XIX. Malta

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1. *Liliana Farruga v Francis Gauci*, Court of Appeal, 28 March 2014[1]

In *Liliana Farrugia v Francis Gauci* the Court of Appeal evolved new criteria for the assessment of *lucrum cessans* in cases where the victim is unemployed.

The parameters for quantifying damages for loss of future earnings (*lucrum cessans*) in personal injury cases were articulated in *Michael Butler v Peter Christopher Heard*.[2] This seminal judgment introduced the 'multiplier' method, whereby compensation is calculated based on the plaintiff's age at the time of the accident, the degree of permanent disability, and the level of current earnings.

However, this framework revealed a conceptual and practical lacuna in instances where the injured party was unemployed or engaged in non-remunerated labour, most notably in the case of housewives. The courts were thus confronted with the challenge of valuing work that, while economically significant, is not reflected in a formal wage structure.

The case of *Liliana Farrugia v Francis Gauci* exemplifies this issue. The plaintiff sustained serious injuries when a shelving unit in the defendant's shop collapsed. In assessing *lucrum cessans*, both the court of first instance and the Court of Appeal affirmed that the domestic labour performed by a housewife possesses intrinsic economic value and must be factored into the computation of damages, although it still adopted a conservative approach by using the national minimum wage as the multiplicand.

Significantly, the Court of Appeal further observed that domestic responsibilities do not cease upon reaching retirement age. This insight informed its determination of the appropriate multiplier, acknowledging

[1] *G Caruana Demajo/L Quintano/D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 369, nos 57–62.

[2] Court of Appeal, 22 December 1967.

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the continuity of unpaid household work beyond conventional employment years.

Moreover, the Court reaffirmed that the assessment of disability should not be confined to medical classification alone. Instead, emphasis must be placed on the functional impact of the injury on the victim's habitual activities, thereby aligning the legal evaluation with the lived realities of the injured party.

2. *Jane Agius v the Attorney General and Others*, Constitutional Court, 14 December 2015[3]

This case opens the door to moral damages where the action for damages caused by an unlawful event can be formulated other than in tort.

In *Butler v Heard* cited above, the Court of Appeal, reflecting the prevailing *favor debitoris* orientation of the time, adopted a restrictive interpretation of the law that effectively excluded compensation for non-pecuniary harm. This encompassed categories such as pain and suffering, loss of enjoyment of life, and general discomfort or inconvenience. Although courts of first instance occasionally attempted to challenge this orthodoxy by awarding damages for moral harm, such decisions were routinely overturned on appeal, thereby reaffirming the doctrinal exclusion of non-pecuniary redress within the framework of civil liability.

This impasse was eventually codified through an amendment to the Civil Code enacted in 2018[4]. The revised provision expressly limited judicial discretion in awarding moral damages, confining such compensation to cases involving criminal offences that either impinge upon the dignity of the person or constitute wilful bodily harm punishable by a term of imprisonment of not less than three years. Consequently, the amendment foreclosed the possibility of awarding moral damages in tort, thereby entrenching a narrow and exceptionalist framework for non-pecuniary compensation.

A significant challenge to this restrictive framework emerged in *Jane Agius v Attorney General and Others*. The plaintiff's nephew, a detainee, died following the accidental administration of an overdose of medication prescribed for drug dependency. The plaintiff initiated proceedings before the ordinary courts, alleging that the death resulted

[3] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2015 (2016) 381, nos 43–55.

[4] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 401, nos 1–6.

from culpable negligence on the part of the authorities. Both the court of first instance and the Court of Appeal upheld the claim for pecuniary loss but dismissed the claim for moral damages, reaffirming that the relative provisions of the Civil Code[5] did not allow for damages other than for pecuniary loss.

The plaintiff subsequently filed a separate action before the court of constitutional jurisdiction, seeking additional damages and a declaration that the Civil Code's failure to provide for moral damages constituted a breach of her right to an effective remedy under art 13 of the European Convention on Human Rights. The first instance constitutional court upheld the claim for moral damages, finding that the authorities' negligence amounted to a breach of the state's positive obligations under art 2 of the Convention. It further affirmed that constitutional courts are empowered to award moral damages for violations of fundamental rights, and noted that the Civil Code provisions did not afford a full remedy, although it stopped short of declaring their invalidity.

