QORTI TAL-MINORENNI
(GHAWDEX)

Magistrat Dr. Joseph Mifsud B.A. (Legal & Int. Rel.),
B.A. (Hons), M.A. (European), LL.D.

Il-Pulizija
(Spettur Bernard Charles Spiteri)

vs.

OMISSIS

Numru: 63/2015

Illum 14 ta' April 2016

Il-Qorti,

Rat l-imputazzjoni migjuba kontra l-imputat **OMISSIS** akkuzat talli nhar id-9 ta' Lulju 2015, ghall-habta ta' 15:30hrs waqt li kien qieghed fl-inhawi ta' Xatt l-Ahmar, limiti ta' Ghajnsielem, Ghawdex u/jew f'dawn il-Gzejjer;

1. B'nuqqas ta' hsieb, jew bi traskuragni jew b'nuqqas ta' hila jew professjoni tieghu, jew b'nuqqas ta' tharis ta' regolamenti involontarjament ikkaguna l-mewt ta' James Xuereb, liema mewt sehhet nhar it-12 ta' Settembru 2015 u dan bi ksur tal-Artikolu 225(1) tal-Kapitolu 9.

Rat in-nota tal-Avukat Generali (*a fol.* 166) datata 14 ta' Marzu 2016 li permezz taghha baghat lill-imputat **OMISSIS** biex jigi ggudikat minn din il-Qorti bhala Qorti tal-Minorenni (Ghawdex) kif mahsub taht:

(1) Artikolu 225(1) tal-Kapitolu 9 tal-Ligijiet ta' Malta;
(2) Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta;

Rat illi, waqt l-udjenza tas-16 ta' Marzu 2016 (*a fol.* 168), gew moqrija l-Artikoli mibghuta mill-Avukat Generali fl-14 ta' Marzu 2016, u f'liema seduta l-imputat iddikjara li ma kellux oggezzjoni li l-kaz tieghu jigi trattat u deciz minn din il-Qorti bi procedura sommarja.

Rat l-atti kollha ta' dan il-procediment u d-dokumenti esebiti fosthom is-*Social Inquiry Report* imhejji mill-*Probation Officer* Joseph Mizzi fuq talba ta' din il-Qorti tat-22 ta' Settembru 2015 (*a fol.* 60 et sequitor).

Semghet is-sottomissjonijiet tal-Prosekuzzjoni, tal-*Parte Civile* u tad-Difiza fis-16 ta' Marzu 2016.

Rat in-noti ta' sottomissjonijiet tal-*Parte Civile* (*a fol.* 182 et sequitor) u tad-Difiza (*a fol.* 189 et sequitor).

KRONOLOGIJA TAL-FATTI

L-incident sehh fid-9 ta' Lulju 2015 fix-Xatt l-Ahmar limiti ta' Ghajnsielem. Dakinhar stess wara li nghata l-ewwel kura fl-Isptar Generali ta' Ghawdex il-vittma ttiehed l-Isptar Mater Dei permezz ta' helicopter.

Ir-rapport dwar il-kaz fis-sistema tal-pulizija maghruf bhala *Current Incident Report* iddahhal fis-27 ta' Lulju 2015 (*a fol.* 21 et sequitor) u dan jidher li sar wara li l-avukat tal-qraba tal-vittma fl-24 ta' Lulju 2015 (*a fol.* 20) baghtet *e-mail* lill-Ispettur Bernard Charles Spiteri fejn staqsietu

"Tistghu ticcekjaw x'sar mir-rapport u xi proceduri ser jittiehdu?". L-Ispettur dakinhar stess wiegeb *"Fuq dan ir-rapport kellna problema ghaliex omm it-tifel kienet talbet lill-pulizija sabiex ma jsirx rapport, ghax kien dehrilha li ma hemmx ghalfejn. Izda l-pulizija xorta konna gbarna kopja tac-certifikat mediku. Fid-dawl ta' dan jien tajt struzzjonijiet lis-surgent sabiex jaghmel ir-rapport tal-okkorenza. Kellimt ukoll lill-Magistrat imma ghalissa ser tinhadem bhala police work. Issa nohorgu charges kemm jista' jkun malajr."*

Bejn id-9 ta' Lulju 2015 u t-12 ta' Settembru 2015 il-vittma kien rikoverat fl-Isptar Mater Dei.

Mill-*Medico Legal Post Mortem Examination Report* (*a fol.* 154) hareg li kagun tal-incident *"he suffered a fracture of C4/c5 with displacement and a fractured left clavicle. As a result he suffered from triplegia and had some use of one upper limb. He had an anterior cervical discectomy and CRD fusion. On the 19th July he had lung collapse and on the 24th August suffered respiratory arrest. On the 12th September he started bleeding profusely from the tracheostomy and died shortly after."*

Fit-12 ta' Settembru 2015 infethet inkjesta' mill-Magistrat Paul Coppini dwar il-mewt ta' James Xuereb.

XHIEDA

F'dawn il-proceduri xehdu tmintax (18)–il xhud fi tmien (8) seduti: L-Ispettur Bernard Charles Spiteri (*a fol.* 10 *et. seq.),* Dr Peter Muscat (*a fol.* 28 *et. seq.),* PS559 Jason Spiteri (*a fol.* 35 *et. seq.),* Joseph Mallia (*a fol.* 41 *et. seq.),* Sonia Mallia (*a fol.* 44 *et. seq.),* Jeremy Portelli (*a fol.* 46 *et. seq.),* Joseph Mizzi (*a fol.* 55 *et. seq.),* PC 1053 Michael Falzon (*a fol.* 70*),* Antonia Grech (*a fol.* 71 *et. seq.),* Loredona Grima (*a fol.* 75 *et. seq.),* Michelina Xuereb (*a fol.* 78 *et. seq.),* Vince Xuereb (*a fol.* 88 *et. seq.),* John Mary Xuereb (*a fol.* 93 *et. seq.),* Dr Anton Grech (*a fol.* 116 *et. seq.),* Dr Mario Scerri (*a fol.* 122 *et. seq.),* Prof Marie Therese Camilleri Podesta (*a fol.* 152

et. seq.), PS382 Josef Cardona (*a fol.* 156 *et. seq.)* u Dr Ali Salfraz (*a fol.* 162*).*

Din il-Qorti hija f'pożizzjoni vantaggjuza meta tigi biex taghmel apprezzament tax-xhieda, u dan ghaliex hija ghexet il-process tul medda ta' zmien u ghalhekk hija f'pożizzjoni, wara li semghet ix-xhieda kollha jixhdu viva voce quddiemha, li teżamina l-imgieba u l-komportament taghhom, stante li kienet hi stess li kkonstatat x'interess seta' kellu xi xhud fid-data li xehed u jekk dak li qal kellux mis-sewwa jew le.

<u>Xhieda okkulari</u>

Il-Qorti analizzat fil-fond dak li ddikjaraw iz-zewg persuni li kienu mal-vittma waqt il-hin tal-incident jigifieri l-imputat u Jeremy Portelli. Huma dawn biss li jistghu jaghtu hjiel dwar kif gara l-incident. Waqt li l-vittma kien rikoverat l-isptar bejn il-Hamis 9 ta' Lulju 2015 u t-12 ta' Settembru 2015 il-pulizija ma hadux il-verzjoni tieghu ta' kif graw il-fatti, meta l-vittma kien f'pozizzjoni li jaghti l-verzjoni tieghu, u dan kif johrog mix-xiehda li taw il-genituri tieghu u zijuh.

L-imputat **<u>OMISSIS</u>** fiż-żewg stqarrijiet li ghamel lill-pulizija fil-31 ta' Lulju 2015 u fl-1 ta' Settembru 2015 ta l-verzjoni tieghu dwar kif sehh l-incident:

> *Dakinhar barra jien u hu, kien hemm iehor maghna certu Jeremy Portelli, filwaqt li n-naha l-ohra tal-bajja kien hemm aktar hbieb taghna. Ahna ftehmna li naqbzu minn fuq il-platform u mmorru fejnhom. L-ewwel qabez Jeremy, imbaghad qabez James. Meta qabez James jien tajtu cans jitla f'wicc l-ilma u hsibt li kien ha jibda jaghmel bhal Jeremy, jghum fejn l-ohrajn. Jien tajt zewg passi lura u qbizt. Jien kont niezel b'saqajja ma' xulxin u malli rajtu hemm isfel, jien ftahthom biex kemm jista' jkun nevitah. Hu baqa fejn kien u malli missejt mal-ilma lqattu. X'hin tlajt f'wicc ilma, jien ghad inhares u ma rajtux hemmhekk. Jien inzilt rasi taht ilma u rajtu niezel 'l isfel fl-ilma. Jien*

inzilt ghalih u tallajtu. Jeremy rega qabez fl-ilma ghax kien diga' telgha u gie jghinni. Ahna wasalnih sa fejn is-sellum u gie wiehed jghinna ntelghuh. Dan il-wiehed kien certu Guzi Mallia. Wara li tellajnih gew erba' bughadasa u tefghulu xugamani taht daharu u cempilna l-ambulanza. Ahna lil James bdejna nkellmuh u nghidulu jistax jharrek idejh u saqajh u jistax jiehu nifs sewwa. (*a fol.* 15 tal-process).

[…]

Jien hsibt li kien beda jghum lejn fejn kien hemm sehibna l-iehor kif konna miftehmin, izda hu baqa hemm. Kieku ghamel bhalma ghamel hu, il-habib taghna l-iehor u cioe Jeremy, jigifieri baqa hemm fejn qabez, kieku James l-istess haga kien jaghmel lil Jeremy. (*a fol.* 16 tal-process).

Ix-xhud **<u>Jeremy Portelli</u>** xehed fis-seduta tat-3 ta' Novembru 2015 (*a fol. 46 et. sequitor*):

Kien id-disgħa (9) ta' Lulju u dakinhar konna nżilna biex ngħumu ma' James u OMISSIS u konna nżilna u morna qbiżna fuq il-platform. Jien qbiżt l-ewwel wieħed, imbagħad kont qed inwarrab minn taħt il-platform naqdef 'il hinn, lejn qrib il-blat. Imbagħad warajja ma nafx x'ġara għax jien l-ewwel wieħed li qbiżt.

...

Wara, imbagħad x'ħin konna ġol-baħar smajt lil James jgħid, "Għinni, għinni OMISSIS!" imbagħad OMISSIS mar jgħinu. Tellgħu mill-baħar mill-qiegħ. Hekk biss.

...
Iva, mar, niżel fil-qiegħ, tellgħu, hu tela' mill-qiegħ u jien u OMISSIS ressaqnih għal fuq is-sellum.

