TENAGA NASIONAL MALAYSIA v. BATU KEMAS INDUSTRI SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
HASAN LAH FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 01-60-12-2015 & 01-1-01-2016]
26 APRIL 2018

TORT: *Damages – Liability – Power disruption causing damage to consumer's manufacturing equipment and processes – Whether power supplier owed duty of care to consumer – Whether satisfied Caparo's three-fold test – Whether case fell within established category of liability – Liability for damage caused by power – Whether a new and novel situation failure – Distinction between economic loss consequent to damage and pure economic loss independent of physical damage – Whether recoverable*

TORT: *Negligence – Duty of care – Power disruption causing damage to consumer's manufacturing equipment and processes – Whether power supplier owed duty of care to consumer – Whether satisfied Caparo's three-fold test – Whether case fell within established category of liability – Liability for damage caused by power failure – Whether a new and novel situation – Distinction between economic loss consequent to damage and pure economic loss independent of physical damage – Whether recoverable*

TORT: *Negligence – Contributory negligence – Power disruption causing damage to consumer's manufacturing equipment and processes – Obligation to take reasonable care of safety of self and property – Whether power failure or disruptions foreseeable – Whether damage could have been prevented had consumer installed protective measures – Whether absence of protection held against consumer – Whether consumer contributorily negligent*

Batu Kemas Industri Sdn Bhd ('the plaintiff') operated a factory that used automated hydraulic presses and other electronically controlled machinery to produce calcium silicate bricks. Tenaga Nasional Berhad ('the second defendant') supplied electricity to the factory. The Government of Malaysia ('the first defendant'), through the Public Works Department ('PWD'), had appointed Markas Perdana Sdn Bhd ('Markas') to execute works at the rest and recreation area ('R & R area') at the 106km Ipoh to Kuala Lumpur highway. The PWD requested TNB to remove and relocate the electrical lines and cables from the project site. But the underground cable was not removed or relocated. In the course of its installation at the R & R area, a

guard rail column struck and ruptured the first defendant's 11KV cable resulting in the power to the factory being disrupted. The plaintiff claimed that the power disruption damaged its manufacturing equipment and processes and caused general, special and exemplary damages. Both the plaintiff and TNB summoned 'experts' to testify on the probable cause for the damage. Insofar as the High Court was concerned, the singular issue that would dispose of the entire case was whether there was a 'protective scheme ... to protect the state-of-the-art machines imported from Germany'. The High Court found that the plaintiff omitted to install 'a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage', that the omission 'totally cancelled out and annulled any breach by TNB, and that 'the plaintiff's contributory negligence was absolute'. The trial court absolved both defendants of all liability on account of the contributory negligence of the plaintiff. On appeal, the Court of Appeal held, *inter alia*, that (i) the first defendant owed a non-delegable duty of care; (ii) TNB was under a duty to exercise greater care when dealing with electricity; (iii) the first defendant was aware of the possibility of underground cables in the project site and the inherent dangers; (iv) the first defendant proceeded with the project works which led to the incident, despite the non-response to its letters to TNB to remove the cables, and thus, had acted negligently; (v) TNB's failure to inform on the location of the cables was not only an act of negligence but an irresponsible act of omission; (vi) the incident led to a surge and not under-voltage as contended by TNB; (vii) TNB failed to put in place a protection scheme to protect consumers against electrical surges; (viii) had a surge protection scheme been in place, it was probable that damage would not have been caused to the plaintiff's equipment; and (ix) the plaintiff had a protection scheme in place against under-voltage and therefore, the contributory negligence of the plaintiff did not arise. Thus, the defendants obtained leave to appeal on the following questions of law: (i) Civil Appeal No 01-60-12-2015, appeal by TNB against the plaintiff: (a) whether the principle of a higher standard of care imposed on electricity suppliers, as stated by the Court of Appeal relying on the Federal Court case of *Lembaga Letrik Negara v. Ramakrishnan,* applies to a commercial claim for pure economic loss by a consumer for interrupted electricity supply; (b) whether the principle of a higher standard of care owing to the 'dangerous nature of electricity' as stated by the Court of Appeal should rightfully be confined to personal injury cases or cases of danger to bodily injury to the public and not extend to commercial claims; (c) in matters of commercial claims against TNB, which is acting under a statutory duty to supply electricity under the Electricity Supply Act 1990 ('the Act'), whether the proper principle applicable is the principle enunciated in *Caparo v. Dickman* ('*Caparo*'), *inter alia*, whether it is just, fair and reasonable that financial losses

for interrupted electricity supply be recoverable from a public body; and (d) whether in the absence of any authorising provision in the Act, can TNB be held liable for economic loss suffered by its consumers due to a disruption in electricity supply; and (ii) Civil Appeal No 01-1-01-2015, appeal by the first defendant against the plaintiff and TNB: (a) whether the principle of a higher standard of care owing to the 'dangerous nature of electricity' as stated by the Court of Appeal should rightfully be confined to personal injury cases or cases of danger to bodily injury to the public and not to extend to commercial claims.

Held (allowing appeals in part)

Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) In a claim based on the tort of negligence, it must be shown that the defendant owed a duty of care to the plaintiff and once the duty existed, the plaintiff must show that the defendant had breached it. In order for a duty of care to arise in negligence (i) harm must be reasonably foreseeable as a result of the defendant's conduct; (ii) the parties must be in a relationship of proximity; and (iii) it must be fair, just and reasonable to impose liability ('*Caparo*'s three-fold test'). (paras 33 & 50)

(2) The 'fair, just and reasonable' element is well-established in cases concerned with economic losses and public services. Where a case falls within the established categories of liability, 'a defendant should not be allowed to seek to escape from liability by appealing to some vague concept of justice and fairness' as the previous authorities 'have by necessary implication held that it is fair, just and reasonable that the claimant should recover'. Where a case falls within one of the established categories of liability, the *Caparo*'s three-fold test, which is to determine the duty of care in a new and novel situation, is inapplicable. Liability for damage caused by power failure is not novel. (paras 60 & 61)

(3) There is a crucial distinction between economic loss consequent to damage which is recoverable, and pure economic loss independent of physical damage which is not recoverable. The claimant was entitled to recover the profits that were lost due to its own property being damaged by the power cut because these losses were the result of physical damage to the claimant's property. This is not regarded as pure economic loss, but the economic loss consequent on physical damage. In exceptional cases, recovery for pure economic loss could be allowed. (paras 78 & 80)

(4) The instant case fell within the established category of liability for damage caused by power failure or disruption. Although much was argued as to whether the power failure caused by a surge or under-voltage, it remained that there would not have been a power failure or disruption, had Markas not ruptured the cable. Without the power failure or disruption, there would not have been the surge or under-voltage. It was plain that the damage was the consequence of the power failure or disruption. The duty of care and breach of it should have been the focus. However, the trial court failed to find who owed the duty and who breached it. (para 81)

(5) All parties and courts below overlooked that contributory negligence is not a complete defence. Contributory negligence, if any, could not absolve the liability, if any, of the defendants. The finding of the trial court that contributory negligence was a complete defence was completely wrong in law. The finding of the trial court that both defendants were not negligent flew in the face of logic and reason. If none of the defendants were negligent, the cable would not have been accidently ruptured. One, at least, must have been negligent. Hence, the dismissal of the entire claim could not be supported. (para 84)

(6) The trial court found that the plaintiff omitted to install 'a comprehensive and credible protection system … against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage'. The trial court was non-committal on whether it was surge or under-voltage because it had not evaluated the opposing views of the 'experts'. The Court of Appeal, after an exhaustive evaluation of the 'expert' evidence and the reliability of it, held that the damage was caused by a surge. Either case, it was the rupture of the cable that resulted in whatever that caused the damage. It was Markas, the contractor of the first defendant, who accidentally ruptured the cable. Markas should have foreseen the damage but Markas was negligent. In any event, the finding that the first defendant had a non-delegable duty of care was not challenged. (paras 85-87)

(7) It was clear that TNB did not take all sensible precautions, even the doable, to ensure that Markas would not accidentally disrupt the supply of power. TNB, when asked to remove and relocate power poles and cables in the project site, should have foreseen that the work by Markas could damage its cable and disrupt power in the area. Overhead lines were relocated but the cable remained *in situ*. There were no surface markers to indicate the presence of the cable and in

the circumstances, TNB should disclose the presence and location of its cable. The failure by TNB to do so was a serious oversight. Therefore, although Markas was negligent, TNB was more culpable and could not shift all blame to the first defendant. Both defendants were culpable but they were not equally liable; TNB was more at fault. (para 95)

(8) Given that the finding of the Court of Appeal was that damage was caused by a surge, whether there were protective measures against under-voltage were not relevant. What was pertinent was whether the plaintiff had protective measures against a surge, and if none, then whether the plaintiff was contributorily negligent. The finding of the Court of Appeal was that protective measures had been installed against under-voltage. The Court of Appeal did not reverse the finding of the trial court that the plaintiff had no protection system against a surge. Hence, both courts below agreed that the plaintiff had no protection system against a surge. However, the absence of protection against a surge was not held against the plaintiff. The Court of Appeal held that the plaintiff could not be expected to protect its property against a surge, and that TNB had the responsibility to install surge arresters at the transformers. (para 98)

(9) There was an obligation to take reasonable care of the safety of self and property. The power failures or disruptions were 'foreseeable'. The plaintiff could have prevented the damage if it had installed surge arresters. But it did not mean, just because the plaintiff could have prevented the damage from the surge that the plaintiff should be wholly faulted and the defendants should be wholly absolved. In any event, the failure to install the surge arresters did not cause the damage. It was the rupture of the cable that caused the damage. Given that there was failure by the plaintiff to take reasonable precautions to protect its machines and presses, there was contributory negligence on the part of the plaintiff, who could not call upon the defendants to compensate in full. (paras 100 & 101)

(10) In the case of damage caused by power failure or disruption, only economic loss consequent to physical damages could be recovered. In the instant case, the claimed economic losses consequent to physical damage were (i) replacement costs of the two machines; (ii) the brake motor; (iii) costs of transformer; (iv) technical advice; (v) labour costs to manually pack the bricks; (vi) costs of two German engineers engaged to repair the machines for 21 days; and (vii) costs of mechanics, electricians, technicians and local supervisors. The rest of the claimed losses and damages were pure economic losses

independent of physical damages and hence, could not be recovered. Since not all could be recovered, the Court of Appeal should not have ordered assessment of the whole claim. (paras 102 & 103)

(11) There should be one apportionment of liability between the defendants and the plaintiff and one apportionment of liability between the defendants *inter se*. The contributory negligence of the plaintiff, though not insubstantial, was much less than the negligence of the defendants. The defendants should bear the major part of it, namely 2/3 of the liability. As between the defendants *inter se*, the liability was apportioned at 40% for the first defendant and 60% of TNB. In the circumstances, in answering the leave questions (i)(a), (b), (c) and (ii)(b), it was held that the high standard of care expected of electricity suppliers applies to personal injury cases and claims for damages caused by power failure or disruption. Pure economic losses independent of physical damage are not recoverable in claims for damages caused by power failure or disruption. Whereas, in answering the leave question (i)(d), it was held that liability for damages caused by power failure or disruption are the liability for a tort under common law. (paras 104 & 105)

Bahasa Malaysia *Headnotes*

Batu Kemas Industri Sdn Bhd ('plaintif') menjalankan kilang yang menggunakan penekan hidraulik automatik dan lain-lain mesin yang dikawal secara elektronik untuk menghasilkan bata kalsium silikat. Tenaga Nasional Berhad ('defendan kedua') membekalkan elektrik ke kilang tersebut. Kerajaan Malaysia ('defendan pertama') melalui Jabatan Kerja Raya ('JKR'), melantik Markas Perdana Sdn Bhd ('Markas') untuk menjalankan kerja-kerja di kawasan rehat dan rawat ('kawasan R & R') di 106km lebuhraya Ipoh ke Kuala Lumpur. Jabatan Kerja Raya meminta TNB mengalihkan dan memindahkan talian dan kabel elektrik dari kawasan projek tersebut. Namun begitu, kabel bawah tanah tidak dialihkan atau dipindahkan. Semasa menjalankan pemasangan di kawasan R & R, turus rel adang pecah dan menyebabkan kabel 11KV defendan pertama pecah mengakibatkan bekalan kuasa ke kilang terganggu. Plaintif menyatakan bahawa gangguan bekalan kuasa merosakkan peralatan pengilangan dan prosesnya dan menyebabkan kerugian am, khas dan teladan. Kedua-dua plaintif dan TNB mengemukakan 'pakar' untuk memberi keterangan tentang sebab yang mungkin mengakibatkan kerugian. Bagi Mahkamah Tinggi, satu-satunya isu yang akan menyelesaikan keseluruhan kes adalah sama ada terdapat 'skim perlindungan ... untuk melindungi mesin-mesin terkini yang diimport dari German'. Mahkamah Tinggi mendapati bahawa plaintif tidak memasang 'satu sistem perlindungan yang komprehensif dan boleh dipercayai ... terhadap apa-apa

kerosakan atau kegagalan elektrik yang termasuk voltan tinggi atau voltan rendah', bahawa ketinggalan tersebut 'membatalkan dan memansuhkan apa-apa pelanggaran oleh TNB secara keseluruhan' dan bahawa 'kecuaian sertaan plaintif adalah mutlak'. Mahkamah bicara melepaskan kedua-dua defendan daripada kesemua liabiliti atas alasan kecuaian sertaan plaintif. Atas rayuan, Mahkamah Rayuan memutuskan, antara lain, (i) defendan pertama tiada kewajipan berjaga-jaga tidak boleh diwakili; (ii) TNB mempunyai kewajipan lebih berjaga-jaga apabila urusannya berkait dengan elektrik; (iii) defendan pertama mengetahui kemungkinan ada kabel bawah tanah dan bahaya yang ada; (iv) defendan pertama meneruskan dengan kerja-kerja projek yang menjurus pada insiden tersebut, walaupun mengetahui tiada jawapan bagi surat-suratnya kepada TNB untuk mengalihkan kabel-kabel tersebut, dan dengan itu, bertindak secara cuai; (v) kegagalan TNB memaklumkan lokasi kabel-kabel tersebut bukan sahaja tindakan cuai malah satu ketinggalan yang tidak bertanggungjawab; (vi) insiden tersebut menjurus pada pusuan dan bukan voltan rendah seperti yang dihujahkan TNB; (vii) TNB gagal menyediakan skim perlindungan untuk melindungi pengguna terhadap pusuan elektrik; (viii) jika skim perlindungan terhadap pusuan disediakan, mungkin tiada kerosakan yang berlaku pada peralatan plaintif; dan (ix) plaintif mempunyai skim perlindungan tersedia bagi voltan rendah dan oleh itu, kecuaian sertaan oleh plaintif tidak timbul. Oleh itu, defendan-defendan memohon kebenaran merayu atas soalan undang-undang berikut: (i) Rayuan Sivil No 01-60-12-2015, rayuan oleh TNB terhadap plaintif: (a) sama ada prinsip standard berjaga-jaga yang tinggi dikenakan terhadap pembekal elektrik seperti yang dinyatakan oleh Mahkamah Rayuan dengan sandaran atas kes *Lembaga Letrik Negara v. Ramakrishnan* terpakai pada tuntutan komersial bagi kerugian ekonomi semata-mata oleh pengguna untuk bekalan elektrik yang terganggu; (b) sama ada prinsip standard berjaga-jaga yang tinggi disebabkan 'sifat elektrik yang membahayakan' seperti yang dinyatakan oleh Mahkamah Rayuan sepatutnya dihadkan pada kes-kes kecederaan diri atau kes-kes bahaya terhadap kecederaan diri kepada umum dan tidak berlanjut kepada tuntutan komersial; (c) perkara-perkara tuntutan komersial terhadap TNB, yang bertindak atas kewajipan statutori untuk membekalkan elektrik bawah Akta Bekalan Elektrik 1990 ('Akta'), sama ada prinsip wajar yang terpakai adalah prinsip yang dinyatakan dalam kes *Caparo v. Dickman* ('*Caparo*'), antara lain, sama ada adil, saksama dan munasabah bagi kerugian kewangan disebabkan gangguan bekalan elektrik boleh diperoleh semula daripada badan awam; dan (d) sama ada tanpa apa-apa peruntukan yang menguatkuasakan dalam Akta, TNB boleh dipertanggungjawabkan bagi kerugian ekonomi yang dialami oleh penggunanya akibat gangguan bekalan elektrik; dan (ii) Rayuan Sivil No 01-1-01-2015, rayuan oleh defendan pertama dan TNB: (a) sama ada prinsip

standard berjaga-jaga yang tinggi disebabkan oleh 'sifat bahaya elektrik' seperti yang dinyatakan oleh Mahkamah Rayuan wajar dihadkan bagi kes-kes kecederaan diri atau kes-kes bahaya terhadap kecederaan diri kepada umum dan tidak berlanjut pada tuntutan komersial.

