GARDEN COURT CHAMBERS

Free Hybrid Event

Avoiding procedural pitfalls in civil claims against public authorities




6pm - 7.30pm

Friday 20 October 2023

PROBATE ISSUES WHEN BRINGING CIVIL CLAIMS UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Garden Court Chambers

20th October 2023

The Legal 500 United Kingdom TOP TIER SET 2023

Chambers TOP RANKED UK Bar 2023 Garden Court Chambers

AIMS OF THIS TRAINING – TO GIVE AN OVERVIEW OF:

- Avoiding Strike outs and Wasted Costs. The potential problems and solutions concerning claims on behalf of a deceased's estate in Article 2 (A2) claims.
- Why grants of Probate or Letters of Administration are essential to the pursuit of A2 civil claims on behalf of a deceased's estate.
- The difference between grants of Probate and Letters of Administration.
- The inherent delays in obtaining grants of Probate and Letters of Administration.
- The protective steps required early on in the inquest process.

1) MECHANISMS FOR BRINGING CLAIMS ON BEHALF OF A DECEASED'S ESTATE

- Law Reform Miscellaneous Provisions Act 1934 – Claims on behalf of the deceased's estate to sue for any cause of action that the deceased would have had if they had not died.

- Fatal Accidents Act 1976 – Claims on behalf of family members and equivalent individuals for losses they have suffered as result the death i.e., dependents.

Human Rights Act 1998 s.7(1) – Claims by 'Direct Victims' of an 'unlawful act' and under Section 7(7) claims by 'indirect victims' which include:
(i) Next of kin representing the estate or interests of the deceased.
(ii) blood relatives with close ties to the deceased or others with close relationship claiming for their own pain, bereavement, and treatment arising from the death (See examples in *Daniel v St George's Healthcare NHS Trust* [2016] EWHC 23 (QB)).

Nb. All persons claiming as indirect victims must be listed in the Claim in their own right in addition to the estate.

Section 7(7) a person is a victim of an unlawful act 'only if he would be a victim for the purposes of article 34 … proceedings were brought in the [ECtHR] in respect of that act'.

2) WILLS AND INTESTACIES

'a Grant of Probate and a Grant of Letters of Administration are not the same thing at all'.

(*Rafferty v Royal Wolverhampton NHS Trust*, 31/5/22, §10 DDJ Edden, Wolverhampton Country Court)

- **Wills (Probate)**
  In broad terms if the deceased (testator) left a Will the identified executor, in the will, should apply for a Grant of Probate through the Probate Registry before they issue a claim on behalf of the estate.

- **Intestate (Letters of Administration)**
  If the deceased died Intestate (without leaving a will) then a person bringing the claim must apply for and be granted Letters of Administration before they can issue a claim.

  (Obtained through the Probate Office using form PA1)

- Probate and Letters of Administration provide the court with the evidence that the person representing the estate has the standing to do so.

- Commencing proceedings without Probate or Letters of Administration will result in the claim being an 'incurable nullity" (*Milburn-Snell v Evans [2011] EWCA Civ 577*).

- However, in *Jennison* v *Jennison* [2022] EWCA Civ 1682 the Court of appeal held in the case of a claimant executor to a will that the standing to bring the claim on behalf of the estate emanated from the will ([50] – [51] *Jennison*). The remainder of the judgement ([52] – [60]) holds that an executor, named in the will, can validly issue a claim without a grant of probate but there had to be a grant of probate before the commencement of the trial.

3) GUARDING AGAINST WASTED COSTS AND STRIKEOUTS

- *Milburn-Snell* and *Rafferty* are a salutary warning that the consequences for failing to obtain Probate or Letters of Administration, before issue of a claim, will result in a strike out with the attendant risk of wasted costs.

- Therefore, it is essential to ensure probate or letters of administration are applied for at the earliest opportunity following instruction in inquest cases.

- In the small number of cases where there is a Will the exceptional circumstances of *Jennison* should not be assumed to provide a fall-back position. Good practice requires that Probate should be applied for as early as possible due to significant administrative delay in the granting of probate.

- In cases of Intestacy, which probably form the majority of cases where Article 2 violations are suspected, it is also imperative to ensure Letters of Administration are applied for at the earliest opportunity after receiving instructions due to the lengthy delays involved.

