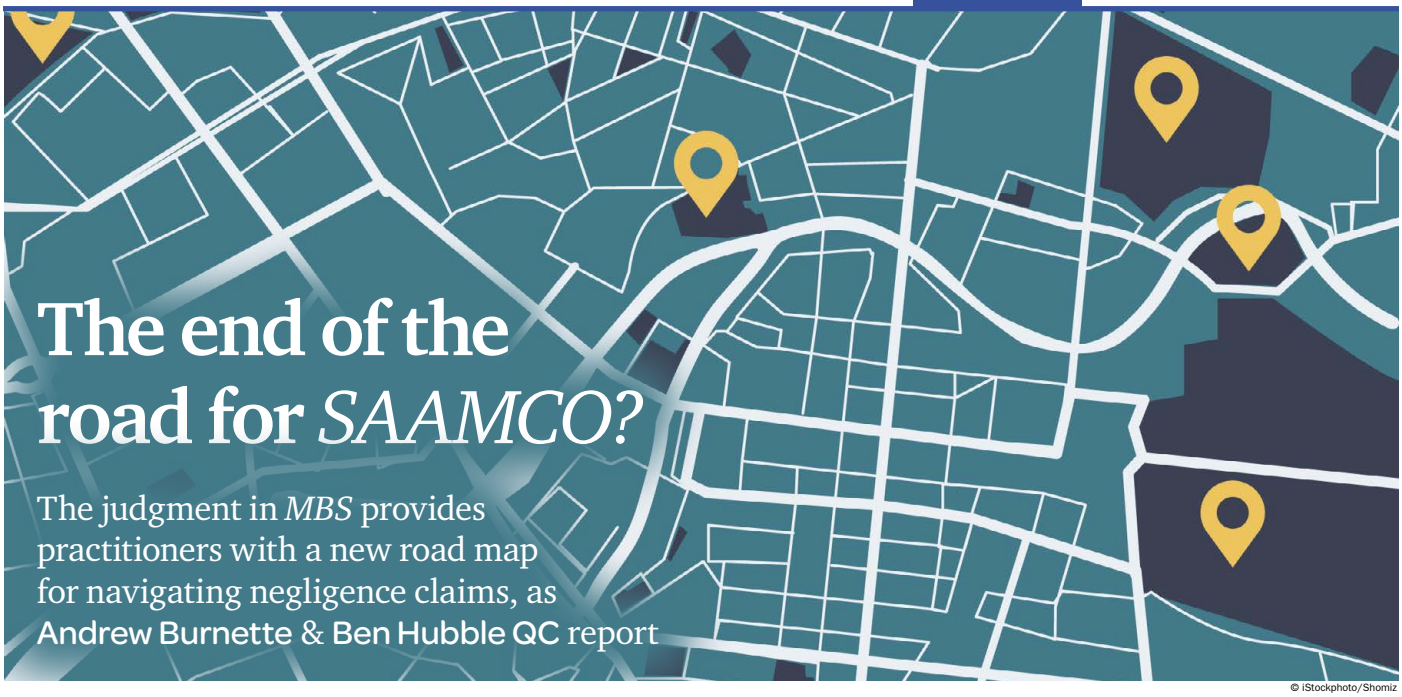

The end of the road for *SAAMCO?*

The judgment in *MBS* provides practitioners with a new road map for navigating negligence claims, as **Andrew Burnette & Ben Hubble QC** report

IN BRIEF

▶ The seminal *SAAMCO* principle—a key aspect of the notion that a defendant is liable only for losses which fall within the scope of the duty of care owed to the claimant—has been re-stated and re-purposed by the Supreme Court.

In his concurring judgment in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2021] All ER (D) 45 (Jun) (*MBS*), Lord Leggatt refers to the scope of duty principle articulated in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365 (*SAAMCO*) as having 'proved difficult to formulate as well as difficult to apply' para [41]. Few practitioners would disagree. Twenty-five years later, following the judgments of the Supreme Court in *MBS* and the linked appeal of *Khan v Meadows* [2021] UKSC 21, [2021] All ER (D) 44 (Jun) we ask—is it the end of the road for *SAAMCO*?

