

Picking the piper, the payment, and tune – the liability of European textile retailers for the torts of suppliers abroad

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1. Introduction

A case involving the victims of a disaster at a Pakistani textile factory has been gaining attention recently in German media,¹ as well as in academic literature.² The defendant in the suit is a discount clothing retailer in Germany who was the production company's major buyer, and counsel for the claimants have filed the claims in the German courts. At issue are a number of key legal questions which may prove to be of broader relevance if a trend develops to try and use courts in Europe³ to increase accountability for cheap mass production further east. Chief amongst those are the competence of the court to adjudicate such actions, the applicable legal regime, and the substantive legal frameworks which will be called to arms. The present piece aims to consider the answers to those questions in light of the importance of the issues raised for European importers in the textile industry and, more generally, the importance of the common law's structures in determining the disputes. We will aim to present an outline of the institutes which may be used to facilitate claims of this sort against retailers by injured parties abroad, as well as the factual circumstances which may ultimately render liability unlikely.

1.1 The German litigation

A textile factory owned and run by Ali Enterprises in an industrial district of Karachi burned to the ground on 11 September 2012. The disaster represents the most devastating fire to occur to date at a Pakistani factory. According to eye-witnesses, the fire broke out after materials in the basement of the factory ignited. Given insufficient provision of fire alarms in that basement, the fire was only detected once its wooden ceiling was ablaze. At that time approximately 1,000 employees were in the factory, and according to official

1 See 'Rot Wie Blut', (*Der Spiegel*, 25 June 2016), online at <http://www.spiegel.de/wirtschaft/unternehmen/kik-brandopfer-aus-pakistan-verklagen-kik-in-deutschland-a-1023269.html> (12/10/16).

2 Eg *Klinger*, *Menschenrechtliche Sorgfalt vor Gericht*, *NJW-aktuell* 17/2016, p 12f.

3 The authors will focus on the European framework, drawing on the Union-level conflict of laws legislation, though naturally the problem of production disasters has broader reach (as shown by the infamous class action brought against Wal-Mart in the USA; for a brief summary: <http://www.law360.com/articles/111170/9th-circ-affirms-toss-of-wal-mart-foreign-labor-case> [12/10/16]).

reports over 260 of them ultimately lost their lives. Hundreds more were injured. This exceptionally high death toll was the result of a number of further deficiencies in the factory setup, including locked and obstructed emergency exits and a lack of adequate fire-fighting equipment on the premises.⁴ The factory produced to a considerable extent for a German clothing retailer.⁵ According to its public corporate profile, that company runs more than 3,000 branches in eight European countries and has a reputation as a leading discount retailer within the industry. Production is carried out by numerous suppliers worldwide, especially in China, Bangladesh and Pakistan. An agent usually initiated business relations with the foreign suppliers and in due course contracts were concluded between the retailer and the suppliers directly. According to news coverage and a public statement by the German retailer, it aims to create long-term business relationships with its suppliers, but, at least in the case now before the German courts, new contracts were concluded on a recurring, individual basis without any underlying relationship agreement.⁶

In its public relations, the German retailer emphasises that it takes responsibility for its suppliers and workers. A sustainability report from 2010⁷ emphasises that:

‘[l]ike most retailers, we don’t operate our own factories, but work with local manufacturers and suppliers. That’s why we are determined to ensure that anyone who, through their work, contributes to our success, does so in appropriate conditions and with full access to their rights.’

Essential to this exercise in responsible practice is an international code of conduct which the retailer requires all of its suppliers to follow. The code outlines minimum standards to be achieved and maintained in factories run by suppliers. It contains a passage as follows:

‘The workplace and the practice of the work must not harm employees’ or workers’ health and safety. A safe and clean working environment shall be provided. Occupational health and safety practices shall be promoted, which prevent accidents and injury in the course of work or as a result of the operation of employer facilities.’⁸

Whether or not these standards are met by the suppliers is monitored by the retailer through audits run by independent companies and an in-house Corporate Social Responsibility (CSR) department.⁹

4 The defendant German retailer conceded that there were extensive defects in the factory and announced that suppliers will have to guarantee the availability of fire extinguishers and emergency exits in the future. Cf *Hamburger Morgenpost*, 8 December 2012.

5 Cf European Center for Constitutional and Human Rights, ‘Der Preis der Katastrophen in den Textilfabriken Südasiens’ online at <https://www.ecchr.eu/de/879.html> (14/10/16) and ‘Zuverlässiger Lieferant’, *Der Spiegel*, 22 October 2012, online at <http://www.spiegel.de/spiegel/print/d-89234400.html> (14/10/16).

6 Cf ‘Zuverlässiger Lieferant’, *Der Spiegel*, 22 October 2012, online at <http://www.spiegel.de/spiegel/print/d-89234400.html> (14/10/16); <http://www.kik-textilien.com/unternehmen/de/presse/pressemitteilungen/unternehmensmeldungen/unternehmensmeldungen-single/date/2012/09/18/article/stellungnahme/>.

7 Cf http://kikstaging.isa-hamburg.com/unternehmen/fileadmin/user_upload_de/Kategorien/Nachhaltigkeitsbericht/Sustainability_Report_2010.pdf, p 24.

8 Cf http://www.kik-textilien.com/unternehmen/fileadmin/user_upload_de/Tschechien/COC-Englisch.pdf, p 4.

9 Cf http://kikstaging.isa-hamburg.com/unternehmen/fileadmin/user_upload_de/Kategorien/Nachhaltigkeitsbericht/Sustainability_Report_2010.pdf.

