Trinity Term
[2021] UKSC 21
On appeal from: [2019] EWCA Civ 152

JUDGMENT

Khan (Respondent) *v* Meadows (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Black
Lord Kitchin
Lord Sales
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON

18 June 2021

Heard on 5 November 2020

Appellant	*Respondent*
Philip Havers QC Eliot Woolf QC (Instructed by Taylor Rose MW)	Simeon Maskrey QC Neil Davy (Instructed by BLM Solicitors (London))

LORD HODGE AND LORD SALES: (with whom Lord Reed, Lady Black and Lord Kitchin agree)

1. A woman approaches a general medical practice for testing to establish whether she is a carrier of a hereditary disease. Tests which are inappropriate to answer that question are arranged. A general medical practitioner when informing her of the results of those tests negligently fails to advise her that she needs a genetic test to establish whether she is a carrier of the relevant gene. In fact, she is a carrier of the disease. Several years later, she gives birth to a baby boy who sadly not only suffers from the hereditary disease but also has an unrelated disability. Is the medical practitioner liable in negligence for the costs of bringing up the disabled child who has both conditions or only for those costs which are associated with the hereditary disease?

2. The legal issues are whether in the context of a claim for clinical negligence the court should follow the approach to ascertaining the scope of a defendant's duty of care laid down by the House of Lords in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ("*SAAMCO*"), and, if it should, how that approach is to be applied. This is one of two appeals which have been heard by the same panel of seven Justices in order to examine the application of *SAAMCO* in different fields of activity. It is being handed down together with the court's judgment in *Manchester Building Society v Grant Thornton UK LLP*.

Factual background

3. The appellant was alerted to the possibility that she was a carrier of the haemophilia gene, which can give rise to the hereditary disease in which the ability of blood to coagulate is severely reduced, when in January 2006 her nephew was born and subsequently diagnosed as having haemophilia. The appellant wished to avoid having a child with that condition. She therefore consulted a general medical practitioner, Dr Athukorala, in August 2006 with a view to establishing whether she was a carrier of that gene. The blood tests which were arranged were those which establish whether a patient has haemophilia. They could not confirm whether she was a carrier of the haemophilia gene. In order to obtain that information, the appellant should have been referred to a haematologist for genetic testing.

4. On 25 August the appellant saw Dr Hafshah Khan, who was another general practitioner in the same practice, to obtain and discuss the results of the blood tests. Dr Khan told her that the results were normal. As a result of the advice which she

received in this and the earlier consultation the appellant was led to believe that any child she might have would not have haemophilia.

5. In December 2010 the appellant 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.

6. 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.

7. Adejuwon's haemophilia is severe. He has been unresponsive to conventional factor VII replacement therapy. He has suffered repeated bleeding in his joints. He has had to endure unpleasant treatment and must be watched constantly as minor injury will lead to further bleeding.

8. In December 2015 Adejuwon was diagnosed as also suffering from autism. This is an unrelated condition; his haemophilia did not cause his autism or make it more likely that he would have autism.

9. Adejuwon's autism has made the management of his treatment for haemophilia more complicated. He does not understand the benefit of the treatment he requires and so his distress is heightened. He will not report to his parents when he has a bleed. He is likely to be unable to learn and retain information, to administer his own medication, or to manage his own treatment plan. New therapies for treatment of haemophilia may mean that his prognosis in respect of haemophilia is significantly improved. However, in itself, his autism is likely to prevent him living independently or being in paid employment in the future.

10. In view of these factual findings, which we have taken from Yip J's admirably succinct summary, it is unsurprising that the sum needed to compensate the appellant if she were entitled to claim for the additional costs of bringing up her son that are associated with both conditions was agreed by the parties at a figure which was over six times the sum to be awarded for the additional costs associated with his haemophilia alone.

11. Dr Khan admitted that she was liable to compensate the appellant for the additional costs associated with Adejuwon's haemophilia but denied responsibility in relation to the additional costs associated with his autism.

12. In the statement of facts and issues the parties agreed that it was "reasonably foreseeable that as a consequence of [Dr Khan's] breach of duty, the appellant could give birth to a child that suffered from a condition such as autism as well as haemophilia".

The parties' contentions

13. The appellant contends that she is entitled to damages for the continuation of the pregnancy and its consequences, including all the costs related to Adejuwon's disabilities arising out of the pregnancy. The respondent contends that her liability should be limited to the costs associated with Adejuwon's haemophilia and that the costs associated with his autism fall outside the scope of the duty she owed to the appellant.

The judgments of Yip J and the Court of Appeal

14. In her judgment ([2017] EWHC 2990 (QB); [2018] 4 WLR 8), Yip J described the legal issue which she had to address in these terms (para 2):

> "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?"

She answered that question in the affirmative and awarded the appellant £9m inclusive of interest. Much of the debate before Yip J concerned two judgments of the Court of Appeal: *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266 ("*Parkinson*") and *Groom v Selby* [2001] EWCA Civ 1522; [2002] Lloyd's Rep Med 1 ("*Groom*"). In the first case, Mrs Parkinson became pregnant following a failed sterilisation. Her son was born with severe disabilities which were not connected to the sterilisation. In the second case, Mrs Groom underwent a sterilisation operation at a time when unknown to anyone she was about six days pregnant. Shortly afterwards, she consulted her general practitioner who failed to arrange a pregnancy test or examine her to see if she was pregnant. By the time she discovered her pregnancy, she did not wish to have a termination, but she would have terminated the pregnancy if informed sooner. She later gave birth to a child with salmonella meningitis resulting in severe

disability. In each case, there was no direct connection between the negligence of the medical practitioner and the disability. In the first case the source of the child's disability was genetic and in the second the disability arose from exposure to a bacterium during the process of her birth. In each case, the mother had not wanted to have any further children and she sought the services of the defendants for that purpose.

15. In each case, in which Brookes LJ and Hale LJ gave the substantive judgments, the Court of Appeal held, in accordance with the judgments of the House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59, which concerned negligent medical advice after a vasectomy, that a parent could not be compensated for the basic maintenance of a healthy, much loved child. But the court held in each case that that ruling did not extend to the birth of a child with significant disabilities and that the claimant could recover compensation for the extra costs of providing for the child's special needs and care relating to the child's disability. In each case, the court held, among other things, that the birth of the child with such disabilities was a foreseeable consequence of the medical practitioner's negligence, that the medical practitioner should be deemed to have assumed responsibility for such an outcome and that the imposition of such liability was not unjust, unfair or disproportionate.

16. In her judgment Yip J noted (para 38) that the Court of Appeal had had regard to *SAAMCO* in *Parkinson*, in which Brookes LJ stated (para 18):

> "it may be necessary on some occasions for a court to ask itself for what purpose a service was rendered, because that inquiry may stake out the limits of the duty of care owed by the person performing the service."

She observed (para 40) that the House of Lords had considered the application of *SAAMCO* in a different context in a clinical negligence claim in *Chester v Ashfar* [2005] 1 AC 134. She also referred to the discussion of *SAAMCO* in the leading judgment of Lord Sumption in this court in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599 ("*Hughes-Holland*").

17. Yip J stated, correctly, in para 26 that the purpose of the service offered by the defendant in this case "was not to prevent the claimant from having any child but rather, ultimately, to prevent her having a child with haemophilia". But she also observed:

> "[The claimant] wished to establish whether she was a carrier. If the service had been performed properly, she would have discovered that she was. She would then have taken steps to ensure that she did not continue with a pregnancy that was going to lead to the birth of a child with haemophilia. In that way, the birth of Adejuwon would have been avoided. Just as in *Groom*, it can be said that the defendant's breach of duty caused the claimant's pregnancy to continue when it would otherwise have been terminated."

