FIRST HALL CIVIL COURT

THE HON. JUDGE TONI ABELA LL.D.

Sitting of Thursday the 16th day of May, 2024

Number 21

Application number 85/22TA

Janet Leslie Kitcher (ID 579718L)

vs

Mary Caruana (ID490249M)

The Court:

Having seen the sworn application of Janet Leslie Kitcher (the plaintiff) of the 2nd of February 2022 by which she pleased and requested the following:

1. "Illi fit-23 ta`Dicembru 2019 f`Rahal Gdid fil-pjazza waqt li kienet fuq iz-zebra crossing, il-konvenuta Mary Caruana, b`imprudenza,negligenza u nuqqas ta`tharis tar-regolamenti tat-traffiku,tajjritha u kkagunatilha hsara fuq il-persuna.

2. Hija ttiehdet l-isptar u filfatt kellha tigi operata minhabba l-ksur li kellha.

3. Illi hija ghandha eta` ta` 71 sena pero` kienet tista tlahhaq max-xogholijiet tad-dar u tiehu hsieb taghha nfisha u ta`zewgha Alfred Kitcher.

4. Illi l-esponenti nterpellat lil Mary Caruana u l-assigurazzjoni Mapfre Middlesea Insurance Plc ghall-hlas tad-danni,haga li m`avveratx ruhha u ghalhekk kellha ssir din il-kawza.

5. Minhabba dan l-incident li hija rrikorriet wara zmien ghand l-ispecjalista Dr Carmel Sciberras fejn iddikjara li ghandha dizabilita` permanenti ta` 8%

6. Illi issa mexxa fid-dar ir-ragel Alfred Kitcher pero` stante l-eta` tieghu ta` 64 mhuwiex mahsub li jkun jista` jiflah ilahhaq max-xoghol kolhu tad-dar u anke li jiehu hsieb tieghu nnifsu.

Ghaldaqstant, l-esponenti titlob bir-rispett illi din l-Onorabbli Qorti prevja kwalunkwe dikjarazzjoni mehtiega u bi provvediment opportun:

1. Tiddikjara ghaliex il-konvenuta m`ghandhiex tigi ddikjarata hatja tad-danni kollha sofferti mill-attrici fl-incident stradali li gara fit-23 ta` Dicembru 2019 f`Rahal Gdid,fuq zebra crossing fil-pjazza tal-istess.

2. Tillikwida d-danni kollha sofferti mill-attrici kemm bhala danni emergens u anke lucrum cessans.

3. Tikkundanna lil Mary Caruana thallas l-ammont li hekk jigi likwidat.

Bl-ispejjez inkuzi dawk tal-ittra ufficcjali tas-17 ta`Novembru 2021 debitament notifikata."

Having seen the sworn answer of Mary Caruana (the respondent) of the 14th March 2022 by which she answered and raised the following exceptions:

1. "Illi l-eccipjenti tichad kwalsijasi responsabilita`ghall-incident stradali illi sehh nhar it-23 ta`Dicembru 2019 fil-Pjazza Antoine de Paule gewwa Rahal Gdid ;

2. Kwindi tichad kwalsijasi responsabilita` ghall-allegati feriti fuq il-persuna tar-rikorrenti;

3. Illi minghajr pregudizzju ghall-permess, ir-rikorrenti ghandha tressaq prova illi l-feriti li kkawzawlha d-dizabilita` permanenti allegati subiti minnha gew effettivament subiti fl-incident stradali tat-23 ta` Dicembru 2019;

4. Inoltre,u minghajr ebda pregudizzju ghall-premess, ir-rikorrenti trid tipprova wkoll il-quantum tad-danni realment subiti minnha.

5. Salv eccezzjonijiet ulterjuri permessi skont il-ligi;

6. Bl-ispejjez kontra r-rikorrenti."

Having seen the acts and document in the suit;

Having heard and read the sworn evidence presented during the course of these proceedings by both parties.

Having heard the legal counsels to the parties making their oral submissions on the 7th February 2024.

Now therefore:

Points of facts

1. On the 23rd of December 2019, the plaintiff along with her husband at about 8.00am, was crossing the pedestrian crossing situated at Pjazza Antoine De Paule at Rahal Gdid. The orange big bulbs typical to these crossings were at the time not functioning due to an outage.

2. At the moment they were crossing, the respondent was driving her vehicle subject matter of the suit, when she overran the plaintiff and even

hit her husband. Plaintiff sustaines that the accident occurred through the fault of respondent. On her part, respondent sustains the contrary.

