THE IMPLICATIONS OF *ALEXANDER CARUANA ET VS DANIEL BONNICI* ON THE AWARDING OF DAMAGES ACCORDING TO ARTICLE 1045 OF THE CIVIL CODE (CHAPTER 16 OF THE LAWS OF MALTA)

Chloe Gambin

ABSTRACT

In a civil action in tort, the damages that an injured individual may claim are primarily dictated by the application of article 1045 of the Maltese Civil Code. This article caters for the provision of actual calculable expenses suffered, as well as loss of future earnings, both as a result of the harm caused to the victim. Throughout the years, the courts of Malta have consistently interpreted this article in a rather limited manner – focusing on the estimation of the loss of earnings of the direct victim of the accident. In the case of *Alexander Caruana et vs Daniel Bonnici*, the court departed from the status quo by calculating the loss of future earnings of the victim's mother. The conclusion arrived at by the court seems fair, though the line of reasoning is open to debate and its consequences far reaching.

KEYWORDS: TORT - DAMAGES - DAMNUM EMERGENS - LUCRUM CESSANS

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1. **Introduction**

Under the Maltese Civil Code,[532] one is liable for any damage caused through his own fault – through lack of attention, diligence and prudence of a bonus pater familias.[533] The damages that may be claimed from such acts are awarded primarily on the basis of article 1045 of Cap 16, and which consist:

> [I]n the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.[534]

In a manner similar to the Common law system, [535] the Maltese courts have classified the above into two broad heads of terms: 'damnum emergens' and 'lucrum cessans'. Calculating the former is relatively simpler than the latter as when calculating 'damnum emergens' the actual and existing losses that the victim would have incurred would be included in the final sum which is to be awarded. With regards to 'lucrum cessans', courts have had a different and inconsistent approach to its calculation. The absence of restrictive regulations on the matter gives the courts a large amount of discretion in deciding how to calculate 'loss of future earnings' that the victim would have suffered. The general principle that the courts try to follow is that of *restitutio in integrum* in fact reference is made to the following statement in which the courts re-iterate this principle: 'il-liġi ġustament trid li l-persuna danneġġjata, tiġi riżarċita; ċioè titpoġġa f'sitwazzjoni mhix agħar, kwantu għal-"lucrum cessans" u "damnum

[532] Hereinafter Ch 16

[533] See articles 1031 and 1032, Ch 16.

[534] Article 1045(1), Ch 16.

[535] See: Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein, *Compensation for Personal Injury in English, German and Italian Law* (Cambridge University Press 2005) 116.

emergens" milli kienet qabel l-infortunju'.[536] This principle is reflected in the formula devised in the 1967 decision of *Butler v Heard*[537] which continues to be referred to by the Maltese courts to date. It has become custom for courts to establish an average yearly income for the injured party, multiply this figure by the number of estimated working years that the victim would have worked should he have been in a position to continue working (the 'multiplier'), and subsequently multiply this figure by the percentage disability suffered by the victim which disability would have been calculated by a medical expert appointed by the courts and/or ex parte medical experts. The court will then often allow for a 'lump sum payment' deduction and the final result would represent the amount of 'lucrum cessans' awarded to the victim.

The court generally only takes into consideration the loss of future earnings of the direct victim – he who has suffered a degree of permanent disability due to the unjust act. Nonetheless, in *Alexander Caruana et v Daniel Bonnici*,[538] the court awarded damages in the form of lucrum cessans to the victim as well as to the victim's mother in her own name. It was argued that Mrs. Caruana was compelled to stay home to care for her son after the accident and was thus deprived of future income. Although the conclusion of the court seems fair, whether the means were within the strict reading of the law per se is debatable, and its consequences may be far reaching.

2. **Facts of the case**

In August 1998, Alan Caruana was injured in a motor bike accident whilst riding pillion behind Daniel Bonnici. Alan's parents subsequently instituted a civil claim for damages against Mr. Bonnici, both in their son's name and in their own names. They requested the court to declare the defendant solely liable for the accident, to liquidate the amount of damages suffered by them and to order the defendant to pay such damages. In reply to their demands, the defendant pleaded that he was not responsible for the accident which accident occurred through Alan's negligence; and furthermore, he had no obligation, 'legali jew fattwali', towards Alan's mother.

