A Tale of Two Duties – Approaching SAAMCO and the Scope of Duty Principle after Manchester Building Society v Grant Thornton UK LLP and Khan v Meadows

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The concept of 'scope of duty' in the tort of negligence, especially its application following Lord Hoffmann's judgment in *SAAMCO*,[1] has generated both controversy and confusion over recent years. Many had thought that Lord Sumption's judgment in *Hughes-Holland v BPE Solicitors*[2] was to be the definitive statement on the topic. However, the starting point in this area now lies in two very recent Supreme Court decisions in two different factual contexts: *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 in the field of professional accountancy advice; and *Khan v Meadows* [2021] UKSC 21 in the field of clinical negligence. The two appeals were heard by the same expanded constitution of the Supreme Court[3] so that the court could provide general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence, particularly the application of the approach in *SAAMCO* within different fields of activity.[4]

The factual contexts of these two cases might not be thought to be too dissimilar, both concerning negligent professional advice. Yet we may well see

these two decisions have far wider reverberations across tort law given that the majority judgment of Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black and Lord Kitchen agreed) presented their analysis within a wider conceptual legal framework, in an attempt to tie together the broader conceptual threads that underpin the tort of negligence. Such an approach is not without controversy, as the concurring judgments of Lord Leggatt and Lord Burrows bear witness.

This article seeks to outline the facts of both cases, followed by a summary which focuses on the key points of the majority's judgments, given that their analysis represents the state of the law in this area going forward. Rather than assessing in detail the relative merits of the majority's approach as against

[1] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ('*SAAMCO*').
[2] *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599.
[3] The seven justices were Lord Reed, Lord Hodge, Lady Black, Lord Kitchin, Lord Sales, Lord Leggatt and Lord Burrows.
[4] *Manchester Building Society* at [1]; *Khan* at [2].

Lord Leggatt's and Lord Burrows' judgments, this article will conclude by emphasising the key conceptual and practical differences that are likely to generate debate in future cases.

The Facts – *Manchester Building Society*[5]

Between 2004 and 2010 the claimant building society ('the society') purchased and issued lifetime mortgages under which interest on the loan was charged to mortgagors at a fixed rate. The society funded those mortgage loans by borrowing at variable rates of interest. In order to protect itself against the risk that the variable cost of borrowing would exceed the fixed rate of interest receivable on the mortgage loans, the society entered into a series of interest rate swap contracts.

From 2005 onwards, the society was required to prepare its accounts in accordance with the International Financial Reporting Standards, which require swaps to be accounted for on the balance sheet at their fair value. The fair value of a swap is its 'mark-to-market' or 'MTM' value, which is the price (or estimated price) for which it can be traded in the market at a given date. This price is calculated by estimating the value of all the future payments to be made over the remaining term of the swap and discounting these payments to a net present value. Between the dates at the beginning and end of the term of the swap, the MTM value of the swap will fluctuate according to the market's forecast of future interest rates over the remaining term of the swap.

A consequence of accounting for the swaps at fair value was that the value shown on the balance sheet would reflect movements in interest rates. The society's reported financial position would accordingly become volatile. This volatility would in turn increase the amount of capital needed to satisfy the FSA's regulatory capital requirements for the society. However, such volatility could be mitigated if (and only if) the society was able to use 'hedge accounting'. Where hedge accounting is permitted, the carrying value of the hedged item (here, the lifetime mortgages) can be adjusted to offset changes in the fair value of the hedging instrument (here, the swaps), thus reducing accounting volatility.

The defendant accountancy firm, Grant Thornton UK LLP ('Grant Thornton'), audited the society's accounts during the relevant period and, in April 2006, advised the society that it could apply the hedge accounting rules to the lifetime mortgages and swaps. The society relied on Grant Thornton's advice in preparing its financial statements for each of the years ending 31 December 2006 to 2011. The society also relied on Grant Thornton's advice that its use of hedge accounting was legitimate when entering into more lifetime mortgages and swaps during this period.

