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No: 52/2011
Office: Civil Appeals Court, 1st District

Redactor: Dr. Alicia Castro
Signatories: Dr. Lopez de Alda Nilza
Dr. Alicia Rivera Castro
Dr. Jose Eduardo Cruz Vazquez

Montevideo, 11 May 2011

VIEWS:
In the disposition of the appeal in the case "Galán Morales, Daniel, et al. v. Catholic Workers Circle of Urugay, et al.—Damages" (Galán Morales, Daniel y otros v. Círculo Católico de Obreros del Uruguay y otros). File No: 2-562663/2007, originally from the Legal Court of First Instance in Civil Matters, 18th District, under appeal lodged against the judgment No. 83 of 13/9/10 issued by Dr. Estela Jubette (fs. 648/656).

RESULTING:
(I) As indicated by these actions, Daniel Galán, as an affiliate of the Catholic Workers Circle of Uruguay; his spouse; and his children pursued reparative action for damages against that institution of collective medical assistance and against their doctors, Drs. Ignacio Musé and Anuar Abisab.

After recounting that the aforementioned was afflicted with a benign brain tumor, they indicated that Dr. Musé prescribed radiation therapy in conjunction with a drug ("temozolomide") and Dr. Asbisab and the defendant refused to provide it unless they paid the sum of USD $19,000; that forced them to acquire the drug in Buenos Aires—where the price was lower—and to consult with specialists in that city, achieving a totally successful treatment. For this, they are claiming the costs of the drug, the travel, and the assistance in Buenos Aires, to which are added loss of earning capacity and moral damages to all the plaintiffs.

The defendants' response focused, in the case of Dr. Musé, on that he merely prescribed a drug that he thought would be adequate, but denied responsibility for the refusal, and as for Dr. Abisab and the mutual institution in that the Mutual coverage did not include then the prescribed drug.

(II) The decision under appeal dismissed the claim, without special costs.
Against that decision the plaintiff appealed (fs. 658/694) and, given leave and after service of the notice, the co-defendants answered the claim (fs. 698/719 and 720/723).

(III) After leave to appeal was granted, the case was received by this Court on 16 December 2010, and, after successive study, in accordance with the provision of Law No. 15.750, Article 61, judgment was rendered, which will be given in advance.

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WHEREAS

(I) Stating the reasons why the decision wrongs them, the appellants indicated that it should have been acknowledged that a constitutionally recognized human right was infringed and that the Decree 614/006 makes the delivery of the drug the responsibility of the Mutual Institution until a decision about how to finance it is reached. They insist that the Catholic Workers Circle breached its service agreement and must account for its personnel or assistants, as well as reiterate that the refusal of Dr. Abisab is unlawful, and that Dr. Musé's behavior was imprudent and unprofessional and erred in informing the Mutual that it was not required to supply the medication; it was also negligent because he did not indicate other therapeutic alternatives. The Appellants add to this, an extensive repetition of damages attributed to the decision of not supplying the drug free of charge.

(II) Firstly, It should be noted that it is recognized that the right to health is part of the set or block of fundamental human rights recognized by International Covenants on Human Rights and the Constitution of the Republic. It is not only a right inherent in the individual human personality, but it has also been expressly included in the International Covenant on Economic, Social, and Cultural Rights—approved by Law No. 13.751 of 11 July 1969—Article 12, in the Additional Protocol of the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador)—approved by Law No. 16.519 of 22 July 1994—Article 10, and in the text of Article 44 of our Constitution, all current and complementary provisions.