On appeal, the Constitutional Court adopted a nuanced approach. It held that the impugned Civil Code provisions govern tortious liability and do not extend to breaches arising from other sources of obligations. In the case at hand, the relationship between the victim and the prison authorities, while not contractual in the conventional sense, was deemed to arise *ex lege* and was a source of obligations which were breached by the defendants. Accordingly, the Court concluded that the matter was not governed solely by tort law provisions, and that no statutory barrier precluded the award of moral damages by the ordinary courts.

While the reliance on a pre-existing legal relationship may be viewed as tenuous, in effect the Constitutional Court's reasoning reflects a broader interpretative principle: that ordinary law should be construed and applied in a manner consistent with fundamental rights, thereby obviating the need for constitutional recourse. By grounding its decision in the nature of the legal relationship rather than undertaking a direct re-interpretation of the Civil Code, the Court effectively opened the door to moral damages in cases where civil harm may be assessed under legal frameworks other than tort. In doing so, it avoided a formal declaration of incompatibility between domestic law and the Convention, while nonetheless facilitating a more expansive and rights-compliant approach to non-pecuniary compensation.

[5] Arts 1045 and 1046 as then in force, prior to the 2018 amendments mentioned above.

3. *Vincent Gauci and another v the Chief Government Medical Officer and others*, Court of Appeal, 28 June 2019[6]

Few areas of law have undergone as pronounced a transformation from a *favor debitoris* orientation to a more victim-centric approach as medical malpractice litigation. Historically, plaintiffs faced formidable hurdles: not only did the burden of proof rest squarely upon them, but success required demonstrating gross negligence on the part of the medical practitioner, a threshold difficult to meet.

This restrictive paradigm has gradually given way to a more liberal and equitable framework, notably consolidated in the Court of Appeal's judgment in *Vincent Gauci et v Tabib Ewlieni tal-Gvern et.* In that case, the plaintiff, having undergone an angioplasty at a state hospital, subsequently experienced impaired mobility necessitating the use of crutches. He initiated proceedings against both the hospital and the attending surgeon, alleging that the latter had negligently struck a nerve while inserting the sheath for the guidewire during the procedure.

The defendants contended that the applicable standard of care was no higher than that of the *bonus paterfamilias*, and that no evidence had been adduced to show a deviation from this standard. Citing *Roe v Minister of Health*,[7] they argued that imposing liability for every adverse outcome would be detrimental to the medical profession and broader public interest. As Lord Denning famously stated, 'we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong ... we must not condemn that which is only misadventure'. Thus, the mere failure to achieve the desired medical outcome does not, in itself, constitute negligence

Significantly, both the court of first instance and the Court of Appeal recognised the evolving jurisprudential trend of framing medical malpractice claims within the realm of contract law rather than tort, even in cases involving public hospitals and salaried medical professionals. While the standard of care remains consistent across both domains, the evidentiary burden shifts: once a contractual relationship is established and the expected outcome is not achieved, the onus falls upon the defendant to demonstrate that the medical obligations were fulfilled *diligenter et secundum artem*.

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[6] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2019 (2020) 391, no 29 ff.

[7] 1954, 2 All England Law Reports (All ER) 131.

The Court of Appeal further nuanced this position by distinguishing between obligations of conduct and obligations of result. While the medical professional's duty is generally one of conduct, it also encompasses a negative obligation of result, namely, not to inflict harm. Although the occurrence of harm does not automatically imply negligence, it does trigger a rebuttable presumption, placing the burden on the practitioner to prove that the injury was not attributable to any fault on his part. This evidentiary shift is both logical and equitable, given the asymmetry of information and control between surgeon and patient.

Although moral damages were neither claimed nor awarded in *Gauci*, the contractual framing of medical malpractice has far-reaching implications. As illustrated in *Jane Agius* (referenced above), such a perspective enhances the patient's prospects of securing compensation not only for pecuniary loss but also for non-pecuniary harm, including pain and suffering, diminished quality of life, and general inconvenience.

4. *Judith Cordina v Michael A. Cordina*, Court of Appeal, 27 January 2021[8]

In a precedent-setting judgment, the Family Court at first instance adjudicated upon a novel claim concerning the civil liability of a parent for psychological harm inflicted upon a child during her upbringing. The plaintiff, the biological daughter of the defendant, instituted proceedings in tort, alleging that she had been raised in an environment marked by persistent physical and psychological abuse perpetrated by her father. She contended that such maltreatment, commencing from an early age, had materially impaired her psychological development and educational attainment, thereby depriving her of the opportunity to pursue higher academic qualifications and, consequently, more remunerative employment.