The survivors and surviving dependants of the factory fire in Pakistan are now suing the German retailer in the Regional Court (*Landgericht*, LG) in Dortmund, Germany. The action was preceded by extensive settlement negotiations. The retailer had set aside \$1 million for compensation payments and had offered to distribute that sum according to a communal fund-based procedure developed for the factory collapse in Rana Plaza, Bangladesh in 2013,¹⁰ where a relatively large number of retailers had garments produced there. In the present case, however, only one company would have been making payments and according to the claimants' representative there was a strong perception that the time-consuming procedure was a stalling tactic. Moreover, damages for pain and suffering would not have been available under the scheme. As a result, the survivors and surviving dependants abandoned the settlement negotiations and have sought relief in the German courts.

1.2 The general issue

If the claimants are successful, this German case could represent the vanguard of a broader litigation trend; it can be seen as typical of production problems. The constellation involves a powerful multinational retailer based in Europe forming supply contracts with a local producer in a problematic regulatory environment.¹¹ The retailer has advertised a personal code for ethical practice in its supply framework, a move popular across various industries for multinationals reactive to social trends concerned with ethical practice and earlier international action on production responsibility issues. Amongst others, the United Nations began paving the way for voluntary frameworks for behavioural standards and continues to promote the issue today, including through its 'Guiding Principles for Business and Human Rights' (2011).¹² Increasing action by interested lobbying groups (such as the Clean Clothes Campaign) and the stream of high-profile disasters which have reached Western newsstands are now pressing the issue further.

A very important question is being raised: under current conditions, how much of the production risk generated in the developing world can be brought to the doorstep of European retailers through the mechanisms of private law.

2. International jurisdiction

The first question to be addressed in a case such as this is whether the court in Europe (here the LG Dortmund) is internationally competent to adjudicate the claims. The answer to that question is found in European law; given the needs of the common market, the European legislator has been particularly active in the area of jurisdiction. As early as 1968 the Brussels Convention on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters was adopted by the Member States of the European Community and came into force in 1973. The Brussels Convention was subsequently amended and

10 That collapse in Bangladesh is the worst ever industrial accident to hit the garment industry. On 24 April 2013, the Rana Plaza building fell, killing 1,134 people and injuring thousands.

11 Though inadequacies in retailers' ethical audits in even the most economically developed of countries can facilitate glaring injustices, as a former slave workforce in Yorkshire could attest: 'Batley bed firm boss jailed over "slave workforce"', BBC News, 12 February 2016, online at <http://www.bbc.com/news/uk-england-leeds-35559960> (13/10/16).

12 Available online at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

was finally replaced by Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, adopted by the EC Council in December 2000. The ‘recast’ of the Regulation (hereafter ‘Brussels Ia Regulation’) entered into force on 1 January 2015.¹³

The basic rule concerning direct jurisdiction is enshrined in art 4 Brussels Ia Regulation, which provides that ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’ In essence, the Brussels Ia Regulation applies whenever the defendant is domiciled in a Member State regardless of whether or not the claimant is situated in the European Union.¹⁴ According to art 63 of the same, this also applies to companies. For the purposes of the Regulation, a company is domiciled where it has its statutory seat, its central administration or its principal place of business.

As a result, the German court is competent to deal with any claims against the retailer arising in the present litigation, and by the same token such claims arising from other production disasters in the developing world could fall to be litigated in any of the Member States of the European Union; the claim can simply follow the defendant retailers. In that sense, the Brussels Ia Regulation provides a tantalising gateway to European court systems for victims across any industry supplying the Union.

3. The applicable legal regime

The next step to be taken by the (Dortmund) court is to determine which private law regime is applicable to the substance of the claims. In order to determine this, the competent court must determine which choice of law rule applies. Then, on that basis, the court must decide which state’s private law to apply. In other words, after the court has selected the applicable choice of law rule and has made the choice between the ‘competing’ substantive states’ laws, it can proceed to determine the substantive outcome on the basis of the chosen law.

In Europe, the law applicable to tort claims has traditionally been determined by national choice-of-law rules. In some European Member States, these national rules were statutory, in others they stemmed from case law. This state of affairs was long considered unsatisfactory and, in particular during the past century, several earnest but unsuccessful attempts were made at the elaboration of a unified legal act on the law applicable to non-contractual obligations on a European level. Eventually, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)¹⁵ was enacted. The Rome II Regulation covers all non-contractual obligations in civil and commercial matters having multistate contacts that implicate the laws of more than one state. The claim of the Pakistani workers against the German retailer at hand is clearly one such case; any production disaster outside of the Union where the victims seek redress against a European retailer purchasing from the affected factory will necessarily fall within the bracket.

13 Regulation 2001/44, OJ L 2001/12, 1; the Regulation was replaced on 10 January 2015 with (EU) Nr 1215/2012, OJ L 2012/351, 1 ff. The norms considered here continue to apply under Reg 1215/2012.

14 Cf CJEU, 1/3/2005, C-281/02, *Ovusu v Jackson*, ECLI:EU:C:2005:120; 14/11/2003, C-478/12, *Maletic v lastminute.com*, ECLI:EU:C:2013:735.

15 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, OJ 2007 L 199, 40.

According to the general, default rule in art 4, para 1 Rome II Regulation, the applicable law is the law of the country in which the harm occurs, ‘irrespective of the country in which the event giving rise to the damage occurred’. Where we are dealing with production disasters abroad, the harm will occur wherever the disaster strikes. In the case at hand this is Pakistan and, accordingly, Pakistani tort law is applicable.

4. The applicable substantive rules

Due to the obvious and extensive history of Western colonialism, it is unsurprising that the legal systems in several of the important countries for textile production (where cheap labour, low regulation and beneficial trade relationships with the EU¹⁶ have enticed Western retailers) owe much in the way of tort law to a European parent, though they might equally be missing an accompanying culture of tort litigation. In India, Pakistan and Bangladesh, for example, systems of tort liability have remained relatively undeveloped since those countries gained independence.¹⁷ In the case of Pakistan, at least one recent court decision has explicitly recognised that the tort law position corresponds to a large extent to the English.¹⁸ With this in mind, it seems clear that the English legal position will be significant as at least giving a guiding understanding of the functioning of common law liability in this area, and perhaps inspiration for new developments elsewhere. For that reason, it is proposed to review English law as it applies to some of the facets of production disaster cases, retaining a core focus on the German litigation surrounding the Ali Enterprises fire in 2012 as an example for potential further litigation against European retailers.

