Principle, Pragmatism, and Policy in Determining the Scope of the Duty of Care and Extent of Liability for Consequences

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ABSTRACT

Manchester Building Society v Grant Thornton UK LLP and Meadows v Khan are twin Supreme Court judgments concerning what is often termed the scope of the duty of care in negligence. This controversial principle seeks to determine whether a loss (or part thereof) factually caused by the defendant's negligence is attributable to the defendant, or whether the defendant is not liable because the loss is outside the scope of their duty of care. In both cases, the decisions were unanimous but their Lordships disagreed as to how the principle should be formulated and addressed. This note critically analyses three issues arising from the judgment. First, it evaluates the conceptual propriety of treating the principle as involving two separate issues, namely the scope of the defendant's duty and whether the claimant's loss falls within it (i.e., the extent of liability for consequences) and concludes that keeping the issues apart, as the majority did, is preferable. Second, however, it argues that the majority's treatment of the second issue was somewhat cursory and suggests two possible approaches, extrapolated from the majority's reasoning and Lord Leggatt's concurring judgments respectively, to determine whether the defendant's extent of liability encompasses a particular loss. Finally, it considers the role of policy-based reasoning in determining the scope of the defendant's duty. It argues that policy-based reasoning remains a useful tool to supplement the majority's focus on the purpose for which the duty existed, which in itself may occasionally lead to confusion.

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INTRODUCTION

On 18 June 2021, the UK Supreme Court handed down the twin judgments of *Manchester Building Society v Grant Thornton UK LLP*[1] ('*MBS*') and *Meadows v Khan*[2] ('*Meadows*'). Both cases concerned the proper application of the principles laid down in *South Australia Asset Management Corp v York Montague Ltd*[3] ('*SAAMCO*'), namely, the use of the scope of the defendant's duty of care to limit their liability for the negligent provision of professional services. Both cases, while differing greatly in context, shared the same essential characteristics. The defendant in each case provided professional services negligently, resulting in a loss for the claimant. The defendant's negligence was a factual 'but for' cause of the loss, but the parties disagreed about whether the loss (or part thereof) fell within the 'scope' of the defendant's duty of care, which would make the defendant liable. They therefore disputed the extent of the defendant's liability.

The same panel of seven Justices heard both cases and the decisions in both were unanimous. In *MBS*, the loss was held to be within the scope of the defendant's duty. In *Meadows*, the loss was held to be outside its scope. The judgments also highlighted and sought to address two separate but related questions: firstly, how the scope of the duty of care should be determined; secondly, whether a loss should fall inside or outside the scope of the duty and the process through which this should be determined. Despite the unanimous decisions, their Lordships were divided as to how these questions should be formulated and addressed.

Three issues will therefore be discussed. The first is the conceptual propriety of treating the scope of the defendant's duty and extent of their liability as separate questions, as was the approach of the majority in both cases (Lords Hodge and Sales, with whom Lord Reed, Lord Kitchin, and Lady Black agreed) and Lord Leggatt (Section II). It will be argued that doing so enhances clarity. The second is the principles and tests that ought to be applicable when addressing the

[1] [2021] UKSC 20, [2021] 3 WLR 81.
[2] [2021] UKSC 21, [2021] 3 WLR 147.
[3] [1996] UKHL 10.

relationship between the defendant's duty and their potential liability, which was only superficially addressed in the majority judgments (Section III). Two approaches, derived from the majority's reasoning and Lord Leggatt's reasoning respectively, will be suggested to that end. The third is the potential use of policy-based reasoning to help determine the scope of the defendant's duty, as suggested by Lord Burrows but rejected by the majority (Section IV). It will be argued that policy-based reasoning is necessary in certain circumstances.

