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Quantifying Damages for *Lucrum Cessans* in Tort: A Fusion of Sources Creating a Unique Legal Structure for Malta

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QUANTIFYING DAMAGES FOR *LUCRUM CESSANS* IN TORT: A FUSION OF SOURCES CREATING A UNIQUE LEGAL STRUCTURE FOR MALTA

Fiona Cilia*

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I. INTRODUCTION

Claims for personal injuries are becoming very common, especially in countries within the European Union. The amounts of claims being made are exceptionally high. Having said this, in

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order to understand the basis of the Maltese Legal system, it is imperative to go through the English case decisions to discover patterns in the reasoning by which damages are awarded under the English system of tort. The starting point will be in the 1960s, when the English courts had a different approach to this issue. The paper will then move on to discuss the innovations that were subsequently introduced into the English system up to recent times, the Maltese legal system of awarding damages and a comparative study between the two legal systems. In order to do so, the author intends to elucidate the different heads of damages for personal injury, clarify the heads of damages under English law which cover similar grounds or overlap with *lucrum cessans*, and will go through each and one of them in order to come up with a definition.

II. DIFFERENT HEADS OF DAMAGES FOR PERSONAL INJURY

A tortfeasor has the duty to compensate the victim for the losses he has suffered. In tort law, the most important factor is *restitutio in integrum* and thus the attempt to put the victim in the same position as he was before the accident occurred. Of course the *restitutio in integrum* as stated by Munkman¹ applies only in cases where the original position can be restored. If such is not possible, a fair compensation equivalent in money, is to be awarded for the damage sustained. In fact Lord Morris in the case *Parry v. Cleaver* stated that: “to compensate in money for pain and for physical consequences is invariably difficult . . . no other process can be devised than that of making a monetary assessment.”²

In *Lim Poh Choo v. Camden and Islington Area Health Authority*, Lord Scarman said, “the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong.”³

1. JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 2 (Butterworths, London, 1989).

2. *Parry v. Cleaver*, 1 All E.R. 555 (1969), [1970] A.C. 1.

3. *Lim Poh Choo v. Camden and Islington Area Health Authority*, [1980] A.C. 174 (1980).

The key issue in tort has thus always been compensation but in order to understand better such vital factor, it is necessary to explain the different heads of damages that exist under the Common Law system when dealing with personal injury.

In the case *West v. Shephard*, Lord Morris said, “in the process of assessing damages judges endeavour to take into account all the relevant changes in a claimant’s circumstances which have been caused by the tortfeasor. These are often conveniently described as ‘heads of damages.’”⁴

Reference to these heads of damages has been made over the years by several judges. One is to note, however, that this reference is different from saying that the heads of damages are to be interpreted in a restrictive manner and as exhausting the field.

In fact, a case in point is Judge Cockburn, who in *Phillips v. London & South Western Railroad Co.*,⁵ a case which dates back to 1879, refers to some of these heads of damages. He mentions “the bodily injury sustained,” “the pain undergone,” “the effect on the health of the sufferer” and the “pecuniary loss sustained.”

Before delving further in the details of the heads of damages, it is appropriate to define ‘damages.’ Lord Blackburn in the *Livingstone v. Rawyards Coal Co.*⁶ case of 1880 defines damages as:

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

So damages are primarily considered to be the means used to put the plaintiff in the same position as if the tort has not been committed. Therefore, the end goal of the court is to reinstate the plaintiff to his previous position as much as possible. In order to do this, the court has to consider the whole case and it is thus more convenient for the judge to consider the whole case under separate heads of damages.

4. *H. West & Son Ltd. v. Shepard*, 2 All E.R. 625 (1963), [1964] A.C. 326.

5. *Phillips v. London & South Western Railroad Co.*, 5 Q.B.D. 78 (1880).

6. *Livingstone v. Rawyards Coal Co.*, 5 App Case 25 (1880).

The main ways of classifying damages in English Law are in terms of whether they compensate for Pecuniary and Non-Pecuniary loss and also in terms of whether they constitute General or Special damages. Thus the principal ways of categorizing damages in English law are either in terms of the pecuniary nature of the loss or the lack of such pecuniary nature or in terms of how specific or general these damages are. It should be clear, however, that these are mutually exclusive ways of classifying the same spectrum of damages. Therefore, all damages can be classified as either pecuniary or not and all damages can be classified according to whether they are general or specific.

A. *Pecuniary Damages*

In *Fair v. London and North Western Rly Co.*,⁷ Judge Cockburn had already referred to the distinction between pecuniary and non-pecuniary loss. He stated that when taking into consideration pecuniary loss, one is to take into account both the incapacity to earn a future improved income and also the present loss.

