Legal Aspects of Corporate Responsibility Reporting: Panacea, Polyfilla or Pandora's Box?

Jennifer A. Zerk[1]

Principal, CSR Vision

Introduction

Many companies produce "corporate responsibility" ("CR") reports.[2] This is something governments around the world appear keen to encourage. Recent years have seen a number of new initiatives at national and regional level designed to improve the availability and accuracy of information on the environmental and social impacts of corporate activity. In some countries, disclosure of environmental and social information is a legal requirement (Accountability, 2003). In the UK, mandatory CR reporting is still a long way off, although the new Operating and Financial Review ("OFR") Regulations will require the directors of publicly listed companies to include information on CR-related issues in an annual OFR where this information is necessary to enable proper assessment of the company's financial performance and prospects.

This article focuses on CR reporting which is "voluntary" in the sense that it is not required by law. While no panacea for reputational problems, CR reporting has become increasingly popular over the last few years,[3] with a good number of companies now on their fourth or fifth report. Clearly, there are many benefits associated with CR reporting. A well-crafted CR report can demonstrate a company's management's understanding of CR-related issues, improve employee morale and enhance the standing of the company among different stakeholder groups. Instead of repeatedly responding to negative press, CR reporting offers companies the chance to present their views, aims and past performance on their own terms. But because it is largely unregulated, CR reporting is also criticised by some groups as being little more than a public relations exercise (Christian Aid, 2004). Like polyfilla, it helps to create a nice façade, but really only covers the cracks.

It is often supposed that these voluntary publications are of little legal consequence. This, however, would be a mistake. In legal terms, CR reporting entails both benefits and risks. This article focuses on the potential legal risks. However it is important not to lose sight of the fact that there may be a legal "up-side" to CR reporting too. Companies able to demonstrate their ethical credentials through their CR reports may be more favourably treated by regulatory authorities and, in event of a prosecution, the courts. In the field of environmental law, some states award incentives to companies prepared to be more transparent and open with respect to their environmental performance and problems (Fiechtl, 2001). It is also quite possible that the discipline of preparing a CR report will help a company to identify and deal with potential legal risks before these become serious.

Of course, the legal risks and benefits of CR reporting will depend on the company, its structure, and the activities it undertakes. The aim of this article is to explore some less obvious legal implications of CR reporting, focussing on the following questions:

(a) Could CR reporting increase the risk of litigation against a company?
(b) Could CR reports be used in evidence in a legal claim against a company? If so, how?
(c) Could CR reports give rise to new legal obligations for a company?
(d) In what circumstances could a company or its directors be held liable for the content of a CR report?
(e) Are there any additional risks associated with Internet publication of CR reports?
(f) Can preparatory work for a CR report be kept confidential?

As CR reporting is a relatively new phenomenon, discussion of the potential legal risks must be largely speculative. The aim of this article is to suggest some preliminary answers to these questions, based on existing law. Some suggestions are also made as to how the legal risks associated with CR reporting might be reduced, based on the information available so far. Finally, it is argued that the information contained in CR reports may have a bearing, over the longer term, on the law relating to the liability of corporate groups.

Could CR reporting increase the risk of litigation against a company?

There is not enough data yet to suggest that CR reporting increases the risk of litigation against a company, although it is reasonable to expect (and there is a certain amount of anecdotal evidence to suggest) that companies which claim to be CR leaders are more likely to attract the attention of activists. Campaigning groups, especially those with a "mandatory CR reporting" agenda, will be keen to highlight what they see as inaccuracies and omissions in CR reports, especially where there is likely to be some media interest.[4] A number of well-known multinationals have found themselves targets of "anti-greenwash" campaigns.

Certainly CR reporting (especially reporting which glosses over difficult issues) can create reputational risks for a company. But whether this translates into a heightened risk of public interest litigation is, at this early stage, difficult to say. In the current political climate, legal challenges to the accuracy of CR reports are more likely to come from campaigners than from governments. Therefore, the litigation risks will be influenced by the extent to which these groups can bring an action in their own right, rather than relying upon public regulatory authorities. The Californian case of *Kasky v Nike*,[5] is a good example of this type of "public interest" litigation. This case concerned a complaint by anti-sweatshop activist Mike Kasky, alleging that Nike had misled the public in relation to its record on workplace standards, contrary to Californian law. The remedies sought included an order that Nike disgorge the profits derived from any business practices found by the court to be unlawful. Nike tried unsuccessfully to have the proceedings stopped at the preliminary stages on the basis that they violated its right of "freedom of speech". The matter eventually settled in September 2003, prior to going to trial on the substantive issues.

Could CR reports be used in evidence in a legal claim against a company? If so, how?

