CONSTRUCTION ACCIDENTS, LEGAL LIABILITY AND HEALTH AND SAFETY

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Faculty of Laws
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- Where I have consulted the published work of others, this is always clearly attributed.
- Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work.
- I have acknowledged all sources used for the purpose of this work.

Signed: ______________________________

Robert Spiteri 82787(M)

Date: ______________________________
Abstract

The focus of this thesis is to examine case law with an aim to establishing the principles involved in employment injury cases, establishing a chain of causation and identifying responsible parties in the construction process and examining health and safety regulations specific to the construction sector.

As one will observe, it is not always a straightforward task to identify who should be held liable when a construction accident occurs. In contrast to employee-employer relationships, where an employer is duty bound towards his employee to provide a safe working environment and a safe system of work, in construction working relationships are in most cases more complex.

This thesis attempts to tackle issues such as contracts of works and self-employed persons as well as contractors and sub-contractors and the relationship between different contractors on the same site. The new duties of the construction client and the project supervisor shall also be tackled, with the aim of establishing the level of duty that exists and whether such duties are equitable.
To my loving family and girlfriend
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Il-Pulizija Spettur Joseph Mercieca v Kevin Bonnici, Paul Demicoli u Paul Magro, Court of Magistrates (Malta) as a Court of Criminal Judicature, Magistrat Consuelo-Pilar Scerri Herrera 21 ta’ October 2009

Il-Pulizija v Chik Ali Olian, Court of Criminal Appeal, 10 September 2010
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Il-Pulizija v Saverina sive Rini Borg et, Court of Criminal Appeal, 31 July 1998

John Sultana v Francis Spiteri, Commercial Court, 28 May 1979

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Cremin v Thomson [1956] SLT 357

Edwards v National Coal Board [1949] KB 704, CA

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Murray v Edinburgh DC [1991] SLT

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Occupiers' Liability Act 1957

Offices Shops and Railway Premises Act 1963

The Construction (Design and Management) Regulations 2007
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<tr>
<td>AC</td>
<td>Appeals Court</td>
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<td>ADRLR</td>
<td>Alternative Dispute Resolution Law Reports</td>
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<td>All ER</td>
<td>All England Law Reports</td>
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<tr>
<td>CDM</td>
<td>Construction Design Management</td>
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<tr>
<td>CHAS</td>
<td>Contractors Health and Safety Assessment Scheme</td>
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<td>CHSW</td>
<td>Construction (Health, Safety and Welfare) Regulations 1996</td>
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<td>CLR</td>
<td>Construction Law Report</td>
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<tr>
<td>CONDAM</td>
<td>Construction Design and Management Regulations</td>
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<tr>
<td>EFCA</td>
<td>European Federation of Engineering Consultancy Associations</td>
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<tr>
<td>EWCA Civ</td>
<td>England and Wales Court of Appeal</td>
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<tr>
<td>EWHC</td>
<td>High Court of England and Wales</td>
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<td>HS at W</td>
<td>Health and Safety at Work</td>
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<td>HSWA</td>
<td>Health and Safety at Work etc Act 1974</td>
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<td>IRLR</td>
<td>Industrial Relations Law Reports</td>
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<td>KB</td>
<td>King’s Bench</td>
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<td>LN</td>
<td>Legal Notice</td>
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<td>MEPA</td>
<td>Malta Environment and Planning Authority</td>
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<td>OHSA</td>
<td>Occupational Health and Safety Act</td>
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<td>Abbreviation</td>
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<tr>
<td>OJ L</td>
<td>Official Journal</td>
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<tr>
<td>OSH</td>
<td>Occupational Safety and Health</td>
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<tr>
<td>PC</td>
<td>Principal Contractor</td>
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<tr>
<td>PSCS</td>
<td>Project Supervisor for the Construction Stage</td>
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<tr>
<td>PSDS</td>
<td>Project Supervisor for the Design Stage</td>
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<tr>
<td>QB</td>
<td>Queen’s Bench</td>
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<td>SLT</td>
<td>Scots Law Times</td>
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<td>VR</td>
<td>Supreme Court of Victoria</td>
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INTRODUCTION

Site of workers’ deaths ‘riddled with safety flaws’¹, Two jailed for death of two women in building collapse², Tragic accident at construction site in Hamrun: Maltese victim was a father of four³, Five accused of causing worker’s death in fall⁴, Contractors, foreman, charged over worker’s death⁵, Worker slightly injured as crane topples over⁶, Project supervisor failed health and safety duties⁷

In the year 2010 there were reported no less than 575 injuries⁸ that resulted from construction accidents. This large figure constituted 17.5 per cent of all work injuries reported to the Occupational Health and Safety Authority.

It is undeniable that construction is one the most dangerous industries to work in and construction sites are fraught with risks and potential dangers. Health and safety regulations strive to reduce risks and dangers as much as is reasonably practicable. However, due to the nature of the work, certain risk elements can only be reduced and not completely eliminated.

In order for these regulations to be effective, there exists the essential requirement of the existence of a system whereby duties and obligations are attributed to different persons involved in construction. The need for accountability for lack of safety measures is quintessential in an industry involving dynamic working relationships where numerous parties involved in a construction project, work alongside one another.

¹ Waylon Johnston, The Times of Malta (13 April 2011).
² The Times of Malta (21 October 2009).
³ Francesca Vella, Malta Independent.
⁴ Times of Malta (25 June 2009).
⁵ The Times of Malta (24 June 2009).
⁶ The Times of Malta (13 April 2007).
⁷ The Times of Malta (14 January 2010).
⁸ National Statistics Office Malta.
It is today understood that the employer owes a duty of care towards his employees and it is also understood that this duty is a very onerous one especially with the establishment of the strict liability theory and legislation that puts the burden of proof on the employer when it comes to establishing whether an employee’s injuries are the result of lack of safety measures or otherwise.

However, unlike the situation that exists in other working environments such as factories, more than one person could or should be in control of all or parts of a construction project. The working relationship between parties in construction is also not as easily established and it is not uncommon in construction accident litigation for a party to argue in favour or against the existence of an employer-employee relationship.

The relevance of defining the parameters to which the employer-employee relationship extends comes to light when one examines Maltese case law involving construction accidents. In civil cases, judgements are many a time awarded on this basis. As a rule, health and safety regulations impose duties and obligations on the employer. However, subsidiary legislation stemming out of the Occupational Health and Safety Authority Act, influenced by European Union directives, have created statutory duties incumbent on other persons such as the owner of a construction site. This fact has given rise to criminal liability for breach of such regulations to persons other than employers.

This Thesis is divided into three chapters; chapter one discusses the traditional aspects of negligence and specifically the employer’s liability towards his employees. This chapter is important as it gives the reader an understanding of how the high level of liability of the employer has developed and the importance given by the courts to statutory regulations when awarding damages to injured employees.
The second chapter delves deeper into the subject of construction accidents where more dynamic working relationships are brought into the picture. Specific judgements involving non-traditional employment relationships are discussed and a progressive development of the thesis is achieved through case law. The main aim of this chapter is to trace the chain of liability, to highlight the importance of control over the construction site and the work methods, and to achieve and to discuss the intricacies that exist in a multi employer environment. The liability towards injured third parties is also touched upon and discussed via case law.

The third chapter focuses on EU Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites and the Maltese Legal Notice 281 of 2004 implementing this directive. The legal notice is scrutinised in depth in an attempt to find weaknesses and suggest remedial measures. The UK implementing regulations are also discussed in order to undergo a comparative study.

The conclusion of this thesis is of substantial importance as it highlights shortcomings of the law and discusses the landmark judgement in the names Pulizija v Kevin Bonnici, Paul Demicoli u Paul Magro as well as the yet undecided case in the names Paul Demicoli v Ministru Politikka Socjali. Mention is also made to Bill 50 of 2010 and suggestions are made with regards to how the new body of law could contribute towards construction health and safety.

To familiarise myself and to gather material on the subject of construction accident litigation, I made use of the library of the Institute of Advanced Legal Studies in London. Numerous journals and books were consulted in order to achieve a better understanding of health and safety as well as the construction industry.
A great effort was made to keep the thesis both legal as well as quintessentially Maltese, aiming at identifying local issues and shortcomings mostly through a Maltese jurisprudential study.

A limitation with regards to material existed, in that there are extremely few books dealing with construction accident law. Use was therefore made of personal injury texts, health and safety law books as well as construction law books.

UK judgements as well as UK statutes were used throughout this thesis mainly because of the UK influence upon the Maltese Health and Safety and Employment legislation and because English texts and judgements have been quoted in a lot of Maltese judgements involving injuries at work.

It is however stressed that this thesis does not mean to imply that the concepts divulged throughout, based upon Common Law theories should always apply in the Maltese scenario or apply in the same way. The legal exercise carried out through this thesis should rather be seen as a comparative exercise whereby new or rather different ideologies proposed by the UK system are compared and contrasted to the Maltese approach, and therefore the UK legislation and case law is being used as a source of interpretation and not as an exclusive source of law. The civil law approach was not in fact studied in depth.

Certain concepts such as duty of care and strict liability are used loosely in this thesis as they are commonly used in UK texts, judgements and legislation, however one must understand that these are not always used in the Maltese Courts or used in a similar way. However similar Maltese concepts such as the Bonus paterfamilias are used significantly in Maltese judgements. Reference is also made to Articles 1033 of the Maltese Civil Code which gives rise to civil liability in the case of breach of legislation which is similar to the UK civil liability in the case of breach of statutory duty.
CHAPTER 1
NEGLIGENCE AND EMPLOYERS’ LIABILITY IN RELATION TO THE CONSTRUCTION INDUSTRY
1.1 Employer's liability; A Staple Element in Construction Accident Cases

When dealing with construction accidents, it is imperative to identify the parties correctly, as different levels of liability exist between different parties and this is governed by the type of relationship of such parties.

The employer-employee relationship is of utmost importance in the construction industry as it is not always easy to establish. Employer's liability is one of the forms of liability that may arise when an accident occurs on a construction site. Therefore to study construction accident liability one must invariably have to examine this relationship in detail.

1.2 The Employers' Duty of Care

The modern duty of care owed by an employer to an employee was established in 1937 by the House of Lords in *Wislon and Clyde Coal Co. Ltd v English*.

Lord Macmillan explained that the provision of a safe system of work was an obligation on the employer. He went on to say:

> He cannot divest himself of this duty, though he may – and if it involves technical management and he is not he himself technically qualified, must perform it through the agency of an employee. It remains the [employer's] obligation and the agent whom the [employer] appoints to perform it, performs it on the [employer's] behalf. The [employer] remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by merely proving that he has a competent agent. If the [employer's] duty has not been performed, no matter how competent the agent selected by the [employer] to perform it for him, the owner is responsible.⁹

⁹ *Wislon and Clyde Coal Co. Ltd v English* [1937] 3 All ER 628.
As Lord Write said, the employer’s duty is ‘Personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company and whether or not the employer takes any share in the conduct of the operations.’

It has therefore long been established that there is a personal non-delegable duty incumbent upon every employer to provide safety to all his employees. This has also been the view of the Maltese courts for quite a long period of time as is seen in the Commercial Court’s ruling of 28 May 1979 in the names of *John Sultana v Francis Spiteri*. In this case the court held that whoever employs persons to do work has the obligation to see that the place of work is always in a reasonable state of safety for the sake of all such employees. ‘[d]-dover li jara li l-post tax-xoghol ikun dejjem fi stat raġonevoli ta’ sikurezza ghal min ikun qed jaḥdem.’

### 1.3 Reasonable Practicability

The standard of care that an employer owes to his employees in the United Kingdom is based on the notion of reasonable practicability. The notion of reasonable practicability is important to understand in order to comprehend the basis of the employer’s duty of care towards his employees and the legal liability incurred if this standard of care is breached. This standard of care is also important to understand as it seems to be the same standard used in Malta and this conclusion is drawn from the aforementioned case where what was required was a reasonable state of safety.

Work should be as safe as is reasonably practicable. An employer discharges his duty if he does what a reasonable or prudent employer would have done in the circumstances. The

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10 Ibid 641.
employer’s duty is therefore not an unlimited one and varies according to the employee’s circumstances.\textsuperscript{12}

‘Reasonable practicability is closely related to the common law idea of the reasonable man.’\textsuperscript{13} Therefore in order to examine whether or not an employer had provided a safe place of work so far as is reasonably practicable, one may examine what a reasonable man would have done in a similar situation. In fact the test of the reasonable man is applied to all persons in society in order to establish whether one has been negligent towards others. The reasonable man is in reality ‘a legal fiction of conduct, meant to embody one who engages in socially responsible behaviour. Mark M. Schneier holds that ‘The reasonable person, by definition acts with due care; negligence is the failure to do what the reasonable person would do under the same or similar conditions.’\textsuperscript{14} In Malta the term that is ordinarily used and which is similar, if not synonymous to the reasonable man is the Roman law term \textit{bonus paterfamilias}. The \textit{bonus paterfamilias} measure has long been used in the Maltese courts as the measure by which it is established whether or not someone is liable in tort towards another or not. The employer must therefore act as a reasonable man or as a \textit{bonus paterfamilias} when it comes to ensuring the health and safety of his employees. An important fact is that the measure of reasonable practicability is used in a lot of regulations drawn up specifically to implement European Union health and safety directives and this is true for both Malta and the United Kingdom.

In the English judgement \textit{Morris v West Hartlepool Steam Navigation}, Lord Reid examined how an employer should be judged when trying to establish whether he had acted as a reasonable man and whether or not he had taken reasonably practicable steps in trying to avoid a safety risk.

\textsuperscript{13} Diana M. Kloss \textit{Occupational health law}, (4\textsuperscript{th} edn Blackwell Science 2005).
Lord Reid held that:

It is the duty of the employer in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident occurring and the possible seriousness of the consequences if an accident does happen, and on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.  

When an employer is accused of negligence, it has been suggested that there are four factors to consider to help clarify the extent of responsibility of the employer and to measure whether the employer has acted in a reasonably practicable manner or not.

1.3.1 Likelihood of Injury

Foreseeability is an important factor when trying to evaluate whether an employer was indeed negligent with regards to health and safety towards his employees. A risk has to be foreseeable for an employer to be expected to take action against it. If there is deemed to be no danger it is hardly appropriate to expect an employer to take precaution even if an accident does somehow occur. This does not mean that if the risks are low then the employer can avoid health and safety precautions.

In Bolton v Stone, Lord Reid held that ‘I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.’

The construction industry is fraught with dangers, and occupations in construction involve high levels of risks. Health and safety legislation strives to reduce these risks to a minimum and the Courts also help evolve and

interpret laws and practices many a time on the basis of reasonable practicability and foreseeability. The Court’s civil liability judgements in most cases examine whether an accident that occurred was foreseeable or not. Therefore it is important to examine whether the reasonable man / bonus paterfamilias would have taken steps to prevent the accident that occurred. It seems that the Maltese Courts have taken a more practical approach than the British Courts and are more in favour of considering every case on its own merits rather than just applying hard and fast rules that impose strict liability on the employer. A Maltese judgement which delved deeply into the merits of foreseeability and reasonable practicability is the judgement given by the Court of Appeal on the 2 June 2009 in the names of Joseph Apap v Frank Borg and Mezilla Construction Limited. This case is a very helpful one, especially if examined both at first instance as well as at appeal.

The facts of the case were as follows. The Plaintiff was a stone mason who was employed by the defendant company Mezilla Construction Limited. The plaintiff was seriously injured whilst working on a dividing wall on a construction site. The building practice that masons use to build a wall in a straight line is to tie a string from one end of the wall to the other end and use the taut length of string as a guide to keep the build straight. Plaintiff had undergone the process of preparing the set up himself from start to finish. He had cut into the stone building block using a small saw, tied the string to a piece of wood and wedged in the said piece of wood in the slot he had sawn in the stone building block. At one point in time whilst plaintiff was working on the wall, the stone in which the wedged piece of wood was held crumbled as a result of the tension that was exerted on it and unfortunately the piece of wood came flying at the plaintiff, blinding him as it struck his right eye.

The Plaintiff initiated proceedings against Mezilla Construction Limited as his employer on the basis that it did not provide him with the proper tools and protective work clothes. The Court of First Instance found the defendant
company responsible for the accidents and awarded damages to the plaintiff. The Court, in giving its reasoning, started by saying that the fact that the stone building block crumbled thereby releasing the wooden missile into plaintiff’s eye, is no one’s fault and that negligence cannot be attributed to either party. The Court held that ‘Żgur illi għall-fatt li tqaċċat il-parti tal-kantun li magħha kien gie marbut l-ispag, ma jista’ jigi attribwut għan-negliżenza ta’ ħadd, għax dan kien dovut biss għan-nuqqas ta’ reżistenza tal-ġebla partikolari’.\(^{17}\) The Court continued by stating that what could have been avoided was the severe consequence of the accident had the employer provided his employee with safety goggles. The Court of First Instance deemed the incident as a foreseeable one and held that the employer was duty bound to protect the plaintiff against such a risk which was not unpredictable. The Court of First Instance held ‘Għax ma kienx imprevedibbli illi incident bhal dak in kwistjoni jinqala’, l-attur u min kien qed jagħmel xogħol simili, messhom ġew provduti wkoll b’din il-protezzjoni permezz ta’ goggles.\(^{18}\)

At this point it could be construed that the court was incorrect to state that the incident was predictable. The accident, even though very unfortunate was very extraordinary and one can hardly say that it was foreseeable.

At the time the accident occurred there were no regulations that made safety goggles obligatory at the workplace, the court therefore relied on the general duty of care imposed on the employer that holds that the employer has to always ascertain the health and safety of all the persons that may be effected with the work that is carried out for such employer. The court held that this general duty of care was enough to hold the employer responsible for the injuries of plaintiff and that one cannot exclude liability on the basis that there were no specific regulations that provided for safety goggles. The Court held ‘Ma tistax għalhekk taħrab mir-responsabilita’ tagħha s-soċjeta’

\(^{17}\) *Joseph Apap v Frank Borg* kemm l’ismu proprju kif ukoll għan-nom u in rappreżentanza ta’ Mezilla Construction Limited, Court of Appeal (Civil Superior), 2 June 2009, 6.

\(^{18}\) Ibid 6.
konvenuta semplicemente għaliex dik il-liġi jew xi regolamenti eżistenti dakinhar ma kienux jispeċifikaw illi bennejja kellhom jiġu pprovduti bi protezzjoni ghal ghajnejhom.\textsuperscript{19}

The defendant company appealed the decision of the Court of First Instance on the basis that the incident was not foreseeable and that the plaintiff himself was responsible for the accident or at least there was a high level of contributory negligence.

The Appellate Court took an opposite view of the Court of First Instance and found that the accident was not a foreseeable one. The Court of Appeal held that:

Dina l-Qorti ma taqbilx li fiċ-ċirkostanzi partikolari ta’ dana l-każ l-incident kien wieħed prevedibbli. L-ewwel Qorti stess ikkummentat li l-incident seħħ minħabba nuqqas ta’ resistenza tal-ġebla u li dan seħħ tort ta’ ħadd, għalhekk wieħed ma jifhimx kif tista’ tghid li l-incident kien prevedibbli meta dak li ġara kien diffett fil-ġebla li tqaċċtet tort ta’ ħadd.\textsuperscript{20}

The Court of Appeal gave its reasoning as to what lengths an employer’s obligations extend to; it held that:

L-obbligu ta’ min iħaddem hu li jipprovvdi “a safe system of work” u “a safe working environment”, u superviżjoni u adegewatezza tal-atrezzi pprovduti. Hu għandu jiżgura li l-post tax-xogħol ikun ħieles minn sogri bla bżonn ghas-saħħa u minn perikli li jistgħu jiġu raġjonevolment evitati għall-inkolumita` fiżika u psikoloġika tal-ħaddiem.\textsuperscript{21}

The Court of Appeal then went on to give reasons on the basis of which it concluded that the system of work being implemented at the construction site was in fact a safe one. It held that ‘Jirriżulta mill-provi akkwiżiti li l-metodu li kienu jużaw l-appellanti kien wieħed li jintuża dejjem mill-bennejja kollha fil-

\textsuperscript{19} Ibid 7.

\textsuperscript{20} Ibid 12.

\textsuperscript{21} Ibid 12.
One might argue contrary to the Court of Appeal, in that even though a system of work may be the accepted practice, it may be inherently dangerous and therefore it would not be a safe system of work. It is cases like these that can potentially improve safety levels at construction sites, where even though a practice might be common place, it would be deemed unsafe by the Courts.

This judgement further highlights the fact that the Maltese judicial system attaches a lot of importance to the notion of reasonable foreseeability when deciding if one is liable in tort or not, especially in the realm of employers’ responsibility.

The Court quoted an earlier judgement which held that ‘in-nozzjoni tal-colpa fis-sistema legali taghna hija bażata fuq il-prevedibbilta’ and for there to be any reason to award damages there is the need for the possibility of predicting the danger that caused the harm. ‘Il-prevedibbilta’ trid tkun ta’ probabilitajiet raţonevoli u mhux ta’ possibilita’ remotissima u inverosimili.

The main criticism of this judgement is the comment made by the Court that the practice used by the injured plaintiff was one used by all stone masons therefore making it a safe practice of work. This cannot be regarded as a valid argument, and if the system used results in a serious injury, then the incident itself is proof that it is unsafe. The Work Equipment (Minimum Safety and Health Requirements) Regulations of 2004 (Legal Notice 282 of 2004) were not yet in force when the incident occurred. Had it been in force, one would possibly be able to argue that the equipment provided was not

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23 Annunziato D’Amato et v Joseph Camilleri et., Court of Appeal, 3 March 1958, 74.
24 Francis Coleiro nomine v Carmelo Cassar, Court of Appeal, 24 April 1964.
adequate and resulted in an unsafe practice used by the stone mason, which resulted in a serious eye injury.

The case in the names of Joseph Apap v Frank Borg discussed above can be closely compared to the older English case in the names of Raymond Knowles v Liverpool City Council. The claim for damages in the English case was however approached from a different angle albeit the incident being quite similar. The case involved a labourer flagger, who whilst working as an employee for the Liverpool City Council, sustained an injury and subsequently proceeded to the Courts to claim damages. Whilst handling a defective flagstone Raymond Knowles sustained an injury to his foot when the flagstone broke in his hands and fell on his foot. He claimed damages for his injury alleging, inter alia, that the council had been negligent, under section one of the UK Employer’s Liability (Defective Equipment) Act 1969 in providing him with equipment supplied by a manufacturer in a defective condition. ‘The Recorder, having found that the flagstone was defective, held that it was ‘equipment’ within the meaning of section 1(1)(a) of the Act.’ Plaintiff was therefore making his claim against his employer for having provided him with defective equipment (the defective flagstone) which caused the injury to his foot. Defendant argued that flagstone did not constitute equipment but rather material, which was not provided for in the Act.

