Neutral Citation Number: [2018] EWCA Civ 2609

Case No: B3/2017/3491

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MRS JUSTICE YIP DBE
[2017] EWHC 2990 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2018

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

DR HAFSHAH KHAN	**Appellant**
- and -	
MNX	**Respondent**

- -
- -

Simeon Maskrey QC and Neil Davy (instructed by **BLM**) for the **Appellant**
Philip Havers QC and Eliot Woolf QC (instructed by **MW Solicitors**) for the **Respondent**

Hearing date: 17 October 2018

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Approved Judgment

Lady Justice Nicola Davies DBE:

1. This is an appeal from the judgment of Yip J who determined that the costs related to the autism of FGN, the respondent's son, following his birth may be properly recovered by her and assessed damages in the agreed sum of £9,000,000. FGN suffers from both haemophilia and autism. The appellant admits that but for her negligence FGN would not have been born because his mother would have discovered during her pregnancy that he was afflicted by haemophilia and so would have undergone a termination of the pregnancy. It is accepted by the appellant that the respondent is entitled to recover the additional costs associated with the condition of haemophilia. The issue at trial and on appeal is whether, as a matter of law, the appellant's liability is limited to additional losses associated with FGN's haemophilia or whether she is liable for the additional losses associated with both his haemophilia and autism. Yip J granted permission to appeal.

2. By an order dated 8 February 2017, the appellant consented to judgment being entered on the basis of the allegations of breach of duty and causation as set out in the Particulars of Claim. Prior to trial the parties reached agreement in relation to quantum on the basis that:

   i) If the court determined the appellant was liable for the additional losses associated with FGN's haemophilia and rejected the respondent's claim that the appellant is also liable for the additional losses associated with FGN's autism, quantum was agreed in the sum of £1,400,000.

   ii) If the court determined that the appellant was liable for the additional losses associated with FGN's haemophilia and autism, quantum was agreed in the sum of £9,000,000.

Factual background

3. In her judgment [7] Yip J set out the core facts as follows:

> "i) The claimant is now aged 40 and is the mother of [FGN] who … is now aged 6.
>
> ii) In January 2006, the claimant's nephew was born and was subsequently diagnosed as having haemophilia.
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> iii) The claimant wished to avoid having a child with that condition and so consulted a general practitioner, Dr Athukorala, in August 2006 with a view to establishing whether she was a carrier of the haemophilia gene.
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> iv) Blood tests were arranged. However, such tests were those to establish whether a patient had haemophilia and could not confirm whether or not the claimant was a carrier. In order to obtain that information, the claimant would have had to be referred to a haematologist for genetic testing.

v) On 25th August 2006, the claimant saw the defendant, another general practitioner at the same practice, to obtain and discuss the results of the blood tests.

vi) The claimant was told that the results were normal. As a result of the advice she received at that consultation and the previous consultation, she was led to believe that any child she had would not have haemophilia.

vii) In … 2010, the claimant became pregnant with [FGN]. Shortly after his birth … he was diagnosed as having haemophilia.

viii) The claimant was referred for genetic testing which confirmed that she was indeed a carrier of the gene for haemophilia.

ix) Had the claimant been referred for genetic testing in 2006, she would have known she was a carrier before she became pregnant. In those circumstances, she would have undergone foetal testing for haemophilia.

x) Such testing would have revealed that the foetus was affected. In such circumstances, the claimant would have chosen to terminate her pregnancy and [FGN] would not have been born.

xi) [FGN]'s haemophilia is severe. He has been unresponsive to conventional factor VIII replacement therapy. His joints have been affected by repeated bleeds. He has to endure unpleasant treatment and must be constantly watched as minor injury will lead to further bleeding.

xii) In December 2015, [FGN] was diagnosed as also suffering from autism. The fact that [FGN] has haemophilia did not cause his autism or make it more likely that he would have autism.

xiii) Management of [FGN]'s haemophilia has been made more complicated by his autism. Even at the age of six, there is a gap between his understanding of his haemophilia and those of children of the same age. He does not understand the benefit of the treatment he requires and so his distress is heightened. He will not report to his parents when he has a bleed. This gap in understanding is likely to grow as he ages. He is unlikely to be able to learn and retain information, to administer his own medication or to manage his own treatment plan.

xiv) New therapies for treatment of haemophilia may mean that his prognosis in respect of haemophilia is significantly improved.

