No limit to the scope of doctors' liability for failures to warn?

Meadows v Khan [2017] EWHC 2990 (QB); [2018] 4 WLR 8
High Court, Queen's Bench Division
Yip J
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In *Meadows v Khan*,[1] a mother brought a wrongful birth claim against a general practitioner for the additional costs[2] of raising her son, who had been born with both hæmophilia and autism. The judge stated the legal issue to be decided as follows: 'Can a mother who consults a doctor with a view to avoiding the birth of a child with a particular disability (rather than to avoid the birth of any child) recover damages for the additional costs associated with an unrelated disability?'[3] The question was not covered by any previous reported case.[4] The stakes riding on it were high. The additional costs associated with the hæmophilia alone had been agreed at £1.4m: those associated with both conditions, at £9m.[5]

The claimant, desiring to avoid having a hæmophiliac child, had undergone medical testing to assess that risk. The claimant's doctor ordered tests appropriate for determining whether she herself was a hæmophiliac, but not whether she carried the hæmophilia gene. The defendant advised the claimant that her test results were normal, leading the claimant to believe that she was not at risk of having a hæmophiliac child. The claimant then became pregnant and gave birth to her son: he was affected by severe hæmophilia and, it was subsequently discovered, autism (an ætiologically-unrelated condition). The autism was sufficient to prevent the son from ever living independently or taking up paid employment. Further, due to the autism the son would not be able to manage his hæmophilia independently, such that the additional costs associated with that disorder were increased.[6]

It was admitted that but for the doctor's negligence the mother would have discovered the hæmophilia through fetal testing, and terminated her pregnancy. The mother's claim for additional costs associated with the child's hæmophilia was admitted.[7] Her claim for additional costs associated with the autism was disputed.

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[1] See also Lauren Sutherland QC, 'Causation in wrongful birth' (2018) 140 *Reparation Bulletin* 6–8.
[2] 'Additional' to those which would normally incurred in raising a healthy child.
[3] *Meadows*, [2]
[4] *Meadows*, [51]
[5] *Meadows*, [4]. The reference to 'additional costs relating [only] to [the claimant's child's] autism', rather than 'hæmophilia', is clearly an error.
[6] *Meadows*, [7]
[7] The increase in costs associated with the hæmophilia due to the child's autism may have been included in the admitted sum, on an 'eggshell-skull' basis, but the judgment is silent on this point.

Finding against the doctor, the judge awarded full compensation to the claimant, whose truly daunting predicament had been caused (in a but-for sense) by the negligence of her doctor.

As a matter of English law, the judge was wrong to do so. The analysis of her reasoning affords an opportunity to examine how the scope-of-liability principles established in *South Australia Asset Management Corpn v York Montague (SAAMCO)*[8] and subsequent authorities, particularly *Hughes-Holland v BPE Solicitors*,[9] ought to be applied in clinical negligence matters arising from failures to warn of risks.

It is worth recalling the principles established in *SAAMCO* and *Hughes-Holland*. Where a defendant is in breach of a duty to take reasonable care in providing information or advice, a distinction is drawn between two questions. The first is 'the assessment of the loss caused by the breach of duty'; the second is 'the extent of the defendant's duty to protect the claimant against it'.[10] In relation to the second question, where the defendant's role is to provide some information to be used in conjunction with other matters identified by the claimant, in deciding upon a course of action, the defendant's liability is limited to the foreseeable consequences of the information supplied being wrong. This is so even if the information supplied by the defendant is, and is known to be, of decisive importance to the claimant. Where the defendant's role is, more broadly, to identify and consider all relevant matters, and generally to advise the claimant as to the course of action to adopt, the defendant's liability extends to all foreseeable consequences of that course of action being taken.[11]

In *Meadows*, it was apparently conceded that the claim was virtually free from difficulties as regards duty, causation and remoteness: proximity and foreseeability were present, the autism 'resulted from … a natural chain of events from conception', and 'standard "but for" causation was made out'.[12] The narrow issue raised by the defence related to the scope of the defendant's duty or liability. The judge noted: 'The purpose of the service offered by the defendant … was not to prevent the claimant having any child but rather, ultimately, to prevent her having a child with hæmophilia'.[13] Accordingly, the defendant, referring to *SAAMCO* and *Hughes-Holland*, argued that she had undertaken only to provide information relating to the risk that hæmophilia might affect the claimant's child, and not to advise generally on the merits of any potential pregnancy.[14]

Rejecting these arguments, Yip J asserted that they adopted the wrong 'starting point'[15]: she preferred to begin by noting that the doctor's breach was a cause of the child's autism.[16] This factor, re-emphasised at several points in the judgment,[17] was relevant to the first question distinguished in *SAAMCO*—the assessment of the loss caused by the breach—but not to the second, central question regarding the scope of

[8] [1997] AC 191
[9] [2017] UKSC 21; [2017] 2 WLR 1029
[10] *Hughes-Holland*, [27] (Lord Sumption); *SAAMCO*, 218A–C (Lord Hoffmann)
[11] *SAAMCO*, 214E–F (Lord Hoffmann); *Hughes-Holland*, [39]–[44] (Lord Sumption)
[12] *Meadows*, [22]
[13] *Meadows*, [26]
[14] *Meadows*, [31]–[46]
[15] *Meadows*, [52]
[16] *Meadows*, [53]
[17] E.g. *Meadows*, [56], [58], [62]

the defendant's liability. In her approach to this second question the judge's reasoning strayed into error.

