

Maltese Tort Jurisprudence  
(1869-1920): A system  
designed *favor debitoris*?

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requirements of the degree of doctor of laws (LL.D.)

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## ANNEX D

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## ABSTRACT

This thesis explores whether Maltese tort legislation and judgments delivered between 1869 and 1920 exude a *favor debitoris* approach; i.e. whether the domestic judiciary was more inclined towards protecting the interests of the debtor, being the **tort-feasor** and also whether the figures of tort-feasor and **property-owner** tended to coincide. This time-frame was selected as it succeeded the promulgation of **Ordinance VII of 1868**, the founding statute of our Civil Code, but preceded the amendments to our tort provisions.

An analysis of Ordinance VII in the context of its sources was conducted to elucidate whether the *pro debitoris* bias was embedded within the legislation itself. Certain provisions in the Ordinance were identified which did clearly show such a bias, together with others which were much more neutral in approach. The study of the judgements was conducted in two separate chapters, one of which focused on general principles relating to liability and damages, whereas the other focused on special cases relating to concurrent and indirect liability. Here too there were various instances where a *pro debitoris* orientation could be noted; particularly in relation to indirect liability, which was interpreted restrictively, in decisions determining scenarios of contributory negligence and in judgements awarding compensation for bodily harm. The Courts in this period did not invoke the *non cumul* rule, indicating that the scope of tort liability was still rather restricted. However, there were also various instances in which the courts seemed to be deliberately adopting a broad understanding of fault to extend liability. The overriding impression resulting from the review of the judgements related to the flexibility of the Courts in Malta's mixed jurisdiction and the great discretion they possessed in interpreting tort law in the period under review.

*Key words: Favor debitoris – Tort-feasor – Ordinance VII of 1868 – Property-owner – Non cumul*

*I dedicate this work to my parents  
who have always encouraged me to  
make education my first priority in  
life.*

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Salvatore e Don Michele Gauci et vs. Saverio Caruana, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXII A (1913-1915) Pt. I, p. 19-23.

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Salvatore e Maria conjugi Aquilina vs. Margherita vedova di Gio. Maria Zammit, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum V A (1869-1871), p. 22-24.

Salvatore Lorenzo Cassar vs. Antonio Seracino e Carmelo Fedele, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXI E (1910-1912) Pt. III, p. 29-31.

Salvatore Portelli vs. Demetrio Dendrinis et noe, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXI A (1910-1912) Pt. I, p. 153-156.

Saverio Grech a nome di Emmanuele di lui figlio minorene vs. Vincenzo Cremona e Pietro Zahra, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum VI A (1872-1873), p. 101-102.

Saveria Mifsud vs. Angelo Bugeja, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XX B (1907-1909) Pt. II, p. 357-360.

Simiana vs. Fenech et, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XVII B (1899-1900), p. 180-181.

Tom. Downs vs. Vincenzo Sammut pro et noe et, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XX A (1907-1909) Pt. I, p. 41-45.

Tommaso Tonna vs. Giuseppe Mangion ed altri, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XVIII B (1901-1903) Pt. II, p. 341-344.

Zahra vs. Grech, Kollezżjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XVI A (1897-1898) Pt. II, p. 42-44.

## **British**

*Jones v Livox Quarries* [1952] 2 QB 608, [1952] 1 TLR 1377, [1952] EWCA Civ 2

*Angelo J. Bartolone v Lynne A. L. Jeckovich et al* [1984] 103 AD 2d 632, [1984]

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## ABBREVIATIONS

ABGB	Allgemeine Buergerliche Gesetzbuch
CoA	Court of Appeal (Malta)
CC	Civil Code
1868 Ordinance/Dingli's Ordinance	Ordinance VII of 1868
FHCC	First Hall of the Civil Court
KDQSM	Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta
CoM	Court of Magistrates
Appunti/annotamenti	Appunti di Sir Adriano Dingli
COCP	Code of Organisation and Civil Procedure

# INTRODUCTION

This thesis was inspired by descriptions of general trends in Maltese tort law, which have highlighted its traditional *favor debitoris* approach and suggested that this is still present nowadays especially in relation to the quantification of damages:

The Maltese law of tort as at present interpreted and applied is not friendly to the victims of personal injury. In particular, the victim is unfavourably treated when it comes to the assessment of damages, where there is arguably a pro-defendant – which translates into an anti-victim – bias, a relic of the *favor debitoris* rule which is still an unduly strong consideration in this context. As a consequence, damages awarded are relatively low by European standards...<sup>1</sup>

Judge Emeritus Giovanni Bonello in a recent article similarly, depicts the Maltese Civil Code as possessing ‘a male-dominated, private-property conscious and paternalistic orientation’ wherein property rights appear as being absolute. He precisely states the following:

Enlightened as Sir Adriano Dingli and his sources undoubtedly were in Victorian times, some of his drafting shows signs of the times: a male-dominated, private-property conscious and paternalistic orientation. The husband is the ‘head of the family’, the children are subject to paternal, rather than parental authority,.....On the property side, the social dimension of owner-ship appears feeble indeed. Private property is virtually absolute,...<sup>2</sup>

Thus if these descriptions are correct, Maltese tort law would tend to favour the tort-feasor and in cases where the damage is indirectly caused through the medium of the tort-feasor’s property, it would also favour the latter in so far as he is a property-owner.

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<sup>1</sup> G. Caruana-Demajo, L. Quintano and D. Zammit ‘Malta’ in Helmut Koziol and Barbara C. Steininger (eds), *European Tort Law 2010* (De Gruyter 2010), 384.

<sup>2</sup> Giovanni Bonello, *Histories of Malta: Reflections and Rejections* (Fondazzjoni Patrimonju Malti 2004) (Vol. 5) 194-195.

This thesis aims to explore the validity of such orientations, through examining half a century of judgements, delivered during the period between the promulgation of Ordinance VII of 1868 and 1920, that is prior to the first amendments Maltese tort law was subjected to, in 1938. Given such period followed closely the promulgation of legislation on the matter, one would expect the rulings of the Court to be in strict unison with the law's content. The author will seek to discover what grounds can be identified in this jurisprudence, for confirming or disproving the generalisations under scrutiny and whether one could go beyond them.

A reconciliation of the *favor debitoris* approach, with Judge Bonello's suggested bias in favour of the property-owner will be attempted, in order to establish whether both legislation as well as jurisprudence<sup>3</sup> manifested such bias and if the debtor was in most cases also the property-owner. Although one would expect the two to coincide, especially within the ambit of occupational injury and animal-liability cases, conflict between them will also be highlighted.

Certain problems were encountered in the research involved in formulating the present work. They mostly arose from the fact that the examined decisions and legislation date back to approximately a century ago. Consequently certain material was difficult to trace, especially the commentaries of jurists indicated by Sir Adrian Dingli as sources for local legislation. Additionally, the entirety of the judgements were accessed manually by going through approximately sixty-seven volumes containing the same decisions, which were reported in the Italian language, with at times the employment of certain archaic terminology. An examination of double the amount of decisions hereinafter reported had to be undertaken in order to ensure that after the selection process, the decisions which were deemed to be truly relevant to the aim of this thesis would be identified. Comparison with foreign legislation also presented some difficulty as the legislation existing within the period under examination was not always readily available. As a matter

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<sup>3</sup> In the context of this thesis this term will refer to court judgements.

of fact, an 1868 version of the ABGB could not be found and communications with an Austrian lawyer were sustained to shed light on the amendments said Code was subjected to from 1868 till the present day. At the risk of being anachronistic, comparisons with modern legislation and jurisprudence were also undertaken.

The author could not hope to exhaustively answer the question formulated in this work's title, which was essentially intended to spark off research. The difficulty in attaining such exhaustiveness is further justified by the fact that the reporting of cases itself was selective, as only published decisions were analysed. Nevertheless, it is safe to assume that the most significant cases were handpicked for publication, especially since some of them are quoted by the judiciary till the present day.

# CHAPTER 1 – THE SPIRIT OF MALTESE TORT LEGISLATION IN 1868

## 1.1 Sir Adrian Dingli and Foreign Codes

Following Sir Adrian Dingli's appointment as Crown Advocate, he reset in motion the revision of Maltese legislation, which had remained stagnant since the promulgation of the Municipal Code back in 1784. In this exercise, Dingli always remained faithful to Malta's traditions and followed closely developments in Continental Europe. Roman law had to necessarily be the basis of such a legislative exercise, which law Dingli had studied so proficiently, by amongst others attending Von Savigny<sup>4</sup>'s lectures on the subject. Ordinances numbers VII of 1868 and I of 1873 codified the laws previously drafted by Dingli regulating the law of things and of persons, respectively. Said Ordinances constituted a set of laws, which were essentially home-grown.

French tort law has been regulated since the Code Napoléon's promulgation by a mere five provisions, being articles 1382 till 1386. These provisions have undergone minimum changes, with amendments only being made to article 1384, which deals with indirect responsibility. While domestic provisions dealing with responsibility are akin to the French dispositions, local provisions regulating damages resemble the Common law pigeon-hole approach of classifying tort into different kinds. Although in Dingli's *appunti* no mention of Common law is made, this does not exclude that he was influenced by the British reign.

The Austrian articles Sir Adrian Dingli makes almost constant reference to are those contained in the ABGB, which was promulgated in 1812. Said articles have been subject to minimal changes since the time Dingli made reference to them. Austrian tort law, analogously to the French, is founded on the general clause approach. The ABGB's date of

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<sup>4</sup> Friedrich Karl von Savigny was a Roman law professor and jurist.  
<<http://www.britannica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny>> accessed 19 February 2014.



promulgation in fact, although preceding that of other European Codes, succeeded the Code Napoléon and is similar to it in certain aspects. Both Codes were shaped in the pre-pandectistic era and consequently had identical influences, which at the time were Natural Law and the repercussions brought about by the Age of Enlightenment. Both assumed the Roman law model of civil law, which is based on a tripartite system.<sup>5</sup>

The 1865 Italian CC was one of the repercussions brought about by Italy's unification. Its 'Dei delitti e dei quasi-delitti'<sup>6</sup> section is essentially a replica of the Code Napoléon, with the only difference being article 1156 laying down liability *in solidum*, which fails to emerge in the French Code. The 1837 Sardinian Code's delicts and quasi-delicts section replicated the contents of the Italian CC and added three articles, which were the sources of articles 538 and 539 of the present Maltese CC, as will be discussed in Chapter 2. The torts and quasi-torts section in the 1836 Sicilian CC is a precise duplicate of the Code Napoléon.

## **1.2 Historical Sources of our Civil Code Provisions and the Amendments they were subjected to**

In this section the author shall reproduce and discuss the original drafting of the torts and quasi-torts section present in the 1868 Ordinance<sup>7</sup>, together with an illustration of those foreign provisions, which were indicated by Dingli in his *appunti* as constituting sources for his drafting. The author has also identified possible sources, which were not pinpointed by Dingli. The differences between such foreign influences and their local counter-parts will be brought to the fore. Moreover, the amendments which such domestic provisions have undergone, transforming them into the articles presently constituting the torts and quasi-

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<sup>5</sup> Willibald Posch, *Austria* (Kluwer Law International 2001), 27.

<sup>6</sup> Of torts and of quasi-torts.

<sup>7</sup> All the provisions will be reproduced in the Italian language, which was the language they were originally drafted in by Dingli.

torts section in the Maltese CC, will also be illustrated. The suggested *favor debitoris* and property-owner bias embedded within legislation will be discussed throughout.

As highlighted by Claude Micallef Grimaud ‘the core provisions of Maltese tort law have never really developed beyond certain basic principles introduced in the Nineteenth Century.’<sup>8</sup> The earliest amendments occurred in 1938. Hence all of the provisions within the *delitti e quasi delitti* section remained unchanged for sixty-five years. As a matter of fact, the majority of them have remained intact since 1868, with only a few articles being subject to modifications.

### **1.2.1 Article 735/Article 1029**

Article 735<sup>9</sup> provides that ‘Damages which happen owing to a fortuitous event or in consequence of an irresistible force are, in the absence of an express provision of the law to the contrary, borne by the party on whose property or person they happen.’ Dingli fails to list the sources behind this article, however a swift analysis of the ABGB reveals that this subject-matter is handled similarly in article 1311. Identically to the domestic provision, said provision stipulates that ‘A pure accident is to be borne by whoever it is in whose patrimony or person it occurs.’

### **1.2.2 Article 736/Article 1030**

Article 736<sup>10</sup> is the abuse of rights provision, which provides that a person cannot be deemed responsible for damage deriving from the exercise of his rights within the proper limits. No corresponding or similar provision is traceable in the 1827 Code Napoléon or in

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<sup>8</sup> Claude Micallef-Grimaud, ‘Article 1045 of the MCC: Is Compensation for Moral Damage Compatible Therewith?’ (2011) 4(2) Journal of Civil Law Studies, 482.  
<<http://www.law.lsu.edu/globals/sitelibraries/jcls/home/V4%20n2%2014%20Micallef.pdf>> accessed 10 December 2013.

<sup>9</sup> ‘735. Il danno che avviene per caso fortuito o in conseguenza di una forza irresistibile resta, in difetto di una espresso disposizione della legge in contrario, a pregiudizio di colui sui beni o sulla persona del quale avviene.’

<sup>10</sup> ‘736. Chi fa uso di un suo diritto entro i giusti limiti, non è responsabile del danno che ne deriva.’

the old Italian, Sicilian and Sardinian codes. A similar disposition however exists in the ABGB, being article 1305, which provides that ‘Whosoever exercises his right within the limits established by the law (§1295, para 2), is not liable for the harm thereby caused to another.’ Article 1295, to which reference is made in the former provision, constitutes a derogation from the general rule laid down in article 1305, as it disposes that responsibility ensues even in the exercise of a right, if such exercise ‘evidently had the object of harming the other.’

Diana Bajada outlined an evident disparity between the local and Austrian provision, being that the former utilises the term ‘proper limits’, whilst the latter employs the term ‘legal limits’. Such discrepancy highlights the Austrian provision’s restrictiveness when compared to the local provision, which Hausmaninger outlined as having been precisely the legislator’s scope, so that said provision would not be invoked vexatiously. Hence it follows that the domestic provision’s application is wider. It has also been pointed out that article 736 bears a close resemblance to the interpretation afforded to articles 1382 and 1383 of the French CC, whose aim is that of curbing the abusive employment of one’s rights ‘in property law, labour law, contractual obligations, and legal proceedings.’<sup>11</sup> However, as will emerge from decisions discussed in Chapter 2, the drafting of this provision permits its invocation for both the extension as well as the exclusion of liability in tort.

### **1.2.3 Article 737/Article 1031**

Article 1382 of the French CC states that: ‘Every action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof.’ This provision has been described as the ‘cornerstone of French delictual

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<sup>11</sup> Diana Bajada, ‘Abuse of Rights in Maltese Jurisprudence: a civil law concept within a mixed jurisdiction’ (LL.D, 2013) 25-26.

liability<sup>12</sup> and has conventionally been the most commonly resorted to article by victims claiming damages caused through other's *dolus* or *culpa*. The generality of this clause is mirrored in article 737 of the 1868 Ordinance. Article 1036 ABGB is similar to the domestic provision, however it is versed in the negative as it provides that 'A person is generally not liable for the damage he has caused without fault or through an involuntary act.'

#### 1.2.4 Article 738/Article 1032

Article 738<sup>13</sup> embodies the *bonus paterfamilias* rule and lays down that a person is considered to be at fault, if in his actions he fails to be prudent, diligent and attentive in the same degree that would be exercised by a good father of the family. In Roman law terms this would equate to *culpa levis in abstracto*. This provision goes on to state that 'No one, in the absence of an express provision of the law, is responsible for damage occasioned for want of prudence, diligence, or attention to a higher degree.' Hence for *culpa levissima* to lead to responsibility, a specific article of the law must impose its necessity. This final part of article 738 is what prevents local Courts from applying vicarious liability to scenarios, which are not expressly depicted in the law. In fact in *P.L.C. Fenech vs. C. Gatt noe et*<sup>14</sup> it was held that '...la responsabilità per fatto altrui non si estende oltre i casi tassativamente indicati dalla legge e non può indursi per ragione di analogia.'<sup>15</sup>

Although Dingli fails to mention the muse to this provision, article 1297 ABGB bears close resemblance to it, as it provides that any person who causes damage through his failure to exercise the diligence and care expected from 'normally competent persons' shall be

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<sup>12</sup> Robert F. Taylor, 'No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability' (1987) 9 Loy. L.A. Int'l & Comp. L. Rev., 548 <<http://digitalcommons.lmu.edu/ilr/vol9/iss3/2>> accessed 1 May 2014.

<sup>13</sup> '738. È considerato essere in colpa chi nelle proprie azioni non usa la prudenza, la diligenza, e l'attenzione di un buon padre di famiglia. Nessuno, in difetto di una espressa disposizione della legge, è responsabile pel danno avvenuto per mancanza di prudenza, diligenza, o attenzione in grado maggiore.'

<sup>14</sup> CoA, 18 March 1904.

<sup>15</sup> Responsibility for the acts of others, cannot be applied by way of analogy to other cases which are not specifically indicated in the law. - Joseph Caruana Scicluna, 'Notion of Responsibility for Tort' (LL.D, 1977), 106.

deemed responsible for his negligence. Nevertheless, such provision does not contain the restrictive part which limits indirect liability to the cases purported by the legislator.

### 1.2.5 Article 739/Article 1033

Article 739<sup>16</sup> lists the different kinds of unlawful acts or omissions, which will lead to responsibility. Whether a person acts with *animus nocendi* or otherwise or acts voluntarily or negligently or imprudently or without the necessary attentiveness, he will still be deemed liable for the damages he occasioned. Dingli indicates no sources for this provision; however it is comparable in many respects to article 1294 ABGB<sup>17</sup>.

The French CC's classification as embodied in article 1383<sup>18</sup> is a simplified version of its domestic and Austrian counterpart, as it merely contrasts negligence with imprudence and intentional behavior. An identical version of this French provision may be encountered in the old Italian<sup>19</sup>, Sicilian<sup>20</sup> and Sardinian<sup>21</sup> CCs. Dingli's choice of not reproducing the simplistic terminology employed in the latter Codes, may be construed as leading to the victim's disfavouring, as in order to be awarded compensation, he must at times prove that the tort-feasor breached a statutory duty imposed by law.

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<sup>16</sup> '739. Chiunque, con o senza intenzione di nuocere, volontariamente o per negligenza, imprudenza o disattenzione, fa ciò che secondo la legge non può fare, od omette ciò che secondo la legge è tenuto a fare, è obbligato a risarcire il danno che ne risulta.'

<sup>17</sup> '1294. Damage arises either from another person's unlawful act or omission or from chance. Unlawfully inflicted damage is caused either voluntarily or involuntarily. The voluntary infliction of damage is based either on malicious intent, if the damage is caused knowingly and willingly; or on negligence, if the damage was caused by culpable ignorance, or by a lack of proper care or diligence. Both are to be termed fault.'

<sup>18</sup> 'Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.'

<sup>19</sup> Article 1152.

<sup>20</sup> Article 1337.

<sup>21</sup> Article 1501.

### 1.2.6 Article 740/Article 1034

Dingli's *appunti* reveal that article 740<sup>22</sup> of the 1868 Ordinance, dealing with the damage caused by a minor or insane under care, was partly inspired by article 1153 of the 1865 Italian CC. The latter provision prescribes that the father or the mother, in the event of the former's absence, are responsible for the damage caused by their minor children residing with them. The same article however does not limit itself to the parent-child responsibility but addresses various other relationships giving rise to the same degree of responsibility, such as that between a tutor and the individual under his care, between a house-owner and his servants, between a tutor and his students and between an artisan and his apprentices. It is pertinent to note that this provision is a replica of article 1384 of the French CC, nevertheless Dingli fell short of mentioning the French provision in his *appunti*.

The specific mention of responsibility for damages caused by the insane, was hence precluded in both the 1865 Italian CC as well as the Code Napoléon, however one could argue that it was covered by the first section of articles 1153 and 1384 respectively. Such section can be classified as an umbrella sub-provision, since it dictated that everyone is responsible not solely for the damage he occasions, but even for that triggered by persons for whom he is answerable. In France, it has in fact been invoked in anonymous accident scenarios, wherein the identification of the tort's author and of fault proved to be problematic.<sup>23</sup> It is in stark contrast with the second part of article 1032 of the Maltese CC, whose effect is of restricting indirect responsibility to the cases listed in the law. Thus, the Italian and French CC, besides enlisting a greater number of relationships giving rise to indirect responsibility, also envisaged a sub-provision, which catered for scenarios falling outside the remit of the relationships depicted by the legislator. This brings to the fore the *pro debitoris* bias of Maltese law, which narrowly regulated vicarious liability.

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<sup>22</sup> '740. Chi ha la cura di un minore o demente, è tenuto pel danno da costui cagionato, quando non abbia adoperata la vigilanza di un buon padre di famiglia per prevenire il fatto.'

<sup>23</sup> 550-551 *Taylor* (n 12).

In article 740, Dingli remained faithful to Malta's legal roots and mentioned the *bonus paterfamilias* rule of thumb, being that responsibility is excluded in the event that the person assigned the care of the minor or insane, had exercised the vigilance of a good head of the family in order to impede the act's occurrence. Similarly, the Italian and French provisions stipulate that no responsibility will arise, if the parent proves that he was unable to prevent the materialisation of the fact for which he is responsible. The element of *culpa in vigilando* was however derived from article 1309 of the ABGB, which holds that damage caused by minors or the insane must be compensated by the persons entrusted with such person's care and custody, if they neglected their supervisory duties.

It is important to stress that the domestic provision under examination, is not a carbon copy of any of the priorly referred to articles, since it is essentially Dingli's creation as evidenced by the term 'Mio' in his annotations.

Besides the fact that Dingli chose not to transpose the 'umbrella sub-provision' existing in the Italian and French articles, thus restricting indirect responsibility as a whole, such responsibility was further confined by the terms employed in some of the local provisions regulating specific indirect liabilities. For instance, within article 740, the employment of the phrase 'any person having the charge', hurdles the success of an injured's claim, as it casts doubt on whether the person to be imputed indirect responsibility is he who was taking actual care of the minor upon the occurrence of the tort or he who exercised legal custody. Although Prof. Caruana Galizia opines that it is the former who is indirectly responsible, in his *appunti* Dingli only enlists parents and tutors<sup>24</sup> and his employment of the term 'ecc.' does not serve as a sufficient basis for supporting Prof. Galizia's line of thought. Consequently, not every person entrusted with a minor's or insane's custody can be imputed responsibility, but solely persons who have legal custody, namely parents and tutors.<sup>25</sup>

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<sup>24</sup> 'Viene così meglio spiegata la responsabilità dei genitori, tutori, ecc....'

<sup>25</sup> 109-110 *Caruana Scicluna* (n 15).

The *favor debitoris* approach is further exhibited by the local provision's imposition of the burden of proving *culpa in vigilando* upon the victim, as opposed to the *juris tantum* presumption of liability, arising in the French and Italian corresponding provisions. Nevertheless, Caruana Scicluna observed an interesting jurisprudential trend, which did not arise in the period under review, whereby the local Courts interpreted article 740 in line with French and Italian decisions and legislation. Hence the *pro debitoris* bias embedded in local legislation was at times, defeated by the Courts by adhering to continental jurisprudence.<sup>26</sup>

### 1.2.7 Article 741/Article 1035

Article 741<sup>27</sup> exempts from responsibility the insane, children below the age of nine and in the case of children under the age of fourteen, solely if it appears that they did not act with discernment, saving the injured party's right of action against the persons indirectly responsible in terms of article 740. In his *appunti* Dingli noted that the discernment requirement in relation to children below the age of fourteen, derived from articles 34 and 35 of the Maltese Criminal Code, which bear the same enumeration till this present day and provide that minors under the afore-mentioned age shall 'be exempt from criminal responsibility for any act or omission done without mischievous discretion.'

Articles 1308<sup>28</sup> and 1309<sup>29</sup> of the ABGB were also indicated by Dingli as sources to this provision. Although said provisions are comparable to the domestic article, they present a noticeable difference, as article 1308 ABGB does not entitle the victim to any compensation if he 'induced the injury through any fault on his part'. Hence, as laid down

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<sup>26</sup> *ibid* 121-122.

<sup>27</sup> '741. I dementi, I fanciulli minori di nove anni, e, quando non consti che abbiano agito con discernimento, quelli ancora che non abbiano compiuto la età di quattordici anni, non sono tenuti a risarcire i danni da loro cagionati; salva al danneggiato l'azione, quando ha luogo, contro coloro che sono tenuti per tali danni, ai termini dello articolo precedente.'

