HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 33

on appeal from[2004] EWCA Civ 175

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Sutradhar (FC) (Appellant)
v.
Natural Environment Research Council (Respondents)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

Appellants:
Lord Brennan QC
Andrew Spink QC
Richard Hermer
(Instructed by Leigh Day and Co)

Respondents:
Michael Beloff QC
Charles Pugh
Ben Cooper
(Instructed by Manches LLP)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss this appeal.

LORD HOFFMANN

My Lords,

2. The question is whether the claimant, who lives in Bangladesh, has a reasonable prospect of success in an action against the Natural Environment Research Council ("NERC") for negligence in issuing a geological report which he says induced the health authorities in Bangladesh not to take steps which would have ensured that his drinking water was not contaminated by arsenic. In consequence he says that he has suffered injury from arsenical poisoning. The Court of Appeal, by a majority (Kennedy and Wall LJJ, Clarke LJ dissenting) and reversing the judge (Simon J) decided that the claimant had no reasonable prospect of satisfying a court that in all the circumstances the NERC owed him a duty of care. It struck out the claim. I agree. In my opinion the claim is hopeless.

Summary judgment

3. Under CPR r 24.2 the court has power to give summary judgment against a claimant if it considers that (a) he "has no real prospect of succeeding on the claim…and (b) there is no other compelling reason why the case or issue should be disposed of at a trial." This is a broader power than existed under the old rules, when a claim could be struck out only on the grounds that the pleading disclosed no cause of action (the old demurrer, on which no evidence was admissible) or that the claim was frivolous, vexatious and an abuse of the process of the court. Under CPR r. 24.2 evidence is admissible and witness statements have been submitted by both sides. The new power has been described by Lord Woolf MR (in *Swain v Hillman* [2001] 1 All ER 91, 92) as salutary:

> "It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…"

4. Lord Woolf went on to say:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position…Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."

5. These remarks were approved by this House in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1: see Lord Hope of Craighead at pp. 259-260; Lord Hutton at pp. 272-273. In addition, as Lord Millett said in the

same case (at p. 294) the "most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone." It is not just to a defendant to subject him to a lengthy and expensive trial when there is no realistic prospect of success.

6. I therefore approach this appeal on the basis that the claimant's allegations of primary fact must (unless plainly fanciful, which is not the case here) be accepted as true and allowance must be made for the possibility that further facts may emerge on discovery or at trial. The question is whether, on these assumptions, he has a real prospect of success. For this purpose, I shall first set out the facts as alleged in the statement of claim together with some incontrovertible background material which is either contained in the evidence or common general knowledge. I shall then consider whether as a matter of law there is any prospect of the claimant being able to establish a cause of action.

The British Geological Survey

7. NERC is incorporated by Royal Charter pursuant to section 1(1)(b) and 1(3) of the Science and Technology Act 1965 for the objects of research, instruction, the dissemination of knowledge and the provision of advice relating to the earth sciences and ecology. Its members are appointed by the Secretary of State for Trade and Industry and it is funded by grants from that Department and fees for activities undertaken for other departments, foreign governments or the private sector.

8. The British Geological Survey (BGS) was founded in 1835 as a branch of the Ordnance Survey and is now a department of NERC. It has an annual budget of £37m; about half consists of grants from public funds and the rest from paid research. It employs about 800 permanent staff and, among other things, undertakes research in hydrogeology. It has a specialised acquifer properties laboratory at Wallingford.

The Bangladesh Second Deep Tubewell Project

9. The Overseas Development Agency (ODA) was in 1992 a functional wing of the Foreign and Commonwealth Office, charged with providing aid to poor countries. It subsequently became the Overseas Development Administration and in 1997 its functions were taken over

by the Department for International Development (DFID). During the period 1983-1992 it was one of the donors funding a project known as the Bangladesh Second Deep Tubewell Project ("DTWII") to increase food production in Bangladesh by assisting the Bangladesh Agricultural Development Corporation ("BADC") to provide 4000 deep tubewells (artesian wells) for irrigation purposes in an area north of Dacca. These were wells of substantial capacity (50-60 litres per second) equipped with a vertical turbine or electrical submersible pump.

