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

In the matter of an Appeal under and in terms of the Provisions of Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006, read inter alia with the provisions of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka from the Judgement of the High Court of the Western Province (holden at Colombo, exercising civil Jurisdiction)

SC APPEAL NO. 143/2018

SC NO. SC HC CA LA. 46/2018

HCCA NO. WP / HCCA/ COL / 08/2014/F

DC COLOMBO CASE NO. DMR 753/2008

1. Wadutantirage Verjiniya Shirani Fernando
2. Gihan Jenius Moses
3. Sheyani Verjiniya Moses
4. Enila Jekila Moses (2nd, 3rd and 4th Plaintiffs appearing by their next friend the 1st Plaintiff)

   All of No. 12A Banglawatta Terrace, Banglawatta Mabola, Wattala

Plaintiffs

Vs.

1. Manager,
   Shanak International (Pvt) Ltd,
   No. 38, 2nd Lane,
   Rawathawatta,
   Moratuwa
2. L.W.D Udaya Athula
   No. 195/2 Gonawala,
   Kelaniya

Defendants

AND BETWEEN

L.W.D Udaya Athula
No. 195/2 Gonawala,
Kelaniya

2nd Defendant- Appellant

Vs.

1. Wadutantirage Verjiniya Shirani Fernando
2. Gihan Jenius Moses
3. Sheyani Verjiniya Moses
4. Enila Jekila Moses (2nd, 3rd and 4th Plaintiffs appearing by their next friend the 1st Plaintiff)

All of No. 12A Banglawatta
Terrace, Banglawatta
Mabola, Wattala

Plaintiffs-Respondents

Manager,
Shanak International (Pvt) Ltd,
No. 38, 2nd Lane,
Rawathawatta,Moratuwa

1st Defendant- Respondent

AND NOW BETWEEN

L.W.D Udaya Athula
No. 195/2 Gonawala,
Kelaniya

2nd Defendant-Appellant-Appellant

Vs.

1. Wadutantirage Verjiniya Shirani Fernando
2. Gihan Jenius Moses
3. Sheyani Verjiniya Moses
4. Enila Jekila Moses (2nd, 3rd and 4th Plaintiffs appearing by their next friend the 1st Plaintiff)

All of No. 12A Banglawatta
Terrace, Banglawatta
Mabola, Wattala

Plaintiffs-
Respondents-Respondents

Manager,
Shanak International (Pvt) Ltd,
No. 38, 2nd Lane,
Rawathawatta,Moratuwa

1st Defendant-Respondent-Respondent

BEFORE: **HON. P. PADMAN SURASENA, J.**
HON. E.A.G.R. AMARASEKARA, J.
HON. K.KUMUDINI WICKREMASINGHE, J.

COUNSEL: Erusha Kalidasa with Renuka Kumarasinghe Instructed by Anusha Wickramasinghe for the 2nd Defendant-Appellant-Appellant.

Dr. Sunil F.A. Cooray with Ms. Sudarshani Cooray for the Plaintiffs- Respondents-Respondents

WRITTEN SUBMISSIONS: By 2nd Defendant-Appellant-Appellant on 24.05.2019.

By the Plaintiffs-Respondents-Respondents on 19.09.2019.

ARGUED ON: 13.01.2023

DECIDED ON: 25.03.2025

K.KUMUDINI WICKREMASINGHE, J.

The Plaintiffs- Respondents-Respondents (hereinafter referred to as the Respondents) initiated this action in the District Court of Colombo seeking to recover a sum of Rupees 20 million as damages on the basis that the negligence of the 2nd Defendant-Appellant-Appellant (hereinafter referred to as the Appellant) had caused the death of the Respondent's husband/father. The Appellant in his answer whilst denying the allegation leveled against him, pleaded that the contributory negligence of the deceased had caused the accident, a result of which caused the death of the deceased.

