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Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004

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The 'corporate veil' refers to the separation of legal identity between parent firms and their subsidiaries, which gives the parent protection against the liabilities of its subsidiaries. Fearing that such liability protection would facilitate illicit activity, early twentieth century courts, especially in America, would sometimes 'pierce' the corporate veil. This article explores *Adams v. Cape* (1990), in which American plaintiffs attempted to persuade the English courts to lift the corporate veil and impose liability for industrial disease on Cape Industries, a leading U.K. asbestos manufacturer. This landmark case shows how corporate strategy can be closely intertwined with international corporate law and occupational health and safety issues. It also highlights how limited liability law and separate legal personality can result in significant injustice to claimants against multinational enterprises.

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Corporations are typically organized according to the laws of limited liability and increasingly operate across national boundaries by means of subsidiaries. A massive business literature has described this process and extolled the enormous material benefits that have ensued. Business historians have made important contributions to this field: indeed, the writings of Alfred D. Chandler, Jr., Mira Wilkins, and Geoffrey Jones on multinational enterprises (MNEs) are one of the most prominent achievements of the profession. But it is also clear that this literature is not comprehensive. Its overwhelming focus has been on structure, economic performance, technology, and entrepreneurship. Political interactions, regulation, and legal aspects are much less well covered. As Morton Keller noted over twenty-five years ago, law and government regulation are lacunae in the Chandler paradigm.[1] Recently, there are encouraging signs that this picture is beginning to change, but even so much more historical work is needed on the interaction between law and business.

Besides this failure to see MNEs as legal constructs, other blind spots exist in business history. Alongside an obsession with entrepreneurship and the internal organization of the firm, there is a tendency to see many facets of company activity as simply 'externalities'. As C. M. Rosen and C. C. Sellers have highlighted, many aspects of big business—such as its environmental impact, culture, and ethics—are not commonly discussed by historians.[2] This yields a somewhat sanitized view of corporate life, in which business historians rarely discuss how corporations injure workers, pollute the environment, or engage in illegal activity. This may explain why business history has so far failed to connect with recent widely publicized debates about the nature of the corporation and globalization.[3]

This paper looks at one of the 'externalities' left out of the literature on the history of MNEs—the occupational and environmental impact of a toxic product. In doing so, it explores the operations of limited liability law and emphasizes the way in which MNEs are shaped by legal as well as economic considerations. At the heart of our discussion is the relationship between parent companies and their

1. Morton Keller, "Business History and Legal History," *Business History Review* 53 (Autumn 1979): 295–303.

2. C. M. Rosen and C. C. Sellers, "The Nature of the Firm: Towards an Eco-cultural History of Business," *Business History Review* 73 (Winter 1999): 577–600.

3. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, 2004).

subsidiaries. In particular, we explore the way in which companies can shield their assets behind the 'corporate veil'—a phrase that rarely (if ever) occurs in business history writing, yet relates to a fundamental concept in company law.

What is the Corporate Veil?

In British law it is well established that corporations are shielded from the liabilities of their subsidiaries by the 'corporate veil'. The roots of this term lie in the evolution of limited liability doctrine as it developed in the nineteenth century and the legal concept that a corporation is an artificial legal person with a 'corporate personality'. Legal reasoning has held that the corporate person is fundamentally separate from its members, whether they are individuals or companies. The principle was enshrined in a House of Lords ruling in *Salomon v. Salomon & Co.* (1897)—a legal decision so important that it has since been "treated by judges and academics alike with a reverence bordering on the religious."[4] It involved the question as to whether Aron Salomon, a boot manufacturer, was personally responsible for the losses of A. Salomon & Co, Ltd. When it was ruled that he was not, the scope of limited liability was greatly extended by establishing that the corporate form could be used legitimately to shield a business owner (whether individual or company) from liability.[5] *Salomon* thus drew a 'veil' between a limited company and its group members or subsidiaries.

Despite the evident success of limited liability—which fully realized Parliament's hopes that it would stimulate entrepreneurial risk-taking—it is important to remember that *Salomon* was regarded by some contemporaries as immoral, even disastrous, because it flew in the face of the logic that those engaged in corporate activity should support it with all their resources. It appeared that limited liability undermined this concept, while separate corporate personality provided an incentive for risks to be externalized by the relatively simple mechanism of making one company a 'parent' or 'holding' company, and another a 'subsidiary'. A parent company now became simply a shareholder and was therefore, legally, no more responsible for the unlawful behavior of a subsidiary than would be a

4. *Salomon v. A. Salomon & Co. Ltd* (1897) A.C. 22; R. Grantham and C. Rickett, eds., *Corporate Personality in the 20th Century* (Oxford, U.K., 1998), 1.

5. For details of *Salomon*, see Grantham and Rickett, *Corporate Personality*.

member of the public for the liabilities of a large public company in which he or she owned a single share.

Anxieties about these aspects of company law sharpened in the early twentieth century, when it was realized—especially in America—that giant corporations had the potential to overwhelm institutions and governments. In the Progressive era, popular discontent and labor agitation led to calls for more government regulation. Limited liability was basically unaffected, but to protect society it was sometimes deemed appropriate for the courts in exceptional cases (usually involving fraud or sham companies) to impose liability upon a shareholder. This was known as 'piercing' the corporate veil—a phrase apparently first coined in America in 1912.[6] By the 1920s, this had become an accepted legal doctrine in the United States. It was also adopted in England, where the more genteel phrase of 'lifting' the corporate veil was used.

Since the early twentieth century, corporate veil litigation has increased. It has also become more complex and controversial with the increasing number of MNEs.[7] Marked national differences have appeared in judicial willingness to pierce the corporate veil, with the practice more widespread in the United States than it is in England (where the orthodoxies of *Salomon* are usually strictly maintained).[8] Transnational business has also complicated veil piercing because of jurisdictional issues about where a case should be litigated (*forum non conveniens*). Above all, the burgeoning of multinational enterprise—much of it occurring after limited liability law was conceived—has introduced areas of litigation not apparent in the nineteenth century. One such area is international toxic tort.[9] The complexities of veil piercing in toxic product cases are strikingly

6. I. M. Wormser, "Piercing the Veil of Corporate Identity," *Columbia Law Review* 12 (Dec. 1912): 496–524. See, generally, G. Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865–1917* (Baltimore, Md., 1997).

7. P. I. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York, 1993), 65–150; Richard Meeran, "Liability of Multinational Corporations: A Critical Stage in the UK," in *Liability of Multinational Corporations under International Law*, eds., Menno Kamminga and Sam Zia-Zarifi (The Hague, 2000), 251–64. See also Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford, 1995), 325–27.

8. Sandra K. Miller, "Piercing the Corporate Veil among Affiliated Companies in the European Community and in the US: A Comparative Analysis of US, German and UK Veil-Piercing Approaches," *American Business Law Journal* 36 (Fall 1998): 73–149; David Milman, ed., *Regulating Enterprise: Law and Business Organization in the UK* (Oxford, 1999), 218–40.

9. Mary E. Rolle, "Unravelling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases," *Georgetown International Environmental Law Review* 15 (Winter 2003): 137–201. See also Frank Pearce

illustrated by a landmark English legal case, *Adams v. Cape* (1990). This involved a British MNE and its liabilities for the toxic mineral asbestos.

