A KHAN OF WORMS: THE SCOPE OF MEDICAL ADVICE

TWINNED with *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2021] 3 W.L.R. 81, the decision of a seven-strong Supreme Court in *Meadows v Khan* [2021] UKSC 21 [2021], 3 W.L.R. 147 considered the application of *South Australia Asset Management Corporation v York Montague* [1997] A.C. 191, (commonly referred to as *SAAMCO*) to a case of clinical negligence. Despite the apparently straightforward nature of the case, it is remarkable because the leading judgment, delivered by Lords Hodge and Sales (with whom Lords Reed, Kitchin, and Lady Black agreed), adopted an approach that earned rebuke from two other justices. Moreover, the challenges the case highlights were, largely, overlooked.

As her nephew suffered from haemophilia, the claimant, Ms. Meadows, visited her general practitioner to establish whether she carried the relevant gene, so as to avoid having any child of her own so stricken. Rather than referring her for genetic counselling, which would have answered this, tests were ordered that would only indicate whether she actually had haemophilia. A few days later, the defendant, Dr. Khan, a second general practitioner at the practice, discussed the results with the claimant, negligently leaving her under the impression that she was not a carrier. In due course Adjewon was born, suffering from severe haemophilia, which would have been avoided but for the negligence. Substantial damages for the additional costs of Adjewon's haemophilia were agreed as being recoverable, but Adjewon was also later diagnosed with autism. *Meadows* addressed whether the additional expenses occasioned by Adjewon's autism could be recovered as well. Dr. Khan relied on *SAAMCO* to argue those losses were not within the scope of her duty given that the advice sought specifically concerned only haemophilia, nor did haemophilia raise the risk of autism. The claimant had not sought to avoid having a child altogether, simply one with haemophilia. At first instance ([2017] EWHC 2990 (QB), [2018] 4 W.L.R. 8), Yip J. felt that the exceptional recovery in *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134 was a closer analogy to *Meadows* than the fate of Lord Hoffmann's avalanche-prone mountaineer in *SAAMCO*. Unlike the independent risk of avalanche, the risk of a pregnancy resulting in autism was bound up with the pregnancy resulting from the defendant's negligence. Yip J. felt there was no just policy distinction between a mother who wished to avoid any pregnancy, as in existing Court of Appeal authority, and only a particular pregnancy, as in *Meadows* (at [58], [68]).

In a single judgment from Nicola Davies L.J., [2019] EWCA Civ 152, [2019] 4 W.L.R. 26, the Court of Appeal disagreed, the autism-related losses were irrecoverable. In *Chester* the very damage the duty focused on occurred, in *Meadows* that was not so. The correct issue was the

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adequacy of connection between the breach and the losses claimed (at [29]). Applying *SAAMCO* required scrutiny of three issues (at [19], [27]): the purpose of the allegedly negligent procedure, advice or information; the appropriate apportionment of risk in light of this; and (although misstated by Nicola Davies L.J.) the counterfactual analysis adopted in *SAAMCO*. Here, the purpose concerned only the risk of bearing a child with haemophilia, Ms. Meadows would have thought she still bore the general risks of pregnancy besides haemophilia, and the autism was, ultimately, coincidental. The defendant had not been advising on the risks of pregnancy generally or on any wish to avoid pregnancy altogether (at [25]). Nor did knowledge of Ms. Meadows's concern broaden the scope of the defendant's duty, indeed, Nicola Davies L.J. noted, (at [27]), that given the specific request, "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".

Over three judgments, the Supreme Court denied the claimant's appeal. Their task was to decide whether *SAAMCO* applied to clinical negligence and, if so, how. Counsel optimistically suggested that the traditionally broad scope of recovery in clinical negligence rendered *SAAMCO*'s scope of duty approach inappropriate. This bold claim was, rightly, roundly rejected as lacking a principled basis; *SAAMCO* was not confined to pure economic losses in commercial settings (at [62]). Both Lords Burrows and Leggatt in their respective concurring judgments emphasised the defendant's professional nature in clinical negligence cases to justify *SAAMCO*'s relevance to their advisory responsibilities (at [72], [90]). It is indeed difficult to see why duties owed by professional advisers, medical or otherwise, should be approached differently. It may be, as was suggested, that in many clinical negligence cases relying on the *SAAMCO* counterfactual to identify recoverable losses is otiose (at [53], [63]), but there will undoubtedly be cases like *Meadows* where it is necessary. Settling *SAAMCO*'s application to these facts was, ultimately, straightforward, Nicola Davies L.J.'s view of the purpose for which the advice had been obtained was approved (at [67], [77], [84]). The known and specific nature of the claimant's interest in haemophilia placed the autism losses outside the scope of the defendant's duty. Applying the *SAAMCO* counterfactual, (at [68], [71], [77]), could also be a useful cross-check, asking if the defendant's advice had been true would the same loss have resulted? The answer, that Adjewon would still have suffered from autism, supported the view those losses were irrecoverable.

