

Legal Opinion on English Common Law Principles on Tort

JABIR AND OTHERS V TEXTILIEN UND NON-FOOD GmbH

7 December 2015

I. GOVERNING LAW – GENERAL PRINCIPLES

1. The governing law in relation to the tort claim by *Jabir and others v KiK* for damages for personal injury and death is the law of Pakistan (Art 4 Section 1 of Regulation (EC) No 864/2007). Principles of the law of tort in Pakistan are principally derived from the English common law. Pakistani courts consider English cases as persuasive authority particularly in tort cases.¹ The English common law of tort is a body of legal rules developed in decided cases. There is some legislation in specific fields, but the grounds of claim in the instant case are governed entirely by the common law. There is a strict doctrine of precedent according to which the decisions of senior courts bind lower ranking courts. The most senior court is the Supreme Court of England and Wales (which replaced the House of Lords in 2009) and for that reason the following opinion draws substantially upon Supreme Court and House of Lords' judgments. Apart from the rare occasions on which previous decisions are overruled, it is normal for common law courts to add to the body of precedent by drawing on existing principles and developing them, often by use of analogies, in order to deal with fresh sets of facts. It is these developments that will frame several of the central points in the following analysis

2. The discussion will sometimes focus on separate speeches by the judges in the same case. This is common practice, as it is those dicta which, through a process of citation and elaboration, lay down the legal rules. Academic writers are rarely cited by the courts.

3. The following discussion will address each head of claim. An initial point, however, concerns a general feature of this case. It deals with the responsibilities of purchasers of goods from suppliers in situations in which there is not the 'arm's length' relationship characteristic of most such commercial situations. Instead, KiK is a purchaser that a/ has declared a commitment to seeing its suppliers' goods produced according to certain standards aimed at securing the welfare of the latter's employees, b/ is in a position of significant power over the supplier enabling it to make its standards prevail if it takes steps needed to do so, and c/ is able to use that influence to improve safety in ways that English law has traditionally looked to as a reason for requiring companies to take on responsibilities in situations analogous to those in this case. The arguments below, it is submitted, fit precisely this aim of English law. This particular type of purchaser/supplier relationship is sufficiently similar to those in which the courts have in the past found corporate civil liability to exist – and the

¹ M Lau, 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract' 1 *Y.B. Islamic & Middle E. L.* 3 1994, at p.10

inclusion of this case within that category would advance English courts' declared intention to fix the boundaries of liability in a way that secures justice and fairness.

II. THE NEGLIGENCE ACTION

4. Overview: The legal claim against KIK is not based upon an allegation that their positive negligent act caused death and personal injury; rather the claim is that KiK failed to do its share to prevent the harm suffered by Ali Enterprises ('AE') employees in breach of a legal obligation to secure a healthy and safe working environment. The employees of AE seek to establish that KiK owed them a direct duty of care to procure a healthy and safe working environment. In the terminology of classic principles of English common law, claimants in this case seek to render KiK liable for the consequences of an omission to act. While the principles of English common law hold that there can generally be no liability for an omission (or non-feasance), there are significant exceptions to this principle. The House of Lords has recognized this in *Smith v Littlewoods Organisation Ltd.*² Lord Goff observed in that case that there are exceptions to the omission principle including situations in which the duty of care arises from a relationship between the parties which gives rise to an "imposition or assumption of responsibility".

5. This assumption of responsibility can reach so far as making the defendant answerable for damage caused by a malicious third party, if the latter was able to take advantage of poor factory safety that the defendant shared a responsibility to provide. Thus, even if the fire in this case was due to arson (indicated in the evidence as a possibility), this would not alter the responsibility of KiK for failing to help ensure that facilities were in place that would have limited the damage done by the act of arson. (see below, para 36 for more on this point) This will only be so, however, if it can be established that there was in place an assumption of responsibility towards the victims by the defendant. The following discussion under the heading 'Proximity' will establish that there has been an assumption of responsibility by KiK to the employees of AE such that a duty of care in negligence has been established. The duty of care so created required KiK to reasonably satisfy themselves that the building was safe for the functions carried out within it, the safety considerations including, but not limited to: appropriate building construction, adequacy of emergency exits and equipment, as well as appropriate health and safety training for staff the lack of which resulted in a large loss of life and personal injury. In order to establish that the claimants have a claim in the tort of negligence, they must establish three elements: (i) a duty of care owed by KiK to the claimants to procure a safe and healthy working environment; (ii) a breach of the duty of care; and (iii) that the breach caused the damage suffered by the claimants.

6. The three stage test set out in *Caparo v Dickman* is commonly employed to determine whether a defendant owes a claimant a duty of care.³ The three stage test requires the claimant to

² [1987] AC 241.

³ See generally *Clerk & Lindsell on the Law of Torts* (eds M Jones and A Dugdale (Electronic Resource), 20th ed, London, Thomson Reuters Chapter 8, section 2.

establish that (i) the harm was foreseeable; (ii) proximity of relationship between claimant and defendant; and (iii) that it is fair, just and reasonable that the law should impose a duty of a given scope on one party for the benefit of the other (per Lord Bridge). However, while the three stage test is commonly cited and much relied upon, there is a further principle to be found in the *Caparo* decision which is relevant to this case: the recognized need to develop the law incrementally and by analogy with previous cases.⁴

7. The Supreme Court has recently approved the analogical approach in *Michael v The Chief Constable of South Wales*.⁵ Lord Toulson JSC (‘Justice of the Supreme Court of the United Kingdom’) (with Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge in agreement) stated that: “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”.⁶ It is correct to observe that there is no English precedent which establishes that a purchaser of manufactured goods owes a duty of care in negligence towards the manufacturer’s employees. However, the common law does not stand still and is most certainly not set in stone. Many of the decided cases on which this submission directly relies have developed the law in explicit recognition of changed social conditions, changed commercial and industrial practice, and changed social perceptions of right and wrong (see, e.g. *Viasystems (Tyneside) Ltd v Thermal Transfer et al* [2005] EWCA Civ 1151 para 79 per Rix LJ (‘Lord Justice’) and *Woodland v Essex County Council* per Baroness Hale JSC).⁷ This characteristic of the tort of negligence is particularly salient in this case, as the special circumstances of *Jabir* coincide with the circumstances of past cases, even though they are not identical.

A. DUTY OF CARE

Foreseeability

8. The harm suffered by the claimants was the foreseeable consequence of KiK’s breach of duty. KiK’s claims not to have been aware of the defects of safety in the factory strain credulity and the Auditor it appointed most certainly was aware of the defects. For the reasons given in Parts III and IV below, this knowledge, and the defective way in which it was recorded, are either imputable to the respondent vicariously, or the result of the respondent’s failure to fulfil its non-delegable duty of

⁴ (1985) 60 ALR 1 at 43-4.

⁵ [2015] UKSC 2.

⁶ *Michael* at [102].

⁷ See para. 37 below.

care. In addition, direct knowledge by the respondents was inescapable. The affidavits⁸ from survivors of the fire indicate that KiK personnel were present in the factory on several occasions and it is reasonably to be expected that even if they confined themselves to commercial issues, as claimed, they would have noted egregious defects in the construction of the factory, including the barred windows and inadequate fire exits which meant that when fire broke out the sheer number of employees led to many people being overwhelmed by fire and smoke before they could exit the premises. Failure to notice these matters is, as commonly referred to, “turning a blind eye” to the obvious. In addition, the defendant was aware, or should have been aware of, the history of fires at the factory and the need therefore to ensure that the emergency exits were adequate and in good order, that fire alarms worked, as well as there being the need to ensure adequate fire safety equipment and training.