The Learned District Judge of Colombo, considering all the evidence led in trial, delivered his judgement on 06.02.2014 granting the Respondents a sum of Rupees 7,680,000/- on damages and/or compensation to be paid by the Appellant. The Learned District Court Judge, in his impugned judgement held inter alia, since the Appellant had pleaded guilty in the Magistrate Court for a charge under section 298 of the Penal Code, the Appellant is guilty for negligence. Furthermore, the Learned District Court Judge held that even if there is contributory negligence on the part of the deceased it cannot be considered, as the negligence on part of the Appellant has been proved in this case.

Being aggrieved by the Judgement of the District Court of Colombo, the Appellant preferred an appeal to the High Court of the Western Province (Exercising Civil Appellate Jurisdiction) holden in Colombo. The Learned

High Court Judges following the oral and written submissions of both parties, delivered their judgement on 11.01.2018 dismissing the Appellants appeal.

Aggrieved by which the Judgement of the High Court of the Western Province (Exercising Civil Appellate Jurisdiction) holden in Colombo, the Appellant appealed to the Supreme Court. On 27.09.2018 the Supreme Court granted leave to appeal on the following question of law, "**Did the High Court err in law by not considering the contributory negligence of the deceased in calculating the quantum of compensation.**"

In the written submissions of the Appellant, the Appellant contends by referring to the document marked වි**4** at page 233 of the brief, that the Learned Magistrate in the connected case has recorded that the deceased had crossed the road where there is a barricade/fence dividing the road according to the Police, reproduced as follows: "මමෙ මරණකරු මාර්ගයන්ේ වැටක් ගසා ඇති නැනකින් මාර්ගය හරහා ගමන් කර ඇති බව පොලිසිය දක්වයි." The Photographs marked **V-1, V-2, V-7, V-8** and **V-9** at pages 187-193 of the brief, clearly demonstrate that the place where the deceased crossed from was divided by a fence.

The Appellant further stated that, that it is logical that an accident can occur as a result of the negligence of one party but the other party can too contribute to the cause of the accident for his negligence. The Appellant stated that the Learned Judges of the High Court of Colombo had also appreciated that the deceased had crossed the road where there was no pedestrian crossing.

In the written submissions of the Respondents, the Respondents contend that contributory negligence is not a defense when the dependents sue for damages in a fatal accident case. The Respondents relied on **R G McKerron in *Law of Delict*, 7th Edition at page 149** "*It follows from a peculiar nature of the action that any defense which strikes only at the deceased's personal right to sue, and not at the existence of the duty, cannot be set up against the dependants. Thus, the dependants can recover in full despite the fact that contributory negligence of the deceased would have been a bar at common law to any claim by the deceased himself, had he merely been injured and not killed. So an agreement by the deceased to accept all risk of injury cannot be set up as a defense to an action by his dependents*".

The Respondents submit that the cause of the accident was due to the negligent driving of the Appellant. The Appellant during cross examination admitted that he was driving at a speed of 50 to 55 kilometers per hour at the time of the accident.

Now I will proceed to answer the question of law on which leave was granted, namely that "Did the High Court err in law by not considering the contributory negligence of the deceased in calculating the quantum of compensation."

Before addressing the aspect of contributory negligence, I will first delve into the law of negligence in Sri Lanka. "*The term Culpa or negligence is the failure, in doing an act, or in omitting to do an act, to take precaution which a reasonable man diligens paterfamilias would take if he, in the circumstances, could have foreseen that injury would directly cause to*

another person or his property if those precaution were not taken" ***S A Railways V Saunders*** **[1931] AD 271.** In order to bring a successful claim in negligence, four elements must be established: (i) the existence of a duty of care, (ii) breach of that duty, (iii) legal causation and (iv) damages.

Lord Atkin in the famous English case of ***Donoghue v Stevenson*** **[1932] AC 562 HL** held "*The breach of road rules can constitute negligence. The question of negligence must be considered on the basis of all evidence. It must not be made to hinge upon one answer such that there was no fault on either side given in the context of the questioning on the fact that there was no police prosecution*".

