

Death of a Party: Tips for Practitioners

Posted On: 19/07/2022

Author: Richard Gregory

Benjamin Franklin held that death, along with taxes, were the only certainties. When the former occurs after a cause of action in a personal injury claim has arisen there will be consequences for that claim.

When a person who is, or was intended to be, a party to a personal injury claim dies (so we are concerned with human beings in this blog, and not companies or other entities which 'cease to be') there will be consequences for the intended or existing litigation.

It is perhaps easiest to consider the four circumstances which can occur in order, and the proper practice and procedure to address their consequences:

1. Claimant dies before issue of a claim form.
2. Claimant dies after issue of a claim form, but before trial or settlement.
3. Defendant dies before issue of a claim form.
4. Defendant dies after issue of a claim form, but before trial or settlement.

Law

There is only one relevant rule, unsupported by commentary within a Practice Direction, namely CPR 19.8, entitled, bleakly, Death.

(1) Where a person who had an interest in a claim has died and that person has no personal representative the court may order –

(a) the claim to proceed in the absence of a person representing the estate of the deceased; or

(b) a person to be appointed to represent the estate of the deceased.

(2) Where a defendant against whom a claim could have been brought has died and –

(a) a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;

(b) a grant of probate or administration has not been made –

(i) the claim must be brought against 'the estate of' the deceased; and

(ii) the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.

(3) A claim shall be treated as having been brought against 'the estate of' the deceased in accordance with paragraph (2)(b)(i) where –

(a) the claim is brought against the 'personal representatives' of the deceased but a grant of probate or administration has not been made; or

(b) the person against whom the claim was brought was dead when the claim was started.

(4) Before making an order under this rule, the court may direct notice of the application to be given to any other person with an interest in the claim.

(5) Where an order has been made under paragraphs (1) or (2)(b)(ii) any judgment or order made or given in the claim is binding on the estate of the deceased.

In all cases involving the death of a party, the general rule of joinder at CPR 19.2 applies, namely the substitution of a new party for an existing one given the passage of interest or liability to another (CPR 19.2(4)).

Claimant Dies Before Issue of a Claim Form

The claim form must be issued in the name of the claimant's personal representative, namely a person who has been issued with a grant to administer a deceased's person's estate. If there is a will that names the personal representative, they are known as the Executor, and if there is no will (or one which does not name an executor, or the named executor is unable or unwilling to act) the Administration of Estates Act 1925 sets out who can apply to court to be the personal representative (commonly a close relative of the deceased). They are known as the Administrator.

Limitation concerns are eased by section 11(5) of the Limitation Act 1980:

If the person injured dies before the expiration of the period mentioned in subsection (4) above [namely three years from the date on which the cause of action accrued, or the date of knowledge (if later) of the person injured] the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from the date of death or the date of the personal representative's knowledge, whichever is the later.

As such, there may be a delay in issuing, but there will be sufficient time to do so.

Claimant Dies After Issue of a Claim Form

Much the same will follow in the overwhelming majority of cases, usually with a stay pending the issue of the grant; the stay will commonly be shorter when there is a named (and willing) Executor, than if an Administrator has to be appointed.

However CPR 19.8(1) comes into play in the absence of a personal representative, most commonly when there is no will, or no named or willing Executor in the will.

In these circumstances, after application which would be determined with regard to the overriding objective, the claim can continue absent any personal representative (CPR 19.8(1)(a)). This would be extremely rare in the case of a claimant; still rare, but more common, in the case of a defendant.

Alternatively, and more commonly, the court can order the appointment of a person to represent the estate of the deceased (CPR 19.8(1)(b)).

Before making either of these orders, the court may direct that notice of the applicant be given to any other person with an interest in the claim (CPR 19.8(4)). Further, after any such order, a judgment or order given in the claim is binding on the estate of the deceased (CPR 19.8(5)).