Diputuskan (membenarkan sebahagian rayuan-rayuan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Dalam tuntutan berdasarkan tort kecuaian, perlu ditunjukkan bahawa defendan mempunyai kewajipan berjaga-jaga kepada plaintif dan sebaik sahaja kewajipan tersebut timbul, plaintif mesti menunjukkan defendan telah melanggarnya. Bagi kewajipan berjaga-jaga timbul dalam kecuaian (i) kerosakan mestilah boleh dijangka secara munasabah akan timbul akibat tindakan defendan; (ii) pihak-pihak mesti mempunyai hubungan rapat; dan (iii) mestilah adil, saksama dan munasabah untuk mengenakan liabiliti ('ujian tiga peringkat *Caparo*')

(2) Unsur 'adil, saksama dan munasabah' adalah matan dalam kes-kes berkaitan dengan kerugian ekonomi dan perkhidmatan awam. Apabila satu-satu kes terangkum bawah kategori liabiliti yang matan, 'defendan tidak boleh dibenarkan lari daripada tanggungan dengan merayu terhadap konsep keadilan dan kesaksamaan yang kabur' kerana autoriti-autoriti sebelumnya 'have by necessary implication held that it is fair, just and reasonable that the claimant should recover'. Apabila satu-satu kes terangkum bawah salah satu kategori liabiliti matan, ujian tiga peringkat *Caparo*, yang adalah untuk menentukan kewajipan berjaga-jaga dalam situasi baru, tidak terpakai. Liabiliti bagi kerugian yang diakibatkan oleh gangguan bekalan kuasa bukanlah baharu.

(3) Terdapat perbezaan penting antara kerugian ekonomi akibat kerosakan yang boleh dipampas semula dan kerugian ekonomi semata-mata terkecuali daripada kerosakan fizikal yang tidak boleh dipampas. Pemohon berhak dipampas bagi kerugian keuntungan akibat hartanya sendiri yang rosak disebabkan pemotongan bekalan kerana kerugian ini adalah akibat kerosakan fizikal pada harta pemohon. Ini tidak dianggap kerugian ekonomi semata-mata, tetapi, kerugian ekonomi akibat kerosakan fizikal. Dalam kes-kes khusus, pampasan kerugian ekonomi semata-mata boleh dibenarkan.

(4) Kes ini terangkum dalam kategori matan liabiliti bagi kerosakan yang diakibatkan oleh kegagalan atau gangguan bekalan kuasa. Walaupun banyak dihujahkan sama ada kegagalan bekalan kuasa disebabkan oleh pusuan atau voltan rendah, tetap tidak akan ada kerosakan atau gangguan bekalan kuasa jika Markas tidak memecahkan kabel. Tanpa kerosakan atau gangguan bekalan kuasa, tidak akan berlaku pusuan

atau voltan rendah. Jelas bahawa kerosakan adalah akibat kegagalan atau gangguan bekalan kuasa. Kewajipan berjaga-jaga dan pelanggarannya sepatutnya menjadi fokus. Walau bagaimanapun, mahkamah bicara gagal membuat dapatan siapa yang mempunyai kewajipan dan siapa yang melanggarnya.

(5) Kesemua pihak dan mahkamah bawahan terlepas pandang bahawa kecuaian sertaan bukan pembelaan menyeluruh. Kecuaian sertaan, jika ada, tidak membebaskan defendan-defendan daripada liabiliti, jika ada. Dapatan mahkamah bicara bahawa kecuaian sertaan adalah pembelaan menyeluruh adalah salah dari segi undang-undang. Dapatan mahkamah bicara bahawa kedua-dua defendan tidak cuai adalah tidak logik dan tidak berasas. Jika tidak seorang pun defendan cuai, maka kabel tidak akan dibocorkan secara tidak sengaja. Sekurang-kurangnya, salah seorang pasti cuai. Oleh itu, penolakan kesemua tuntutan tidak disokong.

(6) Mahkamah bicara mendapati plaintif tidak memasang 'a comprehensive and credible protection system … against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage'. Mahkamah bicara tidak menjelaskan sama ada ini adalah pusuan atau voltan rendah kerana tidak menilai pandangan bertentangan 'pakar'. Mahkamah Rayuan, setelah menilai secara menyeluruh keterangan 'pakar' dan kebolehsandaran terhadapnya, memutuskan bahawa kerosakan disebabkan oleh pusuan. Walau bagaimanapun, kebocoran kabel yang telah menyebabkan apa-apa yang mengakibatkan kerosakan. Markas, sebagai kontraktor defendan pertama, yang secara tidak sengaja membocorkan kabel. Markas sepatutnya menjangka kerosakan tetapi Markas cuai. Walau apapun, dapatan bahawa defendan pertama mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan tidak dicabar.

(7) Jelas bahawa TNB tidak mengambil langkah berjaga-jaga, walaupun yang boleh dibuat, untuk memastikan Markas, secara tidak sengaja, tidak mengganggu bekalan kuasa. TNB, apabila diminta mengalihkan dan memindahkan tiang dan kabel kuasa di kawasan projek, sepatutnya menjangka bahawa kerja oleh Markas boleh merosakkan kabel dan mengganggu bekalan kuasa di kawasan tersebut. Talian atas telah dipindahkan tetapi kabel kekal *in situ*. Tiada tanda pada permukaan untuk menunjukkan adanya kabel dan dalam keadaan tersebut, TNB sepatutnya mendedahkan kewujudan dan lokasi kabel-kabelnya. Kegagalan TNB berbuat demikian adalah salah satu tanggapan serius. Oleh itu, walaupun Markas cuai, TNB lebih

bertanggungan dan tidak boleh memindahkan kesemua kesalahan pada defendan pertama. Kedua-dua defendan bertanggungan tetapi mereka tidak bertanggungan secara sama rata; TNB lebih bersalah.

(8) Memandangkan dapatan Mahkamah Rayuan adalah kerosakan diakibatkan oleh pusuan, sama ada terdapat perlindungan terhadap voltan rendah, tidak relevan. Yang penting adalah sama ada plaintif telah mengambil langkah pencegahan terhadap pusuan, dan jika tiada, sama ada plaintif cuai secara sertaan. Dapatan Mahkamah Rayuan adalah bahawa langkah-langkah perlindungan telah dipasang terhadap pusuan. Mahkamah Rayuan tidak mengakas dapatan mahkamah bicara bahawa plaintif tiada sistem perlindungan terhadap pusuan. Oleh itu, kedua-dua mahkamah bersetuju plaintif tiada sistem perlindungan terhadap plaintif. Mahkamah Rayuan memutuskan bahawa plaintif tidak boleh dijangkakan untuk melindungi hartanya terhadap pusuan, dan bahawa TNB mempunyai tanggungjawab untuk memasang penghalang pusuan pada transformer.

(9) Terdapat kewajipan untuk menjaga keselamatan diri dan harta secara munasabah. Kegagalan atau gangguan bekalan kuasa 'boleh dijangka'. Plaintif sepatutnya menghalang kerosakan jika memasang penangkap pusuan. Walau bagaimanapun, ini tidak bermaksud, hanya kerana plaintif boleh menghalang kerosakan daripada pusuan bahawa plaintif sepatutnya dipersalahkan dan defendan-defendan sepatutnya dilepaskan secara keseluruhan. Walau apapun, kegagalan memasang penangkap pusuan tidak mengakibatkan kerosakan. Kebocoran kabel yang menyebabkan kerosakan. Memandangkan terdapat kegagalan oleh plaintif untuk mengambil langkah berjaga-jaga untuk melindungi mesinnya, terdapat kecuaian sertaan oleh plaintif, yang tidak boleh meminta defendan untuk memampasnya secara penuh.

(10) Dalam kes kerosakan disebabkan oleh kerosakan atau gangguan bekalan kuasa, hanya kerugian ekonomi akibat daripada kerosakan fizikal boleh dipampas. Dalam kes ini, kerugian ekonomi yang dipohon adalah (i) kos mengganti dua mesin; (ii) motor brek; (iii) kos transformer; (iv) nasihat teknikal; (v) kos kerja untuk membungkus bata secara manual; (vi) kos dua orang jurutera Jerman yang dilantik untuk membaiki mesin-mesin tersebut untuk 21 hari; dan (vii) kos mekanik, juruelektrik, juruteknik dan penyelia tempatan. Kerugian dan ganti rugi yang dituntut selebihnya adalah kerugian ekonomi semata-mata terasing daripada kerosakan fizikal dan dengan itu, tidak boleh dipampas. Oleh sebab bukan semuanya boleh dipampas, Mahkamah Rayuan tidak wajar memerintahkan penilaian keseluruhan tuntutan.

(11) Liabiliti sepatutnya dibahagikan antara defendan-defendan dan plaintif dan satu pembahagian liabiliti antara defendan-defendan *inter se*. Kecuaian sertaan plaintif, walaupun bukan tidak substansial, adalah kurang daripada kecuaian defendan-defendan. Defendan-defendan perlu menanggung sebahagian besarnya, iaitu 2/3 liabiliti. Antara defendan-defendan *inter se*, liabiliti dibahagikan pada 40% bagi defendan pertama dan 60% bagi TNB. Dalam keadaan tersebut, dalam menjawab soalan kebenaran (i)(a), (b), (c) dan (ii)(b), diputuskan bahawa standard berjaga-jaga yang tinggi diharapkan daripada pembekal-pembekal elektrik terpakai bagi kes-kes kecederaan diri dan tuntutan ganti rugi bagi kegagalan atau gangguan elektrik. Kerugian ekonomi semata-mata terkecuali daripada kerosakan fizikal tidak boleh dipampas dalam tuntutan ganti rugi yang diakibatkan oleh kerosakan atau gangguan elektrik. Manakala dalam menjawab soalan kebenaran (i)(d), diputuskan bahawa liabiliti bagi kerosakan yang diakibatkan oleh kerosakan atau gangguan elektrik adalah liabiliti bagi tort bawah common law.

Case(s) referred to:

Amal Bakti Sdn Bhd & Ors v. Affin Merchant Bank (M) Bhd [2012] 4 CLJ 813 CA ***(refd)***
Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Assets Investments Pte Ltd v. OSK Securities Bhd [2005] 7 CLJ 401 HC ***(refd)***
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The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***
UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

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Weller & Co v. Foot and Mouth Disease Research Institute [1966] 1 QB 56 ***(refd)***
Yuen Kun Yeu v. Attorney General of Hong Kong [1988] AC 175 ***(refd)***

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Street, Drainage and Building Act 1974, s. 95(2)

Companies Act 1985 [UK], ss. 236, 237
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Winfield on Tort, 7th edn, p 169

(Civil Appeal No: 01-60-12-2015(A))
For the appellant - Cyrus Das, Nadzarin Wok Nordin, David Mathew, Wong Jing En & Norhani Nordin; M/s Nadzarin Kuok Puthucheary & Tan
For the respondent - Malik Imtiaz Sarwar, Chan Wei June, Yusfarizal Yussoff, Ahmad Edham Abdulwani, Abdullah Zubayr Awaluddin & Azeel Iskandar Azmi; M/s Zulpadli & Edham

(Civil Appeal No: 01-1-01-2016(A))
For the appellant - Mohd Radhi Abas, Nik Mohd Noor Nik Kar & Nurhafizza Azizan; SFCs
For the 1st respondent - Malik Imtiaz Sarwar, Chan Wei June, Yusfarizal Yussoff, Ahmad Edham Abdulwani, Abdullah Zubayr Awaluddin & Azeel Iskandar Azmi; M/s Zulpadli & Edham
For the 2nd respondent - Cyrus Das, Nadzarin Wok Nordin, David Mathew, Wong Jing En & Norhani Nordin; M/s Nadzarin Kuok Puthucheary & Tan

[Editor's note: For the Court of Appeal judgment, please see Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor [2006] 4 CLJ 103 (overruled in part).]

Reported by S Barathi

JUDGMENT

Jeffrey Tan FCJ:

[1] These appeals arose from the decision of the Court of Appeal dated 2 July 2015 which reversed the decision of the trial court and allowed all claims by the plaintiff. For ease of reference, we would refer to the parties as plaintiff (Batu Kemas Industri Sdn Bhd), first defendant (Kerajaan Malaysia) and second defendant (Tenaga Nasional Berhad).

[2] The plaintiff's factory (factory) at Lot 2795, Jalan Tanjong Malim - Slim River, Perak used automated hydraulic presses and other electronically controlled machinery to produce calcium silicate bricks. The second defendant supplied electricity to the factory whereat was a power substation.

[3] The Public Works Department (PWD) had appointed Markas Perdana Sdn Bhd (Markas) to execute works at the rest and recreation area at the 106km Ipoh to Kuala Lumpur highway. On 13 October 1997, the PWD handed the project site to Markas. On 31 October 1997, 9 January 1998, and 27 February 1998, the PWD requested the second defendant to remove and relocate the electrical lines and cables from the project site. But the underground cable was not removed or relocated. Then disaster struck. On 5 August 1998, in the course of its installation at the R & R area, a guardrail column struck and ruptured the first defendant's 11KV cable. Power to the factory was disrupted. The plaintiff claimed that the power disruption damaged its manufacturing equipment and processes and caused general, special and exemplary damages.

[4] Both the plaintiff and second defendant summoned 'experts' (PW8 for plaintiff, DW5 and DW7 for second defendant) to testify on the probable cause for the damage. But insofar as the trial court was concerned, the singular issue that would dispose of the entire case was whether there was a "protective scheme ... to protect the state-of-the-art machines imported from Germany". In relation to that singular issue, the trial court held: (a) the plaintiff omitted to install "a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage"; (b) that omission "totally cancelled out and annulled any breach by the second defendant"; (c) "the plaintiff's contributory negligence was absolute"; (d) "the second defendant was not informed of piling works at the location of the underground cable"; (e) "there was no evidence that the project site extended to the location of the underground cable, in the middle of the road"; (f) the loss purportedly suffered by the plaintiff was a direct result of its failure to provide "a credible form of protective system for its production lines from the time they were set up. The plaintiff owed itself the innate duty to ensure that the state-of-the-art and highly sensitive machines and presses were fully protected and insured against electrical breakdown and failure which was highly foreseeable, whatever the cause for them. This negligence and breach had to be ruled in favour of the first and second defendants". For those reasons, the trial court dismissed the claim against the defendants and Markas as third party.

[5] The first argument raised by the plaintiff at the Court of Appeal was that the trial court failed to evaluate the competing views of the 'experts'. The evidence of PW4 and PW8 was that the equipment was damaged by a surge in the voltage attributable to a 'severe voltage transient' caused by a momentary shorting that caused the fuses in the sub-station to explode. But it was the evidence of DW5 and DW7 that the damage was caused by under-voltage. Expert opinion was divided. All the same, the Court of Appeal held that "as a starting point, it must be accepted that on the uncontroverted facts the contractor was negligent in damaging the cable and that they ought reasonably to have foreseen that, if they damage the cable, the supply of electricity to the factories would be interfered with and the occupiers, such as the plaintiff, would suffer loss and damage, including injury to their property (see *SCM (United Kingdom) Ltd v. WJ Whittall & Son Ltd* [1971] 1 QB 337 at p 341)".