There are three basic headings under which the tort principles will be outlined, corresponding to claims having three different basic thrusts. The first, here treated under the heading vicarious liability, relates to an attempt to establish that the retailer is liable without fault for the events following a producer’s failure to maintain safety standards. The second concerns the ordinary negligence framework and a claim that the retailer has breached a duty of care owed directly to the injured parties. The third relates to statutory recovery where the primary tort victim is deceased.

4.1 German law

Before embarking on the journey into the common law, however, it seems useful to introduce the German legal position on the topic. This will give a sense of where the German legal mind will be starting from.

16 Imports from Pakistan, for example, enjoy very favourable treatment under the EU’s Generalised Scheme of Preference – see [http://ec.europa.eu/trade/policy/countries-and-regions/countries/pakistan/\(12/10/16\)](http://ec.europa.eu/trade/policy/countries-and-regions/countries/pakistan/(12/10/16)); those from Bangladesh likewise – [http://ec.europa.eu/trade/policy/countries-and-regions/countries/bangladesh/\(12/10/16\)](http://ec.europa.eu/trade/policy/countries-and-regions/countries/bangladesh/(12/10/16)).

17 See eg M Naeem, *The Scope and Application of Tort Law in Pakistan* (dissertation: University of the Punjab 1991), 132ff (and 127f); S Narayan, ‘India’ in Stijns (ed), *International Encyclopaedia of Laws*, vol 2 (Alphen, Suppl 26, 2012) at [67]ff. In Bangladesh, the same idea has recently been raised where the Rana Plaza factory disaster was discussed explicitly; see eg S Jannat, ‘Limited Application of Tort Law in Bangladesh: Should We Be Concerned?’, *Dhaka Law Review Blog* (1 October 2014) available at <http://www.dhakalawreview.org/?p=375> (15/08/16).

18 *Khan v Haleem* (2012) CLD (SC) 6.

There is, first and foremost, no basis for a direct contractual claim between the factory workers and the German retailer. Nevertheless, third parties to a contract may assert claims against the parties to that contract under the doctrine of contracts with protective effects toward third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*). Originally, German courts developed this doctrine to overcome the narrow confines of the German tort provisions, more specifically the general restriction of recovery for negligently inflicted pure economic loss under § 823 (1) BGB. The extension of contractual protection towards third parties within the ambit of the contract applies (only) to collateral contractual duties, often including duties of protection.¹⁹ The textbook example involves a child in a supermarket with her mother. An employee negligently fails to clean the floor and the child slips and breaks an arm. There is straightforwardly no contractual relationship between the supermarket and the child. The child may sue the negligent employee in tort, but usually supermarket employees are meagrely paid and may very well not be able to pay up. The child also cannot sue the supermarket for the negligent conduct of its employee (§ 831 (1) BGB) if the principal exercised reasonable care when selecting the employee. To avoid the child (or the parents) having to bear the loss, the contract with protective effects comes into play and the duties owed to the mother (in the course of contracting; *culpa in contrahendo*) are extended to benefit the child. As a result, the child has a contractual claim against the supermarket.

The basis for this doctrine has long been disputed, and may lie in a broad interpretation of the contract in question by implying intention.²⁰ Some legal scholars argue that such claims should instead be based on the general principle of good faith in § 242 BGB.²¹ In any event, German courts have stressed time and again that it has always been a concern to avoid excessive extension of the field of protection generated under this institute. A very important prerequisite to establish such an extension has therefore always been the particular third party's need for protection (as seen above with the child). The availability of claims against the immediate employer (producer) would be fatal to any worker's contractual action against a retailer.

A claim in tort (under § 823 (1) BGB) would be equally unsuccessful, as there is no action on the part of the German retailer which would satisfy the requirement of wrongfulness (the company is simply too far removed from the rights infringements on the ground). There remains only the question whether breach of the code of conduct could produce liability under § 823 (2) BGB (for breach of a protective statute). Again the answer is negative: the code is not a relevant statute, defined in art 2 EGBGB (*Einführungsgesetz zum bürgerlichen Gesetzbuch*, Introductory Act for the Civil Code) as any 'legal rule' rendered by a parliament or other legislative body.

It might be expected, then, that a German court would approach claims raised in these production disaster situations with a degree of scepticism. In turn, it might be anticipated that this would lead to the court erring on the side of caution where the basis for a claim seems to be in any serious doubt. Realistically, a maverick decision in favour of a claimant will be unlikely. Though this may not always be the case where a production

19 For a more general outline, see B Markesinis, W Lorenz & G Dannemann, *The German Law of Obligations*, vol I (Oxford 1997), 276 ff.

20 RG 19 November 1915, 87 RGZ 289, 292; BGH 25 April 1965, [1956] NJW 1193, 1194.

21 Larenz, Anmerkung zu BGH Urteil vom 25 April 1956, [1956] NJW 1192, 1194.

disaster claim is litigated in a European Member State (some may be more generous), it is an unpromising start in a major economy and jurisdiction. It is against this backdrop that the common law analysis can begin.

