

# **GHAQDA STUDENTI TAL-LIĠI**

## **POSITION PAPER**

### **REFORM OF THE LAW ON CIVIL DAMAGES**

**5<sup>th</sup> January 2015**

**GhSL President:** Francesco Refalo  
**GhSL Secretary General:** Dirk Urpani  
**GhSL Policy Coordinator:** Vanessa Gatt

**Contributors:** Louisa Dingli  
Vanessa Gatt  
Sarah Pace Warrington  
Gaynor Saliba



## TABLE OF CONTENTS

	<b>Page</b>
<b>Introduction and Scope</b>	5
<b>Section One: Reviewing Civil Responsibility under the Maltese Civil Code</b>	7
<b>1.1 The General Clause in Maltese Tort Law</b>	7
<b>1.1.1 Establishing Damages under Maltese Law</b>	7
<b>1.1.2 Comparative Clauses in Tort: Influences on the Maltese Law of Delict</b>	8
<b>1.1.3 Quantification of Damages Under the General Provision</b>	10
<b>1.1.4 Proposals on Reform in Civil Damages</b>	11
<b>1.2 Indirect Responsibility under Maltese Law</b>	12
<b>Section Two: Damages</b>	15
<b>2.1 Analysing Maltese Leading Judgements on the Award of Damages</b>	15
<b>2.2 Reforming Maltese Law on Damages</b>	22
<b>2.2.1 Introduction</b>	22
<b>2.2.2 <i>Lucrum Cessans</i></b>	23
<b>2.2.3 Non-Pecuniary Damages</b>	25
<b>Conclusion</b>	29



## INTRODUCTION AND SCOPE

The Law Students' Society (*Għaqda Studenti tal-Liġi*) has always aimed to bridge the gap between the student and the law through its many publications, seeking to keep the student – as the up and coming legal professional – informed of the policy debate surrounding the legislative process. Most importantly, however, *GħSL* also aspires to include the student within that debate.

This position paper issued by the *Għaqda Studenti tal-Liġi* has been drawn up as a result of the impending reform to the law on civil damages, and has been compiled by a number of students who, after having read and researched the area of civil responsibility in general, have put together a number of observations and suggestions directly related to previous legislative attempts within this area of law. Each section within this paper constitutes an exercise, whereby elements of comparative law and judicial development are coupled with the contributors' own reflections and experiences as students within a mixed law jurisdiction following this research-oriented exercise.

Amendment to the law of damages will inevitably be affected by the underlying doctrine of civil responsibility. As a result, this paper will not focus solely on the award of damages, but will be split into two parts: the first of this publication will constitute an overview of the current system of delictual responsibility under Maltese law, reviewing the salient comparative and historical aspects of this area of law, while assessing the need for amendment which may have arisen over the years. The two sections within this first section will deal with the general clauses of responsibility in terms of Maltese Law, and indirect responsibility respectively. The second section will in turn focus on the award of damages following the establishment of tortious responsibility. The relevant sections will focus on examining the development to this area of law following judicial intervention, as well providing some observations and recommendations on the impending reform on the law of damages.



# SECTION ONE: REVIEWING CIVIL RESPONSIBILITY UNDER THE MALTESE CIVIL CODE

## 1.1 THE GENERAL CLAUSE IN MALTESE TORT LAW

### 1.1.1 Establishing Damages under Maltese Law (Articles 1030 to 1033)

It is an enshrined principle of tort law that a person be found liable for damages caused through his fault. In Maltese Law, establishing whether or not a tortfeasor may be found liable directs one firstly to article 1030, which states that a person making use of rights competent to him within proper limits, will not be liable for damages resulting therefrom.<sup>1</sup> This immediately raises the question of whether there are further requirements that must be proven for a claim under this article to succeed. Is it sufficient for a claimant to state that his rights have been breached and successfully be awarded damages, when the liable party acted within his rights, or must definite proof of *culpa* or *dolus* be brought? A more pertinent question might be whether this ought to be admitted as a possibility in claiming damages. When the aim of the law is to compensate for harm suffered, should such a provision be removed to allow for the possibility of damages awarded when a person causes harm even when acting within his legal right?<sup>2</sup>

For an action for damages to be successful the following requisites must be satisfied: (i) the act must be unlawful; (ii) the act must cause damage; (iii) the act must be imputable to the person committing it; and (iv) the act must have been committed through ‘*dolus*’ or ‘*culpa*’. The specific intention of causing damage to the victim is not required.<sup>3</sup>

Section 1031 of the Maltese Civil Code states that:

Every person, however, shall be liable for the damage which occurs through his fault.

It is therefore within the context of this article that we begin to speak about liability in fault. Maltese Law finds that liability arises when a person acts in a manner which is a breach of law and duty. In **Joanna Briffa vs Spinola Development Company Limited**, the Court stated:

*Irrispettivament minn jekk l-aġir ta’ l-iżviluppatur (jew persuna privata) ikunx illegali jew le, jekk kienx qed jeccedi l-limiti tal-ħsejjes jew le, jekk l-iżviluppamx irraġjonevolment jew le, din il-Qorti tħoss li min qed jibni għandu jagħmel*

---

<sup>1</sup> Civil Code, Chapter 16 of the Laws of Malta, article 1030

<sup>2</sup> In practice, article 1030 has been applied to abuse of property rights, and procedural rights; see Fiorino d’Oro Company Limited vs Direttur tat-Toroq, Court of Appeal, 17 February 2006.

<sup>3</sup> European Commission on Anti-Trust, ‘Executive summary and overview of the national report for Malta’ <[http://ec.europa.eu/competition/antitrust/actionsdamages/executive\\_summaries/malta\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/malta_en.pdf)> accessed 03/01/2015

*tajjeb kemm għad-danni strutturali li jseħhu f'fond vicin kif ukoll għad-danni naxxenti minn telf ta' qliegħ meta dawn ikunu konsegwenza ta' żvilupp li huwa jkun qed jagħmel. Kif irriteniet l-ewwel Qorti, kull proprjetarju għandu d-dritt li jiżviluppa l-art tiegħu, iżda jekk x-xogħlijiet li qed jesegwixxi jikkagunaw inkonvenjent ta' natura finanzjarja lill-ġirien huwa għandu jagħmel tajjeb għal dan it-telf.*<sup>4</sup>

Therefore in practice it seems that the Maltese Courts allow that harm caused by the actions of the tortfeasor to the property of another, sufficiently proves fault. The inclusion of article 1032 in the Maltese Code clarifies the legislator's position on negligence as the cause of the damage or harm suffered,<sup>5</sup> with a general duty of care imposed on all persons, with no person being held to a higher degree of responsibility unless mandated by law. Article 1033 itself speaks of the duty imposed on a person by law, a breach of which, whether action or omission leads to liability.<sup>6</sup> It is in this article that also provides for the inclusion of *dolus* and *culpa* as elements of the tortfeasor's act. In this respect, article 1033 is more restrictive in nature than foregoing articles.

It may be equally relevant to consider whether or not contributory negligence is admissible under the broad influence of the general clause. In foreign jurisdictions such as Louisiana, it has not been deemed possible to raise a claim of contributory negligence whilst operating under the general clause (Common Law theory being that one cannot be found liable for the harm caused to another, if the wronged individual contributed in some way to his own suffering).

