

SUPERIOR COURT OF JUSTICE OF CORRIENTES

TUBAL LIGATION

In the City of Corrientes, on the twelfth day of the month of April, two thousand six, Justices of the Superior Court of Justice, Carlos Rubín, Fernando Augusto Niz, Juan Carlos Codello and Guillermo Horacio Semhan, and the President of the Court. Eduardo Antonio Farizano, assisted by the Jurisdictional Clerk, Norma Cristina Plano de Fidel, met to consider Case 25438/05, titled: **“FALCÓN MARÍA LILIANA VS. HOSPITAL “VIDAL” OF THE CITY OF CORRIENTES AND THE MINISTRY OF PUBLIC HEALTH OF CORRIENTES AND THE PROVINCE OF CORRIENTES RE: AMPARO”**. The following voting order was established: Carlos Rubín, Fernando Augusto Niz, Guillermo Horacio Semhan and Juan Carlos Codello.

THE SUPERIOR COURT OF JUSTICE

CONSIDERED THE FOLLOWING:

Q U E S T I O N

WHAT IT IS THE APPROPRIATE JUDGMENT IN THE PROCEEDINGS?

JUSTICE CARLOS RUBÍN ANSWERS THE QUESTION UNDER CONSIDERATION as follows:

I.- In Judgment 11 on pp. 185/193, the trial court judge admits the writ of amparo filed, which states the right of the petitioner to undergo Tubal Ligation surgery or any other action advisable in the case, in accordance with medical regulations, ordering that all necessary actions be taken to enforce this right, thus ruling that this operation be performed by Hospital “Vidal” at the expense of the State.

II.- On pp. 199/201, the Province of Corrientes files an appeal and nullity petition against the admission of the exceptional legal instrument of writ of amparo in relation to the contraceptive procedure for reasons of a social and economic nature. It points to the lack of any arbitrariness or illegality, which are the basic premises for the admissibility of this remedy, and states that the broad interpretation made is not consistent with the evidence in the case or with Article 20, Subsection 18 of Law 17,132. It deems that no danger to the mother’s health and that of the baby have been proven, with the medical report indicating that the mother and her pregnancy are in a good state of health.

It argues that at no point did the doctors suggest tubal ligation as a therapeutic indication, and thus the refusal of the Hospital does not appear to be illegal or arbitrary, since sterilization is only authorized when all resources aimed at conserving reproductive organs have been exhausted. It deems it aberrant that society would authorize sterilization on the sole grounds of poverty, and deems that, with no existing law that permits sterilization - as far as it understands - the judge acted as lawmaker and overruled medical opinion by authorizing the tubal ligation requested and ordering the State to bear the costs of said procedure.

It understands that the state is responsible for the health of the public, and finds no

evidence in the case to suggest that the mother or her child have health problems that could justify State responsibility. Other contraceptive methods exist that the petitioner could turn to, which are given out freely by various health centers.

It concludes that the responsibilities of the State include general health and the health care of low-income sectors of the population; however, State welfare cannot extend beyond the immediate needs of an illness.

The petitioner filed an answer to the appeal on pp. 206/210.

III.- The writ of amparo is regulated by Law 2,903, of which Article 1 stipulates that this "...shall be admissible "against all acts or omissions of public authorities that currently or imminently injure, restrict, affect or threaten, in a way that is manifestly arbitrary or illegal, the rights and guarantees recognized by the National or Provincial Constitution..."

This exceptional instrument is admissible in extreme situations in the absence of other more effective and suitable legal avenues for the protection of basic rights. Serious and specific damage must exist that is only remediable through this urgent and prompt measure. The arbitrariness and illegality of the act branded injurious must clearly be in evidence.

In her petition (pp. 2/11back), the petitioner criticizes the decision of the authorities of Hospital "Vidal", of this city, to require court approval for tubal ligation surgery upon the delivery of her seventh child with which she was pregnant, pleading that, if approved by the court, she should be given a Caesarean section and have her Fallopian Tubes ligated in view of the complications that a subsequent postnatal operation would involve.

The writ of amparo is intended to protect the basic rights enshrined in the National and Provincial Constitution - which are compromised in the case at hand - and it requires circumstances to exist whereby arbitrariness or illegality is clearly in evidence. The *Real Academia Española* defines arbitrariness as any actions or behavior that are contrary to justice, reason or law, based on will or a whimsical decision.

