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Resolution No.:	
Proceedings:	SOCIAL
Speaker:	JOAQUÍN SAMPER JUAN
Resolution type:	RULING

Voices:

- x CASSATION APPEAL FOR THE UNIFICATION OF THE DOCTRINE x
- x LACK OF CONTRADICTION x
- x RIGHT TO HEALTH CARE x
- REIMBURSEMENT OF MEDICAL COSTS

Summary:

RCUD. Compensation for medical costs. Jehovah's witness. Lack of contradiction.

RULING

In Villa of Madrid, on June 25 2009.

Having observed the judicial decisions pending before the Chamber under cassation appeal for the unification of the doctrine lodged by Mr. Domingo against the ruling of June 13 2008, passed by the Social Chamber of the Supreme Court of Justice of Catalonia, which settles the appeal against the ruling of February 2 2007, passed by the Employment Court of Barcelona no. 2 in judicial decisions affecting Mr. Domingo against the Servei Català de la Salut (Catalan Health Service), on reimbursement of costs.

His Honor Mr. Joaquin Samper Juan is examining magistrate,

FACTUAL BACKGROUND

First.- On February 2 2007, the Employment Court of Barcelona no. 2 passed a judgment with the following operative part: "I dismiss the complaint lodged by Mr. Domingo against the Servei Català de la Salut and I absolve the defendant from the motions against it."

Second.- This ruling proved the following facts: "FIRST.- The appellant, Domingo, born on 28/04/1981, with Spanish ID no. 000 and Social Security no. 0001 (non-controversial fact). SECOND.- Mr. Domingo had an accident on 10/8/2005 and was referred from the Hospital

Amau de Vilanova and urgently admitted to the Hospital of Bellvitge, for having a subtrochanteric fracture of the right femur. In the Hospital of Bellvitge the surgery was prepared and it required the patient's consent in case of risk, such as a hemorrhage that required blood transfusion. However, the patient refused a possible blood transfusion due to his religious beliefs. The orthopedic surgery and traumatology service did not assume liability for the surgery complications: osteosynthesis with an intramedullary nail. So the patient requested to be discharged and transferred to the Clinic of El Pilar (f. 25, 36 and 61). THIRD.- The patient was operated in the Clinic of El Pilar. Here, he underwent a percutaneous pinning of the proximal femur type gamma, with no need of a blood transfusion. He was admitted on 10/21/2005 and he was discharged on 10/24/2005. The percutaneous pinning does not require a blood transfusion since it is exterior (f.27 and 38, testifies Dr. Vidal). FOURTH.- In the Hospital of Bellvitge there is a hemodilution machine, which allows autologous transfusion (f. 19, testifies Mr. Vidal). FIFTH.- The medical costs amount to EUR 5,779.82 (F. 27, 28, 29, 30, 31, 32, 34): Bill no. 002 of October 25 2005 for EUR 1507.42 and Bill no. 003 of October 24 2005 for EUR 2,272.40. The medical fees of October 2005: EUR 2000. SIXTH.- The appellant requested the reimbursement of the medical expenses of the Servei Català de la Salut. This was denied in a ruling dated 02/21/2006, since the assistance provided to the plaintiff was not considered an urgent case of immediate assistance. A previous complaint was filed against that judicial decision but it was dismissed by decision dated 21/09/2006 (f. 52, 53 and 61)."

Third.- This judgment was lodged by the appellant before the Social Chamber of the Supreme Court of Justice of Catalonia, which passed a ruling on June 13 2008 with the following operative part: "We dismiss the appeal lodged by Mr. Domingo against the ruling of the Employment Court of Barcelona no. 2 of 02/02/2007, passed in the proceedings no. 461/2006, followed at the request of the appellant against the SERVEI CATALA DE LA SALUT. Therefore, we must confirm and we confirm the contested judicial decision."

Fourth.- A cassation appeal for the unification of the doctrine was prepared by the legal representation of the appellant.

Fifth.- This appeal has been accepted for processing. After the appeal was contested, the proceedings were transferred to the public prosecutor, who presented the report on the case file; and after the examining magistrate was heard, the judicial decisions were concluded and a date was set for the voting and judgment: June 18 2009, when it took place.

LEGAL RATIONALE

First.- The aim of this unifying cassation appeal is that the Servei Catalá de la Salut reimburses the medical expenses that the patient paid to the private hospital, where he went to after refusing to undergo a surgery at a Hospital of the Catalan Health Service that could eventually require a blood transfusion. Since he is a Jehovah's Witness, this practice goes against his religious beliefs.