### **1.1.2 Comparative Clauses in Tort: Influences on the Maltese Law of Delict**

In order to understand the compensation as awarded in various jurisdictions, the philosophy of the law on damages must be considered. Section 1382 of the French *Code Civil* states that any harm that is caused by one individual towards another is compensable.<sup>7</sup> The French Civil Law criteria for finding non-contractual liability are less restricted and broader in nature than in Common Law. A practice has therefore developed whereby the French Courts award more conservative amounts in damages than their Common Law counterparts. The underlying philosophy behind the French law is the maintenance of social order. The dominant approach therefore is to ensure an equitable outcome for all parties.

---

<sup>4</sup> Joanna Briffa vs Spinola Development Company Limited, Court of Appeal, 9 January 2009

<sup>5</sup> Civil Code, article 1032:

- (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.
- (2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.

<sup>6</sup> Civil Code, article 1033: Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.

<sup>7</sup> Code Civil des Français, article 1382: *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*



The Italian Civil Code in article 2043 follows the French Code Napoleon in stating that;  
Any intentional or negligent act that causes an unjustified injury to another  
obliges the person who has committed the act to pay damages.<sup>8</sup>

Italian law does not establish the illicit fact that causes the harm, rather it allows judicial discretion in the establishment of what is to be considered such an act. The judicial discretion awarded by the Italian legislator to the judiciary is an interesting, if seemingly arbitrary method of determining the fact. Such a practice may not seem desirable within a system seeking to standardise judicial decisions, yet it offers a human element in deciding whether or not an act will lead to liability in damages.

A contrast must be drawn between this and Common Law systems, where the civil law sections on liability are more direct and specific in their application. The scope of tort law in jurisdictions such as the United Kingdom and the USA has evolved into a more specific system, whereby the law provides for specific liabilities, if it is proven that a particular tort has been committed. The courts tend towards generous reparation in these jurisdictions, in light of the specific and delicate requirements in proving that delict has occurred.

As examined above, varying legal jurisdictions consider whether liability arises when any harm has been caused to another person, or whether the harm corresponds to a more specific provision of law. It has proven possible to merge the seemingly opposing civil law traditions of Common Law and Continental Law, with Maltese tort law being a prime example. In other jurisdictions, legal developments have seen the assimilation of the two traditions, as in the case of Louisiana. As expounded by Palmer,

the example of Louisiana shows that it is possible judicially to receive a large quantity of Anglo-American substance under the umbrella of a general clause, while making legislative changes to the general clause which progressively make it restrictive.<sup>9</sup>

By contrast when one considers the Québécois legal system, the French general clause is adhered to, with little to no Anglo-American influence in the form of designated torts.<sup>10</sup>

The Maltese provision on delicts finds its foundations in French law, with the expression of non-contractual liability arising from article 1031 of the Civil Code.<sup>11</sup> The legislator did not qualify compensable damage in this section, giving rise to judicial flexibility in establishing fault and liability. Maltese Law, as a premise, to follow the flexibility of the French general

---

<sup>8</sup> Italian Civil Code, article 2043: Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno

<sup>9</sup> Vernon Valentine Palmer, "The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana", *Electronic Journal of Comparative Law*, Vol. 5.2, May 2001 (Louisiana)

<sup>10</sup> Quebec Civil Code, article 1457: Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

<sup>11</sup> Christian von Bar, *Non-Contractual Liability Arising out of Damage Caused to Another*, in *Principles of European Law: Study Group on a European Civil Code*, (Sellier, Germany, 7th edn, 2009) p. 232

clause, whilst restricting this freedom in later sections. This has led to an evolution of the original French clause, as transposed into Maltese Law (without rejecting the French position as in jurisdiction of Louisiana). The Court will find that liability in tort arises for faulty conduct, and an abuse of rights.

In keeping with French tradition, the aim of the law on delicts is to restore a person to the position they were in prior to the harm caused to them by another. Indeed, the French Cour de Cassation has found that where punitive damages are *manifestly disproportionate*, the Court will refuse the claim.<sup>12 13</sup>

### 1.1.3 Quantification of Damages Under the General Provision

The Maltese Civil Code considers the damages compensable to victims in article 1045 which states that:

- (1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.
- (2) The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.

In-keeping with the Continental Law position on delicts, the Maltese legislator sought to ensure that restitution awarded by the court reinstates the victim to a status quo ante.

Damages under article 1045 fall under four headings -

- (i) Actual loss caused to the injured party as a result of the act;
- (ii) Expenses incurred by the injured party in consequence of the damage;
- (iii) Loss of actual wages or other earnings; and
- (iv) Loss of future earnings arising from permanent incapacity, total or partial caused by the act.

---

<sup>12</sup> Cour de cassation, Chambre civile (Cass Civ) 1, 10 December 2010, Case no 09-13303, Bulletin des arrêts des chambres civiles (Bull) 2010, no 248. As cited by Veronique Wester-Ouisse and Thomas Thiede in *Case Commentary*, <<http://ectil.org/public/Wester%20Thiede.pdf>> accessed 03/01/15

<sup>13</sup> The Court here held that “*en affirmant qu'une indemnité, allouée par une décision étrangère à l'acheteur d'un bateau, dépassant largement son prix d'achat, est disproportionnée en ce qu'elle lui procure un enrichissement sans cause sans rechercher [...] la condamnation du vendeur à paiement d'une indemnité dépassant le prix du navire n'était finalement pas justifiée et partant proportionnée*”

The creation of a multiplier formula to determine the quantum of damages came about in the landmark judgement **Butler vs Heard**,<sup>14</sup> which had a significant impact on future judgements in awarding civil damages. In itself, this formula proved to be an example of Common law influence, being created by the judiciary for the purposes of the case. This formula would later be refined by the Courts.

#### 1.1.4 Proposals on Reform in Civil Damages

Within Maltese jurisprudence, various attempts have been made to expand on the original system of civil damages, the most recent being Bill 78 of 2011. The Bill targeted the current system of awarding damages under article 1045, with changes being made to the aforementioned article, article 1046, and the addition of article 1046A. Through the addition of the provisions in question, the legislator sought to regulate the position under Maltese law dealing with the non-pecuniary nature of damages, consequent to which is also the reintroduction of a capping system.

The computation of damages in terms of the proposed bill will be delved into in terms of Chapter IV of this paper. This notwithstanding, there exist a few considerations which can still be made at this point. Of notable concern, in fact, is the proposed addition to Article 1046 by means of which the Ministers of Finance and Justice are afforded the discretion to essentially to unilaterally amend that which has been formulated through judicial expertise.<sup>15</sup> The proposed amendment would in fact allow the designated Minister to:

- Quantify damages;
- Define the factors that are to be taken into consideration when calculating the damages payable; and
- Limit liability in respect of the damages payable

One ought to be hesitant to sanction the redistribution of judicial and executive powers in this way. This amendment has the effect of rendering the judiciary a mechanism to simply execute the will of the administration. While jurisprudence shows a certain disformity in the quantum of damages awarded in various cases, the response (in attempts at standardisation) should not be to remove the judiciary's discretion entirely. Should it be felt that there is the need to pass specific legislation to curtail compensation, the proper forum for debate should be opened. It is here however pointed out that what is being contested is not the amendment in its entirety; given the detailed and specific nature of the accompanying Regulations, it is comprehensible that amendment thereto must be made from time to time, and that Ministerial action should suffice. Rather, what is being contested is the extensiveness of the Ministerial discretion which it affords. Executive influence in this case should not be codified in law, but ought to be rather a foundation for the amendments through a process of consultation. In the

---

<sup>14</sup> Michael Butler vs Peter Christopher Heard, Court of Appeal, December 1967

<sup>15</sup> Parliamentary Debates (n6), 17 May 2011, Hon. Dr. Herrera

case of Bill 78, the discretion of the Ministers so designated simply serves to undermine the principle of transparency that is key in democratic society.

