7 Does the '*non cumul*' Rule Exist in our Civil Law?

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This article has three objectives. The first is to assess the significance and field of operation of the rule of *non cumul* in comparative law of tort. The second is to review certain Maltese judgments to establish whether our courts apply this rule. The third is to highlight the bad effects of the prevailing lack of clarity and to argue in favour of reform. To the uninitiated, this may seem a fairly arcane topic with few practical implications. However I aim to show that it lies at the heart of certain thorny dilemmas faced by advocates when instituting court proceedings for civil damages.

'Non cumul' in Comparative Law of Tort

The rule itself is easy to define. There are certain factual situations which give rise to an overlap of contractual and tortious responsibility, so that the plaintiff would appear to have the choice whether to institute an action for damages under tort or under contract. Massimo Bianca[1] gives two examples: a surgeon who conducts an operation carelessly and incompetently and the buyer of a home appliance containing a latent defect, which provokes a fire damaging the buyer's apartment. In the first case, the patient has suffered an infringement not only of his contractual right to the diligent execution of professional services, but also of his right qua citizen not to have his health endangered by the negligent activities of others.[2] In the second, the buyer would appear to have a right of action for damages in tort in addition to his contractual right to take action to remedy the effects of the seller's breach of his warranty against latent defects. In these situations of concurrent responsibility, it is a general principle of French law that the plaintiff has no option but to take a position on the contractual terrain and take action on the basis of breach of contract. This rule is applied very strictly, so as to restrict the plaintiff in such cases to legal action of a contractual character and to exclude any possibility of listing both contractual and tortious claims in the writ.[3] Moreover in these situations, even if the contractual remedy is no longer available because of prescription, the plaintiff may still not exercise the action in tort.[4]

The *raison d'être* of the rule of *non cumul* largely derives from the importance which French law gives to the autonomy of the will of the contracting parties. After all, the contract may clearly state whether the parties should or should not have a choice of action in the event of concurrent responsibility between contract and tort. In such cases jurists[5] agree that it is the contract that will determine the matter. However the contract itself is usually silent about this issue in the standard case of *non cumul*. In this case it is assumed that the parties must have intended to exclude the possibility of an action in tort since they chose to regulate the relationship between them by means of a specific contractual regime, which supersedes the more generic protection of tort law. Similar rules also apply to a different, albeit comparable, situation: where one of the parties to a contract has committed actions that, while they do not constitute a breach of contract, would normally constitute a tort. Here too, the principle of respect for the will of the contracting parties leads French authors to conclude that the availability of an action in tort depends on the reasons for which the parties have omitted to include specific contractual provisions regulating the situation. If they have done so because they specifically intended to exclude the possibility of both contractual and non-contractual remedies, then an action for damages in tort will not be allowed. If, however, the omission of the parties derives from their understanding that the situation is already catered for in terms of general legal principles, then a remedy in tort will be available.[6] Analogously, the rule of *non cumul* is justified as a necessary outcome of the intentions of

1 Massimo Bianca, C., (1994), *Diritto Civile Vol. V*, Dott. A. Giuffrè Editore, Milano.

2 It should be kept in mind that the Italian Constitution speaks of the right of citizens to healthcare.

3 In fact, Mazeaud & Chabas argue that it would be preferable to speak of the rule of choice of action instead of *non cumul*. See Chabas, F., (1998), *Leçons de Droit Civil*, (Leon, H., Mazeaud, J., Chabas, F.), Montchrestien, Paris.

4 See Nicholas, B., (1996), *The French Law of Contract*, OUP, Oxford, p. 173.

5 Chabas, F., ibid, p. 403.

6 Thus Mazeaud & Chabas, ibid, argue that in a contract of sale of a shop, the buyer need not include a clause obliging the seller to avoid spreading malicious rumours after the sale that aim to prevent potential buyers from buying from the shop. A seller who acts in this way

the parties, who have freely decided that their relationship will be regulated by a contractual regime.

It is important to note that this rule appears to be specific to French law of tort. If one looks at English and Italian law, it is clear that this rule is not applicable. As Cane[7] observes, explicitly contrasting English and French law:

> As a general rule, English law allows concurrent liability in contract and tort. This means that if D's conduct constitutes both a tort against P and breach of contract between P and D, P may choose to sue D either in tort or in contract (or in both) in respect of that conduct.[8]

Cane justifies the English position as more flexible and reasonable than the unduly formalistic French approach. He also argues that a judicial preference for an action based on contract law can no longer be justified on the grounds that contracts are the product of the free choices of the parties. Many of the legal effects of contracts arise regardless of the choices of the contracting parties.

Italian authors make similar points. Thus Massimo Bianca[9] notes that there is no objective incompatibility between the specific protection of the parties' interests which contract law provides and the more generic protection provided by the law of tort. Torrente[10] adds that the parties who enter into a contract certainly do not intend to thereby renounce to the general protection of their primary rights under tort law. There is therefore no reason to deny the possibility of concurrent liability. The injured party should be permitted to choose to act either via contract or via tort and the judge is obliged to respect this choice. Moreover, the exercise of one of these actions does not constitute an implicit renunciation of the other, although once compensation for damages is obtained through one action the other will lapse.[11] Finally, in these cases, the plaintiff is also permitted to sue for damages without stating whether he is acting on the basis of tort or breach of contract. The judge would have the discretion to determine which type of action is being exercised.

One should also note that German law follows the English and Italian approach and accepts concurrent liability. The origins of this approach have been traced to Roman law, which also, it seems, permitted the plaintiff to choose between tort and contract in such cases.[12]

Maltese Court Decisions

Court decisions are an indispensable guide in order to determine whether the rule of *non cumul* exists in our law. After all in France this rule was developed by the courts, since the Code Napoleon, like our civil code, is silent on this issue. One could argue that this rule exists in our law since Maltese law of obligations is closely modelled on French law and we also give primary importance to the autonomy of the will of the contracting parties.[13] However, it is equally possible to assert that *non cumul* does not apply in Malta, since our civil law is ultimately based on Roman law, which apparently did not recognize this rule (cf. *supra*). In the absence of statutory regulation, it remains possible to argue that our position has continued to be regulated by Roman law.[14] In the face of these

would be incurring tortious responsibility in line with general principles and the buyer can therefore sue the seller for damages in tort despite the existence of a contract between them. By contrast, if the parties to a contract of deposit stipulate that the depositary is only liable in *culpa lata* for his custody of the thing deposited with him, then the depositor may not institute the ordinary action for damages in tort on the basis of the *culpa laevis* of the depositary. In the latter case it is clear that the contracting parties have specifically excluded the possibility of an action in terms of general principles of tort.

7 Cane, P. (1996), *Tort Law and Economic Interests*, Clarendon Press, Oxford.

8 Ibid, p. 311

9 Bianca, M., op. cit., p. 552

10 Torrente, A. & Sclesinger, P., (1997), *Manuale di Diritto Privato*, Dott. A. Giuffrè Editore, Milan, p. 663.

11 If the exercise of one of these actions is no longer possible due to prescription, the plaintiff may still exercise the other. Italian case decisions have therefore accepted the possibility of making an action in tort against the seller of a thing containing a latent defect, despite the fact that the time limit for the exercise of the contractual action for breach of the warranty against latent defects had expired. This is because the purpose of the action in tort is not to obtain the economic advantage deriving from adequate performance of the contract, but to obtain the compensation to which the buyer is entitled for the injury which she has personally suffered. Bianca, M., op. cit., p. 554.

12 Massimo Bianca quotes a passage from the *Digest* attributed to Ulpian: *Proculus ait, si medicus servum imperite seceurit, vel ex locato vel ex lege Aquilia competere actionem*, Bianca, M., op. cit., pp. 552-3. (Translation: 'Proculus states that if a medical doctor has negligently performed his professional services in regard to a slave, he can be sued either on the basis of *locatio conductio* or of the *lex Aquilia*').

13 Mallia, T., (2000), 'Pre-Contractual Liability in Malta', *Law & Practice*, Vol. 1, No. 1, p. 26.

14 On this point, it is worth quoting the opinion of Judge Paolo Debono, cited by the Court of Appeal in the leading case of *Cassar Desain v. Forbes*:

> the precept of the Code de Rohan that, whenever a dispute cannot be decided by the provisions of the Municipal law, regard must be had to the (Roman) common law, has never in civil cases been repealed and is still applied.

He adds that

> the common law to which the Code refers, is less that which is derived from the *Corpus Juris* than that which was modified by the Canon law as expounded by the writers and accepted by usage in the Courts.

See the decision of the Court of Appeal delivered on the 7th January 1935 in *Marquis James Cassar Desain v. James Louis Forbes, CBE, nomine*, cited in Gulia, Wallace Ph., *Governmental Liability in Malta*, (1974), University Press, Malta.

conflicting arguments, it is the courts that should provide authoritative guidance. Yet while we do have a few case decisions that apparently apply this rule, they do so in a confusing and inconsistent way. Three separate approaches can be identified in our case decisions.

