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Article 1045 of the Maltese Civil Code: Is Compensation for Moral Damage Compatible Therewith?

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ARTICLE 1045 OF THE MALTESE CIVIL CODE: IS COMPENSATION FOR MORAL DAMAGE COMPATIBLE THEREWITH?

Claude Micallef-Grimaud[†]

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ABSTRACT

The paper focuses on Article 1045 of the Maltese Civil Code regulating liquidation of compensation (damages) under Maltese tort law and examines whether or not compensation for moral damage is compatible therewith. French law and Austrian law (being the main sources of Article 1045) are analysed and contrasted with the peculiarities of Maltese tort law whilst the motivations of the original

* This paper is based on the author's LL.D. thesis entitled *The Rationale for Excluding Moral Damages from the Maltese Civil Code: A Historical and Legal Investigation*, University of Malta, 2008 (hereafter *Excluding Moral Damages*). Reproduction of extracts from this paper is permitted provided that clear acknowledgment is made of the author as the source. This paper elaborates on the key points tackled in the presentation delivered by the author during the *Juris Diversitas Symposium on "Mediterranean Legal Hybridity"* held at the Old University in Valletta, Malta, June 12, 2010.

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legislator (Sir Adriano Dingli) are also critically discussed. The paper subsequently examines the dichotomy between responsibility in tort and damages under Maltese tort law and concludes by analysing some selected case law.

I. INTRODUCTION

Les larmes ne se monnaient pas goes one of the sayings for rejecting what is known in civil law countries as *dommage moral* and in common law countries as a “non-pecuniary loss” or a “non-economic loss.”¹ If the loss is one which can be easily measurable in monetary terms, almost all legal systems throughout the world agree that compensation is due. Having said that, acceptance of “*dommage moral*”² or “non-pecuniary loss”³ is not universal. “Moral damage” is generally understood to encompass the pain suffered by the victim or the victim’s family for crimes or torts against the life, health, honesty, integrity or emotional well-being of the victim and is generally difficult to calculate in monetary terms.⁴ Munkman refers to moral damage as including “pain and suffering, both physical and mental; loss of the pleasures of life; actual shortening of life; and at least in some cases, mere discomfort and inconvenience . . .”⁵

In Malta, barring recent legislative proposals which might introduce limited forms of compensation for moral damage in the Maltese Civil Code in certain specific instances,⁶ and the presence of such compensation scattered in specific branches of law,⁷ the core provisions of Maltese tort law have never really developed beyond certain basic principles introduced in the Nineteenth Century⁸ and to

1. “Tears do not permit calculation in money.”

2. As opposed to “*dommage matériel*.”

3. As opposed to “pecuniary losses.”

4. ROSA MARIA ABDELNOUR GRANADOS, LA RESPONSABILIDAD CIVIL DERIVADA DEL HECHO PUNIBLE 330-358 (Editorial Juricentro, 1984).

5. JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 62 (1938).

6. Including in particular, Article 1046 of the Maltese Civil Code (which is not discussed in this paper).

7. Namely: Human Rights cases, 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).

8. Which were in turn heavily reliant upon Roman law principles.

date, claiming compensation for moral damage explicitly is seemingly generally precluded. However, the question is whether or not there is more to this issue than at first meets the eye.

The origins of Article 1045⁹ of the Maltese Civil Code can be traced back to Ordinance No. VII of 1868¹⁰ which regulated delicts and quasi-delicts. This was the work of Sir Adriano Dingli who was appointed crown advocate general on December 27, 1853 and who was tasked with the drafting of several Ordinances which would eventually constitute the Maltese Civil Code. It is apparent that in drafting the provisions regulating delicts and quasi-delicts (or torts and quasi-torts), Dingli was greatly influenced by the *Code Napoléon*, but as shall be seen below, this was not the only source used.¹¹

The Napoleonic Code or *Code Napoléon* was established under Napoléon I.¹² It was drafted by a commission of four eminent jurists and entered into force on March 21, 1804. The Code, with its stress on clearly written and accessible law, was a major step in establishing the rule of law and historians have called it “one of the few documents which have influenced the whole world.”¹³

9. At the time of writing, Article 1045 states as follows:

(1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

(2) The sum to be awarded in respect of such incapacity shall be assessed by the Court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.

10. “[E]nacted to amend and consolidate the laws concerning the rights relative to property, and the different modes of acquiring and transmitting it.” GEORGE ALFRED PAGE, A GUIDE TO THE LAWS AND REGULATIONS OF MALTA. 57 (1868).

11. Arturo Mercieca, *Sir Adriano Dingli [Part II] sommo statista, legislatore, magistrato. (Continuazione)*, 1:4 MELITA HISTORICA: J. OF THE MALTA HIST. SOC. 221-260 (1955).

12. Originally called *Code civil des Français*.

13. ROBERT B. HOLTMAN, THE NAPOLEONIC REVOLUTION (Louisiana State University Press, Baton Rouge, 1981).

“Delicts” and “quasi-delicts” are dealt with in Book III, Title IV, Chapter II of the *Code Napoléon* and are regulated by merely five articles.¹⁴ The provision that basically governs the entire law of tort in France today is contained in Article 1382 of the *Code civil* which has remained identical to the words found in the *Code Napoléon*. This article states, “Any act committed by a person which causes damage to another obliges that person by whose fault it occurred to make reparation.”¹⁵ It is clear that in terms of *delictual responsibility*, this provision is very similar to the Maltese equivalent, In fact, Article 1031 of the Maltese Civil Code, provides that “Every person . . . shall be liable for the damage which occurs through his fault.” This general fault-based liability is defined in Article 1032 of the Maltese Civil Code which states:

- (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*.

Under both legal systems, the elements of damage, fault and the causal link between them are necessary preconditions for any successful action in tort. It is important to note that moral damage is completely absent from the French text, despite its being so similar to the Maltese equivalent. Having said that, although the French text remained to a large extent unchanged in the *Code civil*, the interpretation given to the law clearly came to include what is now known as *dommage moral* or similarly, *préjudice moral*.

There is no doubt that when Sir Adriano Dingli was drafting the Maltese provisions in question, such interpretations had already surfaced. As early as 1833, the French Cour de Cassation established that the words of Article 1382¹⁶ were sufficiently general to allow compensation to be awarded for *dommage moral*.¹⁷ It is said by some that the case, which dealt with the grief of a family upon the death of one of the family members, might not have been directly supported in the *travaux préparatoires* which might mean that the authors thereof only had

14. CODE NAPOLÉON art. 1382-1386 (Paris, 1807).

15. Translated from: “Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.”

16. Imposing a liability to make reparation upon anyone causing another a “*dommage*” in general.

17. Cour de Cassation [Cass.] June 15, 1833, Bull. Civ. (Fr.), S.1833. I.458.

material damage in mind.¹⁸ However, Mazeaud and Tunc, write that since there was an absence in the French provisions of an express exclusion of *dommage moral*, then its acceptance by the old pre-code law could be relied on.¹⁹ Even Pothier himself—the *père du Code civil*—who is said to have cut-off from Justinian doctrine, defined “*délit*”²⁰ in a wide enough manner to include moral damage within it.²¹ There is ample evidence that the *dommage* mentioned by Pothier was wide enough to include even *dommage moral*. The Maltese courts themselves, as early as 1909, were quoting Laurent and other influential commentators who were of this opinion and were taking it as a fact that moral damage was included in Article 1382 of the French Civil Code.²²

Today, there is no doubt that French law accepts compensation for moral damage. The *réparation du dommage moral* is a concept that has been commented upon by numerous authors.²³ Some of these define the so-called “*préjudice moral*” (as opposed to a *préjudice matériel*) as being “celui qui atteint le monde immatériel, incorporel, des pensées et des sentiments.”²⁴

These authors however, admit that the notion of “moral damage” needs further explanation and some say that a *préjudice moral* refers to

18. See MAZEAUD & TUNC, 1 TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 301 (5th ed., 1957-1960).

19. See MAZEAUD & TUNC, *supra* note 18, at 299, 302.

20. “On appelle délit le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort à une autre. Le quasi-délit est le fait par lequel une personne, sans malignité, mais par une imprudence qui n’est pas excusable, cause quelque tort à un autre.”

21. ROBERT JOSEPH POTHIER, 1:1 TRAITÉ DES OBLIGATIONS §2, 158 (1761).

22. See *Cini v. Townsley*, discussed in Part II, *infra*.

23. See *e.g.*, ARMAND DORVILLE, DE L’INTÉRÊT MORAL DANS LES OBLIGATIONS (1901); ANDRÉ MANTELET, RÉPARATION DU PRÉJUDICE MORAL (1907). See also, MARCEL PLANIOL & GEORGES RIPERT, 6:1 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: OBLIGATIONS 753 (2d ed., 1952) (where Planiol and Ripert confirm that as long as the damage is personal, direct and certain, the following can be stated: “Toute espèce de préjudice lésant un intérêt protégé par le droit justifie une action en justice, qu’il touche la personne ou le biens, qu’il soit matériel ou moral, susceptible ou non d’une évaluation exacte en argent.”).