Asbestos and Cape Industries

Asbestos defines a group of fibrous, fireproof minerals, which first attracted the attention of industrialists in the late nineteenth century. Within a few decades, asbestos was a global industry, with mines in South Africa and Canada, and factories in America, Europe, and the Far East. The industry's heyday occurred after the Second World War, when a handful of companies—notably Johns-Manville in the U.S. and Turner & Newall (T&N) in the U.K.—dominated world production.

Until the 1960s, asbestos was widely regarded as a lifesaver, but since then a sinister undercurrent has surfaced. Asbestos is now the most controversial and feared of the industrial minerals, because it can cause asbestosis (a potentially fatal fibrosis of the lungs) and cancers. Most countries in the developed world have virtually banned its manufacture, though they still have to come to terms with its legacy of asbestos-related disease. In America, such has been the explosion in litigation that there have been demands for congressional action. The leading asbestos companies have retreated into bankruptcy or adopted various strategies to limit billions of dollars in liabilities.[10]

The way in which the industry was structured has become important. Asbestos companies were amongst the first to use multidivisional organizations, which extended overseas through complex cartels, licensing agreements, and holding companies. It was an industry with several sectors, which were not only vertically interconnected, but also functioned like separate industries. The production of asbestos textiles, asbestos cement, insulation, and brake linings revolved around the key industry of asbestos mining and the distribution of various fibers. The three main commercial asbestos fibers were white (chrysotile), blue (crocidolite), and brown (amosite). Chrysotile accounted for about 95 percent of world

and Steve Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth, N.H., 1998).

10. See S. J. Carroll et al., *Asbestos Litigation* (Santa Monica, Calif., 2005) (posted at: www.rand.org), who note that through 2002, about 730,000 people had filed claims in the U.S. against 8,400 defendant entities. The eventual costs are likely to exceed $200 billion.

asbestos production, but crocidolite and amosite (known collectively as amphiboles) were important in specialist applications, such as thermal insulation.

In Britain, the industry was controlled by three firms—T&N, Cape Asbestos, and British Belting & Asbestos—whose respective positions can be shown by their approximate issued capital in the early 1970s, when asbestos use was reaching a peak: T&N £65 m, BBA £9 m, and Cape £5 m.[11] Cape Asbestos had been incorporated in London in 1893 to control a syndicate that operated South African crocidolite mines. It then integrated forward into manufacturing by establishing a London plant in 1897 and then later German and French plants.[12] The mines were the linchpin of Cape's business, however. It mined most of the world's amosite and was a leading producer of crocidolite. However, it was not until after the 1930s that Cape became profitable, with specialties such its preformed amosite high-temperature pipe and boiler insulation. The company grew dramatically during and after the Second World War, with sales of fireproof board, insulation for warships, gas masks, brake linings, and parts for armored vehicles.

Throughout the twentieth century, Cape Asbestos was regarded as very much a British business, run from a London headquarters. Yet, even from the 1890s, it was linked with the South African diamond mining company, De Beers, and was also related to another great South African business empire—Anglo-American Corporation. Both, De Beers, and Anglo-American were intertwined through the industrialist Sir Ernest Oppenheimer (1880–1957), who had founded Anglo-American in 1917 and became chairman of both the latter and De Beers. Cape Asbestos, therefore, became part of the most powerful economic conglomerate in South Africa.[13] In the 1930s and 1940s, Anglo-American developed a decentralized structure that was a maze of interlocking directorships, mutual agreements,

11. Monopolies Commission, *Asbestos and Certain Asbestos Products* (London, 1973).

12. Monopolies Commission, *Asbestos*, 135-38. See, also, Cape Asbestos Ltd, *The Story of the Cape Asbestos Company Ltd* (London, 1953); J. McCulloch, *Asbestos Blues: Labour, Capital, Physicians and the State in South Africa* (Oxford, U.K., 2002), 42–58.

13. S. Katzenellenbogen (updated by R. A. Salamie), "Anglo-American Corporation of South Africa Ltd," in *International Directory of Company Histories*, ed., T. Grant (London, 1997), 25–30. See, also, T. Gregory, *Ernest Oppenheimer and the Economic Development of South Africa* (Cape Town, 1962); D. Pallister et al., *South Africa Inc.: The Oppenheimer Empire* (London, 1988); D. Innes, *Anglo-American and the Rise of Modern South Africa* (London, 1984).

restrictive arrangements, and monopolistic business practices.[14] The structure was said to facilitate and stimulate business, but it also made it difficult to trace the group's financial connections. Under the Oppenheimers, Anglo-American emerged as the world's largest mining company. Its empire was "so complex that it [was] never recognized as a single entity."[15] In 1957, Anglo-American and De Beers controlled 40 percent of South Africa's gold, 80 percent of the world's diamonds, a sixth of the world's copper, and produced most of South Africa's coal.

Anglo-American's involvement in Cape Asbestos grew during the Second World War, when an Oppenheimer company—Central Mining & Investment Corporation—became the majority shareholder. By 1949, Central had a majority on the board of directors of Cape. In 1969, Central Mining's shareholding in Cape was superseded by that of Charter Consolidated, a British registered mining finance company, also controlled by Oppenheimer interests.[16] (Charter was one of four major holding companies within the Oppenheimer group: the others were Anglo-American, De Beers, and Rand Selection.) Cape Asbestos thus became a subsidiary of Charter, which had a 63 percent holding.

Structurally, Cape Industries (as Cape Asbestos was known after 1974) resembled its bigger parent and during the twentieth century it became a jumble of holding companies, subsidiaries, interlocking directorships, and cross-licensing agreements. Major company reorganizations occurred in 1948, when Cape formed a holding company, Cape Asbestos South Africa Pty Ltd (CASAP), and in 1960, when Cape Asbestos itself became a holding company with 24 subsidiaries. At the head office at 112–116 Park Street, London, separate holdings companies handled U.K. and overseas business, while beneath them the trading groups were organized into major divisions. By the 1970s, Cape's overseas group had four main divisions: building and insulation, automotive products, mining, and a South African industrial group (see Figure 1).

14. L. Flynn, *Studded with Diamonds and Paved with Gold: Miners, Mining Communities and Human Rights in South Africa* (London, 1992).

15. Pallister et al., *South Africa*, viii.

16. The chairman was now Harry Oppenheimer (1908–2000). See C. Denny, "Dynastic Diamond Billionaire Dies in South Africa," *Guardian*, 21 Aug. 2000.

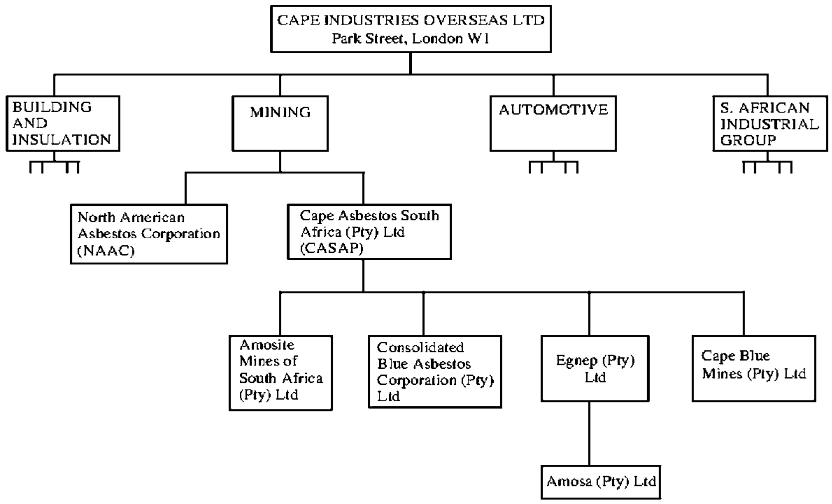

Figure 1 Structure of Cape's overseas business, 1975.

