SUPREME COURT UPDATE

KHAN V MEADOWS [2021] UK SC 21

A Case Note from the 2TG Clinical Negligence Team **Summer 2021**

1. On 18 June 2021, the Supreme Court handed down judgment in *Khan v Meadows* [2021] UKSC 21. This case confirms that the scope of duty analysis in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (**"SAAMCO"**) applies to claims of clinical negligence and gives guidance on how this analysis is best to be understood.

Background

2. The claim in *Khan v Meadows* arose out of admittedly negligent advice given by a General Practitioner in relation to testing for a hereditary disease.

3. In 2006, the Claimant, Ms Meadows, attended her GP surgery requesting testing to establish whether she was a carrier of haemophilia. Blood tests were taken which were correctly reported as normal, but these were capable only of identifying whether she herself had haemophilia, not whether she carried the faulty gene. As a result of these tests and the information she had been given about them, she was led to believe that any children she might have would not suffer from haemophilia.

4. In 2010, the Claimant became pregnant with her son Adejuwon. Shortly after Adejuwon's birth he was diagnosed as a haemophiliac and the Claimant was identified as a carrier of the relevant gene. In 2015, Adejuwon was diagnosed with severe autism. This makes management of his haemophilia considerably more difficult and will likely prevent him from ever living independently or gaining employment.

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1 [2017] EWHC 2318 (QB).

5. The issues submitted to the Court were narrow, the parties having agreed a number of facts. It was common ground that:
    1) If the Claimant had been told that she carried the haemophilia gene in 2006, she would have undergone foetal testing when she became pregnant in 2010. Upon discovering that he was a haemophiliac, the Claimant would have terminated her pregnancy and Adejuwon would not have been born.
    2) It was reasonably foreseeable that the Claimant's pregnancy, like all pregnancies, carried the risk that the child would be born with autism. This risk was entirely unrelated to Adejuwon's haemophilia – the latter condition did not cause his autism or increase the risk that he would suffer from it.

6. It was also accepted that the Defendant was liable for the additional costs, over and above those which would be incurred in raising a healthy child, that arose from the fact of Adejuwon's haemophilia. These costs had been agreed at £1.4 million. Therefore, the only question remaining for the Court to decide was whether the Defendant was also liable for the additional costs that were attributable to Adejuwon's autism. These costs were agreed, subject to liability, at £9 million.

7. At first instance[2], Yip J found in favour of the Claimant and held the Defendant liable for the full costs associated with both Adejuwon's haemophilia and his autism. In doing so, she favoured the Claimant's argument that once a birth has been deemed 'wrongful' (in that, in the absence of negligence, it would not have occurred) a defendant is liable for all those consequences which, as a matter of 'but-for' causation, would have been avoided had the duty of care been satisfied. In the instant case, but for the Defendant's negligence, the Claimant would have terminated her pregnancy and Adejuwon would not have been born, with autism or otherwise.

8. As well as considering the case through the lens of causation, Yip J also addressed her mind to the question of scope of duty. In her view, the *purpose* of the Claimant's interactions with the Defendant was to enable her to decide to terminate any pregnancy where the foetus would suffer from haemophilia. Had this purpose properly been fulfilled then Adejuwon's birth, along with its consequences, would have been prevented. The fact that Adejuwon's autism was unrelated to his haemophilia was irrelevant – each particular pregnancy must be considered as an indivisible whole.

9. This decision was unanimously overturned by the Court of Appeal.[3] Giving the leading judgment, Nicola Davies LJ held that 'but-for' causation was not sufficient to establish liability. The Court was obliged to apply the SAAMCO scope of duty test and, in doing so, ask themselves three questions:
    1) What was the *purpose* of the allegedly negligent information;
    2) What was the *appropriate apportionment of risk* considering the nature of that information; and
    3) *Had the information been correct*, what losses would have occurred in any event?

