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Resolution No.:	
Proceedings:	**CASSATION APPEAL**
Speaker:	**SANTIAGO MARTINEZ-VARES GARCIA**
Resolution type:	**Ruling**

In Madrid, October 22 of 2009

The Third chamber of the Administrative Tribunal of the Supreme Court, Fourth Section, has reviewed the appeal number 710/2008, filed by the court agent Isabel Afonso Rodríguez, on behalf of Mr. Oscar, against the decision of the Fourth Section of the Chamber of the Administrative Law Section of the Superior Court of Catalonia, dated October 16 2007.

Factual background

First. - The Chamber of the Administrative Law Section of the Superior Court of Catalonia, Fourth Section, rejected on October 16 2007, the appeal filed against the administration number 242/2005, ordering each of the parties to pay their own legal costs.

Second. - In written statement dated November 27 2007, attorney Mr. Carlos Arcas Hernández, on behalf of Mr. Oscar, filed the preliminary appeal against the decision of that Chamber, dated October 16 2007.

The Chamber, in a ruling dated January 28 2008, declared that the appeal complied with all formal requirements and requested the parties to appear before the Third Chamber of the Supreme Court.

Third. - In the written statement dated March 4 2008, the court agent Isabel Afonso Rodríguez, on behalf of Mr. Oscar, filed the writ of appeal on the merits, requesting the Supreme Court to reverse the judgment of the lower court and render a new lawful decision. The statement was admitted by decision of the Court dated September 28 2008.

Fourth. - In written statement dated February 2 2009, the attorney for the Government of the Catalonian Region manifested opposition to the appeal and

requested the Court to deny it and to sentence the appellant to pay the legal costs of the Government.

Fifth. - It was agreed by the court to discuss the decision on October 7, 2009.

Chosen to issue the opinion of the Court, Justice Santiago Martínez-Vares García, issued the Court's decision.

Legal Foundation

First: The representative of Mr. Oscar attacks in this appeal, the decision of the Chamber of the Administrative Tribunal, Fourth Section of the Superior Court of Catalonia, dated October 16, 2007. The decision 242/2.005 given by the court after the action against the Resolution of the Catalonian Institute of Health Chancellery of Health of the Government of the Catalonian Region, denied by administrative silence the claims of strict responsibility of the administration requested by the appellant for the total amount of thirty five thousand three hundred forty five Euros for damages suffered due to a electrophysiological study practiced on the appellant on March 25 1997. The decision of the Superior Court of Catalonia rejected the action against the Public Administration.

Second: In its first legal rationale, the lower court determined the object of the controversy. It established that: "the purpose is to determine the legality of the administrative resolution of the ICH that has been challenged, which declines the claim for damages for strict liability caused to the claimant in the medical intervention practiced on the March 25 1997, the electrophysiological study. For such reason he claims the amount of 335,345 Euros, specified in the lawsuit."

In the same Legal Foundation, the decision determines the facts the court considered to be the critical ones: "The claimant was declared in a permanent and absolute disability situation by resolution of the Spanish Social Security Institute on July 17 1986, for his medical condition that included ischemic cardiopathy, heart attack and post infarct angina. The claimant was a high-risk patient with a medical history of heart attacks (November 10 1984), strokes (1996 an 1997), hemi-paresis and recovery from the strokes. On March 24 1997, an electrophysiological study was undertaken. A catheter was introduced throughout the right femoral venous way and another catheter throughout left femoral arterial way. During the proceedings the patient suffered an episode compatible with angina and electrocardiographic alterations. The result was an aortic puncture both upstream and downstream. Therefore, another surgical intervention for the reconstruction of the upstream aorta was practiced. The patient was discharged on April 10 1997, 'with a general good status, without any signs of cardiac insufficiency, good healing of surgical wounds, light anemia and under pharmacological treatment', without any other complication derived from the aforementioned surgical intervention".

Afterwards, in the same legal rationale, the decision compiles the allegations of the parties in trial and the different expert reports filed to support the allegations and establishes that: "In the lawsuit, the claimant alleges that he received deficient assistance during the electrophysiological intervention, since it was totally unnecessary considering the high-risk patient condition and his high hypertension; lack of medical expertise due to breach of the medical protocols, since the aortic rupture caused by the catheter was properly followed through the monitor while it was happening; inexistence of informed consent; definitive and irreversible long-term effects, as well as functional limitations. The damages claimed are referred to the following: hospitalization days, 898 Euros; long-term effects 96.5 points [sic], 184,411 Euros [sic]; correction factor 18,531 Euros; permanent and absolute disability 70,505 Euros; complementary pain and suffering 66,979 Euros; pain and suffering of family members 100,469 Euros (pain and suffering caused to the wife, who requires psychopharmacological treatment for chronic depressive disorder), adding the total amount of 331.345 Euros.

In the affidavit issued by Dr. Pedro Jesús, general medicine and general surgery specialist, it's emphasized how the puncture was caused, iatrogenically, of the ascendant and descendant aorta, by an incorrect exploratory technique, that in any case, shouldn't have been performed; There is no explanation to how the aorta puncture was not observed in the monitor; Neither a radiographic study of the thorax nor a MRA were performed to verify the tear produced. After surgery the patient suffers from ventricular tachycardia, ischemic cardiopathy and aortic puncture. Delayed diagnosis provoked the existence of aftermath effects effects. It concludes that, effectively, there was medical malpractice for the application of an inadequate technique. Nowadays the patient needs continuous medical controls and pharmacological treatment, which has wrought a depression and anxiety.

In the statement of opposition to the claim, the Catalonian Institute of Health argues that the undertaking of the electrophysiological intervention was absolutely appropriate for the case of the claimant, considering the cardiac arrhythmia that they tried to suppress; there was no malpractice, but a proper care of the patient, both in the indicated practice as in the surgical intervention performed afterwards, and a prove is that the patient was discharged from the hospital without suffering any new alterations derived from the electrophysiological intervention afterwards. It is added that the puncture of the aorta is possible, being foreseeable in patients of generalized arteriosclerosis, which does not suppose the incorrect or wrongful undertaking of the aforementioned intervention. There was no delay in the diagnosis, since the patient was operated in emergency, resolving therefore the problem. It is added that the patient was left with a residual aneurism, but the double light presented thrombosed without further problems, and nowadays there is no complication at all. In every moment, the patient was attended as provided by the medical protocols required for each case. The puncture of the aorta was not due

to inexperience, but due to the complication related to an intervention of such nature. Another petition was filed, recognizing only 71.027 Euros, as specified in the written contestation of the claim.