Lord Justice Purchas in the leading judgment rejected the latter contention. The stronger argument was that which was based upon the acknowledged purpose of the 1969 Act which was to protect employees in circumstances where the employer, despite having exercised all reasonable care and relying on a reliable supplier, had exposed his employee to material which had become dangerous through the act of a third party. It was therefore consistent with the Act’s purpose and with an ordinary interpretation of the word ‘equipment’ to construe it as including materials with which an employee worked on his employer’s

business. Accordingly, the flagstone was 'equipment' within the meaning of section 1(1)(a) of the 1969 Act.\textsuperscript{27}

The Act specifically provides for the finding of liability where an employer in the UK provides his employee with defective equipment, even if the defect is unknown to the employer. What is surprising is the extent to which the British Court interpreted the meaning of equipment.

It is desirable that the Maltese Courts should not interpret such regulations in such a far reaching manner just to find liability on the part of the employer; such a system is not equitable and will hardly contribute to an increase in safety standards.

1.3.2 Seriousness of outcome

‘The most serious risk is a risk to a person’s life. Where such a risk is present, the duty to exercise reasonable care demands the expenditure of great expense and trouble, if there is no easier way of obviating that risk.’\textsuperscript{28}

Therefore the onus upon the employer to provide a safe working environment for his employees becomes greater in proportion to the level of danger such employees are exposed to.

When deliberating on the issue of reasonable practicability, Lord Reid held that ‘if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable. And as men’s lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable’.\textsuperscript{29}

\textsuperscript{27} Ibid.
\textsuperscript{28} Tomkins, Humphreys, Stockwell (n 12) 12.
\textsuperscript{29} Marshall v Gotham Co Ltd [1954] AC 360.
The case *Marshall v Gotham Co Ltd*, involved a foreseeable danger but it was held that the danger was a very rare one. The precautions were very onerous and ‘would not have afforded anything like complete protection against the danger, and their adoption would have had the disadvantage of giving a false sense of security’. So it was held not reasonable to have taken them. This is completely different from when strict liability applies through statute. Lord MacMillan held ‘The law in all cases exacts a degree of care commensurate with the risk created.’

### 1.3.3 Proportionality

Proportionality here is referring to the cost and effort of securing a potential danger in relation to the level of exposure of the employees to such danger and the gravity of the risk it poses.

It has been held that one can only escape civil liability for breach of a duty if one convinces the Court that it was not reasonably practicable to avoid or prevent the breach; the preventive measures that need to be taken have to be grossly disproportionate.

To this extent Lord Asquith held that:

‘Reasonably Practicable’ is a narrower term than “physically possible”, and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendant discharges the onus on them.

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30 Ibid.
31 *Reid v Lyon* [1947] AC 156.
32 *Edwards v National Coal Board* [1949] KB 704, CA.
1.3.4 Size of Employer

A court of law might be inclined to take cognisance of certain economical factors when deciding whether an employer is liable or not, for an accident at work. However lack of finances is by no way an excuse to justify lack of safety measures at a place of work. The British Courts have nevertheless, in health and safety cases, given penalties to employers based on the financial strength of the companies. This however is with regards to criminal liability due to breach of statutory duties, and not civil claims by employees.

It has been in fact established in the judgements of *PQ v Australian Red Cross Society*\(^{33}\) and *Voli v Inglewood Shire Council*\(^{34}\) that limited resources should not lead to lack of safety measures. On the other hand, increased standard of care is expected and required of organisations of substantial means. This was confirmed by Lord Reid. He held that ‘Such employers might be expected to take more expensive precautions and may be obliged to exercise initiative in devising or securing safety precautions not available to the smaller firm’.\(^{35}\)

It is incumbent upon employers to keep up to date with health and safety and ‘the employer must not only incur the cost of the precautions indicated by its actual state of knowledge, it must incur the trouble and expense of keeping reasonably up to date with the knowledge of those precautions.’\(^{36}\)


\(^{34}\) [1963] 110 CLR 74.

\(^{35}\) *British Railways Board v Herrington* [1972] AC 877.

\(^{36}\) Tomkins, Humphreys, Stockwell (n 12) 18.
1.3.5 Francis Gauci v Jimmy Bugeja\textsuperscript{37}

This judgement involves a construction accident where an employee sought damages from his employer after he fell seven stories whilst operating a tower crane from the roof of the building.

To attribute liability to the employer for lack of safety measures, the court employed a similar set of ‘ingredients’ of reasonable care from an English text ‘Modern Employment Law’ which provides the following list:

The \textbf{likelihood or otherwise of injury}; the more likely or probable an accident is, the greater the duty to guard against it, but, if there is only a remote possibility of danger, the need for precautions is usually much reduced.

\textbf{Potential seriousness of injury}; if a certain process or product could cause a disastrous accident, any reasonable employer would take the greatest possible care to avoid it. Such stringent precautions would still be necessary even though the chances of the accident happening were in fact quite small.

\textbf{Obviousness of the danger}; since an employer can only guard against hazards he knows or ought to know about, he cannot usually be blamed for injuries caused by hidden or unexpected dangers.

\textbf{Cost of safety}; essentially the law’s task is to balance out society’s desire for profit and the individual worker’s demand for safety and welfare. It rarely resolves a safety problem by forbidding work to be carried out at all, or by requiring precautions so expensive as to drive the employer out of business – though such a conclusion may possibly be reached if the danger is extreme and there is no other way of avoiding it.

\textsuperscript{37} Francis Vella v Jimmy Bugeja, Court of Appeal 27 November 2009.
The inherent risk factor; all kinds of work involve varying degrees of risk about which little or nothing can be done.

1.4 The Employer's Duty of Care: a Contractual Obligation

With regards to the duty imposed on all those who employ persons, The Maltese Courts have repeatedly found employers liable on the basis of the duty of the employer to provide a ‘safe place of work’.

The manner in which the Maltese Courts deliberate about duties and obligations of the employer has led to the understanding that Maltese Courts look at these duties as arising contractually and that liability may be based on the breach of this contractual obligation. Therefore, the employer is contractually obliged to safeguard the employees’ wellbeing. In the aforementioned judgement Francis Sultana v John Spiteri, the courts concluded that the employer has the duty to maintain the workplace in a reasonable state of safety for the employees, an obligation that is specific and determinate and which duty seems to be borne from the concept of neminem laedere found in the responsibility under delicts and quasi delicts.

In the case of Carmena Fenech v Malta Drydocks\(^{38}\) it was in fact concluded that from the moment an employment contract is signed between an employer and an employee, an obligation is created and imposed upon the employer to take care of the well being of the employee in such a way that this duty could be deemed to be forming part of the terms and conditions of that same contract. By drawing this conclusion, the Court traced the source of liability as arising from Article 1125 of the Civil Code, chapter 16 of the

Laws of Malta, which states that ‘[W]here any person fails to discharge an obligation which he has contracted, he shall be liable in damages.’

This reasoning was followed from the case *Debono v Malta Drydocks* where it was held that:

‘Dan premess, ma jista’ qatt ikun dubitat illi min iħaddem hu tenut jadotta l-miżuri kollha idoneji biex jittueta lill-impjegati tieghu. Din ir-responsabilita’ għandha natura kontrattwali bil-konsegwenza li, ghall-iskop tar-riżarċiment tad-danni fuq il-persuna, jaggrava fuq il-ħaddiem li jipprova l-inadempiment ta’ min iħaddem għall-obbligu ta’ l-adozzjoni ta’ tali miżuri;

...

Jekk l-impjegat jirnexxielu jassolvi tali oneru tan-nuqqas ta’ miżuri adegwati ma ghandux għaflejn, stricto jure, jiddemostra s-sussistenza tal-kolpa tal-principal inadempjenti. Jinkombi fuq dan ta’ l-ħħar li juri li l-event leżiv seħħ miħabba fatt mhux imputabbli lilu.’

The Court in *Carmena Fenech v Malta Drydocks* compared the Maltese position as similar to the English Common Law position when it quoted Brenda Barrett who held that ‘wherever there is a contract of employment it could be said that there was an implied duty of care for the personal safety of the other party to the contract.’

The position in Malta, is that the employer need not have committed any direct act of negligence to be held civilly liable for the injury of his employee. Due to the nature of the employer-employee relationship which is contractual, and because such contract imposes a duty of care upon the employer, the fact that there was an unsafe place of work or lack of safety measures is enough to find the employer liable in tort.

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39 Civil Code, art. 1125.
40 *Paul Debono v Malta Drydocks; u b’ digriet tal-10 ta’ April 2004 Saviour Gauci f’ isem il-Gvern ta’ Malta bhala successur tal-Malta Drydocks gie awtorizzat jassumi l-atti tal-kawza minfllok l-istess Malta Drydocks, First Hall Civil Court, 27 April 2005, 6.
This can be very starkly contrasted with the requirements of proving colpa or dolu in any other civil liability case where such a duty of care arising out of a contract does not exist. This element of liability is clearly laid out in article 1033 of the Maltese Civil Code. In an employment injury liability case it need not be proven that the employee was injured because employer acted negligently, what needs to be proven is that the employer failed to provide adequate measures to safeguard the safety of his employees.

1.5 Contributory Negligence

Under Maltese law culpable negligence is defined as:

Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.\(^{42}\)

Therefore negligence which gives rise to a right to claim against the tort-feaser is regulated by this article which determines the factors necessary to find a person guilty of negligence.

Contributory negligence on the other hand is provided for by article 1051 of the Civil Code as:

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.\(^{43}\)

\(^{42}\) Civil Code art. 1033.

\(^{43}\) Ibid art. 1051.
Contributory negligence is a defence in which the defendant invokes this article to prove that the plaintiff has contributed through his imprudence or inattention to the injuries he has sustained. The court must thereafter determine the level of contribution of the plaintiff and subtract the percentage of contribution from the damages that would have otherwise been awarded in full had there been no contribution whatsoever.

‗Contributory negligence is a constant source of debate.‘44 A study into UK jurisprudence will reveal that in the past, when contributory negligence was proven, the case was thrown out as the claim would be defeated entirely. This reasoning is derived from the Roman law rule quod si quis ex culpa sua damnum sentit which translates to, he who suffers a damage by his own fault, has no right to complain. However in 1945 a new act entitled Law Reform (Contributory Negligence) Act 1945 was enacted and as a result of this new act a claim for damages would still be heard if there were elements of contributory negligence and a defendant would not be able to brush off a suit just by claiming the defence of contributory negligence. Section one of this act indeed provides that:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.45

Contributory negligence is a very popular form of defence in an employment injury tort cases and as such deserves a good understanding. The defence of contributory negligence is not always easy to understand.

However one may say that it is difficult to define with any degree of certainty what would constitute contributory negligence since everything depends on the actual facts of each and every individual case. Moreover, due to it being a rather indeterminate

44 Tomkins, Humphreys, Stockwell (n 12) 43.
45 Law Reform (Contributory Negligence) Act 1945 s. 1.
concept a lot rests on the discretion of the adjudicator. Therefore, 
there can be situations where even though the plaintiff acted 
negligently the judge is of the opinion that such negligence did not 
have any bearing on the damage so suffered and therefore it is 
the defendant who must suffer the damages.46

Where a person increases his harm by any slight action or inaction this is 
grounds for contributory negligence in employment injury cases.

Lord Denning held that:

A person is guilty of contributory negligence if he ought 
reasonably to have foreseen that, if he did not act as a 
reasonable, prudent man, he might be hurt himself; and in his 
reckoning he must take into account the possibility of others being 
careless.47

The case shows that where an employee, or in any case, where any person 
is involved in some form of accident which is not his own fault, but such 
accident’s consequence is exasperated by the very fact of the injured 
person’s imprudence or carelessness, then that person is at fault for making 
his injuries more severe and therefore contributory negligence can be 
successfully pleaded to reduce liability.

Lord Denning explained that:

‘If a man carelessly rides on a vehicle in a dangerous position, 
and subsequently there is a collision in which his injuries are 
made worse by reason of his position than they would otherwise 
have been, then his damage is partly the result of his own fault, 
and the damages recoverable by him fall to be reduced 
accordingly.’48

46 Jonathan Thompson, ‘Defences To Liability In Tort (Doctor of Laws, University of Malta, 
2010).
47 Jones v Livox Quarries Ltd [1952] 2 QB 608.
48 Ibid.
1.6 Breach of Statutory Duty

Article 3(1) of the Criminal Code states that “[E]very offence gives rise to a criminal action and a civil action”.\textsuperscript{49} This provision of the Criminal Code is particularly relevant because health and safety legislation provides for a number of statutory duties on the employer as well as other persons that have control which, if breached constitute a criminal offence. It is often the case that civil actions in tort which involve an accident on a construction site or any other place of work will hold the employer or the person in control liable in tort for a breach of his duty under health and safety provisions. In the UK, this form of action is often referred to as a liability arising out of a breach of statutory duty and a person on whom such duty lies has to prove that he took every means to abide by the statutory law or that it was not reasonably practicable to do so, for him to limit his liability.

The burden imposed upon the employer or person in control is very great and even the most common defences fail when there is breach of important statutory duties involved in a tort case.

Goddard LJ remarked that:

It is only too common to find in cases where a plaintiff alleges that a defendant employer has been guilty of a breach of a statutory duty, that a plea of contributory negligence has been set up. In such a case I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent.\textsuperscript{50}

For an action based on a breach of statutory duty to succeed, certain criteria must be determined.

The first question is whether the breach of the statute gives rise to a civil remedy. If it does, the claimant must show: (i) that the

\textsuperscript{49} Chapter 9 of the Laws of Malta, Criminal Code.

\textsuperscript{50} Hutchinson v London and North Eastern Railway Co [1942] 1 KB 481, 488.
provision was breached; (ii) that the damages suffered was of the kind the provision was intended to prevent, and the claimant belongs to the category of persons that the legislation was intended to protect; and (iii) that the breach of duty caused the loss.\textsuperscript{51}

The strength of statutory duty was emphasised by Lord Kilbrandon in the case \textit{Westwood v Post Office} where an employee had disobeyed a notice disallowing persons to enter a lift room and had fallen through a trap door to his death. It was held that the fact that he was not allowed in did not mean that he was not afforded protection by the Offices Shops and Railway Premises Act 1963 and that the wording of the notice had not suggested that there was any danger in the room.

Lord Kilbrandon held that:

\begin{quote}
My Lords, the defence of contributory negligence as an answer, even as nowadays only a partial answer, to a claim arising out of breach of statutory duty is one which it must always be difficult to establish. The very existence of statutory safety provisions must be relevant to the consequences which a man may reasonably be expected to foresee as arising from his own conduct; his foresight as to that will be to some extent governed by what he may reasonably be expected to foresee as arising from his master’s statutory obligations.\textsuperscript{52}
\end{quote}

This form of action is one based on breach of statutory duty with the main aim being to seek a remedy based on the provisions of the statute. Therefore if the statute’s aim is that of protecting a worker from falling from a height, then where such statute is breached the injured party’s claim against defendant for breach of such statute shall succeed.

The case of \textit{Joseph Cini v George Wells} is in fact similar to the aforementioned \textit{Westwood v Post Office} as the defendant pleaded that plaintiff should have passed through the passageway instead of from behind

\textsuperscript{51} Michael Ford, Jonathan Clarke, \textit{Redgrave’s Health and Safety} (5\textsuperscript{th} edn LexisNexis Butterworth 2007).
\textsuperscript{52} \textit{Westwood v Post Office} [1973] 3 WLR 287.
the machinery where it was possible for him to trip in the loose wires or slip in the soluble oil. This, defendant claimed, was a basis for the defence of contributory negligence. However the Court did not agree with defendant’s plea and held that the fact that there were loose wires and oil in the way meant that the place of work was unsafe.

In the case *Joseph Cini v George Wells*, the Judge quoted another Maltese case in the names *Charles Borg v George Wells et nomine* which held that:

In planning a system of work, the employer must take into account the fact that workmen become careless in works involved in their daily routine, u dan tenut kont ta’ l-atmosfera tax-xogħol, id-diffikultajiet li jsib il-ħaddiem fil-kors tax-xogħol tiegħu, il-ħinijiet twal, l-għaġġla fix-xogħol u nuqqas ta’ ħaddiema ohra li jkunu nkarigati biex jaħdmu mieghu.

Where there is a breach of a statutory duty, it is quite easy for an employee to seek a remedy from the Courts. What is required from the employee is to establish that the employer was in breach of an absolute statutory duty. Then it is up to the employer to contest the allegations and he must then show that he took all reasonable steps to prevent the breach. ‘...he may not escape liability even where negligence at common law cannot be established against him.’

### 1.6.1 Breach of Statutory Duty and Contributory Negligence

Lord Tucker opined that ‘[I]n Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the purpose of the statute’.

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53 *Joseph Cini v George Wells u Alex Galea bħala Diretturi għan-Nom u in rappreżentanza tas-soċjeta` Stainless Steel Products Limited. First Hall Civil Court, 29 May 2001.*
54 *Charles Borg v George Wells et nomine, Commercial Court, 9 September 1981.*
55 *Tomkins, Humphreys, Stockwell (n 12) 50.*
56 *Starveley Iron & Chemical Co Ltd v Jones [1956] AC 627.*
The elevated levels of liability an employer is subjected to results from the employer-employee relationship which relationship is governed by ever increasing statutory regulations providing for stricter health and safety standards.

Jonathan Thompson held that:

...the onus probandi in cases involving such accidents is more onerous than that required in traffic collisions due to the intrinsic nature of the relationship between the employer and the employee. In the judgment delivered in the names D’Anastasi v. Enemalta Corporation\(^57\), the Court held that the present prevailing position, which is also backed by modern industrial legislation, creates a presumption that an accident that occurs at the workplace is due to a failure on behalf of the employer to provide ‘a safe system of work’.\(^58\)

When discussing reasonable practicability earlier in this chapter it was suggested that when one is to adjudge whether the employer is guilty of negligence towards the safety of his employees one must consider various factors, proportionality being one of such factors. However, where there is an absolute duty on the employer to provide for certain safety measures it cannot be suggested that the employer can justify the breach on the basis of cost or other such considerations.

This argument can be contrasted to the more traditional notion based on common law negligence where it was held by Sandwick J in Stokes v Guest Keen and Nettlefold Bolts & Nuts Ltd that in balancing the need to deal with a ‘risk’ the employer must:

[w]eigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can

\(^57\) D’Anastasi Anthony v Korporazzjoni Enemalta, First Hall Civil Court 28 June 2005.

\(^58\) Jonathan Thompson, ‘Defences To Liability In Tort (Doctor of Laws, University of Malta, 2010).
be taken to meet it and the expense and inconvenience they involve.  

When dealing with cases involving statutory duty, one has to consider contributory negligence very carefully as it is only in limited circumstances that such a defence shall prevail, at least in toto. ‘[l]est one blindly applies the hoops, hurdles and other stumbling blocks placed in front of a pursuer with a genuine claim by parliament and the courts in a less enlightened era when the health and safety of employees were regarded as less important than they are today.’

1.6.2 Maltese Approach

The approach of the Maltese Courts towards contributory negligence and the employer’s statutory duty is similar to the situation in the UK. The added duty of the employer is made clear in the case *Chetcuti v Buhagiar* where the Judge held that:


 Tomkins, Humphreys, Stockwell (n 12) 35.  
 Gerald u Carmena konjugi Chetcuti, kif ukoll Francis Chetcuti, Miriam Zammit, Carmel Chetcuti, Eugenio Chetcuti, Maria Concetta Baker, Joseph Chetcuti, Maria Stella Chetcuti, ahwa Chetcuti, ilkoll bhala eredi “ex lege” tal-mejet George Chetcuti, u Benjamin Zammit, Paul Baker u Charles Cilia bhala zieg rispettivament ta’ l-atturi Miriam Zammit, Maria Concetta Baker u Maria Stella xebbba Chetcuti llum Cilia v Raymond Buhagiar ghan-nom u in rappreżentanza tas-soċjeta’ TRADING FOUR COMPANY LIMITED, First Hall Civil Court 9 January 2001.}
It is shown clearly in this case that the employer has to protect his employee from any harm even from danger which an employee himself may get into unnecessarily. The Judge also emphasised the importance of training as part of a safe system of work. ‘Min jiħaddem mhux biss irid jagħti isturzzjonijiet dwar x’irid isir imma anki dwar dak li ma jridx isir sabiex jassigura s-sigurta’ ghall-impjegati tieghu’.  

A Construction accident case that reiterates the principles set forth in the above mentioned judgement is the Court of Appeal case of the 20 March 2009 in the names George u Lonza sive Nancy konjugi Cardona v Ferdinando sive Randu Zammit u Peter Paul Zahra. The case involved a construction accident where a part-time stone mason who even though unlicensed was experienced in his trade. Plaintiff George Cardona was an employee of Ferdinando Zammit. Plaintiff instituted a claim against his employer due to the fact that he was struck by a crane arm whilst building a wall and was thrown from a height sustaining serious injuries and permanent disability.

The Court held that the accident was a result of an unsafe place of work so much so that the Court of First Instance concluded that ‘Huma proprju f’lokhom il-kliem adoperati mill-espert legali li dan l-aspett ta’ sigurta’ kienet kważi ġhaġa estranja, tant estranja għall-konvenut Zammit ...’. It resulted from evidence provided that no worker on the construction site was provided with safety equipment. One of the employees had been wearing safety shoes, however he had acquired them himself out of his own initiative.

The Court of First Instance found defendant negligent for not providing a safe system of work and defendant was awarded damages. However the Court of First Instance quoted the Latin maxim qui culpa sua damnum sentit non

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62 Ibid.
63 George u Lonza sive Nancy konjugi Cardona v Ferdinando sive Randu Zammit u Peter Paul Zahra, Court of Appeal 20 March 2009, 6.
*intelligitur damnum sentire*, and decided that Plaintiff was guilty of 20 percent contributory negligence for not wearing safety equipment.

Plaintiff, aggrieved by the Court’s decision, filed an appeal challenging amongst other things the First Court’s findings of contributory negligence. After examining the evidence the Court of Appeal held that:


This was an important conclusion that the Court of Appeal came to, in that the employer is not only responsible for providing safety equipment, he is also responsible of making sure his employees make use of such equipment. The Court of Appeal made reference to the Criminal Appeal case *Pulizija v Godfrey Attard* which held that ‘Bhala general manager kellu jassigura mhux biss li oġġetti bhal scaffolding u safety harness ikunu dispoinibbli x’imkien f’xi store, iżda kellu wkoll jassigura li l-foreman stess jinsisti li ebda xoghol ma jsir mingħajr l-ekwipaġġjament meħtieġ’.\\footnote{Il-Pulizija v Godfrey Attard, Court of Criminal Appeal, 2 September 1999.}

The Court of Appeal concluded this paragraph of this judgement with a very important statement, one which is very relevant to this thesis. It held that it is important for the employer to make sure that he provides employees with a safe system of work and to make sure that his employees comply with such
system ‘Dan għaliex fl-aħħar mill-aħħar incident fuq ix-xogħol jinteressa mhux biss lil min ihaddem u l-ħaddiem li talvolta jista’ jwegga’, imma għal diversi raġunijiet jinteressa lis-soċjeta’ in ġenerali.  