North American Asbestos Corporation

After the 1930s, Cape developed a profitable American business in amosite and crocidolite. In 1936, it began marketing its asbestos products through the Union Asbestos & Rubber Company (UNARCO). Cape contracted with UNARCO to manufacture its products under the 'Unibestos' trade name at various plants, including one in Paterson, New Jersey, in 1941 (later moved to Tyler, Texas, in 1954); and another in Bloomington, Illinois, opened in 1951. Unibestos sold widely and was included in U.S. Navy specifications in 1942, stretching Cape's mines to capacity. Cape sold amosite to UNARCO at a discount in an exclusive arrangement.

After the war, Cape decided to start its own American company. In 1953, it established the North American Asbestos Corporation (NAAC) in Chicago.[17] The NAAC sold blue fiber from Cape's mines in Koegas and Pomfret, and amosite from the Penge mine.[18] The fiber found a ready market throughout the U.S., Canada, the Caribbean, and Mexico. In 1956, Cape reported that it had earned nearly $5 m from fiber sales in North America. In the early 1960s, the NAAC's turnover

17. 'NAAC', *CAC* (Cape Asbestos Companies) *Magazine* 3 (Summer 1954): 5, 27; "Mr Cryor Receives 32 Storeys Up," *CAC Magazine* 4 (Spring 1955): 20.

18. Penge was named after Penge in England.

still topped $5 m a year, generating gross profits of nearly $0.5 m a year.[19] Sales peaked at $10 m in the early 1970s, but in 1977 profits of over $3 m still netted Cape a dividend of $200,000.[20]

The NAAC became an important contributor to Cape's economic performance in the 1950s and 1960s, when Cape often paid its shareholders dividends up to 25 percent. Meanwhile, Cape's asbestos found its way to most of the major American users of amphiboles (particularly Johns-Manville), while most of the fiber used at UNARCO's Tyler and Bloomington plants was supplied by the NAAC. By the late 1970s, Cape had sold nearly half-a-million tons of asbestos in the United States.

The business was undisturbed by the dangers of asbestos. When Cape opened its Chicago office in 1953, it had known for decades that inhaling asbestos fibers scarred the lungs and caused asbestosis. Knowledge of this disease at the firm was better than in most other companies. This was partly because its factories were among the dustiest in the industry, and partly because Cape, in 1930, had been party to the British government's formulation of the world's first asbestosis regulations.[21] By the late 1940s, Cape also knew that there was a rising incidence of lung cancers at its main factory in Barking, near London. Dr. Richard Gaze (1917–1982), who had joined Cape as its chemist and later became its technical director with special responsibility for health and safety, learned of asbestosis the day he joined the company in 1943. He later discussed these dangers with American personnel, though that was hardly necessary.[22] By the 1940s, UNARCO was already receiving compensation claims from workers with asbestosis; and it had helped sponsor industry research into the carcinogenic potential of asbestos (research which was kept secret).[23]

However, dust control in American asbestos plants was poor. Working conditions were particularly bad at UNARCO's Tyler and Bloomington factories—conditions of which Gaze was aware. He visited both plants and was also alerted to the poor conditions at Tyler

19. A. R. Sarabia (Lord, Bissell & Brook) to M. E. Meyer, 23 Jan. 1978, Manchester Metropolitan University Business School [hereinafter, MMUBS Archive].

20. C. G. Morgan memo to Meyer, 6 April 1977, MMUBS Archive.

21. M. Greenberg, "Cape Asbestos, Barking, Health and Environment: 1928–1946," *American Journal Industrial Medicine* 43 (Feb. 2003): 109–19.

22. R. Gaze deposition, US District Court for the District of Texas, Tyler Division, *Herman Yandle/Lester Kay v. PPG Industries Inc.* [Civ. Action Nos. TY-74-3-CA; TY-74-13-CA], London, 4–5 June 1975, 50, 57, MMUBS Archive.

23. B. I. Castleman, *Asbestos: Medical and Legal Aspects* (Englewood Cliffs, N.J., 2005), 554–55; D. Ozonoff, "Failed Warnings: Asbestos-Related Disease and Industrial Medicine," in *The Health and Safety of Workers*, ed. R. Bayer (New York, 1988), 139–218.

by others.[24] Asbestosis cases were inevitable, but these were dealt with under a state workmen's compensation system that provided little coverage for occupational diseases and only modest benefits.[25] Shielded by the latency of asbestos-related diseases, which may take decades to appear, the industry made a fortune, while deferring the fateful day when thousands of sick workers would launch legal claims against the industry.

The disease and litigation 'time bomb' would explode after the 1960s—an explosion made worse by mesothelioma. This extraordinary disease is a painful and invariably fatal cancer of the lining of the chest or of the abdomen. It is both slow growing (taking thirty years or more to appear) and virulent (killing within a year or so of first symptoms). Yet the fatal exposure can be quite trivial (sometimes a matter of days or weeks rather than years) and need not be occupational: environmental or 'bystander' exposure is also dangerous, leading to mesotheliomas among office staff, construction workers, railwaymen, housewives, and schoolteachers.

Cape had a unique insight into mesothelioma. Crocidolite is a particularly potent cause of the disease. Indeed, the appearance of the world's first mesothelioma cluster occurred in the 1950s around Cape's blue asbestos mines in the Northern Cape. By 1969, the U.K. government was so concerned about mesothelioma that it pressured asbestos manufacturers (including Cape) to cease importing crocidolite—though Cape was free to market it elsewhere, including the United States.

Litigation against NAAC and Cape

In the early 1970s, the U.S. market for asbestos was so profitable that Cape contemplated opening a factory near Boston. In 1973, annual American asbestos usage hit 800,000 tons, though this was to prove a peak. In that year, a landmark legal decision involving an asbestos insulation worker (Clarence Borel) effectively shifted awards from the workmen's compensation system to the courts. This ruling (*Borel v. Fibreboard*) held manufacturers strictly liable for their failure to warn of an unreasonably dangerous product, thus launching the

24. R. Brittingham (Pittsburgh Corning) to Gaze, 17 July 1962, MMUBS Archive.
25. Similar problems were evident in the U.K., even though a national compensation scheme operated. See N. J. Wikeley, *Compensation for Industrial Disease* (Aldershot, U.K., 1993).

"greatest avalanche of toxic-tort litigation in the history of American jurisprudence."[26] For an industry built on a failure to warn, that had been using a product that it knew to be lethal for over half a century, this ruling was catastrophic—no more so than to suppliers like Cape.