CR reports are frequently criticised (with some justification) for being more concerned with corporate image than real information. It would therefore be surprising indeed if a CR report were to contain anything approaching an admission of legal liability. What is striking about the current batch of CR reports, though, is the extent to which companies report upon the efforts taken centrally to manage and improve upon the social and environmental performance of not only subsidiaries but contractors as well. This has implications for the allocation of legal liability among members of a corporate group, particularly against the background of recent "foreign direct liability" claims.
"Foreign direct liability" ("FDL") refers to the potential liability of a parent company for the acts or omissions of foreign subsidiaries (Ward, 2001). Recent years have seen a number of FDL cases commenced in UK, US and also Canadian and Australian courts,[6] although to date none of these cases has yet reached trial on the substantive issues of liability.

Why sue the parent company? In cases where the subsidiary has limited financial resources or no longer exists, a lawsuit against the parent company may be the only hope of gaining redress. However, these cases have a political dimension as well. To many, FDL is seen as a way of enhancing corporate accountability in countries where legislative or human rights standards appear to be lacking.

A company and its owners are regarded as separate entities in law,[7] which means that a parent company will not normally be held responsible for the activities of its subsidiary. For parent company liability to arise, it would have to be shown that the parent company was negligent in its own right. As a general rule of thumb, the more limited the involvement of the parent company in the day-to-day operations of the subsidiary, the more difficult it will be for a claimant in a FDL case to prove that it was the parent company, as opposed to the subsidiary, who was legally at fault.[8]

The level of involvement by the parent company (or lack of it) in the day-to-day operations of its foreign subsidiaries may also be relevant to the preliminary issue of whether the venue chosen by the claimant (e.g. the English courts for a UK-incorporated parent company) was the correct "forum" for the case.[9] Broadly speaking, where the parent company has played only a minimal role, compared to that of the foreign subsidiary, the arguments in favour of "staying" (i.e. stopping) the proceedings in favour of a foreign court become much stronger.

There are, therefore, potential legal advantages to a parent company in adopting a "hands-off" approach and delegating as much operational responsibility to the subsidiary as possible.[10] Until fairly recently, companies would not have expected to be criticised for this. This is no longer the case, however. Accusations of "double standards" have been extremely damaging to many companies, particularly in industries which are inherently hazardous or which rely on cheap foreign labour.[11] Nowadays, international companies are expected to be able to demonstrate a "global" and "group-wide" approach to the management of health, safety and environmental ("HSE"), social and ethical issues.

CR reporting gives companies an opportunity to address these concerns. In their CR reports, companies are usually keen to portray a common policy and philosophy, within a brand, towards CR. However, in doing so, they frequently gloss over legal technicalities, such as the issue of legal separation between parent companies and their subsidiaries. Complex corporate group structures are referred to simply as "we" (as in "we have taken steps to ensure that our HSE policy is communicated to everyone who works for us" or "we maintain close relationships with our suppliers") and little attempt is made to explain which operations are covered by the report, and what the relationships between them are.

On the other hand, companies are under pressure to publish quite detailed information about the steps taken internally to implement and verify compliance with their CR commitments. According to the GRI Reporting Guidelines, for instance, CR reports should include details of:

"*... internal management systems, processes and audits that management relies on to ensure that reported data are reliable and complete ...*" *and* "*... organisational structure and key individuals responsible for oversight, implementation, and audit of economic, environmental, social, and related policies ...*"[12]

But, while this kind of information may enhance the credibility of the report, managers will want to think carefully about how this information could potentially be used.

In a FDL case (i.e. in which negligence is alleged against a parent company), the claimant must be able to demonstrate three things, first that the parent company owed her a duty of care, second that the duty of care was breached and, third, that this breach of duty caused her harm. This is known as the "three stage" test for negligence.

A real difficulty for a claimant in a FDL case is proving a "duty of care" between the parent company and herself. The law of negligence varies from jurisdiction to jurisdiction, but under English law it is necessary to show both that the damage suffered by the claimant was foreseeable and that the relationship between the claimant and the defendant was not too remote.[13] At the moment it is still unclear whether or not parent companies do in fact owe a duty of care to those affected by its subsidiaries. So far, there has been very little case law to go on.[14] Arguing against this proposition, it is often pointed out that, as parent and subsidiary are separate in law, if any party is to be held liable it ought to be the subsidiary, not the parent company.[15] On the other hand, the fact that a subsidiary was *primarily* to blame does not necessarily absolve the parent. It is possible in law for one party ("Party A") to be held responsible for the acts or failings of a third party ("Party B"), either because Party A was negligent in failing to supervise or control Party B effectively,[16] or because Party A somehow aided and abetted or conspired with Party B in the commission of a tort.[17]

