

Moral Damages in Maltese Tort Law

ARIANE AQUILINA

According to the Oxford Dictionary of Law, a tort is: 'A wrongful act or omission for which damages can be obtained in a civil court by the person wronged, other than a wrong that is only a breach of contract'.¹

Article 1031 of the Civil Code of Malta establishes the liability of the tortfeasor in Maltese law, providing that 'every person, however, shall be liable for the damage which occurs through his fault'.² Once damages have been caused there must be compensation for these damages which in the case of tort aim to put the claimant in the position he would have been in if the tort had not been committed. The compensation of damages is at the very heart of tort law and the Maltese Courts have developed a tradition of quantifying these damages over the past years using a formula that was developed in the landmark case **Butler vs Heard**.³ In this case the Court followed Article 1045 of the Civil Code in determining what damages could be compensated under Maltese law. Article 1045 lays down four heads of damages that can be compensated for in Maltese law:

- (1) The actual loss which the act shall have directly caused to the injured part;
- (2) The expenses which the latter may have been compelled to incur in consequence of the damage;
- (3) The loss of actual wages or other earnings; and
- (4) The loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.⁴

Article 1045 goes on to say that the sum that is to be awarded shall be assessed by the Court taking into consideration all the circumstances of the case. The first three heads of damages are known as *damnum emergens* and the fourth one is known as *lucrum cessans*.

The situation under Maltese law only allows for compensation of damages of a pecuniary nature. This means that moral damages, also known as non-patrimonial damages and non-pecuniary damages, are not covered. This is generally the case in most countries as it is difficult to evaluate and quantify damages that do not affect property, but rather affect things such as the psyche of a person. However the idea of providing compensation for moral damages is ever increasing. In Italy, for example, the Courts are using the heading of *danno biologico* to compensate for non-patrimonial damages that interfere with the health of an individual.

¹ J Law and E Martin, *Oxford Dictionary of Law* (7th, Oxford University Press 2009) 551

² Chapter 16 of the Laws of Malta, Civil Code, Article 1031

³ Michael Butler vs Peter Christopher Heard, Court of Appeal (Civil, Superior), 22 December 1967

⁴ Civil Code, Article 1045

In **Butler vs Heard**,⁵ a motorist brought a case against another motorist who had crashed into him and caused him injury. The Court had no problem in allowing for the damages sustained by the plaintiff to his motorcycle which amounted to £45, or for the compensation of the wages that Heard actually lost during his recovery that amounted to £445. However, quantifying the damages for Heard's future losses was a more complex matter. When the Court had to quantify the damages for future losses it noted that Maltese law only provides for compensation of damages of a pecuniary nature, saying that in this regard it was inferior to other legal traditions:

S'issa l-ligi tagħna – kif ġa ġie rilevat fis-sentenza appellata – tipprovdni għal kumpens għat-telf pekunjarju biss u f'dan hi inferjuri għal-ligijiet ta' pajjiżi oħra progressivi li jipprovdu anki għal kumpens – xi drabi l-uniku possibbli, għat-'telf personali' li jinkludi 'the lesser impassment of the integrity of the body: pain and suffering, both physical and mental; loss of the pleasures of life; actual shortening of life; and at least in some cases, mere discomfort and inconvenience'.⁶

The Court went on to say that it expected a change to happen in Maltese law to allow compensation for such non-pecuniary damages:

Ta' min jawgura illi din il-fergħa tal-ligi tagħna ma ddumx ma tiġi kif jixraq riformata. Id-differenza ta' rimedju provdut fil-ligi tagħna paragnat ma dak provdut, per eżempju, fil-ligi Ingliza dehret b'mod flagranti u li għandu iġiegħel lil min hu responsabbli jiħasseb bis-serjeta' u bla dewmien f'kaz reċenti li quddiem il-Qrati Inglizi fejn il-kwistjoni kienet jekk id-danni sofferti minn bniedem Ingliz li ġie korrut hawn Malta b'tort ta' Ingliz ieħor, faċċident stradali, għandhomx, f'kawża quddiem dawk il-Qrati, jiġu likwidati skond il-ligi Ingliza (lex fori) jew skond il-ligi Maltija (lex fori delicti) u ġie kalkolat illi dak li kien ikun jista' jingħata skond il-ligi Maltija kien ikun £53 mentri dak li sata' jingħata u ingħatx skond il-ligi Ingliza kien £2303. ('Boys v. Chaplin', Times Law Report, December, 7, 1867).⁷

The Court proceeded to establish a system for quantifying *lucrum cessans* that has been used and refined by later Courts,⁸ however it is interesting to note that even in 1967 the Court believed that Maltese law was somewhat inferior to other legal traditions due to the fact that it did not award compensation for non-pecuniary losses. Subsequent case law followed the position in *Butler vs Heard* however recent judgments reflect a gradual recognition of non-pecuniary and non-patrimonial damages in Maltese law.

In **Busuttil vs Muscat**,⁹ the plaintiff sued the defendant after she underwent a procedure to reduce the appearance of veins on her face but instead ended up with noticeable discolouration and marks on her face. The defendants claimed that there

⁵ Butler vs Heard (n 3)

⁶ Ibid

⁷ Ibid

⁸ The standard formula is to multiply the yearly income x percentage disability x the multiplier, and all this minus a percentage due to the sum being given as a lump sum payment. This lump sum payment reduction is usually 20% however recently it has been varied according to the length of time between the actual damage was caused and the day the case was decided.