The 'Consequentialist' Approach of Vassallo v. Mizzi

An important case in this context is *Mary Vassallo v. Giovanni Mizzi et.*, decided by the Civil Court on the 9th April 1949 (Vol. XXXIII. II. 379).[15] In this case, the plaintiff had leased a dwelling house from the defendant. Part of the roof of this house was unsupported by regular beams (*xorok*). This created an aperture in the roof, which was provisionally covered by a wooden plank. Defendant neglected to repair the roof although this was his legal obligation as lessor and plaintiff claimed that she had often requested him to do so. Subsequently, plaintiff suffered a theft of money and some valuables from the house and it was proven that the thieves had gained access to the property through the roof aperture. She therefore sued defendant for compensation for the damages she had suffered as a result of his negligence. In its judgment, the court observed that it was unclear from the writ of summons whether the negligence being attributed to defendant was based on tort or on breach of contract. After reviewing the differences between contract and tort, the court concluded that the plaintiff had intended to request contractual damages, as:

> *L-apertura fis-saqaf allegata tal-kamra mikrija mhix inkonċiljabbli mal-prevedibbilità ta' dak li seta' jiġri u ġara, ċjoè s-serq; u l-istess nuqqas ta' riparazzjoni, tant bħala obbligu tallokatur li jitnissel mill-kuntratt tal-lokazzjoni, kemm bħala traskuraġni tiegħu allegata non ostanti l-insistenzi tal-attriċi biex jirriperah, huma vjolazzjoni tal-kuntratt, li kellha bħala konsegwenza diretta s-serq li fil-fatt ġara; u skond il-ġurisprudenza, meta l-fattijiet kolpużi li jsorġu fl-okkażjoni ta' kuntratt ikunu prevedibbili meta dak il-ftehim iseħħ, u huma l-konsegwenza diretta tal-vjolazzjoni tal-kuntratt, l-azzjoni eżerċitata ma tistax tkun dik tal-ħtija akwiljana, iżda dik tal-ħtija kontrattwali.*[16]

Up to this stage, the court's reasoning might be interpreted as a fairly straightforward application of the rule of *non cumul*. After all, the court made a prima facie assessment of plaintiff's claim to establish whether it could fall under the law of contract and found that it could. This being the case, it held[17] that it had no option but to consider the claim as being of a contractual nature. However, this reasoning bears closer investigation in view of the nature of the test used to determine that the action could fall under the law of contract. Here two criteria were mentioned: firstly that the damages caused were a direct consequence of the violation of the contract and secondly that these damages were foreseeable at the time when the contract was made. Actually both these criteria are usually required under Maltese law for the court to find that damages are payable to compensate for breach of contract.[18] They appear to be irrelevant to the task of determining whether the action stems from a breach of contract in the first place.

The significance of this objection can be grasped if we consider the case where a breach of contract causes damages that were not foreseeable at the time when the contract was originally made. If we apply the test used in *Vassallo v. Mizzi*, then we would have to conclude that any action for compensation of such damages could not be based on breach of contract. An action in tort would therefore have to be made.[19] However it is equally clear that, if the courts are to apply the rule of *non cumul*, they may not allow an action in tort to be made by one contracting party against the other for compensation of the damages arising from an act which constitutes a breach of their contract. After all the rule of *non cumul*, as it exists in France, compels the plaintiff to take action for breach of contract in these cases of concurrent responsibility, even if the contractual action is prescribed. Indeed, French authors admit that this rule tends to work against the victims who have suffered damages.[20] Moreover, it is a basic principle of French

[15] All case decisions cited in this paper are taken from the *Kollezzjoni Deċiżjonijiet tal-Qrati Superjuri ta' Malta*, published by Legal (Publishing) Enterprises. Volume and page numbers are listed in brackets after each case. All the Civil court decisions mentioned in this paper were delivered by the First Hall of the Civil court, a fact which I deem it superfluous to mention in my citations.

[16] Ibid., p. 381

[17] The court referred to previous court decisions that reached the same conclusions. However I have been unable to trace these decisions, as they were not cited in the judgment.

[18] These principles are contained in sections 1136 and 1137 of our Civil Code. Section 1136 states that

> The debtor shall only be liable for such damages as were or could have been foreseen at the time of the agreement, unless the non-performance of the obligation was due to fraud on his part.

Section 1137 adds

> Even where the non-performance of the obligation is due to fraud on the part of the debtor, the compensation in respect of the loss sustained by the creditor, and of the profit of which he was deprived, shall only include such damages as are the immediate and direct consequence of the non-performance.

Cf. Nicholas, B., op. cit., pp. 224-32

[19] The possibility of making an action in tort in certain cases of negligent breach of contract may be deduced a contrario from the wording of the quoted extract from the judgment.

[20] '*Puisqu'elle leur a refusè de pouvoir opter pour les règles qu'elles auraient intérêt à invoquer*', Chabas, F., op. cit., p. 404.

and Maltese civil law that the question whether contractual responsibility has been incurred is treated separately from the rules which establish whether and to which extent the damages caused by the act which gives rise to contractual responsibility can be compensated.[21] Thus, if the rule applied by the court in *Vassallo v. Mizzi* was that of *non cumul*, then we would have to conclude that the test proposed by the court for determining whether contractual responsibility exists was incorrect, insofar as:

a. it failed to distinguish the issue of the existence of contractual responsibility from the rules establishing the quantum of damages compensated and
b. it implied that one contracting party could sometimes make an action in tort against the other party for the damages arising from a breach of their contract, although this is precisely what the rule of *non cumul* forbids and although this would effectively circumvent section 1136 of the Civil Code.[22]

It may be objected, however, that the court in this case had no desire to apply the rule of *non cumul*. After all the judgment contained no reference to French doctrine or jurisprudence. Other interpretations might be available which better explain the court's reasoning. What if the court believed that the *non cumul* rule does not apply to Malta and was simply trying to find the most appropriate remedy for the plaintiff, given that there was concurrent liability and that she had not clearly identified the nature of her claim for damages? If that were so, then the court's decision to treat the case as one of breach of contract rather than tort would simply be based on its desire to interpret the plaintiff's claim in the manner which was most favourable to her. The test proposed by the court is consistent with this interpretation, as the two limbs of this test constitute, as has been observed, the legal requirements which contractual damages must fulfil to be compensated. However, this interpretation is contradicted by the words used in the judgment, which stated that the court in such cases has no discretion as the claim cannot be considered as one of tort and also by the outcome of *Vassallo v. Mizzi*. In fact the final outcome of this case was actually negative for the plaintiff as the court rejected her claim for damages, partly on the grounds that she had failed to convincingly prove his fault and partly (and highly significantly) since, '*del resto, la kien hemm dak il-mezzu bejt flok ix-xriek, ma kienx ordinarjament previdibbili għal Michelangelo Mizzi li minnu seta' jsir serq*'.[23]

At first sight this comment, which forms part of the *ratio decidendi* of this case, appears rather puzzling. Having initially decided, for classification purposes, that the possibility that the aperture in the roof of the leased property could have facilitated the theft was 'not incompatible' with the principle that the damages claimed must have been foreseeable at the time of the making of the contract of lease, the court now cheerfully observes that in this case, however, the theft was not 'ordinarily' foreseeable by the parties! In order to make sense of this final comment, it is necessary to infer that the court is proposing a two-stage test in cases of concurrent liability. In order to determine whether the claim is for breach of contract, it will undertake a preliminary review of the facts of the case in order to establish whether the damages could conceivably have been

a. directly caused by the breach of contract and
b. foreseeable at the time of making of the contract.

If the facts as stated in the writ of summons permit this interpretation, then the case must be classified as breach of contract. At this stage, the plaintiff must actually prove that the facts were in reality a direct consequence of the breach of contract and were truly foreseeable at the time when the contract was made. However this two-stage test appears highly artificial and unworkable. How, in practice, can one distinguish between a preliminary review of the facts that concludes that the damages caused could have been foreseeable at the time when the contract was made and a definitive assessment of the facts that concludes that the damages caused were foreseeable at that time?

To understand why the court attempted to construct this two-stage test, it is important to highlight another undesirable consequence of its misplaced reliance on the legal criteria governing the payment of contractual damages in order to classify the action as based on contract or on tort. An action satisfying these criteria must *ipso facto* be one where the court believes the damages plaintiff suffered should, according to the law, be compensated. Therefore, if these criteria are used to classify the action, the case ought, logically, to be decided in favour of the plaintiff whenever an action for damages is classified as arising from a breach of contract. The preliminary classification of an action as contractual would necessarily imply that the court is also accepting that the defendant is liable to pay damages for breach of contract. Clearly the court evolved the two-stage test in an attempt to wriggle out

[21] This is why the writ of summons in such cases normally contains two separate requests: firstly that the defendant be declared responsible for the damage caused and secondly that the actual damages s/he is liable to pay be quantified and the defendant condemned to pay them. On this point Nicholas has a very interesting discussion. See Nicholas, B., op. cit., pp. 211-13.

[22] Section 1136 restricts the damages payable for a negligent breach of contract to those that were foreseeable at the time when the contract was made. Note that the case being considered here is different from the issue, discussed further on, as to whether a third party to a contract may sue one of the contracting parties in tort for an act which constitutes a breach of contract.

[23] *Vassallo v. Mizzi*, op. cit., p. 382.

of these implications of its position, which would have greatly reduced its discretion by making it impossible for it to both classify an action as contractual in nature and also to find that damages could not be awarded.[24] In terms of this test, it is clear that not every classification of an action as one for contractual damages must lead to the defendant being found liable to pay damages in compensation.

In any event, the rejection of the plaintiff's claim partly on the strength of one of the special rules of contractual responsibility puts paid to any notion that the court's categorization of the claim as one of breach of contract was motivated by the desire to find the most favourable solution for the plaintiff. The court's position in this case cannot be assimilated to either the Italian or the French position. If an Italian court had decided this issue, it would – unlike the Maltese court – have considered itself free to find that the action was one of tort although the damages arose from an act which also constituted a breach of contract. If a French court was faced with this case, it would have considered the action as being contractual not because of the nature of the damage caused, as the Maltese court argued, but simply because it allegedly arose from an act which constituted a breach of contract. The reasoning of the Maltese court appears close to the French position, with the difference that the French courts first apply a classificatory principle and then deduce its logical consequences, while the Maltese court tried, by artificial and unworkable criteria, to deduce the classificatory principle from its consequences.[25]

The implications of this judgment can be better understood if we look at a more recent case that applied the same 'consequentialist' reasoning. In fact, *Vassallo v. Mizzi* was cited in *Pauline Fenech v. Emmanuel Baldacchino noe*, decided by the Civil Court on the 20th March 1992 (LXXVI. III. 568). In this case, the plaintiff had bought a villa from the defendant. When the contract of sale was finalized, the defendant failed to deliver to her all the keys of the property, leaving another set of keys in the hands of third parties. She claimed that when she visited the villa after the sale, she found some furniture missing and on a subsequent visit she encountered some persons inside the villa who assaulted her and robbed her of a sum amounting to LM45,000.00. She therefore sued the plaintiff to obtain compensation for the damages she had sustained. In his statement of defence, the defendant argued that the alleged theft was purely a figment of the plaintiff's imagination.