<sup>28</sup> '1308. If persons of unsound mind or minors under the age of 14 harm another person, who himself induced the injury through any fault on his part, he is not entitled to compensation.'

<sup>29</sup> '1309. Excepting such a case, he is entitled to compensation from those to whom the damage can be attributed on account of the neglect of their supervisory duties towards such persons.'



in article 1309 ABGB, it is only if no such fault can be attributed to the victim, that the latter may claim compensation on the basis of indirect responsibility from those persons who failed in their supervisory duties towards the minor. Dingli's provision makes no mention of contributory fault on the victim's part and in this respect, the domestic provision is *favor creditoris*.

An additional influence to this article was Pothier's treatise on obligations, wherein he opined that since only individuals who have use of reason are capable of committing delicts or quasi-delicts and the insane and minors are unreasonable persons who cannot commit acts maliciously or imprudently, a harm resulting from their acts cannot amount to a delict or quasi-delict. Pothier went on to discuss that one cannot establish a precise age at which a person acquires use of reason, as such differs from one individual to another. If one has not as yet reached the age of puberty, but has acquired use of reason, his acts are to be deemed as having been committed maliciously and consequently as constituting a delict that he must be held liable for.<sup>30</sup>

A further muse to this provision was Proudhon's treatise on the rights deriving from usufruct, personal use and habitation, wherein he justified minors' and the insane's exoneration from responsibility by the fact that they do not possess free will in committing their actions, as they are deprived from use of reason. Proudhon made reference to the *legem Corneliam de sicariis*, which amongst others stipulated that minors or the insane could not be held liable for deaths which they occasioned, as their innocence had to be safeguarded. He concluded his observations with a parallelism derived from the *lex Aquilia*, which compared damages caused by minors to those which could result by the fall of a wind-driven tile.<sup>31</sup> The commentaries of Marcade, Heimberger and Zacharie were also accredited by Dingli as inspirations for the formulation of article 741. Dingli

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<sup>30</sup> Robert Joseph Pothier, *Trattato delle obbligazioni* (2<sup>nd</sup> edn, Fratelli Vignozzi e Nipote 1841) 93.

<sup>31</sup> M. Proudhon, *Traité des Droits d'Usufruit, d'Usage Personnel, et d'Habitation*, Vol 3 (2<sup>nd</sup> edn, Chez Victor Lagier 1836) 363-364.

terminated the annotations on this article by justifying the reason behind non-liability, as being that such individuals are not capable of committing criminal acts.<sup>32</sup>

### 1.2.8 Article 742/Article 1036

Article 742<sup>33</sup> provides that when damage is caused by minors or insane and the victim cannot be compensated by others and has not contributed to the occurrence of the damage through his 'negligence, want of attention, or imprudence' the Court may, taking into consideration the circumstances of the case and the means of the tort-feasor and those of the injured, order that the victim be fully or partially compensated from the property of the insane or minor. Dingli's *annotamenti* unfold that this article is mainly based on articles 1310 and 1308 of the ABGB.<sup>34</sup>

Article 1308 ABGB provides that 'if persons of unsound mind or minors under the age of 14 harm another person, who himself induced the injury through any fault on his part, he is not entitled to compensation.' Although article 742 does not reflect the Austrian provision *ad litteram*, by inference it stipulates a similar concept as it excludes in particular circumstances, the right to compensation from the minor's or insane's property, in the event of the victim's contributory negligence. The Austrian provision is indisputably wider in its application, since as observed in section 1.2.7 it applies to all scenarios of liability emanating from the acts of minors or the mentally unstable and not merely to situations where the person who is indirectly responsible does not have sufficient assets to entertain the claim for damages.

Nevertheless article 742 as a whole benefits the tort-feasor, as it presents a derogation to the general rule enshrined in article 757, that contributory negligence on the victim's end

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<sup>32</sup> 'E la ragione è che non sono capaci a delinquere.'

<sup>33</sup> '742. Nondimeno, ove il danneggiato non possa ottenere il risarcimento da altri, per mancanza di obbligazione o di mezzi da parte di costoro, e il danneggiato medesimo non abbia con sua negligenza, disattenzione, o imprudenza, dato occasione al danno, puo la Corte, avuto riguardo alle circostanze del caso, e specialmente alle sostanze del danneggiante e del danneggiato, ordinare che il danno sia, in tutto o in parte, risarcito con beni del demente o minore contemplato nell'articolo precedente.'

<sup>34</sup> 'È preso in sostanza da Austr. 1310 e 1308.'

does not annul his right to claim damages. *Ergo* within the ambit of such provision, the victim's contributory negligence will abrogate his right to obtain compensation. In article 741, the victim's contribution was not construed as a deterrent to his right to claim compensation from the persons indirectly responsible for the minor or insane. Hence, it follows that the injured's contribution will only annul his right to obtain compensation from the minor's or insane's assets,<sup>35</sup> but not his right to institute an action to claim it.

Article 1310 ABGB stipulates that:

If the person harmed cannot obtain compensation in such a manner, the judge shall award complete compensation, or an equitable part thereof, taking into account whether some fault can be imputed to the injurer under the particular circumstances notwithstanding the fact of him normally not having capacity; or whether the person harmed refrained from a defence out of consideration for the injurer; or, lastly, the financial means of the injurer and of the person harmed.

An analysis of this provision in light of its preceding articles, namely articles 1308 and 1309 will reveal that it will only come into play after it has been ascertained that the victim did not contribute to his damage 'through any fault'. This justifies how, conversely to the local article, compensation will invariably be awarded under article 1310 and may be reduced depending on the minor's or the insane's fault and not the victim's. The fact that the existence or otherwise of the latter's fault will be taken into consideration, emphasises how parents' or legal custodians' indirect responsibility under Austrian law, arises from mere *culpa in vigilando*, irrespectively of the minor's or insane's fault. Analogously, in a 1966 French decision, the Chamber of the Court of Cassation declared that 'parents will be liable even though actual fault on the part of the child has not been established.'<sup>36</sup>

### **1.2.9 Amendments to articles 740/1034, 741/1035 and 742/1036**

By virtue of Act II of 2012 entitled the Various Laws (Disability Matters) (Amendment) Act, the term 'unsound mind' manifested in articles 740 and 741 was substituted by the phrase

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<sup>35</sup> If indemnification cannot be obtained from the persons indirectly responsible.

<sup>36</sup> 569 *Taylor* (n 12).

‘mental disorder or other condition, which renders him incapable of managing their own affairs,’ . Within article 742 the phrase ‘the person of unsound mind’ was replaced by the term ‘the person with a mental disorder or other condition.’

### **1.2.10 Article 743/Article 1037**

Article 743<sup>37</sup> prescribes that ‘He who for any work or service whatsoever, employs an unfit person, or a person whom he has not reasonable ground to deem fit, is responsible for the damage that such person through his unfitness causes to others, in the execution of the said work or service.’ The *annotamenti* divulge that this provision is fundamentally Dingli’s work, however reference to articles 1314<sup>38</sup> and 1315<sup>39</sup> ABGB was made. Dingli justifies the insertion of the phrase ‘a person whom he has not reasonable ground to deem fit’ as being aimed at the exclusion of the employer’s liability, whenever he employs a skilled and qualified person who subsequently proves to be incompetent.<sup>40</sup>

One may observe that Dingli coined the term ‘unfit person’ from article 1315, which caters for the responsibility of an individual who avails himself of an unfit or a dangerous person ‘for the procurement of his affairs’. The latter article also shares together with the domestic provision, the limitation of responsibility to acts committed during the employee’s performance of his duties, as reflected in the terms ‘in the execution of said work or service’ and ‘in such capacity’, adopted in the local and Austrian provisions respectively. Under the Austrian dispositions, in stark contrast with the local article, an employer who engages an unfit or uncertified person is responsible even if such unfitness

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<sup>37</sup> ‘743. Chi per un lavoro o un servizio qualunque, impiega una persona incapace, o che egli non ha ragionevole motive di riputare capace, è tenuto pel danno che tale persona, per la sua incapacità, nella esecuzione del lavoro o del servizio suddetto, arreca ad altri.’

<sup>38</sup> ‘1314. Whosoever takes into his service a person who is lacking in certification or knowingly keeps a person in his service who is in dangerous due to his bodily or mental condition, or accommodates such person, is liable to the landlord and housemates for compensation of any damage caused by the dangerous nature of such person.’

<sup>39</sup> ‘1315. Whosoever, for the procurement of his affairs, avails himself either of an unfit person, or knowingly of a dangerous person, is liable for the harm such person causes to another in such capacity.’

<sup>40</sup> ‘Le parole “non ha un ragionevole motive di riputare capace” sono inserite per togliere la responsabilità di colui che adopera uno del mestiere. Che poi si trova incapace.’

or lack of certification could not have been discovered on the basis of reasonable grounds.<sup>41</sup>

The mere fact that Dingli selected the Austrian provisions as a source already disfavoured the employee<sup>42</sup>, yet such bias was pursuantly augmented by Dingli's insertion of the reasonability ground, which was not envisaged in the corresponding Austrian provisions.

The employer-employee responsibility was not omitted in the French, Italian, Sicilian and Sardinian old codes. Analogously, in all of them, it was dealt with in the same article regulating different kinds of indirect responsibility. Article 1384 of the 1827 French CC enlists 'masters and trustees' amongst the persons who are indirectly responsible for tortious acts 'caused by their servants and managers in the functions in which they have employed them;'. The old Italian, Sicilian and Sardinian codes in articles 1153, 1338 and 1502 provide likewise. Said provisions also mention the indirect responsibility arising between a tutor or artisan and his student or apprentice during the period in which they were under his supervision. The unlimited nature of the employer's responsibility within the afore-mentioned Codes may be inferred from the legislator's scant wording, which imposes a *juris et de jure* presumption of fault against the employer. Domestically, the situation is truly at the other end of the spectrum, signifying a *pro debitoris* orientation, as no presumption whatsoever arises against the employer, the onus of proof rests on the victim and the only kind of proof which would lead to the victim's compensation, is proof of *culpa in eligendo*, which *culpa* was further qualified with the introduction of the reasonability ground.

### **1.2.11 Article 744/Article 1038**

Article 744<sup>43</sup> stipulates that 'He who without the necessary fitness, undertakes any work or service, is responsible for the damage that he causes to others through his unfitness.' It

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<sup>41</sup> On the other hand, the employer is liberated from responsibility if he unknowingly engages the services of a dangerous individual.

<sup>42</sup> The French and Italian provisions are *pro victim*.

follows that the degree of expected diligence in such provision is superior to the standard *bonus paterfamilias* level and any unfitness will be tantamount to culpable negligence. The *Annotamenti* provide that an examination of articles 1311 and 1299 ABGB led to this provision's creation.

Article 1311 ABGB creates a dividing line between 'a pure accident' and damage caused culpably, either through the violation of a legal rule, whose scope is that of preventing harm which may ensue from an accident or by unnecessarily participating in a third party's dealings. Whilst in an accident scenario, damages are to be borne by the victim or the owner of the goods subjected to the damage, in the latter scenario the tort-feasor would be liable for all damages, which in the absence of his actions would not have arisen. Although the parallelism between this provision and article 744 appears to be quite remote, the execution of acts without the necessary expertise or fitness may be considered to be equivalent to the infringement of a legal rule aimed at preventing harm.

The link between the domestic provision and the sources indicated by Dingli is far more evident when it comes to article 1299 ABGB. This disposition provides that whoever performs a task, which necessitates the possession of certain expertise or a level of extraordinary diligence and who deems himself as possessing such expertise or as having abided by such level of diligence, is responsible for their absence. The term 'extraordinary diligence' militates in favour of the author's initial observation, that the diligence expected from persons falling within the scope of article 744, is superior to that of a *bonus paterfamilias*.

Article 1299 ABGB goes on to stipulate that in the event that the tort-feasor was assigned the technical task by someone else, the latter would also be guilty of negligence if he was aware of the former's inexperience or should have been aware of it had he exercised reasonable care. This part of the provision undeniably reflects article 743 of the 1868

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<sup>43</sup> '744. Chi senza la necessaria capacità intraprende un lavoro o un servizio qualunque, è tenuto pel danno che per la sua incapacità cagiona ad altri.'

Ordinance. Hence the reasonable grounds measure adopted domestically in relation to employers' liability was and is employed by the ABGB only with respect to the engagement of a person for the performance of tasks necessitating a higher level of diligence. Thus, one may argue that such ground which is favourable to the employer<sup>44</sup>, was introduced in article 1299 ABGB to counterweight the high level of diligence expected, as a result of which it is easier to find the tort-feasor liable. Nevertheless such justification cannot be extended to the local situation, as the ground of reasonableness was domestically adopted in scenarios where only ordinary diligence was required. This outlines the local *pro debitoris* bias.

### **1.2.12 Article 745/Article 1039**

Article 745 regulated the innkeeper's responsibility vis-à-vis damage occasioned by his employees while working, to the property of third parties residing within his lodgings. The innkeeper under this domestic provision would also be held liable for theft perpetrated in his lodgings against any of his guests, whether it was committed by his employees or by others, unless he proved that the theft was carried out with irresistible force. Said responsibility was however capped at a value of ten pounds sterling. Consequently an innkeeper was not answerable for the theft of any cash, objects or jewelry exceeding such value, which had not been deposited with him, after he directly requested their owner to do so. This provision thus created a *juris tantum* presumption of fault against the innkeeper, who was indirectly responsible for both his employees as well as any person who committed theft in his hotel. It consequently may be reputed as favouring the injured, even though the capping safeguarded the innkeeper's risk of being exposed to unlimited liability. The *Appunti* reveal that the sources of this article were amongst others, article 1316 ABGB. This provision is similar to the domestic one, with the only distinction being that it also envisages waggoners, besides innkeepers.

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<sup>44</sup> As he can exonerate himself from liability on its basis.

## *Amendments*

Article 745 has been subjected to the most radical change when compared to other provisions contained within the torts and quasi-torts section. This is due to the fact that the original article present within Dingli's Ordinance was substituted and not merely amended. Said substitution occurred via Act II of 1966. Subsequent modifications were undertaken by Act XIII of 1983 and by Legal Notice 407 of 2007. Since such responsibility is the subject of discussion of another thesis and the author did not trace any judgements concerning it, the text of the original article, of the amendments and of the current provision will not be reproduced.

### **1.2.13 Article 746/Article 1040**

Article 746<sup>45</sup> is one of the few provisions dealing with indirect responsibility, which is *pro creditoris*. It provides that 'The owner of an animal, or he who makes use of it, while it is used by him, is responsible for any damage caused by it, whether it was under his custody, or whether it had been lost, or it had strayed.' Dingli's *appunti* outline that within the local scenario, contrary to Roman law, such responsibility cannot be waived by giving up the animal.<sup>46</sup> The *actio de pauperie* arose when an animal caused damage, which was inconsistent with its nature. The defendant in such an action had the option of surrendering the animal to the plaintiff, which was termed as *noxae dare*, alternatively to compensating him in full.<sup>47</sup> Furthermore in his *annotamenti* Dingli points out that under the corresponding Austrian provision, being article 1320 ABGB, conversely to the local provision, fault must arise to render the individual answerable for the animal's behavior.<sup>48</sup> As a matter of fact this provision sets out that a person will only be held responsible if he

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<sup>45</sup> 746. Il proprietario di un animale, o pel tempo in cui ne usa, quegli che se ne serve, è responsabile pel danno cagionato da esso, tanto se si trovi sotto la sua custodia, quanto se siasi smarrito o sia fuggito.'

<sup>46</sup> 'Non se ne può sottrarre col cedere l'animale... Contra Diritto Romano.'

<sup>47</sup> George Long, 'Pauperies' in William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray 1875) 880

<[http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\\*/Pauperies.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Pauperies.html)> accessed 16 February 2014.

<sup>48</sup> 'In Austr. 1320 si vuole una colpa.'



either provoked the animal or agitated it or fell short of keeping it under his care and with regards to an animal-keeper, he will only be liberated from responsibility if he proves that he fulfilled his duties of surveillance and custody. The local provision is identical to articles 1385 and 1154 of the French and Italian CCs respectively. In fact in his annotations Dingli makes reference to Cattaneo's commentary on the Italian provision. As upheld by Giorgi, by virtue of such provision, the owner or user of the animal is presumed to be at fault: '...è chiaro che il fondamento generico dell'obbligazione imposta dall'legislatore al proprietario dell'animale dannificante non è altro che una colpa presunta...'.<sup>49</sup>

#### **1.2.14 Article 747/Article 1041**

Dingli's article 747<sup>50</sup> upholds both the suggested *pro debitoris* evaluation of Maltese tort law, as well as Judge Bonello's 'private-property conscious' interpretation of the Maltese CC. It stipulates that:

The owner of a building is answerable for any damage caused by its fall, when this has happened for want of repair, or owing to any defect in its construction, which defect was known to him or which he had reasonable ground to believe that it existed.

The French<sup>51</sup> and Italian<sup>52</sup> corresponding provisions are identical and they also depict lack of repairs and a construction defect as the two scenarios, which could lead to collapse and for which the building's owner would be held liable. However the outstanding disparity between these foreign provisions and the domestic one is that the former do not exclude liability for latent defects or necessity of repairs, which the owner was not or could not have reasonably been cognisant of. As Dingli points out in his *annotamenti*, the foreign dispositions hold the property-owner liable for any construction defect, irrespective of

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<sup>49</sup> It is clear that the generic basis of the obligation imposed by the legislator on the owner of an animal, which caused damage, is nothing more than presumed fault.

<sup>50</sup> '747. Il proprietario di un edificio è tenuto pel danno cagionato dalla rovina di esso, quando sia avvenuta per mancanza di riparazione, o per un vizio di costruzione, che gli era noto, o che egli aveva ragionevole motive di credere che esistesse.'

<sup>51</sup> Article 1386.

<sup>52</sup> Article 1155.

knowledge of its existence, 'Fanno il proprietario responsabile per vizio di costruzione indistintamente.' In fact Dingli declares that 'L'elemento della scienza e' mio.'<sup>53</sup> This provision is a written testimony of Dingli's bias in favour of the property-owner, as instead of reproducing the text of the foreign provisions, he chose to introduce his own contributions, which unequivocally reduced the possibility of liability being attributed to the property-owner.

### **1.2.15 Article 748/Article 1042**

Article 748<sup>54</sup> provides that a person harmed by a plummeting object which was either suspended or in a precarious position or launched from an establishment, cannot turn against the holder of such establishment, if the latter was not in any way directly or indirectly involved in the commission of the act, unless he may be held indirectly responsible for acts committed by others under any other provision within the torts and quasi-torts section. Conversely, as Dingli's *appunti* impart, under Roman and Austrian law such a string of events would make the holder of a building liable, even though he would not have participated or aided in the execution of the act.<sup>55</sup>

As a matter of fact article 1318 ABGB stipulates that 'If a person is harmed by a dangerously suspended or positioned object falling down, or through something being thrown or poured out of an apartment, the person out of whose apartment it was thrown or poured, or from which the object fell, is liable for the damage.' Dingli reports that his article rather than being consistent with Roman law, reflects modern legislation<sup>56</sup> and

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<sup>53</sup> The element of knowledge is mine.

<sup>54</sup> '748. Se per la caduta di una cosa sospesa o posta in una maniera pericolosa, o se per essere una cosa gettata o versata da un edificio, viene recato danno a qualcuno, il detentore dell'edificio, quando non fosse egli stesso l'autore del fatto, e non vi avesse in alcun modo contribuito, non è responsabile, fuorché nel caso in cui le disposizioni di questo Titolo, rispetto alla responsabilità di una persona per danno cagionato da un'altra, gli siano applicabili.'

<sup>55</sup> 'Diritto Romano dava l'azione de ejectis et effuses contro il proprietario della casa, così pure Austr. 1318.'

<sup>56</sup> 'Siegua il D. moderno contro il Diritto Romano.'

that it is unique since it does not feature in other legislations, apart from the ABGB, in which its effects are counter-active to those of the domestic provision.<sup>57</sup>

This provision is solid proof of Dingli's preferential treatment towards the property-owner, as he inserted a provision, which was only present in the ABGB but termed it in an inverse manner so that it indisputably favoured the property-owner. The final part of this provision reiterates the restrictiveness of scenarios wherein local legislation permits indirect responsibility to arise.

### **1.2.16 Article 749/Article 1043**

Article 749<sup>58</sup> eliminates the possibility of exculpating oneself from responsibility for damages caused, by claiming that one was intoxicated at the time of the tortious act. The sources behind this provision are identical to those from which article 741, dealing with minors' and the mentally instable's exoneration from responsibility, emanated. Although article 1307 ABGB was not mentioned by Dingli as being one of the sources of this provision, evident symmetry may be noted as it provides that 'If a person culpably places himself in a state of mental disorder or necessity, the damage he causes in such state is also attributed to his fault....' This provision hence indirectly favours the victim, as it eliminates a possible defence, which the tort-feasor could have invoked to escape from responsibility.

### **1.2.17 Article 750/Article 1044**

Article 750<sup>59</sup> lays down that a conscientious contribution towards the unjust occurrence of damage will result in responsibility. Contribution may take both the submissive form, for

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<sup>57</sup> 'Quest' articolo non è in altri Codici fuorché l'Austr. Che è in senso contrario.'

<sup>58</sup> '749. L'obbligo di risarcire il danno esiste anche quando l'autore lo abbia recato mentre fosse in istato di ubriachezza.'

<sup>59</sup> '750. Pel danno ingiustamente recato, sono responsabili ancora coloro che vi hanno deliberatamente contribuito con consigli, minacce o comandi.'

instance by giving advice and may also be manifested through a more active participation, by the giving out of directions or at a higher degree through the use of threats. However it is essential that the damage was 'unjustly caused'. The muse to this provision was article 1301<sup>60</sup> ABGB, whose content is comparable to the domestic provision, with the sole difference being that it lists further contributory acts, including the failure to abide by a special rule enacted in order to prevent the harm which actually arose. Within the local provision all the enlisted actions amount to the commission of acts and the omission to follow statutory rules is not mentioned. This provision widens the spectrum of possible tort-feasors and consequently affords the victim an increased opportunity of being awarded damages, as he can institute his action against more than one person.

### 1.2.18 Article 751/Article 1045

Article 751<sup>61</sup> deals with *damnum emergens*, which must be forked out by the person who caused damage without *dolus*. Such damages equate to the:

...real loss that the act has directly occasioned to the injured party; in the expenses which the latter may have been compelled to incur in consequence of the damage; and, if the party injured be a person who works for wages or other payment, in the loss also of such earnings.

Dingli clarifies that although this article follows closely articles 1293, 1323 and 1325 of the ABGB, it still manifests modifications to such provisions. Article 1293 ABGB defines damage as any deterioration to the victim's physique, rights or estate and as the opposite of normal loss of profit, which may result during the course of life. Article 1323 ABGB stipulates that the tort-feasor must reinstate the victim to his *status quo ante* and where

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<sup>60</sup> '1301. Multiple persons may become liable for unlawfully inflicted damage by contributing thereto jointly, in a direct or indirect manner, by instigating, threatening, ordering, helping, concealing or the like, or by omitting to comply with a special duty to prevent the harm.'

<sup>61</sup> '751. Il danno che dev'essere risarcito da colui il quale lo abbia recato senza dolo, consiste nella perdita reale che il fatto abbia direttamente cagionato al danneggiato; nelle spese che questi abbia in conseguenza del danno dovuto fare; e, se il danneggiato e una persona che lavora per salario o altro pagamento, nella perdita ancora di tale guadagno.'

this is physically impossible, it must be attained through financial means. Said provision classifies compensation into two different kinds being 'actual indemnification' and 'full satisfaction'. The former caters for actual damages sustained, whilst the latter is linked to loss of future income and any other compensation due in order to satisfy *restitutio in integrum*. Hence 'actual indemnification' is the equivalent of *damnum emergens* whilst 'full satisfaction' is the corresponding term for *lucrum cessans*. Article 1325 ABGB provides that the tort-feasor must fork out compensation for four different categories of damage namely, medical costs for the recovery of the victim, reimbursement of income which was actually lost as well as future income if the victim 'loses his earning capacity' and finally a sum in representation of moral damages sustained.

### 1.2.19 Article 752/Article 1045

Article 752<sup>62</sup> envisages *lucrum cessans*, which are owed when a tort is committed with *dolus*. In such a scenario, the tort-feasor would have to provide for both the expenses mentioned in article 751 together with loss of future income, which the victim will be prevented from earning owing to the tortious event and which was capped at one hundred pound sterling. In his *appunti* Dingli states that this provision is a mesh of the Austrian provisions dealing with *lucrum cessans*, combined with his own alterations.

