

Meadows v Khan in the Supreme Court: Scope of Duty in Clinical Negligence Claims

Posted On: 24/06/2021

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In *Meadows v Khan* [2021] UKSC 21, the Supreme Court unanimously dismissed Ms Meadows' appeal, finding that there was no principled basis for excluding a clinical negligence claim from the ambit of the 'scope of duty principle' in the tort of negligence. The judgment can be read [here](#). This short blog looks at the majority's reasoning.

Background

In 2006, Ms Meadows consulted her GP practice to establish whether she was a carrier of the haemophilia gene. She did not wish to have a child with haemophilia. Following incorrect tests ordered by Dr Athukorala, she was negligently and incorrectly led to believe by Dr Khan that she was not a carrier.

Ms Meadows became pregnant with her son in 2010. She did not undergo foetal testing for haemophilia during pregnancy, believing that she was not a carrier of the gene. After his birth, Ms Meadows' son was diagnosed with haemophilia. Unrelated to his severe haemophilia, he was also diagnosed with autism in December 2015. His autism has made the management and treatment of haemophilia more complicated.

It was not disputed that had Dr Khan referred Ms Meadows for genetic testing in 2006, she would have known that she was a carrier of the haemophilia gene before she became pregnant. In those circumstances, she would have undergone foetal testing for haemophilia when she became pregnant in 2010. The testing would have revealed that her son was affected by haemophilia. If so informed, Ms Meadows would have chosen to terminate the pregnancy.

Dr Khan admitted liability for the costs attributable to the haemophilia (which were agreed at £1.4m) but denied that she was liable for the costs associated with the autism. She argued that the autism was outside of the scope of her duty of care.

The Issues

The parties' submissions before the Supreme Court raised two central questions: (i) the role which factual 'but for' causation, foreseeability, and remoteness of damage perform in the analysis of a claim of clinical negligence; and (ii) how the question of the scope of a Defendant's duty fits into this analysis, and whether the approach laid down in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 ("SAAMCO") has any relevance in such claims.

The Decision

Agreeing that the SAAMCO approach was the correct one, the majority outlined six questions which should be asked when analysing the place of the scope of the duty principle in the tort of negligence at [28]:

"In our view, and as explained in more detail below, a helpful model for analysing the place of the scope of duty principle in the tort of negligence, and the role of the other ingredients upon which Mr Havers has relied in this context, consists of asking six questions in sequence. It is not an exclusive or comprehensive analysis, but it may bring some clarity to the role of the scope of duty principle which SAAMCO highlighted. Those questions are:

(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)

Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to place the claimant in the position he or she would have been in absent the defendant's negligence."

The focus of the majority's analysis was on the second question relating to the scope of the Defendant's duty.

After considering a long line of authorities pre-dating the SAAMCO decision, the majority expressed the view that the 'scope of duty principle' is broader than the situation considered in SAAMCO and extends to circumstances in which it is not necessary to consider separately the duty nexus question by reference to the so-called SAAMCO counterfactual. It is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation. It asks: "what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?" In answering this question in the context of the provision of advice or information, the court seeks to identify the purpose for which that advice or information was given.

In SAAMCO, Lord Hoffmann said that it was wrong to analyse the scope of duty question as one of measure of damages by asking how to put the Claimant in the position he would have been if he had not been injured: that is the wrong place to begin. In circumstances where the scope of duty question arises in relation to the quantification of damages, having identified the risks against which the defendant has undertaken to protect the Claimant, the duty nexus question addresses how the scope of the Defendant's duty determines the extent of the Defendant's liability.

Turning to the duty nexus question, Lord Hoffman in SAAMCO distinguished "*between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is consequence of that course of action having been taken.*"

When considering the SAAMCO counterfactual in the context of the duty nexus question, the question is not whether the Claimant would have behaved differently if the advice provided by the Defendant had been correct. Rather, the counterfactual assumes that the Claimant would have behaved as he did in fact behave and asks, whether, if the advice had been correct, the Claimant's actions would have resulted in the same loss: see [53].

Applying the above six-stage approach to the facts of Ms Meadows' claim, the majority decided as follows:

(1) The economic costs of caring for a child are of a nature that is clearly actionable.

(2) Dr Khan owed Ms Meadows a duty to take reasonable care to give accurate information or advice when advising her whether or not she was a carrier of the haemophilia gene. The service was concerned with a specific risk, that is the risk of giving birth to a child with haemophilia.

(3) Dr Khan was in breach of her duty of reasonable care.

(4) As a matter of factual causation, Ms Meadows lost the opportunity to terminate the pregnancy in which the child had both haemophilia and autism. There was thus a causal link between Dr Khan's mistake and the birth of Ms Meadows' son, but that is not relevant to the scope of Dr Khan's duty.

(5) The law did not impose any duty on Dr Khan in relation to unrelated risks which might arise in any pregnancy. Dr Khan is liable only for the costs associated with the care of Ms Meadows' son insofar as they are caused by his haemophilia.

(6) Given the purpose for which the service was undertaken by Dr Khan, and there being no question of remoteness of loss, other effective cause or mitigation of loss, the law imposes upon her 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.

Conclusion

There is no good reason to depart from the ordinary 'scope of duty principle' in clinical negligence cases. In a case where (some of) the losses claimed arguably fall outside the scope of the Defendant's duty of care, it is important to distinguish between what as a matter of fact are the consequences of the Defendant's act or omission and what are the legally relevant consequences of the Defendant's breach of duty.

The decision in *Khan* does not mean that all wrongful birth cases arising from negligent advice/information are unlikely to succeed. Each case must be judged on its own facts. If Ms Meadows had consulted Dr Khan to seek advice in relation to a genetic condition (which cannot be conclusively tested for *in utero*) with a view to determining if she was going to have any children at all, the answers to the scope of duty question and the duty nexus question could well have been different.

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