In this case too, it was unclear from the writ of summons whether the alleged liability of the defendant derived from tort or breach of contract and the court again used its discretion to ascertain the legal basis of the action. After reviewing the facts of the case, the court held that the action was contractual in nature, being based on the claim that the defendant's non-delivery of all the keys of the villa constituted a breach of his contractual obligation to ensure the defendant's peaceful possession of the property. The court discarded the possibility of an action based on tort for various reasons, which were primarily:

1. At no stage did the plaintiff allege that defendant was guilty of any criminal misbehaviour in her regard, either in his own name or in complicity with others.
2. Neither did plaintiff claim that defendant intentionally or fraudulently refrained from performing his contractual obligations towards her.
3. According to our case decisions, when the damages arising from a breach of contract were foreseeable at the time when this contract was finalized and are a direct consequence of the breach, the resulting action for compensation of these damages can only be contractual in nature and cannot be based on tort.

The third reason for considering plaintiff's claim as contractual is subject to the same criticism which has been directed at *Vassallo v. Mizzi*, from which it was explicitly derived. However the other two reasons are also misleading and merit further investigation. Indeed, the argument that the action could not be based on tort because the defendant had not been simultaneously accused of committing a criminal offence could only hold water if there existed a general principle limiting the right to claim civil damages in tort to those instances when the tortious act also allegedly constitutes a criminal offence. Yet this is clearly incorrect, because it is universally accepted that the civil and the criminal actions are independent of one another.[26] Secondly, it is also irrelevant for the purposes of classifying an action under contract or tort whether the defendant acted fraudulently or negligently. After all, a breach of contract may be committed intentionally and our law recognizes the

[24] Which is what the court decided in this case.

[25] The consequences being whether or not damages could be compensated in this case. For an original discussion of the role of consequentialist reasoning in judicial decision-making, see the chapter on 'Reason, Intent and the Logic of Consequence' in Rosen, L., *The Anthropology of Justice: Law as Culture in Islamic Society*, (1996), University Press, Cambridge, pp. 39-57.

[26] Thus Caruana Galizia observes

> The concept of tort or delict in civil law is different from that of crime... very often, though not always, a crime is at the same time a tort or a quasi-tort; but even then the two actions which are given rise to, the penal action and the civil action, must be kept distinct... the two actions are instituted, dealt with and judged upon separately and independently one from the other.

Caruana Galizia, V., (rev. Ganado, J. M.), *Notes on Civil Law Laws III Year*, (1978), University Press, Malta, p. 310.

existence of a category of quasi-tort,[27] which consists precisely of unjust acts which are negligently committed. Since it is possible to commit either a tort or a breach of contract either negligently or intentionally, it is clear that the intentional element cannot be the criterion by which claims are classified as contractual or tortious. Yet the court's reference to the intentional element in this context is significant, as it reveals how closely it followed in the footsteps of *Vassallo v. Mizzi* in relying on the rules concerning the quantification of damages to establish responsibility and how, in the process, it was led up a blind alley. In fact our law provides that in cases of fraudulent breach of contract, the damages awarded to the creditor are all the damages which are the immediate and direct consequence of the debtor's non-performance, not limited by the requirement that they should have been foreseeable at the moment of conclusion of the contract.[28] This contrasts with the case of a negligent breach of contract, when the damages awarded are restricted by the requirement that they must have been foreseeable at the moment of conclusion of the contract. In *Fenech v. Baldacchino*, it seems that the court imported this distinction between fraudulent and negligent breach of contract from the field of quantification of damages and tried to use it to determine whether the action was based on contract or tort. In the process, the court came close to considering an intentional breach of contract as being a kind of tort, observing:

> *Konsegwentament ma hemm xejn fl-atti li jista' jissuġġerixxi illi l-attriċi qed titlob xi risarċiment ta' danni 'ex delictu' jew 'quasi delictu', in kwantu wkoll ma jirriżultax... li l-attriċi qed timputa lill-konvenut li hu naqas li jadempixxi l-obbligazzjoni-jiet tiegħu kontrattwali b'dolo u bil-ħsieb li attwalment jarrekalha danni.*[29]

The court did not consider the possibility that the defendant's carelessness in neglecting to deliver all the keys of the villa to the plaintiff might constitute a quasi-tort. Its failure to consider this option, which could have materially influenced its judgment, was a result of its over-reliance on the rules regulating the quantification of contractual damages, which led it to misrepresent the true nature of the distinction between contract and tort as based on whether the defendant had acted negligently or intentionally.

Even when it came to determine whether and to what extent damages were payable, the court in *Fenech v. Baldacchino* faced the same obstacles which had been encountered in *Vassallo v. Mizzi* and tried to surmount them by similar strategies. Once again, the difficulty was that the court had apparently already decided that damages were payable, since it had held that the damages caused were foreseeable in order to justify its classification of the claim as contractual. The court overcame this difficulty partly by holding that plaintiff had failed to provide adequate proof that she had really suffered the damages she claimed and partly by arguing that since the damages she allegedly suffered were foreseeable at the time when the contract of sale was finalized, she should also have foreseen and taken steps to protect herself from the eventual theft of her property.[30] However, this latter argument lacks a secure legal basis as the general rule in cases of liability for negligent breach of contract is that the defendant is liable for all foreseeable damages which are an immediate and direct consequence of his actions. Moreover, the court was clearly unhappy with its own line of argument, since at a later point in the judgment it pointed out that it was impossible for the defendant to have actually foreseen the theft![31]

These shifting and inconsistent criteria can all be seen as attempts to compensate for the 'original sin' committed in *Vassallo v. Mizzi* and repeated in *Fenech v. Baldacchino*, of relying on the rules regulating the payment of contractual damages for the logically prior task of determining whether the action made should/must be considered as contractual in origin. In both cases, the court found against the plaintiff. In *Vassallo v. Mizzi* the court had to invent an artificial two-stage test of foreseeability to arrive at this conclusion. In *Fenech v. Baldacchino*, the court evoked this test and tried to give it weight by evolving additional criteria, which also appeared to lack a secure legal basis. In both cases, a French court would probably have arrived at the same conclusion, but it would simply have held that the presence of a contractual element requires the case to be classified as contractual in nature, leaving the court free to conclude that the damages caused could not be compensated as they were not foreseeable at the time when the contract was concluded. This is clearly a more logical and consistent approach. The same could be said for the Italian approach, which would probably have allowed the court to find that the plaintiff's action was based on tort in either of these cases.

27 See sections 1031, 1032 and 1033 of our Civil Code.

28 In terms of section 1136 of our Civil Code, op. cit. cf. Nicholas, B., (op. cit., p. 229) for French law of contract

> The debtor, therefore, whose fault does not amount to dol is liable for such direct damage as was foreseeable; the debtor who is guilty of dol is liable for all direct damage, whether foreseeable or not.

29 See *Fenech v. Baldaccino*, op. cit., pp. 572-73.

30 Ideally by not turning up at the villa carrying LM45,000.00 in her hands a few days after she became aware that third parties had access to the property!

31 Op. cit., p. 575.

(Mis-)Applying the Principle of Subsidiarity

Other Maltese judgments also seem to apply the rule of *non cumul*, without however invoking the consequentialist reasoning of *Vassallo v. Mizzi*. In this regard, an intriguing judgment was delivered only a month before *Fenech v. Baldacchino* in *Anthony Vella noe v. Alan Clifford Jones*, decided by the Civil Court on the 28th February 1992 (LXXVI. III. 542). In this case, the defendant had entered into a *konvenju*[32] agreement to buy an apartment belonging to the plaintiff. He claimed that on the strength of this agreement defendant had given him specific instructions to buy tiles of a certain type and to perform certain repairs to the property. After he had allegedly incurred expenses amounting to LM796.00, defendant failed to honour the *konvenju*, since he did not take action to finalize the contract of sale within the time period in which the *konvenju* could have been enforced. Plaintiff therefore claimed that defendant had incurred a pre-contractual liability to compensate him for the expenses he had made.[33] Defendant objected that key facts alleged by the plaintiff were untrue and that his claim had no legal basis.

In its judgment, the court observed that plaintiff had not taken any action to enforce the *konvenju* within the period in which he was legally entitled to do so.[34] Therefore:

> *Hu ovvju li dan kien ir-rimedju li kien miftuħ lill-attur nomine biex jikkawtela d-drittijiet tiegħu li l-liġi tagħtih biex jarġina kull telf jew danni riżultanti mill-allegata inadempjenza tal-konvenut. Il-Qorti ma tarax taħt liema figura legali l-attur nomine jista' javvanza pretensjoni għall-kundanna ta' danni pre-kontrattwali meta, ex admissis, ma użufruwiex mir-rimedju li l-liġi stess tagħtih ex contractu.*[35]

Thus the court reasoned that once a contractual action to enforce the *konvenju* was available and had not been utilized by plaintiff, he could not now sue for pre-contractual damages. This is an interesting statement, for a number of reasons. Firstly, because it implies that pre-contractual liability in Maltese law is founded on tort and not on contractual grounds.[36] Secondly, because it might appear to be a very direct application of the doctrine of *non cumul*. It is worth pointing out that in this case the court made no reference to the test developed in *Vassallo v. Mizzi*. Instead of asking whether the damages caused to the plaintiff were foreseeable at the time when the *konvenju* was finalized, the court simply noted that an unutilized contractual remedy had been available. The mere existence of this contractual remedy which had not been availed of and despite the fact that it was no longer available to plaintiff, was held to preclude him from making an action for damages in tort. This appears to be almost identical to the French position. Finally, however, a margin of doubt remains whether the court was applying the rule of *non cumul* in its entirety or some other principle. After all, the court might have meant to imply that pre-contractual liability is based on quasi-contractual grounds, in which case the principle applied could not be that of *non cumul*.[37] Moreover, the quoted extract might be read to imply that it is the fact that plaintiff had not initially attempted to utilize the contractual remedy, not its mere existence, which prevented him from exercising the action in tort.

This interpretation is suggested by another case, which could also be considered as relating to concurrent responsibility: *Frederick Frendo noe v. Godwin Abela noe et*, decided by the Court of Appeal on the 24th October 1989 (LXXII. II. 601). In this case, plaintiff had entered into a contract with the Cargo Handling Company, represented by the defendant Godwin Abela; in terms of which this company engaged to unload merchandise from his ship, the *Veliko Tirnovo*. The company had in turn subcontracted part of the work to the second defendant, a certain Meli, who had to supply the heavy equipment needed to unload the merchandise. It seems that the delivery of this heavy equipment was delayed. In consequence the stevedores (*burdnara*) requested an increased payment, over and above their official tariff, from the plaintiff, arguing that the workers had to take an excessive amount of time in order to unload the merchandise. They brought their claim before the Port Disputes Board, which ordered the plaintiff to pay an additional sum of LM343.20 to the stevedores. The plaintiff in turn sought to recover these additional expenses by suing both Meli as well as the Cargo Handling Company (as represented by Godwin Abela) for the damages caused to him by their delay in unloading the ship. The

32 The colloquial term for a written document containing a unilateral promise to sell, together with a unilateral promise to buy immovable property.