[…]

Avukat Dottor Carmelo Galea:
Meta taqbżu minn fuq din il-platform, intom għal fejn tgħumu, għal ħdejn liema parti tgħumu?
Xhud:
Mhux dejjem l-istess hux.
Avukat Dottor Carmelo Galea:
Dakinhar x'kellkom il-ħsieb li tagħmlu jew xi fthemtu li tagħmlu?
Xhud:
Dakinhar konna morna naqbżu u kien hemm tlett nisa mmorru fejnhom.
Avukat Dottor Carmelo Galea:
Fejn kienu dawn it-tlett nisa?
Xhud:
Kienu hemm isfel eh.
Avukat Dottor Carmelo Galea:
Imma, żomm, nimmaġinaw li din il-bajja, għandek il-platform hawnhekk. Dawn it-tfajliet fejn kienu? Kienu qegħdin hawnhekk jew kienu qegħdin x'imkien ieħor 'il hawnhekk? Jekk nissuġġerilek li kienu n-naħa l-oħra tal-bajja, jista' jkun? U intom kontu se taqbżu minn hawnhekk u tgħumu għan-naħa l-oħra tal-bajja?
Xhud:
Ma konniex 'il bogħod imma.
Avukat Dottor Carmelo Galea:
Iva, imma tridu tgħumu għan-naħa l-oħra tal-bajja, mhux ħa toqgħodu hawnhekk tgħumu intom kontu, hux hekk?
Xhud:
Le, le.
Avukat Dottor Carmelo Galea:
U intom qabel ma qbiżtu fthemtu li se tagħmlu hekk.
Il-Qorti:
Ara qed isaqsik, intom fthemtu dakinhar jew kienet rutina dejjem tagħmlu hekk?
Xhud:
Xħin kien hemm jien ma fthemna xejn li ħa naqbżu jew hekk.
Il-Qorti:

Jiġifieri tas-soltu, rutina.
<u>Xhud</u>:
Iva.
<u>Il-Qorti</u>:
Kontu tagħmluha drabi oħra din, taqbżu u tmorru n-naħa l-oħra.
<u>Xhud</u>:
Dejjem konna naqbżu minn hemm, kważi dejjem.
<u>Avukat Dottor Carmelo Galea</u>:
U meta bniedem jaqbeż, bħala eżempju inti l-ewwel wieħed li qbiżt, xħin qbiżt u tlajt minn ġol-baħar jiġifieri tlajt f'wiċċ il-baħar, inti x'tagħmel is-soltu?
<u>Xhud</u>:
Twarrab minn taħt il-platform.

Ix-xhud **<u>Jeremy Portelli</u>** kien ta l-verzjoni tieghu lill-pulizija meta beda l-istharrig dwar il-kaz (*a. fol.* 26):

Dakinhar 9 ta' Lulju ghall-habta ta' 3.00 p.m. jien flimkien ma' James Xuereb u OMISSIS morna Xatt l-Ahmar sabiex nghumu. Jien qbizt minn fuq il-platform. Jien l-ewwel wiehed li qbizt. Ahna gieli konna qbizna qabel minn fuq il-platform. Malli qbizt bdejt nghum qrib il-blat imma mhux taht il-platform. Jien smajt lil xi hadd jaqbez il-bahar imma ma haristx ghax kont qieghed nghum, jigifieri naqdef. Jien kont ghadni nghum qrib il-platform, imma ma kontx inhares lejn il-platform meta hin minnhom smajt cafcifa bhal meta qabel xi hadd jaqbez fil-bahar u x'hin harist, rajt lil James niezel taht 'l ilma u smajtu jghid il-kliem "ghinni, ghinni OMISSIS". OMISSIS nizel ghalih taht l-ilma u jien dort biex nghinhom biex ntellghuh fuq is-sellum. Peress li kien tqil biex ntelghuh, kien wiehed jismu Guzi minn Ghajnsielem u dan ghinna ntellghuh fuq il-blat. Wara giet ambulanza u haditu l-isptar. Ahna kien ilna hbieb madwar tlett snin u dan l-ahhar ma kellniex xi nghidu. Jien irrid nghid ukoll li lil OMISSIS ma rajtux jolqtu lil James u lanqas smajtu jghid xi kliem lil James waqt li kien qieghed jghum sabiex ma jolqtux. Ahna meta konna imorru l-bahar gieli konna naqzu minn fuq platform u gieli

konna nuzaw is-sellum. Dakinhar morna u qbizna minn hemm, jigifieri minn fuq platform. Dakinhar nies il-bahar kien hemm Guzi u l-mara tieghu, u kien hemm zewg nisa taht platform li ma nafx min huma.

Xhieda ta' tobba u esperti medici

Ix-xhud **Dr. Peter Muscat** kien xoghol fid-Dipartiment tal-Emergenza fl-Isptar Generali ta' Ghawdex meta l-vittma ddahhal ghall-kura wara l-incident (*a fol.* 28):

Jiena kont qieghed xoghol l-Emergenza dak il-hin fid-disgha (9) ta' Lulju two thousand and fifteen (2015) ghall-habta tal-erbgha u tlieta u ghoxrin minuta ta' waranofisinhar (4:23p.m.) meta ddahhal James Xuereb b'ambulanza. Hu kien f'sensieh, jitkellem u jiehu n-nifs wahdu u kien qed jikkomplenja li ma kienx qed ihoss, jista' jcaqlaq kemm idejh u saqajh. Meta ezaminajtu jien sibt illi fil-fatt ma kienx qed ihoss kemm f'idejh u kemm f'saqajh u ma setax icaqlaq saqajh u jdejh. Jiena mill-ewwel infurmajt l-Orthopedic Surgeon u lill-konsulent tal-enestezija u gew jassessjaw lill-pazjent u ordnajnielu C.T. scan tal-whole spine, ta' dahru kollha, fejn irrizulta li kellu, naqra bl-Ingliz ezatt kif inhi, "anterior subluxation of C4 at level C4, C5, and fracture of right inferior articular process, also fracture C5 noted." Il-pazjent imbaghad eventwalment intbaghat Mater Dei bil-helicopter, neurosurgery.

Ix-xhud **il-Professoressa Marie Therese Camilleri Podesta** xehdet dwar x'hareg mill-awtopsja (*a fol.* 152 et sequitor)**:**

Għamilna l-awtopsja fl-erbatax (14) ta' Settembru two thousand fifteen (2015). Issa, aħna li sibna bħala kawża immedjata kienet li beda jibblidja u kellu hypovolimic shock.

Hypovolimic shock jiġifieri ma kienx hemm biżżejjed volum ta' demm ġoċ-ċirkolazzjoni.

[…]

<u>Ix-xhud</u>:
Dan malajr, malajr, malajr; beda jibblidja ħafna u miet.
<u>Il-Qorti</u>:
Jiġifieri dakinhar. Għax dan, imma mill-inċident?
<u>Ix-xhud</u>:
Mill-inċident kienu għaddew July, August, September; kienu għaddew xahrejn.
<u>Il-Qorti</u>:
Hu minn meta beda jibblidja?
<u>Ix-xhud</u>:
Jibblidja fl-aħħar, l-aħħar ġurnata.
<u>Il-Qorti</u>:
Jiġifieri fil-perjodu ta' qabel ma kienx hemm.
<u>Ix-xhud</u>:
Le. Kien hemm diversi problemi, kellu lung collapse, respiratory arrest; imma jiġifieri dan il-bleeding.

Ix-xhud **<u>Dr Ali Salfraz</u>** xehed dwar il-kawza tal-mewt (*a fol.* 162)**:**

The main cause of death was that he bled to death and that happened because there was ulceration in his intestines and stomach and that is a consequence of the prolonged bed rest and lack of blood supply changes to the intestine the covering is ulcerated. Unfortunately he bled to death.

L-espert mediku forensiku **<u>Dr Mario Scerri</u>** li nhatar bhala espert tal-Qorti meta miet il-vittma u mhux meta sehh l-incident xehed (*a fol*. 122 et sequitor) li:

Dina l-inkjesta bdiet fejn dħalt jiena wara illi miet, kellimni l-ispettur u qalli li l-Maġistrat ried illi nidħol fiha. Fil-fatt ġbart il-medical file

history tiegħu u rajt x'ġara u ma ġarax mill-bidu sal-aħħar. Kont kuntent illi mill-istudju tal-istorja medika ma rriżultax li kien hemm negliġenza, traskuraġni jew mismanagement da parti tat-team mediku tal-Ispettur(sic) Mater Dei u li dan miet kaġun ta' komplikazzjonijiet li nqalgħu wara l-ġrieħi subiti minnu fid-disgħa (9) ta' Lulju elfejn u ħmistax (2015).

Kellu frattura tal-clevicle, il-collar bone tax-xellug, u kellu fratturi ta' C45 l-irkiekel tas-survival region ta' fuq. Dawn kienu instabbli ħafna u kien hemm fragments tal-għadam illi daħlu fl-ispinal canal u qegħdin joffru pressure fuq l-ispanal cord. Riżulat ta' dan żviluppa tetraplegia, saqajh u idejh ma setax iċaqlaqhom, l-estramitajiet superjuri u inferjuri, u peress illi leision hija high up kellu problemi biex jieħu n-nifs. Fil-fatt kien qed juża d-diaphram bħala accessory muscle of respiration.

Ftit tal-ġranet wara ġie operat biex tiġi stabilizzata l-frattura imma dik kienet frattura kerha, l-affarijiet baqgħu jikkomplikaw irwieħhom u komplikazzjonijiet li jġib miegħu serħan fit-tul fis-sodda bħal hypostetic pheumonia, komplikazzjonijiet fid-demm, infections, jiġifieri ħaġa ġġib lil oħra u peress illi kien intubat fit-tul kellha ssirlu kaestomy, komplikazzjonijiet ta' trakaestomy illi bil-mod il-mod dan iddeterjora u eventwalment sfortunatament nhar it-tnax (12) ta' Settembru dan tilef ħajtu.

Il-**<u>Psikjatra Dottor Anton Grech</u>** mahtur mill-Qorti biex isegwi lill-imputat xehed (a fol 116 et sequitor):

Kif ġejt mitlub mill-Qorti jiena qiegħed insegwi bħala psikjatra lil OMISSIS; rajtu erba' (4) darbiet minn dakinhar 'il hawn illi ġejt mitlub biex narah. Qed ikollna sessions intensivi. Nista' ngħid mill-bidu li qed ibagħti b'kundizzjoni magħrufa bħala post traumatic stress disorder li hija meta xi ħadd jgħaddi minn esperjenza li tħalli impatt fuqu ħafna din il-kundizzjoni. Minħabba fih kellu tibdiliet fil-karattru tiegħu – ingħalaq fih innifsu, naqsitlu l-enerġija, il-ħeġġa lejn il-ħajja, etc. Inizjalment ippruvajt li ngħinu permezz ta' counselling u

psychotherapy però sfortunatament dan ma kienx biżżejjed u kelli nibdielu xi pilloli illi bdejthomlu mhux l-aħħar session imma s-session ta' qabel. Li hu tajjeb huwa li hemm rispons għal dawn il-pilloli. Jiġifieri overall hemm improvement. Però ovvjament l-esperjenza li għadda minnha għadha imprinted ħafna f'moħħu u qed tħallilu effetti psikoloġiċi u r-rwol tiegħi issa biex nibqa' ngħinu biex joħroġ minnha.

Ma nafx inhix ħa nparla żejjed imma kemm jista' jkun jekk dawn il-proċeduri ma tantx idumu għax kull darba qed nerġgħu nqanqlulu l-esperjenza.

Dwar dak mistqarr mill-Psikjatra Dr Anton Grech il-Qorti tapprezza ferm din l-osservazzjoni u theggeg lill-Avukat Generali li meta jkun hemm kazijiet bhal dawn, il-process jithaffef aktar. Hawnhekk ghandna kaz sfortunat u m'ghandux ikun trattat l-istess bhal kazijiet ohra, b'rinviji li jtawlu l-proceduri bla bzonn.

Il-*Hearsay Rule*

Illi waqt ix-xiehda taghhom Michelina Xuereb (a fol. 78 et. seq.), Vince Xuereb (a fol. 88 et. seq.) u John Mary Xuereb (a fol. 93 et. seq.) irrakkontaw lill-Qorti dak li qalilhom il-vittma dwar dak li sehh dakinhar tal-incident.

