IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

C.A. No. 380/96(F)

D.C. Kuliyapitiya Case No.10685

Karunathilaka Arachchilage

Chandrasena Silva

Kandayaya,

Ethungahakotuwa

Plaintiff

Vs.

1. Wanni Arachchige Edwin Fernando

Kalayani Watta

Sagaragama,

Nattandiya.

2. Rajapakse Arachchige Gamini Rajapakse

Ehila Walahapitiya,

Nattandiya.

Defendants

1. Wanni Arachchige Edwin Fernando

Kalayani Watta

Sagaragama,

Nattandiya.

2. Rajapakse Arachchige Gamini Rajapakse

Ehila Walahapitiya,

Nattandiya.

Defendants-Appellants

Vs.

Karunathilaka Arachchilage Chandrasena Silva

Kandayaya,

Ethungahakotuwa

Plaintiff-Respondent

Before: A.W.A SALAM, J.

Counsel: Dr. S. F.A. Cooray with Ms. Sudharshani Cooray for the Defendnt-Appellants and W. Dayaratne P.C. with Ms. R. Jayawardane for the Plaintiff-Respondents.

Argued on : 01.11.2010

Written submissions tendered on : 02.12.2010

Decided on : 31.01.2011

A.W. ABDUS SALAM, J.

Time and again, it has been repeatedly emphasized that the biggest mockery of law is to deny Justice through delay for delayed justice kills the entire fabric of justice delivery system. It is said that injustice anywhere is a threat to justice, everywhere.

The facts relating to this matter briefly are that the plaintiff's wife died 20 years ago, at the prime of her life, leaving behind a 6 year old child and 1 ½ years old infant of whom the elder child is presently 28 years and the younger well over 21 years. The plaintiff was in his late thirties at that time presently in his late sixties and presumably on the verge of his retirement.

The ex-wife of the plaintiff succumbed to her injuries sustained as a result of the utter rash and negligent driving of the 2nd defendant who drove a lorry in a state of drunkenness, at an unusually excessive speed knocking behind the motorcycle of the plaintiff. At that time the plaintiff's wife was a pillion rider of the motor bicycle along with their younger child. It is common ground that at the time of the collision, the plaintiff was riding his motor bicycle keeping to the extreme left side of the road.

The plaintiff filed the present suit claiming damages in a sum of Rs 500,000/- from the 1st defendant as the owner of the lorry and the 2nd defendant as the driver of the same. The learned district judge by his judgment dated 11 October 1995 awarded damages to the plaintiff

as prayed for in the plaint. This appeal has been preferred by the defendant-appellants against the said judgment.

The grounds of appeal urged on behalf of the appellants are that the deceased was guilty of contributory negligence in that she failed to wear a crash helmet, the plaintiff was not possessed with a certificate of competence to ride a motor bicycle and in any event the damages awarded are excessive.

The evidence led at the trial reveals that the plaintiff was riding his motor bicycle on the left edge of the road and it was the 2nd defendant who caused his lorry driven at an excessive speed to collide with the motor bicycle from behind. As such it is impracticable to attribute any contributory negligence on the part of the plaintiff or his deceased wife to the vehicular accident. Taking into account the manner in which the accident had taken place, had the plaintiff chosen a bicycle as the mode of transport instead of a motor bicycle, their plight would have been even worse . In the circumstances, it would be seen that the failure on the part of the deceased to wear a helmet cannot be regarded as an omission which had contributed in any manner towards the vehicular accident.

The 2nd defendant was indicted in the High Court for causing the death of the wife of the plaintiff by rash and negligent act, an offence punishable under section 298 of the Penal Code. Upon the 2nd defendant offering an unconditional plea of guilt to the charge, he was

sentenced to 2 years rigorous imprisonment, the operational period of which was suspended for 5 years. Further he was ordered to pay compensation to the plaintiff in a sum of Rs 15,000/-.

