QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 31 ta` Jannar 2017

Kawza Nru. 3
Rik. Nru. 9/15 JZM

1) Mary Grace Farrugia (K.I. 627655M)

2) Joseph Psaila (K.I. 49757M)

3) Adriana Cutajar (K.I. 94561M)

4) Ines Psaila (K.I. 345168M)

kontra

1) Tabib Principali tal-Gvern (Sahha Pubblika), fil-kwalita` rapprezentattiva tieghu ;

2) Kap Ezekuttiv tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol, fil-kwalita` rapprezentattiva tieghu ;

3) Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fid-<u>29 ta` Jannar 2015</u> li jaqra :-

1. Illi r-rikorrenti huma ulied u eredi tal-mejtin Andrew Psaila li miet fil-25 ta` Awissu 1988, ta` 60 sena u ta` martu Maria Psaila nee` Farrugia (vide certifikat tat-twelid tar-rikorrenti – Dok 1 sa 4, certifikat tal-mewt ta` l-imsemmi Andrew Psaila – Dok 5 u martu – Dok 6, u certifikat taz-zwieg tal-imsemmija Andrew u Maria – Dok 7).

2. Illi l-imsemmi Andrew Psaila miet kagun ta` cáncer tal-peritoneum ikkagunat esklussivament mill-esposizzjoni ghall-asbestos, maghruf bhala Malignant Mesothelioma (vide kawza tal-mewt fic-certifikat tal-mewt Dok 5 u dokumenti medici ohra enumerati Dok 9.1 sa 9.9).

3. Illi dan Andrew Psaila kien jahdem bhala pipe worker mal-Malta Drydocks Corporation u dan kien l-uniku impjieg tieghu (vide `employment history` tal-ETC anness u mmarkat Dok 8).

4. Illi matul il-perijodu li Andrew Psaila dam hekk impjegat l-asbestoskien `staple material` fl-imsemmija korporazzjoni u kien jintuza f`ammonti kopjuzi minghajr l-ebda kontroll effettiv.

5. Illi ilu ghexieren shah ta` snin maghruf li l-esposizzjoni ghall-asbestos kienet tirrena dannu serju ghal sahhet il-bniedem, twassal ghal mard serju u tista` wkoll tikkaguna l-mewt.

6. Illi minkejja tali gharfien, l-awtoritajiet tas-sahha, il-Ministeru li taht kienet taqa` d-direzzjoni u l-kontroll tat-tarznari, id-Dipartiment tal-Impjiegi u Relazzjonijiet Industrijali naqsu milli jipprovdu lil Andrew Psaila bi protezzjoni adegwata biex jilqghu ghall-hsara kkagunata mill-asbestos, u infatti Andrew Psaila miet minhabba tali esposizzjoni.

7. Illi hadd minn dawk imsemmija fil-paragrafu precedenti ma nforma lill-istess Andrew Psaila bl-effetti nocivi nvoluti mill-esposizzjoni ghall-asbestos.

8. Illi kien biss wara li r-rikorrenti u l-mejjet misserhom bdew jisimghu bil-mard u mwiet ikkagunati mill-asbestos ta` uhud mill-kollegi ta` missierhom, fosthom certu Pellicano li kien habib ta` Andrew Psaila, li saru konxji ta` l-effetti nocivi ta` l-esposizzjoni ghall-asbestos.

9. Illi tali gharfien kien gradwali u maghruf minghajr l-intervent tal-entitajiet fuq indikati li kellhom l-obbligu jissupplixxu tali informazzjoni.

10. Illi l-esposizzjoni ghall-asbestosu l-effetti tieghu affettwat b`mod negattiv il-kwalita` tal-hajja tar-rikorrenti li gew imcahhda prematurament minn presenza sinjifikanti hafna f`hajjithom u li kienu fil-kura palljattiva ta` missierhom minhabba marda ngustament u ntortament kontratta minnu.

11. Illi ghalhekk jissodisfaw il-kriterji biex ikollhom locus standi bhala vittmi, u dan ai termini ta` l-artikolu 34 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem applikabbli f`Malta tramite l-Kap 319 tal-Ligijiet ta` Malta.

Ghaldaqstant ghall-fatti u ghar-raguni fuq premessi, u ghal dawk kollha li jistghu jirrizultaw matul il-procedura odjerna, ir-rikorrent jitlob lil din l-Onorabbli Qorti tiddikjara li fil-konfront individwali tar-rikorrenti gie vjolat :-

1) Id-dritt ghall-protezzjoni tal-hajja, u li l-hajja tal-individwu ma titqieghedx f`periklu bla bzonn, ai termini tal-artikolu 33 tal-Kostituzzjoni ta` Malta, u ta` l-artikolu 2 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, applikabbli ukoll lokalment via l-Kap 319 fuq gia riferit.

2) Id-dritt ghar-rispett tal-hajja privata u tal-familja tal-individwu ai termini tal-artikolu 8 tal-istess Konvenzjoni Ewropea, applikabbli wkoll lokalment via l-Kap 319 fuq gia` riferit.

3) Id-dritt ghar-rispett tal-hajja privata fit-termini tal-paragrafu precedenti pero` f`dak li ghandu x`jaqsam mad-dritt ghall-informazzjoni dwar perikli marbutin ma` l-asbestos.

4) Tikkwantifika kumpens xieraq bhala rimedju ghal ksur tad-drittijiet fuq indikati jew liema minnhom fil-konfront tar-rikorrenti ndividwalment.

5) Tillikwida dan l-ammont ta` kumpens.

6) Tordna li l-ammont hekk likwidat bhala rimedju pekunjarju jithallas lir-rikorrenti ndividwalment.

Bl-imghaxijiet legali u l-ispejjez inkluzi dawk ta` l-ittra ufficjali tad-9 ta` Settembru 2014 u l-mandat ta`inibizzjoni numru 1080/14 kontra l-intimat minn issa ngunt ghas-subizzjoni.

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat ix-xiehda bl-affidavit ta` kull wiehed mill-erba` rikorrenti.

Rat ir-risposta prezentata mill-intimati Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika) fis-27 ta` Frar 2015 li taqra hekk :-

1. Illi fir-rikors promotur ir-rikorrenti bhala eredi tal-mejjet Andrew Psaila qeghdin jallegaw illi l-istess Andrew Psaila matul l-impjieg tieghu fit-Tarzna kien espost ghall-asbestos u li dan wassal biex hu jlaqqat il-marda qerrieda tal-kancer b`dan ghalhekk li gew lesi d-drittijiet fundamentrali tieghu kif protetti bl-artikolu 33 tal-Kostituzzjoni ta` Malta u bl-artikoli 2 u 8 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

Illi l-esponenti jikkontestaw l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti bhala infondati fil-fatt u fid-dritt ghas-segwenti ragunijiet :-

2. Illi in linea preliminari, l-esponenti jeccepixxu li r-rikorrenti ma ezawrewx ir-rimedji ordinarji li taghtihom il-ligi u allura ghandu jirrizulta li r-rikors kostitituzzjonali huwa intempestiv. Il-principji li jirregolaw il-materja tat-twettiq ta` rimedji ordinarji fl-sfond tal-azzjonijiet kostituzzjonali jinsabu fl-artikolu 46(2) tal-Kostituzzjoni u l-artikolu 4(2) tal-Kap 319 tal-Ligijiet ta` Malta. Fihom insibu specifikat li l-qorti b`kompetenza kostituzzjonali ghandha tirrifjuta milli tinqeda b`dawn is-setghat specjali moghtija lilha mil-ligi, jekk kemm il-

darba hija tkun sodisfatta li kien hemm disponibbli mezzi xierqa ta` rimedju taht il-ligi ordinarja biex jindirizzaw il-pretensjonijiet tar-rikorrenti.

Illi in kwantu l-esponenti qeghdin jifhmu li b`din l-azzjoni taghhom ir-rikorrenti qeghdin ifittxu kumpens pekunjarju minhabba li Andrew Psaila allegatament thalla jahdem f`ambjent tax-xoghol fejn kien espost kontinwament ghall-asbestos, liema esposizzjoni allegatament halliet konsegwenzi tragici fuq hajjet Andrew Psaila, allura r-rikorrenti kellhom kull opportunita` li jipprocedu b`kawzi civili ordinarja ghar-rizerciment tad-danni kontra l-principal tax-xoghol tieghu minhabba li huwa naqas milli jipprovdilu "a safe system of work" jew "a safe working environment" ;

F`dan l-ambitu bil-kemm ghandu ghalfejn jinghad li proceduri ta` bixra kostituzzjonali bhalma huma kawzi kostituzzjonali mhumiex mahsuba biex jiehdu post il-proceduri ordinarji li kellhom u setghu jigu prospettati primarjament. Inkella minflok immorru quddiem il-fora ordinarji nibdew nipprocedu mill-ewwel quddiem il-Qrati Kostituzzjonali – haga li tmur lil hinn mill-iskop tal-proceduri kostituzzjonali ;

Ghalhekk fid-dawl ta` dan in-nuqqas ta` ezawriment tar-rimedji ordinarji, l-esponenti umilment jitolbu lil din l-Onorabbli Qorti sabiex tieqaf milli tezercita s-setghat kostituzzjonali taghha ai termini tal-artikolu 46(2) tal-Kostituzzjoni u l-proviso tal-artikolu 4(2) tal-Kap 319 tal-Ligijiet tas` Malta.

3. Illi minghajr pregudizzju ghall-premess, hadd mit-Tabib Principali tal-Gvern (Sahha Pubblika) u mill-Avukat Generali ma jista` jitqies bhala l-legittimu kontradittur lejn it-talbiet tar-rikorrenti ghaliex hadd minnhom ma assoggetta lir-rikorrenti ghall-materjal tal-asbestos, apparti li ebda wiehed minnhom ma huwa responsabbli mill-izvilupp u mill-implimentazzjoni tal-istrategija biex titheggeg u tigi mtejba s-sahha pubblika.

Maghdud ma` dan il-Kap 44 tal-Ligijiet ta` Malta jispecifika min huwa mghobbi bir-responsabilita` tal-hwejjeg li jikkoncernaw it-Tarzna ta` Malta.

4. Illi ghal dak li ghandu x`jaqsam mal-mertu tal-ilmenti tar-rikorrent, qabel xejn ir-rikorrenti jehtigilhom juru li Andrew Psaila kien tassew espost ghall-asbestosu kif ukoll li l-kancer malinju li nstab fuqu hija konsegwenza u kawza unika tal-fatt li l-imsemmi Andrew Psaila kien espost ghall-asbestos.

Tabilhaqq mhux daqstant differenti minn kawzi civili ordinarji, ghalkemm hawn qeghdin fil-kamp kostituzzjonali, ir-rikorrenti xorta jridu jippruvaw n-ness tal-kawzalita` u ma jistghu jistriehu fuq semplici suspetti, ipotezijiet u kongetturi.

5. Illi safejn l-ilment tar-rikorrenti jinsab imsejjes fuq l-allegazzjoni ta` ksur tad-dritt ghall-hajja, kif imhares bl-artikolu 33 tal-Kostituzzjoni u l-artikolu 2 tal-Konvenzjoni Ewropea, dan huwa assolutament bla bazi kemm bhala fatt u bhala dritt peress li hadd mill-intimati ntenzjonalment ma qieghed hajjet Andrew Psaila fil-perikolu jew b`xi mezz gie mcahhad mill-jedd ghall-hajja.

