DUTIES OF CARE BETWEEN ACTORS IN SUPPLY CHAINS

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1. Introduction

Rapid changes to employment practices and structures have tested and will continue to test the limits of liability in tort law. To date, much of this pressure has been applied to the principles governing vicarious liability. That corner of tort law has undergone significant development in response to, for example, the increasing sophistication of many employees and a growing tendency of businesses to outsource work.[1] One important recent change is that vicarious liability can now arise in the absence of a relationship of employment. An relationship that is akin to employment may suffice.[2] Another noteworthy change concerns the recognition of so called 'dual vicarious liability', pursuant to which more than one defendant can incur vicarious liability for a tortfeasor's wrong.[3] These and related developments are reactions to the changing way in which work is being done in the modern world. They are the result of the courts' efforts to ensure that the law of vicarious liability produces outcomes that are thought fair and just to contemporary eyes.

Another part of tort law that has come under significant pressure on account of shifts in employment structures concerns the duty of care element of the action in negligence. Increased outsourcing of work raises the question whether a company within a supply chain might owe a duty of care to employees of another company within the chain. It is this question with which this article is concerned. It is convenient to discuss it by way of the following paradigm scenario. Suppose that Company A requires certain goods for its business but, for one reason or another, it chooses to source them from Company

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1 As Lord Phillips of Worth Matravers PSC observed in an oft-cited remark in *Various Claimants v Institute of the Brothers of Christian Schools* [2012] UKSC 56; [2013] 2 AC 1, [19], vicarious liability 'is on the move'. In *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660, 664 Lord Reed JSC said that '[i]t has not yet come to a stop.'

2 *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 AC 1.

3 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] QB 510.

B rather than to fabricate them itself. Company B tortiously injures one of its employees, Employee. If Employee cannot obtain an effective remedy from Company B for some reason (say, because Company B is insolvent, been wound up, or is without liability insurance, Employee may look to Company A for redress). A claim by Employee against Company A is likely to be confronted with numerous difficulties. However, a key issue in any such claim will be whether Company A owed Employee a duty of care. What are the prospects of a duty being owed in this scenario? This question has arisen for determination by the courts in some other jurisdictions[4] and has received a certain amount of academic scrutiny.[5] However, the issue has never been considered by an English court. It has not been the subject of sustained analysis in this country either. This article fills this gap.

2. Two decisions of the Court of Appeal

At first glance, it might seem that there is little hope that Employee could establish that Company A owed him a duty of care to protect him from suffering injury due to the negligence of Company B. It is, of course, a foundational principle of tort law that, ordinarily, no duty arises to prevent a person from suffering injury at the hands of a third party. The mere fact that the injured person was particularly vulnerable to injury, or the fact that the third party could easily have been prevented from causing the injury concerned, are insufficient to displace this starting principle.[6] This basic rule is a formidable obstacle to Employee's prospects of establishing that Company A owed him a duty of care. This is because Company B is a third party in so far as the relationship between Company A and Employee is concerned.

However, Employee can, perhaps, find a glimmer of hope in two recent landmark decisions of the Court of Appeal: *Chandler v Cape plc*[7] and *Thompson v Renwick*

4 See, e.g., *Doe v WalMart Stores Inc.*, 572 F 3d 677 (9th Cir, 2009).

5 See, e.g., Joe Phillips and Suk-Jun Lim, 'Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees' (2009) 61 Rutgers L Rev 333; Naima Farrell, 'Accountability for Outsourced Torts: Expanding Brands' Duty of Care for Workplace Harms Committed Abroad' (2013) 44 Geo J Int'l L 1491; Peter Rott and Vibe Ulfbeck (2015) 23 ERPL 415; Madeleine Conway, ' A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains' (2015) 40 Queen's LJ 741.

6 This is exemplified by the Supreme Court's recent decision in *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732.

7 [2012] EWCA Civ 525; [2012] 1 WLR 3111.

Group plc.[8] These decisions establish that a parent company will in certain circumstances owe a duty of care to the employees of one of its subsidiaries. Because the parent/subsidiary situation bears at least some resemblance to the paradigm case, *Chandler* and *Thompson* are of significant interest for present purposes.[9]

The claimant in *Chandler* had been negligently exposed to asbestos and contracted asbestosis as a result.[10] The exposure occurred in the course of the claimant's employment by a company known as Cape Building Products Ltd. However, that entity no longer existed by the time that the disease manifested itself and so the claimant looked to its parent company, Cape plc, for redress. The two companies were highly integrated. They were both in the business of producing asbestos, the parent made corporate decisions with close regard to its subsidiaries' interests, and the parent had also appointed a medical doctor who had responsibility for the medical needs of employees within the corporate group generally. By virtue of the foregoing, the subsidiary was effectively a mere division of the parent. The Court of Appeal unanimously held that the parent owed the claimant a duty of care.

