

Scope of Duty - the forgotten ingredient

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Starting shortly ...

STOP
GETTING
IT
WRONG!



- What is scope of duty?

- Lord Denning:

“a person should be liable, within reason, for the consequences of his conduct...”

“Is the consequence fairly to be regarded as within the risk created by the negligence?”

Chickens and eggs



“the duty of care is inseparable from the damage which the claimant 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 claimant damage of the particular kind which he has in fact sustained.”

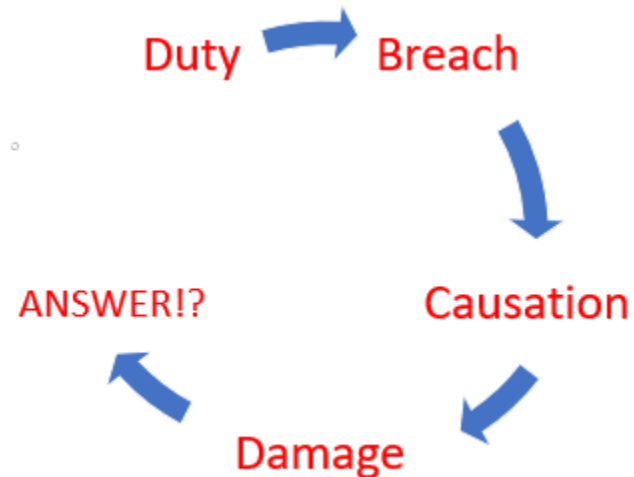
“The SAAMCO principle”

- a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care

So is it:

- Part of causation?
- Part of remoteness?

- Established textbook formula:



Too simplistic (but still a helpful starting point)

- Classic illustration of the scope of duty problem

- Lord Hoffman in SAAMCO (1991): the climber's knee



- Simple but for test does not work

Khan v Meadows (2021 Supreme Court)

FACTS:

- C negligently told by her GP that she did not have haemophilia gene
- Had a baby with haemophilia and autism
- If she had known of risk of haemophilia she would have tested foetus and terminated
- But autism completely unrelated, any child she had could have been autistic

The issue:

- Could she recover damages for additional costs of bringing up a child with haemophilia (£1.4M) or for haemophilia plus autism (£9M)?

- Let's take a vote

The solution:

- SC formulated a 6 step algorithm, intended to help judges to determine extent of recovery in all negligence claims

Step 1: the actionability question

- Must be the right kind of loss or damage
- Must be more than de minimis
- eg bodily consequences and financial costs

Step 2: the scope of duty question

- Put another way: what are the risks of harm to the claimant against which the law imposes a duty on the defendant to take care?
- Development of case law has placed some things wholly outside scope of duty in tort eg purely economic loss (Spartan Steel), psychiatric harm to secondary victims (McLoughlin v. O'Brian), liability for pure omissions (Smith v. Littlewoods), investors' losses through reliance on auditors' reports (Caparo v. Dickman)
- In an 'information' case, the purpose for which information is sought may (but may not) provide the answer
- More complex when C suffers different heads of loss from same wrong: may need to go to Step 5 to do a cross-check

Step 3: the breach question

- Has D failed to show reasonable care in relation to a risk of harm that was within scope?

Step 4: the factual causation question

- Often (but not always) answerable by the but for test

Step 5: the duty nexus question

- 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 step 2?
- Often easy to answer especially in a personal injury claim
- But, in an information or advice case, *may* require application of 'the SAAMCO counterfactual', which is simply an analytical or cross-check tool: what would have happened if the information provided had been correct?

Step 6: the legal responsibility question

- Does some legal principle reduce or extinguish the right to damages?
- Eg Contributory negligence, novus actus, volenti, ex turpi causa, public policy
- Includes remoteness and foreseeability

Let's run some examples through the 6 steps

- Take the simplest RTA example: C knocked off bike by D, suffers broken arm, loss of earnings, need for care

Back to Khan v Meadows:

- Step 1 actionability: ✓
- Step 2 scope of duty: ?
- Step 3 breach: ✓
- Step 4: factual causation: ✓
- Step 5: duty nexus: ?

Step 5 contd: Consider haemophilia and autism losses separately:

- (i) haemophilia losses: she did not want a baby with haemophilia; she sought information about the risk of haemophilia; if she had been properly informed about the risk of haemophilia, she would not have had the baby. So:



- (ii) autism losses: apply the counterfactual – if the information had been true ie she was not a carrier of the haemophilia gene – she would have had the baby, and it would have had the same chance of autism.

So:



Step 6: legal responsibility



Result in SC: damages recoverable were limited to £1.4M

When to apply the counterfactual as a cross-check:

- In an 'information' or 'decision' case
- In a case where the issue is the extent of recoverable loss, rather than whether any loss is recoverable at all
- (Not an exhaustive list!)

A couple more worked examples:

- Parkinson v. NHS (2002)
- Groom v. Selby (2002)

Both are 'no baby' cases

And finally: Chester v Afshar

- Failed to warn of small (non negligent) risk of surgery
- Unable to show that she would have refused surgery if properly advised: so she failed on Step 4 factual causation
- Policy decision to allow recovery

End

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