10. In 1984 the ODA commissioned the BGS to undertake hydrogeological work for the purpose of testing the efficiency of tubewell designs. For this purpose Mr Jeffrey Davies, a geologist specialising in hydrogeology, was employed by the BGS to test 16 well designs. He tested these wells in a relatively small area north-west of Dacca, forming part of the area covered by DTWII, which was chosen for its relatively homogeneous geological character. This project was concluded in 1988.

11. In 1990 Mr Davies proposed a programme to check on whether there had been deterioration in the performance of the DTWII tubewells. He proposed first to revisit the 16 test wells sunk by BGS and then, if he found deterioration, to undertake a more detailed study in the following year. Funding for both stages of this programme was approved by ODA.

The Geological Survey

12. Mr Davies made his initial field trip early in 1991 and found no signs of deterioration. He therefore declared a second visit to be unnecessary and proposed instead that the BGS should spend the £40,000 allocated by ODA on a study of the hydrochemistry of the main aquifer units of the whole area covered by the DTWII project. This involved taking water and sediment samples at various places and sending them to the laboratory at Wallingford for chemical analysis. The proposal claimed that, in addition to adding to the general stock of geological knowledge, his project would be useful in two ways. First, it would provide a better understanding of the way in which the DTWII irrigation wells worked. Secondly, following a suggestion from a colleague at the Institute of Acquaculture at Stirling University, he said that the chemical analysis could reveal the presence of trace elements such as aluminium and iron which might be toxic to the fish which (in a project in which the Stirling Institute was involved) rural Bangladeshis

were being encouraged to farm. Indeed, such elements might be toxic to humans also. It appears that the Wallingford laboratory has a standard procedure which can test simultaneously for all the major and minor ions and the most common trace elements. As these include aluminium and iron, the information concerning the fish was obtainable at no extra cost.

13. Mr Davies did his field work in the first three months of 1992, obtaining groundwater samples from 150 sites in central and north-eastern Bangladesh. Most of the samples were taken from deep tube wells but more than a third came from hand pumped shallow wells which were commonly sunk to provide drinking water. After they had been analysed at Wallingford, he wrote up his report.

The Report

The Report was entitled:

> "Short term BGS Pilot Project to Assess the Hydrochemical Character of the Main Aquifer Units of Central and North-eastern Bangladesh and Possible Toxicity of Groundwater to Fish and Humans."

14. It began with an Executive Summary. This described the project as a "reconnaissance study" which had the primary aim of producing a reliable body of data that could be used to describe the hydrochemistry of the main aquifer units of central and north-eastern Bangladesh. Such data was required to understand the hydrochemical nature of the main aquifers, the genesis of the alluvial aquifers and the modes of occurrence of "trace elements that may be toxic to biological systems". The "Study Inputs" were the obtaining of samples from 150 widespread sites and submitting them to Wallingford "for the determination of 31 major, minor and trace elements". The report included an atlas showing the distribution of major, minor and trace elements within the study area, which could be used "to indicate the distribution of elements and groundwater properties that can be of benefit or harmful to aspects of life in Bangladesh". The summary gave examples relating to the elements which had been identified: deficient iodine in the water supply in some areas, which could produce goitre, high dissolved iron, manganese and zinc in other areas, which could be harmful to fish, and high phosphate content, which could also harm fish. It recorded that

aluminium was not found in quantities likely to be toxic to biological systems. Finally, the summary concluded with a proposal for additional work:

> "This type of rapid reconnaissance survey produces information of relevance not only to hydrogeologists but also to those who are concerned with availability and quality of groundwater for domestic, agricultural, aquaculture and industrial usage. Similar studies undertaken in other parts of Bangladesh could produce comparable results given limited hydrogeological inputs."

