

CASE COMMENT

**THE QUANTIFICATION OF DAMAGES BEFORE THE
MALTESE COURTS IN LIGHT OF TURNER VS. AGIUS
AND RECENT AMENDMENTS TO THE CIVIL CODE**

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The liquidation of civil damages in Maltese law is currently regulated by Articles 1045 and 1046 of the Civil Code. Diverse and sometimes contrasting interpretations have been ascribed to these provisions which ultimately result in different methods for the quantification of damages. Maltese Law awards two types of damages - actual damages (*damnum emergens*) and loss of future earnings (*lucrum cessans*). The quantification of loss of future earnings is based on a formula set by the Maltese Courts in the 1967 landmark case of *Michael Butler vs Christopher Heard*.²

However, while Article 1045 deals with victims who suffer a permanent disability,³ Article 1046 deals with a situation where the victim dies as a consequence of the act giving rise to the damage.⁴ In this case the Court may, in addition to any actual loss and expenses incurred, award compensation to the heirs of the deceased person, as in the case of permanent total incapacity. Moreover, compensation may also be awarded to any person who suffered harm as a result of the death of the victim. This gives rise to the concept of dependency. Although not expressly stated in our law, this concept has been introduced by our Courts by reference to the principles of equity and justice. The issue of dependency is concerned with the degree of dependence of the ascendants, descendants and even the spouse in relation to the deceased victim. Therefore, if the dependency is exceptionally remote, minimal compensation will typically be awarded. This very issue is what troubled the Courts particularly in *Turner vs. Agius*.⁵

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² *Michael Butler vs Peter Christopher Heard*, Court of Appeal (Civil, Superior) [1967].

³ Chapter 16 of the Laws of Malta, Civil Code, Article 1045.

⁴ *Ibid* art. 1046.

⁵ *Anthony Turner et vs Francis Agius et*, Court of Appeal (Civil, Superior) [2003].

Article 1046 also refers to lump sum reductions. Our Courts have persistently made reductions from the lump sum payment to reflect the fact that the dependents and heirs receive a lump sum payment which, in normal circumstances, would have taken years to accumulate. Courts have made further reductions to reflect the personal consumption of the deceased since, had the victim lived, he would have not only inherited the sum all at once, but would have been expected to spend a substantial amount on his own needs. Nevertheless, our Courts have applied inconsistent principles in this area, taking into account the different circumstances of each case. Such inconsistency has robbed the plaintiffs/victims of the benefit of foreseeability of the outcome of such proceedings.

The case of *Turner vs. Agius*⁶ concerned a seventeen year old girl, Carmen Turner, who was a passenger in a car which was driven negligently. As a consequence of the driver's negligence, the car crashed into an electricity pole, resulting in Turner's death. Since Turner was not married and had no children, an action was brought by her mother, father, brothers and sisters claiming compensation for damages suffered.

The Court assessed that 95% of the responsibility was to be attributed to Francis Agius, the driver. Nevertheless, it was held that this was a case of contributory negligence and therefore 5% of the responsibility was adjudged to Turner as she had elected to sit on the lap of another passenger in the front seat of Agius' car. In deciding this, the Court quoted various authors on the subject, including the renowned English author, John M. Logan, in his book 'Briefcase of Tort Law' where he states that 'If as a result of his contributory negligence, the plaintiff suffers greater injury that he otherwise would have sustained, then his entitlement to compensation should reflect that fact.'⁷

The Court thus decided to consider the separate but closely connected questions of responsibility for the damage caused and the quantification of damages.

The issue raised by Agius was that there was no question of dependence of the plaintiffs on the victim of the accident and that, if anything, it was the parents who were maintaining Turner at the time of the accident. The defendant therefore argued that full damages should not be awarded to the parents. The First Hall rejected this argument and chose to ignore the conundrum of dependency, holding that had the victim remained alive, the Court would not have made such deductions and that since the heirs are put in the shoes of the deceased, such deductions should not be

⁶ Ibid.

⁷ *Turner vs Agius* (n 5), citing John M. Logan, *Briefcase of Tort Law*, (1st edn, Routledge Cavendish 1995).

made in their regard. While it is true that the Maltese legal system does not follow the doctrine of judicial precedent, the Court wanted to avoid the creation of a principle awarding less compensation in the event of the death of the victim than if he would have survived and went on to award Lm71,136 to the heirs in compensation for damages suffered. This author agrees with this interpretation, since according to the law of succession, the heirs of the deceased typically assume both the debts and assets of the deceased, and the right of compensation is considered as an asset which is consequently also assumed by the heirs.

Nonetheless, the Court of Appeal rejected the reasoning propounded by the First Hall, Civil Court and reinstated the notion of dependency, concluding that since the heirs did not depend on the victim, the amount of compensation awarded should be significantly reduced to reflect this fact. The Court of Appeal contended that the correct interpretation of the law is that which attempts to reach the best and most ideal consequences. Even though Mr Justice Caruana Demajo had stated at first instance that no deduction should be made on dependency or personal consumption, the Court of Appeal felt that the action for damages is given to the heirs *iure proprio* and that therefore, the argument that the heirs step into the shoes of the deceased was not relevant in this context.

The Court concluded that Carmen Turner was not a 'breadwinner'; her pay was equivalent to the minimum wage and like other young women, there was a high probability that she would get married and her financial dependence on her parents would soon have ended. Ultimately, however, the Court stated that the dependency factor of parents on their seventeen year old daughter was different to the dependency factor of a family on the parents. The compensation was thus accordingly reduced by two-thirds and the Court ruled that the damages due to the victim's heirs amounted to Lm23,755.