3. The plaintiff claims that due to the accident she has sustained injuries of a permanent nature and is seeking, by the present suit to claim damages accordingly.

Points of Law

4. The action being proposed by the plaintiff is that of *culpa aquiliana*. This action is contemplated in article 1031 of the Civil Code. As a general rule, the burden of proof rests on the plaintiff to prove that the accident happened through the fault of the respondent and that has sustained damages arising from the said accident.

5. The relevant provisions of the Civil Code that regulate this matter are:

"1031. *Every person, however, shall be liable for the damage which occurs through his fault. When a person is deemed to be in fault*".

and

"1032.(*1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus pater familias".*

6. Our general principles of the law do not provide a definition as to what is culpa, but as a logical consequence of article 1032(1) of the Civil Code, it is identified with that kind of behaviour were there is lack of prudence, lack of diligence and a behaviour in breach of the principle of what is expected of a *bonus pater familias*.

7. Jurisprudence on the matter teaches that "*min ifittex ghad-danni jrid jipprova mhux biss l-att jew ommissjoni kolpuza izda li dak l-istess att jew ommissjoni ghandhom konnessjoni ta` kawza u effett mad-danni sofferti"* (vide - **Kollez. Vol. XXX. I. 142**). In other words he plaintiff has to establish a direct link between the accident and damages sustained. Jurisprudence also explains that "*il-kolpa fil-kaz ta` fatt dannuz li minnu torigina l-azzjoni akwiljana tavvera ruhha filli wiehed jaghmel att volontarjament u jonqos li jipprevedi l-effett dannuz ta` dak il-fatt meta seta` jipprevedi dak l-effett*" (vide- Kollez. Vol. XLII. I. 74). The plaintiff must also connect the behaviour of the respondent to the forseeabilty of the damage caused, in otherwords "*prevedibilita` din li trid tkun ta` probabilitajiet ragjonevoli u mhux ta` possibilitajiet remotissimi u inverosimili*" (vide – **Kollez. Vol. XLVIII. I. 258**). Furthermore there is culpa "*quando vi ha la violazione di un dovere ed una volontaria omissione di diligenza per cui non si prevedono le conseguenze della propria azione od omissione, e si viola il diritto altrui, senza volerlo ed anche senza avvedersene*".

8. In the Decision in the names **Michael D`Amato noe vs Filomena Spiteri et of 3rd October 2003**, with reference to article 1031 above mentioned the Court had this to say:

"*Din in-norma tal-ligi fil-kamp tar-responsabilita` akwiljana jew extrakontrattwali tikkostitwixxi l-punt kardinali in subjecta materia, u tennuncja l-principju in virtu ta` liema l-lezjoni kagjonata lis-suggett tobbliga lill-awtur tal-lezjoni li jirrizarcixxi l-konsegwenzi negattivi, ossija d-danni, kompjuti bl-att tieghu; Issa kif saput, il-fonti primarju tar-responsabilita` civili hi ravvizata flimgieba imputabbli ghal dolo jew culpa. Il-ligi civili taghna ma tiddefinixix il-kolpa civili fl-ghemil izda taghmlu jikkonsisti fin-nuqqas ta` prudenza, nuqqas ta` diligenza u nuqqas ta` hsieb tal-bonus paterfamilias [Artikolu 1032 (1), Kodici Civili].*

Dan jikkorrispondi in criminalibus ghan-nuqqas ta` hsieb, bi traskuragni, jew b` nuqqas ta` hila fl-arti jew professjoni tieghu jew nuqqas ta` tharis tar-regolamenti statwit fl-Artikolu 225 tal-Kodici Kriminali". (Vide also decision of the **Court of Appeal of the 15th of December 2015 in the names of Paul Azzopardi et vs Charles Grech et**).

9. In the decision of the Court of Appeal of the **15th December 2015 in the names of "Paul Azzopardi et vs Charles Grech et"** the Court said :-

" *… jidher li l-azzjoni attriċi tinbena fuq dak li jipprovdi l-artikolu 1031 tal-Kodiċi Ċivili marbut ma` d-dispożizzjonijiet tal-artikolu 1038 tal-istess Kodiċi. Illi huwa prinċipju ewlieni f`azzjoni ta` danni li min jallega li ġarrab*

ħsara bi ħtija jew l-għamil ta` ħaddieħor irid jipprova r-rabta bejn il-ħsara mġarrba u dik il-ħtija jew dak l-għamil. Għalkemm il-liġi tagħna ma tfissirx x`inhi l-"ħtija", madankollu tgħid li jkun jitqies fi ħtija min f`għemilu jonqos li juża l-prudenza, l-għaqal u l-ħsieb ta` missier tajjeb tal-familja. Fil-każ li l-Qorti għandha quddiemha, l-atturi jixlu lill-imħarrkin b`rieda iżjed minn sempliċi traskuraġni, iżda bil-ħsieb jew l-intenzjoni tal-ħażen li kellu jissarraf fit-teħid tal-kajjik tagħhom".