Cardona v Zammit mentioned above can be compared to another similar construction accident case where the defendant employer was found personally liable for the injuries sustained by his employee.

In the First Hall Civil Court judgement given on the 13 February 2001 in the names Francis Aquilina v Louis Cassar, plaintiff was working as a labourer on the construction site along with his employer Louise Cassar and other employees. On the day of the accident, a new crane system was being used to hoist building blocks up to the level of the building being constructed. The system was new to the workers at the construction site and it resulted that the employee at ground level tying the blocks to be hoisted had no previous experience or training of the said new system. The defendant employer held that the new system being used was specifically intended to implement a safer system of work; however the first time the system was used, plaintiff was struck by one of the stone building blocks being hoisted with the new machinery.

The Court’s technical expert concluded that as a result of the accident, one can conclude that the system being used was in fact unsafe or was not being used properly; it was in fact discovered that, after the accident an additional step whereby stoppers where placed before hoisting the building blocks, was being implemented, which proved that the system used at the time of the accident was being used incorrectly, therefore unsafely.

The defendant as well as all other workers on the construction site were not making use of any safety equipment and where not wearing safety helmets

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66 Cardona v Zammit (n63) 13.
or safety shoes. It resulted that the employer did not provide his employees with such equipment and that he deemed them unnecessary.

Il-konvenut ammetta li la pprovda elmu u lanqas protective clothing lil-haddiema tiegħu; u la kellu supervisor u lanqas chargeman fuq il-lant. Il-periti jikkummentaw, fil-fehma tal-Qorti ġustament: “Hu sorprendenti l-fatt li l-konvenut donnu ma jarax, anzi definitivament ma jarax, il-ħtieġa ta’ tali miżuri ta’ safety fuq ix-xogħol u bħal jintrinċea ruħu wara l-iskuża li ‘ħadd ma jipprovdihom’.67

The Court also observed that at the construction site there was no ‘supervisor’ or ‘chargeman’ and therefore the site and its management was entirely in his responsibility. The defendant employer was also the person operating the crane. The fact that the court gave importance to this detail might imply that other persons other than the employer at a construction site may be found responsible or at least partly responsible for the accident if their direct action caused the accident.

Whereas in the previous case discussed in the names George u Lonza sive Nancy konjugi Cardona v Ferdinando sive Randu Zammit u Peter Paul Zahra it may be argued that even if the workers on the construction site were wearing safety helmets, it would not have prevented a fall from height and claimant’s injuries, in this case it was specifically mentioned that the helmet would have served as an idyllic safety precaution as the claim involved a head injury.

Jekk wieħed ikollu jfittex każ fejn ħaddiem, f’incident, minħabba l-użu ta’ l-elmu, jiskansa li jweġġa’, jew jekk iwegġa’ l-effetti jkunu mtaffija sew, il-każ de quo proprju ma ssibx aqwa minnu. Bil-maqlub, jekk trid issib każ biex turi kemm hu ħazin li ma tilbisx elmu waqt xogħol ta’ kostruzzjoni, l-incident mertu tal-kawża odjerna jillustra dan ampjament.68

68 Ibid 6.
As observed through case law as well as health and safety legislation, the employer has to provide his employees with safety equipment and to make sure that the equipment is made use of. The employer is duty bound towards his employees as well as to society in general.

Maltese health and safety legislation has grown more substantial with the implementation of European Union directives on the subject. This is also true with regards to the construction industry where specific directives have been created to protect workers and even third parties in this industry.

The legal system provides regulations which, if followed, create a less risky environment for all the workers involved. It is, however, up to the contractors and employers in the construction industry to implement the regulations and see that they provide a safe working environment and safe working practices. The Health and Safety Authority is nowadays playing a larger role in safety as inspections on construction sites are on the increase. Such inspections are both educative and provide a means by which regulations can be enforced. In this way persons who do not follow specific regulations can be prosecuted in Courts of Law. One must however recognise the important role civil cases play in the improvement of health and safety standards in the construction industry or any other work place for that matter. Civil cases, resulting in substantial monetary claims being awarded, are both equitable and send a message denoting the importance of creating a safety culture. It is unfortunate that such cases take many years to be decided as this slows the progress of creating this safety mentality. On the other hand the Maltese Courts should be careful not to promote a compensation culture as this places undue burden and expense on persons who create jobs and contribute significantly to the economy.
CHAPTER 2
TRACING THE RESPONSIBLE PARTY;
ESTABLISHING THE WORKING RELATIONSHIP
2.1 Who should be Found Liable?

After analysing the role of the employer and the level of care that he must make sure he attains when dealing with the health and safety of his employees, we shall now examine the situation where the responsibility may fall on other persons who are not direct employers. While it was concluded, that there exists a very high level of responsibility when it comes to the employer-employee relationship, it is less clear to state that the responsibility of the employer should extend laterally to include other persons. Should a person such as a construction site owner be held civilly liable for injuries sustained by his contractor or the contractor's employee? Should a contractor suffer such liability with respect to sub-contractors or a sub-contractor's employee? Can responsibility for an accident be shared and if so should liability also be shared? What is the relationship between the contractors on site? When a third party (non-worker) is injured, who should be held responsible for the lack of safety on site? These are all questions that make construction accidents more complicated than the rest. The fact that there is a temporary relationship between a developer and his contractors combined with the fact that different groups of workers employed by different contractors share the same work site, all make deciding whether one should be held liable or not, a difficult matter.

2.2 Defining the Employer

The trend in Malta has been to follow UK judgements and text writers when it comes to imposing liability on the employer. The defence of contributory negligence has been watered down along the years as health and safety legislation has become stricter and has imposed more and more conditions on the employer. What has in fact resulted, is the imposition of strict liability on the employer, and a general view that the employer should not only provide a safe working environment, he should also ascertain that his employees follow safety procedures. This is exemplified by the fact that an
employer should provide safety equipment and also make sure that it is used. It may be said that the employer not only has to provide a safe system of work, but also make sure to safeguard his employees from themselves; that is any danger an employee might put himself in unnecessarily or any danger that results out of the employee’s negligence.

That the employer is held strictly responsible for the safety of his employees and for the observance of health and safety legislation is today a hard and fast rule and countless Maltese judgements have shown that the Courts attribute criminal and civil liability to any such failures. Therefore one cannot determine an employer’s level of liability just on the basis of whether he directly contributed to the accident or not. Article 1031 and 1032 of the Maltese Civil Code\(^{69}\) state that:

> Every person, however, shall be liable for the damage which occurs through his fault.\(^{70}\) And
> (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.
> (2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.\(^{71}\)

Sub article 2 of article 1032 above is the basis upon which it is justified that an employer should suffer liability when one of his employees is injured at work. Health and safety legislation imposes duties on employers that go beyond that of the bonus paterfamilias.

One may argue as to the extent to which an employer should be held liable at least in civil cases, or as to the level of fault an employee should be held responsible for in such cases. However these arguments will do little to affect the current view on employer’s liability and will certainly not improve health and safety levels at work. What is certain is that the employer’s level

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\(^{69}\) Chapter 16 of the Laws of Malta, Civil Code.

\(^{70}\) Ibid, art 1031.

\(^{71}\) Ibid, art 1032.
of responsibility and the ensuing liability he faces for breach of such responsibility goes beyond that of an ordinary person.

It would however be a prudent exercise to examine who indeed should be held liable both civilly and criminally in cases of injuries and deaths at work places, especially in the construction industry. While one can more easily except that an employer should bear a greater burden of responsibility for work accidents, it is less convincing to attribute such responsibility to non-employers.

The difference between an employer and a non-employer might not be so clear to the casual reader. However legally there is a very important distinction that should be drawn by both legislators and adjudicators when determining whether a person should be held responsible. The distinction made under Maltese legislation is not very clear but it may be observed in Chapter 424 of the Laws of Malta\(^{72}\) that an attempt at drawing a distinction is made.

Article 2 of the Act defines an employer as:

...any person for whom work or service is performed by a worker or who has an employment relationship with a worker, and includes a contractor or subcontractor who performs work or supplies a service or undertakes to perform any work or to supply services and

(a) in relation to work performed under a contract for services means the contractor or subcontractor, but shall not include the directors, managers, partners or owners, occupiers or possessors on behalf of whom work is being carried out, except to such extent as regards any tools, materials or equipment provided by them with regard to any defects thereof or therein which are known and not declared or which could have been known;\(^{73}\)

Therefore this definition, which may be said to be a bit complicated, envisages an employer to be first and foremost a person who engages a

\(^{72}\) Occupational Health and Safety Authority Act.

\(^{73}\) Ibid art. 2.
worker to perform work or who has an employment relationship with such a worker. The definition does not qualify the relationship as permanent or temporary nor does it qualify the relationship on the basis of whether the worker earns a wage from the employer or not.

The important part of the definition is sub clause (a) which explains the classification of a person who contracts a service. It holds that a contractor and a subcontractor shall be defined as employers, however directors, managers, partners or owners, occupiers or possessors on behalf of whom work is being carried out shall not be considered as employers. Interestingly the article makes it very clear that the definition of employer shall not include certain persons such as the owner; this is of paramount importance when considering whether a person should be held liable or not for a construction accident.

So by drawing a line between who is and who is not an employer, one may comfortably argue that persons who are not employers according to this definition should not be expected to be burdened by the duties and responsibilities of an employer. Thus the stringent duties imposed by the Occupational Health and Safety Authority Act, the numerous legal notices, as well as the doctrines of duties of the employer, should not be automatically applied to a person who is not an employer. This argument is obviously also of importance in the realm of criminal liability and shall be dealt with in chapter three.

The term ‘employer’ under English law is described by section 53(2) of HSWA as being someone who works under a ‘contract of employment’ (which may be express or implied, and if express, it may be oral or in writing). One may immediately observe the difference in this English definition of employer when compared to the Maltese definition discussed above and one may say that the English approach gives more certainty but may give rise to injustice if interpreted too strictly.
It however has been the view of adjudicators that the term should not be taken too restrictively as to deny workers certain rights such as those delineated under health and safety legislation.

In the case of *R v Pola*\(^7\) the issue of the employment relationship was raised when a worker was severely injured at a construction site.

The defendant had taken charge of the building of an extension to a house. There were a number of unqualified foreign nationals who were paid relatively small daily sums to work at the site. Their working materials were provided by the defendant and sometimes he brought their lunch and provided transport to pick them up. One of the workers fell from a raised platform and suffered severe brain injuries leaving him with permanent disabilities.\(^75\)

In this case it was in fact held that the worker was sufficiently controlled by his employer to qualify as an employee under the HSWA and the defendant was found criminally liable and was also ordered to compensate the injured worker 90,000 pounds in damages.

The case of *R v Pola* has added the principle under health and safety legislation, that even the most ‘casual’ of employees, provided the their working relationship satisfies the test set for the creation of ‘contracts of employment’, are owed protection by health and safety legislation.

This decision also underlines the importance of properly investigating the employment status of workers who by reason of language difficulties, the nature of their working relationships, if this involve gang-masters, or other difficulties in terms of patterns of working, are not best placed to protect or seek enforcement of their own contractual rights and legal protections.\(^76\)

When justifying the fact that defendant was denied an appeal on the issue on whether he should be held responsible as an employer or not Lord Moses

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\(^7\) *R v Pola* (Shah Nawaz) [2009] EWCA Crim 655; [2010] 1 Cr App R (S) 6 (CA (Crim Div)).

\(^75\) — ‘What do the terms employer and employee mean in the context of HSWA 1974? (Case Comments)’ [2010] HS at W.

\(^76\) Ibid.
described what constituted an employment relationship worthy of protection as follows:

This required evidence of what has been described as “mutual obligations”, in other words, evidence that both the defendant and a worker owed each other obligations. That would be sufficient only to establish a contract. Secondly, the prosecution had to prove that the nature of the contract was one of employment, in other words, that in return for payment the worker placed himself under an obligation to work.77

His Lordship also held that ‘[T]he jury had to be sure that a worker was not entitled to leave work on a particular day as and when he chose’.78

In deliberating their decision, their Lordships found that contracts of employment could arise in circumstances where workers worked day shifts work, and that it was not necessary that there existed an overarching contract of employment. To this effect this case was compared to *Carmichael v National Power plc.*79

### 2.3 Civil Liability of the Project Manager

On large construction projects, construction clients normally engage project managers as their representatives to overlook the project. The project manager is normally more experienced than the client and will give advice to the client in matters which said client has little knowledge of.

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77 *R v Pola*, para 5.
78 Ibid, para 23.
2.3.1 David Caruana v Quality Projects Management u Corinthia Palace Hotel Company Limited

This case involved an employee who was injured whilst working on a construction site. The construction project was owned by the Corinthia Palace Hotel Company Limited but it was being managed by a project management company called Quality Projects Management Limited.

David Caruana was injured when a fork lifter reversed onto him breaking his foot. He was wearing safety shoes that protected him from more serious injuries; however plaintiff claimed that he was injured because he was working in an environment which was not well lit. This, plaintiff claimed, resulted in the fork lifter driver reversing over his foot.

Plaintiff first sued the project management company on its own but later on in the case it joined Corinthia Palace Hotel Company Limited to the suit. Plaintiff was actually directly employed by the Corinthia Palace Hotel but during the project he worked under the control of Quality Project Management.

Quality Project Management’s primary defence was that it was not the employer of plaintiff and that therefore it was not the right defendant in this case.

The Court made an important observation on the meaning of ‘employer’ in the health and safety legislation. It provided that the meaning given to it by Chapter 424 of the Laws of Malta was such that would cover the project managers in this case. It also cited article six of the same body of law which provides for situations where the employer outsources the management of works that are being carried out.

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Skond l-art. 2, de verborum significazione, tal-Kap. 424, “«min ihaddem tfisser il-persuna li għaliha jsir xogħol jew jiġi mogħti servizz minn ħaddiem jew li jkollha relazzjoni ta’ xogħol ma’ ħaddiem”, u “tinkludi kull wahda mill-persuni – «persuna» tinkludi korp ta’ persuni u kull enti korporat stabbilit minn jew taħt xi liġi – li tidderiegħ fuq kullhadd jew li tieħu ħsieb it-treġija ta’ kuljum”. L-obbligi ta’ min ihaddem għas-saħħa tal-ħaddiem għalhekk jorbju mhux biss lil Corinthia Palace bħala dik li għaliha kien qiegħed isir ix-xogħol u li kellha relazzjoni ta’ xogħol ma’ l-attur, iżda wkoll lil Quality Projects bħala dik li kienet tieħu ħsieb it-treġija ta’ kuljum. Ukoll, il-fatt illi t-treġija ta’ kuljum thalliet f’idejn Quality Projects ma teħlisx lil Corinthia Palace mir-responsabbiltà, kif igħid ċar l-ewwel proviso ta’ l-art. 6(1). L-ewwel eċċezzjoni ta’ Quality Projects hija għalhekk miċħuda.\textsuperscript{81}

Article six of the Occupational Health and Safety Act provides that:

(1) It shall be the duty of an employer to ensure the health and safety at all times of all persons who may be affected by the work being carried out for such employer:
Provided that where in pursuance of the foregoing an employer enlists competent external services or persons, the employer shall not be discharged from such incumbent duties arising out of this Act and out of regulations made under this Act:
Provided further that the workers’ obligations in the field of occupational health and safety shall not affect the principle of the responsibility of the employer.\textsuperscript{82}

This case is important as it shows that even where a company divests itself from the control of a construction project it is still ultimately responsible towards the health and safety of its employees. This seems to be true even where the employer had engaged a very competent project management company. In fact the court awarded damages to plaintiff which had to be paid by both defendants in equal amounts.

The judgement should be looked at differently from one where an owner had contracted someone to perform works. In this case, the first defendant was the representative of the second defendant and as such was also found to be responsible. The most important factor however is article six of Chapter 424

\textsuperscript{81} Ibid 4.
\textsuperscript{82} Occupational Health and Safety Authority Act, art. 6.
which specifically provides for liability of the employer in these situations. As we have seen in chapter one of this thesis, where there exists an employer-employee relationship, the levels of responsibility of the employer is greater, and so too is his level liability.

2.4 The Civil Liability of an Owner towards an Independent Contractor

When a property or land owner decides to develop his property / land he, in most cases engages a contractor or rather various contractors who perform different services which result in the final product, that is a finished building. In some cases an owner might be experienced in property development, in other circumstances, this may not be the case and such a person will have to rely solely on the advice of his various contractors and his architect.

2.4.1 Alfred Cutajar v Dione Bartolo u Mario Cauchi\textsuperscript{83}

This case involved a developer who owned a block which was being developed and a painter / plasterer who was contracted by the owner to perform works on the said block.

At the end of a day’s work, the three painters / plasterers that were working at the construction site, decided to pack up their tools that consisted of some ladders, paint brushes, rollers and buckets. It was unanimously decided by the three of them to lower the tools down from the shaft which was intended for the lift of the block. Plaintiff was lowering the tools four floors down the block to his fellow painters and as he went to rest his arm against a plank of wood which was nailed from one side of the shaft’s opening to the other (described by David Sammut, Principal Officer who previously worked as a

\textsuperscript{83} Alfred Cutajar v Dione Bartolo u Mario Cauchi, Court of Appeal, 10 November 2008.
Safety Officer with the Health and Safety Department as ‘fencing’), the plank gave way and he fell down the vacant lift shaft to the ground.

Even though after the accident happened, the Safety Officer had inspected the block which was under construction and had deemed the openings to the shaft intended for the lifts as unsafe, it was decided not to proceed with criminal action against the owner Dione Bartolo. Plaintiff however instituted proceedings in the Civil Court against Dione Bartolo who owned the block and also against one of his fellow painters/plasterers.

The first Court’s finding of Responsibility

The Court of First Instance began its reasoning by quoting a number of civil cases where the employer was found to be responsible for injuries sustained by his employees for some form of negligence in providing a safe place and system of work.

It referred specifically to a the case in the names of Armando Caruana v Filomenu Pace84 which held that even when employees are sent out on different job sites, the site must be safe and there must be a safe system of work. This is relevant to the case in examination, as during the time of the accident and the time of the giving of the first judgment, the legal notice85 providing for safety at construction sites was not yet enacted.

The judgement of the Court of First Instance becomes of interest as the Magistrate compared the role of the owner for whom works were being carried out to that of an employer. In the judgement, Dione Bartolo, the owner of the block of apartments where the accident occurred, was referred to as a property developer, and he was then later referred to by the Court as a contractor. At no point is Dione Bartolo deemed to be, by any party, an

84 First Hall Civil Court, 19 June 2007.
employer of the plaintiff or of anyone else for that matter. To the contrary, the plaintiff as well as other witnesses, namely plaintiff’s partners, specifically said that they were not employed by Dione Bartolo (the defendant) or by anyone else.

The Court of First Instance for this reason had the more difficult task of justifying any findings of liability on the part of Dione Bartolo in the light of the fact that he was not the employer of the injured party. The Court went about this by comparing the duty of care incumbent on the employer to that of the contractor who engages an independent person to perform works but is not employed by the contractor. The difference between an employer and an owner who contracts work might at this point seem superficial and one may argue that such a person should be similarly held responsible as an employer would be. This reasoning, must however be examined in detail in order to gain a good understanding of the relationship that exists between the owner / contractor and a sub contractor, and this must be compared to the relationship that exists between the employer and his employee which was dealt with in chapter one.

The Court of First Instance held that:


86 It is understood that the court referred to defendant as the contractor in the sense that he was a general contractor who employed a sub-contractor. It would have been more appropriate to refer to him as the owner.

87 Cutajr v Bartolo (n81) 14.
It is for this reason that the Court attributed liability in tort to the defendant Dione Bartolo and on that basis the Court held that:


The main defence of Dione Batolo was that the defendant was not employed by him and therefore he did not owe a duty of care towards him. The courts concluding remarks on this defence was as follows:

Dwar l-eċċezzjonijiet tal-konvenut Bartolo, il-Qorti tiċħad l-ewwel eċċezzjoni għax il-fatt li l-attur ma kienx inkariga direttament mhix raġuni valida biex ma jidħolx fir-responsabbilta’ minħabba li r-responsabbilta’ tiegħu hija biss riżultat ta’ l-ambjent tax-xogħol.\(^{89}\)

The Court found defendant partially responsible because it attributed contributory negligence to the plaintiff. The Court held that it was common sense for plaintiff not to lean against the fencing, and that a reasonable person would not have done so.

At this point one should concentrate on the true relationship of the parties involved in the case. The defendant owned the property and contracted plaintiff to perform finishing works. The owner did not involve himself to any extent in the methods used by the plaintiff; his only contribution was the buying of paint for plaintiff to work with.

The Court of Appeal

Dione Bartolo, appealed primarily on the basis that the analogy of the status of ‘employer’ drawn by the first Court was wrong and misleading and that the relationship that really existed was that of appalt (contract of works). The appellant held that in such a situation, the contractor or sub-contractor must himself take the responsibility of preventing and avoiding risk at the work place. Appellant also appealed on the basis that the plaintiff did not act as a bonus paterfamilias when he chose to pass the tools through the shaft instead of using the available staircase. In this regard appellant held that plaintiff should be found totally responsible for having put himself in unnecessary risk.

The Court of Appeal when considering the case at hand felt it necessary to define the relationship that existed at the time of the accident right from the start. It held that ‘lx-xoghol li kellu jagħmel l-attur – wara li ppreżenta ruhu biex jippresta s-servizzi tiegħu bħala bajjad ma’ persuna oħra (mhux l-appellant Bartolo) – kien jikkonsisti f’tibjid permezz ta’ ―rollers‖’. The Court described the three painters as self employed ‘jahdmu ghal rashom’ and that Dione Bartolo never employed the plaintiff directly.

To find the plaintiff liable in tort, the questions that the Court of appeal deemed necessary to ask were the following:

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91 Ibid 19.
92 Ibid 21.
Therefore the Court of Appeal examined the case without entering into the added duty owed by the employer to his employees. It examined the above mentioned questions in order to see whether Dione Bartolo was liable in tort. The Court of Appeal on this basis did not find appellant liable for negligence and attributed responsibility for the accident onto the plaintiff himself.