The safeguard of the tort-feasor's patrimony and the probable and uncertain nature of the victim's future income, were Dingli's justifications vis-à-vis the hundred pound sterling capping. Dingli wanted to prevent the injured party from being unjustifiably enriched as a result of the tort-feasor's compensation. Andò opines that such capping was aimed at preventing the tort-feasor from being 'exposed to an indeterminate liability.'<sup>63</sup> Such

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<sup>62</sup> '752. Il danno però che dev'essere risarcito, da colui il quale lo abbia dolosamente recato, si estende, oltre le perdite e le spese menzionate nell'articolo precedente, al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo state. La Corte fisserà per la perdita di tale guadagno, secondo le circostanze, una somma non eccedente cento lire sterline.'

<sup>63</sup> B Andò, 'The Mélange of Innovation and Tradition in Maltese law: The Essence of the Maltese Mix?' (2012) 15(3) PER/PELJ <<http://www.saflii.org/za/journals/PER/2012/36.html>> accessed 20 March 2014

justifications have also been encountered when dealing with moral damages.<sup>64</sup> Dingli further provided that the courts had to abide by such capping, owing to the novelty of the subject.<sup>65</sup>

Thanks to Dingli's modifications, *damnum emergens* and *lucrum cessans* were regulated by two separate provisions. The tort-feasor's state of mind when committing the tortious act was the determining factor in selecting which one of the afore-mentioned kinds of compensation was due. This invariably hindered *restitutio in integrum*, as if the tort-feasor acted culpably, irrespective of the damages actually sustained, the victim would only be awarded *damnum emergens*.<sup>66</sup> Analogously, article 1324 ABGB provides that 'If damage was caused through malicious intent or conspicuous negligence, the person harmed is entitled to claim full satisfaction; otherwise, he can only claim actual indemnification...'. Nevertheless this Austrian provision imposes no capping.

### 1.2.20 Amendments to articles 751 and 752

By virtue of Ordinance III of 1938 article 751 was partitioned into two sub-sections with the first providing for *damnum emergens* and the second for *lucrum cessans*. The latter kind of damages were no longer restricted to tortious actions committed maliciously. Moreover capping was raised to £1200 in cases of negligent damages, whilst it was eradicated with regards to willful damage.

Consequently thanks to such amendments, the tort-feasor's mind-set impinged less on the compensation to be attributed to the injured party, however it still had an effect on such.<sup>67</sup> The damages awarded by this provision, started to be transformed from a punitive

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<sup>64</sup> Claude Micallef-Grimaud, 'The Rationale for Excluding Moral Damages from the MCC: A Historical and Legal Investigation' (LL.D, 2008).

<sup>65</sup> 'Austr. I. c. con modif. Metto un limite di 100 perché altrimenti si potrebbe cagionare la rovina del danneggiante, mentre il guadagno futuro è cosa di probabilità e può mancare da un momento all'altro per cause naturali. Il limite è una norma alla Corte in questa materia tutta nuova.'

<sup>66</sup> Maria Bonello, 'Delictual Liability: A Study of the 2010 White Paper and the Related Bill' (LL.D, 2013) 31-32.

<sup>67</sup> *ibid* 31.

to a compensatory kind.

A lexical amendment which may have had a bearing on the judiciary's perspective in the selection of damages to be compensated was the substitution of the term 'real loss' present in Dingli's Ordinance, with the term 'actual loss' in the amended article 751, as exhibited in the 1938 Ordinance. The former term encapsulates all patrimonial damages suffered and is thus far more comprehensive than the latter term. Hence such variation created a further impediment to the victim's possibility of being awarded satisfactory compensation, which further accentuates the *pro debitoris* bias of local tort law.

The 1938 Ordinance also introduced the necessity of 'permanent, total or partial incapacity' for *lucrum cessans* to be compensated. Moreover, it repealed article 752 and substituted it with the following provision which remained unaltered and is nowadays article 1046:

Where in consequence of a neglectful act 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 preceding article.

The latter provision introduced the concept of the heir's entitlement to both *damnum emergens* as well as *lucrum cessans*, which was absent in Dingli's Ordinance.

By virtue of Ordinance XXI of 1962 the capping of *lucrum cessans* set at £1200 was eliminated. Consequently after ninety-four years, the judiciary was finally granted absolute discretion in quantifying the sum of damages due for *lucrum cessans*.<sup>68</sup> The article introduced by such Ordinance has remained intact till the present day and is article 1045.<sup>69</sup>

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<sup>68</sup> *ibid* 38-40.

<sup>69</sup> '1045. (1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in 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, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

Although the right to claim *lucrum cessans* has been expanded since Dingli's Ordinance and is no longer capped or demandable solely when *dolus* is involved, compensation is still to a certain extent limited as it must necessarily fall under one of the four different categories enlisted in article 1045(1).<sup>70</sup> Nevertheless local Courts have challenged such restriction and have ordered tort-feasors to make good for damages other than those enunciated in article 1045, such as non-pecuniary damages, eventual medical costs and *danno biologico*.<sup>71</sup>

### **1.2.21 Bill 78 of 2011**

Bill 78 of 2011 envisages the re-inclusion of a capped system of damages with future income and medical disbursements being capped at €600,000 and non-pecuniary compensation at €200,000. Some have viewed this amendment as favouring the tort-feasor, in cases where the victim has a considerably high gross income and would hence be deprived of more than €600,000 in future earnings. The bill also propounds a widening of the scope of *lucrum cessans*, so that such damages will not only contemplate loss of future income but even future medical disbursements.<sup>72</sup> Whilst moral damages, are not defined in the Bill, they are meticulously legislated for.<sup>73</sup> The Bill in fact renders it mandatory for the courts to award moral damages in instances where physical disability arises.<sup>74</sup>

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(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.'

<sup>70</sup> 25 *Bonello* (n 68).

<sup>71</sup> *ibid* 29-30.

<sup>72</sup> *ibid* 69-74.

<sup>73</sup> *ibid* 76-77.

<sup>74</sup> *ibid* 80-81.



### 1.2.22 Article 753/Article 1047

Another provision, which Dingli signifies as having no sources whatsoever is article 753<sup>75</sup>. Said article provides that when a person is dispossessed of his money, indemnification is achieved through payment of five per cent interest per annum, chargeable on the total amount dispossessed. However if *dolus* was involved, interest at six per cent per annum would be due and the Court could also order the tort-feasor to indemnify the victim for any additional damage occasioned to him, including loss of wages, which however could not exceed £100. Nonetheless, for such additional damages to be awarded, the tort-feasor's intent to cause them had to be proved or alternatively they had to be the 'immediate and direct' repercussion of the victim's impossibility of having access to his money. This provision was manifestly punitive in nature, since if mere *culpa* arose in the tort-feasor, only interests at five per cent could be awarded, even though further damages could have been sustained by the victim.<sup>76</sup>

#### *Amendments*

Article 753 was initially amended by Ordinance XXXIX of 1939, which abrogated this provision's original subjection to the £100 capping laid down in article 752, pursuant to such capping being raised to £1,200 in the latter provision, by virtue of Ordinance III of 1938. Consequently the sum of additional damages to be indemnified, was placed completely within the Court's discretion, which had to keep in mind the express circumstances of the case.

The interest rates contemplated in this provision were amended by virtue of Act VI of

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<sup>75</sup> '753. Il danno che consista nella privazione dell'uso del proprio denaro, si risarcisce col pagamento degli interessi alla ragione di cinque per cento l'anno.

Ove però il danneggiante abbia agito dolosamente, gl'interessi si calcolano alla ragione di sei per cento l'anno; e può la Corte, secondo le circostanze, accordare inoltre al danneggiato, il risarcimento di ogni altro danno da lui sofferto, compresa, entro il limite stabilito nell'articolo precedente, ogni perdita di guadagno, quando consti che il danneggiante, con privare il danneggiato dell'uso del proprio denaro, abbia particolarmente avuto la intenzione di recargli tale altro danno, o quando questo sia la conseguenza immediata e diretta di tale privazione.'

<sup>76</sup> Marie-Elise Agius, 'Deprivation of the use of one's money: A Comparative and Jurisprudential Perspective on Article 1047 of the Civil Code' (LL.D, 2011) 31.

1983 to reflect the market rate, as debtors were benefiting from the law's inferior interest rate and were postponing payment. The 1983 Act hence substituted the five per cent interest rate with eight per cent and abrogated the six per cent interest rate. Consequently *dolus* or *culpa* no longer impinged on the interest rate to be employed and a person responsible for dispossessing another of his money was automatically liable to pay eight per cent interest by way of damages accruable on the capital sum. The provision as proposed in the 1983 Act has remained unchanged and has retained the part intrinsically linking *dolus* with compensation for additional damages. Hence this provision has maintained its punitive nature.<sup>77</sup>

### **1.2.23 Article 754/Article 1048**

Article 754<sup>78</sup> stipulates that in cases of vicarious liability, the individual held responsible for another's actions cannot subsequently to compensating the victim seek reimbursement from the person who actually committed the tortious act, unless the latter may be attributed some degree of responsibility. There are no *appunti* relative to this article. Article 1313 ABGB seems to contemplate an inverse scenario as it provides that 'One is generally not responsible for unlawful acts of third persons in which one has had no part. Even in those cases in which the law provides the contrary, such person is entitled to recourse from the culprit.'

### **1.2.24 Article 755/Article 1049**

Article 755<sup>79</sup> once again draws a distinction between *culpa* and *dolus* and provides that when two or more individuals give rise to damage maliciously, they are liable *in solidum*.

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<sup>77</sup> *ibid* 32-38.

<sup>78</sup> '754. Chi è tenuto pel danno cagionato da un altro, risarcendo tale danno, non ha regresso contro l'autore, se non quando questi sia anch'esso responsabile pel danno.'

<sup>79</sup> '755. Quando due o più persone abbiano dolosamente cagionato il danno, la loro obbligazione pel risarcimento è solidaria.

Ove alcuni abbiano agito dolosamente e altro no, quelli sono tutti tenuti in solido, e ciascuno degli altri è tenuto soltanto per la parte del danno che ha egli stesso recato.'

However if one of them has not acted maliciously, he is to compensate for damages caused *pro rata*. As Dingli laid down in his *appunti*, this provision is a modified version of articles 1302 and 1304<sup>80</sup> of the ABGB.<sup>81</sup> Dingli divided the contents of the latter Austrian dispositions into three different provisions being articles 755, 756 and 757, thus amplifying more on the subject-matter.

### 1.2.25 Article 756/Article 1050

Article 756<sup>82</sup> deals with a scenario wherein the tort-feasor's individual contribution cannot be determined. As provided in article 1302 ABGB,<sup>83</sup> in such an instance, every tort-feasor is liable *in solidum*, whether he acted with *dolus* or *culpa*. Both the Austrian and the local provision mention the right of recourse which every tort-feasor has against the others, in the event that he is called to compensate for the entire damage caused. Notwithstanding the afore-mentioned liability *in solidum*, the victim may still request that all involved parties be joined in the suit and may do so by following the procedure laid down in article 979<sup>84</sup> of the COCP. Both articles 755 and 756 are advantageous to the victim, as rather than instituting an action against several defendants and seeking compensation from each and every one of them, the entire sum of damages may be claimed from one of the tort-

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<sup>80</sup> '1304. If, in a case of damage, there is also fault on the part of the person harmed, he has to bear the loss proportionately with the injurer, and, if the proportion cannot be determined, in equal shares.'

<sup>81</sup> 'V. Austr. 1302 e 1304 con serie differenze.'

<sup>82</sup> '756. Se la parte del danno che ciascuno ha cagionato, non può essere determinata, il danneggiato può domandare il risarcimento per intero, da qualunque di coloro che avessero avuto parte, non ostante che tutti o alcuni di essi non abbiano agito dolosamente, salvo al convenuto il regresso contro gli altri. In questo caso, però, il convenuto può domandare che siano tutt'i danneggianti chiamati in causa nel modo e per gli effetti stabiliti nell'articolo 979 delle Leggi di Organizzazione e Procedura Civile, e la Corte può dividere fra loro la somma necessaria pel risarcimento del danno, in porzioni eguali o ineguali, secondo le circostanze; salvo sempre al danneggiato il diritto di ripetere l'intero da ciascuno di essi, i quali verso di lui dovranno essere tutti condannati in solido.'

<sup>83</sup> '1302. In such a case, if the damage was caused negligently and the contributions to it can be determined, each participant is liable only for the part of the damage caused through his negligence. If, however, the damage was caused intentionally, or, if the contributions of each to the damage cannot be ascertained, all are liable for one, and one for all; the person having compensated the damage will, however, have a right of recourse against the others.'

<sup>84</sup> Presently article 962.

feasors and it will be then up to the latter to undergo the time-consuming task of being reimbursed from the remaining tort-feasors.

### **1.2.26 Article 757/Article 1051**

Article 757<sup>85</sup> deals with contributory negligence, imprudence or want of attention on the injured party's behalf. Its source is article 1304 ABGB, however it presents significant modifications introduced by Dingli. Article 757 goes on to provide that the injured party whose contribution cannot be ascertained and who has been involuntarily damaged by others, may only claim half of the total sum of damages from the tort-feasor. However if the tort-feasors or some of them have acted with *dolus*, it will be within the Court's discretionary powers to determine the quantum of damages to be sustained by the victim, based on the circumstances of the case.

The Austrian provision does not take into consideration the perpetrator's state of mind and irrespectively of whether he acted with *dolus* or *culpa*, provided the degree of his contribution can be ascertained, he must fork out compensation at par with his contribution to the damage. Hence within the Austrian provision, the determining criterion is the possibility or otherwise of stipulating the proportion of damage which can be attributed to the tort-feasor. If the latter has acted maliciously but his contribution cannot be quantified, he will only have to compensate half the damages caused. On the other hand in the local provision, once it is established that the tort-feasor acted maliciously, the quantum of damages to be paid by the latter will have to be determined by the Court, irrespectively of whether it was ascertainable beforehand or not. Dingli's modification thus favours the injured party.

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<sup>85</sup> '757. Ove il danneggiato stesso abbia colla sua imprudenza, negligenza, o disattenzione, contribuito o dato occasione al danno, e non si possa determinare in quale proporzione, egli non può domandare da altri che vi avessero involontariamente contribuito, se non una somma corrispondente alla metà del danno. Quando però gli altri o alcuni di essi abbiano agito dolosamente, sarà dalla Corte determinata, secondo le circostanze, la porzione del danno che il danneggiato debba sopportare.'

## *Amendments*

Ordinance III of 1938 substituted the first part of article 757, so that contribution by the victim in an undeterminable proportion and in a scenario wherein the tort-feasor had acted involuntary no longer automatically entitled the victim to claim half of the damages. The Court had to establish such proportion and award damages correspondingly, in the same manner it did when the tort-feasor had acted with *dolus*.

Ordinance XXXIX of 1939 introduced the provision as we know it nowadays. Nevertheless it did not bring about any substantial amendment as it merely merged the two paragraphs formerly constituting the provision into a single one. It reads as follows:

1051. If the party injured has by his imprudence, negligence or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly.

### **1.2.27 Article 1051A**

Article 1051A, which regulates civil redress sought in consequence of damages caused via corruption was initially introduced by Act XX of 2002, which laid down the contents of sub-articles 1 till 7. Act IV of 2013 introduced a further sub-article. The content of this provision will not be elaborated upon as it was obviously not invoked in any of the jurisprudence analysed and hence does not serve the scope of this thesis.

## **1.3 Concluding Remarks**

The anterior examination of past and present local provisions reveals that the torts and quasi-torts section in the 1868 Ordinance and the present CC is bisected into provisions

which manifest a *favor debitoris* approach and in others which benefit the victim or are neutral. Articles 737/1031, 744/1038, 745/1039, 746/1040, 749/1043, 750/1044, 755/1049 and 756/1050 may be deemed as favouring the injured. They deal with the general imputation of fault, the superior standard of care expected from professionals, the hotel-keeper's responsibility, the indirect responsibility of an animal-owner, the impossibility of raising the plea of intoxication, contributory behavior which also constitutes a tort and responsibility *in solidum*, respectively.

On the other hand the articles dealing with the direct responsibility of the property-owner<sup>86</sup>, with the limitation of indirect responsibility to stipulated cases in the law<sup>87</sup>, with compensation<sup>88</sup> and with the employer's<sup>89</sup>, property-owner's<sup>90</sup> and the minor's and insane's carer's<sup>91</sup> indirect responsibility; all exude a *favor debitoris* approach which at times coincides with the property-owner bias. The modifications made to such provisions have not impinged on their original bias.

In the following Chapters dealing intrinsically with domestic jurisprudence, those provisions which have been subjected to amendments, namely articles 745, 751, 752, 753 and 757 shall be indicated in this same numbering, as manifested in Dingli's Ordinance. Nevertheless, for the sake of clarity, the rest of the provisions, which have not been modified, will be indicated in their present enumeration. Whenever the Ordinance from which articles arise is not indicated, it is to be assumed that the relevant Ordinance is Ordinance VII of 1868. Articles comprised in other Ordinances will always be indicated in their original numbering and accompanied with reference to the particular Ordinance from which they derive.

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<sup>86</sup> 748/1042.

<sup>87</sup> Final part of article 738/1032.

<sup>88</sup> 751/1045, 752/1046, 753/1047.

<sup>89</sup> 743/1037.

<sup>90</sup> 747/1041.

<sup>91</sup> 740/1034.

# CHAPTER 2 – JURISPRUDENCE ON TORT LIABILITY AND DAMAGES

## 2.1 Introduction

In this Chapter the vitality of the general clause approach within standard cases of tortious liability will be investigated. To what extent were the Courts able to respond to new situations by extending the scope of articles 1030-1033? This Chapter will also focus on rules relating to damages both in themselves as well as in relation to liability. The legislator's conservative approach emerged very clearly in Chapter 1. Was this reflected in the Courts' deliberations and decisions? How broadly or narrowly did the Courts interpret their discretion in applying or otherwise the relevant tort provisions within Ordinance VII of 1868? The order, which the following sub-sections will assume, is not coincidental. Decisions touching on the cardinal rule that criminal and civil actions are disassociated and independent will be firstly analysed. The application of the abuse of rights provisions in different branches of responsibility will be subsequently illustrated. Ancillary principles such as foreseeability, the undertaking of work without the necessary fitness, contributory negligence and prescription will also be explored. Judgements bearing special focus on compensation for damages will take up a considerable part of this Chapter and will be sub-divided into those decisions awarding *damnum emergens* and *lucrum cessans*, those indemnifying moral damages and those in which payment of interest was ordered by way of damages. Tort decisions arising in the commercial sphere will likewise be dissected.

## 2.2 False and Calumnious Complaints

In the following judgements dealing with false and calumnious complaints, although the Court outlined the independence of civil and criminal actions by referring to article 6<sup>92</sup> of the Criminal Code, it still based itself on a provision contained in the latter Code<sup>93</sup> to determine whether the tort-feasor was responsible. In doing so, it manifested a *favor debitoris* bias, as it necessitated the persistence of bad faith and *animus nocendi* to hold the tort-feasor responsible, when under the general tort provisions, mere *culpa* would have sufficed for such purpose.

In *P.L. Salvatore Reynaud vs. Michele Zammit*<sup>94</sup> (1869) the defendant's false and calumnious complaint put forward against the plaintiff before the Executive Police, led to the plaintiff's three-day arrest. The Court outlined that for a civil action for damages resulting from an allegedly calumnious complaint to succeed, it had to be proved that the complaint satisfied the requisites laid down in article 93 of the Criminal Code<sup>95</sup>. The latter article rendered punishable with imprisonment whoever spontaneously and maliciously made a calumnious accusation before the competent Court by alleging false facts. The plaintiff's action was rejected as the Court held that proof of the defendant's malice or bad faith had not been brought forward.

*Alessandro Muscat vs. Salvatore Galea*<sup>96</sup> (1892) concerned a similar set of events to those arising in the previous judgement and led to the same conclusion by the Court. Vindictiveness<sup>97</sup> was not equated to *animus nocendi*, on the premise that the defendant had a reasonable motive to believe that the plaintiff was the crime's author. The Court

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<sup>92</sup> Still bears the same enumeration.

<sup>93</sup> Rather than the general tort provisions.

<sup>94</sup> KDQSM, Volum V A (1869-1871), p. 222-223.

<sup>95</sup> Article 101 of the present Criminal Code.

<sup>96</sup> KDQSM, Volum XIII B (1891-1893), p. 267-271.

<sup>97</sup> Defendant alleged that the plaintiff had made him lose five pounds sterling of work and it was solely because of such loss that he had instituted the complaint, four years after his initial suspicion that the plaintiff was its author.



argued that the plaintiff's acquittal did not infer the defendant's bad faith in making his complaint and thus could not *per se* render him civilly responsible.

## 2.3 Abuse of Rights

### 2.3.1 Alleged/Actual Damage to Neighbouring Tenement

The 1837 Sardinian CC comprised three provisions within the delicts and quasi-delicts section dealing with the *actio de danno temuto*<sup>98</sup>. These provisions were namely articles 1505, 1506 and 1507 and although they did not arise in the torts and quasi-torts section of the old Italian, French or Sicilian codes, they were reproduced in another section of our CC which deals with the rights of a molested possessor and are presently articles 538<sup>99</sup> and 539<sup>100</sup>. The content of the Sicilian provisions is mirrored in that of the local ones. Article 539 was in fact applied in *Salvatore Caruana vs. Vincenzo Pace*<sup>101</sup> (1889) wherein the plaintiff's request for the registration of a general hypothec, guaranteeing eventual indemnification of future damages was granted. The cause of the alleged future damage, were the roots of a tree situated in the defendant's land, which were allegedly depriving the plaintiff's adjacent land from its nourishing substances. The mere fact that these

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<sup>98</sup> Action instituted on the basis of feared damage.

<sup>99</sup> '538. (1) Where a person has reason to apprehend that in consequence of a new work undertaken by any other person either in such other person's own tenement or in the tenement of others, damage may be caused to an immovable thing possessed by him, he may bring an action demanding that such other person be restrained from continuing such new work, provided this shall not have as yet been completed and one year shall not have elapsed from the commencement thereof.

(2) The court, after summarily taking cognizance of the facts of the claim, may, according to circumstances, either restrain or allow the continuation of such new work, ordering such security as it may deem proper.

(3) Where the continuation of the work has been restrained, such security shall be in respect of the payment of any damages which may be caused by the suspension of the work, in case the opposition to the continuation thereof shall prove to be groundless.

(4) Where the continuation of the work has been allowed, such security shall be for the total or partial demolition of the work, and for the payment of the damages which the plaintiff may suffer, in case he obtains, notwithstanding that the work was allowed to be continued, a final and absolute judgment in his favour.'

<sup>100</sup> '539. Where any person has reasonable cause to apprehend any serious and impending damage to a tenement or other thing possessed by him, from any building, tree or other thing, he may bring an action demanding, according to circumstances, either that the necessary steps be taken to obviate the danger, or that the neighbour be ordered to give security for any damage the plaintiff may suffer therefrom.'

<sup>101</sup> KDQSM, Volum XII B (1888-1889), p. 335-338.

provisions were transposed into our legislation favours the property-owner, as thanks to them he is afforded a further remedy.

Diana Bajada, in her thesis revolving solely on abuse of rights, illustrated how the interpretation of article 832<sup>102</sup> of the Italian CC, which is the Italian provision dealing with abuse of rights, has conduced local courts to the utilisation of article 1030 in order to restrict the property-owners' rights, in the event that their exercise molests neighbours.<sup>103</sup> This approach was manifested in the landmark decision *Negte. Bugeja et vs Washington et*<sup>104</sup> (1896). The plaintiffs alleged that the operation of a machine within the defendants' premises, which was contiguous to the plaintiffs' property, was gravely inconveniencing them. The Court maintained that the property-owner had the right to freely utilise his property and to alter it in any way he deemed convenient, even if by doing so he would be depriving his neighbour from some advantage, provided he did not subject the latter to some grave inconvenience. The *buon vicinato* rule was defined as that inconvenience, which does not exceed the limit of tolerance to be borne by the victim. The difficulty in tolerating the inconvenience would however render it unjust and permit the victim to demand its termination and claim damages. The Court illustrated how intense and continuous noise, tremors and smoke ejected from a machine are tantamount to a serious inconvenience. In formulating its deliberations the Court made reference to Pacifici Mazzoni, Giorgi, Demolombe and French rulings. The Court paid regard to the depreciation, which the plaintiffs' premises would suffer if they had to continue being subjected to the alleged inconvenience, since their respective rent would dwindle in value. The defendant was subsequently inhibited from operating his machine.