Following the 2008 financial crisis, there was a sustained fall in interest rates which caused the MTM value of the society's interest rate swaps to become a financial liability. This liability was offset on the society's balance sheet by the adjustment made to the reported value of the mortgages using hedge accounting. However, in March 2013 Grant Thornton informed the society that it was not after all permitted to apply hedge accounting in preparing its financial statements. The two main effects of that realisation were as follows:

- The society had to account for the fair value of the swaps in its 2012 accounts without any adjustment to the book value of the mortgages. The society also had to restate its accounts for 2011, with the result that the society's profit for 2011 became a loss and its net assets were reduced significantly.
- As a result of these corrections to its accounts, the society had insufficient regulatory capital and, in order to extricate itself from this situation, the society terminated all of its interest rate swap contracts early at considerable cost in 2013.

Grant Thornton admitted that it had been negligent in advising the society when auditing its accounts for

[5] The factual background to this case is most fully summarised in Lord Leggatt's judgment at [44]-[58].

each of the years 2006 to 2011 that the society was entitled to apply hedge accounting.[6] The main question concerned the losses for which Grant Thornton were liable, in particular whether the society could recover the amount paid to close out the swaps early.[7]

The Facts – *Khan*[8]

Ms Meadows consulted a GP, in August 2006, in order to establish whether she carried the gene for haemophilia, a hereditary disease. Tests which were inappropriate to answer that question were arranged – the blood tests which were arranged established whether a patient has haemophilia but they could not confirm whether Ms Meadows carried the haemophilia gene, for which she should have been referred to a haematologist for genetic testing.

On 25 August 2006 Ms Meadows saw Dr Khan, another GP in the same practice, to obtain and discuss the test results. Dr Khan told her that the results were normal. It was accepted that Dr Khan, when informing her of the blood test results, negligently failed to advise Ms Meadows that she needed a genetic test to establish whether she carried the haemophilia gene. As a result of the advice which she received in this and the earlier consultation Ms Meadows was led to believe that any child she might have would not have haemophilia.

In December 2010 Ms Meadows became pregnant with her son, Adejuwon. Shortly after his birth he was diagnosed as having haemophilia. The appellant was referred for genetic testing which revealed that she was indeed a carrier of the gene for haemophilia. Lord Hodge and Lord Sales summarised the counterfactual events as follows:[9]

"Had the general practitioners referred the appellant 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. That testing would have revealed that her son was affected by haemophilia. If so informed, the appellant would have chosen to terminate her pregnancy and Adejuwon would not have been born."

It is a well-established rule that where medical negligence results in an unwanted pregnancy (known as 'wrongful conception' and 'wrongful birth' cases), parents are not entitled to recover damages to reflect the costs of raising a healthy child.[10] However, that rule does not extend to the birth of a child with significant disabilities, in which case parents can recover compensation for the extra costs of providing for the child's special needs and care relating to the child's disability.[11] On that basis, Dr Khan admitted that she was liable to compensate Ms Meadows for the additional costs associated with Adejuwon's haemophilia.[12]

However, the complicating factor in this case was that, in addition to the hereditary condition of haemophilia, Adejuwon was later diagnosed as suffering from autism, a completely unrelated disability.[13] The central question, therefore, was whether Dr Khan was liable in negligence for the costs of bringing up a disabled child who has both haemophilia and autism, or only for those costs which were associated with haemophilia.

The majority's legal analysis in both cases

The majority emphasised that it is desirable for the judgments in both appeals to be read together as reflecting and supporting a coherent underlying

[6] *Manchester Building Society* at [60].
[7] *Manchester Building Society* at [59].
[8] The factual background to this case is summarised in the majority's judgment at [1] and [3]-[12].
[9] *Khan* at [6].
[10] *Khan* at [15], citing *McFarlane v Tayside Health Board* [2000] 2 AC 59.
[11] *Khan* at [15], citing *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266 and *Groom v Selby* [2001] EWCA Civ 1522; [2002] Lloyd's Rep Med 1.
[12] *Khan* at [11].
[13] *Khan* at [1] and [8].

approach. The following section attempts to harmonise the main points of legal analysis from the majority's judgments in each appeal, before explaining the respective outcomes reached in each case. The majority's judgments can be boiled down into seven overarching points.