24. HENRI MAZEAUD, JEAN MAZEAUD, LÉON MAZEAUD & FRANÇOIS CHABAS, 2:1 LEÇONS DE DROIT CIVIL: OBLIGATIONS, THÉORIE GÉNÉRALE 422 (9th ed., Montchrestien, 1998).

“celui qui ne se traduit point par une perte en argent, parce qu’il porte atteinte à un droit *extrapatrimonial*.”²⁵

It is important to note that moral damage is not all treated in the same manner in France. Since the concept has been refined over the years, we find various categories of moral damage in France including *pretium doloris* (or “psychological suffering”), *préjudice esthétique* (or “disfigurement”) and *préjudice d’agrément* more generally (meaning “deprivation of the pleasures of life”).²⁶ In Malta, for reasons explained below, it seems that no such developments can take place unless the law is amended.

The words in respect of “tortious responsibility” and “fault” more specifically, are very similar to the Maltese equivalent, and it is a fact that Maltese law contains no express *exclusion* of moral damage,²⁷ so the question is why damages cannot be awarded explicitly under the Maltese Civil Code to compensate moral harm. The answer, it seems, lies in the fact that Maltese law contains *additional* provisions inserted by Sir Adriano Dingli which are *not* found in French law. These “additional provisions” deal with *damages*, and in this author’s opinion, actually dilute the civil law nature of the provisions on *responsibility* in tort.²⁸ Unlike the provisions on delictual responsibility, the provisions on *damages* in Maltese law, (including Article 1046 which is not discussed in this paper) seem to function very much on a common law basis in the sense that the Maltese courts do not usually grant any compensation unless a particular type of damage falls within the classes of compensable damage contemplated therein.²⁹

English law is very different to the general fault-based system found in Maltese law dealing with delictual *responsibility*. English law recognises a large number of specially designated torts such as trespass, negligence, nuisance and defamation. In this respect, it is the Maltese provisions on “damages” which seem to function on a similar basis. The Maltese courts’ own reference to British case law may of course, be the reason why the provisions function this way, but it may be argued that Adriano Dingli *himself* may have been more influenced by the British

25. *Id.* Emphasis added.

26. See GENEVIÈVE VINEY & PATRICE JOURDAIN, *TRAITÉ DE DROIT CIVIL, LES CONDITIONS DE LA RESPONSABILITÉ* 39-66 (3RD ED., 2006).

27. Just like French law.

28. MALTA CIV. CODE art. 1045, 1046 (2011), available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1> (Last visited December 9, 2011).

29. Which are clearly rooted in the civil law tradition.

rule in Malta than one might realise.³⁰ Moreover, the idea of regulating specific categories of moral injuries such as in case of a breach of the Promises of Marriage Law³¹ or else of Press Law³² is clearly a common law practice and the Ordinances that grant compensation for moral damage in these specific instances must also be studied on the basis of this premise.³³

As was mentioned above, the notion of *damage* was not regulated specifically in the Code Napoléon (and still is not today), so Adriano Dingli must have drawn inspiration *elsewhere* in this regard. Dingli's own *appunti* state that this "influence" was not derived from French law or even English law but Austrian law.³⁴ It is therefore time to examine the domestic text dealing with damages, in light of the Austrian provisions cited by Dingli himself.

II. THE ORIGINAL DOMESTIC TEXT AND AUSTRIAN LAW

In Adriano Dingli's *appunti*, one finds an index of the provisions he introduced. Adjacent to these provisions, one finds a short description of the sources used (as well as some general remarks). The daunting question here is why Dingli felt the need to *exclude* reference to moral damage from Maltese tort law, when it appears that the Austrian provisions he was using as a reference, permitted the awarding of damages for "suffering"—at least in certain limited instances. This is what shall be examined in this section.

The modern Article 1045 of the Maltese Civil Code was originally split into two articles: Article 751 and Article 752 of Ordinance No. VII of 1868 (also referred to as the "Ordinance" hereinafter).³⁵ The former dealt with *damnum emergens* whilst the latter with *lucrum cessans*.

30. As evidenced in the cases cited *infra*.

31. LAWS OF MALTA ch. 5 (1834), available at <http://www.justiceservices.gov.mt/lom.aspx?pageid=27&mode=chrono> (Last visited November 9, 2011).

32. Which is today embodied in the Press Act of the Laws of Malta. *Id.* at ch. 248.

33. This issue is explained in great detail by the author in the paper entitled MORAL DAMAGES OUTSIDE THE AMBIT OF THE MALTESE CIVIL CODE, ID-DRIIT VOLUME XXI, 109-139, (GhSL—the University of Malta's Law Students' Society, 2011).

34. ADRIANO DINGLI, APPUNTI DI SIR ADRIANO DINGLI 59.

35. See MALTA CIV. CODE, *supra* note 9 & 28, at art. 1045.

A. Damnum Emergens

Article 751 of Ordinance No. VII of 1868 states as follows:

Il danno che dev' essere risarcito da colui il quale lo abbia recato senza dolo, consiste nella perdita reale che il fatto abbia direttamente cagionato al danneggiato; nelle spese che questo abbia in conseguenza del danno dovuto fare; e, se il danneggiato e` una persona che lavora per salario o altro pagamento, nella perdita ancora di tale guadagno.³⁶

Very basically, *damnum emergens*, as dealt with in this article, are those actual losses incurred as a result of the injury sustained. It is a well-known fact that Maltese courts have generally restricted *damnum emergens* to *pecuniary losses* that can be easily quantified and have almost never explicitly included moral damage under this heading.³⁷ The words *senza dolo* (without malice) in the original text indicate that in cases of culpable negligence, only *damnum emergens* could be claimed whereas in those cases where the person who caused the damage did so intentionally or maliciously, even *lucrum cessans* could be claimed. In respect of the *type* of damages that could be claimed under *damnum emergens* at the time back then, the situation is more or less similar to the position today. Article 751 indicated that the damage *shall* consist:

1) “. . . nella perdita reale che il fatto abbia direttamente cagionato al danneggiato.”

This translates almost identically into the wording of the modern Article 1045: “. . . the actual loss which the act shall have directly caused to the injured party . . .”

It can be argued that basing ourselves *purely* on the wording of the law, it might be difficult to understand why a moral damage should

36. Translated into English as follows:

The damage that has to be made good for by whoever caused it without malice consists in the actual loss which the act shall have directly caused to the injured party, in the expenses that that the latter may have been compelled to incur as a result of the damage caused and if the injured party is a person who works for a salary or other payment, in the loss of such earnings.

37. The reader is advised to refer to the author's thesis for more detail on this issue. See Micallef-Grimaud, *Excluding Moral Damages*, *supra* star-footnote.

be excluded from this “actual loss.” With respect to the concept of a *perdita reale* the Maltese courts have always understood an “actual loss” to be a *material* or *economic loss* and nothing more.³⁸ By way of example, harm caused to movable or immovable property would usually lead to depreciation in value of the said property, and such “actual loss,” if directly caused by the act in question, can be compensated under this heading. This contrasts sharply with the recent innovations that have taken place outside the ambit of the Civil Code.³⁹

Having said the above, in the recent judgment *Linda Busuttil et v. Dr. Josie Muscat et*⁴⁰ the Court addressed this issue (among others) and indicated that the term *actual loss* found in Article 1045 (as well as the term *any damage* found in Article 1033 of the Civil Code)⁴¹ can no longer be interpreted as referring solely to patrimonial damage and must therefore encompass *damage* of all kinds,⁴² including non-patrimonial damage. In this particular case dealing with a physical injury (a facial scar on a female victim)⁴³ resulting from an unsuccessful medical intervention, the plaintiff was awarded €5,000 in compensation for moral damage, calculated on an *arbitrio boni viri* basis. This judgment has been

38. *Id.*

39. Especially in the realm of Intellectual Property Law where in one particular legislative provision (Article 12 of Enforcement of Intellectual Property Rights (Regulation) Act [Chapter 488 of the Laws of Malta]) “*moral prejudices*” seem to be included under “*actual prejudices*.” *Enforcement of Intellectual Property Rights Act, in LAWS OF MALTA* ch. 488 art. 12 (2006), available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8954&l=1> (Last visited November 7, 2011). The author has his doubts on the consciousness of such innovations and believes that this is more a case of strict adherence to European Union directives and regulations rather than anything else. The Directive in question is Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of intellectual property rights which is transposed almost word-for-word into Chapter 488 of the Laws of Malta.

