# ***Scope of Duty in 2024: Whither Manchester Building Society v Grant Thornton LLP* and *Meadows v Khan?***

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## Introduction

1. Nearly three years have passed since the decisions of the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP,* [2021] UKSC 20; [2022] AC 783 and *Meadows v Khan,* [2021] UKSC 21; [2022] AC 852, both handed down on the same day. They appeared – and were perhaps intended – to be seminal, and to have ushered in a new structured approach to the consideration of the existence and scope of the duty of care in professional negligence.

2. But on closer analysis, has anything really changed?

3. In an attempt to answer that question, this paper seeks to place the decisions in the broader context of the law of negligence generally, and looks at some of the subsequent decisions which have sought to grapple with the Supreme Court's reasoning.

## The decisions

4. In *Manchester Building Society*, an accountant was engaged by a building society to advise on the suitability of its accounts for hedge accounting. The Society issued fixed-interest lifetime mortgages funded by borrowing on variable interest rates. In order to offset the risks of variable interest rate borrowing, it sought to enter interest rate swap contracts. Following changes in international accounting guidelines at the time, these swaps were to be accounted at their 'fair value' or 'mark-to-market' value, a figure that would vary annually depending on prevailing interest rates. Concerned that these assets would increase the volatility of its accounting position, the Society sought to 'hedge' the volatile swap values with the fixed mortgage assets. These hedges could only be applied if the length and maturation date of both assets exactly corresponded with each other. Grant Thornton was engaged in 2006 to advise on whether hedges could be applied to the Bank's balance sheet. It negligently advised that they could. In reliance on this advice the Society entered several long-term swap contracts. In 2011, Grant Thornton identified that its advice had been negligent and that the hedges could not be applied to the accounts, in part because

there was no correspondence between the assets. As a result, the Society' accounts for 2011 went from a reported profit of £6.35 million to a loss of £11.44 million. In 2013, under the pressure of impending regulation, the Society closed all swap agreements early, sustaining a loss of £33 million as a result of changes in the prevailing interest rates. Overturning both decisions below, the Supreme Court held that accounting volatility was within the scope of the accountant's duty and that the loss resulting from closing the swaps was recoverable.

5. *Meadows v Khan* concerned alleged clinical negligence in diagnosing an hereditary condition. The claimant approached her GP ahead of pregnancy to identify whether she was a carrier of haemophilia, an hereditary disease. She indicated an express desire not to have child if she carried the condition. The doctor negligently arranged inappropriate diagnostic tests and incorrectly advised that she did not have the hereditary condition. Several years later, she had a haemophiliac pregnancy. In addition, the child also suffered from autism, which increased the costs of the haemophilia-related treatment and care. It was agreed that autism is a medically unrelated condition which is a latent risk in all pregnancies. Following authorities on wrongful birth claims, the claimant sought the costs of raising a child with both haemophilia and autism. The Supreme Court held that the costs associated with the autism were not recoverable as they were outside the scope of the doctor's engagement.

6. Both cases are concerned with what has come to be known as the *"SAAMCO* principle" (named after the well-known decision of Lord Hoffman in *South Australia Asset Management Corp v York Montague Ltd,* [1997] AC 191). Note that the label *"SAAMCO* principle" is frequently applied to two distinct concepts: (a) the question whether loss factually caused was within the scope of the defendant's duty – the "scope of duty principle"; and (b) an analytical tool for determining the extent of liability flowing from breach of an ascertained duty – the "*SAAMCO* cap" or "*SAAMCO* counterfactual". It is obviously important to know which is being talked about at any given point.

7. The following are the salient features of the decisions:

   (a) The majority of the Supreme Court decided both cases by reference to the following six-point framework:

(i) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(ii) 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)

(iii) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(iv) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(v) 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)

(vi) 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 not 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)

Although the majority appear to have reconceptualised the entire tort of negligence in this way, Lords Burrows and Leggatt deprecated such an approach for which they saw no need.