Considerations of this Court

10. Having established the points of law and fact, the Court has now to establish the question as to who is to be held responsible for the accident in question. After having established responsibility (if ever it is the case), the Court will move on to consider the *quantum of damages* if at all.

Responsibility

11. The core general principle that guides this Court in the circumastances, is that of *the duty to take care* and if it is a case of traffic accident, it is also a question of proper look out. This applies to pedestrian and driver alike, as indeed reg 13 of the Highway Codes states:

"*Pedestrians (as well as motorists) have responsibilities for the proper use of the road. They may be liable for the consequences to themselves or to others through their failure to observe the Law".*

12. The general conduct of drivers besides from being regulated by the general principles of the Civil Code there is also the Highway Code. Albeit that this Code is not binding at law it always remains a good guidance as regards the rights of drivers and pedestrians when it comes to duty of taking care and proper look out. The Code is a tool to interpret and appreciate the facts that are presented during a suit. Furthermore, judge pronouncements are also taken in condsideration, notwithstanding that they have only persuasive force.

13. As has been observed by the Criminal Court of Appeal when it comes to zebra crossing "*sewwieq li jkun gja' ghadda zebra crossing logikament mhux mistenni li jgorr l-istess piz ta' responsabilita', ghal dak li jirrigwarda prekawzjonijiet, illi qieghed fuq kull sewwieq meta ghadu qed javvicina zebra crossing"* (vide **Il-Pulizija-vs- Anthony D'Amato of 8th June, 2001**). In other words, the duty to take care by the driver is more onerous when he has not yet passed the pedestrian crossing as is the case in the current case.

14. From the evidence adduced by the parties, it transpires that respondent had not yet passed the zebra crossing. Furthermore at the time, human traffic was overtly conspicuous, to the extent that the respondent says "…*no traffic lights working and I was driving very slowly because there <u>were a lot of people hanging about and people were all over the pavement.</u> So I stopped at some time …<u>because there were people</u>*

crossing the street (a' fol 104 tergo u ara ukoll a' fol 159 tergo emphasis of the Court). This, in the opinion of the Court, was an additional circumstance that should have highly alerted the respondent as regards the duty of proper look out.

15. However, the Court has two versions to consider since both parties refute responsibility of the accident. Faced with two conflicting versions, this does not entitle the Court to have recourse to the most comfortable of conclusions, that of rejecting the plaintiff's claims. The Court is duty bound, to arrive to the conclusion as to which of the two versions is most likely to be nearest to the truth, dictated by the principle, that in civil matters, the force of a Decision rests on the balance of probabilities and the preponderance of the facts. (vide Kollez. **Vol L pII p440 and the judgement by this Court of the 30th October 2003 in the names of George Bugeja vs Joseph Meilak**).

16. Discrepancies in evidence do not necessarily discredit a witness. For example in her affidavit the plaintiff states that the accident happened "*about 1 metre away from the pavemement on the other side…*" (a' fol 14). While her husband, in cross examination states, that it occurred "*half way"* (a' fol 115) and further on states that it was "*two or three steps away from the opposite pavement"* (a' fol 127 u tergo).

17. But this notwithstanding, the core of the matter lies in the fact, that the accident indeed happened on the zebra crossing and that the plaintiff

was in fact crossing it with her husband. What is more, notwithstanding that crossing lights were not functioning, it all happened in plain day light (a' fol 143 tergo). The respondent stopped, on seeing a person who seemed to have shown uncertainty at crossing. After having established that he was not crossing, without looking to her right, she proceeded to move on, not noticing that the plaintiff and her husband were crossing the road.

18. Indeed, answering a question by the Court whether she looked on both sides she answered thus:

"*At that time, the second time, the first time obviously I did. <u>But the second time I just let go off the breaks and this car started moving the second time.</u> When I realised it was going to cross the street*" (a' fol 106 tergo ara ukoll a' fol 162). But when she realised it was too late.