The affidavit of M.D. Norberto, specialist in the subject, refers to the accident that happened when the catheter tears an athermanous plaque perforating the intimate and creating a false light (aortic puncture). There was no wrongful technique, neither malpractice, since this was a complication that may appear in patients of high atherosclerotic risk. The diagnosis was made rapidly; the patient was intervened in emergency fixing the case. The electrophysiological study was indicated after the patient presented an arrhythmia (ventricular tachycardia), potentially deadly. As a sequel, the patient shows a small residual aneurism, with a thrombosed double light without further problems.

In the affidavit issued by Mr. Aurelio, court-appointed expert, specialist in legal and forensic medicine, illustrates the following: inexistence of informed consent for the treatment undertaken; existence of a risk that the soft plastic catheter may damage the blood vessels; it cannot be assured that the aortic puncture was produced by a lack of attention or inexperience in the applied technique. But affirms that "… there was a deficient provision of assistance services when it was undertaken without prudence the cardiac electrophysiological study to a patient that presents a foreseeable, evitable and elevated complication risk (risk that the patient could not assume since was not duly informed). The treatment and the later developments are qualified as adequate. It is insisted that the intervention was not justified, the electrophysiological test (the arrhythmia was reversed by the pharmacological treatment), instead, a scan of myocardial perfusion with the purpose of identifying the landscape to revascularize. But next establishes that the electrophysiological study would have been adequate in there was informed consent of the patient, since such procedure "was not clinically contraindicated" taking into account its purpose. There is a causal relationship between the intervention and the injury derived from it, this is, the aortic puncture. The claimant suffers psychiatric syndrome, mood changes; cardiac insufficiency; aneurism of traumatic origin operated; moderate esthetic prejudice.

Regarding the damages claimed, Mr. Aurelio values precisely the aftermath effects effects, including pain and suffering, in 88,468.56 (page 12 of the affidavit), correction fact plus total disability in 41,342.79 Euros (page 13 of the affidavit); period of hospitalization, 991.52 Euros, which adds up to 130.802,87 Euros (page 13 of the affidavit), without valuing the pain and suffering of the family that the claim estimated in 100,469 Euros (prejudices caused the claimant's wife).

Clarifying the affidavit it is stated that, nowadays, the claimant makes a living of "bed-living room", suffering from effort dyspnea, breathlessness felling when talking or trying to hold a conversation; symptoms of cardiac insufficiency for the minor

efforts (page 4 of the clarifications, where these points are justified in function of the aftermath effects with its correspondent economic translation). The patient, adds the affidavit, needs of clinical following medical and pharmacological for the rest of his life, even if the aortic lesson have not happened. It also adds in the clarifications, that the wife of the claimant requires a "more intense" psychopharmacological treatment. Also the clarifications of the affidavit (page 10), express that the most adequate diagnosis technique for the study of cardiac arrhythmias is the electrophysiological cardiac study. Adds that if the ventricular tachycardia is not reverted to a sinus rhythm it could be considered as potentially deadly. It does not consider urgent to put the patient under the electrophysiological study (page 10 of clarifications), "it was not justified before the group of symptoms at the time of the exploration, since the pharmacological treatment showed to be effective when it resolved the arrhythmia that initially caused the facultative assistance". Considers the later surgical intervention of reconstruction of the aorta to be adequate. Adds that before of the electrophysiological test, the patient would have also needed medical assistance for life (page 18 of the clarifications)."

The decision, in the second of its legal rationales refers initially to the evaluation of the evidence and states that: "This Court has undertaken a combined evaluation of the allegation and legal rationales of the claim, as well as the ones in the statements of opposition, evidence presented, especially documentary evidence and the affidavits and their ratification, to arrive to the conclusion, by unanimity, that the claim can not be considered because of the following reasons".

In the same rationale the court refers to the case law of the Supreme Court extensively, related to informed consent and the required relation of causality in order to determine if there is or not strict liability of the health administration, specifying the requirements that need to concur in each case for it. Concludes the court relating the liability to the particular case, around which states: "The Public Administration alleges that the patient was informed orally, but since this affirmation was denied in the claim, the burden of proof relied on the Catalonian Institute of Health, that has not proved the existence of neither information nor consent of the claimant.

As stated before, the lack of information or consent does not suppose a factual basis to demand strict liability, since there may be a case with a risk to life when the doctor is obliged to adopt an urgent decision and the more adequate, to save the patient's life, as it has been indicated and that would be considered later on herein.

Getting the core of the question herein discussed, we will analyze next if there is concurrence of the necessary relation of causality between damages suffered and claimed as an exclusive and excluding consequence of the surgical intervention suffered and mentioned above.

Considering the medical history aforementioned, we will analyze the result of the affidavits, that offer completely different rationales, since from the affidavit presented by the claimant medical malpractice is concluded, which is denied by the affidavit brought by the Catalonian Institute of Health and later on confirmed, with nuances and contradictions, in the affidavit requested by the court in this process, which summary was also exposed above.

Therefore, there is no other solution but to proceed to the affidavits since there is opposition about the legal effects of the event herein debated; and not only legal but also medical effects, since the affidavits are contradictory. For that reason, the court has no option but to value them combined, in attention to the specialization of the professional issuing them, the description of the ailments and their meaning regarding the possible determination of the relation of causality requisite.

The affidavits, as another evidence in the process, has the purpose of complementing the knowledge of the court or tribunal, when taking a decision in which the rationale and technical content makes necessary the help of an expert in each one of the scientific subjects that may rise. Regarding medicine, science is inexact and incomplete, among other reasons, because of the own nature of the human being, not always when the "lex artis" is applied neither the totality of the scientific knowledge, the healing of the patient is achieved.

But the affidavit as evidence cannot bind the court radically, but instead, as another piece of evidence, must be valued in function of the reasonability and especially of the circumstances concurring in each case.

It is true that once, unfortunately, a damage or fatal consequence happens, is relatively easy to determine afterwards what should have been done each time. But, in view of the how the events developed, since the beginning of the medical treatment because of the ailments that the claimant presented at the time, so the undertaking of the tests that the medical team considered convenient before the situation of cardiac arrhythmia (potentially deathly tests), the decision, in function of the status of the patient and his medical history, was to undertake the electrophysiological study, the most appropriate surgical intervention, as the affidavits herein assess. Even the affidavit requested by the court does not dismiss its undertaking and in the clarifications states that "is was not medically contraindicated".