Thus, Professor Risso Ferrand, citing Nogueira, noted that "the legal practitioner should interpret rights by trying to favor the source that best protects and guarantees the rights of the individual" (Nogueira, Humberto "The essential or human rights contained in international treaties and their status in domestic law: Doctrine and jurisprudence" in lus and Praxis, Year 9 No. 1, Talca, 2003, p. 422), and added that "the new concept that blends the international and constitutional regulation of human rights in a block that perfectly complements…is governed by the preferential guideline standards (if two rules regulate a right or guarantee, we must prefer the rule that best protects, the one which gives greater scope) and by the principle of preference of interpretation (when a rule of human rights is susceptible to various interpretations, it should be chosen that which best protects and guarantees the right at stake)" (Risso, Martin, What is the Constitution? Montevideo, 2010, p. 60 and 63).

(III) From the reading and interpretation of the relevant provisions, it appears that "every person has the right to health, understood as the enjoyment of the highest level of physical, mental, and social wellbeing" and it is clear that it is the State that is compelled to protect and optimize this right, seeking the physical, moral, and social improvement of all the people to the highest standard possible.

In order to achieve this, the State must not only refrain from harming the health of the population and prevent others from malicious action, but also seek the extension of health services to all, and particularly to the most vulnerable groups, and the provision of free of charge means of prevention, and care to indigents or to people with limited resources. .

Thus, it appears that the State is responsible for designing public health policies and carrying them out by making good legal standards of superior force, expressed as rules, principles, and guidelines (Atienza-Ruiz Manero, The Pieces of the law. Theory of legal statements, Barcelona, 1996, p. 26 ff).

Both the legislation passed on the matter—such as the Decrees/Laws No. 15.181 of 21 August 1981, No. 15.334 of 18 October 1982, No. 15.443 of 5 August 1983, No. 15.703 of 11 January 2008—and the decrees and resolutions of the Executive—cited as Decree No. 265/006 of 7 August 2006 and the ministerial resolution of 16 October 2006—should be interpreted in this context.

From that perspective, it has been discussed the role of the Judiciary as a guarantor of fundamental rights and, without intending to incur excessive oversimplification, it must be recognized that people are allowed to avail themselves of the justice system in order to defend their right to health in various ways, both against actions that violate that right and against harmful omissions, by the state or others.

(IV) The above remarks are necessary in this case, because in the text of the complaint, the patient claims against the Mutual for contractual liability, holding them accountable of a breach of duty of care by not providing free of charge the medication prescribed by the treating physician. In this appeal, the protection of the right to health is invoked as ground for the revocation.

However, according to the rules mentioned, it does not seem that it can be imputed to the health care facility, nor to its medical staff, a breach of contract or a violation of a constitutional right that holds them responsible for the damage alleged by the appellants.

These events having occurred before the enactment of Laws No. 18.211 of 5 December 2007 and No. 18.335 of 15 August 2008, must be judged under the constitutional provisions of the Decrees/Laws No. 15.181 of 21 August 1881 and No. 15.334 of 18 October 1982, according to which “the rights and obligations of Institutions of Collective Health Care (IAMC), and of their members, affiliates, or users, will be determined according to the regulation of this law” and “according to the technical guidelines established by the Ministry of Public Health” (D. L. No. 15.181, Article 7). Instead, it stood in place Decree No. 265/006 of 7 August 2006, which approved the Therapeutic Drug Form.

According to that legal regulation, the private health insurance institutions with a pre-paid scheme should provide their patients, regardless of their economic resources, “the drugs included in the list of Annex I and the nutritional formulas of Annex IV of this Decree,” which did not include—nor includes now—the drug prescribed by the treating physician. The drugs included in Annex II—where the drug in question was included—should be provided, “as soon as the protocols related to these drugs are established and arrangements for national financing of the drugs are defined.”

Without ignoring that the institution was entitled to give the medication—since it was authorized by the Ministry of Public Health—it was not required to give it to its members because the conditions required had not been yet met: not until the 24/7/08 its usage protocol was approved (fs.203) and on 9 October 2007 the form of financing was determined, it cost was assumed by the National Fund of Resources (fs. 212/213).