In the leading book *The Quantum of Damages: Personal Injury Claims*,⁸ pecuniary damages are described as being those damages which are capable of being calculated in terms of money. This category is then further divided in sub-categories listing the various types of pecuniary damages. The first sub-category which the author lists is *expenses*. So all the expenses incurred by the victim such as medical expenses, cost of fares to and from hospital, additional domestic help and the rest can all be reduced to cash and are thus pecuniary damages.

Another sub-category is that of *loss of earning or other profits*. This sub-category deals with all that loss of earning or profit which the plaintiff, has lost due to the accident from the day of the injury to the date of the trial.

7. *Fair v. London and North Western Rly Co.*, [1869] 21 L.T. 326 (Lloyds list law reports, 1963 Volume 1).

8. DAVID A. KEMP, MARGARET S. KEMP & RICHARD O. HARVEY., 1 THE QUANTUM OF DAMAGES: PERSONAL INJURY CLAIMS 8 (3d ed., Sweet and Maxwell, London 1967).

The sub-category of *handicap in the labour market* may seem quite similar to the latter sub-category but in reality, when scrutinized further, it is not. This deals with the disadvantage the plaintiff will have when compared with his colleagues in the labour market due to the injuries suffered. So, even if a person is still capable of performing his normal duties as before, he could still be disadvantaged if he is less capable of doing other kinds of jobs. As Kemp and Kemp⁹ say, if an employer needs one of the employees to be redundant, naturally he will lay off the man least capable, hence probably that person who has been incapacitated to a certain extent. Such loss thus falls under pecuniary damages.

The fact of being disadvantaged in the labour market was given more prominence as time went by, in the case *Smith v. Manchester*¹⁰ where the Court held that an additional award could be made for the fact that the plaintiff was in risk that between the date of the trial and the end of the working life he would have to search for another job. This award is thus granted as a compensation for the “weakening of the claimant competitive position in the open labour market.”

These awards are known as *Smith v. Manchester* awards. In order to be granted, the injuries suffered must be such that the consequent disability will put the plaintiff at a disadvantage with others when seeking alternative employment. Two very important factors that must subsist in order to grant this award are: (a) there must be a real or substantial risk that the claimant is in risk of losing his current employment during his working life and (b) that the claimant is at a disadvantage in obtaining alternative work as a direct consequence of the injuries suffered.

In circumstances like these, even though the loss is a pecuniary one, a mathematical calculation might not lead to justice and thus the courts award an extra sum which is calculated upon rough estimates in order to compensate for the future disadvantage which will be suffered by the claimant. An important factor to keep

9. *Id.* at 8.

10. The claimant slipped and fractured an elbow. As a result, she had to remain on light duties. She was found to be at a great risk of losing her employment before retirement age. The trial judge awarded her £300 while on appeal a sum of £1,000 was awarded. *Smith v. Manchester*, [1974] K.I.R. 1.

in mind is that these awards may not be given if the plaintiff's condition has stabilised by the time of the trial. When assessing such an award, the four factors which are taken into consideration are the net annual income of the plaintiff, the length of the remaining working life, the intensity of the risk of him being put back on the labour market, and the effect of the disability on his working capacity. Usually the courts do not award damages under this heading which amount to more than five years loss of the present net annual wage of the plaintiff.

Kemp and Kemp also include under pecuniary damages those material losses which go beyond the loss of earnings. So if a person loses his fringe benefits, he is entitled to be awarded as damages the pecuniary equivalent of those material benefits which were lost up to the date of the trial.

McGregor¹¹ defines pecuniary loss as being all financial and material loss incurred by the plaintiff. He further clarifies these financial losses by giving the examples of loss of business profits or expenses of medical treatment. McGregor continues his definition by saying that such loss "is capable of being arithmetically calculated in money even though the calculation must sometimes be a rough one where there are difficulties of proof."

Nick Parker writes that:

Pecuniary damages reimburse the expenses incurred due to the accident. For example, the injury may have resulted in the person missing work which in turn will result in a loss of earnings or profits. The injury may have also required the plaintiff to spend money prior to trial for such things as parking and mileage charges for going to see a doctor, or for prescriptions and medical costs not covered by health care.¹²

11. HARVEY MCGREGOR, *MCGREGOR ON DAMAGES* 8 (Sweet and Maxwell, London 1997).

12. Nick Parker, *Damages in Personal Injury Cases*, 2 A LEGAL DIGEST OF CURRENT TRENDS IN PERSONAL INJURY LAW 1 (2002), available at <http://www.rmr.com/files/resourcesmodule/@random4293f2f916ea0/1117053062accid.pdf> (Last visited November 26, 2011).

