *Gilford Motor Co. v. Horne*, [1933] Ch. 935 (A.C.) at 956 (Eng.).

[25] Cf. MA Pickering, 'The Company as a Separate Legal Entity' (1968) 31 Modern L Review 481, 481.

[26] *Smith, Stone & Knight Ltd. v. Birmingham*, [1939] 4 All E.R. 116 (K.B.) at 121 (Eng.) in which Atkinson J formulated six relevant criteria:

(a) Were the profits of the subsidiary treated as profits of the parent?

(b) Were the persons conducting the business of the subsidiary appointed by the parent?

(c) Was the parent the 'head and brain' of the subsidiary?

(d) Did the parent govern the subsidiary?

(e) Were the profits of the subsidiary made as a result of the skill and direction of the parent?

(f) Was the parent in effectual and constant control of the subsidiary?'

[27] Littlewoods Mail Order Stores v. Inland Revenue Commissioners (1969) 1 W.L.R. 1241 (A.C.).

[28] Woolfson v. Strathclyde Regional Council (1978) S.C. (H.L.).

[29] DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852.

that it is a mere façade concealing the true facts. Despite a recent resurgence,[30] Davies states the following in respect of the current state of the doctrine under English law:

> *The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doctrine may seem strong, as in the undercapitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so.*[31]

In the United States, the alter ego doctrine and the instrumentality doctrine are the two most systematic analytical frameworks applied by the Courts in veil piercing cases.[32] In *Lowendahl v Baltimore and Ohio Railroad*[33] the Court held that three elements must be present in order to pierce the veil:

> *(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.*[34]

Under the alter ego doctrine, if it is shown that a company is so controlled by an individual and that the interests of the company become secondary so that it chiefly conducts the business of the individual and not its own, it will be considered to be the alter ego of the individual and the corporate form will be set aside to accomplish an equitable result. In *Zaist v. Olson* the Court held that:

> *If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the*

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[30] Beckett Investment Management Group v. Hall [2007] EWCA Civ. 613; [2007] IRLR 793.

[31] PL Davies et al., Gower and Davies *Principles of Modern Company Law* (Sweet & Maxwell, 8th ed. 2008) 202–08.

[32] See Cheng above (n. 20).

[33] See (N.Y. App. Div. 1936) 247 A.D. at 156, aff'd, (N.Y. 1936) 6 N.E.2d 56.

[34] Ibid.

> *economic entity to escape liability arising out of an operation of one corporation for the benefit of the whole enterprise.*[35]

In *Water Whole International Corp*. the Court identified nine elements the satisfaction of which would render the company an alter ego.[36]

Whilst the above analysis can confirm that 'the concept of piercing the corporate veil is neither clearly defined nor generally agreed upon',[37] it is evident that Courts have persistently held veil piercing to be concerned with equity, taking into consideration all the facts particular to the case at hand. As such, the decision to pierce is ultimately determined in accordance with the bona fide use of the privileges that are awarded to companies and where that privilege is 'utilised so as to defeat public convenience, justify wrong, protect fraud, or defend crime the law will regard the corporation as an association of persons'. If one had to draw conclusions to what extent can Courts by analogy, pierce the veil to address evasion of liability for environmental harm, it appears that the conditions identified above provide enough legal ground to do so.

**II. Liability Matters**

The increased use of the veil piercing doctrine by the Courts in order to encourage green shareholder activism is advocated by this analysis. This section is intended to show two recent trends in environmental law that may, together with veil piercing, serve to control

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[35] See *Zaist v. Olson* (1968) 353 Mass. 614 in which the Court held that If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation of one corporation for the benefit of the whole enterprise.

