

STATUS OF A CIVIL SUIT UPON DEATH OF A PARTY UNDER LAW OF DELICT

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Introduction

Sri Lankan legal system in today's context is a combination of different legal systems in the world. The common law in Sri Lanka is considered as the Roman-Dutch law, where English law and personal laws are considered for some particular areas of law. The law of Delict originates from the Roman-Dutch law which was inserted to Sri Lankan legal system as a result of colonization by the Dutch in or around in 1656. The law of Delict equals to the law of Tort which derives from the English law.

What is a Delict?

*"A Delict is a civil wrong. It is the violation of a duty imposed by the general rule of law, which gives to the party injured a civil remedy"*¹.

The most popular definition for a delict is given by R. G. McKerron² as;

*"The breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach"*².

This definition highlights three important liabilities in a delict;

- 1) An act (wrongful act) or omission on the part of the Defendant;
- 2) Wrongful intention (Dolus) or negligence (Culpa) or the breach of a duty of care/strict duty of the Defendant;
- 3) Damages (pecuniary loss) caused to the Plaintiff as a result of such act or mission by the Defendant.¹

There are several important delicts under civil law as *furtum*, *rapina*, *damnum injuria datum* and *injuria*. Today by far the most important delicts recognized in law are *damnum injuria datum* and *injuria*. They are also known as the two foundation stones of delict.

The delict *damnum injuria datum* was created by *Lex Aquilia* or Aquilian action. The meaning of the Latin term '*damnum injuria datum*' is damages for injuries wrongfully caused. An Aquilian action is a wrong done against a life, person, freedom,

1. Johannes Voet 47.1.1.2. in U. L. Abdul Majeed A Modern Treatise on the Law of Delict (Tort) pg. 1

2. R.G. McKerron The Law of Delict, Platinum August 2009 Re-Print Edition pg. 5

honour and property. Therefore Aquilian Action acts in a non-personal nature.

Injuria was created by the delict *actio injuriarum* which means damages against reputation (libel, slander), honour, good name etc. *Injuria* acts in the context of *contumelia*. The common nature of *Injuria* is to remedy the damages of personal nature.

Continuation of actions upon death of parties

A delict acts among parties in two ways such as;

- 1) a right to sue (for the Plaintiff), and
- 2) a liability to be sued (for the Defendant).

Survival of an action upon death of a party is decided based on the nature of the action as if the cause of action which relates only to him dies with that person.

The law distinguishes actions as personal and non-personal based on their nature. Personal actions lapse with the deceased while non-personal actions survive with the dependents.

One should analyze two important delicts in order to understand the nature of a particular action.

The delict *injuria* which derives from *actio injuriarum* applies for damages (impairment) caused to one's reputation and good name. Defamation, slander and libel can be cited as few examples. One's reputation and good name is personal to such person. One can argue that one's dependents or related ones may get hurt due to such defamatory act but our law has

recognized that such impairment or the cause of action is more personal to the one whom it was aimed at.

In *Appuhamy v. Kirihamy*³ it was decided that;

“A father cannot sue for damages for slander of his daughter, although he may have felt pained by such slander”.

Thus it has been recognized by our law that *actio injuriarum* is a personal action.

The maxim *actio personalis moritur cum persona* speaks for itself. It says that a personal action dies with the parties to the cause.

Therefore it has been recognized by the law of delict that actions under *actio injuriarum* do not survive upon death of the parties.

There are three essential liabilities in an Aquilian action;

1. A wrongful act (or omission) on the part of the Defendant;
2. Pecuniary loss resulting to the Plaintiff;
3. Fault of the part of the Defendant.

Aquilian action applies in situations where damages has caused to life, person, freedom, honour and property (mainly to a person or a property of another). Unlike actions against one's reputation and good name, actions caused to one in the above mentioned situations survive even after the death of such person.

Damages fall under the context of an Aquilian action are considered as mediate damages. That means damages can be direct and affected to one person and at the

same time some other person may indirectly affected by such act. The Roman-Dutch law of Delict has recognized that such other person who has indirectly affected by some act has the right to sue for damages against the person who caused such act resulting damages. Therefore the law has identified that a widow, child or an heir of a deceased has a right to an action against the wrong doer to sue for damages. On the other hand such right to sue can be transmitted to any of the above persons upon the death of the person against whom such action has been caused.

The right to sue for an executor was discussed in Hoffa v. S. A. Mutual Fire and General Insurance Company Ltd⁴ and it was decided that;

“An executor of a deceased can claim only for actual pecuniary loss suffered by the state of the deceased can claim only for actual pecuniary loss suffered by the state of the deceased, even if the death was caused by the Defendant’s wrongful act.

In an action personal injuries he can claim for the deceased’s medical and hospital expenses,² and if he dies from his injuries for his funeral expenses.

He has no claim in respect of pain and suffering and loss of the amenities of life sustained by the deceased as a result of his injuries”

This damage and/or loss is known as patrimonial or pecuniary loss.