4.2 Contract

A brief initial note is required on the availability of contractual actions in the situations being contemplated here. It is conceivable that there could be contractual rights arising as a result of the trading agreements entered into by parties in retail supply chains,²² but these will not be discussed here for a multitude of reasons. First and foremost, it is obvious that such rights have the potential to vary wildly across individual cases based on the particular agreements drafted (and that drafting will also better facilitate the avoidance of liability towards third party employees of the supplier in the first place). Second, contract law is better entrenched and has been codified in, for instance, Pakistan and so reference to the modern English legal position is less relevant; the appropriate analysis there involves more direct reference to local provisions. Finally, given the variety and complexity of the issues at hand it will be helpful here to maintain a focus solely on the tort issues.

4.3 Vicarious liability

4.3.1 Vicarious liability itself

Vicarious liability has been much under discussion recently, with multiple House of Lords and Supreme Court decisions since 2000 broadening and adapting the doctrine. It is worth remembering the fundamental propositions: vicarious liability is a strict form of liability for the tort of a subordinate.²³ Originally this focused on master and servant relationships, later crystallised into a rigid contract of service context, and has more recently been expanded to include relationships ‘akin to employment’.²⁴ This expansion corresponds to the development of less formal work relationships and structures and represents an urge to maintain levels of protection.²⁵ Nevertheless, the division between ‘servants’²⁶ in those relevant relationships and independent contractors for whose wrongs there is no vicarious liability has been maintained throughout.²⁷ In determining that boundary line, the real

22 Under English law through the Contract (Rights of Third Parties) Act 1999, for example.

23 The common law position is stricter in this basic proposition than German-speaking legal systems, which tend to focus on some form of fault element (generally in selection or monitoring an employee) – see eg B Kannowski, §§831–839a, 841 in M Schmoeckel et al. (eds), *Historisch-kritischer Kommentar zum BGB* vol. 3 (Tübingen 2013), nn 6, 8–12 on the historical position and cf the civil code provisions: §831 I BGB (Germany), §1315 ABGB (Austria) and art 55 OR (Switzerland).

24 See eg *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] 2 WLR 806. Cf P Giliker, *Vicarious Liability in Tort. A Comparative Perspective* (Cambridge 2010), 12 f; D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), 69f; J. Wigmore, Responsibility for tortious acts: its history (1894) 7 *Harvard Law Review* 383.

25 See eg *Cox v Ministry of Justice* [2016] 2 WLR 806, [29] ff, [55]; further H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *OJLS* 353.

26 On the terminological difficulties, see eg E Peel & J Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, London 2014), 21-002.

27 Cf J Morgan, ‘Vicarious Liability for Independent Contractors?’, (2015) 31 *PN* 225; C Witting, *Street on Torts*, (14th edn, Oxford 2015), p. 624 ff; E Peel & J Goudkamp (eds), *Winfield & Jolowicz on Tort*, (19th edn, London 2014), 21-008 ff. On the ubiquity of that distinction across other legal orders, see H Koziol (ed), *Comparative Stimulations for Developing Tort Law* (Vienna 2015), p 186.

relationships between the parties rather than their formal appearance are relevant.²⁸ Whilst formerly control was absolutely critical in determining the answer to that question,²⁹ this has been abandoned in favour of a more nuanced balancing of a number of factors in the individual case – what is sometimes referred to as a ‘composite approach’³⁰ – with the attendant increase in uncertainty accepted as in part inevitable.³¹

The factors which form the composite approach were identified by Lord Phillips of Worth Matravers in the *Catholic Child Welfare Services (CCWS)* case.³² These are: (i) whether the employer has greater means to compensate victims and should have insured against liability; (ii) whether the activity was undertaken on the employer’s behalf; (iii) whether the activity is part of the business activity of the employer; (iv) whether the employer created the risk of the tort being committed by instituting the activity; (v) whether the employee was under the employer’s control. The recent decision in *Cox v Ministry of Justice* affirms these factors, albeit noting that the first and fifth factors will generally not be of independent importance.³³ At the same time it confirmed that the approach is a general one and is not limited to the sexual assault context of *CCWS* itself. The judgment has done this, though, at the same time as reaffirming that the aim is to maintain levels of protection previously enjoyed and that independent contractors still fall outside of the scope of the liability.

On this understanding, we turn to the question of whether a retailer–producer relationship can meet those criteria and so ground a vicarious liability claim whereby the retailer is liable for the producer’s tort against the producer’s workers. Before even applying the *CCWS* approach, however, we are confronted with the fact that no English court has had the opportunity to rule on vicarious liability where the ‘servant’ in the relationship is a legal but not a natural person. To that extent a foreign court attempting to apply English principles will be flying blind. The present piece will not review the arguments for or against allowing such a claim, save to note that the issue has recently been discussed in this journal to the end that there is no real conceptual difficulty with the prospect.³⁴ As far as the *Ali Enterprises* fire is concerned, meanwhile, the issue might well receive a favourable treatment in a German court given the present, favourable Germanic position on that issue.³⁵

Presuming for now, then, the applicability of the vicarious liability regime to the production setup at issue here, we turn to the substantive issues. Can there be a relevant relationship akin to employment between a retailer and a foreign producer? There is potential as far as a claimant would be concerned on the twin questions of risk creation

28 *Cox v Ministry of Justice* [2016] 2 WLR 806, [30] f.

29 See eg *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, [36] ff; *Market Investigations v Minister of Social Security* [1969] 2 QB 173, 183; S Deakin, A Johnston & B Markesinis, *Markesinis & Deakin’s Tort Law* (7th edn, Oxford 2012), 556; C Witting, *Street on Torts*, (14th edn, Oxford 2015), 625 f.

30 Eg E Peel & J Goudkamp (eds), *Winfield & Jolowicz on Tort*, (19th edn, London 2014), 21–011.

31 See in particular *Cox v Ministry of Justice* [2016] 2 WLR 806, [28] f; *Market Investigations v Minister of Social Security* [1969] 2 QB 173, 184.