[36] (1) whether the dominant corporation owns or subscribes to all the subservient corporation's stock, (2) whether the dominant and subservient corporations have common directors and officers, (3) whether the dominant corporation provides financing to the subservient corporation, (4) whether the subservient corporation is grossly undercapitalized, (5) whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation, (6) whether most of the subservient corporation's business is with the dominant corporation or the subservient corporation's assets were conveyed from the dominant corporation, (7) whether the dominant corporation refers to the subservient corporation as a division or department, (8) whether the subservient corporation's officers or directors follow the dominant corporation's directions, and (9) whether the corporations observe legal formalities for keeping the entities separate.

[37] B Sjåfjell, 'Environmental Piercing of the Corporate Veil: The Norwegian Supreme Court Decision in the Hempel Case' (2010) 7 European Company L 154–160, <http://ssrn.com/abstract=1616820> 1.

evasion of responsibility of environmental harm by individuals who hide behind the body corporate's limited liability. In reality the piercing of the veil by the Courts should serve as a last resort and essentially environmental legislation should serve to curb any possible room for abuse in the first place. The first trend is the rise of domestic legal frameworksimposing personal environmental liability for directors of companies that cause harm to the environment. The second is the rise of corporate environmental management systems as a response to the imposition of this environmental legislation.

There have been some recent developments whereby civil law and common law jurisdictions now impose civil, administrative and/or criminal liability on corporate officers. It should be said that strictly speaking, veil piercing occurs when a Court puts the notions of limited liability and separate legal personality aside and holds a company's shareholders or directors personally liable for the corporation's actions or debts. In the examples to come, liability placed on directors is typically imposed on the basis of statutory obligations or on the basis of negligence and there is, as such, no veil piercing here, at least in the sense discussed under Part I of this paper. Nevertheless the effects are the same, namely natural persons are given legal responsibility to ensure that conduct of the corporation does not cause environmental harm. This section is intent on illustrating that liability placed on natural persons is capable of altering the conduct of a corporation. So introducing such legal obligations for corporate officers can also be seen as a wider interpretation of veil piercing or as more commonly known, extended liability. In other words, rather than leaving it up to the Courts, veil piercing is in this manner being prescribed in legislation as an inherent methodology when conducting the operations of the body corporate.

Australia provides far-reaching legislation directed towards the protection of the environment[38] some of which impose director liability for the environmental harm caused by their corporations.[39] Liability is generally imposed on the basis of positional liability, managerial liability, responsible officer liability or participatory liability. Different statutory defences are available depending on the particular legislation and territory however all centre on due diligence, lack of control or having taken reasonable steps to avoid the

[38] See for example, the federal Australian Protection of the Sea (Civil Liability) Act 1981; Protection of the Sea (Prevention of Pollution from Ships) Act 1983; Environment and Heritage Legislation Amendment Act (No 1) 2003; World Heritage Properties Conservation Act 1983; Environment Protection (Sea Dumping) Act 1981; Environment Protection and Biodiversity Conservation Act 1999; Hazardous Waste (Regulation of Exports and Imports) Act 1989.

[39] See for example, the state level Australian Acts, The Waste Management and Pollution Control Act 1998 (NT) Art. 91(1); The Environment Protection Act 1993 (SA) Art. 129; The Environment Management and Pollution Control Act 1994 (Tas.) Art. 60.

contravention. Respite is unlikely. The Protection of the Environment Operations Act 1997 in New South Wales was recently amended categorising the offences imposing director/manager liability into special executive liability and executive liability with the former carrying a maximum penalty of 1 million Australian dollars or 7 years' imprisonment or both in the case of an individual.

Likewise Canada's environmental protection legislation[40] provides for the personal liability of those persons who have charge, management or control of the corporation's activities or property. For example, the Canadian Environmental Protection Act[41] provides that:

> *If a corporation commits an offence under this Act, any director, officer, agent or mandatory of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable on conviction to the penalty provided for by (the) Act for an individual in respect of the offence committed by the corporation, whether or not the corporation has been prosecuted or convicted.*[42]

In *Regina v. Shamrock Chemicals and Shirley*[43] the Ontario District Court enforced the director liability provisions of the Environmental Protection Act, finding that the corporation, shareholder and director could each be fined for an environmental offence.