18. In holding the defendant liable for the costs associated with both Adejuwon's haemophilia and his autism, she observed that as a matter of "but for" causation Adejuwon would not have been born but for the defendant's negligence. She recognised that if the claimant had had another pregnancy, it would carry the same risk of autism but held that on the balance of probabilities the subsequent pregnancy would not have been affected by autism. The autism arose out of this pregnancy which would have been terminated but for the defendant's negligence.

19. In para 59 she identified four determinative issues which she derived from *Parkinson* and *Groom*:

> "(i) Whether the autism was a consequence falling within the responsibility the defendant had assumed;
>
> (ii) The purpose of the service provided by the defendant and the scope of the duty that arose from that;
>
> (iii) Whether it was fair, just and reasonable to impose liability for the costs associated with Adejuwon's autism;
>
> (iv) Principles of distributive justice."

In addressing those questions and reaching the conclusion that the defendant was liable, Yip J relied principally on two considerations. First, she held that the focus of the defendant's duty and the claimant's purpose in seeking the service was to provide the claimant with the necessary information to allow her to terminate any pregnancy afflicted by haemophilia (para 62). Secondly, the defendant assumed a responsibility which, if properly fulfilled, would have avoided the birth of Adejuwon (para 63). She concluded that it was not fair, just and reasonable to distinguish between the mother who wanted to terminate this pregnancy and the mother who would have wanted to terminate any pregnancy; nor did any principle

of distributive justice require such a distinction to be made (para 68). Yip J therefore sought to apply the approach of the Court of Appeal in *Parkinson* and *Groom* and awarded the claimant £9m.

20. The Court of Appeal (Ryder LJ, Senior President of Tribunals, Hickinbottom and Nicola Davies LJJ) [2019] EWCA Civ 152; [2019] 4 WLR 26 allowed Dr Khan's appeal and reduced the award of damages to £1.4m. The leading judgment was delivered by Nicola Davies LJ. The court distinguished the facts of this case from *Parkinson* and *Groom*: the focus of the consultation, advice and appropriate testing was directed to the issue of whether Ms Meadows was a carrier of the haemophilia gene and not the wider issue of whether she should become pregnant. The scope of duty test which Lord Hoffmann identified in *SAAMCO* was determinative of the issues which the court had to address (para 27). In short, Dr Khan was not liable for the costs associated with Adejuwon's autism because that type of loss was not within the scope of the risks which she had undertaken to protect Ms Meadows against and therefore was not within the scope of her duty of care. The purpose of the consultation was to put Ms Meadows in a position to make an informed decision in relation to a child which she conceived which was discovered to carry the haemophilia gene. Secondly, the doctor was liable for the risk of the mother giving birth to a child with haemophilia because there had been no foetal testing and consequently no termination of the pregnancy. But the mother would take the risks of all other potential difficulties of the pregnancy and birth, both to herself and to her child. The third factor, applying the *SAAMCO* counterfactual (discussed below), which was misstated in para 27(iii) but must have been what Nicola Davies LJ intended to say, is that if the information which the defendant imparted had been correct, ie that Ms Meadows did not carry the haemophilia gene, the result would have been that the child would have been born with autism. Referring to Lord Reed's judgment in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, para 27, Nicola Davies LJ stated that there was no need separately to consider whether the court's decision was fair, just and reasonable in this case, which was not a novel case but involved the application of established legal principles.

Discussion

21. Mr Philip Havers QC for Ms Meadows challenged the judgment of the Court of Appeal and sought to uphold the reasoning of Yip J. He submitted that "the S*AAMCO* approach", which was relevant to commercial transactions involving pure economic loss, was not suited to cases of clinical negligence in which there was an imbalance of knowledge and power between the clinician and the patient. He argued that Ms Meadows' claim should not be characterised as pure economic loss but as a mixed claim which combined her loss of autonomy through the continuation of the pregnancy and psychiatric damage incidental to her son's disability as well as her claim for the cost of caring for Adejuwon. It was also arbitrary and unfair to draw a

distinction between a parent who did not want any pregnancy (as in *Parkinson* and *Groom*) and a parent who did not want a particular pregnancy. Liability should be imposed because (a) Adejuwon's birth would not have happened but for the defendant's mistake as Ms Meadows would have terminated the pregnancy on learning that her child carried the haemophilia gene and (b) (as agreed by the parties) the possibility that a baby might be born with autism was foreseeable. Adejuwon's autism was no less foreseeable than the child's autism in *Parkinson* or the child's bacterial meningitis in *Groom*. That sufficed to impose liability as the law took a broad view of the kind of damage that was foreseeable in cases involving personal damage: see for example *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 (HL). Dr Khan's failure to provide Ms Meadows with the necessary knowledge to enable her to make an informed decision to terminate a future pregnancy affected by the haemophilia gene was the feature which made her conduct wrongful and Ms Meadows' whole loss flowed from that feature. There was no intervening cause as Adejuwon's autism had an ante-natal cause. The court should bring cases of wrongful birth into line with cases in which clinical negligence causes direct physical injury and in which the *SAAMCO* principle performs no limiting role. Cases of clinical negligence did not give rise to the risk of indeterminate liability which can arise in commercial cases involving pure economic loss.

22. If, contrary to his principal submission, *SAAMCO* were relevant to this case, it did not restrict Ms Meadows' claim because *Parkinson* and *Groom* had established that the kind of loss which was to be compensated in cases of wrongful birth and wrongful conception extended to disabilities arising from all the normal incidents of conception, intra-uterine development and birth. Such disabilities were to be distinguished from significant movements in the property market or the occurrence of an avalanche in Lord Hoffmann's example of the mountaineer's knee in *SAAMCO*. The *SAAMCO* counterfactual had no role to play in the circumstances of this case in which the loss was directly related to the outcome of the birth when it had been Dr Khan's duty to provide Ms Meadows with information to inform her decision whether to terminate a particular pregnancy affected by the haemophilia gene.

23. These submissions raise questions of (i) the role which factual "but for" causation, foreseeability, and remoteness of damage perform in the analysis of a claim of clinical negligence and (ii) how the question of the scope of a defendant's duty fits into this analysis. The submissions also question whether the *SAAMCO* judgment has any relevance in such claims.

24. It is clear 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. Textbooks on negligence often identify four components or ingredients in the tort of negligence, namely, (i) the duty of care, (ii) its breach, (iii) causation of damage and (iv) the damage. For example, in *Clerk and Lindsell*

on Torts, 23rd ed (2020), para 7-04, the authors list these ingredients as (1) the existence of a duty of care situation, (2) the breach of that duty by the defendant, (3) a causal connection between the defendant's careless conduct and the damage and (4) the existence of a particular kind of damage to the particular claimant which is not so unforeseeable as to be too remote. The authors state: "There is no magic in the order as set out, nor should it be supposed that courts proceed from points (1) to (4) in sequence". The authors of *Winfield and Jolowicz on Tort*, 20th ed (2020) suggest that the tort of negligence is constituted by those four elements which they place in order as (i) the duty of care, (ii) its breach, (iii) damage and (iv) causation (para 5-002). They point out that a given fact pattern can put several elements in issue simultaneously and that the elements are interlinked. They suggest that it is conventional for the courts to address the elements of the tort in sequence with the question of duty being a threshold question (para 5-007):

> "Taking the elements of the tort in this order can help judges to structure their decisions and to ensure that elements are not overlooked. Furthermore, the order in which the elements of the tort are considered is important because they form an integrated whole, in which one element can be defined and analysed only in terms of the other elements. For example, as questions of causation and remoteness concern the link between the breach of duty and the damage, it is important to look at fault and damage before looking at causation."