(b) Stages 2 (scope of duty) and 5 (duty nexus) have attracted the most attention. In this regard, the scope of duty principle was said to apply generally and not just to economic loss cases (*Meadows* [62]). It is primarily governed by the purpose of the duty, judged objectively by reference to the reason why the advice was given or information sought.

(c) The *SAAMCO* counterfactual has been all but abandoned except as a cross-check and, even then, will not necessarily be appropriate in all cases. As the court pointed out, formulating an appropriate counterfactual is not a straightforward task and the dangers of manipulation in order to reach the "right" result are legion.

(d) The rigid distinction drawn by Lord Hoffman in *SAAMCO* between "advice" cases and "information" cases has been rejected. The Supreme Court correctly recognised that these were not so much separate categories of cases but merely different ends of a continuous spectrum. This aspect of the decisions has been universally welcomed and no more need be said about it.

8. Three years is hardly long in terms of legal development so it is still too early to draw any definitive conclusions. Nonetheless, the following thoughts are offered as a focus for debate:

(a) Nothing much has changed. The majority have painted some of the furniture a different colour and rearranged the chairs slightly, but their decision contains nothing which is fundamentally new.

(b) In so far as they intended to articulate a statement of principle of general application to the entire tort of negligence, their attempt is almost certainly doomed to join the many corpses of similar attempts that have perished by the wayside in the development of the law of negligence.

(c) The decision is probably best regarded as offering an alternative (but not obligatory) way of analysing certain cases that lend themselves to analysis in such terms. And if that sounds circular, it is deliberately so.

**The function of the law of tort**

9. Tort law is and always has been about the fair allocation of risk between members of society. Whereas in the law of contract it is the parties who allocate risks between themselves by agreement, in tort this is for the law to determine.

10. One peculiar difficulty attending the law of tort is that it is a complete rag-bag of assorted types of liability, derived from sometimes very different historical origins, but all collected together under the broad heading of "civil wrongs". For this reason, it is well-nigh impossible to subject tort to logical and neat analysis. Even looking solely at the tort of negligence, the vagaries of human behaviour and the different ways in which damage can be caused and suffered are myriad: see *Chapman v Pickersgill* (1762), 2 Wilson 145, 146 *per* Pratt CJ when commenting on "novelty" as suggested defence to liability: *"I wish never*

*to hear this objection again. This action is for a tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief."* And of course this is as true for professional negligence as in any other tortious arena. Thus, professional services can range from physically doing something (building or designing a house, performing a surgical operation) at one extreme to giving advice or providing information at the other.

11. Liability for negligence has always involved two broad stages. The first stage involves satisfaction of a set of irreducible minimum requirements before an action can even get off this ground:

    (a) The existence of a notional duty situation, which in turn requires the law to recognise:

        (i) the kind of damage in question

        (ii) the manner of its infliction

        (iii)the category of claimant

        (iv)the category of defendant

    (b) Breach of duty

    (c) Causation in the factual "but for" sense.

12. The second stage involves an evaluative exercise to determine the extent to which the defendant should be held liable for the consequences of his or her conduct. It has always been recognised that the law must draw a line somewhere between consequences for which a defendant should be liable and those for which it should not. In that respect there will always be a tension between a desire on the one hand to compensate an innocent victim to the full extent of its loss and on the other to tailor the extent of liability to reflect the culpability of the defendant.

13. The courts have over the years developed a number of tools to assist them in carrying out this evaluative exercise, including the concepts of proximity and voluntary assumption of responsibility, legal causation and effective cause, foreseeability, remoteness and defences such as contributory negligence and *volenti non fit iniuria.*

14. However, any discussion of this area is liable to be bedevilled by the fact that the same concept may be relevant in more than one context, and that different judges frequently use the same term to mean different things. This creates an obvious danger when trying to transpose reasoning from one case to another and it is important always to analyse the terms used and the context in which they are being deployed. For example, "scope of duty" could mean either the existence of a duty-situation in the sense of actionability, or the extent of a duty once it has been established to exist. Likewise, foreseeability could be relevant to actionability in assessing whether a duty situation exists at all. It could also be relevant to the question of breach (at least some harm must have been foreseeable) and, obviously, causation. Likewise something that is "too remote" could mean that there is no duty, or that the kind of damage is not foreseeable, or that there is no causal link, or that the law is simply imposing an arbitrary limit on the extent of damage for which the defendant is to be held responsible.