In Hong Kong, criminal liability may be imposed on directors for damage to the environment.[44] Liability may also be imposed for failing to take steps to protect the environment.[45]

Article 157 of the UK Environmental Protection Act 1990 in the United Kingdom states that:

> *Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body*

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[40] See for example, the Water Act, RSBC 1996; the Ontario Environmental Protection Act, RSO 1990.

[41] S.C. 1999, c. 33.

[42] Ibid, Art. 280(1).

[43] (1989) 4 C.E.L.R. (N.S.) 315.

[44] See for example, Hong Kong Air Pollution Control Ordinance (Cap 311) & Dumping at Sea Ordinance (Cap 466).

[45] See Antiquities and Monuments Ordinance (Cap 53).

> *corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*[46]

In the United States, CERCLA imposes liability on directors concerning hazardous waste and contaminated land. Specifically, the strict liability imposed by article 107(a) has been interpreted by the courts to suggest that the corporate veil may be pierced so that shareholders, officers, directors and even lenders may be exposed to personal liability.

In the European Union, the Environmental Liability Directive was published to guarantee that costs, damages and expenses are covered by the polluter.[47] 'An operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable'.[48] The Directive defines an operator as:

> *Any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.*[49]

Therefore, directors or managers of companies in E.U. member States causing environmental damage may be found liable as an operator in a similar way to director liability under CERCLA. The Directive takes on a minimum harmonisation approach allowing Member States to transpose its provisions into national legislation, and to implement more stringent provisions than that found in the Directive if they prefer to do so. For example, Hungary did not transpose the term 'operator' as used in the Directive. Rather it is the 'user of the environment' that is liable for environmental damage that user may cause, thus widening the scope of the responsible party under the Directive to include directors and officers of a corporation. [50]

In the Irish case *Wicklow County Council v Fenton & ORS*[51] the High Court of Ireland placed significant importance upon the relevant European legislation. In particular, the definitions of waste, producer, holder, disposal, collection and the role of the polluter pays principle were all assumed from different European Directives. The Court noted that the

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[46] U.K. Environmental Protection Act 1990 Art. 157.

[47] E.U. Directive 2004/35/EC para 2.

[48] Ibid.

[49] Ibid.

[50] 1995 Environment Act (amended in 2007 to transpose Directive 2004/35/EC).

[51] (No 2.) [2002] 2 I.R. 583.

purpose of the Act was to control and prevent environmental pollution and that when environmental pollution arises or is likely to arise the person causing such pollution may be subject to an Order. The Court found both the company and its directors equally negligent. Despite claims of separate legal personality the Court noted that EU legislation defined the polluter as ‘someone who directly or indirectly damages the environment or who creates conditions leading to such damage’.[52] In Paragraph 112 of the judgment, the court held that it cannot be said that the directors did not (at least indirectly) cause those conditions which were required. Judge O’Sullivan concluded that:

> *The domestic law in relation to limited liability of companies would, in my opinion, frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in circumstances where the company in question having first been directed by the Court to comply with such orders was not in a position for financial or other reasons so to do.*[53]

The greening of the corporate behaviour does not depend only upon legal instruments. The use of corporate environmental management systems (EMS) has been on a steady increase and can arguably be credited with being as effective when applied in tandem with environmental legislation.[54] This can be discerned by comparing the number of environmental measures adopted by companies today with those only a few years ago. For example, towards the end of 2009, at least 223,149 ISO 14001:2004 certificates (which provide the requirements for environmental management systems used by companies) had been issued.[55] Towards the end of 2014, 324,148 ISO 14001:2004 certificates had been issued.[56] This is because whilst EMS protect the environment they also perform other corporate functions such as protecting the corporation and its officers from potential environmental liability.[57]

The adoption of an EMS as a tool to allow the incorporation of environmental policies into corporate governance forms an essential part of most environmental liability risk

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[52] Ibid.

