T. 205. XLIV. APPEAL - Torrillo, Atilio Amedeo, et al. v. Gulf Oil Argentina S.A., et al. – CJSN - 31/03/2009

Buenos Aires, 31 March 2009

Regarding the proceeding: "Appeal brought by La Caja ART S.A. in the case *Torrillo, Atilio Amadeo et al. v. Gulf Oil Argentina S.A., et al.*", to decide its legitimacy.

Considering:

1) That the National Chamber for Labor Appeals vacated the trial court's decision and consequently upheld the complaint for damages based on the Civil Code submitted by the parents of a worker killed in a fire produced in the offices in which he worked. In addition to the plaintiff's employer, the court held the Insurance Fund for Work Hazards S.A. responsible based on the fact that it had failed to fulfill its duty related to work safety.

To this end, among other considerations, the Court decided that the place of work was a "climate with clear hazards" that lacked "the resources able to handle an emergency". In opposition to the holding, the insurance company submitted a special petition, whose denial led to this complaint.

2) That the appellant argues, in light of the arbitrariness doctrine, that its responsibility, contrary to the lower court's ruling, is not appropriately categorized within the Civil Code, as art. 1.1 of Law 24.557 regarding labor hazards (LLR) provides that "the prevention of hazards and the reparation for injuries resulting from work are governed by LLR and its regulations."

In the judgment of this Court, the complaint is inadmissible because, on one hand, it refers to a test of common law norms, which is outside federal authority, in accordance with arts. 14 and 15 of Law 48 and, on the other hand, it does not describe the nature of the unusual allegation of arbitrariness that was invoked.

3) That in order to properly clarify this last conclusion, it is appropriate to observe that in its first article, the LLR expressly declared that one of its objectives was "to reduce the labor accident rate by means of preventing the hazards of work" (art. 1.2.a).

The fact that the cited legal source began the enumeration of its objectives with the above-mentioned provision is not by chance. In effect, the key message of the bill sent by the Executive Power was that prevention constituted the "primary objective", the "central theme", making the remaining themes "second priorities", particularly when, in its judgment, the system then in force had shown its inability to "reduce the frequency and seriousness of the accidents" (Parliamentary Record, Buenos Aires, Law, 1996-A, paragraphs 408, 409 and 411). From its side, the legislative record of the National Congress did no more than underscore the objective of prevention, which was "the substantial part" of the bill, the "primary" and "fundamental objective", according to what the reporting member of the Senate majority report emphasized (id., p. 546), among other appearances of representatives and senators (*id.*, p. 458, 483, 567 and *passim*).

4) That, surely, the primary, substantial or paramount nature given to the preventative aspect of work accidents and illnesses is fundamentally due to its indisputable connection with the protective principle expressed in art. 14 *bis* of the National Constitution ("Work in its diverse forms enjoys the protection of the laws"), which, furthermore, provides that these laws should assure the worker "dignified and equitable labor conditions".

In addition, everything from International Human Rights Law – labor being one of the oldest aspects of international standards – was meant to guarantee that work conditions became, at once, safe and healthy (Alston, Philip, "The International Covenant on Economic, Social and Cultural Rights", in Manual on Human Rights Reporting, Geneva, United Nations, 1997, p. 6). In this regard, it is particularly noteworthy that among the international treaties of constitutional rank (National Constitution, art. 75.22, second paragraph), the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides that the States parties recognize the right of every person, on one hand, "to the enjoyment of just and favourable conditions of work

which ensure, in particular […] b) Safe and healthy work conditions" (art. 7), and, on the other hand, "to the enjoyment of the highest attainable standard of physical and mental health", so that, among other measures that these States must adopt, "shall include those necessary for […] b. The improvement of all aspects of environmental and industrial hygiene […]" and "c. The prevention and treatment of occupational diseases" (art. 12).

Other legal norms of equal rank are similarly reviewed within this framework. Firstly, those concerning the specific protection of the female worker contained in the Convention on the Elimination of All Forms of Discrimination against Women, namely, the "right to protection of health and to safety in working conditions", which includes the "safeguarding of the function of reproduction" (art. 11.1.f), and the obligation of the State to provide "special protection to women during pregnancy in types of work proved to be harmful to them" (*id.*, 2.d). Secondly, those related to the special care of child laborers, clearly established in art. 32 of the Convention on the Rights of the Child and, generally, art. 19 of the American Convention on Human Rights. Art. 75.23 of the National Constitution emphasizes a similar protection for women and children.