This court has the rational conviction that the electrophysiological study was the indicated one, even when the other tests indicated in the affidavits could have been undertaken, but any of which was credited to be the most adequate one, like the reputed myocardial perfusion scan. The speculations of what could have been done or the conjectures on the result of other interventions are not valid, unless they are

brought along with the necessary evidence to credit either veracity or reality of them.

The known damage was produced due to the high arteriosclerotic risk of the claimant, which was corrected immediately without causing him further complications.

There was no malpractice but an urgent medical decision due to the seriousness of the patient's condition, which implied the most accurate surgical intervention, indicated definitively at the moment, and not later, considered as vital to save the patient's life, as it actually happened. For this reason, and even though the legal relevance of the arguments of the claim, valued herein fairly, we cannot share the deduction made about the effects of the lack of information and the damages caused.

As expressed previously, the lack of due information must be related necessarily to the circumstances concurring on March 24 1997, when the decision to undertake the electrophysiological study was made, that even when producing an aortic rupture –as has been indicated several times- was a correct decision adjusted to the vital needs that the moment required for the viability of the patient. There is no sense then, to analyze this lack of information in abstraction of those objective urgent circumstances, nor to refer this requirement to general considerations that do not relay in the precise moment of adopting the decision by the medical team."

Third. – The appellant claims in the appeal herein six pleas for revision, all of them under article 88.1.d) of the Law of Jurisdiction for "infraction of the rules of the legal system or the case law, applicable to resolve questions object of the debate". The first plea, claims a infringement of articles 319, 348 and 386.1 of the Law of Civil Procedure, in relation to article 5.4 of the Organic Law of the Judiciary, for violation of the right to judicial protection provided in article 24.1 of the Constitution, for infringement of the rules of reasonable appreciation of evidence, referred to the fact contemplated by the appealed decision of considering that in the case objective circumstances of urgency concurred, since there is no evidentiary support for such an interpretation of the facts.

The second plea, also backed in article 88 of the Law 29/1998, for infringement of article 217 of the Law of Civil Procedure and the case law referred to it, for violation of the rules that distribute the burden of proof in regard to the give as proven that the public administration complied with its duty of informed consent, when the burden of proof should rely on the Administration.

The third of the pleas also under article 88.1.d) of the Law of July 13 1998, for infringement of article 10.5 of the General Law of Health and the case law of the supreme court that refers to it, for lack on informed consent.

The fourth, as well as the previous ones, under article 88.1.d) of the quoted Law, claims the infraction of article 348 of the Law of Civil Procedure, in relation to article 5.4 of the Organic Law of the Judiciary, for violation of the right of judicial protection established in article 24.1 of the Constitution, for infringement of the rules of reasonable appreciation of evidence, in regard to the fact that the appealed decision considered that there was no malpractice in the undertaking of the electrophysiological study done on the patient, when there are affidavits that acknowledge it so.

The fifth of the pleas also under the article 88.1.d) of the Law of Jurisdiction, found it in the infraction of article 217 of the Law of Civil Procedure and in the case law of the Supreme Court that refers to it, claims infringement of the rules related to the distribution of the burden of proof, when the court gave as proved that the sued public administration did not incurred in malpractice without any evidence given by the administration proving that the intervention was undertaken under *lex artis*.

The sixth, and the last of the pleas, under article 88.1.d) of the Jurisdiction Law, claims an infringement of article 106.2 of the Constitution, article 139, 140 and 141 of the Law 30/92 of November 26, and the case law of the Supreme Court that refers to it, in the sense that it is consolidated jurisprudential doctrine about strict liability of the public administration, the one that comprehends it as objective and of result, in a way where the relevant issue is not the illegal proceeding of the administration, but the illegality of the result or lesson."

Fourth. – For logical reasons of priority for the solution of the issues herein set by the appeal, we will examine, in the first place and jointly, pleas second and third of the appeal, that from different angles or points of view, refer to the absence of informed consent, and to the distribution of the burden of proof among the parties in relation to that informed consent.

In relation to the second plea, the first one we will go through, the decision is attributed with the infraction of article 217 of the Law of Civil Procedure and the case law referred to it, when there is a infringement of the rules that prevail in the distribution of the burden of proof in regard of the fact of given as proven that the sued public administration complied with its duty of informed consent, when such burden of proof must rely on the administration. And regarding the third party, it is alleged an infringement of article 10.5 of the General Law of Health and the case law that refers to it, for absence of informed consent.

Getting to the second plea, third in the appeal, according to article 217.2 of the Law of Civil Procedure "it corresponds to the claimant (…) the burden of proof of the certainty of the facts that ordinarily will produce, accordingly to the applicable rules of law, the consequent legal effect to the claims made", while section 3 of the article affirms that "the burden of proof of the facts that, according to the applicable rules,

impede, vanish, or set aside the legal effectiveness of the facts referred to in the previous section, relies on the defendant" and this Chamber adds that section 7 of article 217 of the Law of Civil Procedure contains a mandate that "in the application of the previous sections of this article, the court has to have present the availability and capability to prove that corresponds to each of the parties in litigation".

In this matter, the appealed decision after a careful exposition about the informed consent in the very extensive second legal rationale, affirms that the "defending public administration alleged that the patient was informed orally, but since this statement was denied by the claim, the burden of proof corresponds to the Catalonian Institute of Health, that has not evidenced neither the existence of duly information nor the consent of the claimant".

The plea starts stating that the decision affirms that: "the defending public administration, neither the Catalonian Institute of Health nor its Government, justify of accredited anything about a duly informed consent to the patient, regarding the possible complications or aftermath effects that could carry out the interventions of March 24 and 25, as well as the possibility of alternative therapies to it. Furthermore, there is no justification nor even and allegation in respect of the fact that, in the present case, we are before a case of vital urgency, in which there is no need to give such consent.

Nowhere in the medical history may be found a document or annotation that will serve to accredit that the patient or his family were informed about what were both tests about, the implicit risks, this is, the general risks and personal risks of the very patient because of his background.
The decision of the Supreme Court of Justice of Catalonia does not comply with the quoted doctrine, since it considers that the public administration acted correctly in this case, although, how has been said, it did not justified anything about giving the patient or his family the duly information for their consent, neither anything about there were objective urgency circumstances that exempted the need of it. As it has been said before also in the preceding plea, regarding such urgency, it has not only not showed anything, but also it has not even made some allegations about such an urgency".