It is important to understand the basis on which *Chandler* was decided. *Chandler* was a not a case in which the independent legal personality of the subsidiary was disregarded. The corporate veil was not pierced.[11] The conditions for veil-piercing were plainly not satisfied[12] and, indeed, were not even considered. Rather, *Chandler* was decided on the footing that the parent owed a duty of care directly to employees of the subsidiary. In reaching this conclusion, the Court simply applied the *Caparo* test. The Court was clearly concerned, however, that recognising a duty of care in these circumstances would, unless the *ratio* of the case was carefully defined, tend to undermine the basic principle that there is no duty to prevent third parties from causing harm. Respect for this principle prompted Arden LJ (with whom Moses and

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8 [2014] EWCA Civ 635; [2015] BCC 855.

9 Another decision in the same line of cases is *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC). However, it is convenient to focus on *Chandler* and *Thompson*, these being the more significant decisions.

10 *Chandler* has deservedly elicited a great deal of discussion. Contributions include Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidary [sic]' (2012) 71 CLJ 478; William Day, 'Negligence and the Corporate Veil; Parent Companies' Duty of Care to their Subsidiaries' Employees' [2014] LMCLQ 545; Phillip Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability' (2015) 31 PN 276.

11 This has often been misunderstood. Commentators who have committed this error include Julian Fulbrook, 'Case Comment: *Thompson v Renwick Group Plc*' [2014] JPIL 135, 136; Ugljesa Grusic, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74 CLJ 30, 30–31.

12 As to these conditions, see *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415.

McFarlane LJJ agreed) to propound a narrow test regarding the circumstances in which a parent will owe a duty of care to one of its subsidiary's employees. Her Ladyship said:[13]

> 'In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (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, 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.'

Chandler was carefully considered in *Thompson*. *Thompson* was another asbestos case in which an employee of a subsidiary company argued that the subsidiary's parent owed him a duty of care. This time, however, the facts were far less favourable to the claimant than in *Chandler*. The businesses of the parent company and the subsidiary company were fundamentally different from each other. The parent company was a mere holding company while the subsidiary provided haulage services. In these circumstances, and in view of the test that Arden LJ had propounded in *Chandler*, it is unsurprising that the Court held that the 'evidence available fell far short of what is required for the imposition of a duty of care'.[14]

It is obvious that *Chandler* and *Thompson* endorse a restrictive approach. The distinct impression that one obtains from the passage set out above from Arden LJ's reasons in *Chandler* is that if the criteria that her Ladyship identified do not point firmly in favour of the existence of a duty of care, it is unlikely that a duty will arise. Phillip Morgan correctly observes that 'Arden LJ was careful to set a very narrow ratio'.[15]

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13 [2012] EWCA Civ 525; [2012] 1 WLR 3111, 3131 [80].

14 [2014] EWCA Civ 635; [2015] BCC 855, 865 [39] (Tomlinson LJ).

15 Morgan (n 10) 286. Cf Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc* (2013) 76 MLR 603, 619, who oddly describes *Chandler* as laying down a 'dangerously broad' principle.

Accordingly, *Chandler* and *Thompson* render unpromising any argument that a duty of care ought to be recognised in the supply chain context. It is obvious that the degree to which a parent and subsidiary are integrated is critical to whether a parent will owe a duty of care to an employee of the subsidiary pursuant to *Chandler and Thompson*. However, in a supply chain situation, the degree of integration required to generate a duty of care will nearly always be absent. The businesses may (and often will) be fundamentally different from each other, and one actor in the chain may be able to influence another actor only by way of applying commercial pressure rather than because, for example, the corporate governance of the entities is shared. That is clearly insufficient for the purposes of Arden LJ's test in *Chandler*.

3. General tests for the existence of a duty of care

Parent/subsidiary cases and the paradigm case involving a supply chain resemble each other to a degree. Ultimately, however, the analogy between the two types of case is not particularly close, for the reasons given in the previous paragraph. In the circumstances, arguing that a duty of care is owed in a supply chain case is likely to amount to a plea for a non-incremental extension of the circumstances in which a duty will arise. Given that the common law develops by analogy, such an argument is in principle unattractive.[16] Nonetheless, it is worth considering whether, pursuant to general tests for the existence of a duty of care, a duty might yet arise in a supply chain case. Those general tests are, of course, the *Caparo* test and the assumption of responsibility test. Although the latter has perhaps come to the fore as a result of the decision of the Supreme Court in *Michael v Chief Constable of South Wales*,[17] it is convenient to begin with the *Caparo* test.

