IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. **C. Karunanayake**
   Principal,
   WP/GP Veyangoda Maha Vidyalaya,
   Veyangoda.

2. **A.M.R.B. Amarakoon**
   Commissioner General of Examinations,
   Department of Examinations,
   Pelawatta,
   Battaramulla.

3. **Honourable Attorney General**
   Attorney General's Department,
   Colombo 12.

Defendants - Appellants - Appellants

SC Appeal No. 130/15

WP/PHC/Appeal No. WP/HCCA/GPH/10/2008(F)

DC Attangalla No. 59/M

Vs.

Mannapperuma Mohotti Appuhamilage
Thushari Ranga Mannapperuma
No. 19,
Udammita,
Veyangoda.

Plaintiff - Respondent - Respondent

Before: **L.T.B. Dehideniya, J**
P. Padman Surasena, J
Yasantha Kodagoda, PC, J

Counsel: Raveendra Pathiranage, Senior Deputy Solicitor General (subsequently appointed Additional Solicitor General and President's Counsel) for the Defendants - Appellants - Appellants.
Dr. Sunil Cooray for the Plaintiff - Respondent - Respondent.

Argued on: 2nd October, 2020

Written Submission:
On behalf of the Appellants filed on 19th October 2015 and 16th October 2020.
On behalf of the Respondent filed on 29th June 2017 and 12th March 2021.

Decided on: 21st February, 2022

Yasantha Kodagoda, PC, J

This Judgment relates to an Appeal from judgment dated 11th September 2012 pronounced in Appeal No. WP/HCCA/GPH/10/2008(F) by the High Court of the Provinces of the Western Province holden in Gampaha. That judgment affirmed judgment dated 21st February 2008 pronounced in Case No. 59/M of the District Court of Attanagalla. On 17th July 2015, following a consideration of an Application seeking leave to appeal, this Court granted leave to appeal on the following questions of law:

(i) *Will it amount to a violation of regulations pertaining to the conduct of examinations, if an Invigilator were to allow a candidate to sit for the examination without ensuring whether his examination number is listed in the attendance register?*

(ii) *When there is a case before court claiming damages, shouldn't the Judge first ascertain whether the aggrieved party claiming damages has properly established his case?*

(iii) *Shouldn't a party claiming damages establish his case on a balance of probability?*

(iv) *Shouldn't the Judge decide each case before him on its own merits and based on legal grounds?*

(v) *Have damages been awarded to the Respondent, without proving through evidence the damage caused to the Respondent?*

In the course of the argument and during consideration of this Appeal, the following question of law arose:

> *Can the Lex Aquilia be applied subject to suitable adaptations, and accordingly, in the circumstances of this case, would the Plaintiff be entitled to damages under the Lex Aquilia?*

In this judgment, I propose to deal with all six questions of law. The primary focus of this judgment would be the last question of law.

Need to refer to evidence in detail

As this Appeal is the second successive Appeal originating from the judgment of the District Court, one would have ideally expected the multiple debates relating to the evidence led at the trial by the Plaintiff and the Defendants to have receded to the background, and the Appeal to have been argued based on an agreed set of facts, pivoting around questions of pure law and questions of law mixed with facts. However, during the hearing it became evident that learned Counsel for the Appellants and the Respondent were not in agreement with each other on an agreed set of facts based on the testimonies of witnesses led at the trial. Thus, the debate before this Court raged partly on the facts. Furthermore, the questions of law which were raised, also necessitated a detailed analysis of the evidence and conclusions being reached regarding the facts of the case. In the circumstances, I am compelled to devote a considerable portion of this judgment to the narration, consideration and analysis of testimonial and documentary evidence, and pronouncing my findings *inter-alia* on the facts.

However, it is the expectation of this Court that unless it is unavoidable and absolutely necessary, during the Appeal to the Supreme Court, counsel would base their submissions on an agreed set of facts, focusing on questions of law that arise from such facts and the impugned judgment.

Case for the Plaintiff – Respondent - Respondent

Background

The Respondent (Plaintiff) testified that having studied at Veyangoda Bandaranayake Madya Maha Vidyalaya, she sat for the G.C.E. A/L examination for the first time in 2000. She applied and obtained admission to sit for the same examination for a second time, in August 2001. She chose to sit for the Combined Mathematics, Physics, Chemistry, General English and for the General Common Test examination papers, and accordingly received admission to sit for examination papers of those subjects. The examination number she received was 4307615. The examination centre (No. 0211) was the same school in which

she received her education. The 'admission card' she received was in two parts. The top part contained the 'admission card' proper and the bottom part contained the 'timetable'. The two parts could be separated.

The examination commenced on 4th August 2001. On the first day she went to the examination centre to sit for the examination in Combined Mathematics, she was required to separate the two parts of the afore-stated document and thereafter handover the 'admission card' proper to the Invigilator who officiated at her examination room. Thereafter, it was returned to her only for the purpose of placing her signature to mark her presence at each examination paper she faced. She retained with her the bottom part of the document, namely the 'timetable'. On the morning of the 4th and the afternoon of the 6th, she sat for the Parts I and II of the examination paper in Combined Mathematics. Similarly, on the mornings of the 8th and 9th, she sat for the Physics examination paper, Parts I and II, respectively. Her position was that after the first day (when she had to take with her the 'admission card' and the 'National Identity Card'), she was required to take with her, only her National Identity Card. She had not received instructions or been advised to take with her the 'timetable', and hence after the first day, she did not take it to the examination centre. It was kept at her residence.

Incident

Parts I and II of the 'General English' examination paper were scheduled for the morning and afternoon of the 28th of August. As Part I of the examination was scheduled to commence at 9.00 am, she arrived at the examination centre by 8.00 am. She proceeded to examination room No. 1 of hall No. 3 and went up to the desk at which she answered the two previous examination papers and took her seat. Her position is that the desk at which she sat, was the one on which her examination number was denoted. However, she noted that the location of the desks had been changed following the previous date of the examination.

While she was seated at her desk, she observed Priyanwada Kaushalya, another candidate from her own school, coming into the examination room and searching for her desk. As her examination number was not denoted on any of the desks in that room, around 8.45 am Priyanwada went to meet the Chief Invigilator (1st Appellant). After some time, a female Invigilator (ostensibly Pushpa Ranasinghe) came up to the Respondent and informed her that her examination number was not denoted in their lists, and asked her to come out of the examination room. She complied. As per instructions she received from that Invigilator, she went and met the Chief Invigilator (1st Appellant) who inquired from her whether she applied to sit for the 'General English' examination paper. She answered in the affirmative. The 1st Appellant informed her that in the document he had received (likely to be a reference to the document referred to by the 1st Appellant in his testimony as the 'attendance sheet' and referred to in one question of law in respect of which leave to appeal has been granted as the 'attendance register'), there was no reference to her examination number, and asked her to produce the 'timetable'. She informed him that she did not bring the 'timetable' with her and that it was at her residence. The 1st Appellant informed her that in the circumstances, she cannot be allowed to sit for the examination. She requested from him that she be allowed to sit for the examination. The 1st Appellant told her that she might not have applied to sit for the 'General English' examination paper, and accordingly refused to permit her to sit. He asked her to return home, check the 'timetable' and return on the following day to sit for the examination paper of the next subject. As she had no other option, the Respondent decided to return home. When she went into the room to take her belongings, she noted that no one was seated at her desk. She also noted a few other empty desks.

Having left the examination centre, the Respondent waited immediately outside the school for approximately half an hour contemplating what she should do. Thereafter, she left the school and went to her residence. Having arrived at the residence, she collected the 'timetable' and returned to the examination centre. She had to walk 1½ km from the examination centre to the Veyangoda town, take a bus to go to her home, and walk

another 1½ km from where the bus stopped, to her home. By the time she returned to the examination centre, the time was approximately 2.00 pm. She went and met the Principal of the school (who was at the Principal's quarters) and explained to him what happened. On his advice, she went and met the 1st Appellant (Chief Invigilator) and presented to him the 'timetable', which indicated that she had received admission to sit for the General English examination paper. He informed her that by that time, she had been marked 'absent' for the General English examination paper. The 1st Appellant also queried from her why in the morning she had sat at a desk different to the desk on which her examination number had been denoted. As over 30 minutes had passed following the commencement time of Part II of the examination paper, the 1st Appellant said that it was not possible to permit her to sit for Part II of the General English examination paper. Thus, she lost the opportunity of sitting for Part II of the General English examination paper, as well.

On the 1st September she presented herself for the Chemistry examination paper. After the examination was over, along with her father, she went to the police station and lodged a complaint regarding the incident. She had also complained to the Commissioner General of Examinations. She had received simple (S) passes for Physics and Combined Mathematics, a Credit (C) pass for Chemistry and 73 marks for the General Common Test at the G.C.E. (A/L) examination held in August 2001.

The 'timetable' issued to the Respondent by the Department of Examinations (which inter-alia denotes her entitlement to sit for the 'General English' examination paper) and a copy of the complaint made by her to the Veyangoda police station were produced by her marked "P1" and "P2", respectively.

Albeit brief, the Respondent has testified as to how this entire episode caused her pain of mind, trauma, stress and frustration, in addition to the loss suffered by her as a result of

having lost the opportunity to sit for the General English examination paper at the August 2001 G.C.E. (A/L) examination.

Under cross-examination, it has been suggested to the Respondent, that she had been seated at the desk on which Examination Candidate No. 4307470 had been denoted, and as that was the examination number of Priyanwada Kaushalya, the latter had come and claimed the desk. That suggestion has been denied by the Respondent. It has also been suggested to the Respondent that when she was at the desk, Invigilator Pushpa Ranasinghe came up to the Respondent and having checked the number, asked Priyanwada Kaushalya to sit at the desk at which the Respondent was seated. That was why the Respondent was referred to the Chief Invigilator (1st Appellant). The Respondent has denied that suggestion too. Further, it has been suggested to the Respondent that when she met the 1st Appellant, he asked her for the examination number. As she did not have the 'timetable' with her, she could not reveal the examination number, and hence she was advised to remain there for a while. Thereafter, the 1st Appellant had proceeded to distribute examination papers. In the meantime, the Respondent had left the examination centre. These detailed suggestions have also been denied by the Respondent. In response, the Respondent has taken up the position that the 1st Appellant asked her to return home, check and bring the 'timetable'. Finally, it has been suggested to the Respondent that it was due to her own conduct that she was deprived of the opportunity of sitting for the General English examination paper. She has denied that suggestion as well. She has also denied the suggestion that she gave false testimony that it was the 1st Appellant who prevented her from sitting for the General English examination paper.

During cross-examination, learned counsel for the Appellants has marked as "V1" and produced through the Respondent a document titled 'Rules for Candidates' issued by the Commissioner General of Examinations. [These Rules appear to have been issued purportedly under section 20 of the Public Examinations Act, No. 25 of 1968]. That the

Respondent suffered pain of mind, trauma, stress and frustration has not been impeached during cross-examination.

Ganepola Arachchige Pathiraja Piyasiri Ganepola, an Investigation Officer of the Examination Department also testified having been called by the Respondent. He has corroborated the Respondent's position that she received admission to sit for inter-alia the General English examination paper, has corroborated the examination number and produced the Respondent's 'admission card' marked "P3". The witness has explained that a document titled 'Attendance Sheet' (ostensibly a reference to the 'attendance register' referred to in question "(a)" in respect of which leave to appeal was granted) is issued to Chief Invigilators by the Examination Department. It contains details pertaining to the candidates who are entitled to sit for the examination at the relevant examination centre. It contains information such as the name and examination numbers of the candidates and the subjects each candidate is entitled to sit. He has also said that the examination hall should be prepared in accordance with the information contained in the 'Attendance Sheet'. According to him, on the first day of the examination, candidates are required to bring the 'admission card' and the National Identity Card, with the signature of the candidate attested. According to him, on the first day of the examination, the 'admission card' should be produced to the Invigilator, and thereafter it is retained by the Chief Invigilator till the end of the examination. If the name of a candidate appears in the 'Attendance Sheet' relating to a particular examination paper, the need to disallow such candidate to sit for a that examination paper does not arise. He has produced marked "P4" a handbook issued to Chief Invigilators by the Commissioner General of Examinations, containing guidelines on the conduct of the examination.

In terms of clause 3:2:2 of "P4" (marked "P4A"), on the day prior to the examination, the examination centre should be prepared and the desks should be numbered. While the Chief Invigilator has the discretion to change the arrangement of desks, if there is such a re-arrangement, on the morning of the examination, the numbers should be entered on

the desks, afresh. The arrangement of desks should be entered in the relevant location of the document referred to as the 'Journal'. The witness has explained that when effecting changes to the arrangement of desks and denoting examination numbers on the desks, the 'Attendance Sheet' should be used by the Chief Invigilator.

In terms of clause 4:3:1 of the Guidelines (marked "P4B"), if a candidate fails to produce the 'admission card', and his name appears in the 'Attendance Sheet', the candidate should still be permitted to sit for the examination, subject to his submitting a document written by him stating that he admits that his candidature is subject to the approval of the Commissioner General of Examinations. [It is to be noted that this provision would be applicable only on the first occasion when a candidate arrives to sit for an examination paper, as on other days, the 'admission card' would be with the examination authorities.]

The 'Journal' submitted by the 1st Appellant to higher authorities relating to the G.C.E. Advanced Level Examination held at Veyangoda Bandaranayake Madya Maha Vidyalaya in August 2001 was produced marked "P5". According to advice that has been given to Chief Invigilators, all incidents at the examination centre however trivial they may be, should be recorded in the 'Journal'. According to page 18 of the Journal which contains entries relating to events of 28th August 2001, there is no entry denoting that any special or unusual incident had occurred on that day. According to the entry found in page 40 of the 'Journal', on 28th August 2001 there had been a re-arrangement of desks, and a desk has been assigned to candidate No. 4307615 in room No. 1 of Hall No. 3. That room had examination Nos. 4307420 to 4308131. According to the 1st Appellant, once a candidate comes to present himself for the examination and sits at the desk on which his examination number has been denoted, the Invigilator must afford an opportunity to him to sit for the examination.

Case for the Defendants – Appellants - Appellants

According to the testimony of the 1st Appellant (1st Defendant), he was a principal of a school, and had considerable experience at the conduct of examinations, having participated at the conduct of GCE Ordinary and Advanced Level examinations since 1975. In 2001, due to a national Referendum that had been scheduled (which was subsequently not held), the G.C.E. Advanced Level examination had been conducted in two phases. The first phase of the examination was conducted from the 14th to the 17th of August, 2001. The second phase was conducted from the 27th of August to the 1st September, 2001. During the intervening period, certain changes had been carried out in the examination halls. The seating arrangements were changed twice during the examination.

At the commencement of the examination, the candidates were informed by Invigilators to separate the 'admission card' from the 'timetable' and retain the 'timetable' in their possession, since recourse to it is necessary in order to check the examination number.

Explaining the incident that took place on the 28th of August 2001, the 1st Appellant has testified that approximately 10 minutes prior to the commencement of the General English question paper, while he was examining question paper packets that had to be distributed to the examination rooms, a candidate (referring to the Respondent) came up to his work station, and informed him that her examination number was not available (presumably a reference to a desk on which her examination number had been denoted not being available). He inquired from her whether she had with her the 'timetable', to which she answered in the negative. She told him that she came to sit for the examination from Ratnapura. He told her to wait for some time and that he would find her examination number. As he considered the distribution of exam papers on time to be his primary responsibility, he attended to that duty. According to him, all that he had told the Respondent was to wait for a while, and that he would find her examination number. Following the distribution of examination papers to the four rooms, he returned to his

work station. By that time, the Respondent was not present near his work station. She had left. The 1st Appellant has denied that he told the Respondent that she cannot be permitted to sit for the General English examination paper, since she did not have with her the 'timetable', and that he asked her to return home and bring the 'timetable'.

Around 2.15 pm that afternoon, the Respondent had once again come up to his work station and showed him her 'timetable'. She had told him that she went home and brought the timetable. She had requested for both the first and second examination papers to be given to her to answer them. He had declined and explained why it was not possible to accede to her request. He had informed her that passing General English was not necessary to gain admission to university, and advised her to return home and get ready for the next paper. He had explained that the Respondent was unable to sit for Part II of the General English examination paper since she arrived at the examination centre late, without checking the timetable. He had also said that in terms of the examination rules, it was not possible to give Part I of the examination paper (which was in the morning session) along with Part II of the paper, in the afternoon.