The defendant administration responds "that se decision recognizes that there was no informed consent so this plea cannot be considered in any way".

It is convenient to bring out that the appeal mixes the claim about the inversion of the burden of proof regarding whether there was informed consent or not, with the affirmation that assures the decision made about the informed consent not being necessary because in the particular case the circumstance of existence of a vital risk for the patient concurred. That is not the issue addressed by the plea but whether if it existed informed consent or not, and to that the decision responds with crystal

clarity that there was not, because who could prove it easily did not do so. Therefore it cannot be doubt that there was no informed consent. What the decision does is to recognize that who has the ability to prove was the public administration that sustained that the information was given verbally, asseveration that after being expressly denied by the claimant, gave place to the Chamber to go towards a holding that no consent existed.

Regarding the third of the pleas, we already sustained that alleges an infraction of article 10.5 of the General Law of Health, applicable to the case herein and that established, while was in force, that: "everyone shall have the following rights in respect to different public health administrations: To obtain, in comprehensible terms for him and his family or close one, complete and continued information, verbally and written, about his procedure, including diagnosis, prognosis and alternative treatments."

The plea starts at the absence of informed consent that the decision recognized, and denies as well accreditation of it in the medical history the need for the intervention for the existence of a vital risk.

It goes one and states, "The lower Chamber gives as proven fact that there was a correct undertaking of the public administration regarding the duly informed consent to the patient, without adequately balancing that, in this aspect, the burden of proof relied on the public administration and this one has not accredited that complied with the obligation to inform the patient of the possible complications or aftermath effects that the interventions to be undertaken could cause on him, neither that it was a case of vital urgency. Such infringement has been relevant and determinant of the decision's holding, since considering the aforementioned, the Chamber concludes that there was no malpractice and consequently dismisses the claim".
The public administration argues in contrary that: "The decision recognizes the status of Mr. Oscar's health. However, this does not mean that the current health status of Mr. Oscar was a consequence of the medical practice herein examined, since the decision affirms that the damage was produced but it was corrected immediately, without causing any further complications. We understand therefore that this plea cannot be held."

This plea mixes again, as the previous one did, the existence or not of informed consent, with the possibility that it was necessary or fell into the exception enclosed in section 6.c) of article 10 of the Law 14/1986, "when the urgency does not allow delays because of (…) danger of death" of the patient.

Again we shall underline that the decision holds and recognizes that there was no informed consent.

In view of the aforementioned, is evident that pleas must be upheld. There is an incontrovertible fact that the decision gives as proven and that is the inexistence of informed consent and that inexistence lack of reasoning to be. Even more, when the facts occur in a referential hospital in the pathology presented by the patient, as it is the Hospital of Valle de Hebron. There is no excuse that the events occurred in 1997, since the obligation of information existed even before the enactment of the General Law 14/1986 of Health, and since then more than ten years had gone by, and the content of legal mandate of article 10.5 of the Law was categorical, especially for the undertaking of tests like the ones to be performed to this patient. Without any doubt, because in other case the public administration would have proved it, it was omitted by whom shall complied, the obligation of giving to the patient in comprehensible terms, to his family or close ones, complete and continued information, verbally or written, about the proceedings, including diagnosis, prognostics and alternative treatments.

The patient should have been informed both for the catheter test undertaken on March 24 1997, as well as for the electrophysiological study undertaken on the 25, that had to be suspended "when the patient presented conditions of acute pain compatible with angina along with alterations assessable in the electrocardiographic trace". In the same way, it should been informed when already in hospital and after the test were done "the diagnosis was of aortic puncture type A, that along with severe aortic insufficiency, gave place to an urgent intervention to reconstruct the ascendant aorta", information that in those circumstances we suppose the patient could not receive but that it should been given to his family.

When considering these two pleas, the sentence must be reversed and declared null and void without any value or effect.

Fifth. – Following the resolution of this two pleas, we will go over pleas first, fourth and fifth of the appeal, because the three go around the assessment of the evidence that is showed before lower Court.

The lower Chamber in the same second rationale aforementioned makes a statement that it is convenient to take as reference in relation with the three pleas about which we will make an evaluation subsequently.

The lower Chamber states: "There is no other solution but to proceed to the affidavits since there is opposition about the legal effects of the event herein debated; and not only legal but also medical effects, since the affidavits are contradictory. For that reason, the court has no option but to value them combined, in attention to the specialization of the professional issuing them, the description of the ailments and their meaning regarding the possible determination of the relation of causality requisite".

The Chamber, therefore, by making this affirmation, is giving away that the statement made in the decision regarding the existence of a relation of causality between the medical attention given to the patient and the results derived from it, is acquired from a joint assessment of the evidence and, in particular, of the affidavits considering the various and different ones.

The first plea establishes that the decision infringed articles 319, 348 and 386.1 of the Civil Procedural Law in relation to article 5.4 of the Organic Law of the Judiciary for violation of the right to judicial protection of article 24 of the Constitution, because its infraction of the rules reasonable and non arbitrary assessment of the evidence, referred to the fact that the appealed decision considered that in the case was a concurrence of objective circumstances of urgency, when there is no evidentiary support that covers such and interpretation of the facts.

The plea sustains that: "The decision herein appealed considers that there cannot be analyzed 'the absence due information' in 'abstraction of those objective circumstances of urgency' (page 14 of the decision, second paragraph). Therefore: happens that such asseveration is not accredited by any evidentiary support. This is, such an interpretation is not even defended by the defendant public administration, since in its written statement of defense (page 12), the Catalonian Government affirms that, even though the due consents was not given in written by the patient, he was informed verbally, but anywhere sustains those "objective circumstances of urgency" to justify that the patient did not received the due information. Also, the Catalonian Institute of Health, nothing says about the informed consent in its written statement of defense.

What happens actually is that there is a confusion of dates and interventions in the decision. As we stated in our claim, on March 18 1997, the patient entered the Hospital of Valle Hebrón. After 6 days, on March 24 1997, he went under a catheterization and in the next day, March 25 1997, an electrophysiological study was undertaken. Such facts are not only not discussed by any of the public administrations, but they are also acknowledged just like that in their written statements of defense, and that is how, effectively, is provided in the medical history of the patient.