[16] In *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732, 1761 [102], Lord Toulson JSC said: 'The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account'.

[17] [2015] UKSC 2; [2015] AC 1732. See James Goudkamp, 'A Revolution in Duty of Care?' (2015) 131 LQR 519.

3.1. The Caparo test

The centre of attention in relation to the *Caparo* test for present purposes is likely to be the third stage of the test, that is to say, whether imposing a duty of care would be 'fair, just and reasonable'. The first stage of the test – reasonable foreseeability – is generally of little relevance because it is usually easily satisfied.[18] The second stage – proximity between the parties – is usually discussed only fleetingly by the courts.[19] The discussion will therefore concentrate on the 'fair, just and reasonable' enquiry.

It is well established that the third stage of the *Caparo* test requires the court to weigh anti-duty factors against pro-duty factors.[20] Three anti-duty considerations stand out for particular mention. First, if a duty of care is recognised significant difficulty may be encountered in confining it within sensible bounds. If it is held that Company A owed Employee a duty of care, why should only Company A owe Employee a duty? Why, if Company A is under a duty to Employee, should not all other companies in the supply chain, or at least those companies that stand in a contractual relationship with Company B, also owe Employee a duty? Furthermore, why should Company A come under a duty only vis-à-vis Company B's employees? Why should not Company A, if it is held to owe a duty to Employee, also owe a duty to all of the employees of other companies in the chain? The foregoing raises obvious concerns about overly expansive liability, and liability that is potentially indeterminate in its extent.

Second, the imposition of a duty of care as between Company A and Employee may disturb the contractual allocation of risk between actors in a supply chain. In *Pacific Associates Inc v Baxter*,[21] an employer engaged the claimant to carry out dredging work. The employer also engaged engineers to supervise that work. The claimant

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[18] See James Goudkamp, 'When is a Risk of Injury Foreseeable?' (2008) 124 LQR 37.

[19] This is likely because it has never been made clear what the concept of 'proximity' entails. The classic analyses in this regard are Michael McHugh, 'Neighbourhood, Proximity and Reliance' in Paul Finn (ed), *Essays on Torts* (Sydney, Law Book Co, 1989) 5 and Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998) 59.

[20] In *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) 559 Lord Browne-Wilkinson wrote: 'In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would be-claimants if they are not to have a cause of action in respect of the loss they have individually suffered'.

[21] [1990] 1 QB 993 (CA).

asserted that the engineers owed it a duty of care with respect to the provision of certain information. The Court of Appeal rejected this submission. Ralph Gibson LJ said:[22]

> 'it seems to me to be neither just nor reasonable in the circumstances of the contract terms existing between the [claimant] and the employer … to impose a duty of care on the engineer to the [claimant] in respect of the matters alleged in the statement of claim … So to do would be to impose, in my judgment a duty which would cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered, including in particular the machinery for settling disputes'.

This analysis militates against the erection of a duty of care as between Company A and Employee. Companies in a supply chain typically determine carefully how risks are to be allocated between them. If the courts recognise an exception to the principle that there is no duty to control the conduct of third parties by holding that Company A owes a duty to Employee, the entities' determination as to how all of the relevant risks are to be borne will be outflanked. In response, it might be said that the contractual allocation of risks as between companies in a supply chain is *res inter alia acta* in so far as the relationship between Company A and Employee is concerned. There is some force in this point. However, the fact of the matter is that the courts often pay, despite the *res inter alia acta* maxim, attention to contractual arrangements with third parties for the purposes of decideding whether a duty of care exists. This is clear from *Baxter*, which has just been mentioned.[23]

Third, holding that Company A owed a duty of care to Employee may tend to encourage Company A to become as unconcerned as possible for the interests of employees of Company B (and the employees of other companies in the supply chain). If Company A is held to owe a duty to Employee on the basis that, for example, Company A was involved to a degree in Company B's business, companies within a supply chain may try to distance themselves to the greatest extent possible from the way in which the other companies in the chain do business in the hope that doing so might insulate them from liability. In some situations, this will have significant adverse repercussions for vulnerable employees. Suppose, for example, that Company A is concerned to showcase its corporate social responsibility credentials. It may want to ensure that companies with which it contracts maintain proper employment standards.