Fis-sewwa hadd mill-intimati ma kellu l-animus nocendi li jnehhi hajjet Andrew Psaila jew l-animus nocendi li jikkaguna xi hsara fisika.

6. Illi dwar l-ahhar ilment tar-rikorrenti, marbut mal-jedd tal-privatezza kif protett taht l-artikolu 8 tal-Konvenzjoni Ewropea l-esponent josserva li r-rikorrenti ma elaboraw xejn dwar din ix-xilja. Tassew imkien fir-rikors kostituzzjonali ma gie spejgat b`liema mod l-intimati ndahlulhom fi hwejjighom jew fil-hajja privata taghhom jew tal-familja taghhom. Ghalhekk inkwantu dan l-ilment ma giex sufficjentement imfisser, dan ghandu jigi mwarrab ukoll.

Madanakollu biex l-argument ikun shih, l-esponenti assolutament jichdu bhala fatt li huma ndahlu jew hadu xi mizuri biex jikkompromettu jew ifixklu l-hajja privata u familjarji tar-rikorrenti.

Salvi eccezzjonijiet ulterjuri.

Ghaldaqstant fid-dawl tas-suespost l-esponent jissottometti lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra taghhom.

Rat ir-risposta li pprezentat l-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol fis-27 ta` Frar 2015 li taqra hekk :-

1. Illi fl-ewwel lok u in linea preliminari jigi eccepit illi l-Awtorita` esponenti m`hijiex legittima kontradittur u ghandha tigi liberata mill-osservanza tal-gudizzju bl-ispejjez kontra r-rikorrenti ghas-segwenti ragunijiet :-

1.1 Illi l-mewt ta` Andrew Psaila sehhet fil-25 ta` Awissu 1988 u l-allegati lanjanzi necessarjament jirreferu ghall-perjodu li jipprecedi l-imsemmija data. Illi l-Awtorita` esponenti giet kostitwita b`ligi fis-sena 2000 permezz ta` l-Att XXVII tal-2000 u cioe` 12-il sena wara l-mewt ta` l-imsemmi Andrew Psaila u b`hekk fil-perjodu ta` l-allegati lanjanzi, l-awtorita` espenenti definittivament ma kenitx tezisti.

1.2 Illi minghajr pregudizzju ghas-suespost, il-lanzjanzi mressqa mir-rikorrenti bl-ebda mod ma jolqtu xi agir ta` l-Awtorita` esponenti li jista` b`xi mod jigi interpretat li jlledu d-drittijiet fundamentali tar-rikorrenti u konsegwentement ma tista` qatt tirrispondi ghall-addebiti mressqa kontra taghha. Illi di fatti, imkien fir-rikors promotur ma tissemma b`xi mod l-Awtorita` esponenti jew xi agir ta` l-istess Awtorita` u minn imkien ma tirrizulta xi allegazzjoni fil-konfront tal-istess. Di piu` ma tezisti l-ebda relazzjoni guridika bejn ir-rikorrenti u l-Awtorita` esponenti ;

1.3 Illi wkoll minghajr pregudizzju ghas-suespost, l-Awtorita` esponenti qatt ma setghet tinforma lill-istess Andrew Psaila bl-effetti nocivi involuti mill-allegata esposizzjoni ghall-asbestosstante li fil-perjodu lamentat l-istess Awtorita` esponenti ma kenitx tezisti. Illi di fatti, dan il-punt gie anke trattat mill-Qorti Ewropea ghad-Drittijiet Fundamentali tal-Bniedem fil-kaz Brincat and others vs Malta fejn jinghad illi :-

"Additionally in relation to the Government`s reference to the information available at the OHSA, the Court notes that this authority was only created after the year 2000 and it could therefore not have been a source of information before that date." [emfasi tal-esponent]

2. Illi r-rikorrenti jirrikorru ghall-procedura straordinarja meta huma kellhom a disposizzjoni taghhom rimedji ordinarji sabiex jivventilaw it-talbiet taghhom, senjtament il-proceduri civili ordinarji, liema proceduri ma gewx segwiti mir-rikorrenti..

3. Illi ghar-raguni fuq imsemmija u konformement mad-disposizzjonijiet tal-ligi dina l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-gurisdizzjoni taghha fil-proceduri odjerni. Illi dan l-istess punt kien gie trattat in profundis minn dina l-Qorti diversament presjeduta fis-segwenti sentenzi fejn ic-cirkostanzi kienu identici ghal dawk odjerni :-

a) Maria sive Marthese Attard et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 31/2010/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;

b) Carmel Cachia et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 28/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;

c) *John Mary Abela et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 25/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;*

d) *Joseph Attard et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 26/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;*

e) *Joseph Brincat et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 27/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011.*

4. Illi wkoll in linea preliminari, minghajr pregudizzju ghas-suespost, ir-rikorrenti Mary Grace Farrugia, Joseph Psaila, Adriana Cutajar u Ines Psaila m`ghandhom ebda locus standi fil-kawza odjerna ghal dak li jirrigwarda t-talbiet taghhom taht il-Konvenzjoni Ewropeja. Illi l-imsemmija rikorrenti ma jikkwalifikawx bhala "vittmi" ai termini ta` l-artikolu 34 tal-Konvenzjoni stante li m`hemm l-ebda ness bejn l-allegat dannu ghas-sahha kkagunata lil Andre Psaila u xi ksur ta` dritt fundamentali tar-rikorrenti.

5. Illi in kwantu l-ilment tar-rikorrenti skatta minn episodji li jmorru lura ghal perijodi fern qabel l-adozzjoni tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem fil-ligijiet nostrali fl-1987, u b`hekk ma jistghux jigu mistharrga minn din l-Onorabbli Qorti u dan a tenur tal-Artikolu 7 tal-Kap 319 tal-Ligijiet ta` alta.

6. Illi minghajr pregudizzju ghall-premess, l-imsemmija artikoli jistabilixxu l-principju illi hadd ma jista` jigi pprivat mill-hajja tieghu intenzjonalment hlief fl-ezekuzzjoni tas-sentenza ta` Qorti dwar reat kriminali skond il-ligi ta` Malta li tieghu jkun gie misjuib hati. Illi sabiex jissussisti ksur ta` dan l-artikolu, huwa necessarju illi dd-dritt tal-hajja jigi pprivat intenzjonalment. Fil-kaz in dizamina, bl-ebda sforz ta` l-immaginazzjoni u bl-ebda tigbid ta` l-interpretazzjoni tal-ligi ma jista` jinghad illi l-Awtorita` esponenti ghamel xi haga deliberatament bil-hsieb li tolqot lir-rikorrenti u b`hekk din l-allegazzjoni hija kompletament infondata fil-fatt u fid-dritt u hija frivola u vessatorja u ghaldaqstant ghandha tigi michuda fl-intier taghha.

7. Salv eccezzjonijiet ohra.

Ghaldaqstant u in vista tal-premess, l-Awtorita` esponenti umilment titlob lil dina l-Onorabbli Qorti joghgobha tichad it-talbiet tar-rikorrenti kollha u tiddikjara illi l-lanjanzi kostituzzjonali mqajma mir-rikorrenti u illi dwarhom

sar ir-rikors kostituzzjonali odjern huma nfondati fil-fatt u fid-dritt u dan ghar-ragunijiet premessi u tiddikjara wkoll illi t-tqanqil tal-kwistjonijiet kostituzzjonali min-naha tar-rikorrenti huma fiergha u vessatorji u dan taaht dawk il-provvedimenti li dina l-Onorabbli Qorti jidhrilha xierqa u opportuni, bl-ispejjez kontra r-rikorrenti.

Rat illi fit-2 ta` Marzu 2015 il-partijiet kienu diretti sabiex jressqu provi u jittrattaw biss it-tieni u t-tielet eccezzjonijiet tal-Avukat Generali u Tabib Principali tal-Gvern, kif ukoll l-eccezzjoni mmarkata numru wiehed, li tinqasam fi tlett paragrafi, tal-Awtorita` intimata.

Rat is-sentenza li tat fil-15 ta` Settembru 2015 fejn cahdet it-tieni u t-tielet eccezzjonijiet tal-intimati Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika) bl-ispejjez ghall-istess intimati ; fejn laqghet l-ewwel eccezzjoni tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol bl-ispejjez ghar-rikorrenti ; u fejn astjeniet milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-Awtorita` intimata u lliberat lil din mill-osservanza tal-gudizzju.

Semghet ix-xiehda dwar il-mertu u rat il-provi l-ohra li tressqu fil-kors tal-kawza dwar il-mertu.

Rat id-digriet li tat fl-udjenza tal-24 ta` Mejju 2016 fejn halliet il-kawza ghas-sentenza bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet li pprezentaw il-partijiet.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi dwar il-mertu</u>

1. <u>Persuni li xehdu fil-kawza tal-lum</u>

<u>Ir-rikorrenti Mary Grace Farrugia</u> pprezentat affidavit.

Xehdet illi missierha Andrew Psaila miet bil-kancer ikkawzat bl-esposizzjoni ghall-asbestos. Miet fl-eta` ta` 60 sena fil-25 ta` Awissu 1988.

Stqarret illi missierha dejjem hadem Malta Drydocks.

Fissret illi rabba l-familja tieghu fiz-Zejtun u kien mizzewweg lil Maria nee` Farrugia. Miz-zwieg twieldu l-erba` rikorrenti.

Qalet illi missierha kien bniedem b`sahhtu. Ma kellux mard kroniku serju. La kien ipejjep ; lanqas jixrob.

Fissret illi z-zijiet, hut missierha, kollha ghexu hajja twila.

Xehdet illi missierha kien ragel tal-familja u riservat. Ma kellux delizzji u kien ihobb iqatta` l-hin frank tieghu mal-familja.

Spjegat li missierha kien jiehu hsieb il-manutensjoni tad-dar hu stess. Kien mastrudaxxa tajjeb. Qabel marad, kien qed jippjana li jaghmel il-kcina tat-tielet wild tieghu izda mbaghad kien kostrett ihassar il-pjanijiet minhabba l-marda.

Qalet illi kienet semghet minghand missierha ghax kien jafu illi Paul Pellicano li kien haddiem tat-Tarzna miet bl-*asbestos*.

Stqarret illi l-ewwel sintomi li beda jhoss missierha kienu ghejja kbira, ugiegh ta` zaqq, diarrhea, okkupazzjoni u fl-istess hin ghatx kbir.

Qalet illi missierha mar ghand specjalista tal-intern, Mr Attard li rreferieh ghal x-ray.

Kompliet tghid illi kien Marzu 1988 meta rrizulta li missierha kellu l-mesothelioma.

Qalet illi missierha ghadda taht il-kura tal-konsulent Dr Alfred Caruana Galizia li kien tal-fehma li l-kimoterapija u r-raggi ma kellhomx isiru ghaliex il-marda kienet rezistenti ghalihom. Ghalhekk missierha kellu jinghata trattament paljattiv u jkun medikament segwit mid-Dipartiment tal-Outpatients. Kellmu lil Prof Hamilton ta` Royal Marsden Hospital Surrey li kien spjega li din it-tip ta`

marda kienet terminali u li trattamenti ulterjuri setghu biss izidu s-sofferenza. Fix-xhur qabel miet, missierha la kien jiekol u lanqas jinhasel wahdu. Beda jitlef hafna piz u lanqas baqa` jingharaf. Hija marret tghix ma` ommha u missierha biex tassistih filwaqt li ohtha Adreana waqfet mix-xoghol ghal xahrejn sabiex tkun tista` tghin ukoll.

