

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

SC APPEAL No. 167/2018
SC HC CALA No. 653/2016
Provincial High Court of Civil Appeal
of the Southern Province Holden at Galle
No. SP/HCCA/GA 0082/2014 (F)
District Court Balapitiya Case No.
2843/M

1. Muthuwahandi Lambert,
2. Hetti Arachchige Amarawathie,
3. Mithuwahandi Lalantha
Madushan,
(Appearing by his next friend
appointed in District Court
Balapitiya Case No. PB/236)
All three of them
“Amara” Ang Junction,
Rathgama.
4. Padma Hettiarachchi,
Ang Junction,
Rathgama.
(Next Friend)

PLAINTIFFS

-VS-

1. Haththotuwa Gamage Rukman
Mahendra,
Mahawatta, Habaraduwa.
2. Prasad Malaka Batuwanthudawa
3. Batuwanthudawa Kankanamge
Somadewa,
Both of them
“Seethala”, Thuththagalla,

Ahangama.

DEFENDANTS

AND NOW

Batuwanthudawa Kankanamge

Somadewa,

“Seethala”, Thuththagalla,

Ahangama.

3rd DEFENDANT-APPELLANT

-VS-

1. Muthuwahandi Lambert,

2. Hetti Arachchige Amarawathie,

3. Mithuwahandi Lalantha

Madushan,

(Appearing by his next friend

appointed in District Court

Balapitiya Case No. PB/236)

All three of them

“Amara” Ang Junction,

Rathgama.

4. Padma Hettiarachchi,

Ang Junction,

Rathgama.

(Next Friend)

PLAINTIFFS-RESPONDENTS

1. Haththotuwa Gamage Rukman
Mahendra,
Mahawatta, Habaraduwa.
2. Prasad Malaka Batuwanthudawa
“Seethala”, Thiththagalla,
Ahangama.

**1st and 2nd DEFENDANT-
RESPONDENTS**

AND NOW BETWEEN

Batuwanthudawa Kankanamge
Somadewa,
“Seethala”, Thuththagalla,
Ahangama.

**3rd DEFENDANT-APPELLANT-
PETITIONER**

-VS-

1. Muthuwahandi Lambert,
2. Hetti Arachchige Amarawathie,
3. Mithuwahandi Lalantha
Madushan,
(Appearing by his next friend
appointed in District Court
Balapitiya Case No. PB/236)

All three of them

“Amara” Ang Junction,
Rathgama.

4. Padma Hettiarachchi,
Ang Junction,
Rathgama.
(Next Friend)

PLAINTIFFS-RESPONDENTS-
RESPONDENTS

1. Haththotuwa Gamage Rukman
Mahendra,
Mahawatta, Habaraduwa.
2. Prasad Malaka Batuwanthudawa
“Seethala”, Thiththagalla,
Ahangama.

1st and 2nd DEFENDANT-
RESPONDENTS-
RESPONDENTS

Before: E.A.G.R. Amarasekara, J
Kumudini Wickremasinghe, J
Janak De Silva, J

Counsel: Pubudu Alwis with Supun Jayathilake for the 3rd Defendant-Appellant-
Appellant
Sanjaya Kodituwakku with Chamika Guruge for the Plaintiff-Respondent-
Respondents

Argued on: 23.02.2022

Decided on: 19.02.2025

E.A.G.R. Amarasekara, J,

This is an appeal by the 3rd Defendant-Appellant-Petitioner (hereinafter sometimes referred to as the 3rd Defendant-Appellant) against the Judgment of the Civil Appellate High Court of the Southern Province Holden at Galle dated 21.11.2016, where the Learned High Court Judges dismissed the appeal of the 3rd Defendant-Appellant and affirmed the Judgment of the District Court of Balapitiya dated 15.12.2014 that was originally decided in favour of 1st to 3rd Plaintiffs-Respondents-Respondents (hereinafter sometimes referred to as the Plaintiffs-Respondents).

