

# AN OVERVIEW PERCENTAGE DISABILITY REPORTS IN THE MEDICAL FIELD

YANA MICALLEF STAFRACE  
& CHARLENE GRIMA

**T**ort can be defined as a wrongful act, resulting in injury to another person, or property, or reputation, amongst others, for which the injured party can seek compensation. It involves the responsibility for the payment of damages in cases where a person causes harm to another, independently of any prior agreement or contractual relationship. Liability in tort depends on one important factor, that is, the existence of fault; in fact Article 2031 of the Maltese Civil Code provides that every person shall be liable for the damage which occurs through his fault. The main aim of tort law is that of providing relief for the harm suffered to tort victims.<sup>1</sup>

Broadly speaking, compensation following an injury falls under two main headings, *damnum emergens* and *lucrum cessans*. The first pertains to the repayment of expenses incurred whilst the second is tied to the loss of future earnings arising from a permanent disability.

In respect of compensation under *damnum emergens* Maltese courts are relatively consistent in their approach, in that once there is sufficient proof of actual losses, compensation is granted. On the other hand, this is not the case with respect to compensation under *lucrum cessans* arising from permanent disability. Given that Maltese law does not yet provide any form of guidance in respect of how one can determine a percentage rate of disability, one may question the manner in which medical practitioners conduct their medical reports in cases of tort. In other words, can it be argued that ultimately the determination of compensation in any given case depends on the medical practitioner's 'opinion'? For this reason it is essential to evaluate some of the notions which are generally given weight by medical practitioners in order for a harmed individual to be adequately compensated.

It is important to note that the court is not bound by medical reports. In fact, one particular provision of the Code of Organisation and Civil Procedure provides that "The Court is not bound to adopt the report of the referees against its own conviction."<sup>2</sup> This means that the final decision is that of the judge, this being the case irrespective of whether the medical report in question is a reliable one, being drawn up competently and diligently.

## WHAT MAKES A MEDICAL REPORT A RELIABLE ONE?

It can primarily be argued that for a medical report to be a genuine one the medical practitioner should most importantly make it understandable. The percentage rate of harm should be

meticulously justified rather than providing a medical report without any explanation for the percentage rate of harm.

One might still question the manner in which a rate of permanent disability is calculated or determined by medical practitioners. What criteria should a medical practitioner really bear in mind before determining the percentage rate of harm suffered by an aggrieved individual? In this regard it should be kept in mind that up till now, compensation in Malta is only granted for material losses; consequently the percentage rate of harm should be limited to the harm caused to a person's 'working' or 'potential working' ability rather than any other ability affected by the harm suffered. Therefore, in cases where a person suffers a permanent incapacity, total or partial, yet is still able to maintain his or her employment and to generate the same income he or she earned prior to the injury, the percentage rate of disability suffered would not be very high. Thus, the notion of 'disability' or 'incapacity' referred to in the sphere of tort compensation, is a disability or an incapacity for the affected person to work or else to earn or generate the same income (or 'potential' income) one would have been able to earn (or 'potentially' earn), had no tortious event occurred. On the other hand, case-law also shows that if, despite the harm suffered, one retains his or her employment, there can still be an entitlement to compensation if that harm makes it difficult for such person to amplify his or her earnings. This is due to the fact that what matters is the effect that the injury has on the victim's prospective (not actual) earning ability.<sup>3</sup> Nevertheless the 'effect' of the disability on the victim's patrimony is a matter which should be dealt with by the court, thus a medical practitioner should determine the disability on a purely medical basis rather than legally; this in fact would make a medical report a reliable one.

One should note that there might be instances where despite the fact that more than one medical practitioner is appointed to conduct a medical report no single percentage rate of disability is agreed upon. In fact, this is one of the disadvantages behind the nonexistence of regulating guidelines in the sphere of tort compensation, since ultimately a medical practitioner's opinion is inevitably a subjective estimation of the harm caused to a particular victim. Perceptibly whenever there are divergent opinions - regarding the same tort victim - on the part of different medical practitioners, the court will decide which percentage rate of disability is the most suitable. In such cases the medical report would to a certain extent be set aside by the court.