> xv) In itself, his autism is likely to prevent him living independently or being in paid employment in the future."

4. Yip J accepted that the purpose of the service offered by the appellant was not to prevent the respondent having any child but to prevent her having a child with haemophilia. It was agreed that the risk of autism was a risk that existed with every pregnancy, it was a risk that was not increased nor were the chances of avoiding it lessened by the failure to properly manage the risk of the respondent having a child with haemophilia.

5. The judge considered the authorities as to what were described as wrongful birth and wrongful conception cases. The starting point being identified by her as *McFarlane v Tayside Health Board* [2000] 2 AC 59. This was a failed sterilisation case in which the House of Lords, by a majority, allowed recovery to the mother for the loss and damage associated with her pregnancy but rejected the parents' claim for the costs of raising a normal healthy child.

6. Before the judge, as before this court, the respondent relied upon two decisions of the Court of Appeal, namely *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 and *Groom v Selby* [2002] PIQR P18, submitting that the principles to be derived are:

   i) It is wrong in principle to distinguish between wrongful birth and wrongful conception claims, they are the same;

   ii) They apply even where there is no direct link between negligence and the ensuing disability;

   iii) Where the disability arises from the normal incidents of conception, pregnancy and birth and there is no intervening act a mother can recover;

   iv) In such cases in the law of tort the doctor is undertaking to protect the mother from an unwanted pregnancy.

7. In *Parkinson* the claimant had undergone a sterilisation procedure, the operation was negligently performed and she became pregnant. The claimant was warned by a doctor at the defendant's hospital that the child might be born with a disability but she refused a termination. The claimant subsequently gave birth to a child with severe congenital abnormalities.

8. In *Groom* the claimant had undergone a sterilisation test at a time when, unknown to anyone, she was about 6 days pregnant. Several weeks later she saw the defendant having missed her period and with symptoms including abdominal pain. The defendant negligently failed to carry out or arrange a pregnancy test and failed to examine her to see if she was pregnant. The claimant discovered she was pregnant a few weeks later. Had she known about the pregnancy sooner, she would have terminated it. The child was born apparently healthy, but some four weeks later she was found to be suffering from salmonella meningitis caused by exposure to bacteria from the mother's birth canal and perineal area during the delivery.

9. In *Parkinson* the court, following *McFarlane*, held that in cases of wrongful birth, although parents were not able to recover the costs of the upbringing and caring for a

normal healthy child, they might be entitled to an award of compensation for the extra expenses associated with bringing up a child with a significant disability since the birth of a child with congenital abnormalities was a foreseeable consequence of the surgeon's negligence. In *Groom*, applying *Parkinson*, it was held that the claimant was not entitled to recover the ordinary economic costs of bringing up a healthy child but she was entitled to recover the additional costs attributable to bringing up a disabled child.

10. In *Parkinson* and *Groom* the disability was not caused directly by the negligence of the defendant. In each the doctor had undertaken the task of protecting a patient from an unwanted pregnancy, in *Groom* the pregnancy itself, in *Parkinson* the continuation of the pregnancy. In both the disability arose from genetic causes or foreseeable events during the course of the pregnancy which were not due to a new intervening cause. Hale LJ in *Parkinson* at [92] stated:

> "Another question is when the disability must arise. Mr Stuart-Smith argued that there was no rational cut-off point, as any manner of accidents and illnesses might foreseeably affect a child throughout his childhood. But that is part of the ordinary experience of childhood, in which such risks are always present, and the balance of advantage and disadvantage is deemed to be equal. The two serious contenders are conception and birth. The argument for conception is that this is when the major damage was caused, from which all else flows. This was what the defendants undertook to prevent. But there are at least two powerful arguments for birth. The first is that, although conception is when the losses start, it is not when they end. The defendants also undertook to prevent pregnancy and childbirth. The normal principle is that all losses, past, present or future, foreseeably flowing from the tort are recoverable. The second is that it is only when the child is born that the deemed benefits begin. And it is those deemed benefits which deny the claim in respect of the normal child. In practice, also, while it may be comparatively straightforward to distinguish between ante- and post-natal causes of disability, it will be harder to distinguish between ante- and post-conception causes. Further, the additional risks to mother and child (for example because of the mother's age or number of previous pregnancies) may be among the reasons for the sterilisation. I conclude that any disability arising from genetic causes or foreseeable events during pregnancy (such as rubella, spina bifida, or oxygen deprivation during pregnancy or childbirth) up until the child is born alive, and which are not novus actus interveniens, will suffice to found a claim."

Brooke LJ endorsed this approach in holding that foreseeable incidents during a mother's pregnancy up to the time of birth which caused the child's disabilities would not ordinarily break the chain of causation stating at [53]:

> "In this judgment I am concerned only with the loss that arises when the child's significant disabilities flow foreseeably from his or her unwanted conception. There may well be foreseeable

> incidents during the mother's pregnancy and the time leading up to the birth of the child from which the child's disabilities have flowed, but these will not in the ordinary way be effective to break the chain of causation. If, on the other hand, there is evidence that a child's disabilities, discernible at birth, were caused by some new intervening cause, then the difficult and interesting issues that may arise in such a case will have to be resolved by applying well known principles of causation to the facts of the case before the court."

11. In *Groom* Brooke LJ found that the fact that the child was healthy at birth was irrelevant, finding at [23]:

> "We are concerned in the present case with a child whose severe handicap arose from the normal incidents of conception, intrauterine development and birth."

He went on to hold that the principles of *Parkinson* applied equally to a wrongful birth case. At [24] he held:

> "On this basis, it appears to me that this court's earlier decision in Parkinson is dispositive of this appeal. If we go to the battery of tests to which I referred in paragraph 50 of my judgment in that case, the route to the judge's conclusion in this case would be on the following lines:
>
> (i) in the absence of evidence of any new intervening act, the birth of a premature child who suffered salmonella meningitis through exposure to a bacterium during the normal processes of birth was a foreseeable consequence of Dr Selby's failure to advise the claimant that although she had been sterilised she was in fact pregnant;
>
> (ii) there are no difficulties about proximity;
>
> (iii) there is, as in *Parkinson*, no difficulty in principle in accepting the proposition that Dr Selby should be deemed to have assumed responsibility for the foreseeable and disastrous consequences of performing her services negligently;
>
> (iv) Dr Selby knew that the claimant had been sterilised and wanted no more children (let alone children with serious handicaps) and Dr Selby's duty of care when advising on the symptoms of which the claimant made complaint must be deemed to include the purpose of ensuring that if the claimant was indeed pregnant again she should be informed of this fact, so as to enable her to take appropriate steps to prevent the birth of another child if she wished;
>
> (v) as in *Parkinson*, no radical step into the unknown is in question here;

> (vi) as in *Parkinson*, an award of compensation which is limited to the special upbringing associated with rearing a child with a serious disability would be fair, just and reasonable."

12. The judge also considered the authority of *Chester v Afshar* [2005] 1 AC 134. The defendant, a neurosurgeon, advised the claimant to undergo a surgical procedure on the spine which, even if conducted without negligence, carried a small risk that the claimant would develop cauda equina syndrome. The procedure was carried out, she developed the syndrome and sued the defendant in negligence. At first instance the judge found that the defendant had negligently failed to warn the claimant of the risk of developing the syndrome, the judge did not find that if properly informed the claimant would not have undergone the operation. The Court of Appeal held that since the risk which eventuated was liable to occur irrespective of the skill and care with which the operation might be performed the failure to warn neither affected the risk nor was an effective cause of the claimant's injury. Thus, applying conventional principles the claimant could not satisfy the test of causation. However, in a majority decision, it was held that the issue of causation was to be addressed by reference to the scope of a doctor's duty and that since the injury she sustained was within the scope of the doctor's duty to warn and was a result of the risk of which she was entitled to be warned when he obtained her consent to the operation in which it occurred, the injury was to be regarded as having been caused by the defendant's breach of duty.