3. 1 NLR 83

4. U. L. Abdul Majeed in A Modern Treatise on Law of Delict (Tort) at pg. 335 [1965(2) S.A. 944 (c)]

Litis Contestatio

The Aquilian action under the Roman-Dutch law ensures the dependents/heirs to recover patrimonial loss caused as a result of injuries caused to the deceased. In the event of an action under the delict *injuria* the cause of action doesn’t lapse with the death of the deceased.

This rule is considered in the event where an action has filed to recover damages caused due to *injuria* (defamation) unlike the claim is for patrimonial loss.

“There are two exceptions;

- 1. In the case of actions for injury, the death of either party extinguishes the right of action unless the stage of litis contestatio has been reached. The rule as to litis contestatio applies in the case of an action for damages for injuria involving insult (contumelia), libel and slander which have for their object reparation for a sentimental hurt independent of any patrimonial loss.*
- 2. Homicide committed intentionally or otherwise, is other species of tort which is affected by the death of the party. The Roman-Dutch law authorities say that the heirs of the estate are not entitled to damages except the expenses incurred for funeral and other special expenses.”⁵*

In John Fernando and Attorney General v. Satarasinghe⁶ it was held that,

- 1. “The maxim ‘actio personalis naturecum persona’ applies to every*

action for libel or slander and therefore where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative.

2. However in the case of death of the Plaintiff after *litis contestatio*, the action would continue in favour of heirs of the Plaintiff as part of the Plaintiff's property".

In Milne v. Shield Insurance Co. Ltd⁷, it was decided as;

"As stated above, in the case of Aquilian actions, the right to sue survives even after the death of the injured. But in the case of wrongs to the honour of a person, and those in which there was an element of insult (*contumelia*) the cause of action extinguishes by the death of the person concerned. The general rule appears to be that in all actions for damages for *injuria* the death of the party injured defeats the action. If the Plaintiff dies before *litis contestatio* the right of action is extinguished. In modern law, *litis contestatio* is deemed to take place at the moment when pleadings are closed".

Also in Banda et al v. Cader⁸, Lascelles C.J. and Wood Renton J. held that;

"That there is a *litis constatio* where the rights of the co-owners are in dispute is indisputable, and the point at which the *litis*³*contestatio* arises is, under the practice which

prevails in our courts, clearly marked by the filing of the contesting Defendant's Answer. After this the parties are at issue."

In Muheeth v. Nadarajapillai⁹, Wood Renton C.J. observed that;

"An action became litigious, if it was in *rem*, as soon as the summons containing the cause of action was served on the Defendants; if it was in *personam* in *litis contestatio*, which appears to synchronize with the joinder of issues or the close of the pleadings".

In a recent Supreme Court judgment of W.L.M.N.de Alwis v. Malwatta Valley Plantations and Another¹⁰ decided on 21-06-2019, Aluvihare PC J. decided that;

"As the exceptional circumstances of *litis contestatio* has been reached by the conclusion of the pleadings at the District Court, there is no impediment to the survival of the action. Therefore the right to sue on the cause of action survives, and as such I hold that the substitution".

Procedure to be followed under the Civil Procedure Code

By the Amendment to the Civil Procedure Code Act No 08 of 2017, new sections 393 – sections 398 were substituted as follows;

S. 393 – Memorandum;

S. 394 – Failure to file a Memorandum;

S. 395 – Application for legal representative's removal;

6. 2002 (2) SLR 113

7. 1969 (3) SA (AD) 352 at 358-359

8. 16 NLR 79

5. . U. L. Abdul Majeed in A Modern Treatise on Law of Delict (Tort) at pg. 343 [1965(2) S.A. 944 (c)]

S. 396 – Court make order that action to proceed;

S. 397 – Legal representative to be made a substituted Plaintiff;

S. 398 – Legal representative may apply to have name entered;

S. 398_A – Where no application is made by the legal representative of a deceased Plaintiff;

S. 398_B – Legal representative of deceased sole Plaintiff to apply to be made the Plaintiff.⁴

Conclusion

- Survival of an action upon death of a party decided by the nature of such action whether personal or not.
- Generally actions under *actio injuriarum* are considered as personal actions while actions under Aquilian action are considered as non-personal actions.
- Non-personal actions survive upon death of the injured person for the dependents to recover damages known as patrimonial loss.
- Personal actions lapse upon the death of the person injured.
- Several authorities have decided that *litis contestatio* is the stage where pleadings are completed and issues have been joined in an action.

- Thus, an action (under Aquilian action) survives where the injured person dies after completing the *litis contestatio* stage.
- A new party has to be substituted as the legal representative in the room and place of the deceased person.
- The procedure to be followed in such a situation is mentioned in the Amendment to Civil Procedure Code Act No 08 of 2017.

9. 19 NLR 461 at 462

10. SC/HCCA/LA/47/16