Rejecting the defendant's pleas, the Court declined to frame the matter within the confines of family law, opting instead to ground its reasoning in the general principles of tort. It awarded the plaintiff € 82,984 in damages, calculated on the basis of the average income she would likely have earned had she been afforded the opportunity to complete her education and attain the professional status she aspired to. On appeal, the Court of Appeal substantially upheld the lower court's reasoning but revised the quantum of damages downward to € 43,200. In doing so, it took into account the plaintiff's current circumstances – namely, her marital status,

[8] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2021 (2022) 392, nos 2–10.

relative stability, and youth – emphasising her capacity to avail herself of educational opportunities as a mature student and thereby mitigate the long-term consequences of the harm suffered.

5. *Paul Pullicino v Director General, Works Department*, Court of Appeal, 30 March 2022[9]

This judgment elaborated upon the concept of alternative causation in Maltese tort law.

Between 30 November 1981 and 3 January 1983, the plaintiff was employed as a full-time apprentice with the Works Department, reporting to a government garage three days per week and attending vocational training on the remaining two. During his time in the garage, he participated in the maintenance of motor vehicles and was exposed to asbestos-containing components. Upon completion of his apprenticeship, the plaintiff established a limited liability company through which he operated a business importing motor vehicle parts, an occupation that likewise entailed exposure to asbestos. In 2008, he was diagnosed with mesothelioma.

The plaintiff instituted proceedings against the Works Department, alleging that his illness was causally linked to the inhalation of asbestos fibres during his apprenticeship. Tragically, he passed away before judgment was delivered, and the action was continued by his heirs.

In its defence, the Department contended that it could not be definitively established that the disease was contracted during the plaintiff's employment with the Department, given his subsequent occupational exposure to asbestos.

The court of first instance found in favour of the plaintiff, concluding that the mesothelioma had been contracted 'solely and exclusively' during his employment with the Department. It awarded damages amounting to € 204,633.65 for loss of earnings. The Department appealed.

On appeal, the Court acknowledged that the plaintiff's employment with the Department was of limited duration. Nonetheless, it accepted the medical evidence that even a single exposure to asbestos may suffice to trigger mesothelioma, which can remain latent for decades. The Court, however, rejected the categorical finding of the lower court. It held that the evidence did not exclude the possibility that the disease may have been contracted during the plaintiff's subsequent business activities, or

[9] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 415, nos 2–14.

that multiple exposures – both during and after his employment with the Department – may have contributed to the onset of illness.

The Court of Appeal identified three equally plausible and probable scenarios:

1. that the fatal exposure occurred during the plaintiff's employment with the Department;
2. that it occurred during his subsequent business operations;
3. that it resulted from cumulative exposures across both periods.

Importantly, the Court clarified that the mere possibility of post-employment exposure does not absolve the defendant of liability. In such cases, the burden shifts to the defendant to demonstrate that the probability of causation lies outside its sphere of responsibility. Given that the probabilities were evenly balanced, the Court apportioned liability accordingly and reduced the damages award by half, to € 102,317.

Although the doctrine of alternative causation is not novel – indeed, the Court cited Ulpian[10] and Julian[11], whose respective commentaries on the *Lex Aquilia* reflect early grappling with multi-causal harm and evidentiary uncertainty, as historical support of its reasoning – this judgment marks the first explicit judicial articulation of the principle within the Maltese jurisprudential context. In the absence of an express legislative provision akin to § 830(1) *Bürgerliches Gesetzbuch* (German Civil Code) or art VI.–4:103 of the Draft Common Frame of Reference, the judgment constitutes a landmark decision, offering doctrinal clarity and practical guidance in cases where harm may have resulted from the conduct of more than one potential wrongdoer, but definitive attribution is not possible. This approach reflects a probabilistic conception of causation, relieving the plaintiff of the burden of pinpointing the precise tortfeasor when several actors may have contributed to the harm.

[10] Digesta (Dig) 9.2.11.2 Ulpianus 18 ad ed.
[11] Dig 9.2.51.2 Iulianus 86 dig.