The 1st Appellant has explained that he did not make an entry in the 'journal' regarding this incident, as what had happened was not a 'special incident', and incidents such as the incident in issue occur frequently.

The 1st Appellant has emphasized that he did not intentionally obstruct the Respondent from sitting for the General English examination paper. He has also said that he did not act either negligently or maliciously towards the Respondent. He has testified that he acted in terms of his official responsibilities. His position is that his conduct cannot be attributed to the Respondent not having been able to sit for the General English examination paper. The 1st Appellant has counter-alleged that the Respondent was not able to sit for the General English examination paper due to her own ignorance and recklessness.

Under cross-examination the 1st Appellant has denied that he told the Respondent that she had not applied and thereby not gained the entitlement to sit for the General English examination paper. His position is that having examined the 'attendance sheet', he informed the Respondent that the examination number given by the Respondent denotes that she had not applied to sit for the General English examination paper. His position is that the Respondent had not revealed to him her correct examination number. He has denied the suggestion that he got down the Respondent who was seated at the examination hall. He has also denied the suggestion that he informed the Respondent that she cannot be permitted to sit for the General English examination paper, as she did not have with her the admission card and the timetable.

Judgment of the District Court

The learned District Judge has proceeded on the footing that as (a) the Respondent had applied to sit for the General English examination paper, (b) received admission to sit inter-alia, for the General English examination paper, and (c) arrived at the examination centre on time, it was the responsibility of the State to have provided her the opportunity and all necessary facilities to sit for the General English examination. The learned Judge has expressed the view that unless a candidate fails to attend the examination centre on time, or fails or refuses to sit for the relevant examination paper, it is the responsibility of the State to facilitate the candidate to sit for the examination. He has observed that it was not the position of the Appellants that the Respondent was in fact not entitled to sit the for General English examination paper. Thus, the learned District Judge has held that the Appellants were duty bound to have allowed the Respondent to sit for the General English examination paper, which they have failed to do. He has concluded that it was due to the conduct of the 1st Appellant that the Respondent lost the opportunity of presenting herself for the General English examination paper. The judgment contains a reference to the evidence that on the day prior to the date of the incident, the seating arrangements had been changed. Therefore, the learned Judge has concluded that the 1st

Appellant had the added responsibility of ensuring that candidates are not inconvenienced by the re-arrangement of desks, a responsibility which he had failed to discharge properly. The learned District Judge has noted that candidates were not required to bring the 'timetable' to the examination centre. Hence, the 1st Appellant should not have called upon the Respondent to present it. The view of the learned District Judge is that the 1st Appellant should have permitted the Respondent to sit for the General English examination paper without probing into the issue of whether or not she was entitled to sit for the examination paper, and thereafter, attended to possible issues relating to her candidature and the entitlement to sit for the particular paper. The learned District Judge has also found fault with the 1st Appellant for not having made a journal entry regarding the incident that occurred on the 28th of August 2001.

Due to the foregoing and several other reasons contained in the Judgment of the District Court, the learned District Judge has concluded that the Respondent lost the opportunity to sit for the General English examination paper due to the negligence of the 1st Appellant. He has also held that the three Appellants were jointly and severally responsible for the incident that has been complained of, and for its repercussions.

The learned District Judge has taken into consideration (a) the mental trauma the Respondent had suffered due to this incident, (b) that she had to sit for the General English examination paper in the following year, (c) the negative experience she suffered, and (d) that she had to spend an additional year to become qualified in General English, as factors that justify the ordering of damages.

Accordingly, having answered all the issues raised on behalf of the Plaintiff (Respondent) in favour of the Plaintiff (Respondent), and the issues raised on behalf of the Defendants (Appellants) in the negative, the learned District Judge has held that the Plaintiff (Respondent) was entitled to a sum of Rs. 1,000,000.00 as damages jointly and severally from the Defendants (Appellants), and pronounced judgment in favour of the Plaintiff

(Respondent). This was in the backdrop of the Respondent having in the Plaint filed in the District Court claimed damages amounting to Rs. 3,000,000.00 from the Appellants.

Judgment of the High Court of the Provinces (Civil Appellate)

Having heard the Appeal against the Judgment of the District Court, the learned Judge of the High Court of the Provinces has in his Judgment observed that the re-arrangement of desks in the examination halls had been contrary to the guidelines contained in "P4". He has also observed that as there were only 12 female candidates who had gained admission to sit for the General English examination paper, it would not have taken much time for the 1st Appellant to have checked the arrangement of desks relating to female candidates and identify the desk at which the Respondent should sit. He has expressed the view that in terms of clause 4.3.2 of "P4", examination officials are required to provide an opportunity to all candidates whose names appear on the 'attendance sheet' to sit for the examination. Such opportunity should be provided even in instances where a candidate does not submit the 'admission card'. In terms of clauses 4.3.3 read with 4.4.2, even in instances where the name of a particular candidate does not appear in the 'attendance sheet', if the candidate produces the 'admission card', arrangements should be made to enable such candidate to sit for the examination.

In the circumstances, the learned High Court Judge has expressed agreement with the findings of the learned District Judge. He has also concluded that the Respondent was precluded from sitting for the General English examination paper due to the negligent conduct of the 1st Appellant.

The learned Judge of the High Court has expressed his concluding views in the following manner: *"… I sense that the learned District Judge's decision to award one million as damages to the Plaintiff is not whimsical or arbitrary. Therefore, in that context the learned Judge's view on the traumatic situation the Plaintiff faced in this event cannot be disregarded. The findings of the trial court are accordingly affirmed and the appeal is dismissed."*

Submissions made on behalf of the Appellants

Learned Senior Deputy Solicitor General appearing for the Appellants, in the exercise of his customary nature of frankness, fairness and professionalism, and in accordance with professional ethics expected to be adhered to particularly by counsel representing the Attorney General, rightfully conceded that in law and based on the evidence of this case, the 1st Appellant in his capacity as the Chief Invigilator of the examination centre at which the Respondent sat for the G.C.E. (A/L) examination in August 2001, owed a *'legal duty of care'* towards the Respondent. However, learned counsel's submission was that in the instant case, there was no breach of such legal duty of care, and thus, a cause of action had not arisen in favour of the Respondent. His position was that under the applicable Roman-Dutch law pertaining to the *Lex Aquilia,* there is no requirement that a person who owes a duty of care should take *'every possible precaution to avoid causing harm to the person to whom he owes such duty'*. Citing R.G. Mckerron on "The Law of Delict", learned Senior DSG submitted that the standard of care which the law demands is the care of *diligens paterfamilias* – the care which a reasonably prudent person would exercise in the given circumstances. It is the position of the Appellants that at all times relevant to this case, the 1st Appellant exercised reasonable care as the situation warranted.

Referring to the evidence, learned Senior DSG submitted that, in his capacity as the Chief Invigilator, the 1st Appellant had the administrative entitlement to change seating arrangements, provided he took steps to ensure the smooth conduct of the examination. The 1st Appellant had in the re-arrangement of seats / desks, complied with such standard. Thus, he submitted that in so far as the re-arrangement of desks were concerned, the 1st Appellant had clearly not acted in a wrongful or negligent manner.

As regards the second issue of the Respondent not having received an opportunity to sit for Part I of the 'General English' examination paper, the position of the learned Senior DSG was that the Respondent had not known her examination number. She had gone and met the 1st Appellant sometime between 8.45 - 8.50 am. According to the 1st

Appellant, he had asked her to wait for a while until he attends to a 'priority duty' and returns, and thereafter attend to her matter. What the 1st Appellant had intended to do, was to first distribute the examination papers and thereafter return to his work station and check and provide an opportunity for the Respondent to sit for the General English examination paper. In this regard, learned Senior DSG submitted that in terms of "P4", the 1st Appellant had numerous duties, including the checking of envelopes containing examination papers (a process which can commence only 10 minutes prior to the scheduled time for the commencement of the examination) and also distribute examination paper packs and ensure that the examination papers are with the relevant candidates two minutes before the scheduled time for the commencement of the examination. Thus, he submitted that it was reasonable on the part of the 1st Appellant to have given priority to that function, and for having required the Respondent to wait for a while until he performed that function. The submission of the learned Counsel for the Appellants was that, "*in these pressured circumstances, it cannot be reasonably expected for the 1st Petitioner (sic) to first resolve the Respondent's issue before carrying out the duties he is bound to perform as the Chief Invigilator*". Learned counsel submitted that the Respondent had left the examination centre on her own motion, notwithstanding the 1st Appellant having advised her to wait for a while until he returns following the distribution of examination papers. Thus, he submitted that there was no dereliction of duty on the part of the 1st Appellant in this regard too, and therefore he had not acted in a negligent manner.

As regards Part II of the General English examination paper, learned Senior DSG submitted that the 1st Appellant was quite correct in not having permitted the Respondent to sit for that paper, since according to the applicable Rules ("V1"), no candidate should be allowed to sit for an examination paper if such candidate arrives after the expiry of 30 minutes from the time at which the paper is scheduled to commence. Thus, learned Counsel submitted that it was due to her own conduct that the Respondent was unable to sit for both parts of the General English examination paper.

In view of the foregoing, learned Senior DSG submitted that "*the 1st Petitioner (sic) conducted himself in accordance with the applicable rules, regulations and guidelines*". Due to the aforementioned reasons, learned Senior DSG submitted that there was no negligence that could be reasonably attributed to the 1st Appellant.

Learned Senior DSG also submitted that in an action under the *Lex Aquilia,* the following ingredients should be established by the plaintiff, namely (i) a wrongful act, (ii) pecuniary loss resulting to the plaintiff, and (iii) fault on the part of the defendant. He also submitted that "*compensation in aquilian actions are awarded for pecuniary loss (or patrimonial loss) suffered by the plaintiff arising out of the defendant's negligence*". He strenuously argued before this Court that the Respondent had failed to establish that she had suffered any patrimonial / pecuniary loss due to the alleged negligent conduct of the 1st Appellant.

Learned Senior DSG also submitted that, though the learned District Judge had arrived at a finding that the Respondent had suffered mental pain due to the alleged negligent conduct of the Defendant (1st Appellant) which according to the learned District Judge warranted the award of damages, he had not provided any justification for this conclusion. Learned Counsel emphasized that the Respondent had not presented any evidence to establish that she had suffered any mental suffering due to the allegedly negligent conduct of the 1st Appellant.

He also advocated the strict application of the *Lex Aquilia* and insisted that the plaintiff had a legal duty to establish patrimonial loss, a duty which, in the instant case had not been discharged by the Plaintiff (Respondent). In this regard, learned Senior DSG cited the following quotation from the judgment of Justice Dheeraratne in *Prof. Priyani Soyza v. Rienzie Arsecularatne* [(2001) 2 Sri L.R. 293, at 302]:

"*Damages claimed by the plaintiff under the head of mental shock, appear to be recoverable under the Roman-Dutch Law as well as the English Law (if the test of reasonable foreseeability is satisfied), only if that results in psychiatric illness. Damages on account of emotional shock of*

short duration, which has no substantial effect on the health of a person are not recoverable. … As pointed out by Professor de Villers (Injuries, p. 182), the compensation recoverable under the Lex Aquilia was only for patrimonial damages, that is, loss in respect of property, business, or prospective gains. … I think we are not entitled as judges, to change the material of the Roman Dutch Law, but are only permitted to iron out its creases, whenever the necessity arises. Effecting structural alterations to the Common Law should be the exclusive preserve of the Legislature. …"

In this regard, learned Senior DSG submitted that the Respondent has not offered any evidence to establish that she suffered any psychiatric illness as a result of the alleged negligence of the 1st Appellant. In the circumstances, it was the submission of learned Counsel that, "*damages awarded for alleged mental pain suffered by the Respondent is invalid in law, as alleged mental pain suffered by the Respondent had not been proved in evidence and also due to the fact that under the prevailing law, damages cannot be granted for mental pain in the absence of proof of actual psychiatric illness*".

Learned Senior DSG also submitted that the Respondent had not established that the impugned allegedly negligent conduct on the part of the 1st Appellant had resulted in any loss of future earnings to the Respondent. Citing R.G. Mckerron, learned Counsel submitted that, "*the Plaintiff must prove that the act complained of caused him 'damnum' that is patrimonial loss, accrued or prospective to the person injured; that is to say, loss in respect of property, business, or prospective gains, capable of pecuniary assessment*". Learned Counsel expressed dismay at how the learned District Judge could have, without any evidence regarding the above criterion, awarded damages to the Plaintiff (Respondent) in a sum of Rs. 1,000,000.00. He also submitted that there was no basis in the instant case for the learned District Judge to have awarded damages on equitable grounds.

Learned Senior DSG has concluded his post-argument written submissions by submitting that even if this Court were to determine that the 1st Appellant had been negligent, 'actual' damages should not be awarded, as the Respondent had failed to

establish the justification for such damages by way of evidence. He submitted that, if at all, only 'nominal' damages should be awarded, which should not exceed Rs. 100,000.00. Learned Counsel for the Appellants drew the attention of this Court to a quotation from Abdul Majeed on "*A Modern Treatise on the Law of Delicts*" which contains the view that nominal damages are awarded in a very small amount, not as compensation for any actual loss incurred, but merely to recognize the existence of some legal right vested in the plaintiff, which had been violated by the defendant. Since nominal damages are not awarded for the purpose of compensating the plaintiff, they should not exceed a nominal amount such as five Rand.

Finally, learned Counsel for the Appellants submitted that in view of the afore-stated submissions, this Court should vacate the judgments of both the District Court and the High Court of the Provinces, and allow this Appeal.

Submissions made on behalf of the Respondent

It was the submission of learned Counsel for the Respondent, that as pointed out also by the learned District Judge and the learned Judge of the High Court of the Provinces, the 1st Appellant's non-compliance with clauses 4.3.1, 4.3.2, 4.3.3, 4.4.1, 4.4.2 and 4.4.3 of "P4" was inexcusable and such non-compliance clearly established negligence on the part of the 1st Appellant. He submitted that based on the concurrent findings of both the District Court and the High Court of the Provinces (which he submitted should not be interfered with by this Court), the negligence of the 1st Appellant in refusing the Respondent to sit for the General English examination paper had been clearly established, on more than a balance of probabilities.

Learned Counsel for the Respondent also submitted that in the award of damages for negligence under the *Aquilian action* in the Roman-Dutch law, pecuniary loss which may even be prospective as opposed to accrued, should be considered, and accordingly damages can be awarded to a Plaintiff, although the plaintiff has not suffered any injury

to the person or damage to her belongings, and not suffered any accrued pecuniary loss. His position is that a claim for damages can be maintained in this case, on the basis of prospective pecuniary loss. Learned counsel for the Respondent advocated a flexible approach to the application of the *Lex Aquilia*. His submission was that the *Lex Aquilia* should be applied with a degree of adaptation to ensure that justice is meted out.

As regards the calculation of the damages to be awarded, learned Counsel for the Respondent citing McKerron submitted that "*… although no rigid rules apply to all cases to assist courts in determining the measure of damages to be awarded in a given case, in each set of circumstances certain relevant considerations arise. … there is no measure of damages in the sense of an approximate standard of money value. The assessment must largely depend on the opinion of the individual judge, guided by the amounts awarded in similar cases in the past (due allowance being made for the depreciation of money).*" He submitted that prospective patrimonial loss cannot be measured to a degree of mathematical accuracy. It necessarily has to be only a rough estimate, taking into consideration all the facts and circumstances of the case, including the economic reality of the depreciation of currency. He thus pleaded that the Judgments of the District Court and the High Court of the Provinces be affirmed and this Appeal be dismissed.

The submissions made by learned counsel for the Appellants and the Respondent have *inter-alia* given rise to the need for this Court to consider whether a plaintiff can successfully claim general damages in a case founded on the *Lex Aquilia*, even in instances where patrimonial loss has not been specifically established.