In relation to the third and fourth elements of this analysis (damage and causation) the authors suggest (para 7-001) that there are four distinct concepts of actionable damage, causation in fact, causation in law, and remoteness.

25. The authors of *Charlesworth and Percy on Negligence*, 14th ed (2018), (para 1.34) combine the third and fourth elements of the analysis in the concept of "resulting damage", namely "damage which is both causally connected with the breach and recognised by the law, has been suffered by the complainant". The authors cite Lord Pearson in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1052:

> "The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz, the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole."

26. In their discussion of the role of the scope of duty principle in the context of claims for pure economic loss the authors of *Clerk and Lindsell* state (para 2-187):

> "What the defendant can reasonably contemplate as a consequence of his breach must depend upon the scope or purpose of his duty. If the risk of the particular kind of damage fell outside the purpose of the defendant's duty, then however foreseeable that risk in general terms, it would not fall within the reasonable contemplation of the defendant."

This appeal therefore raises the questions: How does the scope of duty principle fit into the conventional analyses of negligence, and has it any application outside claims for pure economic loss?

27. Mr Simeon Maskrey QC in seeking to uphold the judgment of the Court of Appeal began his able submission by setting the scope of duty question, which the House of Lords' decision in *SAAMCO* has highlighted, in the context of the series of questions which one may ask when analysing whether a claimant is entitled to recover damages for loss caused by the tort of negligence. It was a helpful exercise. We will reformulate and expand upon his questions and carry out a similar exercise before explaining the various stages of, and the role of the scope of duty question in, that analysis.

28. In our view, and as explained in more detail below, a helpful model for analysing the place of the scope of duty principle in the tort of negligence, and the role of the other ingredients upon which Mr Havers has relied in this context, consists of asking six questions in sequence. It is not an exclusive or comprehensive analysis, but it may bring some clarity to the role of the scope of duty principle which *SAAMCO* highlighted. Those questions are:

(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.

29. It is quite possible to consider these matters in a different order and to address more than one question at the same time; for example, in many cases the second and the fifth questions can readily be analysed together. We address the relationship between the second and fifth questions in the context of a claim to which the reasoning in *SAAMCO* applies in paras 38 and 48-52 below.

30. But this analysis serves to demonstrate that the answers to the questions of factual causation and foreseeability, on which Mr Havers relies, cannot circumvent the questions which must be asked in relation to the scope of the defendant's duty.

31. The first question arises because it is trite that a claim in tort is incomplete without proof of damage. Lord Reid stated in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, pp 771-772:

> "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible."

In a Scottish appeal, *Watson v Fram Reinforced Concrete Co (Scotland) Ltd* 1960 SC (HL) 92, 109, Lord Reid similarly stated:

> "The ground of any action based on negligence is the concurrence of breach of duty and damage …"

One may begin, therefore, by considering the damage, which is the subject matter of the claim, to ascertain whether it is of a nature that is actionable.

32. More recently, in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] AC 281, para 7 ("*Rothwell*"), Lord Hoffmann made the same point about the concurrence of breach of duty and loss:

> "a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

Thus, in *Rothwell* the House of Lords held that claimants who had pleural plaques in their lungs which were symptomless and did not increase their susceptibility to other asbestos-related diseases or shorten their life expectancy, did not suffer damage that could give rise to a cause of action. The House of Lords has similarly held that neither the risk of future injury nor anxiety at the prospect of future injury constitutes actionable damage: *Rothwell* para 12; *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176; *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65. In this appeal the actionability question is answered in the claimant's favour as her claim is for the bodily consequences of the pregnancy and the economic costs related to the care of her disabled son.

33. The second question is the scope of duty question. Lawyers have focussed on the scope of duty question since the decision of the House of Lords in *SAAMCO* but the question was not conjured up in that case and arises in a wider context. As Lord Sumption pointed out in *Hughes-Holland*, paras 21-24, it 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. Thus, in *Roe v Minister of Health* [1954] 2 QB 66 Denning LJ said that the questions of duty, causation and remoteness run continually into one another and continued (p 85):

> "It seems to me that they are simply three different ways of looking at one and the same problem. Starting with the

> proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it: but otherwise not."

This emphasis on the consequence of the act or omission as an element in analysing the scope of duty owed by a defendant in tort informed the Privy Council's approach in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, in which Viscount Simonds, delivering the advice of the Board, stated (p 425):

> "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air … It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other."

Similarly, in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 487, Brennan J stated:

> "It is impermissible to postulate a duty of care to avoid one kind of damage - say, personal injury - and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another and independent kind - say, economic loss. … The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

The law has regard to the actual nature of the damage which the claimant has suffered when it determines the scope of the defendant's duty. For example, where the damage which is the subject of a claim is pure economic loss which has been caused by a careless representation, the law has placed limits on the scope of the defendant's duty by requiring that the defendant could reasonably have foreseen that

the claimant would reasonably rely on the representation: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("Caparo"); *NRAM Ltd (formerly NRAM plc) v Steel* [2018] UKSC 13; [2018] 1 WLR 1190; 2018 SC (UKSC) 141. Similarly, limits have been imposed on the scope of a defendant's duty to avoid causing psychiatric injury to secondary victims in an accident or disaster: *McLoughlin v O'Brian* [1983] 1 AC 410; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

34. In *Caparo*, the House of Lords held that a company's auditor did not owe a duty of care to non-shareholders or shareholders, who made investment decisions in reliance on the statutory report, and thereby did not incur liability to them for careless statements in his report. This was because the purpose of the report was limited to enabling shareholders to make informed decisions about the exercise of their rights under the company's constitution. Lord Bridge of Harwich cited Brennan J in *Sutherland Shire Council v Heyman* (above) and said (p 627):

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

In the same case Lord Roskill stated (p 629B):

> "before the existence and scope of any liability can be determined, it is necessary first to determine for what purposes and in what circumstances the information in question is to be given."

Lord Oliver of Aylmerton said (p 651):

> "It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained."

Lord Oliver continued (p 654):

> "To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House."

35. As Lord Sumption has recently explained in *Hughes-Holland*, this 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: *SAAMCO*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company) (No 2)* [1997] 1 WLR 1627 ("*Nykredit*") and *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 ("*Platform Home Loans*"). The principle was applied by this court in relation to negligent misstatements by a solicitor in *Hughes-Holland*, and it was recognised by the Court of Appeal in the context of a medical negligence claim in *Parkinson* (above).

36. What is often called "the *SAAMCO* principle" or "the scope of duty principle" is that "a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care": *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] UKHL 51; [2001] 2 All ER (Comm) 929; [2002] 1 Lloyd's Rep 157, para 11 per Lord Lloyd of Berwick. In *Platform Home Loans* Lord Hobhouse made the same point, stating (p 209B), "it is the scope of the tort which determines the extent of the remedy to which the injured party is entitled". Lord Hobhouse went on to point out (p 209G) that Lord Hoffmann's development of this reasoning in *SAAMCO* was that "instead of applying it to kinds or categories of damage," he "applied it to the *quantification* of damage" (emphasis in the original). In our view, there is merit in referring to this principle as "the scope of duty principle" rather than the *SAAMCO* principle because it predates *SAAMCO* and applies also in circumstances in which it is not necessary to consider separately the duty nexus question by reference to the counterfactual methodology developed in *SAAMCO*. The "scope of duty principle" as so defined is different from what we have called the *SAAMCO* counterfactual, which, as we discuss in paras 53-54 below, is an analytical tool which is useful in some but not all circumstances in ascertaining the extent of a defendant's liability which flows from the breach of a duty of a defined scope.