These principles should apply as much to parent companies and their subsidiaries as to anyone else. But the abstract nature of the company, and the principle of "limited liability" of shareholders are complicating factors. What must a claimant in a FDL case prove to establish a duty of care? There are some clues in existing case law, although these do not provide a clear answer as yet. One suggestion is that a parent company may be legally liable if it can be shown to have "directed" the activities that caused the harm. In the Australian case of *CSR Ltd. v Wren*,[18] for instance, employees of the parent were in fact responsible for the day-to-day operations of the subsidiary. For these reasons, it was held that the parent company owed a duty of care to employees of the subsidiary to warn them and protect them from the dangers of asbestos dust. (This was also the basis on which it was argued that the parent company owed a duty of care to the claimant in the case of *Connelly v RTZ*,[19] although the liability issues in that case were not finally adjudicated upon). Another possibility, which derives from case law on the liability of directors,[20] is that a parent company may be liable for the acts of a subsidiary in cases where it has somehow "assumed responsibility" for the conduct of that subsidiary (Grantham and Rickett, 1999; Todd, 2003).

Getting parent companies to "assume responsibility" for the activities of foreign subsidiaries and contractors has been one of the core goals of the CR movement. Here activists can claim some success. It is now widely accepted that parent companies have particular responsibilities as co-ordinators of intra-group policy on HSE, social and ethical issues, and this is reflected in CR reports. Claims of a "global" approach to the management of CR-related issues, "group-wide" assurance programmes, together with a general tendency to play down legal distinctions between different entities within the group, are all carefully designed to demonstrate the commitment of parent company's management to finding solutions to social and environmental problems posed by the group's activities.

But this is not the kind of "assumption of responsibility" that necessarily results in legal liability. In a FDL case, the claimant would still have to establish, either that the parent company owed a duty of care *specifically* to her, or that the parent company knowingly aided and abetted or conspired in the wrongdoing of its subsidiary.[21] The strongest cases for parent company liability are likely to be those where members of parent company staff were directly responsible on the ground, e.g. advising on or directing the activities of the subsidiary. Nevertheless, any material which suggests that a parent company had some degree of operational control over a subsidiary or contractor (e.g. in relation to

HSE issues), or detailed knowledge of technical processes or the standards to which that subsidiary or contractor operated, will be useful to a claimant bringing a FDL-type case, not only to show a "duty of care", but also for the purposes of proving a causal link between the parent company and the harm. Information on intra-group management systems, organisational structures and lines of communication are all potentially relevant. As noted earlier, these are all issues that companies are now expected to cover in their CR reports.

There is every reason to expect, therefore, that CR reports will be referred to in litigation at some stage in the future. Of course the *significance* of these documents as evidence will depend on the particular case. Overall, the court's role in these cases is to uncover the relevant facts, not to police the accuracy of CR reports. That said, it will be interesting to see how companies respond to attempts to use CR reports in litigation. Companies may explain that much of the material set out in CR reports is aspirational in nature; and if these reports gloss over legal and structural details it is because they are designed to be attractive and accessible. In other words, they are not the last word on organisational issues within the corporate group. In some cases, judges may be inclined to give greater weight to other evidence, written or oral. Even so, it is reasonable to assume that the commitments contained in CR reports are made seriously. As such, they are a useful starting point for more detailed legal enquiries into issues of "who knew what when". Clearly, evidence which conflicts substantially with information set out in a company's CR reports will be embarrassing for that company, if nothing else.

Could CR reports give rise to new legal obligations for a company?

CR reports often set out targets to help guide and measure the success of ongoing CR programmes. Unilateral targets or undertakings of this kind will not be legally binding,[22] unless they become part of the terms of a contract or licence.

However, there is a more subtle way in which CR reports can affect the legal obligations of companies, insofar as they become evidence of "good practice". As noted above, the law imposes obligations on individuals and companies to behave reasonably and with due diligence for the welfare of others. A failure to meet this "reasonableness" or "due diligence" standard potentially exposes that person to legal liability.[23] In determining the appropriate standard of care, courts will take account, not only of past precedent, but of the current practices of comparable organisations as well.[24] In other words, the standards of care owed by a company are not set in stone, but change from time to time to take account of current technical knowledge and "good practice". CR reporting not only provides documentary evidence of "good practice" but is also helping to foster dialogue and consensus as to how CR-related policies should develop in future. As noted above, CR reports tend to focus particularly on the role of the parent company as the co-ordinator of group-wide policy. Much is now expected from parent companies and it is quite likely that these higher expectations will ultimately lead to higher standards of care.

In what circumstances could a company or its directors be held liable for the content of a CR report?