An important principle developed by Lord Atkin in the above case was when the duty of care might arise known as the "neighbour principle". The principle holds that one must exercise reasonable care to avoid actions or inactions that could foreseeably harm another person. Lord Atkin defined a "neighbour" as someone so closely and directly impacted by the act that they should be considered when contemplating the potential effects of one's actions or omissions.

The traditional approach to determining wrongfulness originates from the decision in ***Minister van Polisie v Ewels*** **[1975] 3 SA 590 (A)** at 596–597. This case established that conduct is deemed wrongful if the harm suffered was caused in a legally reprehensible or unreasonable manner, *contra bonos mores* (against good morals), considering all relevant circumstances. In Roman-Dutch law, this principle is known as the "Boni Mores Test," where *boni mores*, meaning "good morals," serves

as a legal standard to evaluate the wrongfulness of a defendant's conduct based on society's sense of justice, morality, and reasonableness. This approach was further discussed in ***Carmichele v Minister of Safety and Security*** **[2001] CCT 48/00 ZACC 22.**

The English case of ***Caparo Industries plc v Dickman*** **[1990] AC 605** enunciated the three fold test, a case dealing with pure economic loss caused by alleged negligent misstatements. In this case, the court held that the three elements that must be established in respect of a duty of care are foreseeability of harm; proximity and whether it is fair, just and reasonable to impose a duty of care.

The second element of the tort of negligence is the defendant's improper act or omission, commonly referred to as a breach of duty. This element presupposes the existence of a standard of proper behavior aimed at avoiding undue risks of harm to others and their property, which ties back to the duty of care. As articulated by Baron Edward Hall in ***Blyth v. Proprietors of the Birmingham Waterworks Co.*** **[1856] 11 Ex Ch 781**, the law of negligence evaluates what type and level of care is reasonable under specific circumstances. It relies on the standard of "*a reasonably prudent person*" and considers how such a person would act in a given situation to pursue their objectives while avoiding harm to others. This case established the reasonable person test.

The next element is causation. To establish causation, it is not enough for the plaintiff to demonstrate that the defendant's conduct caused the harm. The plaintiff must also show a direct link between their damage and the defendant's negligence, the specific aspect of the conduct that breached the duty owed to the plaintiff. The fundamental standard for

causation is the "*but-for*" test, which requires that the defendant's negligence be a *sine qua non* of the harm, a necessary condition without which the harm would not have occurred. In other words, the defendant's negligence is considered a cause of the plaintiff's harm if the harm would not have happened but for the defendant's negligence, as established in ***Cork v. Kirby MacLean Ltd*** **[1952] 2 All ER 402.**

The final element is that a damage must be caused to the Plaintiff as a result of the negligence of the Defendant. As established in the case of ***The Wagon Mound no 1*** **[1961] AC 388** within the principles of remoteness of damage, damage will only be compensable where that damage could have been reasonably foreseen by the reasonable man.

Applying the standards of negligence set out above to the facts of this case. The Appellant was driving his vehicle on Baseline Road when the vehicle he was driving hit the husband/father of the Respondents, a result of which caused his death. It is a trite law established by a plethora of cases that motorists owe a duty of care to all road users, especially pedestrians and children as discussed in the case of **C*han v Peters* [2021] EWHC 2004 QB**. As such the Appellant owed a duty of care to the deceased. In terms of the breach of such duty of care, in applying the reasonable man test did the conduct of the Appellant fall short of that exercised by a reasonably prudent man. The Learned District Court Judge in determining the Appellants negligence held that as the Appellant had pleaded guilty for the charge under **section 298 of the penal code**, the Appellant's negligence has been proven. The Learned High Court Judges held that the place at which the accident occurred was at a roundabout on Baseline Road Colombo, where people

usually go across the road, or at least a reasonable prudent man would expect that a person would go across the road and not drive at excessive speed.

