

Khan (Respondent) v Meadows (Appellant) [2021] UKSC Civ 152.

Introduction

If a child would not have been born but for a doctor's negligent failure to advise of the risk of being born with a hereditary disability, and having been born not only has that hereditary disability but also a further congenital disability, can the mother of the child recover damages for the cost of both disabilities or only the costs associated with the hereditary disability in relation to which the doctor was asked to advise? That was the question the Supreme Court were tasked with answering in the case of Khan (Respondent) v Meadows (Appellant) [2021] UKSC Civ 152.

On 18 June 2021 the Supreme Court handed down the eagerly anticipated judgment. The appeal was unanimously dismissed. 7BR's Simeon Maskrey QC successfully represented the Respondent as lead counsel.

The appeal concerned whether, in the context of a claim in clinical negligence, the Court should follow the approach to ascertaining the scope of a defendant's duty of care laid down in the case of *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ('SAAMCO') and, if so, how that approach is to be applied. The case turned primarily on the principle that where a defendant provides a service by way of advice or information they will only be liable in damages for losses of a kind which fall within the scope of duty of care.

It should be noted that *Khan v Meadows* is one of two appeals heard by the same panel of seven justices examining the application of SAAMCO in different areas. It was handed down and should be read with the Court's judgment in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20. *Manchester Building Society* considers the application of the SAAMCO principles in a more typical financial setting, where the defending accounting firm negligently advised the claimant building society as to a method of accounting which led them to form contracts which on discovering the negligence had to be ended at significant cost. In that case all losses were within the scope of duty, albeit there was a significant finding of contributory negligence.

Facts

The facts of *Khan v Meadows* relate to a woman, Ms Meadows the Appellant, who consulted with her GP before becoming pregnant to establish whether she was a carrier of the hereditary haemophilia gene. She was negligently led to believe by the Respondent that she was not a carrier of the gene, when the tests undertaken to ascertain this were limited to determining whether she herself had haemophilia and were not

determinative of the issue of whether she was a carrier of the gene (an admitted fact). The Appellant went on, a number of years later, to give birth to a child born with haemophilia. In addition, he was also diagnosed with autism, which amongst stand-alone difficulties, made the management of his haemophilia much more difficult. If the Appellant had known that she was a carrier of the haemophilia gene she would have undergone foetal testing for haemophilia during pregnancy and would have terminated the pregnancy on discovering the child had haemophilia.

Trial Judge and Court of Appeal

At first instance ([2017] EWHC 2990 (QB)) Yip J found in favour of the Appellant, awarding damages for both the costs associated with haemophilia and autism, observing that as a matter of 'but for' causation the child would not have been born but for the Respondent's negligence. Yip J concluded it would not be fair, just and reasonable to distinguish between the mother who wanted to terminate *this* pregnancy and the mother who would have wanted to terminate *any* pregnancy. Yip J therefore sought to apply the approach of the Court of Appeal in *Parkinson* ([2001] EWCA Civ 530) and *Groom* ([2001] EWCA Civ 1522), both sterilisation cases.

On appeal by the GP, the Court of Appeal reversed that judgement ([2019] EWCA Civ 152), finding that only the costs associated with the child's haemophilia were recoverable. The case was distinguishable from *Parkinson* and *Groom*. The scope of duty test in *SAAMCO* was determinative and costs associated with the child's autism fell outside of the scope of duty. There was no need to consider separately whether the decision was fair, just and reasonable this not being a novel case but merely a case requiring the application of established principles.

The mother appealed to the Supreme Court.

The Supreme Court

The appeal was heard by seven justices on 5 November 2020: Lord Reed (President), Lord Hodge (Deputy President), Lady Black, Lord Kitchin, Lord Sales, Lord Leggatt, Lord Burrows.

The sole issue was agreed: Was the GP liable in negligence for the costs of bringing up the disabled child who has *both* conditions or *only* those costs which were associated with the hereditary disease on which specific advice was sought? The quantitative difference between the positions was £7.6 million.

The Appellant's position was in effect as Yip J had analysed the case in the High Court. The Appellant submitted that the SAAMCO approach was not applicable to clinical negligence claims, being an approach

adopted more commonly in commercial transactions of pure economic loss and not suited to this arena where there was an imbalance of knowledge and power between patients and medical practitioners. Further, the Appellant submitted that it was arbitrary and unfair to draw distinction between a parent who did not want *any* pregnancy and a parent who did not want a *particular* pregnancy. The birth would not have happened but for the negligence and the possibility of the child being born with autism was foreseeable (a matter agreed); the whole loss therefore flowed. Even if, contrary to this primary position, SAAMCO was applicable to this case it ought not restrict the Appellant's claim.