Consideration and analysis of evidence

The position of the Respondent, that she had applied for, received admission and therefore was entitled to sit for the General English examination paper on the 28th of August 2001, has not been challenged on behalf of the Appellants. That position is supported by the documentary evidence including the 'admission card' ("P3").

The instructions on the reverse of the 'timetable' ("P1") received by the Respondent, required candidates to separate the 'timetable' from the 'admission card' and retain the 'timetable' with the candidate. The instructions contained therein do not require candidates to take the 'timetable' to the examination centre on every day of the examination. Rules applicable to examination candidates ("V1") also do not impose a requirement on candidates to take the 'timetable' with them to the examination centre. Thus, the Respondent cannot be faulted for not having on the 28th August 2001 taken "P1" with her to the examination centre. This matter is of fundamental importance to this case.

On the first day of the examination, following the separation of the 'admission card' from the 'timetable' at the examination hall, the former ("P3") had been submitted by the Respondent to the Invigilator. In this regard, it is necessary for Court to take judicial notice of the fact that in the ordinary course of official duties, 'admission cards' tendered by candidates to Invigilators on the first day of the examination would from that time onwards remain in the custody of the Chief Invigilator till the end of the examination. On each day of the examination, the 'admission cards' would be temporarily returned to the candidates through the respective Invigilators for them to sign it against the relevant subject and return to the Invigilator, who would in turn hand it over to the Chief Invigilator. Thus, it is justifiable to assume that from the commencement of the examination, the 'admission card' of the Respondent would have been in the official custody of the 1st Appellant. The 'admission card' of all candidates including that of the Respondent contains the name and the examination number of the candidate in issue, and the entitlement of the candidate to sit for subjects in respect of which admission has been granted. It is not in dispute that the 'admission card' of the Respondent contains a reference to the fact that she is entitled to sit for the General English examination paper. (Each subject is referred to in the 'admission card' by the number assigned to such subject by the 2nd Appellant.)

On the 28th August 2001, the Respondent arrived at the examination hall well on time. She entered one out of the four examination rooms in Hall No.3, and sat at the desk on which she claims her examination number had been denoted. She had with her the National Identity Card. Thus, on the 28th August 2001, when the Respondent arrived at the examination centre, she was entitled to sit for the General English examination paper. By being present at the examination hall on time, she showed her preparedness and willingness to sit for the General English examination paper. This should have been recognized by the Invigilator in-charge of the relevant examination room and by the Chief Invigilator (1st Appellant), notwithstanding whether or not the Respondent sat at the correct desk, which is a contentious issue in this case.

In these circumstances, as pointed out by the learned Judge of the High Court of the Provinces, in terms of clauses 4.3.3 read with 4.4.2 of "P4", the 1st Appellant in his capacity as the Chief Invigilator was obliged to provide an opportunity to the Respondent to sit for the General English examination paper.

It appears from pages of the 'Journal' ("P5C") which contain entries relating to the arrangement of desks in each of the four rooms, that on the 4th and 6th August 2001 when the Respondent sat for the Combined Mathematics examination paper, her desk was in room No. 1. On the 8th and 9th August 2001, when the Respondent sat for the Physics examination paper, her desk was in room No. 2. On 28th August 2001, when the Advanced Level examination resumed after a long break (which had taken place in view of a national Referendum that had been scheduled to be held and later cancelled), the desk containing the examination number of the Respondent (4307615) once again was located in examination room No. 1. In the circumstances, it is expected that candidates would have been quite confused with the arrangement of desks. Such possible confusion cannot be attributed to any fault on the part of the Respondent, as it is the responsibility of the authorities conducting the examination (agents of the 2nd Appellant, including the

1st Appellant) to provide necessary information and guidance regarding seating arrangements and changes made thereto.

That on the 28th of August the Respondent had gone into an examination hall and sat at a desk, is also a fact not in dispute. It is the Respondent's position that she knew her examination number and that she went and sat at the correct desk on which her examination number was denoted. The 1st Appellant's position is rather vague in that regard. It is the position of the Respondent that when she was at the desk, candidate Priyanwada Kaushalya came into the examination room, checked for the location of her desk, and unable to find it, went and met the Invigilator of that room. Sometime after Priyanwada Kaushalya left the room, the Invigilator in-charge of the relevant examination room - Pushpa Ranasinghe came up to the Respondent and told her that her name was not on the list given to them containing the names of candidates entitled to sit for the General English examination paper. Accordingly, she asked the Respondent to go and meet the Chief Invigilator (1st Appellant). The 1st Appellant has not admitted that fact. His position is that while he was at his work station, the Respondent came up to him and informed him that her examination number is not denoted on any of the desks.

If in fact, the circumstances pertaining to the Respondent having gone and met the 1st Appellant were different to the narrative provided by the Respondent in that regard, it was certainly possible for the Appellants to have summoned Priyanwada Kaushalya and the Invigilator in-charge of room No. 1 - Pushpa Ranasinghe, to testify. However, the Appellants have not done that. Only Priyanwada Kaushalya and Pushpa Ransinghe could have offered evidence to contradict the position of the Respondent, as regards what happened inside room No. 1 between Priyanwada Kaushalya and the Respondent, and regarding the circumstances pertaining to the Respondent having left the examination room and meeting the 1st Appellant. Thus, presenting their evidence was of critical importance. In fact, the list of witnesses dated 11th September 2002 filed on behalf of the Defendants (Appellants) contains the name of Pushpa Ranasinghe. However, she has not

been called to testify on behalf of the Defendants (Appellants). Thus, an inference arises that the Appellants did not present to Court their evidence, as had their evidence been presented, such evidence would have been contrary to the position taken up by the 1st Appellant. This, lends support to the Respondent's position that she was seated at the correct desk and sequel to Priyanwada Kaushalya having been unable to locate her desk, the Invigilator in-charge of room No. 1 told the Respondent to go and meet the 1st Appellant.

It is necessary to note that the 1st Appellant has taken up the position that the name of the Respondent was not in the 'attendance sheet'. If that position is correct, it would have been a queer situation, particularly since it is not in dispute that the Respondent had applied to sit for the General English examination paper and had gained admission for that subject. In the circumstances, the 'attendance sheet' for the 28th August 2001 ought to have contained the name of the Respondent. If such document did not contain the Respondent's name, the 1st Appellant could have gained considerable justification for his own conduct and relief for himself by producing that document, and thereby shifting the blame to the 2nd Appellant, whose responsibility it would have been to cause the preparation of 'attendance sheets' through his subordinates, containing correct information. However, the 'attendance sheet' for 28th August 2001, which should have been in the custody of the 2nd Appellant after the conduct of the examination, was not produced at the trial. No explanation was provided for the Appellants not being able to produce it at the trial. In the circumstances, the non-production of the 'attendance sheet' gives rise to an adverse inference against the Appellants that had it been produced, it would have operated in favour of the Respondent.

As pointed out above, as at 28th of August 2001, the 'Admission Card' ("P3") of the Respondent should have been in the custody of the 1st Appellant. This is not a fact that has been contested by the Appellants. "P3" clearly reveals the numbers of the subjects which the Respondent was entitled to sit. Those numbers are, 10, 01, 13, 02, and 12.

According to "P1", 13 is the number assigned to the subject General English. Thus, quite independent of the 'Attendance Sheet', it is evident that an examination of the 'Admission Card' of the Respondent would have clearly revealed to the 1st Appellant, that the Respondent was entitled to sit for the General English examination paper. When he encountered the problem regarding the Respondent, the 1st Appellant has not examined the 'Admission Card' of the Respondent.

It is observable that contrary to the position taken up in the Answer, the Appellants have not been able to establish that the Respondent was unable to sit for the General English examination paper, due to her having acted contrary to the applicable Rules pertaining to examination candidates, or due to any failure on her part. The Defendants (Appellants) did not produce any document at the trial which supports the position that the Respondent was not entitled to sit for the General English examination paper. Thus, the irresistible conclusion that can be arrived at is that the 1st Appellant having required the Respondent to produce her 'timetable' was unnecessary and unjustifiable. As rightly pointed out by learned Counsel for the Respondent, when the Respondent went to meet the 1st Appellant for the second time, around 2.00 pm, he had claimed that he marked her 'absent' for the General English examination paper Parts I and II, and hence she cannot be permitted to sit for Part II of that paper. This, clearly shows that the name of the Respondent had been on the document ('attendance sheet') containing the names and numbers of candidates who were entitled to sit for the General English examination paper. If not, as quite rightly pointed out by the learned judge of the High Court, it would not have been possible for the 1st Appellant to have marked the Respondent 'absent'.

The Respondent's position is that the 1st Appellant asked her to produce the 'timetable' and as she did not have it in her possession, she was told by the 1st Appellant that she should go home and bring it. Thus, she left the examination centre and proceeded to her residence. The 1st Appellant denies that he required the Respondent do so. His position is that he merely asked her to wait for some time until he distributes question papers to

the four examination rooms and return. Thus, there is a conflict of testimonies regarding this matter. It is necessary to observe that if as the 1st Appellant stated all what the 1st Appellant told the Respondent to do was to wait for a moment until he attends to the distribution of question papers and return, there was no necessity for the Respondent to have left the examination centre and proceed to her residence, knowing well that her residence was situated quite a distance away and hence she would take a considerable amount of time to go home, collect the timetable and return to the examination centre. In this regard, it is pertinent to note that, one test applicable for the determination of credibility is the 'test of probability'. While there are several criteria based upon which probability of a narrative given by a witness can be assessed, one criterion is the general nature of human conduct. If all what the 1st Appellant told the Respondent to do was to wait for a moment until he distributes the examination papers and return and that upon his return he will resolve the Respondent's issue, it is against the very nature of natural human conduct for the Respondent to have left the examination centre and proceeded home to collect and bring back the 'timetable'. Thus, it is my view that the 1st Appellant's position regarding this matter is highly improbable and hence credibility cannot be attached to his version of events regarding the circumstances under which the Respondent left the examination centre.

That the 1st Appellant had not examined the 'Attendance Sheet' to check whether the Respondent was entitled to sit for the General English examination paper is not in issue. He has admittedly not done so, and his position is that, he gave preference to his duty of distributing the examination papers to the four rooms on time. It is my view that checking the 'Attendance Sheet' and ascertaining whether the Respondent was entitled to sit for the General English examination paper was a duty which the 1st Appellant could have conveniently performed without causing a delay in the distribution of examination papers. In this regard, it is to be noted that the 1st Appellant's work station was at the end of a corridor on which the entrances to the four examination rooms (which were actually classrooms) were also located. Thus, the examination rooms to which he had to go to

distribute the examination papers, were only a few feet away from his work station. Therefore, having checked the 'Attendance Sheet', and given necessary guidance to the Respondent, the 1st Appellant could have easily attended to his 'priority duty' of distributing the question papers on time.

The Respondent has not been cross-examined by counsel for the 1st Appellant on the position taken up by the 1st Appellant that the Respondent told him that she came for the examination from Ratnapura. That also operates against the credibility of the position take up by the 1st Appellant at the trial.

According to the Respondent, when she was asked by the 1st Appellant to bring the 'timetable', she returned initially to the examination room, and on that occasion, she saw her desk remaining unoccupied. If in fact she had initially occupied the desk of Priyanwada Kaushalya, that candidate ought to have been occupying the particular desk by the time the Respondent returned to the examination room. That position has also not been put to the Plaintiff (Respondent) by counsel for the Defendants (Appellants). If in fact she was seated at the incorrect desk, it is likely that the Appellants would have called either or both Invigilator Pushpa Ranasinghe and candidate Priyanwada Kaushalya to contradict the testimony of the Respondent. Thus, there is no basis on which I can arrive at a finding that the Respondent had not been initially seated at the desk at which she was supposed to be seated, which contained her examination number.

Under cross-examination the 1st Appellant has stated that as routine practice, approximately 10 minutes prior to the commencement of the examination, he takes with him the bundle of examination papers, checks the number of candidates in each examination room and hands over the exact number of required examination papers to the Invigilators in-charge of each room to be distributed to the candidates. This is what he had done on the 28th as well. Therefore, the 1st Appellant could have used this opportunity to check the desk on which the Respondent's examination number was

denoted and permitted the Respondent to sit for the General English question paper. It would have been reasonably possible for him to engage in this course of action, as he had only four examination rooms to visit. In the alternative, the 1st Appellant could have asked the Respondent to accompany him, first handover the required number of question papers to the four Invigilators in-charge of the four examination rooms, and then checked and identified the desk assigned to the Respondent and allowed the Respondent to sit for the examination paper.

According to the 1st Appellant, each Invigilator in-charge of an examination room has a document referred to as the 'comparison document', which contains the examination numbers of the candidates of that room. The 1st Appellant could have also examined those documents relating to the four examination rooms to identify the examination number of the Respondent and thereby determine the hall in which she should sit and answer the examination paper. If that process resulted in the Respondent getting a couple of minutes late to commence answering the question paper, as admitted by the 1st Appellant under cross-examination, he could have permitted the Respondent to take a few minutes more at the end of the time allocated to answer the examination paper to complete answering the paper.

The 1st Appellant's position is that having examined the 'attendance sheet' he informed the Respondent that the examination number given by her denotes that she had not applied to sit for the General English examination paper. He thereby hints that the Respondent had not revealed to him her correct examination number. However, as admitted by the 1st Appellant, the 'Attendance Sheet' contains not only the examination number of candidates, but their respective names as well. Therefore, had the 1st Appellant inquired from the Respondent what her name was (at the time he inquired from her, what her examination number was), he could have without any difficulty ascertained whether she had applied to sit for the 'General English' examination paper, and if so, whether she was entitled to sit for that question paper. If in fact the 1st Appellant asked the Respondent

to wait for a while until he distributes the question papers to the Invigilators in-charge of the 4 examination rooms and returns to resolve her problem, as observed by me earlier, there would have been no reason for the Respondent to have left the examination centre and return home to collect and bring the 'timetable'.

The critical factor that operates against the position taken up by the 1st Appellant is its improbability and the belatedness in taking up the position he took up in this case, without having made a journal entry in the Journal in which he was required to make entries regarding various unusual incidents that occur. This Court cannot agree with the position taken up by the 1st Appellant that the incident involving the Respondent was a 'trivial' incident, not worthy of being reported in the Journal. In fact, clause 12(iii) of "P4" requires Chief Invigilators to make a journal entry in respect of every unusual incident that occurs, however trivial it may be. This Court must take note of the fact that the incident which resulted in the Respondent having lost the opportunity to sit for the General English examination paper is of sufficient importance to have been recorded by the 1st Appellant in the 'Journal'. Had the 1st Appellant made a contemporaneous journal entry regarding the incident, it would have been possible to assess the credibility of his narrative by applying the test of 'spontaneity'. As it is, his position suffers from 'belatedness', which is another test for the assessment of credibility.

"P2" which is a copy of the statement made by the Respondent to the Veyangoda police station on 1st September 2001, is parallel to her testimony given at the trial. Thus, it is seen that she has maintained 'consistency' as regards her position, which is yet another test based upon which credibility of a witness should be assessed.

Conclusions

Thus, in view of the foregoing reasons, I conclude that the Respondent is a credible witness. In the circumstances and in view of the supporting documentary evidence which serves to corroborate the Respondent's narrative, a high degree of testimonial

trustworthiness can be attached to her testimony. On the other hand, the version of events as narrated by the 1st Appellant is improbable and belated, and hence lacks credibility. Furthermore, the narrative as testified to by the 1st Appellant contains a gaping lacuna, particularly occasioned by the failure to present the evidence of Pushpa Ranasinghe and by not producing the 'attendance register'. Thus, it is not possible to attribute any testimonial trustworthiness to the 1st Appellant's testimony.

In view of the foregoing, this Court accepts the narrative of events as presented by the Respondent as reflective of the actual sequence of events pertaining to the incident that occurred on 28th August 2001. The Respondent's position convinces Court and hence it can be concluded that she has 'proved' her case on a balance of probabilities as is required to be applied in a civil trial of this nature. Thus, accepting the narrative of the Respondent regarding the incidents that resulted in the Respondent not receiving the opportunity to sit for the General English examination paper, I conclude that it was the negligent conduct of the 1st Appellant who was acting as the agent of the 2nd Appellant on the impugned occasion, which resulted in the Respondent losing the opportunity of presenting herself and sitting for the General English examination paper at the G.C.E. A/L examination conducted in August 2001. I also conclude that such situation was not occasioned due to any failure or other factor such as contributory negligence that the 1st Appellant purportedly attributed to the Respondent.

