

**Chamber of Civil, Entrepreneurial  
and Bankruptcy Affairs**

**Composed:**

Mikhail Gogishvili (**Chairman**)

**Judges:**

**Nunu Kvantaliani** (Presenter), **Mariam Ciskadze**

**Secretary** – E.Khachidze

**Cassation Applicant** – LLC “Kutaisi Regional Blood Bank” (defendant (respondent))

**Representative** – N.Alfaidze

**Respondent** – Lamzira Chaladze (Plaintiff)

**Representative** – L.Datuashvili

**Appealed decision** - Kutaisi Appellate Court Chamber of Civil Affairs’ December 28 2006 judgment

**The claim of the Cassation Applicant** – To declare void the appealed judgment and with the new judgment deny the satisfaction of the plaintiff’s application

**Subject of the Dispute:** Compensation for Damage

**D e s c r i p t i v e P a r t :**

Lamzira Chaladze submitted an application against LLC “Kutaisi Regional Blood Bank” and requested 200 000 GEL for pecuniary and non-pecuniary damages. The claim was based on the following. In March 2001 the plaintiff gave birth by caesarean section at Kutaisi #2 Maternity House. Her relatives bought 600g of erythrocyte mass and karyoplasms from LLC “Kutaisi Regional Blood Bank,” as she had lost a large amount of blood and needed transfusions. The transfusion occurred. After 2-3 months the plaintiff’s son became sick, and after 2 years the plaintiff became sick as well. A number of diseases from time to time within short intervals recurred and were not subjected to medical treatment. In 2005 the doctors examined the plaintiff and took a blood test and clarified that during blood transfusion at LLC “Kutaisi Regional Blood Bank” some people were infected with “HIV” so-called AIDS. The Infectious Diseases, AIDS and Clinical Immunology Research Center’s concluded that Lamzira Chaladze and her younger son are HIV positive. The plaintiff’s son was infected from mother’s milk. This fact caused a heavy pecuniary and moral damage to plaintiff’s family. According to the bases of articles: 408, 412-413, 992, 1009 and 1014, the reimbursement of the damages should be imposed on the respondent as the plaintiff and her son were infected because of the Blood Bank’s guilty act.

The respondent contended with the following grounds: There is no evidence proving guilt from the disease of L.Chaladze and her son. The claim is based on the Infectious Diseases, AIDS and Clinical Immunology Research Center’s March 20 2006 letter #01/09/45 which is not admissible evidence. The aforementioned document does not deliberate on the fact of infecting the plaintiff but presumes the donor residing in Russia as the source of infection - whose examination could not be done.

By Kutaisi City Court's June 26 2006 judgment L.Chaladze's application was partially satisfied, and the respondent was fined 20 000 GEL. The decision was appealed by L.Chaladze for the unsatisfied part and the respondent appealed against the entire judgment.