Proximity

9. Proximity of relationship between the claimants and the defendant is based upon the fact that, for the reasons that are developed below, KiK assumed a responsibility for the health and safety of the AE employees. It is well-settled that there may be a duty of care where there has been an assumption of responsibility toward the claimant (see Lord Goff in *Smith v Littlewoods*, referred to in para. 3 above) or where the defendant has created a source of danger. An assumption of responsibility may arise through a contractual obligation (*Stansbie v Troman*, cited with approval by Lord Goff in *Smith v Littlewoods*) but this is not required (see *Chandler, Watson and Perrett*, discussed below). The requirement for proximity of relationship (the second element of the three stage test in *Caparo v Dickman*) will be fulfilled where it can be shown that the defendant has assumed responsibility to the claimant. It is noteworthy that the terms ‘proximity’ and ‘assumption of responsibility’ may be used interchangeably by the courts; the labels themselves are not the important thing. As Lord Roskill said in *Caparo* (also cited in Uzair Karamat Bhandari’s opinion (the ‘Bhandari Opinion’) at para. 58), there is no simple formula or touchstone to which recourse can be had to establish a duty of care... at best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases. In those cases which conclude that a voluntary assumption of responsibility has been recognised, the finding has been that the defendant has so conducted him/herself that the claimant is entitled to rely upon the defendant in relation to the subject matter of the duty created. This opinion will establish that KiK’s conduct entitled the employees of AE to rely on KiK to procure a safe and healthy working environment. Furthermore, decided cases establish that where a defendant has effective control over an activity, then a duty of care may be recognised in relation to aspects of that activity. In many cases, the conduct of the defendant that establishes an assumption of responsibility will include the assertion of effective control over an activity (see for example the regulation of safety

⁸ Affidavits of Aleem Ahmed and Mehmood.

of boxing in *Watson*, below in para. 17). The following discussion will: (i) respond to arguments made in the Bhandari opinion that are relevant to proximity; (ii) analyse jurisprudence which provides appropriate analogies for the present case, in particular to establish the basis upon which an assumption of responsibility has been recognised; and (iii) to apply those principles to *Jabir*.

10. The Bhandari opinion states (at para. 70.5) that it is difficult to compel a third party to act or to do something so as to avoid harm to the plaintiff, and that therefore the respondent cannot be held responsible for failing to require AE to improve its standards. To insist that the respondent compel AE is, the argument goes, in effect to attribute to it legal powers of compulsion that it does not possess – and which are the prerogative of the state alone to impose or which should be secured by contract. It is submitted that this wrongly identifies the type of capacity to compel that KiK exercised over AE. As indicated below, the power to compel AE to improve its safety provision came from i) KiK's *de facto* ability to exert decisive pressure by ceasing to buy the large amounts of output from the factory, or ii) KiK's *de jure* ability to claim breach of a central condition of the Code of Conduct incorporated into the several commercial contracts between it and AE. This is, it is submitted, the only type and extent of compulsion that is legally required of a company in the position occupied by KiK.

11. Furthermore, if a company in the position of KiK was said not to owe to relevant victims an obligation to use the *de facto* sanction of ceasing to do business at its disposal in order to improve the behaviour of a company in the position of AE, then this in effect removes a duty of care from all purchasing companies. It is true that such companies do not have the legal power that states have to issue orders to suppliers to behave in a particular way. However, it does not follow that such companies have no powers to use the sanctions they do possess, *de facto* and *de jure*, coupled with an obligation to use those powers appropriately when they are deemed to meet the requirements of the special position described by the terms 'assumption of responsibility'. There are now several streams of authority in English law which demonstrate the willingness of the courts on appropriate facts to recognise a duty of care in favour of third parties where there has been an assumption of responsibility. An assumption of responsibility does not mean that a person knowingly and deliberately accepts responsibility. All it means is that the law recognises a duty of care.⁹ The following discussion will set out key features of cases which bear strong analogies with the present case. It should also be noted that the decided cases indicate that once there has been the assumption of responsibility, there is a duty on an enterprise in the position of KiK to actively intervene to prevent the damage that occurred. The courts will again look to the *de facto* – and not just *de jure* - position of power that KiK has in relation to AE and ask itself what would have happened had the defendant intervened to insist on a change in safety practice.

⁹*Phelps v London Borough of Hillingdon* [2001] 2 AC 619 at 653f-654e, per Lord Slynn. See also Arden LJ in *Chandler* citing *Customs & Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181.

12. The Court of Appeal in the UK has recently dealt with this point in *Chandler v Cape Industries Plc.*¹⁰ In that case, a parent company was held to have a duty of care to an employee of its subsidiary, and a duty to intervene in order to fulfill that duty, where the employee had been made ill by asbestos dust on the subsidiary's premises. The Court applied the following criteria in finding that the duty of care was broken: (1) the businesses of the parent and subsidiary were in a relevant respect the same; (2) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work was 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. The Court of Appeal found the parent company liable for failure to intervene to correct its subsidiary's unsafe practice even though the parent had no *de jure* power, simply on the basis of being the parent company, to order its subsidiary to act. It was instead a matter of seeing what, *de facto*, had been the policy towards health and safety adopted in the relationship between the two companies, and of seeing where the lines of influence ran, and that could vary from company to company. When and if such influence and focus on health and safety is lodged in part in the parent company then, as the Court put the point, "... at any stage it (the parent company) could have intervened and Cape Products (the subsidiary) would have bowed to its intervention. On that basis ... the Claimant has established a sufficient degree of proximity between the Defendant and himself." (per Arden, LJ at para 75). The same could be said of KiK in relation to AE, despite the fact that the latter was not a subsidiary but rather a supplier subject to the *de facto* power of and integrated into the links of production and sale organized by the purchasing company – factors elaborated on below.

13. The Bhandari opinion describes cases such as the present case and *Chandler* as 'double omissions' (at 70.5) – in a sense they are, as claimants seek redress essentially from one body which has failed properly to do (KiK) that which it was under a duty to do in order to ensure that another party acted properly/failed to act improperly (AE/ UL (previously STR(CSCC)), based in Illinois, USA). However, contrary to the implication in the Bhandari opinion, this does not mean that liability cannot be established upon well-established common law principles.

14. *Chandler* is clearly distinguishable due to the lack of a corporate structure relationship between KiK and AE. However, the fact that Arden LJ states that the case has nothing to do with piercing the veil demonstrates that the corporate structure in itself is not relevant to the assumption of responsibility. KiK was in a position similar to that of the parent, Cape Plc.: it had made a commitment to the health and safety policy to be followed by the supplier (AE); it had enough potential influence over the supplier making it able to fully implement its standards had it wished to; it had, via its auditor, specialist knowledge of the criteria for distinguishing adequate from inadequate factory safety provisions which AE did not have; and it was in a line of business that overlapped with that of AE

¹⁰*Chandler v Cape Industries Plc* Court of Appeal, [2012] EWCA Civ 525

sufficiently to make it fair that its knowledge and experience should be brought to bear on the improvements sought.¹¹ The joint effect of this superior knowledge of current safety criteria, taken together with its failure (alone and via its Auditor, as per the argument in Sections III and IV below) to intervene to rectify working conditions, created an environment in which AE relied on KiK's guidance and was encouraged to continue its workplace practices due to the absence of pressure from KiK.