(1) Using a general conceptual framework: The majority considered that "*the scope of duty question should be located within a general conceptual framework in the law of the tort of negligence*".[14] In adopting such an approach, the majority deployed the following "*helpful model for analysing the place of the scope of duty principle in the tort of negligence*" by asking a sequence of six questions:[15]
"(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."

(2) The 'scope of duty principle': The majority explained that the 'scope of duty principle' is "*an established principle that the law addresses the nature or extent of the duty of the defendant in determining the defendant's liability for damage*".[16] In other words, "*The fact that the defendant owes the claimant a duty to take reasonable care in carrying out its (the defendant's) activities does not mean that the duty extends to every kind of harm which might be suffered by the claimant as a result of that breach of duty*"[17] because "*a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care*".[18] In giving examples of the scope of duty principle, the majority essentially divided the relevant case law loosely into two types of case:

- **'Categories of damage' cases:** The majority cited a number of cases in which the scope of the duty of care only covered certain kinds or categories of damage (such as property damage or personal injury rather than economic loss)[19] or only covered losses to certain classes of individuals in certain circumstances.[20] Similarly, they attempted to draw broader conceptual threads across the taxonomy of negligence claims by opining that "*The scope of duty principle may also be*

[14] *Manchester Building Society* at [4(i)].
[15] *Khan* at [28]; *Manchester Building Society* at [6].
[16] *Khan* at [33], citing *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 at [21]-[24].
[17] *Manchester Building Society* at [8].
[18] *Khan* at [36], citing *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929 at [11].
[19] *Manchester Building Society* at [8], citing *Spartan Steel Ltd & Alloys v Martin & Co (Contractors) Ltd* [1973] QB 27 and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487.
[20] *Manchester Building Society* at [8] and *Khan* at [34] and [38], both citing *Caparo Industries plc v Dickman* [1990] 2 AC 605. In *Khan* at [33], the majority also cited a number of other cases as examples, namely negligent misstatement cases and psychiatric injury to secondary victims cases.

of analytical value and of central importance in other circumstances, such as where a claimant seeks to establish liability arising from a defendant's omissions".[21] These cases generally concern a kind or category of loss incurred which is either wholly within or wholly outside the defendant's duty of care[22] – the recoverability of a head of loss is essentially 'all or nothing'.

- **'Extent of damage' or 'quantification of damage' cases:** As is well-known, the scope of duty principle was developed by the House of Lords in a series of cases concerning the negligent valuation of property following the property crash in the early 1990s, starting with *SAAMCO*.[23] These cases concern a single type of loss, namely pure economic loss. In this context, Lord Hoffmann's development of scope of duty reasoning in *SAAMCO* was that "*instead of applying it to kinds or categories of damage*" he "*applied it to the quantification of damage*".[24] In such "*extent of damage*" cases, "*There may be elements of loss which the claimant has suffered as a consequence of a defendant's acts or omissions which are within the defendant's duty of care, and elements which are outside the scope of that duty*".[25]

The majority also attempted to tighten up the language deployed in this area of law, referring to this as the 'scope of duty principle' rather than the '*SAAMCO* principle' for two reasons: (1) the principle predates *SAAMCO*; and (2) "*on proper analysis SAAMCO is not a distinct principle but rather is an illustration in a particular context of the scope of duty principle*"[26] which arises in a wider context "*in circumstances in which it is not necessary to consider separately the duty nexus question by reference to the counterfactual methodology developed in SAAMCO*". With that in mind, the majority distinguished between the general scope of duty principle and the so-called '*SAAMCO* counterfactual', which this article will return to below.[27]

(3) The scope of duty principle applies to clinical negligence claims (and beyond): On the basis of the analysis set out immediately above, the majority concluded that there is no principled basis either for excluding clinical negligence from the scope of duty principle or for confining the principle to pure economic loss arising in commercial transactions.[28] This is because "*the principle is a general principle of the law of damages. It is therefore not relevant to its applicability whether a claim is characterised as one for economic loss consequent upon a physical injury or as pure economic loss*".

