# Manchester Building Society v Grant Thornton
# [2021] UKSC 20

# Khan v Meadows
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**Summary**

***Manchester Building Society* v *Grant Thornton***

The claimant building society ('MBS') operated subject to a regulatory requirement that it maintain a certain amount of capital so as to reassure regulators that it could withstand certain stresses, such as a lot of people simultaneously wanting to take their money out of the society, or big movements in interest rates. How much capital MBS had to prove it had access to at any one time depended on a variety of factors, including how volatile (swinging up and down) its profits tended to be as a result of how it operated its business. The more volatile, the more capital it had to have in hand, to give it a cushion against sudden downturns in its finances.

In 2005, acting on advice from the defendant firm of accountants ('GT'), MBS adopted a new business model that involved it entering into transactions called 'swaps'. These swaps were supposed to operate as the mirror image of the mortgages that MBS issued to the general public – when it lost on a particular mortgage (because it couldn't be repaid either by the lender or by selling the mortgaged property), it won on the swap; when it won on a particular mortgage (because the mortgage was paid off, at a nice rate of interest for MBS), it lost on the swap. So it seemed that entering into these swaps would make MBS's business a lot more stable and less volatile, with the result that the regulators wouldn't require MBS to maintain as much capital to protect it from shocks to its business – and MBS would be able to lend out more of its capital, and make more money.

GT assured MBS that entering into swaps would provide an effective 'hedge' against up and down swings in its mortgage business and enable MBS to operate without as much capital on hand as it would otherwise be required to do by the regulators. MBS' new business model soon came under strain as a result of the 2008 economic crisis: interest rates fell dramatically, with the result that MBS started to lose a lot of money on its mortgage business. MBS was supposed to be protected against those losses by the offsetting swaps that it had entered into. But in 2013, GT advised that MBS' swaps had turned out not to be (as GT should have realised back in 2005) an effective hedge against losses on its mortgage business. In order to balance its books, MBS had to pay to terminate the swaps it had entered into, and the entire process of getting its accounts back to a state that would satisfy the regulators cost it £32m.

MBS sued GT, arguing that GT had been negligent in the advice it gave MBS in 2005, and that if it had not been negligent, MBS would never have entered into the swaps that it had to get out of in 2013, at a cost of £32m. GT admitted all of that, but countered that it was not liable for the £32m loss under the '*SAAMCO* principle', which can have the effect of limiting how much of the losses suffered by a claimant as a result of the defendant's breaching a *Hedley Byrne* duty of care owed to the claimant can be sued for by the claimant. When the case reached the UK Supreme Court ('UKSC'), the Court had to decide: (1) how the *SAAMCO* principle operated in general, and (2) whether it operated in this particular case

to prevent MBS suing GT for the full £32m that it had lost as a result of its foray into, and hasty exit, from the swaps business.

All of the UKSC agreed that when it came to issue (2), *SAAMCO* did *not* operate to prevent MBS from suing for the full £32m loss that it had suffered. Where they disagreed was over issue (1).

The majority judgment was given by **Lords Hodge and Sales** – Lords Reed and Kitchin and Lady Black agreed with them. They took the view that *SAAMCO* focusses on the 'purpose' of the duty that the defendant owed the claimant. If the claimant suffered a loss that it was not the purpose of the defendant's duty to protect the claimant from suffering, then the loss suffered by the claimant fell outside the 'scope' of the defendant's duty, and *SAAMCO* would operate to prevent the claimant suing the defendant for that loss.

This is the case where the duty of care owed by the defendant to the claimant arises under *Hedley Byrne*, but the same point applies (though *SAAMCO* does not) in cases where the duty of care arose in some other way: at [8], Lords Hodge and Sales invoked *Spartan Steel* v *Martin* [1973] QB 27 and *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 as resting on a similar basis. In *Spartan Steel*, the claimants could not sue for the loss of business that they could have done had their power not been negligently cut off by the defendants as the duty of care that the defendants owed the claimants had been imposed on the defendants to protect the claimants' property from being damaged, not to allow them to carry on with their business. In *Caparo*, the claimant shareholders could not sue for losses that they had suffered as a result of taking over the company in which they owned shares when the company turned out to be a lot less financially healthy than the accounts on which the shareholders were relying – and which had been audited by the defendants – represented. The duty of care that the defendant accountants had owed the claimants was imposed on them to prevent the claimants suffering losses as a result of being lulled into not disciplining or sacking a failing board – not in order to prevent them suffering losses as a result of taking over the company.