19. The Court therefore concludes that the respondent failed to keep a proper lookout. Keeping a proper lookout means more than looking straight ahead. It includes awareness of what is happening in one's immediate vicinity. A motorist shall have a view of the whole road, from side to side, and in the case of a road passing through a built-up area, of the pavements on the side of the road as well. (Vide **Newhaus vs Bastion Insurance Co. Ltd. [1968]**)

Liquidation of damages

20. Under Maltese law the damages that can be claimed are those mentioned in article 1045(1) of the Civil Code:

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

21. In other words, there are two classes of damages: those that are effectively and actually suffered (*damnum emergens*) and the loss of future earnings (*lucrum cessans*). As regards these latter damages, **Vivienne Harpwood in her Modern Tort Law (ediz. 2009, pagna 438**) states that:

"*Deductions may also be made by adjusting the multiplier downwards to allow for certain future contingencies. In an attempt to assess the appropriate sum which should be awarded for loss of future earnings, the courts gaze into the imaginary crystall ball, and try to make the award in the light of what might have been the claimant's future."*

Damnum Emergens

22. In her affidavit the Plaintiff states that she has incurred various legal and medical expenses (a' fol 16).

23. The Court has sifted through the records of the case and failed to find any proof to this effect save that she instructed Mr Carmel Sciberras to issue a medical report. Though no receipts were exhibited, the Court on the guidance of the principle of equitable justice, is liquidating *ex-equo et bono* the sum of three hundred fifty euros (€350) in this regard (vide **Decision of 13th October, 2004 in the names of Margaret Camilleri -vs- The Cargo Handling Co Ltd**).

Lucrum cessans

24. In is undisputed that the plaintiff was a house wife. Our Courts have consistently recognised that though a house wife is not officially gainfully employed, her work as a house wife also has a monetary value. This was recognised by our Courts in the **decisions of 30th November, 2001 in the names Emmanuel Schembri and Filomena Schembri -vs- David Tanti and Muscat -vs- Buhagiar, 15th July, 1983**. It was also decided that compensation of a house wife should not be less that a national minimum wage. (**PA GCD Ebejer vs Spiteri 16/12/97; Borg vs Zammit PA NA 22/3/99; Zammit vs Bezzina App 19/9/73; Apap vs Degiorgio App 16/1/84; u Grech vs Briffa PA 21/2/97**). Therefore for the scope of liquidating damages suffered by the plaintiff the Court is going to apply the

national minimum wage with an additional increase of 10% to make good for any future devaluation of the amount. When the accident happened the Plaintiff was 69 years old (Vide affidavit of plaintiff). Presently the minimum wage is €213.54 per week.

25. The general guiding principle to arrive to a just liquidation of damages are principally established by the now iconic case of **Butler -vs-Hurd.**

26. First and foremost, one has to take into consideration the expert medical advice. In the current case the plaintiff did not see it necessary to formally request the appointment of a Court expert. However, she produced an *ex parte* medical report of Mr Carmel Sciberras who concluded that the plaintiff is suffering from an 8% permanent disability. This witness also stated that "*This kind of injury will never come to normal*" (a' fol 95 and 96).

27. The respondent tries to minimise the damages suffered by the plaintiff because in the past she had to undergo a knee replacement. However, as Mr Carmel Sciberras rightly states, he did not examine the plaintiff's knee because the damage was sustained in another part of the body of the plaintiff (a' fol 145 tergo and 146). The said expert insists that the swelling on the left foot was as a result of the injury. He clearly states "*That is definite*" (a' fol 149).

28. In the light of the above the Court considers right to adopt an 8% permanent disabiltiy.

29. The second criterion in liquiditating damaged is that of the multiplier. It is said that "*a figure somewhat less than the number of years for which the loss is likely to continue - that is, in a personal injury action, until the plaintiff's injuries cease to affect earnings or the plaintiff dies or retires. This figure is then reduced partly because of the 'contingencies' (i.e. that the plaintiff might not have lived or worked so long or might have lost earnings even if the accident had not occurred), and partly because the plaintiff is going to receive not an income but a capital sum which can be invested to produce an income. The multiplier is not the product of precise calculation, but of estimation in the light of the facts of the particular case and of other comparable cases"* (**Peter Cane, Atiyah's Accidents, Compensation and the Law (6th Edit, 1999), page 128**).