There is an obvious confusion in the decision: In page 14, second paragraph, justifies the absence of due information because on March 24 1997, 'the decision was to undertake the electrophysiological study". Well then; that is false, since on March 24 the catheterization was undertaken and it was not until the next day, March 25, when the referred electrophysiological study was done and where the complications occur originating the aftermath effects suffered by the patient. Is important to notice that for any of the interventions there was informed consent.

But the confusion of dates and interventions doesn't exists only in the decision herein appealed, but also, in none of the medical histories of the patient, it is shown that any of them (neither the catheterization of March 24, nor the electrophysiological study of March 25) had to be done under "objective circumstances of urgency", considering that is perfectly accredited that the patient entered the Hospital for ventricular tachycardia on March 18, this is, 6 days before the first intervention. Therefore: Where were the objective circumstances of urgency?

In conclusion: We understand, as explained in the heading of this plea, that there has been infringement of the rules of reasonable and non-arbitrary assessment of the evidence in regard of the fact held in the decision of the referred "objective circumstances of urgency", since there is no base for such affirmation. Even more: The decision herein appealed does not justify either in base of what evidence such conclusion could be reached".

The defendant in its opposition states: "Its important to notice that article 319 of the Law of Civil Procedure, refers to the evidentiary capability of public documents, when no public document has been brought as evidence in the present case. Also, article 386 of the Law of Civil Procedure refers to the judicial presumptions, that haven't been called in the procedure herein either.

Thereon, article 348 of the Law of Civil Procedure is left (without any doubt the only one that should have been claimed) that establishes that the court shall assess the affidavits accordingly to the rules of the reasonable assessment.

It also considers that there is no evidentiary support that gives cover to the concurrence of objective circumstances of urgency. This issue is considered to be relevant and definitive for the holding since it is understood that when the Chamber considers the concurrence of the 'objective circumstances of urgency' it does not go to assess the absence of information provided to the patient and concludes that there was no malpractice in the intervention.

We believe that the objective circumstances of urgency in the realization of this test result from the affidavit undertaken in the procedure. Concretely, from the affidavit and the clarifications of it made by Dr. Norberto (expert appointed by the Catalonian Institute of Health, specialist in cardiology, in opposition to the one appointed by the claimant and of the court-appointed expert that did not have a concrete practice in the cardiology specialization). So this doctor, states that the electrophysiological study was totally indicated for Mr. Oscar case, because the presented an arrhythmia that was potentially deadly in a patient with a history of severe ischemic cardiopathy as the one presented, that is to say, a vital risk concurred. This is the only study that exists in this sense and there is no any other tachycardia study that could be undertaken different from the referred test.

This is the thesis that the decision takes, reasoning adequately the non-binding character of the affidavits undertaken for the judiciary that must be assessed in function of the rules of reasonable assessment and the circumstances of the particular case.

The decision assesses that although the statements of the court-appointed expert about the indication of a perfusion scanning instead of the referred study it was not accredited to be the more adequate. But even more, such expert contradicts himself in relation to this point in the affidavit and in the clarifications. Then all what his affidavit states is that the study wasn't necessarily justified, in the clarification indicates that the most adequate technique for the study and treatment of cardiac arrhythmias is the electrophysiological study since the perfusion scan does not allow to know the seriousness of the arrhythmias nor the origin nor the treatment to be applied and that the ventricular tachycardia (like the ones suffered by the claimant) may be considered as potentially deadly with an elevated risk of sudden death. Finally the expert considers adequate both the electrophysiological study undertook as well as the intervention done later on.

The urgency did not have to be necessarily avowed as such in the medical history, but from the circumstances therein-stated one could deduce such urgency, as it was understood by us and as also was by the Chamber. In this sense, there is no vital urgency in the medical history of the decision ruled by this Chamber on May 16 2005, appeal number 7260/2001, but only concrete circumstances that motivate it.

It is added in the decision, that there was a damage produced due to the high sclerotic risk that presented the patient and that was corrected immediately by the most adequate surgical intervention, without causing complications later on. In fact, and according to the affidavit brought by the defense of the Catalonian Institute of Health, the aftermath effects alleged by the claimant in the lawsuit are not related to the electrophysiological study, but to his previous illness that had in itself a series of aftermath effects and symptoms for life.

That is to say, there is no infringement at all of the rules of reasonable and non arbitrary assessment of the evidence, but even if so, it would not be relevant or determinant to the holding, since it could have been appreciated the existence of malpractice in despite of the considerations of existence of urgency.

Moreover, it cannot be overlooked in this case, that as we stated previously, there is a unique alternative treatment for the illness suffered by Mr. Oscar, for which this party believes that in the particular case the duty to inform should be interpreted less rigorously.

In other hand, it cannot be left aside by us, the facts occurred in 1997 when the Law 14/1986 was in force, which establishes in its section 10.6 the precise written consent of the patient for the undertaking of any intervention (notice the express utilization of this term) except in other cases when the urgency doesn't allow delays that could cause irreversible lessons or in risk of death.

That being said, the Law 41/2002, of November 14, basic law that regulate the patient autonomy and the rights and obligations in the subject of information and clinical documentation, amplifies the requirement of informed consent no only to the intervention but also to the diagnosis and invasive therapeutic procedures and, in general, to the application of procedures that suppose a risk or inconveniences of known and foreseeable negative repercussion on the patient health. That is to say, amplifies without any doubt the cases in which the informed consent is necessary.

According to the clarifications of Dr. Norberto and also according to the opinion of the court-appointed expert Dr. Aurelio, the electrophysiological study is a cumbersome exploration but not an intervention, for which we think it should be concluded that there was no need to comply with the General Law 14/1986, April 14, of Health, regarding the informed consent".

In relation to this plea, in the first place we need to agree upon to initial statements of the opposition to the appeal and that have to do with the unnecessary quoting by the plea of articles 319 and 386.1 of the Law of Civil Procedure. The former is referred to the evidentiary value of public documentation, which are those specified in article 317 in sections 1 to 6, of which is said, "will constitute full proof of the fact, act or status of the documented things, of the dates in which the documentation was produced and in the identity of the notaries and other persons that, in each case, intervene in it". As stated by the public administration, no public document has been brought in this case, and we can therefore recall the recent decision of this Chamber, Sixth Section, dated February 25 2009, appeal number 9401/2004, that quotes a previous decision of the same Chamber and Section, dated March 16, 2005, in which it is established that the new Law of Civil Procedure, after listing in article 317 six types of documentation that considers as public documents, analyzes in its second paragraph the evidentiary value of administrative documentation, and from the text can be deduced, as is concluded also by the exegesis realized by the decision so many times quoted, that the medical reports issued in a health center by a public official are not framed in any of the six possibilities of article 317 (…). Therefore, article 319.1 is not applicable".