Re-stating not re-writing

MBS and *Khan* were always going to be significant judgments—the two unrelated appeals were brought together before an expanded tribunal of seven justices, including the president and deputy president of the Supreme Court. The court has seized the opportunity to return to first principles and provide a restatement of the role of *SAAMCO* within the wider context of scope of duty. These judgments, which provide a helpful road map to follow in negligence cases, reconcile *SAAMCO* with the key decisions since, including *BPE Solicitors v Hughes-Holland* [2017] UKSC 21, [2017] 3 All ER 969 more recently. They will represent a practitioner's starting point from now on, taking the broader framework in *Khan* first before moving to the detail set out in *MBS*.

The outcome of both appeals was unanimous, but in each case Lord Leggatt and Lord Burrows reached their conclusions via alternative analyses which the majority respectfully rejected. We focus on the approach taken by the majority as set out in the judgment of Lord Hodge and Lord Sales.

The appeals

In brief, the issue in:

- *Khan*, a clinical negligence claim, was whether a doctor, who had negligently advised a woman that she did not carry the haemophilia gene, was liable for the additional costs of raising a child who had autism (as well as haemophilia) when she would have not have had a child if she had been competently advised.
- *MBS*, an audit negligence claim, was whether Grant Thornton was liable for all of the losses resulting from its negligent advice that MBS could adopt hedge accounting when preparing its statutory accounts and assessing its capital adequacy requirements. Those losses extended to the cost of breaking interest rate swaps that MBS had entered into as a hedge against the cost of borrowing money to fund its lifetime mortgages business. MBS would not have entered into those swaps if competently advised.

In both judgments, the Supreme Court focused its attention on what it regarded as the increasingly overcomplicated attempts to apply *SAAMCO* over the years. In the view of the majority, a simplification was required, with a particular focus on the purpose of the advice and whether loss arose from the risk it was supposed to guard against.

A negligence road map

The basic objective of compensating a claimant in tort remains, as ever, to place them in the position they would have been in absent the defendant's negligence. The approach of the majority starts at the end of the process with an initial assessment of the overall loss suffered, and then sets out steps to identify the loss for which the defendant is legally liable.

- Stage 1 **Damage**: what has the claimant lost? This is an assessment of the consequences of the defendant's act/omission without, at this stage, considering why or how those consequences arose.
- Stage 2 **Scope of duty**: this is where the majority returned to first principles, focusing on the 'purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given' para [13], *MBS*. Once the purpose of the duty is clear, the question is whether the whole of the loss identified at stage 1 falls within its scope. In *MBS*, the majority summarised this as: '…one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk' para [17]. The *SAAMCO* analysis (stage 5, below) *only* comes into play if there is an issue as to the extent or quantification of loss attributable to the defendant's negligence.
- Stage 3 **Breach of duty**: did the defendant's act or omission breach the duty identified at stage 2?
- Stage 4 **Factual (not legal) causation**: usually described as the 'but for' test—but for the defendant's act/omission, would the claimant's loss have occurred? The majority acknowledge the limitations of this test in more

complex disputes, particularly where there is more than one negligent party and/or cause of harm.
- Stage 5 **Duty nexus**: this, the majority finds, is where *SAAMCO* fits into the overall analysis. Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the defendant's duty of care as analysed at stage 2? This question may not always be required.
- Stage 6 **Legal responsibility**: the application of legal filters, exclusions or other limiting factors such as remoteness, breaks in the chain of causation, contributory negligence and mitigation are applied.

What has changed?

The road map re-positions both the role and the importance of the *SAAMCO* analysis. The Supreme Court distinguishes the broad scope of duty principle, with its purposive intent, from the *SAAMCO* 'principle', downgrading the latter to simply an expression of the '…established principle that the law addresses the *nature or extent of the duty* of the defendant in determining the defendant's liability for damage' (para [33], *Khan)*, (emphasis added). A *SAAMCO* analysis need only be applied *after* scope of duty has been established, where there is an issue as to the degree or quantification of loss.

So where does this leave two of the most fractious elements of *SAAMCO*—advice versus information cases, and the counterfactual analysis?