For its part, the Committee on Economic, Social and Cultural Rights, which is the authorized interpretive body of the ICESCR at the international level, has from distinct perspectives stressed the importance of the Covenant's precepts that have been cited. Thus, it has expressed: a. that safe and healthy work conditions are established as one of the "principle factors determining health"; b. that the improvement of all aspects of work hygiene (ICESCR, art. 12.2.b) implies, in particular, "hygienic and safe work conditions" and "the adoption of preventative measures regarding work accidents and occupational illnesses"; c. that said hygiene "aspires to minimize the causes of the health dangers resulting from the work environment", citing paragraph 2 of art. 4 of Convention No. 155 of the International Labour Organization, and d. that the "prevention" of the recalled art. 12.2.c, requires the establishment of "prevention and education programs" (General Observation No. 14, The right to the highest attainable standard of health (art. 12), 2000, HRI/GEN/1/Rev. 6, paras. 5, 11, 15 and 16).

But it also has formulated repeated warnings and recommendations for the countries in which work safety laws are not adequately enforced, from which result a relatively elevated number of work accidents, as much in the private sphere as the public (e.g., Final observations of the third periodic report of Poland, E/C.12/Add. 26, 16-6-1998, paragraph 18; likewise, *infra*, item 7, fourth paragraph).

Said committee, furthermore, in its last general observation dedicated specifically to the right to work, explained that "work as specified in art. 6 of the Covenant (ICESCR), must be *decent* work. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety […] Protection of the right to work has several components, notably the right of the workers to just and favourable conditions of work, in particular to safe working conditions", whose existence constitutes one of the "interdependent and essential" elements of the exercise of work: its "acceptability and quality" (General Comment No. 18, The Right to Work, 24-12-2005, E/C.12/ GC/18, paras. 7 and 12; similarly: para. 2).

Nor can we overlook, given its supralegal rank (National Constitution, art. 75.22, first paragraph), the Additional Protocol to the American Convention on Human Rights Regarding Economic Social, and Cultural Rights (San Salvador Protocol), in accordance with which the States parties have recognized that the "right to work", envisaged in art. 6, "presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions", which they will guarantee in their national legislation, particularly with respect to: "safety and hygiene at work" (art. 7.e), complemented in the area of the right to health by the "prevention" of occupational diseases (art. 10.2.d; similarly, art. 7.f enunciates the obligation to prohibit all work that jeopardizes the health, safety or morals of minors).

As a result, as stated by the Inter-American Court of Human Rights, work, for those who provide it, "should be a means of realization and an opportunity for the worker to develop his aptitudes, capacity and potential, and to realize his ambitions, in order to develop fully as a human being (Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC - 18/03,

17-9-2003, Serie A N° 18, para. 158). This is an expression that corresponds directly with the National Constitution, whose fundamental goal, as well as what it establishes in its art. 14 *bis*, is "human development" and "economic progress with social justice" (art. 75.19).

In sum, "decent work must be safe work", in the words of the Director General of the International Labour Organization (ILO) in his introduction to the Conclusions adopted by the International Labour Conference at its 910th reunion, 2003, which emphasize that the "central pillars" of a global strategy of Labour Health and Safety concern the "building and maintenance of a national preventative and safety health culture" that implies, *inter alia*, that "the principle of prevention is accorded the highest priority" (Global Strategy on Occupational Safety and Health, ILO, 2004, p. iv and 2). The recent Seoul Declaration on Safety and Health at Work, adopted on 28 June 2008 by the XVIII World Congress on Safety and Health at Work, organized jointly between the ILO and the International Social Security Association (ISSA), after recognizing that "the right to a safe and healthy working environment should be recognized as a fundamental human right and that globalization must go hand in hand with preventative measures to ensure the safety and health of all at work", has insisted that a "national preventative safety and health culture" is one in which, *inter alia*, "the principle of prevention is accorded the highest priority" (point 2). It is appropriate to comment, by the way, that the ILO and the World Health Organization (WHO) rely on a shared definition of occupational health, which was adopted by the Joint ILO/WHO Committee on Occupational Health at its first meeting (1950) and revised at its 12th meeting (1995): "Occupational health should aim at: the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations; the prevention amongst workers of departures of health caused by their working conditions; the protection of workers in their employment from hazards resulting from factors adverse to health; the placing and maintenance of the workers in an occupational environment adapted to his physiological and psychological capabilities …" (italics added). This concerns, certainly, the implementation and updating of aims expressed by the ILO for a long time, as much in its 1919 Constitution (it is "urgently required … [to improve] the protection of the worker against sickness, disease and injury arising out of his employment" – Preamble, second paragraph [Part XIII, First Section of the Treaty of Versailles]), as in the Declaration concerning the aims and purposes of the International Labour Organization, denominated the Declaration of Philadelphia of May 1944 ("adequate protection for the life and health of workers in all occupations", III.g).

