COMPENSATION FOR ACCIDENTS

A STUDY OF RECENT DEVELOPMENTS

BY

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ABSTRACT

Two theses have already been submitted on the subject of the quantum of damages for personal injuries and death. The first one was by Carmel A. Agius (today Mr Justice Agius) in 1969 and the more recent one was by George Cutajar in 1983.

The position prevailing since 1983 has certainly not remained static. This present thesis is precisely aimed at analysing in some depth the developments that have taken place during recent years. In this study, it is proposed to examine the way in which our Courts are moving towards a more open and realistic approach in their assessment and liquidation of damages. The multiplier system as first laid down in **Butler v. Heard** was rigidly applied by our Courts for a number of years. Lately, however, it has been the target of criticism and this has led to a serious appraisal of the system. This has resulted in certain modifications so that the multiplier is no longer tied to a maximum of 20 years, and moreover the 20% deduction usually made because of lump sum payments is at times reduced or even ignored in those instances where the judgment is being delivered a long time after the accident.

Particular emphasis will be directed on problems

encountered when determining the amount of damages in cases of fatal injuries, amongst which the position of the surviving spouse and the notion of dependency.

Special attention will also be given to the concept of moral damages, another aspect of the law of damages which deserves a closer look, and in particular the impact they would have on Maltese society were they to be allowed.

It is hoped that this thesis will provide a clear insight into the progress registered by our Courts in this area of law, and prove that, notwithstanding the lack of legal guidelines, our Courts are capable of achieving admirable results.

To Francis

TABLE OF CONTENTS

TABLE OF STATUTES

ITALY

1. Codice Civile [Italiano]
2. Codice Penale [Italiano]

MALTA

1. Civil Code [Chapter 16]
2. Constitution of Malta
3. Copyright Act [Chapter 196]
4. The Motor Vehicles Insurance (Third Party Risks) Ordinance [Chapter 104]
5. Press Act [Chapter 248]
6. Promises of Marriage Law [Chapter 5]

UNITED KINGDOM

1. Fatal Accidents Act [1976]

TABLE OF JUDGMENTS

MALTA

11. **Domenic Bartolo et -vs- John Attard et noe,** First Hall Civil Court, 28.03.1983

12. **Carmel Bellizzi pro et noe -vs- Joseph Vella,** Court of Appeal, 27.06.1979

13. **Josephine Bondin -vs- Christine Demajo,** Court of Appeal, 08.01.1992, Vol LXXVI Part ii Page 175

14. **Dr Giovanni Bonello noe -vs- Tarcisio Gatt,** First Hall Civil Court, 31/07/80

15. **Hadrian Borg -vs- Mario Caruana,** First Hall Civil Court, 19.02.1993, Vol LXXVII Part iii Page 58

16. **Mary Bugeja noe et -vs- George Agius noe,** Commercial Court, 12.01.1987 ; Court of Appeal, 26.07.1991

17. **Olga Busuttil -vs- Raymond Muscat,** First Hall Civil Court, 06.06.1997

18. **Stephen Busuttil Naudi -vs- Henry Hunt,** First Hall Civil Court, 27.11.1992

19. **Michael Butler -vs- Peter Christopher Heard,** First Hall Civil Court, 28.02.1967 ; Court of Appeal, 22.12.1967

20. **Albert Cachia -vs- Gerald Cutajar,** First Hall Civil Court, 08.02.1982

21. **Malcolm Cachia noe -vs- Joseph Chetcuti,** First Hall Civil Court, 16.10.1991

22. **Victor Cachia et -vs- Carmel Mifsud,** First Hall Civil Court, 29.04.1983

23. **Carmel Camilleri -vs- Alfred Falzon,** Court of Appeal, 14.05.1984

24. **Mario Camilleri -vs- Mario Borg et noe,** First

Hall Civil Court, 08.05.1990, Vol LXXIV Part iii Page 512

25. **Dr Giuseppe Maria Camilleri -vs- Salvu Bonnici et noe**, Court of Appeal, 08.05.1978

26. **Mario Caruana -vs- Joseph Gatt noe**, First Hall Civil Court, 23.02.1996

27. **Jacqueline Cassar -vs- Joseph Buhagiar et**, First Hall Civil Court, 01.03.1992, Vol LXXVI Part iii Page 545

28. **Emmanuela Cauchi -vs- Emmanuele Agius**, Court of Appeal, 15.03.1983

29. **Marianna Cini pro et noe -vs- Paolo Galea et**, Court of Appeal, 27.10.1958, Vol XLII Part i Page 317

30. **Giuseppa Cortis pro et noe -vs- Cecil Baker noe**, First Hall Civil Court, 21.06.1972 ; Court of Appeal, 31.01.1977

31. **George Cumbo et noe -vs- Robert Anastasi**, First Hall Civil Court, 23.10.1992

32. **Carmel Cuomo noe -vs- Abdulla Abdul Mutlib Hasliim**, First Hall Civil Court, 17.01.1978

33. **Josephine Desira pro et noe -vs- Joseph Cassar**, First Hall Civil Court, 13.01.1995

34. **Joseph Farrugia -vs- Francis Bartolo**, Court of Appeal, 16.05.1984

35. **Angelo Galea -vs- Joseph D'Agostino et**, First Hall Civil Court, 16.12.1996

36. **Joseph Galea -vs- Joseph Attard**, First Hall Civil Court, 03.03.1993

37. **Edgar Gatt -vs- Oliver Theuma**, Court of Appeal, 27.04.1987, Vol LXXI Part ii Page 135

38. **Joseph Gatt v. Carmelo Abela noe**, First Hall Civil Court, 28.04.1971

39. **Carmelo Grech pro et noe -vs- Michael Azzopardi**, First Hall Civil Court, 08.01.1947, Vol XXXIII Part ii Page 1

40. **Carmelo Grech v. Kevin Vella**, First Hall Civil Court, 28.06.1996

41. **Elizabeth sive Alice Grech et -vs- Mario Briffa**, First Hall Civil Court, 21.02.1997

42. **Emanuel Grech noe v. Michael Camilleri noe et**, still pending before the Court of Magistrates [Gozo] in its Superior Jurisdiction

43. **Vicki Grech et -vs- Giulietta Grech et** [withdrawn]

44. **Marjorie Grima -vs- Benedict sive Benny Cassar et noe**, First Hall Civil Court, 05.11.1993

45. **Arthur Lambert et noe v. Anthony Buttigieg pro et noe**, Commercial Court, 18.04.1963

46. **Godfrey Leone Ganado v. Norman Zammit**, First Hall Civil Court, 29.11.1972

47. **Pauline Lia pro et noe -vs- Paul Debattista**, First Hall Civil Court, 06.11.1995

48. **Joseph Magro -vs- Tony sive Anthony Busuttil**, First Hall Civil Court, 09.12.1982

49. **Victor Mallia et -vs- Joseph Camilleri**, First Hall Civil Court, 15.01.1993

50. **Rita Mamo -vs- Albert Mizzi noe**, Court of Appeal, 01.03.1988, Vol LXXII Part ii Page 445

51. **Joseph Meli et noe -vs- Captain Edward sive**

Teddy Cachia, First Hall Civil Court, 21.11.1994

52. **Giuseppe Micallef -vs Giuseppe Micallef**, First Hall Civil Court, 18.01.1984

53. **Saviour Micallef pro et noe -vs- Mario Psaila**, First Hall Civil Court, 16.03.1981

54. **Salvatore Mifsud -vs- Carlo Camilleri et noe**, Court of Appeal, 16.11.1983

55. **Carmela Muscat et v. Francis Schembri**, First Hall Civil Court, 27.01.1972

56. **John Mary Muscat -vs- Charles Gatt**, First Hall Civil Court, 16.07.1987

57. **Maria Pace pro et noe -vs- Joseph Abela**, First Hall Civil Court, 21.05.1993, Vol LXXVII Part iii Page 163

58. **Michael Refalo pro et noe -vs- Paul Curmi**, Court of Magistrates [Gozo] in its Superior Jurisdiction, 28.01.1983

59. **Paul Scerri et noe -vs- Tancred Cesareo**, First Hall Civil Court, 27.01.1997

60. **Carmela Schembri -vs- Alfred Caruana noe**, Commercial Court, 20.04.1990

61. **Josephine Schembri et -vs- Nathalie Navarro**, First Hall Civil Court, 21.05.1996

62. **Victor Shaw et -vs- John Aquilina et pro**, Court of Appeal, 27.03.1996

63. **Alfred Shead -vs- Anthony Degiorgio et noe**, First Hall Civil Court, 05.11.1984

64. **Anna Stanley -vs- Alan Zahra**, First Hall Civil Court, 23.03.1993, Vol LXXVII Part iii Page 93

65. **John Sultana -vs- The Malta Drydocks Corporation**, Commercial Court, 28.05.1979

66. **Anthony Tabone -vs- Salvatore Guillaumier et noe**, Commercial Court, 23.06.1988, Vol LXXII Part iv Page 797

67. **Duncan Vassallo -vs- Khalid Schwej**, First Hall Civil Court, 08.03.1996

68. **Paul Vassallo et -vs- Carmelo Pace**, Court of Appeal, 05.03.1986

69. **David Vella -vs- Michael Soler noe**, Commercial Court, 20.03.1990, Vol LXXIV Part iv Page 585

70. **Francis Vella -vs- James Micallef**, First Hall Civil Court, 31.01.1994

71. **Vincenza Vella Dalmas -vs- John Ghigo et**, First Hall Civil, 07.02.1979; Court of Appeal, 05.02.1980

72. **Louis Vincenti noe v. Carmelo Micallef**, First Hall Civil Court, Vol LV Part ii Page 680

73. **Ronald White -vs- Carmel Busuttil noe**, Commercial Court, 06.02.1987

74. **Josephine Xerri pro et noe -vs- Saviour Spiteri et noe**, Court of Magistrates [Gozo] in its Superior Jurisdiction, 22.02.1985

75. **Paul Xuereb noe v. Emanuel Xuereb pro et noe**, First Hall Civil Court, 05.10.1995

76. **Karen Zimelli -vs- Michael Sammut**, First Hall Civil Court, 15.06.1993

UNITED KINGDOM

1. **Boys v. Chaplin** [1967]

2. **British Transport Commission v. Gourley,** [1956] AC 185 at 212 ; [1955] All ER 796 at 808

3. **Fair v. London and North Western Rly Co.,** [1869] 21 LT 326

4. **H. West & Son Ltd. v. Shepherd,** [1964] AC 326 ; [1963] 2 All ER 625

5. **Lister v. Romford Ice and Cold Storage Co. Ltd.,** [1957] A.C. 555 at 591

6. **Livingstone v. Rawyards Coal Co.,** [1880] 5 App. Cas. 25 at 39 (H.L. {Sc})

7. **Mallett v. McMonagle,** [1969] 2 All ER 178 at 191

8. **Phillips v. London and South Western Rly Co.,** [1879] 4 QBD 406 at 407

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CHAPTER 1

THE ISSUES IN PERSPECTIVE

1.1 Introduction

Statistics, especially where a very restricted counting area is concerned, are notoriously tricky. This trickiness is even more accentuated when the percentages are drawn up.

Nevertheless, the general sense is that driving in Malta is becoming even more dangerous, drivers are ever more vicious, patience even more lacking, and road courtesy, as t raditional, almost non-existant. The following statistics speak for themselves. There were 11 road accident deaths in the first 6 months of 1996 as opposed to 9 in the same period of 1995. Between April and June road accidents went up by 20%. 7869 vehicles were involved in traffic accidents or 1544 more than last year in the same period. 1997 has still not reached the end of its sixth month and there have already been 10 fatalities on the road. The only point in favour is that the number of serious road accident injuries between April and June of 1996 was 28, down from 33 during the same quarter in 1995. On the other hand slight injuries went up from 99 to 143 between April and June. [1]

[1] Source : Central Office of Statistics.

Even as regards industrial accidents these have registered an increase in recent years. This has resulted in a new awareness to promote health and safety measures at the place of work. It is every employer's worst nightmare to be faced with a civil liability lawsuit where he may end up paying thousands of Maltese liri in damages because he failed to ensure health and safety measures for his employees.

Thus, considering that the number of road traffic accidents and industrial accidents is on the increase, then the number of civil lawsuits for damages is likewise on the increase. The method of assessing and liquidating damages is fast becoming a hot legal issue since the Courts are always trying to find the means of improving a situation existing since 1967.

1.2 The relevant provisions of the law on damages

The law of damages is conveniently summed up in the two Latin words : ***Neminem Laedere.*** These two words simply mean that whoever causes damage either negligently or maliciously is in duty bound to make good that damage. This is a principle which is universally recognised and applied.

This important principle is also embodied in our Civil Code. Section 1030 thereof starts off by stating that :

> *"Any person who makes use, within the proper limits of a right competent to him shall not be liable for any damage which may result therefrom."*

But then Section 1031 continues :

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

This is a logical and well-founded maxim. Every person is responsible for his own actions. If through his actions he causes damages to another person either because of negligence or malicious action then it is only reasonable that he should make good the harm caused. This is in turn based on the principle of ***restitutio in integrum.***

Therefore, an unlawful act, whether the result of dolus or culpa, which causes damage to the person or to the property of another individual is a source of obligation which entitles the injured party to demand that he be placed in the same position he was in before the occurrence of that unlawful act.

In theory, this principle appears deceptively simple and straightforward but in reality it is far from that. It is not always easy to assess the damages caused especially in the difficult area of personal injuries. It is all very well to quantify the damage caused to the car but it is arduous to quantify the damage caused through loss of limb.

This is the daunting task faced by our Courts today when they assess and liquidate damages for personal injuries and death. The Judge has to strike a balance : on the one hand he must reasonably re-instate the injured party in the position he was in prior to having suffered the injury. On the other hand, he must not allow the injured party to enrich himself at the expense of the defendant. Awarding damages must not

and is not meant to be a way of enriching oneself but rather must serve as a means to compensate the injured party for the loss he has suffered.

Still one cannot help but notice that with the passing of time there has been a significant increase in the amount of damages being awarded by our Courts. Suffice it to mention the very recent judgment handed down by the First Hall Civil Court[2] where a total of Lm80888 were awarded following an accident in which a fourteen year old boy sustained a 60% disability.

Our Courts have definitely come a long way from the time when the maximum they could award by law as **lucrum cessans** was limited to Lm1200. Ordinance XXI of 1962 will best be remembered as the major turning point in the development of the law of damages. In removing this Lm1200 restriction, the legislator afforded our Courts the oppurtunity to keep abreast with the economic development that a country naturally undergoes with the passing of time. It would be senseless to pretend that the Courts would keep awarding the same amount of damages regardless of the contemporary trends in society. Otherwise actions for damages would merely become a rubber stamping exercise.

1.3 What are damages?

When one person causes harm to another person, the normal

[2] **Paul Scerri pro et noe v. Tancred Cesareo** decided by the First Hall Civil Court on 27.01.1997. There was no appeal from this judgment.

remedy which the law gives is a right to recover damages. Such actions are usually founded upon a tort but they may also be founded upon a breach of contract. However, in this thesis, we are only concerned with the former type of action, that is, the damages that are to be awarded following an action founded on tort.

The law of damages presupposes that all questions of liability have been decided. It assumes that the defendant is liable for a tort and that this has caused loss or damage to the plaintiff. The problem that remains is : what are the damages?

Many explanations have been put forward to describe what is meant by the term "damages." Perhaps the best explanation is that given by **John Munkman** : ***Damages are simply a sum of money given as compensation for loss or harm of any kind.***[3]

The traditional picture of Justice holding a pair of scales is most appropriate in this context - into one scale goes the harm or loss sustained, into the other goes the compensation, and the aim of the law is to strike a balance between the two.

The word "compensation" is derived from a Latin root "compensare" meaning "to weigh together." The fundamental principle of every system of civil law is the principle of justice: ***Give to each man that which is his right*** - ***Suum cuique tribuere*** as Roman law phrased it. This is essentially a matter of equality or an even balance which the picture of the scales expresses admirably. If a man owes a

[3] Munkman John Damages for Personal Injuries and Death, London, Butterworths, 1993 at Page 1.

debt, he must pay it back. If a man fails to deliver goods as contracted, he must pay their value. If he infringes a legal right, he must pay the fair equivalent. As **Blackstone** holds in his "Commentaries" *wrong* or *tort* means no more than the infringement of a right. The wrongdoer, in this neutral or non-moral sense as the infringer of a right, owes the compensation for that right in the same way as any other civil right.

After all, Civil law is primarily concerned with two tasks :
[i] identifying wrongs
[ii] granting particular forms of relief for those wrongs
These two tasks, although they can usefully be separated for conceptual and operational purposes, are distinctly linked. Remedies take the normative statements of substantive law and endeavour to turn them into "living truths."

It has repeatedly been stated by our Courts that in calculating the damages given as compensation for an injury caused, one must take into account the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the result of the wrong done to him. In other words, damages must necessarily have to be reduced to a monetary consideration. As the Court rightly explained in **Louis Vincenti noe et v. Carmelo Micallef**[4] :

> *"Huwa fatt inkontrastabbli li d-danneggjat qatt ma jista' fil-fatt jigi restitwit fil-kondizzjoni ta' sahha li kien qabel id-dannu lilu arrekat, tkun kemm tkun il-misura tad-dannu li tigi akkordata. L-ghaliex id-denominatur komuni flus qatt ma jista' jaghmel tajjeb ghall-hajja tal-bniedem, ghal*

[4] Decided by the First Hall Civil Court and found in Vol LV Part ii Page 680.

sieq amputata, jew ghal sieq li l-funzjonalita' taghha hija gravament inceppata ; imma peress li f'dawn il-kazi ma hemmx mezz iehor ta' riparazzjoni, irridu nikkuntentaw bin-"numerata paecuniae" li tista' b'xi mod l-aktar umanament effikaci u possibbli sservi biex il-bniedem ikun jista' jkollu sostituzzjoni ghal dak li jkun tilef minhabba azzjoni anti socjali ta' bniedem iehor fl-istess komunita."

The rule that compensation is measured by the cost of repair, or restoring the original position - *Restitutio in Integrum* - is a derivative or secondary rule which applies only and so far as the original position can be restored. If it cannot the law must endeavour to give a fair equivalent in money, as far as money can be an equivalent, and in that way "make good" the damage.

From the leading principle that damages are compensation, though compensation in terms of money, a number of consequences ensue [5] :-

[i] Damages must be full and adequate -

This proposition entails that the primary aim wherever an assessment of damages is concerned is to reach a fair balance, neither too much nor too little but the golden mean. In assessing the quantum, the Court should not seek to overcompensate the victim by letting itself be influenced by the gravity of the personal injuries sustained. For example, seeing a teenage boy rendered incapable of being normal again because his leg had to be amputated may induce the

[5] Munkman John Damages for Personal Injuries and Death, London, Butterworths,1993 at Page 3.

Court to be overindulgent. Conversely, the Court should not go to the other extreme, that is, taking a restrictive attitude. A wrong has been committed and therefore compensation should not be anything less than adequate.

Although accuracy and certainty are frequently unobtainable, nevertheless, the Court should still strive to make a fair assessment thereby awarding, as far as is humanely possible, a "perfect compensation."

[ii] Damages are normally assessed once and for all -

Assessment and liquidation of damages must and should be final otherwise the plaintiff would be tempted to attribute to the accident that first caused the injury every ailment that he might suffer in the future.

[iii] Difficulty and uncertainty of assessment does not preclude an award of damages -

There are many losses which cannot be easily expressed in terms of money. If a rare porcelain vase is shattered or a family heirloom destroyed, the article itself cannot be replaced and probably has no market value. Likewise, if an arm is lost or a person is deprived of the sense of smell, there is no market value for the personal asset which has been taken away, and there is no easy means of expressing its equivalent in terms of money. Nevertheless, a valuation in terms of money must still be made, otherwise the law would not be able to give any remedy at all.

In actions for personal injuries, the Court is constantly required to form an estimate of chances and risks which cannot be determined with anything like precision. Obviously, the law will disregard possibilities which are slight or chances which are nebulous, otherwise all the circumstances of the situation must be taken into account, whether they relate to the future which the plaintiff would have enjoyed apart from the accident, or to the future of his injuries and his earning power after the accident.

The fundamental principle of the law of damages may therefore be summarised as follows : - damages are compensation for an injury or loss, that is to say, the full equivalent in money so far as the nature of money admits and hence difficulty or uncertainty does not prevent an assessment.

1.4 The meaning and purposes of Compensation

Since the underlying notion of the law of damages is the concept of compensation, it is imperative that one understands what the term "compensation" actually entails.

Many are content to take the notion of compensation for injuries or losses as a starting point without pausing to enquire too closely into why should people be compensated for these or other misfortunes. It is worth devoting some time to a serious enquiry into what is meant by "compensation"

and what purposes are aimed to be achieved in awarding compensation.

Does the existing order after all rest on some peculiar and undefined concept of justice? Are there intuitive feelings common to most of us about when it is just to pay compensation which explain the existing arrangements in the law? Or is the existing order in truth just a jumble of unjustifiable irrationalities, born of political compromises and historical anomalies which no one has had the courage to uproot?

The primary question to be tackled is the raison d'etre for the giving of compensation. The writer **Atiyah** is of the opinion that compensation is a two-sided process. Money is taken from one person, or one group of persons and given to another. He goes on to state that to justify a particular compensation system one may need to enquire first : why the burden of paying compensation is imposed on a particular person or group of persons, and secondly : why one feels the need to compensate the recipient.[6]

What indeed is compensation?

It seems that the notion of compensation embraces at least three distinct ideas. Sometimes compensation is granted as an equivalent for what has been lost. Sometimes it is granted as a substitute or solace for what has been lost and at other times it is granted not because of what has been lost but because of what the victim has never had in comparison with

6 Cane Peter, Atiyah's Accidents, Compensation and the Law, London, Butterworths, 1993 at Pages 349/350.

others in a similar situation.

[i] Compensation as an equivalent for what has been lost

This is the simplest and most straightforward case. Nevertheless, in this context, a further distinction must be made according to the kind of "loss."

(a) First a person may "lose" (in the sense of being physically deprived of) money or other valuable property which can be replaced with money. In this type of case, compensation aims at restoring the **status quo.**

(b) The second type of this kind of compensation is designed to compensate not for physical deprivation of property but for costs which are incurred by the victim. These may range from payment of medical expenses to payment of the cost of the hospital visits. They all involve financial losses incurred as a result of some misfortune - illness, accident, death - and here again compensation is a complete equivalent to what has been lost.

(c) The third type is compensation for lost expectations. When a person is sick, or injured or disabled so that he is unable to work, or when a person is killed or dies, leaving dependants who would have been maintained by his earnings, compensation for lost income is instinctively felt to be required. It will be noticed that this form of compensation differs from compensation for an actual deprivation for in this

kind of case the victim did not have what he is being compensated for losing. This produces important practical, not to mention philosophical, difficulties about the assessment of damages. When a person is physically deprived of property, compensation must naturally be the actual value of what he has lost. However, where a person has lost the expectation of earning money, the question arises whether or not he should be compensated merely for the net value of what he has lost, that is, the gross earnings less what he would have expended in earning that in either money or trouble.

One might ask why a person should be compensated for loss of earnings when that person will never render the services for which the earnings are payment. The obvious answer is because the person has been deprived of the choice whether or not to exercise his or her earning capacity. In many cases, the best evidence available of this capacity is evidence of what the plaintiff was earning before being incapacitated. However, in some cases such as when the victim is a child, the Court has to speculate on what the plaintiff's capacity would have enabled him or her to earn had he or she not been injured.

The notion of compensation as described above is reflected in our legal framework.

[ii] Compensation as substitute and solace

This second type of compensation is not allowed under Maltese Law as yet, and it will be dealt with in greater detail

in Chapter 5. Suffice it to state here that this type of compensation is awarded not as an equivalent but as a substitute or solace for what has been lost. Since it is almost impossible in any modern legal system to award compensation in any form other than money, it follows that giving compensation for "losses" which cannot be valued in or replaced by money (such as pain and suffering or loss of amenity) must have a different purpose from giving compensation for things that can be replaced by money. The object here cannot be to replace what has been lost by some equivalent, but must be to enable the victim to obtain a substitute source of satisfaction or pleasure, or alternatively to comfort the victim or provide him or her with solace for what has happened. This type of compensation is most commonly associated with bodily injury.

In some cases, such as where a person loses the sense of smell, it is difficult to think of anything which would count as a substitute. Even where substitute pleasures can be found, they are almost bound to be only partial. So compensation for lost amenities is often wholly or partly solace for what has been lost. Damages for pain and suffering also provide solace although in theory they too compensate for losses.

[iii] Equilization Compensation

There are circumstances in which the payment of compensation is based on notions of egalitarianism and the meeting of needs as opposed to the making good of losses. Especially when a person's need for compensation is not the result of human conduct but of natural causes, our desire to

compensate may arise out of a desire to balance the position of the disadvantaged person with that of "normal" people.

However, the law of torts embodies ideas of corrective justice, that is, it is concerned with making good disturbances of the **status quo** caused by human conduct whereas egalitarianism is a variety of distributive justice, that is, it concerns how the resources of society should be distributed amongst its members. A common theme in the modern debate about compensation for disability is that compensation ought to be given to meet the needs of disabled people whatever the cause of the disability. This idea is underpinned by notions of distributive justice.

1.5 Raison d'etre of damages for personal injuries

This brings us to the final question as to why should a person be compensated.
It is self-evident from the brief analysis just made that in terms of our law there is only one principle for the assessment of compensation namely, that the party complaining should be put, so far as money can do it, in the position that he would have occupied if the wrong had not been done.

As the learned Mr Justice Giuseppe Mifsud Bonnici succintly put it in **Mario Camilleri v. Mario Borg et noe**[7] :

> *"Il-Gustizzja li taf il-Qorti hija dik li fil-limiti tar-realta' u kemm huwa possibli, terga' tpoggi lill-*

7 Decided by the First Hall Civil Court on 08.05.1990 and found in Vol LXXIV Part iii Page 512.

vittma, ta' kwalsiasi att ingust, fl-istat li kienet qabel. Il-Qorti anzi tifhem il-kuntrarju ta' dan l-argument. Huwa ngust li f'dawn il-kazijiet, u fejn ir-restituzzjoni fizika tal-gisem u s-sahha tal-vittma ta' l-att illegali u ingust ta' haddiehor m'humiex possibli, ma tassikurax kemm tista' kompensazzjoni adegwata."

However, as is often the case with apparently clear legal propositions, difficult problems lie concealed. Throughout the law of damages there runs a tension, never fully resolved, between the notion that it is the duty of the Court to pursue a potentially limitless inquiry into the precise circumstances that would have attended the plaintiff if the wrong had not been done, and on the other hand, a search for rules that are clear, predictable, workable and fair between one claimant and another in similar circumstances, and reasonably inexpensive to apply.[8]

The words "so far as money can compensate" point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that the Courts can do is to award reasonable compensation. In the process there must be an endeavour to secure uniformity in the method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is desirable that as far as possible comparable injuries should be compensated by

8 Finn P.D. Essays on Damages, Sydney, The Law Book Company Limited, 1992 at Page 1.

comparable awards.[9]

Today we are living in a world which is becoming increasingly materialistic. Everything must be translated in terms of money. Likewise any consequences arising from each of our actions must be reduced to money terms. And once damage has ensued from one of our actions we must make good that damage by putting the person whose rights have been found to have been vindicated in the same position, so far as money can do so, as if those rights had been observed.

Probably, one of the most widely cited statement of this proposition is that of Lord Blackburn in **Livingstone v. Rawyards Coal Co.**[10]:

> *"I do not think that there is any difference of opinion as to its being the general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

This so called "indemnity rule" is then usually further refined in the sense that the object becomes, in tort, to put the plaintiff in the position that person would have been in had the tort not been committed. This is the ultimate scope of the law of damages.

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9 Taylor J.A. Bingham's Motor Claims Cases London, Butterworths, 1980 at Page 394.

10 Decided in 1880 5 App. Cas. 25 at 39 (H.L. (Sc.))

CHAPTER 2

THE FIRST TYPE OF DAMAGES AWARDED UNDER OUR LAW FOR PERSONAL INJURIES : DAMNUN EMERGENS

An obligation arising out of tort is to be distinguished completely from an obligation arising from contract. An obligation arising out of contract requires the consent of the parties and therefore there may be an action for damages in case of non-performance of that obligation.
Conversely, in the case of tort a person causes harm to another person and there is no previous relationship between the parties. Nevertheless, a claim for compensation for such injury can still be submitted.

2.1 The relevant provisions of the law

Once the question of responsibility has been determined by the Court and a person is found to be responsible for a certain action, then the next question to be tackled is the assessment and liquidation of damages in favour of the victim.

The relevant section under our law is section 1045 of the Civil

Code which provides that :

> *"The damage which is to be made good by the person responsible ..... shall consist in the actual loss which the act shall have directly caused to the injured party, 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 in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused."*

It is evident from the start that in terms of our law only material damages are allowed. Moral damages, that is, an amount which is given as compensation for the pain, suffering, trouble and inconvenience caused by the accident are only permitted by our law in specific cases namely :

[i] in cases concerning violation of human rights under section 34(4) of the Constitution

[ii] in cases of breach of a promise of marriage when such promise has been reduced to writing in terms of section 3(2) of Proclamation VI of 1834

[iii] in cases of defamatory libel under section 28 of the Press Act (Chapter 248)

[iv] in cases of breach of Copyright law (Chapter 196)

Moral damages are still considered as falling outside the ambit of the Law of Torts.

Therefore, damages following a tort action can only be granted under the four headings outlined in section 1045, that is :

[i] the actual loss suffered

[ii] the expenses incurred

[iii] loss of actual wages or other earnings

[iv] loss of future earnings

The first three are grouped under the heading of Damnum Emergens whereas the latter is commonly referred to as Lucrum Cessans. The former, that is, the Damnum Emergens are easy to assess since they can be factually determined and no problems are encountered in the majority of cases.
It is the latter type of damages, that is, the Lucrum Cessans which have hassled our Courts over the years. The Lucrum Cessans have always been the main preoccupation of our Courts since they are the most problematic. Therefore, it is not surprising that it is in this area that the major innovations have been realised in a bid to find a just system of compensation.

In the leading judgment **Michael Butler -v- Peter Christopher Heard** [11] the Court aptly summed up the root of this problem in the following terms :

> *"Illi fl-ewwel lok ghalhekk il-Qorti sejra tikkunsidra l-ammont tad-danni likwidabili favur l-attur taht l-ewwel tliet kategoriji fuq imsemmija, cioe' t-telf u spejjes attwali tieghu, jew kif komunement jissejhu, id-danni attwali u effettivi (damnum emergens), biex minn hemm imbaghad tghaddi ghall-indagini dwar il-"lucrum cessans". Id-diffikolta' ikbar tat-tieni indagini hija, kif kulhadd jifhem, li mentri d-danni emergenti ghandhom bzonn biss li jigu konstatati materjalment fil-passat il-lukru cessanti jrid jigi kkalkolat ghal futur."*

11 Decided by the First Hall Civil Court on 28.02.1967 and by the Court of Appeal on 22.12.1967.

2.2 Distinction between Damnum Emergens and Lucrum Cessans

Primarily a distinction should be drawn between what is meant by Damnum Emergens and what is meant by Lucrum Cessans. Ordinance VII of 1868 had defined Damnum Emergens as

> *"la perdita reale che il fatto abbia direttamente cagionato al danneggiato ; nelle spese che questi abbia in conseguenza del fatto dovuto fare ; e se il danneggiato e' una persona che lavora per salario od altro pagamento, nella perdita ancora di tale guadagno."*

As to Lucrum Cessans this was defined as

> *"il guadagno che il fatto impedisca al danneggiato di fare in avvenire avuto riguardo al suo stato."*

In 1938 when a new provision was substituted for the previous one Damnum Emergens was then described as

> *"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."*

whereas the Lucrum Cessans was described as

> *"the loss of future earnings arising from any permanent, total or partial incapacity which the act may have caused."*

These are in essence the definitions which prevail in our Civil Code today since these definitions remained unaltered in the Revised Edition of the Laws of Malta. From the wording of the law itself the difference in meaning between the Damnum Emergens and the Lucrum Cessans emerges quite clearly.

