

**PNLA Professional Negligence & Liability
Briefing Note – 18 June 2021**

**Supreme Court reviews the value of the claimant’s claim for damages
– what is the ‘duty nexus question’?**

Landmark judgments were handed down by the Supreme Court on 18 June 2021 in linked decisions with the same panel of seven judges. Lord Reed, President, Lord Hodge, Deputy President, Lady Black Lord Kitchin Lord Sales Lord Leggatt Lord Burrows. Lords Hodge and Sales gave the leading judgment in both cases which were agreed by the majority. Lords Leggatt and Burrows each came to the same decision but provided judgments differing in their reasoning.

Both judgments are concerned with the application of the concept of scope of duty in the tort of negligence, as illustrated by the decision of the House of Lords in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”) in relation to recovery of damages for economic loss. Both concern the liability of professionals but markedly differ in their professional context.

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 (18 June 2021) concerns professional advice given by expert accountants.

URL: <http://www.bailii.org/uk/cases/UKSC/2021/20.html>

Khan v Meadows [2021] UKSC 21 (18 June 2021) concerns professional advice given by a medical expert.

URL: <http://www.bailii.org/uk/cases/UKSC/2021/21.html>

Lords Hodge and Sales state in the Manchester judgment “The reason the appeals were heard by the same constitution of the court was to provide general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence. It is therefore desirable that the judgments in the two appeals should be read together as reflecting and supporting a coherent underlying approach.”

In the Manchester case at paragraph 6 the new test is set out “As we say in *Khan v Meadows*, para 28, it is helpful to analyse the place of the scope of duty principle in the tort of negligence in the following way. When a claimant seeks damages from a defendant in the tort of negligence, a series of questions arise:

- (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
- (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
- (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

- (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
- (5) 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 stage 2 above? (the duty nexus question)
- (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to place the claimant in the position he or she would have been in absent the defendant's negligence."

Both judgments are essential reading for practitioners in professional negligence and liability cases – medical and non-medical - providing a wholly new legal roadmap. Existing claims will need to be reviewed and re-assessed, and for many there could be a substantial impact on the likely chances of success and the assessment of financial loss.