The capping system proposed on the other hand, would serve to avoid the evolution of civil damages into the Anglo-American model of high-risk, high – reward. It is in this respect that consultation between the administration and the private sector would establish an equitable equilibrium between private interests and societal obligations, in the event that harm is caused to other parties. The experience of the judiciary and legal professionals in this area of law cannot be supplanted by executive discretion.

## **1.2 INDIRECT RESPONSIBILITY UNDER MALTESE LAW**

*Neminem laedere* – hurt no one – perfectly depicts the notion of 'responsibility' in tort which ensures that an individual is answerable for any violations of civil norms by enduring the sanctions stipulated at law. Maltese tort law is comprised of both tort (direct responsibility) and quasi-tort (indirect responsibility); with unjust acts, damage and imputability being the common denominators of the two.

Indirect responsibility necessitates that any harm caused by a person or a thing subject to the control of a third parties to be compensated for by the person actually caring for the said subjects. However, even though indirect responsibility does not require the acts or omissions to be carried out by the individual who is actually held to be responsible; the damage is still viewed to have occurred due to negligence in supervising the person or thing of whom he is responsible, hence there remains an element of subjectivity. Strict (objective) liability would differentiate on the ground that fault is irrelevant and one would be liable for any harm inflicted, even if due care was exercised.

French Civil Law reiterates that everyone is responsible for damage which they cause, as well as that caused by acts of individuals for whom one is responsible, or by things within ones custody.<sup>16</sup> Locally, indirect responsibility is limited to the scenarios illustrated in our Civil Code which include the liability of: employers for acts committed by their employees; parents over their children; curators over persons under their care who are of unsound mind; owners or users of animals; and lastly, the responsibility of owners over their buildings.

Indirect responsibility of the employer could be said to comprise of two categories which are *culpa in eligendo* and *culpa in vigilando*. The former refers to the fault of the employer in employing the wrong person for the job, whilst the latter highlights negligence with regards to supervising ones employees. In article 1037, the Maltese Civil Code stresses that an employee may be objectively incompetent, employed by another person who knew of such incompetence, or subjectively incompetent, where an employer has no reasonable grounds to believe the employee to be competent. In either scenario, the employer is responsible for any

---

<sup>16</sup> French Civil Code, article 1384

damage caused by such employees when carrying out their work or service. Jurisprudence<sup>17</sup> has dictated that the elements required for liability of employers to arise are the following: an employer-employee relationship, *culpa in eligendo* and undertakings of the employee causing damage due to his incompetence which are assessed by analysing the *modus operandi* of the employee.

Persons in charge of minors or individuals of unsound mind, for a permanent or temporary period of time, who fail to supervise properly by not exercising care attributable to a *bonus paterfamilias*, are liable for the harm committed by the actions of those under their control. Our law emphasises the paramount importance of fault for indirect responsibility to kick in. If it is proved that one has acted prudently, responsibility will be acquitted even if the minor or individual of unsound mind has caused harm. Of note is the exception depicted in Article 1035 of our Civil Code stating that persons of unsound mind along with minors under the age of nine (as well as under the age of fourteen if proved that they have not acted with mischievous discretion) are not obliged to compensate any harm caused by their behaviour. This exemption applies on a par to the minors and persons with unsound mind as well as to their representatives, unless representatives are liable on the ground of *culpa in vigilando*. However, the subsequent article waters down the harsh and somewhat unjust effects of the preceding article where damage was caused by minors or individuals with unsound mind and there was no indirect responsibility. This empowers the court to award damages using the property of the actual tortfeasor and not the person deemed responsible at law. In order to do this the court must be sure that it is the most just course of action and that the harm was not caused by the victim upon himself.

The Italian system of indirect parental responsibility is similar to the Maltese system in that those in charge of custody of minors are liable to compensate when harm is occasioned by said minor who is unable to will or understand, unless it can be evidenced that the deed could not be prevented.<sup>18</sup> Article 2048<sup>19</sup> is unique to Italian law, as it expands on the concept of indirect responsibility of parents, by extending its application and having it equated to inadequately educating minor children.<sup>20</sup> This approach is better known as *culpa in educando*. This article highlights the importance of duties of not only parents, but of guardians, teachers and others. It perceives that adults in control of minors, when said minors

---

<sup>17</sup> See for example, *Dr Joseph Grech vs Il-Kummissarju tal-Pulizija*, Court of Appeal, 1 March 1998

<sup>18</sup> The Italian Civil Code, article 2047: In caso di danno cagionato da persona incapace d'intendere o di volere (Cod. Pen. 85 e seguenti), il risarcimento è dovuto da chi è tenuto alla sorveglianza dell'incapace, salvo che provi di non aver potuto impedire il fatto. Nel caso in cui il danneggiato non abbia potuto ottenere il risarcimento da chi è tenuto alla sorveglianza, il giudice, in considerazione delle condizioni economiche delle parti, può condannare l'autore del danno a un'equa indennità.

<sup>19</sup> The Italian Civil Code, Article 2048: Il padre e la madre, o il tutore, sono responsabili del danno cagionato dal fatto illecito dei figli minori non emancipati (314 e seguenti, 301, 390 e seguenti) o delle persone soggette alla tutela (343 e seguenti, 414 e seguenti), che abitano con essi. La stessa disposizione si applica all'affiliante. I precettori e coloro che insegnano un mestiere o un'arte sono responsabili del danno cagionato dal fatto illecito dei loro allievi e apprendisti (2130 e seguenti) nel tempo in cui sono sotto la loro vigilanza. Le persone indicate dai commi precedenti sono liberate dalla responsabilità soltanto se provano di non avere potuto impedire il fatto.

<sup>20</sup> Paul Borg, 'Parental Liability for the Tortuous Act of the Minor in the Light of Italian and Maltese Law: a Shift Towards the Italian Concept of *Culpa in Educando*', in *Id-Dritt* (Volume XXIII, Għaqda Studenti tal-Ligi 2013) 1

committing the harm are capable of understanding, are jointly liable for the tortious actions of the minors for breaching their inherent duties of correctly supervising and educating.

Elements of objective liability slither into our Civil Code with regards to indirect responsibility for animals.<sup>21</sup> An owner or user of an animal is responsible independently of whether harm is caused as a result of lack of appropriate administration and supervision since one is still liable if the animal was not under its charge at the time of causation of harm, or had escaped.

The owner of a building is also liable for any harm caused by its collapse if it is due to defects in construction or need of repairs when said owner knew of the defects or works needed, or should have known of them.

To conclude, although at face value the notion of indirect responsibility might appear to be harsh and to go against the recognised concept of the law or tort which centres around fault, when one analyse the various heads of indirect responsibility one can come to conclude that there is an underlying thread of negligence, which, given the circumstances is comparable to fault – and arising as a result of the relationship between the person actually committing the wrongful act and the person who is ultimately held to be responsible for it.

---

<sup>21</sup> Chapter 16 of the Laws of Malta, Article 1040

## SECTION TWO: DAMAGES

### 2.1 ANALYSING MALTESE LEADING JUDGEMENTS ON THE AWARD OF DAMAGES

In the absence of a specified quantum in the Maltese Civil Code, it may be insightful to analyse the manner in which the Courts have developed a workable theory in order to attempt to restore the victim to his original position prior to the tortious action. It would be incorrect to delve into the subject matter at hand without making first reference to the seminal judgment of **Michael Butler vs Peter Christopher Heard**,<sup>22</sup> being the first judgment to introduce a formula by means of which the Court was able to compensate damages for permanent physical disability caused to the plaintiff as a result of the defendant's negligence, imprudence and lack of reasonable observation while driving.