The protection of the psychophysical integrity of the worker, when not a matter of the worker's life itself, through the prevention of work hazards results in, undoubtedly, a question in which this Court's doctrine reaches its greatest importance and seriousness, and accordingly is a subject of special constitutional concern. ("Vizzoti", Judgments: 327:3677, 3689 and 3690, and "Aquino", Judgments: 327:3753, 3770 and 3797).

5) That the LLR, to achieve the aforementioned prevention objective, a branch of the hierarchically superior laws indicated in the previous analysis, created a system in which the ART "actively participate", in accordance with the cited message of the Executive Power: the "incorporation" of those insurers, it added, "in the supervisory role represents a novel step that strengthens the controls over the companies" (Precedents…, cit., p. 412). During the parliamentary debate there was no failure to observe that to the "public control" system of compliance with labour hygiene and safety regulations under the responsibility of the Superintendent of Labour Hazards, "a control is added that without doubt will be much closer though the insurers of labour hazards" (id., p. 568). The informing member of the report of the majority of the Senate had already pronounced this in analogous terms (id., p. 547).

Thus, the cited law obligated the ART to "adopt the legally foreseeable measures to effectively prevent work hazards" (art. 4.1); incorporate in contracts with employers "a plan to improve hygienic and safety conditions, which will indicate the measures and modifications that [they] should adopt in each of their establishments to comply with current law" (art. 4.2), and likewise monitor the execution of said plan and report any failure to comply with this regulation and the hygiene and safety norms (art. 31.1.a) to the Superintendence of Labor Hazards (art. 4.4). In addition to promoting prevention by informing said Superintendence of the required plans and programs of the companies (art. 31.1.c.), they must provide advice to employers "regarding the prevention of hazards" (art. 31.2.a).

For their part, the LLC regulations (decree 170/96) detailed diverse aspects of the development of the improvement plan, at a projected pace, insofar as it should be written "in clear language, endeavoring to avoid the use of ambiguous concepts, so that employers can clearly understand their obligations and identify the aspects that they should improve to comply with current law" (art. 5), insofar as their implementation should be observed by the ART "in the workplace, leaving records of their visits and of the observations carried out in the form that the Superintendence of Labor Hazards provides to this end", which implied verifying the maintenance of the compliance levels reached in the plan (art. 19, a and b).

The cited decree also specified that the ART must provide advice and offer technical assistance to the member employers in the following subjects: a. determination of the existence of hazards and their potential effects on worker health in the establishments covered by the contracts; b. current rules for work hygiene and safety; c. selection of personal protection items; and d. providing information related to the safety of chemical and biological workplace products (art. 18). Art. 19, in turn, after providing that the ART "should undertake permanent activities to prevent hazards and control the conditions and work environment", emphasized among those, e.g., offering training to workers in risk prevention techniques (subsec. c); promoting the formation of joint work hazards committees and contributing to their training (subsec. d); informing the employer and the workers about the prevention system established in the LLR (and in the regulatory decree itself), in particular about the rights and duties of each of the parties (subsec. e); and instructing the workers designated by the employer in how to apply the evaluation systems to verify compliance with the improvement plan (subsec. f). All this, without prejudice to the duty to cooperate in investigations and actions to promote the prevention that the Superintendence of Labor Hazards develops (subsec. g). To comply with the established obligations, Decree 170/96 prescribes that the ART "should rely on personnel specialized in hygiene and safety or work medicine to ensure attention to matters regarding the prevention of hazards to its members" (art. 20).

In all other respects, the regulations envisaged that the employer was obligated to "permit the admission to its establishment, during work hours and without requiring advance notice, of the personnel chosen by the insurers, when consistent with the performance of the functions" anticipated in the LLR and in the contract (art. 28.a), and to provide to the ART the information necessary to evaluate, develop and control the improvement plan (id., b) or to evaluate an accident or illness (id., g). The workers, for their part, are equally obligated to comply with the prevention plans and programs as to use personal and group protection equipment and observe the protection measures issued in the training courses (art. 30, a and c).