33 Since he had initially expressed the desire to buy the property and then failed to appear on the final contract after plaintiff had incurred these expenses.

34 It is unclear from the judgment whether this refers to the legally stipulated period of three months from the day on which the agreement could have been enforced, (see section 1357(2), Civil Code) or to a conventional period stipulated by the parties.

35 *Vella v. Jones*, op. cit., p. 544.

36 In fact, in the above-quoted extract, the court explicitly contrasted pre-contractual liability to a contractually based remedy. This is a significant contribution to the debate on the juridical basis of pre-contractual liability, on which see Mallia, T., op. cit., and Xuereb, G., 'A Comparative Study of the Theory of Precontractual Responsibility', in *Id-Dritt*, published by the Għaqda Studenti tal-Liġi.

37 As this principle only operates in the case of concurrent liability between contractual and tortious responsibility. The overlap between contractual and quasi-contractual responsibility is governed by the principle of subsidiarity, discussed further on in this paper.

case came before the Commercial Court, which decided that plaintiff's action against the Cargo Handling Company, which was based on breach of contract, was time-barred in terms of section 45(b) of the Ports Ordinance (1962). As regards his action against the second defendant, (Meli), the court held that the plaintiff had no right of action against him, because there was no contractual link between them; Meli being a subcontractor of the Cargo Handling Company and not of the plaintiff.

Plaintiff appealed, arguing *inter alia* that his claim for damages from Meli was based on tort and not on contract. Therefore it was not necessary for him to establish a contractual connection with Meli in order to sue him for damages and his action was not time-barred in terms of the Ports Ordinance. However the Court of Appeal rejected this argument, observing that:

1. appellant had based his claim purely on contractual grounds in his writ of summons;
2. given that there was no contractual link, the action for damages should not and could not have been made in the first place against the defendant Meli; and
3. since Meli had entered into a contract with the Cargo Handling Company and since the plaintiff's right of action against the Cargo Handling Company, with which he really had a contractual tie, had expired through prescription, it is inconceivable that he should have retained the same right of action in regard to Meli, with whom he had no legal relationship whatsoever.

Clearly the court in this case applied a principle which was similar to that applied in *Vella v. Jones*. In both cases, the existence of an action for breach of contract which was not availed of was held to prevent plaintiff from making an action for damages in tort. Yet is this principle the same as the rule of *non cumul*? Doubts may arise due to the particular facts of this case as well as the way in which the court expressed its judgment. Significantly in this case the contractual action was exercisable against one person, while the claim in tort was directed against another. In all the other cases of concurrent responsibility which have been reviewed, the contractual and tortious actions overlapped because they were potentially exercisable in regard to the same person. Admittedly, some authors argue that concurrent liability can also arise when the act which causes damage is imputable to more than one person on different legal grounds.[38] However, the justification of the *non cumul* rule lies, as has been observed, in the fact that the particular parties involved had previously decided to regulate their relationship by means of a contract. This justification is missing where, as in this case, there is no previous contractual relationship between the plaintiff and the person being sued in tort. Thus it is unlikely that the French courts would have extended the application of the rule of *non cumul* to a case like *Frendo v. Abela*.

These doubts are reinforced by the way in which the court chose to describe the principle it was applying. In denying the plaintiff the right to take action in tort against the second defendant, the court highlighted the fact that his contractual action against the first defendant had expired through prescription. This fact should not be taken into account if the court is applying the rule of *non cumul*. The court's duty should be limited to ascertaining whether or not a contractual action was originally available to the plaintiff. If this was the case, then he cannot be permitted to make an action in tort, whether the contractual action was still available or was time-barred. Moreover, the court also stressed that in this case the action in tort could not be availed of in the first place.[39] This curious expression seems to have no foundation in the *non cumul* rule, since this rule completely and permanently prevents the plaintiff from taking action in tort once a concurrent contractual liability exists.

One way of explaining the court's approach would argue that it relied heavily on precedents found in English law. In fact there exist various comparable cases in which the English courts have denied the possibility of making a claim in tort and this on the strength, not of the principle of *non cumul*, but of the doctrine of privity of contract. The central argument is that in cases where X, a party to a contract with Y, has subcontracted the performance of some or all of his contractual duties to another person, Z, then this subcontract is a *res inter alios acta* to the original contracting party Y, who is not a party to the subcontract and cannot benefit from it. Y cannot therefore be allowed to sue Z in tort, as this would mean that one is effectively allowing him to circumvent the doctrine of privity of contract.[40] One should note, however, that although the English courts used to argue in this way in the

[38] Massimo Bianca gives the example of the theft of valuables contained in a safe deposit box at a bank, which was perpetrated with the complicity of the guards employed by a security agency. The contractual responsibility of the bank towards its clients who have been the victims of this theft does not eliminate the responsibility in tort of the thieves and the security agency, which is directly responsible towards the bank and the depositors for the criminal activities of its employees. Bianca, M., op. cit., p. 551 fn.

[39] The precise wording of the judgment is '*L-azzjoni fl-ewwel lok għalhekk kif konċepita ma kellhiex u ma setgħetx issir kontra l-konvenut Meli*' *Frendo v. Abela*, op. cit., p. 613

[40] 'In a nutshell, the essential question usually is whether it is permissible, or legitimate, for the courts to impose tort liability on parties who are (or one of whom is) involved in some contractual relationships, not necessarily with each other, in such a way that the tort liability may be added to the burdens or obligations created by the contract', Atiyah, P. S., (1995), *An Introduction to the Law of Contract*, University Press, Oxford, p. 373.

nineteenth century, a much more flexible approach has prevailed since the celebrated decision of the House of Lords in *Donoghue v. Stevenson*.[41] While the English case-law on this issue is too complex and convoluted to be examined in great depth here, the prevailing approach now is that Y can sue Z in tort for compensation of the damages suffered by him, provided that:

1. Z is entitled to benefit from any clause limiting or exempting him from liability in the original contract between X and Y; and
2. Y can only sue for compensation in cases where he or his property have suffered direct physical damage and not where his loss is of a purely economic nature.

Both these provisos shed light on the decision in *Frendo v. Abela*. Concerning the first proviso, a significant judgment was delivered in 1975 by the Privy Council in the Eurymedon case. This judgment over-ruled previous decisions and accepted that in cases of damage to property consigned by the sea, the existence of a clause in the bill of lading exempting third parties such as stevedores from liability for damages, also exempted these third parties from being sued in tort by the buyer of the damaged property.[42] The facts of this English case are analogous to the Maltese one, as in both instances the contractual link which existed between the plaintiff and another party was held to preclude him from exercising an action in tort against a third party. Yet, it is clear that the Eurymedon case was decided on different grounds from *Frendo v. Abela*, as the key issue in this case concerned the efficacy of an exemption clause specifically included in a contract *vis-à-vis* third parties to that contract. By contrast, there was no such exemption clause in the Maltese case and the only reason why the contractual action for damages was denied to the plaintiff was due to the expiration of a legally (and not contractually) imposed period of forfeiture.[43]

Similarly as regards the second proviso, although a superficial reading of the English judgments might conclude that they justify the approach of the Maltese court, deeper analysis shows that they do not. In fact the justification for excluding compensation for pure economic loss under English tort law is that

> a claim for economic loss is often a claim based on a lost expectation, rather than any other kind of loss.[44]

To use the words of continental lawyers, it is because economic loss represents the positive interest which a party to a contract has in seeing it fulfilled more than his negative interest not to have entered into a contract at all, that English courts are wary of granting damages which represent pure economic loss in tort. Thus, in the case of *Simaan General Contracting Co. v. Pilkington Glass*,[45] the right to claim damages in tort was denied to a building contractor who tried to sue the suppliers of glass to his subcontractor on the grounds that this glass was the wrong colour according to the contract and had to be replaced at his cost. The reason for the court's decision was that the loss caused to plaintiff by defendant's carelessness was not physical injury to his person or physical damage to his property, but simply the economic loss resulting from the non-fulfilment by the defendant of his contractual obligations. This decision is superficially similar to *Frendo v. Abela*, as the plaintiff in the Maltese case sued the defendant Meli for compensation of the purely financial loss caused to him by Meli's delay in performing his obligations under his subcontract with the Cargo Handling Company. In reality, however, the damages claimed in the Maltese cases were not the purely economic loss reflecting plaintiff's expectations under the contract. They were the expenses directly caused to the plaintiff as a result of an award by a quasi-judicial body (the Ports Disputes Board), which he would not have incurred had defendant been diligent in performing his obligations. Consequently, these expenses appear more similar to physical damage to property than they do to pure economic loss and this is probably how an English court would regard them. In any case, it would certainly be incorrect for a Maltese court to argue that compensation for such expenses cannot be claimed in tort, since the 'expenses which the latter (the person responsible) may have been compelled to incur in consequence of the damage',[46] are specifically mentioned in our Civil Code as being damages for which the plaintiff is entitled to sue for compensation in tort!

[41] Delivered in 1932. In that case, the consumer who suffered injuries from drinking a bottle of ginger beer allegedly containing a snail was allowed to sue the manufacturer for compensation directly in tort. This action was allowed despite the fact that there was no contractual linkage between the consumer and the manufacturer, since it was her friend who had bought the bottle of ginger beer and since this had been bought from a dealer and not directly from the manufacturer. See Atiyah, ibid., p. 374.

[42] This case is discussed at length by Atiyah, ibid., pp. 99-100.

[43] In reality, this English judgment is an application of the principle, accepted by the French courts, that the parties to a contract may decide to exclude liability in tort. See the first page of this paper for a discussion of this principle.

[44] Atiyah, op. cit., p. 380.

