Fatal accidents and fatal errors

Gordon Exall

Gordon Exall looks at the lessons that practitioners undertaking fatal accident cases can learn from the recent professional negligence case of Amin –v- Imran Khan.

Zahid Mubarek was 19 years old when he was killed on the 28th March 2000 – murdered by a cellmate at Feltham Young Offender Institution. The cellmate was a known racist with a history of violence. Zahid should never have been placed in a cell with him. Unsurprisingly the prison service accepted responsibility for the death. However the original fatal accident claim against the prison service was struck out. Consequently the solicitors originally instructed to act were sued and ordered to pay damages in ***Mubarek Amin –v- Imran Khan & Partners*** [2011] EWHC 2958 (QB). The judgment of Sir Robert Nelson contains important lessons for all those involved in fatal accident litigation.

Problems upon issue of the first action

When the claim form was issued by the original solicitors against the prison service no letters of personal representation had been taken out. The claim was expressed to be in negligence and included issues under the Human Rights Act 1998. No reference was made at all either to the Law Reform Miscellaneous Provisions Act 1934 or the Fatal Accidents Act 1976. As the judge noted the claim form was defective, it did not name the correct causes of action, nor did had the letters of administration been obtained.

Are letters of administration always necessary?

Pausing here we have to observe that letters of administration are not always necessary in a fatal accident case. If the claim is being brought solely by the dependants then section 2(2) of the Fatal Accidents Act 1976 allows a dependant to bring an action directly if there is no executor or administrator of the deceased or no action is brought within six months after the death by the executor or administrator.

The crucial caveat here is that the dependants can only bring an action under the Fatal Accidents Act in relation to their own loss of dependency (and that of the other dependants). They cannot bring an action on behalf of the estate. If the estate has a claim for damages, for instance for pre-death losses and expenses or, as in the Amin case, for aggravated damages then the dependants cannot pursue these claims. Their claims will be limited to their own financial dependency (and the funeral expenses if they have paid them – see section 3(5) of the Act.

Can the estate bring an action and the pleadings be amended if probate is obtained after proceedings are issued?

This question has no definitive answer. There was discussion of this issue in Amin. ***Stubbings –v- Holt*** [1953] 1 AER 925 and ***Hilton –v- Sutton Steam Laundry*** [1945] 1KB 65, suggest not. However CPR 17.3 – (4) allows an amendment to alter

the capacity in which a party claims if the new capacity is one that he had when the proceedings started or has since acquired.

The reality is of course that we should all be anxious to avoid testing this issue. If in doubt the claimant is best advised to obtain a grant of probate and issue in the name of the administrators or executors on behalf of the dependants ad the estate.

Assessing a dependency claim: expectation of benefit not need

On the face of it this was an unpromising claim for dependency. Zahid was aged 19, had no children or obvious dependants, no real employment history and a criminal record. In the original action against the prison service leading counsel had been asked to advise. The judge stated that there were two matters arising from leading counsel's advice in relation to the potential dependency claim by Zahid's parents.

> **"The first is that it appears to confuse the need for support with reasonable expectation of financial gain. It refers to Zahid's parents as "being in a dependent" relationship and "financial support arrangement" but need does not need to exist in a fatal accident claim, an expectation of financial benefit is sufficient". (emphasis in original text)**
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> **Secondly the "advice only addresses the worst case scenario. It was indeed possible that the dependency claim could have been regarded as very small, but it was also possible that a properly mounted claim, supported by an employment consultant's figures and family evidence, could have given rise to a substantial and properly pleaded dependency."**

How the dependency claim should have been assessed

The judge in the Amin case had to consider what would have been awarded if the original action had proceeded against the prison service. He considered:

Earnings

No-one can pretend that assessing a dependency claim in these circumstances is an easy task. However the crucial issue is that there was *evidence* in support of the claim which the court could rely upon. Although Zahid had a troubled past he came from a good family, his brother's went to university. His father and uncle were described as "hardworking, honest and responsible men". His father had arranged a job and Zahid had show some talent . The judge's view was that if this matter had been litigated the court would have taken the view that given Zahid's age, supportive and strong family and availability of work options, he would have got into reasonably well paid employment.