37. The scope of duty principle may also be 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. One example is when the court is considering whether a defendant owed a duty to prevent injury or damage to the person or property of a claimant which has been caused by a third party. See, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241; 1987 SC (HL) 37, *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874; 2009 SC (HL)

21, and *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732.

38. In our view it is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation. It asks: "what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?" The question is appropriately asked and answered at this stage, if it can be, in relation for example to the circumstances in which loss has been incurred, as in *Caparo* where the auditor owed no duty to the would-be investor, or in relation to claims resulting from omissions as in the cases mentioned above. The matter is less straightforward where a scope of duty question arises in relation to the quantification of damages, as in *SAAMCO*, where there is a question whether part or all of the loss claimed was the consequence of the risk against which the defendant had to take care. In such circumstances, having identified the risks against which the defendant has undertaken to protect the claimant, the further question at stage 5 of our suggested sequence (the duty nexus question) addresses how the defendant's scope of duty determines the extent of a defendant's liability.

39. In *SAAMCO* Lord Hoffmann said that it was wrong to analyse the scope of duty question as one of the measure of damages by asking how to put the plaintiff in the position he would have been if he had not been injured. He stated (p 211):

> "I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."

Lord Hoffmann expanded on this reasoning in *Nykredit* (p 1638):

> "Your Lordships [in *SAAMCO*] identified the duty [of the valuer] as being in respect of any loss which the lender might suffer by reason of the security which had been valued being worth less than the sum which the valuer had advised. The principle approved by the House was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if

> he had not lent the money at all. … [I]n order to establish a cause of action in negligence he must show that his loss is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct.
>
> It is important to emphasise that this is a consequence of the limited way in which the House defined the valuer's duty of care and has nothing to do with questions of causation or any limit or 'cap' imposed upon damages which would otherwise be recoverable. … the valuer is responsible only for the consequences of the lender having too little security."

It was therefore of no consequence to the extent of the valuer's liability that the lender would not have entered into the transaction but for the negligent valuation or that a fall in the property market was reasonably foreseeable.

40. Lord Sumption summarised the position in *Hughes-Holland* (paras 35-36) stating that the two fundamental features in the reasoning in *SAAMCO* were: (i) 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 no legal responsibility for his decision; and (ii) the scope of duty principle has nothing to do with the causation of loss as that expression is usually understood in the law.

41. In his discussion of the first of those fundamental features in *SAAMCO*, Lord Hoffmann drew a distinction between "advice" and "information" but, as Lord Sumption demonstrated in *Hughes-Holland* (paras 39-44), they are not distinct or mutually exclusive categories and Lord Hoffmann's reasoning did not suggest that they were. There is in reality a spectrum and it is a matter of analysis of the particular circumstances of a case. In addressing the scope of duty question in the context of the provision of advice or information, the court seeks to identify the purpose for which that advice or information was given. Where the claimant has asked for advice about a risk or about a proposed activity which involved that risk, the court asks: "what was the risk which the advice or information was intended and was reasonably understood to address?" In addressing the scope of duty in relation to a transaction a distinction has been drawn between cases at either end of the spectrum. At one end is the case in which a professional adviser has undertaken to consider all of the material matters which should be taken into account in deciding whether to enter into the transaction, thereby guiding the whole decision-making process. At the other end is the case in which the professional adviser contributes only a very small part of the material on which the client will rely in making its decision whether to enter into the transaction. 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. Where the professional adviser is not guiding the whole decision-making process, the duty nexus question (question 5 discussed below) becomes of central importance 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. As Lord Sumption says (para 44): "[b]etween these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated."

42. The third question (the breach question) logically follows the first two questions. Having established as a fact what the defendant had done or omitted to do, the court asks if the defendant has failed to show reasonable care in relation to a risk of harm which was within the scope of his or her duty as determined by the answer to the second question.

43. Where the answer to the scope of duty question is that the defendant owes a duty of care in relation to some at least of the damage which is the subject matter of the claim, the breach question may be addressed by asking whether and how the defendant was negligent. That was the approach of Lord Hoffmann in *SAAMCO* and of Lord Sumption in *Hughes-Holland*.

44. The fourth question (the factual causation question) addresses the factual cause of the harm of which the claimant complains. Different legal rules have differing causal requirements, as Lord Hoffmann observed in his essay on causation in Richard Goldberg (ed), *Perspectives on Causation* (2011), p 9. In the case of the tort of negligence it is a generally accepted analysis to separate factual causation from the more restrictive requirements of legal causation which we address in the sixth question. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 the House of Lords was dealing with a claim for damages based on the tort of conversion arising out of the Iraqi invasion of Kuwait in which the defendants took possession of aircraft belonging to the claimants, four of which were destroyed on the ground by American bombing in Mosul in the first Gulf War and six of which had to be recovered from Iran at considerable cost. Lord Nicholls of Birkenhead commenced his discussion of how one identifies the true loss of a claimant in cases of tort in words which are apposite to the tort of negligence (para 69):

> "I take as my starting point the commonly accepted approach that the extent of a defendant's liability for the plaintiff's loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The

> first of these inquiries, widely undertaken as a simple 'but for' test, is predominantly a factual inquiry."

45. *McGregor on Damages*, 21st ed (2020), para 8-003 states that the "but for" test is a threshold test and not a sufficient condition of the imposition of liability, and defines it in this way:

> "The defendant's wrongful conduct is a cause of the claimant's harm if such harm would not have occurred without it; 'but for' it."

When Lord Nicholls and Mr McGregor spoke of "wrongful conduct" in those passages, they were not addressing the circumstance identified in, among other cases, *SAAMCO* in which the defendant's conduct might be wrongful in relation to certain elements of harm but not in relation to others. Where the defendant's conduct can be properly described as negligent because it gave rise to some actionable damage, as for example in the valuers' negligence cases, the factual causation question may properly be framed as being whether the loss for which the claimant seeks damages is the consequence of the defendant's negligence. In that circumstance the separate fifth question about the nexus between the legal duty and particular elements of the harm will be essential in the task of identifying the scope of the defendant's liability. We address this point further in paras 48-51 below.

46. But the "but for" test is not of universal utility. It has been criticised as a test of factual causation because it excludes a common sense approach which the common law favours and because it implies that value judgment should have no role in factual causation: *March v E and M H Stramare Pty Ltd* (1991) 171 CLR 506, 515 per Mason CJ, cited with approval by Glidewell LJ in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1374. In fact, value judgments do play a role and the "but for" test is inadequate in cases in which there is more than one wrongdoer and more than one sufficient cause for the harm.

47. The fifth question (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 he or she claims damages. Thus, if a driver of a car drives carelessly and injures a pedestrian who is walking on the pavement, the defendant driver breaches the duty of care which he or she owes to the pedestrian to avoid inflicting physical injury and is liable in damages for such injury and for the economic loss consequent upon the injury, such as loss of wages and costs of care. Similarly, if a surgeon negligently performs an operation and causes his or her patient to suffer pain, an extended period in hospital and similar

consequent economic loss, the court will readily answer those questions in the affirmative.

48. As *Caparo* demonstrates, there may be circumstances in which loss is incurred which is wholly outside the defendant's duty of care. In such circumstances, the scope of duty question provides an answer and the duty nexus question does not require to be considered separately: an auditor does not owe a duty of care to an investor, including a shareholder in the audited company, who relies on his or her skill and care in the auditing of the statutory accounts when deciding to invest in the company.