[53] Ibid.

[54] See Ong above (n. 4).

[55] ISO Press Release 25 October 2010 <http://www.iso.org/iso/news.htm?refid=Ref1363> accessed on 08 March 2016.

[56] The ISO Survey of Management System Standard Certifications – 2014 <http://www.iso.org/iso/iso_survey_executive-summary.pdf?v2014> accessed on 08 March 2016.

[57] Ibid.

management systems due to environmental liability legislation[58] and due to the belief that pollution prevention can be cost effective.[59] There is also the added bonus of attracting the 'green' consumer and EMS certification can also lead to increased investor confidence due to its ability to protect the corporation and its officers from environmental liability.[60] Certain governments have introduced the 'legal requirement for the introduction of corporate EMS applying the latest environmental management quality standards'.[61] In terms of the European Eco-Management and Audit Scheme (EMAS), corporate environmental performance is the concern of the board of directors. For example, the Austrian Eco Audit Act[62] requires the eco auditing of companies to determine conformity with the applicable environmental legislation as well as environmental management standards established such as the ISO 14001 Series or EMAS.[63]

Corporate actors are now expected to go beyond mere compliance and to nurture and advance environmental objectives, implement arrangements that nurture and advance these objectives as well as to have systems in place to measure success. In exchange the corporation is awarded an official confirmation illustrating environmental commitment. The corporation is then permitted to utilise the award in their corporate promotion. Whilst participation is voluntary, external pressure from competitors and internal shareholder pressure often motivate participation. Under ISO 14001, guidelines are provided through which the corporation's environmental policy (which obliges the corporation to prevent pollution, continually improve and comply with environmental legislation and regulation) is to be identified, implementation plans and procedures to be put in place and the company's unique circumstances taken into account. These steps are followed by monitoring the policy and taking corrective action to ensure its execution (ensuring internal audits), and by final evaluation of the EMS by the corporation's top brass 'to ensure its continuing suitability,

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[58] Indeed it is noted that jurisdictions with the most burdensome environmental legislation contain the largest number of EMS participants. See for example, the number of EMAS participant in Germany, Austria and Scandinavian countries as compared to southern European countries.

[59] See D Kirkpatrick and C Pouliot, 'Environmental management, ISO 14000 offers multiple rewards' (1996) 28(6) Pollution Engineering 62–65: 'Indeed energy costs may be reduced and fines and penalties may be minimalized'; see also Ong above (n. 4) where it is also submitted that the increase of the environmentally conscious pubic in their want for goods that are environmentally friendly and persistent NGO pressure have also contributed to the rise of EMS's.

[60] D Morrow and D Rondinelli, 'Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification' (2002) 20(2) European Management J 159–171.

[61] Ibid.

[62] UGStVG BGBl 622/1995.

[63] Ong above (n. 4) at 18.

adequacy, and effectiveness'.[64] Whilst ISO 14001 is concerned with established policies, plans and procedure compliance, there are no requirements beyond this.[65]

In Europe, the growth of Member State legislation encouraging the adoption of corporate EMSs emerges from the regulations covering the voluntary participation by organisations in a Community eco-management and audit scheme.[66] EMAS applies to all 28 EU Member States and the 3 European Economic Area States and is comparable to and compatible with ISO 14001 in terms of makeup and requirements, but it is better designed to actually bring about changes in environmental performance. EMAS, with similar environmental goals as its ISO counterpart, is different in that it requires the declaration of an environmental statement by the organisation and 'is more rigorous in mandating reductions in environmental impacts to levels not exceeding those corresponding to economically viable applications of [the] best available technology'.[67] It also facilitates transparency by requiring that more information be made publicly available by the organisation. Lastly, it requires 'internal system compliance and performance audits, and external verification must be conducted at least once every three years. ISO only suggests system audits against internal benchmarks'.[68]

Although voluntary, the use of EMSs is on the rise as it may form an integral part of the due diligence defence awarded to directors and corporations as a means for evading liability.[69] The due diligence defence is the most readily available defence in those jurisdictions that have opted for fault based liability. In *SPCC v Kelly*[70] the court had this to say of due diligence:

> *Due diligence ... depends on the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to prevent the*

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[64] ISO [International Organization for Standardization], *Environmental Management System - Specifications with Guidance for use*, ISO 14001 EMS (Geneva 1st Ed.1996).