15. Bearing this terminological caution in mind, it is not easy (or even possible) to articulate any consistent principles which apply when determining the extent of a defendant's liability. Which tool a court chooses to deploy on any given occasion will depend on the particular facts before it. Some cases may lend themselves more readily to a causation-based analysis; others to considerations of proximity or voluntary assumption of responsibility. Some could equally well be analysed in a number of different ways, all of which lead to the same answer. Ultimately, it is an evaluative exercise which is not susceptible to prescriptive rules as to how it should be carried out.

16. The speech of Lord Oliver in *Caparo Industries plc v Dickman,* [1990] 2 AC 605 offers some valuable insights in this respect. In that case he emphasised that duty and harm go hand in hand, and that there must always be something in the nature of the relationship between the parties which makes it fair, just and reasonable to impose liability on the defendant for the particular damage suffered. In some cases that might be found in a relationship of "proximity". In another, the courts have looked for a voluntary assumption of responsibility. But, as he stated at 633, "proximity" in such cases *"is an expression used not necessarily as indicating literally "closeness" in an physical or metaphorical sense but merely as a convenient label to describe circumstances from which the law will attribute a duty of care."*

17. In short, it is possible to apply all sorts of labels to different concepts which create the impression of a strictly logical and principled analysis. In truth, however, this is little short of smoke and mirrors. Judges will do what they have always done from time immemorial which is to reach for the tool which will best allow them to achieve their aim of doing justice. As Lord Denning MR pointed out in *Roe v Ministry of Health,* [1954] 2 QB 66, 85 *"The three questions, duty, causation, and remoteness, run continually into one another. 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. Even when the three questions are taken singly, they can only be determined by applying common sense to the facts of each particular case… Instead of asking three questions, I should have thought that in many cases it would be simpler and better to ask the one question: is the consequence within the risk? And to answer it by applying ordinary plain common sense."* See also Thesiger J in *SCM v Whittal,* [1970] 1 WLR 1017, 1031, affd [1971] 1 QB 337. *"In order to limit liability… the courts sometimes say either that the damage claimed was 'too remote' or that it was not 'caused' by the defendant's carelessness or that the defendant did not 'owe a duty of care' to the plaintiff.*"

18. All these concepts can therefore be seen, in essence, to be no more than tools with which the courts equip themselves to make value judgments. The important thing to remember is that there is usually more than one way to Rome and that no one route is inherently better than any other. Indeed, this much can be seen from the fact that all the members of the Supreme Court in *Manchester Building Society* and *Meadows* reached precisely the same conclusion but by different routes: the majority used their six-point framework (where stages 1, 3 and 4 broadly correspond to the irreducible minimum requirements of actionability and stages 2, 5 and 6 to the evaluative assessment), while Lord Burrows put forward a more conventional seven-point schema.

19. It is true that the majority accepted that there was no single accepted formula and that their framework was not intended to be exclusive or comprehensive. But if that is the case, then it is hard to banish the impression of a large number of judges dancing on the head of a tiny conceptual pin to no very great purpose. Why complicate matters by introducing new

concepts such as "scope of duty principle" and "duty nexus" at all? One has sympathy for the view of Lord Leggatt that "duty nexus" was simply a more formal way of describing a causal connection. However, that suggestion was dismissed by the majority even while they accepted in the same breath that a causation-based analysis might lead to the same result. In similar vein, Lord Burrows pointed out that while the scope of duty principle was generally thought to be separate from the concept of remoteness, that distinction itself depended on how you defined remoteness. If remoteness covers voluntary assumption of responsibility, the latter might have been thought perfectly adequate to address the situation.