13. It is of note that in *Chester v Afshar* Lord Hope at [51] stated that:

> "…damages can only be awarded if the loss which the claimant has sustained was within the scope of the duty to take care. …the issue of causation cannot be properly addressed without a clear understanding of the scope of that duty."

Lord Walker at [94] distinguished injury that was merely coincidental. He gave an example of such as follows:

> "…if a taxi-driver drives too fast and the cab is hit by a falling tree, injuring the passenger, it is sheer coincidence. The driver might equally well have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit. But to my mind the present case does not fall into that category. Bare 'but for' causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn."

14. Yip J accepted at [52] of her judgment that looked at from the perspective of risks that the parent was willing to run, there is a distinction between a case where a parent does not want to have any child and one where a parent does not want to have a child with a particular disability. However, she stated, "I am not persuaded that this is the appropriate starting point." The judge explained her reasoning as follows:

> "53. As a matter of simple 'but for' causation, [FGN] would not have been born but for the defendant's negligence. The claimant

therefore would not have had a child with the combined problems of haemophilia and autism. Had she known she was a carrier, she would have undergone foetal testing and would then have terminated this particular pregnancy. The other risks associated with that pregnancy would no longer have existed.

54. It is right that the claimant would have gone on to have another pregnancy at another time and involving, necessarily, a different combination of genes. Although any pregnancy would have carried the same risk of autism, on the balance of probabilities, the subsequent pregnancy would not have been affected by autism.

55. It seems to me that those circumstances produce a much closer analogy to *Chester v Afshar* than to the mountaineer's knee in *SAAMCO*. Just as with the risk inherent in the surgery in *Chester v Afshar*, the risk of autism was an inevitable risk of any pregnancy, but it cannot be said that it would probably have materialised in another pregnancy. In the case of the hypothetical mountaineer in *SAAMCO*, it can be said that if the advice about his knee had been right he would have gone on to climb the same mountain and would have had the same accident. The risk that materialised (an avalanche) had nothing to do with his knee. Here though the risk that materialised had everything to do with the continuation of this pregnancy. The autism arose out of this pregnancy which would have been terminated but for the defendant's negligence.

…

57. I accept that a key part of the rationale in *Chester v Afshar* was that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn. By contrast, the misfortune which was the focus of the duty here was haemophilia not autism. However, the focus of the defendant's duty, or the purpose of the service to put it another way, was to provide the claimant with the necessary information so as to allow her to terminate any pregnancy afflicted by haemophilia, as this pregnancy was. In the circumstances, the continuation of this pregnancy was as unwanted as that in *Groom.*

58. Once it is established that, had the mother been properly advised she would not have wanted to continue with her pregnancy, should it matter why she would have wanted a termination? Why logically should there be a distinction between the parent who did not want any pregnancy and one who did not want this particular pregnancy? In each case, the effect of the doctor's negligence was to remove the mother's opportunity to terminate a pregnancy that she would not have wanted to continue. To draw a distinction on the basis of

> considering the underlying reason why a mother would have wanted to terminate her pregnancy seems unattractive, arbitrary and unfair."

15. The appellant accepts: (i) the "but for" test of causation is made out; (ii) it was reasonably foreseeable that as a consequence of her breach of duty the respondent could give birth to a child where the pregnancy would otherwise have been terminated; (iii) any such child could suffer from a condition such as autism.

16. It is the appellant's contention that in determining whether the costs relating to autism were recoverable the judge was required to apply the "scope of duty test" as set out by Lord Hoffman in *South Australian Asset Management Corportation v York Montague Ltd ("SAAMCO")* [1997] AC 191. The reasoning being that in order to protect a defendant from liability for every foreseeable factual consequence of their negligence the courts have placed an additional test on the consequences of a breach that are considered to be within the appropriate scope of the defendant's liability, namely the requirement that the particular loss claimed must be "within the scope of the duty". It is the appellant's case that the judge misapplied the test. The respondent accepts that the test in *SAAMCO* would apply to this case.