49. The scope of duty question may also arise in relation to the extent of damage. 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. In such circumstances, which arose in *SAAMCO* and the other valuer's negligence 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.

50. The duty nexus question, as is well known, came to the fore in cases concerning valuers' negligence. It was concerned with the allocation of risk in relation to a commercial transaction - the lending of money for the acquisition or development of commercial property. The professional valuer provides the would-be lender with important information as to the value of the property and that information is sometimes fundamental to the financial institution's decision whether it will lend and, if it will, how much it will lend. But the financial institution takes into account other commercial considerations, such as its own assessment of likely trends in the property market, the strength of the borrower's covenant, its own costs in providing the necessary funds to the borrower, and the appropriate rate of interest to charge. Where, having regard to the scope of the professional service which he or she has undertaken, it is concluded that the professional adviser is not to be treated as having taken responsibility for all the consequences of the commercial transaction (the scope of duty question), it is necessary to identify how much of the losses which the financial institution has sustained in the transaction fall within the responsibility of the defendant valuer.

51. In *SAAMCO* (p 214), Lord Hoffmann stated the matter thus:

> "It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as

> responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. … The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

52. In this context where the defendant valuer has provided a negligent service which has caused some actionable loss to the claimant, the court needs to identify the extent of the loss which fell within the defendant's responsibility and to exclude such loss as fell outside the scope of the defendant's duty. The method which the court has adopted, is first to identify what Lord Nicholls described in *Nykredit* as "the basic measure" of the claimant's loss and Lord Hobhouse in *Platform Home Loans* described as the "basic loss" which the claimant has suffered. That is the total loss arising as a matter of "but for" factual causation from the defendant's careless valuation, which includes losses caused by a fall in market values. Because the valuer has not taken responsibility for the fluctuations in market value, but only for the consequences of the valuation being wrong, one must then identify from the "basic loss" the losses which fall within the scope of the valuer's duty.

53. The mechanism by which the duty nexus question is addressed in the valuers' negligence cases is to ask a counterfactual question: what would the claimant's loss have been if the information which the defendant in fact gave had been correct? We refer to that question as "the SAAMCO counterfactual". It is sometimes misunderstood. The question is not whether the claimant would have behaved differently if the advice provided by the defendant had been correct. 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. By this means, the court can ascertain the loss which is attributable to that information being wrong. In some circumstances, as in valuers' negligence, it is appropriate to use this counterfactual. In other circumstances, the

scope of duty question may identify the fair allocation of risk between the parties without the use of this counterfactual. In such cases the *SAAMCO* counterfactual may contribute nothing.

54. Where the counterfactual is applied in negligent overvaluation, the tool used to give effect to the answer to the counterfactual question has been to limit the damages awarded to the difference between the valuation and the true value of the property at the time of the negligent valuation. As Lord Sumption has explained in *Hughes-Holland*, paras 45-46, this tool has been criticised for its imprecision but, as he observed, mathematical precision is not always attainable in the law of damages. Lord Sumption cited Lord Hobhouse's statement that the principle highlighted in *SAAMCO* is "essentially a legal rule which is applied in a robust way without the need for fine tuning or detailed investigation of causation": *Platform Home Loans*, p 207. By this we understand Lord Hobhouse to mean that the *SAAMCO* counterfactual and cap are a robust way of applying the scope of duty principle (para 36 above).

55. The sixth question (the legal responsibility question) is in reality a number of separate questions which must be addressed because the law does not impose responsibility on a defendant for everything that follows from his or her act or omission, even if it is wrongful. The questions are, like the duty nexus question, what Lord Sumption has described as "legal filters" (*Hughes-Holland*, para 20), which have been developed to reflect the court's judgment of the extent of a defendant's liability for his or her wrongdoing.

56. These legal filters include questions of remoteness of damage. The law requires that the wrongdoing is the effective or substantial cause of a loss before the defendant is liable to compensate for the loss by payment of damages. This concept used to be referred to as the "causa causans" when Latin remained in fashion in legal circles. The legal test of remoteness focuses on the foreseeability of the harm which eventuated (*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] AC 617) or on whether the harm was of a kind that might have resulted from an accident of a foreseeable nature (*Hughes v Lord Advocate* [1963] AC 837; 1963 SC (HL) 31). Relevant also to the analysis of effective cause is novus actus interveniens, which is conduct, whether by the claimant or a third party, or a natural event which is a different effective cause and which breaks the causal connection between the defendant's wrongdoing and the harm: for example *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621; 1969 SC (HL) 20; *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292.

57. Other legal filters include (i) contributory negligence on the part of the claimant: for example *Stapley v Gypsum Mines Ltd* [1953] AC 663; (ii) where the

claimant has mitigated his or her loss, obtained any pecuniary advantage by the mitigatory measures, or has failed to avoid loss which he or she could reasonably have been expected to avoid: for example *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673; *Koch Marine Inc v D'Amica Societa di Navigatione ARL (The Elena D'Amico*) [1980] 1 Lloyd's Rep 75; *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353; and (iii) defences such as volenti non fit injuria, the voluntary assumption of risk, where the claimant has, with full knowledge of the risk, freely and voluntarily agreed to incur that risk.

58. In our view, adoption of an analysis of this nature 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. The product of this analysis assists in the determination of the extent of the claimant's entitlement to damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to put the claimant in the position in which he or she would have been absent the defendant's negligence. That principle, vouched by *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; (1880) 7R (HL) 1,7 and *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* 1914 SC (HL) 18, 29, is not the correct starting point of the analysis, as Lord Hoffmann stated in *SAAMCO* (para 39 above): it is better to begin by considering the claimant's cause of action. The scope of duty principle (para 36 above) is, as Lord Sumption explained in *Hughes-Holland*, para 47, a general principle of the law of damages. It requires the court in determining the extent of the defendant's liability in damages to distinguish between what as a matter of fact are consequences of a defendant's act or omission and what are the legally relevant consequences of the defendant's *breach of duty*. A defendant's act or omission may as a matter of fact have consequences which, because they are not within the scope of his or her duty of care, do not give rise to liability in negligence (para 45 above).

59. In his concurring judgment Lord Burrows expresses the view that our approach is in some respects novel. In our view that novelty is 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. We respectfully disagree with Lord Burrows' judgment in two respects. The first matter is his emphasis on policy. While policy decisions may have influenced the extension of the scope of duty principle by its application to the quantification of loss, it is now an established principle which is to be applied and which does not now depend on issues of policy such as judgments whether it is fair and reasonable that it should be applied. The scope of duty principle as it has been developed in and since *SAAMCO* is part of a wider question as to the defendant's duty of care. Secondly, Lord Burrows' scheme at para 79 of his judgment assumes at the first and second stages 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. We prefer to

anchor the scope of duty principle in the question as to the defendant's duty of care, while recognising as we do (para 41 above) 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.

60. Against that background we turn to consider Mr Havers' criticisms of the Court of Appeal's judgment.

61. In essence Mr Havers' submission boils down to two points, that the scope of duty principle as applied in *SAAMCO* does not apply to claims arising out of clinical negligence, and that if the court were to conclude that that principle did apply generally, an exception should be crafted for cases of clinical negligence. We are unable to accept either submission.

