

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

*In the matter of an Appeal with Leave to
Appeal obtained from this Court.*

**PALAMANDADIGE LALITHA PADMINI
FERNANDO**

116/4, Sevagama, Polonnaruwa.

PLAINTIFF

S.C. Appeal 102/2009
S.C. Case No. SC (SPL) LA 313/08
C.A. Appeal No. 349/05
D.C.Colombo Case No. 36051/MR

VS.

CEYLON TOBACCO COMPANY LIMITED

No.178, Srimath Ramanadan Mawatha,
Colombo 15.

DEFENDANT

AND BETWEEN

CEYLON TOBACCO COMPANY LIMITED

No.178, Srimath Ramanadan Mawatha,
Colombo 15.

DEFENDANT-PETITIONER

VS.

**PALAMANDADIGE LALITHA PADMINI
FERNANDO**

116/4, Sevagama, Polonnaruwa.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

CEYLON TOBACCO COMPANY LIMITED

No.178, Srimath Ramanadan Mawatha,
Colombo 15.

**DEFENDANT-PETITIONER
-PETITIONER/APPELLANT**

VS.

**PALAMANDADIGE LALITHA PADMINI
FERNANDO**

116/4, Sevagama, Polonnaruwa.

**PLAINTIFF-RESPONDENT
-RESPONDENT**

BEFORE: Priyasath Dep PC, CJ
Sisira J. De Abrew J
Prasanna Jayawardena PC, J.

COUNSEL: Manoj Bandara with T. Herath instructed by Sudath Perera Associates for the Defendant-Petitioner-Petitioner/Appellant.
Kanishka Witharana with H.M. Thilakarathne instructed by Ms. Medha N. Gamage for the Plaintiff-Respondent-Respondent.

ARGUED ON: 08th January 2018

WRITTEN SUBMISSIONS FILED: By the Defendant-Appellant-Petitioner/Appellant on 23rd October 2009 and 22nd January 2018.
By the Plaintiff-Respondent-Respondent on 14th December 2009.

DECIDED ON: 14th June 2018

Prasanna Jayawardena, PC.J

The Plaintiff-Respondent-Respondent [“the plaintiff”] was the wife of one K.S.Perera. He had started smoking when he was a teenager. Over time, he became a heavy smoker. In the month of September 1996, he was diagnosed with incurable cancer. The plaintiff’s husband died on 13th April 2001. He was then 60 years old.

The Defendant-Petitioner-Petitioner/Appellant [“the defendant”] is a limited liability Company. It is the sole manufacturer of cigarettes in Sri Lanka. The defendant also distributes, sells and markets the cigarettes it manufactures. Further, at the times material to this action, the defendant advertised and promoted the sale of the cigarettes it manufactured.

Prior to his death, the plaintiff’s husband instituted D.C. Colombo Case No. 21163/M against the defendant praying for the recovery of damages on account of the cancer, which he alleged was caused by smoking cigarettes manufactured by the defendant. He died during the pendency of that case. The plaintiff made an application to be substituted in place of her deceased husband. The District Court made Order refusing this application for substitution on the basis that the cause of action claimed by the plaintiff’s husband was personal to him and did not survive his death. The plaintiff did not challenge that Order in the Court of Appeal.

On 11th April 2003, the plaintiff instituted this action against the defendant, pleading four alleged causes of action and praying for the recovery of a sum of Rs.5,000,000/- from the defendant. The plaint is a lengthy one. Some of the averments are less than

lucid. Some others are unnecessarily repetitive or needlessly detailed. However, a perusal of the plaint establishes that the plaint does set out alleged causes of action against the defendant.