The Court of Appeal however made some important concluding remarks, exemplifying instances where a property owner would be liable in damages towards a person contracted to perform a specific job at a construction site. It held that:

Li kieku, ghall-grazzja ta’ l-argument, kellu jirriżulta li waqt li qegħdin jiżbgħu s-saqaf, waqghet xi parti minnu u laqtet lill-attur, allura xi forma ta’ ness kienet tkun preżenti. Li kieku l-bajjada sabu t-taraġ imbarrat jew ingumbrat talment li kellhom neċessarjament jadoperaw inżul alternattiv ghall-ghodod taghhom, allura hawn ukoll wiehed seta’ jikkellem fuq in-nuqqas ta’ “a safe place of work”, imma dan ma kienx il-każ. Li kieku rriżulta li l-attur, minflok utiliżza x-“shaft”, niżżel l-affrijiet mit-taraġ u żelaq minhabba xi materjal ingombranti t-taraġ jew għaliex it-taraġ kellu xi difett strutturali, allura wiehed seta’ jikkonnetti b’xi mod ma’ l-incident lill-appellant konvenut, imma mhux hekk kien il-każ. L-infornju seħħ unikament għaliex il-bajjada, minn jeddhom, għazlu li jutiliżżaw ix-“shaft” tal-lift b’riskju bla bżonn għal saħħithom u ġara dak li ġie spiegat supra. Għalhekk kjarament isegwi li l-aggravji tal-konvenut appellant Dione Bartolo huma fondati u li, konsewgentement l-appell tiegħu għandu jigi milqugħ.94

93 Ibid 22.
94 Ibid 24.
The Court of Appeal commented on the reasoning of the first Court’s judgement by saying that there is a trend that adjudicators cite local and foreign judgements to come to their conclusions but use cases which are dissimilar to the case under examination. There is no doubt that the Court of Appeal was referring to the first Court’s comparison of an employer to that of the defendant. The Court in fact held that:

Il-Qorti tibda billi tirrileva li ġjeli qegħda tiġi rinfacaċjata b’sentenzi, bħal dik li minnha sar l-appell odjern, li jkunu jikkonsistu f’sunt tad-deposizzjonijiet moghtijin, segwiti mbagħad b’aċċenn ghal sensiela ta’ riferenzi minn każistika lokali jew estera u fl ahħarnett deduzzjoni xotta xotta in linea ta’ motivazzjoni in determinazzjoni tal-vertenza. Dak li jqanqal ċertu ammont ta’ perplessita’ f’din il-Qorti huwa meta tinnota li l-kawżi deċiżi li tkun saret riferenza għalihom mhux dejjem ikunu msejsa fuq fattispecji simili ghal dawk mertu tal-kawża. Din il-Qorti għalhekk tħossha fid-dmir illi tissottolineja li meta riferenzi ta’ din ix-xorta jiġu ċitati b’approvazzjoni u b’ sostenn, dan l-eżerċizzju għandu jsir b’kawtela u b’doża ta’ ċirkospezzjoni. Altrimenti, l-istess riferenzi aktar iservu biex jikkonfondu milli jikkonvinċu. 95

This case is very interesting in that it drew a distinction between the employer and someone who contracts work. It is appropriate to say that when someone works on his own behalf (self-employed) he is responsible for his system of work and also his own safety. This does not mean that the contracting party has no duties; on the contrary, the owner / client has to be sure to provide a safe place for workers to work from and safe access, this especially in light of the relatively new and controversial LN 281 of 2004 dealing with construction site health and safety which will be dealt with in chapter three. The contractor, subcontractor or self employed person enjoys the freedom to work under his own conditions, and therefore such a person should be responsible for his actions.

95 Ibid 25.
The Courts however do not always follow the same line of reasoning. In the following case, the duties of the owner were held to be more severe and so also was the finding of liability.

2.4.2 Steve Cuschieri v Panta Contracting Limited Corinthia Palace Hotel Company Limited et

Steve Cuschieri, the person bringing forth the claim as plaintiff, was directly employed by the defendant company Panta Contracting Limited as an electrician. Panta Contracting Limited was contracted by Corinthia Marina Hotel, an establishment which in fact did not have any connection with the other defendant company Corinthia Palace Hotel Company Limited but was owned by the company Marina San George Limited which was later joined in the suit.

This case is very relevant to the construction industry as it provides input of the different relationships that exist at a construction site. This case gives us input of the approach taken by Maltese Courts in evaluating who should be held responsible for an accident at a construction site where there could be more than one person in control or where the employer of the injured worker was not in control of the site and therefore one will have to examine the extent of an employer’s responsibility in such cases. This approach will later be compared to the UK scenario as in health and safety cases, Maltese Courts have in many judgements referred to English writers and jurists when assessing the duties of the employer and whether there was a safe system of work in place.

The case involved an accident that occurred during the development of the Marina San George Hotel. Plaintiff, whilst under the employment of Panta Contracting Limited and whilst carrying out electrical work at the construction site, fell a height of two floors and sustained serious injuries to his head, face and knee.
The accident occurred when plaintiff, after getting an extension lead from upstairs, was walking down the stairs with the lead over his shoulders. As he was going down the unfinished flight of steps (which was still under construction), he lost his balance, and attempted to hold on to a makeshift temporary wooden handrail. As soon as he touched the handrail which was nailed to the concrete stairs, it gave way and plaintiff fell from the flight of stairs to the ground, hitting some scaffolding on the way.

It was established from the start that the temporary handrail was not installed by plaintiff’s employer, Panta Contracting Limited. It was in fact installed by workers of the construction company engaged by Corinthia Marina under the supervision of Ronnie Demicoli an employee of the second defendant. The temporary handrail was intended as a safety measure to protect against falls until the staircase was finished. The project Manager engaged by Corinthia Group gave witness and said that the handrail was installed by the construction contractor of the project, Attard Bros. Co. Ltd.

Mario Falzon, Project Manager mal-Panta Contracting xehed li l-Corinthia stess kienet l-iżviluppatur tal-proġett. Dwar il-poġġaman, qal li l-Corinthia stess kienet poġġitu u Panta Contracting ma kellhex x’ taqsam mieghu. Wara l-incident dan il-poġġaman reġa’ l-poġġa mill-Corinthia Group pero’ rabtuħ iktar milli kien cjoe għamlulu aktar viti mal-ħajt u aktar forza. Meta ġara l-incident il-poġġaman kien inqala’ minn mal-ħajt ghax ma kienx imwaħħal sew. 96

Considerations of the Court

In order to find who should be held responsible to pay for the damages resulting out of tort, the Court quoted articles 1031, 1032, 1033 and 1045 of the Maltese Civil Code.

96 Steve Cuschieri v Panta Contracting Limited Corinthia Palace Hotel Company Limited et, First Hall Civil Court, 28 November 2003, 5.
1031. Every person, however, shall be liable for the damage which occurs through his fault.97

1032. (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.
(2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.98

1033. Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.99

The Court then reiterated the standard notions of the employer's duties and responsibilities towards its employees. At this point however it was not clear towards whom these notions were addressed, whether to the direct employer Panta Contracting or to the Corinthia Group.

Hu dmir ta' kull employer li jiggarantixxi "a safe system of work" fuq il-post tax-xoghol u dan l-obbligu huwa tal-employer u mhux tal-impjegat. Kif jghid Charlesworth "On Negligence" p 1036 pagna 622: - "The duty of employers to provide the servant with a safe place of work was explained by Goddard L.J. to be: "not merely to warn against unusual dangers known to them.... but also to make the place of employment.... as safe as the exercise of reasonable care would permit." "The duty is owed to each individual servant individually" (p 1035).100

The Court then quoted Munkman who holds that:

1. "...it may be that the employer has done nothing at all to carry out his obligations."
2. "In the second place the employer may have been informed of a defect or danger, but done nothing to remedy it."

97 Civil Code, art. 1031.
98 Ibid art. 1032.
99 Ibid art. 1033.
100 Cuschieri v Panta Contracting (n95) 11.
3. “Thirdly, the employer, knowing of a defect in his plant or premises, or of a danger in the course of work, may have taken inadequate measures to eliminate or reduce

4. “Fourthly, though the employer does not know that anything is wrong, it may be that he ought to know - that is he could have found out by reasonable care.”

The defendant company, Corinthia Marina San Gorg Ltd, defended itself by stating that the temporary handrail had been installed by the construction contractor Attard Bros. Co. Ltd and not by themselves.

The defendant company, Panta Contracting Ltd, defended its position by stating that even though the claimant was employed by them, he was not under their control and that the control of the construction site was at the charge of the Corinthia Group. Panta Contracting also claimed that they supplied all their employees with the relevant safety equipment.

The Court made the observation that at the construction site there were a lot of workers all of whom were employed by different contractors who in turn were engaged by the company developing the project namely Corinthia Group.

From the evidence examined, the Court decided that the accident occurred because the temporary handrail was not properly installed and did not provide the protection that it should have. This conclusion was reached as after the accident Marina San Gorg Ltd reinstalled the handrail with greater reinforcement and screws.

As to who was responsible for the above fact (that the handrail was not sufficiently secured), the Court held that even though the handrail was not directly installed by the defendant company Marina San Gorg, the construction contractor Attard Bros. was engaged by them and therefore Marina San Gorg were responsible for their actions. The Court was even

more convinced of their decision due to the fact that the handrail was installed under the supervision of Ronald Demicoli who was Corinthia Group’s Quality Project Manager.

As to contributory negligence, the Court observed that plaintiff was not wearing any safety equipment and that he did not contest that his employer had provided such safety equipment and that such employers were adamant that their employees wear such safety equipment. The Court deemed it appropriate that plaintiff is held responsible for contributory negligence for this reason.

After an examination of all the facts the Court decided that Panta Contracting Ltd, the employer of plaintiff was not negligent in any way or that it had contributed in any way to the accident. The Court unfortunately did not delve any further as to the responsibility of an employer in such a situation and did not give further reasons as to why Panta Contracting Ltd should not be held responsible in any degree. The Court’s decision may be traced to equity, in the sense that if the employer was not in control of the site specifically and it was not in any way responsible for the erection of the wooden handrail, then it should not be held responsible for the accident.

In this case the client / owner was found negligent and liable towards the employee of one of its contractors for the shortcomings of the employees of another one of their contractors. The Court’s conclusion was the result of the understanding that the control over the construction site was in the hands of the owner, and that it therefore was duty bound to establish a safe working environment. Had the accident occurred due to some unsafe system employed by the employee, it would have been hard to envisage liability falling onto the owner / client. Ultimately the direct employer of plaintiff had no fault in the accident and the only person left in the lawsuit was the owner / client. It would have been interesting to see the outcome if the building contractor who had installed the temporary handrail, was also included in the
lawsuit. Would the owner still have been found liable? Would liability be divided?

### 2.5 Different Contractors on the same Site

As was examined in the judgement *Steve Cuschieri v Panta Contracting Limited Corinthia Palace Hotel Company Limited et*, the very fact that more than one group of workers are working on one particular construction site at the same time complicates matters when it comes to identifying a liable person. It is a fact that a contractor is responsible for the health and safety of his own employees and if he fails to implement a safe working system on site, he would be liable to pay damages towards an injured employee. Where, however, the occurrence of an accident cannot be traced to the employing contractor in any way, it is hardly agreeable to find such a contractor liable for damages. The theory of control adopted by the UK Courts could be an easy and sensible way of attributing fault and liability where such fault exists.

#### 2.5.1 Francis and Mary Attard v Joseph Grech

The Court of Appeals case in the names *Francis and Mary Attard v Joseph Grech*[^102] is another interesting case that again highlights the responsibilities and liabilities of different parties on a construction site.

The plaintiffs had instituted court proceedings against defendant because Francis Attard who was a painter had injured himself whilst at work and he was stating that he injured himself as a result of defendant’s lack of skill.

Plaintiff had been contracted to paint a building block which was still under construction. The construction site was a typical one where more than one

[^102]: Francis u Mary konjugi Attard v Joseph Grech, Court of Appeal, 27 March 2009.
group of workers where working on the same site at the same time. There therefore existed a multi-employer environment where different parties were responsible for different jobs on site. In fact, plaintiff as well as defendant were both contracted by the owner of the block under construction and there existed no legal relationship between the two other than the fact that they were engaged by the same owner to work on the same site. It also resulted that there was no one co-coordinating their works; ‘[L]-appalt ta’ l-appellant u dak ta’ l-appellat kienu separati u ma kien hemm ebda ko-ordinazzjoni fix-xogħol rispettiv taghhom.’

Plaintiff was contracted to perform plastering and painting works whilst defendant was contracted to perform concrete works.

The accident happened when whilst on site, plaintiff fell from a height of almost one story whilst passing on a wooden structure intended for the construction of a staircase.

Plaintiff, together with some other plasterers working with him had gotten into the habit of passing from one level to the other over the uncompleted wooden structure which was intended to be used as the form in which concrete would be poured and which would form a staircase. The inevitable happened, and on one occasion plaintiff went through part of the wooden structure which broke under his weight.

The basis of plaintiff’s lawsuit was that the contractor in charge of the concrete works or his employees had constructed the wooden structure that gave way and which resulted in his injuries.

The considerations of the Courts

As to the claim that the wooden structure was not built with the necessary skill, both Courts (First Hall Civil Court and Court of Appeal) agreed that the
wooden structure was not even completed and that it was not intended to be used by persons to pass from one floor to the next. Its sole purpose was for the construction of a staircase. Employees of the defendant gave witness that they had noticed plaintiff and his workers passing over the structure and had warned them that it was not strong enough to take their weight, but this advice fell on deaf ears. This fact was contested, however the Court of First Instance concluded that as a plasterer of experience plaintiff should have known that the structure was not to be used in that way. It was true that there were no signs saying that it was not safe to pass from the structure but the Court deemed them unnecessary due to the obviously apparent danger.

Plaintiff also argued that the structure was not made of appropriate material and the use of chipboard instead of solid wood made the structure weak and dangerous. The First Court however used this fact against him and said that if he knew of this fact he should have taken even more precaution and not have used it as a passageway.

**A Most Important Consideration**

There existed an important factor in this case which to my mind was not sufficiently elaborated upon by either Court. At the time of the accident there existed no proper access to the upper level (roof) from which plaintiff needed to gain access to plaster the dividing wall of the property. This in my view is of particular importance as this fact gives plaintiff a reason to use the wooden structure in order for him to be able to access his place of work. The Court held that plaintiff had chosen to pass over the structure and by doing so he put himself at risk unnecessarily. The Court confirmed that it was true that there existed no other means of access to the roof. It however stated that if this means of access did not exist, plaintiff should have chosen either to wait until the staircase was finished so as to have a safe means of access or else he should have constructed a system of scaffolding and ladders to work from the outside thus avoiding the need to gain access from the roof.
For these reasons, the Court invoked the maxim *volenti non fit injuria* and also quoted Charlesworth stating that where someone can predict a risk but still takes the risk “freely and voluntarily with full knowledge of the nature and extent of the risk he ran” he cannot then put the blame on others if he suffers the consequences of his actions.

At appeals stage there was further elaboration on the fact that there was no other means of access to the roof. Defendant gave witness to the Court that plaintiff had his own wooden planks to work with and that therefore he did not need to use the wooden structure constructed by defendant. It is this fact that was the last nail in plaintiff’s coffin. The Court of Appeal agreed with the findings of the First Court and found plaintiff solely responsible for the accident.

After having examined this case, it is clear that the main cause of plaintiff’s failure was the choice of defendant and also the fact that at the time of the accident there was not yet in force specific health and safety legislation for construction sites.

The case was doomed from the start due to the fact that the defendant was in no way responsible for the health and safety of plaintiff. The employer-employee relationship, which would make the employer responsible to keep a safe working environment and to provide safe means of access to work did not exist. The proper defendant would have probably been the owner of the building especially if the current construction health and safety legislation would have been considered. Had there been someone to coordinate works being carried out, this accident would have probably been avoided. The importance of construction management and supervisors should not be underestimated.

The fact of the matter is that in this case there was no establishment of control over works. There was no person in charge of coordinating and
supervising works being carried out by different contractors and their employees. There was no system in place and this was the primary cause of the accident. The secondary cause of the accident was indeed the bad judgement of the plaintiff himself who chose to use the structure as a means of access. In reality the plasterer / painter was contracted by the property owner who left him and his fellow worker at liberty to choose their own methods and to judge for themselves what safe system of work to implement.

Had the defendant been the property owner himself, there could be certain instances where he could be found responsible for the accident. Reference may be made to comments made about the English case *McCook v Lobo*. 104

*McCook* is not an untypical example of a practicable problem that frequently occurs in construction cases. It might have been different in that case if there had been an agreement between the defendants not to use scaffolding on the job in order to save money. In such circumstances the owner of the premises, who would have been a client under CDM Regulations 2007, could be said to have control of the way in which the work was carried out. 105

Therefore had defendant been in control of the way in which the plaintiff was carrying out his work, the Court in Malta could follow the British reasoning when applying responsibility to a case. It would make sense to find someone responsible if he is in control or ought to be in control and this regardless of his status of employer or property owner. One must however support this reasoning through specific regulation imposing statutory duties on whoever is in control of a construction site, something that LN 281 of 2004 regulating construction site health and safety has started to do.

105 Tomkins, Humphreys, Stockwell (n 12) 189.
2.6 Control over the Construction Site and Control over Construction Works

After having examined three Maltese civil liability judgements which involved accidents on construction sites, a comparison shall be made to the considerations of UK Courts when seeking to attribute liability in similar situations.

As one may note, the cases mentioned above were chosen specifically because they did not involve a straightforward employer-employee relationship. This relationship was dealt with in the previous chapter and it was concluded that where one is employed, one can easily seek compensation from his direct employer where there is negligence and where there is breaches of statutory duty, namely where there is an unsafe system of work.

In the UK where there is no straightforward employer-employee relationship, it is a current understanding that ‘[R]esponsibility for breach of health and safety provisions is based upon control of the situation giving rise to the injury.’106

The establishment of control over working methods and over the construction site is therefore the foremost important element when deciding on whom the gauntlet should fall. This is essential when the accident occurs on a construction site, because the number of different legal relationships that exist, and the multi employer atmosphere makes it harder to attribute responsibility for any shortcomings.

An important English appeals case where the judgement laid down some important principles when it comes to responsibility for accidents in the construction industry, can be compared to the previously discussed Maltese judgements.

106 Tomkins, Humphreys, Stockwell (n 12) 188.
2.6.1 Ronald Keith McCook v (1) Aloysius Lobo, (2) London Seafood Limited and (3) Stanley Headley

Mr. Lobo, one of the defendants, was the owner of the premises which was being converted so as to accommodate a retail fish market to be operated by the second defendant on the ground floor, and was thus undergoing construction works. The Court decided to group the first and second defendants as legally they stood the same ground and throughout, reference will be made to both defendants as one.

Plaintiff, Mr. McCook was directly employed by the third defendant Mr. Stanley Headley. The Court of Appeal elegantly described the relationship as follows:

The third defendant, Stanley Headley, was a building contractor employed by the first defendant to carry out building repairs and refurbishment at these premises. The claimant started work for him in January 1998. The judge held that at all material times the claimant was employed by the third defendant and not by the first defendant. Having examined the facts, he found that the third defendant was at all material times exclusively the claimant's employer. He hired him, he controlled how he did his work, and he paid him. He was in every way the claimant's employer. The first defendant, on the other hand, for reasons given above, never became the claimant's employer either on a temporary basis or in any other manner. There is no appeal against that unequivocal finding.

From the beginning the Court deemed it essential to establish the roles of all the parties. This is a crucial exercise so as to attribute the different statutory duties to the different parties involved in construction. As will be discussed, the roles will vary from one case to another, not only on the basis of contractual agreements, but also on the actions or lack of, of the different parties involved.

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108 Ibid.
In this case, plaintiff was employed as a general labourer with third defendant Stanley Headley, who was in turn contracted by first defendant and the second defendant Mr. Lobo. Whilst at the construction site, plaintiff fell from a ladder from which he was trying to fix a waste pipe to a bracket. Plaintiff used a ladder to gain access to the ceiling. It was established that he fell because the aluminium ladder he was on, was not footed and unsecured. Plaintiff fell from a height of almost twelve feet when the base of the unsecured, unfooted ladder moved suddenly. As a result of the fall Mr. McCook sustained three broken vertebrae in his lower back.

After establishing the facts of the case, the Court proceeded with its first important observation. Who had supplied the ladder? It was quickly established that aluminium ladder was supplied by claimant’s employer and not by the other two defendants; this fact was uncontested.

The second question the Court tackled was that of who had control over the works being carried out by the claimant. It was held that Mr. Lobo (the owner) was not the one in control of the procedure of how the work was being carried out. ‘He did not direct that this particular work should be done, and indeed he was not on site at the relevant time.’ The third defendant, claimant’s employer, was also not at the site at the time of the accident. He was away on break when the accident occurred and when he returned claimant had already been taken to hospital.

**Liability**

The Employer, Mr. Stanley Hadley, was found to be liable in tort towards claimant’s injuries. The Court had easily come to the conclusion that the methods used by defendant were inherently dangerous and in fact held that ‘[T]he risks are almost too obvious to state.’

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109 Ibid.
110 Ibid.
The Judge found third defendant guilty of negligence as well as for breach of statutory duties purporting to the Construction (Health, Safety and Welfare) Regulations 1996 imposed by the specific legislation operational at the time.

When establishing whether the owner of the building was guilty of any negligence or breaches of statutory laws the Court examined the duties of the occupier.

The judge came to the conclusion that as a prudent site owner, the first defendant had visited the site from time to time and that he indicated to the contractor and the employee when he saw anything to cause concern and told them to rectify the situation to reduce the risks.

However, he assumed no responsibility for the supervision of the claimant or any of the third defendant's employees, which he left entirely to him. The owner had relied on the expertise of the third defendant when it comes to the work he contracted and the ensuing health and safety implications. The judge found that he had "properly delegated" the building works and that therefore he was not guilty of employing an incompetent contractor. ¹¹¹

The Judge shot down plaintiff's argument that the owner of the site should have realised that the work was being carried out in a dangerous way and that there was no reason for the owner to believe that the contractor was cutting corners or putting his employees at risk. On the contrary, the judge held that the first defendant was right to believe that the contractor was a careful and competent building contractor.

This argument is reasonable in the sense that when you contract someone to carry out construction work of any sort, such work includes also all the procedures necessary to abide to health and safety regulations. It may be argued that one does not contract a person who is experienced in his line of work and then is expected to provide for safety equipment and a safe environment.

¹¹¹ Ibid (emphasis added).
working system. How is the average person (who is not experienced in the trade he has contracted persons to perform) supposed to know what the safe working system is?

Claimant argued to the Court of Appeal that he should have succeeded at common law on the basis of the decision in *Kealey v Heard*\(^{112}\) and as a separate ground or cause of action under the Occupiers’ Liability Act 1957. He also argued that liability could have been established in any event under regulation 4(2) of the Construction (Health, Safety and Welfare) Regulations 1996, and regulation 10 of the Construction (Design and Management) Regulations 1994.\(^{113}\)

The Judge however dismissed that there was any form of occupier’s liability as the defendant was not found to be negligent in this regard.