62. First, there is no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. Nor is there any principled basis for confining the principle to pure economic loss arising in commercial transactions. As we have already observed, Lord Sumption stated in *Hughes-Holland* (para 47), that 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. That distinction may on the other hand be relevant to the outcome of the application of the principle because in cases where there is a duty to take care to avoid causing physical injury, the economic loss consequent upon that injury will generally be within the scope of duty and will be recoverable if it is not excluded by the legal filters which we have described in our discussion of the sixth question.

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.

64. Secondly, Mr Havers is correct that Adejuwon would not have been born but for the defendant's mistake because Yip J accepted Ms Meadows' evidence that, if she had been correctly advised, she would have had the foetus tested and would have terminated the pregnancy on discovering that Adejuwon carried the haemophilia gene. But that conclusion as to factual causation does not provide any answer to the question as to the scope of the defendant's duty.

65. Thirdly, the foreseeability of the possibility of a boy being born with both haemophilia and an unrelated disability, such as autism, which is a risk in any pregnancy, is a relevant consideration when addressing the scope of the duty of care undertaken by a defendant. That is because the absence of foreseeability would militate against there being a duty of care in relation to such a risk. But the foreseeability of such unrelated disability is in no sense determinative of the question of the scope of the duty of care. That is because 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. Foreseeability is, of course, also relevant to the legal filters such as remoteness of damage, which arise once it has been established that the defendant's duty of care extends beyond particular risks in the pregnancy.

66. Finally, Yip J asked herself whether it is fair, just and reasonable to impose liability in negligence for the totality of Adejuwon's disabilities. But, as Nicola Davies LJ stated, this case does not concern a novel application of the law of negligence in which it is necessary for the court to address that question because established principles provide an answer: *Robinson* (above) para 27 per Lord Reed.

Application to the facts

67. First, the economic costs of caring for a disabled child are of a nature that is clearly actionable. Secondly, 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.

68. 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.

Conclusion

69. We would dismiss the appeal.

LORD BURROWS:

1. Introduction

70. I have had the benefit of reading the joint judgment of Lord Hodge and Lord Sales. I agree with their decision to dismiss this appeal. But this case and the accompanying case of *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 have given this court a renewed opportunity to explain the operation of the principle laid down in *South Australia Asset Management Corpn v York Montague Ltd ("SAAMCO")* [1997] AC 191. This judgment therefore explains in my own words how I understand *SAAMCO* and, in particular, how it applies to the straightforward facts of this case. This judgment is intended to be consistent with, and should be read alongside, my fuller judgment in *Manchester Building Society v Grant Thornton UK LLP*.

71. I would stress the following five points from my judgment in *Manchester Building Society v Grant Thornton UK LLP*:

> (i) In almost all past cases, applying *SAAMCO*, the context has involved a defendant providing professional services, through advice or information, to the claimant. It is unnecessary for the purposes of this case (and *Manchester Building Society v Grant Thornton UK LLP*) to consider whether - and, if so, when and how - *SAAMCO* may apply outside that context. In the context with which we are dealing, one can say that the "*SAAMCO* principle" (which can also be referred to as the "scope of duty principle") is concerned to determine whether factually caused loss is within the scope of the professional's duty of care to the claimant.
>
> (ii) The *SAAMCO* principle is generally regarded as imposing a limit on the losses recoverable that is different from the restrictions of remoteness and legal causation (the latter can alternatively be labelled "intervening cause") although whether that is so may depend on what one regards as determining remoteness and legal causation.
>
> (iii) The scope of the professional's duty of care is a question of law, with a particular emphasis on the purpose of the advice or information, that is

underpinned by the policy of achieving a fair and reasonable allocation of the risk of the loss that has occurred as between the parties.

(iv) A counterfactual test can assist as a flexible cross-check in deciding on the scope of the duty of care. Applying the counterfactual test, one asks, would the claimant have suffered the same loss if the information/advice had been true? If the answer is "yes", the scope of the duty does not extend to the recovery of that loss. If the answer is "no", the scope of the duty does extend to the recovery of that loss.

(v) While Lord Hoffmann in *SAAMCO* confined the application of the counterfactual test to information, as opposed to advice, cases, it is now clear that that is not a rigid distinction. While it is not easy to think of suitable shorthand replacement terminology, what may be said is that the more limited the advice or information being provided - in the sense that the more the claimant has to decide on - the more appropriate the counterfactual test is likely to be.

72. There is no good reason why the *SAAMCO* principle should not apply to information or advice given by a doctor to her patient just as it applies to the advice or information given by other professionals. Indeed, Lord Hoffmann's famous mountaineering hypothetical example given in *SAAMCO* involved a doctor giving negligent information to a patient. The submission by Philip Havers QC, counsel for the claimant and appellant, that the *SAAMCO* principle is simply inapplicable to a doctor's negligence must therefore be rejected. The question we need to answer is how the *SAAMCO* principle applies to the facts of this case, not whether it applies at all.

2. Some uncontroversial aspects of the law applicable to the facts

73. I am grateful to Lord Hodge and Lord Sales for setting out the facts of this case, and the decisions below, at paras 3-20 of their judgment. There are a number of uncontroversial aspects of the law applicable to those facts which are not in dispute between the parties. These include the following:

(i) The defendant (Dr Hafshah Khan) owed the claimant (Omodele Meadows) a duty of care in the tort of negligence when advising her as to whether she was a carrier of haemophilia.

(ii) The defendant was in breach of her duty of care (ie she was negligent) when she led the claimant to believe that she was not a carrier of haemophilia.

The claimant was correctly informed that the blood tests that she had undergone were normal. But that confirmed only that the claimant was not herself a haemophiliac. In order to determine if she was a carrier of haemophilia, which could be passed on to her children, she should have been referred to a haematologist for genetic testing. It was negligent of the defendant not to advise the claimant that she required referral for genetic testing and, therefore, to lead her to believe that the results of the blood tests showed that she was not a carrier of haemophilia.

(iii) Factual causation is satisfied. The defendant admits that "but for" her negligence Adejuwon would not have been born because the claimant would have discovered during her pregnancy that he was afflicted by haemophilia and would, therefore, have undergone a termination of the pregnancy (see the judgment of Nicola Davies LJ in the Court of Appeal, [2019] EWCA Civ 152; [2019] 4 WLR 26, para 2).

(iv) Applying the established case law on what have been termed "wrongful birth" cases and, in particular, *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266, as confirmed in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309, a claimant is entitled to the extra costs of bringing up a child that are attributable to the child's "disability". This has been classified in *McFarlane v Tayside Health Board* [2000] 2 AC 59 as the recovery of pure economic loss but it is hard to see that anything significant turns on that classification (as opposed to treating the loss as economic loss consequent on "personal injury") because there is no doubt that a duty of care is owed by a doctor to his or her patient in relation to that type of loss. In line with that case law, it was accepted in this case that the claimant could recover for the extra cost of bringing up Adejuwon attributable to his haemophilia (the quantum of damages for these losses has been agreed at £1.4m).

74. It follows from these uncontroversial aspects of the law that the sole question at issue on this appeal is whether the claimant is entitled to recover the extra costs of bringing up Adejuwon that are attributable to his having autism in addition to haemophilia. I shall refer to these, slightly inaccurately, as the "autism losses". The quantum of these has been agreed at £7.6m (ie £9m for the extra costs of both the haemophilia and the autism minus £1.4m for the haemophilia-only extra costs).