Lex Aquilia

A common feature of the submissions made by the learned Senior DSG for the Appellants and the learned Counsel for the Respondent regarding their respective cases, and in my opinion quite rightly so, was that the instant case is premised upon the *Lex Aquilia* (Aquilian action). Albeit brief, a consideration of the origin and evolution of the *Lex Aquilia* would be pertinent to justify the conclusions I propose to reach in this matter.

The *Lex Aquilia* which means the 'law proposed by Aquilias' is a fundamental and important type of legal remedy originally found in the ancient Roman law. In ***Gaffoor v. Wilson and Another*** [(1990) 1 Sri L.R. 142], Justice A.R.B. Amerasinghe has captured the origins of the *Lex Aquilia* in the following manner:

> *"The act complained of is a wrong which is technically known as damnum injuria datum. This was created by the Lex Aquilia which was a plebiscite attributed to various years. Suarez holds that the Aquilian law was passed about 133 B.C. Mommsen thinks that it was enacted before 76 BC. Pernice advances very cogent reasons for the contention that this law was passed in the year 287 B.C. This ancient Roman statute is the foundation of our law in regard to damage caused by Negligence."*

R.W. Lee, in his treatise titled *Elements in Roman Law (4th Ed., p.393),* has described the *Lex Aquilia* as a plebiscite attributed to the year 287 B.C. His view is that the 12 Tables and subsequent laws had dealt with specific cases of damages to property, but this legislation was abrogated or superseded by the statute *Lex Aquilia.* A similar view has been held by H.W. Tambiah in "*Principles of Ceylon Law*" (1972, page 390).

According to literature, the original *Lex Aquilia* contained three chapters of laws. The earliest surviving commentary of the *lex* is that attributed to Brutus, believed to have been written in 2 AD. During an unspecified early period, the second chapter had fallen into disuse. Justinian's codification of the laws of the Roman era (*Codex Justinianus* – Code of Justinian - Corpus Juris Civilis) in 529 AD contains only the first and third chapters of the *Lex Aquilia*. The original thrust of this *lex* was on ***'damage unlawfully or wrongfully inflicted by one in respect of the property of another'***. The first chapter provided redress to those whose slaves and herd animals were unlawfully killed by a method of killing referred to as *occidere*. The *lex* provided the wrongdoer to be ordered to pay the owner the highest monetary value of the slave or the animal concerned, during the year preceding the killing. The third chapter provided relief for those whose corporeal

property had been unlawfully damaged by another by burning, breaking or smashing. The *lex* stipulated that the wrongdoer shall be ordered to pay the owner of the property the average value of the property during the 30 days period preceding the damage having been inflicted. With the early evolution of the Roman law, the third chapter developed to cover all damages to property not covered by the first chapter. It had been well understood during the Roman era itself, that what was meant by 'unlawful' or 'wrongful' killing or 'infliction of damage to property' included damage caused both due to intentional as well as negligent conduct, for which there was no lawful justification. Jurists have opined that the relief that could be obtained was not reparation in the form of replacement of the property, but monetary compensation. Thus, the core principle based upon which the *Lex Aquilia* had been originally founded was accountability in respect of damage to or loss of property, inflicted through 'intentional wrongdoing' *(dolus)* or 'unintentional and unjustifiable, and hence blameworthy wrongdoing - negligence' *(culpa)*, resulting in monetary compensation being payable by the wrongdoer to the owner of the property. It is important to note that at the outset, the *lex* was not meant to be used for personal bodily injury caused to the complainant.

Though this was the original form and content of the *Lex Aquilia*, it is the unanimous view of all jurists that the *Lex Aquilia* as well as other Roman era legal principles and legal mechanisms evolved both during the Roman period itself and during subsequent times. This evolution of the *lex* was to cater to changing social, economic and political circumstances, and the needs of individuals and the society. For example, the *Lex Aquilia* evolved and expanded within a short period of time to cover injury inflicted to the body of the complainant. For instance, according to Boberg (*The Law of Delict, vol.1, p.18),* the remedy that compensation in the form of *solatium* may also be recovered for pain and suffering and other non-patrimonial elements of loss associated with bodily injuries (for example, loss of amenities of life, loss of expectation of life, disfigurement and the like), were unknown to the Romans and evolved from Germanic customs. They were adopted by the Roman-Dutch writers who generally treated it as an exception to Aquilian liability.

H.W. Tambiah in "*Principles of Ceylon Law*" (1972, at page 390), has also expressed the view that "*In time, the scope and ambit of this action was greatly extended, partly by the interpretation of the jurisconsults, and partly by the actiones utiles and actiones in factum granted by the praetor in the exercise of his equitable jurisdiction. … As a result of juristic interpretation, the provisions of Lex Aquilia were extended so as to grant a plaintiff a remedy for compensation for the entire pecuniary loss which he has sustained in consequence of the defendant's wrongful act, and not merely for the damage caused to the thing itself as was originally the case.*" In fact, if the *Lex Aquilia* did not evolve with the evolution of human civilization and social needs, with the passage of time, the *Lex Aquilia* would have become yet another respected piece of legal artefact of a bygone era, preserved in a museum of laws.

In several South African cases, judges have observed that the *Lex Aquilia* has evolved from its original scope. In ***Union Government (Minister of Railways and Harbours) v Warneke*** [911 A.D. 657, at 664], Justice Innes held as follows:

> "*… we are still at liberty to inquire whether there is any reason why we should not make it available now. The position of our law with regard to negligence today is the result of the growth and the regulated expansion of the original provisions of the Lex Aquilia. Crude and archaic in some respects, their operation was gradually widened by the application of the utilis actio, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and* ***there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles***." (Emphasis added.)

In ***Matthews and others v Young*** [(1922) A.D. 492, at 504], De Villiers, J. has held as follows:

> "*For as the late Chief Justice, upon a consideration of the authorities in Cape of Good Hope Bank v Fischer, pointed out, in the time of Voet and Matthaeus, the Aquilian law had*

received an extension by analogy to a degree never permitted under the Roman law, ***the actio in factum being extended to every kind of loss sustained by a person in consequence of the wrongful acts of another****…"* (Emphasis added.)

In ***Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd.*** [(1985) (1) SA 475 (AD)], Grosskopf, J. has held that "*It is clear that in our law Aquilian liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury…".*

In *Gaffoor v. Wilson and Another,* justice Amerasinghe refers to the gradual evolution of this instrument of the Roman law in the following manner:

"Although at first the law was narrowly construed, the remedy being available only to the owner of damaged property and where there had been physical destruction and not merely deterioration, the scope of the action was greatly extended partly by means of 'actiones utiles' and 'actiones in factum', and by the time of Justinian, the net of extended actions had spread far enough to cover a father's interest in the physical fitness and earning capacity of his child, even though the father was not the owner of his son and although there was no rumpere, i.e. shattering or breaking down when the son's earning capacity was reduced by an injury to his eye. Whether Chief Justice de Villiers claim in Cape of Good Hope Bank v. Fischer that in the time of Voet and Matthaeus 'the Aquilian action … was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another' is justified or not, it is clear that the scope of the action was greatly extended from time to time."

According to Percival Gane's translation of *Voet's Commentary on the Pandects*, (1955 - vol.2, page 545), "*utilis actio*" is translated as "beneficial action" and also suggests "extended action" and "analogical action". According to Gane, "*beneficial is on the other*

hand, an actual rendering of the meaning of the word 'utilis'. It suggests moreover, as is the fact, that the action was extended because it was for the public benefit that it should be extended."

The Aquilian action along with the other Roman law action – the *Actio Injuriarum,* provide judicial remedies for victims of various forms of unlawful conduct. Historians have recorded that the reception of Roman law into the law of Holland (The Netherlands) took place over a period of time, and particularly during the 15th and 16th Centuries. The original 'Roman Dutch Law' (named by Simon Van Leeuwen in 1652 as *Roomsch Hollandts* – Recht) had in it components of both civil and criminal law, which included an evolved version of the *Lex Aquilia* from the original *lex* of the Roman law. Johannes Voet (who is recognized undoubtedly as the foremost authority on the Roman-Dutch law) in his "*Commentarius ad Pandectas*" published in 1698, has commented that it (the Roman Dutch law) is a 'living thing'. It is pertinent to note that the Roman-Dutch law was abolished in Holland in 1809, and replaced initially by the *Code Napolean* and subsequently in 1839 by the Dutch Civil Code. Thus, it is no longer possible to consider present era judgments of Holland to ascertain the evolution and the present character of the *Lex Aquilia* and its contemporary application.

The *Lex Aquilia* contains a legal basis on which a complainant can seek judicial redress in respect of certain forms of wrongdoing, by pursuing litigation against the wrongdoer in a Court of law. It takes the form of an action for *damages* in respect of certain forms of wrongdoing which have resulted in certain consequences to the plaintiff. Professor R.G. McKerron (7th Edition - 1971, page 13) in his monumental treatise on "*The Law of Delict*" has expressed the undisputed general view that there are three essentials of liability in the Aquilian action; first, a wrongful act, second, fault on the part of the defendant, and third, pecuniary loss resulting to the plaintiff. The first requirement means that the act complained of must involve the invasion of a right – that is to say, the violation of a legally protected interest of the plaintiff. The second requirement means that the loss must be imputable to the defendant; that is to say, the defendant must be responsible for the

wrongdoing, and (i) must have intended the loss to occur, or (ii) he could have by the exercise of reasonable care been able to prevent its occurrence. Thus, in the terminology of the Roman law, the defendant must have been guilty either of *'dolus'* or *'culpa'*. *'Culpa'* is associated with negligence, and is an unintentional form of conduct amounting to wrongdoing resulting in legal culpability being attracted to the negligent person. The third requirement speaks for itself, that is, consequential financial loss to the plaintiff arising out of the impugned wrongdoing.

Actionable Negligence

It is well accepted that *negligent conduct* and *negligent omission* are two forms of negligent wrongdoing, which may give rise to *culpa* and thus facilitate the possibility of a Court considering the grant of judicial redress to the victim through the application of the *Lex Aquilia.* It is not every negligent act or negligent omission that would give rise to a cause of action under the *Lex Aquilia.* In colloquial terminology, *negligence in the air* does not give rise to a cause of action. Only certain forms of negligence which can be referred to as *actionable negligence* would come within the scope of the *Lex Aquilia* and thus give rise to a cause of action which would enable the aggrieved party to seek and obtain redress from a Court of law. Thus, the commencing point of the legal analysis of the instant Appeal is founded upon the need to arrive at a determination on whether in the circumstances of this case, the conduct which should be attributed to the 1st Appellant amounts to *actionable negligence*.

The term *negligence* stems from the Latin term *neglegentia* (also spelled as *negligentia*), and generally means carelessness or inattentive omission. While it is not possible to provide a universally applicable definition of the term *negligence*, broadly speaking, *negligence* is the failure to exercise the standard of care that a reasonably prudent person would have exercised under the given circumstances. It would include any conduct that falls below the legal standard established to protect others against possible harm. Conduct that is intentional or willful does not come within the scope of *negligence*, and based on the

attendant circumstances, may come within the scope of *dolus*. Conduct which a reasonable and prudent person would in the given circumstances not have engaged in, or failure to do what such a person would have in the circumstances have performed, amounts to *negligence*. In Roman-Dutch law, the '*reasonable and prudent person*' referred to for the purpose of applying this control test in order to determine whether the impugned conduct amounts to negligence or not, is referred to as the *diligens paterfamilias*. It would thus be seen that *Culpa* in Roman-Dutch law which is a concept almost synonymous with *negligence* is the failure on the part of the wrongdoer to not foresee what a reasonable man would have foreseen, and thus, prevent it from happening. It is important to note that the question for judges called upon to adjudicate civil cases founded upon *Culpa* in the *Lex Aquilia* is not to determine what the defendant was actually thinking of at or about the time of his impugned conduct expecting or not expecting a particular outcome, but, whether his impugned conduct or behaviour was or was not of such character as the Court ought to demand from a reasonable and prudent man in the given circumstances. Considered as an objective fact, *negligence* may be defined as 'conduct which involves an unreasonable, unjustifiable or preventable risk of harm to others'. *Negligence* is the failure in the given circumstances to have exercised that degree of care which the circumstances demanded. It is a relative and not an absolute conception and may consist either in failure to have done something which a prudent and reasonable man would have done in the given circumstances, or having done something which a prudent and reasonable man would not have done in the given circumstances.

It is necessary to observe that *due diligence* is the opposite of *negligence*. Thus, that the defendant had exercised *due diligence* to an extent a reasonable and prudent person would have, would negate the conclusion that the defendant was *negligent*.

However, negligence *per se* or negligence '*in the air*' will not be a ground for civil liability, unless there existed in the particular case, a legal duty of care. A man cannot be faulted in law for being negligent, unless he had an obligation towards others to exercise due

diligence, and he failed to observe such degree of due diligence which a reasonable and prudent person would have exercised in the given circumstances. Therefore, the legal conception of *actionable negligence* involves three elements – negligence, a duty of care and a breach of that duty. It is only when these three elements are established, that the negligent person can be held to have been responsible for *actionable negligence* and hence legally accountable (culpable in terms of the law) through the *Lex Aquilia.*

Lex Aquilia and the Roman-Dutch common law of Sri Lanka

Following the arrival of the Dutch in Ceylon (as Sri Lanka was called then), and having secured from the Portuguese the control of the island, during their period of colonial rule (1656 to 1796) the Dutch introduced to the colony, the Roman-Dutch law and Dutch institutions of justice such as the *Raden van Justitie* (the High Court of Justice), the *Landraden* (the Land or Country or District Courts) and the *Civiele Raden* or *Stads Raden* (the Civil or Town Courts). As regards the application of the law during the Dutch era, Professor T. Nadaraja in his monumental work "*The Legal System of Ceylon in the historical setting*" (1972), quoting a note written by onetime Dutch Commander of Jaffna A. Pavilioen to his successor, has expressed the view that justice had been administered to the Dutch and other Europeans according to the laws in force in the 'Fatherland' and the Statutes of Batavia. The natives (Ceylonese) were governed according to their own customs if such customs were clear and reasonable and otherwise, according to Dutch law. Further, enactments of the Governor and those of the Council of Ceylon had also been applied. Professor Nadaraja has added that another source of law were the judgments of Courts established by the Dutch. That explains the arrival of the Roman-Dutch law in Sri Lanka and the birth of the common law as introduced by the Dutch.

The nature, contents and the form of the *Lex Aquilia* when it was originally introduced to Ceylon by the judges of the Dutch era, are not clear. Whether this important instrument of civil litigation was specifically introduced through an 'Old Statute of Batavia', a 'New Statute of Batavia', a Proclamation enacted by the Directorate referred to as the 'Council

of Seventeen' or 'Lords Seventeen' of the United Netherlands Chartered East India Company (VOC) for its colonies including Ceylon, legislation enacted by the legislature of The Netherlands at that time – the 'States-General (*Staten-Generaal*) of the Republic of the United Netherland', by a Placaat, or through the gradual introduction and application of Dutch laws on a case by case basis when Dutch judges were called upon to decide cases in Ceylon, is also not clear. Therefore, the exact nature and the scope of the *Lex Aquilia* at the time of its original induction to the body of Ceylon's substantive laws is difficult, if not impossible to be ascertained. Furthermore, when various aspects of the Roman-Dutch law including the *Lex Aquilia* were introduced by the Dutch colonizers, it is unclear whether Dutch judges were permitted to apply them subject to adaptations and modifications to suit domestic conditions in the colony.