4) HUMAN RIGHTS ACT 1998 TIME LIMITS – S.7(5)

Section 7 (5) provides:

> *(5) Proceedings under subsection (1)(a) must be brought before the end of –*
> *a) the period of one year beginning with the date on which the act complained of took place; or*
> *b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, …*

- If instructions are received before limitation expires you should:

i) Identify all potential defendants.
ii) Obtain letters of administration or probate as the case may be.
iii) Endeavour to lodge protectively for all claimants against all potential defendants and agree to extend time for service of claim form (or just the particulars of claim if the defendant refuses to agree extension for both).
iv) If it is not possible to lodge protectively for any/all claimants, obtain written agreements from all potential defendants that they will not rely on a limitation defence if the claim is brought before a particular date (which may be extended).

- If limitation has expired: A Claim will need to be issued and an application made to the court to extend time pursuant to s.7(5)(b) *"such longer period as the court … considers equitable having regard to all the circumstances"*. Unhelpfully for most of our clients the discretion has been exercised sparingly by the courts. See *AP v Tameside MBC* [2017] EWHC 65(QB). The need for a Grant of Letters of Administration and Probate adds another layer of difficulty for late claims.

- In the right case, e.g., a claim issued after the expiry of 12 months since the death, but before the conclusion of an inquest, it may be possible to argue that the civil claim recently described as the A2 *"redress procedural obligation"* , ought to follow the discharge of the A2 *"enhanced procedural obligation",* i.e., the A2 Inquest (*R (Maguire) v HMC Blackpool & Fylde* [2023] UKSC 20, §14). Therefore, if the claim had been issued within one year of the death the trial of the action would have been delayed in any event by the inquest, and therefore no prejudice to the defendant or the administration of justice has in reality occurred. In other words, the consequences of delay would be academic. It has to be recognised however, given the utilitarian approach in *AP v Tameside,* that this is a difficult argument of last resort.

- The above potential problems with Probate and Letters of Administration and their suggested solutions also arise in Personal Injury and Clinical Negligence claims arising from deaths albeit with a Limitation Act 1980 three-year limitation.

5) OTHER CONSIDERATIONS WHEN ACTING FOR THE ESTATE AND FAMILIES IN INQUEST CASES.

- Multiple potential beneficiaries to the will or intestacy need to be identified and contacted. Because, if they are not listed in the Claim Form before limitation expiry application for extensions of time would have to be made with a significant chance of refusal.

- Claims for loss of love affection/ companionship should not be overlooked (see *Regan v Williamson* [1976] 1 WLR 305 recoverable in negligence FAA claims) currently valued at £5000. This is likely to be subsumed in recoverable non-pecuniary loss under the HRA.

- Solicitors not having specialism in Probate/Intestacy matters should consider, if necessary, liaising and referring clients to solicitors specialising in probate to deal with applications to the probate registry.

- In the unusual situation that the named executor in a Will dies then letters of administration would have to be applied for by another person to gain the requisite standing to represent the estate (See online: The Gazette, 13/5/2020, Kelly-Anne Carr *contentious practice department Wright Hassell LLP)*

6) ALTERNATIVE CAUSES OF ACTION – ARTICLES 3 & 8

- Keep an open mind on causes of action during and after the inquest. Consider the availability of other HRA claims if you do not get your desired critical Article 2 narrative conclusion. Consider pleading Articles 3 and 8 in the alternative when you cannot satisfy the causation test for an Article 2 claim:

- Article 3 *Keenan v UK*

  Article 3 provides: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*. In *Keenan v United Kingdom* (2001) 33 EHRR 38 the ECtHR found that Article 2 had not been violated where it could not be proved that failures by a Prison caused the death of the applicant's son in circumstances where it was known or ought to have been known there was a risk to life. The court went on to find that Article 3 was violated by a failure to provide adequate care to a suicidal prisoner without the need to establish that inadequate care actually caused the death. The estate was awarded €7,000 for the distress suffered by the deceased, and €3,000, to the mother for the distress and anguish she must have suffered, as an indirect victim, based on her knowledge that her son had not been given the effective care he needed.