75. It is important to add three points. First, the risk of the child having autism was not increased by the child having haemophilia. The risk of autism was in that sense a general risk of pregnancy. Secondly, applying a conventional approach to "remoteness", focusing on the reasonable foreseeability at the time of breach of the type of loss as a slight possibility (see, for example, *Overseas Tankship (UK) Ltd v*

Morts Dock and Engineering Co Ltd (The Wagon Mound) [1961] AC 388; *Hughes v Lord Advocate* [1963] AC 837; *Overseas Tankship (UK) Ltd v Miller Steamship Co Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617) the birth of an autistic child was not too remote. This was because, as Nicola Davies LJ made clear at para 16 of her judgment, the appellant accepted that:

> "it was reasonably foreseeable that as a consequence of [the defendant's] breach of duty the [claimant] could give birth to a child where the pregnancy would otherwise have been terminated … [and] any such child could suffer from a condition such as autism."

Thirdly, there was no suggestion by Simeon Maskrey QC, counsel for the defendant and respondent, that legal causation was not here satisfied ie it was not suggested that the chain of causation was here broken by an intervening event or action.

76. It follows from these uncontroversial aspects of the law, and from the additional three points in the last paragraph, that the question we need to address in this case is whether the autism losses are irrecoverable because of the application of the *SAAMCO* principle.

3. Application of the *SAAMCO* principle to the facts

77. In my view, in agreement with Lord Hodge and Lord Sales, the autism losses were outside the scope of the defendant's duty of care and are therefore irrecoverable by reason of *SAAMCO*. I would express the reasons for this as follows:

> (i) The purpose of the advice or information is of central importance. The claimant had approached the general practice surgery, as the defendant knew or ought to have known, for the specific purpose of ascertaining whether or not she was a carrier of haemophilia and hence what the impact of that would be if she were to become pregnant. The purpose of the advice or information was not to ascertain the general risks of pregnancy, including the risk of autism. As Nicola Davies LJ expressed it in her judgment at para 27(i):
>
> > "The purpose of the consultation was to put the [claimant] 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. Given the specific inquiry of the … mother, namely would any future child of hers carry the haemophilia gene, it would be

> inappropriate and unnecessary for a doctor at such a consultation to volunteer to the person seeking specific information any information about other risks of pregnancy including the risk that the child might suffer from autism."

(ii) In the light of that purpose, it was fair and reasonable that the risk of the child being born with haemophilia should be allocated to the doctor; but that the risk of the child being born with autism should be allocated to the mother. In common with any mother considering pregnancy, as Nicola Davies LJ expressed it at para 27(ii), the claimant was taking upon herself "the risks of all other [ie non-haemophiliac-related] potential difficulties of the pregnancy and birth both as to herself and to her child."

(iii) Applying the *SAAMCO* counterfactual test as a cross-check, it supports a decision that the autism losses were outside the scope of the doctor's duty of care. If we ask the question, would the claimant have suffered the same loss had the information/advice been true, the answer is "yes" as regards the autism losses (so that the scope of the duty of care does not extend to the recovery of the autism losses) but "no" as regards the haemophiliac losses (so that the scope of the duty of care does extend to the recovery of the haemophiliac losses). This is because had the information/advice that the claimant was not a carrier of haemophilia been correct, the claimant would still have given birth to an autistic child but would not have given birth to a child with haemophilia. Applying the counterfactual test therefore supports the view that the autism losses were outside the scope of the doctor's duty of care.

(iv) If one were to allow this appeal by deciding that the autism losses are recoverable, it is hard to see how one could deny that there would also be recovery of those losses even if the child had been born with autism but not with haemophilia. That would seem an even more startling result because the very risk that the mother was concerned about would not have eventuated at all.

4. The conceptual structure of the tort of negligence

78. With great respect to Lord Hodge and Lord Sales, I do not consider it necessary or helpful in this case, or in the case of *Manchester Building Society v Grant Thornton UK LLP*, 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. For example, 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. As I have explained in para 73 above, there was no dispute in this case about a duty of care being owed, about there being a breach of that duty, and about factual causation. Nor, as I have mentioned in para 75, was there any issue about the loss being too remote, in the conventional *Wagon Mound* sense, or about legal causation. The central issue before us was about the *SAAMCO* principle as to the scope of the duty of care.

79. Scholars have long debated whether the conventional conceptual structure of the tort of negligence could be improved and, in particular, whether the duty of care is an unnecessary element: see, eg, Donal Nolan, "Deconstructing the Duty of Care" (2013) 129 LQR 559. But for the purposes of this judgment, I have had in mind, and would prefer to adhere to, a relatively conventional approach which sees the tort of negligence as involving seven main questions. They are as follows:

> (1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question)
>
> (2) Was there a breach of the duty of care? (the breach, or standard of care, question)
>
> (3) Was the damage or loss factually caused by the breach? (the factual causation question)
>
> (4) Was the damage or loss too remote from the breach of duty? (the remoteness question)
>
> (5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question)
>
> (6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)
>
> (7) Are there any defences? (the defences question)

80. As this approach is relatively conventional, I do not think it is necessary to extend this judgment by explaining each of the seven questions. Suffice it to say that the duty of care concept controls the boundaries of the tort of negligence and problematic areas include pure economic loss, psychiatric illness and omissions;

legal causation, as distinct from remoteness, is focusing on whether intervening acts of the claimant, or third parties, or natural events, break the chain of causation (so that the breach is no longer an effective cause); the *SAAMCO* principle as to whether the loss was within the scope of the duty of care falls to be considered as the sixth question; and defences include contributory negligence (which is a partial defence), voluntary acceptance of risk, illegality and limitation of actions. Questions (4)-(6) are closely related because they are all concerned with limitations on the recovery of factually caused loss: although generally regarded as different from each other, the same result may be reached by applying more than one of those three limitations (and, depending on the facts, the order in which one considers them may be largely a matter of convenience). I would add that what Lord Hodge and Lord Sales appear to treat as their first question - often labelled the question of "minimum actionable damage" (see Jane Stapleton, "The Gist of Negligence" (1988) 104 LQR 213) - can, in my view, be conveniently treated as a sub-issue under the duty of care enquiry (my first question).

81. In this case, and in *Manchester Building Society v Grant Thornton UK LLP*, we have been concerned with my sixth question as to whether factually caused loss was within the scope of the duty of care (although that case, unlike this one, also involved a concurrent claim for breach of a contractual duty of care where the same question arises).

5. Conclusion

82. For these reasons, which in their essentials (at para 77) align with the reasons given by Lord Hodge and Lord Sales (albeit not with all aspects of their conceptual analysis of the tort of negligence), I agree that this appeal should be dismissed.

LORD LEGGATT:

83. I agree with Lord Hodge and Lord Sales that this appeal should be dismissed, broadly for the reasons they give in addressing the facts of the case. But as their analysis of the scope of duty principle may differ at least superficially from mine, I will explain in my own words how I see its application.

84. Although the scope of duty principle is not always straightforward to apply, it is in this case. On the agreed facts, the only purpose for which the claimant, Ms Meadows, consulted the general practice of the defendant, Dr Khan, was to find out whether she was carrying a gene for haemophilia. That did not by itself limit the scope of the defendant's duty, as a doctor's duty will sometimes extend to addressing a matter on which the patient has not asked for advice but which the

doctor recognises or ought to recognise poses a material risk to the patient. In this case, however, there is no finding that the defendant was or ought to have been aware of any fact which gave rise to a duty to advise the claimant about anything other than whether she was carrying a haemophilia gene. Accordingly, the duty owed by the defendant was limited to taking care to give the claimant accurate advice on that matter.

85. It is admitted that Dr Khan incorrectly and negligently advised Ms Meadows that she was not a carrier of a haemophilia gene, when in fact she was. As a result of this negligent advice, the claimant later conceived and gave birth to a son, Adejuwon, who suffers from haemophilia. Had appropriate tests been arranged and the claimant been told, as she should have been, that she was carrying a haemophilia gene, she would have undergone foetal testing during her pregnancy and would have terminated her pregnancy when she found out that she would otherwise give birth to a child with haemophilia.