20. It is for this reason that this paper suggests that the focus in *Manchester Building Society* and *Meadows* on scope of duty and duty nexus is best viewed as simply providing the courts with another tool for their toolkit. In other words, it is a potentially useful way of approaching cases of pure economic loss caused by reliance on negligent professional advice or information. It may, however, struggle to gain much traction outside that somewhat narrow field as can be seen from the difficulties that the courts have encountered in trying to apply the six-stage framework to established categories of liability. Note that in *Manchester Building Society* Lord Leggatt at [107] and Lord Burrows at [179] found it unnecessary to consider how far the scope of duty principle applied outside the context of negligent professional advice. The answer is that it probably does not. It has already been rejected as a universal statement of principle and the case law to date suggests that the courts are trying to confine it as far as they can.

**The subsequent cases**

*Armstead v Royal & Sun Alliance Insurance Co. Ltd,* [2024] UKSC 6; [2024] 2 WLR 632

21. This decision involved the recovery of hire charges for a replacement car following a road traffic accident. The Supreme Court (led by Lord Leggatt and Lord Burrows) held that the analysis in *Manchester Building Society* and *Meadows* has no place in cases concerning physical damage and bodily injury: *"The term scope of duty is sometimes used to refer to the concept of "remoteness" … As a concept separate from remoteness, a contention that the loss is outside the scope of the duty of care refers to the principle recognised in SAAMCO.* ***However this principle has no application here. There can be no issue about the scope of the relevant duty, being the commonplace duty to take care to avoid causing***

***physical damage to another person's property.***" [55] At [73], the court further said that it was "unhelpful" to use the *Manchester Building Society* framework as a checklist in the case before it since that framework had been formulated in cases concerned with the question of whether particular damage fell within the scope of duty of a defendant who had assumed responsibility for providing professional advice.

*Knights v Harrison,* [2021] EWHC 2653 (QB)

22. This was a case of allegedly negligent advice in relation to tax schemes and the issue was whether the defendant was an adviser or an introducer. HHJ Cawson regarded the question before him as being whether any duty of care had arisen in the first place, whereas he saw *Manchester Building Society* as concerned with the scope of a duty which was acknowledged to exist. In his view, the distinction between advice and information was addressed in that context. For his part, he considered voluntary assumption of responsibility to be the most appropriate test to apply to the existence of the duty in the case before him. On the facts, he held that there was no duty but that, if it had existed, the loss claimed would have fallen within its scope.

23. One can debate the correctness of the judge's analysis but it is clear that he had some difficulty in understanding exactly how *Manchester Building Society* fits in to what was already a relatively well-established category of liability and simply chose voluntary assumption of responsibility as the most appropriate analysis for helping him decide whether the defendant should be held liable. *Spire Property Development LLP v Withers LLP,* [2022] EWCA Civ. 970 is another case where the court held that the *Manchester Building Society* framework and the scope of duty principle had been formulated to address the recoverability of damages, and was not designed to determine the existence of a duty in the first place.

*Anan Kasei v Neo,* [2023] EWCA Civ. 11.

24. This case concerned an enquiry into damages for the negligent infringement of a patent. The claimant argued that infringements in the UK had caused a loss of much more substantial international sales. At first instance, Bacon J adopted principles which were well-established in the field of patent infringement and noted that the scope of duty concept in negligence could not readily be transposed to patent infringement which was a statutory

tort. Since the Patents Act did not itself circumscribe the scope of damages, she held that these should be assessed on the usual tortious principles of causation and remoteness.

