The Right of Compensation for Damages: Medical Liability

JESSICA-ANN SPITERI

In this article, Ms Spiteri discusses the right of compensation for damages involved with regards to medical liability, vis-à-vis Articles 1030 to 1045 of the Civil Code.

Jessica-Ann Spiteri *is a fourth year law student at the University of Malta.*

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The notion of damages in Malta is divided into two categories: contractual damages and tortious damages. A doctor-patient relationship can be based on either a contract between the parties or on tort. Therefore, because of this dualist system, one asks which system caters for or governs the rights and liabilities of the parties involved.

First of all, one must mention that a person has a right to medical care, which is protected under Article 25 of the Universal Declaration of Human Rights.[1] For a person to live an adequate life and also have a good standard of living, said article is to be respected. Apart from every person having a right to have the best medical care, the European Union further states that everyone has the right to benefit from medical treatment and, while implementing EU policies, there should be a high level of human health protection.

When a patient is not treated according to the accepted standard of care, medical liability rises. Here, practitioners have a legal obligation to compensate their patients for any injuries suffered caused by the acts or omissions on their part. A medical professional is not obliged by law to give a specific result. However, they are indeed obliged to give the highest amount of professional care. One is required to carry out any treatments in the best interests of the patients and to the best of his capabilities. The law plays a very important role when it comes to the doctor-patient relationship. When there is a dispute between the doctor, the patient or the patient's relatives, the law comes into play as the standards needed were neither taken into consideration nor attained.

In order for a person to be held responsible, there has to be a breach of a contractual obligation or breach of an obligation implied by the law. It is important to mention that a party can choose to sue the alleged offender on the basis of contract or on tort, but there has been a tendency that when there is an allegation that such professional failed to carry out his duty of care, tort law caters for the basis for such claim, unlike contract law. Of course, regardless of whether the relationship between the patient and the professional is contractual or not, the degree of duty is the same. When a person breaches an obligation arising out of a contract, one will incur contractual responsibility. On the other hand, if a person violates an obligation imposed by law, then one would have tortious responsibility. The effects which arise from the breaches of contractual or tortious obligations are also different on the person found responsible for such breach. When a person

1 Universal Declaration of Human Rights: *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.".*

has contractual responsibility and infringes such rights, one may compel the other party to perform such obligations which the person has promised to undertake. Apart from this, the aggrieved party may sue the other party for the damages which arose out of the breach of the contract. On the other hand, when one has a tortious responsibility, there is only one remedy which is available to the injured party when one is suing the offender for the recovery of the damages. It is important to mention that under the Civil Code, the action of damages which arise out of a contractual obligation is time-barred by the lapse of 5 years, while that of tort is barred by 2 years.

When there is a breach of contract or tort, also known as a duty imposed by law which is based on negligence, it can only be successful if the patient proves three main elements of such negligence: first of all, that the physician had a duty to care in such a situation. Secondly, that such physician failed to keep this standard of care which is required by duty, and lastly, that the client suffered damages because of the breach of the duties. As stated above, the professional or doctor has a duty to give and provide the patient with care which is accepted by the standard. Therefore, when there is a breach of duty of the standard of care, one is to look at Article 1132(1) of the Civil Code[2]. Here, one may find a reference to Article 1032 where a person, by his acts, will be deemed to be at fault if he does not use the diligence, prudence and attention of the '*bonus paterfamilias*'. By making a reference to the '*bonus paterfamilias*' the standard of care required is established under contract or tort law. Such profession is linked with the responsibility of the reasonable man which has a required, special skill. Such doctrine has also included acceptance that in such a highly specialised profession, the Court must rely on other members of the same profession. The Court will also rely on their behaviour in order to judge and also compare the treatment which was given to such patient and if it should have been conducted in such a manner.