15. It should be noted that the Court in *Chandler* does not insist that the parent company have a monopoly over health and safety standards before responsibility arises. The subsidiary in *Chandler* also had its own health and safety committee and made its own decisions on these matters. However, the High Court, with which the Court of Appeal did not disagree, insisted that even if the parent company did not decide on all aspects of health and safety policy, it retained enough ultimate control over the relevant features of that policy to give rise to a duty of care.¹²

16. In the subsequent case of *Thompson v Renwick*¹³ the Court of Appeal distinguished *Chandler*. The relevant grounds for present purposes holding against a duty of care in *Renwick* were that the parent company in question was simply a company holding shares, and not engaged in the same line of substantive business as the subsidiary. The Bhandari opinion [paras. 57 and 63] aims to distinguish *Chandler* from the present case, and to align it to *Renwick*. The distinctions it draws are, with respect, misleading. It claims that KiK was, like the Renwick Group, a company that was not in the same line of business as was AE, and that KiK had no superior knowledge about health and safety in the sense called for by the Court in *Chandler*. The two criteria are related: the more the parent company's activities overlap with those of the company over which it has significant potential influence, the more it is likely to have relevant knowledge of best practice in the relevant line of business. This was true of KiK. As a company of wide experience in the sector¹⁴ it was in a position to evaluate good practice using criteria rich in detail as compared with that available to AE alone. It is not enough to cite the provisions of Pakistan's statute law on health and safety, as the benchmark for adequate knowledge. To know whether or not and to what degree the statutes have been violated calls for knowledge that an experienced auditor is likely to have well in excess of that of AE *per se*. The facts of our case therefore show significant overlap with those in *Chandler*.

17. The following discussion identifies key features of English authorities which bear strong analogical relationships with the present case and which support the recognition of a duty of care in *Jabir*. In *Watson v British Boxing Board of Control*,¹⁵ the claimant, a professional boxer, sustained head injuries in a fight regulated by the defendant board. He brought an action against the board on

¹¹This corresponds to the criteria set out by the Court of Appeal (ibid at para 80).

¹²*Chandler v Cape Industries Plc* High Court, [2011] EWHC 951 para 59.

¹³[2014] EWCACiv 635.

¹⁴KiK's response to the claim, Section I (4)(a) at p.7.

¹⁵[2001] 2 WLR 1256.

the basis that the board was under a duty to see that all reasonable steps were taken to ensure that he received immediate and effective medical treatment should he be injured and that the board was in breach in failing to provide immediate resuscitation at the ringside. The Court of Appeal held that there was sufficient proximity between the claimant and the board to give rise to a duty of care. The board was a body with specialist knowledge giving advice to a defined class of persons in the knowledge that that class would rely upon that advice in boxing contests and the claimant in fact relied on the board to exercise skill and care in ensuring his safety during the fight. It should be noted also that compliance with the Board's advice was mandatory. Furthermore, the claimant belonged to a class of persons within the contemplation of the defendant and the defendant was involved in an activity over which it had complete control and which would be liable to result in injury if reasonable care were not exercised.

18. In the case of KiK, there are a number of elements that arguably establish proximity through an assumption of responsibility for the safety of KiK employees as well as control over the working environment and there is also reliance (which need not be explicit) by the employees of AE. The desire of KiK to exercise control over all elements of the supply chain is acknowledged in the *KiK Sustainability Report 2010*. The Report states (at p 13) that: "As a retailer that imports its products directly, we initiate, organise and oversee the flow of goods between Asian production sites and our stores in Europe. We commission the manufacture and production of goods, organise their transport and operate over 3000 stores in six European countries. We are responsible for more than 20,000 employees in Europe, people who we employ directly, as well as those workers involved in producing goods ordered by us in their respective countries. It is therefore logical and economically prudent for us to design processes that make the best possible use of resources, to define social and ecological standards, and adhere to them, and also to assume social responsibility above and beyond our core business activities". The essential element of "control" sufficient to import a duty of care in negligence is evidenced by the following:

- It is argued in the Bhandari opinion that the Code of Conduct reflected a moral responsibility and had no legal force. In fact each purchase order constituted a separate contract which incorporated the Code of Conduct and required that a clean and safe working environment should be provided. Apart from the fact that the Code terms are incorporated into each purchase order, the language of the Code is consistent with an intention to create legal relations. It should be noted also that KiK itself intended that the Code of Practice should have binding force. In the *KiK Sustainability Report 2010*, the company states: "Like 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. To create a binding basis for all our commercial relationships, in 2006 we developed an international Code of Conduct, aligned with SAI's recognised SA8000 standard and comparable with the BSCI code of conduct".

- Bhandari states (para. 11) that KiK “requests” suppliers to comply with the Code. In fact the Code stipulates that “[KiK] terms and conditions rest upon this code of conduct. It is the basis for our working relationship ... The supplier shall guarantee the observation and protection of these regulations”. Under the paragraph of the Code of Conduct headed ‘Control’ it states, ‘KiK strictly demands that all business partners undertake convincing efforts to reach compliance’. A strong analogy can be drawn between the conduct of KiK regarding the manufacture of clothing by AE and the British Boxing Board of control regarding those participating in the sport of boxing in *Watson* (above); in each case the parties have made mandatory provision for the regulation of safety of those taking part in the relevant activity.- The Code states that for the purpose of controlling performance, KiK or an authorised third party may at any time and without further notice inspect its business partners’ and their subcontractors’ sites. The requisite element of control over the operations at AE was thus effected through the contract terms, the programme of audits and Corrective Action Plans (‘CAPS’), visits by KiK representatives (especially those responsible for CSR) and the ultimate sanction for non compliance which would be termination of the business relationship. As the Bhandari opinion states (at para 11) the only legal sanction possible in the case of non-conformity with the Code of Conduct was cancellation of the order and discontinuance of the business relationship. This means that the obligation to comply with the Code was a condition (the most serious form of contract term) of each purchase order contract. Thus, the language in the Code is absolutely consistent with a legal obligation rather than moral expectation.

- Control over AE and AE employees was also effected as a consequence of the volume of orders that were placed with KiK. According to KiK’s audit reports 75% of the output at AE was attributable to KiK. The levels of overtime reflected the intensity of demand and could arguably have compromised safety.

19. It is not necessary for a duty of care to arise in favour of AE employees that they should have knowingly relied upon KiK, either explicitly or implicitly. In *Watson*, Lord Phillips in discussing the whether the beneficiary of a duty of care should consciously rely upon the duty bearer stated: “I do not consider that a conscious reliance by the patient on the hospital to exercise care is an essential element in this duty of care”. He stated that, “It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B’s physical safety becomes dependent upon the acts or omissions of A, A’s conduct can suffice in such circumstances to impose on A a duty to exercise reasonable care for B’s safety. In such circumstances A’s conduct can accurately be described as the assumption of responsibility for B, whether “responsibility” is given its lay or legal meaning”. There are other examples of assumptions of responsibility towards third parties in the absence of reliance or even awareness of the obligation.