As for the statutory duties of the owner, the Judge held that:

> the duty the first defendant owed the claimant did not require him to take precautions to see that the ladder on which the claimant was mounted was footed or secured while the claimant was working from it; or indeed to ensure that the third defendant had given express instructions to the claimant that he should not use the ladder when it was unfooted, or for that matter to discover from each of the third defendant’s employees whether he appreciated the risks of mounting and working from an unfooted ladder.\(^{114}\)

### 2.6.2 Defining Control

As discussed, the element of control in UK judgements plays a large part when deliberating on whether a person should be found guilty in construction accident cases.

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\(^{112}\) [1983] 1 WLR 573.
\(^{113}\) The Construction health and safety regulations at the time.
\(^{114}\) *McCook v Lobo* [2002] EWCA Civ 1760.
The English construction regulations at the time of judgement held that:

It shall be the duty of every person (other than a person having a duty under paragraph (1) or (3)) who controls the way in which any construction work is carried out by a person at work to comply with the provisions of these Regulations insofar as they relate to matters which are within his control.\textsuperscript{115}

The latest English regulations on construction health and safety provide a similar albeit a more detailed set of provisions:

25.—(1) Every contractor carrying out construction work shall comply with the requirements of regulations 26 to 44 insofar as they affect him or any person carrying out construction work under his control or relate to matters within his control.

(2) Every person (other than a contractor carrying out construction work) who controls the way in which any construction work is carried out by a person at work shall comply with the requirements of regulations 26 to 44 insofar as they relate to matters which are within his control.\textsuperscript{116}

In \textit{McCook v Lobo} it was held that:

[I]n principle it is clear that the obligation to perform the duty provided by the regulation cannot be avoided by abdicating responsibility. If compliance is required, it is not an answer to contend that the duty was ignored and thus did not arise. The requisite level of control before the duty does arise, however, is linked to the way in which construction work is carried out and it is confined to construction work within the individual's control. \textbf{For this purpose the obvious person who controls the way in which construction work on site is carried out is an employer.} The employer owes express duties under regulation 4(1). That, therefore, identifies the starting point. \textbf{But someone who is not an employer may also be bound by the statutory obligation under regulation 4(2).} Whether the appropriate level of control over the work is or should be exercised by an individual other than an employer so as to create the duty to comply with the obligations under regulation 4(2) is, in my judgment, a question of fact. It is not answered affirmatively by demonstrating that an

\textsuperscript{115} Construction (Health, Safety and Welfare) Regulations 1996, s 4(2).

\textsuperscript{116} The Construction (Design and Management) Regulations 2007, s 25.
individual has control over the site in a general sense as an occupier, or that as the occupier of the site he was entitled to ask or require a contractor to remove obvious hazards from the site. The required control is related to control over the work of construction.\textsuperscript{117}

The Court of Appeal went further in explaining what is meant by control. When examining the proceedings of the first judgement it held that:

Indeed in what, I suspect, must have been a forensic flourish, it was at one stage submitted that it was sufficient for the claimant to establish that the first defendant enjoyed power to control the site. As the language of regulation 4(2) refers to control rather than power to control, that submission added words to the regulation that are not there and cannot reasonably be read into it. Accordingly it went too far.\textsuperscript{118}

Therefore, this could be understood that even though a person occupying a property as owner and therefore having an ultimate say over such property, does not make such an owner unlimitedly liable to whatever happens on site. The fact that a person may be in control does not automatically imply that he is in control, especially when it comes to control over the method of work employed by contractors or self-employed persons for that matter.

As a last resort, claimant tried to attribute liability to the first defendant through his status as client under the 1996 Regulations.\textsuperscript{119} This is also relevant to the Maltese scenario as this regulation was one of the implementing regulations to the European Directive on construction health and safety, which Directive was also implemented in Malta through Legal Notice 281 of 2004. As a client, first defendant was obliged to provide a health and safety plan, which in fact he did not. On this basis, claimant tried to link his injuries to the fact that the owner / client did not perform this duty. This argument of claimant however failed to sway the adjudicator in his favour. The judgement read as follows:

\textsuperscript{117} McCook v Lobo, [2002] EWCA Civ 1760 (emphasis added).
\textsuperscript{118} Ibid (emphasis added).
\textsuperscript{119} The Construction (Health, Safety and Welfare) Regulations 1996.
Our attention was drawn to the Council Directive 92/57/EEC\textsuperscript{120} of 24 June 1992, which includes provisions relating to on-site outdoor work stations and the provision of scaffolding and ladders. We also looked at two booklets "Health and Safety in Construction" and "A guide to managing health and safety in construction". However, nothing was drawn to our attention from either of those publications to suggest that a health and safety plan, properly prepared by a client under regulation 10, was required to deal expressly with obvious and elementary safety precautions. I can see no reason to accept the submission that specific guidance as to the footing and security of ladders should have been included in such a safety plan. In my judgment, the argument overlooks the essential simplicity of the accident for which in their different proportions the employer and the claimant were both held culpable. I myself doubt whether even the most meticulous safety plan should ever be required to make such detailed provisions.\textsuperscript{121}

Therefore the health and safety plan would not have prevented the accident, for this reason the judge did not establish the necessary causative link between the proved breach and the consequent injury.

This again is a very useful principle that holds that if the risk is so obvious to foresee, then the very fact that client failed to draw up a health and safety plan, does not give rise to liability. There must be a causative link between the harm suffered and the actions of the defendant. This is common to the Maltese understanding of tortuous liability and it could be said that it is a very fair approach when it comes to attributing liability.

Lady Justice Hale had the following comments with regards to control over works and liability:

Regulation 4(2) of the 1996 Regulations to my mind depends entirely on the question of factual control. Of course if a person has factual control and chooses not to exercise it, they cannot thereby escape liability. But there will still be the question of fact as to whether such control exists. In the circumstances of a client


\textsuperscript{121} McCook v Lobo [2002] EWCA Civ 1760.
who is contracting with an apparently reputable contractor to conduct construction work in his premises, there is little reason to doubt the straightforward factual finding made by the judge that the client was not in control of the way in which the claimant was doing his work. Nor do I think that a breach by the client of regulation 10, in regard to a health and safety plan, can alter that position.\textsuperscript{122}

The Plaintiff needed to prove liability of the second defendant (the owner) to be compensated in any way, as his employer, who was indeed found liable, was bankrupt and uninsured and therefore unable to pay for any damages.

The judgement may be said to be equitable in that it did not find the owner liable for something he did not have control of. The adjudicators also did not treat the owner as, or even compared him to, plaintiff’s employer which again was a just decision as it did not in any way result that he was plaintiff’s employer. This case is very useful as it examines civil liability as arising out of statutory law specifically designed to safeguard workers and third parties from accidents in the construction industry. The relevant Maltese regulations were relatively recently enacted and therefore civil claims based on them are scarce.

\textbf{2.6.3 King v Farmer}\textsuperscript{123}

The Case King v Farmer shines some light on the duties of sub-contractors towards their own safety when they themselves are in charge of how they carry out their work. ‘It serves as a useful reminder of the difference in duties and obligations imposed upon a main contractor where the Claimant is a sub-contractor rather than an employee’.\textsuperscript{124}

Mr King, a painter, was sub-contracted by Mr Farmer who was the main contractor who had obtained a contract to paint the exterior of a building.

\textsuperscript{122} Ibid.
\textsuperscript{124} King v Farmer t/a R W Farmer (Builders) 6.8.04 (The Chartered Institute of Loss Adjudicators) <http://www.cila.co.uk/node/181> accessed on 15 January 2011.
Mr Farmer had provided scaffolding, but it was agreed that King had to gain access to the scaffolding using his own ladder.

Mr King fell off the ladder and he alleged that Mr Farmer had breached the Construction (Health, Safety and Welfare) Regulations 1996 by failing to have someone at the foot of the ladder to prevent it slipping. He alleged that Mr Farmer had failed to fulfil his duty to provide safe access to the first stage of scaffolding.

In considering whether there was an employer/employee relationship the High Court applied 3 tests:
- Organisational - who organises the way the work is done.
- Economic reality - who bears the risk of loss and the chance of profit.
- Multiple - looking at all relevant factors.

On the basis of these tests the Court found that Mr King was not an employee. He should therefore have arranged for somebody to foot the ladder, or alternatively have secured it to the scaffolding.\(^{125}\)

Here again it was decided that while it is true that health and safety regulations duties exist for persons who are not employers, this is only the case where such persons have control on the way work is done.

However it has been commented that the approach by the judge was too literal and that if the case was pleaded on the basis of safe access to work, Mr King should have been afforded protection even when on the ladder. ‘[i]n the circumstances “at work” should have been taken in the broader sense of being on site – after all, the purpose of the Regulations is to ensure safety once the person arrives at work’.\(^{126}\)

This reasoning, however, does not give cognisance to the fact that the injured person was not an employee and the main contractor was not in control of the way in which the sub-contractor was operating. These are

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\(^{125}\) Ibid.

\(^{126}\) Tomkins, Humphreys, Stockwell (n 12) 190.
important considerations that have to be taken into account before one can decides a case.

2.7 Civil Liability towards Third Parties (Non-Workers)

Where a person is injured due to the fact that she or he was in the wrong place at the wrong time, finding liability for the accident causing the injury is a question of causation. As is the case in most civil liability claims, the Maltese Courts apply the laws found in the Civil Code dealing with liability. The standards of liability in such cases are therefore applied in a straightforward manner however it would be of interest to examine some Maltese cases which involved the possibility of more than one responsible party. One must bear in mind that a person may be found to be civilly liable when he has committed a criminal offence. This is the basis of finding an employer civilly liable when he or she has not abided by the strict word of health and safety legislations. The specific subsidiary legislation dealing with construction sites shall be examined in detail in chapter three, where the various responsibilities of different parties shall be scrutinised and will be compared to the equivalent UK law.

2.7.1 Alfred Miggiani v Carmelo Cutajar et

This is an early judgement given by the First Hall of the Civil Court of Malta which involved the collapse of a roof which was undergoing construction work. The said roof formed part of a room overlying a shop, and when the roof collapsed the beams (xorok) fell to the floor over the roof of the shop resulting in the collapse of the shop’s roof onto plaintiff’s wife.

127 Alfred Miggiani v Carmelo Cutajar, First Hall Civil Court, 18 March 1963.
The lawsuit was instituted by plaintiff, Alfred Miggiani, against the builder and also against Carmelo Cutajar who is referred to as the contractor. The fact that Carmelo Cutajar is referred to as the contractor is of immense importance with regards to the scope of this thesis. The Court specifically refers to defendant as the contractor and later on the judgement mentioned the phrase ‘sid il-post’ (owner of the property) as distinct and separate from the contractor. Plaintiff later in the case also joined the architect to the suit, stating that he also was responsible for the accident but the owner was never joined in the suit.

The Court found the architect not responsible for the accident, and this because he had not as yet assumed any responsibility or control over the works that were being carried out. ‘...[l]-Konvenut Perit Muscat biss mhux responsabli ghad-danni li saru u dana ghar-raguni li ma kiex lahaq assuma d-direzzjoni u kwindi r-responsabilita’ tax-xoghol ghaliex kien ghad ma kiex ghamel l-applikazzjoni u ottiena permess tas-Sanita...’128

The Court also considered the fact that the accident did not involve technical shortcomings, the responsibilities of which are vested in the architect. ‘...[s]i trattava ta ħaga li ma tinvovix kalkoli u teknika elevata iżda sempliċi prekawzjonijiet ta’ prudenza li jmissu jaf kull min jaħdem xogħol tal-ġebel u kwindi ta’ ħaġa li materjalment kienet tinkombi lill-kuntratttur u lill-bennej biss.’129

In fact the architect did not even know that the work had commenced and the Court did not deem it the responsibility of the architect to tell the builder and the contractor not to start work before he said so as this was an obvious instruction.

128 Ibid 3.
129 Ibid 3.
The Court did not need to examine whether or not the builder was liable in
tort as he admitted to the accusations brought against him. With regards to
the contractor the Court held that:

Ir-responsabilita tal-konvenut Cutajar hija iżjed spikkata fil-każ-
preżenti mħabba li x-xogħol inbeda qabel ma semma l-Perit
inkarikat li jista’ jinbeda u hekk hu stess ġa ħa direzzjoni f’idejħ u
ma għamilx dak li kien rikjest normalment minnu biex jiġi evitat
dak li ġara; telaq ukoll qabel ma ra kif isir ix-xogħol;\textsuperscript{130}

The Court found the contractor responsible due to three main factors namely;
he did not wait for instructions from the architect appointed and took control
of the works himself, he did not take any precaution necessary to avoid such
an accident and finally he did not oversee the work being carried out or give
any instructions. These seem to be fundamental responsibilities echoed
today in health and safety legislation, specifically LN 281 of 2004 dealing
with construction sites.

2.7.2 Caroline Debono v Kunsil Lokali Nadur\textsuperscript{131}

This case involved a public garden that was still under construction. The
local council as owner of the public garden engaged a contractor who had
won the tender. The contractor had in turn sub-contracted work to other
contractors.

While the public garden was still under construction, Caroline Debono, the
plaintiff, decided to enter the garden to enjoy the view. It happened that
whilst she was walking, she tripped in a big hole in the ground breaking her
leg in the process. She brought an action against both the local council of
Nadur as well as the contractor who had won the tender, JCR Limited.

\textsuperscript{130} Ibid 4.
\textsuperscript{131} Caroline Debono v Is-Sindku u Segretarju tal-Kunsill Lokali Nadur, Ghawdex għan-nom u
in rapprezżtanza tal-istess Kunsill u b’digriet tat-2 ta’ Dicembru 2004 ġiet kjamata fil-kawża
s-soċjeta’ JCR Limited, Court of Appeal, 2 July 2010.
The local council contested the claim, bringing amongst others the defence that even though it was the owner of the site where the accident happened, the work was not being carried out by the local council but by the private contractor. The local council also brought the defence that plaintiff should not have entered the site where construction works were being carried out.

The defence of the local council that it was not responsible because it had contracted the work to a private contractor should be examined in great detail. Tracing liability where contractors are involved is the primary intention of this chapter, however, there are not many hard and fast rules which the Maltese Courts follow and judgements differ according to the different factors involved in different cases.

One essential rule that the Maltese Courts follow is the doctrine of *Culpa in Eligendo*.

Article 1037 of the Maltese Civil Code provides specifically that:

> Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others.\(^{132}\)

Therefore, when someone employs an incompetent contractor, he is assuming any liability that arises out of such incompetency. Inversely one may argue that where someone engages a competent contractor, any damages that result should not be borne by the contracting party but by the contractor himself.

The question however is what constitutes an incompetent contractor? Does the mere fact that damage is incurred by a third party make a contractor

\(^{132}\) Civil Code, art 1037.
incompetent? Does the competency of a contractor go beyond the work he was contracted to do, to include also health and safety considerations?

The Court quoted the Court of Appeal judgement in the names of *Michael Balzan v Lawrence Ciantar* which held that ‘n-nuqqas ta’ kuntrattur li jieħu prekawżjonijiet bażiči u elementari ghas-sigurta’ tal-utenti tat-triq, kien fih innifsu jesponi lill-kommittent għar-responsabbilita’ b’applikazzjoni tal-Artikolu 1037 tal-Kodiċi Ċivili’. Thus this judgement held that lack of basic safety precautions taken by a contractor is confirmation that the contractor is incompetent.

The Court examined further the defence that the local council was not liable because it had contracted the works being carried out. Interestingly, it followed the line of thinking we have seen in the UK Courts dealing with health and safety accidents. It held that the local council was very hands on in the project and was overlooking the works closely. This, in the adjudicator’s mind meant that the local council had full faculty to correct any shortcomings on site. Secondly, the court looked into the contract that was entered into by the local council and the contractor; it observed from the contract that it was agreed that the local council reserved the right to give health and safety instructions to the contractor at any time. Thirdly, the court reached the conclusion that the local council was directly involved in the safety measures on site.

While one may observe some similarities between this reasoning and the theory of control adopted in the UK, there are certain elements which are, to my mind, disagreeable. The very fact that the local council contributed to the safety measures the contractor was contractually bound to take care of, did not mean that it was in control. Should one be punished for trying to increase safety on his property whilst in the control of the contractor? Surely

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133 *Michael Balzan v Lawrence Ciantar*, Court of Appeal 17 February 2006.
it is not the intention of article 1037 of the Civil Code to put liability on the owner for any shortcomings of the contractor.

One could argue that, *culpa in eligendo* should only subsist when the contractor is deemed to be incompetent to perform the task at hand in a safe manner and in accordance to health and safety regulations. This conclusion should be reached by examining the competency of his staff, his track record and his level of experience in the business. If a client / owner is deemed to have chosen a competent contractor, then civilly he should not be held liable for any mistake the contractor makes.

At this point a comparison between the Maltese Court’s reasoning and the reasoning of the UK Court in *MCCook v Lobo* discussed previously should be made. When examining the level of control of the site owner the judge held that:

[a]s a prudent site owner the first defendant had visited the site from time to time and that when he saw anything to cause concern he issued instructions so as to reduce any potential risks to anyone on site. For example, he acted in relation to the removal of ladders which were lying about the place and ensured that piles of cement were covered. However, he assumed no responsibility for the supervision of the claimant or any of the third defendant's employees, which he left entirely to him. He relied on the third defendant as the person to whom, as the judge found, he had "properly delegated" the building works. The suggestion that the first defendant should have appreciated that the third defendant was something of a "cowboy operator" was rejected. The judge held that there was nothing in the way in which the work was performed which should have indicated to the first defendant that the third defendant was "in any way cutting corners, engaging in unsafe practices or putting his employees at risk". On the contrary, the judge held that the first defendant was entitled and right to assume that the third defendant was "a careful and competent building contractor."

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One may observe that the UK Court’s reasoning is more akin to the civil law theory of causal link between the damage and the action causing the damage than the reasoning of the Maltese Courts in the above judgement.

The Maltese Court found the local council liable in damages together with the main contractor joined in the suit, for the very reason that it overlooked the works being carried out and therefore was in a position to issue instructions that could have prevented the accident. In this case the damages had to be paid in solidum between the owner and the contractor.

There were other factors that swayed the court to give this judgement. It seemed to be the case that locals were visiting the site on a regular basis whilst the garden was still undergoing construction works. The local council did not take action against this and in fact even though the perimeter was fenced off there was a door which was kept open, supposedly as access for the workers. One must therefore appreciate the circumstances of each and every case as these vary and are the grounds upon which decisions are taken. What is relevant to this thesis is the responsibility the Maltese Court attributed to the owner of the construction site and the value it attributed to the apparent control the local council exercised.

2.8 The Occupier

As we have seen from an examination of Maltese cases, it is not always the person who has created the risk that pays for the damages. It seems that an owner may be found liable to pay for damages for the negligence of his contractors and this because as the owner he sometimes deemed to be ultimately responsible. A quick look at the UK Occupier’s Liability Act may give us insight on an alternative approach to such situations.

Under the Occupier’s Liability Act 1957 an occupier of premises owes a duty of care to all visitors lawfully on the premises. Unless the occupier can and
does modify or exclude their obligations by agreement, they owe to any visitor a duty to take reasonable care so that the visitor will be reasonably safe in using the premises for the purpose of which they are permitted to be there. The occupier may escape liability by giving adequate warnings of existing danger, and they may also expect persons such as workmen entering to carry out a job, to guard against special dangers of their trade. In *Roles v Nathan*, two chimney sweeps had been warned of the dangers of fumes, which they disregarded. They were asphyxiated but the occupier was not held liable. An occupier is not held liable for the faulty work of an independent contractor unless he himself is to blame for the defects. An occupier may avoid such liability if he has taken reasonable steps to ensure that the contractor was competent and the work properly done. The Occupiers’ Liability Act applies to those who occupy land and buildings (including Construction Sites).

### 2.8.1 Who is an Occupier under the Act?

An occupier is most of the time the owner of the construction site or building. This person has to be careful so as to protect visitors and (through later revisions of the law), even trespassers, from injuring themselves on site. It is however not expected that the occupier should protect workers from injuring themselves whilst performing their trade.

However the occupier is not always deemed to be the owner of the premises which is under construction. In fact the element of control again plays an important role. ‘It is I think clear on authority that a person is only in occupation or control for these purposes if he is in a position in law to say who shall not come on the premises.’

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135 Murray v Edinburgh DC, 1991 SLT, 255.
2.8.2 Contractors as Occupiers

The Maltese judgement mentioned previously in the names *Caroline Debono v Kunsil Lokali Nadur* should be examined against the following.

One will agree that when contractors are appointed by owners of properties to perform construction works, accidents and injuries that result through the contractor's activity is traceable to such contractors. In certain situations the courts may consider the owner as still in possession and control of the property and therefore 'still owing a duty of care towards visitors which is personal to them and non-delegable.'\(^{136}\) However it is also the case that courts will usually regard a contractor as having the necessary control and possession to qualify as an occupier. In another UK judgement the court held:

> [t]he appellants [contractors] were under a duty to all persons who might be expected lawfully to visit the house, and that duty was the ordinary duty to take such care as in all the circumstances of the case was reasonable to ensure that visitors were not exposed to danger by their actions.\(^{137}\)

Through an examination of both Maltese and UK judgements one can deduce that control has an important role to play in construction accident cases. It is suggested that this very fact should influence Maltese law makers and the element of control should be included in health and safety regulations as well as in the Civil Code because the element of control has implications both in civil cases as well as in criminal cases. The very fact that a person is the owner / client of a construction project where an accident occurred should not automatically give rise to civil or criminal liability. The courts should evaluate the situation on a case-by-case basis and an appreciation of the duties and obligations of the various parties involved in a construction project should be carried out in order to achieve a just and

\(^{136}\) *Cremin v Thomson*, 1956 SLT 357.

\(^{137}\) *A C Billings & Sons Ltd v Riden*, [1957] 3 All ER 1.
equitable judgement and in order to promote health and safety at construction sites.
CHAPTER 3

THE CONSTRUCTION HEALTH AND SAFETY DIRECTIVE, THE LEGAL NOTICE IMPLEMENTING THE DIRECTIVE AND CRIMINAL LIABILITY
3.1 Occupational Safety and Health Directive

At European level, it had long been felt that harmonisation of basic health and safety standards was needed. To this effect, on the 12 of June of the year 1989 the Occupational Safety and Health Directive\textsuperscript{138} was introduced. This Framework Directive provides certain basic standards in the field of health and safety at work that are to apply to all European Union members besides being the basis upon which further health and safety European directives were introduced.

The European Agency for Safety and Health at Work describes the directive as being necessary due to the alarming number of work related deaths and injuries in Europe.

It is of fundamental importance as it is the basic safety and health legal act which lays down general principles concerning the prevention and protection of workers against occupational accidents and diseases. It contains principles concerning the prevention of risks, the protection of safety and health, the assessment of risks, the elimination of risks and accident factors, the informing, consultation and balanced participation and training of workers and their representatives.\textsuperscript{139}

3.1.1 The Directive in brief

Council Directive EC 89/391 can be said to be divided into three main parts: the general principles of prevention, the duties of the employer and the duties of the workers. The principles form the basis of health and safety legislation and are also reflective of the laws and regulations of Malta.