The *Law Commission's Report on Personal Injury Litigation—Assessment of Damages*¹³ specifically defines pecuniary damages as, “loss in money or money’s worth, whether by parting with what one has or by not getting what one might get, except that it includes matters for which damages are available under section 4 or 5 of this act.”¹⁴

Schedule 1, Part I and II, it lists all those losses which fall under pecuniary loss. Part I deals with such loss before the judgment.

1. Expenses incurred before judgment.
2. Loss of earning or profits suffered before judgment.
3. Loss of income (other than earnings or profits) suffered before judgment.
4. Matters for which damages are available under section 4 of this act.

13. The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages* (Law comm. no. 56) (London 1973).

14. Article 4 (1) states:

In an action for damages for personal injuries damages may be awarded in respect of a) any reasonable expenses gratuitously incurred by any other person in rendering or causing to be rendered to the injured person any necessary services, as if those expenses had been recoverable by him from the injured person; and b) the reasonable value of any necessary services gratuitously rendered to the injured person by any other person, as if their reasonable value had been so recoverable by him.

Article 5(1) states:

In an action for damages for personal injuries damages may, subject to subsection (2) below, be awarded in respect of the reasonable value of any personal services which as a result of the injuries the injured person has been or will or probably will be unable to render to a dependant, being services which the injured person used to render gratuitously to that dependant before suffering the injuries and which but for the injuries he would probably have continued to render gratuitously to him.

5(2) Subsection (1) above applies only to personal services of a kind that can ordinarily be obtained by paying a reasonable amount for them (for example services of a kind that might be rendered by a housekeeper, nurse, secretary or domestic servant whether full-time or part-time, or services involving the provision of transport.) *Id.*

5. The reasonable value of any services to which section 5(1) applies, being services which would probably have been rendered before judgment.
6. Pecuniary loss suffered before judgment, not falling within another paragraph of this Part of this Schedule.

Part II, then deals with future pecuniary loss.

7. Future expenses.
8. Future loss of earnings or profits.
9. Future loss of income (other than earnings or profits).
10. The reasonable value of any services to which section 5(1) of this Act applies being services which would probably have been rendered after judgment.
11. Future pecuniary loss not falling within any other paragraph of this Part of this Schedule.

Both Kemp and Kemp and the *Law Commission* define closely what this head of damage means but delve also into all the possible losses which fall under such head.

Having outlined the meaning of pecuniary damages, one can now move on to the other head of damage known as non-pecuniary damages.

B. Non-Pecuniary Damages

Kemp and Kemp, define non-pecuniary loss as “those losses which are impossible to assess by arithmetical calculation.” Having said this, they then proceed to sub-categorize this head of damage.¹⁵ As a first sub-category, one finds pain, suffering, and shock. The authors here explain that pain and suffering do not necessarily have the same meaning, even though the phrase “*pain and suffering*” has almost become a term of art.” Since for example as in the case *Forrest v. Sharp*¹⁶ damages may be awarded simply for the mental suffering of the victim and not for the pain. In the mentioned case, the plaintiff went through mental suffering

15. KEMP ET AL., *supra* note 8, at 11-13.

16. *Forrest v. Sharp*, 107 S.J. 536 (1963).

because he knew that his life expectancy has been significantly reduced and that he must spend the remaining days in misery.

Shock is a separate factor which must, however, still be taken into account when dealing with pain and suffering

Apart from pain and suffering, Kemp and Kemp deal also with loss of amenities of life. They classify this as a sub-category of non-pecuniary damages. For them this head includes, "Everything which reduces the plaintiff's enjoyment of life considered apart from any material or pecuniary loss which may be attendant upon the loss of amenity."¹⁷

In the case *Manley v. Rugby Portland Cement Co. Ltd.*, Lord Justice Birkett defined loss of amenities in this way, "the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed and will never again go upon his walking excursions—things of that kind—loss of amenities."¹⁸

So loss of amenities is anything which reduces the enjoyment of one's life. Lord Morris and Lord Tucker state that damages under this category may not be reduced in cases where the plaintiff loses consciousness and is thus unaware of the pleasure lost.