[6] The Court of Appeal then made the following observations and findings on the defendants' duty of care: (i) the trial court "failed to consider whether the defendants owed the plaintiff a duty of care in the first place"; (ii) "the damage was foreseeable"; (iii) "the first defendant had control over the supervision of the project works"; (iv) "the PWD had requested the second defendant to relocate the cables in the project site"; (v) "the first defendant owed a non-delegable duty of care to ensure that the project works done would not injure third parties" and that "in the discharge of that duty, the first defendant was obliged to take all necessary precautions; in the context of the present case, to obtain sufficient information on the project site and the potential hazards such as the existence of underground cables"; (vi) the second defendant, who was asked to remove and relocate power poles and cables in the vicinity of the project site, should have foreseen that "the project works could damage the cables" and that consequential damage would ensue; (vii) "great care be taken when dealing with electricity (see *Jaswant Singh v. Central Electricity Board & Anor* [1967] 1 LNS 62; [1967] 1 MLJ 272, at p. 276); (viii) the Federal Court in *Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* [1982] CLJ 401; [1982] CLJ (Rep) 159; [1982] 2 MLJ 128 recognised that a higher standard of care was expected of those controlling electricity; (ix) "damage to the cable resulted in the interruption of electricity supply to the plaintiff's factory ... damage to the cable caused the damage to the plaintiff's equipment. This fact is corroborated by the second defendant's internal report of the investigation on the cause of the damage to the plaintiff's equipment which concluded that the damage was caused by cable being struck by the contractor. The second defendant's findings were communicated to the plaintiff by a letter dated 17 August 1998"; (x) PW4, a senior director of the Jabatan Kawal Selia Pembekalan dan Pasaran Elektrik, Suruhanjaya Tenaga and an electrical and

electronics graduate and registered professional engineer with 27 years in the electricity supply industry, said that a surge occurred with the result that the plaintiff's equipment was burnt out; the surge was due to a 'severe voltage transient' caused by a momentary shorting that in turn caused the fuses at the substation to explode; (xi) PW8, a consultant electrical engineer of 45 years experience, concurred with PW4's findings that the plaintiff's equipment was damaged by transient over-voltage surges at the time of the incident; (xii) in PW8's opinion, damage to the cable resulted in a high fault current to flow through the 22/11KV transformer at the substation that caused the fuses in the 22KV transformer to blow, which led to the sudden collapse of high fault current in the transformer to zero and to overvoltage surges being induced to the 22KV windings connected to the 22KV feeder line of the plaintiff's factory; the over-voltage surges were transmitted to the plaintiff's equipment which broke down the insulation of the electrical equipment rated for low voltage operations; the blow-out of two of the three phase supply system caused virtual interruption of power to the plaintiff's factory which resulted in total stoppage of factory operations; (xiii) DW5, a professor attached to the faculty of engineering at University Technology Malaysia, opined that there was no voltage surge to the plaintiff's factory; DW5 based his finding on a laporan kejadian which showed that there was no damage as a result of 'haba' such as the fuse reacting, equipment burnt in the plaintiff's factory; (xvi) DW7, a PhD holder in electrical engineering from UKM, Master in Electrical Engineering from UiTM, Bachelor of Science in Electrical Engineering from Case Western Reserve University in Cleveland Ohio, USA, and technical expert in power quality and energy efficiency with TNB Distribution, said that damage to the plaintiff's equipment was caused by under-voltage where high current flow to the machinery damaged the equipment; and (xv) the conflicting expert opinion gave rise to the "key technical issues [of] … (a) whether the damage to the plaintiff's equipment was caused by a surge attributable to a 'severe voltage transient' caused by a momentary shorting that in turn caused the fuses at the sub-station to (explode) as contended by the plaintiff or by under-voltage as contended by the second defendant and (b) whether the plaintiff had the relevant protective system in place so as to safeguard themselves from the damage".

[7] The Court of Appeal then evaluated the competing views of the 'experts', and made the following findings: (i) when expert opinions are in conflict … the court is obliged to assess the evidence and accept if necessary the most reliable parts in forming its decision (see *Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 CLJ 717; [2013] 2 MLJ 605) … the court may put relevant questions to the expert for the purposes of clarification or eliciting further information (see *Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor* [2006] 1 CLJ 391; [2006] 3 MLJ 213); (ii) the

trial court referred to the evidence of PW8, DW5 and DW7 but not to the evidence of PW4; there was nothing in the grounds of judgment to indicate that the trial court preferred the evidence of the defendant's experts and if so, the reasons therefor; (iii) whilst the grounds of judgment contained a summary of the evidence of PW8, DW5 and DW7, the trial court failed to evaluate the conflicting evidence of the experts; (iv) without such an evaluation, the trial court made a finding that the incident caused an under-voltage; the trial court held that the determinant factor in the case was the non-installation of a protective system which cancelled out and annulled any breach on the part of the second defendant; (v) the trial court wholly accepted the evidence of DW5 and DW7; the trial court should have discounted the opinion of DW5; (vi) no protection in place against under-voltage was not relevant in view of the surge; there was a relay system in place installed by the plaintiff; (vii) the plaintiff's experts explained that the surge was attributable to a severe voltage transient caused by momentary shorting which caused the fuses at the sub-station to explode; and (viii) the plaintiff's experts' view that severe voltage transient was the cause of the surge supported the plaintiff's case that the incident caused a power surge.

[8] The Court of Appeal proffered the following reasons to 'discount' the opinion of DW5 and DW7: (i) PW8 explained why the incident could not have resulted in under-voltage and caused the breakdown of the fuse carrier; this event was not explained by DW5; (ii) PW8 showed that the basis of DW5's opinion was doubtful by reference to his methodology and that DW5, although challenged, could not adequately explain why the fuse carrier was 'terbakar hangus'; (iii) DW5 stated that under-voltage could be arrested if there were a relay system; but the plaintiff had installed a relay system; the fact that there was damage militated against DW5's opinion that damage was attributable to under-voltage; (iv) unlike PW8, DW5 had no on-field experience on fault analysis; DW5 had no expertise in severe voltage transient but yet concluded and contradicted various international articles, that transient could not go through a transformer; (v) DW5 was not an independent expert, as he had received monetary grants from the second defendant and was a consultant of the second defendant's research team; (vi) DW7 was an employee of the second defendant; (vii) when cross-examined, DW7 was evasive on under-voltage protection; initially, DW7 said that under-voltage protection is mandatory and that the Suruhanjaya Tenaga would take action against a party for failure to install such protection; DW7 retracted his statement after he was informed that the Suruhanjaya Tenaga had not compounded the plaintiff for the incident; (viii) DW7 also contradicted DW5's opinion when he said that a transient could travel through the transformer; and (ix) DW7 was not an independent or reliable witness "who was uninfluenced by the exigencies of litigation". The Court of Appeal held that the views of plaintiff's experts were unassailable and should be preferred.

[9] On contributory negligence, the Court of Appeal held the following evidence proved that protective measures had been installed against under-voltage: (i) the admission of DW1 at a meeting held on 12 October 1999 to discuss the damage that the plaintiff had a relay system as well as the thermal overload; (ii) the admission of DW7 that the thermal overload was a protection against under-voltage; (iii) the evidence of DW7's that it was a mandatory requirement for users to put in place protective measures to protect against under-voltage; and (iv) the damage to the plaintiff's equipment, even with the protective measures in place, debunked the second defendant's contention that the incident caused an under-voltage.

[10] The Court of Appeal held that transient faults should have been protected against by the second defendant, who was culpable for the following reasons: (i) in the opinion of PW8, consumers could not be expected to protect against invasion of high voltage; (ii) the IEC standard referred to by the second defendant did not require a consumer to install a surge arrester on every equipment; (iii) the responsibility to devise a protection at the source of the over-voltage surge, lay with the second defendant; (iv) damage could have been avoided if the second defendant had surge arresters at the terminals of the transformers; (v) the system in place, installed by the second defendant in the 1980s, was an old system; (vi) DW1 admitted that the second defendant had not upgraded the system to modern standards; DW1 admitted that upgraded systems were only available in parts of Perak, Johor and the north of Penang; (vii) apart from the second defendant's failure to act on the three letters from the first defendant, the second defendant also failed to maintain visible cable markers; according to DW2, the only marker was an underground slab to protect the cable; if piling work were carried out (not digging works), workers would not know that there was a slab marker; "as such, the second defendant ought to have informed the Public Works Department of the position of the cable without any specific request (*Lembaga Letrik Negara, Malaysia v. Ramakrishnan*)"; and (viii) the second defendant was compounded under reg. 110(1) of the Electricity Regulations 1994 by the Suruhanjaya Tenaga for not having taken 'langkah awasan munasabah untuk mencegah bahaya' over the incident.

[11] In a nutshell, the Court of Appeal, *inter alia*, held (i) the first defendant owed a non-delegable duty of care; (ii) the second defendant was under a duty to exercise greater care when dealing with electricity; (iii) the first defendant was aware of the possibility of underground cables in the project site and the inherent dangers; (iv) the first defendant wrote three letters to the second defendant to remove cables (above and underground) in the project site; (v) the second defendant did not respond to the first defendant's letters; (vi) the first defendant chose to proceed with the project works which led to the incident; (vii) by doing so, the first defendant acted negligently; (viii) the

first defendant ought to have stopped works pending ascertainment of the cable locations; (ix) the second defendant had knowledge of the cable locations; (x) the second defendant ought to have acted diligently to respond to the first defendant's letters; (xi) the failure to inform on the location of the cables was not only an act of negligence but an irresponsible act of omission; (xii) the incident led to a surge and not under-voltage as contended by the second defendant; (xiii) the second defendant failed to put in place a protection scheme to protect consumers against electrical surges; (xiv) such a protection scheme, which was in place in parts of Perak, Johor and the north of Penang, did not exist in Tanjung Malim, Perak; (xv) had a surge protection scheme been in place, it was probable that damage would not have been caused to the plaintiff's equipment; (xvi) the plaintiff had a protection scheme in place against under-voltage; and (xvii) the contributory negligence of the plaintiff did not arise. The Court of Appeal entered judgment against both defendants and ordered damages to be assessed (for the full judgment of the Court of Appeal, see *Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor* [2015] 7 CLJ 849; [2015] 5 MLJ 52).

[12] Both defendants obtained leave to appeal on the following questions of law:

Civil Appeal No: 01-60-12-2015

(1) Whether the principle of a higher standard of care imposed on electricity suppliers as stated by the Court of Appeal relying on the Federal Court case of *Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* [1982] CLJ 401; [1982] CLJ (Rep) 159; [1982] 2 MLJ 128 applies to a commercial claim for pure economic loss by a consumer for interrupted electricity supply?

(2) Whether the principle of a higher standard of care owing to the 'dangerous nature of electricity' as stated by the Court of Appeal should rightfully be confined to personal injury cases or cases of danger to bodily injury to the public and not extend to commercial claims?

(3) In matters of commercial claims against TNB, which is acting under a statutory duty to supply electricity under the Electricity Supply Act 1990, whether the proper principle applicable is the *Caparo* principle (*Caparo v. Dickman* [1990] 1 All ER 568), *inter alia*, of whether it is just, fair and reasonable that financial losses for interrupted electricity supply be recoverable from a public body?

(4) Whether in the absence of any authorising provision in Electricity Supply Act 1990, can TNB be held liable for economic loss suffered by its consumers due to a disruption in electricity supply?

Civil Appeal No: 01-1-01-2015

(5) Whether the principle of a higher standard of care owing to the 'dangerous nature of electricity' as stated by the Court of Appeal should rightfully be confined to personal injury cases or cases of danger to bodily injury to the public and not to extend to commercial claims?

Submission Of Second Defendant

[13] Under the following captions, the second defendant submitted before us as follows.

Findings Of The Trial Court And The Court Of Appeal

[14] The findings of the trial court, namely (i) there was no duty of care and no breach of any duty of care, (ii) damage was caused by under-voltage, (iii) there was no protection scheme in place, and (iv) the second defendant was not informed of piling works at the location of the underground cable, were based on findings of primary facts which the Court of Appeal could not reverse unless shown to be plainly wrong (learned counsel cited *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1). The Court of Appeal reversed the trial court on both facts and law relating to duty of care, and acted in error when it applied *Lembaga Letrik Negara v. Ramakrishnan* and held that TNB owed a 'higher standard of care'. It was not propounded in *Lembaga Letrik Negara v. Ramakrishnan* that there is a higher standard of care owed by electricity suppliers. Any general principle of a higher standard of care, even if stated in *Lembaga Letrik Negara v. Ramakrishnan*, is confined to cases of bodily harm and injury and has no application where the interruption in power supply caused business loss.

The 'Policy' Point

[15] The Court of Appeal failed to properly consider whether it was fair and reasonable to impose liability for economic loss, and to appreciate that the Electricity Supply Act 1990 did not impose liability on the second defendant for economic loss. The second defendant was recognised as a public body (learned counsel cited *Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695; [2000] 2 MLJ 133). *Caparo* contains the element of whether it is fair, just and reasonable to impose liability for economic loss. Under that latter principle, the Federal Court declined to allow economic loss recovery against a local authority (learned counsel cited *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1) and the Kuala Lumpur City Council (learned counsel cited *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737). Recently, in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008, the Federal Court extended the policy to private

bodies, to deny recovery for pure economic loss against professionals. The second defendant which undertakes a public service should be protected under the third of the *Caparo* principles. In *Spartan Steel & Alloys Ltd v. Martin & Co.* [1972] 3 All ER 557 at 563-574, Lord Denning held that an electricity board should not be held responsible for economic loss (learned counsel also cited *S.C.M. (United Kingdom) Ltd v. WJ Whittall* [1971] 1 QB 337). The Act does not impose liability for economic loss. Section 17 of the Act only imposes liability for negligence, which is limited to damage to any person or property caused by negligence of persons employed by the second defendant and or its agents or servants. Section 17 of the Act excludes economic loss caused by parties not under the control of the second defendant. Under the Act and on general policy grounds, the second defendant should be protected against claims for economic loss. Otherwise, it would open a floodgate of claims which would result in increases in electricity tariffs. Clause 25 of the supply contract insulated the second defendant from claims for economic loss. Exemption clauses are enforceable between parties (learned counsel cited *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556).

Evaluation Of The Expert Evidence

[16] There was no justification for the Court of Appeal to reverse the finding of the trial court that damage was due to under-voltage coupled with the plaintiff's failure to put in place a protective system for its production lines. "… having considered all the evidence, a trial judge ought to be allowed to accept the opinion of the expert with the best explanation and state his reasons for doing so. It is not necessary for the trial court to specifically deal with the evidence of all the other experts and rule them out one by one. Analysis of expert evidence only requires the court to state its reasons for accepting the opinion of one expert and rejecting the other" (learned counsel cited *English v. Emery Reimbold & Strick Ltd* [2002] 3 All ER 385). "The advantage enjoyed by the trial judge who (saw) and heard the expert witnesses is entitled to the same recognition as the assessment of lay witnesses" (learned counsel cited *Joyce v. Yeomans* [1981] 2 All ER 21 at 26-27, and *Maynard v. West Midlands RHA* [1985] 1 All ER 635 at 637). PW4, the Ketua Penolong Pengarah of the Jabatan Bekalan Elektrik Cawangan Utara at the material time was the incident investigator; he was not an expert witness.

Surge Or Under-voltage, And Cable Markers

[17] The trial court was correct to rule that damage was caused by under-voltage. The Court of Appeal relied on the burnt fuse carrier to support the finding of severe voltage transient. But both PW4 and DW3 testified that it is normal for fuse carriers to burn. The Court of Appeal made a finding that the second defendant failed to maintain a visible cable marker. But the three

letters only referred to electrical poles and overhead transmission lines and not to underground cables. DW3 testified that the layer of bricks was a form of marker. The Court of Appeal was wrong in its finding that the second defendant failed to protect users against electrical surges. Where it had the duty, the plaintiff failed to protect its own equipment. PW4 confirmed that the plaintiff did not have any protection for its equipment. PW8 testified that it was the consumer's duty to protect its equipment. The second defendant did not guarantee that there would always be uninterrupted power. If it could be damaged by a power cut, the plaintiff should protect its equipment.

Were The Plaintiff's Machineries Adequately Protected?

[18] The Court of Appeal was wrong in its finding that the plaintiff had protective measures against under-voltage. The evidence reflected that there were no protective measures, or adequate protective measures. In his report, PW4 stated that there were no protective measures against over-voltage or under-voltage. PW4 agreed that if protective measures were in place, the machines would not have 'kesan-kesan terbakar'. PW2 admitted that there was no over-voltage protection. The plaintiff contended that a thermal overload protection system was in place. But PW4 testified that he did not see such a system, that a thermal overload system, which reacted to heat, only protected the motors and would be slow to react to over-current, and that the plaintiff should install surge protectors, if it wished to protect its sensitive equipment. PW2 confirmed that the relay system was actually the relay system in the substation.

The Three Letters

[19] The letters only required the second defendant to remove electrical poles carrying overhead transmission lines. DW3, from PWD Batang Padang, admitted that the PWD never asked the second defendant about underground cables. DW4 testified that the guardrail was located far away from the construction site; the second defendant could not have known that its underground cables were in danger. PW4 also testified that all documents only required the second defendant to remove or relocate the electricity poles above ground. All relevant correspondence and progress reports did not mention underground cables. The trial court was correct in its finding that the second defendant was not informed of piling works.