17. *SAAMCO* involved three cases in which the defendants, as valuers, were required by the plaintiffs to value properties on the security of which they were considering advancing money on mortgage. In each case the defendants considerably overvalued the property. Loans were made which would not have been done if the plaintiffs had known the true value of the properties. The borrowers defaulted, the property market fell which increased the losses suffered by the plaintiffs. The plaintiffs sued for damages, in negligence and breach of contract. The House of Lords held that the duty of the defendants in each case, which was the same in tort as in contract, had been to provide the plaintiffs with a correct valuation of the property. Where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

18. Applying *SAAMCO* Mr Maskrey QC, on behalf of the appellant, identifies three questions which the court is required to address:

    i) What was the purpose of the procedure/information/advice which is alleged to have been negligent;

    ii) What was the appropriate apportionment of risk taking account of the nature of the advice, procedure, information;

    iii) What losses would in any event have occurred if the defendant's advice/information was correct or the procedure had been performed?

19. Relevant to these questions are the following passages from *SAAMCO:* Lord Hoffman at 211A-B, 211H-212F stated:

> "…Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as

> compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action.
>
> …
>
> A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. …
>
> …The real question in this case is the kind of loss in respect of which the duty was owed.
>
> …The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking."

The rationale behind the principle was identified by Lord Hoffman at 213C-214F as follows:

> "Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage

> which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctors bad advice because it would have occurred even if the advice had been correct.
>
> …
>
> I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

20. In *Hughes-Holland v BPE Solicitors and Another* [2017] UKSC 21 Lord Sumption endorsed the approach of Lord Hoffman and at [34] observed that the decision in *SAAMCO* has often been misunderstood, a misunderstanding which arises from a tendency to overlook two fundamental features of the reasoning which he identified thus:

> "35. The first is that where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has no legal responsibility for his decision. …
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> 36. The second fundamental feature of the reasoning follows from the first. It is that the principle has nothing to do with the

> causation of loss as that expression is usually understood in the law."

21. Lord Sumption at [40-42] distinguishes between advice and information as follows:

> "40. In cases falling within Lord Hoffmann's 'advice' category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If 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. The House of Lords might have said of the 'advice' cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser's duty but to risks which had been negligently assessed by the adviser. In the great majority of cases, this would have assimilated the two categories. An 'adviser' would simply have been legally responsible for a wider range of informational errors. But in a case where the adviser is responsible for guiding the whole decision-making process, there is a certain pragmatic justice in the test that the Appellate Committee preferred. If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.
>
> 41. By comparison, in the 'information' category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in *Nykredit*, the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the

> whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision.

22. The appellant contends that if the principles in *SAAMCO* were applied to the facts of *Parkinson* and *Groom* the same result would be achieved.

Discussion

23. The purpose of the respondent's consultation with the appellant was to establish whether she was a carrier of the haemophilia gene. There was a failure to refer the respondent for appropriate genetic testing and a separate failure to provide her with accurate advice, namely that she was a carrier of the gene for haemophilia. The focus of the consultation, advice and appropriate testing was directed at the haemophilia issue and not the wider issue of whether, generally, the respondent should become pregnant.

24. Factually this case differs from *Parkinson* and *Groom*. In *Parkinson* the doctor's duty was to prevent conception thus he assumed responsibility for all the problems of pregnancy. In *Groom* the doctor knew that the claimant had been sterilised and did not want any further children. His advice was given with that knowledge and in that factual context. On the facts of this case the appellant had no such information. Her advice was sought in respect of one issue, namely whether the respondent was a carrier of the haemophilia gene. It did not extend beyond that. The appellant was not asked, still less given relevant information, as to the respondent's wishes generally as to any future pregnancy. That was a decision for the respondent to take having considered a number of factors, many or all of which the appellant had no knowledge. Critically it was no part of that consultation, still less was any advice sought, that in the event that the respondent did give birth a child of hers could suffer from a condition such as autism.