In liquidating damages, the Court considered both the actual loss and expenses resulting from the collision and the actual loss of wages (*damnum emergens*), as well as the loss of future earnings arising from the permanent incapacity suffered by the plaintiff (*lucrum cessans*). Whereas the actual losses and expenses were easily identified, the court went to greater lengths in order to assess the sum to be awarded by way of loss of future earnings. Endorsing the method for computation set out by the First Court, the Court of Appeal explained that:

*Skond dan il-metodu jinsab għab-baži tal-provi, b'kemm qliegħ tad-danneġġjat għandu jitqies li gie permanent ridott għall-futur, ikkonsiderati ukoll il-prospetti li d-danneġġjat kellu qabel il-korriment u dawk il-possibli accidenti li setgħu, anki jekk kieku l-korriment ma ġarax jinfluwixxu fuq il-qligħ u dak it-telf jigi multiplikati għal numru ta' snin, meħud rigward ta' l-età u stat ta' sahha tad-danneġġjat u ċ-ċirkostanzi l-oħra tal-każ. In-numru ta' snin addottat bħala multiplier ma għandux ikun ibbażat fuq l-aspettativa tal-ħajja in ġenerali tad-danneġġjat iżda fuq l-aspettaiva tal-ħajja lavorattiva tiegħu u għandu jieħu rigward taċ-'chances and changes' tal-ħajja. Il-fatt illi d-danni ser jithallsu f'daqqa taht forma ta' kapital hi wkoll ċirkostanza li għandha tittiehed f'konsiderazzjoni bħala raġuni ta' moderazzjoni.*

Despite the divergent views, the Court of Appeal took cognisance of the wage that the appealed (Butler) used to earn at the time of the accident, considering also his probable future prospects given his act of trade. When seeking to determine the disability percentage, the Court of Appeal upheld that this determination was based on the effect that such debility had on the victim's money earning capacity;

*Dak li jrid jigi stabbilit m'huwix il-grad ta' inkapacità f'sens purament mediku iżda l-effett illi l-ħsara personali għandha fuq il-qliegħ tad-danneġġjat. In ridazzjoni effettiva tista' ma tikkorrispondix mal-grad ta' menomazzjoni fizika tad-danneġġjat kif kalkolata mit-tabib.*

---

<sup>22</sup> Court of Appeal, 22 December 1967

Admitting that such formula can never be precise, the Court held that Butler's disability percentage amounted to forty-five percent and that the multiplier should be calculated on a fifteen year period.

In an attempt to track the manner in which the Courts have extended their interpretation of the **Butler vs Heard** formula, below is a synopsis of the leading judgements on the subject matter.

**(i) George Gatt vs Francis Carbone, Court of Appeal, 7 July 1998**

Plaintiff was injured while conducting his general duties at work, following which he was assigned different duties given his medical conditions. At first instance, the defendant company was deemed liable to pay damages, as liquidated in terms of **Butler vs Heard**.

Defendants appealed arguing that the Court should have considered that the plaintiff's change of duty following the accident was more financially rewarding, and that such calculation has put plaintiff in a substantially better financial position seeing he was still working within the same entity. Nonetheless the Court of Appeal rejected the defendants' arguments and held that:

*Il-fatt li persuna diżabbli tkun qed taħdem u taqla' aktar milli kienet qed taqla' qabel ma korriet, ma jfissirx li hija ma setgħetx issib opportunitajiet aħjar ta' xogħol kieku ma korrietx. **Id-diżabilità neċessarjament timplika nuqqas fil-persuna u fil-potenzjal tagħha ghax-xogħol, mhux biss ma' l-employer preżenti iżda ukoll ma terzi jew anke jekk taħdem għal rasha.***

The relevance of this judgment arguably lies in the Court's acceptance of the fact that damages should not be directly linked to one's income per se, but rather to his income earning potential. In what could be regarded as a somewhat veiled endorsement of *danno biologico*, this Court of Appeal pushes this limit by stating that it is the damage to one's person that ought to be compensated and not merely a patrimonial loss in the form of decreased salary.

**(ii) Anthony Turner proprio et nomine et vs Francis Agius et, Court of Appeal, 29 November 2003**

Plaintiffs sued defendant as the responsible for the death of their spinster daughter, Carmen Turner, who died as a result of a collision when she was a passenger in the defendant's car. The first court almost granted plaintiffs full compensation, disregarding some major issues of consideration adopted by previous courts when liquidating damages. While applying a multiplier of thirty years (given that the victim was only seventeen at the time of the accident)



and a basic minimum wage salary, the first completely ignored the dependency issue even though plaintiffs failed to prove that their dependency on the deceased.

Whereas both courts based the *lucrum cessans* calculation on a minimum wage and a multiplier of thirty years, the Court of Appeal came to different conclusions when reasoning out the issues of dependency and self-consumption. Given the circumstances of the case, the Court of Appeal embraced the theorem applied by the legal expert at first instance and reduced two-thirds by way of dependency and a further sum of twenty five percent by way of self-consumption. However, considering the lengthy court proceedings, the Court of Appeal found it apt not to reduce a further twenty percent which is usually reduced when payment is done in a lump sum.

**(iii) Antonella Tonna vs Roderick Gauci et, Civil Court First Hall, 8 October 2004**

The Civil Court First Hall held defendant liable in damages after having negligently caused plaintiff a permanent facial disability following a car accident. Considering that the plaintiff was a nineteen year old law student at the time of the accident, the Court held:

*Id-debilità permanenti mhux neċessarju li tkun waħda fiżika li timmenoma l-persuna fil-possibilitajiet tagħha ta' xogħol minhabba limitazzjoni fil-funzjoni ta' xi organu. Setgħet ukoll tkun debilità psikika li timmanifesta ruħha f'kondizzjoni li negattivament tinfluwenza l-kapaċita għax-xogħol ta' l-individwu. Biżżejjed jitqies l-każ ta' tfajla li ssofri sfregġu f'wiċċha li jkun biż-żmien rimedjabbli imma li jaffettwalha permanentement il-psike tagħha.*

Examining the circumstances of the case, the Court concluded that the amount due to the plaintiff by way of *lucrum cessans* should be calculated upon a salary base of Lm5,000, a disability percentage of four percent (as recommended by the medical expert) and a multiplier of thirty five years, also considering the chances and changes of life. Nonetheless the Court decided to only deduct an amount of eight percent by way of lump sum payment since the court proceedings had been ongoing for a period of six years.<sup>23</sup>

**(iv) Felix Cefai et vs Joseph Cutajar, Court of Appeal, 29 May 2009**

In this judgement, the Courts make important observations upon their discretion to award compensation. Explaining the quantum of damages, the First Court in fact pointed out that in the absence of fixed rules or a quantitative scale governing the award of damages, the quantification thereof falls within the remit of the Courts which will in turn examine the circumstances of the case. The fact that a Court may make additional references to a number

---

<sup>23</sup> The Civil Court First Hall in *Caruana vs Camilleri* (5 October 1993) and *Desira vs Cassar* (13 January 1995) declared that the twenty percent deduction attributed to the lump sum payment should be further reduced by two percent per annum calculated as from the accident to the date when the case becomes *res judicata*.