The Compound Notice

[20] The compound paid by the second defendant was not an admission of liability; DW4 testified that it was the normal practice of the second defendant to pay compound notices issued by the Jabatan Bekalan Elektrik.

Submission Of First Defendant

[21] The finding of the Court of Appeal that the PWD was negligent when it proceeded with work without the reply from the second defendant was inconsistent with its finding that the second defendant ought to have informed the PWD of the underground cables. The Court of Appeal took into consideration that the second defendant was compounded under reg. 110(1). But the Court of Appeal failed to take into consideration the totality of the evidence. The first defendant should not have been found negligent when the Court of Appeal concluded that the second defendant was under a duty to exercise great care in dealing with electricity and that the failure to provide information on the location of the underground cable was an irresponsible act of omission. Through the PWD, the first defendant took all steps to ensure that the work would be free of obstacles. Letters were written to the second defendant, who was therefore aware of the work to be carried out, to remove their equipment. The PWD had no knowledge of the underground cable. The second defendant failed to place markers in the area to protect its property. Without the presence of markers, the PWD could not mention underground cables in the letters. It was sufficient for the PWD to request for the removal of cables. Unless there were markers or the PWD had been so informed, the PWD was in no position to know of the underground cable. Only the second defendant was aware of the underground cable. The PWD could not be faulted, as the PWD had no knowledge of the underground cable. *Caparo* requires the court to ask three questions. On the facts, all three questions ought to be answered in favour of the PWD. The resultant damage, which was too remote, was not foreseeable. There was no relationship of proximity between the plaintiff and the first defendant. Economic loss could not be allowed (learned Senior Federal Counsel (SFC) cited *Highland Towers; UDA Holdings; Spartan Steel; and Lok Kok Beng*). A higher standard of care is confined to personal injury cases (learned SFC cited *Thompson v. Bankstown*; *Munning v. Hydro-Electric Commission; British Railway Board v. Herrington; McCarthy v. Wellington*). The failure of the second defendant to reply to the PWD or remove the underground cable could not be held against the first defendant. The fact that the PWD had control of the work could not make the PWD liable. The PWD had discharged its non-delegable duty of care; it took all necessary precautions to obtain all information. The second defendant should have foreseen that the work could damage its underground cable. In *Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* [1982] CLJ 401; [1982] CLJ (Rep) 159; [1982] 2 MLJ 128, the Federal Court recognised that a higher standard of care is expected from those dealing in electricity. The second defendant should have informed the PWD of the underground cable. The letters mentioned 'cable' which was wide enough to cover underground cables. Work only commenced ten months after the first letter. The Court

of Appeal was wrong in its finding that there was no follow-up, and or that the PWD proceeded with work without first being aware of the location of the cable.

Submission Of The Plaintiff

[22] The plaintiff submitted that the leave questions were 'hypothetical and academic' and so should not be answered.

Leave Questions 1 And 2

[23] Leave questions 1 and 2, which did not relate to the facts, sought to limit the application of *Lembaga Letrik Negara v. Ramakrishnan* to cases of personal injury. The Court of Appeal held that the defendants were negligent, in that each had breached their duty of care to the plaintiff. That finding was not predicated on a higher standard of care. The reference to *Lembaga Letrik Negara v. Ramakrishnan* was a passing reference that was not integral to the decision. That was demonstrated by the following fact pattern: (i) the second defendant admitted breach by its payment of the compound; (ii) the PWD was aware that the work would interfere with cables at the site; (iii) despite being so aware, the PWD proceeded with the work; (iv) PW1 explained that the second defendant had a duty to place cable markers; (v) the Court of Appeal held that the second defendant's failure to provide details of the cable was an irresponsible act of omission; (vi) the finding of failure to provide information was not premised on a higher standard of care.

Legal Principles

[24] The defendants sought to artificially categorise the legal implication of works or things which are dangerous. There is no legal classification of works or things which are dangerous and which are not. The degree of care expected is in proportion to the risk associated with the activity (learned counsel referred to *Halsbury's Laws of Malaysia,* vol. 5 paras. 80.143 and 80.176). The duty to take special precautions applies to a broad range of activities (learned counsel referred to *Halsbury's Laws of Malaysia,* vol. 5 paras. 80.143 and 80.171). The magnitude of risk is a matter that ultimately informs how a court is to determine whether the standard of care has been met (learned counsel cited *Charlesworth & Percy on Negligence,* 11th edn, at pp. 417-427; *Midwood & Co. Ltd v. Manchester Corp* [1905] 2 KB 597; *Beckett v. Newalls Insulation Co. Ltd And Anor* [1953] 1 WLR 8). To determine whether damages are recoverable, the main consideration is whether the damage caused is too remote. The issue of the applicable standard of care has no bearing (learned counsel cited *Charlesworth & Percy on Negligence* 11th edn at para. 4-01; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 at [21] per Steve Shim). Leave question 1 and 2 should be answered in the negative.

Leave Question 3

[25] Leave question 3 was also misconceived. Leave question 3 was based on the erroneous premise that the second defendant was a public body and that the claim was for pure economic loss which involved no physical damage to property. The second defendant contended that the Court of Appeal erred when it failed to appreciate that the second defendant was a public body and was under a statutory duty to supply electricity under the Act. The second defendant asserted that it ought to be protected against pure economic loss under the principles in *Caparo*. But the second defendant, incorporated under the Companies Act 1965 and a licensee under s. 9 of the Act, was a private body. Damage to the cable resulted in damage to the plaintiff's equipment, which the Court of Appeal held was corroborated by the second defendant's internal report. A consumer could not be expected to protect against high voltage. The Court of Appeal noted that damage could have been avoided if the second defendant had surge arresters and that the system in place was outdated. The plaintiff's claim was not based on pure economic loss. The claim was for actual loss suffered as a result of the damage to the machinery. *Caparo*, a leading decision on duty of care, is not directly concerned with pure economic loss. *Spartan Steel* is a better guide on pure economic loss in the context of power disruption. Pure economic loss was recovered from *UDA Holdings Bhd* (learned counsel cited *UDA Holdings Bhd v. Koperasi Pasaraya (M) Bhd* [2009] 1 CLJ 329 at [13]). The Court of Appeal below correctly applied *Caparo*. The damage was foreseeable. Question 3 should not be answered, as the fact pattern was beyond the scope of the question.

Question 4

[26] In the absence of a specific provision exempting the second defendant from liability, question 4 must be answered in the affirmative. The Court of Appeal found the defendants liable on the common law principles of 'proximity' and 'neighbourhood'. The statutory duty relied on by the defendants created the relationship between the parties which gave rise to the common law duty of care (learned counsel cited *Barrett v. Enfield London Borough Council* [1999] 3 All ER 193 at 216 and 217). The second defendant could be held liable for economic loss suffered by consumers.

The Role And Jurisdictional Limits Of The Federal Court

[27] The Federal Court can only assume jurisdiction of a civil appeal where leave has been given under s. 96 of the Courts of Judicature Act 1964 for matters which involve "a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage". In *Ho Tack Sien & Ors*

v. Rotta Research Laboratorium SpA & Anor [2015] 4 CLJ 20; [2015] 4 MLJ 166, the Federal Court held that an appeal under s. 96 is not a review of concurrent findings of fact. Any attempt to revisit the findings of fact of the Court of Appeal was misconceived. Leave questions must be answered on the basis of the facts as found by the Court of Appeal.

Factual Assertions And The Plaintiff's Claim

[28] The correctness of the findings of the Court of Appeal was substantiated by the following:

(a) The plaintiff constructed the substation in accordance with the second defendant's plans and instructions. Supply of electricity was conditional upon compliance with the requirements in the handbook. It was a requirement that consumers must arrange for protection as specified by the second defendant. The plaintiff appointed a consultant to ensure compliance with the protection requirement. The second defendant's supply of electricity signalled that the plaintiff had taken all precautionary measures. The evidence showed that the plaintiff had a two-tier protection system: the equipment came with a built-in protection; the minutes of the meeting dated 12 October 1999 reflected that the second defendant admitted that there was such a built-in protection system. Also, the plaintiff had a relay system at the substation which functioned as a protection system. PW2's evidence on the protection in the substation was not seriously challenged. PW4 stated, which DW7 confirmed, that the plaintiff had a thermal overload as a protection system.

(b) The cable, located within the area of work, was reasonably foreseeable as could be affected by the work.

(c) Three letters requested the second defendant to remove electrical poles and or cables in the vicinity of the project site. Information was communicated at meetings attended by representatives of the defendants. The payment of the compound – PW1 testified that the second defendant failed to take reasonable steps to avoid potential danger by the placement of markers. PW1 testified that the second defendant was negligent.

(d) The evidence of PW1 rendered the existence of underground cables indisputable. This conclusion was reinforced by the fact that the second defendant did not challenge the compound notice but accepted culpability. The evidence of PW1 was clear that the second defendant would have had a location plan of its cables to inform the PWD of the same. There were no markers. There was only a slab to protect the cable. The second defendant failed to maintain visible markers and to ensure that the contractor was informed of the underground cable.

(e) The minutes and records of meetings showed that underground cables were in the contemplation of the parties. It was incorrect to say that underground cables were not in the consideration of the parties.

Severance Of The Cable

[29] It was indisputable that the cable was severed by Markas. The severance damaged the plaintiff's machinery. The second defendant's internal report dated 17 August 1998 stated that the work by Markas caused the power disruption and that the plaintiff's machinery at that time "mengeluarkan bunyi yang luar biasa". The second defendant's letter dated 20 August 1998 stated that consumers suffered resultant damage because of severance of the cable.

Damage By Surge, And Evaluation Of The Expert Evidence

[30] The table relied on by the plaintiff and not disputed by the defendants cross-referred to a plan of the affected parts of the network which showed that a fuse and fuse carriers were burnt and that fuses disconnected at points well before the factory. The burnt fuse and fuse carriers pointed to a severe voltage transient (surge). The experts were in agreement that (i) the incident caused under-voltage which could have been avoided if the cable were not severed; (ii) when the cable was severed, it caused a short circuit and the fuses to operate, which resulted in a severe voltage transient; and (iii) there was under-voltage at the factory.

[31] Where the experts disagreed was whether there was a surge. Curiously, the experts of the second defendant accepted that an unbalanced under-voltage could have caused the motors and computer systems of the machinery to be damaged. In essence, PW4 and PW8 concluded that the short-circuit led to a surge in manner as follows: damage to the cable caused a high fault current to flow through the 22/11Kv transformer at the substation which caused the fuses to blow; the explosion of the fuses led to the sudden collapse of the high flow current in the transformer which resulted in over-voltage surges to the equipment at the factory; that broke down the insulation of the equipment which was rated for low voltage operations; that damaged the equipment. PW4 was the only expert who inspected the actual damage. PW8, with 45 years experience in the investigation of damage to electrical appliances, was of the opinion that severance of the cable led to a short-circuit, as all available current flowed to the fault location, that there was an increase of current, that the 22/11Kv transformer became highly magnetised, that the fuses exploded and the current collapsed to zero, and that that changed the magnetisation and induced the severe voltage transient in the 22/11Kv transformer. PW8 explained that the incident could not have caused under-voltage. The experts of the defendants could not explain how under-voltage could not have caused the breakdown of the fuse carriers.

[32] Amongst themselves, the experts of the second defendant could not agree that the highest point of rate of change of magnetic flux occurred at the 22/11Kv transformer and that the severe voltage transient could not have passed through the transformer. The experts of the second defendant were not unequivocal that a surge could not have travelled through the transformer. The evidence of DW5 was not reliable for the following reasons: DW5 was instructed by the second defendant to determine the voltage at the factory and not the cause of the damage; DW5 had no on-field experience on fault analysis and no expertise in severe voltage transient; DW5, who had received grants of RM140,000 and RM12,000 from the second defendant and was the principal consultant for TNB Research Sdn Bhd from 2001-2002, was not an independent expert. DW5 admitted that over-voltage could be generated when a transformer core becomes over-fluxed, that a change in the magnetic field would create an electric field, that the current dramatically dropped within a very short time, and that there was the possibility of a surge being created in the transformer. DW5's conclusion that a surge could not go through a transformer was contradicted by various articles in international journals. DW5 could not explain why he could not agree with those articles. Tests conducted by DW5 did not support the second defendant: DW5 admitted that a computer simulation could not resolve the engineering problem without the actual field data; the analysis was done without taking into account the condition of the network system; DW5 did not verify or check the parameters of the transformers, which parameters would affect the results. DW7's evidence was questionable: DW7 was evasive on under-voltage protection; DW7 discredited a report he had initiated; DW7 admitted that the thermal overload system was protection against under-voltage; DW7 contradicted DW5's evidence as to whether a surge could travel through a transformer; DW7 said that it could; DW7 said that the simulation data in the test conducted by DW5 was not inter-related; DW7 refused to accept that the fuse carrier burned due to current flashover, but accepted that high voltage impulses could caused a breakdown of the insulation material and that such impulses were transient events; DW7 conceded that the fuse carrier burned due to high thermal energy which he conceded would have been caused by high current flow. The Court of Appeal rightly observed that the trial court failed to evaluate the expert evidence. The Court of Appeal correctly decided that the damage was caused by a surge.

Our Decision

[33] The first matter that must be established to proceed with a claim based on the tort of negligence is that the defendant owed a duty of care to the plaintiff. "The tort of negligence requires first of all that there be a duty of care on the part of the (defendant) not to do any act or omit to do any act

A the doing of which or the omission of which could foreseeably affect other persons resulting in damage or loss to such other persons" (*Siew Yaw Jen v. Majlis Perbandaran Kajang & Another Appeal* [2015] 5 CLJ 189; [2015] 4 MLJ 411 per Zaharah Ibrahim JCA, as she then was, delivering the judgment of the court). "Tortious liability arises from a wrongful act where the B common law imposes a duty to take reasonable care" (*Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor* per Zainun Ali FCJ delivering the judgment of the court). Once a duty existed, the plaintiff must show that the defendant breached it.

[34] Duty of care, as a legal obligation, is relatively modern. The idea of C a general duty of care first appeared in the judgment of William Brett (later Lord Esher) MR in *Heaven v. Pender* (1883) 11 QBD 503, who suggested that there was a wider duty to be responsible in tort to those who might be injured if "ordinary care and skill" was not exercised. William Brett MR's formulation was not accepted by the rest of the court. But it was expressly D adopted by Lord Atkins in *Donoghue v. Stevenson* [1932] AC 562, where the concept of a tortious duty of care in negligence was first established under English law. Prior to *Donoghue v. Stevenson*, liability for personal injury in tort usually depended upon showing physical injury inflicted directly or indirectly, or upon some contractual relationship. But in *Donoghue* E *v. Stevenson*, the House of Lords moved the common law for tort and delict from strict liability based upon direct physical damage to the modern concept of negligence, which is fault-based and only requires injury. Lord Atkin thus stated the neighbour principle which came to be accepted as establishing the general concept of reasonable foresight as the criterion of negligence:

F > The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act G that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[35] " … there were two elements in this formulation. The first was the test of reasonable foresight. A duty would exists only where injury was H reasonable foreseeable. The second was the proximity requirement, namely that the duty was limited to 'persons so closely and directly affected' by the defendant's act that they should be in his contemplation" (Clerk & Lindsell on *Torts,* 21st edn, at 8-12). "… proximity may consist of various forms of closeness – physical, circumstantial, casual or assumed. It involves I considering the relationship from the perspective of both the defendant and the claimant. At root, it will reflect 'a balancing of the claimant's moral

claim to compensation for avoidable harm and the defendants' moral claim to be protected from an undue burden of legal responsibility'. As such it will inevitably overlap with considerations of justice between the parties" (Clerk & Lindsell on *Torts supra* at 8-16).

[36] "… the criterion is the foresight of the reasonable man, that is, was injury to the plaintiff the reasonably foreseeable consequence of the defendant's acts or omissions in all the circumstances of the case? If it was not, then the decision will be that no duty of care was owed by the defendant to the plaintiff. This does not mean, of course, that the plaintiff must be a person identifiable by the defendant. What is required is that he should be one of a class within the area of foreseeable injury. As regards what exactly must be foreseen, it is not necessary to show that the particular accident which has happened was foreseeable, any more than it is necessary to show that the particular damage was foreseeable; it is enough if it was reasonable in a general way to foresee the kind of thing that occurred (see *Stewart West African Terminals Limited* [1964] 2 Lloyd's Rep 371, 375). No duty to take care can be said to exist where there is only a remote possibility of injury. To use the words of Lord Dunedin in *Fardon v. Harcourt-Rivington* (1932) 146 LT 391, 392, 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but, if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions … In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.' " (*Jaswant Singh v. Central Electricity Board* per Gill J, as he then was).