The nature of the dependency

The judge accepted that there was a reasonable chance of children from Zahid's background living at home with their parents, sometimes for many years and providing for them financially. It was the practice of the extended family to make much more substantial payments to their parents. This tradition of making such

payments continued after a son left home, albeit at a lower and proportionate level. Higher sums would be paid after the parents' retirement. In addition the sons were expected to help with caring for the family, including DIY, cooking, gardening and necessary care in their hold age.

The size of the dependency claim

Sir Robert Nelson made the following conclusions in relation to the valuation of the fatal accident and Law Reform Act claim.

(1) Pain and suffering would amount to £7,500.

(2) There would be pre-retirement payments made to the parents which amounted to £22,848.00

(3) Post retirement payments amounted to £55,230.00.

The overall award that was likely to have been made in the fatal accident claim was, therefore, £85,485.

Aggravated damages

In addition the judge found that it was likely that aggravated damages would have been awarded, on the particular facts of that case, on the basis of 50% of the schedule, that is £42,742 giving a total of £128,227.

What would have happened if the original claim had been properly formulated ?

The Judge was absolutely clear in his view as to the likely outcome if the claim had been properly formulated.

"If a schedule had been served on the Secretary of State totalling £128,227, supported by evidence from the family and from the employment consultant and other witnesses about the culture of the Asian community as to the payment to parents by their sons, the probability is that the Secretary of State would have put forward an offer in settlement of the claim. Faced with an evidential basis for the dependency and services claim, he would have been obliged to have offered a figure within striking distance of the sum claimed, and if that was not accepted, pay it into court. This would have been necessary in order to make an effective payment in, and to avoid the litigation and its potential embarrassment, both in relation to the negligence claim, and more particularly the misfeasance in public office claim."

Cultural differences must be considered

The ***Amin*** case is indicative of the facts that the courts are sensitive to the practices of different communities when considering a claim for fatal accident damages. There are several cases where the courts have recognised that cultural factors play a large part in determining whether a claim can be made under the Fatal Accidents Act and the nature of that claim. In ***Kandella –v- British European Airways Corporation*** [1980] 1 All ER 341. Two daughters were killed in a car crash. They were Iraqi and

practising as doctors in England. It was shown that the parents were likely to have to leave Baghdad and live in exile. They would have been reliant upon their daughters for support. I figure equivalent to one-quarter of the daughter's net earnings

The true test is the nature of the dependency relationship

There are, however, cases where it has been accepted that, even in the absence of special cultural factors, a parent can make a claim for loss of an adult child. See ***Davis –v- Bonner*** (reported in Kemp) where the Court of Appeal overturned a judge's decision that there was no dependency claim by the parents of a 29 year old man who had special educational needs. The court held that the test was not whether the dependency claim was established on the balance of probabilities but whether the claimant could establish that there was a "substantial" rather than a "speculative" probability of their dependency, applying the test of ***Davies –v- Taylor*** [1974] AC 207. On the whole, however, these decisions eschew a wholly mathematical approach and damages are awarded on an "overview" approach (£5,000 in the Davis case). See also ***Bhawsar –v- Ahmed*** [2004] All ER (D) 74 where an "overview" approach was used to award £80,000 to an elderly mother of a an adult son.

Lessons to be learned

There are a number of important practical points that come of out the Amin case:

1. **If in doubt obtain a grant of probate** Strictly this may not be necessary, particularly if the claim is being brought only by the dependants. However if there is any doubt at all as to whether there is a claim under the Law Reform Act, it is prudent to ensure the action is brought by the administrators or executors.

2. **Gain evidence to support a dependency claim** As the Amin case shows a claimant does not have to be dependent upon the deceased at the time of death in order to bring a claim. The test is whether the claimant has a "reasonable expectation of benefit". Although these cases are difficult they are not impossible. It may seem obvious to state that evidence is needed and has to be carefully marshalled. However in L (Child) –v- Barry May Haulage [2001] All ER (D) 264 the trial judge observed that on the morning of the trial there was no evidence before him at all.

> **At the outset of the hearing, by which time I was aware of the point of legal principle that the Defendants sought to advance ...I expressed surprise that no witness statements had been served by the Claimant. I was, effectively, being asked by ...the Claimant, to perform a "conventional" calculation on the basis that the deceased had been the sole source both of financial and other (the provision of "services") support for the Claimant.**

A "conventional" calculation cannot be carried out without supporting evidence. As the ***Amin*** case shows appropriate evidence can demonstrate that there is a dependency claim even if the initial circumstances look unpromising.

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