

# Insight 202

from Horwich Farrelly's Large & Complex Injury Group



# WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on the Supreme Court's decisions in two appeals heard by the same panel of seven justices examining the application of SAAMCO in different fields:

- Clinical negligence
- Professional advice given by accountants

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## Different but the same?

The two appeals concern whether in the context of claims for clinical negligence and professional advice given by accountants, 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 is to be applied.

The two separate judgments were handed down together on 18 June 2021, with a suggestion that they should be read together.

**The SAAMCO principle** is a general principle of the law of damages in professional negligence cases, especially against valuers and conveyancers. The SAAMCO case concerned a negligent overvaluation of a property. The damages were limited to the difference between the negligent valuation and the true valuation at the time; the claimant lender was not entitled to recover more than the amount it would have lost had the valuation not been negligent.

## **Khan v Meadows (Rev1) [2021] UKSC 21**

### **Background**

In 2006, the appellant, Ms Meadows, 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 Dr Khan, the respondent, that she was not a carrier. In fact, the tests only confirmed that she did not herself have haemophilia. In 2010, Ms Meadows became pregnant with her son, Adejuwon.

Shortly after his birth Adejuwon was diagnosed as having haemophilia. Subsequent genetic testing confirmed Ms Meadows was a carrier of the gene. Had Ms Meadows known that she was a carrier, when she was pregnant she would have undergone foetal testing for haemophilia. This would have revealed the foetus was affected. Ms Meadows would then have chosen to terminate her pregnancy, and her son would not have been born.

### **Issues**

It was not in dispute that Dr Khan is liable in negligence for the costs of bringing up Adejuwon attributable to his haemophilia. The dispute between the parties arose from the fact that Adejuwon was also born and subsequently diagnosed with autism, a condition unrelated to his haemophilia.

The question was whether Dr Khan is liable for all costs related to Adejuwon's disabilities arising from the pregnancy or only those associated with his haemophilia.

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

### **Judgment**

Lord Hodge and Lord Sales gave the lead judgment with whom Lord Reed, Lady Black and Lord Kitchin agreed. Lord Burrows and Lord Leggatt each gave a concurring judgment.

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



## Detailed review of judgment

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 is to answer the following six questions in sequence:

- (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 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 scope of duty principle

A defendant is liable only for losses which fall within the scope of his or her duty of care to the claimant. The principle predates 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 is in reality a spectrum. In addressing the scope of duty question, the Court seeks to identify the purpose for which advice or information was given. It asks: "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 answers the duty nexus question but in cases where the scope of duty question is concerned with the quantification or extent of a particular kind of loss, the duty nexus question should be addressed separately - after the court has determined that there is a breach of duty and factual causation.

The mechanism by which the duty nexus question has been addressed in the SAAMCO line of cases is the SAAMCO counterfactual. It asks: "what would the claimant's loss have been if the information which the defendant in fact gave had been correct?". The SAAMCO counterfactual is best understood as an analytical tool which is useful in some but not all circumstances to ascertain the extent of liability flowing from the breach of a duty of a defined scope.



The Court rejected the submission by counsel for Ms Meadows that the scope of duty principle does not apply to claims arising out of clinical negligence.

***“...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.”***

Applying the six-step model to the facts of the case:

**Actionability:** The economic costs of caring for a disabled child are clearly actionable.

**Scope of duty:** Dr Khan’s advice was concerned with a specific risk, the risk of a child having haemophilia for which Dr Khan owed a duty of care to Ms Meadows.

**Breach:** Dr Khan was in breach of her duty.

**Factual causation:** there was a causal link between Dr Khan’s mistake and the birth of Adejuwon.

**Duty nexus:** The law did not impose on Dr Khan any duty in relation to unrelated risks (such as autism) which might arise in any pregnancy. In any case, applying the SAAMCO counterfactual, if Dr Khan’s advice had been correct and all else remained the same, Adejuwon would have been born with autism.