20. In *White v Jones*, which concerned the assumption of responsibility by a solicitor to the intended beneficiary of a will, the beneficiary did not “rely” upon the solicitor to discharge his duty of

care. In the words of Lord Browne-Wilkinson, “in the case of a duty of care flowing from a fiduciary relationship liability is not dependent upon actual reliance by the [claimant] upon the on the defendant’s actions but on the fact that, as the fiduciary is well aware, the plaintiff’s economic well-being is dependent upon the proper discharge by the fiduciary of his duty the beneficiary is wholly dependent upon his carefully carrying out his function”.¹⁶

21. “Control” over a third party is a key feature in assumption of responsibility cases. Another example of control being a key feature is *Perrett v Collins*¹⁷ applied by the CA in *Watson*. This was an action by a passenger who was injured in an aircraft accident, allegedly caused by the un-airworthy state of the aircraft, against an inspector who had certified that it was fit to fly. Under the terms of the Air Navigation Order 1989 the aircraft could not lawfully fly unless such a certificate had been issued. Hobhouse LJ said that the inspector owed a duty of care to potential passengers to use reasonable care in inspecting the aircraft and issuing the certificate. He said that in respect of claims for personal injury there was now no difference in principle between liability for negligent statements and liability for other forms of conduct. The question was the degree of control and responsibility which the defendant had over the situation which involved potential injury to the claimant: “Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury.”¹⁸

22. In *Watson*, Phillips LJ recognised that no case had been cited to the court where a duty of care had been established in relation to the drafting of rules and regulations by the governing body of a sport and “which have governed the conduct of third parties towards the claimant. There are, however, authorities dealing with advice given to third parties that foreseeably resulted in injury to the person or property of the claimants. [The first instance judge] equated the formulation of rules and regulations with the giving of advice”.¹⁹ Phillips LJ cited in support the case of *Clay v AJ Crump & Sons Ltd*²⁰ in which a building worker was injured when a wall collapsed upon him. The wall had remained standing because the architect employed to supervise the works had failed to advise that it was dangerous and should be demolished. In answer to a claim by the workman, the architect argued that his only duty was the contractual duty owed to the owners of the building. This argument was rejected on the basis that the architect must reasonably have had the plaintiff in his contemplation when he prepared plans and made arrangements for the work to be done. The employees of AE were the foreseeable victims of KiK’s breach of duty to ensure a safe working environment.

¹⁶ [1995] 2 AC 207.

¹⁷ [1998] 2 Lloyd’s Rep 255.

¹⁸ [1998] 2 Lloyd’s Rep 255.

¹⁹ *Watson* at [59].

²⁰ [1964] 1 QB 533.4

23. *Watson and Perrett* can be contrasted with *Sutradhar v National Environment Research Council*. Here, the British Government commissioned the British Geological Survey to test deep irrigation wells in Bangladesh. The tests could identify toxic elements in the water but not arsenic. The claimant suffered arsenic poisoning after he drank water from a well that had been covered by the survey. He claimed damages on the basis that the defendant had breached its duty to test for arsenic. The court held that the necessary relationship of proximity was absent, as BGS had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh. Nor was there any statute, contract or other arrangement that imposed on BGS responsibility for ensuring that the water was safe to drink. The duty of care depended upon a proximate relationship with the source of danger, namely the supply of drinking water in Bangladesh. Lord Hoffmann described the claim as ‘hopeless’ and stated that: The fact that one has expert knowledge does not of itself create a duty to the whole world to apply that knowledge in solving its problems ... BGS therefore owed no positive duties to the government or people of Bangladesh to do anything. They can only be liable for the things they did ..., not for what they did not do”. The point in *Sutradhar* is that the essential indicators of ‘proximity’ were missing; there was no “control over” or “responsibility for” the provision of safe drinking water. In the case of *KiK*, we see clear elements of both assumption of responsibility and control sufficient to establish a duty of care in negligence.

24. The Bhandari opinion relies upon case law from the United States of America. The governing law in the present case is the law of Pakistan which is based upon the English common law and follows case law from England as persuasive authority. Case law from the USA, however, is not considered persuasive in Pakistan.²¹ The Bhandari opinion seeks to argue that the case of *Doe v. Wal-Mart* is “particularly instructive and deals with most of the issues raised in the instant case”. *Doe v. Wal-Mart* raised different issues and is not a close analogy with the present case. In *Wal-Mart*, the claimants sought to enforce a code of conduct included in Wal-Mart’s supply contracts. The case was a class action brought by suppliers’ employees from a number of different countries. The claim did not allege that any damage that would be recoverable in the English tort of negligence had been suffered and the claim in tort would have been struck out under English law on that basis alone; duties of care according to English common law are recognised in relation to types of harm, with the courts most prepared to recognise a duty of care where physical harm has been suffered as is the case in *Jabir v KiK*. In *Wal-Mart* no harm that is cognizable in negligence was claimed to have been suffered. Furthermore, the factual matrix is entirely different from the instant case. In the present case, there was a proximate relationship between the claimants and the defendant giving rise to an assumption of responsibility; while the code of conduct contributes to evidence the assumption of responsibility, there were other factors referred to in paragraph 18 above namely: the audits, the CAPs, visits by

²¹ M Lau, ‘Introduction to the Pakistani Legal System, with special reference to the Law of Contract’ at p. 11 citing a decision from the Lahore High Court, *S. M. Ilyas & Sons Ltd. v. Monopoly Control Authority, Islamabad* PLD 1976 Lah 834; and *Carl Zeiss Stiftung v. Budeck* PLD Kar 276 at 304.

KiK staff all of which induced reliance by AE and its employees upon KiK, as well as the intensity of KiK's level of demand met by AE. Thus, the terms of the code of conduct are part of a factual constellation that demonstrates the defendants' assumed responsibility towards the claimants. It should also be noted that the fact that there was a history of fires at the factory rendered the occurrence of further fires "highly foreseeable" and this in itself according to US case law may conduce to the recognition of a duty of care in "third party intervention" cases (see *Delgado v Trax Bar & Grill* 36 Cal.4th 224 (2005)).

It is 'fair, just and reasonable' to acknowledge this duty on KiK

25. The third factor required by *Caparo v Dickman* is that the recognition of a duty of care should be fair, just and reasonable. In many cases this element can be seen as the consequence of proximity of relationship (*Chandler, Watson*). It is argued that recognition of a duty of care on facts such as this would promote safer working conditions for vulnerable workers who are exposed on a daily basis to hazardous working conditions. As will be seen below, English courts focus on the way in which fixing a duty of care on companies is a method not just of providing compensation to victims of accidents that could have been prevented with the right supervision, but also of proactively preventing such accidents. This has become a central concern of judicial policy in the UK concerning commercial companies and other institutions. KiK is a corporation with enormous global reach; it deals with over 500 suppliers and its net sales in 2013 were over US\$2 billion (para 6 Bhandari opinion). However, as the Sustainability Report states, KiK does not manufacture anything itself; while knowing intimately all aspects of the business from production to sales, it has outsourced entirely its manufacturing to countries in which overheads are lower than they would be in Germany. Given the features of, and risks created in, that outsourcing, of which the details of this case are a central example, it would conform with the established policies of English courts to reduce those risks to the vulnerable that the duty of care encapsulates. See, for an analogous concern to use the instrument of vicarious liability to induce enterprises and other institutions to protect the vulnerable the statements by the Court of Appeal in *JGE vs The Trustees of the Portsmouth Roman Catholic Diocesan Trust*²² per Lord Justice Ward at para 47.