15. The main body of the report, under the heading "Background", describes the participation of the BGS in DWTII, the fish farming project and the lack of adequate facilities in Bangladesh for obtaining hydrogeological data for the purposes both of designing and siting the most efficient irrigation wells and assessing the suitability of the water for fish. It went on:

> "The above experiences indicate the need to upgrade the groundwater analysis capabilities of institutions in Bangladesh. Improved equipment and staff training are needed urgently … Such a situation must also be of concern to public health workers who, especially during the recently completed 'World Water Decade', actively promoted the installation of thousands of hand-pumped wells as being the best sources of clean, wholesome (ground) water for local domestic use especially at village level.
>
> To overcome the above difficulties a countrywide baseline study of hydrochemical, hydrogeological and geological factors needs to be undertaken. As a first step this report presents the results of a study of the hydrochemistry of aquifer units within central and northern Bangladesh. Within this area…reasonable geological data are available from deep tubewells installed under the [DWTII] project."

Mr Davies then set out the Study Objectives:

> "This study aimed to acquire sufficient data to permit baseline hydrochemical characterisation of aquifer units recognised and recognition of processes controlling variations in groundwater chemistry within these aquifer systems.
>
> Such data should reflect and indicate groundwater flow patterns, location of groundwater recharge and discharge areas and delineation of groundwater bodies. Detailed studies will be made of the occurrence and interaction of aluminium, manganese, silica, phosphorus and iron and their effect upon biological systems in the context of fish cultivation, crop irrigation and potable water supply."

16. There followed a detailed account of the results, including the maps forming the "atlas" which showed the geographical distribution of traces of each element for which the samples were analysed: dissolved iron, silicon, manganese, phosphorus, aluminium, zinc, bromide, fluoride, iodide etc. It discussed the aluminium content and said that "Aluminium is therefore not considered to be a health risk in the majority of the groundwaters surveyed in this study." There were similar discussions of iron and manganese. In the conclusions, the report said that the hydrochemistry of the aquifers reflected a number of factors which were imperfectly understood. After setting these out, it said:

> "The above factors appear to control the distribution of minor elements some of which can be toxic to aspects of agricultural, health and aquacultural fields of interest. Such reconnaissance hydrochemical surveys will give timely indication of the possible presence and distribution of such toxic substances in groundwater systems in Bangladesh."

17. Finally, Appendix 3 set out the raw data of the hydrochemical analyses of Mr Davies's samples, showing the elements for which the samples had been tested and the results.

18. Copies of the report were supplied to the ODA, Mott MacDonald Ltd (the main engineering consultant which had been engaged on DWTII), Dacca University, the Bangladesh Agricultural Development

Corporation and certain non-governmental organisations involved in water resource managements. These copies were no doubt available to anyone who wanted to read them.

Arsenic in the drinking water

19. At the same time as the modest DWTII programme for sinking 4000 irrigation wells, there was in progress a vast scheme, initially funded by the United Nations Children's Fund (UNICEF), the World Bank and other non-governmental organisations, to install more than 4 million shallow hand pumped tube wells to supply drinking water in rural areas all over the country. The object of this programme was to give the people of Bangladesh access to clean drinking water instead of the contaminated pond and other surface water which had been responsible for gastrointestinal diseases and high infant mortality in the past.

20. Unfortunately it appears that in a good many cases the water from these shallow wells, though free of harmful bacteria and other organisms, is contaminated with arsenic. Tests of a limited number of wells have revealed the presence of arsenic at levels considerably higher than the standard measure of safety prescribed by the World Health Organisation. It seems that at least until 1993, and, according to the claimant, considerably later no one thought of testing the tubewell drinking water for arsenic. Mr Peter Ravenscroft, a hydrogeologist who worked for Mott MacDonald Ltd at the relevant time, says in a witness statement made on behalf of the claimant:

> "The majority of investigations into water resources related to quantity, and a high proportion of the practitioners working on water resource or supply projects (whether in Government, aid agencies or as consultants) did not concern themselves about most aspects of water quality. The question of groundwater quality had been very largely (with the exception of coliform bacteria, and to a lesser extent salinity and iron) neglected by both government and aid agencies."

21. The BGS did not test their samples for arsenic and there is no mention of arsenic in Mr Davies's report. UNICEF says that standard procedures for testing ground water at the time did not include tests for

arsenic. There is considerable controversy over whether the responsible organisations should have been aware of the danger at an earlier stage. Mr Ravenscroft says that when he read the 1992 report he paid no attention to the absence of tests for arsenic and other toxic chemicals because "I was not looking for them". It was only in 1995 that he heard reports of arsenic poisoning in neighbouring West Bengal and drew the conclusion that there might be similar problems in Bangladesh.