The question regarding the competence of the plaintiff to ride a motor bicycle has neither been raised in the answer nor has it been suggested by way of an issue by the defendants. In any event as the vehicular accident does not point to any negligent riding, the question whether the plaintiff was a competent rider does not strictly arise for determination in this appeal. Even otherwise the learned district judge has commented that the plaintiff has had sufficient experience in riding motor bicycles as he is a policeman attached to the Police Department. Above all the plaintiff had maintained that he had a valid licence to ride motor bicycles although he was unable to produce it at that time. This piece of evidence of the plaintiff also has not been seriously challenged.

Therefore, the pivotal point that arises for determination is the quantum of damages the plaintiff is entitled to claim from the defendants. The uncontroverted testimony of the plaintiff was that his ex-wife was an employee of the marketing department and had retired from work by reason of its closure. She was in receipt of a monthly pension of Rs 2800/- which she spent for the family. After her death, her pension had been paid to her two children. The children have not sought any damages from the defendants.

Accordingly, the plaintiff maintained that he was deprived of the support of his wife towards the maintenance of the family. Even though the plaintiff has married subsequently, no evidence has been led or it was at least suggested to the plaintiff that his present wife makes any financial contribution towards the expenses of the household.

It is appropriate at this stage to cite a passage from the judgment in Union Bank Vs Warneke 1911 AD 657 which reads as follows...

> "According to Voet (663) (9.2.11) utilis actio was given to a father whose minor son had been killed. By modern practice the right of suing has been extended and that where a free man has been killed through negligence an action is given to the wife and children for what would appear to the conscientiousness of the judge to be just, having regard to the maintenance which the deceased had been able and accustomed by his labour to furnish his wife and children who are the relations. Although the husband is not here specifically mentioned as being entitled to sue in the case of his wife's death through negligence it was not I think intended by the learned author to deny such a right in the case of a needy husband whose wife had been accustomed during her lifetime to support him. It would be no undue extension of the right to hold that, where a wife during her lifetime actively assisted her husband in the support and education of their children, he would be entitled, upon her being killed through negligence to claim such pecuniary damages as it can be proved to have sustained by reason of the permanent loss of such

> assistance. It is one of the duties of a wife to render such assistance. According to voet (25.3.6) the duty of supporting (alendi) children was in his time common to both parents unless one of them was destitute, and by supporting he meant (25.3.4) not only feeding and clothing but also looking after their health and education according to their position in life".

In the instant appeal undisputedly the deceased, was so concerned with the welfare of the plaintiff and her children. She was also aware of indigent circumstances her husband as a State employee had to face. Probably it may be the reason that compelled her to contribute her entire pension towards the house hold expenses. This shows her commitment to a worthy cause and her determination to continue with the practice she was accustomed to even if she was to receive an enhanced pension. She has in fact discharged her duty towards her husband in a much better way than what can reasonably be expected of her. As has been referred to by jurists her pre-mature death had factually led to a clear case of *damnumreifamiliyaris.*

Hence, it can safely be assumed that the deceased may have contributed at least 1/3rd of her income, towards the household expenses, so as to put her husband at his ease, in the fulfillment of his obligation as the head of the family. Of course the evidence of the plaintiff was that his wife spent the whole amount of money she received by way of pension to the benefit of the family. However, as the pension drawn by the deceased is now paid to the two children, in point of fact it is the plaintiff who has suffered patrimonial loss as a result of the death of his wife.

Taking Rs 933/- (1/3rd) as her monthly contribution to the plaintiff, she would have then contributed (933x12x35) a sum of Rs 391860/-, had she continued to support the plaintiff for another 35 years. In the circumstances, taking into consideration the age of the wife of the plaintiff and the enhanced pension she would have been entitled to during a period of 35 years, the learned district judge cannot be faulted for fixing the damages at Rs 500,000/.

For reasons stated above, I am not disposed to subscribe to the view that the quantum of damages awarded to the plaintiff is excessive. Hence, the judgment of the learned district judge under appeal is affirmed and appeal dismissed with costs.

Judge of the Court of Appeal

Kwk/-