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[536] *Dr. Louis Cassar Pullicino nomine v Angelo Xuereb noe. et* [2009] Court of Appeal (Civil, Superior) 1264/1991/2 para 53.

[537] *Michael Butler v Peter Christopher Heard* [1967] Court of Appeal (Civil, Superior) vol 51B (1967) part 1 sec 1 488.

[538] *Alexander u Ruth konjugi Caruana u Ruth Caruana bħala prokuratrici ta' Alan Caruana u b'nota tat-28 ta' April, 2009 Alan Caruana assuma l-atti f'ismu v Daniel Bonnici* [2011] Civil Court (First Hall) 253/2000/1.

In 2009,[539] the First Court tackled the issue of liability. It resulted that Alan had no recollection of the incident and thus the court was entirely dependent upon the statements given by the driver (defendant) and on circumstantial evidence. The court noted that the defendant gave contradictory evidence – first declaring that he lost control of the motor bike and skidded whilst trying to manoeuvre away from a car that was heading towards them. This version subsequently changed to the defendant stating that Alan was not sitting correctly behind him and constantly ignored his warnings which caused them to lose balance and fall.[540] Noteworthy is the court's reaction when faced with such opposing statements: 'Il-qorti għalhekk hija tal-fehma illi ma tistax toqgħod wisq fuq ix-xiehda tal-konvenut, u jkollha tmur fuq ix-xiehda oġġettiva taċ-ċirkostanzi.'[541] It thus took into consideration the visible, lengthy skid marks on the road surface; the distance of the motor bike from the point of injury; and the physical state and reliability of the motor bike – concluding that the defendant had to be driving much faster than the alleged 40-45 kilometres per hour. The court held that this excessive speed was the cause of the accident and on this basis found defendant solely liable.

The judgement raises an interesting discussion with regards to the law of procedure. It is an established principle that onus (burden) of proof lies with he who alleges that a wrong has been done to him, and thus in this case the plaintiffs had to prove, on a balance of probabilities, that the defendant was responsible for the accident. In absence of this proof, the court is obliged to deny plaintiffs' claims on the basis of *in dubio pro reo*[542] or *actore non probante reus absolvitur*[543] Nonetheless, when faced with contradictory evidence the court strives to search for 'elementi ta' prova indipendenti jew materjalment oġġettivi'.[544] Indeed in the case under discussion, the court did not simply declare that there was insufficient evidence brought by the plaintiffs to support their claim, yet passed on to scrutinising the objective evidence found at the scene. It is even arguable that the court may have been influenced by the glaring

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[539] *Alexander u Ruth konjugi Caruana u Ruth Caruana bħala prokuratrici ta' Alan Caruana u b'nota tat-28 ta' April, 2009 Alan Caruana assuma l-atti f'ismu v Daniel Bonnici* [2009] First Hall Civil Court 253/2000/1.

[540] *Caruana et v Bonnici* [2009] (n 8) 2-3.

[541] ibid.

[542] See: *Dietmar Mansfeld et v Ganymede Limited et* [2014] Civil Court (First Hall) 270/2008 35.

[543] See: *Hans Jochim Link et v Raymond Mercieca* [2001] Court of Appeal (Civil, Inferior) 2101/1998/1 6.

[544] ibid p 5; See also: *John Spiteri v Raymond Spiteri* [2004] Court of Appeal (Civil, Inferior) 82/2003/1: after a collision in Gozo plaintiff claimed damages from defendant. The court found for plaintiff for his version of events (in light of the finding of the debris, the positioning of the cars and lack of brake marks on the floor) seemed more credible than defendant's.

inconsistencies in defendant's statements and was thus less inclined to give him the benefit of the doubt.[545]

The issue as to the liquidation of damages was decided in a subsequent sitting in 2011[546] by the same judge, Hon. Giannino Caruana Demajo.