In the proven facts set out in the first instance judgment, which remained unchanged in the appeal, it is proven that: **a)** the appellant, Mr. Domingo, had an accident on October 8 2005, which caused him a subtrochanteric fracture of the right femur; **b)** he was admitted to the Hospital de Bellvitge, where his informed consent was required for a possible blood transfusion, since there was a risk of hemorrhage during surgery (osteosynthesis with an intramedullary nail). He refused to undergo a transfusion, because of his religious beliefs; **c)** on October 20, he requested to be discharged and was transferred to the private Clinic of El Pilar; d) he was admitted here on the next day and after undergoing a percutaneous pinning of the proximal femur (that does not require a blood transfusion) he was discharged on October 24; **d)** in the Hospital of Bellvitge there is a hemodilution machine, which allows autologous transfusion.

In addition to this information, in the second legal base, the instance judgment affirms with full value that "it is true that in the Hospital of Bellvitge there was an autologous machine (hemodilution), but the doctors did not consider using it since the transfusion would have only been necessary in the event of hemorrhage. Furthermore, the existence of this machine does not determine that it could be used for the patient;" and it is reasoned that: "therefore, it cannot be concluded that this case presented the necessary conditions to use the machine."

The appellant requested the managing body to reimburse the money he paid to the private hospital (EUR 5,779.82) but he received a negative response since the Catalan Health Service considered it was not an urgent case of immediate assistance.

The appellant's next claim was dismissed, as well as his subsequent appeal against the judgment, which the Social Chamber of the Supreme Court of Justice of Catalonia passed on June 13 2008 (appeal no. 2522/2007), which rejected the violation of *Art. 5.3 of the RD 63/95*, after pointing out – with full value and supported in page 20 of the Hospital's report requested by the Court – that "it has not been demonstrated, from a medical point of view, that such machine is suitable for blood transfusions in surgeries similar to the one performed" (although this is undoubtedly a typing error, since it should refer to the surgery that was "planned" in the hospital); and after reasoning that "from a medical point of view it is perfectly understandable that the doctors did not think that the hemodilution machine was medically necessary to perform a autologous transfusion."

Second.- The plaintiff has lodged a cassation appeal against this sentence for the unification of the doctrine, using as a precedent the judgment passed by the Social Chamber of the Supreme Court of Justice of the Canary Islands, headquarters in Las Palmas, on February 26 2004 (rec. 1062/20001), which is final.

In this judgment it is proven that: **a)** on November 27 1998, the appellant's wife, who is also a "Jehovah's Witness", was admitted to the Hospital Nuestra Señona del Pino, which is situated in Las Palmas and belongs to the Canary Health Service. She presented a right laterocervical tumor, which was diagnosed as a right carotid chemodectoma and indicated a surgical intervention; **b)** both the patient and her husband refused to sign the informed consent

that authorized an eventual blood transfusion, so the professionals in charge of the service discharged her on December 2 1998; **c)** the patient and her husband decided to go to a private clinic in Barcelona, where she underwent a "superselective embolization with microcoils", making the tumor disappear completely; **d)** the Hospital of Las Palmas could perform the embolization techniques from November, and therefore, it could have been used for the carotid chemodectoma that the wife of the appellant presented. The need of a blood transfusion depended on the post-treatment evolution.

In answer to the refusal of the Health Service to reimburse the 544,618 pesetas he had paid to the private clinic, the plaintiff lodged the corresponding claim, which was estimated in the first instance judgment. The Canary Health Service lodged an appeal, alleging the violation of *Art. 5.3 of R.D. 63/1995* and arguing that there had not been a denial of assistance or life threatening emergency, but a voluntary withdrawal of public health.

The judgment used as a precedent dismissed the appeal. To do so, it begins by noting that the topic of discussion determines if there has been denial of assistance due to the fact that the recurring service "had surgery techniques that did not require a blood transfusion available to it, but did not use them." Then, the content of the judgments of this Court is literally transcribed, dated April 14 1993 (rcud. 1446/1992) and 11/08/1998 (380/1998), although the contents of the second one are mistakenly attributed to the first one and vice versa. It recognizes that his doctrine should maintain a general character but it understands that in this case, the Healthcare Service should be condemned for denial of assistance, since the public Hospital had the mentioned embolization technique to perform the surgery without blood transfusion. After collecting a report before the Court, he states that "it is a common practice in the vascular interventional radiology unit"; and that "if there is an available technique in the Hospital that helps to respect the exercise of religious freedom under *Art. 16* of the Spanish Constitution, the medical services must inform the patient and if this technique does not entail further risks, they should perform it."