[65] Although companies are free to establish procedures that go beyond minimum compliance requirements.

[66] REGULATION (EC) No 1221/2009 on the voluntary participation by organisations in a Community eco management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.

[67] MT Hatch, *Assessing Environmental Policy Instruments* (State University Press of Albany, 2005) 159.

[68] Ibid, 162.

[69] R. v. Weyerhaeuser Canada Ltd., 2000 BCPC 227.

[70] (1991) 5 ACSR 607, 609.

> *contravention. Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances.*[71]

The opportunity afforded to corporate directors to utilise the due diligence defence is designed to encourage the corporate use of the precautionary principle in environmental management. Due diligence in this context is typically not defined within the legislation that has afforded it as a defence. Instead, due to the complex nature of an environmental offence its interpretation has been left to the courts. The defence is based on the justification that the corporation did what was reasonably expected in order to avert a particular occurrence.

An interesting illustration of this is the 2013 Ontario judgment of *Podolsky v. Cadillac Fairview Corp.* (*Cadillac Fairview*).[72] Here the Court accepted the plaintiff's claims that sunlight reflected from a building owned by the defendant corporation could fall within the definition of an emission of radiation and therefore be considered a 'contaminant' under the Ontario Environmental Protection Act. The Court, whilst accepting that the defendant corporation had discharged a contaminant resulting in the death of a substantial amount of birds, ultimately discharged that defendant corporation citing the fact that they had satisfied the due diligence defence because of compliance with industry and building standards as well as having initiated programmes and implemented measures to deter bird strikes. This demonstrates the various interpretations correct director due diligence may take. Therefore the corporation's environmental risk management system cannot simply adopt a broad form of environmental management, but must attend to specifics.

The rise of EMS as a direct result of the imposition of environmental legislation highlights the deterrent factor that can be brought about by removing the insulation from liability that currently places the burden on the injured party. Instead it places liability with the directors responsible for the direction of the company and therefore responsible for the corporate conduct attracting that liability. If the same logic was to be applied to shareholders (on the basis that they also yield considerable power within the corporate structure and are therefore also responsible for the conduct attracting liability), significant pressure would be imposed on the board of directors by their shareholders with the same purpose of mitigating their exposure to potential liability.

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[71] Ibid.

[72] 2013 ONCJ 65.

**III. Press to Play: Activating the Shareholder**

The doctrine of limited liability has severed the action-reaction element in the law. Take the following example. The property of Mr X causes damage to the property belonging to Mr Y. As a result, and should all the elements required in a tort based action be present, Mr X is liable towards Mr Y. The usual consequence of this liability is twofold; Mr X takes measures so as to mitigate or even eliminate any future liability and Mr Y is compensated for the harm suffered. Therefore ownership of property entails not only rights but also liabilities. However this is not the case for the shareholder.