of tests established by jurisprudence – both local and foreign – does not prohibit the Court from utilising different methods in subsequent cases;

*sabiex b'dan il-mod ikun dejjem hemm ċerta elasticità ta' kriterju adattabbli għall-partikolaritajiet ta' kull fattispeċie.*

Explaining the nature of the *lucrum cessans*, the Court referred to various judgements, reiterating that there exists no hard and fast rule that has been settled by case law;

*Jingħad illi l-Qrati tagħna fil-pronunċjament tagħhom dwar kriterji li għandhom jintużaw biex jagħmlu tajjeb għall-inċertezzi ta' likwidazzjoni ta' danni qatt ma rrinunzjaw għall-fakolta' diskrezzjonali tagħhom. Inoltre, id-dannegġjat jingħata somma kapitali darba waħda biss, li meta tingħata b'sentenza m'hijiex aktar soġġetta għal ebda reviżjoni. Għalhekk din is-somma kapitali trid tkun ikkorrispondi kemm jista' jkun mar-rejaltà. Għal numru ta' snin il-Qrati tagħna fil-maġġor parti tal-każi segwew rigorożament il-metodu stabilt għall-ewwel darba fil-kawża **Butler vs Heard**. F'dawn l-aħħar snin però dan il-metodu ta' kalkolazzjoni ġie modifikat sabiex ikun iktar rejalistiku u jieħu konsiderazzjoni aħjar taċ-ċirkostanzi taż-żmenijiet attwali.*

Having regard to the circumstances of the case, especially the victim's age and working capacity, the Court substantially increased the disability percentage initially recommended by the medical expert (from eight to thirty percent). Considering also the correlation between the victim's age at the time of the accident and the physical debility suffered, the Court based the multiplier on the victim's retirement age and refused to further deduct a sum in lieu of the lump sum payment.

**(v) Veron Cutajar vs Lilian Bugeja, Court of Appeal, 30 September 2011**

The importance of this judgment lies in the Court's acceptance of the fact that aesthetic damages, though not harming the victim's wage – earning capabilities, had the effect of reducing one's wage-earning potential. The facts of the case were in fact as follows: plaintiff suffered from permanent scarring in her scalp following a hair treatment at the defendant's (hairdressing) salon. Analysing the plaintiffs' condition, medical experts concluded that she had suffered from a chemical burn amounting to two percent disability. While determining that the defendant failed to use the required level of prudence, diligence and attention of a *bonus paterfamilias*, the Court also attributed to the plaintiff a degree of contributory negligence since the latter failed to seek medical advice immediately.

In examining the nature of the disability suffered, the Civil Court First Hall quoted its earlier case (**Saviour Falzon vs Joseph Sammut**, 14 December 2001) and held:

*Issa fil-każ in eżami, trattandosi ta' diżabilità permanenti minhabba sfregġju, filwaqt li huwa veru li din it-tip ta' diżabilità m'hijiex ser twaqqfu milli jaħdem,*

*però tagħlaqlu l-opportunità għal diversi possibbiltajiet ta' xogħol u għalhekk ma jistax ma jiġix ikkunsidrat l-aspett ta' *lucrum cessans*.*

The first court thus held that the amount due to the plaintiff was to be based on a gross income of €10,249.42 (as recommended by the legal expert) on a multiplier of forty years (seeing that the plaintiff was only seventeen at the time of the incident) and a disability percentage of one and a half percent. Finally the Court reduced ten percent by way of lump sum payment and this following previous jurisprudence which held that two percent were to be reduced for each year that the case spends before the courts (case was first decided after five years). The decision of the Civil Court First Hall was also confirmed on appeal.

**(vi) Lucianne Cassar vs Dragonara Casino Limited, Civil Court First Hall, 19 June 2012**

In this particularly interesting judgement, the Civil Court First Hall as per Mr Justice Silvio Meli decided that in the absence of adequate legislation awarding moral damages, the Courts should decide such matter *arbitrio boni viri*.

Plaintiff sued for damages following an accident while working as slot machine operator with the defendant company. She claimed to have suffered both physical as well as psychological disability (to the extent that she was unable to give birth to her child naturally) following such accident. While examining the nature of the *lucrum cessans*, apart from carrying out the usual computation, the Court referred to its previous decision of **Busuttil vs Muscat** (discussed below) and held:

*Illi għalhekk id-dizabilità riskontrata effettivament taffettwa l-integrità psiko-fizika tal-attriċi, liema integrità hi tutelata kemm mill-Kostituzzjoni ta' Malta, kemm mill- Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali, kif ukoll mill-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea.*<sup>24</sup>

The Court further referred to article 1033 of the Civil Code which holds that any person who is guilty of any act or omission constituting a breach of the duty imposed by law shall be **liable for any damage resulting therefrom** and explained:

*Illi għalhekk l-interpretazzjoni tal-kliem 'tal-ħsara' m'għadhiex aktar limitata bħal ma kienet tradizzjonalment għall-damnum emergens u lucrum cessans, iżda għandha tinkludi l-ħsara kollha riskontrata – u allura mhux dik esklussivament patrimonjali – bħal ma hi dik naxxenti mit-tifrik tal-integrità fizika tal-persuna.*<sup>25</sup>

---

<sup>24</sup> Linda Busuttil et vs Dr Josie Muscat u Tania Spiteri, Court of Appeal 27 June 2014

<sup>25</sup> Ibid

The Court moreover considered that the actual loss which is to be made good by the person responsible should be widened to also include remedies in circumstances wherein an individual's fundamental values are negatively affected;

*Illi għandu jkun paċifiku li l-ħajja li fin-normalita` taċ-ċirkostanzi tista' tkun pjenament vissuta mill-attriċi ġiet effettivament ċirkoskritta b'mod li hi effettwata negattivament mhux biss fiżikament iżda wkoll psikikament, ħaġa li timmerita l-ekwiparazzjoni eżistenzjali li l-imsemmija legiżlazzjoni, Konvenzjonijiet, u Karta Ewropea, jindirizzaw bi kjażezza u li l-qradi Maltin ma jistgħux ikomplu jippekkaw fir-rigward billi jinjorawhom.*

In the absence of adequate legislation regulating the matter the Court held that such quantum must only be calculated by the Court according to its discretion and thus awarded the sum of €8,000 to the plaintiff by way of moral damages. The significance of this judgment arises as a result of the Court's acceptance of the notion of *danno biologico* through the constitutionalisation of tort law.

**(vii) Linda Busuttil et vs Dr Josie Muscat u Tania Spiteri, Court of Appeal 27 June 2014**

This judgement is of particular importance since it seem to have paved the way to awards of moral damages in following jurisprudence of our Courts.