And the quoted decision goes on stating that: "in the other hand, is evident that - as is declared by the repeated decision- a public health center or establishment is no a body of the public administration in the legal sense, and, therefore, the medical reports issued in it cannot even have the consideration of being administrative public documents. In conclusion, we are nor before reliable documentation, because

it is not issued by notary public". In consequence, that reference to article 319 of the Law of Civil Procedure lacks of any potentiality in this plea, and the same can be affirmed in relation to article 386.1 of the same Law of Civil Procedure, so far as the appealed decision in no way makes a reference to the judicial presumptions evidence, which in this case the party may would link to the fact of the decision understanding the absence of informed consent due to the medical act undertaken on the patient was done under a vital risk. Something that we discarded before, since the decision established in a clear and forceful manner that in any case there was informed consent.

Consequently, we have to resolve now if the court used adequately article 348 of the Law of Civil Procedure, to assess the "affidavits according to the rules of reasonable assessment" or, if, as is stated in the plea, it incurred in an arbitrary and unreasonable assessment of the evidence, when considers that "in the case objective circumstances of urgency concurred, since there is no evidentiary support that covers such and interpretation of the facts".

For this is necessary to recall what the appealed decision herein, stated in the first of its legal rationales, which constituted the starting basis of its final conclusion. It referred to "the facts that constitute the factual basis of the legal claim" and stated that "the claimant was declared in a situation of absolute and permanent disability by a resolution of the National Institute of Social Services on July 17 1986, since he suffered from ischemic cardiopathy, heart attacks and post infarct angina.

The claimant was a patient of high risk, with a history of heart attacks (November 10 1984), vascular accidents or strokes (1996 and 1997) with hemiparesis, and later recovery of the strokes. On March 24 1997 an electrophysiological study was undertaken, for which a catheter was introduced through the right femoral venous way and other one through the left femoral arterial way. In that moment he suffered from an episode compatible with angina and electrocardiographic alterations. The result was a puncture of the descendant and ascendant aorta. It was needed another surgical intervention for the reconstruction of the ascendant aorta. He was discharged from the hospital on April 10 1997 'in a good general status without sign of cardiac insufficiency, good healing of surgical wounds, light anemia and pharmacological treatment', without having any other complication derived from such a surgical intervention".

When the decision went over the substance of the matter, stated that "in view of the how the events developed, since the beginning of the medical treatment because of the ailments that the claimant presented at the time, so the undertaking of the tests that the medical team considered convenient before the situation of cardiac arrhythmia (potentially deathly tests), the decision, in function of the status of the patient and his medical history, was to undertake the electrophysiological study, the most appropriate surgical intervention, as the affidavits herein assess. Even the

affidavit requested by the court does not dismiss its undertaking and in the clarifications states that 'is was not medically contraindicated'.

This court has the rational conviction that the electrophysiological study was the indicated one, even when the other tests indicated in the affidavits could have been undertaken, but any of which was credited to be the most adequate one, like the reputed myocardial perfusion scan. The speculations of what could have been done or the conjectures on the result of other interventions are not valid, unless they are brought along with the necessary evidence to credit either veracity or reality of them.

The known damage was produced due to the high arteriosclerotic risk of the claimant, which was corrected immediately without causing him further complications.

There was no malpractice, but an urgent medical decision due to the seriousness of the patient's condition, which implied the most accurate surgical intervention, indicated definitively at the moment, and not later, considered as vital to save the patients life, as it actually happened. For this reason, and even though the legal relevance of the arguments of the claim, valued herein fairly, we cannot share the deduction made about the effects of the lack of information and the damages caused.

As expressed previously, the lack of due information must be related necessarily to the circumstances concurring on March 24 1997, when the decision to undertake the electrophysiological study was made, that even when producing an aortic rupture –as has been indicated several times- was a correct decision adjusted to the vital needs that the moment required for the viability of the patient. There is no sense then, to analyze this lack of information in abstraction of those objective urgent circumstances, nor to refer this requirement to general considerations that do not relay in the precise moment of adopting the decision by the medical team."

This first plea cannot be upheld. By accepting the evident mistake made by the decision referring to the chronology of the events, it is needed to recognize that from the holding one could not extract any other consequence but to record their existence, and that is because such mistake has no relevance for the matter to be solved in the procedure.

We have told how by March 24 1997, a catheterization was undertaken on the claimant, who had been in the hospital since the previous day 18, and in the next day an electrophysiological study as well, this is, the two diagnosis tests that were suitable, according to the assessment of the evidence in the herein reviewed procedure and that the lower Chamber assessed, trying to solve the serious cardiac ailment that he suffered. During the second of them, that tried to induce and study the tachycardia suffered, and during the exploration took place the "conditions of

acute pain compatible with angina along with alterations assessable in the electrocardiographic trace, for which the study had to be suspended".

Before the abovementioned situation the patient was taken to the ward where it showed again "intense thoracic pain and after a series of explorations it is diagnosed with aortic puncture type A, alongside with severe aortic insufficiency, reason why it is urgently attended and his ascendant aorta is reconstructed implanting a Draco tube". This transcription is taken from the affidavit presented by the Catalonian Institute of Health, signed by a specialist doctor in cardiac surgery and explaining the events because states that "the accident happened possibly during the electrophysiological study, when catheter tears an athermanous plaque perforating the intimate and creating a false light (aortic puncture)". It adds "it is possible to create a false way during a cumbersome exploration of the type of a (…) electrophysiological study, even more in patients with generalized arteriosclerosis and presenting multiple athermanous plaque friable in the aorta like it was in this case; this does not mean that the technique was wrong, neither that the doctor doing the test had no experience, on the contrary, is a complication that can appear in patient of high sclerotic risk and most of the times in the hands of experts specialist in invasive exploration as it happened in this case". Add that the diagnosis was done rapidly, that the study was appropriate considering that when a patient has an arrhythmia (ventricular tachycardia) there is a potential for death due to the medical history, and concludes that the urgent intervention was a success because the patient was in that health center, a reference in such ailments and the has experienced medical personnel in cardiovascular urgencies.