I. THE CASES

The Manchester Building Society, the claimant in *MBS*, earned profit by issuing mortgages and entering into interest rate swap contracts to hedge these mortgages.[4] It sought the defendant auditors', Grant Thornton's, advice regarding whether it could employ a method of accounting known as 'hedge accounting' because it entailed more favourable regulatory capital requirements that would allow it to continue its business model.[5] Until 2013, Grant Thornton negligently advised the Society that hedge accounting was permissible because there was an 'effective hedging relationship' between the contracts and the mortgages.[6] It was, in fact, impermissible: there was no such 'effective hedging relationship'.[7] With hedge accounting applied and regulatory requirements seemingly avoided, the Society continued to issue mortgages and enter into contracts. It therefore risked financial loss from having to close out the contracts before maturity to fulfil regulatory capital requirements impermissibly avoided through hedge accounting.[8] This risk materialised in 2013 when Grant Thornton realised its mistake.[9] The Society had to restate its accounts, which then showed insufficient regulatory capital.[10] To remedy this, it closed out the contracts, incurring net losses of approximately £26.7 million plus transaction costs.[11] But for Grant Thornton's negligent advice, it would not have continued to enter into contracts,

[4] *Manchester Building Society* (n 1) [44]–[45].
[5] ibid [38], [49]–[50].
[6] ibid [51].
[7] ibid [55].
[8] ibid [34].
[9] ibid [55].
[10] ibid [56].
[11] ibid [57]–[58].

and thus would have avoided the risk of loss.[12] At first instance, damages were only awarded for the transaction costs (subject to a deduction for contributory negligence).[13] The Court of Appeal dismissed the Society's appeal.[14]

Ms Meadows, the claimant in *Meadows*, sought medical advice to establish whether she carried the haemophilia gene so to avoid giving birth to a child with haemophilia.[15] Dr Khan, the defendant, negligently advised her that a blood test showed she did not carry the gene; instead, she did carry it and a genetic test should have been undertaken.[16] She subsequently gave birth to a son, Adejuwon, who was diagnosed with both haemophilia and autism.[17] Adejuwon's autism was not caused nor made likelier by haemophilia.[18] However, but for Dr Khan's advice, Ms Meadows would have undergone foetal testing whilst pregnant, discovered her foetus was affected, and Adejuwon would not have been born.[19]

Ms Meadows claimed damages for the additional costs of bringing up a child with haemophilia and autism.[20] Dr Khan accepted liability for the haemophilia-related costs but denied liability for the autism-related costs.[21] At first instance, £9 million in damages comprising both sets of costs were awarded.[22] The Court of Appeal allowed Dr Khan's appeal and reduced the award to £1.4 million, comprising only the haemophilia-related costs.[23]

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12 ibid [64].
13 Manchester Building Society v Grant Thornton UK *LLP [2018] EWHC 963 (Comm), [2018] PNLR* 27 [255]–[256].
14 *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, [2019] 1 WLR 4610.
15 *Meadows* (n 2) [3].
16 ibid [3]–[5].
17 ibid [5], [8].
18 ibid [8].
19 ibid [6].
20 *Meadows v Khan* [2017] EWHC 2990 (QB), [2018] 4 WLR 8 [1].
21 ibid.
22 ibid [72].
23 *Meadows v Khan* [2019] EWCA Civ 152, [2019] 4 WLR 26.

II. THE 'SCOPE OF DUTY' PRINCIPLE: TWO ISSUES, NOT ONE

In the Supreme Court, the majority considered that the relevant issues in both cases were the scope of the defendant's duty of care and—primarily in *Meadows*—whether a 'nexus' between the claimant's loss and the subject matter of that duty existed.[24] It was emphasised that these issues were distinct from questions of factual causation and foreseeability.[25] To clarify this distinction, a restructured tort of negligence comprising six stages, phrased as questions, was proposed. The questions concerned actionability, the scope of the duty of care, breach, factual causation, the 'nexus' between the loss and the duty, and remoteness and legal responsibility respectively.[26] The second and fifth questions, which the majority focused on, were as follows:

> (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? ([T]he scope of duty 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? ([T]he duty nexus question)[27]

As regards the 'scope of duty' question, the majority held that the scope of the duty of care owed by a professional adviser depended on the purpose for which the duty existed and the circumstances in which it was owed, judged objectively 'by reference to the reason why the advice is being given' and the parties' relationship.[28] The much-criticised distinction between 'advice' and 'information' cases drawn in *SAAMCO* was discarded.[29] Nevertheless, the majority noted that a defendant adviser might assume responsibility for every

[24] *Meadows* (n 2) [28].
[25] ibid [30].
[26] ibid [28]; *Manchester Building Society* (n 1) [6].
[27] ibid.
[28] *Manchester Building Society* (n 1) [13], [27].
[29] ibid [19]–[22], [92].

aspect of a claimant's decision and therefore be liable for all foreseeable risks so long as factual causation is established.[30]