As another sub-category of non-pecuniary damages, one finds also loss of expectation of life which is quite close to the category of loss of amenities. In cases of loss of expectation of life, damages are awarded in respect of the happiness which the plaintiff might have lost due to the fact that his life span has been reduced as a consequence of the accident. In its decision, in the case *Benhan v. Gambling*¹⁹ the court held that damages awarded under this category should be moderate.²⁰

17. KEMP ET AL., *supra* note 8, at 12.

18. *Manley v. Rugby Portland Cement Co. Ltd.*, 1952 C.A. No. 286 (1952).

19. *Benhan v. Gambling*, [1941] A.C. 157.

20. An interesting point to make at this stage is that in 1971 Judge Crichton halved the award of damages under the head of "expectation of life" on the simple reason that the deceased was a habitual criminal and according to Judge Crichton the "life of a criminal is an unhappy one." This undoubtedly is far from being fair. The fact that a person has had trouble with his criminal record does not in any way mean that he does not enjoy his life. Since life is what we make it, everyone enjoys his life in a different and separate way.

A minor sub-category is that of inconvenience and discomfort. In such case, if the plaintiff suffers incidental inconvenience or discomfort, both of which are non-pecuniary damages, he must be compensated.

As a last sub-category Kemp and Kemp introduce exemplary and aggravated damages. As admitted by them, the distinction between the two is not very clear. Exemplary damages are there to punish the defendant for outrageous or scandalous conduct. Aggravated damages, on the other hand tend to compensate the plaintiff for aggravated harm done to him, such as injury to his feelings.

The *Law Commission* describes non-pecuniary damages in quite a similar way as Kemp and Kemp.²¹ The Report in Part III states that:

Non-Pecuniary Loss means pain and suffering, loss of amenities, and any other matters not falling within Part I or Part II of this Schedule. Okrent and Buckley define non-pecuniary damages as losses (such as pain and humiliation) which have no particular objective dollar amount that can be placed on them.²² Andoh and Marsh on the other hand describe it as “*pain and suffering (including mental distress), loss of amenity and the injury itself.*”²³

While all the definitions revolve around the concept of pain, once again Kemp and Kemp manage to give an all rounded definition of non-pecuniary damages by going into other aspects of damages which do not strictly speaking, fall under the realm of pain but which nonetheless are still to be considered as non-pecuniary damages.

21. KEMP ET AL., *supra* note 8, at 11-13.

22. C.J. OKRENT & W.R. BUCKLEY, *TORTS AND PERSONAL INJURY LAW* 47 (3d ed., Delmar Learning, New York, 2003).

23. BENJAMIN ANDOH & STEPHEN MARSH, *CIVIL REMEDIES* 140 (Dartmouth, England 1997).

C. General and Special Damages

Having dealt in quite some depth with the difference between pecuniary and non-pecuniary damages, it is essential, at this point to go into the disparities that lie between the other principal ways of classifying damages, in terms of General or Special Damages.

Law.com defines “general damages” as:

Monetary recovery (money won) in a lawsuit for injuries suffered (such as pain, suffering, inability to perform certain functions) or breach of contract for which there is *no exact dollar value which can be calculated* (emphasis added). They are distinguished from special damages, which are for specific costs, from punitive (exemplary) damages for punishment, and to set an example when malice, intent or gross negligence was a factor.²⁴

While on the other hand, “special damages” are defined as:

Damages claimed and/or awarded in a lawsuit which were out-of-pocket costs directly as the result of the breach of contract, negligence or other wrongful act by the defendant. Special damages can include medical bills, repairs and replacement of property, loss of wages and other damages which are not speculative or subjective. They are distinguished from general damages, in which there is no evidence of a specific dollar figure.²⁵

Atiyah identifies as the distinction between the two classes the fact that some damages are precisely measurable and quantifiable whilst others are not. He describes “special damages” as being those damages which are confined to out of pocket expenses incurred before the trial and to loss of earnings incurred before the

24. Law.com, *General Damages*, <http://dictionary.law.com/Default.aspx?selected=809> (Last visited November 8, 2011).

25. Law.com, *Special Damages*, <http://dictionary.law.com/Default.aspx?selected=1985> (Last visited November 8, 2011).

trial. On the other hand “general damages” are “damages for loss of earnings likely to be incurred in the future, plus damages for pain and suffering, whether incurred before or after the trial, together with damages for other immeasurable, such as loss of amenities, “loss of expectation of life,” disabilities and disfigurements.”²⁶

Lord Donaldson states that general damages are made up of two elements: a subjective one being the pain and suffering and an objective one being the loss of amenity.²⁷ He observes that this head incorporates both physical and psychiatric injury in respect of past, present and future loss.