Nevertheless, treatises by respected authors (who have extensively quoted original commentaries on the subject by jurists) such as Simon Van Leeuwen, Hugo Grotius and Johannes Voet, and judgments pronounced during the British colonial era and those of the post-independence era, are available as authentic sources of the *Lex Aquilia.* In my view, it would be both reliable and reasonable to assume that at the time of its introduction to Ceylonese legal system, the *Lex Aquilia* had already evolved since its original promulgation during the Roman era. That being due to the influence of Dutch customs, societal requirements, native laws of Holland and the integration of German legal principles to the body of Dutch laws. Therefore, at the time of the infusion of the *Lex Aquilia* into the body of substantive civil law of Ceylon (during the Dutch colonial era), it would have necessarily evolved from the original textual contents of the original Roman plebiscite. However, the exact nature and the scope of the *Lex Aquilia* when it was initially applied in Ceylon during the early years of the Dutch era is not possible to trace, mainly due to inaccessibility of judgments of that era. It is however evident that since the infusion of the *Lex Aquilia* into the laws of Ceylon, it has remained to-date in the body of the common law of this country.

Can the Roman-Dutch law be adapted and applied to suit contemporary requirements or are judges obliged to apply it only in its purported original form?

In the course of making submissions, learned Senior Deputy Solicitor General for the Appellants insisted that in order to be successful in an Aquilian action and to be able to obtain general damages, the Plaintiff must establish ensuing patrimonial loss which has arisen out of actionable negligence on the part of the Defendant. He submitted that in the instant case, the Plaintiff (Respondent) had not established that she suffered any calculable patrimonial loss arising out of the negligence of the 1st Defendant (1st Appellant). Thus, an important question arose during the argument of this Appeal, as to '*whether in an Aquilian action, a plaintiff who has not established calculable patrimonial loss due to the negligence of the alleged wrongdoer, would be entitled to succeed in obtaining general damages*'. This judgment seeks to primarily answer that question of law.

This issue also gives rise to a related question, whether the *Lex Aquilia* which is a component of the Roman-Dutch common law of this country, is amenable to a degree of adaptation to suit ever changing and contemporary requirements. Thus, the following consideration of the law.

As to whether courts applying the Roman-Dutch common law have the jurisdiction to make suitable adaptations to Roman-Dutch common law and thereafter apply it to suit contemporary requirements, primarily pivot around interpretations contained in judgments relating to the 1799 Proclamation issued by the British colonial rulers. This is primarily because, there does not seem to have been any written law promulgated prior to 1799 which contains a reference to the Roman-Dutch law and in particular at the time the Roman-Dutch law was introduced by the Dutch colonizers to Ceylon.

History records that having arrived in the country, in 1795, British colonizers captured Trincomalee and Colombo from the Dutch. Thereafter, on 15th February 1796, the Dutch

capitulated the maritime provinces of Ceylon to the British. Following a brief period of rule of the maritime provinces by the British East India Company, in 1802, Ceylon became a proper British Crown colony. Following the signing of the Kandyan Convention on 2nd March 1815, the entire island fell under British colonial rule and became a subject of the British monarchial sovereignty. Whether such accession of Ceylon to the British empire was lawful is a different question altogether.

According to Professor Nadaraja (page 181), there had been a British constitutional practice and of International Law of that era that had been settled before the conquest of the maritime provinces of Ceylon, that the laws of a conquered country shall continue to remain in force until they are altered by the conqueror. Article 23 of the Articles of Capitulation of 1796 is of significance in this regard, and provided as follows:

"Article 23rd - All Civil suits depending in the Council of Justice shall be decided by the same Council according to our Laws.

Answer – Granted, but they must be decided in twelve months from this date."

Thus, it is seen that a request of the Dutch that the Dutch laws (which prevailed in Ceylon at the time of the Dutch capitulation of the maritime provinces to the British in 1796) had at least in theory been permitted by the British to remain in force, notwithstanding the British colonizers assuming control over the maritime provinces. Nevertheless, according to historians, immediately following capitulation, there had been some confusion as to which law would actually be enforced in the country. Apparently, there had also been a degree of reluctance on the part of Dutch judges to accept British sovereignty and the British legal system. In this backdrop, according to Professor Nadaraja (page 57), the first British Governor Frederick North who arrived in the country in October 1798, had received instructions from London (instructions of 25th May 1798 from the Court of Directors of the East India Company to Governor Fredrick North), to, for the time being, cause the administration of justice as far as possible according to the 'laws and institutions that subsisted under the Dutch Government, and that after due inquiry, he should suggest any improvements which he might think desirable'. In my view, it should

be in this light that the promulgation of the 1799 Proclamation issued by the British colonizers on 23rd September 1799 should be seen. The first paragraph (also referred to as the 'preamble' by some judges and authors) of the 1799 Proclamation issued on the Order of Governor Frederick North by Secretary to the Governor Hugh Cleghorn, provided as follows:

> *"Whereas it is His Majesty's gracious Command, that for the present and during His Majesty's will and pleasure,* ***the temporary Administration of Justice and Police in the Settlements of the Island of Ceylon*** *now in His Majesty's Dominion, and in the Territories and Dependencies thereof, should, as nearly as circumstances will permit, be exercised by us,* ***in conformity to the Laws and Institutions that subsisted under the ancient Government of the United Provinces****,* ***subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable****;* ***and*** *subject also to such directions, alterations, and improvements, as shall be directed or approved of by the Court of Directors of the United Company of Merchants of England trading to the East Indies, or the secret Committee thereof, or by the Governor General in Council of Fort William in Bengal."* (Emphasis added by me.)

In a couple of judgments of the Supreme Court, there has been some doubt expressed regarding the exact contents of the 1799 Proclamation. Thus, I have reproduced here verbatim, the relevant paragraph of the Proclamation obtained from Volume I of the "Collection of Legislative Acts of the Ceylon Government (from 1796 to 1833)" published in 1853. This publication by the then Government of Ceylon, is the first in a series of Legislative Enactments published by the government from time to time, and can thus be recognized as containing authentic texts of legislation promulgated during the period 1796 to 1833.

It would be seen that particularly due to the grammatical construction and the length of the preamble of the 1799 Proclamation, it is difficult to provide a lucid literal meaning to the contents of this Proclamation. However, it would be seen that the 1799 Proclamation had been issued as an urgent and temporary measure. (In the list of 'Contents' under the title '1799 Proclamation', the objective of the Proclamation is provided as, "*Promulgating Regulations for the temporary Administration of Justice and Police throughout the colony*".) It is seen that the Proclamation provided for the continued application of the Roman-Dutch law and for the functioning of Dutch installed institutions of justice and the police, as nearly as it may be possible. However, the Proclamation provided for considerable flexibility in the application of the law and the running of institutions. It was possible to introduce **deviations** to that law and to the institutions, due to (a) sudden or unforeseen emergencies, (b) expediency, (c) alterations being useful, (d) alterations being either absolutely necessary and unavoidable, or beneficial and desirable. The Proclamation was specific regarding who was empowered to introduce such deviations. The Proclamation provided for **directions, alterations and improvements** to be introduced by (i) the Court of Directors of the United Company of Merchants of England operating in the East Indies, (ii) by the Secret Committee of that company, and (iii) by the Governor General in Council of Fort William in Bengal. However, in view of the language used and the structuring of the relevant clause of the Proclamation, it is arguable that the authority to introduce '**deviations**' from the Roman-Dutch law was not limited to the exclusive prerogative of the authorities who were specifically referred to in the Proclamation to issue 'directions', 'alterations' and 'improvements'. I will not at this stage itself pronounce my conclusion regarding this debatable point, in view of the following further analysis which I propose to engage in.

The Proclamation of 1799 was followed by the Royal Charter of 1801, which *inter alia* established the Supreme Court of Ceylon and conferred jurisdiction to it. Articles 2 and 39 of the Charter of 1801, respectively, provided as follows:

"*And whereas, by Our Instructions to the said Frederick North, We declared it to be Our Will and Pleasure that for the present, and during Our Will and Pleasure, the temporary Administration of Justice and Police in the said Settlements, and in the Territories and Dependencies thereof, should, as nearly as Circumstances would permit, be exercised by Our said Governor in Conformity to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such Deviations in consequence of sudden and unforeseen Emergencies or to such Expedients and useful Alterations, as might render a Departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable.*"

"*And it is Our further Will and Pleasure, and We do hereby, for Us, Our Heirs and Successors, grant, ordain, and establish, that the said* ***Supreme Court of Judicature in the Island of Ceylon*** *shall also be* ***a Court of Equity****, and shall and may have full Power and Authority, to Administer Justice in a summary Manner, according to the Law now established in the said Settlements in the Island of Ceylon, and in Point of Form, as nearly as may be, according to the Rules and Proceedings of our High Court of Chancery in Great Britain; and upon a Bill filed, to issue Subpoenas, and other Process under the Seal of the said Supreme Court of Judicature, to compel the Appearance, and Answer upon Oath, of the Parties therein complained against and Obedience to the Decrees and Orders of the said Court of Equity, in such Manner and Form, and to such Effect, as Our High Chancellor of Our United Kingdom of Great Britain and Ireland, doth or lawfully may, under Our Great Seal of Our United Kingdom of Great Britain and Ireland.*" (Emphasis added.)

A new and uniformed system of justice was introduced to the country by the Ceylon Charter of Justice of 1833. That Charter did not have a direct impact on the preservation of the Roman-Dutch law in Ceylon. To clear a possible doubt regarding the status of laws introduced by the British themselves during the intervenient period, and to ensure the continued applicability of the pre-British era substantive laws, another law was promulgated in 1835 amending the Proclamation of 1799. That was Ordinance No. 5 of

1835 issued on 21st December 1835. The portion relevant in the Ordinance of 1835 to the continued preservation of the Roman-Dutch law in Ceylon reads as follows:

> *"Whereas by reason of the many fundamental alterations in the Administration of Justice within these settlements effected by His Majesty's Charter, bearing the date 18th day of February 1833, and on other accounts, the provisions contained in many of the Proclamations and Regulations of Government heretofore passed have become obsolete, or are rendered inexpedient, or inapplicable to the present institutions.*
>
> *It is therefore hereby enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, that the several Proclamations and Regulations of Government following, except in so far as they repeal any former provisions, be and the same are* ***hereby repealed ; that is to say, the Proclamation of the 23rd September 1799****,* ***except in so far as the same doth publish and declare that the Administration of Justice*** *and Police within the Settlements then under the British Dominion and known by the designation of the Maritime Provinces* ***should be exercised by all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces ; which laws and institutions it is hereby declared, still are and shall henceforth continue to be binding and administered through the Maritime Provinces and their dependencies, subject nevertheless to such deviations and alterations as have been, or shall hereafter be by lawful authority ordained*** *; and except in so far as the same doth abolish the application of torture …"* (Emphasis added.)

The afore-contained portion of the Ordinance No. 5 of 1835 is a verbatim reproduction obtained from Volume II of "A Collection of Legislative Acts of the Ceylon Government (from 1833 to 1852)" published in 1854 by the Government of Ceylon, and hence can be recognized as being an authentic reflection of the contents of the Ordinance.

The Ordinance of 1835 although fundamentally repealed a major portion of the Proclamation of 1799, provided specifically that the administration of justice and the police shall within the maritime provinces, be carried out and enforced by Courts in accordance with the laws which were in force during the Dutch period, and that those laws shall remain binding, subject however to **deviations** and **alterations** which have been ordained and those thereafter be by **lawful authority ordained**. The Ordinance of 1835 gives rise to a question of interpretation as to who were intended to be included in the term 'lawful authority'.

Chapter 12 under 'Title II - Administration of Justice' of the Legislative Enactments of Ceylon – 1956 Revised Edition (Volume I) (prepared under the authority of the revised edition of the Legislative Enactments Act No. 2 of 1956 and published in 1958 by the Government Publications Bureau) contains an Ordinance entitled 'Adoption of Roman-Dutch Law' containing both the Proclamation of 23rd September 1799 and Ordinance No. 5 of 1835. Thus, it is an amalgamation of the afore-discussed Proclamation of 1799 and Ordinance of 1835. Its preamble contains the text of the 1799 Proclamation commencing with the words *"Whereas it is His Majesty's gracious command that …"* and ends with the words *"… either absolutely necessary and unavoidable or evidently beneficial and desirable."* The operative part of the Ordinance commences with a paragraph numbered 'section 2'. Its contents are as follows:

> *"We therefore, in obedience to His Majesty's commands, do hereby publish and declare, that the administration of justice and police in the said settlements and territories in the Island of Ceylon, with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all courts of judicature, civil and criminal, magistrates, and ministerial officers,* ***according to the laws and institutions that subsisted under the ancient government of the United Provinces****, subject to such deviations and alterations by* ***any of the respective powers and authorities*** *hereinbefore mentioned,* ***and*** ***to such other deviations and alterations as we shall by these presents, or by any future***

proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice to ordain and publish, <u>or</u> which shall or may hereafter be by <u>lawful authority</u> ordained and published." (Emphasis added.)

Section 3 of the Revised Edition of the Legislative Enactments Act (Chapter I), No. 2 of 1956 has conferred considerable powers on the Commissioner appointed in terms of the Act to prepare the revised edition and to carryout revision of legislative enactments prior to their publication. Such powers include the power to (a) omit provisions of statutes which have been repealed by necessary implication, (b) consolidate into one enactment any two or more enactments, (c) to incorporate into any enactment any amendment, and (d) to make such adaptations or amendments to any enactment as may appear to be necessary or proper, as a consequence of the present political status of Ceylon. Further, section 12(1)(a) and 12(1)(b) of the Act required the Commissioner to transmit the completed revised edition (prior to its publication) to the Prime Minister to lay it before the House of Representatives (Parliament) and to the Minister of Justice to lay it before the Senate. In terms of Section 12(2), both the House of Representatives and the Senate were required to pass a Resolution authorizing the publication of the revised edition in the Gazette. Thus, the procedure provided in the Act tantamounted to the then twin legislative bodies re-enacting the entire body of written law found in Proclamations, Ordinances and Acts in force at that time. Section 12(3) of the Revised Edition of the Legislative Enactments Act provides that, '*the revised edition shall, on and after the date on which it comes into force, be deemed to be and be without any question whatsoever in all courts of justice and for all purposes whatsoever the sole authentic edition of the legislative enactments of Ceylon therein printed*'. Thus, in view of what is evidently an amalgamated, amended and revised version of the 1799 Proclamation and the 1835 Ordinance being published under the title 'Adoption of Roman – Dutch Law' in the 1956 revised version of the Legislative Enactments, and in view of section 12(3) of the Revised Edition of the Legislative Enactments Act, the need to question the authenticity of the texts of the Proclamation of 1799 and the Ordinance of 1835 does not any longer arise. In any event, it is my view that

there is no substantial error in the re-production of the combined effect of the original Proclamation of 1799 and the Ordinance of 1835 in the 1956 Legislative Enactments. It is important to note that presently what has the force of law are the contents of the 'Adoption of Roman – Dutch Law' Act as contained in the 1956 revised edition of the Legislative Enactments. Therefore, Courts are obliged to take cognizance of and apply provisions of the statute as contained in the revised Legislative Enactments (1956).

Thus, it is clear that as it stands now, the law provides for deviations and alterations to the Roman - Dutch law to be introduced by 'those who possess legislative power' and by other '**lawful authorities**'. This points to the proposition that in addition to Parliament (which possesses legislative power), Courts of this country are also empowered to adopt deviations and alterations to the Roman – Dutch law.

Authority conferred on judges of common law legal systems and the adaptation of the Roman-Dutch law to suit contemporary requirements

It would also be seen that the effect of the Proclamation of 1799 as amended by the Ordinance of 1835 was the continued recognition and enforceability of the Roman - Dutch law which had been applied by Dutch institutions of justice of Ceylon as at the time of the capitulation by the Dutch to the British in 1796, subject to (i) amendments introduced during the intervening period of 1799 – 1835, and (ii) laws that may have been thereafter enacted and introduced by those possessing legislative power such as the Parliament, and by other 'lawful authorities'.

Whether by the use of the term 'lawful authority', in addition to the legislature, judges of Courts of law who are called upon to administer the Roman - Dutch law also became empowered to introduce alterations and deviations to the Roman-Dutch law, is a matter of considerable importance. An answer to this critical question has to be determined particularly as successive legislatures of this country have left the Roman-Dutch law uncodified and thus, to-date, remaining in the corpus of the 'common law'. An answer

to this important question is also linked to the introduction of the 'common law tradition' to Ceylon by the British colonizers, and to the recognition accorded in the entire common law world to the role of the higher judiciary to not only interpret and apply the written law, but also to adapt and apply the common law to cater to continually changing societal values, norms, behaviour and expectations and evolving complexities of human civilization. The need to do so is heightened by the progressive development of rights and duties, the complexities and intricacies of disputes being presented to Courts and the expectations of the public and the State that all disputes including complex disputes be adjudicated fairly, leaving no party genuinely aggrieved by an unlawful act or other injustice, remediless.

