

## Shaw (Personal Representative of the estate of Ewan, Deceased) –v- Kovac and University Hospitals of Leicester NHS Trust [2017] EWCA Civ 1028

**Judgment: 18<sup>th</sup> July 2017**

***The Court of Appeal has ruled that no separate entitlement to damages/head of loss flows from a failure to properly consent a patient prior to medical treatment.***

### ***Facts***

On 26<sup>th</sup> September 2007, Mr William Ewan died (aged 86) following an operation for a trans-aortic valve implant. A claim was subsequently brought by Mr Ewan's daughter, on behalf of his estate, against the operating surgeon (a Consultant Interventional Cardiologist) and the relevant NHS Trust.

The crux of the claim in negligence was that the Defendants failed to obtain informed consent in relation to the relevant surgery and that, if Mr Ewan had been properly consented, he would not have agreed to undergo the procedure and would have enjoyed several additional years of life.

Liability was conceded by the Defendants with damages to be assessed. At a High Court Trial in 2015, Mr Ewan's estate was awarded damages for pain, suffering and loss of amenity in addition to damages for pecuniary loss. The total award was £15,591.83 (inclusive of interest).

On Appeal, it was argued that the Judge (HHJ Platts) should have awarded a sum representing a further and distinct head of loss for the unlawful invasion of the personal rights of Mr Ewan and his "loss of personal autonomy" based on an inadequate consent process and the decisions in *Chester v Afshar* [2005] 1 AC 134 and *Montgomery v Lanarkshire Health Board* [2015] AC 1430. This argument was unanimously rejected and the Court of Appeal held that:

### ***Decision***

- No distinct cause of action arises from a failure to obtain informed consent. Any failure in this regard is properly formulated as an action in negligence;
- There is no entitlement to vindictory damages (damages over and above an ordinary award) following the Supreme Court decision in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245;
- There is no entitlement to nominal damages for the wrongful invasion of Mr Ewan's personal autonomy given that damages were pleaded and recovered;
- The main thread of the Appellant's case was that a free-standing award of substantial compensatory damages should be made for the invasion of Mr Ewan's personal autonomy. This argument was rejected on the basis that it was not supported by *Chester v Afshar* or by *Montgomery*. Further, it was considered that any failure to obtain informed consent is actionable in negligence and properly compensated by a general damages award in the usual way; and
- A final argument that a conventional award should be made for the infringement of personal autonomy following *Rees v Darlington Memorial Hospital* [2004] 1 AC 309 was also rejected. In that case, a Claimant was not allowed to recover damages in respect of the birth of a child following a negligent sterilisation procedure, essentially, on policy grounds. A conventional award was allowed in the circumstances of that case. In the present case, there was no deprivation of damages on policy grounds. *Rees* was, therefore, distinguished and it was noted that allowing a conventional award of this nature could open the floodgates to such an award being made in a numerous cases, even where the relevant medical procedure had been a

success. The Court held that it would be "*wholly wrong to be dismissive of these floodgates arguments*" in the current climate of "*claims farming*".

### **Conclusion**

The Court of Appeal held that Mr Ewan's estate had been appropriately compensated in relation to a negligent failure to obtain informed consent and rejected all of the arguments which were made, on Appeal, (as outlined above) in relation to other types of awards being appropriate.

**Jacqueline McAleese**

**20 July 2017**