32 Above, n 29 at [35].

33 Above, n 28 at [20]f.

34 See P Morgan, ‘Vicarious liability for group companies: the final frontier of vicarious liability?’ (2015) 31 PN 276, 288 ff. Contrast eg C Witting, *Street on Torts* (14th edn, Oxford 2015), 631f, 649f. That author views the development as an unlikely one and unnecessary on an understanding of the vicarious liability principle centrally focused on the need to find a defendant with sufficiently deep pockets. The present authors wonder, though, whether even on that basis the much deeper pockets of a successful international retailer might prove important when the producer’s operation is destroyed.

35 See eg J Angyan, ‘Juristische Personen als Besorgungsgehilfen’ (2016) 138 *Juristische Blätter* 289.

and control, but integration may be decisively difficult. If we begin with the entrepreneur test of integration, we cannot but move from the starting point that the producer will be (at the very least nominally) independent. In our Pakistani example, Ali Enterprises was being run as a separate business, seems likely to have produced for buyers other than the defendant retailer,³⁶ and existed before production for that retailer reared its head. As far as risk creation is concerned, the separate existence (prior to the supply contract) of a producer independently capable of conducting the business, including for other buyers, might be thought fatal to any finding of a sufficient relationship. Whilst the impact of that argument might be ameliorated if a particular retailer is driving growth and expansion in the producer (this is potentially the case with Ali Enterprises³⁷), ultimately the inevitable interdependency of companies prospering within the same industry hardly seems sufficient.

A very high level of factual influence must be balanced out against that, with retailers in a notoriously strong position economically. In the present example, growth at Ali Enterprises seems to have been driven at least in part by the lucrative business provided by the defendant; risk is bound to increase with business booming. The retailer was influential enough to be able to introduce the problematic code of conduct into its supply contracts in the first place, and control and benefit questions cannot be seen as formalistic ideas. The limits of that must nevertheless be remembered – the spread of (or attempt to spread) ethical business practices from the retailer's perspective was effected through the ordinary scope of a supply contract and the public diffusion of standard practices does not represent any equivalent to an integration of the target enterprise into the retailer. There does not seem to be a sufficiently strong border between A and B agreeing to contract on the understanding that B has certain behavioural standards with a right in B to terminate if dissatisfied (where no control issue seems to arise) and A and B agreeing that A will have rights to monitor standards at B, make recommendations for improvements, and ultimately terminate if dissatisfied. A clear denial of the existence of a suitable relationship of control and integration would seem more appropriate and more certain than attempts to dissect individual supply contracts for some illusory hook to engage liability. Whilst the concept of accountability in the broader senses of the word would seem to have potential to draw a producer under a retailer's wing where it has promoted and imposed conduct standards on itself and suppliers, any attempt to exploit that to generate a vicarious claim would require clearer, identifiable criteria to be isolated.³⁸

In short, whilst much in the vicarious liability arena might at present be thought uncertain and flexible, on what seem to be settling as the key determinants of a relevant relationship the prospects for a successful claim by workers against foreign buyers for the torts of their employers (the producers) seem bleak. If further expansion on the relationship question did occur, of course, proving a tort on the part of the producer would seem to present no special or novel difficulties, and nor in all likelihood would the scope of employment test.³⁹

36 See the facts as presented by the European Center for Constitutional and Human Rights, online at <https://www.ecchr.eu/de/879.html> (04/07/16) and 'Zuverlässiger Lieferant', *Der Spiegel*, 22 October 2012 (online at <http://www.spiegel.de/spiegel/print/d-89234400.html> [04/07/16]).

37 *Ibid.*

38 Cf J Morgan, 'Vicarious Liability for Independent Contractors?', (2015) 31 PN 225, p 241ff.

39 Especially where recent approaches to that have seemed very flexible themselves – see eg *Mohamud v WM Morrison Supermarkets* [2016] AC 677.

4.3.2 Forms of liability for independent contractors

On the understanding, then, that most likely Ali Enterprises (and producers like it) will be classified as independent contractors (despite the liberal and expansionary attitude taken recently by the courts to relationships giving rise to vicarious liability), the focus must turn to alternative forms of liability which might be argued secondarily. Beyond the ordinary vicarious liability setup, there are still two further institutes to be noted which could seem to be of benefit to a claimant worker injured in a production disaster. Again, these are both still focused on a no-fault liability of the retailer. The first to be considered is a non-delegable duty, whereby the liability would be grounded not in the tort of the producer in the course of an employment(-like) relationship, but in the failure of the retailer itself to guarantee that care was taken in respect of the claimant workers by the producer.⁴⁰ The second is the strict liability of a principal for the torts of an agent; a liability often likewise termed ‘vicarious liability’, though the term will be avoided here for the sake of clarity.⁴¹

4.3.2.1 Non-delegable duties

It will be recalled that non-delegable duties are those which are owed personally by one party to another such that legally they can only be fulfilled by the person who owes them; performance cannot be delegated to another.⁴² In recent years, the English courts have shown a generous tendency with non-delegable duties, with a framework outlined in *Woodland v Essex County Council*⁴³ for a generalised concept in lieu of the small clusters of liability previously seen.⁴⁴ Those groupings include various statutory examples, the spread of fire,⁴⁵ and care of hospital patients. None are applicable where the duty in contemplation is that owed by a retailer to the employees of its suppliers, and any claimant in such a configuration would be left to argue under the *Woodland* formula. The criteria outlined in that case would require:⁴⁶ that there must be an existing relationship between the parties; that in the course of that relationship, one party assumed positive responsibility for the protection of the other from particular risks; and that this responsibility was by virtue of the relationship personal to the defendant.