Most jurisdictions require companies to produce regular financial reports. In the UK, and elsewhere, publishing false or misleading information in an annual financial report is an offence for which directors are personally liable.[25] CR reporting, on the other hand, is voluntary and outside the scope of the UK Companies Act. New regulations are proposed, however, to encourage greater reporting on labour, environmental and social issues by listed companies where this information is relevant to financial performance.[26] These new reporting obligations, known as the OFR, are proposed to be enforced under a regime similar to that already in place for company accounts.[27]

Even though CR reporting is not explicitly regulated under UK law, there are other possible sources of legal liability for incorrect or misleading CR reports. These derive from (a) the law of negligence (b) consumer protection (or "trade practices") laws and (c) securities regulation.

Under the law of negligence, if a company ("Company X") publishes information which is relied on by a third party ("Party Y"), which then turns out to be wrong, it may be possible for Party Y to sue Company X for damages if Party Y has suffered losses as a result. It may be possible to sue a director of Company X as well provided, as discussed above, the director can be said to have "assumed responsibility" for the faults of the company. These principles would apply as much to CR reports as to other kinds of corporate information.

In reality, though, it is extremely unlikely that anyone could successfully sue a company and its directors under UK law for damages arising from incorrect information in a CR report.[28] The overwhelming difficulty faced by a claimant in this sort of action is, once again, establishing a duty of care. The courts tend to be very restrictive about when a duty of care arises in relation to the supply of information, especially where the loss claimed is purely "economic loss".[29] This means that a person is unlikely to be able to claim damages for a poor investment decision made on the basis of a CR report, even in the absence of a disclaimer by the company. Even if it were accepted that a duty of care did exist, the claimant would still have to convince the court that there was a causal link between his reliance on the CR report and his financial losses; a fairly unlikely scenario.

On the other hand, courts tend to be more favourable to claimants in cases of physical (rather than financial) harm. It is just possible that a local community or regulatory authority may rely, at least in part, on corporate assurances in a CR report in deciding, for example, that a product is safe to use, or that water is safe to drink or an area is fit to inhabit.[30] Therefore, if CR reports are to include information on the clean-up of a hazardous site, for example, careful consideration needs to be given to how this material might be used, especially if local authorities or communities are unlikely to have the resources to verify the information independently.[31] If there is any potential for misunderstanding, appropriate warnings, disclaimers or qualifying language should be used.

Another potential source of litigation risk for reporting companies derives from consumer protection (or "trade practices") laws. As the case of *Kasky v Nike* illustrates, these laws provide a potential basis for challenging social and environmental claims made by companies, including those made in CR reports, in a court of law. Even if these challenges never actually make it to court, they can still be costly and potentially embarrassing for companies.

Trade practices laws vary from country to country, something companies will need to bear in mind if they intend (as most leading companies do) to publish their CR reports internationally, for example via the Internet. The UK adopts a "targeted" approach to consumer issues, with specific legislation for specific consumer-related problems.[32] CR reporting is not directly regulated by these provisions, although there is potentially relevant legislation in the form of the Control of Misleading Advertising Regulations 1988.[33] Under these regulations, the OFT has powers to take steps in relation to "misleading advertising". This enforcement regime is designed to work alongside the voluntary code of practice administered by the Advertising Standards Authority ("ASA").[34] "Advertisements" are defined in the regulations as:

"*any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply … of goods or services …" (Regulation 2(1)).*

Advertising is "misleading" if:

"*in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed, or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor" (Regulation 2(2)).*

The definition of "advertising" in the regulations arguably encompasses CR reports. In practice, though, CR reports are not generally regarded as "advertising" for these purposes.[35] Therefore, UK authorities are unlikely to consider a complaint about the accuracy of a CR report under these provisions, although the position may be different if the CR report had been used as part of an advertising campaign.[36]

It has been suggested that UK trade practices law could be improved by enacting a general duty to "trade fairly", similar to that which already exists in Australia and the US.[37] Under section 52 of the Australian Trade Practices Act 1974, companies are prohibited from engaging in "misleading or deceptive conduct". Under section 80 of the same act "any person" can apply to court to have these provisions enforced, without it being necessary for the claimant to show she was personally harmed by the company's conduct.[38] While *Kasky v Nike* may have generated a lot of interest recently, the potential of these kinds of provisions as a means of challenging the social and environmental claims of companies has been recognised in Australia for some time. The 1981 case of *Glorie v WA Chip & Pulp*[39] concerned a complaint by a representative of an anti-logging group about a documentary produced by a timber industry association. In *Australian Federation of Consumer Organisations Inc. v Tobacco Institute of Australia*[41] a consumer organisation successfully complained about a publication by a tobacco industry group challenging the idea that passive smoking causes diseases in non-smokers. The defendant was ordered, as a result, to publish corrective advertising. As noted above, *Kasky v Nike* was eventually settled in September 2003. As part of the terms of settlement, Nike agreed to donate US$1.5m to the US-based Fair Labor Association.