In *Sultan v. Peiris* [35 NLR 57 at 68] Chief Justice Macdonnell has described the status of the Roman – Dutch law in the backdrop of personal laws, in the following manner:

> *"It must be observed that there is no discoverable legislative enactment declaring Roman-Dutch law to be the general law or the 'common law' of the Island. If one went solely by statutes, one would have to conclude that it was but one among a number of laws in force in Ceylon. Kandyans, Tamils and Muhammadans are declared each to have their own law, and if Roman-Dutch law has become the general or (if one may use the term) residuary law of the Island – a law, that is, which provides (1) for Kandyans, Tamils and Muhammadans in matters where their own personal law, as received, is silent, and (2) for the other portions of the community generally – this has been effected by judicial decision, supporting itself on such statute law as refers to legal terms familiar to Roman-Dutch law. If the Roman-Dutch law is the residuary law of the Island, as it unquestionably is, it has not been by reason of positive enactment that this has been effected."*

The situation relating to the Roman-Dutch law did not change following Ceylon gaining Independence in 1948. The previously referred to legislation titled 'Adoption of Roman – Dutch Law' as found in the Legislative Enactments of 1956 remains in force to-date.

Notwithstanding the continuous shrinking of the scope of the Roman-Dutch law due to enactment of legislation during the British colonial rule, post-independence era and during the present Republican era of Sri Lanka, it undoubtedly remains to be the **residual common civil law** of this country. Whenever the need arose, the Parliament has enacted laws with regard to areas which were previously regulated by the Roman-Dutch common law. Lacuna in the Roman-Dutch law has also been taken cognizance of and filled by Parliament through legislation. Recovery of Damages for the Death of a Person Act, No. 2 of 2019 serves as a candid example. It seems to have been Parliament's legislative response to the situation highlighted in the judgment of the Supreme Court in *Priyani Soyza v. Rienzi Arsecularatne*. However, in my opinion, pending such intervention by Parliament, judges called upon to interpret where necessary and apply the common law, may apply such common law with suitable adaptations enabling delivery of justice to aggrieved litigants. It would be undesirable to leave lacuna in the common law, in expectation of Parliament remedying it. In comparison with identifying and filling lacuna in the common law, Parliament has other legislative priorities, such as enacting laws to strengthen the rule of law, democracy and governance, formulating laws pertaining to national security, regulation of finance, trade and commerce, enacting legislation to facilitate rapid economic growth, formulating laws to provide social services and benefits to the needy, enacting enabling national legislation to give effect to Sri Lanka's obligations under international law and codifying new prohibitions and stipulating punishment pertaining to new and advanced manifestations of organized and sophisticated crime. Thus, it is necessary for the judiciary to take cognizance of lacunas in the common law, without leaving it to be dealt with by Parliament which is burdened with other priorities. Further, the vitality of the common law should be retained by the judiciary by providing necessary interpretations and adaptations to it. Nevertheless, such adaptations should not cause violence to the fundamental features of the existing common law. The progressive development of the common law should be gradual and founded upon existing principles of law. Ideally, such interpretations and adaptations

should be subtle, gradual, incremental, smooth, and left in the hands of the higher judiciary.

As aptly put by L.J.M. Cooray, in "*An Introduction to the Legal System of Ceylon*" (1972, page 180), "*The judges should not seek to restrict in any way or frustrate the policies contained in statutes passed by the supreme legislative authority. But this does not mean that there is no scope for judicial activism. … judicial activism would be welcome in those areas where the legislature has not the time nor the inclination to legislate. In a modern democracy, the time of the legislature is generally consumed by the regulation of national economic policy, the provision of educational, social and welfare services, defence and internal security. Matters of private law (civil procedure, the law of persons, property, succession, contracts and torts) and even areas of state concern such as criminal law and criminal procedure tend to suffer neglect in such an atmosphere. … Thus, in areas where the legislature shows no inclination to effect necessary changes the judiciary could adopt a more positive role to develop the law, overruling decisions which are wrong or not in keeping with notions of justice and equity, changing conditions or the circumstances of modern life. In this way the courts can be of assistance to the legislature by alleviating some of the pressures on it. Thirdly, in those areas not controlled by statute but which are common law areas, there is legitimate scope for judicial law-making.*"

Due to multiple reasons, the purity of Roman-Dutch law in this country has also been affected over a long period of time. In *Korossa Rubber Company v. Silva et. al.* [20 NLR 65 at 74-75] Chief Justice Wood Renton has made the following observation:

> *"It is well settled that the Roman-Dutch law, pure and simple, does not exist in this country in its entirety. It has been modified in many directions, both expressly and by necessary implication, by our statute law,* ***and also by judicial decisions****. The defendants' counsel admitted, what could not indeed be denied, that the Roman-Dutch law in Ceylon had been on some points not merely repealed, but impliedly affected by local enactments (see Rabot v. De Silva). But they challenged the proposition that the Roman-*

Dutch law had been or could be abrogated or modified by the action of the Courts. ***The fact that this has been done is, however, incontestable****, and the process has not been confined to this Colony."* (Emphasis added.)

Walter Pereira on "*The Laws of Ceylon*", at page 12, has observed that, "*The whole of the Dutch Law as it prevailed in Holland more than a century ago was never bodily imported into this country. We have only adopted and acted upon so much of it as suited our circumstances, such as the Law of Inheritance in the Maritime Provinces, Community of Property, Law of Mortgage and so forth…"*

Furthermore, as seen in *Suppramania Chetty et. al. v The Fiscal, Western Province* [(1916) 19 NLR 129], *Attorney–General v Smith* [(1908) 11 NLR 126], *Parmsoty v Veenayagamoorthy et. al.* [(1943) 44 NLR 361], *Wije Bus Co. Ltd. v Soysa* [(1948) 50 NLR 350], *Kaluwalage Champika Kumari De Silva v Kodithuwakku Arachchige Neville Kodithuwakku and others* [SC Appeal No. 172/2012], and *General Manager of Railways and another v Bhadra De Silva Rajakaruna and others* [SC Appeal No. 62/2013], disputes that could have necessarily been adjudicated upon by the application of principles of delictual liability contained in the Roman-Dutch law, have been decided upon by the application of principles of tortious liability under the English law on Torts. Thus, it appears that the English law on Torts has co-existed side by side with the Roman-Dutch law on Delicts. Furthermore, there is ample evidence in judgments, that show that certain legal principles essentially borrowed from English Tort law, such as the principle of 'Strict Liability' in the celebrated case of *Fletcher v. Rylands*, have been incorporated into Sri Lankan law.

Therefore, it is not possible to subscribe to the view that in Sri Lanka, delictual disputes remain in the exclusive domain of the original and pure Roman-Dutch law. Thus, applying the original and pure theoretical principles of the *Lex Aquilia* to the instant matter would be neither possible nor necessary.

In ***C. Kodeeswaran v. The Attorney-General***, [72 NLR 337, at 342], (in one of the last judgments pronounced by the Privy Council of the United Kingdom, which was during that period, the court of last resort for cases from Ceylon), arising out of an Appeal from the Supreme Court of Ceylon, on 11th December 1969, Lord Diplock expressing his opinion on behalf of the Privy Council, has adverted to the following regarding the Roman-Dutch law:

> *"… although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the "common law" of Ceylon, it is not the finishing point. Like the common law of England, the common law of Ceylon has not remained static since 1799. In course of time, it has been the subject of progressive development by a cursus curiae (Samed v. Segutamby) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view, if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves, there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law. The absence of any supporting precedent for the proposition in Roman-Dutch law, as applied in the United Provinces, may be due to a number of reasons. It may have been "taken for granted" law in the United Provinces or it may deal with circumstances which did not exist there or did not attract the attention of writers on Roman-Dutch law in the eighteenth century ; or it may be a development of the common law of Ceylon itself either before or after 1799, of which the nascence and growth may be impossible to trace in the absence of any reports of decisions before 1833 and very incomplete reports thereafter until towards the end of the nineteenth century. Even a clear conflicting precedent in the eighteenth century jurisprudence or doctrines of the United Provinces would not necessarily be a conclusive indication that a later decision of a Ceylon court is erroneous. As Wood Renton J. pointed out in Colombo Electric Tramway Co. v. Attorney-General little is known as to the precise extent to which the doctrines of Roman-Dutch law which*

were applied in the United Provinces themselves were actually introduced into Ceylon while it was under Dutch rule, and if authority were found in the eighteenth century law of the United Provinces which was inconsistent with an old-established line of decisions by the Courts of Ceylon, the inference may well be that the authority relates to a part of the law of the United Provinces which was regarded as unsuitable to conditions in Ceylon and was never introduced there."

A view contrary to the above-stated view of Lord Diplock is found in the judgment of Chief Justice H.N.G. Fernando in ***Lily M. De Costa v. Bank of Ceylon*** [72 NLR 457], pronounced on 18th December 1969, merely seven days after Lord Diplock pronounced the afore-stated opinion in ***C. Kodeeswaran v. The Attorney-General***. The judgment of Chief Justice H.N.G. Fernando does not refer to the opinion of Lord Diplock in *Kodeeswaran v Attorney-General*. It is quite possible that in view of the circumstances that prevailed then, Chief Justice Fernando may not have been aware of the opinion contained in the judgment of the Privy Council in *Kodeeswaran v. The Attorney-General*. In view of the structure and hierarchy of courts of that era and the doctrine of *Stare Decisis,* the Supreme Court of Ceylon was bound at that time to follow the *ratio decidendi* of judgments of the Privy Council. In the circumstances, with due respect to the views contained in the judgment of former Chief Justice H.N.G. Fernando and to the high authority of the views of His Lordship, I must respectfully express my inclination to hold the opinion that (a) the views of Lord Diplock as regards the status of the Roman-Dutch law in the common law of this country reflect the correct position of the law, and (b) the proposition that deviations and alterations to the Roman-Dutch common law may be introduced through non-legislative means, such as by judgments of superior Courts, is lawful and hence correct.

Commenting on the status of the Roman-Dutch law during the British colonial era and thereafter, Professor Nadaraja has highlighted the impact of numerous statutes introduced by the legislature and their impact on the Roman-Dutch common law of this

country. He has cited a series of statues which caused a significant erosion of the scope of the Roman-Dutch law. Referring to the impact of judgments of superior courts, Professor Nadaraja has stated the following (page 240 - 243):

> *"We must now turn to the development of the law by the decisions of the courts or what is not inaptly called 'judge-made law'. The courts have recognized that "differences of time and place are to be attended to: and a rule that might have worked very well in the old European country of Holland at the time when Voet wrote (in the seventeenth century) might work very badly in modern Ceylon". Accordingly, rules and institutions of the Roman-Dutch law have been declared inapplicable in Ceylon on various grounds, which can be classified under two main heads. First, rules have not been applied in Ceylon where they were of purely local application in some part of the Netherlands or were so closely implicated with local conditions there, as not to be capable of adaptation to the circumstances of Ceylon. … Secondly, rules of the Roman-Dutch law have been discarded by the courts when they were out of harmony with the conditions of modern life, in accordance with the principle that when the reason for a rule of law ceases to operate, the rule itself ceases to have effect (cessante ratione legis cessant lex ipsa). … Although the courts have thus declared some principles in the old books to be inapplicable in the conditions of modern Ceylon, they have also tried on occasions to adapt other principles to changed circumstances of time and place. They have recognized that they 'are administering not a dead but a living system of law' and that such adaptations is necessary 'in the ordinary course of development of our colonial law to overtake the circumstances of modern life'. Consequently, the courts have stated that they were 'entitled to develop the legal principles handed down [from the Roman and the Roman-Dutch law] in connection with new situations which arise in our own civilization'; and, since the courts have been faced with the duty of declaring the terms of the law contained in the old books, they have also been able sometimes to explain that the law in consonance with modern ideas, often 'by a process of commenting upon the [Dutch] commentators'. … The Judicial Committee of the Privy Council has remarked that* ***the Roman-Dutch Law was 'a virile, living system of law, ever seeking to adapt itself consistently with its inherent basic***

principles to deal effectively with the increasing complexities of modern organized society. *Clearly, however, there were limits to this adaptability; for the courts have declared themselves to be 'powerless to alter the basic principles themselves, or to introduce by 'judicial legislation' fundamental changes in the established elements of an existing cause of action' as laid down by the Roman-Dutch Law'. Consequently, where the Roman-Dutch Law was deemed inadequate to supply answers to all the complicated problems that arise in modern life, the courts have turned to the English Law."*

In ***The Government Agent, Central Province v. Letchiman Chetty et al*** *(24 NLR 36)* Chief Justice Bertram referring to the application of the Roman-Dutch law has held as follows:

"In my opinion this development of the law should be welcomed, and the present case should be treated as coming within the principles laid down. … We are, I think, entitled to develop the legal principles handed down to us in connection with new situations which arise in our own civilization. The tests which were taken as determining tests under the Roman law are not always justly applicable as determining tests in the various combinations of fact, which from time to time, present themselves in modern life. The principle involved was originally an equitable principle, and it is more in accordance with the spirit of that principle that we should administer it equitably rather than upon strictly rigorous lines. … "

It would thus be seen that particularly since the Roman-Dutch law remains in the domain of the 'common law' of Sri Lanka, it has been possible for judges of apex courts to interpret and apply it subject at time to suitable adaptations to suit contemporary conditions of life in Sri Lanka, complexities of modern human behaviour and social norms. Such adaptations of the Roman-Dutch law on the one hand ensure that the Roman-Dutch law does not fall into disuse and become obsolete, and would remain *in par* in its vitality and dynamism with contemporary developments in other bodies of law, such as human rights law. On the other hand, and more importantly, it ensures the

delivery of justice to those who have encountered injustices due to the infringement of their rights or suffered harm due to unlawful conduct.

Adam Geary, Wayne Morrison and Robert Jago in "*The Politics of the Common Law*" (2nd edition, at page 138), discuss the boundaries of judicial law-making and the relationship between the legislature and the judiciary. Commencing with Lord Scarman's speech in *McLoughlin v O'Brian* [(1983) 1 AC 410] the following has been observed:

> "*Lord Scarman argued that the judge had a jurisdiction over a common law that 'knows no gaps' and 'no casus omissus'. If this is the case, the task of the common law judge is to adapt the principles of the law to allow a decision to be made on the facts in hand. This may involve the creation of new law. Whatever the case, judicial reasoning begins from a 'baseline of existing principle'. The judge works towards a solution that can be seen as an extension of principle by process of analogy. For Lord Scarman, this is the 'distinguishing feature of the common law': the judicial creation of new law, as the justice of the case demands. This process may involve policy considerations, but the judge can legitimately involve him/herself in this activity, provided that the primary outcome is the formation of new legal principles. In those cases, where the formation of principle involves too great an intrusion into the field of policy, the judge must defer to Parliament:*
> "*Here lies the true role of the two law-making institutions in our Constitution. By concentrating on principle, the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.*"
>
> "*The real risk to the common law is not its movement to cover new situations and new knowledge, but lest it should stand still, halted by a conservative judicial approach. If that should happen, and since the 1966 practice direction of the House it has become less likely,*

there would be a danger of the law becoming irrelevant to the consideration, and inept in its treatment, of modern social problems. Justice would be defeated. The common law has, however, avoided this catastrophe by the flexibility given by generations of judges."

"…It is a description of the common law judge as the guardian of the conscience of the common law. The judge is charged with the development of the law in such a way that its principles remain coherent as it develops and adapts itself to changing social conditions. Thus, the flexibility of the common law is an element of what makes it just. However, things are somewhat more complicated. Flexibility is inseparable from the 'risk' of 'uncertainty in the law'. This risk varies with the context of the legal problem under consideration. In other words, problems of uncertainty take a different form in areas of 'commercial transaction' and 'tortious liability for personal injuries'. Returning to the issue of justice, Lord Scarman argues that justice can demand a degree of loss of certainty in the law… However, the law has to respond to advances in 'medical science' and technology, and adapt the relevant text for foreseeability."

