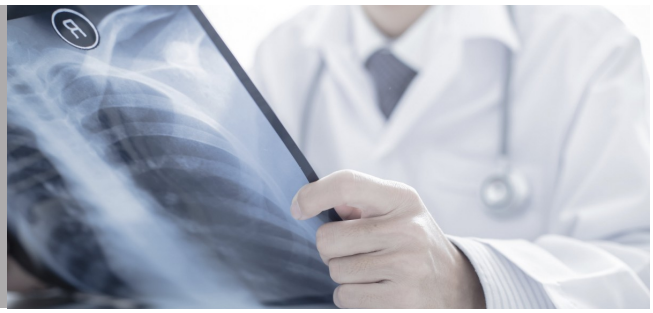
Clinical Negligence



Khan v Meadows: scope of duty and damages for wrongful birth claims

Posted on 29 June, 2021 by | Stephen Cottrell | John Platts-Mills

"In this blog, Stephen Cottrell and John Platts-Mills consider the recent Supreme Court judgment of Khan v Meadows [2021] UKSC 21 in which the SC explained the key role performed by the 'scope of duty' test in the law of negligence generally. Khan v Meadows is a clinical negligence case involving the application of the 'scope of duty' test to careless advice in the context of a wrongful birth case. It serves to emphasise the importance of checking whether the damages claimed really are within the 'scope of duty', it not being enough that, but for the negligence, the damage would have been avoided. Lawyers will need to consider carefully the purpose of the advice given and can use the so-called SAAMCO counterfactual test as a cross-check. For what is meant by the 'SAAMCO counterfactual test' and for further careful analysis of this important case, please read on!" Rob Weir QC

A 7-Judge panel of the Supreme Court has produced a judgment (from 5 SCJs, with the others concurring for slightly different reasons) which sets out a new six-stage test applicable to breach of duty, causation and loss in all negligence cases.

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)

That aspect of the judgment will undoubtedly attract much comment and criticism in academic circles, but for clinical negligence practitioners, the big question is, where does this leave damages for wrongful birth cases?

It seems clear that a significant distinction is now to be drawn between cases of negligently performed treatment (not uncommonly surgical intervention) and cases where the negligence consists of wrong advice or information. On the face of it, a woman who has a negligently performed sterilisation procedure which leads to her having a child with a disability, such as autism, might be entitled to a higher measure of damages than a woman who is negligently advised that her

child will not have a specific disability, such as haemophilia, and in reliance on that advice gives birth to a child with both haemophilia and autism. In advice cases, everything will now depend on the scope of the duty assumed by the advice-giver.

The facts of Ms Meadows's claim

The claimant (Ms Meadows) became aware that a close relative had given birth to a child with haemophilia. She decided to visit her GP to seek advice as to whether she carried the haemophilia gene. Her GP wrongly arranged blood tests that could show only whether the patient has haemophilia, not whether they carry the haemophilia gene. When she received her results, she was wrongly led to believe that she did not have the haemophilia gene.

When Ms Meadows became pregnant several years later, she therefore did not undergo ante-natal foetal testing for haemophilia and her son was born with haemophilia. Yipp J at first instance found that had the claimant been aware that she was a carrier of the haemophilia gene she would have had foetal testing which would have detected the condition in her unborn child, and the pregnancy would have been terminated.

From a clinical perspective, it must be held in mind that not every child conceived by the claimant would have had haemophilia. The claimant's intention in being screened for the haemophilia gene was not to avoid becoming pregnant at all, but rather to enable her to have foetal testing to see whether any given child that she might have would have haemophilia.

The complicating factor – a child born with multiple disabilities

Had the child's only condition been haemophilia, this would have been a legally straightforward case. Breach of duty was admitted and there would have been little dispute that the claimant was entitled to the extra costs of raising a child with haemophilia. The complicating factor was that as well as having haemophilia, the child also suffered with autism. His autism did not flow from his haemophilia – it was an "unrelated disability". The parties agreed that the additional cost of raising a child with autism *and* haemophilia was much more (£9M) than raising a child with haemophilia alone (£1.4M).