In the case before us, we must consider the decision by the authorities of the Hospital the claim is being made against, which is alleged as arbitrary, before passing judgment on the admissibility of this exceptional legal instrument.

IV.- Hospital "Vidal" responds to this request for tubal ligation (p. 24) by stating that the patient has no medical grounds on which to receive tubal ligation as a birth control method, and that the approval of the courts is required for such an operation to be performed.

When evaluating the appropriateness of a request for court approval, it is necessary to abide by the provisions of National Law 17,132, and its provincial equivalent, Law 2839, which regulate medical practice.

Article 20, Subsection 18 of said National Law stipulates - in relation to the type of procedure in question - that medical professionals are prohibited from "performing sterilization operations without a clearly specified therapeutic indication" (Article 20, Subsection 18). The provincial regulation does not stipulate such a prohibition.

If a "specified therapeutic indication" has been provided by a medical professional, the

prohibition contained in said regulation no longer exists, and medical staff will thus be authorized to perform such a surgical procedure when therapeutic reasons exist for doing so, with no court approval necessary under such circumstances.

In Argentina, it has become customary for court approval to be sought for tubal ligations in able-bodied, bio-ethically competent adult women. However, legislation on the matter is clear: **when a specified therapeutic indication is provided, medical professionals are not required to seek prior court approval - as often occurs - and they can proceed directly to the tubal ligation surgery.**

The only regulations mentioning any requirement for court approval is Article 19, Subsection 4 of Law 17,132, and Article 12, Subsection e) of Law 2839, in relation to surgery that **“modifies” the sex of the patient.**

Therefore, any requirement to seek court approval for tubal ligation when a therapeutic indication is provided has no legal basis.

Following continual requests for court approval when an appropriate medical opinion has been issued, the Ombudsman of the City of Buenos Aires, Alicia Oliveira, in a Resolution of March 7, 2000, reiterated the recommendation from the Ministry of Health that directives or instructions be issued to avoid court approval being sought thereafter from women in possession of a specified medical indication for “Fallopian Tube ligation” in order to prevent risks to women’s lives or serious harm to their health, further stating that the informed consent of the patient shall be sufficient, provided that she is guaranteed access to up-to-date information concerning the operation and all other alternative measures.

V.- However, the tube ligation requested by the petitioner was refused by Hospital “Vidal” (p. 24). Upon the request of the Public Defender - representing the petitioner - a Medical Board meeting was held by the Forensic Service of the Judicial Branch of the Province, which adjudged that: Ms. Falcón was found to be in a good general state of health upon examination (pp. 32/33), with no pathology discovered; we are not presented with a high-risk pregnancy and therefore interruption is not a possibility worthy of consideration in this case; the current pregnancy does not endanger the life of the mother or the baby, and; no risks or dangers are envisaged in the event of a subsequent pregnancy. Finally, they report - together with the hospital defending - that the patient has no medical reason to undergo tubal ligation as a method of birth control, adding that **the autonomous will of the patient should be respected and the contraceptive method authorized.**

In turn, the Forensic Unit Psychologist reports (p. 34): the party interviewed (Ms. Falcón) **is fully aware of the implications of her decision to undergo tubal ligation and remains adamant in this respect;** the pregnancy is causing her fear, with indications of distress and anxiety, and accounts of panic attacks; she considers it a big responsibility that she is having trouble coming to terms with due to her financial situation, and; she has been seeking an effective birth control method for some time. The health care professional concludes that, although a subsequent pregnancy would cause her no physical risk, **there could be negative repercussions in her family life, since it would produce a precarious balance of human and scarce economic resources.**

VI.- Where no specified therapeutic indication exists, but there are other factors to consider such as psychological and social concerns, case law has defined “therapeutic indication” **in the broadest sense of the expression and with a holistic understanding of human health**, which concerns the psychological and social aspects in addition to merely biological concerns (see Judgment in ED. 145 1993:439).

This is the line of argument followed by the trial court, which considers health not only to mean the absence of disease, but also the inclusion of the psychological and psychosomatic domains, in accordance with the definition of the World Health Organization.

The trial court considers that any future pregnancy of a multiparous woman with scarce financial resources - as is the case of the petitioner - would carry an element of risk, since it would result in an inadequate and insufficient diet.

