Case Comment

Shaw v Kovac

(CA (Civ Div); Davis LJ, Underhill LJ, Burnett LJ; 18 July 2017; [2017] EWCA Civ 1028)

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Case:
Shaw v Kovac [2017] EWCA Civ 1028; [2017] P.I.Q.R. Q4 (CA (Civ Div))
J.P.I.L. C218 The claimant Mrs Gabriele Shaw claimed damages against the first defendant surgeon and second defendant NHS trust on behalf of the estate of her deceased father Mr William Ewan. At age 86, Mr Ewan had been diagnosed with aortic valve sclerosis. He was referred to the trust to see if he was suitable for a transcatheter aortic valve implantation ("TAVI"), a new procedure at the time, whereby an artificial valve was placed into the defective valve. The alternative would have been open heart surgery or conservative symptomatic treatment. An angiogram was performed, and it was advised that he was suitable for the TAVI procedure. Shortly after the operation, he began to bleed from the aorta, and despite attempts to stem the blood flow, he died.
The claimant's case was that the deceased should have been told the risks of the new procedure and if he had been properly informed he would not have proceeded any further. After disclosure, the defendants agreed not to defend the claim and judgment was entered against them. The heads of loss were: (i) pain, ***J.P.I.L. C219*** suffering and loss of amenity; (ii) damages for loss of expectation of life; (iii) funeral costs and expenses. Damages were assessed at £15,500, including £5,500 for pain, suffering and loss of amenity.[1]
The claimant appealed and subsequently made a late application for two of the appeal judges to recuse themselves. One of the judges had been involved in earlier judicial review proceedings against the outcome of an inquest into her father's death. The second judge had been involved in an application for permission to appeal against the outcome in that case. Both judges had made decisions adverse to the claimant.
The claimant submitted that:

- the judges had made adverse remarks about her; the first judge had suggested that a schedule she had prepared in the judicial review proceedings was misleading and the second judge had agreed with comments that her judicial review case was based on speculation and assertion; in addition, the first judge had found that her father had given informed consent; and
- a sum should have been awarded for the unlawful invasion of her father's personal rights and his loss of personal autonomy caused by the failure to obtain informed consent.

On apparent bias the court held that even if the first judge's comment about the claimant's schedule was seen as a reproof, it could not begin to show a predilection against her when viewed from the perspective of a fair-minded and informed observer.[2] It plainly came within the principles set out in *Locabail (UK) Ltd v Bayfield Properties Ltd*,[3] where it was said that: "the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection." [4]
The comments of the second judge also fell into that category.
The first judge had not made a decision about informed consent. In any event, there was no longer an issue about informed consent because the defendants had conceded the point, and judgment had been entered against them. The fact that the claimant did not wish to have two judges sitting on her appeal who had previously been involved in decisions adverse to her could not, of itself, procure a recusal. The law was clear and the test was objective. There was no proper basis for recusal and apparent bias did not arise. The judges had a judicial obligation to hear the appeal.
The court then turned to loss of personal autonomy as a cause of action. The claimant had suggested that the wrongful invasion of her father's personal autonomy represented a separate and free-standing cause of action. As such a cause of action had never been pleaded

it could not be raised on appeal. Even so the court confirmed that it was clear from the authorities that the failure to obtain informed consent should be formulated as an action in negligence/breach of duty.[5]
Loss of personal autonomy was then considered as a head of loss. The court noted that a free-standing award as suggested by the claimant had never been expressly awarded in a negligence case in any previous reported authority. The claimant could derive no real assistance from the decisions in *Chester v Afshar* [6] or *Montgomery v Lanarkshire Health Board* [7] in order to justify the head of loss she proposed. They concluded that it was contrary to legal principle.***J.P.I.L. C220***
The court pointed out that the existence of the patient's personal rights had always been the foundation of, and rationale for, the existence of a duty of care on doctors to provide proper information. An additional award was unnecessary, as the appropriate damages were those for pain, suffering and loss of amenity in the usual way. If an individual's suffering was increased by his knowledge that his "personal autonomy" had been invaded through want of informed consent, that could be reflected in the award of general damages.[8]
If the claim to an additional award had been well-founded an award would also in principle have been recoverable where there was a lack of informed consent but the operation was a success, or where the patient would have consented even if given the correct information. They could see no justification for such an outcome. Nor were there any policy reasons to justify imposing a fixed sum for such a head of loss. In reality, her claim was for loss of expectation of life, but that was precluded by the Administration of Justice Act 1982 s.1. Moreover, if what was sought was vindicatory damages, that was also precluded for the reasons given in *R. (on the application of Lumba) v Secretary of State for the Home Department*.[9] The appeal was dismissed.[10]
In our jurisdiction awards for fatal injury are atrociously low, and if there is no basis for making a dependency claim the overall quantum can seem wholly disproportionate to the harm caused. Relatives in this situation routinely find this hard to understand or accept. In the present case, the deceased's daughter was a qualified though non-practising barrister and it is clear that she wanted to do all she could to ensure that there was atonement for her father's death. This included procuring a lengthy jury inquest. Her persistence was saluted by Hallett LJ who said that "no daughter could have done more or fought harder to ensure that the circumstances of her father's death were brought to light".[11]
In the civil action, no doubt recognising the limited quantum available, she included claims for "restitutionary damages … and punitive damages (exemplary and/or aggravated damages)". Unsurprisingly these claims were struck out by the Master at an interlocutory stage. Exemplary damages are only available in very limited circumstances and not typically for negligence.[12] Aggravated damages are also tightly confined and are to compensate for a person's injured feelings and mental distress arising from the motives and conduct of the defendant.
Undeterred by the striking out of her restitutionary claim, the claimant contended at trial that she should be able to recover damages for the invasion of her father's personal right to choose what treatment to accept, and for the associated loss of his autonomy. This, she claimed, formed a free-standing cause of action for which support could be derived from the judgments in *Chester v Afshar*, and *Montgomery*. The trial judge rejected the submission as did the Court of Appeal who found the arguments "shifting" and "unfocussed".
The first hurdle which could not be overcome was that the proposed cause of action had not been pleaded. It was not permissible to permit any cause of action, let alone a novel cause of action, to be tried where it had not first been pleaded assuming limitation issues could be overcome. The only cause of action pleaded was negligence in failing to obtain informed consent, and the remedy for this was damages on a conventional basis.
Such damages would include pain, suffering and loss of amenity ("PSLA"), but could not include any loss of expectation of life as such was expressly prohibited by the Administration of Justice Act 1982 s.1. Injury to feelings including any indignity, mental suffering, distress, humiliation or anger can be brought into account in an award of PSLA,[13] which can also include the suffering endured by a person knowing***J.P.I.L. C221*** that their autonomy had been invaded through want of informed consent; but lack of informed consent does not give rise to any new cause of action such as to warrant a separate award of compensatory damages. What was being claimed was not only novel and not supported by authority, but it was contrary to legal principle.