Stqarret illi hi u hutha kienu jkunu kontinwament ma` missierhom. Gieli kellu jigi rikoverat l-isptar minhabba l-ugigh. Ghalkemm kien jiehu l-morfina, huwa kien jiggranfa mas-sodda u jghid li qed itaqqbuh bl-ilma. Anke l-pulmun kien beda jimtela bl-ilma li kellu jitnehha. L-intern kien beda jitmermer ukoll. Sar tentattiv biex jittaffu s-sintomi tal-pulmonary shunt izda ma kienx irnexxa. Fl-ahhar xahrejn ta` hajtu, missierha kien ikun minghajr ossignu adegwat u b`sensazzjoni kontinwa li qed jeghreq.

Spjegat li missierha miet ta` sittin sena minghajr qatt ma ha pensjoni wahda. Bix-xokk ommha waqghet fi speci ta` dipressjoni ; u xi hadd kien ikollu jibqa` maghha, anke bil-lejl. Darba ommhom harget tixtri, laqtitha *mini van* u mietet fuq il-post.

Qalet illi meta semghu ricentament li kienu saru u ntrebhu kawzi fl-ECHR minhabba l-asbestos, hi u hutha ddecidew li jipprocedu. Il-kawza ma kenitx sejra tregga` lura lil missierhom izda taghhom kien pass ta` gieh ghal missierhom li miet intortament, qalb hafna tbatija, ghax kien espost ghall-*asbestos* fuq il-post tax-xoghol tieghu.

It-tliet rikorrenti l-ohra xehdu l-istess.

<u>Gertrude Scerri</u> mid-direzzjoni tal-Isptar Mater Dei xehdet illi ghax, Andrew Psaila miet fis-27 ta` Settembru 1988, ma kellhomx *records* tieghu.

<u>Tabib Konsulent Alfred Caruana Galizia</u> xehed illi l-marda maghrufa bhala *malignant mesothelioma of peritoneum* hija kondizzjoni marbuta ma` l-esposizzjoni ta` *asbestos* ta` kwalunkwe forma. In-nies li l-aktar kienu esposti ghaliha kienu nies li kienu jahdmu fil-*lagging,* fil-*boiler making,* u fil-*brick laying*. Din il-marda hija kerha hafna, u ssehh meta jigi *inhaled* il-*fibre* tal-*asbestos*. Lil Andrew Psaila jiftakru peress li kien jarah. Huwa nduna mill-ewwel li kellu xi haga serja. Il-marda hija kiefra u ma seta` jsir xejn ghaliha. Huwa kkonferma li meta jsehh il-kuntatt mal-*asbestos*, il-marda mbaghad tohrog fuq perijodu fit-tul.

Fil-**<u>kontroezami</u>**, xehed illi Malta l-*asbestos* kien jintuza hafna. Fil-kaz ta` Andrew Psaila kienet saret analizi ta` *peritoneum fluid* biex ikun hemm konferma li kellu kif fil-fatt kellu *malignant mesothelioma.* Ghalkemm baqa` jsegwi l-pazjent ma kienx hemm wisq x`seta` jsir.

2. <u>Persuni li xehdu fil-kawza fl-ismijiet "George Spiteri et vs Policy Manager tal-Malta Shipyards et" (Rik Nru 30/2009 MH)</u>

Fil-kors tal-kawza, bil-permess ta` din il-Qorti, kienu esebiti kopji legali tat-traskrizzjoni ta` xiehda moghtija fil-kawza bin-nru 30/2009.

<u>Prof Joseph Cacciattolo</u> - Kap tad-Dipartiment tal-Medicina - u *consultant respiratory physician* - xehed illi Andrew Spiteri kellu *pleural effusion* u wara testijiet, inkluz *biopsy* tal-*pleura*, irrizulta li kellu *pleural mesothelioma.* Bla dubju ta` xejn, il-marda kienet kawza diretta tal-fatt li kien espost ghall-asbestos. Fil-fatt hemm relazzjoni kawzali ossija *a direct causal relationship* bejn l-esposizzjoni ghall-*asbestos*u l-*pleural mesothelioma*. Spjega li l-*pleural mesothelioma* huwa cancer tal-*lining* tal-pulmun. L-esposizzjoni ghall-asbestos tista` ggib il-*mesothelioma* tal-*lining* tal-msaren, ta` madwar il-qalb u ta` madwar it-testikoli. L-asbestos huwa kawza ta` tip ohra ta` cancer tal-pulmun. Persuna esposta ghall-*asbestos* tista` tizviluppa *asbestosis* li hija marda li taffettwa l-pulmum u tikkawza *fibrosis* li hija marda serja li ggieghel il-pulmun jickien. Spjega li l-*asbestos* jista` ukoll jikkawza qxur fil-pleura li hija r-rit ta` madwar il-pulmun.

Kompla jixhed illi hemm evidenza xjentifika ta` Nordmann li sa mill-1938 stabbiliet illi l-asbestos huwa assocjat mal-cancer tal-pulmun. Ir-rabta bejn l-asbestos u l-*pleural mesothelioma* kienet ikkonfermata fil-British Medical Journal tal-1960. Jekk ikun hemm evidenza li sustanza hija kancerogena jew anke tista` tikkawza hsara lis-sahha tal-bniedem, allura l-awtoritajiet ghandhom jinfurmaw it-tobba u jittiehdu mizuri ta` prevenzjoni. Kien Settembru 1950 meta kien stabbilit ness bejn it-tipjip u l-cancer tal-pulmun. Spjega li kien hemm kampanja ta` informazzjoni min-naha tad-Dipartiment tas-Sahha li bdiet fl-1986 kif ukoll sar *statement of concern* mit-tobba konsulenti tal-Isptar San Luqa.

<u>Dr George Peplow</u> - espert kwalifikat fil-kimika – ex ghalliem l-Universita` ta` Malta – u konsulent fl-analizi u *samping evaluation* tal-*asbestos* – xehed illi l-periklu mill-asbestos huwa kostitwit meta jigi biex jinqala`. Infatti ahjar jibqa` fejn ikun milli jinqala`. Diversi kienu l-postijiet go l-Isptar San Luqa fejn ghad hemm l-asbestos. Il-periklu ghas-sahha huwa kostitwit mill-*fibres* li jmorru fl-arja (u allura jistghu jigu respirati) meta jkun qed jinqala` l-asbestos.

Fil-kaz tal-bastimenti, stqarr illi dawn huma meqjusa bhala *confined spaces* u allura jkun mehtieg illi wara certu hin tax-xoghol il-haddiema ghandhom johorgu `l barra, sabiex sakemm idumu barra, l-arja ta` gewwa tinhareg barra u tissaffa (*filtered*) sabiex il-livell jinzamm accettabbli.

Stqarr illi sa mill-ahhar tas-snin sittin, diga` kien hemm gharfien (*awareness*) dwar il-fatt li l-asbestos kien perikoluz. Dak iz-zmien ma kienx hemm informazzjoni dwar il-limiti tas-sostanza li kienu accettabbli. Ghalkemm l-*awareness* kienet hemm, il-ligijiet bdew dehlin aktar tard fiz-zmien. Go Malta l-*awareness* kienet tezisti sa mill-bidu tas-snin sebghin. Kien fis-sens illi persuna kellha tahseb l-idejn, u li jkun hemm attenzjoni sabiex persuna ma tmissx il-hwejjeg li jkunu gew in kontatt mal-asbestos. Il-metodi ta` testjar inholqu fl-ahhar tas-snin disghin.

Kompla jghid illi l-asbestos – anke fil-qasam tal-bastimenti - kien jintuza bhala *insulation* ghal *hot water pipes*, fil-*partitions* u fil-bibien bhala *fire retardant.* Kien jintuza ukoll fil-*corrugated roofs*.

Spjega li meta nholqot l-OHSA, il-ligi biex tahseb ghall-esposizzjoni tal-haddiema. Iz-zamma fl-Ewropa sabiex ma jkunx importat l-asbestos u ma jkunx manifatturat bdiet fil-bidu tas-snin tmenin.

Fisser illi hemm metodu *standard* ta` kif jigi jitkejjel il-limitu tal-asbestos. Ikun hemm pompa li tigbed l-arja, jinqabdu *fibres,* li mbaghad jittiehdu l-laboratorju. Sa mill-2006, il-WHO stabbiliet limiti godda li huma aktar baxxi, u allura aktar stretti. Safejn jaf hu anke Malta kienet taghmel testijiet.

Fil-**<u>kontroezami</u>** xehed illi fis-snin tmenin l-importazzjoni tal-materja prima kienet illegali u ghalhekk jekk kien hemm xi vapur li kellu l-asbestos, dan xorta seta` jidhol Malta. Il-procedura biex wiehed titqies il-*concentration* tal-*particles* fl-arja saret fl-ahhar tas-snin disghin. Il-periklu tal-asbestos huwa kostitwit kemm fil-kors tal-istallazzjoni kif ukoll waqt ir-rimozzjoni tieghu. Jekk ikun hemm asbestos go kamra, sakemm fl-arja ma jkunx hemm livelli gholjin, ma jkunx hemm problema, izda malli jintmess biex jinqala` jibdew joghlew il-*fibres* u jizdied il-perikolu. Dment illi fl-arja ma jkunx hemm livelli gholja, ma jkunx effett negattiv, ghaliex il-*fibres* jibqghu *contained.*

<u>Tabib Raymond Busuttil</u> - Supretendent tas-Sahha Pubblika – xehed illi l-*health inspectors* huma l-*enforcement u surveillance officers* tieghu. Minn ricerka li saret fir-*registy section* tad-Dipartiment tas-Sahha sabiex jinsabu l-*files* kollha li jirreferu ghall-kelma *asbestos*, instabu minn sitta sa tmien files

izda ma kien hemm xejn dwar l-*asbestos on a national level* ; kien hemm biss episodji specifici. B`mod generali ma kienx hemm direzzjoni dwar l-uzu ta` l-asbestos.

Fil-**kontroezami**, xehed illi meta jkun hemm talbiet minn persuni sabiex jinghataw direzzjoni dwar x`ghandhom fil-kaz ta` mmaniggjar ta` asbestos, huwa jirreferi l-kaz lil timijiet ta` nies apposta. Fit-tarzna kien hemm tim bhal dan. Dawn huma kostitwiti separatament mid-Dipartiment tas-Sahha. Kien impossibbli li ssir ricerka dwar ilmenti individwali. Ikkonferma li huma jkunu nvoluti f`kampanji ta` sahha pubblika. Jaraw x`ikunu l-prijoritajiet imbaghad jaraw x`tip ta` kampanja jkun hemm bzonn ghal suggett partikolari.

Spettur tal-Pulizija Jesmond Borg xehed illi huwa kien responsabbli ghad-Distrett ta` Bormla ghal tliet snin u xahar. Fil-perijodu kemm dam Bormla, qatt ma sar rapport dwar danni jew mewt ikkawzati minn asbestos. Qal illi fittex fid-database tal-Pulizija u ma sab xejn. Qal illi ghal kull okkorrenza jinfetah file, izda ma sabx files dwar danni jew mewt ikkawzati bl-asebestos. Staqsa lil PC 529 Saviour Zerafa li missieru kien involut f`kaz relatat mal-*asbestos* li nfurmah li jekk sar xi haga, dan sart permezz tal-union, probabilment il-GWU u mhux il-pulizija. Meta jsehh incident fuq il-post tax-xoghol u persuna tkun fil-perikolu mminenti li tmut, issir inkjesta magisterjali. Il-pulizija taghmel kuntatt mal-OHSA u din taghmel l-investigazzjoni indipendenti taghha. Il-pulizija ma tkunx infurmata jekk persuna tkunx mietet marda industrijali. Ma jafx li kien hemm rapporti dwar asbestos.