25. The Court of Appeal likewise accepted that the *Manchester Building Society* framework could not be applied to patent infringements without modification. The scope of duty principle would need to be modified and duty nexus did not apply at all. They pointed out that different policy considerations apply in different cases and that it is always necessary to look at the nature of the cause of action which may itself dictate what losses are to be laid at the defendant's door. At [42]-[43] in particular, they referred to the judgments of Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co. (Nos 4 and 5),* [2002] UKHL 19; [2002] 2 AC 883 and Lord Sumption in *Hughes-Holland v BPE Solicitors,* [2017] UKSC 21; [2018] AC 21 to emphasise that there are numerous concepts which can serve as legal filters to determine the extent of a defendant's liability (and also to point out the risk of terminological confusion).

*BDW v URS*, [2023] EWCA Civ. 772; [2024] 2 WLR 181

26. This was a claim by a developer against a firm of structural engineers. Following a review in the wake of the Grenfell Towers disaster, serious structural defects were discovered in a block of flats which required extensive remedial work even though no actual physical damage had yet occurred. The developer claimed the costs of carrying out the investigation and remedial work. The defendant argued that its scope of duty extended only to the risk of harm to the claimant's proprietary interests and the risk of loss incurred by the claimant to third parties. Since the claimant no longer had any proprietary interest in the building when the defects were discovered (having sold all the flats) and since any third party claims were long-since time barred, the claim should be dismissed.

27. The Court of Appeal accepted the claimant's argument that the defendant's duty of care was co-extensive with its contractual duty, viz., to produce the design with reasonable skill and care. This duty protected the claimant against the risk that negligent structural design would lead to structural defects and an unsound building which would subsequently have to be remedied. The *Manchester Building Society* framework was not intended to be applied to the well-known standard duties of care for physical damage and bodily injury that attached to doctors and structural engineers and had no direct application to cases of that sort, although it could act as a sanity check. Rather, the framework was designed to

assist in novel cases which had not previously been considered, or where the type of loss claimed was unusual or stretched boundaries.

*Oxford v Lynn,* [2023] EWHC 624 (Comm)

28. This was a summary judgment application to strike out a claim in negligence against a solicitor for failing to ensure that the claimant was properly protected in its dealings with a third party. The court found that the scope of the defendant's duty did not extend to the losses claimed. It seems to have regarded the scope of duty concept as helpful in this case.

*Charles B Lawrence v Intercommercial Bank, [2021] UKPC 30*

29. In this case, the claimant made a loan of $3 million on the basis of a valuation negligently valuing a property at $15 million . The valuation expressly assumed good title. In fact, not only was the property only worth $2.375 million but there was no good title so that the security was worthless in any event. The claimant recovered $2.4 million from the lawyers who had incorrectly advised on title but also recovered $635,000 (the difference between the true value and the loan) from the valuer. The Privy Council held that the loss attributable to the defective title was outside the defendant's scope of duty. It further held that it was unhelpful to apply the *SAAMCO* counterfactual because to do so would ignore that fact and lead to a result whereby the full amount of the loan was recoverable.

30. With respect, this reasoning is hard to follow. Even if the $15 million valuation had been correct, the claimant would have suffered precisely the same loss because its security would still have been worthless due to the defective title. Since the loss was recouped from the lawyers, it might be thought that there was no compelling reason to make the valuer liable as well. Undoubtedly it had been negligent but, on the facts, that negligence did not cause any loss. The Privy Council, however, took the view that the *SAAMCO* counterfactual required it to be assumed that there was good title. That point can be debated but this in itself neatly illustrates the scope for manipulating the counterfactual to produce the desired result.

*Hope Capital v Alexander Reece Thomson LLP,* [2023] EWHC 2389 (KB)

31. This was a straightforward negligent valuation case where Constable J accepted that the *SAAMCO* cap applied. He noted the approval by the majority in *Manchester Building*

*Society* of Lord Leggatt's analysis of the valuer cases and held that *SAAMCO* was an appropriate counterfactual to apply to such cases.