(4) How to address the scope of duty question: In answering the scope of duty question, "*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 purpose for which the advice is being given*"[29] Alternatively, the question may be framed as asking "*what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?"*[30] whereby "*one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk*".[31]

(5) Dispensing with the 'information'/'advice' distinction: The majority reiterated that one of the fundamental features of the reasoning in *SAAMCO* was that "*where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has*

[21] *Khan* at [37].
[22] *Khan* at [48].
[23] *Khan* at [35].
[24] *Khan* at [36] and *Manchester Building Society* at [9], both citing *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 at 209G.
[25] *Khan* at [49].
[26] *Manchester Building Society* at [9].
[27] *Khan* at [36].
[28] *Khan* at [62].
[29] *Manchester Building Society* at [4(ii)]; see also [13]-[16], where the majority refer to judging the purpose of the duty on an objective basis by reference to the "*reason*" for which the advice is being given.
[30] *Khan* at [38].
[31] *Manchester Building Society* at [17].

no legal responsibility for his decision".[32] In *SAAMCO*, Lord Hoffmann distinguished between: (1) cases in which the defendant owed a duty to provide information for the purpose of enabling someone else to decide upon a course of action; and (2) cases in which the defendant owed a duty to advise someone as to what course of action he should take.[33] In the latter kind of case, Lord Hoffmann considered that the negligent adviser would be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. In the former kind of case, he considered that the negligent information supplier would be responsible for all the foreseeable consequences of the information being wrong.

However, 'advice' and 'information' cases "*are not distinct or mutually exclusive categories and Lord Hoffmann's reasoning did not suggest that they were*" – instead, "*There is in reality a spectrum and it is a matter of analysis of the particular circumstances of a case*".[34] One asks the scope of duty question in the normal way which, in the context of the provision of advice or information, requires the court to identify the purpose for which that advice or information was given: "*what was the risk which the advice or information was intended and was reasonably understood to address*". According to the majority, "*The spectrum lies in the extent of the matter, whether labelled information or advice, which the professional adviser has contributed to the claimant's decision-making*" and between each end of the spectrum, each case is likely to depend on the range of matters for which the defendant assumed responsibility. As a rule of thumb, the less the extent to which the professional adviser is guiding the whole decision-making process, the more important the duty nexus question becomes "*because the court must separate out from the loss, which the claimant has suffered through entering the transaction, the element of that loss which is attributable to the defendant's negligent performance of the service which he or she undertook*".

With that in mind, the majority considered that the 'advice'/'information' distinction "*should not be treated as a rigid straitjacket*"[35] and agreed with Lord Leggatt's proposal to "*dispense with the descriptions "information" and "advice" to be applied as terms of art in this area*" and instead "*to link the focus of analysis of the scope of duty question and the duty nexus question back to the purpose of the duty of care assumed in the case in hand*".[36]

(6) How to address the duty nexus question: In terms of methodology, the majority considered that it is quite possible to consider their schema of six questions "*in a different order and to address more than one question at the same time*".[37] The majority emphasised that the duty nexus question may, in many cases, be answered straightforwardly because the defendant was unquestionably under a duty of care to protect the claimant from the harm for which they claim damages.[38] For example, in 'categories of damage' cases, "*the scope of duty question provides an answer and the duty nexus question does not require to be considered separately*"[39] and, in such cases, it is often helpful to consider the scope of duty question, if possible, before turning to questions of breach of duty and causation.[40]

By contrast, in 'extent of damage' cases, the majority indicated that such cases are particularly appropriate occasions on which to consider the scope of duty and duty nexus questions together.[41] Furthermore, they considered that, in such cases, the duty nexus question "*falls to be addressed after the court has determined that there is a (factual) causal connection between the defendant's act or omission and the loss for which the claimant seeks damages*".[42] The reason for this is purely practical,