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[22] Ibid 1032. See also at 1023 (Purchas LJ), 1037–1039 (Russell LJ).

[23] Andrew Robertson puts the position in the following terms: 'A duty of care may also be denied on the basis that it is inconsistent with the contractual setting even where there is no privity of contract between the claimant and the defendant' (Andrew Robertson, 'Justice, community welfare and the duty of care' (2011) 127 LQR 370, 380).

Commercial pressure may be applied by Company A to ensure that such standards are maintained. However, Company A and companies similarly situated may proceed differently if they are potentially exposed to liability in tort on account of their endeavouring to promote proper safety standards for employees. The point can be encapsulated as follows: imposing a duty of care on Company A vis-à-vis Employee may paradoxically worsen the position of employees of companies that are in a position similar to that of Company B. That is arguably a reason not to countenance a duty of care on the part of Company A. Recognising a duty of care may have adverse social consequences.

Which pro-duty factors are in play and how compelling are they? One factor to consider in this regard is that of vulnerability. In some situations, the employees of Company B will be highly susceptible to injury. Their working conditions may be abysmal, and they may have no realistic opportunity to secure safer employment. Such vulnerability is arguably a reason to impose a duty of care. However, the law affords this consideration relatively little weight. For one thing, it is clear that mere vulnerability is insufficient to establish the existence of a duty of care.[24] This follows inexorably from the starting principle that, ordinarily, no one will come under a duty of care to control the conduct of third parties. Furthermore, while passages can be found case law and literature to the effect the claimant's vulnerability is a factor to consider for the purposes of the *Caparo* test, some doubt exists as to the significance of vulnerability as a pro-duty factor. For example, Jane Stapleton argues:[25]

> 'Courts are becoming more explicitly hostile to claims of vulnerability by plaintiffs who have suffered economic loss because they have chosen to rely on the negligent advice of defendants when they had adequate means of checking the information themselves, even if not as good as the means available to the defendant. Often, but not invariably, this consideration surfaces in cases brought by commercial plaintiffs'.

A second factor that might be thought to weigh in favour of recognising a duty of care is that of control. Control has been recognised as a pro-duty factor.[26] The significance of this factor will obviously vary from case to case. Companies such as Company A might be able to exert more or less influence over companies such as

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[24] 'Even if the plaintiff could do nothing to avoid or reduce the risk of the relevant event occurring … the courts may yet deny that the defendant owes a duty of care': Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 319.

[25] Ibid 305.

[26] See, e.g., *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All ER 490 at 502 [38] (Lord Hoffmann), 504 [48] (Lord Brown of Eaton-under-Heywood).

Company B depending on the unique circumstances of each case. However, while control is a relevant factor for the purposes of the duty of care analysis, it is certainly not a trump consideration. There are countless cases in which a defendant has enjoyed significant control over a given risk of injury yet no duty of care arose. Two leading cases that illustrate this point are *Customs and Excise Commissioners v Barclays Bank plc* [27] and *Murphy v Brentwood District Council*. [28] In *Customs and Excise Commissioners*, the claimants, who were seeking to recover unpaid taxes from two companies, obtained a freezing order against the companies and gave notice of that order to the defendant bank. However, the bank failed to put in place effective measures to prevent the companies from withdrawing funds from certain accounts. The claimants brought proceedings in negligence against the bank. The House of Lords held that the bank did not owe a duty of care for numerous reasons. What matters for present purposes, however, is that the House held that no duty arose even though the bank was obviously in a position to prevent the funds concerned from being withdrawn. Essentially the same points can be made in relation to *Murphy*. In *Murphy*, the defendant council approved plans for the construction of a house. However, the plans were based on erroneous calculations with the result that the house was defectively constructed. The claimant occupier sued the council in negligence. The House of Lords concluded that no duty of care was owed. It did so although the council, since it had the power to approve or disapprove plans, was in a position to control the risk of damage that materialised.

For the foregoing reasons, it is unlikely that a duty of care would be owed by Company A to Employee on the *Caparo* test. Several factors militate against the existence of a duty and the two pro-duty factors that are of the most relevance seem to be of limited significance.