In the December 28 2006 judgment of Kutaisi Appellate Court's Civil Affairs Chamber the appellate's applications were not satisfied for the following reasons: the court found that the relatives bought 600 gram blood at LLC "Kutaisi Regional Blood Bank". The blood belonged to donor Mamuka Sirbiladze which is confirmed by the "Epidemiological Research Act". According to the mentioned document on March 5 2001 M.Sirbiladze ceded blood for a second time under a blood safe program to Kutaisi Blood Bank for HIV testing with the system of "Human HW+2". Karyoplasms were made at Kutaisi City Maternity House and transfused to the plaintiff. In spite of the fact that it was not possible to take blood sample from the donor M.Sirbiladze, and during his examination the Court assessed the evidences in this case file concluded that the donor was HIV positive. The Court's conclusion is based on specialists N.Badridze's and M.Gvamberidze's affidavits, according to which with HIV virus infected the very patient who was transfused from donor M.Sirbiladze and an additional check of the donor would confirm the mentioned conclusion. The indicated mention of presumed infection of M.Sirbiladze is only because the donor was not examined in the center. The court draws its attention to the Infectious Diseases, AIDS and Clinical Immunology Research Center's letter sent by heads of this institution to the investigator of Kutaisi Internal Affairs Department from where, once again, it was confirmed that from 1998 including 2001 the blood of M.Sirbiladze was transfused to 19 people, 10 of whom are unidentified – 4 are dead and 5 of those people's blood was transfused from December 29 2000 to March 20 2001, including L.Chaladze. The mentioned 5 recipients are infected with AIDS and the person who performed transfusion in 1998 virus has not been detected. As a matter the court concluded that donor M.Sirbiladze infected after 1999. The court also concluded that L.Chaladze's husband and elder son is not infected with HIV. During the pregnancy for their second child the plaintiff regularly underwent analysis, and during that period the virus was not detected. The court referred to the specialists' explanations according to which the very reliable HIV test is conducted at the center but because of its high price it is not used during the donors' blood check. According to paragraph 2 article 105 of Civil Procedural Code, case files and full and objective examination of the factual circumstances of the case, the chamber concluded L.Chaladze was infected exactly by using this product – karyoplasms which were bought from the respondent, produced and sold by this organization. The court did not consider that the plaintiff's infection was for any other reason as there was no evidence presented by the party to prove otherwise than according to article 201 of Civil Procedural Code. The chamber as guided by articles: 1011, 1010, 487, 494, 1009 of the Civil Code and as well as the article 3 of the organization's statute concluded L.Chaladze's relatives had a presumption, while buying the necessary blood for the plaintiff, that it was a trustworthy, quality product and nobody warned them of any shortcomings. The court did not take into account the respondent's opinion that at that time and scientific-technological complexities, when selling the product it was impossible to detect any shortcomings accordingly the guiltiness of the organization does not exist, and this excludes responsibility. The court explained that the above mentioned provisions of the statute were obligatory at any complexity level of science or technology, for that very reason the respondent was obliged to produce and sell only safe blood without taking account of what the cost of examination was required during inspection. The court guided by article 413 of the Civil Code concluded by grounding the plaintiff's request for non-pecuniary damages. Relying on article 106 of Civil Procedural Code the court concluded that incurred non-pecuniary damage did not require proof, and the regional court's determined amount for non-pecuniary damage was legitimate. The chamber indicated that L.Chaladze removed her request for pecuniary damage.

The Appellate Court's judgment based on cassation provisions appealed by LLC "Kutaisi Regional Blood Bank" and requested a declaration voiding the rejection of the plaintiff's

application for the following reasons: The court relying on specialists' explanations and the letter of the management of the Infectious Diseases, AIDS and Clinical Immunology Research Center addressed to the investigators of Kutaisi Internal Affairs Department wrongfully concluded that L.Chaldze was infected from the donor M.Sirbiladze's transfusions as the donor's blood was not tested for HIV. For that reason the September 29-30 2005 epidemical research and the letter of the director of Infectious Diseases, AIDS and Clinical Immunology Research Center expressed the only presumption of R.Sirbiladze's infection. The court's ruling is unfounded and relayed only on presumption that after M.Sirbiladze's blood transfusion to 6 recipients 5 people were infected with HIV and the source of the infection was the donor M.Sirbiladze. The Appellate Chamber did not objectively assess that evidence of the cassation applicant's guiltiness, as according to the case files it is not proved during test and selling that violation of statutes and regulations of special instructions of the Blood Bank. The appealed ruling is based on general principles and does not take into account the specialist's explanations that the Blood Bank did not violate the established "Safe Blood Program" regulations during the disputed product's inspection-selling which is confirmed by the October 6-7 and September 29-30 2005 facts. The Appellate Court concluded without any evidence, that M.Sirbiladze has been infected since 1999. By September 29-30 2005 epidemiological research proved that 6 recipients were transfused with M.Sirbiladze's blood on December 29 2000 and the following period. On April 27 2001 and the after period M.Sirbiladze's blood was rejected as defective because of Hepatitis "C". There proves the exclusion of guiltiness of the cassation applicant, especially due to the specialist's evidence of the 6 month "Window Period". The court assessed the mentioned issues non-exhaustively. The Chamber did not correctly interpret article 1009 of the Civil Code and, only relaying general discussion, rejected the Blood Bank's arguments that the presented appeal should not have to be satisfied because of the Immunology Center's letter #01-19/145 according to which there is no 100% accurate method in the world to detect HIV infection in blood at a given scientific-technology development level. The mentioned opinion was reflected in the inspection acts and specialists' explanations. The court should have acquitted the cassation applicant from responsibility according to article 1007 because guilt was not established in accordance with law. The Appellate Court did not consider the mentioned arguments of the appellate complaint as much as the Appellate Court delivering the appellate judgment violated article 249 and second and third paragraphs of article 393 of the Civil Procedural Code.