40. *Linda Busuttil et v. Dr. Josie Muscat et*, First Hall (Civil Court 2011).

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

42. “Hsara” in Maltese.

43. A category of injuries which has generally been treated in a particular manner by the Maltese courts as illustrated *infra*.

appealed and it therefore remains to be seen whether or not the principles enshrined therein will be confirmed or rejected by the Court of Appeal.⁴⁴

2) “. . . nelle spese che questo abbia in conseguenza del danno dovuto fare . . .”

As the reader will note, this is also almost identical to its modern-day equivalent: “. . . *in the expenses which the latter may have been compelled to incur in consequence of the damage . . .*”

This refers to expenses such as necessary repairs after one’s property sustains damage. While the expenses of repairing the said property fall under this sub-heading, the *reduction in value* of the same (which in most cases can never return to its former state) is an *actual loss* as seen above. The courts resort to many principles in compensating, such as developing the rule that the victim should try to minimize expenses, as far as possible, that the person who committed the tort will have to pay.

Medical expenses for physical injuries are also recoverable under this heading (excluding any claims for “pain and suffering” caused by the injuries). Expenses for the treatment of *psychological* injuries (as distinguished from compensation for *the injury itself*) would also theoretically be recoverable under *damnum emergens*.

3) “. . . e, se il danneggiato e` una persona che lavora per salario o altro pagamento, nella perdita ancora di tale guadagno.”

The third category of damages that could be claimed originally is also similar to what may be claimed today under Article 1045: “. . . *in the loss of actual wages or other earnings . . .*”

The well-known case *Butler v. Heard*,⁴⁵ dealing with a street collision between two vehicles, effectively laid down the basic formula for calculating such damages (which goes beyond the scope of this paper). It suffices to say that such formulae give rise to certain problems under this heading just like they do under the *lucrum cessans* heading (as discussed below).

The notion of “loss of wages” under *damnum emergens* can merge with *lucrum cessans* (“loss of future profits”) unless some sort of dividing line is drawn. In the case *Shaw v. Aquilina*⁴⁶ it was concluded that the reference to a loss of “actual or *other earnings*” in Article 1045,

44. The appeal was registered on December 16, 2010.

45. Court of Appeal (Civil, Superior 1967).

46. Court of Appeal (Civil, Superior 1996) (*per* J. Said Pullicino, Carmel A. Agius & J. D. Camilleri).

can be deemed wide enough to include loss of actual profits *until the date of the judgment*. Profits that could be lost in the future⁴⁷ are deemed to fall under *lucrum cessans* (discussed *infra*). In Malta, *damnum emergens* are usually easily proved and very often, compensation under this heading is awarded without any contestation from any of the parties.

Alongside Article 751 dealing with *damnum emergens*, Dingli wrote:

“Austr. 1293, 1323 a 1325 con modif.”

As confirmed by local case law, Article 751 was derived almost entirely from Austrian law as amended by Adriano Dingli himself.⁴⁸ Private law in Austria is divided into general private law—applicable to all persons—and specialised forms of civil law—applicable only to certain categories, such as commercial law for businessmen or employment law for employers and employees. The major part of what is considered “general private law” is regulated in a comprehensive private law code called the Allgemeine Buergerliche Gesetzbuch (“ABGB”). It is interesting to note that ever since Dingli referred to the laws contained in the ABGB, very little has changed. In fact, the provisions he quoted have remained almost identical. Let us look at the laws cited by Dingli.

Article 1293 (ABGB) is the first article to deal with “damage”⁴⁹ whilst Articles 1323 and 1324 (ABGB) deal with methods of indemnification for damage.⁵⁰ Article 1325 (ABGB), which was also cited explicitly by Dingli, is very important. This so called *Schmerzensgeld* dealing with bodily harm, has definitely existed since

47. That is, after the judgment has been delivered.

48. See Giuseppe Fenech v. Vincenzo Pace, Court of Appeal (Civil 1937) (*per* A. Mercieca, Rob. F. Ganado & E. Ganado).

49. And states as follows: “Damage is every detriment which has been caused to any person in regard to his property, his rights or his person. The loss of profits which a person expects according to the usual course of his affairs is to be distinguished there from.”

50. Article 1323 (ABGB) states as follows: “In order to make amends for damage caused, the damaged property must be returned to the former state (*status quo*) or, if this is not possible, the estimated price thereof must be paid. Compensation for only the actual damage suffered is called indemnity; compensation which includes lost profit and the elimination of all effects of the injury is called full satisfaction,” whilst Article 1324 (ABGB) states as follows: “In case of damage caused by malice or by gross negligence, the person injured is entitled to demand full satisfaction, and in other cases only indemnity. Where the general expression ‘damages’ occurs in the law, it is to be interpreted pursuant hereto.” ALLGEMEINES BÜRERLICHES GESETZBUCH (1811), available at <http://www.ibiblio.org/ais/abgb1.htm> (Last visited November 9, 2011).

the origins of the ABGB, so the following applies in Austrian law today as it did at the time when Adriano Dingli was using it as a reference:

A person who harms another person bodily shall bear the expenses of the cure of the person injured, compensate him for lost profits, or where the injured person is made incapable of earning a livelihood for the lost future gains, *and moreover pay him at his request a compensation for his suffering*, in accordance with the particular circumstances of the case.

It is imperative to focus on the italicized words. It is clear from these words that Austrian law has always allowed “some form” of damages for *suffering* even though it must be said, it appears that “immaterial damage” is not *generally* compensated under Austrian law. That being said, certain damages for pain and suffering are actually allowed but only if the person responsible acted with intent or gross negligence, and if the law does not exclude compensation of non-economic damage.⁵¹ The type of “non-pecuniary damage” which *is* compensable is worth mentioning here. Such damage includes the so-called *affection interest*, *the deprivation of the possibility to use a damaged or destroyed item of property*, *the loss of comfort and recreation*, and finally *frustrated expenditures*.⁵² The question thus is self-evident: *Why did Adriano Dingli seemingly and entirely exclude damages for pain and suffering?*

Before answering this important question, we need to examine what was included in domestic Article 752 dealing with *lucrum cessans* (found in Article 1045 today), which must be read together with Article 751 and in respect of which Article 1325 of the ABGB gains even more importance.

B. Lucrum Cessans

Very basically, *lucrum cessans* is referred to in the law as being *a loss of future earnings* which must be a result of the permanent incapacity that which the act shall have directly caused. The Maltese courts have generally been more ‘liberal’ in respect of the *lucrum cessans* heading and it is here that they have sometimes taken moral damage into consideration—some in a more explicit manner than others as shall be seen below.⁵³

51. As in Article 1330 of the ‘ABGB’ for example. *Id.* at art. 1330.

52. Inferred from the second half of Article 1331. *Id.* at art. 1331.

53. *See supra* Part II.A.

Article 752 of Ordinance No. VII of 1868 states as follows:

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 lire sterline.⁵⁴

It is apparent that for *this* type of damage to be recoverable, the person liable for its causation must have acted intentionally. It should be noted that the law was amended in 1938⁵⁵ changing this requirement and grouping *lucrum cessans* and *damnum emergens* into the same article.⁵⁶ It should also be stressed that, at least theoretically, the loss of future earnings can only be compensated if there is a permanent incapacity. Temporary disabilities (however long they may last) are excluded here, although from the *Shaw v. Aquilina* case discussed above, it can be deduced that any effect the temporary disability may have on one's income until the date of the judgment should be recoverable under *damnum emergens*.

Another thing that must be noted is the fact that generally, what one is compensated for under *lucrum cessans* is the effect the disability has on one's ability to generate an income and not for any effect of the disability on any other areas of one's life (like harm to one's feelings.) It is important for the reader to note that there have been several exceptions in this regard.⁵⁷

Under Article 752, the legislator included a ceiling fixed for *lucrum cessans* and this was limited to £100. Thus, the approach of the

54. Basically translated as follows:

However, the damage which must be compensated from whosoever caused it maliciously, extends in addition to the losses and expenses mentioned in the last preceding article (*i.e.*, Article 751), to the future earnings which the fact (causing damage) prevents the victim from receiving, taking into account his state. The Court shall establish for the loss of such future earning, depending on the circumstances, a sum not exceeding one hundred sterling [£100].

55. By 'Ordinance No. VII of 1868 Amendment Ordinance,' 1938–(Ordinance No. III of 1938).

56. The modern Article 1045. MALTA CIV. CODE, *supra* note 9 & 28, at art. 1045.

57. *See supra* Part II.A.

original legislator was to limit damages under *lucrum cessans* by linking this to “loss of income” (as opposed to “loss of enjoyment of life”) and also by limiting the amount that could be awarded in compensation. We shall examine the rationale for this in some detail below. The legal position was amended in 1938 due to an apparent change in mentality⁵⁸ and in 1962, the ceiling was removed completely⁵⁹ so that the courts were free to award large amounts in compensation for the effects of an injury on one’s future earnings. The position today is that in all probability, a new ceiling will be imposed in the very near future (which seems to be around €600,000 according to current proposals).⁶⁰ It obviously remains to be seen in what manner this will be applied and what effect it will have on claims for damages under Article 1045.