**Legal responsibility:** There being no questions of remoteness, other effective cause or mitigation of loss, the law imposes on Dr Khan 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.

Lord Burrows and Lord Leggatt agreed that the appeal should be dismissed but each explained in their own words how they understand SAAMCO and its application to the facts of this case.

Lord Burrows emphasises that the purpose of the advice or information is of central importance. In light of the purpose for which Ms Meadows approached the GP practice (to ascertain whether she was a carrier of the haemophilia gene) it was fair and reasonable that the risk of a child being born with haemophilia should be allocated to Dr Khan.

Applying the SAAMCO counterfactual as a cross-check, it supports the conclusion that the losses relating to Adejuwon’s autism were outside the scope of Dr Khan’s duty of care. He did not consider the six-step model advocated by Lord Hodge and Lord Sales to be helpful or necessary in this case and set out his own approach involving seven questions which he viewed as a more conventional structure of the tort of negligence.

Lord Leggatt agreed that it is always necessary to determine whether, or to what extent, the claimant’s “basic loss” (i.e. the factually caused loss) is within the scope of the defendant’s duty of care. While Lord Hodge and Lord Sales called this the “duty nexus” question, Lord Leggatt referred to this as a “causal connection”, the rationale underpinning the requirement to show a causal connection between the subject matter of the defendant’s advice and the claimant’s loss is that it is not fair and reasonable to impose on a professional adviser liability for

adverse consequences which a person relying on the advice would have suffered even if the advice was sound. No good reason has been given for treating doctors differently in this respect. He did not believe it necessary to apply the SAAMCO counterfactual in this case but had no difficulty in doing so. If the advice had been correct, Adejuwon would still have been born with autism.



# Manchester Building Society v Grant Thornton UK LLP [2021]

Although not a personal injury case, we are reviewing this case for completeness.

## Background

The appellant, Manchester Building Society (the "society") is a small mutual building society. Until 2012, the society's accounts were audited by the respondent, Grant Thornton UK LLP ("Grant Thornton"), a firm of accountants.

In 2006 and annually thereafter, Grant Thornton incorrectly and negligently advised the society that its accounts could be prepared according to a method known as "hedge accounting" and that accounts prepared using that method gave a true and fair view of the society's financial position.

In reliance on that advice, the society carried on a strategy of entering into long-term interest rate swaps as a hedge against the cost of borrowing money to fund its lifetime mortgages business. The misstated accounts served to hide volatility in the society's capital position and what became a severe mismatch between the negative value of the swaps and the value of the mortgages which the swaps were supposed to hedge.

In 2013, Grant Thornton realised its error, and the society had to restate its accounts, showing substantially reduced assets and insufficient regulatory capital.

To remedy the situation, the society closed out the interest rate swap contracts early at a cost of over £32m.

## Issue


The issue on this appeal was whether the society can recover the cost of closing out the swaps from Grant Thornton.

The trial judge and the Court of Appeal held it cannot, in each case based on their understanding of the scope of duty principle illustrated in SAAMCO.

## Judgment

As with *Khan v Meadows*, Lord Hodge and Lord Sales gave the lead judgment with whom Lord Reed, Lady Black and Lord Kitchin agreed. Lord Burrows and Lord Leggatt each give a concurring judgment.





The Supreme Court unanimously allowed the appeal, holding that the society suffered a loss falling within the scope of the duty of care assumed by Grant Thornton, having regard to the purpose for which it gave its advice on the use of hedge accounting. Grant Thornton was liable for the loss suffered by the society in breaking the swaps early, subject to a reduction in damages of 50% for contributory negligence.

### **Detailed review of judgment**

The scope of duty principle is that a defendant is liable only for losses which fall within the scope of his or her duty of care to the claimant. The place of the scope of duty principle within a general conceptual framework of the law of the tort of negligence as explained in *Khan v Meadows* was then analysed.

The scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given. One looks to see what risk the duty was supposed to guard against and then whether the loss suffered represented the fruition of that risk.