Within a year of Borel, Texas lawyers launched a class action suit (*Yandle v. PPG Industries*, 1975) for $100 m dollars in damages on behalf of a group of workers allegedly made ill by conditions at UNARCO's old Tyler plant. The action was launched against Pittsburgh Plate Glass (PPG), which had bought the Tyler factory in 1962, and a decade later dismantled and buried its production facilities after a government survey had highlighted "major industrial hygiene deficiencies."[27] Under product liability law, the NAAC and parent Cape Industries were also sued. In London, Cape's management expressed mystification that "time should be taken up in claims of this nature... [and] could not understand why Cape itself had been joined in the legal proceedings at all."[28] In 1974, Cape told its shareholders that the action was being "strenuously contested ... [because] ... the amounts are highly speculative and conjectural and have only a tenuous basis in law and fact."[29] However, chemist Gaze and NAAC boss Gerry Morgan were soon deposed, as plaintiffs' lawyers made a first stab at piercing Cape's corporate veil. Over two days in 1975, in a solicitor's office in London, Gaze helped seal the fate of PPG and also the NAAC.[30] He testified that since 1961 he had continually discussed health hazards with the Tyler managers (including PPG staff) and that neither Cape nor the NAAC had ever placed warning labels on asbestos bags.

In 1977, lawyers for 462 Tyler employees and those for the defendants (which included the U.S. government, as another seller of asbestos to Tyler) settled the case for over $20 m, with no one accepting liability. Having informed its shareholders that the action had no merit, Cape now had the humiliation of informing them that its share of the damages was $5.2 m (with the NAAC

26. Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York, 1985), 73.

27. UNARCO had sold its asbestos business to Pittsburgh Corning Corporation (a joint venture of Pittsburgh Plate Glass Company [later PPG] and Corning Glass Works); NIOSH, "Asbestos Survey: Pittsburgh-Corning Corporation, Tyler, Texas." Project No: 71-45, 7 Dec. 1971, MMUBS Archive.

28. *Jimmy Wayne Adams and Others v. Cape Industries Plc. and Capasco Ltd*, High Court Chancery Division, 15 March 1988, Day 20, 9, MMUBS Archive.

29. Cape Industries Ltd, *Reports & Accounts* (1974), 18, MMUBS Archive.

30. Gaze deposition, London, 4, 5 June 1975, *Yandle/Kay v. PPG*, MMUBS Archive.

insurers paying about $4 m and Cape over $1 m, or £571,000).[31] The settlement generated enormous publicity—not least because *New Yorker* journalist Paul Brodeur made the Tyler plant the centerpiece of his powerful exposé.[32]

With asbestosis and mesothelioma cases rising, further American litigation was inevitable. Meanwhile, in the early 1970s, several regulatory agencies—notably the Occupational Safety & Health Administration (OSHA) and the Environmental Protection Agency—were becoming concerned about asbestos, raising the specter of regulation for the industry.[33] In 1971, for example, OSHA set its first dust threshold that limited exposure to asbestos in the workplace and thereby began to drive up production costs for asbestos products. Events in South Africa in the 1970s, especially the introduction of economic sanctions against apartheid, compounded Cape's difficulties. So, too, did the growing aversion to amphiboles in world asbestos markets. The company had further problems closer to home. In 1973, it set aside £3.5 m compensation for its U.K. workforce. Many claims related to a Cape factory in Hebden Bridge, Yorkshire, where the mortality from the dusty conditions attracted, first, the attentions of TV documentary makers, and then a major government inquiry.

Meanwhile the NAAC had exhausted its insurance. To reinsure would cost over half-a-million dollars a year, which was far more than the business was worth, even if insurers could be found. In November 1977, Cape decided to liquidate the NAAC and then refuse to appear in American court cases. New cases soon materialized. In 1981, injured workers and their dependants from the Bloomington UNARCO factory launched actions, led by a local lawyer, Jim Walker. By the following year, 250 workers at this plant were alleged to have developed asbestos-related diseases. The first case was lost on a technicality, but 54 former workers succeeded in 1982 in suing the Cape group on the grounds of strict liability in tort and willful and wanton misconduct. The plaintiffs were awarded $55 m in damages. Part of this total ($35 m) was punitive damages against Cape—an expression of the moral outrage of the jury at the manufacturer's behavior in exporting a lethal product without warnings.

31. Cape Industries Ltd, *Reports & Accounts* (1977), 4, MMUBS Archive.

32. Paul Brodeur, *Expendable Americans: The Incredible Story of How Tens of Thousands of American Men and Women Die Each Year of Preventable Industrial Disease* (New York, 1974); Brodeur, *Outrageous Misconduct*.

33. Morgan listed six regulatory agencies causing "chaos in our industry." Letter to Gaze, 28 June 1977, MMUBS Archive.

The year 1982 was eventful. The mighty Johns-Manville filed for bankruptcy, as did UNARCO. In Britain, a two-hour TV documentary ("Alice: A Fight for Life") had given national publicity to Alice Jefferson—a mesothelioma victim from a Cape factory in the north of England. The Bloomington factory was the subject of a "World in Action" TV documentary, which described how "Cape Industries of London, part of one of the richest corporations in the world, has run away from its responsibilities to the sick and dying families of a small town in America."[34] Cape management responded by telling shareholders that it would not be defending the Bloomington action or paying damages. They asserted that the firm did no business in the United States and that judgments were not enforceable in England. Future litigation, they predicted, would have no material effect on Cape Industries.[35]

Did Cape Do Business in America?

In 1983, a federal district judge in Tyler awarded a further 205 Tyler plaintiffs damages of about $75,000 each against Cape. With Cape in default, the plaintiffs then brought proceedings against the group in London. Cape's defense was its nonappearance in U.S. courts and its reliance on the corporate veil. The English courts would now have to decide whether Cape had conducted business in the United States, whether it had controlled the NAAC, and whether Cape had been involved in "morally culpable" acts.

One obstacle for the plaintiffs was the way in which Cape's American operation, the NAAC, had been structured. Cape had made full use of the advantages created by the legal fiction that a company is distinct from its shareholders. The NAAC was a wholly owned subsidiary, with Cape owning all the 1,000 shares. However, the NAAC structure was designed so that Cape had no 'permanent establishment' in the United States. The parent firm had no formal office in America and no 'name' on a door, which meant that Cape was not subject to income tax as a U.S. domestic corporation. This reflected the input of Cape's Chicago attorneys, who were recruited in 1953 to advise, not on the health hazard (that had not yet been accepted as a serious liability for Cape), but on U.S. federal and state taxation. They assured their clients that this could be avoided by

34. ITV, World in Action, "A Small Town Tragedy," 5 July 1982.
35. Cape Industries Ltd, *Reports & Accounts* (1981), 22, MMUBS Archive.

ensuring that all contracts were completed either in the U.K. or South Africa.[36] Other attractions of such a subsidiary arrangement were that returns at that time did not have to be filed at Companies House in London (though Cape had to pay tax on its overall corporate profits in the U.K).[37] Cape's American lawyers explained further advantages of incorporating in Illinois, where "laws are quite liberal as to who may be shareholders and directors and where shareholders' and directors' meetings are held."[38] The eventual arrangement was that Cape had two directors on the board of the NAAC (by the 1970s, these were Cape's managing director and later chairman, Geoffrey Higham, and Richard Gaze). Two Chicago attorneys, Max Meyer and Herbert Brook, were also board members.