At first glance, it is clear that non-delegable duties present a much better prospect for a claimant. The relational approach taken by the Supreme Court would seem superficially to be closer to capturing the essence of the problem where a retailer in a strong position is a step removed from actual employment of the workers on the ground. There are still problems, however, insofar as the relationship between retailer and (textile) worker is always and necessarily mediated by the producer as direct employer. If in our concrete case we again return to the simple fact that the retailer’s strength rested on an economic position relative to Ali Enterprises, manifested in certain, limited contractual rights against that company but not extending to actual control over the work environment or the lives

40 See generally P Giliker, *Vicarious Liability in Tort. A Comparative Perspective* (Cambridge 2010), 116f. An alternative conception does still view the liability as no more than an extension of vicarious liability itself (cf *ibid* at p 117) and the institutes have been termed ‘functionally identical’ (see J Morgan, ‘Vicarious liability for independent contractors?’ (2015) 31 PN 235).

41 On which cf C Beuermann, ‘Dissociating the Two Forms of So-Called “Vicarious Liability”’, in S Pitel *et al* (eds), *Tort Law: Challenging Orthodoxy* (Oxford, 2013), 463ff.

42 See eg *Woodland v Essex County Council* [2014] AC 537 at [4] per Lord Sumption.

43 *Ibid*.

44 On which see eg *Alcock v Wraith* [1991] NPC 135.

45 Spread, rather than outbreak of fire. For that reason there is no application to cases like the factory fire at hand.

46 Above, n 42 at [7] per Lord Sumption.

of the workers, at best it is hard to see how an undertaking (assuming the code of conduct may be interpreted so) could be of a broad enough scope to impose liability. The weaker the connection to the workers' circumstances, the more distant they are from the retailer's own decision making, the narrower the scope of the undertaking must be seen to be and the more difficult it will then be to establish a causal connection between any (in)action and the harm. Resting content on independent compliance reports (as our present retailer did) may then be all that can be required. Moreover, in the (probably common in such circumstances) absence of any direct contact between the retailer and the workers, the strongly personal bedrock for a liability-creating relationship again feels shaky; there is nothing like the care or custody required by Lord Sumption's formula⁴⁷. Place on it the burden of such a strict form of liability for enormous harm spread across a wide array of suppliers (the code explicitly has in mind 'anyone' who 'contributes' to the company's success⁴⁸) and the foundation will give way.

4.3.2.2 Liability for agents

Liability for an agent will be given only very short treatment here for the sake of completeness. It is a form of liability which can encompass independent contractors as well as employees and gratuitous helpers.⁴⁹ In this context, the possibility of establishing liability for an agent who is a legal person seems a little slimmer.⁵⁰

As far as the Ali Enterprises fire is concerned, agency is governed in Pakistan under the Contract Act 1872, where an agent is defined in §182 as a 'person employed to do any act for another or to represent another in dealings with third persons.' In that case, and in similar circumstances where a disaster in a production facility abroad leads to claims against retailers along the supply chain, it is difficult to see how a claim that the producer was an agent for the retailer could be maintained. Where (as discussed for vicarious liability above) the producer seems to be an entity operating for its own benefit rather than simply some integrated subordinate of the retailer, again the stronger economic position of the retailer and the requirement within contract terms that certain conduct standards be met does not seem to render the producer an agent of the other. Certainly a producer will have no capacity to contract or otherwise act on behalf of the retailer, especially in respect of its own workers.

4.4 Direct liability in negligence

With that rather bleak outlook for claimants in the strict liability arena established, then, we now turn to the question of any fault-based liability of the retailer in the tort of negligence – that is, liability for falling below the standard of care to be expected in the circumstances of a reasonable person in the retailer's position. The key issue in a negligence analysis covering cases such as the current litigation will be the existence of a duty of care in itself and this will form the focus of the present analysis. Beyond duty, there may well be difficulty in establishing breach and causation in the particular circumstances

47 *Ibid*, at [23].

48 See above, n 7.

49 See eg C Beuermann, 'Dissociating the Two Forms of So-Called vicarious Liability', in S Pitel *et al* (eds), *Tort Law: Challenging Orthodoxy* (Oxford, 2013), 466. For Pakistan, cf §185 Contract Act 1872.

50 See P Morgan, 'Vicarious liability for group companies: the final frontier of vicarious liability?', (2015) 31 PN 276, 294ff.

of individual cases. We divide the analysis below into duties of care towards the foreign workers, and duties which may be owed to other bystanders or relatives. Given a decent amount of uncertainty, the discussion on the duty issues below is necessarily tentative.

4.4.1 Factory workers

The most prominent line of authorities which seems profitable for any claimant trying to track back along a corporate supply chain to establish liability on the part of the European retailer would be the still-recent decision in *Chandler v Cape* and its ilk.⁵¹ In that case, a parent company was held liable in negligence directly to the employees of its subsidiary for breach of duty in respect of health and safety standards. Those employees had been exposed to asbestos in the course of their work despite the parent having special knowledge of the risk imposed. The court outlined four criteria which decided the case, though these were explicitly not intended to be exhaustive of the potential for liability in the area.⁵² First, the parent and subsidiary companies were engaged in businesses which were the same in some relevant respect. Second, the parent company had, or ought to have had, superior knowledge as regards the health and safety issue in that industry. Third, there was an unsafe system of work in the subsidiary and the parent company knew or ought to have known that. Fourth, the parent company knew or ought to have foreseen that employees of its subsidiary (or the subsidiary company itself) would rely on its protecting them through its superior knowledge.⁵³

The first and most obvious difficulty with applying such an analysis to the textile retailer is that the relationship is not between a parent company and a subsidiary's employees.⁵⁴ Such a relationship is not explicitly discussed by Arden LJ as critical to a finding of liability, but the entire analysis proceeds from that foundation. Certainly a very close relationship would seem to be in order – in *Chandler* itself, amongst other instances of direct control, the parent company's authorisation was required for any capital expenditure at the subsidiary, for example.⁵⁵ This is not the sort of relationship at issue in the production scenario under consideration here, and certainly not in the particular case proceeding through the German courts. The industry is not going to be caught on a claimant's hook so easily; there is no question of direct and binding control or instruction. Instead what is of course significant about the dynamic in the textile industry is simply the economic imbalance, with large retailers from more developed economies in a position to exert enormous economic influence on the rest of the supply chain. A compulsion to exercise that for the benefit of employers of the producer would represent a much more intrusive demand on the retailer's freedom. Paragraph 74 of the *Chandler* judgment also raises the possibility that implementation or maintenance failures, rather than systemic problems will militate against liability in a parent company. If implementation and maintenance of safety mechanisms remains firmly in the hands of

51 [2012] 1 WLR 3111. See also *Connelly v RTZ Corp* (No 3) [1999] CLC 533.