Lords Hodge and Sales thought (at [38]) that the purpose of the duty that GT had owed MBS in this case was directed at enabling MBS to assess whether it was able, within the regulatory regime under which it was operating, to get into the business of entering into swaps that would match the mortgages that it was issuing. MBS suffered the losses it did because it thought that it could, when it couldn't – and GT was responsible for MBS' being misled on that issue. It followed that GT was liable for the full £32m loss suffered by MBS under the *SAAMCO* principle.

**Lord Burrows** also thought that the application of the *SAAMCO* principle turned on 'the scope of the defendant's duty of care' ([179]) but he took the view (which Lords Hodge and Sales expressly said they did not: [5]) that the *SAAMCO* principle was 'underpinned by a policy of seeking to ensure that a professional's liability for negligence reflects a fair and reasonable allocation of the risk of the loss that has occurred as between the parties' ([179]). Lord Burrows went on to observe that determining the scope of a defendant's duty of care for the purpose of applying the *SAAMCO* principle 'clearly...depends on a close analysis of the facts as to what the defendant has said and done and what the parties understood... [T]he purpose of the advice or information...is of particular importance...' ([188]). Lord Burrows went on to conclude that the purpose of the advice that GT had given MBS was to know whether the business model that MBS was proposing to adopt (entering into swaps to match its mortgage business) was appropriate or not, given MBS' financial and regulatory position. The losses suffered by MBS were as a result of its adopting that business model when it was not appropriate to do so (because the swaps did not effectively match MBS's mortgage losses) and so fell within the scope of GT's duty to MBS ([206]).

**Lord Leggatt** took a different approach to the *SAAMCO* principle, one which neither Lords Hodge and Sales ([3]) nor Lord Burrows ([177]) agreed with. Lord Leggatt took the view that the *SAAMCO* principle prevents a claimant suing a defendant for a loss suffered as a result of information or advice that the defendant gave the claimant where there is no *causal relationship* 'between what made the information or advice wrong and the loss'. He went on to observe that 'What makes information or advice wrong is the existence of facts or matters which the adviser has misrepresented or failed to report. It is the foreseeable consequences of those matters to which the adviser's responsibility is limited' ([96]). For example, in Lord Hoffmann's famous example in *SAAMCO* itself of the mountaineer who consults a doctor on his general fitness to go on an expedition, where the doctor gives the mountaineer the all-clear when he should have told the mountaineer to stay at home because of a dodgy knee, and the mountaineer is subsequently injured on the expedition in an avalanche – the reason why (according to Lord Leggatt) the mountaineer cannot sue the doctor for his injury (which would not have been suffered had the doctor not negligently given the mountaineer the all-clear) is that there is no causal connection between 'the injury and the state of affairs which made the [doctor's] advice incorrect, that is to say the condition of the knee' ([97]).

Applying that approach to the case at hand, Lord Leggatt agreed that GT should be held liable to MBS for its £32m loss. What made GT's advice to MBS – that it could use swaps to hedge against changes in the value of its mortgage business – wrong was that the swaps MBS entered into were not an effective hedge, and this was the reason why MBS suffered a £32m loss when it got out of those swaps: 'when the swaps were terminated. the...value of the swaps was not offset by a corresponding adjustment to the value of the mortgages' ([146]).

### ***Khan* v *Meadows***

In January 2006, Omedele Meadows' nephew was born and was quickly diagnosed as suffering from haemophilia. Knowing how much suffering was in store for her nephew as a result of being a haemophiliac, Meadows wanted to ensure that she would not bring into the world someone who would suffer from haemophilia. As a result she consulted her GP with a view to being tested to see whether she was a carrier of the haemophilia gene. Unfortunately, the tests that were carried out were designed to see whether Meadows herself suffered from haemophilia (which she did not) and not to see whether she was a carrier of the haemophilia gene. When the test results came in, Meadows saw another doctor in her GP's practice – the defendant, Dr Hafshah Khan – and Khan told Meadows that her results were normal, without warning her that the tests would not tell her what she wanted to know. Reassured, Meadows went on to have a baby boy, Adejuwon. To her consternation, Adejuwon was diagnosed as suffering from haemophilia. Completely independently of this diagnosis, it also turned out that Adejuwon was autistic. It was conceded that Khan was liable to Meadows on a 'wrongful pregnancy' basis for the extra costs of raising Adejuwon that were attributable to his suffering from haemophilia. The question that the UKSC had to decide was whether Khan was also liable for the extra costs of raising Adejuwon that were attributable to his being autistic, on the basis that those costs would not have been incurred had Khan not been negligent. Argument centred on whether Meadows was barred from suing for those extra costs under the *SAAMCO* principle.