[45] Decided by the Court of Appeal in 1988. Note however that an earlier decision in the Junior Books case allowed an owner of property to sue a sub-contractor directly for the negligent construction of a floor, which meant that the floor had to be re-laid. See Atiyah, ibid., pp. 382-83.

[46] See section 1045 (1) of the Civil Code.

This analysis leads to one firm conclusion. If the principle applied in *Frendo v. Abela* was the principle of privity of contract as understood by the English courts, then the court construed the English position in an unduly rigid way reminiscent of nineteenth century English case-law. A contemporary English court would probably have allowed plaintiff to sue the defendant Meli for damages in tort. However, there are serious objections to accepting that our courts have relied on the English doctrine of privity of contract. After all our Civil Code, which was based on the French Code Napoleon, contains various provisions concerning the relative effect of contracts, which is the Continental analogue to privity of contract. Surely it is to these provisions[47] and to the approach of the French courts that we must look for guidance in interpreting *Frendo v. Abela*? Unfortunately however, the French approach, while probably correct in terms of our Civil Code, does not offer any support for the position adopted by our Court of Appeal in this case. The French courts would not have prevented the plaintiff in *Frendo v. Abela* from taking action against the defendant Meli on the basis of the doctrine of relativity of contract. This is because, firstly, the plaintiff might not have been considered as a third party wholly extraneous to the contract between Cargo Handling Company and Meli. Secondly, even if he had been so considered, the French courts accept that that the principle of contractual relativity does not prevent a third party from suing a contracting party in tort for compensation of the damages caused to him as a result of the non-performance or misperformance of the contract by one of the parties to it.[48]

Both these points require elucidation. To take the second one first, it is clear that the French courts, unlike the English, never apply the principle of relativity of the contractual tie to preclude the plaintiff from exercising an action in tort against one of the parties to a contract to which he is not a party,[49] to obtain compensation for the damages caused to him by the failure of that party to perform her obligations under this contract. This is because they consider that the defendant's failure to perform her contractual duty may constitute a fault in regard to the (third party) plaintiff which is independent of her fault in failing to perform her contractual obligations towards the other contracting party. This principle of the independence of the two faults means that the French courts, again unlike the English ones,[50] will not consider a contractual exemption clause as preventing one party to a contract from exercising an action in tort against a third party to that contract, who has subcontracted to perform the duties of the other contracting party.[51] Consequently, had the French courts considered the plaintiff in *Frendo v. Abela* as a third party in relation to the subcontract between Meli and Cargo Handling company, then they would also have held that the principle of contractual relativity does not prevent him from suing Meli in tort.

It is, however, likely that the French courts would not have considered the plaintiff in this case as being really a third party in regard to the subcontract in question. This is because in French law, the particular successor (*ayant cause à titre particulier*), who has bought or otherwise acquired property under a contract is

> allowed to enforce rights which, while they have no 'real' character can be said to be accessory to the thing acquired.[52]

Thus, in cases where an object is sold to one person who resells it to another, who in turn resells it, the latest buyer is allowed to sue the original supplier or any subsequent seller for breach of the warranty of latent defects or that of peaceful possession. The same position, according to Caruana Galizia, obtains in Maltese law, being based on the principle that the rights transferred to one's successor in title over a thing include actions which one may exercise against third parties in regard to the thing transferred.[53] In various decisions, the French *Cour de Cassation* had extended the application of

47 That is sections 998-1001 of the Civil Code. The similarity between Maltese and French law is very close in this area. The key principle is expressed in French law by article 1165 of the Code Civile, which states

> *Les conventions n'ont d'effet qu'entre les parties contractante; elle ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121*. (Chabas, F., op. cit., p. 868).

In Maltese law, we have section 1001 of our Civil Code, which is almost a word for word translation.

> Contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

48 In various judgments, the *Cour de cassation* has observed that 'a failure to discharge a contractual obligation can constitute in relation to a third party a fault which entails liability, when this fault has an existence which is independent of the contract'. Quoted in Nicholas, B., op. cit., p. 171. He mentions a case in which the defendant had entered into a contract with the state to incarcerate German prisoners of war. His negligent performance of his contractual duties allowed some prisoners to escape and these stole three sheep belonging to plaintiff. The defendant was held liable to compensate plaintiff in tort for the loss he had suffered.

49 Unlike the case where both actions are available against the same person.

50 Compare the decision delivered in the Eurymedon case, *supra*.

51 See Nicholas, B., op. cit., pp. 171-72.

52 Ibid., pp. 172-73.

53 In his notes, Caruana Galizia points out that in cases of breach of the warranty of peaceful possession

> More advantageous is the direct action which doctrine more commonly attributes to the purchaser, by means of which he may turn against former sellers '*omisso medio*'... because the immediate author transfers to the person claiming under him, together with the

this principle to cases where subcontracts have been made, so that:

> The principle was stated to be that where a debtor (in the wide French sense of the term) has sub-contracted the performance of his obligation, the creditor's claim against this substitute debtor is necessarily in contract and is subject to the 'double limit' that it cannot exceed either the extent of the creditor's rights under his contract with the primary debtor or the extent of the substitute debtor's liability under his contract with the primary debtor...The principle thus stated is not confined to contracts resulting in a transfer of property, but is capable of applying to any contract in which the primary debtor sub-contracts the performance of his obligation or part of it.[54]

This principle was applied in a remarkable case in which the plaintiff had given some slides to a photographic studio for enlargement. This studio, in turn, subcontracted the work to the defendant, who lost the slides. Plaintiff was not allowed to sue the defendant in tort, as the court held that he could exercise a contractual action for damages directly against the subcontractor and the rule of *non cumul* forbids the exercise of the action for damages in tort when a contractual action is available against the same person.[55] One should, however, note that a recent decision of the *Cour de Cassation* has approached the issue differently; holding that the action of a house owner against the subcontractor of his building contractor for compensation of the damages caused to him by defects in the plumbing was based on tort and could not be deemed to be of a contractual nature.[56] While there thus exists a conflict in the French judgments, it is however certain that:

1. no French court is prepared to consider the principle of contractual relativity as an obstacle to the exercise of an action in tort by a plaintiff who is a third party to the subcontract against a party to the subcontract;
2. some decisions hold that in certain circumstances an action in contract may also be exercised by this third party plaintiff; and
3. the only application French courts make of the *non cumul* rule in these cases is to prohibit this third party plaintiff from exercising the action in tort against a party to the subcontract, where a contractual action was held to be available to him against this party.

These judgments thus confirm my earlier observation that the rule of *non cumul*, as applied in France, does not apply where the contractual and tortious actions are exercisable against different persons. They prove beyond any doubt that the decision in *Frendo v. Abela* does not conform to the French understanding of either the rule of *non cumul*, or the principle of relativity of contract. In fact, the judgment in this case held that neither an action in tort, nor one in contract was available to the plaintiff against the subcontractor Meli, thus contradicting all of the French judgments that have been cited.[57] At the same time, they confirm how difficult it is to decipher the reasoning of our Court of Appeal in this case. If neither the rule of *non cumul*, nor the principle of relativity of contract, in both its French and English manifestations, can explain this judgment, then which legal principles could it be founded on?

A closer parallel to the principle invoked by the court in both *Frendo v. Abela* and *Vella v. Jones*, may lie outside the law of tort altogether, in the rules governing the exercise of the quasi-contractual remedy of the *actio de in rem verso*. French, Italian and Maltese judgments constantly repeat that this *actio* is a subsidiary action, which may only be utilized if no action ex contractu is available to the plaintiff.[58] This principle of subsidiarity is similar to the rule of *non cumul*.

thing, all the actions which may belong to him against third parties with regard to the thing itself.

See Caruana Galizia, V., 'Sale', *Civil Law Notes*, University Press, Malta, p. 557. An analogous case is perhaps to be found in the interpretation our courts have given to section 1638 of the Civil Code. This concerns the liability of the contractor and the architect under a contract of works in cases where the building they have built is in danger of falling to ruin, or actually does fall to ruin, owing to a defect in the construction. Our courts have held that the right to sue the contractor and the architect in terms of this section does not only belong to the employer but is also transferred to each of his particular successors. See in this regard *Michelangelo Bond v. Carmelo Mangion et.* (LXXV. II. 385); but note that the principle in this case is justified not so much by referring to the theory of accessory rights as to considerations of public policy. In France the basis of this principle is sometimes traced to article 1122 of the Code Civile, which states, '*On est censé avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention*.' Chabas, F., op. cit., p. 870. The Maltese Civil Code also states, in section 998,

> Every person shall be deemed to have promised or stipulated for himself, for his heirs and for the persons claiming through or under him, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement.

54 Nicholas, B., op. cit., p. 174.

55 See the judgment of the Cassation of the 8th March 1988, cited in Nicholas, B., ibid.

56 The decision was given by the Cassation on the 12th July 1991. See Chabas, F., op. cit., pp. 882-83.

57 In *Frendo v. Abela*, the court mentioned that plaintiff seemed to be claiming contractual damages from the third party Meli as part of its argument for dismissing his action as legally unfounded!

58 For a learned and interesting discussion of the *actio de in rem verso* in comparative law, see Zwiegert, K. & Kotz, H. (1998), *An Introduction to Comparative Law*, University Press, Oxford, pp. 537-65. One should also note that our case decisions are divided as to whether the availability of an action in tort or quasi-tort would also prevent the making of the quasi-contractual action. In *Scicluna v. Watson*

In either case, the courts do not permit recourse to be had to the action for damages, whether in tort or in quasi-contract, if the plaintiff could previously have utilized a contractual action for damages, which he allowed to lapse through prescription. Like the rule of *non cumul*, the principle of subsidiarity is not meant to allow the plaintiff to circumvent the law of prescription. However the principle of subsidiarity, being based on equity, is less rigidly applied than the rule of *non cumul*. There exist, in fact, a series of cases in which both the French and the Maltese courts have permitted the plaintiff to exercise the *actio de in rem verso* despite the fact that he could have exercised a contractual action for damages against another party, if he proves to the court's satisfaction that the contractual action was bound to be unsuccessful in compensating him for the damages he sustained. The leading case in Malta is *Said v. Testaferrata Bonnici*, decided by the Civil Court on the 16th June 1936 (XXIX. II. 1105).[59] In this case, Said, the plaintiff, had supplied Pace with wood, beams and paint for improving a tenement he leased which belonged to Testaferrata Bonnici. These materials were utilized for this purpose. Subsequently Pace was declared insolvent and it became clear that although Said could exercise a contractual action against him for payment, this action could not result in his receiving adequate financial compensation. Consequently, the court permitted Said to exercise the *actio de in rem verso* against Testaferrata Bonnici to obtain compensation on the basis of unjustified enrichment.