3.2. The Assumption of Responsibility Test

The assumption of responsibility test originates in the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[29] *Hedley Byrne* was a case involving pure economic

[27] [2006] UKHL 28; [2007] 1 AC 181.
[28] [1991] 1 AC 398 (HL).
[29] [1964] AC 465 (HL).

loss.[30] However, it is clear that the assumption of responsibility test is not confined to claims involving damage of that type. Thus, the test has, for example, been applied in the personal injury context.[31] It should also be noted that although *Hedley Byrne* involved a positive representation of fact made by the defendant to the claimant, the assumption of responsibility test has been extended to cases in which the defendant failed to act.[32]

It is conveniently briefly to recap the key principles that govern the assumption of responsibility test. It holds that a defendant will come under a duty of care where the defendant has (i) voluntarily assumed responsibility for the claimant's safety and (ii) the claimant relied upon that assumption of responsibility.[33] The test is applied objectively in that it is for the court to decide whether responsibility has been assumed. The parties' subjective views are not to the point.[34] An assumption of responsibility must be voluntary in the sense of being '"conscious", "considered" or "deliberate"'.[35] By and large, the assumption responsibility test will be satisfied only where the relationship between the parties is '"equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract'.[36]

The assumption of responsibility test is generally difficult to satisfy, all other things being equal. This is understandable since were the contrary the case, the general and well-established principle that no duty is owed to control third parties would be outflanked. A good and recent illustration at the highest level of the demanding nature of the assumption of responsibility test is *Michael v Chief Constable of South Wales Police*.[37] In this case, a woman was murdered by an ex-partner of hers. Shortly before

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30 The most comprehensive treatment of the decision is Kit Barker and Ross Grantham (eds), *The Law of Misstatements: 50 Years on From Hedley Byrne v Heller* (Oxford, Hart Publishing, 2015).

31 See, e.g., *W v Essex County Council* [2001] 2 AC 550 (HL); *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732.

32 See, e.g., *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384 (Ch D).

33 Lord Bingham of Cornhill explained the concept of reliance in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, 194 [14]. His Lordship said: 'reliance in the law is usually taken to mean that if A had not relied on B he would have acted differently.'

34 *Williams v Natural Life Foods Ltd* [1998] 1 WLR 830 (HL) 835 (Lord Steyn)

35 *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181 (HL) 210 [73] (Lord Walker of Gestingthorpe))

36 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 528 (Lord Devlin). Lord Bingham of Cornhill in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, 190 [4] said that the 'paradigm situation' where responsibility will be assumed is where the parties' relationship has 'all the indicia of contract save consideration'.

37 [2015] UKSC 2; [2015] AC 1732.

she was killed, the woman had called the police in order to ask for help. However, the police call handler misallocated the call's priority (it was wrongly treated as not requiring an immediate response) and the police arrived at the woman's house too late to prevent the murder. The Supreme Court held that despite the fact that the woman had called the police for help and although the police knew the identities of both the woman and the murderer, the police had not assumed responsibility to safeguard the woman's interests.

In view of the foregoing, it is obvious that it will be challenging to establish a duty of care on the assumption of responsibility test in the supply chain scenario. The courts are relatively slow to find that the test is satisfied, all things being equal. It is doubtful that anything short of a clear representation by Company A that it was accepting a duty to look out for Employee's interests will suffice to establish the existence of a duty. Two further considerations reinforce this conclusion.

First, the courts will be slow to recognise a duty on the basis of an assumption of responsibility where to do so would amount to a non-incremental extension of the law. As Lord Bingham of Cornhill put it in in *Commissioners of Customs and Excise v Barclays Bank Plc*:[38]

> 'The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be … to find that there has been an assumption of responsibility or that the proximity and policy considerations of the threefold [Caparo] test are satisfied.'

For the reasons that have been given above,[39] recognising a duty of care in the supply chain context would take the law rather a long way beyond the decisions of *Chandler* and *Thompson*.

Second, to a considerable extent the policy factors that are relevant at the third stage of the *Caparo* test bear also on whether the assumption of responsibility test is satisfied.[40] It was explained earlier why those factors point against the existence of a duty of care in the supply chain scenario.

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38 [2006] UKHL 28; [2007] 1 AC 181, 192 [7].

39 See Section 2.

40 See *Customs v Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, 216 [93] (Lord Mance)

4. Conclusion

This article has addressed a scenario that has not yet arisen for judicial determination in this jurisdiction, namely, whether a company within a supply chain might owe a duty of care to the employees of another company within the chain. It has been argued that it is unlikely that a duty of care will arise in this type of case under English law. It butts up against the foundational principle that a duty of care does not arise to control third parties. Exceptional circumstances are required to displace that starting principle. It is doubtful whether such circumstances will obtain in the supply chain context.