The legal framework concludes, clearly, that the employers must "obligatorily" insure themselves in an ART, except those that, upon raising the special funds necessary, choose self-insurance (LLR, art. 3; also: art. 27.1 and related provisions).

6) That, in such conditions, it is clear that the LLR, to attain its prime objective, the prevention of work hazards, introduced and established a new entity: the ART. In this fact alone lies the essential difference that, for what is relevant here, separates the LLR from the previous regulations which were judged unsatisfactory. Therefore, there is no doubt that for the law and its regulation, the concrete realization of the aforementioned objective, its actual accomplishment, was strongly and decisively based on the premise that adequate performance by the ART of its respective duties contributes effectively to this end.

Hence, the ART have been consigned to maintain a "close" and "permanent" link with the particular labor area to which they remain connected due to the bilateral contract they sign. Hence, requirements of control, promotion, advice, training, information, improvement, investigation, instruction, collaboration, assistance, planning, programming, vigilance, visits to the workplaces and reporting, to use certain regulatory terms already mentioned in the prior point, require from the ART, at the authorized schedule, an activity in two senses. First, the acquisition of extensive knowledge of the specific and inherent reality of the mentioned labor field, and thus this field, so to speak, must keep its doors open for the ART.

Next, they must act on said reality so that their work meets, as needed, the imperatives of prevention, even by means of reporting. Said individual and direct knowledge of those realities, joined, by the way, with the specialized knowledge of prevention that they must be provided, constitute the pair of circumstances on which the LLR formula is based, by way of precise obligations, its innovative program preferring the ART as useful and appropriate vehicles to specifically prevent labor hazards. In other respects, the LLR implicitly assumes WHO verification: the health and safety problems at work are, in principle, preventable and should be prevented, through the use of all means available: legislative, technical, investigatory, and information and economics training and education (Declaration on occupational health for all, Beijing, 13-10-1994, WHO/OCH 94.1. para. 6).

7) That, considering the role of the ART as previously indicated in matters of prevention of labor accidents and illnesses, and in view of the aforementioned aims that the legislation must gradually achieve, defined and required by the National Constitution and international human rights law of constitutional or supralegal rank (supra, item 4), it becomes clear that the former, notwithstanding that they are private law entities (LLR, art. 26.1), are essential contributory entities for achieving the full and effective realization of said aims that have evident importance on at least three levels.

In the first place, the prevention of hazards protects the constitutionally-based rights of each and every one of the individual workers to psychophysical integrity, to health and to life, among other rights. And, as the link between the first two and the last is indivisible (see, e.g., "Campodónico de Beviacqua", Judgment: 323:3229, 3239), prevention refers to the first natural right of the human being preexisting all positive legislation guaranteed by the National Constitution ("Floreancig", Judgments: 329:2552). The human being, of course, is at the center of the entire justice system and an end in itself – beyond one's natural transcendental nature – one's body is sacred and constitutes a fundamental value, with respect to which the remaining rights always have an instrumental nature ("Campodónico de Beviacqua", cit., Judgments: 323:3239 and their citations), particularly when the right to life is understood not only as the right to not be deprived of life arbitrarily, but also as the right to not be impeded from access to the conditions that guarantee a "dignified existence" (Inter-American Court of Human Rights, Case of "Children of the Street" (Villagrán Morales, et al.) v. Guatemala, judgment of 19-11-1999, Serie C No. 63, par. 144, and joint concurring vote of the judges Cançado Trindade and Abreu Burelli, par. 4).

In the second place, at the social level, given the inseparable bond between the hazards of work and the right to health, the case at hand raises a question that transcends the interest of the parties and even the labor field. This is true, on one hand, because health has become a true "public good", according to art. 10.2 of the Protocol of San Salvador, and the Inter-American Court has already conceptualized it (Ximenes Lopes v. Brasil, judgment of 4-7-2006, Serie C N° 139, par. 89, and separate vote of judge Cançado Trindade, par. 40). On the other hand, we are mindful that sufficient tests exist, according to the WHO, that refute the traditional argument that health improves automatically as a result of economic growth, at the same time showing clearly that, to the contrary, the improvement of health is a pre-requisite of economic development (Document submitted by the World Health, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/44, 31-7-2002, p. 3).

