In *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2017] 2 W.L.R. 1029, Mr. Gabriel lent £200,000 to a developer, Mr. Little. He had expected the money to be wholly employed by Mr. Little in developing a property. Mr. Little, however, used the advance to discharge borrowings secured on the property, and other liabilities. In the event, no development of any significance was carried out, the property was worthless and Mr. Gabriel's advance was lost.

In Mr. Gabriel's subsequent claim against his solicitors, BPE, the trial judge held that they had been negligent in not explaining to Mr. Gabriel that Mr. Little would be putting nothing into the project, and in preparing loan documentation suggesting otherwise. Mr. Gabriel claimed his entire loss, contending that had he been aware of Mr. Little's intentions he would not have made the advance. BPE argued that Mr. Gabriel's loss arose from Mr. Little's under-estimate of the development costs, and from Mr. Gabriel's over-estimate of the property's value, being matters for which they were not responsible. The trial judge found for Mr. Gabriel. The Court of Appeal reversed the decision. The Supreme Court upheld the Court of Appeal, holding that BPE had only been instructed to prepare the loan documentation and had not assumed responsibility for Mr. Gabriel's decision to make the loan, and further that even if the advance had been employed in developing the project it would have remained incomplete and worthless. Mr. Gabriel's losses were not within the scope of BPE's duty.

The outcome was dictated by a seemingly straight-forward application of the scope of the duty (or extent of liability) principle elaborated in *South Australia Asset Management Corp v York Montague Ltd.* [1997] A.C. 191 ('*SAAMCO*') by Lord Hoffmann (and in subsequent cases *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd. (No. 2)* [1997] 1 W.L.R. 1627 and *Platform Home Loans Ltd. v Oyston Shipways Ltd.* [2000] 2 A.C. 190). The *SAAMCO* principle may be summarised thus: a person in breach of a duty to take reasonable care *in providing information*, to be used by someone else in deciding upon a course of action, is only responsible "for all the foreseeable consequences of the information being wrong". It would not be fair and reasonable to impose liability on such a person, either by implied term or in tort, for other consequences which would have occurred even if the correct information had been provided. In contrast, a person in breach of a duty to take reasonable care *in advising* someone else as to what course of action to take, considering "all the potential consequences of that course of action", is responsible "for all the foreseeable loss which is a consequence of that course of action having been taken" (*SAAMCO* [1997] A.C. 191, 214).

SAAMCO, *Nykredit* and *Platform Home Loans* each involved claims by lenders against professional valuers arising from the negligent valuation of properties to be used as security for loans. Since those decisions, English law has made broad use of Lord Hoffmann's principle, applying it in cases relating to absolute contractual obligations (e.g. *The Achilleas* [2008] UKHL 48; [2009] 1 A.C. 61; *Supershield Ltd. v Siemens Building Technologies FE Ltd.* [2010] EWCA 7; [2010] 2 All E.R. (Comm) 1185), purely tortious claims (e.g. *Playboy Club London Ltd. v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457; [2016] 1 W.L.R. 3169), statutory duties (e.g. *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184; [2013] 1 All E.R. (Comm) 915) and activities far-removed from the provision of professional advice (e.g. *Calvert v William Hill Credit Ltd.* [2008] EWCA Civ 1427; [2009] Ch. 330; *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408; [2016] 1 W.L.R. 4487).

Despite this, the *SAAMCO* principle has attracted criticism. *Hughes-Holland v BPE* afforded an opportunity for Lord Sumption (with whom the other Justices agreed) to address (amongst other matters) three such criticisms (at [37]–[46]). One concerned whether it was correct to describe the principle as "having nothing to do with causation". Much has been written in connection with this assertion since it was first made (*Nykredit* [1997] 1 W.L.R. 1627, 1638). Lord Sumption dealt with the point shortly (at [38]), (apparently) conceding the criticism, while dismissing it as a "mere question of terminology" of no practical importance. For reasons of space this note will not revisit the debate. Suffice it to say that, on one view, the *SAAMCO* principle adds a different, complementary perspective to those normally considered under the labels "causation" and "remoteness".