A notable oddity of *Meadows* was the substantial attention given by Lords Hodge and Sales to basic matters of the structure of the tort of negligence, parsing this into six questions. The second of these, the "scope of duty question", addressed, as in *Meadows*, the purpose of the service undertaken, overlapping closely with their fifth one, which found the

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counterfactual analysis adopted in *SAAMCO* inelegantly rebadged as the "duty nexus question". Lord Burrows – perhaps more conscious of the classroom – suggested this was, in some ways, novel, and an unhelpful approach (at [78]) as well as, ultimately, unnecessary, a sentiment shared by Lord Leggatt (at [96]). The latter two judgments are to be preferred for their brevity and focus; they lack nothing in rigour for avoiding the majority's approach.

Only Lord Leggatt touched, (at [84]), briefly, on the real challenges *Meadows* highlights. The known and specific purpose of the consultation could not, itself, suffice to limit the duty to haemophilia only: "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." This is undoubtedly correct. A specific request from a patient is not explicit dissent as to further material information. Nicola Davies L.J.'s suggestion that this duty to advise more broadly – mirrored in current professional guidance – can be so easily constrained is highly doubtful. A narrow, task-focused analysis may be more easily justified for specialists, who can, in any case, minimise their risk by simply referring the patient on. The more general a practitioner, the broader the patient's request or presenting symptoms, the less obvious such natural limits will be, and the scope of duty will rely on careful preliminary evaluation by the practitioner of what issues are live in the first place. Clear primary findings of fact about this exchange will be vital. Ask, what more was required to bring the autism losses within Dr. Khan's duty? Clearly knowledge that the patient wishes to avoid any pregnancy suffices, but *Meadows* suggests that unless the patient actively seeks advice about a condition, there may be no recourse when, following negligence, it occurs. Ms. Meadows did not, after all, decline general advice, rather, asking about one risk was not a request for anything else. That distinction matters in that it risks placing the burden of clarification on the patient to explain rather than the practitioner to reasonably explore. This raises two further issues. First, a particularly forthcoming, interrogative, or conversational patient surely cannot extend the scope of the practitioner's duty simply by flooding them with information. There are limits to what can be reasonably expected from any practitioner. Second, *Meadows* hints at a different view of the practitioner-patient relationship to other authorities. The burden for harried practitioners is obvious, particularly given the defendant was advising on results she had not herself ordered. Yet as the Supreme Court made clear in *Montgomery* [2015] UKSC 11, [2015] A.C. 1430, practitioners must, at least for risk disclosure, find time to communicate adequately. *Meadows* suggests, without explaining, greater leniency may be allowed when assessing what issues were live at all; after all, the patient was given advice on the issue she raised, nothing more but nothing less. As *Montgomery* emphasised, both proactive

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communication by practitioners and trusting in capable adults to make their own decisions are important aspects of the law's view of communication in healthcare. In *Meadows*, the latter seemingly constrained the former and patients may now, in retrospect, wish themselves more proactive upon initial presentation instead.

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NO ORAL MODIFICATION CLAUSES: AUTONOMY, CERTAINTY OR PRESUMPTION?

BY a judgment of Lord Sumption with which a majority of the court agreed, the Supreme Court in *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* [2018] UKSC 24, [2019] A.C. 119 ruled that a contractual term which prescribed that the contract was not amendable save in writing signed by or on behalf of the parties (a No Oral Modification or "NOM" clause) was effective to invalidate subsequent oral variations to the contract. Lord Burrows later suggested extrajudicially (in P.S. Davies and M. Raczynska (eds.), *Contents of Commercial Contracts* (London 2020), 49) that *Rock Advertising* might not find traction in other common law jurisdictions. The decision has now been considered for the first time by a Commonwealth apex court. Indications are that it will endure a mixed reception around the common law world.

The Singapore Court of Appeal case of *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("*Lim v Hong*") stemmed from an agreement executed in September 2014 for the sale and purchase of certain shares by the sellers (one Mr. Lim and his mother) and the buyers (Messrs. Hong and Tan). Completion of the transaction was slated for mid-October 2014 but that never occurred, leading the sellers to sue the buyers for breach of contract in 2018. In their defence the buyers pointed to a telephone call between Mr. Lim and Mr. Hong on 31 October 2014 in which both sides had purportedly agreed to rescind the sale and purchase agreement.

Delivering judgment in a five-judge Court of Appeal, Steven Chong J.C.A. found that the parties had indeed orally concluded an agreement to rescind. That was the only satisfactory explanation for the delay of over three years between the stated completion date and the time the sellers served upon the buyers a notice to complete (and subsequently the writ of action). Similarly, although text exchanges between Mr. Lim and Mr. Hong up to 31 October 2014 showed the former trying "desperately" to complete the transaction (at [67]), no further text messages existed after that date. Mr. Lim also did not assist the claimants' case with his inconsistent evidence at trial.

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