The judge's first error occurred in attempting to distinguish *SAAMCO* altogether, through misinterpreting Lord Hoffmann's example of the negligent doctor and the mountaineer's knee. In Lord Hoffmann's version of this 'legal parable',[18] the counterfactual involved the doctor giving correct information about the unfit knee, resulting in the moutaineer's expedition being cancelled.[19] Yip J's version, however, posited that 'if the advice about [the mountaineer's] knee had been right *he would have gone on to climb the mountain and would have had the same accident*'.[20] This allowed the judge to conclude that whereas '[t]he risk that materialised [for the mountaineer] ... had nothing to do with his knee ... [h]ere ... the risk that materialised had everything to do with the continuation of this pregnancy. The autism arose out of this pregnancy which would have been terminated but for the defendant's negligence'.[21] Had Yip J employed Lord Hoffmann's uncorrupted counterfactual, the hypothetical cancellation of the mountaineer's expedition would have been closely analogous to the hypothetical termination of the pregnancy in *Meadows*. Thus, the judge ought to have concluded that, in the mountaineer's case, 'the risk that materialised ... [*had everything to do with the expedition,*] though nothing to do with his knee', just as in the *Meadows* case, 'the risk that materialised had everything to do with the continuation of this pregnancy[, *though nothing to do with the hæmophilia*]'.

Rather than trying to distinguish *SAAMCO*, the judge ought to have recognised its close resemblance. Turning from the fictional mountaineer to the actual facts of *SAAMCO*, the claimant's pregnancy in *Meadows*, which arose as a result of the doctor's negligent advice, and which left the fetus exposed to a range of different risks, was clearly analogous to the mortgage loan transactions in *SAAMCO*, each of which had been prompted by a negligent valuation, and left the lender exposed to risks arising from several sources (i.e. from overvaluation of the security, movements in the property market, and the borrower's default).

A further error on the judge's part was to seek to distinguish *SAAMCO* on the basis of 'the crucial factor' that the 'disabled child resulted from a pregnancy afflicted by the very condition about which the doctor was consulted' (viz hæmophilia), and not by autism alone.[22] In *SAAMCO*, the fact that each lender's loss resulted from a loan transaction 'afflicted' by inadequate security (the 'very condition' about which each valuer had been consulted), did not render each valuer liable for all losses arising from the loan. Only the losses attributable to each negligent overvaluation fell within the scope of the valuer's liability.

The judge accepted that *Meadows* was an 'information' case: 'the focus of the defendant's duty, or the purpose of the service ..., was to provide the claimant with the necessary information so as to allow her to terminate any pregnancy afflicted by hæmophilia'.[23] Applying the *SAAMCO* 'information'/'advice' taxonomy, the

[18] *Hughes-Holland*, [1] (Lord Sumption)
[19] *SAAMCO*, 213C
[20] *Meadows*, [55] (emphasis added)
[21] *Meadows*, [55]
[22] *Meadows*, [69]
[23] *Meadows*, [57]

defendant's duty ought to have been limited accordingly. This the judge rejected.[24] In doing so, she sought[25] to draw analogies with *Groom v Selby*[26] and *Parkinson v St James Seacroft University Hospital NHS Trust*.[27] Neither of these authorities were apt to assist. *Groom* involved a negligent failure by a doctor to detect and inform the claimant of her pregnancy, upon being consulted at an early stage. While *Groom* was also an 'information' case, in the circumstances the doctor's duty extended to 'the purpose of ensuring that if the claimant was indeed pregnant again she should be informed of this fact, so as to enable her to take appropriate steps to prevent the birth of another child if she wished'.[28] The scope of the doctor's liability thus extended widely to the consequences of negligently failing to inform the claimant that she was pregnant with *any* child. Within that scope, the costs associated with raising a disabled child could be recovered.[29] The scope of the doctor's liability was thus not a central issue in *Groom*. It was central in *Meadows*, where the doctor had undertaken to inform the claimant only about her risks of bearing a child afflicted by hæmophilia. As to *Parkinson*, which involved a negligently-performed sterilisation procedure: it was either wholly distinguishable, as not involving 'information' or 'advice' at all, or it was akin to an 'advice' case, such that the scope of the doctor's liability encompassed all foreseeable consequences of the claimant becoming pregnant.