Justice Gratiaen in *Chissel v. R.C. Chapman* [56 NLR 121 at 127] has held that, *"In England, "less timourous" common law judges sometimes find themselves free to invent a new cause of action to meet a new situation (if the problem is unembarrassed by binding precedent). But those of us who administer Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) we may* ***cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society****. But we are powerless to alter the basic principles themselves, or introduce by "judicial legislation" fundamental changes in the established elements of an existing cause of action."* (Emphasis added.)

Those who advocate a conservative and narrow approach to the exercise of judicial power by common law judges insist that the role of judges should be limited to interpreting and applying the law as it is. Adaptation of the existing law to suit contemporary requirements, filling lacuna of existing law through such adaptations, and by these means

developing the law through the pronouncement of progressive judgments is seen by some as *'judicial activism'* and castigated as *'judicial legislation'* or *'judge made law'* which they allege amounts to usurpation of the legislative power of Parliament and an infringement of the *rule of law*. I find myself unable to accept that point of view regarding the role of common law judges pertaining to the common law. The common law is vibrant, flexible and accommodates the ever-changing demands of contemporary human civilization, evolving human conduct and norms and collective values of society. If the common law remained static without evolving and developing with the passage of time, unwritten law would have gone into oblivion long time ago. The growth of the common law in fact depends upon judicial activism. If judicial activism reflected in progressive judgments (a) do not impinge on the written law, (b) does not cause an erosion of the core legal principles found in the common law, (c) do not violate legislation and obstruct legislative intent, (e) are in public interest and (f) are orchestrated towards the delivery of justice, such judgments must be recognized as manifestations of proper and meaningful exercise of judicial power. Such judgments would in my view be very much in compliance with Article 4(c) of the Constitution.

It is necessary to observe that, the *Lex Aquilia* had been originally promulgated to suit a totally different socio-cultural, religious, political and economic environment. The stark difference is exemplified by the fact that the *Lex Aquilia* was promulgated during an era where a group of human beings were classified as slaves and slaves recognized as 'property'. Since the promulgation of the *Lex Aquilia*, human civilization has undergone revolutionary and progressive changes in virtually all components of human life. Conferment of equality and other rights and parity of status to all human beings is the starting point of that revolution. Human norms, values, needs, relationships, and the law, have all undergone significant changes; some norms and legal concepts gone into oblivion; new legal principles such as human rights born, new laws formulated to suit changing needs and circumstances of communities of human beings and the existing law adapted to suit contemporary requirements of human society. In such a totally different

and continuingly evolving era of human civilization, the insistence on the application of the original principles of the *Lex Aquilia* raises many concerns and difficulties pertaining to the administration and delivery of justice.

It appears that Parliament having refrained from codifying the residual common-law of Sri Lanka, has been due to its appreciation that the judiciary is ideally suited to interpret and adapt the ancient Roman-Dutch law to suit contemporary and evolving requirements of society, and thereby ensure the delivery of justice to litigants. Rather than insisting on the theoretical and strict compliance with and the application of the original *Lex Aquilia* promulgated over a millennia ago, it is more important to administer justice in a just and equitable manner, while of course adhering to the fundamental and core principles of the Roman-Dutch law. In a vibrant and efficacious legal system, the common law should not remain stagnant as water in a clogged drain. Rather, the common law should flow retaining its vitality, like fresh water in a stream, gradually evolving through the ever-changing landscape. Gradual and incremental development of the common law is within the legitimate exercise of judicial power by Courts which have been called upon to exercise such power on behalf of the people to the extent empowered by the Constitution and other laws enacted by Parliament. Such development of the Common law by the judiciary augurs well for the administration and delivery of justice and is in public interest. In the circumstances, it is my view that the role of the judiciary cannot and should not be limited to merely *'ironing out the creases'* of the old Roman-Dutch law. While recognizing the need to respect the prerogative of Parliament to effect structural changes to the Roman-Dutch law and the supreme duty of Courts to uphold the rule of law, I would with the greatest humility pronounce that **it is well within the judicial power of Courts to interpret, adapt where necessary and apply the Roman-Dutch law to suit contemporary requirements of modern human society and societal expectations, and thereby deliver justice to litigants**.

In this regard, I am reminded of Chief Justice Hema Basnayake's views in *Bandahamy v Senanayake* [62 NLR 313, at 350], wherein he said that "*Law, like other things, is not static and rigid adherence to previous views even when they are out of place and cannot be reconciled with modern legal concepts does not foster development of legal thought.*"

Furthermore, quite independent of the possible argument that can be propounded regarding the illegitimacy of the 'Promulgation of 1799' introduced by the British colonial rulers (to whom in 1796 the previous colonial rulers had capitulated the maritime provinces), in my view, the 'law' introduced for the '***temporary administration of justice and police in the settlements of the island of Ceylon***' cannot impose restrictions on the present judiciary of Sri Lanka in the exercise of the judicial power conferred on Courts by the Constitution and other applicable laws enacted by Parliament, for the purpose of exercising judicial power on behalf of the people of this country who are collectively sovereign of the Republic.

In view of the foregoing, I hold that the interpretation and adaptation of the common law and cautious application of such interpreted and adapted principles of the unwritten law (in this instance the Roman-Dutch common law) to suit contemporary complex requirements of modern society, are within the ambit of the legitimate exercise of judicial power by Courts as contemplated in Article 4(c) of the Constitution. Nevertheless, any adaptations of the common law including the Roman-Dutch law should not be inconsistent with (a) fundamental and core principles and features of the applicable common law, (b) provisions of written law enacted by Parliament, (c) should be in public interest, and (d) should ensure proper administration and the delivery of justice.

Application of the *Lex Aquilia* to the evidence in the case

It is now necessary to revert to the evidence, the attendant circumstances and to the application of the *Lex Aquilia* to such evidence and attendant circumstances.

As pointed out earlier, learned Senior DSG quite rightly did not dispute that the 1st Appellant and the 2nd and 3rd Appellants through the 1st Appellant, had a legal duty of care towards the Respondent. His position was that (i) the 1st Appellant had not conducted himself in a negligent manner, (ii) the 1st Appellant was not in breach of the duty of care he had towards the Respondent, and (iii) in the alternative, if this Court were to conclude that the 1st Appellant was culpable, the Respondent was only entitled to receive nominal damages (as opposed to general damages).

The 2nd Appellant derives the power to conduct public examinations such as the G.C.E. (A/L) examination from the Public Examinations Act. The functions associated with the conduct of such public examinations are both official and public in nature. Such powers are conferred by law, and are exercised by public officials on behalf of the public, as trustees of the public. In this instance, the powers that are necessary for the conduct of public examinations are conferred on officials conducting examinations, by the Public Examinations Act. The conduct of public examinations is of crucial importance to the public at large, the State, and to candidates in particular. Third parties such as higher educational institutions and employers who wish to ascertain the knowledge and competence of candidates who face such public examinations, also rely on examination results released by the 2nd Appellant. The results that candidates receive at public examinations such as the G.C.E. (A/L), generally has a considerable impact on their entire future. While such examinations must be conducted with integrity and results released to a high degree of accuracy, it is an implied duty contained in the governing law, that examination officials conduct themselves (a) with necessary competency and skill, (b) in accordance with the Rules promulgated in that regard, (c) to a high degree of transparency, (d) with due diligence, and (e) to a high standard of care towards candidates. These are positive legal duties that are imposed by law on persons holding public office and called upon to perform official functions relating to the conduct of public examinations which have a bearing on the legitimate interests of members of the

public and in particular, examination candidates. It is the view of this Court that when conducting public examinations such as the G.C.E. (A/L) examination, officials have an implied legal duty of care towards candidates who are entitled to sit for such examination. That is over and above the delictual obligation officials have towards candidates.

The extent and degree of care that is required, is proportional to the possible harm that would be caused if such care is not exercised. When a candidate shows interest and willingness on his part to sit for a certain examination paper in respect of which he has gained admission, the relevant examination officials are obliged by law to take necessary and reasonably possible measures to facilitate such candidate to present himself for the examination. Thus, on 28th August 2001, the 1st Appellant had a legal duty of care towards the Respondent to facilitate her to sit for the 'General English' examination paper. In the circumstances of this case, that legal duty of care required him to take prudent, reasonable, necessary and feasible measures that were in fact possible under the given circumstances to have been taken, to ensure that the Respondent received an opportunity to sit for the 'General English' examination paper. Any derogation from that standard would render the conduct of the 1st Appellant in his capacity as the Chief Invigilator impeachable.

As determined by the learned District Judge and the learned High Court Judge and as analyzed by me above, the 1st Appellant has failed through his negligent conduct to take such measures as amounting to the legal duty of care he owed towards the Respondent. It appears that his negligence commenced when the desks used by candidates to answer examination papers were re-arranged prior to the 'General English' examination paper. His negligence continued when he neither checked the 'attendance sheet' (which should have necessarily contained the entitlement of the Respondent to sit for the 'General English' examination paper) and when he did not promptly respond to the issue confronted by the Respondent, by examining the Respondent's 'admission card' which

was in his official custody. The 1st Appellant having called upon the Respondent to produce the 'timetable' and when she failed to do so, having asked her to go home and bring it to the examination centre, was also a grossly negligent act. As pointed out above, the 1st Appellant's conduct falls short of the standard expected of a Chief-Invigilator who is required to conduct himself in a lawful, diligent, reasonable and prudent manner. Even if this Court were to conclude that the version of events as testified to by the 1st Appellant is true, he could have easily provided a timely opportunity for the Respondent to sit for Part I of the 'General English' examination paper, while and parallel to his performing the purported 'priority responsibility' of distributing the examination papers to the four Invigilators. The 1st Appellant has conducted himself in callous disregard of the legitimate entitlement of the Respondent to sit for the 'General English' examination paper. In the circumstances of this case, I conclude that a reasonable and prudent Chief – Invigilator in the circumstances confronted by the 1st Appellant on the morning of the 28th of August 2001, would not have conducted himself in the manner he did. Thus, the impugned conduct of the 1st Appellant must necessarily be classified as amounting to negligent conduct, and a breach of the legal duty of care he had towards the Respondent. Furthermore, had the 1st Appellant facilitated the Respondent to sit for Part I of the General English examination paper, she would not have missed sitting for Part II of the same paper. Thus, I conclude that it was the negligent conduct of the 1st Appellant in breach of the legal duty of care he had towards the Respondent vested in him by law in his capacity as the Chief Invigilator, that resulted in the Respondent losing the opportunity to sit for Parts I and II of the 'General English' examination paper of the G.C.E. (A/L) examination held in August 2001. Thus, I conclude that the conduct of the 1st Appellant was negligent and that such negligent conduct is actionable. In my opinion, *'culpa'* should necessarily be attributed to the conduct of the 1st Appellant. Through the negligent conduct of the 1st Appellant, he has breached the legal right of the Respondent to sit for the 'General English' examination paper.

Professor R.G. McKerron (at page 51) has expressed the general view that in the *Lex Aqulia* the plaintiff must prove that the act complained of caused him *'damnum'* – that is, patrimonial loss. He has opined that by *'damnum'*, what is meant is not damage to a thing, but pecuniary loss, either accrued or prospective to the person injured. That would take the form of loss in respect of property, business, or prospective gains, capable of pecuniary assessment. He has emphasized that an important exception to this general rule is the award of compensation for pain and suffering in an action for personal injuries. However, in his opinion, where there has not been any physical injuries or illness, compensation in the form of general damages is not recoverable in an action under the *Lex Aquilia* for mere mental distress or wounded feelings.

As pointed out by learned Senior Deputy Solicitor General, it has been held by Justice Dheeraratne in ***Prof. Priyani Soyza v. Rienzie Arsecularatne*** [(2001) 2 Sri L.R. 293] that the compensation recoverable under the *Lex Aquilia* is only for patrimonial damages, that is, loss in respect of property, business, or prospective gains. Justice Dheeraratne quoting Professor de Villers with approval, has expressed the view that there is a distinction between actions for *injuria* (where the intent is of essence) and actions founded upon *culpa* alone. He has expressed the view that in the former case, compensation might be awarded by way of satisfaction for injured feelings. In the latter, all that could be claimed is for patrimonial damage, which should be explicitly and specifically proved. Damages claimed by a plaintiff under the head of mental shock, appear to be recoverable under Roman Dutch law (if the test of reasonable foreseeability is satisfied), only if that results in psychiatric illness. Damages on account of emotional shock of short duration, which has no substantial effect on the health of a person are not recoverable. The award of compensation for physical pain caused to a person injured through negligence, which is recognized by the Law of Holland, constitutes a notable exception to the rule in question. However, according to Justice Dheeraratne, there is no warrant for any such exception in the case of mental distress or wounded feelings which has not caused any physical injury. Damages calculated on that basis are wholly outside the scope of the Aquilian procedure.

Justice Dheeraratne has expressed the view that compensation for injured feelings arising out of and flowing naturally only from physical hurt inflicted, could be claimed under the Lex Aquilia. Learned Senior Deputy Solicitor General relied heavily on this pronouncement to support his contention that the Respondent is not entitled to receive general damages.

In the South African case of *Union Government (Minister of Railways and Harbours) v. Warneke* [(1911) South African Law Reports 657] Chief Justice Lord De Villiers citing Voet has held that, "*… whatever may have been the practice under the Roman law, it is clear that under the Dutch law the practice was to confine the damages claimable by the Aquilian action to cases in which a calculable pecuniary loss has been actually sustained.*"

Thus, it is evident that in the original and conventional sense of the *Lex Aquilia,* damages can be awarded only if the loss suffered by the plaintiff occasioned as a result of the breach of a duty of care by the defendant, had resulted in *damnum* – that is patrimonial loss and is capable of pecuniary (financial) assessment. It thus seems that the award of damages claimable in an Aquilian action is generally confined only to situations where there is calculable pecuniary loss. The pecuniary loss should be proved by the Plaintiff.

However, it is important to note that, in the Roman-Dutch law as it stands today, there are certain well recognized exceptions to the norm that ensuing patrimonial loss must be proved to enable a Court to grant damages. These exceptions are as follows:

(i) Situations where actionable negligence has caused physical injury to the victim resulting in psychological trauma. (See ***"The Law of Delict"*** by R.G. McKerron, at page 51) In this situation, notwithstanding the Plaintiff being unable to establish patrimonial loss, he is entitled to general damages due to both the physical injury as well as psychological trauma;

(ii) Situations where a legally recognized right of the Plaintiff has been infringed by its breach or denial, as a result of actionable negligence by the Defendant. If the purpose of instituting action was primarily to establish that a right had been infringed by the Defendant and not necessarily to obtain compensation, notwithstanding the Plaintiff being unable to establish patrimonial loss, the Plaintiff will be entitled to nominal damages.

In this regard, I find support in the following paragraph found at page 52 in ***"The Law of Delict"*** by R.G. McKerron:

"In the modern law there is another exception to the rule that patrimonial loss must be proved, namely, where the real purpose of the action is not to obtain compensation for harm done, but to establish some right which is denied or disputed by the defendant. In such a case, if the plaintiff establishes his right, he is entitled to nominal damages, although he proves no loss. The leading authority for this departure from the rule is Edwards v. Hyde. In that case, Solomon J. said "There are many cases where, though in form, the action is one for damages, it is really brought to substantiate and establish some right, and if the plaintiff succeeds in establishing his right, though he proves no damages, he has substantially succeeded in his action, and the court is, therefore, bound to give judgment in his favour for nominal damages." But a mere infringement, not involving a denial, of the plaintiff's rights is not, as might be inferred from the judgment of Sheil J. in Lord v. Gillwald, sufficient to justify an award of nominal damages in our law."

This position is supported by H.W. Tambiah in "*Principles of Ceylon Law*" (page 397).

(iii) Situations where the actionable negligent conduct of the Defendant is deplorable in nature due to its attendant circumstances and is associated with an element of grossly aberrant conduct and must therefore be condemned. In such situations, notwithstanding the Plaintiff being unable to establish

patrimonial loss, he would be entitled to exemplary damages that are nominal in nature.