Whereas the Damnum Emergens can be described as the total amount of damages in reality sustained by the plaintiff, the Lucrum Cessans can be described as the damages which the plaintiff will sustain (in the future) as a result of any permanent incapacity caused by the act of defendant. What is a must for both type of damages is that there must be a nexus between the act of the defendant and the harm/loss suffered by the plaintiff. As the Court of Appeal held in **Josephine Bondin v. Christine Demajo**[1] [2]

> *"Illi trattandosi ta' azzjoni ghal dikjarazzjoni ta' kulpa akwiljana u konsegwenzjali danni l-bazi legali ta' l-azzjoni trid necessarjament tirrizolvi ruhha fin-nexus konsegwenzjali bejn l-operat tal-konvenuta appellata u d-danni sofferti mill-attrici appellanti u dan ghandu jigi ppruvat mill-attrici almenu fuq bazi ta' probabilita'."*

It is now proposed to deal separately with the various sub-headings which make up the Damnum Emergens.

2.3 The Actual Loss suffered by the plaintiff

Under this heading the plaintiff is entitled to recover as damages the actual loss suffered by him. Thus, if plaintiff was involved in a collision with defendant and as a consequence his car was damaged, then he is perfectly entitled to recover an amount equivalent to the loss or damage sustained.

Traffic accidents are quite a frequent phenomenon in our islands and, therefore, one easily finds a wealth of judgments

[12] Decided by the Court of Appeal on 08.01.1992 and found in Vol LXXVI Part ii Page 175.

in this respect. The actual loss suffered rarely poses any problem to the Court since it is something which can easily be determined. Still, from caselaw, it is evident that our Courts will not award such damages unless it is sufficiently proved that damage has been caused to the vehicle of the plaintiff and moreover such damage must be assessed by qualified experts.

Different rules apply depending on whether the vehicle is reduced to a total loss (that is, beyond economical repair) or it has only been partially damaged.

[i] Total Loss

In **Joseph Farrugia v. Francis Bartolo**[13] defendant submitted that since plaintiff's car was a "total loss" then he had the right to choose either to pay the pre-accident value or to pay the costs of the repairs. However, the Court was of the opinion that the plaintiff had the right to demand the difference in price between the pre-accident value and the value after the accident. The Court referred to **Gibb-Trial of Motor Car Accident Cases** who held that :

> *"If the plaintiff's car is beyond repair, he need not repair it and he will be entitled to receive the difference between the value before and after the injury..... the only possible measure of damages where it cannot be so repaired is the difference between the market value before the accident and the value after it, that is, the value of the wreckage."*

The Court concluded that since there was no evidence that defendant had offered to keep the "wreckage" then the

13 Decided by the Court of Appeal on 16.05.1984.

plaintiff was entitled to the difference between the pre-accident value of the car and the value of the wreckage.

If the wrecked car is sold by the plaintiff, then the defendant is entitled to subtract from the amount owed by him the sum recovered by the plaintiff from the sale of the wreckage. This was stated by the Court in **Maria Pace pro et noe v. Joseph Abela**[14] :

> *"Il-Perit Legali illikwida d-danni dovuti lill-atturi taht il-kap ta' "damnum emergens" fis-somma ta' Lm500.00. Din is-somma tirraprezenta l-valur tal-Mini li kienet "total loss" wara li l-istess perit legali "arbitrio boni viri" ffissa l-valur taghha fis-somma ta' Lm650.00 u naqqas is-somma ta' Lm150.00 li l-attrici Maria Pace jirrizulta li dahhlet mill-bejgh tal-Mini bhala karkassa."*

Again in the very recent case of **Angelo Galea v. Joseph D'Agostino et**[15] which resulted from a collision in Qormi Road, Luqa, the Court awarded the sum of Lm1000 as compensation for the actual loss of the plaintiff's vehicle since this was reduced to a total loss following the accident :

> *"Bhala konsegwenza ta' l-incident l-Ford Cortina, proprieta' ta' l-attur, garrbet hsarat estensivi, kellha daqqa enormi tant li giet certifikata "total loss". Il-karrozza kienet qadima pero' f'kundizzjoni tajba. Kienet ilha ghand l-attur mill-1972 allura 17-il sena. Il-valur ta' din il-karrozza qed tigi stabbilita fl-ammont ta' Lm1000. Infatti ingiebet prova illi l-ahhar polza ta' assigurazzjoni fuq din il-vettura kienet ghal dan l-ammont u giet ukoll esebita dokumentazzjoni mahruga minn "The Insurance Association" li taghti valur ta' Lm1200 ghall-vettura tat-tip Cortina manifatturata bhal*

14 Decided by the First Hall Civil Court on 21.05.1993 and found in Vol LXXVII Part iii Page 163.

15 Decided by the First Hall Civil Court on 16.12.1996. An appeal was entered against this judgment.

din ta' l-attur fis-snin 1970/1972. Il-Qorti qieghdha allura taccetta dan l-ammont bhala li jirraprezenta l-valur tal-karrozza ta' l-attur meta din giet totalment distrutta bhala konsegwenza ta' l-incident."

This case further confirms that the Court in arriving at the amount of compensation to be awarded for the total loss of a car is guided by the advice of experts who establish its market. This method prevents attempts at unjustified enrichment at the expense of others.

[ii] Depreciation of Vehicle

It has been established in a number of cases[16] that our Courts follow **Gibb** in dealing with the question of depreciation. **Gibb** holds that no compensation should be given when a vehicle was repaired and was more or less in the state it had been before the collision and provided the same service. On the other hand, in the case of a vehicle which had sustained considerable damages, remained defective or evidently lost its previous good state one had to assess damages for depreciation. An example where there were grounds for compensation for depreciation is the case of **Carmel Cuomo noe v. Abdulla Abdul Mutlib Hasliim**[17] In this case plaintiff claimed damages for depreciation of his car : an Alfetta Alfa Romeo. At that time this type of car was not very common, rather it was considered as a connoisseur's car. The legal referee appointed by the Court was of the opinion that

16 Reference may be made to :
* **Joseph Gatt v. Carmelo Abela noe** decided by the First Hall Civil Court on 28.04.1971.
* **G. Leone Ganado v. Norman Zammit** decided by the First Hall Civil Court on 29.11.1972.

17 Decided by the First Hall Civil Court on 17.01.1978.

when such a car sustained damages it automatically lost a substantial part of its market value. However, it was not easy to calculate such a fall in the market value. Since there was no fixed criterion to go by, one had to follow the criterion of a "bonus paterfamilias" or follow one's own judgment - "arbitrio boni viri." One had to base calculations on "practice and experience". In following the legal referee's report, the Court concluded that the depreciation was to be set at 15% of the pre-accident value of the car.

In the case of **Doctor Giuseppe Maria Camilleri v. Salvu Bonnici et noe**[18] the Court of Appeal stated that it had already been established that a person who suffered damages had a right to be paid for depreciation caused in a car. The question concerned was an objective one and one had to refer to the market value of a repaired car, which is repaired in such a way so as to serve its previous use. If the market value decreased, such value being not only the value established by a dealer but the value any willing customer would be ready to pay, the decrease had to form part of damages in terms of section 1088 (now section 1045) of the Civil Code. However, for damages due to depreciation to be awarded the following conditions had to be primarily fulfilled namely :

(a) the car had to be seriously damaged provided it did not become a "total loss" in which case other rules are applicable
(b) secondly the car must be of a certain quality and finesse, almost brand new.

18 Decided by the Court of Appeal on 08.05.1978.

In **Albert Cachia v. Gerald Cutajar**[19] the Court held that damages for alleged depreciation in the market value of a car, damaged in a collision, were not to be awarded simply because a car was new. Although the fact that a car was new had to be taken into consideration and was extremely significant, it was only one of the factors to be taken into account. Other important factors had to be considered namely that the damage had to be of a certain extent and substantial ; furthermore, it was up to plaintiff to produce evidence that the market value of the car had gone down.

2.4 The actual expenses incurred

The damages recoverable by plaintiff under this heading comprise, amongst others, expenses reasonably incurred for medical treatment, nursing, special medical appliances, improvements or reconstruction carried out in his house as a consequence of his injuries, extra domestic help. The most important factor in this context is that such expenses must have been incurred as a direct consequence of the accident ; therefore, there must be the nexus of cause and effect between the wrongful act of the defendant and the ensuing damage.

A frequent item of expense is the cost of hiring a car. This may arise because the plaintiff needs a car as the result of his injuries but very often the car is not needed as the result of the plaintiff's injuries but is required to take the place of a

19 Decided by the First Hall Civil Court on 08.02.1982.

vehicle damaged in the accident during the period when the damaged vehicle is being repaired.

Our Courts have considered it fit to compensate the plaintiff for such expenses which after all would not have been incurred had it not been for defendant's wrongdoing. However, at the same time, our Courts have always emphasised the point that such expenses should be moderate and not made capriciously. Notwithstanding defendant's tortuous action, it is still incumbent on the plaintiff to minimise as much as possible the amount of damages.

Thus, in **Maria Attard v. Saviour Borg D'Anastasi**[20] the Court held that :

> *"Dwar damnum emergens jidher li kien hemm hsarat fil-vettura ta' l-attrici ammontanti ghal Lm252.36. Gew esebiti d-debiti ricevuti u ma jidhirx li dwarhom hemm kontestazzjoni. Izda l-attrici li tahdem bhala nurse f'hinijiet diversi anki matul il-lejl u f'ghadd ta' djar, talbet ukoll hlas ta' kiri ta' karozza self-drive ghal perjodu ta' disghin jum bir-rata ta' Lm3.75 per diem u ta' dan gabet ukoll xhieda in konferma. Il-konvenut, permezz ta' l-abili difensur tieghu, jikkontendi li dan l-ammont kien wiehed esagerat anzi kapriccjuz. Gara li l-ispare parts, jew parti minnhom hadu tliet xhur biex jigu impurtati minn barra. Fosthom kien hemm il-bumper. Issa skond id-dottrina legali, min jitlob danni ghandu jipprova li tali danni mhux biss huma dovuti izda wkoll li kienu necessarji u ghandu jipprova wkoll li huwa ghamel minn kollox biex ma jkabbarhomx. Issa huwa minnu li l-provi juru li l-attrici tassew kriet karozza ghal tliet xhur u hallset l-ammont ta' Lm337.50 izda wiehed irid jara jekk kienx hemm*

[20] Decided by the First Hall Civil Court on 13.03.1989 and found in Vol LXXIII Part iii Page 740.

il-htiega li tinkera vettura ghal dan il-perjodu kollu."

The Court went on to conclude that it would have been sufficient for the plaintiff to rent the car for 60 and not 90 days and consequently it reduced the amount of damages accordingly. This was done so that the Court would remain faithful to the legal principle that the plaintiff should mitigate the amount of damages as much as possible. Nobody is allowed to enrich himself at the expense of another.

This principle was again reaffirmed in **Anna Stanley v. Alan Zahra**[21] where the Court stated that :

"Fir-rigward tal-likwidazzjoni tad-danni, il-perit legali ddetermina l-ammont komplessiv ta' Lm1012.97. Jirrizulta li dan l-ammont hu ggustifikat bil-provi u ricevuti u l-Qorti ssib il-konsiderazzjonijiet tal-perit legali fir-rigward taghhom validi, u ser tadottahom. Dan b'mod partikolari in kwantu dawn jikkoncernaw il-kiri ta' karrozza alternattiva. Il-Qorti tqis li, anke f'dan, il-principju ghandu jkun li d-danni ghandhom jigu limitati kemm jista' jkun u konsegwentament anke hawn hi mehtiega l-moderazzjoni. Id-dritt li ghandu jigi sodisfatt id-danneggat, hu li jigi pprovdut lilu trasport alternattiv, adegwat u "suitable" fic-cirkostanzi partikolari tal-kaz. Mhux li jinghata necessarjament l-istess tip ta' vettura li giet investita fl-incident. Hemm ukoll l-obbligu li r-rata tal-kiri tkun dik permessa bil-ligi....."

Other expenses included under this particular heading are travelling expenses. Occasionally, due to the injuries sustained

21 Decided by the First Hall Civil Court on 23.03.1993 and found in Vol LXXVII Part iii Page 93.

by the plaintiff in the accident, it would be necessary for the plaintiff to seek medical treatment abroad. Travelling abroad entails considerable expenses, and the defendant is bound to reimburse such expenses provided they are necessary and reasonable. An apt example is that of **Karen Zimelli v. Michael Sammut**[22] where the plaintiff claimed the reimbursement of the travelling expenses incurred by herself and her parents when she travelled to London to undergo a medical test.

> *"L-attrici qed tirreklama wkoll is-somma ta' Lm2299.95 "damnum emergens" skond il-prospett minnha ezibit. Dan l-ammont, fil-parti 'l kbira tieghu hu dovut kwantu ghall-Lm1072 ghal spejjes in korsi biex l-attrici, akkumpanjata mill-genituri taghha, marru ghal ftit granet l-Ingilterra biex isir test mediku sofistikat, maghruf bhala M.R.I. scan, fl-Imaging Centre, Queen's Square, Londra."*

The defendant challenged the payment of this amount arguing that this test *"sar semplicament biex tigi prodotta prova medika 'ex parte'."* However, the Court disagreed on the ground that :

> *"Hi sodisfatta illi dan it-test kien mehtieg - in fatti hemm indikazzjoni li jista' jkun hemm htiega li jerga' jsir fil-futur - biex jghin lit-tobba li qed jikkuraw lill-attrici billi jipprovdilhom stampa cara, attwali u preciza tal-istat fiziku tal-lezjonijiet riportati, kif qed jizviluppaw u x'moviment qed jaghmlu. Hu accettat illi dan it-test hu tal-akbar utilita', mhux biss ghad-djagnosi, imma wkoll biex jigi stabbilit xi progress qed taghmel il-pazjenta, u x'kura hi indikata."*

What the Court in fact disagreed upon with the plaintiff was

[22] Decided by the First Hall Civil Court on 15.06.1993.

that the defendant should be made to pay the travelling expenses of both parents. Probably the main reason behind this was that it would have been sufficient for one parent only to accompany the plaintiff to London. In the words of the Court :

> *"Il-Qorti pero' ma tarax gustifikat illi l-konvenut ghandu jhallas l-ispejjes ghaz-zewg genituri biex akkumpanjaw lill-attrici. L-ispejjes ta' wahda jew wiehed minnhom biss qed jigu ammessi bhala dovuti. Dan l-item ghalhekk ghandu jigu ridott b'terz ta' Lm540 ghall-airfares ghall-Londra w cioe ghall-Lm360, u b'terz ta' Lm270 ghall-ikel waqt li kienu Londra u cioe ghall-Lm180 - riduzzjoni totali mill-kont finali fl-ammont tal Lm270."*

Closely related to this type of expenses are the <u>expenses incurred for availing oneself of the services of a translator</u> when the plaintiff has to travel abroad for medical treatment but unfortunately he does not know how to speak, let alone understand, English. This is what happened in the case of **<u>Mikiel Refalo noe v. Pawlu Curmi</u>**[23] In this case plaintiff's son was injured by defendant in a hunting accident. Plaintiff took his son abroad for treatment, however, since he did not speak English he took a certain Tarcisio Rapa with him so that the latter would act as his interpretor. Defendant refused to pay the expenses for hiring Rapa but the Court disagreed and held that :

> *"Dwar it-tielet punt, cioe' dwar l-ispejjes ta' Tarcisio Rapa, jinghad li l-attur Mikiel Refalo ma jafx bl-Ingliz, u kull meta siefer l-Amerika hu mar ghand it-tfal tieghu. L-ufficjali li l-Gvern jibghat*

23 Decided by the Court of Magistrates Gozo (Superior Jurisdiction) on 28.01.1983.

mal-morda mhux ser joqghodu mieghek il-hin kollu bhal meta jkollok it-tfal tieghek jew xi hadd li jigi minnek u jitla talapposta. Ghalhekk dawn l-ispejjes ghandhom jigu nkluzi wkoll."

Another common head of damages refers to those amounts paid to persons hired by the plaintiff to carry out domestic work whilst the plaintiff is recuperating from his/her injuries. These expenses are frequently claimed by the plaintiff and in the majority of cases the Court accedes to plaintiff's request.

For instance in the case of **Victor and Elsie Mallia v. Joseph Camilleri**[24] the plaintiffs both suffered injuries as a result of a collision with defendant's car. Since Mrs Mallia was unable to carry out the housework herself during her convalescence period, they engaged the services of housemaids. The plaintiffs successfully claimed the reimbursement of such expenses. The Court in disposing of this issue claimed that :

"Din il-likwidazzjoni tidher ghal kollox gustifikata u meta l-Qorti tikkonsidra li ma hemm l-ebda prova kuntrarja tasal biex tikkonkludi li ghandha tkun accettabbli."

It is irrelevant that these services are carried out by persons who are closely related to the injured party so long as these services are not done gratuitously. An apt example is that of **Vicki Grech et v. Giulietta Grech et**.[25] This case stems from a car accident which resulted in serious injuries for the

24 Decided by the First Hall Civil Court on 15.01.1993. This case is the the subject of retrial procedures still pending.

25 This case arose in Gozo however there is no judgment since the plaintiffs, following the Legal Referee's Report, withdrew the lawsuit.

plaintiff. Before the accident the plaintiff used to carry out t he housechores herself ; however after the accident she could not even walk without the aid of crutches and obviously was in no condition to carry out the chores herself. It was her mother who offered her services and care, and for these she was renumerated accordingly. The legal referee was of the opinion that the reimbursement of such expenses was fully justified. In his own words :

> *"Jidher ghalhekk illi l-ispjegazzjoni dettaljata moghtija mill-attrici dwar il-mod ta' kif inhadem il-kumpens moghti lill-ommha, hija accettabli. Wara li bintha ssubiet l-incident stradali in kwistjoni, Mary Vella [the mother] mhux talli ccahdet mill-ghajnuna domestika li omm soltu tippretendi minghand bintha xebba li tkun ghadha tghix maggha, imma oltre dan, il-piz taghha zdied sostanzjalment ukoll minhabba l-inkapacita ta' l-istess bintha, illi ghal bosta xhur irrizulta li kienet kwazi nkapacitata ghal kollox.*
> *Barra minn hekk, huwa komprensibbli wkoll illi l-attrici sakemm irpiljat xi ftit, anke wara li zzewwget, kellha tirrikorri ghall-ghajnuna domestika ta' xi hadd, f'dan il-kaz ta' ommha stess, u specjalment waqt il-gravidanza taghha.*
> *Ghaldaqstant l-esponenti hu tal-fehma illi fic-cirkostanzi partikolari tal-kaz, dawn il-pagamenti ghas-servigi rezi minn omm l-attrici ..... huma gustifikati u ragionevoli, u ghalhekk ghandhom ikunu ripetibbli wkoll."*

Even though the case was later withdrawn by the plaintiffs, one may safely affirm that the Court would have allowed reimbursement of plaintiff's mother for the services she rendered to her daughter.

A novel type of expenses which were claimed by plaintiff in the case of **Karen Zimelli v. Michael Sammut**[26] were those incurred for purchasing and renting a telecell mobile phone. Although it grudgingly conceded that such an expense "may" be considered as necessary due to the particular circumstances of the case at hand, the Court seemed somewhat reluctant to consider such an expense as legitimate. However, in view of the fact that the defendant did not challenge the reimbursement of this expense, the Court ended up by allowing its disbursement :

> *"Ammont iehor rilevanti hu dak li jirrigwarda x-xiri ta' telecell mobile phone w r-renta tieghu mid-29 ta' Jannar 1991 sal-1 t'Ottubru 1992. Ma tidher li saret l-ebda kontestazzjoni dwar din it-talba. Il-Qorti tifhem li inizjalment - konsiderat in-natura tad-debilita' permanenti sofferta mill-attrici w l-konsegwenzjali incertezza psikologika li timporta, certament accentwata sewwa fil-bidu - tali spiza tista' tigi gustifikata bhala necessarja, anke ghas-sigurezza w inkolubita' tal-attrici. Tqis pero' li dan l-item ma ghadux u ma ghandux jitqies li hu hekk necessarju, b'mod permanenti. Dak li qed jigi reklamat qed jigi accettat bhala dovut in vista tan-nuqqas ta' kontestazzjoni. Ma hux il-kaz pero li jigi provdut ghal din l-ispiza ghal zmien oltre dak mitlub."*

Thus it is evident from the wording itself that the outcome would certainly have been different had the defendant contested the disbursement of such an expense. In fact the Court was emphatic that the disbursement should be made only vis a' vis the period stated in the writ so as not to give rise to abuse.

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26 Op. Cit. page 29.

The plaintiff is entitled to recover all expenses reasonably incurred in the treatment of his injuries, that is, medical and hospital expenses. These include fees for medical advice and for surgical operations, the cost of treatment and care in a hospital, and the cost of surgical appliances (such as an artificial leg or eye) and of drugs and other prescriptions. Such expenses have been claimed and successfully rewarded in many cases.

However, not all medical expenses are recoverable. Where the plaintiff engages the services of another doctor so as to obtain a second ulterior opinion it is unlikely that our Courts would agree to reimburse the latter type of expenses. Hence, in the report drawn up by the Legal Referee in **Joseph Galea v. Joseph Attard**[27] it was argued that :

> *"Bhala 'damnum emergens' l-attur qed jirreklama wkoll spejjez medici inkorsi minnu. L-esponenti jhoss li dawn huma gustifikati, hlief l-ispejjez tat-tabib Grixti (Lm50) imqabbad mill-attur biex jaghtih opinjoni dwar id-disabilita' tieghu."*

To sustain his argument the legal referee referred to the case of **Malcolm Cachia noe v. Joseph Chetcuti**[28] wherein the plaintiff was refused disbursement of expenses incurred by him for commissioning a survey on his car prior to instituting the action against the defendant. The latter judgment can be criticised on the ground that had plaintiff repaired his car without referring the assessment of damages to a surveyor he would have risked being exposed to a claim by defendant to excessive damages. A survey is carried out to control the

27 Decided by the First Hall Civil Court on 03.03.1993.

28 Decided by the First Hall Civil Court on 16.10.1991.

quantum of damages. Therefore, it is also in the interest of defendant. If defendant does not appoint a surveyor to inspect third party vehicle and third party is therefore compelled to instruct one himself, then he should not incur that cost.

Occasionally, a death may unfortunately result from an accident. In such circumstances, the heirs of the deceased have the right to recover the funeral expenses. Originally our Courts were rather reluctant to reimburse such expenses on the ground that such expenses would still have to be incurred in the future. However, in the case of **Carmelo Grech pro et noe v. Michael Azzopardi**[29] it was finally established that funeral expenses are also recoverable. The Court premised as follows :

> *"Ghalkemm fid-dottrina huwa kontestat jekk dawna l-ispejjez humiex jew le rekuperabbli, l'ghaliex xi jum jew iehor dejjem iridu jsiru indipendentament mill-htija ta' l-obbligat, din il-Qorti thoss li ghandha tippropendi ghall-akkoljiment taghhom ghaliex l-istess fil-kaz in dizamina gew sopportati 'effettivament' mill-atturi fl-epoka tal-mewt ta' ..... u ghalkemm dejjem xi gurnata jridu jsiru hadd ma jista' jew sata' jghid jekk il-mewt saret fil-futur flok f'dik l-epoka l-ammont taghhom kienx jkun dak li ssopportaw l-atturi jew anqas .....hija haga incerta jekk qatt kienux u jkunu sopportati fil-futur, l'ghaliex dan jiddependi minn hafna cirkostanzi ta' post jew ta' xoghol ..... u difronti ghall-effettiv hlas taghhom anticipat bil-mewt kolpuza kwindi ghandhom jkunu ammessi."*

29 Decided by the First Hall Civil Court on 08.01.1947 and found in Vol XXXIII Part ii Page 1.

Expenses may also be incurred for finding alternative accommodation. Imagine a family living in a second floor flat and the minor son is involved in an accident which leaves him with one leg amputated and the other severely injured. It is quite obvious that in such circumstances it is impossible for the family to continue living in the same place, and alternative suitable accommodation must be found. If in the process the family has to pay a considerable amount to purchase another dwelling house, is that amount taken into consideration? Morevover, if this were to happen, can the Court award the amount directly to the victim's parents?

Both the above issues were precisely dealt with in a very recent judgment : **Paul Scerri pro et noe v. Tancred Cesareo**[30] The plaintiff's minor son was run over by a truck with the consequence that he became severely disabled. The plaintiff, in his evidence stated that:

> *"Huma kienu joqoghdu go flat u kellhom jitilqu minn hemm imhabba li Kurt [the son] ma setghax jitla aktar it-tarag. Hu kien xtara post Lm25000. Qabel xtara l-post hu kien ipprova jsib flat pjanterran biex jaghtuhulu l-Housing. Dawn pero ma setghux jghinuh. Il-flat tal-Gvern li kellu kien xtrah ..... li ma kienx ghall-incident tat-tifel ma kienx jixtri l-post in kwistjoni. Fejn kien qabel, kien bieghu Lm14000. Hu kien issellef il-flus biex ihallas id-differenza. Kien ukoll biegh garage. Kellu wkoll jirritorna s-sussidju fuq il-flat li biegh."*

The plaintiff claimed the sum of Lm11000. This amount represented the difference in price of the new dwelling home and that of the previous one. The Court, in accepting plaintiff's

30 Op. Cit. Page 4.

plea, was motivated by the fact that had it not been for the accident the plaintiff would not have been forced to seek alternative accomodation.

> *"L-attur talab ukoll is-somma ta' Lm11000 differenza fil-prezz tal-post li kellu jixtri u l-post li kellu qabel u biegh. Hu spjega li mhabba dana l-incident huma ma setghux jibqghu fl-istess post li kellu t-tarag u xtara post iehor.*
> *Il-Qorti wara li ezaminat ix-xhieda u d-dokumenti ezibiti tasal ghall-konkluzzjoni li anke dana l-ammont ghandu jithallas lill-.....atturi proprio."*

Therefore the Court made it clear that the said amount was to be paid directly to the victim's parents. This signifies another major breakthrough by our Courts in the law of damages because here the Court is not awarding the damages to the victim proper, that is, the person who has personally suffered the injury, but to other persons, who, notwithstanding the fact that the accident has not befallen on them, have nonetheless incurred expenses as a direct consequence of the accident.

2.5 Loss of actual wages or other earnings

The third type of damage that can be liquidated is the loss of actual wages or other earnings. An injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of the judgment or until he finds some profitable employment. Any loss of money is relevant, whether the money is properly described as "earnings" or not, provided the money is more than a mere "possible contingency."[31]

31 Kemp and Kemp, The Quantum of Damages, London, Sweet and Maxwell, 1967 at Page 20.

The method adopted today for assessing damages for loss of actual earnings was first propounded by the First Hall Civil Court in **Butler v. Heard**[32] over thirty years ago. In that case, the learned Judge explained that :

> *"..... it-telf totali tal-paga jew qligh tal-attur ghaz-zmien kollu li huwa dam fl-isptar u fil-konvalexxenza ..... tiddependi minn tliet elementi (i) kemm kien jaqla l-attur, (ii) giex ghal xi zmien effettivament impedut milli jaghmel dak il-qligh ghal kollox jew in parti, u (iii) jekk dana kienx il-konsegwenza esklusiva tal-ghemil tal-konvenut."*

Consequently, it is only after a detailed examination of these three elements that the Court can arrive at an accurate estimation of the actual wages lost by the plaintiff.

When the plaintiff is paid wages or salary, the loss of earnings up to the date of the judgment can usually be determined by a simple calculation, and an award will be made in respect of this loss. If the plaintiff is boarded out as a consequence of the injuries sustained, then the amount of lost earnings recoverable covers the period between the date of the accident and the date when the plaintiff is boarded out. Thus in **Angelo Galea v. Joseph D'Agostino et**[33] the Court allowed the reimbursement of the wages lost between this period :

> *"..... l-attur tilef f'pagi u allowances bejn id-data ta' l-incident u d-data meta gie 'boarded out' ghal ragunijiet medici konsegwenzjali ghall-incident is-somma komplessiva ta' Lm717.98 kif jirrizulta minn statement rilaxxjat mill-Enemalta Corporation li maghha l-attur kien jahdem."*

32 Op. Cit. Page 19.

33 Op. Cit. Page 23.

Problems tend to arise in the case of a self-employed or professional plaintiff. In such instances it is not always easy to determine the loss of earnings as a result of an injury due to the fact that the income of a self-employed or a professional is not fixed and tends to fluctuate.

One system adopted by our Courts is that outlined in the case of **Stephen Busuttil Naudi v. Henry Hunt**[34] Plaintiff, a self-employed worker, suffered an injury at the hand of defendant. There were no permanent disabilities therefore there were no claims for loss of future earnings ; however, there was a claim for loss of actual wages. The difficulty faced by the Court was how was it going to determine the actual loss of earnings suffered by the plaintiff. The solution favoured by the Court was to examine the Income Tax returns of the plaintiff over a number of years. It calculated the average rate of increase of his income from year to year, and then established the average rate of income. The Court then took the income of that particular year when plaintiff was injured and increased it to reach the average increase of income. In this way the Court succeeded in establishing a figure to help it determine the loss of earnings suffered by the plaintiff.

Nevertheless, the Court is not bound to follow the system described above. At times the Court in fact does not operate on any system but it simply fixes an amount *arbitrio boni viri* .

34 Decided by the First Hall Civil Court on 27.11.1992.

Even in the case of a plaintiff employed at a fixed wage or salary, in certain circumstances it may not be possible to compensate him for his loss of earnings up to the date of the judgment merely by multiplying his weekly wage or salary by the number of weeks during which he could not work because of his injuries. It is implicit in a calculation of this nature that, apart from his injuries, the plaintiff would have been employed and earning money. However, if for some reason the plaintiff, apart from his injuries, might not have been able to earn money, the Court must take this fact into account and award by way of damages the estimated amount of the plaintiff's probable loss of earnings.

Occasionally, it may happen that notwithstanding that the plaintiff has been incapacitated from work because of his injuries, he is nonetheless paid a sum equivalent to his wages which sum he would have earned during the period of incapacity. One case in point is that of **Vicki Grech et v. Giulietta Grech et** [35]. The plaintiff who worked with the Bank of Valletta was absent from work for a number of months following the accident due to the injuries sustained. During this whole period she was nevertheless paid the full wage thanks to a collective agreement which stated that Bank employees who were absent from work because of illness or injury for a period of six months were still entitled to the full pay.