In summary, campaigners looking to challenge companies over the content of their CR reports have a possible avenue open to them under national trade practices laws. If successful, and the CR report is found to have been "misleading", companies may be ordered to pay fines, or publish corrective advertising.

A third potential source of liability for reporting companies derives from securities regulation. Under the UK Financial Services and Markets Act 2000 it is an offence to make a dishonest "statement, promise or forecast" for the purposes of inducing someone to enter into an investment agreement or to deal with an investment in a particular way. However, prosecutions can only be brought by public enforcement agencies (principally the Financial Services Authority) and, to be successful, require proof of actual intent (or recklessness). This is in sharp contrast to the situation in the US, where comparable securities "anti-fraud" regulations can be enforced by private litigation, spawning a lucrative litigation industry. Concerned about the effect on companies of abusive litigation practices, US Congress enacted in 1995 the Private Securities Litigation Reform Act. This litigation provides, among other things, a "safe harbour" from litigation for "forward-looking statements", provided they are identified as such and are accompanied by "meaningful cautionary statements". In other words, forward-looking statements in CR reports, which comply with these legislative requirements, are not actionable under certain federal securities laws, and defendants stand a good chance of having any claim based upon them dismissed at an early stage (Levine, Cooper and Dojlidko, 1999).

Are there any additional risks associated with Internet publication of CR reports?

Companies publishing their CR reports over the Internet need to keep in mind the possibility that these reports will be subject to the trade practices laws of wherever they are viewed or downloaded.[42] This, combined with the prospect of private enforcement in some jurisdictions, makes the legal risks associated with Internet publication difficult to quantify. A further difficulty is that it is not generally possible to reduce these kinds of risks with the use of blanket disclaimers,[43] although appropriate caveats and qualifying language may help a company to defend itself against allegations that the content of a CR report was somehow "misleading".

Can preparatory work for a CR report be kept confidential?

Should legal proceedings be commenced against a company, all documentation in that company's possession or control which is relevant to the proceedings must be identified and, if requested, disclosed to the other side. Lawyers refer to this process as "discovery". "Documentation" covers not only paper documents, but other means of storing information as well, such as maps and plans, photographs, audio tapes, emails, discs and other computer records. For this reason it is important that CR managers discuss their information-gathering procedures carefully with their legal advisors prior to embarking on a new reporting initiative, particularly if any special research projects are likely to be commissioned as part of this process.

Documents do not have to be disclosed, however, if they are protected by a recognised form of "privilege". Under UK and US law, communications between lawyers (including in-house lawyers) and their clients are protected from disclosure on grounds of "legal professional privilege" if the main purpose behind these communications is to obtain legal advice. Thus, a legal opinion on a CR report could remain confidential, although preparatory documentation sent to a lawyer for review would probably not be protected.[44]

The English Court of Appeal recently handed down a decision that raised some doubts as to whether legal professional privilege could be claimed in relation to advice on mere "presentational" matters (as opposed to legal rights and obligations).[45] However this decision – clearly a very worrying one for lawyers advising on CR-related issues and their clients – has now been overturned on appeal.[46] It is hoped that the detailed decision of the House of Lords, to be published in Autumn 2004, will help clear up the confusion.

Summary

The publication of CR Reports carries legal risks for the reporting company as well as benefits. In most countries, the issue of how, when and what to publish has been left up to individual companies. However, these publications will still need to comply with general laws and regulations relating to corporate communications. In addition, company managers need to be mindful of the possibility that CR reports may be referred to in court in prosecutions and civil lawsuits.

Of course, as discussed above, the nature and scale of these risks will depend to a large extent on the company and the activities it undertakes. For many companies, the legal risks may only seem slight. However, the more that companies engage in CR reporting – and the more sophisticated these reporting techniques become – the greater the pressure on companies to stand out from the crowd. In this competitive environment it is important that mangers understand the potential pitfalls and how to deal with them.

Risks and risk reduction

The key legal risks associated with CR reporting are as follows:

(a) The risk that information in the CR report will be used as evidence to support a wider duty of care by parent companies than would otherwise have been the case, especially in relation to employees of, and others affected by, the activities of subsidiaries and contractors, resulting in a greater likelihood of civil liability;

(b) The risk that courts may hold companies to higher standards of care, again resulting in a greater likelihood of civil liability;

(c) The risk of a lawsuit for damages for negligent publication of incorrect information ("negligent misstatement");

(d) The risk of non-compliance with trade practices laws of other states, and higher risks of litigation, particularly in jurisdictions which permit "private" enforcement of trade practices laws;

(e) For companies subject to US securities regulation, a heightened risk of litigation due to the possibility of private enforcement of rules on corporate disclosures; and

(f) The risk that information produced in the preparatory stages may need to be disclosed in the course of legal proceedings.