A second criticism addressed by the Court concerned the "cap", or restriction, on recoverable damages applied in "information" cases. As explained by the Court (at [46]), in the paradigm case where a valuer has negligently over-valued a prospective security, and the lender then suffers loss following a fall in the market, the *SAAMCO* principle is not applied by stripping out the loss attributable to the fall in the market (described in *Platform Home Loans*, [2000] 2 A.C. 190, 206–07, as the "scientific approach"). Instead, the lender's damages are limited to the difference between the negligent valuation and the "true value". The criticism levelled at this "cap" (which "translated [the *SAAMCO* principle] into practical terms": *Nykredit* [1997] 1 W.L.R. 1627, 1631) was, broadly, that it failed to guarantee that losses arising from risks falling outside of the scope of the defendant's liability would be excluded. Lord Sumption dismissed this criticism as well, affirming that the "cap" served to award losses within the scope of the defendant's duty, not to exclude losses falling outside of it. While in "a simple case", he said, it might be possible to "strip out" extraneous sources of loss, this will often be difficult or impossible: "It is fair to

say that as a tool for relating the recoverable damages to the scope of the duty the *SAAMCO* cap or restriction may be mathematically imprecise. But mathematical precision is not always attainable in the law of damages."

Beyond these practical considerations, however, Lord Sumption sought to affirm the fairness of the "cap", on the basis that it represented "the measure of the increased risk to which [the valuer] exposed the lender[,] . . . the maximum measure of his own responsibility for what happened, and therefore provided the limit to what was recoverable by way of damages". Lord Sumption's position is justified when one considers that in such cases, the parties will have in their contemplation that the lender may be willing to lend against a security valued at the amount represented, and that the recoverability of damages up to the difference between its represented and true values is necessary "to meet the complaint that the security was overvalued" (H. Tomlinson and T. Grant (eds.), *Lender Claims* (London 2010), para. 5–34).

A final criticism of the *SAAMCO* principle addressed by the Supreme Court (at [39]–[44]) concerned the "information" and "advice" taxonomy. Recognising the "descriptive inadequacy" of the terms, Lord Sumption sought to provide further guidance. In an "information" case, he explained, the adviser contributes limited material to another's decision-making process, but the other party also relies on further considerations identified by the other party herself, and it is the other party, not the adviser, who assesses the overall merits of the decision. Accordingly, the adviser's liability extends only to the foreseeable consequences of the material she supplies being wrong. This is so, even if the material supplied by the adviser is (and is known to be) determinative of the decision. An "advice" case, on the other hand, occurs where the adviser's duty is to select and then consider all matters relevant to the decision: "[i]f one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against."

Lord Sumption further highlighted that the categories "information" and "advice" were exclusive. "Information" cases do not shade into "advice" cases proportionately as the adviser undertakes more and more extensive informational duties. This is so because in an "advice" case, the loss for which the adviser incurs liability can flow from a risk of the transaction other than that which the adviser had failed to assess. There was, it was said, "a certain pragmatic justice" in this, as by hypothesis the adviser had assumed responsibility "for guiding the whole decision-making process".

Two points arise from this. First, in some cases an adviser might undertake a bundle of separate informational duties pertaining to the same decision: such a case would remain an "information" case, and any liability of the adviser would have to assessed separately in relation to each

informational duty. Second, the two crucial questions to consider in distinguishing between the two categories, it would seem, will be whether it is the adviser or the client who selects the factors to be considered, and whether or not the adviser has undertaken to recommend a course of action: a positive answer to either, it is submitted, should cause the case to be treated as an "advice" case.