Upon perusal of the record of the cross examination of the Appellant in the District court, when questioned on what speed the Appellant was traveling at the time of the accident, the Appellant answered he was traveling at a speed of 40 kilometers per hour *(at page 154 of the brief).* However, as per the document marked **P12** which is the Police statement taken from the Appellant, a few hours after the accident, the Appellant stated that he was traveling at a speed of 50 to 55 kilometers per hour (*at page 155 of the brief*). The Appellant during cross examination concedes to the fact that he could have been traveling at the speed of 50 to 55 kilometers. In **P12**, the Appellant had further stated that one of the front tires of the vehicle had burst, owing to which he lost control of the vehicle, leading to the accident. However, as per the evidence of the Government Analyst *at page 110 of the brief*, the tyre had burst after the accident had occurred and not before. Further, during the cross examination of the Appellant,the Appellant admitted that the vehicle did not come to a halt after hitting the deceased but continued on and hit the pavement, which led to the tyre to burst (*at pages 161-162 of the brief*). Therefore, when all these factors are considered in total it is obvious that the Appellant was in fact traveling at an excessive speed and a breach of duty of care has occurred.

The next element is causation, which is the but-for test, in considering the facts above, if not for the negligent driving and excessive speed of the Appellant, the accident would not have occurred. There is a direct nexus

between the act of negligence and the death of the victim. The final element is to establish negligence is damages which is also satisfied as the deceased has lost his life.

The court can infer that the Appellant was indeed traveling at an excessive speed based on the combination of all these factors together. It was this combination of evidence that led the Learned District Court Judge and the Learned High Court Judges to conclude that the Appellant was driving negligently at an excessive speed, not solely because he entered a guilty plea in the Magistrate's Court in the related case. Therefore, I am of the opinion that the Appellant's negligence has been established in this case due to all these factors.

Now I will consider the aspect of contributory negligence. Contributory negligence is defined by ***U.L. Abdul Majeed in A Modern Treatise on the Law of Delict (Tort)*** as an act or inaction on the part of an injured party that combines with the negligence of another in causing the injury, sometimes as to diminish or bar the recovery of damages for the injury. It is the contention of the Appellant that the deceased attempted to cross the road where there is no pedestrian crossing, where there is a fence separating the line of the road. As such the Appellant contends that the accident occurred due to the negligence or contributory negligence of the deceased.

In ***Union Government (Minister of Railways) v Lee*** **[1927] AD 202,** it was established that a widow or minor children could claim damages for the wrongful death of a person allegedly caused by the defendant's negligence, even if the death resulted from the combined negligence of

the defendant and the deceased. Under Roman-Dutch law unlike Roman law, which adheres to the Lex Aquilia principle the widow does not simply "stand in the shoes" of her husband; rather, she and the children each possess an independent right of action. Thus, the husband's negligence does not prevent them from suing the responsible party for loss of income due to his wrongful death. This principle was upheld in the case of ***Jameson's Minors v C.S.A.R.*** **[1908] TS 575** These principles entailed that there are no grounds on which the negligence of the husband can be imputed to his widow, thus forfeiting her claim for damages.

In the English case of ***Davies v Mann*** **[1842] 152 ER 588** developed the last opportunity rule. This rule places responsibility on the party who had the final opportunity to prevent the accident or injury. It frames contributory negligence in terms of causation. The central issue is whether a causal connection can be established between the injured party's behavior and the occurrence of the accident. If the immediate cause of the accident is attributed to the injured party's actions often described as the injured party's fault having 'directly contributed' to the injury then there is no basis for a damages claim. The crucial question, therefore, is which party had the last and, consequently, the better chance to prevent the harm; that party should then assume responsibility for the resulting damage.

In the case of ***Tuff v. Warman*** **[1858] 5 C.B. (N.S.) 572**, Justice Wightman held that the question to consider when determining a case concerning contributory negligence should be: '*whether the damage was occasioned entirely by the negligence or improper conduct of the*

defendant, or whether the plaintiff himself so far contributed to the misfortune,but for his own negligence or want of ordinary and common care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'