22. The consequences of the failure to test for arsenic have been most unfortunate: a paper published by the World Health Organisation (Smith, Lingas and Rahman, *Contamination of drinking-water by arsenic in Bangladesh: a public health emergency* Bulletin of the World Health Organisation 2000, 1093-1103) estimated that, of the 125 million inhabitants of Bangladesh, between 35 million and 77 million are at risk of drinking contaminated water and described the situation as the greatest environmental disaster that had ever happened.

The claimant

23. The claimant is one of the people affected by arsenic in his drinking water. He lives in the Brahmanbaria region to the north-east of Dacca, from which Mr Davies took some of his samples. He is a villager, now nearly 50, who says that until about 1983 he drank pond water. Then a tubewell was sunk in his village and he drank its water instead. In 1991 he developed symptoms associated with arsenical poisoning (melanosis, keratosis, foot ulceration) which, over the years, have become worse.

The allegations of negligence

24. The claimant says that BGS caused or materially contributed to his illness, either by failing to draw attention to the presence of arsenic or by issuing a report which represented that his water was safe to drink. He, of course, had never seen the report or, one would imagine, heard of BGS. But he says that if the report had said that the water contained arsenic or had not given the impression that the water was safe, the public health authorities in Bangladesh would have taken steps to ensure that it was. So the question is whether BGS owed the claimant and others like him a duty to take reasonable care to test whether the water contained arsenic or not to issue a report which gave the impression that testing for arsenic was unnecessary. The defendants say that there is no

arguable case that they were in a relationship of proximity with the population of Bangladesh which could make them liable on either of these grounds. They do not submit that there are any other grounds upon which the claimant would be bound to fail, although they point out the very considerable difficulties he would have on other issues.

25. I have put the claimant's case in two different ways: BGS owed him a duty to test for arsenic or BGS should not have issued a report which gave the impression that there was no arsenic. It is important to distinguish between these two formulations. The first is that BGS owed him a positive duty to test for arsenic. That way of putting the matter makes it necessary to inquire what could have created such a duty. The second is essentially a claim of misrepresentation: the report is said to have given the impression, by its omission of any tests for arsenic, that the water was free of arsenic, or at any rate safe to drink, and this, as should have been foreseen, lulled the Bangladesh public health authorities into a false sense of security and inhibited them from testing the water themselves and discovering its toxic properties.

26. Lord Brennan QC, who appeared for the claimant, disavowed the allegation of a positive duty to test for arsenic and emphasised the misrepresentation aspect of the case. He realistically saw the considerable difficulties in the way of a claim that BGS, out of all the geological experts in the world, owed such a duty to the people of Bangladesh. Nevertheless, it is important to say why BGS were under no duty to test the water for arsenic because the reasons are relevant to whether any claim can be founded upon the terms of their report.

27. BGS had no connection with the drinking water project and no one asked them to test the water for potability. They owed no duty to the government or people of Bangladesh to test the water for anything. If Mr Davies had not found some spare money in the budget and never done his survey, BGS could not have incurred any liability. The fact that they tested for the elements specified in the report was an accident of the availability of funds, Mr Davies's idea of adding to useful knowledge and Stirling University's concerns about fish farming. The statement of claim places much emphasis upon the expertise, world renown and so forth of BGS, and contrasts this with the impoverished state of Bangladeshi geological facilities. This was a matter to which Mr Davies himself drew attention in the report: see paragraph 15, above. But the fact that one has expert knowledge does not in itself create a duty to the whole world to apply that knowledge in solving its problems. True, the BGS was working in Bangladesh and Mr Davies did test the water for a

number of trace elements. But the fact that he or the BGS in Wallingford chose to run tests for some elements cannot create a duty upon them to test for other elements. BGS therefore owed no positive duties to the government or people of Bangladesh to do anything. They can be liable only for the things they did and the statements they made, not for what they did not do.