Another erroneous strand of reasoning in *Meadows* began with the perceived similarities between that case and *Chester v Afshar*.[30] Thus, in the probable counterfactual in *Meadows*, if the doctor had not been negligent the claimant would have terminated her first pregnancy and then, in the future, would have run the risk of having an autistic child again, by becoming pregnant again.[31] This was, indeed, analogous to *Chester*. It could also be said, as in *Chester*, that on a balance of probabilities 'but-for' causation was established, because the probability of any child being born autistic was very low.[32] The judge wrongly concluded, however, that she was justified in not applying *SAAMCO* because the case before her was closer to *Chester*.[33] While there are difficult aspects to the reasoning of the majority in *Chester*,[34] one aspect is tolerably clear: it is fundamentally concerned with the first question distinguished in *SAAMCO* (the assessment of the loss caused by a breach), whereas *SAAMCO* itself was primarily concerned with the second question (the scope of the defendant's liability for any such loss). Accordingly, there ought to have been no choice to be made between *SAAMCO* and *Chester*.

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[24] *Meadows*, [58], Yip J commenting that she found the distinction between 'information' and 'advice' cases 'unattractive, arbitrary and unfair'.
[25] *Meadows*, [62], [63], [71]
[26] [2001] EWCA Civ 1522; [2002] PIQR P18
[27] [2001] EWCA Civ 530; [2002] QB 266
[28] *Groom*, [23] (Brooke LJ)
[29] *McFarlane v Tayside Health Board* [2000] AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309
[30] [2004] UKHL 41; [2005] 1 AC 134
[31] *Meadows*, [41], [54]
[32] *Meadows*, [54]
[33] *Meadows*, [55]
[34] See e.g.: Tamsyn Clark and Donal Nolan, 'A Critique of *Chester v Afshar*' (2014) 32 OJLS 659, 375–384; Craig Purshouse, 'Causation, coincidences and *Chester v Afshar*' (2017) 3 PN 220–224; Jeffrey Thomson, '*SAAMCO* revisited' [2017] 76(3) CLJ 476, 479–480.

Tantalisingly, the facts of *Meadows* seemed apt to raise *Chester*'s causation question, and as well as *SAAMCO*'s scope-of-liability question . Had issues of causation not generally been conceded,[35] then given the aforementioned similarities between *Meadows* and *Chester*, the claimant may have had difficulty in establishing causation at all. A first potential difficulty was that *Meadows* did not involve a failure to warn a patient about the risks of medical treatment, the class of cases to which the approach to causation in *Chester* may now be restricted.[36] A second, more fundamental, difficulty was raised by the judge herself. Unlike *Chester*, it was not the case in *Meadows* that the 'misfortune which befell the claimant [viz autism] was the very misfortune which was the focus of the [defendant's] duty to warn [viz hæmophilia]'.[37] This missing element had been, the judge admitted, a 'key part of the rationale' for finding that causation was established in *Chester*. [38]

This brings us neatly back to the issue of the scope of the defendant's liability, which, for reasons stated, was the focus of the argument in *Meadows* in any event. The judge ought to have applied *SAAMCO* and dismissed the claimant's claim for additional costs associated with her son's autism as falling outwith the scope of the defendant's duty.

A final 'error' in the judgment in *Meadows*, identifiable with hindsight, was to consider 'the extent to which it would be fair, just and reasonable to hold the defendant liable for the costs related to [the child's] autism'.[39] The parties were agreed that the case was not one which required any incremental development of existing categories of negligence liability: rather, 'each side said the answer lay in applying established principles to the particular facts'.[40] Regarding the existence of a duty of care, the relevant principles had already been laid down in *McFarlane*, *Parkinson*, *Groom*, and *Rees*. Moreover if, properly conceived, the scope-of-liability enquiry is related to the more general enquiry as to the existence of a duty of care,[41] then its principles were established by cases like *SAAMCO* and *Hughes-Holland*. In such circumstances, as is now clear from *Robinson v Chief Constable of West Yorkshire Police*,[42] it was unnecessary and inappropriate to reconsider issues of fairness, justice and reasonableness: the balancing of such issues already 'form[ed] part of the basis on which the law has arrived at the relevant principles', and those principles should simply have been applied.[43]

Standing back, it would be understandable if some reluctance were felt to applying the scope-of-liability reasoning developed in cases of 'business' financial losses, like *SAAMCO*, to failure-to-warn claims in the clinical field which, while also concerned with economic loss, seem akin to claims for losses consequential upon personal

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[35] *Meadows*, [22]–[23]
[36] See *White v Paul Davidson & Taylor (A Firm)* [2004] EWCA Civ 1511; [2005] PNLR 15, [40]–[42] (Arden LJ)
[37] *Meadows*, [57]
[38] *Meadows*, [57]: and see *Chester*, [51]–[59], [62] (Lord Hope), [91]–[94], [101] (Lord Walker).
[39] *Meadows*, [23], [66]–[68].
[40] *Meadows*, [22]
[41] See *Rees*, [84] (Lord Hutton), [106] (Lord Millett). But they are not identical enquiries; cf. *SAAMCO*, 212C (Lord Hoffmann): 'In the present case, there is no dispute that the duty of care was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed'.
[42] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4
[43] *Robinson*, [26]–[27], [29] (Lord Reed)

injury.[44] Not to limit the scope of a doctor-defendant's liability in appropriate cases, however, would be contrary to general principle,[45] a source of incoherence in the law and of potentially serious injustice.

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[44] E.g. *Groom*, [31] (Hale LJ)
[45] *SAAMCO*, 231C–D (Lord Hoffmann)