

Decision No. 1160, dated December 16<sup>th</sup>, 2008 of the  
Supreme Court of Cassation on civil case No. 3373/2007,  
3d Civil Division, Civil College, reported by Judge Maria  
Ivanova

Art. 188 Civil Procedure Code (CPC) (repealed)

Art. 49 Obligations and Contracts Act (OCA)

Regarding alleged delict resulting of medical malpractice

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Proceedings under art. 218a of CPC (repealed), in relation to par. 2 of the  
Transitional and Final Provisions of CPC, SG, No.59/07

The proceedings have been instigated upon cassation appeal filed by F.S and K.  
Ya. against appellate review judgment of the Appellate Court of Plovdiv /AP/ on civil  
case No. 913/06. The appeal formulates complaints for decision incorrectness:  
unreasonableness and unlawfulness, and seeks its revocation.

The plaintiff Y. “S” AD, city of P. expressed no stand.

The cassation appeal is lodged within the time limit established in art. 218c of the  
CPC against appellate review judgment subject to cassation appellate review and its  
examination is admissible.

The Supreme Court of Cassation of the Republic of Bulgaria, having examined  
the complaint pursuant to art. 218e of the CPC, considers as follows:

By the appealed appellate review judgment the Court dismissed the claims under  
art. 49 of the COA brought by the appellants in cassation against the respondent: to  
adjudicate each of the appellants 20 000 BGN for compensation of non-pecuniary  
damage, caused by the death of their son S.Ya. /born on March 15<sup>th</sup>, 2005/, occurred on  
June 11<sup>th</sup>, 2005 due to wrongful acts and omissions in the administration of his treatment  
in the respective hospital. It is accepted that such acts are not to be established under the  
case: the child’s death isn’t due to medical malpractice when diagnosing the disease and  
to non provision of medical care on behalf of the medical team during his treatment.  
There is lack of tort caused by this team within the meaning of art. 45 of the COA upon  
which the respective hospital shall be held liable under art. 49 of the COA.

The Appellate court findings are partially unreasonable and made on the ground  
of incomplete evidence, which, considering the subject matter and the need of special  
medical expertise when solving the dispute, the AC should have collected ex officio –  
Interpretive judgment No. 1/01.

It has been found under the case that the death of the child of the plaintiffs has occurred three hours and a half after its admittance in the respective hospital and is caused by acute virus infection, complicated by the development of intestinal impassability. The infection is diagnosed when performing urgent surgical intervention, required due to found at the admittance of the child at the hospital intestinal impassability /ileus paralyticus/. The appellants' complaint that the intervention was unnecessary and undertaken without performing the necessary studies for the disease of the child is ungrounded. Out of the expert's conclusion and the autopsy protocol it has been found out that considering the established at the admittance of the nursing intestinal impassability and with view to its state as a whole, the performance of urgent surgical intervention to examine the abdominal cavity has been imperative and it has been undertaken with due diligence and in accordance with the rules and methods of treatment of the diagnosed disease.

Nevertheless, the second allegation of the appellants is grounded – not enough evidence have been taken for the child state and the necessary measures for the treatment of the diagnosed at the surgical intervention main disease - virus infection, after the end of the operation at 1 o'clock of June 11<sup>th</sup>, 2005 until the child death at 2 o'clock on same date. In a written conclusion on the case the expert has indicated that the child death couldn't have been prevented, considering the nature and the way of development of the virus infection, even if diagnosed at the time of its admittance at the hospital. The infection has rapidly developed, causing catharal-desquamative pneumonia. Moreover the child had suffered idiopathic non typical for the age mucardiomyopathy, favoring the main disease and leading to its more acute development. The expert has explained in court that virus infections are treated with drugs, not directly against the virus, but strengthening the overall immune protection of the organism and preventing from virus infection. After the operation such medicine has not been given, due to the lack of time. Considering these data the AC has been obliged also ex officio to make clear if there were any established medical rules and regulations /including in the field of time matters/ to treat the infection, what kind of consultation, studies and drugs were necessary and for the later: where these applicable, considering the overall state of the child and were these applied in the case. The non-clarification of the above results in the groundlessness of the Appellate Court final conclusion that there is no tort giving raise to the respondent's liability.

The Appellate Court decision has been delivered in substantial breach of the court procedural rules: incomplete clarification of the case through the fault of to the Appellate Court, resulting in the groundlessness of its final conclusion for unreasonableness of the claim. Therefore the case shall be revoked and the case to be returned to the Appellate Court for new examination, where with expert's help shall be clarified the indicated above circumstances, related to the subject matter – Interpretative judgment No. 1/01, point 11.

Considering the above statement, the Supreme Court of Cassation of the Republic of Bulgaria, 3d Civil Division,

DECIDED:

TO REVOKE the decision of the Appellate Court of Plovdiv on civil case No. 913/06, dated March 21<sup>st</sup>, 2007.

To return the case to this Court to be examined by another panel of judges.