As per the Complaint dated 07.03.2008 filed in the District Court of Balapitiya, the Plaintiffs-Respondents described the cause of action as follows:

- At the time material to this action, the 3rd Defendant-Appellant was the registered owner of the bus bearing Registration No. SP HZ 1709 and on the day of the accident the 1st Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 1st Defendant) was the driver of the said bus and was an employee of the 3rd Defendant-Appellant.
- The 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 2nd Defendant) was the Conductor of the Bus bearing Registration No. SP HZ 1709 at the time and on the date of the accident and he too was an employee of the 3rd Defendant-Appellant.
- On 06.01.2007, at Kahawa, Godagama, on the Galle Colombo Highway, a bomb exploded inside the said bus bearing Registration No. SP HZ 1709 and Muthuwahandi Duleeka Jayaprasadh of "Amara", Anga Handiya, Rathgama, who was travelling in the said bus as a passenger, passed away due to that explosion.
- The death of Muthuwahandi Duleeka Jayaprasadh occurred due to the negligence, carelessness of the 1st and 2nd Defendants and their failure to give the due attention to the security of the passengers travelling in the said bus, and at the time relevant to the incident the 1st and 2nd Defendants acted singularly and jointly within their scope of employment.

- If the 3rd Defendant-Appellant had given the necessary advice to the 1st and 2nd Defendants to act with due attention and to be careful about their passengers at a time terrorist insurgency was in the country, this accident could have been prevented.
- The 1st and 2nd Plaintiffs-Respondents are the parents of the deceased and the 3rd Plaintiff Respondent, who is mentally retarded, is a brother of the deceased. All of them were dependent on the deceased for their existence.
- The deceased was employed in a private institution and was earning a monthly salary exceeding Rs. 10,000/- at the time.
- The aforesaid Plaintiffs-Respondents lost their income due to the death of said Muthuwahandi Duleeka Jayaprasadh occurred in the said accident and by letter dated 13.08.2007 the said Plaintiffs-Respondents demanded a sum of Rs. Three Million Five Hundred Thousand (Rs. 3,500,000/-) from the Defendants as damages, being the aggregation of the loss caused to the 1st and 2nd Defendants, Rs.750,000/- each and Rs. 2,000,000/-, the loss caused to the 3rd mentally retarded brother. However, they have failed and neglected to settle the same. Hence a cause of action had accrued to the said Plaintiffs-Respondents.

The said Plaintiffs-Respondents sought damages from the 3rd Defendant-Appellant and the 1st and 2nd Defendants, a sum of Rs. One Million Five Hundred Thousand (Rs. 1,500,000/-) to the 1st and 2nd Plaintiffs-Respondents and Rs. Two Million to the 3rd Plaintiff-Respondent (Rs. 2,000,000/-) totaling to Rs. Three Million Five Hundred Thousand (Rs. 3,500,000/-) and costs.

In responding to the above Plaint, the 3rd Defendant-Appellant filed his answer dated 03.11.2009 in reply to the averments contained in the Plaint *inter alia* indicating his position which is described below:

- The 3rd Defendant-Appellant admitted the paragraphs 1,2,3 and 4 of the Plaint. Thus, the jurisdiction of the District Court, the fact that the 1st and 2nd Defendants who were the driver and the conductor respectively employed by the 3rd Defendant-Appellant, the registered owner of the aforesaid vehicle, at the time of the accident which took place on 06.01.2007, and the death of the said Duleeka Jayaprasadh due to the bomb explosion described in the Plaint were admitted by the 3rd Defendant-Appellant. However, the 3rd Defendant-Appellant denied that the said death was caused due to the

negligence and carelessness of the 3rd Defendant-Appellant. The 3rd Defendant-Appellant also admitted the receipt of the letter demanding Rs.3,500,000/-.