Williams and Hepple say that special damage is that damage which must be specifically claimed in the statement of claim, while there is no need for one to make any specific monetary claim as regards general damage.²⁸ They explain that:

Pain and suffering are not special damage because their translation into money terms is arbitrary, but if the plaintiff had his clothes ruined in the accident, and incurred hospital expenses, and loss of wages, the value of the clothes and other monetary loss up to the date of the trial would be special damage upon which he would have to put a figure.²⁹

In contrast a general damage is that damage which cannot be accurately quantifiable in money terms. In such case no exact figure needs to be claimed on the pleadings because the court makes its assessment and awards the amount of damages which it deems fit.

General damage, on the other hand, is damage not accurately quantifiable in money terms for which damages can be awarded even in the absence of any specific monetary claim in the plaintiff’s statement of claim.

26. PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 168 (3d ed., Weidenfeld and Nicolson, London, 1980).

27. In the foreword to the first edition of the *Judicial Studies Board Guidelines*.

28. B.A. HEPPEL & G. WILLIAMS, FOUNDATIONS OF THE LAW OF TORT 60-61 (Butterworths, London, 1974).

29. *Id.*

Osborne goes yet into a further difference between the two heads.³⁰ He describes general damages as “compensatory amounts which have to be assessed by the court of trial.” In contrast, “special damages are the specific amounts which represent provable actual financial loss to the claimant.”³¹ Like other authors, he stresses that it is only actual loss incurred between the accident and the trial that can be recovered as special damages. Actual loss which occurs after the trial, even though the amounts of expenses are precisely known, cannot be classified under the head of special damages. He in fact describes in detail what constitutes special damages in this way:

- a) provable loss or earnings until trial;
- b) damage to clothing, repairs to vehicles, hire of alternative transport;
- c) extra travel costs occasioned by the accident, e.g., by the claimant having frequently to visit hospitals as an outpatient, or by relatives having to visit him in hospital;
- d) private medical or nursing treatment.

D. Distinguishing between the Two Classifications

As one can see, English law divides compensable loss conveniently under heads of damages. The factor that determines whether a loss should be listed under one head of damage and not under another is essentially how general or special that loss is and whether it is quantifiable in monetary terms. In order for a claim to fall under the head of special damage, the loss claimed must have taken place up to the time of the trial and it must be quantifiable in monetary terms. So one can very well state that all special damages are pecuniary damages since they can be fully compensated in monetary terms.

The situation is somewhat more complex when dealing with general damages, since not all the losses that fall within this classification can be easily compensated in monetary terms. In fact

30. CRAIG OSBORNE, CIVIL LITIGATION 5 (Oxford University Press, Oxford, 2007).

31. *Id.*

the only loss that can be quantified in monetary terms is loss of future earnings; this in fact is classified also as a pecuniary loss. The head of general damages includes also non-pecuniary losses such as pain and suffering and loss of amenities which undoubtedly can never be exactly quantifiable in monetary terms.

Thus even though one can state that all special damages are pecuniary damages, to state that all pecuniary damages are special damages would be incorrect, since there are certain pecuniary damages which are classified as general damages. To understand how each compensable loss is classified, one is to keep in mind that the same compensable loss is classified twice, (1) under the general or special head of damage and (2) under the pecuniary or non-pecuniary loss. By way of an example, the weakening of a plaintiff's position in the labour market falls under the head of general damages since it is a loss which will occur after the judgment but it is also a pecuniary loss since it can be quantifiable (even if not exactly through a mathematical calculation) in monetary terms.

As Lord Donaldson said, "Paradoxical as it may seem one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering or loss of the amenities of life."³² Whilst no two cases are ever precisely the same, justice requires that there be consistency between awards.

It is therefore also interesting now to go through the procedure as applied under the Maltese legal system when it comes to compensating personal injuries and the way damages for *lucrum cessans* are calculated.

Maltese law divides compensable damages under two headings, mainly *lucrum cessans* and *damnum emergens* so when awarding damages, the Maltese courts must clearly show which damages are being awarded for *lucrum cessans* and which are for *damnum emergens*.

Lucrum cessans is a civilian term derived from Roman law, where it meant 'loss of profit' and corresponds to the Italian "*lucro*

32. JUSTICE BELL, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY (Oxford University Press, Oxford and New York, 2002).

cessante” which indicates an economic loss. Zimmermann refers to the *Principles of European Tort Law* and describes *lucrum cessans* as damage which: “includes future loss of income, and the impairment of the victim’s earning capacity, even if such impairment is not accompanied by any actual loss of income.”³³

In contrast *damnum emergens* is defined as direct consequential loss due to the defendant’s action, and is therefore described as an actual loss.