[32] *Khan* at [40], citing *Hughes-Holland* at [35]-[36].
[33] *SAAMCO* at 214.
[34] *Khan* at [41] and *Manchester Building Society* at [18]-[21], both citing *Hughes-Holland* at [39]-[44].
[35] *Manchester Building Society* at [4].
[36] *Manchester Building Society* at [22]; see also [92].
[37] *Khan* at [29].
[38] *Khan* at [47].
[39] *Khan* at [48].
[40] *Khan* at [38].
[41] *Khan* at [38].
[42] *Khan* at [49].

because "*Proceeding in this way means that one identifies the losses which are in fact in issue so that it is possible to focus with greater precision on the extent to which they fall within the scope of the duty of care owed by the defendant*".[43] This follows the two-stage approach adopted in previous cases as follows:[44]

- **'Basic loss'/factual causation question:** The court must first identify "*the total loss arising as a matter of "but for" factual causation*" from the defendant's negligence.
- **Duty nexus question:** One must then identify from the 'basic loss' the losses which fall within the scope of the defendant's duty as part of the duty nexus question.

(7) SAAMCO counterfactual/cap analysis as a subsidiary cross-check: The majority restated the way in which courts should approach the so-called '*SAAMCO* counterfactual', which Lord Hoffmann had originally proposed as a way to assist in identifying the extent of the loss suffered by the claimant which falls within the scope of the defendant's duty,[45] which the majority now labelled as the duty nexus question. In the context of the valuers' negligence cases, in which Lord Hoffmann had originally developed this counterfactual analysis, the courts were to ask: "*what would the claimant's loss have been if the information which the defendant in fact gave had been correct?*".[46] The majority emphasised that "*The question is not whether the claimant would have behaved differently if the advice provided by the defendant had been correct*", which is a matter for factual causation, but "*Rather, the counterfactual assumes that the claimant would behave 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*". In this way, the court can identify the loss attributable to that information being incorrect and the limit on recoverable damages is often referred to as the '*SAAMCO* cap'.[47]

In other words, the *SAAMCO* counterfactual is "*simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong [ie the loss falling within the scope of the defendant's duty] and (ii) loss flowing from the decision to enter into the transaction at all [ie by application of a simple "but for" test]*".[48]

However, the majority did impose three important caveats on use of the *SAAMCO* counterfactual:

- Although Lord Hoffmann in *SAAMCO* had proposed this form of counterfactual analysis as being of assistance in 'information' cases,[49] given the majority's views on dispensing with the 'advice'/'information' distinction they also considered that linking the use of the counterfactual analysis to 'information' cases was "*unhelpful*".[50] Instead, the majority considered that "*examination of the purpose of the duty provides an appropriate and refined basis for identifying, out of what may be a wide range of factors which contribute to the claimant's loss, the factors for which defendant is responsible*".
- The essential prior questions remain the scope of duty and duty nexus questions.[51] Lord Hoffmann deployed the counterfactual analysis as a way of illustrating and giving emphasis to the importance of the underlying scope of duty principle, but it would have been sufficient to arrive at the same conclusion simply by asking the scope of duty and duty nexus questions.[52] The majority explained that whilst the *SAAMCO* counterfactual and cap are a "*robust way of*

[43] *Manchester Building Society* at [12].
[44] *Khan* at [52]; *Manchester Building Society* at [12].
[45] *Manchester Building Society* at [23].
[46] *Khan* at [53].
[47] *Manchester Building Society* at [23].
[48] *Manchester Building Society* at [23], adding the wording in square brackets to the Lord Sumption's comments in *Hughes-Holland* at [45].
[49] *Manchester Building Society* at [23].
[50] *Manchester Building Society* at [25].
[51] *Manchester Building Society* at [23].
[52] *Manchester Building Society* at [24].

applying the scope of duty principle"[53] they "*should be regarded only as a tool to cross-check the result given pursuant to analysis of the purpose of the duty [as identified under the scope of duty question], but one which is subordinate to that analysis and which should not supplant or subsume it*".[54]