In both the Common law system and the Civil law system, there are numerous cases which relate to this area. One may refer to one of the most important cases in the mixed jurisdiction of Malta under medical liability, which are those of **Savona vs Asphar**[3] and **Gauci vs Felice**[4]. Looking at both judgments, where both doctors were working in a public hospital, many questions were raised. Here, one is able to understand how medical

2 Chapter 16 of the Laws of Malta, Civil Code*: "the degree of diligence to be exercised in the performance of any obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a bonus paterfamilias as provided in section 1032.".*

3 Savona Victor Pr. Et Ne. Vs Dr. Peter Asphar Et, Of Appeal (Civil, Superior), per Camilleri Luigi A., Harding William, Montanaro Gauci A.j., 23rd June 1952.

4 Gauci Rose Et Vs Felice Donald Et, Of Appeal (Civil, Superior), per Cuschieri Noel, Azzopardi Joseph, Zammit Mc Keon Joseph, 8th October 2009.

liability was developed and how issues where tackled. In the first case of Savona vs Asphar, the latter dealt with the amputation of a boy's leg as a result of the negligent medical intervention carried out by the defendant. Such amputation took place because the patient developed gangrene in his leg. This happened because the medical practitioner did not carry out his care and duty to monitor his leg accordingly after his surgery. Both Articles 1031[5] and 1032 were assessed where even though a professional will not be held liable for an act carried out under his profession unless such mistake isn't '*gross*' and the fault is not like what is stated under Article 1032, meaning that a person is held liable if he didn't use the prudence and diligence of the 'bonus paterfamilias'.

Therefore, Article 1032 refers to culpa, but more precisely to '*culpa levis in abstracto'*, where although he acted in good faith, culpa is not pushed aside. One can conclude that the doctor could be held liable for what was addressed above and for committing a medical mistake which is huge in nature, also known in Maltese as '*żball grossolan*'. However, as has been stated above, one must look at another important Article, which is 1038, where such skill is compared to other practitioners who have the same skill. Through the eyes of these 3 mentioned Articles, one may say that such case was primarily dealt by tort law. That is to say that the onus of proof of proving the practitioner's negligence caused the harm suffered to the child. Therefore, such damages were assessed in the same method as in tort law. For such damages to be awarded, a lot must be taken into discussion. It is very important to remember that under tort law, there are two very important terms which are constantly mentioned in calculating the damages which occurred on the child. These are 'lucrum cessans' or 'damnum emergens'. These two references make up the four heads under Article 1045 of the Civil Code to determine what damages should be compensated under our law. Therefore, Article 1045 expresses that first of all:

"The actual loss which the act shall have directly caused to the injured party, secondly the expenses which the latter may have been compelled to incur in consequence of the damage; the loss of actual wages or other earnings, and lastly the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused."

Furthermore, such Article highlights that the sum awarded is to be assessed by the Court when all is taken into consideration. To simplify, the first 3 statements are known as '*damnum Emergens*' while the last one is known as '*lucrum cessans*'. It was made clear that apart from the 'damnum Emergens, which was to be given because the child's leg fell off, his patrimony was eroded, and he was also entitled to '*lucrum cessans*'. It is

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

important to also add, as stated by the Court of First Instance, to include the damages which occurred to the psychological insult because of the loss of the leg, as he was not able to go to school, and the fact that he would depend on others in the future. Here, moral damages were taken into consideration because whatever happened to him was not his fault. It is important to mention that the Court could not award compensation for moral damages, for the very obvious reason that we say in Malta we do not compensate moral damages, but the Court used the notion of '*lucrum cessans*' and other information relating to Article 1045(2) to be able to strengthen the argument. The child, because of the doctor's negligence, was left with a stump that could never be fixed, even with an artificial limb. Even though the child was already mildly incapacitated since birth, now he was crippled indefinitely and could not play football nor even ride a bike. Therefore, the child had lost the happiest times and joys of life. One can see that the Court was angered at the way this child was reduced. This case also referred to English Case law and focused on this child's ability to enjoy life and not on the payment earned or economic loss of life. It is important to refer to the Court of Appeal where, by using the notions of '*lucrum Cessans*' the child was compensated for moral damages he suffered while basing itself on Article 1045(2), where it felt that the words in such Article were enough to include such damages because of the circumstances of this case.