Article 8 Private Life - *Physical & Moral integrity*:

Article 8 protects, inter alia, family, and private life. Where death interferes with the family life aspect that is already covered by Article 2. Whereas interference with the 'private life' of the deceased and next of kin would not require proof that the interference caused the death. Where the failures do not cross the A3 threshold identified in *Keenan*, the 'private life' aspect of A8 should be considered. This is a broad concept (*Evans v UK* 2007-1; 46 EHRR 728 GC) encompassing *Physical & Moral integrity* first identified in *X and Y v. Netherlands A91 (1985) 8 EHRR 235*.

Bensaid v. the United Kingdom 6/2/2001 (App. 44599/98) § 47 recognises the 'preservation of mental stability' as an aspect of Article 8 private life. Thus, in a case where the treatment, prior to a death in state custody, does not cross the A3 threshold of inhuman and degrading treatment there may, for example, still be a viable A8 claim for failure to protect the mental stability of person who died in state custody.

Thank you

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AVOIDING PROCEDURAL PITFALLS IN CLAIMS AGAINST PUBLIC AUTHORITIES

THE NEED TO OBTAIN LEAVE UNDER SECTION 139 MENTAL HEALTH ACT 1983

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20 October 2023

The Legal 500 United Kingdom TOP TIER SET 2023
Chambers TOP RANKED UK Bar 2023 Garden Court Chambers

LEAVE UNDER SECTION 139 MHA 1983

- Long- standing legislative protection of “acts done in pursuance of this Act”

- **139 Protection for acts done in pursuance of this Act.E+W**

(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, . . . , unless the act was done in bad faith or without reasonable care.

- Covers purported performance, not just actual compliance.

- May elevate the substantive test for liability

Need for leave

- (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions……
- Does not apply to claims against hospitals: see section 139 (4).
- Means that, for instance, false imprisonment claims against hospitals do not require leave.
- However, for any claim not covered by section 139 (4), leave is required.

Consequences of failure to seek leave

- Disaster:

- *Seal v Chief Constable of South Wales* [2007] UKHL 31, [2007] 1 WLR 1910. Claimant had noisily objected to a neighbour blocking his car, police were called and detained him in the street. He brought proceedings, but not until the very end of the limitation period, and did so without first obtaining the necessary leave under section 139. House of Lords held (3-2) that no jurisdiction retrospectively to grant leave to pursue the proceedings, and that the proceedings were a nullity.

- If leave is not sought, then the claim is a nullity. This is DIFFERENT from applications to bring proceedings under section 329 Criminal Justice Act, where court can grant permission retrospectively: see *Adorian v Commissioner of Police* [2009] EWCA Civ 18, notwithstanding that the statutory purposes are similar.

Why is leave still required?

- There are interesting Article 5 and Article 14 points in relation to the propriety of this leave requirement.
- There are cases (and *Seal* may be one) where the suggestion that powers under the Mental Health Act are claimed to be being used may not be apparent, or may, in fact, only be something that is asserted subsequently.
- On the face of it, since the burden of proof, say, for a false imprisonment claim rests on the defendant, it should be the defendant that needs to prove the factual and legal basis of the detention, which, on the face of it, ought to include their assertion of acting under the Mental Health Act 1983.
- Seal does not grapple with that point, and is essentially an authority that the onus for speculating what the defence might be rests on the claimant prior to bringing the claim.
- Seal is nevertheless a recent decision, which reviewed the legislative history.

Threshold for grant of leave (1)

- *Winch v Jones* [1986] QB 296, claim for judicial review.
- Sir John Donaldson likened the test to being one of "reasonable suspicions that there has been a failure to exercise reasonable care".
- Threshold lower than the test for permission to judicial review.
- Court of Appeal formulated test for leave as whether, "on the material immediately available to the court, which of course, can include material furnished by the proposed defendant, the applicant's complaint deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed."
- This is still the test.

Threshold for grant of leave (2)

- *Seal: Winch v Jones* approved. See the following quotations from *Seal*:
- Lord Bingham (majority), at paragraph 20, threshold, "set at a very unexacting level."
- Lord Simon Brown: (paragraph 70) that *Winch* had, "decided that the test now is simply whether the case deserves further investigation by the court."
- Baroness Hale: "ones which deserve to be addressed at the trial of the claim"
- See judgment of Hill J in *Upadastra v Commissioner of City of London Police* [2023] EWHC 1853 (KB), at paragraphs 96- 99.