86. It is not in dispute that the expense of caring for a child born with a disorder (such as haemophilia), if it results from negligent advice, is a kind of expense for which damages can in principle be claimed: see *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309. It is agreed that on this basis the defendant is liable to pay damages to the claimant to compensate her for the costs associated with her son's haemophilia. The agreed amount of this compensation, if it stands alone, is £1.4m.

87. The dispute between the parties arises from the fact that, as well as being born with haemophilia, Adejuwon was born with autism. The issue is whether the claimant is entitled to recover compensation for the costs associated with his autism. It is agreed that, if she is, the award of damages of £9m made by the trial judge, but set aside by the Court of Appeal, should be restored.

88. It is common ground that, as Adejuwon would not have been born if the defendant had acted with due care, the costs of caring for an autistic child would not in that event have been incurred. It is also agreed that the possibility of giving birth to a child who suffers from a condition such as autism is a reasonably foreseeable risk of any pregnancy. It follows that the costs associated with that condition are a foreseeable consequence of the defendant's negligent advice.

89. As established by the House of Lords in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ("*SAAMCO*"), however, and reaffirmed on many occasions since - including by this court in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599, a professional person whose duty is

limited to advising on a particular subject matter relevant to a claimant's decision-making is not responsible for all the foreseeable adverse consequences to the claimant of giving negligent and wrong advice, but only for such consequences as result from what made the advice wrong. This principle is generally expressed by saying that a professional adviser is only liable for losses which are "within the scope" of the adviser's duty of care. In my judgment in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 ("*MBS*"), I have considered this principle and its rationale at some length.

90. The scope of duty principle is just as applicable to a medical practitioner as to anyone else who gives professional advice. As outlined at paras 85-89 of my judgment in *MBS*, the rationale underpinning the requirement to show a causal connection between the subject matter of the defendant's advice and the claimant's loss is that it is not fair and reasonable to impose on a professional adviser liability for adverse consequences which a person relying on the advice would have suffered even if the advice had been sound. To do so is to treat an adviser who is negligent in relation to a particular matter as if the adviser had a responsibility to protect the claimant against risks unrelated to that matter. No good reason has been given for treating doctors differently in that regard.

91. Applying the scope of duty principle to the facts of this case, whether or not she was carrying a haemophilia gene was plainly only one factor relevant to any choices made by the claimant about whether she wished to become pregnant and, if she did (by desire or not), whether to terminate the pregnancy. As with any decision whether to have a child, there were many other factors (personal, social, economic and medical) relevant or potentially relevant to those choices. The defendant had no duty to assess or advise the claimant about such other factors. It follows that the defendant is not responsible for all the foreseeable adverse consequences of any decision made in reliance on her negligent advice, but only for those which result from the matter which the defendant negligently misrepresented and which made the advice wrong - that is, the fact that the claimant was carrying a gene for haemophilia.

92. It is not in dispute that there was a causal link between the fact that the claimant has a gene for haemophilia and the fact that her son was born with that disorder. The costs associated with his haemophilia are therefore within the scope of the defendant's duty.

93. The appeal turns on whether or not there was also a causal connection between the fact that the claimant was carrying a gene for haemophilia and the autism from which Adejuwon suffers. That question is answered conclusively by the parties' agreement that the autism was not caused by his haemophilia nor made

more likely by it. It follows that the costs associated with his autism are not within the scope of the defendant's duty of care.

94. In my judgment in *MBS* at paras 105-106, I have addressed the circumstances in which it may be useful to apply the counterfactual test stated by Lord Hoffmann in *SAAMCO* of asking whether the loss would have occurred even if the information or advice given by the defendant had been correct. I have also emphasised (at paras 128-129 of that judgment) that when such a test is applied the relevant question is not - as has sometimes mistakenly been supposed - whether, if the advice given by the defendant had been correct advice to give, the claimant would have acted differently. The question is whether, if the advice had been correct in the sense that the facts had been as the defendant represented them to be, the action taken by the claimant as a result of the defendant's negligent advice would have caused the same injury. Lord Hodge and Lord Sales make the same point at para 53 of their judgment in this case.

95. In order to conclude that the costs associated with Adejuwon's autism are causally unrelated to the subject matter of the defendant's advice, there is no need to apply a counterfactual test; but equally there is no difficulty in doing so. It is plain that, even if the information that the claimant was not carrying a gene for haemophilia had been correct and all other circumstances remained the same, Adejuwon would still have been born with autism. That is one way of explaining why it is not fair and reasonable to impose on the defendant liability for the costs associated with his autism.

96. Much of the judgment of Lord Hodge and Lord Sales is taken up with a discussion of the conceptual structure of the whole tort of negligence. This excursus touches on questions much debated by legal scholars which go far beyond the issues raised by this appeal and the appeal in *MBS*. Like Lord Burrows, I think it undesirable as well as unnecessary to engage in such an exercise. In particular, these appeals are concerned solely with the liability of professional persons for giving negligent advice. Ascertaining the scope of the defendant's duty in such cases depends on identifying the matters relevant to a decision to be taken by the claimant which the defendant has undertaken responsibility for assessing and advising the claimant about. The extent of those matters may be defined by express agreement or, in the absence of such an agreement, is implied from the role of a doctor or other professional person as that role is conventionally understood (or in the case of an auditor prescribed by statute) and by the objective purpose of the advice (which, as discussed at para 160 of my judgment in *MBS*, is not necessarily coextensive with the purposes for which the claimant intends to rely on the advice). Whether or to what extent analogous considerations apply in other contexts, such as careless driving or the negligent performance of a surgical operation to take two examples mentioned in para 47 of the judgment of Lord Hodge and Lord Sales, is not a

question which arises for decision or on which the court has heard any argument on these appeals.

97. Within the context of professional liability for negligent advice, it is not clear to me that there is any substantive difference between my explanation of the correct analytical approach and that of Lord Hodge and Lord Sales. It is common ground between us that it is always necessary to determine whether (or to what extent) the claimant's "basic loss" is within the scope of the defendant's duty of care. Lord Hodge and Lord Sales call this "the duty nexus question" which they formulate as whether there is a sufficient nexus between the loss and the subject matter of the defendant's duty. I understand the word "nexus" to be another term for what I refer to, more prosaically, as a causal connection. I agree with Lord Hodge and Lord Sales that there can be circumstances in which it is obvious that loss incurred by the claimant is wholly outside the scope of the defendant's duty. There can also be cases, inaptly referred to in *SAAMCO* as involving the giving of "advice" rather than "information", where the defendant's duty encompasses all losses which satisfy other requirements such as foreseeability. In cases of either of these types no further or finer analysis is needed of whether or to what extent the loss was caused by a matter within the defendant's area of responsibility which the defendant negligently misstated or failed to report.

98. In the present case some analysis is needed but, as I said at the start of this judgment, it is straightforward. The subject matter of Dr Khan's advice was limited to whether Ms Meadows was carrying a haemophilia gene and accordingly only losses causally connected (or, if the terminology is preferred, which have a sufficient nexus) to that subject matter are within the scope of the defendant's duty. On the agreed facts, the losses caused by the fact that, as the defendant negligently failed to discover and report, the claimant was carrying a haemophilia gene are those associated with the haemophilia from which her child suffers and do not include costs associated only with his autism, which is causally unrelated. The appeal must therefore be dismissed.