The main point here is that the *lucrum cessans* heading was always problematic—and remains so nowadays, despite the fact that certain cases attempted to create guidelines which might help the courts. Above, reference was made to the *Butler v. Heard* case.⁶¹ It is important to note that the appeal stage of *Butler v. Heard* (discussed below) effectively laid down a method of compensation which would be followed (albeit tweaked) by most judgments to this very day. It should also be noted that this method of compensation might be explicitly mentioned in the amendments to Article 1045 and 1046 of the Maltese Civil Code (henceforth referred to as the “Amendments”) which are currently being proposed.⁶² The basic workings of the “*Butler v. Heard* formula” used to calculate the *lucrum cessans* due have been included in rudimentary style as a footnote for the reader’s convenience.⁶³

58. Reflected by the numerous cases that began exhibiting a change in attitude as discussed in the author’s LL.D. thesis.

59. By the Civil Code (Amendment) Ordinance, 1962—(Ordinance No. XXI of 1962).

60. See *New Law to Remove Uncertainties on Compensation*, TIMES OF MALTA, June 1, 2010, available at <http://www.timesofmalta.com/articles/view/20100601/local/new-law-to-remove-uncertainties-on-compensation> (Last visited November 9, 2011).

61. See *supra* note 45.

62. As mentioned *supra*, articles 1045 and 1046 are currently under review and it is highly probable that they will be amended in the near future. An Act amending the said articles had already been passed by the Maltese Parliament (Act VI of 2004) but this never came into effect. Since these new amendments might be contained in other legislative instruments, it would be more prudent to await the termination of the consultation period currently underway before commenting in any detail on the said amendments.

63. The average weekly wage of the complainant is taken and adjusted for inflation. It is then multiplied by the number of weeks in a year and then

The Amendments in question would, among other things, introduce a set of “guidelines” which would help the courts adopt certain methods of calculating damages, as well as include a detailed table listing various percentages of disability depending on the type of injury sustained. The scope of such Amendments seems to be of aiding pre-trial assessments of particular disabilities and therefore facilitating out-of-court settlements.

Alongside Ordinance No. VII of 1868 art. 752, dealing with *lucrum cessans*, Adriano Dingli wrote in his *appunti*: “Austr. L. c. con modif.”

Presumably, no specific article is cited because in drafting his own provisions on *lucrum cessans*, Dingli was looking at the Austrian provisions as a whole as well as the specific articles mentioned above—particularly Article 1325 (ABGB). The content of Dingli’s Article 752 in fact, is taken from various Austrian provisions, some of which were not separated from the content found in Article 751 of the Ordinance.

It was Dingli’s *modifche* that separated the concepts of *damnum emergens* and *lucrum cessans* into separate provisions and it was his idea to give them separate requirements. One would generally have had to verify whether the injury was caused intentionally or else through culpable negligence⁶⁴ to see which provision applied. As noted above, the Austrian provision on methods of indemnification defines both *damnum emergens* and *lucrum cessans* in the same provision as being “indemnity” and “full satisfaction” respectively.⁶⁵

It is clear that Adriano Dingli was very selective in transposing provisions from the ABGB into Maltese law. The only rationale Dingli gives for limiting the various provisions of the ABGB into just two domestic provisions and for limiting the amount that could be claimed

multiplied by the percentage of disability caused to him or her (which must be permanent). The percentage is determined by asking a medical professional how far the disability has produced incapacity to generate an income and not how far it has affected his overall health. Finally, all of this is multiplied by the so-called “multiplier” (the number of years which the court predicts that the plaintiff would have continued to work). Usually this is taken to be the national age of retirement, but nonetheless a full multiplier is hardly ever given. This is the basic formula but there have been numerous decisions that altered or refined it (which go beyond the scope of this paper) including for example, deductions made for “lump sum” payments.

64. Which is not stated explicitly, but can be inferred from the general notions of tort.

65. See ALLGEMEINES, *supra* note 50, at art. 1323.

under Article 752 dealing with *lucrum cessans* is found in his *appunti* where he states:

I am including a limit of 100 (sterling) because otherwise, it might cause the (financial) ruin of the person causing the damage, whilst future earnings are subject to probability and might be lost from one moment to another for natural causes. The limit is a norm for the Courts in this entirely new subject matter.⁶⁶

Although Adriano Dingli only described his rationale for limiting the amount that could be claimed under *lucrum cessans*, one may infer his more general concerns as well. The first concern exhibited by Dingli is, “the (financial) ruin of the person causing the damage.”⁶⁷ Dingli was hesitant to leave the amount of damages open-ended because this could lead to the financial ruin of the person liable to compensate the injured party. This is a fear that some bring to light to justify excluding open-ended compensation for moral damage even today.⁶⁸

His second concern relates to the fact that, “future earnings are subject to probability and might be lost from one moment to another for natural causes,” meaning that he feared cases of unjustified enrichment taking place.⁶⁹ Since the future is uncertain, one could in theory, compensate someone for future earnings which might never materialise, thus going beyond the concept of *restitutio in integrum*. Of course, this may trigger a wider discussion on whether or not the *possibility* of such unjustified enrichment taking place should jeopardise the *right* to seek justice by opting for alternative means of compensation.

The third comment to reflect upon is, “this entirely new subject matter.”⁷⁰ It seems thus, that Dingli decided to start slow and impose limits on this untested virgin law. Several years later, some cases would

66. Translated from the original Italian text: “Metto un limite di 100 perche` altrimenti si potrebbe cagionare la rovina del danneggiante, mentre il guadagno futuro e` cosa di probabilita` e puo` mancare da un momento all` altro per cause naturali. Il limite e` una norma alla Corte in questa materia tutta nuova.”

67. “. . . la rovina del danneggiante . . .”

68. See Micallef-Grimaud, *Excluding Moral Damages*, *supra* star-footnote, at ch. 4.

69. “. . . il guadagno futuro e` cosa di probabilita` e puo` mancare da un momento all` altro per cause naturali.”

70. “. . . questa materia tutta nuova.”

quote Dingli and would even argue that he was correct in adopting such a careful approach.⁷¹

It is this author's opinion that the omission of damages for "pain and suffering"—which was clearly intentional—was not a decision based on ideological incompatibility, but one based on practicality. In drafting the "unique" provisions on damages, Dingli chose a system of law that was similar to Malta's at the time. Austrian law is fault-based just like French law. It is also made up of Roman law concepts, which still survive in Maltese legislation to this day. If Dingli felt that compensation for moral damage would not be compatible with Maltese law, he could have very easily excluded it explicitly. This author believes that Adriano Dingli's limitations were merely a manifestation of initial hesitation; and that he probably expected further development of this dynamic branch of law.

The references to the sources of law are there to aid the courts in their interpretation of Dingli's provisions. If the courts felt that compensation for "suffering" (which was in the original source of law) should have been interpreted in the words, ". . . *al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo stato. . .*,"⁷² what was there to stop them? Where does it say in the original law that moral damage should *not* be taken into account when calculating what is owed to the injured party? Certainly, there was never an explicit provision entitling such injured party to compensation for moral damage on a separate basis, but this cannot be interpreted as a defiant repulsion of the concept of moral damage.

III. THE DICHOTOMY BETWEEN RESPONSIBILITY IN TORT AND DAMAGES UNDER MALTESE LAW

It may be argued that if compensation for moral damage was to be explicitly excluded from Maltese law, then Adriano Dingli would have worded the provisions relating to responsibility in tort differently. There would not have been the possibility of interpreting "damage" (in terms of harm done) to include also a moral damage. The problem however, is that this remains a plausible interpretation even to this day.⁷³ Above, it was noted how a recent judgment (which has been appealed)

71. See Fenech v. Pace, *supra* note 48.

72. ". . . to the future earnings which the fact (causing damage) prevents the victim from receiving, taking into account his state."

