

Delictual Remedies Against Public Authorities in Sri Lanka

There was a time when the Sri Lankan law civil wrongs were interpreted by reference to English law, rather than the Roman Dutch law, which provided the foundation of the General law. The English law rule liability in *Rylands vs. Fletcher* for instance was received into our law, though it is alien to Roman Dutch Jurisprudence on civil wrongs or delicts¹. Post-independence judicial decisions however have clearly established that the law of Delict in Sri Lanka must be developed by reference to the Roman Dutch law rather than English law². This does not mean that English cases and decisions of Commonwealth courts cannot guide our courts as persuasive judicial authorities. Though the modern Roman Dutch law is interpreted by the courts of South Africa. Developments in tort law in common law jurisdiction can help to refine principles of Roman Dutch Law in the light of contemporary issues and problems. Sri Lankan cases refer to English and Commonwealth Judicial authorities in interpreting and refining norms and concepts of Roman Dutch law, which have been creatively developed or can be developed further in the light of this comparative Jurisprudence³. This approach helps to avoid slavish adherence to South African case Law. Roman Dutch Law and English Law are both foreign legal systems that have best received in the law of Sri Lanka. While our courts have the advantages of being able to access the jurisprudence of both systems, they need to develop a local jurisprudence in the light of comparative in either or both systems, they need to develop a local jurisprudence in the light of comparative development in either or both systems. Core norms of Roman Dutch Law must be respected, unless they are changed by legislation. As the Privy Council pointed out many years ago in *Kodeswaram V Attorney General*, the Roman Dutch law must be perceived as the beginning and not the end of Sri Lanka's non statutory General law⁴.

Since the Roman Dutch law of Delict is derived from two basic actions with their origin in classical Roman law, the Aquilian Action and the *Actio Injuriarum*, the liability of public officials and institutions in the law of Delict must be determined within the framework of these two actions. The Roman Dutch law distinguished clearly between civil wrongs that caused patrimonial loss (Physical damages or economic loss) and those which infringed interests of personality including bodily integrity, security and dignity. The wrongs are actionable without evidence or patrimonial loss. Aquilian liability on the other hand is exclusively based on the patrimonial loss caused to the plaintiff through the defendants' wrongful conduct. The issue of whether we can go beyond the basic Roman Dutch law norms and develop a jurisprudence that links the two actions was raised, but was rejected by the Supreme Court in *Priyani Soysa v Arsekularathna*⁵. Until legislative changes are introduced, Sri Lankan courts must develop the law of Delict in Sri Lanka within the framework of the core norms of the Aquilian action and *Actio Injuriarum*.

The Aquilian action has three core elements, proof of wrongful acts or omissions, culpa (negligence) or Dolus (intentional wrongdoing) and resulting patrimonial loss. The *Actio Injuriarum* requires proof of an infringement of interests connected with personal dignity or reputation, committed intentionally or with *anumus injuriandi*. If a private law action in delict is brought against a public servant, liability must therefore be determined within the framework of either of these Roman Dutch law actions.

Can a breach of statutory authority by a public institution or public official create liability in Delict? In England, Public Authorities and individual public servants have been used for damages in civil action in tort, on the basis of ordinary principles of the English Common Law. It is recognized that administrative law remedies can be enforced to obtain redress for abuse of power, and encourage public accountability. However, English law has always recognized that statutory authority given by parliament cannot be the denial of individual redress through tort law. A key principle developed by the courts is that there can be no liability in tort if a public authority or a public official exercises a statutory discretion and causes loss to an individual because of an error of judgment. However, if the loss caused goes beyond that, it is recognized that both public authorities and individuals can be sued in damages for any conduct that amount to common law negligence. Recent cases in England that have gone up in appeal to the House of Lords show how institutions like the Police, Child Welfare and local Education authorities and their staff, have been sued for damages caused to members of the public by negligence.

Failure of child welfare authorities to provide proper care, or protect a child placed in care from child abuse, can therefore create liability in damages⁶. An educational authority can a state educational officer have been sued for negligently failing to provide an adequate education to a child with special need⁷.

In Roman Dutch Law too the negligent breach of a statutory duty can give a delictual remedy. The breach can be the kind of wrongful conduct which is actionable under the Aquilian Action if the status does not provide a special remedy, or exclude a civil remedy in damages.