Similarly in *Fenech noe vs. Gatt noe et*<sup>105</sup> (1902) the Court elucidated that the restriction of the property-owner's rights vis-à-vis the discharge of rain-water, is founded on the

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<sup>102</sup> 'Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico.'

<sup>103</sup> Diana Bajada, 'Abuse of Rights in Maltese Jurisprudence: a civil law concept within a mixed jurisdiction' (LL.D, 2013) 29.

<sup>104</sup> KDQSM, Volum XV (1895-1896), p. 571.

<sup>105</sup> P.L. Constantino Fenech noe vs. Camillo Gatt noe et, KDQSM, Volum XVIII B (1901-1903) Pt. II, p. 164-171.

inviolable nature of property-ownership and is also applicable to property destined for public use.

Nonetheless, in the other judgements traced in the period under review, the abuse of rights provision was invoked to restrict and not to extend liability and the Courts were quite reluctant in ordering the payment of damages between neighbours. Although *Gauci et vs. Caruana*<sup>106</sup> (1913) succeeded the Bugeja Washington judgement and dealt with a similar set of events, it was not decided analogously to the latter ruling. The facts revolved around the inconvenience created by an ice factory, managed by the defendant, to the houses in the vicinity, owned by the plaintiffs and leased to third parties. The termination of the factory's operation was being requested, together with indemnification for the damages sustained till said termination. In the present judgement, antithetically to *Bugeja vs. Washington*, the FHCC did not treat the premise's future depreciation, resulting from the difficulty in attracting tenants, as a valid reason for upholding the plaintiff's claims. Although reference to *Bugeja vs. Washington* was made by the CoA itself, the plaintiff's requests were still dismissed, as the inconvenience was not classified as being in excess of the *buon vicinato* level of tolerance. The CoA reached said conclusion, on the premise that the inconvenience posed no health threat and did not present a real impediment to residing in the premises. This deliberation is in manifest disparity with the Bugeja Washington decision, which clarified that even in the absence of health threats, an intolerable inconvenience may still arise, provided it triggers an undesirable effect.<sup>107</sup>

In *Agius et vs. Marmarà et*<sup>108</sup> (1879) the plaintiff instituted an action against his neighbour for using a blowhole<sup>109</sup> in his premises, which had been created following the Executive Police's orders. The plaintiff's action was dismissed, as the blowhole had been

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<sup>106</sup> Salvatore e Don Michele Gauci et vs. Saverio Caruana, KDQSM, Volum XXII A (1913-1915) Pt. I, p. 19-23.

<sup>107</sup> 'Che, per dirsi tale non è necessario che la molestia cagioni danno alla salute; è sufficiente che produca una sensazione sgradevole...'

<sup>108</sup> Canonico Tesoriere Don Tommaso Agius ed altri vs. Sacerdote Don Luigi Marmarà ed altri, KDQSM, Volum VIII D (1877-1879), p. 726-727.

<sup>109</sup> 'sfiatatojo'.

subsequently tapped by the Police, thus eliminating any of its harmful effects. The defendant was not even charged with his share of the legal expenses, on the premise that the Police's order was equivalent to an irresistible force which the defendant could not be held liable for and which had to be sustained by the person who suffered the damage, in this case being the plaintiff. Conversely, in *Bugeja et vs Washington et* the Court described the licence which the Police had granted the defendant authorising him to operate his machine, as being nothing more than an administrative act and as not having the effect of prejudicing third party rights to claim damages.

In *Antonio Micallef vs. Salvatore Debono*<sup>110</sup> (1910) rather than adopting the same approach manifested in *Caruana vs. Pace* and ordering the defendant to guarantee a sum representing possible future indemnification, the Court dismissed the plaintiff's action as the damages claimed were deemed to be hypothetical and forthcoming. The plaintiff was holding his neighbour liable for non-observance of the required distance from a common wall and causing damages when conducting excavations in his tenement. The Court merely reserved the plaintiff the right to claim damages once they became actual.

### **2.3.2 Government as the Tort-Feasor**

Whilst the abuse of rights doctrine was consistently employed by the local judiciary to regulate claims for damages between neighbouring parties, in *Camilleri vs. Gatt C.M.G noe*<sup>111</sup> (1902) it was used in order to affirm the government's responsibility in compensating a private individual and hence favoured the injured in doing so. In this case, it was established that the Government was bound to compensate damages occasioned to private property as a result of alterations to public land. With reference to Professor Gabba's criticism to an Italian judgement, the government's obligation to indemnify such damage was described as being founded on the right to property and the principle of equity, as a private citizen should not be burdened for the sake of public interest, without

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<sup>110</sup> KDQSM, Volum XXI D (1910-1912) Pt. II, p. 181-184.

<sup>111</sup> Francesco Camilleri vs. Lorenzo Gatt, C.M.G. noe, KDQSM, Volum XVIII B (1901-1903) Pt. II, p. 171-175.

being compensated. The Court proceeded to outline the uselessness of invoking the abuse of rights provision to exonerate the Government from responsibility. Gabba amplified on the triviality of said disposition, describing it as too easy and convenient a defence. He resumed to opine that since the law's aim is that of discouraging the occurrence of damage to others and certain acts instantly appear to be tortious without the need to refer to the law, it would be manifestly unjust to permit the law's consenting of such acts. The plaintiff's claims were subsequently upheld.

The Courts nowadays are no longer willing to hold the State liable in such scenarios. As a matter of fact in a relatively recent judgement in the names *Fiorino d'Oro vs. Direttur tat-Toroq*<sup>112</sup> the Court held that as a general rule the government is not responsible for damages occasioned to private parties whilst executing public works. However this rule could be derogated from, if the execution of works could have been carried out in a less injurious way.

On the other hand in *Laudour et vs. Vella noe*<sup>113</sup> (1888), the Court endorsed various arguments to exclude the government's responsibility. The plaintiffs were requesting that the Government represented by the Customs Collector, indemnify them for the damages they suffered pursuant to the theft of their merchandise, which they had deposited in a government-owned warehouse. The first premise on which liability was excluded, was the requisite of foreseeability, which the government had not fallen short of. The theft, which had deprived the plaintiff from his belongings, was equated to *force majeure*. The Court hence interpreted *force majeure* very loosely and did not limit it to a force of nature but extended its application to human acts. The government's role was also equated to that of a gratuitous depositary, who can only be held liable if he fails to exercise the diligence he would have exercised in the conservation of his own goods, which diligence is less rigorous than that of a *bonus paterfamilias*. The deposit in question was deemed to be gratuitous, as the plaintiff had opted to deposit his merchandise, to save on customs duty.

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<sup>112</sup> CoA, 17 February 2006.

<sup>113</sup> Charles Laudour et vs. Onle. Francesco Vella noe, KDQSM, Volum XII A (1888-1889), p. 8-12.

On the other hand in *Fenech noe vs. Gatt noe et*<sup>114</sup> (1902), which also concerned damages to merchandise stored in a warehouse, which plaintiffs had leased from the Government, *force majeure* was interpreted very restrictively. The merchandise was allegedly damaged by water, which had entered the warehouse after it was discharged from the neighbouring premises. It resulted that the neighbouring tenement was owned by the War Department, which raised the plea of *force majeure*, claiming that the downpour of rain was exceptionally violent on that occasion. The Court rejected said plea and held that an unusual event or an act of nature do not amount to irresistible force. Moreover, it was further amplified that such defence will have less possibility of success, if a prior positive or negative act of man was involved, as in such scenario the damage cannot be classified as having been inevitable and it would have been directly or indirectly caused through man's *dolus* or *culpa*. In its application of article 751 to the facts of the case, the Court made reference to Giorgi's teachings who equated real damages to the estimated value of the goods, in their condition at the time of the damage, without taking into consideration the injured's remote expectations of making a profit from them. Since the goods were merchandise, their real value was reflected in their current price. The Court also compensated the plaintiff for the increment in the tobacco's value, in the interim period between its acquisition by the plaintiff and the date of the incident in question.

## 2.4 Foreseeability

As outlined in a relatively recent judgement, entitled *Biagio Muscat vs. Anthony Falzon et*<sup>115</sup> a tortious act is considered to result from imprudence or lack of diligence if it can be shown that the damage suffered was foreseeable to the tort-feasor. Said foreseeability must be based on reasonable probabilities and not remote or unlikely possibilities. The mandatory co-existence of *culpa* and foreseeability derives from Carrara's illustration of

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<sup>114</sup> *Fenech* (n 107).

<sup>115</sup> KDQSM, Volum XLVII (2003) Pt. I, p. 258.

*culpa* as 'the voluntary omission of diligence in assessing the possible and foreseeable consequences of one's own act.'<sup>116</sup> Decio's line of thought coincides with Carrara's, as he stipulates that "...la colpa sta precisamente nel non avere con diligenza preveduto quello che umanamente si doveva prevedere (L. 12 ff. de Reg. Juris.)"<sup>117</sup>

*Cesare Garcin vs. Francesco Borg et*<sup>118</sup> (1905) testifies that the foreseeability requisite was embraced by our Courts since the early twentieth century. In this case the plaintiff alleged that the defendants had caused the death of his mare when they chased the latter, inducing it to jump into the sea. The Court elucidated that it was difficult for the defendants to foresee that the mare would have jumped in the sea to escape from them, as said animals were by their nature adverse to swimming and also because the previous day, the same mare had steered clear of the sea, even though it was being chased. The Court proceeded to illustrate further the principle of foreseeability and deliberated that only the immediate consequences of an act render its damages indemnifiable. It outlined that the law does not attach responsibility to the damages occasioned by the remote effects of an act, as the cause of the damage must be distinguished from its occurrence.<sup>119</sup> The Court noted that although the mare's illness may have been present previously to its contact with sea-water, the latter incident may have aggravated its illness. Nevertheless such repercussion could not be attributed to the defendants' fault, as they could have never foreseen the mare's reaction. This decision was confirmed on appeal.

The domestic Court's approach once again favours the tort-feasor and has been upheld by our Courts till the present day. It contrasts starkly with the United States "eggshell plaintiff

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<sup>116</sup> K. Camilleri Xuereb, 'Negligence Defined, Negligence Refined – Part I' (2007) *The Journal of the Malta Bar Association* 8.

<sup>117</sup> Fault arises when one does not diligently foresee something, which should have been humanly possible to foresee. - *Carlo Borg vs. Ernesto Seychell*, KDQSM, Volum XXI B (1910-1912) Pt. I, p. 409-415.

<sup>118</sup> KDQSM, Volum XIX B (1904-1906) Pt. II, p. 96-98.

<sup>119</sup> '...poiché la causa del danno risarcibile si deve ricercare nei fatti immediati senza andare in cerca di quelli che avessero potuto concorrere remotamente allo stesso, dai quali la legge non induce responsabilità di sorta, dovendosi all'uopo, bene distinguere la causa dalla data occasione del danno;'

rule”.<sup>120</sup> Such rule dates back to the nineteenth century and holds the tort-feasor fully responsible for all injuries manifested in the plaintiff as a result of the former’s negligence, irrespectively of whether such injuries were totally unforeseeable at the time of the tortious act or whether the victim suffered from a condition which aggravated the injuries sustained. A repercussion of such rule is that the tort-feasor may have to compensate a victim for a very serious illness, even though his negligence was moderate. In *Bartolone v. Jeckovich*<sup>121</sup> the defendant’s negligence led to a car accident in which plaintiff was involved. The plaintiff, who previously to the accident suffered from schizophrenia initially manifested minor injuries consisting of whiplash, however said injuries by time aggravated the already existing psychological condition and plaintiff’s life was completely overturned. The defendant was held fully liable.

## 2.5 Article 1038 – Undertaking Of Work Without The Necessary Fitness

*Tommaso Tonna vs. Giuseppe Mangion ed altri*<sup>122</sup> (1903) and *Micallef vs. Sammut*<sup>123</sup> (1895) both dealt with contractors’ and architects’ responsibility for their construction mistakes and both resorted to tort provisions to permit liability *in solidum* to arise, which liability was not envisaged in the specific provision regulating the defendants’ responsibility, being article 1398<sup>124</sup>. The first decision concerned the defective construction of a wall, erected by the defendants and which subsequently collapsed. The second judgement regarded the badly executed construction and alteration of the

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<sup>120</sup> Steve P. Calandrillo and Dustin E. Buehler, ‘Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule’ (2013) 74(3) OSLJ  
<[http://moritzlaw.osu.edu/students/groups/oslj/files/2013/05/08\\_Calandrillo-and-Buehler\\_Publisher.pdf](http://moritzlaw.osu.edu/students/groups/oslj/files/2013/05/08_Calandrillo-and-Buehler_Publisher.pdf)> accessed 10 January 2014.

<sup>121</sup> Angelo J. Bartolone v Lynne A. L. Jeckovich et al 103 A.D. 2d 632 (1984)  
< <http://www.casebriefs.com/blog/law/torts/torts-keyed-to-prosser/proximate-or-legal-cause/bartolone-v-jeckovich/> > accessed 10 January 2014.

<sup>122</sup> KDQSM, Volum XVIII B (1901-1903) Pt. II, p. 341-344.

<sup>123</sup> KDQSM, Volum XV A (1895-1896), p. 134-136.

<sup>124</sup> Article 1638 of the present Maltese CC, which has never been subject to any amendments.



plaintiff's premises by the defendants, which necessitated their demolition in order to prevent their collapse.

In the first decision, the general tort dispositions were also employed to combat the defendants' plea that they could not be held liable, since the type of building in question did not fall within the scope of article 1398. The FHCC observed that even if the defendants' argument were to be accepted, they would still be held liable under article 1038. It further amplified that in the event that the defendants insisted that they did in fact possess the necessary expertise, their acts or omissions would still fall within the sphere of application of article 1033. Said provision would have identical repercussions to those triggered by article 1038, namely the obligation to indemnify the plaintiff for the damages he sustained. The Court described these articles as 'leggi patrie'.

In both decisions the injured parties were the property-owners and employers. Hence, the *pro debitoris* and property-owner bias did not coincide, as these decisions benefited the property-owner who was the creditor.

In Dingli's commentary to Ordinance VII of 1868<sup>125</sup>, he highlights the generic interpretation afforded to delicts and quasi-delicts by local jurisprudence, as observed in the previous judgements and points out that Roman law, which is the source of such provisions, did not grant them such an interpretation and only applied them to determinate situations.

## **2.6 Contributory Negligence**

In the subsequent five judgements dealing with scenarios of negligence or imprudence on the victim's end, the local Courts adopted varying approaches which can be grouped under three different sub-headings:

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<sup>125</sup> Sir Adrian Dingli, Ordinanza VII del 1868 - Delle Cose, 59.

- (a) Adherence to article 757;
- (b) Observance of old French jurisprudence and
- (c) Conformity to the Common law principle of foreseeability within the context of contributory negligence.

### 2.6.1 Adherence to article 757

Arguably article 757 is unfavourable to the victim, as its terms might render him responsible for contributing to his own damage, even if only *culpa laevissima* can be imputed to him. Conversely, the French approach would only take into account the victim's contribution, if fault amounting to *culpa laevis* can be traced in it. Nonetheless it must be kept in mind that whilst under article 757, the plaintiff's contribution will lead to a reduction in the amount of compensation which at times may amount to a small percentage; under the traditional Common law and old French approach, contributory negligence is a complete defence, such that its presence would completely exclude the tort-feasor's liability. Hence, whilst there is more possibility for the plaintiff's contribution to be classified as such if article 757 is applied, the old French and Common law approach will lead to more drastic consequences.

The previous observation was clearly manifested in *Michele Borg vs. Giorgio Axisa*<sup>126</sup> (1894). *Culpa* was identified in the plaintiff as he had contributed to the damage through his imprudence, negligence and lack of attention. Yet, since article 757 was invoked, the Court held that such contribution could not exonerate the defendant from his responsibility, which could be equivalent to not more than half of the resulting damages.<sup>127</sup> The action concerned the collision between two horses, both of which were carrying a cart and were ridden by the contending parties. The plaintiff was claiming damages sustained to his horse and cart. The court-appointed experts highlighted the fact

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<sup>126</sup> KDQSM, Volum XIV B (1894) Pt. I, p. 182-184.

<sup>127</sup> Since the plaintiff's degree of contribution could not be determined and none of the parties had acted maliciously.

that had the plaintiff entrusted his horse's health with a veterinary rather than with a blacksmith, it would most probably still be usable. Consequently the Court held both parties responsible and condemned the defendant to the payment of half the damages.

*Gatto et vs. Gingell et*<sup>128</sup> (1916) also reflects the Court's faithfulness to article 757's terms. The plaintiffs claimed that the grave damages which emerged in the premises they had leased to the defendants were attributable to the latter's fault. The FHCC ruled that both parties were responsible, since although the defendants' alterations had occasioned the damage, said damage would not have resulted in the first place, if the construction defects in the wall were not present. The CoA confirmed the FHCC's decision and the defendants were only condemned to pay half of the damages.

### **2.6.2 Observance of old French jurisprudence**

As already observed, within French jurisprudence, article 1382 of the French CC, which is the general tort provision, is utilised as the basis of apportioning damages in the event of the injured's contributory negligence. It follows that, if the damage is occasioned exclusively by the victim's fault, he is not entitled to compensation from anyone else.<sup>129</sup>

Mazeaud illustrates how the ancient French approach, in line with Roman and pre-1945 Common law, completely excluded the tort-feasor's liability, even if the victim's fault was not the sole cause of the damage.<sup>130</sup> Nevertheless such rigor was subsequently mitigated and alternatively to excluding responsibility, it started to be apportioned between the parties.<sup>131</sup>

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<sup>128</sup> Conte Dottor Antonio Caruana *Gatto ed altri vs. William Gingell ed altri*, KDQSM, Volum XXIII B (1916-1918) Pt. I, p. 288-298.

<sup>129</sup> Eucharist Bajada, 'Contributory Negligence in Tort law: A Comparative Review in the Light of the Process of European Harmonisation' (LL.D, 2011) 42.

<sup>130</sup> '...du moment que la victime a participé par sa faute à la réalisation du dommage, elle ne peut rien réclamer, même si sa faute n'a été que l'une des causes du dommage. Notre ancien droit paraît avoir admis ce principe, qui passa dans les pays anglo-saxons, où il fut longtemps appliqué avec rigueur.'

<sup>131</sup> H. Mazeaud and others, *Leçons de Droit Civil*, Vol. 1, 9<sup>th</sup> Ed (Montchrestien 1998) 680.

In *Scicluna vs. Gilford*<sup>132</sup> (1894) the local Courts adhered to the ancient French approach as contributory negligence was applied by the Court to dismiss the plaintiff's action. Rather than relying on article 757, the Court resorted to Laurent's teachings, who opined that whoever endures damage through fault of his own, cannot be considered as having suffered an injury and no matter the degree of his responsibility, he has no action of damages and interest. The plaintiff requested damages from the defendant for having allegedly caused his dog's death, which occurred three months after it ate poisoned meat, situated in a room in the defendant's house. The Court noted that in the case at hand, the plaintiff was negligent and at fault for not having impeded his dog from entering the defendant's premises. The defendant's fault was excluded on the basis of the abuse of rights provision, since he had not contravened any legal disposition and had made use of his own rights when placing meat in a room within his own house.

The same consideration was made in *Paolo Busuttil vs. Clement La Primaudaye noe et*<sup>133</sup> wherein it was held that when the negligence envisaged in article 1033 is attributable to the victim, the latter cannot inculcate others and expect any damages.

### **2.6.3 Conformity to the Common law principle of foreseeability within the context of contributory negligence**

In England, until 1945<sup>134</sup>, the principle of contributory negligence 'acted as a complete defence'<sup>135</sup> and hence totally exonerated the defendant from any liability.

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<sup>132</sup> Emmanuele Scicluna vs. Edmondo W. Gilford, KDQSM, Volum XIV B (1894) Pt. I, p. 157-158.

<sup>133</sup> KDQSM, Volum XIV B (1894), p. 94-103.

<sup>134</sup> The year in which the Law Reform (Contributory Negligence) Act was promulgated, which provided that in cases of contributory negligence on the victim's end, the latter would still be entitled to a portion of damages which 'the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:' - <<http://www.legislation.gov.uk/ukpga/Geo6/8-9/28/section/1>> accessed 10 May 2014.

<sup>135</sup> W.V. Horton Rogers, 'Contributory Negligence under English law' in U. Magnus and M. Martín-Casals (eds), *Unification of Tort law: Contributory Negligence* (Kluwer Law International 2004).

In *Tom. Downs vs. Vincenzo Sammut pro et noe et*<sup>136</sup> (1907) the plaintiff was requesting payment for damages allegedly occasioned to him during the execution of a warrant of ejection. The FHCC explained the foreseeability principle within the context of contributory negligence and held that the foreseeability of the possibility of damage, which although it was avoidable the victim chose not to avoid, could in certain cases completely exclude his right to damages. It was elucidated that the plaintiff could not only have foreseen the complained damage, but as a professional he should have foreseen said damage. *Ergo* he could have prevented it by clearing up the premises and transporting all the movables himself, so as to avoid the warrant's forced execution. The plaintiff's action was hence dismissed.

The CoA confirmed the decision. Addison<sup>137</sup>'s stand on contributory negligence was reproduced in the following citation:

....Whenever the immediate and proximate cause of the damage is the plaintiff's own supineness or carelessness, he has no ground of action against the defendant, though the primary and original cause of damage is the defendant's wrongful act.

Both Courts assumed a *favor debitoris* approach, as had they applied article 757 they would have awarded the plaintiff half of the damages, since the contribution's proportion was not established and no malice was alleged.

In *Jones v Livox Quarries*<sup>138</sup> the Court held that 'Contributory negligence does not depend on a duty of care, it depends on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself...'<sup>139</sup>. Not only has this principle been embedded within our jurisprudence since the early twentieth century, but it has been retained till the present day, with

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<sup>136</sup> KDQSM, Volum XX A (1907-1909) Pt. I, p. 41-45.

<sup>137</sup> The author of 'A Treatise on the Law of Torts'.

<sup>138</sup> *Jones v Livox Quarries* [1952] 2 QB 608, [1952] 1 TLR 1377, [1952] EWCA Civ 2.

<sup>139</sup> <<http://www.bailii.org/ew/cases/EWCA/Civ/1952/2.html>> accessed 15 April 2014.

judgements such as *Caroline Debono vs. Is-Sindku u Segretarju tal-Kunsill Lokali Nadur*<sup>140</sup> utilising it as the crux of their deliberations. The adoption of such principle indirectly favours the victim, as his contributory negligence and imprudence must satisfy a further requisite, they must have been committed with foreseeability of the incumbent damage, meaning that they must amount to *culpa levis* to be classified as such and not to *culpa levissima*. However, Common law's pre-1945 approach towards contributory negligence in general, is undoubtedly detrimental to the victim since as opined by Addison, notwithstanding the fact that the tort-feasor's act was reprehensible and that it was the initial cause of the damage, if the complained damage is the 'immediate and proximate' repercussion of the victim's negligence, the latter can claim no damages whatsoever.

If the cases relating to contributory negligence are ambivalent, insofar as some favour the debtor and others the creditor in the way contributory negligence was interpreted, the same could be said in relation to prescription.

## 2.7 Article 1917 - Prescription

The invocation of article 1917<sup>141</sup> within a decision, signified that the action proposed was being classified as dealing with delicts and quasi-delicts and its interpretation shed light on the Court's *favor debitoris* approach or its inverse. The two-year prescriptive term envisaged in such provision, is shorter than that prescribed for identical actions in other legislations from which Dingli sought inspiration. Austria, Italy and France lay down a three-year, five-year and ten-year<sup>142</sup> term respectively. The selection of a comparatively shorter prescriptive period indisputably favours the tort-feasor.

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<sup>140</sup> CoA, 2 July 2010

<sup>141</sup> This article was previously article 53 of Ordinance III of 1860 and is nowadays article 2153 of the CC. Its content has never been modified and provides that 'Actions for damages not arising from a criminal offence are barred by the lapse of two years.'

<sup>142</sup> '2270-1. Actions for tort liability are barred after ten years from the manifestation of the injury or of its aggravation. Where the injury is caused by torture and acts of cruelty, assault or sexual aggressions committed against a minor, the action in tort liability is barred after twenty years.'

The classification of damage as arising in a contractual rather than an extra-contractual context proved to be more beneficial to the creditor, owing to the longer prescriptive period afforded to the former actions. In *Camilleri et vs. Dr Frendo*<sup>143</sup> (1889) the CoA expressed its discord with the FHCC and ruled that the plaintiff's action derived from a contract of mandate and consequently was not regulated by article 1917, which covered extra-contractual damages. The Court commented on the repugnant nature of prescription and on how its extensive interpretation was condemnable by both positive law as well as rationality. Applying article 1917 to any indemnity claim was held to amount to such extensive interpretation. An identical conclusion was reached in *Calafato noe vs. Muscat noe*<sup>144</sup> (1895) and *Giuseppe Attard noe vs. Alfredo Zerafa noe*<sup>145</sup> (1906).

