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FOIL UPDATE 21 June 2021



The scope of the duty of care in clinical negligence

Khan v Meadows (2021) UKSC 21

This appeal concerned whether, in the context of a claim for clinical negligence, the court should follow the approach to ascertaining the scope of a defendant's duty of care laid down in *South Australia Asset Management Corp v York Montague Ltd [1997] AC 191 (SAAMCO)* and, if it should, how that approach was to be applied. It was one of two appeals heard by the same panel of seven justices examining the application of *SAAMCO* in different fields. A separate FOIL Update summarises the *judgment Manchester Building Society v Grant Thornton UK LLP*.

In 2006, the claimant/appellant, consulted her GP practice to establish whether she was a carrier of the haemophilia gene. Following blood tests, she was negligently led to believe by the defendant/respondent, that she was not a carrier. In fact, the tests only confirmed that she did not herself have haemophilia. In 2010, the claimant became pregnant with her son. Shortly after his birth the son was diagnosed as having haemophilia. Subsequent genetic testing confirmed the claimant was a carrier of the gene. Had she known that she was a carrier, she would have undergone foetal testing for haemophilia when she was pregnant. This would have revealed the foetus was affected. The claimant would then have chosen to terminate her pregnancy, and her son would not have been born.

IN BRIEF

The Supreme Court unanimously dismissed the claimant's appeal. It held that there was no principled basis for excluding clinical negligence from the ambit of the scope of duty principle.

It analysed in detail a six-part test to be applied.

It was not in dispute that the defendant was liable in negligence for the costs of bringing up the son attributable to his haemophilia. The dispute between the parties arose from the fact that the son was also born and subsequently diagnosed with autism, a condition which was unrelated to his haemophilia. The question was whether the defendant was liable for all costs related to the son's disabilities arising from the pregnancy or only those associated with his haemophilia.

The High Court held that the defendant was liable for costs associated with both the haemophilia and autism. The Court of Appeal allowed the defendant's appeal, finding her liable for costs associated with the haemophilia only. In so doing, it considered the scope of duty principle as illustrated in *SAAMCO* as determinative of the issue.

The Supreme Court unanimously dismissed the claimant's appeal. It held that there was no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. The defendant was liable only for losses falling within the scope of her duty of care to advise the claimant on whether or not she was a carrier of the haemophilia gene. She was not liable for costs associated with her son's autism.

The court considered that a helpful model to analyse the place of the scope of duty principle within the scheme of the tort of negligence was to answer the following six questions in sequence:

- (1) Was the harm (loss, injury and damage) which was the subject matter of the claim actionable in negligence? (The actionability question);
- (2) What were the risks of harm to the claimant against which the law imposed 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) Was the loss for which the claimant sought damages the consequence of the defendant's act or omission? (The factual causation question);
- (5) Was there a sufficient nexus between a particular element of the harm for which the claimant sought damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (The duty nexus question); and
- (6) Was a particular element of the harm for which the claimant sought damages irrecoverable because it was too remote, or because there was a different effective cause or because the claimant had mitigated his or her loss or had failed to avoid loss which he or she could reasonably have been expected to avoid? (The legal responsibility question).

The second stage in the above scheme related to the scope of duty principle. The scope of duty principle was that a defendant was liable only for losses which fell within the scope of his or her duty of care to the claimant. The principle predated *SAAMCO* but was developed in that case by its application not to kinds or categories of damage but to the quantification of damage. Regarding the distinction drawn between "advice" and "information" in *SAAMCO*, there was in reality a spectrum. In addressing the scope of duty question, the court sought to identify the purpose for which advice or information was given. It asked: "what was the risk which the advice or information was intended and was reasonably understood to address?".

In some cases, the answer to the scope of duty question also answered the duty nexus question (stage five). However, in cases where the scope of duty question was concerned with the quantification or extent of a particular kind of loss, the duty nexus question should be addressed separately after the court had determined that there was a breach of duty and factual causation. The mechanism by which the duty nexus question had been addressed in the *SAAMCO* line of cases

(i.e., valuers' negligence cases) was the *SAAMCO* counterfactual. It asked: "what would the claimant's loss have been if the information which the defendant in fact gave had been correct?". The *SAAMCO* counterfactual was best understood as an analytical tool which was useful in some but not all circumstances to ascertain the extent of a defendant's liability flowing from the breach of a duty of a defined scope.

The court rejected the submission by counsel for the claimant that the scope of duty principle did not apply to claims arising out of clinical negligence. There was no sound basis for excluding clinical negligence from the ambit of the principle nor for confining the principle to cases involving pure economic loss arising in commercial transactions.

Applying the six-step model to the facts of the case, first, the economic costs of caring for a disabled child were clearly actionable. Second, the defendant's advice was concerned with a specific risk, the risk of a child having haemophilia for which the defendant owed a duty of care to the claimant. Third, the defendant was in breach of her duty. Fourth, as a matter of factual causation, there was a causal link between the defendant's mistake and the birth of the claimant's son. Fifth, the answer to the scope of duty question gave a straightforward answer to the duty nexus question: the law did not impose on the defendant any duty in relation to unrelated risks (such as autism) which might arise in any pregnancy. In any case, applying the *SAAMCO* counterfactual, if the defendant's advice had been correct and all else remained the same, the claimant's son would have been born with autism. Sixth, there being no questions of remoteness, other effective cause or mitigation of loss, the law imposes on the defendant responsibility for the foreseeable consequences of the birth of a boy with haemophilia, and in particular the increased cost of caring for a child with haemophilia.

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