The majority then divided their analysis of the 'duty nexus' question (*i.e.*, the extent to which the defendant's liability falls within the scope of their duty) into two stages. First, the 'basic loss'—or the total loss factually caused by the defendant's breach—suffered by the claimant had to be ascertained.[31] In *MBS*, this comprised the Society's net loss (£26.7 million); in *Meadows*, this comprised both the haemophilia-related and autism-related costs (£9 million). Second, if the 'scope of duty' question did not resolve whether (or which part of) the basic loss fell within the defendant's duty, the counterfactual test deployed in *SAAMCO* by Lord Hoffmann could be used as a 'cross-check'.[32] The test involved asking whether the claimant's conduct would have resulted in the same loss had the advice actually given by the defendant been correct, and assuming the claimant would have behaved in the same way.[33] If not, the defendant would be liable. It was emphasised, however, that in most cases the scope of the defendant's duty would provide the answer to the 'duty nexus' question and the counterfactual test would be unnecessary and potentially counterproductive.[34]

In *MBS*, therefore, it was held that the purpose of the advice sought by the Society was to inquire about the implementation of its proposed business model of issuing mortgages and entering into contracts, and assess its regulatory capital position.[35] Given the Society had sought advice regarding hedge accounting for this specific purpose, its loss fell within the scope of Grant Thornton's duty to give accurate advice.[36] In *Meadows*, it was held that the scope of Dr Khan's duty included accurately advising Ms Meadows about whether she carried the haemophilia gene in the context of the risk of giving birth to a child with

[30] ibid [18].
[31] *Meadows* (n 2) [52].
[32] *Manchester Building Society* (n 1) [23]; *Meadows* (n 2) [53], [63].
[33] *Manchester Building Society* (n 1) [23]; *Meadows* (n 2) [53].
[34] ibid. As the majority noted in MBS, the counterfactual world might be conceived in different ways, potentially resulting in confusion. See also *Manchester Building Society* (n 1) [106], where Lord Leggatt agreed with the majority but noted two situations in which the counterfactual test might be useful.
[35] *Manchester Building Society* (n 1) [34], [38].
[36] ibid [38].

haemophilia.[37] There was no duty (and no nexus) concerning unrelated risks such as costs arising from autism.[38]

The separate treatment of the scope of the defendant's duty of care and the extent of their liability (*i.e.*, the 'duty nexus'), and the emphasis that the *SAAMCO* counterfactual test is a tool to assess the latter and not the former is welcomed. It resolves disputes regarding whether the 'scope of duty' principle and the counterfactual test concern the duty of care or relate to causation. It also introduces conceptual clarity. As Stapleton notes, an inquiry regarding the scope of the duty is *forward-looking*: the scope of the duty depends not on the *damage* actually caused by its breach, but rather the *risks* regarding which the defendant must take care going forward.[39] Assessing the scope of the duty by reference to the relevant consequences of its breach as determined by the counterfactual test would be to give an *ex-post*, causation-based answer to an *ex-ante* question about the duty owed by the defendant to the claimant prior to its breach. In contrast, an inquiry regarding the 'duty nexus' and extent of the defendant's liability is a causation-based inquiry that can only be undertaken once factual causation between the defendant's breach and the claimant's loss has been established. This inquiry, per Stapleton, is *backward-looking*.[40] It attempts to retrospectively map the losses factually caused by the defendant's negligence and determine which (if any) fall within the scope of their duty. Likewise, the *SAAMCO* counterfactual test is a retrospective test that does not replace, as the majority rightly emphasise, 'the decision that needs to be made as to the scope of the duty of care'.[41]

The clarity of this division can be contrasted with the previous law, in which the 'scope of duty principle' was not separated into two questions. As Ryan[42] aptly summarises, in *Nykredit*, Lord Hoffmann asserted that the 'scope of duty' principle had nothing to do with causation when discussing the causal

[37] *Meadows* (n 2) [67].
[38] ibid [68].
[39] Jane Stapleton, *Three Essays on Torts* (Oxford University Press 2021) 66, 73
[40] ibid 95.
[41] *Manchester Building Society* (n 1) [23].
[42] Desmond Ryan, 'SAAMCO Re-Explored: BPE and the Law of Professional Negligence' (2018) 34 Journal of Professional Negligence 71, 76–77 (note).