When a corporation causes harm to the environment, its shareholders have no legal obligation imposed on them as a result of that harm and are not legally required to cause the corporation's board to stop or to reduce the harmful conduct. This means that the only consequences to the shareholder as a result of a company's activities are the corporation's share price and the amount of dividends distributed. Fairness and legal uniformity dictate that shareholders demand that the conduct of their corporation does not cause harm to third parties and/or the environment. Failing this, they should be held accountable. This would serve as a deterrent to shareholders who deem profit at all costs as the priority. [73]

Unlimited liability and its shortcomings has been the subject of much debate.[74] That investment will be stifled is commonly raised as a reason for keeping limited liability. Whether the Courts could administer a system of unlimited liability has also been questioned. Lastly we are provided with stories of sending poor unsuspecting individuals into bankruptcy. However there is nothing to show that unlimited liability would discourage investment with the exception of those corporations that under the prevailing rules of tort law impose net costs on society. Even in the case of public corporations this would not burden the market, saving the fall in share price to account for the social cost of the corporation's activities. Furthermore this would not cause insurmountable obstacles to the judicial

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[73] It should be noted that there are different types of investors and the distinction important in the shareholder activism context. Institutional investors typically have larger investment blocks than individual investors as well as having more specialised expertise. This means that they are capable of playing a much more active role than their individual counterparts. Long terms investors may be more willing to sacrifice short terms profit in exchange for particular conduct than short term investors. Despite the importance of this distinction, this paper is concerned with the manner through which to encourage green shareholder activism and not the success that different types of shareholders will have in implementing green resolutions. Therefore investor or shareholder is to apply to all shareholders without distinction.

[74] H Hansmann and R Kraakman, 'Toward unlimited shareholder liability for corporate torts' (1991) 100(7) Yale L J 1879–1934.

administration of an unlimited liability rule as will be shown.[75] Lastly, fears that mum and dad investors would be pushed into bankruptcy for the conduct of the corporation of which they had no knowledge, let alone had a say, are unfounded. It would still be for the Court to decide which costs are to be borne by the corporation and its shareholders and which are not. Many of the justifications behind retaining limited liability are therefore weak.

Unlimited liability does however have the potential to mobilise shareholders. In the environmental context, it has the potential to motivate shareholders to question and to demand of the board that the corporation's conduct be environmentally sound to avoid exposure to potential environmental liability which may ultimately, as a result of unlimited liability, be personally incurred by the shareholders. Shareholder activism arose out of increasing awareness that social, environmental and related issues can have a substantial effect on a corporation's financial performance. This stems from Albert O. Hirschman treatise *Exit, Voice and Loyalty*.[76] Shareholders may decide on one of many courses of action when faced with corporate conduct that they do not agree with. They can sell their investment, raise their objections to the corporate conduct in question or hold on to their investment and do nothing. The former and the latter both do not affect change and risk a poor return on the original investment. Furthermore shareholders are unlikely to turn their backs on a good investment because they do not like the manner in which the corporation is being run without at least first trying to change it. Raising their objections through shareholder resolutions permits shareholders to voice their opinions. This should draw the attention of management as well as, depending on the size and type of corporation, provide leverage due to the publicity of the objection. Unlimited liability may even encourage passive investors who are no longer content with simply attending general meetings. Instead passive investors will realise that they may be affected by the conduct of the corporation so they may attempt to shape it. Even those shareholders that, under a system of unlimited liability, have some form of personal insurance will be forced to take note and internalise the costs or pay higher premiums.

The various arguments presented in this paper point towards 'limiting' unlimited liability. Whilst the discussion relating to unlimited liability in corporate law is not restricted to environmental issues, certain environmental disasters caused by corporations have served to ignite the debate. Many commentators have argued in favour of unlimited liability and then gone on to fashion their ideal model.[77] Should liability attach to the shareholders at the time

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[75] Ibid.

[76] AO Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (Harvard University Press, 1970).

[77] See Hansmann above (n. 74).

the harm was suffered or should it attach to the shareholder at the time the claim is brought? Would collection from multiple shareholders place a strain on the judicial system and would the costs of collection severely reduce the award?[78] These questions are of greater importance when speaking of publicly traded corporations as opposed to two or three shareholder private corporations, for obvious reasons, however the questions remain nevertheless relevant and applicable to privately held corporations. A further question is whether liability should be joint and several or should it attach to the shareholder in accordance with their holding in the company? This last question may have far reaching effects from an activism point of view.