III. THE HISTORICAL DEVELOPMENT OF THE MALTESE CIVIL CODE PROVISIONS

Since 1868, laws have tried to cater to the problematic issue of compensating tort damages. Section 751 of Ordinance VII of 1868 originally dealt with *damnum emergens*, whilst Section 752 dealt with *lucrum cessans* and stated:

Il danno però che dev’essere risarcito da colui il quale lo abbia dolosamente recato si estende, oltre le perdite e le spese menzionate nell’articolo precedente, al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo stato. La corte fissera per la perdita di tale guadagno, secondo le circostanze una somma non eccedente cento sterline.³⁴

The amounts of *lucrum cessans* damages which could be awarded during this period were very limited and were based on the intention of the wrong doer. It was only when damage (which apparently could have been limited to economic loss) was caused intentionally, that the judgment could compensate the victim also for future loss of earnings. Moreover, the ceiling for compensation for such damage was set at £100.

With time this law had to be amended in order to respond to new exigencies. The adjustment took quite a long time, and it was only in 1938 that the law was amended and Sections 751 and 752 were repealed. Through Ordinance No. III of 1938, which was

33. EUROPEAN TORT LAW (TORT AND INSURANCE LAW-YEARBOOK) 22 (Helmut Koziol & Barbara C. Steinger eds., 2003).

34. Ordinance VII of 1868 (Malta).

promulgated and came into force on February 4, 1938, several amendments were made. Not only were *damnum emergens* and *lucrum cessans* grouped within the same article, but the £100 limit on the compensable damages for all those cases which were caused intentionally and which involved compensation of *lucrum cessans* was removed. It is therefore worth noting that the amount of such damages became unlimited. On the other hand, in cases where *culpa* was involved and the damage was not caused maliciously, the award could not be greater than £1,200. The code now linked the compensation of lost earnings directly to whether a permanent incapacity, whether total or partial, was caused.

Consequently, the law started providing compensation for lost earnings both in cases of intentional and culpable infliction of damage, whilst before it only catered to the former case.

The situation changed radically in 1962, when Ordinance XXI finally removed the upper limit on compensation that had been restricting the judges since 1868. This change was decisive in that it gave judges a very wide discretion when awarding damages for *lucrum cessans*. Although the law was still limited by the need to show that loss was “arising from any permanent incapacity” all the distinctions that the different laws had made between negligence and wilfulness were at last completely removed and judges were now free to decide on a particular amount notwithstanding the state of mind of the defendant when the accident was caused. It goes without saying, that this increase in the discretion of the judges brought about a certain degree of uncertainty and it was clear that there could be a significant discrepancy between damages awarded for the same disability by different judges as compensation in *lucrum cessans*.

Notwithstanding the fact that the provisions of the Maltese Civil Code are primarily inspired by continental law, Maltese law quantifies *lucrum cessans* according to a formula which adopted most of its key components from common law.

IV. LUCRUM CESSANS AND GENERAL DAMAGES

Lucrum cessans deals with the loss of earnings due to permanent disability deriving from an accident. The English category which is closest to *lucrum cessans* is general damages.

The latter includes damages for loss of future earnings just like *lucrum cessans* under the Maltese Law. However, this category is much wider than *lucrum cessans* since it includes other headings such as pain and suffering, loss of amenities and loss of expectation of life amongst others. Unfortunately these are not catered to under the *lucrum cessans* as applied by Maltese law.

An authoritative comparison between the heads of compensable damages under English and Maltese law was made in 1967 by the House of Lords in *Boys v. Chaplin*.³⁵ In this case, the plaintiff was injured through the defendant's negligence when his car hit the motorcycle of the former. Both the plaintiff and the defendant were British servicemen, stationed in Malta. According to the House of Lords, the difference between Maltese and English law was the fact that the Maltese system granted damages only in cases of special damages and certain future financial loss. The English system on the other hand, apart from special damages, awarded also damages for pain, suffering, loss of amenities and problematical future financial loss.

A. Calculating the Award: The Multiplier

It is now appropriate to move on to the way calculations are made and how the final award is arrived at. The multiplier system used by the Maltese courts is very similar but not identical to that implemented by the English courts.