28. I turn therefore to whether any claim can be based upon the terms of the report. The essence of the claimant's allegation is that BGS knew or ought reasonably to have known that the report would be relied upon as a statement that the tubewell water of Bangladesh was fit to drink. More specifically, that it did not contain arsenic or any other toxic substances.

29. In my opinion it is quite impossible to find any such statement in the report. Ms Sara Bennett, who describes herself as an Environmental Consultant and has filed a witness statement for the claimant, says that she "accepted the statements made by the study as meaning what they said." If this means that the report contained statements that there was no arsenic in the water, it is simply untrue. The report states absolutely clearly that the samples had been tested at Wallingford for the presence of a number of named elements and draws attention to the fact that the presence or absence of some of these elements (presence of iron, absence of iodine) may be relevant to the toxicity of the water to animals and humans. It says nothing about arsenic. No one could suppose that the BGS had tested the water for arsenic. The report does not say why they did not include arsenic in the suite of elements for which they ran tests. But the highest that the matter can be put for the claimant is that the absence of a test for arsenic implies that BGS (like, it seems, everyone else at the time, including the government, UNICEF and those closely involved in the drinking water programme) thought that the presence of arsenic was so unlikely that it was not necessary to test for it. The report can therefore at best be regarded as an implied statement by BGS that they shared that belief.

30. It is important to be clear about the basis of the claim because the claimant, supported by the witness statements filed on his behalf, goes on to say that if the BGS had warned about the presence of arsenic, the government or some aid agency or NGO would have done something about it. Thus Mr Ravenscroft says that "if arsenic had been identified in 1992 an arsenic mitigation programme would have been quickly implemented". Ms Bennett, who worked on the Northeast Regional Water Management Plan ("NERP") in 1991-1994, says that if the report

had identified arsenic "it would have been highlighted as an urgent issue in the NERP April 1993 report" and measures to mitigate exposure would have been set in train. (This allegation faces formidable difficulties in the light of the measures actually taken (or not taken) by the authorities after the problem was identified, but for the purposes of this application for summary judgment I think it must be accepted as true.) It is, however, a statement about what would have happened if the BGS had tested the water for arsenic and, as I have already said and I think Lord Brennan accepts, the BGS owed no duty to test the water for arsenic. In this respect both the witness statements and the statement of claim display some confusion about exactly what the nature of the claim is. In fact the claim depends upon the very different proposition that the BGS owed a duty not to make an implied statement that in their opinion it was unnecessary to test for arsenic and that it was this implied statement by BGS (rather than the similar implied statements being made at the time by all other experts involved in the drinking water programme) which caused the failure of the government to take protective measures.

31. Is it then arguable that the BGS owed a duty to the population of Bangladesh not to publish a report which, although containing useful information about many other matters, implied, by what it did not say, that the BGS shared the conventional wisdom about arsenic? My Lords, I think that this question has only to be stated in order to show how improbable it is.

32. The grounds upon which courts will decide whether or not a claimant is owed a duty of care have been examined by the House on numerous occasions. The standard framework within which this question is usually examined is to ask whether the damage was reasonably foreseeable, whether there was sufficient "proximity" between the claimant and the defendant and whether it is fair, just and reasonable to impose a duty: see Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618. It has often been remarked that the boundaries between these three concepts are somewhat porous but they are probably none the worse for that. In particular, the requirement that the imposition of a duty should be fair, just and reasonable may sometimes inform the decision as to whether the parties should be considered to be in a relationship of proximity and may sometimes provide a special reason as to why no duty should exist, notwithstanding that the relationship would ordinarily qualify as proximate. In these proceedings the defendant does not allege any such special reason but the concept of fairness and justice obviously looms large in the question of whether the author of a geological survey should

be treated as having a relationship of proximity to the population of Bangladesh.

33. The possibility of a duty of care in tort not to make negligent statements was first established by the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Until then, the law had taken the view, exemplified by the statement of Bowen LJ in *Le Lievre v Gould* [1893] 1 QB 491, 502 that "the law…does not consider that what a man writes on paper is like a gun or other dangerous instrument", that in the absence of contract, fraud or a fiduciary relationship, there is no liability for negligent statements.