The essence of the plaintiff's case against the defendant, as can be extracted from the plaint, is that: (a) the cigarettes manufactured, distributed, marketed, advertised, promoted and sold by the defendant contain Nicotine, which is an addictive substance, and other carcinogenic chemical substances which are harmful to the health of persons who smoke these cigarettes; (b) the defendant did not inform the public that, smoking these cigarettes is harmful to the health of persons who do so; (c) as a result of the defendant advertising and promoting the sale and use of the cigarettes it manufactures, the plaintiff's husband was induced to start smoking cigarettes and he was unaware that doing so was harmful to his health; (d) in the month of September 1996, the plaintiff's husband was diagnosed with incurable cancer which was caused by his having smoked cigarettes manufactured by the defendant; (e) he died on 13th April, 2001 as a result of this cancer; (f) the plaintiff's husband was a tailor who earned an income of about Rs.5,000/- per month; (g) the plaintiff is unemployed and was solely dependent on her husband; (h) as a result of her husband's death, the plaintiff has been deprived of the love, affection, care [“ආරක්ෂාව”], protection [“රැකවරණය”] and maintenance [“නඩත්තුව”] which she received from him; (i) the plaintiff has suffered grievous mental pain and anguish and the plaintiff has been deprived of the protection and hopes she had for her future life with her husband; (j) the plaintiff has been deprived of the pecuniary benefit she would have received, as the heir of the estate of her deceased husband, from the monies which would have been payable to her husband under a decree entered in D.C. Colombo Case No. 21163/M; (k) in these circumstances, the plaintiff has suffered loss and damages which are quantified at a sum of Rs. 5,000,000/-; (l) based on these alleged factual averments, the plaintiff claimed four causes of action upon which she claimed the defendant was liable to pay this sum of Rs.5,000,000/- to her: *ie.* causes of action upon the defendant's alleged negligence, alleged fraudulent acts and alleged violations of several provisions of the Sale of Goods Ordinance and Foods Act.

The defendant filed answer, admitting that it manufactured, marketed and advertised cigarettes and denying the other averments in the plaint. The defendant also pleaded, in its answer, that the plaint should be rejected and/or dismissed since: (i) the plaintiff's action is prescribed on the face of the plaint; (ii) the plaint does not disclose any cause of action and does not conform to the imperative provisions of the Civil Procedure Code and (iii) the plaintiff cannot have and maintain this action because of the refusal of her application to be substituted as the plaintiff in D.C. Colombo Case No. 21163/MR filed by her husband.

When the case was taken up for trial on 30th November 2004, the plaintiff framed issue no.s [1] to [41] and the defendant framed issue no.s [42] to [57]. The defendant then moved to take up its issue no.s [42], [43], [45] and [47] as preliminary issues of law. The plaintiff did not object to this application even though the defendant had

failed to previously move to have the plaint rejected or returned for amendment on account of an alleged failure to disclose a cause of action - *vide*: Kulatunge J's often quoted statement in **FONSEKA vs. FONSEKA** [1989 2 SLR 95 at p.100] that, where a defendant takes up the position that a plaint does not disclose a cause of action, "*.....the defendants should, before pleading to the merits, move to have the plaint taken off the file for want of particulars - Mudali Appuhamy v. Tikarala (4). Under Section 46(2) of the Civil Procedure Code this is the correct procedure even in a case where it is alleged that the plaint does not disclose a cause of action.*".

These issue no.s [42], [43], [45] and [47] were: issue no. [42] - Does the plaint disclose a cause of action against the defendant ?; issue no. [43] - In any event, is the cause of action depicted in the plaint vague ?; issue no. [45] - Is the plaintiff's action prescribed on the face of the plaint ?; and issue no. [47] - Is the plaintiff entitled to have and maintain this action in view of the fact that the application for substitution in D.C. Colombo Case No. 21163/MR was refused by the Court ?

In her written submissions tendered in the District Court, the plaintiff submitted that the four preliminary issues should be answered in her favour because: (i) the plaint does disclose a cause of action and is not vague; (ii) the action is not prescribed on the face of the plaint since the plaintiff's cause of action arose only upon the death of her husband and this action has been instituted within two years of that date; and (iii) the refusal of the plaintiff's application for substitution in D.C.Colombo Case No. 21163/MR has no bearing on her cause of action in this case.

On the other hand, in its written submissions tendered in the District Court, the defendant submitted that, the four preliminary issues should be answered in the defendant's favour and the action be dismissed since: (i) the plaint is prolix; (ii) the plaint does not disclose a cause of action because the plaintiff is not seeking to recover compensation for patrimonial loss but is, instead, seeking to recover loss and damages for loss of love, affection, care and protection, which is not recoverable under our law; (iii) the plaint is vague due to the plaintiff's failure to plead the exact amount of the loss and damage caused by the loss of support consequent to her husband's death; (iv) the plaintiff's cause of action "*emanates from the time her husband came to know that he was suffering from cancer*" - *ie*: in September 1996 - and, therefore, this action is *ex facie* prescribed on the face of the plaint, since it has been filed long after the expiry of two years from September 1996; and (v) the Court's refusal to substitute the plaintiff in the place of her deceased husband in D.C. Colombo Case No. 21163/MR and the plaintiff's failure to appeal from that Order, "*precludes her from filing this action.*".

