

## KEEPING NEGLIGENCE SIMPLE

Simplicity is a neglected legal virtue, perhaps because achieving it can be very hard. It is often easier to pile on complexity than to sit back and try to pare the analysis that is required back to its bare bones. And it needs to be remembered that sometimes the simplest solution may involve a degree of complexity. For example, breaking an enquiry down into many different parts may result in a more straightforward analysis than trying to make do with fewer concepts. The law of negligence is instructive in this respect. The tendency here has been to try to distil the essence of the cause of action into three or four “elements”, but this can be done only by conflating different questions under the same heading, such as “scope of liability” (conflating legal causation and remoteness) or “resultant damage” (conflating damage and factual causation, and sometimes more). However, the greatest risk to simplicity in negligence is posed by the peculiarly common law device of the “duty of care”, which in recent decades has begun to swallow up other elements of the cause of action, with unfortunate results for the clarity, coherence and comprehensibility of the law. Paradoxically, the latest example of this phenomenon of unnecessary complexity comes from a decision of the Supreme Court in a case where the facts and the issue in point could scarcely have been more straightforward.

The claimant in *Meadows v Khan* [2021] UKSC 21; [2021] 3 W.L.R. 147 was concerned about giving birth to a child with haemophilia and so consulted the defendant general practitioner to see if she was a carrier of the haemophilia gene. The defendant negligently advised the claimant that she was not. The claimant later fell pregnant and eventually gave birth to a son, Adejuwon. As it turned out, the claimant *was* a carrier of the haemophilia gene, and that gene was inherited by Adejuwon, who was subsequently diagnosed as suffering from severe haemophilia. But for the defendant’s negligence, this would have been detected by testing during the pregnancy, which (it was decided) would then have been terminated. Several years later, Adejuwon was diagnosed as also suffering from severe autism, this being entirely unrelated to the haemophilia.

In reliance on the decision of the Court of Appeal in the “wrongful birth” case of *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] Q.B. 266, the claimant sued the defendant for both the

additional costs of raising Adejuwon associated with his haemophilia (approximately £1.4m), and the additional costs associated with his autism (approximately a further £7.6m), on the basis that, if she had been properly advised, Adejuwon would never have been born. Whilst the defendant admitted that she was liable to compensate the claimant for the costs associated with Adejuwon's haemophilia, she denied liability for the costs associated with his autism.

In our view, these facts did not give rise to any particularly novel issue of law, and the case was easily resolvable by applying the well-established principle that liability in negligence is generally limited to harm that results from the materialisation of the risks that made the defendant's conduct negligent in the first place. This "risk principle" is perhaps most clearly illustrated by Lord Hoffmann's famous mountaineer example in *South Australia Asset Management Corp. v York Montague Ltd* [1997] A.C. 191; [1996] 3 All E.R. 365 ("SAAMCO") at 213:

"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

In this example, the doctor's advice was negligent because it gave rise to a risk that the unfitness of the mountaineer's knee would, say, cause his leg to give way in the middle of a climb, causing him injury. By contrast, the risk of injury in an avalanche – or of hypothermia in a blizzard – was not a risk that made the doctor's advice negligent, and hence the doctor would not be liable were that risk to materialise, even though the injury would still have been caused by the negligence in the but-for sense.

The risk principle is of long standing (the classic decision is of course *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co (The Wagon Mound)* [1961] AC 388; [1961] 1 All E.R. 404, on which see Williams (1961) 77 L.Q.R. 179), and is itself an application of a broader principle, namely that tort liability is usually limited to those consequences which are attributable to that which made the defendant's conduct wrongful (see *SAAMCO* at 213; *Restatement of Torts (Third): Liability for Physical and Emotional Harm* (2011) §29). Properly

understood, the principle encompasses what Lord Burrows in *Meadows* describes (at [75]) as the “conventional approach” to remoteness, which focuses on the foreseeability of the kind of harm suffered by the claimant; after all, if a particular kind of harm is not foreseeable then the risk of that harm occurring cannot be one of the risks that made the defendant’s conduct negligent (see *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082; [2000] 3 All E.R. 409 at 1091 per Lord Hoffmann).

Applying the risk principle to the facts of *Meadows*, if we ask why the defendant’s conduct was negligent, the answer is because it unreasonably exposed the claimant to a risk that she would give birth to a child with haemophilia and not because it unreasonably exposed her to a risk that she would give birth to a child with autism. Hence it followed from the application of the risk principle that she could not recover for the costs associated with her son’s autism, any more than she could recover for the costs associated with him having a bout of adolescent depression or for the injuries she suffered in an accident while driving him to nursery. The case for the claimant was therefore a hopeless one. Although her counsel sought to avoid the application of negligence orthodoxy by arguing that what was referred to as the “*SAAMCO* principle” did not apply in medical negligence cases, this was hard to fathom (why would a general principle of negligence law *not* apply in such cases?) and undermined by the fact that the mountaineer example involved just such a scenario.