It is quite clearly established as a principle of Roman Dutch Law that the family of the deceased can still bring an action regardless of contributory negligence on the part of the deceased, if the negligence has caused the death of the deceased. It is an undisputed fact that the deceased had attempted to cross the road at a point where there is no pedestrian crossing. However, the place at which the accident occurred is a roundabout on Baseline Road which is associated with people crossing the road as correctly decided by the Learned High Court Judges. In order to be a reasonably prudent driver on Sri Lankan roads, one must recognise that pedestrians, animals, and various obstacles may suddenly appear on the roadway. Therefore, one should drive with an awareness of these possibilities, allowing for a quick response to avoid potential accidents. The Appellant has admitted that it was a Sunday afternoon on which the accident occurred without many vehicles on the road and as such it is likely he did not anticipate any pedestrians to cross the road. The Appellant has also admitted that it is possible he was driving at a

speed of 50 to 55 kilometres per hour when the accident occurred. However, as unfortunate as it is, one cannot concede the fact that it is due to the excessive speed at which the Appellant was traveling which led to the accident and he could not avoid hitting the deceased. As such his negligence is the operative cause of this accident that led to the death of the deceased and the contributory negligence of the deceased if at all, at this juncture is irrelevant.

Addressing the aspect of the quantum of the damages awarded by the Learned District Court Judge. The Respondents had prayed for a sum of Rupees 20 million in damages in their plaint of the District Court. The Learned District Court Judge in his judgement had awarded a sum of Rupees 7,680,000 with legal interest. The Learned District Court Judge had awarded this amount on the calculation that the deceased was 44 years at the time of his death with a monthly income of Rupees 40.000 and an annual income of Rupees 480,000. The Learned District Court Judge held that an average person would work until the retirement age of 60 years as such Rupees 480,000 x 16 years which amounts to Rupees 7,680,000 was awarded to the Respondents. It is settled law that, an Aquilian action under Roman Dutch Law, permits granting only of damages for pecuniary loss and not for loss of love and affection, this position was discussed in detail in the case of ***Prof Priyani Soyza v Reinzie Arsecularatne*** **[2001] 2 Sri LR 295** where it was held that "*Requisites of an action under the Lex Aquilia, have been expressed by different text writers in different ways; but substantially they are the same. Wickramanayake, gives the requisites as*

(i) the plaintiff must show actual pecuniary loss. An exception is the award of compensation for physical pain suffered by a person injured through the negligence of another,
(ii) He must show that the loss was due to the unlawful act of the defendant or that the defendant was acting in excess of his rights,
(iii) He must show dolus or culpa on the part of the defendant (The Law of Delict in Ceylon 1949)".

In the case of ***Sirisena v Ramachandran And Another*** **[2003] 3 Sri LR 344** it was held that in order to be recover damages in a claim of negligence, "*The plaintiff must show that she has suffered patrimonial loss through being deprived of benefits whether in the form of maintenance of services, rendered by the deceased under a legal duty to do so .... the dependents are entitled to compensation only for the actual pecuniary loss which they have suffered by reason of the death. In the ordinary way, when the head of a household is killed, his wife and children are dependent on him to the extent of his earnings or other income, less a deduction for money spent on the maintenance of the husband and his other personal needs*" (at page 346). In ***Geldenhuys v Transvaal Hindu Educational Council*** **[1938] W.L.D. 260** it was discussed that in the event the widow has lost the pecuniary benefits which would have been hers through her husband if he was alive, having regard to the normal expectation of life, such widow will be entitled to claim compensation on account of her being deprived of the support which she was entitled to receive from her husband.

Based on the above principles of law, applying the same to the facts of the instant case, the Learned District Court Judge has granted the

damages on a calculation based on the deceased's monthly wages which is a reasonable basis for the calculation of pecuniary loss. Therefore I see no reason to interfere with the amount of damages awarded by the Learned District Court Judge.

Therefore, considering all of the above factors in this appeal of the Appellant, I am of the view that the Learned District Court Judge and the Learned High Court Judges had arrived at the correct conclusion when considering the negligence on part of the Appellant.

Accordingly, I answer the question of law on which leave to appeal has been granted in the negative. For these reasons, the Judgment of the High Court of the Western Province (Exercising Civil Appellate Jurisdiction) holden in Colombo and the Judgement of the District Court are affirmed.