Most commentators argue in favour of a pro rata liability rule[79] and this discussion certainly finds this more equitable and a more efficient burden placed on the market (in the case of publicly traded shares) then joint and several liability.[80] However, the liability should not be apportioned pro rata based on the shares held in the corporation, but rather pro rata based on the influence exerted in respect of the activity attracting liability. Justifying pro rata liability based on holding necessitates the presumption that 10% of the corporation's equity entitles its holder to 10% say in the decision making process. This is not the case. A certain number of shares do not always yield a corresponding amount of votes. Even excluding this reality and assuming that one share is equal to one vote, the general meeting is made up of a number of shareholders, all with different interests and views and likely to vote differently in respect of different resolutions.

In other words, whilst a shareholder may possess 40% of the voting rights in a corporation, they may be vehemently opposed to a particular activity carried out by the corporation but powerless to restrict the board from executing that conduct. If that conduct then attracts liability, it hardly seems fair that that shareholder should carry 40% of the liability in a system of unlimited liability. It has to be said that in terms of ensuring proper and adequate compensation for tort victims, pro rata liability according to shares held in the company is a far better method because it allows the Court to call on various pockets for

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[78] See Hansmann above (n. 74) for an excellent analysis.

[79] Ibid; see also D Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) Working Paper No. 48, Centre for Law and Economic Studies, Columbia University School of Law.

[80] It should be noted that this paper is in favour of unlimited liability only in respect of tort victims. A contract creditor for example is amply equipped to determine the credit worthiness of a company and carry out a risk assessment on that basis as to whether or not to contract with the company. On the other hand, tort victims are not in a position to do so prior to injury or insist on compensation beyond the company's assets for the harm suffered. This allows the company to unilaterally determine its degree of exposure to tort based claims thereby inviting risky behavior.

compensation. If the Court were to do so on the basis of pro rata liability for responsibility for conduct, a tort victim may go uncompensated in full (or at all) if that shareholder is not sufficiently liquid to satisfy the claim.[81] On one hand, from a shareholder advocacy point of view, pro rata liability based on influence is more likely to motivate the shareholder to pass green resolutions, but on the other hand it may run the risk of creating shareholder apathy and encouraging a hands off attitude. As a safety net however it is essential to have a legal framework which would ensure that no action on the part of the shareholders does not exculpate them from liability. One way of doing this may be the imposition of a rebuttable presumption that all shareholders have contributed to the conduct attracting liability unless evidence is brought forward showing that they were in fact opposed to that conduct.

In a typical case concerning a tortuous act allegedly committed by a corporation, the Court will first determine whether all the elements exist for the corporation to be found liable in tort. Did the alleged victim suffer damage and is there sufficient evidence to show a link between the conduct of the alleged tortfeasor and the harm suffered by the victim? If the corporation is found liable in tort, the Court must then go about determining the amount that is due, typically *restitutio integrum*. Once it is determined that the corporation is liable in tort and the amount established, that corporation will be liable to pay that amount to the victim as compensation for the damage suffered. However, if the assets of the corporation are unable to satisfy that liability, the Court must determine whether the circumstances warrant the imposition of unlimited liability. If the Court is willing to apply unlimited liability the Court must then enter into an additional analysis so as to determine the extent each shareholder has had in influencing that corporate conduct. If unlimited liability is justified on the basis that those behind the corporate veil yielded considerable decision making power and should therefore be held responsible for the actions of the corporation, then the amount for which they are liable should be proportionate to the degree to which they actually influenced the action attracting liability.