Li l-artikoli relevanti dwar il-*Hearsay Rule* huma l-artikoli 598 u 599 tal-Kap 12 rezi applikabbli għall-Kap 9 bl-artikolu 645 tal-Kap 9.

598. (1) Bħala regola, il-qorti ma tiħux qies ta' xiehda dwar fatti li x-xhud igħid li gie jafhom mingħand ħaddieħor jew li qalhom ħaddieħor li jista' jingieb biex jagħti xiehda fuq dawk il-fatti.

(2) Il-qorti tista', ex officio, jew fuq oppozizzjoni tal-parti, ma tħallix jew tichad li jsiru mistoqsijiet bi skop li jittieħdu xiehda bħal dawk.

(3) Izda l-qorti tista' ggiegħel lix-xhud li jsemmi l-persuna li

mingħandha jkun sar jaf il-fatti li għalihom jirriferixxu dawk il-mistoqsijiet.

Meta xiehda fuq kliem ħaddieħor hija ammessa.

599. Il-qorti tista', skont ic-cirkostanzi, tippermetti xiehda fuq kliem ħaddieħor u tieħu qies tagħha, meta dan l-istess kliem ħaddieħor ikollu, fih innifsu, importanza sostanzjali, fuq il-meritu tal-kawza jew ikun jagħmel parti mill-meritu; inkella meta dan ħaddieħor ma jkunx jista jingieb biex jixhed, u l-fatti jkunu tali li ma jkunux jistgħu jigu ppruvati sewwa xort'oħra, l-aktar f'kazijiet ta' twelid, taz-zwieg, tal-mewt, tal-assenza, ta' servitu', ta' rjieħ ta' immobbli, ta' pussess, ta' drawwiet, ta' grajjiet storici pubblici, ta' reputazzjoni jew ta' fama, ta' kliem jew fatti ta' nies li mietu jew li jkunu assenti u li ma kellhom ebda interess li jgħidu jew jiktbu l-falz, u ta' fatti oħra ta' interess generali jew pubbliku jew li jkunu magħrufa minn kulħadd.

Il-kaz li mhux l-ewwel darba li gie citat b'approvazzjoni dwar il-*hearsay rule* f'kawzi ta' natura kriminali huwa **Subramaniam v. Public Prosecutor** fejn insibu dan il-kliem:

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.'

Jekk wieħed jimxi mal-principji ta' dan il-kaz allura certi persuni li magħhom ikun tkellem il-vittma jistgħu jkunu prodotti (il-genituri jew qraba tal-vittma).

Dawn jistgħu jixhdu li l-vittma tassew qal hekk.

Jekk wieħed jezamina l-ewwel sentenza tal-artikolu 599 tal-Kap 12, wieħed jista' jikkonkludi li l-*hearsay rule* fil-Ligi tagħna mhix daqshekk assoluta. U fil-fatt hekk qalet il-Qorti Kostituzzjonali hija u tiddeciedi l-kaz '**Joseph Mary Vella et versus Il-Kummissarju tal-Pulizija**' (13 ta' Jannar 1988) fejn il-Qorti kkonfermat digriet tal-Prim'Awla biex jitħalla jixhed Prokuratur Legali li kien marbut bis-sigriet professjonali. Dan tħalla jixhed mingħajr ma kellu jikxef isem it-terza persuna li kienet qaltlu dwar il-fatti li fuqhom kellu jixhed il-Prokuratur Legali.

F'dak li huma decizjonijiet kriminali, il-Qrati tagħna issa ilhom sew isegwu l-prattika dwar il-*hearsay rule*. Il-Qorti tal-Appell Kriminali fl-1 t'April 2011 'Il-**Pulizija versus Fabio Schembri'** preseduta mil-Prim Imħallef Dr. Silvio Camilleri qalet hekk:

> *"Fil-limitu tal-uzu li għamlet l-ewwel Qorti tal-okkorenza msemmija, ma hemm xejn irregolari. Hu ben stabbilit li waqt li prova hearsay ma hix prova tal-kontenut ta' dak li jigi rapportat li ntqal, hi prova li dak rapportat li ntqal fil-fatt intqal fic-cirkostanzi, data, post u ħin li ntqal u in kwantu tali hi cirkostanza li meħuda ma' provi u cirkostanza oħra tista' wkoll tikkontribwixxi għall-apprezzament li tagħmel il-Qorti."*

Il-Qorti m'ghandhiex il-verzjoni tal-vittma ghaliex fil-perjodu li l-vittma kien l-Isptar ghall-kura l-pulizija f'sitta u sittin (66) jum ma haditx il-verzjoni tieghu dwar il-fatti. Mix-xiehda li ta l-Ispettur Bernard Charles Spiteri qal li hu sar jaf bl-incident meta nfurmatu l-avukat tal-qraba tal-vittma fl-24 ta' Lulju 2015 u mhux dakinhar tal-incident. Dakinhar tal-incident lanqas il-Magistrat tal-Ghassa ma kien infurmat biex jiftah inkjesta. Kien infurmat jiem wara fejn ma hassx li f'dak l-istadju kellu jiftah inkjesta. B'hekk il-Qorti m'ghandhiex il-verzjoni tal-vittma minn sors indipendenti imma ghandha biss dak li xehdu l-qraba tieghu li qalu li qalilhom.

Ir-rwol tal-Qorti tal-Minorenni

Il-Qorti qabel tidhol fil-mertu tal-kaz se tara l-Archbold[1] x'jghid fejn jidhlu l-minorenni jew kif inhu maghruf il-*young offender*:

> A court sentencing a young offender must be aware of obligations under a range of international conventions which emphasise the importance of avoiding "criminalisation" of young people whilst ensuring that they are held responsible for their actions and, where possible, take part in repairing the damage that they have caused. This includes recognition of the damage caused to the victims and understanding by the young person that the deed was not acceptable. Within a system that provides for both the acknowledgement of guilt and sanction which rehabilitate, the intention is to establish responsibility and, at the same time, to promote re-integration rather than to impose retribution.
>
> A court sentencing a person under the age of 18 is obliged to have regard to the principal aim of the youth justice system (to prevent offending by children and young persons) and to the welfare of the offender. As the principal aim of the youth justice system is the prevention of offending by children and young people, the emphasis should be on approaches that seem most likely to be effective with young people.
>
> Young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused and because a young person is likely to be less able to resist temptation, especially where peer pressure is exerted.
>
> It is also important to consider whether the young offender lacks the maturity fully to appreciate the consequences of his conduct and the extent to which the offender has been acting on an

[1] Magistrates' Courts Criminal Practice 2016, **Sentencing in the Youth Court**, pg. 1867 et. Seq.

impulsive basis and the offender's conduct has been affected by inexperience, emotional volatility or negative influences.

In most cases a young person is likely to benefit from being given greater opportunity to learn from mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person, and, therefore, on the likelihood of effective integration into society.

L-eta' tal-protagonisti

Dakinhar tal-inċident, l-imputat kellu erbatax-il sena, l-istess James Xuereb. Il-Qorti se tiehu dan il-fattur fil-kunsiderazzjoni taghha.

Artikolu 37[2] tal-Kodici Kriminali jipprovdi li:

> ***37.*** *(1) Il-minuri ta' taħt is-sittax-il sena jkun ukoll ezenti minn responsabbilità kriminali għal kull att jew nuqqas magħmul* ***mingħajr ħazen***. (enfazi tal-Qorti)
>
> *(2) Fejn l-att jew nuqqas magħmul minn minuri minn erbatax-il sena sa sittax-il sena jsir b'ħazen u fil-kaz ta' minuri minn sittax-il sena sa tmintax-il sena, il-piena applikabbli għal reat għandha titnaqqas bi grad jew tnejn …*

Il-Qorti taghmel referenza ghad-dibattitu Parlamentari tal-21 ta' Jannar 2014 fejn kienet ghaddejja diskussjoni fit-tieni qari dwar l-Abbozz ta' Ligi li jemenda l-Kodici Kriminali (Emenda Nru. 4)[3] fejn il-minuri ta' taht is-sittax-il sena jkun ezenti minn responsabbilta' kriminali ghal kull att jew nuqqas maghmul minghajr hazen:

[2] Att III.2014.4.
[3] Wara l-approvazzjoni tal-Parlament sar l-Att Nru. 3, 2014

Permezz ta' dan l-abbozz ta' liġi, qed nipproponu li jittieħdu deċiżjonijiet importanti dwar ir-responsabilità kriminali tal-minorenni, u allura llum se nkunu qed nitkellmu dwar ir-responsabbilità li għandhom iġorru kriminalment il-minorenni, f'liema età, ta' liema żmien u min għandu jkun responsabbli, jekk għandu jkun responsabbli.

F'pajjiżna għandna liġijiet li jirrigwardaw l-età ta' responsabbilità kriminali li ilhom hemmhekk għal ammont ta' snin. Fil-fatt, il-Kunsill tal-Ewropa u l-*United Nations Human Rights Council* ilhom ħafna jikkritikawna għaliex jidhrilhom li l-età ta' responsabbilità kriminali f'pajjiżna hija baxxa wisq. Huma jidhrilhom li l-età ta' responsabilità kriminali għandha togħla għax hija baxxa wisq.

Aħna kellna nieħdu deċiżjoni dwar kemm għandha togħla l-età ta' responsabbilità kriminali tal-minorenni. Ħafna pajjiżi għollewha għal 18-il sena. Pereżempju, fi Franza, skont l-artikolu 122 sub-inċiż 8 tal-Kodiċi Penali, l-età ta' responsabilità kriminali hija 18-il sena. Dan ma jfissirx li jekk minuri li għandu inqas minn 18-il sena u jwettaq delitt jew kontravenzjoni fi Franza, ma jittieħdu ebda passi dwaru. Dan ifisser li l-passi li jittieħdu ma jiġux klassifikati bħala proċeduri u pieni ta' natura penali, iżda jiġu klassifikati bħala miżuri ta' protezzjoni, għajnuna, ħarsien u edukazzjoni. Mela, fi Franza, jekk inti tikkommetti delitt jew kontravenzjoni f'età ta' inqas minn 18-il sena, se jieħdu passi kontra tiegħek, però mhux ta' natura kriminali, iżda ta' natura edukattiva. Naħseb li dan il-mudell ta' min jistudjah bis-serjetà.

Dwar it-tfal bejn l-14-il sena u s-16-il sena, iċ-ċirkostanzi jinbidlu ftit: se tibqa' tintuża l-proċedura li hemm illum, però jekk jiġi pprovat li dawn aġixxew b'ħażen – jista' jkollok minuri bejn l-14 u s-16-il sena li kkommettew reat imma mhux b'ħażen, jista' jkun li kkommettew reat għax iċ-ċirkostanzi wasslu biex involontarjament jagħmlu tali reat – se jiġu ttrattati bħall-maġġorenni, bid-differenza li l-piena tonqos bi grad jew tnejn. Jekk dak il-minuri kkommetta r-reat b'ħażen, dak li l-Imħallef Vincent Degaetano jikkwotah bħala *mischievous discretion,* li hija duttrina li naħseb amplifikaha ħafna fis-sentenzi tiegħu, u anke fit-tagħlim tiegħu l-Università, il-piena se titnaqqas komparata ma' jekk ikollok maġġorenni.