[37] Lord Macmillan in *Donoghue v. Stevenson* said that the law takes no cognizance of carelessness in the abstract:

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.

[38] "In other words, there is no liability for negligent conduct involving harm unless the law exacts in the circumstances of each particular case a duty to take care. *Winfield on Tort* (7th edn) at p. 169 says: 'If the plaintiff is to succeed it must be established first that the circumstances in which his damage was caused were capable of giving rise to a duty of care, and, secondly, that the defendant actually owed him a duty on the particular facts of the case. The first of these requirements raises questions of law, and the duty may be termed the 'notional duty', while the second raises questions of mixed law and fact. It is the latter which sometimes shade off into questions

of breach of duty or remoteness of damage'" (*Jaswant Singh v. Central Electricity Board*). "… the mere fact that a man is injured by another's act gives in itself no cause of action, if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is exercising a legal right; if the act involves a lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists" (*Grant v. Australian Knitting Mills Ltd* [1936] 1 AC 85 per Lord Wright).

[39] Lord Macmillan went on to state that whether there was a duty and breach would be examined by the standard of the reasonable person, and that the categories of negligence are never closed:

> What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

[40] *Donoghue v. Stevenson* was not first recognised to have established a general principle of liability in negligence (see *Candler v. Crane, Christmas & Co* [1951] 2 KB 164). But that changed with *Hedley Byrne v. Heller* [1964] AC 465 and *Home Office v. Dorset Yacht Co Ltd* [1970] AC 1004, where the duty of care had to be determined in a novel situation. In the latter case, Lord Reid remarked that the steady trend was to regard the law of negligence as being based on legal principle and not precedent and that the *dictum* of Lord Atkin should be regarded as a statement of principle:

> In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v. Stevenson* [1932] A.C. 562 may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification

> in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

[41] Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] AC 728 explained that the neighbourhood principle could be reformulated as a two-stage test, the first focusing on the relationship between the parties and the second on relevant policy concerns:

> Through the trilogy of cases in this *House-Donoghue v. Stevenson* [1932] AC 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] AC 1004 per Lord Reid at p. 1027.

[42] But the *Anns* two-stage test came under scrutiny. In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, Lord Keith pointed out that Lord Atkin's statement of general principle was not intended to afford a comprehensive definition of the duty of care. Lord Keith expressed the position as follows:

> The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances in the case.

[43] Lord Keith cautioned that "there has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation that should be resisted … Rather it was appropriate to ask simply whether it was just and reasonable to impose a duty".

[44] In *Yuen Kun Yeu v. Attorney General of Hong Kong* [1988] AC 175, Lord Keith, delivering the judgment of the Board, pointed out that there was potential ambiguity in the first stage of the two-stage test – did Lord Wilberforce mean to test for proximity between the parties simply by the

reasonable contemplation of likely harm, or did he mean the expression 'proximity or neighbourhood' to reflect the necessary relationship between the claimant and defendant in a wider sense? Lord Keith preferred the second view and said that the expression 'proximity or neighbourhood' was intended to be a composite one, importing the whole concept of the necessary relationship between plaintiff and defendant required to give rise to the duty (see Charlesworth and Percy on *Negligence* 13th edn at 2-17), and that "the two-stage test in *Anns v. Merton* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care".

[45] "Notwithstanding this clarification, Lord Wilberforce's two-stage test was thought to be misleading and to favour a wide and open-ended liability. A series of decisions reflected a decline of judicial confidence and the two-stage test came to be abandoned. The process culminated in *Caparo* …" (Charlesworth and Percy on *Negligence* 13th edn at 2-18).

[46] *Caparo* which had accomplished the take-over of F. Plc., brought an action against its directors alleging fraudulent misrepresentation and against its auditors claiming that they were negligent in carrying out the audit and making their report, which they were required to do within the terms of ss. 236 and 237 of the Companies Act 1985. In its statement of claim, the plaintiffs alleged that they began purchasing shares in F. Plc. a few days before the annual accounts were published to shareholders, that in reliance on those accounts they made further purchases of shares so as to take over the company, and that the auditors owed both shareholders and potential investors a duty of care in respect of the certification of the accounts and should have known that as F. Plc.'s profits were not as high as projected and its share price had fallen significantly, that it was susceptible to a take-over bid and that reliance on the accuracy of the accounts would be placed by any potential bidder such as the plaintiffs. The judge determined that the auditors did not owe the plaintiffs a duty of care at common law either as a shareholder of F. Plc. or as an investor holding no shares. The Court of Appeal held that a duty of care was owed to the plaintiffs as shareholders but not as investors. The House of Lords held that liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment, that since the purpose of the statutory requirement for an audit of public companies under the Companies Act of 1985 was the making of a report to enable shareholders to exercise their class rights in general meeting and did not extend to the provision of information to assist shareholders in the making of decisions as to future investment in the company, and since, additionally, there was no reason in policy or principle why auditors should

be deemed to have a special relationship with non-shareholders contemplating investment in the company in reliance on the published accounts, even when the affairs of the company were known to be such as to render it susceptible to an attempted take-over, the auditors had not owed any duty of care to the plaintiffs in respect of their purchase of F. Plc.'s shares.

[47] Lord Bridge said that there is no single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed, and if so what is its scope, and that in any situation giving rise to a duty of care (i) there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and (ii) the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other:

> But since the *Anns* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] AC 210, 239f-241c; *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] AC 175, 190e-194f; *Rowling v. Takaro Properties Ltd.* [1988] AC 473, 501d-g; *Hill v. Chief Constable of West Yorkshire* [1989] AC 53, 60b-d. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v. Heyman* [1985] 60 ALR 1, 43-44, where he said:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

[48] Lord Oliver echoed that the foreseeability of harm is not the exclusive test, and said that a remedy could be denied to an injured party on the ground of public policy:

> There are, of course, cases where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of "closeness") exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy. *Rondel v. Worsley* [1969] 1 AC 191 was such a case, as was *Hill v. Chief Constable of West Yorkshire* [1989] AC 53, so far as concerns the alternative ground of that decision. But such cases do nothing to assist in the identification of those features from which the law will deduce the essential relationship on which liability depends and, for my part, I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test – even a *prima facie* test – of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense. In *Sutherland Shire Council v. Heyman*, 60 ALR 1, 43-44, Brennan J in the course of a penetrating analysis, observed:
>
> > Of course, if foreseeability of injury to another were the exhaustive criterion of a *prima facie* duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification – perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns* [1978] AC 728. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.
>
> The same approach is, I think, reflected in that passage in the speech of Lord Devlin in the *Hedley Byrne* case [1964] AC 465, 524-525 in which he considered the impact of *Donoghue v. Stevenson* on the facts of that case and in which he analysed and described the method by which the law develops:

In his celebrated speech in that case Lord Atkin did two things. He stated what he described as a 'general conception' and from that conception he formulated a specific proposition of law. In between he gave a warning 'against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted.

What Lord Atkin called a 'general conception of relations giving rise to a duty of care' is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question …

Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was 'proximity' between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides …

In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by *Donoghue v. Stevenson* and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers.

An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of *Donoghue v. Stevenson* to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

[49] Rather than define, Lord Oliver categorised the decided cases according to the type of situation in which liability was established in the past:

> Perhaps, therefore, the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Thus, for instance, cases can be classified according to whether what is complained of is the failure to prevent the infliction of damage by the act of the third party (such as *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] QB 342, *Smith v. Littlewoods Organisation Ltd*. [1987] AC 241 and, indeed, *Anns v. Merton London Borough Council* [1978] AC 728 itself), in failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as the *Anns* case, *Ministry of Housing and Local Government v. Sharp* [1970] 2 QB 223, *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] AC 175) or in the making by the defendant of some statement or advice which has been communicated, directly or indirectly, to the plaintiff and upon which he has relied. Such categories are not, of course, exhaustive. Sometimes they overlap as in the *Anns* case, and there are cases which do not readily fit into easily definable categories (such as *Ross v. Caunters* [1980] Ch. 297). Nevertheless, it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced.

[50] *Caparo*'s "three-fold test" to determine a new situation duty of care, encompassed public policy concerns, probably, to limit "a liability in an indeterminable amount for an indeterminable time to an indeterminable class" (*Ultramares Corporation v. Touche* 255 NY 170, 174, N.E. 441 (1931) per Cardozo CJ) if Lord Atkin's neighbour principle were applied without restriction. In order for a duty of care to arise in negligence, (i) harm must be reasonably foreseeable as a result of the defendant's conduct (as established in *Donoghue v. Stevenson*), (ii) the parties must be in a relationship of proximity, and (iii) it must be fair, just and reasonable to impose liability.

[51] The three-fold test is clear enough. But courts must yet resolve what is 'fair, just and reasonable' and what are the 'public policy' concerns that militate against the imposition of a duty of care. In *Barrett v. Enfield London Borough Council* [2001] 2 AC 550, Lord Browne-Wilkinson explained that 'fair, just and reasonable' depends on the pro and cons of the imposition, or otherwise, of a duty of care:

> In English law, the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

[52] "Ultimately it comes down to judicial conception of desirable policy. The question of responsibility for negligence may be argued in an almost unlimited range of circumstances, and a court may take all kinds of consideration into account in deciding whether a duty ought to be owed. However, this does not mean that the question is entirely at large, or that every new decision is no more than an *ad hoc* determination of policy" (*Charlesworth and Percy* 13th edn, at 2-41). Core concerns of policy include (i) promoting automony – the law draws a distinction between positive acts and failures to do so; (ii) preventing indeterminable liability; (iii) protecting the vulnerable; and (iv) maintaining coherence in the legal system – a duty of care should fit coherently into an overall scheme of rights and responsibilities or, in other words, it should be consistent with other legal rules and principles (see *Charlesworth and Percy* 13th edn at 2-42 to 2-45).

[53] The following two English authorities are representative of the many where the 'fair, just and reasonable' subsumed public interest factors.

[54] In *Marc Rich & Co v. Bishop Rock Marine Co Ltd* [1996] AC 211, during a voyage, a ship developed a crack in its hull. The shipowner requested its classification society to inspect the damage. The classification society advised that the ship be put into dry dock for repairs to be carried out. However, after complaints from the shipowner as to the cost of such an action, the advice was altered and temporary repairs were carried out. Shortly afterwards, the ship sank and the claimant lost cargo valued at US$17.6m. The claimant recovered US$17.5m from the shipowner and sought to recover the difference from the classification society. The House of Lords reiterated the three elements necessary for the imposition of a duty of care set out in *Caparo*. The first two elements were satisfied on the facts. But the House of Lords held that it would be unfair, unjust and unreasonable to place a duty of care on a classification society as against a shipowner, because classification societies act for collective welfare and could not rely on any limitation provision.

[55] Lord Steyn related the factors that militated against the imposition of a duty of care:

> By way of summary, I look at the matter from the point of view of the three parties concerned. I conclude that the recognition of a duty would be unfair, unjust and unreasonable as against the shipowners who would ultimately have to bear the cost of holding classification societies liable,

such consequence being at variance with the bargain between shipowners and cargo owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo owners, the existing system provides them with the protection of the Hague Rules or Hague-Visby Rules. But that protection is limited under such Rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. In my judgment the lesser injustice is done by not recognising a duty of care. It follows that I would reject the primary way in which counsel for the cargo owners put his case.

[56] On the matter of the fairness of the imposition of liability on public bodies for damage caused by a third agency, in *K v. Secretary of State for the Home Department* [2002] EWCA Civ 775, Laws LJ (Brown, Arden LJJ in agreement) said:

Where the putative Defendant is a public body, the existence and nature of the duties it owes to the public are frequently critical to the judgment that falls to be made, whether the public body should be held liable for damage caused by a third agency. The following passage from the speech of Lord Browne-Wilkinson in *Barrett v. Enfield London Borough Council* [1999] 3 All ER 193, [1999] 3 WLR 79 at p 85 of the latter report (cited by Keene LJ at para 24 in *Cowan*), a case to which I must refer further in addressing Mr Hughes' submissions, represents what I think with respect has become a familiar approach:

> In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the Defendant's primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be Defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

Keene LJ also cites (*Cowan*, para 31) this passage from the judgment of Beldam LJ in *Ancell v. McDermott* [1993] 4 All ER 355, 159 LG Rev 389 at p 365e-f of the former report:

> It is exceptional to find in the law a duty to control another's actions to prevent harm to strangers and where they are found they arise from special relationships. When it is contended that such special relationship arises out of duties carried out in the performance of a public office, the court must have regard to the purpose and scope of the public duties, whether they are intended to benefit a particular section of the public, eg investors or depositors, and whether such persons could reasonably place reliance on the fulfilment of the duties.

The authorities dealing with the police as Defendants to negligence actions, from *Hill* onwards, and of which I think *Cowan* is the most recent instance, demonstrate with particular clarity the force of the public interest factors which tend to inhibit the imposition of liability in third agency cases. In *Costello v. Chief Constable of Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752 May LJ said this at 563f-g of the former report:

> For public policy reasons, the police are under no general duty of care to members of the public for their activities in the investigation and suppression of crime (*Hill*'s case). But this is not an absolute blanket immunity and circumstances may exceptionally arise when the police assume a responsibility, giving rise to a duty of care to a particular member of the public (*Hill*'s case and *Swinney*'s case [sc [1997] QB 465]). The public policy considerations which prevailed in *Hill*'s case may not always be the only relevant public policy considerations (*Swinney*'s case).
>
> Neither the police nor other public rescue services are under any general obligation, giving rise to a duty of care, to respond to emergency calls (*Alexandrou*'s case [sc. [1993] 4 AER 328]), nor, if they do respond, are they to be held liable for want of care in any attempt to prevent crime or effect a rescue. But if their own positive negligent intervention directly causes injury which would not otherwise have occurred or if it exacerbates injury or damage, there may be liability (the *Capital & Counties Plc* case [1997] QB 1004).'

Keene LJ specifically adopted this reasoning in holding that on the facts in *Cowan* (which I need not set out) the police owed no duty of care. He stated (para 41):

> It is only if a particular responsibility towards an individual arises, establishing a sufficiently close relationship, that a duty of care may be owed to that individual.

And at para 44 he stated:

> In so far as matters of public policy come into consideration, particularly under the concept of what is just and reasonable, there is the well-established public interest in not fettering or influencing the police in operational matters by the 'spectre of litigation': see

> Ward LJ in *Swinney*, pp 486H-487A. Their duties are difficult enough without that added complication which would arise from imposing a duty of care towards individual citizens to prevent crime.

[57] The Irish Supreme Court has accepted the *Caparo* formula and so has the Hong Kong Court of Appeal, whereas in Canada and Singapore the courts have retained the *Anns* two-stage approach. In New Zealand, the courts have restated the principles which should be applied in a way which combines the *Anns* and the *Caparo* analyses. The ultimate question, it is accepted, is whether in the light of all the circumstances it is just and reasonable that a duty should be imposed, but in deciding this question the focus is on two broad fields of inquiry – first, the degree of proximity, and second, wider policy concerns. In Australia, the initial view favoured in the High Court was to use the notion of proximity as all all-embracing touchstone to denote the circumstances giving rise to a duty, but later cases recognised that proximity in this sense was a mere label and doubted its value. However, the High Court also has rejected the approaches in both *Anns* and *Caparo*, and some later decisions tend simply to revert to *Donoghue v. Stevenson*" (*Charlesworth and Percy,* 13th edn at 2-22).

[58] *Anns* was followed in *Ban Guan Hin Realty Sdn Bhd v. Sunny Yap Chiok Sai & Ors* [1987] 1 LNS 144; [1989] 1 MLJ 131, *Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* [1999] 8 CLJ 131; [1997] 3 MLJ 546, and *Amal Bakti Sdn Bhd & Ors v. Affin Merchant Bank (M) Bhd* [2012] 4 CLJ 813; [2012] 5 MLJ 61. But *Anns* was not followed in *Kerajaan Malaysia lwn. Cheah Foong Chiew & Lagi* [1993] 3 CLJ 143; [1993] 2 MLJ 439, where the court followed *Murphy v. Brentwood District Council* [1991] 1 AC 398, *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105; [1995] 2 MLJ 663, *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1999] 8 CLJ 403; [1998] 2 MLJ 53, *Uniphone Sdn Bhd v. Chin Boon Lit & Anor* [1997] 1 LNS 441; [1998] 6 MLJ 441, *Ku Pon & Ors v. Pemandangan Sinar Sdn Bhd & Ors* [2004] 3 CLJ 466; [2004] 6 MLJ 253, *Assets Investments Pte Ltd v. OSK Securities* [2005] 7 CLJ 401; [2005] 6 MLJ 643, nor, crucially, by this court in *Steven Phoa.* Since *Steven Phoa*, this court had unerringly adopted the *Caparo* formula, in *The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; [2008] 2 MLJ 233, *UDA Holdings Bhd v. Koperasi Pasaraya (M) Bhd, CIMB Bank Bhd v. Maybank Trustees Bhd and Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169, *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor,* and *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2016] 9 CLJ 297; [2016] 6 MLJ 413. In Malaysia, it is *Caparo* that holds sway.