30. For the purpose of making the right calculation in this regard the departure point is the year when the accident occurred and not when the calculation is being made. This calculation takes in consideration the age of the victim. As already pointed out, the plaintiff was 69 years old at the time of the accident. As regards this particular consideration in the **Decision in the names of John u Laura konjugi Ransley vs Edward u Lydia konjuġi Restall of 25th January 2012** the Court observed the following:

"*Hawnhekk għandna fattur pjuttost diskrezzjonali. Il-metodu ta' likwidazzjoni tad-danni kien għal żmien twil ibbażat fuq il-prinċipji enunċjati fil-kawża Butler vs Heard deċiża mill-Qorti tal-Appell Ċivili Superjuri fit-22 ta' Diċembru, 1967. F'dik il-kawża intqal li fid-determinazzjoni tal-multiplier, wieħed irid jieħu in kunsiderazzjoni c-'chances and changes of life', b'mod li dan il-multiplier ma jwassalx lid-danneġġjat li jieħu kumpens daqs li kieku baqa' jaħdem sad-data li jirtira, iżda l-figura tiġi mnaqqsa biex b'hekk ikun ittieħed in kunsiderazzjoni l-fatt li l-persuna ddanneġġjata setgħet, fil-kors normali tal-ħajja tagħha, ma waslitx qawwija u sħiħa sa l-eta' tal-pensjoni*".

31. However this principle was not always standard matter to our Courts and different approaches have been taken. In fact the **Commercial Court in its Decision in the names of Lambert vs Buttigieg of the 18th of April, 1963** had this to say: "*F'din il-materja ta' lucrum cessans il-Qorti għandha tipproċedi b'kawtela kbira peress li l-qliegħ hu ħaġa ta' possibilta' u mhux ta' ċertezza u jkun jista' jonqos minn mument għall-ieħor anke għal kwalunkwe kawża materjali bħal mewt jew mard tad-danneġġjat*.".

32. The most certain criterion in calculating the multiplier is the age of the victim at the time of the accident until the age of retirement. Subject however, to pre accident conditions that would have presumabley shortened the life time of the victim independently from the accident itself.

33. At the time of the accident the plaintiff was 69 years old. This means she was well beyond the retiring age for women, which is that of 61 years

old. However, this does not necessarily mean that the Court is precluded from liquidating damages. This Court has already expressed itself in the **judgement dated 16th Novemeber, 2023 in the names of Francis Bellia -vs- Saviour Agius** to this regard. In that decision, reference to a number of Courts decisions was made, all recognising that a victim beyond the age of retirement is also entitled to compensation for damages. In such a circumstance, it is always in the discretion of the Court to establish the number of years for purposes of multiplier. In this case, this Court deems it right and equitable that the period of 5 years is adequate in the circumstances.

34. According to the Butler -vs- Hurd criteria, the Court must also deduct a lump sum payment to the maximum of 20%. This will be deducted in its entirety when the case has been decided within a reasonable time. If the case takes more than two years to be decided, unreasonableness is a factor that comes into play. Court decisions have also explained that a deduction of two percentages is to be made for every period of two years delay. (Vide **Decision in the names Scicluna -vs- Meilaq PA of 16th July , 2001 and Caruana -vs- Camilleri PA of 5th October, 1993**). Having considered that barely three years have passed since the present case was instituted, the court considers fit that the lump sum payment should be that of 18%.

35. Finally as regards the principle of inflation it has been said that "*The indication that standard awards would be adjusted for inflation can have a major practical effect. Such adjustment require the use of the Retail Price Index imperfect instrument it may be, it is the best we have*". (Ara **Munken on Damages for Personal Injuries and Death; 12th Ed. Lexis Nexis pg 73**). As already evinced, the Court shall be increasing the sum liquidated by 10% to make good for the inflationary erosion of the capital sum being awarded as damages.

Liquidation

5x52x213.54= €55,520 (minimum wage for 5 years) – € 9,994 (18% lump sum payment = €45,526 of 8% (percentage of permanent disability) = €3,642 + €364 (rate of inflation at 10%) = €4006 [total lucrum cessans] + €350 [damnum emergens] = €4,356.

Therefore the total final amount of damages is four thousand, three hundred and fifty six Euros (€4,356).

Decide

Now therefore the Court decides the matter in the following manner:

Accedes to the first demand of the plaintiff.

Accedes to the second and third demands of the plaintiff by liquidating the damages suffered by the plaintiff in the amount of four thousand, three

hundred and fifty six Euros (€4,356) and condems the respondent to pay this amount to the plaintiff with interest from the date of this decision until payment is effected.

Costs shall be totally borne by the respondent.

Hon. Judge. Toni Abela

Deputy Registrar