3. **The Awarding of Damages**

With regards to damnum emergens, the law speaks only of '*actual* loss which the act shall have *directly* caused to the injured party' and of the expenses which he 'may have been compelled to incur'[547] – thus implying that it solely refers to direct expenses already incurred before the court case would have been instituted. However, noting that Alan will need assistance for the rest of his life, the court recognised 'illi element soġġettiv fil-likwidazzjoni huwa, fiċ-ċirkostanzi, inevitabbli'.[548] Referring to a report drawn up by the plaintiffs, the court considered past as well as future expenses. It wisely held that 'ċerti spejjeż, bħal ma huma ikel u sigarretti, ma għandhomx jitqiesu għax huma spejjeż li kienu jsiru f'kull każ'.[549] Indeed, the court must only take into account those expenses which the victim would not have incurred if the accident had not taken place, such as those relating to structural alterations to the house, therapy and nursing. The court arrived to a final sum of 250,000 Euro.

The issue of lucrum cessans, although decided in seven short paragraphs,[550] is subject to more detailed discussion. The plaintiffs argued that before the accident, Alan, his brother Keith and his mother Ruth, had planned to start up a company with the aim of running their father/husband's business (a restaurant in Bugibba) as the latter was forced into an early retirement due to health reasons. After the motorbike accident, Alan was incapable of caring for himself and thus Ruth chose to stay home to look after his needs. Consequently, the court held that '[l]-inċident laqat mhux biss is-sehem ta' Alan f'dan il-proġett iżda wkoll dak ta' Ruth, ommu',[551] and on this basis defendant's plea denying any legal obligations towards Ruth was rejected. The court then passed on to calculating the loss of future earnings of both Ruth and Alan.

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[545] See also: *Vastek International Limited v Engineering and Technology Limited* [2003] Civil Court (First Hall) 1003/2000/1: the court appeared to doubt the veracity of the defendant's allegations when the latter proved to be very inconsistent in his indications of the amount due.

[546] *Caruana et v Bonnici* [2011] (n 7).

[547] Article 1045, Ch 16 (emphasis added).

[548] *Caruana et v Bonnici* [2011] (n 7) para 13.

[549] ibid.

[550] ibid para 4-10.

[551] ibid para 5.

The plaintiffs suggested an average yearly income of Euro 14,000 which was accepted by the court, despite lack of proof as to how they arrived at such an estimation, deeming it as reasonable and conservative rather than exaggerated. The court reasoned that the profit of the business would likely increase in time and thus raised the amount to Euro 22,000 for Alan. On the other hand, it noted that Ruth was not entirely incapable of working and appropriately decreased her income to Euro 8,000.

Alan was 19 years old on the day of accident, whilst his mother was 46. The court assumed that the victim would have continued to work until reaching the age of retirement and thus a multiplier of 40 years was applied for the former and 15 for the latter. One may note that the courts have become more generous in establishing the multiplier – when comparing this with previous decisions which continued to base their formula on that provided by *Butler v Heard*, where the claimant was 22 years old and was given a multiplier of 15 years. Simply put: in this case Alan was given a multiplier of 40 since he was 19 years old. In establishing this figure, the courts take into account the principle of 'chances and changes'. The judge must sensibly predict the likely course of events – in *Barbara v Meilak*,[552] the Court of Appeal increased the multiplier given by the First Court, arguing that although the corporation with whom the victim was working with closed down a few years after the accident, he would probably have found another job.

> Illi llum huwa aċċettat li l-kriterju ta' kif wieħed iqis il-kejl tal-multiplier huwa wieħed li jagħti diskrezzjoni lill-ġudikant, li huwa mistenni li jqis u jiżen iċ-ċirkostanzi kollha tal-każ fid-dawl ta' twettiq ta' eżerċizzju li jagħti kumpens b'ħaqq u mhux b'xi mantra matematika.[553]

Consequently, with a multiplier of 40 and an annual income of Euro 22,000 Alan's estimated loss of earnings amounted to Euro 880,000; and Ruth's annual income of Euro 8,000 multiplied by 15 amounts to a balance of Euro 12,000. According to the formula generally used by the courts, this amount is then reduced by the percentage disability suffered. In establishing this percentage, the courts will consult with medical experts however they are not bound by the result. The figure need not reflect actual medical disabilities yet refers to how the accident has affected the victim's ability to work. In *Tonna v Gauci*,[554] scars on the victim's face were considered to have an impact on her self-esteem and thus merited a 4% permanent disability. The court tends to take into account the

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[552] *Raymond Barbara v Sammy Meilaq et* [2014] Court of Appeal (Civil, Superior) 1170/1995/1.