Procedure for applying for leave

- *Upadrasta* case where lots went wrong. Rest of Hill J's judgment shows the considerations relevant procedurally.
- Necessary to have an order granting leave. NOT like agreement as to limitation, or agreement in relation to procedural step. There needs to be a formal court order.
- Starting point should be, in letter (normally letter of claim)
- Invite agreement to sign consent order.
- That court order (if agreed) would still need to be approved by the court, as it is the court that grants leave: see *Krok v Chief Constable of Norfolk* [2023] EWHC 2541., paragraph 28.
- Leave is from High Court judge, not Master.

If defendant does not agree

- Need to apply to court for leave. This is ALL PRIOR TO ISSUE
- Apply using application notice and bundle of information in support of the application
- Normally, this ought to include a witness statement, relevant pre- issue correspondence, a skeleton argument about the test for leave and the argument as to how the threshold for leave is met.
- It may sometimes be appropriate to include draft particulars of claim.
- It probably makes sense to narrate and explain the attempts made to get the defendant to agree a consent order.
- Think what costs order is appropriate- if the defendant has refused to consent, then the Claimant should have the costs of the application?

The application is for a judge to consider

- UNLIKE section 329 applications, which can come before a Master, it is ONLY a judge of the High Court that has jurisdiction.

- A Master is specifically excluded from exercising jurisdiction, due to CPR 2.4 and PD2B3.1(g) And see *Upadrasta v Commissioner of City of London Police*, at paragraphs 37- 38.

- The Application Notice should be served on the defendant.

- The application should generally seek that an order is made on the papers (as per the analogy from Winch with judicial review permission applications)

- If the application is urgent, then make sure the court appreciates that: see *Krok v Chief Constable of Norfolk*

If leave is granted: costs

- An application for leave is a formal requirement, without which the claimant cannot proceed.
- There is no way that anything less than costs in the case is appropriate, and that is the normal order.
- Since the threshold is low and the defendant has opposed it, there is nothing wrong with expecting the Defendant to pay costs.

- The proper costs order on an OPPOSED application for leave is that the Claimant (or Applicant) should have the costs of the application. An application that is consented to without difficulty should have the costs order of costs in the case .
- See *Krok v Chief Constable of Norfolk* [2023] EWHC 2541 (KB).: see paragraphs 27- 34.

If leave is granted: next steps

- If an order has been granted on the papers, then it should be served, otherwise you may run into other problems: see *Upadrasta* at paragraphs 58- 62

- Any such order is an order made in the case, so would need to accompany the claim form anyway.

- You can then get on with the case.

- As was said in earlier slides, there are some matters where the substantive law is affected by section 139 (1).

That’s all, folks

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Fixed Recoverable Costs

Stephen Clark

Garden Court Chambers

Background

What's going on?

Civil Procedure (Amendment No. 2) Rules 2023 laid before Parliament on 24 May 2023

Implementation Day on 1 October 2023

Creates a new intermediate track covering damages claims between £25,000 to £100,000, subject to exemptions

Scope of exemptions under active review as a result of APIL JR, consultation and representations by PALG – promised implementation by April 2024, but no draft rules yet

How bad can it be?

Table 14 at CPR.PD45 (cf. CPR 45.50(2)(c)) allows for the following sums for *all* costs incurred up to trial:

Band 1: £6,600 + an amount equivalent to 15% of the damages, less £580 if that party did not prepare the trial bundle
Band 2: £17,000 + an amount equivalent to 20% of the damages, less £870 if that party did not prepare the trial bundle
Band 3: £19,000 + an amount equivalent to 20% of the damages, less £1,120 if that party did not prepare the trial bundle
Band 4: £29,000 + an amount equivalent to 22% of the damages, less £1,400 if that party did not prepare the trial bundle

Assuming best case scenario of allocation to Band 4 and a £20,000 damages award, you're looking at a maximum level of costs recovery of £33,400 in the subsequent civil proceedings.

Note additional sums available for counsel doing statement of case or post-issue advice (£2,300) and advice post-defence (£2,900), as well as trial and settlement.

How bad can it be?

Complexity Bands

Band 1: Any claim where (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one da
Band 2: Any less complex claim where more than one issue is in dispute, including personal injury accident claims where liability and quantum are in dispute.
Band 3: Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2, including noise induced hearing loss and other employer's liability disease claims.
Band 4: Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, including any personal injury claim where there are serious issues of fact or law.

n.b. all examples given are PI, RTA or debt claims

What can I do to avoid FRC?