- Whilst the counterfactual test can yield the right result if it is properly applied, the majority emphasised that "*the more one moves from the comparatively straightforward type of situation in the valuer cases, as illustrated by SAAMCO, the greater scope there may be for abstruse and highly debatable arguments to be deployed about how the counterfactual world should be conceived … which would become increasingly untethered from reality*".[55] Accordingly, the counterfactual is useful in some but not all circumstances in ascertaining the extent of a defendant's liability and in those cases where the scope of duty question may identify the fair allocation of risk between the parties without the use of the counterfactual, the counterfactual may well contribute nothing and, indeed, has the potential to confuse rather than assist in the correct analysis.[56] For example, the majority considered that in many clinical negligence cases "*the application of the scope of duty principle results in the conclusion that a type of loss or an element of a claimant's loss is within the scope of the defendant's duty, without the court having to address the SAAMCO counterfactual*"[57]. On that basis, the majority were clear that the counterfactual analysis should not be allowed to drive the outcome in a case and the better approach is to focus more directly on the scope of duty question itself – the counterfactual is optional whereas the scope of duty question is mandatory in every case.[58]

The outcome in Manchester Building Society

The starting point for the majority was that the society "*had made their own assessment about the nature of the commercial markets for lifetime mortgages and for swaps nad had made their own judgment that a business model matching swaps and mortgages would be commercially attractive*" and that "*Grant Thornton was not asked to provide commercial advice about these matters*".[59] However, the purpose of Grant Thornton's advice was that "*the society looked to Grant Thornton for technical accounting advice whether it could use hedge accounting in order to implement its proposed business model within the constraints arising by virtue of the regulatory environment*", namely the FSA's regulatory capital requirements.[60] For the purposes of analysing the scope of the duty of care owed by Grant Thornton, the majority were particularly influenced by the "*commercial reason, as appreciated by Grant Thornton, why advice about this was being sought and why this was fundamental to the society's decision to engage in the business of matching swaps and mortgages. That reason was the impact of hedge accounting on the society's regulatory capital position*".[61] The majority considered that "*reference to the reason the advice was sought and given is important, because that is the foundation for the conclusion that the purpose of the advice was to deal with the issue of hedge accounting in the context of its implications for the society's regulatory capital*".

In such circumstances, Grant Thornton's negligent advice "*had the effect that the society adopted the business model, entered into further swap transactions and was exposed to the risk of loss from having to break the swaps, when it realised that*

[53] *Khan* at [54].
[54] *Manchester Building Society* at [4]; see also [23], where the majority expressly agreed with Lord Burrows' analysis at [195]-[203].
[55] *Manchester Building Society* at [26].
[56] *Khan* at [36] and [53].
[57] *Khan* at [63].
[58] *Manchester Building Society* at [26]; *Khan* at [63].
[59] *Manchester Building Society* at [28].
[60] *Manchester Building Society* at [34].
[61] *Manchester Building Society* at [38].

hedge accounting could not in fact be used and the society was exposed to the regulatory capital demands which the use of hedge accounting was supposed to avoid. That was a risk which Grant Thornton's advice was supposed to allow the society to assess, and which their negligence caused the society to fail to understand".[62] On that basis, the majority concluded that Grant Thornton were liable for the losses suffered by the society in being compelled to break the swaps once the true accounting position was appreciated – "*the society had suffered a loss which fell within the scope of the duty of care assumed by Grant Thronton, having regard to the purpose for which they gave their advice about the use of hedge accounting*".[63]

Importantly, whilst Lord Leggatt engaged in what the majority described as a "*sophisticated analysis to answer the elaborate variants of the submissions advanced by the parties*" on the correct formulation of the *SAAMCO* counterfactual on the facts of this case, the majority declined to engage in such analysis themselves.[64] This was a case in which they considered that identifying the correct counterfactual had already caused significant confusion in the courts below. It was both possible and preferable, therefore, to determine the case by reference to the scope of duty and duty nexus questions alone, without the added complication of the *SAAMCO* counterfactual.