73. As explained in more detail *infra*.

has proceeded to award compensation for moral damage on the basis of such non-restrictive interpretation.⁷⁴

An important early case, which dealt with compensation for moral damage specifically, was the 1908 judgment *Cini v. Townsley*.⁷⁵ Our scope here is to examine what was said in relation to moral damage and its compatibility or otherwise with the wording of Ordinance No. VII of 1868 (which was illustrated in the previous section). This case dealt with an *iniuria*, which is a generic term derived from Roman law, usually meaning a “harm done to one’s honour or reputation” as examined by the author in other works.⁷⁶ There are actually various types of *iniuria*, some of which were (and still are) regulated elsewhere in specific areas of Maltese law,⁷⁷ and which also allow compensation for moral damage if certain conditions are met. Here, however, the type of *iniuria* being alleged was one caused by “parole ingiuriose e diffamanti all’indirizzo dell’attore tendenti ed atti a gettare discredito sul detto Royal Hotel (belonging to the plaintiff) e quindi a recare grave danno all’attore,” which fell under the “general concept of *iniuria*.”⁷⁸ Since this type of *iniuria* was not regulated by any specific law, the claim had to be based on the general provisions of the Ordinance.⁷⁹

The case is interesting because the claim made by the plaintiff explicitly lists moral damage before material damage in the demand for compensation despite the fact that there is no mention of moral damage anywhere in the Ordinance as drafted by Adriano Dingli. The Court of First Instance, commenting on whether it could grant damages or not, simply said that in addition to the fact that such moral damage was not proven, the action could not succeed because “. . . our laws do not contemplate the ‘moral damage’ upon which the present case is based (Ordinance VII of 1868 art. 739,751, 752).”⁸⁰

74. See *supra* note 40.

75. Michele Cini v. Ernest Townsley ed altri, First Hall (Civil Court 1908).

76. See Micallef-Grimaud, *supra* note 33; Micallef-Grimaud, *Excluding Moral Damages*, *supra* star-footnote.

77. As for example, in the Promises of Marriage Law. LAWS OF MALTA, *supra* note 31, at ch. 5.

78. Which seems to have never been regulated by specific provisions of the Ordinance (or indeed the modern Civil Code).

79. Ordinance No. VII of 1868 arts. 739, 751, 752.

80. Translated from the original Italian text: “. . . le nostre leggi non contemplano il danno morale sul quale e` basata la presente istanza.” Ordinanza VII del 1868 arts. 739, 751, 752.

Thus, the courts more than one hundred years ago, adopting a strict-interpretation approach, were citing the lack of a legal basis as the main reason for not compensating for moral damage in general (and in an explicit manner). Although the plaintiff's claims were eventually rejected by the Court, an appeal was filed and the case took a very interesting twist when private international law was invoked by the Court of Appeal.⁸¹

At the appeal stage, the Court stated that the applicable law was not Maltese law but French law since the incident took place in the territorial waters of Tunisia.⁸² What the Court had to say in respect of French law is very important because it indicates to us whether Maltese courts, at that particular moment in time, were ready to reject or accept compensation for moral damage in general (not merely in cases of an *iniuria*) based on laws very similar to those found in Malta. The Court immediately pointed out that the applicable legal provision was Article 1382 of the French Civil Code. The reader will remember from what was discussed above that this provision makes absolutely no reference to moral damage and is, ironically enough, a reflection of the Maltese law on responsibility in tort. Despite the similarities with the Maltese provision on "fault" (even to this very day), the Court quoted Aubry & Rau, and Laurent amongst others who state that "not only material damage is compensable but also moral . . ."⁸³

The Court actually went on to determine the "extent of moral damage" that could be compensated for in this case and said that in calculating this, the Court had to carefully examine the gravity or otherwise of the *effect* produced by the damage in question.⁸⁴ Although the Court decided that the moral damage in this case was not grave, (owing to the fact that the plaintiff's business was not negatively affected by the comments made by the defendant), the Court nonetheless reversed the first instance judgment and proceeded to award five shillings as compensation for the moral damage suffered by the plaintiff.

This case is also noteworthy because the Maltese Court actually adopted an interpretation given to a foreign provision which is similar to

81. Michele Cini vs. Ernest Townsley Court of Appeal (Civil 1909) (*per* G. Carbone, G. Pullicino & A. Parnis).

82. *Id.*

83. "Secondo l'opinione piu' accreditata nella dottrina e nella giurisprudenza di quella nazione non solo il danno materiale, *ma anche il morale* e' risarcibile mediante un indennizzo pecuniario."

84. "Nel calcolare l'estensione del danno morale devesi avere specialmente riguardo all'effetto piu' o meno grave che la causa che ve diede luogo e' atta a produrre e, nel caso, tali effetti sono minimi."

its counterpart in Malta. The only difference is that Maltese law does not stop at regulating responsibility in tort. Maltese law, to this day, also regulates the damages that can be awarded in what were then Articles 751 and 752. In other words, moral damage was accepted on the basis of the French provision dealing with responsibility in tort because the Maltese Court appreciated the fact that moral damage could be reconciled with the wording thereof. So, the question is: “If Maltese law did not contain the articles regulating *liquidation* of compensation but merely those regulating *responsibility* in tort⁸⁵, would the Court of First Instance have interpreted Maltese law in a similar fashion?”

In this regard, Professor V. Caruana Galizia believes that:

[D]amage may refer either to the person or to the property, and according to the prevailing doctrine, which is based on the juridical traditions of Roman law which included defamation among private delicts, the damage may also be moral. This principle has been implicitly recognised by the judgment delivered by the Court of Appeal in re *Cini v. Townsley*, on, the 10th November, 1909.⁸⁶

This brief statement, which was not removed in 1978 by Professor J.M. Ganado in the revised edition of Caruana Galizia’s *Notes on Civil Law*, is very important. Caruana Galizia argues that what the Court of Appeal was saying in terms of French law, applies even to Maltese law by inference. He even mentions the juridical traditions of Roman law and indirectly cites the concept of *iniuria* as being applicable to Maltese law as well. However, according to the findings of the thesis upon which this paper is based, a moral damage (or harm to one’s feelings more generally) only seems to be sufficient to give rise to *responsibility* in tort.⁸⁷

When it comes to liquidation of damages, the Maltese courts are faced with provisions that were included by Adriano Dingli but are not found in French law. What is peculiar in Maltese law is that even though there seems to be agreement on the issue of responsibility, there is no corresponding provision in the Maltese Civil Code which explicitly entitles the victims to claim compensation in tort for such harm if it is purely a moral damage. In other words, a “moral harm” seems to be sufficient to find the culprit directly responsible in tort under the Maltese

85. Being almost identical to the French provisions cited in this judgment.

86. V. CARUANA GALIZIA, NOTES ON CIVIL LAW 312 (J. M. Ganado ed., 1978).

87. See *supra* star-footnote and accompanying text.

Civil Code but “Danni Morali” in terms of compensation, cannot be the sole basis of the claim—at least within the rigid confines of the law currently in force.⁸⁸ In theory, thus, this discrepancy means that a person who causes a moral harm to someone, may be found responsible under Maltese law of tort, but in all probability (subject to possible exceptions as discussed above),⁸⁹ such person would not be forced to compensate the victim(s) unless some sort of real or material damage is *also* caused or unless the issue is regulated by a specific branch of Maltese law outside the ambit of the Maltese Civil Code.⁹⁰

In other words, it appears that the provisions regulating compensation under Maltese law actually *restrict* the more general provisions regulating responsibility in tort and actually prevent compensation for moral damage from being claimed explicitly under the former. The irony here is that French does not explicitly address compensation for moral damage, but since the French provisions only deal with responsibility, the problems that arise locally are non-existent in France.

It appears thus, at least in theory, that had Adriano Dingli omitted the provisions he modeled from Austrian law⁹¹ the Maltese courts might have been ready as early as 1909 to deem compensation for moral damage as being part of Maltese tort law.

IV. SELECTED CASE LAW SEEMINGLY TAKING MORAL DAMAGE INTO CONSIDERATION

Due to length constraints, it is only possible to comment on a few cases here. These shall serve the purpose of illustrating certain “liberal” mechanisms used by the Maltese courts when compensating in tort.

The important 1952 case *Victor Savona pro. et. noe. v. Dr. Peter Asphar*, dealt with the amputation of a boy’s leg as a result of the

88. The very recent case *Linda Busuttil et v. Dr. Josie Muscat et* which was discussed above (*see supra* note 40) awarded compensation for moral damage to the plaintiff, partially on the basis of Article 1033 of the Civil Code (dealing with responsibility in tort) despite the content of Article 1045 (dealing with damages). However, it remains to be seen whether or not this judgment will be confirmed by the Court of Appeal.

89. *Id.*

90. *See supra* note 7.