*Aurium Real Estate London Ultra Prime Ltd v Mishcon de Reya LLP,* [2022] EWHC 1253 (Ch)

32. In this case the defendant had given negligent advice as to whether a "build around" scheme would amount to breach of a lease agreement. The court applied *Manchester Building Society/Meadows* in asking what risk the duty was supposed to guard against and whether the loss represented the fruition of that risk. On the facts, it held that the loss fell outside the scope of the defendant's duty.

*Finnan v Charles Russell Speechlys LLP,* [2023] EWHC 3058 (Ch)

33. Here the master noted that the scope of duty test articulated in *Manchester Building Society* was not entirely apt in the context of the scope of duty of a solicitor asked to achieve a positive outcome rather than to protect against harm.

*Ickenham Travel Group v Tiffin Green,* [2024] EWHC 27 (Comm)

34. This was a negligent auditor case concerning the understatement of accounts. The judge took the view, *obiter*, that the loss claimed would have fallen with the defendant's scope of duty both by reference to the purpose of the retainer (the majority approach) and because it was a reasonably foreseeable consequence of the breach (the Leggatt approach). Again, it could be said that this case demonstrates that the majority approach is simply regarded by the courts as an alternative lens to insert in the telescope.

*Feilding v Simon C Dickinson Ltd* [2022] EWHC 3091 (Ch)

35. This was a pure economic loss case concerning the sale of a painting that was negligently offered as a 'partially autograph copy' when it transpired that it was a 'wholly autograph copy', later resold at several times the initial sale price. Though finding no breach of duty, the court observed, *obiter*, that the SAAMCO cap would apply to the quantification of loss, which would thus be capped at the price at which the painting would have been sold initially but for the negligence.

*Clinical negligence cases*[1]

[1] The application of the *Manchester Building Society* framework to clinical negligence cases has been the subject of an interesting and thought-provoking podcast by 1 Crown Office Row to which reference should be made by those particularly interested in this topic.

36. Clinical negligence cases deserve separate mention. The basic rule in personal injury cases is that if the kind of damage is foreseeable and "but for" causation is established, the defendant is liable for the full extent of the injury even if it occurs in an unanticipated manner and/or to an unanticipated extent. In *SD v Grampian Health Board,* [2022] SCOH 63, the claimant suffered serious brain damage at birth due to compression of the umbilical cord caused by an unforeseen and dramatic increase in the speed of labour in the final stages. It was alleged that but for negligence by the midwives on the ante-natal ward delivery would have taken place earlier and the problem would have been avoided. The court found that there had been no negligence and its comments on *Meadows* are therefore technically *obiter*. Nonetheless, it addressed the scope of duty question and said that the injury suffered was too remote from the mother's time on the ante-natal ward for there to be a sufficient nexus between the alleged breach and the adverse outcome. The court accepted that the services provided by the midwives could not be completely separated from the care provided by the obstetric team but in this case, there was no evidence as to how the alleged breach affected the outcome and what different it would have made if the midwives had done what the claimant alleged they should have done. In other words, the court focused very heavily on causation.

37. By contrast, in *DD v NHS Fife Health Board,* [2022] SAC (Civ) 27, which concerned the alleged negligent discharge of a short-term detention order, the Sheriff Appeal Court focused on the harm that had been caused. In that case the claimant was suffering from a serious mental illness. Following discharge of the detention order, he left hospital against medical advice and proceeded to commit a series of offences as a result of which he claimed that his reputation had been damaged and that he had lost earnings. It was therefore a claim for purely economic loss. The court regarded itself as obliged to follow *Meadows* but had difficulty in applying it given that the duties and functions of the doctor with regard to the detention order were regulated by statute. They regarded the emphasis in *Meadows* on the link between the duty and the losses claimed as fundamental and accordingly held that evidence as to the claimant's precise medical condition and the particular heads of claim was required before it could determine conclusively the extent of recovery.