Finally, at the international level, in view of the multitude of international obligations assumed by the State upon having ratified the previously mentioned treaties, the contributory work of the ART constitutes an important factor for adequately satisfying the alluded to obligations and not incurring international liability. It is moreover opportune to recall, in this regard, that the already mentioned Committee on Economic, Social and Cultural Rights, in its final Observations on the periodic report of Argentina, approved on 8 December 1994, had warned Argentina "that the health and safety in the workplace are frequently below established standards", which resulted in its urging the Government "to analyze the reasons for the lack of effectiveness of its initiatives in the areas of safety and hygiene in the workplace and to make greater efforts to improve all aspects of environmental and industrial hygiene and safety" (E/C.12/1994/ 14, paras. 18 and 21). Subsequently, after having made a request to the government on 17 December 1998 that it indicate the measures that were being taken "to address the persistent problem of accidents at

work and occupational illness, as well as of hygiene and safety in the workplace which are often below standard" (List of Issues: Argentina. E/C.12/Q/ARG/1), it expressed in its Concluding Observations of 1999, as much its concern for the fact that "conditions in workplaces […] frequently fail to meet established standards", as its exhortation "to improve the effectiveness of its measures in the area of safety and hygiene in the workplace, particularly in the construction sector, to increase its efforts to improve all aspects of environmental and industrial hygiene and safety, as well as to ensure that the control and inspection of industrial hygiene and safety are carried out by the public authorities" (Concluding Observations on the second periodic report of the Republic of Argentina, 1-12-1999, E/C.12/1/Add.38, paras. 22 and 37). Not ensuring that private employers comply with basic labor norms could constitute, on the part of the State, a violation of the right to work or of equitable and satisfactory work conditions (Principles on Violations of Economic, Social and Cultural Rights, 1997, II.6), particularly when noting that at the time of the drafting of art. 6 of the ICESCR, which is interdependent with art. 7, "the Commission on Human Rights affirmed the need to recognize the right to work in a broad sense by laying down specific legal obligations rather than a simple philosophical principle" (Committee on Economic, Social and Cultural Rights, General comment No. 18…, cit. paras. 2 and 8).

Nor do I need to point out that the singular interest of the cited committee regarding occupational safety and health, indicated above, is reinforced through its requirement that the States, in order to comply with the obligation provided for in arts. 16 and 17 of ICESCR, provide information not only about "[w]hat legal regulations, administrative or other, exist that require minimal conditions of occupational health and security?", but also regarding "how are those regulations carried out in practice and in what fields do they not apply?", putting in evidence, for its part, that the obligation in regards to prevention points towards a permanent improvement: "[p]lease provide statistical or other information on how the number, nature and frequency of occupational accidents (particularly with fatal results) and diseases have developed over time (10 years ago, 5 years as compared with the present)"; "Please list the measures taken by your Government to improve all aspects of environmental and industrial hygiene" (Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties, HRI/GEN/2/Rev.4, p. 33 - par. 16 and 45 - par. 51.f.). As explained, the States parties "are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases" (Committee on Economic, Social and Cultural Rights, General Comment N. 14…, cit. par. 36), which does nothing more than give specificity to one of the aspects of the labor field, namely the principal of progressivity (PIDESC, art. 2.1; "Aquino", cit., p. 3774-3777, and "Milone", Judgments: 327:4607, 4619) and "the continued improvement of the existing conditions", as art. 11.1 of the latter treaty obligatorily states ("Milone", id.). The Convention on the Elimination of All Forms of Discrimination against Women contains an indication in section 3 of art. 11, it is worth noting, shortly after the already-cited section 1.f relating to "the protection of health and safety in working condition", that does no more than invoke, *expressis verbis*, these traditional guidelines: "Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."

The Mercosur Sociolaboral Declaration, signed in Brasilia on 10 December 1998, is no less eloquent in addressing the question at issue: "Every worker has the right to exercise his activities in a healthy and safe working environment, that preserves his physical and mental health and encourages his professional development and performance. The States Parties commit to formulate, put into practice and realize in permanent form and in cooperation with the employer and worker organizations, policies and programs on the health and safety of workers and the work environment, in order to prevent work accidents and occupational illnesses, promoting environmental conditions favorable for the development of the activities of workers" (art. 17).

