1942 *Present :* **de Kretser and Cannon JJ.**

AGIDAHAMY *v.* FONSEKA.

196—D. C. Colombo, 12,158.

Compensation—Claim for damages by mother—Death of son—Negligence of defendant.

A mother, who is maintained by her son, is entitled to claim damages for loss sustained by the death of the son through the negligence of another.

APPEAL from a judgment of the District Judge of Colombo.

J. E. M. Obeyesekere, for defendant, appellant.

R. C. Fonseka, for plaintiffs, respondents.

Cur. adv. vult.

June 23, 1942. DE KRETSER J.—

One Peter Perera was killed as a result of the negligence of the driver of an omnibus belonging to the defendant. His mother sued defendant for damages for compensation and the District Judge awarded her Rs. 600. The defendant appeals and maintains that she has not proved that she has suffered material loss.

It would appear that the plaintiff's husband owned and managed a boutique. We have no evidence as to the nature of the business or the date of his death. At his death plaintiff, assisted by her mother and some of her daughters, carried on business in the same place. Thereafter the deceased son took over the management of the boutique. We are told that he bought coconuts and firewood and sold it there and that there was good profit from the business. He must have had a flair for business, for the evidence is that his brother-in-law, who had a boutique at Hulftsdorp, employed him to supervise that boutique and paid him Rs. 18 to Rs. 20 a month. That money was devoted by the deceased to the maintenance of his mother and other members of the household, to whom he also gave all his other earnings. The plaintiff, whom the District Judge describes as an ignorant village woman, and who seems to have impressed him as being truthful, described the deceased as the bread-winner of the family. Along with her lived her aged mother, two unmarried daughters, a schoolboy about 15 years old and another youngster, who obtained employment as a messenger but did not contribute to the family expenses. Her evidence is that her eldest son, who lives elsewhere, used to contribute a rupee or two a month.

After the death of the deceased her eldest son paid the rent of the house, but there is no evidence that he continued to make the original contribution nor is there evidence as to what the rent of the house is. It cannot be much, seeing that it is in a village, and it may be that he has merely given his contribution in one form rather than another. It was urged that as plaintiff's rent is being paid she has suffered no loss and that as the boutique is being carried on again she has suffered no loss. There is no evidence that the boutique is being carried on. Plaintiff's evidence clearly refers to the past, and in particular her reference to her mother helping her makes it obvious that she is not refering to the present time because her mother must have passed the stage of rendering assistance, plaintiff herself being sixty years of age.

It seems to me, therefore, that plaintiff may well have been given some compensation for the loss she has sustained by the death of her son, who was such a capable manager. But she has given no figures and the District Judge has confined himself merely to the loss of Rs. 18 to Rs. 20 a month, which the brother-in-law used to give the deceased for the management of his business. That was clearly loss which the plaintiff did sustain. The District Judge has remembered that this money went to maintain a number of persons and has worked out what he thinks might have been plaintiff's proportionate share and, taking into consideration her expectation of life, has awarded her Rs. 600. This seems to be a reasonable way of awarding damages.

Counsel for the appellant referred us to certain authorities which I do not think it necessary to examine in detail. I hope I shall be doing justice to the extremely able judgments of the South African Courts if I summarise their conclusions as follows.

The *Lex Aquilia* of the Roman law applies to loss of property. The Roman law considered that it was impossible to place a value on the life

of a human being. "Property" was gradually extended to include even the loss of prospective gain. Roman jurists were continually hampered by the conception that life cannot be estimated and therefore the action was confined to something in the nature of property. The Dutch, however, were accustomed to the Germanic idea of compensation or blood money, which was to be paid to the relatives of the deceased person by the wrongdoer. They found no difficulty in extending the action to cover cases not strictly within the *Lex Aquilia* and many Dutch jurists, seeking a foundation for the form of action which had come into being, put it on the basis of an extension or *utilis actio* of the *Lex Aquilia*.

One must remember that the Dutch were very particular about forms of action, and so were we in the early part of the last century. But our present code of procedure is based on the desire of the law to do substantial justice between the parties. The Dutch jurists emphasised the distinction between an action based on *injuria* and one based on *culpa* or negligence. In the former, damages may be claimed for injury to feelings; in the latter these feelings find no place. Accordingly, in *Warnecke's Case*[1], a husband was not allowed to claim damages for the loss of the *consortium* of his wife.

The action based on negligence was allowed by the Dutch only to those who had a natural claim on the deceased. In Dutch jurisprudence if a person had a natural claim to be maintained a corresponding duty was implied upon the party bound to maintain. It was not a legal obligation in the sense that it was one imposed by the law, but it was a legal obligation inasmuch as it was recognized by the law. As Innes J. remarked, in *Warnecke's Case (supra)*, "The books agree in confining the remedy to certain relatives depending on the deceased for support..... There is no reason why our courts should not adapt the doctrine and reasoning of the law to the conditions of modern life, so far as can be done without doing violence to its principles." He went on to say that the books do not as a rule make special reference to the obligation because the relationship of the parties imposes it and *Vinnius* gives it to those whom the deceased was wont *ex officio* to maintain.

Counsel for the appellant did not contest the position that the plaintiff in this case was within the class of persons whom the deceased was bound to maintain.

The subject is further discussed in *Lee's Case*[2]. A stepmother was not allowed the right to claim compensation, on the ground that there was no natural obligation between her and the stepson. *Maasdorp—volume IV, pp. 23 and 35*—sums up the law and says that a deceased's wife and children, whether legitimate or illegitimate, or any other person who has a legal claim to maintenance against the injured person, or one who has suffered any other loss through the death of such person, will have an action for damages. He seems to imply that there may be a class of

[1] *S. A. R. Appeal Division (1911), p 657.*
[2] *S. A. L. R. Cape Division (1935), p 202.*

persons entitled to sue other than those entitled to maintenance but who have actually suffered loss, *i.e.*, suffered in property through the death of the deceased.

It has not been shown to us that the decree in this case is erroneous. The appeal will, therefore, be dismissed with costs.

CANNON J.—I agree.

Appeal dismissed.