The learned trial judge made Order answering all four preliminary issues in the plaintiff's favour and directing that the case proceeds to trial on the other issues. The defendant filed an application in the Court of Appeal seeking leave to appeal from that Order and was granted leave to appeal, in the first instance. After hearing both counsel and considering the written submissions filed by them, the Court of Appeal dismissed the defendant's appeal.

The defendant then filed an application in this Court seeking special leave to appeal from the Order of the Court of Appeal. This Court has granted the defendant special leave to appeal on the following three questions of law:

- (i) Whether the Court of Appeal failed to appreciate as to what the cause of action of the plaintiff is, against the defendant ?

In paragraph [16] (a) of its petition to this Court, the defendant stated the basis on which it raised this question of law by citing the definition of a "Cause of Action" in section 5 of the Civil Procedure Code and pleading that, "*In the circumstances, it is submitted with respect that the date of death of the Plaintiff's husband cannot be construed as the date of the commencement of the 'wrong' allegedly committed by the Defendant that gives rise to all the damages that the plaintiff seeks*":

- (ii) Whether the Court of Appeal failed to appreciate that, the plaintiff's action is prescribed on the face of the plaint, in that, *inter alia*, the wrong for the prevention or redress of which the action was brought arose well prior to two years before the institution of action ?
- (iii) Whether the Court of Appeal failed to appreciate that, on an application of the principles enunciated by the Supreme Court in **PROF. PRIYANI DE SOYZA VS. RIENZIE ARSECULERATNE**, the plaintiff is not entitled to the damages prayed for ?

It is evident from paragraph [16] (a) of the petition to this Court, that the first question of law is raised on the basis of the defendant's contention that, the plaintiff's alleged cause of action did not arise upon the death of her husband but, instead, arose in 1996, when he contracted cancer. The second question of law raises the specific issue of whether the plaintiff's action is prescribed on the face of the plaint because the alleged cause of action arose prior to two years before the action was instituted.

Thus, both the first and second questions of law relate back to the defendant's issue no. [45] which asked: "*Is the plaintiff's action prescribed on the face of the plaint ?*". Therefore, these two questions of law can be considered together.

In this regard, it is evident from the averments in the plaint that, the plaintiff's alleged causes of action are based on the premise that the defendant's wrongful and/or unlawful acts caused the death of her husband and that, as a result of the death of her husband, she has suffered loss and damage, which she has quantified in a sum Rs. 5,000,000/-. It is also seen that, the plaintiff's action is in the nature of an Aquilian Action for the recovery of alleged loss and damages caused to the plaintiff by the wrongful acts and/or omissions of the defendant, which are said to consist of *culpa* with regard to the cause of action based on alleged negligence and also *dolus* with regard to the other causes of action based on alleged fraudulent conduct and alleged violation of statutory safeguards.

In this regard, it hardly needs to be said here that, the principles of the Roman-Dutch Law apply to Aquilian Actions of this nature and that, it is a well known principle of the Roman-Dutch Law that, dependents of a deceased person whose death was caused by the wrongful act of another, are entitled to claim compensation from the wrongdoer for the patrimonial loss they suffer as a consequence of the death of the person they were dependent on.

Thus, in **JAMESON'S MINORS vs. C.S.A.R** [1908 TS 575], where the children of a man killed in a railway accident claimed damages caused to them by their father's death, Innes CJ observed [at p. 585], with regard to this type of action, "*..... the compensation claimable under it is due to third parties, who do not derive their rights through his [the deceased's] estate, but on whom they are automatically conferred by the fact of his death*". In **LEGAL INSURANCE COMPANY LTD vs. BOTES** [1963 1 SALR 608], where the widow of a man killed in road accident, sued to recover compensation for damages caused to her as a result of his death, Holmes J stated [at p. 614] with regard to the nature of the action, "*The remedy relates to material loss `caused to the dependents of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed.*". Accordingly, Mckerron states [The Law of Delict 7th ed. at p. 149], "*..... the dependents of the deceased can claim compensation for the pecuniary loss they have suffered in consequence of the death.*". Similarly, Macintosh and Scoble [Negligence in Delict 3rd ed. at p. 203], also writing on the South African Law, observe, "*..... the right of action comes to the dependents quite independently, and is not derived from the deceased or his estate.*". As regards the Law in Sri Lanka, Wikramanayake states [The Law of Delict in Ceylon at p.39], "*This action is available to those to whom the deceased was legally bound to support and the damages awarded is the actual pecuniary loss.*".