Although the application of the risk principle can be more challenging than it was in *Meadows*, the underlying idea is a simple one. Unfortunately, however, that simplicity has come to be obscured for two reasons: first, because of the tendency to associate the principle with a particular case which happened to concern professional advice (hence the “*SAAMCO* principle”); and, secondly, because of its framing not as an issue of remoteness but as one concerned with “the scope of the defendant’s duty of care” (a phrase coined by Lord Hoffmann in *SAAMCO*, but from which he later distanced himself: Hoffmann (2005) 121 L.Q.R. 592, 596). It is in any case a testament to the unnecessary complexity that has arisen in the aftermath of *SAAMCO* that a panel of seven Supreme Court Justices was thought to be required to resolve such an easy appeal. Admittedly, the Supreme Court was somewhat led into the problem by the fact that the judge at first instance, Yip J., had simply considered the but-for causal link between the defendant’s negligent advice and the autism costs, and held that that link was sufficient to make them recoverable ([2017] EWHC 2290 (QB); [2018] 4 W.L.R.

8). Yip J.'s decision was however overturned by the Court of Appeal ([2019] EWCA Civ 152; [2019] 4 W.L.R. 26), on the basis that the autism costs were not within the "scope" of the risks against which the defendant had undertaken to protect the claimant and so were not within the "scope of her duty of care". That decision was in turn upheld by the Supreme Court.

Unsurprisingly, the Justices made short shrift of the issue in the case, and no criticism can be levelled at them as regards their dismissal of the appeal itself. Indeed, the decision in *Meadows* is in substance a ringing endorsement of the risk principle, though the closest that Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black and Lord Kitchin agreed) came to expressing that principle in terms came in the companion appeal of *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2021] 3 W.L.R. 81 ("*MBS*") at [17]. But matters were complicated by the fact that the Justices chose to characterise the issue in the case as going to the "scope of the duty" owed by the defendant, and particularly by the way in which Lord Hodge and Lord Sales sought to fit this "scope of duty principle" into "the conventional analyses of negligence" (at [26]). In the course of doing so, they developed a somewhat esoteric new roadmap of negligence which has the potential to complicate negligence litigation if taken up and employed by other judges.

According to Lord Hodge and Lord Sales (at [28]), "a helpful model for analysing the place of the scope of the duty principle in the tort of negligence ... consists of asking six questions in sequence". Those six questions were: the "actionability" question, the "scope of duty" question, the "breach" question, the "factual causation" question, the "duty nexus" question, and the "legal responsibility" question. The first, third and fourth of those questions essentially concern the familiar concepts of actionable damage, breach of duty and factual causation, while the sixth is an amalgamation of legal causation, remoteness and (some) defences.

The merging of various distinct doctrines under the catch-all heading of "legal responsibility" was somewhat unfortunate, but is unlikely to have much of an impact on the future development of the law. More troublesome are elements two and five of the roadmap. Beginning with the "scope of duty" question, it is important to note that the majority's analysis transforms this from an aspect of the remoteness enquiry (which is how it is generally regarded by commentators: see, e.g., Jones (ed.), *Clerk & Lindsell on Torts*, 23rd edn (2020) at para.2-187) into *the duty of care question itself*, so that the *SAAMCO* principle is now combined with

the question of whether negligence liability can arise in this category of case. This is likely to prove problematic, not least because the former is a highly fact-sensitive enquiry whilst the latter is a question of law.

The reasoning required to arrive at this radical overhaul of the duty of care element ran as follows. On the basis of the well-established principle that “there is no such thing as negligence in the air” (*Meadows* at [33], citing Viscount Simonds in *The Wagon Mound* at 425), the law must have “regard to the actual nature of the damage which the claimant has suffered when it determines the scope of the defendant’s duty” (or perhaps more accurately – since presumably the duty pre-dates the damage – that the law has regard to whether the scope of the duty owed encompasses the type of damage suffered). Hence for a claimant to recover for pure economic loss caused by a careless representation, or for psychiatric injury to a secondary victim in an accident case, he or she would need to establish that such harm fell within the scope of the duty owed to him or her by the defendant, and this was also true where injury was inflicted on the claimant by a third party. In the same way, in cases involving the provision of information or advice, this “scope of duty” question required the court to consider the purpose for which the relevant information or advice was given. Ultimately, then, the “scope of duty” question was “what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?” (at [38]).