This Court does not agree with the interpretation that the appellants assigned to the ministerial decision No. 614/006 of 8 October 2007, according to which, "The Technical Directors of the Institutions and Services will be responsible for the implementation and enforcement of current legislation, without prejudice to its powers to validate other pharmacological options different from those prescribed, provided they are listed in the Therapeutic Drug Form. This means then that the mandatory current health regulations is in force and therefore, the drugs described in the relevant lists, must be supplied by both, the private and public sector, without exceptions of any type."

According to the members of this Court—who disagree with the appellants and also with what in that regard holds our counterpart in the second circuit (TAC 2, Sent. 159/2008, considering IV)—it does not follow that, against the provision of Decree No. 265/007 that is said to apply, the health care institutions should provide its affiliates with whatever drug is included in the Therapeutic Drug Form, without exception. Rather, a more reasonable interpretation indicates that, if the compulsory compliance with the provisions of Decree 265/006 was ratified, it implies the supply of the medications under the conditions mentioned therein, without exceptions. That is, the mandatory current health regulations apply and, to that end, drugs on the lists cannot be denied. It is not reasonable to interpret that the Advisory Commission requirement to establish protocols for the use and method of financing of the drugs included in Annex II is suppressed, putting the Mutual temporarily in charge of providing them.

So, in the opinion of the Court, it cannot be argued that the Mutual violated any legal or contractual obligation, nor that an unlawful act consisting of denying or corrupting the right to health of the member, established as a fundamental right in the terms previously mentioned and regulated by laws and decrees whose constitutionality is unquestionable, has materialized.

(V) The solution reached is that the dismissal of the appeal with regards to the Catholic Workers Circles and of Dr. Anuar Absiab for having made the decision that denied the Mutual coverage of the drug is confirmed.

The decision has very broad support in precedent cases, from the case decided by the Civil Appeals Court, 5th District (Sent. 101/2007) and from the resolution of this Court, acting as the Court de Feria, for counterpart of the 4th District (Sent. 79 of 6 July 2009).

Therefore concluding there that "although the link between the medical institution and its member is regulated by a contract, its content is determined in part by laws and regulations,

that is, with an undeniable state intervention. To that extent, we agree with the statement of the case law and the doctrine, that the Mutual had no obligation to supply a drug that was not included in Annex I or IV of the Therapeutic Drug Form, for their supply was not comoulsory. Granted that the supply was optional, the refusal does fall within the law (Article 10 of the Constitution of the Republic) (Conf. Ettlin, Edgardo. "On the conflict between rights, economic opportunities, and health care contract compliance" in the Journal of Law and Courts, p. 182 and 186)."

(VI) Nor is sustained the claim for exempting the co-defendant Dr. Ignacio Muséof of responsibility, whose conduct was harshly categorized —imprudent, reckless, negligent, mistake-ridden—without a clear, outlining justification for these claims.

It arises from the case file that the doctor prescribed a medication authorized by the Ministry of Public Health, as contained in Annex II of the Therapeutic Drug Form, which the appellants agreed was the appropriate route to treat the patient and recognized that it had been indeed used successfully. As has been seen, there was not an error in what was reported to the medical institution when asked if it was compulsory to give it free of charge to a member.

Perhaps the appellants believe there is a pragmatic contradiction in prescribing a drug that the Mutual system is not compelled to cover, but this contradiction dissolves if it is observed that the Mutual could have chosen to supply it or that the patient could have chosen to purchase it at his own cost, which is what happened. Finally, it has not been established that, if the difficulty to obtain the drug had been suggested, that an alternative medication had been requested by the appellant and denied so in this manner, the defendants cannot be accused of the negligence that is postulated in the appeal.

(VII) In weighing the confirmatory decision in this instance, the Court considers that there is no merit to impose additional costs to the appellants.

On such grounds and provisions cited above, the Court…

FINDS:
To confirm judgment appealed, without special costs..
Notify and return, with a copy for the Judge. (H. notional second instance $40,000.)