NERC BRIEFING

1. In February 2004 the Court of Appeal in London struck out a test case brought by Bangladeshi citizens against the Natural Environment Research Council ('NERC'). The case alleged negligence by the British Geological Survey ('BGS'), a component part of NERC, in connection with a pilot project it had conducted in 1992 which researched the hydrogeology of one region of Bangladesh. The study assessed the presence of a limited number of inorganic elements and compounds in the area's groundwaters, but had not included arsenic or, indeed, a number of other compounds and elements that might be relevant to determining whether or not the waters were safe to drink. It emerged later in the decade that naturally occurring arsenic was prevalent in much of the country's groundwaters, which are the predominant source of drinking water in Bangladesh. The Court decided by a majority of two to one that the claimant (who stood for about seven hundred other claimants, all said to be suffering from arsenic poisoning) had a negligible chance of winning if the matter were allowed to go to trial. The Court, therefore, had a duty to stop the case at this point.

2. The background to Bangladesh's arsenic problem and the history and scope of BGS's survey and report are set out in some detail at http://www.bgs.ac.uk/scripts/briefings/view_brief.cfm?id=166.

3. The claimant's solicitors announced in July 2004 that they intended to seek leave from the House of Lords to appeal against the judgment of the Court of Appeal. If they both obtain leave to appeal and then succeed in having the Court of Appeal's decision reversed, the case will proceed to trial in the usual way. NERC and BGS are confident that they will win if the matter does go to trial.

4. This seems an appropriate moment, however, to explain in more detail why the Court of Appeal decided to strike out the claim at this preliminary stage. The full judgment of the Court may be viewed at http://www.nerc.ac.uk/insight/docs/sutradhar-v-nerc.htm but we summarise its findings below, starting at paragraph 9.

5. Most people at some time or another may risk harming other people through acts of personal carelessness – perhaps from accidentally colliding with someone in the street or from driving too fast, for example - but in the eyes of the law it is unreasonable to impose liability for damages in every circumstance. To strike a fair balance between one person's claims to compensation and another person's claims not to bear a disproportionate burden of liability for what may be a moment's thoughtlessness, the courts have established that a finding of legal liability for negligence requires a certain closeness of relationship, or proximity, between the parties which gives rise to a 'duty of care' on one party towards the other. In essence, the courts will impose a duty of care where they consider one party ought reasonably to have the other person (or perhaps a class of people) in mind as likely to be affected by their behaviour when doing whatever it is that turns out to cause harm to the other person.

6. There are a number of other constituents that also have to be proved before liability for negligence can arise, such as establishing that the defendant has in fact acted negligently, and therefore has breached his duty of care, and that the harm suffered by the claimant was actually caused by that breach. But if, as a matter of law, the courts decide that the relationship between the parties lacks sufficient proximity for a duty of care to arise, a claim in negligence is bound to fail.

7. Examples of the kinds of relationship in which the courts have decided that a duty of care may arise include parent to child, solicitor to client and food manufacturer to consumer, although whether such a duty will actually apply will depend in addition on the particular circumstances of each case. Occasionally a duty of care may exist where the relationship between the parties is indirect, such as where the defendant advises a third party as to action to be taken by that third party which will directly and foreseeably affect the safety or wellbeing of the claimant. For example, in one case the British Boxing Board Control were found liable to a boxer whose injuries received inadequate ringside attention. The Board had not promoted the fight, but they had imposed the mandatory rules which governed the medical facilities that were made available at it. This is the type of A-B-C relationship into which the Bangladesh claimants have attempted to fit their case.

8. The possible types of 'duty of care situation' could be extended by other cases in the future. However, the courts have decided that new categories of relationship will only give rise to a duty of care if they bear similarities to decided cases and extend the recognised classes of relationship only incrementally. In other words, the courts will not impose a duty of care in a novel situation if it unduly stretches the concept of proximity beyond the principles already established by existing case law.

9. In the Bangladesh case the claimant and defendant were entirely unknown to each other and the primary purpose of BGS's survey of groundwaters was to collect data that would assist hydrogeologists, not to give a general assessment of the waters' potability. The question of whether a duty of care could arise in these circumstances towards Bangladeshis who drank groundwaters contaminated by arsenic was therefore the preliminary issue with which the Court of Appeal was concerned. The Court examined the sorts of factors that had persuaded courts in previous cases to impose a duty of care on a defendant, or alternatively to conclude that there was insufficient proximity to give rise to such a duty. They concluded that BGS's relationship with the claimant entirely lacked any of the features of proximity that were required and that the claim ought therefore to be struck out at this preliminary stage since it was bound to fail at trial, with consequential wastage of costs and disappointed expectations for the claimant.