34. The old rule applied whatever the type of loss which might follow from the negligent statement: whether physical injury or financial loss. In *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 194 Asquith LJ, in support of a majority judgment which upheld the previous law, gave an illustration:

> "Singular consequences would follow if the principle laid down in [*Donoghue v Stevenson* [1932] AC 562] were applied to negligent misrepresentation in every case in which the representee were proximate to the representor. The case has been instanced by Professor Winfield and referred to by my brother Denning of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef. The captain of the *Queen Mary*, in reliance on the map and having no opportunity to check it by reference to any other map, steers her on the unsuspected rocks, and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages? If so, people will, in future, think twice before making maps. Cartography would become an ultra-hazardous occupation."

35. Denning LJ, in a famous dissenting judgment, favoured the possibility of liability for negligent statements. But not on the basis of the kind of "proximity" which would satisfy the requirements of *Donoghue v Stevenson* [1932] AC 562 for conduct causing direct physical injury without any intermediate element of reliance, whether by the claimant or a third party. He proposed a much narrower test for a duty of care in respect of statements: the maker must be exercising a

profession in which he can be expected to take care, he must know that the statement is going to be used by the person relying upon it and he must have known the particular transaction for which the information was required:

> "a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all. But when a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction".

36. This dissenting judgment was upheld by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (see Lord Hodson at p. 509, Lord Devlin at p. 530 and Lord Pearce at pp. 538-539). It seems to me that the alleged implied statement about arsenic in the BGS report is no different from a statement in an authoritative textbook on geology to the effect that the aquifers of Bangladesh are very unlikely to contain arsenic. It is clear that Lord Denning would not have regarded the author of such a book as in a relationship of proximity with the population of Bangladesh.

37. Lord Brennan said that the law had developed since the pioneering days of *Candler's* case and the *Hedley Byrne* case and, as an indication of current thinking, relied upon the judgment of Hobhouse LJ in *Perrett v Collins* [1998] 2 Lloyd's LR 255. This was an action by a passenger who was injured in an aircraft accident, allegedly caused by the unairworthy state of the aircraft, against an inspector who had certified that it was fit to fly. Under the terms of the Air Navigation Order 1989 the aircraft could not lawfully fly unless such a certificate had been issued. Hobhouse LJ said that the inspector owed a duty of care to potential passengers to use reasonable care in inspecting the aircraft and issuing the certificate. He said that in respect of claims for personal injury there was now no difference in principle between liability for negligent statements and liability for other forms of conduct. The question was the degree of control and responsibility which the defendant had over the situation which involved potential injury to the claimant:

> "Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury."

38. I do not propose to comment upon this statement, formulated with characteristic care and precision. It may or may not be possible now to subsume liability for negligent statements together with other conduct causing physical injury under a single principle. But that principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. Such a principle does not help the claimant. In *Perrett's* case the inspector had complete control over whether the aircraft flew or not. If he refused a certificate it could not fly. The purpose of the system of certification established by the Air Navigation Order 1989 was equally clearly the protection of persons who might be injured by unairworthy aircraft and therefore placed responsibility for affording such protection upon the inspector. For my part, therefore, I have no difficulty with the proposition that the inspector owed a duty to potential passengers to exercise due care and this may be why *Perrett v Collins* [1998] 2 Lloyd's LR 255 has not been reported in the official series of law reports. (Compare also *Clay v AJ Crump & Sons Ltd* [1964] 1 QB 533 in which an architect had complete control over whether a dangerous wall was left standing and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 in which the Board had control over the medical services provided at boxing matches.) But the claimant does not come even remotely within the principle stated by Hobhouse LJ. The BGS had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that it was safe to drink. Lord Brennan said that while it was true that the BGS had no control over or responsibility for the water supply, they had control over and responsibility for their report. But this emendation of Hobhouse LJ's principle would turn it into complete nonsense. Everyone has control over and responsibility for their own actions. The duty of care depends upon a proximate relationship with the source of danger, namely the supply of drinking water in Bangladesh.