In this respect the Legal Referee commented that :

> *"Fis-sentenza taghha fil-kawza fl-ismijiet Salvatore Mifsud v. Carlo Camilleri, deciza fis-16.11.1983, il-Qorti ta' l-Appell irriteniet illi fil-kalkolu tal-'quantum' tad-danni dovuti wara*

35 Op. Cit. Page 31.

incident stradali, pagamenti maghmula mill-Gvern taht l-Iskema tas-Sigurta' Nazzjonali, m'ghandhomx jittiehdu in konsiderazzjoni.
L-esponent ihoss illi ghalkemm fil-kaz in ezami l-attrici ma bbenefikatx minn din l-iskema, peress illi hija gabret il-paga shiha mill-'employer' taghha, il-'collective agreement' li bis-sahha tieghu hija thallset, ghandu jitqies bhala speci ta' insurance scheme simili, u allura mutatis mutandis il-pagamenti li sarulha lanqas m'ghandhom jittiehdu in konsiderazzjoni fil-kalkolu tad-damnum emergens."

Conversely, in the case of **Mario Caruana v. Joseph Gatt n o e**[36] in which the plaintiff lost three fingers from his right hand on the place of work the Court, following the submissions made by the Legal Referee, refused to award any damages for actual loss of earnings for a period of one year following the accident. The Court argued that since the plaintiff received an injury benefit during the said period which was equivalent to plaintiff's salary *"ghalhekk matul dik is-sena jigi li ma garrab l-ebda telf ta' paga."*
Due to his injury, the plaintiff was unable to continue working with the defendant's company and so he resigned. He succeeded in obtaining another employment after six months and during this period he received a disablement pension of Lm4.45 weekly. The Court concluded that :

"Konsegwentament, bhala damnum emergens, konsistenti f'telf ta' paga, l-attur huwa ntitolat ghar-risarciment ta' sitt xhur paga, u cioe' ghall-perjodu kollu kemm dam jircevi biss 'disablement pension' li minnhom imbaghad jitnaqqas l-'quantum' tal-pensjoni li rceva matul dak il-perjodu."

36 Decided by the First Hall Civil Court on 23.02.1996.

Another interesting case is that of **Victor Shaw and Albert Tabone et pro v. John Aquilina et pro**[37] A fire broke out in the City Gem Bar and Restaurant belonging to the defendant. As a result damage was not only caused to the restaurant but also to the underlying pharmacy owned by the plaintiffs. The pharmacy had to remain closed for around five months since it had been considerably damaged. A few weeks after the fire, the operators of the pharmacy managed to open temporarily in a very small room close to where the damaged pharmacy stood in order to retain the clientele. For the whole five month period the operators of the pharmacy had to keep on paying the staff and had actually lost considerable earnings. Plaintiffs filed a writ of summons requesting the Court to order the defendant to pay damages consisting of wages paid during the five month period as well as actual loss of earnings during the same period. Defendant claimed that the plaintiffs could not sue him since they had subrogated their rights to the insurance as well as claiming that the fire was not caused by any negligence on his part.

The First Hall Civil Court held that the plaintiffs had the right to institute the action since the insurance did not cover those expenses. As to the question as on what grounds could the plaintiffs institute the action, the First Court concluded that the only remedy the plaintiffs had was to institute an action on the basis of section 1032 of the Civil Court.[38] In

37 Decided by the Court of Appeal on 27.03.1996.

38 Section 1031 of the Civil Code states that every person is to be liable for damage that occurs through his own fault whereas section 1032 defines fault as arising when a person, in his own acts, does not use the prudence, diligence and attendance of a bonus pater familias. The Court based plaintiffs' action on this section because the fact that the fire broke out in the defendant's property inferred that juris tantum it was a result of negligence of the defendant. The onus of proof that this was not so lay on the defendant and since the defendant failed to prove this, then it was presumed that the fire was caused as a result of the negligence of defendant.

considering the claim for damages put forward by the plaintiffs, the Court noted that their claims were based on two types of damages suffered in the five month period, namely :-

[i] the payment of salaries to the employees

[ii] and the actual loss of earnings as a result of the forced closure of the pharmacy.

The Court referred to section 1045 of the Civil Code and in interpreting this section it came to the conclusion that whereas the claim concerning the salaries paid was contemplated by the law, the claim regarding the actual loss of earnings was not contemplated by the law. Therefore, the Court regarded the latter as lucrum cessans and not as damnum emergens.

The plaintiffs appealed claiming that, notwithstanding the fact that they had shown that the loss of earnings was actual, the First Hall considered them as lucrum cessans, in other words, as prospective loss of earnings.

In interpreting section 1045(1), the Court of Appeal drew a fine distinction between :

[i] actual loss of future profits brought about as a result of the act which caused the damage

[ii] and loss of future profits as a result of permanent incapacity to earn them.

While the latter would classify as lucrum cessans, the former would classify as damnum emergens. Consequently, the Court concluded, the plaintiffs were entitled to claim them from the defendant :

> *".....din il-Qorti pero' ma taqbilx mal-interpretazzjoni ta' l-Ewwel Qorti illi danni reklamati talli n-negozju tas-socjeta' attrici kellu*

jinzamm maghluq ghal perjodu determinat u bhala konsegwenza diretta ta' hekk is-socjeta' ghamlet telf finanzjarju, ghandu jitqies li hu lucrum cessans u mhux damnum emergens. Indubjament hu telf attwali u mhux telf futur. 'La perdita del guadagno perche' sia risarcibile deve essere reale e non gia dedotta da mere possibilita' astratte' (Vol. XXVI, P. II, p.11).

L-artikolu 1045(1) jiddisponi illi : 'l-hsara li l-persuna responsabbli ghandha twiegeb ghaliha skond id-dispozizzjonijiet ta' qabel hija t-telf effettiv li l-ghemil taghha jkun gieb direttament lill-parti li tbati l-hsara, l-ispejjez li din il-parti setghet kellha taghmel minhabba l-hsara, it-telf ta' paga jew qliegh iehor attwali u t-telf ta' qliegh li tbati 'l quddiem minhabba inkapacita' ghal dejjem, totali jew parzjali li dak l-ghemil seta' igib.' Hu car li dan l-artikolu jiddistingwi bejn (1) it-telf ta' qliegh iehor attwali li jista' ovvjament jinkludi t-telf ta' profitti li l-attur nomine bhala d-danneggjat sofra attwalment fil-perjodu sakemm irripristina l-fond tan-negozju tieghu u (2) it-telf minhabba inkapacita' permanenti futura. Dan l-ahhar hu definit bhala lucrum cessans in kwantu jinvolvi apprezzament ta' telf futur dovut ghall-inkapacita' li timpingi fuq il-kapacita' ta' qliegh waqt li dak ta' l-ewwel huwa definit bhala damnum emergens ghax huma danni konsegwenzjali u attwali ghall-agir kolpuz li d-danneggjat verament ikun sofra."

This case brings out clearly the distinction between the damnum emergens and the lucrum cessans. It confirms that the latter type of damages can only be awared when there is any permanent incapacity, total or partial, which the act may have caused. In the case at hand, the question of lucrum cessans did not enter at all since there were no permanent incapacities. The plaintiffs were only claiming the

reimbursement of the actual loss of earnings suffered by them as a result of the forced closure of the pharmacy, and which the Court of Appeal correctly labelled as damnum emergens.

It must be pointed out that section 1045 is a section of general application and therefore it is not confined to road or industrial accidents. This particular case is proof of this statement.

CHAPTER 3

THE SECOND TYPE OF DAMAGES AWARDED UNDER OUR LAW FOR PERSONAL INJURIES : LUCRUM CESSANS

The method adopted to assess the amount of damages which are to be awarded for loss of future earnings has been applied since 22nd December 1967. Although certain important modifications have taken place since then, yet, the foundations of the system remain essentially intact as when they were first laid down by Mr Justice Maurice Caruana Curran in **Michael Butler v. Peter Christopher Heard**.[39] Moreover, it seems that no major overhaul to the system is intended in the near future because as the Court of Appeal rightly said in **Mary Bugeja noe et v. George Agius noe**[40] *"sakemm ma jigix zviluppat sistema iehor ta' komputazzjoni li taghmel aktar gustizzja huwa dan is-sistema li bhala bazi ghandu jibqa' jigi segwit."*

3.1 Meaning

The fourth heading in section 1045 provides that damages

39 The judgment of the First Hall was delivered on 28.02.1967 and confirmed in appeal on 22.12.1967 wherein the Court of Appeal declared that : *"Sostanzjalment din il-Qorti taqbel mal-metodu adottat mill-ewwel Onorabbli Qorti f'kaz bhal prezenti.....Dana mhux l-uniku metodu possibbli izda fil-fehma tal-Qorti hu metodu sostanzjalment gust u prattiku."*

40 Decided by the Commercial Court on 12.01.1987 and by the Court of Appeal on 26.07.1991.

are to be awarded for loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused, in other words, Lucrum Cessans. This phrase literally means that whosoever has suffered the injury is entitled to the profits which he has lost as a result of the injury.

> *"B'telf ta' qliegh wiehed ma ghandux jifhem biss telf tas-salarju jew hlas iehor li huwa jircievi izda ghandu jinkludi l-ispejjes kollha li mhabba fl-infortunju l-persuna jkollha taghmel ghaliex hija se jkollha titlef dawn il-flus imhabba f'dan l-infortunju."*[41]

In principle, the measure of damages for pecuniary loss is the amount of money which has been lost, or has to be spent, in consequence of the injury. Although, it is not difficult to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been incurred, such an assessment is more problematic in the case of future financial loss because as **Torrente** admitted :

> *"La valutazione del danno puo' essere particolarmente delicata e laboriosa : basti pensare alla determinazione del risarcimento dovuto per danni arrecati alla persona."*[42]

Undoubtedly, the plaintiff is entitled, in theory, to the exact amount of his prospective loss if it can be proved. But, in practice, since future loss cannot usually be proved, the Court has to make a broad estimate, taking into account all the proven facts and the probabilities of the particular case. All this was stated very clearly by Lord Reid in **British**

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41 **Vincenza Vella Dalmas v. John Ghigo et** decided by the First Hall Civil Court on 07.02.1979 and by the Court of Appeal on 05.02.1980.

42 Torrente A. & Schlesinger P. Manuale di Diritto Privato, Milano, Giuffre' Ed., 1985 at Page 711.

Transport Commission v. Gourley[43]:

> *"If he [the plaintiff] had not been injured he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss."*

Likewise, Lord Diplock said in **Mallett v. McMonagle**[44]

> *".... the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages ...."*

In estimating future possibilities the court does not have to decide whether something is more likely to happen than not, but simply values the chances, and may ignore those which are so slight as to have no real weight.

Maltese Courts have always recognised the difficulty of assessing the amount of lucrum cessans. This problem is particularly aggravated by the fact that in calculating the lucrum cessans the Court is dealing with a myriad of

43 (1956) AC 185 at 212, (1955) 3 All ER 796 at 808.

44 (1969) 2 All ER 178 at 191.

probabilities and possibilities ; its eventual assessment cannot be verified there and then. Only time will tell whether the Court's assessment was accurate or otherwise. In **Butler v. Heard** Mr Justice Maurice Caruana Curran conceded that :

> *"Illi dan il-kompitu certament hu dejjem difficili. Ma hemmx dubbju li fil-likwidazzjoni tal-"lucrum cessans" il-Qorti ghandha tipprocedi b'cirkospezzjoni anki kbira, peress li dan il-qliegh hu bazat wisq drabi fuq indizji u fuq fatti futuri li mhumiex ghal kollox certi u l-qligh jista' jonqos minn mument ghall-iehor anki ghal kawzi naturali bhal per ezempju kieku l-attur kien iddestinat biex imut ftit wara din is-sentenza u dana minhabba kawzi ghal kollox indipendenti mill-kollizjoni mal-konvenut. Imma, dan kollu ammess u naturalment mizmum anke fil-post logiku tieghu fil-konsiderazzjoni tal-Qorti, fil-kawzi civili u specjalment tad-danni, l-"id quod plerumque accidit", cioe l-kriterju tal-probabilita' huwa sufficjenti ghal konvinciment morali tal-gudikant, u l-Qorti ghalhekk m'ghandhiex fuqhiex tezita f'dan il-kas takkorda lill-attur dik is-somma li hija gustifikata minn fatti, dati u indizji li jidhru inkommutabili..."*

In addition to the fact that the assessment of lucrum cessans poses a number of difficulties, our Courts suffer another serious drawback namely, that Maltese law is sorely lacking in this aspect of the law. The only "guidelines" offered by our law in the assessment of lucrum cessans are to be found in section 1045(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."*

Therefore, the Court has to take into account these factors, that is,

[i] the circumstances of the case

[ii] the nature and degree of incapacity caused

[iii] and the condition of the injured party

before deciding on what the final amount is to be.

Examples of what circumstances the Court should consider include

(a) whether or not the plaintiff contributed to the accident or not since in cases where he is also at fault the amount would naturally be decreased ;

(b) his age at the time of the accident and his working life expectancy ;

(c) the type of work he was engaged in before the accident and whether he has retained such work or not ;

(d) the effect of the type of injury sustained on the nature of the work carried out by the victim ;

(e) the type of work itself : whether it is skilled or unskilled ;

(f) his possibility of finding more lucrative work or the lack of it.[45]

As regards the nature and degree of incapacity, this is extremely relevant when assessing the lucrum cessans. The type of injury sustained would dictate whether the percentage disability would be high or low, and this would in

[45] For instance in **John Mary Muscat v. Charles Gatt** decided by the First Hall Civil Court on 16.07.1987 it was held that various factors had to be taken into account for the purpose of liquidating the quantum of damages payable to the victim of a traffic accident for loss of future earnings, namely, the victim's age, state of health, life and productive-work expectancy, nature of employment or work carried out, adaptability to do other work, the degree of physical disability, the amount of income from employment or type of work carried out before the accident, the opportunity of carrying out alternative work, the fact that the compensation would be a lump sum and the multiplier rate used in quantifying such claims.

turn influence the final amount. The higher the percentage disability, the higher the compensation. Finally, the Court would also have to analyse the condition of the injured party especially the state of health of the plaintiff before and after the accident.

3.2 An analysis of the system used

As already stated, the basic system which is applied so as to calculate the amount of lucrum cessans was first laid down in **Butler v. Heard**.[46] This case established an objective formula for the liquidation of lucrum cessans. This system, which is based on the English system, consists in

[i] establishing the weekly basic wage of the person injured at the time of the accident or tort

[ii] then increasing it to cater for probable future wage increases including cost of living allowances

[iii] multiplying that amount by 52, which number represents a year

[iv] the result is then multiplied by the number of years that represent the expectation of the victim's working life (the multiplier)

[v] the amount is then multiplied by the percentage disability which is determined by medical experts

[vi] the result is then reduced by 20% for lump sum payment.

This formula has been constantly followed by our Courts ever since as evidenced in a multitude of cases. It is only in recent

46 Op. Cit. Page 19.

years that our Courts have sought to modify this formula, because as was declared in **Salvatore Mifsud v. Carlo Camilleri et noe**[47]:

> *"..... ic-cirkostanzi tal-hajja anke fil-Gzira taghna imbidlu konsiderevolment u l-ammonti qeghdin isiru fuq kriterji ferm differenti minn dawk li kienu jsiru ghaxar snin jew ghoxrin sena ilu. "*

It is now proposed to deal separately with each item comprised in this formula.

[i] The Basic Weekly Wage

The first matter that the Court has to determine is the basic weekly wage of the victim. Once established the amount is increased to provide for future increases in salary including inflation allowances,[48] and then multiplied by 52 to represent the wage for a period of one year.

If the victim is self-employed, the Court is usually guided by the income tax returns. Thus, if the victim did not declare all his income, then he is certainly at a disadvantage when he submits a claim for damages. This point is well illustrated by the case **Josephine Schembri et v. Nathalie Navarro**[49] The plaintiff's husband was run over by the defendant. The victim had a bar which he managed together with his wife. The latter declared that they earned around Lm3500 - Lm4000 annually from this enterprise. However, in the

47 Decided by the Court of Appeal (Commercial) on 16.11.1983.

48 Vide **John Sultana v. The Malta Drydocks Corporation** decided by the Commercial Court on 28.05.1979 wherein the Court emphasised the point that in assessing the loss of future earnings of an injured employee one had to take into account the factor of inflation which caused wages to rise.

49 Decided by the First Hall Civil Court on 21.05.1996.

Income Tax Return, the spouses Schembri had only declared Lm2499 and it was on this amount that the Court proceeded to liquidate the lucrum cessans :

> *"[Il-vittma] flimkien ma' martu l-attrici kien jiggestixxi hanut tax-xorb bl-isem Lucky Bar. L-attrici xehdet li minn dan in-negozju kien ikollhom qligh ta' bejn tlitt elef u hames mija u erbat elef lira (Lm3500 - Lm4000) fis-sena, izda mill-income tax return ghas-sena bazi 1986 - l-ahhar sena shiha qabel il-mewt ta' Anthony Schembri - jidher li l-qligh denunzjat f'dik is-sena kien ta' elfejn erba' mija u disgha u disghin lira (Lm2499)."*

On the other hand, if the victim is in employment then his salary can be easily ascertained. Overtime is taken into consideration except when it is occasional overtime.

This question of overtime proved crucial in the case of **Victor Mallia et v. Joseph Camilleri**[50] The plaintiff was employed as a watchman with the Government, and he also worked part-time as a tile layer. Following the accident, he retained his job with the Government but he had to give up his job as a tile layer since he could no longer squat. Therefore, vis a' vis his job with the Government the plaintiff *"kien u ghadu jaqla' l-istess ammont ta' flus ghaliex baqa' bl-istess impieg mal-Gvern izda mhux l-istess jista' jinghad ghar-rigward ix-xoghol tieghu bhala tile layer. Fil-fatt, filwaqt li fis-sena 1987 huwa dahhal is-somma ta' Lm1855 mix-xoghol tieghu part-time, fis-sena 1988 ma dahhal xejn minn xoghol ta' tile layer peress illi minhabba fil-lezjonijiet li garrab fl-incident, huwa ma setax ikompli dan ix-xoghol."*

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50 Op. Cit. Page 31.

The Court held that although the disability suffered by the plaintiff had in no way affected his job with the Government, and therefore one would be inclined to conclude that the plaintiff was not entitled to any lucrum cessans, yet that disability had severly affected his earning capacity as a tile layer. The Court felt that the plaintiff should nonetheless be compensated for this loss because *"hekk biss tista' ssir gustizzja mal-attur li, wara kollox, kien il-vittima ta' incident stradali li, kif irrizulta, kien kagunat biss minn eghmil irresponsabbli tal-konvenut u li seta' halla konsegwenzi wisq aghar."*

Another important factor when calculating the basic weekly wage is that it is the gross salary that is relevant and not the net amount, that is, the balance in salary after deduction of national insurance and income tax contributions. This point was explained in **Maria Pace pro et noe v. Joseph Abela**[51] wherein reference was made to other judgments :

> *"..... l-income tax u l-kontribuzzjonijiet tan-National Insurance li l-mejjet kien ikollu jhallas kieku baqa' haj m'humiex fatturi li ghandhom jittiehdu in konsiderazzjoni meta wiehed jigi biex jistabbilixxi l-paga medja annwali tieghu ghall-finijiet tal-komputazzjoni tal-qligh futur. Dan il-punt ta' l-income tax diga' gie deciz fis-sens accennat minn din il-Qorti (P.A. Carmela Muscat et v. Francis Schembri et 27-1-1972 ; Avukat Dr Giovanni Bonello noe v. Tarcisio Gatt 31-7-1980)*

The reason behind this principle is that the plaintiff is eventually going to pay tax on the amount of compensation he receives. Therefore, if one were to work out the formula

51 Op. Cit. Page 23.

on the net wage of the plaintiff, the latter would be subject to tax twice.

Still there have been occasional cases where the Court has taken into account the net pay. Thus in **Vincent Axisa v. Alfred Fenech et**[52] the Court disagreed with the Legal Referee's submissions in this respect :

> *"Il-Qorti tinnota li fil-likwidazzjoni tieghu, il-perit legali mexa fuq il-'gross wage.' Dan mhux korrett ghax hu ovvju li l-attur ghandu jigi risarcit dak l-ammont li hu verament tilef u mhux aktar. Ghalhekk il-Qorti trid timxi fuq in-'net pay' u mhux fuq il-'gross.' Dan ghaliex l-attur ma jkunx tenut ihallas taxxa tad-dhul fuq is-somma globali ta' danni likwidata favur tieghu."*

Again in **Kevin Agius v. Colin Murphy noe**[53] the Court, after having established the amount of damages suffered by the plaintiff at Lm36000 stated that *"minn dawn, almenu ghaxar t'elef (Lm10000) lira ghandhom jitqiesu li jithallsu f'taxxi u kontribuzzjonijiet socjali ohra....."* The said amount of Lm10000 was duly deducted from the global amount.
This line of thought was again followed in **David Vella v. Michael Soler noe**[54] wherein the Court argued that from the amount of Lm14500 *"ghandha ssir deduzzjoni ekwivalenti ghal tlett elef u hames mitt lira (Lm3500) li jaghmlu tajjeb ghat-taxxa fuq l-introjtu u kontribuzzjonijiet socjali ohra."*

Nevertheless, the preponderant (and correct) view is that it is the gross wage that must be applied and not the net wage.

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52 Decided by the First Hall Civil Court on 16.04.1991.

53 Decided by the Commercial Court on 23.03.1990 and found in Vol LXXIV Part iv Page 595.

54 Decided by the Commercial Court on 20.03.1990 and found in Vol LXXIV Part iv Page 584.

(a) The case of a housewife

In the past, no compensation was awarded in cases where the victim was a housewife on the premise that a housewife does not "earn" any salary. However, it was felt that this was an unfair situation and that a housewife, if injured, should be entitled to compensation even though she is not "paid" for the service she renders to her family. Today the service performed by the housewife is being given a financial standing and in case of death or injury compensation is due.

> *"Dwar dak li hu lucrum cessans ghalkemm il-mejta hi mara tad-dar u ma taghmel ebda xoghol partikolari hi intitolata ghal danni lucrum cessans. Dan il-principju gie accettat minn dawn il-Qrati gia la darba fiha l-potenzjalita li tahdem u taqla' x'tiekol."*[55]

This brief paragraph aptly sums up the reasoning behind awards of lucrum cessans to housewives : notwithstanding that the victim does not work yet through the injury her potentiality to go out and earn money has been impaired.

This was confirmed in the very recent judgment of **Elizabeth sive Alice Grech et v. Mario Briffa**[56] which concerned a housewife who suffered a 10% disability following the accident

> *"Billi l-attrici ma kinitx tahdem bi qligh ma nistghux nghidu x'kienet il-paga medja taghha. Madankollu, billi x-xoghol tad-dar ukoll ghandu valur ekonomiku, u l-kontribut li taghti mara tad-dar lill-ekonomija domestika ma ghandux jitqies li hu anqas minn dak li jaghti r-ragel, fil-fehma tal-qorti x-xoghol tad-dar ghandu jitqies li jiswa*

[55] **Nazzareno Apap pro et noe v. Francis Degiorgio et** decided by the Court of Appeal on 16.01.1984.

[56] Decided by the First Hall Civil Court on 21.02.1997.

mhux inqas mill-paga minima nazzjonali. Ghalhekk, billi l-paga minima nazzjonali llum hija ta' tlieta u erbghin lira u tmienja u tmenin centezmu (Lm43.88) fil-gimgha, ghall-ghanijiet tal-likwidazzjoni tal-lucrum cessans il-qorti sejra tiehu bhala l-qligh ta' l-attrici s-somma ta' hamsin lira (Lm50) fil-gimgha, jew elfejn u sitt mitt lira (Lm2600) fis-sena. Din, mizjuda b'ghoxrin fil-mija biex taghmel tajjeb ghal zjidiet li jinghataw 'il quddiem, tigi tlitt elef mija u ghoxrin lira (Lm3120).

Therefore, in calculating the "basic weekly wage" of a housewife, the Court in this case adopted the "minimum wage" criterion subject to increases.[57] This approach is wholly justified. A housewife is certainly not the breadwinner and does not contribute directly to the income of the family. Still, one can argue that the service rendered by a housewife is an employment in itself and has an economical value in the sense that if the wife were unable to perform that service, the family would have to employ another person for that purpose.

(b) The case of a minor and/or student

This raises problems akin to those encountered where the victim is a housewife. The main difficulty is that here the Court does not have a fixed salary as its yardstick since the victim does not earn a living yet. Thus, the Court has to approximately determine what his income would be when he starts working. The starting point for the Court is the

57 Vide also **Olga Busuttil v. Raymond Muscat** decided by the First Hall Civil Court on 06.06.1997. In this case, a middle-aged housewife sustained a 12% permanent disability after she fell from a bus driven by the defendant. In assessing the damages, Mr Justice Giannino Caruana Demajo concluded that the housewife's economic value could be compared to the minimum wage.

minimum wage at the time of the accident. This amount is then increased because when the victim eventually starts working the minimum wage would certainly have increased. This was explained in very clear terms by the Court in **Saviour Micallef pro et noe v. Mario Psaila**[58] where the victim happened to be an 11 year old girl. When it came to establishing the weekly wage, the Court held that :

> *"Illi din il-Qorti taqbel mas-suggeriment tal-perit legali li wiehed jiehu bhala bazi is-somma ta' seba' u tletin lira Maltin (Lm37) fil-gimgha u mhux il-qliegh tal-lum u dana in vista tal-fatt illi, kif inghad fuq, il-hajja lavorattiva ta' Marlene Micallef mhix se tibda illum, imma wara li tigi edukata u imrobbija, jigifieri meta wisq probabli il-minimum wage, li qed jizdied minn sena ghal sena, ikun izjed gholi minn dak tal-lum."*

Similarly, in **Paul Scerri et noe v. Tancred Cesareo**[59] where the victim was a 14 year old student the Court remarked that :

> *"Illi ghalkemm meta gara l-incident Kurt Scerri ma kienx jahdem izda huwa kien student u kellu aspettativa ta' hajja lavorattiva twila u normali kif ukoll lucrattiva.....Kurt Scerri kien student u l-prospetti tieghu kienu li ser jaqla' aktar mill-minimum wage. Kieku sar teacher kien jaqla' hafna aktar mill-minimum wage. Il-Qorti ser tiehu bhala bazi paga average basika ta' Lm80 fil-gimgha."*

Therefore, in the above case the Court adopted quite a high weekly wage when considering that the current minimum wage is Lm43.88. However, it appears that the Court was mostly influenced by the fact that the victim was an able

58 Decided by the First Hall Civil Court on 16.03.1981.

59 Op. Cit. Page 4.

student and that probably he would have engaged himself in a well paid job.

(c) The case of an unemployed

What has been the stand adopted by our Courts in the case where the injured party is unemployed at the time of the accident?

This was made very clear in **Hadrian Borg v. Mario Caruana**[60]:

> *"Fil-kaz in ezami, irrizulta li l-attur kien dizokkupat fil-gurnata ta' l-incident u ghadu hekk sal-lum. Madanakollu, huwa jaf is-sengha ta' panel beater u jirrizulta wkoll illi ghamel zmien impjegat mal-Malta Drydocks, kif ukoll mal-korp "Bahhar u Sewwi" u mal-Mediterranean Oilfield Services ;*
> *Izda l-fatt li huwa dizokkupat ma jfissirx li huwa m'ghandux dritt ghar-risarciment tad-danni. Infatti l-Qrati taghna dejjem sostnew li d-danneggjat jisthoqqlu kumpens fi kwalunkwe kaz, ukoll fejn mhux "breadwinner" jew "earner."*

Therefore, notwithstanding the fact that the plaintiff was unemployed both at the time of the accident and at the time of the judgment, the Court felt that he was nevertheless justified in claiming compensation.

Another similar case was that of **Alfred Shead v. Anthony Degiorgio et noe**[61] The plaintiff did not have a regular employment but he was an impressed driver through the

60 Decided by the First Hall Civil Court on 19.02.1993 and found in Vol LXXVII Part iii Page 58.
61 Decided by the First Hall Civil Court on 05.11.1984.

Labour Office. Moreover, from 1979 onwards (the time of the accident) a policy for the control of inflation had been adopted, and wages had been frozen. The Legal Referee followed **Carmel Bellizzi pro et noe v. Joseph Vella**[62] when calculating the amount of lucrum cessans. However, the Court was of the opinion that there were certain fundamental differences between the case quoted and the present case namely :

> *"(1) li l-attur ma kellux impieg fil-fiss imma kien impressed bhala xufier u jitqabbad tramite il-Labour Office kull darba ; u*
> *(2) mill-1979 'l hawn dahhlet policy biex kemm jista' jkun titrazzan l-inflazzjoni u bhala wahda mill-mizuri f'dan ir-rigward gew inblokkati zidied fil-pagi minn sena ghall-ohra. Minn-naha l-ohra pero' l-attur ghandu favurih ukoll illi :*
> *(1) sena ghandha tigi kalkolata a bazi ta' 52 gimgha u mhux 50 gimgha*
> *(2) illi r-re-employment tieghu kien isir pjuttost regolarment."*

After considering these circumstances the Court established the weekly wage at Lm38.

Yet another relevant case is that of **Ronald Azzopardi v. Carmel Degiorgio**[63] The difficulty faced by the Court in this case was that the plaintiff worked as a barman and waiter at an Hotel. His wage amounted to Lm25 per week, and moreover he earned an extra Lm10 as tips. The legal referee based his calculations on a basic wage of Lm60 per week. However, the Court considered the figure too high. It argued that the plaintiff's earnings were not the same throughout the year. There were the high season and the low season. In the

62 Decided by the Court of Appeal on 27.06.1979.
63 Decided by the First Hall Civil Court on 06.06.1985.

latter period the amount of overtime decreased substantially. Therefore, the Court felt that a weekly wage of Lm48 was more appropriate in view of the particular circumstances of the case.

[ii] The Multiplier

This may be described as "the number of years" purchase or, in other words, the working-life expectancy of the victim. Therefore, his/her age at the time of the accident is of crucial importance. Strictly speaking, if the victim at the time of the accident is 30 years old, then the multiplier should be 31 since in normal circumstances one would expect the victim to keep on working till retirement age which at present is 61. However, as was first established in **Butler v. Heard**[64] the Court has to take into account the *changes and chances of life*, consequently the multiplier is never applied in full.

The discretion which the law has accorded to the Court must be used prudently so as to serve its purpose well. It is common knowledge that our Courts have always advocated that one must tread with caution in establishing the multiplier :

> *".....f'din il-materja ta' lucrum cessans il-Qorti ghandha tipprocedi f'kawtela kbira peress li l-qliegh hu haga ta' possibilita u mhux ta' certezza u jkun jista' jonqos minn mument ghall-iehor anke ghal kwalunkwe kawza materjali bhal mewt jew mard tad-danneggjat."*[65]

64 Op. Cit. Page 19.

65 **Arthur Lambert et noe v. Anthony Buttigieg pro et noe** decided by the Commercial Court on 18.04.1963.