Wieħed ma jridx jitlaq bl-idea li l-minorenni ma jistax ikollhom ħażen. Naħseb dak ikun żball. Naħseb li soċjalment irridu naraw għaliex minorenni jkollhom il-ħażen, u soċjoloġikament irridu naraw għaliex fis-

soċjetà tagħna għandna minorenni li ta' 14-il sena jkollhom il-*mens rea,* u meta jkunu f'sensihom anke jkollhom il-ħażen li jkollu raġel ta' 40 sena.[4]

Bħalissa artikolu 35 tal-Kodiċi Kriminali qed jipprovdi li l-minuri ta' taħt id-disa' snin ikunu eżenti mir-responsabilità kriminali għal kull att jew nuqqas, filwaqt li l-minuri ta' taħt l-14-il sena jkunu eżenti mir-responsabbilità kriminali għal kull att jew nuqqas, dejjem jekk ikun magħmul bla ħażen. Illum qegħdin nippproponu li minn disa' snin nitilgħu għal 14-il sena, u l-età ta' meta wieħed ikun eżenti mir-responsabbilità kriminali, jekk l-att isir mingħajr ħażen, titla' għal 16-il sena.

Wieħed jifhem li huwa l-obbligu ta' kull Stat li jistabbilixxi din l-età minima tar-responsabilità kriminali li tikkorrispondi mal-età li t-tfal jitqiesu responsabbli għall-aġir tagħhom, u rridu ngħidu li, għalkemm il-Konvenzjoni tal-Ġnus Magħquda dwar id-Drittijiet tat-Tfal tobbliga lil kull Stat li jagħżel l-età minima ta' responsabilità kriminali, din ma tagħmilx provvediment għall-età minima komuni li tapplika madwar id-dinja. Eżempju, fl-Iżvizzera l-età minima għar-responsabilità kriminali hija ta' seba' snin – din hija l-inqas fost il-pajjiżi żviluppati. Min-naħa l-oħra, fil-Belġju l-età minima għar-responsabilità kriminali hija ta' 18-il sena, u din hija meqjusa bħala l-ogħla waħda. Irrid ngħid li, anke fil-maġġoranza tal-istati fl-Amerika, l-età minima għar-responsabilità kriminali hija ta' 18-il sena.

Jekk inħarsu lejn l-Unjoni Ewropea, naraw li l-età minima għar-responsabilità kriminali hija waħda aktar varjata. Pereżempju, fil-pajjiżi Skandinavi l-età minima għar-responsabilità kriminali hija ta' 15-il sena, filwaqt li fil-Greċja u fl-Olanda hija ta' 12-il sena, fi Franza hija ta' 13-il sena, fl-Awstrija, fil-Ġermanja u fl-Italja mbagħad hija ta' 14-il sena, fil-Polonja u fi Spanja ta' 16-il sena u, kif għedt, fil-Belġju, u l-istess fil-Lussemburgu, l-età minima hija ta' 18-il sena. Jiġifieri t-tendenza madwar id-dinja, bejn wieħed u ieħor, hija li l-età minima għar-responsabilità kriminali tkun ta' 14-il sena.

Jekk wieħed jara għaliex aħna kellna din l-età daqshekk baxxa, jinduna li, bħall-maġġoranza tal-pajjiżi tal-*Commonwealth,* aħna konna nsegwu r-Renju Unit li japplika waħda mill-aktar etajiet baxxi għar-responsabilità kriminali. Fil-fatt, l-età minima fl-Iskozja hija ta' 12-il sena – Il-Parlament Skoċċiż tella' l-età minima minn tmien snin għal 12-il sena biss fl-2010 – filwaqt li, fl-Ingilterra u fl-Irlanda, hija ta' għaxar snin.

[4] Ministru tal-Gustizzja Onor. Owen Bonnici

Tajjeb ninnota li, fis-sena 2000, il-*United Nations Committee on the Rights of the Child* għamel bosta osservazzjonijiet dwar kif il-Konvenzjoni tal-Ġnus Magħquda dwar id-Drittijiet tat-Tfal tista' tiġi applikata aħjar f'Malta. Fil-fatt qal hekk:

"21. *Concern is also expressed that the minimum legal age for criminal responsibility, set at 9 years, is too low.*

22. *The Committee recommends that the State party review its domestic legislation regarding the minimum legal ages for criminal responsibility … in accordance to the principles and provisions of the Convention, especially the best interests of the child.*"

Paragrafu 49 imbagħad jgħid hekk:

"*Concern is expressed at the low age of criminal responsibility (9 years); at the assumption, contained in the State party's legislation, that a child aged between 9 and 14 years could act with "mischievous intent"; and at the exclusion of children aged between 16 and 18 years from the juvenile justice system.*"

Imbagħad ikompli jgħid hekk:

"*In light of articles 37, 40 and 39 of the Convention and other relevant international standards, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the Committee recommends that the State party undertake legislative reform to raise the minimum age of criminal responsibility; to eliminate the assumption that a child aged between 9 and 14 years could act with "mischievous intent"; and to ensure that the juvenile justice system covers all children under the age of 18.*"][5]

Fir-rapport imhejji mill-Ministeru tal-Gustizzja, Kultura u Gvern Lokali dwar in-***National Justice Reform***[6] hemm rappurtat li:

Minors over 16 are similarly exempt from criminal responsibility if they act without mischievous discretion. However with regards to offences committed by minors acting with mischievous discretion and those minors who are doli incapax, the parent or any other person charged with the upbringing of the minor may still be subject to legal sanctions since in such cases vicarious responsibility attaches to the person charged with the minor's upbringing.

[5] Onor. Clyde Puli
[6] Mejju 2015 pg.11

Il-frażi "eżenzjoni minn responsabbiltà kriminali" tfisser li ma tistax tinsab ħtija f'persuna ta' taħt is-sittax-il sena sakemm ma jiġix ippruvat li dik il-persuna tkun aġixxiet b' "ħażen", fit-test Ingliż, "*mischievous discretion*".

Sir Anthony Mamo fin-noti tieghu jiddeskrivi *Mischievous discretion* bhala "*the consciousness of the wrongfulness of [an] act and of its consequences.*"[7]

Il-Qorti tirreferi ghan-noti tal-Kors tal-Ligi[8] dwar din it-tema:

> At this young age, children are considered by law as being incapable of forming a criminal intent which is an essential element in the commission or omission of an offence as clearly stated in the legal maxim:
>
> **'actus non facit reum nisi mens sit rea'** – the material conduct must be accompanied with a guilty mind.
>
> Even at this age, a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequence of his acts. But this presumption is no longer conclusive as it may be rebutted by evidence, for the capacity to commit a crime and contract guilt is measured by the strength of the delinquent's understanding and judgment**: 'malatia supplet aetatem'.**
>
> However, the mere commission of a criminal act is not sufficient *'prime facie'* proof of guilty mind as in the case of adults. The presumption of innocence is so strong that some clearer proof of mental condition is specifically requested by the law. It must be shown that the minor had the consciousness of the wrongfulness of his act and of its consequence.

[7] Mamo Notes (n 25) 79
[8] Sena akkademika 2000/2001

Il-Qorti hadet l-opportunita' li tara kif kazijiet bhal dawn kienu trattati mill-Qorti tal-Minorenni ta' Malta presedut mill-kollega l-Magistrat Doreen Clarke. Fost is-sentenzi li l-Qorti rat hemm dawk: Il-**Pulizija vs HD** deciza 2 ta' Lulju 2010, il-**Pulizija vs KB** deciza fit-2 ta' Ottubru 2013 u l-**Pulizija vs NS** deciza fl-14 ta' Jannar 2015.

Illi l-Qorti tirreferi ghas-sottomissjoni tad-difiza li fi kwalunkwe kaz biex tinstab htija fil-konfront tal-imputat irid jigi pruvat li huwa agixxa b'hazen (*michievious discretion*).

Illi dwar ir-responsabbilta' kriminali ta' tfal kif inhu l-imputat, il-Professur Sir Anthony Mamo jghallem hekk:

> *Even at this age a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequences of his acts; but this presumption is no longer conclusive: it may be rebutted by evidence: for the capacity to commit a crime and contract guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgement: malatia supplet aetatem. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient prima facie proof of a guilty mind. The presumption of innocence is so strong that some clearer proof of the mental condition is necessary. A special proof of mischievious discretion or discernment must be made: it must be shown that the minor had the consciousness of the wrongfulness of his act and its consequences..... The question whether a child has acted with discretion is a question of fact about which no legal rule can be laid down. It depends upon a moral assessment of all the circumstances of each particular case, and it cannot be answered in the affirmative unless it appears clear that the minor has acted with the conciousness of the wrongful and unlawful character of his deed, or, in other words, with a guilty knowledge that he was doing wrong*[9].

[9] Notes on Criminal Law Vol I pagna 78

Il-Qorti tinnota li la l-Prosekuzzjoni u lanqas il-Parte Civile m'huma jsostnu li dak li sehh fid-9 ta' Lulju 2015 gie kkagunat b'xi 'hazen' da parti tal-imputat.

L-Imhallef Harper J. fil-kaz **R (A Child) v. Whitty** (1993) 66 A Crim. R. 462, isostni:

> "*No civilised society, says Professor Colin Howard in his book entitled* ***Criminal Law*** *(4th ed., 1982) p. 343, 'regards children as accountable for their actions to the same extent as adults.*"
>
> "*The wisdom of protecting children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed.*"

Erle J. fil-kaz **Reg. v. Smith** (1845) 1 Cox C.C. 260 qal li:

> "*... a guilty knowledge that he was doing wrong - must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of opinion he did fire it) he had a guilty knowledge that he was committing a crime.*"

Professor Glanville Williams, Q.C. f'[1954] Crim. L.R. 493[10] jghallem li:

> "*... the 'common sense' view of moral responsibility and retributive punishment is still widely maintained in respect of the sane adult who commits a crime. Yet in respect of children it is just as generally abandoned. No one whose opinion is worth considering now believes that a child who does wrong ought as a matter of moral necessity to expiate his wrong by suffering. Punishment may sometimes be the best treatment, but if so it is because this is the only way in which the*

[10] *Criminal Law, The General Part*, 2nd ed. pp. 495-496

particular child can be made to see the error of his ways. . . In this climate of opinion the 'knowledge of wrong' test no longer makes sense.

… Thus at the present day the 'knowledge of wrong' test stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent, or the approved school. The paradoxical result is that, the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law. "

"*It is perhaps just possible to argue that the test should now be regarded as even legally obsolete. The test was designed to restrict the punishment of children and should not be used where no question of punishment arises. This argument has to face the difficulty that the test traditionally protects the child from conviction, whereas the choice between punishment and other treatment is only made after conviction.*"

Il-Professur Glanville Williams ikompli jispjega li:

"*As a matter of policy it is highly desirable that a child who has committed what, for an adult, would be a crime, should be put to answer, even if he is afterwards acquitted on the ground that he did not know his act to be wrong. This desirable result can be reached by drawing a distinction between the burden of proof (or persuasive burden) and the burden of introducing evidence (evidential burden). The burden of proving the child's knowledge of wrong is on the prosecution, but this only means that, when all the evidence is in, the prosecution must fail if the court is not satisfied beyond reasonable doubt of the child's guilt. The fact that the persuasive burden is on the prosecution does not control the burden of introducing evidence on particular issues, for the law may place an evidential burden on the accused even when the persuasive burden is on the prosecution.*"[11]

[11] Ibid p. 498

Lord Lowry f'**C v DPP** at 38C:

> *"A long uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has variously been expressed, as in Blackstone, 'strong and clear beyond all doubt or contradiction', or in Rex v Gorrie (1919) 83 JP 136, 'very clear and complete evidence' or in B v R (1958) 44 Cr App R1 at 3 per Lord Parker CJ, 'It has often been put this way, that ... "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt' ".* (enfazi tal-Qorti)

Il-Qorti taqbel mas-sottomissjoni tad-difiza li "d-diliġenza li hija mistennija minn bniedem adult ċertament ma tistax tinsab fl-aġir ta' persuni ta' età daqstant tenera. Dak li fi bniedem adult jista' jitqies bħala leġġerezza huwa, f'persuni ta' taħt l-età, mhux biss aċċettabbli imma saħansitra mistenni, u jikkwalifika bħala n-norma."