Which cases does it apply to? Adventures in reading the CPR

- Paragraph 2(2) of the Civil Procedure (Amendment No. 2) Rules 2023 is critical:

The amendments referred to in paragraph (1) only apply—
(a) to a claim which includes a claim for personal injuries, other than a disease claim, where the cause of action accrues on or after 1st October 2023; or
(b) to a claim for personal injuries, which includes a disease claim, in respect of which no letter of claim has been sent before 1st October 2023.

- CPR 2.3(1) provides the definition:

'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition;

What can I do to avoid FRC?

Exclusions

CPR 26.9(10)(c):

a claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;

No definition in CPR 26 or CPR 2, but the exact same exclusion for "vulnerable adults" occurs in the EL/PL Protocol at paragraph 4.3(8) and defined, by reference to LASPO, as "a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise."

Scott v. Ministry of Justice [2019] EWHC B13 (Costs) rejected argument that a high risk prisoner was a "vulnerable adult", but said "*By way of example, a woman may well be 'vulnerable' for the purposes of the EL/PL Protocol if she were to bring an employers' liability claim alleging sexual abuse within her workplace, but that same person may well not be classed as being 'vulnerable' if she were to bring a public liability claim against a supermarket because she slipped on a grape.*"

What can I do to avoid FRC?

Exclusions

CPR 26.9(10)(d):

a claim is one the court could order to be tried by jury if satisfied that there is in issue a matter set out in section 66(3) of the County Courts Act 1984(3) or section 69(1) of the Senior Courts Act 1981(4); or

Importantly – *could* be tried by jury, not that it *is* or any such application has been made

Covers all cases of false imprisonment and malicious prosecution

What can I do to avoid FRC?

Exclusions

CPR 26.9(10)(e) and CPR 26.9(11):

(e) a claim against the police which includes a claim for—

(i) an intentional or reckless tort; or

(ii) relief or a remedy in relation to a breach of the Human Rights Act 1998(5).

(11) Paragraph (10)(e) does not apply to—

(a) a road accident claim arising from negligent police driving;

(b) an employer's liability claim;

(c) any other claim for an accidental fall on police premises.

What can I do to avoid FRC?

Allocation criteria

CPR 26.9(7)(c):

the court considers that—
(i) if the case is managed proportionately, the trial will not last longer than three days;
(ii) oral expert evidence at trial is likely to be limited to two experts per party;
(iii) the claim may be justly and proportionately managed under the procedure set out in Section IV of Part 28; and
(iv) there are no additional factors, which would make the claim inappropriate for the intermediate track; and
(d) the claim is brought by one claimant against either one or two defendants, or is brought by two claimants against one defendant.

CPR 26.8:

Where the relief sought includes a claim for non-monetary relief, the claim will not be allocated to the intermediate track unless the court also considers it to be in the interests of justice to do so.

What can I do to avoid FRC?

Arguments for escape

Approach in *Wilkins v Serco Ltd* [2023] EWHC 61 (KB) is the salutary one to follow

Approves reasoning of DJ Avent in *McGuire v. Ministry of Justice*

1. Failure to expressly exclude a particular cause of action in CPR does not mean its general nature is irrelevant to consideration of allocation and can consider the "wider importance" of the cause of action
2. Complexity of the law on liability and quantum relevant
3. "*inherent importance of a claim for false imprisonment, given the significance that the common law attaches to liberty and to the infringement of fundamental constitutional rights*" and exercise of public functions (even on delegated basis)
4. "*The general importance of it being clearly understood by those responsible for detention that court decisions affecting a person's liberty and release from custody were to be actioned on a timely basis*"
5. Chilling effect/slippery slope of deterring lawyers from doing this kind of work
6. Preservation of legal aid in a given field *plus* the impact of statutory charge leading to deduction in damages

What can I do to avoid FRC?

Arguments for escape

Cross-referencing to those cases which *do* have express exclusions in support of your arguments

For example, in a misfeasance claim against the Secretary of State for the Home Department, you may wish to refer to the fact that these claims are subject to a blanket exemption for police related claims as they fall within the definition of "reckless or intentional" tort

Draw on all available sources for general importance, complexity and/or other factors which align you *towards* the exempt cases and *away* from the classes of PI which fall within the intermediate track

Are we doomed?

Not *yet*.

Thank you

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