Simeon Maskrey QC for the Respondent in summary submitted that the scope of duty principle as highlighted in the case of SAAMCO did apply, and once analysed in a series of questions one may ask when considering whether a claimant is entitled to recover damages for loss caused by negligence, in this case the costs associated with autism fell outside of that scope of duty.

The majority judgment recognises that there is no one correct way to scrutinise the tort of negligence, but considered that the scope of duty principle is best analysed and applied by the following six questions [28]:

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 causation 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)*

The Court recognised that it is possible to consider these questions in varying orders and/or address more than one of these questions at the same time. In particular, the second and fifth question can readily be

analysed together. However, setting out the analysis required in this way served to demonstrate that the question of factual causation and foreseeability alone cannot circumvent the question which must be asked in relation to the scope of a defendant's duty [30]. It further assists in the determination of the extent of a claimant's entitlement to damages in accordance with the principle that the law in awarding damage seeks, so far as money can, to put the claimant in the position in which he or she would have been absent the negligence [58].

In summary, the scope of duty principle is that a defendant is not liable for losses which fall outside of the scope of his or her duty of care to a claimant [36]. This is even the case if other losses are caused on a 'but for' basis and are foreseeable.

A further analytical tool the Court considered useful in some case but not all is what is called the SAAMCO counterfactual: what would the claimant's loss have been if the information or advice which the defendant gave had been correct [53-54]. This tool is a useful cross-check once the above questions have been answered.

The Court concluded that there was no basis for excluding clinical negligence from the ambit of the scope of duty principle; nor was there any basis of confining the principle to cases of pure economic loss arising in commercial transactions [62]. It is a principle generally applicable to the law of damages. Factual causation and foreseeability were not determinative of the question of scope of duty [64 – 65]. The question of whether it was fair, just and reasonable to impose liability ought not to have arisen; this was not a case which required novel application but merely a question of applying established principles [66].

Applying the six-stage approach in this case:

1. The economic costs of caring for a disabled child are of a nature that is clearly actionable [67]
2. The scope of duty question was answered by addressing the purpose for which the Appellant obtained the services of the Respondent. She approached them for the specific purpose of seeking to know whether she was the carrier of the haemophilia gene. The Respondent owed a duty to take reasonable care to give accurate information or advice when advising her whether or not she was a carrier of that gene. It was a service concerned with a specific risk of having a child with haemophilia [67]
3. The Respondent was in breach of her duty of care, as accepted [68]
4. As a matter of factual causation, the Appellant lost the opportunity to terminate the pregnancy in which the child had both haemophilia and autism [68]

5. The scope of duty question (2) points to a straightforward answer to the duty nexus question (5): the law did not impose any duty in relation to unrelated risks which might arise in any pregnancy [68]. It followed that the Respondent was liable only for the costs associated with the child's haemophilia [68]. As a cross-check the counterfactual tool was applied: what would the outcome have been if the Respondent's advice had been correct, and the Appellant had not been a carrier of the gene? The undisputed answer was that the child would have been born with autism in any event [68]
6. There was no question of remoteness, other cause or mitigation of loss, and therefore the Respondent was responsible for the foreseeable consequence of the birth of a child with haemophilia and the costs of that care that related to haemophilia [68]

The appeal was dismissed.

In concurring judgments, Lord Burrows emphasises the central importance of the purpose of the advice or information, and asks whether it is fair and reasonable that the risk of a child being born with haemophilia should be allocated to the Respondent. He did not find the six-stage model, which he saw as novel, helpful or necessary in this case. Lord Leggatt also concurred with the majority but puts greater emphasis on causal connection between Respondent's advice and Appellant's loss.

Conclusion

Khan v Meadows is obviously crucial in relation to so called 'wrongful birth' cases, but the principles discussed and the detailed consideration of the justness of the scope of duty principle and how that principle fits into the conventional analyses of negligence has a far broader application.

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Supreme Court Judgment Summary Video

<https://www.supremecourt.uk/watch/uksc-2019-0040/judgment.html>

Judgment of Khan v Meadows

<https://www.supremecourt.uk/press-summary/uksc-2019-0011.html>

Judgment of Manchester Building Society v Grant Thornton UK LLP

<https://www.supremecourt.uk/press-summary/uksc-2019-0040.html>