38. It has been suggested that a focus on scope of duty and duty nexus in clinical negligence cases risks concentrating attention on the specialism of the doctor rather than the overall health or interests of the patient, and also ignores the imbalance of power and knowledge

between doctor and patient. In *Grampian* it was the joint responsibility of the ante-natal midwives and obstetric team to achieve a safe delivery. However, the court only looked at the sudden damage which occurred at the very end of the process rather than the process as a whole. It was thus influenced by the lack of evidence of any harm flowing from the alleged breach other than a general delay to the pregnancy. If it had looked at the ultimate harm flowing from the overall process of labour, on the other hand, it might have reached a different conclusion.

39. In the light of *Armstead,* however, is a distinction now to be drawn between claims for physical injury and pure economic loss? How is a distinction to be justified where both are claimed in the same case? There are further difficulties with *Meadows.* The first (as pointed out by Lord Leggatt) is that determining the scope of the doctor's duty in medical negligence cases by reference to the purpose of a medical consultation may be an inapt, since a doctor may spot some condition or symptom which is not apparent to the patient and in respect of which his advice has not been sought. Does the extent of control over professional liability depend on a patient-led process? Should it as a matter of medical policy. Secondly, what is the justification for the assumption that a baby would still have suffered from autism even if the mother had not been a carrier of the haemophilia gene?

40. Whatever else may be said, it is clear that the consequences of *Manchester Building Society* and *Meadows* have yet to be fully worked out in a clinical negligence context.

**Policy versus principle**

41. The courts have traditionally been very wary of suggesting that they are guided in their decisions by policy rather than principle. This is understandable. Invoking policy without more can only increase uncertainty rather than reducing it, taking us back to an age when equity varied with the length of the Chancellor's foot. No doubt it was for this reason that the majority in *Manchester Building Society/Meadows* deprecated what they regarded as an unhelpful and unprincipled emphasis by Lord Burrows on policy.

42. Even so, it has to be recognised that policy underpins the entire law of negligence in one way or another and occasionally judges have broken cover to say so. Policy can most readily be seen at work when the courts are called upon to recognise or refuse a new category of right, for example damages for the birth of a healthy child, or nervous shock or pure economic loss. For a long time, the law refused to countenance recovery in these

cases for policy reasons and even now the birth of a healthy child cannot give rise to a claim.

> *"This case is entirely novel. In previous times, when faced with a new problem, the judges have not openly asked themselves the question: What is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth. Nowadays we direct ourselves to considerations of policy."* (*Per* Lord Denning MR in *Dutton v Bognor Regis UDC,* [1972] 1QB 373, 397.

43. The recognition of a new form of liability must always involve a policy decision even if the courts sometimes disguise it with other terminology. Thus, the various principles applying to the well-established categories of negligence are simply a crystallisation of policy decisions made in the past. Even the evaluative exercise that must be carried out in determining the extent of the defendant's liability once the irreducible minimum requirements of actionability are established is informed to a great extent by considerations of policy. After all, what is the law's decision not to visit all "but for" consequences on a defendant, if not itself an application of policy? See Lord Leggatt in *Manchester Building Society* at [88] and Lord Burrows at [201]-[203].

44. Moreover, principle can only take one so far in the intractable morass that is the law of negligence. As any study of the law reports will show, there has been a constant ebb and flow over the years between attempts on the part of some judges to formulate a "general principle of negligence" and a more or less immediate retreat to the traditional common law approach of proceeding incrementally by reference to established categories of liability. Attempts to articulate a principle of general application started with *Donoghue v Stevenson,* [1932] AC 562, gathered momentum in *Home Office v Dorset Yacht Co. Ltd,* [1970] AC 1004 and reached a high watermark in *Anns v Merton LBC,* [1978] AC 728 where Lord Wilberforce suggested that every case could be reduced to a simple two-stage process whereby reasonable foreseeability of harm created sufficient proximity to justify the *prima facie* imposition of liability unless there was some reason grounded in policy not to do so. A full-scale retreat back to the incremental approach then followed fairly rapidly, leading to *Anns* and *Dutton* being overruled in *Murphy v Brentwood DC,* [1991] AC 398.