The majority went on to agree with Lord Leggatt's analysis that legal causation was satisfied in this case.[65] The judge was fully entitled to conclude that an equally effective cause of the loss was Grant Thornton's negligent advice. The society's own negligence in deciding to enter into swaps with terms far longer than the likely duration of the mortgages, as part of an overly ambitious application of the business model by the society's management, was properly reflected in the 50% reduction in damages on the basis of contributory negligence.

The outcome in *Khan*

The majority's judgment can be summarised in three key points, as follows. First, the scope of duty question "*depends principally upon the nature of the service which the defendant has undertaken to provide to the claimant*" and involves asking "*what is the risk which the service which the defendant undertook was intended to address*".[66] In this case, the scope of duty question was answered by addressing the purpose for which Ms Meadows obtained the service of the general medical practitioners.[67] This was, uncontroversially, "*to put [Ms Meadows] in a position to enable her to make an informed decision in respect of any child which she conceived who was subsequently discovered to be carrying the haemophilia gene*". The court considered that it did not matter in this context whether Dr Khan's task was the provision of information or of advice. The important point was that 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 – in other words, "*the service was concerned with a specific risk, that is the risk of giving birth to a child with haemophilia*".

Secondly, whilst it was correct that Adejuwon would not have been born but for Dr Khan's mistake because, that was a conclusion as to factual causation question and was therefore irrelevant to the scope of the defendant's duty.[68] Similarly, whilst the foreseeability of the possibility of a boy being born with both haemophilia and an unrelated disability, which is a risk in any pregnancy, is a relevant consideration when addressing the scope of duty question, it is "*in no sense determinative*".[69]

Thirdly, in this case, "*the answer to the scope of duty question points to a straightforward answer to the*

[62] *Manchester Building Society* at [34].
[63] *Manchester Building Society* at [36].
[64] *Manchester Building Society* at [26], referring to Lord Leggatt's analysis at [143]-[150]. See also at [5].
[65] *Manchester Building Society* at [39] and [173]-[174].
[66] *Khan* at [65].
[67] *Khan* at [67].
[68] *Khan* at [64] and [68].
[69] *Khan* at [65].

duty nexus question: the law did not impose on Dr Khan any duty in relation to unrelated risks which might arise in any pregnancy".[70] The court went on to apply the *SAAMCO* counterfactual, concluding that if Dr Khan's advice had been correct and Ms Meadows had not been a carrier of the haemophilia gene, the undisputed answer is that Adejuwon would have been born with autism. On that basis, it followed that Dr Khan was liable only for the costs associated with the care of Adejuwon insofar as they were caused by his haemophilia.

Lord Leggatt's and Lord Burrows' concurring judgments – questions for the future?

Rather than undertaking a detailed analysis of where the reasoning differs between the majority, Lord Leggatt and Lord Burrows, and which approach is more convincing, it is helpful to conclude by comparing the majority's judgment to each of the concurring judgments in an attempt to identify the two key points of difference that are likely to generate future debate.

First, there is the difference in approach to causation and the use of counterfactuals. Both the majority and Lord Burrows are clear that the scope of duty principle is best understood on its own terms, without the emphasis on causation and the *SAAMCO* counterfactual on which Lord Leggatt's analysis relies.[71] This article has already summarised the majority's views on using the counterfactual as an inessential, but helpful, cross-check that is subordinate to the scope of duty question, as well as pointing out that in *Manchester Building Society* the majority declined to consider what the correct counterfactual should be in a case that is further removed from the valuer negligence cases. It remains to be seen whether the counterfactual really does move into the subordinate role envisaged in future cases. The temptation of having a helpful cross-checking tool is that it remains as an inevitably essential feature of each case – that is evident from the fact that Lord Burrows had the same views about using the counterfactual test and yet still could not resist considering what the correct counterfactual should be.[72] The same can be said of the majority's discussion of the counterfactual in *Khan*, a case in which, arguably, the facts were even further removed from the valuer negligence cases than *Manchester Building Society* and where such analysis was not really required. Whilst the primary focus of courts in the future must be on the scope of duty principle and the duty nexus question, the extent to which the *SAAMCO* counterfactual continues to play a prominent role in future cases remains to be seen. Secondly, however, the biggest controversy for the future is likely to be the way in which the majority's general conceptual framework is to be deployed more broadly. Lord Burrows considered that the majority's general conceptual framework of six questions was "*in some respects, a novel approach to the tort of negligence*", particularly because "*their approach does not appear to start with establishing a duty of care, sees the SAAMCO principle as concerned with the "duty nexus" question, and treats contributory negligence alongside remoteness*" whereas he considered the central issue in the appeals to be about "*the SAAMCO principle as to the scope of the duty of care*".[73] For that reason, he set out his own "*relatively conventional approach which sees the tort of negligence as involving seven main questions*", notably adding the question "*Was there a duty of care owed by the defendant to the claimant?*" and omitting the duty nexus question. He elaborated that "*I do not consider it necessary or helpful in this case or in Khan v Meadows … to depart from a more conventional approach to the tort of negligence which begins with the duty of care, treats the SAAMCO principle as being concerned with whether factually caused loss is within the scope of the duty of care, avoids the novel terminology of the "duty nexus", and sees contributory negligence as*