[553] ibid 23.

[554] *Antonella Tonna v Roderick Gauci* [2004] Civil Court (First Hall) 2025/2000/1.

subjective facts of the case – in *Cefai v Cutajar*[555] the medical expert established a permanent disability of 8% yet plaintiff argued that since he could no longer carry out manual labour, which was his line of work before the accident, then this percentage should be increased; and the court subsequently applied a percentage of 30. In the case at hand, Alan suffered a disability of 100% as post-accident he was completely dependent on others 'għall-aktar bżonnijiet bażiċi tal-ħajja'.[556] Consequently, the amount of lucrum cessans could not be reduced. With regard to Alan's mother, the court manifestly departed from the norm as it did not discuss nor even consider the percentage disability applicable to her, and naturally so, since she was not directly harmed by the accident. However notably, the court had earlier decreased her estimated annual income on the premise that she was not wholly unable to work.

Courts also generally make a reduction due to the lump sum payment 'minħabba t-trapass taż-żmien'.[557] However, in this case the court held that since the accident had occurred more than ten years before, it would omit this reduction. The same reasoning was used by the Appeal court in *Turner v Aguis*,[558] where it argued that since final judgement was given in 2003 and the accident occurred in 1993: 'dan it-trapass hu tant twil li għandu jimmilita kontra l-applikazzjoni ta' tnaqqis għal fini ta' "lump sum payment"'.[559] Indeed if this was not so, the defendant would have a greater incentive to try to slow down the proceedings.

The final sum arrived at by the court was Euro 1,250,000.

4. **Comments**

The general trend in Maltese tort cases is to award damages for the loss of earnings only to the direct victim of the accident.

> [I]l-kriterju tal-kumpens għal telf ta' qligħ fil-ġejjieni jintrabat sfiq mal-fatt li kull korriment iġib miegħu żvantaġġ li jissarraf f'telf ta' opportunitajiet *għall-vittma* li, kieku ma kienx għall-inċident, kienet tkun eliġibbli għalihom.[560]

Judge Caruana Demajo's case is rather particular; in deciding to award damages to an indirect or secondary victim, he radically departs from the norm. The Civil

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[555] *Felix Cefai et. v Joseph Cutajar* [2009] Court of Appeal (Civil, Superior) 6/2005/1.

[556] *Caruana et v Bonnici* [2011] (n 7) para 5.

[557] *Tonna v Gauci* (n 23) p 11: the court reduced the sum of lucrum cessans by 8% since the accident occurred in 1998 and judgement was first passed in the First Court in 2004.

[558] *Anthony Turner et v Francis Agius et* [2003] Court of Appeal (Civil, Superior) 120/1994/1.

[559] ibid para 22.

[560] *Barbara v Meilak et* (n 21) p 19 (emphasis added).

Code states that '[a]ny person who, with or without intent to injure ... is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for *any damage* resulting therefrom'.[561] This rather wide basis of liability is limited by article 1045. With regard to damnun emergens, it is evident from the wording of the law that compensation must be given only for losses or expenses suffered directly by the injured party. On the other hand, with regard to loss of earnings, the law is less specific and simply states that compensation is due for

'the loss of actual wages or other earnings, and [for] loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused'.[562] It is undeniable that a victim's mother, who stays home to nurse the latter, incurs financial loss as she is incapable of going to work. However, it is unclear whether the legislator intended such loss to be encompassed within article 1045. The Maltese text sheds light on this issue as it seems to imply that lucrum cessans may only be claimed by the injured party: 'll-ħsara li l-persuna responsabbli għandha twieġeb għaliha ... hija t-telf effettiv li l-egħmil tagħha jkun ġieb direttament *lill-parti li tbati l-ħsara* ... it-telf tal-paga jew qligħ ieħor attwali, u t-telf ta' qligħ li *tbati* 'l quddiem minħabba inkapaċità għal dejjem, totali jew parzjali, li dak l-egħmil seta' jġib.'[563]