#### Motivation Part:

The Cassation Court after examining the case files and legal grounds of the appealed judgment considers that LLC "Kutaisi Regional Blood Bank's" cassation claim is unfounded and should not be satisfied. The judgment of the Appellate Court should remain unchanged for the following reasons:

The Appellate Court considered established that on March 5 2001 within the safe blood program the blood ceded to LLC "Kutaisi Regional Blood Bank" by donor Mamuka Sirbiladze tested for HIV using the "Humana HW+2" system, Karyoplasms were made at Kutaisi City maternity house and transfused to L.Chaladze. From 1998 including 2001 the blood of M.Sirbiladze transfused to 19 person, 10 of them are unidentified – 4 are dead and 5 people's blood transfusion occurred from December 29 2000 to March 20 2001, at the same time as the transfusion for L.Chaladze. The mentioned 5 recipients infected with AIDS and the person to whom in 1998 the blood was also transfused have not been tested as HIV positive. The court concluded that L.Chaladze's husband and elder son is not infected with HIV. During the pregnancy for the second child the plaintiff regularly took analysis and for that period (prior

pregnancy) the virus was not detected. L.Chaladze's HIV infection before Karyoplasms bought from the blood Bank and transfusion her disease's source by any other reason is not confirmed.

The Cassation Court considers that Appellate Court provided an accurate assessment, especially the correctly applied articles 1010 and 1011 of the Civil Code according to which the product is deemed low quality if it does not ensure its reliability, which taking into account all the circumstances, are expected from this product.

According to this code the product means all the moveable property.

Manufacturer, according to this code, means the person who produced the final product, the substantive part or the part of the product. The manufacturer should be deemed also to be any other person who's own name is presented on the product and by other different marks, considered as the manufacturer. The manufacturer should also be regarded as the person who is putting their own product for selling, renting, leasing, or by any other form for any commercial purposes in its field of activity, safeguarding the circumstances as determined by this code.

The existence of juridical facts are confirmed by the following circumstances with the mentioned norms, in particular the consumer L.Chaladze bought the product – Karyoplasms from the manufacturer LLC “Kutaisi Regional Blood Bank” which proved defective – with HIV infection and damage to the consumer's health. The mentioned facts are linked to civil liability according to articles 1009 and 413 of the Civil Code:

The manufacturer of the defective product is liable for the harm caused by this product.

In the case of body or health harm the victim can request reimbursement for physical and moral damages also.

The Cassation Court cannot take into account the cassation applicant's argument which challenged judgment based on those case files which only presumably establish the donor's AIDS virus. According to the paragraph 2 of article 105 of Civil Procedural Code the court assess the evidences with its own criteria, which should be based for their in all aspects on full and objective examination, after that the court delivers conclusions for the existence or non-existence of the case significant circumstances.

In the given case the Appellate Court after analyzing the opinions in the letter given by the head of AIDS Center and in other letter based evidence about the causes of L.Chaladze's presumed disease, the Appellate Court also after specialists' evidence specified that the used word “presumed” in the aforementioned documents conditioned the donor's examination inability, though the court also decided that re-examination of the donor would not have changed the factual circumstances. The court based its conclusion: on specialists' evidence, research and other evidences related to L.Chaladze's infection fact, and after discussing them the court deemed established the fact of the donor's AIDS infection. The cassation applicant has not presented grounded cassation complaint related to this fact. According to the paragraph 2 of article 407 of Civil Procedural Code the established known facts of the Appellate Court is obligatory for the Cassation Court until it is not admissible and grounded in the cassation complaint.