I. The general principles of prevention of risk at the work place; the aim being to evaluate and avoid risk. Where a risk cannot be eliminated by combating it at source, preventive measures should be taken and dangerous systems of work should be replaced by non or less dangerous ones. Finally there should be a collective approach to health and safety rather than an individualistic approach and appropriate information and instructions should be given to all workers.

II. The employer’s obligations are mainly to see that the above principles of prevention are implemented and integrated into all the activities of the undertaking. An employer should consult with his workers when adopting new systems of work and technologies and also make it easy for workers to take part in health and safety discussions. There is also the obligation to report accidents to the competent authority and to keep a list of occupational accidents. Finally each worker should receive adequate health and safety training.

III. The worker’s obligations are to make correct use of machinery and other items that are used at work as well as to use personal protective equipment properly. A worker should inform his employer immediately of any dangers or risks at work so as to enable the employer to take counter measures. The employee is obliged to cooperate with the employer in fulfilling requirements imposed for the protection of health and safety and in enabling the employer to ensure that the working environment and working conditions are safe and pose no risks.
3.2 Council directive EC 92/57 of 24 June 1992 on the implementation of Minimum Safety and Health Requirements at Temporary or Mobile Construction Sites

Council directive EC 92/57 sets out Minimum Safety and Health Requirements at Temporary or Mobile Construction Sites and is one of the supporting directives fleshing out the Framework Directive. These requirements should be the basis upon which each Member State should structure its health and safety legislation in the construction sector.

The Framework Directive with its general principles continues to apply in full to all the areas covered by the individual directives, but where individual directives contain more stringent and/or specific provisions, these special provisions of individual directives prevail.\textsuperscript{140}

The aim of Council directive EC 92/57 is to prevent risks and to establishing a chain of responsibility linking all the parties involved. This is essential in construction accidents and has been examined throughout the previous chapter through local and British case law.

Whereas we have up till now discussed civil consequences of construction accidents, legislation and regulation are concerned with criminal action albeit providing a basis upon which civil action can be brought.

According to Council directive EC 92/57 itself, more than half of the occupational accidents occurring on construction sites are the result of ‘unsatisfactory architectural and/or organizational options or poor planning of the works at the project preparation stage.’\textsuperscript{141} This statement can be understood as a backing element behind the introduction of the Safety and

\textsuperscript{140} Ibid.
Health Coordinator provided for in Council directive EC 92/57. The directive also recognises increased dangers because of the fact that the construction industry involves various undertakings working simultaneously or in succession at the same temporary or mobile construction site. As already touched upon in the previous chapter, inadequate organisation on a construction site leads to mistakes being made which in turn lead to injuries and even loss of lives. The aim of this directive is to improve coordination between the various parties concerned on a construction project, both at preparation stage and whilst the work is being carried out.

Council directive EC 92/57 was implemented into Maltese law in 2004 when Malta became a member of the European Union. Legal Notice 281 of 2004\(^{142}\) pretty much replicates most of what is contained in the directive. However there are some differences, the most significant of which is the elimination of the ‘Project Supervisor’ as defined by the directive and the use of the word ‘Project Supervisor’ to introduce the role of the health and safety coordinators introduced by the directive.

An important feature of both the directive and LN 281 of 2004 is the establishment and definition of the parties involved in construction.

Council directive EC 92/57 defines five parties that have a role to play in construction project health and safety management. These are the Client, the Project Manager, Self-Employed Persons, the Coordinator for Safety and Health at the project preparation stage and the Coordinator for Safety and Health at the Execution Stage. On the other hand, LN 281 of 2004 defines just four parties; the Client, the Contractor, the Project Supervisor and the Self-Employed Person.

\(^{142}\) Legal Notice 281 of 2004 Work Place (Minimum Health and Safety Requirements for Work at Construction Sites) Regulations 2004.
3.2.1 The Client

The client is defined by Council directive EC 92/57 and the LN 281 of 2004 as being a natural or legal person for whom a project is carried out. The client is the owner of the construction project and is referred to as a developer in planning terms. This person is the financier of the project and is the beneficiary of the works being carried out. The client can be a variety of different persons. Under LN 281 of 2004, there is no distinction between different types of clients whether they are property developers whose occupation is to develop properties and sell them at a profit or domestic clients who build a property for themselves or make alterations to their already existing property. The level of duty and obligation of the client remains the same regardless of the size of the property or the person developing the property. The client cannot delegate his health and safety responsibilities to a third party even where he has paid for the specific service of a health and safety coordinator. A client under Maltese regulations cannot even delegate his duties where he has appointed a project supervisor as defined by the directive.

3.2.2 Project Supervisor

The project supervisor is defined by Council directive EC 92/57 as being any natural or legal person responsible for the design and / or execution and / or supervision of the execution of a project, acting on behalf of the client. This definition is quite unsatisfactory and terse, as it does not pinpoint who this person should be. The position one can immediately place the project supervisor in from this definition is that of a representative of the client. A client will own the property or land in need of construction and the funds to construct the building but he does not necessarily have the skill to design

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143 The Project Supervisor as defined by the Directive and the project supervisor as defined by LN 281 of 2004 are two completely different persons. The project supervisor as defined by LN 281 of 2004 is equivalent to the Coordinator for Safety and Health Matters at the Project Preparations Stage and Execution Stage as defined by the Directive.
and execute the project himself. The relationship between the client and the project supervisor can be uncannily compared to the role of the producer (the client) and the director (the project supervisor) in the film making industry. The project supervisor can be the architect designing the build and he may also be the person overseeing the project’s execution during the construction stage. The European Federation of Engineering Consultancy Associations seems to have the same problem with the definition and in a position paper on the Council directive EC 92/57 it stated that:

The term “project supervisor” is not clearly defined in the directive and could be construed as a consulting engineer engaged in the design or management of projects. However, in this document it has been interpreted as a person or organization acting as the overall project supervisor on behalf of the client, e.g. a project manager.144

This interpretation seems to be correct as the directive refers to a project supervisor in the same way one would refer to a representative acting on behalf of the client. The client and the project supervisor are given the same duties and responsibilities and one is used interchangeably with the other. In fact the whole text of the directive is peppered with such provisions one example being ‘the client or the project supervisor shall appoint one or more coordinators for safety and health matters, as defined in Article two (e) and (f), for any construction site on which more than one contractor is present’.145

The interpretation of the project supervisor being the representative or agent of the client is a positive one as it recognises persons such as construction project managers and assigns to such persons specific statutory duties. These persons, both natural and legal, are common in the construction industry and are normally employed on large construction projects. In the previous chapter we came across a judgement dealing specifically with the

145 EC 92/57, art. 3(1).
obligations of the client and the project manager where control is vested entirely in the hands of the project manager.\textsuperscript{146}

Under LN 281 of 2004, the term ‘Project Supervisor’ did not remain faithful to the term described in the directive. The project supervisor as envisaged by LN 281 of 2004 is in fact corresponsive to the directive’s ‘Coordinator for Safety and Health Matters at the Project Preparations Stage’ and the ‘Coordinator for Safety and Health Matters at the Project Execution Stage’. It would seem that the project supervisor as intended by the directive was unfortunately lost through transposition. Considering the current local trend of appointing construction management companies to develop property, it is recommended that amendments be made to correct what seems to be an unfortunate oversight.

3.2.3 Self-Employed Person

Council directive EC 92/57 defines a self-employed person as any person other than those referred to in Article three (a) and (b) of Directive 89/391/EEC (Framework Directive) whose professional activity contributes to the completion of a project. Article three (a) and (b) refer to employers and workers thus, where a person is neither a worker nor an employer and is working on a construction project, he shall fall under this definition. In the Maltese scenario the self-employed worker is commonplace and therefore it is important to recognise his obligations and duties. LN 281 of 2004 defines the self-employed person as being ‘any person, other than a person in the employment, traineeship or apprenticeship of a contractor, whose professional activity contributes to the completion of a project’.\textsuperscript{147}

\textsuperscript{146} David Caruana v Quality Projects Management Limited; u b’dikriet tal- 25 ta’ Novembru 2004 issejjet fil-kawża s-soċjetà Corinthia Palace Hotel Company Limited, First Hall Civil Court, 1 July 2008.

\textsuperscript{147} LN 281 of 2004, art 2.
3.2.4 The Contractor

The contractor is only defined in LN 281 of 2004 and is not defined under Council directive EC 92/57. It defines the contractor as being ‘a contractor or employer whose workers undertake, carry out or manage construction work, and who supplies materials and, or labour to carry out such work’. Therefore the contractor is most of the time an employer who is responsible for the well being of his employees. He is therefore, duty bound as a contractor and as an employer in accordance with health and safety legislation specifically LN 281 of 2004.

3.2.5 The Coordinators for Safety and Health Matters

The directive divides the construction process in two; the planning stage and the execution stage. For this reason the directive deemed it fit to attribute a health and safety coordinator to both the planning and the execution stage. The fact that the process is divided as such, even in the realm of coordinating health and safety, may be deemed necessary due to the different type of expertise needed in both areas. During the planning stage, the design of the building is drawn up; the architect has to make sure that his design may be executed without putting the workers in unnecessary danger. It would therefore be prudent to appoint someone who is knowledgeable in design as the safety coordinator at the project preparation stage. The safety coordinator at planning stage is obliged to make sure the client or the project supervisor (as defined in the directive) consider the general principles of prevention of risk during the design stage and to coordinate how the construction process shall flow, that is coordinating different stages of work done by different contractors. The safety coordinator at execution stage is in charge of coordinating health and safety on the construction site and to help the contractors and employers on site follow a safe system of work. The

148 Ibid.
safety coordinator must also ensure that only authorized persons are allowed onto the construction site.

The position of the safety coordinator is very onerous and one must not accept appointment lightly. The UK Construction (Design and Management) Regulations 1994 (CDM 1994) termed the coordinator for design stage and the coordinator for execution stage as the Project Supervisor and the Principal Contractor respectively. Upon the entering into force of CDM 1994, legal experts in the field warned of the implied liability of such posts.

As the planning supervisor has the primary duty to carry out the site investigation, he is likely to be fired upon from all sides. Not only will he be sued by the injured worker but also the owner and the main contractor are likely to seek a contribution from him in respect of any claims the injured worker successfully brings against them on the basis that he was primarily responsible for identifying the principal hazards on the site. The planning supervisor will also face a criminal prosecution under the HSWA for breach of the CONDAM regulations. The problem does not end here. If work stops whilst the accident is investigated and remedial measures are taken, the planning supervisor is likely to face a claim for the consequential losses suffered by the owner due to the delay. Such claims could of course be very large.

3.2.6 Appointment of the Safety Coordinator

As discussed above, the safety coordinator as mentioned in the Council directive EC 92/57 is referred to under LN 281 of 2004 as the project supervisor. Article three of LN 281 of 2004 provides that the client is obliged to appoint a project supervisor in respect of the planning stage and in respect of the execution stage. It also provides that the same person can act as project supervisor for both stages and that nothing shall preclude the client from acting as project supervisor himself.

149 This could be a possible reason why the Maltese regulations refer to the safety coordinator as the project supervisor.

While under Council directive EC 92/57 the appointment of a safety coordinator is only necessary where more than one contractor is appointed, under LN 281 of 2004, a client has to appoint a project supervisor for any construction project indiscriminately.

### 3.2.7 Requirements of the Safety Coordinator

Council directive EC 92/57 does not provide for any requirements necessary for a person to be appointed as a coordinator at preparation stage or at execution stage. LN 281 of 2004 follows suit and there are no provisions providing for the requirements of the project supervisor. The only guidance offered in Malta is through the Code of Practice for the Construction Industry.\(^{151}\)

The Client must be reasonably sure that all duty-holders appointed for each project - especially designers, the PSDS\(^{152}\), the PSCS\(^{153}\), the main contractor, contractors/sub-contractors and self-employed persons - are competent and have sufficient resources, including time, to achieve compliance with this Code of Practice and with all relevant standards and regulations. This could mean that clients will have to make reasonable enquiries and seek advice to satisfy themselves that the organizations or individuals they appoint are competent, and have, or will allocate adequate resources.\(^{154}\)

By the description of the preparations stage safety coordinator it might appear that it might be appropriate for the role to be carried out by one of the appointed designers (which includes the architect). This might be true for the integration of specific safety measures for subsequent works in the design.\(^{155}\)

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\(^{152}\) Project Supervisor for the Design Stage.

\(^{153}\) Project Supervisor for the Construction Stage.


Therefore the main requirement provided for by the Code is that of competence and dedication, but there are no real objective characteristics and requirements that a project supervisor should have, except for the mention of the architect as being a suitable person for the project preparation stage.

Articles five and six of the directive provide for the tasks, obligations and responsibilities that the involved parties must adhere to. This means that all the duty holders, especially the safety coordinators, must have the required level of knowledge and competences to satisfy these duties. ‘The directive does not indicate which competencies are required. It therefore is the obligation of the Member States to explain or define these in their national regulations. For the safety coordinator this is definitely more than a necessity.’

Jean Pierre Van Lier further states that ‘implementation would improve if Member States would specify a few minimal competence criteria depending on the extent and/or the type/nature of the risks on the building site. Basic criteria for the assessment and proof of the coordinator’s competence are essential.’

It would therefore be suggested that LN 281 of 2004 be amended to include qualifications of the project supervisor. It would be prudent if the legal notice would require different levels of competency according to the size of the construction project and the risk level of the build.

Those who want to take on the task of safety coordination must be able to demonstrate that they have the required competencies and that they can control the information and documents. They have a moral and ethical duty, they should familiarise themselves fully with the various aspects of safety coordination.

156 Ibid.
157 Ibid.
158 Ibid.
The president of the International Health and Safety Construction Coordinators Organization further held that the safety coordinator has to have basic training and specific knowledge. The safety coordinator must be able to apply his knowledge on the construction site. There is also the necessity of experience; a safety coordinator should not be left to control health and safety at a construction site without any prior experience.

It would probably be worth considering amending LN 281 of 2004 to make it a requirement for project supervisors to undergo a specific course aimed at health and safety on construction sites. This is especially appropriate when considering that a number of specialist companies have been set up with the aim of providing health and safety consultancy, some of which specifically aimed at the construction industry. The biggest problem with such an amendment is the fact that the appointment of a project supervisor under Maltese law is obligatory for any construction works being carried out, large or small and certain small projects would incur additional expenses which would be less easily absorbed.

Specific modules should be created to enable the study of safety coordination to be built into other studies or training... A specific course with a final examination should be provided and should be made mandatory for all health and safety coordinators.\textsuperscript{159}

\textbf{3.2.8 Proportionality Principle}

Article three of the directive provides that the duty of the client to appoint one or more coordinators for safety and health matters may be derogated from in certain circumstances. ‘Member States may, after consulting both management and the workforce, allow derogations from the provisions of the first paragraph, except where the work concerned involves particular risks as listed in Annex II’\textsuperscript{160}

\textsuperscript{159} Ibid.
\textsuperscript{160} EC Directive 92/57, art 3.
This gives Member States the power to distinguish between different types of construction works on the basis of the size of the project and level of risk to health and safety. This distinction may be deemed necessary when considering that any form of construction works and any ancillary works to construction fall under the provisions of LN 281 of 2004.

Article 2 of LN 281 of 2004 defines a construction site as any construction site at which building or civil engineering works are carried out, a non-exhaustive list of which is given in Schedule I.

Jean Pierre Van Lier holds that:

It is obvious that not every site requires the same safety coordination. The tools such as the health and safety plan and the file for subsequent works and the way safety coordination is applied can therefore vary considerably. In Member States where the national legislation merely mimics the directive there are problems evident with imposing uniform but unspecified safety coordination. Based on specific criteria and circumstances, exemption from the creation of certain documents can be granted. The size of a construction site could seem a practical solution at first sight, but high risk activities which require normal safety coordination can also occur on these ‘small’ sites.\(^{161}\)

It would seem that LN 281 of 2004 implementing the Council directive EC 92/57 has indeed mimicked to certain extent the directive and has not created any discriminatory levels of health and safety requirements. Considering the system of work and the level of risk of certain construction work, it would seem appropriate that in Malta there should be a level of qualification before a client is made to follow certain provisions. Is there always the need to draw up a health and safety plan? Is it always necessary to appoint a project supervisor? One may be of the opinion that domestic construction work should not be put in the same category as large developments. Where there is only one contractor engaged by a private person one would hardly see the need for the client to be responsible for the

\(^{161}\) Jean-Pierre Van Lier President (n154).
requirements in LN 281 of 2004 or any other health and safety law. Therefore it would be prudent to consider creating a system whereby a distinction is drawn between different construction projects on the basis of size, duration and risk elements. Such a system would most probably better cater for the Maltese construction industry and could lead to an improvement in health and safety standards.

Small domestic construction works which involve one contractor are definitely on the lower end of the risk scale in the construction industry. The client is contracting a service of work from a contractor who shall determine the price, system of work, type of material and every other element involved. The contractor is in control of his work and of the work of his employees. In such a scenario, where the client has minimum or no control, the contractor should be the person upon whom the responsibilities of health and safety should fall. This does not mean to say that the client should be exempted of all responsibilities or obligations; there should always be the duty on the client to appoint a competent person and to provide a safe place where the contractor can start work. A system whereby different regulations apply, according to the size and risk factor of the construction work, should still be structured in a way where all parties who can influence the safety levels of a construction project, shall be obliged to follow certain regulations imposing different duties.

3.3 Current English Regulations Implementing Council directive EC 92/57

The Construction (Design and Management) Regulations 2007 (CDM 2007) came into force on 6 April 2007. These regulations have replaced the previous Construction (Design and Management) Regulations 1994 as well as the Construction (Health Safety and Welfare) Regulations 1996. These new regulations are therefore the latest development of construction health
and safety law in England which transpose Council directive EC 92/57 and which wholly regulate health and safety in construction.

CDM 2007 places duties on each individual involved in construction; that is from project conception and design right through to execution and completion, with extra provisions to protect anyone involved in maintaining completed buildings such as window cleaners.

The 2007 Regulations divide the duties and obligations of the involved parties into two categories; construction projects which are ‘notifiable’ and construction projects which are ‘non-notifiable’. A construction project is deemed to be notifiable if it is planned to continue for more than 30 days or which involves 500 person-days of building work or more. This is equivalent to the Maltese position which establishes that a project shall be notifiable ‘when work is scheduled to last longer than 30 working days and on which more than 20 workers are occupied simultaneously, or on which the volume of work is scheduled to exceed 500 person-days.’

Where a construction project is deemed notifiable in Malta, there is a requirement for the project supervisor to ‘communicate a prior notice drawn up in accordance with Schedule III to the Authority at least four calendar weeks before work starts.’ Other than this requirement there is no other distinction between notifiable and non-notifiable construction sites in Malta.

Contrastingly CDM 2007 does not require the appointment of a CDM coordinator, and a principal contractor where a construction project is not notifiable; it also does not require a written health and safety plan.

This is an interesting fact and may be of relevance to the Maltese scenario in cases of small construction works of low risk. The fact of the matter is that certain duties may be too onerous upon clients with small construction works.

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163 Ibid.
being carried out and that some obligations will not increase the level of safety on sites but will only increase costs and paperwork.

It has been suggested that the previous English regulations were in fact too bureaucratic and the new regulations addressed this issue.

One of the main complaints about CDM 1994 is that it has led to large amounts of unnecessary and unhelpful paperwork. There has been a tendency towards over-detailed, generic documents, rather than communication based on simple, project-specific instructions. It fact it has been held that "unnecessary paperwork does not just make it more difficult to ensure safety, it often makes sites less safe. The HSE says CDM 2007 aims to make dutyholders give the "right information to the right people at the right time."\(^{164}\)

By contrast, whereas the new CDM 2007 regulations have reduced the duties of the client on non-notifiable construction sites, it has overall increased the client's duties and responsibilities where a project is notifiable. It has also improved over CDM 1994\(^ {165}\) by distinguishing the roles of the different parties in a better manner thereby making it easier for the parties to know their role and duties.

### 3.3.1 Competence

CDM 2007 places even more emphasis on competence than the previous regulations on construction health and safety. Under these regulations it is specifically provided that only competent persons can be engaged, and only competent persons should accept appointment, however there are no specific characteristics required. This is true for all parties involved in a construction project. Persons accepting an appointment as one of the

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\(^{165}\) The Construction (Design and Management) Regulations 1994 (Repealed).
parties under CDM 2007 must be able to comply with the duties imposed on them by CDM 2007.

(1) No person on whom these Regulations place a duty shall—
appoint or engage a CDM co-ordinator, designer, principal contractor or contractor unless he has taken reasonable steps to ensure that the person to be appointed or engaged is competent;
accept such an appointment or engagement unless he is competent;
arrange for or instruct a worker to carry out or manage design or construction work unless the worker is competent, or under the supervision of a competent person.

(2) Any reference in this regulation to a person being competent shall extend only to his being competent to—
perform any requirement; and avoid contravening any prohibition, imposed on him by or under any of the relevant statutory provisions.  

3.3.2 The Client under CDM 2007

The client is defined by CDM 2007 as being a ‘person who in the course or furtherance of a business—seeks or accepts the services of another which may be used in the carrying out of a project for him; or carries out a project himself’.  

This definition is very different from that given to the client under the Maltese LN 281 of 2004. It immediately specifies that a person must carry out the construction works in the course or furtherance of a business. A client can then be a person who engages contractors or he may carry out the project himself. This means that the duties incumbent on a person developing property in England, only come in force where a person is carrying out the project in the course of furtherance of a business.

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167 Ibid.
Clients have a duty to ensure that suitable project management arrangements for carrying out work without risk to health and safety are in place and are reviewed throughout the project. This means that even after a CDM coordinator and principal contractor is appointed, the client has to make sure that the health and safety plan is being followed and he must revise such plan when the necessity arises.

The role of the client is an essential one when it comes to health and safety as it is he who decides certain essential aspects such as time and money. In this regard, the client must make sure that these resources are suitable to ensure that work can be carried out so far as practicable without risk to health and safety. The client, together with the principal contractor, must be sure to provide or see that specified welfare facilities listed under schedule two of CDM 2007 are in place as from the start of construction.

CDM 1994 gave the client the possibility of appointing an agent to represent him and to carry out all the duties incumbent upon the client. By doing so, the client was able to divest himself from his responsibility and would not be liable for breaches if it was deemed that he had appointed a competent agent. Under CDM 2007 this in no longer available as this option granted by CDM 1994, was deemed to be giving clients the opportunity to absolve themselves of their legal obligations. ‘The client is prevented from ‘contracting out’ of their legal health and safety responsibilities.’