David Saliba – mill-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol – xehed illi l-Att XXVII tal-2000 dahal fis-sehh fl-2002. L-Att ha post l-Att VII tal-1994 li ha post l-Ordinanza dwar il-Fabbriki. Bis-sahha tal-Att XXVII tal-2000, hareg l-Avviz Legali 123 ta` 2003 : *Protection of Workers from risks related to exposure to asbestosat work* : li kien sostitwit bl-Avviz Legali 232 tal-2006 li ghadu fis-sehh sal-lum.

Qal illi l-ewwel referenza ghall-asbestos saret fl-Art 35(2) tal-Factories Health and Safety Regulations 1986 li kienu saru bis-sahha tal-Ordinanza u li baqghu fis-sehh bis-sahha tal-ligijiet li gew wara.

Stqarr illi meta l-Awtorita` tkun infurmata bl-asbestos fuq il-post tax-xoghol, l-uniku obbligu taghha huwa li tassigura li min ihaddem ihares is-sigurta` tal-haddiema billi jekk ikun il-kaz, tara li jsiru t-testijiet u tara li l-fibres fuq *an 8 TWA (time weighted average)* huwa anqas minn 0.1 *fibres per cubic centimetre* skont l-A.L. 232 tal-2006. Qal illi l-A.L.s-sena 2006. Huwa spjega li l-A.L. 123 tal-2003 kien jiddistingwi bejn tipi differenti ta` asbestos ;

hemm it-TWA kien ikun differenti kif ukoll l-ammont ta` fibres per cubic centimetre. Qabel l-2003 ma kien hemm xejn dwar asbestos. Qabel sar l-Att XXVII tal-2000, l-infurzar kien isir mill-Health and Safety Unit tad-Dipartiment tax-Xoghol.

Qal illi l-Awtorita` kellha lmenti dwar asbestos fid-dockyard izda ma setax ighid minghand min ghaliex bosta kienu anonimi. Huma talbu lit-tarzna sabiex taghmel testijiet skont il-ligi ; mir-rizultati tat-testijiet instab illi l-livelli kienu taht il-limiti tal-ligi.

III. Il-vjolazzjonijiet lamentati

Ir-rikorrenti jilmentaw illi minhabba l-marda li biha miet Andrew Psaila, kien hemm vjolazzjoni tal-Art 33 tal-Kostituzzjoni, u tal-Art 2 u tal-Art 8 tal-Konvenzjoni.

L-Art 33(1) tal-Kostituzzjoni jghid :-

Hadd ma jista' jigi pprivat mill-hajja tieghu intenzjonalment hlief fl-esekuzzjoni tas-sentenza ta' qorti dwar reat kriminali skont il-ligi ta' Malta li tieghu jkun gie misjub hati.

L-Art 2(1) tal-Konvenzjoni jaqra :-

Id-dritt ghall-hajja ta` kulhadd ghandu jigi protett b`ligi. Hadd ma ghandu jigi ipprivat mill-hajja tieghu ntenzjonalment hlief fl-esekuzzjoni tas-sentenza ta' qorti wara li jigi misjub hati ta' delitt li dwaru tkun provduta mil-ligi din il-piena.

Bil-hames eccezzjoni, l-intimati Tabib Principali tal-Gvern u Avukat Generali laqghu ghall-ilment tar-rikorrenti skont l-Art 33 tal-Kostituzzjoni, u ghall-Art 2 tal-Konvenzjoni, billi sostnew illi hadd minnhom intenzjonalment ma qieghed hajjet Andrew Psaila fil-perikolu jew b xi mezz kien imcahhad mill-jedd ghall-hajja. Inoltre hadd minnhom ma kellu l-*animus necandi* li jnehhi hajjet Andrew Psalia jew l-*animus nocendi* li jikkagunalu hsara fizika.

L-Art 8(1) tal-Konvenzjoni jghid :-

Kulhadd ghandu d-dritt ghar-rispett tal-hajja privata tieghu u tal-familja tieghu …

<u>Bis-sitt eccezzjoni</u>, l-istess intimati jilqghu ghal dan l-ilment skont l-Art 8 billi jghidu illi r-rikorrenti ma fissru mkien fejn kien hemm vjolazzjoni, u cahdu li b`xi mod indahlu jew hadu xi mizuri biex jikkompromettu jew ifixklu l-hajja privata u familjari tar-rikorrenti.

Id-disposizzjonijiet tal-Konvenzjoni li fuqhom ir-rikorrenti sostnew l-ilment taghhom kienu trattati b`dettall fid-decizjoni li tat l-ECHR fl-24 ta` Lulju 2014 fil-kaz ta` "**<u>Brincat and Others vs Malta</u>**".

Inghad hekk :-

79. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of unjustified force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, L.C.B. v. the United Kingdom, 9 June 1998, § 36, Reports 1998-III, and Paul and Audrey Edwards, cited above, § 54).

80. This obligation is construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites (see Öneryıldız v. Turkey [GC], no. 48939/99, §71, ECHR 2004-XII) or nuclear testing (see L.C.B. cited above, § 36) or cases concerning toxic emissions from a fertiliser factory (see Guerra and Others v. Italy, 19 February 1998, §§ 60 and 62, Reports 1998-I, although in this case the Court found that it was not necessary to examine the issue under Article 2, it having been examined under Article 8).

81. The Court considers that the same obligations may apply in cases, such as the present one, dealing with exposure to asbestosat a workplace which was run by a public corporation owned and controlled by the Government

…

More particularly, the Court has repeatedly examined complaints under Article 2 from persons suffering from serious illnesses. Such cases include G.N. and Others v. Italy (no. 43134/05, 1 December 2009) in which the applicants suffered from the potentially life-threatening disease hepatitis C; L.C.B. v. the United Kingdom (cited above), where the applicant suffered from leukaemia diminishing her chances of survival, Hristozov and Others v. Bulgaria, nos. 47039/11 and 358/12, ECHR 2012 (extracts), concerning applicants suffering

from different types of terminal cancer; Karchen and Others v. France ((dec.), no. 5722/04, 4 March 2008) and Oyal v. Turkey (no. 4864/05, 23 March 2010), in which the applicants had been infected with the HIV virus, which endangered their life; Nitecki v. Poland ((dec.), no. 65653/01, 21 March 2002), in which the applicant suffered from amyotrophic lateral sclerosis; Gheorghe v. Romania ((dec.), no. 19215/04, 22 September 2005), in which the applicant suffered from haemophilia; and De Santis and Olanda v. Italy ((dec.), 35887/11, 9 July 2013) in which the applicant – who was severely disabled – suffered a cerebral haemorrhage as a consequence of an infection acquired in hospital.

Il-Qorti sostniet illi l-ezami li jrid isir fil-kuntest tal-Art 2 u l-Art 8 tal-Konvenzjoni huwa simili. Qalet :-

101. The Court makes reference to its general principles as stated in Öneryıldız and further elaborated on in Budayeva and Others (both cited above), as summarised in Kolyadenko and Others v. Russia, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, §§ 157-161, 28 February 2012, and as reiterated in Vilnes and Others v. Norway, nos. 52806/09 and 22703/10, § 220, 5 December 2013: "The Court reiterates that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 151 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see Öneryıldız, cited above, § 89, and Budayeva and Others, cited above, § 129). The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous. In the particular context of dangerous activities special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (see Öneryıldız, cited above, §§ 71 and 90). Among these preventive measures particular emphasis should be placed on the public`s right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see Öneryıldız, cited above, §§ 89-90, and Budayeva and Others, cited above, § 132). As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State`s margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate

burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres (see Budayeva and Others, cited above, §§ 134-35). In assessing whether the respondent State complied with its positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities` acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation (see Budayeva and Others, cited above, §§ 136-37)."

102. The Court has also held on many occasions that the State has a positive duty to take reasonable and appropriate measures to secure an applicant`s rights under Article 8 of the Convention (see, among many other authorities, López Ostra, cited above, § 51, Series A no. 303-C; Powell and Rayner v. the United Kingdom, 21 February 1990, § 41, Series A no. 172; and, more recently, Di Sarno and Others v. Italy, no. 30765/08, § 96, 10 January 2012). In particular, the Court has affirmed a positive obligation of States, in relation to Article 8, to provide access to essential information enabling individuals to assess risks to their health and lives (see, by implication, Guerra and Others, cited above, §§ 57-60; López Ostra, cited above, § 55; McGinley and Egan, cited above, §§ 98-104; and Roche, cited above, §§ 157-69). In the Court`s view, this obligation may in certain circumstances also encompass a duty to provide such information (see, by implication, Guerra and Others, cited above, §§ 57-60; and Vilnes and Others, cited above § 235). It has also recognised that in the context of dangerous activities, the scopes of the positive obligations under Articles 2 and 8 of the Convention largely overlap (see Budayeva and Others, cited above, § 133). Indeed, the positive obligation under Article 8 requires the national authorities to take the same practical measures as those expected of them in the context of their positive obligation under Article 2 of the Convention (see Kolyadenko and Others, cited above, § 216).

Il-Qorti kompliet tapplika l-principji fil-kuntest tal-azzjoni li ha l-Istat Malti fir-rigward ta` l-informazzjoni li kien hemm ezistenti dwar l-effetti u konsegwenzi negattivi u serji li ggib maghha esposizzjoni ghall-asebestos u kkonkludiet illi ma kienx bizzejjed illi ttiehdu mizuri legislattivi sabiex l-Istat ikun ezonerat mir-responsabbilita` tieghu ghal vjolazzjoni ta` l-Art 2 fir-rigward ta` mewt ta` wiehed mill-applikanti u ghal vjolazzjoni ta` l-Art 8 fir-rigward ta` applikanti ohra li kienu ghadhom hajjin. Qalet hekk :

103. In the absence of more detail in the Government`s submissions, the Court will assess the case on the basis of the material available to it.

104. On the basis of the material in its possession, the Court considers it established that the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 and Mr Attard (hereinafter "the applicants" for ease of reference) were exposed to asbestosduring their careers as employees at the ship repair yard run by the MDC. Indeed, while admitting that all workers were exposed to some extent, the Government contended that after they had become aware of the relevant dangers, they had ensured that the applicants were not made to work on asbestos-laden ships, without submitting what other possible functions or work they had been assigned at their place of work or any details regarding the dates when they had ceased to work with such material. Given the information and documents available, the Court finds no reason to doubt the applicants` assertions as to their working history.