52 *Chandler*, above, n 51 at [80] per Arden LJ: 'Those circumstances include a situation where...'. Cf. Tomlinson LJ in *Thompson v Renwick Group* [2014] EWCA Civ 635, [33]: 'It is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than exhaustive of the circumstances in which a duty may be imposed.'

53 *Chandler*, above, n 52 at [80].

54 At least in the present case; there could conceivably be cases where the producer is in fact a subsidiary. If so, *Chandler* would obviously be directly in point.

55 *Chandler*, above, n 51 at [73].

an independent factory and in the absence of any overarching integration of management or control across the companies, therefore, a liability in the textile retailer seems unlikely by analogy with *Chandler*.

A final nail in the coffin might well be the issue of special knowledge. In *Chandler* itself, this came in the form of the scientific research of a certain Dr Smither,⁵⁶ who was associated with the defendant parent company. That variety of high-end scientific analysis might be regarded as a completely different creature from the general health and safety and fire prevention standards being contemplated in the present case. The risk involved is not a niche question of industrial disease, but a much more generalised threat to industry safety and the informational asymmetry between the retailer and producer is thus far less pronounced than between the parent and subsidiary (or its employees) in *Chandler*. In short, exploiting the *Chandler* liability in the present situation might represent less of an incremental step and more of a bold leap.

This, then, is a good point at which to deviate in the analysis and consider whether assumption of duty reasoning might instead prove more profitable. Assumption has the potential to avoid the difficulties in tying together the corporate relationship just discussed insofar as a singular undertaking could be sufficient. In this regard we turn first to *Watson v British Boxing Board of Control*.⁵⁷ It will be recalled that in that case the defendant undertook complete responsibility for the regulation of professional boxing and had special knowledge in that regard, whilst the claimant had reasonably relied on that knowledge and regulation. Approaching cases of textile workers in developing countries using this analysis, the informational asymmetry seems clearer; we are now concerned solely with that between the retailer and the individual employees and it could not be more obvious that there is particular knowledge on the part of the retailer. The nature of the undertaking itself, though, raises a number of significant concerns; we are again forced to consider the level of control available to the retailer and the particular nature of their implied responsibility. Certainly there is no extensive regulatory competence of the sort seen in *Watson* and *Wattleworth*⁵⁸ but, more importantly, it is difficult generally to support an implication that a company would ever undertake a responsibility sufficient to ground potentially extensive legal liability where the only control that company is able to exert is the economic leverage gained by the threat of terminating contractual relations (a measure which would still come at an economic cost to the retailer, it must not be forgotten⁵⁹). It is harder still to support the implication that responsibility would be undertaken to employees with whom it has no contact. Moreover, in the particular case of the Ali Enterprises fire, the code of conduct required the supplier to impose the same code on its own contractual partners, which further extends the scope of the attempt to impose standards and accordingly weakens the argument that there is any true assumption of responsibility here. In that regard any general statements pertaining to a desire to undertake responsibility or similar found in marketing or other corporate materials will be insufficient, even if they are framed as undertakings.

Naturally, a significant part of the assumption of responsibility analysis is also the requirement of reasonable reliance – here, reasonable reliance on the part of the claimants

56 *Chandler*, above, n 51 at [76].

57 [2001] QB 1134. Cf also *Wattleworth v Goodwood Road Racing* [2004] PIQR P25.

58 *Ibid.* The latter concerning the Royal Automobile Club, the governing body for British motor sport.

59 Through the potential disruption of supply and the need to source and negotiate with a replacement supplier, for example.

that the retailer would use its superior knowledge to protect their health and safety. Reliance is not always strictly necessary,⁶⁰ but those cases where clear detrimental reliance has not been shown involved small groups of potential claimants and extensive control. In *White v Jones*,⁶¹ for example, the class of persons to whom responsibility was undertaken was limited to the intended beneficiaries of the will and that responsibility fell exclusively within the obvious control of the solicitor to carry out the testator's wishes. Similarly, in *Dorset Yacht*⁶² the class of persons was limited by geographical proximity and there was direct and extensive control over the children involved. Neither of these facets can be seen where a major retailer has broad economic influence and (a series of) supply contracts with one of many independent producers, and it is difficult to identify where actual reliance might otherwise be found on the facts.

Still, then, the existence of a duty which a retailer might owe to the employees of its foreign supplier looks doubtful. Moreover, we could drive the difficulty home further by considering two much more general issues under the umbrella of the fairness, justice and reasonableness of the imposition of a duty. Is the burden being contemplated in the suggestion that a retailer could be liable for the safety practices of an independent producer simply too onerous? First, any defendant would be foolish not to try and argue, in the time-honoured tradition, on the basis of a floodgates argument that the liability being contemplated is too broad and uncertain to be just. The argument might also be thought well-founded given that any one major retailer may be involved with a very wide range of independently functioning (and potentially independently growing) producers and suppliers, across a great multitude of jurisdictions and regulatory regimes in order to feed the insatiable hunger for cheap fashions. Uncertainty over the extent of any liability would be further reinforced in a context where liability is determined not by reference to clear public criteria, such as relationships between parent and subsidiary companies, but on looser questions of factual influence. As noted above, in the *Ali Enterprises* case the code of conduct required the supplier to impose the same code. How far the economic leverage exerted by a major retailer might be thought to extend when it explicitly contracts in such a way as to broaden the influence of its ethical standards beyond the immediate contract is certainly a difficult question. It would doubtless be extreme to find the entire risk of garment production and the regulation of that industry falling on the heads of European retailers.