VII.- As the trial court explains, health is a basic human right and must be interpreted under the definition of the World Health Organization, which refers to a **state of complete physical, mental, and social well-being**. Guaranteeing the health of all its residents is a non-delegable function of the State. This should be understood as **“a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”** (Constitution of the World Health Organization).

Health has been recognized globally as a basic human right, inherent to human dignity, and the physical, mental and social well-being attainable by the population is therefore a right that the State is obliged to guarantee.

The Constitution of the World Health Organization (WHO) was the first international standard to expressly enshrine the right to health, dating back to 1946, defining this basic right as **“the enjoyment of the highest attainable standard of health”**.

Article 25 of the Universal Declaration of Human Rights provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care [...]”.

The right to health is also enshrined in the International Covenant on Economic, Social and Cultural Rights, of which Article 12 provides that States Parties “must take all actions necessary to create conditions that guarantee medical care and services in the event of illness, thus ensuring the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The Covenant is constitutionally binding under Article 75, Subsection 12 of the National Constitution.

Article 12 of the International Convention on the Elimination of All Forms of Discrimination against Women (constitutionally binding under Article 75, Subsection 22 of the National Constitution) enshrines the principle that “States Parties shall take all appropriate measures to eliminate discrimination in access to health care services, including those related to family planning, and shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary”.

Is it not the case that a multiparous party on limited financial resources with five children in

her care - she gave birth to five children, but one died a week after delivery - who is legally competent and has made the voluntary decision to undergo tubal ligation surgery in full knowledge of the risks and consequences involved (informed consent), is exercising these constitutionally enshrined rights? Of course it is. Article 19 of the National Constitution and Article 26 of the Constitution of the Province of Corrientes enshrine the so-called “principle of legal reservation”: **self-determination and respect for self-referential behavior.**

As we have said, even if no strict “therapeutic indication” exists in this case, the decision of the party seeking the writ of amparo was taken with her free, informed consent.

Informed consent means the possibility of an individual to accept a treatment in respect of which he/she has been briefed in full.

Conducting an academic disquisition into the “autonomy of will principle”, the Supreme Court of Justice of the Nation - in the paradigmatic “Bahamondez” case (LL, 2003-D, 125), this despite the majority resolution subsequently being declared as void due to a lack of instantaneity - extensively analyzes the significance of the autonomy of will in relation to what it calls the **“lordship of man over his own body”**, framing the actions of Bahamondez within the sphere of the principle of legal reservation stated in Article 19 of the National Constitution, and asserting that the petitioner **has “[...] the indisputable legal power to refuse to be transfused without his consent [...]”** (in the opinion of Barra and Fayt).

The autonomy principle is based “[...] on the respect of the liberty of individuals as persons in control of their own lives, who cannot viably be used as if they were an object [...]” (Marta Videla, “Derechos Humanos en la Bioética”, Ad-Hoc, p. 66).

Any decision to limit procreation taken by a woman on limited resources and in full command of her capacities, who freely decides to undergo a tubal ligation procedure, is a matter of self-referential behavior that does not compromise third parties and, therefore, is a moral action that is non-sanctionable by the State and exempt from prohibition, in accordance with the right to family planning (Articles 5, 11, 12, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women).

VIII.- Following this line of argument, I hereby conclude that the request for tubal ligation made by the petitioner in full exercise of her constitutional rights to health, family planning and a better quality of life, is admissible.

This decision, freely taken by Ms. Falcón, causes no injury to third parties and is the most beneficial choice for herself and her family - beneficence principle - since a further pregnancy could have negative repercussions on her family nucleus and compromise the precarious balance of human and scarce financial resources (Forensic Psychologist report, p. 34).

It is the obligation of the Province to ensure the fulfillment of these rights, otherwise they would be reduced to a mere declaration with no practical application.

It is the non-delegable task thereof to guarantee the health of its residents, which includes the right to family planning (Article 12.1 of the Convention on the Elimination of All Forms of Discrimination against Women).

IX.- In terms of legal costs, by following the legal line that deems there to be “due reason to sue” when the defeated party has litigated based on a reasonable conviction concerning the right defended in the claim, and where doctrine is contradicted by case law, it is deemed appropriate to make an exception to the general principle and to require each party to bear its own costs. “[...] The existence of a complex or difficult situation, both in the factual and legal domains, can bring the parties to defend their position as maintained in court in the firm belief of that their legal argument holds legitimacy, in view whereof, the establishment of any other solution would only act to discourage the due exercise of the right to legal defense [...]” (quoted from LOUTAYF RANEA, “Condena en costas en el proceso civil”, (judgment in costs in the civil process) Astrea, p. 82).

