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The UK Supreme Court Revisits "But for" Causation in Economic Negligence Cases

“If my grandmother had wheels, she’d be a wagon” –Yiddish proverb

This oft-quoted proverb illustrates the common-sense wisdom affirming the pointlessness of dwelling on counterfactuals. Most people in their day to day lives don’t need to dwell on what might have been, but prefer to focus on what is.

Negligence law, however, must always look backwards into what might have been. Courts in Canada, in all but the most unusual cases, apply a “but for” approach to causation. If the plaintiff’s injury would not have happened “but for” the defendant’s negligence, the defendant is liable unless some limiting principle of remoteness relieves the defendant of liability if the injury could not be foreseen as a natural consequence of the defendant’s negligence.

“But for” causation, however, is not without its problems. Twenty years ago, in *South Australia Asset Management Corp v York Montague Ltd* (“SAAMCO”), Lord Hoffman illustrated how problematic “but for” causation can be as a means of risk allocation with a simple example: an aspiring mountaineer goes to his doctor and asks him if his knee is sufficiently fit to undertake a difficult climb. The doctor negligently pronounces the knee fit, and the mountaineer heads off on the climb, whereupon he suffers an injury that has nothing to do with his knee.

Lord Hoffman in SAAMCO noted that something seems wrong in finding the doctor liable for consequences of the missed diagnosis that have nothing to do with the error in the diagnosis, but rather flow from the vicissitudes of the action that the plaintiff undertook in reliance on the defendant’s advice. SAAMCO itself was a valuer’s negligence case, where a plaintiff, relying on a negligent valuation, suffered losses as a result of having entered into a transaction in reliance on the valuation, even though the losses were caused by a general market decline and would have been suffered even if the valuation had been accurate. The Court found that that the valuer was not responsible for these market losses because they would have been suffered even if the valuation had been

accurate and the property had actually been worth what the valuer said it was. There was no economic responsibility, even though “but for” causation was established.

The principles in SAAMCO, rarely if at all, inform Canadian jurisprudence, even in economic negligence cases, with one exception. Recently, the British Columbia Court of Appeal in *The Owners, Strata Plan LMS 3851 v Homer Street Development Limited Partnership* applied SAAMCO in limiting the damages recoverable by investors asserting a statutory cause of action for misrepresentation under the British Columbia *Real Estate Act*. The disclosure statement contained a material misrepresentation concerning projected occupancy rates, but the investors suffered massive losses on their investments attributable to factors having nothing to do with the misrepresentation. Relying on SAAMCO, the Court of Appeal observed that “rules which make the wrongdoer liable for all the consequences of his wrongful conduct are the exception and need to be justified by some special policy. In the normal course the law limits liability to those consequences which are attributable to that which made the act wrongful.”

On March 22, 2107 a unanimous United Kingdom Supreme Court reaffirmed the continuing importance of the principles laid down in SAAMCO. Like SAAMCO, the case concerned professional negligence, but in this case concerned solicitors’ negligence in a commercial transaction.

BPE Solicitors & Anor v Hughes-Holland (in substitution for Gabriel) (Rev 1) concerned a claim for negligence against a firm of solicitors brought by the trustee in bankruptcy of a client, Mr. Gabriel. Gabriel was a businessman with knowledge of real estate transactions who had agreed with a developer, Mr. Little, to lend £200,000 to him. Gabriel assumed, but was not told, that Little or a company he controlled was going to use the money to develop a certain site and turn it into office premises. In fact, the site was to be transferred to a special purpose vehicle that would use the funds lent by Gabriel to discharge a £150,000 mortgage. Effectively, Little, instead of contributing a property to the project and using the loan to develop it, proposed to contribute nothing to the project. The loan money would in effect be used to pay off a debt owed by his principal operating company, leaving nothing to fund the development unless it could be found from other sources. Gabriel knew nothing of these plans, and would not have lent the money had he known what Gabriel was up to.

Gabriel retained the defendants, BPE Solicitors, to draft a facility letter and a charge over the building on the site. BPE had acted for Gabriel previously to prepare similar

documentation for a different scheme involving Little, which did not proceed. The trial judge found that for the subsequent loan, the specific instructions to prepare the documentation were relayed not from Gabriel directly, but rather from Little, who told BPE, but not Gabriel, that the money would be used to allow the special purpose vehicle to purchase the land. BPE nevertheless used a template to draft the facility containing statements that the purpose of the loan was to assist with the development costs of the property, even though these statements did not accord with reality, nor with his instructions.

The transaction failed, and Gabriel lost his entire investment. The trial judge found BPE negligent for the mistake in preparing the loan documentation. He awarded Gabriel his entire reliance loss because he would not have entered into the transaction if he had been warned about Little's plans. The Court of Appeal reversed the trial judge on the basis that it was Gabriel's onus to show that had the funds actually been used in accordance with Gabriel's assumption, he would have been able to recover his investment. Gabriel did not discharge that onus.

The United Kingdom Supreme Court affirmed this decision, and in doing so reaffirmed the enduring importance of the principle established in SAAMCO. Indeed, the reasons of Lord Sumption, writing for a unanimous court, begin with a recitation of the "mountaineer's knee" example used by Lord Hoffman in SAAMCO. Lord Sumption explains the rule in SAAMCO at a principled level. Referring to traditional liability "filters" such as remoteness, Lord Sumption observed that "the relevant filters are not limited to those which can be analysed in terms of causation. Ultimately, all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken."

While plaintiffs may find this reasoning difficult to accept, there is a sound principled basis for it. Economic negligence cases involve considerations of commercial risk allocation and potentially uncontrollable liability that merit asking whether the plaintiff can justify an economic right to the equivalent of an insurance policy against risks that the defendant ordinarily is not responsible (or paid) to protect the plaintiff from. In *BPE Solicitors,* while the solicitors were indeed negligent, they were not found to be responsible as insurers of their client's transaction. The plaintiff was not entitled to visit upon the solicitors all of the risks of an unwise business decision simply because the plaintiff was lucky enough to have retained a solicitor who made a mistake.

SAAMCO, as recently reaffirmed in *BPE Solicitors*, reminds us that, especially in cases of economic negligence, a plaintiff's

remedy is tightly connected with the extent of the plaintiff's right against the defendant. Professional advisors undertake duties of varying degrees of specificity. Asking them to be presumptively liable for all of the "but for" consequences of negligence—regardless of any connection between the consequences and the gravamen of the negligence—can allocate potentially uncontrollable risk onto professionals, which risk must then be systemically borne by the collectivity of clients, many of whom do not want, and may not be prepared to pay for, the benefit of a professional's responsibility to underwrite that risk.