26. Furthermore, it is important for KiK's business reputation and consumer confidence in the sourcing of the products that such businesses are seen not to exploit workers in less developed countries and it is for that reason that they undertake obligations towards the employees of their suppliers. It is the undertaking of responsibility as evidenced by the conduct described above that reassures the consumer and fosters the consumer confidence in the products that is so vital to this type of business.

²²[2012] EWCA Civ 938

27. It is therefore entirely fair, just and reasonable that KiK should be held accountable for failings in the supply chain over which they have taken effective control.

28. The policy reasons for recognising vicarious liability (considered below in Part IV) which were identified by Lord Phillips in *Various Claimants* apply with as much force to the relationship between KiK and AE employees and the question of whether it is fair, just and reasonable to recognise that KiK owes a duty of care in negligence to AE employees: namely, (i) KiK is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being undertaken by AE on behalf of KiK; (iii) as this opinion argues (see para 50 below) the employees (AE's) activities are likely to be part of the business activity of the employer; (iv) through its relationship with AE, and the control of the working environment, KiK has created the risk of torts being committed by AE and its employees; (v) the employees of AE are, to a greater or lesser degree, under the control of the KiK."²³

The "Floodgates" argument

29. In discussing the third of the *Caparo* criteria and whether it is fair, just and reasonable that a duty of care should be owed by KiK the Bhandari opinion refers at para 70.3 to the "floodgates" argument and fears of indeterminate liability. Bhandari cites in support a quotation from *Clerk & Lindsell on Torts* (21st ed.) which is not applicable or appropriate in the present case. In fact, the Clerk & Lindsell discussion refers to cases of claims for pure economic loss and nervous shock (often brought by secondary victims i.e. witnesses to shocking events), each of which are types of claim with the potential for "ripple" effects and in which courts are concerned about the "floodgates" of liability (that is indeterminate liability). In contrast, the claim in KiK is for physical injury. An assumption of responsibility will more readily be recognised where the injury suffered is physical and where there is no threat that the burden of liability may be disproportionate to the conduct involved. The classic example of claims that may be rejected in part due to fears of indeterminate liability are claims for pure economic loss, that is loss which is not consequential upon physical damage (see, for example the claim for lost production at a factory due to the negligent cutting of a cable in *Spartan Steel and Alloys Ltd. v Martin & Co Ltd*²⁴). In contrast with cases like *Spartan Steel*, the KiK claim is brought by a clearly limited and defined class of claimants who suffered physical injury rather than pure economic loss. Case law demonstrates that English courts are generally inclined to recognise duties of care where the injury suffered is physical, even in omissions type cases.

B. BREACH OF THE DUTY OF CARE

30. Having established that a duty of care was owed by KiK to the employees of AE, it is necessary to establish that the duty was breached. The relevant duty was a duty to procure that the working

²³*Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at [35]

²⁴ [1973] QB 27.

environment was healthy and safe. This KiK failed to do as manifested by the failure to ensure adequate emergency exists, adequate fire alarms, safe building construction and that workers received appropriate health & safety training. The standard of care applied is the reasonable man. The classic test is “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do” (*Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784 per Alderson B).²⁵

31. Employers can rely on a recognised practice to show that they have not been negligent in failing to take steps to avoid injury to their employees unless practice is clearly bad. Thus, the fact that a defendant has acted in accordance with common practice is not necessarily a defence, if the act is dangerous.²⁶ See *Morris v West Hartlepool Steam Navigation Co. Ltd*²⁷, where a seaman fell into the hold through an uncovered hatch with no guardrail. The defendant argued that this was common practice and therefore not negligent but a majority of House of Lords held that there was breach of duty and therefore the shipping company was negligent. Lord Reid stated that:

“if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. But an employer seeking to rely on a practice which is admittedly a bad one must at least prove that it has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects.

Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution”.

In the same case, Lord Tucker:

“Here the likelihood of an accident may have been small, but at least it was sufficient to prevent the respondents from maintaining that the accident could not have happened without the appellant being negligent and the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. Once it is established that danger was foreseeable and, therefore, that the matter should have been considered before the

²⁵ See *Clerk & Lindsell*, n 2 above at para 1-65.

²⁶ See *Clerk & Lindsell*, n2 above at chapter 8 at 145.

²⁷[1956] AC 552.

accident, it appears to me that a reasonable man weighing these matters would have said that the precaution clearly ought to be taken. I am therefore of opinion that the appeal should be allowed.

Sailors are, of course, necessarily exposed to many risks by the very nature of their calling, and no one would suggest that the courts should be ready to interfere with the practice based upon past experience with regard to such occupational risks, but the risk in the present case was not of this nature. It was obvious, its consequences were likely to be calamitous, and the remedy was simple and available. I do not consider that it is imposing too high a standard of care upon a master to require that he should take the precaution suggested, notwithstanding that no such accident had occurred before in his experience”.

32. Applying the principles set out in *Morris v West Hartlepool Steam Navigation Co*, barring windows, especially, in a confined and crowded working space with a limited number of exits (some of which were locked), is a bad practice and therefore negligent even if the practice is a common one in Pakistan (as in the case of the unclosed hatch with no guard rail in *Morris*, above). Adopting the words of Lord Tucker, in a case of fire the risk was manifest, the consequences likely to be calamitous and the remedy, i.e. unbarred windows is simple and available.

C.Causation

33. Having satisfied the duty of care and breach elements, the claimants must also establish causation in fact and in law.²⁸

34. The first test to establish causation in fact is the well-known ‘but-for’ test – if the claimants would have suffered their injuries regardless of the defendants’ negligence, the negligence has not caused the claimants’ loss.²⁹ The present case is straightforward. The cause of the fire is not relevant to the claim. The barred windows, lack of emergency exits, lack of a functioning fire alarm and fire-fighting equipment as well as lack of fire safety training meant that the claimants and others were unable to escape the fire. But-for causation is established on the balance of probabilities, so an event will be treated as a cause if it is more likely than not that it was a cause.

35. ‘Causation in law’ refers to the scope of liability, in other words the extent to which the defendant should be held liable. The damage suffered must be a foreseeable consequence of the breach of duty, sometimes described as requiring that any damage should not be too remote a consequence of the harm.³⁰ The injuries suffered in the instant case are the readily foreseeable consequence of the negligence and would therefore fulfil the requirements on remoteness of damage.

²⁸ See *Clerk & Lindsell*, n2 above, Chapter 2 and generally.

²⁹ *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

³⁰ *Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co Ltd. (The Wagon Mound (no. 1))* [1961] AC 388.

36. The Bhandari opinion (para 80) argues that the cause of the fire was highly relevant contrary to our submission para 5 above. It claims that those responsible for adequate safety cannot be held responsible for the consequences of an arsonist's action but only for the fires likely to be less severe stemming from normal internal defects in the factory. This is a fundamentally flawed argument. A fire can progress in many ways and the claim in the instant case is that death and personal injury were caused by defective health & safety standards as a consequence of KiK's failure to meet its obligations to ensure health & safety. It is not the fire, but the inability to deal with the fire, that is the root of the claim. The focus here is not on whether KiK should have prevented the fire at the factory, but rather on its responsibility once that fire had broken out. The cases cited by Bhandari (at para 80) focus on the former: on the responsibility for the initial malicious or negligent act that causes the conflagration (see *Empress Car Co v National Rivers Authority* cited by Bhandari). These authorities are irrelevant to the present issue. They are not cases in which the courts have held that there is a positive duty to act premised upon an assumption of responsibility to protect third parties from the consequences of another's positive act of wrongdoing (the initial act). Thus, Bhandari cites Lord Sumner in *Weld-Blundell v Stephens*³¹ who said, "In general ... even though A is in fault ... he is not responsible for injury to C, which B a stranger to him deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause ..."
Weld-Blundell is an authority almost 100 years old and long pre-dates the jurisprudence that has developed regarding positive obligations to act where there has been an assumption of responsibility and which are the foundation of the negligence claim in this case. Thus, in *Jabir*, it is not argued that KiK was involved at the initial occurrence of the fire; rather it is argued that KiK should have ensured that if a fire occurred, and however occurring, then appropriate health & safety mechanisms and building construction were in place to protect employees at the factory.