Despite its grand title, the NAAC was a small outfit. In Chicago, the office staff consisted of its office director (first Bob Cryor, then after 1970, Gerry Morgan), assisted by four female secretaries, and a handful of sales people.[39] In legal testimony, Morgan confirmed that the company sold fiber to PPG, but he distanced its activities from Cape Industries. He stated that NAAC was "virtually a one-man organization ... a marketing arm ... a service organization" that handled "virtually no paperwork."[40] Cape's secretary and group lawyer in London, Tony Penna, agreed and argued that NAAC directors were "really cosmetic."[41] Cape Chairman Higham emphasized that his firm's control of its subsidiaries was "arms length" and that the holding company merely "provides services to these subsidiaries."[42]

This testimony appeared to support Cape's contention that it did no business in the United States, though some evidence pointed the other way. For example, Cape exercised close control over the NAAC's accounting. Cape received monthly financial statements, besides detailed quarterly board meeting reports, and dictated the NAAC's dividend. In 1971, Cape Industries' own parent, Charter, began examining Cape's accounting and financial control systems,

36. R. H. Dent to Lord, Bissell & Kadyk, Chicago, 18 Sept. 1953, MMUBS Archive.

37. Evidence of A. J. Penna, *Adams and Others v. Cape*, 15 March 1988, Day 20, 5, MMUBS Archive.

38. Lord, Bissell & Kadyk, 29 Sept. 1953, MMUBS Archive.

39. "Our Men in Chicago," *CAC Magazine* 9 (Spring 1960): 4–5.

40. C. G. Morgan deposition, Chicago, 20 May 1975, *Yandle/Kay v. PPG*, 10, 28, 33, 55, MMUBS Archive.

41. *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 12, MMUBS Archive.

42. G. A. Higham deposition, *Yandle/Kay v. PPG*, London, 4 June 1975, 11, 29, MMUBS Archive.

including the use of computers. Richard Gaze wrote to Chicago attorney Meyer to ensure that the NAAC was part of the modernization program.[43] Cape also monitored and vetted staffing in Chicago. Interestingly, Cape's own legal advice on its policy of giving discounts to favored U.S. customers was that American courts might decide that they had jurisdiction over Cape because the NAAC was so active in the United States and because Cape's trade could not be carried out without its subsidiary.[44]

Richard Gaze's testimony of the close involvement of Cape's directors with the American scene also seemed at odds with Cape's argument that it did not control the NAAC. In the 1950s and 1970s, Cape developed joint ventures with Johns-Manville to make the asbestos marine board 'Marinite'. The NAAC was also closely linked with Cape's London fiber laboratories, which dealt with technical problems in thermal insulation that arose in the U.S. market. Not surprisingly, a transatlantic traffic of personnel and information developed. Unibestos production was launched at UNARCO by a former manager of Cape's Barking facility, Rudolf Wild, who worked for UNARCO between 1928 and the 1940s. In the late 1940s and early 1950s, regular personal contacts were maintained by Thomas C. Hale, another Barking manager, and K. C. Gray, a Cape sales manager.[45] Bob Cryor visited Cape in London almost yearly and his successor at UNARCO visited Barking equally regularly. Cape directors regularly visited the United States. These included Geoffrey Higham, chairman of Cape after 1980. Gaze visited Bloomington in 1956, Pittsburgh in 1961, and thereafter his visits to America became annual. These people (alongside NAAC staff) also visited large contract customers in the U.S. on behalf of the South African mining operations, thus generating new customers.

In private, NAAC personnel did not view themselves as mere 'commission agents' of another firm. Cryor viewed the NAAC as the 'nucleus' of a national distribution organization. "To be somewhat trite," he wrote, "we rather try to think of ourselves as being part of a co-ordinated group with responsibilities to the whole, even though this may mean subordinating other and more profitable interests of NAAC."[46] In fact, Cape did treat the NAAC as part of a coordinated group. Its American subsidiary gave Cape a direct input into the

43. Gaze to M. E. Meyer, 20 July 1971, MMUBS Archive.

44. R.K. Decker memo, 26 Nov. 1962, MMUBS Archive.

45. R. Gaze, "The Development of Unibestos in the USA," n.d., MMUBS Archive.

46. R. Cryor to Malcolm Reid (Cape), 28 Dec. 1956, MMUBS Archive.

industrial politics of U.S. asbestos production. The NAAC had a seat on the Asbestos Textile Institute (ATI), which in turn was linked with the Asbestos Information Association (AIA). These were trade organizations that in the 1970s became increasingly involved with the defense of asbestos and the minimization of health risks. Cryor once served as president of the ATI, while Gaze was on the board of the AIA. Through the NAAC, Cape helped American industrialists defend asbestos and counteract the influence of physicians, such as Dr Irving Selikoff, who in the 1960s had publicized the mineral's dangers. In 1977, Gaze, after attending one AIA meeting, told Morgan that "one of your first tasks must be to try to organize a body of medical opinion that is prepared to stand up to Selikoff."[47]

A most revealing yardstick by which to judge Cape's involvement with the NAAC was the reaction to the *Yandle* litigation in 1974. Far from feeling any regret over the harm to workers or misgivings over the American situation, Cape bitterly resented the way in which it had been hauled before the courts. Penna told the Chicago attorneys that, "we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult."[48] Cape's solution was to launch a major reorganization, in which the primary aim was to evade American litigation, while protecting the trade in asbestos until such time as Cape could withdraw from the market.

The first step in 1974 was to rename the parent company Cape Industries (thus shedding asbestos in name, though the mineral was not eliminated from the company's products until 1990).[49] Then in 1975, the South African mines were moved in Cape's corporate structure from Cape Industries (a large public company) to Cape Industries Overseas Ltd (which had only £100 in shares). (See Figure 1). Meanwhile, on a visit to Chicago in May 1975 Gaze and Penna discussed taking the NAAC 'offshore,' so that Cape's continued presence in America could be disguised—an idea that Gaze raised formally in a confidential letter to then NAAC boss Gerry Morgan.[50] In July 1975, Gaze told Morgan that he and Higham were resigning from the NAAC board "to disassociate the parent company as fully as possible from the operating companies." Gaze added: "It would I think be as well for this letter not to appear on the office file and so I

47. Gaze to Morgan, 7 July 1977, MMUBS Archive.

48. Penna to S. Milwid, 4 July 1977, MMUBS Archive.

49. G. Foster, "The Conundrum at Cape," *Management Today* (Dec. 1977): 43–50, 49–50.

50. Gaze to Morgan, 20 June 1975; Meyer to Penna, 3 Oct. 1975; *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 37, MMUBS Archive.

am sending it to your home. I am also sending a copy to Max [Meyer] at his private address."[51]

The reorganization was to be completed in 1977, as the *Yandle* case reached a conclusion. In November of that year, the Cape board met in London to agree the settlement of *Yandle*, the liquidation of the NAAC, and Cape's disappearance from the U.S. courts. Also on Cape's agenda was "the formation of a new off-shore company to sell asbestos to the North American market."[52] Within days of the meeting, Gaze travelled to Chicago to inform Morgan that he would soon be out of a job. This personal visit was a remarkable courtesy, if Morgan was regarded as merely a distant salesman, especially since Gaze had resigned from the NAAC board. Morgan would later testify that it was Gaze who ran the NAAC and that he himself knew nothing of the approaching liquidation.[53] Now apparently without a job, in December 1977 Morgan visited London, where he met with Tony Penna.

