PUBLIC LAW

LECTURES IN *ADMINISTRATIVE LAW* XXIX

Robert Musumeci

Biography

Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

Challenging Executive Acts of Tort and Contractual Failures

Having explored remedies available against executive actions causing grievance due to administrative or legislative acts, let us now proceed to the ultimate considerations.

As previously discussed, **Article 469A** stipulates that public authorities are generally immune from damage claims arising from acts deemed unlawful, unless clear evidence of bad faith and unreasonableness can be established.

Does this imply that public administration is not held to the same standard of ordinary civil laws that govern tort and contractual liabilities for individual citizens?

THE '*IURE IMPERII*' DOCTRINE

There was a period when the Maltese government enjoyed perceived immunity from judicial scrutiny while exercising its sovereign authority, particularly in actions involving the enactment of laws and the preservation of security. During this time, the injured party had the option to only pursue legal action against the individual directly responsible. In the notable case of **Le Primaudaye**[1], the First Hall of the Maltese courts determined that the State could not be held accountable for alleged damages inflicted by a police officer during a building raid. The court asserted that the proper course of action would have been to bring a lawsuit against the officer rather than the State.

Nonetheless, there were instances when the '*iure imperii*' doctrine faced criticism

[1] **P. Busuttil vs C. La Primaudaye noe** (FH) (15th February 1894) confirmed on appeal by the Court of Appeal on 28 May 1894

from the Court of Appeal. The case of **Cassar Desain**[2] in 1935 is a prime example. This judgment advocated for disregarding the *'iure imperii'* doctrine on the grounds that, in situations where Maltese Public Law had gaps, British Public Law should be followed, as it did not acknowledge the doctrine. In this particular instance, the Court of Appeal explicitly stated that the Crown in Malta was subject to ordinary laws and consequently susceptible to legal actions, encompassing breaches of contracts and wrongdoings committed by its employees. In essence, the government could not seek refuge behind the *'iure imperii'* doctrine.

Nevertheless, the *'iure imperii'* doctrine persisted as a factor in several subsequent court rulings, as exemplified in the **Attard Montalto** case of 1953. Gioacchino Attard Montalto experienced the expropriation of his land by the government. Yet, he was unable to secure compensation based on the ruling of the First Hall, which deemed the government's actions to fall under *'iure imperii'*—an exercise of sovereign authority.[3]

However, the doctrine's demise came to fruition in the seminal **Lowell vs Caruana** [4], where the Court of Appeal decreed that the government, which had opted to reduce the number of approved storeys in a valid permit, could not evade potential lawsuits using the *'iure imperii'* doctrine.

Thus, let's reach the essence clear – immunity evades not the ruler's sphere!

However, from time to time, Parliament tries to manoeuvre through this situation in a complex manner. There are occasions where legal accountability can be deliberately excluded through the enactment of laws. For instance, let's take a look at **Article 80(4)** within the **Development Planning Act**. This particular article underscores that if the Planning Authority chooses to revoke a previously

[2] **Marquis James Cassar Desain vs James Louis Forbes nominee** (CA) (7th January 1935)
[3] **Gioacchino Attard Montalto vs Edgar Cuschieri noe** (FH) (27th June 1953)
[4] **John Lowell nomine vs Dr Carmelo Caruana nomine et** (FH) (14th August 1972)

granted planning permission due to errors in the decision-making process, they are shielded from any obligation to provide compensation under any circumstances.

Yet, even in light of such legal provisions, a substantial concern persists. This centres on the constitutional principles at play. Particularly, **Article 6(1)** of the **European Convention Act** comes to mind. This article emphasizes the requirement that civil claims must be open to submission before a judge for the purpose of adjudication.

TORTIOUS LIABILITY

Once the *'iure imperii'* doctrine has been set aside, a pivotal transformation occurs whereby citizens are endowed with the prerogative to institute private law actions against the government, which encompasses public authorities.

This grants private individuals the capacity to seek recourse, such as claiming damages in cases of negligence.

Within the sphere of tort law, the pertinent provisions of the **Civil Code**, specifically **Articles 1033** and **1037**, come into play.

Article 1033 of the **Civil Code** stands as follows:

> *"Any individual who, whether intentionally or due to negligence, imprudence, or a lack of attention, commits an act or omission that constitutes a violation of the duty prescribed by law, shall bear responsibility for any resulting damages."*

Thus, under the aegis of **Article 1033** of the **Civil Code**, public authorities are compelled to exercise prudence to prevent acts—whether through commission or omission—that could potentially imperil those who are reasonably foreseen.

It is paramount to recognize that under the purview of **Article 1033**, liability can arise both from acts of omission and acts of commission. Let's explore this concept further through two illustrative scenarios:

Consider a scenario where a doctor employed by a State Hospital, through an act of negligence, prescribes an incorrect medical treatment to a patient. As a direct result, the patient experiences severe heart complications. In this context, the patient is fully within their rights to initiate legal action against the government. The rationale lies in the fact that the patient suffered harm due to the negligent act committed by one of the government's employees. Here, the government, through its representative, failed to fulfil its legally mandated duty of providing proper and safe medical care. It is a failure by commission.