The concept of the multiplier is further explained in the following text :

> *"The multiplier will be less than the average working life expectancy of a person of that age but the theory of the matter is that the income from the capital sum, supplemented by drawings on the capital, will provide the plaintiff with the equivalent of his total net earnings throughout the period. Furthermore such an award would make no allowance for the vicissitudes of life (eg : premature death) which may affect the plaintiff after the accident or which might have affected him but for the accident. In other words, the multiplier is set at a figure which takes into account both the fact that a capital sum capable of investment is more valuable than an equivalent aggregate income over a period of time and the chance that the plaintiff might anyway not have earned that income."*[66]

In fact in **Butler v. Heard** the Court adopted a multiplier of 15 for a 22 year old victim. The Court justified this by arguing that :

> *"..... huwa car li mentri haddiem b'sahhtu ta' 25 sena ghandu "life expectancy" u probabilita' li jibqa' jahdem bi qligh sa kemm ikollu 65 sena, il-multiplier ma jistax jkun in-numru estrem ta' 40, imhabba dawk li jissejhu "the changes and chances of life" u ghalhekk rarament jittiehed multiplier ta' izjed minn 15 il-sena."*

The Court went on to mention examples of these "changes and chances" of life such as *"attakki ta' qalb, telf tal-job, krizijiet ekonomici u incidenti simili tal-hajja."*

Our Courts have been rather strict in adhering to this

[66] **Paul Scerri et noe v. Tancred Cesareo** : quoting from **The Law of Tort** by W.V. H. Rogers 1994 2nd Ed. p. 228. [Op. Cit. Page 4]

principle first enunciated in **Butler v. Heard**. They rarely, if ever, deviated from it.

> *"Illi kwantu ghat-telf ta' qliegh futur minhabba inkapacita' permanenti, l-Qrati taghna invarjabilment segwew il-metodu ta' likwidazzjoni adoperat fil-kawza Butler v. Heard deciza mill-Qorti tal-Appell fit-22 ta' Dicembru,1967. Skond dan il-metodu ta' likwidazzjoni ghandu jitqies f'kemm il-qligh tad-danneggat ikun naqas, konsiderati wkoll il-prospettivi li d-danneggat kellu u dawk il-possibili kontingenzi li setghu jinfluwixxu fuq il-qligh u dak it-telf jigi moltiplikat ghall-numru ta' snin, mehud rigward tal-eta' u stat ta' sahha tad-danneggat."*[67]

In fact, up to relatively recently, the multiplier was normally between 15 and 20 even though the victim was 30 years old or younger. The ceiling never exceeded 20. It was always thought that the chances and changes of life should be given priority and that consequently the multiplier should be reduced as much as possible. The following examples support this statement :

* In **Vincenza Vella Dalmas v. John Ghigo et** [68] the victim was 33 years old and a multiplier of 20 was adopted.

* In **Dominic Bartolo et v. John Attard et noe**[69] the victim was 20 years old and a multiplier of 20 was adopted.

* In **Victor G. Cachia et v. Carmelo Mifsud**[70] the victim

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67 **Victor Cachia et v. Carmelo Mifsud** decided by the First Hall Civil Court on 29.04.1983.

68 Op. Cit. Page 47.

69 Decided by the First Hall Civil Court on 28.03.1983.

70 Vide supra.

was 17 years old and a multiplier of 20 was adopted.

* In **Alfred Shead v. Anthony Degiorgio et noe**[71] the victim was 30 years old and a multiplier of 15 was adopted.

* A low multiplier of 20 years was applied in the case of **Rita Mamo v. Albert Mizzi noe**[72] notwithstanding *"l-eta pjuttost zghira ta' l-attrici meta gara l-incident."*

* A rather high multiplier was used in the case of **Emmanuela Cauchi v. Emmanuele Agius**[73] where in respect of a 34 year old charwoman who sustained a 15% disability, the Court adoped a multiplier of 20.

* In **Paul Vassallo et v. Carmelo Pace**[74] the First Hall Civil Court adopted a multiplier of 20 in respect of a victim who was only 23 years old at the time of the accident. Commenting on this the Court of Appeal stated that : *"Il-multiplier ta' ghoxrin sena adottat mill-ewwel Qorti huwa wiehed mill-multipliers l-iktar gholjin li qatt adottaw il-Qrati taghna"* thus confirming that a multiplier of 20 was, in the majority of cases, the maximum that a plaintiff could hope to obtain. In fact, on appeal, the multiplier in this case was reduced to 15 :

> *"Il-Qorti, wara li qieset ic-cirkostanzi kollha, u b'mod specjali il-fatt li d-decuius kienet sejra tizzewweg u l-probabilita' kienet li b'dan il-kambjament fil-hajja taghha aktarx kien ikun hemm perjodu meta tkun qeghda okkupata trabbi*

71 Op. Cit. Page 59.

72 Decided by the Court of Appeal on 01.03.1988 and found in Vol LXXII Part ii Page 445.

73 Decided by the Court of Appeal on 15.03.1983.

74 Decided by the Court of Appeal on 05.03.1986.

familja u ghalhekk ma tkunx tista tahdem jew ma tkunx tista tahdem full-time, u anke wara li qieset li d-decuius kellha l-eta' ta' tlieta u ghoxrin sena meta mietet, hi tal-fehma li multiplier ta' hmistax il-sena ghandu jkun adegwat."

The above examples prove that our Courts were quite conservative when they came to establish the multiplier notwithstanding that the plaintiff was still of a young age at the time of the accident, and in some cases more than others. For instance in **Ronald White v. Carmel Busuttil noe**[75] the Court adopted a multiplier of 15 in respect of a plaintiff who was 36 at the time of the accident. When compared to the previous case just quoted wherein the Court of Appeal adopted a multiplier of 15 notwithstanding that the victim was only 23 years old [**Vassallo v. Pace**] one can see that the multiplier is rather high considering that the victim was 36 years old.

Hence, the Courts were not always consistent in establishing the multiplier. What is certain however is that they invariably favoured a low multiplier.

The multiplier system as first enunciated in **Butler v. Heard** is just and equitable. However, it is not perfect and perhaps its limitations became more evident with the test of time. In the late 1980's our Courts started to harbour the first misgivings towards this system, or more correctly towards certain aspects of this system. Particular changes were needed at least to meet the exigencies of a more developed community.

[75] Decided by the Commercial Court on 06.02.1987.

One of the first judgments which sought to bring about change was that delivered in the case of **Mary Bugeja noe et v. George Agius noe** decided on 12th January 1987 per the late Mr Justice J. Herrera. The plaintiff's husband was involved in an accident at the place of work with the unfortunate consequence that he lost his life. The First Hall was rather detailed in its exposition of the notion of the quantum of damages. It first started off by emphasising that although **Butler v. Heard** laid down the foundation of the system to be used yet a certain amount of discretion was left in the hands of the Judge. This discretion is something which is highly valued by the Court, which after all must be accorded a certain amount of flexibility when fixing the amount of compensation.

> *"Il-ligi taghna fis-Subartikolu 2 tal-Artikolu 1088 [today 1045] hallietha fid-diskrezzjoni prudenti tal-Qorti pero' imponiet fuq il-Qorti li tqis ic-cirkostanzi kollha tal-kaz u l-kondizzjoni tal-parti li tbati l-hsara. Ghalhekk jidher li l-ligi ma stabbiliet l-ebda metodu ta' kalkolu specjali tas-somma dovuta f'kazijiet simili izda halliet dan kollu fd-diskrezzjoni prudenti tal-Qorti..... Din il-Qorti wkoll kellha l-okkazjoni li tikkorrobarhom biex tara l-Qrati taghna f'kawza simili x'metodi juzaw biex jaslu ghall-likwidazzjoni li tkun gusta kemm ghal dawk li soffrew id-danni kif ukoll minn naha l-ohra ghal dawk li jridu jaghmlu tajjeb ghalihom. Dejjem hareg car pero' li dawn il-Qrati fil-pronunciamenti taghhom dwar kriterji li ghandhom jintuzaw biex jippruvaw jaghmlu tajjeb ghall-incertezzi li likwidazzjoni ta' danni f'kazijiet simili, dejjem jaghtu lok ghalihom qatt ma rrinunzjaw ghall-fakolta' diskrezzjonali taghhom..... Barra minn hekk dawn il-kazijiet jistghu jissuccedu f'perjodi differenti ta' zmien u cirkostanzi u li bilfors kif sewwa qalet l-Onorabbli Qorti ta' l-Appell fis-sentenza taghha ta' Butler v.*

Heard : 'Illi kif spiss intqal, il-kriterju normali tal-likwidazzjoni, fid-dawl tal-kliem ampji tal-ligi, huwa ekwitativ u rimess ghad-diskrezzjoni prudenti tal-gudikant li ghandu jkollu certa lattitudni fil-fissazzjoni tal-ammont relattiv.' Dik l-Onorabbli Qorti ppronunzjat ruhha li taqbel li ghandu jkun hemm certa elasticita ta' kriterju ghax il-pronunzjament huwa wiehed ta' probabilita. Id-dannegjat jinghata somma kapitali darba wahda biss li meta tinghata b'sentenza mhiex aktar soggetta ghal ebda rivizjoni. Ghalhekk din is-somma kapitali trid tkun tikkorrispondi kemm jista' jkun mar-realta."

The Court went on to assess the probabilites in this case taking into account all the relevant circumstances. It argued that since the Maltese were enjoying a higher standard of living, and moreover the majority of them were living up to 70 years of age (if not more), it would be unreasonable to assume that the victim would not have reached the retirement age of 60. It is evident from the following extract that the Court disregarded completely the chances and changes of life - one of the most fundamental aspects in the multiplier system :

"Fil-fatt hu veru li hadd ma jista' jghid meta ser imut u George Bugeja [the victim] kieku ma mietx fl-incident 'de quo' seta' miet ftit wara, mewta minn kawzi naturali. Il-probabilita pero hi li ragel fl-ahjar zmien ta' hajtu u b'sahhtu ta' 34 sena kien jibqa' jghin u jahdem u jgawdi mill-beneficcji kollha li jinghatawlu tax-xoghol sakemm jasal ghall-eta' li jinghata l-pensjoni u jieqaf mix-xoghol. Ghalhekk il-prezunzjoni ghandha tkun li hu jibqa' jghix iz-zmien kollu sakemm jaghlaq 60 u mhux li jmut qabel. Dan almenoche ma kienx hemm xi ragunijiet ta' sahha jew cirkostanzi ohra li f'dan il-kaz ma jirrizultawx li b'xi mod jwassluna ghall-konvinzjoni morali li kien hemm

probabilita li dan imut qabel 60 sena. Din il-probabilita ma ghandhiex b'ebda mod tkun kapriccjuza u bla fondazzjoni ta' xejn. Il-prezunzjoni u probabilita hi li ghandha xxaqleb favur dak li hu normali u mhux dak li huwa eccezzjoni. Per ezempju, jekk wiehed ihares harsa ma dwaru mill-ewwel jintebah illi fil-maggoranza n-nies li huma ta' fuq it-tletin u b'sahhithom jibqghu jghixu l-hajja normali taghhom u mhux imutu hesrem. Illum kif sewwa gie relevat, il-life expectancy fil-pajjiz u dan dovut ghal hafna ragunijiet fondati bhal per ezempju ikel ahjar, standard of living ahjar, medicini u kura medika ahjar, hija ta' 70 sena. Ikun irragonevoli f'dawn ic-cirkostanzi ghalhekk li wiehed jghid li l-probabilita hi li George Bugeja ma kienx jaghmel is-servizz tieghu kollu mal-Malta Drydocks. Kwindi ghalhekk fil-fehma ta' din il-Qorti l-probabilita qawwija hi li l-istess Bugeja kien jibqa jahdem sakemm ikollu 60 sena jigifieri 26 sena ohra."

And in effect the Court proceeded to liquidate the amount of damages by adopting a full multiplier of 26.

This judgment certainly did not find favour with the Insurance Community which, suddenly, found itself faced with the concrete possibility of having to pay considerably higher amounts of money in compensation. The line taken by the Commercial Court was considered too radical and the situation was remedied by the Court of Appeal[76] with a more moderate and realistic approach.

"L-ewwel Onorabbli Qorti bhala principju addottat l-ewwel perizja li fiha essenzjalment giet uzata sistema ta' komputazzjoni bbazata fuq kriterji, specjalment ghal dak li hu ffissar ta' multiplier differenti minn dawk stabbiliti l-ewwel darba

[76] The appeal was delivered on 26.07.1991.

f'Butler v. Heard u kostantament segwiti minn din il-Qorti. Infatti jigi osservat li in tema ta' likwidazzjoni ta' lucrum cessans filwaqt li mill-banda 'l wahda l-principju li jirregola l-materja ghandu jkun ir-restitutio in integrum, mill-banda l-ohra, minhabba li si tratta ta' mewt prematura ta' bniedem, hemm certi kontingenzi li wiehed jiltaqa' maghhom fil-hajja li jirrendu dan l-ezercizzju wiehed difficli u aleatorju. Fost dawn il-kontingenzi tispikka l-incertezza dwar kemm kien ser jghix il-mejjet. Oltre dan, trattandosi ta' telf ta' qliegh futur wiehed ma jistax jitkellem biss fuq l-aspettattiva ta' hajja lavorattiva. Din id-diffikolta' mhix xi haga partikolari ghal pajjizna biss izda hija universali u ghalhekk wiehed isib diversi sistemi ta' komputazzjoni ta' lucrum cessans bazati fuq kriterji differenti u minn dawn il-Qrati taghna addottaw is-sistema tal-multiplier li ilu jigi applikat fl-Ingilterra ghal diversi decenni u li gie mportat mill-maggor parti ta' pajjizi ohra fosthom taghna bhala sistema gust u ekwu ghalkemm bhas-sistemi l-ohra kollha li jezistu mhux u ma jistax ikun perfett. Kif inghad, l-ezercizzju tal-likwidazzjoni tal-lucrum cessans hu dejjem kumpless u difficli u s-sistema tal-multiplier ghalkemm twassal ghal soluzzjoni presocche' ekwa u gusta, din hi dejjem approssimattiva. Infatti, l-istess sistema illum f'certi aspetti tieghu huwa kritikat specjalment minhabba li minn mindu gie l-ewwel darba zviluppat, ic-cirkostanzi fid-dinja lavorattiva, fl-ekonomija u fis-socjeta in generali tbiddlu kif ukoll zdiedet l-aspettattiva tal-hajja anke dik lavorattiva kull fejn zdied il-livell tal-medicina."

So here the Court of Appeal is admitting that the multiplier system is far from perfect. It has its disadvantages just like any other system. Nevertheless, the Court of Appeal was adamant on one point : the multiplier system was by far <u>the best system</u> available and until a better system is devised it

is this present system that must serve as a basis for assessing and liquidating damages. However, the Court made it clear that the multiplier system should be updated so as to cater for contingencies which might develop with time.

> *"Din il-Qorti ma jidhrilhiex li hemm ghalfejn toqghod tirrepeti f'hiex jikkonsisti din is-sistema anki peress li tezisti gurisprudenza kopjuza in materja. Tghid biss li sakemm ma jigix zviluppat sistema ohra ta' komputazzjoni li taghmel aktar gustizzja huwa din is-sistema li bhala bazi ghandu jibqa' jigi segwit. Pero, f'dan ir-rigward tosserva li kif ghamlet fid-diversi kazijiet li gew quddiemha din il-Qorti fl-applikazzjoni ta' dan il-metodu bhala bazi, minn zmien ghal zmien, ghandha tkun lesta li skond ic-cirkostanzi tallarga l-applikazzjoni ta' dan is-sistema b'mod li jressaqha aktar biex taghmel gustizzja ahjar specjalment f'sistema bhal taghna li sallum ghadu ma jikkontemplax la danni morali kif anqas danni ghal pain and suffering. Din il-Qorti ma thossx li ghandha jew tista' tikkonsidra ruhha marbuta rigorozament ma' applikazzjoni tas-sistema msemmija li jorbtilha idejha li dejjem u f'kull kaz ghandha tapplika multiplier li f'certi cirkostanzi evidentement ikun iwassal ghal likwidazzjonijiet irreali jekk mhux addirittura ngusti. Fil-fehma konsiderata taghha, sistema, tkun liema tkun, hija tajba purche' thalli f'idejn il-gudikant dak il-margini ta' diskrezzjoni li hu jhoss li konformement ma' l-aspetti partikolari ta' kull kaz hu necessarju biex issir gustizzja."*

When commenting on the liquidation effected by the First Court, the Court of Appeal was especially critical of the fact that the First Court had completely disregarded the chances and changes of life factor. The Court of Appeal felt that it could not endorse such an approach which ultimately was not compatible with the multiplier system.

> *"Issa kwantu ghal-likwidazzjoni maghmula mill-*

ewwel Onorabbli Qorti jigi osservat mill-ewwel li din filwaqt li tasserixxi li kienet qed issegwi s-sistema tal-multiplier addottat multiplier ta' 26 sena ghal persuna ta' 34 sena liema multiplier ma jikkorrispondix ma' dak li hu kompatibbli ma' l-imsemmija sistema. Dan peress li s-sistema ta' multiplier kif koncepita ma tiehux in konsiderazzjoni l-aspettativa tal-hajja lavorattiva fit-totalita taghha. Fi kliem iehor is-sistema tal-multiplier ma jaccettax li ghandu jittiehed in konsiderazzjoni li kull min hu b'sahhtu hu mistenni li jibqa' jahdem sa 60 sena jew sad-data tal-pensjoni izda tirrikjedi li tenut kont ta' l-eta tal-mejjet u fatturi ohrajn minhabba d-diversi kontingenzi tal-hajja jittiehed numru ta' years purchase li hu l-multiplier u li huwa normalment inqas mill-aspettattiva tal-hajja lavorattiva tad-decujus.

Kif iddecidiet l-ewwel Onorabbli Qorti qisu dawn il-kontingenzi ma jezistux u dan din il-Qorti ma thossx li tista' taqbel mieghu u tara li l-kaz kien jipprezenta cirkostanzi li kienu jiggustifikaw multiplier ta' 20 sena."

A subsequent case which adopted the same approach taken by the Court of First Instance was **Emanuel Agius v. Joseph Galea et noe**[77] where Mr Justice Giuseppe Mifsud Bonnici stated the following :

"...l-ammont irid jigi multiplikat skond in-numru tas-snin, li wiehed ghandu jistenna li l-vittma kellha bhala l-hajja lavorattiva taghha. Bir-rispett kollu ghal dak li hemm fis-sentenza imsemmija tal-Qorti ta' l-Appell [referring to Butler v. Heard], *din il-Qorti ma jidhirliex li dak li huma msejjhin the chances and changes of life, dik l-aspettativa ta' hajja lavorattiva shiha, ghandhom ikunu fattur li jittiehed in konsiderazzjoni kontra l-vittma, biex titnaqqaslu dik l-aspettativa. Ghall-grazzja ta' Alla, fl-istadju storiku li waslet fih l-umanita, il-*

[77] Decided by the Commercial Court on 11.07.1989.

probabilita kbira - anki statistikament ppruvata - hija li l-hajja ta' ragel normali, f'Malta, taqbez jekk mhux is-sebghin (70) almenu l-hamsa u sittin (65) sena u allura l-Qorti jidhrilha li l-hajja lavorattiva tal-attur ghandha titqies li kienet se tkun daqshekk iehor shiha - sakemm jirtira bil-pensjoni ta' wiehed u sittin sena (61) - cioe multiplikazzjoni b'20 sena. Il-Qorti tikkonsidra li biex dan ma jigiex illum koncess, f'kull kas, jrid jkun hemm prova li l-vittma hija soggetta ghal xi kondizzjoni patologika - mhux kawzata mill-incident - li tnaqqaslu l-aspettattiva ta' hajja normali u li teskludih mill-kwalifika li jappartieni ghall-maggoranza fl-istatistici ufficjali."

Once again the Court departed substantially from the multiplier system established in **Butler v. Heard** ignoring the changes and chances of life and underlining instead the fact that people are living longer and that therefore the probable outcome is that the victim would reach the age of 61. There was no appeal judgment in this case due to desertion. Still, one can safely assume that such a radical approach would have been tempered by the Court of the Appeal as in the previous case.

Yet, in a later case **Mario Camilleri v. Mario Borg et noe**[78] Mr Justice Giuseppe Mifsud Bonnici defended his previous stance :

"Din il-Qorti kif presjeduta diga tat ir-ragunijiet ghaliex ma taqbilx maz-zewg principji applikati mill-Periti Gudizzjarju f'sentenzi precedenti taghha, bhal dik fil-Qorti tal-Kummerc tal-11 ta' Lulju 1989 fl-ismijiet Agius v. Galea et noe, u dik f'din l-istess Qorti tal-25 ta' Lulju 1989 fl-ismijiet Buttigieg v. Azzopardi fost ohrajn. Dawn iz-zewg

78 Op. Cit. Page 14.

principji jirrigwardaw it-tul tal-hajja lavorattiva li l-vittma ta' incidenti bhal dak li huwa s-suggett ta' din il-kawza, u t-tnaqqis sostanzjali fis-somma tad-danni ghar-raguni li din se tithallas f'daqqa. Il-Qorti qatt ma fehmet dawk ir-ragunijiet u wisq anqas issa li ilha tisma' l-istess argumenti ripetuti diversi drabi u ghalhekk diversi opportunitajiet li tirrifletti u terga' tirrifletti fuqhom ;

Difatti fuq il-principju tat-tul tal-hajja lavorattiva ta' l-attur ; ragel ta' tnejn u tletin sena jinghad illi ghandu jigi kkalkolat illi huwa sa jahdem ghal ghoxrin (20) sena ohra u l-qligh tieghu ghalhekk ghandu jigi kkalkolat sa daqshekk ghaliex daqshekk sa jahdem. Issa l-generalita ta' l-irgiel ta' dawn il-gzejjer illum - ghall-grazzja t'Alla - jissuperaw sewwa dan iz-zmien li fih jahdmu u jkunu jistghu jgawdu l-pensjoni li llum hija stabbilita favur kulhadd. Ghaliex allura l-vittma ta' incident ghandu jigi meqjus bhala wiehed mill-minoranza ta' ghaxra fil-mija (10%) li ma jaslux sa l-eta' ta' wiehed u sittin (61)? Ghaliex? Il-Qorti difatti kellha diversi drabi l-inkredibbli esperjenza li tisma' s-sottomissjonijiet tad-debitur jghid illi 'mhuwiex gust li huwa jigi pprivat mill-vantaggi ta' l-imprevist fil-hajja' u li huwa l-imprevist li jnaqqas il-hajja tal-vittma. Il-Gustizzja li taf il-Qorti hija dik li fil-limiti tar-realta u kemm huwa possibbli, terga' tpoggi lill-vittma, ta' kwalsiasi att ingust, fl-istat li kienet qabel. Il-Qorti anzi tifhem il-kuntrarju ta' dan l-argument. Huwa ingust li f'dawn il-kazijiet, u fejn ir-restituzzjoni fizika tal-gisem u s-sahha tal-vittma ta' l-att illegali u ingust ta' haddiehor m'huwiex possibbli, ma tassikurax kemm tista' kompensazzjoni adegwata. Altru mill-imprevist. L-ezercizzju huwa fuq ir-realta' sakemm hija prevedibbli a bazi ta' statistika u induzzjoni."

Once again the changes and chances of life were sidelined in favour of statistics which show that the majority of people in

these islands reach the retirement age of 61. Such arguments easily put one in a quandary because they can be very persuasive. It is true that most people do in fact reach the age of 61 especially when one considers that today we are living in a modern, more health conscious environment. But resorting to extreme measures is never beneficial to anyone in the long run. One has to be moderate and keep in mind that in this delicate field of the law there are two opposing interests : that of the plaintiff and that of the defendant. If one tips the balance in favour of one to the prejudice of the other, this would undoubtedly have serious repercussions. If one were to favour plaintiff unreasonably and award exorbitant awards this would most certainly involve an economic cost which we are unable to bear. Conversely, if one were to show undue leniency to the defendant, this could lead to a relaxation in values that need to be safeguarded. Therefore, it is imperative to keep these two issues in moderate balance as much as possible.

In effect, recent judgments have shown that although the Courts are being more flexible in establishing the multiplier yet "the changes and chances of life" are still taken into account therefore remaining faithful to the basic principles of **Butler v. Heard**. The following extract from **Vincent Axisa v. Alfred Fenech et**[79] depicts perfectly the approach favoured by the Court at present in its treatment of the multiplier ; while it staunchly upholds the traditional formula as first laid down in **Butler v. Heard**, it is willing to modify this formula, albeit slightly, so as to prevent an injustice from

[79] Op. Cit. Page 55.

being committed. One may safely argue that if one were to adhere rigidly to the original formula it would be unfair to adopt a multiplier of 20 where the victim is under 25 years. So it is only reasonable to better this formula because in certain circumstances a multiplier higher than 20 is indispensable :

> *"Il-Qorti ikkunsidrat ukoll illi l-perit legali ikkalkola il-multiplier fuq wiehed u ghoxrin sena u cioe', l-aspettativa kollha tal-hajja lavorattiva tal-attur sakemm jaghlaq wiehed u sittin sena. Illum, l-attur ghandu wiehed u erbghin sena. Il-Qorti ma tistax taqbel ma' dan ir-ragunament ghax kalkolu simili bl-ebda mod ma jiehu in konsiderazzjoni tac-chances and changes tal-hajja, kif ritenut f'Butler v. Heard, u li illum huwa l-principju assodat fil-gurisprudenza. Din il-Qorti hi tal-fehma li ma ghandiex tkun marbuta ma' decizjonijiet li jillimitaw l-life expectancy sa massimu ta' ghoxrin sena. Dan jista' jkun u fil-fatt hu pruvat li kien f'certi kazi estremi ingust. Hu ovvju, per ezempju, li mhux gust illi tillimita il-hajja lavorattiva ta' guvni ta' tmintax il-sena ghal dan il-massimu. Dan ghaliex fir-rejalta tal-hajja l-midrub ikollu possibilita' kbira li jissupera dan il-limitu ta' eta' fittizju. Mill-banda l-ohra l-Qorti tapprezza s-sagacita' tal-principju li biex, issir gustizzja, f'dan il-kamp dejjem approssimattiva, irid jittiehed kont tal-possibilita ukoll rejali, illi jistghu jintervjenu cirkostanzi, independentement mill-akkadut, li jillimitaw il-hajja lavorattiva tal-midrub. Il-Qorti ghalhekk tifhem li s-soluzzjoni ghandha tkun, f'apprezzament mill-Qorti tac-cirkostanzi ta' kull kaz individwalment u li jigi determinat il-multiplier abbazi ta' dawn ic-cirkostanzi minghajr ma jkun impost a priori limiti ta' eta. Fil-kaz prezenti, l-Qorti tifhem illi multiplier ta' tmintax il-sena hu wiehed rejalistiku."*

This case confirms the Court's willingness to improve the present system in order to keep it abreast with modern developments. A formula developed thirty years ago requires updating so as to keep in line with current trends. The following cases are evidence that our Courts are adopting a more open approach towards the multiplier.

Thus in **Karen Zimelli v. Michael Sammut** [80] the First Hall Civil Court applied one of the highest multipliers ever given: 30 for a victim who was 20 years old at the time of the accident on the basis that :

> *"Meta gara' l-incident, l-attrici kellha biss ghoxrin (20) sena. Kienet tfajla b'sahhitha ta' intelligenza normali, attiva socjalment u taghti rendiment tajjeb fix-xoghol taghha - forsi wkoll xi ftit 'above average.' Salv l-imprivist, hu ragonevoli li wiehed jippresumi li kellha quddiemha bejn erbghin (40) u hamsa u erbghin (45) sena ohra ta' hajja lavorattiva utili. Anke konsiderata t-tendenza, mhux biss li titwal l-eta' tal-irtirar mix-xoghol, imma wkoll li l-nisa jibqghu daqs - jekk mhux izjed - mill-irgiel, anke wara li jizzewgu. F'cirkostanzi bhal dawn, il-Qorti ma jidhrilhiex li ghandha tkun marbuta ma' xi massimu gia stabbilit sallum li, fl-ahhar mill-ahhar, hu dejjem arbitrarju w opinjonistiku. Hi tal-fehma li multiplier ta' tletin (30) sena ikun gust u jirrifletti aktar l-esigenzi tal-kaz in ezami, tenut kont tac-'changes and chances' tal-hajja. Kienet tkun propensa anke li tikkonsidra multiplier itwal kieku ma kienx ghall-konsiderazzjoni medika espressa li mhux eskluz, li seta' jkun hemm xi meljorament marginali fil-kundizzjoni tal-attrici tul iz-zmien. Miljorament, li anke jekk illum hu ipotetiku, ikun ifisser titjieb fil-kapacita' ghall-qliegh tal-attrici."*

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80 Op. Cit. Page 29.

The Court went even so far as to admit that it would have been willing to contemplate a multiplier higher than 30 were it not for the possibility that the victim could eventually recover.

In **Mario Caruana v. Joseph Gatt noe**[81] a multiplier of 25 was adopted for a victim who was 20 years old at the time of the accident whereas in **Jacqueline Cassar v. Joseph Buhagiar et**[82] the Court adopted the same multiplier of 25 years *"kkunsidrata l-eta' zghira ta' l-attrici li kellha biss tmintax-il sena"* at the time of the accident.

Similarly in **Duncan Vassallo v. Khalid Schwej**[83] a multiplier of 25 was adopted for a victim who was between 18 and 19 years old at the time of the accident.

In **Marjorie Grima v. Benedict sive Benny Cassar et noe**[84] the Court opted for a multiplier of 25 for a 22 year old woman. The Legal Referee had in fact suggested a multiplier of 30 but the Court was of the opinion that *"meta jittiehdu in konsiderazzjoni c-cirkostanzi kollha tal-kas, senjatament il-percentagg ta' dizabilita' ser taffettwa l-hajja futura ta' l-attrici, kif ukoll l-eta' ta' l-attrici, il-multiplier l-aktar indikat huwa dak ta' 25 sena."*

In **Robert Barbara v. Saviour Galea**[85] the Court held that

"li inkwantu ghall-multiplier adoperat mill-perit

81 Op. Cit. Page 41.

82 Decided by the First Hall Civil Court on 01.03.1992 and found in Vol LXXVI Part iii Page 545.

83 Decided by the First Hall Civil Court on 08.03.1996.

84 Decided by the First Hall Civil Court on 05.11.1993.

85 Decided by the First Hall Civil Court on 11.10.1996.

legali, din il-Qorti hija tal-fehma li dak ta' ghoxrin (20) sena m'huwiex wiehed gust fil-kaz taht ezami. Huwa veru li l-attur ghandu l-aspettativa ta' hajja lavorattiva ta' tletin (30) sena ; madanakollu, multiplier ta' tletin (30) kif suggerit mill-attur fin-nota tieghu, lanqas m'hu indikat. Jidher li, tenut kont ta' dak li l-Qrati taghna jsejhu ic-chances and changes tal-hajja ta' llum, huwa aktar gust li, fil-kas in ezami, fit-thaddim tal-metodu ta' komputazzjoni stabbilit fis-sentenza "Butler v. Heard" jkun applikat multiplier ta' hamsa u ghoxrin (25) sena."

This case proves that our Courts do not favour extreme measures but rather they always seek the moderate approach.