Plaintiff sued for damages after suffering from facial scaring following a cosmetic treatment performed by defendants. After determining the defendants' liability, the Civil Court First Hall (as per Mr Justice Giannino Caruana Demajo) determined that the damages suffered by the plaintiff where of a moral nature and argued that:

*L-attriċi ġarrbet ħsara f'ġisimha u minħabba f'hekk, ukoll fil-psike tagħha. L-integrità psiko-fiżika tal-persuna hija valur imħares kemm mill-Kostituzzjoni ta' Malta u mill- Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal- Bniedem u tal-Libertajiet Fondamentali u kif ukoll mill- Karta tad-Drittijiet Fondamentali tal-Unjoni Ewropea, li fl-artikolu 3 tgħid illi kull persuna għandha d-dritt għarripiet tal-integrità fiżika u mentali tagħha. Din il-Karta, skond l-art. 6 tat-Trattat dwar l-Unjoni Ewropea, għandha jkollha l-istess valur legali bħat-Trattati, u għalhekk il-qradi maltin, għalkemm il-Karta nfisha japplikawha direttament biss meta jkun qegħdin jimplimentaw il-liġi tal-Unjoni, huma marbuta illi jinterpretaw il-liġijiet ta' Malta b'mod konformi.*

The Court further referred to article 1033 of the Civil Code which specifies that any person who is guilty of any act or omission constituting a breach of the duty imposed by law shall be liable for any damage resulting therefrom. The first court thus explained:

*'il-ħsara li tigri' ma tistax aktar tiġi interpretata bħallikieku tfisser biss ħsara patrimonjali iżda għandha tiġbor il-ħsara kollha, ukoll dik mhux patrimonjali*

*bhal ma hija l-ħsara lill-gisem meta tolqot l-integrità fiżika tal-persuna. L-istess għandu jingħad għat- 'telf effettiv' imsemmi fl-artikolu 1045(1) tal-Kodiċi Ċivili. Wara kollox, u wkoll bla ma nqisu dak li tgħid il-Karta, il-ligi tad-delitti Ċivili ta' pajjiż ewropew tas-Seklu XXI ma tistax tkompli thalli bla rimedju lil min iġarrab ħsara fil-valuri fundamentali tal-ħajja. L-attriċi, bi htija tal-konvenuti, garrbet ħsara fl-integrità tal-persuna tagħha u għalhekk il-konvenuti huma obbligati għall-ħlas ta' din il-ħsara.*

*Il-ħsara mhux partimonjali, min-natura stess tagħha, u fin-nuqqas ta' dispożizzjonijiet legiſlativi li jirregolaw il-quantum, ma tistax tiġi likwidata jekk mhux arbitrio boni viri wara lil-qorti tqis il-fatturi kollha. Wara li qieset dan kollu, il-qorti tillikwida d-danni mhux patrimonjali li garrbet l-attriċi fis-somma ta' ħamest elef euro (€5,000).*

The first court's decision was appealed and although the Court of Appeal retained the same conclusions adopted by the Civil Court First Hall, it adopted different reasoning on the issue of damages. Despite agreeing that the scarring in Busuttil's case could affect her future possibilities, it quoted a previous decision of the Civil Court First Hall (**Zerafa vs Sacco**, 1 October 2003) wherein it was stated that:

*ħsara kawżata f'wiċċ persuna ma hijiex kwistjoni ta' ħsara morali izda ċertament waħda ta' dannu u preġudizzju fiżiku f'wiċċ l-istess persuna li ċertament thalli l-konsegwenzi tagħha kemm fiżiċi u kemm psikoloġiċi, u li wieħed jittratta tali dannu manifest u pależ bhala kwistjoni merament ta' danni morali hija, fl-opinjoni ta' din il-Qorti, sottomissjoni mill-iktar simpliċi li tinjora għal kollox il-valur ta' l-estetika umana fejn ċertament li l-apparenza għandha il-valur tagħha rejali, u wkoll vitali li jvarja skond in-natura ta' xogħol jew attività li jkun intraprenda jew jista' jintraprendi s-sugġett in partikolari; dan apparti konsiderazzjonijiet oħra rilevanti dwar il-kwalità ta' ħajja ta' dak li jkun.*

It further argued:

*Fejn ma taqbilx din il-Qorti mal-ewwel Qorti hu fejn qalet li l-attriċi ma ppruvatx danni patrimonjali bhala *lucrum cessans*, u minflok illikwidat kumpens li qiesithom danni mhux patrimonjali, li ma jirriżultax li, fl-isfond tal-ligi Maltija, jistgħu jingħataw. Il-ligi ta' Malta, fl-Artikolu 1045 tal-Kodiċi Ċivili, jagħti kumpens, taht dan il-kamp, għal telf ta' qliegħ futur, u ma jidhirx li l-karta tad-Drittijiet Fundamentali tal-Unjoni Ewropeja, li japplika biss fil-kuntest ta' crossborder interests, jista' jiġi invokat f'oqasma li ma jaqgħux fil-kompetenza tal-Unjoni, bhalma huwa d-dritt għad-danni ċivili.*

The Court of Appeal contended that this reasoning does not imply that plaintiff could not be awarded damages. She was suffering from a disability percentage of three percent and the fact that she was a housewife did not preclude her from being awarded compensation. The Court thus quoted a decision of the Civil Court First Hall (**Grech vs Briffa**, 21 February 1997) wherein it was held:

*Ix-xogħol tad-dar għandu valur ekonomiku, u l-kontribut li tagħti l-mara tad-dar*

*lill-ekonomija domestika ma għandux jitqies li huwa anqas minn tar-raġel, u għalhekk ma għandux jitqies li jiswa anqas mill-paga minima nazzjonali.*

Accordingly the Court of Appeal worked out the *lucrum cessans* basing it on the national minimum wage at the time of the accident (€10,500), a multiplier of sixteen years and a disability percentage of three percent. On this basis, the final sum amounted to €5,040, almost the same as that awarded by the first court despite the different reasoning.

Finally the Court of Appeal acknowledged the existence of moral damages in Maltese Tort Law and held that:

*Hu aċċettat, anke fil-medicina, li jekk persuna jgarrab xi difett, dan anke jekk fiżikament ma jtellifx lil dik il-persuna milli tinvolvi ruħha f'kull tip ta' xogħol impenjattiv, jista' jkollu effett fuq il-moħħ u l-psike ta' dik il-persuna, b'mod li ma tkunx tista' timpenja ruħha għal kull tip ta' xogħol jew b'ċerta intensità. Difett kosmetiku jista' jkollu dan l-effett fuq il-vitma, b'mod li fiħ jonqos il-possibiltà li jużufriwixxi b'mod sħiħ il-potenzjal tiegħu. Dan, però, irid jiġi ppruvat. Mhux biżżejjed li l-vittma jgħid li l-ħsara li garrab se taffettwa ħajtu; din il-prova trid issir b'mod serju u formali billi jew issir talba għall-perizja indipendenti, jew jitressaq espert ex parte (bħala psikjatra jew psikologu kwalifikat) li jispjega fid-dettal l-effetti li għandu difett fuq il-vitma.*

## 2.2 REFORMING MALTESE LAW ON DAMAGES

### 2.2.1 Introduction

*Wara kollox, u wkoll bla ma nqisu dak li tgħid il-Karta, il-liġi tad-delitti Ċivili ta' pajjiż ewropew tas-Seklu XXI ma tistax tkompli thalli bla rimedju lil min igarrab ħsara fil-valuri fundamentali tal-ħajja.<sup>26</sup>*

This observation made by the Court in **Busuttil vs Muscat** (examined above), summarises the position upheld by the Maltese legal community that the lack of compensation for non-pecuniary damages is but an anachronism, and that the need for reform is apparent. The Court's recent efforts uncover a desire to promote this agenda, however it is clear that the situation can only be rectified by legislative intervention.

This section of the paper examines the manner in which the provisions governing the compensation of civil damages within the Civil Code can be reformed in order to cater for the introduction of non-pecuniary damages, and to increase certainty of the Courts' appreciation on the matter. Various attempts have been made to expand on the original system of civil damages, the most recent being Bill 78 of 2011. The Bill targeted the current system of

---

<sup>26</sup> Ibid

awarding damages under article 1045, with changes being made to the aforementioned article, article 1046, and an addition of article 1046A.