- The 3rd Defendant-Appellant averred that Rs. 3,500,000/- claimed by the Plaintiffs-Respondents is excessive.
- The said bus was insured with the Janashakthi Insurance Company Limited which also covered the accidents caused due to terrorist insurgencies. He informed the insurance company about this accident after the accident and also after the receipt of summons of this case, that was also informed. Thus, the 3rd Defendant-Appellant had given notice to the insurer in terms of the provisions of Section 106 (Chapter 203) of the Motor Traffic Act.
- The said accident was not a fault of the 3rd Defendant-Appellant nor was it caused due to his negligence but took place due to the terrorist activities that prevailed in the country which were beyond his control.
- The Government is liable for the lives of its citizens in such an accident and damages should be paid through the Government Institutions from the Government fund.

The 3rd Defendant-Appellant prayed *inter alia* for a declaration that he is not liable for this accident and as the compensation prayed by the Plaintiffs-Respondents is excessive, to decide on a reasonable compensation. However, as the 1st Defendant was not present in Court on 09.02.2011 and no representation was made on behalf of him, and the 2nd Defendant failed to file his answer, the Learned District Judge fixed the case for *ex-parte* trial against both the 1st and the 2nd Defendants on 09.02.2011.

Thereafter, the case proceeded to trial on 23.06.2011 and on that date, 8 admissions were recorded by the Parties. Issues No. 01 to 11 were raised by the Plaintiffs-Respondents and the 3rd Defendant-Appellant raised Issues No. 12 to 19. Among the admissions referred to above, it was further admitted that there was a risk of terror caused by the terrorist activities prevailed in the country at the time of the said accident.

During the trial, Muthuwahandi Lambert Wijedasa, the 1st Plaintiff-Respondent and Karunarathna Peramuna Gamage, Inspector of Police attached to the Police Station Ambalangoda gave evidence on behalf of the Plaintiffs-Respondents and closed their case by reading in evidence the documents P1 to P8 as their evidence. No objection was reiterated to said documents at the close of the

Plaintiffs' case. The 3rd Defendant-Appellant gave evidence on his behalf and closed his case reading in evidence the documents marked 3V1 to 3V2a for them, also no objection was reiterated to the said documents at the close of the 3rd Defendant-Appellant's case.

The Learned District Judge of Balapitiya delivered the Judgment on 15.12.2014 in favour of the Plaintiffs-Respondents *inter alia* based on the following grounds:

- During a period of heightened terrorist threat in the country, bus drivers, bus conductors, and bus owners received specific instructions providing that any bus departing from Colombo should undergo thorough security checks by the security forces before its departure. Further as per the said instructions, if the bus stops for refreshments at any place, either the conductor or the driver should remain in the bus.
- The 1st and 2nd Defendants being employees of the 3rd Defendant-Appellant failed to follow the aforesaid instructions and when the bus stopped at Balapitiya for refreshments both the conductor and driver has left the bus for refreshments and thus, an opportunity was created to place the bomb in the bus. Within a short distance, after leaving Balapitiya, the bomb exploded causing the destruction of the bus and the alleged death.
- The Learned District Judge accepted the evidence given by the father of the deceased individual, the 1st Plaintiff-Respondent, who worked as a bus conductor to the CTB with regard to facts related to the aforementioned instructions given by the authorities.
- The 3rd Defendant-Appellant failed to prove that the 2nd Defendant, the son of the 3rd Defendant-Appellant, who was employed as the conductor had a license to be employed as a conductor. Hence, he has employed an unexperienced and unskilled person as the conductor.

Hence, the Learned District Judge after considering the oral evidence and the documentary evidence refusing to accept the position taken up by the 3rd Defendant-Appellant came to the conclusion that;

- 1st and 2nd Defendants acted as the employees or agents of the 3rd Defendant-Appellant and failed to follow the instructions given by the National Transport Commission and as a result the accident occurred, and

- As the 1st and 2nd Defendants were employed under the 3rd Defendant Appellant, 1st and 2nd Defendants as well as the 3rd Defendant-Appellant are responsible for the accident caused by their negligence. It appears that other than the vicarious liability, Learned District Judge had also considered that the 3rd Defendant-Appellant was directly negligent, may be due to the fact that he employed a person without license as his conductor.