For a plaintiff who was 60 years old at the time of the accident and who worked as a chargehand in refuelling of airplanes, the Court adopted a multiplier of 8 arguing that:

"Fl-eta' ta' 60 sena, l-attur jista' ragonevolment jitqies li seta' kellu aspettattiva ta' hajja lavorattiva ta' massimu ta' tmien snin ohra, konsiderat in-natura tax-xoghol tieghu."[86]

And for a pensioner of 72 years old, who however ran a bar together with his wife, the Court adopted a multiplier of 4 years.[87]

An interesting analysis of the multiplier was made in the recent case of **Paul Scerri et noe v. Tancred Cesareo**.[88] Here, the Court commented that :

"Illi ghalkemm meta gara l-incident Kurt Scerri

[86] **Angelo Galea v. Joseph D'Agostino et** [Op. Cit. Page 23]

[87] **Josephine Schembri et v. Nathalie Navarro** [Op. Cit. Page 52]

[88] Op. Cit. Page 4.

ma kienx jahdem izda huwa kien student u kellu aspettativa ta' hajja lavorattiva twila u normali kif ukoll lucrattiva. Il-problema li ghandha l-Qorti quddiemha hija jekk ghandiex timxi fuq is-sistema segwita fis-sentenza Butler v. Heard fejn hemm multiplier fiss ta' 20 sena jew inkellha ghandiex issegwi gurisprudenza aktar recenti ta' dawn il-qrati fejn ghalkemm is-sistema segwita minn Butler v. Heard ma gietx skartata ghal kollox izda s-sistema hija interpretata b'mod aktar elastiku biex ma ssirx ingustizzja la ma' naha u la ma' l-ohra.

Illi l-Qrati taghna bhal pajjizi ohra jakkordaw once-for-all lump sum payment. Din hija sistema li ghandha l-problemi taghha billi 'the Court must attempt to assess the value of a loss which may extend thirty or forty years into the future' u kif qal Lord Scarman fil-kaz Lim v. Camden & Islington [1980] AC 183 'knowledge of the future being denied to mankind, so much of the award as is to be attributable to future loss and suffering will almost certainly be wrong. There is only one certainty : the future will prove the award to be either too high or too low.'

Fil-kaz in ezami l-Qorti ma thossx li tista' in all fairness tiffissa working life expectancy ghal Kurt Scerri ta' 20 sena u lanqas ma tista' takkordalu l-hajja massima lavorattiva ta' 43 cioe minn tmintax 'l sena sa wiehed u sittin.....

Fil-kaz in ezami l-Qorti ma thossx li ghandha toqghod fuq multiplier fiss izda sejra tibbaza l-kalkoli taghha fuq hajja lavorattiva ta' 35 sena imhabba c-cirkostanzi tal-kaz u tal-persuna inkapacitata."

In this particular case, the Court chose to steer towards the median line by adopting a multiplier of 35 for a victim who was only 14 years old at the time of the accident. Moreover, it shows the measures that the Court has to adopt lest it tips the balance in favour of one party as against the other. It is

also proof of the current approach being favoured by our Courts : whereas the Court is no longer tied to the maximum of 20 years established by **Butler v. Heard**, yet it does not go to the other extreme of disregarding completely the changes and chances of life.

It has been stated in numerous cases that the multiplier must not be based on the life expectancy of the victim but on his **working** life expectancy :

> *"In-numru ta' snin adottat bhala multiplier m'ghandux ikun bazat fuq l-aspettattiva tal-hajja in generali tad-danneggat izda fuq l-aspettattiva tal-hajja lavorattiva tieghu u ghalhekk jittiehdu in konsiderazzjoni ic-chances and changes tal-hajja.*[89]

The Courts are trying to determine how many more years the victim would have worked had it not been for the accident and not how much more he would have lived.

Besides, the period of the multiplier starts to run from the date of the accident. The fact that the damages are being liquidated after the lapse of the multiplier period does not affect the amount. Damages are liquidated after the accident, at times a short while afterwards, at other times, because of the legal procedures involved, after the lapse of a certain period of time. However, the length of time taken to liquidate damages does not affect the method of liquidation which must always remain the same since it starts to run from the date of the accident, otherwise the liquidation by the multiplier method would not

89 **Paul Vassallo et noe v. Carmelo Pace** [Op. Cit. Page 64]
Carmelo Camilleri v. Alfred Falzon decided by the Court of Appeal on 14.05.1984.
Salvatore Mifsud v. Carlo Camilleri et noe [Op. Cit. Page 52]
Victor Cachia et v. Carmelo Mifsud [Op. Cit. Page 63]

be uniform. Rather the time factor would make it possible for the parties involved to provide the Court with more information. Therefore, the Court would be in a position to make more precise calculations.

> *".....il-perjodu tal-multiplier ghandu dejjem jigi kunsidrat li jibda jiddekorri mid-data tal-incident. Id-danni necessarjament jigu likwidati wara l-incident, u xi drabi ftit wara l-incident u xi drabi ohra, stante proceduri legali li fin-natura taghhom jinvolvu t-trapass taz-zmien, xi ftit snin wara l-incident u eccezjonalment bosta snin wara. Il-fatt li jkun ghadda z-zmien sa kemm jigu likwidati d-danni m'ghandux jaffettwa l-metodu ta' likwidazzjoni li ghandu dejjem jibqa' l-istess billi l-perjodu tal-multiplier dejjem jibda jiddekorri mid-data tal-incident. Altrimenti l-likwidazzjoni bil-multiplier ma issirx b'mod uniformi..... Il-likwidazzjoni bil-metodu tal-multiplier, meta tigi segwita (billi mhux necessarjament ikun il-kaz li tigi dejjem segwita) trid issir b'mod uniformi u biex ikun hemm din l-uniformita' jehtieg li l-perjodu tal-multiplier jigi kunsidrat li jibda jiddekorri mid-data tal-incident. Il-fatt li jkun ghadda z-zmien sakemm jigu effettivament likwidati d-danni m'ghandux ibiddel il-mod kif jiddekorri l-multiplier imma jista' se mai, jaghti izjed informazzjoni lill-Qorti biex tasal b'aktar precizjoni ghall-konkluzjonijiet taghha a bazi tal-istess metodu billi jista', per ezempju, jaghtiha izjed informazzjoni dwar it-telf ta' qliegh li jkun sofra d-danneggat."*[90]

(a) Some reflections

One might be tempted to ask : why were **Bugeja v. Agius**[91]

[90] **Carmelo Camilleri v. Alfred Falzon** [Op. Cit. Page 80]

[91] Op. Cit. Page 66.

and Agius v. Galea[92] so controversial? Why were they perceived as threatening a state of affairs which had for long been constant and which had undergone few, if any, changes?

There is only one obvious answer : Insurance Companies. Under our law, all motor vehicles must have third party insurance cover.[93] In case of an accident, once the third party insurer is notified by a judicial letter of the action instituted against the insured in terms of Chapter 104 of the Laws of Malta, the Insurance Company is bound to honour a judgment against the insured whether or not a claim has been lodged and whether or not the matter relates to material damage, personal injury or death.

If the Courts were to award high amounts then the Insurance Companies would have to increase their premiums, and such an increase would have a negative effect on the cost of living. This is something which our Courts have sought to avoid at all costs. Perhaps our Courts are wary of taking drastic measures which they feel our country is still not in a position to receive.

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92 Op. Cit. Page 71.

93 In terms of section 3(1) of **The Motor Vehicles Insurance (Third Party Risks) Ordinance** [Chapter 104 of the Laws of Malta] *it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance in respect of third-party risks as complies with the requirements of this Ordinance* ; and in terms of section 4(1) *in order to comply with the requirements of this Ordinance, a policy of insurance must, in addition to being a policy of insurance as defined in section 2 of this Ordinance, insure such person, persons, or classes of persons as may be specified in the policy against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person, or the damage to any property, caused by or arising out of the use of the motor vehicle on the road.*

[iii] The Percentage Disability

Awarding damages for lucrum cessans presupposes that the plaintiff has suffered a personal injury at the hands of the defendant. The disability suffered by the plaintiff is translated into a percentage disability and this forms an integral part of the formula used for calculating the amount of compensation to be given.

This percentage disability depends on the nature of the injury suffered. Accordingly it is left to be determined by a member of the medical profession. His job is rather a delicate one since he must assess the percentage disability without discriminating between the plaintiff and the defendant. In the past, the medical practioner was guided by **Schedule VI of Act VI of 1956**[94] which established the degree of disability relative to various amputations and losses. Although this Schedule was repealed by Act X of 1987, nevertheless, it still serves as a guide to the medical expert. Moreover, nowadays, it is common for employment contracts to list degrees of disability vis a' vis certain injuries. This considerably assists the medical expert in establishing the degree of disability. Although the report drawn up by a medical expert carries a lot of weight, yet the report remains essentially a recommendation to the Court. The latter is not bound to adopt that report and there have been cases where the Court increased or decreased the percentage disability arrived at by the medical expert.

94 This Schedule used to form part of the National Insurance Act which was repealed by Act X of 1987.

(a) What does disability mean?

When one hears the word "disability" one is inclined to conjure up images of physical handicap in the sense of losing an actual part of one's body. However, in relation to tort law, the word "disability" embraces a much wider meaning. If the plaintiff suffers from continual headaches as a result of neurological injury for example, post concussion syndrome, those headaches are likewise converted into a percentage because it is argued that if a person, as a result of the injury, is suffering from headaches then that reduces his potential earning capacity.

(b) The relationship between the disability suffered and loss in earnings

In the past it was argued that before any amount of compensation was fixed, it had to result that a person had actually suffered a loss in earnings because of the disability that he has suffered through the accident. Therefore, arguing a contrario sensu, if the victim, notwithstanding the injury, retained his job and suffered no loss in wages, then he was not entitled to lucrum cessans.

However, through developments, our Courts have come up with the argument that a person may suffer a disability which can be translated into a percentage notwithstanding that there are no substantial changes in his working life. The idea behind this is that even though a person may retain his job and his salary yet, because of his injury, he is prevented

from moving on to more rewarding jobs.

Let us take a simple, practical example :

A young girl works as a seamstress in a textile factory, she is involved in a car accident and as a result she suffers a permanent scar on her face ; nevertheless, she still retains her job at the factory because the scar will not affect her job as a seamstress at the factory but it will certainly affect her chance of becoming a model, a job which is more lucrative. So the scar, although it has not affected the girl's working life as it is at present, has however affected her future earning capacity because it is precluding her from finding more lucrative jobs. The injury has taken away this option. As the Court clearly explained in **Edgar Gatt v. Oliver Theuma**[95]

> *".....il-fatt li min isofri lezjoni jkompli jahdem, sija pure fl-impjieg li kellu qabel l-incident..... ma jipprekludihx li jiehu danni meta huwa bhala konsegwenza ta' l-incident kien sofra dizabilita' permanenti. Dik id-dizabilita' permanenti tista' dejjem tkun ta' xkiel ghalih fil-futur li jimmiljora l-posizzjoni finanzjarja tieghu, u kwindi ghal din ir-raguni huwa intitolat ghad-danni li jista' jsofri bhala konsegwenza taghha."*

Therefore, the attitude of the Courts in this respect is that it is not necessary for the plaintiff to suffer an actual reduction in his wage. The important consideration is whether that disability affects his future chances of employment. This type of disability is hence also quantified by our Courts. One has to look at the potential effect that the injury might have on the victim's future earnings.

95 Decided by the Court of Appeal on 27.04.1987 and found in Vol LXXI Part ii Page 136.

The leading case in this regard is **Joseph Magro v. Tony sive Anthony Busuttil**[96] The plaintiff suffered an amputation of his middle finger. The defendant claimed that the plaintiff was not entitled to any lucrum cessans since he had retained his job with the same wage. The Court reflected at length on this submission and concluded that :

> *".....ma kien hemm xejn qabel l-incident li ma tul dawn l-erba' u tletin sena ta' hajja lavorattiva li fadallu li jipprekludi lill-attur li japplika ghall-xoghol iehor izjed remunerativ, anke manwali, fejn ikollu juza s-swaba kollha tieghu. Illum wara l-incident dana ma jistax jaghmlu stante l-feriti li huwa sofra. Fi kliem ohra, l-attur gie prekluz milli jaghmel xoghol li kien ikun jista' jaghmel kieku ma korriex, cioe' li jirrikjedi l-uzu tas-swaba kollha. Ghalhekk d-danni konsistenti f'telf ta' qliegh futur skond it-termini tal-Artikolu 1088 (1) tal-Kodici Civili, bhala konsegwenza tal-imsemmi incident, ma jistghux jigu eskluzi f'dan il-kas."*

The case of **Vincenza Vella Dalmas v. John Ghigo et**[97] is also another apt example. The plaintiff, who before the accident worked as a cleaner, suffered an amputation of her right arm. Notwithstanding her handicap she retained her job and the defendants argued that consequently she was not entitled to damages since she had not incurred any losses in her wage. However, both the First Hall Civil Court and the Court of Appeal rejected this argument on the basis that, even though the plaintiff had retained her job, her earning capacity had been seriously hampered through the accident and that such handicap might affect her future working options.

96 Decided by the First Hall Civil Court on 09.12.1982.

97 Op. Cit. Page 47.

"L-attrici tilfet id-driegh tal-lemin, id-driegh li kienet taghmel kollox bih. Wiehed ma jistax ma jaqbilx li ghandha disabilita fi grad mhux traskurabili meta jqis li din ix-xebba issa tiddependi minn haddiehor ghal bzonnijiet ordinarji taghha u ta' kuljum u ta' dawn se jkollha thallas u hija issa prekluza milli taghmel xoghol li kienet tkun tista' taghmel kieku ma mmankatx ruhha.

Il-fatt li sa issa ghadha impjegata bhal qabel ma ghandux inaqqas mid-dritt taghha ghal kumpens ghaliex il-menomazzjoni li ghandha ghad tfixkilha fl-impieg taghha u ma tista' qatt tkun au pair ma' impjegati ohra fl-istess kategorija. Din il-menomazzjoni tincidi b'mod rilevanti fuq il-patrimonju taghha.

Likewise in **Victor Cachia et v. Carmelo Mifsud**[98] the defendant refused to pay damages for future losses to the plaintiff on the ground that the latter *"mhux talli ma gietx menomata l-kapacita tieghu ta' qliegh mill-mestier tieghu, imma talli l-attivita kummercjali tieghu kibret minghajr tfixkil."*

Commenting on this submission, the Court held that :

"Il-Qorti pero ma tistax taccetta din is-sottomissjoni tal-konvenut. L-attur Ranier Cachia kellu sbatax-il sena meta gara l-incident fil-1976 u ghalhekk fil-mument tal-incident kellu quddiemu hajja lavorattiva ta' almenu erbghin sena. Minhabba l-incident hu gie prekluz milli jaghmel xoghol iehor izjed remunerattiv li kien ikun jista jaghmel kieku ma korriex. Minhabba l-incident.....l-attur Ranier Cachia ma jistax jigri, ma jistax jitwaqqaf, ma jistax jimxi fit-tul, isibha difficli isuq il-bicycle jew karrozza fit-tul ghax iwegga, isibha difficli jimxi fuq art mhux pjana jew li jitla jew jinzel tarag jew slielem u kull sforz in generali huwa difficli ghalih. Dawn kollha huma

98 Op. Cit. Page 63.

fatturi li jimpedixxu lill-attur li ma tul il-hajja lavorattiva tieghu jaghmel xoghol iehor aktar remunerattiv u li jikkostringuh li jkompli jaghmel ix-xoghol li qieghed jaghmel jew xoghol iehor tal-istess natura. Ghalhekk id-danni konsistenti f'telf ta' qliegh futur .... bhala konsegwenza tal-imsemmi incident ma jistghux jigu eskluzi f'dan il-kaz."

The same argument was raised in **Ronald White v. Carmel Busuttil noe**[99] where the defendant claimed that *"l-attur ma tilef xejn mill-earning capacity tieghu ghaliex wara l-incident hu baqa' jahdem fl-istess xoghol u baqa' jiehu l-istess paga u beneficcji u ghalhekk ma ghandu dritt ghall-ebda kumpens bazat fuq daqshekk."* The Court once again rejected the plea raised by the defendant arguing that :

"nonostante li l-attur baqa' impjegat fl-istess xoghol u bl-istess paga, pero' xorta wahda l-attur sofra impairment of earning capacity ghaliex, apparti konsiderazzjonijiet ohra, il-potenzjal ta' qliegh li kellu qabel l-incident gie effettivament menomat. Infatti, jekk per ezempju, ghal xi raguni l-attur fil-futur jitlef l-impieg prezenti tieghu, il-possibilita' ta' ri-impieg fl-istess xoghol jew f'xoghol iehor tonqos minhabba l-imsemmija inkapacita' permanenti. U x'aktarx li aktar ma jghaddi z-zmien aktar tonqos tali possibilita' ta' ri-impieg bir-rizultat li l-attur isofri telf reali li jista' jkun ingenti."

(c) What happens in the event that the victim already suffers a physical disability before the accident?

This issue was dealt with in **Maria Agius v. Herman**

99 Op. Cit. Page 65.

Bezzina[100] . Prior to the accident, the plaintiff was disabled and not gainfully employed. Nevertheless, she still used to perform household tasks. As a result of the accident, she ended up relying on third parties for all her needs. The Court noted that in normal circumstances, the plaintiff would have been entitled to substantial damages. However, the damage liquidation was usually computed on the basis of loss of future income. Since the plaintiff had not sustained any loss or reduction of income, then this method of computation could not be applied in this case. Nonetheless, she was still entitled to damages for the loss of independence she had sustained:

> *"Ma hemmx dubbju li d-dizabilita permanenti li ghandha l-attrici konsegwenti l-incident hija wahda qawwija w f'cirkostanzi normali kienet tattira kumpens qawwi. Izda fil-kaz in ezami, tenut kont l-kondizzjoni tal-attrici antecedenti l-incident w l-fatt li din la soffriet u lanqas sejra ssofri riduzzjoni fl-income futur taghha minhabba din id-dizabilita, l-Qorti hi tal-fehma li ma tistax timxi u tillikwida d-danni a bazi tal-principji enuncjati f'Butler v. Heard li ghal dawn l-ahhar tletin sena kienu jiggwidaw l-gudikant fl-assessment ta' Lucrum Cessans. Il-Qorti trid bilfors tuza d-diskrezzjoni taghha sabiex jintlahaq bilanc bejn dak li haqqa l-attrici w dak li hu dovut jhallas l-obbligat.*
>
> *Illi f'kaz fejn id-danneggat kien, qabel l-incident, kapaci li jimpega ruhhu w jippercepixxi intriotu ekwivalenti ghal dak minimu nazzjonali, d-danni dovuti a bazi ta' dizabilita ta' 65%, kienu jigu likwidati fl-ammont ta' madwar Lm20000. Dawn id-danni izda jkunu qeghdin jirriflettu telf futur li dik l-istess persuna kienet ser tbaghti minhabba dik id-dizabilita. Fil-kaz prezenti dan it-telf futur certament qatt ma jista javvera ruhu. Il-Qorti pero*

[100] Decided by the First Hall Civil Court on 20.05.1996.

thoss li l-attrici ghandha tigi kumpensata ghal dak it-telf ta' indipendenza ghalkemm limitata, li kellha qabel l-incident billi minn dak inhar il-quddiem hi ma tista taghmel ebda facendi d-dar, la tohrog tixtri w ghal kull haga li jkollha bzonn tiddependi fuq terzi persuni. Il-Qorti ghalhekk qed tillikwida arbitrio boni viri is-somma ta' ghaxar t'elef lira bhala dik rappresentanti danni futuri sofferti mill-attrici minhabba d-dizabilita sofferta."

Thus, in view of the particular circumstances of the case, the Court felt that it would be inappropriate to follow **Butler v. Heard.** Rather it considered it more opportune to liquidate an amount *arbitrio boni viri.*[101]

(d) The link of cause and effect

An important point which must never be overlooked is that the disability must have been caused directly through the accident, in other words, there must be the link of cause and effect between the disability suffered and the act of the defendant. Otherwise, if the disability was already there or it was not caused through defendant's tortuous action then the plaintiff cannot expect any damages for loss of future earnings. As **Giorgi** clearly explained in his book **Teori Delle Obbligazioni**[102]:

*"....non si debbono mai comprendere fra i danni risarcibili quelli non connessi **direttamente** col fatto illecito, ma nati in occasione o in sequela del medesimo da altre cause, le quali non erano naturalmente coordinate col fatto illecito stesso."*

101 Vide also Carmelo Grech v. Kevin Vella decided by the First Hall Civil Court on 28.06.1996. In this case, plaintiff, who was a deaf-mute, suffered a 27.5% permanent disability when he was hit by defendant's car. The Court awarded him Lm11,750 by way of damages.

102 Volume V Para. 235

An apt illustration of this is the case of **Joseph Attard v. Emanuel Attard et**[103] The defendants were found responsible for an incident at a bowling pitch, in which the plaintiff sustained a grievous injury to his arms. The plaintiff had already suffered a physical injury to his right arm during the war, and the question arose whether the osteoarthritis[104] he had in his arm was as a result of the war injury or the p resent assault by the defendants. The medical experts were explicit in their report on the matter: the osteoarthritis was a consequence of the war injury, and the assault by the defendants had merely caused the plaintiff a temporary inconvenience. Both the First Hall Civil Court and the Court of Appeal concurred with the medical experts' submissions :

> *"Ghal dak li huma telf ta' qliegh futur il-Qorti kienet tkun inklinata li bhal perit legali addizzjonali turi l-istess simpatija lejn l-attur, li kieku ma kienx ghal mod car tal-ligi taghna fuq il-kwistjoni ; l-artikolu 1088 tal-Kodici Civili jirreferi ghal dan il-kumpens bhala 'loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.' Il-periti medici addizzjonali kienu kategorici fuq din il-kwistjoni meta qalu li l-inkapacita li ghandu l-attur hija dovuta ghall-incident li gralu fi zmien il-Gwerra u mhux ghall-incident li ta lok ghal din il-kawza. Il-Qorti ma ssib ebda raguni ghaliex m'ghandhiex taccetta din il-konkluzjoni tal-periti medici addizzjonali, u kwindi ga la darba l-inkapacita tal-attur mhiex attribwibbli ghal incident tallum, l-ebda kumpens ma jista' jigi lilu moghti fuq bazi ta' telf ta' qliegh futur fil-kuntest tal-ligi kif inhi."*

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103 Decided by the Court of Appeal on 20.06.1984.

104 Means "a chronic inflammation of a joint."

[iv] The lump sum

Damages awarded by a court in a tort action are awarded in a lump sum.[105] The award is made once and for all and there is no possibility of increasing it or decreasing it later because of changes in the plaintiff's situation. In the great majority of cases where the injuries are relatively minor this raises no real problem. In such cases, the plaintiff is likely to be completely recovered long before the damages are assessed, and the whole episode is by then past history.

But the lump sum remedy does raise acute problems wherever a person suffers serious injuries the effects of which may still be felt long after the damages are assessed. The claims which raise problems with lump sums are those involving future earnings losses. In cases of this nature the Judge has to make two wholly different sets of predictions in order to calculate an appropriate sum. First, it is necessary to predict what would have happened to the plaintiff if he or she had not been injured, a prediction which obviously cannot be verified or falsified by subsequent events. Secondly, the Judge has to predict what is now likely to happen to the plaintiff. For instance, it may be necessary to make a prognosis as to the probable outcome of the plaintiff's injuries : will the plaintiff make a complete recovery? If so, how long will it take? If not, what residual degree of disability will there be? How will this affect the plaintiff's earning capacity?

105 In this context the term "lump sum" is used to denote the once and for all payment.

Obviously, the task of predicting the future is extremely difficult and nobody can blame the Judges if they often go wrong in their predictions. But it is highly unsatisfactory that given the extreme difficulty of the task, there is hardly ever any opportunity for making a subsequent correction. If a Judge thinks the plaintiff will make a complete recovery and this does not happen, the plaintiff will have been awarded less damages than he or she should have got. Conversely, if a plaintiff recovers more quickly than the Judge predicted, too much compensation will have been awarded.

These difficulties are sometimes aggravated by the phenomenon of "compensation neurosis." This recognized medical condition, which must be distinguished from conscious malingering, has the effect of prolonging the period of rehabilitation and convalescence until after the judgment or settlement of a tort claim. Anxiety over the damages which may be recovered is so great as to postpone complete recovery. Apart from being a deplorable by-product of the once-for-all damages award, this condition can cause great problems for assessing damages. If the Judge assumes certain disabilities to be permanent whereas they are, in fact, a sympton of compensation neurosis and they could vanish overnight, the plaintiff will have been over-compensated ; if conversely, the Judge thinks the case is one of "compensation neurosis" and wrongly assumes the disability will disappear or lessen after the trial, the plaintiff may be undercompensated.[106]

106 Cane Peter, Atiyah's Accidents, Compensation and the Law, London, Butterworths, 1993, at Pages 109-111.

In the case of **Karen Zimelli v. Michael Sammut** [107] reference was made to this particular "disease." The plaintiff had suffered severe head injuries after being involved in a car collision for which the defendant was found to be responsible. The latter claimed that the plaintiff was suffering from compensation neurosis and that consequently her ailments were only imaginary. In dealing with this issue , the Court held that :

> *"Il-Qorti hi soddisfatta li fil-kaz in ezami ma jirrikorrux l-elementi biex jiggustifikaw is-sottomissjoni tal-konvenut li hawn si tratta ta' compensation neurosis li tippresupponi lezjoni trivjali w superficjali li f'kazi estremi tigi riflessa f'fissazzjoni nevrotika ta' mard immaginarju, li konxjament jew le, twassal ghall-tentattiv ta' gwadan illecitu ta' kumpens ghal danni inezistenti. Hawn si tratta ta' lezjoni gravi li hu provat li pprovakat danni permanenti fit-tessut u c-celloli zghar tal-mohh, u li dawn ic-celloli, fejn interessati, gew irrimedjabilment menomati."*

(a) Suitability of lump sums [that is, once and for all payments]

It is highly questionable whether awarding damages for lost income in a once and for all payment is appropriate in cases where the loss will continue after the date when the damages are assessed. The sum awarded can, of course, be invested to provide an income or used to purchase an annuity, but in practice the sums awarded for lost earnings, even if invested wisely and successfully, would often, especially in times of high inflation, be insufficient to provide an income of the order of that which has been lost. In any event, the recipients

107 Op. Cit. Page 29.

may be quite inexperienced in the handling of large sums of money, and they may dissipate or mismanage the money, or fall a prey to confidence tricksters or invest it in reckless and hopeless enterprises.

The writer **Atiyah** examines two alternative methods to that of the once and for all payment, namely :

{1} Periodical Payments

Any system for awarding damages in the form of periodical payments would have to be confined to awards above a certain figure so that smaller awards could still be paid in a lump sum. Any such system would have to deal also with settlements as well as with court awards. To deal with the latter but ignore the former would be to deal with only a small fraction of cases. To require large settlements out-of-court to be in the form of periodical payments might be thought to involve undue interference with freedom of contract.

In the United Kingdom the Law Commission, after a full inquiry, came to the conclusion that a system of periodical payments could not be fitted into the existing tort framework. However, a majority of the Pearson Commission recommended that a system of damages to be paid by periodical payments should be introduced for serious personal injury cases and for fatal cases. The Commission proposed that the Courts should have the power to award damages either as a lump sum or in the form of periodical

payments ; and that in the latter case, the amounts should be inflation-proofed and variable if the plaintiff's medical condition subsequently changed. But they refrained from insisting that all settlements of fatal and serious personal injury cases should be in this form. Parties would remain free to settle for lump sums, though the Commission thought that plaintiffs might increasingly become aware of the desirability of settling for periodical payments.

However, one thing which emerges clearly from the Pearson Report is that there are very few cases which would be affected by a change in the law such as they recommended. Thus it would be questionable whether the change proposed by the Pearson Committee would be worth the great cost and complexity which it would undoubtedly entail.

{2} Structured Settlement

Under such a settlement, damages for future losses are calculated as a lump sum but instead of the lump sum being paid to the plaintiff, the insurer who is responsible for paying it uses it or part of it to purchase an annuity to provide the plaintiff with a continuing inflation-proofed income for as long as this is needed. The annuity may be for a fixed minimum period so that it will continue to be paid to the plaintiff's estate if the plaintiff dies sooner than expected. Such an arrangement would provide for dependants. Apart from providing security for the future, structured settlements relieve the plaintiff of the need to make difficult investment decisions or to employ an investment advisor, because the

insurer assumes responsibility for investing the lump sum and providing the income.

As a technique for dealing with serious cases of continuing loss, the structured settlement has many advantages. On the other hand, its major disadvantage is that once the "structure" has been set up, the capital is unavailable to the beneficiary. But this disadvantage can be partly neutralized by leaving a lump sum out of the structure or by purchasing a number of "annuities", one of which provides regular income and another of which provides regular but less frequent lump sums. The development of the structured settlement makes the absence of a court power to award periodical payments appear anomalous. It might also lead one to reconsider whether it would, in fact, be objectionable to require cases involving a lump sum greater than a specified amount to be settled in structured form, unless a court ordered otherwise.

Nevertheless, it must be said that structured settlements do not solve all the problems created by the lump sum system precisely because they are based on a lump sum awarded by a Court or agreed by the parties. Thus, all the difficulties of calculation and the problems of proof and delay associated with the present [English] system remain.[108]

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108 One local case which offered to the defendants an alternative method of payment instead of a lump sum payment was that of **Emmanuel Agius v. Joseph Galea et noe** per Mr Justice Giuseppe Mifsud Bonnici. The alternative method consisted in *"li s-Socjeta tibqa' thallas lill-attur kull gimghatejn l-ekwivalenti ta' dak li jkun qed jaqla' haddiem ta' l-istess grad fl-istess industrija ghas-snin li gejjin sakemm l-attur jaghlaq wiehed u sittin sena li minnhom jitnaqqsu dak li l-attur jircievi mill-assikurazzjoni nazzjonali u b'garanzija adegwata favur l-attur f'kaz li s-Socjeta konvenuta tigi likwidata jew tispicca tkun xi tkun ir-raguni."*

(b) Deductions made from the Lump Sum

Whether or not these two methods just described are a better alternative to the once and for all payment is a question of judgment. For our purposes, the lump sum payment concept is not related to the disability but rather

{1} to the payment of quantum of damages itself, that is, after the disability has been established and the quantum determined

{2} lately to the time that lapses to obtain a judgment from the date of the accident.

The lump sum payment is intrinsically a "good" system. What renders it unfitting at times is the length of time taken until compensation is finally assessed and liquidated. It is easy enough to visualize what appalling consequences a minimum wait for compensation can have on the economic situation of the injured party and his family, let alone a wait of some 8 or 10 years. Such lengthy legal procedures have led our Courts to seriously question the customary 20% deduction made from the lump sum in line with **Butler v. Heard**.

Taking into account the formula outlined in **Butler v. Heard**, if the judgment is given soon after the accident then a 20% deduction is made from the total amount of compensation. The reason behind this deduction is that the victim is earning interest on that capital since he has been awarded the amount at one time whereas normally he would have earned the said sum gradually over a number of years. However, our Courts have modified this by arguing that if

between the date of the accident and the date of the judgment, a considerable number of years have passed such as 8 to 10 years then no lump sum deduction is made. If 4 to 5 years have elapsed, then 10% is deducted.