Within days of being fired, Morgan was running a new company—Continental Products Corporation (CPC)—which, although it was not a Cape subsidiary, was based in the same Chicago building (150 North Wacker Drive) and had the same office equipment, furnishings, and telephone number as the NAAC. Like its predecessor, CPC sold asbestos, which coincidentally came from Cape's South African mines. Cape had paid Morgan a generous redundancy package, which along with another $160,000 effectively seeded the new organization.[54] But Cape's involvement was deeper than that. CPC traded through another company, Associated Minerals Corporation (AMC), which was formed in January 1978 and was based in Liechtenstein—a country renowned for its secrecy in financial matters. The AMC stock was held by a nominee, a Liechtenstein lawyer named Dr. Karl Ritter, who agreed to vote as instructed by Cape.[55]

In reality, AMC operated as a Cape shell company that was inserted into a network that did not differ markedly from the previous NAAC arrangement, except that now Cape had no formal link to the United

51. Gaze to Morgan, 4 July 1975, MMUBS Archive.

52. Memo to file, Cape Industries, London, 12/13/14 Dec. 1977, MMUBS Archive.

53. *Mau v. UNARCO.* Morgan direct examination, 14, MMUBS Archive.

54. *Adams and Others v. Cape*, 15 March 1988, Day 20, 4, MMUBS Archive.

55. On bearer share certificates, see Organization for Economic Cooperation and Development [OECD], *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (Paris, 2001), 29–30. Posted at: www1.oecd.org/publications/e-book/2101131e.pdf.

States. (See Figure 2(a), (b).) An internal memorandum explained candidly:

> The Liechtenstein company has been chosen under advice from our lawyers because it enables the shareholders to be disguised under a bearer share certificate arrangement. The Liechtenstein company will be managed by ... Cape Asbestos Fibres Ltd, a wholly owned UK subsidiary of Cape Industries Ltd, but ... we wish to disguise this fact from would-be enquirers. The benefits receivable from the United

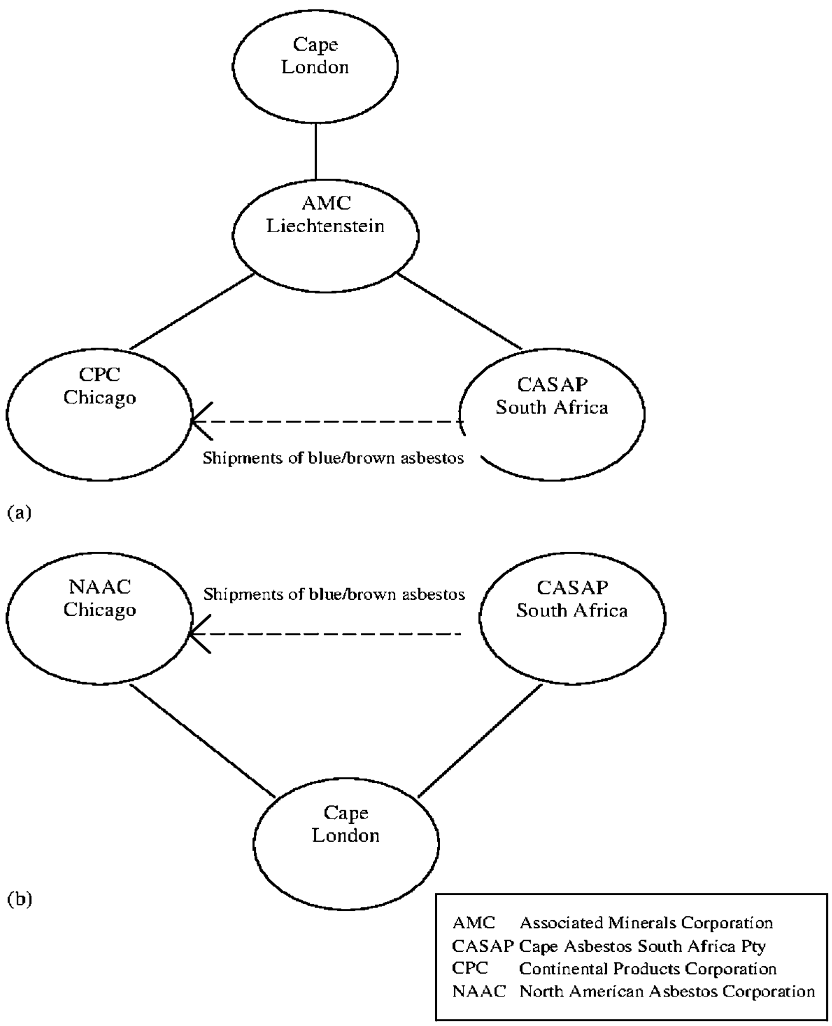

Figure 2 (a) Continental Products Corporation, 1977–81; (b) North American Asbestos Corporation, 1953–1977.

Kingdom from this investment are indirect. It is simply an exercise to enable us to continue to sell asbestos fiber in the United States, thereby protecting commission income from our wholly owned South African subsidiary . . .[56]

Once again the lawyers—Penna and Meyer—were involved, ensuring that there were no cross-directorships, that Cape and CASAP directors kept out of the U.S., and that the Cape connection was secret. As Penna later put it: "clearly disclosure of it was likely to hinder rather than help."[57]

The secret Liechtenstein company enabled Cape to continue selling asbestos to America, despite American product liability law and apartheid sanctions, until it was ready to distance itself from asbestos mining. This occurred in 1979, when a complex series of moves began that was akin to Anglo-American swallowing its own tail. Cape's South African mines were first sold for £15.5 m to Barlow Rand (another Anglo-American company), alongside an indemnity that U.S. judgments were not enforceable in England. The asbestos mines were then sold on again to General Mining (another Oppenheimer-linked firm). As to the fate of the AMC: an attentive reader of Companies House filings would have noted in 1979 the disposal of AMC by Cape Industries Overseas.[58] CPC, a company that was uninsured, was liquidated in 1981.

Despite Cape's documented links with the AMC, Cape staff proved unwilling (or unable) to shed any light upon its origins. When questioned in 1984, the Cape and Charter director Geoffrey Higham stated that he could not recall whether he had ever heard of the AMC (until lawyers mentioned it) and knew nothing about its business.[59] Penna repeatedly denied to the press that Cape had any involvement with the Liechtenstein based firm. Morgan, when questioned in a deposition, testified that he also knew nothing about Cape's connection with the AMC:

Q: Were the principals of that entity (AMC) the principals of some part of Cape Asbestos?

A: I have no idea.

Q: Have you ever . . .

56. Cape memo, *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 14–15, MMUBS Archive.

57. *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 50, MMUBS Archive.

58. Companies House, London: Cape Industries Overseas Ltd (1979). Reports, MMUBS Archive.

59. J. Walker documents: notes on deposition of G.A. Higham, 3, 4, Oct. 1984, *Thacker v. UNR Industries*, 70, MMUBS Archive.

A: Nobody talks about that.

Q: Have you ever determined the identity of the principals until this very day?

A: No, sir. I can't even read the name of the man who signed the contract.[60]

The attempt to enforce the 205 Tyler claims against Cape Industries (*Adams v. Cape*) came to trial in London in 1988. Documents produced in legal discovery now revealed more fully the legal web behind the reorganizations. This was encouraging for the American plaintiffs, because sham companies can induce the courts to pierce the corporate veil. Less helpful to the Americans was significant hostility among the English judiciary to American-style product liability law and the level of damages set by the U.S. courts, which were regarded as astronomic and unfair by English standards. The media took little interest in the case.