Interestingly, medical reports which address physical disabilities caused in a particular case, without referring to the psychological aspect of the affected individual are still common. In this respect it can be argued that there might be instances where tort victims are in fact not granted the compensation they really deserve due to the fact that no reference to other aspects of the individual - particularly the psychological aspect - is made, other than the physical aspect. Hence unfortunately, psychological harm is at times ignored; yet this can be caused by the occurrence of physical harm.<sup>4</sup> The fact that there are several psychological and psychiatric illnesses which can potentially occur consequent to a traumatic experience<sup>5</sup> leads one to question the true worth of certain medical reports relied upon by the court, being reports which solely deal with physical harm and which do not even refer to the mental status of the victim after the tort. Although it is true that as aforesaid, Maltese Law caters for material losses only, a medical report should always reflect the real medical circumstances consequent to a tortious event; this means that psychological harm should be referred to if this is inflicted upon the victim. Nevertheless, in reality there is still scepticism associated with psychological harm, as well as a general fear of compensation syndrome, i.e. when a person shows symptoms that are out of proportion, in order to receive compensation; in fact, in Malta, reference to psychological harm can only be found in relatively recent judgments. Recently, references to Anxiety disorders such as Post-Traumatic Stress Disorder, Acute Stress Disorder and Adjustment Disorder are becoming common.<sup>6</sup> Therefore, the psychological impact of certain physical injuries should be given sufficient consideration since unfortunately, psychological harm may last longer than the physical harm which is suffered, although it might be barely noticeable in some cases.

### WHAT ABOUT THE CASES WHERE MORE THAN ONE TYPE OF PERMANENT DISABILITY OCCURS? SHOULD MEDICAL EXPERTS DECIDE ON A SINGLE PERCENTAGE RATE OF HARM OR DETERMINE EACH PERCENTAGE OF DISABILITY SEPARATELY?

One may refer to cases where a person suffers both physical and psychological harm; in these cases the general approach adopted by the Maltese courts is that a single percentage rate which covers all the permanent harm caused by the same event, is usually determined, thus implying that a particular 'totality' of harm is suffered.<sup>6</sup> In fact, in one particular judgment<sup>7</sup> the Court of Appeal elucidated that the medical examination conducted on a person who suffers more than one form of disability, shall *always* give consideration to the fact that the individual person is a single entity which shall not be divided into separate compartments in order to give a percentage rate for each type of disability suffered. The reasoning behind the court's explanation is that if a percentage rate of disability had to be given for each type of disability, the victim's final disability may amount to

## ... IN CASES WHERE A PERSON SUFFERS A PERMANENT INCAPACITY ... YET IS STILL ABLE TO MAINTAIN HIS OR HER EMPLOYMENT AND TO GENERATE THE SAME INCOME HE OR SHE EARNED PRIOR TO THE INJURY, THE PERCENTAGE RATE OF DISABILITY SUFFERED WOULD NOT BE VERY HIGH

more than a hundred percent (100%)<sup>6</sup> and this would clearly not make sense.

It is quite evident that the determination of a percentage rate of harm caused to a tort victim in any given case is not simple. In fact, in one particular recent local case<sup>8</sup> the court-appointed psychologist refused to quantify the harm suffered by the victim since according to her the harm caused was too 'abstract' to be rated by a percentage. In this respect it can be argued that specific personal injuries affect aspects of one's life which cannot be given a 'price' simply because they are of great value. One can here refer to the loss of independence which certain physical injuries may cause to the aggrieved. Additionally, when psychological harm ensues, mental stability may never be regained, and this is another form of deprivation of the aspects of life that are priceless for every human being. Nevertheless, it is only just that adequate compensation is awarded to persons who suffer harm consequent to another person's fault. The appointment of medical experts is indeed one of the means by which the court can at least be guided in order to determine the compensation to be awarded in any given case for the victim to retain a decent life as much as possible ❄️

#### REFERENCES

1. Legal Information Institute online database. Cornell University Law School. Available from: [www.law.cornell.edu/wex/tort](http://www.law.cornell.edu/wex/tort)
2. Laws of Malta. Code of organization and civil procedure. Chapter 12. Available from: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt)
3. Antonella Tonna vs. Roderick Gauci, Civil Court First Hall, 8th October 2004. Available from: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt)
4. Simone Zammit vs. Doreen Portelli et al, Civil Court First Hall, 16th December 2008. Available from: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt)
5. The Diagnostic and Statistical Manual of Mental Disorders. 5th ed. American Psychiatric Association, 2013.
6. Grima Charlene. The Conceptual Basis and Practical Implications of Compensating Psychological Harm in Maltese Tort Law. LL.D thesis. University of Malta 2014. Chapter 1.1.
7. Emanuel Mizzi vs. Carmel Attard et al, Court of Appeal, 28th April 2006. Available from: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt)
8. Andrew u Maria Antonia Xerri pro et noe vs. Marija Rita sive Marita Mercieca et al, Court of Appeal, 27th February 2009. Available from: [www.justiceservices.gov.mt](http://www.justiceservices.gov.mt)

#### FOR FURTHER INFORMATION PLEASE CONTACT

**Micallef – Stafrace Advocates**

11A, Strait Street, Valletta VLT 1432

T: 2122 3142, 2124 8034

M: 9949 9393

E: [yana@micallefstafrace.com](mailto:yana@micallefstafrace.com)