Id-difiza ssostni li "l-liġi stess tikkunsidra li l-età ta' persuni taħt it-tmintax-il sena tilgħab irwol importanti ħafna fid-determinazzjoni ta' jekk l-aġir tagħhom jistax jitqies li jikser id-dispożizzjonijiet li jistabbilixxu l-ħtija u jikkominaw il-piena għal aġir partikolari. Tant huwa hekk li l-leġiżlatur innifsu stabbilixxa klassifikazzjoni ta' attenwanti li tirrifletti l-età tas-suġġett partikolari; attenwanti li tvarja skont jekk is-suġġett ikunx għadu taħt l-età ta' erbatax-il sena; u mbagħad jekk ikunx laħaq l-età ta' sittax-il sena."

Stewart, Pam and Monahan, Geoff f'**Negligence and the Exuberance of Youth**[12] jispjegaw li,

> *"Although Mr Dederer was only fourteen and a half years of age, the evidence showed that he was an experienced diver. He would have*

[12] Melbourne University Law Review Vol. 32, pg. 756

known that a safe dive always requires water of adequate depth. He acknowledged that, notwithstanding visual inspection and the recollection of seeing other children entering the water, he was not aware of the actual depth into which he plunged. He was aware of the signs placed on the bridge and of the prohibition which each entailed. While the standard of care that could be expected of him was only that of an ordinary person of his age, even a much younger Australian child with less experience of diving would have known that serious risks were involved in proceeding as Mr Dederer did".[13]

"The courts have been at pains to consider the impulsiveness, immaturity, inexperience and lack of foresight of children when making a comparison between the culpability of an adult or corporate defendant, and that of a child plaintiff. These matters have been addressed overtly by the courts, resulting in accommodations for children that would not and clearly should not, be applicable to adults."

"The finding by the High Court majority in Dederer (and one dissenting justice in the NSW Court of Appeal that this minor should shoulder full responsibility for the tragic accident in this case appears somewhat harsh. The plaintiff's actions were certainly foolish, but they were the actions of a boy not yet old enough to vote, obtain a driver's licence or even leave school. While there have been examples of children as young as 12 being held fully responsible for their own actions, this is generally due to a finding of a lack of foreseeability of risk by a defendant."

Il-Qorti thoss li f'dan l-istadju ghandha tikkwota dak li qal l-Isqof ta' Ghawdex Mario Grech fil-25 ta' Lulju 2015:

Għalkemm il-ġustizzja hija kejl meħtieġ għas-soċjetà, l-esperjenza tixhdilna li bil-ġustizzja biss ma rnexxilniex inġibu l-ordni u l-paċi. Għalkemm għandna l-qrati bħala strutturi li jiggarantixxu l-ġustizzja,

[13] **Roads and Traffic Authority of New South Wales v. Dederer** (2007) 238 ALR 761

mhux biss ħafna feriti jibqgħu ma jagħlqux, imma xi drabi l-istess strutturi jikkawżaw ġerħat oħra.

KONSIDERAZZJONIJIET LEGALI

L-Artikolu 225(1) tal-Kap. 9 – Il-Kuncett ta' Negligenza

Fid-dottrina u l-gurisprudenza kontinentali jezistu zewg teoriji partikolari dwar il-kuncett ta' negligenza: it-teorija hekk imsejha oggettiva u dik suggettiva. It-test ghat-teorija oggettiva mhux wiehed li hu mmirat biex jistabbilixxi jekk il-persuna ipprevedietx jew setghetx tipprevedi dak l-incident fil-*fatti specie* partikolari tal-kaz izda jekk l-agir ta' dik il-persuna jaqax taht l-obbligu ragjonevoli ta' attenzjoni li kull persuna fis-socjeta` hija prezunta li ghandu jkollha f'cirkostanza partikolari. Min-naha l-ohra t-teorija suggettiva tenfasizza li wiehed jista' jitkellem fuq agir negligenti jekk ikun hemm nuqqas f'li wiehed ikun *alert* jew vigilanti bil-limitazzjonijiet tieghu personali f'dak il-kaz partikolari.

Il-Kodici Kriminali taghna fl-artikoli 225, [14] 226[15] u 328[16] jitkellem fuq *"nuqqas ta' hsieb, traskuragni, nuqqas ta' hila fl-arti jew professjoni tieghu u*

[14] Artikolu 225: *"Kull min, b'nuqqas ta' hsieb, bi traskuragni, jew b'nuqqas ta' hila fl-arti jew professjoni tieghu, jew b'nuqqas ta' tharis ta' regolamenti, jikkaguna l-mewt ta' xi hadd, jehel, meta jinsab hati, il-piena ta' prigunerija ghal zmien mhux izjed minn erba' snin jew multa mhux izjed minn hdax-il elf sitt mija u sitta u erbghin euro u sebgha u tmenin centezmu (11,646.87)."*

[15] L-Artikolu 226 jirreferi ghall-offizi li ma jwasslux ghall-mewt izda jarrekaw biss hsara gravi jew hafifa fuq il-persuna ta' l-individwu*: "Jekk minhabba l-fatti imsemmijin fl-ahhar artikolu qabel dan issir offiza fuq il-persuna, l-akkuzat, meta jinsab hati, jehel - (a) jekk l-offiza tkun gravi u ggib il-konsegwenzi msemmijin fl-artikolu 218, il-piena ta' prigunerija ghal zmien mhux izjed minn sena jew multa mhux izjed minn erbat elef sitt mija u tmienja u hamsin ewro u hamsa u sebghin ewro centezmi (€4658.75); (b) jekk l-offiza tkun gravi minghajr il-konsegwenzi msemmijin fl-artikolu 218, il-piena ta' prigunerija ghal zmien mhux izjed minn sitt xhur jew multa mhux izjed minn elfejn tlett mija u disgha u ghoxrin ewro u sebgha u tletin ewro centezmi (€2329.37); (c) jekk l-offiza tkun hafifa, il-pieni stabbiliti ghall-kontravvenzjonijiet. (2) Fil-kazijiet imsemmijin fis-subartikolu (1)(c), il-procediment jista' jittiehed biss fuq kwerela tal-parti offiza.*

[16] L-artikolu 328 jaqra: "*Kull min, b'nuqqas ta' hsieb, bi traskuragni jew b'nuqqas ta' hila fl-arti jew professjoni tieghu, jew b'nuqqas ta' tharis ta' regolamenti, jikkaguna hruq, jew jaghmel xi hsara jew ihassar jew jgharraq xi haga, kif imsemmi f'dan is-sub-titolu, jehel, meta jinsab hati - (a) jekk minhabba f'hekk tigri l-mewt ta' persuna, il-piena stabbilita fl-artikolu 225; (b) jekk minhabba f'hekk xi hadd ibati offiza gravi fuq il-persuna, li tkun iggib il-konsegwenzi msemmijin fl-artikolu 218, il-piena ta' prigunerija ghal zmien mhux izjed minn sitt xhur jew multa mhux izjed minn elfejn tliet mija u disgha u ghoxrin euro u sebgha u tletin centezmu (2,329.37); (c) jekk minhabba f'hekk xi hadd ibati offiza gravi minghajr il-konsegwenzi hawn fuq imsemmija, il-piena ta' prigunerija ghal zmien mhux izjed minn tliet xhur jew multa mhux izjed minn elf mija u erbgha u sittin*

nuqqas ta' tharis ta' regolamenti". Ma tezisti l-ebda spjegazzjoni tat-termini *"nuqqas ta' hsieb u traskuragni"*; madanakollu dawn generalment huma mehudin li jfissru bhala nuqqas ta' attenzjoni u ta' tehid ta' prekawzjonijiet li kienu mistennija f'cirkostanzi partikolari. Fir-rigward tat-termini *"nuqqas ta' hila fl-arti u professjoni tieghu"* u *"nuqqas ta' tharis ta' regolamenti"*, l-implikazzjoni ta' dawn il-frazijiet huma pjuttost cari u ma jhallu lok tal-ebda interpretazzjoni. Sakemm l-agir negligenti ma jinkwadrax ruhu taht xi wahda mill-parametri stabbiliti minn dawn l-artikoli tal-ligi, persuna ma tkunx tista` tigi misjuba hatja ta' negligenza ghal dak li ghandu x'jaqsam mal-azzjoni kriminali. Inoltre tali agir negligenti jrid ikun per forza wassal sabiex giet arrekata hsara lill-persuna jew inkella xi proprjeta`. Dan ghaliex fl-artikoli 225, 226 u l-artikoli 328, il-hsara lill-persuna jew lill-proprjeta` hija indikata bhala wahda mill-elementi kostituttivi tar-reat.

Il-Kodici taghna huwa bbazat fuq il-Kodici Taljan tal-1889. Fil-kummentarju tad-disposizzjonijiet relattivi ghal negligenza ta' dan il-Kodici, awturi Taljani dejjem qiesu li ghandu jigi applikat it-test suggettiv.[17] Jekk wiehed iqis it-termini uzati fil-ligi taghna u cioe` *"nuqqas ta' hsieb u traskuragni"*, wiehed jista' jinnota li dawn huma termini li qeghdin jirreferu direttament ghall-attitudni soggettiva ta' min ikun hati tar-reat. Huwa necessarju ghalhekk li wiehed jindika jekk ic-cirkostanzi partikolari tal-kaz kinux jippermettu lill-persuna involuta li tintebah bil-konsegwenzi tal-agir taghha.

Il-parti operattiva u essenzjali tal-akkuza li giet dedotta fil-konfront tal-imputat hija li huwa kkaguna l-mewt ta' James Xuereb *"b'nuqqas ta' hsieb, bi traskuragni, jew b'nuqqas ta' hila fl-arti jew professjoni tieghu, jew b'nuqqas ta' regolamenti"*.

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euro u disgha u sittin centezmu (1,164.69); (d) f'kull kaz iehor, il-piena ta' prigunerija ghal mhux izjed minn tliet xhur jew il-multa jew il-pieni tal-kontravvenzjonijiet: Izda fil-kazijiet imsemmijin fil-paragrafu (d), hlief meta l-hsara tkun kagunata fi proprjetà pubblika, jistghu jittiehdu procedimenti biss bil-kwerela tal-parti offiza."

[17] Ara Impallomeni, Vol III, pg 1662

Il-gurista Sir Anthony Mamo, fin-Noti tieghu, jispjega illi ghalkemm il-frazijiet *"nuqqas ta' hsieb"* u *"traskuragni"* mhumiex moghtija definizzjoni mill-ligi pero jkompli jghid li *"it is clear that by them the law means generally the absence of such care and precautions as it was the duty of the defendant to take in the circumstances"*[18].