37. The next question is whether or not the precautionary measures to deal with the consequences of the arson were adequate. It is submitted that the locking of the fire exits and barring of windows so clearly weakened the ability to respond to fire danger that arose that it amounted to a substantial, and not just marginal, cause of the death and injury that ensued. Finally, the 'but for' test of cause is met, since it is clear that the extensive deaths and injury from the fire (as opposed to the fire itself) would not have happened if the exits and other facilities been working properly.

III. NON-DELEGABLE DUTY OF CARE

38. Further, in the alternative, the claimants argue that KiK owed them a non-delegable duty of care. This claim is different from the negligence claim (Section II above) and the claim that KiK were vicariously liable for the negligent acts of AE (Section IV below). As the Bhandari opinion states (para 36) a non-delegable duty of care is personal to the defendant and not vicarious. In *Woodland v Essex County Council*, Baroness Hale, JSC, commented that "In the one case [vicarious liability], the

³¹ [1920] AC 956 at p986.

defendant is not liable because he has breached a duty which he owes personally to the claimant; he is liable because he has employed someone to go about his business for him and in the course of doing so that person has breached a duty owed to the claimant. In the other case [the non-delegable duty of care], the defendant is liable because he has breached a duty which he owes personally to the claimant, not because he has himself been at fault, but because his duty was to see that whoever performed the duty he owed to the claimant did so without fault”.³²

39. The policy of the law with regard to the non-delegable duty of care is to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives. Thus, a classic – but not the only - example of the non-delegable duty of care is that owed by the employer to his employees. While AE exercised physical control over employees on a day to day basis, KiK exercised an important element of control over the standards of health and safety in the workplace through the programme of standard setting, monitoring, audit and enforcement through the ultimate sanction of severing business relationships.

40. In *Woodland v Essex County Council*, Lord Sumption JSC set out the criteria indicative of the recognition of a non-delegable duty of care. He stated that: “If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him”.

41. Before applying these principles to the facts in the present case, we should remind ourselves of Baroness Hale’s injunction in *Woodland* not to treat the words of judges as if they are statutes and set in stone, such that they may prevent further principled development of the law. It is argued in the

³² At [33].

present case that the essential elements of the factual matrix reflect the key elements of the criteria set out by Lord Sumption, with whom all JSCs agreed in *Woodland*.

Taking the criteria in turn:

- a. The claimants were especially dependent upon KiK because KiK exercised effective control in relation to the provision of a safe working environment. The working environment was maintained by Ali Enterprises and inspections and audits were conducted by auditors appointed by KiK. The nature of the non-delegable duty is that KiK was required personally to ensure the safety of the working environment and could not legally delegate this responsibility to either AE or the auditor.
- b. Antecedent relationship between the claimant and the KiK. KiK's own indication of its method of management of its supply chains (para 47 and 48 below) indicates that it was intended that there be an ongoing involvement of KiK itself, as well as its auditors, (complementing the obligation of AE) in managing several key features of the working environment of the victims. This was a relationship stretching over several years and constituted an assumption of responsibility in relation to the risks, including risk from fire, within the workplace.

This ongoing relationship does place the claimants in the care of KiK and required KiK to protect the claimant from a dangerous working environment. Control is manifested through the terms of, and threatened sanctions associated with, the Code of Conduct, and the impacts on the workplace of the volume of orders, generating the hours it was necessary to work in order to meet the orders;

- c. The Claimants had no control over how KiK elected to try to discharge its obligations, either itself or via AE and the auditors UL/Synergies Sourcing Pakistan (hereafter referred to as the Auditor);³³
- d. KiK relied upon both AE and the Auditor to discharge the health and safety functions the performance of which were necessary to protect the claimants from death and personal injury;
- e. Both UL and AE were negligent in the discharge of the functions assigned to them.
- f. It should be noted that Lord Sumption expressly disapproved the dictum of Lord Phillips in *A (A Child) v Ministry of Defence*³⁴ to the effect that a non-delegable duty of care will be found only where the claimant suffers injury in an environment over which the defendant has physical control. The non-delegable duty of care will arise not because the defendant has control, but despite the fact that he has no control. The essential requirement is control over the claimant for the purpose of assuming a function which the defendant has assumed

³³ Reference is made to two sets of auditors: a/ UL (previously STR(CSCC)), based in Illinois, USA, which KiK has indicated in its response it had appointed; and b/ Synergies Sourcing Pakistan PVT Ltd, which signed the relevant auditing reports. For these purposes both will be referred to as 'the Auditor'.

³⁴ [2005] QB 183 at [47].

responsibility.³⁵ As Mason J stated in *Kondis v State Transport Authority*, “the special [non-delegable] duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or his property as to assume a particular responsibility for his or her safety”.³⁶ In the present case, and for the reasons advanced above, KiK has assumed responsibility for contributing to ensuring a safe working environment: a responsibility which cannot itself be relinquished by entrusting monitoring functions to the Auditor and by relying on day-to-day management by AE enterprises.

- g. In previous decades there were objections by academic commentators to the principle of non-delegable duties, on the ground that it was rare for the initial person at fault not to have the resources to compensate victims. However, in *Woodland*, Baroness Hale stated that “Such arguments scarcely apply in today's world where large organisations may well outsource their responsibilities to much poorer and un- or under-insured contractors”.³⁷

42. This is a central issue of policy in this case. It is fair, just and reasonable that purchasers of goods such as KiK, which has effectively outsourced its manufacturing processes in order to reduce overheads, should be held to account for their failure to protect the vulnerable and dependent claimants. It is precisely for vulnerable people such as the claimants that the non-delegable duty has been recognised. The present analysis therefore disagrees fundamentally with the Bhandari opinion on this point. At para 41 of the latter it is argued that non-delegable duties only arise when vulnerable persons are placed in someone else's custody or care, and that this does not apply to an employee/employer relationship. With respect, this fails to capture the key features of the vulnerability of employees within the group bringing the claim in this case, and fails to acknowledge the basic principle of UK employment law that the employer owes a non-delegable duty of care to its employees. The principle was stated recently by the Court of Appeal *Uren v Corporate Leisure (UK) Ltd and Ministry of Defence (MOD)*.³⁸ That decision makes it clear that careful selection of the Auditor with the mission of assessing risk does not absolve the party which selected the Auditor from the obligation itself to monitor the adequacy of the Auditor's performance. The obligation to take steps to ensure adequate control of the risks is personal to KiK and cannot be delegated. A company in the position of KiK must therefore not only appoint a suitable Auditor but must assure itself that the Auditor has carried out a suitable risk assessment.³⁹

43. As has been argued above KiK owed a duty to the victims of the fire to secure a healthy and safe working environment. KiK could not delegate this duty and the failure of the auditors correctly to

³⁵ *Woodland* at [24].