105. The Court must also consider whether the Government knew or ought to have known of the dangers arising from exposure to asbestosat the relevant time (from the entry into force of the Convention for Malta in 1967 onwards) (see, in a different context, O`Keeffe v. Ireland [GC] no. 35810/09, 28 January 2014, §§ 152 and 168). In this connection the Court notes that the Government implicitly admitted to have known of these dangers in or around 1987, as they stated that as soon as they had become aware of the dangers associated with asbestos, laws were enacted to protect employees from these dangers as early as 1987. Nevertheless, given that Mr Attard had left the dry docks in 1974, the Court must examine whether at the time while he was exposed, that is, at least in the early 1970s, the Government knew or ought to have known of the relevant dangers. The Court acknowledges that the ILO Asbestos Recommendation and subsequent Convention which contained the minimum standards applicable concerning the use of asbestoswere adopted in 1986. Nevertheless, as in many cases, the adoption of such texts comes after considerable preparatory work which may take significant time, and in the ambit of the ILO after having undertaken meetings with representatives of governments, and employers` and workers` organisations of all member countries of the organisation. They are usually preceded by a number of guidelines, and before concrete proposals can be made there is a thorough search for a consensus between the stake holders, namely public authorities as well as employers and workers. It is also common knowledge that the issues surrounding asbestoshave been greatly debated amongst stakeholders all over the world, and that given the interests involved, particularly economic and commercial ones, acknowledging its harmful effects has not been easy. In this connection the Court observes that up to this date a number of countries have not yet banned the substance and only thirty-five countries out of the one hundred and ninety-eight United Nations Member States have ratified the Asbestos Convention. It appears logical, that this cannot be taken to mean that the dangers of asbestosare today still unknown.

106. Thus, as to whether the Maltese Government knew or ought to have known in the early seventies, the Court must rely on other factors, most evident amongst them being objective scientific research, particularly in the light of the domestic context. The Court takes account of the list, submitted by the applicants, which contains references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards - many of them taken from reputable British medical journals. The Court observes that medical studies at the then Royal University of Malta were modelled on, and followed closely upon, the corresponding United Kingdom system, with many graduates in medicine continuing their studies in England and Scotland. Particularly in view of this situation, even accepting the Government`s argument - that is, that information was at the time not as readily available as it is today - it is inconceivable that there was no access to any such sources of information, at least, if by no one else, by the highest medical authorities in the country, notably the Chief Government Medical Officer and Superintendent of Public Health (as provided for in the, now repealed, Department of Health (Constitution) Ordinance, Chapter 94 of the Laws of Malta, see paragraph 42 above). In fact, according to Maltese law it was precisely the duty of the Superintendent of Public Health to remain abreast of such developments and advise the Government accordingly. The Court, further, observes that it has not been submitted that there had been any specific impediment to access the necessary information. Furthermore, the Government failed to rebut the applicants` assertion with any signed statement by a medical expert or authority, who could have attested that the medical professionals in the country were, in or around the 1970s, unaware of these worrying medically related findings at the time. Moreover, the Pellicano judgment by the Commercial Court (see paragraph 35 above) is in itself an implicit acknowledgement by a domestic court that in the years preceding Mr Pellicano`s death in 1979 the authorities knew or ought to have known of the dangers of working with asbestosand that they had failed to provide adequate health and safety measures in that respect. Against this background, the Court concludes that for the purposes of the present case, it suffices to consider that the Maltese Government knew or ought to have known of the dangers arising from exposure to asbestosat least as from the early 1970s.

107. As to the fulfillment of the ensuing obligations, as stated above, the respondent Government claimed that as soon as they had become aware of the dangers associated with asbestos, laws were enacted to protect employees from these dangers and this as early as 1987 by means of the Work Place (Health, Safety and Welfare) Regulations. It follows that, by Government`s admission, up until 1987 no positive action was taken in the nearly two decades (four years in the case of Mr. Attard who left the MDC in 1974) during which the applicants had been exposed to asbestos.

108. As to the steps taken after 1987, the Court firstly notes that the mentioned regulations make no reference to asbestos, unlike the later legislation which was enacted for that precise purpose. Consequently, it is difficult to accept the Government`s argument that the Work Place (Health, Safety and Welfare)

Regulations were the first proactive attempt to safeguard the applicants against these dangers by means of legislation.

109. However, even assuming that the Work Places (Health, Safety and Welfare) Regulations were indeed a legislative reaction to the dangers of asbestosexposure and that, therefore, the Government treated asbestosas falling into the category of a "toxic material" or "dangerous substance" for the purposes of that legislation, the Court notes the following. In accordance with Regulation 16, no employer may use or suffer to be used any chemical or material which is toxic without the approval of the Superintendent of Public Health. The Government did not find it expedient to explain whether such approval had been sought or given for asbestosand, if so, on what grounds. Even if approval was given, by the Government`s implicit admission, asbestoscontinued to be used and employees continued to work on it. Pursuant to Regulation 18, it was the duty of the employer to ensure that the atmosphere in workrooms in which potentially dangerous or obnoxious substances were handled or used was tested periodically to ensure that, inter alia, toxic or irritating fibres were not present in quantities that could injure health, and to maintain an atmosphere fit for respiration. Moreover, no work should have been carried out unless such tests had been done. Again, the Government have not indicated that any such tests had ever been carried out in the workrooms (or elsewhere) where the applicants, like the other employees, had been exposed to asbestos. Apart from the above-mentioned regulations (16 and 18), the Work Places (Health, Safety and Welfare) Regulations made no provision for any other practical measures which could or should have been taken in order to protect the applicants, nor were there any provisions concerning the right to access information. It was only the legislation enacted in 2003 and 2006 which introduced such measures, including (but not limited to) the duty to provide the applicants and people in their situation with information about the risks to health and safety which they were facing.

110. The Court considers that enacting specific legislation fifteen years after the time in the mid-1980s when the Government accept that they were aware of the risks can hardly be seen as an adequate response in terms of fulfilling a State`s positive obligations. Furthermore, by the time the 2002, 2003 and 2006 legislation had been enacted and came into force (see paragraphs 33 and 34 above), the applicants had little if anything to gain since the timing coincided with the end of their careers, when they were leaving or had already left Malta Drydocks (see paragraph 6 above).

111. Consequently, from the information provided, it is apparent that from the mid-1980s to the early 2000s, when the applicants (except for Mr Attard) left the MDC, the legislation was deficient in so far as it neither adequately regulated the operation of the asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees whose lives might have been endangered by the inherent risk of exposure to asbestos. Moreover, even the limited protection afforded by that legislation had no impact on the applicants since it appears to have remained unenforced.

112. The Court considers that, while there is a primary duty to put in place a legislative and administrative framework, it cannot rule out the possibility, a priori, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice. In the present case, however, the only practical measure that appears to have been taken by the State, as the employer, was to distribute masks, on unspecified dates and at unspecified intervals (if distributed repeatedly at all). The Court notes in this connection that the apparently disposable masks (which were shown to the Court) were considered by experts in the Pellicano case to be of "inadequate quality" and "did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time" (see paragraph 33 above). These findings are sufficient for the Court to conclude that such practical attempts left much to be desired.

113. As to the duty to provide access to essential information enabling individuals to assess risks to their health and lives and the duty to provide such information, the Court notes that the Government submitted that no information reports were in fact available and that it was difficult for them to provide any information about the extent of any informative material given to the applicants. They noted, however, that the Occupational Health and Safety Authority (OHSA) provided preventive information and guidelines concerning the management and use of asbestos.

114. It would therefore appear that no information was ever collected or studies undertaken or reports compiled specifically about the asbestossituation at the applicants` place of work. Furthermore, the Government did not even argue that any general information was, in fact, accessible or made available to the applicants. Instead the Government, seemingly oblivious to the obligations arising from the Convention, opted to consider that it was not their responsibility to provide information at the outset and that anyone in such a work environment would in any case be fully aware of the hazards involved. The Court considers the latter statement to be in stark contrast to the Government`s repeated argument that they (despite being employers and therefore well acquainted with such an environment) were for long unaware of the dangers. The Court further finds inappropriate the Government`s contention that the distribution of the above-mentioned masks was an implicit source of information. Additionally, in relation to the Government`s reference to the information available at the OHSA, the Court notes that this authority was only created after the year 2000 and it could therefore not have been a source of information before that date. It follows that in practice no adequate information was in fact provided or made accessible to the applicants during the relevant period of their careers at the MDC.

…

116. The above considerations lead the Court to conclude that in view of the seriousness of the threat at issue, despite the State`s margin of appreciation as

to the choice of means, the Government have failed to satisfy their positive obligations, to legislate or take other practical measures, under Articles 2 and 8 in the circumstances of the present case.

117. It follows that there has been a violation of Article 2 in respect of the applicants in application no. 62338/11 relating to the death of Mr Attard and a violation of Article 8 in respect of the remaining applicants.

Dwar l-interpretazzjoni ta` l-Art 2 tal-Konvenzjoni u l-Art 33 tal-Kostituzzjoni, din il-Qorti taghmel riferenza wkoll ghas-sentenza li tat il-Qorti Kostituzzjonali fl-14 ta` Dicembru 2015 fil-kawza "**Jane Agius vs L-Avukat Generali et**" fejn *inter alia* kienet trattata l-kwistjoni tal-intenzjoni fil-privazzjoni tal-hajja. Inghad hekk :-

Riferibbilment ghall-artikolu 2 tal-Konvenzjoni, hu pacifiku li dan l-artikolu jhaddan aspetti kemm sostantivi kif ukoll procedurali. Minnbarra dan, il-Qorti Ewropea rrikonoxxiet li dan l-artikolu jimponi mhux biss obbligu li l-Istat ma jipprivax persuna arbitrarjament mill-hajja izda li l-Istat ghandu jiehu dawk illazzjonijiet jew mizuri pozittivi ragonevolment mitluba biex tigi zgurata l-protezzjoni ghall-hajja (positive obligations). …

L-intimati jissottomettu li l-artikolu 2 u l-artikolu 33 ghandhom jinqraw ad litteram u japplikaw biss ghall-privazzjoni intenzjonali tal-hajja. Ighidu li ghalkemm huwa minnu li l-awtoritajiet tal-habs ma vvigilawx uti bonus paterfamilias fuq is-sahha tal-prigunier Carlos Chetcuti, "però ma rrizultax li n-nuqqas da parti talawtoritajiet kien wiehed intenzjonat" u ghalhekk l-Istat m`ghandux jitqies li lleda l-jeddijiet sanciti b`dawk l-artikoli. "Il-Qorti ma taqbilx ma` din l-interpretazzjoni li ma ssibx konfort fil-kazistika tal-Qorti Ewropea … fejn jinsab ritenut li lartikolu 2 jimponi obbligazzjoni pozittiva sostantiva u anke procedurali fuq l-Istat.

… Applikati dawn il-principji ghall-kaz odjern, il-Qorti taghraf li Carlos Chetcuti kien fil-kustodja tal-Istat Malti meta giet somministrata doza fatali ta` methadone u dan bhala trattament ghat-tossico-dipendenza tieghu. L-ezistenza ta` ness kawzali bejn is-somministrar tad-doza fil-kuntest tan-nuqqasijiet ingenti fis-sistema adoperata fil-habs u l-mewt ta` Chetcuti huma kkonfermati mill-Qorti tal-Appell li sabet, inoltre, lid-Direttur tal- Habs u lill-ministru responsabbli ghall-akkadut. "Din l-azzjoni da parti tal-impjegata tal-Istat ma tistax, izda, titqies li kienet wahda intenzjonali u certament ma tressqux provi f`dan is-sens. Il-mewt tad-detenut kien ir-rizultat ta` sensiela ta` omissonijiet fl-istruttura responsabbli ghall-kura tad-detenut.