Il-Professur Mamo jkompli jsostni li, *"the essence of negligence is made to consist in the "possibility of foreseeing" the event which has not been foreseen"*[19]. Sabiex jenforza t-tezi tieghu, Mamo jaghmel referenza ghat-taghlim ta' Francesco Carrara, u jikkwotah kif segwenti – *"Il non aver previsto la conseguenza offensiva sconfina la colpa dal dolo. Il non averla potuto prevedere, sconfine il caso dalla colpa"*[20].

Antolisei, fil-ktieb tieghu *Manuale di Diritto Penale (Parte Generale)*, jaghmel ukoll referenza ghal Carrara, u jghid hekk:

> *"Secondo la dottrina tradizionale che vanta origini antichissime e in questi ultimo tempi torna a prevalere, la colpa consiste nella prevedibilita' del risultato non voluto. Scrisse il Carrara: La colpa si definisce la volontaria omissione di diligenza nel calcolare le conseguenze possibili e prevedibili del proprio fatto. Dicesi conseguenza prevedibile, perche' l'essenza della colpa sta nella prevedibilita'".*[21]

Din hija t-tezi li dejjem giet accettata mill-Qrati taghna. Fis-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet ***Il-Pulizija vs Richard Grech***[22] gie deciz li jekk il-prudenza tikkonsisti filli persuna taghmel dak li hu ragjonevolment mistenni minnha sabiex tipprevjeni l-konsegwenzi dannuzi ta' ghemilha, l-imprudenza tikkonsisti filli wiehed jaghmel avventatament dawk l-affarijiet li hu messu ppreveda li setghu jikkagunaw hsara. It-traskuragni, mill-banda l-ohra, timplika certa non-

[18] *Lectures in Criminal Law*, Vol 1, pg 69
[19] ibid, pg 67 (sottolinear fit-test originali)
[20] ibid, pg 68 (sottolinear fit-test originali)
[21] Antolisei, *Manuale di Diritto Penale (Parte Generale)* (Giuffre', 1997, 14 ed) 364
[22] *Pulizija vs Richard Grech* (Appell Kriminali, 21/03/1996, De Gaetano)

kuranza, certu abbandun kemm intellettiv kif ukoll materjali. Fiz-zewg kazijiet, pero', il-hsara tkun prevedibbli, ghalkemm mhux prevista: kieku kienet ukoll prevista, wiehed ikun qieghed fil-kamp doluz b'applikazzjoni tad-dottrina tal-intenzjoni pozittiva indiretta.

Fl-istess sentenza gie ritenut dak li kien diga ntqal fis-sentenza **Il-Pulizija vs Perit Louis Portelli**[23], fejn saret ukoll, fost l-ohrajn, referenza ghal Giorgi:

> *"Hu mehtieg ghall-kostituzzjoni tar-reat involontarju skond l-art. 239 [illum 225] tal-Kodici Penali illi tirrikorri kondotta volontarja negligenti – konsistenti generikament f'nuqqas ta' hsieb ("imprudenza"), traskuragni ("negligenza"), jew nuqqas ta' hila ("imperizia") fl-arti jew professjoni jew konsistenti specifikatament f'nuqqas ta' tharis tar-regolamenti – li tkun segwita b'ness ta' kawzalita' minn event dannuz involontarju.*
>
> *Ghandu jigi premess illi, ghall-accertament tal-htija minhabba f'kondotta negligenti, ghandu jsir il-konfront tal-kondotta effettivament adoperata ma' dik ta' persuna li s-sapjenza rumana identifikat mal-"bonus pater familias", dik il-kondotta, cioe, illi fil-kaz konkret kienet tigi wzata minn persuna ta' intelligenza, diligenza u sensibilita' normali: kriterju li filwaqt li jservi ta' gwida oggettiva ghall-gudikant, ihallih fl-istess hin liberu li jivvaluta d-diligenza tal-kaz konkret. "La diligenza del buon padre di famiglia costituisce un criterio abbastanza indeterminato per lasciare al giudice gran liberta' di valutazione." (Giorgi, Teoria delle Obbligazioni, II, 27, p. 46)"*

Il-kuncett tal-*bonus pater familias*

Il-Qorti taghmel referenza ghas-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-kaz il-**Pulizija v. Kevin Sammut**[24] fit-23 ta' Jannar 2009.

[23] *Pulizija vs Perit Louis Portelli* (Qorti Kriminali, 04/02/1961, Kollez XLV.iv.870, Flores)
[24] App Nru 192/08

F'din id-decizjoni l-Prim Imhallef Vincent Degaetano jidhol fid-dettal dwar il-kuncett tal-*bonus pater familias* u xi jkollu f'mohhu bniedem ta' intelligenza ordinarja:

> Fi kliem iehor, il-kwistjoni tibqa' dejjem dik ta' x'kellu verament f'mohhu l-agent fil-mument li wettaq l-att materjali u mhux x'seta' kellu f'mohhu li kieku kien bniedem ta' intelligenza ordinarja jew ta' sagacja ordinarja jew – biex wiehed juza l-espressjoni uzata mill-ewwel qorti – kieku kien *bonus pater familias*. Argument analogu (u fil-kuntest ta' reati differenti) gie elaborat minn din il-Qorti (kollegjalment komposta) fis-sentenza taghha tat-12 ta' Dicembru 2007 fil-kawza fl-ismijiet **Ir-Repubblika ta' Malta v. John Polidano et**. F'dik is-sentenza nghad hekk:
>
> > **Ghalkemm huwa veru li wiehed irid jiddesumi l-intenzjoni ta' dak li jkun kemm mill-att materjali kif ukoll mic-cirkostanzi antecedenti, konkomitanti u sussegwenti ghall-istess att materjali, l-intenzjoni dejjem tibqa' kwistjoni soggettiva – <u>jigifieri x'kellu f'mohhu l-agent (l-akkuzat) fil-mument li ghamel l-att</u> – u mhux semplicement kwistjoni oggettiva ta' x'missu anticipa jew x'kienet tanticipa l-persuna ta' intelligenza ordinarja. Jigifieri m'ghandhiex issir enfasi preponderanti fuq il-konsegwenzi li rrizultaw mill-att. Kif jispjega Gerald Gordon fil-ktieb tieghu *The Criminal Law of Scotland* [25]:**
> >
> > > **"Intention, then, is subjective, but is proved objectively. Or at least this is so in most cases. Since it is in the end subjective, the jury cannot be prevented from claiming intuitive knowledge of the accused's state of mind, or from believing his account of his state of mind against all the objective evidence. Or at least they should not be so prevented, if they are, as they are always said**

[25] W. Green and Son Ltd (Edinburgh), 1978.

> **to be, the judges of fact. The law should not at one and the same time lay down a subjective criterion, and then require the jury to determine whether the criterion has been satisfied by reference solely to an objective standard, the standard of the reasonable man. It has from time to time been said that a man is presumed to intend the natural consequences of his acts, but in the first place this is at most a presumption, and in the second place it applies only if "natural" is read as meaning "blatantly highly probable": if this were not so, all crimes of intent would be reduced to crimes of negligence."[26]**

U l-istess awtur, fil-kuntest tal-kuncett ta' "recklessness" (li fil-ligi Skocciza *"is advertent and involves foresight of the risk"*[27] u li ghalhekk hu tista' tghid identiku ghall-kuncett taghna ta' intenzjoni pozittiva indiretta) jghid hekk:

> **"When the reasonable man is used as a test of subjective recklessness the position is that if the reasonable man would have foreseen the risk, it will be accepted as a fact that the accused foresaw it, unless there is strong evidence to the contrary. But if the accused can show that in fact he did not foresee the risk, then it is illogical to characterise him as reckless on the ground that a reasonable man would have foreseen it. As Hall[28] says, *'In the determination of these questions, the introduction of the "reasonable man" is not a substitute for the defendant's awareness that his conduct increased the risk of harm any more than it is a substitute for the determination of intention, where that is material. It is a* method *used to determine those operative facts in the minds of normal persons'*.**

[26] Para. 7.28, pp. 232-233.
[27] Para. 7.45, p. 241; "…negligence is inadvertent and involves an absence of such foresight."
[28] Hall, J., ***General Principles of Criminal Law*** 2nd ed., Indianapolis, 1960, p. 120.

> **"Since evidence of the accused's state of mind must normally consist of objective facts from which the jury will draw an inference as to his state of mind, the more careless the accused's behaviour the more likely it is that he will be regarded as reckless, since the more likely it will be that he foresaw the risk involved. A man who kills another by punching him on the jaw may be believed when he says that he did not foresee the risk of death; but a man who kills another by striking him on the skull with a hatchet will be hard put to it to persuade a jury that he did not realise that what he was doing might be fatal. In *Robertson and Donoghue* Lord Justice-Clerk Cooper directed the jury that 'In judging whether…reckless indifference is present you would take into account the nature of the violence used, the condition of the victim when it was used, and the circumstances under which the assault was committed'. All these are objective factors affecting the degree of the carelessness of what the accused did, viewed as something likely to cause death. The jury proceed by way of syllogism to infer from these objective factors that the accused was subjectively reckless, and the major premise is that a reasonable man would have foreseen the risk. So they argue: all reasonable men would foresee the risk of death as a result of what the accused did; the accused is (*ex hypothesi*) a reasonable man; therefore the accused foresaw the risk."[29]**

Dmir li jitnaqqas ir-riskju

Il-Qorti kellha l-opportunita' li tmur fuq il-post fejn sehh l-incident. Il-Qorti nnutat li ghalkemm hemm il-facilita' ta' *spring board* u sellum mal-

[29] Gerald Gordon, *op. cit.* para. 7.53, pp. 245-246.

blat biex min ikun irid jitla' lura fuq il-blat ikun jista' jaghmel dan, ma kien hemm l-ebda avviz li jwissi lil min ikun qieghed jghum hemm biex ikun diligenti u ma jihux riskji. Il-Qorti tirrakkomanda li issa li qrobna ghall-istagun tas-Sajf jittiehdu l-mizuri necessarji biex din ix-xtajta tant popolari tkun sikura ghal dawk li jghumu hemmhekk.

Il-Qorti se tislet minn decizjonijiet barranin dwar ir-responsabbilta' li ghandhom l-Awtoritajiet inkluz il-Kunsill Lokali ta' Ghajnsielem liema zona tinsab fil-konfini tieghu.