25. As to what risks the respondent would consider were still hers to bear at the time of and following the consultation and which risks had been shifted to the appellant, the respondent would have accepted prior to and during any pregnancy that she remained willing to accept the risk of having a child born with autism but would not have accepted that she still had a risk of having a child born with haemophilia as this had been addressed by the appellant. The risk of a child being born with autism was not increased by the appellant's advice.

26. Given the limits of the advice sought and the appropriate testing which should have been provided the scope of duty test identified by Lord Hoffman in *SAAMCO* is not only relevant but determinative of the issues which have to be addressed by a court. I accept Mr Maskrey QC's identification of the three relevant questions, enunciated in paragraph 18 above. Accordingly, I find that:

    i) The purpose of the consultation was to put the respondent in a position to enable her to make an informed decision in respect of any child which she conceived who was subsequently discovered to be carrying the haemophilia gene. Given the specific enquiry of the respondent's mother, namely would any future child of hers carry the haemophilia gene, 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 including the risk that the child might suffer from autism. In giving such information it would be incumbent on a doctor, consistent with her/his own professional obligations, to

take account of a variety of factors which on the facts of this case the appellant was unaware of.

ii) As to the apportionment of risk, the doctor would be liable for the risk of a mother giving birth to a child with haemophilia because there had been no foetal testing and consequent upon it no termination of the pregnancy. The mother would take the risks of all other potential difficulties of the pregnancy and birth both as to herself and to her child.

iii) The loss which would have been sustained if the correct information had been given and appropriate testing performed would have been that the child would have been born with autism.

27. The scope of the appellant's duty was not to protect the respondent from all the risks associated with becoming pregnant and continuing with the pregnancy. The appellant had no duty to prevent the birth of FGN, this was a decision that could only be made by the respondent taking into account matters such as her ethical views on abortion, her willingness to accept the risks associated with any pregnancy and was outwith the limits of the advice/treatment which had been sought from the appellant. It has not been any part of the respondent's case that the appellant had a duty to advise more generally in relation to the risks of any future pregnancy. The risk of a child born with autism was not increased by the appellant's advice, the purpose and scope of her duty was to advise and investigate in relation to haemophilia in order to provide the respondent with an opportunity to avoid the risk of a child being born with haemophilia.

28. In concluding that the appellant should be liable for a type of loss which did not fall within the scope of the appellant's duty to protect the respondent against, the judge did not apply the *SAAMCO* scope of duty test but reverted to the "but for" causation test. The *SAAMCO* test requires there to be an adequate link between the breach of duty and the particular type of loss claimed. It is insufficient for the court to find that there is a link between the breach and the stage in the chain of causation, in this case the pregnancy itself, and thereafter to conclude that the appellant is liable for all the reasonably foreseeable consequences of that pregnancy. In finding that the respondent was deprived of the opportunity to terminate the pregnancy what the judge is in fact referring to is one of the links in the chain of causation whereas following *SAAMCO* the link must be between the scope of the duty and the damage sustained.

29. The judge erred in suggesting that the circumstances of this case produced a much closer analogy with *Chester v Afshar* than to the mountaineer's knee in *SAAMCO*. Central to the reasoning in *Chester v Afshar* was the fact that the misfortune which befell the claimant was the very misfortune that the defendant had a duty to warn against. A fundamental distinction with the facts of this case. The more appropriate analogy is that identified by Lord Walker at [94]. In the context of this case the development of autism was a coincidental injury and not one within the scope of the appellant's duty.

30. It is unnecessary for the court to address separately the issue of whether its decision is fair, just and reasonable. Firstly, applying the established principles in *SAAMCO* encompasses the concepts. A subjective view provided by the court is neither necessary nor desirable. Further, following the decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 at [27], it is unnecessary:

> "It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following the *Caparo* case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is 'fair, just and reasonable'. As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also 'engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper'."

31. For the reasons given, this appeal is allowed.

Lord Justice Hickinbottom:

32. I agree.

The Senior President of Tribunals:

33. I also agree.