In view of the foregoing, I vote to reject the appeal filed on pp. 199/201, thus reaffirming the contested judgment. Order for costs in both courts.

JUSTICE CARLOS RUBÍN ANSWERS THE QUESTION UNDER CONSIDERATION as follows:

I.- I respectfully dissent from the conclusion of the Justice voting before me. Rather, it is my opinion that the appeal filed by the Province (pp. 199/201) should be admitted, thus leaving the contested judgment no longer valid, with each party to bear its own costs. Allow me to elucidate:

II.- The judgment on pp. 185/193 culminates, following extensive analysis of the matter submitted for judgment, in the admission of all parts of the writ of amparo filed and, by consequence, in a declaration stating that the petitioner has the right to undergo Tubal Ligation surgery, or any other action advisable in the case, in accordance with medical regulations, with the order that all necessary measures be taken to enforce this right. This judgment grants the court approval solicited and orders that the petitioner undergo tubal ligation surgery using the service provided by Hospital “Vidal”, at the expense of the State. Furthermore, under the argument that all methods of intervention carry an element of risk in relation to the health of the patient, it orders that the party soliciting the writ of amparo be made aware, understand and consent to said procedure, with this consent recorded in her medical record prior to the operation.

III.- The State refers to the exceptional nature of the legal instrument used in the *sub judice*, which is wholly inadmissible due to the fact that the petitioner asserts that her constitutional rights were violated under social and economic pretexts, which does not constitute an extreme and delicate situation that jeopardizes the protection of basic rights caused by the lack of other appropriate legal avenues. Furthermore, the case does not present conditions of any arbitrariness or illegality that needs remedied. It criticizes the broad interpretation of the trial judge, since, in conformity with Article 20, Subsection 18 of Law 17,132, there is no proven danger to the health of the mother or the child. On the contrary, the reports produced by the Court doctors show that the pregnant mother and her pregnancy were in excellent condition, and that tubal ligation is not advised as a **“therapeutic indication”**. Therefore, the refusal of the hospital to carry out the requested operation does not appear to be illegal or manifestly arbitrary. It goes on to explain that the

term “therapeutic” refers to the treatment of illnesses, a definition in which fertility does not figure. Finally, the State attests that, since the petitioner has the choice of other methods of contraception, free of charge, it would be imprudent for the State to pay for tubal ligation by order of court approval when there is no genuine risk to the subject and the operation is not the last available option for the survival of the mother or child. It ends by stressing that self-determination and the right to personal choice is one thing, whereas for the State to be ordered to provide the means necessary to perform surgery based on grounds of family planning would be quite another. Such a situation would be wholly inadmissible.

IV.- I must first specify that, in accordance with the case law of the Supreme Court, the writ of amparo is an exceptional legal instrument, only applicable in the most delicate and extreme situations where - in the absence of other appropriate legal avenues - the protection of basic rights is jeopardized, and its initiation dictates that a clearly specified set of circumstances must be present, characterized by evidence of manifest arbitrariness, unfairness or illegality, where the inefficacy of ordinary proceedings causes specific and serious damage that can only be remedied through this urgent and prompt legal instrument (Supreme Court: Judgments: 297:93; 298:329; 299:185; 300:200, 1231; 301:642,1061; 302:299; 306:1253, etc.).

Furthermore, it cannot be overlooked that Article 43 of the revised National Constitution provides that all persons may file writs of amparo in a prompt and swift manner, provided that no other appropriate legal avenue is available, **“against all acts or omissions of public authorities or private persons that currently or imminently may injure, restrict, affect or threaten, in a way that is manifestly arbitrary or illegal, the rights and guarantees recognized by this Constitution, a treaty or a law”**.

Therefore, it is important to note that disputable issues or matters that require debate and evidence are excluded from the scope of the writ of amparo (Judgments: 300:688, etc.). Similarly, the pursued legal avenue is inadmissible when the damage that may be caused by its refusal amounts to no more than the normal situation of all persons requesting that their rights be recognized in law through ordinary procedures (Judgments: 297:93).

In view thereof, it is my understanding that the arguments made by the Province are sufficient to affect the legal bases established by the trial court.