That evidence was the base for the lower Chamber balance and assessment of the evidence, and from it took its conclusion that there was no medical malpractice but all the opposite and consequently there was nothing to award to the appellant.

For that reason the plea is herein dismissed.

Sixth. – Going over pleas four and five now, both of them insist in the wrongful assessment of the evidence by the lower Chamber. The former reiterates the confusion in which the decision incurred in relation to the dates in which the interventions occurred and, concretely, the electrophysiological study.

Its refers to both the affidavit evidence from his expert as from the court-appointed one, and sustains that "for all the aforementioned and in view of the medical history in the administrative file, it can be deduced that Mr. Oscar suffered a traumatic aortic puncture; being such intervention complicating, due to an iatrogenic origin that took place during the realization of the cardiac electrophysiological study on 03/25/1997.

In the affidavits term, it is not easy to determine if the aortic puncture was unleashed because a lack of attention of inexperience in the surgery technique. But it is certain that is not unreal that the complication had an iatrogenic origin, giving the possibility to determine medically-legally that there was a deficient provision of health care for a negligent undertaking of the cardiac electrophysiological study on a patient that presented a foreseeable, evitable and elevated risk of complication.

Such a radical and forceful affirmation, made not by an expert brought by the parties but by the court-appointed expert, makes indubitable the reliability of the affirmation, and in ay case, such affirmation must be appraised and considered adequately and, given the case of non sharing its criterion, it forces the requirement of reasoning and specifying in base of which other evidence the opposite conclusion is reached. What cannot be done, and with all due respect, is to give no importance at all or avoid such a strong and forceful asseveration, which moreover, was done by an independent expert, and consequently, of unquestionable impartiality. And this is what, according to the claimant, was done by the appealed decision.

Therefore, we believe that the legal doctrine stated in the heading of this plea has been infringed, since the Supreme Court of Catalonia, alongside the confusion of dates and interventions aforementioned, proceeded to evaluate an arbitrary and unreasonable appreciation of the evidence, when ignored such a categorical asseveration done by the own court-appointed expert, consonant by the way, with the affirmations made by the expert brought by us, Dr. Pedro Jesús".

The administration disagrees with the plea stating that Dr. Pedro Jesús issues its affidavit at the request of the claimant and that he is "a doctor specialist in general medicine and surgery reason why it must prevail the opinion of the affidavit brought by the defense of the Catalonian Institute of Health, since Dr. Norberto is an expert in coronary surgery, being his specialization intensive care and coronary units, in opposition to the court-appointed expert Dr. Aurelio (specialist doctor in legal and forensic medicine) that furthermore and although the initial contradictions recognizes that the only way to induce the arrhythmias suffered by Mr. Oscar was with the electrophysiological study.

The appealed decision assesses adequately all of the affidavits brought before the court, making an assessment the evidence altogether, reasoning the assessment that assumes as its own in pages 12 and 13, and not as is declared in contrary by the claimant. It is clear the Court takes special consideration for the affidavit brought by the Catalonian Institute of Health but also takes partially into account the affidavit of the court-appointed expert (that cannot bind the court), and that moreover as was previously noticed incurs in such a contradictions that in the clarifications changes totally the sense of the affidavit and recognizes as the only and suitable the test undertaken to induce the cardiac arrhythmias. Therefore, the Chamber does not obviate at all the affidavit of the court-appointed expert, but assess it in a just

measure, and that is why the defendant understands that the appeal cannot be upheld because of this plea".

As a basis for the fifth plea, it is affirm that the lower Chamber stated that there was no malpractice: "this collides frontally with the doctrine settled by this Chamber and quoted in the heading of this plea, specially, what was held by this Supreme Court in decision dated October 10 2007, appeal number 1106/2003, according to which is the public administration who is up to show the evidence of the intervention being adjusted to the *'lex artis'* and not to impose on the claimant the burden of proof of the surgical intervention being not adjusted to this *'lex artis'*.

This is, following the doctrine herein mentioned, the claimant does not have to accredit and justify in its claim if there was malpractice, but the decision should have required the public administration to argue and accredit in its statement of defense that things were done according to *lex artis*, and considering the holding of the decision, it is evident that this wasn't the case, but it considers that there was no malpractice because 'the claimant, in its argumentation did not accredited otherwise. For that reason we consider that the legal doctrine and case law exposed in the heading of this plea has been infringed".

The administration responds: "the accordance to *lex artis* in the present case is shown by the evidence brought by the defendant administration. The only possible option before the symptoms presented by Mr. Oscar was the undertaking of a electrophysiological study that was tried but that had to be suspended as soon as the adverse effects were observed and that happened because of the previous sclerotic symptoms of the claimant".

In order to reject this two pleas it will be enough to make a remission to what was stated in the previous rationale, where it was stated that there was no malpractice but instead an adequate behavior of the physicians according to the characteristics of the ailments of the patient, and the problems that arose during the electrophysiological study was foreseeable in the circumstances that occurred given the medical history of the patient, and was solved in an adequate manner so the assessment of the evidence made by the lower Court was adjusted to the rules of reasonable assessment of the evidence and was neither arbitrary nor illogical but in accordance to the Law.

Seventh. – Last, the sixth plea states that: "The decision of the 'Supreme Court of Justice of Catalonia, at the end of its page 13, make a categorical affirmation: 'there was no malpractice', but that isn't backed by any reasoning that explains why, since there is no appraisal about the undertaking of the intervention considered in itself. In other words: the decision does not indicate anything about the fact of the intervention. Nothing says about why in the particular and concrete undertaking of the electrophysiological study done on the patient on March 24 (actually on March

25) there was not malpractice. It does argue about the informed consent, as well as about that the intervention was suitable, but the holding of 'there was no malpractice', happens to be an incontrovertible and willful holding, since there is no reasoning for it.

We understand that, in virtue of the legal doctrine and the case law quoted at the beginning of this plea, it should have been argued, at least, why there was no malpractice in the intervention considered in itself, at the margin of the issue of informed consent and whether it was suitable or not. Especially when there has been an important damage as consequence of the complications that arose from the intervention (when the intervention produced the aortic rupture, as the decision states). Then, it is obvious that something happen during the intervention, and about which nothing has been argued.