The burden of proof is to be placed on those shareholders claiming non approval of the corporate conduct giving rise to tortuous liability. They must provide evidence to show that the decision was carried out despite and not because of them. Minutes of the General Meetings would have to be scrutinized in order to determine policy and the manner in which the resolution was carried. Was this carried unanimously or despite objections? Appointments of directors may also be given weight in the proceedings if these appointments have a bearing on the tortuous act. Did certain shareholders request that impact assessments be carried out and where these assessments considered by the

[81] Although in the case of corporate shareholders it may be argued that persistent veil piercing up the structure may go some way to satisfying the claim.

corporation? Once this is determined the Court would assign a 'responsibility percentage' based on each of the shareholder's influence in respect of the tortuous act and each shareholder would be liable for that percentage of the total amount to be compensated.

Whether pro rata liability based on influence should be applied must be determined on the basis of whether it is justified on the principle of equity and fairness and whether it is workable. The issue of fairness has already been discussed and it seems reasonable that a tortfeasor is liable to the extent of their contribution to the tortuous act. Joint and several liability would place an unfair and unnecessary burden on small shareholders and liability based on shareholding does not take the dissent of shareholders into account. Questions as to whether or not the Court is equipped to carry out this additional analysis should be dispelled immediately. In environmental tort claims, Courts already deal with multiple parties as a result of dispersed pollution, contributory elements, latency of harm and a number of other and more complicated factors in order to determine whether and how much compensation is due and to whom. Determination of shareholder influence on a particular resolution giving rise to a tortuous act is easier than the determination of the existence of that tortuous act itself and should therefore not trouble the Court. A number of guidelines could be established to ease the burden placed on the Court although a mix of corporate or company law principles to determine influence on a resolution giving rise to corporate conduct and tort based principles to determine how to apportion liability based on that influence could also serve the Court well.

This would ensure that not every shareholder is liable to the same degree but only to the extent of their influence on the act giving rise to liability. Shareholders will no longer feel safe in the knowledge that risky behaviour may be pursued in the pursuit of profit because of the financial insulation provided by limited liability. It has been argued that costs associated with corporate monitoring and the submission of proposals is a large deterrent to shareholder activism particularly with respect to the benefits to be reaped as a result of that outlay.[82] Unlimited liability makes activists out of its shareholders by injecting a personal element so that the principle that environmentally related issues can have an effect on a corporation's financial performance now also includes the shareholders' financial performance by extension; the benefit is the mitigation of liability. This will create green incentives amongst shareholders to fight to ensure that their green resolutions trickle down to the board. In a bid to escape liability they will green the conduct of their corporations.

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[82] O Lilliehook and D Margolin 'Shareholder Activism Can it be an Effective Governance Mechanism?' Stockholm School of Economics Master's Thesis in Finance (2009).
Accessed at <http://arc.hhs.se/download.aspx?MediumId=802>

**Conclusion**

This discussion advocates the removal of the limited liability rule as a means to activate shareholders via the piercing of the corporate veil. It has examined how this may happen when the doctrine is applied in the 'traditional' way by Courts. A wider interpretation regarding the application of the doctrine may also be seen via the adoption of national legislation that bestows personal liability upon individuals within a body corporate, aiming at the prevention and mitigation of environmental harm. The rise of environmental management systems as a reaction to the application of environmental legislation that serves to place liability where it belongs, illustrates that corporate actors will take preventive and mitigation measures as a result of the imposition of such liability Finally, the discussion turned to the concept of 'unlimiting' limited liability as an ultimate means of piercing the corporate veil and as a method for placing liability on the appropriate defendant.

The conclusion is that unlimited liability will not deter investment except in those corporations which impose a net cost on society, and that it is justifiable on the basis that shareholders yield considerable power over the direction of the corporation and should therefore be made to direct their corporations to behave in a socially responsible manner. Otherwise they should bear responsibility themselves. As a system of unlimited liability, pro rata liability is advocated on the basis of influence exerted by shareholders in order to affect the act attracting liability. It could be argued that this form of unlimited liability could transform even the most reluctant shareholders into green activists. Such an approach would also lead shareholders to monitor the conduct of the corporation and to propose green resolutions to prevent and mitigate any potential environmental harm from which liability would ensue.