Din il-Qorti m`ghandha l-ebda dubbju li l-mewt ta` Carlos Chetcuti seta` gie evitat bil-kura u attenzjoni adegwata tad-dirigenti tal- habs u mill-ministru responsabbli li kellhom obbligu li jdahhlu sistema effettiva ghall-protezzjoni

tieghu tenut kont il-posizzjoni vulnerabbli tieghu. Ghaldaqstant tikkondividi l-kundanna tan-nuqqasijiet misjuba li giet espressa mill-qrati civili.

L-artikolu 33 tal-Kostituzzjoni "Ir-rikorrenti qed tallega ksur ta` dan l-artikolu flimkien malartikolu 2 tal-Konvenzjoni. Il-kliem tal-artikolu 33 mhuwiex ezattament l-istess bhat-test tal-artikolu 2. L-artikolu 2 jibda bissentenza "Everyone`s right to life shall be protected by law". Dan il-principju assolut mhuwiex rispekkjat fl-artikolu 33 li jinkorpora biss it-tieni frazi tal-artikolu 2. Wiehed jista` jirraguna li din il-frazi thalliet barra appozitament u ghalhekk l-artikolu 33 jitkellem biss dwar indhil dirett mill-Istat.

Izda dan l-artikolu ghandu jinghata l-istess applikazzjoni bhallartikolu 2 tal-Konvenzjoni ghal diversi ragunijiet. L-ewwel nett hu pacifiku li r-responsabbilità guridika temani mhux biss fuq att pozittiv u dirett, imma anke minn att ta` omissjoni fejn persuna tonqos milli taghmel dak li hu mistenni ragonevolment minnha. Att ta` omissjoni jista` jkun leziv daqs att ta` kommissjoni. "Inoltre, l-obbligazzjoni sancita bl-artikolu 33 hija wahda essenzjalment tal-protezzjoni tal-hajja minn azzjonijiet illegali u arbitrarji tal-Istat. Dan jirrikjedi li l-Istat ghandu jkun marbut mhux biss milli jindahal fit-tgawdija ta` tali dritt imma anke li jiehu mizuri pozittivi biex jassigura t-tharis tad-dritt; altrimenti dan l-artikolu ikun wiehed dghajjef u ineffettiv.

Ghaldaqstant u fid-dawl ta` dawn il-konsiderazzjonijiet kollha, din il-Qorti ser tilqa` l-ewwel talba billi ssib lill-intimati responsabbli ghall-ksur tal-artikolu 2 tal-Konvenzjoni u tal-artikolu 33 tal-Kostituzzjoni ta` Malta.

Fil-kaz tal-lum, abbazi tal-provi prodotti, din il-Qorti ssib illi l-mewt ta` Andrew Psaila kienet ir-rizultat ta` sensiela ta` omissonijiet da parti tal-Istat li, mhux biss ma aggornax il-legislazzjoni tal-pajjiz tempestivament pari passu mal-gharfien li maz-zmien beda jizdied tal-perikli tal-asbestos l-aktar meta jkun fi stat ta` *fibres* u tar-riskji tal-uzu tal-asbestos, izda wkoll meta l-Istat naqas palesement milli jaghmel rakkomandazzjonijiet dwar mizuri ta` prevenzjoni ta` l-uzu tas-sostanza bhala parti mir-rutina tax-xoghol ; ma` dawn mizuri ta` infurzar kontra l-perikli ghas-sahha tal-haddiema. L-assjem ta` nuqqasijiet fuq dan il-livell da parti tal-Istat gab mieghu illi Andrew Psaila kien espost mill-employer tieghu ghall-uzu tal-asbestos bhala parti mix-xoghol tieghu bil-konsegwenza li garrab marda terminali li temmet hajtu fl-eta ta` 60 sena. Mhux sostenibbli l-argument tal-intimati illi fiz-zmien meta Psaila kkontratta l-marda, l-gharfien (*awareness*) dwar il-perikli tal-asbestos kien generiku, u li kien biss fis-snin disghin li bdiet tohorg informazzjoni fuq bazi internazzjonali ta` kif ghandu jsir l-immaniggjar tal-asbestos. Din il-Qorti ghamlet l-accertamenti taghha u tghid minghajr l-icken esitazzjoni li dan l-argument huwa fattwalment inkorrett. Hemm imbaghad ix-xiehda ta` Dr George Peplow u tal-Prof Joseph Cacciattolo li tikkostitwixxi prova. Kontra ta` din il-prova, ma hemmx prova diretta u determinanti da parti tal-intimati. Ghalhekk il-Qorti mhijiex sejra titbieghed minn dak fattwalment riskontrat mill-ECHR fil-kaz ta` **Brincat** fis-

sens li l-Istati Malti tramite l-awtoritajiet kompetenti kellu taghrif ghad-disposizzjoni tieghu izda ma adottatax mizuri ta` prevenzjoni fuq livell aktar wiesgha li jolqot il-postijiet kollha tax-xoghol, aktar milli post wiehed li fil-kaz ta` Psaila kienet it-tarzna.

Ghalhekk il-hames eccezzjoni qeghda tkun <u>respinta</u>.

<u>Bir-raba` eccezzjoni</u>, l-Avukat Generali u t-Tabib Principali tal-Gvern qeghdin ighidu li r-rikorrenti jridu jaghmlu l-prova illi Andrew Psaila kien tassew espost ghall-asbestos, kif ukoll li l-kancer malinju li garrab kien konsegwenza u kawza unika tal-fatt illi kien espost ghall-asbestos. Ghalhekk trid issir il-prova tan-ness ta` kawzalita`.

Din il-Qorti taccetta illi sabiex tkun tista` tghaddi ghall-konsiderazzjoni tar-raba`, tal-hames u tas-sitt talbiet, irid jirrizulta ness bejn l-imgieba ta` l-intimati u l-vjolazzjoni. Mill-kamp tar-responsabilita` civili, jista` jinstilet sfond ta` analizi li jista` jigi applikat *mutatis mutandis* ghall- kaz tax-xorta tal-lum.

Issa fil-kaz tal-lum jirrizulta ppruvat dan in-ness.

Irrizulta nfatti illi Andrew Psaila kien impjegat it-Tarzna ta` Malta mit-30 ta` Marzu 1959 sad-data tal-mewt tieghu (ara d-dokument a fol 10). Kien l-uniku impieg tieghu. L-esposizzjoni tieghu ghall-asbestos kienet parti mir-rutina tax-xoghol tieghu ta` kuljum. Skont ic-certifikati medici ezebiti a fol 11 sa fol 19, jirrizulta li Andrew Psalia kien isofri minn *malignant peritoneal mesothelioma* dovuta ghal esposizzjoni ghal *asbestos* fil-kors tax-xoghol tieghu. Ic-certifikat tal-mewt esebit a fol 7 jaghmilha cara li Andrew Psalia miet kagun ta` *malignant mesothelioma of peritoneum industrial exposure to asbestos* u *chronic non specific ulcerative colitis.* Tressqu wkoll provi minn esperti li lkoll qalu illi l-marda hija kagun ta` esposizzjoni ghal *asbestos.*

Tajjeb jinghad illi d-decizjoni ta` **<u>Brincat</u>** (op. cit.) kienet tittratta kwistjoni identika ghal din tal-lum fejn l-ECHR ikkonkludiet li kien ippruvat ness ta` kawzalita` sufficjenti in kwantu *malignant mesothelioma* hija maghrufa bhala kancer rari assocjat ma` esposizzjoni ghal asbestos. Inghad hekk :-

83. The medical certification indicated that Mr Attard`s death was likely to be a result of asbestosexposure; malignant mesothelioma is known to be a rare cancer associated with asbestos exposure. The Court observes that it has not been contested or denied that Mr Attard worked at Malta Drydocks for more than a decade (1959-1974), during which time he was repeatedly exposed to asbestos.

Neither has it been shown that Mr Attard could have been contaminated elsewhere or that he was affected by other factors that could have led to the disease. In these circumstances, and given that Mr Attard has died as a result of his cancer, the Court considers that Article 2 is applicable to the complaint brought by the applicants in application no. 62338/11 relating to the death of the said Mr Attard.

Billi kien sodisfacjentement ippruvat illi Andrew Psaila kien espost ghall-*asbestos,* li l-kancer terminali li garrab kien il-konsegwenza u kkawzat unikament mill-fatt li kien espost ghall-asbestos, liema marda wasslet ghall-mewt tieghu, il-Qorti qeghda <u>tichad</u> ir-raba` eccezzjoni u tilqa` l-ewwel talba.

<u>Bis-sitt eccezzjoni</u>, kien eccepiet li r-rikorrenti ma elaborawx dwar l-ilment skont l-Art 8 tal-Konvenzjoni. Bla pregudizzju, kien hemm cahda bhala fatt li ndahlu jew hadu xi mizuri biex jikkompromettu jew ifixklu l-hajja privata u familjari tar-rikorrenti.

L-obbligu fuq l-Istat li jipprovdi informazzjoni dwar riskji jew perikli ta` esposizzjoni beda jkun rikonoxxjut bid-decizjoni tal-ECHR fil-kaz ta` "**<u>Guerra and Others v. Italy</u>**" tad-19 ta` Frar 1998. Hemm il-Qorti rreferiet ghal "*the right to assess risk factors connected with the activity of a nearby chemical factory.*" Fil-kazi ta` "**<u>McGinley and Egan v. the United Kingdom</u>**" (28 ta` Jannar 2000) u "**<u>Roche v. the United Kingdom</u>**" (19 ta` Ottubru 2005) l-ECHR [l-ahhar kaz il-Grand Chamber] affermat il-principju illi "*respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."* Id-dritt ghall-access ta` informazzjoni relatat ma` riskji li persuna tista` tigi esposta ghalihom (fil-kaz in kwistjoni kienu ghaddasa) kien trattat mill-ECHR fil-kaz ta` "**<u>Vilnes and others v. Norway</u>**" (5 ta` Dicembru 2013) fejn inghad illi "*the State`s positive obligation to provide access to essential information enabling individuals to assess risks to their health and lives may, in certain circumstances, also encompass a duty to provide such information."*

Fil-kaz ta` **<u>Brincat</u>** (op. cit.) inghad ukoll :-

85. However, in the context of dangerous activities, the scope of the positive obligations under Article 2 of the Convention largely overlaps with that of those under Article 8 (see Öneryıldız, cited above, §§ 90 and 160). The latter provision has allowed complaints of this nature to be examined where the circumstances were not such as to engage Article 2, but clearly affected a person`s family and private life under Article 8 (see López Ostra v. Spain, 9 December 1994, Series A no. 303-C and Guerra and Others, cited above).

Il-konkluzjoni kienet illi fil-kaz tal-haddiema li mietu bil-*mesiothelioma* l-ilment taghhom kellu jigi trattat fil-kuntest ta` vjolazzjoni tal-Art 2 mentri fil-kaz tal-haddiema illi mardu bil-*mesiothelioma* l-ilment kellu jigi trattat biss fl-ambitu tal-Art 8.

Din il-Qorti tikkondividi l-linja traccjata mill-ECHR u sejra tqis il-mewt ta` Andrew Psaila – ghar-ragunijiet fuq esposti – bhala vjolazzjoni tal-Art 2 mhux tal-Art 8.

Ghalhekk il-Qorti qeghda tilqa` s-sitt eccezzjoni u tichad it-tieni u t-tielet vjolazzjonijiet lamentati mir-rikorrenti.