The UKSC unanimously decided that Meadows was so barred. As with the previous case, three judgments were given. And once again, Lords Reed and Kitchin and Lady Black agreed with **Lords Hodge and Sales**, putting them in the majority. Lords Hodge and Sales found that the 'the law did not impose on Dr Khan any duty in relation to unrelated risks

which might arise in any pregnancy. It follows that Dr Khan is liable only for the costs associated with the care of Adejuwon insofar as they are caused his haemophilia' ([68]).

**Lord Burrows** agreed with Lords Hodge and Sales that the losses attributable to Adejuwon's autism 'were outside the scope of the defendant's duty of care and are therefore irrecoverable by reason of *SAAMCO*' ([77]). His reasons for so finding were: (1) Meadows had not consulted her doctors 'to ascertain the general risks of pregnancy, including the risk of autism'; (2) in light of the purpose for which Meadows had consulted her doctors, 'it was fair and reasonable that the risk of the child being born with haemophilia should be allocated to the doctor; but that the risk of the child being born with autism should be allocated to the mother'; (3) as confirmation that this was the right result, Meadows would have suffered exactly the same loss – when it came to the costs associated with Adejuwon's autism – had Khan's advice to Meadows that she had nothing to worry about when it came to haemophilia been correct (ibid).

**Lord Leggatt** applied his 'causal relationship' approach to the application of *SAAMCO* to reach the same result as Lords Hodge and Sales. Under that approach, Khan would not be held liable 'for all the foreseeable adverse consequences of any decision made in reliance on her negligent advice, but only for those which result from the matter which [Khan] negligently misrepresented and which made the advice wrong – that is, the fact that [Meadows] was carrying a gene from haemophilia' ([91]). As a result, Khan was rightly held liable for the costs associated with Adejuwon's haemophilia as 'there was a causal link between the fact that [Meadows] had a gene for haemophilia and the fact that her son was born with that disorder' ([92]). By contrast, Adejuwon's 'autism was not caused by his haemophilia nor made more likely be it. It follows that the costs associated with his autism are not within the scope of [Khan's] duty of care' ([93]).

## Comments

Comments will focus on the UKSC's treatment in both these cases of (1) the *SAAMCO* principle, and (2) the structure of the law of negligence. (Though before getting on to those, it is worth noting for a second that *Khan* v *Meadows* seems to have put to bed the issue of whether the Court of Appeal was right to rule in *Parkinson* v *St James and Seacroft University Hospital NHS Trust* [2002] QB 266 that in a wrongful birth/pregnancy case that results in the birth of a disabled child, the parents can sue for the extra costs of raising the child attributable to the child's disability. It seems to have been assumed on all sides in *Khan* that *Parkinson* was right.)

## *The* SAAMCO *principle*

(1) *Purpose/scope of the duty*. It might be thought that the authors of McBride & Bagshaw would welcome the majority's interpretation of *SAAMCO* as based on the principle that a claimant cannot sue a defendant in tort for a loss that the duty breached by the defendant was not designed to protect the claimant from suffering. After all, we were the first to devote a section of our textbook to that principle – it is section 9.3 ('Scope of duty') in the textbook – and one might even think that Lords Hodge and Sales' invocation of *Spartan Steel* in support of that principle was lifted straight out of McBride & Bagshaw. However, we don't deal with *SAAMCO* in the section of our book on 'Scope of duty', but in the next section along where *SAAMCO* is dealt with in isolation.