In his decision in 1988, Mr. Justice Scott accepted that the NAAC had been an integral part of the Cape group, which operated worldwide as a single economic entity.[61] He also agreed that the AMC/CPC arrangement was a façade that was designed to sell fiber in America while avoiding liability. He was skeptical of many of the details presented at the trial by Cape's directors and dismissed Morgan's testimony as "disingenuous and false." Nevertheless, he regarded the NAAC as a separate legal entity, so that "the presence of NAAC at 150 North Wacker Drive, Chicago, Illinois, did not constitute the presence in Illinois of Cape ... "[62] Cape's actions had been "somewhat conspiratorial," but these were too subjective and "not ... relevant to the main question."[63] In Scott's view, the corporate veil could not be lifted simply because justice demanded it, and so he dismissed the *Adams*' claims.

Cape's labyrinthine relationship with Charter was not an issue in *Adams*. However, Charter was pursued by the same group of lawyers and plaintiffs simultaneously in the United States, where a district court decided that Charter was liable because it controlled Cape and was therefore guilty of fraud and injuring workers. This was reversed in 1988, when the U.S. Court of Appeal judged that Charter's control

60. C. G. Morgan deposition, Pittsburgh, 31 Oct. 1980. Court of Common Pleas of Allegheny County, Pennsylvania Civil Division. *Anthony A. Barber et al v. Pittsburgh Corning Corporation v. Commonwealth of Pennsylvania et al.* No. GD 79-21544: 191-2, 193-4, MMUBS Archive.

61. *Adams and Others v. Cape Industries plc and Another* [1991] 1 All ER. 929 CA, MMUBS Archive.

62. *Adams and Others v. Cape*, All ER, 966-7, MMUBS Archive.

63. "*Adams and Others v. Cape,*" All ER, 967, MMUBS Archive.

of Cape did not reach the required level of dominance.[64] In England, too, the *Adams'* case went to the Court of Appeal, which refused to overturn the original verdict. The English Court underlined the legality of Cape's Liechtenstein company. It described the AMC as the "creature of Cape," but did not feel entitled to lift the corporate veil "merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group . . . will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."[65] This was a landmark decision and the most detailed review of this aspect of corporate law ever undertaken in England. The result was a striking restatement of the *Salomon* principle of strict separate personality.

The Corporate Veil and the Asbestos Industry

In the aftermath of *Adams*, Cape promptly declared that it had a "distinguished past and confident future"—an astonishing statement, especially in view of the catastrophic mesothelioma epidemic that was emerging in the polluted towns around Cape's former mines in South Africa.[66] In 1996, Charter Consolidated sold its interest in Cape for about £48 million, leaving Cape Plc to make its own way as an international asbestos removal contractor and manufacturer of nonasbestos fire protection and insulation products. Cape prospered again, though as a shadow of its former self and still burdened with asbestos liabilities.[67]

In retrospect, one is struck by the number of legal landmarks in which Cape was involved. It was part of the first big American asbestos settlement (1977); it was the first company in the United States to incur punitive damages in asbestos litigation (1982); and it owned the first U.S. asbestos company to file for bankruptcy (1982).

64. *Clarence Craig and Duveen A. Craig v. Lake Asbestos of Quebec Ltd v. Charter Consolidated, 1988.* US Court of Appeals for the Third Circuit. No. 87–1254, MMUBS Archive.

65. L.J. Slade, "*Adams and Others v. Cape,*" All ER, 102, MMUBS Archive.

66. Cape Plc, *A Distinguished Past and a Confident Future: A Short History of Cape PLC 1893–1993* (London, 1993).

67. D. Blackwell, "Cape Leaves Litigation Behind," *Financial Times*, 26 March 2004; T. Macalister, "Cape Misses Court Date to Avoid Payment," *Guardian*, 18 Nov. 2003.

In 2003, it settled yet another important case (*Lubbe v. Cape*) brought by 7,500 of its former South African workers, after the court made a precedent-setting ruling that the case could proceed in London.[68] Yet despite all this litigation, Cape emerged remarkably unscathed and had proved itself "astonishingly adept at extricating itself from the (asbestos) business without paying huge compensation."[69]

The question arises as to whether Cape's actions were typical. Before examining that point, it should be noted that the asbestos industry has its defenders. An authorized history of Turner & Newall (T&N) has described the company as a model health hygienist unfairly traduced by historians with an aversion to capitalism.[70] Another historian has absolved the American asbestos companies of conspiracy against the public interest and has pinned the blamed for litigation on 'malevolent' journalists and on opportunistic lawyers.[71] In fact, Cape's use of the corporate veil was quite routine. T&N operated wholly owned American asbestos factories between the 1930s and 1960s through a holding company in Montreal, which also controlled T&N's Canadian mining and manufacturing interests. The structure was originally dictated by T&N's desire to evade American taxes and antitrust law. In 1977, T&N implemented a complex reorganization of its Canadian holding company that involved the setting up of 'buffer' companies to distance its assets from claimants. The arrangements proved highly effective in repelling jurisdictional claims when asbestos personal-injury cases were launched against T&N in the 1980s, both in the United States and Canada.[72] In America, the reaction of W. R. Grace & Company to its spiralling asbestos liabilities after the mid-1980s was to divest itself of over $4 bn in assets behind an elaborate series of restructurings and technical bankruptcy. The result was a near-empty shell for asbestos claimants and a tax-free exit with the assets for the stockholders (though the

68. *Lubbe and Others v. Cape plc* [2000] 1 WLR 1545, MMUBS Archive. See R. Meeran, "Cape Plc: South African Mineworkers' Quest for Justice," *International Journal of Occupational and Environmental Health* 9 (Sept. 2003): 218–27; Peter Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases," *International and Comparative Law Quarterly* 50 (Jan. 2001): 1–25.

69. Pallister et al, *South Africa*, 254.

70. P. Bartrip, *The Way from Dusty Death: Turner & Newall and the Regulation of Occupational Health in the British Asbestos Industry 1890s–1970* (London, 2001).

71. Rachel Maines, *Asbestos and Fire: Technological Trade-offs and the Body at Risk* (New Brunswick, N. J., 2005).

72. G. Tweedale, *Magic Mineral to Killer Dust: Turner & Newall and the Asbestos Hazard* (Oxford, U.K., 2nd ed., 2001), 219.

bankruptcy court was later able to claw back about $1 bn).[73] The core Grace company remains profitable today, though it remains under the shadow of heavy fines levied by the Environmental Protection Agency for asbestos damages at a former Grace mine in Libby, Montana, while seven of its current and former executives face federal indictments that they knowingly placed their workers and the public in danger.

In the late 1990s, the leading Australian asbestos company, James Hardie, also restructured its business to deal with its growing asbestos liabilities. In 2001, it established a compensation fund, while simultaneously and surreptitiously shifting its assets and corporate headquarters to the Netherlands. When the fund ran dry within only three years, the Dutch parent was revealed to be immune to claims because Australia did not have an enforcement treaty with the Netherlands. The subsequent public outcry resulted in a New South Wales Government Commission. The Commission's report revealed a masterly use of the corporate veil to distance Hardie from liability.[74] It also identified a string of possible offences against the Corporations and Trade Practices Acts and the common law.[75]

Inevitably, such problems have been magnified in countries where government regulations are more lax, leading to accusations that the separation of legal identity has enabled MNEs to apply 'double standards'. Certainly, in the United Kingdom, Cape had to operate under far more stringent safety standards than abroad—standards that were never applied, for example, in South Africa.[76] Double standards were also evident in Cape's policy towards the United States, whence fiber was shipped without the safety warnings that became a requirement on bags of raw asbestos imported into the United Kingdom after 1976—an action that reflects little credit on

73. K. Rivlin and J.D. Potts, "Not So Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies with Asbestos Liabilities," *New York University Environmental Law Journal* 11, no. 3 (2003): 626–61; J. Heenan, "Graceful Maneuvering: Corporate Avoidance of Liability through Bankruptcy and Corporate Law," *Vermont Journal of Environmental Law* (2003), online journal published at: www.vjel.org/roscoe/roscoe03a.html.