With regard to the first and second questions of law, it is the plaintiff's position that her alleged causes of action arose only upon the death of her husband. On the other hand, the defendant's position is that, the plaintiff's cause of action arose when she became aware, in 1996, that her husband contracted cancer and while he was alive.

The aforesaid statements of the law make it apparent that, it is the plaintiff's position which is correct since, as set out above, her alleged causes of action to recover compensation for patrimonial loss she claims to have suffered as a result of the death of her husband, only arose upon the death of her husband which deprived her of the patrimonial benefits she received from him during his lifetime. In other words, the causes of action she claims in the plaint came into existence only upon the death of her husband. Until that time, she was dependent on her husband and she had no personal cause of action against the defendant. Her husband may [or may not] have, during his lifetime, had a cause of action against the defendant for loss and damage caused to him as a result of having contracted cancer after smoking cigarettes manufactured and marketed by the defendant. However, any such possible cause of action was personal to him and was extinguished upon his death. As set out above, the cause of action now claimed by the plaintiff is entirely different to any cause of action that her husband may have had during his lifetime.

The aforesaid position was recognised by the Supreme Court in **MEINONA vs. UPARIS** [60 NLR 116], where the widow and children of a person killed as a result of being hit by a motor car, instituted action claiming compensation from the owner and driver of that motor car, for the patrimonial loss caused to the widow and children as a result of the death of their husband and father, Pulle J observed [at p.118], “.....*the tort for which the defendant was responsible did not until the death of the deceased give to his dependents a cause of action,*”. In this connection, Pulle J also cited Salmond [Law of Torts 1953 ed. p. 396] which states, “*Nevertheless the cause of action conferred upon the relatives of the deceased by the Act is a new cause of action, and not merely a continuance of that which was formerly vested in the deceased himself. It is ' new in its species, new in its quality, new in its principle, in every way new [1 (1884) App. Cases 59 at 70.]*” On the same lines, in **NANDAKEERTHI vs. KARUNARATNE** [2004 1 SLR 205], where the widow of a person killed in a road accident claimed compensation from the owner of the vehicle, Wijayarathne J observed [at p.208], with regard to the plaintiff’s right to recover compensation, “*Such right depends on the fact of the plaintiff being a dependent of the deceased where death deprived her of such dependence.*”.

The case of **SUPPRAMANIA CHETTY vs. THE FISCAL, WESTERN PROVINCE** [19 NLR 129] cited by the defendant, was with regard to the damages caused to the plaintiff by the negligence of the Fiscal which resulted in the theft of goods seized in execution of a decree entered in favour of the plaintiff. It is not relevant to the present case. However, when the observation made by Schneider J [at p. 139] that, “..... *the rule is well established that prescription generally runs in cases of tort from the date of the tort, and not from the occurrence of the damage. But, there is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage*” is applied to the present case, it confirms the aforesaid position that the plaintiff’s alleged cause of action in the present case before us arose only upon the death of her husband. That is because, the tort or delict which the plaintiff claims is the defendant causing the death of her husband and the damages caused to the plaintiff commenced only upon the death of her husband. The decision in **CARTLEDGE vs. E. JOPLING & SONS LTD** [1963 1 AER 341] which was cited by the defendant, is also not relevant to the present case. That decision was with regard to the plaintiff having contracted pneumoconiosis as a result of adverse working conditions and the interpretation of section 2 (1) of the Limitation Act, 1939. It has no bearing on a cause of action which accrues to the dependents of a person who dies as a result of tortious or delictual acts of another.

As set out above, it is very clear that, the alleged causes of action claimed by the plaintiff in this action arose only upon the death of her husband on 13th April 2001. This action has been filed on 11th April 2003. Therefore, this action has been filed within two years of the time when the plaintiff’s alleged causes of action arose and within the two year limitation period specified in section 9 of the Prescription Ordinance, as being applicable to actions for the recovery of “*loss, injury or damage*”,

Thus, it is apparent that, the defendant's contention that the plaintiff's cause of action arose when her husband contracted cancer in 1996 is devoid of any merit. Accordingly, the first and second questions of law are answered in the negative.

The third question of law asks whether the Court of Appeal failed to appreciate that, on an application of the principles enunciated by the Supreme Court in **PROF. PRIYANI DE SOYZA VS. RIENZI ARSECULERATNE** [2001 2 SLR 293], the plaintiff is not entitled to the damages prayed for in the plaint.

In this regard, the defendant contends that, the plaintiff's causes of action are to recover compensation for alleged loss and damage caused to her as a result of being deprived of the care and companionship of her husband and for the mental agony caused to her following the death of husband. The defendant goes on to submit that, the defendant is not entitled to such damages because, as the Dheeraratne J held in **PROF. PRIYANI DE SOYZA VS. RIENZIE ARSECULERATNE** [2001 2 SLR 293 at p.303-304], damages are recoverable in an Aquilian Action only on account of calculable patrimonial loss and also "*injured feelings arising out of and flowing naturally from physical hurt done*" but not on account of "*mental distress or wounded feelings causing no physical injury*" or "*loss of care and companionship*".

However, a perusal of the plaint shows that, the defendant's aforesaid submission is factually incorrect since the plaintiff has *not* limited her claims to alleged loss and damage caused to her as a result of being deprived of the care and companionship of her husband and for mental agony caused to her following the death of husband.

Instead, the plaintiff has claimed loss and damages caused to her as a result of, *inter alia*: (i) losing the care ["ආරක්ෂාව"], protection ["රැකවරණය"] and maintenance ["නඩිත්තුව"] which she received from her husband; and (ii) being deprived of the pecuniary benefit she would receive, as the heir of the estate of her deceased husband, from the monies which would have been payable to her husband under a decree entered in D.C. Colombo Case No. 21163/M. These heads of alleged damages may, if proved by evidence to that effect, constitute patrimonial loss which the plaintiff suffered as a result of the death of her husband. For example, in the celebrated case of **THE UNION GOVERNMENT vs. WARNEKE** [1911 AD 657] where the plaintiff's wife was killed in a railway accident and he sued to recover compensation for damages on account of the deprivation of her comfort and society and also on account of the loss of her assistance in the care, clothing and upbringing of his seven children, it was held that, while he was not entitled to damages on account of the loss of her comfort and society, he would be entitled to recover damages for such pecuniary loss, as he may prove to have sustained, as a result of the deprivation of her assistance in the care, clothing and upbringing of his children. Further, as Holmes J stated in **LEGAL INSURANCE COMPANY LTD vs. BOTES** [at p. 614], "*..... material losses as well as benefits and prospects must be considered.*"

It is obvious that the question of whether these alleged damages are in the nature of patrimonial loss or not and whether these alleged damages were, in fact, sustained, will be mixed questions of fact and law which can only be ascertained at the trial, upon evidence placed before the Court. These questions cannot be answered by simply looking at the averments in the plaint, as the defendant seems to suggest. It is apt to cite here the often quoted observation by Kulatunge J in **FONSEKA vs. FONSEKA** [at p.100] that the law requires a plaint to disclose a cause of action and that, *“The law does not require that the plaint should make out a prima facie case which is what the Defendants-Appellants appear to insist on, nor are the Plaintiffs required to state their evidence by which the claim would be proved.”*

For these reasons, the defendant’s remaining contention as embodied in the third question of law, is not only factually incorrect, it is also devoid of substance in law. Therefore, the third question of law is also answered in the negative.

Accordingly, this appeal is dismissed. The Orders of the District Court and the Court of Appeal are affirmed. As set out above, this appeal, which is on preliminary issues, has no merit. However, by its applications to the Court of Appeal and to this Court, the defendant company has succeeded in delaying the trial by more than 12 years and would have caused the plaintiff to incur expenses which are likely to have imposed a difficult burden on her. The plaintiff would have also been put to considerable inconvenience. In another case, these obstacles may even have led to the plaintiff, whose resources are likely to be limited, caving in and giving up the action. In these circumstances, the defendant company shall pay the plaintiff a sum of Rs. 400,000/- as costs, within one month of today. The District Court should hear and determine the trial, on its merits based on the evidence and the law, as soon as possible

Judge of the Supreme Court

Priyasath Dep PC, CJ.
I agree

Chief Justice

Sisira J. De Abrew J.
I agree

Judge of the Supreme Court