[59] In novel claims, local appellate courts had thus ruled on 'fair, just and reasonable' where public policy concerns were not absent.

[60] In *Steven Phoa*, a landslide caused Block 1 of three blocks of apartments to collapse and the respondents to be permanently evacuated from Blocks 2 and 3. MPAJ promised the respondents that a master drainage plan for the affected area on the hill slope behind the apartments would be formulated and implemented so as to ensure the stability and safety of Blocks 2 and 3 occupied by the respondents. However, MPAJ failed to carry out the plan. The respondents filed suit against various parties including MPAJ, for negligence and nuisance. The High Court found MPAJ 15% liable for negligence in respect of MPAJ's acts and omissions prior to the collapse of Block 1 but held that s. 95(2) of the Street, Drainage and Building Act 1974 operated to indemnify MPAJ of any pre-collapse liability but provided no protection to MPAJ for post-collapse liability. Dissatisfied, both MPAJ and respondents appealed to the Court of Appeal who allowed MPAJ's appeal on post-collapse liability and the respondents' cross-appeal on s. 95(2). At the Federal Court, MPAJ appealed against the Court of Appeal's affirmation that MPAJ was 15% liable to the respondents for negligence and nuisance. The respondents' cross-appeal was against the Court of Appeal's finding that their cause of action for post-collapse liability lay in the area of public and not private law.

[61] Abdul Hamid Mohamad FCJ, as he then was, (Arifin Zakaria FCJ, as he then was, in agreement) held that the question was whether it was fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilise the hill slope on neighbouring land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3, that on the facts and in the circumstances of this case, it was not fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations, and that, for the same reasons, the claim for loss due to vandalism and theft which was allowed by the learned trial judge should not be allowed:

> The question then is, considering the public policy and local circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilise the hill slope … to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3?
>
> A local council is established with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on

assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percents. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen. Then there is the attitude of the public from littering and vandalism to resorting to irresponsible means in order to maximise profits, as we see in the facts of this case as narrated by the learned High Court judge.

With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the 'debts' of such people? In my view, the answer is 'No'.

[62] Abdul Aziz Mohamad FCJ in *UDA Holdings Bhd v. Koperasi Pasaraya (M) Bhd* opined that *Steven Phoa* "did not make a ruling, applicable to other cases, that precludes a claim for pure economic loss against a local authority". But in the same case, Zulkefli FCJ, as he then was (Zaki Azmi CJ in agreement), said that "the majority judgment in that case, decided largely on policy grounds, that there should be no recovery for economic loss against a local authority ... if it is a pure economic loss in tort, the reasoning of the Federal Court [in *Stephen Phoa*] is that it should be barred under s. 3 of the CLA as non-recoverable for policy reasons".

[63] In *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor*, it was held, per Zainun Ali FCJ, delivering the judgment of the court, that "it would not be fair, just and reasonable to impose on architects a duty of care for a responsibility which they had not assumed or one which is not within their professional scope of duty", that "claims for pure economic loss in negligence cases must always be brought within the scope of duty of care" and that "the court should exercise caution when determining the existence of a duty of care and allowing claims for pure economic loss".

[64] In the court below, in *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors*, it was held, per Mohd Hishamudin JCA, delivering judgment of the court, that "it would not be just and reasonable to impose a duty of care on the defendants/architects to ensure that there is no undue delay on the part of the developer (Merger Acceptance) in obtaining the CFOs from the local authority, MPSP". A B

[65] Public interest concerns were more evident in *Master Brisbane Itang v. Robinson Lee & Ors* [2014] 1 CLJ 726; [2014] 2 MLJ 565, where it was held, per Mohd Hishamudin JCA, delivering the judgment of the court, that it was not fair, just and reasonable to impose a common law duty of care on the Department/Ministry of Health to ensure the plaintiff was immunised against the JE virus because (a) there was no recent outbreak of the JE virus infection in areas near the appellant's school prior to the incident (b) the immunisation programme covered the whole country and implementation of the policy or programme required the co-operation of other Government agencies (c) there were shortages of vaccine and budget constraints, and (d) to impose any common law duty of care under such circumstances would open a floodgate of litigation against the Department/Ministry of Health. C D

[66] In Malaysia, the 'fair, just and reasonable' element is well-established in cases concerned with economic loss and public services. Still it should be said that where a case fell within the established categories of liability, "a defendant should not be allowed to seek to escape from liability by appealing to some vague concept of justice and fairness" as the previous authorities "have by necessarily implication held that it is fair, just and reasonable that the claimant should recover" (*Clerk & Lindsell supra* at 8-24 citing Hobhouse LJ in *Perrett v. Collins* [1999] PNLR 77). Where a case falls within one of the established categories of liability, the *Caparo* three-fold test, which is to determine the duty of care in a new and novel situation, is inapplicable. Where a case falls within one of the established categories of liability, the third element in *Caparo* does not arise, as the previous authorities "have by necessarily implication held that it is fair, just and reasonable that the claimant should recover". E F G

[67] Liability for damage caused by power failure is not novel. In *SCM (United Kingdom) Ltd v. WJ Whittall and Son Ltd* [1971] 1 QB 337, the defendant contractors negligently damaged an electric cable by a public road which caused a power failure in the plaintiff's premises which in turn resulted in damage to materials and machines and the consequent loss of production. The amended statement of claim alleged that power was cut off for seven hours 17 minutes or thereabouts, that raw materials in the plaintiff's machines solidified, necessitating the stripping down of the machines and the chipping away and discarding of the material, and the H I

examination, re-assembly and testing of the machines, that drills and taps on drilling and tapping machines sheared and had to be scrapped, that milling cutters on milling machines were chipped, and components being plated with nickel, chrome and zinc were damaged beyond recovery, and that as a result, the plaintiff suffered damage including loss of profit from one full day's production. Based on the alleged facts, the Court of Appeal held in principle that the defendant owed the plaintiff a duty of care and was liable for the material damage and the consequent loss of production suffered. Lord Denning MR said:

> It is well settled that when a defendant by his negligence causes physical damage to the person or property of the plaintiff, in such circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim, in addition, for economic loss consequent on it. Thus a plaintiff who suffers personal injuries recovers his loss of earnings; and a shipowner, whose ship is sunk or damaged, recovers for his loss of freight. If and in so far as Mr. Dehn is entitled to claim for the material damage, then he can claim for the loss of production which was truly consequential on the material damage. But, if the loss of production was really due to the cutting off of the electricity for seven hours and 17 minutes - and the plaintiff took the opportunity during that time of remedying the physical damage - then the claim for loss of production would depend on whether, in this type of case, economic loss is recoverable.

[68] In connection with the argument that the contractors owed a duty of care to the electricity board which owned the cable, because the cable was liable to be directly injured, but that the contractors owed no duty to the factory owners because their factory was not liable to be directly injured, only indirectly injured (by having their current cut off), which injury could not be foreseen and the contractor therefore owed no duty of care, Lord Denning said that the question, notwithstanding the distinction between direct and indirect injury, was whether the contractors owed a duty of care, and that economic loss is to be regarded as too remote to be recoverable as damages:

> Mr. Kidwell carried this proposition to its logical conclusion. He said that *British Celanese Ltd. v. A. H. Hunt (Capacitors) Ltd.* [1969] 1 WLR 959 was wrongly decided. In that case the defendants collected on their premises long strips of metal foil. They negligently failed to keep them safe, and they were carried by the wind on to an electricity sub-station owned by the electricity board, thus causing a power failure over a wide area. The defendants ought reasonably to have foreseen this, because it had happened before and they had been warned about it. The plaintiffs were the owners of a nearby factory who suffered physical damage to their materials by the cutting off of the current. They were injured indirectly and not directly. This indirect injury could reasonably be foreseen. Lawton J held that the defendants were under a duty of care to the

factory owners and were liable for the material damage and the loss of profit consequent thereon. I think that Lawton J was right. I cannot accept Mr. Kidwell's proposition. The distinction between "direct" and "indirect" has been attempted before, but it has proved illusory. It was decisively rejected in a parallel field in *The Wagon Mound* [1961] AC 388 and should not be revived here. The cases, too, do not warrant the distinction. A man may owe a duty of care to those whom he foresees may be indirectly injured, as well as to those whom he foresees may be directly affected. A good example is wilful damage done by an escaping borstal boy. Such damage is as indirect as can be, but, being reasonably foreseeable, a duty of care is owed to those in the neighbourhood who may be injured by it: see *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004. Another example is the injury caused by a negligent reference given by a banker. The man who acts upon it suffers damage which is quite indirect; but, being foreseeable, a duty of care is owed to him: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465.

I put on one side, therefore, the distinction between direct and indirect, and ask myself simply: Did the contractors owe a duty of care to the factory owners? I think it plain that they did. They were working near an electric cable which they knew supplied current to all the factory owners in the neighbourhood. They knew that, if they damaged the cable, the current would be cut off and damage would be suffered by the factory owners. Those simple facts put them under a duty to take care not to injure the cable: and this was a duty which they owed to all the factory owners in the vicinity. It comes straight within the principle laid down by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562, 580. Applying that case, I hold that the contractors are liable for all the material damage done to the factory owners and any loss of profit consequent thereon. The *British Celanese* case [1969] 1 W.L.R. 959 was rightly decided, following, as it did, the Canadian case of *Seaway Hotels Ltd. v. Gragg (Canada) Ltd. and Consumers Gas Co.* (1960) 21 DLR (2d) 264, to which I would subscribe so far as it concerned the spoiling of the food.

But I cannot stop there. I must deal with Mr. Kidwell's argument. He said that, if there was a duty of care, it meant that economic loss would be recoverable as well as material damage. No distinction could be made between the two kinds of damage. Lord Devlin said: "I can find neither logic nor common sense" in making a difference between them: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, 517.

There may be no difference in logic, but I think there is a great deal of difference in common sense. The law is the embodiment of common sense: or, at any rate, it should be. In actions of negligence, when the plaintiff has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy. It was first stated by Blackburn J in *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, 557, and has been repeated many times since. He gave this illustration: When a mine

A is flooded by negligence, thousands of men may be thrown out of work. None of them is injured, but each of them loses wages. Has each of them a cause of action? He thought not. So here I would ask: When an electric cable is damaged, many factories may be stopped from working. Can each of them claim for their loss of profit? I think not. It is not sensible to saddle losses on this scale on to one sole contractor. Very often such B losses occur without anyone's fault. A mine may be flooded, or a power failure may occur, by mischance as well as by negligence. Where it is only mischance, everyone grumbles but puts up with it. No one dreams of bringing an action for damages. So also when it occurs by negligence. The risk should be borne by the whole community who suffer the losses rather than rest on one pair of shoulders, that is, on one contractor who may, C or may not, be insured against the risk. There is not much logic in this, but still it is the law. As Lord Wright said in *Liesbosch, Dredger v. Edison S.S.* [1933] AC 449, 460:

> In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but D simply for practical reasons.

In other words, the economic loss is regarded as too remote to be recoverable as damages.

Thus far I have spoken only of accidents which affect a whole community, but the principle has been applied to cases where only one or two persons E suffer economic loss. Take the case where a tug was towing a ship. The defendants' vessel approached so negligently that she sank the ship: but the tug was not damaged. The owners of the tug lost the remuneration which they would have earned on the towage contract. The defendants clearly owed a duty of care to the tug as well as to the tow. If the tug had been physically damaged, her owners could have recovered for it: but, F as their loss was only economic loss, Hamilton J. held that the tug could not recover for it: see *Société Anonyme de Remorquage a Hélice v. Bennetts* [1911] 1 KB 243.

Now apply that case to an ordinary road accident where a haulage contractor is carrying goods under contract to be delivered urgently by a G specified time. He is driving the lorry and his servant is sitting beside him in the cab. The defendant negligently drives into the lorry. The lorry is damaged. The employer is killed. But the servant is not injured. Nor are the goods. Yet the servant loses his employment: and the goods are delayed for many hours so that the owner of the goods is held up and loses production. Applying the tug case, it seems clear that the servant H cannot recover for his loss of wages: nor can the owner of the goods recover for his loss of profit. Suppose next the servant is injured and the employer not. But the employer suffers damage owing to the loss of his services. He cannot recover from the wrongdoer: see *Inland Revenue Commissioners v. Hambrook* [1956] 2 QB 641. Yet in all these instances the I wrongdoer was certainly under a duty of care to everyone concerned, that is, to the employer, to the servant, and to the owner of the goods. If there

> had been physical damage to any of them, the defendant would have been held liable for the physical damage and the loss of earnings consequent thereon. Yet, when there is no physical damage, the defendant is not liable. His breach of duty is the same, no matter whether the damage is physical injury or only economic loss. Only the damage is different. If you refuse to allow the plaintiff in such cases to recover for economic loss, it is not because there is no duty owed to him, nor because it was not caused by the negligence of the defendant, but simply because it is too remote to be a head of damage. It is rather like the cases on nervous shock where a bystander fails to recover. The reason is, not because there is no duty to him, but because the damage is too remote: see *King v. Phillips* [1953] 1 QB 429, 439.

[69] Lord Denning however qualified that economic loss is not always too remote:

> I must not be taken, however, as saying that economic loss is always too remote. There are some exceptional cases when it is the immediate consequence of the negligence and is recoverable accordingly. Such is the case when a banker negligently gives a good reference on which a man extends credit, and loses the money. The plaintiff suffers economic loss only, but it is the immediate – almost, I might say, the intended – consequence of the negligent reference and is recoverable accordingly: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465. Another is when the defendant by his negligence damages a lorry which is carrying the plaintiff's goods. The goods themselves are not damaged, but the lorry is so badly damaged that the goods have to be unloaded and carried forward in some other vehicle. The goods owner suffers economic loss only, namely, the cost of unloading and carriage, but he can recover it from the defendant because it is immediate and not too remote. It is analogous to physical damage: because the goods themselves had to be unloaded. Such was the illustration given by Lord Roche in *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* [1947] AC 265. Likewise, when the cargo owners have to pay a general average contribution. It is not too remote and is recoverable.

[70] Lastly, on when economic loss is too remote or not, Lord Denning said:

> Seeing these exceptional cases you may well ask: How are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls. The same question might be asked in the case of the escaping borstal boys. If their housemasters are negligent, and they escape and do damage, the Home Office is liable to persons in the neighbourhood, but not to those far away. Where, again, is the line to be drawn? Only where 'in the particular

A case the good sense of the judge decides.' That is how Lord Wright put it in the case of nervous shock in *Bourhill v. Young* [1943] AC 93, 110: and I do not think we can get any nearer than that. But, by building up a body of case law, we shall give guidance to practitioners sufficient for all the ordinary cases that arise.

B **[71]** Lord Denning held the contractors liable for the material damage done to the factory-owners and the loss of profit truly consequent thereon, but not for any other economic loss.

[72] Winn LJ expressed agreement with Widgery J who said in *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 QB 56 that "In my C judgment there is nothing in the *Hedley Byrne* case [1964] AC 465 to affect the common law principle that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take care."

[73] Buckley LJ said that the question for consideration was whether "there D is a duty in law not to interrupt the supply or delivery of a commodity or service to a person by a careless act in circumstances where it is foreseeable that such interruption will result in physical damage to property?" Buckley LJ held that *Electrochrome Ltd. v. Welsh Plastics Ltd.* [1968] 2 All ER 205, *British Celanese Ltd. v. A. H. Hunt (Capacitors) Ltd.* [1969] 1 WLR 959, *Seaway* E *Hotels Ltd. v. Gragg (Canada) Ltd. and Consumers Gas Co.* [1959] 17 DLR (2d) 292 and *Baker v. Crow Carrying Co. Ltd.* (unreported) 1 February 1960, CA, Bar Library Transcript No. 45 evinced that courts do hold that there is liability for damage occasioned by interference with the supply of some service.