Conversely, in the subsequent decisions the Court classified the actions before it as being subject to article 1917 by establishing the acts' non-criminality. In *Portelli vs. Dendrinis et noe*<sup>146</sup> (1912) it did so even though the action proposed by the plaintiff was evidently one exercised pursuant to the non-fulfillment of a contract, as was specified by the Court itself<sup>147</sup>. The FHCC established the act's non-criminality by observing that no fraudulent intent could be attributed to the defendants and consequently their negligence could not give rise to a criminal offence. The CoA re-confirmed the previous decision, however it did not re-visit the considerations on prescription but reached its conclusion on issues relating to the merits of the case.

Similarly in *Calleja vs. Falzon*<sup>148</sup> (1918) the CoA overturned the FHCC's decision by applying article 1917 after ascertaining the non-criminality of the complained act. The plaintiff requested that the defendant reimbursed him for the loss of merchandise he suffered,

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<sup>143</sup> Giuseppa vedova Camilleri et vs. Dr Francesco Frendo, KDQSM, Volum XII A (1888-1889), p. 144-145.

<sup>144</sup> KDQSM, Volum XV A (1895-1896), p. 44-45.

<sup>145</sup> KDQSM, Volum XIX B (1904-1906) Pt. III, p. 106-107.

<sup>146</sup> Salvatore Portelli vs. Demetrio Dendrinis et noe, KDQSM, Volum XXI A (1910-1912) Pt. I, p. 153-156.

<sup>147</sup> 'Fosse dichiarato essere i convenuti responsabili dei danni cagionati all'attore in conseguenza della mancata esecuzione del detto contratto di compra-vendita..'

<sup>148</sup> Francesco Calleja vs. Luigi Falzon, KDQSM, Volum XXIII D (1916-1918) Pt. I, p. 952-955.

owing to the latter's negligence. The CoA ascertained said non-criminality by claiming that the complained act did not amount to misappropriation.

*Scicluna noe vs. K.C.B. noe et*<sup>149</sup> (1900) demonstrates a clear bias in favour of the tortfeasor as the silence of the law with regards to the moment from which the two-year prescriptive term had to start to elapse, was interpreted adversely to the victim's interest and antithetically to the foreign provision from which article 1917 derived. The FHCC traced the origin of article 1917 to article 1489 of the ABGB. The Court went as far as quoting the Austrian provision which till the present day in its first part disposes that, an action for reimbursement of damages is extinguished after three years **from the moment in which the injured becomes aware of the damage**. The Court ruled that the prescriptive term should be deemed to start running **from the day in which the tortious act occurred**, as general principles dictated so. Moreover it was held that ignorance of one's right does not feature as one of the reasons for the suspension of prescription. The CoA confirmed the FHCC's judgement and added that it would not be lawful for a judge to remedy the defect in the law, by making use of the old proverb 'non valenti agere, non currit praescriptio'<sup>150</sup> and substituting the law with an arbitrary and misunderstood concept of equity. The prescriptive plea was hence endorsed by both Courts.

Having explored the subsistence or otherwise of bias in relation to liability, the next section will conduct a similar exercise in relation to damages.

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<sup>149</sup> *Banchiere Scicluna noe vs. Ammiraglio Sir Tracey, K.C.B. noe et*, KDQSM, Volum XVII B (1899-1900) Pt. I, p. 151-158.

<sup>150</sup> Prescription cannot run against a person who cannot act.



## 2.8 Damages

### 2.8.1 Article 751 and 752<sup>151</sup> – *Damnum Emergens* and *Lucrum Cessans*

In Dingli's commentary to the 1868 Ordinance, the term 'perdita reale' contained within article 751 was defined as a loss sustained to the victim's patrimony at the time of the damage. Loss of earnings were also described in terms of the victim's patrimony and were deemed to constitute the lack of earnings, which the victim's patrimony would have been augmented with, had the tortious action not occurred.<sup>152</sup> Inversely, patrimonial damages are defined by reference to their constituents being *damnum emergens* and *lucrum cessans* 'Il danno patrimoniale (e il suo risarcimento) è individuabile nei danni inferti alla sfera patrimoniale del singolo soggetto ed è costituito dal danno emergente (danno attuale) e lucro cessante (danni future, mancato guadagno, perdita di chance).'<sup>153</sup>

In *Lorenzo Felici vs. Giuseppe Pulis*<sup>154</sup> (1904) the Court ascertained that the defendant had maliciously injured the plaintiff's body rendering him inept to work for a number of weeks. The Court classified pending fees owed by the plaintiff to his doctors as *damnum emergens*, as the sum owed was still a debt burdening the plaintiff. Although the plaintiff did not bring solid proof of his lost earnings, which he alleged amounted to the sum of ten pounds sterling, the Court felt that they should still be awarded, since the damage had been maliciously caused, provided they did not exceed the sum of hundred pound sterling. The Court paid regard to the plaintiff's job as well as his yearly income, it asserted that the plaintiff was a well-established estate and loan agent, who led a comfortable life from a financial perspective. The Court quantified *lucrum cessans* at the sum of eight pound sterling and awarded other heads of damages, namely the doctors' fees and expenses disbursed for the plaintiff's diet.

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<sup>151</sup> Article 1045 of the present MCC.

<sup>152</sup> 64 *Dingli* (n 126).

<sup>153</sup> Patrimonial damage (and its compensation) is identifiable in the damages inflicted to the individual's patrimonial sphere and consists of *damnum emergens* (current damage) and *lucrum cessans* (future damage, loss of earnings). - <[http://www.risarcimentodanno.it/nuova\\_pagina\\_9.htm](http://www.risarcimentodanno.it/nuova_pagina_9.htm)> accessed 1 May 2014.

<sup>154</sup> KDQSM, Volum XIX A (1904-1906) Pt. II, p. 41-44.

It is manifest that the compensation ordered by the Court did not comprise loss of future earnings, but merely indemnified the injured with the wages he was deprived of, for the weeks subsequent to the incident. Hence although the Court established the tort-feasor's *dolus* and even made reference to article 752, it failed to apply it, as only damages contemplated under article 751 were awarded. This judgement consequently disfavoured the injured.

The decision entitled *Caporale Albert Sadler vs. Magg. Giuseppe Muscat noe ed altri*<sup>155</sup> (1907) concerned the grievous injury sustained to the plaintiff's cranium when he violently hit his head while sitting on the roof of a bus, when it was passing under a bridge. The plaintiff claimed that he had not been adequately alerted by the defendant, whose responsibility was to do so prior to arrival next to such bridge. Moreover it was also the responsibility of the defendant company's director to instruct its employees to provide such adequate alerts or take any other necessary steps to avoid similar adverse scenarios, by supervising his employees with the diligence of a *bonus paterfamilias*. The plaintiff was hence alleging *culpa in vigilando* on the employer's behalf.

The FHCC pointed out that the damages enlisted in article 751, differ from those mentioned in article 752. Whilst the former damages are attributable to a person who occasioned them without malice and hence acted involuntarily and without *animus nocendi* but through his negligence, imprudence or lack of attention, the latter damages pertain to tort-feasors who gave rise to the damage maliciously *ergo* voluntarily and with *animus nocendi*. It is pertinent to outline, that the provisions in question limit themselves to the term 'senza dolo' and 'dolosamente' respectively, and it is the Court who in this judgement took upon the role of presuming that the legislator intended to restrict article 752 to tort-feasors who had acted with the intent to cause harm and not merely to tort-feasors who acted maliciously. Thus the Court in its interpretation, further limited the

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<sup>155</sup> KDQSM, Volum XX B (1907-1909) Pt II, p. 334-336.

possibility of victims being afforded loss of future earnings, which was already restricted by the legislation itself, as besides *dolus, animus nocendi* had to result too. Although the Court seems to equate these two intents, Mazeaud clearly points out that they are diverse, as there is delictual fault where the author of the damage knew that by so acting he would cause harm, even if he did not have the specific intention to harm the victim when acting.<sup>156</sup>

The Court pursuantly categorised the plaintiff's claim as falling within the remits of article 751, as at no point during proceedings was there any allegation of *dolo*. The FHCC commented on the strict terminology from which article 751 was formed. It was outlined that bodily harm occasioned culpably does not in itself give rise to a claim for a determinate sum of damages, but merely constitutes the cause of entitlement to pecuniary damage. In simplified terms, the Court held that the plaintiff failed to indicate the specific heads of damages he was requesting and to quantify financially the damages claimed. Consequently it rejected the plaintiff's claims, as it held that they were unsustainable. One may argue that the Court was here applying the Common law approach of *ubi remedium ibi ius*, whereby rights are deduced from remedies and not vice versa, as upheld in Civil law.

The Court maintained that permanent disability sustained by the injured person, was regulated by article 752. This is truly interesting, as the law at the time did not link *lucrum cessans* to permanent disability and only started doing so post 1938-amendments. A further foreshadowing of the 1938 amendments arose when the Court equated the term real to 'attuale'<sup>157</sup>. As illustrated in Chapter 1, the term 'real loss' forming part of article 751 was subsequently amended to 'actual loss' pursuant to the 1938 amendments. In the author's opinion such modification hindered the victim, as the term 'actual' confines the compensable damage to that committed in a particular moment in time, unlike the term 'real'.

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<sup>156</sup> 452 Mazeaud (n 131).

<sup>157</sup> '...e così la perdita reale, cioè attuale e vera,....'.

This decision is an example of the Court's adherence to rigid formalism which although noted by itself, it failed to distance itself from and undoubtedly favoured the tort-feasor and employer in doing so.

### 2.8.2 Moral Damages

Although legislation at the time and even at present, contained a *pro debitoris* approach with regards to the exclusion of moral damages, the local judiciary in the forthcoming judgements, sought innovative ways of surpassing such an impediment and still awarded such damages to the injured.

The plaintiff, a hotel-owner, in *Michele Cini vs. Ernest Townsley et*<sup>158</sup> (1908) requested that the defendant, who allegedly voiced injurious and defamatory words in his respect, indemnified him for the moral damages sustained to his reputation and for the patrimonial damages, resulting from the defendant's discrediting of the plaintiff's hotel. The FHCC dismissed the plaintiff's action and remarked that domestic legislation did not contemplate moral damages, as evidenced by articles 1033, 751 and 752. This decision was surprisingly overturned by the CoA, which held that the applicable law to such proceedings was the French CC, namely article 1382, as the defendant's defamatory act had occurred in Tunisia's territorial waters. The Court retained that French doctrine and jurisprudence, as opined by Aubry and Rau and Laurent, contemplated moral damages, which were to be indemnified through monetary means. Since in the case at hand, the persons with whom the defendant had discredited the hotel, still took lodgings in it, the consequences triggered by the tortious act were minimal and consequently moral damages awarded were minimal too.<sup>159</sup>

As Claude Micallef-Grimaud elucidates, the CoA's considerations on French law signify the local Court's acceptance of moral damages, as envisaged in a law which resembles local

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<sup>158</sup> KDQSM, Volum XX B (1907-1909) Pt. II, p. 458-459.

<sup>159</sup> They amounted to five shillings.

tort legislation and includes a provision which is congruous to its domestic counter-part, being article 1031. The Maltese Courts hence regarded the French general tort provision, which is reproduced in article 1031 of the Maltese CC, to contemplate moral damages. Micallef-Grimaud's conclusive inference was that the singling out of the local provisions regulating responsibility, would conduce to moral damages being compensable under Maltese law as article 1031 does not specify what kind of damage must subsist. Nevertheless the dispositions dealing with compensation, rule out the possibility of claiming damages on the sole basis of moral harm unless the latter is accompanied by tangible damage or it is expressly provided for in legislation other than the CC. Hence, had the Austrian-inspired provisions dealing with compensation been excluded from our Code, compensation for moral damage might have been considered by the domestic judiciary since the early 20<sup>th</sup> century.<sup>160</sup> Professor V. Caruana Galizia also opined that *Cini vs. Townsley* admitted the existence of moral damages, as founded on the offence of defamation contemplated in Roman law.

The previously mentioned *pro debitoris* approach embedded within legislation stems from Dingli's diversification of sources, which led to a contradiction being created between provisions contained in the same section. The generality of article 1031, which derives its influence from article 1382 of the old Code Napoléon, was curbed by the application of articles 751 and 752, which are founded on Austrian provisions.

In *Balbi vs. Mallia Pulverenti*<sup>161</sup> (1915) the plaintiff claimed that he had suffered moral damages from a letter written by the defendant and sent to an English company, wherein the company's Maltese agent was criticised. The Court took a novel and debatable approach in the interpretation of moral damages. It primarily quoted article 1031 and tied this provision to article 831<sup>162</sup>, which lays down liability for damages, in the event that a

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<sup>160</sup> Claude Micallef-Grimaud, 'Article 1045 of the MCC: Is Compensation for Moral Damage Compatible Therewith?' (2011) 4(2) Journal of Civil Law Studies, 498-501.

<sup>161</sup> Negte. Roberto Balbi vs. Negte. Giuseppe Mallia Pulverenti, KDQSM, Volum XXII C (1913-1915) Pt. II, p. 357-364.

<sup>162</sup> Article 1125 of the present MCC, which has never been amended.

person falls short of fulfilling an obligation, by stating that the indemnification of damage is a type of obligation, which must be fulfilled in compliance with the latter provision.<sup>163</sup> The Court justified such interrelation by the fact that the general and indistinct terminology employed in article 831, contemplated not solely obligations arising from contracts, but even obligations ensuing from quasi-contracts, delicts and quasi-delicts. In a nutshell, the Court considered that the obligation which if violated gives rise to damage, is the obligation to pay damages itself.

The task of determining the *locus delicti commissi*<sup>164</sup> was pursuantly undertaken by the Court which held that the law applicable to a delict is that pertaining to the country wherein it was committed, not prepared, which in this case was England, the country where the letter had been received. English law's stance on moral damages was reported through a citation from *Stephen's Commentaries on the Laws of England* consisting of the following:

An action for damages will in general lie, whatever a right has been invaded or in other words, an injury committed – although no damage shall have been actually sustained, it being material to the establishment and preservation of the right itself, that its invasion shall not pass with impunity.

This extract, signifying the Common law approach, was compared by the Court to local legislation and in compliance with Micallef-Grimaud's observation, the Court illustrated that whilst the Maltese CC did not expressly exclude moral damages, however conversely to other codes, it specifically laid down the manner in which damages had to be quantified. The defendant was ordered to forward to the plaintiff ten pounds sterling or alternatively to apologise to the same.

Although in this decision, the Court once again awarded moral damages through the application of foreign law, it still tackled a scenario in which Maltese law was solely

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<sup>163</sup> 'Che dal reato commesso nasce quindi una vera obbligazione alla rifusione del danno dato, e chiunque ha contrattato una obbligazione è tenuto ad adempierla secondo la legge (articolo 831 Ord. citata);'.

<sup>164</sup> Place of the delict's commission.

applicable and in doing so declared that a provision, which specifically dealt with contracted obligations, was applicable to delicts and quasi-delicts.

### 2.8.3 Damages granted under the Press Act

Ordinance XIV of 1889<sup>165</sup> analogously to Proclamation No. VI of 1834<sup>166</sup>, which shall be discussed in Chapter 3, granted to the injured an additional action for moral damages, but did not abrogate his pre-existing right to claim real damages on the basis of the delict and quasi-delict provisions. Such Ordinance contemplates one of the few instances wherein moral damages are awarded by Maltese Courts, even till this present day. The relevant provision affording such damages was article 21<sup>167</sup>, which provided that in cases of *iniuria*, whose object was that of offending the honour and reputation of an individual, the competent Court may award to the victim a sum not exceeding five hundred pound sterling, besides the real damages suffered which would be due on the basis of the applicable law at the time.

*Musù vs. Minasi*<sup>168</sup> (1899) related to *iniuria* allegedly suffered by the plaintiff, a member of the Executive Council, with the publication of an article, of which he was the subject. Nonetheless both the FHCC and the CoA rejected the plaintiff's demands, as albeit the fact that the published article manifestly criticised the plaintiff's exercise of his professional duties, his honour and reputation had not been tainted in doing so.

*Merewether C.M.G. vs. Sharpe et*<sup>169</sup> (1904) also revolved around the defamation of the occupant of a public office. The plaintiff was the Lieutenant Governor and he alleged that the article written and published by the defendants had offended his honour and

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<sup>165</sup> Currently, Chapter 248 of the Laws of Malta which is the Press Act.

<sup>166</sup> Currently Chapter 5 of the Laws of Malta.

<sup>167</sup> At present article 28, which has been amended to envisage a higher sum of damages to be awarded, being that of eleven thousand and six hundred and forty-six euro and eighty-seven cents (€11,646.87).

<sup>168</sup> KDQSM, Volum XVII A (1899-1900) Pt. I, p. 28-31.

<sup>169</sup> On. Edward M. Merewether C.M.G. vs. Hamilton Sharpe ed altri, KDQSM, Volum XIX A (1904-1906) Pt. I, p. 14-20.

reputation and was hence claiming compensation for the *iniuria* suffered. The FHCC awarded the plaintiff £200 for moral damages, for which payment, the defendants were condemned *in solidum*. On appeal, the CoA reconfirmed the previous decision and in its final considerations, applied article 1049, regulating liability *in solidum*, to moral damages contemplated in the Ordinance in question. It held that that said provision is applicable to any illicit act, irrespective of its criminal nature and to any kind of damages, which are compensable by the law, whether material or moral. The logic behind such conclusion was that solidarity emanates from the nature of the tortious act, which is juridically indivisible, as occasioned by a number of persons, with each of them being individually responsible for the damage in the same degree.

#### **2.8.4 Article 753<sup>170</sup> - Interests**

Interest is undeniably the best form of indemnification for persons who have been neglected from using their own money. It stands out from the other forms of compensation, as its award is not dependant on the plaintiff's success in proving the real damage he sustained.

As Thierry J. Sénéchal and John Y. Gotanda illustrate, there are three motivators for interest to be awarded as damages for being deprived of the use of one's own money, whether said money is owed as a debt or as compensation for damages. The first being that it is the ideal compensation to attain the victim's *restitutio in integrum*, as it indemnifies him for having been deprived of generating profits from such money. The second motivator is to impede the tort-feasor from unjustly enriching himself by holding onto the victim's money and utilising it to his benefit. The final reason is that the accrual of interest to the sum of damages to be paid by the tort-feasor discourages lengthy

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<sup>170</sup> Article 1047 of the present Maltese Civil Code.



proceedings, as well as delay in reimbursing damages, as it is in the tort-feasor's interest to forward the damages as soon as possible.<sup>171</sup>

The legislator's establishment of a fixed rate of interest to be awarded as damages whenever a person was dispossessed of his own money is in line with Domat's teachings. Said jurist maintained that it is difficult to prove the real loss suffered by a creditor, as there is no standard manner in which persons make use of their own money and consequently the loss occasioned to each creditor would differ. Hence it was deemed preferable to standardise the damages to be awarded in such cases. The endless investment alternatives a creditor would have had access to, had he been in possession of his money, prevent the debtor from pleading that no damages were sustained.<sup>172</sup> This argument was perfectly illustrated by Giorgi, 'Sfidiamo qualunque debitore a provare che se il creditore avesse in tempo debito avuto il suo denaro non avrebbe potuto impiegarlo al frutto legale.'<sup>173</sup>

The Courts' *pro debitoris* approach was analysed on the basis of three factors, which emerged from the subsequent rulings:

- (a) the instant from which interest was deemed to have started accruing;
- (b) the rate at which interest was charged and
- (c) compensation of additional damages in certain circumstances.

*Briffa vs. Schembri*<sup>174</sup> (1910) dealt with a warrant, which was abusively and illegally issued against the plaintiff, as a result of which a sum of money appertaining to him was deposited in Court. The warrant's abusive nature was ascertained by the Court as it resulted that it had been issued in execution of a judgement obtained against a number of

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<sup>171</sup> Thierry J. Sénéchal and John Y. Gotanda, 'Interest as Damages' (2009) 47(3) Columbia Journal of Transnational Law, 495-496 <<http://ssrn.com/abstract=1116384>> accessed 25 April 2014.

<sup>172</sup> Marie-Elise Agius, 'Deprivation of the use of one's money: A Comparative and Jurisprudential Perspective on Article 1047 of the Civil Code' (LL.D, 2011), p. 41.

<sup>173</sup> *ibid* p. 43.

<sup>174</sup> Francesco Saverio Briffa vs. Andreanna moglie di Gregorio Schembri, dallo stesso assistita, KDQSM, Volum XXI C (1910-1912) Pt. II, p. 43-48.

persons, amongst whom the plaintiff did not feature. The Court described the additional damages, which could be conceded besides interest, as severe condemnation<sup>175</sup> which the plaintiff was not entitled to, since he had failed to prove their existence. Albeit that the defendant's act, was described by the Court as being illicit and illegal, the Court applied the five per cent interest rate which had to accrue on the sum deposited, from the date of such deposit till its effective withdrawal by the plaintiff.

The previous judgement is an impeccable example of interests being awarded as sole compensation for damages resulting from pecuniary harm. The Court's protection of the tort-feasor's patrimony is evident in its description of additional damages which may be awarded. The instant from which interests were considered to have started to elapse, however favours the victim, as it was held to correspond to the instant when the plaintiff was effectively deprived of his money<sup>176</sup> and not from the moment when the latter initiated proceedings. In the author's opinion this is the right approach, as in the same manner a judgement within the period under examination held that the two-year prescriptive term laid down in article 1917, is to start running from the occurrence of the damage, interests by way of compensation should start elapsing from the same time.

*Mariano Azzopardi vs. Lorenzo Mifsud et*<sup>177</sup> (1877) constituted a civil action, pursued after the plaintiff was robbed of a sum of money and both the defendants Azzopardi and Mifsud were convicted by the Criminal Court for such theft and for receiving a part of the stolen sum, respectively. The Court imposed interest at the rate of six per cent per annum, since the defendant had acted maliciously, which interest had to accrue on the stolen sum, from the date of the theft. Although the Court confirmed the tort-feasor's *dolus*, it did not mention the possibility of ordering payment of other damages suffered, such as loss of income. Nevertheless this could have stemmed from the fact that the plaintiff did not request the latter kind of damages.

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<sup>175</sup> '...severo temperamento...'.  
<sup>176</sup> When it was deposited in Court.  
<sup>177</sup> KDQSM, Volum VIII B (1877-1879), p. 331-333.

In *Magro vs. Agius*<sup>178</sup> (1920), which shall be discussed in Chapter 3, the plaintiff was compensated with interests at five per cent on the sum of which she was deprived as a result of her lawyer's fault in selecting an incompetent legal procurator. However the date from which such interests were ordered to start accruing disfavours the creditor, as it was the date of the judgement and not the date in which the defendant's tortious act arose.

## 2.9 The Commercial Sphere

Finally the author shall consider a number of cases of what could be called 'commercial torts'. The Courts' rulings in the following decisions, dealing with trademarks and merchandise, appear to be uniform, with an evident bias in favour of the creditor and property-owner.

### 2.9.1 Trademark

Jurisprudence within the period under review dealing with abuses of trademarks and brand names, although intrinsically linked to abuse of rights, did not rely on article 1030, but nevertheless still applied provisions which similarly, gave rise to wide liability.<sup>179</sup> The application of *jus commune* rules led the Court to rule in favour of the injured plaintiff.

The plaintiffs' claims were upheld in all of the following judgements. Plaintiffs besides being the creditors were also classified by the Court as being the property-owners. Such classification arose in *Attard noe et vs. Pace noe et*<sup>180</sup> (1893) which concerned damages requested for the unlawful utilisation of the plaintiff's trademark, as exhibited in water bottles. The Court illustrated that both a trade name as well as a brand name are types of properties and consequently their owner has at his disposition, all the rights and defences

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<sup>178</sup> Caterina Magro vs. Don Santo Agius, KDQSM, Volum XXIV B (1919-1920), p. 348-358.

<sup>179</sup> 79-80 *Bajada* (n 105).

<sup>180</sup> Salvatore Attard noe et vs. Margherita moglie di Carmelo Pace noe et, KDQSM, Volum XIII C (1891-1894), p. 453-454.

appertaining to property ownership, including the right to claim damages. The Court's *favor creditoris* approach was further evidenced by the fact that the plaintiffs' claim for damages was upheld, even though they failed to precisely ascertain the damages they suffered.