Where Lord Steyn in *Chester* had referred to the necessity to ensure the autonomy and dignity of each patient,[14] he offered this as being a reason why a doctor should provide information before obtaining consent, not as a free-standing actionable right. In the same case, Lord Hoffmann (in his dissenting judgment) had in fact contemplated that there might be the potential for a "modest solatium" in cases where doctors fail to warn patients of risks, with a view to vindicating the patient's right to choose for himself. However, he rejected the proposition stating that the law of torts would be an "unsuitable vehicle for distributing the modest compensation which might be payable".

In an apparent effort to assist Mrs Shaw's arguments that there should be a new and novel cause of action, Davis LJ raised the issue of "vindicatory damages" stating that there was authority at a high level supporting an award of such damages for egregious violation of constitutional rights,[15] though the scope for such a remedy was extremely limited. Counsel for Mrs Shaw denied any suggestion that an award of vindicatory damages was being sought, and instead contended that compensatory damages were the appropriate remedy.

In argument it was also noted that consent cases in clinical negligence are not treated as trespass to the person actionable per se in the absence of fraud or bad faith. This is because the consent given is not regarded as a nullity.[16]

One of the many reasons found by the Court of Appeal for rejecting Mrs Shaw's arguments on the appeal was that it was not possible to identify a principled basis upon which the courts could assess damages under the new cause of action claimed. Moreover, the right not to have one's body invaded without informed consent was the same from one individual to the next. Whilst this is true, it seems to the author that the assessment of damages for such a cause of action—if established—could be dealt with on the basis that you leave assessment to the hypothetical jury (which applies to any head of general damages).

In conclusion, what the claimant in this case was really trying to do was get around the statutory (AJA s.1) prohibition on claims for loss of expectation of life, and to overcome the desultory award for PSLA. The case has usefully clarified conventional wisdom which is that consent cases do not give rise to any new cause of action based on human rights-type principles surrounding the sanctity or autonomy of the individual. The *Montgomery* decision has perhaps given sufficient recognition to the court's respect for fundamental human rights without the need for a new cause of action, and in the present case it was held that there was no need of a new award of the type sought even allowing for the incremental development of the common law.

Practice points

- It is perhaps obvious, but reliance on novel causes of action requires well honed, focussed and coherent submissions. Even more essential is the need to plead the cause of action in good time and comprehensively. The viability of the cause of action could then be addressed at an interlocutory stage.
- Where apparent bias is raised the test is objective and cannot be determined by the subjective views or wishes of the objecting party. ***J.P.I.L. C222***
- There is a judicial obligation to carry on hearing cases if recusal is not warranted on objective assessment even if it would make the judge (and the parties) more comfortable if the recusal took place.[17]
- If there is to be a change to the abysmally low level of damages for fatal accident it is going to have to come from the Government as the courts cannot address it through the common law.

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J.P.I. Law 2017, 4, C218-C222

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1. *Shaw v Kovac [2015] EWHC 3335 (QB)*.
2. *Porter v Magill [2001] UKHL 67* followed.
3. *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal) [2000] Q.B. 451*.
4. *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal) [2000] Q.B. 451* and *Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315* followed.
5. *Chester v Afshar [2004] UKHL 41* and *Montgomery v Lanarkshire Health Board [2015] UKSC 11* followed.

6.
Chester v Afshar [2004] UKHL 41.
7.
Montgomery v Lanarkshire Health Board [2015] UKSC 11.
8.
Richardson v Howie [2004] EWCA Civ 1127 applied.
9.
R. (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12.
10.
R. (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12 followed.
11.
Shaw v Kovac [2015] EWHC 3335 (QB) at [24].
12.
See *Kuddus v Chief Constable of Leicestershire [2001] UKHL 29; [2002] 2 A.C. 122*.
13.
See per Thomas LJ in *Richardson v Howie [2004] EWCA Civ 1127*.
14.
See [18] of *Chester v Afshar [2004] UKHL 41*.
15.
See *Shaw v Kovac [2017] EWCA Civ 1028* at [53] citing *Att-Gen of Trinidad and Tobago v Ramanoop [2005] UKPC 15*.
16.
See, e.g. *Chatterton v Gerson [1981] Q.B. 432*.
17.
See Chawick LJ in *Triodos Bank NV v Dobbs [2005] EWCA Civ 468*.