39. Simon J refused to strike out the claim on the ground that the law was developing and that "part of the argument [for the defendant] proceeds on the basis that a leading judgment in the Court of Appeal is wrong." That was apparently a reference to Hobhouse LJ in *Perrett v Collins* [1998] 2 Lloyd's LR 255 and it may be that the defendant made such a submission to the judge. However, so far as the judge thought that the case could arguably come within the principle stated by Hobhouse LJ or any conceivable development of that principle, I respectfully think that he was wrong. He also appears to have proceeded on the basis that the BGS had arguably been under a duty to test for arsenic ("The failure to test for arsenic can, at least for the purposes of the present application, properly be viewed in the context of the overall activity of conducting a competent hydrogeological survey"). This is an argument which Lord Brennan now disavows and which, as I have said, has no prospect of success. While therefore it is true that the decision to give summary judgment involves the exercise of a discretion, the judge in my opinion exercised his discretion upon a misapprehension about the relevant principles of law and the Court of Appeal were right to reverse him.

40. In his dissenting judgment, Clarke LJ said (at paragraph 44) that it was arguable that "the defendant should have tested for all trace elements including arsenic or made it clear in the report that it had not tested for arsenic." But in my opinion there could not have been any duty upon the BGS to test for arsenic and the report made it perfectly clear that they had not done so.

41. My Lords, the claimant in my opinion fails at the first hurdle of showing an arguable case that he was owed a duty of care. It is however worth considering the other formidable difficulties which, even if his case on this point had not been as hopeless as I think it is, he would have had to overcome in order to establish liability. He would have to show that it was negligent of the BGS, in the context of a report which did not purport to be a certificate of the potability of drinking water, not to have questioned the current orthodoxy that it was not necessary to test for arsenic. He would have to establish the causative effect of the report in the sense of showing that but for the publication of the report containing its implied endorsement by the BGS of the unlikelihood of arsenic being present in the water, that orthodoxy would have been questioned by the Bangladesh government or someone else who would have alerted the government to the dangers. He would have to show that the government would have done something to provide alterative water supply for the claimant's village. All of these points are conceded to be arguable, but the claimant must succeed on all of them and, as any punter will know,

if your chances on each of four issues are 20%, your chances of succeeding on all four are less than 0.2%.

42. The overriding objectives of the Civil Procedure Rules include achieving justice for both claimants and defendants and saving time and expense. These objectives sometimes conflict and compromises are required. It is not the case that the administration of justice, alone among the services provided by the state, is exempt from any considerations of cost. It is obvious that a trial of this action, involving an examination of the water resources programme in Bangladesh over a number of years, would be an enormous and expensive undertaking. Your Lordships were told that the costs incurred in these proceedings by the claimant and other residents of Bangladesh who wish to bring similar actions, at the expense of United Kingdom public funds, already exceed £380,000. That takes no account of the costs incurred, also at the public expense, by NERC. That is a factor which, however unpalatable it may be to those who think that justice is priceless, must be taken into account. And justice to the defendant requires one to have regard to the burden which a long and complicated trial would impose upon NERC. Speaking for myself, I think that even if the resources of the state and NERC were infinite, it would still be wrong for this case to proceed to trial. But when one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming. I am also in complete agreement with the speech to be delivered by my noble and learned friend Lord Brown of Eaton-under Heywood, which I have had the privilege of reading in draft. I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

43. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. For the reasons set out in his opinion, with which I agree, I would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

44. I too would dismiss this appeal and in doing so agree with everything said by my noble and learned friend Lord Hoffmann. I nevertheless want to add a short judgment of my own simply to highlight what seem to me the critical features of the case.

45. I agree with Lord Hoffmann (para 41) that there could be no duty on BGS to test for arsenic and I agree too that their report made it perfectly clear that they had not done so. I agree therefore that the relevant question is that earlier posed by Lord Hoffmann at paragraph 32**:** is it arguable that BGS owed a duty to the population of Bangladesh not to publish a report which implied, by what it did not say, that BGS shared the conventional wisdom about arsenic (namely—see para 30—that its presence was so unlikely that it was not necessary to test for it)?