Risks (a) and (b) arise out of the information published by the company on intra-group management practices. (It is important to note also that Risk (b) also arises out of the generality of CR activity, not just the activities of one company in particular. Therefore, it may not necessarily be possible for any one company to reduce its liability by doing or publishing less).

In publishing this kind of information, companies take a calculated risk that the PR benefits of putting it out in the public domain outweigh the potential legal disadvantages. Whatever the rationale for publishing CR reports, these risks can be reduced to some extent by following some simple rules:

(i) Be clear as to the coverage of the report (i.e. which entities within the organisation are covered? Who are "we"?).
(ii) Be clear as to the division of responsibilities on CR-related issues. Where day-to-day responsibility for certain operational matters (e.g. HSE) is delegated to subsidiaries or separate operating companies, say so.
(iii) Be consistent.
(iv) When describing CR policies in relation to subsidiaries, franchisees, joint ventures, suppliers and other contractors, be realistic about the extent to which their activities can be monitored and controlled (i.e. avoid creating unrealistic expectations); and
(v) Stick to the facts; avoid grand aspirational statements.

As discussed above, Risk (c) is only very remote, although it is possible to reduce this risk still further with a well-drafted (and prominently displayed) disclaimer. Of course, disclaimers are not always effective, and different countries have different rules on when and how disclaimers can be used.[47] It is therefore probably impossible to draft a disclaimer that will be effective in all jurisdictions.

Risks (d) and (e) can by reduced by scrupulously checking the accuracy of statements in CR reports (and using appropriate caveats and qualifying language), although this will not necessarily protect a company from "public interest" enforcement litigation by groups with a particular agenda. Risk (e) can be further reduced by including wording to ensure that any "forward-looking statements" can take advantage of the "safe harbour" provided under US law. As noted above, Risk (f) needs to be taken into account at an early stage and preferably prior to the information-gathering process.

Possible wider legal implications

The law is not always quick to change, but change it does. Judicial decisions on issues such as the liability of companies are not made in a vacuum but reflect, consciously or unconsciously, a political and economic ideology. Until now, courts have given priority to notions of enterprise, competitiveness and the need for investors to be able to minimise their risks. For these reasons, the company law doctrine of "limited liability" for shareholders has acted as a constraint on parent company liability in other contexts. But the campaign for greater "corporate accountability" has been gathering momentum of late, particularly post-Enron. How will the law respond to these new demands?

The CR movement has been, and still is, a hugely important social movement. Although legislative changes have been few, it is hard to believe that the ideology behind CR will not have an impact on the law on the liability of corporate groups. The idea that companies have responsibilities towards a wide range of stakeholders (however ill defined these responsibilities may be at present) has taken root in the business community, and this is reflected in the content of CR reports. One area where there appears to be a clear consensus developing involves the responsibilities of a parent company to monitor and oversee the HSE, social and ethical standards of subsidiaries and contractors, particularly in countries where regulatory regimes may be under-developed or lacking in resources.

CR reports are more than just words. To the extent that they come to represent "good practice", these new management standards may eventually become enforceable against companies as the legal standard of care owed to group employees, members of local communities and others. Insofar as they help to define the moral responsibilities of companies, they contribute to the development of legal standards as well. Companies should not expect to be able to pay lip service to notions of "group responsibility" in their CR reports, while also relying on the legal separation between companies should trouble arise – at least not indefinitely. Eventually, these cultural changes will start to seep into legal decision-making. Future courts may well feel less constrained by the traditional company law doctrines, and more inclined to explore new theories of group responsibility.

Conclusions

CR reporting potentially opens up a legal Pandora's Box for companies. Not only does it have immediate legal implications for the reporting company, it may also have far reaching consequences for business in general. The immediate legal risks can be dealt with, to some extent, through careful management of the information gathering and reporting process, and through the wording of the report itself. On the other hand, companies will not want to risk spoiling their message with legal jargon and "weasel words". The challenge for each reporting company will be to find a solution that minimises the risks without detracting from the report itself. Clearly, this will vary from company to company and from sector to sector.

Longer term, CR reporting is helping to build a new set of business values. In particular, it is helping to entrench the idea that parent companies do have responsibilities to reduce, as far as possible, any adverse HSE, social and human rights impacts of their subsidiaries, franchisees, suppliers and other contractors. These do not amount to legal duties as yet, but it is only a matter of time before these cultural changes start to become reflected in the case law.