> *"… by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin"*[30]

> *"… the nature and obviousness of the risk, the probability of its occurrence, the age and maturity of those exposed to it, the actual or imputed knowledge of those persons and the likelihood that the warning will be effective to eliminate or reduce the harm resulting from the risk. Most importantly, they include the likelihood that inadvertence, familiarity with the area or constant exposure to the risk will make those coming into contact with the risk careless for their safety"*[31]

> *"… the entrant is only entitled to expect the measure of care appropriate to the nature of the land or premises entered and to the relationship which exists between the entrant and the occupier … Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just …"*[32]

> *"the serious risk of devastating injuries to those engaged in such activities must have been obvious to the RTA. The RTA knew or ought to have known that particularly in the summer months, jumping and diving was occurring with startling frequency, involving at times,*

[30] **Nagle**, at 430
[31] Notes on Recent High Court Decisions on Torts, Neil Foster, 31 October 2005
[32] **Romeo**, at 299

groups of young people every five or ten minutes, with a group capable of comprising 10 to 15 children aged 10 to 16 years".[33]

"In ***Tomlinson v Congleton Borough Council*** *[2004] 1 AC 46 there was a lake, which was known to attract many visitors in hot weather, that had formed in a disused quarry in a country park owned and occupied by the first defendant and managed by the second defendant. Swimming in the lake was prohibited and the defendants placed prominent notices reading "dangerous water: no swimming" and employed rangers with the duty of giving oral warnings against swimming and handing out safety leaflets. The first defendant, aware that the notices were frequently ignored and had little effect in preventing visitors to the car park from entering the water and that several accidents had resulted from swimming in the lake, intended planting vegetation around the shore to prevent people from going into the water but had not yet done so due to a shortage of financial resources. On a hot day the plaintiff, aged 18, went into the lake and from a standing position in shallow water dived and struck his head on the sandy bottom, breaking his neck. He claimed damages against the defendants, alleging that their accident had been caused by their breach of the duty of care that they had owed to him as a trespasser under section 1 of the Occupiers' Liability Act 1984. The judge at first instance found that there had been nothing about the lake that had made it any more dangerous than any other stretch of open water and that the danger and risk of injury from diving in it where it was shallow had been obvious. The Court of Appeal by a majority allowed an appeal by the plaintiff but the House of Lords reversed the Court of Appeal and dismissed the claim, holding that the accident had been due to the plaintiff's own misjudgement in attempting to dive in too shallow water and not to the alleged breach of duty by the defendants. They also held that the risk was not one in respect of which the defendants might reasonably have been expected to afford the plaintiff some protection. Lord Hoffmann stated as follows at pps 80 and 84-5:*

[33] **Roads and Traffic Authority of New South Wales v. Dederer** (2007) 238 ALR 761

"27 ... Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity an inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case Mr Tomlinson knew the lake well and, even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not the state of the premises.

45 ... I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course, the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.

46 ... My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. ... A duty to protect against obvious risks or self-inflicted harm exists only in cases where there is no genuine and informed choice ..."[34]

[34] **Michael Leonard vs The Loch Lomond and the Trossachs National Park Authority** [2014] CSOH 38

Sottomissjonijiet Finali tal-Prosekuzzjoni

Fis-16 ta' Marzu 2016 saru s-sottomissjonijiet finali mill-partijiet wara li kienu maghluqa l-provi.

Il-Qorti tiehu l-opportunita' biex tfahhar lill-Ispettur Bernard Charles Spiteri ghal mod professjonali u uman li bih mexxa dawn il-proceduri. Il-Prosekutur fis-sottomissjonijiet finali tieghu sostna li:

> Il-Prosekuzzjoni f'dan il-każ tifhem l-ewwelnett illi huwa każ diffiċċli u s-sitwazzjoni hija waħda daqsxejn diffiċli wkoll fid-dawl taċ-ċirkostanzi kif ġraw li fih hemm żewġ vittmi. Hemm il-vittma proprja u anke wkoll l-imputat illi żgur illi għaddej minn ċertu sitwazzjonijiet diffiċli f'ħajtu illi jista' wkoll jibqa' jkun hemm konsegwenzi tagħhom. Jiena Sur Maġistrat, ħalli ma ntawwalx ħafna, li ġara l-Qorti taf kif seħħ il-każ mill-provi li nstemgħu, illi allegatament l-imputat qabeż fil-baħar u dak il-ħin laqat lit-tifel l-ieħor illi kien qiegħed jgħum, u li nzertaw ukoll it-tnejn kienu ħbieb, u li mhux l-ewwel darba illi anke wkoll ġieli kienu qegħdin jgħumu flimkien. Li naħseb jiena li l-Qorti trid tqis f'dawn iċ-ċirkostanzi huwa l-ewwelnett jekk il-vittma setgħax ħa xi prekawzjonijiet minn naħa tiegħu sabiex l-inċident seta' ġie evitat. U t-tieni nett jekk l-imputat, anke wkoll tenut l-età tiegħu, setgħax qabel ma qabeż fil-baħar ħa xi miżuri sabiex ma jaqbiżx dak il-ħin jew le. Tenut nerġa' ngħid l-età tiegħu kemm kienet twasslu sabiex dan ukoll jara x'possibilitajiet seta' jieħu sabiex jiġi evitat l-inċident. Li hu żgur Sur Maġistrat illi kawża ta' dan l-inċident il-vittma sofra diversi ġrieħi li sfortunatament wasslu għal dak li wassal.
>
> Il-ġenituri għandhom ikunu, jekk tal-inqas ma humiex preżenti, għandhom iwissu lill-uliedhom biex joqgħodu attenti kif iġibu ruħhom u jgħidulhom dwar ċerti perikli li jkun hemm. U anke wkoll mill-awtoritajiet fejn jista' jkun hemm tabelli li jindikaw biex jiġi evitat ċertu attività, dejjem hija xi ħaġa ta' min jirrakkomandaha. Għax imbagħad wara għalxejn.

Is-*Social Inquiry Report*

Il-Qorti fil-bidu ta' dawn il-proceduri kienet hatret lill-*Probation Officer* Joseph Mizzi biex ihejji *Social Inquiry Report* u jibqa' jissorvelja lill-imputat tul dawn il-proceduri.

Illi fis-sottomissjonijet orali ma saritx referenza ghall-kontenut ta' dan ir-rapport izda fis-sottomissjonijiet bil-kitba l-*Parte Civile* siltet minn dan ir-rapport:

> L-esponenti umilment jissottomettu illi dan ir-rapport huwa ferm importanti ghall-kaz odjern, ghaliex filwaqt li juri kif dan l-incident affetwa liz-zewgt partijiet fil-kaz in kwistjoni, juri wkoll certu fatturi importanti dwar l-imputat, liema fatturi ghandhom, fl-umili fehma tal-esponenti funzjoni doppja. Fl-ewwel lok, juru l-imputat min kien qabel l-incident b'dan li johorgu certu fattizzi important ai fini tal-kulpa; u f-tieni lok, titfa dawl ukoll dwar x'sentenza ghandha tinghata jekk dina l-Onorabbli Qorti tikkonkludi li l-imputat huwa hati tal-imputazzjoni dedotti kontra tieghu.
>
> Ghal din il-parti tan-nota l-esponenti sejrin jaghmlu referenza ghal ewwel punt li titratta l-karattru tal-imputat. Is-surmast tal-iskola fejn jattendi l-imputat jghid li fis-snin precedenti l-imputat kellu imgieba deskritta "*bhala wahda mhux ezemplari*". L-istess surmast tal-iskola jghid ukoll "*li quddiem shabu, OMISSIS jidher li ghandu karatteristici ta' "leader", mhux bniedem misthi, ghandu tendenzi li jhobb jisfida u jkun irid jispikka hdejn l-ohrajn".*[35]
>
> L-Arcipriet tal-parrocca ta' Ghajnsielem jiddeskrivi "*il-karattru tal-imputat bhala 'fuq tieghu', 'jhobb jaghmel ta' rasu', kultant dizubbidjenti'. Zied jghid li OMISSIS huwa 'leader' li kapaci jinfluwenza l-grupp ta' hbieb li jkunu flimkien u ma jibqax lura sabiex jaghmel "atti erojci" quddiem shabu".* L-Arcipriet isemmi wkoll li l-imputat kien qal xi diskors dispregjattiv fil-konfront tal-vittma James fil-festa tar-rahal izda jzid

[35] Pagna 8 tar-rapport. (folio 63 tal-process)

li dan seta' kien taht l-effett tal-alkohol. Jghid li l-familja tal-vittma ippruvat timminimizza dan l-incident, izda ovvjament x'hin James miet, dawn kienu ixxukjati.

Fatti dawn l-osservazzjonijiet, l-esponenti jirrilevu bir-rispett, illi huma ma ghamlux dawn l-osservazzjonijiet sabiex jikkritikaw lill-imputat, izda sabiex jistiednu lil dina l-Onorabbli illi tara l-istampa shiha tal-kwadru meta tigi biex tikkonsidra l-elementi necessarji skond il-ligi biex tigi pruvata l-htija. Dawn l-osservazzjonijiet juru li l-imputat huwa tifel li ta' 14-il sena lest li jisfida u jrid jispikka hdejn l-ohrajn.

Huwa wkoll tifel fuq tieghu u li allura, bir-rispett, seta' facilment jipprevedi l-fatt li jekk jaqbez fuq xi hadd il-bahar seta' jwegga lil dak li jkun fil-bahar. Konsegwentament, kellu, qabel jaqbez il-bahar jara li tahtu kien 'clear'. Din fl-ahhar mill-ahhar hija l-istess attenzjoni li kieku kien jiehu hu kieku ser jabqez minn post minn fuq ghal isfel sabiex jara li tahtu kien 'safe' biex jaqbez u mhux per ezempju jkun hemm il-blat. Fil-kaz in kwistjoni, però, nonostante li OMISSIS kien jaf li fil-mument ezatt li hu kien ha jaqbez, James kien ghadu fil-bahar taht il-platform, iddecieda li ma jaghtix kaz ta' dan u jiehu "zewgt passi" lura u jaqbez. Bl-istess tezi ta' OMISSIS, allura jekk ha biss "zewgt passi" lura seta' jara b'mod car lil James ghadu taht il-platform u kellu jistenna li James iwarrab u mhux b'nuqqas ta' hsieb jaqbad u jaqbez. Fl-ahhar mill-ahhar ikun hati tar-reat kontemplat taht l-artikolu 225 kull min jikkaguna mewt *inter alia* b'nuqqas ta' hsieb, u huwa propju dan li jidher li ghamel l-imputat.

Id-Difiza rribattiet dan:

Finalment, il-parti ċivili tipprova tiġbed argumenti favur it-teżi tagħha minn dak li hemm irrapportat fis-*social inquiry report.* Dan huwa punt li tqajjem għall-ewwel darba fin-nota ta' sottomissjonijiet tal-parti ċivili u huwa l-fattur maġġuri li wassal lill-esponenti sabiex jippreżenta din in-nota ta' sottomissjonijiet responsiva tiegħu.

F'dan ir-rigward, l-esponenti jibda biex jirrileva li dak li jkun ingħad minn persuni li ma jkunux ġew prodotti sabiex jixhdu *viva voce* fi proċedura kriminali, quddiem il-Qorti, u quddiem l-imputat, u li għalhekk ma jkunux ġew assuġġettati għal kontro-eżami da parti tal-imputat, ma huwiex ammissibbli bħala xhieda kemm favur kif ukoll kontra l-imputat. Dan huwa prinċipju fundamentali bbażat fuq id-dritt għal smigħ xieraq u jikkostitwixxi dritt fundamentali tad-difiża. Għaldaqstant, frankament, l-esponenti kien jistenna aħjar minn min ċertament għandu esperjenza ta' proċeduri kriminali milli jipprova jimplika ħtija fih billi jagħmel riferenza għal dak li seta' qal jew ma qalx l-Arċipriet Frankie Bajada.

Fit-tieni lok, dak li jkun qal xhud (u l-Arċipriet Bajada ma jistax jitqies li huwa xhud) dwar il-karattru tajjeb jew ħażin tal-imputat lanqas ma huwa ammissibbli bħala xhieda. Il-Qorti ma hijiex imsejħa sabiex tesprimi ġudizzju fuq l-imġieba ġenerali u ġenerika tal-imputat imma sabiex tiddeċiedi biss jekk, fiċ-ċirkustanzi partikolari li fihom seħħ l-inċident li jkun qiegħed jiġi investigat, il-komportament tiegħu kienx jiġbor fih elementi li jirrenduh wieħed traskurat u mwettaq b'nuqqas ta' ħsieb. U l-Arċipriet Bajada ma kienx preżenti għall-inċident u kwindi ma jista' jitfa' l-ebda dawl fuq id-deċiżjoni li trid tittieħed mill-Qorti.