In order for an action in tort to succeed, the plaintiff needs to prove that the defendant committed an unjust act through *dolus* or *culpa*, and that this act was the immediate or proximate cause of the damage complained of.[564] It may thus be argued that the damage suffered by Ruth was not a direct effect of the accident. In deciding the issue of causality, the Maltese courts have referred to foreign authors:

> Where damage results from multiple causes the courts often resort to the test of 'but for cause' – would the loss have been incurred but for the defendant's negligence. This notion is based on the view that a defendant should be liable only to the extent that it can be shown that his conduct was a condition of the claimant's hurt.[565]

Using this reasoning, the court can safely justify that the damage suffered by Ruth would not have arisen had the defendant driven prudently. On the other

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[561] Article 1033, Ch 16 (emphasis added).

[562] Article 1045(1), Ch 16.

[563] Article 1045(1), Ch 16 (emphasis added).

[564] See: *Carmelo Wismayer noe et v Chev. Anthony Falzon noe et* [1996] Court of Appeal (Civil, Superior) vol 80 (1996) part 2 s 1 667.

[565] S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (6th Ed Clarendon Press) 120, quoted in *Tarcisio Borg noe. et. v Kummissarju tal-Pulizija et.* [2012] Civil Court (First Hall) 11.

hand, the damage caused must also have been foreseeable by the defendant (using the test of the reasonably diligent man). Indeed it is easily foreseeable that reckless driving could lead to the injury of passengers, drivers or pedestrians, yet less foreseeable that it could lead to the inhibition of an uninjured individual to work. Furthermore, in most circumstances, the damage to the claimant's financial situation is unavoidable due to the permanent disability suffered by him. In reality, it was the mother's personal choice to stay home – perhaps the more morally correct choice – yet the financial damage suffered by her was thus not entirely unavoidable.

It is unquestionable that the son's disability will affect the entire family, and in the circumstances, had the accident not taken place, their patrimony would be greater:

> It-telf ta' qliegħ sejjer iġarrbu mhux biss l-attur Alan iżda wkoll l-attrici Ruth – u l-attur Alexander żewġha minħabba sehmu fil-komunjoni tal-akkwisti – għax din ikollha tqatta' ħafna żmien tieħu ħsieb ta' binha flok tmexxi n-negozju.[566]

In my opinion, this fact merits further compensation in addition to that awarded to Alan through article 1045, yet perhaps on a different basis than that applied by the court. Awarding an indirect victim damages in her own name sets a rather dangerous precedent as its application may be abused of. Indeed any family member of the injured party may argue that they were forced to stay home or work fewer hours in order to care for the latter. In the case under discussion, nursing was in fact essential, yet it would prove difficult for the court to assess and draw the line between what was necessary and what was not. A possible solution would be to award a sum, by way of damnum emergens, to the injured individual as expenses for the requirement of a full-time or part-time nurse/carer (depending on the injury). Nonetheless, whilst increasing the patrimony of the family in general, this should not negate the right of the secondary victim to compensation in his/her own name for moral harm. Though in cases where the accident leads to the death of the victim, the latter's parents or spouse are likely to suffer psychological effects which could easily lead to lack of enthusiasm at work ergo loss of earnings. It may thus be regarded as fair to utilise the approach adopted by Judge Caruana Demajo in such instances, including the awarding of moral damages – yet whether there currently exists a legal right to such a claim is debatable.