Third.- For evaluating properly the contradiction assumption, required by *Art- 217 of the Spanish Employment Procedure Act*, it is necessary to specify the subject of debate. The appeal states whether the reimbursement of the medical expenses due to the denial of assistance is appropriate, "since the Managing Body did not offer the possibility of performing the operation without blood transfusion, despite the Medical Center had the adequate technique to perform the operation respecting the religious freedom of the patient." Nevertheless, since there are further considerations that arose during the appeal, it should be made clear that:

a) In the first instance judgment it was declared that: "it is not proven that the percutaneous pinning of the proximal femur could have been performed in the Hospital of Bellvitge the same way it was performed in the private clinic." The respondent argued that "it has not been proven that such method of intervention is appropriate in interventions such as this one. Medical literature establishes clear contraindications and this type of treatment is not recommended for this type of fractures due to the difficulty of obtaining an adequate reduction

(Orthopedics and Traumatology magazine. 47 vol. no. 1. 2003, pages. 26-30). Nevertheless, the appeal does not try to refute such assertions when it asks for the reimbursement of the expenses of such intervention in the private clinic. By the way, when the patient requested to be discharged to go to the private clinic, where he already knew what intervention he would undergo, he did not inform the Catalan Health Service about it.

b) The respondent does not claim that when the doctors of the Hospital required his informed consent they did not provide him adequate information, although the judgments are contradictory at this point and the content of the articles 26 of the Law 16/2003, of May 28, on "cohesion and quality of the Spanish Health National Service" and articles 2.3 and 6, 3, 4. 1 and 2 and 8.1 of the *Law 41/2002, of November 15*, on the "autonomy of patients and rights and obligations with regard to clinical information and documentation." Proof of which is that among the infringed precepts it invokes, it does not invoke none of the aforementioned. Therefore, this question is excluded from the judicial decision of the Board.

The plaintiff claims the reimbursement, since he believes that the Hospital of Bellvitge could have performed the "osteosynthesis with an intramedullary nail" applying the hemodilution technique, which excluded the possibility of a blood transfusion.

FOURTH.- Limiting the debate in this respect, the Court reaches the conclusion that: the judgments on comparison trial cannot be considered contradictory since their different pronouncements are explained in the light of two substantial differences of the proven facts.

The first difference is that the foundation of the reimbursement claims has a very different factual basis. In the case of the sentence used as precedent, the appellant claimed the reimbursement of the money she paid to the private clinic, since the same surgery that she underwent here (elimination of the right carotid chemodectoma) could have been performed in the public Hospital, which had the same technique available to it. On the contrary, in the case of Mr. Domingo, the foundation is different, since he claims the reimbursement of the "percutaneous pinning of the proximal femur", which does not imply a blood transfusion. On the other hand, the judgment under appeal questions if this intervention was correct according to the lex artis and the appellant has not proven that it was. But the possibility of that same pinning surgery being performed in the public Hospital (that would be the comparable supposition to the sentence used as precedent) is not proven. In his opinion, the surgery, which he rejected, the "osteosynthesis with an intramedullary nail", could have been performed in that Hospital using the hemodilution technique.

The second difference is that in the case of the sentence used as precedent, it is proven, not only that the public Hospital had the "embolization" technique that was performed in the private clinic available to it, but also that these enabled the correct extraction of the "carotid chemodectoma" and that "the embolization techniques are frequently used in the vascular interventional radiology units." Therefore, the existence of the technique and its goodness were proven. This is a very different situation, since Mr. Domingo's case only proves the existence of

the "hemodilution" technique in the public Hospital but it does not prove that this technique was adequate for the "osteosynthesis with an intramedullary nail" surgery, which was suggested in the Hospital of Bellvitge. The plaintiff states it in the appeal, but incontrovertibly and without further reasoning. The truth is that the instance and appeal sentences reached a different conclusion, underlining that the doctors did not consider using this machine since its existence does not mean it could be used for the patient and it is not proven that this case presented the necessary conditions to use it if it were necessary.

Fifth.- The fundamental differences break the factual basis required by *Art- 217 of the Spanish Employment Procedure Act* to understand that there is contradiction assumption. Without it, it is impossible to resolve the matter of substance.

The lack of contradiction, which was enough to reject the appeal in the previous judicial phase, appears now, in this phase of passing the judgment, as a cause for its dismissal. It must be resolved this way, without any order for costs *(Art. 233.1 LPL).*

For these reasons, on behalf of His Majesty the King of Spain, and in the exercise of the authority granted by the Spanish people.

WE DECIDE

We dismiss the cassation appeal for the unification of the doctrine lodged by Mr. Domingo against the ruling of June 13 2008, passed by the Social Chamber of the Supreme Court of Justice of Catalonia, which settles the appeal no. 2522/07 against the ruling of February 2 2007, passed by the Employment Court of Barcelona no. 2 in judicial decisions. Without costs.

Actions must be returned to the correspondent Court, with the certification and the communication of this decision.

Thus, by this our ruling, which will be included in the legislative data collection, we pronounce, command and sign it.

PUBLICATION.- In the same day that was read and published the herein decision, by his Honor Mr. Joaquin Samper Juan as examining magistrate in public audience of the Social Chamber of the Supreme Court, I, herein certify.