Advice/Information

In line with the view of Lord Sumption in *BPE*, all seven justices agree that the labels of advice and information are unhelpful and unrealistic. Rather, there is a spectrum of activity that a professional adviser may move along, but it is the underlying purpose behind that activity which will determine whether loss falls within the scope of duty. Lord Leggatt, with whom the majority specifically agreed on this point, says: '[I]t seems to me that it would be desirable to dispense with the descriptions "information" and "advice" as terms of art and to focus instead on the need to identify with precision in any given case the matters on which the professional person has undertaken responsibility to advise and, in the light of those matters, the risks associated with the transaction which the adviser may fairly be taken to owe a duty of care to protect the client against' para [92], *MBS*.

This is the key element of stage 5, the duty nexus question. Rather than asking whether the adviser is guiding the whole decision-making process or merely providing information, the majority take us back to the purpose of the instruction and use that as the basis for attribution of loss. The advice/information distinction has had its day.

Counterfactual

The majority make it clear that the counterfactual analysis (if competent advice been provided, would the outcome have changed or remained the same?) has value only as a cross-checking device, and then only in limited circumstances. Indeed, they say that the counterfactual may only be truly beneficial in relatively simple scenarios, with its value as a tool dropping the more complex the issues in a dispute become.

If the counterfactual is to be used, it must be framed correctly, and it must flow from the primary question of purpose. Furthermore, the majority emphasise that the correct approach to a counterfactual is not 'would the claimant have acted differently had the defendant's information been correct' but 'would the *loss* have been different had the claimant acted exactly the same but the information provided by the defendant had been correct'. The counterfactual tail should not wag the purposive dog—it can only assist in, not direct, a determination of scope of duty.

The counterfactual therefore remains, but its influence is considerably reduced.

Application to MBS & Khan

Applying the road map to *Khan*, the court concluded that, while there was a factual causal link between the doctor's mistake and the child's birth, that link had nothing to do with the scope of the doctor's duty, which was limited to identifying the risk of haemophilia. The doctor was liable only for the foreseeable consequences of *that* risk coming to fruition, so the appeal was dismissed.

However, the appeal by *MBS* succeeded. The court concluded at para [38]: 'In our opinion, reference to the reason the advice was sought and given is important, because that is the foundation for the conclusion that the purpose of the advice was to deal with the issue of hedge accounting in the context of its implications for the society's regulatory capital. It is not in dispute that the loss in issue formed part of the society's "basic loss" flowing from Grant Thornton's negligent advice. *Examination of the purpose for which that advice was given shows that the loss fell within the scope of their duty of care*' (emphasis added).

New map, but where are we going?

So, is it the end of the road for the *SAAMCO* approach? No, but its importance is diminished. The Supreme Court has reduced it to merely one of the later questions to be asked and answered within the context of an overall assessment of negligence. The new road map emphasises the need to focus on the qualitative question of the underlying purpose of a professional's instruction, with the *SAAMCO* analysis shifted to a secondary, quantitative role only.

What does this mean for practitioners, whether acting on behalf of claimants or defendants?
- Theoretically at least, some of the old battlegrounds are gone:
  - information and advice, and the associated fights to shoehorn activity into one or other binary category, are no more or at least will be (even more) arid;
  - the role of the counterfactual has been reduced, with the complex counterfactual most likely consigned to history.
- Inevitably, however, there will be new battlegrounds:
  - the shift in focus to a purposive approach is going to shine an even brighter light on terms of engagement/retainer letters, together with an increased focus on identification of the risk which advice was intended to guard against, particularly given that retainers can develop over time; the concept of 'the purpose of the advice' is one that will admit of many arguments as to the ambit of any 'purpose' in any given set of facts;
  - there will likely be greater debate around client transparency and the objective risks the professional has accepted; and
  - in those limited cases where a counter-factual is appropriate, greater discussion about whether the right framing is proposed.

The steps in the analysis have now been set out with clarity. But we will continue to see the arguments for and against whether a loss is recoverable, but now by reference to: (i) the ambit of the purpose of the duty to advise; and (ii) the nexus between that purpose and the harm suffered. **NLJ**

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