Defendant Dies Before Issue of a Claim Form

If the defendant dies when the claim is not yet issued, there is a simple "how to" guide within CPR 19.8(2), with mandatory requirements.

If a grant of probate or administration has been made, the claim form must be issued against the deceased defendant's personal representatives (CPR 19.8(2)(a)). To search for any grant of representation already made, go to <https://www.gov.uk/search-will-probate>.

If a grant of probate or administration has not been made, the claim form must be issued against "the estate of [the deceased defendant]", and the claimant must apply to the court for an order appointing a person to represent the estate of the deceased (CPR 19.8(2)(b)). The time to apply would be at issue, so that service can be effected within the lifetime of the claim form.

There is no analogue to CPR 19.8(1)(a) whereby the court can allow the claim to continue absent a personal representative.

A curious proviso at CPR 19.8(3) allows that if the words *“the personal representatives of [the deceased defendant]”* are used in the claim form then these will suffice (even if there are no personal representatives because there has been no grant of probate or administration), and goes further to effectively excuse naming a defendant who was actually dead (presumably without the claimant’s knowledge) at issue, whereby the claim form will simply be treated as having been brought against the estate. To this extent, simply naming the defendant, even if dead and even if known to be dead, is excused, and prevents a defendant’s insurer or solicitor seeking the strike out of a claim form under CPR 3.4(2) for having been brought against a person who no longer exists.

Again, before making an order appointing a person to represent the estate of the deceased, the court may direct that notice of the applicant be given to any other person with an interest in the claim (CPR 19.8(4)). And also again, after such an order, a judgment or order given in the claim is binding on the estate of the deceased (CPR 19.8(5)).

Defendant Dies After Issue of a Claim Form

We return to CPR 19.8(1), the general provision whereby a *“person with an interest in a claim”* dies.

If there is a personal representative, they will be substituted as named defendant.

If there is no personal representative, as when a claimant dies, again after application which would be determined with regard to the overriding objective, the claim can continue absent any personal representative (CPR 19.8(1)(a)). Examples where this might be appropriate would be where the claim is relatively small and the need for a representative for the deceased defendant may be disproportionate and cause unnecessary delay and cost, or if there are other parties to the proceedings with the same interest as the deceased defendant. Alternatively, the court can order the appointment of a person to represent the estate of the deceased (CPR 19.8(1)(b)).

Again before making either of these orders, the court may direct that notice of the applicant be given to any other person with an interest in the claim (CPR 19.8(4)). Further, after any such order, a judgment or order given in the claim is binding on the estate of the deceased (CPR 19.8(5)).

Special Cases

One of the most common circumstances where there is a deceased defendant, after the cause of action arose (often very shortly), but before issue of the claim form, is after a road traffic accident in which the defendant was killed. Absent a personal representative, an application for appointment of a personal representative must be made (CPR 19.8(2)(b)(ii)). Where that defendant driver was uninsured, a procedure was agreed between the Official Solicitor and the Motor Insurers' Bureau in 2003. It is set out at 19.8A.3 of the White Book. Simply put, the claim form should be issued against *“the estate of [the deceased defendant]”* and then the claimant should immediately write to the MIB enclosing a copy of the claim form, asking whether the MIB is willing to be appointed to represent the estate of the deceased. If it agrees, and it is anticipated that it usually will, its agreement should be produced to the court in support of an application to give effect to that agreement; if it declines, the Official Solicitor should be approached, and he will usually be willing to accept appointment, subject to payment of his costs, and his involvement will usually be limited to accepting service of proceedings.

Other Notes

If the court does appoint a representative for a deceased party under CPR 19.8(1) or 19.8(2)(b)(ii) it is for the purpose of the proceedings within which the appointment is made only. It does not confer more general rights or responsibilities on that appointee in relation to the estate of the deceased.

Downloaded From:

<https://ropewalk.co.uk/blog/death-of-a-party-tips-for-practitioners/>