U fit-tielet lok, jekk il-kliem li ntqal mill-Arċipriet Bajada jingħata l-piż li ried itih dak l-Arċipriet, jirriżulta li huwa ma qiegħed jattribwixxi l-ebda kolpa lill-esponenti: OMISSIS ma huwiex xi qaddis, u bħal kull tifel ieħor għandu d-difetti tiegħu. Imma li tifel ta' 14-il sena jkun "**kultant** disubbidjenti", jew "iħobb jagħmel ta' rasu" jew "fuq tiegħu" ma jagħmilx minnu xi ġuvnott differenti mill-ġuvintur 'normali' tal-età tiegħu. U l-"atti erojċi" li jirreferi għalihom l-Arċipriet imkien ma ġew spjegati fid-dettall sabiex din l-Onorabbli Qorti tkun tista' tifforma opinjoni dwar jekk dawk l-atti kinux atti pożittivi jew negattivi. Hekk ukoll, din l-Onorabbli Qorti ma għandhiex quddiemha l-elementi neċessarji sabiex tkun tista' tiġġudika jekk verament intqalx xi kliem dispreġġjattiv mill-imputat fil-konfront tal-vittma jew tal-familja tiegħu, u jekk verament intqal xi diskors simili f'liema ċirkustanzi seta' ntqal.

> Għal dawn ir-raġunijiet, huwa sottomess li din il-Qorti għandha tittraskura l-argumenti kollha tal-parti ċivili intiżi sabiex tinstab ħtija fih għab-bażi ta' diskors li seta' ntqal jew ma ntqalx mill-Arċipriet Frankie Bajada, jekk mhux ukoll iċċanfar għall-mod żleali li bih hija ttentat tiżvolġi din il-parti mill-argumenti tagħha.

Il-Qorti tigbed l-attenzjoni li l-iskop ta' *social inquiry (or enquiry) report* huwa li Qorti jkollha "*a report on a person and his or her circumstances, which may be required by a court before sentencing and is made by a probation officer or a social worker from a local authority social services department. Sometimes it is an essential preliminary to any question of a custodial sentence*"[36] u mhux li jintroduci xiehda jew provi li ma jkunux prodotti waqt il-process bic-cans li l-persuna tkun kontra-ezaminata. Li kieku s-Surmast tal-Iskola fejn jattendi l-imputat jew l-Arcipriet tal-Parocca fejn jghix l-imputat riedu jinstemghu kien hemm ic-cans kollu li jixhdu.

Apprezzament tal-provi

Il-Qorti tissottolinea li huwa ben risaput li l-apprezzament tal-provi ghandu jsir mhux biss b'mod spezzettat u individwali izda l-provi ghandhom jigu analizzati flimkien fl-assjem taghhom sabiex wiehed jara x'inferenzi jew interpretazzjoni ragjonevoli u legali jista' jaghti lil dawk il-provi hekk interpretati.

Il-kompitu ta` din il-Qorti hu li taghmel analizi approfondita tal-provi mressqa mill-partijiet. U wara li taghmel tali ezami, trid taghmel id-domanda jekk il-prosekuzzjoni ippruvatx il-kaz taghha skond il-ligi.

Din il-Qorti fid-decizjoni taghha se zzomm quddiem ghajnejja li:

> *Il-Gudikant għandu jezamina bir-reqqa l-provi rilevanti li jkollu quddiemu u mbagħad jiddeciedi l-kawza abbazi tal-ligi applikabbli, tal-*

[36] Collins Dictionary of Law © W.J. Stewart, 2006

gurisprudenza, u tal-provi li fl-opinjoni tiegħu huma konsistenti, konvincenti u korroboranti.[37]

Artikolu 637 tal-Kapitolu 9 jipprovdi gwida cara lill-Qorti kif ghandha tapprezza xhieda ta' xhud:

id-decizjoni titħalla fid-diskrezzjoni ta' min għandu jiggudika l-fatti, billi jittieħed qies tal-imgieba, kondotta u karattru tax-xhud, tal-fatt jekk ix-xiehda għandhiex mis-sewwa jew hix konsistenti, u ta' fattizzi oħra tax-xiehda tiegħu, u jekk ix-xiehda hix imsaħħa minn xiehda oħra, u tac-cirkostanzi kollha tal-kaz.

Ma tistax tinstab htija jew nuqqas ta' htija semplicement fuq analizi ndividwali jew separata tal-provi. Dawn ghandhom jigu kkunsidrati kemm individwalment kif ukoll komplessivament. Dan hu appuntu l-ezercizzju li ghamlet il-Qorti, u cioe' li ezaminat bir-reqqa kollha l-provi prodotti f'dan il-kaz.

KONKLUZJONIJIET

1. Il-Qorti ma kelliex il-verzjoni tal-vittma ghaliex fil-perjodu li l-vittma kien l-Isptar ghall-kura l-pulizija f'sitta u sittin (66) jum ma hadux il-verzjoni tieghu dwar il-fatti. L-Ispettur tal-Ghassa sar jaf bl-incident meta nfurmatu l-avukat tal-qraba tal-vittma fl-24 ta' Lulju 2015, hmistax-il jum wara li sehh l-incident.

2. Il-Qorti ma tistax ma tirrimarkax li f'dan il-kaz tara nuqqas fil-protocol tal-pulizija fejn jidhol incident bhal dan. Dwar dan l-incident serju kien qieghed jitkellem kulhadd, kemm f'Ghawdex kif ukoll f'Malta. Ghaliex min ha r-rapport ma nfurmax lis-superjuri tieghu dwaru? Min imexxi l-pulizija f'Ghawdex x'*follow up* jaghmel dwar ir-rapporti ta' certu entita' li jidhlu?

[37] Appell Civili Numru. 140/1991/2 - **Norbert Agius v. Anthony Vella et., deciz** fil-25 ta' April, 2008 mill-Prim Imhallef Vincent De Gaetano u l-Imhallfin Joseph D. Camilleri u Joseph A. Filletti.

3. Dakinhar tal-incident il-Magistrat tal-Ghassa ma kienx infurmat biex jiftah inkjesta'. Kien infurmat jiem wara fejn ma hassx li f'dak l-istadju kellu jiftah inkjesta'. F'dan il-process ma kellniex il-verzjoni tal-vittma minn sors indipendenti imma ghandna biss dak li xehdu l-qraba tieghu li qalu li qalilhom. La ma kienx infurmat il-Magistrat tal-Ghassa immedjatament dwar l-incident ma nhatrux l-esperti, u lanqas sar access fuq il-post u b'hekk ma setghux ikunu konstatati nuqqasijiet li seta' kien hemm minn dawk responsabbli li jaraw li x-xtajtiet ikunu hielsa mill-perikoli. L-inkjesta' nfethet sitta u sittin (66) jum wara meta miet il-vittma.

4. Il-Qorti tirrileva li fil-lok fejn sehh l-incident fix-Xatt l-Ahmar, konfini ta' Ghajnsielem ghalkemm hemm il-facilita' ta' *spring board* u sellum mal-blat biex min ikun irid jitla' lura fuq il-blat ikun jista' jaghmel dan, ma kien hemm l-ebda avviz li jwissi lil min ikun qieghed jghum hemm biex ikun diligenti u ma jihux riskji. Il-Qorti tirrakkomanda li issa li qrobna ghall-istagun tas-Sajf jittiehdu l-mizuri necessarji biex din ix-xtajta tant popolari tkun sikura ghal dawk li jghumu hemmhekk.

5. Il-Qorti hi dizappuntata li l-Avukat Generali fin-nota tal-14 ta' Marzu 2016 fejn kienu indikati l-artikoli fejn tista' tinstab htija (jew htijiet) kien indikat l-Artikolu 533 tal-Kapitolu 9 tal-Ligijiet ta' Malta li jipprovdi li jekk l-imputat jinstab hati jkun ikkundannat ihallas l-ispejjez tal-esperti izda ma kienx indikat l-Artikolu 37 tal-Kapitolu 9 tal-Ligijiet ta' Malta li jitkellem dwar kif minuri ta' taht is-sittax-il sena jkunu ezenti minn responsabbilta' kriminali jekk l-att isir minghajr hazen, artikolu li zgur huwa krucjali u importanti ghal dan il-kaz.

6. Illi mill-provi prodotti f'dan il-kaz il-Qorti m'ghandha l-ebda dubju li l-imputat m'agixxiex *with the conciousness of the wrongful and unlawful character of his deed*; dan il-Qorti tghidu in vista ta' diversi fatturi fosthom li thoss li anke l-vittma kellu jiehu prekawzjonijiet minn naħa tiegħu sabiex l-inċident seta' jkun

evitat. Min ikun qabeż fil-baħar ghandu jitbieghed immedjatament mill-punt fejn huwa mistenni li nies oħra jinżlu għall-baħar wara l-qabża tagħhom. Il-Qorti taqbel ma' dak li jsostni l-Medical Director tal-Urgent Care tal-University of Vermont Medical Center Daniel Weinstein MD meta jwissi dwar il-qbiz mill-gholi ghall-bahar *"you should always be aware that there may be solid objects under the surface of the water that you can't see and may hit as you enter the water. Also, the force of hitting the water can cause spinal column injuries, fractures, concussions and even death. Once again, what may appear ok because others are doing it may actually be quite dangerous."*[38]

7. Din il-Qorti mill-provi processwali u mix-xhieda mismugha tinsab f'qaghda tiddikjara illi f'dan il-kaz, mehud kollox flimkien, din il-Qorti ma tpoggietx f'pozizzjoni li fiha tista' legittimament tiddikjara l-htija tal-imputat skond l-imputazzjoni migjuba kontrih.

DECIDE:

Il-Qorti in vista ta' dak li jipprovdi l-Artikolu 37 tal-Kap 9 tal-Ligijiet ta' Malta li "***minuri ta' taħt is-sittax-il sena jkun ukoll ezenti minn responsabbilità kriminali għal kull att jew nuqqas magħmul mingħajr ħazen***" u li mill-provi prodotti jirrizulta li dak li sehh mill-imputat, bil-konsegwenzi li rrizultaw wara ma sarx b'hazen, tista' tieqaf hawn u tiddikjara lill-imputat ezenti minn responsabbilta' kriminali, izda fic-cirkostanzi kif zviluppaw thoss li wara li aktar 'il fuq saret l-esposizzjoni legali dwar ir-reat kontemplat fl-Artikolu 225 tal-Kodici Kriminali l-Qorti jidrilha li fil-kaz odjern ma jirrizultawx l-estremi ta' dan ir-reat.

Ghal dawn il-motivi l-Qorti tiddikjara lill-imputat mhux hati tal-imputazzjoni migjuba fil-konfront tieghu u konsegwentement tilliberah minnha.

[38] **Summer Safety: The Dangers of Cliff Jumping and Swimming Holes** (*medcenterblog.uvmhealth.org*)

Il-Qorti tordna d-divjet ta' pubblikazzjoni ta' isem il-minuri OMISSIS fi kwalunkwe mezz ta' komunikazzjoni.

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Dr. Joseph Mifsud
Magistrat