IV. <u>Ir-rimedju</u>

Billi l-Qorti laqghet l-ewwel talba, se tghaddi ghall-konsiderazzjoni tar-raba`, hames u sit talbiet.

Taghmel riferenza ghall-Art 41 tal-Konvenzjoni li jghid :-

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Fil-kaz ta` **<u>Brincat</u>** (op. cit.) inghad hekk :-

62. As transpires from the general principles and the case-law of the Court already cited, in the circumstances of the present case concerning, inter alia, complaints under Articles 2 and 3, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress accessible to the applicants. The same must be held in respect of the complaint under Article 8 which in this specific case is closely connected to the said provisions. … The Court also considers that the remedy provided by the courts exercising constitutional jurisdiction provides a forum guaranteeing due process of law and effective participation for the aggrieved individual. In such proceedings, courts exercising constitutional jurisdiction can take cognisance of the merits of the complaint, make findings of fact and order redress that is tailored to the nature and gravity of the violation. These courts can also make an award of compensation for non-pecuniary damage and there is no

limit as to the amount which can be awarded to an applicant for such a violation (see, mutatis mutandis, Gera de Petri Testaferrata Bonici Ghaxaq v. Malta, no. 26771/07, § 69, 5 April 2011, in relation to Article 1 of Protocol No. 1, and Zarb v. Malta, no. 16631/04, § 51, 4 July 2006, in relation to Article 6). The ensuing judicial decision will be binding on the defaulting authority and enforceable against it. The Court is therefore satisfied that the existing legal framework renders the constitutional remedy capable, in theory at least, of affording, inter alia, appropriate compensatory redress concerning both pecuniary and non-pecuniary damage.

…

66. The domestic system thus offers one legal avenue which would have provided solely for pecuniary damage and another one which allowed for a finding of a violation, provided for all heads of damage, and, moreover, could have afforded any other means of redress relevant to the complaints at issue. The Court observes that it does not transpire that in such cases national law necessarily requires that ordinary civil proceedings be undertaken as a sine qua non before the institution of constitutional redress proceedings, and neither has this been claimed by the Government. The same was in fact held recently by the Civil Court (First Hall) in its constitutional jurisdiction (see paragraph 26, in fine, above). The Constitutional Court`s decision, and, before that, the similar decision of the Civil Court (First Hall) in its constitutional jurisdiction, declining the exercise of its jurisdiction was therefore not mandatory under procedural rules, or in accordance with any well-established case-law to that effect, but rather was a matter of discretion, that is to say it was based on the judgment of the judges sitting on that bench, as provided for in the Constitution (see relevant domestic law). It follows that there is nothing legally incorrect about the rulings of the constitutional organs, and the use of an ordinary remedy before the constitutional redress proceedings is not only customary but also desirable in order to avoid burdening the constitutional jurisdictions unnecessarily with cases. It may be that such an aim would be better achieved if the ordinary courts had the power to award also non-pecuniary ("moral") damage. However, even though in the Maltese legal system the ordinary remedy was limited in scope, it cannot be considered ineffective if followed by constitutional redress proceedings, and therefore the existence of an effective aggregate of remedies cannot be denied.

…

69. Consequently, in the circumstances of the present case and particularly in the absence of any pre-existing mandatory legal requirements ensuing from law or well-established case-law requiring the institution of civil tort actions before recourse to the constitutional organs (in circumstances such as those of the present case), the Court considers that the applicants cannot be held to blame for pursuing one remedy instead of two. Moreover, such an action would have also served the interests of economy of proceedings given that – in any event

– the applicants would have been bound to go before the constitutional organs to obtain the full range of redress which they claimed.

70. The Court also notes that in their applications before the constitutional jurisdictions the applicants concerned requested the court to quantify a fair amount of compensation for the breach of their rights, to liquidate such amount and to order that this pecuniary redress be paid individually to each applicant (see paragraph 14 above). The Court considers that this general wording used by the applicants does not specifically exclude, as the Constitutional Court seems to have held (see paragraph 17, in fine, above) non-pecuniary damage as understood in the Court`s case-law. On the contrary it must be taken as including both pecuniary ("material" damage, consisting under domestic law of damnum emergens and lucrum cessans) and non-pecuniary ("moral") damage, the term `pecuniary` used by the applicants meaning simply `monetary` and therefore before the domestic courts the relevant applicants` request cannot be said to have been deficient.

Fil-konsiderazzjonijiet taghha fl-istess kaz ta` **Brincat**, l-ECHR cahdet li kienu ppruvati danni pekunarji fil-kaz ta` l-applikanti kollha u ghalhekk ikkonkludiet illi taghti kumpens ghal danni mhux pekunarji. Qalet :-

151. On the other hand, given the violations of either Article 2 or 8 of the Convention in the present case – which the mere finding of a violation in this judgment is not sufficient to remedy – the Court awards the applicants the following amounts in respect of non-pecuniary damage: The applicants in application no. 62338/11, EUR 30,000 in total; Mr John Mary Abela EUR 12,000; Mr Dyer, EUR 1,000; and the remaining applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11, EUR 9,000 each.

Fis-sentenza ta` "**Jane Agius vs L-Avukat Generali et**" (op. cit.) il-Qorti Kostituzzjonali qalet hekk :-

Kontrarjament ghal dak li jokkorri f`hafna procedimenti kostituzzjonali, ir-rikorrenti già segwiet dawn il-proceduri ordinarji b`success tant li otteniet il-kundanna tal-organi tal-Istat involuti ghall-mewt kolpuz ta` Carlos Chetcuti kif ukoll otteniet kumpens ghad-danni materjali pekunjarji (damnum emergens u lucrum Rik. Kost. 33/14 7 cessans) fl-ammont mhux negligibbli ta` tmienja u tletin elf, mitejn u tlettax-il euro (€38,213). ***"Madanakollu t-talbiet odjerni, imsejsin fuq allegat lezjoni tal-Konvenzjoni u tal-Kostituzzjoni, imorru oltre s-semplici kumpens pekunjarju in kwantu li jimmiraw precizament ghall-kumpens ghad-danni morali, liema danni morali mhumiex ikkontemplati filligi civili taghna u jezorbitaw minn dak prefiss bl-artikolu 1045 u 1046 tal-Kodici Civili.***

Fil-mori ta` din il-kawza nghatat sentenza mill-Qorti Ewropea filkaz Brincat and others v. Malta, deciza fl-24 ta` Lulju 2014 fejn il-Qorti Ewropea kellha l-opportunità li tindirizza kwistjonijiet simili ghal dawk sollevati fil-kaz tal-lum, partikolarment it-tip ta` rimedji accessibbli ghall-vittmi ta` lezjoni ta` drittijiet fondamentali flordinament guridiku Malti. F`din id-decizjoni, il-Qorti Ewropea esprimiet ruhha dwar ir-rimedju ghad-danni morali f`kaz ta` lezjoni tal-artikolu 2 tal-Konvenzjoni. "Dawk il-proceduri gew istitwiti wara li l-Qorti Kostituzzjonali ta` Malta laqghet l-eccezzjoni tal-intimati fil-kawza Joseph Brincat et v. Policy Manager tal-Malta Shipyards et – deciz fil-11 ta` April 2011 billi rrietniet hekk: ""Din il-Qorti però, bhall-ewwel Qorti, hija tal-fehma li billi rrikorrenti kienu qed jitolbu rizarciment ta` danni, l-azzjoni taht illigi ordinarja kienet taghtihom rimedju shih ghall-ilment taghhom. Ir-rikorrenti m`ghandhom ebda dritt ghal danni morali taht il-ligi ordinarja u l-Konvenzjoni Ewropea ma taghti ebda dritt generali jew assolut ghal danni morali f`kazijiet bhal dawn". "Il-Qorti Kostituzzjonali ikkonfermat id-decizjoni tal-ewwel Qorti u ghazlet li ma tezercitax id-diskrezzjoni taghha taht il-proviso premess. Tajjeb li jigi affermat li, kontrarjament ghall-kaz odjern, ir-rikorrenti f`dik il-kawza ghazlu li jiehdu t-triq kostituzzjonali millewwel minghajr ma ittentaw kawza civili proprju ghaliex kienu qed jimmiraw ukoll ghad-danni morali.

Il-Qorti Ewropea ma kenitx tal-istess fehma u irriteniet: "Nevertheless, the Court notes that an action in tort which is perfectly capable of awarding material/pecuniary damage does not in general provide for an award of non-pecuniary damage ("moral damage" as understood in the Maltese context)" "u, wara li kkonsidrat l-element diskrezzjonali tal-proviso, ikkonkludiet li: ""In the specific circumstances of the case, the Court is therefore satisfied that the national judicial authorities were provided with the opportunity to remedy the alleged violations of the Convention but failed to do so. Consequently, from the Court`s perspective, the applicants` institution of constitutional proceedings sufficed in the present case for the purpose of exhaustion of domestic remedies in respect of the substantive complaints under Articles 2, 3 and 8." …

Fl-isfond tal-interpretazzjoni kostanti tal-gurisprudenza taghna f`dawn l-ahhar decenni dwar it-tip ta` rimedju sancit bl-artikoli 1033, 1045 u 1046 tal-Kap. 16, din il-Qorti hi tal-fehma li dawn id-disposizzjonijiet jeskludu rimedju ordinarju ghad-danni morali u ***r-rikorrenti ma kellhiex triq ohra ghajr ir-rimedju kostituzzjonali u konvenzjonali biex titlob rimedju simili****. "Ghal dawn il-motivi, meta l-Qorti tigi biex tapplika l-principji hawn fuq imfissra ghall-kaz li ghandha quddiemha ssib li ma nghatatx ragunijiet tajbin bizzejjed biex taghzel li ma twettaqx issetghat specjali taghha fil-kompetenza kostituzzjonali jew konvenzjonali taghha. "Ghalhekk billi r-rikorrenti qed titlob precisament rimedju nonpekunjarju fl-isfond ta` allegata lezjoni tal-artikolu 2 talKovenzjoni u tal-artikolu 33 tal-Kostituzzjoni, hi fil-fehma konsiderata ta` din il-Qorti li r-rikorrenti ma kellhiex, fl-istat attwali tal-ligi taghna, rimedju ordinarju effettiv ghad-danni msemmija u ghaldaqstant din l-eccezzjoni qed tigi michuda."*

Il-Qorti Kostituzzjonali kompliet tghid :

Qabel xejn ghandu jinghad illi l-Art. 1045 u 1046 tal-Kodici Civili, li fuqhom huwa msejjes l-argument illi ma jinghataw danni nonpekunjarji taht il-ligi ordinarja, ghax dawk l-artikoli jahsbu biss ghal damnum emergens u lucrum cessans, jinsabu fit-tieni Subsub-titolu (§II) tas-Sub-titolu tnejn (II) tat-Titolu erbgha (IV) tattieni (II) Taqsima tat-tieni Ktieb tal-Kodici Civili: Fuq id-Delitti u Kwazi-delitti. Ghalhekk jolqtu biss id-danni ex delicto u mhux dawk minn ghejjun ohra ta` obbligazzjonijiet.

Issa fil-kaz tal-lum Carlos Chetcuti kien taht il-kustodja tadDirettur tal-Habs u ghalhekk ir-relazzjoni bejniethom aktar ghandha min-natura ta` relazzjoni kuntrattwali jew, ghall-inqas, billi ma kinitx kunsenswali, ex lege, milli relazzjoni ex lege aquilia. Ghalhekk, is-sahha tal-argument imsejjes fuq l-Art. 1045 u 1046 jonqos hafna.

