

Scope of Duty: what are the outer limits in the light of
the Supreme Court's decision in *Hughes-Holland v BPE
Solicitors* [2017] 2 WLR 1029?

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THE MOUNTAINEER'S KNEE

- “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.” - *SAAMCO v York Montague Ltd* [1997] AC 191 at 213

A dilemma illustrated but oversimplified

- What if the injury was suffered
 - when an avalanche hit the Base Camp?
 - when an avalanche hit while climbing, but without the bad knee the mountaineer would have climbed faster and therefore fortuitously avoided it?
 - when an avalanche hit an area which the mountaineer only entered because his knee proved not strong enough to follow the proper route?
 - because the mountaineer fell when his knee gave way?

The SAAMCO principles

- Liability only for losses within the scope of duty
 - “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.”

Whether in contract, tort or statutory duty, the Claimant “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.”

- Distinguishing between
 - A duty to provide information to purposes of enabling someone else to decide what to do
 - A duty to advise someone what to do

SAAMCO – The decision on the facts

- (1) Property valued at £15 million, but was worth only £10 million; loan of £11 million; sold for £2.5 million. Full £8.5 million loss recoverable.
- (2) Property valued at £2.5 million worth only £1.85 million; loan of £1.75 million; property sold for £950 000. Loss £800 000, but damages only £650 000.
- (3) Property valued at £3.5 million; worth only £2 million; loan of £2.45 million; sold for £345 000. Loss £2.1 million; damages only £1.5 million.

Problems with SAAMCO

- Contract v tort – the benefit of the bargain
- Is this about causation?
 - The “no transaction” principle
 - Scope of duty or extent of liability
- Is it a cap on liability?
- When is information not advice?

Illustrations

- *Portman Building Society v Bevan Ashford* [2000] PNLR 344 (CA)
- *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins* [2001]
2 All ER (Comm) 929
- *Haugesund Kommune v Depfa ACS Bank* [2011] 3 All ER 655

Hughes-Holland v BPE

- Facts
- The trial
- The Court of Appeal
- The Supreme Court

Defending SAAMCO

- Causation
 - Substance over language

- The “cap”
 - Loss within duty not an exclusion of loss
 - The onus of proof

- Information and advice
 - Spectrum not distinction
 - Assumption of responsibility

The Bottom Line

- The distinction rephrased
- The hard cases rejected or restricted
- The principle reinforced

Thank you

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