

Khan (Respondent) v Meadows (Appellant)

[2021] UKSC 21

In this highly anticipated judgment, the Supreme Court unanimously dismissed the appeal and held that the Defendant doctor was only liable for losses which fell within the scope of her duty of care, thereby significantly reducing the damages recoverable by the Claimant.

Background

The appeal concerned whether, in the context of a clinical negligence claim, the Court should adopt the approach laid down in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”) regarding the scope of a defendant’s duty of care and, if so, how to apply that approach. The appeal was heard by a panel of seven justices, with Lord Hodge and Lord Sales giving the majority decision and Lords Burrows and Leggatt giving separate decisions. The appeal was handed down together with *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, which considered the application of SAAMCO principles to an accountancy case.

The facts in the case were straightforward. The Claimant, Ms Meadows, wished to avoid having a child with haemophilia and therefore consulted her GP practice to establish whether she was a carrier of the haemophilia gene. Blood tests were arranged. However, blood tests could not establish whether the Claimant was a carrier of haemophilia; for this she needed to be referred for genetic testing. At a consultation with Dr Khan (the Defendant), the test results were said to be normal, thereby leading the Claimant to believe that any child she had would not have haemophilia. The Claimant subsequently gave birth to a son, Adejuwon, who was diagnosed as having haemophilia. Adejuwon was also subsequently diagnosed as having autism. It was not in dispute between the parties that, had the Claimant been properly advised and referred for genetic testing, she would have known she was a carrier of the haemophilia gene and, after undergoing foetal testing for haemophilia during her pregnancy, she would have opted for a termination and Adejuwon would not have been born.

The parties were in agreement that the Defendant was liable for the costs attributable to haemophilia (agreed to amount to £1.4 million). The crux of the dispute was in relation to whether the Defendant was also liable for the costs attributable to autism (agreed to amount to £7.6 million), which was an unrelated condition.

Summary of the basis of the decision

The Court rejected the submissions advanced by the Claimant’s counsel that the scope of duty principle under SAAMCO does not apply to clinical negligence claims, finding that “*there is no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. Nor is there any principled basis for confining the principle to pure economic loss arising in commercial transactions*” [62].

As part of a broader 6-stage framework covering different aspects of the tort of negligence (which will be detailed further below), Lord Hodge and Lord Sales emphasised the need to assess the scope of a defendant's duty of care and, in doing so, to consider the purpose for which the defendant provided their professional services. As part of this assessment, the Court contrasted the scenario in which a defendant provides 'advice' or 'information' on which a client/patient relies when making their own decision as to whether to enter a transaction and the scenario in which the defendant is 'guiding the whole decision-making process'. In the former scenario, the Court emphasised that it was particularly important to analyse whether there is a 'sufficient nexus' between the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care. *"The court must separate out from the loss, which the claimant has suffered through entering the transaction, the element of that loss which is attributable to the defendant's negligent performance of the service which she or he undertook"* [41]. When undertaking this analysis, the Court considered it useful to ask the 'SAAMCO counterfactual' question: *"What would the claimant's loss have been if the information which the defendant in fact gave had been correct?"* [53].

The Court emphasised that this process of analysing damages which are attributable to a defendant's negligence is entirely different from analysing factual causation (i.e. the question of what would have happened 'but for' the defendant's negligence). Thus, while it was correct that, as a matter of factual causation, Ms Meadows would have terminated the pregnancy and that therefore there was a causal link between Dr Khan's mistake and the birth of Adejuwon, *"that is not relevant to the scope of Dr Khan's duty"* [68].

Applying scope of duty principles to Ms Meadows' case, the starting point was therefore to assess the purpose for which Ms Meadows approached the GP practice. On the facts, the purpose for which Ms Meadows sought advice from her GP was to ascertain whether she was a carrier of the haemophilia gene and *"the important point is that the service was concerned with a specific risk, that is the risk of giving birth to a child with haemophilia"* [67]. Furthermore, because the law did not impose on Dr Khan any duty in relation to unrelated risks which might arise in any pregnancy, Dr Khan could only be liable for costs associated with Adejuwon's haemophilia and not the unrelated losses associated with his autism. Applying the 'SAAMCO counterfactual' as an analytical tool or cross-check by asking what the outcome would have been if Dr Khan's advice had been correct and if Ms Meadows had not been a carrier of the haemophilia gene, the answer was that Adejuwon would still have been born with autism.

In their separate decisions, Lord Burrows and Lord Legatt gave largely similar reasons to the majority decision for dismissing the appeal. However, aspects of Lord Burrows' decision are worth highlighting. After emphasising that the 'purpose of the advice or information is of central importance', Lord Burrows went on to adopt similar language to that used by Nicola Davies LJ in the Court of Appeal by analysing the case in terms of risk allocation. Lord Burrows stated that *"it was fair and reasonable that the risk of the child being born with haemophilia should be allocated to the doctor but that the risk of the child being born with autism should be allocated to the mother"* [77(ii)]. Having applied the 'SAAMCO counterfactual', Lord Burrows also went on to make the following point [77(iv)]: *"If one were to allow this appeal by deciding that the autism losses are recoverable, it is hard to see how one could deny that there would also be recovery of those losses even if the child had been born with autism but*

not with haemophilia. That would seem an even more startling result because the very risk that the mother was concerned about would not have eventuated at all.”

Broader ramifications of the judgment

As part of their decision, Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black, and Lord Kitchin agreed) devised a sequence of six questions as a useful model for analysing the scope of duty principle generally in the tort of negligence. The questions are as follows:

- (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question);*
- (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question);*
- (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question);*
- (4) Is the loss for which the claimant seeks damages the consequence of the defendant’s act or omission? (the factual question);*
- (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant’s duty of care as analysed at stage 2 above? (the duty nexus question);*
- (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).*

Lord Burrows did not deem this six-stage model to be “*necessary or helpful in this case*” and he described it as “*in some respects, a rather novel approach to the tort of negligence*”. Lord Burrows instead preferred “*a relatively conventional approach which sees the tort of negligence as involving seven main questions*” [79]:

- (1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question);*
- (2) Was there a breach of the duty of care? (the breach, or standard of care, question);*
- (3) Was the damage or loss factually caused by the breach? (the factual causation question);*
- (4) Was the damage or loss too remote from the breach of duty? (the remoteness question);*
- (5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question);*
- (6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)*

(7) Are there any defences? (the defences question);

Notwithstanding these differing analyses, the judgment crystallises the importance of scope of duty in clinical negligence claims and is likely to be particularly pertinent for clinical negligence practitioners to consider when dealing with cases in which a defendant has provided information to a patient such as ‘consent’ cases. It also serves as an important reminder to practitioners that ‘but for’ causation may not itself be sufficient for the imposition of liability.

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