Everything cannot be because of the 'high arteriosclerotic risk of the claimant" as the decision seems to held, because if that was the case, since the beginning the test should not have been undertook (it would be contraindicated, and it would be conflicting with the holding of the decision stating that was adequate), and, furthermore, in the catheterization intervention of the previous day this complications did not arose, even though the same risk was there for the patient. Then, the 'high arteriosclerotic risk of the claimant' cannot justify, by itself, the damaging result of the intervention.

Therefore, the mere holding of "there was no malpractice", we understand, evidently, that results insufficient. In conclusion: It cannot be acknowledge if there was or not illegality of result or of the injuries of the patient, if nothing is said about what really happened in such intervention that provoked such result. It is stated that there was no malpractice, but the really important issue is to determine if there was or not an illegal result".

The public administration, after a reminder of the legal requirements according to the case law interpretation in order to hold responsibility, states, "the decision holds that the electrophysiological study was the most adequate test (actually, it hold that there was not possible the undertaking of any other test) for the situation of permanent cardiac arrhythmia and potentially deathly because of the relapsing ventricular tachycardia suffered by Mr. Oscar. In this sense, the decision hold that even the affidavit issued by the court-appointed expert indicates that the electrophysiological study was clinically appropriate.

The damage already known, in the word of the decision, was produced due to the high arteriosclerotic risk of the claimant (complication that is described in multiple works and books, which does not mean that the test was wrong neither that the undertaker had no experience), and certainly his previous pathology influenced decisively the result but as we stated, there was no possible option to try to

eradicate the deathly arrhythmias he suffered, that were to be studied thoroughly being the only way to study them the electrophysiological study to try to end them. It was necessary because there he was loosing his life (according to Dr. Norberto).

Furthermore, is indicated next in the decision that the damage caused was corrected immediately without causing any more complications later on, due to the fact that his was in a hospital of best quality where an surgical intervention as complicated as this one, could be don immediately.

In any case the aftermath effects appointed by the appellant nothing have to do with the electrophysiological study and moreover, such test was not even fully undertaken.

The later surgery was successfully done an the patient is how he was before, considering that he is a patient with sever arteriosclerosis and an important heart injury (in the word of Dr. Norberto), being this part what the appealed decision recollects when makes reference to the damage that was corrected immediately, this is, without producing damages".

The plea herein must be dismissed also. After our holding regarding the previous pleas there is no illegal damage that the appellant shouldn't bear himself according to the Law. The true is that we cannot conclude from the damage occurred between days 24 and 25 of April *(sic)* of 1997, including the event of suspension of the electrophysiological study been undertaken when the conditions of acute pains compatible with angina appeared, that unleashed that later on the patient needed to be operated of the aortic puncture type A that resulted, that those who work for the Catalonian health administration were immersed in a malpractice capable generating strict liability of the public administration, so to award damages to the appellant, since between that health care performance and the status of the patient before and after the events there is no relation of causality attributable to the administration. None of the alleged aftermath effects suffered by the patient are a consequence of those interventions, but a result of the general status of the patient and the evolution of the disease he is suffering.

Eighth. – However, this Chamber upheld two of the presented pleas when it was fully shown that in the diagnostic tests to which the patient was subjected to, there was no fulfillment of the obligation to inform adequately the patient of the risks involved and the consequences that could derive, infringing the obligation to do so respecting the autonomy of the patient and leaving to his will the acceptance or rejection to undertake those tests in exercise of his liberty and personal dignity that are consubstantial to it. This upholding took us to reverse the decision of the lower Court, and that imposes us the obligation, according to article 95.2.d) of the Law of Jurisdiction, to make a new decision, as a lower Court to resolve "what corresponds in the terms on which the debate was settled".

As we know, eluding the duty of obtaining the patient's informed consent constitutes an infraction of the *lex artis ad hoc* and reveals an abnormal functioning of the health services, as stated before in decision dated February 1 2008, appeal number 2033/2003, and that this Chamber considered that does not gives *per se* place for awarding damages if there is no damage to be repaired as a consequence of the transgression of the *lex artis.*

But is also stated by the Chamber that in special circumstances that patent infraction produces on the victim of it pain and suffering economically repairable, since its capacity to decide was obstructed without any reason. As stated in decisions dated April 20 and 25, May 9 and September 20, 2005 and June 30 2006. Is equally true that this awards, considering the subjectivity that always goes along with this pain and suffering is hard to calculate by the Court, that has to appraise the quantity and affix an estimation, and that in this case, we establish in the amount of sixty thousand Euros, updated to the date of this decision, without prejudice of the interest that may result for payment delays.

Ninth. – Since the appeal was upheld according to article 139.1 of the legislation of the Administrative Law Jurisdiction, there is no need to condemn the costs on the appellant.

IN THE NAME OF HIS MAJESTY

THE KING

AND BY THE AUTHORITY CONFERED TO US IN THE CONSTITUION

WE RULE

Upholding of the appeal number 710/2008 filed by the representation of Mr. Oscar against decision of the against the decision of the Fourth Section of the Chamber of the Administrative Law Section of the Superior Court of Catalonia, dated October 16 2007, deciding the appeal before the Administrative Court number 242/2005, filed by the same representation aforementioned against the Resolution of the Catalonian Institute of Health, Chancellery of Health of the Government of Catalonia that denied by administrative silence, the claim of strict liability pleaded by the claimant for the amount of three hundred and thirty five thousand three hundred forty five Euros in damages as consequence of the electrophysiological study undertaken on him on March 25 1997, that we reverse herein and declare null and without value nor effects.

We uphold partially the appeal before the Administrative Court number 242/2005, filed by the representation of Mr. Oscar against the Resolution of the Catalonian

Institute of Heath, Chancellery of Health of the Government of Catalonia that denied by administrative silence, the claim of strict liability pleaded by the claimant for the amount of three hundred and thirty five thousand three hundred forty five Euros in damages as consequence of the electrophysiological study undertaken on him on March 25 1997, that we annul herein for being illegal and we declare the right of the appellant to be paid by the Catalonian Institute of Health the award for damages for the amount of sixty thousand Euros (60,000) updated to the date of this decision , without prejudice of the interest that may result payment delays.

We do not condemn judicial costs in this appeal.

Therefore, by this, our decision, that shall by introduced in the Legislative Collection, we hold, order and sign PUBLICATION. – The previous decision was read and published by his Excellency Mr. Santiago Martínez-Vares García, Reporting Justice in this case, in public hearing of the Third Chamber of the Supreme Curt in the same day dated, all of which, as Secretary I herein certify.