The question for the courts was whether the claimant was entitled to recover the full cost related to the haemophilia and the autism, or merely to the haemophilia. The specialist clinical negligence judge (Yip J) decided that the claimant was entitled to the full amount. The Court of Appeal reversed that decision, and the Supreme Court unanimously agreed with the Court of Appeal.

Multiple relevant counterfactuals

Before examining the reasons for the decision of the Supreme Court, it is instructive to look at two competing "counterfactual" scenarios that could be applied to this case:

1. If the claimant had been given appropriate advice, the child would not have been born and so the loss, including those associated with the child's autism, would have been avoided altogether (the "But for Counterfactual").

2. If the advice given to the claimant had been correct (i.e. (i) the claimant did not carry the relevant gene; (ii) the practitioner advised the claimant accordingly; and (iii) the claimant's child was not born with haemophilia), the claimant's child would still have been born with autism (the "SAAMCO Counterfactual").

Personal injury and clinical negligence lawyers are undoubtedly more used to looking at the But-for Counterfactual – in the context of analysing factual or but for causation. In the majority of cases, once but for causation is made out, causation is also established as a matter of law. When one isolates consideration of the but for analysis, one can perhaps see the significance Yipp J appears to have placed in reaching her conclusion on the finding that if the claimant had had another pregnancy, it would carry the same risk of autism but on the balance of probabilities the subsequent pregnancy would not have been affected by autism (as summarised by the Supreme Court at para 18).

The decision provides a reminder that whilst but for causation is usually (see exceptional circumstances such as the

Fairchild enclave) a *necessary* element of negligence it is not always *sufficient* to establish liability, there must also be "legal causation". However, the real focus of the decision is the need to consider the "scope of duty" owed by any professional and its implications for what should be recoverable by way of damages, in cases involving the negligent giving of information or advice. In such circumstances the court may have to consider the, often misunderstood, SAAMCO Counterfactual, in accordance with the dicta of Lord Hoffman in *South Australia Asset Management Corpn v York Montague Ltd* [1997] A.C. 191 (*SAAMCO*).

A reminder of basic principles of damages in wrongful birth cases

The starting point remains that damages for the wrongful birth of a *healthy* child will be extremely limited – only a modest amount will be awarded to compensate the claimant for the loss of the freedom to choose the size of their family in accordance with *McFarlane v Tayside Health Board* [2000] 2 AC 59 and *Rees v Darlington Memorial Hospital NHS Trust* [2003] 2 WLR 1091. The fundamental principle is that the ordinary cost of raising a child is offset by the non-financial blessing of having that child. However, damages may be recovered in wrongful birth cases where the mother suffers injury through the complications of pregnancy/labour (see *McFarlane*, above).

The class of cases with which *Khan* is concerned is those cases where a wrongful birth leads to a child being born with a disability. The courts have recognised (*Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; *Groom v Selby* [2001] EWCA Civ 1522) – and the Supreme Court in *Khan* affirmed – that where a wrongful birth leads to a claimant having a disabled child, the claimant may recover the additional cost of raising the disabled child, i.e. the total cost of raising the disabled child, less the ordinary expenses of raising a healthy child.

These basic principles remain unchanged. The issue in *Khan* was the relatively unusual case where there are two disabilities – one which the parents unsuccessfully sought to avoid (haemophilia), and a second unrelated disability (autism) that afflicts the child who would not otherwise have been born had the parents been properly advised in respect of the first disability.

The Decision in *Khan* as it applies to clinical negligence

The Supreme Court in *Khan* recognised that where the scope of a doctor's duty is to take steps to prevent the claimant having any children at all in the future, and the negligence leads to a wrongful birth, the negligent doctor will be liable for the cost of all disabilities suffered by the child. That is because a doctor who fails to perform a sterilisation knows that the claimant wishes to avoid having any children in the future. The *scope of duty* is therefore to prevent any future pregnancies. It follows that it is within the scope of the doctor's duty to compensate the claimant for the additional cost of any reasonably foreseeable disabilities suffered by the child.