In *Roberto Bonello noe vs. Carmelo Cauchi et*<sup>181</sup> (1909), not even the plaintiff's failure to observe the requisite formalities for registering his trademark led to the dismissal of his action, as the CoA held that the defendant was still responsible for unfair competition, which was repressed by *jus commune* embodied in article 1033. The case concerned the importation and trading of butter and margarine, packaged in parcels similar to those over which the plaintiff company had allegedly registered a trademark. Both the FHCC and the CoA held one of the defendants responsible for damages. Even though the trademark may not have been successfully registered, the general public still recognised it as distinctively representing the plaintiff's products and consequently by almost reproducing it, the defendant had attempted to attract the plaintiff company's clients.

Similarly, in *Cassar vs. Seracino et*<sup>182</sup> (1910) although the abusive reproduction of photographs, had taken place prior to the plaintiff's registration of his exclusivity rights, the Court still held the defendants liable *in solidum* for damages. The Court clarified that the law regulating registration could never be construed as having legitimised unfair competition or the illicit appropriation of others' work, but it had merely added new sanctions to those already imposed by *jus commune*. Hence, whilst said sanctions were fully dependant on registration, the remedies and actions arising from *jus commune* were left unprejudiced and could still be exercised regardless of the registration process.

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<sup>181</sup> KDQSM, Volum XX A (1907-1909) Pt. I, p. 233-238.

<sup>182</sup> Salvatore Lorenzo Cassar vs. Antonio Seracino e Carmelo Fedele, KDQSM, Volum XXI E (1910-1912) Pt. III, p. 29-31.

## 2.9.2 Damages to Merchandise

The scope of contract at the time was construed narrowly, with no acknowledgement of implied contractual duties. Consequently, as reflected in the following decisions, the Courts infiltrated tort rules within a contractual context, to render the tort-feasor responsible.

In *Teofani vs. Russo*<sup>183</sup> (1883) the CoA held the Captain responsible for a delay in the arrival of merchandise, even though the contract in place did not stipulate that he had to travel from the first to the second port as soon as possible. The Court held that the defendant was bound to reimburse the plaintiff with the market price reduction, which his merchandise suffered as a result of the delay.

Analogously in *Nicosia noe vs. Lowe noe et*<sup>184</sup> (1916) although the bill of lading stipulated the following ‘steamer not accountable for loss, damage or pilferage of the goods capable of being covered by insurance’, the Court held that such stipulation did not exclude the possibility of instituting an action against the person who caused the damage. The plaintiff alleged that the beer he was importing was damaged while stored on the vessel on which it was being transported and while it was being unloaded. With regards to the latter damage, the FHCC ruled that it had arisen due to the negligence of the persons employed for the goods’ unloading and placement on the pontoon. Since the defendant had engaged the workers entrusted with the unloading process, he was liable for the damage. The Court did not go into the issue of *culpa in eligendo* or *in vigilando*. With regards to the other damages, the Court invoked the application of the first part of article 757, as the plaintiff had contributed to said damage.<sup>185</sup> This decision was re-confirmed on appeal.

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<sup>183</sup> *Negoziante Atanasio Teofani vs. Capitan Nicola Russo*, KDQSM, Volum X B (1883-1888), p. 332-335.

<sup>184</sup> *Negoziante Paolo Nicosia noe vs. Edward Lowe noe et*, KDQSM, Volum XXIII C (1916-1918iN) Pt. I, p. 746-753.

<sup>185</sup> He had not employed a Customs official to work after office hours and his employees had not adopted the necessary preventive measures.

The plaintiff in *Ellul noe vs. Von Koen*<sup>186</sup> (1891) had suffered damage since the merchandise he was importing from Italy was confiscated by Customs upon its arrival in Malta and notwithstanding the plaintiff's application to the Government, its confiscation was not reversed. He sued the ship-owner for his negligence, which led, he claimed, to the merchandise being confiscated. The Court clarified that whatever the responsibilities existing between the Captain and the agent, the ship-owner is liable in regard to the owner of the merchandise, for all the failings of the Captain and agent, vis-à-vis the vessel and its consignment of goods. The Court affirmed that the goods' confiscation was a repercussion of the Captain and agent's negligence, which led to the plaintiff being deprived of making use of his own goods. Hence the defendant was ordered to forward the plaintiff the value of such confiscated goods.

## 2.10 Conclusion

The previously illustrated judgements led to the conclusion that the Courts, with the exception of damages arising in the commercial sphere, had the tendency to favour the debtor. Future loss of earnings were never awarded, even in scenarios of serious bodily harm and allegedly calumnious complaints were scrutinised from a purely Criminal law perspective, necessitating *animus nocendi* for the victim's compensation. Principles such as foreseeability were invoked, rendering it more arduous to establish the tort-feasor's responsibility. In contributory negligence, albeit the existence of a specific provision regulating the matter, the Courts chose to follow the rigorous approaches adopted in old foreign jurisprudence. Even the legislator's establishment of a higher rate of interest for damages caused maliciously, did not impede the Court from applying the lower interest rate in scenarios of *dolus*. Similarly, the silence of the law was also interpreted beneficially for the tort-feasor, as it was held that the victim could not benefit from a suspension of prescription, due to his unawareness of the tortious act.

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<sup>186</sup> Negte. Giuseppe Ellul noe vs. Negte. Arturo Von Koen, KDQSM, Volum XIII A (1891), p. 3-6.

At the same time there were other cases which proved more difficult to classify as favouring the debtor or otherwise. The abuse of rights provision could for instance be utilised by either side. Article 1038 was employed to favour the creditor and in some cases contributory negligence was based on article 757, to favour the victim. In all the cases reviewed, articles 1031 till 1033 were never interpreted to restrict liability based on *culpa*, on the grounds that a breach of a legally imposed duty could not be shown. This shows that whatever the intention of the legislator was, with respect to these provisions, the Courts tended to interpret tort law broadly and in line with the spirit of the general clause.

# CHAPTER 3 – JURISPRUDENCE ON CONCURRENT AND INDIRECT LIABILITY

The aim of this chapter is to explore two prominent scenarios, wherein tort law rules were invoked in the period under review namely:

1. where they were summoned between contracting parties and
2. where they were applied in cases of indirect liability, which at times also involved a contractual relationship.

The rationale of dealing with these two scenarios together is that they provide two interesting focus points where one can test the extent to which the Courts' decisions appear to reveal a *pro debitoris* or property-owner bias.

## 3.1 Tort Rules Invoked In A Contractual Context

In a string of decisions delivered in the period under review, our Courts applied tort rules in the context of a contract, appearing to cumulate liability in tort and contract. In a chapter of the *International Encyclopedia of Comparative Law*, the distinguished comparative lawyer, Tony Weir, indicates why such a practice could be significant for the purposes of this thesis. In this chapter, he compares the different jurisprudential treatments to scenarios giving rise to both contractual as well as tortious liability. Weir opines that the fainter the difference between contract and tort within a given legal system, the less of a problem it finds in dealing with concurrent liabilities.<sup>187</sup>

The rule of *non cumul* is embraced by the French judiciary, so that the possibility of suing in both contract and tort is inexistent, as 'the victim must not have the best of both

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<sup>187</sup> Tony Weir, 'Complex Liabilities' in Andre Tunc (ed), *International Encyclopedia of Comparative law* (Vol XI, Pt 1, Ch 12, Mohr 1983) 25.



worlds'<sup>188</sup>. Weir conceives that the motivation behind France's rejection of concurrent liabilities is embedded in the structure of the country's legislation. He points out that article 1382 of the French CC is extremely broad in scope and thus tort liability may be triggered by a wide range of circumstances. Hence, if contracting parties were to be permitted to resort to tort in all cases, this would have unfavourable effects on justice itself as all contractual violations would be held to constitute a delict on the basis of article 1382.

In Common law and Germany, such a conundrum has not arisen, as the scope of tort law is much narrower. In Common law, the provisions dealing with tortious responsibility do not contemplate financial damage arising from a negligent contractual breach. In Germany, the central tort provision is not as wide as the French corresponding provision. Hence, although concurrent liability is permitted, where damage is caused between contracting parties; individuals will in most cases resort to the provisions regulating contractual violations, conversely to what would occur in France if the rule of *non cumul* were to be repealed.<sup>189</sup>

### **3.1.2 Sponsali**

This particular sphere of jurisprudence has already been scrutinised by Sylvianne Zahra. Nevertheless, owing to the recurrence of such judgements within the period under review, making them by far one of the most popular actions to be instituted at the time, the author deemed it necessary to dedicate a section to them.

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<sup>188</sup> *ibid* 27.

<sup>189</sup> *ibid* 28-29.

### 3.1.2.1 Historical Context of these Claims

From its outset, Roman law envisaged an action for damages pursuant to a rescinded betrothal.<sup>190</sup> The current Chapter 5 of the Laws of Malta<sup>191</sup> is the sole domestic legislation entirely regulating betrothal and was originally enacted by the British authorities as Proclamation No. VI of 1834.<sup>192</sup>

Prior to the promulgation of such Proclamation, Canon law was the only legislation regulating betrothal in Malta. Under said law, the engaged couple were coerced to fulfill the promise of marriage they had undertaken, in default of which spiritual penalties would ensue, including the prohibition of future marriage.<sup>193</sup> The 1834 Proclamation's goals were to assign to the Civil Courts, exclusive competence in hearing and determining actions arising from breach of *sponsali*<sup>194</sup> and to safeguard the parties' liberality to contract marriage.<sup>195</sup>

The novelty brought about by the 1834 Proclamation, was that besides *damnum emergens*, the injured party would also be entitled to moral damages as a result of the *iniuria* suffered.<sup>196</sup> *Iniuria* has been defined as the injury sustained to 'one's name and reputation, and, in particular, their manifestations in intangible but fundamental social values such as honour and chastity'.<sup>197</sup>

The betrothal's materialisation into a private writing or contract was not contemplated in the afore-mentioned Proclamation or within Civil law before 1913. Hence, there was no

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<sup>190</sup> Sylvianne Zahra, 'Damages for Breach of Promise of Marriage – A Jurisprudential Review' (LL.D, 2012) 21-22.

<sup>191</sup> Entitled 'Promises of Marriage Law'.

<sup>192</sup> 24 *Zahra* (n 190).

<sup>193</sup> *ibid* 38.

<sup>194</sup> betrothal

<sup>195</sup> 39-40 *Zahra* (n 190).

<sup>196</sup> *ibid* 39.

<sup>197</sup> Abel Henty Jones Greenidge, *Infamia: Its Place in Roman and Private Law*, (Aalen: Scientia Verlag, 1977).

impediment, for parties who verbally contracted *sponsali*, to claim damages.<sup>198</sup> This situation was modified by virtue of the *ne temere* decree, issued in 1907, which necessitated that betrothals assumed the written form and be signed by the contracting parties, the pastor, two witnesses and ‘the local Ordinary’.<sup>199</sup>

The formality envisaged in the *ne temere* decree was subsequently implemented to Civil law by virtue of Ordinance XIV of 1913. Pursuant to said Ordinance, Chapter 5 could only be resorted to, if the betrothal assumed the form of a public deed or private writing.<sup>200</sup> Nevertheless a deserted spouse, whose promise of marriage failed to abide by the required formality, was not precluded from claiming material damages on the basis of the remedies pertinent to tortious and contract infringement actions.<sup>201</sup> Such course of action was adopted by the plaintiff in *Rosaria Dalli vs. George Atkins*<sup>202</sup> (1920) wherein she did not claim moral damages but demanded material damages resulting from the defendant’s illicit behavior. The FHCC upheld the plaintiff’s action, noting that the defendant could not exempt himself from responsibility solely because the promise of marriage had not assumed the requisite written form. The CoA reached the same conclusions. It fully comprehended the plaintiff’s action and noted that it was not tantamount to an action deriving from an unjust breach of *sponsali*, which required a valid promise of marriage, but it was an action for damages, the basis of which was an unjust act or omission and damages suffered in consequence to it.<sup>203</sup> The Court’s understanding of the delictual nature of such action was further consolidated by its awarding of interest, to be accrued to the sum of the material damages afforded. As Sylvienne Zahra points out<sup>204</sup>, this judgement marked a shift in the courts’ approach as following its pronouncement the

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<sup>198</sup> 53 *Zahra* (n 190).

<sup>199</sup> <<https://www.ewtn.com/library/CURIA/NETEMERE.HTM>> accessed on 29 April 2014.

<sup>200</sup> As enunciated in article 1233(1)(g) of the CC.

<sup>201</sup> 55 *Zahra* (n 190).

<sup>202</sup> KDQSM, Volum XXIV B (1919-1920), p. 291-295.

<sup>203</sup> ‘...ha proposto invece l’azione di danni i cui elementi sono un atto od un’omissione ingiusta ed un danno sofferto in conseguenza di siffatto atto od omissione.’

<sup>204</sup> 67 *Zahra* (n 190).

Courts started adopting its interpretation and hence started compensating for negative interest in a manner that the injured was relocated to his *status quo ante*.

### 3.1.2.2 The Courts' tendency to blend tort and contract

Whilst on the one hand claims dealing with unjust breach of promise of marriage would appear to be clearly contractual in nature, they can also be seen as 'substantially the result of a quasi-delict'<sup>205</sup> since they envisage a neglected partner alleging to have sustained damage in consequence of *dolus* or *culpa* arising in the fiancé who broke off the engagement. Saving some exceptions, the domestic judiciary in the period under review adopted a uniform approach towards these claims and resolved them by invoking an amalgamation of contractual and tortious rules.<sup>206</sup>

In *Maria Montesini vs. Raffaele Vassallo*<sup>207</sup> (1894) moral damages were afforded to the plaintiff, in the event that the defendant failed to contract marriage within the stipulated four-month time-frame. However material damages claimed were not granted, as the Court noted that such consisted in the expenses disbursed by the plaintiff's parents for her dowry and the items constituting said dowry were not of the depreciating kind and would hence still be utilisable in the future. The application of the *restitutio in integrum* principle led to the debtor's limitation in compensation.

In *Rosario Camenzuli vs. Giuseppe Farrugia noe*<sup>208</sup> (1905) whilst on the one hand, breach of *sponsali* was described by the plaintiff as a refusal to abide by an obligation, one of the judicial demands featured interest at a rate of five per cent, to accrue on moral damages due till effective payment. The latter demand was envisaged in article 753, as a form of damages arising from deprivation of one's own money and hence is a remedy sought

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<sup>205</sup> *ibid* 48.

<sup>206</sup> *ibid* 51.

<sup>207</sup> KDQSM, Vol XIV B (1894), p. 109-110.

<sup>208</sup> KDQSM, Volum XIX B (1904-1906) Pt. II, p. 102-103.

subsequently to a tortious action. The author finds it hard to grasp the notion of interest accruing in favour of moral damages. The Court in fact only awarded a sum for the *iniuria* suffered to which no interests were accrued.

In *Gerada vs. Chetcuti*<sup>209</sup> (1894) the plaintiff was requesting the return of all the gifts he had given the defendant in contemplation of their marriage, together with a sum to be determined by the Court in view of the *iniuria* he allegedly suffered. As pointed out by the Court itself, the plaintiff was not demanding a sum for material damages and neither did it result that any of said damages arose. The Court awarded moral damages and ordered the defendant to return the afore-mentioned gifts. Consequently, it may be inferred that had the plaintiff classified his deprivation from such gifts as a form of material damage, the Court would not have ordered their return or compensation for their loss. The plaintiff's failure to rely on tortious provisions hence proved to be beneficial.

In *Muscat vs. Dingli*<sup>210</sup> (1896) it was the deserted fiancée herself who prior to instituting the present action, called upon the deserting partner to contract marriage with her within a stipulated time-frame. Nevertheless the Court described said time-frame as being unreasonable and held that the plaintiff was not entitled to claim damages since the defendant had eventually proposed marriage but the plaintiff refused said offer. The Court outlined the equivalency between *iniuria* and moral damages, as it pointed out that any moral damage which the plaintiff might have been subjected to pursuant to said breach, was subsequently neutralised by the defendant's offer to contract marriage.<sup>211</sup> Once again in this judgement, the application of tort law in ascertaining the existence of any moral damage, disfavoured the plaintiff.

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<sup>209</sup> Francesco Gerada vs. Elvira figlia celibe del Dr. Giuseppe Chetcuti, KDQSM, Volum XIV A (1894), p. 24-25.

<sup>210</sup> KDQSM, Volum XV C (1895-1896), p. 633-634.

<sup>211</sup> '...-risarcimento per altro, che l'attrice ha moralmente ottenuto colla offerta suddetta del convenuto;'.

Although *quasi*-identical facts arose in *Ancellieri vs. Micallef*<sup>212</sup> (1898), the opposite conclusion was reached by the Court. The defendant's counter-argument hinged on the sole fact that he was ready to contract marriage with the plaintiff. Nevertheless the Court concluded that the defendant's belated change of mind and repentance could in no way impede the plaintiff from exercising the present action.

In *Bartolo vs. Mugliett no.*<sup>213</sup> (1892) the plaintiff, who by virtue of a previous judgement had been condemned to pay moral damages in the event of his failure to contract marriage with the defendant, claimed that the latter had renounced to the effects of the decision pronounced in her favour, as she had contracted a new promise of marriage with someone else. The Court dismissed the plaintiff's action and outlined that the deserting fiancé could not derive any advantage, if the deserted spouse decided to marry someone else and could only liberate himself from payment of moral damages, by marrying the defendant.

In the judgement bearing the names *Giuseppa Gristi vs. Enrico Cassingena*<sup>214</sup> (1892) the CoA concurred with the defendant in that he was justified in breaching the promise of marriage, as the plaintiff suffered from seriously flawed eyesight which the defendant was not aware of, prior to contracting the *sponsali* and which flaw was of a permanent nature and necessitated the use of glasses which was frowned upon by society. Conversely, the FHCC had condemned the defendant to compensate for moral damages suffered, which damages had been aggravated by the defendant's plea concerning the plaintiff's defective eyesight. The FHCC's application of tortious principles favoured the victim, whilst the CoA's contractual interpretation disfavoured her.

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<sup>212</sup> KDQSM, Volum XVI B (1897-1898) Pt. II, p. 294-295.

<sup>213</sup> KDQSM, Volum XIII A (1891), p. 103-104.

<sup>214</sup> KDQSM, Volum XIII B (1891-1893), p. 287-288.

The Court in *Simiana vs. Fenech et*<sup>215</sup> (1900), *Camilleri vs. Dr Frendo*<sup>216</sup> and *Calafato vs. Muscat*<sup>217</sup> in applying the prescriptive period pertinent to contractual breaches, upheld the plaintiffs' claims and awarded moral damages.

### 3.1.2.3 Exceptions to this tendency

#### 3.1.2.3.1 Judgements wherein the Court classified the action as purely tortious

The FHCC in *Ludgarda Borg vs. Carmelo Fenech*<sup>218</sup> (1894) upheld the defendant's plea of prescription as embodied in article 1917 of the 1868 Ordinance and dismissed the plaintiff's action. The Court categorised the plaintiff's action as essentially a claim for damages and interest, deriving from the *dolus* or *culpa* existing on the injurer's behalf and consequently as an action based on quasi-tort as regulated in articles 1031 and 1033 or alternatively as per Laurent's terms, as a 'delitto civile'.

*Giuseppe Pace vs. Salvatore Mizzi*<sup>219</sup> (1916) both in First Instance and in the Appeal stage awarded the plaintiff a substantial amount of material damages, which were even augmented in the latter stage. Moral damages afforded by the FHCC were doubled by the CoA, owing to the fact that the engagement had been unjustly cancelled on the day of the marriage celebration. In lodging her appeal, the plaintiff demanded further heads of damages, including compensation for loss of work whilst assembling her dowry, which she chose to retain. Such claim is unequivocally tortious in nature and is specifically envisaged in article 751. The CoA upheld all of the appellant's requests, with the exception of the sum reclaimed for loss of work, which had been implicitly renounced to by the same appellant when she chose to retain her dowry, the price of which comprised the cost of its manufacture.

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<sup>215</sup> KDQSM, Volum XVII B (1899-1900), p. 180-181.

<sup>216</sup> KDQSM, Volum XII (1889), p. 144.

<sup>217</sup> KDQSM, Volum XV A (1895-1896), p. 44-45.

<sup>218</sup> KDQSM, Volum XIV B (1894), p. 112-113.

<sup>219</sup> KDQSM, Volum XXIII B (1916-1918) Pt .I, p. 299-304.

The parents' threats and requests for financial aid in *Saveria Mifsud vs. Angelo Bugeja*<sup>220</sup> (1907) were held not to feature amongst the justified reasons to breach a promise of marriage, as the plaintiff could not be held responsible for the actions of her parents. The choice of terminology infers the Court's categorisation of the present action as being tortious, since rather than stating that the parents were not a party to the contract arising between the contending parties, the Court chose to base its deliberation on the absence of responsibility, which is the basis of any tortious claim. This case presents one of the highest sums of moral damages a defendant was condemned to pay in claims of this nature, with said damages being liquidated at seventy pounds sterling. Such a hefty sum was the result of one of the defendant's pleas, which accused the plaintiff of having extra-marital affairs with third parties, which plea further aggravated the *iniuria* already occasioned to the plaintiff. Said increment in the sum to be initially awarded further evidences the tortious nature of such claim, as the damages to be indemnified were solely dependant on the harm the plaintiff was subjected to.

In *Girolamo Schembri vs. Carmela Farrugia*<sup>221</sup> (1891) the invocation of the general tort rule led the Court to rule that said action fell within the competence of the Civil Courts. This decision concerned an action resulting from the issuing of a warrant *de non nubendo*<sup>222</sup>. The plaintiff had originally claimed before the Inferior Courts, the legal expenses incurred by him in proceedings he had to institute before the Diocesan Curia, in order to revoke the afore-mentioned warrant, which the defendant had issued against his marriage. The CoA, contrastingly to the FHCC, noted that the plaintiff did have a civil remedy for reclaiming the unjust damage occasioned to him, which remedy was reflected in the renowned principle forming part of the *lex Aquilia*: 'Damni occasionem proestans, damnum fecisse censetur'<sup>223</sup>. *Gauci vs. Agius*<sup>224</sup> (1898) and *Michelina Mangion et vs. Raffaele Farrugia*<sup>225</sup>

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<sup>220</sup> KDQSM, Volum XX B (1907-1909) Pt .II, p. 357-360.

<sup>221</sup> KDQSM, Volum XIII A (1891), p. 68-69.

<sup>222</sup> Warrant impeding the contracting of marriage.

<sup>223</sup> Everyone is responsible for the damage occasioned through his fault.

<sup>224</sup> KDQSM, Volum XVI B (1897-1898) Pt. II, p. 237-238.

<sup>225</sup> KDQSM, Volum XX A (1907-1909) Pt. I, p. 23-24.



(1907) envisaged identical deliberations, however referred to article 1031 rather than an extract from the *lex Aquilia*.

### **3.1.2.3.2 Judgements wherein the Court classified the action as purely contractual**

In *Zahra vs. Grech*<sup>226</sup> (1897) the defendant pleaded that the alleged betrothal between the contending parties had been afflicted by nullity *ab initio*, as neither of the parties possessed the requisite capacity to contract a promise of marriage, since the defendant was married and the plaintiff was bound by another promise of marriage. The Court concurred with the defendant in so far as the betrothal, if contracted while the defendant was married was null. Nevertheless testimonies proved that a new contract of betrothal had been created pursuant to the defendant's wife's death. It is clear that the Court in this judgement tackled the action in purely contractual terms and would have probably accepted the defendant's plea, if the latter had not contracted new *sponsali* following his wife's death. The defendant's plea is intrinsically linked to contracts, as capacity is one of the essential conditions for the validity of contracts.<sup>227</sup> Had the Court categorised the present claim as being tortious, it would still have awarded damages to the plaintiff, even if a new promise of marriage had not been contracted after the defendant's wife's death, since although the previous betrothal did not constitute a valid contract, it still had informally occurred and its breach had obviously occasioned damage to the plaintiff.

Consanguinity was another circumstance, which led to the nullity of *sponsali*. In *Caterina Zammit vs. Giuseppe Sammut*<sup>228</sup> (1912) the defendant raised said plea, which the Court upheld, leading to the dismissal of the plaintiff's request for moral damages.

In *Filippo Said noe. vs. Carmelo Said*<sup>229</sup> (1910) the Court embarked on a contractual examination of the action. It defined betrothal in terms of Canon law, which treated it as a

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<sup>226</sup> KDQSM, Volum XVI A (1897-1898) Pt. II, p. 42-44.

<sup>227</sup> As established in article 966 of the CC.

<sup>228</sup> KDQSM, Volum XXI D (1910-1912) Pt. II, p. 448-449.