³⁶ [1984] 154 CLR 672 (HCA) at 677. See also J. Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” in Neyers, J, Chamberlain, E and Pitel S, (eds) *Emerging Issues in Tort Law*, Oxford, Hart Publishing, 2007.

³⁷ *Woodland* at [42].

³⁸ [2011] EWCA Civ 66 Court of Appeal

³⁹ [2011] EWCA Civ 66 Court of Appeal

report on the deficiencies in health and safety at the factory which then allowed the factory continue production unsafely is a breach of this non-delegable duty by KiK. Its reports enabled KiK to convey to AE, and thereby to the workforce, that KiK was satisfied that the requirements regarding fire safety had been met, so contributing to a false sense of security. The failures of the Auditor in this regard were failures of a key part of KiK's own organization and obligation in relation to one of its suppliers. Following the requirements set out in the case of *Woodland v Essex County Council* KiK's failure of organization in this regard damaged a particularly vulnerable set of victims in an antecedent relationship to KiK – the employees in the factory trapped there by blocked exits and without adequate equipment to fight the fire and smoke.

IV. VICARIOUS LIABILITY

44. Vicarious liability on the part of KiK is potentially present in this case in the following ways: A/ as KiK's liability for the acts and omissions of Ali Enterprises (AE); B/ as KiK's shared liability with AE for the faults of some of AE employees; C/ as KiK's potential liability for the failures of inspection and accurate reporting by the Auditors, engaged to carry out inter alia health and safety evaluation and monitoring.

A. KiK's vicarious liability for the acts and omissions of AE.

45. It is submitted that the relationship between KiK and AE is sufficiently like employment to bring it within the scope of principles assigning vicarious liability to KiK, or alternatively that AE is an independent contractor but is one that can also be brought within the scope of vicarious liability for KiK:

(i) The working relationship between KiK and AE was sufficiently like employment to attract vicarious liability.

46. Other briefs in this case have cited and applied the five criteria for assimilating a working relationship to employment as put forward in *E v. English Province of Our Lady of Charity*.⁴⁰ What follows are considerations that are intended to add to those submissions. These focus on the element of control KiK exercised over AE and on the integration of AE's production processes into KiK's overall organization.

47. *The element of control:* The arguments advanced above (paras 15 ff) concerning KiK's direct duty of care, are adopted here, in the context of the company's vicarious liability. In addition there are the following further elements to consider: The brief for KiK as well as the Bhandari opinion insist that there was no 'control' in the sense required. AE remained, it is claimed, free to accept or reject

⁴⁰(i) control by the "employer" of the "employee"; (ii) control by the contractor of himself; (iii) the organisation test (how central was the activity to the organisation?); (iv) the integration test (whether the activity was integrated into the organisational structure of the enterprise); and (v) the entrepreneur test (whether the person was in business on his own account)

the advice about improvement of standards. The latter were said to have been suggestions aimed at implementing KiK's convictions about corporate ethical responsibility, backed by the threat of ceasing to do business with AE, but not backed by legally binding sanctions. This position ignores three key features of control in this situation: i) the Code is not by itself legally binding on AE, but gains its legal force by being incorporated as an implied term of the contracts governing production and delivery of goods by AE. Alternatively ii) the Code could be given effect via the *de facto* power that a purchaser in the position of KiK has, and which the courts have in recent cases acknowledged as a decisive ingredient attracting liability; iii) the control conferred by (i) or (ii) was combined with the integration of AE's production process into KiK's overall organization to a degree sufficient to make this a relationship akin to employment. Each of these points is elaborated as follows:

48. *The contractual source of control in this case:* it is clear – as has been shown above (para. 18) that the Code of Conduct's provisions are intended to be incorporated into the contracts between KiK and its suppliers. The Code is not itself a contract but, like other sources, such as a typical collective agreement in UK employment law that has no legal effect on its own, the Code has terms capable of being incorporated into the relevant contracts. The courts in the UK distinguish elements of a company code that while general are 1/ sufficiently precise to be capable of implementation, 2/ manifest an intention to create legal relations, and 3/ to which further customary elements of workplace practice can add, placing on the other side of the line those terms in the Code that are no more than policy aspirations. In this case, there is a clear demand, intended for incorporation into the on-going series of contracts of supply/purchase between the companies, that there will be a "safe and clean working environment," as expressed in paragraph 5 of the Code of Conduct.⁴¹ As a point of fact, it should be noted that the presence of this paragraph contradicts KiK's claim that no such provision for health and safety appears in the Code.⁴² It is submitted that a failure by AE to comply with this requirement amounts to a breach of its contractual obligation to KiK, and the sanctions flowing from this breach are enough to confer control.

49. *The de facto nature of control in this case:* Alternatively, even if AE has no legal obligation to comply with KiK's wishes, KiK may still pressure AE to do so by the exercise of KiK's de facto power of control. It was on this basis that the Court of Appeal in *Chandler v Cape Industries* found that the parent company had the requisite control over the subsidiary: control which the company was responsible for not exercising correctly. It was enough, said the Court, that "... At any stage it [Cape Industries] could have intervened and Cape Products [the subsidiary] would have bowed to its intervention."⁴³ The subsidiary would have had no legal obligation to comply with the parent

⁴¹ Contrast other portions of the Code about e.g. redundancy policy which are not typically incorporated [refs]

⁴² KiK's Response to the Claim, 26/08/2015 Section I (1)(b) at p.4

⁴³ *Chandler v Cape Industries*, Para 75

company's demand in *Chandler*, but would have been under significant de facto pressure to do so.⁴⁴ This was enough for the Court to ground a finding of control in the requisite sense.

50. *The link between KiK's control over AE and AE's integration into KiK's organization of production and sale:* It is this link that helps establish the vicarious liability of KiK for AE's negligence. KiK argues that its business relationships with AE are not stable, long-term mutual engagements, but are rather short term, flexible ones.⁴⁵ In fact, the evidence points in the opposite direction: to a relationship over years in which AE played a role that was integrated into the organizational structure of the enterprise, as contemplated by element (iv) in the test formulated in *Our Lady of Charity* per Ward LJ. As KiK points out in its Sustainability Report, the mechanisms which it purports to put in place for the regulation of its relationship with all suppliers, including AE, are an integral part of its organizational steps by which it investigates, evaluates, and approves or rejects a supplier. The work done by AE in producing a product on KiK's behalf is work that must, as the company claims, go through its filters designed to assure a product and production process of the requisite qualities. This is very different from a situation in which, for example, an architect might be employed by KiK to design a new office building. If the architect does the work negligently this does not itself manifest a flaw in the organizational structure and effectiveness of KiK in carrying out its core activities. The matter is very different if the negligence appears in the process of producing goods which KiK claims as its own, and which it sells to the public as such: a process of production over which it has de facto control by its ability to decisively intervene.