Turning our attention to acts of omission, envision a Local Council entrusted with the legal obligation to maintain the roads in a safe and functional state. Should an individual sustain injuries because of road defects, the injured party possesses the legal entitlement to pursue a lawsuit against the Local Council for seeking damages. This legal recourse stems from the Council's failure to meet its prescribed duty of ensuring road safety and maintenance. In essence, the Local Council, through its omission, breached its mandated obligation to uphold the roads as required by law.

In both these scenarios, the pivotal element remains the breach of legal duty, whether through action or inaction, leading to the invocation of **Article 1033**.

As previously highlighted, a pertinent concern pertains to situations where damage arises as a result of an administrative act devoid of bad faith or unreasonableness. A case in point, **David Anthony Pollina**[5], sheds light on this issue. In this instance, the Administrative Review Tribunal confirmed its authority to scrutinize administrative actions, however, it clarified that it lacked the

[5] **David Anthony Pollina vs Malta Transport Authority** (ART) (11th April 2011)

jurisdiction to grant damages as a remedy. It's important to note, though, that this ruling doesn't explicitly bar the possibility of seeking damages through other avenues. Indeed, the verdict specifically stated that the entitlement to claim damages lies exclusively within the purview of the regular courts.

However, in the case of **Josef Borg**[6], a perception emerged suggesting that when an administrative action is in play and lacks demonstrated bad faith or unreasonableness, avenues to seek damages through general legal avenues seem to be restricted. The court's stance in this case emphasized that the proposed legal action cannot be initiated under the broad scope of general tort law. Rather, it necessitates adherence to the parameters outlined in **Article 469A** of **Chapter 12**. This interpretation effectively narrows the path for seeking damages, regardless of the perspective from which it is examined. Yet. as previously mentioned, this line of reasoning could potentially encounter challenges within the scope of **Article 6(1)** of the **European Convention Act**, which provision strongly emphasizes the necessity that civil claims should have the opportunity to be presented before a judge.

Now shifting our focus to **Article 1037** of the **Civil Code**, it becomes evident that this mandates public authorities to exercise due diligence in the selection of their employees.

Article 1037 holds:

> *"Should an individual engage another person, whether for work or services of any nature, who is either unqualified or lacks reasonable grounds for being deemed competent, that individual shall bear liability for any damages that the aforementioned person might cause to others due to incompetence in the execution of such work or services."*

[6] **Josef Borg vs Malta Transport Authority** decided (FH) (11th July 2013)

Strictly speaking, here, we are discussing the concept of '*culpa in eligendo*' which translates to the duty on employers to exercise reasonable care and diligence when selecting employees for specific roles, ensuring that they possess the necessary qualifications and skills. If the employer fails in this duty, and the employee's incompetence or unsuitability results in harm or wrongdoing, the employer can be legally accountable for the consequences.

Let's consider a scenario where a state opts to employ an unwarranted engineer to spearhead the design and supervision of a significant infrastructural undertaking. Upon the project's completion, a section of the structure collapses, causing injury to a passerby. An investigative inquiry subsequently uncovers that the engineer lacked the requisite expertise to design the structure effectively. In this scenario, the individual who suffered harm holds the right to initiate legal proceedings against the government. The foundation for such action lies in the fact that the injured party incurred damages due to the government's choice to appoint an unqualified individual for a task that was beyond their competency. Consequently, the government is accountable, as its decision to entrust an incompetent person with responsibilities they were ill-equipped to fulfil resulted in direct harm.

Nevertheless, over time, the Courts of Malta have continuously broadened the scope of *culpa in eligendo*, as defined in **Article 1037**, to include *culpa in vigilando*. This expansion implies that employers can no longer evade responsibility for wrongdoings committed by their employees merely by demonstrating that they had hired a "responsible" individual. However, it is important to acknowledge that there are scenarios where employers may find it impractical to directly oversee their employees, as they are often not directly engaged in monitoring their employees' tasks. This practical aspect raises questions about the feasibility of this concept.

Nevertheless, one notable case that exemplifies the transition from *culpa in*

eligendo to *culpa in vigilando* is **Grech.**[7] In this particular scenario, the Court of Appeal established that the Police Commissioner couldn't escape accountability by simply asserting that the police officer, who erroneously prevented a doctor from leaving the airport, had met all the necessary criteria at the time of employment, including scrutiny by the public service commission and being selected after a public call. In this instance, the perspective of the court indicates that employing an individual who demonstrates incompetence later on, even if they initially passed through the proper channels during entry, could still potentially lead to the government being liable for damages.