<sup>229</sup> KDQSM, Volum XXI C (1910-1912) Pt. II, p. 163-168.

contract to be concluded with the parties' physical and moral consent. The Court even amplified on whether consent may have been simulated, a deliberation which is intrinsically linked to actions based on contracts. Conclusively, the Court condemned the defendant to the payment of a sum, in the event of his failure to marry the plaintiff within the stipulated time-frame.

The plaintiff's meetings with another man in her household were deemed to constitute a justification for the breach of *sponsali* by the other spouse, as said behavior might have created future problems and triggered rumours.<sup>230</sup> Tuberculosis, which had caused the demise of two family members of the deserted party, was also regarded as a valid justification for the betrothal's rescission, especially since two doctors had advised the defendant to execute such breach.<sup>231</sup>

#### **3.1.2.4 Local Jurisprudence in light of Weir's observations**

An equivalent amount of judgements features under both the above sub-sections so that the author cannot conclude whether the Courts were inclined towards classifying betrothal actions as tortious or as contractual. Hence, by applying Weir's observations, it may be inferred that local tort provisions were as narrow or as broad as the provisions dealing with contractual breaches. Nevertheless, the author believes that the success of the majority of the actions under the tort-related sub-section, conversely to the dismissal of the great part of the actions under the contract-related sub-section, signifies that the tort provisions were broader, as they imposed fewer requisites for their successful invocation.

Although the 1868 Ordinance contained a provision as general as article 1382 of the French CC, this did not halt the local judiciary from granting a delictual remedy to a contracting party. Thus, it may be concluded that the domestic Courts within the period

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<sup>230</sup> Concetta Gasan vs. Giovanni Bonnici (1910), KDQSM, Volum XXI C (1910-1912) Pt. II, p. 138-139.

<sup>231</sup> M.C. vs. G.I. (1910), KDQSM, Volum XXI C (1910-1912) Pt. II, p. 175-176.

under review, embraced concurrent liabilities in the sphere of *sponsali* and awarded damages to the injured irrespectively of his failure to indicate under which regime the action was being instituted.

### 3.1.2.5 *Favor debitoris* approach?

From the standpoint of the judgements which blended tort and contract law, there were as many cases where tort law rules were introduced to extend liability<sup>232</sup>, as were they used to restrict it<sup>233</sup>. From the standpoint of the judgements where liability as a whole was classified as tortious, tort law rules were used to extend liability, especially when compared to the string of judgements in which the action was interpreted from a contractual perspective. In the field of *sponsali* our judgements seem to have been *pro creditoris* rather than *pro debitoris*, this can however be explained by the fact that this was an old-established case of tort liability in Maltese law, which had existed under the Knights and which was also based on Canon and Roman law. Thus the Courts were still being conservative<sup>234</sup> in their approach even while awarding significant damages.

The Courts even assumed a novel trend, which was not reflected in any other judgements dealing with other kinds of tortious actions. They arbitrarily increased moral damages to be indemnified, after deeming the latter to have been aggravated by the defendant's pleas.

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<sup>232</sup> *Camenzuli vs. Farrugia noe, Gristi vs. Cassingena, Simiana vs. Fenech.*

<sup>233</sup> *Montesini vs. Vassallo, Gerada vs. Chetcuti, Muscat vs. Dingli.*

<sup>234</sup> In so far as preserving tradition.

### 3.1.3 *Inquilinato*<sup>235</sup>

Even within the ambit of contracts of lease, the local Courts still managed to infiltrate tort provisions, further substantiating the author's belief that in the period under examination the Court's exerted no resistance vis-à-vis concurring liabilities. However as shall be observed in the following decisions, conversely to the *sponsali* judgements, when the action was tackled from a purely tortious perspective, this led to its dismissal.

In *Aquilina vs. Zammit*<sup>236</sup> (1869) the CoA's classification of payment of rent in arrears as a form of damages hindered the creditor, who was also the property-owner, as the two-year prescriptive period was consequently deemed to be applicable, leading to the dismissal of the action. The plaintiffs had requested that the defendant be condemned to forward them the unpaid rent pertaining to a number of rooms, of which they enjoyed the ownership and in which the defendant had illegally resided for a number of years until his eviction. Whilst the FHCC embraced the plaintiffs' demands, the CoA reversed the previous decision. It specifically outlined that restitution of fruits is a form of damages and interest and that unlawful enjoyment of premises, the ownership of which pertains to someone else, entitles the property-owner to claim damages for being deprived of the enjoyment of his own property.

In *Carlo Borg vs. Ernesto Seychell*<sup>237</sup> (1912) the CoA referred to article 1041, a restrictive tort provision, which unequivocally favours the property-owner and tort-feasor. Such provision, as illustrated in Chapter 1, is essentially Dingli's creation in so far as it excludes the property-owner's liability for latent defects or repairs, of which he had no cognisance or which he could not be reasonably aware of. The lessee was claiming damages occasioned by the collapse of the floor of the premises leased to him and was alleging that such incident was the result of lack of repairs which had to be conducted by the

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<sup>235</sup> tenancy

<sup>236</sup> Salvatore e Maria conjugii Aquilina vs. Margherita vedova di Gio. Maria Zammit, KDQSM, Volum V A (1869-1871), p. 22-24.

<sup>237</sup> KDQSM, Volum XXI B (1910-1912), Pt. I, p. 409-415.

defendant, who was the proprietor and the lessor. The FHCC upheld the plaintiff's demands as the deteriorating state of the rafter, which was the cause of the incident in question, had been noticeable from years before and could not have been ignored by the defendant. The CoA however reversed this judgement and made reference to amongst others, article 1041. It maintained that the defendant, being the property-owner, could not be held liable as the damage in question was due to a latent defect of which he was unaware and additionally he had always executed the necessary repairs.

### **3.2 Employer's Indirect Liability**

As outlined in Dingli's commentary to the 1868 Ordinance, indirect responsibility, rather than being responsibility for the actions of others, is in reality responsibility for one's own failure or act<sup>238</sup>, such as the failure to invigilate a minor or the selection of an unfit employee. This interpretation is partly founded on the law and partly founded on early judgements, which will be discussed further on. It may be construed as an early attempt of preventing indirect liability from developing. In the author's view however, this approach favours the injured, as he is presented with two alternatives to seek compensation, one founded on indirect responsibility and the other founded on direct responsibility. The local Courts in fact, as will be subsequently amplified, when faced with the rigorous nature of article 1037, applied the provisions on direct liability to render the employer responsible.

Robert F. Taylor in fact construed how the parent's presumed fault is embedded in their failure to provide adequate education to their son and to supervise him. In fact, French jurisprudence has established that when a minor's tortious act, whose illicit nature is considerably grave, has occurred in school premises, the parents would be held liable for

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<sup>238</sup> Sir Adrian Dingli, Ordinanza VII del 1868 - Delle Cose, 62.

their shortcomings in educating their child, even though it was the teachers' duty to supervise him.<sup>239</sup>

It is pertinent to note that in Germany, persons resort to contractual remedies rather than invoking the article dealing with the employer's vicarious liability<sup>240</sup> since the latter discharges the employer from liability if he has acted with the appropriate care in the selection of the employee or in the supervision of the latter.<sup>241</sup> The local provision presents a similar rigidity to its German counter-part, however the author did not encounter any local judgements, within the period under examination, wherein the employer's liability was challenged contractually.

### **3.2.1 *Culpa in eligendo* as the sole basis for the employer's responsibility**

From the relative judgements in the period under review, one may easily infer that *culpa in vigilando* was not embraced by the local Courts, as a result of which the injured was disfavoured. The domestic judiciary's strict adherence to article 1037 led to the dismissal of the plaintiff's action since the employer could not be attributed *culpa in eligendo*, regardless of the fact that the employee had manifested his incompetence during his subsequent employment and had triggered serious repercussions. In the landmark judgement *Busuttil vs. La Primaudaye noe et*<sup>242</sup> (1894) the FHCC commented on the corresponding provisions to article 1037, contained within the Italian and French CCs, stating that the latter two were identical and that their application was far wider than that of the local provision. The FHCC itself pronounced that the foreign provisions, conversely to the domestic one, favoured the injured party,<sup>243</sup> as they did not comprise the necessity

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<sup>239</sup> Robert F. Taylor, 'No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability' (1987) 9 Loy. L.A. Int'l & Comp. L. Rev., 570-571 <<http://digitalcommons.lmu.edu/ilr/vol9/iss3/2>> accessed 1 May 2014.

<sup>240</sup> Article 831 of the BGB.

<sup>241</sup> 31 *Weir* (n 187).

<sup>242</sup> KDQSM, Volum XIV B (1894), p. 94-103.

<sup>243</sup> 'Che una simile disposizione, ma assai più estesa a favor dei danneggiati, è contenuta nell'Art. 1153 del Codice Civile Italiano.'

of proving the employee's unfitness previously to the moment of engagement or the employer's failure to find any reasonable ground to deem the employee as fit, in order for responsibility to ensue. The rigorous nature of such requisites was pointed out by the domestic Court itself<sup>244</sup>, however there was no attempt to remedy such an unfavourable situation. The FHCC noted that apart from the plaintiff's action being excluded on the basis of the *jure imperi* principle, as will be discussed in the following section, said action would still have been dismissed owing to the strict requisites of article 1037. The Court implicitly mentioned the law's bias towards the employer as in the case at hand, the Government had in its favour the presumption that it had appointed fit Police officers and said presumption had to be rebutted by the plaintiff himself, by proving the officers' unfitness prior to their employment and not posteriorly to it. The Court noted that article 1037 halted the ancient controversy between Roman law commentators, a group of which held the employer answerable for his deficient selection, whilst the others maintained that there was a *juris et de jure* presumption with regards to the employer's responsibility, as it was the mere selection, which need not necessarily have been deficient, which rendered the employer responsible. This decision was confirmed on appeal.

Other decisions which analogously to the previous, featured the government as defendant and which also rejected the plaintiff's claim on the basis of lack of *culpa in eligendo* were *Neg. Gasan noe vs. Onorevole Vella C.M.G. noe*<sup>245</sup> (1900) and *Ellul Bonnici vs. Compton Domville noe et*<sup>246</sup> (1904). The former concerned damages arising from the execution of a precautionary warrant against the plaintiff, which was subsequently declared to be legally unfounded. The Court held that the government *qua* employer could not be held liable for tortious acts committed by its employees, unless *culpa in eligendo* could be proven in terms of article 1037. In the latter judgement, absence of *culpa in eligendo* conduced the Court to rule that the government was not liable for the damage caused to the plaintiff's tuna fishing net by one of Her Majesty's vessels.

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<sup>244</sup> 'Estremi non richiesti punto né dal Codice Francese, né da quello d'Italia;'

<sup>245</sup> KDQSM, Volum XVII C (1899-1900) Pt. II, p. 238-242.

<sup>246</sup> Salvatore Ellul Bonnici vs. Sir Edward Compton Domville nomine ed altri, KDQSM, Volum XIX A (1904-1906) Pt. II, p. 39-41.

*Fenech vs De Domenico*<sup>247</sup> (1897) foreshadowed the subsequent jurisprudential trend, in considering the employer's liability from the perspective of his direct responsibility. The FHCC expressed its disagreement with the defendant's affirmation that he was being rendered answerable for his employee's act and stipulated that his alleged liability stemmed from his own act in assigning the delivery of a judicial act, to an incompetent employee.<sup>248</sup> Nevertheless in stark contrast with its previous assertion, it did not invoke the direct responsibility provisions and demanded the existence of *culpa in eligendo* to hold the Government responsible. The plaintiff had alleged that as a result of a Court messenger's unfitness, his claim for the payment of merchandise was held to be time-barred, since the judicial letter he had sent in order to interrupt the prescriptive period was not served on the respondent. Damages requested were claimed from the Government, in its capacity as the Court messenger's employer. Interestingly, the determination of *culpa in eligendo* was tied to the Government's selection of the Court Registrar and not of the Court messenger. Said *culpa* was however excluded by the fact that the Court Registrar had been an employee of the Court Registry for a number of years and till the day of his retirement, had continued to skilfully exercise his duties. This judgement was confirmed on appeal.

### **3.2.2 *Culpa in vigilando* and the employer's direct responsibility**

The local Courts commenced to gradually depart from considering *culpa in eligendo* as the sole generator of responsibility and started considering other factors, which could render the employer liable. The general tort provisions and foreign jurisprudence aided the Courts in this exercise.

The permanent debilitation of a minor's hand rendering him inept at working, two factors which would lead to hefty compensation by today's courts<sup>249</sup>, were not sufficient to

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<sup>247</sup> KDQSM, Vol. XVI A, Pt. II (1897-1898), p. 100-101.

<sup>248</sup> Delivery of judicial acts fell within the scope of employment of porters and not of Court messengers.

<sup>249</sup> On the basis of the *Butler vs. Heard* formula.



conduce the FHCC to award indemnification in *Saguna noe vs. Borg et*<sup>250</sup> (1914). The injury had been sustained on work premises, whilst the minor was operating one of the defendant's machines. The FHCC imputed the injury's fault to the victim himself, for having made contact with the posterior part of the machine, rather than staying at its front, as he had been cautioned to do by one of his employers and as practiced by all the other employees.<sup>251</sup> The CoA however reversed this decision. It noted that the absence of specific legislation regulating mishaps at the workplace brought into play the *jus commune* rules contained in articles 1031, 1032 and 1033. It made reference to French jurisprudence, which enshrined the employee's right to demand damages for an occupational injury, if it resulted from the employer's imprudence or negligence in installing or operating machinery or from his direction, supervision or employee selection, taking into consideration the difficulty and risk of the work involved. The CoA imputed fault to the defendants for having entrusted a fifteen-year old with such a dangerous task, when he did not have the necessary skills to protect himself from the jeopardy he was exposed to. The fact that the minor had previous experience in a similar work environment and that boys of the same age had carried out the same duty, did not exonerate the defendants from responsibility.

In the quantification of damages the Court applied article 751 and compensated the victim for the loss of earnings, which he could have derived from his employment with the defendants. Medical expenses, which the plaintiff had undoubtedly incurred, were for some reason not awarded, even though they did constitute a real loss occasioned to the victim. The legislator's *pro debitoris* bias in correlating *lucrum cessans* with the tortfeasor's *dolus* is reflected in this ruling, as although the injured's future earnings were undeniably affected by the permanent disability he suffered, he was not indemnified for

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<sup>250</sup> Francesco Saguna nomine vs. Raffaele Borg ed altri, KDQSM, Volum XXII A (1913-1915) Pt. I, p. 125-128.

<sup>251</sup> Analogously, a number of decisions delivered in 1894 by the Assemblée Plénière, propounded that children who have been injured in an accident may be held liable for their contributory fault, regardless of their understanding or otherwise of the repercussions triggered by their actions. – 564 *Taylor* (n 239)

them, as no *dolus* was traced on the defendant's behalf. Hence, although the CoA ruled in favour of the plaintiff, this judgement can still be construed as disfavouring the victim. Modern jurisprudence, in similar cases to the above, puts into operation the theory of risk, by virtue of which the defendant's diligence must be superior to the standard diligence of a *bonus paterfamilias*.

Conversely, in *Grech noe. vs. Cremona et*<sup>252</sup> (1872), whilst the FHCC embraced the plaintiff's claims, the CoA liberated the employer from responsibility. The victim was a minor who had suffered the mutilation of two fingers, pursuant to being injured by a machine owned by the defendant Cremona *qua* employer and operated by the other defendant *qua* employee. The FHCC invoked the general tort provisions and held that both defendants had fallen short of exercising the prudence, diligence and attention required for the prevention of accidents arising from said machine. It resulted that instead of adopting measures to prevent minors from accessing the whereabouts of the machine, minors were permitted to go in the machine's vicinity, even while it was being operated, notwithstanding the fact that similar accidents to the case at hand had arisen in the past. The employer's responsibility was not intrinsically tied to the employee selection process. In fact it was established on the basis of the employer's assignment of a particular task to the defendant and of his decision to maintain the defendant in his employment, regardless of the various incidents, which had occurred to other minors by the machine operated by him.

Nevertheless on appeal said judgement was reversed with regards to the employer, who was consequently exonerated from any responsibility.<sup>253</sup> The CoA rejected the FHCC's application of the general tort provisions on the premise that the same employer was absent during the incident's occurrence. Conversely to the FHCC, the CoA refused to hold the employer liable, given there was no *culpa in eligendo*. However, it still took into

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<sup>252</sup> Saverio Grech a nome di Emmanuele di lui figlio minorenni vs. Vincenzo Cremona e Pietro Zahra, KDQSM, Volum VI A (1872-1873), p. 101-102.

<sup>253</sup> Both defendants had appealed, but the defendant Zahra had deserted said appeal and consequently the Court could not declare any judgement in his regard.

consideration, as a corollary, the damage which could have resulted from the employee's unfitness in the exercise of his duties.

*Maistre pro et noe vs. Testaferrata Bonnici Asciak et*<sup>254</sup> (1911), *Mompalao De Piro vs. De Lancellotti*<sup>255</sup> (1912) and *Magro vs. Agius*<sup>256</sup> (1920) also signified a shift in the local judiciary's treatment of employers' responsibility. The first decision regarded the destruction and detriment of the plaintiff's objects, caused by the downfall of his workshop's ceiling, which had been triggered by the collapse of the defendant's roof. Although the plaintiff's claims were accepted on the basis of the defendant's *culpa in eligendo* in selecting an unfit employee for the reparation of his roof and the Court did not admit the possibility of responsibility stemming from the employee's unfitness as manifested during his employment; the Court's approach was still innovative. It asserted that the employer's failure to exercise the prudence, diligence and attention of a *bonus paterfamilias* would have been sufficient to render him responsible for the complained damage, even if it were not accompanied by his vicarious liability. Hence, although the FHCC did not recognize the possibility of *culpa in vigilando*, it made an important observation by stating that even if *culpa in eligendo* had not subsisted, the employer would still have been held liable on the basis of the general tort provisions regulating direct responsibility.

A further innovative consideration was made by the CoA, which maintained that the fact that an employer has no expertise whatsoever in the field for which he has granted employment, does not dispense him from his duty to ensure he is assisted by suitable individuals, during the employee selection process. The inobservance of such duty would render the employer responsible for his *culpa in eligendo*, irrespectively of the fact that personally he had no reason to identify the employee's unfitness. This judge-made rule

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<sup>254</sup> Giovanni Maistre pr. et nomine vs. Marchese Daniele Testaferrata Bonnici Asciak ed altri, KDQSM, Volum XXI B (1910-1912) Pt. I, p. 361-366.

<sup>255</sup> Carlo Mompalao De Piro vs. Cesare De Lancellotti quale Impresario del Real Teatro, KDQSM, Volum XXI B (1910-1912) Pt. I, p. 462-464.

<sup>256</sup> Caterina Magro vs. Don Santo Agius, KDQSM, Volum XXIV B (1919-1920), p. 348-358.

raises the standard of reasonableness laid down in article 1037, as it is no longer the reasonableness of an ordinary man which must be employed when engaging employees, but that of a professional in the work field.

In *Mompalao De Piro vs. De Lancellotti* (1912) the plaintiff requested the return of his overcoat, the custody of which had been assigned to the defendant's employees, or payment of its value. The CoA ruled that no matter the simplicity of an employee's duty, he must still possess certain capacities for the undertaking of his tasks. In the case at hand, cloakroom attendants had to exercise ordinary diligence in taking care of the items deposited with them and consequently the employer was responsible for his employees' fault and bad faith, as manifested in the present case. The FHCC had exonerated the employer from responsibility, on the premise that no particular level of vigor was expected from cloakroom attendants and consequently the employer had no reason not to evaluate his employees as being fit for such duty. The application of indirect responsibility to the contract of deposit is also evident in this decision.

*Magro vs. Agius* (1920) dealt with the responsibility of a lawyer for his legal procurator's delay in filing an application in the Court Registry, as a result of which the plaintiff was not conferred a *legato di maritaggio*,<sup>257</sup> which she was next in line for. The plaintiff attributed fault and negligence to her lawyer. The FHCC, similarly to the previous decision, favoured the employer and rejected the plaintiff's claims, as it resulted that the defendant had fulfilled his duties and it was his legal procurator who had delayed in filing the application.

The CoA however reversed this decision and in its deliberations, analogously to *Maistre pro et noe vs. Testaferrata Bonnici Ascjak et* and *Saguna noe vs. Borg et*, it made reference to the *diligens paterfamilias* rule. It was highlighted that whoever assumes the task of drawing up and presenting judicial acts in the interest of others, also undertakes the obligation of acting diligently by presenting the acts in due time. If for the carrying out of

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<sup>257</sup> Women in need were granted goods or income normally via wills of testators who had no heirs  
<<http://architarchiviota.altervista.org/miserigittatelli/rosaria/maritaggio.htm>> accessed on 15 April 2014.

such task he requires the service of another person, he is responsible for the damage occasioned by the latter's unfitness, act or omission, if he employed an unfit person or a person he had reasonable grounds to repute as unfit. Although so far the Court seems to have equated the employer's responsibility to *culpa in eligendo*, it subsequently outlined that although said responsibility might seem to be indirect, it appertains to the employer for his own *culpa in eligendo* or *culpa in vigilando*. The employer's failings in his supervisory duties were hence deemed to constitute by themselves, a ground from which responsibility could emanate. The Court observed that the defendant's allegation that he had no reason to doubt his procurator's diligence or fitness, was contradicted by his own assertion that by agreement reached with his procurator, he used to pay the latter a sum which was significantly inferior to what he was really entitled to. The defendant was reprimanded for not realising that a legal procurator who belittled himself by accepting such a meager sum, demonstrated that he did not have his profession's and his own dignity at heart and consequently did not guarantee punctuality in the execution of his duties. The plaintiff's claim was hence upheld and the defendant was condemned to indemnify her with the sum comprising the *legato di maritaggio* which had been paid to another woman, with interests at five percent from the date of the same judgement.

The Court hence indemnified the plaintiff for her future economic loss, since it compensated her for being deprived of her future entitlement to a *legato*. Such liquidation of damages signifies a departure from article 752's terms, as *lucrum cessans* were awarded even though no *dolus* had arisen in the defendant. Had the Court delivered this decision nowadays, it would still be considered as a departure from article 1045, which is the modern substitute of article 752 and which unequivocally links future loss of earnings to permanent incapacity, which did not emerge in this judgement.

### 3.2.3 Application of Tortious Principles within the ambit of Employment-related Contracts

*Thorman noe vs. Apap et*<sup>258</sup> (1886) and *Gusman vs. Arpa*<sup>259</sup> (1887) manifestly exhibit the application of tortious principles within a contractually-regulated scenario. In the first decision, the plaintiff represented a company, which had employed an individual, hereinafter referred to as “Sciortino”, as the administrator of its affairs in Malta. The defendants were the heirs of two individuals, who by virtue of a contract of surety-ship had guaranteed Sciortino’s honesty and integrity in the exercise of his duties. The plaintiff company requested payment from the defendants for damages occasioned to it by Sciortino’s abuses. Both the FHCC and CoA concurred that guarantors could not exonerate themselves from responsibility by pleading lack of vigilance on the employer’s end. For such exoneration to arise, the employer’s connivance had to be proved or alternatively negligence on his end for having voluntarily ignored his employee’s fraudulent behavior. The FHCC dismissed the plaintiff company’s claims since it had been aware of Sciortino’s shortcomings and abuses for a long time, but had failed to inform the guarantors or to take the necessary preventive measures. The CoA however reformed the previous decision and held that the company could only reclaim from the guarantors, those damages which arose as a result of Sciortino’s fraudulent acts and not those resulting from his simple shortcomings, which the company had been aware of for a long time. Sciortino’s fraudulent behavior could not be identified by the plaintiff company even though it had employed individuals to supervise him, as he was reputed an honest man by the general public and occupied positions of trust.

Although this action was instituted against the defendants on the basis of a contract of surety-ship, it still contains tortious elements within it. As a matter of fact *culpa in vigilando* was still incumbent on the plaintiff company, even though it was the guarantors’ duty to assure said company of its employee’s honesty. Negligence on the employer’s part

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<sup>258</sup> Eduardo Thorman nomine vs. Negte. Michele Apap et, KDQSM, Volum XI B (1886-1888), p. 119-124.

<sup>259</sup> Eugenia Gusman vs. Filippo Arpa Impresario del Teatro Manoel, KDQSM, Volum XI B (1886-1888), p. 271-274.

was also mentioned as one of the instances which could lead to the guarantor's exculpation, in fact, those damages which arose pursuant to such negligent conduct, had to be borne by the plaintiff company itself as they were imputable to itself. Damages awarded to the employer were only those, which he could not have prevented through his supervisory duties. Consequently by infiltrating tortious principles into the contractual relationship existing between the contending parties, the creditor, who in this case was the employer, was awarded less by the CoA, whilst the FHCC went as far as dismissing his claim.