[70] *Khan* at [68].

[71] For the key paragraphs in which each member of the court compares their conceptual approach with the other members, see *Khan* at [59] and [97] and *Manchester Building Society* at [5], [27], [177] and [212].

[72] *Manchester Building Society* at [207].

[73] *Khan* at [78].

one of several possible defences".[74]

Similarly, Lord Leggatt considered that the majority's "*excursus touches on questions much debated by legal scholars which go far beyond the issues raised*" in either appeal and emphasised that "*these appeals are concerned solely with the liability of professional persons for giving negligent advice*" and whether or to what extent analogous considerations apply in other contexts was not a question that should be decided on this occasion.[75]

The majority's judgment is only really precedentially binding insofar as it concerns the scope of duty question, the duty nexus question and the *SAAMCO* counterfactual in the professional advice context, as Lord Leggatt indicates. The general conceptual framework, in particular the duty nexus question, is best considered *obiter*, if persuasive, insofar as it relates to other contexts. The majority themselves do acknowledge this – they preface their framework by acknowledging that "*the components of the tort of negligence are interrelated and that there is no one generally accepted formula for analysing that interrelationship in a claim in negligence*".[76] They also acknowledged that their framework "*is not an exclusive or comprehensive analysis*"[77] However, they considered that their framework provides "*a helpful structure in which to assess the role of the scope of duty principle, "but for" causation and foreseeability of harm in the context of claims of clinical negligence*"[78] and it is fairly clear that the main reason for the majority's approach was driven by the way in which counsel framed their submissions in that case on each of those elements of negligence.[79] They disagreed with Lord Burrows that their approach was particularly novel, such novelty being "*confined to the accommodation of the scope of duty principle highlighted in SAAMCO in a traditional analysis of the tort of negligence in a way that is consistent with principle*".[80] They also disagreed with Lord Burrows on the basis that his framework assumes that "*one can speak of a duty of care and its breach without determining the damage which is necessary to complete the tort of negligence*" whilst they preferred to "*anchor the scope of duty principle in the question as to the defendant's duty of care, while recognising as we do… that in many cases the court, having established that the defendant was negligent in relation to at least some of the damage, will have to ask itself the duty nexus question in applying the scope of duty principle to the quantification of the claimant's loss*".

Most cases do not require courts to concern themselves with overarching conceptual questions about the optimum way to structure the framework of negligence. However, this conceptual disagreement is important given that it is likely to spark debate in future cases about the proper relationship between questions of the existence and scope of duty of care and the duty nexus question in contexts outside of the professional advice sphere, where such questions may well not have been framed in such a way previously. How practitioners, academics and judges seek to further our understanding of these questions in different contexts may well prove to be a new battleground of ideas in the future.

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[74] *Manchester Building Society* at [212].
[75] *Khan* at [96].
[76] *Khan* at [24]. The majority go on to consider different academic proposals for the essential legal framework at [24]-[26].
[77] *Khan* at [28].
[78] *Khan* at [58].
[79] *Khan* at [23] and [26].
[80] *Khan* at [59].