In addition, another important case occurring fifty-eight years after the one referred to above is **Gauci vs Felice**. The First Hall of the Civil Court decided that the medical professional or physician was negligent as the appropriate procedures were not conducted, and because of this, the plaintiff lost a kidney. The plaintiff was subject to an operation at the General Hospital of St Luke's. The defendant was the consultant who took care of plaintiff. The operation was considered a major one. The defendant appointed a surgeon from his firm to perform such operation. The operation was concluded without complication, nonetheless the plaintiff ended up in hospital after a few months. This time the issue was a kidney; the tube leading to such kidney in the previous intervention was closed and so lead to the malfunctioning of this organ, later on the total non-use of the same. Olga Avramov, who was the medical practitioner, was also called in suit as defendant. Felice was exonerated by the First Hall as, by referring to other experts which were appointed, stated that such issue was quite normal and asserted that there are other ways on how the surgeon could see and understand how the path of the tube is connected to the bladder. The Court stated that the defendant who was called in suit was not responsible for the issues which arose from such complication and for not adopting the best care and diligence. The judgment was overturned by the COA, where it stated that the liability of the physician was contractual and not tortious.

Basically, Article 1132(1) was invoked and stated that proof that the contractual obligation had not been adhered to must, in practice, be made by the plaintiff on the basis of Articles 1031 and 1032. Such evidence is very different from that in tort. Additionally, the Court held that the responsibility of the physician must be proved by the plaintiff. It must be shown that he was at fault because his responsibility is not to achieve a specific result, but to have a duty to conduct the act prudently and diligently. So, in this judgment, parts of **Savona vs Asphar** were upheld, but the Court understood the liability in a different manner than the aforementioned case. In this case, the diligence of the bonus paterfamilias was given a lot importance where a high standard of proof was established in order for medical liability to be established. So here, the doctor-patient relationship was a contractual one and not a torturous one. This was brought about by analysing other jurisdictions and went into other detailed discussions of where a doctor has acted negligently.

Of course, there are other cases which arose as the years went by, such as that of **Zerafa vs Olga Avramov**[6]. There was an appeal from the first judgment in 2006, where there was a claim for damages by the Zerafas in relation to a medical procedure which was carried out on his wife at St Luke's Hospital. She was to give birth to her second child through a C Section. After the matter was discussed with the doctor, a consent form was signed, authorising the medical team to carry out a procedure to cut off her fallopian tubes to prevent further conception. However, although the defendant (Dr Olga Avramov) was under the guide of Dr Felice, a few months later, the plaintiff fell pregnant once again. The Courts looked at the civil code and although it fails to state the level of responsibility held by such medical practitioners, the law still subjects such professionals to a responsibility expected to be upheld by such profession. Such decision was based on tort and considered Articles 1031-1033[7]. By referring to other judgments, it was made clear that suing a medical practitioner because of negligence was a serious notion. Such act had different effects and the consequences were more serious than when suing, for example, a driver of a car. This is because his reputation and profession are under a threat, and so the burden of proof is much greater and must therefore be crystal clear. Also, a physician is not to be held liable because something did not go according to plan. He is only to be held liable when he falls below the standard if a competent practitioner in his field would not have done so. The Court took into consideration that after surgeries of such nature, conception rarely still

6 Frankie u Sonja konjugi Zerafa vs Olga Avramov, Donald Felice, Tabib Ewlini tal-Gvern (Civil Court First Hall), per Joseph Azzopardi, 30 ta' January 2006.

7 Chapter 16 of the Laws of Malta, Civil Code, "*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.*".

takes place after such tubes are cut off. Although the plaintiffs stated that the procedure was not carried out, the reports show otherwise. Therefore, negligence had to be proved. However, the case of Zeriba's wife was a hundred-to-one shot and the only negligence found was that she was not made aware of the possibility of becoming pregnant again. The Court stated that such act was not to be labelled as medical negligence. Therefore, not only did the First Hall decide the case in favour of the defendant, but also rejected the appeal as the doctor had no obligation to give the patient all the information which related to the medical procedure in question, especially in this case. Therefore, the procedure was catered for perfectly and was intended for the couples not to have any more children and the act that happened was out of the doctor's control.