91. And which the courts have applied in practice very much on a common-law basis as described above and as shall be seen in the next subsection.

negligent medical intervention carried out by the defendant and the conclusions reached therein clearly indicate that every scenario has to be judged on a case-by-case basis. The Court of First Instance⁹² claimed that apart from the *damnum emergens* due as a result of the erosion of the injured party's patrimony⁹³ the plaintiff was also entitled to *lucrum cessans*. After several discussions relating to the percentage of disability that applied (a deficiency that has always beleaguered the Maltese legal system),⁹⁴ the Court of First Instance went on to make it clear that under this category, one had to include also: "[T]hose damages due for the psychological insult of the loss of the leg, the inability of Victor Savona to go to school and his moral suffering when he sees, especially in the future, that he is always going to depend almost entirely on others."⁹⁵ The Court of First Instance decided to award £650 as compensation under *lucrum cessans* and in doing so, it is clear that moral damage was taken into consideration. The fact that the Court could not award compensation for moral damage *explicitly* is obvious for the reasons stated above, but the Court nonetheless used the legal basis of *lucrum cessans*, and particularly the guidelines in what is today Article 1045(2)⁹⁶ to award, at least in part, compensation for what it called "moral suffering" and the "psychological insult" of losing a leg due to someone else's fault.⁹⁷

The Court of Appeal⁹⁸ argued that there was no need to go into the issue of *damnum emergens* because these damages were clearly due. Similarly to what had been taking place up until then (and what generally happens today), the Court dealt with *damnum emergens* quite briskly and without complicating its calculations by including any novel concepts.

The reasoning of this judgment is very important because the Court of Appeal actually increased the amount of compensation due under *lucrum cessans*, and it did so predominantly on the basis of the

92. First Hall (Civil Court 1952).

93. Amounting to 132 pounds and 6 shillings.

94. See Josephine Anne Cini, *Traditional and New Approaches to the Problem of the Assessment of Damages in Fatal and Personal Injury Claims* (LL.D. thesis, University of Malta, 1997) (on file with the author).

95. "[D]awk (id-danni) dovuti għall-insult psikiku tat-telfa tas-sieq, l-inkapaċità ta' Victor Savona li jmur skola, u s-sofferenzi morali tiegħu meta jara, wisq iżjed 'il quddiem, li huwa dejjem u f'kollox irid kwazi jiddependi minn hadd ieħor."

96. Article 1088(2) at the time.

97. Through negligence.

98. Court of Appeal (Civil, Superior 1952) (*per* L. A. Camilleri, A. J. Montanaro Gauci & W. Harding).

moral injuries and the pain and suffering caused to the plaintiff. The Court of Appeal started its reasoning by summarizing what is today Article 1045. Among other things, the Court commented on the fact that the maximum that it could now award as *lucrum cessans* was £1,200 because the act was not intentional (in which case there would have been no capping).⁹⁹ The Court also said that in exercising its arbitrary discretion, the Court should consider the circumstances of the case, the nature and degree of the incapacity, and condition of the injured party.¹⁰⁰ This reflects the wording of Article 1045(2), which is very important because these words served as the legal basis for taking into consideration several circumstances which had nothing to do with economic or material calculations.

The Court went on to trace the law's development through time. It commented on Adriano Dingli's *appunti* and illustrated his fears in respect of *lucrum cessans*.¹⁰¹ The Court pointed out that the 1938 amendments were a reflection of the fact that times were changing and that the legislator felt the need to modernise the laws drafted by Dingli. The Court stated that this was justified due to the "augmented intensity of life" and the great burden on incapacitated persons who will likely lose more future earnings (and suffer a loss of their "purchase power").¹⁰²

The Court then invoked the maxim *in probatione lucri cessante sufficiens praesumptiones* and went on to refer to English case law. It pointed out that in the case *Philips v. London & South Western Rail Co.*,¹⁰³ it had been stated that: "Such damages cannot be a perfect compensation of the circumstances of the plaintiff and by making allowances for the ordinary chances of life." In relation to an argument that rages on to this very day,¹⁰⁴ the Court opined that fixed scales are not really possible in such situations. To give weight to this argument,

99. This capping was removed by the 1962 amendments. *See supra* note 59.

100. "Fl-eżerċizzju ta' l-arbitriju diskrezzjonali tagħha l-Qorti għandha tqis ċ-ċirkustanzi tal-każ, ix-xorta u grad ta' l-inkapaċita` u l-kondizzjoni ta' parti li tbat l-ħsara."

101. Which were only limited to those cases involving *dolo* and capped at £100.

102. "[I]ntensita` awmentata tal-ħajja, li minn naħa waħda timponi eżiġenzi akbar u kwindi l-inkapaċi aktarx jitlef aktar qliegh futur, u stante l-"purchase power" diminwit tal-flus."

103. 5 Q.D. 78 (Court Appeal 1879).

104. *See* Micallef-Grimaud, *Excluding Moral Damages, supra* star-footnote, at ch. 4.

the Court quoted Law Justice Scott in the English Court of Appeal case *Bailey v. Howard*¹⁰⁵ who was of this same opinion. The Court then moved on to assess the amount of *lucrum cessans* due to the injured party in the case at hand, and determined that the defendant's negligent act left the boy with a stump that could not be improved by benefitting from artificial limbs. Despite the fact that the boy had already been slightly incapacitated from birth, the Court said that the act of the defendant now rendered the boy a 'hopeless cripple.' The Court was clearly angered by the state the boy was reduced to, and it moved on to discuss the moral injuries at play by referring to the English case *Heaps v. Perrite Ltd.*¹⁰⁶

According to what was common practice at the time (especially prior to the 1938 amendments), it should come as a surprise to many that a Maltese court would consider such things as "suffering," both present and future, and such concepts as "the joy of life" which is a non-material consideration *par excellence* (not being easily quantifiable in monetary terms). Despite this fact, the Court in this case was ready to take into consideration the fact that the boy in question would no longer be able to ride a bicycle or kick a football; these are undoubtedly moral considerations.

It is also clear that the Maltese Court was not merely quoting a foreign case. In its own reflections on the case at hand, the Court did not focus on any economic losses *per se* or even the child's earning capacity. It adopted the spirit of English case law and focused on the child's ability to enjoy life. It said that following the defendant's negligent intervention, Savona would no longer be able to do certain things like "play with

105. December 14, 1938, where Justice Scott said the following:
... I see no means of arriving at any sort of quantitative scale for the guidance of judges and juries, except the gradual working out, chiefly through the common sense of juries, of the amount that in the civilization of today is regarded as reasonable for that particular head of damages.

106. *Heaps v. Perrite Ltd.*, 2 All E.R. 60 (Eng. 1932), where it was stated that:

We also have to take in consideration not only the suffering which he had immediately after the accident, but the suffering that he will have throughout his life in future, the constant necessity of having assistance in the carious things that he has to do for his own purposes, apart from earning money; also the fact that the joy of life will have gone from him; he cannot ride a bicycle, cannot kick a football, he cannot have any of the forms of recreation which appeal to the healthy ordinary man . . .

children and keep up with whatever he wishes to do.”¹⁰⁷ Even in its closing arguments, the Court did not swerve into any specific economic considerations and made reference to the “. . . opportunities which life has to offer healthy persons and persons who can keep up with life’s exigencies.”¹⁰⁸

The Court then said that it also considered the amounts given in other local cases when the injury was of a far less severe nature.¹⁰⁹ After considering all those facts, it concluded that the amount awarded by the Court of First Instance was too low and it therefore raised the amount due from £650 to £900 pounds. The total sum awarded was £1,032.60¹¹⁰ and was perhaps one of the largest sums awarded in similar cases up to that moment in time. Subsequent cases would quote this judgment in justifying similar awards.¹¹¹ The Court of Appeal used the legal basis of the *lucrum cessans* heading to compensate the injured party for the moral damage suffered. The Court also based its reasoning on Article 1088(2) (the modern 1045(2)),¹¹² and it must have felt that the words contained therein were wide enough to include even moral harm as being one of the “relevant circumstances” which would help the Court reach an equitable sum to be awarded.

Another case that was decided on similar grounds to the above is the 1964 judgment *Paolo D’Amato noe v. Joseph Ebejer*.¹¹³ This case dealt with a “*sfregju*,” or scar, caused to the face of the plaintiff’s daughter. Whereas in cases of unlawful deaths, the injured parties were being compensated almost exclusively on economic terms,¹¹⁴ in cases of this nature the Court stated explicitly that “one must not look (at the

107. “. . . jilgħab mat-tfal u jlahħaq ma` dak li kien jixtieq jagħmel.”

108. “. . . l-opportunitajiet li toffri l-ħajja għal min hu b’saħħtu u jista’ jlahħaq ma’ l-eżiġenzi tagħha . . . ”

109. See *Coppola v. England Sant Fournier* (1944); *Borg v. Bonnici* (1948).

110. With relative interest payable at different rates.

111. See e.g., *Carmela Fenech pr. et ne. pro et noe v. Antonio Galea* (1956) (confirming several points made in this judgment).

112. Article 1045(2) of the Maltese Civil Code, which, as already illustrated above, states as follows: “The sum to be awarded in respect of such incapacity shall be assessed by the Court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.” MALTA CIV. CODE, *supra* note 9 & 28, at art. 1045.