However, it is observed when assessing the compensation to be paid, the Learned District Judge had just stated that, since the deceased was 23 years old at the time of his death, 1st and 2nd Plaintiffs-Respondents did not have any employment and there was evidence of a disabled child born to the 1st and 2nd Plaintiffs-Respondents, it is his decision that all of them had been looked after by the income earned by the deceased. Hence, the Learned District Judge had decided that the Plaintiffs-Respondents are entitled to claim the amounts as prayed in the Plea from the Defendants, jointly and severally.

It appears that the Learned District Judge had failed to consider that the 1st Plaintiff-Respondent was a conductor of CTB at the time of the accident and the fact that a considerable amount from the income of the deceased should have been spent on his own expenses, such as meals, travelling, clothing and medical expenses by the deceased. Further, being an unmarried person of 23 years of age, naturally he could have saved some money for his future. On behalf of the Plaintiffs-Respondents, it is argued that the deceased being a security officer could have gained promotions if he lived. However, if he lived without facing the accident, being a person of 23 years of age, he could have got married and made a family of his own and might not have been able to maintain the parents and said mentally retarded brother in the same manner as stated in evidence of the 1st Plaintiff-Respondent. As per the evidence given by the 1st Plaintiff-Respondent in the District Court, he retired from service as a conductor only in 2009, which is two years after the accident and had been given Rs.500,000/-, from the Employment Provident Fund, which indicates that the deceased could not have been the sole breadwinner of the family. As stated above, the Learned District Judge had not considered these factors in deciding the pecuniary loss caused by the death of the deceased and accordingly in calculation of the compensation given as a relief.

It is also observed that even though the 2nd Plaintiff-Respondent had not given evidence relating to the pecuniary loss caused to her due to the death of her son and no documentary evidence was placed before the Learned District Judge to prove that the 3rd Plaintiff-Respondent was a brother

of the deceased and he is mentally retarded, the 1st Plaintiff-Respondent's evidence relating to the fact that the deceased looked after the family including the said brother had not been challenged through cross examination. Thus, the fact that the deceased spent money for 1st, 2nd and 3rd Plaintiffs-Respondents from his income is a fact that had not been challenged and hence, it was not incorrect to decide that there was a pecuniary loss to them owing to the death of the deceased. However, there was no clear evidence as to the amount that the deceased spent on each of them.

Being aggrieved by the said Judgment of the District Court dated 15.12.2014, the 3rd Defendant-Appellant appealed to the Civil Appellate High Court of Southern Province at Galle. The Learned High Court Judges delivered the Judgment on 21.11.2016 dismissing the said appeal and affirmed the said District Court Judgment in favour of the Plaintiffs-Respondents. Even the Learned High Court Judges confirmed the damages granted by the District Court. The Learned High Court Judges also stated that the Learned District Court Judge's basis of the calculation of compensation is correct. However, I have already pointed out that certain facts which could have been considered by the Learned District Judge in calculating the damages due to the Plaintiffs-Respondents were not considered by the Learned District Judge.

Being aggrieved by the above Civil Appellate High Court Judgment, the 3rd Defendant-Appellant appealed to this Court. When the leave to appeal application was supported, this Court granted leave on 26.10.2018 only on the following question of law set out in paragraph 19 (o) of the Petition dated 30.12.2016:

(o) Without prejudice to the aforesaid grounds, did the Learned Judges of the Civil Appeals High Court misdirect themselves when they did not consider that the damages awarded by the Learned District Judge was excessive?

Even though there is a rider, namely 'without prejudiced to the aforesaid grounds' inadvertently included in the aforesaid question of law when it was taken from the Petition, Parties in their written submissions do not dispute that leave was granted only on the basis whether the damages awarded by the Learned High Court Judges was excessive- vide paragraph 15 and 23 of the 3rd Defendant-Appellant's written submissions dated 12.01.2021 and paragraph 1 of the written submissions of the 1st and 2nd Plaintiffs-Respondents dated 07.01.2021.