Firstly the weekly wage of the victim is calculated and adjusted for inflation. This is then multiplied by fifty-two in order to obtain the annual wage. Once the wage is calculated, the result is multiplied once again, this time by the percentage of permanent disability caused by the accident. Such disability is assessed by a medical expert. In the leading judgment *Butler v Heard*,³⁶ it was stated that the incapacity that must be taken into consideration is that incapacity which would have an effect on the victim's ability

35. *Boys v. Chaplin*, [1967] 3 W.L.R. 266, [1967] 2 All E.R. 665, (1967) 111 S.J. 297 (QBD), *aff'd* by *Boys v. Chaplin*, [1968] 2 Q.B. 1, [1968] 2 W.L.R. 328, [1968] 1 All E.R. 283, (1967) 111 S.J. 968; *Times*, December 7, 1967 (CA), *aff'd* by *Boys v. Chaplin*, [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085; [1969] 2 Lloyd's Rep. 487; (1969) 113 S.J. 608 (HL).

36. *Butler v Heard*, Court of Appeal (Civil), December 22, 1967.

to make profit, and not just any incapacity. The Court quoted the Italian Court of Cassation which explains this concept very clearly by saying:

Si deve effettuare non già con criterio astratto su un determinato adumo teorico offerto dalla perizia, ma presumendo la misura dell'influenza dell'evento sulla consistenza patrimoniale del danneggiato, nel senso che vi è stato per tale fatto una diminuzione del suo patrimonio.³⁷

In the way calculation is made under the Maltese system, one can see the fusion between the calculation as applied by the Common Law system and the element of *riduzione della capacità lavorativa* as applied by continental law.

Once this calculation is completed, the result obtained is multiplied by the number of years which the Court thinks the victim would have continued to work had he not been injured. This is known as the “multiplier.”

During the late 1960s, when the Maltese courts first made reference to the way damages were calculated under the English system, the Maltese system was very similar to the English one as regards to the multiplier. In *Butler vs Heard*,³⁸ the multiplier was calculated at fifteen and later on it rarely exceeded twenty years in length, just like in the English system. However as years went by, Maltese courts started moving away from the upper limit of twenty years and stated that courts should not be bound by this limit because the population's life expectancy had changed since the *Butler* case in 1967. Any ceilings created were purely subjective and based on an opinion of a particular individual. Therefore, it was decided that there should be no limit as regards to the multiplier but that this should be applied in proportion to the case in hand in order to make sure that justice is done. Notwithstanding the fact that some judges were against this increase in the multiplier, facts show that in quite a good number of cases, high multipliers started to be adopted depending on the case in hand.

37. No reference as regards to the particular judgment is made in the case. *Id.*

38. *Id.*

B. The Rudiments of the Multiplier in Malta and in England

When it comes to calculating the multiplier, the Maltese judge has a wide discretion and can apply different multipliers depending on the circumstances of each case. There are no set of guidelines which the courts are bound to follow and the multiplier adopted is very subjective. The choice of the multiplier is at the mercy of the judge. This means, that one can be faced with a situation where different multipliers are adopted in two analogous cases, for the simple reason that the case is decided by different judges.

With the widespread use of the Ogden Tables³⁹ (actuarial tables in England), the abovementioned discrepancies rarely occur. Thanks to these tables, it is often possible to calculate the exact multiplier which the court will apply in a particular case. Whilst in Malta each judge can base the multiplier upon different elements, in England the multiplier must be based on the age and the gender of the plaintiff, whether the plaintiff was employed at the time of the accident or otherwise, whether he or she suffered from any disability, or their level of education.

If a judge in England chooses to adopt the Ogden Tables system to calculate the multiplier, there will be limited room for the courts' interpretation, unlike with the system used in Malta. Several factors are taken into consideration before arriving at a multiplier. Through the use of this system, it is impossible to claim that the multiplier applied was an arbitrary one. The same unfortunately cannot be said in regards to the Maltese system since there are fewer guiding principles to refer to.

C. Date of Trial versus Date of Accident

In the Maltese system, the multiplier is calculated from the date of the infliction of damage, both in cases of personal injury and in cases of death. By contrast, in the English system the multiplier is calculated from the date of the judgment onwards in

39. Government's Actuary Department, *Compensation for Injury and Death (Ogden Tables)*, available at http://www.gad.gov.uk/services/Other%20Services/Compensation_for_injury_and_death.html (Last visited November 8, 2011).

cases of personal injury, whilst in cases where unlawful death ensues the multiplier is calculated as from the date of the infliction of damage.