10. Applying these questions to the facts of the instant case, the Court of Appeal concluded that the Defendant was not liable for the costs associated with Adejuwon's autism. The Defendant's purpose in consulting with the Claimant was not to advise her whether or not to become pregnant or continue with a pregnancy. Instead, the Defendant was

[2] [2017] EWHC 2990 (QB)

[3] [2019] EWCA Civ 152

providing one specific piece of information which could be taken into account when reaching that decision. All other risks associated with pregnancy and birth, including the risk that the foetus would be afflicted with a congenital disease, remained with the Claimant. Had the information provided to the Claimant been correct (i.e. if she was not in fact a carrier of the haemophilia gene) then Adejuwon would have been born and would have suffered from autism nevertheless. Accordingly, the loss complained of did not fall within the scope of the Defendant's duty of care.

The Supreme Court

11. Although three separate judgments were given by the Supreme Court,[4] the justices were unanimous in dismissing the Claimant's appeal and did so on very similar grounds. In essence, the Justices were united in holding that:

    1) The scope of duty concept was applicable to clinical negligence claims, as to other cases of allegedly incorrect professional advice. Liability in such cases cannot be decided on factual causation alone, nor is foreseeability determinative.
    2) The limits of the defendant's duty of care are to be determined primarily by reference to the objective purpose of the information or advice that they were asked to provide. This majority judgment noted that this may be different to the subjective purpose for which the claimant intends to rely on it.
    3) In the instant case the purpose was very specific – the Claimant wished to know whether she carried the gene for haemophilia. Therefore, any loss arising from a risk *unrelated* to her carriage of the haemophilia gene fell outside the scope of the Defendant's duty of care.

12. The Justices also took similar approaches to the role of the 'SAAMCO counterfactual' – the question of what consequences would have occurred had the information given by the defendant been correct. Taking a view somewhere between the extremes advocated for by either party, the Court accepted that a counterfactual test may in certain circumstances be useful as an analytical tool or cross-check when defining the scope of duty. However, it was neither a necessary stage of the analysis in all cases, nor an impermissible exercise.

13. Indeed, the main differences between the judgments relate not to matters directly at issue in the appeal itself, but to the Justices' attempts to situate the concept of scope of duty within an overarching framework that can be applied to the tort of negligence at large. While it may come as no surprise that consensus was lacking on how to unify the disparate tests and concepts that make up the tort into one comprehensive analytical structure, this is unlikely to cause too many problems outside the lecture theatre.

Conclusion

14. The decision in *Khan v Meadows* will undoubtedly be welcomed by defendants as establishing beyond doubt that the scope of a clinician's duty of care is bounded by the purpose for which their involvement was sought. However, there are two facets of the case that nevertheless mean that scope of duty remains a live question in cases of alleged clinical negligence.

[4] The majority judgment was given by Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black, and Lord Kitchin agreed). Judgments were also given by Lord Burrows and Lord Leggatt.

15. First, there is nothing in the Supreme Court's decision that disturbs the earlier principle of cases such as *Parkinson v St James and Seacroft University Hospital NHS Trust*[5] that where the purpose of the defendant's involvement is to prevent the conception and birth of *any* child, even if perfectly healthy, the clinician will remain liable for all the additional costs arising should a child be born with a disability.

16. Second, and perhaps more importantly, in his minority judgment Lord Leggatt left open the possibility that a clinician may be consulted specifically about Risk A and yet still be liable for losses stemming from Risk B, where the clinician *"recognises or ought to recognise"* that Risk B *"poses a material risk to the patient"*. Giving, as it does, a glimmer of hope to claimants keen to escape the strictness of the SAAMCO test, the circumstances in which this *dictum* apply will no doubt trouble the courts for some time to come.

[5] [2001] EWCA Civ 530

ABOUT THE AUTHOR

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Paige's practice spans Chambers' specialisms, with a developing focus on clinical negligence, personal injury and property damage. She has a particular interest in cases with complex questions of causation and those which stand at the boundary of different practice areas.

Prior to joining Chambers, Paige read for undergraduate and Masters' degrees in Law at Emmanuel College, Cambridge where she received a number of scholarships and prizes. She also previously taught Land Law and Equity and Trusts at the London School of Economics.

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