113. First Hall (Civil Court 1964) (*per* Edoardo Magri).

114. See among others, *Emmanuela Galea pr. et ne. pro et noe v. Paolo Gatt net*, Court of Appeal (Civil, Superior 1958) (*per* A. J. Mamo, A. J. Montanaro Gauci & W. Harding).

matter) merely from the level of incapacity to work but from the complexity of the consequences which the burns left on her person.”¹¹⁵

The Court then went on to say that certain other moral injuries must also be taken into consideration in such cases. The Court said that the burns on her face “ . . . created and will create in the future embarrassment and a sense of suspension and continual fear if she ever marries and gets pregnant.”¹¹⁶

The Court did not stop there. It further took into consideration the fact that it would be very hard for this girl to find a husband anytime in the future and, even if she did, she “ . . . would always be exposed to mortification and to certain disappointments that she will inevitably suffer when the poetry of matrimonial life is briskly interrupted with the discovery of these defects.”¹¹⁷

By mentioning such things as “the poetry of matrimonial life,” the Court clearly took into consideration the fact that this girl suffered a moral injury that would preclude her from enjoying such sentiments as “matrimonial bliss.” Similar to the *Savona v. Asphar* judgment which we saw above (dealing with the loss of a small boy’s leg), the Court went on to say that such injuries would also lead to certain men feeling “repulsed” by the image of the girl and that this certainly does not contribute towards the pursuit (and obtaining) of happiness, which the Court described as every human being’s prerogative.¹¹⁸

The Court said that this impediment to “the pursuit of happiness” or this “loss of enjoyment of life” would include also, a certain “embarrassment in society”¹¹⁹ and that all this “ . . . is an aspect of the damage caused which cannot be compensated within money.”¹²⁰ The Court itself made reference to the *Savona v. Asphar* case which clearly dealt with a more incapacitating injury than a scar on one’s face. This notwithstanding, the Court decided that this case still merited a higher

115. “Wiehed m’ghandux iħares lejha biss mill-grad tal-inkapaċita` għax-xogħol, iżda mill-kompless tal-konsegwenzi deleterji li l-ustjonijiet hallew fuq il-persuna tagħha . . .”

116. “. . . ħolqu u aktar johlqu ‘l quddiem motiv ta` mistħija u sens ta` sospensjoni u ta` biża` kontinwu jekk tizzewweġ u toħroġ gravida.”

117. “. . . l-għarusa tkun dejjem esposta għall-mortifikazzjonijiet u ċerti deluzjonijiet li immankabilment ikollha tgħaddi minnhom meta l-poesija tal-ħajja matrimonjali tiġi bruska interrotta bl-iskoperta ta` dawn id-difetti. . .”

118. “. . . dan żgur ma jikkontribwixxi xejn fit-triq tal-prerogattiva li kull bniedem għandu versu r-riċerka u l-otteniment tal-feliċita` tiegħu fil-ħajja ta` kuljum.”

119. “mistħija fis-soċjeta`.”

120. “. . . huwa aspekk ta` danneġġament li ma jistax jiġi risarċit bi flus.”

amount of compensation than on that occasion! Commenting on the fact that the two cases were different, the Court in this case awarded the plaintiff £1,000 as compensation under the “*lucrum cessans*” heading, which was £100 more than the Court had awarded in *Savona v. Asphar*.¹²¹

What must be duly noted in respect of the above is that it is actually quite rare for the Maltese courts to use such colourful language in referring to such moral considerations, especially post *Butler v. Heard*. However, it must also be pointed out that facial scars on female victims generally seem to trigger a sense of compassion which at times drives the Maltese courts to award compensation on the basis of innovative interpretations of Maltese law of tort.¹²²

The facts of the above-cited *Butler v. Heard* case are by now, well-known to most local legal practitioners and scholars alike. The case (as already mentioned above) dealt with a traffic collision between two vehicles—a car driven by the defendant (Heard) and a motorcycle driven by the plaintiff (Butler). As already mentioned above, the case is important for the way in which it liquidates *damnum emergens* under Article 1088 (today Article 1045), but more important when dealing with *lucrum cessans* because it is here where the courts had previously allowed themselves to be “liberal.” The interesting thing to note here is that as soon as the Court moved on to discuss damages due under *lucrum cessans*, which it defined as “by far the most important,”¹²³ the Court started its reasoning by immediately referring to moral damage. As it turns out, it did this to be very clear that compensation in the case at hand was only due for pecuniary losses. This is how the Court interpreted Article 1088 (today 1045) at the time—perhaps restricting certain previous interpretations that might have included compensation for moral damage as seen above. The reader should, however, bear in mind that whilst the Court deemed the law not to grant the legal basis to award compensation for moral damage explicitly, it was in no way opposed to this ideologically. Actually, the Court went so far as to say that Maltese law is inferior to other laws that specifically allow for compensation for moral damage. To make it absolutely clear that the Court was not just quoting a foreign source to illustrate the position abroad, it went on to

121. Taking into account certain considerations like inflation.

122. See the very recent judgment *Linda Busuttil et v. Dr. Josie Muscat et* as discussed above, *supra* note 40, by way of example.

123. “bil-wisq l-aktar importanti.”

express its hope that this branch of Maltese law would be reformed in the near future.¹²⁴

In truth, the only reforms that were made since then were court-driven developments in respect of breaches of human rights and legislative innovations in the realms of consumer law and intellectual property law more specifically.¹²⁵ In terms of the Maltese Civil Code, at the time of writing, no legislative reforms have ever been made since then. What can be inferred here is that those individuals who oppose the introduction of compensation for moral damage (of whatever kind) in the Maltese Civil Code cannot use *Butler v. Heard* to boost their arguments because the Court made it quite clear that it favored its introduction.

The Court proceeded to comment on the relief felt by the courts following the 1962 amendments (which removed the capping of damages) and how the courts were at full liberty to attain justice in favor of injured parties or their families. After creating what is now known as the “*Butler v. Heard* formula” which the reader is advised to refer to,¹²⁶ the Court went on to reduce the amount awarded by the Court of First Instance but it nonetheless awarded £5,100—one of the largest amounts ever awarded at the time.

It must be noted that judgments delivered post *Butler v. Heard* have tended to focus more on the intricacies of the calculations to be made rather than introduce any new theories or novel interpretations. Having said that, although many cases do in fact seem to take such considerations into account when liquidating damages (some in a more explicit manner than others), the usual practice is to “disguise” any moral considerations by tweaking the formulae used¹²⁷ for such calculations. The following case is an example of such reasoning.

The 1997 case *Paul Scerri et pro et noe v. Tancred Cesareo*¹²⁸ dealt with a serious permanent incapacity. The amount of compensation awarded in this case for the serious disability caused to the plaintiff was Lm80,888 (€188,418.35). As we find in other similar cases, the medical expert appointed to determine the percentage of disability and its effect on the victim’s “income earning capacity” in this case, drifted also into other considerations which the Court was unable to compensate directly. Among other things, the medical expert said that the injured party was:

124. “Ta’ min jawgura illi din il-fergħa tal-ligi tagħna ma ddumx ma tiġi kif jixraq riformata.”

125. As mentioned above.

126. See *supra* note 63.

127. *Michael Butler v. Peter Christopher Heard*, Court of Appeal (Civil, Superior 1967).

128. *First Hall* (Civil Court 1977) (*per* G. Valenzia).

. . . grossly handicapped and will always have problems with walking, going up and down stairs, ladders, etc. . . he may find it difficult to find a partner and marry. His body image of a disabled person may cause psychological problems etc.

These words indicate a rational analysis of the case under examination. Above, we have seen how in the past, such considerations were at times even undertaken by the courts themselves. In this case however, we see how difficult it is for the medical expert to determine what percentage of the disability will affect one's income-earning capacity (as opposed to other areas of one's life). Of course, philosophically speaking, one might question the rationale for distinguishing these two concepts at all. Why not compensate the victim for the effect the disability might have on other areas of his life—like the damage to his love life as mentioned by the medical expert here? Although the Court's final calculations might seem to be by-the-book,¹²⁹ it should be noted that it is always within the Court's discretion to determine the components of the "*Butler v. Heard* formula" (which at the time of writing is still not legally binding on the courts). In deciding the "multiplier" for example, the Court quoted foreign commentators¹³⁰ and despite the fact that the future is uncertain and includes various "vicissitudes of life," the Court still came up with a thirty-five year multiplier, which is partly responsible for the scale of the amount due. It reached this figure ". . . because of the circumstances of the case and of the incapacitated person."¹³¹ This makes us understand how the courts will ultimately determine whether the compensation due is justified or otherwise depending on all the facts and circumstances of the case.

At first glance, one might think that in this case, the fourteen-year-old boy struck by the defendant's car (who suffered a serious disability as a result of the accident), was treated like anyone else, but the *mathematics* involved in the judgment should not distract us from the fact that the Court was well aware of the seriousness of the case.