In this respect, the record of proceedings does not suggest that the actions of the defendant were in any way arbitrary or illegal, and in the absence of any evident manifestation of arbitrariness or illegality, the objection of the party seeking the writ of amparo is declared null and void. I reiterate that the writ of amparo is an exceptional legal instrument whose initiation dictates that a clearly defined set of circumstances must be present, characterized by evidence of manifest arbitrariness or illegality, where the inefficacy of ordinary proceedings causes specific or serious damage that can only be remedied through this urgent and swift legal instrument, thus requiring the special consideration of judges and attorneys to prevent their denaturation.

In her petition, the appellant seeks the approval required by the Director of Hospital “Vidal” for a Fallopian Tube ligation operation. as a method of contraception, in an operation to be performed subsequent to delivery, if necessary, costed and paid for by the State, and

claims that any refusal to perform such an operation would affect her state of mind and life development to such an extent as to cause serious psychological-emotional and social-economic imbalances, with damaging consequences on her health and family.

The alleged arbitrariness and illegality, which are basic premises for a writ of amparo to be deemed admissible, are not apparent in the case under dispute.

Indeed, the valid Argentine regulation concerning the practice of medicine is Law 17,132, of which Article 20, Subsection 18 forbids operations from being performed that may cause sterilization without a clearly specified therapeutic indication, and without all other resources that would conserve the reproductive organs having been exhausted; subsequently, the second paragraph of Article 19, Subsection 3 requires the written agreement of the patient in mutational surgery.

In view thereof, the demand for court approval by the above mentioned Hospital, subsequently solicited by the petitioner, which would authorize the surgery described above, does not appear to be arbitrary or illegal. In particular, this request was not supported by a clearly specified therapeutic indication, which is an indispensable condition for a procedure of this type to be performed without breaching applicable legislation. In coming up against the right to privacy - in this case the intention to restrict her own reproduction, as asserted by the party soliciting the writ of amparo - it is the duty of the public hospital to act fairly and in conformance with the law, health policy and established institutional priorities in relation to health care provisions. (Superior Court, Salta Tomo 88:955; 90:243; 94:567, etc.). Furthermore, I do not deem the decision of the petitioner to have taken made on a sound basis - that "tubal ligation is the most effective" method of contraception (p. 4) - given the variety of methods of contraception that exist, some of which are provided free of charge at hospitals and health centers.

On the other hand, since the writ of amparo is an exceptional legal instrument, it cannot be used on account of an alleged violation of constitutional rights. Rather, it must only be employed as the last available avenue for preventing or promptly remedying imminent or existing damage, which is not the case here, where contraceptive surgery is solicited with no evidence to show that there are no further legal avenues available to the petitioner. Urgency must be on medical grounds, rather than on social and economic grounds as is the case here.

Therefore, I hereby conclude that the case before us does not constitute an extreme and delicate situation that jeopardizes the protection of basic rights due to the lack of other suitable avenues, nor does it feature evident arbitrariness or illegality, or cause serious and specific damage caused by the inefficacy of ordinary procedures only remediable through this urgent and prompt instrument. The writ of amparo is therefore deemed inadmissible, since any judgment as to the invalidity of the action requires further debate and evidence, in consistency with the doctrinal line of the Supreme Court of the Nation (Rulings, 275:320; 296:527; 302:1440; 305:1878; 306:788; 319:2955).

In view of the foregoing, I hereby deem it necessary to admit the appeal in question on its merits, to revoke the judgment on pp. 185/193, and to reject the petition for writ of amparo. Each party to bear its own costs on account of the nature of the issue debated.

JUSTICE GUILLERMO HORACIO SEMHAN ANSWERS THE QUESTION UNDER CONSIDERATION as follows:

He supports the vote of Justice Carlos Rubín on the same legal basis.

JUSTICE JUAN CARLOS CODELLO ANSWERS THE QUESTION UNDER CONSIDERATION as follows:

He supports the vote of Justice Carlos Rubín on a shared legal basis.

By virtue of the above Agreement, the Superior Court of Justice renders the following:

JUDGMENT 22

1°) To reject the appeal filed on pp. 199/201, thus confirming the contested judgment. Order for costs in both courts. It is ordered that it be inserted and that notice be given. Signed: Drs. Farizano-Rubin-Semhan-Niz-Codello.