10. For the purposes of a strike-out application the courts deliberately lean in favour of the claimant by assuming that all the facts alleged against the defendant are correct. A number of important issues which BGS would have hotly disputed if the matter had gone to trial – for example, the foreseeability of harm occurring to the claimant as a result of BGS's actions – were therefore assumed by the Court of Appeal in the claimant's favour. This procedure is adopted to ensure that no case is struck out without a trial except where it is plain that its chances of success at trial are negligible.

11. In deciding that the Bangladesh claim must fail, because there was insufficient proximity between the parties to establish a duty of care, the Court of Appeal took account, among other considerations, of the following circumstances:

• The primary purpose of BGS's report was to produce a body of data that could be used to describe the hydrochemistry of the main aquifer units in central and north eastern Bangladesh, not to assess whether the water was safe to drink.

• It was actually the Government of Bangladesh, not BGS, which had a duty of care to supply uncontaminated water to the claimant and to other Bangladeshis. By contrast, BGS:

- did not create the hazard: they had no responsibility for the presence of arsenic in the groundwaters of Bangladesh;
- had no responsibility for the quality of water abstracted from the country's wells;
- had no control over who drank from the wells; and
- had no duty to supply safe drinking water to consumers in Bangladesh; indeed, they had no power to do so and could not even warn the claimant of the dangers.

• There was no contractual relationship between BGS and the claimant, or even between BGS and the Government of Bangladesh, and there was no particular transaction or event or situation that gave rise to any particular nexus between BGS and the claimant. The claimant did not even know of BGS's existence, or of the existence of BGS's survey and report, and BGS had not assumed any responsibility towards him.

• BGS's survey was conducted under contract to the UK's Overseas Development Administration ('ODA'), and its duty, put at its highest, was owed to ODA and was simply a duty to carry out its hydrogeological survey competently (which BGS maintains it did). It had no duty of care to ensure the waters were safe to drink or that the claimant was supplied with clean water, since these were matters over which it had no responsibility and no control.

• BGS did not control the distribution of its report or give any undertaking to either the claimant or the Government of Bangladesh as to the use to which its report could be put.

• The potential class of claimants was in any case too wide and indeterminate for proximity to the defendant to exist, since it could embrace the many thousands of people who drank from contaminated wells covered by BGS's survey.

12. Anyone interested in following the Court of Appeal's reasoning on each of these issues, and their significance for the Court's conclusion that the claim against BGS was bound to fail, is referred in particular to the judgment given by Wall L J, which begins at paragraph 61 of the transcript of the Court's decision and gives the most detailed analysis of the principles established by previous cases and of their application to the Bangladesh case.

13. The Court concluded that, in all the circumstances of the case, to impose a duty of care on BGS towards Bangladeshis poisoned by drinking contaminated water would not be merely 'an incremental step' beyond the duty of care situations

already recognised by the courts. "It would", in the words of Kennedy LJ, "be a mighty leap which would render the concept of proximity almost meaningless." In his Lordship's view, "if on publication of the report it had been said to BGS that the report was giving a legally enforceable assurance to a large cohort of the Bangladeshi population as to the safety of their water that would surely have been regarded as absurd."

14. One of the three Judges, Clarke L J, dissented from the majority view. Although he made it clear that BGS's submissions "provide strong support for the conclusion that it would not be fair, just and reasonable to expose the defendant to liability to a large number of Bangladeshi citizens" and that the factors relied upon by the defendant "militate against there being a relationship of sufficient proximity between the defendant and the claimants", he thought that the contrary was arguable and that therefore the matter should be allowed to go to trial. However, Clarke L J did not engage in the same detailed analysis as Wall LJ conducted of how fundamentally the Bangladesh claim differed from previous cases where a duty of care had been established.

15. Certain articles which have appeared in the media since the Court of Appeal decision was announced in February indicate a misunderstanding of the judgment. It is not the case, for example, that BGS conceded that it was foreseeable that its report would be seen by those responsible for the provision of water for consumption in Bangladesh, or that if it was relied on by them as representing that the water was safe to drink, so that they abstained from action, the claimant would suffer personal injury as a result. As explained in paragraph 10 above, these were concessions which the defendant was obliged to make in order to apply for a strike out. They were made purely for the purposes of that application, where all the facts alleged by the claimant are deemed to be accepted by the defendant. As Wall L J's judgment makes clear, these issues would in fact be vigorously disputed if the matter ever came to trial.

16. It has also been suggested, quite incorrectly, that the Court of Appeal reached its decision on public policy grounds, such as a supposed need to protect the future provision of development aid funds which might be less forthcoming in future if legal claims arose in respect of services provided by NGOs, or organisations like BGS. As is expressly indicated in paragraphs 24 and 107 of the Court of Appeal judgment, while their Lordships recognised that wider policy issues also pointed towards the non-existence of a duty of care and could not be entirely ignored, these considerations did not affect the Court's conclusion that the claim was bound to fail in any event and ought therefore to be struck out.