8) That, in sum, there is no reason to leave an ART out of the responsibility structure envisaged by the Civil Code for the harm to a worker caused by an occupational accident or illness when the basis for the accident or illness is demonstrated, which includes as much an illicit act and accusation as an adequate causal nexus (exclusive or not) between said harms and the omission or deficient compliance by the former of their legal obligations. Nor is there a reason, when the

aforementioned requirements are satisfied, given the variety of these obligations, for the alluded to exemption to apply due to the sole fact that the ART cannot obligate the insured employers to comply with certain safety norms or prevent them from carrying out their work for not implementing certain safety conditions when they are incapable of sanctioning or closing down establishments. This position, frankly, will lead to a general and permanent exemption, insofar as it is based on limitations no less general and permanent. Similarly, two circumstances are being overlooked. On one hand, emphasizing what the ART are not permitted to do avoids that to which they are obligated: the issue is not about sanctioning failures to comply or imposing compliance for the insurers, but rather something preceding these, namely, preventing the failures as a way for the insurers to avoid noncompliance and the inherent hazards involved. On the other hand, the petitioner forgets that the ART cannot remain indifferent to said noncompliance, as the above-cited reporting obligation is one of their preventative functions.

It is an essential condition of work that it provide dignified conditions and that it guarantee the strict compliance with safety regulations, as much a general matter as in that which concerns the details of each activity. Prevention in health protection and physical integrity of the worker is the legitimate assumption of the provision of services and cannot ignore the adequate preservation of the inherent dignity of the human individual ("Aquino", cit., opinion of Judge Highton de Nolasco, p. 3799).

9) That in regards to the remaining complaints, the special petition refers to questions of fact, proof and non-federal law, which have been resolved in terms that, above and beyond their degree of accuracy, appear sufficient to deny that the appealed judgment entails a clear departure from the proven circumstances of the lawsuit or from the judicial solution envisaged for the case, which, in accordance with the known and permanent doctrine of the Tribunal, leads to the denial of the charge of arbitrariness.

Thus, the complaint is denied and the deposit is surrendered (p. 2). Announce the decision and, as convenient, close the file.

SIGNED: RICARDO LUIS LORENZETTI (dissenting)- ELENA I. HIGHTON de NOLASCO (according to her opinion)- CARLOS S. FAYT - ENRIQUE SANTIAGO PETRACCHI - JUAN CARLOS MAQUEDA - E. RAUL ZAFFARONI - CARMEN M. ARGIBAY (according to their opinion).-

OPINION OF MRS. VICEPRESIDENT DOCTOR DOÑA ELENA I. HIGHTON de NOLASCO AND MRS. MINISTIR DOCTOR DOÑA CARMEN M. ARGIBAY

Considering:

That the special petition, whose denial led to the present complaint, is inadmissible (art. 280 of the Federal Code of Civil and Commercial Procedure).

Accordingly, the complaint is dismissed and the p. 2 deposit forfeited. Notify the parties and, as convenient, close the matter accordingly.

SIGNED: ELENA I. HIGHTON de NOLASCO - CARMEN M. ARGIBAY.-

DISSENT OF MR. PRESIDENT DOCTOR DON RICARDO LUIS LORENZETTI

Considering:

1) That Chamber VI of the National Chamber for Labor Appeals, upon vacating the lower court's decision, upheld the complaint for damages based on common law, lodged by the parents of a worker killed in a fire produced in the offices in which he worked and, as concerns this case, extensively criticized the Insurance Fund for Work Hazards ART S.A. Against said holding, the non-prevailing party submitted the special petition whose denial led to the present complaint.

2) That to so decide the relevant matter, the lower court maintained that the responsibility of the appellant was the correlate of the blame given to the employer for the absence of items that would have been able to avert or lessen the tragic consequences of the accident, as it was unquestionable that the business failings could have been avoided by the insurer appropriately fulfilling its duty of control.

3) That in regards to the lack of application of art. 75 of the Law of Occupational Contracts and section 11 of Law 24.557, the special petition is inadmissible (art. 280 of the Federal Code of Civil and Commercial Procedure).

4) That, on the other hand, the other grievances pertaining to the presence of the elements that trigger the duty to remedy give rise to a federal question sufficient for consideration by the means attempted, given that the judgment is not a reasoned derivation of current law in accordance with the evidence of the case.