Another interesting judgment was that of Spiteri vs CGMO[8]. Here, the patient was given chemotherapy in a negligent manner. Spiteri suffered from a wound which required treatment for a period of time in the burn's unit in the hospital. Consultants stated that the way the physician administered the solution was extremely careless. The Court saw that there were a number of failures, especially where the consultant was to be administered in a way it should not. In addition, it was injected in an unusual manner, but the physician still proceeded, and although the patient stated the excruciating pain he was feeling, still he was not given the drip which he should have been given. Also, the nurses did not cater for the patient and did not request for advice the moment they found out Therefore, not only did the hospital not give the requested attention towards the person, but also lacked the communication between the patient and the staff. The Chief Government Medical Examiner was held responsible because of the lack of diligence in relation to the mistakes as "żball grossolan". Although the relationship was not one in which was contractual in nature, it must be kept in mind that there was no relationship before the issues arose. Since the Government had the obligation to deliver the care towards the patient who was in a public hospital, it was held to be liable.

There are numerous cases which one can mention, such as the case of **Busuttil vs Muscat**[9], where the plaintiff underwent a laser treatment in order to remove veins at the defendant's hospital. Unfortunately, the treatment left her with scars in her face, which resulted in burnt skin. Experts stated that the method used was excessive and the fact that the hospital relied on a patch test which was done before the treatment. Here, the hospital

8 Spiteri Michelina Et Vs It-Tabib Principali Tal-Gvern Et, Civil Court, First Hall, per Caruana Demajo Giannino, 19th June 2003.

9 Linda Busuttil illum Cordina mart James, minnu llum mifruda, u l-istess James Busuttil għal kull interess li jista' jkollu Versus Dr Josie Muscat u Tania Spiteri, Civil Court (First Hall), per Giannino Caruana Demajo 30th November 2010.

was at fault, and the Court did not find any actual loss or debilitation of her future earnings according to Article 1045, as no evidence was brought by the plaintiff on the cosmetics used or bought to cover the spots left on her face in order to go to work.

The Court considered that compensation was only due with respect to the effects that the harm could have had on the plaintiff psychologically. Therefore, at this point, the Court referred to Article 1033, where the Court used this article to allow damages with regards to those deriving from a duty imposed by law. Here, one is to refer to human rights, which are considered to be pillars of the Constitution, and so moral damages are to apply. To this day, the notion of moral damages is still not clear in our Civil Code, which raises a lot of questions. Therefore, here, there was a breach of contract with regards to the element of doctor as one has contracted with the private clinic, whilst it found Dr Muscat liable for tort under Article 1037[10], which deals with employer liability. Since the Court could not attribute fault separately to the hospital and the particular beauty therapist who carried out the treatment, it ordered them to pay the damages in solidum.

In conclusion, one can say that diligence was developed through numerous judgments, where the Courts will ask other physicians for their opinions who are in the same line of work in order to see if such practice was according to such profession or not. A physician should only be held liable if the acts done were not equal to the acts and skills to the other practitioners on the same plane, and so one is guilty of such failure. On the other hand, deviation from accepted principles of practice do not consist in breach of reasonable care. It is insisted that one is to avoid situations where surgical failure or difference in opinions means one is to pay compensation. Also, a professional is not to hold back because a particular treatment carries a considerable risk, but he must make sure and prove that such act is being performed according to reasonable care so that there would not be contractual liability or negligence for deviating from a particular practice. This accrues many times in the medical world as practitioners do their utmost to cater for people's needs as urgently as possible.

One may further add that certain forms of psychological damage are classified as medical, where the same act or omission creates a moral damage which would be the same as under those of medical liability. Therefore, in a certain way, although our legal system does not accept the liquidation of damages which are moral under medical liability, such ban may be derogated under certain circumstances according to each case.

10 *"Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others."*.

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