In the meantime, companies are likely to remain under considerable pressure to issue regular reports on CR-related issues and to demonstrate real progress in relation to them. While there may be risks associated with CR reporting there are advantages too. Most companies would prefer to work with the risks than to abandon CR reporting altogether. However, it remains to be seen how regulatory authorities, shareholders, consumers, employees and other interest groups will make use of CR reports in future. Clearly, companies will need to keep a watching brief on legal developments in the UK, and elsewhere.

Notes

[1]Ph.D (Cantab). Principal, CSR Vision, www.csrvision.co.uk. The author would like to thank Alastair Bruce of ProbusBNW for his interest in this topic, which included organising a discussion forum of the same title which took place in London in June 2004. The views expressed in this article, however, are the author's alone.

[2]Various terms are used to describe corporate responsibility reporting; sustainability reporting, corporate citizenship reporting and non-financial reporting are the most common. In this article, the term "corporate responsibility report" (or "CR report") is used to describe a report issued by a company or corporate group setting out its goals and performance in relation to issues such as health and safety at work and the environment ("HSE"), business ethics, human rights and community investment.

[3]For an entertaining review of recent trends in social and environmental reporting by UK companies, see SalterBaxter and Context (2003).

[4]E.g. "Failing the Challenge: The Other Shell Report 2002" issued by Friends of the Earth, which parodies Shell's own social and environmental report for 2002.

[5]539 U.S. 654 (2003).

[6]UK proceedings include *Ngcobo and Others v Thor Chemical Holdings Ltd.*, TLR 10th November 1995; *Sithole and Others v Thor Chemical Holdings Ltd.*, TLR 15th February 1999; *Connelly v R.T.Z. Corporation plc* [1998] AC 854; *Lubbe v Cape plc* [2000] 1 WLR 1545. For a good example of an attempt (albeit unsuccessful) to bring a FDL claim against a US parent company see *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp 842 (S.D.N.Y. 1986). In addition, numerous claims have been made under the US Alien Tort Claims Act. (Forcese, 2001). (More up-to-date information on the progress of these US cases can be found at the web-site of the US-based International Labor Rights Fund www.laborrights.org.) *Dagi v The Broken Hill Proprietary Company (No. 2)* [1997] 1 VR 428 concerned a claim against an Australian parent company for environmental damage arising out of the operations of a majority-owned subsidiary. For an example of a Canadian FDL case see *Recherches Internationales Quebec v Cambior Inc.*

(Quebec Superior Court, 14th August 1998).

[7]*Salomon v Salomon & Co Ltd.* [1897] AC 22.

[8]Although note that lack of knowledge will not necessarily be a defence where the defendant, acting reasonably, *ought* have been aware of the problems giving rise to the claim.

[9]Many national legal systems allow their courts the discretion to refuse to hear cases where the case would be better heard elsewhere. This is known as the doctrine of *forum non conveniens* (or "inconvenient forum"). See for example *Lubbe v Cape plc* [2000] 1 WLR 1545.

[10]See, for example, *Re Bhopal* 634 F.Supp 842 (S.D.N.Y. 1986) 853. Commenting on this case, one writer added "[t]he advice to multinationals … is to maintain strategic control from afar, but to leave operations in the hands of local managers and safety in the hands of the host government. Control can thus be maintained, and responsibility avoided." (Cassels, 1993, p145).

[11]See further Greidner (2000), Klein (2000) and Korten (1995).

[12]GRI 2002 Sustainability Reporting Guidelines, paras. 2.20 and 3.6.

[13]This is sometimes expressed in three stages, i.e. was the harm foreseeable, was the relationship sufficiently proximate and is it just and reasonable to impose a duty of care in the particular case? See *Caparo Industries plc v Dickman* [1990] 2 AC 605, pp617-8.

[14]*Lubbe v Cape plc* [2000] 1 WLR 1545 settled out of court, as did two similar cases against Thor Chemical Holdings Ltd (note 6 above). *Connelly v RTZ* (note 6 above) was struck out on procedural grounds. The US case of *Doe v Unocal* 963 F.Supp 880 (C.D. Cal., 1997) is still ongoing, however, with the issue of parent company liability under the US Alien Tort Claims Act due to be argued before the courts in the latter half of 2004. However, there is Australian case law to support the idea that a duty of care may be imposed on a parent company in limited circumstances; see the decisions of the Western Australian Supreme Court in *CSR Ltd. v Wren* (18th December 1987), *Barrow and Heys v CSR Ltd.* (4th August 1988), and *CSR Ltd. v Young* (25th February 1998).