requirements for liability.[43] After criticism,[44] his Lordship acknowledged extrajudicially that he had been speaking about causation and the extent of liability rather than the scope of the duty, but maintained vaguely that a 'close link' existed between them.[45] Later, in *Hughes-Holland*, Lord Sumption dismissed the dispute as a 'question of terminology' while simultaneously declaring, with reference to *Nykredit*, that the 'scope of duty' principle was not directed towards causation.[46] It is therefore unsurprising that many, such as Nolan, have criticised the courts' approach as unhelpful and confusing.[47] Conversely, *MBS* and *Meadows* make it clear that the principle contains two strands. The first is prospective, concerns the defendant's duty of care, and asks what it encompasses. The second is retrospective, concerns causation, and asks whether the losses factually caused by the defendant's breach were caused by the subject matter of their negligence.[48]

III. THE DUTY NEXUS QUESTION: FILLING IN THE GAPS

However, the majority's focus on the scope of the duty as *the* relevant test and emphasis on the counterfactual test's redundancy meant their treatment of the 'duty nexus' question was rather perfunctory.[49] Indeed, the majority disregarded the 'duty nexus' question when analysing the facts in *MBS*. How the 'duty nexus' question ought to be answered, without question-begging (*e.g.*, 'the scope of the defendant's duty of care represents the extent of their liability') or

[43] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL), 1638 (Lord Hoffmann).

[44] Jane Stapleton, 'Negligent Valuers and Falls in the Property Market' (1997) 113 Law Quarterly Review 1 (note).

[45] Leonard Hoffmann, 'Causation' (2005) 121 Law Quarterly Review 592, 596.

[46] *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 [38].

[47] Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 Law Quarterly Review 559, 580; Ryan (n 42) 77.

[48] Admittedly, the majority's formulation of the 'duty nexus' question is slightly imprecise insofar that it states the loss must concern the subject matter of the defendant's duty of care for the defendant to be liable, though this is likely a mere oversight. The loss ought to concern the specific part of the duty which the defendant breached before a 'duty nexus' can arise. That the loss concerned a matter within the scope of the defendant's duty is, strictly speaking, neither here nor there unless the defendant's negligence was also concerned with the same matter. In this regard, Lord Leggatt's (more precise) formulation of his Lordship's equivalent of 'duty nexus' question at (n 62) is instructive.

[49] *Manchester Building Society* (n 1) [27].

resorting to the supposedly redundant counterfactual test, is not explicitly addressed and remains uncertain.

A test of assumption of risk

Some hints, though, are provided. In *Meadows*, the majority indicate that the 'scope of duty' question identifies 'the fair allocation of risks between the parties'.[50] One possible solution, therefore, is to treat the 'duty nexus' question as a determination of whether the loss in question materialised from risks assumed by the claimant, the defendant, or neither. This involves a negative enquiry: so long as the loss does not result from a risk assumed by the defendant, it falls outside the scope of their duty and no 'nexus' exists, and vice versa. Risks not assumed by the defendant would generally comprise risks inherent in the claimant's activities on which the defendant could not reasonably be expected to advise or act.

In most cases, the test is simple. In *Meadows*, Dr Khan, by advising Ms Meadows on her carriage of the haemophilia gene, assumed the risk of her children developing haemophilia should the advice be negligent. She did not assume the risk, inherent in any pregnancy, of them developing autism, which was assumed by Ms Meadows.[51] In valuers' cases like *SAAMCO*, a property valuer advising prospective lenders only assumes the risk that their valuation may cause lenders losses comprising the extent of a negligent overvaluation.[52] The risk of market fluctuations is instead assumed by lenders entering into transactions.[53] Conversely, in *MBS*, by advising the Society that hedge accounting was permissible, Grant Thornton assumed the risk of the Society incurring losses to cover regulatory capital shortfalls hidden by hedge accounting: this risk, as the majority noted, was one which Grant Thornton had negligently failed to allow the Society to assess.[54]

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[50] *Meadows* (n 2) [53]. See also *Manchester Building Society* (n 1) [17], where the majority, whilst discussing the 'scope of duty' question, note that one should identify whether the loss was the fruition of a risk which the defendant's duty was supposed to guard against.
[51] *Meadows* (n 23) [27] (Nicola Davies LJ).
[52] John Murdoch, 'Negligent Valuers, Falling Markets and Risk Allocation' (2000) 8 Tort Law Review 183, 196.
[53] ibid.
[54] *Manchester Building Society* (n 1) [34].

Writing before the Supreme Court judgments in *MBS* and *Meadows*, Stapleton similarly noted that if the loss resulted from a risk which the claimant was willing to assume *and* which was unrelated to the subject matter of the defendant's negligence, it should fall outside the scope of the defendant's legal responsibility.[55] She also argued that this was the *only* restriction on the defendant's liability derivable from *SAAMCO*.[56] This approach, however, is too narrow. The extent of the *defendant's* liability should not depend primarily on the *claimant's* acceptance of risks. When analysing the defendant's liability, it is more principled and straightforward to start by considering what risks the defendant assumed: if the defendant had not assumed the risk which caused the loss in question, the claimant's acceptance or non-acceptance of that risk is neither here nor there. The claimant's acceptance of a risk is merely a factor in determining whether the defendant had assumed it—though naturally a finding that the claimant had willingly assumed the risk which caused the loss would militate against a finding that the loss fell within the extent of the defendant's liability.[57]

But relying on 'assumption of risk' itself may cause difficulties. Firstly, it is terminologically and conceptually similar to the notoriously confusing[58] concept of 'assumption of responsibility', concerning whether a duty of care exists. Indeed, at first instance in *Meadows*, Yip J employed 'assumption of responsibility' and held Dr Khan liable for the autism-related costs because it flowed from the improper fulfilment of a responsibility she had assumed.[59] Likewise, Teare J employed it at first instance in *MBS*.[60] Any adoption of the 'assumption of risk' test would therefore require careful consideration of how to keep the two distinct. Secondly, and more fundamentally, the test is merely an extension of the prior analysis

[55] Stapleton (n 39) 98. This would differ from the defence of *volenti non fit injuria* in that the defence requires full knowledge of the risk on the part of the claimant, in addition to a willingness to assume the risk.
[56] ibid.
[57] *Meadows* (n 23) [26]; Stapleton (n 39) 98. The fact that the claimant in *Meadows* had been willing to accept the risk of her child being born with autism was one of the justifications adopted by the Court of Appeal in *Meadows* for holding that the autism-related losses were outside the scope of the defendant's duty.
[58] At Stapleton (n 39) 97, Stapleton describes it as being 'notoriously opaque'. See also Donal Nolan, 'Assumption of Responsibility: Four Questions' (2019) 72 Current Legal Problems 123, 125.
[59] *Meadows* (n 20) [62].
[60] *Manchester Building Society* (n 13) [150]–[151].

concerning the purpose and scope of the duty of care. By merely asking *what* risks the defendant has assumed, it does not solve the ultimate question of *when* a loss can be regarded as flowing from a certain risk.

A relational approach

In this regard, Lord Leggatt's concurring judgments assists in answering the 'duty nexus' question. Lord Leggatt eschewed the majority's restructuring of the tort of negligence and novel terminology of 'duty nexus', and placed substantial reliance on a causation-based analysis involving the *SAAMCO* counterfactual test.[61] Nevertheless, his Lordship also noted that 'the loss [must be] caused by the particular matters which made the defendant's advice incorrect and not by other matters unrelated to the subject matter of the defendant's negligence' for the defendant's negligence to be an effective cause of the loss, and for the loss to fall within the scope of the defendant's duty.[62] This search for an effective causal connection is Lord Leggatt's equivalent of the 'duty nexus' question.[63] This approach suggests that for a 'duty nexus' to exist, there must exist some relationship *beyond factual causation* between the subject of the defendant's negligence and the claimant's loss. On this analysis, the 'duty nexus' inquiry is not a causal inquiry. Instead, it is a factual, relational inquiry that identifies whether there are common features between the loss and the breach of duty indicating they are interlinked without resorting to the obvious fact that the former factually caused the latter.