⁹ Busuttil Linda et vs Muscat Dr Josie et, Civil Court First Hall, 30 November 2010

was no pecuniary loss or loss of wages however the Court did not completely agree with this and pointed out that the plaintiff would have to spend money to buy make up to cover up the damage caused, and that the marks on her face could in fact affect her potential to find a job in certain industries. The most problematic issue was that the plaintiff herself did not bring evidence of patrimonial damages but instead invited the Court to liquidate the damages *arbitrio boni viri*. The Court felt that the possibility to liquidate damages in such a way was not to be used as a way to cover up negligence on any part of the parties to a case. Therefore, the Court could not award compensation for patrimonial damages where the plaintiff did not bring evidence: *‘Fiċ-ċirkostanzi, għalhekk, il-qorti tista’ tgħid biss illi ma saritx il-prova ta’ danni patrimonjali.*¹⁰ However, the Court still went on to discuss the issue of non-patrimonial damages, arguing that the plaintiff had suffered damages to her personal integrity which is protected under the Constitution of Malta, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union:

It-telf li għarrbet l-attriċi, iżda, ma huwiex biss patrimonjali. L-attriċi għarrbet ħsara f’għisimha u, minħabba f’hekk, ukoll fil-psike tagħha. L-integrità psiko-fizika 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 [‘il-Karta’], li fl-art. 3 – ‘Id-dritt għall-integrità tal-persuna’ – para. 1 tgħid hekk: ‘Kull persuna għandha d-dritt għar-rispett tal-integrità fizika 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 jkunu [qegħdin] jimplimentaw il-liġi tal-Unjoni’, huma marbuta illi jinterpretaw il-liġijiet ta’ Malta b’mod konformi.¹¹

The Court proceeded to apply Article 1033 of the Civil Code which states: 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.¹²

It argued that this Article 1033 simply mentions damages without explicitly mentioning patrimonial damages, or excluding non-patrimonial damages, and that damages cannot be interpreted anymore as simply meaning patrimonial damages:

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 tħalli bla rimedju lil min iġarrab ħsara fil-valuri fundamentali tal-ħajja. L-attriċi, bi ħtija tal-konvenuti, għarrbet ħsara fl-integrità tal-persuna tagħha u għalhekk il-konvenuti huma obbligati għall-ħlas ta’ din il-ħsara, kif iġid u jrid l-art.1033 tal-Kodiċi Ċivili moqri fid-dawl tal-art. 3.1 tal-Karta.¹³

¹⁰ Ibid

¹¹ Ibid

¹² Civil Code, Article 1033

¹³ Busuttil vs Muscat (n 9)

The Court concluded that the nature of non-patrimonial damages meant that the liquidation of such damages had to be carried out by the Court *arbitrio boni viri* and proceeded to award Busuttill the sum of €5,000.

Another case that made reference to non-patrimonial damages, based on the findings in **Busuttill vs Muscat**, was **Cassar vs Dragonara Casino Limited**.¹⁴ The plaintiff sued the casino, as her place of work, for neglecting to provide a safe working environment as a consequence of which she suffered personal injury. The Court noted that apart from *damnum emergens and lucrum cessans* the plaintiff suffered other damages, including the inability to give birth to her child in a natural way, a right which any mother is entitled to, and her inability to pick her daughter up which could affect the child in a negative way. The Court concluded that:

*Illi għalhekk id-diżabilita` riskontrata effettivament taffettwa l-integrita` psiko-fizika tal-attrici, liema integrita` 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.*¹⁵

The Court also made reference to Article 1033 of the Civil Code in saying that damages should not be limited to patrimonial damages anymore:

*Illi għalhekk l-interpretazzjoni tal-kliem 'tal-**hsara**' m'għadhiex aktar limitata għal ma kienet tradizzjonalment għall-'**damnum emergens**' u '**lucrum cessans**', iżda għandha tinkludi l-**hsara kollha** riskontrata – u allura mhux dik esklussivament patrimonjali – bħal ma hi dik naxxenti mit-tifrik tal-integrita` fizika tal-persuna.*¹⁶

The Court liquidated these non-patrimonial damages that it called existential damages to the amount of €8,000, which it added to the amounts already established for *damnum emergens* and *lucrum cessans*. It is important to note that both *Busuttill vs Muscat* and *Cassar vs Dragonara Casino Limited* have been appealed which means that their recognition of non-patrimonial damages may in fact be overturned by the Court of Appeals.

The future of non-patrimonial damages in Malta seems promising. In 2011, Bill 78¹⁷ was proposed to amend the Civil Code of Malta. Inter alia, this Bill proposed an amendment to Article 1045 of the Civil Code that would expand the heads of damages compensable under Maltese law to 'include the non-pecuniary loss arising from any permanent disability, total or partial, which the act may have caused.'¹⁸ Apart from this Article 1046 would be amended and inter alia would include a sub-article stating that:

A close relative of the deceased may claim non-pecuniary damages, and the damages payable to each claimant shall be fixed by regulations made in accordance with Article 1046A. A close relative of the deceased shall mean spouse, descendant,

¹⁴ Cassar Lucianne vs Dragonara Casino Limited, Civil Court First Hall, 19 June 2012

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Bill 78 of 2011

¹⁸ Ibid Rule 2, Article 1045 (1)(e)

ascendant or a brother or sister of the deceased person who at the time of his death was living in the same household of the deceased person.¹⁹

This Bill is still before Parliament for consideration however the idea of non-patrimonial damages is certainly present in the minds of the legislators and the judiciary in Malta. Moral damages need to be taken into account by Maltese law makers and judges to make sure that the Maltese legal system is up-to-date and on a par with other European legal systems.

¹⁹ Ibid Rule 3, Article 1046 (4)