It is agreed that any legislative intervention to be made in this respect must be made in terms of Articles 1045 and 1046: insofar as Article 1045 limits the heads of damage to actual losses and loss of future earning exclusively, compensation for any other form of damage will be incompatible with the law. When viewed in terms of the Code in its entirety, however, these articles constitute, really and truly, the only barrier to compensation outside the realms of *lucrum cessans* and *damnum emergens*, and this since the general provisions dealing with delictual responsibility make no such restriction: the wording ‘shall be liable for any damage’ contained in Article 1033<sup>27</sup> is wide enough to encompass the liquidation of moral or other non-pecuniary damages, as noted, and at times even utilised by the Courts in order to circumvent the strictness of Article 1045.

One manner in which the introduction of new heads of damage may be attained would be through the *removal in toto of Articles 1045 and 1046* (perhaps coupled with the enactment of a set of guidelines for the calculation of damages), thereby allowing the Courts the freedom to adjudicate cases in an unrestricted manner and calculate damages following a case-by-case appreciation of the relevant facts and considerations. The institutionalisation of what was previously judicially evolved may prove fatal to its development- for in legalising a principle, this becomes but a rigid computation, superseding notions of justice on a case by case basis.

This having been said, the need for clarity and uniformity is likewise understandable and relevant to the attainment of justice. Indeed, although efficient, the removal of any form of legislative framework could open the door to the introduction of different forms of damages not contemplated at the time of amendment- such as the introduction of *danno esistenziale*, possibly resulting in Sir Dingli’s fear of ‘*la rovina del danneggiante*’.

The legislator’s desire to codify and delineate the extent of the new developments will therefore likely manifest itself in an amendment to the existing law and for this reason, the following observations will take the form of a commentary on some of the more salient provisions contained in the last set of amendments to be proposed in this area of law, Bill LXXVIII of 2011.

### **2.2.2 *Lucrum Cessans***

At a first glance, the amendments to the calculation of *lucrum cessans* proposed in Bill LXXVIII appear to crystallise the formula historically formulated in *Butler v. Heard*, which constitutes the cornerstone of judicial interpretation for the assessment of *lucrum cessans*. A comparative examination will however reveal that there exist a number of significant

---

<sup>27</sup> Vide also article 1031 of the Civil Code

differences between the Butler vs Heard formula currently utilised by the courts, and that crystallised in the amendments: although the premise underlying the calculation remains the same, adjustments made to the variants will ultimately result in lower awards. A number of policy choices made by the legislator in Bill LXXIII belie the impression that the victim will gain from the proposed amendments. Examples of such policy choices include the fact that the Courts must make reference to the victim's net income, as opposed to gross income and reference to the *average* annual net income of the victim of the five years preceding the tortuous act. This does not allow the Courts to take into consideration the victim's skills, education and other potential which may result in higher salaries over time- and this is especially true in the case of young victims at the start of their careers.

Reference is again drawn to use of the victim's annual net income as a multiplying factor. Traditionally speaking, tax computation has never fallen within the remits of the Courts, but has always been viewed as a matter falling within governmental competence.<sup>28</sup> Apart from clear logical problems which present themselves in the computation of tax deductions- such as taking measures to account for a possible future fluctuation in tax rates, judgments have repeatedly held that it is the gross salary which counts for the purposes of the computation exercise,<sup>29</sup> and that no income tax and national contributions are to be deducted.<sup>30</sup> More importantly, this tax deduction is often catered for by means of the twenty per centum lump sum deduction which the Courts have come to take into consideration when awarding damages for *lucrum cessans*.

This percentage has also been incorporated within the proposed formula, though, it is submitted, not without raising further questions as to the fairness of the Bill's provisions. Traditionally speaking, the twenty percent deduction made by judges at the end of the computation is made to account partly, as noted above, to reflect any tax and other reductions which would exist to one's salary during his life, but most importantly, to counter for the victim's possibility of investing the lump sum award for *lucrum cessans* and making unjustified enrichment. Proposing the use of one's annual net income may already prove unfair considering the additional reduction made at the end of the calculation.

Of more significance, however is the rigidity with which the twenty percent reduction must be applied: the Courts are given no discretion whatsoever to reduce this sum in view of the facts of the case, and this may give rise to unfairness. Indeed, while it is true that the use of the Butler- Heard principle within local jurisprudence has been extensive, the Courts have reiterated time and again that this principle is but a guideline, and have therefore proceeded to alter the formula wherever they deemed that it would be just to do so. One particular situation in which a change to the formula would be made, was in those cases whereby judicial proceedings would not have been decided for an excessive number of years. In such cases, the Courts rectified this injustice caused by judicial inefficiency by reducing the percentage

---

<sup>28</sup> Vide for example Maria Pace proprio et nomine vs Joseph Abela, Civil Court First Hall, 21 May 1993

<sup>29</sup> Vide for example Emmanuel Zahra vs Patrick Vassallo, Civil Court First Hall, 15 October 2003, in which a number of cases corroborating this point were quoted.

<sup>30</sup> Alexandra Saliba Sammut et vs Joseph Attard, Civil Court First Hall, 25 January 2001



value to be deduced at the end of the calculation for damages. The time it takes for proceedings to be decided whittles down the benefit of security which is derived from the award of a lump sum, while increasing legal, court and other fees due by the victim. It would be unjust to disallow the Courts from taking into consideration such mitigating factors. A jurisprudential trend has formed over the years in terms of which an annual reduction in the percentage value of the lump sum is triggered after three or so years have lapsed, though application of this principle has not been constant. For example, whereas in **Lawence Caruana vs Anthony Falzon**,<sup>31</sup> the Court of Appeal made an annual deduction of two percent once the first three years of proceedings elapsed, in cases such as **Carmelo sive Charles Micallef et vs Richard Spiteri et**,<sup>32</sup> and **Davies vs Galea**,<sup>33</sup> the Courts refused to make any lump sum deduction in the first place owing to the nature of the damage inflicted. In light of the above, it is hereby suggested that the value of the lump sum deduction should not be fixed at twenty percent, but should rather indicate a bracket in terms of which Courts are flexible to operate, for example, Court are to make a lump sum reduction of up to twenty percent depending on the relevant facts of the case.

Finally, when it comes to determining the percentage disability in terms of the disability table, there are a number of issues which do not fall within the scope of the list set out therein, including for example aesthetic damage, which, as noted by the Court in **Peter Sultana vs Anthony Abela Caruana**,<sup>34</sup> are relevant especially in owing to the psychological damage which may ensue as a result thereof.

### 2.2.3 Non-Pecuniary Damages

The exclusion of non-pecuniary damages from the Civil Code was a clearly intentional decision on Sir Adrian Dingli's part, attributable mostly to practicality and the fear of unjustified enrichment on the part of the party suffering the intangible damage.<sup>35</sup> Indeed, there exists no corresponding provision having the same effect within the Austrian ABGB, which Code is indicated in Dingli's *Appunti* as being the main source of inspiration for the sections on Civil liability. It follows, therefore, that the omission of damages for 'pain and suffering' was not a decision based on ideological incompatibility with the notion of *restitutio in integrum*. This also emerges from the fact that other jurisdictions having laws based on a fault-based theory of responsibility have allowed for the introduction of non-pecuniary damages within their laws.

Bill LXXVIII of 2011 introduced non-pecuniary damage as eligible for compensation through Article 1045(e) without defining the scope or nature of such damage, and rightly so.

