

Present : Fisher C.J. and Drieberg J.

1928.

PODISINGHO *v.* JAYATU *et al.*

197—D. C. Negombo, 2,271.

Lex Aquilia—Action by executor for obstruction to right of way—Loss of professional income to the deceased—Patrimonial loss.

Where in an action for damages for obstruction to a right of way, the executor of a deceased person included a claim for loss of professional income caused to the deceased by his having been deprived of the use of the road,—

Held, that the claim for loss of professional income could not be maintained.

THIS was an action brought by the plaintiff as legal representative of his deceased father to recover damages against the defendants for interference with a right of way to which the deceased had established a claim. The learned District Judge gave judgment for the plaintiff. The main question considered in appeal had reference to the item of damage arising from the loss of professional income caused to the deceased by the obstruction.

Zoysa, K.C. (with *Croos DaBrera*), for defendants, appellant.

H. V. Perera (with *L. A. Rajapakse*), for plaintiff, respondent.

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December 4, 1928. FISHER C.J.—

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In this case, in my opinion, the claim by the plaintiff suing as legal personal representative of his deceased father for damages due to loss of professional income is misconceived. He claims damages based on the undoubted interference by the defendants with the right of way to which the deceased man had established his claim. The only item of damage which we have to consider on this appeal is the claim based on loss to the estate by reason of the deceased man's practice as a Vedarala having suffered from the difficulty, or lesser facility, of approaching his house by reason of the obstruction by the defendants to the right of way. No doubt the obstruction was a tortious act, and direct damage to an estate resulting from a tortious act can form the basis of an action by a representative of the estate. But assuming that the evidence goes to show that this loss of practice did in fact take place, it seems to me to be impossible to say, still less to prove, that there was any necessarily consequential damage to the estate resulting from the obstruction, and I do not think it can be made the basis of a claim by the administrator for damage and loss to the estate. The law in England (as to which see *Pulling v. The Great Eastern Railway*¹) and the law in Ceylon seem to be the same on this point.

The judgment therefore will be set aside, and I agree with the order suggested by my brother Drieberg.

As regards costs the evidence clearly indicates that the defendants acted in an arbitrary manner. The learned Judge says "in spite of Court decrees they persisted in blind pigheaded opposition." I think they should pay the costs of the action. The respondent must pay the appellants' costs of the appeal.

DRIEBERG J.—

I agree that the claim for alleged loss of professional income to the deceased caused by the defendants depriving him of the use of the road to his house is not one which the executor of his will can maintain.

There is not, so far as I am aware, any local case in which this question has expressly come up for decision.

In *Weerusiri v. Sanchihamy*² the executrix of the will of a deceased person was sued for damage done to the plaintiff's buildings by the deceased excavating on his own land and wrongfully depriving the plaintiff to the right of lateral support from the land of the deceased. Lawrie and Withers JJ. decided the question on the ground that the liability of a legal representative for such a tort was to be decided by the law of England and that the action was barred as it had not been brought within six months

¹ (1882) 9 Q. B. D. 110.² (1892) 11 S. C. R. 69.

of the executrix taking on herself the administration of the estate, as provided by the Statute (3 & 4 Will. IV. c. 42, s. 2); this point has not come up since for consideration and I doubt whether it can be said that the question is governed by the English law relating to executors and administrators.

It has been held that the effect of section 27 of the Charter of 1833 was to introduce into Ceylon the law of England governing the powers and duties of executors and administrators with the addition that these powers extended to real as well as personal property (*D. C. Galle No. 28,256*¹); but whether rights of action for delicts can be transmitted or whether they cease on the death of the party injured or of the wrongdoer are not questions concerned with the powers and duties of executors and administrators of an estate, but they are questions of substantive rights and liabilities regarding persons and property which must be governed by the Common law. This aspect of the matter does not appear to have been considered in *Weerasiri v. Sanchihamy* (*supra*).

Under the Roman-Dutch law, in the case of delicts of this sort which fell under the *Lex Aquilia* the right of action does not, as in the case of the action of injury, lapse on the death of the person injured before *litis contestatio* but enures to the benefit of his heirs, and they can sue the wrongdoer to recover what is known as "patrimonial loss" (*de Villiers on Injuries*, pp. 182, 235, 236); and Maarsdorp (*Institutes of Cape Law, 1909 ed.*, p. 20) says that it must be shown that the estate has been prejudiced or suffered some appreciable pecuniary loss and this loss has to be explicitly and specifically proved.

From the notes on the case of *Engelbrecht v. van der Merwe*² in *Vol. III. of Nathan, 1906 ed.*, p. 1596, and *de Villiers on Injuries*, p. 235, it appears that what has to be proved is not loss to the deceased but loss to the estate, and the two are not necessarily the same.

It seems to me that the Roman-Dutch law is the same as the law of England after the exception created by the Statute of 4 Edw. III. c. 7 to the Common law rule of *actio personalis moritur cum persona*, under which an action for tort must be begun and the verdict obtained in the joint life-time of the injured party and the wrongdoer; if either dies before verdict, the action abates and cannot be continued or recommenced by the representatives of the deceased. Under this statute an executor or administrator could maintain an action for injury done to the personal estate of the deceased in his life-time whereby it has become less beneficial to the executor or administrator. See cases noted in *Wheatley v. Lane*.³

¹ *Vanderstraaten's Reports*, 273.

² 10 *Natal Law Reports* (n.s.), 117.

³ 1 *Saunders* 216a, at 217b (f).

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This is the same as the Roman-Dutch Law and is just what is meant by patrimonial loss.

In *Pulling v. The Great Eastern Railway*¹ the plaintiff was injured by an engine of the defendants, and after his death, which was not the result of the injury, his administrators sued for medical expenses incurred and loss of wages owing to his injuries preventing his obtaining employment until his death. It was held that the plaintiff could not recover as the case was not one of tortious impairment of the personal estate of the deceased.

In *T'wycross v. Grant*² the deceased bought shares on a fraudulent representation in a prospectus. He brought an action based on fraud and he died while the action was pending. His executor was allowed to continue the action. It was held that this was a case which fell within the statute, for the shares, for which a large sum had been paid, were practically valueless. The words of Cotton L.J. that "there is a great difference between a tort which necessarily causes damage to the personal estate and a tort which may injure the testator's estate but does not necessarily do so" apply well to the present case, for it by no means follows that the income which the deceased might have made if he had the use of the road would necessarily have formed part of his estate on his death.

The respondent has not proved the other matters in respect of which damages are claimed. As executor, however, he is entitled to a decree ordering the appellants to give over the road to him and for damages for failure to do so from the death of the Vedarala, viz., December 11, 1927. The respondent claims damages for this period at the rate of Rs. 50 per month. This is clearly excessive, being the same rate claimed for the special damage done to the Vedarala's professional practice. I think the sum of Rs. 20 per month will be sufficient and will also enable the respondent to bring this road into a serviceable condition.

The judgment of the District Court is set aside and judgment will be entered ordering the appellants to surrender this road to the respondent and to pay him damages at the rate of Rs. 20 per month from December 11, 1927, until surrender of possession.

The respondent is entitled to his costs in the District Court, but he must pay the appellants the costs of this appeal.

Decree varied.

¹ (1882) 9 Q. B. D. 110.

² (1878) 4 C. P. D. 40.