But where a claimant seeks advice in relation to the likelihood of a child being born with a specific disability, with the doctor knowing that the patient wishes to avoid having a child with *that* disability rather than having any children at all, the scope of the doctor's duty is narrower. As the Court of Appeal put it, when analysing the scope of the duty of care, the defendant assumed the risks associated with the child being born with haemophilia, but the claimant assumed the other ordinary risks associated with pregnancy, including the risk of having a child with autism.

The ratio of the majority of the Supreme Court is found at [63] – [65]:

> 63. *In many, and probably a large majority of, cases of clinical negligence 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. Where a surgeon negligently performs an operation and causes both physical injury and consequent economic loss to the patient, both types of loss will normally be within the scope of the defendant's duty of care. In other words, by undertaking the operation on the patient the surgeon takes responsibility for physical harm caused by any lack of skill and care in performing the operation and for consequential economic loss. Similarly, when a general medical practitioner negligently prescribes unsuitable medication, thereby causing injury or failing to prevent the development of an otherwise preventable medical condition, both the injury or condition and the consequential economic loss will generally be within the scope of the defendant's duty. The negligent care of a mother in the final stages of pregnancy can sadly have the result of the birth of a baby with brain damage and the defendant is normally liable to pay compensation for both the injury and the consequential additional cost of caring for the disabled child. In the Parkinson and Groom cases the object of the service undertaken was to prevent the birth of any child as in each case the mother did not want to have any more children. In Parkinson*

the service undertaken was to prevent a pregnancy while in Groom the task which should have been performed was to make sure that the mother was not pregnant notwithstanding her recent sterilisation. In both cases the added economic costs of caring for a disabled child, whatever his or her disability, were within the scope of the defendant's liability because of the nature of the service which the defendant had undertaken. In none of those cases did the SAAMCO counterfactual have a role to play. But it is necessary in every case to consider the nature of the service which the medical practitioner is providing in order to determine what are the risk or risks which the law imposes a duty on the medical practitioner to exercise reasonable care to avoid. That is the scope of duty question."

Having considered the limited role of 'but for' causation at [64], at [65] the majority said:

"…*the scope of duty question depends principally upon the nature of the service which the defendant has undertaken to provide to the claimant. One asks: "what is the risk which the service which the defendant undertook was intended to address?" Where a medical practitioner has not undertaken responsibility for the progression of the pregnancy and has undertaken only to provide information or advice in relation to a particular risk in a pregnancy, the risk of a foreseeable unrelated disability, which could occur in any pregnancy, will not as a general rule be within the scope of the clinician's duty of care*."

Applying that legal approach to the facts of the case, their Lordships at [67] cited with approval the judgment of Nicola Davies LJ in the Court of Appeal and said:

" … *the scope of duty question is answered by addressing the purpose for which Ms Meadows obtained the service of the general medical practitioners. She approached the general practice surgery for a specific purpose. She wished to know if she was a carrier of the haemophilia gene. Mr Havers accepted as accurate Nicola Davies LJ's statement of the purpose of the consultation in para 27(i) of her judgment in the Court of Appeal*

"The purpose of the consultation was 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."

Dr Khan owed her a duty to take reasonable care to give accurate information or advice when advising her whether or not she was a carrier of that gene. In this context it matters not whether one describes her task as the provision of information or of advice. The important point is that the service was concerned with a specific risk, that is the risk of giving birth to a child with haemophilia."

At [68] they continued:

"Thirdly, Dr Khan was in breach of her duty of reasonable care, as she readily admitted. Fourthly, 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 Adejuwon. But that is not relevant to the scope of Dr Khan's duty. In this case, fifthly, the answer to the scope of duty question points to a straightforward answer to the duty nexus question: the law did not impose on Dr Khan any duty in relation to unrelated risks which might arise in any pregnancy. It follows that Dr Khan is liable only for the costs associated with the care of Adejuwon insofar as they are caused by his haemophilia. One can also apply the SAAMCO counterfactual as an analytical tool by asking what the outcome would have been 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. Sixthly, given the purpose for which the service was undertaken by Dr Khan, and there being no questions 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."