B. KiK's shared vicarious liability with AE for the faults of those AE employees whose actions and omissions caused the deaths of their fellow employees:

51. Assuming, as a matter to be confirmed by further evidence, that some AE employees were responsible for locking the emergency exits, failing to install proper lighting etc, AE as employer is vicariously liable for their acts and omissions. In turn, it has been argued above (section IV(A)) that AE as an entity is in an employment-like relationship with KiK. It follows that both AE and KiK are vicariously liable for the damage done by AE employees. In this situation of shared vicarious liability, the UK Court of Appeal has indicated that a company in the position of KiK does not have to display the same level of control as has classically been required. Instead, the Court indicated that control has generally receded as the crucial factor in these situations, and that the key consideration was whether or not an employee of AE is also so much a part of the work, business or organisation of KiK that it is

⁴⁴ UK Companies Act 2006, typically enables the parent company to appoint and remove directors of the subsidiary, but – unless a specific provision in the Articles of Association permit – does not give it legal power to dictate policy to the directors of the subsidiary with which the latter are under a legal obligation to comply.

⁴⁵ KiK's Response to the Claim, Section I (1)(b) at p.3

just and fair to make the latter liable as well.⁴⁶ For the reasons given above, it is submitted that AE was part of such an integrated system of production, portions of which KiK played an important role in shaping. The process of production had, according to the protocols that KiK set up, to pass through the filter of control both of the quality of the product and of parts of the *process* by which the relevant items were produced. While KiK did not fully control the manner in which that process of production was executed, it did have the ability to exert decisive pressure regarding ways in which the process was not to be carried out: viz. by avoiding those practices which violated local norms of factory safety. As argued above, KiK was at the very least in a position of de facto control on this matter. It is not necessary for the victims to show comprehensive control over all aspects of production, but only control over those aspects of the process concerning health and safety. (Cf discussion of Chandler's case above para 15)

C.KiK's vicarious liability for the acts of the Auditor (UL and/or Synergies Sourcing Pakistan PVT Ltd)

52. A key feature of this case is KiK's insistence that it was not aware of the faults in the safety provisions in the workplace having entrusted that assessment to the Auditor and its reports. As KiK points out, "The auditing process was carried out by a professional, accredited and specialized contractor. The respondent was not involved in the auditing process."⁴⁷ Assuming for these purposes that these assertions are accurate, the question is whether this is enough to absolve KiK from vicarious liability in negligence.

53. On present evidence – the accuracy of which is presently contested by KiK – the reports about the adequacy of factory fire safety measures were inaccurate as well as misleading. As such, the reports were likely to have been an important contributor to the unwillingness of AE to reform its workplace practices, and to KiK's claim of ignorance of the actual defects of factory safety. Whether or not the latter claim by KiK to ignorance of the facts is accurate is a matter to be assessed on the evidence, along with an assessment of the impact of these false reports on AE's continuation of its poor practice. For present purposes, the question is, what vicarious liability does KiK bear for the damage done by these inaccurate analyses carried out by the Auditor? By this route, KiK's liability would not arise on the ground that KiK's own duty of care had been violated: it would instead arise on

⁴⁶ This is the position in *Viasystems (Tyneside) Ltd v Thermal Transfer et al* 2005 in which Rix LJ indicated that he was: "...sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control. ... Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. ... I would hazard ... the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of *both* employers that it is just to make both employers answer for his negligence. ... [Vicarious liability] is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit." (para 79)

⁴⁷ KiK's Response to the Claim, Section I (4)(a) at p.7

the basis of the Auditor's breach of its separate duty of care which is then imputed to KiK vicariously. As such, an assessment of the Auditor's own liability in negligence will have to follow the guidelines provided in the case of *Caparo v Dickman* (above para. 6). These guidelines deal with an issue that is of particular concern in fixing the duties of auditors such as those in this case: advisors which are increasingly relied on by purchasers of goods from supply chains. *Caparo* makes it clear that an auditor's liability for negligently provided advice can arise in relation to a well-defined category of individuals, whom the Auditor would reasonably expect to rely on it, but the decision also makes it clear that the duty does not extend to an indeterminate number of potential future plaintiffs.⁴⁸ Furthermore, the claim in *Caparo* related to pure economic loss and not physical harm. In our case, those who relied on the Auditor's advice about the adequacy of health and safety measures taken were a well-defined category consisting of the existing management of AE as well as its employees who suffered death and physical injury. There is no attempt to extend liability further to those outside the plant who may have suffered from the fire but who form a population of indeterminate size.

The Auditor as Agent for KiK

54. An allied route to KiK's liability for the Auditor's failures would be via principles establishing the Auditor as agent of KiK. It is a basic principle of English law that a principal will be liable for the faults of its agent so long as the latter is acting within the scope of its actual authority.⁴⁹ It should be noted that the objections raised in the Bhandari opinion to the use of the term 'agent' in relation to AE, do not apply in relation to the Auditor. s. 182 of the Pakistan Contract Act of 1872 defines an agent as a person engaged to do any act for another or to represent another in dealings with a third person. An agent is a conduit pipe or intermediary between the principal and third party with the competence to make the principal responsible to the third person. The Auditor is the body exercising a duty on behalf of KiK in its relationship with third persons: the employees killed and injured by the fire. The Auditor carrying out its function was the same as KiK carrying out its function. KiK rejects the basic claim that it had assumed responsibility for ensuring a safe work place, however, for present purposes that is a separate issue. If the claim that responsibility has been assumed by KiK succeeds then the question is what the role of the Auditor is in this process of ensuring this standard. The answer is, it is submitted, that the Auditor stands in for KiK in the discharge of the latter's responsibility for that part of the monitoring function which consisted of verification of the quality of safety in the workplace. The Auditor is indeed the 'conduit pipe' between KiK and the third persons, who are AE as an enterprise and its employees, given the assurance that it was KiK's obligation to deliver either by finding faults that needed to be fixed, or by giving clearance that the fire escape system was fit for purpose.

⁴⁸ *Caparo v Dickman* [1990] UKHL 2, per Lord Bridge

⁴⁹ See *Vicarious Liability* by P. Giliker (Cambridge University Press: 2010) p. 108ff

V. CONCLUSION

55. The claim in *Jabir v KIK* is for physical injuries and death and as Lord Oliver stated in *Murphy v Brentwood*,⁵⁰ “the infliction of physical injury to the person or property of another universally requires to be justified”. The principles that determine liability in the common law of tort are developed incrementally and by analogy with previous case law. The arguments set out above have drawn out the principles upon which liability has been recognised in analogous cases and have demonstrated that those principles apply to the factual matrix in the present case. Recognising the liability of KIK to the victims of the fire at the Ali Enterprises factory would be an incremental step in the application of well-recognised legal principles and would achieve the goal of fairness and justice which lies at the heart of the law.

56. Furthermore, it is submitted that a finding in favour of the victims in this case would keep Pakistani law in alignment with global principles governing transnational business behaviour. A leading source of these standards is the UN Guiding Principles on Business and Human Rights (the ‘Principles’).⁵¹ The Principles are not themselves legally binding. However they can and are being used to inform already established areas of law, such as this one, as a pointer to how that law can cover issues of fundamental importance. Pakistan not only endorsed the Principles, but it is also supporting a legally binding international instrument that will provide *inter alia* effective remedies to victims of corporate related human rights violations.⁵² The Principles give close attention to business relations such as those in this case (See Principles 17-19). They recommend that companies with the market strength of KiK make use of the leverage they possess to actively monitor and pressure those within their supply chains to improve working standards where this is called for (see Principle 19 (b)). This case, it is submitted, provides an important occasion on which the potential of these principles can be realized.

⁵⁰ [1991] 1 AC 398 at 487.

⁵¹ J. Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (UN Doc. A/HRC/17/31) (2011)

⁵² See the ‘Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council’ September 2013, available at <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>