The distinction drawn between "advice" and "information" in SAAMCO should not be treated as a rigid rule and the focus should rather be on identifying the purpose to be served by the duty of care assumed by the defendant.

The SAAMCO counterfactual, which asks whether in an "information" case the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct, is simply a tool to cross-

check the result given pursuant to an analysis of the purpose of the duty. It is subordinate to that analysis and should not supplant or subsume it.

In this appeal, the purpose of Grant Thornton's advice was to establish whether the society could use hedge accounting within the constraints of the applicable regulatory environment to implement its proposed lifetime mortgages business model. Grant Thornton negligently advised that it could.

As a result, the society entered into swap transactions pursuant to the business model and was exposed to the risk of loss in breaking the swaps when it was realised that hedge accounting could not in fact be used, exposing the society to regulatory capital demands which the use of hedge accounting was supposed to avoid. That was a risk that Grant Thornton's advice was supposed to allow the society to assess, and which its negligence caused the society to fail to understand.

The loss suffered by the society therefore fell within the scope of the duty of care assumed by Grant Thornton, in light of the purpose of its advice. The trial judge was entitled to conclude both that Grant Thornton's negligent advice was an effective cause of the loss and that the society's mismatching of mortgages and swaps in an overly ambitious application of the business model amounted to contributory negligence. Therefore, it followed that Grant Thornton is liable for the loss suffered by the society in breaking the swaps once the true accounting position was appreciated, reduced by 50% on account of the society's contributory negligence.

Lord Leggatt framed the scope of duty principle in the language of causation. The question to be determined is whether there is a sufficient causal relationship between what made the information or advice wrong and the "basic loss" (i.e. the factually caused loss). Where the SAAMCO counterfactual is used, care should be taken to ensure that the assumptions adopted are suitable to reflect the allocation of risk between the parties to which the test is designed to give effect.

There are also cases where the counterfactual cannot readily be applied. In this case, there was a causal connection between Grant Thornton's negligent advice and the society's basic loss. The loss was caused by the lack of an effective hedging relationship between the swaps and the lifetime mortgages which they were supposed to hedge, which Grant Thornton failed to appreciate and report to the society, making its advice wrong.

Properly applying the SAAMCO counterfactual, if Grant Thornton's advice had been correct and there had been effective hedging, as Grant Thornton advised there was, the loss would not have occurred.

Lord Burrows' reasoning in his concurring judgment is closely aligned with that of Lord Hodge and Lord Sales including in respect of avoiding a causation explanation of the scope of duty principle, the flexible role of the SAAMCO counterfactual and the

importance of the purpose of the duty in determining the scope of the duty of care. However, he placed greater emphasis on the scope of duty principle as underpinned by the policy of achieving a fair and reasonable allocation of the risk of the loss between the parties.

Like Lord Leggatt, Lord Burrows viewed Grant Thornton's (incorrect) advice that there was effective hedging as critical to the conclusion that the factually caused loss fell within the scope of duty owed and the proper application of the SAAMCO counterfactual.

Lord Burrows did not consider the conceptual framework of the law of the tort of negligence proposed by Lord Hodge and Lord Sales to be necessary or helpful in this case. He advocated what he considered to be a more conventional approach to the tort of negligence which begins with the duty of care, treating the scope of duty principle as being concerned with whether the factually caused loss is within the scope of the duty of care (avoiding Lord Hodge and Lord Sales' "duty nexus" terminology) and saw contributory negligence as one of several possible defences.

These cases emphasise the requirement to consider the SAAMCO principle by asking the scope of duty question (number 2) together with the duty nexus question (number 5).

These are questions that have not previously formed part of the usual analysis of clinical negligence claims but are commonplace in cases involving allegations of negligence on the part of valuers and surveyors.

The answers to these questions will be obvious in most clinical negligence cases and easily satisfied. However, in some, particularly where the purpose of the advice or intervention is to try to avoid a risk that is different in nature to the injury subsequently suffered, such an approach will be key to a proper analysis of liability.