In doing so it may be said that England too has eliminated the idea of having a project supervisor as provided for in the directive, who can be nominated by the client and who will be in charge of the project and responsible for the duties incumbent upon the client. This change might have come about due to the new definition of a client to include persons carrying out a project for business purposes and the fact that there is distinction between the duties of a client of a notifiable project and a non-notifiable one. The English

regulations also provide that where there is more than one client, one of them can be nominated to act as the client on the project and he alone will be responsible to satisfy the duties under the regulations.

3.3.3 Designers

In addition to what is held in the directive and to what is found in LN 281 of 2004, the UK CDM 2007 provides safety provisions for the person in charge of the design of the building. This seems to be a logical advancement as the designer will be bound to design buildings that can be safely executed.

Designers are now required to eliminate hazards where they can and then reduce those risks which remain. Their duties are extended to cover the avoidance of risks to persons using fixed structures designed as workplaces, for example offices, shops and factories.¹⁶⁹

The designer cannot even commence work if any project client is unaware of his duties under these regulations and where a project is notifiable he cannot commence unless a CDM Coordinator has been appointed by the client. The design of the building as far as is reasonably practicable, has to be such that its execution will not put the health and safety of persons constructing and maintaining the building.

3.3.4 The principal contractor

The role of the health and safety coordinator as provided for in the directive, is under English law, divided between the CDM coordinator and the principal contractor. Whereas the CDM coordinator is in charge of safety measures at the design stage, the principal contractor is more involved with coordinating the construction works being carried out by the various contractors and workers on site during the execution stage. ‘These appointments correspond

to the appointments of the co-ordinators for safety and health matters at the project preparation stage and at the project execution stage respectively required by the Directive.\textsuperscript{170}

The principal contractor is therefore the equivalent of the project supervisor for the execution stage under the Maltese LN 281 of 2004.

Again the underlying theme of competency raises its head as the PC\textsuperscript{171} will be required to check the competency of all their appointees, which includes both designers and sub-contractors. In addition, PC’s will need to take reasonable steps to ensure that every worker carrying out the construction work is provided with a suitable site induction, information and training.\textsuperscript{172}

### 3.3.5 CDM Coordinator

The CDM coordinator is the UK equivalent of the project supervisor at planning stage under LN281 of 2004. The CDM coordinator has the same duties as stipulated by the directive of the Coordinator for Safety and Health Matters at the Project Preparations Stage. The CDM coordinator as well as the principal contractor are only appointed where a construction project is notifiable, that is where the construction stage is scheduled to last more than 30 days or 500 person days of construction work.

### 3.3.6 Civil Liability as results from CDM 2007

Article 45 of the CDM 2007 regulations states that:

Breach of a duty imposed by the preceding provisions of these regulations, other than those imposed by regulations 9(1)(b), 13(6) and (7), 16, 22(1)(c) and 1, (2) and (4), 26 to 44 and Schedule 2,


\textsuperscript{171} Principal Contractor.

shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a person who is not an employee of the person on whom the duty is placed.\footnote{The Construction (Design and Management) Regulations 2007, art 45.}

The Guidance notes on the regulations state that:

Civil Liability is now restricted under these regulations only in respect of Part 2 and 3 duties, for which there is civil liability only to employees, except in respect of the duties concerning welfare facilities and to prevent access by any unauthorised person, and the construction phase plan, for which liability is unrestricted.\footnote{The Construction (Design and Management) Regulations 2007 Explanatory Note.}

Under the previous CDM Regulations of 1994, regulation ten imposed civil liability on the client with regards to ensuring that a safety plan was in place before the start of the construction execution phase. ‘That general liability disappears under CDM Regulations 2007 and is replaced by the more specific duties.\footnote{Tomkins, Humphreys, Stockwell (n 12) 183.}

Regulation 45 of CDM 2007 quoted above allows an employee of one of the participants to bring a claim for breach of any of the statutory duties by the employer. The exceptions allowing non-employees to seek a civil remedy under CDM 2007 may be summarised as follows:

- Client’s duty under schedule 2 dealing with welfare facilities such as sanitary and washing conveniences and changing rooms.
- The contractor’s as well as the principal contractor’s duty to prevent unauthorised entry on site. This duty is imposed on the project supervisor under the Maltese LN 281 of 2004.
- The client’s duty to ensure that the principal contractor has followed the health and safety plan.

The most important aspect, and which is a continuation of the duties under CHSW Regulations1996, is found in reg 25(1), (2)
and (4). This gives rise to civil liability for contractors and every person having control of the way in which any construction work is carried out in respect of duties under regs 26-44.\(^{176}\)

Regulation 25 actually guides the duty holders as to how the specific health and safety duties under regulations 26-44 (Part four of the regulations) entitled Duties Relating to Health and Safety on Construction Sites are to be followed and who is to be found liable for breaches. Regulation 25 provides that:

(1) Every contractor carrying out construction work shall comply with the requirements of regulations 26 to 44 insofar as they affect him or any person carrying out construction work under his control or relate to matters within his control.

(2) Every person (other than a contractor carrying out construction work) who controls the way in which any construction work is carried out by a person at work shall comply with the requirements of regulations 26 to 44 insofar as they relate to matters which are within his control.

(3) Every person at work on construction work under the control of another person shall report to that person any defect which he is aware may endanger the health and safety of himself or another person.

(4) Paragraphs (1) and (2) shall not apply to regulation 33, which expressly says on whom the duties in that regulation are imposed.\(^{177}\)

Here we see once more the importance given by UK legislators to the element of control. As we have seen so far establishing control will lead to a fairer situation whereby someone who was entrusted a duty should be held accountable for the failure to perform said duty. The element of control is therefore relevant in both civil and criminal proceedings and should be a factor that is taken into account by adjudicators when deciding who is responsible for an accident on a construction site.

\(^{176}\) Ibid 184.

\(^{177}\) The Construction (Design and Management) Regulations 2007, s 25.
3.4 Criminal Liability

Parties, most commonly employers, involved in a construction project have to fulfil their health and safety duties according to health and safety regulations especially LN 281 of 2004. This legal notice establishes new duties and obligations incumbent upon construction client, the contractor, the project supervisor and the self-employed persons. Where an accident occurs on a construction site, police and health and safety officials are brought on site to evaluate the site and see whether there were any breaches to health and safety regulations. In evaluating whether a party is guilty or not of the injury or death of a person on site, much consideration is given to whether the person in question has followed health and safety regulations. Criminal liability can also be incurred by the parties involved in a construction project through article 225 and 226 of the Maltese Criminal Code; that is, involuntary homicide and involuntary bodily harm.

3.4.1 Article 225 and 226 of the Maltese Criminal Code

When a person is killed or seriously injured on a construction site, and that person’s death or injury can be traced to someone’s action or inaction, it is common for the authorities to bring a case of involuntary homicide against that person.

Article 225 of the criminal code provides that:

(1) Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).\(^\text{178}\)

\(^{178}\) Criminal Code art 225.
Maltese case law has defined the requirements of involuntary homicide stating that:


A lot of construction work necessitates a high level of skill and profession. As we have also seen, there is now a specific body of regulation targeting construction. To this extent, by the application of article 225 of the criminal code, one may be found guilty of involuntary homicide where due to carelessness, imprudence or lack of skill when at work on a construction site, another person is killed. Where an accident occurs due to the lack of observance of a regulation aimed at preventing such an accident, the person who was supposed to observe such regulation as a duty holder under a health and safety regulation can therefore also be found guilty of involuntary homicide. This fact makes LN 281 of 2004 a very onerous piece of legislation and one should consider its importance as more than mere compliance.

In fact this was indeed the argument of the Court in the recent judgement in the names of Pulizija v Kevin Bonnici, Paul Demicoli u Paul Magro. The Magistrate specifically held that:

179 Il-Pulizija Spettur Joseph Mercieca v Kevin Bonnici, Paul Demicoli u Paul Magro, Court of Magistrates (Malta) as Court of Criminal Judicature, 21 October 2009.
180 Ibid.
S’intendi, jsegwi għalhekk li l-kulpa tista’ tkun dovuta wkoll għal non osservanza tal-liġijiet, regolamenti, ordnijiet u simili, bħal ma huma l-assjem ta’ regoli predisposti mill-Awtorita pubblika dwar il-modalità ta’ kif għandu jsir xogħol f’sit taħt kostruzzjoni u speċifika bl-iskop li jiġi evitat il-possibilita’ ta’ ħsara u dannu lil terzi, cioe dak li jkollu l-element ta’ prevenzjoni bħalma hi l-Att dwar l-Awtorita tas-Sahha u s-Sigurta fuq il-post tax-Xogħol [Att XXVII tas-sena 2000] Kap 424.\textsuperscript{181}

For one to be found guilty of involuntary homicide or for involuntary grievous bodily harm for that matter, there must be present the negligent act or the non-observance of regulations accompanied by the foreseeability of the ensuing harm.

In cases of negligence or imprudence, foreseeability has to be proven by the prosecution in order for it to manage to obtain a judgement in its favour. However when the ensuing harm is the result of the non-observance of laws, regulations or orders, foreseeability is presumed; in such cases it is not possible to allow a person to bring evidence to prove the contrary.

In fact this is what was held by the Court of Criminal Appeal in \textit{Pulizija v Saverina sive Rini Borg et.}\textsuperscript{182}

\begin{quote}
\end{quote}

\textsuperscript{181} Ibid.
\textsuperscript{182} \textit{Il-Puluzija v Saverina sive Rini Borg et}, Court of Criminal Appeal 31\textsuperscript{st} July 1998.
To this extent, where a client has not for example appointed a project supervisor and it is proven by the prosecution that the death of a worker was the result of lack of health and safety coordination on site, should the client be found responsible for involuntary homicide?

3.4.2 Il-Pulizija V Raymond Micallef u Elton Bowell et

This case gives us an insight of the criminal liability that contractors and sub-contractors can face when a construction accident occurs. The judgement is interesting because LN 281 of 2004 was not yet enacted and the Magistrate could not rely on the duties and responsibilities of the different parties involved in construction as provided for by said regulations. Instead the judgement was given on the basis of the Occupational Health and Safety Authority Act, the General Provisions for Health and Safety at Work Regulation and on article 225 of the Criminal Code providing for involuntary homicide.

The Facts of the Case

Desiree Limited was a company that owned the property “Desiree” which was to be demolished and developed into a block of apartments. Desiree Limited contracted Central Asphalt Limited to demolish the existing building; these contractors subsequently subcontracted part of the works to Raymond Micallef who employed Elton Bowel to demolish parts of the building by hand. Bowel asked for more persons to help him with the task and

183 Ibid.
184 Il-Pulizija Spettur Carlo Ellul v Carmel sive Raymond Micallef Elton (Elton Lawrence) Bowell, Court of Magistrates (Malta) as a Court of Criminal Judicature, 24 September 2010.
185 Legal Notice 36 of 2003.
suggested the services of three other labourers, Christoper Galea, Mario Schiavone and Joseph Pepe. Unfortunately, whilst the labourers were demolishing a room of the building, the roof collapsed, killing Joseph Pepe in the process.

Raymond Micallef and Elton Bowell were both charged with the involuntary homicide of Joseph Pepe due to imprudence, negligence and non observance of regulations. They were also charged with the non observance of article six of chapter 424 of the laws of Malta for not providing a safe working environment.

Raymond Micallef’s defence was to portray to the Court that he had in fact sub-contracted the work to Elton Bowell and the labourers who were working on site were in fact employed by Elton Bowell himself. The question of who employed who is of paramount importance as health and safety legislation makes it the duty of the employer to provide a safe system of work and safe working environment for his employees.

The Court disagreed with the theory of Raymond Micallef and went on to examine article two of chapter 424 of the laws of Malta which define who is to be regarded as an employer. The Court concluded that Raymond Micallef fulfilled the criteria provided for in the aforementioned act to the necessary degree.
The arguments brought forth by the court are similar to the argument of control which was dealt with in the previous chapter. It is a very strong argument which is easily accepted because one will more readily accept responsibility as dependent upon control. The Court concluded that it was only Raymond Micallef who was the employing contractor and who was responsible for the job. All the persons working under his control and constant directions, including the co-accused Elton Bowell, were deemed by the court to be employed by Raymond Micallef; Raymond Micallef was responsible for the health and safety of his employees.

It was also proven by the prosecution that Raymond Micallef was negligent because he was giving instructions to his workers which went against what is required by the trade of demolition.

The fact that Micallef was even warned by the workers themselves that the roof needed some sort of support whilst they were working and the fact that he was experienced in this field of work, made Micallef even more negligent for not providing the workers with safety equipment and a safe method of work. There was also no architect appointed to supervise the work or give instructions on how the work should be carried out, a factor the court deemed necessary in this sort of work. It also resulted that Micallef did not

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186 Pulizija Spettur Carlo Ellul v Carmel sive Raymond Micallef Elton (Elton Lawrence) Bowell, Court of Magistrates as a Court of Criminal Judicature, 24 September 2010, 6.
even verify whether the workers had the necessary skill and experience to perform the intricate job.

Huwa l-ewwel halla x-xoghol f’idejn l-imputat Elton Bowell meta kien jaf li dan tal-ahħar kien jahdem bhala driver u li għalhekk ma kienx tas-sengħa u imbghad aġħar minn hekk halla f’idejn in-nies li introduċielu Bowell meta dan tal-ahħar iddeċieda li ma setghax ikompli x-xoghol u dan mingħajr ma għamel l-ħičken verifika dwar jekk dawn effettivament kellhomx is-sengħa sabiex jagħmlu dan it-tip ta’ xoghol.188

The Court based its decision on the foregoing and decided that Raymond Micallef should be found criminally liable for the involuntary homicide of Joseph Pepe and this because negligence was proven and the nexus between the accident and Micallef’s actions was established. ‘Il-Qorti hija tal-fehma li f’dawn il-proċeduri altru milli rriżulta li l-ağır tal-imputat Raymond Micallef kien jammonta għal culpa kriminali u li kien hemm nexus bejn dawn l-atti u l-mewt ta’ Joseph Pepe.’189

This judgement should be taken as an indication of the importance of establishing the different parties involved in a construction project and the need to provide the parties involved with the duties they have to follow. One will realise that there was no reference made to the owner of the property (the client under health and safety regulations). The case revolved around the issue of who is the employer of the injured or killed worker and liability was attributed as such. Even though it would be favourable to maintain this theory, it is felt that LN 281 of 2004 was and still is necessary as a body of law attributing duties to the various parties and creating certain safety standards that should be followed.

188 Ibid 10.
189 Ibid.
3.4.3 Il-Pulizija v Chik Ali Olian\textsuperscript{190}

This case involved a Syrian man who was contracted by an owner of a building to carry out certain construction works. The person engaged was Chik Ali Olian, who together with some other fellow workers began said work on the owner’s building. A health and safety officer found the scaffolding to be unsafe, and proceedings were brought against Chik Ali Olian as an employer for failing to provide a safe system of work.

This case is interesting as the court of appeal was very quick to label the accused as an employer. It held that because it was he who was engaged by the owner to perform the work and because he was the person who was going to get paid, then he is automatically the employer in relation to the other workers involved. The Court did not take any cognisance of the agreement between the defendant and the other workers on site. ‘X’kienet ir-relazzjoni ta’ bejn l-appellant u sḥabu hija xi ħaga interna bejniethom.’\textsuperscript{191}

The Court of Appeal confirmed the First Court’s decision and the accused was found guilty of the accusations brought against him. The accused did not manage to convince the court that he was not an employer but worked as a partner with the other workers on site. Also of interest in this case is the fact that the owner of the building was not brought into the proceedings. There was no mention of a project supervisor being appointed or that there was a health and safety plan drawn up.

\textsuperscript{190} Il-Pulizija V Chik Ali Olian, Court of Criminal Appeal 10 September 2010.
\textsuperscript{191} Ibid 4.
3.4.4 Il-Pulizija v Marco Putzulu Caruana

This judgement is of relevance as it revolves around the role of the project supervisor, his duties and the consequences faced when the duties as a project supervisor are not fulfilled or are not fulfilled properly.

Marco Putzulu was appointed as a project supervisor on a construction project in St. Paul’s Bay, in accordance with the requirement of article three of LN 281 of 2004. An investigation against the project supervisor as to whether or not he had implemented his duties according to LN 281 of 2004 was carried out. Marco Putzulu Caruana was accused of not coordinating the relevant health and safety laws at execution level to ensure that contractors and self employed persons safeguard the health and safety of the workers at the construction site and generally for not abiding by articles 5(a)(b)(e) of LN 281 of 2004.

The project supervisor for the execution stage shall:

coordinate implementation of the general principles of prevention and safety;

when technical and, or organizational aspects are being decided, in order to plan the various items or stages of work which are to take place simultaneously or in succession, when estimating the period required for completing such work or work stages;

coordinate implementation of the relevant provisions in order to ensure that contractors, and if necessary for the protection of workers, self-employed persons

apply the principles referred to in regulation 8 in a consistent manner, where required, follow the health and safety plan referred to in regulation 4;

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192 Il-Pulizija (Spt. David Saliba) v Marco Putzulu Caruana, Court of Criminal Appeal 11 January 2010.
coordinate arrangements to check that the working procedures are being implemented correctly.\(^{193}\)

The Court of Magistrates sitting as a court of criminal judicature did not find the accused guilty of the accusations brought against him and deemed his actions as satisfying the requirements of article 5 of LN 281 of 2004.

The decision was appealed in front of the Court of Criminal Appeal, the main grounds of the appeal being the definition attributed to the term coordination.

The judgment is of interest as it directly and indirectly examines the important role of the project supervisor and his duties under LN 281 of 2004. The Court of Criminal Appeal first and foremost established that the project supervisor has a duty towards the client to advise him on health and safety measures to be taken and to bring to his attention any shortcomings on site. He is the person in charge of taking action where there are contractors, workers and self employed persons who are not abiding by the health and safety plan.

\(^{193}\) LN 281 of 2004, art 5.

\(^{194}\) *Il-Pulizija (Spt. David Saliba) v Marco Putzulu Caruana*, Court of Criminal Appeal 11 January 2010, 2.
It resulted that the project supervisor was in communication via email with the works manager appointed by the main contractor. The court did not approve of this fact in the sense that it deemed the project supervisor as owing a duty to report to the client and not just to the works manager; reason being that the client is the person who has the ultimate say on a project. One must however keep in mind that control is an important factor in construction and a distinction should be drawn between who is entitled to have control by law and who is actually exercising control. Considering this fact, the project supervisor’s decision to communicate with the works manager could be deemed as correct if the works manager was the person taking essential decisions on a daily basis.

The method used by the project supervisor was of communicating via email with the works manager. The prosecution held that the very fact that there were manifest irregularities on site was in itself evidence of the inefficacy of the project supervisor’s methods.

The appellant also commented on the state of the scaffolding and the shortcomings which lead to an unsafe construction site. It held that, had the project supervisor been on site, he would have been able to spot the shortcomings and remedy the situation. In this regard one might also put blame on the contractor as well as his employees who erected and used the scaffolding themselves. In construction, contractors and self employed persons should be responsible for the work over which they have control. This is the case under UK law, and the CDM coordinator and principal contractor are responsible for coordinating the various persons working on site.

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195 Ibid 3.
The Court’s Considerations

Meta l-Liġi tuża l-kelma “koordinazzjoni” trid illi l-“Project Manager” għandu jkun “on site” il-aqqa’ l-partijiet kollha involuti fil-kostruzzjoni, jara x’miżuri ta’ sigurta’ ghandhom jittieħdu w jassigura illi dawk il-miżuri jkunu fil-fatt ittieħdu. Tird jikkoordina x-xogħol bejn is-sid, il-kuntrattur u d-diversi ħaddiema illi jkunu qegħdin jaħdmu f’qalunkwe f’xi sit ta’ kostruzzjoni w jassigura illi dawn il-ħaddiema jkunu dejjem siguri w ma jkunux esposti għall-periklu l-iktar u iktar meta jkun hemm bini għoli.¹⁹⁶

The Court went on to assimilate the role of the project supervisor to that of an employer who has to take care of the health and safety of all his employees.

Peress illi sit ta’ kostruzzjoni għandu ċerta periklu imħabba nqgass ta’ ilquqgh, bejn sular u ieħor, u xaftijiet, hija responsabilita’ tal-“Project Manager” illi jassigura illi dan is-sit ma jkunx ta’ periklu ghall-ħaddiema w nies ohra illi jista’ jkollhom aċċess ghas-sit. Din ir-responsabilita’ ma tigix merfuża b’semiqli email mingħajr ma jkun hemm assigurazzjoni illi fil-fatt irrakkomandazzjonijiet qegħdin isiru.¹⁹⁷

An examination of the above statement of the court could be seen as increasing the duties of the project supervisor beyond the intentions of the regulations of LN 281 of 2004. The duties of the project supervisor as set out in LN 281 of 2004 may be summed up in three words; organisation, coordination and implementation. The importance of the project supervisor is most felt where more than one group of workers is working on site at the same time. One must remember that the duty of the employer to provide a safe working system and employer’s liability remains in force even when a project supervisor is appointed on a construction site. ‘The implementation of these regulations shall not affect the principle of employers’ responsibility as provided for in the Act or in subsidiary legislation’.¹⁹⁸ The protection of workers on a construction site remains the

¹⁹⁶ Ibid 8.
¹⁹⁷ Ibid 9.
duty of the different contractors in respect of their employees. The role of the project supervisor is to coordinate and organize the work on site with the aim of maintaining a safe site as well as seeing that the employers and contractors are following the health and safety regulations. It is the duty of the project supervisor to ‘coordinate implementation’ of the general principles of prevention and safety.

The main factor which was considered by the court in order to give judgement was the method of communication used by the supervisor. The fact that he communicated to the works manager solely through emails which many a time did not involve health and safety issues, was the reason why the Court reversed the ruling of the first court.

This final statement by the Court of Criminal Appeal describes the role of the project supervisor in a very precise manner. The fact that the project supervisor was seldomly present on site led to the court deciding that he did not perform his duty properly. What this judgement does is accentuate the importance of this key figure in construction health and safety and makes the role a very onerous one. It also sends a clear message that the role of the project supervisor should not be taken lightly and that there are

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199 It is not the duty of the project supervisor to implement health and safety measures but to coordinate, the implementation by the various parties duty bound to do so.
200 LN 281 of 2004, art 5 (a).
201 Il-Pulizija (Spt. David Saliba) v Marco Putzulu Caruana, Court of Criminal Appeal 11 January 2010, 9.
consequences for negligence in fulfilling the duties referred to in LN 281 of 2004 and other health and safety legislation.

3.4.5 Pulizija v Stanley Cortis u Mariello Spiteri\textsuperscript{202}

A common misconception is for one to assume that the architect appointed for the construction project is also appointed as the project supervisor either at planning stage or even at execution stage.