The reason for this is that unlike other duties of care, duties of care arising under *Hedley Byrne* do not seem to exist to protect a claimant against suffering a particular kind of loss. Where D owes C a duty of care under *Hedley Byrne*, the duty arises because: (i) D indicated to C that C could safely rely on D to take care in a particular matter, and (ii) C did so rely on D. The duty of care is not geared to protecting C from any particular loss – it is geared towards helping protect C's expectation that D will take care. Maybe one could say that the duty of care is intended to help ensure that C does not lose out as a result of relying on D – but if D breaches the duty of care, C isn't ever confined to suing for the loss C has suffered as a result of relying on D; rather C can, in the normal way, sue to be put in the position they would have been in had D not breached their duty of care. In this way, duties of care arising under *Hedley Byrne* are like duties not to defraud someone. The duty that D owes C not to fraudulently induce C to act in a particular way is not designed to protect C against suffering a *particular* loss, but rather *any kind* of loss that C might suffer as a result of being fraudulently induced by D to act in a particular way.

This is why we don't deal with the *SAAMCO* principle under the heading of 'Scope of duty', but rather right next door under its own heading – we acknowledge that there is some kind of relationship between *SAAMCO* and the 'scope of duty' principle: but they are not the same. Instead, we say that to apply the *SAAMCO* principle, you need to look not at the purpose of the duty of care that D owed C, but at why C was relying on D – what C was expecting to get out of trusting D to take care in a particular matter. If C suffers a loss that is unrelated to the reasons why C was relying on D, then C should not be able to sue D for compensation for that loss even if it's the case that C would not have suffered that loss but for D's breach of duty. This approach is much closer to Lord Burrows, where he emphasises the importance under *SAAMCO* of focussing on the purpose for which C was seeking D's help (*Manchester Building Society*, at [188]; *Khan*, at [177]).

So in Lord Hoffmann's mountaineer example, if C is the mountaineer and D is the doctor, C relied on D to take care in advising him that he was good to go on his expedition in order to avoid being injured because he was out of condition. C was not injured because he was out of condition: he was injured he was in the wrong place at the wrong time when an avalanche began. In *Manchester Building Society* v *Grant Thornton*, if C is the building society and D the accountant, C relied on D to take care in advising him on the advisability of entering into swap transactions because C wanted to know that it was safe to run its business using swaps to make its business less volatile. C lost £32m because it wasn't safe to do this, and so *SAAMCO* didn't prevent C suing for that loss. In *Khan* v *Meadows*, if C is the prospective mother and D is the doctor, C relied on D to take care in testing her for the haemophilia gene because she wanted to avoid the suffering involved in her child's having haemophilia. The costs of raising the child associated with the child's autism were unrelated to that suffering, and so were irrecoverable under *SAAMCO*.

(2) *Lord Leggatt's approach*. Lord Leggatt's approach to the *SAAMCO* principle would reach the same results as our preferred approach, so why prefer our approach over Lord Leggatt's? A significant problem with Lord Leggatt's approach to *SAAMCO* is that the *SAAMCO* principle does *not* apply in fraud cases. For example, suppose that the doctor in *Khan* v *Meadows* had – either out of some dislike for the claimant, or out of a misguided desire to encourage women generally to have as many children as possible no matter what – *knowingly lied* to her that her results indicated that she was not a carrier of the haemophilia gene. In such a case, the doctor would have been held liable for *all* the consequences of the claimant's trying to get pregnant, regardless of the reasons why she consulted the doctor in the first place. It is not easy to see, on Lord Leggatt's causal approach to *SAAMCO*, why *SAAMCO* does not apply in a fraud case to ensure that the doctor is only held liable for the

consequences of what it was that made the doctor's lying assurance untruthful. Lord Leggatt might respond that *SAAMCO* is about fairly allocating the risks of loss resulting from the claimant's deciding whether or not to get pregnant (see *Manchester Building Society*, at [88], and *Khan*, at [90]) and that in the scenario where the doctor deliberately lied to the claimant in *Khan*, it is 'fair and reasonable...to treat an adviser who is [fraudulent] in relation to a particular matter as if the adviser had a responsibility to protect the claimant against risks unrelated to that matter' (ibid). This may be a good answer, but the drawback of Lord Leggatt's causal approach to the *SAAMCO* principle is that it suggests *SAAMCO might* be relevant in a fraud case in the absence of some such consideration militating against applying *SAAMCO*. On the McBride & Bagshaw approach to the *SAAMCO* principle, *SAAMCO* does not apply in a fraud case because the duty breached in a fraud case is not designed to protect the claimant against a particular type of loss – it is designed to protect the claimant against suffering *any* loss that the claimant suffers as a result of acting on the defendant's lies.