74. New South Wales Government: Cabinet Office, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (Sept. 2004). Posted at: www.cabinet.nsw.gov.au/publications.

75. Ben Hills, "The James Hardie Story: Asbestos Victims' Claims Evaded by Manufacturer," *International Journal of Occupational and Environmental Health* 11 (April/June 2005): 212–14.

76. J. McCulloch and G. Tweedale, "Double Standards: The Multinational Asbestos Industry and Asbestos-Related Disease in South Africa," *International Journal of Health Services* 34, no. 4 (2004): 663–79.

Cape Industries, given its unparalleled knowledge of the hazards of amphiboles.

Much more is now known about mesothelioma in South Africa than when *Adams* was contested. It is the story of the concealment of a major public health hazard.[77] In the early 1960s, Cape and other South African producers had at first supported research into mesothelioma, but then ensured that the alarming results showing that mesothelioma was linked with environmental exposure were suppressed. This allowed Cape to continue to mine and sell amphiboles vigorously, while denying or minimizing the dangers.

Similarly, knowledge at Cape of health dangers rarely made it to the United States or influenced policy at Cape's operations there. In 1966, for example, Richard Gaze told NAAC boss, Cryor, that asbestos "in no way presents a hazard to the public at large" and denied that there was any evidence that amosite caused mesothelioma.[78] Yet, (as Gaze knew) independent medical studies had appeared only the year before in England that showed that mesothelioma deaths had occurred close to Cape's main factory, even among individuals who had never worked in the asbestos industry.[79] In the late 1970s, Gaze was still telling U.S. asbestos industrialists that crocidolite was not much worse than chrysotile and that "the hazards are greatly exaggerated in this country [the UK]."[80] Such scientifically inaccurate statements facilitated the export of Cape's blue fiber to America, after its import had been effectively banned in the United Kingdom. We shall never know how many workers died as a result, but some idea of the risks can be appreciated from the fate of several Cape executives.[81] Rudolf Wild died of mesothelioma in 1951, as did his daughter who was probably exposed to dust from her father's clothes. Tom Hale died of mesothelioma in 1961. So, too, did Bob Cryor in 1970. Gaze himself, who was a key architect of the NAAC, died from peritoneal mesothelioma in 1982.[82]

77. Flynn, *Studded with Diamonds*, 189–202; McCulloch, *Asbestos Blues*, 181–200.

78. Gaze to Cryor, 22 March 1966, MMUBS Archive.

79. M.L. Newhouse and H. Thompson, "Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area," *British Journal of Industrial Medicine* 22 (Oct. 1965): 261–69.

80. Gaze to Guy Gabrielson (Nicolet Inc.), 18 Feb. 1977, MMUBS Archive.

81. One recent estimate suggests that 10,000 Americans are dying annually from asbestos-related diseases, with 100,000 deaths projected over the next decade. See, Environmental Working Group, *Asbestos: Think Again* (Washington, D.C., 2004). Posted at: www.ewg.org/reports/asbestos.

82. Information from death certificates, legal documents, personal information, and Brodeur, *Expendable Americans*, 141.

Conclusion

Separate legal personality still stands in the shape of *Salomon* and *Adams* and is regarded by most legal experts as 'inherently sound'.[83] This article, however, demonstrates that the corporate veil can allow MNEs to escape responsibility and leave victims of corporate actions with no recourse.[84] The story of Cape Industry's American operations provides a striking illustration of how limited liability can act as a bar to recovery for corporate injuries even when a firm has been found guilty. Over the past twenty-five years tort law has arguably been "*the* uniquely effective and indispensable means of exposing and defeating the asbestos conspiracy, providing compensation to victims, and deterring future malfeasance."[85] Yet in Bloomington and Tyler and in many other American locations, hundreds (indeed thousands) of asbestos victims were denied the opportunity to claim damages from Cape Industries because of the legal doctrines supporting the corporate veil. Companies have been able to use traditional entity law to externalize the costs of conducting highly risky activities. A distinct pattern therefore emerges from this discussion of corporations enjoying the benefits of personality without the drawbacks (such as punishment for misdeeds); and of being able to restructure their businesses in flagrant disregard of industrial hazards and of the interests of anyone but their shareholders.[86]

For business historians, *Adams* and related cases have some intriguing implications. This episode is incomprehensible without an understanding of corporate law, which business historians have largely avoided in favor of a focus on management, technology, and other core business operations. Yet the asbestos cases show that lawyers played a key role in shaping company strategy. This may be a feature of companies involved in the manufacture of toxic

83. Grantham and Ross, *Corporate Personality*, 7.

84. For similar criticisms, see J. Dine, *The Governance of Corporate Groups* (Cambridge, Mass., 2000), 46–48; and Blumberg, *Multinational Challenge*, 133.

85. D. Rosenberg, "The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation," *Harvard Law Review* 99 (May 1986): 1693–1706, 1695. See also M. Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" *Washburn Law Journal* 41 (Spring 2002): 399–425.

86. The corporate veil in other industries remains to be explored. Interestingly, in 1994 BAT Industries in London claimed that it had been wrongfully named in a Minnesota tobacco damages suit, because it was merely a holding company with 164 employees and had only a distant relationship with its U.S. subsidiary Brown & Williamson. On this occasion, the American courts were not convinced. See P. Pringle, *Dirty Business: Big Tobacco at the Bar of Justice* (London, 1998), 203–6.

products. Stanton Glantz, for example, has shown the "unusually active role" played by tobacco industry attorneys, even in scientific research.[87] This view is shared by former Food & Drug Administration head, David Kessler, who believes that the tobacco industry "put itself in the hands of its lawyers" to counter threats to regulation.[88] Until now, the corporate attorney has not been a prominent figure in business history MNE scenarios, but these experiences suggest that it was not simply the entrepreneur that devised corporate strategy.

Above all, this story is important for the discordant note it strikes in the business history literature. It is a story of tax-avoidance, offshore companies, shells, the concealment of information, and the deaths of workers. It would appear that not all MNEs are the progressive institutions commonly portrayed in the literature of business history. Some are closer to Joel Bakan's depiction of the corporation as a monster, whose "legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others."[89] Business historians may disagree with this characterization, but they need to address these issues if they are to relate their work to contemporary debates in management and globalization. To do that they need to bring subjects such as the environment, regulation, ethics, and the social costs of business much closer to the center of the stage than they currently occupy in the Chandler paradigm. For Cape and other asbestos manufacturers the occupational and environmental health problems of producing a toxic product were far from being an 'externality', but were central to the operation, structure, and survival of the business.

87. S. Glantz et al. eds., *The Cigarette Papers* (Berkeley, Calif., 1996), 236.

88. D. Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (New York, 2001), 205.

89. Bakan, *Corporation*, 1–2.

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