It is worth pointing out that the factual situation in *Said v. Testaferrata Bonnici* was comparable to that of *Frendo v. Abela* since in both cases the plaintiff could initially have exercised a contractual action against one person and the point at issue was whether this precluded him from exercising another action (in tort or quasi-contract) against another person. The comparison becomes even closer when we consider certain French cases where the plaintiff was allowed to exercise the quasi-contractual action after he had unsuccessfully attempted to exercise his contractual action for damages. Thus, Mazeaud & Chabas[60] cite the case of a building contractor who was employed by the buyer of a house to carry out certain structural improvements to the property. Subsequently, the buyer having been declared insolvent, he did not pay either the price of the house he had bought to the seller nor the cost of the repairs he had commissioned to the contractor. The contractor initially sued the buyer of the house ex contractu for his fees. However, this action was not successful because the buyer was insolvent. Subsequently, the French court allowed the contractor to exercise the *actio de in rem verso* against the seller of the house, who had meanwhile successfully rescinded the contract of sale and recovered possession of the house together with the structural improvements.

At this point, the circle closes and it becomes clear why the court in *Frendo v. Abela* referred to the plaintiff's action in tort against the second defendant as one which he could only exercise after having first sued the first defendant for breach of contract. The principle being applied here appears to be the principle of subsidiarity and not the rule of *non cumul*, as this principle permits the plaintiff to institute the quasi-contractual action against a third party after he has initially and unsuccessfully, attempted to sue another person for breach of contract. By contrast the rule of *non cumul* would probably, as has been seen, not apply to this situation where the actions in contract and in tort are exercisable against different persons. Moreover, if it did apply, it would permanently prevent the plaintiff from making the action in tort against the third party, as this would be considered to be the logical effect of the mere existence of a contractual action, whether this action had been successfully exercised or not. This is not the stance adopted in *Frendo v. Abela*, where the judgment implied that the plaintiff might have been allowed to exercise the action *ex quasi delicto* against a third party (Meli) had he initially sued the first defendant (Abela *nomine*) for breach of contract and had this contractual action been unsuccessful due to a cause such as the insolvency of the defendant. Finally, the judgment qualified this statement by asserting that this action in tort could, however, never be availed of in a situation where the plaintiff had allowed the contractual action to become time-barred through the operation of prescription. This distinction, which centres on whether or not the contractual action was time-barred, makes sense in the context of the principle of subsidiarity. As has been seen, this principle allows the plaintiff to exercise the *actio de in rem verso* if she proves that her contractual action would have been unsuccessful but not if the reason why the contractual action cannot be successfully exercised is due to her inactivity, which allowed the contractual action to become time-barred through the operation of prescription. The distinction makes no sense in the light of the principle of *non cumul*, which applies regardless of whether the contractual action was time-barred or not.

(XVIII. I. 26) and *Mattocks v. McKeon* (LXXIII. IV. 1019) the courts took a more liberal view, while in *Buttigieg v. Bartolo* (XXVI-II. II. 355) and *Bugeja v. Micallef* (XXXIV. II. 784) they argued that the quasi-contractual action could not be made in these instances.

[59] Reference should also be made to *Tonna v. Cachia Zammit* (XXXV. I. 805), where a contractor of works who had been employed by one co-owner was granted the right to exercise the *actio de in rem verso* against the others, despite the fact that he possessed a contractual right of action only against his employer.

[60] See Chabas, F., op. cit., pp. 830-31.

The conclusion appears inescapable. The court in *Frendo v. Abela* applied the principle of subsidiarity, which plays a restricted role in regard to the quasi-contract of unjustified enrichment, as a general principle operative in the separate and unrelated domain of tort law. In so doing, it ignored the fact that this principle has no basis in our law of tort and that a different principle, that of *non cumul*, already governs this field in French law. The judgment in *Vella v. Jones* can also be construed along the same lines.[61] This application of the principle of subsidiarity to situations of concurrent liability between contract and tort appears to be incorrect, because this principle is founded on a different basis from the rule of *non cumul*. While the rule of *non cumul* is rooted in the respect shown by French law to the autonomous will of the contracting parties, the principle of subsidiarity is based on the idea that the *actio de in rem verso*, being an equitable remedy, should only be allowed as a last resort. Moreover, the legal effects of subsidiarity are different from those of *non cumul*. In *Frendo v. Abela*, the rule of *non cumul* would still have allowed the plaintiff to recover the damages he sustained from the person who was effectively responsible for causing them. This seems a more just and logical outcome than effectively refusing compensation on the strength of a misplaced reliance on the principle of subsidiarity.

Adopting the Italian Approach?

If the judgments previously considered seem to apply the *non cumul* rule, albeit for the wrong reasons (*Vassallo v. Mizzi*), or in the wrong way (*Frendo v. Abela*), the final judgment to be reviewed is one which seems to have gone in the opposite direction. This was given in *Saviour Farrugia nomine v. Emanuel Zahra, Tarcisio Galea and Anthony Montebello*, decided by the Civil Court on the 31st October 1996 (LXXX. III. 1321). In this case plaintiff, Telemalta Corporation, had entered into a contract with defendants Emanuel Zahra and Tarcisio Galea, in terms of which they had to carry our certain excavation work, involving the digging of certain trenches. According to the contract, defendants were allowed to subcontract this work to third parties. Subsequently defendants subcontracted with A. Montebello Ltd., which agreed to perform the work. In the course of the excavations, a cable belonging to Telemalta Corporation itself was exposed and damaged, costing the Corporation LM485.00 to repair. After it paid the defendants Zahra and Galea for the work they had carried out, the Corporation proceeded to sue them, together with Montebello to recover the damages it had suffered. In their defence, Zahra and Galea pleaded that they were not responsible for the damage caused, since they had subcontracted the work and were not even aware of the damage. Defendant Anthony Montebello pleaded that the damage was not imputable to him, since he had no legal relationship with the plaintiff, for whom he had not carried out any work on a personal basis.[62]

In its judgment, the court considered whether the payment plaintiff made to the defendants Zahra and Galea constituted an obstacle to his claim. It held that it did not, since

> *il-fatt li l-atturi ħallsu lil Tarcisio Constructions Limited mingħajr ma naqqsulhom xejn, bl-ebda mod ma jissinifika li huma ma kellhomx dritt li jipproċedu kontra l-konvenuti ex delicto għal xi ħsara li dawn kienu għamlu. Infatti... dan kien il-mod korrett kif kellhom jimxu l-atturi fis-sens illi kellhom iħallsu lil dak li kien imqabbad bit-tender għall-prezz ta' xogħlu, imbagħad imexxu ġudizzjarjament biex jitħallsu tad-danni li kienu ġew lilhom ikkaġunati.*[63]

Since it had classified plaintiff's action as based on tort, the court proceeded to examine whether this action could succeed against any of the defendants. As regards the defendant Montebello, the court observed that it was the company A. Montebello Ltd. and not the defendant personally which had subcontracted to carry out the work. Apparently implying that it was possible for a legal person, such as a company, to be held responsible for committing a tort, the court held that even if this possibility did not exist and plaintiff had therefore correctly sued Montebello personally,[64] plaintiff nevertheless had

61 Depending on how one interprets the court's statement in that case that an action for pre-contractual damages could not be made once the plaintiff had not utilized the contractual action which was available to him. If one reads this statement to mean that pre-contractual liability is based on tort and that the plaintiff could only have sued in tort had he first, unsuccessfully, tried to exercise the contractual action, then the court's position in *Vella v. Jones* is identical to that adopted in *Frendo v. Abela*. However, if one reads this statement to mean that pre-contractual liability is based on quasi-contract, then the judgment is a straightforward and correct application of the principle of subsidiarity.

62 He also pleaded that since the Magistrate's court had held that his actions did not constitute a criminal contravention, he could not be found liable to pay civil damages. However, the Civil court rejected this argument, since the civil and criminal actions are independent of one another.

63 *Farrugia nomine v. Zahra et*, op. cit., p. 1324.

64 That this was the correct approach is suggested by the case of *Anthony Bugeja v. Carmelo Agius et* (LXXV. II. 418). In that case, the Court of Appeal held that while no moral person can commit a tort, all the physical persons who participate, via acts of commission or omission, in torts or quasi-torts are liable in damages. The plaintiff in this case was therefore allowed to personally sue every member of the governing committee of a band club for compensation of the damages caused to him by an explosion resulting from an illegal activity that took place in the club premises.

to prove that Montebello was personally responsible for causing the damage complained of, in line with the general principles of tort law. As this proof had not been made, defendant Montebello could not be held liable in tort. As regards defendants Zahra and Galea, the court made reference to the principles of indirect responsibility in tort so as to establish whether they could be held liable for having subcontracted with Montebello Ltd. In terms of section 1037 of the Civil Code, to succeed in his suit the plaintiff had to prove that these defendants had employed a person 'who is incompetent, or whom he has not reasonable grounds to consider competent.'[65] As the plaintiff had not proved either of these criteria of incompetence, the court also refused his claim for damages against defendants Zahra and Galea.

The decision in *Farrugia v. Zahra* contrasts with that given in *Frendo v. Abela* and with various French judgments. In *Frendo v. Abela*, the court had not allowed one contracting party to sue the subcontractor of the other contracting party in tort. This was permitted in this case. In *Frendo v. Abela*, the court had held that the only action available to the plaintiff was a contractual action against the other contracting party. In this case the court allowed the plaintiff to sue the other contracting party in tort. While the French judgments previously discussed had held that the plaintiff had a contractual action for damages directly against the subcontractor, the court in this case held that the plaintiff could only sue the subcontractor in tort.