The complaint of the cassation applicant that reimbursement of the damage should not be imposed is also groundless because it is established by the evidences from the case files that after taking the blood from the donor, during remanufacturing and selling the provisions are thoroughly protected as provided by “Safe Blood Program” and that research methods cannot ensure “HIV” infection's 100% analysis and reliability of the donor. The cassation applicant also indicated about one of the guiltless exclusion factors to so called “Window Period”, which according to the experts lasting till 6 month period, when the infected blood cannot be detected.

The Cassation Court draws the parties' attention to the factor that the opinion about so called “Window Period” on infection of the recipient expressed in the letter of the head of the

Infectious Diseases, AIDS and Clinical Immunology Research Center is one of the reasons for the way of patient's infection expressed by the author of the letter (It is worth to mention about the presumption expressed in the versions that it is possible the antibodies had not been detected because of the test-systems used). As much as the infection of the patient during the so called "Window Period" is one of the presumed version, and no evidence in the case file proves it.

The Cassation Court explains that since the article 1010 of the Civil Code considers the reliability as criteria for the product's low quality, it is difficult and in some cases impossible for the participant of the civil turnover, especially for non entrepreneur consumer to determine how far reliable this or that product is. Obviously the party of the agreement who offers a consumer a particular product the diligence is on entrepreneur for product to be reliable. Such diligence is superfluous when the party selling such product which is in some extent related to the risk. At the same time the quality of the product determines its price and the interest of the contracting party, accordingly non existence of the contract on quality of the product between the parties do not exclude the liability of the low quality product's manufacturer. In the given case the cassation applicant coming from its business, operates by state license and manufacturing specific product – blood product and its selling, the consumer has a particular confidence. Such confidence determined the contracting party's readiness presumption, as by professional human resources as well as by appropriate technical equipment. By the alleged decision the factual factor is established, that the donor's infection can be detected by appropriate equipment and technology, which is expensive and only the Infectious Diseases, AIDS and Clinical Immunology Research Center can afford it. This factor excludes the cassation applicant's argument to use paragraph one, subparagraph "e" of article 1009 of Civil Code. With the mentioned provision the manufacturer of a substandard product shall not be liable for harm caused by this product, the defect could not be detected at the time it was offered for sale, taking into account the level of scientific and technical development at that time. The manufacturer with the ambition to produce and sell any product had an obligation to support the industry by appropriate equipment, but the high price and rarity of these equipments cannot be exclusion of the manufacturer's liability.

Thereby the Cassation Court explains in view of the fact the manufacturer offering to sell such product which directly affects human's absolute rights – on life and health and the full examination of the quality by taking into account the existing level of science and technique related to some problems, the manufacturer has an obligation to give a consumer information about the mentioned factors and warn about the following results. The Court's such interpretation is relied on article 318 which forms the party's obligation to release the information. The Cassation Court considers in order to regulate the given circumstances the general provisions on obligations also should be used, as paragraph one of article 317 of Civil Code provides an obligation shall arise from the contract between the parties, except when the obligation arises from tort (delict), unjust enrichment or other grounds prescribed by law. The legal basis of consumers' right protection is also regulated by Georgian statute on "Consumers' Rights Protection", according to the paragraph 2 of article 3 of this statute the consumer has right to request the product's preservation, transportation and its use in common circumstances to be safe for his life, health and environment and not to be harmful for his product. According to the paragraph 1 of article 6 the manufacturer is obliged to provide the consumer essential, reliable and full information about the product which will give him the correct choice.

With the aforementioned circumstances the cassation Court Concludes that manufacturer should have provided the information in what extent the product ensured the consumer's safety, accordingly the Appellate Court's indication that L.Chaladze's close relatives when bought the essential blood for the plaintiff presumed to buy undoubtedly reliable and quality product and nobody warned them for the possible shortcoming of the product.

**Resolution Part:**

The Cassation Court guided by article 410 of Civil Procedural Code of Georgia

**H e l d :**

The Cassation complaint of the LLC “Kutaisi Regional Blood Bank not to be satisfied.

The Chamber of Civil Affairs of Kutaisi Appellate Court’s December 28 2006 judgment to be remained unchanged.

The judgment of Cassation Court is final and cannot be appealed.

**Chairman**

**M. Gogishvili**

**Judges:**

**N. Kvantaliani**

**M. Ciskadze**