This case is a very good example of how understanding LN 281 of 2004 can prove difficult even for Health and Safety Officials. The case was brought against two architects working for the same company who were in charge of the design of a construction project and who made site visits as architects to see that the build was going according to plans and according to regulations.

The client did not officially appoint anyone as a project supervisor up to the time when the health and safety officers made a site inspection and found irregularities on site. They organised a meeting with the client and Stanley Cortis, one of the architects. The officers assumed that he was the project supervisor together with another architect Mariello Spiteri the director of the same company that employs Stanley Cortis.

After the inspection a Construction Notification Form was sent to the Occupational Health and Safety Authority; Patrick Azzopardi and John Micallef were indicated as the construction supervisors for the planning stage on behalf of John Micallef Builders Ltd while John Bonavia on behalf of J. Bonavia & Nephews was indicated as project supervisor for the execution stage.

\textsuperscript{202} Il-Pulizija (Dr. David Saliba) v Stanley Cortis Mariello Spiteri, Court of Criminal Appeal, 14 February 2008.
Therefore even though basic health and safety regulations were not abided by and even though health and safety officers made inspections and arraignments, there were no convictions. This case highlights the importance of the Notification Form that has to be filled out where a project is notifiable. It would be advisable to amend the regulations so that in some way, the non-observance of this regulation is caught from the start. To this extent, it is suggested, that when a client has not appointed a project supervisor he should automatically be considered the project supervisor of the construction project for both the planning and execution stage. This is what is in fact held under English Regulations.

3.4.6 Il-Pulizija v Kevin Bonnici, Paul Demicoli u Paul Magro

A relatively recent incident that has had a profound effect on the perception of construction health and safety and the dangers involved in the industry is that which occurred on the 3 of June 2004 where the collapse of a residential building in St. Paul’s Bay left two of its residents dead.

The tragic accident was the basis of a landmark judgement where two men were accused of having breached health and safety regulations and for the involuntary homicide of the victims; they were subsequently found guilty and both given prison sentences.

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204 Il-Pulizija Spettur Joseph Mercieca v Kevin Bonnici, Paul Demicoli u Paul Magro Court of Magistrates (Malta) as a Court of Criminal Judicature, 21 ta’ October 2009.
One of the accused was Paul Demicoli who had bought a plot of land which he intended to develop. The land was left unattended for a period of time during which it got filled with rain water and rubbish and was exposed to the elements. At this point the court said that it was true that this was not the fault of Paul Demicoli, but as owner of the land he was still responsible. Demicoli subsequently excavated the site and left the newly excavated land exposed for another period of time. The excavation of the site led to the base of the adjacent building which was turbazz rock (a weak clay stone) being left open to the elements resulting in the weakening of the neighbouring building’s pediment in the process.

During the development of the site, Paul Magro, a contractor and co-accused was asked by Demicoli to trim off part of the turbazz – (is-sulletta)\textsuperscript{205} close to the neighbouring wall. Paul Magro however refused to do so, because in his opinion this was dangerous as it would weaken the neighbouring block.

Paul Demicoli carried on works on site and at another point contacted Paul Magro once more, this time to send over someone with machinery to clear out some rubble from the site. Paul Magro agreed to send over one of his employees. Kevin Bonnici another co-accused person in this case, was sent with a JCB with specific instruction from his employers to clear out the rubble on Demicoli’s site.

Paul Demicoli, had however, left instructions with his employees on site to tell Kevin Bonnici to trim the part of the turbazz which Paul Magro had refused to trim. Kevin Bonnici blindly followed orders. The trimming of the turbazz led to the collapse of the adjacent building and the demise of two of its residents.

Following the incident an inquiry was ordered. It resulted that Paul Demicoli the owner of the site and client according to health and safety laws, had not

\textsuperscript{205} Structure used by builders to create a larger surface over which pressure can be distribute.
been keeping the appropriate distance from the boundary wall when digging and he had not applied for a risk assessment or nominated a project supervisor.

Demicoli’s only defence was that he was acting according to the instructions given to him by his architect and that he was being prejudiced as the architect was not called into the suit. Even though the architect later on testified that he had never told Paul Demicoli to trim the turbazz but specifically told him not to do so, the court stated that since the architect was not a party to the suit, it should not comment about any of his shortcomings.

Paul Magro was accused with the involuntary homicide of the two victims of the accident on the basis of the fact that he was the director of the company which employed Kevin Bonnici, the employee, whose actions had resulted in the collapse of the building. The Court of Magistrates sitting as a court of Criminal Judicature however held that, a director is not always responsible for the actions of his company and its employees.

Fil-fatt dwar x'tip ta’ diliġenza irid jeżercita d-direttur, Smith & Hogan fil-ktieb taghhom Criminal Law jghidu:

“The degree of care is the average or normal degree of care expected from the particular individual and it is not a superlative degree of care. That is, the reasonable man is not he who is most reasonable, but just the normal type of reasonable man. The law requires not that who is extraordinary but that which is reasonable, that is, that diligent which from Roman times has been known as the “diligentia bonus paterfamilias.”

Għalhekk d-direttur mhux responsabbli għal dak kollu li jiġi fil-kumpanija iżda jekk jieħu ħsieb li jkollu linfrastruttura tajba u jieħu ħsieb li jimpjiega esperti f’ċerti oqsma tax-xoġhol u dan nonostante jiġi incident, id-direttur m’għandux jinżamm responsabbli.\(^{206}\)

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\(^{206}\) Il-Pulizija Spettur Joseph Mercieca v Kevin Bonnici, Paul Demicoli u Paul Magro (n203) 61.
The fact that Paul Magro sent his employee to remove rubble from the site and not to work on the dividing wall, and the fact that his actions were not causative to the accident, resulted in the court deciding that he was not guilty of involuntary homicide.

The Court moved on to decide on whether Paul Demicoli and Kevin Bonnici were guilty of the accusations brought against them or not. Citing LN281 of 2004, the court held Paul Demicoli to be both a client as well as contractor.

As a client Paul Demicoli failed to fulfil the duties as set out in LN 281 of 2004. He failed to nominate a project supervisor for both stages of the construction process and therefore the project was not notified and there were no health and safety plans drawn up and no records were maintained. The Court however went one step further than what is usually the case when similar construction accident cases are heard in court. The Court used article six of LN 281 of 2004 and held that ‘Illi ‘n oltre l-klijent xorta jibqa responsabbli ghas-sigurta’ tal-haddiema fuq is-sit skond l-artikolu ssuseguenti u ċioe dak numru 6.’207

Article six of LN 281 could be understood as making the client vicariously liable for the project supervisor’s failures. Therefore where there are breaches of regulations imposed on the project supervisor, the client may also be found guilty for such breaches.

This article was further construed by the court to mean that the client is responsible for the health and safety of every individual worker as an employer, regardless of whether the worker is the client’s employee.

The Court however was also adamant that Paul Demicoli was negligent in the way he orchestrated the development. The decision to trim the base plate (suletta) of the adjacent building was what caused the fall of the

207 Ibid 74.
building and the death of the two women. The Court decided that there existed the necessary elements to find Paul Demicoli guilty of involuntary homicide.

The Court also found Bonnici (the worker sent by Paul Magro to pick up rubble) guilty of involuntary homicide and this because he was the person who made the fatal move. The Court held that Bonnici acted without thinking and for this reason the Court held that he should be found guilty.

3.5 Concluding Remarks

Health and Safety legislation with regards to construction has developed in leaps and bounds thanks to the introduction of LN 281 of 2004. Even though there has been development, that does not mean that safety has improved significantly over the years. There is today more awareness of the importance of health and safety and the repercussions of not following the duties set out through the various regulations. The next step forward would be to refine LN 281 of 2004 with the view of adapting the regulations to suit the current construction industry and its needs.
CHAPTER 4

CONCLUSIONS AND SUGGESTIONS
4.1 General Remarks

The construction industry has grown rapidly in the past years leading to increased pressure on the work force as well as the Occupational Health and Safety Authority.

Judgements both civil and criminal have shaped our understanding of liability and obligations and thanks to legislation specific to the industry, construction health and safety is continuing to develop and improve. There are today several companies offering construction safety services, and site inspections by the Health and Safety Authority are more frequent. The latest edition of the Code of Practice for the Construction Industry offers sound advice for persons involved in construction and can also be of help to the local courts when deciding civil claims resulting from a construction accident.

The pace at which civil cases are decided has led to slow developments in the ambit of civil liability resulting from accidents at work. This body of case law is necessary for legal practitioners and persons involved in the construction industry to understand how far their liability extends especially with the development of the relevant regulatory system. This factor is also important in the realm of insurance and the further development of construction accidents can have an impact on the insurance industry.

Certain elementary aspects such as the definition of an employer and the liability of an owner of a building are still not fully developed and legislators and adjudicators should strive to address such issues.

4.2 A Critical Analysis of LN 281 of 2004

LN 281 of 2004 is the first Maltese attempt at implementing Council directive EC 92/57 and creating a better safety management system in construction. It is only after the law is implemented and used by the Courts that one can
notice any shortcomings or defects. This was indeed the case with the English Construction (Design and Management) Regulations of 1994, (CDM 1994). When discussing a possible revamp of the CDM 1994, legal experts in the field deemed the following as the necessary points to be improved by the new set of regulations:

- to focus duty holders on managing health and safety while avoiding unnecessary bureaucracy which has become commonplace;
- to clarify the duties involved in complying with the CDM Regulations;
- to concentrate on the role of duty holders (clients, designers, planning supervisors, principal contractors and contractors) and particular topics including assessing competence and resources, preparing health and safety plans and the content of health and safety files.  

As delved into in chapter three, a client has certain duties which under the current legislation cannot be derogated from. The client has to appoint a project supervisor to overlook health and safety regulations and make sure that all persons on site are complying with these regulations. This task can be performed by the client himself, his architect or any other person, however, today, certain companies are offering the service at a charge. According to LN 281 of 2004, there are no requirements necessary for someone to act as a project supervisor. The Code of Practice for the Construction Industry\textsuperscript{209} however provides that the person appointed has to be competent and defines a competent person as being ‘a person who by reason of training, experience or professional qualification is competent to perform the task or function, or assume the responsibility in question.’\textsuperscript{210}

\textsuperscript{209} Occupational Health and Safety Authority, The Code of Practice for the Construction Industry, Malta, [2006].
\textsuperscript{210} Ibid, 6.
4.3 The Introduction of the Project Supervisor as intended by the Directive

LN 281 does not provide for a project supervisor as intended by Council directive EC 92/57, but the term project supervisor is used instead of coordinator. The project supervisor as intended by the directive is a person responsible for the design and / or execution and / or supervision of the execution of a project, acting on behalf of the client. Therefore the directive provides for the situation where a person who wishes to develop a property but does not want to be involved or take upon himself responsibilities beyond his capability, can opt to appoint a professional person such as a construction management company to carry out the construction project for him. This person would be the project supervisor as described by the Council directive EC 92/57 and the duties of the client would fall upon him. It would probably be of benefit to the Maltese construction industry if this position were to be recognised as it is today common to find construction management companies who manage a construction project from start to finish. The client should remain responsible to appoint a competent person to act as the project supervisor and to allocate enough funds and time for the construction project to be carried out in a safe manner.

4.4 Article in Need of Correction

Article six of LN281 of 2004 provides that:

(1) Where a client has appointed any project supervisor to perform the duties referred to in regulations 5 and 6, this does not relieve the client his responsibilities in that respect.
(2) The implementation of these regulations shall not affect the principle of employers’ responsibility as provided for in the Act or in subsidiary legislation.211

It must be noted that there is an apparent mistake in sub article one as it refers to articles five and six. The mistake could be traced to the text in Council directive EC 92/57 as it has a similar article which also refers to articles five and six. The directive refers to the duties of the coordinators at preparation stage and at execution stage. Following this logic, article six of LN 281 of 2004 should refer to article four sub-article three and article five.

4.5 Providing better means by which Clients can satisfy their new Obligations

Following the criteria provided in Council directive EC 92/57 as well as the implementing regulations of the UK, it would seem prudent if legislators actually provide parameters by which a client can fully satisfy health and safety duties and to not be indiscriminately held vicariously liable for any shortcomings of the project supervisor or any other contractor or worker on site especially in civil cases. To this extent, the principle of *culpa in eligendo* could be a satisfactory approach to this issue. It is suggested that more emphasis should be placed on the criteria of competence when appointing persons to perform duties on a construction site. Where adjudicators are satisfied with the level of effort the client made at ascertaining the competence of the project supervisor and the contractors, the client’s duties in this regard should be deemed to be fulfilled.

4.6 The Client should not be considered an Employer

It could very well be the case that a client does not employ any employees and the workers on site are employed by individual contractors or are self-employed. The client should not suffer employers’ responsibility where he is not himself an employer such as could be the case where a developer has a team of construction workers employed with him.
The client’s health and safety obligations should only be those duties as set out by LN 281 of 2004 as there is no other reference to the client in any other set of regulations. When reading the definition of an employer under article 424 of the Laws of Malta, it provides specifically that certain persons are not to be deemed as employers.

"employer" means any person for whom work or service is performed by a worker or who has an employment relationship with a worker, and includes a contractor or subcontractor who performs work or supplies a service or undertakes to perform any work or to supply services, and in relation to work performed under a contract for services means the contractor or subcontractor, but shall not include the directors, managers, partners or owners, occupiers or possessors on behalf of whom work is being carried out, except to such extent as regards any tools, materials or equipment provided by them with regard to any defects thereof or therein which are known and not declared or which could have been known.212

It seems that the legislator had made it clear that owners of property for whom works are being carried out should not be defined as employers under the Occupational Health and Safety Authority Act or in any of its subsidiary legislation to come. It is this fact that is the strongest point of contestation in the yet undecided case of Paul Demicoli v Ministru tal-Politica Socjali.213

Paul Demicoli aggrieved by the judgement given against him in the case Il-Pulizija v Kevin Bonnici, Paul Demicoli u Paul Magro discussed in chapter three, appealed, but also instituted a case against the Minister for social politics challenging LN 281 of 2004.

According to Demicoli, the very fact that the legal notice has created new duties incumbent on a person previously undefined in Chapter 424 of the Laws of Malta makes the legal notice ultra vires. According to Demicoli, the

212 Occupational Health and Safety Authority Act, art 2 (emphasis).
Minister responsible could not have introduced this legislation under his own Authority without the intervention of Parliament. Demicoli is therefore asking the Court to declare that the act of the Minister introducing the legal notice, and defining the term “client” and imposing responsibilities on the client, as *ultra vires*. Demicoli is also asking the Court to declare the article defining the client and attributing responsibility upon the client as null and void.

### 4.7 The Definition of Article six of LN 281 of 2004

The interpretation of article six by the Court in the case *Pulizija v Kevin Bonnici, Paul Demicoli and Paul Magro* was the leading factor that sparked the above contestation of LN 281 of 2004 mentioned in the previous section.

During proceedings of the yet undecided case, *Paul Demicoli v Ministru Politika Socjali*, Dr. Mark Gauci, the CEO of the Health and Safety Authority was questioned as a witness and asked about article six. Dr. Gauci held that there are no obligations here and that when the client does not appoint a project supervisor he does not exonerate himself from his obligations as a client.

The meaning of article six has been dealt with in chapter three. It is accordingly being suggested that this article be amended so as to clearly define the obligation of the client in this respect.

### 4.8 The Building Regulation Act 2009\(^{214}\)

This piece of legislation is not yet in force but offers an opportunity for legislators to further flesh out construction health and safety regulations.

\(^{214}\) Bill 50 of 2010, Laws of Malta, A BILL entitled an act to provide for matters relating to the construction of buildings and other matters connected therewith and to make consequential and other amendments.
The Bill states that:

The object of this Bill is to provide for matters relating to the registration of building tradesmen and building contractors, to the construction of buildings, the establishment of a Building Regulation Board, the setting up of a procedure for appeals against decisions taken by the Director Building Regulation Office or the Building Regulation Board and other matters connected with buildings.\(^{215}\)

In the realm of construction health and safety, competence and compliance are of great importance and they should take centre stage when determining whether one should be found criminally or civilly liable for an accident that occurs on a construction site.

This Bill gives the power to the Minister for Resources to create a mechanism whereby contractors and building tradesmen may be registered and licenced under a new regulatory body named the Building Regulation Office.

This Bill could potentially be used to adopt a system similar to that in the UK whereby the creation of registrar listing licensed contractors and tradesmen could be accessible to construction clients to ascertain that a person or company is licensed and competent. As part of the information contained about different contractors and tradesmen, there could be information pertaining to the person’s health and safety records. This information could include courses he or his employees have followed, track record of any incidents, and other relevant information that could help a client choose a safe and competent person to perform construction work. Thus this system could be used as a means by which the Maltese Courts can ascertain whether or not a client has appointed competent persons or not.

\(^{215}\) Ibid 30.
By way of article six, the Bill also provides the power to the Minister to regulate building matters after consultation with the board. More importantly, sub article two of this same article empowers the Minister and the Board to regulate on matters of health and safety.

(2) Without prejudice to the generality of subarticle (1) such regulations under this article may, in particular with respect to building regulations, provide for all or any of the following -
(e) for securing the health, safety, convenience and welfare of -
(i) persons in or about buildings which are under construction; and
(ii) persons who may be affected by buildings or by matters connected with buildings;216

This is an important step forward in construction health and safety as if this bill comes into force, a specially appointed board composed of construction industry professionals will be able to create legislation.

4.9 Pre-Qualification Assessment Schemes

The notion of competence is a very important factor in the UK and the construction client has the duty to appoint competent contractors who have undergone health and safety training and keep up to date with the latest developments. To this extent clients in the UK are assisted through what are known as Pre-Qualification Assessment Schemes. These schemes such as “The Contractors Health and Safety Assessment Scheme” (CHAS), assist clients by providing a register of contractors who have been pre-assessed to ensure that they are competent in the realm of health and safety. Affiliation with a recognised scheme such as CHAS will automatically signify that the contractor satisfies the health and safety requirements of CDM 2007. Registering with such a scheme is not obligatory, nor is contracting someone affiliated with such a scheme however, ensuring competence is obligatory and these initiatives reduce the paperwork by providing clients with approved contractors. This coupled with a national register of contractors called

216 Ibid art 6.
Constructiononline\textsuperscript{217} helps regulate the industry and provides a system of compliance beneficial to both the contractors and the clients. One can here mention Chapter 288 of the Laws of Malta entitled Building (Price Control) Act, which provides for registration of persons involved in the construction industry, who cannot carry out the trade without being registered. This act can be amended to create a register available to the public.

4.10 Il-Pulizija v Kevin Bonnici, Paul Demicoli u Paul Magro; a Contribution to Construction Health and Safety

The judgement given by the Court in the 2009 case \textit{Pulizija v Paul Demicoli, Kevin Bonnici and Paul Magro} is a very important because it not only gave a severe penalty to the client and the construction worker but also made suggestions at the end of the judgement on how the construction industry could be made safer.

The Magistrate held the following:

1. The contractor should not be allowed to commence works before clear written instructions are given by a competent person-the architect.

2. The contractor should refrain from proceeding with works where it results that there are defects on site or in the adjacent buildings. The architect should be kept informed of the construction progress and where a contractor insists on continuing work, he should be held responsible, as is what in fact happened in this case.

3. Any demolition or excavating works should follow a method statement as drawn up by an architect responsible for the site and this should be approved by a Public Authority so as to ensure that the work is being carried out according to the trade and profession, as well as ensuring

\textsuperscript{217} UK Register of Pre-Qualified Construction Services <www.constructionline.co.uk>.
that the contractor is following the instructions of the architect who remains responsible for the building for a number of years after construction is completed.

4. Adequate machinery and equipment should be used when excavating according to the type of rock on site.

5. The presence of an architect on site is necessary but this should not automatically be taken to mean that the works being carried out should be approved if these works do not rigorously conform to the instructions and plans drawn up by the same architect.

6. **Contractors that perform construction and demolition works should be obliged to undergo training which should be made obligatory by the government; contractors should subsequently be certified.**

7. Article 39A of the Development Planning Act should be modified in such a way as to allow the same Authority to suspend a building permit if works are being executed by persons who are not licenced as stone masons.

8. That even though it does not fall within the competence of the Environment and Planning Authority, this same Authority should inform permit holders to observe Legal Notice 281 of 2004 particularly the regulation which imposes upon a client to nominate a Health and Safety Supervisor for the planning stage as well as for the execution stage.

9. Government should concentrate efforts to strengthen enforcement of the observance of planning laws, the construction management

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218 Emphasis added.
regulations and the health and safety laws under one organization with the aim of providing citizens an authority to obtain state assistance with less difficulty and this in the light that it is today unclear whether an effected citizen should approach: MEPA, OHSA, the Building Regulations Department forming part of the Ministry of Resources and Rural Affairs or the executive police.

The above suggestions are of valuable importance as they highlight shortcomings in the sphere of construction health and safety. If these suggestions are implemented and if LN 281 of 2004 is refined, the industry's safety record will surely be improved.
Select Bibliography

Books


Theses

Thompson J, ‘Defences To Liability in Tort’ (Doctor of Laws, University of Malta, 2010)

Journals


— ‘Flagstone is “Equipment” under Employers’ Liability (Defective Equipment) Act 1969 – Employers liable to employees injured by defects in building materials, which the employer could not have discovered – Knowles v. Liverpool City Council 14 October 1993’ [1994] Construction Law Digest 7

— ‘Secondary Employer Liable for injuries to temporary Employee – Primary employer entitled to complete indemnity against secondary employer’s failure to provide equipment and safe system of work for employee – Nelham v. Sandells Maintenance Ltd and Gillespie (UK) Ltd’ [1996] Construction Law Digest 7

— ‘What do the terms employer and employee mean in the context of HSWA 1974?’ [2010] HS at W


— — ‘Ensuring Safer Sites’ [2007] 151 Solicitors Journal 1464

— — ‘Reasonable Practicability’ [2007] 151 Solicitors Journal 1428


**Articles, Publications and Websites**

— ‘Developers should be Aware of their Health and Safety Responsibilities’ (Langleys 4 September 2009)  

— ‘New Building Site Regulations Aim To Avoid Damages’ (Times of Malta 3 August 2009)  

‘European Agency for Safety and Health at Work’ OSH Framework Directive  

Accidents at Work Q1/2010 (National Statistics Office Malta 19 May 2010)  


Griffiths R, ‘Construction (Design and Management) Regulations 2007: A Briefing’ (RRC Training)

King v Farmer t/a R W Farmer (Builders) 6.8.04 (The Chartered Institute of Loss Adjudicators) <http://www.cila.co.uk/node/181> accessed on 15 January 2011

The Contractors Health and Safety Assessment Scheme <http://www.chas.gov.uk> accessed on 30 March 2011


UK Register of Pre-Qualified Construction Services <www.constructionline.co.uk> 30 March 2011

Miscellaneous

Occupational Health and Safety Authority Malta, Code of Practice for the Construction Industry 2006