The Court clarified that it had previously always accepted the principle that in a case where death ensues, and where the victim is not yet married or depended upon, a substantial amount of money is deducted from the amount when calculating damages. The Court refused to steer away from this established principle and made no exception in this case.⁸

It is this author's opinion that the case of *Turner vs Agius* highlights the fact that our system for awarding compensation is not very predictable for plaintiffs and victims of torts; in fact, there seems to be great uncertainty particularly where the victim dies as a result of the harm caused. This author opines that it would be ideal if the Courts were to have clear rules upon which to regulate their reasoning and award compensation.

⁸ *Turner vs Agius* (n 5).

In 2004, Parliament proposed an amendment to Article 1046 through Act VI of 2004. The amendment however has to date never seen the light of day, as the Act was never enforced. Arguably, one of the reasons for this failed enforcement is the failure of the proposed amendments to fully address the troublesome issues which judges still face when dealing with the quantification of damages in tort cases, despite the fact that the bulk of the Act is dedicated to the eventuality of the death of the victim of the tort.

The proposed amendments introduce a new sub-article meant to completely replace Article 1046. The new article 1046 distinguishes between three different classes of people who can claim damages when the victim of the tort dies. These include the heirs, dependants and close relatives. This author notes that this amendment consequently broadens the range of claimants who may institute civil proceedings claiming compensation. The amendment suggests that heirs of the deceased are to be awarded damages for actual loss and expenses incurred, that is *damnum emergens*, while they cannot claim damages based on future earnings. In *Turner vs Agius*, the Court awarded *lucrum cessans* to the heirs; however, in terms of this amendment, the heirs can only claim damages under *damnum emergens*. According to the amendment, dependants are only awarded compensation for loss of future earnings, which compensation cannot exceed Lm250,000. Close relatives can be compensated for moral damages capped at Lm20,000. In terms of Act VI of 2004, a Court would be primarily obliged to compensate the dependants, whereas in the absence of this amendment, the heirs would be compensated first.

Act VI of 2004 is also arguably considered to be a legislative reaction to the generous multipliers applied in a number of judgments delivered in the late 1980s by Maltese Courts..

In 2011, a second set of amendments was proposed modifying Article 1046 of the Civil Code completely.⁹ Bill 78 of 2011 aims to remove the concept of heirs being awarded *lucrum cessans* entirely. While funeral and hospital costs may still be recovered by the heirs, through this amendment they lose their right to claim *lucrum cessans*.¹⁰ Dependants, defined as ‘any person who at the time of the accident was being maintained by the deceased or any person who by law is entitled to be maintained by the deceased,’¹¹ can only claim damages limited to the amount of maintenance the dependants would have been entitled to claim

⁹ Bill No. 78 of 2011, Civil Code (Amendment) Act, Article 3.

¹⁰ Ibid art. 3(2).

¹¹ Ibid art. 3(3)(a).

from the deceased, had he remained alive until such time as they are legally entitled to claim maintenance.¹²

The proposed amendments also contemplate damages for non-pecuniary losses, which are offered to any spouse, ascendant, descendant, brother or sister who lived in the same house as the deceased at the time of death and are capped at €200,000.¹³

This author holds that had the 2011 proposed amendments been in force at the time the decision of the Court of Appeal was delivered in *Turner vs Agius*, the judgment of the Court would have differed in a number of aspects. In particular, while the heirs were awarded both *damnum emergens* and *lucrum cessans*, they would only have been awarded *damnum emergens* under the 2011 amendments, resulting in a significantly smaller amount of compensation after calculating only actual losses. Furthermore, the 2011 proposed amendments would have allowed the heirs of Carmen Turner to claim moral damages, since they resided with the deceased at the time of her death. This is a new development in our law which the Courts have in the past been rather hesitant to award. The only instances in which our Courts have awarded moral damages so far have been in the case of a violation of human rights under press law and under the promises of marriage law. Evidence of this can be found in cases such as *Micallef vs. Micallef*,¹⁴ where the Court emphasised that '*Il-ligi taghna ma tipprovdux ghad-danni morali li l-parti tista' ssofri.*'

In this respect the amendments may be interpreted as proof of the increasing acceptance by our Courts of the concept of non-pecuniary damages.

This author considers the judgment of *Turner vs Agius* to be a milestone case, particularly for Maltese tort law. The central issues of dependency, personal consumption and attribution of responsibility were all raised and considered in detail both at first instance and by the Court of Appeal, albeit with contrasting interpretations of the law being delivered by the two Courts. While judgments of the Court such as *Turner vs Agius* contribute to the wealth of knowledge on the subject, it is worth noting that the proposed 2011 amendments are a highly anticipated and necessary form of regulation of this controversial subject which will surely help towards eliminating or reducing to a great extent the element of uncertainty with which compensation cases arising from tort have traditionally been addled. In this way, decisions of the Courts could become more uniform and predictable. Nevertheless, others argue that each decision must take into

¹² Ibid art. 3(3)(b).

¹³ Ibid art.3(4).

¹⁴ *Micallef vs. Micallef*, Court of Appeal (Civil, Superior) [1984].

account the different merits of the case and that the proposed legislation should still be subject to revision as a number of uncertainties may still arise.

This author questions whether the decision of *Turner vs Agius* would have been more even-handed if the proposed 2011 amendments were in force at the time. Arguably, the outcome would have been more predictable since it would have been clear from the outset that the heirs would only have been awarded actual losses. The issue as to whether such a conclusion is fairer or not is undeniably not set in stone and will continue to be the subject of further debate on the subject for years to come.