A second unavoidable consideration to throw into the policy melting pot, meanwhile, is the long-term effect of imposing liability on a retailer in the manner contemplated. While the immediate justice for the maimed, injured and bereaved in a single disaster might seem clear enough, the question of sustainability could be viewed in much broader terms. If a retailer's liability rests entirely on the (more or less useful) attempts it has made to promote ethical and safe practices in an environment low on regulation, then a significant disincentive to make those efforts is produced. Any market force in the opposite direction produced by consumers' ethical preferences might seem to pale in comparison.

In the event that a duty could in fact be found to be owed to the foreign workers of

60 See eg *Woodland* above, n 42 at [12] per Lord Sumption, citing *Dorset Yacht v Home Office* [1970] AC 1004 and *White v Jones* [1995] 2 AC 207 as examples where a position of particular vulnerability does away with the need to show any particular reliance.

61 *Ibid.*

62 Above, n 60.

a textile supplier, then of course a claimant must also still establish a breach of that duty and that the breach caused actionable damage. Whilst actionable damage is never really going to present difficulty in a factory disaster case (certainly not in the coming Pakistani example, where many hundreds were killed and injured by the inferno⁶³), proof of its causation will depend entirely on the particular facts and breach could prove to be a minefield. There is insufficient information at hand to analyse the last question even in the example case, but a few clear points should be stressed. The importance of the personal interests under threat and the seriousness of the potential harms in a fire safety situation of that kind would weigh heavily.⁶⁴ So too, though, would the fact that a retailer has limited precautionary measures to take; first amongst them is the drastic ‘nuclear option’ (in the right circumstances, this may be the only option) of terminating the supply agreement. Much might turn on how ethically driven the reasonable person is feeling in court.

4.4.2 Bystanders

In the unlikely event that a claim could be maintained by the factory workers, the door would, however, open to considering recovery by others involved in a factory disaster. Given the number of very extreme and devastating examples, psychological harm to bystanders must be expected; a recognised psychiatric illness (*Hinz v Berry*⁶⁵) should then be reckoned with. Unfortunately, though, assuming that the onlookers in question are not in immediate personal danger, a fact seemingly true of various of the non-worker claimants in the current case,⁶⁶ any claims will be at the mercy of the restrictive *Alcock* criteria for secondary victims.⁶⁷ Some of the more restrictive features of that duty framework often may not, though, be difficult given the type of disaster in contemplation. First and foremost, it is entirely plausible that close ties of love and affection will exist between some bystanders and victims where entire communities are supported by enormous production sites. In the looming litigation, for example, we are confronted with a disaster where family members flocked to the scene and multiple family members worked in the same, large factory. Similarly, proximity in time and space, experiencing the event with unaided senses would not represent an insurmountable hurdle under those circumstances. If the workers can force a foot in the liability door by establishing a sufficient connection to the retailer, the horror of the events will, it seems, speak for itself.

4.5 Statutory liability for death – the Fatal Accidents Act

Of course, if there may be liability on the part of the German retailer as against the workers in the Pakistani factory, then the broader possibilities for successful actions are not limited to bystander recovery. Naturally, they also extend to include claims by the relatives and dependents of deceased workers, which in England would fall within the purview of the Fatal Accidents Act 1976. Given the statutory basis,⁶⁸ this will not be given detailed treatment here, with the specifics of any rules variable across the jurisdictions we have mentioned here. In Pakistan, the relevant statute is the Fatal Accidents Act 1855,

63 See the references in section 1, above.

64 Cf eg *Paris v Stepney Borough Council* [1951] AC 367.

65 [1970] 2 QB 40.

66 See the various sources noted in section 1, above.

67 See *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

68 There being no action at common law for the death of a person, see *Baker v Bolton* (1808) 1 Camp 493.

passed shortly after the original forerunner to the present English legislation,⁶⁹ which provides for damages for the benefit of the spouse, parents and children of the deceased – Fatal Accidents Act 1855, s 1.

5. Conclusion

Applying the rules of a foreign legal system correctly and appropriately always presents a significant challenge for a practitioner. That challenge is only increased by the availability of a significant number of variations in the formulation of the claims and of course by uncertainties and controversies within the law. In the context of a search to introduce accountability into the textile industry worldwide, the common law will be called upon in what are presently some of its most changeable areas. The claims which will be in contemplation in the case about to be heard in Dortmund will face numerous obstacles and may be hanging from the slim possibility of the German court taking an active and particularly sympathetic approach.

What is nevertheless certainly clear is that the meaning and operation of industry codes of conduct or ethical conduct measures are not necessarily apt to achieve what might be taken as their obvious purpose. The present case is one to watch for practitioners interested in the potential development of a new international line of liability, as well as for academics and comparatists interested in the performance of and treatment given to English liability rules in a German court in this unusual new context.

The case will at the very least also serve to highlight the weaknesses in legal recourse for victims of production disasters hoping to impose responsibility right in the engine room of exploitation – retail in the West – and expose an awkward tension. Driving up the costs of retailers' ethical intervention measures by seizing upon them to attach liability in damages may do little to resolve the underlying problem of regulatory failure. By moving production abroad, retailers still have the freedom to pick the regulatory piper's tune. In structuring their relationships to ensure distance, they are also likely one way or another to pay that piper a price set only by their own ethical whims.

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⁶⁹ The Fatal Accidents Act 1846, termed Lord Campbell's Act.

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