The relational inquiry is similarly straightforward in most cases.[64] It also avoids confusion over the metaphysics of causation. In *Meadows*, Adejuwon's autism was unrelated to Dr Khan's negligent advice concerning haemophilia because autism and haemophilia are medically unrelated. In valuers' cases, future market movements are unrelated to current valuations. In both cases, the lack of

[61] That said, his Lordship, like the majority, also acknowledged that a counterfactual test may not be necessary or helpful: *Manchester Building Society* (n 1) [106] (Lord Leggatt).
[62] *Manchester Building Society* (n 1) [174] (Lord Leggatt).
[63] ibid [97] (Lord Leggatt).
[64] Hugh Evans, 'Solicitors and the Scope of Duty in the Supreme Court' (2017) 33 Journal of Professional Negligence 193 discusses a number of difficult hypothetical situations in relation to the 'scope of duty' principle generally. In such cases, a relational inquiry may not provide straightforward answers.

a relationship indicates that no 'duty nexus' exists. Conversely, in *MBS*, the losses incurred by the Society to attain sufficient regulatory capital after having to restate its accounts because hedge accounting was impermissible correlates to Grant Thornton's negligent advice that it was permissible, indicating that a 'duty nexus' exists.

But this relational approach has limitations. It can identify situations where the loss is irrelevant to the defendant's negligence and therefore falls beyond the scope of their duty and extent of their liability. However, where circumstances or content of the claimant's loss correlate to the subject matter of the defendant's breach and a 'duty nexus' apparently exists, the fact that correlation may not equal relevance hinders the inquiry. Consider two scenarios adapted from Lord Hoffmann's 'mountaineer' example in *SAAMCO*:[65]

> A doctor negligently certifies a mountaineer's injured knee as fit. The mountaineer goes on an expedition. This would not have happened but for the doctor's negligence.
>
> *Landslide*: The mountaineer's injury forces him to turn back, encounter a landslide whilst descending, and sustain further injuries.[66]
>
> *Avalanche*: He notices an avalanche, fails to escape, and sustains further injuries. Had his knee been fit, he would have escaped.

A relational analysis shows a correlation between the mountaineer's further injuries and the doctor's negligence in both scenarios: in *Landslide*, the mountaineer's injury, which the doctor had negligently missed, forced him to encounter the landslide; in *Avalanche*, it prevented him from escaping the avalanche. In *Landslide*, however, the injury is plainly merely coincidental.[67]

Here, the 'assumption of risk' test becomes helpful again. By advising the mountaineer about his knee, the doctor assumed the risk of further injuries made harder to avoid by the knee injury. The doctor did not assume the risk of merely

[65] *South Australia Asset Management Corp* (n 3) 213–14.
[66] This is adapted from Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press 2019) 121.
[67] ibid.

coincidental injuries, even if the knee injury correlates to their occurrence. In *Avalanche*, the loss flowed from the former risk; in *Landslide*, the latter. The test therefore shows that a 'duty nexus' exists in *Avalanche* but not *Landslide*.

Accordingly, whilst there is no single obvious solution to the 'duty nexus' question, it is submitted that apart from the counterfactual test, both the 'assumption of risk' test and the relational inquiry derived from Lord Leggatt's reasoning represent helpful starting points.

IV. THE ROLE OF POLICY

The foregoing discussion has focused on the conceptual intricacies of the elements of negligence and the methods by which the 'duty nexus' question might be practically addressed. Nevertheless, the potential role of policy in determining the scope of the defendant's duty and extent of their liability must be mentioned.

The majority held that the application of the 'scope of duty' principle did not depend on fairness or reasonableness and that a policy-based analysis was unnecessary to determine the purpose and scope of the defendant's duty.[68] In contrast, Lord Burrows considered that the principle was underpinned by a policy that the defendant's liability should be fair and reasonable having regard to the allocation of risk between the parties.[69]

The majority's approach is problematic. Their Lordships acknowledge that the scope and purpose of the defendant's duty—as determined by the parties' relationship—are used to identify the 'fair allocation of risks' between the parties, from which one deduces whether a 'duty nexus' exists.[70] But the purpose of the duty may not reflect the 'fair allocation of risks', which is fact-specific and may vary throughout the duration of the parties' relationship. This may be because of extraneous events, a party's knowledge of particular risks, or other reasons. For instance, in *Pearson v Sanders Witherspoon*, the claimant's solicitors negligently

[68] *Manchester Building Society* (n 1) [5]; *Meadows* (n 2) [59].
[69] *Manchester Building Society* (n 1) [179], [192], [201]; *Meadows* (n 2) [71] (Lord Burrows). See also Manchester Building Society (n 1) [88], where Lord Leggatt also notes, in similar terms, the policy rationale behind the 'scope of duty' principle.
[70] *Meadows* (n 2) [53].

