

1958

*Present : Pulle, J., and Sansoni, J.*P. MEINONA *et al.*, Appellants, and P. UPARIS, Respondent*S. C. 246—D. C. Tangalla, 6,525*

*Prescription—Negligence—Death caused thereby—Right of the dependants of the deceased to claim compensation—Period of limitation—Prescription Ordinance (Cap. 55), ss. 9, 10, 14.*

An action for pecuniary loss suffered by the dependent wife and children of a person killed by the negligent act of the defendant (or his servant) is barred after two years from the date of the death of the deceased. In such a case, section 9, and not section 10, of the Prescription Ordinance is applicable.

**A**PPPEAL from a judgment of the District Court, Tangalla.

*Sir Lalita Rajapakse, Q.C.*, with *C. V. Ranawake*, for the plaintiffs-appellants.

*N. E. Weerasooria, Q.C.*, with *W. D. Gunasekera*, for the defendant-respondent.

*Cur. adv. vult.*<sup>1</sup> (1952) 54 N. L. R. 121.<sup>2</sup> (1957) 58 N. L. R. 313.

October 17, 1958. PULLE, J.—

The appellants in this action are the widow and three children of one N. L. Brampy Appuhamy who was knocked down and killed on 18th June, 1953, by a station wagon belonging to the defendant and driven negligently by his servant. They instituted the action from which this appeal arises on 5th October, 1955, claiming a sum of Rs. 10,000 as compensation for the loss sustained by them as dependants of Brampy Appuhamy who at the time of his death was their sole means of support. On all the issues save one the learned trial Judge found in favour of the plaintiffs but having held that the action had not been commenced, in terms of section 9 of the Prescription Ordinance, within two years from the death of Brampy Appuhamy he was constrained to dismiss it with costs. The question for decision is whether the period of limitation is the one fixed by section 9 or, as argued on behalf of the appellants, by section 10. The minority of the 4th plaintiff did not make any difference because, if the action fell within section 9, he could not take advantage of the relief provided by section 14.

A considerable portion of time was devoted by learned counsel for the appellants to an examination of the Fatal Accidents Acts (9 and 10 Vict. C 93 and 27 and 28 Vict. C 95) and some decisions thereon to emphasize that the cause of action which accrues to the wife and children of a person killed by the negligent act of a defendant is distinct and separate from the cause of action which gave to that person, before his death, a right to sue for damages for the tortious act. The distinction is so clear that it is not necessary to elaborate the reasons for making it. *Salmond* on the *Law of Torts* (1953 ed. p. 396) says,

“ Nevertheless the cause of action conferred upon the relatives of the deceased by the Act is a new cause of action, and not merely a continuance of that which was formerly vested in the deceased himself. It is ‘ new in its species, new in its quality, new in its principle, in every way new ’ ”<sup>1</sup>

In regard to a claim on account of patrimonial loss *Morice* on *English and Roman-Dutch Law* states (2nd ed. p. 238);

“ But while the heirs had no action for damages, an action for compensation accrued to the wife, children and other relations of the deceased who had been supported by his labour. The action was for damages to the living relatives, not to the deceased’s estate. (Voet, 9, 211; Grotius’ *Introd.*, 3, 33, 2; VanLeeuwen, *Comm.* 4, 34, 16; Vander Linden *Inst.* 1, 13, 2). The Roman-Dutch law as regards damages for death thus closely resembles the English law as changed by Lord Campbell’s Act. ”

Following upon this distinction it was submitted that the period of limitation should not be the same as in the case of a person who files an action to recover damages for bodily injury suffered by him as a result

<sup>1</sup> (1884) *App. Cases* 59 at 70.

"of an act of negligence. It is conceded that that would be an action in tort to which section 9 of the Prescription Ordinance would apply. It is urged that while in the present case the commission of the tort is the first in the historical sequence of facts constituting the cause of action, the action itself is not one in tort and, therefore, it would not attract the provisions of section 9. I do not think that the point which falls to be determined on this appeal is solved by answering the question whether the action is one in tort or not. The answer must be found on a consideration of the language of section 9 which reads,

"No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen."

In *Dodwell & Co., v. John*<sup>1</sup> Shaw, J., expressed the opinion that,

"the section is intended to apply to actions in respect of torts generally, and includes an action for wrongful conversion, as has been already decided in this Court in the case of *Williams v. Baker*<sup>2</sup>, the cause of action in such a case being for the loss and damage sustained by the plaintiff in consequence of the wrongful act of the defendant."

Pereira, J., did not take the view that an action for wrongful conversion was covered by section 9. He said,

"I cannot help thinking that what is contemplated here is an action for, or rather in respect of, some physical injury or damage caused, or for loss accruing from such cause, and that is, perhaps, the reason why the section is excluded from the operation of section 15." (new section 14).

The Privy Council in the same case<sup>3</sup> disagreed with the view that an action for wrongful conversion was not prescribed in two years. The judgment states,

"Their Lordships think that the words used are to be interpreted as covering a conversion, and not as in their meaning restricted to personal loss, injury or damage, and that an action for a conversion would therefore be barred after two years from its cause."

Although the tort for which the defendant was responsible did not until the death of the deceased give to his dependants a cause of action, nevertheless the tort is the foundation of the claim of the plaintiffs and the loss suffered flowed directly from the tort, which was the causing of bodily injury to the deceased by the negligent driving of the motor vehicle. Thus applying even the restricted interpretation placed on section 9 by Pereira, J., it seems to me that the action is barred after two years from the death of the deceased.

On the question whether the compensation claimed by the plaintiffs is covered by the word "loss" or "injury" or "damage", I derive

<sup>1</sup> (1915) 18 N. L. R. 133.

<sup>2</sup> (1888) 8 S. C. C. 165.

<sup>3</sup> (1918) 20 N. L. R. 206 at 212.

some assistance from the observations of Viscount Simon, L. C. in *Crofton Hand Woven Harris Tweed Co. v. Veitch*<sup>1</sup> on the contrast between “damage” and “injury”. He says,

“ . . . . I shall try to distinguish between ‘damage’ and ‘injury’, following the stricter diction, derived from the civil law, which more especially prevails in Scottish jurisprudence. So used, ‘injury’ is limited to actionable wrong, while ‘damage’, in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not.”

On this reasoning it seems to me that the pecuniary loss suffered by the plaintiffs on the death of the deceased constitutes the “damage” within the meaning of section 9 of the Prescription Ordinance and that, therefore, the present action is out of time. The appeal fails and must be dismissed with costs.

SANSONI, J.—I agree.

*Appeal dismissed.*