The appeal of Appellant is hereby dismissed.

I make no order for costs.

Judge of the Supreme Court

E.A.G.R. AMARASEKARA J,

I had the privilege of reading the judgement written by Her Ladyship Justice Kumudini Wickramasinghe in its draft form.

I prefer to express my views as follows;

As per the journal entry dated 27.09.2018, it is not clear whether the question of law allowed is the one in paragraph 20 (c) or 20 (e) of the Petition dated 20.02.2018. Anyway, the main defence taken up in the Answer as well as what has been addressed in written submission is based on contributory negligence and its relevance to the computation of compensation which indicates that the main contention between the parties, is the question of law mentioned in paragraph 20(E) of the said Petition.

However first I prefer to refer to question of law 20(C) in the Petition, which is mentioned below;

"20(C*). Did the High Court err by its conclusion that the Petitioner drove vehicle at an excessive speed?"*

First of all, it must be noted that the above question of law 20(C) does not challenge the conclusion reached by the Learned District Judge as perverse. The Learned District Judge considering the fact that the 2nd Defendant Appellant pleaded guilty to the charge under Section 298 of the Penal Code before the Magistrate, where a charge has to be proved beyond reasonable doubt which needs a higher standard of proof than before a civil court, and the facts revealed by the Government analyst report and evidence, came to the conclusion that the 2nd Defendant Appellant had driven the vehicle at an excessive speed. I do not see that the said conclusion can be considered as perverse.

In addition to the above facts, the Learned High Court judge has considered what the 2nd Defendant had stated to the Police at a time close to the accident, in coming to the conclusion that the 2nd Defendant was driving at an excessive speed and negligently.

In ***Nadarajah v CTB (1979) 2 NLR 48*** it was held that a plea of guilt tendered by the driver in the Magistrate Court is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit. In ***Mahipala and Others V Martin Singho (2006) 2 Sri L R 272***, it was held that the Defendant's unqualified plea of guilt is most relevant and admissible as evidence of negligence on his part and the plea of guilt in a criminal court is admissible in civil proceedings. Further it was held that when the 1st Defendant pleaded guilty to the charges of recklessness and negligent driving under Motor Traffic Act, it has legal proof in the legal sense.

Hence, even if it is the question of law in paragraph 20(C) which was allowed by this Court, it has to be answered in the negative since there was facts that supports the conclusions of the courts below which came to the conclusion that the 2nd Defendant drove in an excessive speed and was Negligent. As such this court cannot hold that those decisions were perverse.

Now I prefer to consider the question of law mentioned in paragraph 20(E) which has been considered by my sister Judge in her draft judgement and answered in the negative. I too agree that the question of law has to be answered in the negative. The said question of law reads as follows;

"20 E. *Did the High Court err in law by not considering the contributory negligence of the deceased in calculating the quantum of compensation?"*

First it is necessary to refer to Section 3 of Contributory Negligence and Joint Wrongdoers Act No. 12 of 1968. Aforesaid section provides for the apportionment of damages between the parties who are involved in the

contributory negligence and the given section does not apply to a dependent of a party that contributes to the negligence, who file a case on a cause of action that has caused pecuniary loss to the said dependent. Thus, when a dependent of a party to contributory negligence filed a case as a Plaintiff and one has to look at our common law, Roman-Dutch Law, to see whether compensation has to be apportioned or reduced in accordance with the contribution for the negligence caused made by the negligent party to whom the dependent is related.

It must be noted, when the dependents filed an action against a party to the contributory negligence, they filed it based on a cause of action accrued to them due to the pecuniary loss caused to them by said negligence. It must be differentiated from a situation where the dependents are substituted as plaintiffs to a party deceased who was the plaintiff originally. On said occasions, they step into the shoes of the original plaintiff who is a party to the contributory negligence. The case at hand is not a case where the plaintiffs have been substituted for the original plaintiffs who was a party to contributory negligence. In contrast, the present case at hand has been filed by the dependents of a person, who is deceased due to an accident caused by the negligence of the Defendant, for the pecuniary loss caused to them. The deceased might have been a party to the contributory negligence but the dependents are not making claims for a cause of action accrued to the deceased but directly to them.