5) That to vacate a decision for arbitrary legal reasoning, one must perform an analysis of the defects of logic that justify such an exceptional conclusion. The objective is not to turn the Court into a third trial tribunal, nor correct mistaken judgments or reconsider them, but rather to cover exceptional cases in which deficiencies of logical reasoning or a total absence of statutory basis prevents us from considering the judges' decision a "judgment based on law" to which arts. 17 and 18 of the National Constitution refer (Court Reporter: 311:786; 314: 458; 324: 1378, among many others).

In this regard, arbitrariness cannot result merely from disagreement with the resolution adopted, but rather requires a verified departure from the minimum criteria of a judicial argument. The latter requires, for its part, that the decision contain a precise description of the relevant legal facts, and if the rules are not applied, the reasons for which they are inapplicable or invalid should be given or if it is corrected for reasons based on coherent and consistent principles that are grounded in the Constitution. The great task of administering justice is not based only on good intentions or on the law freely applied, but on laws, as no one is above them since our Constitution established a Judicial Branch made up of judges who act in conformance with laws that the community must know and to which they must adjust so that solutions are foreseeable, all of which this Court must respect because they constitute an element of the constitutional guarantee of due process.

6) That there should be no argument over the protection that occupational health and safety deserve. Before various international human rights instruments were incorporated into the text of the Constitution (art. 75, sec. 22), enumerated in the majority opinion, this Court had emphasized in Judgments: 305:2040 the significance of something "that endangers … a legal good as valuable as the health of man embodied in this case in the subordinate worker – which indicates as much a situation in which many members of society find themselves as a substantial determining factor of the level of well-being and prosperity of the Nation – on top of the explicit constitutional basis that covers the aforementioned protection (art. 14 *bis* of the National Constitution)…". There it was emphasized that no matter how much the proprietary rights of the employer should be assured, those rights cannot be equivalent to "those related to the health of the worker, given their paramount importance, determined by the reasons given *ut supra*, from whose importance we conclude that its protection requires considerable exercise of the cardinal virtue of justice."

This Tribunal has strongly indicated that worker protection and constitutional equality cannot be restricted in a manner that undermines the law, and for this reason article 39.1 of the Occupational Hazards Law was deemed unconstitutional and the civil action upheld ("Aquino" case, Judgments: 327:3753).

Which duties of prevention and control that Law 24.557 imposes on the insurers of occupational hazards is not at issue. The resolution of the case requires clarifying whether the elements that the duty to make reparations creates are present.

7) That the challenged decision held that an alleged omission of the insurer of occupational hazards is, by itself, sufficient to create civil responsibility and prove the existence of an adequate nexus of causality. This rule is not based on a legitimate interpretation of the law, consistent with this Supreme Court's precedents, and coherent with the remaining statutory code, as it contains logical defects susceptible to lead to its disqualification as a valid jurisdictional act.

8) That as regards the application of law, the decision does not correctly distinguish, as is necessary, between the compensatory action stemming from the Occupational Hazards Law and that based on the civil action option.

In the first sense, Law 24.557 establishes that the Insurer of Occupational Hazards is obligated to adopt measures legally envisaged to effectively prevent occupational hazards. Prevention of accidents and reduction of the accident rate are a priority objective, in the law as much as with the system in general (art. 1, item 2, section a, of Law 24.557), and thus the insurers of occupational hazards are obligated to adopt legal measures that aim to effectively prevent work hazards and are authorized to include in their respective contracts the compliance obligations regarding health and safety regulations agreed to between the insurer and employer (art. 4, item 1, paragraph 1). The duty of effective prevention implies specific acts of assessment (decree 170/96), of control of the suggested safety measures, and of reporting the employer's compliance failures to the oversight body.

The failure to comply with the referred legal duty has specific consequences within the referenced regulatory subsystem, as it is fair to make the insurer responsible for the hazards from flawed foresight because its obligation is precisely described and is consistent with the indemnification limit, all of which can be insured.

But when the common law action option is exercised, the Civil Code indemnification system should be used. That is so because a harmful fact can give rise to diverse actions that the law makes available to the victim, such as criminal, civil, or labor. Among the claims intended to compensate for harm, one that must be distinguished is based on the system of occupational hazards and has a legislative transactional logic, as it facilitates the action upon establishing presumptions of responsibility and causality, but limits the indemnification to facilitating insurability. In contrast, a civil action is based on the requirement to prove assumptions of legitimacy and, in contrast, there is full redress. Also in this last type there are clear differences between an action based on contractual or extra-contractual matters, or whether damages caused to the worker by a thing, by the environment, or by a manufactured product, are invoked.