As per the evidence and P4, the deceased's monthly income was around Rs.10000/-, per month. The deceased being the person who has to go to his work place for work, he would have naturally spent for his travelling, clothing and meals from the above salary. Other than that, he may have had to spend, if and when a need has arisen for his medicine etc. Being person of 23 years of age, he could have saved some money for his future needs. Thus, it is not incorrect to think that he had at least used Rs. 5500/- from the above income for his monthly needs. There is a balance of Rs.4500/-. As no evidence was led to establish the amount he spent for each Plaintiff-Respondent separately, it is not unreasonable to assume that he spent the said amount equally for the needs of all three Plaintiffs-Respondents, thus spending Rs. 1500/- for each of them. Perhaps, if he lived, he might have got promotions and salary increments, but at the same time if he lived, he could have got married and made his own family. There is no evidence as to the amount he might have earned through such promotion or increments. Even if he earned such extra amount, it may be used for his own family as he might have married, if he lived. Thus, such arguments raised by the Plaintiffs-Respondents cannot be considered in calculating pecuniary loss to the Plaintiffs-Respondents. On the other hand, when calculating pecuniary loss to each Plaintiff-Respondent, their life expectancy also has to be considered. The age of the 1st Plaintiff-Respondent and the age of the 2nd Plaintiff-Respondent found in the birth certificate of the deceased and the marriage certificate of them (P2 and P3) appears to be contradictory. In one of them, the 1st Plaintiff-Respondent is younger than the 2nd Plaintiff-Respondent while in the other it is the vice versa of it. As per the dates of birth of the 1st Plaintiff-Respondent and the 2nd Plaintiff-Respondent mentioned in the birth certificate of the deceased, the 1st Plaintiff-Respondent was born in 1949 and the 2nd Plaintiff-Respondent was born in 1946 (It appears their own birth certificates have not been marked in evidence). Thus, the age of the 1st Plaintiff-Respondent as at the time of the death of the deceased was about 58 years and the age of the 2nd Plaintiff-Respondent was about 61 years. If it is considered that, in general, life expectancy in this country is 70 years, the pecuniary loss due to the death of the deceased for the 1st Plaintiff-Respondent would last for 12 years and for the 2nd Plaintiff-Respondent would last for 9 years. As per the evidence, the mentally retarded brother's (3rd Plaintiff-Respondent) age at the time of the death of the deceased was about 17 years and if it is considered that the deceased, if lived, could have looked after the said brother till the deceased normally retires from service at the age of 60, the pecuniary loss to the brother would last for about 37 years.

Thus, the pecuniary loss that could have been calculated for each Plaintiff-Respondent has to be as follows;

For the 1st Plaintiff-Respondent Rs. 1500 per month X 12 X 12 = Rs. 216,000/-

For the 2nd Plaintiff-Respondent Rs.1500 per month X 12 X 9 = Rs. 162,000/-

For the 3rd Plaintiff-Respondent Rs 1500 per month X 12 X 37 = Rs. 666,000/-

The above pecuniary loss to the Plaintiffs-Respondents totals up to Rs. 1,044,000/-. However, the amount given as damages through the judgments of courts below amounts to Rs.3,500,000/-.

The above clearly establish that the courts below failed to consider relevant facts in calculating the damages and thus erred in their decision in that regard. Thus, the question of law allowed by this Court is answered in the affirmative.

For the forgoing reason, this appeal is partly allowed, and it is directed that the Judgment of the Civil Appellate High Court dated 21.11.2016 and the Judgment of the District Court of Balapitiya dated 15.12.2014 should stand amended in accordance with the above decision of this Court.

Appeal is partly allowed. No costs.

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Judge of the Supreme Court

Hon. Kumudini Wickremasinghe, J

I agree.

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Judge of the Supreme Court

Hon. Janak De Silva, J

I agree.

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Judge of the Supreme Court