R.G. McKerron in ***"The Law of Delict"*** (page 113) states as follows:
Exemplary damages, that is, damages awarded to punish the defendant in an exemplary manner, may be regarded as a species of moral or sentimental damages. The award of exemplary damages is justified where the defendant's conduct involves an element of injuria; where for example, the defendant has been guilty of high-handed, insolent, vindictive or malicious conduct.

However, the question that remains to be answered is whether, in the circumstances of this case, the Plaintiff (Respondent) would be entitled to receive general damages due to (i) the psychological trauma and ensuing suffering sustained by her due to actionable negligence on the part of the 1st Defendant (1st Appellant), and (ii) in view of the possible prospective loss that she may incur in the future due to not having passed the 'General English' examination paper of the August 2001 G.C.E. (A/L) Examination.

Particularly in view of contemporary scientific understanding of the impact and far-reaching consequences of psychological injury and associated pain and suffering which scientists have opined far exceed in gravity in comparison with harm arising out of most physical injuries, serious consideration must be given to the anomaly and injustice arising out of victims of physical injuries who have suffered mental pain (psychological trauma) being entitled to receive general damages and those who have only suffered psychological injury (without having sustained physical injuries or suffered from psychiatric illness) not being entitled to receive general damages. Should not victims who have only suffered psychological trauma also be entitled to a solatium in the form of sentimental general damages? If the *Lex Aquilia* is applied in the afore-stated original narrow premise, victims who have suffered serious psychological trauma resulting from actionable negligence on the part of the wrongdoer in the backdrop of the existence of a

duty of care and a breach of such duty (as in this case), fall into a substantial remediless situation.

Dr. Shivaji Felix, in an article published in 2001 to the Law Society Trust Review (Part II, 160, at page 1-23), titled "*Of Snakes and Ladders – One down for the Roman-Dutch law: One up for the Medical Profession*", has analysed the law and in my view rightly concluded as follows:

"*A person should not be allowed to suffer a wrong without a remedy. The Roman law was never an unreasonable system of law. It offered victims of wrongdoing a wide spectrum of remedies. The modern Roman-Dutch law must also keep abreast with the changing social ethos. … Consequently, the law of negligence must progress and cannot be locked in a time capsule of 1799.*"

It is my considered opinion that the duty of judges is to mold and evolve the common law through (a) identification of the correct law, (b) interpreting terms that require interpretation, (c) making adaptations where doing so is necessary so as to make the law more sensitive and responsive to complexities of contemporary human civilization and complex disputes being presented to Courts and (d) thereby ensure the delivery of justice *inter-alia* to those who have suffered due to transgressions of the law and suffered injustice and harm.

Thus, with the view to providing relief to victims of actionable negligence who have suffered psychological trauma and associated pain of mind, without causing violence to the fundamental principles of law governing the *Lex Aquilia*, it is my view that justice must be served by the law being adapted and enforced to cater to contemporary requirements of the administration of justice and applied in a manner to enable such victims of psychological trauma to be able to obtain general (or real) damages in the form of a solatium. This situation then would serve as the <u>fourth exception</u> to the requirement that patrimonial loss ensuing from actionable negligence should be proved by the claimant.

Award of Damages

In view of the extensive reliance by both the learned Senior DSG for the Appellants and the Counsel for the Respondent on Professor R.G. McKerron's views regarding the award of damages, it is necessary to place his views in the correct context, by reproducing his views on this matter to some degree of detail.

"The damages recoverable for a delict are either ***real*** *or* ***nominal****. Damages are said to be real where they are awarded as compensation for actual loss suffered.* ***If it is clear that some loss has been suffered, however small or difficult of assessment it may be, the damages awarded in respect of it are real and not nominal. Damages are said to be nominal where they are awarded not by way of compensation for any actual loss suffered, but merely by way of recognition of some legal right vested in the plaintiff and violated by the defendant.*** *The only case in which nominal damages in the strict sense will be awarded in our law is where the action, though in the form an action for damages founded on delict, is really brought to establish some right, and the plaintiff establishes his right, but does not prove any actual loss. Since nominal damages are not awarded for the purpose of compensating the plaintiff, they never exceed a small sum of money; for example, five rand.*

Damages are also distinguishable as being either sentimental or patrimonial. Sentimental damages are damages awarded as a solatium for wounded feelings or for mental pain or suffering. As a general rule, sentimental damages will not be awarded unless the wrong complained of constitutes an injuria. Patrimonial damages, on the other hand, are damages awarded as compensation for calculable pecuniary loss sustained by the plaintiff in consequence of the wrong complained of.

Damages are further distinguishable as being either general or special. General damages are awarded as compensation for general damage; special damages as compensation for special damage. This distinction, more particularly in our law as distinguished from English law, belongs rather to the law of pleading and procedure than to the substantive law. General damage is such loss as the law will presume to be a natural or probable consequence of the defendant's act. Special damage,

on the other hand, is loss which arises out of the special circumstances of the case and which will therefore not be presumed. Since general damage is presumed, it is sufficient to allege it generally, and the defendant is not entitled to demand particulars of it. Special damage, on the other hand, not being presumed, must be specifically alleged and claimed, so that the defendant may have due notice of the nature of the claim; otherwise, the plaintiff will not be entitled to lead evidence of it at the trial.

In English law general damage is held to arise by inference of law, and need not be specifically established by evidence. But in our law, except where the wrong complained of is an injuria, damages are not as a rule recoverable unless damage, actual or prospective, is proved to have been suffered. As has been pointed out, therefore, we must be careful how we use the terms, 'general damages' and 'special damages' in our practice.

Unless the wrong complained of constitutes an injuria, ***or the action is brought to establish a right,*** *the rule is that the plaintiff is only entitled to damages in respect of such calculable pecuniary loss as he can prove that he has actually sustained or is likely to sustain. But,* ***it is to be observed that a court is not justified in refusing to award the plaintiff damages, merely because the quantum is difficult of assessment. If it is clear that the plaintiff has sustained, or will sustain, damage, and the best evidence available as to the amount thereof has been produced, the court must do the best it can, on the evidence before it, or assess the damages to which he is entitled.***

Where the plaintiff has only one cause of action, the rule is that damages must be awarded once and for all in a single action. Judgment in the action first brought will bar further action arising from the same cause. Prospective damage – that is, damage which in the ordinary course is likely to accrue – as well as damage which has actually accrued should therefore be included by the plaintiff in his claim. But, it is different where the plaintiff has two or more distinct causes of action. Thus, if the act complained of is not a complete and finished act causing damage once and for all, but a continuing wrong causing fresh damage from day to day, the plaintiff has more than one cause of action, and can therefore bring a second action in respect of damage sustained after

the first action. Similarly, if the removal of lateral support causes more than one subsidence an action will lie in respect of each subsidence, because each subsidence gives a new cause of action." (Emphasis added by me.)

Entitlement of the Plaintiff to nominal damages due to infringement of a right - As I have pointed out earlier, the Respondent has established that the 1st Appellant conducted himself towards the Respondent in a negligent manner. He did so, in the backdrop of having a legal duty of care towards the Respondent, a duty which he breached, resulting in the Respondent not being able to sit for the 'General English' examination paper. This was in the backdrop of the Respondent having the legal right to sit for the 'General English' examination paper. Due to the negligent conduct of the 1st Appellant, the Respondent was denied her right to secure an examination-based assessment of her competency of 'General English' at the August 2001 G.C.E. (A/L) Examination and also the right to qualify in that subject. Thus, those legal rights of the Respondent have been breached by the 1st Appellant. Therefore, the *universitas of the rights* of the Respondent have been adversely affected by the negligent conduct of the 1st Appellant. In contemporary society, legal rights cannot be limited to interests in corporeal property. The impact of the infringement of a legal right cannot necessarily be linked to patrimonial loss. The absence of patrimonial loss makes the infringement not less important to the victim or to society. Thus, the need arises to provide relief to a victim whose rights have been infringed even though such infringement may not have resulted in any calculable patrimonial loss. As pointed out earlier, when a right has been infringed due to actionable negligence of the Defendant, the Plaintiff is entitled to receive nominal damages. Thus, I hold that the Plaintiff (Respondent) is entitled to receive from the Defendants (Appellants) nominal damages.

Entitlement of the Plaintiff to exemplary damages due to deplorable conduct of the 1st Appellant – As seen in the analysis of the evidence, the 1st Appellant who was a public servant duty bound in his capacity as the Chief Invigilator to look-after the legitimate

interests of examination candidates, had, in violation of his official duties acted in a grossly negligent, arbitrary, callous, highhanded and deplorable manner. His conduct has been in contumelious disregard of the Respondent's right to sit for the 'General English' examination paper and her ensuing plight. Such deplorable conduct has resulted in causing an inerasable scar in the academic track-record of the Respondent. That in my view warrants the imposition of 'exemplary damages' on the 1st Appellant. The award of exemplary damages which would be nominal in quantum, should serve as a punitive measure against the 1st Appellant and as a deterrence to all public servants who may be called upon to officiate at public examinations and generally to perform official and public functions.

General damages due to psychological trauma suffered – In this regard, it would be necessary to revert to the evidence of the Respondent. Her position is that when the 1st Appellant told her that she cannot be permitted to sit for the 'General English' examination paper, she got anxious. She had left the examination centre and remained outside for about half an hour, unable to decide on the course of action to be taken. Court can take judicial notice of the psychological trauma she would have suffered as a result of this situation. She had thereafter gone home, collected the 'timetable' and returned to the examination centre. In the ensuing situation, she had also been denied the opportunity of sitting for part II of the 'General English' examination paper. This has caused her further trauma. In the statement made to the Veyangoda police station on 1st September 2001 ("P2") the Respondent has stated that due to the 1st Appellant disallowing her from sitting for the 'General English' examination paper, she was deprived of completing the G.C.E. (A/L) Examination in August 2001. She has also explained that due to this incident, she became frustrated and it affected her mental tranquility. Her position is that as a result of the ensuing psychological trauma, she could not successfully prepare herself and answer the remaining examination paper.

As quite rightly pointed out by the learned District Judge, the negligent conduct of the 1st Appellant has resulted in the Respondent not being able to complete the G.C.E. (A/L) examination held in August 2001. She had to sit for the examination another time in order to pass all subjects including 'General English'. It is necessary to take judicial notice of the nature and magnitude of the psychological trauma suffered by the Respondent when she was deprived of her legitimate entitlement to sit for the 'General English' examination paper. When she encountered the incident described in this judgment, particularly in view of the critical importance of successfully passing the G.C.E. (A/L) Examination, the Respondent would have suffered immensely due to the negligent conduct of the 1st Appellant. It is of course apparent that the loss and psychological injury and harm suffered by the Respondent is incapable of financial assessment. Nevertheless, the afore-stated consequences arising out of the culpable negligence of the 1st Appellant justify in my view the awarding of substantial general damages in the form of a solatium, as opposed to nominal damages. If harm such as psychological trauma and suffering resulting in incalculable loss due to unlawful conduct should go unredressed, that would occasion a failure of justice and in the long-term, result in the public losing faith in the system of administration of justice.

An additional circumstance which justifies the awarding of general damages - It is necessary to point out that learned Counsel for the Respondent did submit that the negligence on the part of the 1st Appellant had resulted in prospective as opposed to accrued patrimonial loss to the Respondent. His submission was that such prospective patrimonial loss is incapable of financial assessment and hence could not be proven through evidence on monetary terms. Given the fact that the negligence necessarily attributable to the 1st Appellant resulted in the Respondent not having been able to pass the 'General English' examination paper of the G.C.E. (A/L) Examination held in August 2001 and that having a bearing on the Respondent's employability, I am inclined to agree with learned Counsel for the Respondent that the impugned negligent conduct of the 1st Appellant caused loss, which for obvious reasons cannot be assessed and determined on

financial terms. As pointed out by the learned Counsel for the Respondent, the consequences arising out of the negligent conduct of the 1st Appellant are both accrued and prospective. That the Respondent did not pass the 'General English' examination paper of the GCE (A/L) Examination held in August 2001 would remain forever a negative feature in her academic track-record. The consequential loss particularly arising out of possible non-selection for certain employment opportunities is incapable of financial assessment. Such loss incapable of financial assessment should not stand in the way of the Court objectively determining and awarding general damages to the Respondent on equitable terms.

In this regard it is necessary to bear in mind that there can be circumstances in which the consequences of the infringement of a legal right cannot as in this case be assessed and determined in terms of financial criteria. That such consequences are incalculable should not in my view, stand in the way for a Court determining and awarding general damages that are justifiably due to the party whose rights have been infringed. Therefore, in my view, the quantum of damages to be awarded should necessarily be determined based on the circumstances of the case. The applicable circumstances which describe the consequential harm occasioned to the Respondent has been narrated above. Thus, in my view, additional to the entitlement to receive 'nominal damages' in respect of the infringement of her rights, the Respondent is entitled to 'general damages' due to the factors of harm I have elaborated above, including but not limited to (i) psychological harm suffered by the Respondent, (ii) prospective incalculable loss arising out of not being able to sit for and obtain an assessment grade for 'General English' at the August 2001 G.C.E. (A/L) Examination and (iii) prospective incalculable loss associated with non-selection for certain future employment opportunities.

It is lawful for a Court to award 'general damages' as the cumulative effect of different heads of damages, which in this case, is the aggregate of afore-stated general damages, nominal damages and exemplary damages.

Thus, in view of the foregoing, it is my view that, as determined by the learned District Judge and affirmed by the learned Judge of the Civil Appellate High Court, the imposition of Rs. 1,000,000/= (One Million Rupees) as general damages payable by the Appellants to the Respondent is lawful and quite justifiable in the circumstances of this case.

In view of the analysis of evidence contained in this judgment and the findings I have reached, I answer the questions of law in respect of which leave to appeal had been granted, in the following manner:

(a) It would amount to a violation of regulations pertaining to the conduct of examinations, if an Invigilator were to allow a candidate to sit for the examination without ensuring whether such candidate is entitled to sit for the relevant examination paper. One way in which that could be ascertained would be by examining the 'attendance register' (also referred to as the 'attendance sheet') for the relevant day. Another would be by examining the 'admission card' and the third method would be by examining the 'timetable' of the relevant candidate. The 'attendance register' and the 'admission card' of the Respondent were in the official custody of the 1st Appellant. Without examining either of those documents, the 1st Appellant had disallowed the Respondent to sit for the 'General English' examination paper.

(b) When there is a case before Court claiming damages, the trial Judge should first ascertain whether the aggrieved party claiming damages has properly established his case. In this case, the learned District Judge and the learned Judge of the High Court of the Provinces have satisfied themselves that the Respondent (Plaintiff) has properly established her case for damages.

(c) The party claiming damages (in this instance the Respondent) should prove his case on a 'balance of probabilities', as is the general standard degree of proof in a civil case. In this case, the Respondent has successfully discharged the burden of proof cast on the Plaintiff and proven her case on a 'balance of probabilities'.

(d) A Judge should decide each case before him objectively, in terms of the law, and on its own merits. In this matter, the learned District Judge and the Judge of the High Court of the Provinces have decided the case on such criteria.

(e) The general damages that have been awarded to the Respondent are in accordance with the law and legal principles governing the award of damages in an Aquilian action.

I have previously answered the vital question of law which arose during the course of the argument, namely the question regarding the adaptability of the Roman-Dutch common law and in particular the law relating to the *Lex Aquilia* to suit contemporary requirements. That question of law has been answered in the affirmative.

In view of the foregoing, I see no justification to interfere with the impugned judgment of the High Court of the Provinces. **In the circumstances, this Appeal is dismissed.** The damages due to the Respondent shall be paid by the Appellants jointly. The Respondent will be entitled to receive legal interests on the damages awarded by the District Court from the date of the judgment of the District Court.

The assistance provided to Court by the learned Senior Deputy Solicitor General for the Appellants and the learned Counsel for the Respondent significantly contributed towards this Court adjudicating this Appeal in the manner it has and accordingly their support is gratefully acknowledged.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree.

Judge of the Supreme Court

P. Padman Surasena, J

I agree.

Judge of the Supreme Court