delayed proceedings, resulting in the defendant (in the proceedings) becoming insolvent by the time judgment was given and causing loss to the claimant.[71] The Court of Appeal held that the solicitors' duty was limited to acting expeditiously to preserve the claimant's right of action.[72] Applying the language of 'purpose', its purpose was to help the claimant bring an action, but not recover losses. This seems reasonable. What if, however, the solicitors had known beforehand of the defendant's impecuniosity? The relationship between the claimant and their solicitors and the purpose of the duty remains unchanged. Yet the risk of the claimant's inability to enforce a delayed judgment has ostensibly shifted onto the solicitors, although this is not clear from the purpose of the duty. Policy-based reasoning—in this case, that it is fair for the solicitors to assume the risk of loss resulting from delays given their knowledge—thus helps resolve the 'scope of duty' question when the purpose of the duty provides no clear answer.

Likewise, *MBS* itself illustrates policy-based reasoning's utility. In *MBS*, the majority asserted that Grant Thornton's specific misrepresentation that an 'effective hedging relationship' existed was 'critical' to the finding that the loss fell within the scope of their duty.[73] Why it was critical was not explained.[74] Lord Burrows, meanwhile, noted that Grant Thornton's specific misrepresentation that there was an 'effective hedging relationship', combined with their knowledge that the Society would rely on their advice and enter into contracts, meant it was fair and reasonable for Grant Thornton to bear the risk of loss resulting from the lack of an 'effective hedging relationship'.[75] Policy-based reasoning, applied sensitively to the facts, transforms bare assertions into reasoned arguments so as to properly address facts relevant to liability.

This is not to suggest a *focus* on policy. Such a focus might, as Todd writes, lead to various considerations—the selection and weighing of which are dependent on individual judges' inclinations—being used to allocate risks and

[71] [2000] PNLR 110 (CA); Evans (n 64) 202.
[72] Pearson (n 71) 125.
[73] *Manchester Building Society* (n 1) [38].
[74] See n 35; *Manchester Building Society* (n 1) [38]. The majority instead looked (separately) to the 'commercial reason' for which Grant Thornton's advice was being sought and given to determine the purpose and scope of Grant Thornton's duty.
[75] *Manchester Building Society* (n 1) [206].

determine responsibility, resulting in uncertainty.[76] However, Lord Burrows' statement that the scope of the defendant's duty is a question of *law* underpinned by policy means principle—namely, that liability depends on the purpose of the duty and the parties' relationship—remains the foremost consideration.[77] Indeed, in *Meadows*, Lord Burrows used considerations of fairness and reasonableness merely to support the prior conclusion that the purpose of Dr Khan's advice meant the autism-related losses fell outside the scope of her duty.[78] Policy-based reasoning becomes necessary only when generalised determinations of relationship and purpose are silent on the specific factual nuances of cases. In this context, the ability of policy-based reasoning to take different considerations into account to address specific facts is beneficial.

CONCLUSION

The law surrounding the scope of the defendant's duty of care and extent of their liability has been clarified by *MBS* and *Meadows*, but not settled. This clarification, particularly the recognition that the scope of the duty and extent of liability involves two separate questions, is welcomed. In clarifying the law, however, the judgments have raised the question of how exactly the extent of the defendant's liability—the 'duty nexus'—should be determined. This note has attempted to sketch two potential ways to address this question. The necessary role of policy-based reasoning in determining liability also has yet to be fully canvassed and will inevitably give rise to future litigation.

[76] Steven Todd, 'Negligence: Breach of Duty' in Steven Todd (ed), *The Law of Torts in New Zealand* (3rd edn, Brookers 2001) 151; James Plunkett, 'Principle and Policy in Private Law Reasoning' (2016) 75 Cambridge Law Journal 366, 386.

[77] *Manchester Building Society* (n 1) [179], [203], [205]; *Meadows* (n 2) [71] (Lord Burrows).

[78] *Meadows* (n 2) [77] (Lord Burrows). His Lordship noted that the purpose of the advice was 'not to ascertain the general risks of pregnancy, including the risk of autism', and that this meant Ms Meadows was taking upon herself the risks of pregnancy which were unrelated to haemophilia, including the risk of incurring autism-related losses.