> *"Skond il-gurisprudenza tal-Qrati taghna l-fatt li d-danni jithallsu f'daqqa taht forma ta' kapital hija cirkostanza importanti biex tigi moderata s-somma tad-danni u f'diversi decizjonijiet tnaqqset kwint (1/5) mis-somma stabilita bil-metodu fuq imsemmi. Huwa ovvju pero' li meta jkun ghadda zmien konsiderevoli mill-incident li jkun ta lok ghad-danni..... ghandha tigi mnaqqsa mis-somma stabilita bil-metodu fuq imsemmi somma inqas ....."*[109]

In **Anthony Tabone v. Salvatore Guillaumier et noe**[110] Mr Justice Joseph D. Camilleri concurred fully with the Legal Referee's submissions namely that :

> *"Ibda biex hemm il-fattur ta' dewmien. Din ic-citazzjoni giet ipprezentata fis-16 ta' Settembru 1982 u wara li ghaddew iktar minn erba' snin, l-attur ghadu ma ha l-ebda hjiel ta' kumpens.*
> *Dan il-fattur jista' jolqot it-tnaqqis solitu ta' 20% ghal dak li hu lump sum payment. Infatti, kien hemm decizjonijiet tal-Qorti ta' l-Appell fejn minhabba certu dewmien dan it-tnaqqis ta' 20% ma giex akkordat. Hemm decizjonijiet fl-ismijiet Zammit v. Bezzina (19-9-1973), Apap v. Degiorgio (16-1-1984) u Eder v. Bajada (29-3-1985) ;*
> *Imbaghad hemm id-decizjoni tal-Prim'Awla tal-Qorti Civili in re Joseph Balzan et v. Louis Vella (9-6-1986) fejn il-Qorti kkummentat b'dan il-mod wara li ghamlet referenza ghal decizjoni minnha stess ta' l-1 ta' Marzu 1985 : Il-Qorti tirrileva li minn mindu nghatat dik id-decizjoni ghaddiet iktar minn sena u l-indikazzjonijiet ekonomici juru li l-aspetti ta' awsterita' kkagonati mir-*

[109] **Carmelo Camilleri v. Alfred Falzon** [Op. Cit. Page 80]

[110] Decided by the Commercial Court on 23.06.1988 and found in Vol LXXII Part iv Page 796.

recessjonijiet qeghdin kull ma jghaddi z-zmien jonqsu u z-zamma ta' paga fissa, bla zidiet, hi x'aktarx ta' natura ekonomika u politika dettata mill-fatt li l-ghadd ta' nies bla xoghol ghad irid jinzel qabel ma jsir caqliq fil-pagi. F'kull kaz din il-Qorti thoss ukoll il-htiega li ghandha ttenni li f'kull ammont li hija tillikwida ghandha tara li dan ikun wiehed li in ultima analisi (dovuta ghal tnaqqis matematiku ta' dak li huwa wara kollox in parte misthajjel u futuristiku) jispicca f'ammont irrizorju u irrejalistiku. Wiehed ma jridx jinsa li l-ligi taghna - hdejn ligijiet ta' pajjizi ohra - ma tantx hija wahda komplimentuza jew generuza hafna f'dak li huwa likwidazzjoni ta' danni..... Ghalhekk wiehed ma jistax jibda jnaqqar u jnawwar min-naha u minn ohra u jqis kollox b'mod restrittiv..."

On the basis of the above arguments, the Court adopted the Legal Referee's calculations in that the lump sum deduction should be 10% and not 20% since a relatively long period of time had passed since the date of the accident.

Mr Justice Giuseppe Mifsud Bonnici was even more bold; he argued that there was no justification for a deduction being made simply because the plaintiff was receiving the amount at once :

"Hekk ukoll fil-kwistjoni tad-deduzzjoni a bazi tal-fatt li s-somma sa tithallas f'daqqa. Il-kalkolu jsir fuq is-salarju prezenti tal-vittma. Hamsa (5%) fil-mija ta' dak is-salarju ; mentri dawk il-hamsa fil-mija (5%) inkwantu huma ta' natura permanenti, il-vittma se tbatihom fuq kull salarju, certament hafna aktar gholi minn ta' llum, li se tkun intitolata ghalih sakemm tibqa' tahdem. Hija esperjenza generali ta' dawn l-ahhar almenu 50 sena ta' l-istorja tad-dinja illi l-valur tal-flus nizel b'mod li ebda rata ta' interessi ma rnexxilha

zzomm il-pass biex tibbilancja l-inflazzjoni u ghalhekk it-tibdil 'il fuq fis-salarji hija rikorrenza ta' kull sentejn - tlieta, l-aktar. Ghalhekk m'hemm assolutament ebda gustifikazzjoni realistika ghal din id-deduzzjoni ghaliex il-hlas qed isir f'daqqa.[111]

The latter argument was likewise adopted in the subsequent case of **Carmela Schembri v. Alfred Caruana noe**[112] where the Court did not deduct the usual 20% since the payment was being made at once. However, one should remark that the Court arrived at this conclusion partly also due to the fact that this lawsuit had been pending before it since 1971, therefore a total of 19 years! The Court in effect stated that :

"Kieku d-danni nghataw fi zmien ragonevoli l-attrici kienet tiggwadanja imghaxijiet fuqhom li jammontaw ghal aktar mill-kwint li solitu jitnaqqas minhabba l-lump sum payment."

In **Maria Pace pro et noe v. Joseph Abela**[113], the Court refused to deduct 10% instead of 20% from the total amount due on the basis that the plaintiff was receiving the compensation in a relatively short period of time when compared to other lawsuits :

"Fis-sentenza aktar recenti ta' din il-Qorti, fl-ismijiet Alexander Caruana et v. Carmel Gauci deciza fit-3 ta' Ottubru 1991, it-tnaqqis ta' l-20% minhabba l-lump sum payment ma sarx. F'dan il-kaz, kienu ghaddew hames snin u disa' xhur minn meta gara l-incident li fih l-attrici sofriet l-inkapacita. Izda, fil-fehma ta' din il-Qorti, dak li wassal lill-Qorti biex tirrifjuta li ssir id-deduzzjoni

111 **Mario Camilleri v. Mario Borg et noe** [Op. Cit. Page 14]

112 Decided by the Commercial Court on 20.04.1990.

113 Op. Cit. Page 23.

kien il-fatt li r-responsabbilita' ghall-incident ma kienet qatt giet ikkontestata, li certament m'huwiex il-kaz fil-kawza odjerna. Fl-imsemmija kawza, jidher li s-socjeta' assiguratrici tal-konvenut kienet disposta li thallas id-danni sofferti mill-atturi fil-vettura taghhom, izda mhux id-danni rizultanti mill-imsemmija inkapacita' ta' l-attrici. Kwindi, hemm bahar jaqsam bejn il-fatti tal-lum u dawk tal-kawza fuq riportata; Din il-Qorti jidhrilha li, fil-kawza odjerna, l-anqas m'hu indikat li minflok it-tnaqqis ta' 20% ikun hemm deduzzjoni ta' 10%. Fil-kawza odjerna ma jistax jinghad li kien hemm xi dewmien esagerat. Difatti, bdiet f'Ottubru 1989 u qieghda tigi deciza f'inqas minn erba' snin - perjodu li meta jitqies kollox ma jista' jitqies twil taht l-ebda aspett. Wara kollox, id-deduzzjoni ta' l-20% minhabba l-lump sum payment skond il-metodu bazi Butler v. Heard issir bhala raguni ta' moderazzjoni u, ghalhekk, f'cirkostanzi eccezzjonali biss wiehed ghandu jiddepartixxi minn din ir-regola."

Similar arguments were brought forward by the Court in **Robert Barbara v. Saviour Galea**[114] The Court refused to deduct 10% instead of the usual 20% from the amount of compensation on the basis that :

"Jinghad li r-rata ta' 10% giet adoperata mill-Qrati taghna f'kazi meta l-pagament tal-lump sum ikun qieghed isir zmien sewwa wara li jkun gara l-incident li jkun ta lok ghad-danni. Fil-kaz de quo, l-incident gara fis-6 t' Awissu 1993 u l-attur ser jithallas fi ftit aktar minn tlett (3) snin wara. Ghalhekk, l-attur zgur li ma jikkwalifikax biex, fil-kaz tieghu, r-riduzzjoni ssir b'din ir-rata."

In **Victor Mallia et v. Joseph Camilleri**[115] the Court conceded that :

"Skond il-metodu ta' likwidazzjoni tal-lucrum

114 Op. Cit. Page 77.

115 Op. Cit. Page 31.

cessans gja accennat, huwa solitu li jsir tnaqqis ta' ghoxrin fil-mija (20%) minhabba li d-danneggjat ikun ser jiehu l-beneficcju tal-'lump sum payment.'

Il-perit legali ikkonsidera jekk ghandux isir dan it-tnaqqis mis-somma fuq imsemmija .... u wasal ghall-konkluzjoni li f'dan il-kaz partikolari huwa xieraq li jsir dan it-tnaqqis. Din il-konkluzjoni huwa bbazaha fuq tlett konsiderazzjoniet u cioe' li, ghalkemm il-flus ser ikunu jiswew anqas fil-futur minhabba l-inflazzjoni, dan ser ikun kompensat bil-fatt li l-attur sejjer jiehu l-beneficcju ta' dawn il-flus illum u ghalhekk jista' jinvestihom b'mod li jaghtuh return f'ghamla ta' imghax ; li l-attur sejjer jithallas ta' xoghol li mhux ser jaghmel u ghalhekk ikollu aktar hin hieles u li l-attur sejjer jigi kompensat fuq il-bazi li sofra inkapacita' totali meta l-percentage of disability f'termini assoluti u mhux biss relativi hija ta' erbgha fil-mija (4%) biss.

Din il-Qorti taqbel ukoll ma' dawn il-konsiderazzjonijiet u jidhrilha li ghandha zzid maghhom li fil-kaz odjern qieghed jigi likwidat il-lucrum cessans fi zmien relattivament qasir wara l-akkadut, u ghalhekk, m'ghandhiex tapplika l-gurisprudenza pjuttost ricenti li meta jkun ghadda zmien konsiderevoli bejn l-event dannuz u l-likwidazzjoni tad-danni dan it-tnaqqis m'ghandux isir."

In **Hadrian Borg v. Mario Caruana**[116] the first Legal Referee submitted that instead of deducting 20% from the amount due one should deduct 17% instead in view of the fact that a considerable period of time had elapsed since the date of the accident. However, the Additional Legal Referee disagreed and in fact suggested a deduction of 10% in lieu of 17%. The Court eventually adopted the latter's suggestion

116 Op. Cit. Page 59.

arguing that :

> *"Din il-Qorti taqbel ma' dawn il-fehmiet tal-perit legali addizzjonali u jidhrilha li l-likwidazzjoni tal-lucrum cessans effettwata mill-ewwel perit ghandha tinbidel u tinhadem a bazi tal-konsiderazzjonijiet fuq riportati* [the fact that the plaintiff was receiving the amount almost 8 years after the date of the accident] *li, fil-fehma tal-Qorti, huma aggustamenti gusti li jisthoqqilhom li jigu akkolti biex b'hekk tkun saret gustizzja mad-danneggjat."*

In a case which was decided 7 years after the date of the accident only a 6% reduction was made from the global amount due : *"Konsiderat ukoll illi l-incident gara seba' snin ilu, hu sewwa illi r-riduzzjoni ghal-lump sum payment tkun biss ta' 6% u dana fl-iskorta ta' gurisprudenza ricenti in materja."* [117] Thus in this latter case the Court attitude was more liberal when compared with the previous case where a 10% reduction was made notwithstanding that the accident had occured almost 8 years before.

Similarly, in **Mario Caruana v. Joseph Gatt noe**[118] the Court chose to follow recent trends in gurisprudence :

> *"Fir-rigward tad-deduzzjoni ta' 20% minhabba il-lump sum payment, il-perit legali, fuq l-iskorta tal-gurisprudenza l-aktar recenti, kkonkluda li din m'ghandhiex issir billi l-incident gara fil-5 ta' Lulju 1985 u ghalhekk, jigi li l-likwidazzjoni qeghda ssir aktar minn ghaxar (10) snin wara - zmien dan li objettivament ghandu jitqies bhala wiehed irragonevoli."*

So in this case no deduction was effected since over 10 years

117 **Angelo Galea v. Joseph D'Agostino et** [Op. Cit. Page 23]

118 Op. Cit. Page 41.

had passed from the date of the accident.

In the case of **Paul Xuereb noe v. Emanuel Xuereb pro et noe**[119] Mr Justice Joseph Said Pullicino retained that if three years elapse from the date of the accident *"allura ghandu jsir tnaqqis ta' 2% ghal kull sena minn dik id-data."*

In the more recent case of **Paul Scerri et noe v. Tancred Cesareo**[120] the Court reverted back to the original formula laid down in **Butler v. Heard**. It deducted 20% from the global amount however this seemed justified enough considering that the judgment was being delivered a little over 3 years since the accident :

> *"Skond il-gurisprudenza recenti tal-Qrati taghna, gie ritenut ukoll li m'ghandhomx isiru deduzzjonijiet ghax qed issir lump sum payment. Izda kif diga ntqal li kapital li jrid jithallas lill-atturi jista' jigi rivestit u dina s-sistema 'automatically takes care of inflation, for inflation is accompanied by high interest rates which will increas the plaintiff's return on the capital.' Ghalhekk fil-kalkoli taghha l-Qorti ser taghmel deduzzjoni ta' 20% ghal lump sum payment."*

From the above cases, one can conclude that although the deductions made from the lump sum are not always the same, yet there is a pattern underlying them all. The longer it takes to receive compensation, the less the deduction would be. So it mostly depends on the particular criteria of each individual case.

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119 Decided by the First Hall Civil Court on 05.10.1995.

120 Op. Cit. Page 4.

CHAPTER 4

DAMAGES AWARDED IN FATAL INJURIES

4.1 Introduction

Unfortunately, an accident may sometimes have tragic consequences. The law has also catered for this possible contingency by providing in section 1046 that :

> *"Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred, award to the heirs of the deceased person damages, as in the case of permanent total incapacity, in accordance with the provisions of the last preceding section."*

Two factors are immediately clear from the start :

[i] the formula adopted so as to calculate the amount of compensation for fatal injuries is basically the same as that used for non-fatal injuries, the only differences being that in fatal injuries the percentage disability is 100% and an additional percentage is deducted representing the consumption of the deceased had he remained alive [121];

121 *"L-istess metodu ta' likwidazzjoni ta' danni gie wkoll segwit fil-kaz ta' omicidji nvolontarji b'dan pero li tigi mnaqqsa wkoll percentagg iehor mis-somma ghal dak li l-mejjet kien jonfoq fuqu nnifsu kieku baqa' haj."* **[Elvira Abela v. The Prime Minister et** decided by the First Hall Civil Court on 23.10.1992 and by the Court of Appeal on 30.12.1994]

[ii] secondly, the law speaks of the "heirs of the deceased person" and this may give rise to certain difficulties in practice.

4.2 Who is entitled to claim damages in the case of death?

Before examining the Maltese position it is worthwhile taking a brief look at the position in the United Kingdom and in Italy.

[i] United Kingdom

In the United Kingdom damages for fatal injuries are regulated by **The Fatal Accidents Act** of 1976 which **Munkman** describes as a "wrongful death" statute. This means that the statute gives an independent cause of action to near relatives of the deceased who have been deprived of their breadwinner or at any rate of partial means of support.[122]

Section 1(1) of the said Statute reads :

> *"If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."*

Thus, under the terms of this section, it is a condition

122 Munkman John Damages for Personal Injuries and Death London, Butterworths, 1993 at Page 137.

p recedent to the success of a claim that the injured party should have been able to sue if he had survived.

Section 1(2) then goes on to state that every action under the said Act is for the benefit of the dependants of the deceased.

Section 1(3) subsequently defines "dependants" to mean :
[i] the wife or husband or former wife or husband
[ii] any person who -
(a) was living with the deceased in the same household immediately before the date of the death, and
(b) had been living with the deceased in the same household for at least two years before that date, and
(c) was living during the whole of that period as the husband or wife of the deceased;
[iii] any parent or other ascendant
[iv] any person who was treated by the deceased as his parent
[v] any child or other descendant
[vi] any person {not being an actual child of the deceased} who in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage
[vii] any brother, sister, uncle or aunt, and the issue of any of them

Section 1(5) then enlarges the primary class by providing that, in deducing any of these relationships, the following rules should apply :
[i] an illegitimate child is treated as the legitimate child of his

mother and reputed father

[ii] a relationship of the half blood is equivalent to the whole blood and a step-child is equivalent to a child

[iii] finally, relationship by affinity, ie through marriage is equivalent to consanguinity so that any person who, by any of these rules, is related by blood to the wife, is similarly related to the husband and vice versa.

It is not sufficient that the claimant merely satisfies the statutory meaning of "dependant." It must be shown in addition that there is a reasonable likelihood that the claimant has or will suffer financial loss as a result of the death of the deceased. In many cases the dependants will have a clear and immediate financial loss. For instance, where a husband before his death was maintaining his wife and children the fact that his wife and children will suffer financial loss as a result of the husband's death is obvious.[123]

From this brief analysis one can see that the UK Statute is quite comprehensive as regards the persons who have the right to claim compensation in case of death. It lays down in clear terms who are those persons eligible for compensation in such circumstances.

[ii] Italian Law

Damages arising from death are dealt with by Article 1223 of the Italian Civil Code.

> *"La giurisprudenza, con un orientamento chiaramente innovativo, concede "azione" per il*

[123] White Paul Personal Injury Litigation Bristol, Jordans, 1996 at Page 20.

risarcimento della perdita degli alimenti che la vittima corrispondeva o che, con ragionevole certezza, avrebbe corrisposto o continuato a corrispondere in futuro ai sopravvissuti, pur senza esservi giuridicamente obbligato. Questa aspettativa si ritiene fondata quando le condizioni economiche dei congiunti siano tali da fare assegnamento sul soccorso della vittima, in ragione della sua gia' raggiunta o sperata capacita' di guadagno." [124]

Therefore, Italian Law grants to the relatives of the deceased the right to claim damages in case of death. The relatives must be persons who suffer damages as a direct consequence of the death of their relative. However, not all those who suffer as a consequence of the death have a right to claim compensation. As **Massimo Bianca** rightly explains :

"Il fatto illecito sofferto da un soggetto non costituisce ..... titolo del diritto al risarcimento a favore di tutti i terzi che in conseguenza dell'illecito vedano diminuite sicure occasioni di guadagno..... il riconoscimento giurisprudenziale del diritto al risarcimento a favore di determinati terzi trova fondamento nella lesione di una situazione giuridica propria dei sopravissuti. Questa situazione, precisamente, si identifica ***nello stabile vincole solidale, socialmente rilevante, che li legava alla vittima.*** *Questo vincolo puo' essere appunto ravvisato nella partecipazione al gruppo familiare, ad una comunita' religiosa e ancora nei rapporti di societa' e di lavoro."*

Italian Law thus restricts the right to claim compensation to those persons who were closely linked to the victim. Such persons must have depended on the victim for their

[124] Bianca Massimo Inadempimento delle obbligazioni Libro IV Bologna, Zanichelli Ed., 1979, 2nd Ed. at Page 287.

livelihood, or else would have depended on the victim in the future. Therefore, parents may claim damages in the event of the death of their child notwithstanding that the latter was still a student because in the future they might have depended on him. Similarly, children who have lost their parents may also claim damages since they had the right to be maintained by their parents. However, they do not have the right to claim as damages any savings the parents may have made in their favour since such savings cannot be determined with certainty.

[iii] Maltese Law

In contrast, our Section 1046 is rather brief and to the point : it grants to the **heirs** of the deceased person the right to claim damages. In terms of our law, an heir is a person who is either instituted as such under a will by the decujus himself, or in the absence of a will, he is considered to be an heir by the law. Therefore, strictly speaking, an heir can be a person who is closely related to and dependent upon the decujus just as he can be a person who is neither related to nor dependant upon the decujus.

In the context of awards for fatal injuries, the word "heirs" is perhaps unsuitable. As the Court explained in **Joseph Meli et noe v. Captain Edward sive Teddy Cachia**[125]

> *" Ir-raguni principali li f'xi okkazzjonijiet giabet nuqqas ta' kjarezza fl-interpretazzjoni tal-provedimenti tal-ligi in materja hija l-uzu tal-kelma 'werrieta' fl-artikolu 1046 tal-Kap 16."*

[125] Decided by the First Hall Civil Court on 21.11.1994.

For instance, according to our law of succession, the surviving spouse can never be the heir of the predeceased spouse where there are children. In such an event, the surviving spouse is only entitled to the usufruct of the property of the predeceased spouse. Therefore, upon a strict interpretation of section 1046, the surviving spouse does not have the right to claim compensation. It is the children who have the right to sue for damages since they are the true lawful heirs of their deceased parent. One immediately senses the injustice of such a situation.

However, although the wording of section 1046 remains unaltered, our Courts, through their judgments, have given a new dimension to the term "heirs." A fair amount of caselaw has now established that the surviving spouse not only has an interest but the right to claim damages in the event of death of his or her spouse. The principle that the surviving spouse is to be considered as an "heir" for the purposes of section 1046 is now deeply ingrained in the Maltese legal framework.

The case which initially dealt with this issue of whether the spouse has the right to sue for compensation in her own name was **Marianna Cini pro et noe v. Poalo Galea et**[126] The victim in this case was a 31 year old father of four. While working on a building site the roof caved in and he was buried under the debris. His wife and four children sued for compensation. The defendants argued that the widow was not entitled to compensation because Section 1046 only grants this right to the heirs of the deceased. And in terms of our

[126] Decided by the First Hall Civil Court on 30.04.1958 and by the Court of Appeal on 27.10.1958.

law, the surviving spouse is not an heir. The Court, however, submitted that Section 1046 should not be read in isolation but it should be seen in conjuction with sections 1031 and 1033. Section 1031 states that every person shall be liable for the damage which occurs through his fault whereas section 1033 provides that 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. The Court argued that on the basis of these two sections, which are of a general application, the surviving spouse has a personal right to sue for compensation.

> *"Ghar-rigward tal-attrici f'isimha proprju, ukoll issottometta l-perit legali, "stricto jure" hija hi eskluza mill-kumpens li l-imsemmi artikolu tal-ligi jaghti lill-eredi tal-mejjet, ghaliex hija mhijiex eredi ta' zewgha, billi dan halla superstiti lill-uliedu msemmijin; pero hija, kif jinghad fic-citazzjoni, soffriet danni patrimonjali, li huma t-telf tal-mezzi ghal tul hajjitha, u n-nofs ta' dak kollu li skond l-art. 1360 tal-Kodici Civili jifforma oggett u materja tal-komunjoni tal-akkwisti li giet xjolta bil-mewt ta' zewgha ; u l-art. 1074 kombinat mal-art. 1076 tal-istess Kodici, jirrendi responsabbli ta' kwalunkwe dannu lil min, bl-intenzjoni jew minghajr intenzjoni li jaghmel deni, jaghmel dak li skond il-ligi ma jistghax jaghmel jew jommetti dak li skond il-ligi hu tenut jaghmel u ghalhekk jekk l-attrici, f'isimha proprju, ma ghandhiex dritt ghal kumpens skond l-art.1089 a kawza tal-mewt ta' zewgha, hija ghandha dritt ghar-rizarciment tad-danni skond id-dispozizzjoni generali kontenuta fl-art. 1074 u 1076 tal-imsemmi Kodici. F'kazi simili, dawn il-Qrati dejjem irrikonoxxew li tikkompeti din l-azzjoni anki lill-mara tal-mejjet."*

In subsequent cases our Courts never hesitated in confirming this right to sue to the surviving spouse. One can refer to **Maria Pace pro et noe v. Joseph Abela**[127] where the Court stressed the fact that :

> *"Fir-rigward ta' l-attrici Maria Pace, ghad li din mhux eredi ta' zewgha, jinghad li ghandha l-interess u kwindi, id-dritt li f'isimha proprju tunixxi ruhha ma' uliedha, eredi ta' zewgha, fl-azzjoni kontra l-konvenut u kif, imbaghad, l-ammont akkordat mill-Qorti jigi allokat bejn l-attrici u uliedha hija kwistjoni ta' bejniethom skond il-ligi..."*

In **Josephine Desira pro et noe v. Joseph Cassar**[128] the defendant shot and killed the plaintiff's husband without any provocation or any justifiable reason at law. In liquidating the damages suffered by the plaintiffs as a consequence of the death of Temistokoli Desira, the Court remarked that it has always been held by the Maltese Courts that the persons who would suffer damages as a consequence of a death were not only the children of the deceased, as his heirs, but also his wife, since the deceased was the bread winner of the family.

> *"Hu naturali li bhala konsegwenza tal-mewt l-inkapacita' lavorattiva tad-decujus hi totali w id-dizabilita ghax-xoghol hi ta' mija fil-mija. Mill-banda l-ohra hu wkoll ovvju illi d-danni konsegwenzjali ghall-incident ma jsofrihomx id-decujus imma l-armla w uliedu. Il-ligi tispecifika l-eredi imma gie kostantament u korrettement ritenut fil-gurisprudenza li dawn ghandhom jinkludu wkoll l-armla anke jekk hi ma hijiex strettament jew dejjem eredi tieghu. Bhala konsegwenza tal-mewt l-armla u l-ulied jonqsilhom is-sostenn materjali ta' min*

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127 Op. Cit. Page 23.

128 Decided by the First Hall Civil Court on 13.01.1995.

jipprovdilhom il-mezz ta' l-ghixien u ghal dan il-konvenut ghandu jaghmel tajjeb."

Still, in my opinion, it is now high time that our legislator concretizes this situation, which has evolved through jurisprudence, into law. The word "heirs" in section 1046 should be changed into "dependants." In this way, all dependants of the deceased, be they wife, husband, children, parents or other close relatives, who depend on the deceased for their livelihood and/or care, would have the right to institute the action for damages. Moreover, it would be wise for the legislator to specify in clear terms the persons who would qualify as "dependants" so as to avoid any doubts later on. In this respect one may refer to the **UK Fatal Accidents Act of 1976** as a role model.

The word "heirs" is not merely inappropriate because it questions the surviving spouse's right to claim damages, but also because one can have different types of heirs.

"Huma werrieta sew ulied id-decujus, f'kaz li dan jkollu tfal, sew il-genituri tieghu u hutu, f'kaz li jkun ghadu guvni. Il-ligi ghalhekk ma taghmel ebda distinzzjoni bejn werriet u iehor u konsegwentement xi whud esprimew l-opinjoni li fl-assenza ta' distinzjoni, kull werriet ghandu jigi trattat b'mod ugwali." [129]

In other words, our law does not differentiate between one type of heir or another. Everybody is on the same level and it is left to our Courts to make rules where the need arises. And this is precisely where the question of dependency comes in.

[129] **Joseph Meli et noe v. Captain Edward sive Teddy Cachia** [Op. Cit. Page 111]

4.3 The notion of dependency

The term "dependant" may be defined as a person who is financially supported by another. There are several classes of dependants but perhaps the picture that immediately comes to mind is that of the husband who supports his wife and children. In the event of his death, it is his widow and children who would suffer the most since they would lose the source of their income. Therefore, it is understandable that the surviving spouse and the children should be compensated. However, this notion of dependency may be especially problematic in cases of death of a child as will be explained below.

[i] Death of a child

This argument of dependency does not hold so strong when one talks of the death of a child. In such a case, it is the victim, that is the child, rather than his parents, who is a dependant and not the other way round. In effect, one common plea raised by the defendant in cases involving the death of a child is that the heirs of the child [normally these would be the parents and any brothers/sisters] are not entitled to any damages since they were not dependant on the deceased for their livelihood. Nevertheless, notwithstanding the lack of dependency, the law does not deny to the parents and brothers/sisters of the deceased the right to claim damages. What happens in practice is that the amount of compensation is reduced depending on the degree of dependency between the claimants and the deceased.

Hence, the degree of dependency is only relevant vis a' vis the amount actually liquidated.

In **Dominic Bartolo et noe v. John Attard et noe**[130] the plaintiffs' daughter was killed when riding as a passenger in defendant's car. The latter claimed that the plaintiffs were not entitled to any damages since they were not dependant on their daughter for their livelihood. In the assessment of damages, the Court explained that it had to consider whether the plaintiffs, who were not dependant for their living on the deceased, had a right to claim damages. The Court was of the opinion that although the plaintiffs were not the deceased's dependants, the degree of dependence had still to be taken into account when assessing the damages.

> *"Dwar l-ewwel punt [jekk l-atturi humiex intitolati ghal xi kumpens peress li ma humiex dipendenti tal-mejta], il-Qorti taqbel perfettament ma' dak li qal il-perit ..... u cioe' illi llum huwa pacifiku li l-eredi tal-mejta ghandhom dritt ghar-rizarciment tad-danni kontra d-dannegjat anki jekk ma jkunux strettament dipendenti fuq il-vittma. S'intendi pero' id-degree of dependence jigi rifless fl-ammont likwidat. F'dan il-kaz il-mejta kienet bint l-atturi Dominic u Lorenza mizzewgin Bartolo, u oht l-atturi l-ohrajn. Wara li qies dan il-grad ta' relazzjoni u l-kontingenzi kollha possibbli, il-perit kkonkluda li l-atturi ghandhom idahhlu kumpens ekwivalenti ghal terz tat-tifdil li hu kalkolat kienet taghmel il-mejta matul hajjitha, u li huma kienu jirtu bhala eredi taghha."*

So the Court, after taking into account the degree of relationship, concluded that the plaintiffs were entitled to one

130 Op. Cit. Page 63.

third of the compensation.

A similar case was that of **Paul Vassallo et noe v. Carmelo Pace**[131] Plaintiffs' daughter drowned when the car she was in with the defendant fell into the sea. The defendant again argued *"li d-decuius kienet xebba li ma kienet tikkontribwixxi xejn ghall-familja, li kienet waslet ghaz-zwieg mal-konvenut u li kieku baqghet hajja, x'aktarx li ftit wara z-zwieg taghha, kienet tieqaf mix-xoghol u l-werrieta taghha kienu jkunu l-konvenut (allura zewgha) u uliedhom."*
The Court however did not concur with the defendant's submissions holding that :

> *"Il-Qorti tosserva f'dan ir-rigward li mhux preciz il-konvenut meta jghid li d-decuius ma kienet tikkontribwixxi xejn lill-familja, cioe' lill-atturi, billi mid-deposizzjoni tal-attur jirrizulta li kienet tikkontribwixxi s-somma ta' tletin lira Maltin (Lm30) fix-xahar. Jista' jizdied ukoll li skond il-ligi taghna d-danni f'kaz ta' mewt ghandhom jigu mhallsa lill-eredi tad-decuius u f'dan il-kaz eredi tad-decuius fil-mument tal-mewt taghha - u dak hu l-mument rilevanti ghall-finijiet tal-fissazzjoni tad-danni huma l-atturi. Ic-cirkostanza tad-dipendenza hija fattur li jista' jittiehed fil-konsiderazzjoni tal-ammont imma mhiex kondizzjoni biex id-danni jinghataw."*

At the moment of her death, the decujus was still living with her parents. Therefore, the latter were the rightful heirs and entitled to the compensation. The arguments of the defendant's legal counsel were simply conjectures : what could have been was irrelevant at this point in time. Moreover, evidence showed that the deceased used to

131 Op. Cit. Page 64.

forward to her family Lm30 per month. The degree of dependency can therefore be taken into account but it is not an essential condition for the award of damages.