[15]This argument may be made at the first and third stages of the "three stage" test, i.e. that the relationship between the parent company and the defendant was too remote to support a "duty of care" in law and also that, whatever the failings of the parent, it was the acts and omissions of the *subsidiary* that actually caused the harm.

[16]Howarth (1994). It has been suggested that a duty of care ought to exist in cases where a parent company has transferred particularly hazardous technology to a subsidiary (Meeran, 1995).

[17]This is known as "secondary" liability. The main difference between "primary" and "secondary" liability is that in the case of "secondary" liability it is not necessary to establish a duty of care, but the claimant must show instead that the defendant *knowingly* contributed to the commission of a tort.

[18]WA Supreme Court, 18th December 1987.

[19]It was claimed by the claimant's solicitors that "... in order to meet contractual deadlines for the supply of uranium internationally by RTZ companies, *directors of their English companies were directly responsible on the ground*, for substantially increasing the output of uranium – and the consequent dust levels – without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure." (Meeran, 1999, pp166-7 (emphasis added)).

[20]*Williams v Natural Life Health Foods Ltd.* [1998] 1 WLR 830.

[21] It has been noted that the theory of "assumption is liability" is really only a shorthand way of saying that a duty of care ought to be imposed in the particular case. See *Phelps v Hillingdon LBC* [2001] 2 AC 619, p654.

[22]On rare occasions, unilateral undertakings may be binding under the legal doctrine of "estoppel" if they are made with the intention of being relied upon by another party, but the undertakings that appear in CR reports are not of this type.

[23]Provided a "duty of care" can be shown towards those affected and that it was the failure to meet the legal standard of care that resulted in the harm (see discussion on the "three stage" test for negligence above).

[24]*Hayward v P.L.A.* (1954) 2 Lloyd's Rep. 363.

[25]Companies Act 1985 (as amended), sections 233(5), 245-245C.

[26]DTI (2004).

[27]DTI (2004), p30.

[28]The more usual targets for this kind of litigation are the company's accountants for failing to spot inaccuracies in the information (usually financial information) provided to the claimant. However, the liability of accountants as "auditors" or "assurance providers" in relation to CR reports is outside the scope of this article.

[29]See *Murphy v Brentwood District Counci*l [1991] 1 AC 398.

[30]See *Sutradhar v National Environmental Research Council* [2004] EWCA Civ. 175; *Times*, March 19, 2004 (CA). This case concerned a claim for damages by a group of Bangladeshi nationals against the author of a report on water quality. In that case, however, the court held that no duty of care existed between the defendant and claimants.

[31]Lord Clarke, in his minority judgment in the Sutradhar case (note 30 above) thought this would be a relevant factor in deciding whether or not a duty of care existed.

[32]The overall enforcement body for consumer issues in the UK is the Office of Fair Trading.

[33]S.I. 1988 No. 915.

[34]For further information see www.asa.org.uk.

[35]Note that the ASA code of conduct expressly excludes "press releases and other public relations material" which are not "advertisements" (see CAP Code, Introduction, para. 2(j)). CR reports would, however, be covered by the DTI "Code of Conduct on Non-Advertising Green Claims". Note also the guidelines produced by DEFRA on environmental reporting

see: www.defra.gov.uk/environment/envrp/guidelines.htm.

[36]If, for example, the CR report had been sent out to customers in a mail shot along with other promotional material such as fliers and catalogues.

[37]OFT (1986). See Australian Trade Practices Act, 1974, s. 52 and United States Federal Trade Commission Act 1970, s. 45(a)(1).

[38]*Truth About Motorways Pty. Ltd. v Macquarie Infrastructure Management Limited* (2000) 169 ALR 616.

[39](1981) 39 ALR 67.

[40]Note, however, that in this particular case the court did not accept that the material was "misleading or deceptive".

[41](1991) 98 ALR 670.

[42]See, for example, the Australian case of *ACCC v Hughes* [2002] ATPR 41-863 in which the court held that "deceptive and misleading" statements made on a web-site were actionable under Australian trade practices law, notwithstanding that the server was located in the US.

[43]See further discussion on "Risks and risk reduction" below.

[44]*Three Rivers District Council v Governor & Company of the Bank of England* (No. 5) [2003] 3 WLR 667 (CA).

[45]*Three Rivers District Council v Governor & Company of the Bank of England* (No. 5) [2004] 3 WLR 1065 (CA).

[46]*Law Society Gazette*, 5th August 2004.

[47]See for instance section 2(1) of the UK Unfair Contract Terms Act 1977 which states that a person cannot restrict their liability for death or personal injury by virtue of a unilateral disclaimer. Disclaimers which restrict other forms of liability are only effective to the extent that they are "reasonable" (see Unfair Contract Terms Act, section 2(2)).

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