The most important thing to note about this question is its potential sweep. As well as encompassing the duty of care enquiry and the *SAAMCO* principle, it easily subsumes the standard remoteness enquiry into the foreseeability of the type of damage suffered by the claimant: in *The Wagon Mound*, for example, we could say that the defendant owed a duty of care to protect the claimant against the risk of damage by fouling but not against the risk of damage by fire. But the “scope of duty” question can surely extend even further. We could ask, for example, whether the scope of the defendant’s duty of care encompassed not only deliberate intervening acts (as was said to be the case in *Meadows*) but also non-deliberate ones, thereby encompassing the “legal causation” question, and no great stretch would be required to soak up, say, the volenti defence as well. Furthermore, in the wrong hands, “scope of duty” also has the potential to cause problems when it comes to issues of breach, damage and factual causation (indeed in Lord Hodge and Lord Sales’ exposition of the elements of negligence they seem to have introduced unnecessary complexity into the breach enquiry by linking it to “scope

of duty”). It seems, then, that the *über*-tort of negligence (Stevens, *Torts and Rights* (2007), at p. 295) now has its *über*-element.

By contrast, element five of the new roadmap (the “duty nexus”) is something of a damp squib. The relationship between this element and the scope of duty question is not entirely clear, but the idea seems to be that the judge needs first to identify the scope of the duty owed and then to consider whether the particular loss for which the claimant is suing falls within or outside that scope (this latter being the “duty nexus” question). Apparently, however, the duty nexus question has salience only in what we call “relationship negligence” cases, where the defendant can control the extent of the duty owed by making clear the purpose for which some advice or service is being given, such that there may be a genuine issue as to whether one part of the claimant’s loss is rightly attributable to the defendant’s negligent provision of the advice or service in question.

Returning to the facts of *Meadows*, Lord Hodge and Lord Sales noted that the claimant approached her general practitioner for a specific purpose: to find out whether she was a carrier of the haemophilia gene. The scope of the duty therefore extended to taking reasonable care when providing her with that information. This formulation of the scope of duty was said to provide a “straightforward” answer to the duty nexus question, namely that the law did not impose on the defendant any duty in relation to unrelated risks which might arise in any pregnancy. It followed that while the defendant was liable for the costs of raising Adejuwon associated with his haemophilia, she was not liable for the costs associated with his autism.

In separate judgments, Lord Burrows and Lord Leggatt agreed with the conclusion of the majority, along with much of their reasoning; they were not, however, prepared to go along with their comments on the conceptual structure of the law of negligence. According to Lord Burrows, it was not “necessary or helpful ... to advocate what appears to me to be, in some respects, a novel approach to the tort of negligence as formulated in the six questions that Lord Hodge and Lord Sales suggest should be asked” (at [78]). He preferred what he called a more “conventional approach” in which the scope of duty question was simply added to the usual list of elements (duty, breach, factual causation, remoteness, legal causation and defences). Lord Leggatt similarly described the majority’s “discussion of the conceptual structure of the whole tort of negligence” as “undesirable as well as unnecessary” (at [96]).

There is much more that could be said about *Meadows*, but we will limit ourselves to four observations. First, while we have been somewhat critical of the new roadmap, the clear recognition therein of damage as a separate element of the negligence cause of action is welcome, as is the rejection of the suggestion that this issue can be subsumed into the duty enquiry. In our view, the question of what kind of interference with a person's interests is sufficient to ground a negligence claim is conceptually quite distinct from other issues, such as whether negligence liability extends to the type of situation before the court. Secondly, the relationship between the "scope of duty" question and the traditional remoteness enquiry focused on foreseeability is obscure. As we have already indicated, it is not at all obvious why both concepts are thought to be necessary, and the suggestion (at [65]) that the foreseeability of a given risk is a "relevant consideration when addressing the scope of the duty of care undertaken by a defendant" and that "the absence of foreseeability would militate against there being a duty of care" in relation to that risk serves only to deepen the mystery. Surely it would just be easier to deal with both questions at the remoteness stage? Thirdly (and connectedly), while we welcome the focus on the conceptual structure of negligence in *Meadows* it is important that judges who engage with such questions are prepared to challenge assumptions that have taken hold in the profession, such as that the issue in *Meadows* concerned the "scope of the duty" owed by the defendant, or that the remoteness enquiry is limited to questions of foreseeability. (Of course, it may be that we are wrong and that these assumptions are valid: the point is that judges and counsel do not even question them). And finally, we would endorse the clear implication in Lord Leggatt's judgment that attempting to extrapolate general principles applicable across the whole of negligence law from cases involving negligent advice or services provided by a professional defendant pursuant to a prior assumption of responsibility is a dangerous game (see also the observations of Lord Burrows at [71], and in *MBS* at [179]). If the new negligence roadmap is to be used at all, it should in our view be limited to relationship negligence cases of this kind, where the defendant exercises some control over the extent of the duty of care owed. Where the defendant exercises no such control – as in, say, a road accident case – the "scope of duty" concept is unnecessary, and employing it is surely bound to complicate rather than to illuminate.

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