F **[74]** In *Spartan Steel*, negligent damage to an electric mains cable by contractors interrupted a "melt" of metal at the plaintiff's nearby factory. There were three claims, the first being that, because the plaintiff had to pour molten metal out of its furnace to prevent the metal solidifying and damaging the furnace, the metal depreciated in value by £368; secondly they lost a G profit from the sale of the metal from that melt of £400. Thirdly, during those 14 1/2 hours, when the power was cut off, the plaintiffs would have been able to put four more melts through the furnace; and, by being unable to do so, they lost a profit of £1,767. The defendants did not dispute that they were liable for the £368 physical damages and the £400 loss of profit on the first H melt, because that was truly consequential on the physical damages and thus covered by *SCM v. Whittall*. But the defendants denied that they were liable for the £1,767 for the other four melts. The defendants said that was economic loss for which they are not liable. The judge at first instance allowed all three claims. The appeal was allowed, by a majority. Lord Denning said:

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> At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the Defendant. Whenever the courts set bounds to the damages recoverable-saying that they are, or are not, too remote-they do it as a matter of policy so as to limit the liability of the Defendant.

[75] Lord Denning went on to explain that the recovery of economic loss depends wholly on whether the defendant had a duty of care and whether the economic loss was foreseeable:

> In many of the cases where economic loss has been held not to be recoverable, it has been put on the ground that the defendant was under no duty to the plaintiff. Thus where a person is injured in a road accident by the negligence of another, the negligent driver owes a duty to the injured man himself, but he owes no duty to the servant of the injured man: see *Best v. Samuel Fox & Co Ltd* ([1952] 2 All ER 394 at 398, [1952] AC 716 at 731); nor to the master of the injured man: *Inland Revenue Comrs v. Hambrook* ([1956] 3 All ER 338 at 339, 340, [1956] 2 QB 656 at 660); nor to anyone else who suffers loss because he had a contract with the injured man: see *Simpson & Co v. Thomson* ([1877] 3 App Cas 279 at 289); nor indeed to anyone who only suffers economic loss on account of the accident: see *Kirkham v. Boughey* ([1957] 3 All ER 153 at 155, [1958] 2 QB 338 at 341). Likewise, when property is damaged by the negligence of another, the negligent tortfeasor owes a duty to the owner or possessor of the chattel, but not to one who suffers loss only because he had a contract entitling him to use the chattel or giving him a right to receive it at some later date: see *Elliott Steam Tug Co v. Shipping Controller* ([1922] 1 KB 127 at 139) and *Margarine Union GmbH v. Cambay Prince Steamship Co Ltd* ([1967] 3 All ER 775 at 794, [1969] 1 QB 219 at 251, 252).
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> In other cases, however, the defendant seems clearly to have been under a duty to the plaintiff, but the economic loss has not been recovered because it is too remote. Take the illustration given by Blackburn J in *Cattle v. Stockton Waterworks Co* ([1875] LR 10 QB 453 at 457, [1874-80] All ER Rep 220 at 223): when water escapes from a reservoir and floods a coal mine where many men are working; those who had their tools or clothes destroyed could recover, but those who only lost their wages could not. Similarly, when the defendants' ship negligently sank a ship which was being towed by a tug, the owner of the tug lost his remuneration, but he could not recover it from the negligent ship although the same duty (of navigation with reasonable care) was owed to both tug and tow: see *Société Remorquage à Hélice v. Bennetts* ([1911] 1 KB 243 at 248). In such cases if the plaintiff or his property had been physically injured, he would have recovered; but, as he only suffered economic loss, he is held not entitled to recover. This is, I should think, because the loss is regarded by the law as too remote: see *King v. Phillips* ([1953] 1 All ER 617 at 622, [1953] 1 QB 429 at 439, 440).

> On the other hand, in the cases where economic loss by itself has been held to be recoverable, it is plain that there was a duty to the plaintiff and the loss was not too remote. Such as when one ship negligently runs down another ship, and damages it, with the result that the cargo has to be discharged and reloaded. The negligent ship was already under a duty to the cargo-owners; and they can recover the cost of discharging and reloading it, as it is not too remote: see *Morrison Steamship Co Ltd v. Steamship Greystoke Castle (Owners of Cargo lately laden on*). Likewise, when a banker negligently gives a reference to one who acts on it, the duty is plain and the damage is not too remote: see *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*.
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> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable. Thus in *Weller & Co v. Foot and Mouth Disease Research Institute* it was plain that the loss suffered by the auctioneers was not recoverable, no matter whether it is put on the ground that there was no duty or that the damage was too remote. Again, in *Electrochrome Ltd v. Welsh Plastics Ltd*, it is plain that the economic loss suffered by the plaintiffs' factory (due to the damage to the fire hydrant) was not recoverable, whether because there was no duty or that it was too remote.

[76] Lord Denning sketched five policy considerations: (a) the position of the statutory undertakers – "If the board do not keep up the voltage or pressure of electricity, gas or water – or, likewise, if they shut it off for repairs – and thereby cause economic loss to their consumers, they are not liable in damages, not even if the cause of it is due to their own negligence"; (b) the nature of the hazard, namely, the cutting of the supply of electricity – "This is a hazard which we all run. It may be due to a short circuit, to a flash of lightning, to a tree falling on the wires, to an accidental cutting of the cable, or even to the negligence of someone or other. And when it does happen, it affects a multitude of persons; not as a rule by way of physical damage to them or their property, but by putting them to inconvenience, and sometimes to economic loss. The supply is usually restored in a few hours, so the economic loss is not very large. Such a hazard is regarded by most people as a thing they must put up with – without seeking compensation from anyone. There are some who install a standby system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage"; (c) "If claims for economic loss were

permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false. A machine might not have been in use anyway, but it would be easy to put it down to the cut in supply. It would be well-nigh impossible to check the claims. If there was economic loss on one day, did the applicant do his best to mitigate it by working harder next day? And so forth. Rather than expose claimants to such temptation and defendants to such hard labour – on comparatively small claims – it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage"; (d) "in such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses – usually many but comparatively small losses – rather than on the one pair of shoulders, that is, on the contractor on whom the total of them, all added together, might be very heavy"; (e) "The fifth consideration is that the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes actual physical damage to person or property, that physical damage can be recovered: see *Baker v. Crow Carrying Co Ltd*, referred to by Buckley LJ in *SCM v. Whittall* ([1970] 3 All ER 245 at 261, [1971] 1 QB at 356), and also any economic loss truly consequential on the material damage: see *British Celanese Ltd v. A H Hunt (Capacitors) Ltd* and *SCM v. Whittall*. Such cases will be comparatively few. They will be readily capable of proof and will be easily checked. They should be and are admitted.

[77] Lord Denning concluded that the plaintiffs should recover for the physical damage to the one melt (£368), and the loss of profit on that melt consequent thereon (£400); but not for the loss of profit on the four melts (£1,767), because that was economic loss independent of the physical damage. Edmund Davis LJ disagreed but Lawton LJ agreed with the Master of the Rolls.

[78] Thus, in a claim for loss or damage caused by power failure or disruption, as opposed to claims of the kind of loss in negligent misstatement cases that follow from *Hedley Byrne*, there is a crucial distinction between economic loss consequent to damage which is recoverable, and pure economic loss independent of physical damage which is not recoverable. "(*Spartan Steel*) held that the claimant was entitled to recover the profits that were lost due to its own property being damaged by the power cut (a melt that had to be removed from the furnace) because these losses were the result of physical damage to the claimant's property. This is not regarded as pure economic loss, but the economic loss consequent on physical damage. The claimant was unable to recover the lost profit on four melts that would have been processed in the period when the power supply was cut. This constituted pure economic loss unrelated to any physical damage to the claimant's property" (Clerk & Lindsell on *Torts supra* at 8-139; *Charlesworth & Percy* 13th edn labelled pure economic loss as relational loss).

[79] *Spartan Steel* was a different illustration of the general rule that "no duty of care is owed by a defendant who negligently damages property belonging to a third party, to a claimant who suffers loss because of a dependence upon the property or its owner. The leading authority is the 1875 case of *Cattle v. Stockton Waterworks Co* (1875) LR 10 QB 453 where the claimant suffered economic loss in performing a contract with a third party as a result of damage to that party's property … Blackburn J held that such loss was irrecoverable on the ground that no property of the claimant was damaged. The rule was reaffirmed by the Privy Council and House of Lords respectively in *Candlewood Navigation Corp Ltd v. Mitsui OSK Lines Ltd* [1986] AC 1 and *Leigh & Sillavan Ltd v. Alliance Shipping Co* [1986] AC 785 … "(Clerk & Lindsell on *Torts supra* at 8-138). "The reasons given by the courts for the no-recovery rule fall under the heads of both proximity and fairness" (Clerk & Lindsell on *Torts supra* at 8-140).

[80] In exceptional cases, recovery for pure economic loss could be allowed. "In New Zealand, certain first instance decisions allow relational claims on a "proximity" analysis similar to that in Australia. The Court of Appeal has not finally determined the question, but at least two decisions give some support to a transferred loss theory" (*Clerk & Lindsell* 13th edn at 2-232). "In *Caltex Oil (Australia) v. The Dredge 'Willemstad'* (1976) 136 CLR 529, the High Court of Australia allowed recovery where the oil supply to the claimant's refinery was cut because the defendant damages the supply pipeline which was not owned by the claimant … what seems to have influenced the High Court most was the fact that the damage to the claimant's refinery was specifically foreseeable. In *Canadian National Ry Co v. Norsk Pacific S.S. Co* [1992] 91 DLR (4th) 289 the Supreme Court of Canada developed an exception based on the notion of 'joint venture' … and justified a finding of proximity ... In *Perre v. Apand Pty Ltd* (1999) 164 ALR 606 the Australia High Court cautiously expanded the scope of exceptional recovery. The defendant negligently supplied diseased potato seed to a grower who produced a diseased crop. This resulted in a quarantine being imposed on all growers within a 20km radius of the outbreak. The claimants fell within the quarantine and suffered losses both as growers and processors ... In *Perre*, there was little risk of indeterminacy; the autonomy of the defendant was already limited by its liability for the physical damage; the claimant was vulnerable as there was nothing it could do by way of contract to protect itself; and the defendant knew of the risks of supplying diseased seed. Hence a duty should be imposed. The current willingness of the English appellate courts to articulate policy reasoning rather than to rely on bright lines excluding liability, suggests that the incremental approach of *Perre* might be followed" (Clerk & Lindsell on *Torts supra* at 8-141).

[81] That the instant case fell within the established category of liability for damage caused by power failure or disruption was beyond argument. Given that there was liability for damage caused by power failure, the trial court could take it for granted, which it did, that there was a duty of care. But even so, the trial court should have proceeded to find who owed that duty of care and who breached it. Much was argued as to whether the power failure caused a surge or under-voltage. The second defendant contended that it was under-voltage that could not have caused the damage. But whether it was surge or under-voltage, it remained that there would not have been a power failure or disruption, had Markas not ruptured the cable. Without the power failure or disruption, there would not have been the surge or under-voltage. The Court of Appeal held that the power failure or disruption caused a surge. We agree that if under-voltage could not have caused the damage, then there could not have been the undeniable damage. In any event, it was plain that the damage was the consequence of the power failure or disruption. Whether the power failure or disruption caused a surge or under-voltage was a red herring. The duty of care and breach of it should have been the focus. There were two defendants and a third party who resisted liability. But the trial court failed to find who owed that duty and who breached it. Rather, the trial court held that the singular issue that would dispose of the entire case was whether there was a "protective scheme ... to protect the state-of-the-art machines imported from Germany". And in relation to that so-called singular issue, the trial court held (a) that the plaintiff omitted to install "a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage"; (b) that the omission "totally cancelled out and annulled any breach by the second defendant"; (c) that "the plaintiff's contributory negligence was absolute"; (d) that the second defendant was not informed of piling works at the location of the underground cable; (e) that there was no evidence that the project site extended to the location of the underground cable, in the middle of the road; (f) that the loss purportedly suffered by the plaintiff was a direct result of its failure to provide "a credible form of protective system for its production lines from the time they were set up. The plaintiff owed itself the innate duty to ensure that the state-of-the-art and highly sensitive machines and presses were fully protected and insured against electrical breakdown and failure which was highly foreseeable, whatever the cause for them. This negligence and breach had to be ruled in favour of the first and second defendants".

[82] There was no finding by the trial court that it was surge or under-voltage. The finding of the trial court was that the plaintiff omitted to install "a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults **which would include over-voltage and under-voltage**" (boldness added), that the omission "totally cancelled out

and annulled any breach by the second defendant, and that "the plaintiff's contributory negligence was absolute". The trial court absolved both defendants of all liability on account of the contributory negligence of the plaintiff. But with respect to the trial court, if contributory negligence were a complete defence, then a motorcyclist, who was negligent in not wearing a helmet, could not succeed in action for his injuries against a motorist who collided, not even from the rear, into him.

[83] Subsections 12(1) and (2) of the Civil Law Act 1956 (CLA), which are identical to sub-ss. 1(1) and (2) of the English Law (Contributory Negligence) Act 1945, provide:

> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that:
>
> (a) this subsection shall not operate to defeat any defence arising under a contract; and
>
> (b) where any contract or written law providing for the limitation of liability is applicable to the claim the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.
>
> (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

[84] But sub-ss. 12(1) and (2) of the CLA were not cited to the courts below or to this court. All parties and courts below overlooked that contributory negligence is not a complete defence. Where there is contributory negligence, liability is apportioned and "the damages recoverable reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". Contributory negligence, if any, could not absolve the liability, if any, of the defendants. The finding of the trial court that contributory negligence was a complete defence was completely wrong in law. The finding of the trial court that both defendants were not negligent flew in the face of logic and reason. If none of the defendants were negligent, then the cable would not have been accidently ruptured. One, at least, must have been negligent. Dismissal of the entire claim could not be supported.

[85] Where the trial court omitted to do, the Court of Appeal trawled through the evidence, evaluated the opposing views of the 'experts', made the findings set out in [11] of this judgment, held both defendants liable, and ordered damages to be assessed. It was argued that the findings of the trial court, namely (i) there was no duty of care and no breach of any duty of care, (ii) damage was caused by under-voltage, (iii) there was no protection scheme in place, and (iv) the second defendant was not informed of piling works at the location of the underground cable, were based on findings of primary facts which the Court of Appeal could not reverse unless shown to be plainly wrong. Well, the trial court would be plainly wrong if it held that there was no duty of care and or breach of it. But there was no finding by the trial court that there was no duty of care and or breach of it. Rather, the finding of the trial court was that there was contributory negligence on the part of the plaintiff which "totally cancelled out and annulled any breach by the second defendant". But as said, there was also no finding by the trial court that the damage was caused by under-voltage. To be exact, the finding of the trial court was that the plaintiff omitted to install "a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage". The trial court was non-committal on whether it was surge or under-voltage. That was because the trial court had not evaluated the opposing views of the 'experts'. The Court of Appeal was wholly warranted to step in and fill in the void left by the trial court.

[86] On whether it was surge or under-voltage, the Court of Appeal held, after an exhaustive and commendable evaluation of the 'expert' evidence and the reliability of it, that the damage was caused by a surge (see [7-8] of this judgment). We could not disagree with that finding that the damage was caused by a surge. But as said, whether the rupture of the cable caused a surge or under-voltage was a red herring. Either case, it was the rupture of the cable that resulted in whatever that caused the damage. It was Markas, the contractor of the first defendant, who accidentally ruptured the cable. And we agree with the Court of Appeal's "starting point" that Markas should have foreseen the damage and that Markas was negligent.

[87] Markas ruptured the cable. But the Court of Appeal held both defendants liable. Basically, the Court of Appeal held that the first defendant was liable on account of its finding that the first defendant owed a non-delegable duty of care to ensure that the work would not injure third parties, coupled with the 'starting point' that "it must be accepted that on the uncontroverted facts the contractor was negligent in damaging the cable and that they ought reasonably to have foreseen that, if they damage the cable, the supply of electricity to the factories would be interfered with and the occupiers, such as the plaintiff, would suffer loss and damage, including

injury to their property ...". Whether indeed the first defendant had a non-delegable duty of care was not taken up in argument before us. Rather, it was submitted that the PWD had taken all necessary steps to obtain all information on overhead poles and cables and therefore had discharged its non-delegable duty of care. We underline that the finding that the first defendant had a non-delegable duty of care was not challenged. *Albeit* so, it was submitted (see [21] of this judgment) that the second defendant should be wholly faulted, that the failure of the second defendant to reply to the PWD or remove the underground cable should not be held against the first defendant, that the three-fold tests in *Caparo* should be answered in favour of the first defendant, that the resultant damage was too remote, and that economic loss should not be allowed.