(3) *Policy*. But why then, it might be asked, does *SAAMCO* apply in a *Hedley Byrne* case – given that the duty of care breached under *Hedley Byrne* is also not designed to protect the claimant from suffering a particular kind of loss? Lords Hodge and Sales refused to get drawn into this issue, holding that it is unnecessary for the purpose of applying the *SAAMCO* principle to get drawn into issues as to what the policy considerations underlying *SAAMCO* are: *Manchester Building Society*, at [5]. Lord Burrows disagreed, taking in the *Manchester Building Society* much the same view as Lord Leggatt in *Khan*, that the *SAAMCO* principle is 'concerned to achieve a fair and reasonable allocation of the risk of loss that has occurred as between the parties' ([192]). This seems a little vague, and it is easy to understand Lords Hodge and Sales' concerns that these references to what is 'fair and reasonable' as between the parties might make application of the *SAAMCO* principle unacceptably uncertain (*Manchester Building Society*, at [5]).

A somewhat sharper idea as to what really underpins *SAAMCO* comes into view when you realise that *Hedley Byrne* duties of care aren't really meant to be part of the law of tort at all – they exist to mimic the contractual duty of care that D will owe C when D promises C that he will take care in some matter in return for C's paying him something (a 'consideration') in return. D will owe C a *Hedley Byrne* duty of care when D makes the same kind of promise to C but instead of giving D something in return, C relies on D to take care instead. In such a case, D and C's relationship will be regarded as 'equivalent to contract' and *Hedley Byrne* will give C the duty of care that C would have had to pay for in order to enjoy under the law of contract. Now – contract law exists to allow someone to sue when they don't get what they were paying for, and allows them to sue for not getting what they paid for. It follows that a similar idea should apply to determine D's liability if D breaches a *Hedley Byrne* duty of care that D owed C – C should be able to sue D not for not getting what she paid for (as she paid D nothing) but for not getting what she was trying to get when she relied on D to take care. *SAAMCO* is designed to ensure that that is what C recovers – damages for not getting what she was trying to get when she relied on D to take care. And exactly the same idea will apply if D does actually owe C a contractual duty of care – *SAAMCO* will work to ensure that C recovers damages for not getting what she was trying to get when she paid D to take care.

(4) *Clarifications*. Despite the above disagreements among the judges in these two cases, they were agreed on clarifying a couple of matters arising out of Lord Hoffmann's judgment in *SAAMCO* itself.

First, Lord Hoffmann thought that it might be helpful to distinguish between cases where D provided C with 'information' and cases where D provided C with 'advice' – he

thought that *SAAMCO* would apply to the first kind of case, but not the second. McBride & Bagshaw never thought this distinction had any merit, and it is good to report that this distinction has now been repudiated: see Lord Leggatt's judgment in *Manchester Building Society* at [92], with Lords Hodge and Sales agreeing at [22] (also in *Khan*, at [41]).

Second, Lord Hoffmann thought that in 'information' cases, D could never be liable to C for more than the loss C would have suffered had the information D supplied C been correct. The UK Supreme Court expressed scepticism in the cases discussed here as to how valuable this 'counterfactual' test was in determining D's liability to C under *SAAMCO*. Lord Burrows pointed out (*Manchester Building Society*, at [199]) one situation where the counterfactual test seemed to go completely wrong: D, a firm of accountants, tells C, a company, that its finances are good. As a result C pays a dividend to its shareholders. It then turns out that C's finances are anything but good and seeks to sue D for the money it has paid out to the shareholders. Lord Hoffmann's counterfactual test suggests C's claim should be denied under *SAAMCO*: had the information that D supplied C been correct (and C's finances were good), C would have still paid the dividend to the shareholders. As a result, Lord Burrows suggested (ibid, at [192], [201]) that Lord Hoffmann's counterfactual test was merely a 'useful cross-check' to help confirm that the courts were reaching the right decision in applying *SAAMCO*, but it is not one that would 'be helpful in all cases'. The majority were in agreement with this suggestion: Lord Hodge and Sales at ibid, [4], [23]; though Lord Leggatt's causal approach to *SAAMCO* led him to think that Lord Hoffmann's counterfactual test, if properly applied, was more helpful than just being a 'useful cross-check': ibid, [125]-[132].

**The structure of the law of negligence**

It is sometimes observed that a case on a pretty obscure point on the law of subrogation – *Banque Financière de la Cité* v *Parc (Battersea) Ltd* [1999] 1 AC 221 – has become one of the most cited cases in English legal history because at page 227 it contains a canonical statement of the 'Four questions' that have to be addressed to determine whether a defendant is liable to a claimant under the law on unjust enrichment.