Tassew illi, bi ftit eccezzjonijiet, il-gurisprudenza tghid illi l-qrati ta` gurisdizzjoni civili ma jaghtux danni non-pekunjarji jew morali. Dan ma hux ghax hemm disposizzjoni tal-ligi positiva li espressament tivvjeta d-danni morali izda ghax il-qrati, influwenzati x`aktarx mis-sentiment favor debitoris, adottaw interpretazzjoni x`aktarx stretta u rigida tal-Art. 1045 tal-Kodici Civili. Madankollu, il-ligi civili ma ghandhiex tigi interpretata in vacuo bhallikieku fl-interpretazzjoni tal-ligi civili l-qrati ta` gurisdizzjoni civili ma ghandhomx iqisu wkoll il-principji kostituzzjonali u d-drittijiet fondamentali. Tassew illi, fejn hemm konflitt irrikonciljabbli bejn il-ligi civili u dik kostituzzjonali jew il-Konvenzjoni, huma l-qrati ta` gurisidizzjoni kostituzzjonali li ghandhom is-setgha li jghidu illi dik id-disposizzjoni tal-ligi civili ghandha, safejn tkun inkonsistenti, tkun bla effett bejn il-partijiet fil-kawza. Fejn, izda, hija possibbli "interpretazzjoni konformi" mal-Kostituzzjoni jew tal-Konvenzjoni, il-qrati ta` gurisdizzjoni civili ghandhom, bla ma b`hekk ikunu qeghdin jusurpaw setghat li ma humiex taghhom, jinterpretaw il-ligi civili ordinarja b`mod "konformi" mal-Kostituzzjoni u mal-Konvenzjoni flok jaghzlu interpretazzjoni li tohloq konflitt u hekk joholqu sitwazzjoni antikostituzzjonali li tista` tigi rimedjata biss wara kawza kostituzzjonali u jqieghdu wkoll lill-istat Malti fi stat ta` ksur tal-obbligi Internazzjonali tieghu taht il-Konvenzjoni.

Kjarifikat dan il-punt dwar danni pekunarji u danni non-pekunarji jew morali, il-Qorti Kostituzzjonali kkonkludiet li fil-kaz li kellha quddiemha, ma kienx hemm dipendenza tal-attrici fuq il-mejjet, u ma kien hemm ebda affinità affettiva bejniethom ghajr dik familjari li, izda ma kinitx wahda qawwija, u ghalhekk ma giex ippruvat li l-attrici garrbet tbatija u sofferenza kbira minhabba c-cirkostanzi tal-mewt :

Nghaddu issa ghall-meritu proprju tal-aggravju: l-attrici nghatat rimedju tajjeb u bizzejjed bid-danni likwidati favur l-awtur taghha fil-kawza civili? Fl-

ewwel agrument taghha kontra l-aggravju l-attrici tghid illi "talba ghal dikjarazzjoni ta` lezjoni ta` drittijiet fundamentali ma tista` qatt tigi promossa quddiem il-qrati ordinarji" u illi "l-unika mezzi disponibbli ghal persuna sabiex titlob dikjarazzjoni f`dan is-sens jinstabu fl-Artikolu 46 tal-Kostituzzjoni ta` Malta".

Dan huwa minnu, izda xorta tibqa` l-kwistjoni jekk dik iddikjarazzjoni hijiex mehtiega jew jekk inghatax gà rimedju xieraq u bizzejjed mill-qrati ta` gurisdizzjoni civili.

Din il-Qorti hija tal-fehma illi d-dikjarazzjoni tal-Prim`Awla talQorti Civili, konfermata mill-Qorti tal-Appell in re Vincent Chetcuti v. Direttur tal-Habs u Ministru tal-Intern, b`termini x`aktarx qawwija u enfatici illi kienu n-nuqqasijiet tal-awtoritajiet li wasslu, kemm direttament kif ukoll indirettament, ghall-mewt ta` Carlos Chetcuti, huma ta` sodisfazzjoni bizzejjed ghall-attrici minghajr htiega ta` dikjarazzjoni ulterjuri ta` ksur ta` jeddijiet fondamentali. Il-fatt li l-istess dikjarazzjoni terga` tinghata minn din il-Qorti ma jzid xejn.

Izda l-attrici ma hijiex qieghda titlob biss dikjarazzjoni ta` ksur ta` drittijiet fondamentali izda wkoll il-hlas ta` danni non-pekunjarji b`zieda mad-danni likwidati fil-kawza civili. Hawn ukoll tqum il-kwistjoni jekk humiex mehtiega d-danni non-pekunjarji, b`zieda ma` dawk pekunjarji, biex ikun inghata rimedju xieraq u bizzejjed.

Il-Qorti tosserva illi f`dan il-kaz ma kienx hemm dipendenza tal-attrici fuq il-mejjet, u ma kien hemm ebda affinità affettiva bejniethom ghajr dik familjari li, izda, ma kinitx wahda qawwija fleffetti taghha. L-attrici ma wrietx illi garrbet tbatija u sofferenza kbira minhabba c-cirkostanzi tal-mewt, elementi li tqiesu relevanti mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ***Paul u Audry Edwards v. ir-Renju Unit****. Kull ma wriet l-attrici hu li hi dahlet fiz-zarbun ta` missier Carlos Chetcuti bhala werriet tieghu wara mewtu. La wriet li kellha relazzjoni affettiva u effetiva manneputi taghha u lanqas ressqet xiehda li qatt uriet interess f`Carlos Chetcuti waqt li kien il-habs, imqar permezz ta` xi zjara, telefonata jew korrispondenza.*

Il-fatt li, bhala regola, f`kazijiet xierqa, jista` jkun hemm jedd ghal danni morali jew non-pekunjarji f`kazijiet bhal dan tal-lum ma jfissirx li bilfors, f`kull kaz, dawk id-danni ghandhom jinghataw, bla ma tqis kemm tkun qawwija jew dghajfa r-rabta bejn il-mejjet u min jitlob id-danni. Il-mewt ta` persuna, aktar u aktar meta l-mewt tkun tragika u li setghet giet evitata, iggib niket ghal kulhadd; izda biex min ihalli warajh il-mejjet ikollu jedd ghal danni morali huwa mehtieg illi tintwera tbatija u sofferenza fi grad illi ma ntweriex fil-kaz tal-lum. Fic-cirkostanzi ta` dan il-kaz, ilQorti tifhem illi l-kumpens "mhux negligibbli", kif definit millewwel Qorti, ta` tmienja u tletin elf, mitejn u tlettax-il euro (€38,213) gà likwidat mill-qrati civili huwa rimedju xieraq u bizzejjed ghal kull forma ta` dannu li setghet garrbet l-attrici minhabba l-mewt ta` Carlos Chetcuti.

Fil-kaz tal-lum, il-Qorti tqis illi kien ippruvat li r-rikorrenti - ghalkemm mhux dipendenti fuq missierhom - kellhom relazzjoni vicina u ta` intimita` mieghu, u li l-mewt bikrija tieghu gabet sofferenza fuqhom. Mill-provi rrizulta kemm missierhom kien iqatta` hin maghhom, izda dan kollu spicca fix-xejn mal-marda kiefra tieghu li sa anke pprekludietu milli jkun jista` jaghti l-ghozza tieghu lin-neputijiet. Psaila spicca go qiegh ta` sodda, ghadda minn tbatija effett ta` marda kattiva, spicca fis-sitwazzjoni fejn ghalkemm ir-rikorrenti ghamlu l-almu taghhom biex jiehdu hsiebu bl-ahjar mezz possibbli, dan xorta baqa` jbati sakemm miet.

Din il-Qorti tghid illi tal-lum **mhux kaz** fejn dikjarazzjoni ta` lezjoni ghandha tkun rimedju sufficjenti. Il-fattispeci li wasslu ghad-decizjoni tal-ECHR fil-kaz ta` "**Di Sarno and others v Italy**" mhux simili ghal dawk tal-lum. Esposizzjoni ghal skart mhijiex esposizzjoni ghall-aebestos, bl-effetti kancerogeni ppruvati tieghu.

Il-Qorti taf bis-sentenza li nghatat fit-23 ta` Novembru 2016 fil-kawza "**George Spiteri vs Policy Manager tal-Malta Shipyards et**" minnha diversament presjeduta ; in partikolari l-quantum li kien likwidat favur ir-rikorrenti.

Pero` din il-Qorti hija tal-fehma illi fil-kaz tal-lum il-quantum tal-kumpens li ghandu jigi likwidat ghandu jkun superjuri ghal dak likwidat f`dik il-kawza.

Ghal dak li jirrigwarda *non precuniary damages,* din il-Qorti sejra toqghod fuq il-linji traccjati fil-kaz ta` **Brincat**. Hemm fost l-applikanti kien hemm l-eredi ta` haddiem kunjomu Attard li miet b`kancer attribwit ghall-esposizzjoni mill-asbestos. Attard miet fl-2006 fl-eta` ta` 61 sena. Fil-kaz tal-lum Psaila miet fl-1988 fl-eta` ta` 60 sena. Il-Qorti sejra tillikwida kumpens fl-ammont ta` **€30,000** ghall-vjolazzjoni tal-Art 2 tal-Konvenzjoni u ghall-Art 33 tal-Kostituzzjoni sabiex jinqasam indaqs bejn kull wiehed u wahda bejn l-erba` rikorrenti.

Dwar *pecuniary damages*, ma tressqux provi. Ghalhekk mhix sejra taghmel likwidazzjoni fl-assenza ta` dawn il-provi.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :

Ghar-rigward ta` dawk l-eccezzjonijiet tal-intimati Tabib Principali tal-Gvern (Sahha Pubblika) fil-kwalita` rapprezentattiva tieghu u l-Avukat Generali li baqghu mhux decizi bis-sentenza taghha tal-15 ta` Settembru 2015, qeghda tichad il-bqija tal-eccezzjonijiet, hlief ghas-sitt eccezzjoni li qeghda tkun milqugha.

Qeghda tilqa` l-ewwel talba.

Qeghda tichad it-tieni u t-tielet talbiet.

Qeghda tipprovdi dwar ir-raba`, il-hames u s-sitt talbiet safejn dawn huma konsegwenzjali ghas-sejbien ta` vjolazzjoni tal-Art 2 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali u tal-Art 33 tal-Kostitituzzjoni ta` Malta, billi qeghda tillikwida favur ir-rikorrenti kumpens fl-ammont ta` tletin elf Ewro (€30,000) liema ammont ghandu jinqasam indaqs bejn l-erba` rikorrenti, b`dan illi l-intimati Tabib Principali tal-Gvern (Sahha Pubblika) fil-kwalita` rapprezentattiva tieghu u l-Avukat Generali ghandhom ihallsu lil kull wiehed u wahda mill-erba` rikorrenti l-ammont ta` sebat elef u hames mitt Ewro (€7,500).

Tordna illi l-ispejjez relatati mal-ewwel, mar-raba`, mal-hames u mas-sitt talbiet ghandhom jithallsu mill-intimati Tabib Principali tal-Gvern (Sahha Pubblika) fil-kwalita` rapprezentattiva tieghu u l-Avukat Generali, filwaqt li l-ispejjez relatati mat-tieni u mat-tielet talbiet ghandhom jithallsu mir-rikorrenti.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur