

SIRIWARDENA AND ANOTHER  
v.  
LOKUGE AND ANOTHER

COURT OF APPEAL  
ANANDA COOMARASWAMY, J.,  
EDUSSURIYA, J.  
C.A. 499/92(F)  
D.C. COLOMBO 8113/M.  
SEPTEMBER 01 AND 29, 1994.

*Roman Dutch Law – Accident – Damages – Quantum – Right to Support – Loss of Support – Minor male child – Unmarried daughter – Legal Right/Duty – Filial affection.*

Plaintiffs-Respondents – daughter and son of H (mother) claiming to be dependents of H instituted action for damages arising out of loss of support when H died in a bus Accident. H was a Pensioner.

**Held:**

(1) The 2nd plaintiff respondent who was 18 years of age at the date of his mother's death would have continued to receive an allowance as an Orphan up to the age of 21 years from the Pension fund.

Since there is no evidence of a disability which would have made him dependent on his mother, he is expected to earn a living after the age of twenty-one.

The basis of his action is a legal right to support from the deceased and a legal duty on the part of the deceased to support the claimant. However, there is no legal duty to support a son over 21 years, unless he is incapacitated and unable to earn a living.

(2) Support must be rendered in consequence of a legal duty to support and not from mere filial affection. The 2nd plaintiff respondent is therefore not entitled to damages.

(3) However in the case of the unmarried daughter the 1st plaintiff-respondent, under Roman Dutch Law, has a right to support from a Parent.

**Case referred to:**

1. *Young v. Hurton* W.L.D. 90.

**APPLICATION** in Revision from the Order of the District Court of Colombo

*K. Paul, State Counsel* for the Appellant.

*Bimal Rajapakse* for Respondent.

November 11, 1994.

**EDUSSURIYA, J.**

The Plaintiff-Respondents who claim to be the daughter and son of one Migel Gamage Harriet, claiming to be dependents of the said Harriet instituted this action to recover Rs. 150,000/- as damages arising out of loss of support, when the said Harriet died when a bus in which she was travelling met with an accident.

The owner of the bus and the driver are the 1st and 2nd defendants/Appellants.

The counsel for the respondents submitted that the State counsel appearing for the Appellants informed Court that there was no merit in this appeal.

Although, State Counsel said so, when the Court questioned the legality of the award he made submissions contesting the award, but not negligence.

Respondents Counsel has also submitted that nothing has been urged in the petition of appeal on the quantum of damages. On the contrary in the Petition of Appeal the Appellants have prayed that the judgment be set aside.

Although, the plaintiffs/respondents have stated in their plaint that they were dependent on the pension drawn by the deceased, not a word was mentioned about the pension in the evidence in chief given

by the 1st plaintiff/respondent. In evidence in chief the 1st Plaintiff/Respondent stated that they were maintained on a sum of about Rs. 2000/- made by the deceased as a seamstress. However, in cross-examination she admitted that the deceased drew a pension of Rs. 1134/- per month. Then in re-examination in answer to a leading question "you said your mother received an income of Rs. 2000/- as a seamstress in addition to the pension?" she replied "Yes". In fact the 1st plaintiff/respondent had not said prior to that her mother earned Rs. 2000/- in addition to the pension. On the contrary in cross-examination the 1st plaintiff/respondent admitted that in their claim for compensation to the Insurance Corporation they mentioned the pension as her mother's only income.

The 1st plaintiff/respondent produced marked P5 a letter from a Grama Sevaka which stated that the deceased earned about Rs. 1500/- as a seamstress.

The Grama Sevaka has not given evidence and further the 1st Plaintiff/Respondent admitted that she did not know the Grama Sevaka and that she gave letter D8 to the Grama Sevaka and requested the Grama Sevaka to give the letter to the effect that her deceased mother made Rs. 2000/- per month as a seamstress. The letter D8 states that such a certificate is required for the purpose of making a claim from the insurance. It also states that a member of a local authority has also given such a certificate.

There is no evidence which shows how the Grama Sevaka knew the deceased's income as a seamstress. After all, the Grama Sevaka is not an officer of the Inland Revenue Department, nor is there evidence to show that the Grama Sevaka received reports from the deceased regarding her income. Therefore, P5 cannot be acted upon. Besides, if the deceased made any money as a seamstress, would not the plaintiffs/respondents have stated so in their plaint. In paragraph 8 of the plaint the plaintiffs/respondents have stated that the deceased was a relation of theirs and that the deceased was in receipt of a pension from the Government and that the Plaintiffs/Respondents were totally dependent on such pension.

Besides, as mentioned earlier the 1st plaintiff/respondent admitted that in their claim to the Insurance Corporation they have stated that the deceased's income was the Government Pension of Rs. 1134/- (p. 48 of Brief) in the column relating to the deceased's occupation or business. The 1st plaintiff/respondent also admitted that they had not mentioned in the column relating to other income in D1 that the deceased earned Rs. 2000/- (p. 49 of Brief). The 1st plaintiff/respondent also admitted that in D1 it is stated that the income from occupation or business was a sum of Rs. 40844/- being the pension for three (3) years. So that even in D1 there was no mention of an income as a seamstress. It therefore appears that the 1st plaintiff/respondent in the examination in chief made no mention of their claim based on the pension (1) because the 2nd Plaintiff/Respondent as an orphan would receive an orphan's allowance up to the age of twenty-one (21) years and (2) because they had decided to make a claim based on an alleged income of Rs. 2000/- for the first time with a view to enhancing their claim.

Hence, it would be preposterous to accept the evidence that the deceased made Rs. 2000/- per month as a seamstress.

The 2nd plaintiff/respondent who was eighteen years of age at the date of his mother's death would have continued to receive an allowance as an orphan up to the age of twenty-one (21) from the pension fund.

Since there is no evidence of a disability which would have made him dependent on his mother there after or that he would have become dependent on his mother in the future due to some illness or otherwise he is expected to earn a living after the age of twenty-one.

The basis of the action is a legal right to support from the deceased and a legal duty on the part of the deceased to support the claimant. There is no legal duty to support a son over the age of twenty-one years, unless he is incapacitated and unable to earn a living.

Learned counsel for the respondents has himself stated in his written submissions that in the case of a major child it will no doubt be essential to aver that he was dependent on the deceased

**and was unable, without the deceased's assistance to support himself.** (Macintosh and Scoble – Negligence in Delict 4th Edition 1958. p. 21 and p. 212). Macintosh and Scoble (p. 214) there refer to the case of *Young v. Hurton*<sup>(1)</sup> and states that, that was a case where a major son who had been incapacitated, sought damages. Support must be rendered in consequence of a legal duty to support and not from mere filial affection. Needless to say that a mother is under no legal duty to support a son over the age of twenty-one years in the absence of any disability.

We therefore hold that the 2nd plaintiff/respondent is not entitled to any damages.

However, it is different in the case of an unmarried daughter even though she is over the age of twenty-one. Under the Roman-Dutch Law an unmarried daughter has a right to support from a parent.

Taking into consideration the level of society to which she belongs and her age we are of the view that her prospects of marriage without a dowry are bleak. Her mother could not have saved any money for her since they were dependent on the pension of Rs. 1134/- per month.

The deceased was fifty-six (56) years of age at the time of her death. We are of the view that the deceased life expectancy was seventy (70) years.

In the absence of evidence regarding how much of the pension she spent on herself, or how much was spent on the 1st and 2nd Respondents. We are of the view that the deceased spent about Rs. 300/- per month on the 1st Plaintiff/Respondent.

We therefore, award damages in sum of Rs. 3600/- per year for the period of fourteen (14) years aggregating to Rs. 50,400/- with legal interest from date of plaint till payment in full. Subject to the above variation the appeal is dismissed. No costs

**ANANDA COOMARASWAMY, J.** – I agree.

*Award Varied.*

*Appeal dismissed.*