This judgment could be interpreted as a clear statement that the *non cumul* rule does not apply in Maltese law. After all, the judge classified the plaintiff's action as tortious without considering that he might have been trying to sue defendants Zahra and Galea for breach of contract. Indeed, plaintiff might not have suffered damage had these defendants chosen a different method to give effect to their contractual obligations towards him. On the other hand, one might argue that the contractual responsibility of the defendants did not arise in this case and there was therefore no overlap between their liability in tort and in contract. If there were no concurrent responsibility, this judgment could have no relevance to the issue under discussion. To settle this question, it is necessary to determine whether the plaintiff could have sued any of the defendants for breach of contract or whether there were any special factors that excluded their contractual responsibility.

The first point to be considered is whether the act or omission that caused the damage to plaintiff's property constituted a breach of any of the defendants' contractual obligations. This is by no means clear in this case, as defendants Zahra and Galea could object that they had carried out the excavation work that they had contracted with Telemalta Corporation to do, as proved by the fact that this Corporation had paid them for it. The fact that in the course of the work a cable belonging to Telemalta itself was exposed and damaged did not mean that they had not diligently performed their duties under the contract, since this contract had not expressly imposed on them a duty to protect the plaintiff's property while carrying out the excavation work. While this argument may appear to be sound, it is important to note that it does not conform to the approach adopted by French and Italian courts to this issue and that their approach has strong persuasive authority, since it is based on legal provisions that also exist in our Civil Code. In fact French courts have held that the obligations arising under a contract are not limited to those explicitly agreed upon between the parties, but also include implied accessory duties, since contracts in French law also have effect in regard to: '*toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation*'.[66] The French courts have therefore accepted that in various cases duties of protection, which they term '*obligations de sécurité*', may oblige one party to a contract to protect the person or the property of other contracting parties. They have thus held that a building contractor who performs construction works is bound by a duty of protection not to cause any damage to the property that belongs to his client.[67] This principle would appear to apply to *Farrugia v. Zahra*, as this case also dealt with a contract of works (*locatio operas*) and as our Civil Code, in section 993, also provides that contracts are binding; 'not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom or law, is incidental to the obligation, according to its nature'. Consequently there would appear to have been nothing to prevent the court from following the lead of the French judgments and concluding that defendants Zahra and Galea were in breach of their implied contractual duty to protect the property of the plaintiff, Telemalta Corporation and that plaintiff could therefore exercise a contractual action for damages against them.

The argument that a concurrent contractual liability existed in *Farrugia v. Zahra* gains added reinforcement from the

[65] This section was interpreted by the Court of Appeal in *Dr Joseph R. Grech v. Commissioner of Police* (LXXII. II. 199) In that case the court held that this section presents two alternative tests of incompetence: purely objective incompetence at the moment when the person is employed and a more subjective test, which requires that the specific employer in question did not have reasonable grounds to consider the particular employee involved as incompetent.

[66] According to article 1135 of the Code Civil. See Chabas, F., op. cit., pp. 396-401.

[67] Ibid, p. 400.

views of Italian scholars like Di Majo or Massimo Bianca. Both authors note that the existence of these ancillary contractual '*obligations de sécurité*', which they term '*obblighi di protezione*', has also been accepted in Italy. Di Majo argues that the recognition of this category of obligations reflects the fluidity of the boundary between contractual and extra-contractual responsibility, since these obligations impose duties to protect the person or the property of the contracting parties that are not expressly mentioned in the contract.[68] Massimo Bianca provides an alternative juridical basis for these obligations, arguing that these '*obblighi di protezione*' do not constitute a separate category of obligations, but should rather be seen as emerging from the general rule that all obligations must be performed with the diligence of a *bonus paterfamilias*.[69] Thus, my duty to take care of the property of my creditor would emerge from my legally defined duty to diligently perform my contractual obligations.[70] This approach could also conceivably have been adopted by our Civil Court in *Farrugia v. Zahra*, since the Maltese Civil Code also contains the general rule requiring the diligence of a *bonus paterfamilias* in the performance of a contractual obligation.[71]

This review of French and Italian law suggests that *Farrugia v. Zahra* might well have been classified as a case of breach of contract, had the court been so inclined. However there are various other objections to this thesis. One of these stems from the fact that defendants Zahra and Galea had subcontracted the performance of their contractual obligation to A. Montebello Ltd. Since they were allowed to subcontract in terms of the original contract and since it was the subcontractor who actually caused the damage, it might be thought that these defendants could not be found liable for breaching their contract with the plaintiff. This argument, while tempting, would be wrong. Our courts have on various occasions held that the fact that the contractor in a contract of works has subcontracted the performance of his obligation to a third party does not exempt him from his responsibility towards his employer for the diligent performance of his contractual obligations.[72] This is also the opinion of Caruana Galizia, who argues that where the contractor has subcontracted the execution of the work, 'the contractor, evidently, does not thereby deprive himself of the quality of a contractor and is not discharged from his obligations, unless the employer acknowledges the sub-contractor'.[73] It seems that the acknowledgement to which Caruana Galizia is referring is an express acknowledgement of a specific subcontractor, which cannot be inferred from the fact that the contract of works in this case allowed the contractor to subcontract the performance of his contractual obligations. This continuing contractual responsibility of the contractor for the fault of his subcontractor is in line with the judgment in *Frendo v. Abela*. It conforms to various other cases in which our courts have held that a party who assumes a contractual obligation knowing that its performance depends on a third party will remain responsible for the performance of this obligation.[74]

Other critics would accept that the facts in *Farrugia vs Zahra* constituted a breach of contract and that defendants Zahra and Galea were not exempted from their contractual responsibility to protect Telemalta Corporation's property simply because they had subcontracted the performance of their duties to a third party. However they would object that since plaintiff had paid these defendants for their work, this prevented him from suing them for breach of contract. Alternatively, they might claim that in this case the rules for compensation of contractual damages did not permit the plaintiff

68 Di Majo, A., (1997), *La Responsabilità Contrattuale*, G. Giappichelli Editore, Torino, pp. 91-92.

69 Bianca, M., (1994), *Diritto Civile Vol. IV*, Dott. A. Giuffrè Editore, Milano, pp. 93-95.

70 The Italian courts have even accepted that my contractual duty to protect the person or property of my creditor also entitles third parties to the contract to exercise a contractual right of action for compensation against me. In this way these third parties may obtain compensation for any damage to their person which results from my non-compliance with these obligations of protection. Cf. Di Majo, op. cit., pp. 184-190.

71 See sections 1032 and 1132 of our Civil Code.

72 See, for instance, *Joseph Zarb v. Carmelo Agius* (XLI. II. 892), where the principle was stated to be

Jekk l-opra, li kienet oġġett ta' l-appalt, ġiet eżegwita minn persuna oħra bħala subappaltatur, l-appaltatur jibqa' responsabbli lejn l-appaltant għall-eżekuzzjoni ta' l-appalt, anki apparti mill-fatt li l-materjal ħażin ikun fornieh hu.

This principle was quoted approvingly and applied in *Emanuel Abela v. Perit Arkitett Fred Valentino et.* (LXXXII. II. 1202).

73 See Caruana Galizia, V., rev. Ganado, Prof. J. M., (1987), 'The Contract of Letting and Hiring', *Notes on Civil Law Vol. III*, University Press, Malta, p. 765. This is a different case from that mentioned in fn. 53 of this paper.

74 This principle was stated in these terms in *John Falzon v. Silvio Mifsud* (XLIV. I. 329)

jekk l-obligat jassumi l-obligazzjoni meta kien jaf li l-eżekuzzjoni tagħha kienet tiddependi mill-fatt tat-terz, mingħajr ma jistipula ebda klawsola ta' eżoneru, fil-fatt hu jkun qiegħed iwiegħed il-fatt tiegħu, u mhux il-fatt tat-terz; għax assuma obligazzjoni li tabilfors kienet tikkomprendi l-fatt tat-terz.

It was cited in *Albert Farrugia v. Michael Attard pro et noe* (LXXXII. II. 52), where the court held that a contractual obligation to repair a car includes an obligation to compensate for the damages caused by the delay in repairing the car, even if this was due to the delay of the third party who supplied the parts.

to recover the damages he suffered from the defendant.[75] However, as discussed earlier in this paper,[76] each of these objections is beside the point. If the court had applied the *non cumul* rule and if the act of the defendants constituted a breach of contract, then the plaintiff could not have been permitted to sue them in tort even though he could not obtain compensation by exercising the contractual action. This occurred in the other Maltese cases reviewed in this paper, where although plaintiff could not exercise the contractual action, the court nevertheless held that the fact that this action had been available to him at some point prevented him from exercising the action in tort.

Thus it seems clear that if one accepts that defendants Zahra and Galea were in prima facie breach of their contractual obligations, then the court's decision to allow the plaintiff to sue them in tort implies that the rule of *non cumul* is not followed in Maltese law. At this stage, however, two clarifications must be made to my argument. Firstly it might be thought that the argument is rather weak, since it hinges on the possibility that the court in this case might have found that a contractual action for breach of defendants' duties of protection existed under Maltese law. If this possibility did not really exist, then there would have been no overlap between defendants' contractual and tortious responsibilities and the court's decision could have no relevance to the issue of *non cumul*. However this objection misses the point. It is not the court's decision that a contractual action was not available which is being attacked, but rather the fact that the court did not even consider whether or not a contractual action was available to the plaintiff, in addition to his action in tort. It is submitted that the court would have been compelled to consider and pronounce itself on this issue if the rule of *non cumul* had existed in our system. How else could the court decide whether to allow the action in tort, if not by first ascertaining whether there was a concurrent contractual responsibility?[77] Secondly, doubts may arise concerning the practical relevance of this discussion. These will be silenced if one considers that in this case the court's decision, had it applied the rule of *non cumul*, could easily have been the opposite of what it was. It will be recalled that the primary reason why the court refused the plaintiff's action in *Farrugia v. Zahra* was that he had failed to prove the fault of the defendants according to the rules of tort. However, if the court had concluded that the defendants were in breach of their contractual obligations, then the onus of proof would have shifted to them and it is the defendants who would have had to show why they were not at fault for the breach. Had they failed to exculpate themselves by providing additional proof, they would have been held responsible to compensate plaintiff for the damage caused to his cable. The practical point of this debate is clear.

The conclusion is that the Civil Court in this case adopted an approach which contrasts dramatically with the other judgments which have been reviewed. This approach appears to be similar to that adopted by the Italian courts, since it makes no reference to the rule of *non cumul* and seems to accept that in cases of concurrent responsibility the court may freely decide whether to classify the action as contractual or tortious.