45. However, the well-established categories of liability are themselves a fairly disparate assortment: physical damage/bodily injury, manufacturers, builders, occupiers, negligent

false statements causing pure economic loss. For that reason alone, it is probably unproductive to try to derive any general principle from them. Indeed, there would seem to be no good reason to do so; the courts have already established the parameters for the attribution of liability by reference to the different considerations which apply to each category.

46. Accordingly, if it would be impossible and unnecessary to extract any general principle even from the categories of case which are well-established, it would seem well-nigh hopeless to try to devise an overarching principle to govern the recognition or refusal of new categories of case in all circumstances.

**Conclusion**

47. Where then have we reached in the three years following *Manchester Building Society* and *Meadows*?

48. Of one thing there can be no doubt and that is that the *SAAMCO* counterfactual has been abandoned as a universal test and now limps on as a mere cross-check which may or may not be of use in a particular case. Obviously, it is particularly apt to limit the extent of recoverable loss in the type of case for which it was conceived, namely negligent valuation cases such as *Hope Alexander*. Beyond that, it is uncertain whether it will be of much utility. Indeed, Lord Leggatt in *Manchester Building Society* at [127] considered that it was unsuitable for application outside such cases. The suggestion above that it may have been misapplied in *Charles Lawrence* only goes to show how difficult it is to devise an appropriate counterfactual and how changing the parameters can lead to diametrically opposed results. The likelihood is, therefore, that it will end up being called upon where it supports the court's conclusion but not otherwise.

49. So far as the already well-established categories of liability are concerned, the courts appear to be finding that the *Manchester Building Society/Meadows* framework either adds nothing or is positively confusing and unhelpful. There are now authoritative statements that the scope of duty concept does not apply to cases of physical damage and bodily injury, patent infringement and negligent engineers/builders. In these cases, the courts will presumably just carry on applying the same principles that they have hitherto applied and distinguish *Manchester Building Society/Meadows.* It is more than likely that some retrenchment will occur very soon in clinical negligence as well.

50. Where the scope of duty principle seems to have been found to be of most use is in the very specific context in which it first arose, namely negligent information/advice causing purely economic loss, such as negligent valuation and cases like *Aurium* and *Oxford v Lynn.* No doubt we will see the courts struggling with this for a while yet, but the difficulties experienced by them so far in applying the framework outside such cases suggest that it may soon be confined to that context – a view supported by at least some academic commentary.[2]

51. A lot of what is said in the majority judgment is unproblematic, indeed even orthodox. However, one must wonder whether the cases could just as well have been decided using the familiar concepts of legal causation, voluntary assumption of responsibility, *novus actus* or remoteness. Was it really necessary for the majority to go to the trouble of inventing new concepts such as scope of duty and duty nexus? Are these in fact new concepts at all, or are they simply a rebranding or redeployment of our old friends causation, remoteness, proximity *et al* in disguise? As the learned editors of *Clerk & Lindsell (16 ed.)* commented presciently as long ago as 1989:

    *"Much of the trouble has stemmed from conceptualising "duty," "breach" and "remoteness" and the superimposition of needless terminological confusion through the indiscriminate use of technical jargon in different senses."*

52. Is this the trap into which the majority has fallen? It is difficult to disagree with Lord Denning when he said that it is surely ultimately a matter of common sense. If so, we will be back where we started, carrying out an evaluative judgment to determine the extent of the defendant's liability and using whatever conceptual tools fit best with the problem at hand, be that causation, remoteness, proximity, duty-nexus or whatever.

*What has been will be again, what has been done will be done again;*
*There is nothing new under the sun.*

Ecclestiastes 1:9 (NIV)

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[2] *Nolan and Plunkett: Keeping Negligence Simple* (2022) LQR 138 (Apr), 175-181; *Tavares: Darren Eaton v Auto-Cycle Union Ltd (Trading as Acu),* Case Comment (2023) JPIL 1 C8-C10;