Mirroring Common law and Scandinavian countries, the Maltese legal system is concerned with monetary compensation – damages are pecuniary and often

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[566] *Caruana et v Bonnici* [2011] (n 7) para 6.

based on set formulae; moral damages are reserved for very limited occasions. In Italy, courts compensate for patrimonial and non-patrimonial damages. The latter relate to cases of personal injury and encompass biological and moral damages. Maltese courts may be said to compensate for biological damages as these relate to injuries to the psycho-physical integrity of a person. The standard method applied in Italy to determine the amount of biological damages suffered is also similar to that adopted by the Maltese courts.[567] With a difference to Italian law, the awarding of lucrum cessans by the Maltese courts is founded upon a reduction in one's capacity to work – the courts have broadened this interpretation by awarding damages even in cases of purely cosmetic injuries or psychological harm.[568]

Moral damages under Italian law may also be awarded for harm, anxiety and distress to a person's general well-being; the amount is capped at 20% of the biological damages awarded.[569] Yet unfortunately, the theory of *restitutio in integrum* often stressed by the Maltese courts, opposes the idea of non-pecuniary damages. Maltese courts are in fact weary of awarding moral damages in cases of tort: 'Il-liġi trid li l-ħsara tiġi riżarċita, mhux li l-infortunat jagħmel investiment mid-disgrazzja li ġratlu.'[570] The legislator has prescribed instances in which the court may award damages to compensate for emotional distress or offences to the integrity of the injured party, yet these are few and far between.[571] Moral damages may also be granted by the Constitutional Court for violations of human rights. However, as rightfully and innovatively pointed out in *Busuttil v Muscat* by the same Judge Caruana Demajo, injury to one's physical or mental integrity constitutes a violation of one's right under article 3(1) of the Charter of Fundamental Rights of the European Union.[572] Furthermore,

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[567] The most commonly applied criteria have been developed by the Tribunal of Milan: it is based upon a variable index (a fixed amount of money for a given percentage of disability). The sum increases proportionately with the percentage of disability; and decreases in relation to the age of the injured person. See: Piero Mastrosimone, 'Italy: How To Quantify Damages In Personal Injury Cases in Italy' (2013) <http://www.mondaq.com/x /275092/Personal+Injury/How+To+Quantify+Damages+In+Personal+Injury+Cases+In+Italy > Accessed 14 March 2015.

[568] See: *Tonna v Gauci* (n 23); *Linda Busuttil et v Dr. Josie Muscat et* [2010] Civil Court (First Hall) 2429/1998/1; *Sultana v Abela Caruana* [2002] Court of Appeal (Civil, Superior) 1229/1992/1; *Jo-Ann Stivala pro et noe v Lorenza Dimech et* [2013] Civil Court (First Hall) 31/2000/1.

[569] Which may be increased in certain limited situations. See: Piero Mastrosimone (n 36).

[570] *Cassar Pullicino nomine v Xuereb noe. et* (n 5) para 53.

[571] See: The Consumer Affairs Act (Chapter 378 of the Laws of Malta); The Press Act (Chapter 248 of the Laws of Malta); The Promises of Marriage Law (Chapter 5 of the Laws of Malta); and The Enforcement of Intellectual Property Rights (Regulation) Act (Chapter 488 of the Laws of Malta).

[572] *Busuttil v Muscat* (n 37) para 60; same reasoning was upheld in *Lucianne Cassar v Dragonara Casino Limited (C23950)* [2012] Civil Court (First Hall) 753/2004.

> [I]l-liġi tad-delitti ċivili ta' pajjiż ewropew tas-Seklu XXI ma tistax tkompli tħalli bla rimedju lil min iġarrab ħsara fil-valuri fondamentali tal-ħajja. L-attriċi, bi ħtija tal-konvenuti, ġarrbet ħsara fl-integrità tal-persuna tagħha u għalhekk il-konvenuti huma obbligati għall-ħlas ta' din il-ħsara, kif igħid u jrid l-art. 1033 tal-Kodiċi Ċivili moqri fid-dawl tal-art. 3.1 tal-Karta.[573]

On this basis, the court held that the phrase '... the actual loss which the act shall have directly caused to the injured party', under article 1045(1), should be interpreted to include non-patrimonial damage to the integrity of the individual. This interpretation refers exclusively to the individual who is directly injured by the act and thus does not serve as a remedy for the situation at hand – awarding damages to a secondary victim. Nonetheless, building on what was stated in the aforementioned judgement, one may argue that a mother whose child was unjustly injured in an accident suffers from psychological harm which is a violation of her right under article 3(1) of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the 'EU Charter'). Hence, she may claim for damages under article 1045 in her own name, as a direct victim of the unjust act.