Its means that the statute must be interpreted as intending to give a private right of action. If this is established, a delictual remedy is available, provided certain other dimension on the civil remedy is clarified by the statute⁸. In Roman Dutch Law Delict, individual public officers can also be liable for international and negligent acts.

Failure to prevent an assault in police custody has been considered State that create possibility for violation of fundamental rights under our Consultation. This omission has resulted in delictual liability for damages under the Aquilian Action in South Africa⁹. Bodily Security and the integrity of the person are protected by both the Aquilian Action and the Actio Injuriarum of Roman Dutch Law. The torture or a Deliberate physical assault in police custody can lead to an Aquilian Action for damages based on Dolus international wrongdoing or a causes for damages under the Actio Injuriarum¹⁰. Acts of sexual violence are also actionable as assaults and infringements of person and dignity under the Actio Injuriarum, without proof of patrimonial loss¹¹.

Though animus injuriandi has to prove in a case based on the Actio Injuriarum. South Africa's courts have refused to recognize that there was an absence of animus injuriandi or lack of intention, due to mistaken belief that the conduct was not wrongful. In Minister of Justice V Hoffmeyer¹², the Appellate Division held that it was an injuria to deny a prisoner who was detained after lawful arrest, reading materials and correspondence. The fact that prison officials were not aware that this was wrongful and considered irrelevant, since the infringement involved an interference with constitutionally guaranteed rights of personal liberty and bodily security. The norms of the Roman Dutch law thus clearly reinforce the fundamental right of bodily security and personal liberty protected under the constitution.

The liability of the State in delict has been recognized in Sri Lanka in the state Liability in Delict Act 1969 which also retains the Roman Dutch Law on the subject. The liability of the State or public authorities in delict can thus be a direct institutional liability for negligence, or a Vicarious liability for the acts of omissions of its officers or agents. Vicarious liability requires that the acts or omissions are done in the course of employment, or under colour of authority. The concept of "acting under colour authority" is now being interpreted in other jurisdictions so as to prevent an individual act of abuse of power being designated a "purely individual act" that is outside the scope of employment and unconnected with the State of public institution. Deliberate and international wrongful acts such assault and torture can be considered as conduct within the course of employment so as to impose vicarious delictual liability on the State or public authorities¹³. The concept of "immunity" and public policy can sometimes used to limit the liability of the State or public authorities or officials, in delict traditional Immunities are increasingly being challenged in the public interest in some jurisdictions. In Hall V Simon¹⁴ the House of Lords overruled its earlier decision in Rondel V Worsley¹⁵ and rejected the concept of immunity of lawyers for negligence in the conduct of the litigation. The European Court on Human Rights has also questioned the validity of a decision of English Courts that used grounds of public policy to deny the liability of the police for negligence in conducting a criminal investigation¹⁶. This type of judicial interpretation of compensation for damages based on infringement of human rights can help to reinforce the norms and values incorporated into the constitution's Chapter on Fundamental Rights.

The Aquilian Action, and action Injuriarum can therefore provide civil remedies to persons who have suffered damage because of intentional conduct of public institutions and public officials including in circumstances where there has been a breach of statutory authority.

End Notes

1. Subaida Umma V Wadood (1927) 29 NLR 330. Silva V Silva 1982 2 SLR 709.
2. David V Abdul Cader (1963) 65 NLR 253. Gafoor V Wilson 1990 1 SLR 142. Chissel V Chapmen (1954) 56 NLR 121.
3. Priyani Soysa V Arsakularathne SC 89/99 (2000). Bank of Oeylon V Cargills 1991 1 SLR 104.
4. (1969) 72 NLR 337 at 342.
5. Note 3.
6. Barret V Enfield London Borough Council 1999 3 AER 193. Bedfordshire County council (1995) 3 AER 353.
7. Phelps V Hillingdon London Borough Council 2000 4 AER 504.
8. Desilva V Coutinho 1971 3 SA 123; Burchelop.cit. Page 46-47.
9. Minister van police V Ewels 1975 3 SA 590.
10. Dowling V Diocesan College 1999 3 SA 847.
11. Minister of Policie V Rabie 1986 1 SA 117.
12. 1993 3 SA 131 AD.
13. Notes 10 & 11.
14. 2000 2 AER 673.
15. 1969 1 AC 191.
16. Osman V UK 1999 II admin LR 200. Considering the Court of Appeal opinion in Osman V Fergasun 1993 4 AER 344 contrary to Art 6(1) of the European Convention on Human Rights.