Joseph Meli pro et noe v. Captain Jude Taddeo sive Teddy Cachia[132] is another case where a young person, this time a 16 year old boy, lost his life in a traffic accident. The defendant objected to the Legal Referee's report in that the deceased was the son and brother of the plaintiffs ; the latter were not dependant on him for their living and therefore the resultant amount should have been further reduced. The Court, in keeping with other judgments, underlined the importance of the degree of dependency in a fatality case. It stated that one has to differentiate between the loss of a spouse, especially the husband, who is the main breadwinner of the family and the loss of a son/daughter who rather is himself/herself a dependant on his/her parents. From an emotional point of view, the loss of a husband or a child are equally devastating but from an economic, financial sense, the loss of a husband generates more damage than the loss of a child.

> *"Il-kwistjoni ta' bejn il-kontendenti hi bazikament jekk din il-Qorti, fil-komputazzjoni tad-danni dovuti lill-atturi ghandhiex tati importanza ghal fatt li d-decujus ma kienx bread winner u f'liema kaz taghmel tnaqqis iehor minhabba l-probabilita li dan kien jizzewweg jew le.*
> *Il-gurisprudenza nostrana, partikolarment fi snin recenti, dejjem hasset li tali distinzjoni ghandha ssir. Hemm differenza sostanzjali bejn jekk l-atturi kienu jiddependu ghal ghajxien taghhom mil-qligh tad-decujus, ghal kaz fejn l-istess decujus kien semplicament jifforma parti minn nuclew familjari*

132 Op. Cit. Page 111.

bil-presunzjoni li dan fil-futur jifforma familja tieghu. Fl-ewwel ipotesi, l-atturi, senjatament meta jkunu l-armla u wlied l-istess decujus, ghandhom jitpoggew fl-istess sitwazzjoni bhal ma kienu qabel l-akkadut b'mod li l-ghajxien taghhom jigi garantit. Fit-tieni ipotesi tali assenza tad-decujus minn nuclew familjari ma taghmilx differenza sostanzjali ghal introitu ta' dik il-familja, anzi pjuttost il-breadwinner ikollu piz anqas x'jerfa. B'daqshekk din il-Qorti mhux qed tghid li t-telf ta' iben jew bint ma ghandu jgib ebda konsegwenzi fuq il-persuna li kkawzat l-mewt tieghu."

The Court concluded that a 50% reduction should be made from the amount of compensation since the plaintiffs were not dependant on the decujus for their livelihood :

"Din il-Qorti ..... hi tal-fehma li l-grad ta' dipendenza tal-atturi ghad-decujus huwa fattur importanti meta jigu komputati danni konsegwenza ta' mewt..... Ghalhekk din il-Qorti sejra, fil-komputazzjoni tad-danni dovuti lill-atturi, tnaqqas hamsin fil-mija mill-ammont likwidat, li fil-fehma taghha, jirrapresenta tnaqqis gust minhabba l-assenza ta' dipendenza tal-atturi ghad-decujus."

[ii] Death of a Spouse

The death of a spouse is a totally different matter. For instance, are the heirs entitled to compensation when it is the wife who dies as the result of the accident? Are the husband and the children dependant on the wife for their livelihood? A woman, who is a fulltime housewife, does not earn a living. However, it can be argued that her contribution to the family

takes the form of services. The value of these is a recoverable loss and may be converted into money and capitalised in the same way as a money contribution. Therefore, our Courts have recognised the right of the heirs to claim compensation even though the deceased did not as such contribute financially to the family.

The case of **Nazzareno Apap pro et nomine v. Francis Degiorgio et**[133] concerned the death of plaintiff's wife following a traffic accident. The victim was a full time housewife and the defendants argued that there was no loss of future earnings. However, both the First Hall and the Court of Appeal emphasised the point that :

> *"Dwar dak li hu lucrum cessans ghalkemm il-mejta hi mara tad-dar u ma taghmel ebda xoghol partikolari hi intitolata ghal danni lucrum cessans. Dan il-principju gie accettat minn dawn il-Qrati gia la darba fiha l-potenzjalita li tahdem u taqla x'tiekol."* [First Hall]

> *"Ic-cirkostanza li l-persuna li tkun mietet tkun mara tad-dar li ma tkunx qeghda tahdem barra mid-dar bi qliegh ta' flus billi tkun qeghda tiehu hsieb il-familja ma jfissirx li l-eredi taghha ma jkunux intitolati ghad-danni billi hija dejjem ghandha l-potenzjalita anzi d-dritt li tmur tahdem. Din ic-cirkostanza tista' se mai taffetwa l-quantum tad-danni."* [Court of Appeal].

The fact that the victim is a housewife and not a full time earner merely affects the quantum of damages but it does not preclude the heirs from seeking compensation. In order to establish the amount of damages due by way of lucrum

133 Op. Cit. Page 56.

cessans the Court would work on an amount just above the current minimum wage.[134]

One would be inclined to question how the Court would tackle a situation where the deceased is a married woman who is a full time earner and thus may contribute substantially to the family. It may even happen that it is the wife and not the husband who is the main breadwinner of the family. This is not a far-fetched idea considering the high number of working married women. The Court would have to analyse in depth the contributions forwarded by the dead wife, as well as the possibility of her continuing to work till retirement age. These are all factors which would greatly influence the Court's ultimate decision.

The case of **Mary Bugeja noe et v. George Agius noe**[135] dealt with the death of plaintiff's husband while at his place of work. As we have already seen, this case raised a number of controversial issues. As regards the question of dependency, the Court of Appeal was rather brief. It merely stated that :

> *"Qabel taghlaq fuq il-kwistjoni tal-likwidazzjoni tal-lucrum cessans minhabba li l-appellanti ssollevaw il-kwistjoni tal-grad tad-dipendenza ta' l-atturi vis-a'-vis il-mejjet, din il-Qorti tosserva li fis-sistema taghna l-grad ta' dipendenza mhux wiehed mill-kriterji bazi biex jirradika d-dritt ghar-risarciment tad-danni f'kazijiet bhal dan u fic-cirkostanzi m'ghandux iservi biex tigi*

134 Vide, for example, **George Cumbo et noe v. Robert D'Anastasi** decided by the First Hall Civil Court on 23.10.1992 wherein plaintiff's wife was run over by the defendant. In assessing the loss of future earnings, the Court applied a multiplier of 15 years, after taking into account the victim's age who was 39 at the time of the accident, and Lm35 per week, an amount just above the current minimum wage.

135 Op. Cit. Page 66.

likwidata somma differenti minn dik li qed tasal ghaliha din il-Qorti."

In my opinion, the question of dependency should not have caused any problems in this instance since it was obvious that the widow and her children were clearly dependant on the decujus for their livelihood. There was in fact a very strong degree of dependency between the plaintiffs and the deceased.

Therefore, on this notion of dependency, one can conclude that being dependant on the deceased is not an overwhelming prerequisite for claiming damages. The degree of dependency is only relevant when one comes to assess the final amount of compensation. The more remote the degree of dependency, the lesser the amount of compensation would be. The wife and children of the deceased easily fall within the meaning of "dependants' and hence in such a context the question of dependency is relatively unimportant. Conversely, where the decujus was still young and unmarried, the factor of dependency gains importance and would undoubtedly have a bearing on the final amount. This emphasizes the nature of our law which only allows <u>real</u> damages, that is, what the heirs actually lose as a result of the death from a financial standpoint. If a person loses a close relative on whom he was not dependant, he is not compensated for the pain and distress brought about by the loss of a loved one. Rather the amount of compensation is reduced to take into account the remoteness of the degree of dependency.

4.4 The manner in which the amount of compensation is distributed between the heirs

Where the plaintiffs are the widow and the children of the deceased, the amount of compensation is usually divided as to one half to the widow and the remaining one half to the children between them.

Thus in **Maria Pace pro et noe v. Joseph Abela**[136]

> *L-atturi.....talbu lil din il-Qorti sabiex, a skans ta' proceduri ohra fil-futur, u f'kaz li din il-Qorti tillikwida d-danni favur taghhom, tghaddi biex taqsam bejniethom l-ammont tad-danni hekk likwidat u in sostenn tat-talba kontenuta fl-istess rikors huma pprezentaw nota studjata hafna li biha rriferew ghall-prattika adottata mis-Sekond'Awla ta' dil-Qorti li fil-kaz ta' danni likwidati bhala lucrum cessans minhabba l-mewt ta' ragel/missier dawn jigu ripartiti b'mod li l-armla tiehu nofs u l-ulied jiehdu n-nofs l-iehor. Saret ukoll riferenza ghall-atti tal-kawza Carmel Busuttil pro et noe v. Francis Spiteri noe fejn, wara rikors tal-kontendenti, il-Qorti tal-Kummerc approvat li s-somma tad-danni in segwitu ghall-mewt ta' zewg l-attrici tigi ripartita billi nofs imur fuq l-armla u n-nofs l-iehor imur fuq it-tliet ulied minuri fi kwoti ndaqs bejniethom.*

The Court in fact proceeded to divide the compensation as to one half to the wife and one half to the children.

Similarly, in **Pauline Lia pro et noe v. Paul Debattista**[137] the Court apportioned the amount of damages half to the widow and half to the children of the deceased

136 Op. Cit. Page 23.

137 Decided by the First Hall Civil Court on 06.11.1995.

and again in **Josephine Schembri et v. Nathalie Navarro**[138] the Court observed *"illi ladarba l-atturi kienu jiddependu fuq il-qligh tal-mejjet, id-danni minhabba fil-mewt tieghu jmissu kollha lilhom, fis-sehem ta' nofs kull wiehed"* that is half to the widow and half to her son.

This method of distributing the amount of compensation is not simply confined to decided cases but it is likewise followed in out of court settlements. Where settlements are reached out of Court, the widow nevertheless has to seek prior authorisation from the Second Hall so as to be able to receive the said sum. The Second Hall must also sanction such an agreement. Occasionally, the Court may even impose conditions as it may deem suitable in the circumstances. Moreover, the Court must approve the method of distribution of the amount agreed upon by the parties. As already indicated, the common practice is to give one half to the widow and one half to the children. This is evident from a number of decrees of the Second Hall. The amount awarded to the children is usually deposited in the Bank saving the right of the wife to receive the interest thereon. This is a practice frequent both in court and out of court settlements :

> *".....liema somma.....ghandha tigi spartita bejn l-attrici Maria Pace u uliedha inkwantu ghal nofs lill-istess Maria Pace proprio u in kwantu ghan-nofs l-iehor ugwalment bejn l-istess Maria Pace nomine u l-attrici Rose Pace ; b'dan li s-sehem tal-minuri ghandu jigi ddepozitat mill-attrici Maria Pace.....f'depozitu fiss mal-Mid Med Bank Limited....."* [139]

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[138] Op. Cit. Page 52.

[139] **Maria Pace pro et noe v. Joseph Abela** [Op. Cit. Page 23]

The case of **Josephine Xerri et noe v. Saviour Spiteri et noe**[140] proved to be a rather odd case. It is usual for a couple to make a will as soon as they marry. As long as there are no children, the spouses can institute one another as heirs. In this case there were no children, therefore, strictly speaking, the widow should have received the whole amount of compensation. However, her husband used to give financial aid to his parents and brothers even though he was married. So in a way his parents and brothers felt his loss, from a financial standpoint, just as much as his wife. They were likewise dependant on him. In effect, the Court proceeded to distribute the amount of compensation 50% to his widow and 50% to his parents and brothers. This was an atypical case where the Court took into account the particular circumstances of the case. Such a division was sanctioned so as to respect the actual damage the accident caused.

A second issue which arose in this case was that the plaintiff claimed that she should be disbursed for the loss of earnings suffered by herself. Following the death of her husband, she suffered a mental depression and consequently had to stop working. The Court refused to allow such damages arguing that there was no direct causation between the death of plaintiff's husband and the mental depression suffered by the plaintiff.

> *"Illi ghal dak li jirrigwarda d-danni sofferti minn Josephine, armla ta' Wistin Xerri, li l-istess attrici tallega li jikkonsistu f'telf ta' qligh billi tilfet l-impieg taghha.... minhabba depressjoni kbira ikkawzata mill-mewt gharrieda ta' zewgha, jinghad mill-ewwel illi meta d-dannu ma jkunx*

[140] Decided by the Court of Magistrates (Superior Jurisdiction) Gozo on 22.02.1985.

b'kawza diretta u prossima tal-incident imma l-incident ikun il-kawza indiretta tal-istess dannu, biex l-attrici tista' tagixxi b'success biex titlob id-danni minnha sofferti indirettament trid tipprova li l-istess danni kienu previdibbli ; illi din il-prova ma saritx u kienet difficli hafna li ssir fil-kaz tad-danni reklamati mill-atturi billi t-telf tal-impieg kien dovut ghal depression u l-kwistjoni jekk il-mewt ta' persuna mahbuba ggibx depression ta' gravita li ttellef l-impieg jew le tiddependi minn elementi u fatturi principalment soggettivi u ghalhekk naturalment d-danni konsegwenzjali huma bil-fors imprevedibbli. Ghaldaqstant il-Qorti ma tilqax it-talba ta' Josephine Xerri ghad-danni minnha reklamati minhabba t-telf ta' impieg taghha."

This case reiteriated the principle that the damages must be a direct result of the act of the tortfeasor. The breakdown was simply an indirect cause of the accident.

The case of **Elvira Abela v. The Onor. Prime Minister et**[141] deserves special attention. The plaintiff's husband died when the car he was driving plunged into the sea after he drove off a dangerous ramp at Xatt ir-Risq. The Court held the Minister of the Environment, The Commissioner of Police, and the Chairman and the Executive Director of the Malta Maritime Authority responsible for the fatal accident of Nazzareno Abela on account of their failure to fix safety barriers and signs. The Court had no doubt that, under the circumstances, the defendants were negligent and had in fact remained so despite the occurrence of several accidents at the same spot. In liquidating the lucrum cessans, the First Hall followed the multiplier system as outlined in **Butler v.**

141 Op. Cit. Page 106.

Heard. The Court considered several probabilities before deciding on the amount such as

* the probability that the deceased might not have endured many more years of hard work away from Malta

* the possibility that the Arabian Gulf Oil Company with which he worked might not have renewed his contract of employment

The Court proceeded to liquidate the lucrum cessans on the basis of a salary of Lm3600 per annum over a multiplier period of 25 years. It then deducted 20% therefrom because of the lump sum payment and an additional reduction of 33% representing the amount the deceased would have spent on himself.

The fact that Mrs Abela had already received a hefty sum of Lm15000 on account of two life insurance policies taken by her husband was irrelevant in so far as the assessment of damages was concerned.

The Court of Appeal, however, criticised the judgment of the First Hall on two major points. Ironically, these two points are those which at present are the target of criticism : the multiplier and the deduction for lump sum payments.

As regards the multiplier, the Court of Appeal remarked that it could not understand how the First Hall had adopted a multiplier of 25 instead of 28 when the latter had just observed that *"il-hajja lavorattiva tal-bniedem m'ghadhiex dik li kienet u twalet sostanzjalment kemm minhabba l-opportunitajiet li jezistu kif ukoll minhabba li n-nies saru aktar longevi u kwindi, aktar propensi ghax-xoghol."* The Court of Appeal seemed to expect that, after arguing thus, the

First Hall should have adopted a multiplier of 28. Failure on the part of the First Hall to do so was senseless and the Court of Appeal went on to adjust this by adopting a multiplier of 28 years.

As regards the issue of lump sum payments, the Court of Appeal departed from the usual mode adopted on the basis that *"pagament f'daqqa huwa kontra u mhux favur id-danneggjat u tnaqqis fuq din il-bazi tikkostitwixxi aggravju doppju fuq min suppost qed jigi rizarcit ghal li tilef."* The Court in fact suggested an alternative method of payment arguing that *"din il-Qorti ma tistax issegwi dak li ghamlet l-ewwel Onorabbli Qorti ghaliex m'humiex konsoni mar-raguni li jsiru dawk is-suppozizzjonijiet u kongetturi kollha implikati fil-metodu adottat."* The Court thus ordered the defendants to pay the sum of Lm6000 yearly for a period of 28 years (multiplier). Since the accident had happened in 1984 and the case was being decided in 1994, the Court ordered that the arrears were to be paid in eight amounts every four months. The arguments brought forward by the Court to justify this mode of payment were :

> *(a) Id-dannu ekonomiku soffert mill-attrici jikkonsisti essenzjalment filli hija, fil-mewt ta' zewgha, tilfet introjtu ta' Lm10800 annwali netti, li kienet pero taqsam ma' zewgha ;*
> *(b) biex dan id-dannu jigi kompensat, arbitrio boni viri, il-Qorti jidhrilha li man-nofs ta' dak l-introjtu, il-minimum, ghandu jizdied ammont, biex jaghmel tajjeb ghall-inflazzjoni prezunta, ghal zmien ta' ghaxar snin, bazata fuq l-indici tal-istess, fuq il-medda tas-snin li ghaddew minn wara l-ahhar gwerra mondjali sallum ;*
> *(c) fuq l-attrici qeghdin jintefghu l-fatturi aleatorji ta' [a] mewt qabel id-dekors tat-tmienja*

u ghoxrin sena tal-aspettativa, u [b] il-logoriju kontinwu tal-valur tal-flus fuq l-pagament annwali, liema ammont se jibqa' kif stabbilit fid-data ta' din is-sentenza, [c] staticita, fl-ammont minghajr assunzjoni ta' zidiet possibbli, kieku zewgha baqa' haj.

According to the Court *"dawn il-konsiderazzjonijiet huma bazati fuq ir-realta' osservabbli llum, u huma hafna aktar vicini ghar-raguni milli arbitriju, u jevitaw dawk is-suppost predizzjonijiet tal-futur li jiddominaw il-metodu tal-1967."*

4.5 Deductions for personal consumption

When an individual is killed, in addition to the deduction made because the amount of compensation is given to the heirs at one go, a further percentage is deducted from the global amount. This percentage represents the amount for personal consumption. Had the person stayed alive and been compensated, he would have spent part of this amount on himself such as on food, clothes, entertainment, etc....However, since he is dead, this fraction from the compensation would not be used towards such ends. Through caselaw, it has now been established that this amount be deducted. In this way, the heirs of the deceased are not allowed to take advantage of the fact that he is dead.

The percentage deducted for personal consumption is not always the same. At times it is calculated to be 25% and at other times it even goes as high as 33%. It all depends on the type of person the deceased was, and also the kind of life that

he led. If he were a married man, the probability is that the would not have spent much on himself preferring to contribute as much as possible to his family. On the other hand, if he were still a single, young person, the probability is that he would have spent more on himself.

For instance, in **Mary Bugeja noe et v. George Agius noe**[142] the decujus was survived by a wife and three minor children. The First Hall was of the opinion that the deceased would have spent 2/5 of the amount on himself. However, the Court of Appeal argued that *"tenut kont tad-daqs tal-familja tal-mejjet u fatturi ohrajn, jidhrilha li kwart kien ikun aktar ekwu."*

In **Josephine Desira pro et noe v. Joseph Cassar**[143] the Court referred to the recent judgments delivered by the Maltese Courts on this subject where it was held that when calculating the damages, the total earnings of the deceased in one year would be considered to be less than the amount which he would have actually earned. The Court referred particularly to the case of **Elvira Abela v. Onor. Prime Minister et**[144] In this latter case the deceased was married but did not have any children and the Court calculated the damages on 3/5 of the annual earnings of the deceased. However, in the present case, the deceased had 4 children and taking into account the strong degree of dependency between the deceased and the plaintiffs the Court felt that it would be more appropriate to calculate the damages on 2/3

142 Op. Cit. Page 66.
143 Op. Cit. Page 114.
144 Op. Cit. Page 106.

of the annual earnings of the deceased.

> *"Rilevanti wkoll fil-kaz in ezami illi l-grad ta' dipendenza qawwija bejn id-decujus, l-armla w uliedhom. Hawn si tratta in fatti ta' armla li thalliet bhala konsegwenza diretta ta' l-akkadut tfendi ghal rasha u tiehu hsieb u tmantni erbat itfal minuri. Kien ikun kaz iehor kieku d-decujus halla warajh biss qraba ohra, jew lill-martu biss jew lill-uliedu maggorenni jew lit-tnejn ;*
> *Il-gurisprudenza l-aktar recenti tiehu kont ta' dan il-fattur li jincidi direttament fuq l-ammont li ghandu jittiehed bhala dhul baziku li fuqu ghandhom jigu kalkolati d-danni. Hu pacifiku li tali ammont ikun fil-kaz ta' mewt anqas minn dak li attwalment kien jaqla' d-decujus..... Il-Qorti hi tal-fehma illi fil-kaz in ezami l-kalkolu ghandu jsir, in vista tac-cirkostanza li d-decujus halla wkoll tfal minuri a bazi ta' 2/3 tad-dhul tal-vittma....."*

Thus, in this case, the Court attached particular importance to the fact that the children of the deceased were still minors, and that his widow and children relied on him for their living.

4.6 Ancillary Issues

[i] Property and Life Insurance

Lord Radcliffe once remarked that *"We live in a society which has been almost revolutionised by a growth of all forms of insurance."*[145]

There could not be a truer statement because Insurance has certainly invaded all stratas of life. Insurance has developed

[145] **Lister v. Romford Ice and Cold Storage Co. Ltd.** [1957] A.C. 555 at 591.

consistently over the years to the point where it is now part and parcel of our everyday lives. It is no longer some executive perk or an optional extra one can do without ; rather some form of insurance protection has today become a vital necessity. The hectic pace of modern life as well as the laws of probability dictate that, at one time or another, one will have to revert to one's insurers be it because of one's car, one's house, one's health or a variety of other potential causes of concern.

In the case of property insurance such as insuring one's car against damage, if the victim receives compensation from the Insurance Company, then he cannot subsequently seek compensation also from the person who caused the damage in respect of the insured losses. Naturally, he can seek compensation from the other party vis a' vis the uninsured losses. Normally, an Insurance Company pays with subrogation, that is, it pays compensation to the victim but then it would sue the tortfeasor to recover the said amount from him.

Life Insurances pose a different matter. If the victim dies, then upon his death, his heirs receive a sum of money from the Insurance Company. This sum of money is completely unrelated to the question of compensation given by a Civil Court. In other words, this sum of money is not deducted from the amount of compensation awarded by the Court. Accordingly, the Court in **Elvira Abela v. The Onor. Prime Minister et**[146] held that :

"Jirrizulta wkoll li Nazareno Abela [the deceased]

146 Op. Cit. Page 106.

kellu Life Insurance kif ukoll Accidental Death Benefit Provision mas-Sunlife of Canada u l-attrici, wara l-mewt ta' zewgha, inkassat is-somma ta' Lm8002.12 u s-somma ta' Lm7228.14 dovuti lilha in forza ta' dawn iz-zewg assigurazzjonijiet. Dawn l-ammonti, pero', m'ghandhomx jitnaqqsu mis-somma dovuta lill-attrici in linea ta' danni ghaliex huwa evidenti li gew imhallsa ghaliex il-mejjet kien ihallas il-premium fuq kull wahda mill-Poloz tal-Assigurazzjoni."

This is the correct approach to adopt. The victim had paid the premium exactly with this purpose in mind, namely, that if he should lose his life through an accident then his family would benefit from the insurance. Such an amount is to be considered extraneous to the amount of compensation awarded by the Court.[147]

A particular problem which arose recently concerned the compensation due to the relatives of the victims who died in the explosion on board the tanker *Um El Faroud.* The Malta Drydocks offered Lm275000 compensation to the relatives of the victims of the explosion. This money is supposedly being offered at present to ease the suffering of the families in a timely manner prior to the decision by the Court on the damages to be awarded. The families of the victims are seeking compensation through the Civil Court but since this process takes a relatively long time it was felt that it would be better to issue the money immediately. Some of the families would undoubtedly have found themselves in stringent conditions following the death of their breadwinner. However, the legal problem which has arisen is whether this

147 The amount paid by the Insurance Company is contractual as distinct from quasi-tort.

compensation being offered is due to the fact that the victims had been covered by two life insurances, or whether this compensation is an advancement on the amount of damages to be decided upon gradually by the Court. This constitutes a significant difference in the eventuality that the Court finds the Malta Drydocks responsible for the explosion and proceeds to assess and liquidate the damages due to the victims' families. If the amount being offered at present were to be considered as part of the compensation to be awarded by the Court then the latter would deduct the amount already distributed. Conversely, if the amount being offered is regarded as the amount due to the victims' families because of the life insurances in favour of the victims, then the amount already given by the Malta Drydocks would not be taken into consideration.

[ii] Income Tax and National Insurance Contributions

Another important point concerns Income Tax and National Insurance Contributions. Had the victim stayed alive, he would have paid income tax on that sum he would have received as compensation. However, no deduction from the amount of compensation is made for income tax purposes even though in reality the heirs do not pay income tax on the compensation received. This general trend adopted by our Courts was established way back in 1972 in the case of **Carmela Muscat et v. Francis Schembri**[148] where it was argued that the question of whether income tax should be paid on the amount of compensation was a question to be

[148] Decided by the First Hall Civil Court on 27.01.1972.

settled between the victim and the Commissioner of Inland Revenue. The party responsible for the accident should not figure in such an instance.

A subsequent case which examined this issue in some depth was **Giuseppa Cortis pro et noe v. Cecil Baker noe**[149] The problem which arose in this particular case was whether the amount of compensation given on the death of the victim was to be declared among the assets of the deceased for succession duty purposes. The Court was of the opinion that the compensation should not be declared because it is something given by way of contribution independent from the estate of the deceased. Once the Court dislocated the amount of compensation from the estate of the deceased, the natural conclusion was that the sum awarded for damages in case of death in not subject to succession duty. Rather the sum represents the damage suffered by the heirs and it does not form part of the deceased's inheritance.

Similarly, it has been held that national insurance benefits are not to be taken into account. National Insurance represents a relationship between the injured party and the the Director of Social Services, and therefore, the party responsible is extraneous to this relationship.

The above rules have been confirmed in more recent cases:

> *".....l-income tax u l-kontribuzzjonijiet tan-national insurance li l-mejjet kien ikollu jhallas kieku baqa' haj m'humiex fatturi li ghandhom jittiehdu in konsiderazzjoni meta wiehed jigi biex jistabbilixxi l-paga medja annwali tieghu ghall-*

[149] Decided by the First Hall Civil Court on 21.06.1972 and by the Court of Appeal on 31.01.1977.

finijiet tal-komputazzjoni tal-qligh futur. Dan il-punt ta' l-income tax diga gie deciz fis-sens accennat minn din il-Qorti [P.A. Carmela Muscat et v. Francis Schembri et ; Dr Giovanni Bonello noe v. Tarcisio Gatt] Fir-rigward tas-Sigurta Nazzjonali imbaghad, gie dejjem ritenut li ammonti li wiehed jippercepixxi mill-Fond tan-National Insurance matul il-hajja lavorattiva tieghu m'ghandhomx jivvantaggjaw lid-danneggjant ghaliex dawn huma l-korrispettiv tal-kontribuzzjonijiet li, ghalhekk, m'ghandhomx jiffavorixxu lid-danneggjat ghall-istess raguni [P.A. Lawrence Schembri pro et noe v. Vincent Raimondo] Ghalhekk l-ammont ta' Lm2900 bhala paga medja annwali din il-Qorti qieghda tasal ghalih indipendentement minn kull income tax u kontribuzzjonijiet li kienu jkun talvolta dovuti minn Michael Pace matul il-hajja lavorattiva tieghu." [150]

Likewise in **Mary Bugeja noe et v. George Agius noe**[151] the Court of Appeal once again made its stand clear when it stated that :

"Fic-cirkostanzi din il-Qorti ma jidhriliex li ghandu jkun hemm tnaqqis iehor bhal tnaqqis ghal dak li d-decujus kien ihallas f'income tax kieku baqa' haj. Dana ghaliex kienx ihallas taxxa jew kemm kien ihallas kieku baqa' haj jiddependi minn diversi fatturi li din il-Qorti fic-cirkostanzi ma tarax li ghandha bizzejjed biex tidhol fihom."

This chapter attempted to address certain problems which are peculiar to fatal injuries. Otherwise, all that has been stated in the previous chapter regarding the multiplier system vis a' vis non-fatal injuries wholly applies to fatal injuries.

150 **Maria Pace pro et noe v. Joseph Abela** [Op. Cit. Page 23]

151 Op. Cit. Page 66.

CHAPTER 5

MORAL DAMAGES : A FUTURE DEVELOPMENT ?

"B'dawn id-danni ghandu jinftiehem l-assiemi ta' dawk id-duluri fisici jew morali li oggettivament ma jistghux jsibu l-korrispettiv taghhom fi flus, izda jistghu almenu jigu stmati ekwitativament u bejn wiehed u iehor fid-dawl tal-eta' u tal-kondizzjoni tal-persuna danneggata..... " [152]

5.1 Introduction

So far we have been considering damages for financial loss, that is, material damages since these are the damages which are recognised and permitted under our law.

However, there exist other classes of damages, which although not allowed by our law, deserve particular attention. The majority of foreign legal systems are more generous when it comes to compensation for injuries and death because they do not limit themselves to awarding simply real damages.

In effect, legal systems such as the American, English, Irish and Australian systems, amongst others, provide damages for certain intangible "losses" or "psychic losses" as they have sometimes been called by American writers over and above damages for material loss. Damages for mental distress such

[152] **Butler v. Heard** [Op. Cit. Page 19]

as pain, suffering, discomfort, humiliation, indignity and embarrassment are awarded under the head of "pain and suffering." On the other hand, damages for loss of the ability to do things and to enjoy life in a way possible before the accident are usually referred to as damages for "loss of amenities" or "loss of faculty." These two types of injury merge, as for instance, where a person has suffered a loss of sexual potency, or is so badly injured as to impair the prospect of marriage. The two kinds of damages may both be recoverable since loss of faculty may be accompanied by pain and suffering ; but it is possible to have loss of faculty without any pain or mental distress at all, as in the case of someone who is rendered permanently unconscious or is incapable of appreciating their situation. It is also possible to have pain and suffering with no actual disability or loss of faculty. But in most serious cases the two go together. Loss of limbs, paralysis, blindness or deafness, and so on, are unlikely to be inflicted without considerable pain and suffering.[153]

5.2 The scope of awarding moral damages

The award of damages under the head of pain and suffering is designed to compensate the plaintiff for the pain and suffering attributable to

[i] the injury ; and

[ii] consequential surgery ; and

[iii] mental and physical suffering

153 Cane Peter Atiyah's Accidents, Compensation and the Law London, Butterworths, 1993 at Page 138.

Such an award covers both past and future suffering. Moreover, the award is made on a subjective test, that is "what was the pain and suffering of this particular individual?" and therefore the pain and suffering must be actually experienced. If there is no evidence that the plaintiff is actually experiencing pain and suffering then no award will be made.

Technically, loss of amenity is a seperate head from pain and suffering but usually one sum is awarded for pain and suffering and loss of amenity without distinguishing between the two heads. The award for loss of amenity is designed to compensate the plaintiff for loss of faculty or pleasure in life over and above the pain and suffering of the injury. In contrast to the award for pain and suffering, the award for loss of amenity is based on an objective test and thus may be awarded irrespective of whether the plaintiff is personally aware of his loss, for example, if he is unconscious.