The First Court in *Busuttil v Muscat* recognised that there was no set formula to refer to in order to award non-patrimonial damages and thus liquidated damages *arbitrio boni viri*.[574] This reasoning opens up new possibilities for the court; affording it greater discretion to decide, upon the appreciation of the facts, what amount is justifiable and reasonable. Unfortunately the decision, although not revoked or amended, was criticised by the Court of Appeal.[575] It argued that there exists no legislative basis for awarding non-patrimonial damages and that the EU Charter only applies to cross border interests. Instead, it reverted to the traditional method and applied the renowned formula (which coincidentally lead to approximately the same amount as awarded by the First Court).[576]

5. **Concluding remarks**

The formula used by the Maltese courts in the calculation of 'lucrum cessans' is in truth, a fairly reasonable one – it is based on probability, the idea of 'what would have been', rather than a completely arbitrary approach. Nonetheless, the courts at times stray from the strict interpretation of *restitutio in integrum* – for instance, a housewife injured in an accident who never worked and has no

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[573] *Busuttil v Muscat* (n 37) para 62.

[574] ibid para 63.

[575] *Linda Busuttil et v Dr. Josie Muscat et* [2014] Court of Appeal (Civil, Superior) 2429/1998/1.

[576] First court awarded Euro 5,000; Court of Appeal calculated Euro 5,040 – thus it did not deem it necessary to amend the judgement appealed from.

intention of working, will still be compensated for loss of future earnings.[577] Indubitably, she deserves compensation, yet the motivation seems irrational – the formula is perhaps too logical which paradoxically, may give rise to illogical results in practice.

The possibility to award moral damages in tort cases to the injured individual, and/or to his or her parents or spouse in the case of death or severe injury, would be a welcomed remedy for such victims. One may note that despite moral damages being absent from the French Civil Code, the French courts have aptly developed the notion, and award damages for inter alia, psychological suffering, disfigurement and deprivation of the pleasures of life. Nonetheless, the French text is rather open-ended[578] and is thus subject to wide interpretation unlike the situation in Malta, where judicial discretion is significantly curtailed by article 1045. It remains particularly difficult for a victim morally or psychologically affected by an accident to claim compensation – unless he can formally prove that this has an effect on his potential to work.[579]

The approach taken by Judge Caruana Demajo in the Caruana case was thus a means to circumvent the strict interpretation often given to article 1045, thereby providing a just remedy not only for the individual directly injured by the unjust act, yet also for the relatives of the victim who undoubtedly suffer alongside the victim. It seems odd that the judge did not apply and develop the approach previously adopted by him in *Busuttil v Muscat* – evolving the concept of awarding damages *arbitrio et boni viri* for psychological harm; although in hindsight, the Court of Appeal would be likely to disagree with this reasoning. It is important to note that the case is yet to become res judicata as it is awaiting judgement by the Court of Appeal. It is hard to predict what course of action the court will choose to take. Agreeing with the decision of the First Court would create a rather new precedent for the awarding of damages. In my opinion this would certainly be constructive, yet judges must subsequently be extra cautious in seeking to detect possible 'abuses' of this development. Furthermore, the defendant should not be made to suffer unreasonably – the circumstances of the case together with his degree of fault should be taken into consideration. On the other hand, if the Court of Appeal were to disagree with the awarding of lucrum cessans to the victim's mother, one would hope that it provides an alternative basis for doing so rather than denying her any right to compensation outright. I

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[577] See: *Busuttil v Muscat* [2014] (n 4).

[578] Article 1383 of the French Civil Code states that: Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.

[579] See: *Busuttil v Muscat* [2011] (n 37) p 34: 'Mhux biżejjed li l-vitma jgħid li lħsara li ġarrab se taffettwa ħajtu; din il-prova trid issir b'mod serju u formali billi jew issir talba ghal perizja indipendenti, jew jitressaq espert ex parte (bħala psikjatra jew psikologu kwalifikat) li jispjega fid-dettal l-effetti li għandu difett fuq il-vitma.'

believe the Court of Appeal has the opportunity to sow the seeds for the development of a system that compensates for damage that is not solely patrimonial, and it should seize it.