It is of note that the court reached its decision on the "duty nexus question" (whether there is 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) without having to rely on the SAAMCO Counterfactual. Rather, the Supreme Court considered that the answer to the "scope of duty" question pointed to a straightforward answer to the "duty nexus question". However, in the Supreme Court's view the SAAMCO Counterfactual analysis could be applied and supported its conclusion. Furthermore, the Supreme Court considered this to probably be the case in the large majority of clinical negligence cases.

It should be held in mind that, *SAAMCO* concerned the way in which a financial institution might make a complex financial decision and the limited role in that process that negligently given advice might play – it might only be one factor in the decision making of a large, sophisticated company. It might be thought inappropriate to apply such an analysis in the context of a patient-doctor relationship, and that was the thrust of the claimant's submission. The Supreme Court rejected the claimant's submission on the ground that the *SAAMCO* approach – or the "scope of duty" approach as they preferred to call it – was of universal application.

The Effect of the Decision in Khan and how to Deal with it in Practice

There seems to be a significant incongruity between wrongful birth cases that flow from negligent treatment and those that flow from negligent advice. A mother whose negligently performed sterilisation leads to the birth of a child with the same disabilities as the child in *Khan* would receive the full measure of damages (£9M) whereas Ms Meadows received only £1.4M. That is potentially troubling.

At first blush, it might be thought that Defendants in clinical negligence cases might rush to categorise negligent treatment cases as negligent advice cases (for example, re-categorising a failed sterilisation as a failure to advise as to the outcome of the surgery and the chances of pregnancy) but we do not believe that this is a legitimate fear. The focus of the Supreme Court was on the substance of the relationship between the patient and practitioner and courts are unlikely to be persuaded by artificial attempts to limit or circumscribe the scope of duty as it appears from all the circumstances of the case.

It will be noted that the case of *McFarlane* concerned negligent advice following a vasectomy. In such a case, where the point of the advice is to avoid any pregnancy, it is likely that damages for all disabilities in the subsequently born child will be recoverable.

The emphasis at paragraph 65 of the judgment on the nature of the service and the comments of their Lordships at [63] on *Parkinson and Groom* tends to suggest that liability for the full measure of damages including the autism losses might attach in circumstances similar to those in *Khan.* Take the example in which a patient had reason to visit an obstetrician or specialist pregnancy advisory service (rather than a GP) and made it clear that in the event of her being the carrier of a genetic condition, such as haemophilia, she would have a sterilisation. The obstetrician/specialist practitioner arranges the wrong test which does not identify whether the patient carries the relevant gene (as in Ms Meadows's case), knowing that she intended to avoid any pregnancy should she carry the gene. On these facts, it is at least arguable that the nature of the service is such that the scope of the practitioner's duty entails liability in respect of the costs of manging all of the child's disabilities, including "unrelated disabilities".

Taking the above example further, could the Defendant argue that the nature of the service – arranging a test to detect

the presence of the haemophilia gene – meant that the defendant had “only undertaken to provide information and advice in relation to a particular risk in pregnancy” so that the defendant did not assume the risk of a foreseeable unrelated disability?

It might seem arbitrary for such a significant difference in damages to turn on such a precise distinction in the facts. But the uncertainties that flow from this judgment illustrate that damages for negligent advice need not always be lower than damages in negligent treatment cases.

It will be essential for practitioners to have in mind the precise scope of the duty that the defendant can be said to have assumed when proofing claimants and closely analysing the contemporaneous records. Precise pleading in relation to the purpose of the consultation and the consequent scope of duty will be crucial.

While *Khan* is a difficult case that might prompt some defendants to argue that the scope of their duty, and so the extent of their liability, is more circumscribed in advice cases than in treatment cases, those arguments will not always have merit. Skilled analysis and investigation of the facts and precise pleading will, in an appropriate case, allow a claimant to recover the full amount.

Stephen Cottrell's practice consists predominantly of high-value Personal Injury litigation, Fatal Accidents and Clinical Negligence claims. He has extensive experience in catastrophic injury work dealing with brain injury, spinal injury, amputation, and complex multi-trauma. Stephen is recognised as a leading personal injury junior by Chambers & Partners and Legal 500.

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