CONTRACTUAL LIABILITY

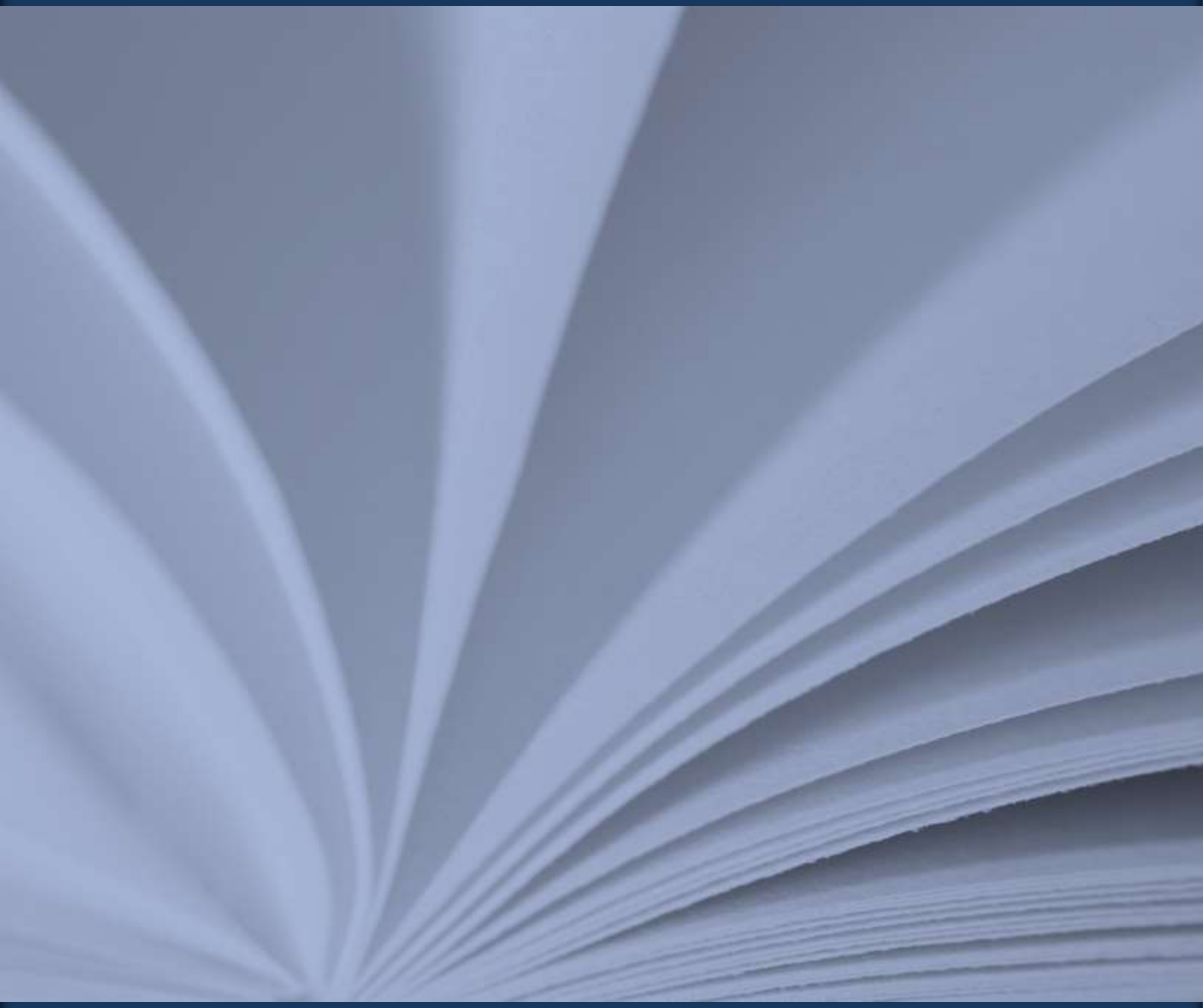
As previously indicated, it's imperative to acknowledge that contractual bonds forged between public authorities and individuals extend beyond the scope of administrative acts, as delineated within the contours of **Article 469A**.

In the noteworthy case of **Supreme Travel Ltd**[8], an enlightening revelation emerged. The decision made by Transport Malta to terminate the concession granted to Supreme Travel (STL) originated not from an administrative action but rather was born out of a contractual agreement established between the two entities in their individual capacities. Specifically, the actions attributed to STL, as seen in the context of the obligations assumed under the said contract, played a pivotal role in shaping this course of action.

In its core essence, this underscores a pivotal principle: when a governmental action delves into the intricate realm of contractual relationships, it is the dominion of private law that prevails. In this scenario, the remedies typically accessible through the avenue of judicial review of administrative acts, namely those enshrined within **Article 469A**, hold no sway. Instead, it is the tenets of

[7] **Doctor Joseph Grech vs Commissioner of Police** (CA) (1st March 1988)
[8] **Supreme Travel Ltd vs Malta Transport Authority** (FH) (18th October 2011)

private law that take the reins, orchestrating the affair as if it were a mere interaction between individual citizens.



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