Union Government v Lee (1927) A.D. 202, which is referred to by her Ladyship Justice Wickremesinghe in her draft judgment which also has been referred to by R.G. Mckerron in his book titled Law of Delict Platinum Edition at page 323 and 324, is a case where it was held that

the negligence of the deceased, although it would have been an answer to any claim for damages by him, if he had been injured but not killed, was not a bar to a claim by his widow;

In the same book at page 66 and 67 with regard to negligence of a third person, Mckerron states as follows:

"*As a general rule it is no defence for the defendant to plead that the negligence of a third party contributed to the damage. To this rule there is only one real exception, namely, where the negligence of the third person is imputable to the plaintiff. Where this is the case, the position is the same as if the plaintiff had been guilty of negligence. The negligence of one person is imputable to another only in those exceptional cases in which the law holds one person responsible for the wrongful acts of another. Thus, since one spouse is not responsible for the delicts of the other unless the other was acting as his or her agent or servant. The negligence of the plaintiff's spouse is not ordinarily imputable to the plaintiff. Similarly, since dependents do not derive their rights through the deceased's estate, the negligence of the deceased cannot be imputed to them. Of the exceptional cases referred to, by far, the most important is the liability of a master for the wrongs of his servant. The contributory negligence of a servant acting in the course of his employment can always be set up, both at common law and under the Apportionment of Damages Act, to a claim by his employer.*"

In same book at page 149 it is stated as follows:

"*It follows from the peculiar nature of the action that any defence which strikes only at the deceased's personal right to sue, and not at the existence of the duty, cannot be set up against the dependents. Thus, the*

dependents can recover in full despite the fact that the contributory negligence of the deceased would have been a bar at common law to any claim by the deceased himself, had he been merely injured and not killed. So, an agreement by, the deceased to accept all risk of injury cannot be set up as a defence to an action by his dependents. …….."

Then it is clear as per the Roman-Dutch Law, our Common Law, contributory negligence of the deceased cannot be used to defeat or reduce a claim made by the dependents of the deceased based on a cause of action accrued to the dependents, themselves. This may not be so, if they have been substituted to the claim of a deceased plaintiff, or they claim their compensation as part of one that should be accrued to the deceased estate or the dependents are vicariously liable for the alleged acts of the deceased. The present case at hand is one filed on a cause of action accrued to the dependents which caused pecuniary loss to them due to death of the deceased for which the Negligence of the Defendant contributed.

In ***Master Divers (Pvt.) Ltd. Vs Anusha Karunaratne and Others (2010) 1Sri L R 403 at 419***, Abdul Salam J held "*Finally it must be observed that unlike in English Law, the Roman Dutch Law looks at the Aquilian Action extended to the dependents of the deceased as an independent, non-derivative remedy, unfettered by defences vitiating the deceased's personal right to sue, including the contributory negligence- vide* ***Union Government Vs Lee****."*

As such, as per the Common Law, Contributory Negligence of the deceased need not have been considered by the Courts below to refuse or reduce the compensation. Hence, the question of law 20 (E) mentioned above, has to be answered in the Negative.

This court observes that in calculating the compensation, the Learned District Court Judge had considered Rs. 40,000 /= as the monthly income of the deceased and there is a loss of Rs. 40,000 /= per month to the Plaintiffs who are the Dependents. However, the deceased could have used a considerable amount from that Rs. 40,000 /= for his day-to-day expenses such as travelling to work, clothes, medical expenses and meals. In my view, he should have used at least 1/3rd of that amount for his expenses. However, there is no question of law raised or allowed regarding that aspect. It is not proper to reduce the compensation on a point not raised or argued by the parties.

Since I answer the questions of law relied upon by the parties in the Negative, I dismiss the appeal. No costs.

Judge of the Supreme Court

P. PADMAN SURASENA J.

I agree with the judgement of Hon. Justice E.A.G.R. Amarasekara.

Judge of the Supreme Court