As Lord Scarman stated:

Knowledge of the future being denied to mankind, so much of the award as is to be attributable to future loss and suffering will almost certainly be wrong. There is

129. 80 (wage per week) \times 52 (weeks in a year) \times 35 ('multiplier') \times 60% (percentage of disability) \times 20% (lump sum reduction) = Lm69,888 as *lucrum cessans* + Lm11,000 as *damnum emergens* = Lm80,888 (€188,418,35).

130. W.V.H. ROGERS, *THE LAW OF TORT* 228 (2d ed. 1994).

131. ". . . minhabba ċ-ċirkostanzi tal-każ u tal-persuna inkapaċitata."

really only one certainty: the future will prove the award to be either too high or too low.¹³²

The Maltese Court was willing to award quite a large sum of money despite this “uncertainty of the future” which the Court itself cited in the judgment. Can we confidently say therefore, that the boy’s suffering in general was not taken into consideration?

Although the previous judgment is a typical example of how the Maltese courts seemingly take moral injuries into consideration (*i.e.*, indirectly), certain recent case law has re-ignited the discussion of whether or not compensation for moral damage can be *explicitly* awarded on the basis of Article 1045 of the Maltese Civil Code. The case *Linda Busuttil et v. Dr. Josie Muscat et*, which was already discussed above,¹³³ merits particular attention in this regard. In this judgment (dealing with a facial scar caused to a female victim as the result of an unsuccessful medical intervention), the Court awarded the plaintiff €5,000 purely on the basis of the moral injuries suffered by same. Above, it was already mentioned that this judgment is important in the manner in which it interprets the term “*actual loss*” found in Article 1045 to include also “non-patrimonial damages”—despite the fact that the Maltese courts have generally refused such interpretation. On this point, this author had already previously expressed views similar to those found in the judgment in question¹³⁴ and hopes that the same will be confirmed by the Court of Appeal.¹³⁵

The judgment in question is also very creative in the manner in which it resorts to EU law to obtain a remedy for the plaintiff. Very innovatively, in its deliberations, the Court said that the female plaintiff suffered a physical injury as well as an injury to her “psyche.” The Court observed that the “physical and mental integrity” of the person is a right enshrined in the Maltese Constitution, in the European Convention on Human Rights as well as in Article 3 of the Charter of Fundamental Rights of the European Union (the “Charter”).¹³⁶ The Court then argued that since the Charter has the same legal status as the Treaties of the

132. *Lim v. Camden & Islington A.H.A.* (1980) A.C., 183.

133. *See supra* note 40.

134. *See the author’s LL.D. thesis, supra* star-footnote.

135. An appeal was registered on December 16, 2010.

136. European Union, *Charter of Fundamental Rights of the European Union*, December 7, 2000, Official Journal of the European Communities, December 18, 2000 (2000/C 364/01), available at <http://www.unhcr.org/refworld/docid/3ae6b3b70.html> (Last Visited November 12, 2011).

European Union in Malta, the Maltese courts are bound to interpret Maltese law in conformity with the principles enshrined therein (despite the fact that the provisions of the Charter are applicable only when Union law is being implemented by Member States).¹³⁷ This author commends the Maltese Court for entertaining such liberal interpretations in its deliberations but believes that the judgment is on more solid ground when discussing the interpretation of the terms “*any damage*” in Article 1033 and “*actual loss*” in Article 1045.¹³⁸

Very recently, there has been another interesting judgment¹³⁹ which has attracted considerable media attention.¹⁴⁰ Although this judgment (which has been appealed¹⁴¹) does not explicitly veer into moral considerations *per se*, the fact that the Court awarded €1,250,000 in compensation to the victim of the traffic accident in question¹⁴² as well as to the other plaintiffs (being members of the victim’s family), is noteworthy to say the least.

These recent judgments (which are not yet *res judicata*) indicate a certain willingness by the Maltese courts to compensate victims of torts and quasi-torts in a more comprehensive manner. However, it remains to be seen to what extent the above-cited Amendments will reflect such views.

V. FINAL THOUGHTS

The uniqueness of Article 1045 emerges from the fact that unlike the Maltese provisions modeled on the French legal system¹⁴³ the “damages” encompassed in the said Article were inspired by Austrian law, and whether intended or otherwise, function very much on a common law basis. Unless the damage inflicted (including moral harm) is one which falls within the classes of compensable damage under Article 1045¹⁴⁴ then, despite the responsibility of the tortfeasor, no

137. *Id.* at art. 51.1.

138. *See supra* note 9 & 41.

139. Alexander Caruana et pro et noe v. Daniel Bonnici, First Hall (Civil Court 2011).

140. <http://www.timesofmalta.com/articles/view/20110315/local/man-disabled-in-accident-awarded-1-25-million-in-damages> (Last visited November 12, 2011).

141. An appeal was registered on April 4, 2011.

142. Who did not die but suffered one hundred percent disability.

143. In other words, the provisions relating to tort liability (which are rooted in the civil-law tradition).

144. Or Article 1046 dealing with damages when death ensues.

compensation will usually be awarded to the victim. The nature of Article 1045 itself¹⁴⁵ led to the Maltese courts' hands being effectively tied for well over a century.¹⁴⁶ It is only in certain instances that the courts came up with liberal interpretations of Article 1045 that allowed them to award compensation for moral damage. In such cases, a strict interpretation of the law would seem to indicate that these are indeed incompatible with the provisions on damages.¹⁴⁷ That said, without entering into the complex mechanisms for liquidating such damages in tort,¹⁴⁸ since the dawn of the Maltese Civil Code, the courts may not have been explicit, but the pain and suffering of certain complainants was clearly taken into account when calculating the amount of compensation due.¹⁴⁹ Another thing to note is that certain cases are generally dealt with in a particular manner. For example, cases involving an *iniuria* (or harm to one's honour or reputation) are generally treated with added caution—perhaps owing to the serious damage such offense may lead to in a small territory such as Malta.¹⁵⁰ Bodily harm inflicted on children is also usually tackled in a more sensitive manner, and the basis

145. The legal rationale of which was examined above.

146. Despite the amendments that took place in 1938 and 1962.

147. That is, both article 1045 as well as article 1046 of the MALTA CIV. CODE, *supra* note 28, at arts. 1045 & 1046.

148. Which is the subject of Fiona Cilia's paper, included in this volume of J. CIV. L. STUD.

149. A prime example being the case Paul Scerri *et pro et noe v. Tancred Cesareo* discussed *supra* note 128.

150. See *Perit Joseph Boffa v. John A. Mizzi*, First Hall (Civil Court 2002) (*per P. Sciberras*) which granted the plaintiff Lm300 (€98.81) as damages for the *iniuria* against the memory of his late father. The Court reached this sum on an '*ex aequo et bono*' basis, which indicates that the claim was decided on general principles of law rather than article 1045 of the Civil Code). The reader should note that there have been recent developments regarding this case. On November 22, 2011 in a Chamber judgment of the European Court of Human Rights in the case *John Anthony Mizzi v. Malta* (application no. 17320/10), the Court held (by a majority) that there had been a violation of Article 10 (freedom of expression and information) of the European Convention on Human Rights. The Court held that Malta was to pay Mr. Mizzi EUR700 in respect of pecuniary damage, EUR4,000 in respect of non-pecuniary damage and EUR5,300 for costs and expenses. More information on this is *available at* [http://www.codex-online.com/codex/contents.nsf/vWebAccessDocuments/CC29F5CFE5BFB1BB C2257953004643FA/\\$file/Chamber+judgment+John+Anthony+Mizzi+v.+Malt a+22.11.11.pdf](http://www.codex-online.com/codex/contents.nsf/vWebAccessDocuments/CC29F5CFE5BFB1BB C2257953004643FA/$file/Chamber+judgment+John+Anthony+Mizzi+v.+Malt a+22.11.11.pdf) (Last visited November 30, 2011).

for compensation is often clearly based on moral considerations.¹⁵¹ Another category of injuries includes cases of scars or disfigurement on young females which, as we have seen above, sometimes lead to rather innovative ways of interpreting Maltese law on damages in tort.¹⁵²

It remains to be seen to what extent the above-cited Amendments will alter Article 1045 (if at all), and whether the principles outlined above will be solidified or else shaken at their core.

151. As seen in *Savona v. Asphar* discussed *supra*.

152. As seen in *Paolo D'Amato noe v. Joseph Ebejer* discussed *supra*. See also, *Peter Sultana v. Anthony Abela Caruana*, Court of Appeal (Civil, Superior 2002) (*per J. Said Pullicino, C. A. Agius & J. D. Camilleri*), which dealt with what the Court referred to as a "psychological injury" caused as a result of a scar left on the plaintiff's face.