Although the test is primarily objective, it does have subjective overtones insofar as the Court will have regard to the plaintiff's former lifestyle. This may be particularly pertinent where the plaintiff previously was a very active person, for instance, a keen sportsman who has suffered a disabling injury in such a way that he can no longer pursue his sport. Notwithstanding that his pain and suffering may be the same as any other person with that disability, his loss of amenity may be greater than that of another person who did not previously lead an active life and hence the total award for pain and suffering and loss of amenity may be greater in

the end.[154]

5.3 Quantification of pain and suffering, and loss of amenities

Naturally in cases such as these the calculation of damages is to a very large extent arbitrary. Something which cannot be measured in money is "lost" and the award of damages requires some monetary value to be placed on it. There appears to be no way of working out any relationship between the value of money - what it will buy - and damages awarded for pain, suffering and loss of amenities.

Lawyers are not the only people who have wrestled with the problem of valuing pain and suffering, loss of amenities, and so on. Economists concerned with cost-benefit analysis have tried to place values on these things, and have also found the problems very hard. Economists normally value things by looking for a "market price" but there is no "market" for pain and lost limbs. Some economists have simply accepted the lawyers' figures as evidence of the value placed by society on these intangibles. Others have suggested that the "value" of an injury is the amount which a person would be prepared to pay to avoid incurring that injury ; but it has been pointed out that this may be a gross under-estimate because the sum a person is prepared to pay to avoid an injury is limited by the amount of money that person has.

It has therefore been suggested that the real "value" of an

[154] White Paul Personal Injury Litigation Bristol, Jordans, 1996 at Page 13.

injury is the amount which a person would be willing to accept to incur the injury. Thus, attempts have been made to determine values for life and limb implicit in actual wage rates current in industries with different injury rates.

Another approach calculates "implicit" valuations by assessing the cost of measures to avoid additional injury or death. The idea behind this is that the value placed on life and freedom from injury can be assumed to be just short of the amount that would have been spent (but was not) to avoid the injury or death. Some of the valuations produced by these approaches seem very high to the lawyer. But this is partly because the lawyer's concern with just compensation is very different from the economist's interest in determining how much the members of a group faced with a risk are prepared to accept as an alternative to removal of the risk. For this reason economic approaches to the value of life are of limited use to the lawyer.

There is moreover the additional difficulty that the value of money differs according to the wealth of the recipient. To a wealthy person an award of Lm35000 for a lost leg may be of little moment whereas a similar sum to a not so well to do person may be untold riches. This problem is peculiar to awards of damages for non-pecuniary loss, because where damages are given for financial loss the wealth of the recipient is immaterial. In practice, as the wealth of a society increases, so the real value of awards of this kind tends to go up ; and it is noticeable that awards for non-pecuniary loss tend to be higher in the United States than they are in

England or anywhere else in the world. So while the wealth of the individual plaintiff does not affect the level of awards for non-pecuniary loss, the wealth of society as a whole does.[155]

5.4 A brief look at foreign systems

[i] English System

The term "personal loss" is used to denote every kind of harm and disadvantage which flows from a physical injury, other than the loss of money or property. It therefore includes the loss or impairment of the integrity of the body, pain and suffering (both physical and mental), loss of the pleasure of life, actual shortening of life and at least, in some cases, mere discomfort or inconvenience.

These factors have been variously stated both in the 19th century cases and the modern ones, most notably by Cockburn CJ in **Phillips v. London and South Western Rly Co**[156]:

> *"..... a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained ; the pain undergone ; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent ; the expenses incidental*

155 Cane Peter Atiyah's Accidents, Compensation and the Law London, Butterworths,1993 at Page 139.

156 (1879) 4 QBD 406 at 407

> *to attempts to effect a cure, or to lessen the amount of an injury ; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the rest of his life."*

More briefly, the same Judge had said in **Fair v. London and North Western Rly Co**[157] :

> *"..... in assessing [the] compensation the jury should take into account two things : first, the pecuniary loss [the plaintiff] sustains by the accident ; secondly, the injury he sustains in his person, or his physical capacity of enjoying life."*

It will be seen from these extracts, both of long-standing authority, that it is not enough to say that one must give the plaintiff compensation for his pecuniary loss and, in addition, "something for his pain and suffering." The personal loss embraces much more than compensation for actual pain.[158]

The most authoritative pronouncements are now in **H. West & Son Ltd v. Shepherd**[159] :

> *"If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation, no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb - if, for instance, the plaintiff's main interest in life was some sport or*

157 (1869) 21 LT 326

158 Munkman John Damages for Personal Injuries and Death London, Butterworths, 1993 at Page 116.

159 (1964) AC 326, (1963) 2 All ER 625

hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment ..... These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages."

[ii] Irish System

In terms of Irish Law the compensation must include a sum to compensate the victim for financial loss, past and future, and for the damages, past and future, sustained to the plaintiff's amenity and quality of life in all its aspects, including actual pain and suffering, both physical and mental, both private to the plaintiff and in the plaintiff's relationship with family, with friends, in working and social life and in lost opportunity.

As The Honorable Mr Justice Liam Hamilton, President of the Irish High Court noted *:*

"A judgment as to what constitutes proper compensation in money terms for pain, suffering or deprivation of amenities or quality of life, can only be intuitive or, essentially, one of first impression.
Different people are affected in different ways by injury and that is why there cannot be and should not be a standard rate of compensation for particular injury. A ballerina is more affected by the loss of a leg than a Judge would be, a concert pianist by the loss of an arm than a lawyer would be and so on. The determination of proper compensation for pain, suffering and deprivation of amenities of life cannot be standardised and can only be intuitive and should be made by a caring,

understanding and sympathetic tribunal, be it Judge, jury or other form of tribunal because the injured party was entitled to go through life without being injured through the fault of another."[160]

[iii] Italian System

"Il danno non patrimoniale (o, come anche si puo dire, sebbene con terminologia equivoca, danno morale) consiste nel dolore, fisico or psichico (ad es. a seguito di un'offesa all'integrita' fisica, all'onore, ecc.., ovvero in seguito alla perdita di una persona cara). " [161]

It has not been long since Italy introduced the possibility of recovering moral damages. Its approach has always been aimed at awarding damages for actual financial losses. However, the current position prevailing in Italy is that moral damages are recoverable but only in those instances specified by law.[162]

"Il danno non patrimoniale non e', di regola, risarcibile, salvo che la legge ne preveda espressamente la risarcibilita' (art. 2059 cod. civ.) : in pratica l'unico caso, ma di ampia portata, in cui il legislatore ne ammette la risarcibilita' e quello (art. 185 cod. pen.) di danno derivante da reato (omicidio, lesioni, truffa, calunnia, ingiuria, ecc.). Naturalmente non e' possibile commisurare il risarcimento al dolore : si puo' soltanto ipotizzare che la sofferenza sia lenita dal vantaggio dell'attribuzione di una somma di danaro (pecunia doloris) il cui ammontare deve essere determinato

160 A Paper written by The Honorable Mr Justice Liam Hamilton on Methods of Assessment of Damages for Personal Injuries in Ireland.

161 Torrente A. & Schlesinger P. Manuale di Diritto Privato Milano, Giuffre' Ed., 1985 12th Ed. at Page 710.

162 This can be compared to the Maltese position since in terms of our law moral damages are only admitted in those instances laid down by law. Re. to Page 18.

equitativamente dal giudice (art. 1226 cod. civ. richiamato dall'art. 2056).
Il risarcimento di un danno morale non e' ovviamente concepibile se non a favore di una persona fisica. Il diritto al risarcimento, una volta sorto, e' trasmissibile, sia inter vivos che mortis causa."[163]

From the above text it is obvious that moral damages can only be awarded when the damage caused is as a result of a crime. Therefore, moral damages under Italian Law are akin to punitive damages since they are imposed as a sort of punishment on the wrongdoer.

Massimo Bianca argues that only in an improper sense can one speak of liquidation of moral damages given the fact that the suffering of a victim [such as the pain of a parent following the death of his child] is not something which can be compared to a sum of money. In reality it amounts to a form of indemnity.

He goes on to state that the current system refuses to acknowledge the need for the civil protection of personality rights. These rights [eg ; life, honour, health] amount to non patrimonial rights, that is, rights which from a social standpoint cannot have an equivalent in money. The violation of such rights causes damages in the sense that a protected right has been violated. However, from an economical viewpoint, this violation does not amount to a damage. Rather, the individual must suffer negative financial consequences through the violation in order that he may claim damages.

163 Torrente A. & Schlesinger P. Manuale di Diritto Privato Milano, Giuffre' Ed., 1985 12th Ed. at Page 711.

Bianca stresses the need for protection of these rights so as to ensure that the plaintiff would still be compensated even if he suffers damage which does not result from a crime or if the damage is not purely financial. This need appears to be even more pressing vis a' vis injuries to physical integrity in respect of which one must first show that as a rule these have negative economical consequences capable of being quantified in money. He concludes that the adoption of fixed normative parameters avoids the dangers of excessive abuses in the liquidation of damages but would end up with economically rating the personal damages.[164]

A novel type of damage which Italian law has recently admitted is "il danno biologico." Italian authors such as **Cazzaniga, Gerin** and **Francescini** have all at one point or another emphasized the value of the human being in the context of the assessment and liquidation of damages. Their works served as an initiative to Italian jurists to start thinking seriously about this concept. The starting point was Il Tribunale di Genova which in 1974 liquidated damages for personal injuries under three headings, namely :

(a) damage for patrimonial loss

(b) damages for pain and suffering

(c) and damage which the Judges called "danno extrapatrimoniale" which consists in the "menomazione fisica in se' considerata."

The latter type of damage was the subject of controversial discussions and debates. However, the position was made clear

164 Bianca Massimo Inadempimento delle Obbligazioni Libro IV Bologna, Zanichelli Ed., 1979 2nd Ed. at Page 301.

in the late 1970's and early 1980's when the Italian Constitutional Court and the Court of Cassation of Rome reaffirmed the principle that "il danno extrapatrimoniale e' risarcibile." The Court explained that :

> *"Il principio al quale ci si deve attenere e' quello per cui il danno cosidetto biologico deve essere considerato risarcibile ancorche' non incide sulla capacita' di produrre reddito, ed anche indipendentemente da quest'ultima, le cui menomazioni vanno indipendentemente risarcite."*

This concept of "danno biologico" was further explained in a subsequent judgment by the same Tribunal as:

> *"..... un menomazione dell'integrita' psico-fisica in se' e per se' considerata, in quanto incidente sul valore uomo in tutta la sua concreta dimensione, che non si esaurisce nella sola attivita' a produrre ricchezza, ma si collega alla somma delle funzioni naturali afferenti al soggetto nell'ambiente in cui la vita si esplica, ed avente rilevanza non solo economica, ma anche biologica, sociale, culturale ed estetica."* [165]

This type of damage has invaded the Italian legal system to such an extent that it is considered to be the very essence of every assessment of damages. In the absence of a physical disability, one cannot even claim damages for patrimonial loss.

5.5 The Maltese Position

Unfortunately (or fortunately) Maltese Law only allows real damages. No moral damages can be assessed or liquidated. It is

165 Torrente A. & Schlesinger P. Manuale di Diritto Privato Milano, Giuffre' Ed., 1985 12th Ed. at Page 711.

true that they are given in certain areas of the law but they have so far eluded the ambit of the law of torts.

The question of whether they should be allowed or not is rather of a delicate nature considering the consequences. Still our Courts seem to look with disfavour upon the fact that these type of damages are as yet not allowed by our law. Thirty years ago in **Butler v. Heard**, the Court was already "advocating" the eventual introduction of this type of damages :

> *"Qabel ma taghlaq din is-sentenza, il-Qorti tixtieq tirrileva li fid-danni fuq likwidati hija ma akkordat xejn ghat-tbatija u d-duluri li sofra l-attur, ghall-operazzjonijiet gravi u dwejjaq ta' tmien (8) xhur sptar li huwa kellu jissubixxi, ghall-ugieghat fisici, ghat-tnaqqis mill-integrita' korporali tieghu, ghal-perikolu tal-mewt li ghadda minnu, ghall-umiljazzjoni morali u sofferenzi mentali li l-attur kellu jghaddi minnhom fl-ahhar tliet snin u ghad irid idum ghaddej minnhom. Dana l-Qorti m'ghamlitux ghax il-ligi ta' Malta ma tammettix il-"pretium doloris". Fl-Inghilterra u pajjizi ohrajn il-"pain and suffering" huwa dejjem legalment ikkunsidrat bhala dannu autonomu, cioe' fih innifsu, ghalkemm intqal ukoll li "money cannot renew a physical frame that has been shattered." Anke fis-sistema legali taljan, li qabel kien jibza' mid-danni morali jew non-patrimonjali, instab ir-rimedju, ghaliex il-Kodicijiet il-godda jiddisponu li d-danni non-patrimonjali jistghu jigu akkordati meta jkunu gejjin minn reat..... Forsi l-ligi, fil-kors tal-evoluzjoni taghha, li gie mxiet hafna 'l quddiem taht dan il-qasam fl-ahhar tletin sena..... ma ddumx ma tasal fil-livell tal-ligi ta' pajjizi ohrajn li jammettu d-dannu non-patrimonjali f'dawn il-kazijiet, ghax is-sistema prezenti jiffavorixxi biss lill-aggressur u lit-traskuratur."*

In the subsequent case of **Giuseppe Micallef v. Giuseppi Micallef**[166] the Court reiteriated its disfavour with this system which remained unchanged. This case concerned a fight which ended up with the defendant biting off part of the plaintiff's right ear thereby causing him a permanent disfigurement in his face. Although the Court admitted that the plaintiff had in fact suffered a permanent disfigurement he was nevertheless denied any moral damages for the sole reason that this type of damages are not contemplated by our law.

> *"Jitnissel ukoll li, kuntrarjament ghal certi ligijiet esteri, l-ligi taghna ma tipprovdix ghal danni morali li l-parti lesa tista' ssofri, bhalma certament sofra l-attur fil-kas in ezami..... Huwa veru li l-attur sofra sfregju permanenti f'wiccu, ghalkemm dan mhuwiex wisq apparenti minn distanza ragonevoli ; izda dan l-isfregju jista' jikkagunalu biss, fic-cirkostanzi tieghu, xi ammont ta' dulur jew dispjacir li jaghtu lok ghal danni morali, li sfortunatament mhumiex kontemplati fil-ligi taghna u kwindi l-Qorti ma tistax taghtihom."*

The plaintiff was thus denied any damages by way of lucrum cessans on the basis that he had not suffered any financial loss and therefore he could not claim any damages.

In the more recent case of **Karen Zimelli v. Michael Sammut** [167] the Court made an intèresting observation. It noted that :

> *"L-attrici tissottometti li l-Qorti ghandha tikkonsidera fatturi li strettament ma humiex relatati mal-kapacita' lavorattiva taghha imma huma aktar orjentati lejn l-aspett ta' "pain and suffering" li l-ligi taghna ghadha sallum ma*

166 Decided by the First Hall Civil Court on 18.01.1984.

167 Op. Cit. Page 29.

tippermettiex kumpens ghalihom. Fost dawn hemm li ma tistax tmur tiddeverti f'discos, ma tistax tkompli tezercita l-hobbies taghha tal-aerobics u ghawm, ma tistax tixxemmex jew tixrob alcohol. Il-Qorti jidhrilha pero li whud minn dawn l-attivitajiet kif ukoll ohrajn, bhal per ezempju l-fatt li d-debilita' permanenti taghha kienet oggettivament tista' tnaqqsilha sostanzjalment l-opportunita' li tizzewweg, u l-fatt li ma tistax issuq karrozza, il-fatt li ser ikollha minn zmien ghal zmien il-htiega ta' kontrolli medici, ma humiex neqsin minn element socjo-ekonomiku li jista' f'determinati cirkostanzi, jigi tradott f'akkwist jew il-kaz tal-attrici, f'telf finanzjarju. Hekk per ezempju, iz-zwieg jista' jipprovdi status u sigurezza finanzjarja lill-mara. Li ssuq jew le jista' jkun determinanti fl-akkwist ta' impieg jew biex tlahhaq ma' aktar minn impieg wiehed. Il-Qorti ghalhekk jidhrilha li hu xieraq f'kazijiet kongruwi bhala dak in ezami, li t-telf ta' qliegh futur ma ghandhux jigi biss relatat mat-telf attwali mill-impieg jew professjoni, imma ghandu jiehu kont - ukoll jekk marginalment - ta' dawn il-fatturi li kwazi certament ser jinvolvu telf finanzjarju, b'effett permanenti, bhala konsegwenza diretta tad-debilita. Il-Qorti ghalhekk qed izzied il-grad ta' debilita' certifikata, b'hamsa fil-mija (5%) ghall-hamsa w erbghin fil-mija (45%) biex taghmel fronti ghal dan il-pis u dannu rejali finanzjarju taht dawn l-aspetti."

In this instance, the Court, after declaring that moral damages are not allowed by our law, proceeded to award damages for certain factors which if taken at face value appear to be the right ingredients for moral damages. The fact that the plaintiff cannot continue practising her favourite hobbies, the fact that she cannot drive, the fact that because of her injury her chances of securing a good marriage have diminished are all sources of pain and suffering, and loss of amenities. The

able Judge however avoided this issue of moral damages by declaring that such negative factors resulting from the injury constitute a financial loss for the plaintiff and therefore they can be compensated for. The Court increased the degree of disability to make good for these "losses" therefore augmenting the final amount. It thus extended the meaning of lucrum cessans so as to incorporate these factors.

The reasonings adopted in the above case seem to be reminiscent of what the First Hall Civil Court had previously observed in **Vincenza Vella Dalmas v. John Ghigo et**[168]:

> *"Il-Qrati taghna ghalkemm dejjem irribadew li danni morali ma humiex ammessi taht il-ligi taghna, minn certu zmien il hawn, gustament, bdew jakkordaw kumpens f'kazi fejn prima facie d-danni dehru principalment morali."*

This may be compared to what the Italians describe as "danno patrimoniale indiretto." In other words, damage which can be translated in terms of money since it brings about an economic loss to the victim.[169]

One can thus see that our Courts give a very wide interpretation regarding real damages. There are few instances where one's injury does not affect one's personality. A change in one's personality would surely have a negative

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168 Op. Cit. Page 47.

169 **Torrente & Schlesinger** in their book Manuale di Diritto Privato declare that : *"Non si deve confondore con il danno non patrimoniale o morale il cosiddetto danno patrimoniale indiretto, ossia le conseguenze economiche per una lesione ad un bene non suscettibile di valutazione economica (ad esempio una diffamazione puo' determinare una perdita di clientela, una lesione fisica puo' determinare l'impossibilita' di stipulare un contratto vantaggioso.) Tra il danni patrimoniali indiretti la giurisprudenza ha ricompreso il danno alla vita di relazione : vale a dire la diminuita possibilita' (a causa di una invalidita' o di un danno estetico) di inserirsi nei normali rapporti sociali, con conseguente influenza negativa sulla capacita' di reddito futuro."*

impact on one's earning capacity. Therefore, the natural conclusion is that it is true that our Courts do not award moral damages but if one suffers an injury which impinges on the individual's physical activity in such a way as to constitute a patrimonial loss, then that individual is entitled to be compensated for that injury. This is especially the case where the damages awarded hover between real damages and moral damages.

Again in **Victor Mallia et v. Joseph Camilleri**[170] the Court confirmed that our law still does not recognise, much less, award damages for pain and suffering. In this case plaintiff and his wife were involved in a collision with the defendant. As a result the wife ended up with scarring of her forehead. The medical expert was of the opinion that this *"cosmetic blemish on her forehead is permanent and will need make-up to make it less obvious."* The Court, adopting the Legal Referee's conclusions, held that since the wife retained her job as a restaurant cleaner notwithstanding the injuries suffered, no lucrum cessans could be awarded in this instance since there was no loss of future earnings which the act may have caused :

> *"Jibqa' l-fatt pero' illi l-atturi ma ressqu l-ebda provi in sostenn ta' dak li l-attrici qalet lill-espert mediku, fis-sens li minhabba l-lezjonijiet li sofriet ma setghetx tkompli tahdem bhala cleaner f'restaurant u fl-assenza ta' dawn il-provi, il-perit legali kellu bilfors jikkonkludi li ma setax jillikwida lucrum cessans fir-rigward ta' l-attrici.*

Furthermore, no damages for pain and suffering could be given to the wife since our law does not allow them :

170 Op. Cit. Page 31.

"Il-perit legali, ovvjament, lanqas seta' jillikwida danni minhabba dak li l-espert mediku sejjah 'scarring of the forehead' ghaliex, kif huwa risaput, sallum is-sistema taghna ghadu ma jikkontemplax la danni morali u lanqas danni ghal 'pain and suffering'."

5.6 Are changes possible and desirable?

This is the question which harps at the back of the mind of every legal professional interested in this field of law. Such a question does not attract a simple "yes" or "no" answer. Rather it has to be dwelt upon at length because depending on the course of action taken, different consequences ensue.

There are two opposing facets to this query. There are those who are in favour of changing our law so that it accomodates moral damages, and there are those who oppose such changes and prefer to leave the law as it is. These two groups can conveniently be referred to as those seeking the interest of the plaintiff and those seeking the interest of the defendant.

The plaintiff's position : A person whose life has been completely disrupted by an injury would feel that not only has he an interest but a right to claim damages for pain and suffering. Aside from the fact that his life would never be the same again, he will be constantly reminded of the accident through the injury, especially if such an injury is of a permanent nature. The loss of a loved one is even more hard to bear.
It is therefore easy to sympathise with a person who has been seriously injured or with a young widow left to fend for herself

or with young fatherless children. No amount of money would however erase what has happened. It will not make an injury disappear nor bring back to life a loved one. But since there is no other alternative, the only solution is to award a sum of money in the hope that this might alleviate some of the pain, suffering and discomfort of the plaintiff. This should be the only and ultimate scope of giving moral damages.

The position of the defendant : Everyone must answer for his actions. A person who through dolus or culpa caused injury or death to another must make reparation. The damages awarded in terms of our law are not given as a form of punishment against the tortfeasor but they are awarded so as to reintegrate the plaintiff to his previous position. However, there are certain legal systems, most notably the American system, which admit punitive damages. These damages are given over and above material and moral damages, to serve as a punishment to the tortfeasor for the damage he caused. Claiming moral damages besides real damages may be a means of seeking revenge upon the tortfeasor. It is true that a person who has been injured or who has lost a loved one is fully justified in feeling angry and resentful towards the wrongdoer. However, moral damages should not be used as a means to punish the wrongdoer.

If moral damages were to be allowed, Malta would constitute a more favourable forum for a case to be heard. At this point, it is pertinent to refer to the case of **Boys v. Chaplin**[171] This case concerned two English citizens who were involved in a traffic accident in Malta. The question which arose was whether it was

[171] Decided in 1967.

Maltese law which was applicable [as the lex loci delicti] or English law [as the lex domicilii]. The matter went up to the House of Lords which in the end decided that it was English law which was the appropriate law to apply. This decision was mainly motivated by the fact that Maltese law, unlike English law, does not permit moral damages. Consequently, had the case been tried in accordance with Maltese law, the plaintiff would have recovered a considerably lesser amount than if the case had been tried in accordance with English law.

The introduction of moral damages in the Maltese legal framework would force Insurance Companies to increase substantially insurance premiums. Such a move would be essential since the Insurance Companies would have to make up for the increase in the amounts of compensation . Many perhaps are skeptical of the fact whether economically Malta is prepared for such an increase.

Increasing the amount of compensation would also trigger a rise in the number of lawsuits for damages. This constitutes one of the major drawbacks of introducing moral damages since our Courts are already suffering from a backload of cases still pending.

Still, in my opinion, the advantages of introducing moral damages far outweigh the disadvantages. One cannot expect to introduce a notion without being burdened with certain drawbacks. Thus, what I would strongly recommend is that moral damages be introduced within the Maltese legal system. They are already admitted in various branches of our law ; suffice it to mention Constitutional law, Press law, Copyright law.

Now is the time to introduce them in the ambit of damages for personal injury and death. However, allowing awards for moral damages without any restrictions whatsoever might give rise to abuse. Actions for compensation would no longer constitute a remedy to right a wrong that has been committed but they would resolve themselves into races for the highest amount of money.

Therefore, I would suggest that moral damages be introduced but subject to certain restrictions. The amount awarded would be in relation to the degree of disability suffered, that is, the more serious the degree of disability is, the higher the amount of moral damages would be. The reason being that the more serious the disability is, the greater the pain and suffering would be.

More importantly, the law would set a statutory limit for moral damages in the sense that the highest amount that can be awarded for moral damages would be dictated by the law itself. This quantum would be achieved by consensus with the Insurance Community who in the long run and in the vast majority of cases has to fork out the money. Moreover, this limit would be subject to revision from time to time so as to keep in line with the cost of living.

Such a move would also be in conformity with the attitude favoured by our legislator vis a' vis moral damages in other branches of the law. In those areas where moral damages are permissable, the legislator has already established a limit on the amount of moral damages that can be awarded with the exception, however, of moral damages recoverable in terms of

the Constitution. [172]

Our law, at present, is perhaps a trifle "insensitive." It disregards the damages suffered by the plaintiff from an emotional aspect and concentrates exclusively on the financial damages sustained. Every compensation that is given must be measured against the material loss suffered. Perhaps the time has arrived for our legislator to take this bold step forward and introduce moral damages in the law of damages so as to bring us in line with foreign systems. The emphasis should be more orientated to the physical and emotional loss suffered, rather than being restricted only to the financial loss.

[172] In terms of The Press Act, moral damages are limited to Lm2000. Damages cannot be in excess of Lm500 in cases of infringement of The Copyright Act whereas for a breach of a promise of marriage the legislator left it to the Court to fix the amount in its discretion having regard to the character and station in life of the parties as well as to all other circumstances of the case.

CHAPTER 6

THE PAST VERSUS THE FUTURE

It is accepted by all legal systems that a person who has suffered injury by reason of the wrongful act of another person is entitled to be adequately and reasonably compensated for such injury and for any economic or financial loss which arises as a direct consequence of such injury. Where such systems differ, and where potential area of conflict arises, is in the method used to assess such compensation and economic loss.

Maltese Courts adopt the conventional approach to the assessment of damages to be awarded for personal injuries sustained through the wrongful act of another by awarding such sum as will, so far as money can do so, put the plaintiff in the same position as he or she would have been if the wrongful act had not occurred. It is obvious, of course, that no money will adequately compensate a person who has been seriously injured and whose life has in effect been shattered. It will not restore the plaintiff to his previous position but once an accident has occurred and the plaintiff sustained serious injury, then the only way in which he or she can be compensated is in money terms.

This is the reason why it is difficult to find a perfect system. No system can ever erase the injury suffered by the plaintiff,

especially where the injury is of a permanent nature. Although the ultimate goal of every compensation system is to restore the plaintiff to his former position, this is however subject to a very important limitation : "as far as it is humanely possible."

Some members of the legal profession had shown dissatisfaction with the multiplier system. It was a system that had virtually remained unchanged for more than two decades. At times, in following blindly the multiplier system, an injustice was rendered to the persons involved. It seemed that our Courts lacked both the spirit and the courage to alter the situation, and were content to go on applying the same formula without any variations at all.

However, change was imminent and it came in the form of two controversial judgments, that is, **Bugeja v. Agius** [173] and **Agius v. Galea**.[174] Though these two judgments did not have the effect desired by their proponents, yet they succeeded in breaking the spell of **Butler v. Heard**. They have been described as a *"tentattiv biex wiehed jitbieghed mill-gurisprudenza tradizzjonali li tipproponi sistema ta' kwantifikazzjoni tad-danni li aktarx ma tirriflettix sostanzjalment l-ammont ta' danni ekwitattivi u kwantitativi. Dan ghaliex hija sistema li tekwivali d-dannu fisiku mad-dannu patrimonjali."* [175]

The outcome was that the multiplier is no longer confined to a maximum of 15 or 20. Rather multipliers of 25 and 30 have

173 Op. Cit. Page 66.

174 Op. Cit. Page 71.

175 Submissions made by the Legal Referee in his Report in the case of **Emanuel Grech noe v. Michael Camilleri noe et** still pending before the Courts of Magistrates (Gozo).

become the order of the day. This was a significant move, and in my opinion, a move in the right direction. Contemporary society is different from what it was thirty years ago both from an economic and medical aspect. People are learning to take better care of themselves ; they are living longer and therefore the majority of them easily reach retirement age. Therefore, it would be unreasonable to assume that a 25 year old person who suffers a permanent disability should be tied to a maximum multiplier of 20 years. Such an attitude is far too conservative and rather than aiding the victim it puts him at a disadvantage.

We have thus seen recent judgments favouring a higher multiplier. Yet, although our Courts no longer have any qualms on adopting multipliers in excess of 20, they still refrain from adopting a full multiplier. Such an approach would depart substantially from the multiplier system as outlined in **Butler v. Heard**. The changes and chances of life still form an intrinsic part of the multiplier system, and are duly taken into account.

Some lawyers have even questioned the criteria upon which medical experts determine the percentage of disability suffered by the victim. Does the percentage disability represent the physical incapacity of the victim as a human being, or does it represent the decrease in his earning capacity?

Our legal system also favours lump sum payments. Since these payments are made at one go, it is common practice for our Courts to deduct a percentage therefrom. The major drawback of lump sum payments is that many years may elapse before the victim is able to receive any payments. This may put the

plaintiff in dire need since he may be prevented from working because of his injury. Such a situation is particularly aggravated in case of fatal injuries. The breadwinner of the family may die and his family would be left to fend for itself. Our Courts have tried to find a solution to this problem by deducting a lesser percentage when the award is being made a considerably long time after the commencement of the lawsuit. However, in my opinion, this situation can and should be alleviated by a system which provides for interim payments pending the determination of the injured party's claim in cases where liability is admitted or obvious.

These are in essence the major developments which have taken place in the assessment and liquidation of damages for personal injuries and death. This is one of the most dynamic parts of Civil law which is constantly subject to change and improvements. However, it must be emphasised that the assessment of damages in actions for personal injuries and death is not and can never be an exact science. What one can only hope for is a method which strives to render justice to the parties involved notwithstanding the odds against it. Perhaps it would not be remiss in concluding this study on the following note :

> *"Jidher li r-riflessjonijiet fuq din il-parti difficli tal-ligi ghadhom ma waslux biex isibu soluzzjoni adegwata. Biss tentattivi fir-rigward ma jistghux jieqfu biex tinstab soluzzjoni konformi mal-haqq."*[176]

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176 **Elvira Abela v. The Onor. Prime Minister et** [Op. Cit. Page 106]

BIBLIOGRAPHY

1. Bianca Massimo C. **Inadempimento delle Obbligazioni** Vol IV Bologna, Zanichelli Editore, 1979 2nd Ed.

2. Cane Peter **Atiyah's Accidents, Compensation and the Law** London, Butterworths, 1993 5th Ed.

3. Finn P.D. **Essays on Damages** Sydney, The Law Book Company Limited, 1992 1st Ed.

4. Kemp and Kemp **The Quantum of Damages** London, Sweet and Maxwell, 1967.

5. Munkman John **Damages for Personal Injuries and Death** London, Butterworths, 1993 9th Ed.

6. Taylor J.A. **Bingham's Motor Claims Cases** London, Butterworths, 1980 8th Ed.

7. Torrente Andrea & Schlesinger Piero **Manuale di Diritto Privato** Milano, Giuffre' Editore, 1985 12th Ed.

8. White Paul **Personal Injury Litigation** Bristol, Jordan Publishing Limited, 1996 1st Ed.