In *Gusman vs. Arpa*, the domestic judiciary, when faced once again with a contract regulating employment, to a certain extent disfavoured the employer in its ruling. The case revolved around the plaintiff's request for a sum owed to her as salary in advance. The plaintiff had been engaged by the Manuel Theatre to fulfill the role of leading lady. The defendant terminated the plaintiff's employment after her first performance, which proved to be unsatisfactory. The Court claimed that the plaintiff was not entitled to any salary, since the defendant could no longer make use of her services. Nevertheless it surprisingly outlined that the plaintiff had suffered both material as well as moral damages, since she had been embarrassed by the defendant's formal protest against her.

Although the Court was faced with a demand for the payment of salary and a written agreement, it still felt the need to examine the defendant's fault, even though such was not any point alleged by the plaintiff. The Court undoubtedly facilitated the plaintiff's task in subsequently claiming damages, as it unequivocally declared that the defendant was at fault and that the plaintiff had a right to seek both material as well as moral damages.<sup>260</sup> This judgement hence constitutes an indirect declaration of responsibility, even though it was not demanded and may be classified amongst those decisions which favour the employee, albeit the rejection of the latter's claim.

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<sup>260</sup> It seems that the Court believed that moral damages could be awarded by the domestic judiciary.

### 3.2.4 Concluding Remarks

Whilst the Courts had difficulty in recognising the employer's supervisory duties in cases concerning grievous bodily injury, it found no obstacle in invoking such responsibilities within a contractual context, wherein the employee's integrity had been contractually guaranteed, nor had it any difficulty in declaring *di sua sponte* an employee's right to claim moral and material damages, for termination of a contractually-regulated employment. Hence the Court's strict adherence to article 1037, resulting in a *pro debitoris* approach is contradicted by its application of tortious principles within a contractual context, the end result of which, disfavours the employer.

### 3.3 *Jure Imperi vs. Jure Gestionis*

The State's *jure imperi* defence led to the dismissal of all of the following actions. Nonetheless by such dismissal, the injured parties were not denied the right to compensation, as they could institute proceedings against the public officials who were directly responsible for the tortious act. Nonetheless, the victim was still to a certain extent disfavoured and discouraged, as he had to disburse all the legal expenses of proceedings, which he had instituted against the State before filing another action. Article 1037's application was thus restricted in order to exempt the State from responsibility for the acts of its public officials. This was achieved by limiting the types of employees, which could fall within such article's remits, to those exercising duties in the private interest.

*Busuttil vs. La Primaudaye noe et*<sup>261</sup> (1894) was the first domestic decision which laid down the dual capacity of the State. The damages claimed by the plaintiff were those, which had been allegedly caused by the Police officers who had been assigned the custody of the plaintiff's silverware shop, whilst the latter was undergoing criminal proceedings. The Court considered the teachings and rulings of French and Italian jurists and tribunals,

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<sup>261</sup> *Primaudaye* (n 242)



as constituting a just interpretation to article 1037's application to the relationship arising between the State and its agents. The first personality of the State was delineated as that which it exercised thanks to the sovereign power with which it was vested and which comprised namely the promulgation and enforcement of laws and the maintenance of good order and security amongst citizens.<sup>262</sup> The second personality of the State afforded it the status of a moral, civil and juridical *persona*, possessing its own goods, interests, credits and debts which were distinct from those possessed by its citizens, which afforded it the right to exercise all civil acts, from which rights and obligations regulated by the CC would derive.<sup>263</sup> The Court concurred with Bonasi's teachings in his *Trattato sulla responsabilità penale e civile dei Ministri e degli altri ufficiali pubblici*, in that article 1153 of the Italian CC is not applicable to the State in the exercise of its first personality, as the employees contemplated in such article are those exercising duties in the private interest and not those occupying public functions. Consequently, the responsibility for tortious acts committed by public officials in the exercise of the Sovran duties delegated to them by the State, is purely personal to them, affording to the injured party no recourse against the State.

The FHCC concluded that the government had appointed the police officers in its *jure imperi* capacity, *ergo* it could not be held answerable for their actions. Although the plaintiff's claims were rejected, he was however reserved the right to claim the same damages against its authors or against any other persons who were bound by some obligation towards him. Said decision was confirmed by the CoA.

In *Scicluna noe vs. Lloyd C.B. noe et*<sup>264</sup> (1900) the Court went a step further and quoted Addison who illustrated that, analogously public officials are also not responsible for the tortious acts of the person to whom they delegate some of their duties, even though they had appointed him themselves. This further complicates matters for the victim, as his

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<sup>262</sup> *jure imperi*

<sup>263</sup> *jure gestionis*

<sup>264</sup> *Banchiere Scicluna noe vs. Contrammiraglio Lloyd, C.B. nomine ed, KDQSM, Volum XVII B (1899-1900) Pt. I, p. 137-151.*

action will be dismissed both if he institutes it against the State, as well as against a particular public official, if the latter delegated his duty to another official.

In *Micallef vs. Tesoriere Generale e Direttore dei Contratti*<sup>265</sup> (1918), the plaintiff was the owner of land, which had been allegedly damaged by the Government's alterations to a valley. He claimed damages resulting from the impossibility of using his premises until their restoration. The FHCC identified a derogation to the *jure imperi* principle, being the issuing of an illegal order, which would render the State liable irrespective of its Sovran capacity. Nevertheless since this was not the case in the present action, the plaintiff's claim was rejected.

### **3.4 Article 1040 - The Responsibility of the Owner or User of an Animal**

Caruana Scicluna sub-divides the theories sustaining the animal-owner's or animal-user's responsibility into three. The first is propounded by Chironi and it hinges on the fact that the owner or user of the animal reaps advantages from it and consequently must also be burdened by its disadvantages. The second is formulated by amongst others, Borsari and contends that liability ensues from the sole ownership of the animal. The third and final theory as suggested by Giorgi and Baudry-Lacantinerie, imputes responsibility to the owner's or user's presumed *culpa in vigilando*.<sup>266</sup>

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<sup>265</sup> Alfonso Maria Micallef vs. Onor. Tommaso Vella, Tesoriere Generale e Direttore dei Contratti, KDQSM, Volum XXIII F (1916-1919) Pt. II, p. 323-331.

<sup>266</sup> Joseph Caruana Scicluna, Notion of Responsibility for Tort, LL.D (1977), p. 147-148.

### **3.4.1 The Second Theory - Liability ensuing from Mere Ownership of the Animal**

The second theory was invoked in *Sammut vs. Hughes C.B.C.M.G noe*<sup>267</sup> (1891). This decision dealt with a horse's death, allegedly caused by its collision with a mule-driven cart, appertaining to the Army Staff Corps and driven by a cart-driver employed with the same Corps. The plaintiff was hence requesting the defendant, in his capacity as Captain, to award damages for such loss. The Court primarily excluded the defendant's responsibility *qua* employer, on the ground of absence of *culpa in eligendo*. It then moved on to establish the existence or otherwise of the animal-owner's responsibility and illustrated that such was essentially founded on the principle that our property cannot harm others. Reference to Borsari's teachings, one of the main propounders of such theory, was made. In his commentary to article 1154 of the Italian CC<sup>268</sup>, he opined that any damage occasioned by our animal to others' physical or material property, either as a result of his escape or of his defective nature, must be reimbursed by ourselves. The Court hence upheld the plaintiff's claims.

### **3.4.2 The Third Theory – Responsibility emanating from *Culpa in Vigilando***

The third theory was advanced by the court-appointed legal expert and embraced by the Court in *Borg utrinque*<sup>269</sup> (1899). The plaintiff had suffered a number of lesions following a collision with the defendant's horse, which led to loss of employment and administration of medical treatment for approximately a month. The expert held the defendant responsible for his *culpa in vigilando*, as envisaged in article 1034 and the Court upheld the plaintiff's requests.

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<sup>267</sup> Giovanni Sammut vs. Col. Emilius Hughes C.B.C.M.G. noe, KDQSM, Volum XIII A (1891), p. 66-68.

<sup>268</sup> Article 1040 is a replica of this provision.

<sup>269</sup> KDQSM, Vol. XVII B (1899-1900), p. 75-77.

### 3.4.3 Derogations to the Animal-owner's Objective Liability

The domestic Courts, in line with the teachings of Aubry, Rau and Giorgi developed a judge-made rule, in that the animal-owner or user could be exonerated from responsibility, if it was proved that the damage was the result of irresistible force or of the victim's fault. This line of thought was upheld in *Sammut vs. Hughes C.B.C.M.G noe*<sup>270</sup> (1891), *Frendo Azzopardi vs. Bezzina*<sup>271</sup> (1896) and *Rogerson noe vs. Dowling*<sup>272</sup> (1906). Such derogation from the animal-owner's or user's objective liability disfavours the victim. In fact in *Frendo Azzopardi vs. Bezzina* the injured's contributory negligence led to him being compensated with only half of the damages he had suffered. This judgement concerned a collision between the defendant's cart and the plaintiff's vehicle, which were both being driven by animals. The plaintiff was claiming compensation for the damage he sustained to his physique, to his horse and to his vehicle. Testimonies however proved that the plaintiff had been riding his horse rapidly, when the location of the incident should have discouraged him from doing so.

In *Rogerson noe vs. Dowling* the plaintiff's imprudence led to the animal-owner's total exoneration from responsibility by the FHCC. In this decision, the plaintiff claimed damages from the defendant, after the latter's dog bit his daughter, making her face health problems and making him incur medical expenses. The FHCC held that the plaintiff had been imprudent in sending his minor daughter, of young age, for grocery shopping at the canteen where the defendant's dog was stationed. The CoA reversed such decision and noted that the injured minor could not be deemed at fault for her carefree behavior and that it was the defendant who was at fault for having violated the law by permitting his dog to stay in a canteen. The minor's parents' contributory imprudence was also

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<sup>270</sup> *Sammut vs. Hughes* (n 267).

<sup>271</sup> *Frendo Azzopardi vs. Bezzina*, KDQSM, Volum XV C (1895-1896), p. 479-482.

<sup>272</sup> *John Rogerson nomine vs. Joseph Dowling*, KDQSM, Volum XIX A (1904-1906) Pt. I, p. 145-148.

excluded by the Court, on the basis of the customary nature of their act<sup>273</sup> and of the foreseeability principle.<sup>274</sup>

The domestic judiciary in *Sammut vs. Hughes C.B.C.M.G noe* and *Frendo Azzopardi vs. Bezzina* illustrated that in compliance with the teachings of Aubry, Rau, Giorgi and Larombière, an animal-owner or user could not exculpate himself by proving that he was not at fault for the damage or that he exercised all the necessary diligence in order to prevent it. In *Frendo Azzopardi vs. Bezzina* the Court expounded on the matter and held that such responsibility would subsist, regardless of the animal's nature, whether it was tame or wild or affected by some defect and irrespective of the unpredictability of the incident. The Court brought to the fore the objectiveness of such liability, by comparing it to the responsibility of the carers of minors or of the mentally unstable, which conversely to that of an animal-owner or user, was limited to those instances wherein the care-giver fell short of exercising the vigilance of a *bonus paterfamilias*, in attempting to inhibit the tortious act of the person under his care.

The FHCC's deliberations in *Rogerson noe vs. Dowling* truly reflect the judiciary's *favor debitoris* approach. The Court held that even in the event that the defendant was held liable, the damages which would have to be compensated, namely the doctor's fee and the price of medicines, would still not be due, as the plaintiff and his family were entitled to free healthcare and medicines. Consequently, the FHCC held that it would be unfair to aggravate the defendant's financial status<sup>275</sup> and indemnify the plaintiff merely because the latter opted to not make use of his entitlement by purchasing medicine and choosing a doctor who would charge him. The Court's reasoning is reflected in Dingli's commentary to article 752, wherein as discussed in Chapter 1, he justified the £100 capping by the fact that its absence could lead to the tort-feasor's ruin. The CoA however revoked this

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<sup>273</sup> It was habitual to send one's minor child for grocery shopping at canteens.

<sup>274</sup> It had not been proved that the plaintiff was aware or could have suspected that a dog would be present at the canteen, in violation of the law.

<sup>275</sup> '...non gli era lecito di aggravare la condizione del convenuto...'

decision and held that the plaintiff's entitlement to free healthcare should not prejudice his right to claim medical expenses.

#### **3.4.4 Re-definition of the Responsibility of the Owner or User of an Animal**

In *Vella vs. Chapelle noe*<sup>276</sup> (1916) the Court adopted a completely opposite stance to that upheld by the Courts in the previous judgements. The defendant was the owner of a company, the premises of which were guarded by two dogs, one of which bit the plaintiff causing him to miss a month's work. The Court expressed its dissent with Borsari's theory and noted that the animal-owner's responsibility does not only arise from the principle that our property cannot cause harm to others, as no responsibility should ensue if the requisites for establishing it are absent.<sup>277</sup> The Court held that the *juris et de juris* presumption in favour of the animal-owner did not really arise, as the theory that the animal-owner cannot exonerate himself from responsibility by proving absence of fault in his acts or omissions was ill-founded and was rebutted by a number writers.

The animal-owner's responsibility was re-defined by the Court through an amalgamation of the general tort provisions regulating direct responsibility<sup>278</sup> and the articles providing for the animal-owner's and employer's responsibility. The Court held that such responsibility would arise, whether the animal were in his owner's or user's custody or whether it had wandered off, but solely if he did not employ the prudence, diligence and attention of a *bonus paterfamilias* or if he acted in violation of the law or omitted to do something, which was required of him by the law or if he assigned the custody of his animal to an unfit person or a person whom he had no reasonable ground to deem fit. The Court concluded that the plaintiff's injury had been accidental and that he himself had contributed to it by imprudently entering unknown premises and shouting. Finally

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<sup>276</sup> Giorgio Vella vs. Barone Francesco Chapelle nomine, KDQSM, Volum XXIII E (1916-1919) Pt. II, p. 69-76.

<sup>277</sup> This stance mirrors the traditional French understanding of liability, which was founded on subjective fault, which must be traced in the tort-feasor mind-set. – 574 *Taylor* (n 239).

<sup>278</sup> Articles 1031, 1032 and 1033.

recourse to article 1320 of the ABGB was made, which as outlined in Chapter 1, provides that the damage occasioned by an animal must be reimbursed by whoever provoked or irritated it or neglected its surveillance and in the absence of any such person, the damage must be considered as the result of *force majeure*. The plaintiff's claims were rejected.

The Court hence transformed one of the few provisions regulating indirect responsibility, which was *pro creditoris* into a disposition favouring the tort-feasor. Although Dingli himself in his *appunti* made it clear that the Austrian provision was diverse from the local one, as the former necessitated the existence of fault, whilst the latter did not, the Court still chose to find comfort in such foreign provision when dismissing the plaintiff's action.

### **3.4.5 Concluding Remarks**

Whilst both articles 1040 and 1037 present an apparent bias, the former in favour of the injured, the latter in favour of the employer, the Courts seem to have employed more effort in departing from the contents of the former rather than the latter article. The FHCC in *Vella vs. Chapelle noe* went against article 1040's terms, whilst in the employment-related judgements, the contents of article 1037 were never negated.

## **3.5 Conclusion**

The initial part of this Chapter was dedicated to an analysis of a considerable amount of *sponsali* decisions, which in general exuded a *favor creditoris* approach. An observable trend was that classifying betrothal claims as purely tortious led to a more favourable result to the plaintiff, when compared to when such claims were interpreted from a strictly contractual perspective. This signified the inexistence of *non cumul* at the time, which affirmation was further confirmed by tenancy-related decisions. In the latter decisions, the application of tort rules on the one hand disfavoured the property-owner as

they prescribed his claim for unpaid rent by a shorter period but on the other hand they also favoured him as article 1041, which undeniably safeguards the property-owner from potential liability claims, was applied. The employer's liability was also restrictively interpreted as in many cases subsistence of *culpa in eligendo* was required for the employer's responsibility to ensue. The general tort provisions assisted the Courts in departing from such a rigid interpretation. The infiltration of tort rules within contractually-regulated employment scenarios indirectly disfavoured the employer, as they were invoked to extend his liability. The *jure imperi* defence led to the dismissal of the plaintiff's action. As regards the responsibility of animal-owners or users, which was one of the few indirect liability provisions which favoured the victim, article 1040's terms were at times disregarded by the Courts and different criteria to establish liability were applied, which were less onerous on the animal-owner or user.



## CONCLUSION

The investigation conducted in this thesis was inspired by two hypotheses, which have resulted very difficult to prove or disprove in practice. It has however yielded certain insight into the general trends in our tort jurisprudence in the period under review, which can be stated with some degree of confidence. One of them is the success of the plaintiff's action whenever articles 1031, 1032 or 1033 were invoked by the judiciary, which articles embody the *jus commune* rules. These provisions assisted the Courts in departing from the rigorous confines delineating the employer's liability, which surfaced both in the law as well as in jurisprudence. In betrothal judgements, the summoning of article 1031 conducted Courts to rule that they had competence to hear such claims. Applying article 1031 instead of article 757 to evaluate the victim's contributory negligence, would arguably render it less likely for his contribution to be classified as such. In the sphere of contractor's and architect's responsibility, the failed application of articles 1398 and 1038 would not rule out the possibility of indemnification, as article 1033 would come into play. In trademark rulings, reliance on *jus commune* rules led to consistent favourable decisions for the plaintiff. The Court itself declared the possibility of moral damages being awarded on the foundation of article 1031, had articles 751 and 752 not been part of our legislation. On the other hand in a judgement concerning the animal-owner's responsibility, the general tort provisions served an antithetical aim to that described so far, as they were employed to re-define such liability, rendering it less onerous on the tort-feasor in doing so.

A common trait to all the examined judgements is their recurring reference to Roman law principles and jurists. This trend stems from the fact that the 1868 Ordinance or any subsequent or previous Code, never repealed or substituted Roman law which always stood as an autonomous source of law.<sup>279</sup> French, Italian and Common law decisions and

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<sup>279</sup> Andò B., 'The Mélange of Innovation and Tradition in Maltese law: The Essence of the Maltese Mix?' (2012) 15(3) PER/PELJ, 71 <<http://www.saflii.org/za/journals/PER/2012/36.html>> accessed 20 March 2014.

doctrine were also commonly referred to. This signifies the Courts' pragmatic ability to draw up on different sources. The Courts were already operating as Courts within a mixed jurisdiction, as when a solution could not be found in the Civil Code, instead of applying arguments by way of analogy, they employed foreign legislation.

The author could not take on the role of concluding that every judgement which upheld the plaintiff's claims expressed a bias in his favour, as in order to do so, access to the case-file and to the whole body of evidence would have been necessary. Moreover as observed throughout the thesis, acceptance of the plaintiff's claims did not necessarily mean that adequate compensation was awarded, especially in light of the punitive nature of compensation at the time. Nevertheless there were some decisions, which emanated a *pro debitoris* bias. The depiction of additional damages to be awarded over and above interest, as severe condemnation, instead of a natural consequence of article 753, is an illustration of such bias. So is the fact that future earnings were never awarded, even when article 752 was invoked. In cases of evident permanent disability, the lack of *dolus* on the tort-feasor's behalf led to the victim being awarded only *damnum emergens*. Insisting on proof of *culpa in eligendo*, irrespective of the employee's unfitness manifested subsequent to his engagement, also signified such bias. The invocation of a foreign provision, which was specifically indicated by Dingli as being counter-active to the corresponding local provision and the development of derogations in order to exculpate the animal-owner, when as per local legislation his liability should be objective, also outlines said bias. The same applies to the disregard of local legislation, specifically regulating contributory negligence scenarios, which was substituted by the application of rigorous foreign principles, which completely exonerated the defendant from responsibility. In line with Dingli's justification of the hundred pound sterling capping, the Court also interpreted indemnification as a burden to the tort-feasor, which would aggravate his financial status.

Local judgements in the period under review lacked a certain consistency. This reflected the great discretion they assumed and may have been the outcome of the diversity of sources from which our legislation sought inspiration and the effect of Malta's Colonial set-up. The inapplicability of the doctrine of precedent may also have been another contributing factor. Such inconsistency was brought to the fore when in *Camilleri vs. Gatt C.M.G. noe*, equity was held to be the tool which entitled a private property-owner to compensation from the government for damages occasioned to his premises, by alterations to public land. On the other hand, in *Scicluna noe vs K.C.B. noe et* remedying the law's silence, with respect to the moment from which prescription had to elapse, by selecting a moment which would favour the victim, was held to constitute a misapplication of the concept of equity. The Courts' varying understanding of *force majeure* is a further testimony of a certain inconsistency at the time. Whilst in *Ladour et vs. Vella noe* theft was equated to *force majeure*, in *Fenech noe vs. Gatt noe et* not even an act of nature was deemed to be sufficient to constitute irresistible force and scenarios wherein positive or negative acts of man were involved, were categorically excluded from being classified as *force majeure*.

An outstandingly evident feature of these decisions was that the Courts cumulated liability in tort and in contract without any difficulty and irrespectively of the plaintiff's claims. The fact that the *non cumul* rule was not upheld is in itself favourable to the victim, but since at the time indirect liability rules were narrower than contract rules, the former's application within a contractual context, did not always favour the creditor.

Returning to the original hypotheses, which sparked off this investigation, additional research was conducted in order to see whether it was amenable to a more statistical approach. After the author handpicked a total of 83 decisions to scrutinise in this thesis, a subsequent selection was undertaken in order to conduct a statistical analysis. Decisions which were excluded from this analysis were those dealing with the dismissal or upholding of prescriptive pleas, as in the vast majority of them, it was not clear whether the action

exercised was tortious or contractual in nature. The same applied to certain betrothal decisions, which were classified by the Court as purely contractual. Employment-related decisions which endorsed tortious rules within contractually-regulated scenarios were also omitted from this analysis, as they shared closer bonds with contract law.

The analysis revealed that from a total of 71 judgements, 42 were decided in favour of the plaintiff and 29 upheld the defendant’s pleas. As regards the social status of the contending parties, although in the Introduction the term “property-owner” was linked to premises’ ownership, for the purposes of this analysis, such term will be construed to encapsulate the following individuals:

- owners of merchandise;
- traders;
- employers;
- company directors;
- vehicle-owners;
- animal-owners and
- owners of sums of money from which they were deprived.

	Decisions in favour of plaintiff	Decisions against the plaintiff
	42	29
<b>No property-owning element</b>	16	10
<b>Both parties were property-owners</b>	15	5
<b>Only the plaintiff was the property-owner</b>	6	9
<b>Only the defendant was the property-owner</b>	5	5

Proceedings wherein both parties were property-owners, featured actions being instituted between animal-owners, owners of neighbouring tenements, merchants, by traders against ship-owners or the employers of the ship crew, by animal-owners against employers and between owners of vehicles or animal-driven carts pursuant to collisions. Actions which were absent from the property-owning element, mostly concerned deserted spouses instituting actions for breach of promise of marriage. Decisions featuring a property-owning defendant envisaged claims by individuals who had sustained bodily harm either by an animal, from a collision or on work premises.

A re-analysis of the previously tabulated figures would conduce to the following results:

- Of the 35 cases featuring a property-owning plaintiff and a non-property owning defendant, 21 were decided in his favour and the remaining 14 against him.
- Of the 20 decisions wherein both parties were property-owners, 15 were decided in favour of the plaintiff and the remaining against him.

The above statistics might lead one to think that the property-owner was favoured, however an examination of rulings wherein the plaintiff was not a property-owner, will revert the reader back to his starting point, being unable to observe any specific emerging trend. This is so because from the 36 decisions wherein the claimant was not a property-owner, 21 were decided in his favour and 15 against him.

Likewise, the correlation between the *pro debitoris* and property-owner bias could not be proven, as only 9 judgements featured a property-owning defendant and a non-property owning plaintiff and 5 of them were decided in favour of the plaintiff, being the creditor. An evident trend was however traced with regards to those cases featuring the Government as the defendant, mostly in his capacity as employer. From a total of 7 decisions only 1 held the Government liable whilst in the remaining decisions, the plaintiffs' claims were dismissed.

Thus it is clear that the judgements reviewed do not indicate a significant *favor debitoris* or pro-property-owner bias in the application of the law on the part of the Courts. Insofar as such bias is present in the law itself or its interpretations, this would appear to have been restricted to certain areas and not to be a hegemonic understanding which was impossible to question or debate. Ascribing some bias to the Courts does not do justice to the extreme flexibility they manifested.

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