[88] On the negligence of the first defendant, the Court of Appeal held that the first defendant ought to have foreseen that there could be cables at the project site, and that the first defendant was negligent when it proceeded with the work pending "ascertainment of the location of the cables". To be fair, the first defendant wrote three letters to the second defendant to remove poles and cables. Work only proceeded some nine or ten months after the PWD first wrote to the second defendant. It was argued that the PWD did everything necessary to obtain information of the cables. The PWD waited some nine or ten months for the second defendant to reply. It would not seem fair to expect the PWD to wait forever for the second defendant to respond. But there was something that the PWD could yet have done. Even without the reply and or cooperation of the second defendant on the cable location, the PWD could have ascertained the presence or absence of cables directly beneath the guardrail column. A simple probe of the ground would accomplish that. But that was not done. That was not prudent. And of course, the rupture *per se* of the cable was negligent. We could not therefore disagree with the finding of the Court of Appeal that the first defendant was at fault.

[89] As for the negligence of the second defendant, the Court of Appeal faulted the second defendant for its inertia when it should respond to the letters of the first defendant. The Court of Appeal held that the second defendant, who had a duty to exercise great care when dealing with electricity and had knowledge of the cable locations, ought to have acted diligently and responded to the first defendant's letters. The Court of Appeal stingingly held that the second defendant's failure to inform the first defendant of the cable was an irresponsible act of omission. Other factors that led the Court of Appeal to its finding of liability against the second defendant were the absence of surface markers, the absence of a protection scheme against a surge, and the fine paid by the second defendant for not having taken adequate safety measures to prevent the incident.

[90] The 'great care when dealing with electricity' and 'higher standard of care' of the Court of Appeal was said at [24] of its judgment:

> Due to the nature of the supply contract and bearing in mind the dangerous nature of electricity, not only must great care be taken when dealing with electricity (see *Jaswant Singh v. Central Electricity Board and Anor* [1967] 1 MLJ 272, at p 276). Further, the Federal Court in *Lembaga Letrik Negara, Malaysia v. Ramakrishnan* recognised that a higher standard of care was expected of those controlling electricity. At p 130 Raja Azlan Shah CJ (as HRH then was) said:
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> > The other category forms part of the general law of negligence based on the *Donoghue v. Stevenson* principle and relates to the duty of exercising a high standard of care falling on those controlling an extremely dangerous entity, such as electricity of a lethal voltage.

[91] On account of [24] of the judgment of the Court of Appeal, the defendants raised questions 1, 2 and 5 which essentially asked whether the 'higher standard of care' as stated by the Court of Appeal is confined to personal injury cases and not to commercial claims. But it should be pointed out that it was not said by the authorities relied by the Court of Appeal that electricity suppliers have "a higher standard of care".

[92] In *Jaswant Singh*, the plaintiff sued the defendants for damages arising out of the death of five buffaloes and one dog belonging to him as a result of their being electrocuted by coming into contact with a telephone wire; the wire, which had snapped on 30 November 1962, was lying on the ground and resting on the overhead electricity lines belonging to the first defendant, and remained so resting till the day of the incident on 3 December 1962. Gill J, as he then was, held that "when electricity is carried overhead by wires or cables great care must be taken, in addition to any precautions required by statute, to see that it is not likely to become a source of danger":

> When electricity is carried overhead by wires or cables great care must be taken, in addition to any precautions come required by statute, to see that it is not likely to become a source of danger. In my opinion, the defendants were negligent in allowing the telephone wire to remain resting on electricity wires for such a long time ... In all the circumstances of the case, both defendants failed to observe the standard of care required of them and were thus in breach of a duty to take care.

[93] In *Lembaga Letrik Negara, Malaysia v. Ramakrishnan*, the respondent, a ten-year old boy who climbed up H-pole, which carried high-voltage electric wires, in an attempt to release a bird trapped on the wire of the pole, was electrocuted as he reached the bracket which supported the cable-box. The claim was based on the negligence of the appellants in erecting and

maintaining the H-pole immediately adjoining an unfenced public footpath in a rice field, which H-pole and wires constituted a dangerous hazard and allurement to the respondent, and for breach of statutory duty under the Electricity Regulations 1951. The defence was a bare denial of negligence and breach of statutory duty. In the course of arguments before the High Court and the Federal Court, the main contention was that the respondent was a trespasser and therefore the relationship of occupier/trespasser fell into consideration. The trial judge decided the case on the basis that it was a straightforward case of negligence, based on the *Donoghue v. Stevenson* principle. The trial judge held the appellant liable for breach of duty of care but failed to consider the issue of contributory negligence which was pleaded in the statement of defence. It was in the context of the duties of occupier versus the general law of negligence that Raja Azlan Shah CJ (Malaya) (as HRH then was) said:

> The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier of a structure with respect to the safety of those who come upon it or within the area of the control exercised or exercisable by the occupier. The other category forms part of the general law of negligence based on the *Donoghue v. Stevenson (supra)* principle and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous entity, such as electricity of a lethal voltage.

[94] Gill J, as he then was, said that when electricity is carried overhead, the standard of care is to ensure that it is not likely to become a source of danger. Raja Azlan Shah CJ (Malaya) (as HRH then was) said that a high standard of care falls upon those controlling an extremely dangerous entity, such as electricity of a lethal voltage. In both cases, it was said that electricity suppliers have "a high standard of care" not "higher standard of care". It was not said that the high standard of care applies only to personal injury cases and not commercial claims. After all, if uncontained and or uncontrolled, electricity could be deadly to life or property. Even a momentary lapse could have catastrophic consequences. Therefore, in proportion to the hazard and danger, electricity suppliers must take all precautions or all care to ensure (the high standard of care) that the electricity would be contained and controlled and would not pose a hazard or danger to life or property.

[95] But it would not appear that all sensible precautions, even the doable, were taken by the second defendant to ensure that Markas would not accidentally disrupt the supply of power. We agree with the Court of Appeal that the second defendant, when asked to remove and relocate power poles and cables in the project site, should have foreseen that the work by Markas could damage its cable and disrupt power in the area. Overhead lines were

relocated. But the cable remained *in situ*. Perhaps the cable could not be relocated on account of the cost. Maybe it was more practical to reposition the guard rail by a few feet to avoid the cable. But for that to happen, the second defendant must come forward and disclose the presence and location of the cable. Only the second defendant knew of the presence of the cable. There were no surface markers to indicate the presence of the cable. Under the circumstances, the second defendant should disclose the presence and location of its cable. But the second defendant failed to do that. That was a serious oversight. In the end, only the layer of bricks stood between guardrail column and cable. But that layer of bricks was not on the surface to alert Markas. There were no surface markers. There was no disclosure of the cable. Markas was nonetheless negligent. But the second defendant was more culpable. Had there been surface markers, it would be hard to fault the second defendant, notwithstanding its failure to disclose the presence of the cable. But in the absence of surface markers, the second defendant must disclose the presence and location of its cable to avoid any accidental rupture. The second defendant should know that there were no surface markers and that it had not disclosed the presence of the cable. The second defendant should have foreseen that the accidental rupture of its cable would result in a power disruption that could cause loss and damage in the neighbourhood. Yet the second defendant was wholly indolent. The second defendant could not shift all blame to the first defendant. Both defendants were culpable. But they were not equally liable. As we see it, the second defendant was more at fault.

[96] There was more than one tortfeasor. Subsection 12(3) of the CLA provides that "s. 10 shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) in respect of the damage suffered by any person". Section 10(1) of the CLA provides:

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
>
> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
>
> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the

damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action;

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[97] "Where a claimant sues two or more defendants who are liable on account of their negligent conduct in respect of the same damage, he will be awarded his entire damages against each defendant. Although the court has power to apportion the damages as between the defendants and frequently does so, in a joint action there can only be one judgment and one assessment of damages for the claimant; and damages against joint tortfeasors cannot be divided, even though the defendants sever their defences and their culpability may vary … Where the claimant has been contributorily negligent, apportionment of liability between the claimant and the defendants must be kept separate from apportionment of contribution between the defendants *inter se*: *Fitzgerald v. Lane* [1989] AC 328" (*Halsbury's Law of England supra* at para 83 and note 5 at p. 95). There should be one judgment and one assessment of damages for the claimant. Where the claimant was contributorily negligent, there should be one apportionment of liability between the claimant and the defendants, and one apportionment of liability between the defendants *inter se*.

[98] The Court of Appeal held that there was no contributory negligence. The Court of Appeal held that protective measures had been installed against under-voltage (see [9] of this judgment). But given that the finding of the Court of Appeal was that damage was caused by a surge, whether there were protective measures against under-voltage were not relevant. What was pertinent was whether the plaintiff had protective measures against a surge, and if none then whether the plaintiff was contributorily negligent. The finding of the trial court was that the plaintiff omitted to install "a comprehensive and credible protection system ... against any foreseeable electricity breakdown or faults which would include over-voltage and under-voltage". The finding of the Court of Appeal was that protective measures had been installed against under-voltage. The finding of the trial court that the plaintiff had no protection system against a surge was not reversed by the Court of Appeal. Hence, both courts below agreed that the plaintiff had no protection system against a surge. But the absence of protection against a

surge was not held against the plaintiff. The Court of Appeal held that the plaintiff could not be expected to protect its property against a surge, and that the second defendant had the responsibility to install surge arresters at the transformers (see [10] of this judgment).

[99] "In order to establish contributory negligence, the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered as a consequence of the defendant's negligence. The question is not who has the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon common sense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts are so mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain sense the claimant contributed to the damage" (*Halsbury's Laws of England,* 5th edn, (2010) vol. 78 at para 76).

[100] It was the rupture of the cable that caused the damage which could have been avoided if there were surge arresters. The Court of Appeal held that the responsibility lay with the second defendant to install surge arresters at the transformers. On the other hand, the trial court held that the plaintiff "owed itself the innate duty to ensure that the state-of-the-art and highly sensitive machines and presses were fully protected and insured against electrical breakdown and failure which was highly foreseeable, whatever the cause for them". We disagree with the trial court that contributory negligence is a complete defence. We however agree that there is an obligation to take reasonable care of the safety of self and property. In *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1977] 1 LNS 45; [1978] 1 MLJ 61, Seah J, as he then was (Lee Hun Hoe CJ (Borneo) and Chang Min Tat FJ in agreement) said:

> Contributory negligence is an expression meaning "negligence materially contributing to the injury" (see Lord Porter in *Caswell v. Powell Duffryn Associated Collieries* [1940] AC 152 186), the word "contributory" being regarded "as expressing something which is a direct cause of the accident" (see judgment of Lord Maugham in *R v. Southern Canada Power Co* [1937] 3 All ER 923 930). However, the word "negligence" is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression "contributory negligence" it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. More recently, Lord Simon in giving the judgment of the Privy Council in *Nance v. British Columbia Electric Ry* [1951] AC 601, 611 said at page 611:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

[101] We are in no position to rule on whether surge arresters at the transformers could have prevented the damage. But we believe that surge arresters at the power lines of the factory could have prevented the damage. The plaintiff had state-of-the-art and highly sensitive machines and presses at the factory. As said by the trial court, power failures or disruptions are "foreseeable". Given that power failures and disruptions were foreseeable and that the machines and presses were worth, so it was alleged, in the millions, would a prudent man in the shoes of the plaintiff not protect his expensive and sensitive machines and presses against power failures and disruptions? Surge arresters would come at a cost. But without surge arresters, the price to pay could be much much greater. Given the stake, would a prudent man in the shoes of the plaintiff not take all reasonable precautions to protect his expensive and sensitive machines and presses? A prudent man would take the precautions. Alternatively, could it be reasonable care for the safety of his property if he failed to take precautions to protect his expensive and sensitive machines and presses? Surely failure to do so could not be reasonable care. The plaintiff could have prevented the damage if it had installed surge arresters. But it does not mean, just because the plaintiff could have prevented the damage from the surge that the plaintiff should be wholly faulted and the defendants should be wholly absolved. The failure to install the surge arresters did not cause the damage. As a matter of fact, the failure to take reasonable care would have been inconsequential had the cable not been ruptured. It was the rupture of the cable that caused the damage. But given that there was failure by the plaintiff to take reasonable precautions to protect its machines and presses, there was contributory negligence on the part of the plaintiff who could not therefore call upon the defendants to compensate it in full.

[102] The Court of Appeal ordered damages to be assessed. Unfortunately, the Court of Appeal failed to see that the damages claimed included both economic loss consequent to damage and pure economic loss independent of physical damage. In the case of damage caused by power disruption or failure, pure economic loss independent of physical damage is not recoverable (*Spartan Steel*). But the purport and effect of the order of the

Court of Appeal – assessment of the entire claim – was that even pure economic loss independent of physical damage, as in the instant case, was recoverable. It would only stand to reason that the Court of Appeal would not have ordered assessment of damages of all and sundry, if the Court of Appeal were not of the view that all were recoverable. But as clearly illustrated in *Spartan Steel and SCM (United Kingdom) Ltd v. WJ Whittall and Son Ltd*, in the case of damage caused by power failure or disruption, only economic loss consequent to physical damage could be recovered. In the instant case, the claimed economic loss consequent to physical damage were (i) replacement cost of two machines (RM1,434,720); (ii) the brake motor (RM17,988); (iii) cost of transformer (RM4,136); (iv) technical advice (RM6,200); (v) labour cost to manually pack the bricks (RM18,000); (vi) cost of two German engineers engaged to repair the machines for 21 days (RM103,757.11); and (vii) cost of mechanics, electricians, technicians and local supervisors (RM22,000).

[103] But it was so plain and obvious, self-evident, that the rest of the claimed losses and damages was pure economic loss independent of physical damage. The alleged loss consequent to failure to supply (RM4,368,363.20), the alleged loss consequent to termination of orders (RM40,710.40 and RM86,521.60), the alleged penalty for failure to supply (RM45,000 and RM60,000), the alleged loss of profits on account of the loss of the machinery (RM5,120,541.36), the alleged loss incurred on account of the loss of production and the profits thereof (RM32,651,550.43 and continuing), the alleged actions by banking institutions to recover loans (RM13,977.715.64), the alleged actions by suppliers to recover payments or debts (RM418,159.21), and the alleged loss of goodwill and market confidence in the plaintiff (RM3,000,000), even if true, were just pure economic loss independent of physical damage. In fact, the alleged actions by banking institutions and suppliers were liabilities incurred by the plaintiff without the slightest of correlation to the power failure or disruption. To put it mildly, the alleged losses were grossly over-stated. In any event, being not economic loss consequent to physical damage, all alleged losses enumerated in this paragraph could not be recovered. Wheat should be separated from the chaff. Since not all could be recovered, the Court of Appeal should not have ordered assessment of the whole claim. It should have ordered the assessment of only the alleged losses set out in para. 102 of this judgment.

[104] There should be one apportionment of liability between defendants and plaintiff, and one apportionment of liability between the defendants *inter se*. "The basis for the apportionments is not an exact science" (*R (on the application of RLT Built Environment Ltd) v. Cornwall Council* [2016] EWHC 2817). In our judgment, the contributory negligence of the plaintiff, though

not insubstantial, was much less than the negligence of the defendants. The defendants should bear the major part of it, namely 2/3 of the liability. As between the defendants *inter se*, we apportion liability at 40% (first defendant) and 60% (second defendant).

[105] Before we make our orders, we would answer the leave questions as follows:

Answer to leave questions 1, 2, 3 and 5

The high standard of care expected of electricity suppliers applies to personal injury cases and claims for damage caused by power failure or disruption. Pure economic loss independent of physical damage is not recoverable in claims for damage caused by power failure or disruption.

Answer to leave question 4

Liability for damage caused by power failure or disruption is the liability for a tort under common law.

[106] For the reasons herein, we unanimously allow these appeals in part upon the following terms; (a) the claims as enumerated in para. 103 of this judgment are dismissed; (b) the order of assessment of the Court of Appeal is set aside; (c), the quantum of the alleged loss and damage enumerated in para. 102 of this judgment to be assessed by the High Court, which assessment to include (i) the loss of goods in production on 5 August 1998 and the profits thereof (ii) the loss of production on 5 August 1998 and the profits thereof, and (iii) the replacement cost of machinery or other equipment physically damaged or the repair cost; (d) the defendants to pay 2/3 of the loss and damage as assessed to the plaintiff, to be contributed by the defendants in the proportion of 40% (first defendant) and 60% (second defendant).