46. Lord Hoffmann at paragraph 42 of his speech rightly points out that, the existence of a relevant duty of care aside, one of the other formidable difficulties in the claimant's path would be to show that it was negligent of BGS, in the context of a report which did not purport to be a certificate of the potability of drinking water, not to have questioned the current orthodoxy that it was unnecessary to test for arsenic. For the purpose of deciding whether BGS were under a duty of care, however, we must assume that their report, in impliedly stating that arsenic was not a hazard, constituted a negligent misstatement. If the claimant could prove that, but for such negligent misstatement, the government of Bangladesh or other relevant Bangladeshi authorities would have discovered the hazard and eliminated it from the water supply thereby safeguarding the claimant from the injury he sustained (each of these representing further formidable difficulties in the claimant's path as Lord Hoffmann also points out in paragraph 42) would he be entitled to succeed in this claim? That critically seems to me the true issue.

47. Beguilingly though the argument was put by Lord Brennan QC, there seems to me to be only one answer to that question, the answer no. *Clay v A J Crump & Sons Ltd* [1964] 1 QB 533, *Perrett v Collins* [1998] 2 LLR 255 and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 are the authorities principally relied upon by the

appellant in this appeal. But in the present case there is nothing like the directness and immediacy between the defendant's role in events and the claimant's injuries which characterise each of those cases: an architect who was responsible for the safety of the site buildings negligently left standing a wall which then collapsed on the plaintiff workman; an inspector responsible for certifying airworthiness negligently certified an aircraft as fit to fly; and the British Boxing Board of Control, with the responsibility for determining the medical care and facilities to be immediately available for those injured in the boxing ring, negligently failed to specify a sufficient level of care. It is the contrasts rather than the similarities between those cases and this which are so striking.

48. Here the essential touchstones of proximity are missing. BGS had no "control over" or "responsibility for" (see p 262 of Hobhouse LJ's judgment in *Perrett v Collins* quoted by Lord Hoffmann at paragraph 38 above) the provision of safe drinking water to the citizens of Bangladesh in the same way as the architect, the air safety inspector and the British Boxing Board of Control had control over and responsibility for ensuring respectively a safe wall, a safe aircraft and a safe system for treating injured boxers. There was here no "particular transaction" (Denning LJ's phrase in his dissenting judgment, later to be vindicated, in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 183) such as the preparation of accounts to be shown to a known potential investor—or, indeed, such as triggered the implied statements attesting to the safety respectively of the wall, the aircraft and the boxing ring in the later three cases. BGS's position is akin rather to that of the notionally negligent marine hydrographer referred to by both Denning LJ and Asquith LJ in *Candler's* case. Moreover (and this perhaps is just a mirror image of the last point), unlike the comparatively narrow classes of potential claimants in the other cases—those likely to be injured respectively by the collapsing wall, the crashing aeroplane or the inadequate provision of immediate care for injured boxers—the class of potential claimants here (assuming BGS were indeed to owe the duty of care contended for) is the entire population of Bangladesh or at the very least that of the areas tested during the 1992 survey.

49. I recognise, of course, that the three pre-conditions to the imposition of a duty of care classically formulated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605—the foreseeability of harm, a sufficient proximity between the parties, and that it is fair, just and reasonable to impose a duty of care in all the circumstances—to a substantial degree overlap. There are copious statements throughout the case law and the academic commentaries to that effect. And I recognise too that we are to assume for present purposes that the appellant can

establish both the foreseeability of harm and that it would be fair, just and reasonable to impose a duty of care here, in the sense that there are no sufficient policy reasons for denying a duty which would otherwise exist, as, for example, in cases of psychiatric injury (see *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455), "wrongful birth" (see *Parkinson v St James's and Seacroft University Hospital NHS Trust* [2002] QB 266), or actions brought in respect of police investigations (see, most recently, *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495). But all that said, if ever there were a case which is bound to fall at the proximity hurdle this surely is it. Whatever is required to constitute a sufficient proximity to support a duty of care—and I acknowledge the imprecision of the concept and the many criticisms it has attracted down the years—it is not to be found on any possible view of the facts here. That is the long and the short of it. The appellant's claim must inevitably fail and so too, therefore, must his appeal.

LORD MANCE

My Lords,

50. I have had the advantage of reading in draft the speech of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss this appeal.