In light of this wide panorama, the law can permit electing among different legal systems, or a combination, to ensure that the victim is able to bring an action and utilize other regulations if convenient.

The current case concerns the exercise of an option and is a decision that the plaintiff makes voluntarily which we cannot indicate is insufficient, as there are clear judicial elements that the regulatory code provides and accessible information at a low cost. Once the plaintiff chooses the action, the judge is able to define the claim, describing it, that is to say, selecting the applicable regulation in light of the given facts, but cannot substitute it for the decision that the legislature made in its area of authority.

The judgment of qualification cannot affect the rights of due process, changing by way of judicial decision the claim that the defendant has already answered, nor can it use rules pertaining to different areas, thus undermining the law's logic. The latter is particularly clear in all comparative law and in the diverse remedial subcategories that the Argentinean legal regulatory system envisages, in which the common law play the role of complementary, but not substitutive, source.

As strong as the protection of the worker may be, as was indicated in the cited precedents in item 6, once this action is chosen, the Civil Code should be applied and it is inappropriate to use both a system based on social security and one that is civil, in its different aspects and according to

each case. Current law does not permit that method, nor is it reasonable to break up the foreseeability system in place.

9) That in the exercise of a civil action the plaintiff must prove the premises on which it is based, which include as much the illicit act, the accusation, as the causal nexus with the harm. The plaintiff asserts that the insurer did not exercise the health and safety controls for which it is responsible regarding the compliance failures that occurred in the insured company and accordingly tries to obligate the insurer to compensate in full for the harm caused by the accident. Current civil law requires the demonstration of an adequate nexus of causality between the omission and the harm, which, although it may be a reason for a broad interpretation, cannot be ignored, as no one can be judged in accordance with criteria that are not part of the law.

10) That the mentioned regulation is consistent with the precedents of this Court ("Rivero" case recorded in Judgments: 325:3265). Said judgment concerned an analogous case. The appeals court, upon vacating the judgment of the trial court, rejected the lawsuit aimed at "Mapfre Aconcagua ART S.A." by considering, in essence, that the insurer's failure to comply with the obligations and responsibilities regarding prevention and vigilance and the failure to carry out recommendations – in that case respecting the use of a safety belt – were insufficient to make it responsible, as the accident had occurred due to essentially physical causes that could not have been avoided regardless of the whether the action complained of had been taken. This is particularly true when it did not have the duty to routinely watch the work during the entire day, nor give instructions on execution, lacking the legal authority to prevent them in risk scenarios. As is observed, in those situations the paramount point of the present case was debated, that is, the responsibility of the occupational risk insurers for the deficient exercise of the duty to control health and safety matters.

The Court disallowed the direct submissions by denying the special petitions lodged by the plaintiff and by the Public Defender. It did so by determining that the allegation of arbitrariness was not true and the case did not satisfy the requirements of art. 280 of the Federal Code of Civil and Commercial Procedure.

Even when it is affirmed that the State has delegated its police power to the occupational risk insurers, it also cannot derive responsibility from it, as the State is not responsible for accidents of this type. There is no civil responsibility for the State in current law for all the accidents in which an abstract failure to control has been verified, without proving the causal nexus. On the other hand, the Federal Government cannot delegate a state police power that belongs to the provinces (art. 126 of the National Constitution).

11) That although in the precedent cited in the previous item only four judges provided explicit reasons for why the challenged decision was not arbitrary, this Court in its current composition shares them and judges them applicable by virtue of the substantial analogy previously indicated in the case under consideration.

12) That the solution reached does not amount to placing an ART at the margin of responsibility in the Civil Code scheme, nor does it establish a general stay emphasizing how they are not permitted to avoid their obligations.

It is important to make two essential points. First, it is not appropriate to make the insurers responsible if the bases for the duty to remedy the harm do not exist, among which is an adequate causal nexus. Second, the failure of the duties of control and prevention by itself does not authorize establishing a general and abstract rule that automatically and inexorably lifts them to a position apt to produce the harmful result in disregard of the normal course of events.

Therefore, the direct submission and the special petition lodged with the scope indicated are upheld and the challenged judgment is vacated. With costs (art. 68 of the Federal Code of Civil and Commercial Procedure).

Return the complaint to the original tribunal so that it is added to the facts and it is ordered that the responsible person issue a new judgment amended for consistency with this decision.

Refund the deposit of p. 2. Notify the parties.

SIGNED: RICARDO LUIS LORENZETTI.