

Court of Cassation

First Civil Chamber

Public hearing of Tuesday 7 December 2004

Appeal No.: 02-10957

Published in the bulletin

Appeal.

Mr. Ancel, president

Mrs. Duval-Arnouls, contributing advisor

Mr. Sainte-Rose, general advocate

SCP Richard, SCP Bore and Salve of Bruneton, lawyer(s)

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

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THE COURT OF CASSATION, FIRST CIVIL CHAMBER, rendered the following judgment:

On the only ground of appeal:

Reviewed Article 1147 of the Civil Code;

Whereas Mrs. X...has received on 12 December 1980 tympanoplasty performed by Mr. Y..., an otorhinolaryngologist (ear, nose and throat doctor).; that, following a facial paralysis after the intervention, Mr. Y...sent his patient to a colleague who removed the prosthesis that he had inserted; that on 13 January 1999, Mrs. X...sought the accountability of Mr. Y...citing a breach of his obligation to inform;

Whereas to convict Mr. Y...to repair the damage linked to the entire facial paralysis, the challenged judgment reveals that he had not informed his client of the risk of paralysis associated with the fitting of a prosthesis, if the intervention surgery was necessary in light of the possibility of cholesteatoma, that the fitting of a prosthesis was not essential, that the occurrence of the damage for which compensation was sought constituted a contingency that should have been reported to Mrs. X...having been deprived of any possibility of choice due to the lack of information presented;

Whereas, however, the violation of the obligation to inform can be penalized only as to the loss of opportunity suffered by the patient, to avoid by a perhaps more appropriate decision, the risk that is eventually realized, the damage corresponding to a fraction of the various amounts of damage suffered, which is determined by measuring lost opportunity and cannot be equal to the bodily harm resulting from the medical procedures; that, in determining thus, the appeal court violated the aforementioned text;

FOR THESE REASONS:

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NULL AND VOID, in all its provisions, the judgment delivered 28 November 2001 between the parties, by the Court of Appeal of Rennes; call, therefore, the case and the parties in the state where they were before said judgment, and, to be done right, return in front of the Court of Appeal of Caen;

Order Mrs. X... to bear the costs;

Having reviewed Article 700 of the new Code of Civil Procedure, reject the request of Mrs...X;

Said that the procedures of the public prosecutor at the Court of Cassation, this judgment will be transmitted to be transcribed in the margin or after the appealed judgment;

Done and judged by the Court of Cassation, First Civil Chamber, and pronounced by the president in his public hearing of seventh of December two thousand and four.

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Challenged decision: Court of Appeal of Rennes, 28 November 2001

Titling and summaries: MEDICAL AND PARAMEDICAL PROFESSION – Doctor – Contractual liability – Obligation to inform - Breach – Sanction - Determination. A breach of the obligation to inform can be punished only according to the loss of opportunity suffered by the patient to avoid, by a decision perhaps more appropriate, the risk that has been realized.

The damage then corresponds to a fraction of the various heads of damage suffered which is determined by measuring lost opportunity and cannot be equal to bodily harm resulting from medical procedures.

MEDICAL AND PARAMEDICAL PROFESSION – Doctor – Contractual responsibility - Damages – Lost of opportunity to avoid the risk realized – Evaluation – Procedures – Determination of CONTRACTUAL LIABILITY – Damage – Compensation – Evaluation of prejudice – Elements – Loss of opportunity – Various applications

Jurisprudential precedents: On the compensation of prejudice resulting from a breach of a doctor's obligation to inform, in the same direction as: First Civil Chamber, 1990-02-07, Bulletin 1990, I, no. 39, p. 30 (rejected); First Civil Chamber, 1999-06-29, Bulletin 1999, I, no. 220, p. 141 (partial appeal). On the determination of indemnity for compensation for the loss of opportunity, in the same direction as: First Civil Chamber, 2000-07-18, Bulletin 2000, I, no. 224 (1), p. 147 (partial appeal), and the cited judgments. On the compensation for prejudice resulting from a breach of a doctor's obligation to inform, cf: State Board, Assembly, 2004-05-19, no. 216039, and the cited judgment.

Applied Texts:

Civil Code 1147