Conclusion

This review of Maltese judgments has revealed three different approaches to the rule of *non cumul*. These can be summarized as

a. a 'consequentialist' interpretation of the rule that uses the criteria governing the payment of contractual damages to determine when plaintiff's action is contractual;
b. an alternative interpretation that construes the rule in terms of the principle of subsidiarity of the *actio de in rem verso*; and
c. a rejection of the rule which reflects the Italian approach.

In response to the question that inspired this paper, one can therefore say that while the Maltese courts do not expressly refer to the rule of *non cumul*, they have sometimes stated similar principles to deal with situations of concurrent liability. Yet although these principles may have similar effects, they are couched in a different form than the *non cumul* rule and may also have very different effects. Overall the Maltese position is characterized by the uncertainty resulting from the courts' reliance on shifting and occasionally contradictory principles. This is clearly an unsatisfactory situation and it would appear preferable if our courts were to articulate and consistently adhere to a clear position by either adopting the rule in full or rejecting it. If the Maltese courts were to consistently reject the rule, then this would clearly benefit the plaintiff, allowing him/her the choice whether to act in tort or in contract depending on which type of action appears most favourable. This would appear to be equitable, although it might be difficult to reconcile this position with a strict interpretation of the theory of the autonomy of the will of the

[75] It might perhaps be argued that these rules do not cover a situation where the plaintiff, who accepts to pay the defendant in full for the adequate performance of his contractual duties also wishes to bring an action for damages against this defendant.

[76] Refer to the discussion of the judgments given in *Vassallo v. Mizzi* and *Fenech v. Baldacchino*, in section headed 'The "Consequentialist" Approach of *Vassallo v. Mizzi*', of this paper.

[77] Indeed, if there had been no concurrent contractual responsibility, the court would have been obliged to ascertain the reasons for this. If the parties had specifically excluded their contractual responsibility, then this might also affect their responsibility in tort. On this see Mazeaud, op. cit. in section headed '*'Non cumul'* in Comparative Law of Tort' of this paper.

contracting parties. If on the other hand our courts were to accept this rule *in toto*, then this would also benefit the plaintiff, while ensuring that the criteria followed by our courts are logical and knowable in advance.

The practical effects of either of these approaches may also be gauged from the impact each would have had on the cases reviewed in this paper. Rejecting the *non cumul* rule, while consistent with the court's approach in *Farrugia v. Zahra*, would probably also have left the outcome unaffected in *Vassallo v. Mizzi* and *Fenech v. Baldacchino*. In each of these cases the plaintiff failed to provide adequate proof of his claim and the need to prove the case would still have existed if his claim had been classified as tortious. The decision in *Frendo v. Abela*, which was criticized as unduly restrictive, is the only decision which would have been overturned had our courts adopted the Italian approach and rejected the rule in question. Again, accepting the rule would have left the decisions in *Vassallo v. Mizzi* and *Fenech v. Baldacchino* unaffected, while it would probably have overturned the decisions in *Frendo v. Abela* and *Farrugia v. Zahra*, which were both criticized in this paper.

Leaving the *non cumul* rule in a state of suspended animation may produce other, more insidious, effects. As *Farrugia v. Zahra* shows, leaving the classification of an action to the arbitrary discretion of the court may encourage the court to classify the action as one of tort in a case which might otherwise have been categorized as a breach of contract. This reduces the court's motivation to develop our law of contract, by exploring whether implicit contractual duties of protection can exist in our civil law. Our law of tort may also be suffering from the effect of the misleading principle developed in *Vassallo v. Mizzi*, which classifies an action as contractual if its facts satisfy the legal criteria for compensation of contractual damages. This influenced the court in *Fenech v. Baldacchino* to go a step further and import the distinction between fraudulent and negligent breach of contract in order to classify the action as contractual or tortious. In that case the court went so far as to imply that a fraudulent breach of contract is a kind of tort! This clearly distorts the relationship between contract and tort.

In this light, it is interesting to consider the recent decision by the Court of Appeal in the case of *Victor Shaw et noe v. John Aquilina noe*, delivered on the 27th March 1996 (LXXX. II. 623). In this case, the first court seems to have implicitly referred to the rules regulating the payment of contractual damages in order to interpret the rules regulating the payment of damages in tort, despite the significant differences that exist between these two sets of rules. Since 1962, in fact, Maltese tort legislation has made no distinction between the negligent and intentional causing of damage, insofar as the liability of the offender to compensate the victim both for *damnum emergens* and for *lucrum cessans* is concerned.[78] By contrast, as has already been observed,[79] the rules regulating the payment of contractual damages distinguish between fraudulent (or intentional) and negligent breach of contract and it is only in the former case that they permit unrestricted compensation of all the damages directly caused by the breach. In *Shaw v. Aquilina*, the first court held that in the case of a quasi-tort consisting of the negligent omission of due maintenance of electrical equipment, the damages payable to the victim could only be 'restricted real damages', excluding *lucrum cessans*. In a statement that was quoted approvingly by the Court of Appeal,[80] the first court justified this stance by pointing out, *inter alia*, that in this case defendant had not committed the damage intentionally. While various explanations can be given for the court's approach,[81] they are not mutually exclusive and it does not seem too far-fetched to argue that the court was also (unduly) influenced by the rules governing the payment of contractual damages. After all there appears to be little basis in our present law of tort for the a priori exclusion of compensation for damages consisting in *lucrum cessans* whenever the offender has acted negligently. This interpretation of the rules of

78 On this see Caruana Galizia, (1978), op. cit., p. 316A.

79 See note number 18 in this paper.

80 But one should note that the judgment ofthe Court of Appeal was confined to the assessment of damages, as plaintiff did not appeal from that part of the first court's judgment that established defendant's responsibility in quasi-tort.

81 The first court's approach can also be explained by noting that it based its decision on the fact that the defendant was liable for committing a quasi-tort on section 1031 of our Civil Code. This section, unlike section 1033, does not expressly mention that the act or omission constituting the tort or quasi-tort must be in breach of a legally imposed duty. Section 1031 states that the offender will only be liable for 'the damage' which he causes, unlike section 1033, which states that he will be liable for 'any damage'. Thus, section 1031 seems to offer a lower level of compensation to the victim than section 1033. Alternatively, one can explain the court's approach as based on obsolete legal principles. This explanation is suggested by the date of the case decision cited in the judgment, which stated that the damages that can be compensated where damage is negligently caused are limited to the *damnum emergens*. The case was *Luigi Gusman v. Dr Paolo Boffa*, decided by the Civil Court on the 27th February 1935 (XXIX. II. 368). In 1935, Maltese statutes specifically excluded the possibility of compensation of *lucrum cessans* in cases where damage is negligently caused. However, they were amended in 1938 to allow compensation of *lucrum cessans* in these cases too, up to a limit of £1,200. In 1962, even this limit was removed. On this see Cini, J. A., (1997) 'Traditional and New Approaches to the Problem of the Assessment of Damages in Fatal and Personal Injury Claims', LL D dissertation, (unpublished).

tortious liability becomes more comprehensible if it is seen as yet another import from the law of contract, following in the trail of *Fenech v. Baldacchino*.

Finally it should be observed that the bad effects of the present lack of clarity concerning *non cumul* go beyond a lack of legal certainty, possible denials of justice and the distorted development of both our tort and our contract law. This situation is constantly creating difficulties for practising lawyers who have to draft writs or other written pleadings. To fully understand these difficulties, it is important to note one critical characteristic of our court judgments which operates whenever there is a case of concurrent liability and it is unclear whether the claim should best be treated under tort or contract. In these cases, the judgment almost invariably describes the decision to classify the action under one category or the other as a search for and discovery of the real intentions of the plaintiff, who is treated as the only authority able to classify his action. This means, firstly, that in a case where plaintiff has specifically requested damages for tort or for breach of contract, the court usually feels bound by this request and does not consider itself free to re-classify the case in the way that is most favourable to his claim. Given the prevailing uncertainty as to whether we follow the rule of *non cumul* and how we are to interpret this rule, it is obvious that difficulties will arise whenever there is any hint of a possible situation of concurrent liability. In this situation, filing an action asking specifically for compensation based on tort can expose a client to the risk of having his claim refused on the grounds that he should have sued for breach of contract, at least 'initially'.[82] Clearly the same situation can happen in reverse, when a client sues specifically on the basis of breach of contract, only to be told that his action might have succeeded had he sued for damages in tort.

The client may prefer to hedge his bets by requesting damages on both tortious and contractual grounds, perhaps by making one claim subsidiary to the other. However, the rule of *non cumul* would prevent him from making such claims and he may also encounter another obstacle, which is that the courts do not always admit that situations of concurrent liability have arisen. The claim in tort may be viewed as legally incompatible with the claim in contract, requiring that two separate actions be filed. In this context, it is not surprising that most clients prefer not to commit themselves and simply make a claim for damages, without further specifying the legal basis of their claim. This might seem to be the best solution, because it leaves the final decision as to the legal classification of the claim in the hands of the judge, who will presumably exercise his discretion in a way that is favourable to the plaintiff. However, the judge may still conceive of his role as being that of discerning the plaintiff's (unstated) intentions to ascertain the legal basis of his claim and not that of exercising his personal discretion in the interests of the plaintiff. In that event, it is possible that the judge will classify the action in a manner prejudicial to plaintiff's claim.[83] Here too, therefore the situation would be vastly improved if we had a definitive pronouncement clearly establishing whether or not we possess the rule of *non cumul* in our civil law.

The conclusion can be stated succinctly. The lack of clear guidelines to handle situations of concurrent liability is producing various harmful effects on both our substantive and procedural law. It is helping to create situations in which citizens are denied access to justice. We need to reform our system, if necessary by *ad hoc* legislation, to ensure that these situations do not continue to multiply.

[82] As in *Frendo v. Abela*, op. cit.

[83] On this point, Bianca, M., (op. cit., p. 555) observes

Se l'attore chiede il risarcimento del danno sofferto adducendo entrambi i fatti e senza offrire elementi per l'ulteriore specificazione della domanda, il giudice determina a sua scelta il tipo dell'azione esercitata... Il potere di scelta del giudice deve tuttavia ammettersi anche se implica una decisione riservata all'autonomia della parte.