---

<sup>31</sup> Court of Appeal, 5 October 2001

<sup>32</sup> Court of Appeal, 15 January 2002

<sup>33</sup> Civil Court First Hall, 10 October 1997

<sup>34</sup> Court of Appeal, 15 January 2002

<sup>35</sup> Claude Micallef Grimaud, 'The rationale for excluding moral damages from Maltese Law' (LL.D. Thesis, University of Malta 2008) 28

The notion of Moral or Non-pecuniary damage takes on a significantly different number of forms depending on the relevant facts of the case: the process adopted by foreign courts-practicing both Civil or Common Law- in assessing non-pecuniary losses is most importantly highly subjective,<sup>36</sup> basing their considerations on factors such as the intensity of the pain suffered and mental suffering. To hinder the Court's subjective discretion will inevitably lead to stagnation of the law whenever new and unforeseen circumstances requiring compensation arise.

This notwithstanding, despite the fact that the legislator has not limited the scope of the damage by defining it, Bill LXXVIII of 2011 indirectly achieved the same result by strictly regulating the manner in which non-pecuniary damages were to be awarded.<sup>37</sup> As opined by Kemp and Kemp, this form of damage is not susceptible to assessment by *arithmetic computation*.<sup>38</sup> By rendering the percentage of disability suffered by the victim directly relevant to the calculation of non-pecuniary damages, Bill LXXVIII of 2011 goes against the impression which transpires from Article 1045(e) that the introduction of such damages is being contemplated in a general manner; as the Bill stands, damages would only be due in cases whereby permanent physical damage ensues and according to the strict percentage set out in the Disability Regulations Table.

This in itself also gives rise to another problem: despite the fact that in calculating the percentage disability Courts are allowed a margin of discretion to cater for the victim's *subjective working capacity*, Clause 4 of the *Regulation for the Assessment of Damages for Death or Incapacity* issued with the White Paper, states that there can be so adjustment of this nature whatsoever owing to the purely medical nature evaluation underlying these values. This creates a conflict and is dangerous since it could create a situation where the profession of the victim or any other capabilities of the victim which may have been adversely affected by the tortuous acts of another, are not to be taken into consideration.

Ultimately, as the proposed computation currently stands, Bill LXXVIII does not take into account that damage which is not a medically verifiable illness bringing about permanent damage, and as such may not reflect the true extent to which that permanent damage has exacerbated feelings of pain and suffering (example psychological conditions may be awarded a lower percentage of disability despite having a huge impact on one's everyday life). This amendment creates a paradoxical situation in which the compensation of non-pecuniary damage does not, really and truly, compensate moral damages. By incorporating this formula, the legislator lost sight of the underlying scope of compensating moral damage, i.e. acknowledging that people do not matter solely insofar as they are considered to be

---

<sup>36</sup> Maria Bonello, 'Delictual Liability: A study of the 2010 White Paper and the Relevant Bill' (LL.D. Thesis, University of Malta 2012) 77

<sup>37</sup> Vide Bill LXVIII, article 1046(4), whereby the non-pecuniary damages to be awarded to the victim consequent to a permanent disability are to be calculated through use of the formula *Percentage Disability x €200,000*.

<sup>38</sup> Fiona Cilia, 'Quantifying Damages for *Lucrum Cessans* in Tort: A Fusion of Sources creating a Unique Legal Structure for Malta', <<http://www.law.lsu.edu/globals/sitelibraries/jcls/home/V4%20n2%209%20Cilia.pdf>> accessed 30 August 2014

money making machines. Moral damage ultimately signifies that one's own subjective experience of pain and loss is relevant to a legal system which does not seek to protect only property, but also the individual person per se. It is a notion which the Courts themselves have endorsed and have been taking into consideration in their awards, and as a result, rather than clarifying a notion that has evolved through the judicial channel, Bill LXXVIII retraces its steps and annuls it.

In view of the severe limitations to moral damages set out above, it may be high time for the codification/ acceptance of the concept of *danno biologico* within the Maltese legal system, a concept already adopted by the Court in cases such as **Cassar vs Dragonara Casino**. Similarly to the award of damage for the loss of the amenities of life under Common law, damages for *danno biologico* are compensated for injury to one's physical integrity, i.e. to the victim's state of being and one's ability to carry out activities previously engaged in by the victim. This allows the Court to view the victim as a human being, an element currently missing from the proposed amendments.

Jurisprudence and doctrine evidence that health is not a patrimonial asset, and that damage to one's psycho-physical integrity ought to be compensated nonetheless. This may prove especially relevant in those cases whereby disability suffered is not permanent, or whereby despite the fact permanent disability is suffered, the victim's employment does not cease and the victim's sole entitlement to compensation would only be for non-pecuniary damage. With amendment to the restrictions imposed by Article 1045, the Courts could much like their Italian counterparts,<sup>39</sup> justify the award of such damages solely on the basis of the general articles on delictual responsibility, which are wide enough to cover any such damage, explaining that:

*Illi għandu jkun paċifiku li l-ħajja li fin-normalita` taċ-ċirkostanzi tista' tkun pjenament vissuta mill-attriċi ġiet effettivament ċirkoskritta b'mod li hi effettwata negattivament mhux biss fizikament iżda wkoll psikikament, ħaġa li timmerita l-ekwiparazzjoni eżistenzjali li l-imsemmija leġislazzjoni, Konvenzjonijiet, u Karta Ewropea, jindirizzaw bi kjarizza u li l-qrati Maltin ma jistgħux ikomplu jippekkaw fir-rigward billi jinjorawhom.<sup>40</sup>*

It is humbly submitted that the constitutionalisation of private law is a phenomenon that will almost inevitable creep within Maltese law, as in other foreign jurisdictions. The Courts seem certainly keen to speed up this process. It is therefore within the legislator's interest to regulate its introduction and ensure that this form of compensation does not become a method by means of which more frivolous claims could become compensated- as was the case in Italy with the development of *danno biologico* into *danno esistenziale*.

---

<sup>39</sup> The notion of *danno biologico* was affirmed on the basis of Article 2043 of the Italian Codice Civile in light of an exercise of constitutionalisation of Italian private law.

<sup>40</sup> Lucianne Cassar vs Dragonara Casino Limited, Civil Court First Hall, 19 June 2012

Of course, this re-introduces the problem of uniformity in quantification, although overcoming this hurdle will always prove difficult in nature. One may consider enacting guidelines giving rough percentages according to which the Courts may base their outcome, but the very fact that *danno biologico* is not intimately linked to one's ability to earn revenue, necessarily renders these parameters flexible in nature.

## CONCLUSION

This paper in no way seeks to be exhaustive in its observations: it simply seeks to point out a number of recommendations in light of the impending reform on civil responsibility, in the hope that the recommendations set out therein may at least serve as a platform for discussion. It also hopes to point out the fact that amendments may also be due to the area of delictual responsibility itself (as opposed to simply reforming the law on damages).

When it comes to damages, then, one must note that proposing a drastic solution for the computation of damages under Maltese law- as that set out in Bill LXXIII- is not the solution for lack of clarity within the current system. The rigidity with which the legislator sought to regulate the award of non-pecuniary damages comes at the price of the Courts' discretion to balance out the competing interests which exist in any claim for damages. Indeed, 'rigidity is one of the main components that obstruct the courts in properly carrying out their definitive purpose, [the purpose of liquidating] a fair award to which the individual claimant is entitled to'.<sup>41</sup>

---

<sup>41</sup> Bonello (n 30) 107