Having a multiplier which is calculated from the date of the infliction of damage is of greater benefit to the victim since this will mean that the multiplier is greater than it would have been had it been calculated from the date of the judgment onwards. The only problem with the Maltese system is that it creates possible confusion between the damages awarded for *damnum emergens* and those for *lucrum cessans*. If damages for future loss of earnings are also given from the date of the infliction of damage, one would be faced with double compensation. Thus during the period between the infliction of damage and the judgment a person is entitled to both *lucrum cessans* and *damnum emergens*. Under the English system actual damages are awarded for the period between the date when the damage is inflicted to the date of the judgment, whilst in cases of personal injury compensation for future loss is given from the date of the judgment. Such a system eliminates the risk of double compensation.

D. Calculating Disability

When calculating disability, Maltese courts generally base their judgment on the decisions of the experts. The medical expert must first decide whether there is a disability and if so, what is the percentage of disability in regard to the plaintiff's working capacity. In cases where a permanent disability is adjudged by different experts with a different percentage of disability, the court usually takes an average of these percentages. In cases where the plaintiff suffers from different types of disabilities, the court usually decides on each disability and adds up all the percentages in order to arrive at a global percentage. The effect of such disability should not be calculated according to the repercussions the disability has on the functioning of the body in general but on the repercussions it has on the working life of the plaintiff. In Malta, various court judgments have concluded that loss of future earnings covers compensation for a reduction in plaintiff's ability to work in general. This means that a disability is not only calculated in cases where the disability will impede the plaintiff to

continue in his job and earn a living but even if he keeps his job or is promoted. Having said that, the courts, do insist on tailoring the degree of incapacity to the particular occupation, social status, and education of the victim.

Disability under the Ogden Tables is considered as a contingency other than mortality. The tables take into consideration the fact that the plaintiff is now disabled and the award is calculated around this detail. For the Ogden Tables, there is no need for a qualification of degree or type of disability. Anything which is impeding the plaintiff from earning a future income is calculated as a disability.

Unlike the Maltese system, the multiplier method in England caters simply to loss of earnings and not for loss of ability to work in the abstract. In England, in order for a person to be awarded damages for disabilities which hinder the ability to work in general, one must then refer to the *Smith v. Manchester* awards. These awards are given in circumstances where a mathematical calculation is not possible and where there is a weakening of the claimant's competitive position in the open labour market.

On a closer look, one can see that the same factors which are taken into consideration when calculating the duration of the multiplier in England are taken into consideration when calculating the percentage of disability in Malta.

Another distinctive element under the Maltese system is the fact that in Malta an unemployed person will still be able to get an award under the multiplication system; this in England is not possible since no loss of income is involved and therefore the Ogden Tables cannot be applied. Such persons under the English system will either get a *Smith v. Manchester* award or otherwise will have to opt for an award for loss of amenities.

As one can see, the Maltese focus on establishing the degree of disability has resulted in an all-encompassing technique which aims to calculate by the same variable both future loss of income for the specific plaintiff and his/her loss of capacity to work in general.

E. Lump Sum Payments and Alternative Methods

Awards for cases of *lucrum cessans* in tort take the form of a lump sum payment both in the English system as well as in the Maltese system. This brings along with it several problems, since the judge must predict the future, and this can never be done flawlessly. In England, the courts can give interim awards and also provisional awards (which can then be varied subsequently), but in Malta the award is rigorously given as a lump sum payment.

F. Lump Sum Deductions

Both the Maltese system and the English system apply a deduction in order to cater to the fact that the victim or the heirs are acquiring a large sum of money which can be invested. In Malta this is known as Lump Sum deduction. However, in the Common Law system, the deduction is taken into consideration when calculating the multiplier. The courts assume that the lump sum will be invested and yield an interest, so a rate of return is taken into consideration in the Ogden Tables.

G. Compensation Proposals

Fresh government proposals to amend compensation law were launched in June this year, aimed at establishing new guidelines and increasing awards. The main amendments currently discussed are the permanent disability capping, which will be increased to €600,000, and the introduction of non-pecuniary damages (damages for pain and suffering or moral damages) which will, however, be capped at €250,000.

The proposal also establishes guidelines for compensation awarded for specific disabilities, such as loss of limbs and organs, with a long and very detailed schedule that caters to different types of disabilities.

V. CONCLUSION

As one can see, despite the fact that the provisions of the Maltese Civil Code in relation to responsibility are still

predominantly influenced by continental law, the calculation of damages is mostly influenced by common law. The mode of calculating damages and the provisions of the Maltese Civil Code will shift further towards the system employed by the Common Law system if such legal amendments were to be approved in Parliament. However, notwithstanding this, the strong fusion of sources will always subsist in the Maltese legal system and it is this which ultimately helps the Maltese system in maintaining its individual and unique structure.