In revisiting the *SAAMCO* principle, the Court dealt exclusively with claims for financial losses. It is suggested that in a suitable future case the Court should consider the application of the principle more widely. In particular, the *SAAMCO* principle could be applied usefully to claims concerning failures by medical professionals to warn of risks. At a high level, these cases are strikingly similar to those involving failures by professionals in their duties to advise clients in relation to financial risks: and the absence of the *SAAMCO* principle from such cases is all the more surprising, given Lord Hoffmann's famous illustration of the principle, to wit, the story of the mountaineer's knee.

In order to explore this suggestion, consider the much-commented *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 (noted in [2005] C.L.J. 32). In *Chester*, a patient suffered a serious injury during a surgical procedure. The main issue was whether the surgeon's failure to warn the patient of the small, inherent risk of such an injury associated with the procedure, should be treated as a cause of the injury. The patient had established that, if warned, she would have delayed undergoing the procedure: but she could not establish that she would never have elected to have the procedure at some later date, thereby running the same risk of injury. Their Lordships' concern was that, in those circumstances, the occurrence of the injury following the failure to warn ought to be treated as a pure coincidence. This issue arose from their consideration of the dissenting opinion of McHugh J. in a closely analogous Australian case, *Chappel v Hart* [1998] HCA 55; 195 C.L.R. 232. McHugh J. approached the "pure coincidence" issue by adopting the following reasoning: "it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. … If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff" (at [27]). McHugh J. concluded that, as the failure to warn the patient had not increased her risk of injury, whether the surgery took place when it did or was delayed, it was not a legally a cause of the injury.

As a matter of English law, this reasoning should have been rejected as doubly heretical. First, English law had already taken a different direction in *SAAMCO*. Whereas in *Chappel* (at [26]), McHugh J. cited *The Empire of Jamaica* [1955] P. 52 in support of his reasoning, Lord Hoffmann had by then already adopted that authority as illustrating the *SAAMCO* principle

(*SAAMCO* [1997] A.C. 191, 213). Second, to equate a material increase in the risk of injury with a material contribution to the injury itself was permissible only in those exceptional cases discussed in *Fairchild v Glenhaven Funeral Services Ltd.* [2002] UKHL 22; [2003] 1 A.C. 32. *Chester* was not such a case.

Had *Chester* been approached by analogy with *SAAMCO*, the just result sought by the majority could have been achieved, without misgivings and without recourse to modifying orthodox causation principles. "But for" causation was established on a balance of probabilities (*Chester*, at [19], [61], [81]). The risk of the injury as a result of the breach was reasonably foreseeable, and there were no reasons not to find legal causation. The only remaining step would have been to apply the *SAAMCO* principle. In this regard, *Chester* would arguably have been treated as an "advice" case, the surgeon's duty being to protect the patient against the full range of risks associated with the procedure. His responsibility would have extended to the all consequences of the decision to proceed with the surgery. In the alternative, if *Chester* were treated as an "information" case, the injury would have been damage within the "cap". By failing to warn of the risk of injury the surgeon represented that there was none; the true position was that there was such a risk; the difference between the two was the very injury that occurred.

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BREACH OF DUTY: A DISAPPEARING ELEMENT OF THE ACTION IN NEGLIGENCE?

All causes of action in tort, like all causes of action generally, are constituted by elements or ingredients. It is often the case that these elements are not crisply separated from each other. That is certainly so in relation to the cause of action in negligence, it having regularly been pointed out that none of its elements is self-contained. Denning L.J. took that view further than most. In *Roe v Minister of Health* [1954] 2 Q.B. 66, 86, he asserted: "you will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems that they are simply three different ways of looking at one and the same problem." More commonly it is accepted that although the various elements of the tort of negligence overlap, they nonetheless retain separate identities. Thus, determining whether the tort of negligence has been committed is not generally understood as requiring a single homogeneous enquiry but an analysis whereby one examines each element of the action *seriatim* in order to determine whether it is present. This conventional understanding was