One hopes that the same does not prove true of Lords Hodge and Sales' judgments in the two cases under discussion here, as both judgments set out a very unusual – and completely unnecessary (for the purpose of deciding the case) – approach to determining whether a defendant is liable to a claimant under the law of negligence. The relevant paragraphs are [6] in *Manchester Building Society*, and [28] in *Khan*. In each they identify six questions that have to be addressed in order to determine whether a defendant is liable to a claimant under the law of negligence:

> (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 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)

This attempt to reinvent the wheel when it comes to the law of negligence drew sharp criticism from the other judges who decided *Manchester Building Society* and *Khan*. In *Manchester Building Society*, Lord Burrows protested that he did 'not consider it necessary or helpful...to depart from a more conventional approach to the tort of negligence which begins with the duty of care, treats the *SAAMCO* principle as being concerned with whether factually caused loss is within the scope of the duty of care, avoids the novel terminology of the "duty nexus", and sees contributory negligence as one of several possible defences' ([212]). In *Khan*, Lord Burrows repeated his attack (at [78]) and went one better than Lord Hodge and Sales by coming up with *seven* questions that had to be answered when determining whether a defendant was liable to a claimant in negligence:

(1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question)

(2) Was there a breach of the duty of care? (the breach, or standard of care, question)

(3) Was the damage or loss factually caused by the breach? (the factual causation question)

(4) Was the damage or loss too remote from the breach of duty? (the remoteness question)

(5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question)

(6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)

(7) Are there any defences? (the defences question)

While Lord Leggatt had nothing to say about Lord Hodge and Sales' novel approach to the law of negligence in *Manchester Building Society*, in *Khan* he observed that their 'excursus touches on questions much debated by legal scholars which go far beyond the issues raised by this appeal and the appeal in *MBS*. Like Lord Burrows, I think it undesirable as well as unnecessary to engage in such an exercise' ([96]).

Indeed. It is hard to know where to begin in evaluating the mess that either of these approaches threaten to make of the law of negligence.

First, Lord Hodge and Sales' actionability question will normally be answered in the positive as most harms that a claimant might want to sue for in negligence will be actionable under the right circumstances.

Second, Lord Hodge and Sales seem to have forgotten Lord Burrows 'duty of care question' – which is a pretty important element in a negligence claim (sarcasm alert).

Third, talk of 'factual causation' as distinct from 'legal causation' (under Lord Burrows' approach) just takes us back to the 1960s when – 60 years on – we might expect the law to be presented in less obfuscatory language.

Fourth, talk of 'factual causation' as being distinct from questions around the scope of the defendant's 'legal responsibility' involves buying into a particular picture of the law of negligence that has been argued for by Jane Stapleton (her book on *Three Essays on Torts*, arguing for this view of the law of negligence, is reviewed by yours truly here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3944045) but has not yet established itself as so obviously correct as to deserve endorsement by the UK Supreme Court.

Fifth, it is hard to know what the 'duty nexus' question in Lord Hodge and Sales' approach is referring to, and how that is different from the 'legal responsibility' question.

Sixth, it is hard to understand why questions (4) and (5) under Lord Burrows' approach are arranged in that order.

Seventh, as the 9th chapter of McBride & Bagshaw makes clear, there are many reasons why a claimant might not be able to sue a defendant in respect of a particular loss that are not covered by either Lord Burrows' questions (4) and (5), or Lord Hodge and Sales' questions (1), (2), (5) and (6).

It still remains the case that the DBCA approach to determining a defendant's liability to a claimant in negligence, as set out in McBride & Bagshaw, remains the best. We simply ask:

D: did the defendant owe the claimant a duty of care?

B: did the defendant breach that duty of care?

C: did the breach cause the claimant harm or harms?

A: is that harm or are those harms actionable?

and, if you like, you can tack on a fifth question that takes us all the way back up to D again:

D: does the defendant have a defence to being sued by the claimant.

This is not rocket science, and nor should it be. The law should be as comprehensible as possible. None of the approaches to the structure of the law of negligence at all assist in making the law comprehensible. It is hard to know what the UKSC were thinking when they went off on mad frolic of their own. God help us if anyone is encouraged to follow them down this path.

*Nick McBride*